

17-56081

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGINIA DUNCAN, et al,

Plaintiff 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 EXCERPTS OF RECORD,
VOLUME I, ER 0001-0175**

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

VIRGINIA DUNCAN, RICHARD
LEWIS, PATRICK LOVETTE, DAVID
MARGUGLIO, CHRISTOPHER
WADDELL, CALIFORNIA RIFLE &
PISTOL ASSOCIATION, INC.,
Plaintiffs,
v.
XAVIER BECERRA, in his official
capacity as Attorney General of the State
of California,
Defendant.

Case No.: 3:17-cv-1017-BEN

**ORDER GRANTING
PRELIMINARY INJUNCTION**

I. INTRODUCTION

On July 1, 2017, any previously law-abiding person in California who still possesses a firearm magazine capable of holding more than 10 rounds will begin their new life of crime. That is because California Penal Code § 32310 was amended last fall by the passage of a California ballot initiative, Proposition 63. With this change, § 32310(c) requires persons who lawfully possess these magazines today to *dispossess*

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2 them or face criminal penalties of up to one year in a county jail and a fine of \$100 per
3 magazine, or both.¹ Section 32310(d) provides three options for dispossession. First, a
4 person may “remove the large-capacity magazine from the State.” § 32310(d)(1).
5
6 Second, a person may “sell the large-capacity magazine to a licensed firearm dealer.”
7 § 32310(d)(2). Third, a person may “surrender the large-capacity magazine to a law
8 enforcement agency for destruction.” § 32310(d)(3). Naturally, there are statutory
9 exceptions for some individuals such as active and retired law enforcement officers
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11 ¹The full text of § 32310 as amended by Proposition 63 is as follows:

12 § 32310. Prohibition on manufacture, import, sale, gift, loan, purchase, receipt, or
13 possession of large-capacity magazines; punishment

14 (a) Except as provided in Article 2 (commencing with Section 32400) of this chapter and
15 in Chapter 1 (commencing with Section 17700) of Division 2 of Title 2, any person in
16 this state who manufactures or causes to be manufactured, imports into the state, keeps
17 for sale, or offers or exposes for sale, or who gives, lends, buys, or receives any large-
18 capacity magazine is punishable by imprisonment in a county jail not exceeding one year
19 or imprisonment pursuant to subdivision (h) of Section 1170.

20 (b) For purposes of this section, “manufacturing” includes both fabricating a magazine
21 and assembling a magazine from a combination of parts, including, but not limited to, the
22 body, spring, follower, and floor plate or end plate, to be a fully functioning large-
23 capacity magazine.

24 (c) Except as provided in Article 2 (commencing with Section 32400) of this chapter and
25 in Chapter 1 (commencing with Section 17700) of Division 2 of Title 2, commencing
26 July 1, 2017, any person in this state who possesses any large-capacity magazine,
27 regardless of the date the magazine was acquired, is guilty of an infraction punishable by
28 a fine not to exceed one hundred dollars (\$100) per large-capacity magazine, or is guilty
of a misdemeanor punishable by a fine not to exceed one hundred dollars (\$100) per
large-capacity magazine, by imprisonment in a county jail not to exceed one year, or by
both that fine and imprisonment.

(d) Any person who may not lawfully possess a large-capacity magazine commencing
July 1, 2017 shall, prior to July 1, 2017:

- (1) Remove the large-capacity magazine from the state;
- (2) Sell the large-capacity magazine to a licensed firearms dealer; or
- (3) Surrender the large-capacity magazine to a law enforcement agency for
destruction.

(§§ 32400, 32405, and § 32406). There are also exceptions for employees of armored vehicle businesses (§ 32435) and for movie and television actors when magazines are used as a prop (§ 32445). While there are other exceptions for licensed firearm dealers, manufacturers, and gunsmiths, there are no exceptions made for members of the Armed Forces, or those honorably discharged or retired. Likewise, there are no exceptions for civilian firearms instructors, concealed weapon permit holders, or families who live far from timely help by local law enforcement agencies and who must be self-reliant for their own defense, defense of their families, or of home and property. Finally, there are no exceptions made for citizens who, should the need ever arise, may be called upon to form a militia for the protection of the state from either foreign or domestic enemies.

A. Complexity

California's gun laws are complicated. *See Peruta v. County of San Diego*, 824 F.3d 919, 925 (9th Cir. 2016) (*en banc*), *cert. denied*, 2017 WL 176580 (June 26, 2017) ("California has a multifaceted statutory scheme regulating firearms."). Proposition 63 adds one more layer of complexity. Perhaps too much complexity. *See id.* at 953 (Callahan, J., dissenting) ("The counties and California have chipped away at the Plaintiffs' right to bear arms by enacting first a concealed weapons licensing scheme that is tantamount to a complete ban on concealed weapons, and then by enacting an open carry ban. Constitutional rights would become meaningless if states could obliterate them by enacting incrementally more burdensome restrictions while arguing that a reviewing court must evaluate each restriction by itself when determining

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2 constitutionality.”). In California, the State has enacted, over the span of two decades, an
3 incrementally more burdensome web of restrictions on the rights of law-abiding
4 responsible gun owners to buy, borrow, acquire, modify, use, or possess ammunition
5 magazines able to hold more than 10 rounds. The language used, the internally-
6 referenced provisions, the interplay among them, and the plethora of other gun
7 regulations, have made the State’s magazine laws difficult to understand for all but the
8 most learned experts. *See e.g.*, Cal. Pen. Code § 32310(a) (criminalizing manufacturing,
9 importing, keeping for sale, offering for sale, giving, lending, buying or receiving a large
10 capacity magazine while excepting “as provided in Article 2 (commencing with Section
11 32400) of this chapter and in Chapter 1 (commencing with Section 17700) of Division 2
12 of Title 2”); § 32310(b) (defining “manufacturing” as fabricating or assembling a
13 magazine from a combination of parts); § 32415(b) (§ 32310 prohibition on lending does
14 not apply to the loan when it “occurs at a place or location where the possession of the
15 large capacity magazine remains in the accessible vicinity of the person to whom the
16 large capacity magazine is loaned”); § 32406(b) (excepting museums and institutional
17 collections open to the public if securely housed and protected from unauthorized
18 handling); § 32406(f) (excepting a “person lawfully in possession of a firearm that the
19 person obtained prior to January 1, 2000, if no magazine that holds 10 or fewer rounds of
20 ammunition is compatible with that firearm and the person possesses the large-capacity
21 magazine solely for use with the firearm”); § 16470 (defining “large capacity magazine”
22 to include an ammunition feeding device with the capacity to accept more than 10 rounds
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1 but not including a feeding device “that has been permanently altered so that it cannot
2 accommodate more than 10 rounds,” and a .22 caliber tube feeding device and a tubular
3 magazine that is contained in a lever-action firearm); § 32311 (criminalizing
4 manufacturing, importing, keeping for sale, offering for sale, giving, lending, buying, or
5 receiving “any large capacity magazine conversion kit”); § 32390 (declaring any large
6 capacity magazine to be a nuisance); § 18010 (destroying nuisance large capacity
7 magazines). Too much complexity fails to give fair notice and violates due process. “[A]
8 penal statute creating a new offense must be sufficiently explicit to inform those who are
9 subject to it what conduct on their part will render them liable to its penalties . . .
10 consonant alike with ordinary notions of fair play and the settled rules of law; and a
11 statute which either forbids or requires the doing of an act in terms so vague that men of
12 common intelligence must necessarily guess at its meaning and differ as to its application
13 violates the first essential of due process of law.” *Connally v. General Const. Co.*, 269
14 U.S. 385, 391 (1926); *see also United States v. Lanier*, 520 U.S. 259, 266 (1997) (quoting
15 *Connally*).

16 At the preliminary injunction hearing, the attorney for the Attorney General,
17 although well prepared, was not able to describe all of the various exceptions to the
18 dispossession and criminalization components of § 32310. Who could blame her? The
19 California matrix of gun control laws is among the harshest in the nation and are filled
20 with criminal law traps for people of common intelligence who desire to obey the law.
21 Statutes must be sufficiently well-defined so that reasonably intelligent citizens can know

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2 what conduct is against the law. The plaintiffs, who are law-abiding responsible
3 residents of California, want to keep pistols and rifles and the magazines that are
4 commonly used with their firearms without running afoul of California's gun control
5 statutes. But these statutes are too complicated to give fair notice.
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7 **B. Magazines Able to Hold More than 10 Rounds Are Popular**

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9 Ammunition magazines that hold more than 10 rounds are popular. Some estimate
10 that as many as 100,000,000 such magazines are currently owned by citizens of the
11 United States. Under federal law, they may be bought, sold, lent, used, and possessed.
12 However, unlike citizens and residents of 43 other states, and hundreds if not thousands
13 of local jurisdictions, after June 30, 2017, all law-abiding citizens of California will be
14 deemed criminals *if they simply possess* a lawfully acquired magazine capable of holding
15 more than 10 rounds of ammunition.
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18 **C. Plaintiffs**

19 Plaintiffs are a group of California residents who either already own magazines
20 holding more than 10 rounds or who want to own magazines holding more than 10
21 rounds for their defense of self and state. Plaintiff Richard Lewis is a law-abiding citizen
22 and an honorably discharged 22-year United States Marine Corps veteran. For more than
23 20 years, Lewis has lawfully possessed and continues to possess large capacity
24 magazines. Plaintiff Patrick Lovette is a law-abiding citizen and an honorably retired 22-
25 year United States Navy veteran. For more than 20 years, Lewis has lawfully possessed
26 and continues to possess large capacity magazines. Plaintiffs allege they lawfully possess
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large capacity magazines for self-defense and other lawful purposes. Plaintiff California Rifle and Pistol Association, Inc, is a membership organization almost as old as the State of California. The organization represents tens of thousands of its California members.

D. Constitutional Challenge and Motion for Preliminary Injunction

Plaintiffs bring facial and as-applied challenges through 42 U.S.C. § 1983 seeking a declaratory judgment that California Penal Code § 32310 (the ban on magazines holding more than 10 rounds) impermissibly infringes on California citizens' federal constitutional right to keep and bear arms, a right protected by the Second Amendment to the United States Constitution. By this motion for preliminary injunction, Plaintiffs seek only to maintain the *status quo* until a final determination is made on the merits of their constitutional claims, by temporarily restraining the State from enforcing the dispossession requirement and criminal penalties associated with § 32310 (c) & (d).

E. Two Questions

Ultimately, this case asks two questions. "Does a law-abiding responsible citizen have a right to defend his home from criminals using whatever common magazine size he or she judges best suits the situation? Does that same citizen have a right to keep and bear a common magazine that is useful for service in a militia? Because a final decision on the merits is likely to answer both questions "yes," but a final decision will take too long to offer relief, and because the statute will soon visit irrevocable harm on Plaintiffs and all those similarly situated, a state-wide preliminary injunction is necessary and justified to maintain the *status quo*. Because Plaintiffs have demonstrated on this

preliminary record a likelihood of success on the merits, a likelihood of irreparable harm, a balance of equities that tips in their favor, and that an injunction would be in the public interest, a preliminary injunction will issue.

II. ARTICLE III STANDING & RIPENESS

Defendant does not challenge Plaintiffs' Article III standing at this time. Nevertheless, federal courts are obligated to satisfy themselves that a plaintiff has standing and that the case is ripe. *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (reversing because plaintiff lacked standing). To establish Article III standing, a plaintiff must have: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, __ S. Ct. __, 2017 WL 2407473, at *4 (June 5, 2017) (citations and quotation marks omitted). "The same principle applies when there are multiple plaintiffs. At least one plaintiff must have standing to seek each form of relief requested in the complaint." *Id.* at *5. At a minimum, Plaintiffs Lewis and Lovette have standing to challenge the dispossession requirement and criminalization component of California's large capacity magazine ban and their case is ripe.

Article III standing analysis recognizes that, where threatened action by government is concerned, courts do not require a plaintiff to expose himself to criminal liability before bringing suit. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-129 (2007); *Steffel v. Thompson*, 415 U.S. 452 (1974). Under the statute at issue here,

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2 merely continuing to possess a magazine able to hold more than 10 rounds may be
3 charged as a criminal misdemeanor. The injury will be immediate and concrete. *See*
4 *Jackson v. City & County of San Francisco*, 829 F. Supp. 2d 867, 871-872 (N.D. Cal.
5 2011). Ripeness, however, does require a credible threat of prosecution. That
6 requirement is satisfied here as the Attorney General has not indicated that § 32310 (c) &
7 (d) will not be enforced on July 1, 2017. Moreover, the State has vigorously enforced
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§ 32310 in the past.² Therefore, the Article III requirements of standing and ripeness are

²See e.g., *People v. Verches*, H041967, slip. op., 2017 WL 1880968, at *1-3 (Cal. Ct. App. May 9, 2017). *Verches* describes the California investigation leading up to a prosecution under the predecessor to § 32310 for *importing a large capacity magazine*:

“On May 21, 2011, a task force of California law enforcement agents, including special agent Bradley Bautista of the California Department of Justice, Bureau of Firearms, surveilled a gun show in Reno, Nevada. Their objective was to identify suspected California residents who entered Nevada to purchase weapons or accessories that would be illegal in California. Agents observed an individual, later identified as Verches, purchase an upper receiver for an assault rifle and three large-capacity automatic rifle magazines capable of holding 30 rounds of ammunition. They also heard Verches ask the vendor if he had a “lower” receiver so he could build an assault rifle. Agent Bautista observed Verches leave the gun show carrying a white plastic bag, which he placed in the rear compartment of a black Mercedes Benz bearing a California license plate. Agent Bautista did not know if the plastic bag contained the items that Verches had purchased. Verches was accompanied by an unidentified man.

Agent Bautista confirmed that the Mercedes was registered to Verches at a residential address in Morgan Hill, California. He observed Verches and the unidentified man drive away in the Mercedes, with Verches in the passenger seat. Agents followed Verches in the Mercedes to various stops around Reno, where Verches exited the vehicle for short periods of time, before eventually arriving at a casino-hotel valet parking lot around 6:33 p.m. Agents twice lost sight of the vehicle during the time they were following it. Agents terminated the surveillance after confirming that Verches was a registered guest at the hotel until May 22, 2011, the next day. However, agents placed an electronic tracking device on the Mercedes. Records from the tracking device show that the Mercedes made 15 stops between leaving the gun show and arriving the next day at Verches's house in Morgan Hill.

Agent Bautista conducted a California Automated Firearms System records check that showed Verches did not have any assault rifles registered in his name. He and another agent also made a positive identification of Verches by comparing his DMV photograph with video taken of Verches's purchase at the gun show. Agent Bautista conducted an automated criminal history check and public database search, and later verified Verches's address with the Morgan Hill Police Department. The address matched the registration

satisfied.

III. STANDARD FOR A PRELIMINARY INJUNCTION

The standard for issuing a preliminary injunction is well established and not in dispute. A plaintiff seeking a preliminary injunction must establish: (1) that he is likely to succeed on the merits; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Doe v. Harris*, 772 F.3d 563, 570 (9th Cir. 2014).

Plaintiffs claim that § 32310 (c) & (d) trenches on their federal Constitutional rights under the Second Amendment and the Takings Clause. Consequently, a judicial evaluation must be made, beginning with a judgment as to whether there is a likelihood that Plaintiffs will ultimately prevail on the merits of their claims. It is a preliminary judgment. It is made on an incomplete evidentiary record. But the evidence presented is important.³

address for the Mercedes that agents followed from the gun show. On May 24, 2011, Agent Bautista went to the residence and did not see the Mercedes, but observed Verches exiting the house and leaving in another vehicle that was parked in front and registered in his name. Two days after observing Verches at his house, Agent Bautista obtained a search warrant for unregistered AR–15 type or assault rifles and large-capacity magazines, to be found on Verches's person, in his vehicles, or in his home.”

³“In *Fyock*, we affirmed the district court’s denial of a preliminary injunction to enjoin a city ordinance restricting possession of large-capacity magazines We concluded that the ordinance would likely survive intermediate scrutiny *because the city presented sufficient evidence* to show that the ordinance was substantially related to the compelling government interest of public safety.” *Silvester v. Harris*, 843 F.3d 816, 822 (9th Cir. 2016) (citations omitted) (emphasis added).

A. The Second Amendment – Certain Policy Choices Are off the Table

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court made absolutely clear that “the enshrinement of constitutional rights necessarily takes certain policy choices off the table.” *Heller*, 554 U.S. at 636. The State of California’s desire to criminalize simple possession of a firearm magazine able to hold more than 10 rounds is precisely the type of policy choice that the Constitution takes off the table. Because the right to bear arms includes the right to keep and carry ammunition and magazines holding more than 10 rounds for those arms, for both self-defense and to be ready to serve in a militia, the State’s criminalization of possession of “large capacity magazines” likely places an unconstitutional burden on the citizen plaintiffs.

1. Likelihood of Success on the Merits

The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. Amend. II. Second Amendment rights are not watered-down,⁴ second-class rights.⁵ “[I]t is clear that the Framers and ratifiers of the Fourteenth

⁴“In *Heller*, however, we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing, and this Court decades ago abandoned ‘the notion that the Fourteenth Amendment applies to the States only a *watered-down*, subjective version of the individual guarantees of the Bill of Rights.’” *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 785–86 (2010) (citations omitted) (emphasis added).

⁵“Municipal respondents’ remaining arguments are at war with our central holding in *Heller* : that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home. Municipal respondents,

Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.” *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 778 (2010). The right to bear arms for a legal purpose is an inherent right pre-dating and transcending the Second Amendment. “The right there specified is that of ‘bearing arms for a lawful purpose.’ This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.” *United States v. Cruikshank*, 92 U.S. 542, 553 (1875), *overruled on other grounds*, *United States v. Miller*, 307 U.S. 174 (1939).

Some may fear that the right to keep and bear arms means citizens hold a right to “possess a deadly implement and thus has implications for public safety,” and that “there is intense disagreement on the question whether the private possession of guns in the home increases or decreases gun deaths and injuries.” *McDonald*, 561 U.S. at 782-83 (argument of the City of Chicago). True enough. But, public safety interests may not eviscerate the Second Amendment.⁶ “The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. All of the

in effect, ask us to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause.” *McDonald*, 561 U.S. at 780.

⁶For example, the Supreme Court reminds us that, “[o]ur precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role . . . the Government’s authority and expertise in these matters do not automatically trump the Court’s own obligation to secure the protection that the Constitution grants to individuals.” *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010).

1 constitutional provisions that impose restrictions on law enforcement and on the
2 prosecution of crimes fall into the same category.” *McDonald*, 561 U.S. at 783
3 (collecting cases where those likely guilty of a crime are set free because of constitutional
4 rights).
5

6
7 The Supreme Court recognizes an individual’s right to keep and bear arms under
8 the Second Amendment for self-defense in the home. *Heller*, 554 U.S. at 636. This right
9 to keep and bear arms is fundamental and is incorporated against states under the
10 Fourteenth Amendment. *McDonald*, 561 U.S. at 791.
11

12 The Supreme Court also recognizes that the Second Amendment guarantee
13 includes firearms that have “some reasonable relationship to the preservation or
14 efficiency of a well regulated militia.” *Miller*, 307 U.S. at 178. *Miller* implies that
15 possession by a law-abiding citizen of a weapon that could be part of the ordinary
16 military equipment for a militia member, or that would contribute to the common
17 defense, is protected by the Second Amendment.⁷ Concluding that magazines holding
18 more than 10 rounds might be found among today’s ordinary military equipment or that
19 such magazines would contribute to the common defense, requires only a modest finding.
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26 ⁷In *Miller*, the weapon was a sawed-off shotgun. Because there was little evidence before
27 the district court that a sawed-off shotgun could be “any part of the ordinary military
28 equipment or that its use could contribute to the common defense,” possession of the
weapon was not protected by the Second Amendment. *Miller*, 307 U.S. at 178 (citation
omitted).

1
2 *a. Self-defense and militia use*

3 *Heller* and *Miller* are not inconsistent. *Heller* acknowledges that protection for
4 weapons useful to a militia are also useful for defending the home. “It is enough to note,
5 as we have observed, that the American people have considered the handgun to be the
6 quintessential self defense weapon Whatever the reason, handguns are the most
7 popular weapon chosen by Americans for self-defense in the home, and a complete
8 prohibition of their use is invalid.” *Heller*, 554 U.S. at 629. As *McDonald* puts it, “[i]n
9 *Heller*, we recognized that the codification of this right was prompted by fear that the
10 Federal Government would disarm and thus disable the militias, but we rejected the
11 suggestion that the right was valued only as a means of preserving the militias. On the
12 contrary, we stressed that the right was also valued because the possession of firearms
13 was thought to be essential for self-defense. As we put it, self-defense was ‘the *central*
14 *component* of the right itself.’” *McDonald*, 561 U.S. at 742 (emphasis in original).

15
16 In *Caetano v. Massachusetts*, the Court underscored these two related points from
17 *Heller* and *McDonald*. First, the Second Amendment extends to common modern
18 firearms useful for self-defense in the home. Second, there is no merit to “the proposition
19 ‘that *only* those weapons useful in warfare are protected.’” See *Caetano*, 136 S. Ct. 1027,
20 1028 (2016) (per curiam) (quoting *Heller*, 554 U.S. at 582, 624-25) (remanding for
21 further consideration of whether Second Amendment protects stun guns) (emphasis
22 added); *contra Kolbe v. Hogan*, 849 F.3d 114, 131 (4th Cir. 2017) (weapons useful in
23 warfare are not protected by the Second Amendment).

b. Ammunition magazines are arms

The Second Amendment protects firearms and the ammunition and magazines that enable arms to fire. The Second Amendment does not explicitly protect ammunition. “Nevertheless, without bullets, the right to bear arms would be meaningless. A regulation eliminating a person’s ability to obtain or use ammunition could thereby make it impossible to use firearms for their core purpose.” *Jackson*, 746 F.3d at 967. “Thus the right to possess firearms for protection implies a corresponding right to obtain the bullets necessary to use them.” *Id.* (citing *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) (holding that the right to possess firearms implied a corresponding right to have access to firing ranges in order to train to be proficient with such firearms). Indeed, *Heller* did not differentiate between regulations governing ammunition and regulations governing the firearms themselves. *Id.* The same is true for magazines. “Constitutional rights thus implicitly protect those closely related acts necessary to their exercise . . . The right to keep and bear arms, for example ‘implies a corresponding right to obtain the bullets necessary to use them.’” *Luis v. United States*, 136 S. Ct. 1083, 1097 (2016) (Thomas, J., concurring) (quoting *Jackson*, 746 F.3d at 967). Without protection for the closely related right to keep and bear ammunition magazines for use with the arms designed to use such magazines, “the Second Amendment would be toothless.” *Id.*

Most, if not all, pistols and many rifles are designed to function with detachable magazines. They are necessary and integral to the designed operation of these arms. Of course, when a magazine is detached the magazine is not a firearm. It is not dangerous.

1
2 It may be made of stainless steel or it may be made of polymers, but it cannot fire a single
3 round of ammunition. Its only function is to hold ammunition. Other parts of a firearm
4 are also necessary and integral to the designed operation, but may be separated (*e.g.*,
5 removable gun barrels, gun sights, trigger assemblies, hand grips, etc.). For firearms
6 designed to have magazines, without the magazine attached, the weapon may be limited
7 to firing a single round in the chamber, or not at all (as is the case with some popular
8 pistols designed for safety reasons to fire only when a magazine is in place). Although
9 the State does not concede the issue, neither does it press its case on the argument that
10 magazines are not “arms” for purposes of Second Amendment analysis. Opposition at 9.
11 Nor has any other court considering the question held that a magazine of any capacity is
12 not subject to Second Amendment review. *See e.g., Fyock v. City of Sunnyvale*, 25 F.
13 Supp. 3d. 1267, 1276 (N.D. Cal. 2014), *aff’d*, 779 F.3d 991 (9th Cir. 2015) (“Rather, the
14 court finds that the prohibited magazines are ‘weapons of offence, or armour of defence,’
15 as they are integral components to vast categories of guns.”). Thus, that which the State
16 defines as a “large capacity magazine” will be analyzed according to Second Amendment
17 principles. This is the theater of operations in which the constitutional battle will be
18 fought.

24 **2. Second Amendment Tests**

25 ***a. The tripartite binary test with a sliding scale and a reasonable fit***

26
27 For a Second Amendment challenge, the Ninth Circuit uses what might be called a
28 tripartite binary test with a sliding scale and a reasonable fit. In other words, there are

1
2 three different two-part tests, after which the sliding scale of scrutiny is selected. Most
3 courts select intermediate scrutiny in the end. Intermediate scrutiny, in turn, looks for a
4 “reasonable fit.” Courts in other circuits tend to also use some variation of a multi-part
5 test with the result that intermediate scrutiny is applied to gun restrictions. It is,
6 unfortunately, an overly complex analysis that people of ordinary intelligence cannot be
7 expected to understand. These complicated legal tests, which usually result in Second
8 Amendment restrictions passing an intermediate scrutiny test (a test that is little different
9 from a rational basis test), appear to be at odds with the simple test used by the Supreme
10 Court in *Heller*. The *Heller* test is a test that anyone can figure out.

14 *Heller* asks whether the law bans types of firearms commonly used for
15 a lawful purpose — regardless of whether alternatives exist. And
16 *Heller* draws a distinction between such firearms and weapons
17 specially adapted to unlawful uses and not in common use, such as
18 sawed-off shotguns.

19 . . .

20 Roughly five million Americans own AR-style semiautomatic
21 rifles. The overwhelming majority of citizens who own and use
22 such rifles do so for lawful purposes, including self-defense and
23 target shooting. Under our precedents, *that is all that is needed*
24 for citizens to have a right under the Second Amendment to
25 keep such weapons.

26 *Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Justices Thomas and
27 Scalia dissenting from denial of certiorari) (emphasis added) (citations omitted). A
28 complicated Second Amendment test obfuscates as it extirpates, but it is the test that this
Court is bound to follow.

b. Constitutionally suspect under the simple test

Under the simple *Heller* test, § 32310 (c) & (d) are highly suspect. They are suspect because they broadly prohibit common pistol and rifle magazines used for lawful purposes. “[T]hat is all that is needed for citizens to have a right under the Second Amendment to keep such weapons.” *Friedman*, 136 S. Ct. at 449.

Magazines holding more than 10 rounds are useful for self-defense by law-abiding citizens. And they are common. Lawful in at least 43 states and under federal law, these magazines number in the millions. *Cf. Hollis v. Lynch*, 827 F.3d 436, 449 (5th Cir. 2016) (defining the term “common” by applying the Supreme Court test in *Caetano* of 200,000 stun guns owned and legal in 45 states being “common”); *see also NYSR&PA v. Cuomo*, 804 F.3d 242, 255-57 (2nd Cir. 2015) (noting large-capacity magazines are “in common use” as the term is used in *Heller* based on even the most conservative estimates). To the extent they may be now uncommon within California, it would only be the result of the State long criminalizing the buying, selling, importing, and manufacturing of these magazines. To say the magazines are uncommon because they have been banned for so long is something of a tautology. It cannot be used as constitutional support for further banning. *See Friedman v. City of Highland Park, Illinois*, 784 F3d 406, 409 (7th Cir. 2015) (“Yet it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so the it isn’t commonly used. A law’s existence can’t be the source of its own constitutional validity.”).

1
2 Nevertheless, § 32310 (c) & (d) are suspect even under the more complicated
3 analysis employed by the Ninth Circuit Court of Appeals, because the statute is not a
4 reasonable fit as a means to achieve the State’s important objectives. To pass muster
5 under the intermediate scrutiny test a statute must have “a reasonable fit” with the State’s
6 important interest. The analysis works like this.
7

8
9 ***c. Constitutionally suspect under the “reasonable fit” test***

10 **i. burden & scrutiny**

11 First, a court must evaluate the burden and then apply the correct scrutiny.
12 *Jackson*, 746 F.3d at 960 (citing *United States v. Chovan*, 735 F.3d 1127, 1136-37 (9th
13 Cir. 2013)). “This two-step inquiry: ‘(1) asks whether the challenged law burdens
14 conduct protected by the Second Amendment; and (2) if so, directs courts to apply an
15 appropriate level of scrutiny.’” *Bauer v. Becerra*, 858 F.3d 1216, 2017 WL 2367988, at
16 *3 (9th Cir. 2017) (quoting *Jackson*, 746 F.3d at 960). As discussed below, § 32310 (c)
17 & (d) burden conduct protected by the Second Amendment.
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19
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21 **ii. presumptively lawful or historical regulation**

22 In determining whether a given regulation falls within the scope of the Second
23 Amendment under the first step of this inquiry, another two-step test is used. “[W]e ask
24 whether the regulation is one of the ‘presumptively lawful regulatory measures’
25 identified in *Heller*, or whether the record includes persuasive historical evidence
26 establishing that the regulation at issue imposes prohibitions that fall outside the
27 historical scope of the Second Amendment.” *Id.* (citations omitted). If the regulation is
28

presumptively lawful, the inquiry ends. Likewise, if the regulation is a historically approved prohibition not offensive to the Second Amendment, the inquiry ends. Section 32310 (c) & (d) fail both parts of the test. A complete ban on ammunition magazines of any size is not one of the presumptively lawful regulatory measures identified in *Heller*. Neither is there any evidence that magazine capacity restrictions have a historical pedigree.

iii. closeness to the core and severity of the burden

If the constitutional inquiry may continue, then the correct level of scrutiny must be selected. For that selection a third two-step evaluation is required. The first step measures how close the statute hits at the core of the Second Amendment right. The second step measures how severe the statute burdens the Second Amendment right. “Because *Heller* did not specify a particular level of scrutiny for all Second Amendment challenges, courts determine the appropriate level by considering ‘(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.’” *Bauer*, 2017 WL 2367988, at *4 (quoting *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016)). *Fyock v. City of Sunnydale*, 779 F.3d 991, 999 (9th Cir. 2015), has already recognized that a regulation restricting law-abiding citizens from possessing large-capacity magazines within their homes hits at the core of the Second Amendment. *Fyock* said, “[b]ecause Measure C restricts the ability of law-abiding citizens to possess large capacity magazines within their homes for the purpose

1
2 of self-defense, we agree with the district court that Measure C may implicate the core of
3 the Second Amendment.” *Id.*

4
5 **iv. the sliding scale of scrutiny**

6 *Heller* says the core of the Second Amendment is the right of law-abiding,
7 responsible citizens to use arms in defense of their home. 554 U.S. at 635.

8
9 Guided by this understanding, our test for the appropriate level
10 of scrutiny amounts to ‘a sliding scale.’ A law that imposes
11 such a severe restriction on the fundamental right of self
12 defense of the home that it amounts to a destruction of the
13 Second Amendment right is unconstitutional under any level of
14 scrutiny. Further down the scale, a law that implicates the core
of the Second Amendment right and severely burdens that right
warrants strict scrutiny. Otherwise, intermediate scrutiny is
appropriate.

15 *Bauer*, 2017 WL 2367988, at *4 (citations and quotations marks omitted). Where a
16 restriction “...does not ‘severely burden’ or even meaningfully impact the core of the
17 Second Amendment right, . . . intermediate scrutiny is . . . appropriate.” *See id.* (citing
18 *Silvester*, 843 F.3d at 821 and *Chovan*, 735 F.3d at 1138). *Fyock* held that the district
19 court did not abuse its discretion in finding Sunnyvale’s magazine capacity restriction did
20 not have a severe impact. “[T]here was no abuse of discretion in finding that the impact
21 Measure C may have on the core Second Amendment right is not severe and that
22 intermediate scrutiny is warranted.” 779 F.3d at 999.

23
24 The State argues as a foregone conclusion that intermediate scrutiny is the correct
25 point on the sliding scale for a regulation on magazines. According to the State, *Fyock*’s
26 approval of “intermediate scrutiny” is controlling, and other courts have applied

1
2 intermediate scrutiny to regulations on large capacity magazines. The approach is
3 consistent with past cases analyzing the appropriate level of scrutiny under the second
4 step of *Heller*, as the Ninth Circuit has repeatedly applied intermediate scrutiny. *See e.g.*,
5 *Silvester*, 843 F.3d at 823 (applying intermediate scrutiny to a law mandating ten-day
6 waiting periods for the purchase of firearms); *Fyock*, 779 F.3d at 999 (applying
7 intermediate scrutiny to a law prohibiting the possession of large capacity magazines);
8 *Jackson*, 746 F.3d at 965, 968 (applying intermediate scrutiny to laws mandating certain
9 handgun storage procedures in homes and banning the sale of hollow-point ammunition
10 in San Francisco); *Chovan*, 735 F.3d at 1138 (applying intermediate scrutiny to a law
11 prohibiting domestic violence misdemeanants from possessing firearms). Applying
12 intermediate scrutiny, *Fyock* did find that the plaintiffs were unlikely to succeed on the
13 merits.
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18 The difference here, and it is a important difference, is that the district court in
19 *Fyock* had before it an evidentiary record that was credible, reliable, and on point. *Fyock*,
20 779 F.3d at 1000 (“Ultimately, the district court found that Sunnyvale submitted pages of
21 credible evidence, from study data to expert testimony to the opinions of Sunnyvale
22 public officials, indicating that the Sunnyvale ordinance is substantially related to the
23 compelling government interest in public safety.”). That is not the case here. Here, the
24 Attorney General has submitted at this preliminary stage incomplete studies from
25 unreliable sources upon which experts base speculative explanations and predictions.
26
27 The evidentiary record is a potpourri of news pieces, State-generated documents,
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2 conflicting definitions of “mass shooting,” amorphous harms to be avoided, and a
3 homogenous mass of horrible crimes in jurisdictions near and far for which large capacity
4 magazines were not the cause.

5
6 **v. tailoring required: “a reasonable fit”**

7 Assuming intermediate scrutiny applies, “a reasonable fit” test is conducted. “Our
8 intermediate scrutiny test under the Second Amendment requires that (1) the
9 government’s stated objective . . . be significant, substantial, or important; and (2) there .
10 . . be a ‘reasonable fit’ between the challenged regulation and the asserted objective.”
11 *Silvester*, 843 F.3d at 821–22 (quoting *Chovan*, 735 F.3d at 1139). Under the second
12 prong “intermediate scrutiny does not require the least restrictive means of furthering a
13 given end.” *Id.* at 827 (quoting *Jackson*, 746 F.3d at 969).

14
15
16 **vi. four important California interests**

17 In this case, the Attorney General identifies four State interests. Each is important.
18 The four articulated State interests are: (1) protecting citizens from gun violence; (2)
19 protecting law enforcement from gun violence; (3) protecting the public safety (which is
20 similar to protecting citizens and law enforcement from gun violence); and (4) preventing
21 crime. *See* *Oppo*. at 9; 17-18. The question then becomes, whether the dispossession and
22 criminalization components of § 32310’s ban on firearm magazines holding any more
23 than 10 rounds is a reasonable fit for achieving these important goals. For intermediate
24 scrutiny “the burden of justification is demanding and it rests entirely on the State.”
25 *Tyler v. Hillsdale County Sheriff’s Dept.*, 837 F. 3d 678, 694 (6th Cir. 2016) (quoting
26
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2 *United States v. Virginia*, 518 U.S. 515, 533 (1996) (considering the constitutionality of
3 18 U.S.C. §922(g)(4)’s permanent gun ban for person previously treated for mental
4 illness).

5
6 This Court finds on the preliminary evidentiary record before it that the
7 dispossession and criminalization component of §32310 (c) & (d) *is not a reasonable fit*.
8 It may well be that on a more robust evidentiary showing, made after greater time and
9 testimony is taken, that the State will be able to establish a reasonable fit. But not yet.
10 The Attorney General asserts that empirical evidence is not required. *Oppo*. at 19. He
11 asserts that the substantial evidence demonstrating a reasonable fit can take other softer
12 forms such as “history, consensus, and simple common sense,” as well as “correlation
13 evidence” and even simply “intuition.” *Oppo*. at 19-20. But if this “evidence” were
14 sufficient, all firearm restrictions except an outright ban on all firearms would survive
15 review.
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19 Yet, as the Second Circuit cautioned, “on intermediate scrutiny review, the state
20 cannot ‘get away with shoddy data or reasoning.’ To survive intermediate scrutiny, the
21 defendants must show ‘*reasonable* inferences based on *substantial* evidence’ that the
22 statutes are substantially related to the governmental interest.” *NYSR&PA*, 804 F.3d at
23 264 (citations omitted) (emphasis in original) (striking down New York State’s 7-round
24 magazine limit). This Court declines to rely on anything beyond hard facts and
25 reasonable inferences drawn from convincing analysis, which amounts to substantial
26 evidence based on relevant and accurate data sets, when considering whether to maintain
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28

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2 the *status quo* or permit a state experiment that will irrevocably harm law-abiding
3 responsible magazine-owning citizens.

4
5 ***d. The State's evidence***

6 The State's preliminary theoretical and empirical evidence is inconclusive. In fact,
7 it would be reasonable to infer, based on the State's evidence, that a right to possess
8 magazines that hold more than 10 rounds may *promote* self-defense – especially in the
9 home – and would be ordinarily useful for a citizen's militia use. California must provide
10 more than a rational basis to justify its sweeping ban on mere possession. *See e.g.*,
11 *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) ("Illinois had to provide us with
12 more than merely a rational basis for believing that its uniquely sweeping ban [on
13 carrying guns in public] is justified by an increase in public safety. It has failed to meet
14 this burden.").

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16
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18 So what is the evidence? The Attorney General has provided expert declarations
19 and 3,100 pages of exhibits.⁸ Much of the evidence submitted is dated. Approximately
20 75% of the exhibits the Attorney General has submitted are older than 2013. The
21 documents that are more recent include various surveys of shooting incidents, news
22 articles, position pieces, and firearm descriptions. The amalgamation of exhibits often
23 seems irrelevant. For example, Exhibit 37 is a smorgasbord of news articles about guns.
24
25

26
27 ⁸Both sides interpose evidentiary objections to various documents. The objections are
28 overruled. For a preliminary injunction, a court may "rely on otherwise inadmissible
evidence, including hearsay evidence." *San Francisco Veteran Police Officers Ass'n, v.*
City and County of S.F., 18 F. Supp. 3d. 997, 1006 (N.D. Cal. 2014) (citations omitted).

1
2 Among the offerings is a piece about thirteen separate incidents in Australia going back
3 to 1867 in which there are no mentions of large capacity magazines. Oppo. Gordon
4 Declaration Exh. 37, at 101-04. At Exhibit 37, page 151-52, one finds a news piece
5 about a 17-year-old incident in Brazil involving a submachine gun. News about events in
6 Paris, France and Shfaram, Israel fill pages 162-165 and 175-177, while page 195 tells of
7 a shooter in 2010 using a revolver, and page 132 recounts a shooter using two revolvers.
8
9

10 Another exhibit, the Attorney General's Exhibit 50, appears to be a 100-page, 8-
11 point type, 35-year survey of shooting incidents published by Mother Jones magazine.
12 Oppo. Gordon Declaration at Exh. 50. Mother Jones magazine has rarely been
13 mentioned by any court as reliable evidence. It is fair to say that the magazine survey
14 lacks some of the earmarks of a scientifically designed and unbiased collection of data.
15 In another example, Attorney General's Exhibit 30 includes an article from Mother Jones
16 Magazine with a headline, "'A Killing Machine': Half of All Mass Shooters Used High-
17 Capacity Magazines." Oppo. Gordon Declaration at Exh. 30. Yet, as will be discussed
18 below, the survey found at Attorney General's Exhibit 59 describes in detail only six
19 incidents out of 92 where a mass shooter used a high capacity magazine. Attorney
20 General's Exhibit 14 contains an expert declaration from Christopher Koper that relies,
21 *inter alia*, on Exhibit 30. The expert then concedes that "[A]ssessing trends in LCM
22 [large capacity magazine] use is much more difficult because *there was, and is, no*
23 *national data source on crimes with LCMs*, and few local jurisdictions maintain this sort
24 of information." Oppo. Gordon Declaration at Exh. 14, n.7 & ¶ 47. Further illustrating
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1
2 the lack of hard data underlying the muddled evidence, Koper then attaches his own
3 published report in support of his Exhibit 14 declaration. Titled “An Updated
4 Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun
5 Violence, 1994-2003,” Koper summarizes his findings. He states, “it is not clear how
6 often the ability to fire more than 10 shots without reloading (the current magazine
7 capacity limit) affects the outcomes of gun attacks. All of this suggests that the ban’s
8 impact on gun violence is likely to be small.” *Id.* at Exhibit “C,” ¶ 3.3.
9
10

11 **i. The Mayors Against Illegal Guns survey**

12 Another example of California’s evidence is a survey of mass shooting incidents
13 found in the Attorney General’s Exhibit 59. *Oppo. Gordon Declaration at Exh. 59.* The
14 Attorney General relies specifically on Exhibit 59 in its brief. *Oppo. at 11-12.* Yet,
15 Exhibit 59 tends to prove the opposite of a justification for § 32310 (c) & (d), *i.e.*, it tends
16 to prove there is no need to dispossess and criminalize law-abiding responsible citizens
17 currently possessing magazines holding more than 10 rounds.
18
19

20 Exhibit 59 is a shorter survey of mass shooting incidents that occurred between
21 January 2009 and September 2013. The survey was produced by Mayors Against Illegal
22 Guns.⁹ Although the survey describes little about the protocols used to select its data, it
23
24

25 ⁹Mayors Against Illegal Guns is apparently not a pro-gun rights organization. According
26 to Wikipedia, it was formed by Mayor Michael Bloomberg. Mayor John Tkazik of
27 Poughkeepsie, New York, resigned along with fifty others in 2014, explaining that the
28 organization: “under the guise of helping mayors facing a crime and drug epidemic,
MAIG intended to promote confiscation of guns from law-abiding citizens.” Later in
2014, it merged with another group and became “Everytown For Gun Safety.”

1
2 does describe in helpful detail 92 mass shooting incidents (where a mass shooting is
3 defined using the FBI's definition of an incident where four or more people were killed
4 with a gun). The survey describes itself as relying on FBI reports and media reports.
5
6 Though the study is not ideal, because gun violence is a deadly serious issue, some
7 empirical data needs to be carefully reviewed for purposes of the motion for preliminary
8 injunction.
9

10 Thus, to test the claims made by the Attorney General against a set of data he
11 himself offers in support of his justification of § 32310 (c) & (d), the Court has reviewed
12 closely the 92 incidents described in Ex 59.¹⁰ Exhibit 59, like the rest of the Attorney
13 General's anthology of evidence, does not demonstrate that the ban on possession of
14 magazines holding any more than 10 rounds is a reasonable fit, at least at this preliminary
15 stage of the proceedings.
16
17

18 Intermediate scrutiny requires the State to demonstrate a reasonable fit. A
19 reasonable fit cannot be just any fit. This is not simply a policy decision by the State.
20 This affects a Constitutionally protected right. The State may experiment. The State
21 need not create a tight fit. The State need not choose the least restrictive means to
22 achieve its important goals. But the means must provide a reasonable fit. The Attorney
23 General claims that magazines holding any more than 10 rounds may be useful and
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25

26
27 ¹⁰Due to limited time and judicial resources, Ex 59 will be the empirical data set relied on
28 by the Court to determine reasonable fit. Other surveys may cover larger time periods
and use different parameters. Experts relied on by both parties criticize the reliability and
inclusivity of all of the available data sets.

appropriate in the military context, but they pose a distinct threat to safety in private settings as well as places of assembly. The Attorney General asserts that the “military-style features of LCMs make them particularly attractive to mass shooters and other criminals and pose heightened risks to innocent civilians and law enforcement.” Oppo. at 11. He asserts that “LCMs are used disproportionately in mass killings and in murders of police.” Oppo. at 11. The Mayors Against Illegal Guns survey (hereinafter “Mayors’ survey”) belies these assertions. Oppo. Gordon Declaration, Exh. 59.

(a) of 92 cases, only 10 are from California

What does the Mayors’ survey teach about the fit of California’s statute? First, it is noted that 82 of the 92 cases are from jurisdictions beyond California. Only ten of the 92 mass shootings in the survey took place in California. These ten incidents prove very little about whether § 32310 (c) & (d) provide a reasonable fit – or means – of achieving the State’s four public safety goals.

(b) the 10 California cases examined

In three of the ten California incidents, the firearm is unknown and the magazine type, if any, is unknown. (#52 Willowbrook (2/11/11), #65 Los Angeles (4/3/10), #92 Wilmington (1/27/09)).¹¹ In a fourth incident, a revolver was used. (#18 Tule River Reservation (12/8/12)). Revolvers, of course, do not use magazines at all. In a fifth incident, a pistol was used but no mention is made of a magazine holding any more than

¹¹The Court has assigned numbers to the list of incidents in the Mayors’ survey for ease of reference.

1
2 10 rounds. (#20 Northridge (12/2/12)). In a sixth incident, a pistol was used with four
3 (legal) 10-round magazines. (#31 Oakland (4/2/12)). This, of course, tends to prove the
4 statute would not have the desired effect. In two more incidents, the pistols used were
5 purchased legally in California. (#40 Seal Beach (10/12/11); #84 Santa Clara (3/29/09)).
6 These would have been sold with California-legal 10-round magazines. No mention is
7 made of larger magazines being used. If that was the case, then again the data tends to
8 prove that the statute would have no good effect.
9
10

11 **(c) no effect in eight cases**

12 In other words, only ten of 92 mass shootings occurred in California and § 32310
13 (c) & (d) would have had no effect on eight of those ten. The criminalization of
14 possession of magazines holding more than 10 rounds would have had no effect on mass
15 killings by revolver. It would have had no effect on pistols bought legally in California
16 because they are sold with 10-round magazines. It would have had no effect on shootings
17 where magazines holding any more than 10 rounds were not used.
18
19
20

21 **(d) a closer look at the two magazine cases**

22 Of the 92 mass shootings recorded in the Mayors' survey, only two occurred in
23 California *and* involved the use of illegal magazines. (#7 Santa Monica (6/7/13) and #85
24 Oakland (3/21/09)). In the Santa Monica incident, the shooter brought multiple firearms,
25 as happens to be the case in almost all "mass shootings." He brought an AR-15, a
26 revolver, and 3 zip guns. He reportedly possessed forty 30-round magazines. He killed
27 five victims. The survey notes that the AR-15 and the illegal magazines may have been
28

1
2 illegally imported from *outside* of California. Receiving and importing magazines
3 holding any more than 10 rounds was already unlawful under California law at the time
4 of the Santa Monica tragedy. In that instance, criminalizing possession of magazines
5 holding any more than 10 rounds likely would not have provided additional protection
6 from gun violence for citizens or police officers or prevented the crime.
7

8
9 In the remaining incident, a shooter in Oakland, California also brought multiple
10 guns. He used an SKS assault-type rifle with a magazine holding more than 10 rounds
11 and a pistol. He killed four policemen. He killed the first two policemen with the pistol
12 when officers stopped his car in a traffic stop. He then fled on foot to an apartment. Two
13 more officers were killed with the assault rifle and an illegal large capacity magazine and
14 a third was wounded. The murderer had a lengthy criminal history, according to the
15 Mayors' survey. At the time of the mass shooting, the killer *was on parole for assault*
16 *with a deadly weapon*. As such, he was *already prohibited from possessing* any kind of
17 gun. As in the Santa Monica example, criminalizing possession of magazines holding
18 any more than 10 rounds likely would not have provided additional protection from gun
19 violence for citizens and police officers or prevented crime in the Oakland example.
20
21
22

23 (e) conclusions from California cases

24
25 To sum up, of the 92 mass killings occurring across the 50 states between 2013 and
26 2009, only ten occurred in California. Of those ten, the criminalization and dispossession
27 requirements of § 32310 would have had no effect on eight of the shootings, and only
28 marginal good effects had it been in effect at the time of the remaining two shootings.

On this evidence, § 32310 is not a reasonable fit. It hardly fits at all. It appears on this record to be a haphazard solution likely to have no effect on an exceedingly rare problem, while at the same time burdening the constitutional rights of other California law-abiding responsible citizen-owners of gun magazines holding more than 10 rounds.

(f) no effect on revolvers

The evidence surveying the other 82 mass shooting incidents (which occurred outside of California) also suggests § 32310 makes for an uncomfortably poor fit. For example, as noted earlier, some mass shootings involve only *revolvers* – a style for which there are no magazines. (#18 Tule River Reservation, Cal. (12/8/12) 5 dead, #29 Port St. John, Fla. (5/15/12) 4 dead; #37 Bay City, Tex. (11/30/11) 4 dead). California’s statute will have no effect on these types of mass shootings.

(g) no effect on shotguns

A number of mass shootings involve a *shotgun* as the weapon of choice. The vast majority of shotguns likewise cannot be equipped with a magazine holding more than 10 rounds. (#1 Washington, D.C., Navy Yard (9/16/13) 12 dead; #11 Manchester, Ill. (4/24/13) 5 dead; #12 Federal Way, Wash. (4/21/13) 4 dead; #14 Herkimer, N.Y. (4/13/13) 4 dead; #30 Gilbert, Ariz. (5/2/12) shotgun & 2 pistols & 6 hand-grenades, 4 dead; #46 Wagener, S.C. (7/3/11) 4 dead; #51 Oak Harbor, Ohio (4/16/11) shotgun & .22 rifle, 4 dead; #57 Jackson, Ky. (9/10/10) 5 dead; #64 Chicago, Ill. (4/14/10) 5 dead; #69 Bellville, Tex. (1/16/10) shotgun & handgun 5 dead; #83 Carthage, N.C. (3/29/09)

shotgun & handgun, 8 dead). California's statute will have little or no effect on these types of mass shootings.

(h) no effect on handguns without large capacity magazines

A large number of mass shooting incidents (40 of 92) were the result of shooters using only *pistols or handguns* for which there is no indication in the Mayors' survey that a magazine holding any more than 10 rounds was employed. (#2 Crab Orchard, Tenn. (9/11/13); #3 Oklahoma City, Okla. (8/14/13); #4 Dallas, Tex. (8/7/13); #5 Clarksburg, W.V. (7/26/13) (original assailants pointed gun at victim who wrested away the handgun he used to kill the assailants and 2 others); #6 Hialeah, Fla. (7/16/13); #8 Fernley, Nev. (5/13/13); #16 Tulsa, Okla. (1/7/13); #20 Northridge, Cal. (12/2/12); #22 Minneapolis, Minn. (9/27/12); #27 Seattle, Wash. (5/20/12); #31 Oakland, Cal. (4/2/12); #32 Norcross, Ga. (2/20/12); #33 Villa Park, Ill. (1/17/12); #34 Grapevine, Tex. (12/25/11); #35 Emington, Ill. (12/16/11); #38 Greensboro, N.C. (11/20/11); #39 Liberty, S.C. (10/14/11); #40 Seal Beach, Cal. (10/12/11); #41 Laurel, Ind. (9/26/11); #45 Wheatland, Wyo. (7/30/11); #47 Grand Prairie, Tex. (6/23/11); #48 Medford, N.Y. (6/9/11); #50 Ammon, Id. (5/11/11); #53 Minot, N.D. (1/28/11); #55 Boston, Mass. (9/28/10); #56 Riviera Beach, Fla. (9/27/10); #62 Manchester, Conn. (8/3/10); #63 Hialeah, Fla. (6/6/10); #65 Los Angeles, Cal. (4/3/10); #67 New Orleans, La. (3/26/10); #70 Madison, Wis. (12/3/09); #71 Lakewood, Wash. (11/29/09) (hand gun of slain police officer used to kill other officers); #73 Jupiter, Fla. (11/26/09); #74 Percy, Ark. (11/12/09); #75 Oklahoma City, Okla. (11/9/09); #79 Kansas City, Kan. (6/22/09) (2 guns stolen from a

1
2 police sgt.); #80 Middletown, Md. (4/19/09); #84 Santa Clara, Cal. (3/29/09); #87 Miami,
3 Fla. (3/15/09); #90 Cleveland, Ohio (3/5/09); #91 Brockport, N.Y. (2/14/09)).

4 California's statute will have no effect on these types of mass shootings.

5
6 **(i) no effects on unknowns and oddities**

7 For 20 of the remaining 92 recorded incidents, the weapon and ammunition used
8 was simply "*unknown*." A few incidents were oddities not easily categorized and not
9 involving a magazine holding any more than 10 rounds. In #4 Dallas, Tex. (8/7/13), the
10 shooter used a handgun and detonated a bomb. New Town, N.D. (#21) (11/18/12)
11 involved a hunting rifle. Oakland, Cal. (#31) (4/2/12) involved a pistol and four 10-
12 round magazines which are lawful in every state. Monongalia, W.V. (#42) (9/6/11)
13 involved a .30-.30 rifle. Carson City, Nev. (#43) (9/6/11) involved an already-illegal
14 machine gun. Appomattox, Va. (#68) (1/19/10) involved a rifle used to shoot at
15 responding police officers. California's statute will have no effect on these types of mass
16 shootings.
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21 **(j) conclusions from 80 of 92 cases**

22 Having examined the facts as reported by the Mayor's survey for all of the mass
23 shooting incidents from around the United States over the fairly recent five-year period, it
24 appears that the vast majority of events are identified as not involving either assault-type
25 rifles or large capacity magazines. To reduce or eliminate such incidents requires some
26 means other than § 32310's dispossession and criminalization approach. The § 32310
27
28

1
2 approach would have had little or no discernable good effect towards reaching
3 California's four important safety objectives.

4
5 **(k) six assault rifle cases with no large capacity magazines**

6 The twelve remaining incidents involved either assault-type rifles or magazines
7 holding more than 10 rounds. These deserve a closer look. In six cases an *assault-type*
8 *rifle* was used but there is no data identifying large capacity magazine use. In
9 Albuquerque, N.M. (#15) (1/19/13) the shooter used four guns: two shotguns, a .22 rifle,
10 and an AR-15. In Wagener, S.C. (#46) (7/3/11), although the shooter owned an AK-47,
11 revolvers and pistols, he chose to use only a shotgun. Put another way, given the choice
12 between using an assault rifle or pistols with large capacity magazines, this mass shooter
13 selected a shotgun as his weapon of choice. In Washington, D.C. (#66) (3/30/10) there
14 were three gunmen who among them used two pistols and one AK-47. In Osage, Kan.
15 (#72) (11/28/09) an "assault rifle" was the weapon. Likewise, in Mount Airy, N.C. (#77)
16 (11/1/09) an "assault rifle" was used. While in Geneva County, Ala. (#89) (3/10/09) the
17 shooter used three weapons: an AR-15, an SKS, and a .38 pistol. The survey does not
18 mention large capacity magazines being used in any of these six incidents.

19
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21
22 **(l) remaining 6 cases involve large capacity magazines**

23 The final group of incidents do involve use of magazines holding more than 10
24 rounds. Of the 92 mass shooting incidents over the five years from 2009 to 2013,
25 although millions of magazines holding more than 10 rounds are owned by citizens
26 nationwide, according to the Mayors' survey, *only six incidents* involved a magazine
27
28

1
2 holding more than 10 rounds. Two incidents involved a pistol and a magazine holding
3 more than 10 rounds. Four incidents involved an assault rifle or other weapon and a
4 magazine holding more than 10 rounds.
5

6 As noted earlier, the Santa Monica, California incident (#7) on June 7, 2013
7 involved a shooter with an AR-15, a revolver, and three “zip guns.” The shooter carried
8 forty 30-round magazines (probably for use with the AR-15). The AR-15 had no serial
9 number. The shooter was 23-years-old, suggesting that the large capacity magazines he
10 possessed he obtained in violation of California law since he was not old enough to have
11 owned such magazines before California criminalized their purchase or importation. As
12 mentioned earlier, the Mayors’ survey notes that the “assault rifle, high-capacity
13 magazines, and several components to modify the firearms *may have been shipped from*
14 *outside California.*” (Emphasis added). It is hard to imagine that the shooter, having
15 already evaded California law to acquire large capacity magazines, would have
16 dispossessed himself of the illegally acquired large capacity magazines if the existing law
17 had included the new Proposition 63 amendments to § 32310.
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22 The next and probably most heinous shooting was the well-publicized Sandy Hook
23 Elementary School shooting in Newtown, Connecticut. (#17) (12/14/12). The shooter
24 carried a variety of weapons and large capacity magazines. Shortly afterwards, the State
25 of Connecticut made acquisition of large capacity magazines unlawful. However, unlike
26 in California, continued possession of pre-ban magazines remained lawful if declared and
27 the magazines were permitted to be filled to capacity for home protection and shooting
28

1
2 range practice. *See* State of Connecticut Department of Emergency Services and Public
3 Protection, Division of State Police, Special Licensing & Firearms Unit: *FAQS*
4 *REGARDING P.A. 13-3 As Amended by P.A. 13-220* (dated 3/5/14).
5

6 The Aurora, Colorado (#24) (7/20/12) movie theater shooting involved the use of a
7 highly unusual 100-round drum magazine on an AR-15, along with a shotgun and two
8 pistols. The criminalization of possession of 100-round drum magazines would seem to
9 be a reasonable fit as a means to achieve California's important safety objectives. On the
10 other hand, it may be the type of weapon that would be protected by the Second
11 Amendment for militia use under *Miller*. In any event, California's § 32310 (c) & (d)
12 would not have prevented the shooter from acquiring and using the shotgun and pistols
13 loaded with smaller 10-round magazines.¹²
14

15
16 The next incident is the Tuscon, Arizona shooting (#54) (1/8/11) in which Chief
17 Judge John Roll, a friend of this Court, was killed. It involved a 33-round magazine for a
18 Glock 19 pistol. Again, a 33-round magazine would seem unusual. But a Glock 19 with
19 its standard magazine would seem to be the quintessential self-defense weapon.
20
21

22 The fifth mass shooting took place in Binghamton, New York (#82) (4/3/09) where
23 two handguns and a 30-round magazine were used in the killing of 14 victims. The
24 survey reports that 98 rounds were fired in the attack. Since 1994, it has been illegal in
25 New York to purchase a magazine holding more than 10 rounds.
26

27
28 ¹²The Colorado incident is the only case where a truly high capacity 100-round magazine was used.

1
2 The sixth mass shooting occurred in East Oakland, California (#85) (3/21/09) and
3 involved a pistol and a SKS assault-style rifle with a high-capacity magazine. As
4 mentioned earlier, the shooting took place during a time when the shooter, who had a
5 criminal history, was *on parole for assault with a deadly weapon*.
6

7 **(m) conclusions from the Mayor's survey**

8 Some conclusions can be drawn from the Mayor's survey submitted by the
9 Attorney General. Of the ten mass shooting events that occurred in California, only two
10 involved the use of a magazine holding more than 10 rounds. In view of the large
11 population of California and the five-year time period studied, it appears that the Prop 63
12 amendments to § 32310 aim to eliminate that which is an incredibly rare danger to public
13 safety. Moreover, based on this preliminary evidentiary record submitted by the Attorney
14 General, § 32310 is a poor fit as a means to eliminate the types of mass shooting events
15 experienced in California. In other words, § 32310 appears to be a poor fit as a means for
16 the State to achieve its four important objectives.
17

18 In East Oakland, the shooter had already demonstrated that he was not a law-
19 abiding responsible gun owner. On the contrary, the Mayors' survey notes that "[t]he
20 shooter had a lengthy criminal history, including a conviction for armed battery, which
21 would have [already] prohibited him from possessing a gun." It notes that "he was on
22 parole for assault with a deadly weapon at the time of the shooting." It also notes that
23 one month before the mass shooting incident in which police officers were targeted,
24 "[t]he shooter took part in a home invasion robbery . . . in which a rifle was reported
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1
2 stolen.” Criminalizing possession of a magazine holding any more than 10 rounds, as the
3 amendments to § 32310 do, likely would have had no effect on this perpetrator.

4 The shooter was already prohibited from possessing a gun, by virtue of his
5 criminal history. He was already at risk of arrest simply by possessing a gun. Moreover,
6 he was probably subject to a Fourth Amendment waiver and search at any time by state
7 parole officers, as a result of being on parole for assault with a deadly weapon. It does
8 not take much imagination to guess that, notwithstanding the amendments to § 32310
9 (c) & (d), the shooter in that case would have continued to illegally possess his illegally
10 acquired large capacity magazines for use with his illegally possessed firearms.

11 12 13 14 **(n) a slippery slope**

15 What is clear from the preliminary evidence presented is that individuals who
16 intend to engage in mass gun violence typically make plans. They use multiple weapons
17 and come loaded with extra ammunition. They pick the place and the time and do much
18 harm before police can intervene. Persons with violent intentions have used large
19 capacity magazines, machine guns, hand grenades and pipe bombs, notwithstanding laws
20 criminalizing their possession or use. Trying to legislatively outlaw the commonly
21 possessed weapon *de jour* is like wearing flip flops on a slippery slope. A downhill slide
22 is not hard to foresee.

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26 Tragically, when 30-round magazines are banned, attackers will use 15 or 17-
27 round magazines. If magazines holding more than 10 rounds are banned they will use
28 multiple 10-round magazines. If all semi-automatic weapons are banned they will use

1
2 shotguns and revolvers. All of these scenarios already occur. Because revolvers and
3 handguns are the quintessential home defense weapon protected by the Second
4 Amendment and specifically approved in *Heller*, and because the average defensive gun
5 use involves firing 2.2 rounds (according to the State's experts), states could rationalize a
6 ban on possession of rounds in excess of three per weapon.¹³ Criminals intent on
7 violence would then equip themselves with multiple weapons. The State could then
8 rationalize a one-weapon-per-individual law. Since "merely" brandishing a firearm is
9 usually effective as a defense to criminal attack (according to the State's experts), it could
10 be argued that a one-revolver-with-one-round-per-individual ban is a reasonable
11 experiment in state police power as a means to protect citizens and law enforcement
12 officers from gun violence.
13

14
15 Statutes disarming law-abiding responsible citizen gun owners reflect an opinion
16 on gun policy. Courts are not free to impose their own policy choices on sovereign
17 states. But as *Heller* explains, the Second Amendment takes certain policy choices and
18 removes them beyond the realm of debate. Disarming California's law-abiding citizenry
19 is not a constitutionally-permissible policy choice.
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21
22
23

24 ¹³In drawing lines and defining how a regulation "fits," this is not so far-fetched. Indeed,
25 in the past New York State drew the line at seven live rounds arguing that since the
26 average citizen expends only two rounds in self-defense, citizens should make do with
27 seven rounds." See *New York State Rifle and Pistol Ass'n v. Cuomo*, 990 F. Supp. 2d
28 349, 372 (W.D.N.Y. 2013), *aff'd in part and rev'd in part*, 804 F.3d 242 (2nd Cir. 2015)
("Defendants contend, pointing to a study conducted by the NRA, that the average citizen
using his or her weapon in self-defense expends only two bullets. Thus, New York
argues, citizens do not truly need more than seven rounds.").

1
2 To the specific point, a mass shooting accomplished with the use of a gun
3 magazine holding more than 10 rounds of ammunition, or any number of rounds, is an
4 exceedingly tragic event. Fortunately, it is also a rare event. Section 32310's ban and
5 criminalization of possession of magazines holding more than 10 rounds is not likely to
6 prevent future mass shootings. And § 32310 (c) & (d) do not provide a reasonable fit to
7 accomplish California's important goal of protecting the public from violent gun crime,
8 as the preliminary data set from the Mayors' survey bears out.
9
10

11 **ii. The State's Expert Declarations**

12 The preliminary expert witness declarations submitted by the Attorney General are
13 likewise unpersuasive. They do not constitute evidence reasonably believed to be
14 relevant to substantiate the State's important interests. *Fyock*, 779 F.3d at 1000 (city may
15 rely on evidence reasonably believed to be relevant). On the contrary, the data offered by
16 the Attorney General is made up of anecdotal accounts, collected by biased entities, upon
17 which educated surmises and tautological observations are framed. A statute
18 criminalizing the mere possession of an integral piece of a constitutionally protected
19 firearm, cannot be justified on the basis of defective data or emotion-driven claims. *City*
20 *of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438–39 (2002) (“This is not to say
21 that a municipality can get away with shoddy data or reasoning.”).
22
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26 **(a) Webster**

27 For example, the Attorney General submits the expert declaration of a professor of
28 health policy and management. *See* Declaration of Daniel W. Webster (filed 6/5/17).

1
2 Although the expert offers many opinions about the public safety threat posed by
3 magazines holding any more than 10 rounds, he concedes that robust supporting data is
4 missing. *“To date, there are no studies that have examined separately the effects of an*
5 *assault weapons ban, on the one hand, and a LCM ban, on the other hand” Id. at*
6 *¶ 25* (emphasis added). He then opines that the largest protective effect of these bans
7 comes from restricting magazines holding any more than 10 rounds because “LCMs are
8 used much more frequently than assault weapons.” As discussed earlier, however, the
9 Mayor’s survey paints a different picture. Without the benefit of unbiased, scientifically
10 collected empirical data, it is unclear upon what evidence Professor Webster is basing his
11 opinions.
12

13
14 The professor also acknowledges, that *“no formal, sophisticated analyses of data*
15 *on mass shootings in public places by lone shooters for the period 1982-2012 collected*
16 *by Mother Jones magazine has been performed to my knowledge” Id. at ¶ 22*
17 (emphasis added). He grudgingly admits in his declaration that “it is possible that the
18 federal ban on assault weapons and magazines holding more than 10 rounds did
19 contribute to a proportionately small yet meaningful reduction in gun violence, *but*
20 *available data and statistical models are unable to discern the effect.” Id. at ¶ 21*
21 (emphasis added). Nevertheless, the professor opines that California’s 10-round
22 magazine limit “seems prudent.” *Id. at ¶ 26*. In fact, he opines that “[i]ndeed, a lower
23 limit could be justified,” based on a complete absence of reliable studies done on formal
24 data sets. *Id.*
25
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28

(b) Allen

In another example, the Attorney General submits the declaration of an economist who, like the professor of public health, also acknowledges the shoddy state of empirical research on large capacity magazine use. *See* Declaration of Lucy P. Allen (filed 6/5/17). She found two comprehensive sources detailing mass shootings: (1) data from Mother Jones’ investigation published by Mother Jones magazine covering mass shootings from 1982-2017; and (2) a study by the Citizens Crime Commission of New York City covering 1984-2012. *Id.* at ¶ 11. She admits that between the two sources, “[f]or many of the mass shootings, the data does not indicate whether a large-capacity magazine is used.” *Id.* at ¶ 13 and n.9. In opining about the use of firearms in self-defense, the economist relies on a data set from the NRA Institute for Legislative Action, but admits that “it is not compiled scientifically.” *Id.* at ¶ 6.

(c) Donahue

In yet another example, the Attorney General submits the declaration of a professor with graduate degrees in economics (from Yale) and law (from Harvard University). *See* Declaration of John J. Donahue (filed 6/5/17). Professor Donahue also notes the dearth of solid data, conceding, “*I am not aware of any current social science research providing an estimate for the number of American households that own large-capacity magazines or LCMs . . . or for the number of LCMs in private hands in America.*” *Id.* at ¶ 19 (emphasis added). Citing a few news articles and little more, he opines that, “a review of the resolution of mass shootings in the U.S. suggests that bans on large

1
2 capacity magazines can help save lives by forcing mass shooters to pause and reload
3 ammunition.” *Id.* at ¶ 21.

4
5 Ironically, Professor Donahue’s declaration was signed, and the preliminary
6 injunction hearing in this case was held, one day before the shooting incident at the
7 baseball field in Alexandria, Virginia. There, a shooter targeted members of a
8 Congressional baseball team firing up to 100 rounds. No one tried to tackle or disarm the
9 shooter while he paused to reload. Instead, it ultimately took two Capitol Police
10 members who were already at the scene to stop the shooter. As Michigan Representative
11 Mike Bishop told CBS News Detroit at the scene,
12

13
14 “The only reason why any of us walked out of this thing, by the grace of
15 God, one of the folks here had a weapon to fire back and give us a moment
16 to find cover. We were inside the backstop and if we didn’t have that cover
17 by a brave person who stood up and took a shot themselves, we would not
18 have gotten out of there and every one of us would have been hit – every
19 single one of us.”

20 See <http://detroit.cbslocal.com/2017/06/14/michigan-representative-ok;>
21 <http://dailymail.co.uk/news/article-4603404>. Likewise, the shooting at Fort Hood, Texas,
22 involved a shooter using a FN “Five-seveN” pistol which comes standard with a 10 or 20
23 round magazine. The shooter fired some 220 rounds, meaning he would have had to stop
24 and re-load a 20-round high capacity magazine ten times. Yet no one, even on a military
25 base, tried to tackle or disarm the shooter while he paused to reload.

26
27 The expert witness also belittles the possibility of an elderly or disabled
28 homeowner needing a firearm for self-defense from a violent home invasion that would

1
2 hold enough rounds such that reloading was not necessary. The elderly or disabled
3 homeowner suffering a violent home invasion attack may need (more than anyone else) a
4 larger capacity magazine for home protection. That person, the expert decries as
5 “mythical,” and “conjured” up by NRA experts, and dismisses as irrelevant. *Id.* at ¶ 28.

7 Professor Donahue then speculates about how *if* there were a “future case” of a
8 law-abiding citizen who needs a gun for self-defense and needs more than 10 rounds, that
9 citizen “can either re-load the defensive weapon by inserting a new clip or by using a
10 second weapon.” *Id.* at ¶ 36. Based upon his own speculation, he then opines that this
11 implies the large capacity magazine ban is “well-tailored” and likely to have little or no
12 impact on self-defense capability. *Id.*

15 The professor did not need to speculate about some unlikely, hypothetical, future
16 case. The scenario has actually played out in the past. And it turns out that his
17 speculation was a bit off. Among the Attorney General’s evidentiary presentation is a
18 news account of a law-abiding woman and her husband who late one night needed to fire
19 a gun in self-defense against armed robbers. *Oppo. Gordon Declaration, Exh. 41.*

22 As two armed men broke in, Susan Gonzalez was shot in the chest. She made it
23 back to their bedroom and found her husband’s .22 pistol. Wasting the first rounds on
24 warning shots, she then emptied the single pistol at one attacker. Unfortunately, out of
25 ammunition, she was shot again by the other armed attacker. She was not able to re-load
26 or use a second gun. Both her and her husband were shot twice. Forty-two bullets were
27 fired. *Id.*, Exh. 41 (Jacksonville Times-Union, July 18, 2000) (“Suddenly the door flew
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2 open and two masked men burst into the doublewide wearing gloves and camouflage
3 jackets and waving guns She was shot in the chest . . . dialed 911 . . . then grabbed
4 her husband's Ruger .22 from a drawer . . . fired several shots over the robbers' heads to
5 scare them off . . . saw one of the gunmen . . . crouched near her refrigerator. . . sneaked
6 up behind him and emptied the Ruger, hitting him twice with her seven or eight
7 remaining bullets. The other gunman . . . then shot Susan Gonzalez, now out of
8 ammunition. [The gunman] fled from the house but returned . . . [.] He put a gun to
9 Susan Gonzalez's head and demanded the keys to the couple's truck."); *cf.* Oppo. Gordon
10 Declaration, Exh. 102 at 388 (Washington Post, Jan. 30, 2013, Transcript of Senate
11 Judiciary Committee Hearing on Gun Violence), Senator L. Graham remarks: "I do not
12 know if 10 versus 19 is common or uncommon. I do know that 10 versus 19 in the hands
13 of the wrong person is a complete disaster. I do know that six bullets in that hands [sic]
14 of a woman trying to defend her children may not be enough. . . [.] One bullet in the
15 hands of the wrong person we should all try to prevent. But when you start telling me
16 that I am unreasonable for wanting that woman to have more than six bullets, or to have
17 and AR-15 if people [are] roaming around my neighborhood, I reject the concept."). The
18 Attorney General's own evidence casts doubt on the reliability of his experts' opinions.

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25 **(d) James**

26 The Attorney General submits the declaration of a retired police chief of
27 Emeryville, California. *See* Declaration of Ken James (filed 6/5/17). James relies on his
28 police experience and debriefings of several high profile mass shootings. He says that

1
2 the existence of high capacity magazines only serves to enhance the killing and injuring
3 potential of a firearm. *Id.* at ¶ 6. No quarrel there. Firearms have the potential to injure
4 and kill.¹⁴ He then opines that “possession and use of high capacity magazines by
5 individuals committing criminal acts pose a significant threat to law enforcement
6 personnel and the general public.” No doubt about that. He does not, however, try to
7 explain why forcing law-abiding individuals to disarm and dispossess themselves of
8 magazines holding more than 10-rounds is the solution. He simply suggests that victims
9 have not used them in the past and so they do not need them now. *Id.* at ¶ 8. It is hardly
10 surprising, however, that law-abiding citizens in California, who have been prohibited for
11 years from buying guns with magazines holding more than 10 rounds, would fire no more
12 than 10 rounds in a self-defense situation.
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16 James also describes one professional investigation experience in which he took
17 part. Whatever else James draws from the experience, his experience suggests that a
18 criminal firing 40 rounds does not always result in a mass shooting disaster or wounded
19 bystanders. He describes an Emeryville drive-by shooting where more than 40 shell
20 casings were found at the scene; only one person was killed and no other person was
21 injured. *Id.* at ¶ 7. Having read and viewed news accounts of self-defense gun use,
22 James then says, “I have performed these reviews to discover evidence that the ability of
23 a victim to fire a large number was necessary.” *Id.* at ¶ 8. Perhaps he meant to say the
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¹⁴At the same time, they have the potential to deter and protect.

opposite. Lastly, James' declaration relies on a position paper that appears to have been inadvertently omitted.

(e) City of Sunnyvale

In the *Fyock* case, the court had a sufficiently convincing evidentiary record of a reasonable fit. But there are important differences between the City of Sunnyvale and the entire State of California. Sunnyvale is the crown jewel of California's Silicon Valley. It has a population density of approximately 6,173 persons per square mile, according to the 2010 census. Sunnyvale has consistently ranked among the ten safest cities (of similar size) according to the FBI's crime reports. According to a Wikipedia article, "Sunnyvale is one of the few U.S. cities to have a single unified Department of Public Safety, where all personnel are trained as firefighters, police officers, and EMTs, so they can respond to an emergency in any of the three roles." In a dense population municipality where the local government has uniquely cross-trained emergency personnel that can quickly respond to crime, perhaps a law-abiding citizen can make do with a maximum of ten rounds for self-defense. And perhaps there is a higher risk of stray bullets penetrating walls and wounding bystanders. And perhaps there are few elderly or disabled single adults living alone and far from help in Sunnydale. Perhaps residents are wealthy enough to purchase multiple firearms or live in gated, security-guarded enclaves.

Compare this with Imperial County, California, with a population approximately the same as the City of Sunnyvale. There the population density is only 34 persons per square mile. In Alpine County, California, the entire county population is 1,175 people,

1 according to the 2010 census. Population density is two persons per square mile. Law
 2 enforcement response times are no doubt longer there. The risk of stray bullets wounding
 3 bystanders is probably low. It is likely that many rely on themselves and their lawfully-
 4 owned firearms for self-defense. Certainly in suburban and rural settings, there will be
 5 occasions when more than 10-rounds are needed for self-defense. Even in San Francisco,
 6 with the densest population area in the State (17,858 people per square mile¹⁵), one court
 7 conceded that more than 10 rounds may be needed for defense from criminals. *See San*
 8 *Francisco Police Officers Ass'n v. City and County of S.F.*, 18 F. Supp. 3d 997, 1005
 9 (N.D. Cal. 2014) (“Although there will be some occasions when a law-abiding citizen
 10 needs more than ten rounds to defend himself or his family, the record shows that such
 11 occasions are rare. This will be even rarer in a dense urban area like San Francisco where
 12 police will likely be alerted at the onset of gunfire and come to the aid of the victim.
 13 Nonetheless, in those rare cases, to deprive the citizen of more than ten shots may lead to
 14 his of her own death. Let this point be conceded.”).

20 **iii. False Dichotomy**

21 In the end, it is a false dichotomy upon which the Attorney General rests his
 22 evidentiary case. The Attorney General argues that any magazine in criminal hands with
 23 more than 10 rounds is “unusually dangerous” to law-abiding citizens. (“Unusually
 24 dangerous” is not the same as the Second Amendment reference point of “unusual and
 25 dangerous” is not the same as the Second Amendment reference point of “unusual and
 26 dangerous” is not the same as the Second Amendment reference point of “unusual and
 27 dangerous” is not the same as the Second Amendment reference point of “unusual and

28 ¹⁵See www.sacbee.com/news/politics-government/capitol-alert/article 12486362.html
 (Mar. 4, 2015).

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2 dangerous.”) At the same time he (and his experts) declare that no good law-abiding
3 citizen really *needs* a gun magazine holding more than 10 rounds for self-defense.

4
5 As a purely public policy choice, a government may declare that firearms of any
6 capacity are dangerous in the hands of criminals, a proposition with which this Court
7 would certainly agree. At the same time, it can also be the case that firearms with larger
8 than 10-round magazines in the hands of law-abiding citizens makes every individual
9 safer and the public as a whole safer. Guns in the hands of criminals are dangerous; guns
10 in the hands of law-abiding responsible citizens ameliorate that danger. The Second
11 Amendment takes the policy choice away from state government. To give full life to the
12 core right of self-defense of the home, every law-abiding responsible United States
13 citizen has a constitutionally-protected right to keep and bear a handgun (a handgun
14 being the quintessential weapon of choice). Pistols are handguns. Pistols are designed to
15 use magazines of various capacities and some of the most popular come standard with 15
16 or 17 round magazines.

17
18 Using the resources of the criminal justice system against the law-abiding
19 responsible citizen to wrest a heretofore lawfully-posessed magazine holding any more
20 than 10 rounds out of his or her hands, is hardly the reasonable fit required by
21 intermediate scrutiny. The “evidence must fairly support” the “rationale” for the state’s
22 statute. *Jackson*, 746 F.3d at 969–70. “[A]nd courts should not credit facially
23 implausible legislative findings.” *Id.*

iv. Ballot Initiative Finding

Here, there are no legislative findings as the statutory provisions in effect are the product of a voter initiative. The initiative contains findings. But to the extent the findings are relevant, they expresses a purpose that affronts the over-arching ideal of the Second Amendment. Sections 2.11 and 2.12 of Proposition 63, in the section titled “Findings and Declarations” addresses “military-style large-capacity ammunition magazines.” It declares, “*No one except trained law enforcement should be able to possess these dangerous magazines.*” (Emphasis added.)

The rationale is anathema to the United States Constitution’s Bill of Rights guarantee of a right to keep and bear arms. It is a right naturally possessed by regular, law-abiding responsible citizens, whom are neither reliant upon, nor subservient to, a privileged, powerful, professional police state.¹⁶

¹⁶ See e.g., *Silveira v. Lockyer*, 328 F.3d 567, 569-70 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing *en banc*). Judge Kozinski cautions against,

... fall[ing] prey to the delusion – popular in some circles – that ordinary people are too careless and stupid to own guns, and we would be far better off leaving all weapons in the hands of professionals on the government payroll. But the simple truth – born of experience – is that tyranny thrives best where government need not fear the wrath of an armed people. Our own sorry history bears this out: Disarmament was the tool of choice for subjugating both slaves and free blacks in the South. In Florida, patrols searched blacks’ homes for weapons, confiscated those found and punished their owners without judicial process. See Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309, 338 (1991). In the North, by contrast, blacks exercised their right to bear arms to defend against racial mob violence. *Id.* at 341-42. As Chief Justice Taney well appreciated, the institution of slavery required a class of people who lacked the means to

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2 A reasonable fit as a means to protect citizens and law enforcement from gun
3 violence and crime, in a state with numerous military bases and service men and service
4 women, would surely permit the honorably discharged member of the Armed Forces who
5 has lawfully maintained a magazine holding more than 10 rounds for more than twenty
6 years to continue to keep and use his magazine. These citizens are perhaps the best

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9 resist. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (finding
10 black citizenship unthinkable because it would give blacks the right to “keep
11 and carry arms wherever they went”). A revolt by Nat Turner and a few
12 dozen other armed blacks could be put down without much difficulty; one
13 by four million armed blacks would have meant big trouble.

14 All too many of the other great tragedies of history – Stalin’s atrocities, the
15 killing fields of Cambodia, the Holocaust, to name but a few – were
16 perpetrated by armed troops against unarmed populations. Many could well
17 have been avoided or mitigated, had the perpetrators known their intended
18 victims were equipped with a rifle and twenty bullets apiece, as the Militia
19 Act required here. If a few hundred Jewish fighters in the Warsaw Ghetto
20 could hold off the Wehrmacht for almost a month with only a handful of
21 weapons, six million Jews armed with rifles could not so easily have been
22 herded into cattle cars.

23 My excellent colleagues have forgotten these bitter lessons of history. The
24 prospect of tyranny may not grab the headlines the way vivid stories of gun
25 crime routinely do. But few saw the Third Reich coming until it was too
26 late. The Second Amendment is a doomsday provision, one designed for
27 those exceptionally rare circumstances where all other rights have failed
28 where the government refuses to stand for reelection and silences those who
29 protest; where courts have lost the courage to oppose, or can find no one to
30 enforce their decrees. However improbable these contingencies may seem
31 today, facing them unprepared is a mistake a free people get to make only
32 once.

33 Fortunately, the Framers were wise enough to entrench the right of the
34 people to keep and bear arms within our constitutional structure. The
35 purpose and importance of that right was still fresh in their minds, and they
36 spelled it out clearly so it would not be forgotten.

1
2 among us. They have volunteered to serve and have served and sacrificed to protect our
3 country. They have been specially trained to expertly use firearms in a conflict. Oppo.
4 Gordon Declaration, Exh. 102 at 389 (Washington Post, Jan. 30, 2013, Transcript of
5 Senate Judiciary Committee Hearing on Gun Violence), Senator J. Johnson remarks: “It
6 is my understanding talking with my associates in the military, that public policing
7 mirrors much of what the military does.” They have proven their good citizenship by
8 years of lawfully keeping firearms as civilians. What possibly better citizen candidates to
9 protect the public against violent gun-toting criminals?
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12 Similarly, a reasonable fit as a means to protect citizens and law enforcement from
13 gun violence and crime, would surely make an exception for a Department of Justice-
14 vetted, privately trained citizen to whom the sheriff has granted a permit to carry a
15 concealed weapon, and whom owns a magazine holding more than 10 rounds.
16 California’s statute does not except such proven, law-abiding, trustworthy, gun-owning
17 individuals. Quite the opposite. Under the statute, if not enjoined, all of these worthy
18 individuals will become outlaws on July 1, 2017, should they not dispossess themselves
19 of magazines holding 10+ rounds they currently own.¹⁷
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25 ¹⁷There is some irony in the fact that these CCW holders have abided by the law. In
26 applying for a concealed weapon permit, they disclose, *inter alia*, their name, physical
27 address, date and place of birth, criminal history, traffic violation history, and the
28 particular type and caliber of firearm (including serial number) they intend to carry. See
Cal. Pen. Code § 26175. In so doing, they provided a ready-made list of gun-owning
citizens and a list of the types of guns they carry, which guns are likely to use magazines
holding more than 10 rounds.

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2 The Attorney General articulates four important objectives to justify this new
3 statutory bludgeon. They all swing at reducing “gun violence.” The bludgeon swings to
4 knock large capacity magazines out of the hands of criminals. If the bludgeon does not
5 work, then the criminals still clinging to their large capacity magazines will be thrown in
6 jail while the magazines are destroyed as a public nuisance. The problem is the bludgeon
7 indiscriminately hammers all that is in its path. Here, it also hammers magazines out of
8 the hands of long time law-abiding citizens. It hammers the 15-round magazine as well
9 as the 100-round drum. And it throws the law-abiding, self-defending citizen who
10 continues to possess a magazine able to hold more than 10 rounds into the same jail cell
11 as the criminal. Gun violence to carry out crime is horrendous and should be condemned
12 by all. Defensive gun violence may be the only way a law-abiding citizen can avoid
13 becoming a victim.

14
15 Put differently, violent gun use is a constitutionally-protected means for law-
16 abiding citizens to protect themselves from criminals. The phrase “gun violence” may
17 not be invoked as a talismanic incantation to justify any exercise of state power. Implicit
18 in the concept of public safety is the right of law-abiding people to use firearms and the
19 magazines that make them work to protect themselves, their families, their homes, and
20 their state against all armed enemies, foreign and domestic. To borrow a phrase, it would
21 indeed be ironic if, in the name of public safety and reducing gun violence, statutes were
22 permitted to subvert the public’s Second Amendment rights – which may repel criminal
23 gun violence and which ultimately ensure the safety of the Republic. *Cf. United States v.*

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2 *Robel*, 389 U.S. 258, 264 (1967) (“Implicit in the term ‘national defense’ is the notion of
3 defending the values and ideals which set this Nation apart. . . . It would indeed be ironic
4 if, in the name of national defense, we would sanction the subversion of one of those
5 liberties – the freedom of association – which makes the defense of the Nation
6 worthwhile.”).

7 8 **2. Irreparable Harm**

9
10 There are elements of Second Amendment jurisprudence that have First
11 Amendment analogies. *See Jackson*, 746 F.3d at 960. The Ninth Circuit has held that the
12 “[t]he loss of First Amendment freedoms, for even minimal periods of time,
13 unquestionably constitutes irreparable injury.” *Associated Press v. Otter*, 682 F.3d 821,
14 826 (9th Cir. 2012) (alteration in original) (quoting *Elrod v. Burns*, 427 U.S. 347, 373
15 (1976)). A “colorable First Amendment claim” is “irreparable injury sufficient to merit
16 the grant of relief.” *Warsoldier v. Woodford*, 418 F.3d 989, 1001 (9th Cir. 2005)
17 (internal quotation marks omitted). “If the underlying constitutional question is close. . .
18 we should uphold the injunction and remand for trial on the merits.” *Ashcroft v. Am.*
19 *Civil Liberties Union*, 542 U.S. 656, 664-65 (2004). The same is true for Second
20 Amendment rights. Their loss constitutes irreparable injury. Perhaps even more so in
21 this context, where additional rounds may save lives, and where Plaintiffs and those like
22 them will irrevocably lose possession and use of their magazines upon delivery to the
23 police to be destroyed, or upon sale to a firearms dealer who will have little market for re-
24 sale, or upon shipment somewhere out of state. The right to keep and bear arms protects
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2 tangible and intangible interests which cannot be compensated by damages. *Grace v.*
3 *District of Columbia*, 187 F. Supp. 3d 124, 150 (D.D.C. 2016) (quoting *Ezell v. City of*
4 *Chicago*, 651 F.3d 684, 699 (7th Cir. 2011). “The right to bear arms enables one to
5 possess not only the means to defend oneself but also the self-confidence – and psychic
6 comfort – that comes with knowing one could protect oneself if necessary.” *Grace*, 187
7 F. Supp. 3d at 150. Loss of that peace of mind, the physical magazines, and the
8 enjoyment of Second Amendment rights constitutes irreparable injury.
9
10

11 **3. Balance of Hardships**

12 Balancing in the First Amendment context weighs more heavily the chilled rights
13 of individuals, especially when criminal sanctions loom. “As to the balance of equities,
14 we recognize that while the preliminary injunction is pending, there will be some
15 hardship on the State. Nevertheless, the balance of equities favors Appellees, whose First
16 Amendment rights are being chilled. This is especially so because the Act under scrutiny
17 imposes criminal sanctions for failure to comply.” *Doe v. Harris*, 772 F.3d 563, 583 (9th
18 Cir. 2014). “Where a prosecution is a likely possibility, yet only an affirmative defense is
19 available, speakers may self-censor rather than risk the perils of trial. There is a potential
20 for extraordinary harm and a serious chill upon protected speech.” *Ashcroft v. Am. Civil*
21 *Liberties Union*, 542 U.S. 656, 670-71 (2004). The same is true here. While a
22 preliminary injunction is pending, there will be some hardship on the State.
23 Nevertheless, because §32310 (c) & (d) impose criminal sanctions for a failure to act it
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2 poses the potential for extraordinary harm on Plaintiffs, while discounting their Second
3 Amendment rights. The balance of hardships favors Plaintiffs.

4 **4. Public Interest**

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6 “Once an applicant satisfies the first two factors [likelihood of success on the
7 merits and irreparable harm], the traditional stay inquiry calls for assessing the harm to
8 the opposing party and weighing the public interest. These factors merge when the
9 Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009); *U.S.*
10 *S.E.C. v. Wilde*, 2013 WL 2303761, at *8 (C.D. Cal. May 20, 2013); *Native Songbird*
11 *Care and Conservation v. LaHood*, 2013 WL 3355657, at *12 (N.D. Cal. July 2, 2013);
12 *Tracy Rifle & Pistol LLC v. Harris*, 118 F. Supp. 3d 1182, 1193 (E.D. Cal. 2015).

13
14 The public interest favors the exercise of Second Amendment rights by law-
15 abiding responsible citizens. And it is always in the public interest to prevent the
16 violation of a person’s constitutional rights. *Hobby Lobby Stores, Inc. v. Sibelius*, 723
17 F.3d 1114, 1145 (10th Cir. 2013), *aff’d sub nom., Burwell v. Hobby Lobby Stores, Inc.*,
18 134 S. Ct. 2751 (2014); *Doe*, 772 F.3d at 583 (quoting *Sammartano v. First Judicial*
19 *Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002)) (“Finally, the public interest favors the
20 exercise of First Amendment rights. Although we appreciate the State’s significant
21 interest in protecting its citizens from crime, nothing in the record suggests that enjoining
22 the CASE Act would seriously hamper the State’s efforts to investigate online sex
23 offenses, as it can still employ other methods to do so. On the other hand, we ‘have
24 consistently recognized the significant public interest in upholding First Amendment
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principles.’’). The balance of equities and the public interest merge when a likely constitutionally infringing statute is preliminarily enjoined to maintain the *status quo*. That is the case here.

B. The Government Takings Claim

The Attorney General asserts 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. *See* Oppo. at 22, (citing *Chicago, B. & Q. Railway Co. v. Illinois*, 200 U.S. 561, 593-594 (1906) and *Akins v. United States*, 82 Fed. Cl. 619, 622 (2008)). The Attorney General then cites a number of courts that have rejected Takings Clause challenges to laws banning the possession of dangerous weapons. *See* Oppo. at 23 (citing *Akins*, 82 Fed. Cl. at 623-24 (restrictions on manufacture and sale of machine guns not a taking) and *Gun South, Inc. v. Brady*, 877 F.2d 858, 869 (11th Cir. 1989) (temporary suspension on importation of assault weapons not a taking)). California has deemed large capacity magazines to be a nuisance. *See* Cal. Pen. Code § 32390. That designation is dubious. As the Supreme Court recognized a decade before *Heller*, “[g]uns in general are not ‘deleterious devices or products or obnoxious waste materials.’” *Staples v. United States*, 511 U.S. 600, 610 (1994) (citation omitted).

Plaintiffs remonstrate that defending the law’s forced, uncompensated, physical dispossession of magazines holding more than 10 rounds as an exercise of its “police power” is not persuasive. Supreme Court precedent casts doubt on the State’s theory that

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2 an exercise of the police power cannot constitute physical takings. *Loretto v.*
3 *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In *Loretto* – a case the
4 Attorney General does not cite – the Supreme Court held that a law requiring physical
5 occupation of private property was both “within the State’s police power” and an
6 unconstitutional physical taking. The Court explained that whether a law effects a
7 physical taking is “a separate question” from whether the state has the police power to
8 enact the law. *Id.* at 425-26 (“It is a separate question, however, whether an otherwise
9 valid regulation so frustrates property rights that compensation must be paid. We
10 conclude that a permanent physical occupation authorized by government is a taking
11 without regard to the public interests that it may serve.”).

12
13 In a similar vein, the Supreme Court holds that a law enacted pursuant to the state’s
14 “police powers to enjoin a property owner from activities akin to public nuisances” is not
15 immune from scrutiny under the regulatory takings doctrine. *Lucas v. South Carolina*
16 *Coastal Council* 505 U.S. 1003, 1020-27 (1992). The Court reasoned that it was true
17 “[a] fortiori” that the “legislature’s recitation of a noxious-use justification cannot be the
18 basis for departing from our categorical rule that total regulatory takings must be
19 compensated.” *Id.* at 1026.

20
21 Recently, the Supreme Court summarized some of the fundamental principles of
22 takings law. *Murr v. Wisconsin*, __ S. Ct. __, 2017 WL 2694699 (Jun. 23, 2017). “The
23 Takings Clause of the Fifth Amendment provides that private property shall not be taken
24 for public use, without just compensation. The Clause is made applicable to the States

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2 through the Fourteenth Amendment. As this Court has recognized, the plain language of
3 the Takings Clause requires the payment of compensation whenever the government
4 acquires private property for a public purpose, but it does not address in specific terms
5 the imposition of regulatory burdens on private property.” *Id.* at *7 (quotations and
6 citations omitted). *Murr* notes that almost a century ago, the Court held that “while
7 property may be regulated to a certain extent, if regulation goes too far it will be
8 recognized as a taking.” *Id.* (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393,
9 415 (1922)).

10
11 Takings jurisprudence is flexible. There are however, two guides set out by *Murr*
12 for detecting when government regulation is so burdensome that it constitutes a taking.
13 “First, with certain qualifications a regulation which denies all economically beneficial or
14 productive use of land will require compensation under the Takings Clause. Second,
15 when a regulation impedes the use of property without depriving the owner of all
16 economically beneficial use, a taking still may be found based on a complex of factors,
17 including (1) the economic impact of the regulation on the claimant; (2) the extent to
18 which the regulation has interfered with distinct investment-backed expectations; and (3)
19 the character of the governmental action.” *Murr*, 2017 WL 2694699, at *8 (citations and
20 quotation marks omitted). “[A] physical *appropriation* of property g[ives] rise to a *per se*
21 taking, without regard to other factors.” *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2427
22 (2015).
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1 The dispossession requirement of § 32310(c) & (d) imposes a rare hybrid taking.
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3 Subsection (d)(3) is a type of physical appropriation of property in that it forces owners
4 of large capacity magazines to “surrender” them to a law enforcement agency “for
5 destruction.” Thus, (d)(3) forces a *per se* taking requiring just compensation. But there
6 are two other choices. Subsection (d)(2) forces the owner to sell his magazines to a
7 firearms dealer. It is a fair guess that the fair market value of a large capacity magazine
8 on or after July 1, 2017, in the State of California, will be near zero. Of course, the
9 parties spend little time debating the future fair market value for the to-be-relinquished
10 magazines. Subsection (d)(1) forces the owner to “remove” their large capacity
11 magazines “from the state,” without specifying a method or supplying a place. This
12 choice obviously requires a place to which the magazines may be lawfully removed. In
13 other words, (d)(1) relies on other states, in contrast to California, which permit
14 importation and ownership of large capacity magazines. With the typical retail cost of a
15 magazine running between \$20 and \$50, the associated costs of removal and storage and
16 retrieval may render the process more costly than the fair market value (if there is any) of
17 the magazine itself. Whatever stick of ownership is left in the magazine-owner’s “bundle
18 of sticks,” it is the short stick.

19 Here, California will deprive Plaintiffs not just of the *use* of their property, but of
20 *possession*, one of the most essential sticks in the bundle of property rights. Of course, a
21 taking of one stick is not necessarily a taking of the whole bundle. *Murr*, 2017 WL
22 2694699, at *19 (Roberts, C.J., dissenting) (“Where an owner possesses a full ‘bundle’ of
23 sticks, it is the short stick.”)

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2 property rights, the destruction of one strand of the bundle is not a taking, because the
3 aggregate must be viewed in its entirety.”). Nevertheless, whatever expectations people
4 may have regarding property regulations, they “do not expect their property, real or
5 personal, to be actually occupied or taken away.” *Horne*, 135 S. Ct. at 2427. Thus,
6 whatever might be the State’s authority to ban the sale or use of magazines over 10
7 rounds, the Takings Clause prevents it from compelling the physical *dispossession* of
8
9 such lawfully-acquired private property without just compensation.
10

11 Plaintiffs have demonstrated a likelihood of success on the merits of their
12 governmental takings claim. Without compensation, Plaintiffs will be irreparably harmed
13 as they will no longer be able to retrieve or replace their “large” capacity magazines as
14 long as they reside in California. As the law-abiding owner relinquishes his magazine, he
15 or she may also forfeit the self-defense peace of mind that a large capacity magazine had
16 instilled. As in other cases where constitutional rights are likely chilled, the balance of
17 hardships weighs in the citizen’s favor. *Doe*, 772 F.3d at 583 (“As to the balance of
18 equities, we recognize that while the preliminary injunction is pending, there will be
19 some hardship on the State.”).
20
21
22

23 The public interest also favors the protection of an individual’s core Second
24 Amendment rights and his or her protection from an uncompensated governmental taking
25 that goes too far. Notably, a preliminary injunction will not increase the number of large
26 capacity magazines lawfully present in California. The State may continue to investigate
27 and prosecute the unlawful importation, purchase, sale, manufacturing, etc., of large
28

1
2 capacity magazines during the pendency of a preliminary injunction. Regardless of the
3 likelihood of success on Plaintiffs' Second Amendment claims, Plaintiffs are also entitled
4 to a preliminary injunction to maintain the *status quo* and prevent irreparable injury under
5 the Takings Clause of the Constitution.
6

7 IV. CONCLUSION

8 Every injury or death caused by the misuse of a firearm is a tragedy. That the
9 mentally ill and violent criminals choose to misuse firearms is well known. This latest
10 incremental incursion into solving the "gun violence" problem is a reflexively simple
11 solution. But as H.L. Mencken wrote, "There is always a well-known solution to every
12 human problem – neat, plausible, and wrong."¹⁸
13
14

15 Magazines holding more than 10 rounds are "arms." California Penal Code
16 Section 32310, as amended by Proposition 63, burdens the core of the Second
17 Amendment by criminalizing the mere possession of these magazines that are commonly
18 held by law-abiding citizens for defense of self, home, and state. The regulation is
19 neither presumptively legal nor longstanding. The statute hits close to the core of the
20 Second Amendment and is more than a slight burden. When the simple test of *Heller* is
21 applied, a test that persons of common intelligence can understand, the statute is
22 adjudged an unconstitutional abridgment. Even under the more forgiving test of
23 intermediate scrutiny, the statute is not likely to be a reasonable fit. It is not a reasonable
24
25
26

27 ¹⁸ H.L. Mencken, *Prejudices: Second Series*, Alfred A. Knopf, Inc. (1920), p. 158.
28

1
2 fit because, among other things, it requires law-abiding concealed carry weapon permit
3 holders and Armed Forces veterans to dispossess themselves of lawfully-owned gun
4 magazines that hold more than 10 rounds – or suffer criminal penalties.
5

6 The Court does not lightly enjoin a state statute, even on a preliminary basis.
7 However, just as the Court is mindful that a majority of California voters approved
8 Proposition 63 and that the government has a legitimate interest in protecting the public
9 from gun violence, it is equally mindful that the Constitution is a shield from the tyranny
10 of the majority. Plaintiffs’ entitlements to enjoy Second Amendment rights and just
11 compensation are not eliminated simply because they possess “unpopular” magazines
12 holding more than 10 rounds.
13
14

15 If this injunction does not issue, hundreds of thousands, if not millions, of
16 otherwise law-abiding citizens will have an untenable choice: become an outlaw or
17 dispossess one’s self of lawfully acquired property. That is a choice they should not have
18 to make. Not on this record.
19

20 Accordingly, with good cause appearing for the reasons stated in this opinion,
21 Plaintiffs’ motion for a preliminary injunction is GRANTED.
22

23 ///

24 ///

25 ///

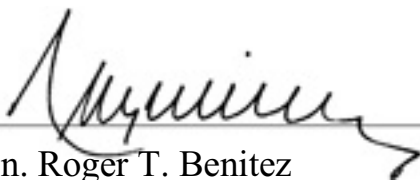
IT IS HEREBY ORDERED that:

1. Defendant Attorney General Xavier Becerra, and his officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with him, and those duly sworn state peace officers and federal law enforcement officers who gain knowledge of this injunction order or know of the existence of this injunction order, are enjoined from implementing or enforcing California Penal Code sections 32310 (c) & (d), as enacted by Proposition 63, or from otherwise requiring persons to dispossess themselves of magazines able to hold more than 10 rounds lawfully acquired and possessed.

2. Defendant Becerra shall provide, by personal service or otherwise, actual notice of this order to all law enforcement personnel who are responsible for implementing or enforcing the enjoined statute. The government shall file a declaration establishing proof of such notice.

IT IS SO ORDERED.

DATED: June 29, 2017


Hon. Roger T. Benitez
United States District Judge

NAME AND ADDRESS OF ATTORNEY

Alexandra Robert Gordon
 455 Golden Gate Avenue, Suite 11000
 San Francisco, CA 94102-7004

PHONE: (415) 703-5509

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA

TRIAL JUDGE Hon. Roger T. Benitez

COURT REPORTER Deborah O'Connell

VIRGINIA DUNCAN, et al.,

CIVIL NO. 17-cv-1017-BEN-JLB

(Appellant/Appellee) Plaintiff

vs

XAVIER BECERRA, in his official capacity as
 Attorney General of the State of California; et
 al.,

NOTICE OF APPEAL (Civil)

(Appellant/Appellee) Defendant

Notice is hereby given that Attorney General Xavier Becerra

Plaintiff ☒ Defendant above named, hereby appeals to the United States Court

of Appeals for the: (check appropriate box)

☒ Ninth Circuit

☐ Federal Circuit

from the: (check appropriate box)

☐ Final Judgment

☒ Order (describe)

entered in this proceeding on the 29 day of June 2017.

Transcripts required ☒ Yes ☐ No.

Date civil complaint filed: 5/17/17

Date: 7/27/17

/s/ Alexandra Robert Gordon

Signature

CERTIFICATE OF SERVICE

Case Name: **Duncan, Virginia et al v. Xavier
Becerra**

No. **17-cv-1017-BEN-JLB**

I hereby certify that on July 27, 2017, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

NOTICE OF APPEAL

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 27, 2017, at Sacramento, California.

Tracie L. Campbell
Declarant

/s/ *Tracie Campbell*
Signature

SA2017107272
12766650.doc

ER0068

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

VIRGINIA DUNCAN, ET AL.,
PLAINTIFFS,
V.
XAVIER BECERRA, ET AL.,
DEFENDANTS.
.

.
. NO. 17-CV-1017
. JUNE 13, 2017
. 10:05 A.M.
. SAN DIEGO, CALIFORNIA
.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE ROGER T. BENITEZ
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: MICHEL & ASSOCIATES PC
BY: SEAN BRADY, ESQ.
180 EAST OCEAN BOULEVARD, STE. 200
LONG BEACH, CALIFORNIA 90802

FOR THE DEFENDANTS: CALIFORNIA DEPARTMENT OF JUSTICE
ATTORNEY GENERAL'S OFFICE
BY: ALEXANDRA ROBERT GORDON, ESQ.
455 GOLDEN GATE AVENUE, STE. 11000
SAN FRANCISCO, CALIFORNIA 94102

COURT REPORTER: DEBORAH M. O'CONNELL, RPR, RMR, CSR
333 WEST BROADWAY, SUITE 420
SAN DIEGO, CALIFORNIA, 92101

REPORTED BY STENOTYPE, TRANSCRIBED BY COMPUTER

1 SAN DIEGO, CALIFORNIA, JUNE 13, 2017, 10:05 A.M.

2 * * * *

3
4 THE COURT: GOOD MORNING.

5 THE CLERK: ONE ON CALENDAR, CASE NO. 17-CV-1017,
6 DUNCAN, ET AL. V. BECERRA, ET AL., MOTION HEARING.

7 THE COURT: ALL RIGHT. COUNSEL, PLEASE REGISTER YOUR
8 APPEARANCES. PLEASE SPEAK SLOWLY SO I CAN WRITE DOWN YOUR
9 NAMES.

10 MR. BRADY: SEAN BRADY, ON BEHALF OF PLAINTIFFS.

11 MS. GORDON: ALEXANDRA ROBERT GORDON, ON BEHALF OF
12 DEFENDANTS.

13 THE COURT: TODAY IS THE DATE AND TIME SET FOR MOTION
14 HEARING ON THE REQUEST FOR PRELIMINARY INJUNCTION IN THIS CASE.

15 AND I BELIEVE THAT, MR. BRADY, YOU ARE THE ONE WHO IS
16 SEEKING THE INJUNCTION AND, THEREFORE, YOU HAVE THE BURDEN TO
17 GO FORWARD.

18 SO BEFORE WE START, HOWEVER, LET ME ASK MS. GORDON A
19 QUESTION.

20 WHICH VERSION OF SECTION 32310 IS IN EFFECT? IS IT THE
21 PROP 63 VERSION, OR IS IT THE SB-1446 VERSION?

22 MS. GORDON: IT IS THE PROP 63 VERSION, YOUR HONOR.
23 IT'S LATER ENACTED SO IT CONTROLS.

24 THE COURT: THANK YOU. ALL RIGHT. MR. BRADY --

25 BY THE WAY, I HAVE READ YOUR BRIEFS. I READ YOUR REPLY TO

1 THE OPPOSITION. I READ AN AWFUL LOT OF THE MATERIAL. I THINK
2 THERE WERE LIKE 2,000 PAGES BY -- SUBMITTED BY THE STATE, FILED
3 LATE, AS I RECALL.

4 YOU'RE SUPPOSED TO SUBMIT COURTESY COPIES TO US, ALONG
5 WITH YOUR OPPOSITION, WHICH YOU DID NOT DO. BUT I WILL FORGIVE
6 YOU THIS TIME, OKAY.

7 MS. GORDON: THANK YOU, YOUR HONOR.

8 THE COURT: ALL RIGHT. SO YOU COMPRESSED MY TIME TO
9 REVIEW ALL OF THIS. I MADE AN EFFORT TO TRY TO REVIEW ALL OF
10 WHAT WAS SUBMITTED, BUT I WILL TELL YOU I WAS NOT ABLE TO
11 REVIEW ALL OF IT. SO PLEASE FORGIVE ME IF I MISSPEAK OR MISS
12 SOMETHING.

13 ALL RIGHT, NOW MR. BRADY, THE FLOOR IS YOURS.

14 MR. BRADY: THANK YOU, YOUR HONOR.

15 WITH THE MOTION BEFORE YOU, THE PLAINTIFFS SEEK MERELY TO
16 PAUSE IMPLEMENTATION OF SECTION 32310, WHICH BANS THE
17 POSSESSION OF CERTAIN AMMUNITION MAGAZINES. AND IT IS BECAUSE
18 IT VIOLATES VARIOUS PROVISIONS OF THE CONSTITUTION AS LAID OUT
19 IN THE BRIEFING. AND UNLESS ENJOINED PRIOR TO JULY 1ST, COMING
20 UP HERE SOON, PLAINTIFFS, AS WELL AS COUNTLESS THOUSANDS OF
21 OTHER CALIFORNIANS IN THEIR POSITION, WILL BE PERMANENTLY AND
22 UNLAWFULLY DISPOSSESSED OF PROPERTY THAT THEY LAWFULLY
23 ACQUIRED. AS SUCH, I THINK THIS IS ESSENTIALLY A PERFECT
24 EXAMPLE OF A CASE WHERE PRELIMINARY INJUNCTION IS APPROPRIATE
25 TO PRESERVE THE LONGSTANDING STATUS QUO AND TO AVOID THOSE

1 INEQUITIES AND IRREPARABLE HARM OF DISPOSSESSING PEOPLE OF
2 THEIR PROPERTY.

3 THE RARITY OF CALIFORNIA'S LAW, BOTH IN SUBSTANCE AND
4 EFFECT, BELIES THE ATTORNEY GENERAL'S ASSERTIONS THAT THERE IS
5 SOME URGENCY OR NEED THAT THIS IS SOME NECESSARY PUBLIC SAFETY
6 MEASURE THAT NEEDS TO BE IMPLEMENTED BY JULY 1ST, AND THAT WE
7 CAN'T WAIT FOR LITIGATION.

8 THE COURT: AS I RECALL, THERE IS, WHAT, SEVEN STATES
9 IN THE DISTRICT OF COLUMBIA THAT HAVE ADOPTED SIMILAR
10 LEGISLATION.

11 MR. BRADY: THAT IS CORRECT, YOUR HONOR.

12 THE COURT: AND I THINK THEY SAID 11 JURISDICTIONS
13 OUT OF HOWEVER MANY THOUSANDS OF JURISDICTIONS WE HAVE IN THE
14 U.S.

15 MR. BRADY: THAT IS MY UNDERSTANDING. I DIDN'T DO AN
16 EXHAUSTIVE STUDY OF EVERY CITY OR COUNTY THAT DOES. WE FOCUSED
17 MAINLY ON THE STATES AND D.C.

18 THE COURT: YOUR POINT IS, THAT BECAUSE OF THE RARITY
19 OF THESE TYPES OF REGULATIONS, THAT INDICATES THAT THERE IS
20 REALLY NO PRESSING NEED TO DISPOSSESS PEOPLE OF THEIR OTHERWISE
21 LAWFULLY POSSESSED MAGAZINES?

22 MR. BRADY: PRECISELY, YOUR HONOR. SO THAT GOES TO
23 THE RARITY OF THE SUBSTANCE OF THIS PARTICULAR STATUTE. AND I
24 THINK THERE IS ALSO THE RARITY OF ITS EFFECT, WHICH IS ALSO
25 INSTRUCTIVE HERE. AND THAT IS THAT FEW LAWS COMPEL PHYSICAL

1 DISPOSSESSION OF PRIVATE PROPERTY. BUT FAR FEWER, IF ANY, GO
2 AS FAR AS CALIFORNIA'S LAW HERE, COMPELLING PHYSICAL
3 DISPOSSESSION OF PROPERTY OWNED BY TENS OF MILLIONS OF
4 AMERICANS, ACCORDING TO THE RECORD, FOR LAWFUL PURPOSES,
5 INCLUDING THE FUNDAMENTAL RIGHT TO SELF-DEFENSE AND CONVERTING
6 OTHERWISE LAW-ABIDING CITIZENS INTO CRIMINALS SOLELY FOR
7 CONTINUING TO POSSESS PROPERTY THAT THEY HAVE HAD FOR AT LEAST
8 17 YEARS WITHOUT INCIDENT.

9 SO AS YOUR HONOR SUGGESTED, SURELY IF THERE WAS THIS NEED
10 TO -- FOR THIS LAW TO GO INTO EFFECT, THERE WOULD BE MORE
11 STATES AND JURISDICTIONS THAT HAD SUCH A LAW --

12 THE COURT: AND THE FEDERAL BAN WAS ALLOWED TO LAPSE,
13 RIGHT?

14 MR. BRADY: THAT IS CORRECT, YOUR HONOR.

15 THE COURT: SO, OBVIOUSLY, AFTER MUCH REVIEW AND
16 DEBATE, THE FEDERAL GOVERNMENT BELIEVED THAT IT WAS NOT
17 NECESSARY AND THEN ALLOWED IT TO LAPSE; IS THAT A FAIR
18 STATEMENT?

19 MR. BRADY: THAT IS A COMPLETELY ACCURATE STATEMENT
20 AS FAR AS I UNDERSTAND HOW THINGS WENT. AND IT IS VERY
21 INFORMATIVE AND INSTRUCTIVE HERE, I BELIEVE, THAT THE
22 INDIVIDUAL TASKED WITH REVIEWING THE FEDERAL BAN,
23 MR. CHRISTOPHER KOPER.

24 THE COURT: DR. KOPER.

25 MR. BRADY: KOPER. MADE A REVIEW OF THAT PARTICULAR

1 LAW AND FOUND THERE WAS NO EFFECT. THAT IT HAD NO EFFECT ON
2 CRIME. IT HAD NO EFFECT ON SHOOTINGS. AND SINCE THAT TIME, IN
3 HIS -- AND THAT WAS IN 2004, WHEN HE MADE HIS INITIAL
4 ASSESSMENT OF THAT LAW. SINCE THEN, BECAUSE, YOU KNOW, PRO GUN
5 GROUPS HAVE LATCHED ON TO HIS WORK TO SHOW, LOOK, THE
6 INDIVIDUAL TASKED BY THE U.S. DEPARTMENT OF JUSTICE UNDER THE
7 CLINTON ADMINISTRATION, WHO WAS IN FAVOR OF THE BAN, SAYS THERE
8 IS NO DISCERNABLE EFFECT, HE SUDDENLY -- DR. KOPER SUDDENLY
9 CHANGED HIS TUNE AND SAID, HOLD ON, I DON'T WANT MY WORK TO BE
10 USED TO SUGGEST THAT THERE IS, YOU KNOW, NO BENEFIT TO THESE
11 THINGS. AND HE SAYS, BASED ON PURE SPECULATION, THAT I BELIEVE
12 THAT IF THE LAW HAD CONTINUED, OR IF IT WAS CHANGED SOMEWHAT,
13 THAT IT MAY HAVE MADE A DIFFERENCE. BUT THAT'S NOT BASED ON
14 THE TYPE OF CONCRETE EVIDENCE THAT THE GOVERNMENT NEEDS TO
15 SURVIVE HEIGHTENED SCRUTINY.

16 AND SO I THINK BASED ON THAT ALONE, THE GOVERNMENT CAN'T
17 MEET ITS BURDEN. BECAUSE UNDER ANY LEVEL OF HEIGHTENED
18 SCRUTINY FOR THE SECOND AMENDMENT CLAIM WE'RE TALKING ABOUT A
19 BAN. AND SO ONCE YOU'RE IN THE -- ONCE YOU ACCEPT --

20 THE COURT: YOU'RE NOT TALKING ABOUT A BAN. YOU'RE
21 TALKING ABOUT DISPOSSESSING PEOPLE OF SOMETHING THEY ALREADY
22 POSSESS.

23 MR. BRADY: CORRECT, YOUR HONOR. THAT IS UNDER THE
24 TAKINGS CLAIM.

25 THE COURT: BUT THAT'S OUR -- THAT IS WHY WE'RE

1 REALLY HERE TODAY IS ONLY WITH REGARDS TO C AND D, RIGHT?

2 MR. BRADY: YEAH.

3 THE COURT: THE STATUTE, RIGHT. SO WE'RE GOING TO
4 DECIDE WHETHER OR NOT PEOPLE CAN BE REQUIRED TO DISPOSSESS
5 THEMSELVES OF THESE MAGAZINES, PENDING A HEARING ON THE MERITS.

6 MR. BRADY: I THINK THAT IS FAIR TO SAY, YOUR HONOR,
7 YES. HOWEVER I DO BELIEVE THAT DEPRIVING PEOPLE OF THEIR
8 SECOND AMENDMENT RIGHTS IN ADDITION TO THE DISPOSSESSION --

9 THE COURT: THAT GOES MORE TO THE MERITS, RIGHT?

10 MR. BRADY: TRUE. IT DOES. BUT, NONETHELESS, THEY
11 WOULD STILL BE INFLICTED WITH A CONSTITUTIONAL INFRINGEMENT,
12 WHICH EVEN FOR A DAY IS IRREPARABLE HARM. BUT I WILL CONCEDE
13 THAT THE MORE PRESSING PROBLEM IS THE PHYSICAL DISPOSSESSION
14 UNDER THE TAKINGS ANALYSIS. AND THE ATTORNEY GENERAL,
15 CALIFORNIA ATTORNEY GENERAL ONLY PUTS FORTH TWO POINTS TO
16 OPPOSE OUR TAKINGS CLAIM, BOTH OF WHICH ARE DEMONSTRABLY
17 ERRONEOUS IF YOU LOOK AT THE CASE LAW.

18 THE FIRST POINT IS THAT THE PROPERTY TAKEN HAS TO BE
19 ACTUALLY USED BY THE GOVERNMENT. BUT IF YOU LOOK AT THE CASE
20 LAW, THE *RICHMOND ELKS HALL ASSOCIATION* CASE SAYS THAT A
21 PHYSICAL TAKING CAN OCCUR EVEN IF THE GOVERNMENT ITSELF DOES
22 NOT, QUOTE, *DIRECTLY APPROPRIATE THE TITLE, POSSESSION, OR USE*
23 *OF THE PROPERTY*.

24 THE *HAWAII HOUSING AUTHORITY VS. MIDKIFF* CASE ALSO SAYS
25 THAT THE GOVERNMENT DOES NOT HAVE TO ACTUALLY USE THE PROPERTY.

1 THIRD PARTIES CAN BE INVOLVED, AND THAT IT JUST HAS TO BE FOR A
2 PUBLIC PURPOSE.

3 THE GOVERNMENT'S POSITION IS THAT THEY WANT THESE
4 MAGAZINES OUT OF THE PUBLIC TO BENEFIT THE PUBLIC GOOD. AND SO
5 WHETHER THE GOVERNMENT IS TAKING PROPERTY TO MAKE SOMETHING, A
6 NEIGHBORHOOD SAFER FOR THE COMMUNITY, OR IS TAKING PERSONAL
7 PROPERTY FOR THE PURPOSE OF MAKING THE COMMUNITY SAFER, EITHER
8 WAY IT IS A TAKING. THE GOVERNMENT DOESN'T HAVE TO ACTUALLY
9 USE IT. IT JUST HAS TO BE FOR THE PUBLIC GOOD. SO THEIR FIRST
10 POINT IS DEMONSTRABLY ERRONEOUS.

11 YOU MOVE ON TO THE SECOND POINT THAT THE ATTORNEY GENERAL
12 MAKES, AND THAT IS --

13 THE COURT: DO THE PEOPLE HAVE A VESTED OWNERSHIP
14 INTEREST IN THESE MAGAZINES AT THIS TIME?

15 MR. BRADY: YEAH. JUST TO BE CLEAR, THE -- ANYBODY
16 WHO CURRENTLY POSSESSES ONE OF THESE MAGAZINES IN CALIFORNIA
17 HAD TO HAVE ACQUIRED THAT PRIOR TO THE YEAR 2000, WHICH MEANS
18 THEY HAVE HAD THEM FOR OVER 17 YEARS, OR THEY CANNOT HAVE
19 LAWFULLY ACQUIRED THEM. BECAUSE IT HAS BEEN ILLEGAL TO ACQUIRE
20 ONE OR MAKE ONE OR IMPORT ONE SINCE THE YEAR 2000. SO THAT'S
21 WHY I THINK IT IS PARTICULARLY PROBLEMATIC HERE UNDER THE DUE
22 PROCESS CLAUSE AND TAKINGS CLAUSE.

23 THE COURT: WOULD THIS BE ANALOGOUS TO, SAY, FOR
24 EXAMPLE, IF YOU HAD A RADIO TOWER THAT HAD BEEN GIVEN TO YOU,
25 YOU'D BEEN GIVEN PERMISSION TO HAVE THAT RADIO TOWER PURSUANT

1 TO SOME CONDITIONAL USE PERMIT OR WHATEVER, AND THEN THE STATE
2 OR THE CITY OR THE COUNTY CAME ALONG AND SAID, WELL, YOU HAVE
3 GOT TO REMOVE IT. YOU HAVE GOT TO TAKE IT DOWN?

4 MY RECOLLECTION IS THAT THERE ARE CASES THAT SAY THAT, NO,
5 YOU CAN'T DO THAT. BECAUSE YOU HAVE A VESTED RIGHT IN THE
6 TOWER UNLESS YOU PROVIDE SOME OTHER COMPENSATION OR AN
7 AMORTIZATION PERIOD OR SOMETHING THAT ALLOWS THE PEOPLE TO NOW
8 BE ABLE TO RESOLVE THAT OWNERSHIP INTEREST. IS THAT A FAIR
9 ANALOGY DO YOU THINK?

10 MR. BRADY: I THINK THAT IS SPOT ON, YOUR HONOR. AS
11 LONG AS -- THE GOVERNMENT DOES HAVE THE AUTHORITY TO PHYSICALLY
12 DISPOSSESS PEOPLE OF PROPERTY. BUT THEY HAVE TO PROVIDE --
13 THEY HAVE TO PROVIDE COMPENSATION, JUST COMPENSATION FROM THE
14 GOVERNMENT. SECTION 32310 DOES NOT HAVE ANY MECHANISM TO
15 PROVIDE SUCH COMPENSATION, NOR DOES ANY OTHER PROVISION IN
16 CALIFORNIA LAW. THEY DON'T EVEN PRETEND TO WANT TO PROVIDE
17 COMPENSATION TO PLAINTIFFS OR ANY OF THE OWNERS HERE. AND
18 THEY -- TO THE CONTRARY, THEY CONTEND THEY DON'T NEED TO. THEY
19 SAY THIS IS JUST WITHIN THEIR POLICE POWERS. IT'S NOT A
20 TAKINGS CLAUSE ISSUE, AND SO THEY CAN JUST -- THEY CAN JUST BAN
21 THESE THINGS. BUT AGAIN, THAT'S THEIR SECOND POINT. BECAUSE
22 IT'S WITHIN THEIR POLICE POWERS, THE TAKINGS CLAUSE DOESN'T
23 APPLY. BUT THAT WOULD ESSENTIALLY NULLIFY THE TAKINGS CLAUSE
24 IF THE GOVERNMENT CAN DO ANYTHING WITHIN ITS POLICE POWERS AND
25 NOT BE SUBJECT TO CONSTITUTIONAL SCRUTINY. AND THAT THE CASE

1 LAW ON THAT POINT, I WOULD DIRECT YOUR HONOR TO THE *LORETTO*
2 CASE AND THE *LUCAS* CASE, WHICH EXPRESSLY CONTRADICTS THAT
3 ASSERTION. IT SAYS, YES, THE GOVERNMENT HAS THE POLICE POWER
4 TO DO THIS, BUT IT'S STILL A TAKING. AND BECAUSE THEY DON'T
5 PROVIDE JUST COMPENSATION, IT'S A TAKING.

6 AND SO THOSE ARE THE ONLY TWO ARGUMENTS THAT THE ATTORNEY
7 GENERAL HAS PUT FORTH ON THE TAKINGS CLAIM. THEY DO NOT
8 DISPUTE THAT IS A PHYSICAL DISPOSSESSION OF PROPERTY. THEY DO
9 NOT CONTEND THERE IS ANY MECHANISM FOR JUST COMPENSATION, LET
10 ALONE ANY COMPENSATION.

11 AND I WANT TO BE CLEAR THAT THE ABILITY TO SELL A
12 MAGAZINE, SELL ONE OF THESE MAGAZINES FOR THE PLAINTIFFS, IN AN
13 ARTIFICIAL MARKET CREATED BY THE STATE BECAUSE THERE ARE VERY
14 FEW PEOPLE TO WHOM THESE PEOPLE CAN SELL --

15 THE COURT: THERE WOULD BE NO DEMAND FOR IT.

16 MR. BRADY: CORRECT.

17 THE COURT: OR VERY LITTLE DEMAND. UNLESS YOU SOLD
18 IT OUT OF STATE TO ONE OF THE OTHER 42 STATES THAT DON'T HAVE A
19 BAN ON THEM.

20 MR. BRADY: CORRECT. BUT IT WOULD STILL BE A -- IT
21 WOULD STILL BE A TAKINGS WITHOUT JUST COMPENSATION FROM THE
22 STATE. IT HAS TO BE FROM THE STATE. THIS IS QUITE CLEAR IN
23 THE STATE LAW THAT IT CANNOT BE A THIRD PARTY PROVIDING THE
24 COMPENSATION FOR THAT VERY REASON, THAT IT WOULD BE AN
25 ARTIFICIAL MARKET. AND THEY'RE ENTITLED TO JUST COMPENSATION,

1 MARKET VALUE. AND AS YOUR HONOR JUST INDICATED, IF MARKET
2 FORCES WOULD DICTATE THAT THE POTENTIAL PURCHASER KNOWS THAT
3 THE BUYER MUST SELL, THEN THEY'RE PROBABLY NOT GOING TO GET
4 JUST COMPENSATION.

5 AND, YOU KNOW, SOME OF THESE MAGAZINES THAT WE'RE TALKING
6 ABOUT ARE NOT SOLELY JUST, YOU KNOW, YOUR \$20 MAGAZINE. I'VE
7 SPOKEN TO INDIVIDUALS WHO HAVE COLLECTOR'S ITEMS FROM WORLD
8 WAR I, WORLD WAR II.

9 THE COURT: THEY COULD SELL THEM TO THE MOVIE
10 INDUSTRY.

11 MR. BRADY: CORRECT, YOUR HONOR. WHICH I THINK
12 GOES -- THE FACT THAT THERE IS AN EXCEPTION TO THE LAW FOR THE
13 ENTERTAINMENT INDUSTRY GOES TO THE POINT THAT THIS IS REALLY
14 NOT A SERIOUS ATTEMPT AT CREATING A PUBLIC SAFETY MEASURE BY
15 BANNING THESE MAGAZINES. IT'S POLITICS. YOU'RE PRECISELY
16 RIGHT. THEY WON'T TRUST AN INDIVIDUAL TO CONTINUE TO POSSESS
17 THIS PROPERTY THAT THEY HAVE OWNED FOR OVER 17 YEARS WITHOUT
18 INCIDENT, BUT THEY'LL TRUST THE MOVIE INDUSTRY, YOU KNOW, SOME
19 GUY DRIVING TO AND FROM THE PROP HOUSE TO HAVE ACCESS TO THESE
20 MAGAZINES SO THAT THEY CAN MAKE FILMS AND NOT UPSET THEIR
21 FRIENDS AND POLITICAL ALLIES IN HOLLYWOOD.

22 IT IS QUITE CYNICAL TO SUGGEST THAT THIS IS, YOU KNOW, A
23 DIRE NEED TO REMOVE THESE MAGAZINES. AND FRANKLY, THAT THEY
24 MAKE AN EXCEPTION FOR RETIRED LAW ENFORCEMENT OFFICERS, IF
25 THERE IS A -- IF THEIR CONTENTION, THE STATE'S CONTENTION IS

1 THAT THESE MAGAZINES ARE ONLY UTILIZED FOR OFFENSIVE PURPOSES,
2 MILITARY PURPOSES, THEN WHAT NEED DOES A RETIRED LAW
3 ENFORCEMENT OFFICER HAVE FOR THEM? NOW --

4 THE COURT: LET ME ASK YOU A QUESTION. SINCE YOU
5 JUST UTTERED THE WORDS *MILITARY PURPOSES*.

6 MR. BRADY: YES, YOUR HONOR.

7 THE COURT: DO YOU THINK IT IS INCONSISTENT FOR
8 LAW-ABIDING CITIZENS TO POSSESS WEAPONS THAT WOULD -- THAT ARE
9 NOT UNUSUAL WEAPONS, LIKE HAND GRENADES OR BAZOOKAS, ETC.,
10 WEAPONS LIKE, I DON'T KNOW, I'M GOING TO THROW SOMETHING OUT
11 THERE, SAY A GLOCK 19, FOR EXAMPLE? DO YOU THINK IT IS
12 INCONSISTENT FOR PEOPLE TO OWN THOSE WEAPONS FOR BOTH
13 SELF-DEFENSE AND FOR THE MILITARY PURPOSES THAT *MILLER*
14 ACKNOWLEDGED WAS ONE OF THE REASONS FOR THE SECOND AMENDMENT?
15 DO YOU SEE ANY INCONSISTENCY IN THAT?

16 MR. BRADY: NOT AT ALL, YOUR HONOR. I THINK IF YOU
17 LOOK AT THE DECLARATION OF ONE OF PLAINTIFF'S EXPERTS, STEVE
18 HELSLEY, HE INDICATES THAT THE EVOLUTION OF PRIVATE FIREARM
19 OWNERSHIP COMES FROM THE MILITARY. THE COLT 1911 PISTOL, WHICH
20 WAS CREATED BY JOHN BROWNING FOR WORLD WAR I IN 1911, HENCE ITS
21 NAME, WAS THE STANDARD ISSUE FOR THE U.S. ARMY UP UNTIL
22 RECENTLY AND IS MOST LIKELY THE MOST POPULAR HANDGUN MODEL. IT
23 MIGHT BE EDGED OUT NOW BY THE NEW GLOCKS, AS YOUR HONOR
24 INDICATES. BUT THE M1 GARAND IS -- THE FEDERAL GOVERNMENT HAS
25 A PROGRAM, THE CIVILIAN MARKSMANSHIP PROGRAM, THAT WILL SHIP AN

1 M1 GARAND TO YOUR DOOR IN A STATE WHERE YOU DON'T HAVE TO GO
2 THROUGH A DEALER. HERE THEY WOULD HAVE TO SHIP IT TO A DEALER,
3 AND YOU WOULD HAVE TO OBTAIN IT. BUT THOSE ARE THE
4 QUINTESSENTIAL MILITARY RIFLES THAT WERE USED BY OUR SERVICE
5 MILITARY MEN AND WOMEN IN WORLD WAR II AND KOREA.

6 SO NO, I DON'T THINK THERE IS ANY INCONSISTENCY. NOW WHEN
7 YOU'RE TALKING ABOUT FLAME THROWERS, LIKE YOUR HONOR SAID, OR
8 GRENADES, NOW WE'RE TALKING DANGEROUS. THEY'RE INHERENTLY
9 DANGEROUS -- THEY CAN BLOW UP -- AND UNUSUAL. I THINK THAT IS
10 THE PART, THE UNUSUAL --

11 THE COURT: THAT IS WHY I ASKED THE QUESTION. SO I
12 HAVE READ *MILLER*. AND *MILLER* SAID THAT A SHOTGUN -- ALTHOUGH
13 IT DIDN'T REALLY GO INTO GREAT DETAIL ABOUT IT, *MILLER* SAID
14 THAT A SHOTGUN IS NOT THE TYPE OF WEAPON THAT WOULD NORMALLY BE
15 USED IN A MILITARY SITUATION AND, THEREFORE, *MILLER* SAID WOULD
16 NOT BE COVERED BY THE SECOND AMENDMENT.

17 BECAUSE *MILLER* SAID THAT WEAPONS PROTECTED BY THE SECOND
18 AMENDMENT WOULD BE THE TYPES OF WEAPONS THAT WOULD BE USED IN A
19 MILITARY CONTEXT AND IN THE CONTEXT OF A MILITIA, KEEPING IN
20 MIND THAT THE MILITIA IS A NONPROFESSIONAL GROUP OF CITIZENS --
21 BLACKSMITHS, CARPENTERS, LAWYERS, DOCTORS, ETC. -- WHO ARE
22 CALLED UPON TO DEFEND THE FREE STATE. AND THEY WOULD GRAB
23 WHATEVER THEY HAD AVAILABLE TO THEM, WHICH MIGHT BE A MUSKET OR
24 A PISTOL, OR I SUPPOSE IN SOME CASES, A SWORD. IT STRIKES ME
25 THAT -- I THINK *HELLER* ALLUDED TO IT IN A WAY, BUT *HELLER*

1 DIDN'T MAKE IT SPECIFIC THAT IT IS NOT INCONSISTENT TO SAY THAT
2 THE SECOND AMENDMENT PROTECTS THOSE WEAPONS THAT A MILITIA
3 MIGHT NEED, SAY IN THE CASE WE WERE INVADED BY THE RUSSIANS, OR
4 FOR PERSONAL SELF-DEFENSE.

5 DO YOU AGREE WITH THAT ANALYSIS?

6 MR. BRADY: WELL, I THINK, YOUR HONOR, THAT THE
7 DIFFERENCE IS *MILLER* WAS OPERATING UNDER THE ASSUMPTION OF A
8 DIFFERENT VIEW OF THE MILITIA THAN YOUR HONOR IS, IN THAT IT
9 WAS TALKING ABOUT A MILITIA, A FORMAL MILITIA --

10 THE COURT: RIGHT.

11 MR. BRADY: -- BY THE STATE. WHEREAS, *HELLER*
12 CLARIFIED THAT IS NOT THE CASE.

13 THE COURT: I UNDERSTAND THAT. I UNDERSTAND THAT.
14 BUT MY QUESTION GOES MORE TO THE TYPE OF WEAPON.

15 MR. BRADY: SURE.

16 THE COURT: *MILLER* SAID THAT THE REASON FOR THE
17 SECOND AMENDMENT OR THE TYPES OF WEAPONS THAT WERE PROTECTED BY
18 THE SECOND AMENDMENT WERE WEAPONS THAT WOULD HISTORICALLY HAVE
19 A MILITARY USE, RIGHT?

20 MR. BRADY: CORRECT.

21 THE COURT: AND WEAPONS THAT WOULD HISTORICALLY HAVE
22 A MILITARY USE, UNLESS THEY'RE UNUSUAL, RIGHT, WOULD INCLUDE
23 WEAPONS THAT WOULD HAVE A MAGAZINE GREATER THAN TEN ROUNDS,
24 RIGHT?

25 MR. BRADY: CORRECT.

1 THE COURT: LIKE A GLOCK 19, RIGHT?

2 MR. BRADY: CORRECT.

3 THE COURT: OR AN AR-15 OR SOMETHING ALONG THOSE
4 LINES, WHICH COULD ALSO BE USED FOR SELF-DEFENSE, RIGHT?

5 MR. BRADY: THAT IS CORRECT.

6 THE COURT: AND THEN THE *CRUIKSHANK* CASE, AS I
7 RECALL, SAID THAT THE RIGHT OF SELF-DEFENSE IS NOT GIVEN TO THE
8 PEOPLE BY THE CONSTITUTION. IT IS AN INHERENT RIGHT, THE
9 SOURCE OF WHICH IS NOT THE SECOND AMENDMENT, RIGHT?

10 MR. BRADY: THAT IS CORRECT, YOUR HONOR, YES.

11 THE COURT: SO THOSE TWO THINGS -- SO *MILLER* IS NOT
12 INCONSISTENT WITH *CRUIKSHANK* TO THE EXTENT THAT THE TYPES OF
13 WEAPONS WE'RE TALKING ABOUT HERE -- AND, OF COURSE, I REALIZE
14 WE'RE NOT REALLY TALKING ABOUT THE WEAPONS NECESSARILY, PER SE;
15 WE'RE TALKING ABOUT THE MAGAZINES. BUT THAT THE SAME TYPES OF
16 WEAPONS THAT THE SUPREME COURT IN *MILLER* SAID WOULD BE
17 PROTECTED BY THE SECOND AMENDMENT ARE THE SAME TYPES OF WEAPONS
18 THAT LAW-ABIDING CITIZENS MIGHT POSSESS FOR SELF-DEFENSE, WHICH
19 ARE THE SAME TYPES OF WEAPONS WE'RE TALKING ABOUT HERE.

20 MR. BRADY: THAT IS CORRECT, YOUR HONOR. I DON'T
21 THINK *HELLER* IS INCONSISTENT WITH THAT NOTION THAT WEAPONS FOR
22 THE MILITIA ARE APPROPRIATE. AND THOSE ARE THE RIFLES AND THE
23 HANDGUNS THAT YOUR HONOR JUST INDICATED, THAT ARE COMMONLY
24 POSSESSED. AND THAT IS THE STANDARD THAT *HELLER* SETS FORWARD
25 IS, ARE THESE ARMS THAT ARE COMMONLY OWNED, TYPICALLY POSSESSED

1 BY LAW-ABIDING PEOPLE FOR LAWFUL PURPOSES. AND THE FLIP SIDE
2 OF THAT IS WHAT THE GOVERNMENT MUST SHOW TO TAKE THEM OUT OF
3 THAT CATEGORY, TO PUT THEM IN THE DANGEROUS AND UNUSUAL, FROM
4 *HELLER*, QUOTE, *HIGHLY UNUSUAL IN SOCIETY AT LARGE*.

5 I DON'T THINK THAT UNDER ANY VIEW ONE COULD SAY THAT
6 MAGAZINES OWNED BY THE TENS OF MILLIONS ARE HIGHLY -- ARE
7 HIGHLY UNUSUAL IN SOCIETY AT LARGE. TO THE CONTRARY, THESE ARE
8 THE MAGAZINES THAT PEOPLE MOST OFTEN GO TO, PARTICULARLY FOR
9 HANDGUNS, WHICH *HELLER* -- THE *HELLER* COURT DESCRIBED AS THE
10 QUINTESSENTIAL SELF-DEFENSE WEAPON. SO TO SUGGEST THEY'RE NOT
11 FOR SELF-DEFENSE IS, YOU KNOW, JUST SORT OF RISIBLE. I HATE TO
12 -- I DON'T WANT TO CONDESCEND, YOU KNOW, MAKE LIGHT OF THE VIEW
13 THAT TO SUGGEST THAT THESE MAGAZINES AREN'T A COMMON USE IS NOT
14 REALLY A LEGITIMATE POSITION BASED ON THE RECORD AND BASED ON
15 THE FACTS.

16 AND I DON'T REALLY THINK THE ATTORNEY GENERAL TRIES TO
17 DISPUTE THAT MUCH. I MEAN, HE DOES TAKE ISSUE WITH -- WITH OUR
18 FIGURES, RIGHT. HE SAYS THAT, WELL, THESE MAGAZINES ARE SORT
19 OF BEING CONSOLIDATED IN THE HANDS OF AN EVER SHRINKING FEW.
20 BUT EVEN UNDER THOSE ESTIMATES, IF YOU LOOK, IT IS STILL TENS
21 OF MILLIONS OF PEOPLE.

22 THE COURT: WHY WOULD THAT MATTER?

23 MR. BRADY: I DON'T BELIEVE IT WOULD, YOUR HONOR.
24 BUT I'M JUST SAYING, EVEN IF YOU TAKE THE ATTORNEY GENERAL'S
25 VIEW OF THINGS THAT WE'RE TALKING ABOUT MAGAZINES OWNED BY TENS

1 OF MILLIONS OF PEOPLE, THAT ARE ONLY PROHIBITED BY SEVEN
2 STATES, ALL OF THOSE RESTRICTIONS ARE OF RECENT VINTAGE DESPITE
3 THE FACT THESE MAGAZINES HAVE BEEN IN CIRCULATION, BEEN AROUND
4 FOR HUNDREDS OF YEARS AND HAVE BEEN UBIQUITOUS FOR THE BETTER
5 PART OF THE LAST CENTURY.

6 SO I THINK UNDER THAT, ONCE YOU ACCEPT THAT THESE ARE
7 MAGAZINES, THESE ARE ARMS THAT ARE COMMONLY POSSESSED BY
8 LAW-ABIDING PEOPLE, THEN THEY COME WITHIN THE FIRST STEP OF THE
9 SHOVAN TEST, WHICH IS THEY ARE PROTECTED BY THE SECOND
10 AMENDMENT. AND ONCE THEY ARE, AND YOU GET TO THE SECOND STEP
11 OF THE SHOVAN TEST, WHICH IS APPLYING SOME FORM OF HEIGHTENED
12 SCRUTINY. AND I THINK THAT WE CAN -- THE FOIA COURT IN THE
13 NINTH CIRCUIT HAS DONE YOUR HONOR'S JOB FOR YOU IN DECIDING
14 WHICH TEST APPLIES, I BELIEVE, EVEN THOUGH PLAINTIFFS DISPUTE
15 WE DON'T THINK IT SHOULD BE INTERMEDIATE SCRUTINY.

16 THE COURT: YOU THINK IT SHOULD BE STRICT SCRUTINY?

17 MR. BRADY: YES, YOUR HONOR. BUT THE REALITY IS,
18 BECAUSE WE'RE TALKING ABOUT CONDUCT --

19 THE COURT: I'M BOUND BY THE NINTH CIRCUIT DECISION
20 IN THE SUNNYVALE --

21 MR. BRADY: CORRECT. AS FAR AS THE -- AS FAR AS THE
22 LEVEL OF SCRUTINY THAT APPLIES. BEYOND THAT, THE COURT
23 EXPRESSLY SAID IT WAS NOT TAKING ANY POSITION ON THE SUBSTANCE.
24 IT SIMPLY INDICATED THAT INTERMEDIATE SCRUTINY WOULD APPLY.
25 BUT EVEN UNDER INTERMEDIATE SCRUTINY, WE'RE TALKING ABOUT A

1 BAN. AND SO THE NOTION THAT SOMETHING THAT IS PROTECTED BY THE
2 SECOND AMENDMENT CAN BE BANNED IS SIMPLY INCOMPATIBLE WITH THE
3 WAY RIGHTS WORK. WHAT GOOD IS CONSTITUTIONAL PROTECTION OF
4 SOMETHING IF IT CAN JUST BE BANNED?

5 AND SO I THINK ON THAT BASIS ALONE, EVEN IF THE GOVERNMENT
6 CAN SHOW THAT IT HAS A COMPELLING INTEREST, WHICH IT DOES,
7 ADMITTEDLY, OBVIOUSLY STOPPING MURDERS AND GUN VIOLENCE IS A
8 COMPELLING INTEREST, AND EVEN IF IT FURTHERED THAT INTEREST,
9 WHICH WE DISPUTE, BUT ASSUMING IT DOES, BASED ON, YOU KNOW,
10 MR. KOPER, DR. KOPER'S POSITIONS, WE THINK THERE IS NO BASIS
11 FOR THAT. BUT EVEN ASSUMING THAT IT FURTHERED THAT POINT,
12 THERE STILL HAS TO BE A SUFFICIENT FIT, SUFFICIENT TAILORING TO
13 ACHIEVE THAT INTEREST. AND AN OUTRIGHT BAN JUST SIMPLY CANNOT
14 MEET THAT STANDARD. AND SO --

15 THE COURT: WHAT WOULD?

16 MR. BRADY: WHAT WOULD? YOU KNOW, I THINK
17 POTENTIALLY -- IF WE'RE TALKING ABOUT MERE POSSESSION, I DON'T
18 KNOW IF YOU KNOW, MAKING IT MORE DIFFICULT FOR -- INCREASING
19 PENALTIES FOR ALLOWING PEOPLE TO GET THESE MAGAZINES INTO THE
20 WRONG HANDS. SO, YOU KNOW, SO FOR EXAMPLE, LEAVING THESE
21 MAGAZINES OUT FOR SOMEBODY WHO YOU KNOW IS TROUBLED OR A MEMBER
22 OF A GANG OR INTENTIONALLY GIVE THEM TO SOMEBODY OF THAT
23 PERSUASION.

24 YOU KNOW, LET'S NOT FORGET THERE ARE ALREADY THOUSANDS OF
25 LAWS IN PLACE IN CALIFORNIA TO ADDRESS THE PROPER STORAGE OF

1 FIREARMS THAT WE'RE NOT CHALLENGING. YOU HAVE TO GO THROUGH A
2 BACKGROUND CHECK TO OBTAIN THESE THINGS. WE'RE NOT DISPUTING
3 THAT. TEN-DAY WAIT PERIODS. THERE ARE A WHOLE HOST OF LAWS
4 ALREADY IN PLACE. I KNOW WE'RE LOOKING AT THIS IN A VACUUM,
5 BUT I THINK IT DOES SERVE US TO TAKE A STEP BACK AND LOOK --

6 THE COURT: I THINK IT WAS JUDGE CALLAHAN IN -- I
7 THINK IT WAS A DISSENT IN *PERUTA* WHO TALKED ABOUT HOW WE KEEP
8 LOOKING AT THESE THINGS ON AN INDIVIDUAL BASES. AND IF YOU
9 LOOK AT ANYTHING ON AN INDIVIDUAL BASES, YOU CAN MAKE IT MAKE
10 SENSE OF ALMOST ANYTHING. BUT WHAT YOU'RE ALLUDING TO IS THE
11 FACT THAT IN CALIFORNIA, WE HAVE SIGNIFICANT GUN CONTROL LAWS.
12 AND IF YOU KEEP ADDING TO IT, EVENTUALLY THERE REALLY WON'T BE
13 A SECOND AMENDMENT, BASICALLY, RIGHT?

14 MR. BRADY: PRECISELY, YOUR HONOR. AND I THINK EVEN
15 THOUGH I'M MOST CERTAINLY NOT CONCEDED THAT THE BAN ON
16 TRANSFERS AND MANUFACTURING IMPORTATION THAT WE'RE CHALLENGING
17 IN THE UNDERLYING LAWSUIT, THAT THOSE LAWS WOULD MEET
18 INTERMEDIATE SCRUTINY. I THINK THERE IS -- THEY'RE CERTAINLY
19 NOT AS INVIDIOUS AS A BAN ON POSSESSION. YOU KNOW, ONCE YOU'RE
20 TALKING ABOUT AN OUTRIGHT BAN ON POSSESSION, YOU'RE TALKING
21 ABOUT CRIMINALIZING AN INDIVIDUAL WHO IS ENGAGING IN
22 CONSTITUTIONALLY PROTECTED CONDUCT, RETROACTIVELY, MIND YOU,
23 BECAUSE THESE PEOPLE HAVE HAD THESE MAGAZINES FOR OVER 17
24 YEARS. NOW ALL OF A SUDDEN THE GOVERNMENT WANTS TO CHANGE THE
25 CONSEQUENCES SIGNIFICANTLY WITH A CRIMINAL CHARGE FOR

1 MAINTAINING POSSESSION OF PROPERTY THAT THEY HAVE HAD FOR OVER
2 17 YEARS WITHOUT INCIDENT.

3 AND THAT IS WHY THERE IS ALSO A DUE PROCESS COMPONENT TO
4 OUR LAWSUIT. AND I THINK IT DOES APPLY HERE AT THIS PARTICULAR
5 HEARING. BECAUSE ON JULY 2ND, SOMEBODY WHO OWNS ONE OF THESE
6 MAGAZINES MAY NOT KNOW THAT THIS LAW HAS TAKEN EFFECT AND IS
7 NOW SUBJECT TO CRIMINAL PROSECUTION FOR SIMPLY MAINTAINING THE
8 SAME PROPERTY THAT HE OR SHE HAS HAD FOR OVER 17 YEARS. AND
9 THAT SIMPLY IS NOT ACCEPTABLE UNDER THE DUE PROCESS CLAUSE TO
10 CHANGE THE CONSEQUENCES OF PAST TRANSACTIONS.

11 YOU KNOW, YOU CAN BAN POSSESSION POTENTIALLY UNDER THE DUE
12 PROCESS CLAUSE PROSPECTIVELY. I WOULD -- I DON'T THINK YOU CAN
13 BUT -- AT LEAST ARGUABLY, BUT WHAT YOU CAN'T DO IS GO
14 BACKWARDS.

15 AND SO I THINK THAT THE IMPENDING DATE OF JULY 1ST THAT
16 WILL CONVERT COUNTLESS THOUSANDS OF CALIFORNIANS INTO
17 CRIMINALS, INCLUDING PLAINTIFFS, IF THEY DON'T PERMANENTLY AND
18 UNLAWFULLY DISPOSSESS THEMSELVES OF THEIR PROPERTY IS
19 INDEFENSIBLE UNDER THE TAKINGS CLAUSE AND THE DUE PROCESS
20 CLAUSE. AND THE --

21 THE COURT: IF I DO NOT GRANT THE PRELIMINARY
22 INJUNCTION, BUT WE GET TO THE END OF THE ROAD AND ON THE MERITS
23 I FIND THAT THE PLAINTIFF SHOULD PREVAIL, ONE OF TWO THINGS
24 WILL HAVE HAPPENED. EITHER PEOPLE THAT OWN THESE -- OR POSSESS
25 THESE MAGAZINES NOW WHO WILL, AS LAW-ABIDING CITIZENS WILL DO,

1 THEY WILL DISPOSSESS THEMSELVES, MEANING THAT THEY GET RID OF
2 THEM, BUT NOW SUDDENLY, THEY HAVE THE RIGHT TO POSSESS THEM
3 AGAIN, RIGHT.

4 MR. BRADY: CORRECT, YOUR HONOR. BUT THEY HAVE
5 ALREADY SUFFERED THE TAKINGS VIOLATION. AND THERE IS NO
6 REPAIRING THAT. THAT IS WHY THIS IS, PER SE, IRREPARABLE
7 INJURY.

8 THE COURT: CAN I ASK A QUESTION. IS THIS -- ARE YOU
9 ASSERTING A FACIAL OR AN AS APPLIED CHALLENGE TO 32310?

10 MR. BRADY: BOTH, YOUR HONOR. IF YOU LOOK AT
11 PLAINTIFFS' COMPLAINT, IT SAYS THAT THIS 32310 SHOULD BE
12 STRICKEN IN ITS ENTIRETY, OR ALTERNATIVELY, TO THE EXTENT IT
13 PROHIBITS THE POSSESSION OF THESE MAGAZINES.

14 THE COURT: BEFORE I FORGET, I PROBABLY SHOULD HAVE
15 HAD BOTH OF YOU -- BOTH OF YOU SEEM TO HAVE PARTIES WITH YOU AT
16 COUNSEL TABLE. I SHOULD HAVE HAD YOU INTRODUCE WHO IS WITH
17 YOU.

18 MR. BRADY, WHO IS SITTING NEXT TO YOU AT COUNSEL TABLE?

19 MR. BRADY: THIS IS MY COLLEAGUE, MR. CLINTON
20 MONFORT.

21 MR. MONFORT: GOOD MORNING, YOUR HONOR.

22 THE COURT: AND MS. GORDON.

23 MS. GORDON: THIS IS TAMAR PACHTER, MY COLLEAGUE FROM
24 THE DEPARTMENT OF JUSTICE.

25 THE COURT: HOW DO YOU SPELL HER LAST NAME?

1 MS. GORDON: P-A-C-H-T-E-R.

2 THE COURT: ALL RIGHT. GO AHEAD.

3 MR. BRADY: WELL, I THINK, YOUR HONOR, I'M -- I
4 BELIEVE I'VE MADE ALL THE POINTS OTHER THAN I WOULD LEAVE YOUR
5 HONOR WITH THE REITERATION THAT THE ATTORNEY GENERAL HAS NOT
6 SHOWN THAT THEY'RE LIKELY TO OPPOSE US, SUCCEED ON THE MERITS.
7 WE'RE LIKELY TO SUCCEED ON THE MERITS. THEY HAVE NOT SHOWN
8 THAT THERE IS SOME GRAVE PUBLIC SERVICE BY THIS LAW GOING INTO
9 EFFECT ON JULY 1ST. AND THE EQUITIES OF THIS SHARPLY TIP IN
10 FAVOR OF THE PLAINTIFFS WHO WILL SUFFER A TAKINGS VIOLATION IF
11 THE LAW IS NOT ENJOINED ON JULY 1ST. BECAUSE AS YOUR HONOR
12 INDICATED, THEY WILL BE GETTING RID OF THOSE MAGAZINES. THEY
13 WILL NOT RECEIVE GOVERNMENT COMPENSATION. THERE IS NO
14 MECHANISM FOR THAT TO HAPPEN. AND SO THIS IS A -- ALMOST A
15 TEXTBOOK CASE OF THE APPROPRIATENESS FOR A PRELIMINARY
16 INJUNCTION.

17 WITH THAT, I THANK YOU, YOUR HONOR, UNLESS YOU HAVE ANY
18 QUESTIONS.

19 THE COURT: ALL RIGHT. THANK YOU.

20 MS. GORDON.

21 BEFORE YOU BEGIN, MS. GORDON, LET ME ASK YOU A QUESTION.
22 A FEW YEARS AGO I HAD A CASE, A RATHER CONTROVERSIAL CASE
23 BEFORE ME. IT WAS A CRIMINAL CASE. AND IT WAS BEING FILED
24 AGAINST SOME DEFENDANTS. AND I DISMISSED THE INDICTMENT
25 AGAINST THE DEFENDANTS. AND I DISMISSED IT BECAUSE I CONCLUDED

1 THAT THE LAW THAT THEY WERE BEING CHARGED WITH WAS SO VAGUE, SO
2 COMPLEX, SO BEYOND COMMON UNDERSTANDING THAT NOBODY COULD
3 POSSIBLY EVER REALLY UNDERSTAND WHAT THE LAW SAID.

4 I BELIEVE THE LAW IS, AND I BELIEVE THAT THE LAW SHOULD
5 BE, THAT LAWS SHOULD BE WRITTEN IN SUCH A WAY THAT PEOPLE OF
6 REASONABLE INTELLIGENCE SHOULD BE ABLE TO UNDERSTAND WHAT THE
7 LAW SAYS. SO THAT THEY DON'T HAVE TO WALK AROUND WITH A LAWYER
8 ON THEIR HIP TO FIGURE OUT WHETHER OR NOT THEY'RE ABOUT TO
9 VIOLATE THE LAW OR WHETHER THEY HAVE VIOLATED THE LAW.

10 NOW I WAS TRYING TO FIGURE OUT THE EXCEPTIONS TO THIS LAW.
11 AND, FRANKLY, IT ALMOST DROVE ME TO DRINKING. CAN YOU TELL ME
12 WHAT THE EXCEPTIONS ARE. WHO WILL BE ALLOWED TO POSSESS THESE
13 MAGAZINES IF I DO NOT ENJOIN THE STATUTE GOING INTO EFFECT?
14 WHO WILL ACTUALLY BE ALLOWED TO OWN THESE MAGAZINES, AND WHERE
15 WOULD ONE GO TO FIND THOSE EXCEPTIONS?

16 I KNOW YOU'RE GOING TO TELL ME THAT YOU WOULD GO TO THE
17 LAW, RIGHT, AND LOOK AT IT. BUT THE AVERAGE PERSON, WHO DOES
18 NOT HAVE A LAW DEGREE, HOW WOULD HE OR SHE KNOW WHETHER HE OR
19 SHE IS SOMEONE WHO IS EXEMPTED FROM THIS PROHIBITION?

20 MS. GORDON: OKAY, SO TAKING YOUR LAST QUESTION
21 FIRST, THERE ARE, OF COURSE, NO ALLEGATIONS IN THIS COMPLAINT
22 THAT PLAINTIFFS DO NOT UNDERSTAND THE LAW AS IT -- AT ALL OR AS
23 IT APPLIES TO THEM. THEY DO NOT LIKE IT, BUT IN SOME SENSE
24 THAT PRESUPPOSES THEY UNDERSTAND IT. AND THEY'RE NOT HAPPY
25 WITH WHAT IT IS MANDATING THEM TO DO.

1 FOR THE REST OF THE PEOPLE, PENAL CODE SECTIONS 32400 TO
2 32450 SET OUT THE EXCEPTIONS TO THE BAN ON LARGE CAPACITY
3 MAGAZINES. I DON'T HAVE ALL OF THEM IN FRONT OF ME.

4 THE COURT: BOB, CAN YOU BRING ME THAT SECTION.

5 SO WHAT WERE THOSE SECTIONS AGAIN?

6 MS. GORDON: SO IT STARTS AT SECTION 32400. AND THE
7 NOTABLE EXCEPTIONS -- OBVIOUSLY, THESE ARE A LOT OF
8 EXCEPTIONS -- ARE THAT IT DOESN'T APPLY TO LAW ENFORCEMENT. IT
9 DOESN'T APPLY TO A SWORN PEACE OFFICER. IT DOES NOT APPLY TO
10 HONORABLY RETIRED LAW ENFORCEMENT, SWORN POLICE OFFICER. AND
11 IF YOU LOOK AT 32406(F), IF YOU ARE A PERSON WHO HAS A FIREARM
12 PURCHASED BEFORE JANUARY 1ST, 2000, AND THERE IS NO COMPATIBLE
13 MAGAZINE WITH THAT THAT IS UNDER TEN, YOU MAY POSSESS A LARGER
14 CAPACITY MAGAZINE FOR THAT PARTICULAR FIREARM.

15 THE COURT: SO READING 32405, IT SAYS SECTION 32310
16 DOES NOT APPLY TO THE SALE TO, LENDING TO, TRANSFER TO,
17 PURCHASE BY, RECEIPT OF, POSSESSION OF, OR IMPORTATION INTO THE
18 STATE OF A LARGE CAPACITY MAGAZINE BY A SWORN PEACE OFFICER AS
19 DEFINED IN CHAPTER 4.5, COMMENCING WITH SECTION 830, OF TITLE
20 III, OF PART 2, OR SWORN FEDERAL LAW ENFORCEMENT OFFICER IS
21 AUTHORIZED TO CARRY A FIREARM IN THE COURSE AND SCOPE OF THAT
22 OFFICER'S DUTY.

23 SO WHAT DOES TITLE III OF PART 2 SAY, CHAPTER 4.5 OF TITLE
24 III OF PART 2? WHAT IS THAT?

25 MS. GORDON: I DON'T HAVE IT IN FRONT OF ME. I

1 APOLOGIZE, YOUR HONOR.

2 THE COURT: YOU DON'T KNOW?

3 MS. GORDON: OFF THE TOP OF MY HEAD, NO, I DO NOT.
4 BUT I BELIEVE THAT WHAT THE SECTIONS SET OUT ARE THE ABILITY
5 OF -- SORT OF WHO IS LAW ENFORCEMENT, WHO IS ABLE TO ACTUALLY
6 CARRY WEAPONS THAT ARE NOT AVAILABLE TO THE GENERAL PUBLIC.

7 THE COURT: IS A JUDGE EXEMPT FROM THIS STATUTE?

8 MS. GORDON: I ACTUALLY DON'T KNOW, YOUR HONOR.

9 THE COURT: IF YOU DON'T KNOW, YOU REPRESENT THE
10 STATE. YOU'RE PART OF THE ATTORNEY GENERAL'S OFFICE. IF YOU
11 DON'T KNOW, HOW IS THE AVERAGE PERSON, ME, FOR EXAMPLE,
12 SUPPOSED TO KNOW?

13 MS. GORDON: SO I CONFESS, YOUR HONOR, THAT I DON'T
14 KNOW. AND THE REASON WHY I DON'T KNOW IS THAT NONE OF THE
15 EXEMPTIONS ARE ACTUALLY ALLEGED TO APPLY HERE. SO I HAVE READ
16 THROUGH THEM. I HAVE A BASIC FAMILIARITY WITH THEM.

17 THE COURT: BUT --

18 MS. GORDON: THEY'RE NOT --

19 THE COURT: THE REASON I ASK YOU --

20 MS. GORDON: THEY'RE NOT AT ISSUE HERE.

21 THE COURT: THEY ARE. THEY ARE AT ISSUE, AREN'T
22 THEY? BECAUSE ONE OF THE THINGS WE'RE TRYING TO FIGURE OUT IS
23 WHETHER OR NOT THERE IS A REASONABLE FIT BETWEEN THE
24 LEGISLATION AND THE COMPELLING STATE INTEREST, RIGHT?

25 MS. GORDAN: YES.

1 THE COURT: AND WE'RE TRYING TO FIND OUT, OKAY, LET'S
2 TAKE A LOOK AT WHAT THE STATUTE COVERS AND WHAT IT EXEMPTS,
3 RIGHT. SO, FOR EXAMPLE, I WAS SOMEWHAT CHIDING MR. BRADY ABOUT
4 TRANSFERRING THESE MAGAZINES TO THE MOVIE INDUSTRY, ACTORS,
5 GOVERNOR SCHWARZENEGGER, HE HAS TO HAVE HIS LARGE CAPACITY
6 MAGAZINE SO THAT HE CAN BE BACK, RIGHT.

7 SO MY QUESTION TO YOU IS, THIS LAW HAS TO MAKE SENSE.
8 EXPLAIN TO ME WHAT IS THE REASONABLE FIT IN EXCUSING OR
9 EXEMPTING THE MOVIE INDUSTRY FROM BEING ABLE TO POSSESS THESE
10 LARGE CAPACITY MAGAZINES? WHAT IS THE THINKING BEHIND THAT?

11 MS. GORDON: I ASSUME THAT THE THINKING BEHIND THE
12 ENTERTAINMENT INDUSTRY MIGHT BE TWOFOLD. ONE, I DON'T ASSUME
13 THAT THE MAGAZINE IS ACTUALLY GOING TO BE LOADED WHEN IT'S ON A
14 LOT.

15 THE COURT: BUT THAT IS AN ASSUMPTION, ISN'T IT?

16 MS. GORDON: IT IS AN ASSUMPTION. TWO --

17 THE COURT: SO IF YOU HAVE SOMEONE IN THE MOVIE
18 INDUSTRY THAT POSSESSES IT AND DECIDES TO MISUSE IT, THEY CAN
19 DO THAT, RIGHT?

20 MS. GORDON: PRESUMABLY THEY COULD, YOUR HONOR. BUT
21 I'M NOT AWARE OF HIGH INSTANCES OF MASS SHOOTINGS ON
22 ENTERTAINMENT LOTS BY ACTORS. SO WE NEED TO LOOK AT -- AND I
23 SAY THAT BECAUSE WE NEED TO LOOK -- OR ANYONE ELSE. WE NEED TO
24 LOOK AT WHAT THIS LAW IS DESIGNED TO DO. AND I THINK THE
25 EXCEPTIONS --

1 THE COURT: WHAT IS IT DESIGNED TO DO?

2 MS. GORDON: IT IS DESIGNED TO INCREASE THE PUBLIC
3 SAFETY, TO MITIGATE THE EFFECTS OF GUN VIOLENCE, AND TO STOP
4 CRIME. THIS IS BECAUSE WE KNOW THAT LARGE CAPACITY MAGAZINES
5 ARE DISPROPORTIONATELY REPRESENTED IN CRIME. IN CRIME --

6 THE COURT: I SAW THAT. I SAW THAT LANGUAGE IN YOUR
7 MOTION, BUT I REALLY DIDN'T SEE ANY EVIDENCE TO SUPPORT THAT,
8 OR AT LEAST NOT EVIDENCE THAT, IN MY OPINION, WOULD PASS
9 MUSTER. SO HIGH CAPACITY MAGAZINES ARE USED DISPROPORTIONATELY
10 IN CRIME.

11 MS. GORDON: YOUR HONOR, IN 86 PERCENT OF THE MASS
12 SHOOTINGS IN THE LAST 20 YEARS, LARGE CAPACITY MAGAZINES HAVE
13 BEEN FEATURED.

14 THE COURT: OKAY. THAT IS LARGE CAPACITY --

15 MS. GORDON: MORE THAN TEN.

16 THE COURT: YOU'RE TALKING ABOUT MASS SHOOTINGS?

17 MS. GORDON: I'M TALKING ABOUT MASS SHOOTINGS.

18 THE COURT: BUT YOUR LANGUAGE, WHICH IS WHAT KIND OF
19 THREW ME, YOUR LANGUAGE SAID -- LET ME FIND IT. IT SAYS, *THESE*
20 *LARGE CAPACITY MAGAZINES ARE DISPROPORTIONATELY USED IN CRIME,*
21 *COMMA, AND FEATURED PROMINENTLY IN SOME OF THE MOST SERIOUS*
22 *CRIMES.*

23 THE FIRST PART OF THAT SENTENCE I DON'T THINK IS JUSTIFIED
24 BY ANY OF THE EVIDENCE THAT YOU SUBMITTED TO ME. THAT IS, THAT
25 LARGE CAPACITY MAGAZINES ARE DISPROPORTIONATELY USED IN CRIME.

1 MS. GORDON: OKAY, YOUR HONOR.

2 THE COURT: YOU AGREE?

3 MS. GORDON: I DON'T AGREE.

4 THE COURT: YOU DON'T AGREE. YOU DON'T AGREE THAT
5 THAT IS INACCURATE?

6 MS. GORDON: I DO NOT AGREE THAT THAT IS INACCURATE.

7 THE COURT: DO YOU HAVE ANY EVIDENCE TO SHOW THAT, IN
8 FACT, LARGE CAPACITY MAGAZINES ARE DISPROPORTIONATELY USED IN
9 CRIME?

10 MS. GORDON: I WOULD LOOK AT THE EXPERT DECLARATIONS
11 WE HAVE SUBMITTED. I WOULD LOOK AT THE FINDINGS OF OTHER
12 COURTS, EVERY ONE OF WHICH HAS UPHELD CHALLENGES TO LARGE
13 CAPACITY MAGAZINES AS CONSTITUTIONAL.

14 THE COURT: LET ME TAKE AN EXAMPLE. SO THE CITY OF
15 CHICAGO, FOR EXAMPLE, WHICH I BELIEVE, HAS THE HIGHEST MURDER
16 RATE IN THE COUNTRY, YOU'RE GOING TO TELL ME THAT IN THE
17 MAJORITY OF THOSE SHOOTINGS, THAT THERE WAS A WEAPON USED THAT
18 HAD A LARGE CAPACITY MAGAZINE?

19 MS. GORDON: NO, YOUR HONOR. BUT IT DOESN'T HAVE TO
20 BE THE MAJORITY OF EVERY MURDER. CERTAINLY, IN THE MAJORITY,
21 86 PERCENT IS WELL MORE THAN THE MAJORITY OF MASS SHOOTINGS
22 YOU'RE GOING TO SEE SOMEONE USING A LARGE CAPACITY.

23 THE COURT: WELL, THAT IS WHAT I'M TRYING TO GET AT.
24 SO IN OTHER WORDS, WHAT YOU'RE REALLY SAYING IS, THAT IN
25 CONNECTION WITH MASS SHOOTINGS, IN CONNECTION WITH MASS

1 SHOOTINGS, HIGH CAPACITY MAGAZINES ARE USED IN A
2 DISPROPORTIONATE WAY, BUT NOT CRIME, JUST IN MASS SHOOTINGS.

3 MS. GORDON: CERTAINLY NOT ALL CRIME. I BELIEVE IT
4 IS ACTUALLY GREATER THAN MASS SHOOTINGS. BUT LET'S GO WITH
5 MASS SHOOTINGS, OKAY. LET'S JUST SAY THAT ACTUALLY, ONLY IN
6 MASS SHOOTINGS AND I BELIEVE --

7 THE COURT: HOW MANY MASS SHOOTINGS HAVE THERE BEEN
8 IN THE LAST 30 YEARS?

9 MS. GORDON: IN THE LAST 30 YEARS? IN THE LAST 30
10 YEARS, I DON'T KNOW THE WHOLE NUMBER. I KNOW THAT IF YOU LOOK
11 BETWEEN 2007 TO 2013, AND THIS IS IN THE MAYORS AGAINST ILLEGAL
12 GUNS REPORT, THAT THERE ARE ABOUT TWO A MONTH. SO I THINK THAT
13 WAS ABOUT 35 TOTAL. MY MATH IS AWFUL. LET'S NOT TRUST MY
14 MATH. LET'S SAY TWO A MONTH DURING THAT PERIOD OF TIME.

15 AND THERE IS ALSO EVIDENCE, AND YOU CAN SEE THIS IN THE
16 EXHIBITS THAT ARE SUBMITTED BY AMICUS, THAT THE NUMBER IS GOING
17 UP.

18 NOW I MEAN IF THE POINT IS THAT MASS SHOOTINGS ARE
19 RELATIVELY RARE OCCURRENCES, THAT IS TRUE. I'M NOT GOING TO
20 SUGGEST THAT MASS SHOOTINGS ARE HAPPENING EVERY HOUR OF EVERY
21 DAY. BUT THEY DO A TREMENDOUS AMOUNT OF DAMAGE. AND PART OF
22 WHAT ALLOWS A TREMENDOUS AMOUNT OF DAMAGE TO HAPPEN IS THE USE
23 OF LARGE CAPACITY MAGAZINES. AND ALSO --

24 THE COURT: LET ME ASK YOU A COUPLE OF QUESTIONS --

25 MS. GORDON: SURE.

1 THE COURT: -- IF YOU DON'T MIND.

2 WHAT ELSE DO MASS SHOOTINGS GENERALLY HAVE IN COMMON?

3 MS. GORDON: WELL, THEY USUALLY INVOLVE A LOT OF
4 HELPLESS PEOPLE BEING HELD HOSTAGE BY A GUN.

5 THE COURT: AND THAT IS REALLY TRAGIC. AND BY THE
6 WAY, EVERYBODY WOULD AGREE THAT ANY TIME ANYBODY IS SHOT OR
7 INJURED, THAT IT IS TRAGIC. WE ALL AGREE WITH THAT.

8 BUT WHAT ELSE? WHAT ELSE DO YOU THINK IS COMMON TO THESE
9 MASS SHOOTINGS? I ASSUME YOU HAVE READ ALL OF THESE MASS
10 SHOOTING INCIDENT REPORTS AND THAT YOUR EXPERTS HAVE TALKED
11 ABOUT AND SUBMITTED. WHAT ELSE IS COMMON?

12 MS. GORDON: WELL, YOUR HONOR, THE MOST SALIENT AND
13 PREVALENT CHARACTERISTIC THAT IS IN COMMON IS THE USE OF A
14 LARGE CAPACITY MAGAZINE.

15 THE COURT: THERE IS SOMETHING ELSE THAT IS ACTUALLY
16 VERY, VERY COMMON IN ALL OF THOSE.

17 MS. GORDON: MAY I ASK WHAT -- WHAT IS THE ANSWER,
18 YOUR HONOR, THAT YOU'RE LOOKING FOR?

19 THE COURT: SURE. I'LL TELL YOU WHAT THE RIGHT
20 ANSWER IS.

21 MS. GORDON: THANK YOU.

22 THE COURT: THE RIGHT ANSWER IS, THERE ARE MULTIPLE
23 WEAPONS. IN ALMOST EVERY ONE OF THESE SHOOTINGS, WITH THE
24 POSSIBLE EXCEPTION OF THE SHOOTING OF CONGRESSWOMAN GIFFORD AND
25 JUDGE ROLL, WHO, BY THE WAY, I KNEW AND RESPECTED AND THOUGHT

1 AS A FRIEND. IN ALMOST EVERY ONE OF THOSE SHOOTINGS, THERE
2 WERE ALSO -- THERE WERE NUMEROUS WEAPONS THAT WERE BEING USED.

3 MS. GORDON: ACTUALLY, YOUR HONOR, IF YOU LOOK AT THE
4 ALLEN DECLARATION, LUCY ALLEN HAS STUDIED THIS. AND SHE OPINES
5 THAT IN 47 PERCENT OF MASS SHOOTINGS, THERE IS ACTUALLY ONLY
6 ONE GUN BEING USED.

7 THE COURT: YEAH, I READ HER DECLARATION.

8 MS. GORDON: NOW PERHAPS IN THE ONES THAT GAIN THE
9 MOST NOTORIETY, THE SHOOTER HAS MULTIPLE WEAPONS.

10 THE COURT: THE ONES THAT EVERYBODY THINKS ABOUT, FOR
11 EXAMPLE, SANDY HOOK.

12 MS. GORDON: OKAY, BUT EVEN ACCEPTING --

13 THE COURT: SAN BERNARDINO.

14 MS. GORDON: ABSOLUTELY. AND --

15 THE COURT: ORLANDO.

16 MS. GORDON: AND THE SHOOTING IN TUCSON.

17 THE COURT: *PULSE*.

18 MS. GORDON: WHICH IS A YEAR AGO YESTERDAY.

19 THE COURT: SO THE POINT I'M TRYING TO MAKE IS SIMPLY
20 THIS, SO IF WE'RE LOOKING FOR A REASONABLE FIT, AND WE'RE
21 TRYING TO DO AWAY WITH THESE MASS SHOOTINGS, WHAT I'M CONCERNED
22 ABOUT AND I'M THINKING ABOUT IS, WHERE DO WE STOP? WHERE DO WE
23 STOP INTERFERING WITH PEOPLE'S SECOND AMENDMENT RIGHTS? IS THE
24 NEXT STEP FOR CALIFORNIA TO SAY, OH, BY THE WAY, YOU'RE ONLY
25 ALLOWED TO OWN ONE GUN?

1 MS. GORDON: I THINK THERE IS A HUGE STEP, YOUR
2 HONOR, MULTIPLE HUGE STEPS BETWEEN SAYING, WE'RE GOING TO BAN A
3 SUBSET OF MAGAZINES, RIGHT, PROVEN TO BE THE MOST LETHAL. YOU
4 CAN HAVE AS MANY MAGAZINES AS YOU WANT.

5 THE COURT: I'M GLAD YOU JUST MENTIONED THAT.
6 BECAUSE NOW LET'S LOOK AT YOUR EXPERT'S DECLARATIONS. YOUR
7 EXPERTS SAY THAT THE REASON WHY THESE MAGAZINES ARE SO
8 DANGEROUS IS BECAUSE PEOPLE WHO ARE GOING TO ENGAGE IN THESE
9 MASS SHOOTINGS GENERALLY SELECT THE WEAPON THAT WILL ALLOW THEM
10 TO HAVE THE MOST AMMUNITION, THE MOST ROUNDS, RIGHT?

11 MS. GORDON: CORRECT.

12 THE COURT: YOU AGREE?

13 MS. GORDON: YES. THERE IS A PERSON EFFECT VERSUS A
14 WEAPON EFFECT, YES.

15 THE COURT: OKAY. SO IF WE NOW BAN OR CAUSE PEOPLE
16 TO DISPOSSESS THEMSELVES OF WEAPONS THAT HAVE ANYTHING GREATER
17 THAN TEN ROUNDS, WHAT DO YOU THINK IS GOING TO HAPPEN THE NEXT
18 TIME THAT YOU HAVE A MASS SHOOTING? WHAT KIND OF A WEAPON DO
19 YOU THINK YOU'RE GOING TO SEE THAT THE MASS SHOOTER IS GOING TO
20 USE?

21 MS. GORDON: SO I WOULDN'T SPECULATE, BUT BASED ON
22 THE LAST CORRECT ANSWER, I'M GOING TO ASSUME THAT WE'RE GOING
23 TO POSIT THAT THE SHOOTER WILL JUST GET MORE MAGAZINES, WILL
24 GET MORE FIREARMS.

25 THE COURT: OR WILL SIMPLY USE A WEAPON THAT HAS A

1 MAGAZINE THAT WILL HOLD TEN ROUNDS.

2 MS. GORDON: CORRECT.

3 THE COURT: RIGHT?

4 MS. GORDON: BUT TEN ROUNDS CAN BE DISCHARGED
5 EXTREMELY QUICKLY, AND THEN THE SHOOTER HAS TO RELOAD.

6 THE COURT: AS OPPOSED TO 15?

7 MS. GORDON: SURE. AND THE SHOOTER HAS TO RELOAD,
8 RIGHT?

9 THE COURT: RIGHT.

10 MS. GORDON: AND THEN -- OR GRAB ANOTHER MAGAZINE.

11 THE COURT: LET ME GET BACK TO MY QUESTION.

12 MS. GORDON: OKAY, YOUR HONOR.

13 THE COURT: BECAUSE I'M TRYING -- I'M NOT THE
14 BRIGHTEST LIGHT BULB IN THE BUILDING SO I'M TRYING TO WORK MY
15 WAY THROUGH THIS.

16 SO THE STATE SAYS THAT IN ORDER TO PROTECT THE PUBLIC, WE
17 HAVE TO DISPOSSESS PEOPLE OF MAGAZINES THAT THEY CURRENTLY
18 LAWFULLY POSSESS AND HAVE POSSESSED FOR A LONG TIME. AND THE
19 REASON WHY WE HAVE TO DO THAT IS BECAUSE MASS SHOOTERS
20 GENERALLY USE THE GUN THAT HAS THE HIGHEST CAPACITY MAGAZINE
21 THAT IS AVAILABLE. THAT IS WHAT YOUR EXPERT TESTIFIED OR SAYS.

22 MS. GORDON: THAT'S CORRECT.

23 THE COURT: ALL RIGHT. SO THE NEXT MASS SHOOTER,
24 AFTER WE HAVE NOW CAUSED EVERYBODY TO DISPOSSESS THEMSELVES OF
25 WEAPONS THAT HOLD MORE THAN TEN ROUNDS, THE NEXT DERANGED

1 PERSON WHO DECIDES THAT THEY'RE GOING TO SHOOT SOMEONE, THEY'RE
2 GOING TO USE A WEAPON THAT HOLDS TEN ROUNDS, A MAGAZINE THAT
3 HOLDS TEN ROUNDS BECAUSE IT IS THE HIGHEST NUMBER OF ROUNDS
4 THAT THE GUN ALLOWS, RIGHT?

5 MS. GORDON: CORRECT.

6 THE COURT: OKAY. SO THEN ISN'T IT LOGICAL TO ASSUME
7 THAT FIVE OR TEN YEARS DOWN THE ROAD, THE STATE WILL THEN COME
8 BACK AND SAY, WE HAVE TO -- WE HAVE TO GET RID OF PEOPLE WHO
9 HAVE MAGAZINES THAT HOLD TEN ROUNDS. WE'LL MAKE IT SIX ROUNDS.
10 IS THAT NOT A LOGICAL PROGRESSION THAT YOU CAN SEE WHERE THIS
11 IS GOING? BECAUSE REMEMBER, WE HAVE TO MAKE A DECISION AS TO
12 WHAT IS A REASONABLE FIT, RIGHT?

13 MS. GORDON: CORRECT.

14 THE COURT: SO I'M TRYING TO FIGURE OUT WHAT IS A
15 REASONABLE FIT? SO WHEN WE GET DOWN TO THE POINT WHERE THE
16 MAGAZINES THAT HOLD TEN ROUNDS ARE THE ONES THAT ARE BEING
17 MOSTLY USED BY MASS MURDERERS, RIGHT, WE WILL THEN GET DOWN TO
18 A LAW THAT SAYS, YOU HAVE TO DISPOSSESS YOURSELF OF ANY
19 MAGAZINE THAT HOLDS TEN ROUNDS, HOLDS MORE THAN SIX ROUNDS.
20 DOES THAT MAKE SENSE?

21 MS. GORDON: I UNDERSTAND THE PROGRESSION, YOUR
22 HONOR.

23 THE COURT: AND THEN WE'LL GET FROM SIX DOWN TO
24 THREE. AND YOUR EXPERT SAYS THAT THE AVERAGE PERSON WHO NEEDS
25 WEAPONS FOR SELF-DEFENSE ONLY FIRES 2.2 ROUNDS, WHICH MEANS

1 THAT EVENTUALLY, PEOPLE WILL NOT BE ALLOWED TO OWN ANY WEAPONS
2 UNLESS IT IS A DERRINGER.

3 MS. GORDON: WELL, NO, YOUR HONOR. BECAUSE THE
4 SECOND AMENDMENT AND *HELLER* WOULD PROHIBIT THE STATE FROM DOING
5 THAT.

6 THE COURT: OKAY. WHERE IS THE LINE? THAT IS THE
7 LINE. THE LINE I'M TRYING TO GET TO IS, WHERE IS THAT LINE?

8 MS. GORDON: SO *HELLER*, AS WE KNOW, DIDN'T DRAW A
9 LINE. EXCEPT FOR TO SAY THAT A CATEGORICAL BAN ON ALL HAND
10 GUNS IS UNCONSTITUTIONAL. AND THE REASON FOR THAT, OF COURSE,
11 IS THAT THEY SAY THE HANDGUN IS THE QUINTESSENTIAL WEAPON THAT
12 PEOPLE CHOOSE TO DEFEND THEMSELVES IN THEIR HOME.

13 THE COURT: LIKE A GLOCK 19.

14 MS. GORDON: WELL, PEOPLE MIGHT LIKE A GLOCK 19 IN
15 THEIR HOME. BUT THERE IS NO EVIDENCE THAT, IN FACT, PEOPLE ARE
16 USING ALL THE ROUNDS THAT THEY MIGHT BE ABLE TO DEFEND
17 THEMSELVES IN THEIR HOME. IN FACT, EVEN PLAINTIFFS' EXPERTS
18 SAY THAT MOST OF THE TIME, ALL YOU HAVE TO DO IS SORT OF WAVE
19 YOUR GUN AT AN ATTACKER, AND THAT IS GOOD ENOUGH.

20 NOW THERE IS A HUGE DIFFERENCE, RIGHT. SO WE KNOW BANNING
21 ALL HANDGUNS, QUINTESSENTIAL SELF-DEFENSE WEAPON.

22 THE COURT: YEAH, *HELLER* ACCIDENT ALLOW THAT.

23 MS. GORDON: CAN'T DO THAT.

24 THE COURT: AGREED.

25 MS. GORDON: SO THE CLOSER WE GET TO THAT LINE, THE

1 MORE DIFFICULTY WE'RE GOING TO HAVE SURVIVING CONSTITUTIONAL
2 ATTACK.

3 THE COURT: OKAY, WHY NOT 15 AS OPPOSED TO 10?

4 MS. GORDON: THE LEGISLATURE HAS MADE A DETERMINATION
5 AND BASED THIS, I GUESS, OFF OTHER JURISDICTIONS THAT HAVE COME
6 TO THIS CONCLUSION --

7 THE COURT: SEVEN.

8 MS. GORDON: SEVEN ACTUALLY WAS STRUCK DOWN BY THE
9 SECOND CIRCUIT. TEN, HOWEVER, HAS BEEN UPHELD BY EVERY
10 JURISDICTION TO CONSIDER IT, AS EITHER NOT BEING PROTECTED BY
11 THE SECOND AMENDMENT, OR EVEN ASSUMING THAT IT IS PROTECTED BY
12 THE SECOND AMENDMENT, IT CLEARLY PASSES INTERMEDIATE SCRUTINY.
13 AND I SHOULD SAY, HAVING READ THE RECORDS IN ALL OF THESE
14 CASES, THEY LOOK REMARKABLY SIMILAR TO THE RECORDS HERE. SAME
15 CAST, EXCEPT FOR ME, REALLY, AND YOUR HONOR. IT IS REMARKABLY
16 SIMILAR RECORD. AND EVERY COURT TO CONSIDER IT HAS UPHELD A
17 BAN ON TEN. AND THE BAN ON TEN, OF COURSE, IS WHAT WE'RE HERE
18 TO TALK ABOUT, RIGHT.

19 NOW WHAT OTHER STATES DO, WELL, THERE ARE TREMENDOUS
20 POLICY CONSIDERATIONS, RIGHT, THAT STATES TAKE INTO ACCOUNT,
21 RIGHT, WHEN THEY DECIDE TO LEGISLATE IT ALL.

22 THE COURT: BUT POLICY CONSIDERATIONS CAN'T TRUMP THE
23 SECOND AMENDMENT.

24 MS. GORDON: ABSOLUTELY NOT.

25 THE COURT: OKAY.

1 MS. GORDON: BUT NOR CAN THE FACT THAT JUST BECAUSE
2 42 STATES HAVE NOT DECIDED TO DO THIS DICTATE WHAT ANY GIVEN
3 STATE CAN DO, WHEN *HELLER* AND *MCDONALD* TELL US THERE IS STILL A
4 PLACE FOR REASONABLE REGULATION OF FIREARMS.

5 THE COURT: THAT IS WHAT I'M TRYING TO GET AT. I'M
6 TRYING TO FIGURE OUT, HOW DO WE DECIDE WHAT IS A REASONABLE FIT
7 AND WHAT IS NOT A REASONABLE FIT? AND WHEN DO WE TELL PEOPLE
8 THAT THEY CAN -- THEY SHOULD DISPOSSESS THEMSELVES OF SOMETHING
9 THAT THEY HAVE OWNED FOR A LONG PERIOD OF TIME WITHOUT ABUSING
10 IT, WITHOUT KILLING ANYONE, OR WITHOUT INJURING SOMEONE? I'M
11 TRYING TO FIGURE OUT HOW DO WE DRAW THAT LINE? WHERE DO WE
12 DO -- WHERE DO WE DO THE DISTINCTION BETWEEN POLICY AND AN
13 INFRINGEMENT ON THE SECOND AMENDMENT? AND WHY IS TEN -- WHERE
14 IS THIS TEN NUMBER -- YOU KNOW, IS THIS LIKE A CLAY TABLET THAT
15 MOSES BROUGHT DOWN FROM THE MOUNTAIN THAT SAID, THOU SHALT NOT
16 OWN A MAGAZINE OF MORE THAN TEN ROUNDS?

17 MS. GORDON: TEN IS GOING TO BE -- NO, I DON'T THINK
18 IT'S MODELED AFTER THE COMMANDMENTS, YOUR HONOR. I THINK TEN
19 IS, OF COURSE, GOING TO BE A COMPROMISE BETWEEN WHAT PEOPLE
20 COULD CONCEIVABLY NEED FOR SELF-DEFENSE AND WHAT IS GOING TO
21 KEEP PEOPLE SAFE. BECAUSE THAT'S ALWAYS THE DYNAMIC THAT IS
22 GOING ON.

23 THE COURT: BUT WHO IS TO TELL PEOPLE WHAT -- I MEAN,
24 WHO IS TO TELL PEOPLE WHAT THEY NEED FOR SELF-DEFENSE? JUST
25 LAST WEEK, THERE WAS AN INCIDENT HERE IN SAN DIEGO COUNTY,

1 WHERE A GENTLEMAN WAS STABBED TO DEATH IN A HOME INVASION. WHO
2 IS TO SAY THAT IF THAT GENTLEMAN HAD HAD A GLOCK 19 THAT HE
3 COULD REACH, AND FIRED ALL 15 SHOTS AT THIS ASSAILANT, INSTEAD
4 OF HE BEING THE VICTIM, THE ASSAILANT WOULD HAVE BEEN THE ONE
5 WHO WOULD HAVE BEEN DOWN AND OUT.

6 AND WHO ARE WE TO TELL THAT UNFORTUNATE VICTIM NOW THAT
7 YOU ONLY NEED TO FIRE 2.2 ROUNDS, YOU ONLY NEED TO WAVE THE GUN
8 AROUND TO SCARE THIS ASSAILANT AWAY? WHERE DO WE GET THAT?

9 MS. GORDON: WE GET THAT BECAUSE THAT'S THE JOB OF
10 THE LEGISLATURE. AND IN THIS CASE, THAT'S THE JOB OF THE
11 LEGISLATURE AND THE PEOPLE --

12 THE COURT: BUT ISN'T THAT WHAT THE SECOND AMENDMENT
13 WAS INTENDED TO DO, WAS TO PROVIDE PEOPLE WITH THE RIGHT TO
14 DEFEND THEMSELVES -- NO, NOT TO GIVE THEM THE RIGHT, BECAUSE
15 THE RIGHT PREEXISTED THE SECOND AMENDMENT, BUT TO SIMPLY
16 CONFIRM AND GUARANTEE THE FACT THAT THEY HAVE THAT RIGHT.

17 MS. GORDON: OF COURSE, YOUR HONOR. BUT *HELLER* SAYS
18 THAT THEY DON'T GET TO DEFEND THEMSELVES WITH ANY WEAPON,
19 RIGHT.

20 THE COURT: A BAZOOKA.

21 MS. GORDON: RIGHT. WHAT IF THAT POOR MAN WHO WAS
22 STABBED TO DEATH HAD HAD A MACHINE GUN, RIGHT. IT MIGHT HAVE
23 GONE COMPLETELY DIFFERENTLY. BUT NO ONE IS SUGGESTING THAT WE
24 NEED TO ALLOW PEOPLE TO HAVE MACHINE GUNS IN THEIR HOMES FOR
25 SELF-DEFENSE.

1 THE COURT: YOU'RE RIGHT.

2 MS. GORDON: YOU RAISE AN IMPORTANT POINT, RIGHT,
3 BECAUSE, OF COURSE, THERE ARE GOING TO BE INSTANCES, AND I
4 THINK THEY'RE RARE, RIGHT, WHERE, PERHAPS, BEING ABLE TO HAVE
5 MORE AMMUNITION, MORE FIRE POWER WITHOUT RELOADING COULD SAVE
6 SOMEONE'S LIFE. BUT THEY ACTUALLY PALE IN COMPARISON TO THE
7 MANY MORE UNDOCUMENTED INSTANCES WHERE INNOCENT PEOPLE ARE
8 BEING SLAUGHTERED IN A MASS SHOOTING.

9 AND SO IT IS THE JOB OF THE LEGISLATURE AND THE PEOPLE TO
10 TAKE EVIDENCE AND WEIGH IT. AND PEOPLE MAY NOT AGREE WITH EACH
11 OTHER. EXPERTS MAY NOT AGREE WITH EACH OTHER. BUT AS LONG
12 AS --

13 THE COURT: WHICH GETS ME BACK TO THE QUESTION I WAS
14 TRYING TO POSE TO YOU. SO IF THE PEOPLE AND THE LEGISLATURE
15 DECIDE IN FIVE YEARS THAT, YOU KNOW, MOST OF THE MASS SHOOTINGS
16 ARE OCCURRING BECAUSE PEOPLE ARE POSSESSING WEAPONS WITH
17 MAGAZINES OF TEN ROUNDS, WE, THEREFORE, NEED TO CHANGE THE LAW
18 AND REQUIRE PEOPLE TO DISPOSSESS THEMSELVES OF MAGAZINES THAT
19 HOLD MORE THAN SEVEN ROUNDS, THAT WOULD BE OKAY?

20 MS. GORDON: I CAN ONLY SAY, YOUR HONOR, I ACTUALLY
21 THINK IT WOULD BE OKAY.

22 THE COURT: I SEE. WHAT ABOUT THREE ROUNDS?

23 MS. GORDON: AND THE REASON BEING TOO CLOSE TO WHAT
24 WE'RE SEEING IS NEEDED FOR ACTUAL -- USED IN FOR ACTUAL
25 SELF-DEFENSE IN THE HOME.

1 THE COURT: FIVE ROUNDS?

2 MS. GORDON: I DON'T KNOW, YOUR HONOR, FIVE ROUNDS.
3 BUT THE POINT IS, THAT TEN IS NO WHERE CLOSE TO THAT LINE.

4 THE COURT: OKAY.

5 MS. GORDON: AND SO WE DON'T HAVE TO WORRY ABOUT
6 SEVEN, SIX, FIVE, FOUR BECAUSE WE'RE TALKING ABOUT TEN.

7 THE COURT: LET ME ASK YOU A QUESTION. LET ME GET
8 BACK TO THE EXCEPTIONS --

9 MS. GORDON: SURE.

10 THE COURT: -- BECAUSE THE EXCEPTIONS TROUBLE ME. SO
11 THERE ARE THESE MILLIONS OF PEOPLE THAT OWN THESE MAGAZINES.
12 AND THEY HAVE OWNED THEM FOR A LONG TIME. THEY'RE LAW-ABIDING
13 CITIZENS. AND WE KNOW THAT. WE KNOW THAT BECAUSE, IN FACT,
14 THEY HAVEN'T COMMITTED ANY CRIMES USING THESE MAGAZINES. NOW
15 THERE IS AN EXCEPTION FOR POLICE OFFICERS, WHICH MAKES
16 ABSOLUTELY -- OR LAW ENFORCEMENT OFFICERS MAKES AWFULLY GOOD
17 SENSE TO ME. THERE IS AN EXCEPTION FOR RETIRED LAW ENFORCEMENT
18 OFFICERS, WHICH I THINK JUDGE REINHARDT IN ONE CASE INDICATED
19 MADE ABSOLUTELY NO SENSE. AND I DON'T THINK THAT JUDGE
20 REINHARDT IS A FAN OF GUN -- A GUN FAN. BUT HE SAID THAT MADE
21 NO SENSE. BUT I CAN UNDERSTAND THAT IF THE POINT IS TO REDUCE
22 VIOLENCE, I CAN SEE HOW A RETIRED POLICE OFFICER SHOULD BE
23 ALLOWED TO HAVE THESE KINDS OF WEAPONS.

24 I DON'T UNDERSTAND THE MOVIE INDUSTRY. THAT IS A WEIRD
25 ONE. AND THE ONLY THING I CAN THINK OF IS THEY HAVE A VERY

1 POWERFUL LOBBY. THEY CAN USE A PLASTIC, YOU KNOW, A PLASTIC
2 WEAPON. BUT WHY NOT, FOR EXAMPLE, PEOPLE THAT HAVE CCW'S, WHO
3 HAVE BEEN PROVEN TO BE OF GOOD MORAL CHARACTER, WHO KNOW HOW TO
4 HANDLE A WEAPON. THERE IS NO EXCEPTION FOR THEM. THEY'RE
5 TREATED AS OF JULY 1, IF THEY DO NOT DISPOSSESS -- IF THEY OWN,
6 SAY, FOR EXAMPLE, AN AR-15 OR IF THEY OWN A GLOCK 19, IF ON
7 JULY 1ST, THEY DO NOT DISPOSSESS THEMSELVES OF THOSE MAGAZINES,
8 ON THAT DATE, THEY BECOME A CRIMINAL.

9 MS. GORDON: CORRECT.

10 THE COURT: WHAT IS THE POINT OF THAT?

11 MS. GORDON: THE POINT IS, IS THAT ANYTHING ELSE IS
12 THE SYSTEM THAT WE HAVE RIGHT NOW, WHICH IS NOT WORKING, RIGHT,
13 FOR A VARIETY OF REASONS. BECAUSE THERE ARE LOOPHOLES, WHICH
14 IS WHAT THE AMENDMENTS ARE ATTEMPTING TO CLOSE. IT IS
15 EXTREMELY DIFFICULT. IT IS FRUSTRATING LAW ENFORCEMENT
16 EFFORTS. BECAUSE THEY CAN'T TELL WHETHER A HIGH CAPACITY
17 MAGAZINE WAS ACTUALLY PURCHASED BEFORE THE DATE, BEFORE 2000.
18 IT IS ALSO THE CASE THAT IN SOMETHING LIKE 76 PERCENT OF CRIMES
19 WITH FIREARMS, THEY'RE STOLEN. OR IN THE CASE OF NEWTOWN, THAT
20 IS SOMEONE WHO TAKES HIS MOTHER'S --

21 THE COURT: YOU THINK THAT IS GOING TO MAKE A BIT OF
22 DIFFERENCE?

23 MS. GORDON: I DO.

24 THE COURT: DO YOU THINK THAT THE PEOPLE THAT HAVE
25 THESE HIGH CAPACITY MAGAZINES, BUT WHO ARE NOT LAW-ABIDING

1 CITIZENS, ARE JUST GOING TO GO RUNNING INTO POLICE DEPARTMENTS
2 AND THEY'RE GOING TO SAY, HEY, HERE IS MY MAGAZINE THAT HOLDS
3 MORE THAN TEN ROUNDS?

4 MS. GORDON: I DO NOT, NO.

5 THE COURT: NO.

6 MS. GORDON: NO. BUT IN NO WAY DO I THINK THAT THAT
7 DEFEATS THE PURPOSE AND CONSTITUTIONALITY OF THIS BAN. THE
8 FACT THAT THERE ARE INSTANCES THAT MAY NOT MAKE SENSE, LIKE THE
9 ENTERTAINMENT INDUSTRY MAKES SENSE TO YOUR HONOR, THE FACT
10 THAT -- IT IS NOT PERFECT BUT REMEMBER IT DOESN'T NEED TO BE
11 PERFECT, YOUR HONOR.

12 THE COURT: YOU READ JUDGE REINHARDT'S OPINION IN,
13 WHAT IS IT, *SILVEIRA*, I GUESS.

14 MS. GORDON: I'M FAMILIAR WITH IT, YES.

15 THE COURT: WHERE HE SAID THAT RETIRED POLICE
16 OFFICERS SAID THAT DISTINCTION DIDN'T MAKE ANY SENSE TO HIM.

17 MS. GORDON: I HAVE, YES.

18 THE COURT: HOW WOULD I EXPLAIN TO JUDGE REINHARDT
19 THIS EXCEPTION FOR THE ENTERTAINMENT INDUSTRY? AND WHAT
20 BASIS -- I MEAN, IF HE DIDN'T THINK THAT LAW ENFORCEMENT,
21 RETIRED LAW ENFORCEMENT OFFICERS SHOULD HAVE THE ABILITY TO
22 POSSESS THESE WEAPONS, DO YOU THINK YOU'D BE ABLE TO CONVINCE
23 HIM THAT THE ENTERTAINMENT INDUSTRY SHOULD BE ALLOWED TO HAVE
24 THESE WEAPONS?

25 MS. GORDON: I HIGHLY DOUBT THAT I COULD CONVINCE

1 JUDGE REINHARDT --

2 THE COURT: DO YOU THINK ANYBODY COULD --

3 MS. GORDON: BUT, YOUR HONOR, NO ONE IS ACTUALLY
4 CHALLENGING THOSE EXCEPTIONS HERE. IF, IN FACT, YOUR HONOR
5 FEELS THAT THEY IN SOME WAY -- OR THE ISSUE THAT MAKES THIS
6 STATUTE PROBLEMATIC, I AM NOT QUITE SURE OF HOW THIS WORKS, BUT
7 I ASSUME THAT THE COURT HAS THE ABILITY TO ENJOIN THE STATE
8 FROM GIVING LARGE CAPACITY MAGAZINES TO THE ENTERTAINMENT
9 INDUSTRY. BUT THAT IS VERY DIFFERENT FROM ENJOINING THE STATE
10 FROM ENFORCING A DULY-ENACTED PIECE OF LEGISLATION THAT IS
11 MEANT TO PROTECT PEOPLE.

12 THE COURT: IT GOES TO THE QUESTION OF WHETHER IT IS
13 A REASONABLE FIT. WHAT IS A REASONABLE FIT? AND I'M TRYING TO
14 FIGURE OUT, WHY IS THIS A REASONABLE FIT FOR THE LEGISLATION?
15 AND I DON'T UNDERSTAND IT. I HAVE A VERY DIFFICULT TIME. AS
16 OPPOSED TO, FOR EXAMPLE, AS I SAID, CREATING AN EXCEPTION FOR
17 PEOPLE WHO HAVE A CONCEAL CARRY PERMIT. THEY'VE ALREADY BEEN
18 -- THEY HAVE ALREADY GONE THROUGH TESTING AND HAVE BEEN --
19 THEIR BACKGROUND HAS BEEN CHECKED, ETC. THOSE PEOPLE, THOSE
20 WHO MAY POSSESS A GLOCK 19, I BELIEVE ONE OF THE MOST POPULAR
21 HANDGUNS OUT THERE ON THE MARKET, AS OF JULY 1, THEY HAVE TO
22 GET RID OF THOSE GUNS. THEY NOW HAVE TO GO OUT, THEY HAVE TO
23 PURCHASE A NEW GUN. THEY HAVE TO GO OUT AND THEY HAVE TO
24 QUALIFY WITH THE NEW GUN BECAUSE OF WHAT, BECAUSE THE
25 ENTERTAINMENT INDUSTRY CAN KEEP THEIR MAGAZINES? IS THAT --

1 YOU SEE WHAT I'M SAYING?

2 MS. GORDON: I UNDERSTAND WHAT YOU'RE SAYING. AND I
3 UNDERSTAND THAT THE EXCEPTION FOR THE ENTERTAINMENT INDUSTRY IS
4 TROUBLING TO YOUR HONOR. BUT I DON'T ACTUALLY THINK THAT IN
5 THE VAST MAJORITY OF CASES, RIGHT, THAT THE EXCEPTION FOR THE
6 ENTERTAINMENT INDUSTRY UNDERMINES THE FACT THAT THERE IS A
7 REASONABLE FIT BETWEEN WHAT PLAINTIFFS CONCEDE IS A COMPELLING
8 INTEREST IN PROTECTING PEOPLE AND PROTECTING LAW ENFORCEMENT,
9 AND THIS LAW TAKEN AS A WHOLE.

10 AT THE MARGINS, COULD IT BE BETTER? COULD IT BE MORE
11 PRECISE? COULD IT NOT HAVE AN EXCEPTION FOR THE ENTERTAINMENT
12 INDUSTRY? SURE. BUT THAT IS AT THE MARGINS. AND REALLY,
13 WE'RE HERE TO SORT OF ASK IF THERE IS A REASONABLE FIT. NOT
14 LEAST RESTRICTIVE MEANS NOT PERFECT, JUST REASONABLE. AND I
15 WOULD SUGGEST THERE IS NOTHING IN THIS LAW, RIGHT, THAT IS
16 UNREASONABLE. IT IS ABSOLUTELY A REASONABLE FIT. I THINK THIS
17 LAW COULD ACTUALLY SURVIVE ANY LEVEL OF SCRUTINY. BUT OF
18 COURSE IT ONLY HAS TO SURVIVE INTERMEDIATE SCRUTINY. I'M
19 SORRY, I DON'T WANT TO GET OFF THIS IF YOU HAD --

20 THE COURT: NO, GO AHEAD.

21 MS. GORDON: I WAS JUST GOING TO TOUCH ON THE TAKINGS
22 POINT JUST QUICKLY.

23 THE COURT: GOOD. BECAUSE I WAS GOING TO MOVE ONTO
24 THAT MYSELF.

25 ALL RIGHT, GO AHEAD.

1 MS. GORDON: I THINK THERE IS A LITTLE BIT OF
2 CONFUSION ABOUT WHAT THE STATE IS AND ISN'T SAYING. SO REALLY,
3 A PHYSICAL TAKING, WHICH IS THE TAKING THAT PLAINTIFFS SAY THEY
4 ARE ALLEGING AND ARGUING HERE, HAPPENS WHEN THE GOVERNMENT
5 EITHER INVADES YOUR PROPERTY OR APPROPRIATES YOUR PROPERTY FOR
6 PUBLIC USE. AND IT IS ALSO TRUE, AS PLAINTIFFS RIGHTLY POINTED
7 OUT, THAT IT DOESN'T HAVE TO BE THE GOVERNMENT ITSELF. THE
8 GOVERNMENT COULD SEND AN AGENT TO DO THAT, BUT IT HAS THE SAME
9 EFFECT. BUT THERE IS NOTHING ABOUT SOMETHING BEING A BAN ON
10 POSSESSION THAT IMMEDIATELY MAKES IT A TAKING, RIGHT. THE
11 QUESTION --

12 THE COURT: CAN YOU CITE ME TO ANY OTHER LAWS THAT
13 HAVE FORCED PEOPLE TO DISPOSSESS THEMSELVES OF PROPERTY THAT
14 THEY HAVE OWNED, LAWFULLY OWNED FOR A LONG TIME THAT IS NOT A
15 TAKING?

16 MS. GORDON: WELL, THAT WOULD -- SO OFF THE TOP OF MY
17 HEAD, I CAN. I CAN GIVE YOU ONE. AND I'M HAPPY TO SUBMIT
18 MORE.

19 THE COURT: TELL ME WHAT IT IS.

20 MS. GORDON: THIS IS A LITTLE OBSCURE. BUT IT IS
21 FISH AND GAME 2021 AND 2021.5. AND HERE IS WHAT IT DID, IT
22 BANNED -- AND IN A WAY, IT SORT OF OPERATED THE SAME WAY AS
23 THIS LAW IN THAT SHARK FIN, IT BANNED SHARK FIN.

24 THE COURT: YOU COULDN'T POSSESS SHARK FIN. SO IF
25 YOU HAD A SHARK FIN, YOU HAD TO GET RID OF IT?

1 MS. GORDON: SUBJECT TO CERTAIN EXCEPTIONS, YES.
2 IT'S A COMPLETE BAN ON POSSESSION, SALE, DISTRIBUTION. YOU
3 CANNOT HAVE A SHARK FIN IN CALIFORNIA.

4 THE COURT: HOW LONG CAN YOU KEEP A SHARK FIN?

5 MS. GORDON: I DON'T THINK THAT A SHARK FIN ACTUALLY
6 STAYS GOOD FOR THAT LONG. BUT A SHARK FIN USUALLY IS AN
7 INCREDIBLY LUCRATIVE ITEM. PEOPLE WILL PAY SOMETHING LIKE \$100
8 FOR A BOWL OF SHARK FIN SOUP AND UP TO \$600 FOR THE SHARK FIN.
9 SO THERE IS A BAN ON POSSESSION OF THAT. THERE ARE, OBVIOUSLY,
10 BANS ON POSSESSION OF ALL KINDS OF OTHER THINGS THAT ARE
11 ILLEGAL, RIGHT, SO ILLEGAL DRUGS. THERE IS A BAN ON POSSESSION
12 ON MOUNTAIN LION PARTS. THERE ARE BANS ON ALL KINDS OF THINGS.
13 BUT THE POINT I'M TRYING TO MAKE IS, THAT IT MATTERS WHAT POWER
14 THE GOVERNMENT IS USING AND FOR WHAT PURPOSE.

15 SO IF THE GOVERNMENT WERE SEIZING, USING ITS POWER OF
16 EMINENT DOMAIN, LARGE CAPACITY MAGAZINES, AND WE WERE
17 DISTRIBUTING THEM TO HIGHWAY PATROL OFFICERS BECAUSE WE REALLY
18 THOUGHT THAT CHP HAVING LARGE CAPACITY MAGAZINES WOULD MAKE THE
19 STREET SAFER, THAT IS A TAKING, RIGHT. BECAUSE WE'VE
20 CONFISCATED YOUR PROPERTY FOR PUBLIC GOOD, FOR PUBLIC USE. AND
21 THE LAW IS THAT NO SUBSET OF PEOPLE SHOULD HAVE TO BEAR THE
22 EXPENSE, THE BURDEN OF WHAT IS GOOD FOR THE PUBLIC. THAT'S NOT
23 WHAT WE'VE DONE HERE. PURSUANT TO OUR -- THE POLICE POWER, WE
24 ARE REGULATING AND WE ARE CONFISCATING THIS PROPERTY BECAUSE WE
25 HAVE DETERMINED THAT IT IS A NUISANCE. IT IS DANGEROUS. THAT

1 IS AN -- THE LAW IS VERY CLEAR OVER AND OVER AGAIN --

2 THE COURT: BUT --

3 MS. GORDON: -- THAT IS NOT A TAKING.

4 THE COURT: BUT GETTING BACK TO MY QUESTION EARLIER,
5 LOOK, IS THERE ANYONE WHO CAN DISPUTE THAT A GUN IS NOT A
6 DANGEROUS DEVICE? NOBODY CAN DISPUTE THAT. BUT IT'S DANGEROUS
7 IN BOTH DIRECTIONS. IT'S DANGEROUS FOR THE PERPETRATOR WHO
8 USES IT INAPPROPRIATELY, AND IT'S ALSO DANGEROUS TO THE
9 PERPETRATOR WHEN THE VICTIM HAPPENS TO HAVE THE WEAPON, RIGHT.
10 SO IT IS DANGEROUS. BUT SIMPLY BECAUSE IT'S DANGEROUS DOESN'T
11 MEAN THAT THE GOVERNMENT CAN SIMPLY COME IN AND SAY, YOU MUST
12 DISPOSSESS YOURSELF OF IT, PARTICULARLY IF IT IS -- AT LEAST
13 ARGUABLY, PROTECTED BY THE SECOND AMENDMENT.

14 MS. GORDON: WELL, YOU'RE RIGHT. THE GOVERNMENT HAS
15 TO ACT WITHIN CONSTITUTIONAL BOUNDS, RIGHT. AND THE GOVERNMENT
16 HAS DONE SO HERE. THERE IS REALLY NO APPRECIABLE USE OR
17 BENEFIT TO HAVING A LARGE CAPACITY MAGAZINE TO DEFEND YOURSELF
18 IN YOUR HOME, RIGHT.

19 THE COURT: BUT YOU KEEP SAYING THAT TO ME. BUT MY
20 QUESTION TO YOU IS, WHY WOULD YOU SAY THAT?

21 MS. GORDON: I WOULD SAY IT BECAUSE POLICE CHIEFS SAY
22 IT.

23 THE COURT: OH, GREAT.

24 MS. GORDON: BECAUSE EXPERTS SAY IT. BECAUSE THE
25 COLLATERAL DAMAGE THAT YOU'RE DOING, SPRAYING BULLETS AROUND IN

1 YOUR HOME, THEY GO THROUGH WALLS, THEY GO THROUGH WINDOWS,
2 RIGHT. AND IN POINT OF FACT, PLAINTIFFS THEMSELVES, THE
3 DATABASES INDICATE THAT THEY'RE NOT FIRING MORE THAN TWO
4 ROUNDS. THERE ARE NO REPORTED CASES IN CALIFORNIA IN THE LAST
5 TEN YEARS OF ANYONE FIRING TEN ROUNDS IN THEIR HOME.

6 THE COURT: IS THAT THE TEST?

7 MS. GORDON: SORRY?

8 THE COURT: IS THAT THE TEST?

9 MS. GORDON: WELL, IT IS PART OF THE TEST, RIGHT.
10 BECAUSE THE CLOSER THAT A LAW GETS TO THE FUNDAMENTAL RIGHTS
11 SECURED BY THE SECOND AMENDMENT, WHICH IS THE RIGHT OF PEOPLE
12 TO DEFEND THEMSELVES, RIGHT, THAT IS --

13 THE COURT: LISTEN, IF YOU'RE A WOMAN, AND YOU'RE IN
14 YOUR BEDROOM, AND YOU HEAR IN THE MIDDLE OF THE NIGHT SOMEONE
15 BREAKING INTO YOUR HOUSE, DO YOU THINK -- DO YOU THINK YOU'RE
16 GOING TO ASK YOURSELF, YOU KNOW, I HAVE 15 ROUNDS IN THIS
17 WEAPON, AND SO I FEEL PRETTY COMFORTABLE THAT I CAN FIRE 15
18 ROUNDS IN PROTECTING MYSELF? DO YOU THINK -- DO YOU THINK THAT
19 RESTRICTING THAT WOMAN TO DEFENDING HERSELF TO TEN ROUNDS AND
20 IF SHE'S NOT LUCKY ENOUGH TO DETER THE PERPETRATOR WITH TEN
21 ROUNDS THAT THE OTHER FIVE ROUNDS MIGHT HAVE DONE IT? DO YOU
22 THINK THAT THAT IS SOMETHING THE GOVERNMENT SHOULD BE MEDDLING
23 IN AND TELLING THAT WOMAN THAT, HEY, LISTEN, TEN ROUNDS, THAT
24 IS ALL YOU GET. YOU FIRE TEN ROUNDS, AND IF YOU CAN'T HIT THAT
25 PERPETRATOR, TOO BAD, SO SAD. THAT IS JUST THE WAY IT GOES.

1 OH, AND IF YOU WOULD HAVE HAD THE OTHER FIVE, YOU MIGHT HAVE
2 GOTTEN HIM, AND YOU MIGHT HAVE KEPT YOURSELF FROM BEING RAPED
3 OR ASSAULTED OR MURDERED. DO YOU THINK THAT IS REALLY THE
4 GOVERNMENT'S -- FOR THE GOVERNMENT TO TELL PEOPLE WHAT THEY CAN
5 DO TO PROTECT THEMSELVES IN THOSE KINDS OF SITUATIONS? REALLY?

6 MS. GORDON: YES, YOUR HONOR. I THINK -- I MEAN, THE
7 WAY YOUR HONOR HAS PHRASED IT, NO. BUT I THINK THE
8 GOVERNMENT'S JOB IS TO PROTECT ITS PEOPLE.

9 THE COURT: INCLUDING THE WOMAN WHO HEARS SOMEBODY
10 BREAKING INTO HER PLACE, WHO IS ABOUT TO BE RAPED OR MURDERED.

11 MS. GORDON: WELL, HERE IS THE THING, IF YOU LOOK AT
12 THE EVIDENCE, THERE IS REALLY ALMOST NONE ON THIS SIDE OF THAT,
13 THAT THAT WOMAN HAS ACTUALLY NEEDED OR FIRED MORE THAN TEN
14 SHOTS TO DEFEND HERSELF; WHEREAS, WE HAVE A LOT OF EVIDENCE ON
15 THE OTHER SIDE OF LARGE CAPACITY MAGAZINES BEING USED TO KILL A
16 LOT OF INNOCENT PEOPLE. SO --

17 THE COURT: RARELY.

18 MS. GORDON: NOT THAT RARELY. AND REALLY, HOW MANY
19 PEOPLE HAVE TO DIE IN MORE MASS SHOOTINGS BEFORE IT'S OKAY FOR
20 THE GOVERNMENT TO ACT?

21 THE COURT: BUT IF THAT IS THE ANALYSIS, YOU GET BACK
22 TO WHAT I WAS ASKING YOU EARLIER, WHICH IS WHY I WAS ASKING
23 YOU, WHY NOT SEVEN? WHY NOT SIX? WHY NOT THREE? WHY NOT
24 SIMPLY HAVE PEOPLE THROW THEIR HANDGUNS AT SOMEONE WHO BREAKS
25 IN THROUGH THEIR WINDOW BECAUSE THEY'RE NOT ALLOWED TO PUT A

1 ROUND IN THE CHAMBER?

2 MS. GORDON: AS I'VE SAID, THE CLOSER WE GET TO THE
3 CORE RIGHT, WHICH IS THE RIGHT TO PROTECT ONESELF, RIGHT, BUT
4 NOT WITH ANY WEAPON, NOT IN ANY MANNER, NOT ANY WAY ONE FEELS
5 THEY MIGHT LIKE TO DO SO, RIGHT. WE KNOW THAT THESE ARE BOTH
6 TRUE. YOU HAVE A RIGHT TO HAVE A FIREARM FOR SELF-DEFENSE.
7 YOU DO NOT HAVE A RIGHT TO HAVE SOMETHING THAT COULD REASONABLY
8 BE DEEMED DANGEROUS BY THE STATE. AND THIS IS PRETTY
9 REASONABLY DEEMED DANGEROUS.

10 THE COURT: BUT THERE IS NO EVIDENCE THAT THE PEOPLE
11 THAT NOW POSSESS THESE HAVE MISUSED THEM OR ARE ABOUT TO MISUSE
12 THEM. I DIDN'T SEE ONE BIT OF EVIDENCE ANYWHERE IN THE
13 EVIDENCE YOU SUBMITTED TO ME THAT SAYS THAT THE PEOPLE THAT
14 CURRENTLY POSSESS THESE MAGAZINES ARE ABOUT TO ABUSE THEM OR
15 USE THEM IN AN IMPROPER MANNER. AND AS OF JULY 1, IF THEY
16 DON'T DISPOSSESS THEMSELVES OF THESE WEAPONS, THEY
17 AUTOMATICALLY BECOME A CRIMINAL, HAVING DONE ABSOLUTELY NOTHING
18 IN THE PAST TO JUSTIFY THAT LABEL, RIGHT.

19 MS. GORDON: YOUR HONOR, I MEAN, THAT IS A PARTICULAR
20 WAY OF SEEING IT, AND I'M NOT GOING TO ATTEMPT TO ACTUALLY PUSH
21 TOO HARD AGAINST THAT. BUT AGAIN, THE QUESTION -- THAT'S
22 RIGHT. SO THERE ARE LAW-ABIDING PEOPLE WHO HAVE DONE NOTHING
23 WRONG. AND MAYBE THEY COULD KEEP THEIR LARGE CAPACITY MAGAZINE
24 FOREVER WITH NO INCIDENT. THAT SYSTEM ISN'T WORKING TO
25 ACTUALLY ACHIEVE THE GOALS AND TO SERVE THE COMPELLING INTEREST

1 THAT THE STATE HAS. TOO MANY LARGE CAPACITY MAGAZINES ARE
2 COMING IN. TOO MANY ARE IN CIRCULATION. TOO MANY ARE FALLING
3 INTO THE WRONG HANDS. TOO MANY ARE CAUSING SHOOTINGS LIKE
4 SAN BERNARDINO, AND LIKE ORLANDO, AND LIKE NEWTOWN.

5 AND SO THE STATE JUST MADE A REASONED JUDGMENT THAT WHAT
6 WE'RE DOING ISN'T WORKING. BUT THAT THERE IS ACTUALLY
7 EVIDENCE, AND THERE WAS EVIDENCE, FOR EXAMPLE -- AND THIS IS IN
8 THE WEBSTER DECLARATION, AND ALSO IN KOPER'S DECLARATION,
9 EXHIBIT 107 TO MY DECLARATION, WHERE THEY'RE VERY CLEAR ABOUT
10 WHAT THE FEDERAL BAN ACTUALLY ACHIEVED.

11 AND, IN FACT, AS YOU -- THERE IS A HUGE STOCK PILING OF
12 ASSAULT WEAPONS AND LARGE CAPACITY MAGAZINES BEFORE THE BAN
13 GOES INTO EFFECT. SO THERE IS A DELAYED SORT OF ABILITY TO
14 KIND OF SEE WHAT IT'S DOING. BUT IN THE LATER YEARS, VIOLENT
15 CRIME, MASS SHOOTINGS START TO GO DOWN. SPECIFICALLY THERE ARE
16 FEWER FATALITIES AND FEWER MASS SHOOTINGS AS YOU GET CLOSER TO
17 2004. AND THOSE NUMBERS GO BACK UP AFTER THE BAN IS ALLOWED TO
18 EXPIRE.

19 THERE IS A LOT OF EVIDENCE THAT SUGGESTS AND, YOU KNOW,
20 YOUR HONOR COULD SIMPLY LOOK AT THE FINDINGS THAT HAVE BEEN
21 ADOPTED BY EVERY COURT TO CONSIDER THIS ISSUE, THAT THIS BAN IS
22 A REASONABLE FIT. THIS IS WHAT IS NEEDED. IS IT PERFECT? NO,
23 IT ISN'T. AND WE'VE DOCUMENTED ALL THE WAYS I THINK TODAY THAT
24 IT IS NOT PERFECT. IT DOESN'T NEED TO BE PERFECT. IT NEEDS TO
25 BE REASONABLE TO DO THE IMPORTANT JOB OF PROTECTING THE PEOPLE

1 OF CALIFORNIA. THAT IS THE LEGISLATURE'S JOB, YOUR HONOR.
2 THEY'RE ENTITLED TO WEIGH CONFLICTING OPINIONS AND TO MAKE THE
3 BEST DETERMINATION THAT THEY CAN. THE PEOPLE, OF COURSE, ARE
4 EMPOWERED TO DO THE SAME. THAT IS WHAT THEY HAVE DONE HERE.
5 AND SO TO -- TO OFFER THE EXTRAORDINARY REMEDY OF ENJOINING A
6 DULY-ENACTED PIECE OF LEGISLATION SIMPLY BECAUSE IT'S NOT
7 PERFECT, I'M ASKING YOUR HONOR NOT TO DO THAT. PLEASE DENY THE
8 PRELIMINARY INJUNCTION.

9 THE COURT: JUST A SECOND. DON'T GO AWAY YET.

10 MS. GORDON: OKAY.

11 THE COURT: LET ME ASK YOU ABOUT *MILLER*. I KNOW
12 THERE IS THIS DISCUSSION, YOU KNOW, THERE ARE THOSE WHO WANT TO
13 LIMIT THE SECOND AMENDMENT TO SOME SORT OF AN ORGANIZED
14 MILITIA, SOMETHING WHICH I BELIEVE *HELLER* HAS INDICATED WAS NOT
15 INTENDED, AND SOMETHING WHICH I BELIEVE IF ONE READS THE REAL
16 HISTORY BETWEEN THE SECOND AMENDMENT, ONE WOULD FIND IS NOT
17 SUPPORTED BY THE HISTORY. BUT LET'S SET THAT ASIDE FOR THE
18 TIME BEING.

19 THERE IS NO QUESTION THAT *MILLER* SAID, THE SUPREME COURT
20 DECISION IN *MILLER* SAID THAT THE TYPES OF WEAPONS THAT ARE
21 PROTECTED BY THE SECOND AMENDMENT ARE THOSE TYPES OF WEAPONS
22 THAT CAN BE USED FOR MILITARY PURPOSES AND WHICH WOULD BE
23 AVAILABLE TO A LAW-ABIDING CITIZEN WHO WAS CALLED UPON TO SERVE
24 IN A MILITIA. AGAIN, A MILITIA BEING A GROUP OF CITIZENS WHO
25 ARE CALLED UPON TO PROTECT A FREE STATE FROM EITHER INVASION OR

1 OTHER TYRANNY OR WHATEVER.

2 SO YOU WOULD AGREE THAT *MILLER*, IF WE ADOPT THAT REASONING
3 UNDER *MILLER*, THESE TYPES OF MAGAZINES WOULD, IN FACT, BE THE
4 TYPES OF MAGAZINES THAT WOULD BE PROTECTED BY THE SECOND
5 AMENDMENT, WOULDN'T YOU?

6 MS. GORDON: I'M SORRY, JUST SO I'M FOLLOWING, IS
7 THAT ON THE THEORY THAT THESE MAGAZINES WERE AVAILABLE AT THE
8 TIME OF THE SECOND AMENDMENT OR --

9 THE COURT: I READ -- NO, NO. ON THE THEORY THAT THE
10 MILITIA, WHICH WAS A GROUP OF CITIZENS --

11 MS. GORDON: RIGHT.

12 THE COURT: JUST CITIZENS, CITIZENS WHO SOMEBODY
13 SAID, WE'RE BEING ATTACKED. YOU RECALL THE STORY OF LEXINGTON
14 AND CONCORD?

15 MS. GORDON: I DO.

16 THE COURT: WHERE THE BRITISH CAME TO DISARM THE
17 COLONISTS.

18 MS. GORDON: YES, OF COURSE.

19 THE COURT: AND AS THEY ARRIVED THERE, MORE AND MORE
20 CITIZENS BEGAN TO SHOW UP WITH THEIR MUSKETS AND THEIR PISTOLS;
21 REMEMBER THAT?

22 MS. GORDON: I DO.

23 THE COURT: SO THEY GRABBED WHATEVER THEY HAD
24 AVAILABLE TO THEM, AND THAT'S WHAT THEY USED, WHETHER IT WAS A
25 MUSKET OR PISTOL OR WHATEVER. SO WE ASSUME THAT *MILLER* STANDS

1 FOR THE PROPOSITION THAT THE WEAPONS THAT THE SECOND AMENDMENT
2 WAS INTENDED TO PROTECT WERE THE KINDS OF WEAPONS THAT WOULD BE
3 USED BY A CITIZEN IN THE MILITARY CONTEXT, YOU WOULD AGREE THAT
4 A LARGE CAPACITY MAGAZINE WOULD BE PRECISELY THE KIND OF WEAPON
5 THAT YOU WOULD NEED AS A MEMBER OF THAT MILITIA, RIGHT?

6 MS. GORDON: NO, I WOULD NOT AGREE.

7 THE COURT: NO?

8 MS. GORDON: BECAUSE WHY WOULDN'T AN M16 BE PRECISELY
9 THE KIND OF WEAPON ONE WOULD NEED, RIGHT, TO BE PART OF THAT
10 MILITIA. YET WE KNOW UNDER *HELLER*, THAT IT'S PERMISSIBLE TO
11 BAN AN M16. SO I DON'T THINK THE TEST IS JUST, WHAT DO PEOPLE
12 LIKE, YOU KNOW, AND WHAT COULD THEY GRAB? AT A CERTAIN POINT,
13 I THINK THE DESTRUCTIVE FIRE POWER OF A WEAPON IS GOING TO
14 ACTUALLY COME INTO PLAY. AND I'M NOT SURE IT IS --

15 THE COURT: SO YOU'RE SAYING THAT THE MILITIA SHOULD
16 BE USING WEAPONS THAT DO NOT HAVE DESTRUCTIVE FIRE POWER?

17 MS. GORDON: WHY IS IT -- NO, I WOULDN'T SAY DO NOT
18 HAVE DESTRUCTIVE FIRE POWER. BUT IT GETS A LITTLE CONFUSING,
19 RIGHT. BECAUSE NOW WE'RE NOT TALKING ABOUT THEM SERVING IN THE
20 MILITIA, OF COURSE, BUT TALKING ABOUT THEM WALKING AROUND WITH
21 LARGE CAPACITY MAGAZINES. WE'RE TALKING ABOUT PRIVATE
22 CITIZENS.

23 THE COURT: WHICH ARE WHAT MAKES UP A MILITIA.

24 MS. GORDON: ABSOLUTELY.

25 THE COURT: OKAY.

1 MS. GORDON: AND, OF COURSE, YOU WANT THEM TO BE ABLE
2 TO DEFEND THEMSELVES. BUT THE TYPES OF WEAPONS WE'RE TALKING
3 ABOUT THAT A MILITIA HAS IS DISTINCT FROM THE TYPES OF WEAPONS
4 THAT THE MODERN MILITARY USES, RIGHT. MODERN MILITARY COULD
5 USE THE M16, BUT INDIVIDUAL CITIZENS CANNOT.

6 THE COURT: JUST A SECOND. IT IS IN YOUR MOTION
7 SOMEWHERE WHERE YOU TALK ABOUT THESE WEAPONS HAVING MILITARY
8 USE. IT WILL TAKE ME A MINUTE TO FIND IT.

9 MS. GORDON: TEN, STARTING AT TEN, YOUR HONOR.

10 THE COURT: THANKS FOR HELPING ME. I APPRECIATE
11 THAT.

12 YEAH, IT SAYS THAT THESE MAGAZINES ARE MOST SUITABLE FOR
13 MILITARY AND LAW ENFORCEMENT APPLICATIONS. THAT IS EXACTLY
14 WHAT *MILLER* SAID, THAT THE TYPES OF WEAPONS THAT THE SECOND
15 AMENDMENT PROTECTS ARE THE TYPES OF WEAPONS THAT WOULD BE ABLE
16 TO BE USED BY MILITARY, FOR MILITARY USE. NOW WE UNDERSTAND
17 THAT *HELLER* SAYS IF IT IS AN UNUSUAL WEAPON, SUCH AS, FOR
18 EXAMPLE, WE DON'T EXPECT CITIZENS TO OWN F18'S. WE DON'T
19 EXPECT THEM TO OWN BAZOOKAS OR HAND GRENADES OR FLAME THROWERS,
20 AS MR. BRADY POINTED OUT. BUT CERTAINLY, AS WE KNOW, THERE ARE
21 MILLIONS OF LAW-ABIDING CITIZENS WHO POSSESS GLOCK 19'S,
22 AR-15'S, ETC., WHO HAVE NEVER HURT ANYONE WITH THOSE WEAPONS.
23 BUT IF, AS I KIND OF JOKINGLY SAID EARLIER, THE RUSSIANS WERE
24 TO INVADE, WE MIGHT ALL WANT TO GO OUT AND PULL OUR AR-15'S AND
25 OUR GLOCK 19'S IN ORDER TO PROTECT THE FREE STATE, RIGHT?

1 MS. GORDON: WE MIGHT, BUT WE CAN'T.

2 THE COURT: AND THAT IS EXACTLY WHAT *MILLER* SAID THE
3 SECOND AMENDMENT WAS INTENDED TO PROTECT, RIGHT?

4 MS. GORDON: TRUE. BUT *HELLER* --

5 THE COURT: AND *MILLER* HAS NOT BEEN OVERTURNED, HAS
6 IT?

7 MS. GORDON: IT HAS NOT.

8 THE COURT: IT IS STILL GOOD LAW.

9 MS. GORDON: IT IS.

10 THE COURT: RIGHT. AND ALL THAT *HELLER* HAS DONE IS
11 SAID, YES, THAT IS EXACTLY RIGHT. THOSE ARE THE KINDS OF
12 WEAPONS THAT LAW-ABIDING CITIZENS WOULD OWN. BUT YOU ALSO
13 WOULD USE THEM FOR SELF-DEFENSE. AND THE QUINTESSENTIAL WEAPON
14 YOU WOULD USE FOR SELF-DEFENSE IS A HANDGUN, SUCH AS A GLOCK
15 19, THAT HOLDS MORE THAN 15 ROUNDS, RIGHT?

16 MS. GORDON: OR CAN, YES.

17 THE COURT: UNLESS WE'RE GOING TO GET INTO THE *HELLER*
18 II -- WAS IT *HELLER* II, WHERE THEY TALKED ABOUT, YOU CAN HAVE A
19 TEN-ROUND MAGAZINE, BUT YOU CAN ONLY PUT SEVEN ROUNDS IN IT?
20 WASN'T THAT *HELLER* II?

21 MS. GORDON: NO. THAT IS THE SECOND CIRCUIT CASE WE
22 CITED. AND THAT IS THE LOAD LIMIT.

23 THE COURT: YEAH.

24 MS. GORDON: SO IT IS NOT THE MAGAZINE CAPACITY
25 LIMIT. IT'S THE LOAD LIMIT THAT GETS STRUCK DOWN.

1 THE COURT: YEAH, RIGHT. EXACTLY.

2 MS. GORDON: YEAH. THAT IS THAT CASE. IT IS NEW
3 YORK STATE PISTOL AND RIFLE OR RIFLE AND PISTOL ASSOCIATION. I
4 THINK THERE IS SOME AMBIGUITY. AND I DON'T THINK IT'S
5 SUFFICIENT THAT A LOT OF LAW-ABIDING PEOPLE MAY ACTUALLY
6 POSSESS A LARGE CAPACITY MAGAZINE. BUT LET'S SAY IT IS. LET'S
7 SAY THAT DECIDES RIGHT THERE THAT SOMEHOW LARGE CAPACITY
8 MAGAZINES FALL UNDER THE PURVIEW OF THE SECOND AMENDMENT.
9 THEY'RE PROTECTED. WE'RE STILL GOING TO INTERMEDIATE SCRUTINY.
10 AND AGAIN, AS EVERY COURT CONSIDERED THE ISSUE HAS HELD, THE
11 LAW PASSES INTERMEDIATE SCRUTINY.

12 THE COURT: THANKS. YOU'VE WITHSTOOD MY WITHERING
13 CROSS-EXAMINATION OF YOU QUITE WELL.

14 MS. GORDON: THANK YOU, YOUR HONOR.

15 THE COURT: DO YOU HAVE ANYTHING ELSE YOU WANTED TO
16 ADD?

17 MS. GORDON: I DO NOT. THANK YOU.

18 THE COURT: MR. BRADY, SO WHY DO YOU THINK THAT
19 MS. GORDON IS ALL WET?

20 MR. BRADY: YOUR HONOR, WHAT I BELIEVE I HEARD FROM
21 COUNSEL IS A CONCESSION THAT LAW-ABIDING PEOPLE WILL BE
22 IMPACTED BY THIS LAW, AND THAT IN SOME INSTANCES, PEOPLE WILL
23 NOT BE ABLE TO DEFEND THEMSELVES WITH ONLY TEN ROUNDS. AND
24 ALL --

25 THE COURT: BUT SHE SAID IT'S NEVER HAPPENED BEFORE.

1 MR. BRADY: SHE SAID THERE IS NOTHING RECENTLY IN
2 CALIFORNIA. BUT THE RECORDS SHOW SEVERAL INCIDENTS. AND IF
3 YOU LOOK AT THE EXPERT MASSAD AYOUB DECLARATION, HE INDICATES
4 THAT IN REVIEWING THESE SHOOTINGS, IT'S THE AMOUNT OF SHOTS
5 FIRED ARE RARELY RECORDED FOR SOME REASON. THAT IS SOMETHING
6 THAT DOES NOT GET RECORDED IN CIVILIAN SHOTS.

7 IN POLICE OFFICER SHOOTINGS, THEY ARE ALWAYS RECORDED FOR
8 THE PURPOSE OF THE OFFICER HAS TO DEFEND THE SHOOT, RIGHT. AND
9 IN THOSE INSTANCES, IT'S QUITE FREQUENT THAT OVER TEN ROUNDS
10 ARE FIRED. AND EVEN IN THE CASES WHERE THEY'RE NOT BY ONE
11 PARTICULAR OFFICER, IF THERE ARE TWO OR THREE OFFICERS
12 RESPONDING, AND EACH OF THEM DISCHARGE THEIR WEAPON FOUR TIMES,
13 WELL, THAT IS TWELVE ROUNDS, THAT'S OVER TEN.

14 SO BUT I WANT TO GET BACK TO THE CONCESSION THAT ALBEIT
15 RARE, IT WILL IMPACT LAW-ABIDING PEOPLE AND THE CONCESSION THAT
16 IT WILL NOT IMPACT CRIMINALS. SHE INDICATED, ADMITTED THAT
17 THEY WILL NOT DISPOSSESS THEMSELVES OF THESE ARMS, WHICH GOES
18 TO THE EFFICACY OF THIS LAW AND WHY IT COULDN'T MEET
19 INTERMEDIATE SCRUTINY.

20 THE COURT: BUT WHAT ABOUT HER COMMENT, THOUGH, WHICH
21 MAKES SENSE AND THAT I UNDERSTAND, AND THAT IS THAT, SO A
22 LAW-ABIDING CITIZEN CAN POSSESS THESE MAGAZINES, BUT AS WE ALL
23 KNOW, THERE ARE BURGLARIES THAT OCCUR AND SOMETIMES THESE
24 WEAPONS THAT USE THESE MAGAZINES ARE STOLEN BY, BY DEFINITION
25 CRIMINALS, RIGHT, WHO ARE NOT LIKELY TO OBEY THE LAW, RIGHT.

1 AND THEY'RE LIKELY TO, PERHAPS, MISUSE THOSE WEAPONS, RIGHT?

2 MR. BRADY: SURE. WELL, FIRST, I DON'T THINK THAT
3 THE CONSTITUTIONAL RIGHTS OF THE LAW ABIDING CAN BE IMPACTED BY
4 THE ACTIONS OF CRIMINALS. BUT EVEN ASSUMING THEY COULD --

5 THE COURT: THAT IS THE WHOLE POINT OF THE STATUTE,
6 ISN'T IT?

7 MR. BRADY: THAT'S THE POINT OF THE STATUTE, BUT
8 THAT'S WHY IT IS UNCONSTITUTIONAL. IT INFRINGES UNNECESSARILY
9 ON CONSTITUTIONAL RIGHTS. BUT EVEN ASSUMING THAT THE
10 GOVERNMENT CAN, THERE ARE FAR LESS RESTRICTIVE MEANS, FOR
11 EXAMPLE, CALIFORNIA'S REQUIREMENT THAT FIREARMS BE STORED IN A
12 WAY THAT THOSE WHO ARE PROHIBITED FROM POSSESSING THEM CAN
13 OBTAIN THEM. SO IF THEY WANT TO SAY YOU HAVE TO STORE YOUR
14 MAGAZINE IN A WAY THAT A BAD GUY COULD NOT OBTAIN ONE --

15 THE COURT: THAT WOULD, IN ESSENCE, CREATE A LEAST
16 RESTRICTIVE STANDARD, WHICH IS A STRICT SCRUTINY STANDARD,
17 WHICH THE NINTH CIRCUIT HAS SAID DOES NOT APPLY IN THESE KINDS
18 OF CASES, RIGHT?

19 MR. BRADY: NO, YOUR HONOR. REMEMBER WE DON'T NEED
20 TO MEET -- EVEN UNDER INTERMEDIATE SCRUTINY, THEY STILL HAVE TO
21 HAVE A FIT. I WAS SIMPLY POSING AN EXAMPLE FOR YOUR HONOR OF A
22 LESS -- OF A LESSER RESTRICTED MEANS. I KNOW THE TEST IS NOT
23 THAT IT HAS TO BE THE LEAST RESTRICTIVE MEANS. I WAS PROVIDING
24 THAT AS AN EXAMPLE OF A SITUATION WHERE THERE IS LESS
25 RESTRICTIVE MEANS. AND AGAIN, I THINK WE'RE TALKING ABOUT A

1 BAN, OKAY. WHEN YOU'RE TALKING ABOUT A BAN, EVEN THOUGH IT
2 DOESN'T HAVE TO BE THE LEAST RESTRICTIVE MEANS, THERE HAS TO BE
3 A REASONABLE FIT. AND BANNING CONDUCT THAT IS PROTECTED BY THE
4 CONSTITUTION SIMPLY CANNOT WITHSTAND ANY FORM OF HEIGHTENED
5 SCRUTINY, OTHERWISE --

6 THE COURT: LOOK --

7 MR. BRADY: -- THAT RESTRICTION IS WORTHLESS.

8 THE COURT: FACIALLY AND SUPERFICIALLY, ALMOST ANYONE
9 THAT YOU TELL THEM, YOU SAY TO THEM, LOOK, IF WE BAN THESE HIGH
10 CAPACITY MAGAZINES, WE'RE GOING TO KEEP PEOPLE FROM GETTING
11 SHOT, WHO CAN POSSIBLY DISAGREE WITH THAT? I MEAN, YOU KNOW,
12 RIGHT. SO THE REASONABLE FIT STANDARD IS KIND OF A DIFFICULT
13 STANDARD FOR ME TO GET THROUGH. BECAUSE, YEAH, SURE, WE BAN
14 THESE MAGAZINES, FEWER ROUNDS, FEWER PEOPLE LIKELY TO GET SHOT,
15 KILLED, OR INJURED. SUPERFICIALLY THAT MAKES PERFECTLY GOOD
16 SENSE TO ALMOST ANYONE, RIGHT?

17 MR. BRADY: SUPERFICIALLY IT MIGHT, YOUR HONOR. BUT
18 WHEN YOU DELVE DOWN INTO THE FACTS, THE FLIP SIDE OF THAT IS
19 THAT A PERSON IN SELF-DEFENSE MIGHT NEED MORE THAN TEN ROUNDS.
20 AND THIS LAW WOULD MAKE THAT PERSON A VICTIM. AND IF YOU LOOK
21 AT PLAINTIFFS' EXPERT'S DECLARATION, PROFESSOR DR. GARY KLECK,
22 HE INDICATES THAT BASED ON HIS REVIEW OF INCIDENTS AND
23 STATISTICS, THAT IT IS FAR MORE LIKELY FOR SOMEBODY TO USE A
24 FIREARM AND NEED MORE THAN TEN ROUNDS TO DEFEND THEMSELVES THAN
25 SOMEBODY -- THAN THE MAGAZINE CAPACITY MAKING A DIFFERENCE IN A

1 MASS SHOOTING. AND I THINK THAT'S KEY. YOUR HONOR, I THINK,
2 WAS HONING IN ON THIS, THAT THE MAGAZINE CAPACITY ALMOST NEVER
3 MATTERS IN THESE MASS SHOOTINGS. SURE, THEY USE OVER TEN-ROUND
4 MAGAZINES FAIRLY OFTEN; ALTHOUGH, I'M NOT SURE IT IS A
5 MAJORITY. DR. KLECK'S DECLARATION EXPLAINS ALL OF THAT STUFF.
6 BUT EVEN IF IT DOES, THE VIRGINIA TECH SHOOTING, ONE OF THE
7 DEADLIEST SHOOTINGS IN HISTORY, HE USED A BACKPACK FULL OF
8 TEN-ROUND MAGAZINES. SO THE MAGAZINE -- AND LIKE YOUR HONOR
9 INDICATED, THEY OFTEN USE MULTIPLE FIREARMS AND CHANGE AS THEY
10 GO. AND SO --

11 THE COURT: THERE WAS ONE THING THAT I OMITTED TO ASK
12 MS. GORDON ABOUT. THERE IS SOMETHING ELSE THAT IS COMMON WITH
13 ALL THESE MASS SHOOTINGS, AND THAT IS PLANNING, UNLIKE THE
14 PERSON AT HOME WHO IS ASLEEP. I USE THE WOMAN AS AN EXAMPLE
15 BECAUSE I'VE SEEN THOSE CASES IN MY CRIMINAL SENTENCINGS. THE
16 WOMAN IS ASLEEP, WAKES UP IN THE MIDDLE OF THE NIGHT, HEARS A
17 NOISE IN HER APARTMENT. AND SHE IS NOT PLANNING -- SHE IS NOT
18 PLANNING TO SHOOT ANYONE. SHE IS BASICALLY WANTING TO PROTECT
19 HERSELF. BUT IN ALL THESE MASS SHOOTINGS, THE OTHER THING THAT
20 IS IN COMMON BESIDES THE FACT THAT THEY NORMALLY BRING A LOT OF
21 WEAPONS TO THE SHOOTING, IS THE FACT THEY HAVE HAD A CHANCE TO
22 PLAN FOR THOSE, RIGHT, WHETHER THEY BRING A 15-ROUND MAGAZINE
23 OR TEN-ROUND MAGAZINE DOESN'T REALLY MAKE A DIFFERENCE.

24 MR. BRADY: THAT IS EXACTLY RIGHT, YOUR HONOR. AND
25 THE EXPERT DECLARATIONS FOR PLAINTIFFS SHOW THAT BOTH THAT OF

1 MASSAD AYOOB AND DR. GARY KLECK. AND LET'S BE CLEAR, MR. AYOOB
2 IS A SELF-DEFENSE EXPERT, WHOM THE POLICE, HIGHEST POLICE
3 AGENCIES IN THE COUNTRY HIRE TO TRAIN THEIR PEOPLE FOR
4 SELF-DEFENSE PURPOSES.

5 THE COURT: HE SEEMS VERY CREDIBLE IN HIS
6 DECLARATION.

7 MR. BRADY: AND SO TO SUGGEST THAT THE ACADEMICS THAT
8 WERE REVIEWING THE STATISTICS FOR THE ATTORNEY GENERAL KNOW
9 WHAT IS BETTER IN A SELF-DEFENSE SITUATION THAN MR. AYOOB IS --
10 DOESN'T REALLY PASS MUSTER.

11 I ALSO, ON THE SECOND AMENDMENT POINT, I'D JUST LIKE TO
12 POINT OUT THAT EVEN IF PEOPLE RARELY NEED TO ACTUALLY DISCHARGE
13 OVER TEN ROUNDS IN A SELF-DEFENSE SITUATION, THAT IS NOT THE
14 TEST. *HELLER* IS VERY CLEAR THAT THE RIGHT IS TO BARE ARMS IN
15 CASE OF CONFRONTATION. THAT MEANS IN CASE YOU NEED MORE THAN
16 TEN ROUNDS, YOU SHOULD BE ABLE TO HAVE IT. IT ALLOWS YOU TO
17 HAVE THE WEAPONRY THAT IS IN COMMON USE, TYPICALLY POSSESSED BY
18 LAW-ABIDING PEOPLE FOR LAWFUL PURPOSES. IT IS INDISPUTABLE
19 THAT THESE MAGAZINES FIT THAT DESCRIPTION. AGAIN, THE STANDARD
20 IS THAT THE GOVERNMENT MUST PROVE THAT THEY ARE HIGHLY UNUSUAL
21 IN SOCIETY AT LARGE, AND THAT IS JUST NOT THE CASE HERE. SO
22 WHEN YOU'RE TALKING ABOUT BANNING THEM, THAT CAN'T MEET THE FIT
23 TEST OF INTERMEDIATE SCRUTINY.

24 NOW UNLESS YOUR HONOR HAS ANY MORE QUESTIONS ON THE SECOND
25 AMENDMENT, I'D LIKE TO MOVE ON TO THE TAKINGS --

1 THE COURT: GO AHEAD.

2 MR. BRADY: -- ISSUE. SO COUNSEL SUGGESTED THAT
3 THERE IS, PERHAPS, A MISUNDERSTANDING OF THE ATTORNEY GENERAL'S
4 POSITION ON THE TAKINGS ISSUE. I BELIEVE I HAVE THEIR POSITION
5 QUITE CLEAR. AND THAT IS THAT THEY SAY THE GOVERNMENT MUST
6 ACTUALLY TAKE THE PROPERTY AND USE IT ITSELF. AGAIN, AS I
7 INDICATED PREVIOUSLY, THAT IS DEMONSTRABLY ERRONEOUS BASED ON
8 THE CASE LAW. AND I WILL CITE TO YOU, TO YOUR HONOR, *HAWAII*
9 *HOUSING AUTHORITY VS. MIDKIFF*, 467 U.S. 229, AT 255.

10 QUOTE, *THE COURT LONG AGO REJECTED ANY LITERAL REQUIREMENT*
11 *THAT CONDEMNED PROPERTY BE PUT INTO USE FOR THE GENERAL PUBLIC.*
12 *IT IS NOT ESSENTIAL THAT THE ENTIRE COMMUNITY, NOR EVEN ANY*
13 *CONSIDERABLE PORTION, DIRECTLY ENJOY OR PARTICIPATE IN ANY*
14 *IMPROVEMENT IN ORDER FOR IT TO CONSTITUTE A PUBLIC USE.*

15 IT GOES ON TO SAY THAT THERE IS NO NEED FOR THE GOVERNMENT
16 TO ACTUALLY USE THE PROPERTY. IN THE *KELO* CASE, THE GOVERNMENT
17 WAS GETTING IT TO A THIRD PARTY. THE GOVERNMENT DIDN'T TAKE
18 POSSESSION OF THE PROPERTY. THE ISSUE IN *KELO* --

19 THE COURT: I KNOW *KELO*.

20 MR. BRADY: YEAH, IS WHETHER IT WAS A PUBLIC USE. SO
21 JUST BECAUSE IT'S GOING TO A THIRD PARTY, OR NOT GOING TO ANY
22 PARTY AT ALL, THE QUESTION IS NOT WHETHER THE GOVERNMENT
23 ACTUALLY USES IT. THE QUESTION IS WHETHER IT IS FOR THE PUBLIC
24 GOOD. AND HERE, THAT IS -- IF IT'S NOT FOR THE PUBLIC GOOD,
25 THEN THEY CAN'T TAKE IT UNDER THE TAKINGS CLAUSE. AND THEY

1 HAVE NO INTEREST UNDER THE SECOND AMENDMENT TO BAN THEM IF IT
2 DOESN'T FURTHER THE PUBLIC GOOD.

3 SO WITH THAT, YOUR HONOR, I WILL SUBMIT UNLESS YOU HAVE
4 ANY QUESTIONS.

5 THE COURT: MS. GORDON?

6 MS. GORDON: I WILL ALSO SUBMIT, YOUR HONOR, UNLESS
7 YOUR HONOR HAS ANY QUESTIONS.

8 THE COURT: ALL RIGHT. WELL, LISTEN, I WANT TO THANK
9 YOU BOTH. I THINK YOU BOTH DID AN EXCELLENT JOB OF
10 REPRESENTING YOUR RESPECTIVE POSITIONS. THE BRIEFING WAS
11 CERTAINLY MORE THAN SUFFICIENT, AND YOUR ARGUMENTS WERE
12 ENLIGHTENING. I WILL TAKE THE MATTER UNDER SUBMISSION. AND
13 HOPEFULLY I'LL BE ABLE TO ISSUE A DECISION BEFORE THIS LAW GOES
14 INTO EFFECT, OKAY.

15 ANYTHING ELSE? IF NOT, WE'RE ADJOURNED. THANK YOU.

16 MS. GORDON: THANK YOU, YOUR HONOR.

17 MR. BRADY: THANK YOU, YOUR HONOR.

18 (RECESS AT 11:42 A.M.)

19 ---000---

20

21

22

23

24

25

C-E-R-T-I-F-I-C-A-T-I-O-N

I HEREBY CERTIFY THAT I AM A DULY APPOINTED,
QUALIFIED AND ACTING OFFICIAL COURT REPORTER FOR THE UNITED
STATES DISTRICT COURT; THAT THE FOREGOING IS A TRUE AND CORRECT
TRANSCRIPT OF THE PROCEEDINGS HAD IN THE AFOREMENTIONED CAUSE;
THAT SAID TRANSCRIPT IS A TRUE AND CORRECT TRANSCRIPTION OF MY
STENOGRAPHIC NOTES; AND THAT THE FORMAT USED HEREIN COMPLIES
WITH THE RULES AND REQUIREMENTS OF THE UNITED STATES JUDICIAL
CONFERENCE.

DATED: AUGUST 1, 2017, AT SAN DIEGO, CALIFORNIA

S/DEBORAH M. O'CONNELL, CSR #10563
REGISTERED PROFESSIONAL REPORTER

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Attorney General Xavier Becerra

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

VIRGINIA DUNCAN, et al.,

Plaintiffs,

v.

**XAVIER BECERRA, in his official
capacity as Attorney General of the
State of California; et al.,**

Defendants.

17-cv-1017-BEN-JLB

**ATTORNEY GENERAL XAVIER
BECERRA'S ANSWER**

Judge: Hon. Roger T. Benitez
Courtroom: 5A
Action Filed: May 17, 2017

1 Defendant Attorney General Xavier Becerra submits this Answer in response
2 to Plaintiffs' Complaint. The Attorney General answers, in paragraphs that
3 correspond to the Complaint's paragraphs, as follows:

4 1. To the extent that the allegations contained in paragraph 1 are Plaintiffs'
5 characterization of their case and conclusions of law, no answer is required. With
6 respect to the remainder of the allegations in paragraph 1, the Attorney General
7 lacks sufficient knowledge or information to form a belief as to the truth of the
8 allegations, and on that basis denies the allegations of paragraph 1. Except as
9 specifically admitted, the Attorney General denies the allegations of paragraph 1.

10 2. To the extent that the allegations contained in paragraph 2 are Plaintiffs'
11 characterization of their case and conclusions of law, no answer is required. The
12 Attorney General admits that California Penal Code section 32310 speaks for itself.
13 The Attorney General further admits that large-capacity magazines, as defined by
14 California law, *see* Cal. Penal Code § 16740, are a threat to public safety. The
15 Attorney General denies the remainder of the allegations in paragraph 2. Except as
16 specifically admitted, the Attorney General denies the allegations of paragraph 2.

17 3. To the extent that the allegations contained in paragraph 3 are Plaintiffs'
18 characterization of their case and conclusions of law, no answer is required. The
19 Attorney General admits that California Penal Code section 32310 speaks for itself.
20 The Attorney General further admits that each judicial opinion referenced in
21 paragraph 3 speaks for itself. The Attorney General denies the remainder of the
22 allegations in paragraph 3. Except as specifically admitted, the Attorney General
23 denies the allegations of paragraph 3.

24 4. To the extent that the allegations contained in paragraph 4 are legal
25 conclusions, no answer is required. To the extent they may be deemed allegations
26 of fact, the Attorney General denies the allegations of paragraph 4.

27 5. To the extent that the allegations contained in paragraph 5 are Plaintiffs'
28 characterization of their case and conclusions of law, no answer is required. To the

1 extent they may be deemed allegations of fact, the Attorney General denies the
2 allegations of paragraph 5.

3 6. Paragraph 6 sets forth a description of the relief sought by Plaintiffs. The
4 Attorney General denies that Plaintiffs are entitled to such relief. The Attorney
5 General denies the remaining allegations of paragraph 6.

6 7. The Attorney General admits that this Court has jurisdiction. The
7 Attorney General denies the remaining allegations of paragraph 7.

8 8. The Attorney General admits that Plaintiffs seek declaratory and
9 injunctive relief, as well as attorneys' fees. The Attorney General further admits
10 that each statute referenced in paragraph 8 speaks for itself. Except as specifically
11 admitted, the Attorney General denies the allegations of paragraph 8.

12 9. The Attorney General admits the allegations of paragraph 9.

13 10. The Attorney General lacks sufficient knowledge or information to form
14 a belief as to the truth of the allegations in paragraph 10, and on that basis denies
15 the allegations of paragraph 10.

16 11. The Attorney General lacks sufficient knowledge or information to form
17 a belief as to the truth of the allegations in paragraph 11, and on that basis denies
18 the allegations of paragraph 11.

19 12. The Attorney General lacks sufficient knowledge or information to form
20 a belief as to the truth of the allegations in paragraph 12, and on that basis denies
21 the allegations of paragraph 12.

22 13. The Attorney General lacks sufficient knowledge or information to form
23 a belief as to the truth of the allegations in paragraph 13, and on that basis denies
24 the allegations of paragraph 13.

25 14. The Attorney General lacks sufficient knowledge or information to form
26 a belief as to the truth of the allegations in paragraph 14, and on that basis denies
27 the allegations of paragraph 14.
28

1 15. The Attorney General lacks sufficient knowledge or information to form
2 a belief as to the truth of the allegations in paragraph 15, and on that basis denies
3 the allegations of paragraph 15.

4 16. The Attorney General lacks sufficient knowledge or information to form
5 a belief as to the truth of the allegations in paragraph 16, and on that basis denies
6 the allegations of paragraph 16.

7 17. The Attorney General lacks sufficient knowledge or information to form
8 a belief as to the truth of the allegations in paragraph 17, and on that basis denies
9 the allegations of paragraph 17.

10 18. To the extent that the allegations contained in paragraph 18 are Plaintiffs'
11 characterization of their case and conclusions of law, no answer is required. To the
12 extent that they are allegations of fact, the Attorney General lacks sufficient
13 knowledge or information to form a belief as to the truth of the allegations in
14 paragraph 18, and on that basis denies the allegations of paragraph 18.

15 19. To the extent that the allegations contained in paragraph 19 are legal
16 conclusions, no answer is required. The Attorney General admits that he is the
17 Attorney General of California and the chief law officer of the State. The Attorney
18 General admits that article V, section 13 of the California Constitution speaks for
19 itself. Except as specifically admitted, the Attorney General denies the allegations
20 of paragraph 19.

21 20. The Attorney General lacks sufficient knowledge or information to form
22 a belief as to the truth of the allegations in paragraph 20, and on that basis denies
23 the allegations of paragraph 20.

24 21. The Attorney General admits that he is the chief law officer of the State,
25 and as such, is charged with upholding and enforcing the laws of the State. The
26 Attorney General denies the remaining allegations of paragraph 21.

27 22. The Attorney General denies the allegations of paragraph 22.
28

23. To the extent that the allegations contained in paragraph 23 are Plaintiffs' characterization of their case and conclusions of law, no answer is required. The Attorney General admits that the Second Amendment speaks for itself. Except as specifically admitted, the Attorney General denies the allegations of paragraph 23.

24. To the extent that the allegations contained in paragraph 24 are Plaintiffs' characterization of their case and conclusions of law, no answer is required. The Attorney General admits that each judicial opinion referenced in paragraph 24 speaks for itself. Except as specifically admitted, the Attorney General denies the allegations of paragraph 24.

25. To the extent that the allegations contained in paragraph 25 are Plaintiffs' characterization of their case and conclusions of law, no answer is required. Attorney General admits that each judicial opinion referenced in paragraph 25 speaks for itself. Except as specifically admitted, the Attorney General denies the allegations of paragraph 25.

26. To the extent that the allegations contained in paragraph 26 are Plaintiffs' characterization of their case and conclusions of law, no answer is required. Attorney General admits that each constitutional provision and judicial opinion referenced in paragraph 26 speaks for itself. Except as specifically admitted, the Attorney General denies the allegations of paragraph 26.

27. To the extent that the allegations contained in paragraph 27 are Plaintiffs' characterization of their case and conclusions of law, no answer is required. The Attorney General admits that the Takings Clause of the Fifth Amendment speaks for itself. Except as specifically admitted, the Attorney General denies the allegations of paragraph 27.

28. To the extent that the allegations contained in paragraph 28 are Plaintiffs' characterization of their case and conclusions of law, no answer is required. The Attorney General admits that the judicial opinion referenced in paragraph 28 speaks

1 for itself. Except as specifically admitted, the Attorney General denies the
2 allegations of paragraph 28.

3 29. To the extent that the allegations contained in paragraph 29 are Plaintiffs'
4 characterization of their case and conclusions of law, no answer is required.
5 Attorney General admits that each judicial opinion referenced in paragraph 29
6 speaks for itself. Except as specifically admitted, the Attorney General denies the
7 allegations of paragraph 29.

8 30. To the extent that the allegations contained in paragraph 30 are Plaintiffs'
9 characterization of their case and conclusions of law, no answer is required. The
10 Attorney General admits that the judicial opinion referenced in paragraph 30 speaks
11 for itself. Except as specifically admitted, the Attorney General denies the
12 allegations of paragraph 30.

13 31. To the extent that the allegations contained in paragraph 31 are Plaintiffs'
14 characterization of their case and conclusions of law, no answer is required. The
15 Attorney General admits that the Due Process Clause of the Fourteenth Amendment
16 speaks for itself. Except as specifically admitted, the Attorney General denies the
17 allegations of paragraph 31.

18 32. To the extent that the allegations contained in paragraph 32 are Plaintiffs'
19 characterization of their case and conclusions of law, no answer is required.
20 Attorney General admits that each judicial opinion referenced in paragraph 32
21 speaks for itself. Except as specifically admitted, the Attorney General denies the
22 allegations of paragraph 32.

23 33. To the extent that the allegations contained in paragraph 33 are Plaintiffs'
24 characterization of their case and conclusions of law, no answer is required.
25 Attorney General admits that each judicial opinion referenced in paragraph 33
26 speaks for itself. Except as specifically admitted, the Attorney General denies the
27 allegations of paragraph 33.
28

1 34. To the extent that the allegations contained in paragraph 34 are Plaintiffs'
2 characterization of their case and conclusions of law, no answer is required. The
3 Attorney General admits that the judicial opinion referenced in paragraph 34 speaks
4 for itself. Except as specifically admitted, the Attorney General denies the
5 allegations of paragraph 34.

6 35. The Attorney General admits that a magazine is a container that holds
7 and feeds rounds of ammunition to a firearm. Except as specifically admitted, the
8 Attorney General denies the allegations of paragraph 35.

9 36. The Attorney General admits that magazines may be fixed or detachable.
10 The Attorney General lacks sufficient knowledge or information to form a belief as
11 to the truth of the remainder of the allegations in paragraph 36, and on that basis
12 denies the allegations of paragraph 36. Except as specifically admitted, the
13 Attorney General denies the allegations of paragraph 36.

14 37. The Attorney General lacks sufficient knowledge or information to form
15 a belief as to the truth of the allegations in paragraph 37, and on that basis denies
16 the allegations of paragraph 37.

17 38. The Attorney General lacks sufficient knowledge or information to form
18 a belief as to the truth of the allegations in paragraph 38, and on that basis denies
19 the allegations of paragraph 38.

20 39. The Attorney General lacks sufficient knowledge or information to form
21 a belief as to the truth of the allegations in paragraph 39, and on that basis denies
22 the allegations of paragraph 39.

23 40. The Attorney General lacks sufficient knowledge or information to form
24 a belief as to the truth of the allegations in paragraph 40, and on that basis denies
25 the allegations of paragraph 40.

26 41. The Attorney General lacks sufficient knowledge or information to form
27 a belief as to the truth of the allegations in paragraph 41, and on that basis denies
28 the allegations of paragraph 41.

1 42. The Attorney General lacks sufficient knowledge or information to form
2 a belief as to the truth of the allegations in paragraph 42, and on that basis denies
3 the allegations of paragraph 42.

4 43. The Attorney General lacks sufficient knowledge or information to form
5 a belief as to the truth of the allegations in paragraph 43, and on that basis denies
6 the allegations of paragraph 43.

7 44. The Attorney General lacks sufficient knowledge or information to form
8 a belief as to the truth of the allegations in paragraph 44, and on that basis denies
9 the allegations of paragraph 44.

10 45. The Attorney General admits that California law speaks for itself. The
11 Attorney General lacks sufficient knowledge or information to form a belief as to
12 the truth of the remainder of the allegations in paragraph 45, and on that basis
13 denies the allegations of paragraph 45. Except as specifically admitted, the
14 Attorney General denies the allegations of paragraph 45.

15 46. To the extent that the allegations contained in paragraph 46 are legal
16 conclusions, no answer is required. The Attorney General admits that a number of
17 jurisdictions have laws prohibiting large-capacity magazines. The Attorney
18 General admits that each statute referenced in paragraph 46 and footnote 7 speaks
19 for itself. Except as specifically admitted, the Attorney General denies the
20 allegations of paragraph 46.

21 47. To the extent that the allegations contained in paragraph 47 are Plaintiffs'
22 characterization of their case, no answer is required. The Attorney General lacks
23 sufficient knowledge or information to form a belief as to the truth of the
24 allegations in paragraph 47, and on that basis denies the allegations of paragraph
25 47.

26 48. The Attorney General admits that Senate Bill 23, Senate Bill 1080, and
27 California Penal Code sections 16740 and 32310 speak for themselves. Except as
28 specifically admitted, the Attorney General denies the allegations of paragraph 48.

49. The Attorney General admits that Senate Bill 23 speaks for itself. Except as specifically admitted, the Attorney General denies the allegations of paragraph 49.

50. The Attorney General admits that in July 2016, the California Legislature passed and the Governor signed Senate Bill 1446 into law. The Attorney General further admits that in November 2016, California voters approved Proposition 63. The Attorney General admits that Senate Bill 1446, Proposition 63, and California Penal Code section 32310 speak for themselves. Except as specifically admitted, the Attorney General denies the allegations of paragraph 50.

51. The Attorney General admits that California Penal Code section 32310 speaks for itself. Except as specifically admitted, the Attorney General denies the allegations of paragraph 51.

52. The Attorney General admits that California Penal Code section 32310 speaks for itself. Except as specifically admitted, the Attorney General denies the allegations of paragraph 52.

53. The Attorney General admits that each section of the California Penal referenced in paragraph 53 speaks for itself. Except as specifically admitted, the Attorney General denies the allegations of paragraph 53.

54. To the extent that the allegations contained in paragraph 54 are Plaintiffs' characterization of their case and conclusions of law, no answer is required. The Attorney General admits that California Penal Code section 32310 speaks for itself. The Attorney General further admits that each judicial opinion referenced in paragraph 54 speaks for itself. The Attorney General denies the remainder of the allegations in paragraph 54. Except as specifically admitted, the Attorney General denies the allegations of paragraph 54.

55. To the extent that the allegations contained in paragraph 55 are Plaintiffs' characterization of their case and conclusions of law, no answer is required. The Attorney General denies the allegations of paragraph 55.

1 56. To the extent that the allegations contained in paragraph 56 are Plaintiffs'
2 characterization of their case and conclusions of law, no answer is required. The
3 Attorney General admits that California Penal Code section 32310 speaks for itself.
4 The Attorney General denies the remainder of the allegations in paragraph 56.
5 Except as specifically admitted, the Attorney General denies the allegations of
6 paragraph 56.

7 57. To the extent that the allegations contained in paragraph 57 are Plaintiffs'
8 characterization of their case and conclusions of law, no answer is required. The
9 Attorney General denies the allegations of paragraph 57.

10 58. To the extent that the allegations contained in paragraph 58 are Plaintiffs'
11 characterization of their case and conclusions of law, no answer is required. The
12 Attorney General denies the allegations of paragraph 58.

13 59. To the extent that the allegations contained in paragraph 59 are Plaintiffs'
14 characterization of their case and conclusions of law, no answer is required. The
15 Attorney General admits that the Due Process Clause of the Fourteenth Amendment
16 speaks for itself. The Attorney General further admits that each judicial opinion
17 referenced in paragraph 59 speaks for itself. Except as specifically admitted, the
18 Attorney General denies the allegations of paragraph 59.

19 60. To the extent that the allegations contained in paragraph 60 are Plaintiffs'
20 characterization of their case and conclusions of law, no answer is required. The
21 Attorney General denies the allegations of paragraph 60.

22 61. To the extent that the allegations contained in paragraph 61 are Plaintiffs'
23 characterization of their case and conclusions of law, no answer is required. The
24 Attorney General denies the allegations of paragraph 61.

25 62. To the extent that the allegations contained in paragraph 62 are Plaintiffs'
26 characterization of their case and conclusions of law, no answer is required. The
27 Attorney General denies the allegations of paragraph 62.
28

63. To the extent that the allegations contained in paragraph 63 are Plaintiffs' characterization of their case and conclusions of law, no answer is required. The Attorney General denies the allegations of paragraph 63.

64. The Attorney General incorporates and reasserts each and every response contained in the foregoing paragraphs of this Answer, as though fully set forth herein.

65. To the extent that the allegations contained in paragraph 65 are Plaintiffs' characterization of their case and conclusions of law, no answer is required. The Attorney General admits that California Penal Code section 32310 speaks for itself. The Attorney General denies the remainder of the allegations in paragraph 65. Except as specifically admitted, the Attorney General denies the allegations of paragraph 65.

66. The Attorney General denies the allegations of paragraph 66.

67. The Attorney General denies the allegations of paragraph 67.

68. To the extent that the allegations contained in paragraph 68 are Plaintiffs' characterization of their case and conclusions of law, no answer is required. The Attorney General admits that California Penal Code section 32310 speaks for itself. The Attorney General denies the remainder of the allegations in paragraph 68. Except as specifically admitted, the Attorney General denies the allegations of paragraph 68.

69. The Attorney General denies the allegations of paragraph 69.

70. The Attorney General incorporates and reasserts each and every response contained in the foregoing paragraphs of this Answer, as though fully set forth herein.

71. To the extent that the allegations contained in paragraph 71 are Plaintiffs' characterization of their case and conclusions of law, no answer is required. The Attorney General admits that California Penal Code section 32310 speaks for itself. The Attorney General denies the remainder of the allegations in paragraph 71.

1 Except as specifically admitted, the Attorney General denies the allegations of
2 paragraph 71.

3 72. The Attorney General denies the allegations of paragraph 72.

4 73. The Attorney General denies the allegations of paragraph 73.

5 74. The Attorney General incorporates and reasserts each and every response
6 contained in the foregoing paragraphs of this Answer, as though fully set forth
7 herein.

8 75. The Attorney General admits that the Dupe Process Clause and each
9 judicial opinion referenced in paragraph 75 speaks for itself. The Attorney General
10 denies the remainder of the allegations in paragraph 75. Except as specifically
11 admitted, the Attorney General denies the allegations of paragraph 75.

12 76. The Attorney General denies the allegations of paragraph 76.

13 The Attorney General denies that Plaintiffs are entitled to the relief set forth in
14 the Prayer for Relief immediately following paragraph 76, or to any relief
15 whatsoever. To the extent that the Prayer for Relief states any allegations, the
16 Attorney General denies them.

17 **FIRST AFFIRMATIVE DEFENSE**

18 The Complaint, and the claims for relief alleged therein, fails to state facts
19 sufficient to constitute a cause of action.

20 **SECOND AFFIRMATIVE DEFENSE**

21 Plaintiff's claims in this action are barred in that they do not have standing to
22 bring them.

23 **THIRD AFFIRMATIVE DEFENSE**

24 The Complaint, and each cause of action therein, is improper as Plaintiffs have
25 an adequate remedy at law.

26 **FOURTH AFFIRMATIVE DEFENSE**

27 The Complaint, and every cause of action therein, is barred by the equitable
28 doctrines of estoppel, laches, unclean hands, and/or waiver.

FIFTH AFFIRMATIVE DEFENSE

To the extent that the Attorney General has undertaken any conduct with regard to the subjects and events underlying Plaintiffs' Complaint, such conduct was, at all times material thereto, undertaken in good faith and in reasonable reliance on existing law.

SIXTH AFFIRMATIVE DEFENSE

The Attorney General has not knowingly or intentionally waived any applicable affirmative defense. The Attorney General reserves the right to assert and rely upon other such defenses as may become available or apparent during discovery proceedings or as may be raised or asserted by others in this case, and to amend the Answer and/or affirmative defenses accordingly. The Attorney General further reserves the right to amend the Answer to delete affirmative defenses that he determines are not applicable after subsequent discovery.

WHEREFORE, Defendant prays that:

1. Plaintiffs take nothing by reason of the Complaint;
2. Judgment be entered in favor of Defendant;
3. Defendant be awarded costs incurred in defending this action; and
4. Defendant be awarded such further relief that the Court may deem just and proper.

1 Dated: June 12, 2017

Respectfully submitted,

2 XAVIER BECERRA
3 Attorney General of California
4 TAMAR PACHTER
5 Supervising Deputy Attorney General
6 NELSON R. RICHARDS
7 ANTHONY P. O'BRIEN
8 Deputy Attorneys General

9 /s/ Alexandra Robert Gordon
10 ALEXANDRA ROBERT GORDON
11 Deputy Attorney General
12 *Attorneys for Defendant*
13 *Attorney General Xavier Becerra*
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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

VIRGINIA DUNCAN, RICHARD
LEWIS, PATRICK LOVETTE, DAVID
MARGUGLIO, CHRISTOPHER
WADDELL, CALIFORNIA RIFLE &
PISTOL ASSOCIATION,
INCORPORATED, a California
corporation,

Plaintiffs,

v.

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

Defendants.

Case No: 17-cv-1017-BEN-JLB

**ORDER GRANTING EX PARTE
APPLICATION FOR ORDER
SHORTENING TIME**

Having considered the Plaintiff's Ex Parte Application for Order Shortening Time to Hear Motion for Preliminary Injunction and finding good cause therefor:

IT IS HEREBY ORDERED that the time for service of Plaintiffs' Motion for Preliminary Injunction and supporting documents is shortened from 28 days to 14 days, so that filing and service by May 29, 2017, constitutes sufficient notice of the proceedings referenced therein.

IT IS FURTHER ORDERED that all papers in opposition must be filed and served by June 5, 2017. Any reply in support must be filed and served by June 9, 2017.

ER0148

1 The hearing on Plaintiffs' Motion for a Preliminary Injunction shall take place on
2 **Tuesday, June 13, 2017, at 10:00 a.m.** in Department 5A of the above-titled court,
3 located at 221 West Broadway, San Diego, CA 92101.

4
5 Date: May 26, 2017

Signed: _____


Honorable Roger T. Benitez
U.S. District Court Judge

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ER0149

C.D. Michel – SBN 144258
Sean A. Brady – SBN 262007
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

VIRGINIA DUNCAN, RICHARD
LEWIS, PATRICK LOVETTE, DAVID
MARGUGLIO, CHRISTOPHER
WADDELL, CALIFORNIA RIFLE &
PISTOL ASSOCIATION,
INCORPORATED, a California
corporation,

Plaintiffs,

v.

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

Defendant.

Case No: 17-cv-1017-BEN-JLB

**EX PARTE APPLICATION FOR
ORDER SHORTENING TIME TO
HEAR PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Date:
Time:
Dept: 5A
Judge: Hon. Roger T. Benitez

ER0150

**TO THE COURT AND ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS
OF RECORD:**

Notice is hereby given that on May 25, 2017, counsel for Plaintiffs Virginia Duncan, Richard Lewis, Patrick Lovette, David Marguglio, and California Rifle & Pistol Association, Incorporated, will apply to this Court for an order to shorten time on Plaintiffs' Motion for Preliminary Injunction. Specifically, Plaintiffs will ask this Court to hear their motion for preliminary injunction on June 12, 2017, upon 14 days' notice to Defendant. Plaintiffs will also seek an order that any opposition be due on or before June 5, 2017, and any reply be due on or before June 9, 2017.

At 2:53 p.m. on May 24, 2017, Plaintiffs' counsel contacted attorneys at the Office of the Attorney General to provide notice that Plaintiffs' intended to file this ex parte application for order shortening time. Barvir Decl. ¶ 2; Ex. A at 3. Plaintiffs' counsel was subsequently directed to Deputy Attorneys General Alexandra Robert Gordon and Anthony O'Brien, counsel assigned to represent Defendant Attorney General Xavier Becerra in this matter. Barvir Decl. ¶ 3; Ex. A at 2. Plaintiffs' counsel then reached out to Ms. Robert Gordon and Mr. O'Brien to provide more-detailed notice of this application and to attempt meet and confer efforts. Barvir Decl. ¶ 4; Ex. A at 1. Defendant's counsel has said that his client would oppose Plaintiffs' request for an order shortening time. Barvir Decl. ¶ 5; Ex. B at 1.

Plaintiffs bring this application for good cause on the grounds that they require an order on their motion for preliminary injunction before July 1, 2017, when the amendments to California Penal Code section 32310 take effect, requiring Plaintiffs (and potentially hundreds of thousands of law-abiding Californians) in lawful possession of magazines over 10 rounds to permanently dispossess themselves of their property or face criminal prosecution. If Plaintiffs cannot have their motion for preliminary injunction heard and granted before July 1st, they will suffer irreparable harm.

///

///

ER0151

1 This application is based on the memorandum of points and authorities and the
2 declarations of Anna M. Barvir and Sean A. Brady filed simultaneously herewith, as well
3 as all the records currently on file and any oral argument that this Court may authorize.

4 Date: May 25, 2017

MICHEL & ASSOCIATES, P.C.

5
6 s/C.D. Michel
7 C.D. Michel
8 Email: cmichel@michellawyers.com
9 Counsel for Plaintiffs Duncan, Lewis
10 Lovette, Marguglio, Waddell, and
11 California Rifle & Pistol Association,
12 Incorporated
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ER0152

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF CALIFORNIA

3 VIRGINIA DUNCAN, RICHARD
4 LEWIS, PATRICK LOVETTE, DAVID
5 MARGUGLIO, CHRISTOPHER
6 WADDELL, CALIFORNIA RIFLE &
7 PISTOL ASSOCIATION,
8 INCORPORATED, a California
9 corporation,

10 Plaintiffs,

11 v.

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

15 Defendant.

Case No: 17-cv-1017-BEN-JLB

CERTIFICATE OF SERVICE

16 IT IS HEREBY CERTIFIED THAT:

17 I, the undersigned, am a citizen of the United States and am at least 18 years of
18 age. My business address is 180 East Ocean Boulevard, Suite 200 Long Beach, California
19 90802. I am not a party to the above-entitled action.

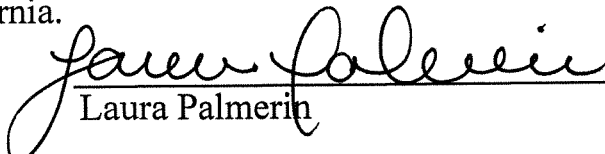
20 I have cause service of the following documents, described as:

21 **EX PARTE APPLICATION FOR ORDER SHORTENING TIME TO
22 HEAR PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

23 on all parties by email with return receipt requested and by overnight mail, with postage
24 fully prepaid, for each address named below and depositing each in the U.S. Mail at Long
25 Beach, California, on May 25, 2017.

26 Ms. Alexandra Robert Gordon
27 alexandra.robertgordon@doj.ca.gov
28 Mr. Anthony P. O'Brien
anthony.obrien@doj.ca.gov
California Department of Justice
1300 I Street, Suite 125
Sacramento, CA 95814

I declare under penalty of perjury that the foregoing is true and correct. Executed
on May 25, 2017, at Long Beach, California.


Laura Palmerin

ER0153

C.D. Michel – SBN 144258
Sean A. Brady – SBN 262007
Anna M. Barvir – SBN 268728
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

VIRGINIA DUNCAN, RICHARD
LEWIS, PATRICK LOVETTE, DAVID
MARGUGLIO, CHRISTOPHER
WADDELL, and CALIFORNIA RIFLE
& PISTOL ASSOCIATION,
INCORPORATED, a California
corporation,

Plaintiffs,

v.

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

Defendants.

Case No.: '17CV1017 BEN JLB

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

1 Plaintiffs Virginia Duncan, Richard Lewis, Patrick Lovette, David Marguglio,
 2 Christopher Waddell, and California Rifle & Pistol Association, Incorporated, through
 3 their counsel, bring this action against Defendant Attorney General Xavier Becerra, in his
 4 official capacity, and make the following allegations.

5 INTRODUCTION

6 1. Millions of law-abiding Americans own firearms equipped with magazines
 7 capable of holding more than ten rounds of ammunition.¹ There is nothing unusual or
 8 novel about this technology. Indeed, many of the nation’s best-selling handguns and rifles
 9 come *standard* with magazines that can hold more than ten rounds, and firearms
 10 equipped with such magazines are safely possessed by law-abiding citizens in the vast
 11 majority of states. The reason for the popularity of these magazines is straightforward: In
 12 a confrontation with a violent attacker, having enough ammunition can be the difference
 13 between life and death.

14 2. Although magazines capable of holding more than ten rounds have existed and
 15 been in common use for more than a century, California banned their manufacture, sale,
 16 import, or transfer effective January 1, 2000. In the state’s view, these standard-issue
 17 magazines are actually “large-capacity magazines” that threaten public safety.² Last year,
 18 the state took the additional and extreme step of banning the mere *possession* of
 19 magazines over ten rounds. Under the revised law, California Penal Code section 32310
 20 (“Section 32310”), owners of such magazines who want to keep the property they
 21 lawfully acquired and have used only for lawful purposes may no longer continue to do
 22

23 ¹ A firearm “magazine” is a device that holds ammunition cartridges or shells, and
 24 (along with other parts of the firearm) it feeds the ammunition into the chamber for firing.
 25 Sporting Arms & Ammunition Mfrs.’ Inst. (SAAMI), *Glossary Results–M* (2009),
<http://saami.org/glossary/display.cfm?letter=M>.

26 ² Defined as “any ammunition feeding device with the capacity to accept more
 27 than 10 rounds,” but not including a feeding device that has been permanently altered so
 28 that it cannot accommodate more than 10 rounds, a .22 caliber tube ammunition feeding
 device, or a tubular magazine that is contained in a lever-action firearm. Cal. Penal Code
 § 16740.

1 so.

2 3. Section 32310 violates multiple constitutional provisions. First, it
 3 impermissibly burdens Plaintiffs' Second Amendment rights. The Second Amendment
 4 protects the right to keep and bear arms "typically possessed by law-abiding citizens for
 5 lawful purposes," *District of Columbia v. Heller*, 554 U.S. 570, 624-25 (2008), including
 6 the ammunition and magazines necessary to make them effective, *see Jackson v. City and*
 7 *County of San Francisco*, 746 F.3d 953, 967-68 (9th Cir. 2014); *Fyock v. Sunnyvale*, 779
 8 F.3d 991, 998 (9th Cir. 2015). Because the magazines California has prohibited are "in
 9 common use . . . for lawful purposes like self-defense," the prohibition "cannot stand."
 10 *Heller*, 554 U.S. at 624, 636.

11 4. Section 32310 also violates the Takings Clause. By banning *possession*—in
 12 addition to sales and use—of magazines that were lawfully acquired and are presently
 13 lawfully possessed, Section 32310 constitutes a physical appropriation of property
 14 without just compensation that is *per se* unconstitutional. *See Horne v. Dep't of Agric.*, --
 15 U.S. --, 135 S. Ct. 2419, 2427 (2015).

16 5. Finally, Section 32310 violates the Due Process Clause. Banning magazines
 17 over ten rounds is no more likely to reduce criminal abuse of guns than banning high
 18 horsepower engines is likely to reduce criminal abuse of automobiles. To the contrary,
 19 the only thing the ban ensures is that a criminal unlawfully carrying a firearm with a
 20 magazine over ten rounds will have a (potentially devastating) advantage over his law-
 21 abiding victim. And Section 32310 raises particularly acute due process concerns because
 22 it criminalizes the continued possession of magazines that were lawful when acquired.
 23 *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 541 (2005); *id.* at 548-49 (Kennedy, J.,
 24 concurring).

25 6. Desiring to acquire, possess, use, and/or transfer these constitutionally protected
 26 firearm magazines for lawful purposes including self-defense, but justifiably fearing
 27 prosecution if they do, Plaintiffs respectfully request that this Court: (1) declare that
 28 California Penal Code section 32310 infringes Plaintiffs' constitutional rights; and (2)

1 permanently enjoin Defendants from enforcing section 32310 to the extent it prevents
2 law-abiding Californians, like Plaintiffs, from acquiring, possessing, using, or
3 transferring constitutionally protected arms.

4 **JURISDICTION AND VENUE**

5 7. The Court has original jurisdiction of this civil action under 28 U.S.C. § 1331,
6 because the action arises under the Constitution and laws of the United States, thus
7 raising federal questions. The Court also has jurisdiction under 28 U.S.C. § 1343(a)(3)
8 and 42 U.S.C. § 1983 since this action seeks to redress the deprivation, under color of the
9 laws, statutes, ordinances, regulations, customs and usages of the State of California and
10 political subdivisions thereof, of rights, privileges or immunities secured by the United
11 States Constitution and by Acts of Congress.

12 8. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28
13 U.S.C. §§ 2201 and 2202, respectively, and their claim for attorneys' fees is authorized
14 by 42 U.S.C. § 1988.

15 9. Venue in this judicial district is proper under 28 U.S.C. § 1391(b)(2), because a
16 substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this
17 district.

18 **PARTIES**

19 **[Plaintiffs]**

20 10. Plaintiff Virginia Duncan is a resident of San Diego County, California, and a
21 law-abiding citizen of the United States. Plaintiff Duncan does not currently own a
22 magazine prohibited by Section 32310, but she seeks to acquire such a magazine to keep
23 in her home for self-defense and other lawful purposes. But for California's restrictions
24 on magazines over ten rounds and her reasonable fear of criminal prosecution for
25 violating them, Plaintiff Duncan would immediately acquire and continuously possess a
26 magazine over ten rounds within California for lawful purposes, including in-home self-
27 defense.

28 11. Plaintiff David Marguglio is a resident of San Diego County, California, and a

1 law-abiding citizen of the United States. Plaintiff Marguglio does not currently own a
2 magazine prohibited by Section 32310, but he seeks to acquire such a magazine to keep
3 in his home for self-defense and other lawful purposes. But for California's restrictions
4 on magazines over ten rounds and his reasonable fear of criminal prosecution for
5 violating them, Plaintiff Marguglio would immediately acquire and continuously possess
6 a magazine over ten rounds within California for lawful purposes, including in-home
7 self-defense.

8 12. Plaintiff Christopher Waddell is a resident of San Diego County, California, and
9 a law-abiding citizen of the United States. Plaintiff Waddell does not currently own a
10 magazine prohibited by Section 32310, but he seeks to acquire such a magazine to keep
11 in his home for self-defense and other lawful purposes. But for California's restrictions
12 on magazines over ten rounds and his reasonable fear of criminal prosecution for
13 violating them, Plaintiff Waddell would immediately acquire and continuously possess a
14 magazine over ten rounds and a firearm capable of accepting such a magazine within
15 California for lawful purposes, including in-home self-defense.

16 13. Plaintiff Richard Lewis is a resident of San Diego County, California, a law-
17 abiding citizen of the United States, and an honorably discharged 22-year veteran of the
18 United States Marine Corps. Plaintiff Lewis currently owns magazines capable of holding
19 more than 10 rounds, items that he has lawfully possessed for over 20 years. He is not
20 exempt from California laws barring the acquisition, possession, and/or transfer of
21 magazines over ten rounds. Plaintiff Lewis seeks to continue possessing his lawfully
22 owned property, acquire additional magazines capable of holding more than 10 rounds,
23 and devise or transfer his lawfully owned property to his offspring. But for California's
24 restrictions on magazines over ten rounds and his reasonable fear of criminal prosecution
25 for violating them, Plaintiff Lewis would continue to possess his lawfully owned
26 magazines over ten rounds, immediately acquire additional such magazines, and devise
27 or transfer them to his offspring.

28 14. Plaintiff Patrick Lovette is a resident of San Diego County, California, a law-

1 abiding citizen of the United States, and an honorably retired 22-year veteran of the
2 United States Navy. He intends to relocate to Arizona in August 2017. Plaintiff Lovette
3 currently owns magazines capable of holding more than 10 rounds, items that he has
4 lawfully possessed for over 20 years. He is not exempt from California laws barring the
5 acquisition, possession, and/or transfer of magazines over ten rounds. Plaintiff Lovette
6 seeks to continue to possess his lawfully owned property, acquire additional magazines
7 over 10 rounds, and devise or transfer his lawfully owned property to his offspring. Once
8 he relocates to Arizona, Mr. Lovette also intends to visit California with his firearm and a
9 magazine over ten rounds for self-defense. But for California's restrictions on magazines
10 over ten rounds and his reasonable fear of criminal prosecution for violating them,
11 Plaintiff Lovette would continue to possess his lawfully owned magazines over ten
12 rounds, immediately acquire additional such magazines, travel between California and
13 Arizona with those magazines, and devise or transfer them to his offspring.

14 15. Each of the individual Plaintiffs identified above seeks to keep, acquire,
15 possess, and/or transfer magazines capable of holding more than 10 rounds for lawful
16 purposes, including in-home self-defense, as is their right under the Second Amendment
17 to the United States Constitution. Each of the individual Plaintiffs identified above is
18 eligible under the laws of the United States and of the State of California to receive and
19 possess firearms.

20 16. Plaintiff California Rifle & Pistol Association, Incorporated ("CRPA"), is a
21 nonprofit membership and donor-support organization qualified as tax-exempt under 26
22 U.S.C. § 501(c)(4) with its headquarters in the City of Fullerton, in Orange County,
23 California. Founded in 1875, CRPA seeks to defend the civil rights of all law-abiding
24 individuals, including the fundamental right to acquire and possess commonly owned
25 firearm magazines.

26 17. CRPA regularly provides guidance to California gun owners regarding their
27 legal rights and responsibilities. In addition, CRPA is dedicated to promoting the
28 shooting sports and providing education, training, and organized competition for adult

1 and junior shooters. CRPA members include law enforcement officers, prosecutors,
2 professionals, firearm experts, and the public.

3 18. In this suit, CRPA represents the interests of the tens of thousands of its
4 members who reside in the state of California, including in San Diego County, and who
5 are too numerous to conveniently bring this action individually. Specifically, CRPA
6 represents the interests of those who are affected by California's restriction on magazines
7 capable of holding more than 10 rounds. In addition to their standing as citizens and
8 taxpayers, those members' interest includes their wish to exercise their constitutionally
9 protected right to keep and bear arms without being subjected to criminal prosecution,
10 and to continue to lawfully possess property that they lawfully obtained. But for
11 California's restrictions on magazines over ten rounds and their reasonable fear of
12 prosecution for violating them, CRPA members would seek to acquire, keep, possess
13 and/or transfer such magazines for in-home self-defense and other lawful purposes.

14 **[Defendants]**

15 19. Defendant Xavier Becerra is the Attorney General of California. He is the chief
16 law enforcement officer of California. Defendant Becerra is charged by Article V,
17 Section 13 of the California Constitution with the duty to see that the laws of California
18 are uniformly and adequately enforced. Defendant Becerra also has direct supervision
19 over every district attorney and sheriff in all matters pertaining to the duties of their
20 respective officers. Defendant Becerra's duties also include informing the public, local
21 prosecutors, and law enforcement regarding the meaning of the laws of California,
22 including restrictions on certain magazines classified as "large-capacity magazines." He
23 is sued in his official capacity.

24 20. The true names or capacities—whether individual, corporate, associate, or
25 otherwise—of the Defendants named herein as Does 1-10, are presently unknown to
26 Plaintiffs, and are therefore sued by these fictitious names. Plaintiffs pray for leave to
27 amend this Complaint to show the true names or capacities of these Defendants if and
28 when they have been determined.

21. Defendants Becerra and Does 1-10 are responsible for formulating, executing, and administering California's restrictions on magazines capable of holding more than 10 rounds at issue in this lawsuit, and they are in fact presently enforcing them.

22. Defendants enforce California restrictions on magazines capable of holding more than 10 rounds against Plaintiffs and other California citizens under color of state law within the meaning of 42 U.S.C. § 1983.

GENERAL ALLEGATIONS

[Right to Keep and Bear Arms]

23. The Second Amendment to the United States Constitution declares that "the right of the people to keep and bear arms shall not be infringed." U.S. CONST. amend. II.

24. The United States Supreme Court has concluded that "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day, and . . . individual self-defense is 'the central component' of the Second Amendment right." *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (quoting *Heller*, 554 U.S. at 628). The Court has held that "a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society" is unconstitutional, especially when that prohibition extends "to the home, where the need for defense of self, family, and property is most acute." *Heller*, 554 U.S. at 628.

25. The "arms" protected by the Second Amendment are those "typically possessed by law-abiding citizens for lawful purposes" today. *See, e.g., id.* at 624-25; *see also Caetano v. Massachusetts*, -- U.S. --, 136 S. Ct. 1027, 1027-28 (2016). The Second Amendment's protection also includes the ammunition and magazines necessary to meaningfully keep and bear arms for self-defense. *See Jackson*, 746 F.3d at 967-68; *Fyock*, 779 F.3d at 998. As such, the Second Amendment protects magazines and the firearms equipped with them that are in common use for lawful purposes.

26. The Supreme Court has also held that the Second Amendment right to keep and bear arms is incorporated into the Due Process Clause of the Fourteenth Amendment and may not be infringed by state and local governments. *McDonald*, 561 U.S. at 750.

[Takings Clause]

27. The Takings Clause of the Fifth Amendment provides “nor shall private property be taken for public use, without just compensation.” U.S. Const. amend. V. The Takings Clause applies against the states through the Fourteenth Amendment. *See Lingle*, 544 U.S. at 536.

28. The Takings Clause protects against two kinds of governmental takings: “a restriction on the *use* of property,” which is known as a “regulatory taking,” and a direct “physical *appropriation*” of “an interest in property.” *Horne*, 135 S. Ct. at 2425, 2427.

29. “When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.” *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002). That rule applies to takings of both real and personal property. *See Horne*, 135 S. Ct. at 2427.

30. A regulation that “goes too far”—for example, by depriving a property owner of economically beneficial use or otherwise “interfer[ing] with legitimate property interests”—also requires just compensation. *Lingle*, 544 U.S. at 537-39.

[Due Process Clause]

31. 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.

32. “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 also, Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (collecting cases). Thus, a statute that deprives an individual of life, liberty, or property without furthering “any legitimate governmental objective” violates the Due Process Clause. *Lingle*, 544 U.S. at 542.

33. Legislation that changes the law retroactively—making conduct that was legal when undertaken illegal—is especially likely to run afoul of the Due Process Clause. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976); *E. Enterprs. v. Apfel*, 524

U.S. 498, 547-550 (1998) (Kennedy, J., concurring in part and dissenting in part). “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. Consequently, due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity.” *E. Enterprs.*, 524 U.S. at 548-49.

34. A law that deprives an owner of private property without a permissible 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 Restricted Items and Their Uses]

35. A firearm magazine is a device that stores ammunition, and it is a critical part of delivering a loaded cartridge to the firing chamber of a rifle, pistol, or shotgun for discharge of a projectile (bullet or shot).

36. Magazines can be either fixed to (“integral”) or detachable from a firearm. Removal of fixed magazines requires disassembly of the firearm. Once a fixed magazine is removed from a firearm, the firearm lacks a structure to store ammunition, rendering the firearm unable to accept ammunition for firing, unless manually loaded into the chamber one round at a time after each discharge.

37. On the other hand, detachable magazines are designed to be routinely removed from and reinserted into a firearm.³ Removal generally requires a shooter to use a finger on the shooter’s dominant hand to press a button or push a lever that releases the magazine from the cavity into which it is inserted to feed ammunition into the firearm’s chamber for firing. Once a detachable magazine is removed, the firearm is unable to

³ “Detachable magazine” means, in relevant part, “any ammunition feeding device that can be removed readily from the firearm with neither disassembly of the firearm action nor use of a tool being required.” Cal. Code Regs. tit. 11, § 5469(a). They generally consist of four parts—a follower, a spring, the magazine-body, and a floor plate—but can vary between three and five parts. *See* Ex. A (image of a disassembled detachable magazine in five parts).

1 accept ammunition for firing, unless manually loaded into the chamber one round at a
2 time after each discharge.⁴

3 38. Originally, firearms only had “fixed” magazines.⁵ The modern detachable
4 magazine was given form in 1879 with the introduction of the Remington-Lee bolt-action
5 rifle, and detachable magazines have been in common use ever since. Frank M. Sellers,
6 *Sharps Firearms* (1978).

7 39. Detachable magazines offer several advantages beyond ease of reloading the
8 firearm. Most important to self-defense, including in the home, detachable magazines
9 allow for quick loading. This is especially beneficial if the gun is stored in an unloaded
10 condition.

11 40. The detachable magazine is also useful if the firearm “jams.” A “jam” is the
12 failure of an expended cartridge case to eject or the failure of a loaded cartridge to enter
13 the chamber properly. The proper procedure for clearing a “jam” usually involves first
14 removing the magazine. If the magazine is fixed, clearing the “jam” can be more difficult
15 (and dangerous) because the next round in the magazine is trying to feed into the
16 chamber and the user does not have the option, as there would be with a detachable
17 magazine, of removing the magazine from below to stop that pressure.

18 41. Even outside a “jam” situation, detachable magazines offer safety advantages.
19 Many fixed magazines require that the cartridges be cycled through the loading process
20 for unloading. That creates many more opportunities for an accidental discharge—
21 opportunities that are exacerbated when unloading must occur in a vehicle, in darkness,
22
23
24

25 ⁴ This may not even be an option for some firearm models, e.g., ones with
26 magazine disconnect safety.

27 ⁵ Examples are the Lewis & Clark’s Girandoni rifle (20-round capacity) and the
28 Henry lever action rifle used in America’s civil war (15-round capacity). Silvio Calabi,
Steve Helsley & Roger Sanger, *The Gun Book for Boys* (2012).

1 or in a crowded location.⁶

2 42. Detachable magazines are a convenient and safe way to store and transport
3 ammunition. And if mud or dirt gets into the magazine, it is often much easier to clean or
4 replace a detachable magazine.

5 43. Finally, pre-loaded detachable magazines allow shooters to conveniently share
6 ammunition while practicing—if they have similar firearms—or to safely reload while
7 waiting one's turn to shoot, since the magazine is outside of the firearm while reloading
8 takes place.

9 44. Firearm users have had the choice of magazine types and capacity for over 130
10 years. What they select is based on their respective need. For generations, Americans
11 have overwhelmingly chosen detachable magazines.

12 45. While California does not prohibit all detachable magazines—allowing for
13 those with a capacity of ten rounds or less—it does prohibit the sizes of magazines that
14 are most popular among the American public. Indeed, detachable magazines capable of
15 holding more than ten rounds come standard with countless handgun and rifle models
16 throughout the country. And law-abiding Americans own such magazines by the tens of
17 millions.

18 46. Detachable magazines capable of holding more than ten rounds are so common
19 that only seven states and the District of Columbia place any restrictions on them. Not
20 only are all those restrictions of recent vintage, they differ as to what capacity is
21 acceptable and for what types of firearms magazine-capacity should be restricted.⁷

24 ⁶ For instance, the Evans rifle with its 34-round integral capacity would involve
25 cycling the action 34 times to completely unload it.

26 ⁷ Colorado (Colo. Rev. Stat. Ann. § 18-12-302) (15-round capacity maximum);
27 Connecticut (Conn. Gen. Stat. Ann. § 53-202w) (10-round capacity maximum); District
28 of Columbia (D.C. Code Ann. § 7-2506.01) (10-round capacity maximum); Hawaii
(Haw. Rev. Stat. Ann. § 134-8(c)) (10-round capacity maximum for handguns only);
Maryland (Md. Code Ann., Crim. Law § 4-305(b)) (10-round capacity maximum);
Massachusetts (Mass. Gen. Laws Ann. ch. 140, § 131M) (10-round capacity maximum);

47. There is little dispute that magazines having a capacity over 10 rounds are popular for self-defense purposes. The grip of a handgun is sized to the common human hand. If enough space exists inside the grip for detachable magazines capable of holding more than 10 rounds—as is true for most commonly sold handguns and rifles—it makes sense, from a self-defense perspective, to take advantage of that space by accommodating as much ammunition as possible. Each available round is an additional opportunity to end a threat. That is precisely why millions of Americans choose magazines over ten rounds for self-defense, including in the home.

[California’s Ban on Magazines Over Ten Rounds]

48. In 1999, the California legislature enacted Senate Bill 23 (“SB 23”), making it a crime, beginning January 1, 2000, to manufacture, import, sell, or transfer any “large-capacity magazine” in the state of California. S. B. 23, 1999-2000 Reg. Sess. (Cal. 1999) (codified at Cal. Penal Code § 32310 [formerly Cal. Penal Code § 12020(a)(2)]).⁸ SB 23 defined “large-capacity magazine” as “any ammunition feeding device with the capacity to accept more than 10 rounds,” but not including feeding devices that have been permanently altered to accommodate no more than 10 rounds or any .22 caliber tube ammunition feeding device. Cal. Penal Code § 16740 (formerly Cal. Penal Code § 12020(c)(25)).

49. As originally enacted, California’s restriction did not include “possession” as one of the prohibited activities relating to magazines over ten rounds. This meant that individuals who lawfully possessed such magazines prior to the enactment of SB 23 did not have to dispose of them.

New Jersey (N.J. Stat. Ann. § 2C:39-9(h)); (10-round capacity maximum); and New York (N.Y. Penal Law § 265.02(8)) (10-round capacity maximum).

⁸ In 2010, California enacted Senate Bill 1080 (“SB 1080”), which reorganized the Penal Code sections relating to firearms “without substantive change.” S. B. 1080, 2009-2010 Reg. Sess. (Cal. 2010). Penal Code section 12020(a)(2) thus became Penal Code section 32310.

50. In July 2016, however, the California legislature passed and the Governor signed Senate Bill 1446 (“SB 1446”), amending Section 32310 to also prohibit the mere possession of magazines capable of holding more than 10 rounds. S. B. 1446, 2015-2016 Reg. Sess. (Cal. 2016). On November 8, 2016, California voters approved Proposition 63, which made effectively the same amendment as SB 1446 did to Section 32310, prohibiting (again) the possession of magazines capable of holding more than 10 rounds.⁹

51. Under either version of the recently amended Section 32310, any person in lawful possession of a magazine capable of holding more than ten rounds has until July 1, 2017, to: (1) remove it from the state; (2) sell it to a licensed firearms dealer; or (3) surrender it to law enforcement.

52. Penalties for violating Section 32310 range from an infraction punishable by a fine of up to \$100 to a felony punishable by a fine and/or imprisonment.

53. California law identifies several exceptions to the ammunition magazine restrictions, including but not limited to possession by military and possession by law enforcement while acting “in the course and scope of their duties.” *See* Cal. Penal Code §§ 32400-32450. None of the listed exceptions to Section 32310’s magazine ban applies to the acquisition, making, and possession of magazines capable of holding more than ten rounds by law-abiding citizens, including Plaintiffs, for self-defense.

[Violation of Plaintiffs’ Right to Keep and Bear Arms]

54. Section 32310 prohibits magazines that come standard with or are commonly used in firearms that are “typically possessed by law-abiding citizens for lawful

⁹ While laws passed by way of voter initiative generally supersede those made via legislation, Cal. Const. art. 2, § 10(c), Proposition 63 provides that its provisions may be amended “by a vote of 55 percent of the members of each house of the Legislature and signed by the Governor so long as such amendments are consistent with and further [its] intent” SB 1446 was passed by such a majority, but before the people voted to adopt Proposition 63. It is thus unclear which controls. This is largely irrelevant because both versions amended Section 32310 (albeit in different subdivisions), however, to prohibit the possession of magazines capable of holding more than 10 rounds. Whichever version controls, Plaintiffs seek an injunction of Section 32310 for the same reasons.

purposes,” *Heller*, 554 U.S. at 624-25, throughout the United States. Indeed, millions of firearms—including the most popular models—that come stock from the factory with magazines over ten rounds have been sold in the United States. People also buy such magazines aftermarket by the millions. Notwithstanding California’s description of the prohibited magazines as being “large capacity,” magazines with capacities of more than ten rounds are, instead, *standard*-capacity for many common firearms that are lawfully possessed in the clear majority of states.

55. Prohibiting law-abiding adults from acquiring, keeping, possessing, and/or transferring these commonly owned magazines implicates and violates their Second Amendment rights. A total ban on standard-issue, commonly possessed magazines is not remotely tailored to increasing public safety. To the contrary, limiting magazine capacity to ten rounds decreases public safety.

[Violation of the Plaintiffs’ Rights Under the Takings Clause]

56. Section 32310 makes it a crime for individuals to continue to possess magazines that they lawfully acquired and presently lawfully possess.

57. By forcing individuals who would otherwise keep their lawfully acquired property to instead physically surrender that property without government compensation, Section 32310 effects a per se unconstitutional taking. *See Horne*, 135 S. Ct. at 2427.

58. In the alternative, to the extent that Section 32310 does not constitute a physical taking, it is an unconstitutional regulatory taking.

[Violation of Plaintiffs’ Right to Due Process]

59. Under the Due Process Clause, the government may deprive individuals of their property only when doing so furthers a “legitimate governmental objective.” *Lingle*, 544 U.S. at 542. The due process concerns are heightened when a law applies retroactively to change the consequences of conduct that was lawful at the time. *See E. Enterprs.*, 524 U.S. at 547-550 (Kennedy, J., concurring in part and dissenting in part).

60. By making it a crime for individuals to continue to possess property that they lawfully acquired, Section 32310 deprives individuals of protected property interests

1 without due process of law. For prohibiting law-abiding adults from possessing lawfully
2 acquired and commonly owned magazines based solely on their ability to accept more
3 than 10 rounds does not further a “legitimate governmental objective” in a permissible
4 way. *Lingle*, 544 U.S. at 542.

5 **DECLARATORY JUDGMENT ALLEGATIONS**

6 61. There is an actual and present controversy between the parties. Plaintiffs
7 contend that Section 32310 infringes on Plaintiffs’ right to keep and bear arms under the
8 Second and Fourteenth Amendments to the United States Constitution, by generally
9 prohibiting commonly possessed ammunition feeding devices that it deems “large-
10 capacity magazines.” Plaintiffs also contend that Section 32310 violates the Takings
11 Clause by requiring owners who lawfully purchased “large-capacity magazines” to
12 surrender physical possession of their property to the government rather than keeping it
13 in their possession. And Plaintiffs contend that Section 32310 violates the Due Process
14 Clause by banning lawfully acquired magazines based on a feature (capacity to accept
15 more than 10 rounds) that has no relation to enhancing public safety or any other valid
16 governmental objective. Defendants deny these contentions. Plaintiffs desire a judicial
17 declaration that the California Penal Code section 32310 violates Plaintiffs’ constitutional
18 rights. Plaintiffs should not be forced to choose between risking criminal prosecution and
19 exercising their constitutional rights.

20 **INJUNCTIVE RELIEF ALLEGATIONS**

21 62. Plaintiffs are presently and continuously injured by Defendants’ enforcement of
22 California Penal Code section 32310 insofar as that provision violates Plaintiffs’ rights
23 under the Second Amendment, the Takings Clause, and the Due Process Clause by
24 precluding the acquisition, possession, and use of firearm magazines that are “typically
25 possessed by law-abiding citizens for lawful purposes” nationwide.

26 63. If not enjoined by this Court, Defendants will continue to enforce Section
27 32310 in derogation of Plaintiffs’ constitutional rights. Plaintiffs have no plain, speedy,
28 and adequate remedy at law. Damages are indeterminate or unascertainable and, in any

1 event, would not fully redress any harm suffered by Plaintiffs because they are unable to
2 engage in constitutionally protected activity due to California's ongoing enforcement of
3 Section 32310.

4
5 **FIRST CLAIM FOR RELIEF**
6 **Right to Keep and Bear Arms**
(U.S. Const., amends. II and XIV)

7 64. Paragraphs 1-63 are realleged and incorporated by reference.

8 65. Section 32310's definition of "large-capacity magazine" includes many firearm
9 magazines that come standard with or are common for firearms "typically possessed by
10 law-abiding citizens for lawful purposes" nationwide. Section 32310, therefore, generally
11 prohibits Californians, including Plaintiffs, from acquiring, keeping, possessing, and/or
12 transferring magazines protected by the Second Amendment, subject to significant
13 criminal penalties, including imprisonment.

14 66. These restrictions on magazines that are commonly possessed throughout the
15 United States by law-abiding, responsible adults for lawful purposes infringe on the right
16 of the People of California, including Plaintiffs, to keep and bear protected arms as
17 guaranteed by the Second Amendment of the United States Constitution, and as made
18 applicable to California by the Fourteenth Amendment.

19 67. In violation of the Second Amendment, Section 32310 prohibits law-abiding,
20 responsible adults, including Plaintiffs, who would otherwise do so, from acquiring,
21 keeping, possessing, and/or transferring magazines capable of holding more than ten
22 rounds that are in common use by law-abiding citizens for lawful purposes throughout
23 the United States.

24 68. Section 32310's prohibitions extend into Plaintiffs' homes, where Second
25 Amendment protections are at their zenith, but also affects lawful and constitutionally
26 protected conduct such as hunting, recreational shooting, and competitive marksmanship
27 participation.

28 69. Defendants cannot satisfy their burden of justifying Section 32310's restrictions

1 on the Second Amendment right of the People, including Plaintiffs, to acquire, keep,
2 possess, transfer, and use magazines that are in common use by law-abiding adults
3 throughout the United States for the core right of defense of self and home and other
4 lawful purposes.

5 **SECOND CLAIM FOR RELIEF**
6 **Takings Clause**
(U.S. Const. amends. V, XIV)

7 70. Paragraphs 1-69 are realleged and incorporated by reference.

8 71. Section 32310 makes it a crime for individuals to continue to possess
9 magazines that they lawfully acquired and presently lawfully possess.

10 72. By forcing individuals who would otherwise keep their lawfully acquired
11 property to instead physically surrender that property without government compensation,
12 Section 32310 effects a per se unconstitutional taking. *See Horne*, 135 S. Ct. at 2427.

13 73. In the alternative, to the extent that Section 32310 does not constitute a physical
14 taking, it is an unconstitutional regulatory taking.

15 **THIRD CLAIM FOR RELIEF**
16 **Due Process Clause**
(U.S. Const. amend. XIV)

17 74. Paragraphs 1-73 are realleged and incorporated by reference.

18 75. Under the Due Process Clause, the government may deprive individuals of their
19 property only when doing so furthers a “legitimate governmental objective.” *Lingle*, 544
20 U.S. at 542. The due process concerns are heightened when a law applies retroactively to
21 change the consequences of conduct that was lawful at the time. *See E. Enterprs.*, 524
22 U.S. at 547-550 (Kennedy, J., concurring in part and dissenting in part).

23 76. By making it a crime for individuals to continue to possess property that they
24 lawfully acquired, Section 32310 deprives individuals of protected property interests
25 without due process of law, as prohibiting law-abiding adults from possessing lawfully
26 acquired and commonly owned magazines based solely on their ability to accept more
27 than 10 rounds does not further a “legitimate governmental objective” in a permissible
28 way. *Lingle*, 544 U.S. at 542.

PRAYER FOR RELIEF

Plaintiffs pray that the Court:

1. Enter a declaratory judgment under 28 U.S.C. § 2201 that California Penal Code section 32310 is unconstitutional on its face or, alternatively, to the extent its prohibitions apply to law-abiding adults seeking to acquire, use, or possess firearm magazines that are in common use by the American public for lawful purposes, because such unlawfully infringes on the right of the People to keep and bear arms in violation of the Second and Fourteenth Amendments to the United States Constitution, unconstitutionally takes property without compensation in violation of the Takings Clause, and arbitrarily deprives Plaintiffs of protected property interests under the Due Process Clause.

2. Issue an injunction enjoining Defendants and their officers, agents, and employees from enforcing California Penal Code section 32310 in its entirety, or, alternatively, to the extent such can be segregated from the rest of the statute, any provision of section 32310 that prohibits the acquiring, using, or possessing of firearm magazines that are in common use by the American public for lawful purposes;

3. Award remedies available under 42 U.S.C. § 1983 and all reasonable attorneys' fees, costs, and expenses under 42 U.S.C. § 1988, or any other applicable law; and

4. Grant any such other and further relief as the Court may deem proper.

Dated: May 17, 2017

MICHEL & ASSOCIATES, P.C.

/s/C.D. Michel

C.D. Michel

Counsel for Plaintiffs

EXHIBIT A

SAFETY CAUTION:

With the GLOCK pistol field stripped, the trigger should not be manually reset to its forward position and pulled, as damage to the trigger safety could result.

SAFETY CAUTION:

With the GLOCK pistol field stripped, do not manually pull the firing pin to the rear of the slide and allow it to snap forward, as doing so can damage the firing pin and the firing pin safety.

MAGAZINE DISASSEMBLY

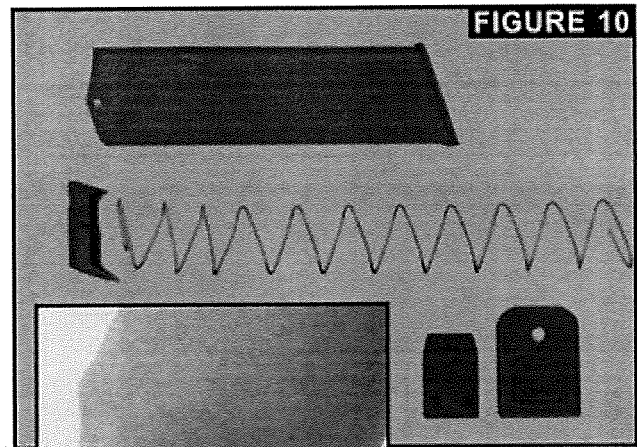
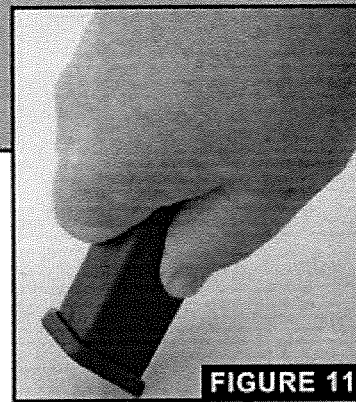
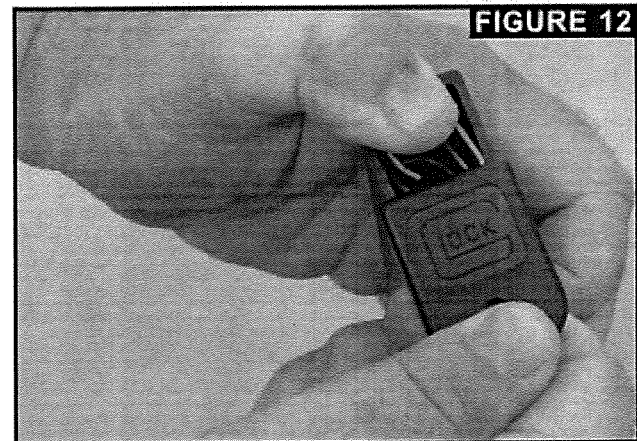
Magazines do not normally need to be disassembled for cleaning each time your GLOCK pistol is cleaned. Disassembling and cleaning magazines at less frequent intervals (perhaps every 3-4 months) is normally sufficient, unless the magazines have been exposed to dirt or other adverse conditions or inspection indicates the need for cleaning.

When it is necessary to disassemble magazines for cleaning, proceed as follows:

SAFETY CAUTION:

The magazine spring, follower, and inner floorplate are under spring tension, and can cause eye or other injury if not controlled during removal. Wear protective safety glasses to reduce the risk of eye injuries. Be sure to maintain downward pressure on the magazine spring, with your thumb, while disassembling.

For all magazines with the standard magazine floorplate and magazine insert, insert punch fully into the opening in the floorplate (Fig. 13). Push the magazine insert down into the magazine tube, and with the punch still in place, pull the floor plate forward with the punch while holding firmly on the sides of the magazine near its base. Remove the floor plate (Fig. 10), the magazine insert, the magazine spring and the follower.

**FIGURE 10****FIGURE 11****FIGURE 12**

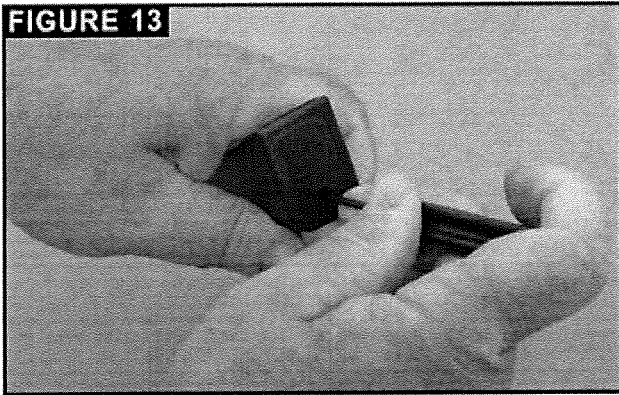
WARNING: THE MAGAZINE SPRING IS UNDER COMPRESSION. BE SURE TO MAINTAIN DOWNWARD PRESSURE ON MAGAZINE SPRING WITH YOUR THUMB WHILE DISASSEMBLING. FAILURE TO DO SO COULD RESULT IN INJURY.

For older magazines without the magazine insert, press inward with thumb and first finger as you push the magazine floor plate forward or use a hard surface (Fig. 11). As soon as the floor plate starts to move, reposition hand so thumb retains magazine spring. Remove the floor plate, magazine spring and follower.

For GLOCK magazines with a retaining pin visible in the center hole:

The retaining pin is part of a reinforcement plate. To remove the floorplate the reinforcement plate is disengaged by pushing it into the magazine tube. This is accomplished by pushing the retaining pin in with a punch (Figure 13). Then follow the procedures outlined above.

FIGURE 13



CLEANING THE FIELD STRIPPED PISTOL

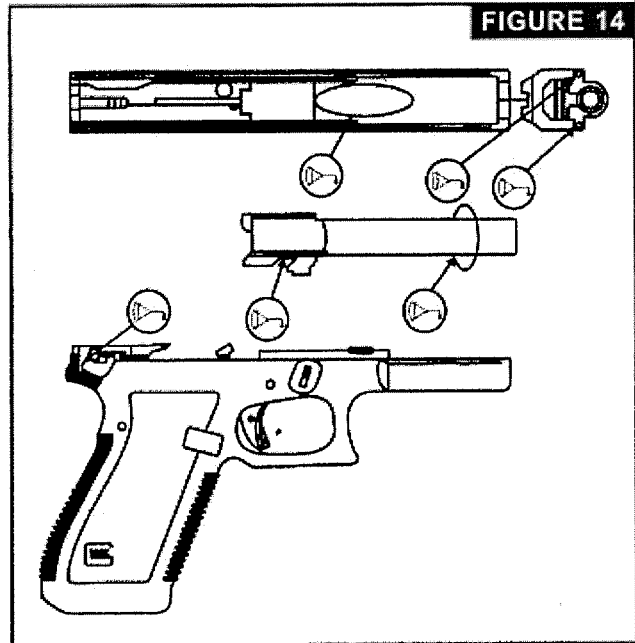
BARREL. Once field stripped, the barrel and chamber are easily cleaned from the chamber end using a bore brush and solvent. Standard firearm solvents can be used on the pistol. The inside of both the chamber and barrel should be wiped completely dry using clean patches once they have been thoroughly cleaned.

SLIDE. The slide rail cuts should be cleaned of dirt and debris by using a clean patch on the end of a toothbrush-type cleaning tool. Note that the copper colored lubricant found on portions of the slide of brand new GLOCK pistols should not be removed, as it will help to provide long-term lubrication of the slide. The breech face and the area under the extractor claw should be held muzzle down and cleaned with a toothbrush-type cleaning tool, and should both be absolutely dry and free of any dirt or debris after cleaning. All other exposed areas of the slide should be checked for cleanliness, and wiped or brushed clean as required.

FRAME. The frame should be checked for cleanliness. Exposed parts in the frame may be wiped with a clean, soft cloth that has been slightly dampened with a quality firearm cleaning solvent. All solvent should then be wiped from the parts so that they are clean and dry.

MAGAZINE. When necessary, the disassembled magazines can be brushed out with a dry brush, and the magazine springs and followers wiped off with a soft, clean cloth. If solvent or lubricant are used, they must be completely dried from the magazine parts prior to reassembly to prevent contamination of ammunition and possible failures to fire.

FIGURE 14



LUBRICATING THE FIELD STRIPPED PISTOL

To properly lubricate your GLOCK pistol after it has been thoroughly cleaned and dried, use a clean patch that has been slightly dampened with quality gun oil. Wipe the outside of barrel, including the barrel hood and lugs, the inside top of the slide forward of the ejection port where the barrel hood rubs against the slide and the opening that the barrel slides through in front of the slide. One drop of oil should be spread along the entire length of each slide rail cut. Most importantly, a drop of oil is needed (Figure 14) where the rear end of the trigger bar touches the connector at the right rear corner of the frame.

CERTIFICATE OF SERVICE

Case Name: **Duncan, Virginia et al v.
Xavier Becerra**

No. **17-56081**

I hereby certify that on October 12, 2017, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

APPELLANT'S EXCERPTS OF RECORD, VOLUME I, ER 0001-0175

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 12, 2017, at San Francisco, California.

N. Newlin
Declarant

s/ N. Newlin
Signature