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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,

vs.

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

Defendants.

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

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

Hearing Date: December 1, 2017
Hearing Time: 2:30 p.m.
Courtroom: 10A
Judge: Josephine L. Staton

Action Filed: April 24, 2017

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INTRODUCTION

This law suit seeks to vindicate the right of law-abiding Californians to possess firearms that for years have been among the most popular choices of Americans for self-defense. Not only does California's sweeping Assault Weapon Control Act violate the Second Amendment, it results in the taking of private property by the government without just compensation. The law both eliminates the ability of Californians to pass certain firearms on to their heirs—a long-recognized property right—and, in many cases, forces current gun owners who are unable to register their firearms to forfeit them. Under the regime, property rights are diminished retroactively based on a wholly irrational classification system, in violation of due process.

The State argues that there are few limits to their regulatory authority. Perhaps most egregiously, the State contends that the state enjoys a blanket police power through which it may evade the constraints the Constitution places on the exercise of government power. Fortunately, the State's argument has been thoroughly rejected by the Supreme Court. There are substantial limits to state authority—limits the State of California has crossed.

Because Plaintiffs state valid claims under the Fifth and Fourteenth Amendments, Defendant's Partial Motion to Dismiss Plaintiffs' Due Process Clause and Takings Clause Claims ("Motion") should be denied.

STATEMENT OF FACTS

Through the years, California has enacted increasingly onerous restrictions and outright prohibitions on the possession of firearms. The Roberti-Roos Assault Weapon Control Act of 1989 ("the AWCA") targets commonly owned semiautomatic, centerfire rifles with detachable magazines. FAC ¶ 6. Such rifles have been in safe and effective use by civilians in the United States—including in California—for over a century. *Id.* ¶ 7. Recent versions of the AWCA seek to restrict gun ownership by criminalizing possession of firearms that contain certain

combinations of popular features, namely, "pistol grips," "thumbhole stocks," "flash suppressors," and adjustable stocks. *See* Cal. Penal Code §§ 30515, 30600(a). FAC ¶¶ 8–12, 42–47. None of these features increases a rifle's "rate of fire and capacity for firepower," Cal. Penal Code § 30505(a), and the State provides no rationale as to why particular combinations are prohibited while others are not.

The firearms banned by the AWCA are extremely popular with the American public. Between 1990 and 2014, more than 11 million rifles having at least some of the enumerated features were manufactured in or imported into the United States. FAC ¶ 15. In 2012, these rifles accounted for approximately 20 percent of all retail firearm sales. *Id.* And in 2014 alone, approximately 1,228,000 such rifles were manufactured or sold in the United States. *Id.* Possession of firearms designated as "assault weapons" under the statute is punishable as either a misdemeanor or felony, with potential imprisonment in county jail or state prison. Cal. Penal Code § 30600(a).

The AWCA does include a "grandfather clause" permitting an individual who lawfully obtained a banned firearm before the law's enactment to keep his weapon so long as he registers it. *Id.* § 30900. To register, however, a gun owner must provide the name and address of the individual from whom the firearm was acquired, as well as the date he acquired it, *id.* § 30900(a)—information that many California gun owners were never required to maintain. The law's most striking feature, however, is its prohibition on bequeathing banned firearms to children and loved ones—a provision that effectively disinherits California citizens. *Id.* § 30915

Plaintiffs are law-abiding Californians who wish to possess firearms prohibited by the AWCA,[1] hope to pass their firearms on to their offspring, or will

[1] Defendant avers, without citing authority, that Plaintiffs who do not currently own banned firearms lack standing. These Plaintiffs suffer a concrete injury because the AWCA will prevent them from acquiring firearms, either by purchasing firearms or through bequests or intestate transfers; an injunction will redress this injury. Plaintiffs therefore have standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Additionally, because Plaintiffs would benefit directly from a favorable

be prevented from keeping their firearms because they no longer possess the information required to register them. FAC ¶¶ 48–57. Plaintiffs also include the California Rifle & Pistol Association, Inc., a nonprofit organization dedicated to defending the civil rights of California's law-abiding gun owners. In addition to alleging violations of the Second Amendment (which Defendant does not move to dismiss), *id.* ¶¶ 95–106, Plaintiffs challenge the severe restrictions the AWCA will place on their right to possess property, in violation of the Fifth Amendment's Takings Clause, *id.* ¶¶ 113–16. Plaintiffs additionally challenge both the retroactive manner in which the AWCA bans certain firearms and its irrational classification regime under the Fourteenth Amendment's Due Process Clause. *Id.* ¶¶ 107–112.

STANDARD OF REVIEW

"To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), a complaint generally must satisfy only the minimal notice pleading requirements of Rule 8(a)(2)." *Porter v. Jones*, 319 F.3d 483, 494 (9th Cir. 2003). Rule 8(a)(2) merely requires that a plaintiff provide a short and plain statement showing that he is entitled to relief to give a defendant fair notice of the claims and the grounds for the claims. Fed. R. Civ. P. 8(a)(2). At this stage in the proceedings, district courts are required to construe the allegations in the complaint in the light most favorable to Plaintiffs. *See Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). The plaintiff "'receives the benefit of imagination, so long as the hypotheses are consistent with the complaint.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007) (quoting *Sanjuan v. American Bd. of Psychiatry & Neurology*, 40 F.3d 247, 251 (7th Cir. 1994)).

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disposition, they may seek to vindicate the property rights of third parties. *See Hodel v. Irving*, 481 U.S. 704, 711 (1987).

ARGUMENT

I. PLAINTIFFS STATE A PLAUSIBLE TAKINGS CLAIM

The economist Milton Friedman described the ability to possess property as "the most basic of human rights." Milton Friedman & Rose D. Friedman, *Two Lucky People: Memoirs* 605 (1998). The Framers, who similarly recognized the importance of private property, chose to enshrine that right in the Constitution by means of the Fifth Amendment, which prohibits the government from taking property for public use "without just compensation." Under modern jurisprudence, the Takings Clause applies to two types of governmental action: "physical taking[s]" and "regulatory takings." *Horne v. Dep't 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.

The AWCA results in a physical taking of firearms possessed by law-abiding gun owners. First, the law eliminates the ability of Californians to bequeath legally-owned weapons to children or loved ones in any meaningful way. Cal. Penal Code §§ 30605, 30915. Second, those who lawfully possess firearms deemed "assault weapons" but, through no fault of their own, are unable to register them, are required to forfeit their property. In neither case does California provide compensation. The AWCA therefore violates the Takings Clause and must be enjoined.

A. The AWCA Requires That Law-Abiding Californians Forfeit Firearms They Have Inherited.

"[T]he right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times." *Hodel v. Irving*, 481 U.S.

at 716. In prohibiting law-abiding Californians from bequeathing firearms to their offspring, the AWCA wholly disregards this right. Apparently unfazed by the serious constitutional questions the AWCA's disinheritance provision raises, the State largely fails to engage with Plaintiffs on this issue. Fortunately, Supreme Court precedent is clear: a prohibition on bequeathing property to one's offspring constitutes a taking for which just compensation is owed.

The Supreme Court has repeatedly explained that the Takings Clause is implicated when the state restricts the ability of its citizens to transfer property to their descendants following their deaths. In *Hodel v. Irving*, 481 U.S. 704, the Supreme Court evaluated the permissibility of a legislative scheme which, like the AWCA, sought to prevent property from being transferred from one generation to the next. A series of Nineteenth Century land acts had assigned Indians, until then living on communal reservations, individual plots of land that were to be subdivided upon their deaths and passed on to their descendants. As this process was repeated through the generations, land was divided into smaller and smaller plots, resulting in a situation that was "administratively unworkable and economically wasteful." *Id.* at 707. Congress addressed the problem by passing the Indian Land Consolidation Act, which required that the smallest parcels of land—those representing less than 2% of a given tract and earning their owners less than $100 per year in rent—escheat to the tribe. *Id.* at 709. Despite there being "little doubt that the extreme fractionation of Indian lands is a serious public problem," the Supreme Court invalidated the escheat provision of the Act because it amounted "to virtually the abrogation of the right to pass on property to one's heirs," which was "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 716. *Andrus v. Allard* likewise recognized that the ability to bequeath property was protected by the Takings Clause; although the Court upheld a statute prohibiting the sale of parts from endangered birds, it explained that it was

"crucial that appellees retain the rights . . . *to donate or devise* the protected birds." 444 U.S. 51, 66 (1979); *see Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2429 (2015).

For two reasons the AWCA results in a constitutional violation that is actually more concerning than the statute at issue in *Irving*. First, under the AWCA, the heirs of gun owners suffer an actual forfeiture because they are required to relinquish them after taking title; under the Indian Land Consolidation Act, the offspring of Indians did not forfeit property because they never actually received it. Second, the AWCA does not permit California gun owner to transfer their property to descendants *inter vivos*; under the Indian Land Consolidation Act, that option remained available. *See id.* at 715. Thus, under the AWCA a gun owner's heir can *never* take meaningful possession of the property to which he is entitled.

The State does not attempt to distinguish *Irving*; indeed, it does not even cite it in its Motion. Instead, the State suggests blithely that the AWCA's disinheritance provision is of no concern because Plaintiffs may in fact "bequeath their weapons to their heirs." Mot. at 11. The AWCA mandates that Californians who receive an "assault weapon," *within 90 days*, permanently modify or "[r]ender the weapon permanently inoperable," "[s]ell the weapon to a licensed gun dealer," succeed in the near-impossible task of acquiring a permit, or "[r]emove the weapon from" the State of California. Cal. Penal Code § 30915; Cal. Code Regs. tit. 11, § 5478(a)(2). Under such conditions, a gun owner's heir can hardly be said to have meaningfully inherited a firearm; unless he takes drastic action to convert, relinquish, or destroy his property, he becomes a criminal within ninety days. Cal. Penal Code § 30605.

B. The AWCA's Registration Requirement Prevents Californians From Keeping Firearms They Lawfully Acquired.

The State rests much of its argument that the new registration requirement does not effect a physical taking on the AWCA's "grandfather clause." That provision, allows individuals who possessed newly defined "assault weapons" before January 1, 2017, to keep those firearms so long as they are registered by July

1, 2018. *See id.* § 30680. As with the AWCA's disinheritance provision, however, the registration requirement, in practice, results in a forced forfeiture of private property.

While the California Department of Justice initially sought to promulgate regulations requiring a registrant to provide the date his "assault weapon" was acquired and the address of the person or entity from whom it was acquired, following several public hearings and a 45-day public comment period, those proposed regulations were amended to state that such information is "to be provided if known," and that "the name and address of the person or firearms dealership from whom the assault weapon was acquired is optional." FAC ¶ 40. Disregarding the concerns of both the public and apparently the California Department of Justice, in 2016, the legislature amended the AWCA to make the information mandatory. *See* 2016 Cal. Legis. Serv. Ch. 40 (A.B. 1135) (codified at Cal. Penal Code § 30900(b)(3)). Many Californians, some of whom have owned their firearms for years, no longer possess details regarding the acquisition of their weapons—information that they were not previously required to maintain. Plaintiff Dennis Martin is such an example. FAC ¶¶ 56. For those who cannot register their firearms, continued possession of their "assault weapons" will be criminalized following January 1, 2018, when the registration period closes. *See* Cal. Penal Code § 30680.

The State argues that Plaintiffs cannot assert their challenge because "they do not allege that their registration was rejected by the Department of Justice . . . or even that they attempted to register their assault weapons." Mot. at 11–12. The State apparently believes that the California Department of Justice *might* permit Plaintiffs to register their weapons even without the required information, and that Plaintiffs should therefore attempt to register their weapons before challenging the statute. Such a suggestion, however, is belied by the plain text of the law, which states that "[t]he registration *shall contain* . . . the date the firearm was acquired, the

name and address of the individual from whom, or business from which, the firearm was acquired." Cal. Penal Code § 30900(b)(3). Because any attempt to register their weapons would be futile, Plaintiffs have adequately pled that their weapons are subject to forfeiture under the law. *See Sporhase v. Neb. ex rel. Douglas*, 458 U.S. 941, 944 & n.2 (1982) (standing to challenge Nebraska law requiring permit before transferring water across state border even though land owners never applied for a permit because, under the challenged law, the permit would not have been granted); *Nat'l Ass'n for the Advancement of Multijurisdiction Practice v. Berch*, 773 F.3d 1037, 1044 (9th Cir. 2014) (standing to challenge Arizona's bar admission rule despite not applying for admission because "such an application would be futile"); *Taniguchi v. Schultz*, 303 F.3d 950, 957 (9th Cir. 2002) ("We have consistently held that standing does not require exercises in futility.").

C. The AWCA's Disinheritance and Registration Provisions Effect Unconstitutional Physical Takings.

The disinheritance and registration provisions under sections 30915 and 30680 of the AWCA mandate that firearm owners forfeit their property—physical takings that require government compensation. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324 n.19 (2002) (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 the kind mandated by the AWCA is the *sine qua non* of a physical taking because it "absolutely dispossess[es] the owner." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982).

Precisely because sections 30915 and 30605 prohibit possession of firearms designated as "assault weapons," they are 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 Supreme 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 statute "prohibiting traffic in intoxicating malt liquors for medicinal purposes"); *Jacob Ruppert, Inc. v. Caffey*, 251 U.S. 264, 278–79 (1920) (upholding statute 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 AWCA requires the latter, it effects "*per se* takings" that require 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 should be all the more true when the property in question is expressly protected by the Bill of Rights.

Californians who either cannot register their weapons or continue to possess them after inheriting them from a family member or loved one will be forced to forfeit their property, lest they run afoul of section 30605(a), which authorizes a penalty of "imprisonment in a county jail for a period not exceeding one year." To be sure, Plaintiffs need not surrender their weapons to *the government* to avoid imprisonment. Plaintiffs could, as Defendant notes, sell their weapons, remove their weapons from the state of California, or permanently modify or "[r]ender the weapon permanently inoperable." Cal. Penal Code § 30915; Cal. Code Regs. tit. 11, § 5478(a)(2); *see* Mot. at 12. Just as a district court in this Circuit recently held

regarding California's attempt at confiscating 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).

As to the first alternative, 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 v. City of New London*, 545 U.S. 469 (2005), 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. The Supreme Court has also found that a government-mandated diversion of privately owned water to a third party was a physical taking, even though the government neither performed the diversion nor possessed the water. *Int'l Paper Co. v. United States*, 282 U.S. 399, 404–06 (1931); *see also Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1292–93 (Fed. Cir. 2008). The compelled sale of one's property is no less a physical taking than a law that "forced residents to sell their homes to the City." *Amen v. City of Dearborn*, 718 F.2d 789, 797 (6th Cir. 1983).

Regarding the second, the possibility of physically moving a prohibited weapon to another state—on pain of criminal prosecution if kept or returned in-state—does not make the AWCA 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. By stripping the property owner of his most basic property right—physical possession in the relevant jurisdiction—the AWCA 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 transferring a firearm out of state exists only if (1) the property owner has some out-of-state location to store the firearm—which is certainly not true in all and maybe not true in most cases, and (2) the transferee 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 on firearms 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 & Cty. of San Francisco*, 746 F.3d 953, 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. *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); *Jackson*, 746 F.23 at 967 (same).

Finally, the ability to convert a weapon into something different, or to destroy it by rendering it "permanently inoperable," does not save the AWCA. As the government argued in *Horne*, raisin growers could have "plant[ed] different crops," or "[sold] their raisin-variety grapes as table grapes or for use in juice or wine." *Horne*, 135 S. Ct. at 2430. Similarly in *Loretto*, the property owner in could have converted her building into something other than an apartment complex. *See* 458 U.S. at 439 n.17. The Court rejected that argument in both cases. Requiring a property owner to convert his property into something different is a taking that must

be compensated: "property rights 'cannot be so easily manipulated.'" *Horne*, 135 S. Ct. at 2430 (quoting *Loretto*, 458 U.S. at 439 n.17).

Because the AWCA works a physical taking of Plaintiffs' property, the state "has a categorical duty to compensate the former owner," *Tahoe-Sierra*, 535 U.S. at 322, yet the AWCA makes no provision for government compensation. Indeed, certain "options" for an owner to comply with the AWCA's disinheritance or registration requirements—surrendering firearms to the government, moving them out of state, or rendering them permanently inoperable—result in no compensation. *See* Cal. Penal Code §§ 31100, 30915(a), (d). Sale to a licensed firearms dealer, *id.* § 30915(b), may result in some compensation, but it is not compensation from the government. "Although the Court has wrestled with many issues in its extensive takings jurisprudence . . . it has invariably operated under the assumption that the government is the entity charged with paying just compensation." *Carson Harbor Vill., Ltd. v. City of Carson*, 353 F.3d 824, 831 (9th Cir. 2004) (O'Scannlain, J., concurring) (emphasis added) (collecting cases); *see, e.g., First English Evangel. Luth. Church v. Los Angeles Cty.*, 482 U.S. 304, 319 (1987) ("[T]he Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land.").

This case underscores the reason for that rule. The Constitution requires not simply some compensation for a taking of private property, but "just compensation,"—that is, "'the market value of the property at the time of the taking.'" *Horne*, 135 S. Ct. at 2432 (quoting *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984)). But nothing in the AWCA even suggests, let alone ensures, that the compensation a gun owner receives for the potential sale of his property to a third party will reflect its fair market value. In fact, by severely limiting the population of Californians who will be eligible to purchase banned weapons, the AWCA practically ensures that an owner who attempts to sell his weapon rather than destroying or surrendering it will receive less than fair market value. Precisely

to avoid such a result, the Takings Clause prevents "government attempts to lay the general public's burden of just compensation on third parties." *Carson*, 353 F.3d at 831.

D. At the Very Least, the AWCA Results in a Regulatory Taking.

A regulatory taking is "a restriction on the use" of private property. *Id.* (emphasis added). A regulation that deprives an owner of "all economically beneficial use of her property" categorically requires government compensation. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)). A regulation of property use also requires compensation if it "goes too far"—an inquiry that requires analysis of several factors, including "the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Id.* at 537–38, 540.

There is no question that the AWCA places an extreme burden on Plaintiffs' use of their personal property. For example, those who wish to keep firearms they have inherited in California may render them "permanently inoperable." *Id.* § 30915. Clearly a law requiring one to convert his firearm into an intimidating paperweight "goes too far." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 at 415 (1922). Thus, even if this Court were not to find the compelled physical dispossession resulting from the AWCA to be a physical taking, requirements such as this are nevertheless "functionally equivalent" to a physical taking and thus require government compensation under the regulatory takings doctrine. *Lingle*, 544 U.S. at 539.

E. There is No "Police Power Exception" to the Takings Clause.

The State makes the bold and unqualified claim that when "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." Mot. at 13 (citing Cal. Pen. Code § 30800(a)(1)). Even assuming that "assault weapons" are a "public nuisance," that California can legally

ban (a dubious assumption, *see Staples v. United States*, 511 U.S. 600, 610 (1994) ("Guns in general are not 'deleterious devices or products or obnoxious waste materials,'" (citation omitted))), the State's assertion that any law enacted pursuant to a state's police power is exempt from scrutiny under the Takings Clause has been resoundingly rejected by the Supreme Court. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)—a case the State does not cite—the Supreme Court held that a law requiring physical occupation of private property was both "within the State's police power" and an unconstitutional physical taking, *id.* at 425. The Court stated expressly that whether a law effects a physical taking is "a separate question" from whether the state has the police power to enact it. *Id.*; *see also Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985) (distinguishing between physical taking and exercise of police power).

Moreover, in *Lucas v. South Carolina Coastal Council*, the Court held that a law enacted pursuant to the state's "police powers to enjoin a property owner from activities akin to public nuisances" was not immune from scrutiny even under the more permissive *regulatory* takings doctrine. 505 U.S. 1003, 1020-27 (1992). The Court reasoned that it was true "[*a*] *fortiori*" that the "legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated." *Id.* at 1026. The same is true for the "categorical" rule that physical takings must be compensated. *Id.* at 1015; *Horne*, 135 S. Ct. at 2425.

Even *Goldblatt v. Town of Hempstead*, which the State cites for the proposition that "California may take private property in 'a valid exercise of the [government's] police powers,' without providing compensation," Mot. at 16, makes clear that "governmental action in the form of regulation [can] be so onerous as to constitute a taking which constitutionally requires compensation." 369 U.S. 590, 592, 594 (1962). Indeed, the Court declined to hold that the mining regulation in

that case constituted a taking because "there [was] no evidence in the present record which even remotely suggest[ed] that prohibition of further mining [would] reduce the value of the lot in question." *Id.* at 594. Had the facts been different, the Court very well could have held that the government's otherwise valid exercise of its police power violated the Takings Clause. *See id.* The State's other authorities fair no better. *See Lucas*, 505 U.S. at 1022 & n.13 (explaining that *Mugler v. Kansas*, 123 U.S. 623 (1887) and its progeny involved restrictions only on the *use* of property); *Everard's Breweries v. Day*, 265 U.S. 545 (1924) (prohibiting the sale but not possession of liquor); *Chicago, B. & Q. Ry. Co. v. Illinois*, 200 U.S. 561, 593 (1906) ("If, in the execution of *any power, no matter what it is*, the government . . . finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner." (emphasis added)). Precedent is clear: laws enacted pursuant to a state's police power are not immune from scrutiny under the Takings Clause. The State provides no authority to the contrary.

F. Plaintiffs' Claims Entitle Them to Declaratory and Injunctive Relief.

The State makes a final argument that if Plaintiffs are entitled to relief, it can only be monetary compensation—not the declaratory and injunctive relief Plaintiffs seek. As with its police power argument, such a contention is not supported by precedent. *See, e.g.*, *Horne v. Dep't of Agric.* (*Horne* I), 133 S. Ct. 2586 (2013) (taking claim could be raised defensively without first seeking compensation in Court of Federal Claims); *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013) (landowner could pursue takings challenge even though exaction had only been threatened); *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 130 S. Ct. 2592 (2010) (evaluating whether Florida Supreme Court committed a judicial taking, even though the claimant made no attempt to secure compensation for alleged taking in state court).

Because Plaintiffs have alleged a plausible claim under the Takings Clause, the State's motion to dismiss that claim should be denied.

II. PLAINTIFFS STATE A PLAUSIBLE DUE PROCESS CLAIM

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). The AWCA violates the Due Process Clause because it retroactively and irrationally deprives California gun owners of property.

A. The AWCA Retroactively Criminalizes Firearms in Violation of the Due Process Clause.

For largely the same reasons that it runs afoul of the Takings Clause, the AWCA also violates the Due Process Clause, as retroactively criminalizing the ability to bequeath firearms that were lawful when purchased is not a legitimate means to advance a governmental objective. *Lingle*, 544 U.S. at 542.

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*, 545 U.S. at 493 (Kennedy, J., concurring).

As those cases reflect, even assuming the dubious contention that the AWCA generally furthers a legitimate government interest, the state must independently justify its retroactive enforcement against gun owners who lawfully acquired their property before California criminalized its acquisition, transfer, or possession. That, the state cannot do.

As explained above, the AWCA denies to any "assault weapon" purchaser coveted sticks in the bundle of property rights, including the ability to transfer—whether sell or bequeath—the firearm. That was not the condition under which purchasers obtained these firearms. The State has, therefore, changed the rules after the fact, with sever consequence to both liberty and property interest. As such, Plaintiffs have sufficiently pled at least one Due Process violation. But there are others.

B. The AWCA's Prohibitions and Restrictions Are Irrational.

A law that deprives an owner of private property without a legitimate justification violates the Due Process Clause, regardless of whether it also violates the Takings Clause. *See Lingle*, 544 U.S. at 541–42; *id.* at 548–49 (Kennedy, J., concurring). The State argue that the AWCA is rational because "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." Mot. at 19 (quoting Cal. Pen. Code § 30505). But that begs the question: how exactly do they pose a threat? The term "assault weapon" itself is of a political—not technical—origin, concocted in 1989 by anti-gun publicists to expand the category of "assault rifles" (an actual category of weapons), "'so as to allow an attack on as many additional firearms as possible on the basis of undefined "evil" appearance.'" *Stenberg v. Carhart*, 530 U.S. 914, 1001 n.16 (2000) (Thomas, J., dissenting) (quoting Bruce H. Kobayashi & Joseph E. Olson, *In Re 101 California Street: A Legal and Economic Analysis of*

Strict Liability for the Manufacture and Sale of "Assault Weapons," 8 Stan. L. & Pol'y Rev. 41, 43 (1997)); FAC ¶ 1. In an attempt to ban this fictitious category of firearms, the AWCA creates arbitrary distinctions, prohibiting rifles that have certain features in combination with a non-fixed magazine while permitting rifles that have the exact same features in combination with a fixed magazine, and prohibiting rifles with a fixed magazine due to their maker's marks, regardless of their features, while permitting effectively identical rifles with non-fixed magazines. The legislature, in enacting the AWCA, expressly sought to ban firearms that had "high rate[s] of fire and capacity for firepower," Cal. Penal Code § 30505(a), yet, as Plaintiffs have pleaded, none of these features affects those characteristics. FAC ¶ 19.

Examples of the law's arbitrary effect are not difficult to generate. As the FAC explains, a semiautomatic, centerfire rifle with a detachable magazine with "Colt AR-15" engraved on it that does not have a "pistol grip" or "flash suppressor" and has a fixed (non-adjustable) stock is an "assault weapon," while a rifle in the same configuration with "Illegal Assault Weapon" engraved on it is not. FAC ¶ 109. A rifle marked "Illegal Assault Weapon" could legally have a "detachable magazine" and not be an "assault weapon," as long as it does not have other restricted features, while the rifle marked "Colt AR-15" could have a fixed magazine and would still be an "assault weapon." *Id.* Likewise, there is no legitimate basis for banning rifles that have the enumerated features in combination with a non-fixed magazine while permitting rifles that have the very same enumerated features in combination with a fixed magazine rifle. *Id.*

Because Plaintiffs allege that the AWCA deprives Californians of property without any rational basis, they have pled a plausible claim under the Due Process Clause. *See Crown Point Dev., Inc. v. Sun Valley*, 506 F.3d 851, 852–53 (9th Cir. 2007).

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C. The Registration Requirement Violates the Due Process Clause

In seeking to enforce the registration requirement, the State demands the impossible: that "assault weapon" owners 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 the firearm by July 1, 2018. And to register the firearm, 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." P.C. § 30900(b)(3). This will be referred to as the "date and source" requirement hereafter. 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). FAC ¶ 40. 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. FAC ¶ 4. Yet, the AWCA nonetheless demands such information, and provides no mechanism for firearm owners who lack that information to comply with the registration requirement on which continued possession of their lawfully acquired "assault weapons" 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. 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 that information. 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. As explained above, 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*, 545 U.S. at 493 (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. FAC ¶ 22. 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.

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 the individuals 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. The State 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 have stated a sufficient claim that the date and source requirement violates the Due Process Clause as applied to individuals who lack the means to comply.

CONCLUSION

The right to possess and enjoy one's property is fundamental and expressly protected by the Constitution. Enforcement of California's ban on so-called "assault weapons" would deprive law-abiding Californians of this precious liberty. Indeed,

the law is especially repugnant because it is retroactive and advances no legitimate government interest, in violation of the Due Process Clause.

The State must be stopped from implementing its unconstitutional regulatory scheme. Because Plaintiffs have alleged valid claims under both the Fifth and Fourteenth Amendments, Defendant's motion to dismiss should be denied.

Dated: November 9, 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:

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

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

Executed November 9, 2017

/s/Laura Palmerin
Laura Palmerin