

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendant.

Case No.: 3:17-cv-1017-BEN

**ORDER GRANTING
PRELIMINARY INJUNCTION**

I. INTRODUCTION

On July 1, 2017, any previously law-abiding person in California who still possesses a firearm magazine capable of holding more than 10 rounds will begin their new life of crime. That is because California Penal Code § 32310 was amended last fall by the passage of a California ballot initiative, Proposition 63. With this change, § 32310(c) requires persons who lawfully possess these magazines today to *dispossess*

1
2 them or face criminal penalties of up to one year in a county jail and a fine of \$100 per
3 magazine, or both.¹ Section 32310(d) provides three options for dispossession. First, a
4 person may “remove the large-capacity magazine from the State.” § 32310(d)(1).
5
6 Second, a person may “sell the large-capacity magazine to a licensed firearm dealer.”
7 § 32310(d)(2). Third, a person may “surrender the large-capacity magazine to a law
8 enforcement agency for destruction.” § 32310(d)(3). Naturally, there are statutory
9
10 exceptions for some individuals such as active and retired law enforcement officers

11 ¹The full text of § 32310 as amended by Proposition 63 is as follows:

12 § 32310. Prohibition on manufacture, import, sale, gift, loan, purchase, receipt, or
13 possession of large-capacity magazines; punishment

14 (a) Except as provided in Article 2 (commencing with Section 32400) of this chapter and
15 in Chapter 1 (commencing with Section 17700) of Division 2 of Title 2, any person in
16 this state who manufactures or causes to be manufactured, imports into the state, keeps
17 for sale, or offers or exposes for sale, or who gives, lends, buys, or receives any large-
18 capacity magazine is punishable by imprisonment in a county jail not exceeding one year
19 or imprisonment pursuant to subdivision (h) of Section 1170.

20 (b) For purposes of this section, “manufacturing” includes both fabricating a magazine
21 and assembling a magazine from a combination of parts, including, but not limited to, the
22 body, spring, follower, and floor plate or end plate, to be a fully functioning large-
23 capacity magazine.

24 (c) Except as provided in Article 2 (commencing with Section 32400) of this chapter and
25 in Chapter 1 (commencing with Section 17700) of Division 2 of Title 2, commencing
26 July 1, 2017, any person in this state who possesses any large-capacity magazine,
27 regardless of the date the magazine was acquired, is guilty of an infraction punishable by
28 a fine not to exceed one hundred dollars (\$100) per large-capacity magazine, or is guilty
of a misdemeanor punishable by a fine not to exceed one hundred dollars (\$100) per
large-capacity magazine, by imprisonment in a county jail not to exceed one year, or by
both that fine and imprisonment.

(d) Any person who may not lawfully possess a large-capacity magazine commencing
July 1, 2017 shall, prior to July 1, 2017:

- (1) Remove the large-capacity magazine from the state;
- (2) Sell the large-capacity magazine to a licensed firearms dealer; or
- (3) Surrender the large-capacity magazine to a law enforcement agency for
destruction.

1
2 (§§ 32400, 32405, and § 32406). There are also exceptions for employees of armored
3 vehicle businesses (§ 32435) and for movie and television actors when magazines are
4 used as a prop (§ 32445). While there are other exceptions for licensed firearm dealers,
5 manufacturers, and gunsmiths, there are no exceptions made for members of the Armed
6 Forces, or those honorably discharged or retired. Likewise, there are no exceptions for
7 civilian firearms instructors, concealed weapon permit holders, or families who live far
8 from timely help by local law enforcement agencies and who must be self-reliant for their
9 own defense, defense of their families, or of home and property. Finally, there are no
10 exceptions made for citizens who, should the need ever arise, may be called upon to form
11 a militia for the protection of the state from either foreign or domestic enemies.
12
13
14

15 **A. Complexity**

16 California's gun laws are complicated. *See Peruta v. County of San Diego*, 824
17 F.3d 919, 925 (9th Cir. 2016) (*en banc*), *cert. denied*, 2017 WL 176580 (June 26, 2017)
18 (“California has a multifaceted statutory scheme regulating firearms.”). Proposition 63
19 adds one more layer of complexity. Perhaps too much complexity. *See id.* at 953
20 (Callahan, J., dissenting) (“The counties and California have chipped away at the
21 Plaintiffs’ right to bear arms by enacting first a concealed weapons licensing scheme that
22 is tantamount to a complete ban on concealed weapons, and then by enacting an open
23 carry ban. Constitutional rights would become meaningless if states could obliterate
24 them by enacting incrementally more burdensome restrictions while arguing that a
25 reviewing court must evaluate each restriction by itself when determining
26
27
28

1
2 constitutionality.”). In California, the State has enacted, over the span of two decades, an
3 incrementally more burdensome web of restrictions on the rights of law-abiding
4 responsible gun owners to buy, borrow, acquire, modify, use, or possess ammunition
5 magazines able to hold more than 10 rounds. The language used, the internally-
6 referenced provisions, the interplay among them, and the plethora of other gun
7 regulations, have made the State’s magazine laws difficult to understand for all but the
8 most learned experts. *See e.g.*, Cal. Pen. Code § 32310(a) (criminalizing manufacturing,
9 importing, keeping for sale, offering for sale, giving, lending, buying or receiving a large
10 capacity magazine while excepting “as provided in Article 2 (commencing with Section
11 32400) of this chapter and in Chapter 1 (commencing with Section 17700) of Division 2
12 of Title 2”); § 32310(b) (defining “manufacturing” as fabricating or assembling a
13 magazine from a combination of parts); § 32415(b) (§ 32310 prohibition on lending does
14 not apply to the loan when it “occurs at a place or location where the possession of the
15 large capacity magazine remains in the accessible vicinity of the person to whom the
16 large capacity magazine is loaned”); § 32406(b) (excepting museums and institutional
17 collections open to the public if securely housed and protected from unauthorized
18 handling); § 32406(f) (excepting a “person lawfully in possession of a firearm that the
19 person obtained prior to January 1, 2000, if no magazine that holds 10 or fewer rounds of
20 ammunition is compatible with that firearm and the person possesses the large-capacity
21 magazine solely for use with the firearm”); § 16470 (defining “large capacity magazine”
22 to include an ammunition feeding device with the capacity to accept more than 10 rounds
23
24
25
26
27
28

1
2 but not including a feeding device “that has been permanently altered so that it cannot
3 accommodate more than 10 rounds,” and a .22 caliber tube feeding device and a tubular
4 magazine that is contained in a lever-action firearm); § 32311 (criminalizing
5 manufacturing, importing, keeping for sale, offering for sale, giving, lending, buying, or
6 receiving “any large capacity magazine conversion kit”); § 32390 (declaring any large
7 capacity magazine to be a nuisance); § 18010 (destroying nuisance large capacity
8 magazines). Too much complexity fails to give fair notice and violates due process. “[A]
9 penal statute creating a new offense must be sufficiently explicit to inform those who are
10 subject to it what conduct on their part will render them liable to its penalties . . .
11 consonant alike with ordinary notions of fair play and the settled rules of law; and a
12 statute which either forbids or requires the doing of an act in terms so vague that men of
13 common intelligence must necessarily guess at its meaning and differ as to its application
14 violates the first essential of due process of law.” *Connally v. General Const. Co.*, 269
15 U.S. 385, 391 (1926); *see also United States v. Lanier*, 520 U.S. 259, 266 (1997) (quoting
16 *Connally*).

17
18
19
20
21
22 At the preliminary injunction hearing, the attorney for the Attorney General,
23 although well prepared, was not able to describe all of the various exceptions to the
24 dispossession and criminalization components of § 32310. Who could blame her? The
25 California matrix of gun control laws is among the harshest in the nation and are filled
26 with criminal law traps for people of common intelligence who desire to obey the law.
27
28 Statutes must be sufficiently well-defined so that reasonably intelligent citizens can know

1
2 what conduct is against the law. The plaintiffs, who are law-abiding responsible
3 residents of California, want to keep pistols and rifles and the magazines that are
4 commonly used with their firearms without running afoul of California's gun control
5 statutes. But these statutes are too complicated to give fair notice.
6

7 **B. Magazines Able to Hold More than 10 Rounds Are Popular**

8
9 Ammunition magazines that hold more than 10 rounds are popular. Some estimate
10 that as many as 100,000,000 such magazines are currently owned by citizens of the
11 United States. Under federal law, they may be bought, sold, lent, used, and possessed.
12 However, unlike citizens and residents of 43 other states, and hundreds if not thousands
13 of local jurisdictions, after June 30, 2017, all law-abiding citizens of California will be
14 deemed criminals *if they simply possess* a lawfully acquired magazine capable of holding
15 more than 10 rounds of ammunition.
16
17

18 **C. Plaintiffs**

19 Plaintiffs are a group of California residents who either already own magazines
20 holding more than 10 rounds or who want to own magazines holding more than 10
21 rounds for their defense of self and state. Plaintiff Richard Lewis is a law-abiding citizen
22 and an honorably discharged 22-year United States Marine Corps veteran. For more than
23 20 years, Lewis has lawfully possessed and continues to possess large capacity
24 magazines. Plaintiff Patrick Lovette is a law-abiding citizen and an honorably retired 22-
25 year United States Navy veteran. For more than 20 years, Lewis has lawfully possessed
26 and continues to possess large capacity magazines. Plaintiffs allege they lawfully possess
27
28

1
2 large capacity magazines for self-defense and other lawful purposes. Plaintiff California
3 Rifle and Pistol Association, Inc, is a membership organization almost as old as the State
4 of California. The organization represents tens of thousands of its California members.
5

6 **D. Constitutional Challenge and Motion for Preliminary Injunction**

7 Plaintiffs bring facial and as-applied challenges through 42 U.S.C. § 1983 seeking
8 a declaratory judgment that California Penal Code § 32310 (the ban on magazines
9 holding more than 10 rounds) impermissibly infringes on California citizens' federal
10 constitutional right to keep and bear arms, a right protected by the Second Amendment to
11 the United States Constitution. By this motion for preliminary injunction, Plaintiffs seek
12 only to maintain the *status quo* until a final determination is made on the merits of their
13 constitutional claims, by temporarily restraining the State from enforcing the
14 dispossession requirement and criminal penalties associated with § 32310 (c) & (d).
15
16
17

18 **E. Two Questions**

19 Ultimately, this case asks two questions. “Does a law-abiding responsible citizen
20 have a right to defend his home from criminals using whatever common magazine size he
21 or she judges best suits the situation? Does that same citizen have a right to keep and
22 bear a common magazine that is useful for service in a militia? Because a final decision
23 on the merits is likely to answer both questions “yes,” but a final decision will take too
24 long to offer relief, and because the statute will soon visit irrevocable harm on Plaintiffs
25 and all those similarly situated, a state-wide preliminary injunction is necessary and
26 justified to maintain the *status quo*. Because Plaintiffs have demonstrated on this
27
28

1
2 preliminary record a likelihood of success on the merits, a likelihood of irreparable harm,
3 a balance of equities that tips in their favor, and that an injunction would be in the public
4 interest, a preliminary injunction will issue.

6 II. ARTICLE III STANDING & RIPENESS

7 Defendant does not challenge Plaintiffs' Article III standing at this time.

8 Nevertheless, federal courts are obligated to satisfy themselves that a plaintiff has
9 standing and that the case is ripe. *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1,
10 11 (2004) (reversing because plaintiff lacked standing). To establish Article III standing,
12 a plaintiff must have: "(1) suffered an injury in fact, (2) that is fairly traceable to the
13 challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable
14 judicial decision." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, __ S. Ct. __, 2017 WL
15 2407473, at *4 (June 5, 2017) (citations and quotation marks omitted). "The same
16 principle applies when there are multiple plaintiffs. At least one plaintiff must have
17 standing to seek each form of relief requested in the complaint." *Id.* at *5. At a
18 minimum, Plaintiffs Lewis and Lovette have standing to challenge the dispossession
19 requirement and criminalization component of California's large capacity magazine ban
20 and their case is ripe.

21 Article III standing analysis recognizes that, where threatened action by
22 government is concerned, courts do not require a plaintiff to expose himself to criminal
23 liability before bringing suit. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-
24 129 (2007); *Steffel v. Thompson*, 415 U.S. 452 (1974). Under the statute at issue here,

1
2 merely continuing to possess a magazine able to hold more than 10 rounds may be
3 charged as a criminal misdemeanor. The injury will be immediate and concrete. *See*
4 *Jackson v. City & County of San Francisco*, 829 F. Supp. 2d 867, 871-872 (N.D. Cal.
5 2011). Ripeness, however, does require a credible threat of prosecution. That
6 requirement is satisfied here as the Attorney General has not indicated that § 32310 (c) &
7 (d) will not be enforced on July 1, 2017. Moreover, the State has vigorously enforced
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2 § 32310 in the past.² Therefore, the Article III requirements of standing and ripeness are

3
4 ²See e.g., *People v. Verches*, H041967, slip. op., 2017 WL 1880968, at *1-3 (Cal. Ct.
5 App. May 9, 2017). *Verches* describes the California investigation leading up to a
6 prosecution under the predecessor to § 32310 for *importing a large capacity magazine*:

7 “On May 21, 2011, a task force of California law enforcement agents,
8 including special agent Bradley Bautista of the California Department of
9 Justice, Bureau of Firearms, surveilled a gun show in Reno, Nevada. Their
10 objective was to identify suspected California residents who entered Nevada
11 to purchase weapons or accessories that would be illegal in California.
12 Agents observed an individual, later identified as Verches, purchase an
13 upper receiver for an assault rifle and three large-capacity automatic rifle
14 magazines capable of holding 30 rounds of ammunition. They also heard
15 Verches ask the vendor if he had a “lower” receiver so he could build an
16 assault rifle. Agent Bautista observed Verches leave the gun show carrying a
17 white plastic bag, which he placed in the rear compartment of a black
18 Mercedes Benz bearing a California license plate. Agent Bautista did not
19 know if the plastic bag contained the items that Verches had purchased.
20 Verches was accompanied by an unidentified man.

21 Agent Bautista confirmed that the Mercedes was registered to Verches at a
22 residential address in Morgan Hill, California. He observed Verches and the
23 unidentified man drive away in the Mercedes, with Verches in the passenger
24 seat. Agents followed Verches in the Mercedes to various stops around
25 Reno, where Verches exited the vehicle for short periods of time, before
26 eventually arriving at a casino-hotel valet parking lot around 6:33 p.m.
27 Agents twice lost sight of the vehicle during the time they were following it.
28 Agents terminated the surveillance after confirming that Verches was a
registered guest at the hotel until May 22, 2011, the next day. However,
agents placed an electronic tracking device on the Mercedes. Records from
the tracking device show that the Mercedes made 15 stops between leaving
the gun show and arriving the next day at Verches's house in Morgan Hill.

Agent Bautista conducted a California Automated Firearms System records
check that showed Verches did not have any assault rifles registered in his
name. He and another agent also made a positive identification of Verches
by comparing his DMV photograph with video taken of Verches's purchase
at the gun show. Agent Bautista conducted an automated criminal history
check and public database search, and later verified Verches's address with
the Morgan Hill Police Department. The address matched the registration

1
2 satisfied.

3 III. STANDARD FOR A PRELIMINARY INJUNCTION

4 The standard for issuing a preliminary injunction is well established and not in
5 dispute. A plaintiff seeking a preliminary injunction must establish: (1) that he is likely
6 to succeed on the merits; (2) that he is likely to suffer irreparable harm in the absence of
7 preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an
8 injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7,
9 20 (2008); *Doe v. Harris*, 772 F.3d 563, 570 (9th Cir. 2014).

10 Plaintiffs claim that § 32310 (c) & (d) trenches on their federal Constitutional
11 rights under the Second Amendment and the Takings Clause. Consequently, a judicial
12 evaluation must be made, beginning with a judgment as to whether there is a likelihood
13 that Plaintiffs will ultimately prevail on the merits of their claims. It is a preliminary
14 judgment. It is made on an incomplete evidentiary record. But the evidence presented is
15 important.³

16
17
18
19
20
21 address for the Mercedes that agents followed from the gun show. On May
22 24, 2011, Agent Bautista went to the residence and did not see the Mercedes,
23 but observed Verches exiting the house and leaving in another vehicle that
24 was parked in front and registered in his name. Two days after observing
25 Verches at his house, Agent Bautista obtained a search warrant for
26 unregistered AR–15 type or assault rifles and large-capacity magazines, to
27 be found on Verches's person, in his vehicles, or in his home.”

28 ³“In *Fyock*, we affirmed the district court’s denial of a preliminary injunction to enjoin a
city ordinance restricting possession of large-capacity magazines We concluded that
the ordinance would likely survive intermediate scrutiny *because the city presented
sufficient evidence* to show that the ordinance was substantially related to the compelling
government interest of public safety.” *Silvester v. Harris*, 843 F.3d 816, 822 (9th Cir.
2016) (citations omitted) (emphasis added).

1
2 **A. The Second Amendment – Certain Policy Choices Are off the Table**

3 In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court made
4 absolutely clear that “the enshrinement of constitutional rights necessarily takes certain
5 policy choices off the table.” *Heller*, 554 U.S. at 636. The State of California’s desire to
6 criminalize simple possession of a firearm magazine able to hold more than 10 rounds is
7 precisely the type of policy choice that the Constitution takes off the table. Because the
8 right to bear arms includes the right to keep and carry ammunition and magazines holding
9 more than 10 rounds for those arms, for both self-defense and to be ready to serve in a
10 militia, the State’s criminalization of possession of “large capacity magazines” likely
11 places an unconstitutional burden on the citizen plaintiffs.
12
13
14

15 **1. Likelihood of Success on the Merits**

16 The Second Amendment provides: “A well regulated Militia, being necessary to
17 the security of a free State, the right of the people to keep and bear Arms, shall not be
18 infringed.” U.S. Const. Amend. II. Second Amendment rights are not watered-down,⁴
19 second-class rights.⁵ “[I]t is clear that the Framers and ratifiers of the Fourteenth
20
21

22
23 ⁴“In *Heller*, however, we expressly rejected the argument that the scope of the Second
24 Amendment right should be determined by judicial interest balancing, and this Court
25 decades ago abandoned ‘the notion that the Fourteenth Amendment applies to the States
26 only a *watered-down*, subjective version of the individual guarantees of the Bill of
Rights.’” *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 785–86 (2010) (citations
omitted) (emphasis added).

27 ⁵“Municipal respondents’ remaining arguments are at war with our central holding in
28 *Heller* : that the Second Amendment protects a personal right to keep and bear arms for
lawful purposes, most notably for self-defense within the home. Municipal respondents,

1
2 Amendment counted the right to keep and bear arms among those fundamental rights
3 necessary to our system of ordered liberty.” *McDonald v. City of Chicago, Ill.*, 561 U.S.
4 742, 778 (2010). The right to bear arms for a legal purpose is an inherent right pre-dating
5 and transcending the Second Amendment. “The right there specified is that of ‘bearing
6 arms for a lawful purpose.’ This is not a right granted by the Constitution. Neither is it
7 in any manner dependent upon that instrument for its existence.” *United States v.*
8 *Cruikshank*, 92 U.S. 542, 553 (1875), *overruled on other grounds*, *United States v.*
9 *Miller*, 307 U.S. 174 (1939).

10
11
12 Some may fear that the right to keep and bear arms means citizens hold a right to
13 “possess a deadly implement and thus has implications for public safety,” and that “there
14 is intense disagreement on the question whether the private possession of guns in the
15 home increases or decreases gun deaths and injuries.” *McDonald*, 561 U.S. at 782-83
16 (argument of the City of Chicago). True enough. But, public safety interests may not
17 eviscerate the Second Amendment.⁶ “The right to keep and bear arms, however, is not
18 the only constitutional right that has controversial public safety implications. All of the
19
20
21

22
23 _____
24 in effect, ask us to treat the right recognized in *Heller* as a second-class right, subject to
25 an entirely different body of rules than the other Bill of Rights guarantees that we have
26 held to be incorporated into the Due Process Clause.” *McDonald*, 561 U.S. at 780.

27
28 ⁶For example, the Supreme Court reminds us that, “[o]ur precedents, old and new, make
clear that concerns of national security and foreign relations do not warrant abdication of
the judicial role . . . the Government’s authority and expertise in these matters do not
automatically trump the Court’s own obligation to secure the protection that the
Constitution grants to individuals.” *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34
(2010).

1
2 constitutional provisions that impose restrictions on law enforcement and on the
3 prosecution of crimes fall into the same category.” *McDonald*, 561 U.S. at 783
4 (collecting cases where those likely guilty of a crime are set free because of constitutional
5 rights).
6

7 The Supreme Court recognizes an individual’s right to keep and bear arms under
8 the Second Amendment for self-defense in the home. *Heller*, 554 U.S. at 636. This right
9 to keep and bear arms is fundamental and is incorporated against states under the
10 Fourteenth Amendment. *McDonald*, 561 U.S. at 791.
11

12 The Supreme Court also recognizes that the Second Amendment guarantee
13 includes firearms that have “some reasonable relationship to the preservation or
14 efficiency of a well regulated militia.” *Miller*, 307 U.S. at 178. *Miller* implies that
15 possession by a law-abiding citizen of a weapon that could be part of the ordinary
16 military equipment for a militia member, or that would contribute to the common
17 defense, is protected by the Second Amendment.⁷ Concluding that magazines holding
18 more than 10 rounds might be found among today’s ordinary military equipment or that
19 such magazines would contribute to the common defense, requires only a modest finding.
20
21
22
23
24
25

26 ⁷In *Miller*, the weapon was a sawed-off shotgun. Because there was little evidence before
27 the district court that a sawed-off shotgun could be “any part of the ordinary military
28 equipment or that its use could contribute to the common defense,” possession of the
weapon was not protected by the Second Amendment. *Miller*, 307 U.S. at 178 (citation
omitted).

1
2 ***a. Self-defense and militia use***

3 *Heller* and *Miller* are not inconsistent. *Heller* acknowledges that protection for
4 weapons useful to a militia are also useful for defending the home. “It is enough to note,
5 as we have observed, that the American people have considered the handgun to be the
6 quintessential self defense weapon Whatever the reason, handguns are the most
7 popular weapon chosen by Americans for self-defense in the home, and a complete
8 prohibition of their use is invalid.” *Heller*, 554 U.S. at 629. As *McDonald* puts it, “[i]n
9 *Heller*, we recognized that the codification of this right was prompted by fear that the
10 Federal Government would disarm and thus disable the militias, but we rejected the
11 suggestion that the right was valued only as a means of preserving the militias. On the
12 contrary, we stressed that the right was also valued because the possession of firearms
13 was thought to be essential for self-defense. As we put it, self-defense was ‘the *central*
14 *component* of the right itself.’” *McDonald*, 561 U.S. at 742 (emphasis in original).

15
16
17
18
19 In *Caetano v. Massachusetts*, the Court underscored these two related points from
20 *Heller* and *McDonald*. First, the Second Amendment extends to common modern
21 firearms useful for self-defense in the home. Second, there is no merit to “the proposition
22 ‘that *only* those weapons useful in warfare are protected.’” *See Caetano*, 136 S. Ct. 1027,
23 1028 (2016) (per curiam) (quoting *Heller*, 554 U.S. at 582, 624-25) (remanding for
24 further consideration of whether Second Amendment protects stun guns) (emphasis
25 added); *contra Kolbe v. Hogan*, 849 F.3d 114, 131 (4th Cir. 2017) (weapons useful in
26 warfare are not protected by the Second Amendment).
27
28

1
2 ***b. Ammunition magazines are arms***

3 The Second Amendment protects firearms and the ammunition and magazines that
4 enable arms to fire. The Second Amendment does not explicitly protect ammunition.
5 “Nevertheless, without bullets, the right to bear arms would be meaningless. A
6 regulation eliminating a person’s ability to obtain or use ammunition could thereby make
7 it impossible to use firearms for their core purpose.” *Jackson*, 746 F.3d at 967. “Thus
8 the right to possess firearms for protection implies a corresponding right to obtain the
9 bullets necessary to use them.” *Id.* (citing *Ezell v. City of Chicago*, 651 F.3d 684, 704
10 (7th Cir. 2011) (holding that the right to possess firearms implied a corresponding right to
11 have access to firing ranges in order to train to be proficient with such firearms). Indeed,
12 *Heller* did not differentiate between regulations governing ammunition and regulations
13 governing the firearms themselves. *Id.* The same is true for magazines. “Constitutional
14 rights thus implicitly protect those closely related acts necessary to their exercise . . . The
15 right to keep and bear arms, for example ‘implies a corresponding right to obtain the
16 bullets necessary to use them.’” *Luis v. United States*, 136 S. Ct. 1083, 1097 (2016)
17 (Thomas, J., concurring) (quoting *Jackson*, 746 F.3d at 967). Without protection for the
18 closely related right to keep and bear ammunition magazines for use with the arms
19 designed to use such magazines, “the Second Amendment would be toothless.” *Id.*

20
21
22
23
24
25
26 Most, if not all, pistols and many rifles are designed to function with detachable
27 magazines. They are necessary and integral to the designed operation of these arms. Of
28 course, when a magazine is detached the magazine is not a firearm. It is not dangerous.

1
2 It may be made of stainless steel or it may be made of polymers, but it cannot fire a single
3 round of ammunition. Its only function is to hold ammunition. Other parts of a firearm
4 are also necessary and integral to the designed operation, but may be separated (*e.g.*,
5 removable gun barrels, gun sights, trigger assemblies, hand grips, etc.). For firearms
6 designed to have magazines, without the magazine attached, the weapon may be limited
7 to firing a single round in the chamber, or not at all (as is the case with some popular
8 pistols designed for safety reasons to fire only when a magazine is in place). Although
9 the State does not concede the issue, neither does it press its case on the argument that
10 magazines are not “arms” for purposes of Second Amendment analysis. Opposition at 9.
11 Nor has any other court considering the question held that a magazine of any capacity is
12 not subject to Second Amendment review. *See e.g., Fyock v. City of Sunnyvale*, 25 F.
13 Supp. 3d. 1267, 1276 (N.D. Cal. 2014), *aff’d*, 779 F.3d 991 (9th Cir. 2015) (“Rather, the
14 court finds that the prohibited magazines are ‘weapons of offence, or armour of defence,’
15 as they are integral components to vast categories of guns.”). Thus, that which the State
16 defines as a “large capacity magazine” will be analyzed according to Second Amendment
17 principles. This is the theater of operations in which the constitutional battle will be
18 fought.

24 **2. Second Amendment Tests**

25 *a. The tripartite binary test with a sliding scale and a reasonable fit*

26 For a Second Amendment challenge, the Ninth Circuit uses what might be called a
27 tripartite binary test with a sliding scale and a reasonable fit. In other words, there are
28

1
2 three different two-part tests, after which the sliding scale of scrutiny is selected. Most
3 courts select intermediate scrutiny in the end. Intermediate scrutiny, in turn, looks for a
4 “reasonable fit.” Courts in other circuits tend to also use some variation of a multi-part
5 test with the result that intermediate scrutiny is applied to gun restrictions. It is,
6 unfortunately, an overly complex analysis that people of ordinary intelligence cannot be
7 expected to understand. These complicated legal tests, which usually result in Second
8 Amendment restrictions passing an intermediate scrutiny test (a test that is little different
9 from a rational basis test), appear to be at odds with the simple test used by the Supreme
10 Court in *Heller*. The *Heller* test is a test that anyone can figure out.

14 *Heller* asks whether the law bans types of firearms commonly used for
15 a lawful purpose — regardless of whether alternatives exist. And
16 *Heller* draws a distinction between such firearms and weapons
17 specially adapted to unlawful uses and not in common use, such as
18 sawed-off shotguns.

19 . . .

20 Roughly five million Americans own AR-style semiautomatic
21 rifles. The overwhelming majority of citizens who own and use
22 such rifles do so for lawful purposes, including self-defense and
23 target shooting. Under our precedents, *that is all that is needed*
24 for citizens to have a right under the Second Amendment to
25 keep such weapons.

26 *Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Justices Thomas and
27 Scalia dissenting from denial of certiorari) (emphasis added) (citations omitted). A
28 complicated Second Amendment test obfuscates as it extirpates, but it is the test that this
Court is bound to follow.

1
2 ***b. Constitutionally suspect under the simple test***

3 Under the simple *Heller* test, § 32310 (c) & (d) are highly suspect. They are
4 suspect because they broadly prohibit common pistol and rifle magazines used for lawful
5 purposes. “[T]hat is all that is needed for citizens to have a right under the Second
6 Amendment to keep such weapons.” *Friedman*, 136 S. Ct. at 449.

7
8 Magazines holding more than 10 rounds are useful for self-defense by law-abiding
9 citizens. And they are common. Lawful in at least 43 states and under federal law, these
10 magazines number in the millions. *Cf. Hollis v. Lynch*, 827 F.3d 436, 449 (5th Cir. 2016)
11 (defining the term “common” by applying the Supreme Court test in *Caetano* of 200,000
12 stun guns owned and legal in 45 states being “common”); *see also NYSR&PA v. Cuomo*,
13 804 F.3d 242, 255-57 (2nd Cir. 2015) (noting large-capacity magazines are “in common
14 use” as the term is used in *Heller* based on even the most conservative estimates). To the
15 extent they may be now uncommon within California, it would only be the result of the
16 State long criminalizing the buying, selling, importing, and manufacturing of these
17 magazines. To say the magazines are uncommon because they have been banned for so
18 long is something of a tautology. It cannot be used as constitutional support for further
19 banning. *See Friedman v. City of Highland Park, Illinois*, 784 F3d 406, 409 (7th Cir.
20 2015) (“Yet it would be absurd to say that the reason why a particular weapon can be
21 banned is that there is a statute banning it, so the it isn’t commonly used. A law’s
22 existence can’t be the source of its own constitutional validity.”).

1
2 Nevertheless, § 32310 (c) & (d) are suspect even under the more complicated
3 analysis employed by the Ninth Circuit Court of Appeals, because the statute is not a
4 reasonable fit as a means to achieve the State’s important objectives. To pass muster
5 under the intermediate scrutiny test a statute must have “a reasonable fit” with the State’s
6 important interest. The analysis works like this.
7

8
9 ***c. Constitutionally suspect under the “reasonable fit” test***

10 **i. burden & scrutiny**

11 First, a court must evaluate the burden and then apply the correct scrutiny.
12 *Jackson*, 746 F.3d at 960 (citing *United States v. Chovan*, 735 F.3d 1127, 1136-37 (9th
13 Cir. 2013)). “This two-step inquiry: ‘(1) asks whether the challenged law burdens
14 conduct protected by the Second Amendment; and (2) if so, directs courts to apply an
15 appropriate level of scrutiny.’” *Bauer v. Becerra*, 858 F.3d 1216, 2017 WL 2367988, at
16 *3 (9th Cir. 2017) (quoting *Jackson*, 746 F.3d at 960). As discussed below, § 32310 (c)
17 & (d) burden conduct protected by the Second Amendment.
18
19

20 **ii. presumptively lawful or historical regulation**

21
22 In determining whether a given regulation falls within the scope of the Second
23 Amendment under the first step of this inquiry, another two-step test is used. “[W]e ask
24 whether the regulation is one of the ‘presumptively lawful regulatory measures’
25 identified in *Heller*, or whether the record includes persuasive historical evidence
26 establishing that the regulation at issue imposes prohibitions that fall outside the
27 historical scope of the Second Amendment.” *Id.* (citations omitted). If the regulation is
28

1
2 presumptively lawful, the inquiry ends. Likewise, if the regulation is a historically
3 approved prohibition not offensive to the Second Amendment, the inquiry ends. Section
4 32310 (c) & (d) fail both parts of the test. A complete ban on ammunition magazines of
5 any size is not one of the presumptively lawful regulatory measures identified in *Heller*.
6 Neither is there any evidence that magazine capacity restrictions have a historical
7 pedigree.
8
9

10 **iii. closeness to the core and severity of the burden**

11 If the constitutional inquiry may continue, then the correct level of scrutiny must
12 be selected. For that selection a third two-step evaluation is required. The first step
13 measures how close the statute hits at the core of the Second Amendment right. The
14 second step measures how severe the statute burdens the Second Amendment right.
15 “Because *Heller* did not specify a particular level of scrutiny for all Second Amendment
16 challenges, courts determine the appropriate level by considering ‘(1) how close the
17 challenged law comes to the core of the Second Amendment right, and (2) the severity of
18 the law’s burden on that right.’” *Bauer*, 2017 WL 2367988, at *4 (quoting *Silvester v.*
19 *Harris*, 843 F.3d 816, 821 (9th Cir. 2016)). *Fyock v. City of Sunnydale*, 779 F.3d 991,
20 999 (9th Cir. 2015), has already recognized that a regulation restricting law-abiding
21 citizens from possessing large-capacity magazines within their homes hits at the core of
22 the Second Amendment. *Fyock* said, “[b]ecause Measure C restricts the ability of law-
23 abiding citizens to possess large capacity magazines within their homes for the purpose
24
25
26
27
28

1
2 of self-defense, we agree with the district court that Measure C may implicate the core of
3 the Second Amendment.” *Id.*

4
5 **iv. the sliding scale of scrutiny**

6 *Heller* says the core of the Second Amendment is the right of law-abiding,
7 responsible citizens to use arms in defense of their home. 554 U.S. at 635.

8
9 Guided by this understanding, our test for the appropriate level
10 of scrutiny amounts to ‘a sliding scale.’ A law that imposes
11 such a severe restriction on the fundamental right of self
12 defense of the home that it amounts to a destruction of the
13 Second Amendment right is unconstitutional under any level of
14 scrutiny. Further down the scale, a law that implicates the core
of the Second Amendment right and severely burdens that right
warrants strict scrutiny. Otherwise, intermediate scrutiny is
appropriate.

15 *Bauer*, 2017 WL 2367988, at *4 (citations and quotations marks omitted). Where a
16 restriction “...does not ‘severely burden’ or even meaningfully impact the core of the
17 Second Amendment right, . . . intermediate scrutiny is . . . appropriate.” *See id.* (citing
18 *Silvester*, 843 F.3d at 821 and *Chovan*, 735 F.3d at 1138). *Fyock* held that the district
19 court did not abuse its discretion in finding Sunnyvale’s magazine capacity restriction did
20 not have a severe impact. “[T]here was no abuse of discretion in finding that the impact
21 Measure C may have on the core Second Amendment right is not severe and that
22 intermediate scrutiny is warranted.” 779 F.3d at 999.

23
24 The State argues as a foregone conclusion that intermediate scrutiny is the correct
25 point on the sliding scale for a regulation on magazines. According to the State, *Fyock*’s
26 approval of “intermediate scrutiny” is controlling, and other courts have applied
27
28

1
2 intermediate scrutiny to regulations on large capacity magazines. The approach is
3 consistent with past cases analyzing the appropriate level of scrutiny under the second
4 step of *Heller*, as the Ninth Circuit has repeatedly applied intermediate scrutiny. *See e.g.*,
5 *Silvester*, 843 F.3d at 823 (applying intermediate scrutiny to a law mandating ten-day
6 waiting periods for the purchase of firearms); *Fyock*, 779 F.3d at 999 (applying
7 intermediate scrutiny to a law prohibiting the possession of large capacity magazines);
8 *Jackson*, 746 F.3d at 965, 968 (applying intermediate scrutiny to laws mandating certain
9 handgun storage procedures in homes and banning the sale of hollow-point ammunition
10 in San Francisco); *Chovan*, 735 F.3d at 1138 (applying intermediate scrutiny to a law
11 prohibiting domestic violence misdemeanants from possessing firearms). Applying
12 intermediate scrutiny, *Fyock* did find that the plaintiffs were unlikely to succeed on the
13 merits.
14

15
16
17
18 The difference here, and it is a important difference, is that the district court in
19 *Fyock* had before it an evidentiary record that was credible, reliable, and on point. *Fyock*,
20 779 F.3d at 1000 (“Ultimately, the district court found that Sunnyvale submitted pages of
21 credible evidence, from study data to expert testimony to the opinions of Sunnyvale
22 public officials, indicating that the Sunnyvale ordinance is substantially related to the
23 compelling government interest in public safety.”). That is not the case here. Here, the
24 Attorney General has submitted at this preliminary stage incomplete studies from
25 unreliable sources upon which experts base speculative explanations and predictions.
26
27
28 The evidentiary record is a potpourri of news pieces, State-generated documents,

1
2 conflicting definitions of “mass shooting,” amorphous harms to be avoided, and a
3 homogenous mass of horrible crimes in jurisdictions near and far for which large capacity
4 magazines were not the cause.

5
6 **v. tailoring required: “a reasonable fit”**

7 Assuming intermediate scrutiny applies, “a reasonable fit” test is conducted. “Our
8 intermediate scrutiny test under the Second Amendment requires that (1) the
9 government’s stated objective . . . be significant, substantial, or important; and (2) there .
10 . . be a ‘reasonable fit’ between the challenged regulation and the asserted objective.”
11 *Silvester*, 843 F.3d at 821–22 (quoting *Chovan*, 735 F.3d at 1139). Under the second
12 prong “intermediate scrutiny does not require the least restrictive means of furthering a
13 given end.” *Id.* at 827 (quoting *Jackson*, 746 F.3d at 969).

14
15
16 **vi. four important California interests**

17
18 In this case, the Attorney General identifies four State interests. Each is important.
19 The four articulated State interests are: (1) protecting citizens from gun violence; (2)
20 protecting law enforcement from gun violence; (3) protecting the public safety (which is
21 similar to protecting citizens and law enforcement from gun violence); and (4) preventing
22 crime. *See Oppo.* at 9; 17-18. The question then becomes, whether the dispossession and
23 criminalization components of § 32310’s ban on firearm magazines holding any more
24 than 10 rounds is a reasonable fit for achieving these important goals. For intermediate
25 scrutiny “the burden of justification is demanding and it rests entirely on the State.”
26 *Tyler v. Hillsdale County Sheriff’s Dept.*, 837 F. 3d 678, 694 (6th Cir. 2016) (quoting
27
28

1
2 *United States v. Virginia*, 518 U.S. 515, 533 (1996) (considering the constitutionality of
3 18 U.S.C. §922(g)(4)'s permanent gun ban for person previously treated for mental
4 illness).

5
6 This Court finds on the preliminary evidentiary record before it that the
7 dispossession and criminalization component of §32310 (c) & (d) *is not a reasonable fit*.
8 It may well be that on a more robust evidentiary showing, made after greater time and
9 testimony is taken, that the State will be able to establish a reasonable fit. But not yet.
10 The Attorney General asserts that empirical evidence is not required. *Oppo*. at 19. He
11 asserts that the substantial evidence demonstrating a reasonable fit can take other softer
12 forms such as “history, consensus, and simple common sense,” as well as “correlation
13 evidence” and even simply “intuition.” *Oppo*. at 19-20. But if this “evidence” were
14 sufficient, all firearm restrictions except an outright ban on all firearms would survive
15 review.
16
17
18

19 Yet, as the Second Circuit cautioned, “on intermediate scrutiny review, the state
20 cannot ‘get away with shoddy data or reasoning.’ To survive intermediate scrutiny, the
21 defendants must show ‘*reasonable inferences based on substantial evidence*’ that the
22 statutes are substantially related to the governmental interest.” *NYSR&PA*, 804 F.3d at
23 264 (citations omitted) (emphasis in original) (striking down New York State’s 7-round
24 magazine limit). This Court declines to rely on anything beyond hard facts and
25 reasonable inferences drawn from convincing analysis, which amounts to substantial
26 evidence based on relevant and accurate data sets, when considering whether to maintain
27
28

1
2 the *status quo* or permit a state experiment that will irrevocably harm law-abiding
3 responsible magazine-owning citizens.

4
5 ***d. The State's evidence***

6 The State's preliminary theoretical and empirical evidence is inconclusive. In fact,
7 it would be reasonable to infer, based on the State's evidence, that a right to possess
8 magazines that hold more than 10 rounds may *promote* self-defense – especially in the
9 home – and would be ordinarily useful for a citizen's militia use. California must provide
10 more than a rational basis to justify its sweeping ban on mere possession. *See e.g.*,
11 *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (“Illinois had to provide us with
12 more than merely a rational basis for believing that its uniquely sweeping ban [on
13 carrying guns in public] is justified by an increase in public safety. It has failed to meet
14 this burden.”).

15
16
17
18 So what is the evidence? The Attorney General has provided expert declarations
19 and 3,100 pages of exhibits.⁸ Much of the evidence submitted is dated. Approximately
20 75% of the exhibits the Attorney General has submitted are older than 2013. The
21 documents that are more recent include various surveys of shooting incidents, news
22 articles, position pieces, and firearm descriptions. The amalgamation of exhibits often
23 seems irrelevant. For example, Exhibit 37 is a smorgasbord of news articles about guns.
24
25

26
27 ⁸Both sides interpose evidentiary objections to various documents. The objections are
28 overruled. For a preliminary injunction, a court may “rely on otherwise inadmissible
evidence, including hearsay evidence.” *San Francisco Veteran Police Officers Ass'n, v.*
City and County of S.F., 18 F. Supp. 3d. 997, 1006 (N.D. Cal. 2014) (citations omitted).

1
2 Among the offerings is a piece about thirteen separate incidents in Australia going back
3 to 1867 in which there are no mentions of large capacity magazines. Oppo. Gordon
4 Declaration Exh. 37, at 101-04. At Exhibit 37, page 151-52, one finds a news piece
5 about a 17-year-old incident in Brazil involving a submachine gun. News about events in
6 Paris, France and Shfaram, Israel fill pages 162-165 and 175-177, while page 195 tells of
7 a shooter in 2010 using a revolver, and page 132 recounts a shooter using two revolvers.
8
9

10 Another exhibit, the Attorney General's Exhibit 50, appears to be a 100-page, 8-
11 point type, 35-year survey of shooting incidents published by Mother Jones magazine.
12 Oppo. Gordon Declaration at Exh. 50. Mother Jones magazine has rarely been
13 mentioned by any court as reliable evidence. It is fair to say that the magazine survey
14 lacks some of the earmarks of a scientifically designed and unbiased collection of data.
15 In another example, Attorney General's Exhibit 30 includes an article from Mother Jones
16 Magazine with a headline, "'A Killing Machine': Half of All Mass Shooters Used High-
17 Capacity Magazines." Oppo. Gordon Declaration at Exh. 30. Yet, as will be discussed
18 below, the survey found at Attorney General's Exhibit 59 describes in detail only six
19 incidents out of 92 where a mass shooter used a high capacity magazine. Attorney
20 General's Exhibit 14 contains an expert declaration from Christopher Koper that relies,
21 *inter alia*, on Exhibit 30. The expert then concedes that "[A]ssessing trends in LCM
22 [large capacity magazine] use is much more difficult because *there was, and is, no*
23 *national data source on crimes with LCMs*, and few local jurisdictions maintain this sort
24 of information." Oppo. Gordon Declaration at Exh. 14, n.7 & ¶ 47. Further illustrating
25
26
27
28

1
2 the lack of hard data underlying the muddled evidence, Koper then attaches his own
3 published report in support of his Exhibit 14 declaration. Titled “An Updated
4 Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun
5 Violence, 1994-2003,” Koper summarizes his findings. He states, “it is not clear how
6 often the ability to fire more than 10 shots without reloading (the current magazine
7 capacity limit) affects the outcomes of gun attacks. All of this suggests that the ban’s
8 impact on gun violence is likely to be small.” *Id.* at Exhibit “C,” ¶ 3.3.
9
10

11 **i. The Mayors Against Illegal Guns survey**

12 Another example of California’s evidence is a survey of mass shooting incidents
13 found in the Attorney General’s Exhibit 59. *Oppo. Gordon Declaration at Exh. 59.* The
14 Attorney General relies specifically on Exhibit 59 in its brief. *Oppo. at 11-12.* Yet,
15 Exhibit 59 tends to prove the opposite of a justification for § 32310 (c) & (d), *i.e.*, it tends
16 to prove there is no need to dispossess and criminalize law-abiding responsible citizens
17 currently possessing magazines holding more than 10 rounds.
18
19

20 Exhibit 59 is a shorter survey of mass shooting incidents that occurred between
21 January 2009 and September 2013. The survey was produced by Mayors Against Illegal
22 Guns.⁹ Although the survey describes little about the protocols used to select its data, it
23
24

25 ⁹Mayors Against Illegal Guns is apparently not a pro-gun rights organization. According
26 to Wikipedia, it was formed by Mayor Michael Bloomberg. Mayor John Tkazik of
27 Poughkeepsie, New York, resigned along with fifty others in 2014, explaining that the
28 organization: “under the guise of helping mayors facing a crime and drug epidemic,
MAIG intended to promote confiscation of guns from law-abiding citizens.” Later in
2014, it merged with another group and became “Everytown For Gun Safety.”

1
2 does describe in helpful detail 92 mass shooting incidents (where a mass shooting is
3 defined using the FBI's definition of an incident where four or more people were killed
4 with a gun). The survey describes itself as relying on FBI reports and media reports.
5
6 Though the study is not ideal, because gun violence is a deadly serious issue, some
7 empirical data needs to be carefully reviewed for purposes of the motion for preliminary
8 injunction.
9

10 Thus, to test the claims made by the Attorney General against a set of data he
11 himself offers in support of his justification of § 32310 (c) & (d), the Court has reviewed
12 closely the 92 incidents described in Ex 59.¹⁰ Exhibit 59, like the rest of the Attorney
13 General's anthology of evidence, does not demonstrate that the ban on possession of
14 magazines holding any more than 10 rounds is a reasonable fit, at least at this preliminary
15 stage of the proceedings.
16
17

18 Intermediate scrutiny requires the State to demonstrate a reasonable fit. A
19 reasonable fit cannot be just any fit. This is not simply a policy decision by the State.
20 This affects a Constitutionally protected right. The State may experiment. The State
21 need not create a tight fit. The State need not choose the least restrictive means to
22 achieve its important goals. But the means must provide a reasonable fit. The Attorney
23 General claims that magazines holding any more than 10 rounds may be useful and
24
25

26
27 ¹⁰Due to limited time and judicial resources, Ex 59 will be the empirical data set relied on
28 by the Court to determine reasonable fit. Other surveys may cover larger time periods
and use different parameters. Experts relied on by both parties criticize the reliability and
inclusivity of all of the available data sets.

1
2 appropriate in the military context, but they pose a distinct threat to safety in private
3 settings as well as places of assembly. The Attorney General asserts that the “military-
4 style features of LCMs make them particularly attractive to mass shooters and other
5 criminals and pose heightened risks to innocent civilians and law enforcement.” *Oppo*. at
6 11. He asserts that “LCMs are used disproportionately in mass killings and in murders of
7 police.” *Oppo*. at 11. The Mayors Against Illegal Guns survey (hereinafter “Mayors’
8 survey”) belies these assertions. *Oppo*. Gordon Declaration, Exh. 59.

11 **(a) of 92 cases, only 10 are from California**

12
13 What does the Mayors’ survey teach about the fit of California’s statute? First, it is
14 noted that 82 of the 92 cases are from jurisdictions beyond California. Only ten of the 92
15 mass shootings in the survey took place in California. These ten incidents prove very
16 little about whether § 32310 (c) & (d) provide a reasonable fit – or means – of achieving
17 the State’s four public safety goals.

19 **(b) the 10 California cases examined**

20
21 In three of the ten California incidents, the firearm is unknown and the magazine
22 type, if any, is unknown. (#52 Willowbrook (2/11/11), #65 Los Angeles (4/3/10), #92
23 Wilmington (1/27/09)).¹¹ In a fourth incident, a revolver was used. (#18 Tule River
24 Reservation (12/8/12)). Revolvers, of course, do not use magazines at all. In a fifth
25 incident, a pistol was used but no mention is made of a magazine holding any more than
26

27
28 ¹¹The Court has assigned numbers to the list of incidents in the Mayors’ survey for ease
of reference.

1
2 10 rounds. (#20 Northridge (12/2/12)). In a sixth incident, a pistol was used with four
3 (legal) 10-round magazines. (#31 Oakland (4/2/12)). This, of course, tends to prove the
4 statute would not have the desired effect. In two more incidents, the pistols used were
5 purchased legally in California. (#40 Seal Beach (10/12/11); #84 Santa Clara (3/29/09)).
6 These would have been sold with California-legal 10-round magazines. No mention is
7 made of larger magazines being used. If that was the case, then again the data tends to
8 prove that the statute would have no good effect.
9
10

11 **(c) no effect in eight cases**

12 In other words, only ten of 92 mass shootings occurred in California and § 32310
13 (c) & (d) would have had no effect on eight of those ten. The criminalization of
14 possession of magazines holding more than 10 rounds would have had no effect on mass
15 killings by revolver. It would have had no effect on pistols bought legally in California
16 because they are sold with 10-round magazines. It would have had no effect on shootings
17 where magazines holding any more than 10 rounds were not used.
18
19

20 **(d) a closer look at the two magazine cases**

21 Of the 92 mass shootings recorded in the Mayors' survey, only two occurred in
22 California *and* involved the use of illegal magazines. (#7 Santa Monica (6/7/13) and #85
23 Oakland (3/21/09)). In the Santa Monica incident, the shooter brought multiple firearms,
24 as happens to be the case in almost all "mass shootings." He brought an AR-15, a
25 revolver, and 3 zip guns. He reportedly possessed forty 30-round magazines. He killed
26 five victims. The survey notes that the AR-15 and the illegal magazines may have been
27
28

1
2 illegally imported from *outside* of California. Receiving and importing magazines
3 holding any more than 10 rounds was already unlawful under California law at the time
4 of the Santa Monica tragedy. In that instance, criminalizing possession of magazines
5 holding any more than 10 rounds likely would not have provided additional protection
6 from gun violence for citizens or police officers or prevented the crime.
7

8
9 In the remaining incident, a shooter in Oakland, California also brought multiple
10 guns. He used an SKS assault-type rifle with a magazine holding more than 10 rounds
11 and a pistol. He killed four policemen. He killed the first two policemen with the pistol
12 when officers stopped his car in a traffic stop. He then fled on foot to an apartment. Two
13 more officers were killed with the assault rifle and an illegal large capacity magazine and
14 a third was wounded. The murderer had a lengthy criminal history, according to the
15 Mayors' survey. At the time of the mass shooting, the killer *was on parole for assault*
16 *with a deadly weapon*. As such, he was *already prohibited from possessing* any kind of
17 gun. As in the Santa Monica example, criminalizing possession of magazines holding
18 any more than 10 rounds likely would not have provided additional protection from gun
19 violence for citizens and police officers or prevented crime in the Oakland example.
20
21
22

23 **(e) conclusions from California cases**

24
25 To sum up, of the 92 mass killings occurring across the 50 states between 2013 and
26 2009, only ten occurred in California. Of those ten, the criminalization and dispossession
27 requirements of § 32310 would have had no effect on eight of the shootings, and only
28 marginal good effects had it been in effect at the time of the remaining two shootings.

1
2 On this evidence, § 32310 is not a reasonable fit. It hardly fits at all. It appears on this
3 record to be a haphazard solution likely to have no effect on an exceedingly rare problem,
4 while at the same time burdening the constitutional rights of other California law-abiding
5 responsible citizen-owners of gun magazines holding more than 10 rounds.
6

7 **(f) no effect on revolvers**

8 The evidence surveying the other 82 mass shooting incidents (which occurred
9 outside of California) also suggests § 32310 makes for an uncomfortably poor fit. For
10 example, as noted earlier, some mass shootings involve only *revolvers* – a style for which
11 there are no magazines. (#18 Tule River Reservation, Cal. (12/8/12) 5 dead, #29 Port St.
12 John, Fla. (5/15/12) 4 dead; #37 Bay City, Tex. (11/30/11) 4 dead). California’s statute
13 will have no effect on these types of mass shootings.
14
15

16 **(g) no effect on shotguns**

17 A number of mass shootings involve a *shotgun* as the weapon of choice. The vast
18 majority of shotguns likewise cannot be equipped with a magazine holding more than 10
19 rounds. (#1 Washington, D.C., Navy Yard (9/16/13) 12 dead; #11 Manchester, Ill.
20 (4/24/13) 5 dead; #12 Federal Way, Wash. (4/21/13) 4 dead; #14 Herkimer, N.Y.
21 (4/13/13) 4 dead; #30 Gilbert, Ariz. (5/2/12) shotgun & 2 pistols & 6 hand-grenades, 4
22 dead; #46 Wagener, S.C. (7/3/11) 4 dead; #51 Oak Harbor, Ohio (4/16/11) shotgun & .22
23 rifle, 4 dead; #57 Jackson, Ky. (9/10/10) 5 dead; #64 Chicago, Ill. (4/14/10) 5 dead; #69
24 Bellville, Tex. (1/16/10) shotgun & handgun 5 dead; #83 Carthage, N.C. (3/29/09)
25
26
27
28

1
2 shotgun & handgun, 8 dead). California's statute will have little or no effect on these
3 types of mass shootings.

4
5 **(h) no effect on handguns without large capacity magazines**

6 A large number of mass shooting incidents (40 of 92) were the result of shooters
7 using only *pistols or handguns* for which there is no indication in the Mayors' survey that
8 a magazine holding any more than 10 rounds was employed. (#2 Crab Orchard, Tenn.
9 (9/11/13); #3 Oklahoma City, Okla. (8/14/13); #4 Dallas, Tex. (8/7/13); #5 Clarksburg,
10 W.V. (7/26/13) (original assailants pointed gun at victim who wrested away the handgun
11 he used to kill the assailants and 2 others); #6 Hialeah, Fla. (7/16/13); #8 Fernley, Nev.
12 (5/13/13); #16 Tulsa, Okla. (1/7/13); #20 Northridge, Cal. (12/2/12); #22 Minneapolis,
13 Minn. (9/27/12); #27 Seattle, Wash. (5/20/12); #31 Oakland, Cal. (4/2/12); #32 Norcross,
14 Ga. (2/20/12); #33 Villa Park, Ill. (1/17/12); #34 Grapevine, Tex. (12/25/11); #35
15 Emington, Ill. (12/16/11); #38 Greensboro, N.C. (11/20/11); #39 Liberty, S.C.
16 (10/14/11); #40 Seal Beach, Cal. (10/12/11); #41 Laurel, Ind. (9/26/11); #45 Wheatland,
17 Wyo. (7/30/11); #47 Grand Prairie, Tex. (6/23/11); #48 Medford, N.Y. (6/9/11); #50
18 Ammon, Id. (5/11/11); #53 Minot, N.D. (1/28/11); #55 Boston, Mass. (9/28/10); #56
19 Riviera Beach, Fla. (9/27/10); #62 Manchester, Conn. (8/3/10); #63 Hialeah, Fla.
20 (6/6/10); #65 Los Angeles, Cal. (4/3/10); #67 New Orleans, La. (3/26/10); #70 Madison,
21 Wis. (12/3/09); #71 Lakewood, Wash. (11/29/09) (hand gun of slain police officer used
22 to kill other officers); #73 Jupiter, Fla. (11/26/09); #74 Percy, Ark. (11/12/09); #75
23 Oklahoma City, Okla. (11/9/09); #79 Kansas City, Kan. (6/22/09) (2 guns stolen from a
24
25
26
27
28

1
2 police sgt.); #80 Middletown, Md. (4/19/09); #84 Santa Clara, Cal. (3/29/09); #87 Miami,
3 Fla. (3/15/09); #90 Cleveland, Ohio (3/5/09); #91 Brockport, N.Y. (2/14/09)).

4 California's statute will have no effect on these types of mass shootings.

5
6 **(i) no effects on unknowns and oddities**

7 For 20 of the remaining 92 recorded incidents, the weapon and ammunition used
8 was simply "*unknown*." A few incidents were oddities not easily categorized and not
9 involving a magazine holding any more than 10 rounds. In #4 Dallas, Tex. (8/7/13), the
10 shooter used a handgun and detonated a bomb. New Town, N.D. (#21) (11/18/12)
11 involved a hunting rifle. Oakland, Cal. (#31) (4/2/12) involved a pistol and four 10-
12 round magazines which are lawful in every state. Monongalia, W.V. (#42) (9/6/11)
13 involved a .30-.30 rifle. Carson City, Nev. (#43) (9/6/11) involved an already-illegal
14 machine gun. Appomattox, Va. (#68) (1/19/10) involved a rifle used to shoot at
15 responding police officers. California's statute will have no effect on these types of mass
16 shootings.
17
18
19
20

21 **(j) conclusions from 80 of 92 cases**

22 Having examined the facts as reported by the Mayor's survey for all of the mass
23 shooting incidents from around the United States over the fairly recent five-year period, it
24 appears that the vast majority of events are identified as not involving either assault-type
25 rifles or large capacity magazines. To reduce or eliminate such incidents requires some
26 means other than § 32310's dispossession and criminalization approach. The § 32310
27
28

1
2 approach would have had little or no discernable good effect towards reaching
3 California's four important safety objectives.

4
5 **(k) six assault rifle cases with no large capacity magazines**

6 The twelve remaining incidents involved either assault-type rifles or magazines
7 holding more than 10 rounds. These deserve a closer look. In six cases an *assault-type*
8 *rifle* was used but there is no data identifying large capacity magazine use. In
9 Albuquerque, N.M. (#15) (1/19/13) the shooter used four guns: two shotguns, a .22 rifle,
10 and an AR-15. In Wagener, S.C. (#46) (7/3/11), although the shooter owned an AK-47,
11 revolvers and pistols, he chose to use only a shotgun. Put another way, given the choice
12 between using an assault rifle or pistols with large capacity magazines, this mass shooter
13 selected a shotgun as his weapon of choice. In Washington, D.C. (#66) (3/30/10) there
14 were three gunmen who among them used two pistols and one AK-47. In Osage, Kan.
15 (#72) (11/28/09) an "assault rifle" was the weapon. Likewise, in Mount Airy, N.C. (#77)
16 (11/1/09) an "assault rifle" was used. While in Geneva County, Ala. (#89) (3/10/09) the
17 shooter used three weapons: an AR-15, an SKS, and a .38 pistol. The survey does not
18 mention large capacity magazines being used in any of these six incidents.

19
20
21
22 **(l) remaining 6 cases involve large capacity magazines**

23 The final group of incidents do involve use of magazines holding more than 10
24 rounds. Of the 92 mass shooting incidents over the five years from 2009 to 2013,
25 although millions of magazines holding more than 10 rounds are owned by citizens
26 nationwide, according to the Mayors' survey, *only six incidents* involved a magazine
27
28

1
2 holding more than 10 rounds. Two incidents involved a pistol and a magazine holding
3 more than 10 rounds. Four incidents involved an assault rifle or other weapon and a
4 magazine holding more than 10 rounds.
5

6 As noted earlier, the Santa Monica, California incident (#7) on June 7, 2013
7 involved a shooter with an AR-15, a revolver, and three “zip guns.” The shooter carried
8 forty 30-round magazines (probably for use with the AR-15). The AR-15 had no serial
9 number. The shooter was 23-years-old, suggesting that the large capacity magazines he
10 possessed he obtained in violation of California law since he was not old enough to have
11 owned such magazines before California criminalized their purchase or importation. As
12 mentioned earlier, the Mayors’ survey notes that the “assault rifle, high-capacity
13 magazines, and several components to modify the firearms *may have been shipped from*
14 *outside California.*” (Emphasis added). It is hard to imagine that the shooter, having
15 already evaded California law to acquire large capacity magazines, would have
16 dispossessed himself of the illegally acquired large capacity magazines if the existing law
17 had included the new Proposition 63 amendments to § 32310.
18
19
20
21

22 The next and probably most heinous shooting was the well-publicized Sandy Hook
23 Elementary School shooting in Newtown, Connecticut. (#17) (12/14/12). The shooter
24 carried a variety of weapons and large capacity magazines. Shortly afterwards, the State
25 of Connecticut made acquisition of large capacity magazines unlawful. However, unlike
26 in California, continued possession of pre-ban magazines remained lawful if declared and
27 the magazines were permitted to be filled to capacity for home protection and shooting
28

1
2 range practice. *See* State of Connecticut Department of Emergency Services and Public
3 Protection, Division of State Police, Special Licensing & Firearms Unit: *FAQS*
4 *REGARDING P.A. 13-3 As Amended by P.A. 13-220* (dated 3/5/14).
5

6 The Aurora, Colorado (#24) (7/20/12) movie theater shooting involved the use of a
7 highly unusual 100-round drum magazine on an AR-15, along with a shotgun and two
8 pistols. The criminalization of possession of 100-round drum magazines would seem to
9 be a reasonable fit as a means to achieve California's important safety objectives. On the
10 other hand, it may be the type of weapon that would be protected by the Second
11 Amendment for militia use under *Miller*. In any event, California's § 32310 (c) & (d)
12 would not have prevented the shooter from acquiring and using the shotgun and pistols
13 loaded with smaller 10-round magazines.¹²
14
15

16 The next incident is the Tuscon, Arizona shooting (#54) (1/8/11) in which Chief
17 Judge John Roll, a friend of this Court, was killed. It involved a 33-round magazine for a
18 Glock 19 pistol. Again, a 33-round magazine would seem unusual. But a Glock 19 with
19 its standard magazine would seem to be the quintessential self-defense weapon.
20
21

22 The fifth mass shooting took place in Binghamton, New York (#82) (4/3/09) where
23 two handguns and a 30-round magazine were used in the killing of 14 victims. The
24 survey reports that 98 rounds were fired in the attack. Since 1994, it has been illegal in
25 New York to purchase a magazine holding more than 10 rounds.
26
27

28 ¹²The Colorado incident is the only case where a truly high capacity 100-round magazine was used.

1
2 The sixth mass shooting occurred in East Oakland, California (#85) (3/21/09) and
3 involved a pistol and a SKS assault-style rifle with a high-capacity magazine. As
4 mentioned earlier, the shooting took place during a time when the shooter, who had a
5 criminal history, was *on parole for assault with a deadly weapon*.

7 **(m) conclusions from the Mayor's survey**

8
9 Some conclusions can be drawn from the Mayor's survey submitted by the
10 Attorney General. Of the ten mass shooting events that occurred in California, only two
11 involved the use of a magazine holding more than 10 rounds. In view of the large
12 population of California and the five-year time period studied, it appears that the Prop 63
13 amendments to § 32310 aim to eliminate that which is an incredibly rare danger to public
14 safety. Moreover, based on this preliminary evidentiary record submitted by the Attorney
15 General, § 32310 is a poor fit as a means to eliminate the types of mass shooting events
16 experienced in California. In other words, § 32310 appears to be a poor fit as a means for
17 the State to achieve its four important objectives.

18
19
20 In East Oakland, the shooter had already demonstrated that he was not a law-
21 abiding responsible gun owner. On the contrary, the Mayors' survey notes that "[t]he
22 shooter had a lengthy criminal history, including a conviction for armed battery, which
23 would have [already] prohibited him from possessing a gun." It notes that "he was on
24 parole for assault with a deadly weapon at the time of the shooting." It also notes that
25 one month before the mass shooting incident in which police officers were targeted,
26 "[t]he shooter took part in a home invasion robbery . . . in which a rifle was reported
27
28

1
2 stolen.” Criminalizing possession of a magazine holding any more than 10 rounds, as the
3 amendments to § 32310 do, likely would have had no effect on this perpetrator.

4
5 The shooter was already prohibited from possessing a gun, by virtue of his
6 criminal history. He was already at risk of arrest simply by possessing a gun. Moreover,
7 he was probably subject to a Fourth Amendment waiver and search at any time by state
8 parole officers, as a result of being on parole for assault with a deadly weapon. It does
9 not take much imagination to guess that, notwithstanding the amendments to § 32310
10 (c) & (d), the shooter in that case would have continued to illegally possess his illegally
11 acquired large capacity magazines for use with his illegally possessed firearms.

12 13 14 **(n) a slippery slope**

15 What is clear from the preliminary evidence presented is that individuals who
16 intend to engage in mass gun violence typically make plans. They use multiple weapons
17 and come loaded with extra ammunition. They pick the place and the time and do much
18 harm before police can intervene. Persons with violent intentions have used large
19 capacity magazines, machine guns, hand grenades and pipe bombs, notwithstanding laws
20 criminalizing their possession or use. Trying to legislatively outlaw the commonly
21 possessed weapon *de jour* is like wearing flip flops on a slippery slope. A downhill slide
22 is not hard to foresee.

23
24
25
26 Tragically, when 30-round magazines are banned, attackers will use 15 or 17-
27 round magazines. If magazines holding more than 10 rounds are banned they will use
28 multiple 10-round magazines. If all semi-automatic weapons are banned they will use

1
2 shotguns and revolvers. All of these scenarios already occur. Because revolvers and
3 handguns are the quintessential home defense weapon protected by the Second
4 Amendment and specifically approved in *Heller*, and because the average defensive gun
5 use involves firing 2.2 rounds (according to the State’s experts), states could rationalize a
6 ban on possession of rounds in excess of three per weapon.¹³ Criminals intent on
7 violence would then equip themselves with multiple weapons. The State could then
8 rationalize a one-weapon-per-individual law. Since “merely” brandishing a firearm is
9 usually effective as a defense to criminal attack (according to the State’s experts), it could
10 be argued that a one-revolver-with-one-round-per-individual ban is a reasonable
11 experiment in state police power as a means to protect citizens and law enforcement
12 officers from gun violence.
13

14
15
16 Statutes disarming law-abiding responsible citizen gun owners reflect an opinion
17 on gun policy. Courts are not free to impose their own policy choices on sovereign
18 states. But as *Heller* explains, the Second Amendment takes certain policy choices and
19 removes them beyond the realm of debate. Disarming California’s law-abiding citizenry
20 is not a constitutionally-permissible policy choice.
21
22

23
24 ¹³In drawing lines and defining how a regulation “fits,” this is not so far-fetched. Indeed,
25 in the past New York State drew the line at seven live rounds arguing that since the
26 average citizen expends only two rounds in self-defense, citizens should make do with
27 seven rounds.” *See New York State Rifle and Pistol Ass’n v. Cuomo*, 990 F. Supp. 2d
28 349, 372 (W.D.N.Y. 2013), *aff’d in part and rev’d in part*, 804 F.3d 242 (2nd Cir. 2015)
 (“Defendants contend, pointing to a study conducted by the NRA, that the average citizen
 using his or her weapon in self-defense expends only two bullets. Thus, New York
 argues, citizens do not truly need more than seven rounds.”).

1
2 To the specific point, a mass shooting accomplished with the use of a gun
3 magazine holding more than 10 rounds of ammunition, or any number of rounds, is an
4 exceedingly tragic event. Fortunately, it is also a rare event. Section 32310's ban and
5 criminalization of possession of magazines holding more than 10 rounds is not likely to
6 prevent future mass shootings. And § 32310 (c) & (d) do not provide a reasonable fit to
7 accomplish California's important goal of protecting the public from violent gun crime,
8 as the preliminary data set from the Mayors' survey bears out.
9

11 **ii. The State's Expert Declarations**

12 The preliminary expert witness declarations submitted by the Attorney General are
13 likewise unpersuasive. They do not constitute evidence reasonably believed to be
14 relevant to substantiate the State's important interests. *Fyock*, 779 F.3d at 1000 (city may
15 rely on evidence reasonably believed to be relevant). On the contrary, the data offered by
16 the Attorney General is made up of anecdotal accounts, collected by biased entities, upon
17 which educated surmises and tautological observations are framed. A statute
18 criminalizing the mere possession of an integral piece of a constitutionally protected
19 firearm, cannot be justified on the basis of defective data or emotion-driven claims. *City*
20 *of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438–39 (2002) (“This is not to say
21 that a municipality can get away with shoddy data or reasoning.”).
22
23
24
25

26 **(a) Webster**

27 For example, the Attorney General submits the expert declaration of a professor of
28 health policy and management. *See* Declaration of Daniel W. Webster (filed 6/5/17).

1
2 Although the expert offers many opinions about the public safety threat posed by
3 magazines holding any more than 10 rounds, he concedes that robust supporting data is
4 missing. “*To date, there are no studies that have examined separately the effects of an*
5 *assault weapons ban, on the one hand, and a LCM ban, on the other hand*” *Id.* at
6 ¶ 25 (emphasis added). He then opines that the largest protective effect of these bans
7 comes from restricting magazines holding any more than 10 rounds because “LCMs are
8 used much more frequently than assault weapons.” As discussed earlier, however, the
9 Mayor’s survey paints a different picture. Without the benefit of unbiased, scientifically
10 collected empirical data, it is unclear upon what evidence Professor Webster is basing his
11 opinions.
12
13
14

15 The professor also acknowledges, that “*no formal, sophisticated analyses of data*
16 *on mass shootings in public places by lone shooters for the period 1982-2012 collected*
17 *by Mother Jones magazine has been performed to my knowledge*” *Id.* at ¶ 22
18 (emphasis added). He grudgingly admits in his declaration that “it is possible that the
19 federal ban on assault weapons and magazines holding more than 10 rounds did
20 contribute to a proportionately small yet meaningful reduction in gun violence, *but*
21 *available data and statistical models are unable to discern the effect.*” *Id.* at ¶ 21
22 (emphasis added). Nevertheless, the professor opines that California’s 10-round
23 magazine limit “seems prudent.” *Id.* at ¶ 26. In fact, he opines that “[i]ndeed, a lower
24 limit could be justified,” based on a complete absence of reliable studies done on formal
25 data sets. *Id.*
26
27
28

1
2 **(b) Allen**

3 In another example, the Attorney General submits the declaration of an economist
4 who, like the professor of public health, also acknowledges the shoddy state of empirical
5 research on large capacity magazine use. *See* Declaration of Lucy P. Allen (filed 6/5/17).
6 She found two comprehensive sources detailing mass shootings: (1) data from Mother
7 Jones' investigation published by Mother Jones magazine covering mass shootings from
8 1982-2017; and (2) a study by the Citizens Crime Commission of New York City
9 covering 1984-2012. *Id.* at ¶ 11. She admits that between the two sources, “[f]or many
10 of the mass shootings, the data does not indicate whether a large-capacity magazine is
11 used.” *Id.* at ¶ 13 and n.9. In opining about the use of firearms in self-defense, the
12 economist relies on a data set from the NRA Institute for Legislative Action, but admits
13 that “it is not compiled scientifically.” *Id.* at ¶ 6.

14
15
16
17
18 **(c) Donahue**

19 In yet another example, the Attorney General submits the declaration of a professor
20 with graduate degrees in economics (from Yale) and law (from Harvard University). *See*
21 Declaration of John J. Donahue (filed 6/5/17). Professor Donahue also notes the dearth
22 of solid data, conceding, “*I am not aware of any current social science research*
23 *providing an estimate for the number of American households that own large-capacity*
24 *magazines or LCMs . . . or for the number of LCMs in private hands in America.*” *Id.* at
25 ¶ 19 (emphasis added). Citing a few news articles and little more, he opines that, “a
26 review of the resolution of mass shootings in the U.S. suggests that bans on large
27
28

1
2 capacity magazines can help save lives by forcing mass shooters to pause and reload
3 ammunition.” *Id.* at ¶ 21.

4
5 Ironically, Professor Donahue’s declaration was signed, and the preliminary
6 injunction hearing in this case was held, one day before the shooting incident at the
7 baseball field in Alexandria, Virginia. There, a shooter targeted members of a
8 Congressional baseball team firing up to 100 rounds. No one tried to tackle or disarm the
9 shooter while he paused to reload. Instead, it ultimately took two Capitol Police
10 members who were already at the scene to stop the shooter. As Michigan Representative
11 Mike Bishop told CBS News Detroit at the scene,
12

13
14 “The only reason why any of us walked out of this thing, by the grace of
15 God, one of the folks here had a weapon to fire back and give us a moment
16 to find cover. We were inside the backstop and if we didn’t have that cover
17 by a brave person who stood up and took a shot themselves, we would not
18 have gotten out of there and every one of us would have been hit – every
19 single one of us.”

20 *See* <http://detroit.cbslocal.com/2017/06/14/michigan-representative-ok;>
21 <http://dailymail.co.uk/news/article-4603404>. Likewise, the shooting at Fort Hood, Texas,
22 involved a shooter using a FN “Five-seveN” pistol which comes standard with a 10 or 20
23 round magazine. The shooter fired some 220 rounds, meaning he would have had to stop
24 and re-load a 20-round high capacity magazine ten times. Yet no one, even on a military
25 base, tried to tackle or disarm the shooter while he paused to reload.

26
27 The expert witness also belittles the possibility of an elderly or disabled
28 homeowner needing a firearm for self-defense from a violent home invasion that would

1
2 hold enough rounds such that reloading was not necessary. The elderly or disabled
3 homeowner suffering a violent home invasion attack may need (more than anyone else) a
4 larger capacity magazine for home protection. That person, the expert decries as
5 “mythical,” and “conjured” up by NRA experts, and dismisses as irrelevant. *Id.* at ¶ 28.
6

7 Professor Donahue then speculates about how *if* there were a “future case” of a
8 law-abiding citizen who needs a gun for self-defense and needs more than 10 rounds, that
9 citizen “can either re-load the defensive weapon by inserting a new clip or by using a
10 second weapon.” *Id.* at ¶ 36. Based upon his own speculation, he then opines that this
11 implies the large capacity magazine ban is “well-tailored” and likely to have little or no
12 impact on self-defense capability. *Id.*
13
14

15 The professor did not need to speculate about some unlikely, hypothetical, future
16 case. The scenario has actually played out in the past. And it turns out that his
17 speculation was a bit off. Among the Attorney General’s evidentiary presentation is a
18 news account of a law-abiding woman and her husband who late one night needed to fire
19 a gun in self-defense against armed robbers. *Oppo*. Gordon Declaration, Exh. 41.
20
21

22 As two armed men broke in, Susan Gonzalez was shot in the chest. She made it
23 back to their bedroom and found her husband’s .22 pistol. Wasting the first rounds on
24 warning shots, she then emptied the single pistol at one attacker. Unfortunately, out of
25 ammunition, she was shot again by the other armed attacker. She was not able to re-load
26 or use a second gun. Both her and her husband were shot twice. Forty-two bullets were
27 fired. *Id.*, Exh. 41 (Jacksonville Times-Union, July 18, 2000) (“Suddenly the door flew
28

1
2 open and two masked men burst into the doublewide wearing gloves and camouflage
3 jackets and waving guns She was shot in the chest . . . dialed 911 . . . then grabbed
4 her husband's Ruger .22 from a drawer . . . fired several shots over the robbers' heads to
5 scare them off . . . saw one of the gunmen . . . crouched near her refrigerator. . . sneaked
6 up behind him and emptied the Ruger, hitting him twice with her seven or eight
7 remaining bullets. The other gunman . . . then shot Susan Gonzalez, now out of
8 ammunition. [The gunman] fled from the house but returned . . . [.] He put a gun to
9 Susan Gonzalez's head and demanded the keys to the couple's truck."); *cf.* Oppo. Gordon
10 Declaration, Exh. 102 at 388 (Washington Post, Jan. 30, 2013, Transcript of Senate
11 Judiciary Committee Hearing on Gun Violence), Senator L. Graham remarks: "I do not
12 know if 10 versus 19 is common or uncommon. I do know that 10 versus 19 in the hands
13 of the wrong person is a complete disaster. I do know that six bullets in that hands [sic]
14 of a woman trying to defend her children may not be enough. . . [.] One bullet in the
15 hands of the wrong person we should all try to prevent. But when you start telling me
16 that I am unreasonable for wanting that woman to have more than six bullets, or to have
17 and AR-15 if people [are] roaming around my neighborhood, I reject the concept."). The
18 Attorney General's own evidence casts doubt on the reliability of his experts' opinions.

24
25 **(d) James**

26 The Attorney General submits the declaration of a retired police chief of
27 Emeryville, California. *See* Declaration of Ken James (filed 6/5/17). James relies on his
28 police experience and debriefings of several high profile mass shootings. He says that

1
2 the existence of high capacity magazines only serves to enhance the killing and injuring
3 potential of a firearm. *Id.* at ¶ 6. No quarrel there. Firearms have the potential to injure
4 and kill.¹⁴ He then opines that “possession and use of high capacity magazines by
5 individuals committing criminal acts pose a significant threat to law enforcement
6 personnel and the general public.” No doubt about that. He does not, however, try to
7 explain why forcing law-abiding individuals to disarm and dispossess themselves of
8 magazines holding more than 10-rounds is the solution. He simply suggests that victims
9 have not used them in the past and so they do not need them now. *Id.* at ¶ 8. It is hardly
10 surprising, however, that law-abiding citizens in California, who have been prohibited for
11 years from buying guns with magazines holding more than 10 rounds, would fire no more
12 than 10 rounds in a self-defense situation.
13
14
15

16 James also describes one professional investigation experience in which he took
17 part. Whatever else James draws from the experience, his experience suggests that a
18 criminal firing 40 rounds does not always result in a mass shooting disaster or wounded
19 bystanders. He describes an Emeryville drive-by shooting where more than 40 shell
20 casings were found at the scene; only one person was killed and no other person was
21 injured. *Id.* at ¶ 7. Having read and viewed news accounts of self-defense gun use,
22 James then says, “I have performed these reviews to discover evidence that the ability of
23 a victim to fire a large number was necessary.” *Id.* at ¶ 8. Perhaps he meant to say the
24
25
26
27
28

¹⁴At the same time, they have the potential to deter and protect.

1
2 opposite. Lastly, James' declaration relies on a position paper that appears to have been
3 inadvertently omitted.

4
5 **(e) City of Sunnyvale**

6 In the *Fyock* case, the court had a sufficiently convincing evidentiary record of a
7 reasonable fit. But there are important differences between the City of Sunnyvale and the
8 entire State of California. Sunnyvale is the crown jewel of California's Silicon Valley. It
9 has a population density of approximately 6,173 persons per square mile, according to the
10 2010 census. Sunnyvale has consistently ranked among the ten safest cities (of similar
11 size) according to the FBI's crime reports. According to a Wikipedia article, "Sunnyvale
12 is one of the few U.S. cities to have a single unified Department of Public Safety, where
13 all personnel are trained as firefighters, police officers, and EMTs, so they can respond to
14 an emergency in any of the three roles." In a dense population municipality where the
15 local government has uniquely cross-trained emergency personnel that can quickly
16 respond to crime, perhaps a law-abiding citizen can make do with a maximum of ten
17 rounds for self-defense. And perhaps there is a higher risk of stray bullets penetrating
18 walls and wounding bystanders. And perhaps there are few elderly or disabled single
19 adults living alone and far from help in Sunnydale. Perhaps residents are wealthy enough
20 to purchase multiple firearms or live in gated, security-guarded enclaves.
21
22
23
24
25

26 Compare this with Imperial County, California, with a population approximately
27 the same as the City of Sunnyvale. There the population density is only 34 persons per
28 square mile. In Alpine County, California, the entire county population is 1,175 people,

1
2 according to the 2010 census. Population density is two persons per square mile. Law
3 enforcement response times are no doubt longer there. The risk of stray bullets wounding
4 bystanders is probably low. It is likely that many rely on themselves and their lawfully-
5 owned firearms for self-defense. Certainly in suburban and rural settings, there will be
6 occasions when more than 10-rounds are needed for self-defense. Even in San Francisco,
7 with the densest population area in the State (17,858 people per square mile¹⁵), one court
8
9 conceded that more than 10 rounds may be needed for defense from criminals. *See San*
10 *Francisco Police Officers Ass'n v. City and County of S.F.*, 18 F. Supp. 3d 997, 1005
11 (N.D. Cal. 2014) (“Although there will be some occasions when a law-abiding citizen
12
13 needs more than ten rounds to defend himself or his family, the record shows that such
14 occasions are rare. This will be even rarer in a dense urban area like San Francisco where
15
16 police will likely be alerted at the onset of gunfire and come to the aid of the victim.
17
18 Nonetheless, in those rare cases, to deprive the citizen of more than ten shots may lead to
19
20 his of her own death. Let this point be conceded.”).

21 **iii. False Dichotomy**

22 In the end, it is a false dichotomy upon which the Attorney General rests his
23
24 evidentiary case. The Attorney General argues that any magazine in criminal hands with
25
26 more than 10 rounds is “unusually dangerous” to law-abiding citizens. (“Unusually
27
28 dangerous” is not the same as the Second Amendment reference point of “unusual and

¹⁵See www.sacbee.com/news/politics-government/capitol-alert/article 12486362.html
(Mar. 4, 2015).

1
2 dangerous.”) At the same time he (and his experts) declare that no good law-abiding
3 citizen really *needs* a gun magazine holding more than 10 rounds for self-defense.

4
5 As a purely public policy choice, a government may declare that firearms of any
6 capacity are dangerous in the hands of criminals, a proposition with which this Court
7 would certainly agree. At the same time, it can also be the case that firearms with larger
8 than 10-round magazines in the hands of law-abiding citizens makes every individual
9 safer and the public as a whole safer. Guns in the hands of criminals are dangerous; guns
10 in the hands of law-abiding responsible citizens ameliorate that danger. The Second
11 Amendment takes the policy choice away from state government. To give full life to the
12 core right of self-defense of the home, every law-abiding responsible United States
13 citizen has a constitutionally-protected right to keep and bear a handgun (a handgun
14 being the quintessential weapon of choice). Pistols are handguns. Pistols are designed to
15 use magazines of various capacities and some of the most popular come standard with 15
16 or 17 round magazines.

17
18
19
20 Using the resources of the criminal justice system against the law-abiding
21 responsible citizen to wrest a heretofore lawfully-possessed magazine holding any more
22 than 10 rounds out of his or her hands, is hardly the reasonable fit required by
23 intermediate scrutiny. The “evidence must fairly support” the “rationale” for the state’s
24 statute. *Jackson*, 746 F.3d at 969–70. “[A]nd courts should not credit facially
25 implausible legislative findings.” *Id.*

26
27
28

iv. Ballot Initiative Finding

Here, there are no legislative findings as the statutory provisions in effect are the product of a voter initiative. The initiative contains findings. But to the extent the findings are relevant, they express a purpose that affronts the over-arching ideal of the Second Amendment. Sections 2.11 and 2.12 of Proposition 63, in the section titled “Findings and Declarations” addresses “military-style large-capacity ammunition magazines.” It declares, “*No one except trained law enforcement should be able to possess these dangerous magazines.*” (Emphasis added.)

The rationale is anathema to the United States Constitution’s Bill of Rights guarantee of a right to keep and bear arms. It is a right naturally possessed by regular, law-abiding responsible citizens, whom are neither reliant upon, nor subservient to, a privileged, powerful, professional police state.¹⁶

¹⁶ See e.g., *Silveira v. Lockyer*, 328 F.3d 567, 569-70 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing *en banc*). Judge Kozinski cautions against,

. . . fall[ing] prey to the delusion – popular in some circles – that ordinary people are too careless and stupid to own guns, and we would be far better off leaving all weapons in the hands of professionals on the government payroll. But the simple truth – born of experience – is that tyranny thrives best where government need not fear the wrath of an armed people. Our own sorry history bears this out: Disarmament was the tool of choice for subjugating both slaves and free blacks in the South. In Florida, patrols searched blacks’ homes for weapons, confiscated those found and punished their owners without judicial process. See Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309, 338 (1991). In the North, by contrast, blacks exercised their right to bear arms to defend against racial mob violence. *Id.* at 341-42. As Chief Justice Taney well appreciated, the institution of slavery required a class of people who lacked the means to

1
2 A reasonable fit as a means to protect citizens and law enforcement from gun
3 violence and crime, in a state with numerous military bases and service men and service
4 women, would surely permit the honorably discharged member of the Armed Forces who
5 has lawfully maintained a magazine holding more than 10 rounds for more than twenty
6 years to continue to keep and use his magazine. These citizens are perhaps the best

7
8
9 resist. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (finding
10 black citizenship unthinkable because it would give blacks the right to “keep
11 and carry arms wherever they went”). A revolt by Nat Turner and a few
12 dozen other armed blacks could be put down without much difficulty; one
13 by four million armed blacks would have meant big trouble.

14 All too many of the other great tragedies of history – Stalin’s atrocities, the
15 killing fields of Cambodia, the Holocaust, to name but a few – were
16 perpetrated by armed troops against unarmed populations. Many could well
17 have been avoided or mitigated, had the perpetrators known their intended
18 victims were equipped with a rifle and twenty bullets apiece, as the Militia
19 Act required here. If a few hundred Jewish fighters in the Warsaw Ghetto
20 could hold off the Wehrmacht for almost a month with only a handful of
21 weapons, six million Jews armed with rifles could not so easily have been
22 herded into cattle cars.

23 My excellent colleagues have forgotten these bitter lessons of history. The
24 prospect of tyranny may not grab the headlines the way vivid stories of gun
25 crime routinely do. But few saw the Third Reich coming until it was too
26 late. The Second Amendment is a doomsday provision, one designed for
27 those exceptionally rare circumstances where all other rights have failed
28 where the government refuses to stand for reelection and silences those who
29 protest; where courts have lost the courage to oppose, or can find no one to
30 enforce their decrees. However improbable these contingencies may seem
31 today, facing them unprepared is a mistake a free people get to make only
32 once.

33 Fortunately, the Framers were wise enough to entrench the right of the
34 people to keep and bear arms within our constitutional structure. The
35 purpose and importance of that right was still fresh in their minds, and they
36 spelled it out clearly so it would not be forgotten.

1
2 among us. They have volunteered to serve and have served and sacrificed to protect our
3 country. They have been specially trained to expertly use firearms in a conflict. Oppo.
4 Gordon Declaration, Exh. 102 at 389 (Washington Post, Jan. 30, 2013, Transcript of
5 Senate Judiciary Committee Hearing on Gun Violence), Senator J. Johnson remarks: “It
6 is my understanding talking with my associates in the military, that public policing
7 mirrors much of what the military does.” They have proven their good citizenship by
8 years of lawfully keeping firearms as civilians. What possibly better citizen candidates to
9 protect the public against violent gun-toting criminals?
10
11

12 Similarly, a reasonable fit as a means to protect citizens and law enforcement from
13 gun violence and crime, would surely make an exception for a Department of Justice-
14 vetted, privately trained citizen to whom the sheriff has granted a permit to carry a
15 concealed weapon, and whom owns a magazine holding more than 10 rounds.
16 California’s statute does not except such proven, law-abiding, trustworthy, gun-owning
17 individuals. Quite the opposite. Under the statute, if not enjoined, all of these worthy
18 individuals will become outlaws on July 1, 2017, should they not dispossess themselves
19 of magazines holding 10+ rounds they currently own.¹⁷
20
21
22
23

24
25 ¹⁷There is some irony in the fact that these CCW holders have abided by the law. In
26 applying for a concealed weapon permit, they disclose, *inter alia*, their name, physical
27 address, date and place of birth, criminal history, traffic violation history, and the
28 particular type and caliber of firearm (including serial number) they intend to carry. See
Cal. Pen. Code § 26175. In so doing, they provided a ready-made list of gun-owning
citizens and a list of the types of guns they carry, which guns are likely to use magazines
holding more than 10 rounds.

1
2 The Attorney General articulates four important objectives to justify this new
3 statutory bludgeon. They all swing at reducing “gun violence.” The bludgeon swings to
4 knock large capacity magazines out of the hands of criminals. If the bludgeon does not
5 work, then the criminals still clinging to their large capacity magazines will be thrown in
6 jail while the magazines are destroyed as a public nuisance. The problem is the bludgeon
7 indiscriminately hammers all that is in its path. Here, it also hammers magazines out of
8 the hands of long time law-abiding citizens. It hammers the 15-round magazine as well
9 as the 100-round drum. And it throws the law-abiding, self-defending citizen who
10 continues to possess a magazine able to hold more than 10 rounds into the same jail cell
11 as the criminal. Gun violence to carry out crime is horrendous and should be condemned
12 by all. Defensive gun violence may be the only way a law-abiding citizen can avoid
13 becoming a victim.

14
15 Put differently, violent gun use is a constitutionally-protected means for law-
16 abiding citizens to protect themselves from criminals. The phrase “gun violence” may
17 not be invoked as a talismanic incantation to justify any exercise of state power. Implicit
18 in the concept of public safety is the right of law-abiding people to use firearms and the
19 magazines that make them work to protect themselves, their families, their homes, and
20 their state against all armed enemies, foreign and domestic. To borrow a phrase, it would
21 indeed be ironic if, in the name of public safety and reducing gun violence, statutes were
22 permitted to subvert the public’s Second Amendment rights – which may repel criminal
23 gun violence and which ultimately ensure the safety of the Republic. *Cf. United States v.*
24
25
26
27
28

1
2 *Robel*, 389 U.S. 258, 264 (1967) (“Implicit in the term ‘national defense’ is the notion of
3 defending the values and ideals which set this Nation apart. . . . It would indeed be ironic
4 if, in the name of national defense, we would sanction the subversion of one of those
5 liberties – the freedom of association – which makes the defense of the Nation
6 worthwhile.”).

8 **2. Irreparable Harm**

9
10 There are elements of Second Amendment jurisprudence that have First
11 Amendment analogies. *See Jackson*, 746 F.3d at 960. The Ninth Circuit has held that the
12 “[t]he loss of First Amendment freedoms, for even minimal periods of time,
13 unquestionably constitutes irreparable injury.” *Associated Press v. Otter*, 682 F.3d 821,
14 826 (9th Cir. 2012) (alteration in original) (quoting *Elrod v. Burns*, 427 U.S. 347, 373
15 (1976)). A “colorable First Amendment claim” is “irreparable injury sufficient to merit
16 the grant of relief.” *Warsoldier v. Woodford*, 418 F.3d 989, 1001 (9th Cir. 2005)
17 (internal quotation marks omitted). “If the underlying constitutional question is close. . .
18 we should uphold the injunction and remand for trial on the merits.” *Ashcroft v. Am.*
19 *Civil Liberties Union*, 542 U.S. 656, 664-65 (2004). The same is true for Second
20 Amendment rights. Their loss constitutes irreparable injury. Perhaps even more so in
21 this context, where additional rounds may save lives, and where Plaintiffs and those like
22 them will irrevocably lose possession and use of their magazines upon delivery to the
23 police to be destroyed, or upon sale to a firearms dealer who will have little market for re-
24 sale, or upon shipment somewhere out of state. The right to keep and bear arms protects
25
26
27
28

1
2 tangible and intangible interests which cannot be compensated by damages. *Grace v.*
3 *District of Columbia*, 187 F. Supp. 3d 124, 150 (D.D.C. 2016) (quoting *Ezell v. City of*
4 *Chicago*, 651 F.3d 684, 699 (7th Cir. 2011). “The right to bear arms enables one to
5 possess not only the means to defend oneself but also the self-confidence – and psychic
6 comfort – that comes with knowing one could protect oneself if necessary.” *Grace*, 187
7 F. Supp. 3d at 150. Loss of that peace of mind, the physical magazines, and the
8 enjoyment of Second Amendment rights constitutes irreparable injury.
9
10

11 **3. Balance of Hardships**

12 Balancing in the First Amendment context weighs more heavily the chilled rights
13 of individuals, especially when criminal sanctions loom. “As to the balance of equities,
14 we recognize that while the preliminary injunction is pending, there will be some
15 hardship on the State. Nevertheless, the balance of equities favors Appellees, whose First
16 Amendment rights are being chilled. This is especially so because the Act under scrutiny
17 imposes criminal sanctions for failure to comply.” *Doe v. Harris*, 772 F.3d 563, 583 (9th
18 Cir. 2014). “Where a prosecution is a likely possibility, yet only an affirmative defense is
19 available, speakers may self-censor rather than risk the perils of trial. There is a potential
20 for extraordinary harm and a serious chill upon protected speech.” *Ashcroft v. Am. Civil*
21 *Liberties Union*, 542 U.S. 656, 670-71 (2004). The same is true here. While a
22 preliminary injunction is pending, there will be some hardship on the State.
23
24
25
26
27 Nevertheless, because §32310 (c) & (d) impose criminal sanctions for a failure to act it
28

1
2 poses the potential for extraordinary harm on Plaintiffs, while discounting their Second
3 Amendment rights. The balance of hardships favors Plaintiffs.

4 **4. Public Interest**

5
6 “Once an applicant satisfies the first two factors [likelihood of success on the
7 merits and irreparable harm], the traditional stay inquiry calls for assessing the harm to
8 the opposing party and weighing the public interest. These factors merge when the
9 Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009); *U.S.*
10 *S.E.C. v. Wilde*, 2013 WL 2303761, at *8 (C.D. Cal. May 20, 2013); *Native Songbird*
11 *Care and Conservation v. LaHood*, 2013 WL 3355657, at *12 (N.D. Cal. July 2, 2013);
12 *Tracy Rifle & Pistol LLC v. Harris*, 118 F. Supp. 3d 1182, 1193 (E.D. Cal. 2015).

13
14 The public interest favors the exercise of Second Amendment rights by law-
15 abiding responsible citizens. And it is always in the public interest to prevent the
16 violation of a person’s constitutional rights. *Hobby Lobby Stores, Inc. v. Sibelius*, 723
17 F.3d 1114, 1145 (10th Cir. 2013), *aff’d sub nom., Burwell v. Hobby Lobby Stores, Inc.*,
18 134 S. Ct. 2751 (2014); *Doe*, 772 F.3d at 583 (quoting *Sammartano v. First Judicial*
19 *Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002)) (“Finally, the public interest favors the
20 exercise of First Amendment rights. Although we appreciate the State’s significant
21 interest in protecting its citizens from crime, nothing in the record suggests that enjoining
22 the CASE Act would seriously hamper the State’s efforts to investigate online sex
23 offenses, as it can still employ other methods to do so. On the other hand, we ‘have
24 consistently recognized the significant public interest in upholding First Amendment
25
26
27
28

1
2 principles.”). The balance of equities and the public interest merge when a likely
3 constitutionally infringing statute is preliminarily enjoined to maintain the *status quo*.
4 That is the case here.

6 **B. The Government Takings Claim**

7 The Attorney General asserts that, when the government acts pursuant to its police
8 power to protect the safety, health, and general welfare of the public, a prohibition on
9 possession of property declared to be a public nuisance is not a physical taking. *See*
10 *Oppo*. at 22, (citing *Chicago, B. & Q. Railway Co. v. Illinois*, 200 U.S. 561, 593-594
11 (1906) and *Akins v. United States*, 82 Fed. Cl. 619, 622 (2008)). The Attorney General
12 then cites a number of courts that have rejected Takings Clause challenges to laws
13 banning the possession of dangerous weapons. *See Oppo*. at 23 (citing *Akins*, 82 Fed. Cl.
14 at 623-24 (restrictions on manufacture and sale of machine guns not a taking) and *Gun*
15 *South, Inc. v. Brady*, 877 F.2d 858, 869 (11th Cir. 1989) (temporary suspension on
16 importation of assault weapons not a taking)). California has deemed large capacity
17 magazines to be a nuisance. *See Cal. Pen. Code* § 32390. That designation is dubious.
18 As the Supreme Court recognized a decade before *Heller*, “[g]uns in general are not
19 ‘deleterious devices or products or obnoxious waste materials.’” *Staples v. United States*,
20 511 U.S. 600, 610 (1994) (citation omitted).

21
22 Plaintiffs remonstrate that defending the law’s forced, uncompensated, physical
23 dispossession of magazines holding more than 10 rounds as an exercise of its “police
24 power” is not persuasive. Supreme Court precedent casts doubt on the State’s theory that
25
26
27
28

1
2 an exercise of the police power cannot constitute physical takings. *Loretto v.*
3 *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In *Loretto* – a case the
4 Attorney General does not cite – the Supreme Court held that a law requiring physical
5 occupation of private property was both “within the State’s police power” and an
6 unconstitutional physical taking. The Court explained that whether a law effects a
7 physical taking is “a separate question” from whether the state has the police power to
8 enact the law. *Id.* at 425-26 (“It is a separate question, however, whether an otherwise
9 valid regulation so frustrates property rights that compensation must be paid. We
10 conclude that a permanent physical occupation authorized by government is a taking
11 without regard to the public interests that it may serve.”).

12
13
14
15 In a similar vein, the Supreme Court holds that a law enacted pursuant to the state’s
16 “police powers to enjoin a property owner from activities akin to public nuisances” is not
17 immune from scrutiny under the regulatory takings doctrine. *Lucas v. South Carolina*
18 *Coastal Council* 505 U.S. 1003, 1020-27 (1992). The Court reasoned that it was true
19 “[a] fortiori” that the “legislature’s recitation of a noxious-use justification cannot be the
20 basis for departing from our categorical rule that total regulatory takings must be
21 compensated.” *Id.* at 1026.

22
23
24 Recently, the Supreme Court summarized some of the fundamental principles of
25 takings law. *Murr v. Wisconsin*, ___ S. Ct. ___, 2017 WL 2694699 (Jun. 23, 2017). “The
26 Takings Clause of the Fifth Amendment provides that private property shall not be taken
27 for public use, without just compensation. The Clause is made applicable to the States
28

1
2 through the Fourteenth Amendment. As this Court has recognized, the plain language of
3 the Takings Clause requires the payment of compensation whenever the government
4 acquires private property for a public purpose, but it does not address in specific terms
5 the imposition of regulatory burdens on private property.” *Id.* at *7 (quotations and
6 citations omitted). *Murr* notes that almost a century ago, the Court held that “while
7 property may be regulated to a certain extent, if regulation goes too far it will be
8 recognized as a taking.” *Id.* (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393,
9 415 (1922)).

10
11
12 Takings jurisprudence is flexible. There are however, two guides set out by *Murr*
13 for detecting when government regulation is so burdensome that it constitutes a taking.
14 “First, with certain qualifications a regulation which denies all economically beneficial or
15 productive use of land will require compensation under the Takings Clause. Second,
16 when a regulation impedes the use of property without depriving the owner of all
17 economically beneficial use, a taking still may be found based on a complex of factors,
18 including (1) the economic impact of the regulation on the claimant; (2) the extent to
19 which the regulation has interfered with distinct investment-backed expectations; and (3)
20 the character of the governmental action.” *Murr*, 2017 WL 2694699, at *8 (citations and
21 quotation marks omitted). “[A] physical *appropriation* of property g[ives] rise to a *per se*
22 taking, without regard to other factors.” *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2427
23 (2015).
24
25
26
27
28

1
2 The dispossession requirement of § 32310(c) & (d) imposes a rare hybrid taking.
3 Subsection (d)(3) is a type of physical appropriation of property in that it forces owners
4 of large capacity magazines to “surrender” them to a law enforcement agency “for
5 destruction.” Thus, (d)(3) forces a *per se* taking requiring just compensation. But there
6 are two other choices. Subsection (d)(2) forces the owner to sell his magazines to a
7 firearms dealer. It is a fair guess that the fair market value of a large capacity magazine
8 on or after July 1, 2017, in the State of California, will be near zero. Of course, the
9 parties spend little time debating the future fair market value for the to-be-relinquished
10 magazines. Subsection (d)(1) forces the owner to “remove” their large capacity
11 magazines “from the state,” without specifying a method or supplying a place. This
12 choice obviously requires a place to which the magazines may be lawfully removed. In
13 other words, (d)(1) relies on other states, in contrast to California, which permit
14 importation and ownership of large capacity magazines. With the typical retail cost of a
15 magazine running between \$20 and \$50, the associated costs of removal and storage and
16 retrieval may render the process more costly than the fair market value (if there is any) of
17 the magazine itself. Whatever stick of ownership is left in the magazine-owner’s “bundle
18 of sticks,” it is the short stick.

19
20
21
22 Here, California will deprive Plaintiffs not just of the *use* of their property, but of
23 *possession*, one of the most essential sticks in the bundle of property rights. Of course, a
24 taking of one stick is not necessarily a taking of the whole bundle. *Murr*, 2017 WL
25 2694699, at *19 (Roberts, C.J., dissenting) (“Where an owner possesses a full ‘bundle’ of
26
27
28

1
2 property rights, the destruction of one strand of the bundle is not a taking, because the
3 aggregate must be viewed in its entirety.”). Nevertheless, whatever expectations people
4 may have regarding property regulations, they “do not expect their property, real or
5 personal, to be actually occupied or taken away.” *Horne*, 135 S. Ct. at 2427. Thus,
6 whatever might be the State’s authority to ban the sale or use of magazines over 10
7 rounds, the Takings Clause prevents it from compelling the physical *dispossession* of
8 such lawfully-acquired private property without just compensation.
9
10

11 Plaintiffs have demonstrated a likelihood of success on the merits of their
12 governmental takings claim. Without compensation, Plaintiffs will be irreparably harmed
13 as they will no longer be able to retrieve or replace their “large” capacity magazines as
14 long as they reside in California. As the law-abiding owner relinquishes his magazine, he
15 or she may also forfeit the self-defense peace of mind that a large capacity magazine had
16 instilled. As in other cases where constitutional rights are likely chilled, the balance of
17 hardships weighs in the citizen’s favor. *Doe*, 772 F.3d at 583 (“As to the balance of
18 equities, we recognize that while the preliminary injunction is pending, there will be
19 some hardship on the State.”).
20
21
22

23 The public interest also favors the protection of an individual’s core Second
24 Amendment rights and his or her protection from an uncompensated governmental taking
25 that goes too far. Notably, a preliminary injunction will not increase the number of large
26 capacity magazines lawfully present in California. The State may continue to investigate
27 and prosecute the unlawful importation, purchase, sale, manufacturing, etc., of large
28

1
2 capacity magazines during the pendency of a preliminary injunction. Regardless of the
3 likelihood of success on Plaintiffs’ Second Amendment claims, Plaintiffs are also entitled
4 to a preliminary injunction to maintain the *status quo* and prevent irreparable injury under
5 the Takings Clause of the Constitution.
6

7 IV. CONCLUSION

8 Every injury or death caused by the misuse of a firearm is a tragedy. That the
9 mentally ill and violent criminals choose to misuse firearms is well known. This latest
10 incremental incursion into solving the “gun violence” problem is a reflexively simple
11 solution. But as H.L. Mencken wrote, “There is always a well-known solution to every
12 human problem – neat, plausible, and wrong.”¹⁸
13
14

15 Magazines holding more than 10 rounds are “arms.” California Penal Code
16 Section 32310, as amended by Proposition 63, burdens the core of the Second
17 Amendment by criminalizing the mere possession of these magazines that are commonly
18 held by law-abiding citizens for defense of self, home, and state. The regulation is
19 neither presumptively legal nor longstanding. The statute hits close to the core of the
20 Second Amendment and is more than a slight burden. When the simple test of *Heller* is
21 applied, a test that persons of common intelligence can understand, the statute is
22 adjudged an unconstitutional abridgment. Even under the more forgiving test of
23 intermediate scrutiny, the statute is not likely to be a reasonable fit. It is not a reasonable
24
25
26

27 ¹⁸ H.L. Mencken, *Prejudices: Second Series*, Alfred A. Knopf, Inc. (1920), p. 158.
28

1
2 fit because, among other things, it requires law-abiding concealed carry weapon permit
3 holders and Armed Forces veterans to dispossess themselves of lawfully-owned gun
4 magazines that hold more than 10 rounds – or suffer criminal penalties.
5

6 The Court does not lightly enjoin a state statute, even on a preliminary basis.
7 However, just as the Court is mindful that a majority of California voters approved
8 Proposition 63 and that the government has a legitimate interest in protecting the public
9 from gun violence, it is equally mindful that the Constitution is a shield from the tyranny
10 of the majority. Plaintiffs’ entitlements to enjoy Second Amendment rights and just
11 compensation are not eliminated simply because they possess “unpopular” magazines
12 holding more than 10 rounds.
13
14

15 If this injunction does not issue, hundreds of thousands, if not millions, of
16 otherwise law-abiding citizens will have an untenable choice: become an outlaw or
17 dispossess one’s self of lawfully acquired property. That is a choice they should not have
18 to make. Not on this record.
19

20 Accordingly, with good cause appearing for the reasons stated in this opinion,
21 Plaintiffs’ motion for a preliminary injunction is GRANTED.
22

23 ///

24 ///

25 ///

26

27

28

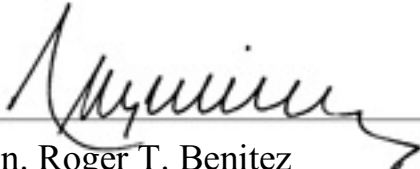
1
2 **IT IS HEREBY ORDERED** that:

3 1. Defendant Attorney General Xavier Becerra, and his officers, agents, servants,
4 employees, and attorneys, and those persons in active concert or participation with him,
5 and those duly sworn state peace officers and federal law enforcement officers who gain
6 knowledge of this injunction order or know of the existence of this injunction order, are
7 enjoined from implementing or enforcing California Penal Code sections 32310 (c) &
8 (d), as enacted by Proposition 63, or from otherwise requiring persons to dispossess
9 themselves of magazines able to hold more than 10 rounds lawfully acquired and
10 possessed.
11

12
13
14 2. Defendant Becerra shall provide, by personal service or otherwise, actual notice
15 of this order to all law enforcement personnel who are responsible for implementing or
16 enforcing the enjoined statute. The government shall file a declaration establishing proof
17 of such notice.
18

19 **IT IS SO ORDERED.**

20 DATED: June 29, 2017

21
22 
23 Hon. Roger T. Benitez
24 United States District Judge
25
26
27
28