17-56081

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VIRGINIA DUNCAN, et al.,

Plaintiffs and Appellees,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California,

Defendant and Appellant.

On Appeal from the United States District Court
for the Southern District of California

No. 17-cv-1017-BEN-JLB
The Honorable Roger T. Benitez, Judge

APPELLANT'S REPLY BRIEF (PRELIMINARY INJUNCTION APPEAL – NINTH CIRCUIT RULE 3-3)

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INTRODUCTION

In response to escalating mass shootings and gun violence, the Legislature and the people of California enacted amendments to California Penal Code section 32310 (Section 32310) that ban possession of magazines holding more than ten rounds of ammunition. These large-capacity magazines (LCMs), which were designed for combat, are used disproportionately in the mass killing and injuring of innocent civilians and the murder of law enforcement personnel. Because LCMs are so dangerous, they have been illegal to acquire in California for decades. In order to strengthen the enforcement of state law regarding LCMs and close a loophole that allowed for their continued circulation, Section 32310, as enacted, prohibits the possession of LCMs.

In their defense of the district court's order preliminarily enjoining this important public safety legislation, plaintiffs fail to address most of the Attorney General's arguments regarding the district court's numerous reversible errors or the controlling law and the facts of this case. For example, plaintiffs do not acknowledge the weight of precedent upholding LCM prohibitions under intermediate scrutiny, nor do they give more than a passing reference to Ninth Circuit law regarding the Second Amendment generally or the proper application of intermediate scrutiny in particular.

Instead, plaintiffs argue, without foundation and largely based on a vast over-reading of *District of Columbia v. Heller*, 554 U.S. 570 (2008), that Section 32310 is a categorical ban on a class of magazines and therefore presumptively invalid, or at a minimum, that Section 32310 is subject to and fails strict scrutiny. In the alternative, plaintiffs assert that Section 32310 "flunks" intermediate scrutiny because most other states do not have LCM bans and because the State did not prove to a virtual certainty that the law will work. Plaintiffs also insist that simply because Section 32310 will cause the dispossession of some LCMs, it is a taking requiring compensation. This Court, along with many others, already has rejected most of plaintiffs' arguments, and they all fail for lack of legal and factual support.

Because Section 32310 does not violate the Second Amendment or the Takings Clause, plaintiffs did not and cannot meet their burden to show a likelihood of success or serious questions going to the merits of these claims. In the absence of constitutional injury, plaintiffs also cannot demonstrate irreparable, if any, injury, or that the balance of hardships and the public interest militate in favor of an injunction. Accordingly, the district court abused its discretion by enjoining enforcement of Section 32310. The

Attorney General thus respectfully requests that this Court reverse the order of the district court.

ARGUMENT

I. THE INUNCTION WAS AN ABUSE OF DISCRETION BECAUSE SECTION 32310 DOES NOT VIOLATE THE SECOND AMENDMENT

As this Court and every other court to consider legislation banning LCMs has held, even assuming that LCMs are entitled to Second Amendment protection, their prohibition is at least reasonably related to the State's important interests, and thus, LCM bans satisfy intermediate scrutiny and are constitutional. *See Fyock v. City of Sunnyvale*, 779 F.3d 991, 1000-01 (9th Cir. 2015); Appellants' Opening Brief, ECF No. 12 (AOB), 24-25 (citing cases). The same conclusion must be reached here. The record demonstrates that by banning a subset of particularly dangerous magazines, Section 32310 furthers the State's compelling interests in protecting civilians and law enforcement from gun violence, protecting public safety, and reducing the incidence and lethality of mass shootings. *See* AOB 33-41. The record further shows that Section 32310 also advances the State's interests by closing a loophole that allowed for the continued proliferation of LCMs, removing obstacles to enforcement, and

strengthening the existing ban on the purchase, sale, transfer, or importation of LCMs. *See* AOB 10-12. Accordingly, the statute is valid.

A. At Most, Intermediate Scrutiny Applies to Section 32310

In evaluating state regulations under the Second Amendment, this Court employs a two-step inquiry. *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). First, the court "asks whether the challenged law burdens conduct protected by the Second Amendment." *Id*. If not, the challenged law does not implicate the Second Amendment and is valid. *See id*. at 1138. If a Second Amendment right is implicated, the court then selects an appropriate level of scrutiny. *Id.* at 1136. To determine the appropriate level of scrutiny, this Court, along with the other circuits, employs a two-step inquiry that considers "(1) how close the challenged law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on that right." *Jackson v. City and Cty. of S.F.*, 746 F.3d 953, 960-61 (9th Cir. 2014).

Even assuming that LCMs, which are dangerous, military-type weapons that transform a firearm "into a weapon of mass death rather than a home-protection type device," ER 788, are entitled to Second Amendment protection, because "the prohibition of . . . large-capacity magazines does not effectively disarm individuals or substantially affect their ability to

defend themselves," intermediate scrutiny is the appropriate standard.[1] *See Fyock*, 779 F.3d at 999; *see also Wiese v. Becerra*, 263 F. Supp. 3d 986, 992 (E.D. Cal. 2017) (stating that "virtually every other court to examine large capacity magazine bans has found that intermediate scrutiny is appropriate, assuming these magazines are protected by the Second Amendment."); AOB 30.

Plaintiffs wrongly assert that the "simple fact" that the State has banned part of a firearm that may be entitled to Second Amendment protection, "not only mandates strict scrutiny, but, just as in [*District of Columbia v.*] *Heller*, should suffice to invalidate the ban." Answering Brief, 22. *Heller* does not support this conclusion.[2] The law at issue in *Heller* was struck down not

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[1] As the Attorney General has argued, LCMs are not within the right secured by the Second Amendment. *See* AOB 27-28 & n. 7; *see also Kolbe v. Hogan*, 849 F.3d 114, 127 (4th Cir.), *cert. denied*, 138 S. Ct. 469 (2017). Because Section 32310 satisfies heightened scrutiny, however, for purposes of this analysis, this Court may assume, without deciding, that some Second Amendment protection applies. *See Fyock*, 779 F.3d at 997. Thus, even if they could be credited, plaintiffs' and amici's arguments regarding the purported historical pedigree, popularity, and "common use" of LCMs are largely immaterial.

[2] In support of their contention that a state may not regulate any firearm or part of a firearm protected by the Second Amendment, plaintiffs also cite to *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012), and *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011). Neither case supports this argument. In *Kachalsky*, the Second Circuit noted that in

simply because it was a "ban," but because it prohibited an "entire class of arms," considered to be "the quintessential self-defense weapon," and was thus more severe than all but a "[f]ew laws in the history of our Nation." *Heller*, 554 U.S. at 628-29; *see also Kolbe*, 849 F.3d at 138-39 (stating that the decision in *Heller* "does not mean that a categorical ban on any particular type of bearable arm is unconstitutional."). The Court held that laws of this type, which effectively "destroy" the right to keep and bear arms for the purpose of self-defense in the home, are categorically unconstitutional. *Heller*, 554 U.S. at 618, 628-29; *compare id.* at 627 (stating that modern "weapons that are most useful in military service—M-

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Heller, because the challenged statute "ran roughshod" over the right to bear arms for self-defense in the home, the "Court simply noted that the handgun ban would be unconstitutional '[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights.'" 701 F.3d at 88-89 (quoting *Heller*, 554 U.S. at 628). The court then went on to apply intermediate scrutiny to a statute that did "not burden the 'core' protection of self-defense in the home." *Id.* at 93. In *Masciandaro*, the Fourth Circuit stated that in *Heller*, the Supreme Court "expressly avoided deciding what level of scrutiny should be applied when reviewing a law burdening the right to keep and bear arms." 638 F.3d at 469. It then stated that "[t]he Second Amendment is no more susceptible to a one-size-fits-all standard of review than any other constitutional right" and upheld the challenged regulation under intermediate scrutiny. *Id.* at 474.

16 rifles and the like, may be banned.").[3] Section 32310 does not prohibit any class of firearms nor does it ban the majority of ammunition magazines that an individual may possess. Rather, it prohibits a particularly dangerous subset of magazines that "are hardly central to self-defense" and have been illegal for sale in California for more than twenty years. *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1271 (N.D. Cal. 2014), *aff'd sub nom. Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015). Under Section 32310, individuals may lawfully continue to possess as many handguns and as many magazines containing up to ten rounds as they see fit. The statute has, at most, a "*de minimis* effect" on and impacts only the "periphery of the Second Amendment right." *Heller v. District of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011) (*Heller II*); *Fyock*, 25 F. Supp. 3d at 1271. In short, Section 32310 bears no resemblance to the ban struck down in *Heller*, and thus is not categorically invalid. *See Fyock*, 779 F.3d at 999; *S.F. Veteran Police Officers v. City & Cty. of San Francisco*, 18 F. Supp. 3d 997, 1002 (N.D. Cal. 2014) ("Given that the San Francisco rule [banning possession of LCMs] is not a total ban on self-defense at home or in public, there is no

[3] *See also New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 256 (2d Cir. 2015) (*NYSRPA*); *Friedman v. City of Highland Park*, 784 F.3d 406, 407-08 (7th Cir. 2015).

occasion whatsoever to apply the 'categorical' prohibition advanced by plaintiffs, even if such a 'categorical' test had ever been adopted by our appellate courts (which has not occurred).").

The related assertion of amici that because LCMs are allegedly "popular" or in "common use," Section 32310 is presumptively invalid is also unavailing. *See, e.g.*, Brief of Amici Curiae Doctors for Responsible Gun Ownership, et al., ECF No. 58-1, 30-36. Amici, like the district court, ER 17-20, conflate the "common use test," which determines only whether conduct receives any protection at all under the Second Amendment, with the level of scrutiny that applies to regulation of protected conduct. *See Heller*, 554 U.S. at 628-29. The argument that any firearm or firearm part that may be protected by the Second Amendment is immune from regulation has been rejected by every court to consider it. *See* Brief of Amicus Curiae the City and County of San Francisco, et al., ECF No. 29 (S.F. Brief), 7-9. Thus, even overlooking that LCMs have been unavailable to the vast majority of Californians since 1994 and are not likely to be "commonly used" in this State, the facts that LCMs may be popular or that people feel they need them for self-defense do not render LCM bans presumptively impermissible. *See Fyock*, 779 F.3d at 999; *Jackson*, 746 F.3d at 963-64.

Plaintiffs are also incorrect that Section 32310 must, at a minimum, be evaluated under strict scrutiny. Answering Brief 22. Strict scrutiny is reserved for a regulation "that implicates the core of the Second Amendment right" to use arms in defense of hearth and home and severely burdens that right." *Chovan*, 735 F.3d at 1138. Because "having a capacity to accept more than ten rounds [is] hardly crucial for citizens to exercise their right to bear arms," *Fyock*, 25 F. Supp. 3d at 1278, and Section 32310 leaves individuals with numerous other firearm and magazine options, this Court and every other court to consider similar bans has held that intermediate scrutiny applies, *see Fyock*, 779 F.3d at 999; *Wiese*, 263 F. Supp. 3d at 992 (citing cases); *see also Silvester v. Harris*, 843 F.3d 816, 823 (9th Cir. 2016) ("There is accordingly near unanimity in the post-*Heller* case law that when considering regulations that fall within the scope of the Second Amendment, intermediate scrutiny is appropriate.").[4] This conclusion is entirely consistent with *Heller*, in which the Supreme Court emphasized that the Second Amendment right is, by its nature, "not unlimited," and is not a

[4] *See also* Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 697-98 (2007) ("It simply is not true that every right deemed 'fundamental' triggers strict scrutiny," for "[e]ven among those incorporated rights that do prompt strict scrutiny, such as the freedom of speech and of religion, strict scrutiny is only occasionally applied.").

"right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 U.S. at 626; *Peruta v. Cty. of San Diego*, 824 F.3d 919, 928 (9th Cir. 2016) (en banc), *cert. denied sub nom.*, *Peruta v. California*, 137 S. Ct. 1995 (2017).

While plaintiffs insist that Section 32310 places a "severe" burden on the right to self-defense in the home, Answering Brief 17, 22, they point to no evidence in support of this assertion. Instead, plaintiffs' argument regarding burden seems to be based on the misconception that LCMs are necessary and integral to the operability of a firearm or the ability to use a firearm for self-defense in the home. *See* Answering Brief 18. While a magazine necessary to supply a firearm with *some* bullets may be considered "integral" to core functionality, a magazine that expands capacity beyond 10 rounds is not. Firearms designed and manufactured to accept a detachable magazine, which includes the vast majority of handguns and long guns, will function regardless of the capacity of the magazine itself. *See Fyock*, 25 F. Supp. 3d at 1278. Since 2000, when California's law banning the acquisition of LCMs came into effect, manufacturers have been making "California-compliant" ammunition magazines, which are widely available.

In fact, there is no cognizable evidence that the inability to possess an LCM has had—since 1994 when it became illegal to acquire an LCM—or

would have any impact on the right to bear arms for self-defense. *See* AOB 30-32. To the contrary, defensive gun use is "comparatively rare," and even when it occurs, "the purpose is not to fire as many shots as possible, only as many shots as necessary." *Colorado Outfitters Ass'n v. Hickenlooper*, 24 F. Supp. 3d 1050, 1070 (D. Colo. 2014), *vacated for lack of standing*, 823 F.3d 537 (10th Cir. 2016); *see also* ER 223-24, 2223. Numerous studies demonstrate that in the unusual circumstance in which a firearm is used in self-defense, on average, 2.2 bullets are fired. ER 178-80, 212. Out of 47 incidents in California during the period from January 2011 to May 2017, there were no instances in which a defender was reported to have fired more than 10 rounds. ER 179-80; *see also* ER 212-13. Plaintiffs' subjective beliefs as to the necessity of LCMs for self-defense or hypothetical scenarios in which an LCM might be useful are inadequate to demonstrate any burden on, let alone the "destruction" of their Second Amendment rights. *See NYSRPA*, 804 F.3d at 263; *Heller II*, 670 F.3d at 1263-64.[5]

[5] Amicus posits that because most law enforcement officers are issued LCMs, "it follows that law-abiding laypersons require the same." Brief of Eighteen States, ECF No. 72, 7. What may be advisable for law enforcement, who perform functions such as addressing terrorist threats, pursuit and arrest of suspects, search for people and weapons, and crowd control, is not indicative of the self-defense needs of civilians.

Accordingly, and because the burden, if any, Section 32310 places on Second Amendment rights is "light," *Fyock*, 25 F. Supp. 3d at 1278, intermediate scrutiny applies. *See Jackson*, 746 F.3d at 964.

B. Section 32310 Advances the State's Compelling Interests

The record demonstrates that Section 32310 furthers the State's important interests in protecting civilians and law enforcement from gun violence, protecting public safety, and reducing the incidence and lethality of mass shootings. AOB 33-41. Specifically, the evidence shows that banning possession of LCMs has the greatest potential to "prevent and limit shootings in the state over the long-run." *NYSRPA*, 804 F.3d at 264. A reduction in the number of LCMs in circulation will reduce the number of crimes in which LCMs are used and reduce the lethality and devastation of gun crime when it does occur. *See, e.g.*, ER 191, 212-13, 229-31, 328.

Plaintiffs incorrectly argue that the State must demonstrate that Section 32310 will advance its interests to a "material degree" and "alleviate" the "harms it recites," ostensibly by proving that Section 32310 will work perfectly and cannot be circumvented. *See* Answering Brief 23, 26. But intermediate scrutiny does not require the fit between the challenged regulation and the stated objective to be perfect, nor does it require that the regulation be the least restrictive means of serving the interest. *Jackson*, 746

F.3d at 969. Instead, the State is only required to demonstrate that Section 32310 promotes a "substantial government interest that would be achieved less effectively absent the regulation." *Fyock*, 779 F.3d at 991. Under intermediate scrutiny, the "question is not whether [the government], as an objective matter, was correct," and the State need not establish that Section 32310 will actually achieve its desired end. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 211 (1997) (*Turner II*); *Jackson*, 746 F.3d at 966. Rather, the evidence must only demonstrate, as it does here, a reasonable inference that the law "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Peruta*, 824 F.3d at 942. In determining whether a law survives intermediate scrutiny, courts "afford substantial deference to the predictive judgments of the legislature." *Turner II,* 520 U.S. at 195. Deferential review is particularly apt "[i]n the context of firearm regulation," where "the legislature is 'far better equipped than the judiciary' to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks." *Kachalsky*, 701 F.3d at 97 (citation omitted).

Plaintiffs assert that the Attorney General's evidence is "paltry," Answering Brief 14, but they fail to demonstrate that the record in this case, which is substantially similar if not identical to the records relied upon by

numerous courts holding that LCM bans are constitutional, is not "substantial evidence." *See* AOB 34-41 (detailing evidence); *Fyock*, 779 F.3d at 1000-01; *Kolbe*, 849 F.3d at 126; *NYSRPA*, 804 F.3d at 263-64; *Heller II*, 670 F.3d at 1261-64; *Wiese*, 263 F. Supp. 3d at 992-93; *Fyock*, 25 F. Supp. 3d at 1280-81. In fact, plaintiffs barely mention the Attorney General's nearly 3,000-page record, beyond briefly faulting it for containing data from other jurisdictions and noting that some of the articles about mass shootings do not indicate whether an LCM was used. Answering Brief 27. While the Attorney General submitted California-specific data, ER 202-13, 327-28, 788-790, 803-816, 2121-24, as well as considerable evidence regarding the use and lethality of LCMs in mass shootings and the murder of law enforcement, AOB 35-41, the State may "justify . . . restrictions by reference to studies and anecdotes pertaining to different locales altogether." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001); *Fyock*, 773 F.3d at 1000-01. Indeed, the State may rely on any evidence "reasonably believed to be relevant to the problem that [the government is] address[ing]." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51 (1986).

Plaintiffs' contention that Section 32310 fails intermediate scrutiny because there is evidence, mostly from their experts, suggesting that bans of

LCMs do not eliminate gun crime or reduce violent crime generally is baseless. Answering Brief 28.[6] As an initial matter, even if the studies and expert opinions relied upon by plaintiffs were valid and not contradicted by empirical evidence, *see, e.g.*, ER 180-83, 220-24, 1401-1514,[7] some disagreement regarding the efficacy of the ban on LCM possession does not prevent Section 32310 from surviving intermediate scrutiny. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 437 (2002) (plurality opinion); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994); *Fyock*, 779 F.3d at 1001-01.

Further, plaintiffs misconstrue the objectives of Section 32310. While prohibiting LCMs should lead to some decrease in violent crime and gun crime generally, the law's specific goal is to reduce the incidence and severity of death and injury from crimes committed with LCMs, such as mass shootings and the murder of law enforcement. *See, e.g.*, ER 2123; 2132-33; *see also Kolbe*, 849 F.3d at 128. None of plaintiffs' evidence

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[6] *See also* Brief of Amici Curiae Law Enforcement Groups, et al., ECF No. 70, 18.

[7] For example, plaintiffs' expert Dr. Kleck's work on guns and gun violence, which has been widely discredited in other contexts, is similarly unreliable here. *See, e.g.*, David Hemenway, *Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates*, 87 J. Crim. L. & Criminology 1430 (1997); ER 221, 275.

rebuts the fact that weapons equipped with LCMs "greatly increase the firepower of mass shooters," "result in more shots fired, persons wounded, and wounds per victim," *Heller II*, 670 F.3d at 1263, and are "particularly attractive to mass shooters and other criminals, including those targeting police," *Kolbe*, 804 F.3d at 139. It also does not undermine the conclusion of the people and the Legislature that prohibiting LCMs would increase the public safety, in part by "curtailing their availability to criminals and lessen[ing] their use in mass shootings [and] other crimes," *Kolbe*, 804 F.3d at 140.[8]

Plaintiffs also mischaracterize the evidence regarding the efficacy of the federal ban on LCMs, as well as its relevance to the potential effectiveness of Section 32310. They cite a description of an early report on the impact of the federal ban that "[t]here was no evidence that lives were saved, no evidence that criminals fired fewer shots during gun fights, [and] no evidence of any good accomplished." Answering Brief 27 (citing SER 528). The actual report, which was updated several times, concluded that the federal ban reduced the use of LCMs in gun crimes and that it would have had an even more substantial impact had it not been allowed to expire

[8] *See generally,* AOB 4-8, 36-38.

in 2004. ER 224-30, 313-25, 1268-69, 1425-26. Further, one of the authors of the report, Dr. Christopher Koper, has opined that the federal ban had several features that may have limited its efficacy, which are not present in Section 32310, including the federal ban's "grandfather" clause, which allowed LCMs manufactured before 1994 to be owned and transferred. Dr. Koper estimates that there may have been 25-50 million LCMs exempted from the federal ban and an additional 4.8 million pre-ban LCMs were imported into the country between 1994 and 2000 under the grandfathering exemption. Section 32310, by eliminating the grandfathering exception should be more effective than the federal ban. ER 2361-62.

Plaintiffs' remaining arguments regarding the fit between Section 32310 and the State's important interests are all unavailing. Plaintiffs assert that Section 32310 is unconstitutional because other states do not ban the possession of LCMs. Answering Brief 26. Given that a number of jurisdictions do ban LCMs, *see* AOB 10 n.3, California is not "an extreme outlier," but even if it were, the judgment of other states as to how best to respond to gun violence within their jurisdictions has no bearing on whether California's decision to ban possession of LCMs is constitutional. *See McDonald v. City of Chicago*, 561 U.S. 742, 785 (2010) (plurality). In light of the unique conditions in each State and the "divergent views on the issue

of gun control" held by the citizens of those States, *id.* at 783, an approach to firearm violence that may be appropriate or effective in one State may not be appropriate or effective in another. While the Second Amendment imposes some "limits" on policy alternatives, it "by no means eliminates" the States' "ability to devise solutions to social problems that suit local needs and values." *Id.* at 785; *see also Oregon v. Ice*, 555 U.S. 160, 171 (2009) ("We have long recognized the role of States as laboratories for devising solutions to difficult legal problems. This Court should not diminish that role absent impelling reason to do so.").

Plaintiffs' assertion that Section 32310 cannot survive intermediate scrutiny because since 2000, California "addressed its concerns" about LCMs without banning possession of grandfathered magazines, Answering Brief 26, is especially weak. Section 32310 was amended because the previous version did not adequately "address concerns" about LCMs. Instead, the grandfathering of LCMs proved to be a dangerous loophole that frustrated enforcement and did not stop the proliferation of LCMs in California despite a ban on their sale or transfer. ER 208-209, 2123, 2132-33; *see also* S.F. Brief 16-18. Further, the government is permitted to take such incremental regulatory attempts to solve social problems. *See Renton*, 475 U.S. at 52-53.

Finally, plaintiffs' contention that Section 32310 is a "poor fit" because criminals will not voluntarily surrender their LCMs, Answering Brief 25, misunderstands how possession bans work. The point is not whether criminals will choose to comply with the law, but that the law reduces the availability of LCMs for criminals. Prohibiting possession makes theft of LCMs far less likely and makes it more difficult for people to evade existing law and acquire LCMs. Reducing the availability of LCMs in turn reduces the likelihood that they can be used to kill civilians and law enforcement personnel. ER 196-97. Further, even if some criminals will still retain LCMs, the fact that a law could be violated does not render it unconstitutional. *See Colorado Outfitters Ass'n*, 24 F. Supp. 3d at 1073.[9]

[9] Plaintiffs' reliance on First Amendment speech cases for the proposition that the government may not permissibly prohibit a protected activity because that activity "*could* lead to abuses," is misplaced. Answering Brief 25 (emphasis added). There is no inherent right to possess an LCM. Moreover, and as demonstrated by the substantial evidence in the record regarding the use and particular dangerousness of LCMs, including evidence that LCMs are used disproportionately in mass killings and in murders of police, *see* AOB 4-8, 36-37, the government has not banned possession of LCMs because possession *could* lead to abuses, but because it *does*.

II. THE INUNCTION WAS AN ABUSE OF DISCRETION BECAUSE SECTION 32310 DOES NOT VIOLATE THE TAKINGS CLAUSE

Plaintiffs also failed to establish a likelihood of success or serious questions going to the merits of their takings claim. *See* AOB 56-60. While plaintiffs apparently concede that Section 32310 does not effect a regulatory taking, they assert that because Section 32310 bans possession of LCMs, and thus individuals will have to divest themselves of previously grandfathered LCMs by one of the three ways set forth in Section 32310(d),[10] it is a physical taking. Physical takings, however, occur by one of two means—neither of which is present here—a "direct government appropriation or [a] physical invasion of private property." *Lingle v. Chevron U.S.A., Inc*., 544 U.S. 528, 537 (2005). A direct appropriation occurs when the government exercises its authority to obtain ownership or possession of private property and either dedicates the property to its own purposes or transfers the property to some third party. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (2003). A physical invasion or occupation of property typically occurs "when the government itself occupies the property or requires the landowner to submit to physical occupation of its land." *Stearns*

[10] It is also possible to modify an LCM so it can only accept a maximum of ten rounds. *See* Cal. Penal Code § 32425(a); ER 613-15.

Co., Ltd. v. United States, 396 F.3d 1354, 1357 (Fed. Cir. 2005). Plaintiffs do not explain, and it not obvious, how Section 32310 involves the direct invasion or physical occupation of property.

In support their takings argument, plaintiffs cite out-of-context phrases from cases that a "physical taking 'dispossesses the owner' of property," and argue that this principle applies to personal property and even where the government forces an individual to transfer property to a third party. Answering Brief at 31-35. Plaintiffs' argument, and their selective reading of case law, continues to ignore the fundamental distinction for Takings Clause purposes between the government's exercise of its power of eminent domain to appropriate property for public use and government action pursuant to its police power that may result in the permanent loss of private property. *See* AOB 55-59.[11] While the eminent domain power is used to confer benefits upon the public (by the taking of private property for public use), the police power is used to prevent harm. *See Penn Central Transp. Co. v. City of N.Y.*, 438 U.S. 104, 123 (1978). In contrast to property

[11] *See also* Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 Yale L.J. 1119, 1183 (1995) ("Eminent domain has historically been distinguished from other forms of governmental action that deprive persons of property values ... by the fact that ... the government puts the property taken to a specific, publicly mandated use.").

acquired through the exercise of eminent domain power, "property seized and retained pursuant to the police power is not taken for a 'public use' in the context of the Takings Clause." *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1153 (Fed. Cir. 2008). Further, the government is not "required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain." *Bennis v. Michigan*, 516 U.S. at 442, 452 (1996).

Indeed, in addition to the cases cited in the Opening Brief, AOB 57-60, there are numerous examples of exercises of police power that, though resulting in the taking of property, do not implicate the Takings Clause. In *Bennis v. Michigan*, for example, the Supreme Court found no constitutional taking, where the state seized a car under its forfeiture laws after the petitioner's husband, unbeknownst to her and without her permission, had engaged in illegal sexual activity with a prostitute in the car. 516 U.S. at 446. The Court stated that the car, though literally taken, was nonetheless not "taken for public use" within the meaning of the Takings Clause. *Id.* The forfeiture's purposes, rather, were punitive and deterrent: "'preventing further illicit use of the [property] and [] imposing an economic penalty,

thereby rendering illegal behavior unprofitable.'" *Id*. (quoting *Calero-Toledo v. Pearson Yacht Leasing Co*., 416 U.S. 663, 687 (1974)).[12]

Similarly, in *AmeriSource Corp. v. United States*, an innocent owner, whose property had been seized for use in a criminal prosecution and rendered worthless as a result, argued that he was entitled to just compensation under the Takings Clause. The court declined to find a taking, explaining that the owner incorrectly assumed that "'public use,' encompassed any government use of private property aimed at promoting the common good." 525 F.3d at 1153. "In the context of the Takings Clause, ... 'public use' has a narrower meaning because courts have construed it in harmony with the police power." *Id.* The court concluded that, because the seizure of the property was "clearly within the bounds of the police power," it was "not seized for public use within the meaning of the Fifth Amendment" and no unconstitutional taking had occurred. *Id.* at 1154 (internal quotation marks and citations omitted); *see also Acadia Tech., Inc. v. United States*, 458 F.3d 1327, 1332 (Fed. Cir. 2006) (stating that the "seizure of goods suspected of bearing counterfeit marks is a classic

[12] In so holding, the Court stated that the distinction between "complicit" and "innocent" owners does not control the takings inquiry when personal property is lawfully seized by means other than the exercise of eminent domain. *Bennis*, 516 U.S. at 453.

example of the government's exercise of the police power to condemn contraband or noxious goods, an exercise that has not been regarded as a taking for public use for which compensation must be paid."); *People v. Sakai*, 56 Cal. App. 3d 531, 538-39 (1976) (holding that statute banning the sale or possession with intent to sell certain whale meat or other food or products was a reasonable and proper exercise of the police power and thus not a taking).

Plaintiffs' reliance on cases that involve the exercise of the eminent domain power and acquisition of private property for public use or forcing the sale of private property to a government designee to use for a public purpose is misplaced. For example, plaintiffs rely heavily on *Horne v. Department of Agriculture*., 135 S. Ct. 2419 (2015), in which the Supreme Court held that a reserve requirement set by the federal government's Raisin Administrative Committee, whereby raisin growers were required to "give a percentage of their crop to the Government, free of charge," constituted a categorical physical taking. 135 S. Ct. at 2424. The analysis turned on the fact that under the program "[a]ctual raisins [were] transferred from the growers to the Government. Title to the raisins passe[d] to the Raisin Committee." *Id*. at 2428. By contrast, Section 32310 does not transfer title of plaintiffs' LCMs to the government nor does it involve government

appropriation of "private property for its own use" or public purpose. *Id.* at 2419.[13]

Plaintiffs' other cases are similarly inapt. In *Kelo v. City of New London*, 545 U.S. 469 (2005), the Court held that a City's exercise of eminent domain power through an economic development plan qualified as "public use" under the Takings Clause, even though city was not planning to open condemned land to use by general public and the development was undertaken by "private enterprise." *See* 545 U.S. at 483. In *Richmond Elks Hall Association v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977), this Court, in a challenge to the exercise of eminent domain power by a city and its agency, held that "[w]hen a public entity acting in furtherance of a public project directly and substantially interferes with property rights and thereby significantly impairs the value of the property, the result is a taking in the constitutional sense and compensation must be paid." 561 F.2d at 1330-32. And in *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992), the court held that the transfer of title and control, in an exercise of the federal government's eminent domain power, of all of

[13] Plaintiffs' attempt to distinguish cases rejecting Takings Clause challenges to laws banning the possession of dangerous weapons on the basis that they predate *Horne*, *see* Answering Brief 40, thus fails.

President Nixon's official papers to the National Archives was a taking that required "compensation even where the conversion of private property for public use is based on a weighty public interest." 978 F.2d at 1276, 1284-87. Notably, none of these cases, or any case, holds that a regulation that may cause dispossession, standing alone and divorced from the question of what power and for what purpose the government is acting, is a physical taking.[14]

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, also do not support plaintiffs' argument. Contrary to plaintiffs' reading of them, these cases do not stand for the proposition that the ban or confiscation of property pursuant to the police power is a compensable taking. In *Loretto*, the Court

[14] Plaintiffs mistakenly rely on cases such as *Andrus v. Allard*, 444 U.S. 51 (1979), in support of their argument that Section 32310 is a taking. *Andrus* involved the prohibition on commercial transactions of eagle feathers. In determining that the prohibition was not a taking, the Court stated that although the law did prevent the most profitable use of plaintiffs' property, because Plaintiffs could continue to possess the artifacts, they had not been deprived of all economic benefit. *Id.* at 66-67. Nothing in *Andrus* suggests that a ban on possession of LCMs is a taking and, like in *Andrus*, Section 32310 does not deprive plaintiffs of all economic benefit of their property. *See* Cal. Penal Code § 32310(d). Plaintiffs' attempts to distinguish other cases cited by the Attorney General on the sole basis that the laws in question did not prohibit possession, *see* Answering Brief 39, are similarly unavailing.

stated that when the "'character of the governmental action' is a permanent physical occupation of property," a taking occurs "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." 458 U.S. at 434-35 (citing *Penn Central*, 438 U.S. at 124). Put another way, a permanent physical occupation of private property for public use is a "per se" taking that is exempt from or automatically satisfies the three-factor analysis typically applied to takings set forth in *Penn Central*. Not only does *Loretto* not address the question of whether a physical occupation pursuant to the police power, or a power other than eminent domain, is a taking, but the Court has cautioned that the per se rule for physical occupations must be narrowly confined to avoid imposing burdensome liabilities on government acting in the public interest. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002).

Similarly mistaken is the assertion that the State's authority to ban the possession of LCMs is undermined by the Supreme Court's admonition in *Lucas* that the government's justification of "prevention of harmful use," standing alone, "cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated." 505 U.S. at 1026. *Lucas* stands for the unremarkable proposition that where private property is taken

for the public use, simply invoking the police power does not suffice to circumvent the requirement of just compensation. It does nothing to refute the equally well established proposition that most exercises of police power, not for the government's own or public use, that result in the taking of private property are not takings within the meaning of the Takings Clause. Moreover, unlike in *Lucas*, Section 32310 does not "carry with [it] the heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." 505 U.S. at 1018. Also in contrast to the regulation at issue in *Lucas*, Section 32310 does not "go[] beyond what the relevant background principles would dictate." *Id.* at 1030. LCMs have been declared a nuisance subject to confiscation and destruction under state law, §§ 32390, 18010(a)(20), and thus the ban on possession of LCMs—including LCMs that were grandfathered under the prior law—is entirely consistent with the relevant "background principles." *See id.* at 102 ("[I]n the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [one] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale).").

III. THE INJUNCTION WAS AN ABUSE OF DISCRETION BECAUSE PLAINTIFFS CANNOT MEET THEIR BURDEN TO DEMONSTRATE IRREPARABLE HARM, OR DEMONSTRATE THAT THE BALANCE OF HARM AND PUBLIC INTEREST TIP IN THEIR FAVOR

Aside from the alleged deprivation of its constitutional rights, plaintiffs do not identify any cognizable injury caused by the enforcement of Section 32310. Accordingly, in the absence of any constitutional violation, plaintiffs did not and cannot demonstrate that they will be injured, let alone irreparably so, by allowing duly enacted legislation to go into effect, or that the balance of hardships and the public interest militate in favor of an injunction.[15] *See* AOB 61-62; *Winter*, 555 U.S. at 23; *Golden Gate Rest.*

[15] Plaintiffs' repeated assertion that because the district court enjoined only the ban on possession of LCMs under Section 32310(c) and (d), as opposed to the entirety of the statute, the injunction is "narrow," merely maintains the status quo, and is not an abuse of discretion, *see* Answering Brief for Appellees, ECF No. 55, (Answering Brief), 1, 3, 5, 15, 42, 43, 46, is both wrong and misunderstands their burden. Plaintiffs did not and cannot meet their burden to show a likelihood of success or serious questions going to the merits of their Second Amendment and Takings Clause claims. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). Accordingly, they are not entitled to the "extraordinary remedy" of an injunction of duly enacted state law. *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 24 (2008). That the district court improperly granted only the relief plaintiffs sought, as opposed to *sua sponte* enjoining the entirety of a law that has been in effect since 2000, does not make the injunction "narrow" nor does it merely maintain the "status quo." The status quo is that because the district court misapplied governing law and made clearly erroneous findings of fact, the State is enjoined from enforcing a valid state law designed to protect the public safety and reduce gun violence.

Ass'n v. City and County of San Francisco, 512 F.3d 1112, 1126-27 (9th Cir. 2008); *Fed. Trade Comm'n v. Affordable Media, LLC*, 179 F.3d 1228, 1236 (9th Cir. 1999); *Tracy Rifle & Pistol LLC v. Harris*, 118 F. Supp. 3d 1182, 1193-94 (E.D. Cal. 2015); *S.F. Veteran Police Officers*, 18 F. Supp. 3d. at 1005. The district court's order enjoining the enforcement of Section 32310 was thus an abuse of discretion. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009); *Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 676 (9th Cir. 1988).

CONCLUSION

For the foregoing reasons, the Attorney General respectfully requests that this Court reverse the district court's order granting the motion for preliminary injunction, vacate the preliminary injunction, and grant such other relief as the Court deems just.

Dated: February 7, 2018

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17-56081

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VIRGINIA DUNCAN, et al.,

Plaintiffs and Appellees,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California,

Defendant and Appellant.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: February 7, 2018

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Signature of Attorney or Unrepresented Litigant: /s/ Alexandra Robert Gordon

Date: Feb 7, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

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Case Name: **Duncan, Virginia et al v. Xavier Becerra** No. **17-56081**

I hereby certify that on February 7, 2018 , I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

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N. Newlin	*/s/ N. Newlin*
Declarant	Signature

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