NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

VIRGINIA DUNCAN; et al., Plaintiffs-Appellees, v. XAVIER BECERRA, in his official capacity as Attorney General of the State of California, Defendant-Appellant.	No. 17-56081 D.C. No. 3:17-cv-01017-BEN-JLB MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Roger T. Benitez, District Judge, Presiding

Argued and Submitted May 14, 2018
San Francisco, California

Before: WALLACE and N.R. SMITH, Circuit Judges, and BATTS,** District Judge.

The State of California ("California"), through its Attorney General, Xavier Becerra, appeals the district court's grant of a preliminary injunction enjoining

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Deborah A. Batts, United States District Judge for the Southern District of New York, sitting by designation.

California from enforcing California Penal Code §§ 32310(c) & (d). "We review a district court's decision to grant or deny a preliminary injunction for abuse of discretion." *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011). We do not "determine the ultimate merits," but rather "determine only whether the district court correctly distilled the applicable rules of law and exercised permissible discretion in applying those rules to the facts at hand." *Fyock v. Sunnyvale*, 779 F.3d 991, 995 (9th Cir. 2015). We have jurisdiction under 28 U.S.C. § 1292(a)(1), and we affirm.[1]

I.

The district court did not abuse its discretion by granting a preliminary injunction on Second Amendment grounds. *Thalheimer*, 645 F.3d 1109 at 1115.

[1] "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). California makes only a cursory argument that the latter three elements are unmet if we find the district court did not abuse its discretion regarding the first element. Because we find the district court did not abuse its discretion, we only address the first element of the preliminary injunction standard for each constitutional question. *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief. . . . [A] bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review." (citation omitted)).

1. The district court did not abuse its discretion by concluding that magazines for a weapon likely fall within the scope of the Second Amendment. First, the district court identified the applicable law, citing *United States v. Miller*, 307 U.S. 174 (1939), *District of Columbia v. Heller*, 554 U.S. 570 (2008), *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (per curiam), and *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014). Second, it did not exceed its permissible discretion by concluding, based on those cases, that (1) some part of the Second Amendment right likely includes the right to bear a weapon "that has some reasonable relationship to the preservation or efficiency of a well regulated militia," *Miller*, 307 U.S. at 178; *see also Heller*, 554 U.S. at 583, 627-28; *Caetano*, 136 S. Ct. at 1028; and (2) the ammunition for a weapon is similar to the magazine for a weapon, *Jackson* 746 F.3d at 967 ("'[T]he right to possess firearms for protection implies a corresponding right' to obtain the bullets necessary to use them." (quoting *Ezell v. City of Chicago*, 61 F.3d 684, 704 (7th Cir. 2011))).

2. The district court did not abuse its discretion by applying the incorrect level of scrutiny. The district court applied both intermediate scrutiny and what it coined the "simple test" of *Heller*. The district court found Plaintiffs were likely to succeed under either analysis. Although the district court applied two different tests, there is no reversible error if one of those tests follows the applicable legal

principles and the district court ultimately reaches the same conclusion in both analyses.

Here, in its intermediate scrutiny analysis, the district court correctly applied the two-part test outlined in *Jackson*. The district court concluded that a ban on ammunition magazines is not a presumptively lawful regulation and that the prohibition did not have a "historical pedigree." Next, the district court concluded, citing *Fyock*, that section 32310 infringed on the core of the Second Amendment right, but, citing *Silvester v. Harris*, 843 F.3d 816, 823 (9th Cir. 2016), *Fyock*, 779 F.3d at 999, *Jackson*, 746 F.3d at 965, 968, and *Chovan*, 735 F.3d at 1138, that intermediate scrutiny was the appropriate scrutiny level. The district court concluded that California had identified four "important" interests and reasoned that the proper question was "whether the dispossession and criminalization components of [section] 32310's ban on firearm magazines holding any more than 10 rounds is a reasonable fit for achieving these important goals."

3. The district court did not abuse its discretion by concluding that sections 32310(c) and (d) did not survive intermediate scrutiny. The district court's review of the evidence included numerous judgment calls regarding the quality, type, and reliability of the evidence, as well as repeated credibility determinations. Ultimately, the district court concluded that section 32310 is "not likely to be a

reasonable fit." California articulates no actual error made by the district court, but, rather, multiple instances where it disagrees with the district court's conclusion or analysis regarding certain pieces of evidence. This is insufficient to establish that the district court's findings of fact and its application of the legal standard to those facts were "illogical, implausible, or without support in inferences that may be drawn from facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc). In reviewing the district court's grant of a preliminary injunction, we cannot "re-weigh the evidence and overturn the district court's

evidentiary determinations—in effect, to substitute our discretion for that of the district court." *Fyock*, 779 F.3d at 1000.[2]

II.

The district court did not abuse its discretion by granting a preliminary injunction on Takings Clause grounds. *Thalheimer*, 645 F.3d at 1115. First, the district court, citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015), *Loretta v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992),

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[2] The dissent *does* re-weigh the evidence. It concludes that "California's evidence . . . was more than sufficient to satisfy intermediate scrutiny" and that the "2013 Mayors Against Illegal Guns (MAIG) Survey . . . easily satisfies the requirement that the evidence upon which the state relies be 'reasonably believed to be relevant' and 'fairly support' the rationale for the challenged law." These conclusions mean the dissent *is* "substitut[ing] [its] discretion for that of the district court," which is impermissible under the applicable standard of review. *Fyock*, 779 F.3d at 1000-01.

Further, disagreeing with another district court regarding a similar record is not necessarily an abuse of discretion. Here, the district court made evidentiary conclusions regarding the record provided by California, specifically noting that it had provided "incomplete studies from unreliable sources upon which experts base speculative explanation and predictions." These conclusions are not "illogical, implausible, or without support in inferences that may be drawn from facts in the record." *Hinkson*, 585 F.3d at 1251. As noted above, it is not our role to "re-weigh the evidence and overturn the district court's evidentiary determinations—in effect, to substitute our discretion for that of the district court." *Fyock*, 779 F.3d at 1000.

outlined the correct legal principles. Second, the district court did not exceed its discretion by concluding (1) that the three options provided in section 32310(d) (surrender, removal, or sale) fundamentally "deprive Plaintiffs not just of the *use* of their property, but of *possession*, one of the most essential sticks in the bundle of property rights"; and (2) that California could not use the police power to avoid compensation, *Lucas*, 505 U.S. at 1020-29; *Loretto*, 458 U.S. at 426 (holding "a permanent physical occupation authorized by the government is a taking without regard to the public interest it may serve").[3]

[3] The dissent also "re-weigh[s] the evidence" and the district court's conclusions on the Takings Clause question. *Fyock*, 779 F.3d at 1000. The district court concluded that the three options available under section 32310(d) constituted either a physical taking (surrender to the government for destruction) or a regulatory taking (forced sale to a firearms dealer or removal out of state). The dissent first takes issue with the district court's conclusion that storage out of state could be financially prohibitive. It is not "illogical" or "implausible" to conclude that forcing citizens to remove property out of state effectively dispossess the property due to the financial burden of using it again. *Hinkson*, 585 F.3d at 1263. Such removal, as the district court notes, also eliminates use of the Banned Magazines in "self defense." *See Heller*, 554 U.S. at 592 ("[W]e find that [the text of the Second Amendment] guarantee[s] the individual [a] right to possess and carry weapons in case of confrontation."). Second, the dissent argues the district court incorrectly weighed the regulatory takings factors in *Murr*. While the cost ($20 to $50) of the magazine may seem minimal, the district court also noted that the "character of the governmental action," *Murr*, 137 S. Ct. at 1943, was such that "California will deprive Plaintiffs not just of the *use* of their property, but of *possession*," Similarly, this conclusion is not "illogical," "implausible," or "without support in inferences that may be drawn from the facts in the record." *Hinkson*, 585 F.3d at 1263.

AFFIRMED.