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

APPELLEES' BRIEF OPPOSING REHEARING EN BANC

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INTRODUCTION

There is no reason for this Court to expend its limited en banc resources revisiting an unpublished panel opinion in an interlocutory appeal affirming a grant of a narrow preliminary injunction to preserve the status quo pending the resolution of plaintiffs' constitutional claims in ongoing trial court proceedings that have never been stayed. That preliminary injunction does not preclude continued application of the state's longstanding magazine ban, which will prevent anyone from lawfully acquiring new prohibited magazines, but rather enjoins implementation only of the state's recent effort to extend its ban to individuals who have long *lawfully* possessed the now-prohibited magazines, thus forcing them to dispossess themselves of their (twice-over) constitutionally protected property. And the panel's decision affirming that narrow relief is preliminary and unpublished, so it does not definitively resolve the issues or bind future panels or district courts in this Circuit. Rather, consistent with this Court's precedent in a very similar case, the panel applied only narrow abuse-of-discretion review to the district court's preliminary conclusions, and expressly stated that it was not resolving the ultimate merits of the underlying constitutional claims. Moreover, as even the dissenting judge emphasized, the district court did not stay the underlying proceedings, which have continued to move forward toward a final, appealable disposition.

That makes en banc review at this juncture particularly inappropriate because a final decision on all of the issues in this case is just around the corner. The parties have completed discovery and fully briefed the merits of all of plaintiffs' claims—those at issue in the preliminary injunction and others—in ongoing summary judgment proceedings on which the district court has held argument and received supplemental briefing. The parties are awaiting the court's final decision, which could issue any day. If the court grants plaintiffs summary judgment and enters a permanent injunction, then another three-judge panel and, if appropriate, the full court will have the opportunity to consider these issues on a complete record. And if the district court reverses course, then this appeal will be moot. Either way, it makes far more sense to await a final decision than to engage in premature en banc review now.

In all events, the panel decision is correct and does not conflict with any decision of this Circuit. This interlocutory appeal presents only narrow issues about whether the state may force individuals to dispossess themselves of commonly owned magazines that they have lawfully possessed without incident for at least a decade. The panel decision—holding that the district court did not abuse its discretion in merely maintaining the 15-year status quo while plaintiffs litigate the Second Amendment and Takings Clause implications of the state's confiscatory magazine ban—is eminently reasonable and eminently consistent with this Court's

precedent. And any claim that enforcement of the state's ban as to individuals who have lawfully possessed the now-prohibited magazines for decades cannot await final resolution of plaintiffs' claims is considerably undermined by the fact that the state did not seek a stay of the preliminary injunction pending its interlocutory appeal, took two extensions before filing its opening brief and another before filing its reply, and did not ask this Court to reconsider the panel's decision en banc. Simply put, this case is an exceedingly poor candidate for en banc review.

BACKGROUND

For nearly two decades, California has taken the outlier position of prohibiting law-abiding citizens from obtaining firearm magazines capable of holding more than 10 rounds of ammunition, the magazine for the most common firearms used for self-defense. For the first 15 years of that prohibition's existence, however, the state saw no need to dispossess individuals who had lawfully acquired such magazines before their prohibition. But in 2016, the state belatedly changed course, deeming magazines that were long lawfully possessed without incident contraband and decreeing that individuals who lawfully possess lawfully acquired magazines must now dispossess themselves of that property. As a result, 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 stringent transfer and sale restrictions. Cal. Penal Code §32310(a), (d).

Plaintiffs—California residents who lawfully possess pre-ban magazines or who would acquire such magazines if they were lawful, and an organization whose members possess or would possess such magazines—sued to enjoin enforcement of the magazine ban, alleging, *inter alia*, that it violates the Second Amendment and the Takings Clause. Although plaintiffs have challenged California's magazine restrictions in both their prospective and retrospective aspects, plaintiffs sought only a limited preliminary injunction to preserve the status quo by enjoining the new confiscatory aspects of the 2016 law and allowing the continued possession during this litigation of magazines lawfully obtained before the 2000 prospective-only-ban. The district court issued that narrow preliminarily relief, concluding that "[p]laintiffs have demonstrated on this preliminary record a likelihood of success on the merits [under both the Second Amendment and the Takings Clause], 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.

A panel of this Court—Judges Wallace, N.R. Smith, and Batts (S.D.N.Y., by designation)—affirmed in an unsigned, unpublished opinion. Consistent with this Court's decision in *Fyock v. City of Sunnyvale*, 779 F.3d 991 (9th Cir. 2015), the panel emphasized that it "d[id] not 'determine the ultimate merits'" of the case, "but

rather 'determine[d] 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.'" Mem.Op.2 (quoting *Fyock*, 779 F.3d at 995).

Under that deferential standard, the panel held that the district court did not abuse its discretion by concluding that the confiscatory possession ban likely implicates the Second Amendment and likely must satisfy intermediate scrutiny. Mem.Op.3-4. The panel then held that the court did not abuse its discretion by concluding that the ban is unlikely to survive intermediate scrutiny, emphasizing that the state "articulate[d] no actual error made by the district court, but, rather, multiple instances where it disagree[d] with the district court's conclusion or analysis regarding certain pieces of evidence." Mem.Op.5. Mindful of *Fyock*'s command that it "c[ould not] 'reweigh the evidence and overturn the district court's evidentiary determinations—in effect … substitute [its] discretion for that of the district court,'" Mem.Op. 5-6 (quoting *Fyock*, 779 F.3d at 1000), the panel found the state's arguments "insufficient to establish that the district court's findings of fact and its application of the legal standard to those facts were 'illogical, implausible, or without support in inferences that may be drawn from facts in the record,'" Mem.Op.5 (quoting *United States v. Hickson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc)).

The panel also concluded that the district court "outlined the correct legal principles" on the Takings Claim and "did not exceed its discretion" by concluding that plaintiffs are likely to succeed on their claim that the ban "fundamentally deprive[s] Plaintiffs not just of the *use* of their property, but of *possession*," and that "California could not use the police power to avoid compensation" for that dispossession. Mem.Op.7. It further concluded that the court's regulatory-takings analysis was not illogical, implausible, or lacking in evidentiary support. Mem.Op.7 n.3.

As for irreparable harm, the public interest, and the balance of the equities, the panel noted that the state had "ma[de] only a cursory argument that [those] elements" were not satisfied, instead focusing almost exclusively on the likelihood-of-success issue. Mem.Op.2. n.1. The panel accordingly "only address[ed] the first element of the preliminary injunction standard." Mem.Op.2 n.1.

Judge Wallace dissented, contending that the district court "presupposed a much too high evidentiary burden for the state" on the Second Amendment question and that the ban does not effect a taking because plaintiffs may remove the banned magazines from the state. Dis.Op.2, 6. At the same time, he "commended" the district court for "proceed[ing] with deliberate speed" while the appeal was pending, which would allow this Court later "to decide this case with a full and complete record and a new review." Dis.Op.8-9.

Although the state did not seek panel or en banc rehearing, a judge of this Court called for a vote to determine whether the case should be reheard en banc, and the Court asked the parties to brief that question. Dkt. 101.

REASONS NOT TO REHEAR THIS CASE EN BANC

I. The Panel's Narrow, Interlocutory, Unpublished Decision Is Remarkably Ill-Suited for Rehearing En Banc.

Setting aside the merits, this case is a remarkably poor candidate for en banc review, as the panel's unpublished decision is narrow, interlocutory, and governed by a deferential standard that the panel explicitly made clear prevented it from resolving the underlying merits of the claims.

This appeal arose out of a preliminary injunction that involves only a subset of the constitutional issues in this case. While plaintiffs have challenged the entirety of California's magazine ban, they sought to preliminarily enjoin only the recently revised portion that now requires law-abiding citizens to immediately dispossess themselves of magazines that they have lawfully owned without incident for nearly two decades. As plaintiffs explained below, forcing law-abiding citizens to dispossess themselves of magazines that they have long lawfully possessed poses distinct constitutional problems even beyond those posed by the state's general magazine ban. And the district court granted a preliminary injunction only as to that narrow issue, preserving both the prospective aspects of the ban that have been in place since 2000 and the status quo for those Californians who have long lawfully

possessed their now-banned magazines pending final resolution of plaintiffs' constitutional claims. In doing so, the court made clear that it was not resolving the ultimate merits of those claims, and indeed explicitly acknowledged that it could reach different conclusions after a "more robust evidentiary showing, made after greater time and testimony is taken." ER0025.

Consistent with the narrow and preliminary nature of the relief granted, the state did not seek a stay pending its interlocutory appeal of the preliminary injunction. And far from expediting that appeal, the state took multiple extensions, all the while trying to *stay* the proceedings below rather than keep them moving toward a final decision that would supplant the preliminary injunction. The district court declined the state's request to delay the trial court proceedings, and in part because of the leisurely pace at which the state chose to brief its interlocutory appeal, is now poised to issue a final decision any day. Plaintiffs filed a motion for summary judgment on *all* claims (not just those at issue in the preliminary injunction) in March 2018, *see* D.Ct.Dkt. 46, and the court held extensive arguments in May 2018, and, following argument, ordered the parties to file supplemental briefing, which they have since done. *See* D.Ct.Dkt. 62, 63, 64, 65. The court then took the motion under submission. Both parties have recognized that the court's imminent ruling could dispose of the entire case. Indeed, the parties jointly asked the court to stay other aspects of the proceedings pending resolution of the motion because, if granted, it

would "adjudicate the entire matter" and "moot" the remaining proceedings. D.Ct.Dkt. 71 at 3.

In light of the impending decision by the district court, rehearing en banc would not be an efficient use of this Court's resources. If the district court grants summary judgment, a panel of this Court can then review that decision—which will finally resolve *all* issues—on a complete record and under a less deferential standard, and the full court can then consider whether to rehear that panel's decision. Indeed, Judge Wallace acknowledged in his dissent that a final decision "will allow [the Court] to decide this case with a full and complete record and a new review." Dis.Op.9. Further review at this juncture, by contrast, would not promote judicial economy and, if anything, might further delay the ultimate resolution of the important constitutional issues this case presents.

En banc review also would make little sense given the abuse-of-discretion standard that the parties agreed constrained the panel in this interlocutory posture. This Court made abundantly clear in *Fyock* that appellate review of a preliminary injunction does not resolve the merits of the underlying legal claims, but is "limited" and "narrow," asking "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*, 779 F.3d at 995. Indeed, the *Fyock* Court explicitly applied the abuse-of-discretion standard not just to the discretionary judgment of

whether preliminary injunctive relief was appropriate, but to literally every issue the district court addressed in that case, from the scope of the Second Amendment to the applicable standard of review to the ultimate likelihood of success. *See*, *e.g.*, *id.* at 996 ("we conclude that the district court did not abuse its discretion in finding Fyock failed to demonstrate the first element for a preliminary injunction"). As a result, the panel avoided resolving the merits of the underlying claims—a point that it made explicit. *See id.* at 995 ("we are not called upon today to determine the ultimate merits of Fyock's claims").

That is precisely what the panel did here as well, reviewing each step in the district court's analysis only for abuse of discretion. *See* Mem.Op.3-6. That abuse-of-discretion review was expressly tethered to the incomplete record that necessarily underlay the court's preliminary injunction decision. The fact-bound application of the abuse-of-discretion standard on an as-yet-incomplete record is the very antithesis of an issue that merits en banc review.

Moreover, just like the panel before it in *Fyock* and the district court below, *see* ER0025, the panel made explicitly clear that its decision does not "'determine the ultimate merits'" of the underlying constitutional issues. Mem.Op.2 (quoting *Fyock*, 779 F.3d at 995). That determination is consistent with binding Supreme Court precedent that makes clear that the disposition of issues in a preliminary injunction posture is not law of the case or otherwise binding in subsequent phases

of the litigation. *See Texas v. Camenisch*, 451 U.S. 390, 394-95 (1981). The ultimate constitutionality of California's magazine ban—in both its prospective and its retrospective application—thus remains an issue that can and should be resolved when the district court issues its final decision, and indeed is more sensibly resolved then, when the court's final legal conclusions will be subject to more searching appellate review. Granting en banc review in this preliminary, non-binding, abuse-of-discretion posture, by contrast, would be both extraordinary and an extraordinary waste of en banc resources, as the en banc Court's disposition of the preliminary injunction would not even bind a subsequent panel's consideration of a final appeal. *See id.*

En banc review also would be a particularly poor use of this Court's resources because the panel decision was unpublished and therefore is "not precedent" that could bind district courts in the Circuit even on the narrow and fact-bound issues addressed. 9th Cir. R. 36-3. Indeed, "later panels of the court, as well as lower courts within the circuit," are "free ... to disregard" an unpublished decision. *Hart v. Massanari*, 266 F.3d 1155, 1159 n.2 (9th Cir. 2001). Unpublished opinions are thus exceedingly ill-suited for en banc review, as en banc is "seldom used merely to correct the errors of individual panels," and certainly should not be used to review unpublished decisions that will not even be "applied in future cases." *Id.* at 1172 n.29.

II. The Panel's Decision Is Correct And Does Not Conflict With This Court's Precedent.

En banc review is also unwarranted because the decision below is correct and does not begin to satisfy the traditional en banc criteria. En banc review is not "necessary to secure or maintain uniformity of the court's decisions," Fed. R. App. P. 35, or ensure "national uniformity," 9th Cir. R. 35-1, because the panel's decision does not conflict with any decision of this Court or any other court of appeals. To the contrary, it follows directly from Supreme Court and circuit precedent.

A. The Panel's Conclusions as to the Second Amendment Claims Are Correct and Consistent with Circuit Precedent.

The panel correctly concluded that the district court did not abuse its discretion in entering a preliminary injunction that merely preserves the status quo by permitting plaintiffs to keep their constitutionally protected and long-lawfully possessed magazines while the parties litigate this case. Magazines capable of holding more than 10 rounds of ammunition are "necessary and integral" for pistols and rifles commonly used for self-defense. ER0016. They thus fall within the scope of the Second Amendment, which extends to ammunition and accessories such as magazines, *see Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014), for arms "typically possessed by law-abiding citizens for lawful purposes," *District of Columbia v. Heller*, 554 U.S. 570, 625, 635 (2008). At a bare minimum,

the district court plainly "identified the applicable law" and "did not exceed its permissible discretion" by applying that law to reach that conclusion. Mem.Op.3.

The panel also correctly concluded that the district court did not abuse its discretion by concluding that, at a minimum, intermediate scrutiny applies, and that the state's confiscatory ban is unlikely to satisfy intermediate scrutiny. Intermediate scrutiny requires the state to show that its imposition of an extraordinary retrospective and confiscatory ban on magazine possession—the most draconian form of regulation available—bears a "reasonable fit" to its goal of reducing mass shootings and gun violence. *United States v. Chovan*, 735 F.3d 1127, 1136-37 (9th Cir. 2013).

The district court carefully considered the record before it and concluded that the state had not yet met that burden. The state's own toleration of a prospective-only ban for a decade and a half makes its justification of its late-breaking decision to change course particularly challenging. In all events, the district court's disposition was not only correct, but fact-bound and directly tethered to the incomplete record assembled at the preliminary stage. Moreover, as the panel explained, it "included numerous judgment calls regarding the quality, type, and reliability of the evidence, as well as repeated credibility determinations." Mem.Op.4. Indeed, the district court made plain that it reached its conclusions because it was not persuaded that the state's evidence was "credible," "reliable," or

"on point." ER0023-56. While it did not rule out the possibility that the state could provide a better record at a later stage, it found that the state offered only "speculative explanations and predictions" at the preliminary-injunction stage. ER0023.

To be sure, a different district court reached a different preliminary conclusion about the constitutionality of a similar magazine ban in *Fyock*. But the abuse-of-discretion standard necessarily contemplates that two courts permissibly could reach differing conclusions, *see* Mem.Op.6 n.2, especially when, as here, they make different judgments about how "credible, reliable, and on point" the evidence is, ER0023. The panel's decision thus does not conflict with the district court's decision in *Fyock*, and it certainly does not conflict with this Court's decision, which necessarily left open the possibility that another court could reach a different conclusion when it expressly disclaimed any effort to "determine the ultimate merits of Fyock's claims." *Fyock*, 779 F.3d at 995. Accordingly, whatever members of this Court may think of the district court's findings and conclusions in this case, the panel did not err by concluding that they were within the court's discretion.

B. The Panel's Takings Clause Holding Is Correct and Consistent with Circuit Precedent.

The panel also correctly concluded that the district court did not abuse its discretion in holding that the retrospective and confiscatory aspects of the possession ban likely violate the Takings Clause. The ban requires law-abiding citizens who lawfully acquired the now-banned magazines to dispossess themselves of them. A

long line of Supreme Court cases establishes that the uncompensated, forced dispossession of lawfully acquired property is a physical taking. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 n.19 (2002); *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426 (2015). And while the state maintains that it may take any property it wants so long as it invokes its "police power," that argument is squarely foreclosed by longstanding Supreme Court precedent. *See Loretto*, 458 U.S. at 425; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1020-27 (1992). The district court thus correctly identified the governing law and did not illogically apply that law to the facts of this case. Accordingly, here too there was plainly no abuse of discretion.

Nor did the district court abuse its discretion by concluding that forcing citizens to remove property from the state effectively dispossesses the owner of that property. Mem.Op.7 & n.3. Like a mandatory sale to a third party or surrender to the government, a mandatory transfer of property out of state works "a direct interference with or disturbance of" the owner's property rights. *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1330 (9th Cir. 1977). Moreover, 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*, No. 15-274 (Jan. 4, 2016). At a minimum, the panel was correct that the district court did not abuse its discretion in concluding that plaintiffs' option to move the magazines out of state could amount to a regulatory taking. Mem.Op.7 n.3.

C. Plaintiffs Satisfied the Remaining Preliminary Injunction Factors.

Finally, the panel correctly concluded that it did not need to address the remaining highly discretionary preliminary injunction factors, as the state "ma[de] only a cursory argument that the latter three elements are unmet." Mem.Op.2 n.1 The state was wise to avoid those issues, as plaintiffs indisputably face irreparable injury, both due to their constitutional injury, *see Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012), and due to the law's extraordinary requirement that they surrender for destruction or otherwise dispossess themselves of their property or risk criminal possession, *see Taylor v. Westly*, 488 F.3d 1197, 1202 (9th Cir. 2007). Indeed, it is hard to imagine a more straightforward case of irreparable injury than a demand to immediately surrender for destruction the very property that the plaintiff maintains is protected by the Constitution. The public interest also clearly favors plaintiffs, who are seeking to vindicate two constitutional rights. *See Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009). And plaintiffs' concrete, irreparable injury outweighs any injury the state may suffer from maintaining during this litigation the status quo that the state itself tolerated for 15 years. That is

particularly true because the enjoined aspect of the law affects only individuals who have lawfully possessed the magazines without incident for nearly two decades. Indeed, the weakness of the state's countervailing interest is evidenced by the fact that it did not even seek a stay pending this interlocutory appeal, let alone ask for rehearing en banc. *See Rodde v. Bonta*, 357 F.3d 988, 999 n.14 (9th Cir. 2004).

CONCLUSION

The Court should decline to rehear this appeal en banc.

Respectfully submitted,

s/Paul D. Clement

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September 12, 2018

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of 9th Cir. R. 32-1 because this brief contains 3,886 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.

September 12, 2018

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 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

ADDENDUM

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 17 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

VIRGINIA DUNCAN; et al., Plaintiffs-Appellees, v. XAVIER BECERRA, in his official capacity as Attorney General of the State of California, Defendant-Appellant.	No. 17-56081 D.C. No. 3:17-cv-01017-BEN-JLB MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Roger T. Benitez, District Judge, Presiding

Argued and Submitted May 14, 2018
San Francisco, California

Before: WALLACE and N.R. SMITH, Circuit Judges, and BATTS,** District Judge.

The State of California ("California"), through its Attorney General, Xavier Becerra, appeals the district court's grant of a preliminary injunction enjoining

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Deborah A. Batts, United States District Judge for the Southern District of New York, sitting by designation.

California from enforcing California Penal Code §§ 32310(c) & (d). "We review a district court's decision to grant or deny a preliminary injunction for abuse of discretion." *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011). We do not "determine the ultimate merits," but rather "determine 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. Sunnyvale*, 779 F.3d 991, 995 (9th Cir. 2015). We have jurisdiction under 28 U.S.C. § 1292(a)(1), and we affirm.[1]

I.

The district court did not abuse its discretion by granting a preliminary injunction on Second Amendment grounds. *Thalheimer*, 645 F.3d 1109 at 1115.

[1] "A plaintiff seeking a preliminary injunction 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." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). California makes only a cursory argument that the latter three elements are unmet if we find the district court did not abuse its discretion regarding the first element. Because we find the district court did not abuse its discretion, we only address the first element of the preliminary injunction standard for each constitutional question. *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief. . . . [A] bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review." (citation omitted)).

1. The district court did not abuse its discretion by concluding that magazines for a weapon likely fall within the scope of the Second Amendment. First, the district court identified the applicable law, citing *United States v. Miller*, 307 U.S. 174 (1939), *District of Columbia v. Heller*, 554 U.S. 570 (2008), *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (per curiam), and *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014). Second, it did not exceed its permissible discretion by concluding, based on those cases, that (1) some part of the Second Amendment right likely includes the right to bear a weapon "that has some reasonable relationship to the preservation or efficiency of a well regulated militia," *Miller*, 307 U.S. at 178; *see also Heller*, 554 U.S. at 583, 627-28; *Caetano*, 136 S. Ct. at 1028; and (2) the ammunition for a weapon is similar to the magazine for a weapon, *Jackson* 746 F.3d at 967 ("'[T]he right to possess firearms for protection implies a corresponding right' to obtain the bullets necessary to use them." (quoting *Ezell v. City of Chicago*, 61 F.3d 684, 704 (7th Cir. 2011))).

2. The district court did not abuse its discretion by applying the incorrect level of scrutiny. The district court applied both intermediate scrutiny and what it coined the "simple test" of *Heller*. The district court found Plaintiffs were likely to succeed under either analysis. Although the district court applied two different tests, there is no reversible error if one of those tests follows the applicable legal

principles and the district court ultimately reaches the same conclusion in both analyses.

Here, in its intermediate scrutiny analysis, the district court correctly applied the two-part test outlined in *Jackson*. The district court concluded that a ban on ammunition magazines is not a presumptively lawful regulation and that the prohibition did not have a "historical pedigree." Next, the district court concluded, citing *Fyock*, that section 32310 infringed on the core of the Second Amendment right, but, citing *Silvester v. Harris*, 843 F.3d 816, 823 (9th Cir. 2016), *Fyock*, 779 F.3d at 999, *Jackson*, 746 F.3d at 965, 968, and *Chovan*, 735 F.3d at 1138, that intermediate scrutiny was the appropriate scrutiny level. The district court concluded that California had identified four "important" interests and reasoned that the proper question was "whether the dispossession and criminalization components of [section] 32310's ban on firearm magazines holding any more than 10 rounds is a reasonable fit for achieving these important goals."

3. The district court did not abuse its discretion by concluding that sections 32310(c) and (d) did not survive intermediate scrutiny. The district court's review of the evidence included numerous judgment calls regarding the quality, type, and reliability of the evidence, as well as repeated credibility determinations. Ultimately, the district court concluded that section 32310 is "not likely to be a

reasonable fit." California articulates no actual error made by the district court, but, rather, multiple instances where it disagrees with the district court's conclusion or analysis regarding certain pieces of evidence. This is insufficient to establish that the district court's findings of fact and its application of the legal standard to those facts were "illogical, implausible, or without support in inferences that may be drawn from facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc). In reviewing the district court's grant of a preliminary injunction, we cannot "re-weigh the evidence and overturn the district court's

evidentiary determinations—in effect, to substitute our discretion for that of the district court." *Fyock*, 779 F.3d at 1000.[2]

II.

The district court did not abuse its discretion by granting a preliminary injunction on Takings Clause grounds. *Thalheimer*, 645 F.3d at 1115. First, the district court, citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015), *Loretta v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992),

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[2] The dissent *does* re-weigh the evidence. It concludes that "California's evidence . . . was more than sufficient to satisfy intermediate scrutiny" and that the "2013 Mayors Against Illegal Guns (MAIG) Survey . . . easily satisfies the requirement that the evidence upon which the state relies be 'reasonably believed to be relevant' and 'fairly support' the rationale for the challenged law." These conclusions mean the dissent *is* "substitut[ing] [its] discretion for that of the district court," which is impermissible under the applicable standard of review. *Fyock*, 779 F.3d at 1000-01.

Further, disagreeing with another district court regarding a similar record is not necessarily an abuse of discretion. Here, the district court made evidentiary conclusions regarding the record provided by California, specifically noting that it had provided "incomplete studies from unreliable sources upon which experts base speculative explanation and predictions." These conclusions are not "illogical, implausible, or without support in inferences that may be drawn from facts in the record." *Hinkson*, 585 F.3d at 1251. As noted above, it is not our role to "re-weigh the evidence and overturn the district court's evidentiary determinations—in effect, to substitute our discretion for that of the district court." *Fyock*, 779 F.3d at 1000.

outlined the correct legal principles. Second, the district court did not exceed its discretion by concluding (1) that the three options provided in section 32310(d) (surrender, removal, or sale) fundamentally "deprive Plaintiffs not just of the *use* of their property, but of *possession*, one of the most essential sticks in the bundle of property rights"; and (2) that California could not use the police power to avoid compensation, *Lucas*, 505 U.S. at 1020-29; *Loretto*, 458 U.S. at 426 (holding "a permanent physical occupation authorized by the government is a taking without regard to the public interest it may serve").[3]

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[3] The dissent also "re-weigh[s] the evidence" and the district court's conclusions on the Takings Clause question. *Fyock*, 779 F.3d at 1000. The district court concluded that the three options available under section 32310(d) constituted either a physical taking (surrender to the government for destruction) or a regulatory taking (forced sale to a firearms dealer or removal out of state). The dissent first takes issue with the district court's conclusion that storage out of state could be financially prohibitive. It is not "illogical" or "implausible" to conclude that forcing citizens to remove property out of state effectively dispossess the property due to the financial burden of using it again. *Hinkson*, 585 F.3d at 1263. Such removal, as the district court notes, also eliminates use of the Banned Magazines in "self defense." *See Heller*, 554 U.S. at 592 ("[W]e find that [the text of the Second Amendment] guarantee[s] the individual [a] right to possess and carry weapons in case of confrontation."). Second, the dissent argues the district court incorrectly weighed the regulatory takings factors in *Murr*. While the cost ($20 to $50) of the magazine may seem minimal, the district court also noted that the "character of the governmental action," *Murr*, 137 S. Ct. at 1943, was such that "California will deprive Plaintiffs not just of the *use* of their property, but of *possession*," Similarly, this conclusion is not "illogical," "implausible," or "without support in inferences that may be drawn from the facts in the record." *Hinkson*, 585 F.3d at 1263.

AFFIRMED.

Duncan v. Becerra, No. 17-56081

WALLACE, Circuit Judge, dissenting:

I respectfully dissent. For the reasons stated below, I conclude that the district court abused its discretion in preliminarily enjoining California Penal Code §§ 32310(c) & (d).

I.

In this case, we apply intermediate scrutiny because the challenged law "does not implicate a core Second Amendment right, or . . . place a substantial burden on the Second Amendment right." *Jackson v. City and Cty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014). Under this standard, a challenged law will survive constitutional scrutiny so long as the state establishes a "reasonable fit" between the law and an important government interest. *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). "When reviewing the reasonable fit between the government's stated objective and the regulation at issue, the court may consider 'the legislative history of the enactment as well as studies in the record or cited in pertinent case law.'" *Fyock v. Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015) (quoting *Jackson*, 746 F.3d at 966). California may establish a reasonable fit with "any evidence 'reasonably believed to be relevant' to substantiate its important interests." *Id*.

The majority concludes the district court did not abuse its discretion in concluding California's large-capacity magazine (LCM) possession ban did not survive intermediate scrutiny on the ground that the district court's conclusion was based on "numerous judgment calls regarding the quality, type, and reliability of the evidence." The problem, however, is that the district court's "judgment calls" presupposed a much too high evidentiary burden for the state. Under intermediate scrutiny, the question is not whether the state's evidence satisfies the district court's subjective standard of empiricism, but rather whether the state relies on evidence "reasonably believed to be relevant" to substantiate its important interests. *Fyock*, 779 F.3d at 1000. So long as the state's evidence "fairly supports" its conclusion that a ban on possession of LCMs would reduce the lethality of gun violence and promote public safety, the ban survives intermediate scrutiny. *Jackson*, 746 F.3d at 969.

California's evidence—which included statistical studies, expert testimony, and surveys of mass shootings showing that the use of LCMs increases the lethality of gun violence—was more than sufficient to satisfy intermediate scrutiny. For example, the September 2013 Mayors Against Illegal Guns (MAIG) Survey, which the district court writes off as inconclusive and irrelevant, easily satisfies the requirement that the evidence upon which the state relies be "reasonably believed to be relevant" and "fairly support" the rationale for the challenged law. The

MAIG survey shows that assault weapons or LCMs were used in at least 15 percent of the mass shootings reported, and that in those incidents 151 percent more people were shot, and 63 percent more people died, as compared to other mass shootings surveyed. Even if the MAIG survey also shows that most mass shooting incidents did not involve LCMs, California could draw a "reasonable inference" based on the data that prohibiting possession of LCMs would reduce the lethality of gun violence. *Jackson*, 746 F.3d at 966. Other evidence cited by the state similarly supports the conclusion that mass shootings involving LCMs result in a higher number of shots fired, a higher number of injuries, and a higher number of fatalities than other mass shootings. The district court's characterization of this evidence as insufficient was based either on clearly erroneous findings of fact or an application of intermediate scrutiny that lacked support in inferences that could be drawn from facts in the record. In either case, it was an abuse of discretion.

It is significant that California, in seeking to establish a reasonable fit between §§ 32310(c) & (d) and its interest in reducing the lethality of mass shootings, relied on much of the same evidence presented by the City of Sunnyvale in *Fyock*, a case in which we affirmed the district court's conclusion that Sunnyvale's LCM possession ban was likely to survive intermediate scrutiny. The district court attempts to distinguish the two cases, stressing that an "important difference" between this case and *Fyock* is that the court in *Fyock* "had a

sufficiently convincing evidentiary record of a reasonable fit," which "is not the case here." But the evidentiary record in *Fyock* included much of the same evidence the district court here found insufficient—including the aforementioned September 2013 MAIG survey, and expert declarations by Lucy Allen and John Donohue, which the district court dismissed as "defective" and "biased." The district court did not explain why the evidentiary record in *Fyock* was "sufficiently convincing," while a substantially similar evidentiary record here was insufficient. Given the overlap between the records, and the district court's failure to identify any material differences, the district court's contention that the record here is less credible, less reliable, and less relevant than the record in *Fyock* is difficult to accept.

The majority argues in a footnote that in concluding the district court abused its discretion I have impermissibly re-weighed the evidence. That is not so. Our obligation to refrain from re-weighing evidence is meant to ensure we do not overturn a district court's ruling simply because we would have placed more weight on certain pieces of evidence than others. This obligation to refrain presumes the district court has applied the correct legal standard. Here, by contrast, my argument is that the district court did not evaluate the evidence consistent with the applicable legal standard. This is conceptually distinct from the question whether one piece of evidence should have been given more weight vis-à-vis

another piece of evidence. Here, the district court was required under intermediate scrutiny to credit evidence "reasonably believed to be relevant" to advancing the state's important interests. *Fyock*, 779 F.3d at 1000. Instead, the district court rejected this standard for a subjective standard of undefined empirical robustness, which it found the state did not satisfy. This it cannot do.

In sum, I conclude the district court abused its discretion in concluding that California had not established a "reasonable fit" between §§ 32310(c) & (d) and the state's important interests. On the record before the district court, California's LCM possession ban likely survives intermediate scrutiny. Therefore, Plaintiffs were unlikely to succeed on the merits of their Second Amendment challenge and were not entitled to a preliminary injunction.

II.

The district court also concluded that Plaintiffs were likely to succeed on the merits of their claim under the Takings Clause on the ground that §§ 32310(c) & (d) was both a physical appropriation of property and a regulatory taking. In my view, the district court's application of relevant takings doctrine was without support in inferences that could be drawn from facts in the record, and therefore constituted an abuse of discretion.

The district court is correct that a physical appropriation of personal property gives rise to a *per se* taking. *Horne v. Department of Agriculture*, 135 S. Ct. 2419,

2427 (2015). But here, LCM owners can comply with § 32310 without the state physically appropriating their magazines. Under § 32310(d)(1), an LCM owner may "[r]emove the large-capacity magazine from the state," retaining ownership of the LCM, as well as rights to possess and use the magazines out of state. The district court hypothesized that LCM owners may find removal to be more costly than it is worth, but such speculation, while theoretically relevant to the regulatory takings inquiry, does not turn the compulsory removal of LCMs from the state into a "physical appropriation" by the state. *See Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002) (explaining that it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa") (footnote omitted). Given that Plaintiffs do not specify whether they intend to surrender or sell their LCMs, as opposed to remove them from the state and retain ownership, the availability of the removal option means Plaintiffs are unlikely to succeed on their claim that the LCM possession ban is unconstitutional as a physical taking. *See Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1175 (9th Cir. 2018) (explaining that to succeed on a facial challenge, plaintiffs must show either that "no set of circumstances exists under which the challenged law would be valid," or that the law lacks any "plainly legitimate sweep"); *cf. Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) ("In

determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases.").

Nor was the district court within its discretion to conclude that § 32310 likely constituted a regulatory taking. Under the relevant *Penn Central* balancing test, a regulatory taking may be found based on "a complex of factors," including "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Here, the district court speculated that because the typical retail cost of an LCM is "between $20 and $50," LCM owners may find "the associated costs of removal and storage and retrieval" to be too high to justify retaining their magazines. In my view, this speculation is insufficient to conclude that plaintiffs are likely to succeed on the merits of their regulatory takings claim. Even accepting the district court's finding on the "typical retail cost" of an LCM, there are no facts in the record from which to draw an inference regarding the overall economic impact of §§ 32310(c) & (d) on Plaintiffs, particularly as it relates to Plaintiffs' "distinct investment-backed expectations" for their LCMs. Without this foundation, the district court could not plausibly draw the inference that requiring the removal of LCMs from

California was "functionally equivalent" to a direct appropriation and thus constituted a regulatory taking. *Lingle v. Chevron USA Inc.*, 544 U.S. 528, 539 (2005).

III.

"Abuse-of-discretion review is highly deferential to the district court." *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 881 (9th Cir. 2012). In this case, however, I do not consider it a close call to conclude the district court abused its discretion in finding Plaintiffs were likely to succeed on the merits of their constitutional challenges to California's LCM ban. As to Plaintiffs' Second Amendment challenge, the district court clearly misapplied intermediate scrutiny by refusing to credit relevant evidence that fairly supports the state's rationale for its LCM ban. As to Plaintiffs' Takings Clause challenge, the district court offered only speculation on the economic impact of the challenged law and did not assess Plaintiffs' distinct investment-backed expectations for their LCMs. Therefore, I would conclude the district court exceeded the broad range of permissible conclusions it could have drawn from the record. The proper course is to reverse the district court's order granting the preliminary injunction and remand for further proceedings. Accordingly, I dissent.

As a final note, I realize the end result of the district court's rulings are temporary. The district court is to be commended for following our constant

admonition not to delay trial preparation awaiting an interim ruling on the preliminary injunction. *See Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 673 (9th Cir. 1988). The district court has properly proceeded with deliberate speed towards a trial, which will allow it to decide this case with a full and complete record and a new review. Thus, although I would reverse the district court's order and remand for further proceedings, I credit the district court for ensuring the case did not stall awaiting disposition of this appeal.