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

15 **VIRGINIA DUNCAN, et al.,**
16
17 Plaintiffs,
18
19 v.
20 **XAVIER BECERRA, in his official**
capacity as Attorney General of the
State of California, et al.,
21 Defendants.

17-cv-1017-BEN-JLB

**REPLY BRIEF IN SUPPORT OF
DEFENDANT'S MOTION TO
STAY PROCEEDINGS PENDING
APPEAL**

Date: September 11, 2017
Time: 10:30 a.m.
Dept: 5A
Judge: Hon. Roger T. Benitez
Trial Date: None Set
Action Filed: May 17, 2017

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	1
I. Defendant Has Demonstrated That a Stay Pending Appeal Is Warranted	1
A. The Court May Stay Proceedings in the Exercise of Its Authority to Control Its Docket	1
B. Legal Standard for a Stay of Proceedings	4
II. The Attorney General Has Satisfied Both the <i>Nken</i> and <i>Landis</i> Standards for the Court to Grant the Motion to Stay	5
A. Even if It Were Applicable, the Attorney General Would Satisfy the <i>Nken</i> Standard	5
1. The Attorney General Is Likely to Prevail on Appeal	6
2. The Attorney General Will Suffer Irreparable Harm in the Absence of a Stay	7
3. Plaintiffs Will Not Be Harmed by a Stay	10
4. A Stay Is in the Public Interest	11
B. A Stay Is Warranted Under the <i>Landis</i> Standard	12
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

<i>Adobe Lumber, Inc. v. Hellman</i> 415 F. Supp. 2d 1070 (E.D. Cal. 2006)	11
<i>Alliance for the Wild Rockies v. Cottrell</i> 632 F.3d 1127 (9th Cir. 2011)	6
<i>Bradberry v. T-Mobile USA, Inc.</i> No. C 06 6567 CW, 2007 WL 2221076 (N.D. Cal. Aug. 2, 2007)	11
<i>California Assoc. for Health Services at Home v. Sebelius</i> No. CV 11-10618, 2012 WL 893782 (C.D. Cal. Mar. 13, 2012)	10, 12
<i>Caribbean Marine Services Co. v. Baldrige</i> 844 F.2d 668 (9th Cir. 1988)	2, 3
<i>City of Los Angeles v. Alameda Books, Inc.</i> 535 U.S. 425 (2002)	7
<i>Clinton v. Jones</i> 520 U.S. 681 (1997)	1
<i>CMAX, Inc. v. Hall</i> 300 F.2d 265 (9th Cir. 1962)	5
<i>Colorado Outfitters Ass’n v. Hickenlooper</i> 24 F. Supp. 3d 1050 (D. Colo. 2014)	6
<i>Ctr. for Fair Pub. Policy v. Maricopa County</i> 336 F.3d 1153 (9th Cir. 2003)	7
<i>Dependable Highway Exp., Inc. v. Navigators Ins. Co.</i> 498 F.3d 1059 (9th Cir. 2007)	12
<i>Duncan v. Becerra</i> Ninth Circuit Case No. 17-56081	13
<i>Friedman v. City of Highland Park</i> 784 F.3d 406 (7th Cir.)	6

TABLE OF AUTHORITIES
(continued)

	<u>Page</u>
<i>Fyock v. City of Sunnyvale</i> 25 F. Supp. 3d 1267 (N.D. Cal. 2014).....	6, 7, 8, 9
<i>Golden Gate Rest. Ass’n v. City and County of San Francisco</i> 512 F.3d 1112 (9th Cir. 2008).....	5, 6, 7, 9
<i>Gustavson v. Mars, Inc.</i> No. 13-CV-04537-LHK, 2014 WL 6986421 (N.D. Cal. Dec. 10, 2014).....	9
<i>Heller v. District of Columbia</i> 670 F.3d 1244 (D.C. Cir. 2011)	6, 8
<i>Hilton v. Braunskill</i> 481 U.S. 770 (1987)	5
<i>Kolbe v. Hogan</i> 849 F.3d 114 (4th Cir. 2017).....	6
<i>Kotrous v. Goss-Jewett Co. of N. California</i> No. CIV. S021520 FCD JFM, 2005 WL 2452606 (E.D. Cal. Oct. 4, 2005).....	1
<i>Landis v. North American Co.</i> 299 U.S. 248 (1936)	5, 12
<i>Leyva v. Certified Growers of Cal., Ltd.</i> 593 F.2d 857 (9th Cir. 1979).....	10
<i>Lockyer v. Mirant Corp.</i> 398 F.3d 1098 (9th Cir. 2005).....	4, 9
<i>McCollough v. Minnesota Lawyers Mut. Ins. Co.</i> No. CV-09-95, 2010 WL 441533 (D. Montana Feb. 3, 2010).....	9
<i>McElrath v. Uber Technologies, Inc.</i> No. 16-CV-07241-JSC, 2017 WL 1175591 (N.D. Cal. Mar. 30, 2017).....	5
<i>Minor v. FedEx</i> No. C 09-1375 TEH, 2009 WL 1955816 (N.D. Cal. July 6, 2009)	8, 9

TABLE OF AUTHORITIES
(continued)

	<u>Page</u>
<i>Murphy v. DirecTV, Inc.</i> No. 2:07-cv-06465-FMC-VBKx, 2008 WL 8608808 (C.D. Cal. July 1, 2008)	11
<i>National Meat Association, et al. v. Brown, et al.</i> No. 108CV01963, 2009 WL 1473819 (E.D. Cal. 2009).....	11
<i>New York State Rifle & Pistol Ass’n v. Cuomo</i> 804 F.3d 242 (2d Cir. 2015)	6
<i>Nken v. Holder</i> 556 U.S. 418 (2009)	4, 5, 12
<i>Penn Central Transp. Co. v. City of N.Y.</i> 438 U.S. 104 (1978)	8
<i>Phelan v. Taitano</i> 233 F.2d 117 (9th Cir. 1956)	2
<i>Pickup v. Brown</i> No. 2:12-cv-02497, 2013 WL 411474 (E.D. Cal. Jan. 29, 2013)	4, 5
<i>Pimentel v. Dreyfus</i> 670 F.3d 1096 (9th Cir. 2012)	7, 10
<i>Rivers v. Walt Disney Co.</i> 980 F. Supp. 1358 (C.D. Cal. 1997)	12
<i>Rollins v. Dignity Health</i> No. 13-cv-01450-THE, 2014 WL 6693891 (N.D. Cal. Nov. 26, 2014)	5
<i>Rucker v. Davis</i> 237 F.3d 1113 (9th Cir. 2001)	3
<i>San Francisco Veteran Police Officers Ass’n v. City of San Francisco</i> 18 F. Supp. 3d 997 (N.D. Cal. 2014)	6
<i>Thomas More Law Ctr. v. Harris</i> No. 15-03048 (C.D. Cal. Aug. 18, 2015)	9

TABLE OF AUTHORITIES
(continued)

Page

<i>Turner Broad. Sys., Inc. v. FCC</i> 520 U.S. 180 (1997)	7
<i>Welch v. Brown</i> No. CIV. 2:12-2484 WBS, 2013 WL 496382 (E.D. Cal. Feb. 7, 2013).....	1, 4, 5, 9
<i>Wiese v. Becerra</i> No. CV 2:17-903 WBS KJN, 2017 WL 2813218 (E.D. Cal. June 29, 2017).....	6
<i>Zaborowski v. MHN Gov. Servs., Inc.</i> C 12-05109 SI, 2013 WL 1832638 (N.D. Cal. May 1, 2013).....	11

STATUTES

California Penal Code	
§ 32310	6, 7, 8, 10
§ 32310 (c).....	5, 10
§ 32310 (d).....	5

CONSTITUTIONAL PROVISIONS

United States Constitution	
First Amendment	4
Second Amendment.....	8

COURT RULES

Federal Rules of Appellate Procedure	
Rule 3-3	11

INTRODUCTION

The Attorney General asks this Court to stay these proceedings in the exercise of its authority to control its docket pending resolution of the appeal of the preliminary injunction earlier entered in this case. The Ninth Circuit's decision is likely to provide significant guidance, if not rulings of law, that will materially impact and/or affect this litigation. Accordingly, a stay of proceedings in this case pending resolution of the appeal will prevent the Court and the parties from spending limited resources to address matters that may be determined in the Court of Appeals. Although the parties disagree as to the relevant standard for analyzing a stay of district court proceedings pending appeal, the disagreement is unimportant, as a stay is justified under any standard.

ARGUMENT

I. DEFENDANT HAS DEMONSTRATED THAT A STAY PENDING APPEAL IS WARRANTED

A. The Court May Stay Proceedings in the Exercise of Its Authority to Control Its Docket.

As an initial matter, plaintiffs are mistaken that there is a “prevailing rule” that requires parties to litigate the same issues simultaneously before two courts, rather than await guidance from the Court of Appeals. *See* Plaintiffs’ Opposition, ECF No. 40, (Opp.) at 1. On the contrary, “the District Court has broad discretion to stay proceedings as an incident to its power to control its own docket,” *Clinton v. Jones*, 520 U.S. 681, 706 (1997), and stays of district proceedings pending appeal, including appeals from the grant or denial of preliminary injunctions, are not “extraordinary.” Rather, district courts regularly stay cases because resolution of appellate proceedings will simplify issues or questions of law in the cases before them and/or will promote judicial efficiency and avoid inequity, waste, and hardship. *See Welch v. Brown*, No. CIV. 2:12-2484 WBS, 2013 WL 496382, at *1 (E.D. Cal. Feb. 7, 2013); *Kotrous v. Goss-Jewett Co. of N. California*, No. CIV. S021520 FCD JFM, 2005 WL 2452606, at *5 (E.D. Cal. Oct. 4, 2005); *see*

1 generally Attorney General's Memorandum of Points and Authorities in Support of
2 Motion to Stay, ECF No. 39 (Memo) at 5-8.

3 The cases plaintiffs rely upon are not to the contrary. In support of their
4 theory that there is a Ninth Circuit proscription against stays of district court
5 proceedings pending preliminary injunction appeals, plaintiffs cite selectively from
6 *Phelan v. Taitano*, 233 F.2d 117, 119 (9th Cir. 1956), and *Caribbean Marine*
7 *Services Co. v. Baldrige*, 844 F.2d 668, 673 (9th Cir. 1988), neither of which
8 supports their argument. (Opp. at 1, 2, 14.) In *Phelan*, an appeal was taken from an
9 order denying a preliminary injunction. See 233 F.2d at 119. The district court
10 subsequently dismissed the action and when the plaintiffs appealed the dismissal,
11 they argued that the appeal from the preliminary injunction order divested the
12 district court of jurisdiction to rule on the motion to dismiss. See *id.* In rejecting
13 this contention, the Ninth Circuit stated that an "appeal from an interlocutory order
14 does not divest the trial court of jurisdiction to continue with other phases of the
15 case. The case, except for the hearing on the appeal from the interlocutory order, is
16 to proceed in the lower court, as though no such appeal had been taken, unless
17 otherwise specially ordered." *Id.* (citation and internal punctuation omitted).
18 *Phelan* stands for no more than the unremarkable proposition that an appeal of an
19 order denying preliminary injunctive relief does not divest the district court of
20 jurisdiction to resolve the case. It has no bearing on the question presented here,
21 which is whether a district court may exercise its considerable discretion to stay
22 proceedings pending appeal.

23 Plaintiffs' reliance on *Caribbean Marine Services Co. v. Baldrige*, 844 F.2d
24 668, 673, is similarly unavailing. In that case, plaintiffs, owners and crew members
25 of commercial tuna boats, successfully moved to enjoin the government from
26 placing female observers on board their boats to enforce the Marine Mammal
27 Protection Act. See *id.* at 670, 673. Plaintiffs argued, without any evidence, that
28 the presence of female observers would destroy morale, distract the crew and

1 expose owners to liability for sexual harassment and assault. *See id.* at 671-72. In
2 reversing the grant of the preliminary injunction, the Ninth Circuit did not review
3 the merits of plaintiffs’ claims, but instead confined its review to whether the
4 district court properly evaluated and weighed the relevant harms. *Id.* at 674. The
5 Ninth Circuit, in dicta, stated that its “disposition of appeals from most preliminary
6 injunctions *may* provide little guidance as to the appropriate disposition on the
7 merits.” *Id.* at 673 (emphasis added). It also stated that “[i]n *some* cases, such
8 *appeals* unnecessarily delay the litigation and waste judicial resources.” *Id.*
9 (emphasis added). The court noted, also in dicta, that in that particular case, the
10 government’s request for a stay of discovery was unwarranted, and more to the
11 point, its entire appeal was improvident. *See id.* The court stated that rather than
12 filing an appeal, “the parties should have sought a rapid resolution of the legal
13 issues presented *in this case* by moving for summary judgment or proceeding to a
14 trial.” *Id.* (emphasis added).

15 Despite plaintiffs’ characterization of it, *Caribbean Marine Services Co.* does
16 not establish a “prevailing rule” that all preliminary injunction appeals are
17 uniformly inappropriate and thus that district courts always must “press forward”
18 with duplicative and potentially unnecessary litigation. *See Opp.* at 1. At most, the
19 case stands for the proposition that in some cases, it is better to proceed to judgment
20 in the district court before appealing. *See Caribbean Marine Services Co.*, 844
21 F.2d at 673. The obvious corollary to this is that in some cases, it is better *not* to
22 proceed hastily to judgment, but rather to appeal from the grant of a preliminary
23 injunction, especially where doing so will provide significant guidance. *Cf. Rucker*
24 *v. Davis*, 237 F.3d 1113, 1118 (9th Cir. 2001) (en banc) (internal citations omitted),
25 *rev’d on other grounds, Department of Housing and Urban Development v. Rucker*,
26 535 U.S. 125 (2002) (“We typically will not reach the merits of a case when
27 reviewing a preliminary injunction. . . . Of course, there will be cases in which the
28 district court’s interpretation of the law with respect to the underlying issues is

1 challenged, and the resolution of such a legal question will be dispositive.”). In
2 such cases, the district court may determine that the fair and prudent course of
3 action is to stay proceedings pending appeal. *See, e.g. Welch*, 2013 WL 496382, at
4 *1 (staying proceedings pending a preliminary injunction appeal because “it is
5 expected that the appeal will resolve an issue that is central to this case ..., namely,
6 whether it is likely that [the challenged statute] violates the First Amendment.”);
7 *Pickup v. Brown*, No. 2:12-cv-02497, 2013 WL 411474, *1 (E.D. Cal. Jan. 29,
8 2013) (“because the preliminary injunction appeal will resolve issues related to the
9 constitutionality of [the statute] that this court will need to address in order to move
10 forward, it will achieve efficiencies to await the outcome of the Ninth Circuit
11 proceedings.”). As discussed herein and in the Attorney General’s Memorandum,
12 this is one such case.

13 **B. Legal Standard for a Stay of Proceedings**

14 When considering a motion to stay, the court weighs the following factors:
15 “the possible damage which may result from the granting of a stay, the hardship or
16 inequity which a party may suffer in being required to go forward, and the orderly
17 course of justice measured in terms of the simplifying or complicating of issues,
18 proof, and questions of law which could be expected to result from a stay.”
19 *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005).

20 Plaintiffs wrongly contend that the four-factor test set forth by the Supreme
21 Court in *Nken v. Holder*, 556 U.S. 418 (2009), provides the correct legal standard
22 for assessing a motion to stay pending appeal because this is not an appeal from a
23 related but independent lawsuit. Opp. at 2. However, and as set forth in the
24 Attorney General’s Opening Memorandum, Memo at 3, n.1, *Nken* applies to stays
25 of a court order or judgment pending appeal. *See, e.g., Nken*, 556 U.S. at 425-26
26 (applying the four-factor test in the context of a request to stay an order of removal
27
28

1 pending petition of review of order of removal).¹ Here, the Attorney General is not
2 requesting a stay of the preliminary injunction; he is asking the Court to exercise its
3 discretion to stay further proceedings pending appeal in order “to promote economy
4 of time and effort for itself, for counsel, and for litigants.” *CMAX, Inc. v. Hall*, 300
5 F.2d 265, 268 (9th Cir. 1962). Should this Court grant the requested stay, the
6 Court’s order enjoining enforcement of California Penal Code Section 32310 (c)
7 and (d) would remain in effect. Accordingly, the standard first articulated in *Landis*
8 *v. North American Co.*, 299 U.S. 248, 254 (1936), applies.² *See, e.g., McElrath v.*
9 *Uber Technologies, Inc.*, No. 16-CV-07241-JSC, 2017 WL 1175591, *5 (N.D. Cal.
10 Mar. 30, 2017); *Pickup*, 2013 WL 411474, at *1. However, and regardless, the
11 Attorney General’s request for a stay is justified under both the *Nken* and the
12 *Landis* tests.

13 **II. THE ATTORNEY GENERAL HAS SATISFIED BOTH THE *NKEN* AND *LANDIS***
14 **STANDARDS FOR THE COURT TO GRANT THE MOTION TO STAY.**

15 **A. Even if It Were Applicable, the Attorney General Would Satisfy the**
16 ***Nken* Standard.**

17 In the Ninth Circuit, the standard for granting a stay (of an order or judgment)
18 on appeal is similar to that used to determine whether a preliminary injunction
19 should be granted. *Golden Gate Rest. Ass’n v. City and County of San Francisco*,
20 512 F.3d 1112, 1115-16 (9th Cir. 2008). Thus, an applicant for a stay must show
21 some combination of irreparable injury to its interests and the likelihood of success
22 on appeal. If the movant can establish a likelihood that it will prevail on its appeal,

23 ¹ The court in *Nken* cited to the “traditional test” for stays of orders or
24 judgments pending appeal from *Hilton v. Braunskill*, 481 U.S. 770, (1987). *See*
25 556 U.S. at 426. *Hilton* also involved a stay of a civil order (of habeas corpus)
26 pending appeal.

27 ² As noted in the Attorney General’s Memorandum, some district courts have
28 applied the *Nken* standard to stays of district court proceedings pending appeal.
Memo at 3, n.1. Other courts apply the standard set forth in *Landis*, including in
cases where an appeal is taken from an interlocutory order in the same case. *See,*
e.g., Rollins v. Dignity Health, No. 13-cv-01450-THE, 2014 WL 6693891 (N.D.
Cal. Nov. 26, 2014); *Welch*, 2013 WL 496382, at *1; *see generally McElrath*, 2017
WL 1175591, at *5.

1 it need only establish “a possibility of irreparable injury” to merit a stay pending
2 appeal. *Id.* at 1115–16 (quoting *Lopez v. Heckler*, 713 F.2d 1432, 1435–6 (9th Cir.
3 1983)). Similarly, however, if the movant can establish that “the balance of
4 hardships tips sharply in its favor,” it need only demonstrate that its appeal raises
5 “serious legal questions.” *Id.*

6 **1. The Attorney General Is Likely to Prevail on Appeal.**

7 The Attorney General has demonstrated a substantial case on the merits, as
8 every other court that has considered the constitutionality of large-capacity
9 magazine (LCM) bans, including in a nearly identical challenge to Section 32310 in
10 the Eastern District of California, *Wiese v. Becerra*, No. CV 2:17-903 WBS KJN,
11 2017 WL 2813218, at *2-7 (E.D. Cal. June 29, 2017), have upheld the law at issue.
12 *See Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1271 (N.D. Cal. 2014), *aff’d*
13 *sub nom. Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015); *Kolbe v. Hogan*, 849
14 F.3d 114, 130-41 (4th Cir. 2017) (en banc); *New York State Rifle & Pistol Ass’n v.*
15 *Cuomo*, 804 F.3d 242, 263-64 (2d Cir. 2015), *cert denied sub nom, Shew v. Malloy*,
16 136 S. Ct. 2486 (2016) (*NYSRPA*); *Friedman v. City of Highland Park*, 784 F.3d
17 406, 411-12 (7th Cir.), *cert. denied*, 136 S. Ct. 447 (2015); *Heller v. District of*
18 *Columbia*, 670 F.3d 1244, 1260-64 (D.C. Cir. 2011) (*Heller II*); *San Francisco*
19 *Veteran Police Officers Ass’n v. City of San Francisco*, 18 F. Supp. 3d 997, 1002-
20 1006 (N.D. Cal. 2014); *Colorado Outfitters Ass’n v. Hickenlooper*, 24 F. Supp. 3d
21 1050, 1067-74 (D. Colo. 2014), *vacated and remanded for lack of standing*,
22 823 F.3d 537 (10th Cir. 2016).

23 Plaintiffs incorrectly contend that the above cases differ from the present
24 matter, because many, though not all, of them involve final decisions on the merits
25 and not appeals of motions for a preliminary injunction. *Opp.* at 5. While
26 preliminary injunction decisions are reviewed for abuse of discretion, *Alliance for*
27 *the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011), in making that
28

determination in this case, the Ninth Circuit will have to rule on dispositive questions of law, many of which are addressed by the decisions of other courts that have upheld the validity of LCM bans. *See Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012). The relevant question, which will be addressed on appeal, is what kind of record the Attorney General must provide under the appropriate level of scrutiny. In keeping with other cases cited by the Attorney General, it is possible that based upon such controlling precedent as *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 439-40 (2002), *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997), *Fyock*, 779 F.3d at 1001, and *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1167-68 (9th Cir. 2003), all of which allow the government greater flexibility in satisfying an evidentiary burden less demanding than that applied here, the Ninth Circuit will rule that the record before this Court was sufficient to justify Section 32310. Accordingly, the Attorney General has established at least a serious question, if not a likelihood of success, on the merits. *See Golden Gate Rest. Ass’n*, 512 F.3d at 1119 (citations omitted).

2. The Attorney General Will Suffer Irreparable Harm in the Absence of a Stay.

If a stay is denied, the Attorney General will be forced to litigate issues that may be substantially resolved, narrowed, or rendered moot by the Ninth Circuit’s decision in this case. For example, and in addition to what is set forth in the Memorandum, *see* Memo at 5-6, the Ninth Circuit’s opinion may resolve plaintiffs’ takings claim as a matter of law and also address highly relevant issues, including: (1) what standard of review applies to Section 32310; (2) what evidentiary burden the Attorney General must meet under that standard and what types of evidence he may put forth; and (3) whether under the applicable standard of review, the Court may reweigh the evidence *de novo* and/or what level of deference to the findings of the Legislature and the People is warranted. The Ninth Circuit’s decision in this case will thus clarify the necessary scope of discovery in this matter, if not limit or

1 eliminate the need for further discovery, thereby saving both the Attorney General
2 and plaintiffs valuable time and resources.

3 In opposition, plaintiffs contend that there is no need to await guidance from
4 the Court of Appeals because there “is virtually no dispute as to the analytical
5 framework under which discovery will proceed.” Opp. at 10. This argument,
6 however, ignores much of what is contained in this Court’s 66-page order granting
7 the preliminary injunction. To be clear, the Attorney General agrees with plaintiffs’
8 extended discussion that the “appropriate analytical framework for Second
9 Amendment challenges is not an open question in this circuit.” *Id.* at 10-11. He
10 also agrees that intermediate scrutiny is the correct standard and that the evidentiary
11 requirements under intermediate scrutiny are well established. *Id.* at 12. It is not
12 certain from the Court’s order, however, which standard of review – the “simple
13 test of *Heller*,” intermediate scrutiny, or some combination – is being applied. For
14 example, the Court’s insistence on “hard facts and reasonable inferences drawn
15 from convincing analysis, which amounts to substantial evidence based on relevant
16 and accurate data sets” due to the alleged severe burden on a core Second
17 Amendment right, Order at 25, suggests a higher level of scrutiny and more
18 stringent evidentiary burden than what is required under intermediate scrutiny. *See,*
19 *e.g., Fyock*, 779 F.3d at 1001 (citing *City of Renton v. Playtime Theatres, Inc.*, 475
20 U.S. 41, 51-52 (1986)). On appeal, the Ninth Circuit will determine whether
21 intermediate scrutiny was applied properly.³ This decision will, in turn, dictate the

22 ³ Plaintiffs’ related argument that its takings claim can be resolved as a
23 matter of law and thus no discovery is required is similarly weak. Opp. at 13. As
24 an initial matter, while plaintiffs allege only a physical takings claim, the Court has
25 analyzed plaintiffs’ claim as a “hybrid taking.” Order at 62. Accordingly, if the
26 Ninth Circuit holds that this is the correct legal framework, evidence relevant to the
27 fact-specific inquiry of whether Section 32310 effects a regulatory taking, such as
28 whether Section 32310 deprives plaintiffs of all economically beneficial use of their
LCMs as well as evidence regarding the factors set forth in *Penn Central Transp.*
Co. v. City of N.Y., 438 U.S. 104 (1978), would be necessary. Moreover, even
assuming that plaintiffs’ assertion that no discovery is necessary with respect to
their takings claim is correct, the need to await guidance on pure questions of law
also militates in favor of a stay. *See Minor v. FedEx*, No. C 09-1375 TEH, 2009
(continued...)

1 amount and type of discovery that is warranted here.

2 Plaintiffs' argument that the Attorney General's claim of irreparable harm
3 "flows from the normal consequences of litigation," Opp. at 6, also fails.⁴

4 Although "being required to defend a lawsuit without more does not constitute a
5 clear case of hardship or inequity," *Lockyer*, 398 F.3d at 1112, in this case there is
6 more. Specifically, and unlike in the cases on which plaintiffs rely, the Ninth
7 Circuit's decision is likely to narrow the factual and legal issues in this case.
8 Accordingly, forcing the parties to spend resources on motion practice that is
9 premature and discovery that may become irrelevant establishes "a possibility of
10 irreparable injury" sufficient to merit a stay pending appeal. *Golden Gate Rest.*
11 *Ass'n*, 512 F.3d at 1115–16; *see also id.* at 1119 ("[I]f there is a probability or
12 strong likelihood of success on the merits, a relatively low standard of hardship is
13 sufficient."); *Lockyer*, 398 F.3d at 1112 (noting the importance of stays where an
14 appeal could narrow factual and legal issues before the district court); *McCollough*
15 *v. Minnesota Lawyers Mut. Ins. Co.*, No. CV-09-95, 2010 WL 441533 (D. Montana
16 Feb. 3, 2010). For this reason, the second factor favors staying of these
17 proceedings.⁵

18 (...continued)
19 WL 1955816, at *1 (N.D. Cal. July 6, 2009).

20 ⁴ Plaintiffs note that the Attorney General has made similar arguments
21 regarding irreparable harm that were denied by a different federal court. Opp. at 6,
22 citing *Americans for Prosperity Foundation v. Harris*, No. 14-cv-9448 (C.D. Cal.
23 May 19, 2015), *Thomas More Law Ctr. v. Harris*, No. 15-03048 (C.D. Cal. Aug.
24 18, 2015). The decisions in those two cases—which involve different issues and
25 facts—are not controlling and have no bearing on the Court's determination here.
26 Moreover, courts have adopted these arguments regarding irreparable harm in other
27 motions to stay. *See, e.g., Minor*, 2009 WL 1955816, at *1 ("[I]t certainly appears
28 to be a hardship to conduct pointless discovery that may well be moot.");
Gustavson v. Mars, Inc., No. 13-CV-04537-LHK, 2014 WL 6986421, at *3 (N.D.
Cal. Dec. 10, 2014); *Welch*, 2013 WL 496382, at *1.

⁵ Indeed, plaintiffs' counsel, who also served as counsel for plaintiffs in
Fyock, in which plaintiffs appealed from the denial of a preliminary injunction,
acknowledged that being forced to litigate in the face of legal uncertainty that will
be resolved on appeal constitutes hardship and a waste of judicial resources. *See*
Appellants' Motion to Stay Appeal, Case No. 14-15408, ECF No. 13 at 7-8, 11.
The parties in *Fyock* stipulated to a stay of district court proceedings, stating that
(continued...)

3. Plaintiffs Will Not Be Harmed by a Stay.

In sharp contrast to the burden and expense faced by the Attorney General, plaintiffs will suffer no harm should this Court stay proceedings. Despite the fact that this Court has enjoined the Attorney General from enforcing Section 32310 (c) and (d), plaintiffs claim that they are harmed because they also challenge Section 32310's ban on acquiring, transferring, manufacturing, and importing such magazines"—which were not subject to the preliminary injunction. Opp. at 7 (citing Cal. Penal Code § 32310 (a), (b)). These parts of the law have been in effect since 1999. Therefore, a stay in proceedings until resolution of an expedited appeal will not harm plaintiffs, who have not been permitted to acquire or transfer LCMs for nearly 20 years.

Plaintiffs simultaneously assert that they need the litigation to proceed expeditiously because the Attorney General could prevail on appeal and the preliminary injunction could dissolve. Opp. at 7-8. But for the Ninth Circuit to reverse the grant of a preliminary injunction, it would have to determine that this Court abused its discretion by basing its decision upon an erroneous legal standard or a clearly erroneous finding of fact. *Pimentel*, 670 F.3d at 1105. Such conclusions, which would indicate that plaintiffs are not entitled to injunctive relief, would define the scope of this litigation, and would be useful to know before proceeding further. See *Leyva v. Certified Growers of Cal., Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979); *California Assoc. for Health Services at Home v. Sebelius*, No. CV 11-10618, 2012 WL 893782, at *2-3 (C.D. Cal. Mar. 13, 2012).

(...continued)

“granting a stay will benefit both parties to this action by sparing them the expense of contemporaneous litigation and the accompanying fees and expenditure of time inherent in pursuing litigation in both this Court and the Court of Appeals.” Case No. 4:13-cv-05807-PJH, ECF No. 63. These arguments are equally true in this case.

1 Finally, plaintiffs' notion that they will be harmed by some postponement of
2 discovery and trial is unfounded. Preliminary injunction appeals are expedited.
3 Ninth Cir. R. 3-3. Even given the 29-day extension of time that the Attorney
4 General was granted in which to file his Opening Brief, and even assuming that
5 either party seeks a further extension before the Ninth Circuit, there is still no threat
6 of significant delay in resuming proceedings in this Court. Moreover, the mere fact
7 that proceedings will be delayed while the appeal is pending does not constitute
8 serious harm that would warrant denial of a stay. *See Zaborowski v. MHN Gov.*
9 *Servs., Inc.*, C 12-05109 SI, 2013 WL 1832638, at *3 (N.D. Cal. May 1, 2013);
10 *Murphy v. DirecTV, Inc.*, No. 2:07-cv-06465-FMC-VBKx, 2008 WL 8608808, at
11 *3 (C.D. Cal. July 1, 2008).

12 **4. A Stay Is in the Public Interest.**

13 Finally, as to the fourth factor, the public interest “lies in conservation of
14 judicial resources” and weighs in favor of granting the stay. *See Bradberry v. T-*
15 *Mobile USA, Inc.*, No. C 06 6567 CW, 2007 WL 2221076, at *4 (N.D. Cal. Aug. 2,
16 2007). Plaintiffs agree that there is a public interest in conserving judicial
17 resources, but claims that such judicial economy is best served by the “expeditious
18 resolution of litigation.” Opp. at 8 (quoting *Dahl v. City of Huntington Beach*,
19 84 F.3d 363, 366 (9th Cir. 1996)). The expedited briefing schedule ensures that
20 “there is no threat of significant delay” in staying the action. *National Meat*
21 *Association, et al. v. Brown, et al.*, No. 108CV01963, 2009 WL 1473819, at *5
22 (E.D. Cal. 2009). Moreover, where, as here, issues on appeal may be dispositive of
23 a claim before the lower court, “a stay [of discovery] at this point will promote
24 economy of time and effort for both the parties and the court.” *Adobe Lumber, Inc.*
25 *v. Hellman*, 415 F. Supp. 2d 1070, 1079 (E.D. Cal. 2006). The public interest
26 therefore is served by staying this action.

1 **B. A Stay Is Warranted Under the *Landis* Standard.**

2 As set forth in the Attorney General’s Memorandum, he has more than
3 satisfied the factors set forth in *Landis v. North American Co.*, 299 U.S. 248. *See*
4 Memo at 4-8. If this action is not stayed, the Attorney General and plaintiffs will
5 waste time and resources simultaneously litigating the same issues before the
6 district and the appellate court, and without the guidance of the Court of Appeals.
7 Given that this Court has granted a preliminary injunction, this action is at a very
8 early stage, and preliminary injunction appeals are expedited, there is no
9 meaningful possibility that the proposed stay would harm Plaintiffs’ interests in any
10 way. *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066
11 (9th Cir. 2007). Finally, a stay would “promote economy of time and effort” for the
12 Court as well, as it would relieve the Court from expending valuable time and
13 resources on decisions that it may have to reconsider in light of the Ninth Circuit’s
14 ruling on pure questions of law, or that the ruling may render moot. *Rivers v. Walt*
15 *Disney Co.*, 980 F. Supp. 1358, 1360 (C.D. Cal. 1997); *see also Landis*, 299 U.S. at
16 254-255. Thus, a stay of proceedings pending appeal will prevent prejudice to the
17 Attorney General, cause no prejudice to plaintiffs, and serve the interests of judicial
18 economy and efficiency. *See, e.g., Rivers*, 980 F. Supp. at 1360.

19 Plaintiffs’ contrary arguments fail for the same reasons as those made with
20 respect to *Nken*, and show a lack of understanding of the issues raised on appeal.
21 For instance, and as discussed above, even if intermediate scrutiny applies, the
22 parties need clarification on what amount of evidence is needed to satisfy that
23 standard. Having the Attorney General expend time and resources litigating on
24 standards that the Ninth Circuit may reject would impose an unfair burden on the
25 Attorney General (and plaintiffs). *See California Assoc. for Health Services at*
26 *Home*, No. 2012 WL 893782, at *2-3 (granting stay where Ninth Circuit decisions
27 “are likely to narrow issues” in case). Such hardship warrants imposition of the
28 temporary stay pending appeal.

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Dated: September 5, 2017

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Attorney General Xavier Becerra*

CERTIFICATE OF SERVICE

Case Name: Duncan, Virginia et al v. Xavier Becerra No. 17-cv-1017-BEN-JLB

I hereby certify that on September 5, 2017, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**REPLY BRIEF IN SUPPORT OF DEFENDANT’S MOTION TO STAY PROCEEDINGS
PENDING 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 September 5, 2017, at San Francisco, California.

N. Newlin

Declarant

/s/ N. Newlin

Signature