







# Journal on Firearms and Public Policy

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*Professor Emeritus*  
Simon Fraser University

### *Publisher*

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*Women & Guns Magazine*

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# Journal on Firearms & Public Policy

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**Volume 26**

**Fall 2014**

**The Canadian Long-Gun Registry:  
A Preliminary Evaluation**

Gary Mauser 1

**Firearms Homicide in Australia, Canada, and  
New Zealand: What can we learn from long-term  
international comparisons?**

Samara McPhedran, PhD\*  
Jeanine Baker, PhD  
Pooja Singh, BA (Hons) 27

**UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA  
Opinion in PALMER v. DISTRICT OF COLUMBIA** 41

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
Opinion in SILVESTER V. HARRIS** 58

**Negroes and the Gun, the black tradition of arms by  
Nicholas Johnson**

Gary Mauser, reviewer 117







# The Canadian Long-Gun Registry: A Preliminary Evaluation

Gary Mauser

## INTRODUCTION

In March 2012, eleven years after its introduction, Canada scrapped its controversial long-gun registry. Starting in 2001, farmers, hunters and target shooters had been required to register their long guns (shotguns and rifles). The political battle had been fierce. The country was sharply divided over the issue, urban vs. rural; the West vs. the East; men vs. women. The opposition parties, backed by the Canadian Association of Chiefs of Police and the media, bitterly resisted any change in the federal gun laws. Gun owners celebrated their freedom, but opponents predicted disaster.

International observers were shocked by Canada's decision to cancel the long-gun registry (LGR) because universal firearm registration is integral to the United Nations "Programme of Action" that underlies international efforts to control civilian firearms. In the 1990s Canada had joined Australia and the United Kingdom in passing exceptionally restrictive gun laws. South Africa had even used Canada's 1995 Firearms Act as the template for their Firearms Control Act in 2000. Despite ending the long-gun registry, Canada still maintains a strict gun control regime: a firearms licence is required to own a firearm, stringent regulations are in place for storing and transporting firearms, handguns remain registered, many military-style semi-automatic long guns are either prohibited or restricted, and fully-automatic firearms are prohibited.

Understanding why Canada abandoned the long-gun registry requires knowing why it had been introduced. Thus, I briefly review the politics of 1990s including the rise of the Reform Party. In the second section I explore whether there is a link between the long-gun registry and murder rates. Effectiveness was at the heart of the political battle. Did the LGR influence homicide rates in general, and spousal homicide in particular? What role did the LGR play, if





any, in reducing multiple-victim murders? Will its removal presage an increase in murder rates? Will more women die?

I conclude by arguing that gun control is fundamentally a cultural war. Firearms have been so successfully demonized that both sides, pro and con alike, have abandoned reasoned arguments in preference for political mobilization. The modern bureaucratic state does not readily relinquish power. Despite the systematic failure to find convincing evidence that general gun laws are effective in reducing violent crime, urban progressives cling stubbornly to their myths. It took the rise of the populist Reform Party to roll back Canadian gun laws. Canadian grass-roots organizations have demonstrated that they can overturn governmental policies, such as the long-gun registry, that are championed by elite groups but which lack strong public support. The battle over civilian firearms rights will continue.

#### RECENT CANADIAN FIREARM LAWS

The Twentieth Century saw Canada, along with other countries in the British Commonwealth, increasingly tighten the noose on civilian gun owners. While the famous English jurist Sir William Blackstone asserted that English subjects have the right to carry arms for personal protection, this “right” appears to be somewhat diminished over the centuries. The Canadian Charter of Rights and Freedoms provides less protection for individual rights than the American Bill of Rights (Kopel 1992). It may not be surprising that there is nothing like the Second Amendment in the Charter of Rights, but other freedoms, such as freedom of speech, are also less protected in the UK and the British Commonwealth than under the Bill of Rights in the US.

By abandoning the long-gun registry Canada joined New Zealand as one of the few countries that have rolled back civilian gun laws (Thorp, 1997). In so doing Canada defied strong local and international pressures from progressive forces. In the past few decades Australia, England, and the European Union have introduced ever more onerous restrictions on civilian firearms. The pattern is well known: a public multiple-person shooting dominates the media for a few weeks or months, creating a moral panic, which is capitalized upon by organizations opposed to civilian ownership of firearms,





leaving politicians rushing to pass yet another restriction in civilian gun rights. Outside of the United States, public debate is minimal since any attempt to defend gun owners is vilified or ignored by the media. Despite the seeming unanimity among the political elite and the media there is no convincing evidence that disarming law-abiding civilians protects society from criminal violence or suicidal killers.

The current Canadian firearms law is the 1995 Firearms Act (Bill C-68), which mandates universal firearm registration and owner licensing. The Liberal Party of Canada brought in the 1995 Federal Firearms Act after a horrendous multiple-victim shooting in 1989. Prior to this legislation, the provinces had assumed responsibility for long guns (rifles and shotguns) through provincial hunting regulations, while the Federal Government controlled handguns relying upon its constitutional role of protecting “peace, order and good government.” This division had been upended in 1977 by the Federal Government’s introduction of the Firearms Acquisition Certificate (FAC) that required prospective gun purchasers to pass a criminal record check before purchasing a firearm.

In 1989, Gamil Gharbi murdered 14 female engineering students at the Ecole Polytechnique in Montreal. Gharbi (who had changed his name to Marc Lépine) was the son of a wife-beating Algerian immigrant to Canada who, after his father abandoned his mother, knew whom to blame for his personal problems: liberated women. Police incompetence allowed Gharbi the time to kill at leisure. At the university, Gharbi ordered the males to leave the room, and, after they meekly complied, he shot the remaining women to death. Despite his stopping to change magazines during the carnage nobody attempted to intervene. The police arrived long after Gharbi had committed suicide. The Montreal coroner strongly criticized the police handling of the matter (Sourour, 1991), while Canadian feminists blamed all men (Rebick, 2005). The media were dominated by strident calls for disarming men in order to “stop violence against women.”

Immediately after the Gharbi shootings, the government of the day, Brian Mulroney’s Progressive-Conservatives, introduced tighter gun controls on civilians (Bill C-17), including prohibiting large-capacity magazines and semiautomatic military-style rifles, introducing





safe-storage regulations, and stricter screening and training of prospective firearms purchasers. Thanks to Gharbi's choice of the semi-automatic rifle marketed under the name Mini-14, a major focus of Bill C-17 was semiautomatic military-style guns. A series of Orders-in-Council prohibited a wide variety of semiautomatic firearms that had been converted from fully automatic, and also their high-capacity cartridge magazines. Ironically, the Mini-14 was neither restricted nor prohibited because of its popularity in Western Canada.

Bill C-17 tightened up the FAC system so that applicants were now required to provide a photograph and two references. Applicants had to take a safety-training course and an examination, and then wait a mandatory twenty-eight-day period before being allowed to acquire a firearm. The application form was expanded to screen applicants' marital and medical qualifications as well as criminal involvement. If the applicant was married or divorced, one of the references was required to be from a spouse or former spouse. Police screened applicants by telephoning neighbors, spouses, and ex-spouses, if any. Other major changes included new explicit regulations for safe storage, handling, and transportation of firearms.

During this same time period (the early 1990s), public support for the Progressive-Conservatives was fast eroding. In the 1993 election, their backing splintered into three antagonistic factions, the Reform Party in the west, the Bloc Québécois (the Quebec Party), and a minuscule rump retaining the Progressive-Conservative name. As a result, the Liberals handily won a majority in Parliament, and, in thrall to the feminist lobby, promptly introduced radical changes to Canada's already strict gun laws (Bill C-68). This was the second gun law born of Gharbi's murders.

When the Liberals came to power, they could not allow themselves to be outflanked by the Progressive-Conservatives on gun control, as both parties relied upon urban voters, so they rammed Bill C-68 through Parliament in 1995. Demonizing guns allowed progressives to simultaneously manipulate the fears of both upscale urbanites as well as recent immigrants who tended to live in high-crime neighborhoods. Radical feminists played a dominant role in shaping the progressives' political calculations, but other forces, including antipathy to the United States (a long-standing Canadian idiosyncrasy), continued to play an important role.





Despite their mutual antagonism, three of the four opposition parties (Reform, Progressive-Conservative and New Democrat ) united against the legislation. The only opposition party to support the new gun law was the Bloc Québécois. In 2000, the Supreme Court of Canada rejected a constitutional challenge by six provincial governments (including Ontario, the most populous province) and ruled that the federal gun law was justified under the “peace, order and good government” clause of the constitution.

The keystone of the Liberals’ Firearms Act (Bill C-68) was licensing; henceforth, owning a firearm, even a normal rifle or shotgun, was a criminal offence without holding a valid licence. Any person who allows a licence to expire is subject to arrest and having their firearms confiscated. Furthermore, long guns (rifles and shotguns) now had to be registered. The government prohibited over half of all registered handguns in Canada (the smaller styles of handguns that could be carried more easily concealed) and initiated plans to confiscate them. There was no evidence provided that these handguns had been misused. The Auditor General of Canada found that no evaluation of the effectiveness of the 1991 firearm legislation had ever been undertaken (Auditor General, 1993, pp. 647 - 655).

Bill C-68 became law on December 5, 1995 (the second gun law to commemorate the National Day of Remembrance and Action on Violence against Women), but, because of the complexity of the regulations, it took until 1998 for the Canadian Firearms Centre (established as a program within the Justice Department) to begin issuing firearm licences and requiring gun buyers to register long guns. On January 2001, gun owners were required to have a licence and by July 2003 to register all rifles and shotguns in their possession. Not everyone complied, as C-68 was not popular among those affected. Approximately 65% of firearms owners are estimated to have registered at least one rifle or shotgun, and ultimately it became clear that no more than half of the country’s long guns ended up in the registry (Mauser 2007).

In addition to licensing owners and registering firearms, the Firearms Act of 1995 broadened police powers of search and seizure and expanded the types of officials who could make use of such powers; it weakened constitutionally protected rights against self-incrimination, and it imposed stricter requirements for obtaining



a firearm licence (the application retained the personal questions required by the previous legislation and now required two personal references plus endorsements from current or former “conjugal partners”).

The Firearms Centre proved unable to cope. The Auditor General released a scathing report revealing stunning incompetence (Auditor General 2002a). Despite Allan Rock’s promises that the firearms program would cost only C\$2 million, the Auditor General only a few years later estimated that expenditures would exceed C\$1 billion by 2005. By 2012, the cumulative total had ballooned to more than C\$2.7 billion (Lott and Mauser, 2012). Fiscal and other irregularities uncovered by the Auditor General (December 2002a,b, 2006) including mismanagement, corruption and misleading Parliament, stimulated a parliamentary revolt. In 2003, Parliament established the Firearms Centre as a freestanding agency and imposed an annual spending cap. In 2006, responsibility for the Firearms Centre was transferred to the Royal Canadian Mounted Police (RCMP).

Thanks to the continued disarray of the opposition, Jean Chrétien led the Liberals to victory in the two subsequent elections (1997 and 2000). However, fundamental changes were taking place. Opposition to the Liberals’ 1995 Firearms Act (Bill C-68) was intense from the beginning and continued unabated. But it was restricted to rural Canada. Opposition became more respectable following the Auditor General’s 2002 report and the publication of a critical analysis of the 1995 Firearms Act by the influential Fraser Institute (Mauser, 1995). Grassroots anger helped to fuel the rise of the Reform Party and contributed to the virtual elimination of the Liberals in the West in 1997. Reform Party stalwart Garry Breitkreuz, MP (Yorkton-Melville, Saskatchewan), led the fight in Parliament by vociferously criticizing gun licensing and registration, pointing out their failings. Scrapping Bill C-68 was a staple campaign promise for the Reform Party while in opposition.

The Reform Party continued growing stronger. In 2003, the Reform Party merged with the Progressive-Conservatives to create the Conservative Party of Canada. The Liberal government fell in 2006 when the Auditor General’s reports led to RCMP investigations of Liberal insiders. Arrests and convictions followed, and the Conservatives won a minority government under Prime



Minister Stephen Harper. The Conservatives finally won a majority in 2011. By 2012, the Conservatives had managed to appoint a majority of Senators, and so controlled both branches of the Canadian government.

The Conservative majority victory inaugurated a fundamentally different style of government. In addition to ending the long-gun registry, Canada's first truly Conservative government scandalized the progressives by expanding individual rights to self-defence and by cracking down on violent criminals. Punishment overshadowed rehabilitation. Historic changes were not limited to the criminal code: the Conservatives staked out robust positions in the United Nations, such as strongly supporting Israel, and by casting cold water on feel-good initiatives such as the Kyoto climate change agreement and the Arms Trade Treaty.

Once Stephen Harper became Prime Minister, the Conservatives immediately moved to end the long-gun registry. The first effort, a private member's bill (Bill C-391) introduced by Candice Hoepfner, MP (Portage-Lisgar, Manitoba), was narrowly defeated (153 - 151) in 2010 in the House of Commons. The Conservatives had to wait until they had a majority in both the House and Senate. In 2012, Parliament voted to kill the long-gun registry in an intensely partisan battle in the House. Only two MPs broke ranks (both NDP representing rural ridings) to vote for Bill C-19, which was virtually identical to the earlier Bill C-391, and were promptly disciplined by their party leader. The bill was duly passed by the Senate and immediately proclaimed into law by the Governor General.

The long-gun registry is difficult to kill. Immediately following the passage of Bill C-19, a cabal of Chief Provincial Firearms Officers mandated that retailers must continue to maintain the same information as had been required by the long-gun registry. This was widely viewed as a backdoor approach to setting up provincially controlled long-gun registries. The Federal Government quickly introduced new regulations carefully tailored to close this loophole. At the same time, the Quebec government launched a legal challenge to halt the destruction of the data in the long-gun registry so they could set up their own provincial registry. Still before the courts, Quebec continues to enforce the LGR within its territory. This will ultimately





be settled in the Supreme Court of Canada. Rumours persist that the RCMP continues to maintain unauthorized versions of the LGR.

The Conservatives' decision to scrap the LGR was the first major installment of Prime Minister Stephen Harper's campaign promise to change firearm legislation in order to focus on criminals rather than hunters and farmers. Since the abandonment of the LGR, the Prime Minister has taken other steps to relax the burden of firearms regulations. The most recent came on July 2014 when Public Safety Minister Steven Blaney announced legislation to reduce red tape in firearm regulations, restrict the ability of Chief Firearms Officers (CFOs) to make arbitrary decisions, and to create a grace period at the end of a five-year licence expiry to prevent criminal charges for the technical offence of expired paperwork.

#### WILL SCRAPPING THE LONG-GUN REGISTRY ENDANGER PUBLIC SAFETY?

It is still too soon to properly evaluate after abandonment of the LGR, as only one year of crime data is available since its demise. However, a prediction of what will happen after the demise of the LGR can be derived from its eleven years of operation.

In this section, I will examine homicide rates, including spousal homicides and multiple-victim murders, as well consider the accused's criminal history, and the legal status of the murder weapon. This is the first published analysis of the homicide data for the full eleven-year period that the LGR was in effect. Thanks to a series of Special Requests I made to Statistics Canada for unpublished data, it is now possible to look at specific types of homicides, such as spousal murders (1995-2012) and multiple-victim murders (1974-2012), as well as to explore the legal status of the murder weapon. The value of universal licensing and firearms registration is put into question if few violent offenders hold a firearms licence and if virtually no murder weapons are registered.

It is important to remember that while the long-gun registry was included along with licensing in the 1995 Firearms Act, it took until 2001 to require owners to get a firearms licence and until 2003 to mandate the registration of long guns. This long lag was due to the





immense challenge of creating the bureaucracy to implement licensing and registration.

FIRST, WAS REGISTERING LONG-GUNS ASSOCIATED WITH A FALL IN MURDER RATES?

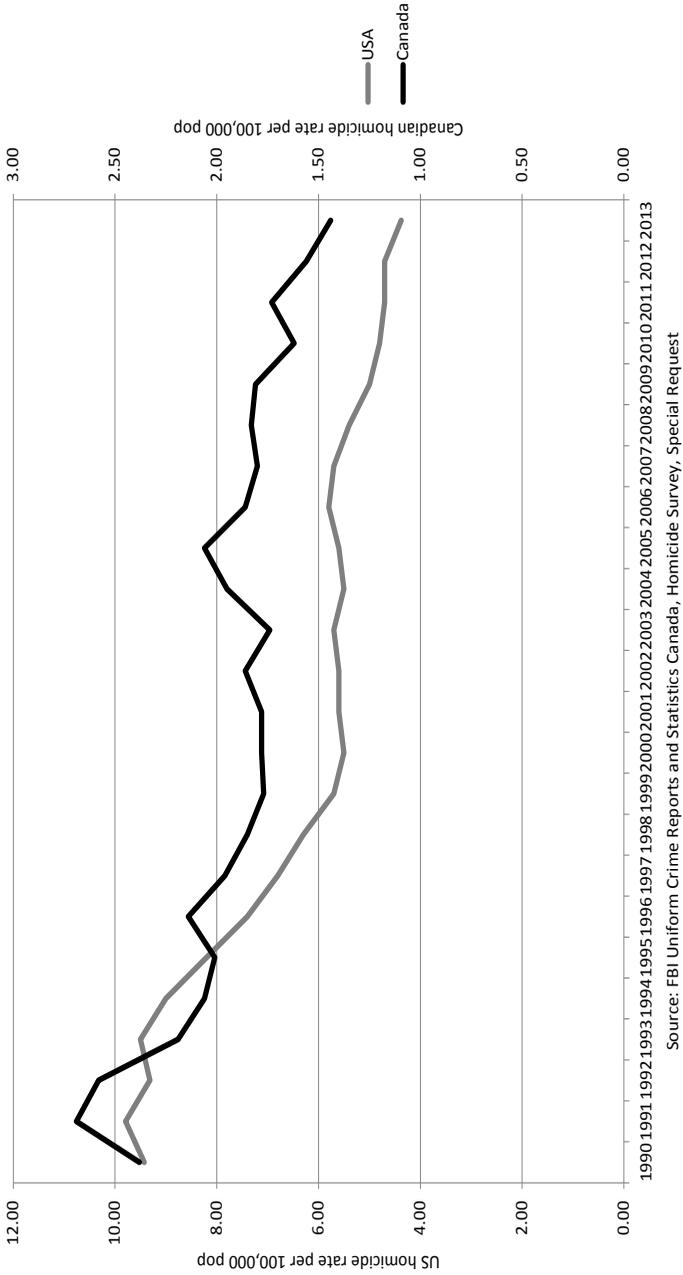
After the introduction of the long-gun registry Canadian homicide rates continued to fall at the same rate (or more slowly) as they had before. Canadian homicide rates have been declining intermittently since the 1970s, but no solid evidence has been found linking any of Canadian gun laws to this slide (Dandurand, 1998; Langmann 2011; Mauser 2007). Langmann's work masterfully confirmed earlier academic findings: "This study failed to demonstrate a beneficial association between legislation and firearm homicide rates between 1974 and 2008." There is not a single refereed academic study by criminologists or economists that has found a significant benefit from the Canadian gun laws.

One way to visually evaluate Canadian gun laws is to compare Canada with the United States. It is difficult to argue that Canadian gun laws are effective when homicide rates dropped faster in the United States than in Canada over the same time period (1991 to 2012). During these years, increasing numbers of Americans obtained permits to carry concealed handguns while gun laws in Canada became progressively restrictive. The homicide rate fell 55% in the US from the peak in 1991 to 2012 but slid just 46% in Canada. Even after the introduction of the LGR in 2003, rates dropped faster in the US than in Canada (dropping 23% in the US to 17% in Canada). Apparently, allowing civilians to carry concealed handguns about town is at least as effective in reducing murder rates as Canada's restrictive gun laws.

The failure of the long-gun registry to influence homicide rates can also be seen by comparing homicide rates before and after the implementation of the long-gun registry in 2003. The homicide rate fell no faster after long guns were required to be registered in 2003 than before. Between 1991 and 2002, the homicide rate fell 31% but just 17% from 2003 to 2012. The decline is roughly 2 points per year both before and after the introduction of the LGR.



**Chart 1. Homicide Rates, United States and Canada  
(1990 - 2013)**





Some have suggested that gun control is particularly useful in reducing multiple-victim murders. In this view, restricting access to firearms would not only bring down multiple-victim shootings, but would also cause a decline in the total numbers of multiple-victim murders. As can be seen in Chart 2 the long-gun registry has had no obvious influence on the rate of multiple shootings or multiple-victim murders. The annual number of multiple-victim shootings continued its long irregular decline that began in the 1970s at roughly the same rate after the LGR was introduced. High-profile shootings occurred even after the long-gun registry came into force (e.g., Justin Bourque in Moncton, New Brunswick in 2014; Kimver Gill at Montreal's Dawson College in 2006, James Roszko at Mayerthorp in 2005, and the murder of six people in an apartment building in Surrey by the Red Scorpion drug gang in 2007).

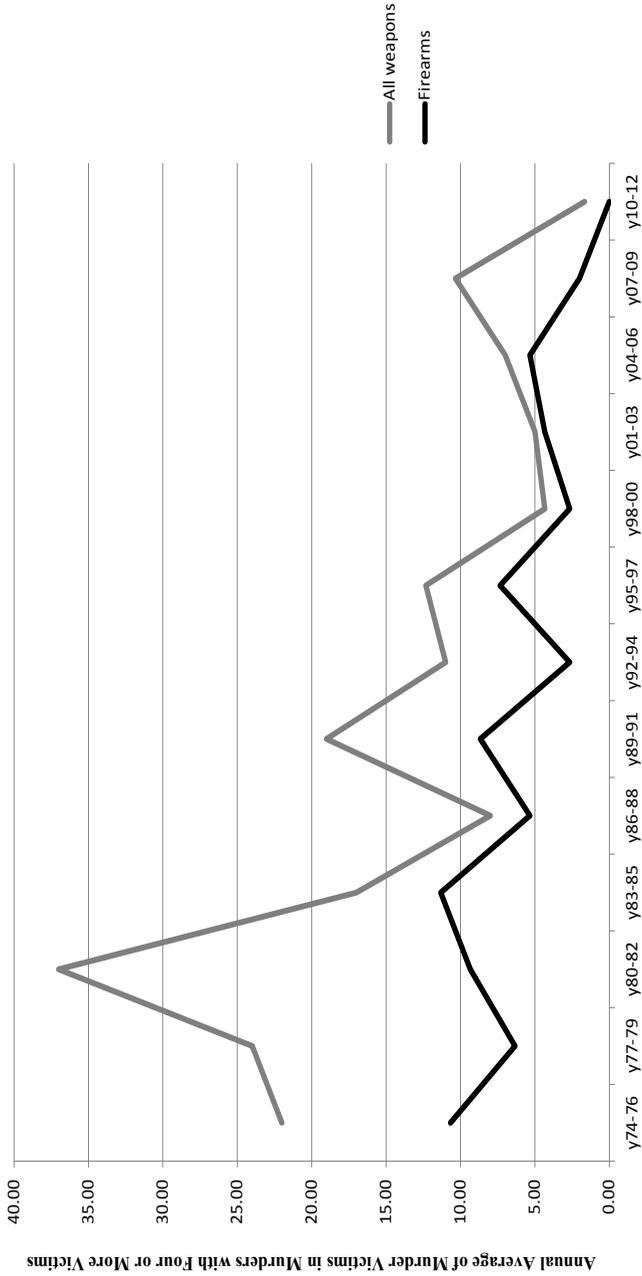
The Canadian findings are consistent with international research. There is no convincing empirical support for claiming that laws restricting general civilian access to firearms are effective in reducing homicide rates either in the United States or elsewhere, such as Australia (Baker and McPhedran, 2008; McPhedran, et al., 2010). In general, laws that restrict access to particular instruments such as firearms have not been found to influence the murder rate (See Kates and Mauser, 2007; Kleck, 1991, 1997; Mauser, 2008). Criminologists typically argue that demographics, not firearms laws, better explain the decline in Canadian homicides (e.g., Abma, 2011).

#### SECOND, DO FIREARMS OWNERS POSE A THREAT TO PUBLIC SAFETY AND NEED TO BE MONITORED?

Firearms certainly can be misused, but it approaches paranoia for the police to develop computer routines to screen the database of firearms licence holders every night. Under the current regime law-abiding citizens who own firearms are monitored nightly for outstanding warrants, court orders or firearm prohibitions. This is irrational, overly intrusive and diverts police resources from more serious threats to public safety. Available statistics show that law-abiding gun owners are much less likely to be murderous than other Canadians. This should not surprise: firearms owners have been



**Chart 2. Multiple-Victim Homicides and Firearms, Canada, 1974-2012**



Source: Special Request, Statistics Canada, Homicide Survey, August 2014



screened for criminal records since 1979, and it has been illegal since 1992 for people with a violent record to own a firearm.

Gun owners may be compared with other Canadians by calculating the homicide rate per 100,000. Statistics Canada reports that 194 licensed gun owners were accused of committing murder over the 16-year period (1997-2012), or an average of 12 owners per year out of an annual average of 2 million licensed firearms owners. This gives a homicide rate of 0.60 per 100,000 licensed gun owners. Over the same 16-year period, there were 9,315 homicides in total, or an average national homicide rate of 1.81 per 100,000 people in the general population. In other words, licensed Canadian firearms owners are less likely to commit murder than other Canadians. Or to put this another way, Canadians who do not have a firearms licence are three times more likely to commit murder than those who do (Mauser 2014).

### THIRD, ARE LONG GUNS THE WEAPONS OF CHOICE IN DOMESTIC HOMICIDES?

Supporters of the registry argue that since ordinary rifles and shotguns are often used in domestic homicides, they should be registered in order to aid police in identifying their owners. Registration, it is claimed, encourages responsible use as well as pinpointing anyone who has misused a firearm.

In fact, the long-gun registry and licensing are rarely needed by police to solve spousal homicides: first, in almost all cases the murderer is immediately identified, and secondly few firearms used by abusive spouses to kill their wives are possessed legally.

An analysis of a Special Request to Statistics Canada found that just 4% of long guns involved in homicide were registered that and only 24% of homicide suspects who used a firearm had a valid FAC or firearms licence (Mauser 2012a).

Most spouses (65%) accused of homicide had a history of violence involving the victim (Sinha 2012). Approximately two-thirds of those accused of homicide were known to have a Canadian criminal record; the majority of these were previously convicted of violent offences. Over one-half of the victims were also known to have





a Canadian criminal record; most had been convicted of violent offences (Statistics Canada, 2001, 2002, 2003, 2004, 2005).

Every home has a variety of objects, such as baseball bats, hammers, or kitchen knives that can be used for assault or murder. Spousal murderers are opportunistic in that they use whatever implements are available to them to kill. Creating an expensive bureaucracy to register one or more of these items does nothing to protect vulnerable women.

In the period 1995-2012, there were approximately 585 homicides and 59 female spousal murders in Canada each year; long guns are involved in the deaths of 10 female spouses. The most common weapons in spousal murders are knives and not firearms. In the period 1995-2012, knives were used in 32% of the murders of female spouses (Mauser, 2014). Firearms of any kind were used in 27% of homicides of female spouses.

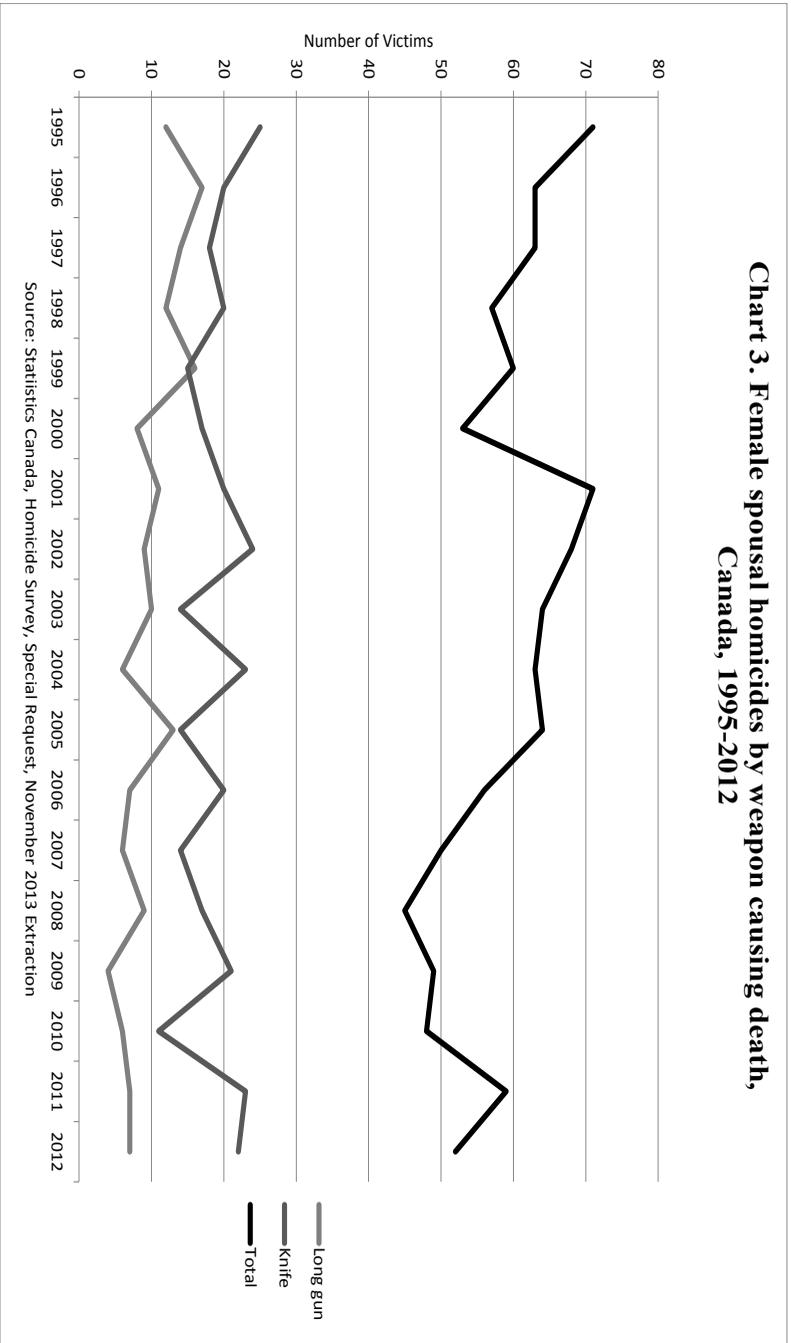
FOURTH, DID SPOUSAL MURDERS WITH GUNS FALL AFTER THE LAW WAS PASSED EVEN THOUGH SPOUSAL MURDERS WITHOUT GUNS REMAIN THE SAME?

Spousal murders (both with and without guns) have slowly been declining since the mid-1970s (Sinha 2011). See Chart 3.

Firearms are involved in a small percentage of spousal homicides. Knives, clubs, fists and feet are much more prevalent. Knives or cutting instruments are used in 39% of spousal homicides, firearms of any kind 25%, and a long gun in 15%. The total female spousal murder rate has been slowly if irregularly declining since 1979. There is no discernible change after 2001 when the long-gun registry began. Over this same time frame, the percentage of homicides involving guns has declined at approximately the same rate. Since the decline in spousal murders is a long-term trend, it is logically incorrect to link it to legislation that came into force only in the last few years.



**Chart 3. Female spousal homicides by weapon causing death, Canada, 1995-2012**





FIFTH, IS THE LONG-GUN REGISTRY AN IMPORTANT TOOL FOR THE POLICE?

Proponents of the registry claim that the police use the long-gun registry 16,000 to 17,000 times daily and therefore it is valuable. Besides mistaking frequency of use with usefulness, this claim is disingenuous in that it confuses the long-gun registry with the Canadian Firearms Registry On-line (CFRO) that contains information about the owner of the firearm.

During the ten years from 2003 to 2012, there were 5,952 homicides; 1,819 of those involved firearms. Statistics Canada reports that only 166 were registered (9.1%). In just 95 cases – that is only 5.2 percent of all firearm homicides – was the gun registered to the accused. Only 54 of these 95 cases involved long-guns; thus, less than 3 percent of firearms homicides involved long-guns registered to the accused. (Mauser 2014)

The small number of cases involved registered long-guns implies that eliminating the long-gun registry could not meaningfully compromise law enforcement's ability to trace firearms in Canada, as registered firearms are involved in only 5.2% of firearm homicides and 1% of all homicides. Predictably, the police have not been able to say that the long-gun registry identified any murderer from tracing a firearm in these few cases.

Nor has the long-gun registry proved useful in solving police killings. Since 1961, 123 police have been shot and killed. Only one of these murders involved a registered long gun, and it did not belong to the murderer. Once again, the registry could not have been useful to the police in identifying the killer.

The long-gun registry has reduced the effectiveness of the police by driving a wedge between them and responsible citizens who own firearms. Including firearms licences in criminal databases encourages police to confuse law-abiding citizens with criminals. This does not encourage public cooperation. Police distance themselves further from the public by no longer shooting at public gun ranges alongside fellow citizens; they now have their own private ranges. The bewildering complexity of firearms laws means that many individuals are uncertain if they have unknowingly violated a firearm law. Such confusion provokes distrust in both police and civilians





alike. Rightly or wrongly, the public increasingly feels like the police are searching for ways to confiscate their firearms.

Treating honest citizens as if they were criminals violates the basic principles of Sir Robert Peel, the father of modern policing. The ability of the police to perform their duties is dependent upon the public approval of police actions. Police must secure the willing co-operation of the public in voluntary observation of the law to be able to secure and maintain the respect of the public. If not, the police begin to resemble a military occupying force.

SIXTH, DOES THE REGISTRY HELP THE POLICE BY LETTING THEM KNOW WHO HAS FIREARMS?

The long-gun registry ipso facto contains no information about unregistered firearms, and less than half of the Canadian firearm stock has been registered (Mauser 2007). Unsurprisingly, the most dangerous criminals have not registered their firearms. Trusting the registry can get police officers killed. The failure of the registry to signal a firearm owner at a residence does not rule out a firearm being there.

When police approach a dangerous person or situation, they must assume there could be an illegal weapon. The police need information they can trust. Experienced police officers who work on the front lines say they do not find the registry helpful (Grismer, 2011; Hansen, 2012).

In summary, Canadian homicide rates have been declining intermittently since the 1970s, but no solid evidence has been found linking any of the Canadian gun laws to this slide, including the long-gun registry. Available statistics show that law-abiding gun owners are much less likely to be murderous than other Canadians. An analysis of a Special Request to Statistics Canada found that less than 3% of long guns involved in homicide were registered to the accused, and that only 24% of homicide suspects who used a firearm had a valid FAC or licence. Spousal murders (both with and without guns) have slowly been declining since the mid-1970s. The long-gun registry did not have a measurable effect on the spousal homicide rate. Importantly, registered firearms were involved in only 4.7% of





firearm homicides and 1% of all homicides. The registry is not useful to police because it cannot alert them to the existence of unregistered guns. Only half of Canada's gunstock has been registered. Trusting the registry can get police officers killed. In a period of tight police budgets, it is difficult to justify the \$C70 million annual cost of the Firearms Program when it focuses exclusively on law-abiding citizens.

## CONCLUSIONS

In summary, the available data suggest that Canadian homicide rates are likely to continue declining after the demise of the long-gun registry. No convincing evidence has been found that the long-gun registry has acted to reduce homicide rates, so logically its end would not be expected to produce an increase.

Homicide rates dropped faster in the United States than in Canada, despite an increasing number of Americans deciding to carry concealed handguns over the past two decades. The long-gun registry had no observable impact on spousal murder rates. The total female spousal murder rate has been slowly if irregularly declining since 1979. Importantly, there was no discernible change after 2001 when the long-gun registry began. The long-gun registry has had no obvious influence on the rate of multiple shootings or multiple-victim murders. The annual number of multiple-victim shootings continued its long irregular decline that began in the 1970s, at roughly the same rate both before and after the LGR was introduced. Despite the failure of the long-gun registry to reduce criminal violence, many progressives as well as the Association of Chiefs of Police refuse to admit that it was ineffective.

Canada only started rolling back the gun laws, including the long-gun registry, when the Conservative Party of Canada won power. The CPC is committed to conservative ideas, such as limited government, punishing criminals, and the importance of the nuclear family. The CPC built a coalition of social and fiscal conservatives, including recent immigrants (called "visible minorities" in Canada) and rural gun owners. It is not beholden to urban progressives. It is impressive that Conservatives can maintain power despite the continued dominance of the media by the progressives and the





opposition of the police bureaucracy who remain in the thrall of those who oppose civilian ownership of firearms.

The Conservatives' majority government represents a sea change in Canadian politics and has the potential to dramatically shift the national culture. The rise of the Reform Party and Conservative Party meant the end of consensual politics. The Conservative Party was the ideological opponent of the progressive parties that had dominated Canada since WWII. The fusion of the Reform Party with the Progressive-Conservatives under the leadership of Stephen Harper imbued the new Conservative Party with the libertarian and conservative values that drove the Reform Party.

Scrapping the long-gun registry was the first real step in Prime Minister Harper's campaign promise to dismantle the overly bureaucratic and expensive firearms legislation. Hysteria over guns had created an oppressive regime for law-abiding gun owners. Blaming guns allowed politicians to simultaneously be seen to do something while skating past their inability to stop the drug gangs that continued to thrive and break many laws involving violence. The Conservative revolution has just begun. Many needed changes remain to be made in policing and corrections.

The political battle over civilian firearms reflects a deeper cultural war. Gun control is not a policy area amenable to rational negotiation. Faith in tighter controls over citizen firearms approaches the fervor of a religious belief for many progressives. Old-fashioned political organizing was required to win elections, and continue winning elections, in order to replace progressives with conservatives. Firearms owners were one of the key constituents of the populist Reform movement, and they continue to be crucial for the Harper Conservatives. The conservative coalition has endured for over twenty years to date. However, the jury is still out whether the shooting community will continue to provide political support for the CPC, as newer issues come to the fore, or whether their commitment will fade. Historically, populist groups collapse after winning early victories. If this happens, the CPC will drift back to normal politics, driven by the need for votes to rely upon urban progressives. The goal of any political party is to win and maintain political power.



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## ENDNOTES:

1. This essay updates an earlier article that appeared in the *Journal on Firearms and Public Policy* (2012) and includes the most recent crime statistics.
2. For more detail about Canadian firearms legislation, see Mauser (2007 and 2012b,c).
3. The Liberal Party of Canada is a progressive or left-leaning party. In North America, “liberal” refers to socially liberal. Outside of North America, “liberal” implies classical liberalism, i.e., promoting free trade and private property rights while opposing both socialism and traditional conservatism.
4. “Peace, order and good government” is the introductory phrase of section 91 of the Canadian Constitution Act, 1867, that outlines the scope of the legislative jurisdiction of the federal Parliament.
5. 5 Bill C-17 became law on December 5, 1991 to coincide with the “National Day of Remembrance and Action on Violence against Women,” (a memorial to Gharbi’s victims).
6. Preston Manning, an evangelical Christian, founded the Reform Party in order to give Western Canada a voice in national politics. Reform was a populist party that advocated smaller and more democratic government, balanced budgets, higher political morality, and the repeal of the 1995 Liberal gun law.
7. The Bloc Québécois is a party that was founded to create a sovereign Quebec. It held and lost two referendums on independence.
8. “Progressive” refers to those who espouse socially liberal policies, e.g., the expanding welfare state, active governmental involvement in social issues, such as gay rights, opposition to abortion legislation, and restrictive controls on civilian firearms.
9. “Radical feminism” refers to a branch of feminism that views women as victims of the “patriarchy”; more specifically, it blames men for family violence and assumes women are blameless victims. One of the government-funded groups pushing for stricter gun control was the National Action Committee for the Status of Women. See Delacourt (2000) and Rebeck (2005).





10. The Canadian New Democratic Party is a socialist, left-leaning political party, akin to Labour parties in the UK and Australia.

11. The CFOs argued that this power was pursuant to Section 58 of the Firearms Act, wherein a Chief Firearms Officer (CFO) who issues a business licence may attach any reasonable condition (including written record-keeping) on a business licence in their jurisdiction establishing what activities a business can undertake, as well as conditions CFO considers desirable in the particular circumstances and in the interest of public safety.





MAUSER

THE CANADIAN LONG GUN REGISTRY.







# Firearms Homicide in Australia, Canada, and New Zealand: What can we learn from long-term international comparisons?

Samara McPhedran, PhD\*

Jeanine Baker, PhD

Pooja Singh, BA (Hons)

## AUTHORS' INTRODUCTION

First published online in 2010, the following paper compares firearm homicide rates over time in three countries with shared social and legal histories and many contemporary similarities: Australia, Canada, and New Zealand. Importantly, however, these countries have adopted very different approaches to firearms management. Australia, for example, chose in the mid-1990s to embark on a legislative regime considered by many to be one of the most severe in the Western world. This approach emphasised – among its many measures - bans on semi-automatic rifles and shotguns as well as on pump action shotguns and universal registration of all firearms. Canada, although sharing some legislative aspects with Australia, took a less restrictive approach, while New Zealand's laws have unquestionably been the least restrictive out of the three countries.

It has been argued by some that the 'Australian model' has produced unique declines in firearm homicide, and it is increasingly common to see other countries being urged to follow the Australian approach. When we tested the claim about Australia's uniqueness, we found little evidence to support the premise that Australia's laws have created unique results. Instead, we found that similar declines in firearm homicide have also occurred in other countries – despite those countries' notably different approaches to legal firearms ownership. The most pronounced declines over time were, in fact, in New Zealand. The key implication of the following work is that differences in the degree of legislative restrictiveness around legal



firearms ownership do not translate to corresponding differences in rates of firearm homicide between different countries. These findings remain as pertinent for international firearms policy development today as they were when first released.

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#### ABSTRACT

Although firearm homicide remains a topic of interest within criminological and policy discourse, existing research does not generally undertake longitudinal comparisons between countries. However, cross-country comparisons provide insight into whether 'local' trends (for example, declines in firearm homicide in one particular country) differ from broader, international trends. This in turn can improve knowledge about the role of factors such as policing practices and socioeconomic variables in the incidence of lethal violence using firearms. The current study compared long-term firearm homicide trends in three countries with similar social histories but different legislative regimes: Australia, Canada, and New Zealand. Using negative binomial regression, it was found that the most pronounced decline in firearm homicide over the past two decades occurred in New Zealand. Connections between social disadvantage, policing policy, and violence are discussed.

Although firearm homicide remains a topic of significant interest within criminological and violence reduction policy discourse, longitudinal research on trends in firearm deaths is relatively limited, and – perhaps due to the relatively small sample sizes for firearm homicide in most developed nations – tends to focus on firearm suicide rather than interpersonal violence. In the context of suicide, several studies have found evidence of displacement from firearms to other methods and/or an absence of overall declines in suicide



following periods of legislative reform, or no evidence of impacts on pre-existing trends in firearm suicide (Beautrais, Fergusson, & Horwood, 2006; Bridges, 2004; Caron, 2004; Caron, Julien, & Huang, 2008; De Leo, Dwyer, Firman, & Neulinger, 2003; De Leo, Evans, & Neulinger, 2004; Leenaars & Lester, 1996).

The majority of studies that examine trends in firearm deaths evaluate a single country or state/province, before and after significant epochs of legislative reform, and the results and conclusions vary considerably (Killias, Van Kesteren & Rinslisbacher, 2001). This level of inconsistency was reflected in a recent meta-review of United States firearms legislation research, which came to the conclusion that "...the evidence available from identified studies was insufficient to determine the effectiveness of any of the firearms laws reviewed singly or in combination" (Hahn, Bilukha, Crosby, Fullilove, Liberman, Moscicki, Snyder, Tuma, & Briss, 2005, p.40).

While valuable in elucidating potential impacts and/or limitations of legislative change, existing research does not generally provide long-term comparisons of firearm violence between countries. However, long-term cross-country comparisons can deliver important contextual information and insight into whether 'local' trends (for example, declines in firearm homicide in one particular country) differ from broader, international trends. This can in turn assist in disentangling legislative impacts from other factors potentially affecting homicide rates and interpersonal violence, such as policing practices and socioeconomic variables.

In recognition of the value of cross-country comparisons, it has recently been proposed that the declines in firearm homicide in Australia over the past decades are the most rapid in the Western world (Dearden & Jones, 2008). However, this has not been empirically assessed. Consequently, it is not clear whether the long-term declines in firearm homicide in Australia have been more rapid than in other Western countries, or whether the ongoing decline in Australian firearm homicide is commensurate with long-term declines in lethal violence recorded in other countries.

Although a number of papers have addressed 'local' trends in firearm-related deaths (e.g., Baker & McPhedran, 2007; Klieve, Barnes, & De Leo, 2009; Lee & Suardi, 2008), Australian research does not currently offer information about whether the long-term,



ongoing downwards trend in Australian firearm homicide is unique compared to other countries. In this regard, Canada and New Zealand offer a suitable comparison against which Australian homicide trends can be assessed. Each of the three countries shares a similar social history and holds in excess of 20 years of firearm homicide data. These characteristics facilitate long-term cross-country comparisons of lethal firearm violence. Therefore, this paper compares Australian, New Zealand, and Canadian trends in firearm homicide to test the hypothesis that the long-term declines in Australian firearm homicide differ from the long-term trends in New Zealand and Canada.

## METHOD

Publicly available firearm homicide data and population estimates were obtained from the Australian Bureau of Statistics (ABS), New Zealand Police, Statistics New Zealand, and Statistics Canada reports and online databases. New Zealand data were also drawn from Green (2008) and Thorpe (1997). Where possible, both rate and count data were obtained.<sup>1</sup>

Australian and Canadian records provided firearm homicide data from 1979-2007, whereas New Zealand firearm homicide data could only be gathered from 1986 onwards. Therefore, the comparisons of Australia and Canada take in 29 years of data whereas the comparisons of those two countries with New Zealand cover a slightly shorter time period of 22 years.

A series of different statistical methods were examined for their suitability of application to the dataset at hand. Goodness of fit tests rejected the use of Poisson regression due to overdispersion. Also, simple linear regression using rates was not a good fit for the full series of data for all three countries.

Therefore, negative binomial regressions were performed on the data, following principles set out by Klieve and colleagues (2009). Briefly, negative binomial regression models count data, such as the number of deaths within a specified population over a period of time. The estimated change in the occurrence of an event is derived by comparison of incidences over a change of one unit in

the independent variable (in this case, years), and expressed as an 'incidence rate ratio'.

The regressions used homicide count data with population as an offset, which in practical terms expresses deaths as a rate per head of population. While this method is not ideal for autocorrelated data, it was nonetheless the most suitable choice given the specific characteristics of the dataset at hand (i.e., independent observations, a number of datapoints, overdispersed data). The reader is referred to Hilbe (2007) for more detailed discussion of this technique.

Separate main effect models were fit to estimate trends in firearm homicides for each country, and country-comparison models incorporated an interaction term to capture differences in the relative trends over time in firearm homicide between countries. Confidence intervals are reported at the 95% level.

## RESULTS

Figure 1 shows firearm homicides as a rate/100 000 population, for each country. Given its relatively small population, New Zealand rates fluctuated more noticeably than either of the other countries in the early portion of the dataset, particularly in the earliest years of available data.

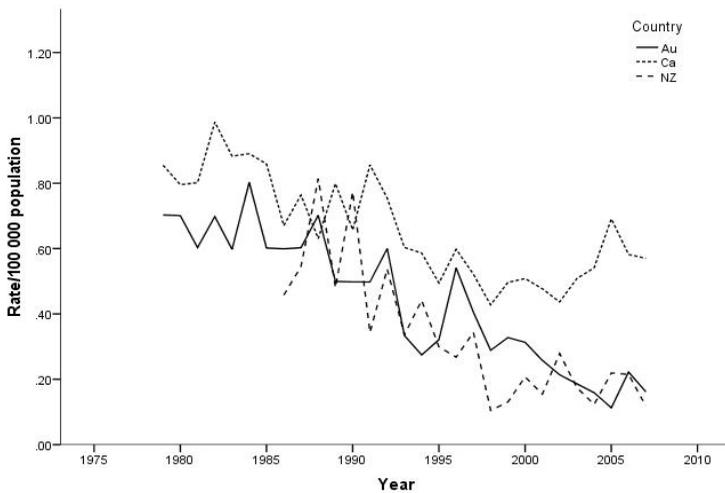


FIGURE 1. FIREARM HOMICIDE RATE BY COUNTRY

Table 1 shows individual trends for each country, and relative trends (ratios) for comparisons of Australian, Canadian, and New Zealand firearm homicide. Note that the Australian and Canadian comparison took in a longer time period than the comparisons involving New Zealand, for reasons previously explained.

Given the variation in the early years of the New Zealand dataset (particularly 1987-1990), two different model specifications were tested; Model 1 which used the raw data, and Model 2 where the number of firearm homicides from 1987-1990 was replaced with the mean number of firearm homicides for those four years. The observed differences between New Zealand and Australia, and New Zealand and Canada, were robust to this alternate specification. Therefore, Table 1 presents only Model 1 results.<sup>2</sup>

	Trend (95% CI)	Ratio (95% CI)	p.value
Australia	0.9461 (0.9370-0.9553)	1.0024 (0.9999-0.0050)	0.064
Canada	0.9787 (0.9726-0.9849)		
Australia	0.9338 (0.9205-0.9472)	1.0408 (1.0185-1.0636)	<0.001
New Zealand	0.9234 (0.9026-0.9447)		
Canada	0.9833 (0.9735-0.9932)	1.0723 (1.0512-1.0938)	<0.001
New Zealand	0.9234 (0.9026-0.9447)		



Note: Trend results vary for Australia and Canada when assessed against New Zealand, due to the shorter time period used.

The long-term trends in Australian and Canadian firearm homicide did not differ significantly. However, firearm homicide in New Zealand from 1986-2007 declined more markedly (around 8% per year, on average) than firearm homicides in either Australia or Canada over the same time period.

The Canadian trends, while not differing from Australian trends over the full time series, display a noteworthy feature in the most recent years of data. In some of those years, there have been 'spikes' in the firearm homicide rate. 2005 is the most prominent example. Possible reasons for this finding are discussed below.

### Conclusions

The proposal that Australia has experienced unique declines in firearm homicide over the past decades was not supported. Rather, it appears that the most pronounced decline in firearm homicide over the last 20 years has occurred in New Zealand (consistent with recent observations that the overall incidence of homicide in New Zealand has halved in the past two decades; see Collins, 2009), whereas Australia more closely resembles Canada in its incidence of firearm homicide. Therefore, it is not correct to assert that Australia's declines in firearm homicide are more rapid than the declines in various other countries. Nor are the declines in Australian homicide associated with lower rates of firearm homicide, on average, relative to New Zealand. Based on the most recent decade of data, the firearm homicide rate in New Zealand averages 0.17/100 000 population, compared with the Australian average of 0.22/100 000 population.

It is pertinent to note that the level of legislative restriction surrounding firearms ownership differs between the three countries. For example, Canada and New Zealand permit the ownership and use of the types of firearms that are banned in Australia. Additionally, Canada, like Australia, mandates registration of all firearms whereas New Zealand, unlike Canada and Australia, does not require registration of all firearms. However, these differences do not appear to be reflected in the long-term declines in homicide rates, suggesting the need to consider other explanations for the trends.

Existing literature highlights relationships between social disadvantage and crime (Jones-Webb & Wall, 2008; Phillips, 2002; Wilson, 1987), and there is a degree of empirical support for the hypothesis that homicide rates are associated with economic indices such as unemployment (Bellair





& Roscigno, 2000; Krivo & Peterson, 2004; Lee & Slack, 2008). Although a great deal of study in this field comes from the United States and may not be wholly applicable to other countries, Australian research, too, has found associations between male youth unemployment and rates of lethal violence (Narayan & Smyth, 2004). In the current context, it is worthwhile considering socioeconomic correlates of crime in relation to the three countries of interest.

There are a range of socioeconomic indicators on which New Zealand has varied from Australia and Canada over the past years, and some of these may offer insight into the apparent differences in firearm homicide trends between countries. Of particular note is that unemployment rates in Australia, New Zealand, and Canada have consistently differed. According to Labor Force Survey results from each country, after passing through the economic downturn of the early 1990s and experiencing unemployment rates in the order of 10 percent, all three countries have experienced declining rates of unemployment.

However, unemployment rates in New Zealand have consistently been lower than Australian unemployment rates, which have in turn been lower than Canadian unemployment rates (Australian Bureau of Statistics, 2008; Statistics Canada, 2008; Statistics New Zealand, 2008). It should be noted that these figures do not differentiate between short- and long-term unemployment. Future work will assess potential relationships between unemployment and homicide rates in more detail. It will also examine whether trends in non-firearm homicide, as well as firearm homicide, have differed between the three countries.

The relationship of economic variables to the incidence of violent crime merits further scrutiny. Although the three countries in this study have experienced similar levels of economic growth as indexed by measures such as Gross Domestic Product (GDP), their comparative experiences of socioeconomic disadvantage have not been explored. While overall economic stability and growth may have contributed to the observed declines in firearm homicides in each country, it is increasingly recognized that there are inequalities in the distribution of wealth within individual countries, evidenced by the elevated risk of social disadvantage faced by certain groups in the community (for example, unemployed young people, persons with substance abuse or mental health issues). In this regard, broad measures such as GDP may not provide a suitably nuanced reflection of social wellbeing and/or injury mortality (Nasrullah, Laflamme, & Khan, 2008).





The majority of firearms used to commit homicide in Canada and Australia are not legally owned. Over 80% of firearm homicides in Canada (Dauvergne & De Socio, 2008) and over 90% of firearm homicides in Australia (Davies & Mouzos, 2007; Mouzos & Houliaris, 2006) are committed by persons using illicitly owned firearms. Data on the licensing status of homicide offenders could not be obtained for New Zealand, however the Australian and Canadian observations may indicate dissociation between firearm violence and legislative approaches to firearms ownership, whereby legislative reform does not impact on the population of individuals who commit firearm violence. Thus, broader changes in social policy and crime prevention policies may explain the declines in firearm homicide.

For example, it has been suggested that in at least one Australian state (New South Wales), firearm homicides are linked with the illicit drug trade (Fitzgerald, Briscoe, & Weatherburn, 2001). Recent declines in firearm homicide in that state coincided with a heroin 'shortage,' which has also been associated with declines in property crime (Degenhart, Conroy, Gilmour, & Collins, 2005). Similar relationships between the illicit drug trade and firearm homicide have been found in Canada, and recent spikes in the rate of Canadian firearm homicide have been linked with gang- and drug-related activity involving young men from socially disadvantaged backgrounds (Royal Canadian Mounted Police, 2006). While specific information on urban disadvantage and firearm crime was not available for New Zealand, broadly consistent findings have emerged regarding youth involvement with deviant peer groups, illicit substance use, and violent crime in general (Fergusson, Swain-Campbell, & Horwood, 2002).

In both Australia and Canada, it has been found that firearm homicides, while rare, occur disproportionately in urban crime 'hotspots' (Fitzgerald, Briscoe & Weatherburn, 2001; Royal Canadian Mounted Police, 2006; Williams & Poynton, 2006). This begs the question of how the firearms used in such homicides are obtained. Recent Australian research has assessed the possibility that theft from legal owners is where homicide perpetrators illicitly acquired their firearm. However, over a three year study period, it emerged that only two stolen firearms were linked with homicide (Bricknell, 2008a). One was a handgun stolen from a security guard (Bricknell,



2008b), and the source and type of the second firearm was not specified (Bricknell, 2008a). This suggests a role for alternative methods of acquisition, aside from theft, although it is not clear how the three countries of interest vary in this regard and how different methods of illicit firearms acquisition may relate to the incidence of firearm homicide.

Connections between the illicit drug trade, other illicit activities, and socioeconomic disadvantage, offer a useful conceptual framework for understanding both the occurrence of firearm homicide and the prevalence of illicit firearms use in homicide incidents. In recognition of the connection between illicit firearms use and other illicit activities, Australian crime prevention has increasingly focused on disrupting organized criminal networks that are involved with the illicit drug trade (e.g., 'Task Force Gain,' Parliament of New South Wales, 2004).

In addition, community policing, community involvement, and partnerships between communities and all levels of government have received growing recognition as important tools in reducing criminal activity (Armstrong, Francis, & Totikidis, 2005; Cherney & Sutton, 2007; Ellison, 2006). Canada has, in recent years, adopted a similar approach (e.g., Alberta Government, 2007; Mann, Senn, Girard, & Ackbar, 2007; NCPC, 2008). Long-term monitoring of violence in areas of urban disadvantage may elucidate whether community-oriented partnerships and prevention efforts have an influence on firearm (and, indeed, non-firearm) homicide rates, above and beyond the influence of broader social and economic factors. This is a direction for future study.

\* Samara McPhedran, PhD, corresponding author

International Coalition for Women in Shooting and Hunting (WiSH)  
PO Box 393, Glebe, New South Wales, Australia, 2037. Phone: +61  
415 963 189, email: [chair@ic-wish.org](mailto:chair@ic-wish.org)

Jeanine Baker, PhD

International Coalition for Women in Shooting and Hunting (WiSH)

Pooja Singh, BA (Hons)

International Coalition for Women in Shooting and Hunting (WiSH)

## ENDNOTES

1. For years or cases where only one type of information was available, population counts were used in conjunction with the one available data type, to calculate the second type of data.

2. Alternate specification results: Australia vs. New Zealand Ratio (95% CI) = 1.0397 (1.0148-1.0653),  $p = 0.002$ ; Canada vs. New Zealand Ratio (95% CI) = 1.0797 (1.0556-1.1044),  $p < 0.001$ .

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*Publisher's note:* The following is the order in *Palmer v. District of Columbia*. Filed in 2009, this case sought to overturn the District of Columbia's complete ban on the carry of firearms outside of the home. To quote Alan Gura, "With this decision in *Palmer*, the nation's last explicit ban of the right to bear arms has bitten the dust. Obviously, the carrying of handguns for self-defense can be regulated. Exactly how is a topic of severe and serious debate, and courts should enforce constitutional limitations on such regulation should the government opt to regulate. But totally banning a right literally spelled out in the Bill of Rights isn't going to fly. My deepest thanks to the Second Amendment Foundation for making this victory possible and to my clients for hanging in there. Congratulations Americans, your capital is not a constitution-free zone."

**UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA**

**TOM G. PALMER, GEORGE LYON,  
EDWARD RAYMOND, AMY MCVEY, and  
SECOND AMENDMENT FOUNDATION, INC.,  
Plaintiffs,**

v.

**DISTRICT OF COLUMBIA and CATHY LANIER,  
Defendants.**

**APPEARANCES OF COUNSEL**

**ALAN GURA, ESQ.  
GURA & POSSESSKY, PLLC, Attorneys for Plaintiffs**

**ANDREW J. SAINDON, ESQ.  
OFFICE OF THE ATTORNEY GENERAL FOR THE  
DISTRICT OF COLUMBIA, Attorney for Defense**

**SCULLIN, Senior Judge**



## MEMORANDUM-DECISION AND ORDER

### I. INTRODUCTION

Currently before the Court are Plaintiffs' motion for summary judgment and Defendants' cross-motion for summary judgment.

### II. BACKGROUND

In their complaint, Plaintiffs assert two claims for relief. In their first claim, Plaintiffs allege that, “[b]y requiring a permit to carry a handgun in public, yet refusing to issue such permits and refusing to allow the possession of any handgun that would be carried in public, Defendants maintain a complete ban on the carrying of handguns in public by almost all individuals.” *See* Dkt. No. 1, Complaint at ¶ 39. Plaintiffs also contend that “Defendants’ laws, customs, practices and policies generally banning the carrying of handguns in public violate the Second Amendment to the United States Constitution, facially and as applied against the individual plaintiffs in this action, damaging plaintiffs in violation of 42 U.S.C. § 1983.” *See id.* at ¶ 40.

In their second claim for relief, Plaintiffs allege that “Defendants’ laws, customs, practices and policies generally refusing the registration of firearms by individuals who live outside the District of Columbia violate the rights to travel and equal protection secured by the Due Process Clause of the Fifth Amendment to the United States Constitution, facially and as applied against the individual plaintiffs in this action, damaging plaintiffs in violation of 42 U.S.C. § 1983.” *See id.* at ¶ 42.

Plaintiffs seek relief in the form of an Order permanently enjoining Defendants, “their officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of the injunction, from enforcing D.C. Code § 7-2502.02(a)(4) to ban registration of handguns to be carried for self-defense by law-abiding citizens[.]” *See id.* at WHEREFORE Clause. Furthermore, Plaintiffs seek an Order permanently enjoining Defendants, “their officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of the injunction, from enforcing D.C. Code



§ 22-4504(a), OR, in the alternative, ordering [D]efendants to issue licenses to carry handguns to all individuals who desire such licenses and who have satisfied the existing requirements, aside from residence requirements, for the registration of a handgun[.]” *See id.* Finally, Plaintiffs seek an Order permanently enjoining Defendants, “their officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of the injunction, from denying firearm registration and handgun carry permit applications made by otherwise qualified individuals on account of lack of residence within the District of Columbia[.]” *See id.*

The parties do not dispute the basic facts that underlie this action. D.C. Code § 7- 2502.01(a) provides that “no persons or organization in the District shall possess or control any firearm, unless the persons or organization holds a valid registration certificate for the firearm.” D.C. Code § 7-2502.02(a)(4) provides that individuals who are not retired police officers may only register a handgun “for use in self-defense within that person’s home.” Pursuant to this statutory limitation, Defendants distribute handgun registration application forms requiring applicants to “give a brief statement of your intended use of the firearm and where the firearm will be kept.”

Defendants maintain a custom, practice and policy of refusing to entertain gun registration applications by individuals who do not reside in the District of Columbia. Defendants require gun registration applicants to submit “[p]roof of residency in the District of Columbia (e.g, a valid DC operator’s permit, DC vehicle registration card, lease agreement for a residence in the District, the deed to your home or other legal document showing DC residency.” A first violation of the District of Columbia’s ban on the ownership or possession of unregistered handguns is punishable as a misdemeanor by a fine of up to \$1,000, imprisonment of up to five years, or both. *See* D. C. Code § 7-2507.06.

D.C. Code § 22-4504(a) provides that “[n]o person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon capable of being so concealed.” The first violation of this section by





a non-felon is punishable by a fine up to \$5,000 and imprisonment of up to five years.

Former D.C. Code § 22-4506 empowered the District of Columbia's police chief to issue licenses to carry handguns to individuals, including to individuals not residing in the District of Columbia. However, it was Defendant District of Columbia's policy for many years not to issue such licenses. On December 16, 2008, the District of Columbia's City Council and Mayor repealed the Police Chief's authority to issue handgun carry licenses. Accordingly, the District of Columbia lacks any mechanism to issue handgun carry licenses to individuals.

Plaintiff Palmer, a resident of the District, would carry a functional handgun in public for self-defense but refrains from doing so because he fears arrest, prosecution, fine, and imprisonment as he does not possess a license to carry a handgun. Plaintiff Palmer sought to register a handgun in the District of Columbia so that he might carry it for self-defense. On or about May 12, 2009, Defendant Lanier denied Plaintiff Palmer's application to register a handgun for the following reason:

The intended use of the firearm as stated on your firearms registration application, "I intend to carry this firearm, loaded, in public, for self-defense, when not kept in my home" is unacceptable per the "Firearms Registration Emergency Amendment Act of 2008," which states that pistols may only be registered by D.C. residents for protection within the home.

Defendant Lanier subsequently approved Plaintiff Palmer's application to register the handgun for home self-defense.

Plaintiff George Lyon, a resident of the District, would carry a functional handgun in public for self-defense but refrains from doing so because he fears arrest, prosecution, fine, and imprisonment as he does not possess a license to carry a handgun in Washington, D.C. Plaintiff Lyon is licensed to carry handguns in the states of Virginia, Utah, and Florida. He has approximately 240 hours of firearms training, of which approximately 140 hours relate specifically to handguns. Plaintiff Lyon sought to register a handgun in the District of Columbia so that he might carry it for self-defense. On or about April 8, 2009, Defendant Lanier denied Plaintiff Lyon's application





to register a handgun for the following reason:

The intended storage and use of the firearm as stated on your firearms registration application, “carrying personal protection, keep at home or office” is unacceptable per the “Firearms Registration Emergency Amendment Act of 2008,” which states that pistols may only be registered by D.C. residents for protection within the home.

Defendant Lanier subsequently approved Plaintiff Lyon’s application to register the handgun for home self-defense.

At the time Plaintiffs filed this action, Plaintiff Raymond was not a resident of the District, was enrolled as a student in the Franklin Pierce Law Center in New Hampshire, was employed as a Patent Examiner and owned a home in Waldorf, Maryland. Plaintiff Raymond holds a Master of Business Administration degree as well as a Master of Science degree in Electrical Engineering. He has started various successful businesses and is an honorably discharged Navy veteran.

On April 6, 2007, District of Columbia Police stopped Plaintiff Raymond for allegedly speeding. At that time, Plaintiff Raymond held valid permits to carry a handgun issued by the states of Maryland and Florida and still holds those permits. Although Plaintiff Raymond was never charged with a traffic violation, he was charged with carrying a pistol without a license because his loaded handgun was located in his car’s center console. Plaintiff Raymond subsequently pled guilty to misdemeanor possession of an unregistered firearm and unregistered ammunition. He successfully completed a sentence of probation.

Plaintiff Raymond would carry a functional handgun in public for self-defense while visiting and traveling through the District of Columbia but refrains from doing so because he fears another arrest and prosecution as well as fine and imprisonment as he does not possess a license to carry a handgun in the District of Columbia. On June 26, 2009, Plaintiff Raymond sought to register a handgun in the District of Columbia, but he was refused an application form because of his lack of residence in the District.

Plaintiff Amy McVey, a resident of the District, would carry a functional handgun in public for self-defense but refrains from doing so because she fears arrest, prosecution, fine, and imprisonment as



she does not possess a license to carry a handgun in the District of Columbia. Plaintiff McVey is licensed by the state of Virginia to publicly carry a handgun.

Plaintiff McVey sought to register a handgun in the District of Columbia so that she could carry it for self-defense. On July 7, 2009, Defendant Lanier denied her application to register a handgun for the following reason:

The intended storage and use of the firearm as stated on your firearms registration application, “I intend to carry the loaded firearm in public for self-defense when not stored in my home” is unacceptable per the “Firearms Registration Emergency Amendment Act of 2008,” which states that pistols may only be registered by D.C. residents for protection within the home.

Plaintiff Second Amendment Foundation, Inc. (“SAF”) is a non-profit membership organization incorporated under the laws of Washington with its principal place of business in Bellevue, Washington. SAF has more than 650,000 members and supporters nationwide, including in the District of Columbia. The purposes of SAF include education, research, publishing and legal action focusing on the Constitutional right to privately own and possess firearms and the consequences of gun control. SAF expends its resources encouraging the exercise of the right to bear arms and advising and educating its members, supporters, and the general public about the law with respect to carrying handguns in the District of Columbia. The issues raised by, and consequences of, Defendants’ policies are of great interest to SAF’s constituency. Defendants’ policies regularly cause SAF to expend resources as people turn to it for advice and information. Defendants’ policies bar the members and supporters of SAF from obtaining permits to carry handguns.

### III. DISCUSSION

The Supreme Court’s decisions in *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), direct the Court’s analysis of Plaintiffs’ claims. In *Heller*, the plaintiffs mounted a Second Amendment challenge to a District of Columbia law that “totally ban[ned] handgun possession in the home” and

“require[d] that any lawful firearm in the home be disassembled or bound by a trigger lock[.]” *Heller*, 554 U.S. at 603, 628. The validity of the challenged measures depended, as a preliminary matter, on whether the Second Amendment codified an individual right or a collective right. *See id.* at 577. After consulting the text’s original public meaning, the Court concluded that the Second Amendment codified a pre-existing, individual right to keep and bear arms and that the “central component of the right” was self-defense. *See id.* at 592, 599. Furthermore, the Court held that, because “the need for defense of self, family, and property is most acute in the home,” the D.C. ban on the home use of handguns “the most preferred firearm in the nation” failed “constitutional muster” under any standard of heightened scrutiny. *Id.* at 628-29 & n.27. The same was true for the trigger-lock requirement. *See id.* at 635. The *Heller* Court concluded that it did not need to “undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment” to dispose of the case. *Id.* at 626. Nor did the Court have a reason to specify, for future cases, which burdens on the Second Amendment right triggered which standards of review, or whether a tiered-scrutiny approach was even appropriate in the first place. *See id.* at 628-29. By any measure, the Court found that the District of Columbia statute overreached.

Two years later, in *McDonald*, the Court evaluated a similar handgun ban that the City of Chicago had enacted. The question presented in *McDonald*, however, was not whether the ban infringed the Chicago’s residents’ Second Amendment rights, but, rather, whether a state government could even be subject to the strictures of the Second Amendment. The answer to that question depended on whether the right was “deeply rooted in this Nation’s history and tradition” and “fundamental to *our* scheme of ordered liberty[.]” *McDonald*, 130 S. Ct. at 3036.

The Court stated that its “decision in *Heller* point[ed] unmistakably to the answer.” *Id.* The Court explained that self-defense, recognized since ancient times as a “basic right,” was the “central component” of the Second Amendment guarantee. *Id.* Thus, the Court concluded that that right restricted not only the federal government but, under the Fourteenth Amendment, also the states. *See id.* at 3026. Having reached that conclusion, the Court



remanded the case to the Seventh Circuit for an analysis of whether, in light of *Heller*, the Chicago handgun ban infringed the Second Amendment right. *See id.* at 3050.

Neither *Heller* nor *McDonald* speaks explicitly or precisely to the scope of the Second Amendment right outside the home or to what it takes to “infringe” that right. However, both opinions, at the very least, “point[] in a general direction.” *Ezell v. City of Chicago*, 651 F.3d 684, 700 (7th Cir. 2011) (noting that *Heller* does not leave the court “without a framework for how to proceed”). As the Ninth Circuit recently noted in *Peruta v. Cnty. of San Diego*, 742 F.3d 1144 (9th Cir. 2014),<sup>2</sup> which addressed statutes very similar to the ones at issue in this case,

[t]o resolve the challenge to the D.C. restrictions, the *Heller* majority described and applied a certain methodology: it addressed, first, whether having operable handguns in the home amounted to “keep[ing] and bear[ing] Arms” within the meaning of the Second Amendment and, next, whether the challenged laws, if they indeed did burden constitutionally protected conduct, “infringed” the right.

*Id.* at 1150.

In analyzing the issues in this case, the Court must apply the two-step approach that the District of Columbia Circuit set forth in *Heller v. Dist. of Columbia (Heller II)*, 670 F.3d 1244 (D.C. Cir. 2011). The first question requires this Court to decide whether the restricted activity, in this case, a restriction on a responsible, law-abiding citizen’s ability to carry a gun outside the home for self-defense falls within the Second Amendment right to keep and bear arms for the purpose of self defense. *See Peruta*, 742 F.3d at 1150 (citing *Ezell*, 651 F.3d at 701; *Kachalsky v. City of Westchester*, 701 F.3d 81, 90 (2d Cir. 2012)). To determine the precise methods by which that right’s scope is discerned, the Supreme Court has directed, in both *Heller* and *McDonald*, that courts must consult “both text and history.” *Heller*, 554 U.S. at 595, *McDonald*, 130 S. Ct. at 3047).

As the Court noted in *Heller*, “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future



judges think that scope too broad.” *Heller*, 554 U.S. at 634-35. To arrive at the original understanding of the right, “we are guided by the principle that ‘[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning’” unless evidence suggests that the language was used idiomatically. *Id.* at 576 (quoting *United States v. Sprague*, 282 U.S. 716, 731, 51 S. Ct. 220, 75 L. Ed. 640 (1931)) (other citation omitted). “Of course, the necessity of this historical analysis presupposes what *Heller* makes explicit: the Second Amendment right is ‘not unlimited.’” *Peruta*, 742 F.3d at 1151 (quoting [*Heller*, 554 U.S.] at 595, 128 S. Ct. 2783).

Furthermore, “[i]t is ‘not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.’” *Id.* (quoting [*Heller*, 554 U.S.] at 626, 128 S. Ct. 2783). “Rather, it is a right subject to ‘traditional restrictions,’ which themselves and this is a critical point tend to show the scope of the right.” *Id.* (quoting *McDonald*, 130 S. Ct. at 3056 (Scalia, J., concurring)) (citing *Kachalsky*, 701 F.3d at 96; *Nat’l Rifle Ass’n of Am.*, 700 F.3d at 196 (“For now, we state that a longstanding presumptively lawful regulatory measure . . . would likely [burden conduct] outside the ambit of the Second Amendment.”); *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (“That some categorical limits are proper is part of the original meaning.”)).

As the court noted in *Peruta*, “[t]he Second Amendment secures the right not only to ‘keep’ arms but also to ‘bear’ them[.]” *Peruta*, 742 F.3d at 1151; and, as the Supreme Court explained in *Heller*, “[a]t the time of the founding, as now, to ‘bear’ meant to ‘carry[.]’” *Heller*, 554 U.S. at 584. “Yet, not ‘carry’ in the ordinary sense of ‘convey[ing] or transport[ing]’ an object, as one might carry groceries to the check-out counter or garments to the laundromat, but ‘carry for a particular purpose confrontation.’” *Peruta*, 742 F.3d at 1151-52 (quoting [*Heller*, 554 U.S. at 584]). According to the *Heller* majority, the “natural meaning of ‘bear arms’” was the one that Justice Ginsburg provided in her dissent in *Muscarello v. United States*, 524 U.S. 125 (1998), that is “‘wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.’” *Heller*, 554 U.S. at 584 (quoting *Muscarello*, 524 U.S. at 143, 118 S. Ct. 1911).

(Ginsburg, J., dissenting) (quoting *Black's Law Dictionary* 214 (6th ed. 1998)).

Furthermore, “bearing a weapon inside the home’ does not exhaust this definition of ‘carry.’ For one thing, the very risk occasioning such carriage, ‘confrontation,’ is ‘not limited to the home.” *Peruta*, 742 F.3d at 1152 (quoting *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012)). Moreover, it is beyond dispute that “the prospect of conflict at least, the sort of conflict for which one would wish to be ‘armed and ready’ is just as menacing (and likely more so) beyond the front porch as it is in the living room.” *Id.* Thus, “[t]o speak of “bearing” arms within one’s home would at all times have been an awkward usage.” *Id.* (quotation omitted). In addition, the *Heller* Court stated that the Second Amendment secures “the right to ‘protect[] [oneself] against both *public* and private violence,’ . . . thus extending the right in some form to wherever a person could become exposed to public or private violence.” *United States v. Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011) (Niemeyer, J., specially concurring) (quoting [*Heller*, 128 S. Ct.] at 2798, 2799). Moreover, the *Heller* Court emphasized that the need for the right was “most acute” in the home, *Peruta*, 742 F.3d at 1153 (citing *Heller*, 554 U.S. at 628, 128 S. Ct. 2783), “thus implying that the right exists outside the home, though the need is not always as “acute.” *Id.* (citing *McDonald*, 130 S. Ct. at 3044 (2010) (“[T]he Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home.”)). However, *Heller* also pointed out that “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings” is presumptively lawful. *Heller*, 554 U.S. at 626. Finally, “both *Heller* and *McDonald* identifi[ed] the ‘core component’ of the right as self-defense, which necessarily ‘take[s] place wherever [a] person happens to be,’ whether in a back alley or on the back deck.” *Peruta*, 742 F.3d at 1153 (citing *Moore*, 702 F.3d at 937 (“To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*.”)) (other citation omitted).

This Court agrees with the Ninth Circuit’s statement in *Peruta* that “[t]hese passages alone, though short of dispositive, strongly suggest that the Second Amendment secures a right to carry a firearm in some fashion outside the home.” *Peruta*, 742 F.3d at



1153. “Reading those lines in light of the plain meaning definition of ‘bear Arms’ elucidated above makes matters even clearer; the Second Amendment right ‘could not rationally have been limited to the home.’” *Id.* (quoting *Moore*, 702 F.3d at 936). Although “people may ‘keep Arms’ (or, per *Heller*’s definition, ‘have weapons,’ 554 U.S. at 582, 128 S. Ct. 2783), in the home for defense of self, family, and property, they are more sensibly said to ‘bear Arms’ (or, *Heller*’s gloss: ‘carry [weapons] . . . upon the person or in the clothing or in a pocket,’ *id.* at 584, 128 S. Ct. 2783) in *nondomestic* settings.” *Id.* (citing *Kachalsky*, 701 F.3d at 89 n.10 (“The plain text of the Second Amendment does not limit the right to bear arms to the home.”); *Drake v. Filko*, 724 F.3d 426, 444 (3d Cir. 2013) (Hardiman, J., dissenting) (“To speak of ‘bearing’ arms solely within one’s home not only would conflate ‘bearing’ with ‘keeping,’ in derogation of the Court’s holding that the verbs codified distinct rights, but also would be awkward usage given the meaning assigned the terms by the Supreme Court.”)) (footnote omitted).

In addition to the textual analysis of the phrase “bear Arms,” the Court in *Heller* looked to the original public understanding of the Second Amendment right as evidence of its scope and meaning, relying on the “important founding-era legal scholars.” *Heller*, 554 U.S. at 600-03 (examining the public understanding of the Second Amendment in the period after its ratification because “[t]hat sort of inquiry is a critical tool of constitutional interpretation”). Based on its historical review, the Court found support for the proposition that the Second Amendment secures an individual right to carry in case of confrontation means nothing if not the general right to carry a common weapon outside the home for self-defense. Furthermore, as the court in *Peruta* correctly pointed out, “with *Heller* on the books, the Second Amendment’s original meaning is now settled in at least two relevant respects.” *Peruta*, 742 F.3d at 1155. “First, *Heller* clarifies that the keeping and bearing of arms is, *and has always been*, an individual right. *Id.* (citing [*Heller*], 554 U.S. at 616, 128 S. Ct. 2783). “Second, the right is, *and has always been*, oriented to the end of self-defense.” *Id.* (citation omitted). After an exhaustive summary of the text and history of the Second Amendment, the Ninth Circuit in *Peruta* concluded that “the carrying of an operable handgun outside the home for the lawful purpose of self-defense,



though subject to traditional restrictions, constitutes ‘bear[ing] Arms’ within the meaning of the Second Amendment.” *Peruta*, 742 F.3d at 1166. As the Ninth Circuit noted, this conclusion is not surprising in light of the fact that other circuits have reached the same result. *See id.* (citing *Moore*, 702 F.3d at 936 (“A right to bear arms thus implies a right to carry a loaded gun outside the home.”); *Drake*, 724 F.3d at 431 (recognizing that the Second Amendment right “*may* have some application beyond the home”); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (“We . . . assume that the *Heller* right exists outside the home. . . .”); *Kachalsky*, 701 F.3d at 89 (assuming that the Second Amendment “must have *some* application in the very different context of the public possession of firearms”)). This Court, joining with most of the other courts that have addressed this issue, reaches this same conclusion.

Finally, as the *Peruta* court pointed out, “[u]nderstanding the scope of the right is not just necessary, it is key to [the court’s] analysis [because,] if self-defense outside the home is part of the core right to ‘bear arms’ and the [District of Columbia’s] regulatory scheme prohibits the exercise of that right, no amount of interest-balancing under a heightened form of means-end scrutiny can justify [the District of Columbia’s] policy.” *Id.* at 1167 (citing *Heller*, 554 U.S. at 634, 128 S. Ct. 2783 (“The very enumeration of the right takes out of the hands of government even the Third Branch of Government the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.”)). Thus, having concluded that carrying a handgun outside the home for self-defense comes within the meaning of “bear[ing] Arms” under the Second Amendment, the Court must now ask whether the District of Columbia’s total ban on the carrying of handguns within the District “infringes” that right.

This question is not difficult to answer. As the Seventh Circuit stated in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), “[a] blanket prohibition on carrying gun[s] in public prevents a person from defending himself anywhere except inside his home; and so substantial a curtailment of the right of armed self-defense requires a greater showing of justification than merely that the public *might* benefit on balance from such a curtailment, though there is no proof that it would.” *Id.* at 940. This does not mean that the government

cannot place some reasonable restrictions on carrying of handguns; for example, “when a state bans guns merely in particular places, such as public schools, a person can preserve an undiminished right of self-defense by not entering those places; since that’s a lesser burden, the state doesn’t need to prove so strong a need.” *Id.* The District of Columbia appears to be the only jurisdiction that still has such a complete ban on the carrying of ready-to-use handguns outside the home. That does not mean that other jurisdictions are indifferent to the dangers that the widespread public carrying of guns; rather, those jurisdictions “have decided that a proper balance between the interest in self-defense and the dangers created by carrying guns in public is to limit the right to carry a gun to responsible persons rather than to ban public carriage altogether[.]” *Id.* at 940. In addition, to “the usual prohibitions of gun ownership by children, felons, illegal aliens, lunatics, and in sensitive places such as public schools, the propriety of which was not questioned in *Heller* . . . some states sensibly require that an applicant for a handgun permit establish his competence in handling firearms.” *Id.* at 940-41 (internal parenthetical omitted). Some states “also permit private businesses and other private institutions (such as churches) to ban guns from their premises.” *Id.* at 941.

In light of *Heller*, *McDonald*, and their progeny, there is no longer any basis on which this Court can conclude that the District of Columbia’s total ban on the public carrying of ready-to-use handguns outside the home is constitutional under any level of scrutiny. Therefore, the Court finds that the District of Columbia’s complete ban on the carrying of handguns in public is unconstitutional. Accordingly, the Court grants Plaintiffs’ motion for summary judgment and enjoins Defendants from enforcing the home limitations of D.C. Code § 7-2502.02(a)(4) and enforcing D.C. Code § 22-4504(a) unless and until such time as the District of Columbia adopts a licensing mechanism consistent with constitutional standards enabling people to exercise their Second Amendment right to bear arms.<sup>4</sup> Furthermore, this injunction prohibits the District from completely banning the carrying of handguns in public for self-defense by otherwise qualified non-residents based **solely** on the fact that they are not residents of the District.



### C. Equal protection and right to travel challenges to residency requirements

Plaintiff Raymond, the only non-resident individual Plaintiff, and SAF, insofar as some of its members who are not residents of the District of Columbia who would like to carry a hand gun in the District when they are there, argue that Defendants' practice of refusing to issue a permit to carry a gun in the District based solely on the fact that a person is not a resident violates their right to travel and the equal protection clause of the Fourteenth Amendment.

The Court has difficulty seeing how these challenges, under the circumstances of this case, are not co-extensive with Plaintiff Raymond's Second Amendment challenges to the current District laws regarding the complete ban on carrying handguns in public. Furthermore, as things now stand, Plaintiff Raymond, and all others who are not residents of the District, are treated exactly the same as residents of the District insofar as the District has a complete ban on the carrying of handguns in public for self-defense. Thus, to the extent that Plaintiff Raymond's right to travel and equal protection claims are not co-extensive with his Second Amendment claims, the Court finds that these claims are not ripe.<sup>5</sup>

## IV. CONCLUSION

Having reviewed the parties' submissions and the applicable law, and for the above-stated reasons, the Court hereby **GRANTS** Plaintiffs' motion for summary judgment and **DENIES** Defendants' cross-motion for summary judgment; and the Court further

**ORDERS** that Defendants, their officers, agents, servants, employees and all persons in active concert or participation with them who receive actual notice of this Memorandum- Decision and Order, are permanently enjoined from enforcing D.C. Code § 7-2502.02(a)(4) to ban registration of handguns to be carried in public for self-defense by law-abiding citizens; and the Court further

**ORDERS** that Defendants, their officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of this Memorandum- Decision and Order are permanently enjoined from enforcing D.C. Code § 22-





4504(a); and the Court further

**ORDERS** that Defendants, their officers, agents, servants, employees, and all persons in active concert or participation from them who receive actual notice of this Memorandum- Decision and Order for enforcing D.C. Code § 7-2502.02(a)(4) and D.C. Code § 22-4504(a) against individuals based solely on the fact that they are not residents of the District of Columbia.

**IT IS SO ORDERED.**

Dated: July 24, 2014  
Syracuse, New York

Frederick J. Scullin, Jr.  
Senior United States District Judge

Endnotes

1. Plaintiffs also seek costs of the suit, including attorney fees and costs under 42 U.S.C. § 1988 and declaratory relief consistent with the injunction. *See* Complaint at WHEREFORE Clause.
2. The *Peruta* court addressed the issue of “whether a responsible, law-abiding citizen has a right under the Second Amendment to carry a firearm in public for self-defense.” *Peruta*, 742 F.3d at 1147. As a preliminary matter, the court noted that “California generally prohibits the open or concealed carriage of a handgun, whether loaded or unloaded, in public locations.” *Id.* (citations and footnote omitted). However, an individual could apply for a license to carry a concealed weapon in the city or county in which he worked or resided. *See id.* at 1148 (citations omitted). To obtain such a license, however, an applicant had to meet several requirements, including a demonstration of good moral character, completion of a specified training course, and establishing good cause. *See id.* (citations omitted). The plaintiff challenged San Diego County’s procedures for obtaining a concealed-carry license, in particular its definition of the term “good cause.” *See id.*
3. As the *Peruta* court noted, several other circuit courts have also applied this two-step inquiry. *See Peruta*, 742 F.3d at 1150 (citing *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir.



2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell*, 651 F.3d at 701-04; *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010); *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010)).

4. The Court notes that, in *Heller v. Dist. of Columbia*, 08-CV-1289, Dkt. No. 83, Judge Boasberg recently dismissed all of the plaintiffs' challenges to the constitutionality of the District's firearm laws with prejudice except for their challenge to the vision requirement for gun registration, which, because he decided that challenge based on jurisdictional grounds, he dismissed without prejudice. *See id.* at 62. The plaintiffs had challenged the registration requirements of the District's gun laws. The issue of the complete ban on the carrying of handguns in the District for self-defense was not at issue nor was the residency requirement at issue in that case. What were at issue, however, were the regulations pertaining to the registration of firearms, specifically the basic registration requirements as they applied to long guns and the following registration requirements that applied to all guns: (1) to register a weapon, registrants must appear in person and in possession of the firearm to be registered and must submit to being photographed and fingerprinted, *see* D.C. Code § 7-2502.04; (2) to register a weapon, registrants must complete a firearms-training and safety class and pass a test demonstrating knowledge of the District's firearms laws, *see* D. C. Code § 7-2502.03(a)(10), (13); (3) registrants are limited to registering one pistol every thirty days, *see* D.C. Code § 7- 2502.03(e); (4) firearm-registration certificates automatically expire three years after the date they are issued, unless the registrant renews them, *see* D. C. Code § 7-2502.07a(a), and registrants are eligible to renew their certificates so long as they continue to meet the District's initial registration requirements, *see* D.C. Code § 7-2502.03(a), and follow any procedures the Metropolitan Police Department ("MPD") Chief establishes by rule, *see* D.C. Code § 7- 2502.07a(b). In addition, the plaintiffs challenged several provisions related to the administration and enforcement of the gun-registry scheme, including (1) the requirement that gun owners keep their registration certificates with them when they are in possession of their registered firearms and be able to exhibit the certificate upon the demand of law enforcement, *see* D. C. Code § 7-2502.08(c); (2) the requirement that gun owners notify MPD in writing if their registered weapons are lost, stolen, or destroyed, if they sell or transfer their weapons, or if they change their name or address, *see* D. C. Code § 7-2502,08(a); (3) the fees associated with the registration process, *see* D.C. Code § 7-2502.05(b); and (4) the penalties for violations of the registration scheme, *see* D.C. Code § 7-2507.06. The plaintiffs in



OPINION

PALMER V. DISTRICT OF COLUMBIA

*Heller* have filed a Notice of Appeal from Judge Boasburg's May 15, 2014 Memorandum-Opinion. *See Heller*, 08-CV-1289, at Dkt. No. 84.

5. As stated above, with respect to Plaintiff Raymond's Second Amendment claim, the District of Columbia may not completely bar him, or any other qualified individual, from carrying a handgun in public for self-defense simply because they are not residents of the District.





*Publisher's note:* The following is the order in *Silver v. Harris*. Filed in 2011, this case challenged California's ten-day waiting period. Senior Judge Anthony W. Ishii ruled that the 10-day waiting period violates the Second Amendment "as applied to those individuals who successfully pass" the state's background check prior to the ten days, and who are in lawful possession of an additional firearm. In his ruling, Judge Ishii relied on other SAF cases including *Moore v. Madigan*, *Ezell v. Chicago* and *McDonald v. Chicago*.

**UNITED STATES DISTRICT  
COURT EASTERN DISTRICT OF CALIFORNIA**

**JEFF SILVESTER, et al., Plaintiffs**

v.

**KAMALA HARRIS, Attorney General of California,  
and DOES 1 to 20, Defendants**

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This case deals with the constitutionality of various firearms related statutes. Plaintiffs challenge the 10-day waiting period imposed by California Penal Code § 26815(a)<sup>1</sup> and § 27540(a),<sup>2</sup> and approximately 18 categories of exemptions to the waiting period found in Penal Code § 26000 et seq. and § 27000 et seq. Plaintiffs contend that the 18 exemptions violate the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs contend that the 10-day waiting periods violate the Second Amendment. Specifically, Plaintiffs contend that the 10-day waiting periods violate the Second Amendment as applied to those who already lawfully possess a firearm as confirmed in the Automated Firearms System ("AFS"), to those who possess a valid Carry Concealed Weapon ("CCW") license, and to those who possess a valid Certificate of Eligibility



(“COE”). See Doc. No. 91 at 29:23-30:8. Plaintiffs do not challenge the 10-day waiting period on a facial basis, do not challenge the waiting period laws as applied to first time firearms purchasers, and do not challenge the requirement that firearm purchasers pass a background check. See Doc. Nos. 91 at 17:13-15; 93 at 3:1-3; 98 at 16:10-15; and 105 at 7:6-8, 13:17-20.

In March 2014, the Court conducted a bench trial in this matter. The Court has now taken live testimony, deposition testimony, and numerous exhibits. The parties have completed all briefing and made their final arguments. Given the nature of the challenges made, the Court emphasizes that it is expressing no opinion on the constitutionality of the 10-day waiting period in general or as applied to first time California firearms purchasers.

After considering the evidence and the arguments, the Court concludes that Penal Code § 26815(a) and § 27540(a)’s 10-day waiting periods impermissibly violate the Second Amendment as applied to those persons who already lawfully possess a firearm as confirmed by the AFS, to those who possess a valid CCW license, and to those who possess both a valid COE and a firearm as confirmed by the AFS system, if the background check on these individuals is completed and approved prior to the expiration of 10 days. Because of the Court’s resolution of the Second Amendment issue, the Court need not reach the Fourteenth Amendment challenges.

## I. REQUEST FOR JUDICIAL NOTICE

### *Parties’ Positions*

Defendant requested that the Court take judicial notice of various exhibits. Defendant argued that each of the exhibits could be judicially noticed as legislative facts because such facts are relevant to the justification for the statutes at issue, the court’s legal reasoning, and to the decision making process.

Plaintiffs objected and argued that it was unclear how Defendant intended to use the information in the exhibits. Plaintiffs recognized the distinction between adjudicative facts and legislative facts, but contended that they could not determine the admissibility of the exhibits without further clarification. However, relevancy, hearsay, and contestability issues in general with Defendant’s exhibits



make judicial notice under Rule 201 improper. Further, as part of supplemental briefing, Plaintiffs stated that once specific portions of exhibits were identified by Defendant in her proposed findings of fact and conclusions of law, Plaintiffs would then make arguments in their June 30, 2014 responsive briefing as to those specific exhibits.

#### Discussion

At the end of the last day of trial testimony, and upon the parties' agreement, the Court ordered the parties to include and to cite to specific proposed exhibits and portions of proposed exhibits as part of their proposed findings of fact and conclusions of law. See Trial Tr. at 526:9- 533:13. The parties were permitted to file responsive briefing and objections to the proposed findings, including evidentiary objections to any evidence that was included in the proposed findings and the subject of Defendant's motion for judicial notice. See id. The Court would then make evidentiary rulings based on the briefing and the proposed findings of fact and conclusions of law. See id. This framework was primarily meant to address the exhibits in Defendant's request for judicial notice. The framework was designed to provide the Court and the parties with a method of determining how and for what purpose an exhibit was being used. Defendant's proposed findings of fact and conclusions of law comply with the Court's order. In fact,

Defendant helpfully submitted binders with the exhibits and the specific excerpts that were cited in her proposed findings. Nevertheless, as part of Defendant's June 30, 2014 responsive briefing, Defendant defended and addressed exhibits that were part of the request for judicial notice, but were not included in her proposed findings.

If Defendant did not cite an exhibit or portion of an exhibit in her proposed findings and conclusions, then Defendant did not sufficiently rely upon such evidence. There was an inadequate demonstration of how such evidence was intended to be used and/or how the evidence is relevant. The Court will not comb through the hundreds of pages of proposed exhibits and make rulings if an exhibit is not actually cited and specifically relied upon by a party. Cf. Hargis v. Access Capital Funding, LLC, 674 F. 3d 783, 792-93 (8th Cir. 2012) (courts need not take judicial notice of irrelevant evidence); Southern Cal. Gas Co. v. City of Santa Ana, 336 F.3d



885, 889 (9th Cir. 2003) (in summary judgment context court is not required to examine the entire file when specific evidence was not adequately identified); Charles v. Daley, 749 F.2d 452, 463 (7th Cir. 1984) (courts need not take judicial notice of irrelevant evidence); Rodriguez v. Bear Stearns Cos., 2009 U.S. Dist. LEXIS 31525, \*34 (D. Conn. Apr. 14, 2009) (courts need not take judicial notice of cumulative evidence).

Accordingly, the Court will limit its discussion and consideration to the exhibits and excerpts that were actually cited by Defendant in her proposed findings. Those exhibits are Defendant's Exhibits CD through CI, DG, DH, DM, DQ, DS, DT, DV, DW, DX, EC, EJ, EK, and GN. All other exhibits that were included in Defendant's March 24, 2014 request for judicial notice (Doc. No. 78), but that were not cited in Defendant's proposed findings of fact and conclusions of law, will not be considered by the Court.

The Defense exhibits at issue fall into one of four general categories – legislative history, history books, professional journal articles, and a newspaper article. The Court will examine each category of exhibits separately.

#### 1. Legislative Histories

The Ninth Circuit has approved of taking judicial notice of legislative history. Association des Eleveurs de Canards et D'oies du Quebec v. Harris, 729 F.3d 937, 945 n.2 (9th Cir. 2013); Chaker v. Crogan, 428 F.3d 1215, 1223 n.8 (9th Cir. 2005); see also Korematsu v. United States, 584 F.Supp. 1406, 1414 (N.D. Cal. 1984). Defendant has limited the portions of legislative history that she wishes the Court to consider. In their June 30 responsive briefing, Plaintiffs did not address these specific portions of legislative history. The Court finds that the identified portions of legislative history are relevant and probative. Therefore, the Court will grant Defendant's motion with respect to the identified excerpts of legislative history. Therefore, the Court takes judicial notice of the following portions of Exhibit CD: Cover & p. 701. The Court takes judicial notice of the following portions of Exhibit CE: Cover & p. 657. The Court takes judicial notice of the following portions of Exhibit CF: Cover & pp. 2799, 2800. Exhibit CG: Bates Numbers AG000008, AG000026, AG000052 through AG000055, and AG000059 through AG000061. The Court takes judicial notice of the following portions

of Exhibit CH: Bates Numbers AG000231 through AG000233, AG000297 through AG000298, AG000343 through AG000344. The Court takes judicial notice of the following portions of Exhibit CI: Bates Numbers AG000399 through AG000402, and AG000468.

## 2. Category 2 – History Books

In their June 30, 2014 responsive briefing, Plaintiffs did not make any evidentiary arguments regarding the specific excerpts from Defendant's history books. Regardless, the Court has conducted an independent evaluation of the excerpts submitted.

Exhibit EC consists of excerpts from a book by Jack Larkin, *The Reshaping of Everyday Life: 1790-1840* (Harper Perennial 1988). The excerpts from this book deal with the nature of life in America from 1790 to 1840. Defendant seeks to admit these excerpts in order to demonstrate that, given the nature of the way of life between 1790 and 1840, most people would have been unable to readily obtain firearms. Because the geographic and economic conditions did not lend themselves to a person being able to immediately purchase and possess a firearm, Defendant contends that the citizens of 1790 and 1840 would have no quarrel with a government imposed waiting period before obtaining firearms. See Doc. No. 88 at ¶¶ 29-34, G.

Although it appears that Exhibit EC is the type of historical work that has been consulted in cases such as *McDonald*, *Heller*, and *Peruta*, the information contained in Exhibit EC is not particularly relevant to this case. Exhibit EC appears to be a generalized historical text that touches on many aspects of the American life as it existed between 1790 and 1840. What Exhibit EC excerpts do not contain is any information regarding firearm waiting period laws that may have existed between 1790 and 1840, or information regarding the understanding of the Second Amendment during this timeframe. It is that type of information, not American life in general or the economic and geographic conditions of the time, that are relevant. "The Constitution structures the National Government, confines its actions, and, in regard to certain individual liberties and other specified matters, confines the actions of the States." Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991). "[T]he constitutional right to bear arms restricts the actions of only the federal or state governments or their political subdivisions, not private actors." Florida Retail Fed'n, Inc. v. Attorney Gen. of Fla., 576 F.Supp.2d

1281 (N.D. Fla. 2008). That naturally-occurring non-governmental forces may have limited the ability of some individuals in some parts of the country to readily obtain firearms does not show that it was understood around 1791 (the year the Second Amendment was adopted) or 1868 (the year the Fourteenth Amendment was adopted) that the government could impose a waiting period between the time of purchase and the time of possession of a firearm.<sup>3</sup> The Court does not find the excerpts in Exhibit EC to be relevant, and declines to consider them.<sup>4</sup> See Hargis, 674 F.3d at 792-93; Charles, 749 F.2d at 463; Rodriguez, 2009 U.S. Dist. LEXIS 31525 at \*34.

Exhibit EK consists of excerpts from a book by Adam Winkler, *Gunfight: The Battle over the Right to Bear Arms in America* (W.W. Norton 2013). Exhibit EK discusses some of the laws in existence around the founding era. However, there is nothing in Exhibit EK that discusses waiting period laws between 1791 and 1868. The first mention of a waiting period law was a 1923 model law that imposed a 1-day waiting period on the delivery of handguns. According to Winkler, this law was proposed by a private organization, the U.S. Revolver Association. Winkler states that this law was adopted by nine states, including California. However, like Exhibit EC, Exhibit EK does not discuss waiting period laws during 1791 or 1868.<sup>5</sup> Because there is no discussion of waiting periods during the relevant time periods, the Court does not find the excerpts from Exhibit EK to be relevant, and declines to consider them.<sup>6</sup> See Hargis, 674 F.3d at 792-93; Charles, 749 F.2d at 463; Rodriguez, 2009 U.S. Dist. LEXIS 31525 at \*34.

### 3. Professional Articles

In their June 30, 2014 responsive briefing, Plaintiffs did not make any evidentiary arguments regarding the specific excerpts from the professional journal articles cited by Defendant. Depending on their use in a case, see Toth v. Grand Trunk R.R., 306 F.3d 335, 349 (6th Cir. 2002), social science studies can be reviewed by courts as “legislative facts.”<sup>7</sup> See Snell v. Suffolk County, 782 F.2d 1094, 1105-06 (2d Cir. 1986); Dunagin v. Oxford, 719 F.2d 738, 748 n.8 (5th Cir. 1985); cf. United States v. Carter, 669 F.3d 411, 418 (4th Cir. 2011) (government may establish the “reasonable fit” of legislation through a wide range of sources including empirical evidence). Legislative facts can be considered more liberally and are outside the

structures of Federal Rule of Evidence 201. See Castillo-Villagra v. INS, 972 F.2d 1017, 1026 (9th Cir. 1992); United States v. Gould, 536 F.2d 216, 219 (8th Cir. 1976); see also Qualley v. Clo-Tex Int'l, Inc., 212 F.3d 1123, 1128 (8th Cir. 2000) (holding that trial court erroneously took judicial notice of legislative facts under Rule 201).

The Court finds that the excerpts from Defendant's Exhibits DG (pp. 27-29), DH (pp. 585, 588, 590), DS (pp. 228-231), DT (pp. 59-61, 69-72), DV (pp. 1583-1585), DW (pp. 225, 226, 229, 232, 234-236), and DX (pp. 40, 51-52) are relevant. Given the absence of additional argument from Plaintiffs on these exhibits, the Court will consider these exhibits as legislative facts. However, the Court will not take judicial notice of these exhibits under Rule 201. See Qualley, 212 F.3d at 1128.

With respect to Exhibits DM and DQ, these are portions of articles that relate to suicide studies in Australia. Exhibit DM is a 1994 study of 33 survivors of attempted firearm suicides, who were all treated at Westmead Hospital (a teaching hospital of the University of Sydney). Exhibit DQ is a 1999 study of suicide statistics from Tasmania, Australia. The Court does not find these articles to be probative. There are cultural, societal, and geographic differences between Australia and the United States. These types of differences can manifest themselves not only when comparing suicide statistics between the two countries, but also when comparing the suicide rates of the states and territories of Australia with the states of the United States. The Tasmania study, for example, highlights the fact that Tasmania had one of the highest suicide rates of all of Australia, yet made up only 2.6% of Australia's total population. In other words, there was something unique that was occurring in Tasmania. Suicide is a complex psychological occurrence. Without further expert guidance, the Court is not inclined to consider two studies that focus on two small portions of a separate country. The Court declines to consider Exhibits DM and DQ.<sup>8</sup> See Hargis, 674 F.3d at 792-93; Charles, 749 F.2d at 463; Rodriguez, 2009 U.S. Dist. LEXIS 31525 at \*34.

With respect to Exhibit EJ, this exhibit is several pages from a book entitled "Reducing Gun Violence in America." Only one page of the excerpts has potential relevance (the other excerpts are the cover and publishing pages). The one page discusses a study that

found a reduction in the firearm suicide rate for people over the age of 55, and the reduction may have been due to the Brady Act waiting period. See Defendant's Ex. EJ. The book page appears to have been written by the study's authors, Messrs. Cook and Ludwig. The Court will consider portions of the underlying study. See Defendant's Ex. DH. Because the Court will consider portions of the underlying study, additional information from the study's authors is relevant. The Court will consider Exhibit EJ, but will not take judicial notice of Exhibit EJ under Rule 201. See Qualley, 212 F.3d at 1128.

#### 4. Newspaper Article

Exhibit GN is a 2014 newspaper article from the Washington Post, whose headline reads, "Study: Repealing Missouri's background check law associated with a murder spike." Plaintiffs did not address this exhibit as part their June 30 responsive briefing. Nevertheless, Plaintiffs are not challenging California's background check. Plaintiffs do not argue that they should be exempt from a background check nor do they argue that the background check is unconstitutional, rather they argue that they should not be subject to the full 10-day waiting period between the time of purchase and the time of possession. See Doc. No. 105 at 7:6-8, 13:17-20. The Washington Post article purports to describe the results of a study on an issue that is not before the Court. Thus, the article is not relevant, and the Court will not consider Exhibit GN.<sup>9</sup> See Hargis, 674 F.3d at 792- 93; Charles, 749 F.2d at 463; Rodriguez, 2009 U.S. Dist. LEXIS 31525 at \*34.

## II. STANDING

Defendant contends that the two entity plaintiffs, California Guns Federation ("CGF") and the Second Amendment Foundation ("SAF") do not have standing to maintain this lawsuit. Defendant argues that there is insufficient evidence that the entities have been personally injured by the Penal Code provisions at issue, and that there is insufficient evidence that any of the entities' members have been injured. CGF and SAF contend that the evidence is sufficient to show both direct personal injuries to themselves, as well as injuries to their members.

### Legal Standard

It is the plaintiff's burden to establish standing to bring a lawsuit in federal court. See Washington Env'tl. Council v. Bellon, 732 F.3d 1131, 1139 (9th Cir. 2013). An organization may have representational standing, where it acts as a representative of its members, or direct standing, where it seeks to redress an injury it has suffered in its own right. See Smith v. Pacific Props. & Dev. Corp., 358 F.3d 1097, 1101 (9th Cir. 2004). "An organization has direct standing to sue when it shows a drain on its resources from both a diversion of its resources and frustration of its mission." Valle Del Sol Inc. v. Whiting, 732 F.3d 1006, 1018 (9th Cir. 2013); Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC, 666 F.3d 1216, 1219 (9th Cir. 2012). The organization's "standing must be established independent of the lawsuit filed by the plaintiff." Fair Hous., 666 F.3d at 1219. "An organization cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." Valle Del Sol, 732 F.3d at 1018. An organization may assert standing on behalf of its member if the "members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc., 528 U.S. 167, 181 (2000); Washington Env'tl. Council v. Bellon, 732 F.3d 1131, 1139 (9th Cir. 2013).

### Findings of Fact

SAF has between 30,000 and 40,000 members, supporters, and donors in California. Gottlieb Dep. 18:11-13.<sup>10</sup> One-third to one-half of the total 30,000 to 40,000 California members, supporters, and donors are dues-paying members. See id. at 18:16-19:4.

SAF conducts research on state and federal firearms laws, including California's firearms laws. See id. at 22:3-11. Approximately 20% of SAF's research deals with California's firearms laws. See id. at 22:12-19.

SAF also expends funds in the defense of the civil rights of its members, including the prosecution of this lawsuit. See id. at 35:10-23.

SAF seeks input from its members about which litigation to pursue, and SAF members contacted SAF about challenging the California 10-day waiting period. See id. at 28:1-3, 29:2-11. Over the years, a number of SAF members have contacted SAF to complain about the 10-day waiting period. See id. at 30:1-15.

SAF has California members who are subjected to the 10-day waiting period, and has California members who wish to purchase a firearm and also have a CCW, a COE, and/or another firearm. See id. at Depo. Ex. 13, Responses to Interrogatories 5, 8-15.

SAF has publicly commented on the 10-day waiting period, and done research into the California 10-day waiting period laws for a number of years (possibly for more than a decade). See id. at 23:25-24:23.

SAF receives between 50 and 100 calls per year from California members regarding the 10-day waiting period. See id. at 43:4-9.

Aside from this lawsuit, SAF has expended resources researching the 10-day waiting period, and expended staff time and money and resources in connection with other people's calls, letters, e-mails, and discussions about the 10-day waiting period. See 35:17-36:1.

SAF has never attempted to purchase a firearm in California, nor has it incurred any expenses in acquiring firearms in California. See id. at 33:17-20, 62:19-23.

CGF is a public interest group that was created by gun owners. See id. at 117:7-8.

CGF's purposes are to defend people whom CGF believes to be unjustly charged with violating California firearms laws, and to challenge laws that CGF believes are unconstitutional under the Second and Fourteenth Amendments. See id. at 117:8-12. CGF will file amicus briefs in various cases, including before the United States Supreme Court, but such briefs tend to be on issues that CGF believes would be useful in California. See id. at 120:2-5. CGF routinely publishes white papers, FAQ's, and Wiki's that explain California's gun laws, including explaining legislative history. See id. at 120:23-121:4. CGF defends people who have been improperly charged for violation of various California firearms, and also engages in litigation to ensure that California's firearms laws are constitutional. See id. at 117:21-118:3.



CGF has approximately 30,000 members, most of whom are in California. See Trial Tr. 121:11-14. Almost all of CGF's members are subject to the 10-day waiting period. See id. at 121:18-19. "Quite a few" of CGF's members have written about the 10-day waiting period on CGF's blog. See id. at 143:11-19.

CGF brought this lawsuit so that its members who already have firearms in the AFS system, possess a CCW, or possess a COE, would not have to wait 10 days to obtain a firearm. See id. at 121:23-25. Although not an individual plaintiff, Gene Hoffman, the CGF's chairman, currently owns a firearm, plans to obtain a firearm in the future, and has a CCW license. See id. at 113:13-114:1, 136:1-7.

CGF has never attempted to purchase a firearm on its own behalf for self-defense. See id. at 145:19-146:2.

#### Conclusions of Law

##### Direct Standing

To show an injury that is sufficient for direct standing, an organization must show: (1) frustration of purpose, and (2) diversion of funds. See Valle Del Sol, 732 F.3d at 1018.

##### *a. CGF*

CGF has met the first requirement. It is within CGF's purposes to defend and advocate for Second Amendment rights, including bringing lawsuits that challenge laws that may infringe upon the Second Amendment. The 10-day waiting period is a law that CGF believes unconstitutionally infringes upon the rights of those who have at least one gun registered in the AFS system, a CCW license, and/or a COE. CGF brought this lawsuit to remedy this perceived unconstitutional infringement. Therefore, CGF has demonstrated that the 10-day waiting period frustrates its purposes.

CGF has not met the second requirement. The testimony of CGF's chairman establishes that CGF is active in litigation in general, and has expended resources in connection with this lawsuit. However, expenditure of resources in the current lawsuit alone does not meet the requirements for direct standing. See Fair Hous., 666 F.3d at 1219. There is no evidence that deals with CGF researching, expending funds, educating or engaging in advocacy activities, or spending time addressing members' concerns about the 10-day waiting period separate and apart from this lawsuit. Cf. Valle Del Sol, 732 F.3d at 1018; Fair Hous., 666 F.3d at 1219.



Because there is no evidence that the 10-day waiting period laws have caused a diversion of CGF's resources, separate and apart from this lawsuit, CGF has not met its burden of establishing direct standing. See id.

*b. SAF*

SAF has met the first requirement. SAF is engaged in educational, research, and litigation efforts regarding the Second Amendment. SAF believes that the 10-day waiting period unconstitutionally infringes upon the Second Amendment rights of its members and of non-members in California, and has brought this lawsuit to remedy that perceived infringement. Therefore, SAF has demonstrated that the 10-day waiting period frustrates its purposes.

SAF has met the second requirement. SAF has been researching the 10-day waiting period for likely more than a decade. SAF yearly receives numerous complaints and questions from its members about the 10-day waiting period. SAF has had to divert time, resources, and money as part of its efforts to research the 10-day waiting period and to educate and address the concerns of its California members. Therefore, SAF has demonstrated a diversion of resources from the 10-day waiting period. Cf. Valle Del Sol, 732 F.3d at 1018; Fair Hous., 666 F.3d at 1219.

Because SAF has met both requirements, it has established its direct standing to challenge the 10-day waiting period laws. See id.

## 2. Representative Standing

An organization has standing to bring suit on behalf of its members if the organization shows: (1) its members would have standing to bring suit; (2) the lawsuit is germane to the organization's purpose; and (3) neither the claims asserted nor the relief requested require participation of a member. See Friends of the Earth, 528 U.S. at 181; Bellon, 732 F.3d at 1139.

CGF and SAF have met the requirements for representative standing by an organization. Both CGF and SAF have members in California who either already possess a firearm, a COE, or a CCW license, and plan on obtaining a firearm in the future. These California members' Second Amendment right to keep and bear firearms is burdened by the 10-day waiting period, see infra., and those members could have filed suit on their own behalf. The burden

imposed by the 10-day waiting period is germane to the purposes of both CGF and SAF. These organizations actively research, publicly address/educate, and litigate on Second Amendment issues. No specific members are necessary to either determine the constitutional validity of the challenged laws or to fashion a remedy. Therefore, CGF and SAF have representative standing to sue on behalf of their members. Friends of the Earth, 528 U.S. at 181; Bellon, 732 F.3d at 1139.

### III. SECOND AMENDMENT CHALLENGE

#### A. Contentions

##### *Plaintiffs' Contentions*

Plaintiffs argue that the 10-day waiting period interferes with the right to keep and bear arms, interferes with property rights, and causes additional expenses that may prevent a person from obtaining a firearm. Plaintiffs argue that there were no waiting period laws in existence in either 1791 or 1868, that waiting period laws are not prevalent today, and are not longstanding and presumptively lawful regulations.

Plaintiffs argue that it is unnecessary to determine whether intermediate or strict scrutiny applies because the waiting period laws will not pass intermediate scrutiny. Under intermediate scrutiny, the 10-day waiting period laws are justified as being necessary to do a background check and to provide a cooling off period. However, Plaintiffs argue that they do not contend that they should be exempt from a background check, rather their challenge deals with timing. As for background checks, 10-days is an arbitrary figure. For 20% of all applicants, the background check is approved and completed in about one hour. For those who already own a firearm and are known to be trustworthy due to the licenses that they hold and a history of responsible gun ownership, there is no justification for imposing the full 10-day waiting period. With respect to cooling off periods, Plaintiffs aver that for those individuals who already possess a firearm, the waiting period will not prevent impulsive acts of violence because the individual already has a firearm. As to concerns about whether a person may become prohibited from



possessing a firearm after the firearm has been delivered, California has implemented two “safety net” systems, APPS and rap back. These programs undercut the need to impose a full 10-day waiting period.

Plaintiffs propose that the Court should order modification of the background check system and waiting period laws as follows: Any person for whom Defendant can determine (a) has a valid and current CCW license, that person should be subject to the same background check as the 18 statutory exceptions to the 10-day waiting period and should not be subject to the 10-day waiting period; (b) has a valid and current COE and for whom the AFS system shows a firearm purchase since 1996, that person is subject to the same background check as the 18 statutory exceptions to the 10-day waiting period and should not be subject to the 10-day waiting period; and (c) has purchased a firearm that is documented in the AFS system since 1996, that person may take delivery of the firearm upon approval of the background check. See Doc. No. 91 at pp.29-30.

#### *Defendant's Contentions*

Defendant argues that the 10-day waiting period does not burden the Second Amendment. None of the organizational plaintiffs have attempted to purchase a firearm, and both Plaintiffs Jeff Silvester and Brandon Combs have possessed a firearm at all relevant times. The increased cost or minor inconvenience of having to make return trips to a gun store are de minimis.

Defendant also argues that the 10-day waiting period falls under one of the longstanding regulatory measures identified by the Supreme Court. The 10-day waiting period is a condition or qualification on the commercial sale of a firearm. As a longstanding and presumptively lawful regulation, the 10-day waiting period does not burden the Second Amendment.

Defendant also argues that in 1791 and 1868, the nature of production of firearms, where firearms were sold in relation to where people lived, and the relative expense of firearms made obtaining a firearm within 10 days of deciding to purchase one nearly impossible. As a result, the people of 1791 and 1868 would have accepted a 10-day waiting period before obtaining a firearm.





Defendant argues that if the Second Amendment is burdened, the 10-day waiting period's burden is not so severe as to justify strict scrutiny. Under intermediate scrutiny, the 10-day waiting period laws are constitutional. The waiting period laws serve the important interests of public safety and keeping prohibited persons from obtaining firearms.

The 10-day waiting period reasonably fits these interests in three ways. First, it provides sufficient time for the Department of Justice to perform a background check. The nature of the databases utilized often require analysts to seek out information and dispositions from other agencies, entities, and states, which can be extremely time consuming. Further, sometimes prohibiting information is entered into the system after the initial check. Without the 10-day waiting period, there could be an incomplete check and prohibited individuals could obtain firearms. Relying on a CCW license or a COE is not a substitute for the background check because new prohibiting events may have arisen after a person obtains the CCW license or COE. Second, it provides a cooling off period so that individuals will have time to re-think committing impulsive acts of violence. Suicide is often based on transient thoughts. Studies show that waiting periods limit a person's access to firearms, and allows time for the transient suicidal thoughts to pass. Even if a person has a firearm in the AFS system, there is no guarantee that the person still has the firearm. Further, a firearm may be in an inoperable condition, or a person may not have ammunition for the weapon. For those individuals, a cooling off period could be beneficial. Further, some guns are not suitable for some purposes, and a cooling off period for a newly purchased firearm is beneficial. Finally, the waiting period laws provide Department of Justice agents with additional time in which to investigate straw purchases. It is better to intercept a weapon before it is delivered to a purchaser. If the waiting period laws did not exist, law enforcement would have to perform more retrievals of firearms from straw purchasers. Therefore, the 10-day waiting period is a "reasonable fit" and constitutional.





## B. Findings of Fact

### 1. Impact of the 10-day Waiting Period

Unless a statutory exception applies, every person who wishes to purchase a firearm in California must wait at least 10-days from the date of purchase before taking possession of a firearm. See Cal. Pen. Code §§ 26815(a), 27540(a).

The 10-day waiting period affects a person's ability to defend themselves through the use of a newly purchased firearm. See Trial Tr. at 74:2-75:1. The 10-day waiting period interferes with the exercise of dominion over property with respect to a newly purchased firearm. See Trial Tr. 29:10-13, 74:21-75:1.

Generally, the 10-day waiting period requires a firearm purchaser to make at least two trips to a firearms dealer in order to complete a firearms transaction. The multiple trips required to complete a transaction can cause disruptions in work and personal schedules, extra fuel expense, and wear and tear on a car depending upon where a firearm or a firearms dealer is located in relation to the purchaser. See id. at 26:9-14, 33:16-34:12, 35:13-36:8. This can be a financial burden on a purchaser. See id. at 26:15-18, 84:15-85:3.

The 10-day waiting period may also necessitate additional fees for the transfer of firearms between dealers, so that a person can purchase a firearm from a more distant dealer, but can retrieve the firearm from a closer dealer. See 28:2-29:1.

Schedule conflicts and dealer location may cause a person to miss the window to retrieve a firearm after the 10-day waiting period has expired. See 65:12-66:10.

The additional transfer expenses, the impact on a purchaser's schedule, and/or the location of a firearm may combine with the 10-day waiting period to cause a person to forego purchasing a firearm. See 111:2-6.

Plaintiffs Brandon Combs ("Combs") and Jeff Silvester ("Silvester") each currently possess a firearm and both intend to purchase a firearm in the future. See 20:24-21:9, 49:12-19. Neither Combs nor Silvester is prohibited from owning or possessing a firearm in California. See id. at 21:10-11, 63:4-64:21. Both Combs and Silvester have foregone opportunities to purchase a firearm, or have been unable to complete the purchase of a firearm, due to



operation of the 10-day waiting period. See id. at 27:18-28:6, 29:2-9, 35:9-36:8, 74:21-75:1, 79:11-14, 82:6-84:1.

## 2. Waiting Period Laws

Defendant has identified no laws in existence at or near 1791 or 1868 that imposed a waiting period of any duration between the time of purchase and the time of possession of a firearm.

Defendant has identified no historical materials at or near 1791 or 1868 that address government imposed waiting periods or the perception of government imposed waiting periods in relation to the Second Amendment.

To the Court's knowledge, ten states and the District of Columbia impose a waiting period between the time of purchase and the time of delivery of a firearm. Three states and the District of Columbia have waiting period laws for the purchase of all firearms: California (10 days), District of Columbia (10 days),<sup>11</sup> Illinois (3 days for pistols, 1 day for long guns),<sup>12</sup> and Rhode Island (7 days).<sup>13</sup> Four states have waiting periods for hand guns: Florida (3 days),<sup>14</sup> Hawaii (14 days),<sup>15</sup> Washington (up to 5 days from the time of purchase for the sheriff to complete a background check),<sup>16</sup> and Wisconsin (2 days).<sup>17</sup> Connecticut has a waiting period for long guns that is tied to an authorization to purchase from the Department of Emergency Services and Public Protection.<sup>18</sup> Minnesota and Maryland have a waiting period for the purchase of handguns and assault rifles (7 days).<sup>19</sup> There is no federal waiting period law. See 18 U.S.C. § 922(s) (Brady Act's 5-day waiting period expired in 1998).

In 1923, the California Legislature created a waiting period for handguns, whereby no handgun, pistol, or other concealable firearm could be delivered to its purchaser on the day of purchase. See Def. Ex. CD (1923 Cal. Stat. ch. 339 §§ 10, 11).

In 1953, the 1923 handgun waiting-period law was codified into the California Penal Code with no substantive changes. See Def. Ex. CE (1953 Cal. Stat. ch. 36 §§ 12071, 12072). One California court has cited legislative hearing testimony from 1964 in which witnesses testified that this 1953 law was "originally enacted to cool people off," but that this law was "not enforced with regard to individual transfers through magazine sales nor at swap meets."<sup>20</sup> People v. Bickston, 91 Cal.App.3d Supp. 29, 32 & n.4 (1979).

In 1955, the California Legislature extended the handgun waiting period from 1 day to 3 days. See Def. Ex. CF (1955 Cal. Stat. ch. 1521 §§ 12071, 12072). No legislative history has been cited that addresses why the waiting period was extended from 1 to 3 days.

In 1965, the California Legislature extended the handgun waiting period from 3 days to 5 days. See Def. Ex. CI at AG000401-402 (1965 Cal. Stat. ch. 1007 §§ 12071, 12072).

The legislative history indicates that the Legislature extended the waiting period from 3 days to 5 days in 1965 because the 3-day waiting period did not provide Cal. DOJ sufficient time to conduct proper background checks on prospective concealable firearms purchasers, before delivery of the firearms to the purchasers. See Bickston, 91 Cal.App.3d Supp. at 32; Def. Ex. CI at AG000468 (June 30, 1965 letter from Cal. Assemblymember Beilenson letter to the Governor); Def. Ex. CI at AG000470 (June 24, 1965 letter from Assistant Attorney General Barrett to the Governor). Additionally, a report from the 1975-1976 session of the Senate Judiciary Committee indicates that the “purpose of the 5-day provision is to permit the law enforcement authorities to investigate the purchaser’s record, before he actually acquires the firearm, to determine whether he falls within the class of persons prohibited from possessing concealed firearms.” Def. Ex. CH at AG000298 (Cal. S. Comm. on the Judiciary, 1975-76 Regular Sess., Rep. on A.B. 1441, at 1-2 (1975)). No legislative history relating to the 1965 law has been cited that relates to a “cooling off” period.

In 1975, the California Legislature extended the handgun waiting period from 5 days to 15 days. See Def. Exh. CH (1975 Cal. Stat. ch. 997 §§ 12071, 12072).

The legislative history indicates that the California Legislature extended the waiting period from 5 days to 15 days in order to “[g]ive law enforcement authorities sufficient time to investigate the records of purchasers of handguns prior to delivery of the handguns.” Def. Ex. CH at AG000297 (Cal. S. Comm. on the Judiciary, 1975-76 Regular Sess., Rep. on A.B. 1441, at 1-2 (1975)). A waiting period of 5 days was thought to be “inadequate for the [California] Bureau [of Firearms] to thoroughly check all records of the purchasers . . .” Id. at AG000344 (September 15, 1975 letter from Cal. Assemblymember Murphy letter to the Governor).

No legislative history relating to the 1975 law has been cited that addresses a “cooling off” period.

In 1991, the California Legislature expanded the waiting period to cover all firearms. See Cal. Pen. Code §§ 12071, 12072 (1991 ed.) & Historical & Statutory Notes for 1990 Legislation. In 1996, the California Legislature reduced the waiting period from 15 days to 10 days. See Def. Ex. CG (Cal. S.B. 671, 1995-96 Regular Sess., ch. 128 sections 12071(b)(3)(A), 12072(c)(1)); Trial Tr. 169:2-5.

The California Legislature reduced the waiting period from 15 days to 10 days because the California Department of Justice (“Cal. DOJ”)’s Bureau of Firearms (“BOF”) switched to an electronic database system, which allowed for faster processing of background checks. See Def. Ex. CG at AG000061, AG000212 (Cal. S.B. 671, 1995-96 Regular Sess., S. Third Reading, as amended Jun. 4, 1996); see also Def. Ex. CG at AG000057 (“This bill will assist the Department and gun dealers in expediting the background check process.”). BOF is the agency within Cal. DOJ that conducts background checks on prospective firearm purchasers. See Trial Tr. 167:11-13.

A report from the Senate Committee on Criminal Procedure and a report from the Assembly Committee on Public Safety indicate that the waiting period is used to provide time to complete a background check and to provide a “cooling off” period. See Def. Ex. CG at 2099- 0051 and AG000075. However, no legislative history related to the 1996 law has been cited that deals with specific findings or evidence related to the “cooling off” period.

One California court has opined: “[I]t appears that an original intent to provide at least an overnight cooling-off period from ‘application for the purchase’ was supplemented over the years with additional time to allow the Department of Justice to investigate the prospective purchaser of the weapon.” Bickston, 91 Cal.App.3d Supp. at 32.

### 3. The California Background Check

The California background check begins with the completion and submission of a Dealer Record of Sales (“DROS”). See Trial Tr. 170:21-24. The DROS is an application form that a gun dealer electronically submits to Cal. DOJ, which contains information about the prospective purchaser, the firearm, and the dealership. See id. at 171:3-19.



After Cal. DOJ receives a DROS application, BOF begins the background check process on the prospective purchaser. See id. at 171:18-172:3.

The DROS application is sent to Cal. DOJ's Consolidated Firearms Information System ("CFIS"), which is a computerized system. See id. at 292:7-16. CFIS coordinates the electronic portion of the background check process, called the Basic Firearms Eligibility Check ("BFEC"), by sending inquiries to other electronic databases and compiling the responses.<sup>21</sup> See id. at 292:17-294:1.

The first database queried as part of the BFEC is California's Department of Motor Vehicles ("DMV") database.<sup>22</sup> See id. at 294:2-3.

The identification information on the DROS application is verified with DMV for several reasons: to ensure that the background check is run on the correct person, to prevent the occurrence of "straw purchases,"<sup>23</sup> and to prevent people from using fake identification to purchase firearms. See id. at 236:23-237:9. Cal. DOJ sends a DROS applicant's California driver's license or California identification number to the DMV database. See id. At 294:4-9. The DMV database then returns the person's name, date of birth, and license status to Cal. DOJ. See id.

The name and date of birth returned by the DMV database are checked against the name and date of birth on the DROS application to see whether the information matches. See id. at 294:10-18. If the information matches and the driver license status is valid, the system continues to the next check within the BFEC process. See id. at 294:19-21. If the information does not match, a "DMV mismatch" is recorded, the background check process stops, and the DROS application is sent to a DMV mismatch queue for Cal. DOJ analysts, who are known as Criminal Identification Specialist IIs ("CIS Analysts"), to review. See id. at 200:12-17, 294:22-295:6.

CIS Analysts must verify the information before making a final determination as to whether there is a mismatch. See id. at 238:13-239:2. A DMV mismatch does not necessarily indicate that the person is prohibited from owning or possessing a firearm. See id. at 237:10- 238:12. A DMV mismatch can occur for an innocent reason, such as if a dealer incorrectly enters information on the DROS application, or if the applicant has changed his/her name



and is using the new name to purchase the firearm, but has not yet updated that information with the DMV. See id.

Unless a DMV mismatch can be corrected by a CIS Analyst, the DROS application must be rejected. See id. at 172:4-11, 238:17-25.

Once a DROS application successfully passes the DMV database check, the next step in the BFEC process is for the DROS application to be queried against the Automated Firearms System (“AFS”) database. See id. at 295:9-12. The AFS database checks to see if the subject firearm has been reported as lost or stolen. See id. at 173:7-14, 295:19-20.

The AFS contains various firearms records, but does not contain records for every gun in circulation in California. See id. at 180:17-19. The bulk of the firearms records in the AFS database are DROS’s that were made on a particular date and time. See id. at 180:21-24. DROS records from January 1, 2014 forward are kept for long guns. See id. At 181:24-182:1. Although they may go back earlier, the bulk of the DROS records for handguns are from 1996 forward. See id. at 340:1-11. Registrations of certain weapons classified as “assault weapons” from 1989 to 2001 are contained in the AFS. See id. at 181:2-7. The AFS also contains records of CCW license holders. See id. at 181:8-9. The AFS also contains law enforcement reports of weapons that have been identified as being lost, stolen, evidence, held for safekeeping, or retained for official use. See id. at 181:9-13. Finally, the AFS contains voluntary reports of people who have obtained a firearm by various methods, such as operation of law, an inter-family transfer, or transfers relating to curios and relic collections. See id. at 181:14-21. The AFS database is not an “absolute database,” but is a type of “leads database” that reflects Cal. DOJ’s belief about whom the last possessor of a firearm was based on the most recent DROS transaction. See id. 253:11-14. Law enforcement personnel can access the AFS in the field in real time, and law enforcement officers view the AFS database as reliable. See id. at 251:19-22, 252:15-21, 443:3-20.

If the AFS search finds that the subject firearm has been reported as lost or stolen, Cal. DOJ notifies the local law enforcement agency that made the report and requests that the agency conduct an investigation to confirm that the firearm involved in the pending DROS transaction is the same firearm that was reported as lost or

stolen, and to confirm whether the “lost or stolen” entry in the AFS database is still valid and active. See id. at 174:5-14. The resulting investigations by local law enforcement agencies require them to take an active role to confirm that the firearm on the DROS application is actually the firearm that was reported as lost or stolen. See id. at 175:5-9. How soon an agency begins its investigation depends on the agency’s priorities, and the issue is rarely resolved within one day’s time. See id. at 175:10-15.

If a gun passes the AFS database check, and if the subject gun is a handgun, then the CFIS conducts a 30-day purchase-restriction check.<sup>24</sup> See id. at 296:5-8.

CFIS checks within its own database to determine whether the DROS applicant purchased another handgun within the previous 30 days. See id. at 296:9-12. If the DROS applicant purchased another handgun within 30 days, then the background check stops and the DROS application is denied. See id. at 296:13-15.

If the DROS applicant has not purchased a handgun within the previous 30 days, CFIS continues to check whether the applicant has had a previous application denied. See id. at 296:16-23. If so, summary information regarding the previous denial is electronically appended to the background check results for a CIS Analyst to review at a later time. See id. at 296:24-297:3. The background check then continues forward. See id. at 297:3-4.

The next step in the BFEC process for all firearms is for the DROS application to be queried against the Automated Criminal History System (“ACHS”). See id. at 297:14-18. ACHS is a state database that contains criminal history information reported to Cal. DOJ by criminal justice agencies in California. See id. at 176:7-16.

The DROS applicant’s name, variations on the DROS applicant’s name (e.g. Robert, Bob, Bobby), date of birth, a range of dates around the date of birth, and any other identifying information from the DROS application, are all run through the ACHS database as part of an initial check. See id. at 297:19-22, 298:22-299:8. As part of the initial check, ACHS also will query three other databases: the Wanted Persons System (“WPS”) database, the California Restraining and Protective Order System (“CARPOS”) database, and the Mental Health Firearms Prohibition System (“MHFPS”) database. See id. at 297:23-298:7. WPS is a California state database

that contains records of warrant information. See id. At 184:10-21. A person with a record in WPS could potentially be prohibited from possessing a firearm. See id. at 184:14-18. Under federal law, any warrant prohibits the wanted person from owning or possessing a firearm, and under state law, persons wanted for a felony offense are prohibited from owning or possessing a firearm. See id. at 184:22-185:6.

CARPOS is a California state database that contains information on restraining and protective orders. See id. at 182:16-21, 184:6-9. CARPOS is queried in order to detect domestic violence restraining orders and certain protective orders that would prohibit the DROS applicant from owning or possessing a firearm. See id. at 182:22-25.

MHFPS is a California state database that contains mental health records and records of certain prohibited juveniles. See id. at 185:18-186:2. MHFPS is queried in order to detect prohibitions under California law relating to mental health issues. See 186:3-187:17.

The initial check is to see if there is more detailed information about the DROS applicant contained within any of the ACHS, WPS, CARPOS, and MHFPS databases. See id. at 298:17-21.

If the name variations and possible birth dates run in the initial check match records in ACHS's own database, then ACHS returns "criminal identification information" ("CII") numbers associated with the records. See id. at 300:1-13, 327:19-22. CFIS then conducts a subsequent query of the ACHS database utilizing the unique CII numbers to obtain more detailed criminal history information about the DROS applicant. See id. at 300:1-13. If any of the variant names and birth dates match information contained in the WPS, CARPOS, or MHFPS, then the CFIS system will do a subsequent check of those databases using the particular name and birthdate that generated a match during the initial search so that more detailed information/records can be obtained. See id. at 298:17-21, 300:14-301:23.

If matches are found in the ACHS, WPS, CARPOS, or MHFPS databases, the information is appended to the results of the background check. See id. at 301:18-23.

After the ACHS, WPS, CARPOS, or MHFPS queries are complete, the next step in the BFEC process is for the DROS



application to be queried against the federal National Instant Criminal Background Check System (“NICS”) database. See id. at 302:1-3.

NICS checks are similar to ACHS checks in that NICS does a name variant and birth date range check. See id. at 302:4-11. Also similar to ACHS, NICS will conduct a search of its own database as well as a search of three other federal databases: the Interstate Identification Index (“IIP”) database, the National Crime Information Center (“NCIC”) database, and the Immigration and Customs Enforcement (“ICE”) database. See id. at 191:6-8, 193:13-14, 194:17-25, 195:1-3, 302:12-17.

The IIP database contains criminal history records from California and other states that share their criminal history records with the FBI. See id. at 191:6-16. If a person is convicted of a felony in any state, that person is prohibited from owning or possessing a firearm under California law. See id. at 192:1-4.

The NCIC database contains federal warrants, domestic violence restraining orders, and stolen gun information. See id. at 193:15-19.

The ICE database helps to identify people who are in the United States unlawfully. See id. at 195:1-7.

If there are matches or “hits” in the NICS system, the CFIS system goes into a response process. See id. at 303:3-7. The CFIS system will check if there is an FBI number or a state identification number from another state that was included in the NICS response. See id. at 303:7-8. If there are FBI or state identification numbers, then the CFIS system will send another transaction out specifically to the IIP database to see if there is additional information. See id. at 303:9-12.

After the NICS check is completed, the BFEC is considered complete. See id. at 303:13-16. All results obtained by CFIS through the BFEC’s search of databases are attached to the DROS application, and those DROS applications for which there is a hit/match are placed into the DROS processing queue for a CIS Analyst to review. See id. at 200:6-11, 303:13-304:3. The processing queue is an electronic queue. See id. at 200:9-10.

CIS Analysts first review records in the DMV mismatch queue to determine whether there is a real mismatch of the applicant’s identity in the DMV records, or whether the records can be fixed



and a match can be made. See id. at 316:20-317:15. If the CIS Analyst is able to correct the mismatch, the CIS Analyst will then send the DROS application through the BFEC process. See id. If a match cannot be made, the DROS application is rejected. See id. at 317:3-5.

CIS Analysts then verify that each DROS applicant is the same individual matched by the computer to the criminal and other database records. See id. at 201:16-20.

CIS Analysts then look into the record to determine if the information in the record would prohibit the individual from possessing a firearm. See id. at 201:20-22. If there is information in the record that would prohibit possession of the firearm, then the CIS Analyst verifies the prohibiting information. See id. at 201:23-202:6. If the CIS Analyst determines that an individual is prohibited from purchasing or possessing a firearm, the CIS Analyst instructs the dealer not to deliver the firearm to the DROS applicant. See id. at 202:7-10.

The amount of time it takes a CIS Analyst to process a queued DROS application depends upon the size of the records involved and the number of databases for which there have been hits. See id. at 202:11-14. It is “fairly routine” for a CIS Analyst to take longer than a day to process a queued DROS application. See id. at 202:15-20.

CIS Analysts may have to confirm or discover a disposition as part of the process of verifying prohibiting information. For example, if the disposition of a prohibiting arrest was a conviction, the person would not be eligible to own or possess a firearm, but if the conviction was dismissed or reduced, the person may be eligible. See id. at 179:11-25.

In cases in which an arrest record contains no dispositional information, the CIS Analyst must obtain a final disposition on that arrest to determine whether the person is actually prohibited. See id. at 201:23-202:6. Without dispositional information, a CIS Analyst cannot determine whether an individual is eligible to own and possess a firearm because there must be a conviction for there to be a prohibition. See 323:12-21. If there is an open disposition, a CIS Analyst has to obtain the disposition, which could mean telephoning a local law enforcement agency, a district attorney, or a court to try

to find out the disposition (for example, a conviction or a dismissal). See id. at 180:5-13, 201:23-202:6, 323:12-324:1. Dispositional records could be lost, missing, or purged. See 177:10-11.

In addition to obtaining and confirming in-state records, CIS Analysts routinely “chase down” out-of-state dispositions. See id. at 192:14-21. The federal III database, which contains criminal history information from other states, often does not contain complete and accurate records on out-of-state criminal convictions. See id. at 192:5-8. Dispositional information is frequently missing in the III records. See id. at 192:9-13. CIS Analysts then have to call or fax courts of other states or federal courts to obtain the disposition information. See id. at 192:22- 193:12.

Obtaining the necessary dispositional information from either in-state or out-of-state courts can be a very lengthy process. See 180:11-13.

For cases in which there is a disposition, CIS Analysts review criminal history or other relevant records to confirm that Cal. DOJ is correctly approving or denying a DROS application. See id. at 178:12-20.

Further, mental health facilities get information from the patients, who may not be able to provide accurate personal information, and this may cause the CIS Analysts to contact the mental health facility to ensure that a person is not prohibited. See id. at 455:17-456:5.

CIS Analysts must also review and verify the results of the federal NCIC queries because NCIC results are based on a person’s name. See 193:20-194:7. CIS Analysts may also need to contact the relevant agencies to confirm that certain warrants are still active because sometimes the warrants are no longer valid. See id. at 194:4-13.

In addition to obtaining missing dispositional information, CIS Analysts must inquire into the background or details of records to make the correct determination on a prohibition. See id. at 319:1-14. For example, an analyst may have to determine whether a felony that was reduced to a misdemeanor actually could have been reduced. See id. at 319:15-18; see also 319:23-320:7. To conduct such an investigation, the CIS Analysts must contact the arresting agency for a copy of the arrest report and review that report and determine the relationship between the offender and the victim. See 320:8-17.

Similarly, if a member of the military is arrested out of state for possession of a controlled substance, a CIS Analyst must determine the disposition, determine whether the member was subject to a court-marshal, and find out the type of discharge the individual may have received (i.e., honorable or dishonorable). See id. at 320:23-321:7. To conduct this investigation, the CIS Analyst must obtain specific information from the military. See id. at 321:16-22.

CIS Analysts may also have to decipher people's names because aliases may be used. See id. at 455:4-16.

Not all DROS applications go to the processing queue for an analyst to review. See id. at 303:19-21. If a DROS application has been checked by all of the databases, and there are no hits or matches found in any of the databases, then that DROS application is considered "auto- approved" and is not put into any queue for a CIS Analyst to review. See id. at 198:5-12, 303:22-304:3. The BCEF currently does not check to see if a DROS applicant has a COE, a CCW license, or a firearm within the AFS system. However, it is possible for the BCEF to include an automated search to determine whether a DROS applicant has a COE, a CCW license, or a firearm in the AFS system. See id. at 279:11-281:24. Such a check would be "simple." See id. at 279:23.

The BFEC may result in one of six dispositions: approved, denied, delayed, undetermined, approved after delay, and denied after delay.<sup>25</sup> See id. at 505:11-17. A DROS application may be delayed for up to 30 days in order for BOF to further investigate whether the applicant is prohibited from possessing a firearm. See id. at 506:11-21. For dispositions that result in a finding of "undetermined," i.e. BOF cannot determine whether a person is prohibited from possessing a firearm, the dealer has the discretion to either refuse or permit the transfer of the firearm. See id. at 232:6-15, 506:24-507:3.

Once BOF approves a DROS application, the DROS applicant has 30 days in which to take possession of the firearm. See 27 C.F.R. § 478.124; see also Cal. Pen. Code § 26835(f); Trial Tr. 459:10-13. Accordingly, BOF considers a completed and approved background check to "be good" for 30 days. See Trial Tr. at 459:10-13.

#### 4. DROS Processing

Cal. DOJ can receive between 1,500 and 10,000 DROS applications per day, but on average, it currently receives between

2,000 to 3,000 DROS applications per day. See id. at 172:24-173:1, 456:6-8.

In 2010, Cal. DOJ processed 498,945 DROS applications, and had 5,026 denials. See Def. Ex. AA. Therefore, about 99% of DROS applications were approved and found to have been submitted by non-prohibited citizens in 2010.

In 2011, Cal. DOJ processed 601,243 DROS applications, and had 5,805 denials. See id. Therefore, about 99.1% of DROS applications were approved and found to have been submitted by non-prohibited citizens in 2011. In 2012, Cal. DOJ processed 817,738 DROS applications, and had 7,524 denials. See id. Therefore, about 99.1% of DROS applications were approved and found to have been submitted by non-prohibited citizens in 2012. Of the denials, most were crime related, but 793 were due to mental health prohibitions and 405 were due to domestic violence restraining orders. See Defendant's Ex. AO.

In 2013, Cal. DOJ processed 960,179 DROS application, and had 7,371 denials. See Defendant's Ex. AP; 489 Trial Tr. 332:4-14, 453:4-7. Therefore, about 99.3% of DROS applications were approved and found to have been submitted by non-prohibited citizens in 2013. Of the denials, most were crime related, but 810 were due to mental health prohibitions and 460 were due to domestic violence restraining orders. See Defendant's Ex. AP.<sup>26</sup>

There is always a backlog of DROS applications in the electronic DROS application queue for background checks, and the current backlog stands at about 20,000 DROS applications. See id. at 314:11-20. There are 24 CIS Analysts, and they typically work well in excess of 40 hours a week to keep up with the influx of DROS applications.<sup>27</sup> See id. at 200:18-19, 203:1-8, 313:7- 314:13. CIS Analysts are required to work mandatory overtime hours (between 30 and 40 overtime hours per week) in order to address the backlog of queued DROS applications. See id. 313:7-314:3.

If a DROS application has been in the DROS application queue for an extended period of time before a CIS Analyst can review it, e.g. day 8 or 9 of the 10-day waiting period, then the CIS Analyst will re-run that DROS application through a "refresher" check of the CFIS state data bases in order to ensure that all updated information is in the CIS Analyst's possession. See id. At 322:3-23, 475:1-14.



There have been instances in which additional prohibitors have arisen between the time the DROS application is submitted and the time in which the CIS Analyst reviews the application. See id. at 322:18-21. However, no evidence was presented that quantifies how many times new prohibitors have arisen between the initial check and the refresher check.

Approximately 80% of all DROS applications are not auto-approved and require the review of a CIS Analyst. See id. at 200:2-5.

Approximately 20% of all DROS applications are auto-approved and do not go into the DROS application queue for review by a CIS Analyst. See id. at 198:13-15, 303:22-304:3.

Depending on network traffic or database maintenance issues, a DROS application can be auto-approved somewhere between 1 minute and 120 minutes, but “probably” auto approvals occur within 60 minutes.<sup>28</sup> See id. at 240:1-6, 307:22-309:15.

The only time that a CIS Analyst would review an auto-approved DROS application is if BOF is contacted about a particular DROS applicant by an outside source, such as a law enforcement officer or a medical professional. See 199:8-200:1. Outside requests to further investigate an auto-approved DROS application occur “occasionally.” See id. at 199:14-16. No evidence was presented to quantify or explain what is meant by “occasionally.” No evidence was presented concerning at what point in the 10-day waiting period the outside requests are received. No evidence was presented as to how many of the outside requests ultimately led to a denial of the auto-approved DROS applications.

There is no evidence of the average amount of time it takes to complete a “non-auto approved” DROS application. However, because of the daily applications received and the backlog, sometimes a CIS Analyst will not begin to review a queued DROS application until day 8 or 9 of the 10 day waiting period. See id. at 322:3-5.

BOF employees believe that 10 days is a sufficient period of time in which to complete a background check. See 473:25-474:5.

If a background check is completed prior to 10 days, the firearm is not released because state law mandates a 10-day waiting period. See id. at 244:5-12.



### 5. Information Entry In The Cal. DOJ Databases

Cal. DOJ databases may not have the most up-to-date information because reporting agencies may fail to submit information to the Cal. DOJ databases or may delay in submitting information to Cal. DOJ databases. See Trial Tr. 177:2-15, 187:8-188:15, 220:23-221:2, 324:13-16.

ACHS is not always up-to-date with criminal history records for various reasons, including a lag time between actual disposition and entry of the disposition, and occasionally records are lost, purged, or never reported. See id. at 177:5-15.

Records in the MHFP are often not complete or up-to-date. See id. 187:8-10. Even though mental health facilities are required by law to report prohibiting events immediately, some facilities still submit records only periodically despite the ability to electronically report immediately. See id. at 187:23-188:7. Further, some courts have not been reporting mental health prohibition information as required by law, and when the state courts do report prohibiting events, the reports are done through the mail, which results in a time lag between when the courts mail the reports and when Cal. DOJ receives and processes them.<sup>29</sup> See id. at 187:13-188:15.

### 6. Cooling Off Period

A cooling off period is a period of time that is intended to provide a person with the opportunity to gather their emotions, so that they do not obtain a firearm in a state of anger and make impulsive decisions to commit acts of violence against themselves or others. See Trial Tr. 232:16-233:7, 499:16-24.

No evidence has been submitted regarding current or historical California suicide statistics or “time to crime” statistics.<sup>30</sup>

One study that examined 30 survivors of firearm suicide attempts indicated that suicide can be a relatively impulsive act in that more than half of the 30 survivors reported having suicidal thoughts for less than 24 hours. See Defendant’s Ex. DS at 230. Other studies indicate that, of the total number of survivors studied, more than half had considered suicide for less than one hour prior to their attempt. See Defendant’s Ex. DG at p.28. Another study indicates that risk periods for suicide are transient. See Defendant’s Ex. DT at 61.

In order to limit the access of a suicidal individual to a handgun, one recent study recommends a waiting period combined with a permit requirement. See Defendant's Ex. DG at 29. The study hypothesizes that for "a suicidal person who does not already own a handgun, a delay in the purchase of one allows time for suicidal impulses to pass or diminish." Id. No specific waiting period is advocated by this study.

Studies regarding suicide rates and waiting period laws conducted prior to 2005 are generally considered inconclusive. See Eugene Volokh, Implementing the Right To Keep And Bear Arms For Self-Defense: An Analytical Framework And A Research Agenda, 56 UCLA L. Rev. 1443, 1538 (citing Robert A. Hahn, et al., Firearms Laws and the Reduction of Violence: A Systematic Review, 28 Am. Jnl. of Preventative Med. 40, 52 (2005)).

One study examined the national homicide and suicide rates between 1985 and 1997 in light of the enactment of the Brady Act. See Defendant's Ex. DH. For victims aged 21 to 55, no statistically significant differences between treatment states and controls states were found, as to either homicide rates or suicide rates. See id. at 588, 590. However, a decrease in suicide rates for individuals over the age of 55 was observed. See id. The decrease was at least partially offset by an increase in non-gun suicides, which makes it less clear that the waiting period reduced overall suicides for those over age 55. See Defendant's Ex. EJ.

One study performed in 1992 found that only 3% of suicides occur within 2 weeks of obtaining a firearm. See Defendant's Ex. DW at 235 (discussing Kellerman, A.L, et al., Suicide In The Home In Relationship To Gun Ownership, N. Eng. J. Med. 327:467-472 (1992)).

One study examined suicide rates for the 238,292 individuals who purchased handguns in California in 1991. See Defendant's Ex. DV. From 1991 to 1996, the waiting period in effect in California for handguns was 15 days. See id. The study concluded that those who purchase a handgun have a substantially increased risk of firearm suicide, beginning with the first week of purchase and lasting for six years. See id. Of the 238,292 purchasers, 48 committed suicide within two weeks of obtaining the firearm (after having waited 15 days), and 40 purchasers were murdered

with firearms within the first month of obtaining a handgun. See id. at 1585.

### 7. Criminal Investigations Of Straw Purchases

A “straw purchase” is a purchase that a non-prohibited person makes for someone who is prohibited from owning and possessing a firearm. See Trial Tr. 343:4-14. Straw purchases are prohibited under federal law, and may implicate California law. See 18 U.S.C. §§ 922, 924; Abramski v. United States, 134 S.Ct. 2259 (2014); Cal. Pen. Code §§ 27545, 27590.

Some straw purchasers have never purchased a firearm in California, and some straw purchasers previously have purchased firearms in California. See id. at 350:12-16.

Gun dealers have the right to refuse to conduct a sale of a firearm. See id. at 405:1-3. Dealers can also be indicted for conspiring to facilitate straw purchases of firearms, and so have an incentive to report a suspected straw purchase. See id. at 405:18-25.

Cal. DOJ special agents attend gun shows to ensure that promoters are in compliance with the law and to prevent prohibited persons from obtaining firearms, magazines, or ammunition.

See id. at 342:14-25. Special agents also look for potential straw purchases of firearms. See id. at 343:1-16.

The special agents attempt to identify the parties involved in a straw purchase, such as through license plates, business cards on tables, or observing printed forms being filled out. See id. at 346:14-347:10, 400:1-7. As many as four individuals may participate in a straw purchase at a gun show. See 346:14-347:1. Agents spend a good portion of their time attempting to determine whether any person whom they have identified at the gun show is a prohibited person. See id. at 398:9-399:2.

The special agents attempt to complete an investigation within 10 days because the agents want to be able to intercept the firearm before it is delivered to the straw purchaser. See id. at

348:14-25. Because of the nature of the investigation, if the waiting period were 3 days instead of 10, it would be nearly impossible for the special agents to complete an investigation of a gun show straw purchase prior to delivery of the firearm. See id. at 348:14-349:12. The special agents prefer to intercept a firearm before the firearm is transferred from the straw buyer to the prohibited person



because it keeps the firearm off of the street and out of trouble. See id. at 349:13-21.

There are other ways in which the special agents become aware of straw purchases besides observations at gun shows. See id. at 351:3-6. The federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (“BATFE”) and the gun dealers themselves may report suspicious activity, as well as special agent inspections of a gun dealer’s records. See id. at 351:8-20. Depending on when the information is obtained by the special agent, the 10-day waiting period may aid the special agents in determining whether a transaction is a straw purchase and may help the agents intercept the firearm. See 353:6-9, 354:21-355:7, 356:10-16. However, sometimes the special agents must go retrieve the firearm from the straw purchaser because the firearm has already been delivered. See id. at 349:22-23, 354:21-355:7, 407:22-408:6, 408:19-24. For straw purchases detected through an inspection of a dealer’s records, the firearm in question usually will have left the store by 30 to 60 days. See id. at 407:22-408:15.

There is no evidence concerning how many straw purchase arrests are made/violations determined by the special agents. There is no evidence that describes what percentage of straw purchase investigations are from gun shows or BATFE reports or dealer reports or dealer inspections. However, in approximately 15% of the straw purchase investigations, the weapon was intercepted within the 10-day waiting period. See id. at 408:16-24. Approximately 85% of straw purchase investigations do not conclude within the 10-day waiting period and a retrieval of the firearm may then be necessary. See id.

#### 8. The APPS System

The Armed and Prohibited Persons System (“APPS”) is a database that cross-references persons with firearms records in the AFS, typically a DROS record, with those who have a prohibiting conviction or circumstance. See Trial Tr. At 216:21-217:2. The APPS database consults each of the state databases involved in a BFEC, i.e. the AFS, ACHS, WPS, CARPOS, and MHFPS databases. See id. at 475:17-476:10. However, the APPS database is prohibited by law from accessing the NICS system. See id. at 475:11-15. APPS became active in 2007. See id. at 337:19-21.





APPS is updated on a 24 hour 7 days a week basis. See id. at 497:25-498:7.

The purpose behind APPS is to identify prohibited persons who have firearms and to enable law enforcement to retrieve the firearms before those persons can use the firearms to harm others or themselves. See id. at 217:21-218:3. APPS is a kind of “pointer tool” that identifies people who may be armed and prohibited in a particular law enforcement agency’s jurisdiction, but the information in APPS must be updated and verified before any law enforcement action can be taken. See id. at 218:4-219:7, 337:4-10. As part of the verification process, dispositions sometimes must be “chased down” by an analyst. See id. at 219:11-20.

The BFEC and waiting period is designed to stop a prohibited person from obtaining a firearm, whereas the APPS system is designed to retrieve a firearm from someone who has subsequently become prohibited from possessing a firearm. See id. at 420:11-16, 497:10-15.

APPS records-matching software searches for only an exact name and date of birth, whereas the BFEC searches for name variants and date of birth ranges. See id. at 304:16-305:10. That is, the APPS check will only find exact matches to the name entered, but will not find variations of a name. See id. at 304:24-305:18.

There are 21,000 people identified as armed and prohibited in the APPS system, and these individuals purchased firearms prior to becoming prohibited from doing so. See id. at 338:2-8. Not every person who has become prohibited from possessing a firearm is in the APPS system. See id. at 219:7-10, 340:15-18. Most of the APPS candidates are pulled from records concerning handguns that were sold in California from 1996 forward. See id. at 340:3-11.

### 9. Rap-Back

A “rap-back” is a notification that Cal. DOJ receives whenever someone with fingerprints on file with Cal. DOJ is the subject of a criminal justice agency record, e.g. a notification of a subsequent arrest record. See Trial Tr. 221:21-222:9, 492:7-12. Rap-back is fingerprint based, which means the match is done by fingerprint. See id. at 223:19-20.

A non-fingerprint based event, such as a mental health hold or a restraining order, would not be discovered through rap-back. See



id. at 223:13-16, 224:8-9. Cal. DOJ does not receive rap-backs for persons who are arrested or convicted outside of California. See id. at 224:25-225:2.

Rap-back mainly deals with people who are in the criminal history system and who have fingerprints on record. See 493:8-14. In contrast, APPS deals with people who may or may not have fingerprints in the criminal history system, but who nevertheless are found in a non-fingerprint database, such as the MHFP database. See id. at 493:8-12.

#### 10. CCW Licenses

California law provides for either the sheriff of a county or the chief of police of a city to issue a CCW license to a citizen. See Cal. Pen. Code §§ 26150 (sheriff), 26155 (chief of police); Trial Tr. 458:19-20. CCW licenses apply to pistols, revolvers, or firearms that are capable of being concealed upon a person. See Cal. Pen. Code §§ 26150, 26155. A CCW license allows an individual to carry a concealed firearm in public. See id.

CCW licenses, amendments to CCW licenses, and applications for a CCW license are required to be uniform throughout California. See Cal. Pen. Code § 26175; Scocca v. Smith, 912 F.Supp.2d 875, 883 (C.D. Cal. 2012).

In order to obtain a CCW license, an applicant must prove to the sheriff or chief of police that: (1) the applicant is of good moral character; (2) good cause exists for issuance of the license; (3) the applicant either is a resident of the city or county, or has a place of business/employment within the city or county and spends a substantial period of time at the place of business/employment; and (4) the applicant has completed the training course required by Penal Code § 26165.<sup>31</sup> See Cal. Pen. Code §§ 26150, 26155. CCW license applicants must submit fingerprints along with the CCW license application, and those fingerprints are submitted to Cal. DOJ. See Cal. Pen. Code § 26185(a)(1); Scocca, 912 F.Supp.2d at 883. Additionally, if there is “compelling evidence,” an applicant may be required to submit to psychological testing before being issued a CCW license. See Cal. Pen. Code § 26190(f).

Once Cal. DOJ receives the fingerprints, Cal. DOJ sends a report to the licensing agency relating to the CCW license applicant, including whether the person is prohibited under state or federal law

from possessing, receiving, owning, or purchasing a firearm. See Cal. Pen. Code §26185(a)(2).

The sheriff or chief of police may not issue a CCW license until he or she receives the Cal. DOJ report on the CCW applicant. See Cal. Pen. Code § 26185(a)(3). No CCW license may be issued if the Cal. DOJ “determines that the person is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm.” Cal. Pen. Code § 26195(a); Scocca, 912 F.Supp.2d at 883.

Once a CCW license is issued, it is valid for up to two years. See Cal. Pen. Code § 26220(a).

The sheriff or police chief may include reasonable restrictions or conditions that they deem warranted, including restrictions as to the time, place, manner, and circumstances under which the CCW license holder may carry a concealed handgun. See Cal. Pen. Code § 26200(a). With some exceptions, the general rule is that a CCW license has applicability throughout the state of California. See Scocca, 912 F.Supp.2d at 883-84.

A CCW license may be revoked whenever Cal. DOJ or the issuing local agency determines that the CCW license holder has become prohibited under state or federal law from possessing, owning, receiving or purchasing a firearm. See Cal. Pen. Code § 26195(b)(1). If Cal. DOJ determines that a CCW license holder has become prohibited, then Cal. DOJ is required to contact the local agency that issued the CCW license. See Cal. Pen. Code § 26195(b)(2). If the local agency revokes a CCW license, that local agency must notify Cal. DOJ. See Cal. Pen. Code § 26195(b)(3).

BOF does not issue CCW licenses, but does accept the applicant’s fingerprints and runs a background check on the applicant in order to insure that the applicant is not prohibited from possessing a firearm. See Trial Tr. 458:17-459:6. The BOF forwards the results of the background check, along with a copy of the applicant’s California criminal history, to the sheriff or chief of police. See id. at 459:4-6.

BOF considers an approved background check to “be good” for 30 days. See 459:7-13.

Sheriffs or chiefs of police rarely issue a CCW license within 30 days of the completed background check, and some agencies may wait as long as 9 months after the background check before issuing the CCW license. See id. at 459:14-23.

CCW license holders are subject to the “rap-back” system. See id. at 225:15-17. CCW license holders have a CII number. See id. at 488:14-489:22.

Silvester possess a CCW license issued by the City of Hanford chief of police. See Joint Ex. 6.<sup>32</sup>

### 11. Certificate Of Eligibility

A COE is a certificate issued by the California Department of Justice. See Cal. Pen. Code § 26710; Trial Tr. 60:14-17, 494:14-15.

In order to obtain a COE, a person must make a request for a COE to Cal. DOJ. See Cal. Pen. Code § 26710(a). The COE applicant is required to pay a fee. See id. § 26710(d). A COE applicant also provides a full set of live scan fingerprints and is issued a CII number. See Trial Tr. at 495:9-13. Cal. DOJ is then required to examine its records and the records in NICS “in order to determine if the applicant is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm.” Cal. Pen. Code § 26710(b). If a person passes the background check, pays the filing fees, and submits the fingerprints, then Cal. DOJ is required to issue the COE. See Cal. Pen. Code § 26710(c); Trial Tr. at 511:9-12.

A COE is valid for one year. See Trial Tr. at 61:7-8. COE’s may be renewed on a yearly basis by paying a fee. See id. at 60:23-25. Prior to the expiration of the COE, the holder submits a renewal form, attests to the accuracy of the date in the renewal form, and pays a fee. See id. at 61:9-22.

A COE is one component/requirement for several exceptions to the 10-day waiting period and for other firearms related activities. For example, “consultant evaluators,” who are exempt from the 10-day waiting period, are required to have a COE. See Cal. Pen. Code §§ 16410, 27750. Along with a federal license, a COE is required for certain transfers of curio and relic firearms, and for the curio and firearm exception to the 10-day waiting period. See Cal. Pen. Code §§ 26585, 26970, 27670, 27966. Retail firearms dealers are required to possess inter alia a COE. See Cal. Pen. Code §§ 26700, 26705. A COE may also be obtained for employees of firearm dealers. See Cal. Pen. Code §§ 26915, 29120. In order to organize a gun show, an organizer or producer must have a COE. See Cal. Pen. Code §§ 16800, 27200. A COE is required for some transfers of used firearms at gun shows. See Cal. Pen. Code § 26525. A manufacturer

of firearms is required inter alia to possess a COE. See Cal. Pen. Code § 29050. Additionally, some individuals in the entertainment industry or individuals working with the military may seek to obtain a COE. See Trial Tr. 494:25-495:8.

A COE reads: “This is to certify that [Cal. DOJ] has completed a firearms eligibility check on the above named individual. As of the date of issue, there is nothing that would prohibit the individual from acquiring or possessing a firearm.” Plaintiff’s Ex. 4. COE’s also identify their “date of issuance” and their “date of expiration.” See id. COE holders are subject to the “rap-back” system. See id. at 224:21-24. Combs possess a valid COE. See Joint Ex. 5.

### C. Legal Standard

The Second Amendment reads: “A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II. The Second Amendment right to keep and bear arms is an individual right and a fundamental right that is incorporated against states and municipalities under the Fourteenth Amendment. See McDonald v. City of Chicago, 130 S.Ct. 3020, 3042 (2010); District of Columbia v. Heller, 554 U.S. 570, 595 (2008); Peruta v. County of San Diego, 742 F.3d 1144, 1149-50 (9th Cir. 2014); Nordyke v. King, 681 F.3d 1041, 1043 (9th Cir. 2012) (en banc). The Second Amendment “protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home.” McDonald, 130 S.Ct. at 3044; see Heller, 554 U.S. at 630. However, the Second Amendment’s protection is not unlimited, and longstanding regulatory measures such as “prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms,” are presumptively lawful. McDonald, 130 S.Ct. at 3047; Heller, 554 U.S. at 626-27; United States v. Chovan, 735 F.3d 1127, 1133 (9th Cir. 2013).

The Ninth Circuit has adopted a two-step Second Amendment framework: (1) the court asks whether the challenged law burdens conduct protected by the Second Amendment, and (2) if so, the court determines whether the law meets the appropriate level of

scrutiny. See Jackson v. City & County of San Francisco, 746 F.3d 953, 960 (9th Cir. 2014); Chovan, 735 F.3d at 1136; see also National Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms and Explosives, 700 F.3d 185, 194-95 (5th Cir. 2012) (“N.R.A.”); Ezell v. City of Chicago, 651 F.3d 684, 702-03 (7<sup>th</sup> Cir. 2011); United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010).

Under the first step, courts must determine “whether the challenged law burdens conduct protected by the Second Amendment, based on a historical understanding of the scope of the Second Amendment right, or whether the challenged law falls within a well-defined and narrowly limited category of prohibitions that have been historically unprotected.” Jackson, 746 F.3d at 960 (citing Brown v. Entertainment Merchants Ass’n, 131 S.Ct. 2729, 2733-34 (2011)); Heller, 554 U.S. at 625; Chovan, 735 F.3d at 1136). This is accomplished by asking “whether the regulation is one of the „presumptively lawful regulatory measures’ identified in Heller, or whether the record includes persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment.” Jackson, 746 F.3d at 960 (citing Heller, 554 U.S. at 627; Chovan, 735 F.3d at 1137); see also Peruta, 742 F.3d at 1153-54; Ezell, 651 F.3d at 702-03; Chester, 628 F.3d at 680. In assessing the historical understanding, not all historical or scholarly sources are equal, and courts should focus on scholarly opinions that are consistent with Heller and McDonald, and on historical sources around the adoption of the Second Amendment (1791) and the time near the adoption of the Fourteenth Amendment (1868). See Peruta, 742 F.3d at 1155-66; Ezell, 651 F.3d at 702-03; Chester, 628 F.3d at 680. If a law burdens conduct that falls outside of the Second Amendment’s scope, then the analysis ends and there is no violation. See N.R.A., 700 F.3d at 195; Ezell, 651 F.3d at 703.

As to the second step, rational basis review is not to be used. Heller, 554 U.S. at 628 n.27; Chovan, 735 F.3d at 1137. Instead, if a law burdens a right within the scope of the Second Amendment, either intermediate or strict scrutiny will be applied. See Jackson, 746 F.3d at 961; Chovan, 735 F.3d at 1138; N.R.A., 700 F.3d at 195; Chester, 628 F.3d at 682. Whether intermediate or strict scrutiny applies depends on: (1) how close the law comes to the core of the



Second Amendment right, and (2) the severity of the law's burden on the right. Jackson, 746 F.3d at 960-61; Chovan, 735 F.3d at 1138; N.R.A., 700 F.3d at 195; Ezell, 651 F.3d at 703. Generally, a regulation that threatens a core Second Amendment right is subject to strict scrutiny, while a less severe regulation that does not encroach on a core Second Amendment right is subject to intermediate scrutiny. See Jackson, 746 F.3d at 961; N.R.A., 700 F.3d at 195; Chester, 628 F.3d at 682.

The “intermediate scrutiny” standard requires: (1) that the government’s stated objective must be significant, substantial, or important, and (2) that there is a reasonable fit between the challenged regulation and the government’s asserted objective. Jackson, 746 F.3d at 960; Chovan, 735 F.3d at 1139; N.R.A., 700 F.3d at 195; Chester, 628 F.3d at 683. For there to be a “reasonable fit,” the regulation must not be substantially broader than necessary to achieve the government’s interest. See Peruta, 742 F.3d at 1177; Reed v. Town of Gilbert, 707 F.3d 1057, 1074 n.16 (9<sup>th</sup> Cir. 2013); Fantasyland Video, Inc. v. County of San Diego, 505 F.3d 996, 1004 (9<sup>th</sup> Cir. 2007); see also United States v. Marzarella, 614 F.3d 85, 98 (3<sup>d</sup> Cir. 2010). The government cannot rely on “mere speculation or conjecture.” See Edenfield v. Fane, 507 U.S. 761, 770-71 (1993); see also United States v. Carter, 669 F.3d 411, 418 (4<sup>th</sup> Cir. 2011) (government may not rely on “anecdote and supposition”). A regulation “may not be sustained if it provides only ineffective or remote support for the government’s purpose,” rather there must be an indication that the regulation will alleviate the asserted harms to a “material degree.” Edenfield, 507 U.S. at 770-71; Valley Broadcasting Co. v. United States, 107 F.3d 1328, 1334 (9<sup>th</sup> Cir. 1997).

#### D. Conclusions Of Law

##### 1. Burden On The Second Amendment

When the 10-day waiting period laws apply, they prohibit every person who purchases a firearm from taking possession of that firearm for a minimum of 10 days. One cannot exercise the right to keep and bear arms without actually possessing a firearm. Cf. Andrews v. State, 50 Tenn. 165, 178 (1871) (“The right to keep and bear arms necessarily involves the right to purchase them . . .”). The





purchased firearm cannot be used by the purchaser for any purpose for at least 10 days. Also, in some cases, due to additional costs and disruptions to schedules, the 10-day waiting period may cause individuals to forego the opportunity to purchase a firearm, and thereby forego the exercise of their Second Amendment right to keep and bear arms. Therefore, the 10-day waiting period burdens the Second Amendment right to keep and bear arms.<sup>33</sup> Cf. id.

It is Defendant's burden to show that the 10-day waiting period either falls outside the scope of Second Amendment protections as historically understood or fits within one of several categories of longstanding regulations that are presumptively lawful. See Jackson, 746 F.3d at 960; Chovan, 735 F.3d at 1136-37; United States v. Greeno, 679 F.3d 510, 518 (6th Cir. 2012); Ezell, 651 F.3d at 702-03; Chester, 628 F.3d at 680. Defendant has not met her burden.

First, in terms of relevant historical understandings, Defendant has not established that waiting period laws were understood to be outside the protections of the Second Amendment. Defendant has cited no statutes or regulations around 1791 or 1868 that imposed waiting periods between the time of purchase and the time of delivery. Nor has Defendant cited historical materials or books that discuss waiting periods or attitudes towards waiting periods between 1791 and 1868. There is no evidence to suggest that waiting periods imposed by the government would have been accepted and understood to be permissible under the Second Amendment. Cf. Peruta, 742 F.3d at 1153-66.

Second, in terms of Heller's longstanding presumptively lawful regulations, Defendant has not established that the 10-day waiting period is a presumptively lawful longstanding regulatory measure that imposes a condition and qualification on the commercial sale of a firearm. Such commercial regulations have been recognized as presumptively lawful by the Supreme Court.

McDonald, 130 S.Ct. at 3047; Heller, 554 U.S. at 626-27. The Supreme Court did not explain what precisely it meant by the phrase "conditions and qualifications on the commercial sale of arms," and the parties have cited no cases that interpret this phrase. Through a parenthetical citation in Nordyke, the Ninth Circuit suggested that a county ordinance, which permitted firearms to be brought to gun shows on county property if the gun was secured or in one's personal



possession, was a law imposing a condition and qualification on the commercial sale of a firearm. See Nordyke, 681 F.3d at 1044. Nordyke did not expand on the concept beyond parenthetically quoting the relevant language from Heller. Nordyke may be read as indicating that the manner of how a firearm is displayed for sale is an acceptable commercial regulation.

Aside from Nordyke, and based on a plain reading of the term, longstanding commercial regulations might entail regulations about who may sell (e.g. a licensed dealer) or purchase (e.g. someone over the age of 18) a firearm, what firearms may be sold (e.g. prohibiting the sale of certain types of firearms), when a firearm may be purchased (e.g. no purchases after 8:00 p.m.), or where a firearm store may be located (e.g. zoning ordinances). In comparison to Nordyke and a plain reading of Heller's language, it is not clear to the Court that a 10-day waiting period would qualify as a commercial regulation. Defendant cites no comparable commercial laws that apply to other goods and that require an individual to wait around 10-days before completing a purchase. The Court is not satisfied that Defendant has shown that the 10-day waiting period is one of Heller's envisioned conditions and qualifications of a commercial sale.

Moreover, Defendant has not established that the waiting period law is sufficiently "longstanding" to be entitled to a presumption of lawfulness. Included in the concept of a "longstanding and presumptively lawful regulation" is that the regulation has long been accepted and is rooted in history. See N.R.A., 700 F.3d at 196; United States v. Rene E., 583 F.3d 8, 12 (1st Cir. 2008). It is true that California has had some form of a waiting period since 1923. However, as described above, the Court is aware of no waiting period laws in any states during the time periods around 1791 and 1868. Consistent with these historical periods, currently only ten states impose a waiting period between the time of purchase and the time of delivery of a firearm. Waiting period laws did not exist near the time of adoption of the Second and Fourteenth Amendments, and they are not common now. That one state may have had some form of regulation for a significant period of time is insufficient for the Court to conclude that the law has been so generally accepted that it is presumptively lawful. Cf. N.R.A., 700 F.3d at 196 ("... a longstanding measure that harmonizes with the history and tradition

of arms regulation in this country would not threaten the core of the Second Amendment guarantee.”). Further, the 10-day waiting period at issue was not imposed until 1996, and it was not until 1975 that California began to impose a waiting period that extended to double digits (15 days). Prior to 1975, the waiting period was 5 days. The waiting period that was in effect the longest in California was the 1-day waiting period between 1923 and 1955 for handguns, and there is an indication that the law was not applied to all transactions. Imposition of waiting periods beyond a “single digit” period is a recent development. *Cf. Church of the Am. KKK v. City of Gary*, 334 F.3d 676, 682-83 (7th Cir. 2003) (noting that 30-day advance notice requirement to obtain a permit was reasonable under the circumstances of one case, but that a 45-day advance notice requirement was a substantially longer period and not reasonable). Finally, the waiting period at issue applies to all firearms. Prior to 1991, the waiting period applied only to handguns. Although the 1996 waiting period is shorter in duration than the 15-day period imposed in 1975, the 1996/1991 waiting period is wider in scope. Applying a waiting period to all firearms is a recent development. In essence, Defendant has simply pointed to the fact that California has had some form of waiting period since 1923. That is not enough.

The 10-day waiting period burdens the Second Amendment rights of the Plaintiffs.

## 2. Level Of Scrutiny

Defendants contend that intermediate scrutiny applies to this case. Plaintiffs contend that the Court may utilize intermediate scrutiny because, if the laws do not pass intermediate scrutiny, then they will not pass strict scrutiny. Plaintiff is correct that if the waiting period laws do not pass intermediate scrutiny, they will not pass strict scrutiny. Given the parties’ focus on intermediate scrutiny, and the necessary implication if the laws do not pass intermediate scrutiny, the Court need not decide whether strict scrutiny applies. Instead, the Court will examine the waiting period laws under intermediate scrutiny.

## 3. Governmental Interest

Defendant contends that California has important interests in public safety/preventing gun violence and preventing prohibited



individuals from obtaining firearms. Plaintiffs do not dispute that these are important interests. Courts have recognized a state's important public safety interest with respect to various firearms laws. See Jackson, 746 F.3d at 965. "It is self-evident that public safety is an important government interest." Id. It is also self-evident that preventing people who are prohibited from possessing a firearm from obtaining one is also an important interest that goes hand in hand with public safety. Defendant has demonstrated that public safety and keeping firearms out of the hands of prohibited individuals are important interests. See id.; see also Chovan, 735 F.3d at 1139.

#### 4. Reasonable Fit

Defendant has identified three rationales that it contends are "reasonable fits" that justify the 10-day waiting period: (1) conducting a background check; (2) providing a "cooling off period" to prevent impulsive acts of violence; and (3) investigating straw purchases. The Court will assess each of these justifications in relation to the three "as applied" groups.

##### *a. Those Who Have A Firearm In The AFS System*

The class of individuals that Plaintiffs identify within this group are those who already possess a firearm as confirmed by the AFS database, i.e. a firearm transaction is within the AFS system. See Doc. Nos. 91 at 30:5-8; and 105 at 7:15-18. Plaintiffs do not argue that this class of individuals should be exempt from further background checks. Rather, Plaintiffs contend that these individuals should not be subject to a per se 10-day waiting period, and should be able to take possession of their firearm upon passing the background check. See Doc. Nos. 98 at 16:10-15; and 105 at 7:6-8, 13:17-20, 30:25-31:12, 31:21-22. Thus, under Plaintiffs' arguments and challenges, this class of individuals will still be required to undergo and pass a background check when they attempt to purchase a firearm. See Doc. Nos. 91 at 30:5-8; and 105 at 7:6-9, 13:17-20, 30:25-31:22.

##### *i. Background Check*

Given the current BOF staffing levels, the potential additional research involved in reviewing a DROS application, and the possible response times from other agencies and states, 10-days is a sufficient





period of time in the clear majority of cases for BOF to complete a background check and approve or deny a DROS application.

However, within the 10-day waiting period, background checks can be completed anywhere from 1 minute to 10 days.

20% of all DROS applications are auto-approved usually in about 1 to 2 hours, and require no further review.<sup>34</sup> The mandated 10-day waiting period is the only thing that stops BOF from approving the sale and releasing the firearm when a DROS application is auto-approved.

80% of all DROS applications are not auto-approved, and further review, analysis, and/or investigation is necessary to determine if a person is prohibited from possessing a firearm. For non-auto-approved DROS applications that are completed within 10-days, the 10-day mandatory waiting period is the only thing stopping BOF from approving the sale and releasing the firearm.

For all DROS applications that are approved by BOF prior to expiration of the 10-day waiting period, conducting a background check is no longer a justification for the 10-day waiting period because the DROS applicant has been approved as determined by a completed background check.

Although additional disqualifying information may come to BOF's attention during the 10-day waiting period, that can be said of any time-frame, be it 1 day or 60 days. Moreover, the requirement in essence is to pass the background check, it is not to pass the background check every day for 10 straight days. Further, 20% of all DROS applications are auto-approved in a very short period of time, and they normally are not reviewed or rechecked at any time. Finally, of the approximately 99% of DROS applications that are approved, no new disqualifying information was obtained during the 10-day waiting period. Of the approximately 1% of DROS applications that are denied, there is no evidence regarding when in the 10-day waiting period that the disqualifying information was obtained, i.e. was the disqualifying information obtained during the initial BFEC or was it obtained late in the process as part of a re-check. Requiring an approved DROS applicant to wait the full 10-days, when the application is otherwise approved and the applicant already has a firearm in the AFS system, on the chance that new information might come in, is unduly speculative and anecdotal.





See Edenfield, 507 U.S. at 770-71; Carter, 669 F.3d at 418; Valley Broadcasting, 107 F.3d at 1334.

If disqualifying information arises about an individual who has already taken possession of a newly purchased firearm, California has in place the APPS system, which is designed to retrieve such firearms from prohibited persons. The APPS system acts as a safety net for individuals who have been previously approved to possess a firearm, but who later become prohibited.

*ii. Cooling Off Period*

The rationale behind the “cooling off period” is to prevent individuals from performing impulsive acts of violence to others or to themselves. The “cooling off period” seeks to limit a person’s access to a firearm.

Because 80% of DROS applications are not auto-approved, a waiting period of at least 1- day will naturally occur because CIS Analysts must obtain and review various information.

If a person already possess a firearm, then that person will generally have access to that firearm and may commit impulsive acts of violence with it.

There is no evidence that a “cooling off period,” such as that provided by the 10-day waiting period, prevents impulsive acts of violence by individuals who already possess a firearm.<sup>35</sup> A waiting period for a newly purchased firearm will not deter an individual from committing impulsive acts of violence with a separate firearm that is already in his or her possession.

None of the submitted social science studies/excerpts advocate for a 10-day waiting period, or attempt to defend a 10-day waiting period as being supported by clinical or empirical evidence. The studies that are supportive of waiting periods are supportive in theory and seem to assume that the individual does not already possess a firearm. E.g. Defendant’s Ex. DG at 29.

It is true that some individuals may not have ammunition for a firearm in their possession, or that the firearm may not be in working condition. However, no evidence attempts to quantify this, and it is unduly speculative to conclude that this is a common occurrence. See Edenfield, 507 U.S. at 770-71; Carter, 669 F.3d at 418; Valley Broadcasting, 107 F.3d at 1334.

If an individual already possess a firearm and then passes





the background check, this indicates a history of responsible gun ownership. There has been no showing that applying the 10- day waiting period to all individuals who already possess a firearm will materially prevent impulsive acts of violence. See Valley Broadcasting, 107 F.3d at 1334.

In terms of the AFS database to confirm possession of a firearm, the BCEF can be modified to make a simple check if a DROS applicant has a firearm within the AFS database. It is true that the AFS system does not contain every firearm in circulation in California. However, if a person has a weapon that appears within the AFS system database, and that person's application is otherwise approved, Defendant has not explained why it should be presumed that such an individual no longer possesses the firearm. Such a presumption is not supported by any identified evidence. Moreover, the AFS system is available to law enforcement personnel on a real time basis in the field, and law enforcement considers the AFS system to be reliable. If a law enforcement officer in the field who is about to confront a suspect can use and rely on the AFS system and proceed with more caution, then it is unknown why Cal. DOJ or BOF cannot also assume that an otherwise approved DROS applicant is still in possession of a firearm that is in the AFS system. Considering the absence of relevant data, law enforcement's real time reliance on the AFS system, and an otherwise approved background check, it can reasonably be assumed that a DROS applicant who has a firearm in the AFS system is still in possession of that firearm.<sup>36</sup>

### *iii. Straw Purchases*

There is no evidence that the legislature implemented the waiting period laws in order to give law enforcement the opportunity to investigate straw purchases.

In a straw purchase, although it might be easier to intercept a weapon prior to delivery, this only occurs in about 15% of investigations. There is no evidence regarding the number of straw purchase investigations that lead to arrests or convictions or retrievals of firearms relative to the number of DROS applications. Further, although some straw purchasers have purchased other guns in the past, there is no evidence regarding how often this occurs.

Straw purchase investigations begin when law enforcement officers review paperwork at gun shops, observe behavior and



interactions at gun shows, or receive a tip from BATFE or a gun shop owner. Not all of the transactions observed or paperwork examined create a reasonable belief that a straw purchase is occurring. The agents only investigate a transaction if they have reason to believe that a straw purchase is occurring. Given Agent Graham's description of straw purchase investigations, the vast majority of transactions do not appear to be straw purchases. Applying the full 10-day waiting period to all transactions for purposes of investigating a straw purchase, in the absence of any reason to suspect that a straw purchase is in fact occurring, is too overbroad. See Peruta, 742 F.3d at 1177.

If law enforcement officers personally observe what they believe to be a straw purchase, be it at a gun show or at a gun store, they may intercede during the purchase process.

If the legislature believes that law enforcement should have additional time in which to investigate a straw purchase, then a statute could be enacted that permits law enforcement to cause a delay in the approval of a DROS application, if law enforcement has reason to believe that a straw purchase is occurring.<sup>37</sup>

*iv. Conclusion*

As applied to individuals who already possess a firearm as confirmed by the AFS system, Defendant has not established that applying the full 10-day waiting period when the background check is completed prior to 10-days is a "reasonable fit." The 10-day waiting period laws as applied to individuals who already lawfully possess a firearm as confirmed by the AFS system, and who pass the background check prior to 10-days, violates the Second Amendment.<sup>38</sup> See Edenfield, 507 U.S. at 770-71; Peruta, 742 F.3d at 1177; Valley Broadcasting, 107 F.3d at 1334

*b. Those Who Have A CCW License*

*i. Background Check*

Plaintiffs do not contend that CCW license holders should not have to undergo and pass the background check. First, Plaintiffs' proposed injunctive relief requests that CCW license holders undergo the same background check as other individuals who are exempt from the 10-day waiting period. Police officers who



are exempt from the 10-day waiting period pursuant to California Penal Code § 26950(a) and § 27650(a) must still pass the BFEC. See Trial Tr. 501:17-19. Therefore, the BFEC/standard background check would apply to CCW license holders when they attempt to purchase a firearm. Second, Plaintiffs have expressly confirmed that all members of the as applied challenges would still be required to pass a background check when they attempt to purchase a firearm. See Doc. No. 105 at 7:6-8, 13:17-20, 30:25-31:22.

The Court's above analysis with respect to background checks for those who have a firearm in the AFS system also applies to CCW license holders. If the background check is completed in less than 10-days, then a background check is no longer a justification to make a CCW license holder wait the full 10-days.

Also, the BFEC can be modified to make a simple check through the AFS system to determine if a person has a valid CCW license.

Additionally, not only does the APPS system act as a safety net for any CCW license holder who may become prohibited from possessing a firearm, the rap back program acts as a further safety net with respect to California criminal conduct by a CCW license holder.

### *ii. Cooling Off Period*

For CCW license holders who already possess a firearm as confirmed by the AFS system, the above analysis regarding a cooling off period (for those who already have a firearm as confirmed in the AFS system) also applies to CCW license holders.

For CCW license holders who do not already possess a firearm as confirmed by the AFS system, there is no evidence regarding unlawful firearm violence committed by CCW license holders. There is no evidence regarding suicide attempts by CCW license holders or how long after purchase of a firearm that suicides by CCW license holders generally occur. The social science studies regarding waiting periods in general are inconclusive at best. None of the submitted social science studies presented to the Court address suicide as it relates to individuals who must meet the type of requirements of a CCW license,<sup>39</sup> and none of the excerpts advocate for or defend a 10-day cooling off period.

The nature and unique requirements of CCW licenses are such that it is unlikely that CCW license holders would engage





in impulsive acts of violence. CCW license applicants must demonstrate good moral character. Engaging in unlawful acts of violence is inconsistent with good moral character. CCW license applicants must take a statutorily mandated class and demonstrate proficiency and safe handling of a firearm. Safe handling practices could cause a gun owner to be more reflective and deliberate about using a firearm. CCW license applicants must pass the BFEC, which searches databases that deal with criminal and mental health prohibitions. If the person does not pass the background check, they cannot obtain a CCW license. CCW license applicants must demonstrate good cause to either a sheriff or a police chief in order to obtain the CCW license, and a sheriff or chief of police may impose reasonable restrictions on as part of a CCW license. Thus, CCW licenses are not issued without reason and individual consideration. If there is sufficient cause to believe that an applicant has or is experiencing mental health problems, then a sheriff or police chief may require that applicant to undergo psychological testing. If a person is mentally unstable with respect to themselves or others, the psychological testing could detect that problem. With the exception of passing the BFEC/standard background check, none of these CCW license requirements must be met by an ordinary California firearms purchaser. Finally, once issued, a CCW license allows its holder to carry a concealed handgun in public for 2 years, generally throughout the entire State of California.

If an individual has met the requirements for obtaining a CCW license, and thereby has demonstrated that he or she can be expected and trusted to carry a concealed handgun in public for 2 years, it is unknown why that person would have to wait 10-days before being permitted to take possession of newly purchased firearm.<sup>40</sup> Imposing the 10-day waiting period as a cooling off period on a CCW license holder is speculative and its effects appear remote at best.<sup>41</sup> See Edenfield, 507 U.S. at 770-71; Peruta, 742 F.3d at 1177; Valley Broadcasting, 107 F.3d at 1334.

*iii. Straw Purchase*

The Court's above analysis with respect to straw purchases for those who have a firearm in the AFS system also applies to CCW license holders.



There is no data or evidence regarding CCW license holders engaging in straw purchases.

The requirements for obtaining a CCW license strongly indicate that a CCW license holder is unlikely to engage in a straw purchase. A CCW license holder must demonstrate to either a sheriff or a police chief that he or she is of good moral character. Engaging in a straw purchase so that a prohibited person may obtain a firearm is not compatible with good moral character. A CCW license holder must also demonstrate good cause for issuance of a CCW license. If there is good cause to obtain the CCW license, it seems unlikely that a CCW license holder would jeopardize the CCW license for the purpose of helping a prohibited individual obtain a firearm. See Edenfield, 507 U.S. at 770-71; Valley Broadcasting, 107 F.3d at 1334.

*iv. Conclusion*

As applied to individuals who hold a valid CCW license, Defendant has not established that applying the full 10-day waiting period when the background check is completed prior to 10- days is a “reasonable fit.” The 10-day waiting period laws as applied to individuals who possess a valid CCW license, and who pass the background check prior to 10 days, violates the Second Amendment.<sup>42</sup> See Edenfield, 507 U.S. at 770-71; Peruta, 742 F.3d at 1177; Valley Broadcasting, 107 F.3d at 1334.

*c. Those Who Have A COE*

Plaintiffs do not contend that COE holders should not have to undergo and pass a background check. First, Plaintiffs’ proposed injunctive relief requests that COE holders undergo the same background check as other individuals who are exempt from the 10-day waiting period. Police officers who are exempt from the 10-day waiting period pursuant to California Penal Code §§ 26950(a) and 27650(a) must still pass the BFEC/standard background check. See Trial Tr. 501:17-19. Therefore, the BFEC/standard background check would apply to COE holders when they attempt to purchase a firearm. Second, Plaintiffs have expressly confirmed that all members of the as applied challenges would still be required to pass a background check when they attempt to purchase a firearm. See Doc. No. 105 at 7:6-8, 13:17-20, 30:25-31:22.



The class of COE holders under this as applied challenge was somewhat unclear. Plaintiffs indicated that the class consisted of those who merely hold a valid COE. See id. at 7:11-13.

However, a COE in and of itself only establishes that a person passed the background check one other time in the past. Unlike a CCW license holder, a COE holder does not have to establish good moral character, good cause, take a mandated course, or be subject to possible psychological testing. That is, COE holders are not subject to nearly the same level of scrutiny as are CCW license holders. At oral argument, Plaintiffs acknowledged that the process to obtain a CCW license is more demanding than that required to obtain a COE. See id. at 8:12-21.

If a COE holder does not already possess a firearm, they are very similar to a first time firearms purchaser. Plaintiffs do not challenge the waiting period laws for first time firearms purchasers without a COE. Plaintiffs stated at oral argument that while it is theoretically possible for a COE holder to not possess a firearm, it was highly unlikely. See id. at 8:21-9:1. However, Plaintiffs conceded that “if somebody has a COE, but there is no evidence that they also own a gun, it may be appropriate to subject them to a 10-day waiting period.” Id. at 10:8-12. Given the Plaintiffs’ concessions at oral argument and the nature of merely holding a COE, the Court cannot hold that the 10-day waiting period as applied to those who merely hold a valid COE violates the Second Amendment.

However, Plaintiffs stated that any concerns about whether a COE holder already possess a firearm could be addressed through the remedy issued, essentially by fashioning “a remedy that says COE and possess a firearm.” Id. at 9:22-10:3. This is consistent with the relief requested by Plaintiffs in their proposed findings of fact and conclusions of law. Plaintiffs requested injunctive relief for those who hold a valid COE and also have a firearm as confirmed by the AFS system. See Doc. No. 91 at 30:1-4.

Consideration of the waiting period laws as applied to those who possess both a valid COE and a firearm as confirmed by the AFS system leads to a finding that the waiting period laws violate the Second Amendment. For those who have both a valid COE and already possess a firearm as confirmed by the AFS system, the constitutional analysis would be the same as detailed above for those





who already possess a firearm as confirmed by the AFS system. The only distinction between the two “as applied groups” is that the COE holder has made himself or herself more identifiable in terms of the state criminal law firearms prohibitions through the rap back program and the issuance of a CII number.

The BFEC can be modified to make a simple check through the AFS system to determine if a DROS applicant has a valid COE and also to determine if the DROS applicant has a firearm within the AFS database.

The Court will accept Plaintiffs’ concessions and suggestions. For the reasons stated above with respect to those who have a firearm as confirmed by the AFS system, the Court finds that the 10-day waiting period laws as applied to those who possess both a valid COE and a firearm as confirmed by the AFS system, and who pass the background check prior to 10 days, is not a reasonable fit and thus, violates the Second Amendment. See Edenfield, 507 U.S. at 770-71; Peruta, 742 F.3d at 1177; Valley Broadcasting, 107 F.3d at 1334.

#### IV. FOURTEENTH AMENDMENT CHALLENGE

Plaintiffs state that the Court need not address their Fourteenth Amendment challenges if the Court finds merit to their three as applied challenges to the 10-day waiting period. Plaintiffs contend that if a violation of the Second Amendment is found, then the appropriate injunctive relief would essentially create additional exceptions to the waiting period and the Fourteenth Amendment issues would not need to be addressed. Because the Court has found violations of the Second Amendment as discussed above, the Court will follow Plaintiffs’ recommendation and decline to reach the Fourteenth Amendment issues.

#### V. ORDER

The Court has found that the 10-day waiting periods of Penal Code § 26815(a) and § 27540(a) violate the Second Amendment as applied to certain groups. Plaintiffs urge the Court to follow the approach of Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012), in which the Seventh Circuit stayed its ruling for 180-days in order to give the Illinois legislature the opportunity to craft new laws in





light the unconstitutionality of various Illinois firearms laws. The Court finds Moore's approach to be appropriate.

Accordingly, **IT IS HEREBY ORDERED** that:

1. The 10-day waiting periods of California Penal Code § 26815(a) and § 27540(a) violate the Second Amendment as applied to those individuals who successfully pass the BFEC/standard background check prior to 10 days and who are in lawful possession of an additional firearm as confirmed by the AFS system;

a. If the BFEC/standard background check for such an individual is completed and approved before 10-days, Defendant shall immediately release the firearm for delivery to such individual and shall not wait the full 10-days;

2. The 10-day waiting periods of California Penal Code § 26815(a) and § 27540(a) violate the Second Amendment as applied to those individuals who successfully pass the BFEC/standard background check prior to 10 days and who possess a valid CCW license issued pursuant to California Penal Code § 26150 or § 26155;

a. If the BFEC/standard background check for such an individual is completed and approved before 10-days, Defendant shall immediately release the firearm for delivery to such individual and shall not wait the full 10-days;

3. The 10-day waiting periods of California Penal Code § 26815(a) and § 27540(a) violate the Second Amendment as applied to those individuals who successfully pass the BFEC/standard background check prior to 10 days and who possess both a valid COE issued pursuant to California Penal Code § 26710 and a firearm as confirmed by the AFS system.

a. If the BFEC/standard background check for such an individual is completed and approved before 10-days, Defendant shall immediately release the firearm for delivery to such individual and shall not wait the full 10-days;

4. Defendant shall modify their BFEC procedures as they deem necessary so as to be able to comply fully and in good faith with this order;<sup>43</sup>

5. Nothing in this order is to be construed as interfering with Defendant's authority to deny a transfer or sale of a firearm to those who are prohibited by state or federal law from possessing a firearm;





6. Nothing in this order is to be construed as interfering with the Defendant's ability to delay a transfer or sale of a firearm when further investigation is required to confirm that a buyer or transferee is not prohibited by state or federal law from possessing a firearm;

7. Paragraphs 1 through 6 of this order are stayed for a period of 180 days from entry of this order;

8. The parties shall appear for a status conference on December 8, 2014 in Courtroom No. 2 at 1:30 p.m.;<sup>44</sup> and

9. The Clerk shall enter judgment in favor of Plaintiffs and against Defendant.

**IT IS SO ORDERED.**

Senior Federal District Judge Anthony Ishii

Dated: August 22, 2014

ENDNOTES (CONVERTED FROM ORIGINAL FOOTNOTES.)

1. Penal Code § 26815(a) reads in pertinent part: "A dealer . . . shall not deliver a firearm to a person, as follows: (a) Within 10 days of the application to purchase, or, after notice by the department pursuant to Section 28220, within 10 days of the submission to the department of any correction to the application, or within 10 days of the submission of any fee required pursuant to Section 28225, whichever is later."

2. Penal Code § 27540(a) reads: "No firearm shall be delivered: (a) Within 10 days of the application to purchase, or, after notice by the department pursuant to Section 28220, within 10 days of the submission to the department of any correction to the application, or within 10 days of the submission of any fee required pursuant to Section 28225."

3. If anything, given the absence of any such laws, and accepting Defendant's assertions about American life at the time, it seems more likely that the citizenry of 1791 and 1868 would not have been accepting of such laws because those laws would have created additional difficulties and barriers to obtaining a firearm.

4. Even if the Court considered the excerpts of Exhibit EC, they would not change the Court's findings or conclusions.

5. If anything, the cited excerpts indicate that waiting period laws did not exist around 1791 or 1868, that waiting periods are a relatively recent





phenomena, and that most states have not had waiting periods. Exhibit EK does not show that waiting periods were outside the Second Amendment's scope.

6. Even if the Court considered the excerpts of Exhibit EK, they would not change the Court's findings or conclusions.

7. Legislative facts generally arise when a court is faced with a constitutional challenge to a statute. See Korematsu, 584 F.Supp. at 1414; State v. Erickson, 574 P.2d 1, 5 (Alaska 1978). Legislative facts are facts that help a tribunal or court to determine the content of law and policy and to exercise its judgment or discretion in determining what course.

8. Even if the Court did consider the excerpts from Exhibits DM and DQ, those exhibits would not change the Court's findings of fact or conclusions of law of action to take; they are facts that are ordinarily general and do not concern the immediate parties. See United States v. Gould, 536 F.2d 216, 219 (8th Cir. 1976); Erickson, 574 P.2d at 4-5 & n.14. Legislative facts "have relevance to legal reasoning and the lawmaking process, whether in the formation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." Advisory Comm. Note to Fed. R. Evid. 201(a).

9. Even if the Court did consider the excerpts from Exhibit GN, the Court would not change its findings of fact or conclusions of law.

10. Alan Gottlieb is the Executive Vice President of SAF. The parties stipulated to use Mr. Gottlieb's deposition testimony in lieu of live testimony. See Doc. No. 75

11. D.C. Code Ann. § 22-4508.

12. 720 Ill. Comp. Stat. 5/24-3(A)(g).

13. R.I. Gen. Laws §§ 11-47-35(a)(1), 11-47-35.2(a).

14. Fla. Stat. § 790.0655(1)(a).

15. Haw. Rev. Stat. Ann. § 134-2(e).

16. Wash. Rev. Code Ann. § 9.41.090(1)(c).

17. Wis. Stat. Ann. § 175.35(2)(d).

18. Conn. Gen. Stat. Ann. §§ 29-37(d), (e).

19. Md. Code Ann., Pub. Safety §§ 5-101(x), 5-123 to 5-125; Minn. Stat. § 624.7132(Subd. 4).

20. The parties have not referred or cited to any hearing testimony from 1964





21. Defendant's Exhibit CB is a chart that depicts the databases reviewed during the automated review portion of the background check process.
22. Firearms purchasers are required to have a valid California driver license or identification card issued by DMV. See Trial Tr. 236:15-22.
23. "Straw purchases" occur when a purchaser obtains a firearm for a separate, undisclosed, prohibited person. See Trial Tr. 343:4-14.
24. Under California law, a person can lawfully purchase only one handgun in a 30-day period. See Cal. Pen. Code § 27535; Trial Tr. at 206:19-21
25. Under new legislation known as AB 500, and which appears to be codified at Penal Code § 28220(f), BOF can delay a disposition for up to 30 days in order to further investigate whether an applicant is prohibited from possessing a firearm. See Cal. Pen. Code § 28220(f); Trial Tr. 506:11-21. Plaintiffs have partially relied upon § 28220(f) in their discussion of straw purchases. Plaintiffs do not challenge the constitutionality of § 28220(f).
26. From 1991 to the present, there has consistently been a DROS application approval rate near 99%. See Defendant's Ex. AA.
27. Cal. DOJ does not hire temporary employees as CIS Analysts because the California budget process does not allow the BOF to start hiring new people, and it typically takes six to eight months to train a CIS Analyst. See Trial Tr. 204:21-205:14, 326:17-327:11
28. The 1 minute figure is based on test programs that were run by BOF. See Trial Tr. 308:8-17.
29. There is currently work being done to automate the ability of the state courts to report prohibiting mental health events to the BOF. See 188:14-15. There is no indication of when those efforts will come to fruition.
30. Time to crime statistics are kept by the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives. See Trial Tr. 418:11-23. Time to crime statistics measure the elapsed time from a lawful sale of a firearm to the time of a crime committed with that firearm. See id.
31. The Court notes that in order to purchase a handgun in California, unless an exemption applies, an individual must obtain a handgun safety certificate. See Cal. Pen. Code § 31615. In order to obtain a handgun safety certificate, an individual must pay a fee and pass a written test. See Cal. Pen. Code §§ 31630, 31640, 31645, 31650, 31655
32. The issuing agency is identified as the city of Hanford. Under Penal Code § 26155, Silvester's CCW license would have been approved by the Hanford chief of police.





33. Defendant has argued that because Combs and Silvester have each had a firearm during the relevant time period, their Second Amendment rights have not been impaired. However, that Combs and Silvester have been able to exercise their Second Amendment right with respect to at least one firearm does not mean that they have diminished rights under the Second Amendment. The Second Amendment applies to “arms” and its language does not limit its full protections to a single firearm. Some firearms are better suited for particular lawful purposes than others. Defendant has cited no authority that suggests that the Second Amendment only has application to a single firearm

34. No evidence indicates that a material number of auto-approved DROS applications are ever rechecked.

35. Defendant argues that because some firearms are better suited for certain purposes than other firearms, a waiting period may prevent an impulsive act of violence with the new weapon. Relying on Agent Graham’s testimony, Defendant cites the example of Shareef Allman, an individual who had several firearms, including at least one pistol, a rifle, and an assault-style weapon, and who killed nine people in Cupertino, California. See Trial Tr. at 360:13-20, 415:21-416:8. The assault-weapon was not used in the shooting. See *id.* at 415:17-21. The pistol was obtained legally, and it was unknown whether the rifle was legally obtained. See *id.* at 417:9-17, 418:3-10. However, as Agent Graham admitted, any cooling off period created by the 10-day waiting period did not work. See *id.* at 419:20-23. In Allman’s case, Allman did not use the most dangerous firearm (the assault weapon). The firearms that Allman did have were either lawfully obtained and subjected to the 10-day waiting period, or they were obtained unlawfully and not subject to any background checks or waiting periods. Aside from Allman, Agent Graham had no other examples. See *id.* at 414:7-15.

36. To the extent that there are unarticulated concerns about whether an individual still possess a firearm within the AFS system, it may be possible to add a question on the DROS application in order for the applicant to confirm that the individual still possess a firearm that was either voluntarily registered, a handgun purchased on or after January 1, 1996, or any firearm purchased on or after January 1, 2014. However, the parties have not addressed the issue, and the Court expresses no opinion on the matter, other than to say that an additional question may be a possibility.

37. California has provided for additional delays if there is difficulty in determining whether an individual is prohibited from possessing a firearm. Cal. Pen. Code § 28220(f). Plaintiffs suggest that law enforcement may utilize AB 500/§ 28220(f) in the context of straw purchases. The parties





have not briefed this issue extensively, and the Court does not express an opinion on the question, other than to note that such an interpretation of § 28220(f) may be possible.

38. Again, the Court emphasizes that this as applied challenge is not one that challenges the requirement that a purchaser pass a background check. These individuals must still pass the background check when they attempt to purchase a firearm. They may not, however, be required to wait the full 10-days if the background check is completed and approved prior to 10-days.

39. The Court notes that one professional article endorsed waiting periods, prohibiting certain individuals from purchasing firearms, and permits for handgun purchasers. See Defendant's Ex. DG. California has such a prohibition and conducts a background check to enforce those prohibitions. Also, CCW license holders who purchase a handgun will have gone through two certification-type processes: the process to obtain the CCW license and the process to obtain a handgun safety certificate. See Cal. Pen. Code §§ 26150, 26155, 31615.

40. The Court notes that the submitted legislative history regarding the California waiting periods generally support the conclusion that the waiting period laws were modified to 5 days, 15 days, and 10 days in response to concerns about the background check process. There is little evidence to suggest that the waiting periods were modified for the purpose of expanding or retracting a cooling off period.

41. The Court notes that the state of Florida excepts its CCW license holders from the 3-day waiting period for handguns. See Fla. Stat. § 790.0655(2)(a).

42. Again, the Court emphasizes that this as applied challenge is not one that challenges the requirement that a

purchaser pass a background check. These individuals must still pass the background check when they attempt to purchase a firearm. They may not, however, be required to wait 10-days if the background check is completed and approved prior to 10-days.

43. The Court particularly directs Defendant's attention to the testimony Assistant Bureau Chief Buford and the "simple" checks within AFS to determine if an individual has a firearm, has a valid CCW license, or has a valid COE.

44. The parties shall file a joint status conference report on December 1, 2014. If the parties agree upon a different date for a status conference, they may file a stipulation with the Court to move the the status conference.

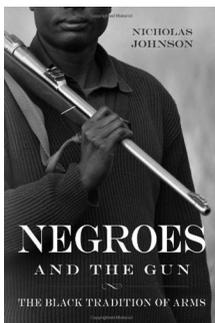




# Negroes and the Gun, the black tradition of arms

## Nicholas Johnson

Gary Mauser, reviewer



“I am,” she answered crisply, “a Second Amendment absolutist.” Growing up in Birmingham, Ala., in the early 1960s, when racial tensions rose, there were, she said, occasions when the black community had to exercise its right to bear arms in self-defense, becoming, if you will, a well-regulated militia. -  
Dr. Condolezza Rice, August 6, 2000.

What comes to mind when thinking about guns and Afro-Americans? The media typically portray blacks as either criminals or anti-gun activists. Here is a glimpse into the real story.

Television tells us little about the real America. Black Americans, like other Americans, have long used guns to defend their homes and families against violence. They did so even while enslaved in the 18th and 19th centuries. After the end of slavery, blacks found guns vital in protecting themselves against white marauders and other criminals. Recently, black plaintiffs have taken decisive steps to advance Second Amendment rights for all Americans. Otis McDonald, for example, a black Chicago resident, driven by a desire to protect his family from criminal violence, launched a legal challenge to the Chicago gun ban that resulted in the Supreme Court forcing Chicago to allow residents to carry concealed handguns.

The history of armed blacks in the US illustrates why many Americans do not trust their government. There is widespread agreement among American black leaders, men such as Frederick





Douglas, WEB DuBois, Robert Williams and Martin Luther King, Jr., in support of black people using firearms to protect themselves and their families from attack. This is largely unknown because the mainstream media ignore any story that contradicts their progressive vision. According to progressives the only role for black people is to serve as defenseless victims of white oppressors – and to wait passively to be rescued by the Democrat Party. The truth is much more interesting.

### DEMOCRATS AND BLACK INTELLECTUALS

Democrats also attempt to erase the tradition of responsible firearms usage by blacks. When the Democrats can't ignore black libertarians or conservatives, they routinely ridicule them. Nevertheless, distinguished black intellectuals, such as Supreme Court Justice Clarence Thomas and economics professor Thomas Sowell, senior fellow at the Hoover Institute, continue to play important roles in defending individual liberty for all Americans.

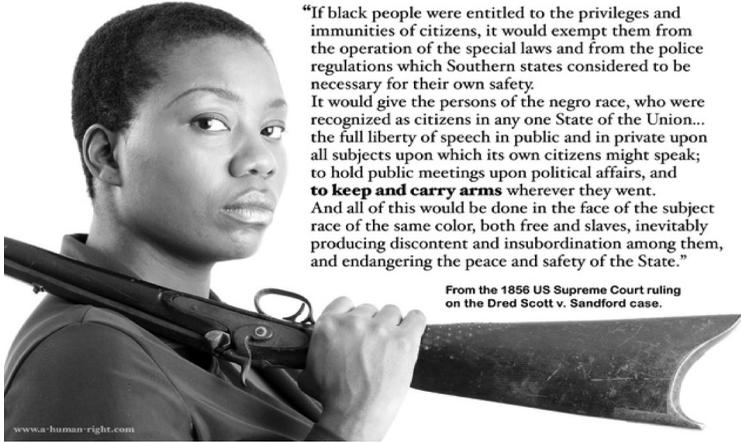
Joining this eminent group is Nicholas Johnson, a black Fordham law professor who was the lead author of a well-received legal tome, *Firearms Law and the Second Amendment*.

His recent book, *Negroes and the Gun*, the black tradition of arms (Prometheus Books, 2014) tells the captivating story of armed black Americans. He graphically portrays a vital part of the American experience that is all but unknown. It is eye opening to read about these farmers, doctors, janitors and ministers using firearms to protect themselves, their families or their neighbors from attack. Unfortunately, not all of these stories of armed self-defence end happily, but many do.

Only war freed the slaves in the United States. The Civil War was precipitated by the Supreme Court's 1857 Dred Scott decision destroying the delicate balance between free states and slave states. The Court denied Dred Scott's claim to be free even though he had lived as a free citizen in a free state after escaping slavery many years earlier. The court argued that blacks couldn't be citizens, because if they were, then they would enjoy full citizenship rights, including being allowed to have and use guns.



## FREE PEOPLE OWN GUNS. SLAVES DON'T.



“If black people were entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which Southern states considered to be necessary for their own safety.

It would give the persons of the negro race, who were recognized as citizens in any one State of the Union... the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and **to keep and carry arms** wherever they went.

And all of this would be done in the face of the subject race of the same color, both free and slaves, inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.”

From the 1856 US Supreme Court ruling on the Dred Scott v. Sandford case.

### REPUBLICANS FREED THE SLAVES

After the Civil War, the federal government, dominated by Republicans, passed the 13th, 14th and 15th Amendments with the express purpose to free the slaves and guarantee them full citizenship, including voting rights and the right to “keep and bear arms.” The Republicans ruled Congress because almost all Democrats, being from Southern states, had resigned to join the rebels at the start of the war.

Reconstruction, following the Civil War (1865 to 1877), was a tumultuous period. In the countryside of the former Confederacy, ex-slaves and former slave owners attempted to work out a way to live with each other. Unfortunately, this often involved violence. Many of the newly freed slaves armed themselves, not only to hunt for food but also to defend their families from criminal attack. White supremacy had been reestablished by 1877, in part through the Ku Klux Klan enforcing Jim Crow laws and working in connivance with racist local police. Importantly, this period saw the first general gun control laws introduced – primarily to disarm blacks.

Black Americans have long owned and used firearms for personal protection. Not all such uses turned to their advantage,



particularly when the local authorities backed up their attackers. But, consistent with modern research, no shots are fired in almost all cases of defensive gun use. Aggressors back down when confronted with armed force, so blacks could often save themselves by brandishing a firearm. Early in the 20th century, black communities organized to defend their legal rights, especially the right to armed self-defence. In one famous case, the National Association for the Advancement of Colored People (NAACP) hired Clarence Darrow to defend Dr. Ossian Sweet and his family, accused of murder in 1925 for shooting and killing members of a white mob.

#### SELF-DEFENCE AND POLITICAL NONVIOLENCE

Professor Johnson explains how the black leadership simultaneously embraced private self-defence and political nonviolence without contradiction. Martin Luther King carefully distinguished the use of arms to defend specific individuals against an immediate attack from using arms to advance group political goals. The first is the natural right of everyone, and consequently armed self-defence has won the widespread support of many including Mahatma Gandhi. The second is much more problematic, and in that case, King argued for nonviolent “socially organized masses on the march.”

During the 1960s Reverend Martin Luther King, Jr. and the Southern Christian Leadership Council staged dramatic scenes where blacks attempted to exercise their civil rights in a nonviolent manner provoking a violent response from white authorities. King saw nonviolence as a strategy, not ideological dogma. Television images of blacks being beaten, gassed, even attacked by vicious dogs, helped pressure the federal government to wrest control from racist state governments. This approach was effective in winning the support of many Americans for the plight of blacks under the Jim Crow laws of the South. Then-president John Kennedy finally saw the political advantage of backing Reverend King.

Despite relying on nonviolence, Reverend King was not a pacifist. Behind these carefully scripted scenes, patrols of armed blacks protected the nonviolent marchers and demonstrators. Armed stand-offs between KKK and the black militia, such as the Deacons for Defense and Justice, Civil Rights Guards, and other spontaneously





formed groups of friends and neighbors, never made it to television, but many such confrontations, often at night, effectively protected the lives of numerous pacifists and demonstrators. It was a transformational time. White pacifists travelled south to participate in challenging racist authorities. The pacifists were shocked to discover that their black allies came from a rural tradition of armed self-defence.

Professor Johnson recounts instances where black communities pushed the boundary of armed personal defence by arming themselves to rally as a group in order to rescue individuals threatened by white mobs or even local authorities. Perhaps surprisingly, such efforts were often effective. As in individual armed self-defence, firearms often did not need to be fired to be effective. At other times, however, community defence efforts turned out badly.



## THE 1960s AND THE SECOND AMENDMENT

For many reasons, as Johnson explains, this all began unraveling in the 1960s when the civil rights movement metastasized into black radicals advocating political violence under the rubric of armed self-defence. At the same time, young black leaders won election





as mayors of large urban cities, such as Los Angeles, Detroit and Atlanta. Unfortunately, they proved unable to control urban riots and black-on-black violence (usually drug-related) in their cities. Opportunistically, the new generation of black leaders joined with the emerging gun-control movement to create the progressive coalition that exists to this day. With the complaisance of the media, the modern paradigm soon supplanted the long tradition, generations old, of armed individual self-reliance.

The Second Amendment is only secondarily about people defending their families from criminals. Its primary purpose is to enshrine the natural right of citizens to defend themselves against government depredations. As the quotation from professor Rice observes, members of the black community have traditionally armed themselves to resist the unacceptable actions of malevolent authorities. Their efforts fall squarely in the American republican tradition and in accord with common sense.

