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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

STEVEN RUPP; STEVEN DEMBER; CHERYL JOHNSON; MICHAEL JONES; CHRISTOPHER SEIFERT; ALFONSO VALENCIA; TROY WILLIS; and CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California; and DOES 1-10,

Defendants.

8:17-cv-00746-JLS-JDE

DEFENDANT'S NOTICE OF PARTIAL MOTION AND PARTIAL MOTION TO DISMISS PLAINTIFFS' DUE PROCESS CLAUSE AND TAKINGS CLAUSE CLAIMS

Date: December 1, 2017
Time: 2:30 p.m.
Courtroom: 10A
Judge: The Honorable Josephine L. Staton
Trial Date: N/A
Action Filed: April 24, 2017

TO PLAINTIFFS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on December 1, 2017, at 2:30 p.m., or as soon thereafter as the matter may be heard, in Courtroom 10a of the above-titled court, located at 411 W. Fourth St., Santa Ana, California 92701, defendant Xavier Becerra, in his capacity as the Attorney General of the State of California ("Defendant"), shall move, and hereby does move this Court for an order under Federal Rule of Civil Procedure 12(b)(6) dismissing the Takings Clause and Due Process Clause claims of the First Amended Complaint. Defendant does not seek, by this motion, dismissal of plaintiffs' claim based on the Second Amendment.

Defendant moves to dismiss plaintiffs' claim based on an alleged violation of their rights under the Takings Clause under the Fifth and Fourteenth Amendments on the ground that it fails to state a claim upon which relief may be granted. Plaintiffs are not required to surrender their assault weapons to the government. They allege no economic loss due to California's prohibition on assault weapons and no investment-backed expectations in their assault weapons. Furthermore, California's prohibition on assault weapons is a legitimate exercise of the state's police power and is not a taking requiring compensation.

Defendant moves to dismiss plaintiffs' claim based on an alleged violation of their rights under the Due Process Clause of the Fourth Amendment on the ground that it fails to state a claim upon which relief may be granted. California's prohibition on assault weapons is rationally related to its objective of promoting public safety in California.

This motion is made following the conference of counsel under C.D. Cal. L.R. 7-3, which took place on September 28, 2017.

This partial motion to dismiss is based upon this notice of motion and motion, the accompanying memorandum of points and authorities, the pleadings and papers on file, and upon such further evidence, both oral and documentary, as may be offered at the time of the hearing.

Dated: October 5, 2017

Respectfully submitted,

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/s/ Peter H. Chang

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INTRODUCTION

In 1989, an individual armed with an AK-47 semiautomatic rifle opened fire at the schoolyard of Cleveland Elementary School in Stockton, California, where over 300 children were playing. The shooter killed five children and wounded 29 others, expending over 100 rounds and reloading his AK-47 at least once during the shooting. In response to this random, mass shooting, the California Legislature enacted the Roberti-Roos Assault Weapons Control Act (AWCA).

By the AWCA, California prohibits, among other things, the manufacture, possession, transport, sale, offer for sale, and import of assault weapons. The AWCA defines assault weapons by make and model and by feature. As defined by feature, a semiautomatic rifle is an assault weapon if it lacks a fixed magazine and has one or more militaristic features such as a conspicuously protruding pistol grip, a forward pistol grip, a folding stock, or a flash suppressor, or has an overall length of less than 30 inches. Owners of assault weapons prior to their prohibition may register to keep their weapons.

Plaintiffs claim that the AWCA violates the Second Amendment, the Takings Clause, and the Due Process Clause. Plaintiffs' takings claim must be dismissed because plaintiffs are not required to surrender their assault weapons to the government, and they allege no economic loss due to California's prohibition on assault weapons and no investment-backed expectations in their assault weapons. Furthermore, California's prohibition on assault weapons is a legitimate exercise of the state's police power requiring no compensation. Plaintiffs' due process claim must be dismissed because the AWCA is rationally related to its objective of promoting public safety by reducing assault weapons in California.

Although federal courts of appeals have uniformly rejected Second Amendment challenges to states' prohibitions against assault weapons, Defendant

does not move to dismiss plaintiffs' Second Amendment claim on the pleadings at this time in order to develop further facts for the record.

STATEMENT OF FACTS

I. CALIFORNIA'S PROHIBITION OF ASSAULT WEAPONS

The California Legislature passed the AWCA in 1989 in response to a proliferation of shootings that involved semiautomatic weapons. *See Silveira v. Lockyer*, 312 F.3d 1052, 1057 (9th Cir. 2002) (citing 1989 Cal. Stat. ch. 19, § 3, at 64, codified at former Cal. Penal Code § 12275 et seq.), *abrogated on other grounds by District of Columbia v. Heller*, 554 U.S. 570 (2008). The immediate cause of the AWCA's enactment was a random, mass shooting that year at the Cleveland Elementary School in Stockton, California. *Id.* at 1057. An individual armed with an AK-47 semiautomatic rifle opened fire on the schoolyard, where 300 students were enjoying recess. *Id.*; *Kasler v. Lockyer*, 2 P.3d 581, 587 (Cal. 2000). The shooter shot at least 106 rounds, reloaded his weapon at least once, killed five children aged 6 to 9, and wounded one teacher and 29 children. *Silveira*, 312 F.3d at 1057; *Kasler*, 2 P.3d at 587.

The California assembly met soon after the Stockton shooting in an extraordinary session called to enact a response to the mass shooting. *Silveira*, 312 F.3d at 1057 (citing 1 Cal. Assembly J., 1989-1990 Reg. Sess., at 436-37 (Feb. 13, 1989)). The Legislature also received testimony that assault weapons were favored by gangs in shooting. At the legislative committee hearing, the California Attorney General testified that "semi-automatic military assault rifles" were the "weapons of choice" for gang shootings. *Kasler*, 2 P.3d at 587 (citing 1 Assem. J., 989-1990 Reg. Sess., at 438). And a Los Angeles police officer "familiar with gangs and the increasing use of assault weapons" also testified that there is "only one reason [gang members] use [military assault rifles], and that is to kill people. They are weapons of war." *Id.* (citing 1 Assem. J., 1989-1990 Reg. Sess., at 450).

After the AWCA was enacted in 1989, it was amended in 1999 and 2016 to close loopholes exploited by gun manufacturers.

A. The AWCA Initially Identified Prohibited Assault Weapons by Make and Model

The AWCA was the first legislative restriction on assault weapons in the nation. *Silveira*, 312 F.3d at 1057. In enacting the AWCA, the Legislature expressly found that "the proliferation and use of assault weapons poses a threat to the heath, safety, and security of all citizens of this state." Cal. Pen. Code § 30505. The Legislature found that each of the restricted firearm "has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings." *Id.*

The AWCA renders it a felony offense to manufacture in California any specified assault weapons, or to possess, sell, transfer, or import into the state such weapons without a permit. Cal. Pen. Code §§ 30600, 30605. The AWCA specifically lists approximately forty models of firearms as subject to its restrictions, including "civilian" models of military weapons that feature slightly less firepower than the military-issue versions, such as the Uzi, an Israeli-made military rifle; the AR-15, a semiautomatic version of the United States military's standard-issue machine gun, the M-16; and the AK-47, a Russian-designed and Chinese-produced military rifle. *Id.* § 30510; *Silveira*, 312 F.3d at 1058.

The AWCA, as originally enacted, also included a mechanism for the California Attorney General to seek a judicial declaration in superior court that weapons identical to the listed firearms are also subject to the statutory restrictions. (Former Cal. Pen. Code § 12276.5(a)(1)-(2).) Following judicial confirmation of the legal requirements to add firearms to the prohibited list, the Attorney General added additional semiautomatic rifles to the prohibited assault weapons list. Cal. Code Regs. Tit. 11, § 5499; *see Kasler*, 2 P.3d at 587. The Attorney General's

ability to add weapons to the assault weapons list ended in 2006. *See* Cal. Pen. Code § 30520.

B. The 1999 Amendments: Closing the "Copycat" Weapons Loophole by Prohibiting Rifles with Assault Weapon Features

After enactment of the AWCA, gun manufacturers began to produce "copycat" weapons. S.B. 880, 2015-2016 Reg. Sess., Assembly Comm. on Pub. Safety, June 13, 2016 (S.B. 880 Report) at 4.[1] These "copycat" weapons were substantially similar to the restricted weapons, but circumvented the restrictions by having insubstantial variations from the restricted weapons. *Id.*; *Silveira*, 312 F.3d at 1058, n.5. (citation omitted). In 1999, the Legislature amended the AWCA to address the proliferation of these "copycat" weapons. *Silveira*, 312 F.3d at 1058. The 1999 amendments to the AWCA added a new method of defining the class of restricted weapons by features. It provided that a weapon constituted a restricted assault weapon if it has the capacity to accept a type of *detachable* magazine in addition to one of several specified military characteristics. Exh. 1 (S.B. 880 Report) at 4. This feature-based definition of an assault weapon was intended to close the loophole created by the AWCA's definition of assault weapons as only those specified by make and model. *See id.*

C. The 2016 Amendments: Closing the "Bullet Button" Loophole by Defining Assault Weapon as a Rifle That has a Prohibited Feature *and* Lacks a Fixed Magazine

The AWCA was most recently amended in 2016 to close the "bullet button" loophole. Implementing regulations of the 1999 amendments defined a detachable magazine as any ammunition feeding device that can be removed readily from the firearm without disassembly of the firearm action or the use of a tool. Exh. 1 (S.B. 880 Report) at 4-5. In response to this definition, firearms manufacturers

[1] Exhibit 1 to Defendant's Request for Judicial Notice, filed concurrently with this partial motion to dismiss.

developed a new feature to make "military-style, high-powered, semi-automatic rifles 'California compliant'"—the "bullet button." *Id.* at 5.

The "bullet button" is a minor design change made by gun manufacturers that allows shooters to use the tip of a bullet as a "tool" to push a button to release the ammunition magazine. *Id.* (quoting 2012 Violence Policy Center, *The "Bullet Button"—Assault Weapon Manufacturers' Gateway to the California Market*.) With the "bullet button," a detachable ammunition magazine may be removed and replaced in seconds, rendering meaningless the distinction between a magazine that is not "detachable" within the meaning of California law, and a magazine that can be readily detached without the use of a tool. *Id.*

As proponents of the 2016 amendments noted, the feature that makes a semiautomatic rifle capable of killing or wounding more people in a shorter amount of time more than any other feature is the capacity to reload one magazine after another in rapid succession. Exh. 1 (S.B. 880 Report) at 6. The "bullet button" thus defeated the Legislature's original intent to define assault weapons primarily on the method of detaching the magazine. "These weapons [with "bullet buttons"] are the functional equivalents of illegal assault weapons in every respect, except that the shooter uses a bullet, magnet, or other instrument, instead of his or her finger, to depress the button that releases the weapon's magazine. These weapons may be reloaded as quickly as prohibited assault weapons, but they have been permitted to flood into this state at an alarming rate, threatening Californians' safety." *Id.* at 8 (Argument in Support by the Law Center to Prevent Gun Violence).

The December 2015 mass shooting in San Bernardino illustrates the compelling need to eliminate the "bullet button" loophole. Thirty-six people were shot in less than four minutes by two individuals using "California compliant" AR-15 style "bullet button" weapons "that were nearly indistinguishable from illegal assault weapons." Exh. 1 (S.B. 880 Report) at 8 (Argument in Support by the Law

Center to Prevent Gun Violence); *see* Exh. 2 to Defendant's Request for Judicial Notice (U.S. Department of Justice press release).

The 2016 amendments changed California's approach to defining prohibited assault weapons by focusing on the absence of a "fixed magazine," rather than on the "capacity to accept a detachable magazine." Cal. Pen. Code § 30515(a)(1). A "fixed magazine" is defined as an "ammunition feeding device contained in, or permanently attached to, a firearm in such a manner that the device cannot be removed without disassembly of the firearm action." *Id.* § 30515(b). Accordingly, a semiautomatic rifle with a non-fixed magazine and one of the specified militaristic features is prohibited under the 2016 amendments. A semiautomatic rifle may have one or more of the militaristic features and a *fixed* magazine, or it may have a detachable magazine without additional military-style features, but it may not have both military features and a detachable magazine—otherwise it is considered an assault weapon.

D. The Original Enactment and the 1999 and 2016 Amendments of the AWCA Each Includes a Grandfather Clause

The AWCA, as originally enacted and as recently amended, includes a grandfather clause that permits anyone to retain an assault weapon that was lawfully possessed prior to being made unlawful, provided such weapons are registered by their owners with the California Department of Justice. Cal. Pen. Code §§ 30680, 30900. With respect to bullet-button assault weapons covered by the 2016 amendments, if an individual lawfully possessed the weapon prior to January 1, 2017, he or she may continue to possess it if he or she was eligible to register the weapon prior to January 1, 2017, and registers the weapon by July 1, 2018. Cal. Pen. Code §§ 30680, 30900(b)(1).

II. PLAINTIFFS' ALLEGATIONS

Plaintiffs are California residents who either own assault weapons or seek to acquire assault weapons currently prohibited by the AWCA, or both, and a gun rights advocacy group. First Amended Complaint (Dkt. No. 16) (FAC), ¶¶ 48-58. Plaintiffs assert that the challenged portions of the AWCA violate the Second Amendment, the Due Process Clause, and the Takings Clause because it prohibits their ability to acquire and constrains their ability to transfer assault weapons. *Id.* at ¶¶ 95-116.[2] Two plaintiffs also assert that the AWCA registration requirement violates their asserted rights because they do not have all of information necessary to register their assault weapons and are thus prohibited from maintaining possession of their assault weapons. *Id.* at ¶¶ 106, 112, & 116.

PROCEDURAL HISTORY

Plaintiffs filed their Original Complaint on April 24, 2017. Dkt No. 1. After the Court issued an Order to Show Cause on July 31, 2017, for failure to serve the Original Complaint within 90 days of filing, plaintiffs effected service. Dkt. No. 10. On September 11, 2017, plaintiffs filed the First Amended Complaint. Dkt. No. 16. This partial motion to dismiss is Defendant's first responsive pleading.

LEGAL STANDARD

This motion is brought under Federal Rule of Civil Procedure 12(b)(6). A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint. *North Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations and quotations omitted). "A Rule 12(b)(6) dismissal may be based on either a 'lack of a cognizable legal theory' or

[2] Plaintiffs challenge only California Penal Code section 30510(a), 30515(a)(1)(A-C), 30515(a)(1)(E-F), 30515(a)(3), 30520, 30600, 30605, 30900(b)(3), 30925, and 30945, and California Code of Regulations, title 11, section 5499, as they apply to assault weapons. FAC, ¶ 5 & Prayer.

'the absence of sufficient facts alleged under a cognizable legal theory.'" *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008) (quotation omitted). The court accepts as true all material allegations in the complaint and construes those allegations in the light most favorable to the plaintiff. *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). However, the court need not accept as true legal conclusions, conclusory allegations, unwarranted deductions of fact, or unreasonable inferences. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988, *amended by* 275 F.3d 1187 (9th Cir. 2001).

Plaintiffs assert a facial challenge to the AWCA. *See* FAC, Prayer, ¶ 1. A facial challenge is a challenge to the entire legislative enactment. *Hoye v. City of Oakland*, 653 F.3d 835, 859 (9th Cir. 2011). It is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

ARGUMENT

I. THE AWCA DOES NOT VIOLATE THE TAKINGS CLAUSE

Plaintiffs'[3] takings claim is without merit and Defendant is entitled to dismissal as a matter of law. The Takings Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides that private property shall not "be taken for public use, without just compensation." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536 (2005). Its purpose is to prohibit the "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978) (internal quotations and citations omitted). Plaintiffs present a facial challenge, which is a particularly high

[3] Only Plaintiffs Rupp, Jones, Seifert, Willis, Grassey, and Martin currently own assault weapons. FAC, ¶¶ 48, 51, 52, and 54-56. Plaintiffs Dember, Johnson, and Valencia do not own assault weapons and do not have standing to assert the takings claim. *Id.*, ¶¶ 49, 50, and 53.

hurdle to overcome as it requires plaintiffs to establish that there are no circumstances under which the AWCA could operate within the bounds of the Constitution.[4] They must establish that "the mere enactment of a statute constitutes a taking." *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 686 (9th Cir. 1993) (quotation omitted). Facial takings challenges "face an uphill battle since it is difficult to demonstrate that mere enactment of a piece of legislation deprived the owner of economically viable use of his property." *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.10 (1997) (internal punctuation marks and citations omitted).

Plaintiffs claim that the AWCA effects compensable regulatory and physical takings by "constraining" their property right during their lifetimes and by requiring them to surrender their assault weapons when they die. FAC, ¶¶ 83, 98-103. Fatal to plaintiffs' claim, however, is that they allege no economic loss caused by the AWCA. Under the AWCA, plaintiffs remain free to possess and use their assault weapons acquired prior to those weapons being prohibited provided that plaintiffs timely register their weapons. Cal. Pen. Code, § 30680. Plaintiffs remain free to sell their weapons out of state or to a licensed gun dealer within the state. *Id.* §

[4] Although plaintiffs seem to allude to bringing both a facial and an as-applied challenge, *see* FAC, Prayer, ¶ 1, their claims are facial because the claims are based solely on the enactment of the AWCA, and not government action on their specific assault weapons. *See Levald, Inc. v. City of Palm* Desert, 998 F.2d 680, 686 (9th Cir. 1993) ("A facial challenge involves a claim that the mere enactment of a statute constitutes a taking," and is to be distinguished from an "as applied" challenged, which "involves a claim that the particular impact of a government action on *a specific piece of property* requires the payment of just compensation.") (emphasis added, citation and internal quotation marks omitted). With respect to plaintiffs whose claims are based on their alleged inability to meet the registration requirements, they do not allege that they attempted to register their assault weapons or that their registration attempts were denied. These claims are both unripe and do not raise an as-applied challenge to the AWCA's registration requirements. *See Hoye v. City of Oakland*, 653 F.3d 835, 854-56 (9th Cir. 2011) (stating that an as-applied challenge challenges a specific application of a facially valid statute to an individual or group of individuals or the future application of the statute in the allegedly impermissible manner in which it has been applied in the past).

31055. Plaintiffs may also bequeath their weapons to their heirs, who may then sell the weapons, or store and use the weapons out of the state. *Id.* § 30915. The heirs may maintain possession of the weapons if they live outside the state or if they permanently affix the magazines or remove the military feature or features of the weapons. *See id.* § 30605; Cal. Code Regs. Tit. 11, § 5478(a).

A similar challenge to the AWCA under the Takings Clause was previously raised and rejected by the Ninth Circuit in *Silveira*. In that case, the plaintiffs contended that the AWCA violated the Takings Clause because it reduced the value of their assault weapons. *Silveira*, 312 F.3d at 1092.[5] The Ninth Circuit described the claim as one it can "dispose of readily" because "[i]t is well established . . . that a government may enact regulations pursuant to its broad powers to promote the general welfare that diminish the value of private property, yet do not constitute a taking requiring compensation, so long as a reasonable use of the regulated property exists." *Silveira*, 312 F.3d at 1092 (citing *Am. Sav. & Loan Ass'n v. County of Marin*, 653 F.2d 364, 368 (9th Cir. 1981) ("If the regulation is a valid exercise of the police power, it is not a taking if a reasonable use of the property remains.")).

Plaintiffs' takings claim must fail.

A. The AWCA Does Not Effect a Physical Taking Requiring Compensation Because Plaintiffs Retain Possession and Use of, and the Right to Sell, Their Assault Weapons and Because It Is an Exercise of the Police Power

1. The AWCA Does Not Effect a Physical Taking

The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property. *Lingle*, 544 U.S. at 537. "In a physical taking, the government acts pursuant to its eminent domain power to take private property for 'public use.'" *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030,

[5] Unlike the plaintiffs in *Silveira*, Plaintiffs here do not even allege that the AWCA reduced the value of their assault weapons.

1034 (9th Cir. 2000). Physical takings are exemplified by government actions such as the seizure of a coal mine, *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951), or a private warehouse, *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

Plaintiffs' physical takings claim must fail because the AWCA does not require them to surrender their assault weapons to the government. Under the AWCA's grandfather clause, plaintiffs who register their assault weapons may continue to possess, use, and enjoy their assault weapons. Cal. Pen. Code § 30680. Plaintiffs also may sell their weapons and bequeath their weapons to their heirs. *Id.* §§ 30625, 31055, 30915. Their heirs may sell the weapons, or store and use the weapons out of the state. *Id.* § 30915. The heirs may maintain possession of the weapons if they live outside the state or if they permanently affix the magazines or remove the military feature or features of the weapons. *See id.* § 30605; Cal. Regs. Tit. 11, § 5478(a); FAC, ¶¶ 42-43.

Plaintiffs Grassey and Martin further allege that they cannot continue to possess their assault weapons under AWCA because registration requires information on the date they acquired their assault weapons and the name and address of the individual from whom they acquired the weapons—and since they do not have those information, they cannot register their weapons. FAC, ¶¶ 55-56, 90-91; Cal. Pen. Code § 30900(c). This contention fails for two reasons.

First, these allegations do not support a facial challenge to the AWCA's registration requirement under the Takings Clause, because Plaintiffs do not allege or contend that the registration requirements would be invalid in all circumstances. *See Salerno*, 481 at 745 (to succeed on a facial challenge, plaintiffs "must establish that no set of circumstances exists under which the [statute] would be valid.") And to the extent plaintiffs Grassey and Martin contend that their registration allegations comprise an as-applied challenge, they lack standing to do so and the issue is not ripe for adjudication because they do not allege that their registration was rejected

by the Department of Justice because they cannot provide the called-for information, or even that they attempted to register their assault weapons. *See* FAC, ¶¶ 55-56.

Article III standing is premised upon the Constitution's limitation of the judicial to "cases" or "controversies." *Hein v. Freedom From Religion Found, Inc.*, 551 U.S. 587, 597-98 (2007). "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id*. (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). The injury, moreover, must constitute "an invasion of a legally protected interest which is (1) concrete and particularized, and (2) actual or imminent, not merely conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiffs Grasey and Martin has no standing to assert an as-applied challenge to the registration requirements of the AWCA.

The challenged registration statute (Cal. Pen. Code § 30900(b)(3)) does not facially require a registration to be rejected if it lacks all of the listed information, and has not been applied. Thus, there are insufficient facts about the effect of that section to properly analyze an as-applied claim. A "court cannot determine whether a regulation goes 'too far' [so as to constitute a taking] unless it knows how far the regulation goes." *Palazzolo v. Rhode Island*, 533 U.S. 606, 622 (2001).

Second, if plaintiffs cannot or choose not to register their assault weapons, their takings claim still fails. Plaintiffs may, prior to July 1, 2018, sell their assault weapons, store and use their assault weapons out of state, or modify their assault weapons by permanently affixing the magazines or removing the military feature or features of the weapons. Cal. Pen. Code §§ 30605, 30900(b)(1); *see* Cal. Code Regs. Tit. 11, § 5478(a)(2) ("Deregistration requests will also be accepted for assault weapons . . . that have been modified or reconfigured to no longer meet that definition." Thus, even the lack of a registration opportunity would not constitute a physical taking.

There is no direct government appropriation or physical invasion of any of plaintiffs' assault weapons. There is no taking of private property for a "public use," and, therefore, no physical taking as a matter of law.

2. Prohibition on Possession of Dangerous Property Under the State's Police Power Is Not a Physical Taking

In a physical taking, the government exercises its eminent domain power to take private property for "public use." S*ee Lingle*, 544 U.S. at 536; *Chevron USA, Inc.*, 224 F.3d at 1034. By contrast, where, as here, the government acts pursuant to its police power to protect the safety, health, and general welfare of the public, a prohibition on possession of property declared to be a public nuisance is not a physical taking. *See* Cal. Pen. Code § 30800(a)(1) (declaring the possession assault weapons, unless expressly permitted by statute, to be a public nuisance); *see Akins v. United States*, 82 Fed. Cl. 619, 622 (2008) ("Property seized and retained pursuant to the police power is not taken for a 'public use' in the context of the Takings Clause."); *see also Everard's Breweries v. Day*, 265 U.S. 545, 563 (1924); *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887) ("A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.").

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

taken in order to be put to public use," "the Takings Clause simply does not apply").

Unlike in cases where the government has physically occupied or appropriated private property for its own use (either directly or through agents), the AWCA is an exercise of the State's police power to protect the public by gradually reducing the number of assault weapons in circulation, not to transfer title to the government or an agent of the government for use in service of the public good. Accordingly, it does not amount to a physical taking.

B. The AWCA Does Not Effect a Regulatory Taking Requiring Compensation

Regulation of private property may be "so onerous" that "its effect is tantamount to a direct appropriation or ouster" requiring compensation. *Lingle*, 544 U.S. at 537. Where a plaintiff challenges a government regulation as an uncompensated regulatory taking of private property, a court must focus on the severity of the burden the regulation imposes upon property rights and the character of the government action. *Id.* at 539; *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 327 (2002). Where, as here, a regulation does not require physical invasion of property or destruction of "all economically beneficial use" of property, a takings claim is to be governed by the factors set forth in *Penn Central*. *See id*. at 538-39.

Primary among the *Penn Central* factors are the economic impact of the regulation on the plaintiff and the extent the regulation has interfered with distinct investment-backed expectations. *Lingle*, 544 U.S. at 538-39, *citing Penn Central*, 438 U.S. 124. In addition, the character of the government's action—whether it amounts to a physical invasion or merely affects property interests by adjusting the benefits and burdens of economic life to promote the common good—may be relevant to determining whether a taking has occurred. *Lingle*, 544 U.S. at 539.

Under the *Penn Central* analysis, the AWCA does not effect a taking requiring compensation because plaintiffs allege no economic loss of any kind and no investment-backed expectations. Furthermore, the character of the government action in this instance is an enactment under the Legislature's police power to further public safety by placing a minor restriction on plaintiffs' ability to transfer their assault weapons to people who, under the AWCA, would not be able to possess those weapons. There is no regulatory taking as a matter of law.

1. Plaintiffs Allege No Economic Loss Due to the AWCA or Any Investment-Backed Expectations in Their Assault Weapons

The two "primary" factors under the *Penn Central* analysis are not present here. Plaintiffs do not allege any economic loss or impact due to the AWCA. Plaintiffs further do not allege any investment-backed expectations in their assault weapons. Plaintiffs are free to continue to possess and use their assault weapons after registering them, and may continue to enjoy any economic benefit they have in their assault weapons. Cal. Pen. Code § 30680. Plaintiffs, including any who are unable to meet all of the requirements to register their assault weapons, are also free to sell their assault weapons, store and use their assault weapons out of state, or modify their assault weapons by permanently affixing the magazines or removing the military feature or features of the weapons. Cal. Pen. Code § 30605; Cal. Code Regs. Tit. 11, § 5478(a). There is no economic loss or investment-backed expectation, and thus there is no regulatory taking requiring compensation. *See Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010) (plaintiffs' lack of "distinct investment-backed expectations," the "primary factor" of a regulatory takings determination, is "fatal" to their takings claim).

2. The AWCA Was Enacted Under the State's Police Power to Promote Public Safety

The character of the government's action under the AWCA further confirms that there is no compensable taking. The AWCA was enacted under California's

police power to ensure public safety and to reduce the likelihood that its citizens will fall victim to preventable firearm violence. *See* Cal. Pen. Code § 30505(a). California may take private property in "a valid exercise of the [government's] police powers," without providing compensation. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962) (citations omitted) (holding that an ordinance that completely prohibited a beneficial use of a property to which it had previously been devoted was not an unconstitutional taking); *see Bennis v. Michigan*, 516 U.S. 442, 452 (government not required to compensate owner for property lawfully acquired under governmental authority other than eminent domain).

As the Supreme Court has acknowledged, "property owners necessarily expect the use of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; as long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027–28 (1992) (quotation omitted); *see also Heller*, 554 U.S. at 595 ("Like most rights, the right secured by the Second Amendment is not unlimited."). Indeed, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

A long line of federal cases dating back more than a century has rejected takings challenges in a wide variety of situations when the challenged governmental action under police power prohibited a previous, beneficial use for private property that caused substantial individualized harm. *See, e.g., Chi., B. & Q. R. Co. v. Illinois*, 200 U.S. 561, 593-94 (1906) ("It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given." (citation omitted)); *Mugler*, 123 U.S. at 669 ("The power which the states have of prohibiting [the] use by individuals of their property, as will be prejudicial to the heath, morals, or safety

of the public, is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.").

The AWCA was enacted as an exercise of the state's police power. In enacting the AWCA, the Legislature declared, "the proliferation and use of assault weapons pose a threat to the health, safety, and security of all citizens of this state." Cal. Pen. Code § 30505(a). The Legislature further found that an assault weapon's function as a legitimate sports or recreational firearm is "substantially outweighed by the danger that it can be used to kill and injure human beings." *Id.* The enactment of the AWCA to ensure public safety and reduce the likelihood that their citizens will fall victim to preventable firearm violence is squarely an exercise of the state's police power. *See United States v. Morrison*, 529 U.S. 598, 618 (2000) ("[W]e can think of no better example of the police power . . . reposed in the States[] than the suppression of violent crime and vindication of its victims.").

The AWCA is a legitimate exercise of the police power. Its limited "constraint" on plaintiffs' ability to transfer their assault weapons does not constitute a "public use" in the context of the Takings Clause. Plaintiffs' takings claim must be dismissed.

C. Injunctive Relief Is Inappropriate Because the Takings Clause Does Not Limit California's Power to Regulate Assault Weapons

Plaintiffs' claim further fails because it seeks only to enjoin Defendant from enforcing the challenged portions of the AWCA. The Takings Clause does not limit the government's power to act, or replace the role of the people in determining which social policies to pursue. *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835, 856 (9th Cir. 2001). Instead, it is merely

a conditional limitation that permits the government to do what it wants so long as it pays compensation. *Id.*; *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (holding that the Takings Clause is designed to secure compensation for a proper interference amounting to a taking, not to limit governmental authority).

Should the Court find that the AWCA effects a taking without compensation, the only remedy is monetary compensation. *Lingle*, 544 U.S. at 536-37 (the Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.") (emphasis in original) (quotation omitted). Plaintiffs, however, seek only declaratory and injunctive relief. FAC, Prayer. Plaintiffs' takings claim thus must be dismissed because it fails to state a claim upon which the relief sought can be granted.

II. THE AWCA DOES NOT VIOLATE THE DUE PROCESS CLAUSE

Plaintiffs' due process claim is without merit and Defendant is entitled to dismissal as a matter of law. Plaintiffs allege that the AWCA violates their rights under the Due Process Clause because the AWCA does not advance any legitimate government objective and, for plaintiffs who cannot provide the required information to register their assault weapons, it "arbitrarily" deprives them of their weapons. FAC, ¶¶ 108, 112. Plaintiffs due process claim fails because the AWCA is rationally related to the Legislature's public safety objectives.

While a regulation that fails to serve *any* legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause, the AWCA easily survives a due process challenge as a matter of law. Regulations "survive a substantive due process challenge if they were *designed to* accomplish an objective within the government's police power, and if a rational relationship existed between the provisions and purposes" of the regulation. *Levald*, 998 F.2d at 690 (quotation omitted). The "threshold for a rationality review challenge asks

only 'whether the enacting body could have rationally believed at the time of enactment that the law would promote its objective.'" *MHC Financing Ltd. Partnership v. City of San Rafael*, 714 F.3d 1118, 1130-31 (9th Cir. 2013) (quotation omitted).

The AWCA was enacted in response to a series of mass shootings involving semiautomatic rifles. *See Siveira*, 312 F.3d at 1057; *Kasler*, 2 P.3d at 587. In enacting the AWCA, the Legislature expressly found and declared that "the proliferation and use of assault weapons poses a threat to the health, safety, and security" of Californians. Cal. Pen. Code § 30505. The Legislature was also presented with evidence that assault weapons were increasingly being used by violent gangs. *Kasler*, 2 P.3d at 587. The Legislature amended the AWCA in 1999 and 2016 to counter gun manufacturers' attempts to sidestep the AWCA's prohibitions. The 1999 amendments added a category of assault weapons defined by their features, together with a detachable magazine, because manufacturers created "copycat" weapons by making insubstantial changes to the assault weapons defined by their make and model. *Silveira*, 312 F.3d at 1058, n. 5; S.B. 880 June 13, 2016 Report at p. 4.[6] The 2016 amendments changed the feature-based definition of assault weapons so that assault weapons include semiautomatic rifles that contain one of the specified features and lack a fixed magazine. Cal. Pen. Code

[6] Plaintiffs allege that the purposes of the challenged assault weapon-defining features (the folding or telescoping stock, thumbhole stock, flash suppressor, and pistol grips) are to promote "ergonomic comfort, accuracy, and safe handling." FAC, ¶ 2. "This circumlocution is . . . a milder way of saying that these features make the weapons more deadly." *New York State Rifle and Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 262 (2nd Cir. 2015). Courts of appeals have described these features as military features, designed with the principal purpose of "'killing or disabling the enemy' on the battlefield." *Kolbe v. Hogan*, 849 F.3d 114, 125 (4th Cir. 2017), *petition for cert. filed* (U.S. July 26, 2017) (No. 17-127); *see New York State Rifle and Pistol Ass'n, Inc.*, 804 F.3d at 248. For example, flash suppressors "are designed to help conceal a shooter's position by dispersing muzzle flash." *Kolbe*, 849 F.3d at 125. These features "serve specific, combat-functional ends" and "[t]he net effect of these military combat features is a capability for lethality—more wounds, more serious, in more victims—far beyond that of other firearms in general, including other semiautomatic guns." *Id.* at 138 (quotation omitted).

§ 30515(a)(1). The Legislature made these amendments because gun manufacturers created weapons with a "bullet button" that allowed users of those weapons to rapidly change magazines. Exh. 1 (S.B. 880 Report) at 6. As noted in the legislative history of the 2016 amendments, the shooters in the 2015 San Bernardino mass shooting used AR-15 style "bullet button" semiautomatic rifles that were not defined to be assault weapons prior to the 2016 amendments. *Id.* at 8.

The Legislature's stated objective in enacting the AWCA and its amendments is to promote public safety by reducing the number of assault weapons in circulation in California. There is a clearly rational relationship between the AWCA's legitimate objective and its ban on assault weapons.

Plaintiffs contend that there is no legitimate basis for banning assault weapons defined by their features, which could be modified so that they no longer meet the definition of assault weapons, while assault weapons defined by their make and model remain assault weapons regardless of their features. FAC, ¶¶ 42-45, 110. There was nothing irrational about the Legislature initially targeting weapons it found to be particularly dangerous, or choosing to prohibit certain sets of features and not others. Although the law may end up prohibiting some models of guns while allowing others that are substantially similar, the Legislature is entitled to pursue its goals incrementally. *See McDonald v. Bd. of Elec. Com'rs of Chicago*, 394 U.S. 802, 809 (1969).

Plaintiffs further contend that the AWCA arbitrarily deprives assault weapons from owners who do not have all of the information listed in registration requirements. As addressed above, this issue is not suitable as a facial challenge and is not ripe for adjudication as an as-applied challenge because plaintiffs have not attempted to register their assault weapons. *See*, *supra*, at pp. 11-12. Furthermore, the Legislature has clearly legitimate rationales in seeking information to identify when and from whom the registrant acquired the weapons, as information about the chain of possession and background of the weapons can

help establish the background of the weapon and to confirm that the weapons are eligible for registration. In light of the rational relationship between these requirements and their purposes, plaintiffs' due process challenge fails.

The Court should dismiss plaintiffs' due process claim.

III. THE AWCA DOES NOT VIOLATE THE SECOND AMENDMENT BUT DEFENDANT DOES NOT MOVE TO DISMISS CLAIM AT THIS TIME, IN ORDER TO DEVELOP THE RECORD

The main thrust of plaintiffs' challenge to the AWCA is their Second Amendment claim. Plaintiffs assert that they have a right under the Second Amendment to obtain, possess, and transfer weapons classified by the AWCA as assault weapons. FAC, ¶¶ 98-103, 106. Courts of appeals across the country, however, have uniformly rejected Second Amendment challenges to assault weapons bans.

The Fourth Circuit Court of Appeals has flatly held that assault weapons are not protected by the Second Amendment. *Kolbe*, 849 F.3d at 137. The Fourth Circuit and three other federal courts of appeals have also upheld assault weapons bans similar to the AWCA after either applying intermediate scrutiny analysis or finding that assault weapons were not common at the time of ratification. *Kolbe*, 849 Fed.3d at 140-41 (holding alternatively that Maryland's assault weapons ban survives intermediate scrutiny); *New York State Rifle and Pistol Ass'n, Inc.*, 804 F.3d at 269 (holding that New York and Connecticut's ban on assault weapons do not violate the Second Amendment), *cert denied*, *Shew v. Malloy*, 136 S.Ct. 2486 (2016); *Heller v. District of Columbia*, 670 F.3d 1244, 1263 (D.C. Cir. 2011) (upholding the District of Columbia's ban on assault weapons after intermediate scrutiny analysis); *Friedman v. City of Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015) (upholding a city ordinance banning possession of assault weapons because states may prohibit civilian possession military-grade firearms and city residents have ample means to exercise their right of self-defense), *cert denied*, 136 S.Ct. 447 (2015).

Nevertheless, Defendant does not move to dismiss plaintiffs' Second Amendment claim on the pleading at this time. Defendant believes that the Court would benefit from further factual development on the AWCA's public safety bjectives should intermediate scrutiny analysis be necessary to adjudicate the claim. *Cf. Fyock v. Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015) (applying the Second Amendment intermediate scrutiny analysis).

CONCLUSION

For the reasons provided above, plaintiffs' Due Process Clause and Takings Clause claims should be dismissed. Defendant respectfully requests that the Court grant his partial motion to dismiss.

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Respectfully submitted,

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