No. 17-56081

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGINIA DUNCAN; RICHARD LEWIS; PATRICK LOVETTE; DAVID MARGUGLIO; CHRISTOPHER WADDELL; CALIFORNIA RIFLE & PISTOL ASSOCIATION, INC., a California Corporation,

Plaintiffs-Appellees,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of California, No. 3:17-cv-01017-BEN-JLB

ANSWERING BRIEF FOR APPELLEES

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January 5, 2018

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the California Rifle & Pistol Association, Inc., certifies that it is a nonprofit organization. It has no parent corporation and no stock, so no publicly held corporation owns more than ten percent of its stock.

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INTRODUCTION

The district court entered a narrow preliminary injunction that preserves the status quo by allowing law-abiding California citizens to continue to possess lawfully acquired, commonly owned firearm magazines during the pendency of this litigation. That limited relief, which leaves California's ban on the prospective acquisition of new magazines in place and protects citizens from the enormous inconvenience of having to dispossess themselves of constitutionally protected property before the legality of the state's confiscatory efforts are settled, was well within the district court's discretion. To be sure, California certainly has an interest in keeping firearms out of the hands of criminals. But criminals will not comply with the retrospective and confiscatory aspects of the law, which demand a substantial degree of voluntary action, and the Constitution forbids the government to pass laws that infringe the right of law-abiding citizens to keep and bear arms, U.S. Const., amend. II, or that take citizens' property without just compensation, U.S. Const., amend. V. The district court did not abuse its discretion by preliminarily enjoining the purely retrospective and confiscatory aspects of a law requiring citizens who have lawfully possessed commonly owned magazines for decades without incident to immediately dispossess themselves of their property before they can even litigate whether that law impermissibly burdens their constitutional rights.

Americans overwhelmingly choose standard-capacity magazines for the most popular handguns for self-defense, and those magazines typically hold more than 10 rounds. Because magazines that can hold more than 10 rounds are "typically possessed by law-abiding citizens for lawful purposes," the Second Amendment protects them. *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008). California's ban on their possession is thus subject to heightened scrutiny, meaning the state must at a minimum establish that its law is reasonably tailored to achieve its objectives. The state's retrospective and confiscatory ban—which prohibits not only the prospective possession of magazines, but also the continued possession of long-possessed and lawfully purchased magazines—lacks *any* tailoring, much less a close fit, to its aim of preventing mass shootings and gun violence.

Precisely because it applies not just prospectively, but to those who already lawfully acquired magazines in the past, the state's ban raises not only Second Amendment problems but takings issues as well. By affirmatively requiring individuals who lawfully obtained and have long lawfully possessed magazines to dispossess themselves of that property without compensation, the retrospective aspects of the law work an uncompensated physical taking, which the Takings Clause plainly proscribes. The state's only response is that it may take its citizens' property so long as it does so pursuant to its police power, but Supreme Court

precedent squarely forecloses that argument. *See, e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982).

The district court did not abuse its discretion when it decided to maintain the status quo while plaintiffs litigate these important constitutional issues. If this Court lifts the injunction, plaintiffs not only will suffer the irreparable harm inherent in a constitutional deprivation, but also will be forced to turn their lawfully acquired property over to law enforcement for destruction or move it out of state. Plaintiffs undeniably will suffer an irreparable injury based on that forced dispossession of constitutionally protected property, and that concrete injury outweighs any speculative injury the state might suffer by maintaining a status quo that the state itself preserved for over 15 years. Because the public interest also favors an injunction in these circumstances, the Court should affirm the district court.

STATEMENT OF JURISDICTION

Plaintiffs agree with Appellant's jurisdictional statement. *See* Dkt.12 at 14.

STATEMENT OF THE ISSUE

Whether the district court abused its discretion by preliminarily enjoining a state law that would require plaintiffs to dispossess themselves of lawfully acquired and heretofore lawfully possessed firearm magazines capable of holding more than 10 rounds of ammunition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case implicates the Second, Fifth, and Fourteenth Amendments to the United States Constitution. The Second Amendment provides: "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 Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V. And the Fourteenth Amendment provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV. All applicable statutes are reproduced in the addendum to Appellant's brief.

STATEMENT OF THE CASE

With very few limited exceptions, California has generally made it unlawful for the average, law-abiding citizen to obtain the standard-issue magazine for the

most common firearms used for self-defense. However, for the first 15 years of the magazine ban's existence, in recognition of the takings problem that would result from the confiscation of lawfully acquired magazines, the state allowed individuals who had lawfully acquired such magazines before their prohibition to retain them. But in 2016, the state did away with even that limited protection and prohibited possession entirely, decreeing that individuals who lawfully possess lawfully acquired magazines must now dispossess themselves of that property. Plaintiffs, who include California residents who lawfully possess pre-ban magazines (as well as individuals who would acquire such magazines if it were lawful to do so), sued to enjoin the enforcement of the state's magazine ban, and sought a limited preliminary injunction that would preserve the status quo by allowing continued possession of magazines obtained pre-possession-ban during the pendency of this litigation. The district court issued that narrow preliminarily relief.

A. Magazines Capable of Holding More Than 10 Rounds of Ammunition Are Common And Have No History of Regulation.

Magazines that hold more than 10 rounds of ammunition are commonly possessed by the American public. Magazines of that size have been in circulation since before the American Revolution, and they have been commonly owned since 1862. SER275-88, 295-96; *see also* ER2421-23 (Curcuruto Decl. ¶¶4, 13); ER2427-29 (Helsley Decl. ¶¶3, 10). Between 1990 and 2015, for example, approximately 115 million magazines capable of holding more than 10 rounds were in circulation

in the United States. ER2422-23 (Curcuruto Decl. ¶¶6-8, 12-13); *see also* SER296; SER557. This number represents roughly half of all magazines acquired during that time period. ER2422 (Curcuruto Decl. ¶8). Indeed, magazines of a much larger capacity—up to 30 rounds for rifles and up to 20 rounds for handguns—are "standard equipment for many popular firearms." SER298.

Magazines holding more than 10 rounds are overwhelmingly used by law-abiding citizens for lawful purposes. *See* SER295. The magazines were developed for self- and home-defense, and they are specifically marketed and purchased for that purpose. ER2388 (Ayoob Decl. ¶24); ER2421 (Curcuruto Decl. ¶4); ER2427-29 (Helsley Decl. ¶¶4-11); SER723 (Duncan Decl. ¶6); SER727 (Lovette Decl. ¶6); SER732 (Marguglio Decl. ¶6); SER736 (Waddell Decl. ¶6).

As a historical matter, no evidence suggests a tradition of government regulation with respect to magazine capacity. Magazines capable of holding more than 10 rounds have existed since the mid-1500s, nearly two centuries before the country's Founding, yet there were no restrictions on them at the time of the ratification of the Second Amendment. SER310-14. The first laws regulating magazines—passed in three states and the District of Columbia—were enacted "during the prohibition era, nearly a century and half after the Second Amendment was adopted, and over half a century after the adoption of the Fourteenth Amendment." SER288-90. Today, the overwhelming majority of states place no

restrictions on magazine capacity, much less require law-abiding citizens to surrender them under threat of criminal penalty.

With the exception of one brief period in time, the federal government has taken the same approach as the overwhelming majority of states. For nearly all of the nation's history, the federal government did not regulate magazine capacity at all. In 1994, Congress adopted a nationwide prospective ban on certain magazines, which included a grandfather clause. *See* Pub. L. 103-322, 108 Stat. 1999 (1994) (formerly codified at 18 U.S.C. §922(w)). Ten years later, Congress vindicated the wisdom of the grandfather clause, but not the efficacy of the ban, by allowing the ban to expire after a study commissioned by the Department of Justice revealed that it had resulted in no appreciable impact on crime across the country. SER528; SER290. The possession of magazines capable of holding more than 10 rounds of ammunition remains legal under federal law today.

B. California Takes the Extraordinary Step of Imposing a Retrospective and Confiscatory Ban on the Possession of Magazines.

Since January 1, 2000, California has taken the outlier position of prohibiting the manufacture, importation, sale, and transfer of any "large-capacity magazine," defined as "any ammunition feeding device with the capacity to accept more than 10 rounds," with some exceptions not relevant here. Cal. Penal Code §§32310, 16740. While the 2000 law operated as a prospective ban on law-abiding citizens acquiring

the prohibited magazines, it did not prohibit possession. Accordingly, while individuals who did not presently possess prohibited magazines could no longer legally obtain one, citizens who had obtained such magazines before the law took effect were permitted to continue to retain them. In other words, the law had a de facto grandfather clause.

In July 2016, however, the legislature eliminated even that concession to Second Amendment rights and the Takings Clause, amending the relevant section of the California code to prohibit the possession of "large-capacity magazines" as well, and thereby prohibiting continued possession by even those who had obtained such magazines when it was lawful to do so. S. 1446, 2015-2016 Reg. Sess. (Cal. 2016). Indeed, the legislation affirmatively requires those in present possession to surrender for destruction or otherwise dispossess themselves of their lawfully acquired (and heretofore lawfully possessed) magazines. A few months later, in November 2016, the voters approved a referendum initiative, Proposition 63, that did the same. *See* Cal. Penal Code §32310. As a result, under California law, anyone currently in possession of a magazine capable of holding more than 10 rounds of ammunition must surrender it to law enforcement for destruction, remove it from the state, or sell it to a licensed firearms dealer, who in turn is subject to the transfer and sale restrictions. *Id.* §32310(a), (d). Failure to do so can result in criminal penalties, including up to a year in prison or fines. *Id.* §32310(c). That retrospective and

confiscatory ban on the possession of lawfully acquired magazines has no analog in federal law and is an outlier among state laws as well.

C. Plaintiffs Sued To Protect Their Constitutional Rights, and the District Court Preliminarily Enjoined the Possession Ban During The Pendency of the Litigation.

Plaintiffs sued to enjoin the enforcement of the state's magazine restrictions, alleging as relevant here that they violate the Second Amendment and the Takings Clause. ER0154-75. The individual plaintiffs—Virginia Duncan, Patrick Lovette, David Marguglio, and Christopher Waddell[1]—reside in San Diego, California, and either possess a lawfully acquired magazine with the capacity to hold more than 10 rounds, or seek to acquire and possess one. SER723-24 (Duncan Decl. ¶9); SER727 (Lovette Decl. ¶4); SER732-33 (Marguglio Decl. ¶9); SER736-37 (Waddell Decl. ¶9). The organizational plaintiff—California Rife & Pistol Association, Inc.—represents law-abiding owners of magazines that can hold more than 10 rounds and who would retain possession if the Court enjoins the ban, as well as individuals who would acquire and possess such magazines if it were legal to do so. SER740-41 (Barranco Decl. ¶¶4-6).

Although plaintiffs' lawsuit targeted California's magazine restrictions in both their prospective and retrospective aspects, the district court's injunction was

[1] Plaintiff Richard Lewis moved to dismiss his claims on December 28, 2017. *See* SER751 (District Court Dkt.47).

narrowly targeted to the retrospective and confiscatory aspects of the possession ban. In particular, the district court enjoined the possession ban and its elimination of the de facto grandfather clause pending the resolution of plaintiffs' claims on the merits, thereby preserving the status quo under which citizens who obtained magazines when it was lawful to do so may continue to possess them. Applying the well-settled standard for a preliminary injunction, the court concluded that "[p]laintiffs have demonstrated on this preliminary record a likelihood of success on the merits, a likelihood of irreparable harm, a balance of equities that tips in their favor, and that an injunction would be in the public interest." ER0007-08. In reaching that conclusion, the district court held that plaintiffs were likely to succeed on their claims under both the Second Amendment and the Takings Clause.

As for the Second Amendment claims, the district court first concluded that magazines capable of holding more than 10 rounds of ammunition fall within the scope of the Second Amendment because they are "common" and "useful for self-defense in the home." ER0015. It further found that no evidence suggests that those magazines have a "historical pedigree" that would take them outside the scope of the right. ER0021.

Because the magazine possession ban falls within the scope of the Second Amendment, the district court considered this Court's two-part test for determining the level of scrutiny that applies: whether the law burdens the exercise of Second

Amendment rights and, if so, whether the law is a reasonable fit to the state's interest. ER0020 (citing *United States v. Chovan*, 735 F.3d 1127, 1136-37 (9th Cir. 2013)). Although the court concluded that the possession ban "hits at the core of the Second Amendment," ER0021, it proceeded on the assumption that intermediate scrutiny applies, ER0028-29. After carefully reviewing the state's evidence, the court then concluded that the state had not met its burden at this preliminary stage of proving that the law satisfies intermediate scrutiny because the state failed to provide "credible," "reliable," or "on point" evidence that a complete ban on possession is a "reasonable fit" to its asserted purposes of preventing mass shootings and gun violence. ER0023-56. While the court did not rule out the possibility that the state could provide a better record at a later stage of the litigation, at this stage, the court found that the state offered only "speculative explanations and predictions." ER0023. As the court explained, the ban on possession of magazines capable of holding more than 10 rounds is a "bludgeon" that "indiscriminately hammers all that is in its path," unjustifiably "throw[ing] the law-abiding, self-defending citizen … into the same jail cell as the criminal." ER0055. Because that sweeping prohibition lacks any reasonable tailoring, the district court concluded that plaintiffs are likely to succeed on the merits of their Second Amendment claims.

The district court also concluded that plaintiffs are likely to succeed on their takings claims because the Takings Clause "prevents [the state] from compelling the

physical *dispossession* of … lawfully-acquired private property without just compensation." ER0063. The court found unpersuasive the state's argument that its police power can overcome a takings claim, observing that "whatever might be the State's authority to ban the sale or use of magazines over 10 rounds," the state cannot "actually … take[] away" its citizens' lawfully acquired property without providing just compensation. *Id.*

The district court also found that plaintiffs satisfied the other preliminary injunction factors. The court explained that the loss of Second Amendment rights "constitutes irreparable injury," especially so where plaintiffs will irrevocably lose possession and use of their magazines. ER0056-57. It concluded that the public interest "favors the exercise of Second Amendment rights by law-abiding responsible citizens," especially when, as with respect to the limited preliminary relief the plaintiffs sought here, doing so will "maintain the *status quo*." ER0058-59. And it concluded that the balance of the equities favors plaintiffs, who will face "criminal sanctions for failure to act." ER0057-58.

STANDARD OF REVIEW

The scope of this Court's review of a preliminary injunction decision is "narrow," and involves "only whether the district court correctly distilled the applicable rules of law and exercised permissible discretion in applying those rules to the facts at hand." *Fyock v. City of Sunnyvale*, 779 F.3d 991, 995 (9th Cir. 2015).

The relevant factors for a preliminary injunction are (1) plaintiffs' likelihood of success on the merits, (2) plaintiffs' likelihood of irreparable harm absent preliminary relief, (3) the balance of the equities, and (4) whether an injunction serves the public interest. *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). "The basic function of a preliminary injunction is to preserve the status quo pending a determination of the action on the merits." *Chalk v. U.S. District Court*, 840 F.2d 701, 704 (9th Cir. 1998).

SUMMARY OF ARGUMENT

The district court acted well within its broad discretion in entering a narrow preliminary injunction that merely preserves the status quo by permitting plaintiffs to keep their lawfully acquired, constitutionally protected magazines during the pendency of this litigation. Magazines with the capacity to hold more than 10 rounds of ammunition are "necessary and integral" for pistols and rifles commonly used for self-defense, and thus fall within the purview of the Second Amendment. ER0016. The state's imposition of an extraordinary retrospective and confiscatory ban on their possession—the most draconian form of regulation available—must be justified under heightened scrutiny. At a minimum, the state must show that its law bears a "reasonable fit" to its goal of reducing mass shootings and gun violence in light of its own willingness to allow those who lawfully acquired the now-prohibited magazines to continue possessing them for over a decade.

The paltry evidence the state submitted at the preliminary injunction phase was carefully considered by the district court, and the court's conclusion that it falls well short of satisfying that standard is hardly an abuse of discretion. The state's position boils down to the argument that the most effective way to reduce crimes involving the prohibited magazines is to ban their possession entirely, even when lawfully acquired. But the logic of that rationale would permit the state to confiscate all guns, in the name of reducing gun violence. The Supreme Court squarely rejected that line of argument in *District of Columbia v. Heller*, 554 U.S. 570 (2008), holding that a state's aim of reducing crime does not, under any level of scrutiny, justify an across-the-board ban on possession of firearms, let alone their confiscation. The Second Amendment has taken that "policy choice[] off the table." *Id.* at 636. That holding in *Heller* precludes the state's argument here, especially because citizens throughout American history have owned and used these magazines responsibly and for the "core lawful purpose of self-defense." *Id.* at 630.

Moreover, as to citizens who lawfully acquired those magazines, there can be no serious dispute that the uncompensated, forced dispossession of them by the government amounts to a physical taking. The state's argument that it may take its citizens' property without paying compensation so long as it invokes its "police power" is squarely foreclosed by long-standing Supreme Court precedent. And its sweeping assertion that citizens "do not have a right to have something that could

reasonably be deemed dangerous by the state" would dramatically expand state power at the expense of property rights. ER0118.

Plaintiffs readily satisfy the other requirements for a preliminary injunction, and the district court certainly did not abuse its discretion in finding them satisfied. Plaintiffs indisputably face an irreparable injury, both due to their constitutional injury and due to the law's extraordinary requirement that they surrender for destruction or otherwise physically dispossess themselves of their property or risk criminal prosecution. The notion that litigants must acquiesce in the state's demand that they turn over their property for destruction before a final determination of whether the demand is constitutional is antithetical to our judicial system. The preliminary injunction exists for cases like this.

The public interest also favors plaintiffs, as the public has a strong interest in the vindication of constitutional rights. Finally, the balance of the equities favors plaintiffs, for plaintiffs' concrete, irreparable injury outweighs any speculative injury the state might suffer from maintaining the status quo for the duration of this litigation. Indeed, the state itself "preliminarily enjoined" the most draconian aspects of its magazine restrictions by allowing citizens who lawfully acquired the prohibited magazines to continue to possess them for the first 15 years of the restrictions' existence. Having already made the considered judgment that citizens who already possessed these magazines, and who had done so without incident,

should be able to keep them, the state cannot insist on immediate enforcement and immediate destruction before the legality of its actions is even litigated. The district court did not abuse its discretion when it merely preserved that status quo while plaintiffs litigate their claims.

ARGUMENT

The district court correctly identified the governing law for issuing a preliminary injunction and did not abuse its discretion when it concluded that plaintiffs demonstrated "on this preliminary record a likelihood of success on the merits, a likelihood of irreparable harm, a balance of equities that tips in their favor, and that an injunction would be in the public interest." ER0007-08.

I. Plaintiffs Are Likely To Succeed On The Merits Of Their Constitutional Claims.

Plaintiffs are likely to show that California's retrospective and confiscatory ban on the mere possession of standard-issue magazines violates both the Second Amendment and the Takings Clause. Although plaintiffs needed to show a likelihood of success on only one of those grounds to justify a preliminary injunction, the district court was correct as to both claims.

A. The Possession Ban Violates the Second Amendment.

The district court did not abuse its discretion when it concluded, based on the record before it at the time, that plaintiffs are likely to show that California's extraordinary retrospective and confiscatory ban on the possession of the most

commonly owned firearm magazines fails to satisfy heightened scrutiny. *See Chovan*, 735 F.3d at 1136. The law imposes the most severe kind of burden, as it bans the mere possession of magazines protected by the Second Amendment to the point of confiscating lawfully acquired magazines possessed without incident for over a decade. And the district court did not abuse its discretion in concluding that the state utterly failed to supply credible and reliable evidence that the possession ban is tailored at all, much less reasonably so, to the state's asserted interests.

1. The retrospective and confiscatory possession ban plainly implicates plaintiffs' Second Amendment rights.

The Second Amendment provides that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II; *see McDonald v. City of Chicago*, 561 U.S. 742, 790-91 (2010) (plurality) (incorporating the Second Amendment against the states). Nearly a decade ago, the Supreme Court made clear that the Second Amendment "confers an individual right" that belongs to "the people"—a term that "unambiguously refers to all members of the political community," except those subject to certain "longstanding prohibitions" on the exercise of the right, such as "felons and the mentally ill." *Heller*, 554 U.S. at 580, 622, 626-27. The right belongs to all "law-abiding, responsible citizens," and it protects arms that are "typically possessed by law-abiding citizens for lawful purposes." *Id.* at 625, 635. The right extends to ammunition and accessories such

as magazines, for "without bullets, the right to bear arms would be meaningless." *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014).

The state does not dispute many of the factual findings of the district court, all of which confirm that the magazines at issue fall within the scope of the Second Amendment. First, the state does not dispute that the magazine ban applies to nearly all "law-abiding, responsible citizens," save for discrete exceptions like law enforcement agents or members of the entertainment industry. *Heller*, 554 U.S. at 635. The state does not argue that magazines are not "arms" for purposes of the Second Amendment, and it does not dispute that magazines "are necessary and integral to the designed operation" of "pistols and many rifles." ER0016. Finally, the state does not dispute that magazines capable of holding more than 10 rounds "are popular," or that tens of millions of Americans possess them. ER0006.

These findings were sufficient for the district court to conclude that the Second Amendment protects the prohibited magazines, and comparable facts were sufficient for this Court to "agree with" the conclusion of another district court that a magazine possession ban likely implicated the Second Amendment. *Fyock*, 779 F.3d at 999. Indeed, virtually every court to consider the issue has reached that conclusion. *See, e.g.*, *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 255 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406, 415 (7th Cir. 2015).

In light of these findings, and this Court's previous conclusion in *Fyock*, the state wisely does not ask this Court to reverse the district court on the ground that the prohibited magazines fall outside the purview of the Second Amendment. Dkt.12 at 38. Instead, the state invites the Court to proceed on the assumption that they *are* constitutionally protected, Dkt.12 at 28 n.7, but also preserves its argument that, notwithstanding their common possession by law-abiding citizens, the magazines do not fall within the right because they "are not appropriate for self-defense, and are not actually used for such purposes in practice," as they are "clearly most useful in military service." Dkt.12 at 38 (quotation marks omitted). But the state points to zero evidence to substantiate any of those claims—likely because ample record evidence supports the district court's factual finding that "[m]agazines holding more than 10 rounds" are "common" and "useful for self-defense by law-abiding citizens." ER0019; ER2427-28.

Instead, the state relies on only a single decision from the Fourth Circuit taking the novel position that arms are not protected by the Second Amendment if they are "most useful in military service." *Kolbe v. Hogan*, 849 F.3d 114, 137 (4th Cir. 2017) (en banc). This Court has never embraced that outlier position—and for good reason, as it is squarely foreclosed by Supreme Court precedent. *Heller* makes clear that the starting (and ending) point for determining which arms are protected by the Second Amendment is not whether they are "useful in military service," but whether

they are "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625, 627; *accord Fyock*, 779 F.3d at 998. Whether arms that fit that bill are also useful to the military is entirely beside the point.

The Fourth Circuit's contrary contention is foreclosed not only by Supreme Court and Ninth Circuit precedent, but also by the text of the Constitution. The fact that the military might also find certain magazines or arms useful can hardly suffice to render them outside the scope of an amendment that was designed, in part, to ensure the existence of "[a] well regulated Militia." U.S. Const. amend. II. To be sure, the fact that arms are useful to the military does not necessarily bring them within the purview of the Second Amendment. But it defies common sense and the plain intent of the Second Amendment's prefatory clause to claim that usefulness for military purposes suffices to remove arms from the amendment's protections. While the militia was not expected to muster with tanks, they were surely expected to muster with individual arms useful for military service. And today there are countless guns, knives, and other arms that, as a result of their superior utility and function for self-defense, are commonly possessed by both the American public and the armed forces. But in all events, even if military-utility could somehow be counted against Second Amendment protection, the state has made absolutely no effort to *prove* that the magazines it seeks to ban are "most useful in military service." Dkt.12 at 38 (quotation marks omitted). The district court certainly did

not abuse its discretion by declining to embrace a factual proposition that the state did not even attempt to substantiate.

2. The possession ban plainly burdens plaintiffs' Second Amendment rights.

While the state invites this Court to resolve this case on the premise that the Second Amendment protects the prohibited magazines, it nonetheless maintains that its law does not burden plaintiffs Second Amendment rights *at all* because citizens rarely need more than 10 rounds to defend themselves. Dkt.12 at 41. Setting aside the state's failure of proof on that point, that argument confuses the inquiry into the severity of the burden with the inquiry into whether arms are protected. Once arms are protected, a law-abiding citizen has a right to possess them, regardless of the frequency with which they will need to be used.

That is evident from *Heller* itself. Once the Supreme Court concluded that Americans commonly owned handguns for self-defense—in other words, that handguns are constitutionally protected—the Court did not ask how frequently citizens actually need to use handguns for self-defense. It was enough that the Constitution "guarantee[s] the individual right to possess and carry [handguns] in case of confrontation." 554 U.S. at 592. To ask whether individuals really *need* to be "armed and ready" for confrontation most of the time, *id.* at 584, would be to empower judges to "decide on a case-by-case basis whether the right is *really worth* insisting upon"—something that "[t]he very enumeration of the right" forbids,

id. at 634. Accordingly, the simple fact that the state has attempted to make it impossible to possess something that the Second Amendment protects not only mandates strict scrutiny, but, just as in *Heller*, should suffice to invalidate the ban. *See, e.g.*, *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011).

But in all events, while the state belabors its Alice-in-Wonderland claim that its extraordinary directive that lawfully acquired magazines be surrendered for prompt physical destruction imposes no burden at all, it ultimately concedes that at least "intermediate scrutiny applies," Dkt.12 at 43—another wise concession given that this Court already concluded that a district court did not "abuse[] its discretion by applying intermediate scrutiny" to a comparable prohibition in *Fyock*. 779 F.3d at 998. And the district court here did not apply strict scrutiny or *Heller*'s total invalidation rule, but rather concluded that the plaintiffs are likely to prevail on their Second Amendment challenge "[e]ven under the more forgiving test of intermediate scrutiny." ER0064. So while plaintiffs certainly disagree with the state's claim that the ban should be subject to *only* intermediate scrutiny, the district court's finding that the ban flunks intermediate scrutiny renders the state's protests regarding the severity of the burden largely beside the point here.

3. The possession ban is not sufficiently tailored to achieve the state's interest.

As the district court explained, intermediate scrutiny requires the state to establish a "reasonable fit" or a "substantial relationship" between its law and a "significant, substantial, or important" government objective. *Chovan*, 735 F.3d at 1136, 1139. The fit requirement seeks to ensure that the encroachment on liberty is "not more extensive than necessary" to serve the government's professed interest. *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 816 (9th Cir. 2013). To that end, it requires the state to establish that its chosen restriction advances its interest "to a material degree." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (plurality). The state's "burden is not satisfied by mere speculation or conjecture." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001). The state instead must establish that its chosen restriction "will in fact alleviate" the "harms it recites." *Id.* In discharging its burden, California is plainly handicapped by the twin realities that the state is an extreme outlier in resorting to a confiscatory ban in regulating magazines and that the state itself addressed its concerns with magazines without resorting to a confiscatory and retrospective ban for a decade and a half.

The district court correctly held that the state failed to substantiate its claim that its outright ban on possession is substantially related or appropriately tailored to the state's asserted interests in preventing mass shootings and gun violence. The state advances two primary arguments in support of its possession ban—the

prohibited magazines are frequently used in mass shootings and, relatedly, criminals might misuse the magazines—but each claim is fatally flawed as a legal matter and in all events factually unsubstantiated.

First, as a legal matter, the Second Amendment does not tolerate banning the possession of constitutionally protected arms on the ground that they are frequently involved in certain kinds of crime, even serious ones. In *Heller*, the District of Columbia attempted to justify its handgun ban on the ground that handguns were involved in the vast majority of firearm-related homicides in the United States. 554 U.S. at 696 (Breyer, J., dissenting) (collecting statistics). Despite the government's clear and compelling interest in preventing homicides, the Supreme Court held that a ban on possession of those protected arms by law-abiding citizens lacks the required fit to that goal "[u]nder any of the standards of scrutiny." *Id.* at 628-29 (majority opinion).

Heller similarly rejected the argument that protected arms may be prohibited on the ground that criminals might misuse them. Again, there, the government argued that handguns made up a significant majority of all stolen guns and that they were overwhelmingly used in violent crimes. *Id.* at 698 (Breyer, J., dissenting). But despite the government's clear interest in keeping handguns out of the hands of criminals and unauthorized users, the Supreme Court rejected that argument, too, concluding that a ban on possession by law-abiding citizens is not reasonably

tailored to prevent misuse by criminals. *Id.* at 628-29 (majority opinion). Moreover, California's retrospective ban is a particularly poor fit for invocation of a criminal misuse interest because compliance with the confiscatory aspect of the ban requires the kind of voluntary action only a law-abiding citizen would undertake.

The Supreme Court's approach in *Heller* follows a long history of rejecting the notion that the government may flatly ban constitutionally protected activity on the ground that the activity could lead to abuses. *See, e.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002) (government cannot ban virtual child pornography on the ground that it might lead to child abuse because "[t]he prospect of crime" "does not justify laws suppressing protected speech"); *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (state cannot impose a "flat ban" on solicitations by public accountants on the ground that solicitations "create[] the dangers of fraud, overreaching, or compromised independence"). That extreme degree of prophylaxis is incompatible with the decision to give the activity constitutional protection. California's overinclusive approach violates the basic principle that "a free society prefers to punish the few who abuse [their] rights … after they break the law than to throttle them and all others beforehand." *Se. Promotions Ltd. v. Conrad*, 420 U.S. 546, 559 (1975); *accord Vincenty v. Bloomberg*, 476 F.3d 74, 84-85 (2d Cir. 2007); *Robb v. Hungerbeeler*, 370 F.3d 735, 743 (8th Cir. 2004).

At the end of the day, the state can justify its extraordinary retrospective and confiscatory ban only on the ground that it reflects the *non plus ultra* of its policy choice regarding the types of arms it desires its residents to use. As the state acknowledges, its view is that "the most effective way to eliminate" injuries due to large-capacity magazines "is to prohibit them." Dkt.12 at 49. But that argument simply ignores the framers' judgments reflected in the Bill of Rights. Surely the most effective way to eliminate defamation is to prohibit printing presses, and the most effective way to eliminate crime is to empower police officers with unlimited search authority, and so on. But the Constitution prohibits such extreme measures by giving protection to free speech and the privacy of the home. The Second Amendment is no different. *Heller* made clear that the Second Amendment "necessarily takes certain policy choices off the table." 554 U.S. at 636. California's possession ban is one of them, both because it is far too sweeping to reflect any sort of reasonable fit to the state's interest, and because the state's rationale, "taken to its logical conclusion," would "justify a total ban on firearms kept in the home." *Heller v. District of Columbia*, 801 F.3d 264, 280 (D.C. Cir. 2015).

Moreover, even if the possession ban were permissible in theory, the district court did not abuse its discretion in finding that the state's evidence at this preliminary stage falls short of showing that it will advance "to a material degree" the state's interest in reducing mass shootings and gun violence. *44 Liquormart*, 517

U.S. at 505. The state's evidence consisted of "incomplete studies from unreliable sources upon which experts base speculative explanations and predictions." ER0023. For example, much of its evidence involved crimes outside of the United States, many of the state's examples did not specify the capacity of the magazine used in the crime at issue, and many of those that did actually confirmed that a "large-capacity" magazine was *not* used. *See, e.g.*, ER0026-27; ER0650-758. These evidentiary deficiencies are particularly glaring given the state's 15 years of experience grandfathering in those who already possessed the magazines. If that decision were really creating some loophole in an otherwise comprehensive ban, the state was in a position to know. Likewise, since most states have not imposed even a prospective ban similar to California's, the state had ample opportunities to marshal comparative studies.

At the same time that the state fell well short of carrying its burden, plaintiffs supplied ample counter-evidence that the possession ban is unlikely to advance the state's interests. For example, a report by the U.S. Department of Justice following the national ban on magazines capable of holding more than 10 rounds found that "no evidence" supported a finding that "lives were saved," and that "no evidence" supported a finding that "criminals fired fewer shots during gun fights." SER528. Moreover, plaintiffs offered substantial empirical evidence demonstrating that criminals rarely fire more than 10 shots during the vast majority of gun crimes. *See,*

e.g., ER2436-37 (Kleck Decl. ¶¶7-8). The 10-round limit therefore would have no impact on the vast majority of gun crimes.

The record also amply supports the district court's conclusion that standard-issue magazines may well have a positive impact on public safety when in the hands of victims. Plaintiffs offered evidence of both a self-defense expert and a criminologist who concluded that the ban will disadvantage law-abiding citizens defending against an attack, which "is more likely, on net, to harm the safety of … citizens than improve it." ER2380-85 (Ayoob Decl. ¶¶5-17); ER2429-32 (Helsley Decl. ¶¶11-15); ER2441-44 (Kleck Decl. ¶¶18-20, 25). In view of this evidence and the broad sweep of the law, the district court did not abuse its discretion in concluding that the possession ban is a "bludgeon" that "indiscriminately hammers all that it is in its path." ER0055.

This Court's holding in *Fyock* in no way compels a different conclusion. The panel in that case made abundantly clear that its review was "limited" and constrained by the "narrow scope" of a preliminary injunction appeal. 779 F.3d at 995. The panel determined "only whether the district court correctly distilled the applicable rules of law and exercised permissible discretion in applying those rules to the facts at hand." *Id.* The abuse-of-discretion standard necessarily contemplates that two courts may permissibly reach differing conclusions, *see Fed. Sav. & Loan Corp. v. Ferm*, 881 F.2d 1083 (9th Cir. 1989), particularly when the courts are

presented with different factual records from which different inferences and conclusions may be drawn. As the district court here explained, "the district court in *Fyock* had before it an evidentiary record that was credible, reliable, and on point," but "[t]hat is not the case here." ER0023. Moreover, the court went out of its way to emphasize that it was not ruling out the possibility that it may reach a different conclusion on a "more robust evidentiary showing, made after greater time and testimony is taken." ER0025. While plaintiffs seriously doubt that the state will *ever* be able to satisfy any form of heightened scrutiny, the district court plainly did not abuse its discretion by concluding, given the record before it at this stage, that "[e]ven under the more forgiving test of intermediate scrutiny, the statute is not likely to" survive Second Amendment scrutiny. ER0064.

B. The Possession Ban Violates the Takings Clause.

The district court also correctly concluded that the retrospective and confiscatory aspects of the possession ban likely violate the Takings Clause. The Takings Clause provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V; *see Chicago, B&Q Ry. Co. v. Chicago*, 166 U.S. 226, 239 (1897) (holding that the Takings Clause applies to the states). A physical taking occurs whenever the state "dispossess[es] the owner" of property. *Loretto*, 458 U.S. at 435 n.12 (1982). And whenever a physical taking occurs, the government must pay just compensation. *Id.* at 421. That result does

not vary with the source of state power the state invokes. When the Supreme Court extended the Bill of Rights to the states, it assumed that states had near-plenary powers and nonetheless held that states could not use any of those powers to violate fundamental constitutional rights. The Takings Clause is no different. The Supreme Court long ago rejected the argument that invoking the police power immunizes the government from its obligation to pay just compensation when it takes private property. While the police power may make a taking *permissible*, insofar as it tends to show that the state took the property for public use, it does not make it any less a taking. Because California seeks to physically dispossess plaintiffs of their lawfully acquired property without compensation, plaintiffs are likely to succeed on their takings claims.

1. The possession ban results in a physical taking.

By prohibiting the possession of magazines capable of holding more than 10 rounds of ammunition even by those who lawfully acquired and have long lawfully possessed them, California clearly seeks to effectuate a physical taking. The state does not dispute that the law requires the physical surrender of lawfully acquired personal property without compensation. Nor could it, as the law on its face "requires persons who lawfully possess these magazines today to *dispossess* them or face criminal penalties of up to one year in a county jail and a fine of $100 per magazine, or both." ER0001-02. The state instead argues—in a single, conclusory

sentence—that "a ban on possession, standing alone, is not a physical taking." Dkt.12 at 67. That conclusion finds no support in case law or common sense.

A statute that requires a citizen to dispossess herself of lawfully acquired property is a textbook example of a physical taking. The very definition of a physical taking is "absolutely dispossess[ing] the owner" of property. *Loretto*, 458 U.S. at 435 n.12; *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 n.19 (2002) (a physical taking "dispossess[es] the owner" of property); *Nixon v. United States*, 978 F.2d 1269, 1287 (D.C. Cir. 1992) (statute that "physically dispossessed" property owner "resulted in" per se taking); Black's Law Dictionary (10th ed. 2014) (defining "taking" to include the "transfer of possession"). And a physical taking occurs when the government dispossesses an owner of personal property, not just real property, as the "categorical duty" imposed by the Takings Clause applies "when [the government] takes your car, just as when it takes your home." *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426 (2015).

The Supreme Court's recent decision in *Horne* is particularly instructive. In that case, the Court invalidated a law requiring raisin farmers to surrender a percentage of their crops to the Department of Agriculture. *Id.* at 2428. Because the law dispossessed the farmers of the "[a]ctual raisins," the Court held that the law resulted in "a clear physical taking" that required compensation. *Id.* The same is

true here, where the entire aim of the law is to "dispossess[]" California citizens of the "actual" magazines. *Id.* at 2428, 2438.

The state does not seriously dispute that requiring plaintiffs to "[s]urrender the large-capacity magazine" to the government for destruction, Cal. Penal Code §32310(d)(3), results in a physical taking. That conclusion is obvious, as relinquishing both title and possession of the magazines forfeits "the entire 'bundle' of property rights" in the property. *Horne*, 135 S. Ct. at 2428. The state instead argues that the law does not amount to a physical taking because it also allows citizens to surrender their property to persons or places other than the government, or destroy it altogether: Plaintiffs may sell the magazines to a firearms dealer, move them to another state, or permanently alter the magazines so that they cannot hold more than 10 rounds. Dkt.12 at 71-72 (citing Cal. Penal Code §32310(d)). But none of those options renders the law anything other than a physical taking.[2]

[2] To the extent the option to sell or move the magazines is characterized as a regulatory taking, rather than a physical one, the result is the same. As the district court correctly observed, "whatever expectations people may have regarding property regulations, they 'do not expect their property, real or personal, to be actually occupied or taken away.'" ER0063 (quoting *Horne*, 135 S. Ct. at 2427); *see also Loretto*, 458 U.S. at 436. Indeed, most regulatory takings restrict the use of property without transferring a property interest to the government, which underscores that government possession (as opposed to private dispossession) is not a prerequisite for a taking.

The first option—forcing plaintiffs to sell their property—is no less a taking than if the government seized it. As the authorities cited make clear, the gravamen of a taking is the dispossession of the property from the owner. Whether the government edict forces the owner to hand the property over to the government or to a third party, there is still a taking. Thus, in the landmark *Kelo* case, it made no difference to the Court's analysis that the law allowed Ms. Kelo to sell her property to a "private nonprofit entity." *Kelo v. City of New London*, 545 U.S. 469, 473-75 (2005). Instead, as this Court has emphasized, "it is sufficient" that the law "involves a direct interference with or disturbance of property rights," even if the government itself does not "directly appropriate the title, possession or use of the propert[y]." *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1330 (9th Cir. 1977). At a minimum, forcing citizens to sell their property places an unconstitutional condition on the possession of their property, which effects an unconstitutional taking. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595-96 (2013).

The second option—moving the property out of California to another state—fares no better. Like a mandatory sale to a third party or surrender to the government, a mandatory transfer of property out of state, often away from the owner's primary home, involves "a direct interference with or disturbance of" the owner's right to the property. *Richmond Redevelopment Agency*, 561 F.2d at 1330. And it is no answer

that citizens can possess their property in another state. As California itself has recognized, "each State bears an independent obligation to ensure that its regulations do not infringe the constitutional rights of persons within its borders." Amicus Brief for the States of New York, California, et al., at 20, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). California cannot invoke the permissive laws of another state to validate its own unconstitutional restriction. *See Jackson*, 746 F.3d at 967 ("That Jackson may easily purchase ammunition elsewhere is irrelevant."); *cf. Whole Woman's Health*, 136 S. Ct. at 2304, 2312 (the availability of abortion services in a nearby state did not cure constitutional violation).

The third option—permanently altering the magazines to accept fewer than 10 rounds—cannot be squared with Supreme Court takings precedents either. Dkt.12 at 71. In *Horne*, for example, the raisin growers could have "plant[ed] different crops," or "[sold] their raisin-variety grapes as table grapes or for use in juice or wine." *Horne*, 135 S. Ct. at 2430. Likewise, in *Loretto*, the property owner could have converted her building into something other than an apartment complex. *See* 458 U.S. at 439 n.17. The Supreme Court rejected those arguments in both cases, admonishing that "property rights 'cannot be so easily manipulated.'" *Horne*, 135 S. Ct. at 2430 (quoting *Loretto*, 458 U.S. at 439 n.17).

Finally, the state appears to suggest that there can be no taking when the government's purpose in seizing the property is to eliminate the circulation or

availability of the property rather than to take control of it. Dkt.12 at 70. The state cites *Horne* for this argument, but *Horne* actually confirms just the opposite. The purpose of the law in *Horne* was not for the government to use the raisins, but rather "to stabilize prices by limiting the supply of raisins on the market"—in other words, to eliminate the circulation of excess raisins. *Horne v. Dep't of Agric.*, 569 U.S. 513, 516 (2013). The state's proposed rule also makes little sense, as it would incentivize the government to get rid of the property it seizes rather than put it to good use. The Takings Clause does not draw that irrational distinction, and the district court was correct to reject it.

2. There is no "police power exception" to the Takings Clause.

Apparently recognizing that the district court was correct that plaintiffs are likely to establish that the possession ban would effect a physical taking of their property, the state claims that "what is dispositive" is not whether the state is actually taking its citizens' property, but "under what power and for what purpose the government is acting." Dkt.12 at 67-68. According to the state, so long as "the government acts pursuant to its police power," its actions are "not a physical taking." *Id.* at 68. That argument is wrong from start to finish.

At the outset, the state confuses the takings inquiry with the compensation inquiry when it asserts that the "dispositive" question is "under what power" the government took the property. *Id.* That question might be informative as to the

threshold question of whether the government has the power to take the property in the first place—in other words, whether it has taken the property for a "public use"—because "the 'public use' requirement is … coterminous with the scope of a sovereign's police powers." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984); *see also Richardson v. City & Cty. of Honolulu*, 124 F.3d 1150, 1156 (9th Cir. 1997). But it says nothing about whether the government has an obligation to pay just compensation. That obligation arises by virtue of the taking, regardless of the power pursuant to which the property was taken.

To the extent the plain text of the Takings Clause leaves any room for doubt about that, the Supreme Court has definitively resolved it, expressly rejecting a so-called "police power exception" to the Takings Clause. In *Loretto*, the Court held that a law requiring physical occupation of private property was both "within the State's police power" *and* a physical taking that required compensation. 458 U.S. at 425. The Court made clear that the question of whether a law effects a physical taking is "a separate question" from whether the state has the police power to enact it, and that an uncompensated taking is unconstitutional "without regard to the public interests that it might serve." *Id.* at 426; *see also Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985) (distinguishing between physical taking and exercise of police power); *Chi., B&Q Ry. Co. v. Illinois*, 200 U.S. 561, 593 (1906).

The Supreme Court followed the same course in *Lucas v. South Carolina Coastal Council*, holding that a law enacted pursuant to the state's "police powers to enjoin a property owner from activities akin to public nuisances" is not immune from scrutiny even under the more permissive *regulatory* takings doctrine. 505 U.S. 1003, 1020-27 (1992). The Court explained that the "legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated." *Id.* at 1026. The same is true for the categorical rule that the government must compensate for physical takings. *Id.* at 1015; *Horne*, 135 S. Ct. at 2425.

The state's attempts to distinguish these cases are unavailing. The state tries to distinguish *Loretto* only by claiming that the magazine-possession ban "does not involve any physical invasion by the government of private property." Dkt.12 at 70. How exactly the state believes that to be true, it does not explain, as the state cannot seriously mean to suggest that requiring its residents to surrender their magazines altogether is any less a physical invasion of their property rights than requiring them to accept the placement of a cable antennae. Indeed, the devastating physical invasion on plaintiffs' magazines is exactly parallel to the physical intrusion on farmers' raisins in *Horne*. In all events, none of this has anything to do with the relevant holding of *Loretto*, which is directly contrary to the state's never-mind-the-Takings-Clause-we-are-exercising-our-police-power argument.

The state makes much the same mistake with respect to *Lucas*, trying to distinguish it based on the Supreme Court's observation that a regulation does not result in a taking if the confiscation of property conforms to "background principles." Dkt.12 at 70. Again, that speaks only to whether there has been a taking, not to whether the state is excused from providing compensation for a taking because it took property via its police power. And in all events, the "background principles" here plainly cut the other way on the takings question because the state is seeking to dispossess its citizens of magazines that they *lawfully* obtained, *before* those magazines were "subject to confiscation and destruction under state law." *Id.* To be sure, the takings analysis would be different as to an individual who *unlawfully* obtained such a magazine after the ban was already in place. But just as "confiscatory regulations" of real property "cannot be newly legislated or decreed (without compensation)," *Lucas*, 505 U.S. at 1029, neither can outright confiscations of personal property be decreed after the fact. After all, "whatever expectations people may have regarding property regulations, they 'do not expect their property, real or personal, to be actually occupied or taken away.'" ER0063 (quoting *Horne*, 135 S. Ct. at 2427).

The state's other authorities likewise provide no support for the proposition that its police power immunizes its uncompensated physical dispossession of property. Indeed, *Chicago, B&Q Railway* actually refutes that proposition, as the

Court made crystal clear there that "if, in the execution of *any power, no matter what it is*, the government … finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner." 200 U.S. at 593 (emphasis added).

Nor do the state's cases support the proposition that laws "prohibit[ing] property found to be harmful or dangerous" cannot constitute a taking in the first place. Dkt.12 at 69. Most of those cases found no taking precisely because they did not involve *prohibitions* on possession—a fact that the Supreme Court found critical when distinguishing some of these very same cases in *Horne*. *See* 135 S. Ct. at 2429. For instance, *Evervard's Breweries v. Day* involved a challenge to the federal restriction on the *manufacture and sale* of liquors, not to a restriction on their possession. 265 U.S. 545, 563 (1924). As for *Andrus v. Allard*, 444 U.S. 51, 67 (1979), the regulation banning possession of eagle feathers there included a grandfathering clause—which is precisely why the Court concluded that it was not a taking. Likewise, *Gun S., Inc. v. Brady*, 877 F.2d 858, 869 (11th Cir. 1989), involved a restriction on the *importation* of guns, not their possession. *See also Mugler v. Kansas*, 123 U.S. 623 (1887) (law restricted use of property and did not require dispossession); *Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 967–68 (9th Cir. 2003) (ordinance conditioned continued *operation* of hotels, not their *ownership*, on compliance with "basic maintenance, housekeeping, and

security regulations"); *Wilkins v. Daniels*, 744 F.3d 409, 419 (6th Cir. 2014) (finding no taking because "neither the government nor a third party ha[d] occupied appellants' property"; government had merely required appellants to implant microchips into animals that they then "retain[ed] the ability to use and possess").

Indeed, the state cites only two cases that actually involved challenges to possession bans, and both notably pre-dated *Horne*. *See Akins v. United States*, 82 Fed. Cl. 619, 623 (Fed. Cl. 2008); *Fesjian v. Jefferson*, 399 A.2d 861 (D.C. Ct. App. 1979). Accordingly, to the extent those cases fail to abide by the Supreme Court's subsequent admonition that there is a fundamental difference between a regulation that restricts only the *use* of private property and one that requires "physical surrender … and transfer of title," *Horne*, 135 S. Ct. at 2429, they are no longer good law and should not be embraced by this Court.

In sum, the district court acted well within its discretion in rejecting the state's assertion of a police-power exception to the Takings Clause. In addition to finding no support in precedent, the state's position would essentially rewrite takings law and constitutional law more generally. As a general matter, the federal Constitution is indifferent to the source of state power used to violate a federal constitutional prohibition. While the federal government is one of limited and enumerated powers, the federal Constitution generally assumes that states exercise plenary or police powers. And once the Supreme Court incorporated the Bill of Rights against the

states, those provisions prohibited certain state actions whatever the source of power under state law. The only reason the source of state power is even discussed in takings cases is because it has some relevance to whether the government can satisfy the threshold requirement of taking private property for public use. But once that hurdle is cleared, the source of power used to take private property is of no further moment. Otherwise, the very fact that the taking was for a public use not only would allow the taking to occur, but would obviate the need for just compensation. That result is, of course, wholly antithetical to the Takings Clause. Such a rule would, as the state put it, mean that the state is free to take at will, and without paying any compensation at all, anything "that could reasonably be deemed dangerous by the state." ER0118. That sweeping proposition would subordinate property rights to government whim, in direct contravention of the Takings Clause.[3]

II. Plaintiffs Face Immediate And Irreparable Harm.

The district court also did not abuse its discretion in finding the second preliminary injunction factor satisfied, particularly given the narrow relief plaintiffs

[3] The state also argues in a footnote that injunctive relief is not appropriate for takings claims. *See* Dkt.12 at 66 n.24. But that argument, too, is squarely foreclosed by Supreme Court precedent, as the Court has repeatedly recognized that declaratory and injunctive relief are available remedies for takings claims. *See, e.g.*, *Horne*, 135 S. Ct. 2419 (2015); *Koontz*, 133 S. Ct. 2586 (2013); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection*, 130 S. Ct. 2592 (2010). That is particularly true in a case like this, where there is no indication that the lawmakers would have wanted to effectuate a taking if they knew they would have to provide just compensation.

sought. It is "well established" that any "deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Accordingly, California's magazine restrictions in both their prospective and retrospective aspects work an immediate and irreparable injury as to all citizens to whom they deny Second Amendment rights.

Nonetheless, even though plaintiffs challenged those restrictions in their entirety, they did not ask the court to preliminarily enjoin them in their entirety, but rather asked the court to enjoin only the ban's new retrospective and confiscatory possession ban—in other words, to enjoin the elimination of the de facto grandfather clause so that citizens who presently possess lawfully acquired magazines may continue to do so for the duration of this litigation. As to those individuals, the law works not one, but two, constitutional violations, as it not only deprives them of constitutionally protected property, but does so with no promise of compensation. And while such constitutional deprivations are the quintessential irreparable injury, the irreparable injury here is even more concrete. If the law goes into effect, plaintiffs will immediately become criminals unless they hand over their lawfully acquired property for destruction or otherwise dispossess themselves of it. Yet if plaintiffs later succeed in this litigation, they may never be able to get their property back.

For precisely that reason, this Court has found that the deprivation of property readily "creat[e] the requisite 'irreparable harm,'" for "without a preliminary injunction, plaintiffs run the risk that California will permanently deprive them of their property," as "[o]nce the property is sold, it may be impossible for plaintiffs to reacquire it." *Taylor v. Westly*, 488 F.3d 1197, 1202 (9th Cir. 2007). The district court did not abuse its discretion in reaching the same conclusion here—particularly given that the state apparently intends to *destroy* surrendered magazines altogether. Indeed, it is hard to imagine a clearer case of irreparable injury, or a clearer case for the importance of preliminary relief, than a situation where the state demands surrender of property for destruction even while litigation over the constitutionality of that demand proceeds.

III. The Public Interest Favors Enjoining The Possession Ban.

A preliminary injunction in these circumstances is also plainly in the public interest. As this Court has repeatedly recognized, the public interest "tip[s] sharply in favor of enjoining" a law that implicates the exercise of constitutional rights. *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009). California's possession ban implicates both the Second Amendment and the Takings Clause, and "all citizens" share an interest in "upholding the Constitution." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). Moreover, it bears repeating that the district court did not preliminarily enjoin the aspects of the law that ban purchase,

sale, or importation of magazines that hold more than 10 rounds, so, as the district court emphasized, its "preliminary injunction will not increase the number of large capacity magazines lawfully present in California." ER0063. Instead, it will only leave magazines that were lawfully obtained long ago in the hands of the individuals who have long lawfully possessed them—something that the state itself was content to do for the past 15 years.

Indeed, even now, the state makes no attempt to prove that continuing to leave magazines in the hands of individuals who have a long and proven track record of not misusing them poses any distinct public safety risk. Instead, it just posits that, as a general matter, banning the prohibited magazines may decrease the likelihood of gun violence. As the district court found, the credible evidence presented below actually supports the contrary conclusion that the public is affirmatively safer when law-abiding citizens are able to defend themselves with magazines that can hold more than 10 rounds. ER0051. But in all events, whatever the benefits (or lack thereof) of a magazine ban in the abstract, having allowed those who lawfully obtained the prohibited magazines to continue to possess them for more than a decade, and having made no effort to prove that confiscating them now will have any distinct or material public safety benefit, the state cannot plausibly claim that the narrow preliminary relief the district court entered to preserve the status quo for the duration of this litigation is contrary to the public interest.

IV. The Balance Of The Equities Favors Enjoining The Possession Ban.

Finally, the "balance of hardships between the parties" clearly favors plaintiffs. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1137 (9th Cir. 2011). The state "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). And even setting aside the constitutional infirmity, this law will undoubtedly impose hardship on plaintiffs, for they must forfeit their property, move it out of state, or sell it—or face criminal penalties and incarceration. The state has identified no comparable imminent, concrete injury that will result from allowing individuals who already lawfully possess magazines to continue to do so for the duration of the litigation. Indeed, it is hard to see how the state could suffer a meaningful hardship from being forced to preserve for just a little while longer a status quo that the state itself was content to preserve for a decade and a half.

Moreover, the state's retrospective and confiscatory ban depends to a unique degree on voluntary compliance. Unlike a restriction on sales of magazines that would impact both law-abiding citizens and criminals, the addition of a possession ban to a law that already prohibited transfer, sale, and importation essentially impacts only law-abiding citizens, as no one but a law-abiding citizen would have lawfully possessed the prohibited magazines before their possession was prohibited. The state cannot seriously contend that criminals will surrender their *unlawfully* acquired

magazines or otherwise dispossess themselves of magazines they already *unlawfully* possess. Thus, while law-abiding citizens will suffer immediate hardship, the state's interest in avoiding the criminal misuse of magazines will not be materially advanced. Because an injunction here will merely "preserve … the status quo" while plaintiffs "litigate the merits" of their claims, the balance of the equities favor plaintiffs. *Rodde v. Bonta*, 357 F.3d 988, 999 n.14 (9th Cir. 2004).

CONCLUSION

For the reasons set forth above, this Court should affirm.

Respectfully submitted,

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January 5, 2018

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellees state that there are no related cases currently pending in this Court.

Dated: January 5, 2018

s/Paul D. Clement
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the length limits permitted by Ninth Circuit Rule 32-1 because this brief contains 11,132 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type.

Dated: January 5, 2018

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Paul D. Clement
Paul D. Clement