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8
 9 IN THE UNITED STATES DISTRICT COURT
 10 FOR THE EASTERN DISTRICT OF CALIFORNIA
 11 SACRAMENTO DIVISION

13 **WILLIAM WIESE, et al.,**

14 Plaintiffs,

15 v.

17 **XAVIER BECERRA, et al.,**

18 Defendants.

2:17-cv-00903-WBS-KJN

**DEFENDANTS' NOTICE OF MOTION
 AND MOTION TO DISMISS SECOND
 AMENDED COMPLAINT PURSUANT
 TO FEDERAL RULE OF CIVIL
 PROCEDURE 12(b)(6)**

Date: November 6, 2017
 Time: 1:30 p.m.
 Courtroom: 5, 14th Floor
 Judge: Hon. William B. Shubb
 Trial Date: None Set
 Action Filed: April 28, 2017

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NOTICE OF MOTION

PLEASE TAKE NOTICE THAT on November 6, 2017 at 1:30 p.m., or as soon thereafter as the matter may be heard before the Honorable William B. Shubb in Courtroom 5 of the United States District Court for the Eastern District of California, located at 501 I Street, Sacramento, California 95814, defendants Attorney General Xavier Becerra and Bureau of Firearms Chief Stephen Lindley,¹ will move this Court to dismiss plaintiffs' Second Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

This motion to dismiss is brought on the grounds that (1) the Second Amended Complaint fails to satisfy the pleading requirements set forth in *Ashcroft v. Iqbal*, 556 U.S. 662, 678-80 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); and (2) the Second Amended Complaint fails to state a claim upon which relief can be granted under the Second Amendment, the Takings Clauses of the United States or California Constitution, the Due Process Clause, or the Equal Protection Clause of the United States or California Constitution. This motion is based on this Notice, the Memorandum of Points and Authorities, the concurrently filed Request for Judicial Notice, the papers and pleadings on file in this action, this Court's June 29, 2017 Order Denying Preliminary Injunction, and upon such matters as may be presented to the Court at the time of the hearing.

Dated: September 27, 2017

Respectfully Submitted,

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¹ Pursuant to Federal Rule of Civil Procedure 25(d), Chief Stephen Lindley, in his official capacity, is substituted for Acting Chief Martha Superior.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

1
2
3 In the wake of escalating mass-shootings and gun violence, the Legislature and the people
4 of California have enacted a ban on the possession of magazines holding more than ten rounds of
5 ammunition. These large-capacity magazines (LCMs) are disproportionately used in crime, and
6 feature prominently in some of the most serious crime, including mass shootings and the killings
7 of law enforcement officers. When LCMs are used to commit crime, more shots are fired, more
8 victims are wounded, and there are more wounds per victim. This in turn leads to more injuries,
9 more lethal injuries, and higher rates of death than crimes involving firearms with conventional
10 magazines. Because LCMs are so dangerous, federal and state law have restricted their
11 manufacture, importation, and sale for decades. In order to strengthen these restrictions, and
12 close a loophole that allowed for the continued proliferation of LCMs, California Penal Code
13 Section 32310 (Section 32310) prohibits the possession of LCMs by private citizens.

14 Plaintiffs challenge this important public safety legislation and allege that it violates the
15 Second Amendment and the Takings and Equal Protection Clauses, and that it is
16 unconstitutionally vague and overbroad. The Second Amended Complaint should be dismissed in
17 its entirety because, even after amendment, plaintiffs do not allege sufficient facts in support of
18 their constitutional claims. Rather, the Second Amended Complaint is comprised of little more
19 than boilerplate legal conclusions that fail to satisfy the pleading burden under Federal Rule of
20 Civil Procedure 12(b). Moreover, of greater significance, and as this Court already has held, the
21 law furthers the government's important interests in reducing the incidence and lethality of mass
22 shootings, is likely not a taking of property for public use requiring compensation, and is not
23 vague or overbroad. Plaintiff's equal protection claim is duplicative of their Second Amendment
24 claim and also fails on the merits. Because plaintiffs cannot demonstrate that Section 32310 is
25 unconstitutional, they cannot state a claim upon which relief can be granted. Accordingly,
26 defendants respectfully request that this Court dismiss the Second Amended Complaint with
27 prejudice.
28

BACKGROUND

I. RELEVANT LAW AND PROCEDURAL HISTORY

A. Section 32310.

Because they are particularly lethal and are disproportionately used in mass shootings and other crime, LCMs have been extensively regulated in the United States for decades. In the wake of numerous gun massacres during the 1980s and early 1990s, Congress passed the Violent Crime Control and Law Enforcement Act (the Federal Ban) in 1994. H.R. Rep. 103-489, at 32-33 (1994). The Federal Ban prohibited the possession or transfer of all “large-capacity ammunition feeding devices,” defined as those with the capacity to accept more than ten rounds. *See* Pub. L. 103-322, Sept. 13, 1994, 108 Stat. 1796, 1998-2000 (formerly codified at 18 U.S.C. § 922(w)). In 2000, California adopted its own legislation prohibiting the manufacture, import, keeping or offering for sale, giving, or lending of LCMs. Cal. Stats. 1999, ch. 129, §§ 3, 3.5, presently codified at Cal. Penal Code § 32310.² In 2013, California enacted a ban on the purchase or receipt of LCMs. Cal. Stats. 2013, ch. 728 (A.B. 48) § 1 (amending § 32310(a)). California also declared unlawfully possessed LCMs to be a “nuisance.” §§ 108010, 32390. Thus, though the Federal Ban expired in 2004, LCMs have remained illegal to buy, sell, or import in California. Combined, both the federal and state law have made LCMs unavailable to the vast majority of Californians for over two decades.

Although California banned the manufacture, sale, and transfer of LCMs in 2000, it initially did not ban possession of these LCMs, instead grandfathering in possession of LCMs obtained before 2000. *See Fyock v. City of Sunnyvale*, 779 F.3d 991, 994 (9th Cir. 2015). Rather than serving as a limited exception, the grandfathering provision made the prior version of Section 32310 “very difficult to enforce.” SAC, Ex. B at 8 (Sen. Bill No. 1446, 3d reading Mar. 28, 2016 (2015-2016 Reg. Sess.) (Cal. 2016)).³ Specifically, because LCMs lack identifying marks to

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

³ In evaluating a motion to dismiss, this Court may consider exhibits attached to the Complaint. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002). This Court may also take judicial notice of the legislative history of state laws. *See Anderson v.* (continued...)

1 indicate when they were manufactured or sold, there has been no reliable way for law
2 enforcement to determine which LCMs were properly grandfathered and which had been illegally
3 smuggled and purchased or were the product of “magazine conversion kits” that enabled people
4 to evade the law. *Id.* In an effort to close what proved to be a dangerous loophole and address
5 the proliferation of LCMs in California despite a ban on their sale or transfer, both the Legislature
6 and the people separately enacted substantially similar prohibitions on the possession of LCMs.
7 *See id.*; Prop. 63, § 2, ¶ 5, as approved by voters (Gen. Elec. Nov. 8, 2016) (uncodified findings
8 and declarations of the people of California), attached as Exhibit B to the accompanying RJN.

9 On July 1, 2016, the Legislature enacted Senate Bill (SB) 1446, which prohibits the
10 possession of LCMs (defined under Section 16740 as “a feeding device with the capacity to
11 accept more than 10 rounds”) beginning on July 1, 2017. Cal. Stats. 2016, ch. 58 (SB 1446) § 1,
12 attached as Exhibit A to the accompanying RJN. SB 1446, which went into effect on January 1,
13 2017, amended Section 32310 to state that, beginning on July 1, 2017, any person possessing an
14 LCM, with exemptions not relevant here, would be guilty of an infraction punishable by a fine
15 starting at \$100 for the first offense. *Id.* (amending Section 32310 to add a new subdivision (c)).
16 The law also provided that anyone possessing an LCM may, prior to July 1, 2017, dispose of the
17 magazine by any of the following means: (1) removing it from the state; (1) selling it to a licensed
18 firearms dealer; (3) destroying it; or (4) surrendering it to a law enforcement agency for
19 destruction. Cal. Stats. 2016, ch. 58 (S.B. 1446) § 1 (amending Section 32310 to add a new
20 subdivision (d)).

21 On November 8, 2016, California voters passed Proposition (Prop.) 63, the “Safety for All
22 Act of 2016.” Prop. 63, § 1 (RJN, Ex. B). The measure contained a number of provisions,
23 including amendments to Section 32310, intended to close “loopholes that leave communities
24 throughout the state vulnerable to gun violence and mass shootings.” *Id.*, § 2, ¶ 5. Prop. 63’s
25 amendments to Section 32310 largely mirror those made under SB 1446. Both provisions

26 (...continued)

27 *Holder*, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012). Accordingly, relevant portions of the history of
28 SB 1446 and Proposition 63 are attached as exhibits to the concurrently filed Request for Judicial
Notice in Support of Motion to Dismiss (RJN).

1 prohibit the possession of LCMs on or after July 1, 2017, and list options for the disposal of
2 LCMs before that date. *Id.* Prop. 63 eliminated some of the exceptions contained in SB 1446 and
3 increased the potential consequence for violations of the possession ban, from an infraction to an
4 infraction or a misdemeanor. *Id.*, § 6.1.⁴

5 **B. Procedural History**

6 On April 28, 2017, plaintiffs filed their original complaint, alleging that Section 32310, as
7 amended by Proposition 63, violates their rights under the Second Amendment, Takings Clause,
8 and Due Process Clause. Dkt. No. 1. On June 5, 2017, plaintiffs filed a First Amended
9 Complaint, adding three plaintiffs as well as a claim that Section 32310, as amended, is
10 unconstitutionally overbroad. Dkt. No. 7. Shortly thereafter, plaintiffs filed a motion for a
11 temporary restraining order and preliminary injunction on June 12, which was denied. Dkt. No.
12 26. By order dated June 16, 2017, this Court denied plaintiffs' renewed motion for a temporary
13 restraining order based on an insufficient showing of irreparable harm and plaintiffs' delay in
14 filing suit and the fact that plaintiffs' injunction motion would be heard before the ban on
15 possession went into effect on July 1. Dkt. No 45.

16 By order dated June 29, 2017, this Court denied plaintiffs' renewed motion for preliminary
17 injunction. In so doing, this Court determined that plaintiffs had failed to show a likelihood of
18 success on the merits of their Second Amendment, takings, vagueness, and overbreadth claims.
19 This Court further held that plaintiffs also did not demonstrate irreparable injury or that the
20 balance of harms or public interest required injunctive relief. *See Wiese v. Becerra*,
21 __ F. Supp. 3d __, No. CV 2:17-903 WBS KJN, 2017 WL 2813218, at *2-*9 (E.D. Cal. June 29,
22 2017).

23 Plaintiffs' Second Amended Complaint was filed on August 16, 2017. Dkt. No. 59.

24 _____
25 ⁴ As this Court has stated, because Proposition 63's amendments were enacted after SB
26 1446, under California law, they are the governing provisions. Memorandum and Order re:
27 Motion for Preliminary Injunction, Dkt. No. 52, (Order) at 19 (citing *People v. Bustamante*, 57
28 Cal. App. 4th 693, 701 (2d Dist. 1997)). Therefore, references to Section 32310 in this brief are
to the statute as amended by Proposition 63.

1 **II. THE ALLEGATIONS OF THE SECOND AMENDED COMPLAINT**

2 Plaintiffs Wiese, Morris, Cowley, Macaston, Flores, Dang, and Federau (Individual
3 Plaintiffs) are residents of California who currently possess LCMs acquired before 2000. SAC
4 ¶¶ 8-14.⁵ Plaintiffs the Calguns Foundation, Inc., Firearms Policy Coalition, Inc., Firearms
5 Policy Foundation, Inc., and Second Amendment Foundation are non-profit organizations that
6 engage in education and advocacy about gun laws and defend and protect the civil rights of gun
7 owners. *Id.*, ¶¶ 17-20. The Individual Plaintiffs bring this action “on behalf of themselves, and as
8 representatives of the class of similar individuals consisting of law-abiding California residents,
9 who are not otherwise prohibited or nor exempt, who lawfully and have legally possessed Large-
10 Capacity Magazines in this state, prior to December 31, 1999.” *Id.*, ¶ 21. Plaintiff Flores is also
11 suing as the trustee of a trust created under California law. *Id.*, ¶ 22. Plaintiffs allege that Section
12 32310’s ban on possession of LCMs: (1) violates the Second Amendment; (2) is an
13 unconstitutional taking in violation of the Fifth and Fourteenth Amendments to the United States
14 Constitution; (3) is an unconstitutional taking in violation of article I, section 19 of the California
15 Constitution; (4) is unconstitutionally vague and overbroad; and (5) violates the Equal Protection
16 Clause under the United States and California Constitution. *Id.*, ¶¶ 56-116.⁶ The SAC seeks
17 declaratory and injunctive relief. *Id.* at 33-34.

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22 ⁵ The SAC also names plaintiffs Normandy and Nielson, who are residents of Arizona and
Utah, respectively, who visit family in California and attend trainings and shooting competitions.
SAC, ¶¶ 15-16.

23
24 ⁶ The SAC alleges that the Individual Plaintiffs as well as many members of the
Organizational Plaintiffs also “seek to acquire, and would acquire, additional large-capacity
25 magazines . . . but they would be further prevented from doing so by the Large-Capacity
Magazine Ban, if it is enforced.” SAC, ¶ 23. However, the SAC only challenges Section
26 32310(c), as amended by SB 1446 and Proposition 63, which requires the dispossession of LCMs
that were acquired before 2000. *Id.*, ¶ 1. Regardless of whether Section 32310(c) is enforced,
27 Section 32310(a), which is not here at issue, prohibits, and has prohibited since 2000, the
manufacture, importation, sale, purchase, or receipt of LCMs. § 32310(a). The SAC is devoid of
28 any allegations regarding Section 32310(a).

ARGUMENT**I. LEGAL STANDARD**

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed for failure to state a claim upon which relief can be granted. A motion to dismiss under Rule 12(b)(6) “tests the legal sufficiency of a claim.” *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal is proper where there is no cognizable legal theory or there are insufficient facts alleged to support a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984). To defeat a Rule 12(b)(6) motion, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its face,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); that is, the plaintiff must allege facts that consist of “more than a sheer possibility that a defendant has acted unlawfully,” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A plaintiff must allege “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do,” instead, the plaintiff must allege facts sufficient to “raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555.

In deciding a Rule 12(b)(6) motion, a court must assume the plaintiff’s allegations of fact are true and must draw all reasonable inferences in his or her favor. *See Daniels-Hall v. National Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010). However, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.” *Iqbal*, 556 U.S. at 678. While the court generally looks only to the face of the complaint and its exhibits, *Van Buskirk*, 284 F.3d at 980, the court may also consider documents that are proper subjects of judicial notice, *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 991 (9th Cir. 2009). A court may dismiss a complaint pursuant to Rule 12(b)(6) without leave to amend if “it is clear that the complaint could not be saved by an amendment.” *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005).

II. PLAINTIFFS HAVE FAILED TO STATE VIABLE CLAIMS FOR RELIEF AS A MATTER OF LAW.

Plaintiffs bring a facial challenge to Section 32310 on the grounds that it violates the Second Amendment, as well as the Takings, Due Process, and Equal Protection Clauses of United

1 States Constitution, and article I, sections 7 and 19 of the California Constitution.⁷ In order to
 2 succeed on a facial challenge, plaintiffs “must establish that no set of circumstances exists under
 3 which the [regulation or statute] would be valid.” *United States v. Salerno*, 481 U.S. 739, 745
 4 (1987); *see also Chem. Specialties Mfrs. Ass’n, Inc. v. Allenby*, 958 F.2d 941, 943 (9th Cir. 1992).
 5 To support a finding of facial unconstitutionality, voiding a statute or regulation as a whole,
 6 plaintiffs cannot prevail by suggesting that in some future hypothetical situation constitutional
 7 problems may possibly arise as to the particular *application* of the statute. Rather, they must
 8 show that the statute is unconstitutional in *all* of its applications. *See Wash. State Grange v.*
 9 *Wash. State Republican Party*, 552 U.S. 442, 450 (2008). Where, as here, a statute has a “plainly
 10 legitimate sweep,” a facial challenge must fail. *Id.* at 449 (citation and internal quotations
 11 omitted). Plaintiffs have not met the “heavy burden” to show that the Section 32310 facially
 12 violates the Second Amendment, the Takings, Due Process, and Equal Protection Clauses.
 13 *Salerno*, 481 U.S. at 745. Indeed, plaintiffs have failed to allege sufficient facts to state a cause of
 14 action under these provisions, let alone facts demonstrating a total and fatal conflict with their
 15 prohibitions. *See id.*

16
 17
 18 ⁷ Although plaintiffs claim to bring both a facial and an as-applied challenge to Section
 19 32310, *see* SAC ¶ 1, their claims are facial because the relief that they seek in permanently
 20 enjoining the statute would benefit other LCM owners. *See Ctr. for Competitive Politics v.*
 21 *Harris*, 784 F.3d 1307, 1314 (9th Cir. 2015) (noting that plaintiff’s First Amendment claim was
 22 facial, and not as-applied, because the relief they seek would “reach[] beyond the particular
 23 circumstances of these plaintiffs,” and thus plaintiffs must “satisfy [the] standards for a facial
 24 challenge to the extent of that reach” (citation omitted)), *cert. denied*, 136 S. Ct. 480 (2015).
 25 Moreover, the SAC alleges no facts to support an as-applied challenge. Specifically, there are no
 26 allegations suggesting that the “law is unconstitutional as applied to [the plaintiffs’] particular . . .
 27 activity, even though the law may be capable of valid application to others.” *Foti v. City of*
 28 *Menlo Park*, 146 F.3d 629, 635 (9th Cir.), *as amended on denial of reh’g* (1998). The SAC
 contains no allegations that Section 32310 has been applied or enforced against plaintiffs at all,
 (nor could there be as it has been enjoined and is not in effect) let alone in an impermissible or
 selective manner. *See Hoyer v. City of Oakland*, 653 F.3d 835, 854-56 (9th Cir. 2011) (stating that
 an as-applied challenge challenges a specific application of a facially valid statute to an individual
 or group of individuals or the future application of the statute in the allegedly impermissible
 manner in which it has been applied in the past). To the extent that allegations in the SAC are
 specific to individual plaintiffs, *see, e.g.*, SAC ¶ 88 (stating that plaintiff Flores possesses a rare
 LCM for himself and on behalf of a family trust), these allegations are derivative of plaintiffs’
 facial challenge and fail for the same reasons discussed herein.

1 **A. Plaintiffs’ Second Amendment Claim Fails.**

2 Count I of the SAC alleges that Section 32310 violates the Second Amendment. SAC
 3 ¶¶ 56-69. The Supreme Court held, in *District of Columbia v. Heller*, 554 U.S. 570, 622 (2008),
 4 that the Second Amendment confers an individual right to keep and bear arms. The Court stated
 5 that the Second Amendment has “the core lawful purpose of self-defense” and “elevates above all
 6 other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and
 7 home.” *Id.* at 630, 635. This right is incorporated against the states through the Fourteenth
 8 Amendment. *McDonald v. City of Chi.*, 561 U.S. 742, 790-91 (2010) (plurality).

9 The Second Amendment, however, does not provide “a right to keep and carry any weapon
 10 whatsoever in any manner whatsoever and for whatever purpose.” *Heller*, 554 U.S. at 626.
 11 Rather, the right to keep and bear arms, like other constitutional rights, is limited in scope and
 12 subject to regulation. *Id.* at 626-28. Thus, the Supreme Court has emphasized that the Second
 13 Amendment “does not imperil every law regulating firearms” and that “state and local
 14 experimentation with reasonable firearms regulation will continue under the Second
 15 Amendment.” *McDonald*, 561 U.S. at 785; *see also Heller*, 554 U.S. at 626-29.

16 In evaluating whether the Second Amendment permits such state regulation, the Ninth
 17 Circuit employs a two-step inquiry. *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir.
 18 2013). First, the court “asks whether the challenged law burdens conduct protected by the Second
 19 Amendment.” *Id.* If not, the challenged law does not implicate the Second Amendment and is
 20 valid. *See id.* at 1138. If a Second Amendment right is implicated, the court then selects an
 21 appropriate level of scrutiny. *Id.* at 1136. Even assuming that LCMs, which are unusually
 22 dangerous, designed to “kill or disable the enemy,” “clearly most useful in military service” and
 23 not commonly used for self-defense, *see Kolbe v. Hogan*, 849 F.3d 114, 137 (4th Cir. 2017) (en
 24 banc); *Hightower v. City of Boston*, 693 F.3d 61, 66, 71 (1st Cir. 2012), fall within the purview of
 25 the Second Amendment, this Court has determined that Section 32310 is subject to intermediate
 26 scrutiny.⁸ *See Order* at 6-7; *see also Fyock*, 779 F.3d at 999 (Evaluating challenge to LCM ban

27 ⁸ Plaintiffs’ bald assertion that strict scrutiny should apply to Section 32310, *see SAC*,
 28 ¶ 68, is incorrect. Not only has the Ninth Circuit determined that intermediate scrutiny is the
 (continued...)

1 and stating “Consistent with the reasoning of our sister circuit, we also agree that intermediate
2 scrutiny is appropriate.”); *Kolbe*, 849 F.3d at 138 (applying intermediate scrutiny to LCM ban);
3 *New York State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 260-61 (2d Cir. 2015), *cert denied*
4 *sub nom, Shew v. Malloy*, 136 S. Ct. 2486 (2016) (*NYSRPA*) (same); *Friedman v. City of*
5 *Highland Park*, 784 F.3d 406, 410 (7th Cir.), *cert. denied*, 136 S. Ct. 447 (2015) (same); *Heller II*,
6 670 F.3d at 1264 (same). It has further held that Section 32310 satisfies intermediate scrutiny, as
7 “California’s stated interests of reducing the incidence and harm of mass shootings and easing
8 enforcement of the state’s existing ban ‘would be achieved less effectively absent the regulation,’
9 and thus there is a reasonable fit between [Section 32310] and California’s important objectives.”
10 Order at 10 (citing *Fyock*, 779 F.3d at 1000). There are no allegations in the SAC that address
11 and/or undermine this holding.

12 To the contrary, many of the allegations in the SAC are unsupported legal conclusions, *see*
13 SAC, ¶¶ 43, 47, 54, 65, that do not satisfy plaintiffs’ pleading burden and are insufficient to state
14 a cause of action. *See Iqbal*, 556 U.S. at 680-81; *Twombly*, 550 U.S. at 557. The remainder of
15 plaintiffs’ Second Amendment allegations are directed solely at the first part of the two-step
16 inquiry, that is, whether LCMs burden conduct protected by the Second Amendment. Plaintiffs
17 allege that: (1) LCMs “are an intrinsic part of all semi-automatic firearms, which were designed,
18 developed, produced and sold in large quantities starting in the early 20th Century and continuing
19 through today,” SAC, ¶ 32; (2) many millions of magazines have existed lawfully within the
20 United States and are used by Americans for self-defense, competition, training, and sport, *id.*, ¶¶
21 33, 46-47, 49, 57; (3) LCMs are the sorts of “lawful weapons in common use that law-abiding
22 people possess at home for lawful purposes – and exactly what they would bring to service in
23 militia duty should such cause be necessary,” *id.*, ¶ 46; (4) the need for and usefulness of LCMs
24 for self-defense is demonstrated by the fact that civilian law enforcement officers and armored

25 _____
(...continued)

26 applicable standard, *see Fyock*, 779 F.3d at 999, but, as this Court has noted, “intermediate
27 scrutiny is appropriate because “the prohibition of . . . large capacity magazines does not
28 effectively disarm individuals or substantially affect their ability to defend themselves.” Order at
6 (quoting *Heller v. District of Columbia*, 670 F.3d 1244, 1262 (D.C. Cir. 2011) (*Heller II*)).

1 vehicle companies and their employees can use LCMs; *id.*, ¶¶ 53, 58; (5) criminals will still use
2 LCMs and thus law-abiding citizens need them for self-defense, *id.*; and (6) any person who owns
3 firearms with LCMs as the only feeding device would have to acquire reduced capacity
4 magazines, the financial burden of which “disarms the owner of the use of such firearms until a
5 suitable replacement magazine can be found,” *id.*, ¶ 63. Even accepting these allegations as true,
6 all this suggests is that is that Section 32310 is subject to intermediate scrutiny under the Second
7 Amendment, which, as this Court has determined, it passes. *See* Order at 6 (concluding that
8 intermediate scrutiny applies because the Section 32310 “does not affect the ability of law-
9 abiding citizens to possess the ‘quintessential self-defense weapon’—the handgun. Rather, [it]
10 restricts possession of only a subset of magazines that are over a certain capacity.” (quoting
11 *Fyock*, 779 F.3d at 999)).

12 The SAC does not, and cannot, allege that Section 32310 does not advance the State’s
13 compelling interests in protecting civilians and law enforcement from gun violence and protecting
14 the public safety. Section 32310 furthers these interests by eliminating a particularly lethal subset
15 of magazines, LCMs, that are designed to cause greater fatalities and injuries and are
16 disproportionately used in mass shootings and the killing of law enforcement officers. Order
17 at 8-11; *Fyock*, 779 F.3d at 1000. In addition to common sense, which suggests that the most
18 effective way to eliminate the threat of death, injury, and destruction caused by LCMs is to
19 prohibit their possession, the evidence shows that banning possession of LCMs has the greatest
20 potential to “prevent and limit shootings in the state over the long run.” *NYSRPA*, 804 F.3d
21 at 264; *see also* Order at 9-10. Banning possession of grandfathered LCMs also eliminates
22 obstacles to enforcement of the existing ban on the purchase, sale, transfer, or importation of
23 LCMs. Order at 9-10. Accordingly, “there is a reasonable fit between the ban and California’s
24 important objectives,” Order 10-11, and thus Section 32310 does not violate the Second
25 Amendment. *See NYSRPA*, 804 F.3d at 263-64; *Friedman*, 784 F.3d at 411-12; *Heller II*, 670
26 F.3d at 1260-64; *S.F. Veteran Police Officers Ass’n v. City of S.F.*, 18 F. Supp. 3d 997, 1002-06
27 (N.D. Cal. 2014).

28

1 Because Section 32310 survives intermediate scrutiny and is constitutional, plaintiffs’
2 Second Amendment claim fails as a matter of law. The Court should thus dismiss Count I of the
3 SAC. *See Mahoney v. Sessions*, No. 14-35970, 2017 WL 4126943, at *7 (9th Cir. Sept. 19, 2017)
4 (affirming dismissal of Second Amendment claim where policy “survives intermediate scrutiny
5 and is, therefore, constitutional under the Second Amendment”); *Wilson v. Lynch*, 835 F.3d 1083,
6 1094-95 (9th Cir. 2016) (same); *Hall v. Garcia*, No. C 10-03799 RS, 2011 WL 995933, at *5
7 (N.D. Cal. Mar. 17, 2011) (dismissing Second Amendment claim where official action “bears a
8 substantial relationship to important objective.”).

9 **B. Plaintiffs’ Takings Clause Claims Fail.**

10 Plaintiffs also fail to allege a plausible takings claim under either the United States or the
11 California Constitution. The Takings Clause of the Fifth Amendment, made applicable to the
12 states through the Fourteenth Amendment, provides that private property shall not “be taken for
13 public use, without just compensation.” *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536
14 (2005). Its purpose is to prohibit “[g]overnment from forcing some people alone to bear public
15 burdens which, in all fairness and justice, should be borne by the public as a whole.” *Penn*
16 *Central Transp. Co. v. City of N.Y.*, 438 U.S. 104, 123 (1978) (internal quotations and citations
17 omitted). Takings claims are divided into two classes: physical and regulatory takings. A
18 physical taking occurs when the government physically invades or takes title to property either
19 directly or by authorizing others to do so. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458
20 U.S. 419, 426 (1982). In contrast to a physical taking, a regulatory taking occurs where
21 “government regulation of private property [is] so onerous that its effect is tantamount to a direct
22 appropriation or ouster.” *Lingle*, 544 U.S. at 537. In the context of real property, government
23 regulation that “completely deprives an owner of all economically beneficial use of her property”
24 is generally deemed to be a taking compensable under the Fifth Amendment. *Id.* at 528.

25 The California Constitution provides: “Private property may be taken or damaged for a
26 public use and only when just compensation, ascertained by a jury unless waived has first been
27 paid to, or into court for, the owner.” Cal. Const. art. I, § 19(a). The California Supreme Court
28 has acknowledged the “broader protections granted landowners by the addition of ‘or damaged’

1 to the language of our state’s compensation clause,” *HFH Ltd. v. Superior Court*, 15 Cal. 3d 508,
 2 517-18 (1975), but has generally construed the federal and state takings clauses “congruently,”
 3 *San Remo Hotel, L.P. v. City & Cnty. of S.F.*, 27 Cal. 4th 643, 664 (2002) (collecting cases).⁹

4 Physical and regulatory takings are further divided into facial and as-applied challenges.
 5 *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 686 (9th Cir. 1993). In a facial takings
 6 challenge, a party attacking a statute must demonstrate that its “mere enactment” constitutes a
 7 taking and deprives the owner of all viable use of the property as issue. *Tahoe-Sierra*
 8 *Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 318 (2002). The
 9 Supreme Court has stated that facial takings challenges “face an ‘uphill battle’ since it is difficult
 10 to demonstrate that ‘mere enactment’ of a piece of legislation ‘deprived [the owner] of
 11 economically viable use of [his] property.’” *Suitum v. Tahoe Regional Planning Agency*, 520 U.S.
 12 725, 736 n.10 (1997) (internal and external citations omitted).¹⁰ Plaintiffs have failed to allege
 13 facts sufficient to make this showing.

14 **1. Section 32310 Is Not a Physical Taking.**

15 Insofar as plaintiffs have attempted to allege physical taking claim, they have not
 16 succeeded. The SAC alleges that because the options set forth in Section 32310(d) to store an
 17 LCM out of state or sell it to a licensed dealer are “illusory,” the only way to dispose of an LCM
 18 is to “surrender” it to law enforcement for destruction. SAC ¶¶ 61, 97-98. It further alleges that
 19 to the extent that Section 32310 allows an LCM owner to modify an LCM to bring it into
 20 compliance with the law, this “destroys the functionality” of an LCM and amounts to both a
 21

22 ⁹ The California Supreme Court has explained that the addition in 1879 of the term “or
 23 damaged” to article I, section 19 “was not intended to expand the scope of the constitutional
 24 compensation provision beyond the ambit of eminent domain and public improvements. It
 25 appears, instead, that the words ‘or damaged’ were added to clarify that the government was
 26 obligated to pay just compensation for property damaged in connection with the construction of
 27 public improvements, even if the government had not physically invaded the damaged property.”
 28 *Customer Co. v. City of Sacramento*, 10 Cal. 4th 368, 379 (1995). Section 32310 thus does not
 “damage” property within the meaning of the California Constitution.

¹⁰ An as-applied takings challenge “involves a claim that the particular impact of a
 government action on a specific piece of property requires the payment of just compensation.”
Levald, 998 F.2d at 686 (quoting *Keystone Bituminous Coal Ass’n v. Benedictis*, 480 U.S. 470,
 494 (1987)).

1 physical invasion of and damage to property requiring compensation. *Id.*, ¶ 79. As a threshold
2 matter, these allegations are not supported by fact or logic and do not “state a claim to relief that
3 is plausible on its face.” *Twombly*, 550 U.S. at 570. Further, they do not establish that Section
4 32310 is a physical taking.

5 In a physical taking, the government exercises its eminent domain power to take private
6 property for “public use.” See *Lingle*, 544 U.S. at 536; *Chevron USA, Inc. v. Cayetano*, 224 F.3d
7 1030, 1034 (9th Cir. 2000). By contrast, where, as here, the government acts pursuant to its
8 police power to protect the safety, health, and general welfare of the public, a prohibition on
9 possession of property declared to be a public nuisance is not a physical taking. See *Chi., B. & Q.*
10 *R. Co. v. Illinois*, 200 U.S. 561, 593-594 (1906) (“It has always been held that the legislature may
11 make police regulations, although they may interfere with the full enjoyment of private property
12 and though no compensation is given.”); *Akins v. United States*, 82 Fed. Cl. 619, 622 (2008)
13 (“Property seized and retained pursuant to the police power is not taken for a ‘public use’ in the
14 context of the Takings Clause.”); see also *Everard’s Breweries v. Day*, 265 U.S. 545, 563 (1924);
15 *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887).

16 Recognizing this distinction, a number of courts have rejected Takings Clause challenges to
17 laws banning the possession of dangerous weapons. See *Akins*, 82 Fed. Cl. at 623-24 (restrictions
18 on sale and possession of machine guns not a taking); *Fesjian v. Jefferson*, 399 A.2d 861 (D.C.
19 Ct. App. 1979) (ban on machine guns not a taking); cf. *Gun South, Inc. v. Brady*, 877 F.2d 858,
20 869 (11th Cir. 1989) (suspension on importation of assault weapons not a taking); cf. *Burns v.*
21 *Mukasey*, No. CIVS090497MCECMK, 2009 WL 3756489, at *5 (E.D. Cal. Nov. 6, 2009), *report*
22 *and recommendation adopted*, No. 209CV00497MCECMK, 2010 WL 580187 (E.D. Cal.
23 Feb. 12, 2010) (stating that because the firearm seized was “not taken in order to be put to public
24 use,” “the Takings Clause simply does not apply”).

25 Unlike in cases where the government has physically occupied or appropriated private
26 property for its own use (either directly or through agents), see *Lingle*, 544 U.S. at 536; *Horne v.*
27 *Dept. of Agric.*, 135 S. Ct. 2419, 2427-29 (2015), Section 32310 is an exercise of the State’s
28 police power to protect the public by eliminating the dangers posed by LCMs. Regardless of how

1 plaintiffs choose to divest themselves of an LCM to comply with Section 32310, the purpose of
2 the statute is to remove LCMs from circulation, not to transfer title to the government or an agent
3 of the government for use in service of the public good. Accordingly, it does not amount to a
4 physical taking.

5 **2. Section 32310 Is Not a Regulatory Taking.**

6 The SAC also fails to allege a plausible claim that Section 32310 is a regulatory taking.
7 The SAC sets forth conclusory allegations that Section 32310 “would completely deprive the
8 owners of all economically beneficial uses of their lawfully-owned property, and therefore,
9 constitutes a regulatory taking.” SAC ¶ 77. As a threshold matter, the rule that the deprivation of
10 all economically beneficial use of property constitutes a taking has not been applied outside of the
11 land use context and it is not clear that it is applicable here. *See Lucas v. South Carolina Coastal*
12 *Council*, 505 U.S. 1003, 1027 (1992) (“[I]n the case of personal property, by reason of the State’s
13 traditionally high degree of control over commercial dealings, [one] out to be aware of the
14 possibility that new regulation might even render his property economically worthless (at least if
15 the property’s only economically productive use is sale or manufacture for sale).”).

16 Moreover, and regardless, plaintiffs’ claim is belied by the face of the statute. As plaintiffs
17 acknowledge, until July 1, 2017, Section 32310 provides that LCM owners can protect or realize
18 the economic value of their LCMs by storing them out-of-state or selling them to a licensed
19 firearms dealer. *See* § 32310(d); SAC ¶¶ 61, 75, 96-98. It is also possible to modify an LCM so
20 it can only accept a maximum of ten rounds. *See* § 32425(a) (exempting from Section 32310 the
21 giving of an LCM to “a gunsmith, for the purposes of maintenance, repair, or modification of that
22 large-capacity magazine”). Accordingly, and despite plaintiffs’ unsupported allegations that
23 these methods are “illusory,” *see, e.g.*, SAC, ¶ 61, Section 32310, on its face, does not deprive
24 plaintiffs of all economically beneficial uses of their property and thus plaintiffs cannot state a
25 facial regulatory takings claim. *See Lucas*, 505 U.S. at 1019; *Chevron USA, Inc.*, 224 F.3d at
26 1041-42.

1 Plaintiffs also have not sufficiently alleged an as-applied or “partial regulatory” taking
2 challenge. Even assuming that any such claim is ripe,¹¹ the SAC does not allege facts
3 demonstrating that Section 32310 is a taking in light of: (1) its economic impact on plaintiffs;
4 (2) the extent to which Section 32310 interferes with “distinct investment-backed expectations”;
5 and (3) the “character of the government action.” *Penn Central*, 438 U.S. at 124. The SAC
6 alleges that “many of California’s gun owners, including some members and constituents of the
7 organization plaintiffs, own many magazines, worth substantial amounts of value, for many
8 different types of firearms” and that the financial impact of the loss of “these intrinsic firearm
9 parts would be substantial.” SAC, ¶ 38. It also alleges that plaintiff Flores possesses LCMs that,
10 as part of an antique pistol, have “substantial historical and financial value, and [are]
11 irreplaceable.” *Id.*, ¶ 12. Even overlooking that plaintiffs cannot meaningfully explain why they
12 cannot protect the value of their LCMs by storing them out-of-state, selling, or modifying them,
13 in accordance with Section 32310, the SAC does not allege either a sufficient loss of value from
14 Section 32310 nor any meaningful interference with distinct investment-backed expectations in
15 LCMs that were acquired decades ago. *See Penn Central*, 438 U.S. at 123; *MHC Fin. Ltd. P’ship*
16 *v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013) (81 percent value loss “not . . .
17 sufficient . . . to constitute a taking”); *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177,
18 1195 (Fed. Cir. 2004) (judicial insistence on “severe economic deprivation” stems from nature of
19 regulatory taking claim as arguing that regulatory interference is so severe as to equate to
20 condemnation or appropriation); *cf. Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)
21 (“Government hardly could go on if to some extent values incident to property could not be
22 diminished without paying for every such change in the general law.”); *Hotel & Motel Ass’n of*
23 *Oakland v. City of Oakland*, 344 F.3d 959, 967 (9th Cir. 2003) (“public interest in preventing
24

25 ¹¹ Even if plaintiffs are not required to exhaust administrative remedies and seek
26 compensation from the State, *see Levald*, 998 F.2d at 686, the statute has not been applied and
27 thus there are insufficient facts about the effect of Section 32310 to properly analyze an as-
28 applied claim. A “court cannot determine whether a regulation goes ‘too far’ [so as to constitute
a taking] unless it knows how far the regulation goes.” *Palazzolo v. Rhode Island*, 533 U.S. 606,
622 (2001).

1 activities similar to public nuisances is a substantial one that rarely results in a taking (citation
2 omitted)).

3 Because Section 32310 does not impose any physical invasion or appropriation of private
4 property for public use and does not facially deprive plaintiffs of all economically beneficial use
5 of their LCMs, it is neither a physical nor a regulatory taking and plaintiffs cannot state a
6 plausible takings claim. The Court should thus dismiss Count II of the SAC.

7 **C. Plaintiffs' Vagueness Claim Fails.**

8 Plaintiffs do not and cannot state a vagueness claim.¹² Their facial vagueness claim is not
9 cognizable because, outside of the First Amendment context, courts “do not consider whether the
10 statute is unconstitutional on its face,” but rather “whether the [statute] is impermissibly vague *in*
11 *the circumstances of this case.*” *United States v. Purdy*, 264 F.3d 809, 811 (9th Cir. 2001)
12 (quoting *United States v. Ocegueda*, 564 F.2d 1363, 1365 (9th Cir. 1977)) (emphasis in original);
13 *see also Nichols v. Harris*, 17 F. Supp. 3d 989, 1012 (C.D. Cal. 2014) (rejecting plaintiff’s facial
14 challenge to California’s open carry regulations on vagueness grounds because “facial challenges
15 on the ground of unconstitutional vagueness that do not involve the First Amendment are not
16 cognizable.” (citation omitted)), *appeal docketed*, No. 14-55873 (9th Cir. May 29, 2014).
17 Because plaintiffs’ challenge can only be facial in scope, and because no facial vagueness
18 challenge is cognizable in this case, plaintiffs cannot state a vagueness claim as a matter of law.

19 Even if a vagueness claim could be made in this case, the LCM ban is not
20 unconstitutionally vague. There can be no question that Section 32310 reasonably apprises the
21 public as to what conduct is prohibited under the statute. Section 32310 prohibits the possession
22 of LCMs, and Section 16740 defines LCMs as “any ammunition feeding device with the capacity
23 to accept more than 10 rounds, but shall not be construed to include any of the following: (a) A
24 feeding device that has been permanently altered so that it cannot accommodate more than 10
25 rounds. (b) A .22 caliber tube ammunition feeding device. (c) A tubular magazine that is

26 _____
27 ¹² Counts III (Vagueness) and IV (Vagueness and Overbreadth) both challenge the LCM
28 ban on vagueness grounds, albeit with slightly different allegations. The vagueness allegations in
both counts will be discussed together.

1 contained in a lever-action firearm.” § 16740. There is nothing unconstitutionally vague about
2 the regulatory scope of the LCM ban. *See Cal. Teachers Ass’n v. State Bd. of Educ.*, 271 F.3d
3 1141, 1151 (9th Cir. 2001).

4 Despite the clear scope of the LCM ban, the SAC alleges that it is “hopelessly vague and
5 ambiguous.” SAC, ¶ 3. Plaintiffs’ vagueness challenge rests in large part on the chaptering of
6 two parallel versions of Section 32406, which sets forth certain exemptions to the LCM ban. *Id.*,
7 ¶¶ 83-89, 100-01.¹³ Plaintiffs allege that there is some confusion as to whether SB 1446 pre-
8 amended Proposition 63 with respect to the exceptions to the LCM ban because Section 32406 (as
9 amended by SB 1446) contains several exemptions that are omitted from Section 32406 (as
10 amended by Proposition 63), including, *inter alia*, the exemptions for trustees and persons in
11 possession of a pre-2000 LCM “if no magazine that holds 10 or fewer rounds of ammunition is
12 compatible with that firearm and the person possess the [LCM] solely for use with that firearm.”
13 SAC, ¶¶ 85-89 (citing § 32406(e), (f)). But, as this Court has noted, Order at 19, even if there
14 were some ambiguity as to which version of Section 32406 is operative—and, as discussed below,
15 there is not—Section 32406 (or the LCM ban as a whole) would not be rendered void-for-
16 vagueness merely because a court may be required to determine which version of the statute
17 applies in a given case. *See Karlin v. Foust*, 188 F.3d 446, 469 (7th Cir. 1999) (“[W]hile
18 plaintiffs are correct that the two statutes operate to impose conflicting standards on a physician’s
19 decision to perform an emergency abortion on a minor, this conflict does not render AB 441 void
20 for vagueness. . . . Instead, the conflicting provisions in the two statutes concerning emergency
21 abortions for minors creates a question of implied repeal under Wisconsin law.”).

22 Regardless, and as this Court already has determined, there is no ambiguity because the
23 amendments of Proposition 63, enacted *after* SB 1446, take precedence over those contained in
24 SB 1446. *See* Order at 19; *Bustamante*, 57 Cal. App. 4th at 701 (“Where two laws on the same

25 ¹³ Plaintiffs also allege that the LCM ban is unconstitutionally vague due to some
26 purported ambiguity concerning the “options for disposal” of LCMs and the alleged
27 impracticality of some of those options. *See, e.g.*, SAC, ¶¶ 90-91, 97. Any alleged impracticality
28 of compliance, however, would not render the LCM vague, and any vagueness on the margins of
the statute would not render the statute as a whole vague. *See Cal. Teachers Ass’n*, 271 F.3d at
1151.

1 subject, passed at different times, are inconsistent with each other, the later act prevails.”
2 (citations omitted)). Prior to the passage of Proposition 63 by California voters, the Official
3 Voter Information Guide explained that Proposition 63 would modify certain exceptions to the
4 LCM ban contained in SB 1446:

5 Beginning July 2017, recently enacted law [SB 1446] will prohibit most of these
6 individuals [who acquired their LCMs before 2000] from possessing these magazines.
7 Individuals who do not comply are guilty of an infraction. However, there are various
8 individuals who will be exempt from this requirement—such as an individual who owns a
9 firearm (obtained before 2000) *that can only be used with a large-capacity magazine*.
Proposition 63 *eliminates several of these exemptions*, as well as increases the maximum
penalty for possessing large-capacity magazines.

10 (Cal. Secretary of State, Official Voter Information Guide, at 87, attached as Exhibit C to the
11 accompanying RJN, *also available at* [http://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-](http://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf)
12 [vig.pdf](http://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf).)¹⁴

13 In an attempt to support their vagueness allegations, plaintiffs attach as Exhibit A to the
14 SAC the Department of Justice’s Finding of Emergency, filed with the Office of Administrative
15 Law (“OAL”) in connection with proposed LCM regulations that were later withdrawn on
16 December 29, 2016.¹⁵ The Finding of Emergency mentions that, “[i]n anticipation of
17 [Proposition 63’s] passages [sic], the Legislature pre-amended Proposition 63 with the passage of
18 Senate Bill 1446.” SAC, Ex. A, at 1. The Finding of Emergency, however, *does not* state that
19 SB 1446 pre-amended Proposition 63 in any respect that is material to this litigation. When the
20 Legislature intended to pre-amend Proposition 63, it stated so explicitly in the statute, as was the
21 case when the Legislature passed Senate Bill 1235 (SB 1235)—on the same day as SB 1446—to
22 pre-amend Proposition 63’s ammunition sale requirements. *See* Cal. Stats. 2016, ch. 55
23 (SB 1235) (“This bill would, if [Proposition 63] is enacted by the voters at the November 8, 2016,
24

25 ¹⁴ The Court may take judicial notice of the Official Voter Information Guide, as it is an
26 official government document obtained from a source “whose accuracy cannot reasonably be
questioned.” Fed. R. Evid. 201.

27 ¹⁵ OAL, Amended Notice of Withdrawal (Dec. 29, 2016), *available at*
28 <https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/regs/lcmp-withdrawal.pdf>.

1 statewide general election, amend the act . . .). In contrast to SB 1235, neither the text of SB
 2 1446 nor its legislative history disclose any intention to pre-amend Proposition 63.

3 For these reasons, Plaintiffs have failed to state a vagueness challenge to the LCM ban and
 4 the Court should dismiss Counts III and IV of the SAC.

5 **D. Plaintiffs’ Overbreadth Claim Fails.**

6 Plaintiffs’ overbreadth claim also fails. As a threshold matter, the overbreadth doctrine
 7 simply does not apply outside of the First Amendment context and, thus, is inapplicable in this
 8 case. *See, e.g.*, Order at 22; *Salerno*, 481 U.S. at 745 (“[W]e have not recognized an
 9 ‘overbreadth’ doctrine outside the limited context of the First Amendment.” (citation omitted));
 10 *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 101 (2d Cir. 2012) (“Overbreadth challenges are
 11 generally limited to the First Amendment context.” (citing *Salerno*, 481 U.S. at 745)); *United*
 12 *States v. Chester*, 628 F.3d 673, 688 (4th Cir. 2010) (“[I]mporting the over-breadth doctrine . . .
 13 into the Second Amendment context would be inappropriate.”).¹⁶ Because they have not alleged
 14 a First Amendment challenge to the law, overbreadth doctrine does not apply, and plaintiffs
 15 cannot state a claim that the LCM ban is unconstitutionally overbroad.

16 Even if the doctrine were applicable in this case, plaintiffs’ overbreadth claim would be
 17 redundant of their Second Amendment claim. A statute is unconstitutionally overbroad only
 18 when it infringes upon or would have the tendency to chill constitutionally protected activity.
 19 *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800-01 (1984) (“There
 20 must be a realistic danger that the statute itself will significantly compromise recognized First
 21 Amendment protections . . . for it to be facially challenged on overbreadth grounds.”). Plaintiffs
 22 contend that Section 32310 is overbroad because “its provisions capture a substantial amount of
 23 constitutionally-protected activity, the prohibition of which does not advance the stated
 24 justification for the ban, and the law is not readily susceptible to a limiting construction that
 25 would render it constitutional.” SAC, ¶ 4; *see also id.*, ¶ 103 (alleging that “the ban sweeps up a

26 _____
 27 ¹⁶ Even in the First Amendment context, overbreadth doctrine has been recognized as
 28 “strong medicine” and is employed by the courts “with hesitation.” *New York v. Ferber*, 458 U.S.
 747, 769 (1982).

1 substantial amount of constitutionally-protected conduct under the Second Amendment”).
2 Plaintiffs’ overbreadth claim is contingent on—and duplicative of—their Second Amendment
3 claim and does not provide separate or independent grounds for relief. *See Chaudhry v. City of*
4 *Los Angeles*, 751 F.3d 1096, 1106 (9th Cir. 2014) (holding that claim is not duplicative and
5 subject to dismissal if it would entitle plaintiff to additional relief unavailable in connection with
6 other claims).

7 Accordingly, plaintiffs cannot state an overbreadth claim as a matter of law in this case.
8 The Court should thus dismiss Count IV of the SAC.

9 **E. Plaintiffs’ Equal Protection Clause Claim Fails.**

10 Plaintiffs’ barely-elaborated equal protection claim is particularly inadequate. The Equal
11 Protection Clause of the Fourteenth Amendment “commands that no State shall ‘deny to any
12 person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that
13 all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*,
14 473 U.S. 432, 439 (1985). Legislative provisions that arbitrarily or irrationally create discrete
15 classes cannot withstand constitutional scrutiny under the Equal Protection Clause. *Romer v.*
16 *Evans*, 517 U.S. 620, 623 (1996). However, courts must balance this principle with the “practical
17 necessity that most legislation classifies for one purpose or another, with resulting disadvantage
18 to various groups or persons.” *Id.* at 631 (citations omitted). In an attempt to reconcile the
19 promise of equal protection with the reality of lawmaking, courts apply the most searching
20 constitutional scrutiny to those laws that burden a fundamental right or target a suspect class, such
21 as those based on race, national origin, or religion. *Id.* With respect to protected classifications,
22 the government is required to demonstrate that the classification is narrowly tailored to further
23 compelling government interests. *See Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Laws that
24 do not burden a protected class or infringe on a constitutionally protected fundamental right are
25 subject to rational basis review. *Romer*, 517 U.S. at 631. Under the deferential rational basis test,
26 statutes are generally “presumed valid” and upheld if the classification drawn by the statute is
27 rationally related to a legitimate state interest. *Fields v. Legacy Health Sys.*, 413 F.3d 943, 955
28

1 (9th Cir. 2005). Such statutes must be “wholly irrational” to violate the Equal Protection Clause.
2 *Id.*¹⁷

3 The SAC alleges that Penal Code section 32445 provides an exception to Section 32310 for
4 LCMs that are loaned and used “solely as a prop for a motion picture, television, or video
5 production.” SAC, ¶ 110. The SAC alleges this exception, which favors a “selected few
6 politically favored citizens” is discriminatory and violates equal protection. *Id.*, ¶¶ 110-115.
7 Because Section 32310 does not implicate a suspect class of persons or infringe on a group’s
8 fundamental rights with no valid justification,¹⁸ plaintiffs’ equal protection claim receives
9 rational-basis review. *See Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037, 1047 (9th Cir. 2002).
10 Challenged legislation survives rational basis review as long as, in enacting legislation, the
11 legislature is acting in pursuit of a permissible government interest that bears a rational
12 relationship to the means chosen to achieve that interest. *Heller v. Doe*, 509 U.S. 312, 319
13 (1993). Under rational basis review, when legislative judgment is called into question on equal
14 protection grounds and the issue is debatable, the decision of the legislature must be upheld if
15 “any state of facts either known or which could reasonably be assumed affords support for it.”
16 *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938). “[T]he burden is on the one
17 attacking the legislative arrangement to negative every conceivable basis which might support it.”
18 *Heller*, 509 U.S. at 319 (internal quotation marks omitted).

19
20 ¹⁷ Plaintiffs also allege that Section 32310 violates the Equal Protection Clause of the
21 California Constitution, Cal. Const. art I, § 7. The California Constitutional provisions granting
22 equal protection have been found “ ‘substantially the equivalent’ of the equal protection clause of
23 the Fourteenth Amendment to the federal Constitution.” *Serrano v. Priest*, 18 Cal. 3d 728, 763,
24 (Cal. 1976) *supplemented*, 20 Cal. 3d 25 (Cal. 1977); *Walgreen Co. v. City & County of San*
25 *Francisco*, 185 Cal. App. 4th 424, 434 n.7 (2010).

26 ¹⁸ To the extent that plaintiffs allege that Section 32310 impinges on the fundamental right
27 to bear arms, these allegations are duplicative of plaintiffs’ Second Amendment allegations and
28 should be rejected. *See Kwong v. Bloomberg*, 723 F.3d 160, 170 n.19 (2d Cir. 2013) (“Like every
Circuit to have addressed this issue, we simply conclude that plaintiffs should not be allowed to
use the Equal Protection Clause ‘to obtain review under a more stringent standard’ than the
standard applicable to their Second Amendment claim.” (quoting *Woollard v. Gallagher*, 712
F.3d 865, 873 n.4 (4th Cir. 2013))); *Flanagan v. Harris*, No. LACV1606164JAKASX, 2017 WL
729788, at *5 (C.D. Cal. Feb. 23, 2017) (“An Equal Protection claim brought under the
Fourteenth Amendment that is the same as one brought simultaneously under a different
constitutional provision cannot provide an independent basis for relief.”).

1 The SAC does not allege that there is no conceivable basis for allowing individuals, having
2 obtained a permit, to use an empty LCM as a prop for a motion picture, television, or video
3 production while prohibiting people from possessing and using LCMs in generally. The SAC
4 also does not allege that there is no rational relationship between Section 32310 and the
5 government's compelling interests in protecting the public safety and reducing the lethality and
6 incidence of mass shootings. Moreover, given that this Court has found that Section 32310
7 survives intermediate scrutiny, Order at 9-11, any such claim must fail. The Court should thus
8 dismiss Count V of the SAC.

9 **F. To the Extent the SAC Alleges a Section 1983 Claim, this Claim Fails.**

10 Insofar as plaintiffs are alleging a claim under 42 United States Code section 1983, the SAC
11 does contain various allegations that defendants have acted in violation of section 1983 by
12 violating the Second Amendment and the Takings, Due Process, and Equal Protection Clauses.
13 *See, e.g.*, SAC, ¶ 67. However, because plaintiffs have failed to adequately allege any
14 constitutional violation for the reasons set forth above, any section 1983 claim should be
15 dismissed.

16 **CONCLUSION**

17 For the foregoing reasons, defendants respectfully request that the Court dismiss the Second
18 Amended Complaint in its entirety with prejudice and without leave to amend.

19 Dated: September 27, 2017

Respectfully Submitted,

20
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