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8
 9 IN THE UNITED STATES DISTRICT COURT
 10 FOR THE EASTERN DISTRICT OF CALIFORNIA
 11 FRESNO DIVISION

12
 13 **JEFF SILVESTER, MICHAEL POESCHL,
 BRANDON COMBS, THE CALGUNS
 14 FOUNDATION, INC., a non-profit
 organization, and THE SECOND
 15 AMENDMENT FOUNDATION, INC., a
 non-profit organization,**

16
 17 Plaintiffs,

18 v.

19 **KAMALA HARRIS, Attorney General of
 California (in her official capacity), and
 20 DOES 1 to 20,**

21 Defendants.

1:11-cv-02137-AWI-SKO

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 DEFENDANT CALIFORNIA
 ATTORNEY GENERAL KAMALA D.
 HARRIS’S MOTION FOR SUMMARY
 JUDGMENT (FED. R. CIV. P. 56) –
 INCLUDING STATEMENT OF
 UNDISPUTED MATERIAL FACTS**

Hearing Date: October 28, 2013
 Hearing Time: 1:30 p.m.
 Trial Date: March 25, 2014
 Action Filed: December 23, 2011

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1 Defendant Kamala D. Harris, Attorney General of the State of California (the “Attorney
2 General”), submits the following memorandum of points and authorities in support of her motion
3 for summary judgment against Plaintiffs Jeffrey A. Silvester (“Silvester”), Brandon S. Combs
4 (“Combs”; together with Silvester, the “Individual-Person Plaintiffs”), The Calguns Foundation,
5 Inc. (“CGF”), and The Second Amendment Foundation, Inc. (“SAF”).

6 SUMMARY OF CASE

7 Plaintiffs mount a federal constitutional challenge to two California laws, California Penal
8 Code sections 26815 and 27540 (together, the “Waiting Period Law” or the “Law”), that mandate
9 a 10-day waiting period between application to purchase and delivery of a firearm, for all
10 California residents not statutorily exempt from the waiting period.¹

11 The Waiting Period Law has long been justified on two solid grounds. First, the Law
12 creates a “cooling off” period to limit a person’s immediate access to firearms, in case the person
13 has an impulse to use a firearm to commit an act of violence. Second, the Law allows law-
14 enforcement officials sufficient time to conduct thorough background checks on prospective
15 firearms purchasers, so that people prohibited by law from possessing firearms (because of, e.g.,
16 having violent felony convictions) are hindered in acquiring them. *See People v. Bickston*, 91
17 Cal. App. 3d Supp. 29, 31 (1979) (interpreting relevant legislative history).

18 In attacking the Waiting Period Law, Plaintiffs make two primary but insufficient
19 contentions. First, Plaintiffs argue that the 10-day waiting period infringes, without sufficient
20 justification, on their Second Amendment right under the U.S. Constitution. Plaintiffs contend
21 that a waiting period is especially unjustified for anybody who has been through the waiting
22 period before in connection with a prior firearm purchase, and who must go through the waiting
23 period again to acquire additional firearms. Second, Plaintiffs assert that their right to equal
24 protection under the Fourteenth Amendment is violated by statutory exemptions for certain
25 classes of people from the Waiting Period Law, exemptions that the Individual-Person Plaintiffs
26 and similarly situated people do not enjoy.

27 ¹ The differences between the two statutes appear to be irrelevant to the present case, and
28 so the two statutes are treated as one statute here.

1 Contrary to Plaintiffs' assertions, the brief delay occasioned by the Waiting Period Law
2 does not infringe on any Second Amendment interest that has been recognized by the courts. At
3 most, the Law presents only a minor inconvenience in the process leading to the acquisition of
4 firearms, not an infringement on an individual person's right to keep and bear arms. Nor is the
5 Fourteenth Amendment infringed by the limited exemptions granted by the Legislature. The
6 waiting period and the exemptions are fully justified under any appropriate level of scrutiny.

7 No material, undisputed facts are present. Instead, this case presents pure questions of
8 federal constitutional law ripe for resolution via motion for summary judgment. As discussed
9 below, the Court should enter summary judgment in favor of the Attorney General for the entire
10 case.

11 **QUESTIONS PRESENTED**

12 1.A. Does enforcement of California's statutory 10-day waiting period between an
13 individual person's application to purchase a firearm and delivery of the firearm to the person
14 (Cal. Penal Code §§ 26815 and 27540) violate the Second Amendment?

15 1.B. Does enforcement of California's statutory 10-day waiting period between an
16 individual person's application to purchase a firearm and delivery of the firearm to the person
17 (Cal. Penal Code §§ 26815 and 27540) violate the Second Amendment, where the person already
18 has gone through at least one 10-day waiting period in connection with at least one previous
19 firearm purchase?

20 2. Does the allowance of multiple statutory exemptions to the 10-day waiting period,
21 and concomitant creation of some groups of people with exemptions alongside other groups of
22 people lacking any exemptions, violate the Fourteenth Amendment's Equal Protection Clause?

23 **BRIEF ANSWERS**

24 1.A. No. Enforcement of California's statutory 10-day waiting period does not
25 substantially burden any person's Second Amendment right and does not abridge the Second
26 Amendment under any appropriate standard of review.

27 1.B. No. Enforcement of California's statutory 10-day waiting period as to a person
28 who has already gone through at least one 10-day waiting period in connection with a previous

1 firearm purchase does not substantially burden that person's Second Amendment right and does
2 not abridge the Second Amendment under any appropriate standard of review.

3 2. No. There is no violation of the Fourteenth Amendment's Equal Protection Clause
4 merely because certain groups of people have statutory exemptions from the 10-day waiting
5 period; the exemptions do not discriminate against any suspect class of people or unduly burden
6 the exercise of a fundamental right, and the exemptions are rationally related to legitimate
7 government objectives.

8 **BACKGROUND INFORMATION**

9 The Waiting Period Law, in various iterations imposing a waiting period of between one
10 day and 15 days for purchases of firearms (sometimes for handguns only), has been in effect in
11 California for 90 years. *Deering's California Codes, Penal Code Annotated of the State of*
12 *California*, §§ 1473 to End at 735 (1961), citing Stats. 1923 ch. 339, § 10, p. 710; First Am.
13 Compl., ¶¶ 45-47. For about two decades in the 1970s through the 1990s, the waiting period for
14 handguns was 15 days. See *People v. Doolin*, 45 Cal. 4th 390, 415 (2009); *Jacoves v. United*
15 *Merchandising Corp.*, 9 Cal. App. 4th 88, 112 nn.13, 14 (1992); *Bickston*, 91 Cal. App. 3d Supp.
16 at 31 (1979); First Am. Compl., ¶¶ 45-47.

17 Presently, California Penal Code section 26815(a) provides as follows:

18 No firearm shall be delivered...[w]ithin 10 days of the application to purchase, or,
19 after notice by the [California Department of Justice ("DOJ")] pursuant to section
20 28220, within 10 days of the submission to the department of any correction to the
application, or within 10 days of the submission to the department of any fee
required pursuant to section 28225, whichever is later.

21 California Penal Code section 27540(a) provides as follows:

22 No [firearms] dealer...shall deliver a firearm to a person...[w]ithin 10 days of the
23 application to purchase, or, after notice by the department pursuant to section
24 28220, within 10 days of the submission to the department of any correction to the
application, or within 10 days of the submission to the department of any fee
required pursuant to section 28225, whichever is later.

25 The 10-day waiting period is part of an approval process designed to restrict firearms
26 purchases to those persons legally eligible to possess and to own firearms. As explained in DOJ
27 publication *California Firearms Summary 2013* (available online at <http://oag.ca.gov/firearms>):
28

1 In California, only licensed California firearms dealers who possess a valid
2 Certificate of Eligibility (COE) are authorized to engage in retail sales of firearms.
3 These retail sales require the purchaser to provide personal identifier information
4 for the Dealer Record of Sale (DROS) document that the firearms dealer must
5 submit to the DOJ. There is a mandatory 10-day waiting period before the
6 firearms dealer can deliver the firearm to the purchaser. During this 10-day
7 waiting period, the DOJ conducts a firearms eligibility background check to ensure
8 the purchaser is not prohibited from lawfully possessing firearms.

9 . . . Generally, it is illegal for any person who is not a California licensed firearms
10 dealer (private party) to sell or transfer a firearm to another non-licensed person
11 (private party) unless the sale is completed through a licensed California firearms
12 dealer. A “Private Party Transfer” (PPT) can be conducted at any licensed
13 California firearms dealership that sells handguns. The buyer and seller must
14 complete the required DROS document in person at the licensed firearms
15 dealership and deliver the firearm to the dealer who will retain possession of the
16 firearm during the mandatory 10-day waiting period. In addition to the applicable
17 state fees, the firearms dealer may charge a fee not to exceed \$10 per firearm for
18 conducting the PPT.

19 The infrequent transfer of firearms between immediate family members is exempt
20 from the law requiring PPTs to be conducted through a licensed firearms dealer.
21 For purposes of this exemption, “immediate family member” means parent and
22 child, and grandparent and grandchild, but does not include brothers or sisters
23 (Pen. Code, § 16720).

24 (*Id.* at 3.)

25 According to the California Bureau of Firearms publication *Dealer Record of Sales*
26 *Transactions* (available online at <http://oag.ca.gov/firearms/statistics>), DOJ processed 2,827,042
27 DROS applications in the five-year period between January 1, 2008, and December 31, 2012.

28 (*Id.* at 2.) DOJ denied 28,430 of the applications. (*Id.*)

STATEMENT OF UNDISPUTED MATERIAL FACTS

As stated above, this case presents pure questions of federal constitutional law. The case involves very few material facts, and none of them are in dispute. The undisputed material facts are:

1. At all relevant times, one effect of the Waiting Period Law has been that all California residents lawfully purchasing firearms must wait a minimum of 10 days between applying to purchase the firearms and receiving delivery of them (unless the purchasers are statutorily exempt from the waiting period). (First Am. Compl., ¶¶ 1, 20, 21.)

2. At all relevant times, Silvester has owned at least one firearm. (First Am. Compl., ¶¶ 1, 2.; Decl. of Jonathan M. Eisenberg in Supp. of Def. Cal. Att’y Gen. Harris’s Mtn. for Summ. J.

1 (“Eisenberg Decl.”), Exh. A (Silvester Interrog. Resps.) at 3:5-3:6.)

2 3. At all relevant times, Combs has owned at least one firearm. (First Am. Compl., ¶¶ 1,
3 3; Eisenberg Decl., Exh. B (Combs Interrog. Resps.) at 3:5-3:6.)

4 **PROCEDURAL HISTORY**

5 On December 23, 2011, Plaintiffs plus another individual person, Michael Poeschl
6 (“Poeschl”), a former plaintiff who later voluntarily withdrew from the case, filed the original
7 complaint in this case. No defendant ever filed a pleading responsive to that complaint. On
8 February 24, 2012, Plaintiffs plus Poeschl voluntarily filed the first amended complaint, which
9 remains the operative complaint, and contains two causes of action asserted under the U.S.
10 Constitution, one under the Second Amendment and the other under the Fourteenth Amendment.
11 On March 15, 2013, the Attorney General answered the first amended complaint.

12 While discovery has taken place in the case (and the discovery period is closed), there
13 have been no contested motions previously in the case. The present motion for summary
14 judgment is the first contested motion in the case.

15 **LEGAL STANDARDS FOR MOTIONS FOR SUMMARY JUDGMENT**

16 Summary judgment is appropriate when it is demonstrated that there exists no genuine
17 issue as to any material fact and that the moving party is entitled to judgment as a matter of law.
18 Fed. R. Civ. P. 56; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d
19 142 (1970); *Fortyune v. American Multi-Cinema, Inc.*, 364 F.3d 1075, 1080 (9th Cir. 2004). The
20 party seeking summary judgment bears the initial burden of informing the court of the basis for
21 its motion and of identifying the portions of the declarations (if any), pleadings, and discovery
22 that demonstrate an absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477
23 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Soremekun v. Thrifty Payless, Inc.*, 509
24 F.3d 978, 984 (9th Cir. 2007). A fact is “material” if it might affect the outcome of the suit under
25 the governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49, 106 S.Ct. 2505,
26 91 L.Ed.2d 202 (1986); *United States v. Kapp*, 564 F.3d 1103, 1114 (9th Cir. 2009). A dispute is
27 “genuine” as to a material fact if there is sufficient evidence for a reasonable jury to return a
28

1 verdict for the non-moving party. *Anderson*, 477 U.S. at 248; *Freecycle Sunnyvale v. Freecycle*
2 *Network*, 626 F.3d 509, 514 (9th Cir. 2010).

3 Where the non-moving party will have the burden of proof on an issue at trial, the movant
4 may prevail by presenting evidence that negates an essential element of the non-moving party's
5 claim or by merely pointing out that there is an absence of evidence to support an essential
6 element of the non-moving party's claim. See *James River Ins. Co. v. Herbert Schenk, P.C.*, 523
7 F.3d at 915, 923 (9th Cir. 2008); *Soremekun*, 509 F.3d at 984. If a moving party fails to carry its
8 burden of production, then "the non-moving party has no obligation to produce anything, even if
9 the non-moving party would have the ultimate burden of persuasion." *Nissan Fire & Marine Ins.*
10 *Co. v. Fritz Cos.*, 210 F.3d 1099, 1105-06 (9th Cir. 2000). If the moving party meets its initial
11 burden, the burden then shifts to the opposing party to establish that a genuine issue as to any
12 material fact actually exists. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.
13 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Nissan Fire*, 210 F.3d at 1103. The opposing
14 party cannot "rest upon the mere allegations or denials of the pleading but must instead produce
15 evidence that sets forth specific facts showing that there is a genuine issue for trial." *Estate of*
16 *Tucker v. Interscope Records*, 515 F.3d 1019, 1030 (9th Cir. 2008) (internal punctuation omitted).

17 The opposing party's evidence is to be believed, and all justifiable inferences that may be
18 drawn from the facts placed before the court must be drawn in favor of the opposing party. See
19 *Anderson*, 477 U.S. at 255; *Matsushita*, 475 U.S. at 587; *Narayan v. EGL, Inc.*, 616 F.3d 895, 899
20 (9th Cir. 2010). While a "justifiable inference" need not be the most likely or the most persuasive
21 inference, a justifiable inference must be rational or reasonable. See *Narayan*, 616 F.3d at 899.
22 Inferences are not drawn out of the air, and it is the opposing party's obligation to produce a
23 factual predicate from which the inference may be drawn. See *Sanders v. City of Fresno*, 551 F.
24 Supp. 2d 1149, 1163 (E.D. Cal. 2008); *UMG Recordings, Inc. v. Sinnott*, 300 F. Supp. 2d 993,
25 997 (E.D. Cal. 2004). "A genuine issue of material fact does not spring into being simply
26 because a litigant claims that one exists or promises to produce admissible evidence at trial." *Del*
27 *Carmen Guadalupe v. Agosto*, 299 F.3d 15, 23 (1st Cir. 2002); see *Bryant v. Adventist Health*
28 *System/West*, 289 F.3d 1162, 1167 (9th Cir. 2002). Further, a "motion for summary judgment

1 may not be defeated . . . by evidence that is merely colorable or is not significantly probative.”
2 *Anderson*, 477 U.S. at 249–50; *Hardage v. CBS Broad. Inc.*, 427 F.3d 1177, 1183 (9th Cir. 2006)
3 (internal punctuation omitted). If the nonmoving party fails to produce evidence sufficient to
4 create a genuine issue of material fact, the moving party is entitled to summary judgment. *Nissan*
5 *Fire*, 210 F.3d at 1103.

6 ARGUMENT

7 I. THE ATTORNEY GENERAL IS ENTITLED TO SUMMARY JUDGMENT 8 ON PLAINTIFFS’ SECOND-AMENDMENT CLAIM

9 The Second Amendment states: “A well regulated Militia, being necessary to the security
10 of a free State, the right of the people to keep and bear Arms, shall not be infringed.” Assuming
11 for the sake of argument that this Court accepts that the Waiting Period Law regulates conduct
12 arguably within the Second Amendment’s scope, then the Court must analyze the Law for
13 compliance with the Second Amendment. However, the U.S. Supreme Court has not defined the
14 standard of scrutiny that applies to laws regulating conduct arguably within the Second
15 Amendment’s scope. *District of Columbia v. Heller*, 554 U.S. 570, 628, 634, 128 S.Ct. 2783,
16 171 L.Ed.2d 637 (2008). Nor has the U.S. Court of Appeals for the Ninth Circuit. *Nordyke v.*
17 *King*, 681 F.3d 1041, 1044 (9th Cir. 2012). The standard of scrutiny remains an open question in
18 the present case.

19 It is, nonetheless, instructive that the U.S. Supreme Court has held that “not every law
20 which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right.”
21 *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 873, 112 S.Ct. 2791, 120
22 L.Ed.2d 674 (1992). In the same vein, the High Court in *Heller* makes it plain that “[l]ike most
23 rights, the right secured by the Second Amendment is not unlimited.” 554 U.S. at 626. Although
24 *Heller* did uphold the invalidation of a very strict law of the District of Columbia that generally
25 prohibited the possession of handguns, *id.* at 576, 636, *Heller* took care to provide an expressly
26 non-exhaustive list of “presumptively lawful regulatory measures,” *id.* at 627 n.26—“a variety of
27 tools” that “the Constitution leaves. . . for combating” the problem of firearm violence in the
28 United States. *Id.* at 636. The list includes prohibitions on the possession of “weapons not

1 typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns,”
2 *id.* at 625, and “M-16 rifles and the like,” *id.* at 627, as well as “longstanding prohibitions on the
3 possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms
4 in sensitive places such as schools and government buildings, or laws imposing conditions and
5 qualifications on the commercial sale of arms.” *Id.* at 626-27. Likewise, *Heller* indicated that
6 gunpowder-storage laws “do not remotely burden the right of self-defense...” *Id.* at 632.
7 “Nor...does our analysis suggest the invalidity of laws regulating the storage of firearms to
8 prevent accidents.” *Id.*

9 **A. The Challenged Laws Pass The Substantial-Burden Test**

10 **1. The Substantial-Burden Test Stated**

11 In deciding Plaintiffs’ Second Amendment claim, this Court should adopt and apply the
12 “substantial burden” test articulated in *United States v. DeCastro*, 682 F.3d 160 (2d Cir. 2012), a
13 test that adheres faithfully to the above-repeated indications within *Heller* of the appropriate test.

14 In *DeCastro*, the Second Circuit held that “heightened scrutiny is appropriate only as to
15 those regulations that substantially burden the Second Amendment.” *Id.* at 164. The *DeCastro*
16 Court observed that *Heller* did not “mandate that any marginal, incremental or even appreciable
17 restraint on the right to keep and bear arms be subject to heightened scrutiny. Rather, heightened
18 scrutiny is triggered only by those restrictions that . . . operate as a substantial burden on the
19 ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful
20 purposes).” *DeCastro*, 682 F.3d at 166.

21 *DeCastro* emphasized that its approach is consistent with that of other circuit courts,
22 which have endorsed applying varying degrees of scrutiny based not only on the degree of burden
23 on the Second Amendment right but also on the extent to which the regulation impinges on the
24 “core” of the right. *Id.*

25 As *DeCastro* explained in justifying the substantial-burden standard, a similar threshold
26 showing is needed to trigger heightened scrutiny of laws alleged to infringe other fundamental
27 constitutional rights. 682 F.3d at 167. For example, the right to marry is fundamental, but
28 “reasonable regulations that do not significantly interfere with decisions to enter into the marital

1 relationship” are not subject to the “rigorous scrutiny” that is applied to laws that “interfere
2 directly and substantially with the right to marry.” *Zablocki v. Redhail*, 434 U.S. 374, 386-87
3 (1978). The right to vote is fundamental, but “the rigorousness of our inquiry into the propriety
4 of a state election law depends upon the extent to which a challenged regulation burdens First and
5 Fourteenth Amendment rights.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *see also Casey*,
6 505 U.S. at 873-74 (“[N]ot every ballot access limitation amounts to an infringement of the right
7 to vote. Rather, the States are granted substantial flexibility in establishing the framework within
8 which voters choose the candidates for whom they wish to vote;” holding that fact that law which
9 serves valid purpose has incidental effect of making it more difficult to exercise a right cannot be
10 enough to invalidate law); *Karlin v. Foust*, 188 F.3d 446, 481 (7th Cir. 1999) (“[I]nconvenience,
11 even severe inconvenience, is not an undue burden”).

12 Other circuit courts have joined *DeCastro* in holding that courts must consider the severity
13 of the burden on Second Amendment rights in deciding what level of scrutiny to apply. *See, e.g.,*
14 *Heller v. District of Columbia*, 670 F.3d 1244, 1261, 1252 (D.C. Cir. 2011) (“[W]e determine the
15 appropriate standard of review by assessing how severely the prohibitions burden the Second
16 Amendment right”); *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) (“[T]he rigor of
17 this judicial review will depend on how close the law comes to the core of the Second
18 Amendment right and the severity of the law’s burden on the right”); *United States v.*
19 *Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (to determine standard of review, “we would
20 take into account the nature of a person’s Second Amendment interest, the extent to which those
21 interests are burdened by government regulation, and the strength of the government’s
22 justifications for the regulation”); *see also Young v. Hawaii*, 911 F. Supp. 2d 972, 988 (D. Haw.
23 2012) (summarizing law in this area). Under this framework, as another U.S. District Court in
24 this federal circuit has recognized, “[a] firearm law or regulation imposes a substantial burden on
25 Second Amendment rights if the law or regulation bans law-abiding people from owning firearms
26 or leaves them without adequate alternatives for acquiring firearms for self-defense.” *Scocca v.*
27 *Smith*, No. C-11-1318 EMC, 2012 WL 2375203 at *7 (N.D. Cal. Jun. 22, 2012).

28

1 On the other hand, in the *absence* of such a severe burden, relatively lenient *rational-basis*
2 *review* should be applied. *DeCastro*, 682 F.3d at 166-67. Under rational-basis review, a
3 legislative classification will be upheld if it is rationally related to a legitimate government
4 interest. *Silveira v. Lockyer*, 312 F.3d 1052, 1088 (9th Cir. 2002).

5 In the present case, the Court should adopt and apply a substantial-burden test like the one
6 used in *DeCastro*.

7 **2. The Substantial-Burden Test Applied**

8 Under a substantial-burden analysis, Plaintiffs have not alleged a valid Second
9 Amendment claim, because the 10-day waiting period, the alleged infringement of the Second
10 Amendment, simply does not rise to the level of a constitutional violation. Plaintiffs' Second
11 Amendment right is not materially infringed by the minimal delay imposed by the Law, allowing
12 the California Bureau of Firearms to conduct mandatory background checks.

13 Under and after *Heller*, the Waiting Period Law, as a regulation of the commercial sale of
14 firearms,² remains ones of the "tools" available to the State of California to address the problem
15 of firearm violence without violating the Second Amendment. 554 U.S at 636.

16 Moreover, Plaintiffs cannot and do not allege that enforcement of the Waiting Period Law
17 has left Plaintiffs, or the individual people that they represent, in the case of the organizational
18 plaintiffs (CGF and SAF), unable to acquire legal firearms. Indeed, Plaintiffs own and have
19 access to firearms already. (First Am. Compl. at ¶¶ 1, 2, 4, 55, 56, 64; Eisenberg Decl., Exhs. A
20 (Silvester Interrog. Resps.) at 3:5-3:6, B (Combs Interrog. Resps.) at 3:5-3:6.) Since this lawsuit
21 was filed, Plaintiffs (unless they have become disqualified from purchasing firearms) have had
22 many chances to lawfully acquire additional firearms. Plaintiffs also can borrow other people's
23 firearms, as Silvester has done before. (Eisenberg Decl., Exh. C (Depo. of Silvester) at 128.) In
24 this regard, it is significant that law-abiding people in California generally have ready access to
25 firearms, as the 2.8 million DROS transactions with only 28,000 denials between 2008 and 2012
26 evidence.

27 ² California Penal Code sections 26815 and 27540 regulate firearms dealers. California
28 Penal Code section 26815 also covers interpersonal sales of firearms.

1 Unable to claim that the Waiting Period Law deprives them of gun ownership, Plaintiffs
2 instead assert that enforcement of the Law inconveniences them by, for example, making them
3 have to take two trips instead of one trip to a firearms dealer to acquire firearms lawfully,
4 complaining that these trips take time and money (usually in gas bills for automobile travel).
5 (Eisenberg Decl., Exh. D (Depo. of Combs) at 170-71.) Similarly, Plaintiffs complain that it is
6 more difficult to purchase heavily discounted and/or hard-to-find firearms from remote sellers,
7 because of the need to make two trips to the sellers. (Eisenberg Decl., Exh. C (Depo. of Silvester)
8 at 42-57.)

9 But the case law cited above undercuts these complaints as the basis for a constitutional
10 violation. A mere burden or an inconvenience on a right without more is not a constitutional
11 violation. *Karlin*, 188 F.3d at 481. Only a substantial burden amounting to an effective denial of
12 the right is a constitutional violation. *DeCastro*, 682 F.3d at 166. Therefore, it is not of
13 constitutional significance in and of itself that Plaintiffs are merely inconvenienced by the
14 Waiting Period Law in acquiring firearms, by having to take second trips to the firearms dealer's
15 store. Also, nothing in the Second Amendment entitles Plaintiffs to obtain relatively rare or
16 intensely coveted firearms at discount prices at remote locations, without any waiting period,
17 especially when other serviceable firearms are available for purchase.

18 Given that the Waiting Period Law imposes only, at worst, a minor burden or an
19 inconvenience on the Second Amendment right, as explained above about *DeCastro*, 682 F.3d at
20 166-67, the Court should apply rational-basis review to the Law.

21 The Waiting Period Law easily passes rational-basis review. The Law is rationally related
22 to the indisputably legitimate—indeed, substantial—government interest in public safety via the
23 reduction of firearm violence. *See United States v. Call*, 874 F. Supp. 2d 969, 976-77 (D. Nev.
24 2012) (citing several cases classifying government interest in public safety via reducing gun
25 violence as satisfying not just rational-basis standard but intermediate-scrutiny standard); *Peruta*
26 *v. County of San Diego*, 758 F. Supp. 2d 1106, 1117 (S.D. Cal. 2010) (“In this case, Defendant
27 has an important and substantial interest in public safety and in reducing the rate of gun use in
28

1 crime”); *cf. United States v. Salerno*, 481 U.S. 739, 750, 754, 107 S.Ct. 2095, 95 L.Ed.2d 697
2 (1987) (holding that government’s interest in reducing crime by arrestees is compelling).

3 As stated above, the Law serves that interest in at least two ways. First, the Law creates a
4 cooling-off period to limit a person’s immediate access to firearms, in case the person has an
5 impulse to use a firearm to commit an act of violence. Even if a person (like Silvester or Combs)
6 already has a firearm, limiting that person’s ability to acquire another firearm can only decrease
7 the likelihood that the person will use a firearm in an act of violence. The Law also allows law-
8 enforcement officials sufficient time to conduct background checks on prospective firearms
9 purchasers, so that people prohibited by law from having firearms (because of, e.g., having
10 violent felony convictions) will not be able to acquire them. See *Bickston*, 91 Cal. App. 3d Supp.
11 at 31. At bottom, ten days is not innately too long a time to wait to acquire a firearm, especially
12 in light of the important societal interests that the waiting period serves.

13 Trying to establish that the Law is irrational, Plaintiffs assert that any person who, in
14 connection with a firearms purchase, has legitimately passed a background check need not go
15 through another background check, which supposedly would be redundant with the prior
16 background check. (First Am. Compl., ¶¶ 20, 56, 64.) This assertion is false. That person may
17 have become ineligible to possess and/or to purchase firearms since passing the earlier
18 background check (*see* Cal. Penal Code §§ 29800 et seq., 30000 et seq.); thus, there is the same
19 need for a background check of this person as of any other person, in connection with a present
20 application to purchase firearms.³ Similarly, Plaintiffs have asserted that any person with a
21 “certificate of eligibility” (for dealing in firearms) issued per California Penal Code section 26710
22 has an “ongoing” background check, making redundant any background check associated with a
23 new firearm purchase. (First Am. Compl., ¶ 4.) This assertion is unsupported. It is simply not so
24 that a certificate of eligibility activates or effectuates or constitutes an ongoing background check
25 of the certificate holder. *Cf. Jackson v. Dep’t of Justice*, 85 Cal. App. 4th 1334, 1338, 1340, 1349

26 _____
27 ³ A person who acquired a firearm legally may lose his or her right to possess that firearm,
28 which is then subject to repossession. See *People v. James*, 174 Cal. App. 4th 662, 665-66
(2009).

1 (2001) (holding that DOJ properly denied licensed firearms dealer’s application for renewal of
2 assault weapons permit based on violations of relevant law during term of permit; issue was
3 determined in course of processing renewal application; revocation of permit did not occur
4 automatically).

5 In conclusion, the Law passes the substantial-burden test and therefore does not infringe
6 the Second Amendment, meaning that the Court should grant the Attorney General’s motion for
7 summary judgment as to the Second Amendment claim.

8 **B. The Challenged Laws Survive Intermediate Scrutiny**

9 The Ninth Circuit has *not* adopted an “intermediate scrutiny” standard applicable to Second
10 Amendment cases.⁴ But even if this Court were to determine that intermediate scrutiny is the
11 appropriate standard of review here, the Waiting Period Law would survive that heightened level
12 of scrutiny.

13 “[I]ntermediate scrutiny requires [1] the asserted governmental end to be more than just
14 legitimate; it must be either ‘significant,’ ‘substantial,’ or ‘important,’ and it requires [2] the ‘fit
15 between the challenged regulation and the asserted objective be reasonable, [but] not
16 perfect.’” *Peruta*, 758 F. Supp. 2d at 1117, quoting *United States v. Marzzarella*, 614 F.3d 85, 98
17 (3d Cir. 2010). “The narrow tailoring requirement is satisfied so long as the regulation promotes
18 a substantial government interest that would be achieved less effectively absent the regulation and
19 the means chosen are not substantially broader than necessary to achieve the government’s
20 interest. *Fantasyland Video, Inc. v. Cnty. of San Diego*, 505 F.3d 996, 1004 (9th Cir. 2007)
21 (internal punctuation omitted) (holding that regulation may be considered narrowly tailored under
22 intermediate scrutiny even if plaintiff challenging regulation can posit less drastic means of
23 achieving state objective. The test for intermediate scrutiny can be stated in the form of a series
24 of questions, as follows: is the law in question related to a substantial governmental interest? *See*
25 *Parker*, 919 F. Supp. 2d at 1084 (stating test in form other than questions). If no, the law does

26 ⁴ At least one local federal trial court has applied *both* intermediate scrutiny *and* rational-
27 basis review in a Second Amendment case. *See United States v. Parker*, 919 F. Supp. 2d 1072,
28 1084 (E.D. Cal. 2012).

1 not pass the test. *See id.* If yes, another question comes up: is the law in question reasonably
2 adapted to achieve that interest? *See id.* If no, the law does not pass the test. *See id.* If yes, yet
3 another question comes up: does the law impose a substantial burden on the Second
4 Amendment? *See id.* If no, the law does not pass the test. If yes, the law does pass the test. *See*
5 *id.*

6 As the substantial-burden analysis above has shown, the Waiting Period Law is related to
7 the legitimate and indisputably important governmental interest in protecting public safety by
8 reducing gun violence. And, as previously noted, the Law imposes, at most, only a minor burden
9 or inconvenience on the Second Amendment. Consequently, the central question for intermediate
10 scrutiny here becomes whether the Law is reasonably adapted to achieve the governmental
11 interest in public safety.

12 The U.S. Court of Appeals for the Ninth Circuit, in other areas of jurisprudence, has upheld
13 statutes based on logic, common sense, and mere theories for how the legislatures could have
14 believed or supposed that the statutes had reasonably close connections to the ends sought. *See,*
15 *e.g., Coyote Publ'g v. Miller*, 598 F.3d 592, 598 (9th Cir. 2010) (relying on logic and “common
16 sense” to evaluate whether statutory restrictions on brother advertising were reasonably adapted
17 to achieve government end of resisting commodification of human sexuality); *Ass'n of Nat'l*
18 *Advertisers, Inc. v. Lungren*, 44 F.3d 726, 734-35 (9th Cir. 1994) (accepting theory for how
19 California law setting standards for “environmental” marketing catchphrases promotes state’s
20 interests in having consumers of products accurately informed of their contents and
21 characteristics and in having adequate stewardship of environment).

22 Here, it is beyond reasonable dispute that the Legislature reasonably could have supposed
23 that mandating a 10-day cooling-off period between application to purchase a firearm and
24 delivery of that firearm would dissuade at least some people experiencing violent impulses from
25 acting out those impulses with firearms, thereby reducing gun violence and increasing public
26 safety. Even if a person already has a firearm, limiting that person’s ability to acquire another
27 firearm can only decrease the likelihood that the person will use a firearm in an impulsive act of
28

1 violence. In sum, a cooling off period is reasonably adapted to achieve the State of California's
2 public-safety objective.

3 Similarly, the Legislature reasonably could have supposed that giving law-enforcement
4 officials 10 days to conduct a thorough background check on prospective firearms purchaser
5 would hamper some people who are not legally permitted to possess firearms – because of, e.g.,
6 their criminal histories, their mental-health histories, or restraining orders against them – in
7 acquiring them, thereby reducing gun violence and increasing public safety. See *Bickston*, 91
8 Cal. App. 3d Supp. at 31. Background checks may not stop all persons disallowed firearms from
9 obtaining them, but, again, the U.S. Constitution does not require perfect efficacy of a law for it
10 to survive intermediate scrutiny.

11 Although Plaintiffs complain about all the statutory exemptions to the Waiting Period
12 Law (First Am. Compl., ¶¶ 24-42, 69-70), these exceptions (discussed in detail below) tailor the
13 Law to fit the asserted objective, making the restriction less sweeping than otherwise, and thus
14 support the constitutionality of the law. Cf. *People v. Flores*, 169 Cal. App. 4th 568, 576-77
15 (2008) (finding exceptions to California's open-carry firearms regulations support the
16 constitutionality of the law, by tailoring it).

17 In conclusion, if the Court finds that it is appropriate to apply intermediate scrutiny to the
18 Waiting Period Law (although for the reasons stated above the Attorney General submits that
19 such analysis is not required), then the Court should conclude from that analysis that the Law
20 survives the heightened level of scrutiny. The Law is related to an indisputably important
21 governmental interest in public safety. The Law is reasonably adapted to serving that interest.
22 And the Law imposes at worst a minor burden on the Second Amendment right.

23 **II. THE ATTORNEY GENERAL IS ENTITLED TO SUMMARY JUDGMENT**
24 **OF PLAINTIFFS' FOURTEENTH-AMENDMENT CLAIM**

25 Of the Waiting Period Law, Plaintiffs claim a violation of the Fourteenth Amendment
26 Equal Protection Clause, in that certain classes of people have statutory exemptions—a total of 18
27 groups of such exemptions (First. Am. Compl., ¶¶ 25-42)—while the Individual-Person Plaintiffs
28

1 and other people do not enjoy any exemptions. However, as a matter of law, this claim of
2 Plaintiffs cannot be sustained because each exemption is supported by sufficient justification.

3 Where an equal-protection claim is based on membership in a suspect class such as race or
4 the burdening of a fundamental right, then heightened scrutiny is applied; otherwise only rational-
5 basis review applies. *See Kahawaiolaa v. Norton*, 386 F.3d 1271, 1277–78 (9th Cir. 2005)
6 (stating that “[w]hen no suspect class is involved and no fundamental right is burdened, we apply
7 a rational basis test to determine the legitimacy of the classifications”); (First Am. Compl., ¶ 70
8 (attacking exemptions as “arbitrary, capricious, and irrational”).)

9 Plaintiffs do not and could not truthfully assert that any of the exemptions discriminates
10 against any suspect class of people, such as racial or ethnic minorities. And the Attorney General
11 already has established that the Waiting Period Law does not burden the Second Amendment
12 right (as the Law passes even heightened scrutiny). Therefore, the Court should subject each of
13 the challenged groups of statutory exemptions to rational-basis review. Such analysis should lead
14 to conclusions that all of the exemptions survive rational-basis review.

15 The first challenged exemptions, in California Penal Code sections 26950, 27050, 27055,
16 27060, 27065, 27600, 27610, 27615, and 27650, cover, generally, peace officers who are
17 authorized to carry firearms while performing their duties as peace officers. (See First. Am.
18 Compl., ¶ 26.) The Legislature rationally could have decided that peace officers, who enforce the
19 laws and apprehend people who violate the laws, have a special need for swift access to firearms
20 to be able to do their jobs effectively. Moreover, the Legislature could reasonably conclude that
21 peace officers who need firearms quickly and may have to purchase them personally, and who are
22 already subject to stringent internal departmental regulations relating to firearms, need not be
23 subject to the additional restrictions imposed by the Waiting Period Law. These exemptions pass
24 thus rational-basis review.

25 The second challenged exemptions, in California Penal Code sections 26955 and 27655,
26 cover, generally, firearms dealers delivering firearms *other than handguns* at auctions or similar
27 events. (See First. Am. Compl., ¶ 27.) The Legislature rationally could have concluded that
28 firearms auctions or similar events often occur at temporary locations, meaning that dealers may

1 lack access to the same locations 10 days later to complete firearms transactions, so the 10-day
2 waiting period should be curbed in such instances, at least for firearms that are not handguns and
3 thus are not easy to conceal, to allow legitimate transactions to be completed. The Legislature
4 also rationally could have concluded that buyers of curio and relic firearms often acquire them at
5 auctions and similar events, and these types of firearms are relatively less lethal, or less likely to
6 be used in acts of violence or by people, such as convicted felons, prohibited from possessing
7 firearms, and so a loosening of the waiting period makes sense in this atypical circumstance.
8 Therefore, these exemptions also pass rational-basis review.

9 The third challenged exemptions, in California Penal Code sections 27110, 27125, 27710,
10 and 27725, cover, generally, dealer-to-dealer transfers of firearms. (See First. Am. Compl., ¶ 28.)
11 The Legislature rationally could have concluded that the 10-day waiting period would
12 unnecessarily double (or even triple) in length for any person who purchases a firearm from one
13 dealer that first has to obtain the firearm from another dealer before delivery to the purchaser, if
14 there was a dealer-to-dealer waiting period. Allowing swifter dealer-to-dealer transfers lets a
15 firearm reach its lawful new owner after just a 10-day waiting period, not a 20- or even 30-day
16 waiting period. Thus, these exemptions pass rational-basis review as well.

17 The fourth challenged exemptions, in California Penal Code sections 26960, 27130, 27660,
18 and 27730, cover, generally, a dealer's transfer of firearms (other than handguns) to himself or
19 herself. (See First. Am. Compl., ¶ 29.) The Legislature rationally could have concluded that
20 dealers, who are subject to many more relevant regulations and much more relevant oversight
21 than other people, and who presumably handle high volumes of firearms regularly, are
22 significantly less likely to abuse immediate access to firearms, making the 10-day waiting period
23 less crucial in their cases. Also, given a dealer's ready access to firearms from their own
24 inventory, imposing a waiting period might tempt such a person to evade the law entirely, making
25 the waiting period counterproductive. These exemptions pass rational-basis review.

26 The fifth challenged exemptions, in California Penal Code sections 27100 and 27700,
27 cover, generally, transfers of firearms between or to importers or manufacturers. (See First. Am.
28 Compl., ¶ 30.) As with dealer-to-dealer-to-buyer transactions, the Legislature rationally could

1 have concluded that the 10-day waiting period would unnecessarily double (or even triple) in
2 length for any person who purchases a firearm that was recently in the possession of an importer
3 or manufacturer and that must go first to a dealer and then to the purchaser. Allowing more
4 expedited importer and/or manufacturer transfers is consistent with allowing a firearm to reach its
5 purchaser after just a 10-day waiting period. These exemptions pass rational-basis review.

6 The sixth through eleventh and eighteenth challenged exemptions, in California Penal Code
7 sections 26965, 26970, 27140, 27665, 27740, and 27670, cover, generally, people with permits
8 for various kinds of unusual or unusually dangerous weapons (short barrel rifles, short barrel
9 shotguns, assault weapons, machineguns, destructive devices, curio and relic firearms, cane guns,
10 firearms that are not immediately recognizable as firearms, undetectable firearms, wallet guns,
11 unconventional pistols, and zip guns). (See First. Am. Compl., ¶¶ 31-26, 43.) The Legislature
12 could have rationally concluded that people who have been deemed authorized to have such
13 unusual or unusually dangerous weapons are more likely to be (1) adept at using safely, and (2)
14 especially trustworthy with, less dangerous (albeit still potentially deadly) weapons, such that a
15 10-day waiting period for purchases of more ordinary weapons would be less necessary. These
16 exemptions pass rational-basis review.

17 The twelfth challenged exemptions, in California Penal Code sections 27105 and 27705,
18 cover, generally, transactions involving firearms serviced or repaired by a gunsmith. (See First.
19 Am. Compl., ¶ 37.) The Legislature rationally could have concluded that people bringing
20 firearms to gunsmiths for repairs are not seeking immediate access to firearms for unlawful
21 reasons, because these people are voluntarily giving up immediate access to firearms, possibly for
22 longer than 10 days, such that a 10-day waiting period delaying return of the firearms is less
23 necessary. These exemptions pass rational-basis review.

24 The thirteenth challenged exemptions, in California Penal Code sections 27115 and
25 27715, cover, generally, dealer sales to persons residing out of state. (See First. Am. Compl., ¶
26 38.) The Legislature rationally could have preferred to avoid a potential conflict with the
27 dormant commerce doctrine (*see Nat'l Ass'n of Optometrists and Opticians v. Harris*, 682 F.3d
28 1144, 1147-48 (9th Cir. 2012)) in regulation of interstate firearms transactions via a 10-day

1 waiting period. Moreover, the Legislature could reasonably conclude that the foreign
2 jurisdiction's laws would provide sufficient controls, including waiting periods. These
3 exemptions pass rational-basis review.

4 The fourteenth challenged exemptions, in California Penal Code sections 27120 and
5 27720, cover, generally, firearms deliveries to wholesalers. (See First. Am. Compl., ¶ 39.) As
6 suggested above for dealer-to-dealer transactions and transactions involving importers or
7 manufacturers, the Legislature rationally could have concluded that the 10-day waiting period
8 would unnecessarily double (or even triple) in length for any person who purchases a firearm that
9 was recently in the possession of a wholesaler, and has to go first to a dealer and then to the
10 purchaser. Allowing swifter wholesaler-to-retailer transfers would allow a firearm to reach its
11 purchaser after just a 10-day waiting period, not a 20- or even 30-day waiting period. These
12 exemptions pass rational-basis review.

13 The fifteenth through seventeenth challenged exemptions, in California Penal Code
14 sections 27000, 27005, 27135, 27735, 27745, and 27750 cover, generally, certain regulated loans
15 of firearms, for such purposes as target shooting and licensed target-shooting facilities. (See
16 First. Am. Compl., ¶¶ 40-42.) The Legislature rationally could have concluded that prompt, well-
17 regulated lending of firearms is, as a practical matter, necessary for certain lawful businesses,
18 such as licensed target-shooting facilities. These exemptions pass rational-basis review. Also,
19 the Legislature rationally could have concluded that because a loan of a firearm is, by definition,
20 for a limited time period, the lender of a firearm is more likely to have a personal relationship
21 with the borrower, and the lender of a firearm has an incentive to assure safe return receipt of the
22 firearm, a loosening of the waiting-period restriction is reasonable in a loan scenario.

23 In sum, Plaintiffs' multi-part claim under the Fourteenth Amendment fails in all respects,
24 and the Court should grant summary judgment in favor of the Attorney General on this claim.

25 CONCLUSION

26 Enforcement of California's statutory 10-day waiting period does not substantially burden
27 any person's Second Amendment right, and does not abridge the Second Amendment under any
28

1 appropriate standard of review. Plaintiffs, who possess firearms already, are complaining about
2 the mere inconvenience of a waiting period that is well-justified as a public-safety measure.
3 Similarly, there is no violation of the Fourteenth Amendment merely because the California
4 Legislature, in tailoring the waiting period narrowly, exempted certain groups of people from
5 the waiting period. Each exemption is well-justified. Therefore, the Court should grant the
6 Attorney General's motion for summary judgment in its entirety.

7 Dated: September 25, 2013

Respectfully Submitted,

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12 /s/
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