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9 WILLIAM WIESE, JEREMIAH MORRIS,
LANCE COWLEY, SHERMAN MACASTON,
10 ADAM RICHARDS, CLIFFORD FLORES,
L.Q. DANG, FRANK FEDEREAU, ALAN NORMANDY,
11 TODD NIELSEN, THE CALGUNS FOUNDATION,
FIREARMS POLICY COALITION,
12 FIREARMS POLICY FOUNDATION,
and SECOND AMENDMENT FOUNDATION

13 UNITED STATES DISTRICT COURT

14 FOR THE EASTERN DISTRICT OF CALIFORNIA

15 WILLIAM WIESE, an individual; JEREMIAH
16 MORRIS, an individual; LANCE COWLEY, an
17 individual; SHERMAN MACASTON, an
18 individual; ADAM RICHARDS, in his capacity
as Trustee of the Magazine Ban Lawsuit Trust;
19 CLIFFORD FLORES, individually and as
trustee of the Flores Family Trust; L.Q. DANG,
20 an individual; FRANK FEDEREAU, an
21 individual; ALAN NORMANDY, an
22 individual; TODD NIELSEN, an individual;
THE CALGUNS FOUNDATION; FIREARMS
23 POLICY COALITION; FIREARMS POLICY
24 FOUNDATION; SECOND AMENDMENT
FOUNDATION,

25 Plaintiffs,

26 vs.

Case No. 2:17-cv-00903-WBS-KJN

**FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

1 XAVIER BECERRA, in his official capacity as
2 Attorney General of California; MARTHA
3 SUPERNOR, in her official capacity as Acting
4 Chief of the Department of Justice Bureau of
5 Firearms,

Defendants.

6
7 COME NOW the plaintiffs WILLIAM WIESE, JEREMIAH MORRIS, LANCE
8 COWLEY, SHERMAN MACASTON, ADAM RICHARDS, CLIFFORD FLORES, L.Q.
9 DANG, FRANK FEDEREAU, ALAN NORMANDY, TODD NIELSEN, THE CALGUNS
10 FOUNDATION, FIREARMS POLICY COALITION, FIREARMS POLICY FOUNDATION,
11 and SECOND AMENDMENT FOUNDATION (collectively, “Plaintiffs”), by and through their
12 undersigned counsel, who hereby complain and allege as follows:

13
14 **INTRODUCTION**

15 1. This is a facial and as-applied constitutional challenge to California Penal Code §
16 32310, as recently amended by Senate Bill 1446 and Proposition 63, and Penal Code § 32390
17 (collectively, the “Large-Capacity Magazine Ban”), which would, if enforced, and as applied,
18 individually and collectively prohibit Plaintiffs and other law-abiding citizens from continuing to
19 possess, use, or acquire lawfully-owned firearms, in common use for lawful purposes such as
20 self-defense (inside and outside the home), competition, sport, and hunting.

21 2. This action further challenges the Large-Capacity Magazine Ban statutory scheme
22 which would, if enforced, as of July 1, 2017, subject thousands of law-abiding gun owners to
23 criminal liability and sanctions, and subjecting their lawfully-possessed personal property to
24 forfeiture, seizure and permanent confiscation, without due process or compensation.

25 3. Moreover, the Large-Capacity Magazine Ban is hopelessly vague and ambiguous,
26 as it fails to provide fair or even adequate notice to law-abiding gun owners of what they may do
27 with their personal property without being subject to criminal sanctions, fails to fairly or
28

1 adequately inform them of which version of the statutes may apply, fails to fairly or adequately
2 inform them whether they are subject to an exception thereunder, and encourages or authorizes
3 arbitrary or discriminatory enforcement.

4 4. The Large-Capacity Magazine Ban is also unconstitutionally overbroad because
5 its provisions capture a substantial amount of constitutionally-protected activity, the prohibition
6 of which does not advance the stated justification for the ban, and the law is not readily
7 susceptible to a limiting construction that would render it constitutional.

8 5. The possession of all ammunition magazines, which are intrinsic operating parts
9 of modern, constitutionally-protected semi-automatic firearms, has heretofore been legal. In
10 1999, through passage of Senate Bill 23 (“SB23”), California enacted legislation banning the
11 importation, sale or manufacture of standard-capacity ammunition feeding devices that can hold
12 more than ten rounds of ammunition (so-called “large-capacity magazines” as the Legislature
13 called and defined them in Cal. Penal Code § 16740). However, as a part of SB23, possession of
14 lawfully-acquired “large capacity magazines” was not prohibited and continued to be legal.
15 Therefore, millions of these “grandfathered” large-capacity magazines have existed and currently
16 are lawfully possessed by law-abiding California gun owners. More to the point, they are
17 inherent, operating parts of handguns and other firearms that are lawfully owned and protected
18 under the United States Constitution. The Large-Capacity Magazine Ban is, effectively and now,
19 actually, a confiscation, in part, of bearable arms, protected by the United States Constitution.
20

21 6. This action therefore seeks to vindicate the right of the people of the State of
22 California, including Plaintiffs, and others similarly situated, to keep and bear arms under the
23 Second Amendment, as incorporated to the states, which prohibits infringement of a core right to
24 keep and use commonly-possessed firearms for lawful purposes, including self-defense.

25 7. This action is brought by individual and organizational plaintiffs, both on their
26 own behalves, and as representatives on behalf of the class of individuals who are or would be
27 affected by the Large-Capacity Magazine Ban, that is, those law-abiding California residents,
28 who are not otherwise exempt, who lawfully and have legally possessed Large-Capacity

1 Magazines in this state, prior to December 31, 1999.

2
3 **PARTIES**

4 8. Plaintiff William Wiese is a natural person and a law-abiding California resident
5 who resides in the City of San Jose, California. Wiese has lawfully owned and possesses large-
6 capacity magazines, as defined by statute, before 2000. Wiese is a board member and supporter
7 of The Calguns Foundation. Wiese is a member and supporter of Second Amendment
8 Foundation, Firearms Policy Coalition, and Firearms Policy Foundation. Plaintiff Wiese is suing
9 herein in his capacity as an individual, and as a named Trustor and Beneficiary of the Magazine
10 Ban Lawsuit Trust, described further herein.

11 9. Plaintiff Jeremiah Morris is an individual, and a law-abiding resident of the
12 County of Kern, California. Morris has possessed, and continues to lawfully possess a so-called
13 large-capacity magazine for an AR-type rifle, chambered in 5.56 x 45 mm, since before the ban
14 on the importation and sale of such magazines in 2000. Morris holds an active license to carry a
15 concealed weapon (“CCW”) issued by his county sheriff, issued to him only after proving “good
16 cause” and his “good moral character” to his licensing authority, successfully completing a
17 course of training on the law and firearms proficiency, passing an extensive Live Scan-based
18 background check¹ and placement into the State’s “Rap Back” system for monitoring law
19 enforcement contact, arrests, and criminal convictions. Morris has maintained an active CCW
20 license, requiring additional training and background checks, since 2010.

21
22 10. Plaintiff Lance Cowley is an individual, and a law-abiding resident of the County
23 of Placer, California. Plaintiff Cowley is the lawful possessor of one or more large-capacity
24 magazines, as defined by statute, which he legally acquired before 2000. Cowley is a member
25 and supporter of The Calguns Foundation, Second Amendment Foundation, Firearms Policy
26 Coalition, and Firearms Policy Foundation.

27
28 ¹ Laws relating to licenses to carry a concealed handgun are set forth in California Penal Code §
26150, *et seq.*

1 11. Plaintiff Sherman Macaston is an individual, and law-abiding resident of the
2 County of Sonoma, California. Plaintiff Macaston was born and raised in California, and has
3 honorably served his country, serving two combat tours of duty in Vietnam. After being
4 honorably discharged from the United States Army in 1978, Plaintiff Macaston returned to
5 California, and here he lawfully acquired, prior to 2000, large-capacity magazines for a
6 Browning Hi-Power pistol, chambered in 9mm, and large-capacity magazines for a Smith &
7 Wesson Model 59 pistol, also chambered in 9mm. In fact, the large-capacity magazines that
8 Plaintiff Macaston acquired for the Smith & Wesson Model 59 pistol are the only magazines that
9 he has for that particular pistol, and as far as plaintiff Macaston is aware, and on information and
10 belief, no 10-round OEM magazines were ever produced by the original manufacturer,
11 specifically for that particular pistol, before its production was discontinued in 1988.

12 12. Plaintiff Adam Richards is an individual and licensed attorney, with a law
13 practice in the County of Sacramento, California, suing herein in his capacity as a duly appointed
14 Trustee of the Magazine Ban Lawsuit Trust, a trust that was created and established under
15 California law in 2017 to keep one or more large-capacity magazines owned by plaintiff Wiese
16 within this state during the duration of this lawsuit, and thereafter, in accordance with California
17 law, to wit: Cal. Penal Code § 32406, subdiv. (e), as currently chaptered.² See paragraph 86,
18 *infra*. In his capacity as trustee of the Magazine Ban Lawsuit Trust, plaintiff Richards has
19 received or will have received one or more large-capacity magazines.

20 13. Plaintiff Clifford Flores is an individual and law-abiding resident of the County of
21 Santa Clara, California. Plaintiff Flores has possessed, and continues to possess, large-capacity
22 magazines as defined by statute, since before 2000, which include a large capacity magazine
23 originally manufactured for, and made a part of a Pistole Parabellum 1908 Luger pistol,
24

25 _____
26 ²Plaintiffs' reference to this statute should not be construed as and is not intended as any
27 concession on the validity or enforceability of the ban, in whole or in part, the entirety of which
28 Plaintiffs maintain is unconstitutional. *See e.g., infra*, Count III, ¶¶ 81-90 (demonstrating how the
conflicting versions of the law as chaptered under SB 1446 and Prop. 63 render the law void for
vagueness).

1 chambered in 9mm Luger, and a large-capacity magazine originally manufactured for, and made
2 a part of a Mauser C96 “Broomhandle” pistol, also chambered in 9mm Luger. On information
3 and belief, both of these pistols are World War I-era pistols, manufactured in 1917 or before, and
4 imported into the United States thereafter for legal sale and acquisition by collectors. On
5 information and belief, the large-capacity magazines that are a part of these pistols have
6 substantial historical and financial value, and are irreplaceable – especially in California, where
7 the transfer of large-capacity magazines by ordinary citizens has been generally prohibited since
8 2000. Plaintiff Flores would like to pass these pistols on to his son, a law-abiding California
9 resident, but is prevented from doing so due to the prohibition on the transfer of large-capacity
10 magazines within this state, as described herein, and he would be deprived of any opportunity to
11 pass the same onto any family member, or anyone else, should he be forced to dispose of the
12 magazines pursuant to the Large-Capacity Magazine Ban. Plaintiff Flores is suing in his
13 capacity as an individual and as the trustee of the Flores Family Trust, a testamentary trust
14 established in approx. 2008 to bequeath all personal property to his children, successors, issue
15 and heirs, including his son.

16 14. Plaintiff L.Q. Dang is an individual, and law-abiding resident of the County of
17 Alameda, California. Plaintiff Dang has lawfully owned, since before 2000, two large-capacity
18 magazines as defined by statute for a Steyr GB pistol, chambered in 9mm Luger. The large-
19 capacity magazines which plaintiff Dang owns is solely for use with that pistol, and on
20 information and belief, no other magazine that holds ten or fewer rounds of ammunition was
21 manufactured or is otherwise compatible with that firearm. Plaintiff Dang is a supporter of the
22 Calguns Foundation.

23 15. Plaintiff Frank Federau is an individual, and law-abiding resident of the County of
24 San Francisco, California. Plaintiff is the lawful possessor of large-capacity magazines,
25 including one or more magazines that are currently working and intrinsic parts of a lawfully
26 possessed AR-15 platform model rifle, chambered in .458 SOCOM caliber. Said magazines hold
27 10 rounds of .458 SOCOM ammunition for the firearm as it is currently chambered and used.
28

1 However, such magazine also holds 30 rounds of 5.56 x 45mm ammunition, and is therefore
2 classified as a large-capacity magazine under California law, even though plaintiff's firearm does
3 not accept that round. On information and belief, plaintiff Federau is one of many other persons
4 in a similar situation regarding the use of firearm magazines that are capable of accepting more
5 than 10 rounds of a different caliber ammunition. Federau is a member and supporter of The
6 Calguns Foundation, Second Amendment Foundation, Firearms Policy Coalition, and Firearms
7 Policy Foundation.

8 16. Plaintiff Lt. Alan Normandy (retired) is an individual and law-abiding resident of
9 Prescott, Arizona. Normandy has family in California and visits them often. Normandy is an
10 honorably retired police officer who faithfully served the people of California in the South San
11 Francisco Police Department for over 28 years. Normandy competes in shooting competitions
12 and conducts and participates in firearms training, and would like to do so in California.
13 Normandy is a former S.W.A.T. and tactical firearms instructor, and a firearms expert.
14 Normandy was a firearms consultant for the "Mythbusters" television program produced for and
15 broadcast on the Discovery Channel. Normandy is an individual member, member of the board
16 of directors, and the current vice-president of Firearms Policy Coalition. Normandy is a member
17 and supporter of The Calguns Foundation, Second Amendment Foundation, and Firearms Policy
18 Foundation.

19 17. Plaintiff Todd Nielsen is an individual and a law-abiding resident of Mapleton,
20 Utah. Nielsen is an honorably retired peace officer and a 20+ year veteran of the San Jose Police
21 Department. Nielsen competes in shooting competitions and conducts and participates in
22 firearms training through his firm, Nielsen Training and Consulting. Nielsen is a member and
23 supporter of The Calguns Foundation, Second Amendment Foundation, Firearms Policy
24 Coalition, and Firearms Policy Foundation.

25 18. Plaintiff The Calguns Foundation, Inc. (CGF) is a non-profit membership
26 organization incorporated under the laws of California with its principal place of business in
27 Sacramento, California, with members residing both within and outside of this state, dedicated to
28

1 promoting education for all of stakeholders about California and federal firearm laws, rights and
2 privileges, and defending and protecting the civil rights of California gun owners. CGF
3 represents these members and supporters, who include California firearm retailers and
4 consumers. CGF brings this action on behalf of itself, its members, supporters, who possess all
5 the indicia of membership, and similarly situated members of the public.

6 19. Plaintiff Firearms Policy Coalition, Inc. (FPC) is a non-profit membership
7 organization incorporated under the laws of Delaware with its principal place of business in
8 Sacramento, California, with members residing both within and outside of this state, that serves
9 its members and the public through direct and grassroots advocacy, legal efforts, and education.
10 The purposes of FPC include defending the United States Constitution and the People's rights,
11 privileges and immunities deeply rooted in the Nation's history and tradition, especially the
12 fundamental right to keep and bear arms. FPC represents these members and supporters, who
13 include California firearm retailers and consumers. FPC brings this action on behalf of itself, its
14 members, supporters, who possess all the indicia of membership, and similarly situated members
15 of the public.

16 20. Plaintiff Firearms Policy Foundation, Inc. (FPF) is a non-profit membership
17 organization incorporated under the laws of Delaware with its principal place of business in
18 Sacramento, California, with members residing both within and outside of this state, that serves
19 to defend and advance constitutional rights through charitable purposes, with a focus on the
20 fundamental, individual right to keep and bear arms. FPF represents these members and
21 supporters, who include California firearm retailers and consumers. FPF brings this action on
22 behalf of itself, its members, supporters, who possess all the indicia of membership, and
23 similarly situated members of the public.

24 21. Plaintiff Second Amendment Foundation, Inc. (SAF) is a non-profit membership
25 organization incorporated under the laws of Washington with its principal place of business in
26 Bellevue, Washington. SAF has over 650,000 members and supporters nationwide, including
27 California. The purposes of SAF include education, research, publishing and legal action
28

1 focusing on the Constitutional right to privately own and possess firearms, and the consequences
2 of gun control. SAF brings this action on behalf of itself, its members, supporters, who possess
3 all the indicia of membership, and similarly situated members of the public.

4 22. Individual plaintiffs Wiese, Morris, Cowley, Macaston, Flores and Dang are
5 bringing this claim on behalf of themselves, and as representatives of the class of similar
6 individuals consisting of law-abiding California residents, who are not otherwise prohibited nor
7 exempt, who lawfully and have legally possessed Large-Capacity Magazines in this state, prior
8 to December 31, 1999. Organizational plaintiffs CGF, FPC, FPF and SAF are bringing this
9 claim as public interest organizations, whose California members similarly have lawfully
10 possessed Large-Capacity Magazines in this state, prior to December 31, 1999. As to all claims
11 made in a representative capacity herein, there are common questions of law and fact that
12 substantially affect the rights, duties and liabilities of a large number of California residents who
13 knowingly or unknowingly are subject to the Large-Capacity Magazine Ban. The relief sought
14 in this action is declaratory and injunctive in nature, and is a matter of substantial public interest.

15 23. Individual plaintiffs and California Residents Richards and Flores, in addition to
16 any other capacity designated herein, are suing as trustees of trusts created under California law.
17 The creators of said trusts have evidenced an intention to pass along such lawfully-acquired and
18 held personal property to the beneficiaries, or their children, issue or heirs, but are or would be
19 prevented from doing so by the prohibition on the transfer of personal property represented by
20 the Large-Capacity Magazine Ban.

21 24. Individual plaintiffs and California residents Wiese, Morris, Cowley, Macaston,
22 Flores, Dang and Federau also seek to acquire, and would acquire, additional large-capacity
23 magazines for lawful use and purposes such as self-defense, recreation and competition, as
24 would many of the members of CGF, FPC, FPF, and SAF, but they are and have been further
25 prevented from doing so by the Large-Capacity Magazine Ban.

26 25. Defendant Xavier Becerra is the Attorney General of the State of California, and
27 is sued herein in his official capacity. The Attorney General is the chief law enforcement officer
28

1 of the state, and it is his duty to ensure that California’s laws are uniformly and adequately
2 enforced. The Attorney General is the head of the California Department of Justice (“DOJ”).
3 The DOJ and its Bureau of Firearms regulate and enforce state law related to the sales,
4 ownership, and transfer of firearms, including the licensing and regulation of firearms dealers.
5 The Attorney General maintains an office in Fresno.

6 26. Defendant Martha Supernor is the Acting Chief of the DOJ Bureau of Firearms.
7 Upon information and belief, Ms. Supernor reports to Attorney General Becerra, and is
8 responsible for overseeing the licensing and regulation of firearms and firearms dealers. She is
9 sued herein in her official capacity.

10 11 **JURISDICTION AND VENUE**

12 27. This court has jurisdiction over all claims for relief pursuant to 28 U.S.C. § 1331,
13 as this action arises under the Constitution and laws of the United States, and under 28 U.S.C. §§
14 1343 and 42 U.S.C. § 1983. All Plaintiffs herein are seeking relief under the Declaratory
15 Judgment Act, 28 U.S.C. §§ 2201-2202. To the extent that the court determines that Plaintiffs
16 are asserting state law claims, this court has supplemental jurisdiction under 28 U.S.C. § 1367(a).

17 28. Venue is proper under 28 U.S.C. § 1391(b). Assignment to the Fresno Division is
18 proper pursuant to Local Rule 120(d) because the Attorney General and Department of Justice
19 maintain an office in Fresno and at least one of the named plaintiffs in this action resides in this
20 jurisdiction.

21 22 **BACKGROUND AND FACTS COMMON TO ALL COUNTS**

23 *The Second Amendment*

24 29. The Second Amendment to the United States Constitution states, in pertinent part,
25 that “the right of the people to keep and bear arms, shall not be infringed.” U.S. Const., Amend
26 II. The Second Amendment further “elevates above all other interests the right of law-abiding,
27 responsible citizens to use arms in defense of hearth and home.” *District of Columbia v. Heller*,
28

1 554 U.S. 570, 635 (2008). The Second Amendment protects “arms....of the kind in common
2 use.... for lawful purposes like self-defense.” *Id.*, 554 U.S. at 624.

3 30. California is unique in that its state constitution contains no provision securing the
4 right to keep and bear arms. Without any express right to keep and bear arms within its
5 constitution, the political branches of the State were effectively given free rein to restrict the
6 rights of law-abiding people for decades, creating one of the most onerous and burdensome gun
7 control schemes in the country.

8 31. Indeed, until the U. S. Supreme Court decided *McDonald v. City of Chicago*, 561
9 U.S. 742, 130 S.Ct. 3020 (2010), and incorporated the Second Amendment’s guarantees as
10 against states and local governments through the Fourteenth Amendment, law-abiding California
11 residents and visitors were not able to enjoy the freedoms and benefits of an enduring and
12 substantive protection of the fundamental, individual right to keep and bear arms.

13 32. The Second Amendment is not a second-class guarantee buried at the bottom of
14 our Constitution. As the Court held in *McDonald*, “it is clear that the Framers and ratifiers of the
15 Fourteenth Amendment counted the right to keep and bear arms among those *fundamental* rights
16 necessary to our system of ordered liberty.” 130 S.Ct. at 3043 (emphasis added.)
17

18 ***Ammunition Magazines and the California Magazine Ban***

19 33. Ammunition magazines and feeding devices are an intrinsic part of all semi-
20 automatic firearms, which were designed, developed, produced and sold in large quantities
21 starting in the early 20th Century and continuing through today. Today, a vast majority of
22 firearms, including handguns, are self-loading semi-automatic firearms that require a magazine
23 to feed each round of ammunition. Of these semi-automatic firearms, a vast majority in
24 existence use spring-loading magazines which load each successive round of ammunition. A
25 magazine is therefore an inherent part of, and inseparable from, a modern firearm. In fact, most,
26 if not all all semi-automatic firearms sold at retail by all manufacturers today are sold with at
27 least one magazine included as an inherent part of that firearm. A modern, semi-automatic
28

1 firearm is essentially inoperable without a magazine, or other ammunition feeding device.

2 34. Although an exact number is not known at this time, as will be shown at trial,
3 over the past century, many millions of magazines have existed, lawfully within the United
4 States, as inherent parts of semi-automatic firearms commonly held and used by Americans for
5 lawful purposes like self-defense, competition, training, and sport.

6 35. Likewise, and up through 1999, millions of California citizens lawfully acquired,
7 possessed and continued to possess semi-automatic firearms that contained, as a part of such
8 firearms, magazines, many of which were only *later* legislatively branded as “large-capacity
9 magazines,” though they were never described as such before 1999.

10 36. In 1999, through passage of Senate Bill 23, California enacted legislation
11 generally banning methods of acquiring standard-capacity ammunition feeding devices that can
12 hold more than ten rounds (so-called “large-capacity magazines”, as defined in Penal Code §
13 16740). However, as a part of Sen. Bill 23, as enacted, possession of lawfully-acquired “large
14 capacity magazines” was not prohibited and continued to be lawful. Individual Plaintiffs Wiese,
15 Morris, Cowley, Macaston, Fores and Dang, and the members of the putative class of persons on
16 whose behalf this action is brought, are law-abiding citizens, who are neither prohibited nor
17 exempt, and who have lawfully possessed such large-capacity magazines through December 31,
18 1999.

19 37. California gun owners, in trusting and justifiable reliance upon the legislative
20 compromise and the continued lawful possession of large-capacity magazines, owned, continued
21 to own, and acquired new firearms which included firearms capable of accepting large-capacity
22 magazines. Furthermore, many California gun owners made choices regarding firearms based
23 upon the reasonable assumption that they would be able to use, and continue to use, lawfully-
24 acquired magazines, including large-capacity magazines.

25 38. The California Department of Justice acknowledges, in its recently-issued
26 “Finding of Emergency” for regulations it had sought to promulgate related to the Large
27 Capacity Magazine Ban, that “[t]here are likely hundreds of thousands of large-capacity
28

1 magazines in California at this time. In recent years, there has been an increase in these types of
2 firearms on the market. The Department therefore expects many gun owners to be affected by the
3 new ban.” The California Department of Justice likely understates the number of large-capacity
4 magazines in this state. On information and belief, the true number of magazines well exceeds
5 the Attorney General’s estimates. A true and correct copy of the Department’s “Finding of
6 Emergency” promulgated on or about December 16, 2016 (less exhibits thereto) is attached
7 hereto as **Exhibit A**.

8 39. As a further matter of scale, moreover, this is not simply a matter of prohibiting
9 ownership of one or two items of personal property. Many of California’s gun owners, including
10 some members and constituents of the organization plaintiffs, own many magazines, worth
11 substantial amounts of value, for many different types of firearms. For example, plaintiff Flores
12 has two large-capacity magazines as part of World War I-era Luger and Mauser pistols, the value
13 of which is substantial, and which are irreplaceable, given the current state of California law.
14 Plaintiff Macaston has grandfathered large-capacity magazines for a Smith & Wesson Type 59
15 pistol, for which Smith and Wesson never created original magazines capable of accepting ten or
16 fewer rounds, specifically to be used with that pistol. And plaintiff Dang has two grandfathered
17 large-capacity magazines for use with a Steyr GB pistol, which are very rare and difficult to
18 obtain (and again, are impossible to obtain lawfully in California.) The financial impact for the
19 loss of these intrinsic firearm parts would be substantial, as plaintiffs will demonstrat at trial.

20 40. On July 1, 2016, Governor Brown signed into law the provisions of Senate Bill
21 1446, which amended and will amend Penal Code § 32310(b), to make it a criminal offense to
22 possess large-capacity magazines starting on July 1, 2017, “regardless of the date the magazine
23 was acquired[.]” The law as signed would also require a person in lawful possession of any
24 large-capacity magazines prior to July 1, 2017, to dispose of such magazine(s) only as provided
25 by the statute.
26

27 41. Furthermore, on November 8, 2016, California voters enacted Proposition 63 (the
28

1 “Safety for All Act”³, a measure that was sponsored and heavily promoted as a “gun safety”
2 measure by Lt. Gov. Gavin Newsom. Proposition 63 amended Penal Code §§ 32310, 32400,
3 32405, 32410, 32425, 32435, 32450, added section 32406, and repealed section 32420 by
4 initiative statute, which changed the law to totally prohibit and criminalize the possession of
5 “large-capacity magazines” as of July 1, 2017, for Plaintiffs and others similarly situated.
6 Proposition 63 took effect on the day after the election. (Cal. Const., Art. II, § 10(a): “An
7 initiative statute or referendum approved by a majority of votes thereon takes effect the day after
8 the election unless the measure provides otherwise.”)

9 42. Absolutely no financial impact statement or report about the costs of enforcement
10 of this scheme was ever conducted in conjunction with either SB 1446, or Proposition 63,
11 because both the bill’s sponsors, and the initiative’s promoters, simply assumed that the state, via
12 local law enforcement agencies, had the power to confiscate the magazines without providing
13 compensation therefor.

14 43. In fact, in enacting the provisions of SB 1446, and/or Proposition 63, neither the
15 sponsors of the bill, nor the proponents of the initiative, considered such statutory scheme to
16 implicate any takings violation at all. (See Senate Rules Committee Analysis dated 5/19/16
17 regarding SB 1446, at pp. 4-5 (summarily concluding that "courts have held that prohibiting
18 possession of dangerous weapons is a valid exercise of the government’s police power not to be
19 confused with the power of eminent domain [*sic*][,]” a copy of which is attached hereto as
20 **Exhibit B.**) Therefore, the State has neither created nor established, nor has there even been any
21 established process, remedy or administrative body to which one may seek compensation for the
22 surrender/takings of the firearm parts at issue. Accordingly, Plaintiffs are not required to exhaust
23 any administrative remedies, as there are no such administrative remedies available at all, and
24 any request for compensation by individual magazine holders – individually and collectively –
25 would be futile.
26

27 _____
28 ³The full text of Proposition 63 can be viewed or downloaded at:
[https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0098%20\(Firearms\)_0.pdf](https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0098%20(Firearms)_0.pdf).

1 44. Plaintiffs simply wish to continue to hold and otherwise exercise their Second
2 Amendment right to possess, keep, use and acquire firearms and standard-capacity magazines,
3 which are in common use, and for lawful purposes, but cannot because of the total, categorical
4 ban presently and soon to be imposed by the Large-Capacity Magazine Ban.

5 45. Plaintiffs further wish, on their own behalves, on behalf of all similarly-situated
6 individuals lawfully possessing large-capacity magazines, to prevent the state from enforcing its
7 statutory scheme which amounts to a taking of constitutionally-protected arms, without just
8 compensation, by declaring the entire statutory scheme to be invalid.

9 46. The ammunition magazines that Plaintiffs wish to continue to lawfully possess,
10 use and/or acquire—those items prohibited through California’s Large-Capacity Magazine
11 Ban—are exactly the type of instruments that are afforded protection under the Second
12 Amendment for the acquisition, protection, and use by law-abiding people for the preservation of
13 self and the state in times of unjust force. They are inherent parts of lawfully acquired and
14 possessed firearms including most handguns, that are now subject to confiscation, i.e., through
15 “surrender” to the state.

16 47. Such magazines are, in virtually every other state of the Union, exactly the sorts
17 of lawful weapons in common use that law-abiding people possess at home for lawful purposes—
18 and exactly what they would bring to service in militia duty should such cause be necessary.
19 *See, e.g., Heller II*, 670 F.3d at 1261 (“We think it clear enough in the record that semi-automatic
20 rifles and magazines holding more than ten rounds are indeed in ‘common use,’ as the plaintiffs
21 contend.”); *Colorado Outfitters Ass’n v. Hickenlooper*, 24 F. Supp. 3d 1050, 1068 (D. Colo.
22 2014) (concluding that statute “affects the use of firearms that are both widespread and
23 commonly used for self-defense,” in view of the fact that “lawfully owned semi-automatic
24 firearms using a magazine with the capacity of greater than 15 rounds number in the tens of
25 millions”); *Shew v. Malloy*, 994 F. Supp. 2d 234, 246 (D. Conn. 2014) (concluding that semi-
26 automatic rifles such as the AR-15 as well as magazines with a capacity greater than 10 rounds
27 “are ‘in common use’ within the meaning of *Heller* and, presumably, used for lawful purposes”).
28

1 48. Despite California’s apparent legislative policy preferences and animus towards
2 Second Amendment rights (and, by extension, those who would lawfully seek to assert and
3 exercise them), “[T]he enshrinement of constitutional rights necessarily takes certain policy
4 choices off the table.” *Heller*, 554 U.S., at 636, 128 S.Ct., at 2822. Indeed, the Court “expressly
5 rejected the argument that the scope of the Second Amendment right should be determined by
6 judicial interest balancing[.]” *McDonald v. City of Chicago*, 561 U.S. at 785, 130 S.Ct. at 3047
7 quoting *District of Columbia v. Heller*, 554 U.S., at 634-636, 128 S.Ct., at 2820-2821.

8 49. Millions of semi-automatic firearms in common use for lawful purposes are
9 possessed by law-abiding people throughout the United States, including in California. Those
10 firearms include, but are not limited to, highly-popular makes and models of handguns like the
11 Glock models 17, 19, 22, and 23, the Smith & Wesson M&P series models, the Springfield
12 Armory XD series models, and many others, including some pistols that have now been
13 discontinued.

14 50. Millions of such firearms, including those handguns, are commonly possessed by
15 law-abiding people for lawful purposes including target shooting, training, sport shooting,
16 competition, and self-defense.

17 51. Millions of such firearms, including those handguns, were designed with and
18 were intended to be used with magazine capacities exceeding 10 rounds. For example, one of
19 the most common and popular models of handgun commonly used and possessed for self-
20 defense, the Glock model 17 9mm, was designed with a 17-round magazine.

21 52. Many of these handguns that were designed for factory-standard large-capacity
22 magazines that hold more than 10 rounds, including the Glock model 17 handgun, are available
23 for sale in the State of California to law-abiding people and on the Roster of Handguns Certified
24 for Sale (Roster) promulgated and maintained by the California Department of Justice.⁴

25 53. Some handguns were designed, equipped and sold *only* with Large-Capacity
26

27 _____
28 ⁴ The Roster can be viewed online at <http://certguns.doj.ca.gov>.

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1 Magazines, and for which no magazines holding ten or fewer rounds were ever produced by the
2 original manufacturer. For example, manufacturer Smith & Wesson, on information and belief,
3 never produced or sold OEM magazines holding ten or fewer rounds specifically for use with its
4 Model 59 pistol, the type that is owned by plaintiff Macaston. On information and belief, the
5 Steyr GB 9mm pistol owned by plaintiff Dang was manufactured only with large-capacity
6 magazines, and no compatible magazines were ever made or are otherwise available for said
7 firearm.

8 54. The State of California expressly recognizes that the large-capacity magazines
9 prohibited under the Large-Capacity Magazine Ban to normal, law-abiding people who possess
10 them for lawful purposes have intrinsic value for self-defense in its exemption for armored
11 vehicle companies and their employees, Cal. Penal Code § 32435, as armored vehicle companies
12 and personnel are only legally authorized for defensive, rather than offensive, actions using such
13 large-capacity magazines to preserve life and property from violent attackers. Other statutory
14 exemptions make it clear that California fully recognizes that large-capacity magazines have
15 intrinsic value as parts of semi-automatic pistols, per the exemptions that it allows. (See list of
16 statutory exemptions, found at Penal Code Part 6, Title 4, Div. 10, Chapter 5, Article 2, at §§
17 32400, *et seq.*)

18 55. As alleged herein, the legislative prohibition on the possession of a fundamental
19 part of most lawfully-owned handguns and rifles amounts to a de facto confiscation of firearms,
20 or parts thereof, which are in common use for lawful purposes. As Plaintiffs will demonstrate at
21 trial, the so-called large capacity magazines are widely owned, used and are inherent parts of
22 operating and lawfully-possessed firearms. The state may not enact nor enforce a statutory
23 scheme which amounts to confiscation of constitutionally-protected bearable arms, either with or
24 without compensation.

25 56. Plaintiffs must now appeal to the third branch of government and seek declaratory
26 and injunctive relief to invalidate the statutory provisions and enjoin any further action by the
27 Attorney General of California and the California Department of Justice Bureau of Firearms to
28

1 confiscate and take, or to allow confiscation and taking by local law enforcement agencies, their
2 lawfully-possessed and constitutionally-protected property, and infringe their right to keep and
3 bear lawfully-acquired arms, in common use, which are not unusual and dangerous.

4
5 **CLAIMS FOR RELIEF**

6 **COUNT I: VIOLATION OF U.S. CONST., AMEND. II**

7 57. Plaintiffs incorporate herein by reference paragraphs 1 through 56 as if fully set
8 forth herein.

9 58. Large capacity magazines, as so called and defined by the Legislature, are
10 commonly possessed by law-abiding citizens in California, and throughout the United States, for
11 self-defense, target shooting, hunting, and other lawful purposes. Most modern semi-automatic
12 firearms are designed for, and commonly sold with magazines that hold more than 10 rounds of
13 ammunition.

14 59. The need for, and usefulness of such large-capacity magazines, as so defined by
15 the Legislature, is demonstrated by the fact that they are issued to civilian law enforcement
16 officers, presumably for self-defense purposes. Criminals and other prohibited persons have and
17 will use magazines against the unarmed and the armed, without any limitation in capacity. The
18 Large-Capacity Magazine Ban’s prohibition on the possession of large-capacity magazines –
19 “regardless of the date the magazine was acquired” – puts law abiding citizens such as Plaintiffs
20 at a severe disadvantage to those intending to do them harm.

21 60. The arbitrarily-defined large capacity magazines, as so defined by the Legislature,
22 are not merely individual pieces of personal property, but rather, are intrinsic and inherent
23 constitutionally-protected parts of constitutionally-protected firearms, which are lawfully
24 possessed and used by millions of California citizens, including Plaintiffs affected herein.

25 61. California Penal Code section 32310, subdiv. (b), as amended by the Large-
26 Capacity Magazine Ban, would prohibit as of July 1, 2017 the possession of large-capacity
27 magazine, “regardless of the date the magazine was acquired,” including previously and
28

1 lawfully-owned magazines as described above, and in substantial quantities to be proven at trial.

2 62. California Penal Code section 32310, subdiv. (d), as amended by Proposition 63,
3 requires a person who, prior to July 1, 2017, legally possesses a large-capacity magazine to
4 “dispose” or the magazine, only by three specific methods, which are: (1) *personal* physical
5 removal of the magazine from the state (since giving/arranging for or otherwise selling to
6 someone out of state is still prohibited); (2) sale of the magazine to a “licensed firearms dealer,”
7 and (3) surrender of the magazine to a law enforcement agency for destruction. However, and as
8 alleged further below (*infra* at ¶¶ 93-95), the first two of these purported options are illusory, as
9 they do not reflect viable means of recovering the value of their personal property, leaving only
10 the third “option,” i.e., “surrender” of the magazine to law enforcement, for which no
11 compensation is provided for or appropriated.

12 63. Furthermore, California Penal Code § 32390, which has already been enacted,
13 provides that any large-capacity magazine is a “nuisance” and is subject to an injunction against
14 its possession, manufacture, or sale, and is subject to confiscation and summary destruction.
15 However, neither the statute nor the regulations that pertain to it provide for compensation to be
16 provided to the owner of a legally-owned large capacity magazine.

17 64. As an added burden, any person who has lawfully owned one or more firearms
18 with a large-capacity magazine as the *only* ammunition feeding device for such firearm will now
19 have to acquire – presumably through the added expense of purchasing – at least one, if not
20 more, reduced-capacity (non-large-capacity) magazine for each such firearm owned. This is an
21 expense that could cost California gun owners hundreds, if not thousands of dollars, a burden
22 which disarms the owner of the use of such firearms until a suitable replacement magazine can
23 be obtained.

24 65. All of the individual Plaintiffs herein, and organizational Plaintiffs on behalf of
25 their California members and similarly-situated individuals who lawfully possess large-capacity
26 magazines, are suing to enjoin enforcement of the Large-Capacity Magazine Ban on the grounds
27 that the Ban violates their rights to own, possess, and use firearms as guaranteed by the Second
28

1 Amendment, and that the Ban constitutes an illegal taking of their constitutionally-protected
2 firearms.

3 66. First, the Large Capacity Magazine Ban infringes upon the right of the people,
4 including Plaintiffs, to keep and bear arms, as guaranteed by the Second Amendment, and made
5 applicable to the States by the Fourteenth Amendment, of the United States Constitution. The
6 arms include handguns which, as *Heller* observed, are the “quintessential self-defense weapon,”
7 *Heller*, 554 U.S. at 629, 128 S. Ct. at 2818, and are therefore widely, commonly and lawfully
8 possessed in California and in all other states in the Union.

9 67. The Large Capacity Magazine Ban further amounts to a total, confiscatory taking
10 of lawfully-held, common, and constitutionally-protected arms, or intrinsic parts thereof, from
11 law-abiding people who possess them for lawful purposes and therefore violates the Second
12 Amendment.

13 68. By maintaining and enforcing a set of laws that restrict law-abiding people from
14 acquiring or possessing arms in common use for lawful purposes like self-defense, Defendants,
15 acting under color of state law, are propagating customs, policies, and practices that violate the
16 Second Amendment to the United States Constitution, facially and as applied against the
17 individual Plaintiffs, depriving Plaintiffs of civil rights and damaging Plaintiffs in violation of 42
18 U.S.C. § 1983.

19 69. Because California’s Large-Capacity Magazine Ban Laws constitute a total ban
20 on the possession and acquisition of constitutionally-protected instruments to keep in the home,
21 strict scrutiny should apply. The prohibition and taking of heretofore lawful and integral
22 firearms parts implicates a core protection of the Second Amendment right to keep and bear
23 arms, and severely burdens such right, as will be demonstrated at trial, which makes such ban
24 and taking categorially unconstitutional under any level of heightened scrutiny.

25 70. Plaintiffs are entitled to injunctive relief against such infringing customs, policies,
26 and practices. Plaintiffs and all of them, on their own behalves and on behalf of the class of all
27 similarly-situated persons, seek declaratory and injunctive relief, in a specific manner according
28

1 to proof at trial.

2 WHEREFORE, Plaintiffs seek declaratory and injunctive relief as set forth below.

3
4 **COUNT II: VIOLATION OF U.S. CONST., AMENDS. V and XIV**
5 **(Due Process and Takings)**

6 71. Plaintiffs incorporate herein by reference paragraphs 1 through 70 as if fully set
7 forth herein.

8 72. The Fifth Amendment to the United States Constitution provides that no person
9 shall be deprived of life, liberty, or property, without due process of law; nor shall private
10 property be taken for public use, without just compensation.

11 73. The Fourteenth Amendment to the United States Constitution provides that no
12 State shall deprive any person of life, liberty, or property without due process of law.

13 74. Aside from the violation of the Second Amendment, as applied to the states, as set
14 forth above, that the statutory scheme represents, defendants' enforcement of the Large-Capacity
15 Magazine Ban violates additional rights of Plaintiffs, and the class of persons they represent,
16 specifically: their rights to compensation and/or due process as guaranteed by the Fifth and
17 Fourteenth Amendments to the United States Constitution, in that the Laws completely
18 dispossess them of their lawfully-owned, constitutionally-protected personal property.
19 Moreover, the manner in which Plaintiffs and the class have kept, bore and possessed such
20 property was a substantial, constitutionally-protected liberty interest.

21 75. Penal Code section 32310, subdiv. (d) as amended by Proposition 63, provides for
22 three and only three enumerated ways of disposing of a lawfully-possessed magazine, owned
23 prior to July 1, 2017, and is therefore a taking of the entire bundle of said Plaintiffs' rights to
24 possess, use and dispose of the property in the manner as they see fit. Subdivision (d)(3)
25 provides for the purported option of the property owner to "surrender" a large-capacity magazine
26 to any law enforcement agency for destruction, without stating any means of recompensing the
27 property owner for such statutorily-mandated "surrender." Subdivision (d)(2) provides for the
28

1 purported option of the property owner to sell the magazine to a licensed firearms dealer, without
2 providing for the fact that not every firearms dealer (in fact very few) will or are otherwise
3 permitted to receive large-capacity magazines, leaving this as not a valid option. The purported
4 option to “sell the large-capacity magazine to a licensed firearms dealer” set forth in section
5 32310, subdiv. (d)(2) as amended, is illusory, and not really an option at all. As will be
6 demonstrated at trial, and on information and belief, a substantial number of licensed firearms
7 dealers refuse or will refuse to accept for sale any large-capacity magazines because, among
8 other reasons, economics, vagueness of risk, and personal choices relating to their views of the
9 unconstitutionality that SB 1446/Proposition 63 presents, and refuse to participate in an
10 undertaking that amounts to a de facto taking, and the legal and financial risks associated with
11 receiving “large capacity magazines” under a vague law. The inability and/or refusal of
12 California firearms dealers to accept the large-capacity magazines for sale, effectively means
13 there is no market for the sale of Plaintiffs’ personal property, as will be demonstrated at trial.

14 76. Penal Code § 32390 (previously codified at § 12029), provides that any large-
15 capacity magazine is considered to be a “nuisance,” and is subject to summary confiscation and
16 disposal, even those that were and continue to be lawfully possessed. Under Pen. Code §
17 18010(b), such items are “subject to confiscation and summary destruction whenever found
18 within the state.” Neither the statute, nor any regulations promulgated that pertain to such
19 statute, provide for any means by lawfully-possessing large-capacity magazine owners to
20 challenge, petition, or even address the fact that such personal property is legally owned, and
21 therefore may not be detained or destroyed by an arm of the state, with or without compensation.

22 77. The Large Capacity Magazine Ban, as a whole, is a regulatory scheme which
23 completely deprives the owners of all economically beneficial uses of their lawfully-owned
24 property, and therefore, constitutes a regulatory taking. See, *Lucas v. S.C. Coastal Council*, 505
25 U.S. 1003, 1019, 112 S.Ct. 2886 (1992). Certain regulations, such as the Large-Capacity
26 Magazine Ban moreover, are so onerous that their effect is tantamount to a direct appropriation
27 of property, and therefore, a compensable taking under the Fifth Amendment. See, e.g., *Lingle v.*
28

1 *Chevron U.S.A., Inc.*, 544 U.S. 528, 538, 125 S.Ct. 2074, 2081 (2005). In essence, this statutory
2 scheme eviscerates the full bundle of rights, i.e., the rights to possess, use and dispose of the
3 property in a manner that plaintiffs may choose, which includes personal property. *Horne v.*
4 *Dept. of Agriculture*, __ U.S. __ 135 S.Ct. 2419, 2427 (2015).

5 78. Individual plaintiffs and California residents Wiese, Morris, Cowley, Macaston,
6 Flores and Dang would like to pass along firearms to their children, issue and heirs, but are
7 prevented from doing so by the Large-Capacity Magazine Ban provisions which prohibit transfer
8 to another person. This is, in essence, deprivation of the right to pass on lawfully-owned – and
9 we might add, Constitutionally-protected – personal property.

10 79. By enacting and enforcing the Large-Capacity Magazine Ban, defendants are
11 thereby propagating customs, policies, and practices which violate the Fifth and Fourteenth
12 Amendment to the United States Constitution, facially and as applied against the individual
13 Plaintiffs in this action, damaging Plaintiffs in violation of 42 U.S.C. § 1983. Plaintiffs are
14 therefore entitled to declaratory and permanent injunctive relief against such customs, policies,
15 and practices.

16 80. Plaintiffs are entitled to injunctive relief against such infringing customs, policies,
17 and practices. Plaintiffs and all of them, on their own behalves and on behalf of the class of all
18 similarly-situated persons, seek declaratory and injunctive relief, in a specific manner according
19 to proof at trial.

20 WHEREFORE, Plaintiffs seek declaratory and injunctive relief as set forth below.

21
22
23 **COUNT III: VIOLATION OF U.S. CONST., AMEND. XIV**
24 **(Vagueness)**

25 81. Plaintiffs incorporate herein by reference paragraphs 1 through 80 as if fully set
26 forth herein.

27 82. In 2016, the Legislature, and the People – guided by Lt. Gov. Newsom, the
28 primary proponent of Proposition 63 – enacted the Large-Capacity Magazine Ban, in two

1 separate versions. The version of the Large-Capacity Magazine Ban, found in SB 1446
2 (Stats.2016, c. 58, hereinafter "the SB 1446 Version") was passed by the Legislature, on June 30,
3 2016, signed by Gov. Brown on July 1, 2016 and chaptered on July 1, 2016. However, the
4 version of the Large-Capacity Magazine Ban found in Proposition 63 (Prop. 63, § 6.4,
5 hereinafter "the Prop. 63 Version) was passed by California voters at the polls on November 8,
6 2016, and became effective Nov. 9, 2016.

7 83. Unlike the many other gun-control bills that were considered and passed in 2016,
8 SB 1446 did not contain a "pre-amendment" provision whereby certain provisions of the bill
9 would become law only if "the Safety for All act of 2016 is enacted by the voters at the
10 November 8, 2016, statewide general election and becomes effective[.]” And thus, Proposition
11 63, when enacted, purported to amend certain sections of the Penal Code, and "add" other
12 sections, in apparent conflict with those provisions enacted by SB 1446. This has resulted in the
13 chaptering and current existence of two conflicting laws, some of which share the same sections
14 of the California Penal Code, pertaining to the subject of Large-Capacity Magazines.

15 84. For example, the California Penal Code currently has two live but differing
16 versions of Penal Code § 32406, both of which are active, but which include the competing SB
17 1446 Version and the Prop. 63 Versions of the law. True and correct copies of Penal Code
18 section 32406, certified by the State of California Legislative Counsel Bureau, are attached
19 hereto as **Exhibits C and D**.

20 85. Plaintiffs Dang, and others similarly situated, are or would be subject to the
21 exemptions set forth in Pen. Code § 32406, subdiv. (f) (in the SB 1446 Version), in that they
22 have lawfully possessed a Steyr GB firearm, since before 2000, which is a firearm for which
23 there are no magazines holding ten rounds or fewer available, and plaintiff Dang thus possesses a
24 large-capacity magazine solely for use with that firearm.

25 86. Plaintiff Richards has received, or will have received, one or more large-capacity
26 magazines owned by plaintiff Wiese, or in which he otherwise has a possessory interest, as the
27 trustee of a trust that has been established to hold and keep such Large-Capacity magazine(s)
28

1 within this state pending resolution of this lawsuit and thereafter. Plaintiff Richards and others
2 similarly situated are subject to the exemptions set forth in Pen. Code § 32406, subdiv. (e) (in the
3 SB 1446 Version), in that he and they are the trustees of a legally-established trust, created under
4 California law, which includes large-capacity magazines as a trust asset.

5 87. Plaintiff Flores possesses rare and irreplaceable large-capacity magazines
6 currently, for himself and also as a trustee of the Flores Family Trust, in which he seeks to
7 bequeath most or all of his personal property to his son, a California resident, but is prevented
8 from doing so. As a trustee of a duly-established trust, plaintiff Flores and others similarly
9 situated are subject to the exemptions set forth in Pen. Code § 32406, subdiv. (e) (in the SB 1446
10 Version), in that he and they are the trustees of a legally-established trust, created under
11 California law, which includes large-capacity magazines as a trust asset.

12 88. However, by running two “parallel” versions of Pen Code § 32406, with
13 substantive differences between them, the state has enacted vague and conflicting laws, with no
14 certainty as to which version applies. The entire Large Capacity Magazine Ban, including §§
15 32310(b) and (c) to which the exceptions of 32406 appear on their face to apply, is therefore
16 vague and unenforceable, because it fails to provide adequate notice to plaintiffs, and others
17 similarly situated, and other persons of ordinary intelligence as to whether they and others
18 similarly situated are or would be subject to or exempt from its provisions.

19 89. Defendants are therefore thereby propagating customs, policies, and practices that
20 violate the Fifth and Fourteenth Amendment to the United States Constitution, facially and as
21 applied against the individual plaintiffs in this action, damaging Plaintiffs in violation of 42
22 U.S.C. § 1983. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief
23 against such customs, policies, and practices.

24 90. Plaintiffs are entitled to injunctive relief against such infringing customs, policies,
25 and practices. Plaintiffs and all of them, on their own behalves and on behalf of the class of all
26 similarly-situated persons, seek declaratory and injunctive relief, in a specific manner according
27 to proof at trial.
28

1 WHEREFORE, Plaintiffs seek declaratory and injunctive relief as set forth below.

2
3 **COUNT IV: VIOLATION OF U.S. CONST., AMEND. XIV**
4 **(Vagueness and Overbreadth)**

5 91. Plaintiffs incorporate herein by reference paragraphs 1 through 90 as if fully set
6 forth herein.

7 92. The Large-Capacity Magazine Ban further fails to provide adequate notice and is
8 vague, in violation of the Due Process Clause of the Fourteenth Amendment. The Large-
9 Capacity Magazine Ban is unconstitutionally vague and overbroad both on its face, and as
10 applied to one or more of the individual plaintiffs herein.

11 93. As asserted above, the purported option to “sell the large-capacity magazine to a
12 licensed firearms dealer” set forth in section 32310, subdiv. (d)(2) as amended, is illusory, and
13 not really an option at all. As will be demonstrated at trial, a substantial number of licensed
14 firearms dealers refuse or will refuse to accept for sale any large-capacity magazines because,
15 among other reasons, economics, vagueness of risk, and personal choices relating to their views
16 of the unconstitutionality that SB 1446/Proposition 63 presents, and refuse to participate in an
17 undertaking that amounts to a de facto taking, and the legal and financial risks associated with
18 receiving “large capacity magazines” under a vague law. Both the vagueness of the law as
19 amended, and the refusal of California firearms dealers to accept the large-capacity magazines
20 for sale, effectively means there is no market for the sale of Plaintiffs’ personal property, as will
21 be demonstrated at trial.

22 94. As will be demonstrated at trial, and as applied to the Plaintiffs herein, the
23 purported option under Penal Code § 32310, subdiv. (d)(1) to “remove the large-capacity
24 magazine from the state,” is not a viable option and is also vague. In the first place, there is no
25 provision which allows the holder of a large-capacity magazine to sell, or arrange a sale of the
26 magazine to a willing buyer, out of state. Indeed, section 32310, subdiv. (a), makes no such
27 exception, and expressly criminalizes the offering or exposure for sale of such magazines by any
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1 person in the state. Therefore, arranging an out-of-state sale of the large-capacity magazine
2 itself, while the magazine holder is within this state, is expressly prohibited. Therefore, section
3 32310, subdiv. (d)(1) does not provide any avenue by which a lawful large-capacity magazine
4 holder, including Plaintiffs, can or will recover any portion of the value of his or her property.
5 Physical transfer of the magazines to an out of state recipient, without arranging for the transfer
6 beforehand, is impractical if not implausible. And, moreover, any such *forced* sales would not
7 result in fair or just compensation in any event.

8 95. Therefore, Penal Code § 32310, subdivisions (d)(1) and (d)(2) are impermissibly
9 vague, and utterly impractical, and amount to no real option that does not expose Plaintiffs and
10 other large-capacity magazine holders to criminal liability, nor does it provide any relief to large-
11 capacity magazine holders to recover any portion, in whole or in part, of the value of their
12 lawfully-owned property. The only option, therefore, as will be demonstrated at trial, is to
13 “surrender” the large-capacity magazine to a law enforcement agency for destruction, effectively
14 rendering it a taking for which compensation is not provisioned or required.

15 96. Furthermore, as to plaintiffs Normandy and Nielsen, and similarly-situated
16 individuals, the statute as amended by Proposition 63 is further vague, in that it purports to
17 exempt “honorably retired peace officers” and retired federal officers from the new prohibitions
18 on possession of large-capacity magazines, but such retired peace officers and retired federal
19 officers continue to be prohibited from the importation restrictions of section 32310(a). And
20 thus, the statute as amended results in the absurdity of allowing a retired peace officer or retired
21 federal officer to possess large-capacity magazines in this state, for lawful purposes, but
22 prohibits them from bringing them in, even temporarily. And therefore, retired peace officers
23 such as plaintiffs Normandy and Nielsen, and similarly-situated individuals, who often
24 participate in, or are asked to join or conduct, or instruct in firearms training programs for law
25 enforcement agencies and civilians are legally prohibited from bringing large-capacity
26 magazines into the state, though once here, they may possess them. The inherent absurdity
27 subsisting within this purported exemption not only necessarily results in a failure to provide
28

1 persons of ordinary intelligence with fair and adequate notice of what is and is not truly
2 permissible or prohibited conduct, but it effectively defeats the very purposes for which the
3 purported exemption was ostensibly designed. The two parallel Penal Code sections 32406 as
4 enacted by SB 1446 and Proposition 63 are therefore unconstitutionally vague.

5 97. The Large-Capacity Magazine Ban, taken in total, is vague because it fails to
6 provide adequate notice to a person of ordinary intelligence what they can do with a lawfully-
7 held large-capacity magazine, nor does it provide them with viable, practical options. Therefore,
8 on the face of its provisions, and as applied, for the reasons stated herein, the Large-Capacity
9 Magazine Ban violates the Due Process Clause of the Fourteenth Amendment.

10 98. The Large-Capacity Magazine Ban further violates the Due Process Clause of the
11 Fourteenth Amendment for the related reason that it is unconstitutionally overbroad. As written,
12 the ban requires all current owners of large-capacity magazines in California (who presumably
13 number into the thousands, if not tens of thousands) to dispose of their magazines by July 1,
14 2017. As will be demonstrated at trial, there can be no legitimate claim that the ban's *retroactive*
15 application to current, legal owners of such magazines advances the stated objective of the law –
16 to reduce the prevalence of “mass shootings” or the extent of harm inflicted during those
17 (fortunately) rare tragic incidents. Accordingly, the ban sweeps up a substantial amount of
18 constitutionally-protected conduct under the Second Amendment. And given that the entire
19 statutory scheme is designed around this forced extraction of property, it is not readily
20 susceptible to a limiting construction that would render it constitutional. Rather, the
21 constitutional infirmity infects the entire statutory scheme, rendering it hopelessly overbroad.

22 99. Defendants are thereby propagating customs, policies, and practices that violate
23 the Fifth and Fourteenth Amendment to the United States Constitution, facially and as applied
24 against the individual plaintiffs in this action, damaging Plaintiffs in violation of 42 U.S.C. §
25 1983. Plaintiffs are therefore entitled to permanent injunctive relief against such customs,
26 policies, and practices.

27 100. Plaintiffs are entitled to injunctive relief against such infringing customs, policies,
28

1 and practices. Plaintiffs and all of them, on their own behalves and on behalf of the class of all
2 similarly-situated persons, seek declaratory and injunctive relief, in a specific manner according
3 to proof at trial.

4 WHEREFORE, Plaintiffs seek declaratory and injunctive relief as set forth below.

5
6 **PRAYER FOR RELIEF**

7 WHEREFORE, Plaintiffs request that judgment be entered in their favor and against
8 Defendants, and pray for relief as follows:

9 1. For declaratory judgment and relief, pursuant to 28 U.S.C. § 2201, that California
10 Penal Code sections 32310, 32390, and sections 32445 and 32450 are unconstitutional and
11 violate the Second Amendment;

12 2. For declaratory judgment and relief, pursuant to 28 U.S.C. § 2201, that California
13 Penal Code sections 32310, 32390, and sections 32445 and 32450 are unconstitutional and
14 violate the Fifth and Fourteenth Amendments;

15 3. For declaratory judgment and relief, pursuant to 28 U.S.C. § 2201, that California
16 Penal Code sections 32310, 32390, and sections 32445 and 32450 are indefinite, vague and
17 uncertain, and therefore unenforceable, and also, on the grounds that it is not clear which version
18 of these statutes (i.e., the version passed pursuant to SB 1446 or Prop. 63), and the exceptions
19 thereto, may apply, among other grounds;

20 4. For injunctive relief, consistent with declaratory relief sought herein, enjoining
21 defendants, and their officers, agents and employees, from enforcing any of the provisions of
22 California Penal Code sections 32310, 32390, and sections 32445 and 32450;

23 5. For costs of suit, including attorneys' fees and costs under 42 U.S.C. § 1988 and
24 any other applicable law; and

25 6. For all such relief to which Plaintiffs may be justly entitled.
26
27
28

1 Dated: June 5, 2017

SEILER EPSTEIN ZIEGLER & APPLGATE LLP

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/s/ George M. Lee

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George M. Lee

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EXHIBIT A

Finding of Emergency

The Department of Justice (Department or DOJ) finds that an emergency exists, and that the immediate adoption of sections within Chapter 39, of Division 5, of Title 11 is necessary to avoid serious harm to the public peace, health, safety, or general welfare.

Specific Facts Demonstrating the Need for Immediate Action

Proposition 63, a measure banning the possession of large-capacity magazines, was approved by the voters on November 8, 2016 and took effect November 9, 2016. In anticipation of its passages, the Legislature pre-amended Proposition 63 with the passage of Senate Bill 1446 (Chapter 48, Statutes of 2016). The clarifying amendments take effect on January 1, 2017.

Pursuant to Proposition 63, as amended, beginning July 1, 2017, it will be an infraction punishable by a fine for a person to possess any large-capacity magazine, regardless of the date the magazine was acquired. (Penal Code, § 32310, subdivision (b).) The new law requires a person in lawful possession of a large-capacity magazine prior to July 1, 2017 to dispose of the magazine. Some persons are exempt from the ban, including active and retired law enforcement, armored car entities, and licensed gun dealers. (Penal Code, §§ 32400, 32405, 32406, 32410, 32430, 32435, 32450.) Starting July 1, 2017, anyone who violates the ban is subject to a year in jail, and a \$100 fine for a first offence, \$250 fine for a second offense, and a \$500 fine for a third offense. (Penal Code § 32310, subdivision (b).)

These emergency regulations are necessary for the implementation and on-going enforcement of the ban on large-capacity magazines. The proposed regulations provide guidance to California residents on how to comply with the ban. These regulations need to be established as soon as possible so the Department has time to notify gun owners and gun owners have time to make the necessary changes to comply with the ban.

There are likely hundreds of thousands of large-capacity magazines in California at this time. In recent years, there has been an increase in these types of firearms on the market. The Department therefore expects many gun owners to be affected by the new ban. Under the new law, gun owners have six months to dispose of or permanently alter their large-capacity magazines. Pursuant to Penal Code section 32310, subdivision (c), a person who legally possesses a large-capacity magazine shall dispose of that magazine by any of the following means 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; (3) destroy the large-capacity magazine; or (4) surrender the large-capacity magazine to a law enforcement agency for destruction.

Alternatively, gun owners may permanently alter large-capacity magazines by reducing their ammunition capacity so that it no longer meets the definition of a “large-capacity magazine.” Penal Code section 16740 defines “large-capacity magazine” to mean any ammunition feeding device with the capacity to accept more than 10 rounds, but shall not be construed to include a feeding device that has been permanently altered so that it cannot accommodate more than 10 rounds. If a gun owner chooses to permanently reduce the capacity of their large-capacity

magazines, these emergency regulations provide guidance for doing so with what the Department has determined to be the acceptable minimum level of permanence.

By providing this information to the public in a timely manner, through the emergency process, the Department will avert serious harm to public peace, health, safety, or general welfare.

Technical, Theoretical, and Empirical Study, Report, or Similar Document, if any, Upon Which the Department Relied

In addition to existing regulations forming the basis of these proposed regulations, the following documents were used:

UTAS MAKINE LTD., UTS-15 owners manual, attached for reference
KEL TEC, KSG owners manual, Rev 042814, attached for reference
Standard MFG. DP-12 shotgun owners manual, attached for reference

Authority and Reference Citations

Authority: Penal Code sections 26905, 26910, 32310, 32311, 32315.

Reference: Penal Code sections 16740, 32310, 32311, 32315, 32400, 32405, 32406, 32410, 32415, 32425, 32430, 32435, 32440, 32445, 32450.

Repealed: Penal Code section 32420 was removed from the authority of section 5480 because SB 1446 repealed that section.

Informative Digest/Policy Statement Overview

Existing law prohibits the sale, gift, and loan of a large-capacity magazine. A violation of this prohibition is punishable as a misdemeanor with specified penalties, or as a felony. The new law goes further and provides that possession of large-capacity magazines by a non exempt person is an infraction punishable by a fine not to exceed \$100 for the first offense, by a fine not to exceed \$250 for the second offense, and by a fine not to exceed \$500 for the third or subsequent offense, regardless of the date the magazine was acquired. The law requires a person in lawful possession of a large-capacity magazine prior to July 1, 2017, to dispose of the magazine as provided. By creating a new crime, this law imposes a state-mandated local program.

Existing law creates various exceptions to the prohibition on the sale, gift or loan of a large-capacity magazine including, but not limited to, the sale of, giving of, lending of, importation into this state, or purchase of, any large-capacity magazine to, or by the holder, of a special weapons permit for use as a prop for a motion picture or any federal, state, county, city and county, or city agency that is charged with the enforcement of any law, for use by agency employees in the discharge of their official duties, whether on or off duty, and where the use is authorized by the agency and is within the course and scope of their duties. The new law makes conforming changes to those exceptions by including possession of a large-capacity magazine in those provisions and would establish additional exceptions, including exceptions to allow

licensed gunsmiths and honorably retired sworn peace officers to possess large-capacity magazines.

The objective of the proposed regulations is to inform California gun owners of their options for complying with new California laws while maintaining public safety.

Article 4. Large-Capacity Magazine Permits

§ 5480. Requirements for Large-Capacity Magazine Permits Pursuant to Penal Code Section 32315.

This section is amended to state that a separate Large-Capacity Magazine Permit is needed for each licensed location. The permit will automatically transfer with an existing California Firearms Dealer if their physical store moves and they notify the Department prior to moving. Large-Capacity Magazine Permit applications can only be submitted online.

§ 5483. Large-Capacity Magazine Permit Record Keeping.

This section is amended to include instructions on how permittees shall document the Large-Capacity Magazine Permit records, which form to use, any additional documentation to be kept with the form, and timeframe for completing the documentation.

§ 5484. Large-Capacity Magazine Permit Revocations.

This section is amended to include the grounds for revocation of a Large-Capacity Magazine Permit, and the factors surrounding the revocation.

Article 5. Large-Capacity Magazines and Large-Capacity Magazine Conversion Kits

§ 5490. Large-Capacity Magazine; manufacturing

This section has been added to inform gun owners who legally possess a large-capacity magazine that they may disassemble and clean the magazine without triggering the ban.

§ 5491. Large-Capacity Magazine; capacity

This section has been added to inform gun owners of the legal definition of a large-capacity magazine and provide guidance on reducing the capacity on their large-capacity magazines.

§ 5492. Large-Capacity Magazine Conversion Kits.

This section has been added to clarify the definition of large-capacity magazine conversion kits.

Government Code Section 11346.5(a)(3)(D) Evaluation

The proposed regulations are not inconsistent or incompatible with existing state regulations.

Mandate on Local Agencies or School Districts

The Department has determined the proposed emergency regulations do impose a state-mandated local program or a mandate requiring reimbursement by the State pursuant to Chapter 58, Statutes of 2016, because it creates a new crime. However, SB 1446 states that no reimbursement

is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction.

Other Matters Prescribed by Statute Applicable to the Agency or to Any Specific Regulation or Class of Regulations

None.

Nonduplication of State Statutes as Necessary To Satisfy Government Code Section 11349.1(a)(6)

To satisfy the requirements of Government Code section 11349.1(a)(6), the text of the proposed regulations are nonduplicative.

Forms Incorporated by Reference

Large-Capacity Magazine Permit Application, BOF 050 (Rev. 12/2016)
Large Capacity Magazine Report, BOF 1002 (Rev. 12/2016)

Cost Estimates

The Department has assessed the potential for significant adverse impact that might result from the proposed emergency action and has determined:

- There will be no non-discretionary costs or savings to local agencies
- There will be no costs to school districts
- There will be no costs or savings in federal funding to the State

As detailed on the attachment to the Economic and Fiscal Impact Statement (STD. 399), the Department estimates its costs (state agency) directly related to the large-capacity magazine permit and enforcement of the large-capacity magazine laws and regulations will be insignificant.

Finding of Emergency

Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law, the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency to the Office of Administrative Law, the Office of Administrative Law shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

Explanation of Failure to Adopt Nonemergency Regulations

The Department is unable to develop regulations in the standard manner because of the short timeframes provided in the legislation. The legislation was signed into law on July 1, 2016, and the ban commences on July 1, 2017. It is the Department's intention to provide guidance to California's gun owners so that by July 1, 2017, they will be in compliance with the law. The proposed regulations provide options for disposal of large-capacity magazines, as well as instructions for reducing the capacity of a large-capacity magazine, and need to be formalized and provided to California residents as soon as possible.

EXHIBIT B

SENATE RULES COMMITTEE

SB 1446

Office of Senate Floor Analyses
(916) 651-1520 Fax: (916) 327-4478

THIRD READING

Bill No: SB 1446
Author: Hancock (D), et al.
Amended: 3/28/16
Vote: 21

SENATE PUBLIC SAFETY COMMITTEE: 4-3, 4/19/16
AYES: Hancock, Leno, Liu, Monning
NOES: Anderson, Glazer, Stone

SENATE APPROPRIATIONS COMMITTEE: Senate Rule 28.8

SUBJECT: Firearms: magazine capacity

SOURCE: Author

DIGEST: This bill, commencing July 1, 2017, prohibits the possession of large-capacity magazines, as specified.

ANALYSIS:

Existing law:

- 1) Banned the possession of “assault weapons” and “large capacity ammunition feeding devices,” defined as a magazine capable of holding more than 10 rounds of ammunition, manufactured after that date. That law, the federal assault weapons law (the Violent Crime Control and Law Enforcement Act, H.R. 3355, Pub.L. 103-322,) became effective on September 13, 1994, expired in 2004 and has not been reenacted.
- 2) Defines a “large-capacity magazine” as any ammunition feeding device with the capacity to accept more than 10 rounds, but shall not be construed to include any of the following:
 - a) A feeding device that has been permanently altered so that it cannot accommodate more than 10 rounds.

- b) A .22 caliber tube ammunition feeding device.
 - c) A tubular magazine that is contained in a lever-action firearm. (Penal Code § 16740.)
- 3) Provides that, except as specified, commencing January 1, 2000, 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, or lends, any large-capacity magazine is punishable by imprisonment in a county jail not exceeding one year or imprisonment for 16 months, two or three years pursuant to Penal Code Section 1170(h). “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. (Penal Code § 32310.)
 - 4) Provides that, commencing January 1, 2014, any person in this state who knowingly 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 conversion kit is punishable by a fine of not more than \$1,000 or imprisonment in a county jail not to exceed six months, or by both that fine and imprisonment. This section does not apply to a fully assembled large-capacity magazine. A “large capacity magazine conversion kit” is a device or combination of parts of a fully functioning large-capacity magazine, including, but not limited to, the body, spring, follower, and floor plate or end plate, capable of converting an ammunition feeding device into a large-capacity magazine. (Penal Code § 32311.)
 - 5) Provides that, upon a showing that good cause exists, the Department of Justice may issue permits for the possession, transportation, or sale between a licensed firearms dealer and an out-of-state client, of large-capacity magazines. (Penal Code § 32315.)
 - 6) Provides that, except as specified, any large-capacity magazine is a nuisance and is subject to an injunction against its possession, manufacture or sale, and is subject to confiscation and summary destruction. (Penal Code § 32390.)

This bill:

- 1) Provides that, except as specified, 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 \$100 upon the first offense, by a fine not to exceed \$500 upon the third or subsequent offense.

- 2) Requires that a person who, prior to July 1, 2017, legally possesses a large-capacity magazine dispose of that magazine by any of the following means:
 - a) Remove the large-capacity magazine from the state.
 - b) Prior to July 1, 2017, sell the large-capacity magazine to a licensed firearms dealer.
 - c) Destroy the large-capacity magazine.
 - d) Surrender the large-capacity magazine to a law enforcement agency for destruction.
- 3) Exempts the following:
 - a) An individual who honorably retired from being a sworn peace officer, as specified or an individual who honorably retired from being a sworn federal law enforcement officer, who was authorized to carry a firearm in the course of scope of that officer's duties, as specified.
 - b) A licensed gunsmith for the purpose of maintenance, repair or modification of the large-capacity magazine, as specified.
 - c) Any federal, state or local historical society, museum or institutional society, museum or institutional collection which is open to the public, provided that the large-capacity magazine is property housed, secured from unauthorized handling and unloaded.
 - d) Any person who finds the large-capacity magazine, if the person is not prohibited from possessing firearms or ammunition pursuant to federal or state law, and the person possessed the large-capacity magazine no longer than necessary to deliver or transport the same to a law enforcement agency for that agency's disposition according to the law.
 - e) A forensic laboratory or any authorized agent or employee thereof in the course and scope of his or her authorized activities.
 - f) The receipt or disposition of a large-capacity magazine by a trustee of a trust, or an executor or administrator of an estate, including an estate that is subject to probate, that includes a large-capacity magazine.
 - g) Any person lawfully in possession of a firearm that the person obtained prior to January 1, 2000 if no magazine that holds 10 or less rounds of

ammunition is compatible with that firearm and that person possesses the large-capacity magazine solely for use with that firearm.

4) Makes a number of conforming changes to the Penal Code.

Background

Since January 1, 2000, California has banned the importation, manufacture or sale of high capacity magazines. (Penal Code §§ 32310, 32390.) These magazines have also been deemed a public nuisance and are, therefore, subject to confiscation and destruction, although this requires a prosecutor to obtain a civil injunction, which is costly and time-consuming. (Penal Code § 18010.) This bill imposes criminal penalties for possession of high capacity magazines in California.

According to a report released by the Violence Policy Center in December of 2015:

Since 1980, there have been at least 50 mass shootings (3 or more fatalities) where the shooter used high-capacity ammunition magazines. A total of 436 people were killed in these shootings and 425 were wounded. This number is likely a significant undercount of actual incidents since there is no consistent collection or reporting of this data. Even in many high-profile shootings information on magazine capacity is not released or reported.

(http://www.vpc.org/fact_sht/VPCshootinglist.pdf.)

There were at least three mass shootings involving large-capacity magazines in 2015. On December 2, 2015, 14 people were killed and 21 were seriously injured in a mass shooting at the Inland Regional Center in San Bernardino, California. The perpetrators of this mass shooting used four high capacity magazines. In July of 2015, six people were killed (including the shooter) and two were wounded in a shooting at the Navy Operational Support Center and Marine Corps Reserve Center, in Chattanooga, Tennessee. The perpetrator used multiple 30-round magazines. On June 17, 2015, a shooting at the Emanuel African Methodist Episcopal Church, in Charleston, South Carolina, left nine people dead. The perpetrator used 13-round magazines. (*Id.*)

Comments

The Fifth Amendment “Takings” Clause

The “takings clause” of the Fifth Amendment to the United States Constitution states: “nor shall private property be taken for public use without just compensation.” California law already bans the import, manufacture and sale of

high capacity ammunition magazines, and has declared them a nuisance and subject to confiscation and destruction. (Penal Code §§ 32310, 32390, 18010.) Nonetheless, the question has been raised whether adding criminal penalties for possession of these ammunition magazines would constitute a “taking of private property for public use without just compensation,” in violation of the Fifth Amendment.

The U.S. Supreme Court has recognized for well over a century a difference between legislative action that results in a taking of private property for public use through a process of eminent domain and a legitimate use of the police power of the state to protect the public health and welfare. In upholding a statute prohibiting the sale of alcohol, the Court stated:

The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

(*Mugler v. Kansas*, 123 U.S. 623, 668-669 (1887).)

Specifically in the context of the regulation of firearms, courts have held that prohibiting possession of dangerous weapons is a valid exercise of the government’s police power not to be confused with the power of eminent domain. In 1978, Washington, D.C. passed a law prohibiting the ownership of certain types of weapons, including those that could fire more than 13 rounds without reloading. The law was quickly challenged by a several gun owners who had legally purchased such weapons before the law went into effect and were thus required to dispose of them or be in violation of the law. They claimed this amounted to a taking by the government, without just compensation, in violation of the Fifth Amendment. The Court of Appeals for the District of Columbia held:

Petitioners’ third constitutional challenge alleges that D.C. Code 1978 Supp., § 6-1820(c) provides for a taking of their property without just compensation in violation of the Fifth Amendment. That section of the Code provides three alternatives for disposition within seven days of a firearm denied registration. The unsuccessful applicant may (1) “peaceably surrender” the firearm to the chief of police, (2) “lawfully remove” the firearm from the District for as long as he retains an interest in the firearm, or (3) “lawfully dispose” of his interest in the firearm. Petitioners’ argument is that the second and third alternatives require, under the terms imposed by the Federal Gun Control Act of 1968, 18

U.S.C. § 922 (1970), a quick “forced sale” of the firearms at less than fair market value to a dealer in firearms, while the first alternative would provide not even a salvage value return.

Assuming, arguendo, that the statute authorized a “taking,” we note that the Fifth Amendment prohibits taking of “private property . . . for public use, without just compensation.” Such a taking for the public benefit under a power of eminent domain is, however, to be distinguished from a proper exercise of police power to prevent a perceived public harm, which does not require compensation. *Lamm v. Volpe*, 449 F.2d 1202, 1203 (10th Cir. 1971). That the statute in question is an exercise of legislative police power and not of eminent domain is beyond dispute. The argument of petitioner, therefore, lacks merit.

(*Fesjian v. Jefferson*, 399 A.2d 861, 865-866 (1979).)

Exception for Retired Peace Officers

The assault weapons ban in California (AWCA) allowed law enforcement agencies to sell or transfer assault weapons to a sworn peace officer upon that officer’s retirement. This provision was challenged in *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002). The Ninth Circuit held:

We thus can discern no legitimate state interest in permitting retired peace officers to possess and use for their personal pleasure military-style weapons. Rather, the retired officers exception arbitrarily and unreasonably affords a privilege to one group of individuals that is denied to others, including plaintiffs.

In sum, not only is the retired officers’ exception contrary to the legislative goals of the AWCA, it is wholly unconnected to any legitimate state interest. A statutory exemption that bears no logical relationship to a valid state interest fails constitutional scrutiny. The 1999 AWCA amendments include, however, a severability provision providing that should any portion of the statute be found invalid, the balance of the provisions shall remain in force. Accordingly, because the retired officers’ exception is an arbitrary classification in violation of the Fourteenth Amendment, we sever that provision, § 12280(h)-(i), from the AWCA.

(*Id.* at 1091-92.)

Like the AWCA, this bill exempts retired sworn peace officers from the ban on the possession of large-capacity magazines.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: Yes

SUPPORT: (Verified 5/17/16)

American Academy of Pediatrics, California
California Academy of Family Physicians
California Chapter of the American College of Emergency Physicians
California Chapters of the Brady Campaign to Prevent Gun Violence
California Church IMPACT
City of Long Beach
City of Oakland
City of Santa Monica
Cleveland School Remembers
Coalition Against Gun Violence
Courage Campaign
David Alvarez, Councilmember, City of San Diego
Eric Garcetti, Mayor of the City of Los Angeles
Law Center to Prevent Gun Violence
Physicians for Social Responsibility
Rabbis Against Gun Violence
Violence Prevention Coalition of Greater Los Angeles
Youth ALIVE!

OPPOSITION: (Verified 5/17/16)

California State Sheriffs' Association
Firearms Policy Coalition
Gun Owners of California
National Rifle Association
Outdoor Sportsman's Coalition of California
Safari Club International Foundation
The California Sportsman's Lobby

ARGUMENTS IN SUPPORT: According to the California Chapters of the Brady Campaign to Prevent Gun Violence:

Since January 2000, California law has prohibited the manufacture, importation, sale, gift, or loan of any large capacity ammunition magazine capable of holding more than ten rounds. SB 1446 is a narrow

bill that would add a prohibition on *possessing* large capacity magazines, as defined in the bill, regardless of the date the magazine was acquired. Current and retired police officers would be exempt from the prohibition.

Mass shootings involving large capacity magazines have demonstrated the tragic carnage caused by these magazines. The shooters in the recent San Bernardino tragedy as well as the gunmen in Santa Monica (2013), Fort Hood, Tucson, Aurora, and Newtown were able to injure or kill large numbers of people very quickly because of their ability to shoot a large number of bullets in a very short period of time. Jared Loughner, who was able to rapidly fire 31 bullets in 15 seconds without reloading, killed six people and wounded thirteen others in Tucson. The shooting ended when bystanders tackled the gunman while he was reloading. Nine year old Christina-Taylor Green was shot by the thirteenth bullet – had there been a magazine limit of ten rounds, she might be alive today.

California had a number of mass shootings involving large capacity ammunition magazines before the ban on their sale and transfer in year 2000 (in San Ysidro, Stockton, San Francisco and Orange). Other rampage shootings involving large capacity magazines have happened since then - and will happen again - because of the prevalence of large capacity magazines and the difficulty of enforcing existing law. It is nearly impossible to prove when a large capacity magazine was acquired or whether the magazine was illegally purchased after the 2000 ban. Furthermore, until 2014, magazine conversion kits were being sold in California. These kits, containing parts to repair large capacity magazines, were legally purchased and later assembled into new large capacity magazines. Since the possession of large capacity magazines is permissible, this practice, which clearly evaded the intent of the law, was able to increase the proliferation of large capacity magazines in the state. SB 1446 would enable the enforcement of existing law regarding large capacity magazines.

With average use, magazines typically last about twelve years. It is now time to end the grandfathering of large capacity magazines and exploitation of the law by prohibiting their possession. Serious hunters do not use large capacity magazines. A prohibition on the sale, transfer, and *possession* of large capacity magazines clearly furthers public

safety. The California Brady Campaign Chapters appreciate your introduction of SB 1446 and are in full support.

ARGUMENTS IN OPPOSITION: The Firearms Policy Coalition states in opposition to this bill:

Most firearms sold in America today, and certainly the highest by volume sold, such as AR-15s and semi-automatic handguns, come standard from the factory with magazines that hold more than ten rounds. Law enforcement agencies and peace officers purchase those same firearms with those same magazines because they are standard kit -- and, most importantly, because no one wants to be under-armed in a self-defense situation.

Furthermore, many magazines are altered and made "California Legal" at some point of manufacture. Given this, SB 1446 would immediately make most full size handguns inoperable as it bans any magazine that has been permanently altered to only accept 10 rounds or less, creating a taking of constitutionally protected property.

Many people have purchased permanently altered magazines to be compliant with California's ever growing body of law surrounding firearms and have based their consumer choices on this being the law of the land. Now the goal posts would appear to be moving yet again.

SB 1446 is simply an unconstitutional taking of personal property and an express infringement on the fundamental civil rights of all Californians. The measure creates significant criminal liability for items currently -- and lawfully -- possessed by hundreds of thousands, if not millions, of Californians. Depriving people of Constitutionally-protected civil rights by criminalizing the possession of items commonplace to gun owners is poor policy and invites litigation.

Even more disturbing, SB 1446 invites a deepening wedge between the police and non-police as it protects "honorably retired peace officers" from the dispossession of their personal property. This wanton violation of the 14th amendment to the United States Constitution creates a caste system of civilians- those who used to be police officers and those who weren't.

According to the federal civil rights case *Silveira v. Lockyer* (9th Cir. 2002), 312 F.3d 1052, retired peace officers are not allowed to maintain

the “assault weapons” they acquired through exemptions they held as active duty peace officers. When they became non-peace officers through separation from their employer, they became civilians.

The State will need to track all of the magazines purchased by peace officers, should they become former, retired or “honorably retired” to ensure the state’s expressed interest in controlling these firearms parts is met and can confiscate magazines from peace officers who retire early, resign, are fired or are otherwise not deemed “honorably retired”.

With no appropriation for outreach in SB 1446, and the untold millions of magazines in circulation, we fear widespread, inadvertent non-compliance and a revolving door of lives upended by the deluge of criminal prosecutions in every courthouse in the state as everyday people become overnight criminals. An appropriation today may save millions of dollars later as the inventory of these parts is significant and the outreach is non-existent, creating a potential wave of prosecutions of otherwise law abiding person whose only “crime” was possession of ammunition feeding devices (including those of 10 rounds or less) that were lawfully acquired.

Without pre-emption, firearms parts owners may be subject to a withering hail of statutes and ordinances aimed at them with different penalties depending on which jurisdiction prosecutes first. Ironically, some local laws are more severe than the proposed state statute.

Prepared by: Jessica Devencenzi / PUB. S. /
5/19/16 10:37:24

**** END ****

EXHIBIT C



State of California

PENAL CODE

Section 32406

32406. Subdivisions (b) and (c) of Section 32310 do not apply to the following:

(a) An individual who honorably retired from being a sworn peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, or an individual who honorably retired from being a sworn federal law enforcement officer, who was authorized to carry a firearm in the course and scope of that officer's duties. For purposes of this section, "honorably retired" has the same meaning as provided in Section 16690.

(b) A federal, state, or local historical society, museum or institutional society, or museum or institutional collection, that is open to the public, provided that the large-capacity magazine is unloaded, properly housed within secured premises, and secured from unauthorized handling.

(c) A person who finds a large-capacity magazine, if the person is not prohibited from possessing firearms or ammunition, and possessed it no longer than necessary to deliver or transport it to the nearest law enforcement agency.

(d) A forensic laboratory, or an authorized agent or employee thereof in the course and scope of his or her authorized activities.

(e) The receipt or disposition of a large-capacity magazine by a trustee of a trust, or an executor or administrator of an estate, including an estate that is subject to probate, that includes a large-capacity magazine.

(f) A person lawfully in possession of a firearm that the person obtained prior to January 1, 2000, if no magazine that holds 10 or fewer rounds of ammunition is compatible with that firearm and the person possesses the large-capacity magazine solely for use with that firearm.

(Added by Stats. 2016, Ch. 58, Sec. 4. (SB 1446) Effective January 1, 2017. See same-numbered section added November 8, 2016, by Proposition 63.)

EXHIBIT D



State of California

PENAL CODE

Section 32406

32406. Subdivision (c) of Section 32310 does not apply to an honorably retired sworn peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, or honorably retired sworn federal law enforcement officer, who was authorized to carry a firearm in the course and scope of that officer's duties. "Honorably retired" shall have the same meaning as provided in Section 16690.

(Added November 8, 2016, by initiative Proposition 63, Sec. 6.4. See same-numbered section added by Stats. 2016, Ch. 58.)