

1 XAVIER BECERRA  
Attorney General of California  
2 State Bar No. 118517  
MARK R. BECKINGTON  
3 Supervising Deputy Attorney General  
State Bar No. 126009  
4 ANTHONY P. O'BRIEN  
Deputy Attorney General  
5 State Bar No. 232650  
JOHN D. ECHEVERRIA  
6 Deputy Attorney General  
State Bar No. 268843  
7 300 South Spring Street, Suite 1702  
Los Angeles, CA 90013  
8 Telephone: (213) 269-6249  
Fax: (213) 897-5775  
9 E-mail: John.Echeverria@doj.ca.gov  
Attorneys for Defendant Attorney General  
10 Xavier Becerra

11 IN THE UNITED STATES DISTRICT COURT  
12 FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
13  
14

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

Plaintiffs,

22 **v.**

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

Defendants.

17-cv-1017-BEN-JLB

**MEMORANDUM OF POINTS AND**  
**AUTHORITIES IN SUPPORT OF**  
**DEFENDANT'S EX PARTE**  
**APPLICATION TO STAY**  
**JUDGMENT PENDING APPEAL**

Date:  
Time:  
Judge: Hon. Roger T. Benitez  
Courtroom: 5A  
Action Filed: May 17, 2017

## BACKGROUND

On March 29, 2019, this Court granted Plaintiffs’ motion for summary judgment, holding that California Penal Code section 32310<sup>1</sup> as a whole violates the Second Amendment. *See* Order Granting Pls.’ Mot. for Summ. J. (the “Order”) (Dkt. No. 87) at 84:25-85:13. The Court entered Judgment (Dkt. No. 88), declaring Section 32310 unconstitutional in its entirety and enjoining its enforcement. Defendant plans to file a notice of appeal forthwith. An immediate stay of the Judgment pending the appeal is warranted to preserve the status quo. Defendant hereby respectfully requests that this Court stay the Judgment during the pendency of the appeal, and reinstate the preliminary injunction issued on June 29, 2017 (Dkt. No. 28) enjoining enforcement of Section 32310(c) and (d) during the stay. Defendant respectfully requests that this Court rule on this stay application by April 5, 2019.

In addition, to prevent a surge of large-capacity magazine (LCM) acquisitions in the State of California (the “State”) while the Court considers Defendant’s request for a stay pending the appeal, and to preserve the immediate status quo, Defendant requests that the Court issue a temporary stay until the Court rules on the application. Defendant respectfully requests that the Court issue its ruling on the temporary stay by April 2, 2019. In the event that some California residents have already purchased LCMs over the weekend, the Court has the discretion to tailor an appropriate remedy to account for those cases while otherwise maintaining the status quo.

This case presents a question of first impression in this circuit—whether 10-round large-capacity magazine (“LCM”) restrictions comport with the Second Amendment. Every other circuit to have considered this question has upheld the

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<sup>1</sup> All subsequent statutory references are to the California Penal Code, unless otherwise noted.

1 restrictions.<sup>2</sup> A stay of the Judgment pending appeal is warranted to preserve the  
 2 status quo while the Ninth Circuit considers this important constitutional question.  
 3 In enjoining LCM restrictions that have been in effect for nearly two decades, the  
 4 Judgment is far broader than the preliminary injunction and has effected a sudden  
 5 and dramatic change in California gun-safety laws. Absent a stay, the State faces  
 6 an influx of previously illegal LCMs while it attempts to defend the law on appeal.  
 7 The Court should stay its Judgment pending the appeal.

### 8 SUMMARY OF ARGUMENT

9 All four factors that courts consider in evaluating a request to stay pending  
 10 appeal weigh in favor of Defendant's request for a stay. *See Humane Soc'y of U.S.*  
 11 *v. Gutierrez*, 558 F.3d 896, 896 (9th Cir. 2009) ("A party seeking a stay must  
 12 establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer  
 13 irreparable harm in the absence of relief, [3] that the balance of equities tip in his  
 14 favor, and [4] that a stay is in the public interest." (citing *Winter v. Nat'l Res. Def.*  
 15 *Council, Inc.*, 555 U.S. 7, 20 (2008))).

16 **First**, Defendant meets the requirement of showing a strong likelihood of  
 17 succeeding on the merits of the Second Amendment claim on appeal.<sup>3</sup> This Court  
 18 resolved on the merits a question of first impression in the Ninth Circuit involving

19  
 20 <sup>2</sup> *See Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney General N.J.*  
 21 *(ANJRPC)*, 910 F.3d 106, 122 (3d Cir. 2018); *Kolbe v. Hogan*, 849 F.3d 114, 140-  
 22 41 (4th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 469 (2017); *N.Y. State Rifle &*  
 23 *Pistol Ass'n v. Cuomo (NYSRPA)*, 804 F.3d 242, 262-64 (2d Cir. 2015), *cert. denied*  
 24 *sub nom. Shew v. Malloy*, 136 S. Ct. 2486 (2016); *Friedman v. City of Highland*  
 25 *Park*, 784 F.3d 406, 411-12 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (2015);  
 26 *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1264 (D.C. Cir. 2011).

27 <sup>3</sup> In addition to ruling that Section 32310 violates the Second Amendment,  
 28 the Court found that Section 32310(c) and (d) violate the Takings Clause. *See*  
 Order Granting Pls.' Mot. for Summ. J. (the "Order") (Dkt. No. 87) at 84:20-23.  
 While Defendant maintains that the LCM-possession ban does not effect a taking  
 requiring just compensation, in requesting a stay of the Judgment, Defendant  
 requests that the Court reinstate the preliminary injunction pending the appeal to  
 preserve the status quo. *See Nken v. Holder*, 556 U.S. 418, 429 (2009) (describing  
 the status quo as the "state of affairs before" the injunctive relief was granted).  
 Accordingly, the likelihood of success on the merits is limited to the ruling on the  
 Second Amendment claim.

1 Second Amendment law. As this Court has acknowledged, the appeal will be the  
 2 first opportunity for the Ninth Circuit to address the constitutionality of LCM  
 3 restrictions in a decision that arises from a final judgment. *See* Order at 80:13-15  
 4 (“If this judgment is appealed, the Court of Appeals will have the opportunity to  
 5 rule *on the merits*, for the first time.”).<sup>4</sup> The four other circuit courts that have  
 6 considered the constitutionality of state-wide LCM restrictions on the merits (the  
 7 Second, Fourth, Seventh, and D.C. Circuits) have upheld them on records that are  
 8 substantially similar to the one presented in this action. *See NYSRPA*, 804 F.3d at  
 9 262-64; *Kolbe*, 849 F.3d at 140-41; *Friedman*, 784 F.3d at 411-12; *Heller II*, 670  
 10 F.3d at 1264. And the Third Circuit recently joined them in holding that 10-round  
 11 LCM restrictions do not violate the Second Amendment as a matter of law. *See*  
 12 *ANJRPC*, 910 F.3d at 122 (affirming denial of preliminary injunction motion  
 13 because “the Act survives intermediate scrutiny, and like our sister circuits, we hold  
 14 that laws restricting magazine capacity to ten rounds of ammunition do not violate  
 15 the Second Amendment”). At a minimum, this case presents a serious question of  
 16 first impression in the Ninth Circuit, satisfies the first factor for a stay pending  
 17 appeal where, as here, the equities tip strongly in favor of granting a stay.

18 ***Second***, absent a stay, the State will be irreparably injured as a matter of law.  
 19 LCMs have been illegal to manufacture, import, keep or offer for sale, give, or lend  
 20 since 2000; and as long as the Court’s decision remains in effect, individuals who  
 21 have been prevented from acquiring LCMs for nearly twenty years will be able to  
 22 lawfully acquire them. Indeed, out-of-state firearms dealers are already advertising  
 23 to California residents that they may now purchase LCMs. *See* Decl. of John D.  
 24 Echeverria in Supp. of Def.’s Ex Parte Appl. to Stay J. Pending Appeal  
 25 (“Echeverria Decl.”), Ex. 1. Moreover, a stay pending appeal will protect

26 <sup>4</sup> The two Ninth Circuit cases considering the constitutionality of LCM  
 27 restrictions occurred in the context of preliminary injunction motion. *See Fyock v.*  
 28 *Sunnyvale*, 779 F.3d 991 (9th Cir. 2015) (affirming district court denial of  
 preliminary injunction motion); *Duncan v. Becerra*, 742 Fed. App’x 218 (9th Cir.  
 2018) (affirming district court grant of preliminary injunction motion).

1 prospective purchasers of LCMs because anyone who acquires an LCM during the  
 2 appeal will be required to divest themselves of the LCMs if the possession  
 3 restrictions at Section 32310(c) and (d) are ultimately sustained. In addition, the  
 4 State suffers irreparable harm when a duly enacted law is enjoined from  
 5 enforcement during an appeal if the law is ultimately sustained.

6 ***Third***, the balance of harms favors the State. While a stay will delay the relief  
 7 that Plaintiffs seek in this action, acquisition of LCMs has been unlawful for nearly  
 8 two decades, and Plaintiffs' summary judgment motion remained under submission  
 9 for more than nine months; any additional delay pending appeal would be  
 10 comparatively minor and would preserve the status quo until this matter is finally  
 11 resolved. While any delay in the enjoyment of a constitutional right will involve a  
 12 burden to those who wish to exercise it, if the Judgment is affirmed on appeal, any  
 13 such burden would be relatively modest in comparison to the substantial burden  
 14 that will be imposed on the State if the acquisition of new LCMs is permitted  
 15 during the appeal.

16 ***Fourth***, the public interest strongly favors the granting of a stay. A stay  
 17 pending appeal will preserve the status quo involving an important public-safety  
 18 law that has been in effect for nearly two decades while the Ninth Circuit considers  
 19 this complex Second Amendment challenge. The Court's Judgment, if not stayed  
 20 pending appeal, will disrupt the State's efforts to protect the public and law  
 21 enforcement.

## 22 **LEGAL STANDARD**

23 Under Federal Rule of Civil Procedure 62, a U.S. District Court may suspend  
 24 an injunction during the pendency of an appeal of the injunction and may stay  
 25 enforcement of a final judgment. A party seeking a stay must establish a likelihood  
 26 of succeeding on the merits, a likelihood of suffering irreparable harm in the  
 27 absence of a stay, a favorable balance of the equities, and that the public interest  
 28 supports the stay. *Humane Soc'y*, 558 F.3d at 896. Although there must be a

1 minimal showing on each factor, courts must balance these factors, employing a  
 2 flexible approach that considers the facts of the particular case. *Leiva-Perez v.*  
 3 *Holder*, 640 F.3d 962, 966 (9th Cir. 2011); *see also Hilton v. Braunskill*, 481 U.S.  
 4 770, 777 (1987). Notably, to obtain a stay, a party “need not demonstrate that it is  
 5 more likely than not that they will win on the merits” or that “ultimate success is  
 6 probable.” *Leiva-Perez*, 640 F.3d at 966-67. A “substantial case on the merits” or  
 7 “serious legal questions” will suffice “so long as the other factors support the stay.”  
 8 *Id.* (quoting *Hilton*, 481 U.S. at 778). District courts “may properly stay their own  
 9 orders when they have ruled on an admittedly difficult legal question and when the  
 10 equities of the case suggest that the status quo should be maintained.” *Wash. Metro*  
 11 *Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844-45 (D.C. Cir.  
 12 1977).

## 13 ARGUMENT

### 14 I. DEFENDANT SATISFIES THE “LIKELIHOOD OF SUCCESS” FACTOR 15 SUPPORTING A STAY.

16 A party seeking a stay pending appeal can demonstrate a likelihood of success  
 17 on the merits by demonstrating that the appeal concerns “serious legal questions, or  
 18 has a reasonable probability or a fair prospect of success.” *Leiva-Perez*, 640 F.3d at  
 19 971; *see also Hunt v. Check Recovery Sys., Inc.*, Nos. C 05 4993 SBA, C 06 2037  
 20 SBA, 2008 WL 2468473, at \*3 (N.D. Cal. 2008) (noting that “most of the  
 21 foregoing issues are questions of first impression on which no binding precedent  
 22 exists” and noting that “this fact alone satisfies the requirement that movant is  
 23 likely to succeed on the merits” (citing *Pearce v. E.F. Hutton Grp., Inc.*, 828 F.2d  
 24 826, 829 (D.C. Cir. 1987))); *c.f. Britton v. Co-Op Banking Grp.*, 916 F.2d 1405,  
 25 1412 (9th Cir. 1990) (noting that trial court has the discretion to stay proceedings  
 26 pending appeal from a refusal to compel arbitration and that the district court in  
 27 *Pearce* “granted its motion for stay pending appeal because appellant’s claim raised  
 28 issues of first impression [and] appellant would suffer substantial harm if action



were not stayed”). At a minimum, in establishing the first factor, a party seeking a stay pending appeal “must show that there is a ‘substantial case for relief on the merits’”—a “standard [that] does not require the petitioners to show that ‘it is more likely than not that they will win on the merits.’” *Lair v. Bullock*, 697 F.3d 1200, 1205 (9th Cir. 2012). In ordering a stay, “the Court need not determine that it erred and will likely be reversed—an acknowledgment one would expect few courts to make; instead, so long as the other factors strongly favor a stay, such a remedy is appropriate if ‘a serious legal question is presented.’” *Loving v. Internal Revenue Serv.*, 920 F. Supp. 2d 108, 110 (D.D.C. 2013).

This case raises “serious legal questions” warranting a stay pending appeal. *See Leiva-Perez*, 640 F.3d at 971. Indeed, this case involves a question of first impression in the Ninth Circuit. *See* Order at 80:13-15 (“If this judgment is appealed, the Court of Appeals will have the opportunity to rule *on the merits*, for the first time.”); *see also* note 4 *supra*. In granting Plaintiffs’ motion for summary judgment, this Court became the first court in the nation to find that 10-round LCM restrictions violate the Second Amendment. Five circuit courts have upheld them on substantially similar records, with four of them applying intermediate scrutiny. *See* note 2 *supra*. This pattern of authority shows, at a minimum, that the appeal will present “serious legal questions,” which establishes the first factor for a stay where the balance of the equities tips in favor of a stay.

Moreover, Defendant is likely to prevail on the merits during the appeal. Although this Court held that Section 32310 imposes a severe burden on the core Second Amendment right, *see, e.g.*, Order at 80:9-10, the Ninth Circuit has held as a matter of law that intermediate scrutiny applies to LCM restrictions like Section 32310. *See Fyock*, 779 F.3d at 999. In *Fyock*, the Ninth Circuit “agree[d]” with the D.C. Circuit “that intermediate scrutiny is appropriate.” *Id.* at 999. It did so because the Sunnyvale ordinance was “simply not as sweeping as the complete handgun ban at issue in *Heller*,” did not prevent law-abiding citizens from

1 possessing handguns for self-defense, and “restrict[ed] possession of only a subset  
2 of magazines that are over a certain capacity.” *Id.* That reasoning applies to  
3 Section 32310 even though it is a state-wide measure and does not include every  
4 exception reflected in the Sunnyvale ordinance.<sup>5</sup>

5 Moreover, under intermediate scrutiny, Defendant submitted sufficient  
6 evidence to demonstrate that Section 32310 is reasonably fitted to the State’s  
7 important interests in protecting the public and law enforcement officers from gun  
8 violence. In defense of Section 32310, Defendant advanced the same reasons and  
9 substantially similar evidence as was presented by the government in *Fyock*, which  
10 the Ninth Circuit characterized as “precisely the type of evidence that [the State is]  
11 permitted to rely upon to substantiate its interests” and fit under intermediate  
12 scrutiny. *Fyock*, 779 F.3d at 1001. On appeal, the Ninth Circuit will review de  
13 novo a record—comprised of legislative history, studies cited in pertinent cases,  
14 and expert reports<sup>6</sup>—similar to the one it accepted in *Fyock* and one that  
15 demonstrates a reasonable fit between the ban on a dangerous subset of magazines  
16 and the State’s important public safety interests. While the Court may maintain that

17 <sup>5</sup> In affirming this Court’s preliminary injunction order, the Ninth Circuit  
18 confirmed that intermediate scrutiny applies to Section 32310. *See Duncan*, 742  
19 Fed. App’x at 221. Even though the preliminary injunction order applied two  
20 different tests to Section 32310—“intermediate scrutiny and what it coined the  
21 ‘simple test’ of *Heller*”—the Ninth Circuit held that the Court did not apply “the  
22 incorrect level of scrutiny” where “one of those tests follows the applicable legal  
23 principles and the district court ultimately reaches the same conclusion in both  
24 cases.” *Id.* The court explained that, “in its intermediate scrutiny analysis, the  
25 district court correctly applied the two-part test outlined in *Jackson [v. City & Cnty.*  
26 *of San Francisco*, 746 F.3d 953 (9th Cir. 2014).” *Id.* The court explained that, at  
27 the second step of the analysis, “the district court concluded, citing *Fyock*, that  
28 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 [*United States v.*] *Chovan*, 735 F.3d at 1138,  
that intermediate scrutiny was the appropriate scrutiny level.” *Id.* (emphasis  
added).

<sup>6</sup> Without objection from Plaintiffs, the Court *sua sponte* rejected the expert  
reports submitted by Defendants on the ground that they—like those of Plaintiffs—  
were unsworn and not made on personal knowledge. *See Order* at 67 n.59. But  
expert reports need not be sworn under penalty of perjury, nor based on personal  
knowledge. Fed. R. Civ. P. 26(a)(2)(B); Fed. R. Evid. 702. Each of the expert  
witnesses, except for Mr. Webster, were deposed in this action and presented the  
same opinions under oath and subject to cross examination by Plaintiffs’ counsel.



1 this evidence is insufficient, at a minimum, the case presents a significant legal  
2 question—one that has not been resolved in the Ninth Circuit—that warrants a stay.

3 In sum, the “likelihood of success” factor strongly favors entry of a stay  
4 pending the appeal of this novel and important Second Amendment case.

## 5 **II. THE STATE WILL SUFFER IRREPARABLE INJURY ABSENT A STAY.**

6 The factor of irreparable harm is a “bedrock requirement” for the issuance of a  
7 stay. *Leiva-Perez*, 640 F.3d at 965. It is significant, then, that “a state suffers  
8 irreparable injury whenever an enactment of its people or representatives is  
9 enjoined.” *Coal. for Economic Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997).  
10 Because the Judgment has enjoined an important gun-safety statute in its entirety,  
11 the State (represented by Defendant) is suffering irreparable injury absent a stay.  
12 Moreover, the State stands to suffer irreparable harm if LCMs are permitted to flow  
13 into the State while the Judgment is being appealed. Indeed, out-of-state firearms  
14 dealers are already advertising to California residents that they may now purchase  
15 LCMs. *See* Echeverria Decl., Ex. 1. If Section 32310 is sustained on appeal absent  
16 a stay—based in part on the dangers posed by LCMs that are disclosed in the  
17 record—the State will suffer irreparable injury because there will be more LCMs in  
18 the State than before the Judgment.<sup>7</sup> Although the Court believes that “[t]he  
19 problem of mass shootings is very small,” Order at 60:26, the record reflects that  
20 LCMs are used frequently in public mass shootings and, when used, result in far  
21 more fatalities and injuries compared to shootings that do not involve LCMs. The  
22 irreparable injury factor favors a stay.

## 23 **III. THE BALANCE OF THE HARMS FAVORS A STAY.**

24 In comparison with the irreparable harm suffered by the State if a stay is not  
25 issued pending the appeal, law-abiding Californians would still be able to retain 10-  
26 round magazines for lawful self-defense. While a stay will delay the relief that

27 <sup>7</sup> And if Section 32310(c) and (d) are reinstated on appeal, individuals who  
28 acquire new LCMs during the hiatus will be forced to divest themselves of the  
magazines, further warranting a stay pending the appeal.

1 Plaintiffs seek, acquisition of LCMs has been unlawful for nearly two decades; any  
 2 additional delay pending appeal would be comparatively minor and would preserve  
 3 the status quo until this matter is finally resolved. There is no evidence in the  
 4 record—or in the Court’s own research, *see* Order at 2-3—that any individual in the  
 5 State has been unable to defend themselves since 1994 with a firearm due to the  
 6 LCM restrictions. The balance of the harms favors a stay.

#### 7 **IV. THE PUBLIC INTEREST IS BEST SERVED BY A STAY.**

8 Consistent with the consensus among the circuit courts, LCM restrictions like  
 9 Section 32310 are justified as public safety measures. By enjoining a significant  
 10 component of California’s gun-safety regime, the Court’s Judgment alters the status  
 11 quo. In a state of 39 million individuals, *see* Order at 51:20, the public safety  
 12 concerns implicated by Section 32310 strongly favor a stay.

#### 13 **CONCLUSION**

14 To preserve the status quo, Defendant respectfully requests that the Court  
 15 issue a stay of the Court’s Judgment pending appeal no later than April 5, 2019. In  
 16 addition, and for the same reasons set forth above, Defendant respectfully requests  
 17 that the Court issue a temporary stay of its decision pending its consideration of  
 18 Defendant’s request for a stay of its ruling pending appeal.

19 Dated: April 1, 2019

Respectfully Submitted,

20 XAVIER BECERRA  
 21 Attorney General of California  
 22 MARK R. BECKINGTON  
 23 Supervising Deputy Attorney General  
 24 ANTHONY P. O’BRIEN  
 25 Deputy Attorney General

26 /s/ John D. Echeverria

27 JOHN D. ECHEVERRIA  
 28 Deputy Attorney General  
*Attorneys for Defendant Attorney  
 General Xavier Becerra*