17-56081

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VIRGINIA DUNCAN, et al.,

Plaintiffs and Appellees,

v.

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

Defendant and Appellant.

On Appeal from the United States District Court
for the Southern District of California

No. 17-cv-1017-BEN-JLB
The Honorable Roger T. Benitez, Judge

APPELLANT'S OPENING BRIEF (PRELIMINARY INJUNCTION APPEAL – NINTH CIRCUIT RULE 3-3)

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INTRODUCTION

In the wake of escalating mass shootings and gun violence, the Legislature and the people of California have enacted a ban on the possession of magazines holding more than ten rounds of ammunition. These large-capacity magazines (LCMs) are disproportionately used in crime and feature prominently in some of the most serious crime, including mass shootings and killings of law enforcement officers. When LCMs are used, more shots are fired and there are more wounds per victim. This in turn leads to more injuries, more fatalities, and higher rates of death than crimes involving firearms with conventional magazines. Because LCMs are so dangerous, federal and state law have restricted their manufacture, importation, and sale for decades. Now, in order to strengthen these restrictions, and close a loophole that allowed for the continued circulation of LCMs, California Penal Code section 32310 (Section 32310) prohibits the possession of LCMs by private citizens.

The district court enjoined this important public safety legislation, reasoning that Section 32310 likely violates the Second Amendment and the Takings Clause. However, the district court's opinion, which stands in marked contrast to those of every other court to consider the constitutionality of LCM bans, including this one, is based on a misapprehension and

incorrect application of governing law. The court assumed, despite the lack of any cognizable support in the record, that banning possession of a subset of particularly lethal magazines, which have been unavailable to the majority of Californians for decades, constitutes "disarmament" and is presumptively, if not categorically, invalid. Starting with this misconception, the district court then alternated between applying strict scrutiny and ruling that prohibiting possession of LCMs was a "policy choice" that was "off the table." Insofar as the district court purported to apply intermediate scrutiny, as it acknowledged it was "bound" to do, it did so incorrectly. The district court further erred by determining that Section 32310 amounted to a taking simply because it bans possession of magazines determined to be an unacceptable risk to the public safety.

Properly analyzed, Section 32310 is constitutional. Even assuming that LCMs are entitled to Second Amendment protection, the record demonstrates that banning their possession advances the State's compelling interests in protecting civilians and law enforcement from gun violence, protecting public safety, and reducing the incidence and lethality of mass shootings. The statute is thus valid. Further, because the law is an exercise of the State's police power that does not deprive LCM holders of all economic or beneficial use of their property, it is not a taking. The district

court's order enjoining the enforcement of Section 32310 was thus in error and should be reversed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this case under 28 U.S.C. § 1331. This Court has jurisdiction over this appeal from an order granting a preliminary injunction. 28 U.S.C. § 1292(a)(1). The district court's order granting the preliminary injunction was entered on June 29, 2017. Excerpts of Record (ER) 1-66. The Attorney General timely filed a notice of appeal on July 27, 2017. ER 67. *See* Fed. R. App. P. 4(a)(1).

STATEMENT OF ISSUES

1. Did the district court err in determining that plaintiffs had met their burden to establish a likelihood of success on the merits on their claim that Section 32310's ban on possession of a subset of particularly dangerous ammunition magazines violates the Second Amendment?

1a.) Did the district court err in failing to apply the correct level of scrutiny under the Second Amendment to Section 32310?

1b.) Did the district court err in failing to properly apply intermediate scrutiny to Section 32310?

2. Did the district court err in determining that plaintiffs had met their burden to establish a likelihood of success on the merits on their takings claim?

3. Did the district court err in concluding that plaintiffs had met their burden to establish irreparable harm and that the balance of harms and the public interest favored plaintiffs?

PERTINENT STATUTES AND REGULATIONS

California Penal Code section 32310 is set forth in an addendum attached to this brief.

STATEMENT OF THE CASE

I. FEDERAL AND STATE REGULATION OF LARGE-CAPACITY MAGAZINES

A. The Prevalence of Large-Capacity Magazines in Mass Shootings and the Murder of Law Enforcement Officers.

California law defines "large-capacity magazine" as any ammunition-feeding device with the capacity to accept more than 10 rounds. Cal. Penal Code § 16740. LCMs, which were designed to afford soldiers an ample supply of ammunition for combat, allow shooters to fire large numbers of rounds without pausing to reload their weapon. ER 205, 313. Not only does this capability enable an individual to kill and injure more people in a short period of time, it also makes it unnecessary to stop and reload, thereby

eliminating pauses that allow law enforcement or bystanders to intervene and victims to escape or hide. ER 195-96, 205, 222, 2091-2105. LCMs thus appear to be the weapon of choice for anyone determined to inflict maximum damage on as many people as possible. ER 197, 217-20, 222-23, 1251-56, 1493.

Shooters employed LCMs to kill and injure innocent victims in numerous recent high-fatality gun massacres. In what was until very recently the deadliest shooting in this country's history in Orlando, Florida,[1] the gunman, using multiple 30-round magazines killed forty-nine and injured fifty-three people. ER 218-19, 828. To cite just a few other examples, in the 2012 shooting at Sandy Hook Elementary School in Newtown, Connecticut, the gunman used an AR-15-type rifle equipped with 30-round magazines to fire more than 144 rounds of ammunition within five minutes, killing twenty children and six teachers. ER 195-96, 315, 886, 1158-60. Also in 2012, in Aurora, Colorado, a shooter armed with an

[1] On October 1, 2017, an assailant apparently used a variety of assault rifles and LCMs in a shooting rampage that killed 58 people and injured more than 500 others during an outdoor music festival in Las Vegas. *See Nine Rounds a Second: How the Las Vegas Gunman Outfitted a Rifle to Fire Faster*, New York Times, Oct. 5 2017, https://www.nytimes.com/interactive/2017/10/02/us/vegas-guns.html.

assault rifle with a 100-round magazine and other firearms, opened fire in a movie theater, killing 12 and wounding 58 people. ER 848, 1208. In the 2011 shooting spree in Tucson, Arizona, that killed six and wounded 13, among them the Honorable John Roll and former Congresswoman Gabrielle Giffords, the gunman had two handguns, two 31-round magazines, and two 15-round magazines. ER 206, 600-01, 851, 1217-18, 2110. In 2007, the Virginia Tech shooter used a Glock 19 and several 15-round magazines to fire 174 shots and kill 32 people. ER 603, 855, 2111; *see generally* ER 831-911, 1200-1229, 2090-2114, 2039-89 (detailing mass shootings in the United States between 1981-2017).

LCMs have also been used in a number of mass shootings in California, including in San Bernardino in 2015, where assailants shot 36 people in four minutes during a holiday party, killing 14 and seriously injuring 22 more. ER 207, 836, 2045. To cite just a few other examples, in 2013 in Santa Monica, an assailant used a home-built AR-15 rifle and LCMs to kill his father and brother and then killed and injured more people in a city bus, a police cruiser, and his ultimate destination of Santa Monica College. ER 206-07, 845, 2060. In the 1993 shooting at an office building at 101 California Street in San Francisco, a gunman using two semiautomatic assault pistols with 40- and 50-round magazines killed eight people and

wounded six others. ER 314, 968. And, in 1989, during a school shooting in Stockton, an assailant used an assault rifle with a seventy-five-round magazine, among other weapons, to fire 106 rounds into a schoolyard in under two minutes, killing five children and wounding 29 others. ER 601, 968; *see also* ER 206-07 (listing additional shootings in California).

When LCMs are used in mass attacks, the outcome is devastating. On average, assailants who use LCMs shoot more than twice as many victims and kill 40-60 percent more victims as compared to other mass shootings. ER 218-19, 1197. Further, both the number and severity of mass shootings continues to increase. ER 629-34. The last ten years saw twice as many shooting incidents in which six or more people were killed than in the previous decade. ER 832-63. The fatality rate in mass shootings has also risen. One recent study of high-fatality mass shootings (where at least six people were killed) between 1966 and 2015 concluded that such massacres have markedly increased in frequency and lethality, reaching "unprecedented levels in the past ten years." *See* Louis Klarevas, *Rampage Nation: Securing America from Mass Shootings* 215, 78-79, 257 (2016), District Ct. Dkt. No. 16-1. This study also found that the use of magazines holding more than ten rounds is "the factor most associated with high death tolls in gun massacres." *Id*.

LCMs are also disproportionately prevalent in the killings of law enforcement officers. Commenting about the increasing use by criminals of assault weapons with LCMs, the president of the San Francisco Police Officers Association stated, "Just about every crook you run into out there . . . [has] got one of these weapons. And it's putting our officers' lives at risk." ER 1256. Another officer explained, "Our weaponry and our bulletproof vests don't match up to any of those types of weapons." ER 1254.

B. Federal Law Regarding Large-Capacity Magazines

LCMs have been heavily regulated in the United States for decades. In 1989, the U.S. Department of Treasury, charged with developing guidelines for which firearms could be imported into the United States, determined that the ability to accept an LCM was a signature characteristic of military firearms and that detachable LCMs did not serve any sporting purpose. ER 928, 947. A Report by the House of Representatives issued in 1994, noted that semiautomatic assault weapons with LCMs are the "weapons of choice among drug dealers, criminal gangs, hate groups, and mentally deranged persons bent on mass murder." ER 1101.

As a result, and following numerous mass shootings during the 1980s and early 1990s, Congress passed the Violent Crime Control and Law

Enforcement Act (the Federal Ban) in 1994. H.R. Rep. 103-489 (1994), ER 1070-1144. The Federal Ban prohibited the possession or transfer of all "large-capacity ammunition feeding devices," defined as those with the capacity to accept more than ten rounds. *See* Pub. L. 103-322, Sept. 13, 1994, 108 Stat. 1796, 1998-2000 (formerly codified at 18 U.S.C. §§ 921(b)(31)(A) 922(w)). The ban did not apply to LCMs that were lawfully possessed on the date of enactment. The Federal Ban, which also prohibited the possession or transfer of assault weapons (except those manufactured before 1994), expired in 2004. *Id*., 108 Stat. at 2000.

C. California Law Regarding Large-Capacity Magazines

In 2000, before the Federal Ban expired, California adopted its own legislation prohibiting the manufacture, import, keeping, or offering for sale, giving, or lending of LCMs. Cal. Stats. 1999, ch. 129, (S.B. 23) §§ 3, 3.5, presently codified at Cal. Penal Code § 32310.[2] In 2013, California enacted a ban on the purchase or receipt of LCMs. Cal. Stats. 2013, ch. 728 (A.B. 48) § 1 (amending § 32310(a)). California also declared unlawfully possessed LCMs to be a "nuisance." §§ 18010, 32390. Thus, although the

[2] All subsequent statutory references are to the California Penal Code, unless otherwise noted.

Federal Ban expired in 2004, LCMs have remained illegal to buy, sell, or import in California.

Currently, at least seven other states and eleven local jurisdictions restrict the possession or sale of ammunition magazines on the basis of capacity.[3]

D. Closing a Loophole: The Prohibition on Possession of Large-Capacity Magazines

California's regulation of LCMs, like the Federal Ban, initially grandfathered in possession of LCMs legally obtained before its enactment (in 2000). Rather than serving as a limited exception, the grandfathering provision made the prior version of Section 32310 "very difficult to enforce." ER 2123 (Sen. Bill No. 1446, 3d reading Mar. 28, 2016 (2015-2016 Reg. Sess.) (Cal. 2016)). Specifically, because LCMs lack identifying

[3] *See* Haw. Rev. Stat. § 134-8(c); Mass. Gen. Laws Ann. ch. 140, §§ 121, 131M (enacted as 1998 Mass. Stats. ch. 180, § 8); Md. Code, Crim. Law § 4-305; N.J. Stat. Ann. §§ 2C:39-1(y), 39-3(j), 39-9(h); N.Y. Penal Law §§ 265.00(23), 265.02(8), 265.10, 265.11, 265.20(7-f), 265.36-265.37; Conn. Gen. Stat. §§ 53-202w-202x; Colo. Rev. Stat. §§ 18-12-301, 18-12-302, 18-12-303; Rochester, N.Y., Muni. Code No. 47-5; D.C. Code § 7-2506.01; Chicago, Ill. Muni. Code §§ 8-20-010, 8-20-085; Sunnyvale, Cal. Muni. Code, § 9.44.050; Los Angeles, Cal. Muni. Code §§ 46.30, 55.13; San Francisco, Cal. Pol. Code Art. 9, § 619; Oakland, Cal. Code of Ordinances, § 9.38.030-9.38.040 (Ord. No. 13352, § 1(D), 1-19-2016); Cook County, Ill. Code of Ordinances, § 54.212 (Ord. No. 13-O-32, 7-17-2013); Aurora, Ill. Code of Ordinances, § 29-49; Franklin Park, Ill. Code of Ordinances, § 3-13G-3; Oak Park, Ill. Muni. Code, § 27-2-1.

marks to indicate when they were manufactured or sold, there is no reliable way for law enforcement to tell the difference between properly grandfathered LCMs and those that have been illegally smuggled and purchased or were the product of "magazine conversion kits." ER 208-09. In an effort to close what proved to be a dangerous loophole and address the proliferation of LCMs in California despite a ban on their sale or transfer, both the Legislature and the people separately enacted substantially similar prohibitions on possession of LCMs. ER 2123, 2168.

On July 1, 2016, the Legislature enacted Senate Bill (SB) 1446, which prohibits the possession of LCMs beginning on July 1, 2017. ER 2116-19. SB 1446, which went into effect on January 1, 2017, contained amendments to Section 32310 to state that, beginning on July 1, 2017, any person possessing an LCM, with exemptions not relevant here, would be guilty of an infraction punishable by a fine starting at $100 for the first offense. ER 2117 (Cal. Stats. 2016, ch. 58 (S.B. 1446) § 1 (amending Section 32310 to add a new subdivision (c).). The law also provided that anyone possessing an LCM may, prior to July 1, 2017, dispose of the magazine by any of the following means: (1) removing it from the state; (2) selling it to a licensed firearms dealer; (3) destroying it; or (4) surrendering it to a law enforcement

agency for destruction. ER 2117 (Cal. Stats. 2016, ch. 58 (S.B. 1446) § 1 (amending Section 32310 to add a new subdivision (d)).

On November 8, 2016, California voters passed Proposition (Prop.) 63, the "Safety for All Act of 2016." ER 2132-60. The measure contained a number of provisions, including amendments to Section 32310, intended to close "loopholes that leave communities throughout the state vulnerable to gun violence and mass shootings." ER 2132-33. Prop. 63's amendments to Section 32310 largely mirror those made under SB 1446. Both provisions prohibit the possession of LCMs on or after July 1, 2017, and list options for the disposal of LCMs before that date. ER 2139. Prop. 63 eliminated some of the exceptions contained in SB 1446 and increased the potential consequence for violations of the possession ban, from an infraction to an infraction or a misdemeanor. ER 2138-39.[4]

[4] Because Prop. 63's amendments were enacted after SB 1446, under California law, they are the governing provisions. *People v. Bustamante*, 57 Cal. App. 4th 693, 701 (2d Dist. 1997) (citing *County of Ventura v. Barry*, 202 Cal. 550, 556 (1927), and *People v. Dobbins*, 73 Cal. 257, 259 (1887)). Therefore, references to Section 32310 in this brief are to the statute as amended by Proposition 63.

II. RELEVANT BACKGROUND

A. Procedural History

Plaintiffs are California residents who either already possess LCMs or who wish to possess LCMs in the future, as well as a "nonprofit membership and donor support organization" that purports to represent the interests of "those who are affected by California's restriction on magazines capable of holding more than 10 rounds." ER 157-60. Plaintiffs sued the Attorney General on May 17, 2017, alleging that the longstanding proscription on the manufacture, import, or sale of LCMs contained in Section 32310(a),[5] as well as the 2016 amendments prohibiting possession in Section 32310(c), violate the Second Amendment. ER 170-71. The Complaint further alleges the ban on possession of LCMs violates the Takings and Due Process Clauses. ER 171.

Eight days after filing the Complaint, on May 25, 2017, plaintiffs moved for an order shortening time to hear their forthcoming motion for preliminary injunction. ER 150-53. The district court granted plaintiffs' motion the next day, over the Attorney General's objection. ER 148-49,

[5] Section 32310(a) was not the basis of plaintiffs' preliminary injunction motion. Rather, plaintiffs sought injunctive relief on the claim that Section 32310(c)'s prohibition on possession of LCMs is unconstitutional.

151. The Attorney General submitted his opposition to plaintiffs' preliminary injunction motion on June 5, 2017, and the motion was heard on June 13, 2017. ER 69-132. By order dated June 29, 2017, the district court granted plaintiffs' motion. ER 1-66.

B. The District Court's Order Enjoining Enforcement of State Law

The district court determined that plaintiffs were likely to succeed on their Second Amendment and Takings Clause claims, and further concluded that the remaining injunction factors were satisfied. ER 7-8, 12-65. The court stated that "[u]ltimately, this case asks two questions. 'Does a law-abiding responsible citizen have a right to defend his home from criminals using whatever common magazine size he or she judges best suits the situation? Does that same citizen have a right to keep and bear a common magazine that is useful for service in a militia?'" ER 7. Because the court found that the answers to both of these questions was probably "yes," and that a "final decision will take too long to offer relief," it concluded that "a state-wide preliminary injunction is necessary and justified to maintain the status quo." ER 7.

The district court began with the observation that "California's gun laws are complicated," and opined that "Proposition 63 adds one more layer

of complexity. Perhaps too much complexity." ER 3. The court stated that over the span of two decades, California had enacted "an incrementally more burdensome web of restrictions on the rights of law-abiding responsible gun owners to buy, borrow, acquire, modify, use, or possess ammunition magazines able to hold more than 10 rounds." ER 4.

Turning to plaintiffs' Second Amendment claim, the district court concluded that because the Second Amendment right to bear arms includes the right to carry LCMs to use with those arms for both self-defense and possible militia service, LCMs were entitled to Second Amendment protection. ER 14-17. In selecting the applicable level of scrutiny, the district court acknowledged that the Ninth Circuit generally employs intermediate scrutiny in assessing firearm regulations, including those related to LCMs. ER 17-18, 22-23. The court went on to state that intermediate scrutiny is "unfortunately, an overly complex analysis that people of ordinary intelligence cannot be expected to understand." ER 18. The court continued, "these complicated legal tests, which usually result in Second Amendment restrictions passing an intermediate scrutiny test (a test that is little different from a rational basis test), appear to be at odds with the simple test used by the Supreme Court in *Heller*." ER 18. The court described the "*Heller* test" as asking whether a law bans firearms that are

commonly used for a lawful purpose, "regardless of whether alternatives exist." ER 18 (citing *Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas, J. and Scalia, J., dissenting from denial of certiorari)). The court then found that Section 32310 is "highly suspect" under the "simple *Heller* test." ER 19.

The district court next decided that Section 32310 failed the "reasonable fit test." ER 25. Because it determined that Section 32310 amounted to "disarmament," ER 41, and "would irrevocably harm law-abiding responsible magazine-owning citizens," ER 26, the court "decline[d] to rely on anything beyond hard facts and reasonable inferences drawn from convincing analysis, which amounts to substantial evidence based on relevant and accurate data sets," ER 25. The court concluded that the Attorney General had failed to meet this standard and characterized the Attorney General's evidence as "incomplete studies from unreliable sources upon which experts base speculative explanations and predictions." ER 23.

The court conducted its own analysis of the data contained in one of the exhibits submitted by the Attorney General, a report by Mayors Against Illegal Guns of mass shootings between January 2009 and September 2013,

(MAIG Report),[6] which the court decided would be the only data set on which it would rely "due to time constraints." ER 29-40 & n.10. The court noted that mass shootings were "incredibly rare," and that only ten of the 92 mass shootings reported in the five-year period covered in the MAIG Report occurred in California. ER 31, 39. Regarding mass shootings that took place in other jurisdictions, the court found that Section 32310 also made for an "uncomfortably poor fit." ER 33-34. The court noted that some of these mass shootings involved only revolvers, which do not take magazines, and shotguns, which generally cannot be equipped with magazines holding more than ten rounds. ER 33.

The district court further concluded that the expert declarations submitted by the Attorney General "do not constitute evidence reasonably believed to be relevant to substantiate the State's important interests." ER 42. The court rejected the opinion of Professor John J. Donohue, III, that "a review of the resolution of mass shootings in the U.S. suggests that bans on large capacity magazines can help save lives by forcing mass shooters to pause and reload ammunition." ER 44-45. In so doing, the court noted that

[6] The MAIG Report was updated by the successor organization to Mayors Against Illegal Guns, Everytown for Gun Safety, to include mass shootings through 2016. ER 2026-88. The district court did not consider the updated data.

after Professor Donohue had signed his declaration, the shooting incident during a Congressional softball game in Alexandria, Virginia occurred, and no one tried to tackle or disarm the shooter when he tried to reload. ER 45.

The district court stated that people with violent intentions have continued to use weapons despite laws criminalizing their use, and thus that "trying to legislatively outlaw the commonly possessed weapon de jour is like wearing flip flops on a slippery slope." ER 40. The court opined that because the average defensive gun use involves 2.2 shots, the state could, in the future, rationalize a ban on possession of rounds in excess of three per weapon. ER 41. It further stated that a "reasonable fit" to protect citizens and law enforcement from gun violence would make an exception for honorably discharged members of the Armed Forces and citizens with permits to carry a concealed weapon who possess LCMs, because "'[w]hat possibly better citizen candidates to protect the public against violent gun toting criminals?" ER 52-54.

The district court concluded that laws "disarming law-abiding responsible citizen gun owners" are "not a constitutionally-permissible policy choice." ER 41 (citing *District of Columbia v. Heller*, 554 U.S. 570, 622 (2008)). Accordingly, the court concluded that Section 32310(c)'s ban

on possession "likely places an unconstitutional burden on the citizen plaintiffs." ER 12.

The district court next found that plaintiffs demonstrated a likelihood of success on the merits of their takings claim. ER 59-63. It declared that Section 32310 imposes "a rare hybrid taking." ER 62. It reasoned that people "do not expect their property, real or personal, to be actually occupied or taken away." ER 63 (citing *Horne v. Dept. of Agriculture*, 135 S. Ct. 2419, 2427 (2015)). Thus, the court concluded that "whatever might be the State's authority to ban the sale or use of magazines over 10 rounds, the Takings Clause prevents it from compelling the physical dispossession of such lawfully-acquired private property without just compensation." ER 63.

The district court further held that the "loss of that peace of mind [conferred by knowing one has adequate weapons to defend himself], the physical magazines, and the enjoyment of Second Amendment rights" constitutes irreparable injury. ER 57. It also held that the balance of harms and the public interest favored plaintiffs. ER 57-59. The court thus enjoined the Attorney General and his officers, agents, servants, employees, and attorneys, from "implementing or enforcing California Penal Code sections 32310 (c) & (d), as enacted by Proposition 63, or from otherwise requiring

persons to dispossess themselves of magazines able to hold more than 10 rounds lawfully acquired and possessed." ER 66.

SUMMARY OF ARGUMENT

In enacting Section 32310, the Legislature and the people of California drew upon, and attempted to improve, legislation that federal, state, and local governments have used for decades to limit the risks posed by LCMs. LCMs, which were designed for combat, are used to quickly kill and injure large numbers of innocent victims and law enforcement personnel and, as the district court acknowledged, ER 47-48, they are devastatingly effective at accomplishing this goal. Section 32310 is an incremental, but highly significant, legislative effort to protect against these dangers.

Under controlling law, because Section 32310 places a trivial, if any, burden on the right to bear arms for self-defense, it is subject only to intermediate scrutiny. Also under controlling law, because the record demonstrates that Section 32310 advances important interests by curtailing the use of magazines that result in more shots fired and more deaths and injuries, it satisfies intermediate scrutiny and is constitutional.

The district court's contrary determination is based on numerous legal errors, any one of which requires reversal. First, despite a complete lack of cognizable record evidence, the district court assumed that LCMs are needed

or used defensively, and that having to use ten-round magazines effectively destroyed the right to self-defense. Based on its mistaken belief that a ban on possession of magazines that have been largely illegal in California for decades amounts to "disarmament," the court declared the prohibition of possession of LCMs "off the table" and presumptively invalid under *Heller*. This determination that LCMs are integral to the right of self-defense also appears to have infected the district court's application of intermediate scrutiny.

Although the district court criticized the evidence presented by the Attorney General, that evidence is substantially the same as the record in *Fyock v. City of Sunnyvale*, 779 F.3d 991 (9th Cir. 2015), in which this Court affirmed the denial of a preliminary injunction of a municipal ordinance prohibiting the possession of LCMs, as well as in other cases upholding LCM bans. Unlike in those cases, however, the district court here did not afford the required deference to California's legislative judgment on firearms policy, demanded a level of proof from the government that is not required under intermediate scrutiny, and, in effect, constitutionalized its own policy preferences. Under a correct application of the law, the record demonstrates that in formulating its judgments, the people and the Legislature drew reasonable inferences based on substantial evidence that

prohibiting possession of LCMs, and thereby reducing their availability to criminals, would reduce the amount and severity of some of the worst types of gun violence.

The district court's determination that Section 32310 is a taking requiring compensation is also incorrect as a matter of law. As another district court recently concluded, there is no legal support for the district court's notion that a ban on personal property deemed harmful to the public by the State is a taking for public use which requires compensation. *Wiese v. Becerra*, No. CV 2:17-903 WBS KJN, 2017 WL 2813218, at *6 (E.D. Cal. June 29, 2017).

ARGUMENT

I. STANDARD OF REVIEW

The district court's order granting the preliminary injunction is found at ER 1-66. An order granting a preliminary injunction is reviewed for abuse of discretion. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). In deciding whether the district court has abused its discretion, this Court employs a two-part test: "first, [it] determine[s] de novo whether the trial court identified the correct legal rule to apply to the relief requested," and "second, [it] determine[s] if the district court's application of the correct legal standard was (1) illogical, (2) implausible, or

(3) without support in inferences that may be drawn from the facts in the record." *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012) (citation omitted). A decision based upon an erroneous legal standard or a clearly erroneous finding of fact amounts to an abuse of discretion. *Id.*; *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009). The district court's conclusions of law are reviewed de novo and its findings of fact for clear error. *Alliance for the Wild Rockies*, 632 F.3d at 1131. "[F]actual findings predicated on a misunderstanding of the governing rules of law" will not be affirmed under the clear error standard. *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 774 F.3d 935, 944 (9th Cir. 2014).

"A preliminary injunction is an extraordinary remedy never awarded as a matter of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To prevail, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. Alternatively, "[a] preliminary injunction is appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *Alliance for the Wild Rockies*, 632 F.3d at 1134-35 (internal quotations omitted). A plaintiff must

establish all four *Winter* factors even under the alternative sliding scale test. *Id*. at 1135.

II. THE DISTRICT COURT ERRED IN FINDING THAT PLAINTIFFS WERE LIKELY TO SUCCEED ON THE MERITS OF THEIR SECOND AMENDMENT CLAIM.

The district court's determination that plaintiffs are likely to succeed on their Second Amendment claim conflicts with the decisions of every other court to consider the constitutionality of LCM bans, including those of this Court and the Eastern District of California, which denied a motion for preliminary injunction in a substantially similar challenge to Section 32310. *See Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1271 (N.D. Cal. 2014) ("No court has yet entered a preliminary injunction against a law criminalizing the possession of magazines having a capacity to accept more than ten rounds, nor has any court yet found that such a law infringes the Second Amendment."), *aff'd sub nom. Fyock v. City of Sunnyvale*, 779 F.3d 991; *Wiese*, 2017 WL 2813218, at *4 ("Because of this reasonable fit [between Section 32310 and California's important objectives], plaintiffs have not shown that the large capacity magazine ban fails intermediate scrutiny and have not shown a likelihood of success on the merits on their Second Amendment claim."); *Kolbe v. Hogan*, 849 F.3d 114, 130-41 (4th Cir. 2017) (en banc) (affirming grant of summary judgment on Second

Amendment challenge to state LCM ban), *petition for cert. filed*, 17-127 (U.S. July 21, 2017); *New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 263-64 (2d Cir. 2015) (same), *cert denied sub nom*, *Shew v. Malloy*, 136 S. Ct. 2486 (2016) (*NYSRPA*); *Friedman v. City of Highland Park*, 784 F.3d 406, 411-12 (7th Cir.) (same), *cert. denied*, 136 S. Ct. 447 (2015); *Heller v. District of Columbia*, 670 F.3d 1244, 1260-64 (D.C. Cir. 2011) (*Heller II*) (same); *S.F. Veteran Police Officers Ass'n v. City of San Francisco*, 18 F. Supp. 3d 997, 1002-06 (N.D. Cal. 2014) (denying preliminary injunction in Second Amendment challenge to municipal LCM ban); *Colorado Outfitters Ass'n v. Hickenlooper*, 24 F. Supp. 3d 1050, 1067-74 (D. Colo. 2014) (after a bench trial, entering judgment for defendant in Second Amendment challenge to LCM ban), *vacated for lack of standing*, 823 F.3d 537 (10th Cir. 2016). As these courts have concluded, even assuming that LCMs are entitled to Second Amendment protection, the prohibition of LCMs is at least reasonably related to the State's important interests, and thus, LCM bans satisfy intermediate scrutiny and are constitutional. A proper consideration of both the law and the evidence in this case dictates the same result here.

A. Even Assuming that Large-Capacity Magazines Were Entitled to Second Amendment Protection, Section 32310 Would Be Constitutional.

The Supreme Court held, in *District of Columbia v. Heller*, 554 U.S. 570, that the Second Amendment confers an individual right to keep and bear arms. This right is incorporated against the states through the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742, 790-91 (2010) (plurality). The Supreme Court was clear, however, that the Second Amendment does not provide "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626; *see also Peruta v. Cty. of San Diego*, 824 F.3d 919, 928 (9th Cir. 2016) (en banc) ("The Court in *Heller* was careful to limit the scope of its holding."), *cert. denied sub nom.*, *Peruta v. California*, 137 S. Ct. 1995 (2017). Rather, the right to keep and bear arms, like other constitutional rights, is limited in scope and subject to regulation. *Heller*, 554 U.S. at 626-28. The Court has emphasized that the Second Amendment "does not imperil every law regulating firearms" and that state and local governments will continue to regulate firearms to protect the public safety. *McDonald*, 561 U.S. at 786; *Heller*, 554 U.S. at 626-29.

In evaluating whether the Second Amendment permits such state regulation, this Court employs a two-step inquiry. *United States v. Chovan*,

735 F.3d 1127, 1136 (9th Cir. 2013). First, the Court "asks whether the challenged law burdens conduct protected by the Second Amendment." *Id.* If not, the challenged law is valid. *See United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010). If a Second Amendment right is implicated, the Court then selects an appropriate level of scrutiny. *Chovan*, 735 F.3d at 1136.

Section 32310 prohibits a subset of military-style magazines that are unusually dangerous and that "are designed to enhance the[] capacity to shoot multiple human targets very rapidly." *Heller II*, 670 F.3d at 1262. LCMs are not appropriate for self-defense, and are not actually used for such purposes in practice. *See Hightower v. City of Boston*, 693 F.3d 61, 66, 71 (1st Cir. 2012). Consequently, and as the Fourth Circuit recently determined, "whatever their other potential uses," because LCMs are designed to "kill or disable the enemy," they are "clearly most useful in military service" and thus are not within the right secured by the Second Amendment. *See Kolbe*, 849 F.3d at 137.

However, even assuming that some Second Amendment protection is warranted,[7] because Section 32310 advances the State's compelling interests in protecting public safety and protecting civilians and law enforcement from gun violence, it is constitutional.

1. Intermediate Scrutiny Is the Appropriate Standard.

Heller did not provide a framework for Second Amendment challenges to firearm regulations. To determine the appropriate level of scrutiny, this Court, along with the other circuits, employs a two-step inquiry that considers "(1) how close the challenged law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on that right." *Jackson v. City and Cty. of S.F.*, 746 F.3d 953, 960-61 (9th Cir. 2014). *Heller* identified the core of the Second Amendment as "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635. Accordingly, "a law that imposes such a severe restriction

[7] The Attorney General maintains that LCMs are not within the purview of the Second Amendment. However, because Section 32310 would survive heightened scrutiny, for purposes of this analysis, this Court may assume, without deciding, that some Second Amendment protection applies. *See Fyock*, 779 F.3d at 997 (bypassing step one on preliminary injunction motion because ban on LCMs would survive heightened scrutiny even if they fell within the scope of the Second Amendment); *see also Bauer v. Becerra*, 858 F.3d 1216, 1221 (9th Cir. 2017); *Silvester v. Harris*, 843 F.3d 816, 826–27 (9th Cir. 2016).

on the fundamental right of self defense of the home that it amounts to a destruction of the Second Amendment right is unconstitutional under any level of scrutiny." *Silvester*, 843 F.3d at 821. A "law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny. Otherwise, intermediate scrutiny is appropriate." *Id*.

Plaintiffs did not and cannot meet their burden to show that Section 32310 burdens their right to bear arms for self-defense. *See Alliance for the Wild Rockies*, 632 F.3d at 1135. At most, Section 32310 regulates the manner in which persons may exercise their Second Amendment rights. *See Jackson*, 746 F.3d at 961. It does not impose a complete ban on an entire category of firearms considered to be "the quintessential self-defense weapon." *See Heller*, 544 U.S. at 629. Section 32310 does not ban any class of firearms nor does it ban the majority of ammunition magazines that an individual may possess. Rather, it prohibits a particularly dangerous subset of magazines that have been illegal for sale in California for more than twenty years. As this Court held in *Fyock*, "the prohibition of . . . large-capacity magazines does not effectively disarm individuals or substantially affect their ability to defend themselves." 779 F.3d at 999. Accordingly, in assessing the constitutionality of a municipal ordinance banning possession

of LCMs, substantially identical to Section 32310, this Court, like every other court to consider the issue, applied intermediate scrutiny. *Id*.; *see also Kolbe*, 849 F.3d at 138 (holding that Second Amendment does not apply, but in the alternative, LCM ban survives intermediate scrutiny); *NYSRPA*, 804 F.3d at 257-61 (assuming "for the sake of argument" that Second Amendment was implicated and applying intermediate scrutiny to LCM ban); *Heller II*, 670 F.3d at 1261-63 (same); *Friedman*, 784 F.3d at 410 (upholding municipal ban on assault weapons and LCMs, but declining to determine what level of scrutiny applied).

Even if *Fyock* were not controlling, the record in this case would compel the conclusion that intermediate scrutiny is appropriate.[8] There is no evidence that the inability to possess a magazine containing eleven or more rounds would have any impact on, let alone burden, the right to bear arms for self-defense. Beyond a few isolated anecdotes in which persons apparently fired more than ten rounds in self-defense in their homes or

[8] As demonstrated more fully below, the record here is substantially the same as the *Fyock* record, containing the same studies, many of the same expert reports, and factual findings and reasoned analyses of other legislatures and courts. The major difference is that the studies and reports have been updated and there are more legislative and judicial findings and analysis, as more jurisdictions, in response to escalating mass shootings, have passed LCM bans since *Fyock* was filed.

supposedly would have been aided by the ability to do so, *see* ER 2381-82, and plaintiffs' claims that they need to keep military firepower in their homes to defend themselves against possible attackers, there is no credible proof that magazines holding more than ten rounds are necessary or regularly used for self-defense. *See Heller II*, 670 F.3d at 1262; ER 223-24, 2223.[9] Notably, plaintiffs provide no evidence demonstrating that individuals who did not possess an LCM before the 2000 ban was enacted, and thus have not had one for at least seventeen years, have been unable to defend themselves.

In fact, numerous studies have shown that law-abiding individuals do not fire ten or more rounds in their homes, in self-defense or for any other reason. An analysis of the NRA's own reports of firearm use in self-defense "demonstrated that in 50 percent of all cases, two or fewer shots were fired, and the average number of shots fired across the entire data sample was about two." ER 299-303. An updated analysis of the NRA's reports for the period January 2011 to May 2017 likewise indicates that individuals fired on average only 2.2 bullets when using a firearm in self-defense. ER 178-79.

[9] Plaintiffs' expert, Dr. Kleck, has opined elsewhere that most defensive uses of guns result in few if any shots fired. ER 289-97.

Out of 47 incidents in California during this period, there were no instances in which a defender was reported to have fired more than 10 bullets. ER 179-80, *see also* ER 212-13.

In contrast to the data indicating that LCMs are disproportionately used and increase casualties in mass shootings and the killing of police, there is no study or systematic data to support the argument that LCMs are necessary for or commonly used in self-defense. ER 223-24; *Colorado Outfitters*, 24 F. Supp. 3d at 1070. For these reasons, courts that have examined the civilian use of LCMs for self-defense have found evidence of such uses to be lacking. *See NYSRPA*, 804 F.3d at 263; *Hightower*, 693 F.3d at 66, 71; *Heller II*, 670 F.3d at 1263-64; *Heller v. District of Columbia*, 698 F. Supp. 2d 179, 193-94 (D.D.C. 2010).

Moreover, because Section 32310 does not restrict the possession of any firearm, or the number of magazines that a person may own, or the number of defensive shots he can fire in the unlikely event that such shots would be necessary, the statute leaves individuals "countless other handgun and magazine options to exercise their Second Amendment rights." *Fyock*, 25 F. Supp. 3d at 1278. The burden on Second Amendment rights, if any, is thus minimal. Accordingly, intermediate scrutiny applies. *See Jackson*, 746 F.3d at 964; *Wiese*, 2017 WL 2813218, at *3; *see also Bauer*, 858 F.3d at

1222-23 (stating that this Court and its sister circuits have "overwhelmingly applied intermediate scrutiny when analyzing Second Amendment challenges under *Heller*'s second step.") (collecting cases)).

2. Section 32310 Advances the State's Compelling Interests.

Intermediate scrutiny requires that: (1) the government's stated objective must be significant, substantial, or important; and (2) there must be a "reasonable fit" between the challenged regulation and the asserted objective. *Chovan*, 735 F.3d at 1139. Intermediate scrutiny does not require the fit between the challenged regulation and the stated objective to be perfect, nor does it require that the regulation be the least restrictive means of serving the interest. *Jackson*, 746 F.3d at 969. Rather, the government "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* at 969-70 (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986)). In determining whether a law survives intermediate scrutiny, courts "afford substantial deference to the predictive judgments of the legislature." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (*Turner II*). The courts' narrow role is to "assure that, in formulating its judgments, [the State] has drawn reasonable inferences based on substantial evidence." *Turner Broad. Sys., Inc. v. FCC*,

512 U.S. 622, 666 (1994) (plurality) (*Turner*). Section 32310 easily passes scrutiny under this framework.

There is no dispute that the government has important interests in promoting public safety and preventing and mitigating the effects of gun violence. *See, e.g.*, *Bauer*, 858 F.3d at 1223 ("[I]t is self-evident that public safety is an important government interest, and reducing gun-related injury and death promotes public safety.") (citation and punctuation omitted); *Fyock*, 779 F.3d at 1000; *Chovan*, 735 F.3d at 1135. Section 32310 furthers these interests by banning a subset of magazines that are responsible for some of the deadliest incidents of gun violence. *Fyock*, 779 F.3d at 999-1000. Section 32310 also advances these interests by closing a loophole, removing obstacles to enforcement, and strengthening the existing ban on the purchase, sale, transfer, or importation of LCMs. *See Wiese*, 2017 WL 2813218, at *4.

The reasoned judgment of the people and the Legislature that prohibiting the possession of LCMs will protect civilians and law enforcement by reducing the incidence and severity of gun massacres is supported by the record in this case, which includes numerous studies, expert reports, the reasoned analysis of other state and local legislatures, and the decisions of federal courts upholding those legislative judgments. In

addition to the legislative history and findings of Section 32310, ER 2132-33, the record includes: (1) empirical studies of mass shootings in the United States compiled by *Mother Jones*, MAIG and Everytown for Gun Safety, the Violence Policy Center, and the Citizens Crime Commission of New York City, *see* ER 628-46, 831-911, 1195-1229, 2026-89, 2090-2105, 2107-14; (2) declarations of Lucy Allen, Professor Daniel W. Webster, and Professor John J. Donohue, III, regarding defensive gun use, uses of LCMs in mass shootings and other crime, benefits of forcing a shooter to reload, the efficacy of LCM bans, and the potential effect of a prohibition on the possession of LCMs, ER 176-88, 189-201, 214-32; (3) declarations by experienced law enforcement officials regarding their experience with LCMs and the difficulty of enforcing existing law, ER 202-13; (4) studies and legislative findings of other jurisdictions regarding mass shootings, *see, e.g.*, ER 622-27, 917-21, 1145-93, 1230-1359, 1571-2024, 2090-2114, 2372-78; (5) published work and declarations by Dr. Christopher Koper, the primary author of the most comprehensive academic studies regarding the effects of the Federal Ban, ER 310-607, 1400-1514, 1888-2005, 2006-24, 2349-71; (6) media reports detailing mass shootings occurring between 1986 and 2017, ER 647-830; (7) reports by Congress and the ATF, ER 922-1144, 1360-99, 1545-70; and (8) hundreds of pages of testimony, reports, and

other materials regarding LCMs, mass shootings, and gun violence, *see, e.g.*, ER 249-87, 298-305, 310-607, 912-16, 1242-1359, 1400-1544, 2106-14, 2209-2348. Courts have relied on similar, and in some cases identical, evidence in holding that LCM bans sufficiently advance important government interests. *See Fyock*, 779 F.3d at 1000-01; *Kolbe*, 849 F.3d at 126; *NYSRPA*, 804 F.3d at 263-64; *Heller II*, 670 F.3d at 1261-64; *Wiese*, 2017 WL 2813218, at *3-*4; *Fyock*, 25 F. Supp. 3d at 1280-81.

The record demonstrates that the LCMs banned by Section 32310 enable a shooter to hit "multiple human targets very rapidly," and "contribute to the unique function of any assault weapon to deliver extraordinary firepower." *Kolbe*, 849 F.3d at 137; ER 205, 2342-48. As noted above, LCMs are used disproportionately in mass killings and in murders of police. ER 2351-56. In instances where the magazine capacity used by a killer in a mass shooting over the last thirty years could be determined, researchers found that 86 percent of them involved an LCM. ER 316, *see also* 180-82, 220, 2106-2114. In the past two years, LCMs were used in eight of the nine mass shootings with known magazine capacity. ER 181-82. While LCMs accounted for only 21 percent of the civilian magazine stock in 1994 (the final year before the institution of the Federal Ban), they were used in somewhere between 31 to 41 percent of gun

murders of police. *See Heller II*, 670 F.3d at 1263; ER 217, 222-23, 485-90, 558, 589-90, 919, 1424, 2013-15, 2362, 2356.

When LCMs are used in crime, they result in more shots fired, more victims wounded, and more wounds per victim. ER 182, 220.[10] In cases where an oversized magazine was used, an average of approximately four more people were killed in each shooting and nine more people were wounded than in shootings involving standard-capacity magazines. One study has shown an average of 22 fatalities or injuries per mass shooting with an LCM compared to nine without. ER 182.[11] Another study found that the use of LCMs and assault weapons in recent mass shootings was associated with a 151 percent increase in the number of people shot and a 63 percent increase in the number of deaths. ER 1197; *see also* 2356-58.

Thus, as the Commission that examined the Sandy Hook Elementary School mass shooting determined, the lethality and utility of a firearm in crime is directly "correlated to capacity." ER 1856. While LCMs may be useful and appropriate in a military context, they "pose a distinct threat to

[10] For example, in the massacre in Orlando, the shooter was able to fire 24 shots in nine seconds. ER 828.

[11] A victim is more than 60 percent more likely to die if he receives two or more gunshot wounds than if he receives one. ER 318.

safety in private settings as well as places of assembly." ER 1368, 1656, 1855. The Chief of Police in Los Angeles was even more direct, stating that LCMs transform a firearm "into a weapon of mass death rather than a home-protection type device." ER 788-89.

In addition to common sense, which suggests that the most effective way to eliminate the death, injury, and destruction caused by LCMs is to prohibit them, the evidence shows that banning possession of LCMs has the greatest potential to "prevent and limit shootings in the state over the long-run." *NYSRPA*, 804 F.3d at 264. A reduction in the number of LCMs in circulation will reduce the number of crimes in which LCMs are used and reduce the lethality and devastation of gun crime when it does occur. ER 191, 212-13, 229-31, 328.

A comprehensive study of the effect of the Federal Ban demonstrates that it reduced the use of LCMs in gun crimes and that it would have had an even more substantial impact had it not been allowed to expire in 2004. ER 224-30, 313-25, 1268-69, 1425-26. While the use of LCMs initially increased after the Federal Ban went into effect, due in large part to a massive stock of grandfathered and imported magazines not regulated by federal law, LCM use in crime, including gun massacres, appeared to be

decreasing by the early 2000s.[12] ER 225-26, 324-25, 2361-69. A later investigation by the *Washington Post*, using more current data on the use of LCMs in crime in Virginia, confirmed that between 1994 and 2004, the period the Federal Ban was in effect, gun crimes using LCMs declined by roughly 31 to 41 percent. ER 589, 919, 2362. This investigation also determined that once the Federal Ban expired in 2004, crimes with LCMs more than doubled. ER 228-29, 793-95, 2362, 2365, 2367. Section 32310, which is far more robust than the Federal Ban, can reasonably be expected to be more effective in reducing LCM use and its consequent harms. ER 213, 230-31, 325-28, 2364-66.

The evidence also indicates that because shooters limited to ten-round magazines must reload more frequently, the prohibition of LCMs helps create a "critical pause" that has been proven to give potential victims an opportunity to hide, escape, or disable a shooter. *Colorado Outfitters*, 24 F. Supp. 3d at 1072-73; ER 195. Moreover, the "two or three second pause during which a criminal reloads his firearm can be of critical benefit to law

[12] This study found that had the Federal Ban been allowed to operate long enough to meaningfully reduce the number of LCMs in circulation, it could have reduced the number and fatality of gunshot victimizations by five percent. ER 2363. This correlates to approximately 3,241 fewer people being wounded or killed as a result of gun crime every year. ER 2363.

enforcement." *Heller II*, 670 F.3d at 1264; ER 2255-57. For example, eleven children at Sandy Hook Elementary School were able to escape while the shooter reloaded his 30-round LCM. ER 195-96. In the Tucson, Arizona shooting, the shooter was tackled and subdued while attempting to reload. ER 195-96. (noting that citizens have subdued a perpetrator stopping to reload his weapon in at least 20 different shootings in the United States since 1991). By contrast, in the Aurora movie theater shooting, the gunman was able to empty a 100-round drum magazine without any significant break in the firing and ended up shooting dozens of people. ER 218, 315.[13] "[T]he lower the capacity of the magazine, the sooner opportunities are created that allow people to take life saving measures." *Rocky Mtn. Gun Owners v. Hickenlooper*, Case No. 2013CV33879, 2017 WL 4169712, *3 (District Court, City & County of Denver, July 28, 2017). Thus, "limiting a shooter to a ten-round magazine could mean the difference between life and death for many people." *Kolbe*, 849 F.3d at 128.

Finally, the record also shows that it was the experience of law enforcement that the prior version of Section 32310 was "very difficult to

[13] Section 32310's ban on possession of LCMs also will limit damage caused by civilians indiscriminately firing more rounds than necessary, thereby endangering themselves and bystanders. *Kolbe v. O'Malley*, 42 F. Supp. 3d 768, 795-96 (D. Md. 2014); ER 1265.

enforce." ER 2121-23, 2167-68. Reflecting this difficulty, the Los Angeles Police Department continued to recover increasingly larger numbers of guns loaded with LCMs in the years after the 2000 restrictions were enacted, a trend that is consistent with the experience of other states that have prohibited the sale, but not possession, of LCMs. *See* District Ct. Dkt. No. 16, at 6. Section 32310 eliminates these impediments to enforcement and strengthens existing law, as there will be no need for law enforcement to guess which magazines are "grandfathered" and which were acquired illegally. ER 209, 2123; *see also Wiese*, 2017 WL 2813218, at *4.

Accordingly, and as multiple courts have held, substantial evidence demonstrates that there is "reasonable fit" between Section 32310 and the State's important interests in protecting the public and preventing and reducing the death, injury, and destruction caused by LCMs. *See Fyock*, 779 F.3d at 1000-01; *Kolbe*, 849 F.3d at 139-41; *NYSRPA*, 804 F.3d at 263–64; *Heller II*, 670 F.3d at 1262-64; *Wiese*, 2017 WL 2813218, at *3-*4; *S.F. Veteran Police Officers*, 18 F. Supp. 3d at 1003-04.

B. The District Court Relied on an Incorrect Legal Standard and Clearly Erroneous Findings of Fact.

The district court's analysis of Section 32310, which proceeds from the assumption that a ban on possession of LCMs amounts to "disarmament," is

"not a constitutionally-permissible policy choice," and thus presumably would fail any level of scrutiny, ER 41, is both legally and factually unsupportable and is thus an abuse of discretion. *See Korab v. Fink*, 797 F.3d 572, 577 (9th Cir. 2014). Even insofar as the district court claimed to apply intermediate scrutiny, it failed to do so correctly, and thus committed reversible error. *Id*.

1. The District Court Abused Its Discretion by Applying the Wrong Legal Standard.

As a threshold matter, it is not entirely clear which standard of review the district court applied to Section 32310, as it seemed to shift between: (1) discussing Section 32310 as if it were a categorical ban of the type at issue in *Heller*, and thereby unable to survive any standard of review, ER 12-13, 41; (2) applying what it called "the simple test of *Heller*," in which once a weapon is in common use, it presumptively cannot be regulated, ER 17-20; (3) applying strict scrutiny, ER 25-26, 54-56; and (4) purporting to apply intermediate scrutiny, ER 18, 24-40. Much of the court's analysis, however, relies on a misreading of *Heller* and a misconception of the scope of an individual's right under the Second Amendment and consequent restrictions on the government's ability to enact reasonable gun safety regulations.

While the Court in *Heller* stated that the Second Amendment takes "certain policy choices of the table," it was quite clear that these limits "by no means eliminate[]" the States' "ability to devise solutions to social problems that suit local needs and values." *McDonald*, 561 U.S. at 785. Rather, the government retains "a variety of tools for combating [firearm violence]." *Heller*, 554 U.S. at 636. The policy choice that is "off the table" after *Heller* is (regulation comparable to) a complete ban on possession of handguns, the "the quintessential self-defense weapon." *Id.* at 629. Section 32310, which does not "burden" a Second Amendment right, let alone cause its complete destruction, bears no resemblance to the ban struck down in *Heller*, and thus is not subject to categorical invalidation. *See Fyock*, 779 F.3d at 999 (stating that municipal ban on LCMs "is simply not as sweeping as the complete handgun ban at issue in *Heller* and does not warrant a finding that it cannot survive constitutional scrutiny of any level."); *S.F. Veteran Police Officers*, 18 F. Supp. 3d at 1002.[14]

[14] The district court is incorrect that this Court, in *Fyock*, held that a ban on possession of LCMs "hits at the core of the Second Amendment." ER-21. Rather, this Court stated in *Fyock* that such a ban "*may* implicate the core of the Second Amendment," but that any burden imposed on the

Although the district court repeatedly posits that magazines holding more than ten rounds are "useful" for self-defense, and thus that having to use any number and combination of smaller magazines would "irrevocably harm" individuals forced to dispossess themselves of previously grandfathered LCMs, *see* ER 12, 19, 26, 51, 56, that reasoning is unsupported by evidence and any related finding is clearly erroneous.[15] The closest the district court comes to supporting its conclusion regarding self-defense is in attempting to distinguish this Court's decision upholding an LCM ban in *Fyock*. ER 23-24. Based on its own research, the district court stated that unlike in Sunnyvale, which "is the crown jewel of California's Silicon Valley," and where "*perhaps* a law-abiding citizen can make do with a maximum of ten rounds for self-defense," in Imperial and Alpine Counties:

> Population density is two persons per square mile. Law enforcement response times are *no doubt* longer there. The risk of stray bullets wounding bystanders is

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Second Amendment right is "not severe." 779 F.3d at 999 (emphasis added).

[15] While the district court acknowledged the lack of recorded instances of anyone in California firing ten shots in self-defense as "hardly surprising," given that the acquisition of LCMs has been illegal in California for years, ER 48, it continued to assume that the ability to fire more than ten rounds from a firearm without reloading is essential for self-defense.

> *probably* low. *It is likely* that many rely on themselves and their lawfully-owned firearms for self-defense.

ER 49-50 (emphasis added).[16] Such speculation, however, "do[es] not constitute evidence" that would support a finding that Section 32310 impermissibly burdens the Second Amendment right to bear arms for self-defense in the home. *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1316 (9th Cir.), *cert. denied*, 136 S. Ct. 480 (2015); *Chalk v. U.S. Dist. Court Cent. Dist. of Cal.*, 840 F.2d 701, 708 (9th Cir. 1988). Further, the district court's supposition is belied by the record, which demonstrates that LCMs are not necessary or appropriate for self-defense.[17] There is thus no legal or factual basis for holding Section 32310 categorically invalid.

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[16] The district court did not refer to plaintiffs' evidence. The only other evidence it cited is a reference to an article submitted by the Attorney General containing an account of a woman in Florida who ran out of bullets during a home invasion by two armed assailants. ER 46-47 (citing Paul Pinkham, "*Have Gun, Will Not Fear It Anymore*," Florida Times-Union, July 18, 2000). As the article notes, "incidences [involving multiple attackers] are very rare." ER 784. Moreover, nothing in the article suggests that having an LCM would have aided the victim's ability to defend herself. It does not seem that the victim felt that an LCM would have been beneficial, since her chosen weapon after the incident was a five-round revolver. ER 783-84.

[17] The district court's related finding that LCMs are useful for service in the militia, *see, e.g.*, ER 14, is entirely unsupported as plaintiffs did not make or provide support for this argument. Even assuming that the Second

To the extent that the district court reasoned that Section 32310 is "suspect" or subject to strict scrutiny simply because many people have or would like to have LCMs, this is also reversible error. See ER 7, 19-20, 25-26, 51. As an initial matter, the "simple test of *Heller*" referenced by the district court is derived from a dissent by two Justices and is not governing law. *See* ER 18 (citing *Friedman*, 136 S. Ct. at 449 (Thomas, J. and Scalia, J., dissenting from denial of certiorari)). Further, the district court's analysis appears to conflate the Supreme Court's discussion of "common use," which bears on whether conduct receives any protection at all under the Second Amendment, with the level of scrutiny that applies to regulation of protected conduct. *See Heller*, 554 U.S. at 628-29. These are distinct inquires. *See Chovan*, 735 F.3d at 1136. Even overlooking the lack of record evidence that

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Amendment creates a right to possess a weapon, such as a 100-round drum, solely because the weapon may be useful for militia service, *see Hollis v. Lynch*, 827 F.3d 436, 445 (5th Cir. 2016), "[i]n the absence of any evidence tending to show that possession or use of [an LCM] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument," *United States v. Miller*, 307 U.S. 174, 178 (1939). "Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense." *Id.*

LCMs are commonly used for self-defense, that LCMs may be popular or that people feel they need them for self-defense do not render LCM bans presumptively impermissible or subject to strict scrutiny. *See Fyock*, 779 F.3d at 999; *Jackson*, 746 F.3d at 963-64; *cf. Teixeira v. City of Alameda*, No. 13-17132, 2017 WL 4509038, at *8 (9th Cir. Oct. 10, 2017) (en banc) ("[T]he Second Amendment does not elevate convenience and preference over all other considerations."). Indeed, the district court's view that the subjective determination of (enough) people about what is desirable for self-defense is sufficient to insulate weapons and ammunition, no matter how dangerous, from regulation contravenes governing precedent, *see Nordyke v. King*, 644 F.3d 776, 784 (9th Cir. 2011), *on reh'g en banc*, 681 F.3d 1041 (9th Cir. 2012), and cannot be reconciled with the assurances of the Supreme Court that "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment," *McDonald*, 561 U.S. at 785.

2. The District Court Abused Its Discretion by Failing to Properly Apply Intermediate Scrutiny.

The district court's determination that there is not a "reasonable fit" between Section 32310 and the State's compelling interests is based on a

misunderstanding of the Attorney General's burden under intermediate scrutiny and a mischaracterization of the record. The court rejected an exhaustive study on mass shootings in the United States compiled and regularly updated by *Mother Jones* as "rarely … mentioned by any court as reliable evidence" and lacking "some of the earmarks of a scientifically designed and unbiased collection of data." ER 27. Similarly, the court stated that two of the Attorney General's experts, Dr. Daniel Webster and Lucy Allen, noted the general lack of existing "scientifically collected empirical data" regarding defensive gun use, gun violence, and the use of LCMs, and disregarded their declarations on this basis. ER 42-44.[18]

While the Attorney General produced a considerable body of empirical evidence demonstrating that prohibiting possession of LCMs advances the

[18] In fact, the *Mother Jones* survey, which is arguably the most comprehensive compilation of public mass shootings in this country, has been cited by a number of courts in upholding LCM bans. *See New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 990 F. Supp. 2d 349, 369 (W.D.N.Y. 2013); *Kolbe*, 42 F. Supp. 3d at 780 & n.17; *Shew v. Malloy*, 994 F. Supp. 2d 234, 250 (D. Conn. 2014); ER 636-41 (describing methodology employed by *Mother Jones*). Courts have also relied on similar analysis by Lucy Allen and Professor Webster in concluding that LCM laws pass intermediate scrutiny. *See Kolbe*, 849 F.3d at 127; *Kolbe*, 42 F. Supp. 3d at 780.

government's objectives,[19] "scientifically collected empirical" proof is not required under intermediate scrutiny.[20] *See, e.g.*, *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 439 (2002) (plurality opinion); *Ctr. for Fair Pub. Policy v. Maricopa Cty*, 336 F.3d 1153, 1168 (9th Cir. 2003). Rather, substantial evidence can take many forms: "history, consensus, and simple common sense," *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 628 (1995) (quotation marks omitted); *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1073 (9th Cir. 2006); correlational evidence, *see United States v. Carter*, 750 F.3d 462, 469 (4th Cir. 2014); and intuition, *Williams-*

[19] The district court appears to have overlooked much of the Attorney General's evidence, including the declarations and published works of Dr. Christopher S. Koper, the declaration of Blake Graham, Supervising Special Agent at the California Department of Justice, Bureau of Firearms, the ATF reports, the findings of other legislatures and most other courts regarding LCM prohibitions, the updated survey of mass shootings conducted by Everytown for Gun Safety, the surveys compiled by the Violence Policy Center and the Citizens Crime Commission of New York City, and other reports, testimony, and articles all of which demonstrate the fit between Section 32310 and the State's important goals.

[20] With respect to firearms and ammunition, scientific proof about the efficacy of regulations likely does not exist. *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, 1465-67 (2009) ("There are no controlled experiments that can practically and ethically be run.").

Yulee v. Fla. Bar, 135 S. Ct. 1656, 1666 (2015). While the government must carry its burden to establish a reasonable fit between a regulation and a governmental interest, it may use any evidence "reasonably believed to be relevant to the problem that [the government is] address[ing]." *Renton*, 475 U.S. at 51. This evidence need only "fairly support" the state's rationale, and the "standard for substantiality is doubly deferential in this case, where the Court is reviewing a legislative judgment on firearms policy." *Heller*, 45 F. Supp. 2d at 47-49 (quoting *Turner II*, 520 U.S. at 195). The district court's imposition of highly exacting evidentiary requirements is thus improper under intermediate scrutiny and an abuse of discretion.[21]

The district court's other criticisms of the Attorney General's evidence suffer from the same legal and factual infirmities. The court characterized the Attorney General's record as out of date and focused on "horrible crimes in other jurisdictions near and far for which large-capacity magazines were not the cause." ER 23-24. However, although the Attorney General provided relevant evidence both from within California and from other jurisdictions, *see, e.g.*, ER 202-13, 310-605, 622-46, 802-911, 917-21, 1145-

[21] Even under strict scrutiny, the type of proof demanded by the district court is not required. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001).

1359, 1571-1887, 2090-2114, 2372-78, the Supreme Court explicitly has allowed "litigants to justify . . . restrictions by reference to studies and anecdotes pertaining to different locales altogether." *Lorillard*, 533 U.S. at 555 (citation omitted). Thus, while the California-specific data in the record is more than enough to justify Section 32310, the Court is not limited to consideration of that that data. Similarly, while the Attorney General provided comprehensive evidence spanning from the 1980s to 2016, he was not required to demonstrate the required fit with only evidence from after 2013. *See, e.g.*, *Jackson*, 746 F.3d at 966.

Contrary to the district court's reasoning, it is also unnecessary to show, under any standard of review, that Section 32310 will eliminate or affect either gun violence generally or every mass shooting, that there is perfect agreement as to the optimal way to reduce the dangerous impact of LCMs, or that Section 32310 cannot be circumvented. *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390-91, 393-394 (2000); *Turner*, 512 U.S. at 666; *Silvester*, 843 F.3d at 827-29; *Fyock*, 779 F.3d at 1001-01. Under intermediate scrutiny, the "question is not whether [the government], as an objective matter, was correct," and the State need not establish that Section 32310 will actually achieve its desired end. *Turner II*, 520 U.S. at 211; *Jackson*, 746 F.3d at 966. Nor does the government "bear the burden

of providing evidence that rules out every theory… that is inconsistent with its own." *Alameda Books, Inc.*, 535 U.S. at 437. Rather, the evidence must only demonstrate, as it does here, a reasonable inference that the law "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Peruta*, 824 F.3d at 942.

The district court further erred by failing to afford the deference to California's legislative determination required under intermediate scrutiny and by impermissibly substituting its own policy judgment. *See Turner II*, 520 U.S. at 195. As noted above, the district court conducted its own analysis based solely on data from a partial version of one study, the MAIG Report. Having so limited its analysis, the court then concluded that the report "prove[d] very little" about whether Section 32310's ban on possession sufficiently advanced the State's legitimate goals," and that Section 32310 was a "haphazard solution likely to have no effect on an exceedingly rare problem." ER 26, 30, 33, 55. The MAIG Report is not primarily concerned with LCM use. *See* ER 1194-1229. It therefore neither provided an exhaustive survey of LCM use in its 92 cases, nor did it systematically analyze the use of LCMs in mass shootings. However, even a review of just the information in the MAIG Report confirms that incidents involving LCMs result in higher casualty rates and that jurisdictions with

some type of LCM ban experience fewer mass shootings per capita. It also confirms, along with recent events, that mass shootings are not rare. ER 1194-1229. Moreover, "lawmakers are entitled to weigh the severity of the risk as well as the likelihood of its occurrence." *Peruta*, 824 F.3d at 943 (Graber, J., concurring). Thus, if in enacting Section 32310, the State relied only on the limited data set considered by the district court, this would be enough to demonstrate a reasonable fit. *See Silvester*, 843 F.3d at 828-29.

Even overlooking the numerous factual, logical, and analytical errors contained in the district court's interpretation of the MAIG Report data,[22] the proper inquiry is not whether the court would reach the same decision regarding Section 32310, but whether there is sufficient evidence showing the State's decision was reasonable. *Turner*, 512 U.S. at 666. In making

[22] For example, the district court speculated that because some LCMs used in mass shootings may have been stolen or otherwise obtained in violation of existing law, prohibiting "law-abiding citizens" from possessing LCMs likely would have no impact on mass shootings. ER 36-40. But, prohibiting possession makes theft of LCMs far less likely and makes it more difficult for people to evade existing law and acquire LCMs. Reducing the availability of LCMs in turn reduces the likelihood that they can be used to massacre civilians and law enforcement personnel. ER 196-97. Moreover, the line between "law-abiding citizen" and criminal is not as definite as the district court suggests. The assailants in the Virginia Tech, San Bernardino, and Orlando shootings, as well as many others, were "law-abiding citizens" who legally obtained firearms and LCMs and used them to slaughter innocent people. ER 183, 186-88, 637, 836, 855, 874, 1855.

this determination, the court is not permitted to "review de novo the [government's] evidence of the harm to be prevented and the likely efficacy of the regulation in preventing that harm." *Id.*

Finally, the district court's determination that there is not a reasonable fit between Section 32310 and the State's important interests because the statute does not exempt honorably discharged veterans and individuals with permits to carry concealed weapons (CCW holders), ER 53-54, is wrong as a matter of law. Intermediate scrutiny does not require that Section 32310 be "narrowly tailored" or the least restrictive available means to serve the stated interests. Rather, the fit need only be substantial, not "perfect." *See Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 841 (9th Cir. 2016), *petition for cert. filed*, 2017 WL 1076379 (U.S. Mar. 20, 2017). Thus, the fact that the district court might prefer a different statute does not render Section 32310 invalid.[23]

[23] Moreover, it is not clear how the alternatives cited by the district court would adequately serve the State's interests. There is no record evidence to support the district court's conclusion that veterans and CCW holders are the best "citizen candidates to protect the public." ER 54. There is, however, considerable evidence of CCW holders using their firearms and LCMs to kill civilians and law enforcement personnel. *See Peruta*, 824 F.3d at 943 (Graber, J., concurring).

III. THE DISTRICT COURT ERRED IN FINDING THAT PLAINTIFFS ESTABLISHED A LIKELIHOOD OF SUCCESS ON THEIR TAKINGS CLAIM.

The district court's determination that Section 32310 is a taking requiring compensation is also an abuse of discretion. The court, relying on out-of-context quotations from largely inapposite Supreme Court jurisprudence, concluded that because Section 32310 requires the dispossession of some LCMs, it is a per se "hybrid taking." ER 62. This is not the law. Rather, Section 32310, which is an ordinary exercise of the State's police power to protect the public by prohibiting the possession of a subset of magazines that California has determined are dangerous and used primarily to kill and injure people, is neither a physical nor regulatory taking, nor a "hybrid" of the two.[24]

The Takings Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides that private property shall not "be taken for public use, without just compensation." *Lingle v. Chevron U.S.A., Inc*., 544 U.S. 528, 536 (2005). Its purpose is to prohibit "[g]overnment from forcing some people alone to bear public burdens

[24] Further, even if Section 32310 were a taking requiring "just compensation," this would not be a proper basis for injunctive relief. *Wiese*, 2017 WL 2813218, at *6.

which, in all fairness and justice, should be borne by the public as a whole." *Penn. Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 123 (1978) (internal quotations and citations omitted). Takings claims are divided into two classes: physical and regulatory takings. A physical taking occurs when the government physically invades or takes title to property either directly or by authorizing others to do so. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). By contrast, a regulatory taking occurs where "government regulation of private property [is] so onerous that its effect is tantamount to a direct appropriation or ouster." *Lingle*, 544 U.S. at 537. Government regulation that "completely deprives an owner of all economically beneficial use of her property" is generally deemed to be a taking compensable under the Fifth Amendment. *Id.* at 528.

A. Section 32310 Is Not a Physical Taking.

The district court erroneously assumed that because Section 32310 requires the dispossession of LCMs, it is a physical taking. ER 61-63. The court reasoned that because Section 32310(d)(3) provides for the "surrender" of LCMs to law enforcement (as one of the ways of removing LCMs), the statute effects "a per se taking." ER 61 (citing *Horne*, 135 S. Ct. at 2427-29). However, a ban on possession, standing alone, is not a physical taking. Rather, what is dispositive is under what power and for what purpose the

government is acting with respect to particular property. In a physical taking, the government exercises its eminent domain power to take private property for "public use." S*ee Lingle*, 544 U.S. at 536; *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1034 (9th Cir. 2000). By contrast, where, as here, the government acts pursuant to its police power to protect the safety, health, and general welfare of the public, a prohibition on possession of property declared to be a public nuisance is not a physical taking. *See Chi., B. & Q. R. Co. v. Illinois*, 200 U.S. 561, 593-594 (1906) ("It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property and though no compensation is given."); *Akins v. United States*, 82 Fed. Cl. 619, 622 (2008); *see also Everard's Breweries v. Day*, 265 U.S. 545, 563 (1924); *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887); *Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 967 (9th Cir. 2003).

Recognizing this distinction, a number of courts have rejected Takings Clause challenges to laws banning the possession of dangerous weapons. *See Akins*, 82 Fed. Cl. at 623-24 (restrictions on sale and possession of machine guns not a taking); *Fesjian v. Jefferson*, 399 A.2d 861, 865-66 (D.C. Ct. App. 1979) (ban on machine guns not a taking); *cf. Gun South, Inc. v. Brady*, 877 F.2d 858, 869 (11th Cir. 1989) (suspension on importation of

assault weapons not a taking); *cf. Burns v. Mukasey*, No. CIVS090497MCECMK, 2009 WL 3756489, at *5 (E.D. Cal. Nov. 6, 2009), *report and recommendation adopted*, No. 209CV00497MCECMK, 2010 WL 580187 (E.D. Cal. Feb. 12, 2010) (stating that because the firearm seized was "not taken in order to be put to public use," "the Takings Clause simply does not apply"). Courts have also rejected Takings Clause challenges more generally where the government has acted to prohibit property found to be harmful or dangerous. *See, e.g.*, *Wilkins v. Daniels*, 913 F. Supp. 2d 517, 543 (S.D. Ohio 2012), *aff'd*, 744 F.3d 409, 418-19 (6th Cir. 2014).

In concluding that plaintiffs were likely to succeed on their takings claim, the district court mistakenly relied on *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); ER 60. In *Loretto*, the Supreme Court held that government compulsion of the placement of a cable box on an apartment building was a "permanent physical invasion" for which compensation was required. 458 U.S. at 439. The Court reasoned that "[t]o the extent that the government permanently occupies physical property, it effectively destroys [the rights to possess, use and dispose of property]." *Id.*

at 435. Section 32310 does not involve any physical invasion by the government of private property.

Similarly, the ability of States to prohibit the possession of LCMs is unchanged by the Supreme Court's admonition in *Lucas*, that the government's justification of "'prevention of harmful use,' standing alone, cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated." 505 U.S. at 1026. In *Lucas,* the Court held that where government regulation "goes beyond what the relevant background principles would dictate," and completely eliminates the economically productive or beneficial uses of land, a "total [regulatory] taking occurs." *Id.* at 1030. *Lucas*, which has not been applied outside of cases involving land, does not transform the exercise of police power to eliminate a harmful weapon into a taking. To the contrary, and as discussed below, does Section 32310 does not eliminate the entire value of an LCM, and the inability to possess previously grandfathered LCMs, which are already a nuisance subject to confiscation and destruction under state law, *see* §§ 32310, 32390, 18010, is entirely consistent with "background principles."

Unlike in cases where the government has (permanently) physically occupied or appropriated private property for its own use (either directly or

through agents), *see Horne v. Dept. of Agric.*, 135 S. Ct. at 2427-29; *Loretto*, 458 U.S. at 432, 434-35, Section 32310 is an exercise of the State's police power to protect the public by eliminating the dangers posed by LCMs. The purpose of the statute is to remove LCMs from circulation, not to transfer title to the government or an agent of the government for use in service of the public good. Accordingly, the district court abused its discretion in holding that Section 32310 effects a physical taking.

B. Section 32310 Is Not a Regulatory or "Hybrid" Taking.

To the extent that the district court determined that Section 32310 is a regulatory taking, ER 60-61, this is also in error. While there is no evidence in the record regarding the economic impact of Section 32310, the statute provides that LCM owners can protect or realize the economic value of their LCMs by storing them out-of-state or selling them to a licensed firearms dealer. *See* § 32310(d). It is also possible and relatively easy to modify an LCM so it can only accept a maximum of ten rounds. *See* § 32425(a); ER 613-15. Accordingly, plaintiffs cannot establish either a sufficient loss of value from Section 32310 or any meaningful interference with distinct investment-backed expectations in LCMs that were acquired decades ago. *See Penn. Cent. Transp. Co.*, 438 U.S. at 123; *MHC Fin. Ltd. P'ship v. City*

of San Rafael, 714 F.3d 1118, 1127 (9th Cir. 2013); *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1195 (Fed. Cir. 2004).

Given that Section 32310 is neither a physical nor a regulatory taking, it follows that it cannot be a "hybrid" of both. *See Valenciano v. City & Cty. of S.F.*, No. C 07-0845 PJH, 2007 WL 3045997, at *5 (N.D. Cal. Oct. 18, 2007) ("[T]he court has located no reference in any Supreme Court or Ninth Circuit decision to a 'hybrid' takings claim.").

IV. IN THE ABSENCE OF ANY CONSTITUTIONAL VIOLATION, PLAINTIFFS CANNOT MEET THEIR BURDEN TO DEMONSTRATE IRREPARABLE HARM, OR DEMONSTRATE THAT THE BALANCE OF HARMS TIPS IN THEIR FAVOR.

The district court's finding that plaintiffs would suffer irreparable injury in the absence of an injunction was in error because it was based almost entirely on its conclusion that Section 32310 infringes on plaintiffs' constitutional rights, and fails for the same reasons. ER 56-58, 63-64. *See Winter*, 555 U.S. at 22; *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1214 (9th Cir. 1984); *Fyock*, 25 F. Supp. 3d at 1282.

In the absence of any constitutional violation, plaintiffs cannot establish harm sufficient to outweigh the injury an injunction inflicts on the State. Ultimately, plaintiffs have not established, and cannot establish, harm sufficient to outweigh the fact that "[a]ny time a State is enjoined by a court

from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (quotation and citation omitted); *see also Herb Reed Enters., LLC v. Florida Entm't Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013) (concluding that "the district court abused its discretion by relying on unsupported and conclusory statements regarding harm [plaintiff] might suffer."). Plaintiffs cannot show that having to use magazines containing ten rounds outweighs the grievous injuries and deaths caused to innocent civilians and law enforcement by LCMs. Nor is it in the public interest to enjoin a duly enacted law designed to protect the public safety and reduce gun violence. *See Tracy Rifle & Pistol LLC v. Harris*, 118 F. Supp. 3d 1182, 1193-94 (E.D. Cal. 2015); *see also Fed. Trade Comm'n v. Affordable Media, LLC*, 179 F.3d 1228, 1236 (9th Cir. 1999).

CONCLUSION

For the foregoing reasons, the Attorney General respectfully requests that this Court reverse the district court's order granting the motion for preliminary injunction, vacate the preliminary injunction, and grant such other relief as the Court deems just.

Dated: October 12, 2017

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17-56081

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VIRGINIA DUNCAN, et al.,

Plaintiffs and Appellees,

v.

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

Defendant and Appellant.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: October 12, 2017

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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-56081

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

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Signature of Attorney or Unrepresented Litigant /s/ Alexandra Robert Gordon

Date Oct 12, 2017

("s/" plus typed name is acceptable for electronically-filed documents)

Addendum

STATE OF CALIFORNIA
LEGISLATIVE COUNSEL BUREAU
AUTHENTICATED
ELECTRONIC LEGAL MATERIAL

State of California

PENAL CODE

Section 32310

32310. (a) Except as provided in Article 2 (commencing with Section 32400) of this chapter and in Chapter 1 (commencing with Section 17700) of Division 2 of Title 2, any person in this state who manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, buys, or receives any large-capacity magazine is punishable by imprisonment in a county jail not exceeding one year or imprisonment pursuant to subdivision (h) of Section 1170.

(b) For purposes of this section, "manufacturing" includes both fabricating a magazine and assembling a magazine from a combination of parts, including, but not limited to, the body, spring, follower, and floor plate or end plate, to be a fully functioning large-capacity magazine.

(c) Except as provided in Article 2 (commencing with Section 32400) of this chapter and in Chapter 1 (commencing with Section 17700) of Division 2 of Title 2, commencing July 1, 2017, any person in this state who possesses any large-capacity magazine, regardless of the date the magazine was acquired, is guilty of an infraction punishable by a fine not to exceed one hundred dollars ($100) per large-capacity magazine, or is guilty of a misdemeanor punishable by a fine not to exceed one hundred dollars ($100) per large-capacity magazine, by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.

(d) Any person who may not lawfully possess a large-capacity magazine commencing July 1, 2017 shall, prior to July 1, 2017:

(1) Remove the large-capacity magazine from the state;

(2) Sell the large-capacity magazine to a licensed firearms dealer; or

(3) Surrender the large-capacity magazine to a law enforcement agency for destruction.

(Amended November 8, 2016, by initiative Proposition 63, Sec. 6.1.)

CERTIFICATE OF SERVICE

Case Name: **Duncan, Virginia et al v. Xavier Becerra** No. **17-56081**

I hereby certify that on October 12, 2017, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

APPELLANT'S OPENING BRIEF (PRELIMINARY INJUNCTION APPEAL – NINTH CIRCUIT RULE 3-3)

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 12, 2017, at San Francisco, California.

N. Newlin	*/s/ N. Newlin*
Declarant	Signature

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