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 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE EASTERN DISTRICT OF CALIFORNIA
 12 FRESNO DIVISION

13
 14 **JEFF SILVESTER, BRANDON COMBS,**
 15 **THE CALGUNS FOUNDATION, INC., a**
 16 **non-profit organization, and THE SECOND**
 17 **AMENDMENT FOUNDATION, INC., a**
 18 **non-profit organization,**

19 Plaintiffs,

20 v.

21 **KAMALA D. HARRIS, Attorney General of**
 22 **California (in her official capacity),**

23 Defendant.

1:11-cv-02137-AWI-SKO

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 MOTION OF DEFENDANT KAMALA D.
 HARRIS FOR STAY PENDING APPEAL**

Hearing Date: October 27, 2014

Hearing Time: 1:30 p.m.

Judge: Hon. Anthony W. Ishii

Trial Date: March 25, 2014

Action Filed: December 23, 2011

[Set for Hearing Concurrently with Motion to
 Amend Judgment]

23 Defendant Kamala D. Harris, Attorney General of the State of California (“Defendant”),
 24 submits the following memorandum of points and authorities in support of her motion, brought
 25 under Federal Rule of Civil Procedure (“FRCP”) 62, to stay enforcement of the final judgment
 26 entered herein on August 25, 2014 (Dkt. 106), which judgment references the Court’s order in the
 27 nature of injunctive relief stated at pages 55 and 56 of the findings of fact and conclusions of law.
 28 (Dkt. 107.)

BACKGROUND

As the Court knows, the present case adjudicates a Second Amendment challenge to California’s statutory 10-day waiting period for firearm purchases (codified at California Penal Code sections 26815 and 27540; the “WPL”), as applied to certain persons who already own firearms or have certain permits related to handling firearms.

Under existing law, any person who does not qualify for one of the statutory exemptions to the WPL and wishes to purchase a firearm legally in California must wait 10 days between submitting a “Dealer Record of Sale” (“DROS”) application to California’s Bureau of Firearms (“BOF”) for approval to purchase the firearm, and, after being so approved, actually taking delivery of the firearm.

In an August 2014 written ruling following a March 2014 bench trial, this Court decided that the WPL violates the Second Amendment as applied to any prospective firearm purchaser who (1) passes California’s background check in less than 10 days and (2) (a) has a firearm recorded in that person’s name in California’s Automated Firearms System (“AFS”) or (b) has a valid, current Carry Concealed Weapon (“CCW”) license or (c) has both a firearm recorded in that person’s name in AFS and a valid, current Certificate of Eligibility (“COE”). The Court ordered that BOF must modify its DROS-application-processing system to allow for the release of a purchased firearm to any such person, as soon as he or she passes the background check, whether or not 10 days have transpired. The Court stayed this ruling for 180 days, as stated at lines 17 and 18 of page 56 of the findings of fact and conclusions of law.¹

Defendant is appealing this Court’s final judgment to the U.S. Court of Appeals, Ninth Circuit. (See Notice of Appeal, Dkt. 111.) Defendant hereby requests that this Court stay the judgment during the pendency of the appeal.

¹ On September 22, 2014, Defendant filed a motion to amend the judgment to extend the time to comply with the remedial order from 180 days to 12 months at least. The present motion to stay the judgment pending appeal, set for hearing concurrently with the motion to amend the judgment, seeks to stay the judgment until the Ninth Circuit appeal is resolved, while the motion to amend the judgment seeks to extend the time to implement the remedial order *if* a stay is not granted or if that order is upheld on appeal. Defendant requests a stay pending appeal irrespective of the ruling on the motion to amend the judgment.

SUMMARY OF ARGUMENT

All four factors that courts consider in evaluating a stay request (per *Humane Soc. of U.S. v. Gutierrez*, 558 F.3d 896, 896 (9th Cir. 2009)) weigh in favor of Defendant’s stay request here.

First, because the Court resolved truly novel questions of first impression involving Second Amendment law, Defendant meets the requirements of showing a strong likelihood of succeeding on the merits in the appeal.

Second, absent a stay, the State of California (the “State”) will be irreparably injured as a matter of law. A U.S. state is irreparably harmed when duly enacted legislation, such as the WPL, is enjoined from being enforced during an appeal, if the law is ultimately sustained. Furthermore, BOF, part of the California Department of Justice which Defendant heads (see Cal. Gov’t Code § 12510), will have to expend significant time and resources modifying the complex systems for processing DROS applications to comply with the Court’s order, and these expenditures cannot be recouped in the event of a successful appeal revealing the expenditures to have been unnecessary.

Third, the balance of harms favors the State. While a stay will delay relief that Plaintiffs Jeff Silvester (“Silvester”) and Brandon Combs (“Combs”)² (if they pass future background checks and do so in less than 10 days) might otherwise receive in acquiring future firearms, that delay will also preserve the status quo until the matter is finally resolved on appeal. In the meantime, it is difficult to predict the amount of additional time that Silvester or Combs, each of whom already has firearms, may need to wait to take possession of an additional firearm sought while the appeal is pending. Although any delay in the enjoyment of the constitutional right will involve some burden if, in fact, this Court’s judgment is ultimately affirmed on appeal, as a practical matter the burden imposed on Plaintiffs by a stay is modest in comparison to the burden that will be imposed on the State if BOF is required to implement the Court’s remedial order during the pendency of Defendant’s appeal.

² Future references to “Plaintiffs” mean Silvester, Combs, The Calguns Foundation, Inc., and The Second Amendment Foundation, Inc.

1 “questions of first impression on which no binding precedent exists” can, on their own, satisfy
2 “the requirement that a movant is likely to succeed on the merits,” even where the trial court has
3 come to a conclusion contrary to that advocated by the party seeking a stay. *Hunt v. Check*
4 *Recovery Sys., Inc.*, 2008 WL 2468473, at *3 (N.D. Cal. 2008), citing *Pearce v. E.F. Hutton*
5 *Group, Inc.*, 828 F.2d 826, 829 (D.C. Cir. 1987).

6 As the court in *Loving v. Internal Revenue Serv.*, 920 F. Supp. 2d 108 (D.D.C. 2013),
7 explained:

8 As the IRS [the party seeking the stay] diplomatically notes, it is placed in the
9 uncomfortable position of “asking a district court to determine whether its decision is
10 likely to be overturned.” Mot. at 3. The IRS is correct that the Court need not
11 determine that it erred and will likely be reversed—an acknowledgment one would
12 expect few courts to make; instead, so long as the other factors strongly favor a stay,
13 such remedy is appropriate if “a serious legal question is presented.” [Citations.]
Although the Court continues to believe its decision was correct, it is certainly
14 cognizant that the issue is one of first impression and raises serious and difficult legal
15 questions. If the other factors tip in favor of a stay, therefore, this factor will not
16 preclude one.

17 *Id.* at 110.

18 As this Court is aware, the case at bar apparently is the first challenge to a firearm-
19 acquisition waiting-period law under the Second Amendment. The underlying issue of what sort
20 of waiting period a state may impose on the acquisition of firearms, and on what grounds, is of
21 obvious importance nationwide. Whatever decision the Court reached was going to be an
22 important ruling on a question of first impression. For that basic reason, this case is a prime
23 candidate for a stay on appeal. *See Salix v. U.S. Forest Serv.*, 995 F. Supp. 2d 1148, 1154 (D.
24 Mont. 2014) (holding that lack of controlling appellate-court precedent indicates that appellant
25 has likelihood of success on merits, for stay purposes).

26 The present case has additional complications beyond dealing with novel legal issues.
27 When the case was past the discovery stage, the Ninth Circuit, in *United States v. Chovan*, 735
28 F.3d 1127 (9th Cir. 2013), first announced the analytical framework to be applied in Second
Amendment cases in the circuit. The scope of the injunction sought also kept changing, right up
to the closing argument. The Court was called on to evaluate dense witness testimony about
California’s computerized law-enforcement databases, evidence from history about the perceived

1 scope of the Second Amendment in the Founding Era of the United States, and reports of
2 medical-research studies about the efficacy of firearm-acquisition waiting periods in reducing
3 firearm violence. The specificity of the injunction that the Court issued is a testament to the
4 complexity of the case, and a sign that a stay of the injunction is appropriate while the appeal
5 proceeds.

6 This Court's conclusion that Plaintiffs should prevail in this case is not inconsistent with a
7 determination that Defendant has substantial grounds for an appeal. In the evolving area of
8 Second Amendment law encompassing the present case, the Ninth Circuit could surely conclude
9 that a 10-day waiting period for new firearm acquisition, as to people who already have firearms,
10 is not an impermissible burden on Plaintiffs' Second Amendment right to keep and bear arms.
11 Even if the Ninth Circuit holds that the WPL, as applied here, burdens the Second Amendment
12 right to some degree, the appellate court may well uphold California's 10-day waiting
13 requirement, under intermediate scrutiny, as reasonably related to the State's indisputably
14 important (indeed, compelling) interests in reducing firearm violence and, in particular, keeping
15 firearms (or additional firearms) out of the hands of people who are not entitled to possess them.
16 Defendant presented un rebutted testimony from high-ranking BOF employees that the 10-day
17 waiting period regularly leads to the denial of DROS applications that a shorter waiting period
18 might pass through. The Ninth Circuit also might well agree with Defendant that the record
19 before this Court demonstrates the benefits of "cooling off" periods for firearm acquisition to a
20 degree sufficient to sustain the lines drawn by the Legislature in the statutes at issues in this case.

21 In sum, the "likelihood of success" factor, properly understood, favors the entry of a stay
22 pending appeal in this novel and important case.

23 **II. THE STATE OF CALIFORNIA WILL BE IRREPARABLY INJURED ABSENT A STAY**

24 For a court evaluating a stay request, the irreparable harm to the movant if there is no stay
25 is a "bedrock requirement." *Leiva-Perez*, 640 F.3d at 965. It is thus significant that "[i]t is clear
26 that a state suffers irreparable injury whenever an enactment of its people or representatives is
27 enjoined." *Coalition for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997). Because
28

1 the Court has partly enjoined enforcement of the WPL, the State (represented here by Defendant)
2 has suffered an irreparable injury for purposes of stay analysis.

3 Separately and independently, a party subject to an injunction faces irreparable injury if the
4 injunction requires the party to expend significant time and resources to comply that the party will
5 not be able to recoup even if its position is ultimately vindicated on appeal. *Project Vote/Voting*
6 *for America, Inc. v. Long*, 275 F.R.D. 473, 474 (E.D. Va. 2011). Here, the Court granted
7 Defendant six months to comply with the injunction, recognizing that substantial time and effort
8 would be required. And as detailed in the declarations of Stephen J. Lindley and Marc St. Pierre,
9 submitted with Defendant's pending motion to amend the judgment, orderly compliance with the
10 injunction will actually require at least twice as much time, to enable BOF to hire and to train new
11 employees, do extra processing of DROS applications, and change the relevant computer
12 systems.³ If the Ninth Circuit overturns this Court's injunction, these expensive and disruptive
13 measures will prove to have been unnecessary, but there is no realistic prospect that the State will
14 be able to recover, from Plaintiffs or otherwise, any compensation for the efforts it was forced to
15 undertake. In other words, the harm will be irreparable.

16 Therefore, in two ways, Defendant has demonstrated the irreparable injury that will arise in
17 the absence of a stay.

18 **III. THE BALANCE OF HARMS FAVORS A STAY**

19 These concrete harms to the State from having to implement the Court's order while it
20 remains under appellate review outweigh any harm that Plaintiffs may suffer from preservation of
21 the legal status quo pending appeal. Silvester and Combs already have firearms, and nothing
22 about the operation of the WPL (other than the background check, potentially) precludes them
23 from acquiring more during the pendency of an appeal. Under the existing WPL, Silvester and
24 Combs each have to wait 10 days between submitting an application to BOF to purchase a
25 firearm, passing a background check, and taking delivery of the firearm, for each firearm
26

27 ³ Defendant resubmits copies of the two declarations with the present motion, for ease of
28 reference.

1 purchase. Given that the Court has continued to allow BOF to conduct background checks on
2 every prospective firearm purchaser for each proposed purchase, and the background checks take
3 up to 10 days each, the injunction may or may not reduce the waiting period for any particular
4 DROS applicant below 10 days; the length of any reduction in a particular case is unknown. Nor
5 would immediate implementation of the Court's order even ensure that Plaintiffs or others could
6 acquire firearms without making a second trip to a firearm dealer, which second trip is perhaps
7 the primary practical harm identified by the Court in its decision. Unless Silvester and Combs
8 fall into the small fraction of "auto-approved" DROS applicants, each of them probably would
9 still have to take two trips to a dealer to acquire a new firearm, even if the Court's order could be
10 implemented immediately. Under these circumstances, any concrete harm that Plaintiffs will
11 suffer from additional delay in implementing the Court's remedial order while the matter remains
12 on appeal is outweighed by the harm that the State will suffer if it is forced to implement an
13 injunction that is ultimately not sustained on appeal.

14 **IV. THE PUBLIC INTEREST IS BEST SERVED BY STAYING THE INJUNCTION**

15 As the Court is aware, Defendant has justified the WPL, even as applied to people who
16 already have firearms, as a public-safety measure. The Legislature enacted the WPL for the
17 undeniably important purpose of keeping firearms out of the hands of people who might have a
18 propensity to misuse them. The Ninth Circuit may ultimately validate the Legislature's choice in
19 that regard. While that remains a possibility, the public interest favors staying this Court's
20 injunction.

21 Another important consideration is that the ability to grant a stay during the pendency of an
22 appeal grants "the district court [the] power . . . to preserve the status quo." *Natural Res. Def.*
23 *Council v. Sw. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001). In the context of an injunction,
24 the status quo is defined as the state of affairs *before* the court entered the injunction. *See Nken v.*
25 *Holder*, 556 U.S. 418, 429 (2009) (describing the status quo as "the state of affairs before the
26 removal order was entered"). The Court's order here alters the status quo for a system that
27 processes nearly 1 million firearm-acquisition applications per year. A stay will preserve that
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1 process during the pendency of an appeal that might affirm the status quo, and therefore serves
2 the public interest.

3
4 **CONCLUSION**

5 Defendant has demonstrated the existence of, at a minimum, serious questions to be
6 resolved on appeal in this complex and novel case. Without a stay the State will suffer
7 irreparable harm, both by having one of its laws partially invalidated and because BOF will have
8 to incur costs and administrative disruption for which it will not be possible to recover
9 compensation if Defendant eventually prevails on appeal. Those clear and concrete harms
10 outweigh any harm that Plaintiffs may suffer by virtue of maintenance of the legal status quo
11 pending appeal. For similar reasons, the public interest also favors entry of a stay.

12 Thus, Defendant respectfully requests that the Court stay its injunction and judgment issued on
13 August 25, 2014, pending consideration and resolution of this case by the Ninth Circuit.

14 Dated: September 24, 2014

Respectfully Submitted,

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19 /s/
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