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8
 9 IN THE UNITED STATES DISTRICT COURT
 10 FOR THE EASTERN DISTRICT OF CALIFORNIA
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<p>13 WILLIAM WIESE, et al.,</p> <p>14</p> <p>15 Plaintiff,</p> <p>16</p> <p>17 XAVIER BECERRA, et al.,</p> <p>18 Defendant.</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>26</p> <p>27</p> <p>28</p>	<p>Case No.: 17-cv-00903-WBS-KJN</p> <p>DEFENDANTS’ OPPOSITION TO RENEWED MOTION FOR TEMPORARY RESTRAINING ORDER AND ISSUANCE OF PRELIMINARY INJUNCTION</p> <p>Date: June 16, 2017 Time: 10:00 a.m. Courtroom: 5, 14th Floor Judge: Hon. William B. Shubb Trial Date: None Set Action Filed: April 28, 2017</p>
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1 In accordance with the Court’s Order, dated June 14, 2017, defendants Xavier Becerra and
2 Martha Supenor (together, “Defendants”) respectfully submit this opposition to the Renewed
3 Motion for Temporary Restraining Order and Issuance of Preliminary Injunction (the “TRO
4 Motion”) (Dkt. Nos. 28, 29), filed by plaintiffs (“Plaintiffs”) on June 14, 2017.¹

5 INTRODUCTION

6 In 2016, in the wake of escalating mass-shootings and gun violence, the Legislature and the
7 people of California enacted a ban on the possession of magazines holding more than ten rounds
8 of ammunition. These large-capacity magazines (“LCMs”) are disproportionately used in crime,
9 and feature prominently in some of the most heinous crimes, including homicides, mass
10 shootings, and killings of law enforcement officers. Because LCMs are so dangerous, federal and
11 state law have restricted their manufacture, importation, and sale for decades. Now, in order to
12 strengthen these restrictions, and close a loophole that allowed for the continued proliferation of
13 LCMs, California Penal Code section 32310 (“Section 32310”)² prohibits the possession of
14 LCMs by private citizens beginning July 1, 2017.

15 Plaintiffs seek to enjoin the implementation and enforcement of this important public safety
16 legislation and request that this Court (1) issue an “immediate” TRO enjoining the enforcement of
17 Section 32310 and (2) set a briefing and hearing schedule on their motion for a preliminary
18 injunction on shortened time no later than June 30, 2017.³ (*See* Notice of Mot. (Dkt. No. 28);
19 Proposed Order (Dkt. No. 28-14).) The Court should do neither. Plaintiffs are not entitled to
20 injunctive relief at all, let alone on an emergency basis or on shortened time.

21
22 ¹ In conjunction with this opposition, Defendants have filed a Declaration of Alexandra
23 Robert Gordon (“Gordon Decl.”), a Declaration of Professor John J. Donohue (“Donohue Decl.”),
24 a Declaration of Daniel W. Webster (“Webster Decl.”), a Declaration of Lucy P. Allen (“Allen
25 Decl.”), a Declaration of Blake Graham (“Graham Decl.”), and a Request for Judicial Notice
26 (“RJN”), with exhibits annexed thereto, which are expressly incorporated herein by reference.

27 ² All subsequent statutory references are to the California Penal Code, unless otherwise
28 noted.

³ While the Declaration of George M. Lee (“Lee Decl.”) (Dkt. No. 28-12) requests to have
the motion heard “before June 30, 2017” (Lee Decl. ¶ 4), this appears to be a typographical error,
as Plaintiffs’ Notice of Motion requests a hearing “no later than June 30, 2017” (Notice of Mot. at
2), and the enforcement date of the challenged statute is July 1, 2017.

1 The law that Plaintiffs challenge in this action—California’s amendment of Section 32310
2 to prohibit the possession of LCMs—was originally enacted nearly one year ago in Senate
3 Bill 1446, with an enforcement date of July 1, 2017. Sen. Bill No. 1446, 2015-2016 Reg. Sess.
4 (Cal. 2016) (“SB 1446”). On November 8, 2016, California voters passed Proposition 63, which
5 largely mirrored SB 1446’s amendments to Section 32310 with an enforcement date of July 1,
6 2017. Even though SB 1446 was enacted nearly a year ago and Proposition 63 went into effect
7 immediately upon its passage in November 2016, Plaintiffs waited until April 28, 2017 to file
8 their complaint, which contends that Section 32310, as amended by Proposition 63, violates their
9 Second Amendment and Due Process rights. Plaintiffs did not seek any injunctive relief at that
10 time, and they waited until June 12, 2017—more than *seven months* after the enactment of
11 Proposition 63—to seek injunctive relief to enjoin this critical public safety measure. Plaintiffs’
12 TRO Motion should be denied.

13 **First**, Plaintiffs’ request for a TRO should be denied in accordance with Local Rule 231(b)
14 and this Court’s procedures due to Plaintiffs’ delays in seeking injunctive relief. Plaintiffs waited
15 until less than three weeks before the enforcement date of the law, a month-and-a-half after filing
16 their complaint and more than seven months after the law went into effect, to file their initial
17 motion for a TRO. Plaintiffs offer no explanation, nor can they credibly do so, for waiting until
18 the last minute to seek injunctive relief. The Court can deny the TRO Motion on this ground
19 alone.

20 **Second**, Plaintiffs have failed to establish sufficient grounds for the issuance of a TRO.
21 Plaintiffs cannot establish a likelihood of success on the merits for any of their claims.
22 Possession of LCMs is not protected by the Second Amendment, and, even if it were, there is a
23 “reasonable fit” between Section 32310 and the State’s important interests. *Fyock v. Sunnyvale*,
24 779 F.3d 991, 1000 (9th Cir. 2015) (upholding municipal LCM ban under the Second
25 Amendment). Section 32310 does not constitute an unconstitutional taking because the statute is
26 an exercise of the State’s police power that does not deprive plaintiffs of all economic or
27 beneficial use of their property. Nor is the statute unconstitutionally vague or overbroad; it is
28 clear from the face of the statute what magazines are subject to its prohibition, and Plaintiffs

1 cannot establish their overbreadth claim because the statute does not impair any constitutional
2 rights. In addition, Plaintiffs' TRO Motion is unsubstantiated by any cognizable evidence of
3 irreparable injury that they would suffer in the absence of injunctive relief; Plaintiffs' egregious
4 delays in seeking injunctive relief merely confirm the absence of irreparable injury here. By
5 contrast, the harm to the State's ability to effectively enforce its laws and to the public interest in
6 the event that injunctive relief is granted would be considerable. Accordingly, the law, the
7 balance of equities, and the public interest all weigh against issuing injunctive relief.

8 **Third**, Plaintiffs have failed to establish good cause to shorten time on the briefing and
9 hearing for their motion for a preliminary injunction. Plaintiffs delayed in seeking injunctive
10 relief until the last moment, and they cannot now, by way of an ex parte application, seek an
11 extremely compressed briefing and hearing schedule, which would severely prejudice
12 Defendants' ability to review the voluminous materials submitted in support of the motion for a
13 preliminary injunction and adequately prepare an opposition.⁴

14 **STATEMENT OF FACTS**

15 On July 1, 2016, the State of California enacted SB 1446, which prohibited the possession
16 of LCMs (defined under section 16740 as "a feeding device with the capacity to accept more than
17 10 rounds") beginning on July 1, 2017. SB 1446 went into effect on January 1, 2017 and
18 amended Section 32310 to state that, beginning on July 1, 2017, any person possessing an LCM,
19 with exemptions not relevant here, would be guilty of an infraction punishable by a fine starting
20 at \$100 for the first offense. Cal. Stats. 2016, ch. 58 (SB 1446) § 1 (amending Section 32310 to
21 add a new subdivision (c)). The law also provided that anyone possessing an LCM may, prior to
22 July 1, 2017, dispose of the magazine by any of the following means: (1) removing it from the
23 state; (2) selling it to a licensed firearms dealer; (3) destroying it; or (4) surrendering it to a law
24 enforcement agency for destruction. *Id.* (amending Section 32310 to add a new subdivision (d)).

25 _____
26 ⁴ Although this opposition raises arguments that are applicable to Plaintiffs' motion for a
27 preliminary injunction, due to the time constraints in having to brief the instant opposition to the
28 TRO Motion on an extremely compressed schedule, Defendants reserve the right to submit
additional arguments and evidence in opposition to Plaintiffs' request for a preliminary injunction
in the event the Court is inclined to issue a preliminary injunction.

1 The Senate Bill Analysis noted that the amendments were necessary because the prior version of
2 the law, which did not prohibition possession of LCMs, was “very difficult to enforce.” (Gordon
3 Decl., Ex. 46 (Sen. Bill No. 1446, 3d reading Mar. 28, 2016 (2015-2016 Reg. Sess.) (Cal.
4 2016)).) Specifically, there was no reliable way for law enforcement to know which LCMs were
5 properly grandfathered and which had been illegally smuggled and sold or were the product of
6 “magazine conversion kits,” which enabled people to skirt the law. (*Id.*; Graham Decl.,
7 ¶¶ 24-32.)

8 On November 8, 2016, California voters passed Proposition 63, the “Safety for All Act of
9 2016.” (Gordon Decl., Ex. 49 (Prop. 63, § 1, as approved by voters (Gen. Elec. Nov. 8, 2016));
10 *see also* Pls.’ Req. for Judicial Notice in Support of Pls.’ Mot. for TRO and Issuance of Prelim.
11 Inj. (“RJN”) (Dkt. No. 28-13), Ex. E (text of Proposition 63).) The measure included several
12 provisions—including amendments to Section 32310—intended to close “loopholes that leave
13 communities throughout the state vulnerable to gun violence and mass shootings.” (Gordon
14 Decl., Ex. 50 (Prop. 63, § 2, ¶ 5 (uncodified findings and declarations of the people of
15 California)); *id.* (Prop. 63, § 2, ¶ 11 (finding that LCMs “significantly increase a shooter’s ability
16 to kill a lot of people in a short amount of time. That is why these large-capacity ammunition
17 magazines are common in many of America’s most horrific mass shootings, from the killings”)).)

18 The amendments to Section 32310 largely mirror the same amendments made under SB
19 1446. Both provisions prohibit the possession of LCMs on or after July 1, 2017, and list options
20 for the disposal of LCMs before that date. (Gordon Decl., Ex. 50.) Prop. 63 also increased the
21 potential consequence for violations of the possession ban, from an infraction to an infraction or a
22 misdemeanor. (*Id.*, (Prop. 63, § 6.1).) Because Proposition 63’s amendments to Section 32310
23 were enacted after the enactment of SB 1446, Proposition 63’s amendments supersede those of
24 SB 1446 and are the governing provisions for the statute.⁵

25 On April 28, 2017, Plaintiffs filed their original complaint, alleging that Section 32310, as
26 amended by Proposition 63, violates their rights under the Second Amendment, Takings Clause,

27 ⁵ References to Section 32310 in this brief are to the statute as amended by Proposition 63.
28

1 and Due Process Clause. (Dkt. No. 1.) On June 5, 2017, Plaintiffs filed a First Amended
2 Complaint, adding three plaintiffs as well as a claim that Section 32310, as amended, is
3 unconstitutionally overbroad. (Dkt. No. 7.) On Thursday, June 8, 2017, counsel for Plaintiffs
4 informed counsel for Defendants that Plaintiffs intended to file the motion for a TRO and
5 preliminary injunction on the following Monday, June 12, 2017. (Declaration of George M. Lee
6 in Supp. of Pls.’ Mot. for TRO and Issuance of Prelim. Inj. (“Lee Decl.”) (Dkt. No. 28-12) ¶ 5.)
7 In addition, counsel for Plaintiffs proposed a briefing schedule that would have afforded
8 Defendants only seven days to prepare and file an opposition, to which counsel for Defendants
9 did not agree. (*Id.*)

10 On June 12, 2016, at the close of business hours, Plaintiffs filed their initial motion for a
11 TRO. The motion—comprised of 15 separate filings spanning over 200 pages—requested a TRO
12 and a briefing and hearing schedule on their motion for a preliminary injunction on shortened
13 time prior to the July 1, 2017 enforcement date of Section 32310. (Dkt. Nos. 9-23.) By Order
14 dated June 13, 2017, this Court denied Plaintiffs’ motion “without prejudice to its being renewed
15 at such time as plaintiffs may seriously want the court to rule on it.” (Order (Dkt. No. 26).)
16 Plaintiffs refiled the TRO Motion on June 14, 2017, requesting “the immediate issuance of
17 temporary injunctive relief, and/or that this matter be heard no later than June 30, 2017.” (Dkt.
18 No. 28.)

19 ARGUMENT

20 **I. PLAINTIFFS’ REQUEST FOR A TRO SHOULD BE DENIED DUE TO PLAINTIFFS’** 21 **REPEATED, INEXCUSABLE DELAYS IN SEEKING INJUNCTIVE RELIEF.**

22 Plaintiffs’ request for an immediate TRO should be denied due to Plaintiffs’ seven-month
23 delay in seeking injunctive relief. Under Local Rule 231(b) of the Local Rules of the United
24 States District Court for the Eastern District of California,

25 [T]he Court will consider whether the applicant [for a TRO] could have sought relief by
26 motion for preliminary injunction at an earlier date without the necessity for seeking last-
27 minute relief by motion for [a TRO]. Should the Court find that the applicant unduly
28 delayed in seeking injunctive relief, the Court may conclude that the delay constitutes

1 laches or contradicts the applicant’s allegations of irreparable injury and may deny the
2 motion solely on either ground.”

3 Similarly, this Court’s procedures make clear that an applicant for a TRO must submit a
4 “satisfactory explanation” for, *inter alia*, “the need for the issuance of such an order.”

5 Plaintiffs have delayed in pursuing the injunctive relief sought in the TRO Motion, and they
6 have failed to offer any credible explanation for these delays. Plaintiffs claim that they have
7 “moved with all due haste to file” the Motion on June 12, 2017 (Lee Decl. ¶ 3), and they
8 represent that there has not “been undue delay in bringing a TRO” and that the TRO Motion
9 could not have been brought earlier (TRO Checklist (Dkt. No. 29)). Nothing in Plaintiffs’
10 supporting materials substantiates these claims. To the contrary, SB 1446’s amendments to
11 Section 32310 were enacted nearly one year ago with an enforcement date of July 1, 2017.
12 Moreover, Plaintiffs have had since November 2016 to challenge Proposition 63’s amendments to
13 Section 32310. At a minimum, Plaintiffs had seven months since the passage of Proposition 63 to
14 file a complaint and a regularly noticed motion for a preliminary injunction to be heard well
15 before the July 1, 2017 enforcement date, which would have provided the parties and the Court
16 sufficient time to brief and consider their arguments. Plaintiffs do not adequately explain the
17 reason for their delays, let alone establish excusable neglect in failing to seek injunctive relief at
18 an earlier time.

19 Plaintiffs’ delays in seeking injunctive relief warrant the denial of their request for a TRO
20 because Plaintiffs created the emergency they now cite to justify a TRO. For this reason alone,
21 the Court should deny Plaintiffs’ request for a TRO.

22 **II. PLAINTIFFS HAVE FAILED TO ESTABLISH SUFFICIENT GROUNDS FOR THE ISSUANCE**
23 **OF A TRO.**

24 “In order to obtain a temporary restraining order or a preliminary injunction, the moving
25 party ‘must establish that he is likely to succeed on the merits, that he is likely to suffer
26 irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor,
27 and that an injunction is in the public interest.’” *Foster v. SCME Mortg. Bankers, Inc.*, No. CIV.
28

1 2:10-518 WBS GGH, 2010 WL 1408108, at *1 (E.D. Cal. Apr. 7, 2010) (quoting *Winter v.*
2 *NRDC*, 555 U.S. 7, 20 (2008)); *see also Aiello v. OneWest Bank*, No. 2:10-cv-0227-GEB-EFB,
3 2010 WL 406092, at *1 (E.D. Cal. Jan. 29, 2010) (“Temporary restraining orders are governed
4 by the same standard applicable to preliminary injunctions.”) (citations omitted)). Alternatively,
5 injunctive relief “is appropriate when a plaintiff demonstrates that serious questions going to the
6 merits were raised and the balance of hardships tips sharply in the plaintiff’s favor.” *Alliance for*
7 *the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (internal citation omitted).
8 Plaintiffs must make a showing of all four *Winter* factors even under the alternative sliding scale
9 test. *Id.* at 1132, 1135. It is well settled that injunctive relief “is ‘an extraordinary and drastic
10 remedy, one that should not be granted unless the movant, by a clear showing, carries the burden
11 of persuasion.’” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

12 **A. Plaintiffs Have Failed to Establish a Likelihood of Success on the Merits of**
13 **Any of Their Claims.**

14 Plaintiffs assert four facial and as-applied challenges to Section 32310: (i) that the law
15 violates the Second Amendment, (ii) that the law constitutes a taking in violation of the
16 Fourteenth Amendment, (iii) that the law is void for vagueness, and (iv) that the law is
17 unconstitutionally overbroad. (Mem. of P. & A. in Supp. of Pls.’ Mot. for TRO and Issuance of
18 Prelim. Inj. (“Memorandum” or “Mem.”) (Dkt. No. 28-1) at 9 (“This both is a facial and as-
19 applied challenge”)) Plaintiffs have failed to demonstrate a likelihood of success on the
20 merits as to any of these claims.

21 **1. Second Amendment.**

22 Plaintiffs’ Second Amendment claim, which has been rejected by every court to consider it,
23 is without merit and cannot provide the basis for enjoining state law. *See Fyock v. City of*
24 *Sunnyvale*, 25 F. Supp. 3d 1267, 1271 (N.D. Cal. 2014), *aff’d sub nom. Fyock v. Sunnyvale*, 779
25 F.3d 991 (9th Cir. 2015) (“No court has yet entered a preliminary injunction against a law
26 criminalizing the possession of magazines having a capacity to accept more than ten rounds, nor
27 has any court yet found that such a law infringes the Second Amendment.”); *Kolbe v. Hogan*, 849
28 F.3d 114, 130-41 (4th Cir. 2017) (en banc); *N.Y.S. Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242,

1 263-64 (2d Cir. 2015), *cert denied sub nom, Shew v. Malloy*, 136 S. Ct. 2486 (2016) (*NYSRPA*);
2 *Friedman v. City of Highland Park*, 784 F.3d 406, 411-12 (7th Cir. 2015), *cert. denied*, 136 S. Ct.
3 447 (2015); *Heller v. District of Columbia*, 670 F.3d 1244, 1260-64 (D.C. Cir. 2011) (*Heller II*);
4 *S.F. Veteran Police Officers Ass’n v. City of S.F.*, 18 F. Supp. 3d 997, 1002-06 (N.D. Cal. 2014);
5 *Colorado Outfitters Ass’n v. Hickenlooper*, 24 F. Supp. 3d 1050, 1067-74 (D. Colo. 2014),
6 *vacated and remanded for lack of standing*, 823 F.3d 537 (10th Cir. 2016).

7 While the Supreme Court held, in *District of Columbia v. Heller*, 554 U.S. 570, 622 (2008),
8 that the Second Amendment confers an individual right to keep and bear arms, Plaintiffs overstate
9 the nature and scope of that right and the consequent restrictions on the government’s ability to
10 enact reasonable gun safety regulations. The Court in *Heller* stated that the Second Amendment
11 has “the core lawful purpose of self-defense” and “elevates above all other interests the right of
12 law-abiding, responsible citizens to use arms in defense of hearth and home.” *Id.* at 630, 635.⁶
13 The Court was clear, however, that the Second Amendment does not provide “a right to keep and
14 carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Heller*, 554
15 U.S. at 626. Rather, the right to keep and bear arms, like other constitutional rights, is limited in
16 scope and subject to regulation. *Id.* at 626-28. “When the fledgling republic adopted the Second
17 Amendment, an expectation of sensible gun safety regulation was woven into the tapestry of the
18 guarantee.” *Nat’l Rifle Ass’n v. Bureau of Alcohol, Tobacco & Firearms*, 700 F.3d 185, 200 (5th
19 Cir. 2012). Thus, the Supreme Court has emphasized that the Second Amendment “does not
20 imperil every law regulating firearms” and that “state and local experimentation with reasonable
21 firearms regulation will continue under the Second Amendment.” *McDonald*, 561 U.S. at 785;
22 *see also Heller*, 554 U.S. at 626-29.

23 In evaluating whether the Second Amendment permits such state regulation, the Ninth
24 Circuit employs a two-step inquiry. *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir.
25 2013). First, the court “asks whether the challenged law burdens conduct protected by the Second
26

27 ⁶ This right is incorporated against the states through the Fourteenth Amendment.
28 *McDonald v. City of Chi.*, 561 U.S. 742, 790-91 (2010) (plurality).

1 Amendment.” *Id.* If not, the challenged law does not implicate the Second Amendment and is
2 valid. *See id.* at 1138; *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010). If a Second
3 Amendment right is implicated, the court then selects an appropriate level of scrutiny. *Chovan*,
4 735 F.3d at 1136. LCMs are unusually dangerous, designed to “kill or disable the enemy,”
5 “clearly most useful in military service” and not commonly used for self-defense. *See Kolbe*, 849
6 F.3d at 137; *Heller II*, 670 F.3d at 1262; *Hightower v. City of Boston*, 693 F.3d 61, 66, 71 (1st Cir.
7 2012) (noting that “large capacity weapons” with ability to carry more than ten rounds are not “of
8 the type characteristically used to protect the home”). Consequently, and as the Fourth Circuit
9 recently determined, LCMs are not within the right secured by the Second Amendment. *See*
10 *Kolbe*, 849 F.3d at 137. Plaintiffs’ claim thus fails at the threshold of the Court’s analysis. *See*
11 *Jackson v. City and County of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014). Moreover,
12 because Section 32310 advances the State’s compelling interests in protecting citizens and law
13 enforcement from gun violence, protecting public safety, and preventing crime, it is
14 constitutional.⁷

15 **a. Intermediate Scrutiny Is Appropriate.**

16 Even if Section 32310’s prohibition on LCMs fell within the scope of Second Amendment
17 protection, the law would survive constitutional scrutiny. In determining the appropriate level of
18 scrutiny to apply to a Second Amendment challenge, the court must consider “(1) how close the
19 challenged law comes to the core of the Second Amendment right, and (2) the severity of the
20 law’s burden on that right.” *Jackson*, 746 F.3d at 960-61. At most, Section 32310 regulates the
21 manner in which persons may exercise their Second Amendment rights. *See id.* at 961. It does
22 not impose a complete ban on an entire category of firearms considered to be “the quintessential
23

24 ⁷ Because Section 32310 would survive heightened scrutiny even if it implicated Second
25 Amendment protections, for purposes of this analysis, this Court may assume, without deciding,
26 that some Second Amendment protection is warranted. *See Fyock*, 779 F.3d at 997 (bypassing
27 step one on preliminary injunction motion because ban on LCMs would survive heightened
28 scrutiny even if LCMs fell within the scope of the Second Amendment); *see also Bauer v.*
Becerra, No. 15-15428, 2017 WL 2367988, at *4 (9th Cir. June 1, 2017) (assuming without
deciding that fee on firearms implicated the Second Amendment); *Silvester v. Harris*, 843 F.3d
816, 826–27 (9th Cir. 2016) (assuming without deciding that waiting period laws fall within the
scope of the Second Amendment at step one).

1 self-defense weapon,” like the law at issue in *Heller*. See 544 U.S. at 629. Rather, it bans a
2 particularly dangerous subset of magazines that have been illegal for sale in California for more
3 than twenty years. Section 32310 does not restrict the number of magazines that a person may
4 own, or the number of defensive shots he can fire in the unlikely event that such shots would be
5 necessary. Thus, the “prohibition of ... large capacity magazines does not effectively disarm
6 individuals or substantially affect their ability to defend themselves.” *Fyock*, 779 F.3d at 999.
7 Accordingly, in assessing the constitutionality of a municipal ordinance banning possession of
8 LCMs, which was substantially identical to Section 32310,⁸ the Ninth Circuit, like every other
9 court to consider the issue, concluded that intermediate scrutiny was appropriate. *Id.*⁹ The Ninth
10 Circuit’s determination is binding here. See *Ranchers Cattlemen Action Legal Fund United*
11 *Stockgrowers of Am. v. U.S. Dep’t of Agriculture*, 499 F.3d 1108, 1114 (9th Cir. 2007) (stating
12 that while decisions made during the preliminary injunction phase are not, as a “general rule,”
13 controlling, conclusions on pure issues of law are binding).

14 Moreover, and contrary to plaintiffs’ view (Mem. at 14-16), strict scrutiny is reserved for
15 only those laws that significantly burden the core Second Amendment right to keep and bear arms
16 for self-defense in the home. See *Silvester*, 843 F.3d at 821 (9th Cir. 2016); *Jackson*, 746 F.3d at
17 961, 964-65. Notably, Plaintiffs do not cite, and research has not revealed, a single case applying
18 strict scrutiny to a regulation of firearms. Section 32310 places no appreciable burden on an
19 individual’s ability to defend himself at home or anywhere else. See *Kolbe*, 849 F.3d at 127 (“[I]t
20 is rare for a person, when using a firearm in self-defense, to fire more than ten rounds.”);

21 *NYSRPA*, 804 F.3d at 258 (stating that ban on large-capacity magazines “does not effectively

22 ⁸ Plaintiffs’ assertion that because the ban in *Fyock* only involved a municipal ordinance
23 that this Court is not bound by the Ninth Circuit’s determination that intermediate scrutiny applies
24 to LCM prohibitions is baseless. (Mem. at 14-15.) The Ninth Circuit’s determination that
25 intermediate scrutiny was appropriate was not based on the geographic scope of the ordinance.
26 Rather, intermediate scrutiny applied because the complete ban on LCMs, like Section 32310,
27 was not as sweeping as a complete ban on handguns and “restricts possession of only a subset of
28 magazines that are over a certain capacity. It does not restrict the possession of magazines in
general,” “nor does it restrict the number of magazines that an individual may possess.” *Fyock*,
779 F.3d at 999. Other courts have applied intermediate scrutiny to state-wide bans on LCMs.
See *Kolbe*, 849 F.3d at 138; *NYSRPA*, 804 F.3d at 260-61.

⁹ See also *Friedman*, 784 F.3d at 410 (same); *Heller II*, 670 F.3d at 1264 (same).

1 disarm individuals or substantially affect their ability to defend themselves.”); *Hightower*, 693
2 F.3d at 66, 71 (noting that “large capacity weapons” with ability to carry more than ten rounds are
3 not “of the type characteristically used to protect the home”).

4 In fact, numerous studies have shown that law-abiding individuals do not fire ten or more
5 rounds in their homes, in self-defense or for any other reason.¹⁰ An analysis of the NRA’s own
6 reports of firearm use in self-defense “demonstrated that in 50 percent of all cases, two or fewer
7 shots were fired, and the average number of shots fired across the entire data sample was about
8 two.” (Gordon Decl., Ex. 4.) An updated analysis of the NRA reports for the period January
9 2011 to May 2017 likewise indicates that individuals fired on average only 2.2 bullets when using
10 a firearm in self-defense. (Allen Decl., ¶¶ 7-10.) Out of 47 incidents in California during this
11 period, there were no instances in which a defender was reported to have fired more than 10
12 bullets. (Allen Decl., ¶ 10; *see also* RJN, Ex. A (Declaration of Ken James) ¶ 8.)

13 There is no credible evidence that a civilian would need more than a ten-round magazine in
14 his home in order to defend himself. As a former Baltimore Police Colonel has stated, “the
15 typical self-defense scenario in a home does not require more ammunition than is available in a
16 standard 6-shot revolver or 6-10 round semiautomatic pistol. In fact, because of the potential
17 harm to others in the household, passersby, and bystanders, too much firepower is a hazard.”
18 (Gordon Decl., Ex. 30 at 16.) *See also Heller II*, 670 F.3d at 1263-63 (noting that “high-capacity
19 magazines are dangerous in self-defense situations because the tendency is for defenders to keep
20 firing until all bullets have been expended, which poses grave risks to others in the household,
21 passersby, and bystanders.” (internal quotation marks omitted)); *Colorado Outfitters*, 24 F. Supp.
22 3d at 1072 (citing testimony by Mr. Ayoob that his students “frequently feel the need to ‘spray
23 and pray’” that at least one shot will hit their target).

24
25 _____
26 ¹⁰ Gun rights proponents have testified that 98 percent of the time that firearms are used
27 defensively, it is only necessary to “brandish” a gun, but not fire it. (Donohue Decl., ¶¶ 34-36.)
28 Mr. Ayoob similarly has commented that “[t]he bottom line is, it’s not about ‘what gun you
have,’ so much as ‘did you have a gun?’” (Gordon Decl., Ex. 5.)

1 For these reasons, courts that have examined the civilian use of large-capacity magazines
 2 for home or self-defense have found evidence of such uses to be lacking. *See NYSRPA*, 804 F.3d
 3 at 263; *Hightower*, 693 F.3d at 66, 71; *Heller II*, 670 F.3d at 1263-64; *Heller v. District of*
 4 *Columbia*, 698 F.Supp.2d 179, 193-94 (D.D.C. 2010). Thus, even if this Court were not bound
 5 by *Fyock* (and it is), Section 32310 would be subject to intermediate scrutiny.

6 **b. Section 32310 Advances the State’s Compelling Interests.**

7 In the Ninth Circuit, the intermediate scrutiny test under the Second Amendment requires
 8 that (1) the government’s stated objective must be significant, substantial, or important; and (2)
 9 there must be a “reasonable fit” between the challenged regulation and the asserted objective.
 10 *Chovan*, 735 F.3d at 1139. Intermediate scrutiny does not require the fit between the challenged
 11 regulation and the stated objective to be perfect, nor does it require that the regulation be the least
 12 restrictive means of serving the interest. *Jackson*, 746 F.3d at 969. Rather, the government “must
 13 be allowed a reasonable opportunity to experiment with solutions to admittedly serious
 14 problems.” *Id.* at 969-70 (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52
 15 (1986)). In determining whether a law survives intermediate scrutiny, courts “afford substantial
 16 deference to the predictive judgments of the legislature.” *Turner Broad. Sys., Inc. v. FCC*, 520
 17 U.S. 180, 195 (1997). The courts’ narrow role is to “assure that, in formulating its judgments,
 18 [the State] has drawn reasonable inferences based on substantial evidence.” *Turner Broad. Sys.,*
 19 *Inc. v. FCC*, 512 U.S. 622, 666 (1994) (plurality). Substantial evidence can take many forms:
 20 “history, consensus, and simple common sense,” *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 628
 21 (1995) (quotation marks omitted); *Drake v. Filko*, 724 F.3d 426, 438 (3d Cir. 2013); correlational
 22 evidence, *see United States v. Carter*, 750 F.3d 462, 469 (4th Cir. 2014); and intuition, *Williams-*
 23 *Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015). Section 32310 easily passes scrutiny under this
 24 framework.

25 The government has important interests in promoting public safety and preventing crime
 26 and gun violence. *See, e.g., Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 768 (1994);
 27 *Fyock*, 779 F.3d at 1000; *Chovan*, at 1135. Section 32310 furthers these interests by eliminating
 28 a particularly lethal subset of magazines, LCMS, that are designed to cause greater fatalities and

1 injuries and are disproportionately used in mass shootings and the killing of law enforcement
2 officers. *Fyock*, 779 F.3d at 1000. (Gordon Decl., Ex. 34.) LCMs holding more than 10 rounds
3 of ammunition—in some cases up to 100 rounds—allow shooters to inflict mass casualties by
4 continuously firing bullets without pausing to reload. Despite Plaintiffs’ contention that there is
5 no evidence of a causal connection between LCMs and gun crime (Mem at 17),¹¹ LCMs are the
6 thread linking numerous recent high-fatality gun massacres, including the 2012 Aurora movie
7 theater shooting, where a gunman shot 70 people in ten minutes; the 2012 Sandy Hook
8 Elementary shooting, where a gunman fired 154 rounds, killing 26 children and teachers, in under
9 five minutes; the 2015 San Bernardino shooting, where assailants shot 36 people in four minutes;
10 and the 2016 Orlando nightclub shooting, where a gunman shot over 100 people and killed 49.
11 (Webster Decl., ¶ 10; Allen Decl., tbl. 1.) While Plaintiffs argue that it is “the desire to kill” and
12 not LCMs that are the cause of these mass shootings (Mem. at 18), the fact remains that those
13 who are determined to kill as many innocent victims as possible overwhelmingly employ LCMs in
14 order to realize their “lethal intent.” (See Donohue Decl. ¶ 29; Graham Decl. ¶ 19; Gordon Decl.,
15 Exs. 9-11, 22.)

16 In addition to common sense, which suggests that the most effective way to eliminate the
17 threat of death, injury, and destruction caused by LCMs is to prohibit their use, the evidence
18 shows that banning possession of LCMs has the greatest potential to “prevent and limit shootings
19 in the state over the long run.” *NYSRPA*, 804 F.3d at 264. A reduction in the number of LCMs in
20 circulation will reduce the number of crimes in which LCMS are used and reduce the lethality

21
22 ¹¹ Plaintiffs’ related contention that there is no evidence linking “grandfathered, pre-ban
23 large capacity magazines and mass shootings” (Mem. at 17) is both unsupported by competent
24 evidence and irrelevant. Existing law, which allowed for possession of grandfathered LCMs was
25 extremely difficult to enforce. Because LCMs lack identifying marks to indicate when they were
26 manufactured or sold, grandfathering meant that police officers who came upon LCMs could not
27 determine whether they were legally obtained. The Los Angeles County Sheriff’s Department has
28 explained that the state’s LCM “law is difficult to enforce since the date of acquisition is nearly
impossible to prove,” and magazines “acquired before the ban, or illegally purchased in other
states since the ban, are usually indistinguishable. A ban on the possession of high capacity
magazines will help address this issue.” (Gordon Decl., Ex. 62.) Reflecting the sheer difficulty
of enforcement, the Los Angeles Police Department continued to recover drastically *larger*
numbers of crime guns loaded with LCMs in the years after the enactment of the 2000
restrictions, suggesting the law was not having its intended effect. (*Id.*, Ex. 63)

1 and devastation of gun crime when it does occur. (Webster Decl., ¶¶ 24-26; Donohue Decl.,
2 ¶¶ 9-10, 36; James Decl., ¶¶ 6-9, Ex. A.)

3 The only comprehensive study of the effect of the federal ban on LCMs demonstrates that
4 the ban reduced the use of LCMs in gun crimes and that it would have had an even more
5 substantial impact had it not been allowed to expire in 2004. (Webster Decl., ¶¶ 17-24; Gordon
6 Decl., Ex. 6 at ¶¶ 7-50, 66, 74-75.) While the use of LCMs initially increased after the federal
7 ban went into effect, due in large part to a massive stock of grandfathered and imported
8 magazines not covered by federal law, LCM use in crime appeared to be decreasing by the early
9 2000s. (Webster Decl., ¶ 19; Gordon Decl., Ex. 58 at ¶¶ 54-63, 78-88.) A later investigation by
10 the *Washington Post*, using more current data on the use of LCMs in crime in Virginia, confirmed
11 that between 1994 and 2004, the period the federal ban was in effect, that gun crimes using LCMs
12 declined by roughly 31 to 41 percent. This investigation also determined that once the federal
13 ban expired, crimes with LCMs more than doubled. (Gordon Decl., Exs. 18, 19 & 58 at ¶¶ 57, 74,
14 81; Webster Decl., ¶¶ 19, 23.) Section 32310, which is far more robust than the federal ban, can
15 reasonably be expected to be more effective in reducing LCM use. (Webster Decl., ¶ 26; Gordon
16 Decl., Exs. 6 at ¶¶ 51-57 & 58 at ¶¶ 69-77; James Decl., ¶ 9.)

17 Experience also indicates that because shooters limited to ten-round magazines must reload
18 more frequently, the prohibition of LCMs helps create a “critical pause” that has been proven to
19 give potential victims an opportunity to hide, escape, or disable a shooter. *Colorado Outfitters*,
20 24 F. Supp. 3d at 1072-73. (Donohue Decl., ¶ 21; Gordon Decl., Exs. 14, 30.) Moreover, the
21 “two or three second pause during which a criminal reloads his firearm can be of critical benefit
22 to law enforcement.” *Heller II*, 670 F.3d at 1264. (Gordon Decl., Ex. 54.) For example, eleven
23 children at Sandy Hook Elementary School were able to escape while the shooter reloaded his 30-
24 round LCM. (Donohue Decl., ¶ 21; *see id.* (noting that citizens have subdued a perpetrator
25 stopping to reload his weapon in at least 20 different shootings in the United States since
26 1991).)¹² Further, it will limit damage caused by civilians indiscriminately firing more rounds

27 _____
28 ¹² For example, in the 2013 massacre at Washington Navy Yard, a man with a seven-shell
(continued...)

1 than necessary, thereby endangering themselves and bystanders. *Kolbe v. O'Malley*, 42 F. Supp.
2 3d 768, 795-96 (D. Md. 2014). (Gordon Decl., Ex. 61 at 16.)

3 Accordingly, substantial evidence demonstrates that there is “reasonable fit” between
4 Section 32310 and the State’s important interests. *Chovan*, 735 F.3d at 1139. Section 32310
5 prohibits possession of LCMs while allowing people to have as many magazines containing 10
6 rounds or fewer as they wish. Even assuming that it “could have been drawn more narrowly,
7 because the burden [is] minimal and intermediate scrutiny does not require the least restrictive
8 means,” the law is constitutional. *Bauer v. Becerra*, No. 15-15428, 2017 WL 2367988, at *6 (9th
9 Cir. June 1, 2017) (citing *Jackson*, 746 F.3d at 967).¹³ Plaintiffs thus have not demonstrated a
10 likelihood of success on their Second Amendment claim.

11 2. Takings.

12 Plaintiffs’ takings claim fares no better. The Takings Clause of the Fifth Amendment,
13 made applicable to the states through the Fourteenth Amendment, provides that private property
14 shall not “be taken for public use, without just compensation.” *Lingle v. Chevron U.S.A., Inc.*,
15 544 U.S. 528, 536 (2005). Its purpose is to prohibit “[g]overnment from forcing some people

16 _____
17 (...continued)

18 shotgun killed twelve people, but while he reloaded, a victim he had cornered was able to crawl to
19 safety. In 2014, a gunman at Seattle Pacific University was tackled while he reloaded his shotgun.
20 Other examples abound. (E.g., John Wilkens, *Construction Workers Felt They ‘Had To Do
21 Something,’* SAN DIEGO UNION-TRIBUNE, Oct. 11, 2010,
22 [http://www.sandiegouniontribune.com/sdut-hailed-as-heroes-construction-workers-who-stopped-
2010oct11-htmlstory.html](http://www.sandiegouniontribune.com/sdut-hailed-as-heroes-construction-workers-who-stopped-2010oct11-htmlstory.html) (after gunman wounded two students, “workers chased after him as he
21 stopped to reload, knocked him” down “and held him until police arrived”); *Deer Creek Middle
22 School Shooting: At Least Two Shot in Incident in Littleton, Colorado*, HUFFINGTON POST, Apr.
23 25, 2010, http://www.huffingtonpost.com/2010/02/23/deer-creek-middle-school_n_473943.html
24 (math teacher “tackled the suspect as he was trying to reload his weapon”); Shaila Dewan, *Hatred
23 Said to Motivate Tenn. Shooter*, N.Y. TIMES, Jul. 28, 2008,
24 <http://www.nytimes.com/2008/07/28/us/28shooting.html> (“It was when the man paused to reload
that several congregants ran to stop him.”).)

25 ¹³ While Plaintiffs dispute the efficacy of Section 32310, even if any of their supposition
26 regarding the behavior of mass-shooters were valid and not contradicted by empirical evidence
27 (see, e.g., Gordon Decl., Ex. 34; Allen Decl., ¶¶ 11-16; Webster Decl., ¶¶ 13-16), some
28 disagreement regarding the utility of the ban on LCM possession would not prevent Section
32310 from surviving intermediate scrutiny. See *Turner*, 512 U.S. at 666; *Fyock*, 779 F.3d at
1001-01; *Kashalsky v. County of Westchester*, 701 F.3d 81, 99 (2d Cir. 2012).

1 alone to bear public burdens which, in all fairness and justice, should be borne by the public as a
2 whole.” *Penn Central Transp. Co. v. City of N.Y.*, 438 U.S. 104, 123 (1978) (internal quotations
3 and citations omitted). Although a taking often occurs when the government physically invades
4 or confiscates property, the Supreme Court has recognized that economic regulation may also
5 effect a taking if it “goes too far.” *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).
6 Government regulation that “completely deprives an owner of all economically beneficial use of
7 her property” is generally deemed to be a taking compensable under the Fifth Amendment.
8 *Lingle*, 544 U.S. at 528.

9 **a. Section 32310 Is Not a Physical Taking.**

10 Plaintiffs argue that Section 32310 is a physical taking because it compels the physical
11 appropriation of property. (Mem. at 24-28.) Plaintiffs reason that because they claim that there is
12 no market for selling LCMs to a licensed firearms dealer and storing LCMs out of state is
13 “unrealistic,” the only option left for all LCM owners is to surrender their LCMs to law
14 enforcement for destruction and thus, they are entitled to compensation. (*Id.* at 24-25 (citing
15 § 32310(d)).)¹⁴ Even overlooking the complete lack of cognizable evidentiary support for this
16 argument, Section 32310 still does not amount to a physical taking. In a physical taking, the
17 government exercises its eminent domain power to take private property for “public use.” *See*
18 *Lingle*, 544 U.S. at 536; *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1034 (9th Cir. 2000).
19 By contrast, where, as here, the government acts pursuant to its police power to protect the safety,
20 health, and general welfare of the public, a prohibition on possession of property declared to be a
21 public nuisance is not a physical taking. *See Chi., B. & Q. R. Co. v. Illinois*, 200 U.S. 561, 593-
22 594 (1906) (“It has always been held that the legislature may make police regulations, although
23 they may interfere with the full enjoyment of private property and though no compensation is
24 given.”); *Akins v. United States*, 82 Fed. Cl. 619, 622 (2008) (“Property seized and retained
25 pursuant to the police power is not taken for a ‘public use’ in the context of the Takings
26 Clause.”); *see also Everard’s Breweries v. Day*, 265 U.S. 545, 563 (1924); *Mugler v. Kansas*, 123

27 ¹⁴ Although Plaintiffs do not address this, they may also modify an LCM to accept ten
28 rounds or less to comply with the law. § 16740.

1 U.S. 623, 668-69 (1887). Recognizing this distinction, a number of courts have rejected Takings
2 Clause challenges to laws banning the possession of dangerous weapons. *See Akins*, 82 Fed. Cl.
3 at 623-24 (restrictions on sale and possession of machine guns not a taking); *Fesjian v. Jefferson*,
4 399 A.2d 861 (D.C. Ct. App. 1979) (ban on machine guns not a taking); *cf. Gun South, Inc. v.*
5 *Brady*, 877 F.2d 858, 869 (11th Cir. 1989) (suspension on importation of assault weapons not a
6 taking).¹⁵

7 In contrast to the cases cited by plaintiffs (*see* Mem. at 27), Section 32310 is not an exercise
8 of the eminent domain power and does not involve the government acquiring LCMs for public
9 use or forcing the sale of property to a government designee to use for a public purpose. *See*
10 *Dore v. United States*, 97 F. Supp. 239, 242 (Ct. Cl. 1951) (rice milling companies' forced sales
11 of rice to the government for public use in compliance with government orders, made in exercise
12 of wartime powers, constituted taking of rice for public use, so as to entitle companies to just
13 compensation under Fifth Amendment); *Edward P. Stahel & Co. v. United States*, 78 F. Supp.
14 800 (Ct. Cl. 1948) (priority order of October 16, 1941, made by War Production Board requiring
15 owners of silk to fill orders of contractors having contracts with government for manufacture of
16 parachutes and orders of Defense Supplies Corporation constituted a taking of property for public
17 use).

18 Regardless of how Plaintiffs choose to divest themselves of an LCM in accordance with
19 Section 32310, the purpose of the statute is to remove LCMs from circulation, not to transfer title
20 to the government or an agent of the government for use in service of the public good.

21 Accordingly, it does not affect a physical taking.

22 **b. Section 32310 Is Not a Regulatory Taking.**

23 In addition to the reasons discussed above as to why this regulation is not a "taking" at all,
24 *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-1028, Plaintiffs' argument

25 ¹⁵ Plaintiffs' argument that after the Supreme Court's decision in *Heller*, the regulation of
26 LCMs is not a valid exercise of police power (Mem. at 31-35) is unfounded. While *Heller*
27 recognizes a core Second Amendment right of individuals to possess an operable handgun in the
28 home for self-defense, the Court affirmed the longstanding police power of the States to enact
reasonable gun regulations. *Heller*, 554 U.S. at 626-29; *McDonald*, 561 U.S. at 785.

1 that Section 32310 is a regulatory taking also fails. As Plaintiffs acknowledge, until July 1, 2017,
 2 they are able to protect or realize the economic value of their LCMs by storing them out-of-state
 3 or selling them to a licensed firearms dealer.¹⁶ See § 32310(d). It is also possible and relatively
 4 easy to modify an LCM so it can only accept a maximum of ten rounds. Gordon Decl., Ex. 7
 5 at 5-6. Accordingly, Section 32310 does not deprive plaintiffs of all economically beneficial uses
 6 of their property and thus plaintiffs cannot succeed on a regulatory taking claim.¹⁷ See *Lucas*,
 7 505 U.S. at 1019; *Chevron USA*, 224 F.3d at 1041-42.¹⁸

8 3. Vagueness.

9 Plaintiffs' claim that Section 32310 is "unconstitutionally vague on its face and as applied
 10 to Plaintiffs" (Mem. at 43) fails as a matter of law. Where a plaintiff's constitutional challenge to
 11 a statute does not involve the First Amendment (as is the case here), the Court "do[es] not
 12 consider whether the statute is unconstitutional on its face," but rather "whether the [statute] is
 13 impermissibly vague *in the circumstances of this case.*" *United States v. Purdy*, 264 F.3d 809,
 14 811 (9th Cir. 2001) (quoting *United States v. Ocegueda*, 564 F.2d 1363, 1365 (9th Cir. 1977); see
 15 also *Nichols v. Harris*, 17 F. Supp. 989, 1012 (C.D. Cal. 2014) (rejecting plaintiff's facial

16 _____
 17 ¹⁶ It is unclear how much value Plaintiffs' LCMs, all of which were acquired before 2000,
 18 still have. (See Mem. at 38; Declaration of Youngman ("Youngman Decl."), ¶ 10 (Dkt. No. 28-
 19 2).) Relatedly, while Plaintiffs cite *Penn Central Transp. Co. v. City of N.Y.*, 438 U.S. 104, even
 20 assuming that analyzing the ban on LCMs under the *Penn Central* factors, there are insufficient
 21 facts about the effect of Section 32310 to do so. A "court cannot determine whether a regulation
 22 goes 'too far' [so as to constitute a taking] unless it knows how far the regulation goes."
 23 *Palazzolo v. Rhode Island*, 533 U.S. 606, 622 (2001).

24 ¹⁷ Plaintiffs mistakenly rely on cases such as *Andrus v. Allard*, 444 U.S. 51 (1979), in
 25 support of their argument that Section 32310 is a regulatory taking. *Andrus* involved the
 26 prohibition on commercial transactions of eagle feathers. In determining that the prohibition was
 27 not a taking, the Court stated that although the law did prevent the most profitable use of
 28 plaintiffs' property, because they could continue to possess the artifacts, they had not been
 29 deprived of all economic benefit. 444 U.S. at 66-67. Nothing in *Andrus* suggests that a ban on
 30 possession is a per se taking. Further, and as discussed herein, Section 32310 does not deprive
 31 plaintiffs of all economic benefit of their LCMs.

32 ¹⁸ To the extent that Plaintiffs suggest that Section 32310 is a taking because it is
 33 "retroactive," this argument is baseless. Section 32310 is not retroactive, as it does not punish
 34 individuals for the past possession of LCMs. Rather, the law imposes criminal penalties only
 35 upon those individuals that possess LCMs *on or after* July 1, 2017. § 32310 (c), (d). Thus,
 36 Section 32310 does not "alter[] the legal consequences of acts completed before its effective
 37 date," *Chang v. United States*, 327 F.3d 911, 920 (9th Cir. 2003).

1 challenge to California’s open carry regulations on vagueness grounds because “facial challenges
2 on the ground of unconstitutional vagueness that do not involve the First Amendment are not
3 cognizable.” (citation omitted), *appeal docketed*, No. 14-55873 (9th Cir. May 29, 2014).
4 Because this case does not involve the First Amendment, Plaintiffs cannot assert a facial
5 challenge to Section 32310 on vagueness grounds.

6 Even if a vagueness claim could be made in this case, Section 32310 is not
7 unconstitutionally vague or ambiguous. Plaintiffs contend that Section 32310 is
8 “unconstitutionally vague to the point of being downright confusing and nonsensical.” There is
9 no merit to this argument. “What renders a statute vague is not the possibility that it will be
10 difficult to determine whether the incriminating fact it establishes has been proved; but rather the
11 indeterminacy of precisely what that fact is.” *United States v. Williams*, 553 U.S. 285, 306 (2008);
12 *see also Hill v. Colorado*, 530 U.S. 703, 732 (2000) (“[S]peculation about possible vagueness in
13 hypothetical situations not before [the Court] will not support a facial attack on a statute when it is
14 surely valid in the vast majority of its intended applications.”); *Cal. Teachers Ass’n v. State Bd. of*
15 *Educ.*, 271 F.3d 1141, 1151 (9th Cir. 2001) (“Even when a law implicates First Amendment
16 rights, the constitution must tolerate a certain amount of vagueness.”).

17 The regulatory ambit of Section 32310 is clear: it prohibits the possession of LCMs, which
18 are defined as “any ammunition feeding device with the capacity to accept more than 10 rounds,
19 but shall not be construed to include any of the following: (a) A feeding device that has been
20 permanently altered so that it cannot accommodate more than 10 rounds. (b) A .22 caliber tube
21 ammunition feeding device. (c) A tubular magazine that is contained in a lever-action firearm.”
22 § 16740. There is nothing ambiguous about this statute, and, in the particulars of this case,
23 Plaintiffs do not argue that there is any uncertainty as to the application of the statute to their
24 LCMs. To the contrary, they admit that they are in possession of LCMs that are subject to
25 Section 32310. (*See, e.g., Declaration of William M. Wiese Jr.* (Dkt. No. 28-6) ¶ 3 (“I have
26 legally owned large-capacity magazines, *as that term is defined by statute.*” (emphasis added)).)

27 Plaintiffs also argue that Section 32310 is unconstitutionally vague due to some
28 inconsistencies between SB 1446 and Proposition 63. (Mem. at 41-42.) Any inconsistencies

1 between the two measures is of no moment. The amendments of Proposition 63 take precedence
2 over those contained in SB 1446 because Proposition 63 was enacted by the people of California
3 after the enactment of SB 1446. *See Hawaii v. Trump*, ___ F.3d ___, 2017 WL 2529640, at *20
4 (9th Cir. June 12, 2017) (“[A] later enacted, more specific statute generally governs over an
5 earlier, more general one.” (citation omitted)). Here, SB 1446 was enacted in July 2016 with an
6 effective date of January 1, 2017. Proposition 63 was enacted several months later, on November
7 8, 2016, effective the next day, and contained several changes to SB 1446, including enhanced
8 penalties for violation of the statute. Accordingly, Section 32310, as amended by Proposition 63
9 (and not SB 1446), is controlling and there can be no confusion as to what is required of Plaintiffs
10 on July 1, 2017.

11 The statute is not void for vagueness and Plaintiffs’ vagueness claim cannot provide the
12 basis for injunctive relief.

13 4. Overbreadth.

14 As with each of their other claims, Plaintiffs’ overbreadth claim fails. (*See Mem.* at 43-44.)
15 As a threshold matter, the overbreadth doctrine simply does not apply outside of the First
16 Amendment context and, thus, is inapplicable in this case. *See, e.g., United States v. Salerno*, 481
17 U.S. 739, 745 (1987) (“[W]e have not recognized an ‘overbreadth’ doctrine outside the limited
18 context of the First Amendment.” (citation omitted)); *Kachalsky v. Cnty. of Westchester*, 701 F.3d
19 81, 101 (2d Cir. 2012) (“Overbreadth challenges are generally limited to the First Amendment
20 context.” (citing *Salerno*, 481 U.S. at 745)); *United States v. Chester*, 628 F.3d 673, 688 (4th Cir.
21 2010) (“[I]mporting the over-breadth doctrine . . . into the Second Amendment context would be
22 inappropriate.”). And even in the First Amendment context, overbreadth doctrine has been
23 recognized as “strong medicine” and is employed by the courts “with hesitation.” *New York v.*
24 *Ferber*, 458 U.S. 747, 769 (1982). Because overbreadth doctrine does not apply in the Second
25 Amendment context, Plaintiffs cannot state a claim that Section 32310 is unconstitutionally
26 overbroad.

27 Moreover, even if the doctrine were applicable in this case, Plaintiffs overbreadth claim
28 would still fail. A statute is unconstitutionally overbroad only when it infringes upon or would

1 have the tendency to chill constitutionally protected activity. *Members of City Council of L.A. v.*
 2 *Taxpayers for Vincent*, 466 U.S. 789, 800-01 (1984) (“There must be a realistic danger that the
 3 statute itself will significantly compromise recognized First Amendment protections . . . for it to
 4 be facially challenged on overbreadth grounds.”). Plaintiffs contend that Section 32310 is
 5 overbroad because it “would deprive countless responsible owners of their *constitutionally-*
 6 *protected rights.*” (*Id.* at 44 (emphasis added).) But this claim assumes the conclusion—that
 7 depriving owners of their LCMs would violate their constitutional rights. Plaintiffs have failed to
 8 establish any such constitutional violation. (*See supra* Section II.A.1-3.) Because Plaintiffs’
 9 overbreadth claim is contingent on the unconstitutionality of Section 32310, and because they
 10 have failed to demonstrate any other constitutional violation in the enforcement of Section 32310,
 11 even if overbreadth were applicable in the context of the Second Amendment, Plaintiffs’
 12 overbreadth claim is groundless.¹⁹

13 **B. Plaintiffs Have Failed to Demonstrate Either Irreparable Injury or that**
 14 **the Balance of Hardships and the Public Interest Weigh in Favor of**
 15 **Injunctive Relief.**

16 Aside from claiming that they will not longer have possession of their LCMs, Plaintiffs fail
 17 to articulate any *irreparable* injury if a TRO is not issued. As a threshold matter, because their
 18 constitutional claims fail (*see supra* Section II.A), plaintiffs cannot demonstrate that they will be
 19 injured, let alone irreparably so, in the absence of an injunction. *See Goldie’s Bookstore, Inc. v.*
 20 *Superior Ct.*, 739 F.2d 466, 472 (9th Cir. 1984); *Fyock*, 25 F. Supp. 3d at 1282. (*See also* Mem.
 21 at 19 (noting that irreparable harm is “inseparably linked to the likelihood of success on the
 22 merits” (citation omitted)).) Plaintiffs have not established that having to use lower-capacity
 23 magazines instead of LCMs qualifies as irreparable harm. *See S.F. Veteran Police Officers Ass’n*,
 24 18 F. Supp. 3d at 1005.²⁰

25 ¹⁹ Plaintiffs contend that they are law-abiding citizens and that “[t]here is simply no
 26 evidence any of *these* magazines or any of their owners have ever been involved in mass
 27 shootings, gun crimes, or in anything other than purely lawful activities.” (Mem. at 44 (emphasis
 28 in original).) Even so, the State is not precluded from prohibiting LCMs that may be used in
 criminal activity, or fall into the wrong hands, in the future.

²⁰ Plaintiffs have not established that their LCMs—which were all acquired before 2000—
 would be more effective than standard magazines for self-defense purposes. (Youngman Decl., ¶
 (continued...))

1 Any claim of irreparable injury in this case is further undermined by Plaintiffs' delays in
2 seeking injunctive relief in this case. Plaintiffs waited for more than seven months to seek
3 injunctive relief, and less than three weeks before the enforcement date of Section 32310. (*See*
4 *supra* Section I.) If Plaintiffs' purported injuries were so serious, they should have sought
5 injunctive relief at a much earlier date. Plaintiffs' own delay in seeking injunctive relief
6 "contradicts [their] allegations of irreparable injury and [the Court] may deny the motion solely
7 on [this] ground." L.R. 231(b); *see also See Boutros v. Tan*, No. 13-cv-01306, 2013 WL
8 3338660, at *2 (E.D. Cal. July 2, 2013) (noting that the plaintiff's "delay of nearly six months
9 constitutes an 'undue delay' under Local Rule 231(b)" because plaintiff's delay in seeking
10 injunctive relief "contradicts Plaintiff's claims that Plaintiff will be irreparably injured if a [TRO]
11 does not issue"); *Occupy Sacramento v. City of Sacramento*, No. 11-cv-02873, 2011 WL
12 5374748, at *4 (E.D. Cal. Nov. 4, 2011) (noting that plaintiffs' 25-day delay in seeking injunctive
13 relief "tends to undermine their claim that the extraordinary remedy of a TRO is warranted").

14 Ultimately, plaintiffs have not established, and cannot establish, harm sufficient to
15 outweigh the fact that "[a]ny time a State is enjoined by a court from effectuating statutes enacted
16 by representatives of its people, [the State] suffers a form of irreparable injury." *Maryland v.*
17 *King*, 133 S. Ct. 1, 2 (2012) (quotation and citation omitted). Plaintiffs cannot show that having
18 to use magazines containing ten rounds outweighs the grievous injuries and deaths caused to
19 innocent civilians and law enforcement by LCMs. Nor can they demonstrate that it is in the
20 public interest to enjoin a duly-enacted law designed to protect the public safety and reduce gun
21 violence and gun-related crime. *See Tracy Rifle and Pistol LLC v. Harris*, 118 F. Supp. 3d 1182,
22 1193-94 (E.D. Cal. 2015); *see also Fed. Trade Comm'n v. Affordable Media, LLC*, 179 F.3d
23 1228, 1236 (9th Cir. 1999). Accordingly, in addition to Plaintiffs' failure to demonstrate a

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26 _____
27 (...continued)

28 10 (stating that older LCMs "may suffer from defects such as worn springs, followers and feed
lips, which may greatly impair their reliability."))

1 likelihood of success on the merits as to their claims, the law, the balance of hardships, and the
2 public interest all weigh decisively against injunctive relief.²¹

3 **III. PLAINTIFFS' REQUEST FOR A BRIEFING AND HEARING SCHEDULE ON SHORTENED**
4 **TIME FOR THEIR MOTION FOR A PRELIMINARY INJUNCTION SHOULD BE DENIED.**

5 In addition to a TRO, Plaintiffs request an accelerated briefing and hearing schedule on their
6 motion for a preliminary injunction. (Notice of Mot. at 2 (Dkt. No. 28); Proposed Order at 2-3
7 (Dkt. No. 28-14).) Although not explicitly styled as an ex parte request for shortened time on the
8 motion for a preliminary injunction, Plaintiffs' TRO Motion seeks to, *inter alia*, set a briefing
9 schedule and hearing date no later than June 30, 2017. To receive ex parte relief, however,
10 Plaintiffs must show that they are "without fault in creating the crisis that requires ex parte relief,
11 or that the crisis occurred as a result of excusable neglect." *Mission Power Engineering, Co. v.*
12 *Continental Casualty Co.*, 883 F. Supp. 488, 492 (C.D. Cal. 1995). Under Local Rule 144(e), any
13 ex parte application to shorten time "will not be granted except upon affidavit of counsel showing
14 a satisfactory explanation for the need for the issuance of such an order and for the failure of
15 counsel to obtain a stipulation for the issuance of such an order from other counsel or parties in
16 the action." Similarly, pursuant to this Court's procedures, any applicant for ex parte relief must
17 submit "an affidavit indicating a satisfactory explanation for the following: 1) the need for the
18 issuance of such an order; 2) the failure of the filer to obtain a stipulation for the issuance of such
19 an order from other counsel or parties in the action, [and] 3) why such request cannot be noticed
20 on the court's motion calendar pursuant to Local Rule 230."

21 Plaintiffs' moving papers fail to disclose sufficient good cause for shortening time on the
22 motion for a preliminary injunction. *See* Fed. R. Civ. P. 6(c)(1)(C) (requiring a showing of "good
23 cause" for shortening time). Plaintiffs are not entitled to an order shortening time based on their
24 own delays in seeking injunctive relief. (*See supra* Section I.) Moreover, Plaintiffs' ex parte

25 ²¹ Plaintiffs also claim that they have raised "serious questions" concerning the merits of
26 their claims. (Mem. at 20-21). They have not done so. (*See supra* Section II.A.) Given the
27 universal rejection of Plaintiffs' arguments by all courts to have considered LCM bans, including
28 the Ninth Circuit, Plaintiffs have not raised "serious questions" about the constitutionality of
Section 32310, and, in any event, the balance of the hardships weigh strongly against injunctive
relief.

1 request for a highly compressed briefing and hearing schedule would severely prejudice
2 Defendants' ability to review the voluminous materials submitted in support of the motion for a
3 preliminary injunction and adequately prepare an opposition. Any claim of good cause is further
4 undermined here by the parallel litigation in *Duncan v. Becerra*, which is currently pending
5 before the Honorable Roger T. Benitez in the United States District Court for the Southern
6 District of California (Case No. 17-cv-1017-BEN-JLB). As noted in the Supplemental
7 Declaration of George M. Lee ("Lee Supp. Decl.") (Dkt. No. 25), filed in conjunction with
8 Plaintiffs' initial motion for a TRO, the plaintiffs in that action are "seeking substantially similar
9 relief" (Lee Supp. Decl. ¶ 3), and the hearing on plaintiffs' motion for a preliminary injunction
10 has already occurred. Even if the motion for a preliminary injunction in this case is heard on a
11 normal briefing and hearing schedule, another court will likely rule on the propriety of enjoining
12 enforcement of Section 32310 prior to the July 1, 2017 enforcement date.²²

13 The Court should deny this ex parte request for lack of good cause and set the matter for
14 hearing at least 28 days following the filing of the TRO Motion (July 12, 2017), with the parties'
15 respective briefing deadlines being governed by Local Rule 230(c) and (d). The Court should not
16 delay enforcement of this vital public safety measure simply because Plaintiffs sat on their rights
17 and waited until the eve of the statute's enforcement date to pursue injunctive relief. In the event
18 that the Court is inclined to hear the motion for a preliminary injunction on an expedited basis,
19 however, Defendants request that the hearing be set for June 30, 2017, with Defendants'
20 opposition being due four days prior to the hearing.

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25 ²² As Mr. Lee correctly observed, depending on the outcome of *Duncan*, it may not be
26 necessary to schedule a hearing on Plaintiffs' motion for a preliminary injunction. And even if
27 the plaintiffs in *Duncan* do not prevail, the only purpose an expedited hearing in this matter
28 would serve is to give Plaintiffs the opportunity to have a different judge potentially enjoin the
statute. Nothing prevented Plaintiffs from seeking injunctive relief, and scheduling a hearing
before this Court, long before the *Duncan* litigation even commenced. (*See supra* Section I.)

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CONCLUSION

For the foregoing reasons, Plaintiffs' TRO Motion should be denied.

Dated: June 16, 2017

Respectfully submitted,

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TAMAR PACTER
Supervising Deputy Attorney General
ALEXANDRA ROBERT GORDON
Deputy Attorney General

s/ John D. Echeverria
JOHN D. ECHEVERRIA
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CERTIFICATE OF SERVICE

Case Name: **Wiese, William, et al. v.** No. **2:17-cv-00903-WBS-KJN**
Xavier Becerra, et al.

I hereby certify that on June 15, 2017, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**DEFENDANTS' OPPOSITION TO RENEWED MOTION FOR TEMPORARY
RESTRAINING ORDER AND ISSUANCE OF PRELIMINARY INJUNCTION**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 15, 2017, at San Francisco, California.

N. Newlin
Declarant

/s/ N. Newlin
Signature