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and SECOND AMENDMENT FOUNDATION

13
14 UNITED STATES DISTRICT COURT

15 FOR THE EASTERN DISTRICT OF CALIFORNIA

16 WILLIAM WIESE, et al.,

17
18 Plaintiffs,

19 vs.

20 XAVIER BECERRA, in his official capacity as
21 Attorney General of California, et al.,

22 Defendants.
23

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

**PLAINTIFFS' OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS THIRD AMENDED
COMPLAINT PURSUANT TO FEDERAL RULE
OF CIVIL PROCEDURE 12(B)(6)**

Date: February 19, 2019

Time: 1:30 p.m.

Courtm. 5

Judge: Sr. Judge William B. Shubb

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I. INTRODUCTION

California has generally banned the importation, manufacture, sale, or receipt of large-capacity firearm magazines since 2000. And thus, for 18 years, California gun owners have been forced to live with a constitutionally unacceptable, but politically compelled compromise: that the further acquisition, importation, or manufacture of large-capacity magazines would be prohibited, but that gun owners – including the individual Plaintiffs herein – would be permitted to keep their existing lawfully acquired and possessed property as “grandfathered” items.

In 2016, the Legislature and the drafters of Proposition 63 reneged on that arrangement. Seventeen years after the fact, they required that virtually all owners of large-capacity magazines either remove them from the State, sell them to a licensed firearms dealer, or “surrender” them to the State. None of these options allowed a “grandfathered” magazine possessor to keep his or her property, and therefore, they are being forcibly dispossessed of them.

As we have before, we say this was a bridge too far. Plaintiffs are seeking declaratory and injunctive relief to challenge the *entire* confiscatory ban on large capacity magazines (the “LCM ban”). Here, we oppose the State’s Motion to Dismiss the Third Amended Complaint (“TAC”) (“MTD” or the “Motion”) as follows:

First, the provisions at issue – which include a retroactive prohibition on lawfully-acquired parts of firearms, and parts intrinsic to them, constitute a categorical ban that violates the Second Amendment to the United States Constitution. Plaintiffs will show at trial that the magazines themselves are integral firearm parts, which cannot be so readily and easily banned today under the Supreme Court’s precedents. Plaintiffs will be able to show that the subject magazines are arms, and/or parts of arms, *not both “dangerous and unusual,”* and that they are in widespread common use, for lawful purposes, including self-defense. Therefore, they are protected from the State’s categorical ban under the Supreme Court’s mandate in *District of Columbia v. Heller*. To the extent that any review of the LCM ban should be subject to some form of scrutiny, such review should not involve a balancing of interests that is clearly prohibited by *Heller*, and, in any event, the ban would fail to pass constitutional muster under any *proper*

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1 application of constitutional scrutiny, even the “intermediate scrutiny” standard that the State
2 seeks.

3 Second, this retroactive ban on lawfully-possessed private property would completely
4 dispossess Plaintiffs and thousands of others like them of important, valuable, and
5 Constitutionally-protected property. Therefore, the retroactive LCM ban amounts to a violation
6 of the Takings and Due Process Clauses of the Federal and state constitutions, as the State in no
7 way provides or allows for just compensation to be paid to “grandfathered” magazine owners
8 who will lose, in many instances, their right to keep and maintain their valuable, and in some
9 cases irreplaceable, property, and will stand exposed to criminal sanctions should this ban be
10 enforced.

11 Further, the retroactive LCM ban suffers from constitutionally unacceptable problems in
12 vagueness and overbreadth, particularly as the enactment of two different versions of the LCM
13 ban in 2016 resulted in the chaptering of two current, live, and inconsistent versions of the law,
14 neither of which satisfies the fundamental due process requirements for adequate notice of what
15 is and is not prohibited under the law.

16 For these reasons, and others as discussed at length below, the State’s Motion should be
17 denied.
18

19 20 **II. STANDARD OF REVIEW**

21 On a motion to dismiss, a court must accept as true all material allegations of the
22 complaint, and construe the complaint in favor of the complaining party. *Gladstone Realtors v.*
23 *Vill. of Bellwood*, 441 U.S. 91, 109 (1979) (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975));
24 *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010) (“We accept as true all
25 well-pleaded allegations of material fact, and construe them in the light most favorable to the
26 non-moving party.”). The court “will hold a dismissal inappropriate unless the plaintiffs’
27 complaint fails to ‘state a claim to relief that is plausible on its face.’” *Zucco Partners, LLC v.*
28 *Digimarc Corp.*, 552 F.3d 981, 989 (9th Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550

1 U.S. 544, 570 (2007)).
2

3 **III. STATEMENT OF FACTS**

4 The following facts are largely taken from Plaintiffs’ Third Amended Complaint
5 (“TAC”), filed February 26, 2018 (Dkt. #76).

6 **A. FIREARM AMMUNITION MAGAZINES AND THE ORIGINAL CALIFORNIA MAGAZINE BAN**

7 Firearm ammunition magazines and feeding devices are intrinsic parts of all semi-
8 automatic firearms, which were designed, developed, produced, and sold in large quantities
9 starting in the early 20th Century. Today, a vast majority of constitutionally-protected firearms
10 in common use for lawful purposes – including handguns, “the quintessential self-defense
11 weapon,” *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008) – are self-loading, semi-
12 automatic firearms that require a magazine to feed each successive round of ammunition.

13 A magazine is simply “a receptacle for a firearm that holds a plurality of cartridges or
14 shells under spring pressure preparatory for feeding into the chamber. Magazines take many
15 forms, such as box, drum, rotary, tubular, etc. and may be fixed or removable.”

16 (<https://saami.org/saami-glossary/?letter=M>.) Plaintiffs here will easily prove that the vast
17 majority of the firearms in common use for lawful purposes, particularly handguns, sold at retail
18 to the non-military market (e.g., civilian and law enforcement purchasers) are semi-automatic,
19 and contain removable magazines. (TAC, ¶ 32.) And moreover, Plaintiffs will show that
20 ammunition feeding devices and magazines are therefore an inherent operating part of, and
21 inseparable from, functioning semi-automatic firearms. (*Id.*) Plaintiffs will further show that all
22 semi-automatic firearms are essentially inoperable without them. (*Id.*) Modern semi-automatic
23 firearms of the kind in use for lawful purposes (including self-defense) sold at retail in the non-
24 military market generally include at least one magazine intended to be used as a part of those
25 firearms. (*Id.*)

26
27 Although an exact number may never be known, over the past century, many millions of
28 magazines certainly have existed, lawfully within the United States, as these inherent parts of

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1 semi-automatic firearms commonly held and used by Americans for lawful purposes such as
2 self-defense, competition, training, and sport. (TAC, ¶ 33.) At trial, Plaintiffs will demonstrate,
3 through data supporting a study by the National Shooting Sports Foundation, that magazines
4 capable of holding more than 10 rounds of ammunition accounted for approximately 115 million,
5 or approximately half, of all magazines owned in the United States between 1990 and 2015. It
6 can also be safely assumed that many more such magazines were manufactured within or
7 imported into the United States (and California specifically) for sale, both prior to 1990 as well
8 as after 2015.

9 Along with the rest of the nation, and up through 1999, millions of California citizens,
10 including Plaintiffs herein, lawfully acquired and possessed semi-automatic firearms – many of
11 which contained magazines capable of holding more than ten rounds of ammunition. However,
12 in 1999, through passage of Senate Bill 23, California enacted legislation generally banning
13 methods of *acquiring* magazines that hold more than ten rounds, legislatively branding them
14 “large-capacity magazines” as currently defined in Penal Code § 16740.¹ And since that time,
15 the Code has generally forbidden the manufacture, importation, sale, or receipt of any large-
16 capacity magazine. *See* Cal. Pen. Code § 32310(a) (formerly § 12020(a)(2)).

17 However, and as part of the legislative arrangement in connection with Sen. Bill 23, as
18 enacted, the continued possession of lawfully-acquired “large capacity magazines” up to that
19 point (i.e., “grandfathered” magazines) was not prohibited and would still be lawful. Individual
20 Plaintiffs Wiese, Morris, Cowley, Macaston, Flores, and Dang, and the members of the class of
21 persons on whose behalf this action is brought, are law-abiding citizens, who are neither
22

23 _____
24 ¹To be sure, the very term “large-capacity magazine” is an irksome and controversial label. In
25 states where there are no limits on magazine capacity, the term “large capacity magazine” is
26 generally not even used. Where it is used, the mere capability to hold more than 10 rounds is not
27 necessarily enough for the label to apply. *See e.g.*, Colo. Rev. Stat. § 18–12–301(2)(a)(I)
28 (defining “large capacity magazine” as those having capacity to accept more than 15 rounds).
Indeed, consistent with their commonality and popularity among law-abiding gun owners, in
most states, magazines that hold more than 10 rounds are considered “*standard* capacity
magazines.” We use the term “large-capacity magazine” in this opposition, as we must, solely
because that is the codified definition at issue.

1 prohibited from the possession of firearms or ammunition nor exempt from California’s
2 restrictions upon firearms and ammunition, and who lawfully possessed and used such large-
3 capacity magazines with their firearms up through and including December 31, 1999.

4 **B. SENATE BILL 1446 AND PROPOSITION 63**

5 In 2016, gun control measures in California moved forward at a steady, and
6 unprecedented pace. Among these measures included additional laws pertaining to large-
7 capacity magazines, contained in Senate Bill 1446 (“SB 1446”) and Proposition 63.

8 Purportedly concerned about what they presumably viewed as a prevalence of mass
9 shootings and the terrorist attacks in San Bernardino, California, on December 2, 2015 (*see* Req.
10 for Jud. Notice, Exhibit B, p. 4), the Legislature passed SB 1446, which amended Penal Code §
11 32310(b) to make it a criminal offense to possess a large-capacity magazine, “regardless of the
12 date the magazine was acquired[.]” The law as signed would have required a person in lawful
13 possession of any large-capacity magazines prior to July 1, 2017, to dispose of such magazine(s)
14 by surrender, sale to a licensed firearms dealer, or removal from the State in the manner provided
15 by the statute. The provisions of SB 1446 were signed into law by then-Governor Brown on July
16 1, 2016, and became effective on January 1, 2017.

17 The author and proponents of SB 1446 never considered the actual value of the
18 magazines subject to the ban, payment of “just compensation” to the owners of previously
19 grandfathered magazines who would surrender their magazines to law enforcement, or the
20 existence of any type of market that would be available to the owners who attempt to dispose of
21 their LCMs through forced sales to licensed firearm dealers. The bill’s author and sponsors
22 simply assumed that the State, via local law enforcement agencies, had the power to confiscate
23 the magazines under the “police powers” of the State, and without providing the owners any
24 compensation. (*See* Req. for Jud. Notice, Exhibit B, pp. 4-6.)

25 Then, on November 8, 2016, California voters enacted Proposition 63 (titled the “Safety
26 for All Act”), a measure that was sponsored and heavily promoted as a “gun safety” measure by
27 Lt. Governor Gavin Newsom. (*See* Req. for Jud. Notice, Exhibit E.) Proposition 63 amended
28

1 Penal Code §§ 32310, 32400, 32405, 32410, 32425, 32435, 32450, added section 32406, and
2 repealed section 32420 by initiative statute, which changed the law to totally prohibit and
3 criminalize the possession of large-capacity magazines as of July 1, 2017. Proposition 63 took
4 effect the day after the election. *See* Cal. Const., Art. II, § 10(a) (“An initiative statute or
5 referendum approved by a majority of votes thereon takes effect the day after the election unless
6 the measure provides otherwise.”).

7
8 With regard to those provisions of Proposition 63 dealing with large-capacity magazines,
9 the proponents and drafters likewise clearly had mass shootings in mind, a type of crime that has
10 dominated our news during the past decade. Specifically, contained within the “Findings and
11 Declarations” (section 2) of Proposition 63, the measure stated:

12 11. Military–style large-capacity ammunition magazines—some capable of
13 holding more than 100 rounds of ammunition—significantly increase a shooter’s
14 ability to kill a lot of people in a short amount of time. That is why these large
15 capacity ammunition magazines are common in many of America’s most horrific
16 mass shootings, from the killings at 101 California Street in San Francisco in
17 1993 to Columbine High School in 1999 to the massacre at Sandy Hook
18 Elementary School in Newtown, Connecticut in 2012.

19 12. Today, California law prohibits the manufacture, importation and sale of
20 military-style, large capacity ammunition magazines, but does not prohibit the
21 general public from possessing them. We should close that loophole. No one
22 except trained law enforcement should be able to possess these dangerous
23 ammunition magazines.

24 (Prop. 63, § 2; *see* Req. for Jud. Notice, Exhibit E.)

25 As defendants’ motion admits, mass shootings were the stated *raison d’être* justifying
26 these new magazine restrictions. However, Plaintiffs will demonstrate at trial, through expert
27 testimony, that *pre-ban* (i.e., lawfully-held, since before 2000) large-capacity magazines
28 generally have *not* been used in mass shootings. It is true that, in some of the incidents, large-
capacity magazines were used, such as in the San Bernardino terrorist attack of December 2,
2015, which the Legislature specifically cited as a catalyst justifying passage of SB 1446. (*See*
Req. for Jud. Notice, Exh B at p. 4.) But in that event, given the relatively young age of the
shooters and that they obtained their weapons through straw purchases in close proximity to the

1 attacks, it is reasonably inferable that their large-capacity magazines were either illegally
 2 imported or manufactured. And the State is greatly overstating the case in suggesting that such
 3 magazines are responsible for causing harm across the field of *all crime* with its sweepingly
 4 broad and entirely unsupportable assertions like LCMs “are disproportionately used in crime.”
 5 (MTD at 3:5-6.) In short, Plaintiffs’ evidence will show that the State’s justification for this ban
 6 is illusory because there is no current evidence that legally-possessed large-capacity magazines
 7 have been involved in mass shooting incidents in California since the year 2000. And more to the
 8 point, Plaintiffs’ clear and detailed allegations on these factually determinative points must be
 9 accepted as true in determining whether they have crossed the low threshold for overcoming the
 10 State’s MTD and retaining their right to have these important claims heard. *Daniels-Hall v. Nat’l*
 11 *Educ. Ass’n*, 629 F.3d at 998.

12
 13 **C. THE INSTANT ACTION**

14 Plaintiffs commenced the instant action on April 28, 2017, and filed their First Amended
 15 Complaint on June 6, 2017. (Dkt. No. 7.) Plaintiffs Wiese, Morris, Cowley, Macaston, Flores,
 16 and Dang are individual and law-abiding California residents, who acquired, prior to 2000, large-
 17 capacity magazines, as intrinsic parts of their legally-possessed firearms. Each of these
 18 individual plaintiffs wishes to keep these magazines in the State of California, and is naturally
 19 unwilling to destroy or “surrender” his property to the State. Some of the Plaintiffs have “pre-
 20 ban” magazines of substantial value, either intrinsically or because they have historical value.
 21 (TAC, ¶ 12.) Some of these magazines are the only magazines that the Plaintiffs may have for
 22 that particular firearm. (*Id.*, ¶ 11, 12.) And some of the magazines are the only magazines that
 23 were ever made for that particular firearm. (*Id.*, ¶ 13.)

24
 25 Plaintiffs, including the organizational plaintiffs, are bringing this matter individually,
 26 and as representatives on behalf of the class of individuals who are or would be affected by the
 27 ban; that is, those law-abiding residents, who are not otherwise exempt, and who lawfully
 28 possessed large-capacity magazines in this State before December 31, 1999. (TAC, ¶ 7.) *See*

1 *Residents of Beverly Glen, Inc. v. City of Los Angeles*, 34 Cal.App.3d 117 (1973); *Tenants Assn.*
2 *of Park Santa Anita v. Southers*, 222 Cal.App.3d 1293, 1299-1300 (1990) (a right to sue in a
3 representative capacity may be recognized where the question is one of public interest).

4 Plaintiffs filed a motion for a temporary restraining order and issuance of a preliminary
5 injunction to enjoin enforcement of the law, on June 12, 2017 (Dkt. #9). On June 29, 2017, this
6 Court denied Plaintiffs' motion.² (Dkt. #52). By stipulation of the parties, and order of this
7 Court (Dkt. #54), Plaintiffs filed their Second Amended Complaint on August 17, 2017 (Dkt.
8 #59). Defendants likewise moved to dismiss the Second Amended Complaint under FRCP
9 12(b)(6), and this Court granted the motion on February 7, 2018 (Dkt. #74), under the same
10 reasoning as justified its prior dismissal. This Court granted the Plaintiffs leave to amend
11 consistent with the Court's Order.

12 On February 26, 2018, Plaintiffs filed the current and Operative Third Amended
13 Complaint. Plaintiffs' amendments directly allege, make it clear that they intend to prove and
14 can prove, the ultimate fact that the LCM ban would not reduce the incidence or lethality of mass
15 shootings. Firstly, the TAC clarifies that the express and stated rationale for the new LCM ban
16 lies in the supposed prevention of mass shootings, and in likewise calling the grandfathered
17 possession exemption a "loophole." (TAC, ¶ 41). Moreover, we directly allege that which was
18 stated and discussed at length in connection with our motion for preliminary injunction, i.e., that
19 LCMs have not been used in mass shootings in California since the prohibition was enacted.
20

21 _____
22 ²As this Court is aware, on that same day, the District Court for the Southern District of
23 California granted the plaintiffs' motion for a preliminary injunction there, enjoining
24 substantially those same portions of the LCM ban that were the subject of Plaintiffs' motion in
25 the instant case. *Duncan v. Becerra*, Civ. No. 3:17-01017-BEN-JLB, Hon. Roger T. Benitez
26 presiding. Judge Benitez' order in that matter rendered the prospect of an appeal of this Court's
27 order largely moot, since any interlocutory appeal of the denial of an injunction would have
28 required the Plaintiffs to show continuing "serious, perhaps irreparable consequence" from this
Court's order. *See Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981). It also inevitably shows
that Plaintiffs here have at least "state[d] a claim to relief that is plausible on its face." *Zucco*
Partners, LLC, 552 F.3d at 989 (quoting *Twombly*, 550 U.S. at 570)). The Ninth Circuit has
since affirmed Judge Benitez' grant of the preliminary injunction against this ban. *Duncan v.*
Becerra, 742 Fed.App'x 218 (9th Cir. 2018).

1 (Id., ¶ 42). And moreover, Plaintiffs clarify their assertion that actual intermediate scrutiny, to
2 the extent that it must be applied, requires the State to prove a reasonable fit between the law and
3 the substantial objective that it ostensibly advances, and that the State has failed to carry this
4 burden. (Id., ¶ 70).

5 In short, Plaintiffs have alleged and are here prepared to prove at trial that legally-owned
6 (grandfathered) LCMs have not been involved in California mass shootings since the original
7 ban was enacted in 2000 (*id.*, ¶ 42), and the lack of the State’s evidence otherwise shows that the
8 wide breadth and confiscatory nature of the new LCM ban cannot be justified.

9
10 **III. ARGUMENT**

11 **A. IN EVALUATING PLAINTIFFS’ SECOND AMENDMENT CLAIMS, THIS COURT SHOULD**
12 **REJECT ANY INTEREST-BALANCING APPROACH, WHICH WOULD CLEARLY BE**
13 **INCONSISTENT WITH *HELLER*.**

14 **1. Because the LCM Ban is Tantamount to a Confiscation of a Widely-Used,**
15 **Constitutionally-Protected Class of Arms, *Heller*’s Categorical Approach**
16 **Controls.**

17 Traditionally, in discussing Second Amendment claims, the parties at the outset routinely
18 recite standards of review leading to their preferred forms of scrutiny. Indeed, the State,
19 following suit, cites *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013) to shuttle us
20 toward the “two-step” approach in leading to what the State claims is “an appropriate level of
21 scrutiny.” (Def. Motion at 11:3-8). *See also Teixeira v. County of Alameda*, 873 F.3d 670, 682
22 (9th Cir. 2017) (en banc) (quoting *Chovan* at 1136 (“We apply a two-step inquiry to examine
23 *Teixeira*’s claim ... and ... we then determine the ‘appropriate level of scrutiny.’”). And the
24 State thus argues that even if a statewide, confiscatory magazine ban does implicate Second
25 Amendment interests – as if that is still somehow a debatable point³ – the law meets and survives

26
27 ³The Ninth Circuit has already settled this. *Fyock v. City of Sunnyvale*, 779 F.3d 991, 999 (9th
28 Cir. 2015) (“Because Measure C restricts the ability of law-abiding citizens to possess large-
capacity magazines within their homes for the purpose of self-defense, we agree ... that Measure
C may implicate the core of the Second Amendment.”).

1 “intermediate scrutiny” because it merely “eliminat[es] a particularly lethal subset of magazines”
2 (*id.*, at 11:24-25), as simply a matter of “common sense” (*id.*, at 3:16).

3 The State, however, completely glosses over what is perhaps the most salient point in
4 *Heller*: a means-end analysis is *not* to be used – and must be bypassed completely – when a
5 textual and historical analysis shows that the law at issue effectuates a ban against any category
6 of protected arms. In other words, *Heller* commands that governments may only ban classes of
7 arms that have been banned in our “historical tradition,” such as firearms that are *both*
8 “dangerous and unusual,” and thus are not the sort of lawful weapons that citizens have
9 commonly possessed and used for self-defense. 554 U.S. at 627-628. If the law amounts to an
10 impermissible ban on such a category of firearms, unless one of the narrow set of “longstanding”
11 exceptions happens to apply, it must be struck down without resort to or need for any “level of
12 scrutiny.” “[U]nder [*Heller*], ‘complete prohibitions’ of Second Amendment rights are always
13 invalid. [...] It’s appropriate to strike down such ‘total ban[s]’ without bothering to apply tiers
14 of scrutiny because no such analysis could ever sanction obliterations of an enumerated
15 constitutional right. [Citation.] With this categorical approach to such bans, [*Heller*] ensured
16 that judicial tests for implementing gun rights would not be misused to swallow those rights
17 whole.” *Wrenn v. District of Columbia*, 864 F.3d 650, 665 (D.C. Cir. 2017) (citing *Heller*, 554
18 U.S. at 629); *Powell v. Tompkins*, 783 F.3d 332, 347 (1st Cir. 2015) (“Together, *Heller* and
19 *McDonald* establish that states may not impose legislation that works a complete ban on the
20 possession of operable handguns in the home by law-abiding, responsible citizens for use in
21 immediate self-defense.”); *see also* Eugene Volokh, *Implementing the Right to Keep and Bear*
22 *Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev.
23 1443, 1463 (2009) (“Absent [from *Heller*] is any inquiry into whether the law is necessary to
24 serve a compelling government interest in preventing death and crime, though handgun ban
25 proponents did indeed argue that such bans are necessary to serve those interests and that no less
26 restrictive alternative would do the job”); Joseph Blocher, *Categoricalism and Balancing in First*
27 *and Second Amendment Analysis*, 84 N.Y.U. L. Rev. 375, 380 (2009) (“Rather than adopting one
28 of the First Amendment’s many Frankfurter-inspired balancing approaches, the majority [in

1 *Heller*] endorsed a categorical test under which some types of ‘Arms’ and arms-usage are
2 protected absolutely from bans and some types of ‘Arms’ and people are excluded entirely from
3 constitutional coverage.”).

4 In this regard, the *Heller* majority itself ultimately undertook this categorical approach,
5 holding simply that the handgun ban at issue there “amounts to a prohibition of an entire class of
6 ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose. The
7 prohibition extends, moreover, to the home, where the need for defense of self, family, and
8 property is most acute. Under any of the standards of scrutiny that we have applied to
9 enumerated constitutional rights, banning from the home ‘the most preferred firearms in the
10 nation to ‘keep’ and use for protection of one’s home and family,’ would fail constitutional
11 muster.” *Heller*, 554 U.S. at 628-629 (citing *Parker v. District of Columbia*, 478 F.3d 370, 400
12 (D.C. Cir. 2007)).

13 And therefore, the *proper* threshold inquiry here should not simply be whether a law
14 merely “implicates” Second Amendment concerns, but whether the possession of certain
15 weapons (such as handguns – or in this case, semi-automatic weapons containing *standard-*
16 *capacity* magazines) is constitutionally protected because they have not traditionally been banned
17 and are in common use by law-abiding citizens. *See Friedman v. City of Highland Park*, 784
18 F.3d 406, 414 (7th Cir.2015) (Manion, J., dissenting) (“[W]here, as here, the activity is directly
19 tied to specific classes of weapons, we are faced with an additional threshold matter: whether the
20 classes of weapons regulated are commonly used by law-abiding citizens.”).

21 In considering whether and how to apply this categorical approach, we look at the pillars
22 of text, history, and tradition. And in determining whether the magazine ban at issue survives
23 this challenge, we look to the plain text of the Constitution, and history of these devices integral
24 to semi-automatic firearms. This look reveals that the LCM ban amounts to a prohibition on a
25 significant category of firearms forbidden under *Heller* as a matter of law.

26 **i. Text and History**

27 First, with regard to the text, we start with the plain language of the Second Amendment
28 itself, which states that “the right of the people *to keep* and bear arms, shall not be infringed”

1 (emphasis added). The term “keep” simply means “[t]o retain; not to lose,’ and ‘[t]o have in
 2 custody.’” *Heller*, 554 U.S. at 582 (“The most natural reading of ‘keep Arms’ in the Second
 3 Amendment is to ‘have weapons.’”). And in this case, Plaintiffs Wiese, Morris, Cowley,
 4 Macaston, Flores, and Dang, as individuals and representatives of the class of similarly-situated
 5 individuals, have all legally possessed large-capacity magazines in this State, prior to December
 6 31, 1999, without incident. (TAC, ¶ 21.) Naturally and rightfully, they desire to *keep* this valued
 7 personal property, i.e., they “simply wish to continue to hold and otherwise exercise their Second
 8 Amendment right to possess, keep, use and acquire firearms and standard-capacity magazines,
 9 which are in common use, and for lawful purposes, but cannot do so should this total, categorical
 10 Large-Capacity Magazine Ban be enforced.” (*Id.*, ¶ 45.)

11 Historically, “[r]epeating, magazine-fed firearms date back to at least the 1600s.”
 12 Clayton Cramer & Joseph Olson, *Pistols, Crime, and Public Safety in Early America*, 44
 13 *Williamette L. Rev.* 699, 716 (2008). Magazines holding more than ten rounds are older than the
 14 Second Amendment itself. “For example, in 1718 (seventy-one years before the drafting of the
 15 American Bill of Rights) the ‘Puckle Gun’ was patented in England. It was a repeating firearm
 16 from which multiple individual shots could be discharged without physically reloading the gun.”
 17 This firearm held eleven pre-loaded charges. *Id.* at 716-717. Box magazines date from before
 18 ratification of the Fourteenth Amendment, and handgun magazines containing more than ten
 19 rounds became popular in the 1930s. David B. Kopel, *The History of Firearm Magazines and*
 20 *Magazine Prohibitions*, 78 *Alb. L. Rev.* 849, 851 (2015).

21 By the time California legislatively branded them “large-capacity magazines” ages later,
 22 at the end of 1999 (SB 23, 1999-2000 Reg. Sess. (Cal. 1999); former § 32310), millions of such
 23 magazines had been manufactured and sold into circulation here and around the county as
 24 integral operating parts of semi-automatic firearms. Kopel, *supra*, at 862 (“Long before 1979,
 25 magazines of more than ten rounds had been well established in the mainstream of American gun
 26 ownership.”). Indeed, with many of the most popular semi-automatic firearms, magazines of this
 27 capacity or greater are the most prevalent type of magazine employed, or the only type
 28 manufactured for those firearms. Plaintiffs here will show at trial that magazines of this capacity

1 or greater are now “standard” in semi-automatic firearms. And for this reason, virtually all such
2 firearms are sold at retail in the vast majority of jurisdictions throughout the United States with at
3 least one or more magazines of this capacity.

4 **ii. Tradition**

5 As for the closely related matter of tradition, these items have always been accepted as
6 integral to semi-automatic firearms. While California’s 2000 legislative action generally banned
7 most forms of future acquisition and transfer of these magazines, it had never before banned the
8 mere possession of these items, and thus, countless law-abiding citizens of this State have relied
9 upon this longstanding status of the law in continuing to use and possess them for many
10 recognized lawful purposes, including self-defense, competition, training, and sport. Again, the
11 numbers speak for themselves in proving tradition. Large-capacity magazines in California
12 today number into the “hundreds of thousands,” at least, as the DOJ’s own recent findings
13 indicate. (Req. for Jud Notice, Ex. A). And they number into the millions nationwide. *See*
14 *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (“We think it
15 clear enough in the record that semi-automatic rifles and magazines holding more than ten
16 rounds are indeed in ‘common use,’ as the plaintiffs contend.”); *Colorado Outfitters Ass’n v.*
17 *Hickenlooper*, 24 F.Supp.3d 1050, 1068 (D. Colo. 2014) (magazines with capacities of greater
18 than 15 rounds “number in the tens of millions”). The numbers irrefutably show that a majority
19 of Americans prefer semi-automatic handguns, and that roughly half of the magazines sold and
20 distributed have – *traditionally* – been those holding more than ten rounds. And, but for recent
21 (and certainly not longstanding) legislation, virtually all magazines manufactured and sold into
22 the American non-military market for full-sized pistols would be standard-capacity, holding
23 more than ten rounds of ammunition.

24 **iii. Commonality**

25 Similarly, these historically and traditionally respected firearm instrumentalities are
26 indisputably in common use throughout California and beyond. As Plaintiffs’ Third Amended
27 complaint explains, “[s]uch [large-capacity] magazines are, in virtually every other state of the
28 Union, exactly the sorts of lawful weapons in common use that law-abiding people possess at

1 home for lawful purposes [.]” (TAC, ¶ 48.) “Millions of semi-automatic firearms in common
 2 use for lawful purposes are possessed by law-abiding people throughout the United States,
 3 including in California. Those firearms include, but are not limited to, highly-popular makes and
 4 models of handguns like the Glock models 17, 19, 22, and 23, the Smith & Wesson M&P series
 5 models, the Springfield Armory XD series models, and many others, including some pistols that
 6 have now been discontinued.” (*Id.*, ¶ 50.) “Millions of such firearms, including those handguns,
 7 are commonly possessed by law-abiding people for lawful purposes including target shooting,
 8 training, sport shooting, competition, and self-defense.” (*Id.*, ¶ 51.) And millions of such
 9 firearms, including those handguns, were designed and intended to be used with magazine
 10 capacities exceeding 10 rounds. For example, one of the most popular handgun models
 11 commonly used and possessed for self-defense, the Glock model 17 9mm, was designed with a
 12 17-round magazine. (*Id.*, ¶ 52.) And many of these handguns that were designed for factory-
 13 *standard* large-capacity magazines holding more than 10 rounds, including the Glock model 17
 14 handgun, are available for sale in California to law-abiding people on the DOJ’s Roster of
 15 Handguns Certified for Sale (Roster). (*Id.*, ¶ 53.)

16 These key allegations of the operative complaint are not, as the State asserts or suggests,
 17 mere “arguments” or “conclusions of law.” These are matters of *fact* – facts that cannot
 18 reasonably be disputed.⁴ *Every* court to have considered this specific issue has recognized that
 19 such magazines are indeed in common use by a wide swath of ordinary Americans. *See e.g.*,
 20 *Heller II*, 670 F.3d at 1261 (“[w]e think it clear enough in the record that semi-automatic rifles
 21 _____

22 ⁴If the State actually does dispute this, then they should be required to prove this at trial. One
 23 need only travel to any other state in the Union where such magazines are not prohibited —
 24 indeed, the vast majority of states — and visit any gun store there, any shooting range, attend any
 25 shooting competition, any gun show, or talk to any other ordinary gun owners in those states,
 26 where it will be manifestly apparent that “standard-capacity” magazines (called “LCMs” by our
 27 Legislature since 2000), are indeed standard fare, widely and commonly kept, by good and
 28 decent people, for good and useful purposes. *See United States v. Vongxay*, 594 F.3d 1111, 1118
 (9th Cir. 2010) (“most scholars of the Second Amendment agree that the right to bear arms was
 ‘inextricably ... tied to’ the concept of a ‘virtuous citizen[ry]’ that would protect society through
 ‘defensive use of arms against criminals, oppressive officials, and foreign enemies alike . . .’”) (citing Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 *Law & Contemp. Probs.* 143, 146 (1986)).

1 and magazines holding more than ten rounds are indeed in ‘common use,’ as the plaintiffs
 2 contend.”); *Colorado Outfitters Ass’n v. Hickenlooper*, 24 F. Supp. 3d 1050, 1068 (D. Colo.
 3 2014) (“lawfully owned semi-automatic firearms using a magazine with the capacity of greater
 4 than 15 rounds number in the tens of millions”); *Shew v. Malloy*, 994 F. Supp. 2d 234, 246 (D.
 5 Conn. 2014) (semi-automatic rifles such as the AR-15 as well as magazines with a capacity
 6 greater than 10 rounds “are ‘in common use’ within the meaning of *Heller* and, presumably, used
 7 for lawful purposes”); *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1276-1277 (N.D. Cal.
 8 2014) (such magazines are “typically possessed by law-abiding citizens for lawful purposes”);
 9 *N.Y. State Rifle & Pistol Ass’n*, 990 F. Supp. 2d at 365 (presuming use for lawful purposes). And
 10 again, such clear *allegations of fact* are all Plaintiffs must plead in order to defeat the State’s
 11 MTD and proceed to trial on the merits of the claims these allegations support.

12 The indisputably widespread common and ordinary use of such magazines must further
 13 be measured by what is commonly used and held in the rest of the country. For example,
 14 handguns were not in common use by ordinary, law-abiding citizens within the District of
 15 Columbia when the Supreme Court struck down the District’s thirty-year ban on their possession
 16 and lawful use of handguns. But *Heller* noted: “[i]t is no answer to say, as petitioners do, that it
 17 is permissible to ban the possession of handguns so long as the possession of other firearms (i.e.,
 18 long guns) is allowed. It is enough to note, as we have observed, that *the American people* have
 19 considered the handgun to be the quintessential self-defense weapon.” 554 U.S. at 629
 20 (emphasis added). Plaintiffs here will easily demonstrate that a large swath of semi-automatic
 21 handguns used by ordinary Americans around the country utilize magazines holding more than
 22 10 rounds of ammunition as *standard*-capacity magazines.

23 Amicus Curiae Everytown for Gun Safety (“Everytown”) argues that the common use
 24 test is “illogical.” (Proposed Amicus Brief at 8:15). Hardly. *See Heller*, 554 U.S. at 624;
 25 *Caetano v. Mass.*, ___ U.S. ___, 136 S.Ct. 1027, 1032-33 (2016) (the “[h]undreds of thousands” of
 26 stun guns, which are “less popular than handguns,” makes them “a legitimate means of self-
 27 defense across the country”); and citations above. Everytown’s lamentation that the ubiquity of
 28 firearms “creates perverse incentives for the firearm industry” to give gun manufacturers “the

1 unilateral ability to insulate highly dangerous firearms or firearm features with Second
2 Amendment protection [...]” (Proposed Amicus Brief, at 10:14-16), is entirely irrelevant.⁵
3 “[T]he court will not judge whether the public’s firearm choices are often used for self-defense,
4 or even whether they are effective for self-defense – *the firearms must merely be preferred.*”
5 *Fyock v. City of Sunnyvale*, 25 F.Supp.3d 1267, 1278 (N.D. Cal. 2014) (italics added); see
6 *Caetano*, 136 S.Ct. at 1028-29; see also *Friedman*, 784 F.3d at 416 n. 5 (Manion, J., dissenting)
7 (“The fact that a statistically significant number of Americans use AR-type rifles and large-size
8 magazines demonstrates *ipso facto* that they are used for lawful purposes. Our inquiry should
9 have ended here: the Second Amendment covers these weapons.”).

10 Therefore, because the statewide LCM ban essentially amounts to a prohibition of an
11 entire class of arms, and/or a critical component thereof, which have been overwhelmingly
12 chosen by American society for lawful purposes, and implicates a core Second Amendment
13 right, it is a *categorical prohibition* that necessarily cannot survive any level of scrutiny
14 whatsoever. The inquiry should end there, and Defendants’ motion to dismiss this claim should
15 be denied. While this is surely not a claim that could even be decided on a motion to dismiss in
16 any event, Plaintiffs’ opposition demonstrates that such a categorical ban must be struck down.

17 **2. Any Application of Intermediate Scrutiny Cannot Involve the Interest-**
18 **Balancing Prohibited by *Heller*.**

19 We recognize that this Court may feel bound by the law of this circuit, namely, *Fyock v.*
20 *City of Sunnyvale*, 779 F.3d 991 (9th Cir. 2015), to conclude that Plaintiffs’ claims – to the
21 extent they should be subject to any standard of review at all – would be subject to “intermediate
22 scrutiny.” Should this Court adhere to this position (as stated in its Order of June 29, 2017), as
23

24
25 ⁵Everytown’s view is also distorted by its hostility toward the Second Amendment generally,
26 leading it to suggest that gun owners should just blithely submit to any assertion of police powers
27 in the name of combatting so-called “gun violence.” In reality, state legislators – pandering to
28 prohibitionist groups such as Everytown, and exploiting public fears over the perceived
dangerousness of certain weapon types – have their own perverse incentives to enact firearm
prohibitions that would render ordinary, commonly-used firearms less prevalent or even non-
existent, even among the virtuous. Indeed, the State *expressly admits* this is its ultimate goal in
its zeal to reduce the “continued proliferation” of such items. (MTD at 3:13.)

1 further articulated in the TAC, we must emphasize that a vast difference exists between *actual*
2 intermediate scrutiny and how that test has been applied in recent Second Amendment cases.
3 “Intermediate scrutiny” in Second Amendment cases has devolved into the very sort of interest-
4 balancing expressly prohibited by *Heller*. Assuming that this Court does not find the LCM ban
5 is a categorical ban absolutely prohibited by *Heller*, it must take care to apply a proper level and
6 form of scrutiny that does not involve the prohibited interest-balancing.

7 *Heller* did many great things to reaffirm basic civil liberties for law abiding citizens, but
8 it left open the question of what specific level of scrutiny to apply in future cases involving
9 firearms restrictions that fall short of categorical bans. But the *Heller* Court did expressly and
10 emphatically make clear that rational-basis review is an unacceptably deferential standard to
11 apply in evaluating restrictions that impinge upon the fundamental rights enshrined in the Second
12 Amendment. *Heller*, 554 U.S. at 628, n. 27. Thus, in evaluating such restrictions, the lower
13 courts have generally avoided applying rational basis review (at least in name) and have instead
14 applied some form of heightened scrutiny – either “strict” or “intermediate” scrutiny (though
15 most commonly some variation of the latter).

16 But, whatever label is applied to this form of scrutiny, the fact is, *any* interest-balancing
17 in resolving Second Amendment claims is forbidden under *Heller*. The *Heller* court expressly
18 *rejected* this methodology wholesale. The majority directly confronted and then renounced
19 Justice Breyer’s argument in his dissent for a “judge-empowering ‘interest balancing inquiry,’”
20 stating:

21 We know of no other enumerated constitutional right whose core protection has
22 been subjected to a freestanding “interest-balancing” approach. The very
23 enumeration of the right takes out of the hands of government—even the Third
24 Branch of Government—the power to decide on a case-by-case basis whether the
25 right is *really worth* insisting upon. A constitutional guarantee subject to future
26 judges’ assessments of its usefulness is no constitutional guarantee at all.
27 Constitutional rights are enshrined with the scope they were understood to have
28 when the people adopted them, whether or not future legislatures or (yes) even
future judges think that scope too broad.

Heller, 554 U.S. at 634-35. Indeed, writing for the majority, Justice Scalia observed that the
Second Amendment rights have already been subjected to all the “interest-balancing” that is

1 needed or warranted: “Like the First [Amendment], [the Second Amendment] is the very *product*
 2 of an interest balancing by the people—which Justice Breyer would now conduct for them anew.
 3 And whatever else it leaves to future evaluation, it surely elevates above all other interests the
 4 right of law-abiding, responsible citizens to use arms in defense of hearth and home.” *Id.*, at 635.

5 Nevertheless, the circuit courts have been engaging in the very sort of interest-balancing
 6 that the *Heller* court rejected and essentially applying what is the functional equivalent of the
 7 *rational basis* review that the court flatly rejected as improper. Legal scholars have recognized
 8 this now for the last several years. As Professor Roston observed in 2012, “the lower courts’
 9 decisions strongly reflect the pragmatic spirit of the dissenting opinions that Justice Steven
 10 Breyer wrote in *Heller* and *McDonald*.” Allen Rostron, *Justice Breyer’s Triumph in the Third*
 11 *Battle Over the Second Amendment*, 80 *Geo. Wash. L. Rev.* 703, 706-707 (2012). In fact, even
 12 back then, Professor Rostron suggested that Justice Breyer’s dissenting view in *Heller* had
 13 become the controlling law of the land, because the lower courts “have effectively embraced the
 14 sort of interest-balancing approach that Justice Scalia condemned, adopting an intermediate
 15 scrutiny test and applying it in a way that is highly deferential to legislative determinations and
 16 that leads to all but the most drastic restrictions on guns being upheld.” *Id.*, at 706-07.

17 During this period of the Supreme Court’s general passivity since *McDonald* in 2010, the
 18 circuit courts have become further emboldened in their application of this approach and improper
 19 deference to state legislatures’ “empirical judgment” in enacting laws that impinge upon Second
 20 Amendment rights. *Heller*, 554 U.S. at 690. In other words, intermediate scrutiny has become,
 21 to the circuit courts, not just a tool for conducting improper “balancing of interests” but a means
 22 of effectively stacking the deck in favor of states seeking to restrict firearms rights. *See e.g.*,
 23 *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012) (finding that the challenged law,
 24 which restricts citizens’ ability to transport firearms into New York from out of state, “only
 25 minimally affects the ability to acquire a firearm,” the court reasoned that it was not even
 26 “subject to any form of heightened scrutiny”); *Kachalsky v. County of Westchester*, 701 F.3d 81,
 27 98-99 (2d Cir. 2012) (giving “substantial deference” to the state legislature’s “belief” that the
 28 regulation would serve a public safety interest); *Drake v. Filco*, 724 F.3d 426, 435-37 (3d Cir.

1 2010) (applying “intermediate scrutiny” to uphold New York’s “justifiable need” requirement
 2 for concealed carry licenses by essentially just deferring to the state’s generic justification that
 3 the law helped ensure public safety); *Kolbe v. Hogan*, 849 F.3d 114, 141 (4th Cir. 2017) (readily
 4 acceding to the state’s proffered “policy judgments” that the restrictions at issue were necessary
 5 to “protect[] public safety”); *Heller II*, 670 F.3d at 1258 (accepting as adequate to pass muster
 6 under intermediate scrutiny the District of Columbia’s claim that the firearm registration
 7 requirement at issue advanced the general interests of “protect[ing] police officers and . . .
 8 aid[ing] in crime control,” even while the court itself recognized that the District had presented
 9 this justification “incompletely” and “almost cursorily”); *NRA v. BATFE*, 700 F.3d 185 (5th Cir.
 10 2012) (upholding a statute prohibiting the sale of handguns to people ages 18–20 under
 11 intermediate scrutiny, despite the indisputable severity of establishing an almost total handgun
 12 prohibition against an entire class of adults).

13 This is, of course, the prevailing methodology in the Ninth Circuit as well, where the test
 14 for the appropriate standard of review as applied to Second Amendment claims is currently
 15 drawn from *Chovan*, 735 F.3d at 1136. Under *Chovan*, the court is supposed to ask “whether the
 16 challenged law burdens conduct protected by the Second Amendment,” and if it does, determine
 17 the “appropriate level of scrutiny.” *Id.* The resulting analysis permits a court to conduct the
 18 prohibited balancing of interests, which in turn inevitably permits upholding the regulation so
 19 long as the burden could reasonably be perceived as relatively insubstantial in comparison to the
 20 proffered state interest.⁶ And even where Second Amendment conduct is implicated, it is
 21 nevertheless routinely minimized and dismissed – since, as noted, the proffered justification for
 22 such restrictions is generally just a variation of the generic “public safety” theme, which this
 23

24
 25 ⁶Dissenting in *Teixeira*, Judge Bea made the point that the majority had improperly evaluated the
 26 *degree* of the burden, and not simply whether the ordinance at issue burdened Second
 27 Amendment rights at all. “*Chovan* did not require the burden to be ‘meaningful’ or ‘substantial’
 28 to proceed to the second step in the analysis, the ‘severity’ of the burden. It required only that the
 right be burdened. Second, *Chovan* explicitly required the ‘severity’ of the burden to be
 examined at its second step, as necessary to choose the level of judicial scrutiny to be applied.”
Teixeira, 873 F.3d at 695 (9th Cir. 2017) (Bea, J., dissenting) (quoting *Chovan*, 735 F.3d at
 1138).

1 improper methodology encourages courts to readily accept. *See e.g., Silvester v. Harris*, 843 F.3d
 2 816, 827 (9th Cir. 2016) (where the Ninth Circuit, purporting to apply intermediate scrutiny,
 3 marginalized the actual burden on the plaintiffs, reasoning that “[t]he actual effect of the [waiting
 4 period laws] on Plaintiffs is very small,” and minimized the government’s burden by
 5 emphasizing that “the [reasonable fit] test is not a strict one . . . and scrutiny does not require the
 6 least restrictive means of furthering a given end” – regardless of the trial court’s findings of fact
 7 and conclusions of law to the contrary).

8 While the Supreme Court has yet to denounce with one voice this judicial obstructionism
 9 against the Second Amendment currently prevailing in the lower courts, it has at least signaled
 10 recognition that the Ninth Circuit has gone awry in its use of supposed “intermediate scrutiny” to
 11 decide these cases. *See Jackson v. City and County of San Francisco*, 135 S.Ct. 2799, 2801
 12 (2015) (Thomas, J., dissenting from denial of cert.) (“[N]othing in our decision in *Heller*
 13 suggested that a law must rise to the level of the absolute prohibition at issue in that case to
 14 constitute a ‘substantial burden’ on the core of the Second Amendment right. And when a law
 15 burdens a constitutionally protected right, we have generally required a higher showing than the
 16 Court of Appeals demanded here.”). Indeed, the Ninth Circuit’s opinion in *Jackson* is flawed for
 17 several reasons, the primary of which is that it applied intermediate scrutiny even though it found
 18 that the statute at issue burdened the Second Amendment’s core right to possess firearms in the
 19 home, for self-defense purposes. Also, it found that firearm storage laws do not “severely
 20 burden” the core right – a proposition that Justice Thomas has specifically called into question.
 21 Cf. *McDonald*, 561 U.S. at 790–91 (2010) (noting that *Heller* and *McDonald* reject a quantitative
 22 “costs and benefits” approach). The Supreme Court’s recent decision to review the case of *New*
 23 *York State Rifle & Pistol Association v. City of New York*, 883 F.3d 5 (2d Cir. 2018), *cert.*
 24 *granted*, 2019 WL 271961 (U.S. Jan. 22, 2019) (No. 18-280) (“*NYSRPA*”) – where the Second
 25 Circuit engaged in similarly constitutionally suspect analyses to uphold New York City’s
 26 sweepingly broad ban on transporting a licensed, locked and unloaded handgun outside city
 27 limits – signals the high court is finally ready to reign in this judicial activism within the lower
 28 courts and ensure that laws restricting Second Amendment rights are properly and fairly

1 scrutinized in accordance with the core principles pronounced in *Heller* and *McDonald*.

2 Here, this Court’s order denying Plaintiffs’ motion for a preliminary injunction found that
3 intermediate scrutiny applies because Penal Code section 32310 “does not affect the ability of
4 law-abiding citizens to possess the ‘quintessential self-defense weapon’ – the handgun. Rather,
5 [it] restricts possession of only a subset of magazines that are over a certain capacity.”
6 (MEMORANDUM AND ORDER RE: MOTION FOR PRELIMINARY INJUNCTION (Dkt. #52) (“Order”) at
7 6:21-25 (citing *Heller*, 554 U.S. at 629).) Irrefutably, however, the ban implicates the core of the
8 Second Amendment right. *Fyock*, 779 F.3d at 999. Further, “[c]onstitutional rights
9 [...]implicitly protect those closely related acts necessary to their exercise. ‘There comes a point
10 ... at which the regulation of action intimately and unavoidably connected with [a right] is a
11 regulation of [the right] itself.’” *Luis v. United States*, 136 S. Ct. 1083, 1097 (2016) (Thomas, J.,
12 concurring) (quoting *Hill v. Colorado*, 530 U.S. 703, 745 (2000) (Scalia, J., dissenting)). “The
13 right to keep and bear arms, for example, ‘implies a corresponding right to obtain the bullets
14 necessary to use them[.]’” *Luis*, 136 S.Ct. at 1097 (quoting *Jackson v. City and County of San*
15 *Francisco*, 746 F.3d 953, 967 (9th Cir. 2014)).

16 But if a statute that implicates a core exercise of the Second Amendment right, or
17 prohibits activity essential to an exercise of the right such as the possession of large-capacity
18 magazines – which are not “only a subset” of magazines in general, but in Plaintiffs’
19 circumstances are integral to the functioning of their firearms – can nevertheless be upheld
20 merely because there is *some articulable* governmental justification for it, then true
21 “intermediate scrutiny” ceases to exist. For when it comes to firearms, a government can always
22 at least articulate, on paper, some “reasonable”-sounding, generic public safety concern –
23 irrespective of the actual effects of the law. That is not the standard for intermediate scrutiny.
24 *See, Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994) (“[the government] must
25 demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in
26 fact alleviate these harms in a direct and material way”). *Actual* intermediate scrutiny – not just
27 that of the watered-down variety being improperly applied by too many courts in Second
28 Amendment cases – means the government bears a real burden, which it must meet with

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1 *substantial* evidence. The State cannot carry that burden here.

2 **3. Defendants Bear a True Evidentiary Burden Under *Actual Intermediate***
3 **Scrutiny, Which They Cannot Overcome in Their Motion to Dismiss.**

4 Consistent with the prevailing distortions of the Second Amendment jurisprudence, the
5 State’s apparent position is that it bears no evidentiary burden to justify the existence of its LCM
6 ban – even as applied to owners of pre-ban, grandfathered magazines – and even while giving lip
7 service to an “intermediate scrutiny” standard. The State distorts the picture further by claiming
8 that Plaintiffs are alleging the State must show the ban will end “*all* gun violence” or “*would*
9 *have prevented*” the past incidents of gun violence. (MTD at 13:20-23 (italics added).) Of
10 course, no one is claiming that anyone must or could prove this. But the fact that the State cannot
11 prove *this* does not somehow mean it is relieved of the burden to substantiate the *actual*
12 *justification* it has proffered in support of the ban – that the ban will reduce the incidence or
13 lethality of mass shootings – as the State claims in attempting to shirk any burden-carrying
14 responsibility. (*Id.* at 13: 15-19.) *See Turner Broad. Sys., Inc.*, 520 U.S. 180, 195 (1997). For the
15 same essential reason, nor can the State hope to carry its actual burden with mere speculation
16 that access to such magazines “leads to more injuries and higher fatality rates than crimes
17 involving smaller, conventional magazines.” (MTD at 3: 8-9.) Indeed, if such slippery-slope
18 justifications were sufficient to sustain magazine bans, States could (and *would*, in places like
19 California) eventually succeed in banning everything except *single* round capacity firearms.

20 This practice of wholly ignoring or minimizing the traditional governmental burdens
21 under purportedly legitimate forms of constitutional scrutiny demonstrates that “intermediate
22 scrutiny” in this context has devolved into something functionally and practically
23 indistinguishable from the *Heller*-prohibited rational basis review. One of the fundamental
24 differences between rational basis scrutiny and intermediate scrutiny of a challenged
25 governmental action is supposed to be the evidence required to reasonably justify the action.
26 Under rational basis review, the burden rests with the challenger to negate every conceivable
27 basis that might support a challenged law. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S.
28 356, 364 (1973). And no evidence is required. *F.C.C. v. Beach Communications, Inc.*, 508 U.S.

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1 307, 313-315 (1993).

2 By contrast, when a heightened level of scrutiny is used, the requirements change, and
 3 rational speculation is no longer good enough. Under *actual* intermediate scrutiny, the
 4 government bears the burden of proof to demonstrate a reasonable fit between the challenged
 5 regulation and a *substantial* governmental objective that the law ostensibly advances. *Board of*
 6 *Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480–81 (1989). To carry this burden,
 7 the government must not only present evidence, but “*substantial* evidence” drawn from
 8 “*reasonable* inferences” that actually support its proffered justification. *Turner Broad. Sys., Inc.*,
 9 520 U.S. at 195 (emphasis added); *see also City of Renton*, 475 U.S. at 51–52 (the evidence that
 10 the lawmakers rely upon must be “reasonably believed to be relevant to the problem” the
 11 government is addressing). And the regulation must often be more than merely “relevant” to the
 12 problem at hand. Indeed, in the related First Amendment context, the government is typically
 13 put to the evidentiary test to show that the harms it recites are not only real, but “that [the speech]
 14 restriction will in fact alleviate them to a material degree.” *Italian Colors Rest. v. Becerra*, 878
 15 F.3d 1165, 1177 (9th Cir. 2018) (citing *Greater New Orleans Broad. Ass'n, Inc. v. United States*,
 16 527 U.S. 173, 188 (1999) (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993))). This same
 17 evidentiary burden should apply with equal force to Second Amendment cases, where equally
 18 fundamental rights are similarly at stake. *See Ezell v. City of Chicago*, 651 F.3d 684, 706–07 (7th
 19 Cir. 2011) (“Both *Heller* and *McDonald* suggest that First Amendment analogues are more
 20 appropriate, [...] and on the strength of that suggestion, we and other circuits have already begun
 21 to adapt First Amendment doctrine to the Second Amendment context[.]”) (citing *Heller*, 554
 22 U.S. at 582, 595, 635; *McDonald*, 130 S.Ct. at 3045).

23 In this case, however, the State essentially flips this evidentiary burden on its head,
 24 arguing that the government has no burden to prove anything in relation to its own proffered
 25 justifications. (MTD at 13:19-26.) Not only does the State’s motion suggest that *Plaintiffs* bear
 26 the evidentiary burden of showing that the law will *not* advance “public safety,”⁷ but it treats its

27
 28 ⁷Indeed, what firearm law doesn’t somehow *claim* to advance “public safety?”

1 own stated justifications as simply presumptively true. If, as the State claims, laws can survive
2 intermediate scrutiny by merely appealing to some people’s idea of “common sense” (Motion at
3 3:16), then, again, true intermediate scrutiny does exist in Second Amendment cases, because it
4 has devolved into nothing more than rational basis review masquerading as “heightened”
5 constitutional scrutiny.

6 Frankly, these are simply not issues that can be resolved on a motion to dismiss under
7 Rule 12. The government may or may not eventually be able to clear the required hurdles to
8 survive appropriately-applied, *real* heightened scrutiny, but still, it must do so with *real* evidence
9 and not mere speculation. *See e.g., Ezell*, 651 F.3d at 709 (in analogous First Amendment
10 contexts, “the government must supply actual, reliable evidence to justify restricting protected
11 expression based upon secondary public-safety effects”); *City of Renton*, 475 U.S. at 51–52. As
12 Judge Benitez observed looking at largely the same evidence that the State presented in *Duncan*
13 *v. Becerra*, the State’s evidence consists of “incomplete studies from unreliable sources upon
14 which experts base speculative explanations and predictions,” “a potpourri” of “amorphous
15 harms to be avoided,” and “a homogenous mass of horrible crimes in jurisdictions near and far
16 for which large capacity magazines were not the cause.” *Duncan v. Becerra*, 265 F.Supp.3d at
17 1120.

18 Finally, it is worth noting – as the Attorney General was fond of pointing out at the
19 hearing on Plaintiffs’ motion for a preliminary injunction – that, to date, apparently no circuit
20 court has actually reviewed a Second Amendment case under strict scrutiny – at least not *en*
21 *banc*. The two opinions that actually deigned to apply strict scrutiny to Second Amendment
22 claims were quickly reversed by *en banc* panels. *See Kolbe v. Hogan; Tyler v. Hillsdale County*
23 *Sheriff’s Department*, 837 F.3d 678 (6th Cir. 2016). What does this tell us? Simply, that many
24 of our circuit courts are hostile to the fundamental, individual right of private firearm ownership
25 recognized in *Heller*, and that Second Amendment challenges to government restrictions,
26 especially in this Circuit, virtually always resolve in favor of the government. Therefore, we
27 ruefully conclude that “heightened scrutiny” means only “intermediate scrutiny” in Second
28 Amendment cases – and a watered-down version of it at that, resembling analytical devices

1 materially indistinguishable from the rational basis review that *Heller* forbade. The danger of
 2 such distorted analyses jeopardizing the core of the fundamental rights recognized in *Heller* is
 3 particularly acute where (as here) the government believes it has no particular burden to
 4 demonstrate Legislative propriety, aside from offering generic platitudes to “public safety.”⁸
 5 Thus, should this Court ultimately decide to apply intermediate scrutiny here, we implore the
 6 Court to put the government to the test and hold it to the exacting standards of *actual*
 7 intermediate scrutiny, which its amorphous justifications cannot survive. Indeed, if a federal
 8 district court judge could hold that the Plaintiffs in *Duncan* carried the exceptionally high burden
 9 of demonstrating a likelihood of irreparable harm so as to warrant the extraordinary remedy of a
 10 statewide preliminary injunction against the ban, surely, the Plaintiffs here must be deemed to
 11 have at least crossed the low threshold for merely stating a “plausible” claim sufficient to permit
 12 them the *opportunity* for an adjudication of the merits of their case.⁹

13 **4. Should There Be Any “Interest-Balancing,” Strict Scrutiny is Actually the**
 14 **More Appropriate Test.**

15 In actuality, strict scrutiny is the more appropriate standard should this Court engage in
 16 any “interest-balancing.” Plaintiffs’ claims undisputedly implicate the core of the Second

17
 18 ⁸ The State proceeds with an inflated sense of self-confidence here in light of the recent opinions
 19 in *Ass’n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney General N.J. (ANJRPC)*, 910 F.3d 106 (3d
 20 Cir. 2018), and *Worman v. Healey*, 293 F.Supp.3d 251 (D. Mass. 2018), which rejected other
 21 challenges to different LCM bans. (MTD at 4, 11, 12, 13.) But it overplays the situation right out
 22 of the gate, claiming that “several courts have joined the growing consensus that LCM
 23 restrictions are constitutional,” when it only cites these *two* extraterritorial cases, one of which is
 24 a district court case currently on appeal. Moreover, the cases are clearly distinguishable. The
 25 *Worman* plaintiffs challenged merely an “enforcement notice” stating the Massachusetts
 26 Attorney General’s Office interpretation of a law concerning “assault weapons,” which “lack[ed]
 27 the binding effect and force of law” and presented no demonstrable threat of actual enforcement.
 28 *Worman*, at 260. And in the *ANJRPC* case, as discussed further below, the New Jersey ban at
 issue there is less burdensome than the ban at issue here, because it contains express exceptions
 permitting owners of LCMs to modify their LCMs to accept ten rounds or fewer and to register
 and thereafter retain firearms with LCMs that cannot be so modified. *ANJRPC*, 910 F.3d at 111.

⁹ As of the time this Opposition is filed, the parties in *Duncan* await the district court’s ruling on
 the plaintiffs’ motion for summary judgment (heard on May 10, 2018). Accordingly, the parties
 in *Duncan* have jointly requested a continuation of the pretrial deadlines in that matter,
 contemplating and requesting a final pretrial conference on May 6, 2019. Joint Motion of the
 Parties to Amend Scheduling Order, No. 3:17-cv-01017-BEN-JLB (ECF Doc. No. 84, filed
 February 1, 2019).

1 Amendment right. See *Fyock*, 779 F.3d at 999; *N.Y. State Rifle & Pistol Ass’n, Inc. v. Cuomo*,
2 804 F.3d 242, 255 (2d Cir. 2015); *Friedman*, 784 F.3d at 415; *Heller II*, 670 F.3d at 1261. While
3 the Ninth Circuit applied intermediate scrutiny in upholding Sunnyvale’s ban of large-capacity
4 magazines in *Fyock*, that decision does not preclude application of strict scrutiny here. The
5 *Fyock* court found the burden of that ban was not substantial enough to invoke strict scrutiny,
6 *Fyock*, 779 F.3d at 999-1000, but the burden to be imposed by this ban is notably more
7 significant. That ban is merely a *citywide* restriction on the possession of large-capacity
8 magazines: one need only step across the border of Sunnyvale City limits to be entirely free of its
9 proscription. The ban here applies across California entirely; there is no escaping its proscription
10 anywhere within this state. And moreover, as a simple matter of scale, this statewide ban would
11 affect far many more people, many of whom live in outlying counties who are unlikely to even
12 realize that the ban was enacted, and who may often have the greatest need for the LCMs that the
13 State seeks ban since their homes tend to be located relatively far from law enforcement agencies
14 and emergency responders.

15 “The core of the *Heller* analysis is its conclusion that the Second Amendment protects the
16 right to self-defense in the home. The Court said that the home is ‘where the need for defense of
17 self, family, and property is most acute,’ and thus, the Second Amendment must protect private
18 firearms ownership.” *Silvester v. Harris*, 843 F.3d 816, 820 (9th Cir. 2016) (*Silvester*) (quoting
19 *Heller*, 554 U.S at 628). This is why the Second Amendment protects “arms . . . of the kind in
20 common use . . . for lawful purposes like self-defense,” *Heller*, 554 U.S. at 624, and “elevates
21 above all other interests the right of law-abiding, responsible citizens to use arms in defense of
22 hearth and home,” *id.* at 624; *Caetano*, 136 S.Ct. at 1028 (quoting *McDonald v. Chicago*, 561
23 U.S. 742, 767 (2010) (“That right vindicates the ‘basic right’ of ‘individual self-defense.’”).

24 The LCM ban unquestionably places a substantial burden upon the right to self-defense
25 under the Second Amendment. If nothing else, as Plaintiffs’ complaint persuasively alleges with
26 no realistic possibility of refutation by the State, these magazines are integral operating parts of
27 the modern day semi-automatic firearms for which they are routinely produced, such that many,
28

1 if not most, firearms are essentially inoperable without them.¹⁰ This ban would therefore and
2 necessarily impair “the right of law-abiding, responsible citizens to use arms in defense of hearth
3 and home,” *Heller*, 554 U.S. at 624, which is “the core of the Second Amendment right,”
4 *Silvester*, 843 F.3d. at 821. The countless Californians who have reasonably relied upon the
5 continuing ability to possess these magazines for self-defense would be forced to acquire
6 substitute magazines, and perhaps even substitute firearms if their current firearms only
7 accommodate magazines holding more than ten rounds, in order to salvage some form of their
8 constitutionally-protected right to possess and use firearms for defensive and other lawful means.

9 The expense of replacing these magazines with substitute magazines or firearms could be
10 substantial in many cases, entirely cost-prohibitive in others, or even render the firearms
11 completely useless in still others, such as where a person has multiple such magazines or simply
12 cannot afford to make the new purchases necessary to replace his or her existing ammunition or
13 firearms subject to the ban. And some such magazines are simply irreplaceable. (TAC, ¶¶ 11,
14 12, 13.) At best, potentially scores these individuals would be left with a lesser level of firearm
15 protection; at worst, some would be left with no firearm protection at all.

16 In the real world, magazine capacity makes a difference. Whether or not documented
17 instances of firearm self-defense (where the number of shots fired has actually been recorded)
18 have involved more ten rounds of fire is beside the point. The fact that few people may actually
19 require large-capacity magazine for self-defense “should be celebrated, and not seen as a reason
20 to except magazines having a capacity to accept more than ten rounds from Second Amendment
21 protection.” *Fyock v. City of Sunnyvale*, 25 F.Supp.3d 1267, 1276 (N.D. Cal. 2014). Again, “the
22 court will not judge whether the public’s firearm choices are often used for self-defense, or even
23

24
25
26 ¹⁰ In fact, California law *requires* many models of new pistols sold at retail to have “magazine
27 disconnect mechanisms,” which means that these firearms are literally incapable of being fired
28 without a magazine. See Pen. Code §§ 31910(b)(4)-(6), 32000, and 16900 (defining “magazine
disconnect mechanism” as “a mechanism that prevents a semiautomatic pistol that has a
detachable magazine from operating to strike the primer of ammunition in the firing chamber
when a detachable magazine is not inserted in the semiautomatic pistol”).

1 whether they are effective for self-defense – the firearms must merely be preferred.” *Id.* at 1278;
2 *see Caetano*, 136 S.Ct. at 1028-29 (Ms. Caetano’s mere possession of a stun gun in an encounter
3 with her violent ex-boyfriend “may have saved her life,” even though she never deployed it[.]”).
4 Unquestionably, having a large-capacity magazine at one’s disposal certainly *could*, and likely
5 *would*, provide a greater level of protection in a self-defense situation given the simple, yet
6 significant fact that one has a greater number of rounds available to fire. Plaintiffs will show,
7 through expert testimony, that this is particularly true for average citizens who, unlike many
8 trained and highly-equipped law enforcement personnel, are generally not as ready to efficiently
9 confront an armed criminal. Citizens faced with such peril are likely to have a single firearm and
10 a single magazine at their disposal, and may be more susceptible to the psychological effects of
11 fear, anxiety, and stress that naturally occur when faced with the threat of deadly violence and
12 tend to deprive one of the focus and clarity of mind necessary to make accurate shots at the
13 attacker. For example, the evidence will show that, in home invasion situations, while average
14 citizens may be able to retrieve their loaded firearms, they typically struggle to properly equip
15 themselves with any additional ammunition. Uniformed police, on the other hand, are usually
16 armed against the very same criminals with two spare magazines, each containing seventeen
17 rounds or more of 9mm, or fifteen rounds of .40 caliber cartridges. Plaintiffs will show that
18 collective law enforcement experience has determined this to be critical to officer survival in
19 confrontations with armed criminals. That is, the threat from the criminals is the same, and the
20 constitutional right to armed self-defense – if it is to afford meaningful protection – must be
21 construed to preserve for average citizens the ability to *defend* themselves just the same.

22
23 Especially when coupled with the reality that this ban would effectuate, essentially, a
24 *confiscation* of valuable personal property intrinsic to countless protected firearms, “it amounts
25 to a destruction of the Second Amendment right . . . unconstitutional under any level of
26 scrutiny.” *Bauer v. Becerra*, 858 F.3d 1216, 1222 (9th Cir. 2017) (quoting *Silvester*, 843 F.3d at
27 821). At the very least, this confiscatory ban “implicates the core of the Second Amendment
28 right and severely burdens that right.” *Id.* And for that reason, if this law is to be evaluated with

1 an “interest-balancing” test, it should be subjected to strict scrutiny review. Because the
2 government cannot demonstrate that the ban is *narrowly* tailored to achieve a *compelling* state
3 interest and that no less restrictive alternative exists to achieve the same end, as it must show
4 under this standard, *United States v. Alvarez*, 617 F.3d 1198, 1216 (9th Cir. 2010), it cannot
5 carry its burden and the motion to dismiss this claim should be denied.

6
7 **B. PLAINTIFFS STATE A CAUSE OF ACTION FOR TAKINGS.**

8 Penal Code § 32310(c) and (d), which as of July 1, 2017, would require individual
9 plaintiffs, and a large class of similarly-affected individuals who lawfully own pre-ban
10 magazines, to dispose of, destroy, or “surrender” their constitutionally-protected personal
11 property, thereby resulting in a taking of such property for which no compensation has been or
12 would be provided, in violation of both the Takings and Due Process Clauses of the United
13 States Constitution and the California Constitution.

14 The Takings Clause of the United States Constitution guarantees property owners “just
15 compensation” when their property is “taken for public use.” U.S. Const., 5th Amend. The Due
16 Process Clause likewise guarantees property owners due process of law when the State
17 “deprive[s] [them] of ... property.” U.S. Const., 14th Amend., § 1. And the California
18 Constitution also provides that “Private property may be taken *or damaged*¹¹ for a public use and
19

20 _____
21 ¹¹The State attempts to dismiss the notion of any damage to personal property interests here by
22 hypothesizing that the magazines may be permanently modified to render them incapable of
23 accepting more than ten rounds of ammunition. (MTD, 16:12-17). However, the sole basis for
24 the State’s claim here is an oblique reference Penal Code § 32425(a) which does not mention
25 permanent modifications at all, Pen. Code, § 32425 (providing an exception to section 32310 for
26 “[t]he lending or giving of any large-capacity magazine to, or possession of that magazine by, a
27 person licensed pursuant to Sections 26700 to 26915, inclusive, or to a gunsmith, for the
28 purposes of maintenance, repair, or modification of that large-capacity magazine”). And the
DOJ has withdrawn its proposed “emergency regulations” that had specified permissible forms
of permanent modifications to large-capacity magazines. (RJN, Exhs. G and H.) Thus,
California citizens have no formal guidance whatsoever as to what sort of “modifications”
suffice, if any, purportedly satisfy any such an exception. This contrasts with the New Jersey ban
at issue in *ANRPC*, 910 F.3d 106, which *expressly provides* for such an exception within the
text of the ban itself, as well for registration of firearms with LCMs that cannot be so modified,
id. at 111, and thus further highlights the especially onerous nature of California’s ban.

1 *only* when just compensation, ascertained by a jury unless waived, has first been paid to, or into
2 court for, the owner.” Cal. Const., Art. I, § 19 (emphasis added).

3 As in this case, a plaintiff suffering an unconstitutional taking without compensation may
4 seek declaratory and injunctive relief as a remedy. *See e.g., Lingle v. Chevron U.S.A. Inc.*, 544
5 U.S. 528, 528 (2005) (plaintiffs brought suit seeking a declaration that a rent cap effected an
6 unconstitutional taking of its property, and sought injunctive relief against application of the
7 cap); *San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal.4th 643, 649 (2002)
8 (plaintiffs challenged ordinance under California constitution by petition for writ of mandate);
9 *Jefferson Street Industries, LLC v. City of Indio*, 236 Cal.App.4th 1175, 1195 (2015) (a facial
10 challenge to an ordinance alleged to effect a regulatory taking may be brought through an action
11 for declaratory relief). In its Order, this Court denied Plaintiffs’ motion for a preliminary
12 injunction, in part, based on the proposition that preliminary injunctive relief is not generally
13 available for a takings claim. (Order at 16:12 – 17:18). Having already cited to *Babbitt v.*
14 *Youpee*, 519 U.S. 234 (1997) (affirming lower courts’ grant of injunctive and declaratory relief,
15 where statute violated the Takings Clause), we respectfully disagree with that determination, but
16 find that this should have no bearing on the instant motion to dismiss. *See also, Golden Gate*
17 *Hotel Assn. v. City & County of San Francisco*, 836 F.Supp. 707, 709 (N.D. Cal. 1993) (granting
18 injunction enjoining city from enforcing city hotel conversion ordinance constituting a taking)
19 (reversed on other grounds, 18 F.3d 1482 (9th Cir. 1994)). A court also has jurisdiction to enjoin
20 the taking of private property before the amount of compensation has been determined. *Felton*
21 *Water Co. v. Superior Court*, 82 Cal.App. 382, 388 (1927).

22 This action is being brought by individual plaintiffs, all of whom are law-abiding owners
23 of pre-ban (grandfathered) magazines, for themselves and on behalf of those in a class who are
24 similarly situated, in a representative capacity pursuant to state law. *See e.g., Residents of*
25 *Beverly Glen, Inc. v. City of Los Angeles*, 34 Cal.App.3d 117 (1973) (plaintiffs had standing to
26 bring takings-type challenge to ordinance, in a representative capacity under state law).
27
28

1 **1. The Retroactive Magazine Possession Ban Constitutes a *Per Se* Taking.**

2 A “classic taking” is well understood to be one in which “the government directly
3 appropriates private property for its own use.” *Tahoe-Sierra Preservation Council, Inc. v. Tahoe*
4 *Regional Planning Agency*, 535 U.S. 302, 324 (2002). And likewise, a “paradigmatic taking,”
5 has also been equally well understood to be “a direct government appropriation or physical
6 invasion of private property.” *Lingle*, 544 U.S. at 537. Such takings – where the government
7 directly appropriates the property itself – are *per se* takings for which just compensation must be
8 provided, without regard to factors regarding the economic impact of the regulation or the nature
9 or character of the government action. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458
10 U.S. 419, 426 (1982).

11 The law has further developed to recognize another type of *per se* taking, one in which
12 government regulation of private property may be so onerous that its effect *is tantamount* to a
13 direct appropriation or ouster. These regulations are also compensable takings under the Fifth
14 Amendment, and occur when such regulations “completely deprive an owner of ‘all
15 economically beneficial us[e]’ of her property.” *Lingle*, 544 U.S. at 538 (citing *Lucas v. South*
16 *Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (*Lucas*)).

17 Where there has been a *per se* taking, under either theory, compensation *must* be paid to
18 the property owner, *irrespective* of the perceived public good. *See, e.g., Loretto*, 458 U.S. at
19 426; *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979) (“[T]here is no question but that
20 Congress could assure the public a free right of access [...] if it so chose. Whether a statute or
21 regulation that went so far amounted to a ‘taking,’ however, is an entirely separate question.”);
22 *Nat’l Wildlife Fed’n v. I.C.C.*, 850 F.2d 694, 706 (D.C. Cir. 1988) (“government action that
23 causes a permanent physical occupation of real property amounts to a taking ‘without regard to
24 whether the action achieves an important public benefit or has only minimal economic impact on
25 the owner’”).

26 Here, Penal Code § 32310(c) and (d) as amended constitutes both a direct physical
27 appropriation of Plaintiffs’ personal property and a scheme so onerous that it deprives Plaintiffs
28

1 of all economically beneficial use of their property. It therefore amounts to a *per se* taking, for
2 which compensation *must* be provided.

3 **a. Section 32310(d) is a Taking Because It Compels the Physical**
4 **Appropriation of Property.**

5 There can be no question that the statute itself *provides* for the direct physical
6 appropriation of tangible property by the government through forced physical surrender. The
7 question is whether that is the only practical, viable (and intended) result. Penal Code §
8 32310(d) as enacted, states:

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

- 11 (1) Remove the large-capacity magazine from the state;
12 (2) Sell the large-capacity magazine to a licensed firearms dealer; or
13 (3) Surrender the large-capacity magazine to a law enforcement agency for
14 destruction.

15 California’s ban does *not* expressly provide for LCM owners to “modify their LCMs ‘to
16 accept ten rounds or less” or to “register their firearms with LCMs that cannot be ‘modified to
17 accommodate ten rounds or less,” like the New Jersey ban at issue in the *ANJPRC* case which
18 specifically carves out such exceptions within the text of the ban itself. *ANJPRC*, 910 F.3d at
19 111. And, in fact, of California’s three limited “options,” the third option (“surrender”), we
20 contend, is the true option which the State intends to compel, and to which its statutory scheme
21 would effectively relegate most owners of pre-ban magazines who wish to comply with the law.
22 As Plaintiffs will show, it is the only economically viable option for the vast majority of
23 California pre-ban magazine holders to remain in compliance with the law.

24 To illustrate, the first purported “option” under subdivision (d), which is to “remove the
25 large-capacity magazine from the state,” is simply not viable for the vast majority of the class,
26 i.e., lawful pre-ban magazine holders. In the first place, the State has taken great pains to prevent
27 or prohibit the sale of such items to others within the confines of this State. Subdivision (a) of
28 section 32310 specifically states: “[A]ny person in this state who [...] *offers or exposes for sale*,
[...] any large-capacity magazine is punishable by imprisonment in a county jail not exceeding

1 one year or imprisonment pursuant to subdivision (h) of Section 1170.” (Emphasis added.)
2 Therefore, conscientious California pre-ban large capacity magazine holders who wish to dispose
3 of their property using the first “option” apparently may not go on the Internet, offer it for sale,
4 or even call a prospective purchaser in another state to arrange for the sale. They must, by
5 statute, physically drive to a border state before they may even begin to offer or expose it for
6 sale, or even begin to *look* for a willing buyer or receiver. This is simply, economically and
7 practically, untenable. Indeed, the notion that an actual market exists for 18+ year-old firearms
8 parts is, in itself, highly doubtful.

9 It is apparent that the Legislature and drafters of Proposition 63 simply and callously
10 assumed (or were simply indifferent to the fact) that any lawful pre-ban large-capacity magazine
11 holder wishing to take the magazine out of state to preserve his or her constitutionally-protected
12 right to *keep* and bear arms has a friend, relative, or other recipient willing to take or bear the
13 costs of storing firearms or firearms parts on the holder’s behalf. This is simply unrealistic. Yet,
14 this is the only option available to the class of pre-ban magazine holders who actually wish to
15 *keep* their firearms, intact or otherwise.¹² If such owners wish to keep their firearms intact, they
16 must essentially lose access to them – a substantial deprivation of their rights and interests in the
17 property that in itself constitutes a taking. *See Nixon v. United States*, 978 F.2d 1269, 1285 (D.C.
18 Cir. 1992) (“The retention of some access rights by the former owner of property does not
19 preclude the finding of a *per se* taking.”).

20
21 The second purported “option” under § 32310(d) – to sell to a “licensed firearms dealer”
22 – is equally illusory and (from a takings perspective) suffers from the same defect as the first
23 option, i.e., it simply presupposes that there is an actual market for such items. That is not only a
24 callous assumption, but it is a false one. There is no guarantee (or reason to assume) that
25 licensed firearms dealers would even be willing to participate in this state-endorsed confiscation
26

27 ¹²Again, and as will be proven at trial, ammunition magazines are not separate artifacts, but are
28 considered to be and are inherent operating parts of functioning firearms; semi-automatic
firearms are essentially inoperable without them. (TAC, ¶ 32).

1 scheme, forcing upon California gun owners the gross indignity of disassembling and selling
 2 away valuable firearms parts they have lawfully held for years. And moreover, from a purely
 3 economic point of view, there is no reason to assume that licensed firearms dealers would even
 4 be willing to buy such items, at cost, or even at all. Indeed, there are very few people within the
 5 State to whom licensed firearms dealers could resell such items, except for the small class of
 6 exempt people such as law enforcement officers. *See* Pen. Code § 32450(c).

7 But in the bigger picture, of course, the government’s dispossession of personal property,
 8 by *forcing* its sale to third parties, must itself be considered no less than a taking in the first
 9 place. At one time, during a *bona fide* national emergency/World War, the government routinely
 10 did just this, forcing property owners to relinquish valuable materiel in forcing its sale to third
 11 parties for wartime use. And in such instances, the courts routinely held these commandments to
 12 be takings, whether or not the property was directly appropriated by the government. *See Dore*
 13 *v. United States*, 97 F. Supp. 239, 242 (Ct. Cl. 1951) (“When, as here, the United States exercises
 14 its authority to order delivery and in its sovereign capacity forces the ‘sale’ of property to it for
 15 public use there is, in our opinion, a ‘taking’ and just compensation must be made.”); *Edward P.*
 16 *Stahel & Co. v. United States*, 78 F. Supp. 800, 804 (Ct. Cl. 1948) (“But to say that when the
 17 Government forbids an owner of property to make any other use of it, and requires him to sell it,
 18 upon request, to the Government, or its designee who will use it for a Government purpose, is
 19 not a taking of the property for public use, would be to make the constitutional right contingent
 20 upon the form by which the Government chose to acquire the use of the property.”).

21 And therefore, the State cannot simply defer, deflect, or “outsource” its duty to provide
 22 just compensation under the Takings Clause, by just *assuming* that a market for such forced sales
 23 exist. “A ‘sale’ implies willing consent to the bargain. A transaction although in the form of a
 24 sale, but under compulsion or duress, is not a sale.” *Dore*, 97 F. Supp. at 242. “‘Just
 25 compensation,’” we have held, means in most cases the fair market value of the property on the
 26 date it is appropriated. [...] ‘Under this standard, the owner is entitled to receive ‘what a willing
 27 buyer would pay in cash to a willing seller’ at the time of the taking.’” *Kirby Forest Indus., Inc.*
 28

1 v. *United States*, 467 U.S. 1, 10, 104 S.Ct. 2187, 2194 (1984) (citation omitted). A true market
2 for these old pre-ban magazines – comprised of *voluntary* buyers and sellers – simply does not
3 exist.

4 There being no viable, true market for these pre-ban magazines, (again, which essentially
5 cannot be offered for sale while within this State), that leaves only one plausible, practical option
6 for a conscientious pre-ban magazine holder to comply with the law: to “surrender” it to a law
7 enforcement agency for destruction. And let us make no mistake: this is the option which the
8 State wants, for (a) it is the only viable option as discussed above, and (b) it is hard to imagine
9 that such large-capacity magazines which the State believes “are disproportionately used in
10 crime, and feature prominently in some of the most serious crime, including homicides, mass
11 shootings, and killings of law enforcement officers,” (MTD at 3), are somehow acceptable to
12 export to other parts of the country. And the destruction option is, for purposes of this
13 discussion, a direct physical appropriation of previously lawfully-held property, whether the
14 government takes title to it or not. It is therefore a taking, for which compensation has not even
15 been considered, or would be provided.¹³

16 Therefore, by enactment of this confiscatory statutory scheme, the State has or will have
17 engaged in a taking. “[T]o constitute a taking under the Fifth Amendment it is not necessary that
18 property be absolutely ‘taken’ in the narrow sense of that word to come within the protection of
19 this constitutional provision; it is sufficient if the action by the government involves a direct
20 interference with or disturbance of property rights. [...] Nor need the government directly
21 appropriate the title, possession or use of the properties[.]” *Richmond Elks Hall Ass'n v.*
22

23
24
25 ¹³ The Legislature, in enacting SB 1446, never even considered the question of compensation at
26 all, nor did it consider the question of a viable market for the forced sale of these items. We
27 know this because the Legislative analysis simply assumed, as discussed below, that the
28 retroactive magazine ban was not a taking in the first place, but was a valid exercise of its police
power. (See Senate Rules Committee Analysis dated 5/19/16 regarding SB 1446, at pp. 4-5,
Plaintiffs’ Req. for Jud. Notice, Exhibit B.) Moreover, there is nothing in the legislative history
of SB 1446, or Proposition 63, that indicates that the drafters/proponents ever even considered a
study of compensation, or a viable market for the forced sale of these items.

1 *Richmond Redevelopment Agency*, 561 F.2d 1327, 1330 (9th Cir. 1977) (citations omitted);
2 *Kaiser Aetna*, 444 U.S. at 175 (“[T]his Court has observed that “[c]onfiscation may result from a
3 taking of the use of property without compensation quite as well as from the taking of the
4 title[.]”) (quoting *Chicago, R. I. & P. R. Co. v. United States*, 284 U.S. 80, 96 (1931)).

5 **b. The Effect of Section 32310(c) and (d) Constitutes a Taking Because**
6 **the Statutory Scheme Completely Deprives the Owners of All**
7 **Economically Beneficial Use of Their Property.**

8 Irrespective of whether the statute as amended will substantially result in direct physical
9 appropriation of the pre-ban magazines, one thing is clear: it is, in any event, compelling
10 *dispossession* of this property. And thus, it amounts to a compensable taking, which, as noted,
11 even goes beyond the New Jersey ban, because the law will have completely deprived the
12 owners of *all* economically beneficial use of their property. *Lucas*, 505 U.S. at 1019; *Lingle*, 544
13 U.S. at 538. In doing so, the State has deprived plaintiffs and those similarly situated of “the
14 entire ‘bundle’ of property rights,” i.e., their rights to possess, use, and dispose of these items as
15 they see fit. *Horne v. Department of Agriculture*, ___ U.S. ___, 135 S.Ct. 2419, 2428 (2015).

16 In *Horne*, the Supreme Court confirmed that the Takings Clause applies to direct
17 appropriations of personal property, included within its description of a “paradigmatic” taking.
18 That this was the first time that the Supreme Court squarely addressed the issue of whether
19 personal property was subject to the Takings Clause is somewhat remarkable because it is self-
20 evident. However, it has long been established that laws or regulations which essentially destroy
21 the value of personal property, or require its surrender, may and often do constitute a taking,
22 thereby entitling the property owner to compensation or other relief.

23 In fact, some 40 years ago, in *Andrus v. Allard*, 44 U.S. 51 (1979) (*Allard*), the Supreme
24 Court considered the question of whether a law that affected the value of personal property could
25 be challenged, among other grounds, for the reason that it constituted a taking without
26 compensation – or more precisely, whether it violated the plaintiffs’ property rights under the
27
28

1 Fifth Amendment.¹⁴ The specific question presented to the court was whether federal
2 conservation statutes designed to prevent the destruction of certain species of birds violated the
3 Fifth Amendment rights of the plaintiffs. The conservation statutes in question prohibited
4 generally the sale of protected bird parts, but not the possession thereof. The plaintiffs were
5 engaged in the trade of Indian artifacts, and in fact, had been prosecuted and fined for *selling*
6 such artifacts which contained the feathers of protected birds. 444 U.S. at 54-55. Ultimately, the
7 court, considering the merits of the claim, concluded that the conservation statutes did not
8 amount to a taking, the primary reasons for which had to do with the enduring economic value of
9 the property, and that the laws did not completely destroy that bundle of property rights to
10 deprive the owners of any use whatsoever. But in this regard, the court stated:

11 The regulations challenged here do not compel the surrender of the artifacts, and
12 there is no physical invasion or restraint upon them. Rather, a significant
13 restriction has been imposed on one means of disposing of the artifacts. But the
14 denial of one traditional property right does not always amount to a taking. At
15 least where an owner possesses a full “bundle” of property rights, the destruction
16 of one “strand” of the bundle is not a taking, because the aggregate must be
17 viewed in its entirety. [. . .] In this case, it is crucial that appellees retain the
18 rights to possess and transport their property, and to donate or devise the protected
19 birds.

20 444 U.S. at 65–66 (internal citations omitted).

21 Unlike the regulations in *Allard*, the relevant portions of the LCM Ban, specifically §
22 32310(c) and (d) as amended, *do indeed* compel the surrender of lawfully-held personal
23 property. The magazine ban as enacted is a complete and retroactive ban on the *possession* of
24 previously lawfully-held, and constitutionally-protected, personal property. Unlike the plaintiffs
25 in *Allard*, but like the plaintiffs in *Horne*, the retroactive ban on the possession of pre-ban
26 magazines in fact causes Plaintiffs here to “lose the entire ‘bundle’ of property rights in these
27 items. The distinction from *Allard* that Chief Justice Roberts drew in *Horne* directly applies
28

¹⁴The court noted that although the argument was cast in terms of “economic substantive due process,” the language used by the district court was consistent with the terminology of the Takings Clause. 444 U.S. at 64, n. 21.

1 here: “*Allard* is a very different case. [...] [T]he owners in that case retained the rights to
 2 possess, donate, and devise their property. In finding no taking, the Court emphasized that the
 3 Government did not ‘compel the surrender of the artifacts, and there [was] no physical invasion
 4 or restraint upon them.’ [...] Here of course the raisin program requires physical surrender of the
 5 raisins and transfer of title, and the growers lose any right to control their disposition.” *Horne*,
 6 135 S.Ct. at 2429 (citing *Allard*, 444 U.S. at 65-66).

7 Again, this statutory scheme is built upon the assumption that all “pre-ban” large-
 8 capacity magazine holders in this State simply have the means and the ability to store their
 9 personal property out of State, or could simply sell the magazines to a licensed firearm dealer –
 10 with no supporting analysis of the likely burdens or costs for such out-of-state storage or the
 11 existence of a market for such forced sales. This reveals the State’s true motive here: to force
 12 law-abiding gun owners to surrender these valuable and integral components of their firearms.
 13 In other words, the State’s ultimate goal is simply confiscation and destruction of Plaintiffs’
 14 lawfully-held personal property.

15 **c. The Statute is Not a Valid Exercise of Police Power.**

16 Much of the authority upon which the State relies in claiming this confiscatory ban is a
 17 valid exercise of its “police power” is entirely inapposite because it pre-dates the paradigmatic
 18 shifts in *Heller* and *Lucas*. (MTD at 18, n. 13.) Second, the State’s call to “police power” is
 19 largely irrelevant if this Court finds this statutory scheme to be a *per se* taking. Again, *per se*
 20 takings require compensation – irrespective of any “public good” that is asserted or achieved.
 21 *See Loretto*, 458 U.S. at 425 (Assuming a valid exercise of the state’s police power, the court
 22 stated: “It is a separate question, however, whether an otherwise valid regulation so frustrates
 23 property rights that compensation must be paid.”).

24 On the first point, regarding the purported police power to regulate “dangerous weapons,”
 25 the case upon which the Legislature primarily relied in determining that it had the unilateral
 26 authority to enact this ban without running afoul of the Takings Clause is *Fesjian v. Jefferson*,
 27 399 A.2d 861 (D.C. Ct. App. 1979). (*See* Plaintiffs’ Req. for Jud. Notice, Exhibit B, at p. 6.)
 28

1 This pre-*Heller* decision applied a simple rational basis test to an important fundamental right,
2 albeit on equal protection grounds. 399 A.2d at 864. After *Heller*, the proper inquiry would be
3 whether the firearms themselves are in common use, for lawful purposes, and are not dangerous
4 and unusual. *Heller*, 554 U.S. at 627. And as to the specific takings argument, it could fairly be
5 said that in *Fesjian* the D.C. Court of Appeals simply gave short shrift to the takings argument
6 based on the assumption that *all* firearms could be summarily banned in a pre-*Heller* District of
7 Columbia. In one paragraph, where the court assumed *arguendo* that the D.C. statute prohibiting
8 the plaintiffs (representing themselves in pro per) from registering their weapons was a taking,
9 the court simply concluded that “a taking for the public benefit under a power of eminent domain
10 is, however, to be distinguished from a proper exercise of police power to prevent a perceived
11 public harm, which does not require compensation. [...] That the statute in question is an
12 exercise of legislative police power and not of eminent domain is beyond dispute.” *Fesjian*, 399
13 A.2d at 866. There was no discussion or analysis whatsoever as to whether the D.C. statute
14 amounted to forced dispossession, or deprived plaintiffs of the economically beneficial use of
15 their property, constituting a *per se* taking. Those Supreme Court takings cases, of course, came
16 later.

17
18 Indeed, *Heller* completely changes the landscape as to takings cases involving firearms
19 since courts may no longer simply assume that *all* firearms could be banned within any given
20 jurisdiction. For example, in *Quilici v. Vill. of Morton Grove*, 532 F.Supp. 1169 (N.D. Ill. 1981),
21 the district court ruled that a village ordinance which completely banned possession of handguns
22 except by peace officers, members of armed forces, and licensed gun collectors, but which
23 allowed continued recreational use of handguns at licensed gun clubs, was a reasonable exercise
24 of police power. As in *Fesjian* (and in fact, citing to it), the district court made short work of the
25 takings argument, summarily reasoning: “It is well established that a Fifth Amendment taking
26 can occur through the exercise of the police power regulating property rights. In order for a
27 regulatory taking to require compensation, however, the exercise of the police power must result
28 in the destruction of the use and enjoyment of a legitimate private property right.” *Quilici*, 532

1 F.Supp. at 1183-84, aff'd, 695 F.2d 261 (7th Cir. 1982). If a court believes it can simply uphold
2 a ban *all* firearms without regard to the Second Amendment, it is a short step to dismiss a related
3 takings claim as being a valid exercise of police power. All pre-*Heller* takings cases involving
4 firearms, including *Fesjian*, are inherently suspect for this very reason alone. Understanding this
5 to be the argument, the State has cited one post-*Heller* case which upheld a firearm seizure and
6 dismissed the plaintiff's takings claim, *Burns v. Mukasey*, 2009 WL 8756489 at *5 (E.D. Cal.
7 2009) (MTD at 18, n. 13.) But in *Burns*, the district court did not believe at the time that the
8 Second Amendment was applicable to the states (as the decision pre-dated *McDonald*), *id.*, at *4.
9 Furthermore, the district court in *Burns* similarly gave short shrift to the plaintiff's takings claim,
10 limited to a discussion of whether his firearm constituted a taking for "public use," and there was
11 no discussion regarding the alleged police power of the state. *Id.*, at *5. *Burns* therefore has no
12 applicability here.

13 The second point of significance is, while we do not concede that the retroactive LCM
14 ban involves an exercise of "police power," *it simply does not matter* if it does. Any reliance
15 upon older, pre-*Lucas* cases in adopting some type of bright-line rule regarding the payment of
16 compensation is, today, a fools' errand, just as any reliance upon hoary cases that attempted to
17 draw such lines is insufficient to uphold this ban. Notably, *Lucas*, the very case that gives us its
18 eponymous test regarding deprivation of all economically beneficial use of a claimant's property,
19 also involved the alleged exercise of a state's "police power." In *Lucas*, the owner of two
20 beachfront lots intended to build houses there, but was prohibited by a statute forbidding any
21 permanent inhabitable structures on the land in question. 505 U.S. at 1008. The plaintiff sued in
22 state court, and the South Carolina Supreme Court ultimately rejected his challenge under the
23 Takings Clause, holding that in the legitimate exercise of its police power, the state could restrict
24 his ability to use the land in order "to mitigate the harm to the public interest that [such a] use of
25 his land might occasion." *Id.*, at 1020–21. The *Lucas* Court disagreed. It held that, when "the
26 State seeks to sustain regulation that deprives land of all economically beneficial use, ... it may
27 resist compensation only if the logically antecedent inquiry into the nature of the owner's estate
28

1 shows that the proscribed use interests were not part of his title to begin with.” *Id.*, at 1027. And
2 thus, the high court remanded the case for the state courts to determine, under state law, whether
3 “background principles of ... property law” prohibited the future uses that the owner intended.
4 *Id.*, at 1031.

5 The rule post-*Lucas* now and simply boils down to this: Does the regulation result in the
6 complete elimination of the property’s value or beneficial use? If so, it amounts to the
7 equivalent of a physical appropriation, *see Lucas*, 505 U.S. at 1017; *Lingle*, 544 U.S. at 539–40,
8 and compensation must be paid. The *Lucas* court itself strongly implied that “many of [its] prior
9 opinions” which wrestled with the concept of “‘harmful or noxious uses’ of property” were
10 simply “early attempt[s] to describe in theoretical terms why government may, consistent with
11 the Takings Clause, affect property values by regulation without incurring an obligation to
12 compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the
13 State’s police power.” *Lucas*, 505 U.S. at 1022–23. With regard to these early cases, the court
14 stated:

15 When it is understood that “prevention of harmful use” was merely our early
16 formulation of the police power justification necessary to sustain (without
17 compensation) any regulatory diminution in value; and that the distinction
18 between regulation that “prevents harmful use” and that which “confers benefits”
19 is difficult, if not impossible, to discern on an objective, value-free basis; *it*
20 *becomes self-evident that noxious-use logic cannot serve as a touchstone to*
distinguish regulatory “takings”—which require compensation—from regulatory
deprivations that do not require compensation.

21 505 U.S. at 1026 (emphasis added.) Accordingly, the older line of cases, starting with *Mugler v.*
22 *Kansas*, 123 U.S. 623 (1887), which attempted to distinguish between valid exercises of “police
23 powers” and takings, simply does not result in a bright-line rule today. In fact, it is quite likely
24 that *Mugler* – decided under today’s standards – would have a different result, and it certainly
25 would be subject to a different analysis. The dispositive fact upon which the court relied in
26 *Mugler* was that the plaintiff had not been deprived of his property. “He still has possession of
27 it. He still has the right to sell it. Nor is it claimed that he is deprived of its use generally. The
28 only claim is that he is deprived of the privilege to use it for the manufacture of liquors for sale

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1 as a beverage.” *Mugler*, 123 U.S. 623, 8 S.Ct. at 285–86. So it was easy for the court simply to
 2 conclude, as a binary matter, that “[t]he law was within the police power of the state.” *Id.*, at
 3 286. Today, of course, the analysis would hinge not upon physical possession, but whether the
 4 plaintiff was deprived of all economically beneficial use thereof. *Lucas*, 505 U.S. at 1019.¹⁵

5 The State’s Motion suggests that *Lucas* is limited to land use cases, and “it is not clear
 6 that it is applicable here.” (MTD at 17:16-19). But that is not correct. *See, Bair v. United*
 7 *States*, 515 F.3d 1323, 1328 (Fed. Cir. 2008) (“In cases of personal property, the background
 8 principles are defined by the law existing at the time that the property came into existence. Any
 9 lawful regulation defining the scope of the property interest that predates the creation of that
 10 interest will ‘inhere in the title’ to the property.”). Moreover, *Lucas* merely restated a preexisting
 11 general principle that any limitation on the use of any property so severe could not be *newly*
 12 *legislated or decreed* without providing compensation. *See, United States v. Security Industrial*
 13 *Bank*, 459 U.S. 70, 78 (1982) (there was “substantial doubt” as to whether the retroactive
 14 destruction of creditors’ liens could comport with the Takings Clause).

15 Here, there is no question – and the State cannot legitimately dispute – that Plaintiffs and
 16 similarly-situated, pre-ban magazine holders (of whom there may be hundreds of thousands – *see*
 17 Req. for Jud. Notice Exhibit A), have and have had a valid possessory interest in their personal
 18 property, lawfully and legally held, without controversy for many years – 17 years or more.
 19 *Their* property was not a nuisance 17 years ago, and it is not today. There is no evidence that
 20 *any* legal “pre-ban” magazine holders are using or ever have used their property in noxious or
 21 dangerous ways. Instead, the statute is a categorical ban on possession itself, designed to punish
 22 Plaintiffs and others similarly situated, as a supposed remedy to the tragedies of mass shootings
 23 and other incidents of “gun violence” – when there is no evidence that any of these “pre-ban”
 24

25
 26
 27 ¹⁵And even if the prohibitory liquor law were found not to deprive the plaintiff of *all*
 28 economically beneficial use of the distillery, that would not end the story either. The law’s effect
 would still be subject to the regulatory takings analysis required by *Penn Central Transportation*
Co. v. City of New York, 438 U.S. 104 (1978), as discussed below.

1 magazines, especially those owned by Plaintiffs, are or have been used in such incidents.
2 Plaintiffs are being completely dispossessed of this lawfully-held, and Constitutionally-protected
3 property either as a forced physical surrender or its equivalent by the destruction of all beneficial
4 use thereof. It is, quite simply, a *per se* taking for which compensation must be provided,
5 irrespective of the purported public good or the police power of the State.

6 **2. The Retroactive Magazine Possession Ban Constitutes a Burdensome**
7 **Regulatory Taking.**

8 The same analysis alternatively supports a conclusion that the retroactive ban on the
9 prohibition of these grandfathered, pre-ban magazines constitutes an unreasonably burdensome
10 regulatory taking, which also requires compensation. Aside from the direct appropriations of
11 and interference with property constituting *per se* takings, discussed above, the Supreme Court
12 has held, starting with *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), that compensation
13 is also required for a “regulatory taking” – a restriction on the use of property that goes “too far.”
14 260 U.S. at 415; *Horne*, 135 S.Ct. at 2427. “And in *Penn Central Transp. Co. v. New York City*,
15 [...], the Court clarified that the test for how far was ‘too far’ required an ‘ad hoc’ factual
16 inquiry.” *Horne*, 135 S.Ct. at 2427. “Primary among those factors [in *Penn Central*] are ‘[t]he
17 economic impact of the regulation on the claimant and, particularly, the extent to which the
18 regulation has interfered with distinct investment-backed expectations.’ [...] In addition, the
19 ‘character of the governmental action – for instance whether it amounts to a physical invasion or
20 instead merely affects property interests through ‘some public program adjusting the benefits and
21 burdens of economic life to promote the common good’ – may be relevant in discerning whether
22 a taking has occurred.” *Lingle*, 544 U.S. at 539; *Palazzolo v. Rhode Island*, 533 U.S. 606, 617
23 (2001).

24 In essence, the “principal guidelines” under *Penn Central* are the economic impact on the
25 regulation and the character of the government action. Each test focuses on the severity of the
26 burden that the government imposes upon these private property rights. Here, the economic
27 burden on the Plaintiffs, and upon the class of similarly-situated individuals they represent, is
28

1 substantial. As discussed above, to the extent that the forced dispossession of the magazines is
 2 not a taking *per se*, there is no viable market for the “forced sale” of these items. In some cases,
 3 the value of these “pre-ban,” “grandfathered” magazines is substantial. (TAC, ¶ 11-13.) Some
 4 of these magazines are substantial in value because they are the only type of magazine that was
 5 ever made for that particular firearm (*id.*, ¶ 13) or the manufacturer never made original ten-
 6 round or fewer magazines for that firearm (*id.*, ¶ 11, 13). Ironically, the very thing that makes all
 7 of these magazines so valuable and essentially irreplaceable is the fact that their further
 8 acquisition and importation into the State is illegal under § 32310(a).

9 And again, even generously assuming that some semblance of a market exists, the law
 10 does not permit the offering for sale of these items while within the confines of this State. Pen.
 11 Code § 32310(a). Unlike the plaintiffs in *Fyock*, this is not simply a matter of taking items of
 12 personal property to a neighboring township a few miles away in order to escape the prohibition.
 13 The statewide scale, combined with a restrictive law preventing the interstate or extra-state sale
 14 of these items, makes the burden of compliance far more substantial. Contrast the case of *Quilici*
 15 *v. Vill. of Morton Grove*, 532 F. Supp. 1169 (N.D. Ill. 1981), where, in rejecting the takings
 16 challenge to a village-wide ban on handguns, the district court concluded: “The Morton Grove
 17 ordinance does not go that far. The geographic reach of the ordinance is limited; gun owners who
 18 wish to may sell or otherwise dispose of their handguns outside of Morton Grove.” 532 F.Supp
 19 at 1184. Such is clearly not the case here.

20 We measure these severe burdens upon the Plaintiffs, of course, against the character of
 21 the government’s action. Here, there can be no substantial or legitimate justification for the
 22 retroactive confiscation of large-capacity magazines that are now at least 17 years old, and in
 23 many cases, even older. The stated, express justification for this massive retroactive ban is to
 24 prevent the incidence of horrific mass shootings that have occurred over the past few years, most
 25 notably culminating in the terrorist attacks in San Bernardino in 2015. But an objective and
 26 careful examination of the data shows that to the extent mass shootings occur in California, pre-
 27 ban, large-capacity magazines lawfully held in California since well before 2000 have not been
 28

1 and are not the instrumentality. Plaintiffs will indeed show at trial that there is little or no data to
2 support any conclusion that pre-SB 23 “grandfathered” large-capacity magazines have been
3 involved in such incidents. And when large-capacity magazines have been used (e.g., in San
4 Bernardino), they were imported illegally in contravention of existing law prohibiting their
5 importation. The data indicate an extremely low probability that any of the large-capacity
6 magazines used in mass shootings since 2000 were grandfathered magazines. Thus, there is
7 virtually no benefit to be gained in (or legitimate justification for) banning possession of large-
8 capacity magazines that have been legally and peaceably owned since 2000. There is indeed no
9 evidence that large-capacity magazine bans in general have anything to do with reducing murder
10 rates, or gun homicides in particular.

11 In sum, whether the retroactive ban on the continued possession of personal property,
12 legally held for at least 17 years and more, constitutes direct appropriation, completely
13 eliminates their value, or substantially interferes with Plaintiffs’ property rights rising to the level
14 of a regulatory taking, compensation must be provided. In this case, the State never even
15 considered that it might need to provide compensation as a taking, instead presumptively
16 assuming that it could simply dispossess Plaintiffs of long-held, lawfully-owned, and integral
17 parts of firearms under its “police powers.” It was wrong in so assuming, and should therefore
18 be prevented from enforcing this retroactive ban, unless and until it provides for such
19 compensation or amends the law to keep grandfathered magazines legal within this State. In
20 response to Plaintiffs’ legitimate concerns about the failure of the State to provide any sort of
21 claims process through which LCM owners could seek compensation, the State says this Court
22 can and should ignore these concerns because they amount to nothing more than a “legal
23 conclusion.” (MTD at 17:26-28.) But, of course, this is a purely *factual* point: the State either did
24 or did not provide such a process, and the State does not claim it did. Thus, these concerns
25 cannot be swept aside and, instead, must be accepted as true along with the rest of Plaintiffs’
26 well-pleaded facts that the State has not even attempted to refute in its motion.
27
28

1 **C. PLAINTIFFS STATE CAUSES OF ACTION FOR VAGUENESS AND OVERBREADTH (COUNTS**
2 **III & V).**

3 **1. The Vagueness Claims Stand On Their Own In Stating Colorable Claims For**
4 **Relief That Easily Survive The State’s Motion To Dismiss.**

5 In contesting Plaintiffs’ vagueness concerns, the State overlooks the irony of its reliance
6 upon *Karlin v. Foust*, 188 F.3d 446 (9th Cir. 1999). Drawing directly from the high court’s
7 opinion in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the *Karlin* court emphasized in no
8 uncertain terms the key constitutional principle at the bottom of this claim – that “a law is
9 unconstitutional ‘if its prohibitions are not clearly defined.’” *Id.* at 458 (quoting *Grayned*, at
10 108). Harnessing the high court’s commanding analysis, the Ninth Circuit emphasized the core
11 concerns underlying Plaintiffs’ void-for-vagueness claim:

12 Vague laws offend several important values. First, because we assume that man is
13 free to steer between lawful and unlawful conduct, we insist that laws give the
14 person of ordinary intelligence a reasonable opportunity to know what is
15 prohibited, so that he may act accordingly. Vague laws may trap the innocent by
16 not providing fair warning. Second, if arbitrary and discriminatory enforcement is
17 to be prevented, laws must provide explicit standards for those who apply them. A
18 vague law impermissibly delegates basic policy matters to policemen, judges, and
19 juries for resolution on an ad hoc and subjective basis, with the attendant dangers
20 of arbitrary and discriminatory application.

21 *Karlin* at 458 (quoting *Grayned* at 108-09).

22 Thus, “there are two means by which a statute can operate in an unconstitutionally vague
23 manner.” *Karlin*, 188 F.3d at 458. “First, a statute is void for vagueness if it fails to provide ‘fair
24 warning’ as to what conduct will subject a person to liability.” *Id.* “Second, a statute must
25 contain an explicit and ascertainable standard to prevent those charged with enforcing the
26 statute’s provisions from engaging in ‘arbitrary and discriminatory’ enforcement.” *Id.* at 458-59.
27 The statutory scheme at issue here woefully fails these fundamental requirements of due process,
28 and there is no basis for the State’s setting aside of those concerns simply because the claims
implicate fundamental rights other than free speech.

1 **2. The DOJ’s Own Findings Poignantly Demonstrate the Serious Vagueness**
2 **Problems that the State Seeks to Bypass in Ignoring This Evidence.**

3 Significantly, the DOJ itself – the very arm of the State charged with the crucial task of
4 enforcing the LCM ban against California citizens – has publicly acknowledged that the ban as
5 written failed to satisfy either requirement of due process. The DOJ went on record to declare
6 that “emergency regulations” were necessary to “provide guidance to California residents” on the
7 most basic and fundamental enforcement issue – “how to comply with the ban” – and that
8 without such guidance, citizens would not understand the core provisions delineating the
9 “options for disposal of large-capacity magazines” or the option of “reducing the capacity of a
10 large-capacity magazine.” (TAC, Exh. A at 1-2, 3, 5). In the DOJ’s own words, this
11 clarification was necessary to “avert serious harm to public peace, health, safety, or general
12 welfare” that would ensue should the LCM ban be enforced without such emergency regulations.
13 *Id.* at 2.

14 But after issuing such “emergency regulations,” it later retracted them after receiving
15 criticism that it had failed to comply with the ordinary notice and comment process. And,
16 crucially, the DOJ has never publicly retracted any of its pronouncements that effectively
17 declared the LCM ban unconstitutionally vague and ambiguous because, in its own schooled
18 opinion, it was not possible to enforce this law in a clear, consistent, and non-discriminatory
19 manner based upon the face of the LCM ban alone. This is compelling evidence of inherent
20 vagueness, coming directly from the DOJ, and starkly exposes the reality the State seeks to avoid
21 in blithely claiming that “[t]here can be no question that section 32310 reasonably apprises the
22 public as to what conduct is prohibited from under the statute.” (MTD at 20:17-18.) Indeed,
23 how could there be “no question” here when a federal district court judge has painstakingly
24 detailed the vagueness concerns subsisting throughout this very statutory scheme? *See Duncan v.*
25 *Becerra*, 265 F.Supp.3d 1106, 1111 (S.D. Cal. 2017) (where Judge Benitez illustrated in detail
26 realistic concerns about how California’s increasingly “burdensome web of restrictions on the
27 rights of law-abiding responsible gun owners to buy, borrow, acquire, modify, use, or possess
28

1 ammunition magazines able to hold more than 10 rounds” is “so vague that men of common
2 intelligence must necessarily guess at its meaning”) (quoting *Connally v. General Constr. Co.*,
3 269 U.S. 385, 391 (1926).

4 **3. The Legislative and Initiative History Inevitably Compel the Conclusion that**
5 **the Two Conflicting Versions of the LCM Ban Both Remain in Effect.**

6 The DOJ had much reason for the urgent concerns that spurred its “emergency” response
7 to the “serious harms” posed by the LCM ban’s lack of clarity in enforcement. Material
8 uncertainties and inconsistencies abound within the statutory scheme. The starting point is
9 inevitably the two parallel versions of the scheme under SB 1446 and Proposition 63, which have
10 become a major subject of debate in this litigation. The State continues to insist that the
11 significant substantive differences between the two versions may be swept aside with the general
12 principle that a later enacted law typically prevails over an earlier law on the same subject.
13 (MTD 19:19-23.) But no such simplistic solution exists for this problem. In fact, the primary
14 authority the State cites in support of its proposition is the opinion in *People v. Bustamante*, 57
15 Cal.App.4th 693 (1997), which drew its analysis from decisional and statutory law that can only
16 undermine the State’s position.

17 The *Bustamante* court relied upon the California Supreme Court case of *People v.*
18 *Dobbins*, 73 Cal. 257 (1887) and Government Code § 9605, to conclude that a later-enacted
19 criminal statute prevailed over an earlier criminal statute defining the same general criminal
20 offense. *Bustamante*, 57 Cal.App.4th at 701. Both of these authorities make clear this general
21 rule about later-enacted statutes is actually a rebuttable presumption that dissolves in the face of
22 evidence that the later-enacted law is not intended to prevail over earlier laws on the same
23 subject. *Dobbins*, at 259 (explaining that this rule creates a “presumption” that “when two laws
24 upon the same subject, passed at different times, are inconsistent with each other, the one passed
25 last must prevail,” rebuttable with evidence of contrary legislative intent regarding which
26 prevails); Govt. Code, § 9605 (“In the absence of any express provision to the contrary in the
27 statute which is enacted last, it shall be conclusively presumed that the statute which is enacted
28

1 last is intended to prevail over statutes which are enacted earlier at the same session . . .”).

2 Something else the *Bustamante* decision does not mention is the closely related
3 presumption of statutory interpretation that, absent clear evidence to the contrary, the later
4 enactment of a law is not intended to repeal or supplant earlier laws on the same subject and
5 instead both statutes are intended to be enforced. *People v. Carter*, 131 Cal.App.3d 177, 181
6 (1933); *Western Mobile Assn. v. County of San Diego*, 16 Cal.App.3d 941, 948 (1971). Unless it
7 is clear that a repeal was intended, no such intent will be implied, and “the courts are bound to
8 maintain the integrity of both statutes” insofar as they may reasonably be read to stand together.
9 *Western Mobile*, at 948. The State has made no effort to refute or address any of these factors
10 that sideline the *Bustamante* opinion as not controlling. And here, there is no suggestion in the
11 relevant history that Proposition 63 was intended to repeal or prevail over SB 1446 in
12 establishing the LCM ban. If anything, the history indicates to the contrary, that SB 1446 was
13 intended to modify Proposition 63 or at least remain simultaneously in effect. The DOJ made its
14 own assessment of this issue, publicly declaring in its Finding of Emergency, issued on
15 December 15, 2016, after Proposition 63 had become effective, that “[i]n anticipation of
16 [Proposition 63’s] passages [sic], the Legislature pre-amended Proposition 63 with the passage
17 of Senate Bill 1446 . . . and [t]he clarifying amendments take effect on January 1, 2017.” (Req.
18 for Jud. Notice, Exh. A at p. 1 (italics added)).

19 Indeed, the Legislature was fully aware of the initiative’s final content in drafting SB
20 1446, since that version had been established since December 2015 – several months before SB
21 1446 was enacted into law – and yet nothing in the history indicates any intent to repeal that law
22 or render its effectiveness subject to the fate of Proposition 63. The content of SB 1446 itself
23 evinces an intent for that law to remain in effect. For instance, the version of § 32406 under SB
24 1446 establishes five exemptions to the ban that are absent from the version enacted under
25 Proposition 63. These protect: historical societies that keep large-capacities magazines
26 “unloaded, properly housed within secured premises, and secured from authorized handling;”
27 one who “finds a large-capacity magazine, if the person is not prohibited from possessing
28

1 firearms or ammunition, and possessed it no longer than necessary to deliver or transport it to the
2 nearest law enforcement agency;” forensic laboratories, and their agents or employees, “in the
3 course and scope of [their] authorized activities;” “[t]he receipt or disposition of a large-capacity
4 magazine by a trustee of a trust, or an executor or administrator of an estate, including an estate
5 that is subject to probate, that includes a large-capacity magazine;” and “[a] person lawfully in
6 possession of a firearm that the person obtained prior to January 1, 2000, if no magazine that
7 holds 10 or fewer rounds of ammunition is compatible with that firearm and the person possesses
8 the large-capacity magazine solely for use with that firearm.” § 32406(b)-(f) (S.B. 1446). One
9 could scarcely argue that these exemptions should not exist and that people in possession of
10 LCMs under such circumstances *should* be subject to criminal sanction for that possession.

11 The Legislature’s careful crafting of these eminently reasonable exemptions when fully
12 aware of the more limited scope of exemptions under the Proposition 63 version – coupled with
13 the evident lack of an intent to repeal SB 1446 – can only evince an intent for the SB 1446
14 version to remain in effect despite the enactment of Proposition 63. Thus, the timing of
15 Proposition 63 as the “later-enacted” of the two laws cannot support the State’s contention that
16 Proposition 63 supplanted SB 1446 in to-to. Rather, we must presume that both laws were
17 intended to remain in effect, *Western Mobile Assn.*, 16 Cal.App.3d at 948 – either as separate
18 schemes or as one collective scheme in which the Proposition 63 version was “pre-amended” by
19 SB 1446, such that the SB 1446 version prevails to the extent of any inconsistency, unless and
20 until the Legislature takes the affirmative step of repealing the SB 1446 version in order to install
21 the Proposition 63 version as solely controlling.

22 In fact, when the Legislature has intended to effect a repeal of a statute that runs parallel
23 to a different version of the same statute enacted under Proposition 63, it has done so
24 affirmatively. Last year, through Assembly Bill 103, the Legislature expressly recognized that
25 two parallel versions of Penal Code § 29805 (generally concerning firearm restrictions for
26 certain misdemeanants) existed “as a result of Proposition 63” (AB 103, Leg. Counsel Digest, §
27 21), and it went on to retain both versions as operative in making individual amendments to both
28

1 (effectively mirroring each section’s language with the other) (*id.* ¶¶ 45-46). Then, a few months
 2 later, the Legislature decided to actually repeal the version of section 29805 that pre-dated the
 3 one enacted under Proposition 63 (Stats 2017 ch 784 § 1 (AB 785)), expressly stating its intent to
 4 render the old version “obsolete” (AB 785, Leg. Counsel Digest). This additional compelling
 5 evidence showing the Legislature does and will take affirmative action to repeal a law that runs
 6 parallel to the version of the same law enacted under Proposition 63 solidifies Plaintiffs’ position
 7 that, unless and until the Legislature takes such action, both versions must be considered to
 8 remain in effect and meanwhile, to the extent of any inconsistency between the two versions, the
 9 later-*effective* version (SB 1446) controls.¹⁶

10 **4. The Resulting Conflicts and Confusion Within the LCM Ban Strongly**
 11 **Support Plaintiffs’ Claim that the Scheme is Unconstitutionally Vague.**

12 Naturally, whether the two versions of the LCM ban exist as separate schemes or as one
 13 collective scheme in which the Proposition 63 version was “pre-amended” by SB 1446, the
 14 resulting scheme fails to ensure “‘fair warning’ as to what conduct will subject a person to
 15 liability” with “an explicit and ascertainable standard.” *Karlin v. Foust*, 188 F.3d at 458. Either
 16 there are two parallel statutory schemes purporting to establish the same LCM ban under quite
 17 different terms and conditions, or only one is in operation and we have a contentious debate
 18 about which prevails over the other in whole or in part. In the meantime, those who fall within
 19 the legislatively-crafted exemptions specific to the SB 1446 version are left with uncertainty as
 20 to whether the ban actually applies to them, and those charged with enforcing the ban are left
 21

22 ¹⁶The State’s reference to the Proposition 63 Voter Information Guide does not change this
 23 analysis. (MTD at 19-20.) The single brief statement that the State extracts from the lengthy
 24 Guide reads: “Beginning July 2017, recently enacted law [SB 1446] will prohibit most of these
 25 individuals [who acquired their LCMs before 2000] from possessing these magazines.
 26 Individuals who do not comply are guilty of an infraction. However, there are various
 27 individuals who will be exempt from this requirement – such as an individual who owns a
 28 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.” (Exh. C. to Motion at p. 87). If anything, the description
 of the SB 1446 version in terms of its *future* application – i.e., the effect the law *will* have
 beginning July 2017 and who *will* be exempt under it – indicates that the initiative backers also
 contemplated a simultaneous operation of these laws.

1 with the power to enforce it “on an ad hoc and subjective basis, with the attendant dangers of
2 arbitrary and discriminatory application.” *Id.* at 458. And even more generally, with the lack of
3 the “guidance” that the DOJ itself deemed urgently necessary to avert “the serious harm”
4 inevitably flowing from the ban’s intrinsic vagueness, the average citizen will not only not know
5 “how to comply with the ban,” but also will not understand the core provisions establishing the
6 “options for disposal” of LCMs or how to reduce the capacity of LCMs to “the acceptable
7 minimum level of permanence.” (RJN, Exh. A at 1-2, 3, 5.) In fact, many citizens will be left
8 not even knowing whether their particular magazines fall within the LCM ban in the first place,
9 like those in the position of Plaintiff Federau who has one or more magazines for use with his
10 lawfully-possessed AR-15 platform model rifle. (TAC ¶ 14.) That rifle is only chambered for
11 .458 SOCOM ammunition, and the magazines at issue can hold no more than 10 rounds of *that*
12 ammunition. (*Id.*) However, the magazines *could* hold more than 10 rounds of a *different* caliber
13 ammunition (e.g., 30 rounds of 5.56 x 45 mm). (*Id.*) So Federau and potentially countless other
14 similarly situated citizens are stuck in the position of having no certainty about whether their
15 magazines are or would be considered “large-capacity” magazines simply because they could
16 hold more than 10 rounds of some *other* ammunition for which their firearms are not calibrated
17 or which they have no intention of using.

18
19 The allegations in support of this claim are “well-pleaded factual allegations,”
20 specifically delineating both the nature of the vagueness at issue and how it affects the parties
21 and all those similarly situated. Thus, the Court “should assume their veracity and then
22 determine whether they plausibly give rise to an entitlement to relief.” *Ashcroft v. Iqbal*, 556
23 U.S. 662, 679 (2009). This standard is met so long as the allegations and reasonable inferences
24 therefrom “are plausibly suggestive of a claim entitling the plaintiff to relief.” *John Doe I v.*
25 *Nestle USA*, 766 F.3d 1013, 1025 (9th Cir. 2014). Given the serious conflicts and confusion
26 subsisting in the LCM ban that the State’s own law enforcement arm has recognized as
27 dangerous to the public welfare in its current state – the scope of which far exceed the narrow
28 concerns about the potential vagueness of the single phase (“copies or duplicates”) at issue with

1 the pre-enforcement notice in *Worman v. Healey*, 293 F.Supp.3d at 269-270– the allegations are
2 not just “plausibly suggestive of a claim,” they are palpable.

3 **5. The State Fails in Its Attempt to Brush Off Plaintiffs’ Viable Claims of**
4 **Vagueness and Overbreadth in Count IV.**

5 The State also attempts to brush off the related vagueness and overbreadth claims in
6 Count IV, asserting that “the overbreadth doctrine does not apply outside of the First
7 Amendment context and thus, is inapplicable in this case[,]” and that because the Plaintiffs have
8 not alleged a First Amendment challenge to the law, “overbreadth doctrine does not apply, and
9 plaintiffs cannot state a claim that the LCM ban is unconstitutionally overbroad.” (MTD at 21:6-
10 13).. But again, this is not how it works. These challenges are neither dependent upon
11 Plaintiffs’ alleging a First Amendment free speech claim nor prevailing on their Second
12 Amendment claim. Such claims are properly grounded in the independent, fundamental due
13 process protections designed to ensure fair warning, consistent and non-arbitrary application, and
14 to prevent the enforcement of laws that improperly sweep up “a substantial amount of
15 constitutionally protected conduct” under the guise of a legislative goal that “does not match
16 the text of the statutes.” *Powell’s Books, Inc. v. Kroger*, 622 F.3d 1202, 1207 (9th Cir. 2010)
17 (quoting *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 397 (1998)); see e.g., *Phelps v. U.S.*,
18 831 F.2d at 898 (vagueness and overbreadth challenge to a statute governing the release of
19 persons adjudged not guilty of a crime by reason of insanity); *U.S. v. Rodriguez-Deharo*, 192
20 F.Supp.2d 1031, 1038-39 (E.D. Cal. 2002) (vagueness and overbreadth challenge to a domestic
21 violence statute).

22 Given the nature of the State’s conclusory, surface-level assertions here, it has failed to
23 present any reasoned analysis or argument to refute or even contest any of the Plaintiffs’
24 allegations in support of Count IV. That is a problem for the State, as the moving party who
25 bears the general burden here: “In considering a motion to dismiss for failure to state a claim, the
26 court generally accepts as true the factual allegations of the complaint in question, construes the
27 pleading in the light most favorable to the party opposing the motion, and resolves all doubts in
28

1 the pleader’s favor.” *Robinson v. Salazar*, 885 F.Supp.2d 1002, 1014 (E.D. Cal. 2012). Having
 2 made no effort to meet any of the specific allegations in this count, the State motion’s necessarily
 3 fails under this standard.

4 Moreover, even if the State had offered some sort of argument in support of its
 5 conclusory contention that the allegations fail to state a claim, this count would survive under the
 6 general standards designed to test for such adequacy. As with Count III, the allegations in
 7 support of this count comprise “more than an unadorned, the-defendant-unlawfully-harmed-me
 8 accusation,” *Iqbal*, 556 U.S. at 678, and instead contain more than “sufficient factual matter”
 9 that, “accepted as true,” “state claim to relief that is plausible on its face,” *Iqbal* at 678 (quoting
 10 *Twombly*, 550 U.S. at 570). The TAC specifically alleges, in detail, that: the purported disposal
 11 options of selling the prohibited LCMs to a firearms dealer and removing them from the state are
 12 illusory and utterly impractical options that could trap the unwary by exposing them to criminal
 13 liability in attempting to comply with the LCM ban through these purported disposal options (¶¶
 14 99-101); the purported exceptions for “honorably retired police officers,” trustees of a trust, and
 15 administrators of an estate are of similarly illusory protection given how they also invite arbitrary
 16 and discriminatory enforcement by their terms (¶¶ 102-104); and the ban is unconstitutionally
 17 overbroad because, as Plaintiffs will demonstrate at trial, the retroactive application of the LCM
 18 ban to current, legal owners of such magazines in no way advances the stated objectives of the
 19 law (¶ 106). These allegations are, at the very least, “plausibly suggestive of a claim entitling the
 20 plaintiff to relief.” *John Doe I*, 766 F.3d at 1025. And again, notably, the State does not claim
 21 otherwise. The State has failed to carry its burden in this motion to dismiss Counts III and IV,
 22 and therefore they must proceed to trial on the merits with the rest of Plaintiffs’ colorable claims.
 23

24
 25 **D. PLAINTIFFS HAVE STATED A CLAIM THAT THIS STATUTORY SCHEME VIOLATES THE
 26 EQUAL PROTECTION CLAUSE.**

27 Under the Equal Protection Clause of the Fourteenth Amendment, no state shall “deny to
 28 any person within its jurisdiction the equal protection of the laws,” U.S. Const. amend. XIV, § 1,

1 which is “essentially a directive that all persons similarly situated should be treated alike,” *City*
 2 *of Cleburne, Texas v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). “The Equal Protection
 3 Clause . . . den[ies] to States the power to legislate that different treatment be accorded to
 4 persons placed by a statute into different classes on the basis of criteria wholly unrelated to the
 5 objective of that statute. A classification ‘must be reasonable, not arbitrary, and must rest upon
 6 some ground of difference having a fair and substantial relation to the object of the legislation, so
 7 that all persons similarly circumstanced shall be treated alike.’” *Reed v. Reed*, 404 U.S. 71, 75–
 8 76 (1971) (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

9 Here, the State rotely recites standards applicable to the evaluation of equal protection
 10 claims while blithely assuming that no fundamental right is at stake, and in the end, never even
 11 gets around to justifying or explaining why exactly one class of ordinary citizens should be
 12 allowed to receive and possess large-capacity magazines as some kind of special privilege when
 13 other ordinary law-abiding citizens should be denied the same right – especially for lawful
 14 purposes like self-defense. Indeed, under this “Hollywood exception,” even honorably retired
 15 peace officers such as Plaintiffs Alan Normandy (TAC, ¶ 15) and Todd Nielsen (*id.*, ¶ 16), who
 16 reside out of state, and who often participate in firearms training programs, are precluded from
 17 simply *bringing* their LCMs into California for entirely lawful purposes. (*Id.*, ¶ 102.) As
 18 Plaintiffs’ TAC alleges, Penal Code § 32445 provides for an exception to possession of an LCM
 19 “for use solely as a prop for a motion picture, television, or video production.” (TAC, ¶ 113.)
 20 And, in order to use an LCM as a movie or television prop “an exempted holder of a special
 21 weapons permit (under § 32450(a)) would necessarily need to give possession of a proscribed
 22 magazine to a non-exempted actor or actress (under section 32445) – in order words, someone
 23 just like the average law-abiding California gun owner or visitor.” (*Id.*, ¶ 114.) “However,
 24 under this section, the receiver of the large-capacity magazine may even be a prohibited person
 25 since there is no requirement of a background check through the Department of Justice, or even
 26 any other form of evidencing the statutorily-exempted receiver’s eligibility to possess or acquire
 27 firearms or firearm parts – indeed, placing everyone on the same footing.” (*Id.*)
 28

1 But the State’s presumption that rational basis review should apply in the first place is
2 questionable. “When a state statute burdens a fundamental right or targets a suspect class, that
3 statute receives heightened scrutiny under the Fourteenth Amendment’s Equal Protection
4 Clause.” *Silveira v. Lockyer*, 312 F.3d 1052, 1087 (9th Cir. 2002) (citing *Romer v. Evans*, 517
5 U.S. 620, 631 (1996)). “Statutes infringing on fundamental rights are subject to the same
6 searching review.” *Silveira*, 312 F.3d at 1088. And here, it has already been established that a
7 law that restricts the ability of law-abiding citizens to possess large-capacity magazines within
8 their homes for the purpose of self-defense implicates the core of the Second Amendment.
9 *Fyock*, 779 F.3d at 999. Thus, a fundamental right is at stake, and the law requires heightened
10 review.

11 Furthermore, even under rational basis review, that standard, although deferential, “is not
12 a toothless one,” *Mathews v. Lucas*, 427 U.S. 495, 510 (1976), and “even the standard of
13 rationality . . . must find some footing in the realities of the subject addressed by the legislation.”
14 *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993). When conducting rational-basis review, it is
15 this Court’s “duty to scrutinize the connection, if any, between the goal of a legislative act and
16 the way in which individuals are classified in order to achieve that goal.” *Silveira*, 312 F.3d at
17 1088. And because “[t]he search for the link between classification and objective gives substance
18 to the Equal Protection Clause,” *Romer*, 517 U.S. at 632, courts “insist on knowing the relation
19 between the classification adopted and the object to be attained.” *Id.* at 633. To that end, the
20 question is focused “whether there is a rational basis for the *distinction*, rather than the
21 underlying government action.” *Gerhart v. Lake County Montana*, 637 F.3d 1013, 1023 (9th Cir.
22 2011), *cert. denied*, 132 S. Ct. 249 (2011) (italics added).

23 Under any standard, however, the State offers absolutely no justification whatsoever for
24 the differential treatment under the Hollywood exception. So what, exactly, is or could be the
25 supposed governmental interest advanced in allowing television and movie actors to receive and
26 possess LCMs while denying ordinary citizens the same? Perhaps the State indeed simply
27 desires to “cater[] to its privileged, rich elite, concentrating in film and television hubs in
28

1 Hollywood and the Los Angeles Area,” as Plaintiffs have alleged (TAC, ¶ 115). And the State
2 could have also simply admitted that its legislators *want* Hollywood entertainment producers to
3 have access to large-capacity magazines (in addition to any other form of weaponry they want),
4 to give or lend to people as they wish for whatever entertainment purpose, so that Hollywood
5 actors such as Matt Damon can continue to make violent movies glorifying illegal gunplay,
6 while at the same time, the State *distrusts* its ordinary citizens to have the same privileges (which
7 is quite obvious from its Motion). There appears to be no other conceivable justification for this
8 classification.

9 Because the State has not offered any justification – or even suggested that a legitimate
10 justification exists, and because no conceivably *rational* basis could justify this disparate
11 treatment as somehow advancing the claimed governmental objective, its motion to dismiss
12 Plaintiffs’ fifth cause of action must be denied.

13
14 **IV. CONCLUSION**

15 For the foregoing reasons, plaintiffs respectfully request that defendants’ motion to
16 dismiss be denied.

17
18 Dated: February 5, 2019

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