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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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WILLIAM WIESE, an individual;
JEREMIAH MORRIS, an individual;
LANCE COWLEY, an individual;
SHERMAN MACASTON, an individual;
CLIFFORD FLORES, individually
and as trustee of the Flores
Family Trust; L.Q. DANG, an
individual; FRANK FEDERAU, an
individual; ALAN NORMANDY, an
individual; TODD NIELSEN, an
individual; THE CALGUNS
FOUNDATION; FIREARMS POLICY
COALITION; FIREARMS POLICY
FOUNDATION; and SECOND AMENDMENT
FOUNDATION,

Plaintiffs,

v.

XAVIER BECERRA, in his official
capacity as Attorney General of
California; and MARTHA SUPERIOR,
in her official capacity as
Acting Chief of the Department
of Justice Bureau of Firearms,

Defendants.

No. 2:17-cv-903 WBS KJN

MEMORANDUM & ORDER RE: MOTION
TO DISMISS THIRD AMENDED
COMPLAINT

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1 Before the court is defendants' Motion to Dismiss
2 Plaintiffs' Third Second Amended Complaint. (Docket No. 95.)
3 The court held a hearing on the motion on February 19, 2019.

4 I. Factual and Procedural History

5 This case concerns a challenge to California's
6 prohibition on the possession of gun magazines that can hold more
7 than ten bullets, or "large capacity" magazines.¹ Although
8 California had banned the purchase, sale, transfer, receipt, or
9 manufacture of such magazines since 2000, it did not ban the
10 possession of these magazines. Fyock v. City of Sunnyvale, 779
11 F.3d 991, 994 (9th Cir. 2015). In effect, Californians were
12 allowed to keep large capacity magazines they had obtained prior
13 to 2000, but no one, with a few exceptions such as law
14 enforcement officers, has been allowed to obtain new large
15 capacity magazines in California since 2000.

16 On July 1, 2016, California enacted Senate Bill 1446
17 ("SB 1446"), which amended California Penal Code § 32310,
18 criminalizing the possession of large capacity magazines as of
19 July 1, 2017, regardless of when the magazines were obtained.
20 Then, on November 8, 2016, the California electorate approved
21 Proposition 63, which largely mirrors SB 1446. The amended
22 version of Section 32310 enacted by Proposition 63 requires that
23 anyone possessing a large capacity magazine either remove the
24 magazine from the state, sell the magazine to a licensed firearms

25 ¹ Large capacity magazines are defined under California
26 Penal Code § 16740 as any ammunition-feeding device with the
27 capacity to accept more than ten rounds, though this section
28 specifically excludes from this definition any "ammunition
feeding device that has been permanently altered so that it
cannot accommodate more than 10 rounds."

1 dealer, or surrender the magazine to a law enforcement agency for
2 its destruction prior to July 1, 2017. Cal. Penal Code §
3 32310(d).²

4 A. Procedural History

5 On April 28, 2017, plaintiffs filed the instant action
6 alleging that Section 32310 is unconstitutional. After the
7 original Complaint was amended, the court denied plaintiffs'
8 request for a temporary restraining order and then denied
9 plaintiffs' request for a preliminary injunction. (Docket Nos.
10 45, 52.) In denying a preliminary injunction, the court held
11 that injunctive relief was not warranted because, among other
12 things, plaintiffs were not likely to succeed on their Second
13 Amendment, takings, void for vagueness, and overbreadth claims.

14 After the court denied plaintiffs' request for a
15 preliminary injunction, plaintiffs filed their Second Amended
16 Complaint ("SAC"), which expanded on their previously asserted
17 claims and which added (1) an equal protection claim under the
18 U.S. and California Constitutions; (2) an allegation that the ban
19 operates as a taking under the California Constitution; and (3)
20 additional allegations in support of their vagueness claims.

21 (Docket No. 59.)

22 The court dismissed the Second Amended Complaint on
23 February 7, 2018. (Docket No. 74.) The court dismissed the
24 Second Amendment claim after determining that intermediate

25 ² As a shorthand, the court refers to the current version
26 of Section 32310, with its elimination of the grandfather clause
27 for large capacity magazines owned before 2000, as the "large-
28 capacity magazine ban," notwithstanding the fact that California
has banned the purchase, sale, transfer, receipt, or manufacture
of such magazines since 2000.

1 scrutiny applied and after finding that there was a reasonable
2 fit between the ban and its important objective of reducing the
3 incidence and harm of mass shooting. This decision was informed
4 by, *inter alia*, the Ninth Circuit's decision in Fyock v. City of
5 Sunnyvale, 779 F.3d 991, and decisions in several other circuits
6 finding that there was a reasonable fit between similar large
7 capacity magazine bans and similar objectives in other
8 jurisdictions. (Docket No. 74 at 4-10.)

9 The court next held that the Second Amended Complaint
10 did not sufficiently allege that the large capacity magazine ban
11 was a physical taking under the United States or California
12 Constitutions because magazine owners may sell the magazines to
13 licensed gun dealers, remove them from the state, or permanently
14 modify them so they no longer accept more than 10 rounds. The
15 court further held that the Second Amended Complaint did not
16 sufficiently allege the ban was a regulatory taking because these
17 options meant the ban did not completely deprive the owners of
18 all beneficial use of their property. (Id. at 10-13.)

19 Finally, the court held that the Second Amended
20 Complaint did not sufficiently allege that the large capacity
21 magazine ban was void for vagueness or was overbroad, or that its
22 exemption for magazines used solely as props in movie,
23 television, or video production violated the equal protection
24 clause of the United States and California Constitutions. (Id.
25 at 13-23.) Accordingly, the court dismissed the Second Amended
26 Complaint in its entirety.

27 B. Duncan v. Becerra

28 Shortly after this court denied plaintiffs' request for

1 a preliminary injunction, Judge Roger T. Benitez enjoined
2 California's large capacity magazine ban in Duncan v. Becerra,
3 265 F. Supp. 3d 1106 (S.D. Cal. 2017). The district court in
4 Duncan held that, among other things, the plaintiffs in that case
5 had shown a likelihood of success of the merits on their Second
6 Amendment and takings claims. After this court dismissed the
7 Second Amended Complaint in the instant case, the Ninth Circuit
8 upheld Judge Benitez's preliminary injunction in a memorandum
9 disposition in Duncan v. Becerra, 742 F. App'x 218 (9th Cir.
10 2018). Proceedings in the district court in Duncan v. Becerra
11 are ongoing, and that court's preliminary injunction remains in
12 effect.

13 II. Discussion

14 The court notes that plaintiffs' Third Amended
15 Complaint has only minor changes from the Second Amended
16 Complaint, which this court previously found insufficient under
17 Federal Rule of Civil Procedure 12(b)(6).³ However, after the
18 court's decision dismissing the Second Amended Complaint, the
19 Ninth Circuit issued its decision in Duncan affirming the
20 district court's injunction against the large capacity magazine
21 ban.

22 It is unclear how the Ninth Circuit's decision in
23 Duncan is reconcilable with its prior decision in Fyock v. City
24 of Sunnyvale, 779 F.3d 991, which affirmed the denial of a
25 preliminary injunction against a similar municipal large capacity
26 magazine ban. Nevertheless, the Ninth Circuit's affirmance in

27 ³ Almost all of the additional allegations in the Third
28 Amended Complaint concern plaintiffs' Second Amendment claim.

1 Duncan compels this court to deny the motion to dismiss
2 plaintiffs' claims in the Third Amended Complaint for violations
3 of the Second Amendment and the takings clauses of the United
4 States and California Constitutions. If it is the law of this
5 Circuit that the district judge in Duncan had discretion to find
6 that plaintiffs there were likely to succeed on the merits of
7 claims substantially identical to the claims of plaintiffs here,
8 it follows as a matter of law that the Third Amended Complaint in
9 this action does not fail to state a claim upon which relief can
10 be granted on those very claims.

11 Although the Ninth Circuit was not presented with an
12 equal protection claim in Duncan, that decision also compels this
13 court to deny defendants' motion to dismiss the Third Amended
14 Complaint's equal protection claim. In addressing the motion to
15 dismiss the Second Amended Complaint, this court held that
16 plaintiffs had not sufficiently alleged that the large capacity
17 magazine ban's exemption for magazines used solely as props in
18 movie, television, or video production (the "film prop
19 exemption") violates the equal protection clauses of the United
20 States and California Constitutions because (1) the exemption did
21 not involve a suspect class; (2) because the ban did not violate
22 the Second Amendment, the ban did not burden a fundamental right
23 and therefore rational basis review applied; and (3) the ban
24 survived rational basis review because California could have
25 rationally believed that magazines used solely as film props were
26 not at risk of being used in mass shootings and this exception
27 could benefit an important sector of the California economy.
28 (Docket No. 74 at 20-23.)

1 While there is no dispute that the large capacity
2 magazine ban and its film prop exemption does not involve a
3 suspect class, in light of Duncan, the court must revisit its
4 prior determination that the law did not burden the exercise of a
5 fundamental right, because if the law does burden a fundamental
6 right, strict scrutiny, rather than the rational basis test,
7 applies. Because this court has now determined that the Third
8 Amended Complaint states a claim for a violation of the Second
9 Amendment, it follows that Third Amended Complaint sufficiently
10 alleges that the ban and its film prop exemption burden the
11 exercise of a fundamental right such that strict scrutiny
12 applies.

13 Under strict scrutiny, the court asks whether a law is
14 narrowly tailored to serve a compelling government interest.
15 Honolulu Weekly, Inc. v. Harris, 298 F.3d 1037, 1047 (9th Cir.
16 2002). Here, defendants have not sufficiently identified a
17 compelling government interest for this exemption. Nor have they
18 sufficiently explained how the film prop exemption is narrowly
19 tailored to serve that interest.⁴ Further, plaintiffs allege
20 that the law discriminates against the majority of Californians
21 by allowing actors, studio employees, or studio contractors to
22 possess large capacity magazines (albeit for a limited use) while
23 denying such right to other Californians. Accordingly,
24 plaintiffs have sufficiently alleged the film prop exemption
25 fails strict scrutiny, and the court will deny the motion to
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27 ⁴ The court will not speculate as to how such an
28 exemption could be narrowly tailored or what a compelling
government interest might be.


1 dismiss as to the equal protection claim.

2 The court reaches a different result as to plaintiffs'
3 other claims. The Ninth Circuit's decision in Duncan has no
4 effect on this court's prior determination as to plaintiffs'
5 allegations that the large capacity magazine ban is void for
6 vagueness. The court will not repeat its prior discussion on
7 this issue and holds that the Third Amended Complaint does not
8 sufficiently allege the large capacity magazine ban is void for
9 vagueness for the reasons stated in the court's order dismissing
10 the Second Amended Complaint. (See Docket No. 74 at 14-18.)
11 Similarly, even though plaintiffs have now sufficiently alleged
12 the large capacity magazine ban prohibits a substantial amount of
13 constitutionally protected conduct in light of the Ninth
14 Circuit's decision in Duncan, Duncan has no effect on the court's
15 prior holding that the overbreadth doctrine is inapplicable in
16 the Second Amendment context, and dismissal of the overbreadth
17 claim is appropriate for that reason. (See Docket No. 74 at 19.)
18 Accordingly, the court will dismiss the Third Amended Complaint's
19 vagueness and overbreadth claims.⁵

20 ⁵ The court GRANTS plaintiffs' and defendants' requests
21 for judicial notice (Docket Nos. 61-1 and 98-1) and takes
22 judicial notice of the text of Senate Bill 1446; Proposition 63;
23 the California Official Voter Information Guide for Proposition
24 63; the California Department of Justice Finding of Emergency and
25 Notice of Proposed Emergency Action regarding Proposition 63; the
26 version of California Penal Code § 32406 enacted by SB 1446; the
27 version of § 32406 enacted by Proposition 63; the Office of
28 Senate Floor Analyses' May 19, 2016 report regarding SB 1446; the
December 16, 2016 proposed regulations regarding large capacity
magazines; and the December 29, 2016 Amended Notice of Withdrawal
of the proposed regulations. The court takes judicial notice of
these documents as the text of these documents is not subject to
reasonable dispute, the documents were previously attached to
pleadings in this case, and the court may take judicial notice of

1 IT IS THEREFORE ORDERED that defendants' Motion to
2 Dismiss Third Amended Complaint (Docket No. 95) be, and the same
3 hereby is, GRANTED IN PART. Defendants' motion to dismiss as to
4 the Third Amended Complaint's Second Amendment, takings, and
5 equal protection claims is DENIED. Defendants' motion to dismiss
6 as to the Third Amended Complaint's vagueness and overbreadth
7 claims is GRANTED. Because plaintiffs have already amended their
8 complaint multiple times and it does not appear that further
9 amendment could improve on their allegations in support of their
10 vagueness and overbreadth claims, Counts III and IV are DISMISSED
11 WITH PREJUDICE.⁶

12 Dated: February 25, 2019


13 **WILLIAM B. SHUBB**
14 **UNITED STATES DISTRICT JUDGE**

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23 legislative history reports when ruling on a motion to dismiss.
24 See, e.g., In re Google, Inc. Gmail Litig., No. 13-MD-02430-LHK,
25 2013 WL 5423918, *6 (N.D. Cal. Sept. 26, 2013) (citations
omitted).

26 ⁶ The court finds no need to rule on the motions of
27 Everytown for Gun Safety (Docket Nos. 96-97) and California Rifle
28 & Pistol Association (Docket Nos. 100-01) to file amicus curiae
briefs. The court has read the briefs and does not find that
they add anything substantively to the dialogue.