No. 19-55376

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGINIA DUNCAN; RICHARD LEWIS; PATRICK LOVETTE; DAVID MARGUGLIO; CHRISTOPHER WADDELL; CALIFORNIA RIFLE & PISTOL ASSOCIATION, INC., a California Corporation,

Plaintiffs-Appellees,

v.

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

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of California,
No. 3:17-cv-01017-BEN-JLB

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the California Rifle & Pistol Association, Inc., certifies that it is a nonprofit organization. It has no parent corporation and no stock, so no publicly held corporation owns more than ten percent of its stock.

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INTRODUCTION

The district court was eminently correct to conclude that California's attempt to prohibit law-abiding citizens from manufacturing, obtaining, selling, transferring, or even *possessing* standard-issue magazines for firearms that are typically possessed for self-defense violates the Constitution. To be sure, California has an interest in keeping firearms out of the hands of criminals. But depriving law-abiding citizens of the right to obtain or even possess constitutionally protected arms to defend themselves and their families is not a permissible means of achieving that end.

Americans overwhelmingly choose magazines that come standard with the most popular self-defense handguns, and those magazines typically hold more than 10 rounds. Because magazines that can hold more than 10 rounds are "typically possessed by law-abiding citizens for lawful purposes," the Second Amendment protects them. *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008). California's ban—which both retrospectively confiscates long-possessed and lawfully purchased magazines and prospectively prohibits the acquisition, transfer, or possession of magazines—necessarily fails any level of constitutional scrutiny, for it lacks *any* tailoring (much less the requisite close fit) to accomplish its objectives. Simply put, the state cannot outright prohibit what the Constitution protects.

The state's ban violates not only the Second Amendment, but also the Takings Clause, precisely because it applies to those who already lawfully acquired magazines in the past, not just prospectively. By affirmatively requiring individuals who lawfully obtained and have long lawfully possessed magazines to dispossess themselves of that property without compensation, the retrospective aspect of the law effects an uncompensated physical taking, which the Takings Clause plainly proscribes. The state's only response is that it may take its citizens' property so long as it does so pursuant to its police power, but Supreme Court precedent squarely forecloses that argument.

In short, the district court correctly held the magazine ban unconstitutional. To hold otherwise—to allow the state to seize magazines from lawful gun owners and to prohibit them from acquiring the most common magazines for firearms used for self-defense—would impermissibly infringe their constitutional rights both to self-defense and property. This Court should affirm.

STATEMENT OF JURISDICTION

Plaintiffs agree with Appellant's jurisdictional statement. *See* Dkt.7 at 15.

STATEMENT OF THE ISSUES

Whether the district court correctly declared unconstitutional and permanently enjoined a state law banning firearm magazines capable of holding more than 10 rounds of ammunition.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case implicates the Second, Fifth, and Fourteenth Amendments to the United States Constitution. The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V. And the Fourteenth Amendment provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV. All applicable statutes are reproduced in the addendum to Appellant's brief.

STATEMENT OF THE CASE

With very few limited exceptions, California has prohibited the average, law-abiding citizen from obtaining, possessing, or transferring possession of the

standard-issue magazine for the most common firearms used for self-defense. Plaintiffs, who include California residents who lawfully possess pre-ban magazines and California residents who would acquire such magazines if it were lawful to do so, sued to enjoin the enforcement of the state's ban. After securing a preliminary injunction—which this Court upheld—to prevent California from moving forward with enforcement of the retrospective, confiscatory aspects of the law, the district court considered all the evidence before it and concluded that California could not justify its infringement of plaintiffs' constitutional rights under the Second, Fifth, and Fourteenth Amendments.

A. Magazines Capable of Holding More Than 10 Rounds of Ammunition Are Common and Have No History of Prohibition or Even Regulation.

Magazines that hold more than 10 rounds of ammunition are in widespread use throughout the country, having been in circulation since before the American Revolution and commonly owned since 1862. ER1801-20; ER1700; ER 1706-08; SER126-425 (recounting the history of rifles and handguns with capacities of more than ten rounds). Their popularity has only grown as technology has improved. *Id.* Between 1995 and 2000, for example, approximately 4.7 million magazines capable of holding more than 10 rounds were imported into the United States. ER25 (citing *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (*Heller II*)). Had the 1994 federal prohibition not been in place, this number likely would have

been far higher. And between 1990 and 2015, approximately 115 million of these magazines were in circulation. ER1700; *see also* ER25 ("The result of almost four decades of sales to law enforcement and civilian clients is millions of semiautomatic pistols with a magazine capacity of more than ten rounds and likely multiple millions of magazines for them." (quoting ER1708) (emphasis removed)). That number represents roughly half of all magazines acquired during that time period. ER 1700.

Magazines holding more than 10 rounds are overwhelmingly used by law-abiding citizens for lawful purposes. *See* ER1818. The magazines were developed for self- and home-defense. They are specifically marketed and purchased for that purpose. ER1699; SER541-66. And civilians overwhelmingly choose them to increase their chances of staying alive should they be faced with a violent confrontation. ER1708-09. Magazines capable of holding more than ten rounds are also essential in some of the most popular competitive shooting sports in America. *See* International Practical Shooting Confederation, http://www.ipsc.org; Chad Adams, Complete Guide to 3-Gun Competition 89 (2012). They are commonly used for recreational target shooting and hunting. ER24-25 (quoting ER1699 (emphasis added). Many of the nation's bestselling firearms—including the ever-popular Glock pistol—have for decades come standard with magazines that California now prohibits. ER1706-07.

As a historical matter, there is no evidence suggesting any long tradition of government regulation with respect to magazine capacity. Magazines capable of holding more than 10 rounds have existed since the mid-1500s—nearly two centuries before the country's founding—yet there were no restrictions on them at the time of the ratification of the Second Amendment. ER1910-1914. The first laws regulating magazines—passed in three states and the District of Columbia—were enacted "during the prohibition era, nearly a century and half after the Second Amendment was adopted, and over half a century after the adoption of the Fourteenth Amendment." ER1811. Today, the overwhelming majority of states place no restrictions on magazine capacity, much less prohibit them entirely or require law-abiding citizens to surrender magazines long-held and lawfully procured. ER24.

With the exception of one brief period in time, the federal government has taken the same approach as most of the states. For nearly all of the nation's history, the federal government did not regulate magazine capacity at all. In 1994, Congress adopted a nationwide *prospective* ban on certain magazines, which included a grandfather clause for individuals who had lawfully acquired such magazines before the ban took effect. *See* Pub. L. 103-322, 108 Stat. 1999 (1994) (formerly codified at 18 U.S.C. §922(w)). Ten years later, Congress vindicated the wisdom of the grandfather clause, but not the efficacy of the ban, by allowing the ban to expire after

a study commissioned by the Department of Justice revealed that it had resulted in no appreciable impact on crime across the country. ER707; ER668; ER692. Thus, under federal law today, law-abiding citizens may obtain, possess, and transfer possession of magazines capable of holding more than 10 rounds of ammunition.

B. California Takes the Extraordinary Step of Banning These Common Magazines.

Since January 1, 2000, California has taken the outlier position of prohibiting the manufacture, importation, sale, and transfer of any "large-capacity magazine," defined as "any ammunition feeding device with the capacity to accept more than 10 rounds," with some exceptions not relevant here. Cal. Penal Code §§32310, 16740. The 2000 law operated as a prospective ban on law-abiding citizens acquiring the standard-issue magazines for firearms used for self-defense. But even those onerous restrictions, in recognition of the takings and due process problems that otherwise would result, did not prohibit the *possession* of such magazines. As a result, the 2000 ban had a de facto grandfather clause for those who had lawfully obtained such magazines before it took effect.

In July 2016, however, the legislature eliminated even that concession to Second Amendment rights and the Takings Clause, amending the relevant section of the California code to prohibit the possession of magazines capable of holding more than 10 rounds of ammunition, thereby prohibiting continued possession by even those who had obtained such magazines when it was lawful to do so. S.B. 1446,

2015-2016 Reg. Sess. (Cal. 2016). Indeed, the legislation affirmatively requires those in possession of lawfully acquired (and heretofore lawfully possessed) now-banned magazines to surrender for destruction or otherwise dispossess themselves of those magazines. A few months later, in November 2016, the voters approved a referendum initiative, Proposition 63, that did the same. *See* Cal. Penal Code §32310. As a result, under California law, anyone currently in possession of a magazine capable of holding more than 10 rounds of ammunition must surrender it to law enforcement for destruction, remove it from the state, or sell it to a licensed firearms dealer, who in turn is subject to the transfer and sale restrictions of the law. *Id.* §32310(a), (d). Failure to do so can result in criminal penalties, including up to a year in prison. *Id.* §32310(c). That retrospective and confiscatory ban on the possession of lawfully acquired magazines has no analog in federal law and is a radical outlier among state laws.

C. Plaintiffs Sued to Protect Their Constitutional Rights, This Court Upheld a Preliminary Injunction, and the District Court Permanently Enjoined the Possession Ban.

Plaintiffs sued to enjoin the enforcement of the state's magazine restrictions, alleging as relevant here that they violate the Second Amendment and the Takings Clause. ER1943-65. The individual plaintiffs—Virginia Duncan, Patrick Lovette, David Marguglio, and Christopher Waddell—reside in San Diego, California, and either possess a lawfully acquired magazine with the capacity to hold more than 10

rounds or seek to acquire and possess one. ER1946-48. The organizational plaintiff—California Rife & Pistol Association, Inc.—represents law-abiding owners of magazines that can hold more than 10 rounds and who would retain possession if it were legal to do so, as well as individuals who would acquire and possess such magazines if it were legal to do so. ER1948-49.

The district court preliminarily enjoined the retrospective and confiscatory aspects of the law during the pendency of this litigation, SER816, and this Court affirmed, *see Duncan v. Becerra*, 742 Fed. Appx. 218 (9th Cir. 2018) (unpublished). As the Court explained in its decision upholding the injunction, the district court's conclusion that firearms magazines "likely fall within the scope of the Second Amendment" was not an abuse of discretion. *Id.* at 221. That conclusion was grounded in the Supreme Court's decisions in *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), as well as this Court's decision in *Jackson v. City and Cty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014). Furthermore, this Court held that the district court did not abuse its discretion in concluding that the retrospective and confiscatory aspects of the law were "not likely to be a reasonable fit" to the state's interests. *Duncan*, 742 Fed. App'x at 221. The Court also held that the district court did not abuse its discretion in concluding that

the retrospective and confiscatory aspects of the law likely violate the Takings Clause. *See id.* at 222.

After this Court affirmed the preliminary injunction, the district court granted summary judgment to the plaintiffs on both their Second Amendment and their takings claims. ER8-93. In support of their motion, plaintiffs submitted evidence confirming that (1) ammunition magazines are "arms" within the scope of the Second Amendment, (2) magazines over ten rounds are in common use, and (3) there is no longstanding history of laws in the United States restricting magazine capacity. Plaintiffs offered further evidence that the magazine ban was not "substantially related" to California's public safety interests, and that the ban lacked a reasonable "fit" with the state's interest in preventing the criminal misuse of magazines capable of holding more than ten rounds. Finally, plaintiffs argued that the ban was an unconstitutional taking that also violated the Due Process Clause.

In granting summary judgment for plaintiffs, the district court explained that a straightforward application of the Supreme Court's decision in *Heller* made clear that California's magazine ban could not withstand constitutional scrutiny. Applying that test, the court determined that the magazines California sought to prohibit were in common legal usage, and that California could not justify its ban by arguing that certain magazines are too lethal. The court also considered the historical evidence offered by the parties and found that "there is no longstanding historically-accepted

prohibition on detachable magazines of any capacity." ER40. Based on these findings, the court concluded that "California's law prohibiting acquisition and possession of magazines able to hold any more than 10 rounds places a severe restriction on the core right of self-defense of the home such that it amounts to a destruction of the right and is unconstitutional under any level of scrutiny." ER31.

The court nevertheless went on to evaluate the magazine ban under this Court's "tiers of scrutiny approach." Describing the magazine ban as "a single-dimensional, prophylactic, blanket thrown across the population of the state," the court concluded that the law "fails strict scrutiny and violates the Second Amendment" because the ban places a severe burden on the right to keep and bear arms and is "not narrowly tailored or the least restrictive means of achieving these interests." ER50-51.

The court also evaluated the law under intermediate scrutiny. After undertaking an exhaustive review of California's evidence, in which a 36-year survey of mass shootings by the publication *Mother Jones* played a prominent role, ER55, the court concluded that "even under the modest and forgiving standard of intermediate scrutiny, the magazine ban is a poor fit to accomplish the State's important interests." ER87.

Turning to the plaintiffs' takings and due process arguments, the court concluded that the Takings Clause prevents California "from compelling the

physical dispossession of such lawfully-acquired private property without just compensation." ER91. Accordingly, the court granted plaintiffs' motion for summary judgment and permanently enjoined the enforcement of §32310. ER93.

The state appealed. At the state's request, the district court granted a partial stay pending appeal, staying its judgment as to the law's prospective prohibitions, but leaving the injunction in place as to the state's effort to confiscate magazines from individuals who lawfully obtained them. ER224. The court also enjoined the state from enforcing the law against individuals who acted in reliance on its judgment before the court entered the stay. *Id.*

STANDARD OF REVIEW

This Court reviews a district court's decision to grant a motion for summary judgment *de novo*. *See Stevens v. Corelogic, Inc.*, 899 F.3d 666, 672 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1222 (2019). In so doing, this Court does not weigh the evidence or determine the truth of the matter, but only determines whether there is a genuine issue for trial. *See Balint v. Carson City, Nev.*, 180 F.3d 1047, 1054 (9th Cir. 1999). The district court's summary judgment order may be affirmed on any ground supported by the record. *See Campidoglio LLC v. Wells Fargo & Co.*, 870 F.3d 963, 973 (9th Cir. 2017); *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 956 (9th Cir. 2009).

SUMMARY OF ARGUMENT

The district court correctly concluded that California's magazine ban violates both the Second Amendment and Takings Clause. Magazines with the capacity to hold more than ten rounds of ammunition have existed for centuries, and they are typically possessed by responsible, law-abiding Californians for self-defense today. Under *Heller*, that entitles them to Second Amendment protection. The state's imposition of a wholesale ban on such magazines—including a confiscatory ban on their continued possession no matter how long they have been owned and used without difficulty—necessarily violates the Second Amendment, for the state cannot flatly prohibit what the Constitution protects. That conclusion follows not just from *Heller*, but from a long line of cases rejecting efforts to ban constitutionally protected conduct on the ground that it could lead to abuses. Just as the government cannot ban constitutionally protected speech even out of concern that it might lead a small number of individuals to commit crimes, it cannot ban constitutionally protected arms out of concern that a small number of individuals may misuse them. Any other conclusion would render the Second Amendment the second-class right that the Supreme Court has admonished it is not.

California's law also runs afoul of the Takings Clause, for the state insisted not just on prohibiting possession on a prospective basis, but on requiring law-abiding individuals who lawfully acquired the now-prohibited magazines to

dispossess themselves of that property. That forced dispossession is a clear physical taking, as none of the various options that the state has given its citizens for effectuating it changes the fact that Californians may no longer possess property that they lawfully acquired. The state's insistence that it is free to take its citizens' property without paying compensation so long as it invokes its "police power" is risible and squarely foreclosed by more than a century of Supreme Court precedent. The notion that the state has some residual police power unconstrained by the Bill of Rights is as dangerous as it is flawed. If accepted, it would work a dramatic expansion of state power at the expense of property rights.

The state, of course, has a strong interest in protecting its citizens from violence. But the state may not deprive its citizens of their constitutional rights in the process—especially when those efforts are wildly overbroad and unsubstantiated by sufficient evidence. Because California's magazine ban seeks to prohibit what the Constitution protects—and deprives its citizens of their property without compensation to boot—it is not a constitutionally permissible means of accomplishing the state's asserted objectives.

ARGUMENT

I. California's Magazine Ban Violates The Second Amendment.

California's ban of the most commonly owned firearm magazines violates the Second Amendment. The law imposes the most severe kind of burden, as it flatly

bans not only the manufacture, sale, and transfer of magazines protected by the Second Amendment, but even their mere possession. That ban is plainly unconstitutional, for the banned magazines are protected by the Second Amendment, and the state cannot flatly prohibit what the Constitution protects. Even if resort to tiers of scrutiny were appropriate, moreover, the state utterly failed to meet its burden of supplying credible, reliable, and admissible evidence that the ban is tailored at all, much less reasonably so, to its asserted interests.

A. The Magazine Ban Plainly Implicates Plaintiffs' Second Amendment Rights.

The Second Amendment provides that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II; *see McDonald v. City of Chicago*, 561 U.S. 742 (2010) (incorporating the Second Amendment against the states). Over a decade ago, the Supreme Court made clear that the Second Amendment "confers an individual right" that belongs to "the people"—a term that "unambiguously refers to all members of the political community," except those subject to certain "longstanding prohibitions" on the exercise of the right, such as "felons and the mentally ill." *Heller*, 554 U.S. at 580, 622, 626-27. The right protected by the Second Amendment thus belongs to all "law-abiding, responsible citizens." *Id.* at 625.

Heller likewise made clear that the Second Amendment protects a right to possess weapons that are "typically possessed by law-abiding citizens for lawful

purposes." 554 U.S. at 624-25. And as this Court has made equally clear, that right plainly encompasses ammunition, for "without bullets, the right to bear arms would be meaningless." *Jackson*, 746 F.3d at 967. California therefore concedes, as it must, that the Second Amendment protects the possession of magazines, for this Court has already held "there must be some corollary, albeit not unfettered, right to possess the magazines necessary to render [semiautomatic] firearms operable." *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015); *see* Dkt.7 at 35.

California nonetheless maintains that this constitutional protection cuts off at magazines capable of holding ten rounds. *See* Dkt.7 at 35. Nearly every court to consider that argument has declined to embrace it, and with good reason. Magazines capable of holding more than ten rounds not only have been around for centuries, but continue to be possessed by millions of law-abiding Americans to defend themselves and their families. *See* ER9-10; ER1801-1840; SER126-425. It is little surprise, then, that nearly every appellate court that has analyzed this issue has concluded, or at least was willing to assume, that bans on magazines capable of holding more than ten rounds burden conduct protected by the Second Amendment. *See, e.g.*, *Fyock*, 779 F.3d at 999 (holding lower court did not abuse its discretion in holding that magazines capable of holding more than ten rounds are in common use); *Worman v. Healey*, 922 F.3d 26, 37 (1st Cir. 2019); *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. of N.J.*, 910 F.3d 106, 117 (3d Cir. 2018), *N.Y. State Rifle & Pistol*

Ass'n, Inc. v. Cuomo, 804 F.3d 242, 260 (2d Cir. 2015); *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406, 415 (7th Cir. 2015); *Heller II*, 670 F.3d at 1261.

The state tries to argue that the banned magazines do not satisfy the *Heller* test because they are less common *in California*. That argument is doubly flawed. To start, the state cites no authority for the proposition that its residents could lose rights that all the rest of "the people" protected by the Second Amendment possess simply because not enough Californians choose to exercise them. At any rate, the state's argument is disingenuous. As the district court correctly explained, the disparity between the number of banned magazines nationwide and the number in California is merely the inevitable result of the fact that California has banned their acquisition for nearly two decades. "'[I]t would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn't commonly used. A law's existence can't be the source of its own constitutional validity.'" ER27 (quoting *Friedman*, 784 F.3d at 409).

The state next suggests that the banned magazines are not protected because they are not commonly *used* for self-defense, invoking as support for that claim "evidence" that it maintains "reflects that, on average, individuals use far fewer than ten rounds when engaged in self-defense with a firearm." Dkt.7 at 46. At the outset, the record confirms that individuals do at times require more than ten rounds to defend themselves, and that in some cases lives were likely saved because more than

ten rounds were available. *See* ER287; SER721-750. But the relevant question concerns the denominator, not the numerator. In other words, the question is not whether individuals commonly fire more than 10 rounds. It is whether magazines capable of holding ten rounds are "*typically possessed* by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 624-25 (emphasis added). By the state's logic, handguns themselves would not qualify for protection if the state could muster evidence that most handgun owners are fortunate enough not to have to fire them in self-defense. That is why *Heller* appropriately focused on whether firearms are typically possessed for law-abiding purposes, not on how frequently they are actually used for those purposes.

Implicitly recognizing that the banned magazines are plainly entitled to protection under *Heller*, the state asks this Court to eschew *Heller*'s test in favor of a new "important limitation" that would exclude certain common lawfully possessed weapons from the Second Amendment entirely. Dkt.7 at 36 (quoting *Heller*, 554 U.S. at 627). According to the state, "the Second Amendment does not extend to 'weapons that are most useful in military service,'" even if they are also commonly possessed by law-abiding citizens for lawful purposes. *Id.* (quoting *Heller*, 554 U.S. at 627). That limitation finds no support in *Heller*—likely because it is antithetical to the Second Amendment itself. After all, if part of the purpose of the Second Amendment were to ensure that individuals would have in their possession the arms

necessary to ensure "[a] well regulated Militia," it would have made no sense at all for the right to exclude weapons "most useful in military service."

In reality, the "important limitation" to which *Heller* referred was the historical prohibition on "dangerous and unusual weapons." *Heller*, 554 U.S. at 627 (citing 4 Blackstone 148-49 (1769); 3 B. Wilson, Works of the Honourable James Wilson 79 (1804); J. Dunlap, The New–York Justice 8 (1815); C. Humphreys, A Compendium of the Common Law in Force in Kentucky 482 (1822); 1 W. Russell, A Treatise on Crimes and Indictable Misdemeanors 271–272 (1831); H. Stephen, Summary of the Criminal Law 48 (1840); E. Lewis, An Abridgment of the Criminal Law of the United States 64 (1847); F. Wharton, A Treatise on the Criminal Law of the United States 726 (1852)). To be sure, *Heller* noted that some of the weapons "most useful in military service" today may qualify as "dangerous and unusual." *Heller*, 554 U.S. at 627. But *Heller* in no way supports the nonsensical converse proposition that *all* weapons that are particularly useful to the military categorically fall outside the scope of the Second Amendment.

The primary decision the state relies on to support that novel restriction, *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017), is an outlier. This Court has never embraced the test set forth in *Kolbe*—and for good reason, as it is squarely foreclosed by Supreme Court precedent, not to mention the text of the Constitution. The Seventh Circuit's decision in *Friedman* does not support the state's proffered test either. In

fact, *Friedman* treated magazines capable of holding more than ten rounds as *protected* by the Second Amendment, before (mistakenly) concluding that Highland Park nonetheless could prohibit them. *See* 784 F.3d at 411. In short, there is no "useful in military service" exception to the Second Amendment.

Finally, the state's attempt to characterize its magazine ban as the kind of "longstanding prohibition" that is "presumptively lawful" has no basis in reality. Dkt.7 at 39. This Court has already recognized that "large-capacity magazines" have not been "the subject of longstanding, accepted regulation." *Fyock*, 779 F.3d at 997. In fact, there is no "evidence that magazine capacity restrictions have a historical pedigree." ER34. Contrary to the state's suggestions, that is not for lack of opportunity. Multi-shot firearms long pre-dated the founding, yet there were no laws restricting ammunition capacity when the Second Amendment was adopted. ER39; ER1811. And of the very few early laws on the subject after the Second Amendment and even after the Fourteenth Amendment were ratified—none of which "set the limit as low as ten"—all were eventually repealed. ER36, 39, 1811. Of course, the more recent laws that have passed in a small minority of states and localities do not qualify as "longstanding," as each was enacted fewer than 30 years ago, making them even younger than the 33-year-old handgun ban that *Heller* overturned. 554 U.S. at 635. Accordingly, the state cannot escape constitutional scrutiny of its magazine ban by invoking the "longstanding prohibition" mantra.

In sum, the magazines California seeks to eradicate plainly fall within the scope of the Second Amendment under the test articulated in *Heller*, and there is no historical tradition of prohibiting, or even restricting, their possession. The state's effort to ban magazines capable of holding more than ten rounds thus clearly implicates (and just as clearly violates) the Second Amendment.

B. The Magazine Ban Cannot Withstand Second Amendment Scrutiny.

Like the handgun ban in *Heller*, California's magazine ban violates the Second Amendment "[u]nder any of the standards of scrutiny" that courts apply in reviewing restrictions on constitutional rights. *Heller*, 554 U.S. at 628. Indeed, given that magazines, like handguns, are protected by the Second Amendment, a categorical ban on either is categorically unconstitutional. Simply put, the government cannot flatly prohibit something that the Constitution protects.

That conclusion follows not just from *Heller*, but from a long line of cases rejecting the notion that the government may flatly ban constitutionally protected activity on the ground that it could lead to abuses. *See, e.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002) (government cannot ban virtual child pornography on the ground that it might lead to child abuse because "[t]he prospect of crime" "does not justify laws suppressing protected speech"); *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (state cannot impose a "flat ban" on solicitations by public accountants on the ground that solicitations "create[] the dangers of fraud,

overreaching, or compromised independence"). That extreme degree of prophylaxis is incompatible with the decision to give the activity constitutional protection. California's overinclusive approach violates the basic principle that "a free society prefers to punish the few who abuse [their] rights … after they break the law than to throttle them and all others beforehand." *Se. Promotions Ltd. v. Conrad*, 420 U.S. 546, 559 (1975); *accord Vincenty v. Bloomberg*, 476 F.3d 74, 84-85 (2d Cir. 2007); *Robb v. Hungerbeeler*, 370 F.3d 735, 743 (8th Cir. 2004).

Indeed, the state's own defense of its ban essentially concedes that it reflects policy objectives and means that are incompatible with the framers' choices and the constitutional text. According to the state, "LCM restrictions [read: prohibitions] have the greatest potential to 'prevent and limit shootings in the state over the long-run.'" Dkt.7 at 58 (quoting *N.Y. State Rifle*, 804 F.3d at 264). But when it comes to constitutional rights, the government does not get to resort to the most draconian means of achieving its objectives. Surely the most effective way to eliminate defamation is to prohibit printing presses, and the most effective way to eliminate crime is to empower police officers with unlimited search authority, and so on. But by protecting free speech and the privacy of the home, the Constitution prohibits such extreme measures, because the framers valued liberty above the complete elimination of defamation or crime. The Second Amendment is no different. *Heller* made clear that the Second Amendment "necessarily takes certain policy choices off

the table." 554 U.S. at 636. Outright prohibiting things that the Second Amendment protects is one of them.

There is thus no need to subject the ban to tiers of scrutiny, for a flat ban on constitutionally protected conduct could not possibly be sufficiently tailored to achieve an important government interest without unnecessarily abridging constitutional rights. After all, a ban does not just abridge a right; it obliterates it. But if the Court were to apply a level of scrutiny, only strict scrutiny could suffice, for such a "serious encroachment on the core right," *Jackson*, 746 F.3d at 964, demands an equivalent justification, accompanied by the narrowest of tailoring. But in all events, the state could not satisfy any level of heightened scrutiny, for even intermediate scrutiny requires the state to prove that its law is "narrowly tailored to serve a significant governmental interest," *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017), while "avoid[ing] unnecessary abridgement" of constitutional rights, *McCutcheon v. FEC*, 572 U.S. 185, 221 (2014) (plurality op.). The state has come nowhere close to meeting that burden.

1. The state failed to prove that its magazine ban meaningfully furthers its proffered public safety interests.

At the outset, while the state undoubtedly has an important interest in promoting public safety and preventing crime, that does not mean that the state necessarily has an important interest in every firearms-related restriction it imposes. After all, "it would be hard to persuasively say that the government has an interest

sufficiently weighty to justify a regulation that infringes constitutionally guaranteed Second Amendment rights if the Federal Government and the states have not traditionally imposed—and even now do not commonly impose—such a regulation." *Heller II*, 670 F.3d at 1294 (Kavanaugh, J., dissenting). That is precisely the case here. For the first 200 years of our nation, limits on ammunition capacity were virtually unheard of, even though firearms capable of firing more than ten rounds have been existence for centuries. Even today, the vast majority of states do not impose magazine capacity restrictions, and with the exception of a brief failed effort a few decades ago, neither does the federal government.

Moreover, for a law to be substantially related to the government's interests, the government must demonstrate that the "restriction will in fact alleviate" its concerns. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001). The government cannot meet that burden by relying on "mere speculation or conjecture." *Id.* Instead, the government must offer evidence demonstrating that the restriction it seeks to impose will in fact further its stated interests. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 437 (2002).

Here, the state fell woefully short of meeting that burden. According to the state, it may ban and confiscate magazines capable of carrying more than ten rounds because (1) such magazines increase casualties in mass shootings, Dkt.7 at 50, (2) such magazines are disproportionately used against law enforcement personnel,

Id. at 55, (3) use of these magazines deprives the public and law enforcement of "critical pauses" during active shootings, *Id.* at 44, (4) confiscating magazines reduces crime, *Id.* at 58, and (5) such magazines endanger the public even when used in self-defense, *Id.* at 60. But after carefully considering the record, the district court correctly concluded that the state offered nothing but "mere speculation" to support those claims. *Lorillard Tobacco,* 533 U.S. at 555.

In fact, the state's theory that magazines capable of carrying more than ten rounds exacerbate crime proved to be sheer speculation. A Department of Justice study commissioned by the Clinton administration to study the effects of the 1994 federal ban on magazines capable of holding more than ten rounds and "assault weapons" concluded that, ten years after the ban was imposed, "there [had been] no discernible reduction in the lethality and injuriousness of gun violence." ER668. Indeed, "[t]here was no evidence that lives were saved [and] no evidence that criminals fired fewer shots during gun fights." SER670; *see also* ER1800 ("the federal assault weapons law and its national LCM ban had no effect on the California violent crime rate, murder rate, gun murder rate, the number of people killed in mass shootings, the number of incidents of mass shootings, or the number of police officers killed in the line of duty."). The state's own expert, Dr. Kopel, declared that the federal ban could not be "clearly credit[ed] ... with *any* of the nation's recent drop in gun violence," ER574 (emphasis added), and that "[s]hould [a nationwide

ban] be renewed, the ban's effects on gun violence are likely to be small at best and perhaps too small for reliable measurement," ER575. Experience in the wake of the expiration of the federal ban reinforces the lack of correlation between efforts to limit magazines and crime rates. Since Congress allowed the ban to expire in 2004, likely millions more of the formerly banned magazines have been purchased throughout the United States. ER1700. Yet violent crime has steadily declined. What the federal experiment thus proves, as the district court rightly concluded, is that there is no credible support for the theory that the availability of magazines capable of holding more than ten rounds is causally related to violent crime. ER66.

In fact, plaintiffs produced evidence that such laws may well *decrease* public safety because they restrict the self-defense capabilities of the law-abiding—as the time it takes to change magazines is much more likely to negatively affect surprised victims of crime than their pre-meditated attackers. ER1709-10. Unlike perpetrators of violent crime and mass shootings, victims do not choose when or where an attack will take place. *Id.* For the victim, the time and location of the attack, and the number and intentions of the attackers are all unknowns. ER1710. That is precisely why magazines with larger capacities are overwhelmingly preferred by law-abiding Americans for personal and home defense. The availability of more ammunition in a firearm provides security and increases the likelihood of surviving a criminal attack.

The evidence plaintiffs presented to support this point was overwhelming. Mr. Helsley described the suitability of firearms with increased ammunition capacities for self-defense: "A firearm equipped with a magazine capable of holding more than ten rounds is more effective at incapacitating a deadly threat and, under some circumstances, may be necessary to do so." *Id.* He further described the impact of magazine restrictions like California's:

> [L]imits on magazine capacity are likely to impair the ability of citizens to engage in lawful self-defense in those crime incidents necessitating that the victim fire many rounds in order to stop the aggressive actions of offenders, while having negligible impact on the ability of criminals to carry out violent crimes.

ER1708, SER721-750 (collecting stories of victims requiring more than ten rounds to fight off attackers). The reasons citizens benefit from having more than ten rounds immediately available in a self-defense emergency are clear: Given that criminal attacks occur at a moment's notice, taking the victim by surprise, usually at night and in confined spaces, victims rarely have multiple magazines or extra ammunition readily available for reloading. ER1708-10. Most people do not keep back-up magazines or firearms at the ready while they sleep; they must typically make do with a single gun and its ammunition capacity. ER1709.

Even when additional magazines are available, moreover, it is extremely difficult—and potentially deadly—to stop to change magazines while under attack, the stress of which degrades the fine motor skills necessary for the task. That same

stress can also reduce the accuracy of any shots that are fired. *Id.* Even if accurate, it is rare that a single shot will immediately neutralize an attacker. ER1710-12. And the presence of multiple attackers may require far more defensive discharges to eliminate the threat.

Rather than make any serious attempt to refute that evidence, the state focused on trying to prove that the banned magazines are frequently used in mass shootings, and that eradicating them would decrease the fatality rate in those circumstances. But the two centerpieces of the state's case—a "Mayors Against Illegal Guns" report and a survey from *Mother Jones* magazine—did not actually substantiate this claim. As the district court explained, these studies reviewed only a small number of such events in California, and for most of those, the ban would have had no effect. ER55-58. The court therefore correctly concluded that this limited data simply could not suffice to demonstrate that depriving all law-abiding Californians of their constitutional right to possess the prohibited magazines substantially furthers the state's proffered interests. ER55.[1]

[1] The district court also rightly noted that neither of these reports was actually admissible evidence. ER60; *see In re Oracle Corp. Securities Litig.*, 627 F.3d 376, 385 (9th Cir. 2010) ("A district court's ruling on a motion for summary judgment may only be based on admissible evidence."). While likely relevant under Rule 403, both are based on hearsay, were compiled by organizations critical of firearms ownership, and are of highly questionable reliability even on their own terms. ER60.

2. The state failed to prove that the "fit" between its chosen means and its proffered ends is reasonable.

Even assuming the magazine ban does meaningfully advance the state's proffered interests, intermediate scrutiny demands not just meaningful correlation but narrow tailoring. *See Packingham*, 137 S. Ct. at 1736; *see also United States v. Chovan*, 735 F.3d 1127, 1136, 1139 (9th Cir. 2013). That narrow-tailoring requirement seeks to ensure that the encroachment on liberty is "not more extensive than necessary" to serve the government's interest. *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 816 (9th Cir. 2013). The state thus bears the burden of establishing that its law is "closely drawn to avoid unnecessary abridgment" of constitutional rights, *McCutcheon*, 134 S. Ct. at 1456; s*ee Ward v. Rock Against Racism*, 491 U.S. 781, 782-83 (1989). The state is entitled to no deference when assessing the fit between its purported interests and the means selected to advance them. *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 214 (1997). Rather, it must prove that those means in fact do not burden the right "substantially more" than "necessary to further [its important] interest." *Id.*

Here, the state's approach is the polar opposite of tailoring. It flatly bans Californians—including those who, like Plaintiff Lovette and members of CRPA, have lawfully owned the now-banned magazines for more than 20 years without incident—from acquiring or possessing magazines over ten rounds. *See Jackson*, 746 F.3d at 964 (contrasting "complete ban" with regulations). The state paints with

the broadest strokes possible, simply obliterating the right to acquire, keep, and use common magazines for self-defense. That is not the sort of "fit" that can survive any form of heightened scrutiny. *See, e.g.*, *Avitabile v. Beach*, 368 F. Supp. 3d 404 (N.D.N.Y. 2019) (taser ban fails even intermediate scrutiny); *Maloney v. Singas*, 351 F. Supp. 3d 222 (E.D.N.Y. 2018) (nunchaku ban fails even intermediate scrutiny). As explained, the state cannot flatly forbid what the Constitution protects.

The state's claims to the contrary largely mirror arguments that the Supreme Court already considered and rejected in *Heller*. For instance, *Heller* makes clear beyond cavil that the Second Amendment does not tolerate banning the possession of constitutionally protected arms on the ground that they are frequently involved in or help further certain kinds of crime, even serious ones. In *Heller*, the District of Columbia attempted to justify its handgun ban on the ground that handguns were involved in the vast majority of firearm-related homicides in the United States. 554 U.S. at 696 (Breyer, J., dissenting) (collecting statistics). The Court did not question that premise, but nonetheless held that banning those protected arms was not an option open to the District "[u]nder any of the standards of scrutiny." *Id.* at 628-29 (majority opinion).

Heller similarly rejected the argument that protected arms may be banned on the ground that criminals might misuse them. The District argued that handguns make up a significant majority of all stolen guns and that they are overwhelmingly

used in violent crimes. *Id.* at 698 (Breyer, J., dissenting). But despite the government's clear interest in keeping handguns out of the hands of criminals and unauthorized users, the Court rejected that argument, too, concluding that a ban on possession of handguns by *all* citizens is far too blunt an instrument for preventing their misuse by criminals. *Id.* at 628-29 (majority opinion). So too here. Indeed, the retrospective aspects of California's ban are a particularly poor fit for invocation of a criminal misuse interest because compliance with the confiscatory aspect of the ban requires the kind of voluntary action that only a law-abiding citizen would undertake.

At bottom, then, the state cannot escape the problem that the means it has selected are simply far too draconian where constitutional rights are concerned. Indeed, "taken to its logical conclusion," the state's defense of its magazine ban would "justify a total ban on firearms kept in the home." *Heller v. District of Columbia*, 801 F.3d 264, 280 (D.C. Cir. 2015). Whatever the state may think about that result as a policy matter, any theory that supports it is one that the Second Amendment "necessarily takes … off the table." *Heller*, 554 U.S. at 636.

II. California's Confiscatory Possession Ban Violates The Takings Clause.

The district court correctly concluded that California's extraordinary decision to confiscate magazines from law-abiding individuals is the rare government initiative that violates not one, but two provisions of the Bill of Rights. The Takings

Clause provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V; *see Chicago, B&Q Ry. Co. v. Chicago*, 166 U.S. 226, 239 (1897) (holding that the Takings Clause applies to the states). A physical taking occurs when the state "dispossess[es] the owner" of property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982). And when a physical taking occurs, the government must pay just compensation. *Id.* at 421.

The force of the Takings Clause does not vary with the source of power the state invokes. Unlike the federal government, which possesses only its enumerated powers (and is still restrained by restrictions in the Bill of Rights), as far as the federal Constitution is concerned, states possess plenary power. That plenary power is constrained, however, by the restrictions in the Bill of Rights incorporated against the States. The Takings Clause is no different. The Supreme Court long ago rejected the argument that invoking the police power immunizes the government from its obligation to pay just compensation when it takes private property. While the police power may help satisfy the government's obligation that a taking is for public use, it does not make it any less a taking that requires compensation. Because California seeks to physically dispossess plaintiffs of their lawfully acquired property, its plan to confiscate magazines from Californians without compensating them would constitute a taking.

A. The Possession Ban Effectuates Physical Takings.

By prohibiting the possession of magazines capable of holding more than 10 rounds of ammunition even by those who lawfully acquired and have long lawfully possessed them, California clearly seeks to effectuate a physical taking. The state does not dispute that the law requires the physical surrender of lawfully acquired personal property without compensation. Nor could it, as the law on its face subjects Californians "to criminal prosecution, should they not dispossess themselves of magazines holding more than 10 rounds." ER69. The state instead argues that its confiscatory law does not effect physical takings because the state does not intend to "permanently and physically occup[y] or appropriate[] private property for its own use." Dkt.7 at 68. That claim finds no support in case law or common sense. A state takes a building, and must provide compensation, whether it plans to occupy it or destroy it to promote a nature preserve.

A statute that requires a citizen to dispossess herself of lawfully acquired property to further an articulated public interest is a textbook example of a physical taking. The very definition of a physical taking is "absolutely dispossess[ing] the owner" of property. *Loretto*, 458 U.S. at 435 n.12; *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 n.19 (2002) (a physical taking "dispossess[es] the owner" of property); *Nixon v. United States*, 978 F.2d 1269, 1287 (D.C. Cir. 1992) (statute that "physically dispossessed" property

owner "resulted in" per se taking); Black's Law Dictionary (10th ed. 2014) (defining "taking" to include the "transfer of possession"). And a physical taking occurs when the government dispossesses an owner of personal property, not just real property, as the "categorical duty" imposed by the Takings Clause applies "when [the government] takes your car, just as when it takes your home." *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426 (2015). And there is no less a taking if the state plans to destroy the car (to reduce emissions) rather than drive it.

The Supreme Court's decision in *Horne* is instructive. There, the Court invalidated a law requiring raisin farmers to surrender a percentage of their crops to the Department of Agriculture. *Id.* at 2428. Because the law dispossessed the farmers of the "[a]ctual raisins," the Court held that the law resulted in "a clear physical taking" that required compensation. *Id.* The decision did not turn on the precise fate of the raisins. The same is true here, where the entire aim of the law is to "dispossess[]" California citizens of their "actual" magazines. *Id.* at 2428, 2438.

The state does not seriously dispute that requiring plaintiffs to "[s]urrender" their magazines to the government for destruction, Cal. Penal Code §32310(d)(3), results in a physical taking. That conclusion is obvious, as relinquishing both title and possession of the magazines forfeits "the entire 'bundle' of property rights" in the property. *Horne*, 135 S. Ct. at 2428. The state instead argues that the law does not effectuate a physical taking because it also allows citizens to surrender their

property to persons or places other than the government, or destroy it altogether: Plaintiffs may (1) remove their magazines from the state, (2) sell them to a firearms dealer, or (3) permanently alter the magazines so that they cannot hold more than 10 rounds. *See* Cal. Penal Code §32310(d); *id.* §16740(a). In reality, none of those options renders the law anything other than a physical taking.[2]

The first option—moving the property out of California to another state—is no less a taking than if the government seized it. Like a mandatory sale to a third party or surrender to the government, a mandatory transfer of property out of state, often away from the owner's primary home, involves "a direct interference with or disturbance of" the owner's right to the property. *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1330 (9th Cir. 1977). It is no answer that citizens can possess their property in another state. As California itself has recognized, "each State bears an independent obligation to ensure that its regulations do not infringe the constitutional rights of persons within its borders."

[2] To the extent the option to sell or move the magazines is viewed as a regulatory taking, rather than a physical one, the result is the same. As the district court correctly observed, "whatever expectations people may have regarding property regulations, they 'do not expect their property, real or personal, to be actually occupied or taken away.'" ER91 (quoting *Horne*, 135 S. Ct. at 2427); *see also Loretto*, 458 U.S. at 436. Indeed, most regulatory takings restrict the use of property without transferring a property interest to the government, which underscores that government possession (as opposed to private dispossession) is not a prerequisite for a taking.

Amicus Brief for the States of New York, California, et al. at 20, *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274). California cannot invoke the permissive laws of another state to validate its own unconstitutional restriction. *See Jackson*, 746 F.3d at 967 ("That Jackson may easily purchase ammunition elsewhere is irrelevant."); *cf. Whole Woman's Health*, 136 S. Ct. at 2304, 2312 (availability of abortion services in a nearby state did not cure constitutional violation).

The second option—forcing plaintiffs to sell their property—fares no better. As the authorities cited make clear, the gravamen of a taking is the dispossession of the property from the owner. Whether the government edict forces the owner to hand the property over to the government or to a third party, there is still a taking. As this Court has emphasized, "it is sufficient" that the law "involves a direct interference with or disturbance of property rights," even if the government itself does not "directly appropriate the title, possession or use of the propert[y]." *Richmond Redevelopment Agency*, 561 F.2d at 1330. At a minimum, forcing citizens to sell their property places an unconstitutional condition on the possession of their property, which effects an unconstitutional taking. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606-07 (2013).

The third option—permanently altering the magazines to accept fewer than 10 rounds—cannot be squared with Supreme Court takings precedents either. Dkt.7

at 19. In *Horne*, for example, the raisin growers could have "plant[ed] different crops," or "[sold] their raisin-variety grapes as table grapes or for use in juice or wine." 135 S. Ct. at 2430. Likewise, in *Loretto*, the property owner could have converted her building into something other than an apartment complex. *See* 458 U.S. at 439 n.17. The Supreme Court rejected those arguments in both cases, admonishing that "property rights 'cannot be so easily manipulated.'" *Horne*, 135 S. Ct. at 2430 (quoting *Loretto*, 458 U.S. at 439 n.17).

The state tries to distinguish *Horne* on the ground that the property owner in that case was "required to engage in a completely different commercial market," such as winemaking, to keep his raisins. Dkt.7 at 70. But that is no different from what occurs here. California would allow a citizen to keep his lawfully purchased 12-round magazine—so long as he permanently alters it so that it is no longer a 12-round magazine. That is tantamount to ordering the farmer in *Horne* to turn his raisins into wine. Providing such an option to a property owner does not relieve the government of its burden to pay him just compensation for depriving him of the property that he actually possessed.

Finally, the state appears to suggest that there can be no taking when the government's purpose in seizing the property is to eliminate the circulation or availability of the property rather than "to transfer title to the government or an agent of the government for use in service of the public good." Dkt.7 at 68. *Horne*

confirms just the opposite. The purpose of the law in *Horne* was not for the government to use the raisins, but rather "to stabilize prices by limiting the supply of raisins on the market"—in other words, to eliminate the circulation of excess raisins. *Horne v. Dep't of Agric.*, 569 U.S. 513, 516 (2013). The state's proposed rule also makes little sense, as it would incentivize the government to get rid of the property it seizes rather than put it to productive use. The Takings Clause does not draw that irrational distinction, and the district court was correct to reject it.[3]

B. There Is No "Police Power Exception" to the Takings Clause.

The state alternatively contends that it does not matter if it has taken private property because "[w]here … the government exercises its police powers to protect the safety, health, and general welfare of the public, no compensable taking has occurred." Dkt.7 at 66. As noted, however, this argument is a non-starter. It was rejected by the Supreme Court decades ago; it was wrong when the state first asserted it to this Court in its prior appeal; and it is just as wrong now. Simply put, the police power does not give states carte blanche to confiscate private property.

At the outset, the state's argument that it enacted the magazine ban pursuant to "the State's police powers—not its eminent domain powers," confuses the

[3] For all the same reasons, the retroactive application of the magazine ban also violates due process. The ban "change[s] the legal consequences of transactions long closed," thus "destroy[ing] the reasonable certainty and security which are the very objects of property ownership." *E. Enters. v. Apfel*, 524 U.S. 498, 502 (1998) (Kennedy, J.).

relevant inquiry. Dkt.7 at 65. The federal constitution is generally indifferent to the source of the state (or local) power invoked. While identifying an enumerated power that justifies government action is often a critical matter for the federal government, the Constitution generally assumes that states have plenary authorities and asks whether that state action violates a constitutional right incorporated against the states. At most, the question of what authority permits a state or local government to confiscate property might be informative as to the question of whether the taking is for a "public use"—which is a prerequisite for a taking even if full compensation is provided—because "the 'public use' requirement is … coterminous with the scope of a sovereign's police powers." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984); *see also Richardson v. City & Cty. of Honolulu*, 124 F.3d 1150, 1156 (9th Cir. 1997). It says nothing, however, about whether the government has an obligation to pay just compensation. That obligation arises whenever there is a material taking by state action, regardless of the power pursuant to which the state purports to take the property.

To the extent the plain text of the Takings Clause leaves any room for doubt about that, the Supreme Court has definitively resolved it, expressly rejecting a "police power exception" to the Takings Clause. Indeed, the Supreme Court first rejected that proposition all the way back in *Chicago, Burlington & Quincy Ry. v. Illinois*, 200 U.S. 561 (1906), the very case the state cites, where the Court made

crystal clear there that "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." *Id.* at 593 (emphasis added). And the Court reaffirmed that holding in *Loretto*, where it held that a law requiring physical occupation of private property was both "within the State's police power" *and* a physical taking that required compensation. 458 U.S. at 425. In doing so, the Court made clear that the question of whether a law effects a physical taking is "a separate question" from whether the state has the power to enact it, and that an uncompensated taking is unconstitutional "without regard to the public interests that it might serve." *Id.* at 426; *see also Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985) (distinguishing between physical taking and exercise of police power).

The Supreme Court followed the same course in *Lucas v. South Carolina Coastal 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 *regulatory* takings doctrine. 505 U.S. 1003, 1020-27 (1992). The Court explained 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 the government must compensate for physical takings. *Id.* at 1015; *Horne*, 135 S. Ct. at 2425.

The state's attempts to distinguish these cases are unavailing. The state tries to minimize *Loretto* by claiming that the purpose of the magazine-possession ban "is to remove LCMs from circulation in the State, not to transfer title to the government or an agent of the government for use in service of the public good." Dkt.7 at 68. But what mattered in *Loretto* was not how the government rationalized its "invasion of an owner's property interests," *Loretto*, 458 U.S. at 435, but rather the effect that its forced occupation of the property had on its owner. As the Court explained, the government's occupation in *Loretto* impinged the owner's ability to exclude others from her property and to control her property, and it emptied the owner's right to sell her property "of any value, since the purchaser will also be unable to make any use of the property." *Id.* at 435-36. A physical occupation was simply too "intrusive" for the Court to tolerate. *Id.* at 441.

California's confiscatory magazine ban implicates the precise concerns animating *Loretto* because it vitiates the right of a Californian magazine owner "to possess, use and dispose" his property. *Id.* at 435 (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)). Just like the apartment in *Loretto*, the banned magazines can no longer be put to free use. *See id.* at 436. Indeed, they cannot be used by their owners at all, for the owners can do nothing under California

law but dispossess themselves of that lawfully acquired property. And just as in *Loretto*, "even though the owner may retain the bare legal right to dispose of the [magazine] by transfer or sale," the state's ban "will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property." *Id.* Indeed, this case is *a fortiori* vis-à-vis *Loretto*, as a magazine owner cannot even keep possession of his now-useless property. At best, he can keep *title*—but only by moving the magazine to somewhere where (at least so long as he wants to live in California) he can no longer possess it.

The state's effort to distinguish *Lucas* fares no better. According to the state, *Lucas* stands for the proposition that a state's police powers may trump the right to possess personal property because "'some values are enjoyed under an implied limitation and must yield to the police power.'" Dkt.7 at 65 (quoting *Lucas*, 505 U.S. at 1027). In fact, the "implied limitation" to which *Lucas* referred was "the State's traditionally high degree of control over *commercial* dealings." *Lucas*, 505 U.S. at 1027 (emphasis added). *Lucas* thus noted that to the extent "property's only economically productive use is sale or manufacture for sale," the state might restrict sale to such a degree as to "render [the] property economically worthless." *Id.* at 1028. But *Lucas* certainly did not suggest that personal property is held subject to the "implied limitation" that the state may order its owner to dispossess himself of the property entirely.

Moreover, *Lucas* emphasized the importance of inquiring whether a property owner was able to use his property in a particular manner before the state attempted to restrict it. *See id.* Here, the state is seeking to dispossess its citizens of magazines that they *lawfully* obtained, *before* those magazines are "subject to confiscation and summary destruction." Dkt.7 at 20. To be sure, the takings analysis would be different as to an individual who *unlawfully* obtained such a magazine after the ban was already in place. But just as "confiscatory regulations" of real property "cannot be newly legislated or decreed (without compensation)," *Lucas*, 505 U.S. at 1029, neither can confiscations of personal property be decreed after the fact. After all, "whatever expectations people may have regarding property regulations, they 'do not expect their property, real or personal, to be actually occupied or taken away.'" ER91 (quoting *Horne*, 135 S. Ct. at 2427).

The state alternatively suggests that even if there is no *general* police power exception the Takings Clause, laws designed to "protect the safety, health, and general welfare of the public" cannot constitute a taking. Dkt.7 at 66. But the cases the state invokes found no taking because, unlike the confiscatory magazine ban, they did not involve *prohibitions* on possession—a fact that the Supreme Court found critical when distinguishing some of those very same cases in *Horne*. *See* 135 S. Ct. at 2429. For instance, in *Andrus v. Allard*, 444 U.S. 51, 67 (1979), the regulation banning possession of eagle feathers included a grandfathering clause—

which is precisely why the Court concluded that it was not a taking. Likewise, in *Wilkins v. Daniels*, 744 F.3d 409, 419 (6th Cir. 2014), the court found no taking because "neither the government nor a third party ha[d] occupied appellants' property"; the government had merely required appellants to implant microchips into animals that they then "retain[ed] the ability to use and possess."

The cases the state cites dealing with possession bans do not help its cause either. Two pre-date *Horne*. *See Akins v. United States*, 82 Fed. Cl. 619, 623 (Fed. Cl. 2008); *Fesjian v. Jefferson*, 399 A. 2d 861 (D.C. 1979). Accordingly, to the extent those cases fail to abide by the Supreme Court's subsequent admonition 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, they are no longer good law. Two additional cases are recent district court decisions that have yet to be considered on appeal. *See Maryland Shall Issue v. Hogan*, 353 F. Supp. 3d 400, 408-09 (D. Md. 2018), *appeal docketed*, No. 18-2474 (4th Cir. Dec. 13, 2018); *Wiese v. Becerra*, 263 F. Supp. 3d 986, 993 (E.D. Cal. 2017). In fact, the district court in *Wiese* stayed proceedings pending this appeal because the case concerns the very law at issue here. *See* Order, *Wiese v. Becerra*, No. 2:17-cv-00903-WBS-KJN (May 8, 2018), Dkt.110.

Ultimately, the only circuit precedent the state can cite in support of its assertion that a state may confiscate magazines is *Ass'n of N. J. Rifle and Pistol*

Clubs, Inc., 910 F.3d 106 (3d Cir. 2018), a recent case that upheld, in a preliminary injunction posture, a similar confiscatory magazine ban. But to the extent the Third Circuit definitively held that New Jersey's ban was not a taking, the decision is simply wrong, for the very same reasons that the state's arguments here are wrong: A state's invocation of its police power cannot obviate its duty to compensate its citizens when it chooses to dispossess them of their property.[4]

In sum, the district court correctly rejected the state's assertion of a police-power exception to the Takings Clause. In addition to finding no support in precedent, the state's position would essentially rewrite takings law and constitutional law more generally. As a general matter, the Constitution is indifferent to the source of state power used to violate a constitutional prohibition. While the federal government is one of limited and enumerated powers, the Constitution generally assumes that states exercise plenary or police powers. And once the Supreme Court incorporated the Bill of Rights against the states, those

[4] Notably, the Third Circuit reached its contrary conclusion only by purporting to distinguish *Horne* on the ground that the government took the raisins at issue there for the "government use" of "sell[ing them] in noncompetitive markets." *Ass'n of New Jersey Rifle and Pistol Clubs, Inc.*, 910 F.3d at 124 n.32. In fact, the government was free to "dispose of" the raisins "in its discretion," including by simply giving them away to third parties. *Horne*, 135 U.S. at 2424. The Third Circuit did not and could not explain how confiscating property so that the government may give it to someone else is a taking, but ordering the owner to give it away directly is not.

provisions prohibited certain state actions, without regard to the source of the state's power under state law. The only reason the source of state power is even discussed in takings cases is because it has some relevance to whether the government can satisfy the threshold requirement of taking private property for public use. But once that hurdle is cleared, the source of power used to take private property is of no further moment. Otherwise, the very fact that the taking was for a public use (and thus not wholly prohibited) would obviate the need for just compensation. That result is, of course, wholly antithetical to the Takings Clause. Such a rule would, as the state put it, mean that the state is free to take at will, and without paying any compensation at all, anything so long as doing so was for the purpose of furthering "the safety, health, and general welfare of the public." Dkt.7 at 66. That sweeping proposition would subordinate property rights to government whim, in direct contravention of the Takings Clause.[5]

[5] The state also argues in a footnote that injunctive relief is not appropriate for takings claims. *See* Dkt.7 at 65 n.19. But that argument, too, is squarely foreclosed by Supreme Court precedent, as the Court has repeatedly recognized that declaratory and injunctive relief are available remedies for takings claims. *See, e.g.*, *Horne*, 135 S. Ct. 2419; *Koontz*, 570 U.S. 595; *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl Protection*, 560 U.S. 702 (2010). That is particularly true in a case like this, where there is no indication that the lawmakers would have wanted to effectuate a taking if they knew they would have to provide just compensation.

CONCLUSION

For the reasons set forth above, this Court should affirm.

Respectfully submitted,

s/Paul D. Clement

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September 16, 2019

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellee states that this Court previously affirmed the district court's decision to preliminarily enjoin the retrospective and confiscatory aspects of the law at issue in this case. *See Duncan v. Becerra*, 742 Fed. Appx. 218 (9th Cir. 2018) (unpublished). Counsel are aware of no other related cases.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the length limits permitted by Ninth Circuit Rule 32-1 because this brief contains 11,458 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type.

Dated: September 16, 2019

s/Paul D. Clement
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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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