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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

STEVEN RUPP, et al.,

Plaintiffs,

vs.

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

Defendant.

CASE NO.: 8:17-cv-00746-JLS-JDE

PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: December 15, 2017
Hearing Time: 2:30 p.m.
Courtroom: 10A
Judge: Josephine L. Staton

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INTRODUCTION

This coming July, Plaintiffs will face irreparable injury resulting from an irrational and unjustified requirement that they provide the exact date, and the name and address from whom, they lawfully acquired firearms, years ago, that the State of California now deems to be "assault weapons." Plaintiffs have sought the narrow remedy of preliminarily enjoining the State from imposing this extraordinary registration requirement on Plaintiffs who literally cannot obtain the required information. The State's response brief does nothing to call into question Plaintiffs' entitlement to such relief.

At the threshold, the State's response casts no doubt on Plaintiffs' standing to challenge the date and source requirement. First, the State overlooks the well-settled rule that "standing does not require exercises in futility." *Taniguchi v. Schultz*, 303 F.3d 950, 957 (9th Cir. 2002), as amended (Sept. 25, 2002). The State admits the date and source requirement is mandatory, and Plaintiffs declared that they cannot comply with that mandatory condition. Plaintiffs' attempt to register their firearms would thus be futile. Second, the State wrongfully questions the validity of Plaintiffs' injury. While the State might have a relatively easy time obtaining date and source information through law enforcement channels available to it, significant legal and practical hurdles stand in the way of ordinary citizens trying to do the same thing. If anything, then, the State's insistence that the information is readily available *from sellers* only undermines its claim that it must obtain that information *from Plaintiffs*. Third, the State cannot discount Plaintiffs' standing based on the never-before-known possibility that Plaintiffs may approximate the date they acquired their firearm. While that new development, if true, is certainly a welcome one, it does not change the fact that Plaintiffs cannot comply with the source requirement.

On the merits, Plaintiffs are likely to succeed on their claims under the Due Process Clause, the Takings Clause, and the Second Amendment. The date and

source requirement applies retroactively and is thus subject to heightened scrutiny under due process. But even applying a lower level of scrutiny, the State has failed to show how imposing that requirement even on individuals who lack the means to comply bears a rational relationship to its professed interest in "help[ing]" DOJ "establish that the firearm is lawfully possessed by the registrant." Def.'s Opp'n Mot. Prelim. Inj. ("Opp'n") 10.

The date and source requirement also violates the Takings Clause. The State's argument about public use, is a nonstarter. The State either is taking Plaintiffs' property for public use in violation of the Takings Clause, or is not taking it for public use and thus violates both the Takings Clause and due process. The State's references to diminution in economic value, are inapposite, as Plaintiffs are raising a physical, not regulatory, takings claim. Binding Supreme Court precedent squarely forecloses the State's theory that exercises of the police power cannot constitute physical takings. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 (1982). And the Supreme Court has expressly provided that injunctive relief is an appropriate remedy for a takings violation. *E. Enters. v. Apfel*, 524 U.S. 498, 502 (1998) (plurality opinion); *Babbitt v. Youpee*, 519 U.S. 234 (1997).[1]

Finally, the State cannot brush aside the serious Second Amendment problems with the date and source requirement, particularly as applied to people who have no means to obtain that information. It dispossesses those who cannot comply with it of their commonly possessed firearms. The State has already recognized through its grandfathering clause that it does not have an interest in prohibiting the continued possession of these firearms by individuals who have lawfully possessed them for years. And Plaintiffs seek preliminary relief from the

[1] To be clear, while Plaintiffs' principal submission is that the registration requirement works a physical taking, to the extent the court disagrees, Plaintiffs also contend that requiring individuals to remove popular and useful features will diminish their value and, as such, constitutes a regulatory taking.

imposition of this requirement only as applied to such individuals who innocently failed to record information that the law never, until now, required them to keep. The Court should issue that narrow relief to avoid irreparable injury to Plaintiffs' fundamental constitutional rights.

I. Plaintiffs Have Standing to Challenge the Date and Source Requirement Because It Directly and Actually Injures Plaintiffs, Making the Issue Ripe for Judicial Review

Despite its admission that providing date and source information to register one's "assault weapon" is mandatory, Opp'n 1, 3, the State nevertheless asserts that Plaintiffs lack standing to challenge that requirement because none of them has attempted registration without providing the information and been denied, Opp'n 1, 5-7. But federal courts "have consistently held that standing does not require exercises in futility." *Taniguchi*, 303 F.3d at 957.

Plaintiffs have shown that an attempt to register where they lack date or source information would be futile, and thus their failure make such an attempt does not present a standing problem. Plaintiff Martin has declared that he is unable to provide date and source information, and countless members of Plaintiff CRPA are in the same boat. Martin Decl. ¶¶ 5-7; Travis Decl. ¶¶ 5-6. If meeting the date and source requirement is mandatory, as the State confirms it is, then an attempt by Plaintiffs to register without being able to meet it would be a quintessential futile act, performance of which cannot be a prerequisite for their standing. *See, e.g.*, *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 945 (1982) (Because plaintiffs "would not have been granted a permit had they applied for one," "[t]heir failure to submit an application therefore does not deprive them of standing to challenge" a permitting requirement.); *Desert Outdoor Advert., Inc. v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996) (holding that plaintiffs had standing to challenge a permit requirement "even though they did not apply for permits, because applying for a permit would have been futile."). Plaintiffs therefore cannot be denied standing to challenge the date and source

requirement simply for failure to take the futile action of attempting to register.

The State next asserts that Plaintiff Martin and CRPA members cannot claim an injury because, according to the State, "in most instances the date and source information is readily available if the owner exercises basic, reasonable diligence," and Plaintiffs have not alleged that they have done enough to obtain it mandatory. Opp'n 7. Setting aside that whether "most" people can comply says nothing about whether Plaintiffs can, the State erroneously assumes that "assault weapon" owners may obtain date and source information simply by requesting it from the licensed firearm dealer that processed the transfer. Opp'n 6-7. That is not the case.

The State relies on Blake Graham, a "Special Agent Supervisor for the California Department of Justice, Bureau of Firearms" in asserting that "there should be a chain of records of sale that the [firearm] owner can obtain" from the dealer. Opp'n 6-7. While it is correct that dealers should have records containing the date and source information, at least for a period of time,[2] dealers are prohibited from ever releasing the "seller's personal information" to the purchaser. Cal. Penal Code § 28215(f). And none of the laws that the State or Mr. Graham cites provides any specific mechanism for an owner to obtain—let alone legally compel the release of—the information about the seller that is required for registration (i.e., the "source" information). Instead, those laws establish nothing more than that the dealers *have* this information. But whether a dealer *has* such information is unhelpful to Plaintiffs if the dealer cannot disclose it.[3]

Even if there were no such *legal* barriers to obtaining this information, the *practical* barriers to obtaining it also defeat the State's effort to impose that

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[2] 18 U.S.C. 923(g)(1)(A); 27 CFR 478.129(b) (ATF Form 4473 must be maintained for 20 years), Pen. Code, § 28220, subd. (e) (All DROS forms and correspondence by a California FFL must be maintained for 3 years)

[3] Nor does the State explain what people who brought firearms legally from out of state and do not have access to any such records are to do.

burden on Plaintiffs. Assuming an owner can recall or track down the dealer who sold the firearm or processed the transaction—and does so before the dealer purges old records, as allowed by law—dealers are certainly under no legal obligation to scour their potential mountains of sale records to locate a specific owner's date and source information, let alone to disclose it to them, particularly free of charge.

The State does not contend otherwise. Instead, it claims that owners can step in the (gum)shoes of a Special Agent, like Mr. Graham, and track down the firearm by contacting the manufacturer to learn about the firearm's destiny. Opp'n 6, 22-23. In other words, the State is suggesting that Plaintiffs can and must run what is effectively a law enforcement trace on their own firearm, despite lacking the law enforcement resources, (or authority) to do so. Of course, the manufacturer is under no duty to disclose the information—and is unlikely to incur the costs of (or potential liability for) doing so. Even if the manufacturer voluntarily complies, the dealer that sold the firearm may not be so accommodating, and in all events will still be precluded from disclosing the seller's personal information if the firearm was sold by a private party through the dealer. In short, the State's suggestion that the fantastical steps it hypothesizes are merely "reasonable diligence" is risible.

As a last resort, the State claims that had Plaintiffs just contacted DOJ personnel, they would have learned that they need only provide an approximate (not exact) date of acquisition on their registration. Opp'n 7 n.4. Even assuming this is true, a governmental entity cannot defeat a party's standing on the ground that it might decide to interpret the law leniently. In all events, the approximation option, at most, resolves Plaintiffs' concerns with the "date" portion of the "date *and* source" requirement. Plaintiffs would still be unable to provide the "source" information and thus be unable to register.

Moreover, Plaintiffs cannot be expected to have known about this option

prior to reading the State's brief, and the State's course of conduct leading up to this suit suggests that the option might be illusory.

As explained in the motion, Plaintiff CRPA had its counsel point out the problems with the date and source requirement to DOJ when DOJ was proposing its regulations implementing the provision, specifically stating:

> Lastly, DOJ should allow registrants to provide the date to the best of their recollection for the fields on the CFARS form requiring them to provide information about the exact date (to the day) that they acquired the firearm, the source from whom they acquired the firearm, and the location from where they acquired the firearm. The majority of firearm owners honestly do not know these data points for their firearms because they are not required to know them or keep track of them. It would be inequitable and impractical to force them to provide a definitive answer under "penalty of perjury" []. **By requiring this information, DOJ is either forcing individuals to commit perjury or effectively preventing the registration of newly-defined "assault weapons" by owners who forgot all the small details of their firearm's acquisition (and which California law does not require them to remember).** Because the Penal Code does not make "memory of firearm acquisition details" a prerequisite to "assault weapon" registration under Penal Code section 30900, the DOJ's requirements are legally improper. Therefore, DOJ should revise the CFARS form so that it allows registrants to provide information to the best of their recollection. This would also alleviate the perjury concerns currently plaguing the CFARS Form.

Brady Decl., Ex. A. DOJ never responded to assuage these concerns. It did not explain that a registrant could provide an approximate date on the registration form itself, in a published bulletin, in a letter responding to CRPA's counsel, or even in response to this lawsuit—until now. Plaintiffs should not be expected to know it was an option, especially when the registration form does not provide for approximations and one must declare under penalty of perjury that the information provided on the registration is accurate. Pls' Req. for Jud. Not., Ex. G. But in all events, again, that DOJ has (perhaps) addressed the date problem does nothing to solve the source problem. And Plaintiffs cannot register without providing *both*

pieces of information.

Accordingly, even assuming Plaintiffs were required to show that they took steps to acquire the date and source information to have standing here—and the State cites zero authority suggesting that they are—the steps that the State suggests could be taken in reality cannot be. Plaintiffs have established Article III standing to challenge the State's new impossible-to-satisfy registration requirement.

Similarly, the State's contention that Plaintiffs' claims are not ripe must also fail. This argument is based on the same arguments the State raises to undermine Plaintiffs' standing and does not provide a separate basis for dismissal. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 n. 8 (2007) ("standing and ripeness boil down to the same question in this case"); *Jackson v. City and County of San Francisco*, 09-2143, 2012 WL 3580525, at *1 (N.D. Cal. Aug. 17, 2012).

II. Plaintiffs Are Likely to Succeed on the Merits

A. The Date and Source Requirement Violates the Due Process Clause

Plaintiffs are likely to succeed on their claim that, as applied to individuals who have no means to comply, the date and source requirement violates the Due Process Clause. At the outset, the State does not dispute that a retroactive law is subject to heightened constitutional scrutiny. *See Kelo v. City of New London*, 545 U.S. 469, 493 (2005) (Kennedy, J., concurring). Instead, citing no case law of its own, the State asserts that the AWCA is not actually retroactive. According to the State, the AWCA "does not punish individuals for the past possession of assault weapons," Opp'n 11, and thus "does not punish individuals for past action," Opp'n n.11. But this cabined view of retroactivity misses the point.

Even assuming that the AWCA does not punish individuals for past possession of newly declared "assault weapons," there can be no serious dispute

that it punishes people for past action. At a minimum, the AWCA punishes individuals for failing, years ago, to retain detailed information about the exact date on which they purchased their firearm and the name and address of the person from whom they obtained it; Before the AWCA, it was lawful to own a newly declared "assault weapon" without a record of the exact date or source from which it was obtained; after the AWCA, it became unlawful to do so. The AWCA thus "change[d] the legal consequences of transactions long closed," "destroy[ing] the reasonable certainty and security which are the very objects of property ownership." *E. Enters.*, 524 U.S. at 502 (plurality opinion). Accordingly, the rule that courts must give "careful consideration to due process challenges to legislation with retroactive effects" applies with full force here. *Id.* at 547 (Kennedy, J., concurring in the judgment and dissenting in part).

Even applying a lower level of constitutional scrutiny, Plaintiffs are likely to show that imposing the date and source requirement without regard to whether individuals have access to that information is not rationally related to a legitimate state interest. As explained in Plaintiffs' moving papers, the requirement burdens individuals who qualify for the AWCA's grandfather provision, which governs only people who lawfully obtained their firearms in the past. But many of those individuals may not have access to the required information, both due to the passage of time and because, at the time they obtained their firearms, the law did not require them to retain those records. Accordingly, and as DOJ has previously recognized, the information understandably "may not be known" by them.[4] Requiring those law-abiding citizens to provide that information at this late date or lose their firearm is not rational, and it runs headlong into the command that the government may not "compel the doing of impossibilities." *Bayview Hunters*

[4] Dep't of Justice, Firearms Division, *Department of Justice Regulations for Assault Weapons and Large Capacity Magazines: Final Statement of Reasons*, http://www.ossh.com/firearms/caag.state.ca.us/firearms/regs/fsor.htm (last visited Dec. 1, 2017) (attached as Exhibit H to Plaintiffs' Request for Judicial Notice filed with Pls.' Mem. Supp. Mot. Prelim. Inj. ("Mot.").)

Point Cmty. Advocates v. Metro. Transp. Comm'n, 366 F.3d 692, 699 (9th Cir. 2004), *as amended on denial of reh'g and reh'g en banc* (June 2, 2004).

The State offers only one justification for the date and source requirement: that it "helps to establish that the firearm is lawfully possessed by the registrant." Opp'n 10 (date requirement); *see also* Opp'n 10 (name and address requirement "assist[s] the DOJ in determining whether the registrant is in lawful possession of the weapon"). While that interest may suffice as to individuals who *have* date and source information, it does not begin to explain why the State should be able to punish people who do not have access to date and source information that they were not required to keep at the time of their transactions. The State argues that it needs to know the exact month, day, and year that an individual obtained a firearm in order to confirm that the registrant acquired the firearm "between January 1, 2001 and December 31, 2016," thus falling within the grandfather provision, and so that DOJ can cross-check the registration with its own firearms database. Opp'n 10. But a simple statement certifying that the weapon was acquired at *some* point during that fifteen-year period (or providing an approximate date of acquisition, should the individual have one) would suffice to serve the former purpose. And DOJ does not need the precise date of acquisition to look up the transaction in its firearms database and confirm that it was lawful; all it needs is the firearm's serial number.

On that point, the availability of the State's firearm database underscores the irrationality of the date and source requirement, especially as applied to individuals who do not already have that information. For firearms acquired in 2014 or later, DOJ can ascertain date and source details by a simple search of its database using the firearm's serial number.[5] And for firearms acquired prior to

[5] See Assembly Bill No. 809, 2010-2011 Reg. Sess. (generally requiring all firearm transactions in California occurring after January 1, 2014, to be reported to the California Department of Justice for the purposes of registration in the department's Automated Firearms System ("AFS"))

2014, DOJ can use the serial number required for registration to conduct the "reasonable diligence" it demands of Plaintiffs, but with all of the access and authority available to law enforcement. It is irrational and unreasonable to impose that requirement on the ordinary citizen when the State can do it.

As for the source requirement, the State asserts that this information "might" allow the DOJ "to verify the registrant's information with any information the DOJ has on file for the transaction, the firearm, and the seller," "to confirm that the firearm was obtained from the identified seller," and to "track down the seller… to determine whether the seller was in lawful possession of the firearm at the time of the sale." Opp'n 10. That the requirement "might" serve some useful purpose hardly suffices to justify imposing it on individuals who have no means to comply. At any rate, it is not remotely rational to punish *the purchaser* for failure to keep information years ago that DOJ now claims would assist it in policing the conduct of *the seller*.

Finally, imposing the date and source requirement without regard to whether individuals actually have date and source information is ill-designed "to accomplish [the] objective" the State claims to advance, as it will actually discourage registration in many instances. Opp'n 9. If a citizen is unable to obtain the required date and source information, the citizen either must get rid of the firearm (which, as the Legislature acknowledged, Req. for Jud. Not. ¶ 2, would be an unconstitutional taking, *see* Section B *infra*, or modify the firearm (which would obviate the need for registration). It is hard to see how a registration requirement can be rational when it is impossible to satisfy and the alternatives result either in a constitutional violation or no registration at all. The far more rational course, as DOJ itself recognized long ago, is to require date and source information only if it is actually known. Req. for Jud. Not. ¶ 7.

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B. The Date and Source Requirement Violates the Takings Clause

Plaintiffs are also likely to succeed on their argument that the AWCA violates the Takings Clause as applied to individuals who cannot comply with the date and source requirement. The State's arguments to the contrary are misguided from start to finish.

First, the State cannot defeat Plaintiffs' motion on the ground that the State is not taking Plaintiffs' property for a "public use," Opp'n 13, or "public benefit," Opp'n 14. This Court has long made clear that "public use" is not limited to actual *use* by the government but is "coterminous with the scope of the sovereign's police powers." *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984). To the extent the State is affirmatively arguing that dispossession of Plaintiffs' firearms would not serve a public purpose, the State effectively confirms that the law is depriving Plaintiffs of their property without due process. *See Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 at 197 (1985) (a "regulation that goes so far that it has the same effect as a taking" may instead be "an invalid exercise of the police power, violative of the Due Process Clause"); *E. Enters.*, 524 U.S. at 539 (Kennedy, J., dissenting) (same). And in all events, if the State is taking property for some purpose other than public use, the remedy is that it may not take the property at all—not that it may take the property without paying compensation. *Midkiff*, 467 U.S. at 241.

Second, the State confuses physical takings and regulatory takings when it argues that Plaintiffs have failed to allege "diminution in economic value to their assault weapons caused by the AWCA." Opp'n 14; *see* Opp'n 12. Claims of diminution in economic value are distinctly *regulatory* takings claims. Plaintiffs' claim here is a physical takings claim—that the date and source requirement will have the effect of requiring Plaintiffs to dispossess their property, which is the hallmark of a physical taking. *See Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2429 (2015). The State's arguments about economic value and reliance on regulatory-

takings cases are thus inapposite. *See Silveira v. Lockyer*, 312 F.3d 1052, 1092 (9th Cir. 2002) (regulatory takings case).[6]

Third, the State cannot defeat a takings claim on the ground that the taking at issue was a valid exercise of the State's police power. *See* Opp. 14-15. Setting aside whether the date and source requirement as currently constituted is a valid exercise of the State's police power in the first place, the Supreme Court has foreclosed the argument that a law enacted pursuant to a State's police power categorically "is not a physical taking." *Id.* In *Loretto v. Teleprompter Manhattan CATV Corp.*—a case the State does not cite—the Supreme Court held that a law requiring physical occupation of private property was both "within the State's police power" *and* an unconstitutional physical taking. 458 U.S. at 426. The Court made clear that the question whether a law effects a physical taking is "a separate question" from whether the State has the police power to enact it, and a taking is unconstitutional "without regard to the public interests that it might serve." *Id.*; *see also Williamson*, 473 U.S. at 197 (distinguishing between physical taking and exercise of police power); *Chicago, B. & Q. Ry. Co. v. Illinois*, 200 U.S. 561, 593 (1906) ("If, in the execution of *any power, no matter what it is*, the government . . . finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner."); *Duncan v. Becerra*, 17-cv-1017-BEN-JLB, 2017 WL 2813727, at *23 (June 29, 2017).

The Court followed the same course in *Lucas v. South Carolina Coastal*

[6] In the course of discussing diminution in value, the State also observes that Plaintiffs may sell their firearms, move them out of state, or alter certain features. *See* Opp'n 12-13. Plaintiffs acknowledged those alternatives in their moving papers and explained why they do not cure the takings problem. Mot. 20. Except for its argument that Plaintiffs have failed to allege a loss of economic value, the State does not otherwise meaningfully respond to any of those arguments. Moreover, while Plaintiffs' principal submission is that the registration requirement works a physical taking, to the extent the court disagrees, Plaintiffs also contend that requiring individuals to remove popular and useful features will diminish their value and in doing so constitute a regulatory taking.

Council, holding that a law enacted pursuant to the State's "police powers to enjoin a property owner from activities akin to public nuisances" is not immune from scrutiny even under the more permissive *regulatory* takings doctrine. 505 U.S. 1003, 1020-27 (1992). The Court reasoned that it was true "*[a] fortiori*" that the "legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated." *Id.* at 1026. The same is true for the categorical rule that physical takings must be compensated. *Id.* at 1015; *Horne*, 135 S. Ct. at 2425.

The State can find no refuge in the cases it cites in support of its police-power defense, which apply regulatory takings principles and involve restrictions on *use*, not *possession*. See Opp'n 14-15. For example, *Everyard's Breweries v. Day*, 265 U.S. 545, 563 (1924), "involved a federal statute that forbade the sale of liquors," *Andrus v. Allard*, 444 U.S. 51, 67 (1979), and *Gun South, Inc. v. Brady*, 877 F.2d 858, 869 (11th Cir. 1989), involved a restriction on the importation of guns. And to the extent *Akins v. United States*, 82 Fed. Ct. 619, 622 (2008), and *Fesjian v. Jefferson*, 399 A. 2d 861 (D.C. Ct. App. 1979), suggest that a physical taking need not be compensated if it is pursuant to the police power, those cases cannot be reconciled with the Supreme Court's more recent holding in *Horne* that there is a fundamental difference between a regulation that restricts only the *use* of private property, and one that requires "physical surrender . . . and transfer of title." *Horne*, 135 S. Ct. at 2429. As *Horne* made clear, "[w]hatever . . . reasonable expectations" people may have "with regard to regulations," they "do not expect their property, real or personal, to be actually occupied or taken away." *Id.* at 2427. The State does not even mention *Horne*, let alone try to distinguish it.

Finally, the State misapprehends the law when it argues that the "only remedy" for a takings claim is "monetary compensation." Opp'n 15. The Supreme Court has expressly recognized that declaratory and injunctive relief are available remedies for takings claims. *See, e.g.*, *E. Enters.*, 524 U.S. at 522 (plurality

opinion) ("Based on the nature of the taking alleged in this case, we conclude that the declaratory judgment and injunction sought by petitioner constitute an appropriate remedy under the circumstances, and that it is within the district courts' power to award such equitable relief."); *Babbitt*, 519 U.S. 234 (affirming grant of declaratory and injunction relief on takings claim); *Hodel v. Irving*, 481 U.S. 704 (1987) (same). Injunctive relief is both appropriate and warranted here.

C. The Date and Source Requirement Violates the Second Amendment

1. The Date and Source Requirement Burdens Conduct Protected by the Second Amendment

The rifles the State has reclassified as "assault weapons" are protected by the Second Amendment under the straightforward common use test articulated by the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570, 624-28 (2008). *See* Mot. at 15. The State does not (and cannot) dispute the reality that the rifles affected by the AWCA are among the most popular in the country and are thus, by definition, "in common use" for lawful purposes. Instead, the State oddly suggests that because the prohibited rifles offer improved performance, accuracy, and reliability—such that fully-automatic versions of them are also preferred by the military—should somehow remove them from Second Amendment protection. Opp'n at 17-18. The State's argument fails, as it relies solely on deeply flawed out-of-circuit authority that not only grossly mischaracterizes the rifles at issue, but, more importantly, squarely conflicts with binding Supreme Court precedent.

In *Heller*, the Supreme Court announced that the Second Amendment protects those arms that are "typically possessed by law-abiding citizens for lawful purposes." 554 U.S. at 625. This pronouncement did not include a caveat that such protection is conditioned upon a finding that arms common to civilian use are not also suitable for military use. And when it came time to review the District's handgun ban, the Supreme Court simply surveyed the choices of the American public to determine whether handguns are deserving of Second

Amendment protection. *Id*. at 629 ("It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon."). Nowhere in *Heller*'s comprehensive 64-page majority opinion did it even consider the extensive use of handguns by the United States military.[7] The more-suitable-for-military-use test the State invokes thus directly conflicts with *Heller*.

In all events, even if such a test were appropriate, it would be irrelevant here because neither the State nor the principal decision on which it relies provides a single example of the rifles Plaintiffs seek to possess ever being used by any military. *See Kolbe v. Hogan*, 849 F.3d 114, 130-41 (4th Cir. 2017) (en banc). Nor could they, as militaries use *automatic* rifles, i.e., machineguns, not the *semi*-automatic rifles at issue here. That both rifles share some safe-handling and accuracy enhancing features—such as pistol grips, adjustable stocks, and flash suppressors—does not make the semi-automatic version a military-specific firearm any more than a Jeep sold at the local dealership is a military-specific vehicle. Indeed, the Supreme Court has specifically explained that semiautomatic rifles, including ones prohibited by the AWCA, "traditionally have been widely accepted as lawful possessions." *Staples v. United States*, 511 U.S. 600, 612 (1994).

Unsurprisingly, other circuit courts to address laws like the AWCA have followed *Heller* and found, or assumed without deciding, that the prohibited firearms are typically possessed by law-abiding citizens and are thus protected by the Second Amendment. *N.Y. State Rifle and Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 257 (2d Cir. 2015), *cert. denied sub nom. Shew v. Malloy*, 136 S. Ct. 2486

[7] A determination of whether arms are protected under the Second Amendment does not, and cannot, turn on whether the military also uses those firearms or finds them suitable for their purposes. This would allow the state to ban countless firearms, knives, and other arms that, as a result of their superior utility and function for self-defense, are commonly possessed by both the American public and the armed forces.

(2016); *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011). This Court should reject Defendant's invitation to follow the novel approach adopted by the Fourth Circuit in *Kolbe*, which strays from *Heller*'s clear instruction.

Under *Heller*, the prohibited firearms easily satisfy the common use analysis by any reasonable measurement. *See* Curcuruto Decl. ¶ 9, 14 (Between 1990 and 2017 approximately 13.7 million AWCA-prohibited rifles were produced or imported into the United States, with 1.5 million in 2015 alone); *id* at ¶ 8, 11 (Rifles prohibited by AWCA are among the most popular firearms possessed by civilians); *id.* at ¶ 10, Helsley Decl. ¶ 19-21 (These rifles are commonly owned for the lawful purpose of self-defense.); Helsley Decl. ¶¶ 3-5 (These rifles are also acquired for hunting, target and competitive shooting.); Req. for Jud. Not. ¶ 3 (Rifles prohibited by AWCA are legal in 45 states.). Restrictions on them thus trigger Second Amendment scrutiny. *See Caetano v. Massachusetts*, 136 S. Ct. 1027, 1027-28 (2016). And because the date and source requirement poses an obstacle to Plaintiffs registering and continuing to possess their common rifles, it must be analyzed under heightened scrutiny.

2. As applied to individuals who lack the means to comply, the date and source requirement cannot survive constitutional scrutiny.

Because the date and source requirement operates to preclude possession of a firearm that is protected by the Second Amendment, *Heller* commands that, to the extent it could ever satisfy constitutional scrutiny at all, it must satisfy strict scrutiny. But even under intermediate scrutiny, the date and source requirement is invalid because the State has failed to establish a "reasonable fit between the challenged regulation" and a "significant, substantial, or important" government objective. *Silvester v. Harris*, 843 F.3d 816 at 821-22 (9th Cir. 2016); *Jackson*, 746 F.3d at 965. Moreover, the State has not established, as it must, that the date

and source requirement is narrowly drawn to avoid burdening substantially more conduct than is necessary to achieve the State's public safety interests. *McCutcheon v. Fed. Election Comm.*, 134 S. Ct. 1434, 1456-57 (2014); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 214 (1997)

As Plaintiffs' moving papers made clear, this motion does not challenge the AWCA as a whole or the Act's registration scheme per se. Plaintiffs seek relief only from the date and source requirement as currently constituted, as the lack of an exception for individuals who innocently failed to keep certain records makes it impossible for such individuals to register their lawfully owned firearms. Rather than justify imposing a categorical date and source requirement on individuals who have long *lawfully* possessed their firearms without incident, however, the State argues only that the AWCA furthers a compelling public safety interest by "prohibiting a particularly dangerous subclass of firearms that pose an acute danger to the public and law enforcement." Opp'n p. 20-21. The State goes on to argue that these firearms can and should be prohibited because they are "particularly dangerous" and are "disproportionately" used by criminals in attacks on the public and law enforcement personnel. Opp'n p. 21. The State's proffered justifications fail on several counts, as they are largely nonresponsive to the limited question at hand.

As an initial matter, the State's argument that these firearms are so dangerous that they must be prohibited even to people who have long lawfully possessed them is undermined by the fact the AWCA itself has a "grandfathering" clause, expressly authorizing individuals who lawfully acquired them to *continue possessing* them. Thus, even if the State had a constitutionally viable interest in prohibiting *other* people from possessing these firearms, it does not begin to explain why it has a distinct interest in prohibiting people from possessing them simply because they failed to anticipate that they should keep date and source information from long-ago-closed transactions.

Indeed, the State fails to offer *any* justification for enforcing the date and source requirement in a manner that precludes people from registering altogether. As explained in Plaintiffs' moving papers, the Legislature adopted the registration scheme to better track those individuals who are "grandfathered in" and allowed to remain in possession of their rifle(s) in case they become prohibited from owning firearms in the future. Mot. 18-19; Req. for Jud. Not. ¶ 1. As Plaintiffs explained, surely the State's stated interest in keeping track of these firearms would be better served by allowing people to come forward and lawfully register their firearms than by a requirement that makes registration impossible, leaving those firearms unaccounted for. The State neither disputes that commonsense proposition nor explains how enforcing the date and source requirement in such a manner can be reconciled with the Legislature's professed interest in *encouraging* registration.

Nor does the State attempt to make any showing that the date and source requirement is "closely drawn to avoid unnecessary abridgment" of constitutional rights. *McCutcheon*, 134 S. Ct. at 1456. Nor could it, as the absence of an exception for individuals who, for innocent reasons, lack date and source information is the quintessential example of a dramatically overbroad restriction on constitutional rights. After all, the State has already recognized, through the grandfathering clause, that people who have lawfully possessed these firearms for years do not pose a serious safety risk problem. The State does not begin to explain how that logic could cease to hold true simply because someone innocently failed to keep date and source information from potentially several years ago. In short, the State has not claimed—let alone attempted to meet its burden to prove—that its public safety interests would be less effectively achieved by allowing Plaintiffs to register their "assault weapons" without providing the date and source information, instead of dispossessing them of lawfully acquired firearms simply because they do not have that information.

In all events, the State's reasoning that protected arms may be banned because they are also chosen by criminals has been squarely rejected by the Supreme Court. In *Heller*, it was argued that the justification for banning handguns was even more strongly related to the government's public safety objectives, with handguns accounting for 81 percent of all firearm homicides. *Heller* at 697-99 (Breyer, J., dissenting). But despite the government's clear interest in keeping these firearms out of the hands of criminals, wholly banning the possession of commonly used, protected arms by law-abiding citizens lacks the required fit under any level of scrutiny. *Id*. at 628-29 (majority opinion). While this Court need not resolve that issue to resolve this motion, the same result should follow in this case.

In sum, the State does not have a legitimate interest in confiscating firearms—particularly constitutionally protected ones—from individuals simply because they did not foresee years ago that they might one day be expected to identify precisely when and where they obtained their firearms. Because the State has failed to meet its burden to justify the date and source requirement as applied to individuals who lack the means to comply with it, Plaintiffs are likely to succeed on the merits of this aspect of their Second Amendment claim.

III. Plaintiffs Will Suffer Irreparable Harm in the Absence of Preliminary Relief While the State Would Not be Hardly Inconvenienced

The State does not dispute that if the date and source requirement violates either the Due Process Clause, the Takings Clause, or the Second Amendment, Plaintiffs are per se irreparably harmed. *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *see also* Mot. at 20:14-21:7. Rather, its only defense is that there is no such violation. As such, should the Court find Plaintiffs are likely to succeed on any of their constitutional claims, irreparable harm results a fortiari.

The State's claims of harm that would result from granting Plaintiffs the relief they seek are belied by the State's own actions. Moreover, the State admits

that it is already accepting registrants' approximations on their firearm acquisition dates. So the State cannot now claim it would be harmed by being required to accept them. And, as for the source information, the State has described the mechanism for obtaining such information itself: It need only conduct "reasonable diligence" in contacting the respective firearm's manufacturer and tracing the firearm. Opp'n 6-7. The State can do this even if the requirement is preliminary enjoined. In all events, Plaintiffs are merely asking that the State continue to do the same as it has for previous "assault weapon" registrations when providing date and source information was voluntary. *See* Mot. at 5. The State has not provided a single example of that system being inadequate to serve its interests. Its suggestion that doing so would endanger public safety now, therefore, is a demonstrable exaggeration that should be ignored. Granting the relief Plaintiffs seek will frankly not be a big deal for the State.

Plaintiffs, on the other hand, will lose their property or be subjected to criminal prosecution for continuing to possess an unregistered "assault weapon" come July 1, 2018. After that date, they will have no mechanism to register their firearms. And, this is not just an issue facing Plaintiffs. As explained in their motion, there are potentially thousands of people affected. *Id.* at 3:26-4:1-4. On balance, therefore, equity tips sharply in favor of granting the extremely limited relief Plaintiffs seek with this motion.

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CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion for a Preliminary Injunction.

Dated: December 1, 2017

MICHEL & ASSOCIATES, P.C.

/s/Sean A. Brady
Sean A. Brady
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

Case Name: *Rupp, et al. v. Becerra*
Case No.: 8:17-cv-00746-JLS-JDE

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

I am not a party to the above-entitled action. I have caused service of:

PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

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Xavier Becerra
Attorney General of California
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Deputy Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102
E-mail: peter.chang@doj.ca.gov

I declare under penalty of perjury that the foregoing is true and correct. Executed December 1, 2017.

/s/Laura Palmerin
Laura Palmerin

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(1) Plaintiffs' Reply to Defendant's Opposition to Motion for Preliminary Injunction; (2) Declaration of Sean A. Brady in Support

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