

1 TAMAR PACTER
Supervising Deputy Attorney General
2 NELSON R. RICHARDS
ANTHONY P. O'BRIEN
3 Deputy Attorneys General
ALEXANDRA ROBERT GORDON
4 Deputy Attorney General
State Bar No. 207650
5 455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
6 Telephone: (415) 703-5509
Fax: (415) 703-5480
7 E-mail:
Alexandra.RobertGordon@doj.ca.gov
8 *Attorneys for Defendant*
Attorney General Xavier Becerra

9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
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14 **VIRGINIA DUNCAN, et al.,**

15 Plaintiffs,
16 v.

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

20 Defendants.

17-cv-1017-BEN-JLB

**DEFENDANT ATTORNEY
GENERAL'S EARLY NEUTRAL
EVALUATION (ENE)
CONFERENCE STATEMENT**

Date: August 2, 2017
Time: 2:45 p.m.
Judge: Hon. Jill L. Burkhardt
Action Filed: May 17, 2017

1 Pursuant to this Court’s Order dated July 6, 2017, Defendant Attorney General
2 Xavier Becerra respectfully submits this Early Neutral Evaluation (ENE)
3 Statement.

4 **I. NATURE OF THE CASE, CLAIMS, AND DEFENSES**

5 In the wake of escalating mass-shootings and gun violence, in 2016 the
6 Legislature and the people of California enacted a ban on the possession of
7 magazines holding more than ten rounds of ammunition. These large-capacity
8 magazines (“LCMs”) are disproportionately used in crime, and feature prominently
9 in some of the most heinous crimes, including homicides, mass shootings, and
10 killings of law enforcement officers. Because LCMs are so dangerous, federal and
11 state law have restricted their manufacture, importation, and sale for decades. Now,
12 in order to strengthen these restrictions, and close a loophole that allowed for the
13 continued proliferation of LCMs, California Penal Code section 32310 (“Section
14 32310”) prohibits the possession of LCMs by private citizens beginning
15 July 1, 2017.

16 Plaintiffs seek to invalidate this important public safety legislation claiming
17 that it violates the Second Amendment, as well as the Takings and Due Process
18 Clauses. As set forth in the Attorney General’s Opposition to Plaintiffs’ Motion for
19 Preliminary Injunction (AG Opp.), ECF No. 9, these claims lack merit. While the
20 district court determined that Plaintiffs were likely to prevail on the merits of their
21 Second Amendment and Takings claims and preliminarily enjoined the
22 implementation and enforcement of Section 32310 (c) and (d), *see* ECF No. 28, the
23 Attorney General intends to appeal this decision.¹

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26 ¹ In considering substantially similar challenges to Section 32310, the
27 Honorable William B. Shubb determined that plaintiffs were not likely to prevail on
28 their Second Amendment or takings claims and denied their motion for preliminary
injunction. *See Wiese v. Becerra*, No. 2:17-903 WBS KJN, 2017 WL 2813218, *2-
*8 (E.D. Cal. June 29, 2017).

1 **A. Second Amendment Claim**

2 Even if Section 32310's prohibition on LCMs fell within the scope of Second
3 Amendment protection, and it does not, *see Kolbe v. Hogan*, 849 F.3d 114, 137 (4th
4 Cir. 2017) (en banc), the law would survive constitutional scrutiny. The
5 government has important interests in promoting public safety and preventing crime
6 and gun violence. *See, e.g., Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753,
7 768 (1994); *Fyock v. Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015); *United States*
8 *v. Chovan*, 735 F.3d 1127, 1135 (9th Cir. 2013). Section 32310 furthers these
9 interests by eliminating a particularly lethal subset of magazines, LCMs, that are
10 designed to cause greater fatalities and injuries and are disproportionately used in
11 mass shootings and the killing of law enforcement officers. *Fyock*, 779 F.3d at
12 1000. In addition to common sense, which suggests that the most effective way to
13 eliminate the threat of death, injury, and destruction caused by LCMs is to prohibit
14 their use, the evidence shows that banning possession of LCMs has the greatest
15 potential to "prevent and limit shootings in the state over the long run." *New York*
16 *State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 264 (2d Cir. 2015), *cert denied*
17 *sub nom, Shew v. Malloy*, 136 S. Ct. 2486 (2016). A reduction in the number of
18 LCMs in circulation will reduce the number of crimes in which LCMS are used and
19 reduce the lethality and devastation of gun crime when it does occur. Experience
20 also indicates that because shooters limited to ten-round magazines must reload
21 more frequently, the prohibition of LCMs helps create a "critical pause" that has
22 been proven to give potential victims an opportunity to hide, escape, or disable a
23 shooter. *Colorado Outfitters Ass'n v. Hickenlooper*, 24 F. Supp. 3d 1050, 1072-73
24 (D. Colo. 2014). Moreover, the "two or three second pause during which a criminal
25 reloads his firearm can be of critical benefit to law enforcement." *Heller v. District*
26 *of Columbia*, 670 F.3d 1244, 1264 (D.C. Cir. 2011). Further, it will limit damage
27 caused by civilians indiscriminately firing more rounds than necessary, thereby
28 endangering themselves and bystanders. *Kolbe v. O'Malley*, 42 F. Supp. 3d 768,

1 795-96 (D. Md. 2014). Accordingly, substantial evidence demonstrates that there is
2 “reasonable fit” between Section 32310 and the State’s important interests, and the
3 law thus satisfies intermediate scrutiny. *Chovan*, 735 F.3d at 1139; AG Opp. at 17-
4 21.

5 **B. Takings and Due Process Claims.**

6 The Takings Clause of the Fifth Amendment, made applicable to the states
7 through the Fourteenth Amendment, provides that private property shall not “be
8 taken for public use, without just compensation.” *Lingle v. Chevron U.S.A., Inc.*,
9 544 U.S. 528, 536 (2005). Its purpose is to prohibit “[g]overnment from forcing
10 some people alone to bear public burdens which, in all fairness and justice, should
11 be borne by the public as a whole.” *Penn Central Transp. Co. v. City of N.Y.*, 438
12 U.S. 104, 123 (1978) (internal quotations and citations omitted). Although a taking
13 often occurs when the government physically invades or confiscates property, the
14 Supreme Court has recognized that economic regulation may also effect a
15 (regulatory) taking if it “goes too far,” *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415
16 (1922), and government regulation that “completely deprive[s] an owner of ‘all
17 economically beneficial us[e]’ of her property” is generally deemed to be a taking
18 compensable under the Fifth Amendment, *Lingle*, 544 U.S. at 538 (quoting *Lucas v.*
19 *South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)) (emphasis in
20 original).

21 Section 32310 is an exercise of the State’s police power to protect the public
22 by eliminating the dangers posed by LCMs. The purpose of the statute is to remove
23 LCMs from circulation, not to transfer title to the government or an agent of the
24 government for use in service of the public good. Accordingly, Section 32310 does
25 not amount to a physical taking. *See Penn Central*, 438 U.S. at 123; *Chi., B. & Q.*
26 *R. Co. v. Illinois*, 200 U.S. 561, 593-594 (1906); *Akins v. United States*, 82 Fed. Cl.
27 619, 622 (2008). Section 32310 is also not a regulatory taking as it does not
28 deprive plaintiffs of all, or even most, economic or beneficial use of their property.

1 *Lingle*, 544 U.S. at 538. In addition to selling or storing LCMs out of state,
2 § 32310(d), it is also possible and relatively easy to modify an LCM so that it will
3 only accept a maximum of ten rounds, thereby allowing Plaintiffs to retain value in
4 their LCMs even after the statute's enforcement date. *See* AG Opp. at 21-24.

5 Plaintiffs' skeletal due process claim, which is largely derivative of their other
6 claims, also fails. *See* AG Opp. at 24-25.

7 **C. Defenses.**

8 In addition to arguing that Plaintiffs' claims fail on the merits, the Attorney
9 General has asserted the following defenses:

- 10 1. The Complaint fails to state a cause of action as a matter of law.
- 11 2. Plaintiff's claims in this action are barred in that they do not have standing to
12 bring them.
- 13 3. The Complaint, and each cause of action therein, is improper as Plaintiffs have
14 an adequate remedy at law.
- 15 4. The Complaint, and every cause of action therein, is barred by the equitable
16 doctrines of estoppel, laches, unclean hands, and/or waiver.
- 17 5. To the extent that the Attorney General has undertaken any conduct with
18 regard to the subjects and events underlying Plaintiffs' Complaint, such conduct
19 was, at all times material thereto, undertaken in good faith and in reasonable
20 reliance on existing law.

21 **II. SETTLEMENT POSITION**

22 Because Section 32310 is constitutional and duly-enacted statute, and given
23 the Attorney General's sworn duty to uphold the laws of the State, the Attorney
24 General cannot excuse Plaintiffs from compliance with Section 32310 or otherwise
25 refuse to enforce it. The Attorney General is thus unable to make a settlement offer
26 and settlement in this action is unlikely to occur unless Plaintiffs dismiss all their
27 claims.

1 **III. ATTENDEES**

2 Deputy Attorney General, Alexandra Robert Gordon, the principal attorney for
3 Defendant the Attorney General, will appear telephonically. Deputy Attorney
4 General Anthony P. O'Brien may also appear telephonically.²

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7 Dated: July 18, 2017

Respectfully submitted,

8 XAVIER BECERRA
9 Attorney General of California
10 TAMAR PACHTER
11 Supervising Deputy Attorney General
12 NELSON R. RICHARDS
13 ANTHONY P. O'BRIEN
14 Deputy Attorneys General

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16
17 /s/ Alexandra Robert Gordon
18 ALEXANDRA ROBERT GORDON
19 Deputy Attorney General
20 Attorneys for Defendant
21 Attorney General Xavier Becerra

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26 ² Both counsel have settlement authority insofar as they (1) have primary
27 responsibility for handling the case, and (2) may negotiate settlement offers, which
28 they are willing to recommend to the Attorney General, the government official
 having ultimate settlement authority.