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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

**SOUTHERN DIVISION**

STEVEN RUPP; STEVEN DEMBER; CHERYL JOHNSON; MICHAEL JONES; CHRISTOPHER SEIFERT; ALFONSO VALENCIA; TROY WILLIS; DOUGLAS GRASSEY; DENNIS MARTIN; 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,

Defendant.

Case No: 8:17-cv-00746-JLS-JDE

**MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Hearing Date: December 15, 2017
Hearing Time: 2:30 p.m.
Courtroom: 10A
Judge: Hon. Josephine L. Staton

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## INTRODUCTION

While this lawsuit challenges California's "assault weapon" ban in its entirety, this motion seeks only limited preliminary relief. As it has in past iterations, the latest version of the ban contains a grandfathering provision allowing individuals who already possess a lawfully obtained firearm that has become prohibited to continue to lawfully possess it—an accommodation the Legislature expressly recognized was designed to avoid takings problems. And like past iterations of the ban, this one requires those who seek to avail themselves of that grandfathering provision to register their firearms by a date certain; here, July 1, 2018. Unlike past iterations, however, the current law imposes a new registration criterion: that registrants must supply the date the "assault weapon" was acquired, as well as the name and address of the person or business from whom it was acquired.

As the California Department of Justice ("DOJ") recognized when rejecting a practically identical requirement years ago, that condition poses serious problems, as many Californians, including some Plaintiffs, do not have that information for perfectly innocent reasons. After all, neither state nor federal law has ever required them to maintain it, and no database exists from which they can obtain it. Yet even though DOJ rejected a mandatory requirement to provide such information in favor of an optional one for precisely those reasons, the State has now made the provision of such information a mandatory condition of registration. Accordingly, absent preliminary relief from this Court, individuals who do not have that information and have no means of obtaining it will be prohibited from maintaining possession of their lawfully acquired "assault weapons" for the utterly arbitrary reason that they failed to predict that the State may someday demand information that they were not required to keep at the time. That result not only will violate the Due Process Clause, but also will work unconstitutional takings and deprive individuals of their Second Amendment rights.

To prevent those irreparable injuries from coming to pass, Plaintiffs ask this Court to preliminarily enjoin the State from making its new "date and source" requirement a

mandatory condition of registration until such time as this Court can fully adjudicate the many grave constitutional problems that this requirement creates. There is no public interest in inflicting a likely constitutional violation, especially where, as here, the status quo can be preserved with no demonstrable harm to anyone. This is, indeed, a textbook case for preliminary relief.

## FACTUAL BACKGROUND

California's Roberti-Roos Assault Weapons Control Act of 1989 (the "AWCA") generally makes it illegal to possess any "assault weapon." *See* California Penal Code, §§30500 *et seq.* California has created various different definitions of "assault weapon" over the years. *See* Cal. Penal Code § 16150; Cal. Penal Code § 30515; Cal. Code Regs. tit. 11, § 5469(d); Cal. Code Regs. tit. 11, § 5469(e)**,** Cal. Code Regs. tit. 11, § 5469(b); *see also* Compl. ¶¶ 9-18. Among the firearms most recently declared "assault weapons" are semiautomatic, centerfire rifles that do *not* have a "fixed magazine"[1] but do have any one of certain statutorily enumerated features. *See* Cal. Penal Code § 30515(b).

Semiautomatic, centerfire rifles with *detachable* (i.e., not "fixed") magazines have been in safe, effective use by civilians in this country for over a century. Helsley Decl. ¶ 19. Many such rifles come standard with—or can be modified with common aftermarket products to have—various features, some of which trigger the AWCA's prohibitions, e.g., a "pistol grip" (or "forward pistol grip"), a "thumbhole stock," a "flash suppressor," and an adjustable ("telescoping") stock. *Id*. at ¶¶ 2, 19, 22; Curcuruto Decl. ¶¶ 8-9; Cal. Penal Code § 30515.

It is not entirely clear from the legislative history why the State restricts these features. None of them increases a rifle's "rate of fire and capacity for firepower," which is what the AWCA claims it seeks to address. Cal. Penal Code § 30505(a); Helsley Decl. ¶¶ 9, 15, 22. To the contrary, they "actually tend to make rifles easier to control and more

[1] A "fixed magazine" is "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." Cal. Penal Code § 30515(b).

accurate—making them safer to use." *Murphy v. Guerrero*, No. 14-00026, 2016 WL 5508998, at *18 (D. N. Mar. I. Sept. 28, 2016); *see also* Helsley Decl. ¶¶ 4, 8, 19. While it is true that these features allow for easier use by people who are weaker or have physical disabilities, these features are a benefit to the safe and effective handling of a firearm by any user by making it adaptable to the specific user. Helsley Decl. ¶¶ 11-13. Indeed, each of these particular features is designed to promote comfort, safe handling, and accuracy. *Id*. at ¶¶ 9, 13, 17. And, rifles with such features are particularly effective for self-defense purposes. *Id*. at ¶¶ 19-21.

Between 1990 and 2015, approximately 13.7 million rifles with these features were either produced in or imported into the United States for sale in its commercial markets, with more than 1.5 million of them in 2015 alone. Curcuruto Decl. ¶ 9, 14. Purchasers consistently report that one of the main reasons for their purchase of this class of rifle is self-defense. *Id.* at ¶ 10; *see also* Helsley Dec 19-21. Other lawful purposes for which people acquire these rifles include hunting, competitive shooting, and target shooting. Curcuruto Decl. ¶ 10. Rifles with these features have existed for many years, in some case centuries. *See* Helsley Decl. ¶¶ 3-5. The vast majority of States place no special restrictions on semiautomatic, centerfire rifles with a detachable magazine having the features the AWCA prohibits. Only five states other than California (plus the District of Columbia) do, and all those restrictions are of recent vintage. Req. for Jud. Not. ¶ 3.

The AWCA contains a grandfathering provision under which individuals who were already in lawful possession of a firearm before it was deemed an "assault weapon" may continue to lawfully possess it. Cal. Penal Code § 30900, subd. (b). According to the Legislature, that provision is designed to "avoid taking issues" that would result if "the owner of a weapon which had been legally acquired … ha[d] to relinquish it." Req. for Jud. Not. ¶ 2.

To avail themselves of that exception, individuals must register their "assault weapons" with DOJ. *Id*. § 30900. While *all firearms* must now be registered with DOJ upon transfer, prior to January 1, 2014, rifles and shotguns that did not qualify as "assault

weapons" were not required to be. Req. for Jud. Not. ¶ 4. Accordingly, for the roughly 3.3 million long-guns that were lawfully sold between January 1, 2001 and December 31, 2013, the State would not have ownership records for any of them that were not voluntarily registered. Req. for Jud. Not. ¶ 5. The legislature's stated purpose for the grandfathering provision's registration requirement is to "enable law enforcement to disarm the [registrant] through the Armed Prohibited Persons System program if the [registrant] were to become prohibited from possessing firearms and assist law enforcement in the tracing of crime guns." Req. for Jud. Not. ¶ 1.[2]

Each different definition of "assault weapon" in the AWCA has its own respective registration window and requirements. *See* Cal. Penal Code § 30960(a) (former Cal. Penal Code § 12285 (f) (1992)); Cal. Penal Code § 30520 (former Cal. Penal Code § 12276.5) (added by Assemb. B. 2718, 2005-2006 Reg. Sess. (Cal. 2006), 2006 Cal. Stat. 6342-43); Cal. Penal Code § 30515 (former Cal. Penal Code § 12276.1) (added by Sen. B. 123, 1999-2000 Reg. Sess. (Cal. 1999), 1999 Cal. Stat. 1805-06); Penal Code § 30900, subd. (b) (Former Cal. Penal Code § 30900, subd. (c) (2012-2016); Former Penal Code § 12285, subd. (a) (2009-2011)); *see also* Compl. ¶¶ 25-47. A rifle falling under the most recent definition is eligible for the registration exemption only if it was lawfully possessed between January 1, 2001 and December 31, 2016, and is registered by July 1, 2018. Cal. Penal Code § 30900, subd. (b)(1).[3] But the AWCA also imposes a new registration criterion its previous iterations did not: To register a newly defined "assault weapon," one must provide "the date the firearm was acquired [and] the name and

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[2] The Armed and Prohibited Person System ("APPS") is an online database that "cross-reference[s] persons who" own or possess a firearm against "persons who are prohibited from owning or possessing a firearm," to identify individuals who lawfully obtained a firearm but are no longer permitted to possess it. Cal. Penal Code § 30000(a).

[3] The Complaint says registration must be done by December 31, 2017, Compl. ¶ 39., but the legislature has extended that deadline until July 1, 2018. Cal. Penal Code § 30900, subd. (b)(1); Req. for Jud. Not. ¶ 8.

address of the individual from whom, or business from which, the firearm was acquired." Cal. Penal Code § 30900, subd. (b)(3) (hereinafter, the "date and source requirement").

Notably, DOJ considered just such a requirement years ago, but ultimately rejected it as unworkable. In 2000, DOJ proposed regulations that would have required owners of previously defined "assault weapons" who sought to register them to furnish such date and source information. But various public hearings and a 45-day public comment period revealed the serious concern that, for perfectly innocent reasons, "[t]he exact date and name and address of the person or firearms dealer from whom the assault weapon was acquired may not be known." Req. for Jud. Not. ¶ 7. After all, neither California nor federal law has ever required firearm owners to maintain such information, and there is no readily available source from which those who do not recall the exact date on or person or location from which they obtained their firearms can obtain that information. Accordingly, DOJ amended its proposed regulations to provide that the acquisition date need be supplied "only if known," and that "the name and address of the person or firearms dealership from whom the assault weapon was acquired is optional." *Id.*

Plaintiffs were hoping for a similar clarification from DOJ's regulations implementing the current registration scheme. Plaintiff CRPA had its legal counsel raise the concerns about the date and source requirement with DOJ in various letters between December 30, 2016—when DOJ first proposed regulations—and August 2, 2017—when DOJ's regulations were formally adopted. Travis Decl. ¶¶ 7-14. But, this time, without even acknowledging, let alone addressing, the concerns that Plaintiff CRPA raised, which DOJ has long recognized as valid, DOJ adopted regulations requiring registrants to provide date and source details, which prompted Plaintiffs to amend their complaint to address the problem via this litigation and prompted Plaintiff CRPA to file a lawsuit in California superior court challenging the propriety of such regulations. Cal. Code Regs. tit. 11, § 5474. Travis Decl. ¶¶ 15-16.

The AWCA, therefore, makes the provision of date and source information a mandatory requirement for registration; indeed, there is not even any mechanism through

which a registration application, which must be completed online, can be submitted without supplying that information. Cal. Penal Code § 30900, subd. (b)(3) (requiring applicants to provide the date upon which the firearm was acquired and from whom); Req. for Jud. Not. ¶ 4. Accordingly, for individuals who do not have any record or recollection of precisely when and where they lawfully obtained their firearms, the grandfathering provision is an empty promise, as it is impossible for them to comply with the registration requirement on which its invocation is conditioned.

Plaintiff Martin and countless members of Plaintiff CRPA are in precisely that position. They lawfully obtained and presently possess newly defined "assault weapons," and would otherwise register them, in order to maintain their possession. Yet, they have no means of doing so because they, for perfectly innocent reasons, cannot satisfy the date and source requirement. Martin Decl. ¶¶ 5-7; Travis Decl. ¶¶ 5-6. Plaintiffs accordingly bring this motion to preliminarily enjoin DOJ's mandatory enforcement of the date and source requirement pending resolution of this litigation, so that they and other similarly situated individuals are not forced to dispossess themselves of their lawfully owned "assault weapons" by July 1, 2018, simply because they cannot recall precisely when and where they obtained them.

## LEGAL STANDARD

"The purpose of a preliminary injunction is to preserve the status quo pending a determination of the action on the merits." *Chalk v. U.S. Dist. Ct. (Orange Cty. Superin. of Schs.)*, 840 F.2d 701, 704 (9th Cir. 1998). To obtain such relief, the moving party must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm absent preliminary relief; (3) that the balance of equities tips in favor of injunction; and (4) that an injunction is in the public interest. *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

## ARGUMENT

While Plaintiffs believe that the AWCA suffers from many constitutional flaws, this motion seeks only limited relief. Plaintiffs do not ask this Court to preliminarily

enjoin the AWCA in its entirety, nor its requirement that individuals who lawfully possess newly defined "assault weapons" must register them to avail themselves of the law's grandfathering provision. All Plaintiffs seek is to preliminarily enjoin the AWCA's new mandatory date and source requirement, which arbitrarily threatens Plaintiffs and similarly situated individuals with criminal penalties for no reason other than because they cannot recall precisely when and where they lawfully obtained the firearms that the AWCA now declares prohibited "assault weapons." Plaintiffs do not seek to enjoin the State from *asking* individuals to provide date and source information to register their "assault weapons" if they have it. Plaintiffs simply ask this Court to require the State to follow the same course DOJ has followed for nearly two decades and make the provision of date and source information optional, rather than mandatory, until this Court can determine whether the State may constitutionally condition the continued possession of lawfully acquired firearms on a requirement that, for many, is impossible to satisfy.

## I. PLAINTIFFS' AS-APPLIED CHALLENGE TO THE DATE AND SOURCE REQUIREMENT IS LIKELY TO SUCCEED ON THE MERITS

### A. The Date and Source Requirement Violates the Due Process Clause

Plaintiffs are likely to succeed on their claim that, as applied to individuals who have no means to comply, the date and source requirement works a due process violation. The Due Process Clause of the Fourteenth Amendment provides that "No state shall … deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *see, e.g.*, *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (collecting cases). In seeking to enforce the date and source requirement, the State demands the impossible: that Plaintiffs provide information that some of them—through no fault of their own—do not have. Such a law cannot withstand scrutiny under the Due Process Clause.

To maintain lawful possession of a firearm that was lawfully acquired but now qualifies as an "assault weapon," the owner must register it by July 1, 2018. And to

register it, the owner must supply "the date the firearm was acquired [and] the name and address of the individual from whom, or business from which, the firearm was acquired." Cal. Penal Code § 30900, subd. (b). The obvious problem with that requirement, as DOJ recognized nearly two decades ago, is that "[t]he exact date and name and address of the person or firearms dealer from whom the assault weapon was acquired may not be known" by people who lawfully obtained their firearms, often years before (*i.e.*, by the only people for whom the grandfathering provision's registration requirement is relevant).[4] Neither California nor federal law has ever required a firearm purchaser to keep that information, and there is no readily available source for individuals who lack that historical information to obtain it. *See supra* Factual Background Part I. Yet, the AWCA nonetheless demands such information, and provides no mechanism for "assault weapon" owners who lack that information to complete the registration on which continued possession of their lawfully acquired property is now conditioned.

That result cannot be reconciled with due process. "Lex non cogit ad impossibilia: 'The law does not compel the doing of impossibilities.'" *Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm'n*, 366 F.3d 692, 699 (9th Cir. 2004), *as amended on denial of reh'g and reh'g en banc* (June 2, 2004) (quoting Black's Law Dictionary 912 (6th ed. 1990)). Courts have long recognized that the Due Process Clause embodies that common-sense principle. For example, in *Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers*, a district court dismissed a plaintiff's complaint because the plaintiff failed to comply with a pretrial production order. *See* 357 U.S. 197, 198 (1958). The plaintiff, a Swiss company, argued that compliance with the order was impossible because production would have violated Swiss law. *See id.* at 211.

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[4] Dept. of Justice Regulations for Assault Weapons and Large Capacity Magazines, *Final Statement of Reasons*, California Department of Justice § 978.30 (b) Requirements for Assault Weapons Registration (2000), http://www.ossh.com/firearms/caag.state.ca.us/firearms/regs/fsor.htm. (last visited November 10, 2017).

The Supreme Court agreed, concluding that due process prohibits the government from penalizing a person for failing to do the impossible. *See id.* at 209-12.

In a more recent case involving Second Amendment rights, the Seventh Circuit recognized this same principle. *See Ezell v. City of Chicago*, 651 F.3d 684, 698 (7th Cir. 2011). There, the City of Chicago conditioned lawful possession of firearms on range training, while at the same time prohibiting all firing ranges within city limits. *Id.* at 690. The court held the law invalid. As Judge Rovner explained in her concurring opinion, "the City may not condition gun ownership for self-defense in the home on a prerequisite that the City renders impossible to fulfill within the City limits." *Id.* at 712; *cf. Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1530 (11th Cir. 1996) (injunction prohibiting developer from discharging storm water runoff impermissible because "compliance with such a standard is factually impossible"). Yet here, the impossible is precisely what California demands. Plaintiffs, who in some cases, acquired their firearms many years ago, do not possess the information now demanded by the State; nor do they have any readily available means of obtaining it. Because their compliance with the date and source requirement is impossible, the requirement violates Plaintiffs' right to due process.

The date and source requirement is especially concerning because the AWCA effectively seeks to retroactively criminalize conduct that was lawful at the time. Our legal system "for centuries . . . has harbored a singular distrust of retroactive statutes, and that distrust is reflected in th[e Supreme] Court's due process jurisprudence." *E. Enters. v. Apfel*, 524 U.S. 498, 502 (1998) (majority opinion). "If retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership." *Id.* at 548. It therefore "does not follow . . . that what [a legislature] can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Usery v. Turner Elkhorn*, Mining Co., 428 U.S. 1, 16-17 (1976). Courts accordingly have "given careful consideration to due process challenges to

legislation with retroactive effects," *E. Enters.*, 524 U.S. at 547–48 (Kennedy, J., concurring in part and dissenting in part) (collecting cases), subjecting such laws to "heightened scrutiny," *Kelo v. City of New London*, 545 U.S. 469 at 493 (2005) (Kennedy, J., concurring).

Plaintiffs acquired their firearms legally and have legally possessed them, in some cases, for years. And the AWCA includes a grandfathering clause ostensibly because of the manifest unfairness and constitutional problems that would result from criminalizing the possession of—and thereby confiscating—firearms that were lawfully acquired at the time. *See supra* Factual Background Part I. Yet, for Plaintiffs and similarly situated individuals, the date and source requirement destroys the legislature's promise of an exemption from the AWCA's confiscatory effects years later. *See supra* Factual Background Part I (the Legislature [created] the grandfathering provision . . . to "avoid taking issues" that would result if "the owner of a weapon which had been legally acquired … ha[d] to relinquish it." Req. for Jud. Not. ¶ 2.)

Worse still, the requirement does so on a ground of which Plaintiffs lacked notice when it actually mattered—*i.e.*, when they acquired their firearms. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Yet, California never warned Plaintiffs that they might be required to produce the names and addresses of those from whom they acquired their firearms, or the precise dates when they acquired them. It is, therefore, understandable that Plaintiffs no longer have such information, especially for firearms that were purchased years ago. Defendant cannot now penalize Plaintiffs for failing to maintain these records when the law never gave Plaintiffs any notice that possession of such information would eventually become a prerequisite for compliance with firearm possession laws. Accordingly, Plaintiffs are likely to succeed on their claim that the date and source requirement violates the Due Process Clause as applied to individuals who lack the means to comply.

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**B. The Date and Source Requirement Will Work Unconstitutional Takings**

Plaintiffs are also likely to succeed on their claim that the date and source requirement violates the Takings Clause as applied to individuals who have no means to comply, as the requirement threatens to dispossess such individuals of their lawfully acquired property without any government compensation. The Takings Clause applies to two types of governmental action: "physical taking[s] and "regulatory takings." *Horne v. Dept. of Agric.*, 135 S. Ct 2419, 2427 (2015). A physical taking occurs when "the government physically takes possession of an interest in property for some public purpose"—that is, when it "dispossess[es] the owner" of private property to promote the general good. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322, 325 n. 19 (2002). When the government physically takes property, it "has a categorical duty to compensate the former owner." *Id*. at 322. That duty applies equally to takings of real and "personal property." *Horne*, 135 S.Ct. at 2427. By contrast, a regulatory taking is "a restriction on the *use*" of private property. *Id.* (emphasis added).

As applied to individuals like Plaintiffs who lack the means to comply, the date and source requirement works a paradigmatic physical taking that requires government compensation. Once the July 1, 2018 registration date arrives, it will no longer be lawful to continue to possess an "assault weapon"—even if that firearm was lawfully obtained at a time when its acquisition and possession were lawful—unless it has been registered. Cal. Penal Code § 30900, subd. (b). Accordingly, as applied to individuals who lawfully obtained their "assault weapon" but do not know precisely when or where they did so, the date and source requirement is a government mandate that they physically dispossess themselves of their property. As the Legislature itself recognized when explaining why the AWCA includes a grandfathering provision, *see supra* Factual Background Part I, such is a physical taking that requires government compensation. *See Tahoe-Sierra*, 535 U.S. at 324 n.19 (holding that a physical taking "dispossess[es] the owner" of property); *Nixon v. United States*, 978 F.2d 1269, 1287 (D.C. Cir. 1992) (statute that "physically dispossessed" property owner "resulted in" *per se* taking). Indeed, physical dispossession

of that kind is the *sine qua non* of a physical taking; what "distinguish[es]" a physical from a regulatory taking is whether the regulation "absolutely dispossess[es] the owner." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982); *see Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84, 95 (2d Cir. 1992) (finding "no physical taking" where there was "no absolute dispossession" of property rights).

Precisely because the AWCA prohibits *possession* by individuals who cannot register their "assault weapons," it is readily distinguishable from restrictions on the *use* of personal property that have been upheld against takings challenges. For example, in *Andrus v. Allard*, 444 U.S. 51 (1979), the Court held that a ban on the sale of previously lawful eagle products was not a taking. But *Andrus* emphasized that it was "crucial that [the owners] *retain[ed] the rights to possess* and transport their property." *Id.* at 66 (emphasis added). Likewise, in the Prohibition-era cases involving takings challenges to restrictive liquor laws, those challenges were rejected because the statutes restricted only the ability to *sell* lawfully acquired alcohol, not to continue to possess it. *See James Everard's Breweries v. Day*, 265 U.S. 545, 560 (1924) (upholding law "prohibiting traffic in intoxicating malt liquors for medicinal purposes"); *Jacob Ruppert, Inc. v. Caffey*, 251 U.S. 264, 278-79 (1920) (upholding law barring sales of liquor "for beverage purposes").

As the Supreme Court recently explained in distinguishing those cases from a regulation that physically dispossessed farmers of their raisins, there is a fundamental difference between a regulation that restricts only the *use* of private property, and one that requires "physical surrender . . . and transfer of title." *Horne*, 135 S. Ct. at 2429. Because the date and source requirement requires the latter, it is a "*per se* taking[]" that requires government compensation. *See id.* "Whatever . . . reasonable expectations" people may have "with regard to regulations," they "do not expect their property, real or personal, to be actually occupied or taken away." *Id.* at 2427. That is all the more true when the property in question is expressly protected by the Bill of Rights. *See infra* Argument, Part I.C.

To be sure, the AWCA does not necessarily require an "assault weapon" owner who cannot comply with the registration requirement to surrender her lawfully acquired property to *the government*. The owner may also "[s]ell the weapon to a licensed gun dealer" or "[r]emove the weapon from this state." Cal. Penal Code § 30920. But neither of those alternatives is any less a taking. As to the first, it is well-established that a physical taking can occur even if the government itself does not "directly appropriate the title, possession or use of the propert[y]." *Richmond Elks Hall Ass'n v. Richmond Redevel. Agency*, 561 F.2d 1327, 1330 (9th Cir. 1977). Rather, "it is sufficient if the action by the government involves a direct interference with or disturbance of property rights." *Id.* For example, there was no dispute that the real property at issue in *Kelo*, 545 U.S. 469, was physically taken for purposes of the Takings Clause, even though the owner had the option to sell her home to a "private nonprofit entity," *id.* at 473-75; *see also, e.g.*, *Int'l Paper Co. v. United States*, 282 U.S. 399, 404-06 (1931); *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1292-93 (Fed. Cir. 2008); *Amen v. City of Dearborn*, 718 F.2d 789, 797 (6th Cir. 1983). Indeed, selling property to avoid having it taken is an option in almost every takings case, including several in which the Supreme Court has found physical takings.

Similarly, the possibility of moving the firearm to another state—on pain of criminal prosecution if kept or returned in-state—does not make the date and source requirement any less a physical taking. Like a mandatory sale to a third party or physical surrender to the government, a mandatory transfer of property out of state "physically dispossesse[s]" a property owner and results in a taking. *Nixon*, 978 F.2d at 1287; *see Tahoe-Sierra*, 535 U.S. at 324 n.19. It "is no answer" that the property owner may maintain title or access the property by traveling outside California; "retention of some access rights by the former owner of property does not preclude the finding of a *per se* taking." *Nixon*, 978 F.2d at 1285-86. Just as a district court in this Circuit recently held regarding California's attempt at confiscating certain ammunition magazines, none of these alternatives is any less of a taking than government confiscation. *See Duncan v.*

*Becerra*, No. 3:17-CV-1017-BEN, 2017 WL 2813727, at *24 (S.D. Cal. June 29, 2017). By stripping the property owner of his most basic property right—physical possession in the relevant jurisdiction—the date and source requirement works a physical taking regardless of whether the government itself "directly appropriate[s] the title, possession or use of the propert[y]." *Richmond Elks*, 561 F.2d at 1330.

Moreover, the option of removing a firearm out of state exists only if (1) the owner has some out-of-state location to store it—which is certainly not true in all and maybe not true in most cases; and (2) that other state permits possession of the firearm—a policy choice by a different sovereign over which California has no control. California can no more invoke the permissive firearm laws of other states to defend the constitutionality of its own restrictions than Texas could invoke the permissive abortion laws of other states to defend the constitutionality of its restrictions on clinics. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2304, 2310-13 (2016); *Jackson v. City and County of San Francisco*, 746 F.3d 953 at 967 (9th Cir. 2014) ("That Jackson may easily purchase ammunition elsewhere is irrelevant."). In short, there is no "first mover" exception to the Takings Clause; California may not enact an unconstitutional law simply because other states have not, yet. *Cf. Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76- 77 (1981) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.") (internal quotations omitted);

Because the date and source requirement will allow the state to work a physical taking of Plaintiffs' property, the State "has a categorical duty to compensate the former owner." *Tahoe-Sierra*, 535 U.S. at 322. The AWCA plainly fails to fulfill that duty, as it makes no provision for government compensation. Accordingly, Plaintiffs are likely to succeed on their claim that the date and source requirement works an unconstitutional taking as to those who are unable to comply with it.

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### C. The Date and Source Requirement Violates the Second Amendment

Finally, Plaintiffs are likely to succeed on their claim that the date and source requirement violates the Second Amendment. The Supreme Court has described "the right of law-abiding, responsible citizens to use arms in defense of hearth and home" as the Second Amendment interest "surely elevate[d] above all other[s]." *District of Columbia v. Heller*, 554 U.S. 570 at 635 (2008). The Ninth Circuit employs a two-step analytical framework when evaluating Second Amendment claims, asking first whether the law burdens conduct protected by the Second Amendment, and then whether it survives the appropriate level of heightened scrutiny. *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). By conditioning the continued possession of firearms protected by the Second Amendment on compliance with a registration requirement with which they do not have the means to comply, the date and source requirement deprives those Plaintiffs of rights protected by the Second Amendment. Whatever interest the State may have in knowing the date that and source from which "assault weapons" were obtained, confiscating firearms from those who, for perfectly innocent reasons, do not have such information does not further the State's registration interest at all, let alone do so in a sufficiently tailored manner.

#### 1. The date and source requirement plainly burdens conduct protected by the Second Amendment

The Second Amendment protects those arms that are "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 624-25; *see also Caetano v. Massachusetts*, 136 S. Ct. 1027, 1027-28 (2016). It thus protects any firearm that is "in common use" by law-abiding citizens today. *Heller*, 554 U.S. at 627. A straightforward application of that test compels the conclusion that the firearms the AWCA requires Plaintiffs to register are protected by the Second Amendment.

It is well-documented that rifles possessing the features that trigger the AWCA's new "assault weapon" definition are among the most popular firearms possessed by law-abiding citizens, including for the core lawful purpose of self-defense. *See* Curcuruto

Decl. ¶ 8, 11; *see also* Helsley Decl ¶¶ 20, 22. Indeed, the Supreme Court has specifically explained that semiautomatic rifles, including ones prohibited by the AWCA, "traditionally have been widely accepted as lawful possessions." *Staples v. United States*, 511 U.S. 600, 612 (1994). The popularity of rifles with the features the AWCA prohibits is unsurprising. Those features, which have been around for decades, and in some instance, even centuries, provide better ergonomics, more control, lower recoil, ease of use, and lightness in weight. *See supra* Factual Background Part I. Those qualities also make it easier for firearms to be used by persons of varying age and physical ability. *Id*.

Accordingly, the rifles to which the AWCA's registration requirement applies plainly fall within the scope of the Second Amendment. As applied to individuals who, like Plaintiffs, lack the information necessary to satisfy it, the date and source requirement therefore plainly burdens their Second Amendment right. Indeed, conditioning the continued possession of constitutionally protected firearms on the provision of information that the state knows the possessor may understandably not have is no different from banning continued possession entirely. Accordingly, as applied to such individuals, the date and source requirement imposes an obvious and a severe burden on Second Amendment rights under step one of the two-step framework.[5]

**2. As applied to individuals who lack the means to comply, the date and source requirement cannot survive constitutional scrutiny**

A law that completely denies a constitutionally protected right to those entitled to exercise it must "fail constitutional muster" under "any of the standards of scrutiny." *Heller*, 554 U.S. at 628-29. That is the approach that a Ninth Circuit panel endorsed in

[5] To be clear, Plaintiffs believe that the AWCA's ban on the possession of "assault weapons" is also unconstitutional as to individuals who do not presently possesses such firearms but wish to acquire them, and they fully intend to challenge that ban. But for purposes of this motion, Plaintiffs seek to enjoin the State only from using an impossible-to-comply-with registration requirement to dispossess law-abiding citizens of such firearms that they obtained when their possession was lawful and who wish to continue to lawfully possess them.

*Jackson*, 746 F.3d 953, noting that a law that "amounts to a destruction of the Second Amendment right, is unconstitutional under any level of scrutiny." *Id.* at 961. As explained above, the rifles the State considers to be "assault weapons" are among the most popular in the country and are used largely for the core purpose of self-defense. Curcuruto Decl. ¶ 7; Helsley Decl ¶¶ 19-21. Because the AWCA conditions Plaintiffs' possession of their lawfully acquired firearms on a requirement with which they have no means of complying, it effectively "amounts to a destruction" of their right to keep such arms. Thus, the date and source requirement as currently constituted is "unconstitutional under any level of scrutiny." *Id.*

Even if means-ends analysis is necessary here, the same result obtains. Courts select the appropriate level of scrutiny, either intermediate or strict,[6] based on "how close the law comes to the core of the Second Amendment" and "the severity of the law's burden on the right." *Chovan* at 1138. Under either form of heightened scrutiny, a challenged law is presumed unconstitutional, and the government bears the burden of justifying it. *See e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) ("unless the conduct at issue is not protected by the Second Amendment at all, the government bears the burden of justifying the constitutional validity of the law"). As the D.C. Circuit recently confirmed, the 'core' or 'central component' of the Second Amendment right to keep and bear arms protects individual self-defense,' (citation omitted), by 'law-abiding, responsible citizens' (citation omitted)." *Wrenn v. District of Columbia*, 864 F.3d 650 at 657 (D.C. Cir. 2017) (quoting *McDonald v. Chicago*, 561 U.S. at 767-78 (2010), and *Heller I*, 554 U.S. at 635); *see also Jackson*, 746 F.3d at 959–61. As applied to individuals who have no means of complying with it, the date and source requirement is a functional ban on possession of

[6] The Supreme Court has made clear that "rational basis" is not appropriate for analyzing restrictions on the Second Amendment. *Heller*, 554 U.S. at 628 n.27.

a firearm protected by the Second Amendment, which is a severe restriction on core conduct that demands strict scrutiny.

But even if this Court selects intermediate scrutiny, the date and source requirement as currently constituted could not survive. Intermediate scrutiny requires a "reasonable fit between the challenged regulation" and a "significant, substantial, or important" government objective. *Silvester v. Harris*, 843 F.3d 816 at 821-22 (9th Cir. 2016); *Jackson*, 746 F.3d at 965. While a reasonable fit "is not necessarily perfect" and "not necessarily the least restrictive means," it must be "a means narrowly tailored to achieve the desired objective." *McCutcheon v. Fed. Election Comm.*, 134 S. Ct. 1434 at 1456-57 (2014). The government bears the burden of "affirmatively establish[ing] the reasonable fit" required, *Jackson*, 746 F.3d at 965, and it is entitled to *no deference* when assessing that "fit." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 214 (1997). Rather, the government must prove that those means do not burden "substantially more" constitutionally protected conduct than "necessary to further [its important] interest." *Id.* This does not require the government to employ the least restrictive means," *Fyock v. Sunnyvale*, 779 F.3d 991 at 1000-01 (2015), but the fit must still be "reasonable." *United States v. Marzarella*, 614 F.3d 85, 97-98 (3d Cir. 2010).

Setting aside for present purposes whether the State has a legitimate interest in depriving *any* law-abiding citizens of the rifles that the AWCA prohibits, the State does not claim any interest in dispossessing law-abiding citizens of firearms that they obtained when it was legal to obtain and possess them. To the contrary, the AWCA contains an express grandfathering provision, designed, among other things, to avoid the obvious takings problem that otherwise would result. *See supra* Part I.B. Nor does the State claim any interest in dispossessing law-abiding citizens of such firearms simply because they cannot recall precisely when or where they obtained them. To the contrary, the Legislature justified the registration requirement solely on the theory that it "would enable law enforcement to disarm the person through the [APPS] program *if the person*

*were to become prohibited from possessing firearms and assist law enforcement in the tracing of crime guns*." Req. for Jud. Not. ¶ 1.

Whatever the merits of those interests are generally, a mandatory date and source requirement not only is not reasonably tailored to further them, but actually impedes them. This motion does not attack or endorse registration per se, but seeks only to enjoin the date and source requirement because it makes it impossible for Plaintiffs to register, which makes no sense. To be sure, the State may prefer to know both who possesses an "assault weapon" and when and where it was obtained. But the reality is that many people do not have that information. The Legislature did not and cannot explain why the response to that problem should be to deprive those individuals of their lawfully acquired firearms (without even providing any compensation), rather than to just allow them to register their firearms without supplying that information, as DOJ permitted for years. Surely, the State's interest of keeping track of firearms is are far better served by allowing people to come forward and lawfully register their firearms than by a requirement so onerous as to make registration impossible. The date and source requirement, to the contrary, actually discourages individuals who lack the requisite information from even trying to register their firearms, thereby impeding the State's interest in obtaining more complete possession records.

The date and source requirement also is not remotely "closely drawn to avoid unnecessary abridgment" of constitutional rights, *McCutcheon*, 134 S. Ct. at 1456, as it would enable law enforcement to confiscate firearms without regard to whether they were lawfully acquired or are presently lawfully possessed. Indeed, the whole problem with imposing a mandatory date and source requirement, as DOJ recognized long ago, is that individuals may have perfectly innocent reasons, having nothing to do with the legality of the acquisition, for not knowing exactly when or the identity or address from whom they acquired firearms at a time when they were legal to obtain and possess, and did not have to be registered with DOJ. Accordingly, while this motion does not seek to enjoin the State from *asking* people who have such information to supply it, it does seek to enjoin

the State from rejecting a registration application of a lawfully obtained firearm simply because the owner does not recall precisely when and where the firearm was obtained—a dramatically overbroad reaction to what amounts to nothing more than an innocent record-keeping shortcoming.

In sum, while the State might have an interest in obtaining date and source information from individuals who have it, the State certainly does not have an interest in confiscating firearms from people simply because they did not foresee years ago that they might one day be expected to identify precisely when and where they obtained their firearms. Accordingly, Plaintiffs are likely to succeed on their claim that the date and source requirement violates the Second Amendment as applied to individuals who lack the means to comply with it.[7]

## II. THE REMAINING FACTORS WARRANT RELIEF

### A. Plaintiffs will Suffer Irreparable Harm if the Court Denies Relief

If this Court finds that Plaintiffs are likely to succeed on one or more of their claims, the remaining preliminary injunction factors follow readily, for "it is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). 11A Charles Wright et. al., *Federal Practice and Procedure* § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). The Ninth Circuit has imported the First Amendment's "irreparable-if-only-for-a-minute" rule to cases involving other rights and, in doing so, has held a deprivation of these rights as irreparable harm per se. *Monterey Mech. Co. v. Wilson*, 125 F. 3d 702,

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[7] To be clear, Plaintiffs do not mean to suggest that the State may not try to devise a more tailored regulatory regime designed to distinguish between individuals who simply do not *have* that information, and individuals who have that information, but wish to hide it from the State because their firearms were not lawfully obtained. But that kind of tailoring to avoid arbitrary and unjustified confiscation of firearms is precisely what the current date and source requirement lacks.

715 (9th Cir. 1997). The Second Amendment should be treated no differently. *See McDonald v. Chicago*, 561 U.S. 742, 780 (2010) (refusing to treat the Second Amendment as a second-class right subject to different rules); *Ezell v. Chicago*, 651 F. 3d 684, 700 (7th Cir. 2011) (a deprivation of the right to keep and bear arms is "irreparable and having no adequate remedy at law."). Nor should the right not to have property taken without just compensation, or not to be deprived of property without due process of law be treated differently.

The constitutional violations alone are enough to satisfy the irreparable harm factor, but the circumstances here make the irreparable harm unmistakable. Because Plaintiffs must comply with the registration requirement by July 1, 2018, in order to continue to lawfully possess their firearms, the need to "preserve the status quo pending a determination of the action on the merits"—the fundamental purpose of a preliminary injunction—is particularly strong. *Chalk*, 840 F.2d at 704. The need for injunctive relief is even more apparent because the impending harm is a physical taking of property that cannot be remedied easily, if at all—a quintessential example of irreparable injury. *See, e.g.*, *Taylor v. Westly*, 488 F.3d 1197, 1202 (9th Cir. 2007) ("[W]ithout a preliminary injunction, plaintiffs run the risk that California will permanently deprive them of their property . . . . Once the property is [disposed of], it may be impossible for plaintiffs to reacquire it, thus creating the requisite 'irreparable harm.' "). Finally, the property at stake is not just any personal item, but one that is constitutionally protected for the most essential purpose—defense of a person's life against harm. *See Heller*, 554 U.S. at 595; *see also Duncan v. Becerra* No. 3:17-CV-1017-BEN, 2017, at *24 (S.D. Cal. June 29, 2017) (district court in this Circuit recently finding a ban on possessing commonly owned ammunition magazines would cause irreparable injury due to the loss of Second Amendment rights and tangible and intangible interests which cannot be compensated by damages).

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**B. Granting Preliminary Injunctive Relief is in the Public Interest**

For similar reasons, preliminarily enjoining the date and source requirement would be in the public interest. When challenging government action that affects constitutional rights, "[t]he public interest . . . tip[s] *sharply* in favor of enjoining the law." *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (emphasis added). Here, Plaintiffs seek to vindicate their fundamental Second Amendment rights, as well as their rights under the Takings and Due Process Clauses. As the Ninth Circuit has made clear, "*all citizens* have a stake in upholding the Constitution" and have "concerns [that] are implicated when a constitutional right has been violated." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). (emphasis added). This is especially the case when we are potentially talking about many thousands of people.[8]

Moreover, the State has no plausible argument that temporarily enjoining the date and source requirement will endanger public safety. The State itself has already delayed implementation of the registration requirement, underscoring that there is no urgency to when any of its provisions take effect. *See* Req. for Jud. Not. ¶ 8 (extending the deadline to register an "assault weapon" from January 1, 2017, to June 30, 2018). The registration requirement also reflects the State's determination that allowing individuals who, like Plaintiffs, already lawfully possess these rifles to continue to do so does not pose a serious public safety risk. And rightfully so, as Plaintiffs and similarly situated individuals have safely possessed their rifles for years, and prepared to record their ownership—as soon as the State gives them a feasible means of doing so. And perhaps most telling is that the DOJ has acknowledged the problems with the date and source requirement.[9] The public interest thus weighs heavily in favor of temporarily preserving the status quo until this Court can determine whether the State may constitutionally

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[8] *See supra*, Factual Background Part I (The sale of 3.3 million long guns between 2001 and 2013 assuredly implicates at least several thousand citizens who are affected by this law.)

[9] *Supra*, footnote 10.

condition continued possession of lawfully acquired firearms on a date and source requirement that is impossible to satisfy.

**C. The Balance of Equities Tips in Favor of Injunctive Relief**

The final factor considers "the balance of hardships between the parties." *Alliance for the Wild Rockies v. Cottrell*, 632 F. 3d 1127, 1137 (9th Cir. 2011). In contrast to Plaintiffs injuries, the state will suffer no harm from a preliminary injunction of the date and source requirement. The state "cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013); *see Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) ("[I]t is clear that it would not be equitable . . . to allow the state . . . to violate the requirements of federal law.") (citations omitted). But even absent the constitutional dimensions of this lawsuit, the balance of harms tips in Plaintiffs' favor. As the State itself recognized in creating a grandfathering provision, depriving Plaintiffs who have hitherto complied with the law and never endangered public safety of their constitutionally protected firearms does not serve the public interest or increase public safety. The balance of equities also favors litigants who seek only "to preserve, rather than alter, the status quo while they litigate the merits of th[eir] action." *Rodde v. Bonta*, 357 F. 3d 988, 999 n. 14 (9th Cir. 2004). Here, preliminarily enjoining the date and source requirement will maintain the status quo while the case moves forward on the merits.

## CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion for a Preliminary Injunction.

Dated: November 14, 2017

**MICHEL & ASSOCIATES, P.C.**

/s/Sean A. Brady
Sean A. Brady
Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Case Name: *Rupp, et al. v. Becerra*
Case No.: 8:17-cv-00746-JLS-JDE

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

I am not a party to the above-entitled action. I have caused service of:

**MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Xavier Becerra
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Deputy Attorney General
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San Francisco, CA 94102
E-mail: peter.chang@doj.ca.gov

I declare under penalty of perjury that the foregoing is true and correct.

Executed November 14, 2017

/s/Laura Palmerin
Laura Palmerin