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13 **UNITED STATES DISTRICT COURT**
14 **SOUTHERN DISTRICT OF CALIFORNIA**

15 VIRGINIA DUNCAN, RICHARD
16 LEWIS, PATRICK LOVETTE, DAVID
17 MARGUGLIO, CHRISTOPHER
18 WADDELL, CALIFORNIA RIFLE &
19 PISTOL ASSOCIATION,
20 INCORPORATED, a California
21 corporation,

22 Plaintiffs,

23 v.

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

27 Defendant.

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

**PLAINTIFFS' EARLY NEUTRAL
EVALUATION CONFERENCE
STATEMENT**

Action Filed: May 17, 2017

28 Pursuant to this Court's June 6, 2017 Order for Telephonic Counsel-Only Early
Neutral Evaluation Conference and the Honorable Judge Burkhardt's Civil Chambers
Rules, Plaintiffs Virginia Duncan, et al., submit this Early Neutral Evaluation Conference
Statement.

I. NATURE OF THE CASE

This is a declaratory and injunctive relief action, brought on behalf of five
individuals and a self-defense civil rights organization, challenging the constitutionality
of California Penal Code section 32310, a state-law ban on the manufacture, transfer,

1 possession, and use of firearm magazines capable of holding more than ten rounds of
2 ammunition (“magazines over ten rounds”). Plaintiffs allege that the ban violates several
3 provisions of the United States Constitution and pray this Court permanently enjoin its
4 enforcement. Compl. at 17-19, ECF No. 1. Defendant Attorney General Xavier Becerra
5 denies Plaintiffs’ claims. Answer at 12-13, ECF No. 25.

6 Promptly after this case was filed on May 17, 2017, Plaintiffs sought an ex parte
7 order shortening time to hear Plaintiffs’ Motion for Preliminary Injunction. Pls.’ Ex Parte
8 App. for Order Shortening Time, ECF No. 4. The Court granted that relief, the parties
9 exchanged briefing, and the Court heard Plaintiffs’ motion on June 13, 2017. Order
10 Granting Ex Parte App. for Order Shortening Time, ECF. No. 5; Pls’ Mot. Prelim. Inj.,
11 ECF No. 6; Def.’s Opp’n Mot Prelim. Inj., ECF No. 8 (and supporting documents). On
12 June 29, 2017, the Honorable Judge Roger T. Benitez issued an order granting Plaintiffs’
13 request for preliminary injunction, on the grounds that Plaintiffs had established, on the
14 current record, a likelihood of succeeding on the merits of their constitutional claims and
15 that all the remaining preliminary injunction factors warranted temporary relief. Order
16 Granting Prelim. Inj. at 7-8, ECF No. 28.

17 II. THE CLAIMS

18 Seeking declaratory and injunctive relief, Plaintiffs assert that Penal Code section
19 32310 violates the Second Amendment, the Takings Clause, and the Due Process Clause
20 of the United States Constitution. Compl. at 16-19, ECF No. 1.

21 First, Plaintiffs allege that section 32310 impermissibly burdens the Second
22 Amendment because it prohibits possession of common firearm magazines possessed for
23 lawful purposes like self-defense. *Id.* at 3, 8, 14-15, 17-18. The Second Amendment
24 protects the right to keep and bear arms “typically possessed by law-abiding citizens for
25 lawful purposes,” *District of Columbia v. Heller*, 554 U.S. 570, 624-25 (2008), including
26 the ammunition and magazines necessary to make them effective, *see Jackson v. City and*
27 *County of San Francisco*, 746 F.3d 953, 967-68 (9th Cir. 2014); *Fyock v. Sunnyvale*, 779
28 F.3d 991, 998 (9th Cir. 2015). Because the magazines California has prohibited are “in

1 common use . . . for lawful purposes like self-defense,” the prohibition is within the
2 scope of the Second Amendment and it must withstand appropriate judicial review.
3 *Heller*, 554 U.S. at 624, 636. Because the state can point to no justification—let alone
4 one sufficient to withstand heightened scrutiny—for banning magazines lawfully and
5 safely owned by tens of millions of Americans to defend themselves, the ban cannot
6 stand.

7 Second, Plaintiffs claim that the magazine ban violates the Takings Clause
8 because, by banning possession of magazines lawfully acquired and presently lawfully
9 possessed, it constitutes a physical appropriation of property without just compensation.
10 Compl. at 3, 9, 15, 18, ECF No. 1. Section 32310 subjects to criminal punishment “any
11 person in this state who possesses any large-capacity magazine” after July 1, 2017,
12 “regardless of the date the magazine was acquired.” Cal. Penal Code § 32310(c). By its
13 plain terms, the law is a government mandate that owners of private property physically
14 dispossess themselves of their property—a physical taking that requires government
15 compensation. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*,
16 535 U.S. 302, 324 n.19 (2002) (holding that a physical taking “dispossess[es] the owner”
17 of property); *Nixon v. United States*, 978 F.2d 1269, 1287 (D.C. Cir. 1992) (statute that
18 “physically dispossessed” property owner of their property “resulted in” *per se* taking).
19 Because the law provides for no such compensation, it is a physical appropriation of
20 property without just compensation that is *per se* unconstitutional. *See Horne v. Dep’t of*
21 *Agric.*, -- U.S. --, 135 S. Ct. 2419, 2427 (2015).

22 And third, because section 32310 retroactively criminalizes and deprives owners of
23 lawfully acquired magazines without advancing the government’s interest in public
24 safety, Plaintiffs allege that the possession ban also violates the Due Process Clause.
25 Compl. at 3, 9-10, 15-16, ECF No. 1. Plaintiffs argue there is no reason to believe that
26 physical dispossession of magazines from those who have safely and lawfully possessed
27 them since the state banned their acquisition in 2000 is related to advancing the state’s
28 interest in public safety. Section 32310 raises particularly acute due process concerns

1 because it criminalizes the continued possession of magazines that were lawful when
2 acquired. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 541 (2005); *id.* at 548-49
3 (Kennedy, J., concurring).

4 Plaintiffs are confident in the factual allegations and all legal claims asserted in
5 their complaint. Indeed, case law, as well as theoretical and empirical evidence, strongly
6 support each claim. As Judge Benitez recently held in his order granting preliminary
7 injunction: “Plaintiffs have demonstrated on this preliminary record a likelihood of
8 success on the merits.” Order Granting Prelim. Inj. at 8-9, ECF No. 28. Plaintiffs trust
9 that, even upon a more fully developed record, they will ultimately succeed on the merits.

10 **III. THE DEFENSES**

11 Defendant has answered the complaint and denies that section 32310 is
12 unconstitutional. *See Answer*, ECF No. 25. Defendant raises five defenses: (1) Plaintiffs
13 fail to state sufficient facts to constitute a claim; (2) Plaintiffs lack standing; (3) Plaintiffs
14 have an adequate remedy at law; (4) the complaint is barred by equitable doctrines; and
15 (5) Defendant’s acts were undertaken in good faith and reasonable reliance on existing
16 law. *Id.* at 12-13.

17 Despite these denials and defenses, Plaintiffs remain confident in their allegations
18 and legal claims. Especially considering that Judge Benitez has already found that the
19 theoretical and empirical evidence that Defendant produced in opposition to Plaintiffs’
20 preliminary injunction motion is “inconclusive” at best. Order Granting Prelim. Inj. at 26-
21 56, ECF No. 28. Rather than offering any substantially new or different evidence,
22 Plaintiffs expect Defendant will argue that his evidence proves that section 32310 is
23 constitutional and will appeal any rulings holding otherwise. Indeed, counsel for
24 Defendant has already notified Plaintiffs’ counsel of their intentions to appeal Judge
25 Benitez’s preliminary injunction ruling. *See Joint Discovery Plan* at 4, 10-11, ECF No.
26 31.

27 **IV. PARTIES’ POSITIONS REGARDING SETTLEMENT**

28 The parties have discussed the possibility of settlement, and they do not believe

1 this case has any potential of settling. *Id.* at 8.

2 Plaintiffs believe that California Penal Code section 32310 violates various
3 constitutional provisions, and Defendant disagrees. Plaintiffs have no intention of
4 dismissing this lawsuit unless Defendant allows law-abiding citizens to own, possess,
5 purchase, and transfer magazines over ten rounds. And Defendants intend to continue
6 enforcing section 32310 as required by California law.

7 **V. ATTORNEY AND NON-ATTORNEY CONFERENCE ATTENDEES**

8 Michel & Associates, P.C. attorney Anna M. Barvir will participate in the August
9 2, 2017 telephonic Early Neutral Evaluation Conference on behalf of Plaintiffs Duncan,
10 et al. Attorney Sean A. Brady may also appear.

11 Pursuant to this Court's July 6, 2017 Order for Telephonic Counsel-Only Early
12 Neutral Evaluation Conference, Plaintiffs' counsel will make available by telephone Mr.
13 Rick Travis, a representative of plaintiff the California Rifle & Pistol Association,
14 Incorporated, with full settlement authority.

15
16 Dated: July 19, 2017

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/s/ Anna M. Barvir

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