

SEILER EPSTEIN ZIEGLER & APPEGATE LLP
Attorneys at Law

1 George M. Lee (SBN 172982)
Douglas A. Applegate (SBN 142000)
2 **SEILER EPSTEIN ZIEGLER & APPEGATE LLP**
601 Montgomery Street, Suite 2000
3 San Francisco, California 94111
Phone: (415) 979-0500
4 Fax: (415) 979-0511

5 Raymond M. DiGuseppe (SBN 228457)
LAW OFFICES OF RAYMOND MARK DIGUISEPPE, PLLC
6 2 North Front Street, Fifth Floor
Wilmington, NC 28401
7 Phone: (910) 713-8804
Fax: (910) 672-7705

8 Attorneys for Plaintiffs
9 WILLIAM WIESE, JEREMIAH MORRIS,
LANCE COWLEY, SHERMAN MACASTON,
10 CLIFFORD FLORES, L.Q. DANG, FRANK FEDERAU,
ALAN NORMANDY, TODD NIELSEN,
11 THE CALGUNS FOUNDATION,
FIREARMS POLICY COALITION,
12 FIREARMS POLICY FOUNDATION,
and SECOND AMENDMENT FOUNDATION

13
14 UNITED STATES DISTRICT COURT

15 FOR THE EASTERN DISTRICT OF CALIFORNIA

16
17 WILLIAM WIESE, et al.,

18 Plaintiffs,

19 vs.

20
21 XAVIER BECERRA, in his official capacity as
Attorney General of California, et al.,

22 Defendants.
23
24
25
26
27
28

Case No. 2:17-cv-00903-WBS-KJN

**PLAINTIFFS' OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS SECOND AMENDED
COMPLAINT PURSUANT TO FEDERAL RULE
OF CIVIL PROCEDURE 12(B)(6)**

Date: February 5, 2018

Time: 1:30 p.m.

Courtm. 5

Judge: Sr. Judge William B. Shubb

TABLE OF CONTENTS

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

I. INTRODUCTION1

II. STATEMENT OF FACTS.....2

 A. AMMUNITION MAGAZINES AND THE ORIGINAL CALIFORNIA MAGAZINE BAN2

 B. SENATE BILL 1446 AND PROPOSITION 634

 C. THE INSTANT ACTION.....6

III. ARGUMENT8

 A. IN EVALUATING PLAINTIFFS’ SECOND AMENDMENT CLAIMS, THIS COURT SHOULD REJECT ANY INTEREST-BALANCING APPROACH, WHICH WOULD CLEARLY BE INCONSISTENT WITH *HELLER*.8

 1. Because the LCM Ban is Tantamount to a Confiscation of a Widely-Used, Constitutionally-Protected Class of Arms, *Heller’s* Categorical Approach Controls.....8

 2. Any Application of Intermediate Scrutiny Cannot Involve the Interest-Balancing Prohibited by *Heller*.15

 3. Defendants Bear a True Evidentiary Burden Under *Actual* Intermediate Scrutiny, Which They Cannot Overcome in Their Motion to Dismiss.20

 4. Should There Be Any “Interest-Balancing,” Strict Scrutiny is Actually the More Appropriate Test.....23

 B. PLAINTIFFS STATE A CAUSE OF ACTION FOR TAKINGS.....26

 1. The Retroactive Magazine Possession Ban Constitutes a *Per Se* Taking.28

 a. Section 32310(d) is a Taking Because It Compels the Physical Appropriation of Property.29

 b. The Effect of Section 32310(c) and (d) Constitutes a Taking Because the Statutory Scheme Completely Deprives the Owners of All Economically Beneficial Use of Their Property.....33

 c. The Statute is Not a Valid Exercise of Police Power.....35

SEILER EPSTEIN ZIEGLER & APPEGATE LLP
Attorneys at Law

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

2. The Retroactive Magazine Possession Ban Constitutes a Burdensome Regulatory Taking40

C. PLAINTIFFS STATE CAUSES OF ACTION FOR VAGUENESS AND OVERBREADTH (COUNTS III & V).....42

1. The Vagueness Claims Stand On Their Own In Stating Colorable Claims For Relief That Easily Survive The State’s Motion To Dismiss.42

2. The DOJ’s Own Findings Poignantly Demonstrate the Serious Vagueness Problems that the State Seeks to Bypass in Ignoring This Evidence.44

3. The Legislative and Initiative History Inevitably Compel the Conclusion that the Two Conflicting Versions of the LCM Ban Both Remain in Effect.45

4. The Resulting Conflicts and Confusion Within the LCM Ban Strongly Support Plaintiffs’ Claim that the Scheme is Unconstitutionally Vague.49

5. The State Fails in Its Attempt to Brush Off Plaintiffs’ Viable Claims of Vagueness and Overbreadth in Count IV.....50

D. PLAINTIFFS HAVE STATED A CLAIM THAT THIS STATUTORY SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE.52

IV. CONCLUSION.....54

TABLE OF AUTHORITIES

Cases

Andrus v. Allard, 44 U.S. 51, 100 S.Ct. 318 (1979)33, 34, 35

Ashcroft v. Iqbal, 556 U.S. 662 (2009).....50, 51

Babbitt v. Youpee, 519 U.S. 234 (1997)27

Bair v. United States, 515 F.3d 1323 (Fed. Cir. 2008)39

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).....2, 51

Board of Trustees of State Univ. of New York v. Fox, 492 U.S. 469 (1989)21

Caetano v. Mass., ___ U.S. ___, 136 S.Ct. 1027 (2016).....14, 24, 25

Carson v. Am. Brands, Inc., 450 U.S. 79 (1981).....7

Chicago, R. I. & P. R. Co. v. United States, 284 U.S. 80, 52 S.Ct. 87 (1931)33

City of Cleburne, Texas v. Cleburne Living Ctr., 473 U.S. 432 (1985)52

Colorado Outfitters Ass’n v. Hickenlooper, 24 F.Supp.3d 1050 (D. Colo. 2014)12

Daniels-Hall v. Nat’l Educ. Ass’n, 629 F.3d 992 (9th Cir. 2010)2

District of Columbia v. Heller, 554 U.S. 570, 128 S.Ct. 2783 (2008) passim

Dore v. United States, 97 F. Supp. 239 (Ct. Cl. 1951)31

Drake v. Filco, 724 F.3d 426 (3d Cir. 2010)17

Edenfield v. Fane, 507 U.S. 761 (1993)21

Edward P. Stahel & Co. v. United States, 78 F. Supp. 800 (Ct. Cl. 1948).....31

Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011)21, 22

F.C.C. v. Beach Communications, Inc., 508 U.S. 307 (1993).....20

Felton Water Co. v. Superior Court, 82 Cal.App. 382 (1927)27

Fesjian v. Jefferson, 399 A.2d 861 (D.C. Ct. App. 1979)36, 37

SEILER EPSTEIN ZIEGLER & APPEGATE LLP
Attorneys at Law

1 *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015).....10, 14, 23

2 *Fyock v. City of Sunnyvale*, 25 F.Supp.3d 1267 (N.D. Cal. 2014)13, 14, 25

3 *Fyock v. City of Sunnyvale*, 779 F.3d 991 (9th Cir. 2015) passim

4 *Gerhart v. Lake County Montana*, 637 F.3d 1013 (9th Cir. 2011).....54

5 *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91 (1979).....2

6 *Golden Gate Hotel Assn. v. City & County of San Francisco*,
7 836 F.Supp. 707 (N.D. Cal. 1993).....27

8 *Grayned v. City of Rockford*, 408 U.S. 104 (1972)43, 44

9 *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999)21

10 *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244 (D.C. Cir. 2011)12, 13, 17, 23

11 *Heller v. Doe by Doe*, 509 U.S. 312 (1993)53

12 *Hill v. Colorado*, 530 U.S. 703 (2000)19

13 *Horne v. Department of Agriculture*, ___ U.S. ___, 135 S.Ct. 2419 (2015).....33, 34, 35, 40

14 *Hotel & Motel Assn. of Oakland v. City of Oakland*, 344 F.3d 959 (9th Cir. 2003)43

15 *Italian Colors Rest. v. Becerra*, No. 15-15873, 2018 WL 266332 (9th Cir. Jan. 3, 2018).....21

16 *Jackson v. City and County of San Francisco*, ___ U.S. ___, 135 S.Ct. 2799 (2015)18

17 *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014).....19

18 *Jefferson Street Industries, LLC v. City of Indio*, 236 Cal.App.4th 1175 (2015).....27

19 *John Doe I v. Nestle USA*, 766 F.3d 1013 (9th Cir. 2014)50, 52

20 *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012).....17

21 *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S. Ct. 383 (1979)28, 33

22 *Karlin v. Foust*, 188 F.3d 446 (9th Cir. 1999).....43, 44, 49

23 *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 104 S.Ct. 2187 (1984).....32

24 *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc)17, 22, 43

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

Kolender v. Lawson, 461 U.S. 352 (1983) 43

Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973) 20

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074 (2005) 27, 28, 33, 38

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164 (1982)..... 28, 35

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886 (1992)..... passim

Luis v. United States, ___ U.S. ___, 136 S. Ct. 1083 (2016) 19

Mathews v. Lucas, 427 U.S. 495 (1976)..... 53

McDonald v. Chicago, 561 U.S. 742 (2010) passim

Mugler v. Kansas, 123 U.S. 623 (1887) 38, 39

N.Y. State Rifle & Pistol Ass’n, Inc. v. Cuomo, 804 F.3d 242 (2d Cir. 2015) 13, 21, 23, 43

Nat’l Wildlife Fed’n v. I.C.C., 850 F.2d 694 (D.C. Cir. 1988)..... 28

Nixon v. United States, 978 F.2d 1269 (D.C. Cir. 1992) 30

NRA v. BATFE, 700 F.3d 185 (5th Cir. 2012) 17

Palazzolo v. Rhode Island, 533 U.S. 606, 121 S.Ct. 2448 (2001)..... 41

Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007)..... 10

Penn Central Transportation Co. v. City of New York,
438 U.S. 104, 98 S.Ct. 2646 (1978)..... 39, 40, 41

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158 (1922) 40

People v. Bustamante, 57 Cal.App.4th 693 (1997) 45, 46

People v. Carter, 131 Cal.App.3d 177 (1933)..... 46

People v. Dobbins, 73 Cal. 257 (1887)..... 46

Phelps v. U.S., 831 F.2d 897 (9th Cir. 1987)..... 43, 51

Powell v. Tompkins, 783 F.3d 332 (1st Cir. 2015) 9

1 *Powell’s Books, Inc. v. Kroger*, 622 F.3d 1202 (9th Cir. 2010).....51

2 *Quilici v. Vill. of Morton Grove*, 532 F.Supp. 1169 (N.D. Ill. 1981)36, 37, 41

3 *Ramirez v. Ghilotti Bros.*, 941 F. Supp. 2d 1197 (N.D. Cal. 2013).....44

4

5 *Reed v. Reed*, 404 U.S. 71 (1971).....52

6 *Residents of Beverly Glen, Inc. v. City of Los Angeles*, 34 Cal.App.3d 117 (1973).....7, 28

7 *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*,

8 561 F.2d 1327 (9th Cir. 1977)33

9 *Robinson v. Salazar*, 885 F.Supp.2d 1002 (E.D. Cal. 2012)51

10 *Romer v. Evans*, 517 U.S. 620 (1996)53, 54

11 *Rose v. Locke*, 423 U.S. 48 (1975)43

12 *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920).....52

13 *San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal.4th 643 (2002)27

14 *Shew v. Malloy*, 994 F. Supp. 2d 234 (D. Conn. 2014)13

15 *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002)53

16 *Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016).....18, 23, 24, 26

17 *Skilling v. U.S.*, 561 U.S. 358 (2010).....43

18 *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,

19 535 U.S. 302, 122 S.Ct. 1465 (2002).....28

20 *Teixeira v. County of Alameda*, 873 F.3d 670 (9th Cir. 2017) (en banc)8, 18

21 *Tenants Assn. of Park Santa Anita v. Southers*, 222 Cal.App.3d 1293 (1990).....7

22

23 *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994)20

24 *Tyler v. Hillsdale County Sheriff's Department*, 837 F.3d 678 (6th Cir. 2016).....22

25 *U.S. v. Rodriguez-Deharo*, 192 F.Supp.2d 1031 (E.D. Cal. 2002).....51

26 *United States v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010).....26

27

28

1 *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013).....8, 18

2 *United States v. Decastro*, 682 F.3d 160 (2d Cir. 2012)17

3 *United States v. Security Industrial Bank*, 459 U.S. 70 (1982)39

4 *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383 (1998).....51

5 *Warth v. Seldin*, 422 U.S. 490 (1975).....2

6 *Western Mobile Assn. v. County of San Diego*, 16 Cal.App.3d 941 (1971).....46, 48

7 *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017)9

8 *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981 (9th Cir. 2009).....2

9

10

11 **Statutes**

12 Cal. Govt. Code § 960546

13 Cal. Pen. Code § 167404

14 Cal. Pen. Code § 1690024

15 Cal. Pen. Code § 2980548

16 Cal. Pen. Code § 3191024

17 Cal. Pen. Code § 3200024

18 Cal. Pen. Code § 32310 passim

19 Cal. Pen. Code § 324005

20 Cal. Pen. Code § 324055

21 Cal. Pen. Code § 324065, 47

22 Cal. Pen. Code § 324105

23 Cal. Pen. Code § 324255, 26

24 Cal. Pen. Code § 324355

25 Cal. Pen. Code § 3244553

26 Cal. Pen. Code § 324505, 31, 53

27 Colo. Rev. Stat. § 18–12–3014

28

SEILER EPSTEIN ZIEGLER & APPEGATE LLP
Attorneys at Law

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

Other Authorities

Allen Rostron, *Justice Breyer’s Triumph in the Third Battle Over the Second Amendment*,
80 Geo. Wash. L. Rev. 703 (2012)16

Clayton Cramer & Joseph Olson, *Pistols, Crime, and Public Safety in Early America*,
44 Williamette L. Rev. 699 (2008)11

David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*,
78 Alb. L. Rev. 849 (2015).....11

Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self–Defense:
An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443 (2009)9

Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*,
84 N.Y.U. L. Rev. 375 (2009)9

Constitutional Provisions

Cal. Const. Art. I, § 19.....27

Cal. Const., Art. II, § 105

U.S. Const., 14th Amend., § 126, 52

U.S. Const., 5th Amend.26

SEILER EPSTEIN ZIEGLER & APPEGATE LLP
Attorneys at Law

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

I. INTRODUCTION

California has generally banned the importation, manufacture, sale, or receipt of large-capacity firearm magazines since 2000. And thus, for 18 years, California gun owners have been forced to live with a Constitutionally unacceptable, but politically compelled compromise: that the further acquisition, importation, or manufacture of large-capacity magazines would be prohibited, but that gun owners – including the individual Plaintiffs herein – would be permitted to keep their existing lawfully acquired and possessed property as “grandfathered” items.

In 2016, the Legislature and the drafters of Proposition 63 reneged on that arrangement. Seventeen years after the fact, they required that virtually all owners of large-capacity magazines either remove them from the State, sell them to a licensed firearms dealer, or “surrender” them to the State. None of these options allowed a “grandfathered” magazine possessor to keep his or her property, and therefore, they are being forcibly dispossessed of them.

We say this was a bridge too far. In this action, Plaintiffs are seeking declaratory and injunctive relief to challenge the *entire* confiscatory ban on large capacity magazines (the “LCM ban”). Here, we oppose the State’s Motion to Dismiss (“Motion”) as follows:

First, the provisions at issue – which include a retroactive prohibition on lawfully-acquired parts of firearms, and parts intrinsic to them, constitute a ban that violates the Second Amendment to the United States Constitution. Plaintiffs will show at trial that the magazines themselves are integral firearm parts, which cannot be so readily and easily banned today. Plaintiffs will be able to show that they are arms, and/or parts of arms, *not “dangerous and unusual,”* that are in widespread common use, for lawful purposes, including self-defense. Therefore, they are protected from the State’s categorical ban under the Supreme Court’s mandate in *District of Columbia v. Heller*. To the extent that any review of the LCM ban should be subject to some form of scrutiny, such review should not involve a balancing of interests that was clearly prohibited by *Heller*.

Second, this retroactive ban on lawfully-possessed private property would completely dispossess Plaintiffs of important, valuable, and Constitutionally-protected property. Therefore,

1 the retroactive LCM ban amounts to a violation of the Takings and Due Process Clauses of the
2 Federal and state constitutions, as the State in no way provides or allows for just compensation to
3 be paid to “grandfathered” magazine owners who will soon lose, in many instances, their right to
4 keep and maintain their valuable, and in some cases irreplaceable, property.

5 Further, the retroactive LCM ban suffers from Constitutionally unacceptable problems in
6 vagueness and overbreadth, particularly as the enactment of two different versions of the LCM
7 ban in 2016 resulted in the chaptering of two current, live, and inconsistent versions of the law.

8 For these reasons, and others as discussed at length below, the State’s Motion should be
9 denied.

10 11 **II. STATEMENT OF FACTS**

12 The following facts are largely taken from Plaintiffs’ Second Amended Complaint
13 (“SAC”), filed August 16, 2017 (Dkt. #59). On a motion to dismiss, a court must accept as true
14 all material allegations of the complaint, and construe the complaint in favor of the complaining
15 party. *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 109 (1979) (citing *Warth v. Seldin*,
16 422 U.S. 490, 501(1975)); *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992 (9th Cir. 2010) (“We
17 accept as true all well-pleaded allegations of material fact, and construe them in the light most
18 favorable to the non-moving party.”). The court “will hold a dismissal inappropriate unless the
19 plaintiffs’ complaint fails to ‘state a claim to relief that is plausible on its face.’” *Zucco*
20 *Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 989 (9th Cir. 2009) (quoting *Bell Atl. Corp. v.*
21 *Twombly*, 550 U.S. 544, 570 (2007)).

22 23 24 **A. AMMUNITION MAGAZINES AND THE ORIGINAL CALIFORNIA MAGAZINE BAN**

25 Ammunition magazines and feeding devices are intrinsic parts of all semi-automatic
26 firearms, which were designed, developed, produced, and sold in large quantities starting in the
27 early 20th Century. Today, a vast majority of firearms, including handguns, “the quintessential
28 self-defense weapon,” *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008), are self-loading

1 semi-automatic firearms that require a magazine to feed each successive round of ammunition.

2 A magazine is simply “a receptacle for a firearm that holds a plurality of cartridges or
3 shells under spring pressure preparatory for feeding into the chamber. Magazines take many
4 forms, such as box, drum, rotary, tubular, etc. and may be fixed or removable.”

5 (<http://saami.org/glossary/>.) Plaintiffs here will easily prove that the vast majority of the
6 firearms in common use for lawful purposes, particularly handguns, sold at retail to the non-
7 military market (e.g., civilian and law enforcement purchasers) are semi-automatic, and contain
8 removable magazines. (SAC, ¶ 32.) And moreover, Plaintiffs will show that ammunition
9 feeding devices and magazines are therefore an inherent operating part of, and inseparable from,
10 functioning semi-automatic firearms. (*Id.*) Plaintiffs will further show that all semi-automatic
11 firearms are essentially inoperable without them. (*Id.*) Modern semi-automatic firearms of the
12 kind in use for lawful purposes (including self-defense) sold at retail in the non-military market
13 generally include at least one magazine intended to be used as a part of those firearms. (*Id.*)

14 Although an exact number may never be known, over the past century, many millions of
15 magazines certainly have existed, lawfully within the United States, as these inherent parts of
16 semi-automatic firearms commonly held and used by Americans for lawful purposes such as
17 self-defense, competition, training, and sport. (SAC, ¶ 33.) At trial, Plaintiffs will demonstrate,
18 through data supporting a study by the National Shooting Sports Foundation, that magazines
19 capable of holding more than 10 rounds of ammunition accounted for approximately 115 million,
20 or approximately half of all magazines owned in the United States between 1990 and 2015. It
21 can also be safely assumed that many more such magazines were manufactured within or
22 imported into the United States (and California specifically) for sale, both prior to 1990 as well
23 as after 2015.

24
25 Along with the rest of the nation, and up through 1999, millions of California citizens,
26 including Plaintiffs herein, lawfully acquired and possessed semi-automatic firearms – many of
27 which contained magazines capable of holding more than ten rounds of ammunition. However,
28 in 1999, through passage of Senate Bill 23, California enacted legislation generally banning

1 methods of *acquiring* magazines that hold more than ten rounds, legislatively branding them
2 “large-capacity magazines” as currently defined in Penal Code § 16740.¹ And since that time,
3 the Code has generally forbidden the manufacture, importation, sale, or receipt of any large-
4 capacity magazine. *See* Cal. Pen. Code § 32310(a) (formerly § 12020(a)(2)).

5 However, and as part of the legislative arrangement in connection with Sen. Bill 23, as
6 enacted, the continued possession of lawfully-acquired “large capacity magazines” up to that
7 point (i.e., “grandfathered” magazines) was not prohibited and would still be lawful. Individual
8 Plaintiffs Wiese, Morris, Cowley, Macaston, Flores, and Dang, and the members of the class of
9 persons on whose behalf this action is brought, are law-abiding citizens, who are neither
10 prohibited from the possession of firearms or ammunition nor exempt from California’s
11 restrictions upon firearms and ammunition, and who lawfully possessed and used such large-
12 capacity magazines with their firearms up through and including December 31, 1999.

13
14 **B. SENATE BILL 1446 AND PROPOSITION 63**

15 In 2016, gun control measures in California moved forward at a steady, and
16 unprecedented pace. Among these measures included additional laws pertaining to large-
17 capacity magazines, contained in Senate Bill 1446 (“SB 1446”) and Proposition 63.

18 Concerned about an apparent prevalence of mass shootings and the terrorist attacks in
19 San Bernardino, California, on December 2, 2015 (*see* Req. for Jud. Notice, Exhibit B, p. 4), the
20 Legislature passed SB 1446, which amended Penal Code § 32310(b) to make it a criminal
21 offense to possess a large-capacity magazine, “regardless of the date the magazine was
22 acquired[.]” The law as signed would have required a person in lawful possession of any large-
23 _____

24 ¹To be sure, the very term “large-capacity magazine” is an irksome and controversial label. In
25 states where there are no limits on magazine capacity, the term “large capacity magazine” is
26 generally not even used. Where it is used, the mere capability to hold more than 10 rounds is not
27 necessarily enough for the label to apply. *See e.g.*, Colo. Rev. Stat. § 18–12–301(2)(a)(I)
28 (defining “large capacity magazine” as those having capacity to accept more than 15 rounds).
Indeed, consistent with their commonality and popularity among law-abiding gun owners, in
most states, magazines that hold more than 10 rounds are considered “*standard capacity*
magazines.” We use the term “large-capacity magazine” in this opposition, as we must, solely
because that is the codified definition at issue.

1 capacity magazines prior to July 1, 2017, to dispose of such magazine(s) by surrender, sale to a
2 licensed firearms dealer, or removal from the State in the manner provided by the statute. The
3 provisions of SB 1446 were signed into law by Governor Brown on July 1, 2016, and became
4 effective on January 1, 2017.

5
6 The author and proponents of SB 1446 never considered the actual value of the
7 magazines subject to the ban, payment of “just compensation” to the owners of previously
8 grandfathered magazines who would surrender their magazines to law enforcement, or the
9 existence of any type of market that would be available to the owners who attempt to dispose of
10 their LCMs through forced sales to licensed firearm dealers. The bill’s author and sponsors
11 simply assumed that the State, via local law enforcement agencies, had the power to confiscate
12 the magazines under the “police powers” of the State, and without providing the owners any
13 compensation. (*See* Req. for Jud. Notice, Exhibit B, pp. 4-6.)

14 Then, on November 8, 2016, California voters enacted Proposition 63 (titled the “Safety
15 for All Act”), a measure that was sponsored and heavily promoted as a “gun safety” measure by
16 Lt. Governor Gavin Newsom. (*See* Req. for Jud. Notice, Exhibit E.) Proposition 63 amended
17 Penal Code §§ 32310, 32400, 32405, 32410, 32425, 32435, 32450, added section 32406, and
18 repealed section 32420 by initiative statute, which changed the law to totally prohibit and
19 criminalize the possession of large-capacity magazines as of July 1, 2017. Proposition 63 took
20 effect the day after the election. *See* Cal. Const., Art. II, § 10(a) (“An initiative statute or
21 referendum approved by a majority of votes thereon takes effect the day after the election unless
22 the measure provides otherwise.”).

23 With regard to those provisions of Proposition 63 dealing with large-capacity magazines,
24 the proponents and drafters likewise clearly had mass shootings in mind, a type of crime that has
25 dominated our news during the past decade. Specifically, contained within the “Findings and
26 Declarations” (section 2) of Proposition 63, the measure stated:

27 11. Military–style large-capacity ammunition magazines—some capable of
28 holding more than 100 rounds of ammunition—significantly increase a shooter’s

1 ability to kill a lot of people in a short amount of time. That is why these large
2 capacity ammunition magazines are common in many of America's most horrific
3 mass shootings, from the killings at 101 California Street in San Francisco in
4 1993 to Columbine High School in 1999 to the massacre at Sandy Hook
5 Elementary School in Newtown, Connecticut in 2012.

6 12. Today, California law prohibits the manufacture, importation and sale of
7 military-style, large capacity ammunition magazines, but does not prohibit the
8 general public from possessing them. We should close that loophole. No one
9 except trained law enforcement should be able to possess these dangerous
10 ammunition magazines.

11 (Prop. 63, § 2; *see* Req. for Jud. Notice, Exhibit E.)

12 As defendants' motion admits, mass shootings were the stated *raison d'être* justifying
13 these new magazine restrictions. However, Plaintiffs will demonstrate at trial, through expert
14 testimony, that *pre-ban* (i.e., lawfully-held, since before 2000) large-capacity magazines
15 generally have *not* been used in mass shootings. It is true that, in some of the incidents, large-
16 capacity magazines were used, such as in the San Bernardino terrorist attack of December 2,
17 2015, which the Legislature specifically cited as a catalyst justifying passage of SB 1446. (*See*
18 Req. for Jud. Notice, Exh B at p. 4.) But in that event, given the relatively young age of the
19 shooters and that they obtained their weapons through straw purchases in close proximity to the
20 attacks, it is reasonably inferable that their large-capacity magazines were either illegally
21 imported or manufactured. In short, Plaintiffs' evidence will show that the State's justification
22 for this ban is illusory because there is no current evidence that legally-possessed large-capacity
23 magazines have been involved in mass shooting incidents in California since the year 2000.

24 **C. THE INSTANT ACTION**

25 Plaintiffs filed the instant action on April 28, 2017, and filed their First Amended
26 Complaint on June 6, 2017. (Dkt. No. 7.) Plaintiffs Wiese, Morris, Cowley, Macaston, Flores,
27 and Dang are individual and law-abiding California residents, who acquired, prior to 2000, large-
28 capacity magazines, as intrinsic parts of their legally-possessed firearms. Each of these
individual plaintiffs wishes to keep these magazines in the State of California, and is unwilling to

1 destroy or “surrender” his property to the State. Some of the Plaintiffs have “pre-ban”
2 magazines of substantial value, either intrinsically or because they have historical value. (SAC,
3 ¶ 12.) Some of these magazines are the only magazines that the Plaintiffs may have for that
4 particular firearm. (*Id.*, ¶ 11, 12.) And some of the magazines are the only magazines that were
5 ever made for that particular firearm. (*Id.*, ¶ 13.)

6 Plaintiffs, including the organizational plaintiffs, are bringing this matter individually,
7 and as representatives on behalf of the class of individuals who are or would be affected by the
8 ban; that is, those law-abiding residents, who are not otherwise exempt, and who lawfully
9 possessed large-capacity magazines in this State before December 31, 1999. (SAC, ¶ 7.) *See*
10 *Residents of Beverly Glen, Inc. v. City of Los Angeles*, 34 Cal.App.3d 117 (1973); *Tenants Assn.*
11 *of Park Santa Anita v. Southers*, 222 Cal.App.3d 1293, 1299-1300 (1990) (a right to sue in a
12 representative capacity may be recognized where the question is one of public interest).

13 Plaintiffs filed a motion for a temporary restraining order and issuance of a preliminary
14 injunction to enjoin enforcement of the law, on June 12, 2017 (Dkt. #9). On June 29, 2017, this
15 Court denied Plaintiffs’ motion.² (Dkt. #52). By stipulation of the parties, and order of this
16 Court (Dkt. #54), Plaintiffs filed their Second Amended Complaint on August 17, 2017 (Dkt.
17 #59). Defendants have now moved to dismiss the Second Amended Complaint under FRCP
18 12(b)(6), and Plaintiffs oppose the motion for the reasons that follow.

19 //
20 //
21 //
22 //
23 //

24
25 ²As this Court is aware, on that same day, the United States District Court for the Southern
26 District of California granted the plaintiffs’ motion for a preliminary injunction there, enjoining
27 substantially those same portions of the LCM ban that were the subject of Plaintiffs’ motion in
28 the instant case. *Duncan v. Becerra*, Civ. No. 3:17-1017 BEN JLB, Hon. Roger T. Benitez
presiding. Judge Benitez’ order in that matter rendered the prospect of an appeal of this Court’s
order largely moot, since any interlocutory appeal of the denial of an injunction would have
required the Plaintiffs to show continuing “serious, perhaps irreparable consequence” from this
Court’s order. *See Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981).

III. ARGUMENT

A. IN EVALUATING PLAINTIFFS’ SECOND AMENDMENT CLAIMS, THIS COURT SHOULD REJECT ANY INTEREST-BALANCING APPROACH, WHICH WOULD CLEARLY BE INCONSISTENT WITH *HELLER*.

1. Because the LCM Ban is Tantamount to a Confiscation of a Widely-Used, Constitutionally-Protected Class of Arms, *Heller’s* Categorical Approach Controls.

Traditionally, in discussing Second Amendment claims, the parties at the outset routinely recite standards of review leading to their preferred forms of scrutiny. Indeed, the State, following suit, cites *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013) to shuttle us toward the “two-step” approach in leading to what the State claims is “an appropriate level of scrutiny.” (Def. Motion at 9:16-21). See also *Teixeira v. County of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017) (en banc) (quoting *Chovan* at 1136 (“We apply a two-step inquiry to examine *Teixeira’s* claim ... and ... we then determine the ‘appropriate level of scrutiny.’”). And the State thus argues that even if a statewide, confiscatory magazine ban does implicate Second Amendment interests – as if that is still somehow a debatable point³ – the law meets and survives “intermediate scrutiny” because it merely “eliminat[es] a particularly lethal subset of magazines” (*id.*, at 11:14-15), as simply a matter of “common sense” (*id.*, at 11:17).

The State, however, completely glosses over what is perhaps the most salient point in *Heller*: a means-end analysis is *not* to be used – and must be bypassed completely – when a textual and historical analysis shows that the law at issue effectuates a ban against an entire category of protected firearms. In other words, *Heller* commands that governments may only ban classes of guns that have been banned in our “historical tradition,” such as guns that are “dangerous and unusual,” and thus are not the sort of lawful weapons that citizens have commonly possessed and used for self-defense. 554 U.S. at 627-628. If the law amounts to an impermissible ban on such a category of firearms, unless one of the narrow set of “longstanding”

³The Ninth Circuit has already settled this. *Fyock v. City of Sunnyvale*, 779 F.3d 991, 999 (9th Cir. 2015) (“Because Measure C restricts the ability of law-abiding citizens to possess large-capacity magazines within their homes for the purpose of self-defense, we agree ... that Measure C may implicate the core of the Second Amendment.”).

1 exceptions happens to apply, it must be struck down without resort to or need for any “level of
 2 scrutiny.” “[U]nder [*Heller*], ‘complete prohibition[s]’ of Second Amendment rights are always
 3 invalid. [...] It’s appropriate to strike down such ‘total ban[s]’ without bothering to apply tiers
 4 of scrutiny because no such analysis could ever sanction obliterations of an enumerated
 5 constitutional right. [Citation.] With this categorical approach to such bans, [*Heller*] ensured
 6 that judicial tests for implementing gun rights would not be misused to swallow those rights
 7 whole.” *Wrenn v. District of Columbia*, 864 F.3d 650, 665 (D.C. Cir. 2017) (citing *Heller*, 554
 8 U.S. at 629); *Powell v. Tompkins*, 783 F.3d 332, 347 (1st Cir. 2015) (“Together, *Heller* and
 9 *McDonald* establish that states may not impose legislation that works a complete ban on the
 10 possession of operable handguns in the home by law-abiding, responsible citizens for use in
 11 immediate self-defense.”); *see also* Eugene Volokh, *Implementing the Right to Keep and Bear*
 12 *Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev.
 13 1443, 1463 (2009) (“Absent [from *Heller*] is any inquiry into whether the law is necessary to
 14 serve a compelling government interest in preventing death and crime, though handgun ban
 15 proponents did indeed argue that such bans are necessary to serve those interests and that no less
 16 restrictive alternative would do the job”); Joseph Blocher, *Categoricalism and Balancing in First*
 17 *and Second Amendment Analysis*, 84 N.Y.U. L. Rev. 375, 380 (2009) (“Rather than adopting one
 18 of the First Amendment’s many Frankfurter-inspired balancing approaches, the majority [in
 19 *Heller*] endorsed a categorical test under which some types of ‘Arms’ and arms-usage are
 20 protected absolutely from bans and some types of ‘Arms’ and people are excluded entirely from
 21 constitutional coverage.”).

22 In this regard, the *Heller* majority itself ultimately undertook this categorical approach,
 23 holding simply that the handgun ban at issue there “amounts to a prohibition of an entire class of
 24 ‘arms’ that is overwhelmingly chosen by American society for that lawful purpose. The
 25 prohibition extends, moreover, to the home, where the need for defense of self, family, and
 26 property is most acute. Under any of the standards of scrutiny that we have applied to
 27 enumerated constitutional rights, banning from the home ‘the most preferred firearms in the
 28 nation to ‘keep’ and use for protection of one’s home and family,’ would fail constitutional

1 muster.” *Heller*, 554 U.S. at 628-629 (citing *Parker v. District of Columbia*, 478 F.3d 370, 400
2 (D.C. Cir. 2007)).

3 And therefore, the *proper* threshold inquiry here should not simply be whether a law
4 merely “implicates” Second Amendment concerns, but whether the possession of certain
5 weapons (such as handguns – or in this case, semi-automatic weapons containing *standard-*
6 capacity magazines) are constitutionally protected because they have not traditionally been
7 banned and are in common use by law-abiding citizens. *See Friedman v. City of Highland Park*,
8 784 F.3d 406, 414 (7th Cir.2015) (Manion, J., dissenting) (“[W]here, as here, the activity is
9 directly tied to specific classes of weapons, we are faced with an additional threshold matter:
10 whether the classes of weapons regulated are commonly used by law-abiding citizens.”).

11 In considering whether and how to apply this categorical approach, we look at the pillars
12 of text, history, and tradition. And in determining whether the magazine ban at issue survives
13 this challenge, we look to the plain text of the Constitution, and history of these devices integral
14 to semi-automatic firearms. This look reveals that the LCM ban amounts to a prohibition on a
15 significant category of firearms forbidden under *Heller* as a matter of law.

16 **i. Text and History**

17 First, with regard to the text, we start with the plain language of the Second Amendment
18 itself, which states that “the right of the people *to keep* and bear arms, shall not be infringed”
19 (emphasis added). The term “keep” simply means “[t]o retain; not to lose,” and “[t]o have in
20 custody.” *Heller*, 554 U.S. at 582 (“The most natural reading of ‘keep Arms’ in the Second
21 Amendment is to ‘have weapons.’”). And in this case, Plaintiffs Wiese, Morris, Cowley,
22 Macaston, Flores, and Dang, as individuals and representatives of the class of similarly-situated
23 individuals, have all legally possessed large-capacity magazines in this State, prior to December
24 31, 1999, without incident. (SAC, ¶ 21.) Naturally and rightfully, they desire to *keep* this valued
25 personal property, i.e., they “simply wish to continue to hold and otherwise exercise their Second
26 Amendment right to possess, keep, use and acquire firearms and standard-capacity magazines,
27 which are in common use, and for lawful purposes, but cannot do so should this total, categorical
28 Large-Capacity Magazine Ban be enforced.” (*Id.*, ¶ 43.)

1 Historically, “[r]epeating, magazine-fed firearms date back to at least the 1600s.”
2 Clayton Cramer & Joseph Olson, *Pistols, Crime, and Public Safety in Early America*, 44
3 *Willamette L. Rev.* 699, 716 (2008). Magazines holding more than ten rounds are older than the
4 Second Amendment itself. “For example, in 1718 (seventy-one years before the drafting of the
5 American Bill of Rights) the ‘Puckle Gun’ was patented in England. It was a repeating firearm
6 from which multiple individual shots could be discharged without physically reloading the gun.”
7 This firearm held eleven pre-loaded charges. *Id.* at 716-717. Box magazines date from before
8 ratification of the Fourteenth Amendment, and handgun magazines containing more than ten
9 rounds became popular in the 1930s. David B. Kopel, *The History of Firearm Magazines and*
10 *Magazine Prohibitions*, 78 *Alb. L. Rev.* 849, 851 (2015).

11 By the time California legislatively branded them “large-capacity magazines” ages later,
12 at the end of 1999 (SB 23, 1999-2000 Reg. Sess. (Cal. 1999); former § 32310), millions of such
13 magazines had been manufactured and sold into circulation here and around the county as
14 integral operating parts of semi-automatic firearms. Kopel, *supra*, at 862 (“Long before 1979,
15 magazines of more than ten rounds had been well established in the mainstream of American gun
16 ownership.”). Indeed, with many of the most popular semi-automatic firearms, magazines of this
17 capacity or greater are the most prevalent type of magazine employed, or the only type
18 manufactured for those firearms. Plaintiffs here will show at trial that magazines of this capacity
19 or greater are now “standard” in semi-automatic firearms. And for this reason, virtually all such
20 firearms are sold at retail with at least one or more magazines of this capacity.

21 **ii. Tradition**

22 As for the closely related matter of tradition, these items have always been accepted as
23 integral to semi-automatic firearms. While California’s 2000 legislative action generally banned
24 most forms of future acquisition and transfer of these magazines, it had never before banned the
25 mere possession of these items, and thus, countless law-abiding citizens of this State have relied
26 upon this longstanding status of the law in continuing to use and possess them for many
27 recognized lawful purposes, including self-defense, competition, training, and sport. Again, the
28 numbers speak for themselves in proving tradition. Large-capacity magazines in California

1 today number into the “hundreds of thousands,” at least, as the DOJ’s own recent findings
 2 indicate. (Req. for Jud Notice, Ex. A). And they number into the millions nationwide. *See*
 3 *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (“We think it
 4 clear enough in the record that semi-automatic rifles and magazines holding more than ten
 5 rounds are indeed in ‘common use,’ as the plaintiffs contend.”); *Colorado Outfitters Ass’n v.*
 6 *Hickenlooper*, 24 F.Supp.3d 1050, 1068 (D. Colo. 2014) (magazines with capacities of greater
 7 than 15 rounds “number in the tens of millions”). The numbers irrefutably show that a majority
 8 of Americans prefer semi-automatic handguns, and that roughly half of the magazines sold and
 9 distributed have – *traditionally* – been those holding more than ten rounds. And, but for recent
 10 (and certainly not longstanding) legislation, virtually all magazines manufactured and sold into
 11 the American non-military market for full-sized pistols would be standard-capacity, holding
 12 more than ten rounds of ammunition.

13 **iii. Commonality**

14 Similarly, these historically and traditionally respected firearm instrumentalities are
 15 indisputably in common use throughout California and beyond. As Plaintiffs’ Second Amended
 16 complaint explains, “[s]uch [large-capacity] magazines are, in virtually every other state of the
 17 Union, exactly the sorts of lawful weapons in common use that law-abiding people possess at
 18 home for lawful purposes [.]” (SAC, ¶ 46.) “Millions of semi-automatic firearms in common
 19 use for lawful purposes are possessed by law-abiding people throughout the United States,
 20 including in California. Those firearms include, but are not limited to, highly-popular makes and
 21 models of handguns like the Glock models 17, 19, 22, and 23, the Smith & Wesson M&P series
 22 models, the Springfield Armory XD series models, and many others, including some pistols that
 23 have now been discontinued.” (*Id.*, ¶ 48.) “Millions of such firearms, including those handguns,
 24 are commonly possessed by law-abiding people for lawful purposes including target shooting,
 25 training, sport shooting, competition, and self-defense.” (*Id.*, ¶ 49.) And millions of such
 26 firearms, including those handguns, were designed and intended to be used with magazine
 27 capacities exceeding 10 rounds. For example, one of the most popular handgun models
 28 commonly used and possessed for self-defense, the Glock model 17 9mm, was designed with a

SEILER EPSTEIN ZIEGLER & APPEGATE LLP
Attorneys at Law

1 17-round magazine. (*Id.*, ¶ 50.) And many of these handguns that were designed for factory-
2 *standard* large-capacity magazines holding more than 10 rounds, including the Glock model 17
3 handgun, are available for sale in California to law-abiding people on the DOJ’s Roster of
4 Handguns Certified for Sale (Roster). (*Id.*, ¶ 51.)

5 These key allegations of the operative complaint are not, as the State asserts or suggests,
6 mere “arguments” or “conclusions of law.” These are matters of *fact* – facts that cannot
7 reasonably be disputed.⁴ Every court to have considered this specific issue has recognized that
8 such magazines are indeed in common use by a wide swath of ordinary Americans. *See e.g.*,
9 *Heller II*, 670 F.3d at 1261 (“[w]e think it clear enough in the record that semi-automatic rifles
10 and magazines holding more than ten rounds are indeed in ‘common use,’ as the plaintiffs
11 contend.”); *Colorado Outfitters Ass’n v. Hickenlooper*, 24 F. Supp. 3d 1050, 1068 (D. Colo.
12 2014) (“lawfully owned semi-automatic firearms using a magazine with the capacity of greater
13 than 15 rounds number in the tens of millions”); *Shew v. Malloy*, 994 F. Supp. 2d 234, 246 (D.
14 Conn. 2014) (semi-automatic rifles such as the AR-15 as well as magazines with a capacity
15 greater than 10 rounds “are ‘in common use’ within the meaning of *Heller* and, presumably, used
16 for lawful purposes”); *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1276-1277 (N.D. Cal.
17 2014) (such magazines are “typically possessed by law-abiding citizens for lawful purposes”);
18 *N.Y. State Rifle & Pistol Ass’n*, 990 F. Supp. 2d at 365 (presuming use for lawful purposes).

19 The indisputably widespread common and ordinary use of such magazines must further
20 be measured by what is commonly used and held in the rest of the country. For example,

21
22
23 ⁴If the State actually does dispute this, then they should be required to prove this at trial. One
24 need only travel to any other state in the Union where such magazines are not prohibited —
25 indeed, the vast majority of states — and visit any gun store there, any shooting range, attend any
26 shooting competition, any gun show, or talk to any other ordinary gun owners in those states,
27 where it will be manifestly apparent that “standard-capacity” magazines (called “LCMs” by our
28 Legislature since 2000), are indeed standard fare, widely and commonly kept, by good and
decent people, for good and useful purposes. *See United States v. Vongxay*, 594 F.3d 1111, 1118
(9th Cir. 2010) (“most scholars of the Second Amendment agree that the right to bear arms was
‘inextricably ... tied to’ the concept of a “virtuous citizen[ry]” that would protect society through
‘defensive use of arms against criminals, oppressive officials, and foreign enemies alike . . .’”)
(citing Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 Law & Contemp. Probs. 143,
146 (1986)).

1 handguns were not in common use by ordinary, law-abiding citizens within the District of
2 Columbia when the Supreme Court struck down the District’s thirty-year ban on their possession
3 and lawful use of handguns. But *Heller* noted: “[i]t is no answer to say, as petitioners do, that it
4 is permissible to ban the possession of handguns so long as the possession of other firearms (i.e.,
5 long guns) is allowed. It is enough to note, as we have observed, that *the American people* have
6 considered the handgun to be the quintessential self-defense weapon.” 554 U.S. at 629
7 (emphasis added). Plaintiffs here will easily demonstrate that a large swath of semi-automatic
8 handguns used by ordinary Americans around the country utilize magazines holding more than
9 10 rounds of ammunition as *standard*-capacity magazines.

10 Amicus Curiae Everytown for Gun Safety (“Everytown”) argues that the common use
11 test is “unprecedented and illogical.” (Proposed Amicus Brief at 7:14.) Hardly. *See Heller*, 554
12 U.S. at 624; *Caetano v. Mass.*, ___ U.S. ___, 136 S.Ct. 1027, 1032-33 (2016) (the “[h]undreds of
13 thousands” of stun guns, which are “less popular than handguns,” makes them “a legitimate
14 means of self-defense across the country”); and citations above. Everytown’s lamentation that
15 the ubiquity of firearms “creates perverse incentives for the firearm industry” to “bestow highly
16 dangerous firearms, and firearm features, with Second Amendment protection[.]” (Proposed
17 Amicus Brief, at 9:5-6), is entirely irrelevant.⁵ “[T]he court will not judge whether the public’s
18 firearm choices are often used for self-defense, or even whether they are effective for self-
19 defense – *the firearms must merely be preferred.*” *Fyock v. City of Sunnyvale*, 25 F.Supp.3d
20 1267, 1278 (N.D. Cal. 2014) (italics added); *see Caetano*, 136 S.Ct. at 1028-29; *see also*
21 *Friedman*, 784 F.3d at 416 n. 5 (Manion, J., dissenting) (“The fact that a statistically significant
22 number of Americans use AR-type rifles and large-size magazines demonstrates *ipso facto* that
23

24
25 ⁵Everytown’s view is also distorted by its myopically hostile perspective toward the Second
26 Amendment, leading it to suggest that gun owners should just blithely submit to any assertion of
27 police powers in the name of combatting so-called “gun violence.” In reality, state legislators –
28 pandering to prohibitionist groups such as Everytown, and exploiting public fears over the
perceived dangerousness of certain weapon types – have their own perverse incentives to enact
firearm prohibitions that would render ordinary, commonly-used firearms less prevalent or even
non-existent, even among the virtuous. Indeed, the State *expressly admits* this is its ultimate goal
in its zeal to reduce the “continued proliferation” of such items. (Def. Motion at 2:12.)

1 they are used for lawful purposes. Our inquiry should have ended here: the Second Amendment
2 covers these weapons.”).

3 Therefore, because the statewide LCM ban essentially amounts to a prohibition of an
4 entire class of arms, and/or a critical component thereof, which have been overwhelmingly
5 chosen by American society for lawful purposes, and implicates a core Second Amendment
6 right, it is a *categorical prohibition* that cannot survive any level of scrutiny whatsoever. The
7 inquiry should end there, and Defendants’ motion to dismiss this claim should be denied. While
8 this is surely not a claim that could even be decided on a motion to dismiss in any event,
9 Plaintiffs’ opposition demonstrates that such a categorical ban must be struck down.

10 **2. Any Application of Intermediate Scrutiny Cannot Involve the Interest-
11 Balancing Prohibited by *Heller*.**

12 We recognize that this Court may feel bound by the law of this circuit, namely, *Fyock v.*
13 *City of Sunnyvale*, 779 F.3d 991 (9th Cir. 2015), to conclude that Plaintiffs’ claims – to the
14 extent they should be subject to any standard of review at all – would be subject to intermediate
15 scrutiny. Should this Court adhere to this position (as stated in its Order of June 29, 2017), we
16 must emphasize that a vast difference exists between *actual* intermediate scrutiny and how that
17 test has been applied in recent Second Amendment cases. “Intermediate scrutiny” in Second
18 Amendment cases has devolved into the very sort of interest-balancing expressly prohibited by
19 *Heller*. Assuming that this Court does not find the LCM ban is a categorical ban absolutely
20 prohibited by *Heller*, it must take care to apply a proper level and form of scrutiny that does not
21 involve the prohibited interest-balancing.

22 *Heller* did many great things to reaffirm basic civil liberties for law abiding citizens, but
23 it left open the question of what specific level of scrutiny to apply in future cases involving
24 firearms restrictions that fall short of categorical bans. But the *Heller* Court did expressly and
25 emphatically make clear that rational-basis review is an unacceptably deferential standard to
26 apply in evaluating restrictions that impinge upon the fundamental rights enshrined in the Second
27 Amendment. *Heller*, 554 U.S. at 628, n. 27. Thus, in evaluating such restrictions, the lower
28 courts have generally avoided applying rational basis review (at least in name) and have instead

1 applied some form of heightened scrutiny – either “strict” or “intermediate” scrutiny (though
2 most commonly some variation of the latter).

3 But, whatever label is applied to this form of scrutiny, the fact is, *any* interest-balancing
4 in resolving Second Amendment claims is forbidden under *Heller*. The *Heller* court expressly
5 *rejected* this methodology wholesale. The majority directly confronted and then renounced
6 Justice Breyer’s argument in his dissent for a “judge-empowering ‘interest balancing inquiry,’”
7 stating:

8 We know of no other enumerated constitutional right whose core protection has
9 been subjected to a freestanding “interest-balancing” approach. The very
10 enumeration of the right takes out of the hands of government—even the Third
11 Branch of Government—the power to decide on a case-by-case basis whether the
12 right is *really worth* insisting upon. A constitutional guarantee subject to future
13 judges’ assessments of its usefulness is no constitutional guarantee at all.
14 Constitutional rights are enshrined with the scope they were understood to have
15 when the people adopted them, whether or not future legislatures or (yes) even
16 future judges think that scope too broad.

17 *Heller*, 554 U.S. at 634-35. Indeed, writing for the majority, Justice Scalia observed that the
18 Second Amendment rights have already been subjected to all the “interest-balancing” that is
19 needed or warranted: “Like the First [Amendment], [the Second Amendment] is the very *product*
20 of an interest balancing by the people—which Justice Breyer would now conduct for them anew.
21 And whatever else it leaves to future evaluation, it surely elevates above all other interests the
22 right of law-abiding, responsible citizens to use arms in defense of hearth and home.” *Id.*, at 635.

23 Nevertheless, the circuit courts have been engaging in the very sort of interest-balancing
24 that the *Heller* court rejected and essentially applying what is the functional equivalent of the
25 *rational basis* review that the court flatly rejected as improper. Legal scholars have recognized
26 this now for the last several years. As Professor Roston observed in 2012, “the lower courts’
27 decisions strongly reflect the pragmatic spirit of the dissenting opinions that Justice Steven
28 Breyer wrote in *Heller* and *McDonald*.” Allen Rostron, *Justice Breyer’s Triumph in the Third
Battle Over the Second Amendment*, 80 Geo. Wash. L. Rev. 703, 706-707 (2012). In fact, even
back then, Professor Rostron suggested that Justice Breyer’s dissenting view in *Heller* had
become the controlling law of the land, because the lower courts “have effectively embraced the

1 sort of interest-balancing approach that Justice Scalia condemned, adopting an intermediate
2 scrutiny test and applying it in a way that is highly deferential to legislative determinations and
3 that leads to all but the most drastic restrictions on guns being upheld.” *Id.*, at 706-07.

4 During this period of the Supreme Court’s general passivity since *McDonald* in 2010, the
5 circuit courts have become further emboldened in their application of this approach and improper
6 deference to state legislatures’ “empirical judgment” in enacting laws that impinge upon Second
7 Amendment rights. *Heller*, 554 U.S. at 690. In other words, intermediate scrutiny has become,
8 to the circuit courts, not just a tool for conducting improper “balancing of interests” but a means
9 of effectively stacking the deck in favor of states seeking to restrict firearms rights. *See e.g.*,
10 *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012) (finding that the challenged law,
11 which restricts citizens’ ability to transport firearms into New York from out of state, “only
12 minimally affects the ability to acquire a firearm,” the court reasoned that it was not even
13 “subject to any form of heightened scrutiny”); *Kachalsky v. County of Westchester*, 701 F.3d 81,
14 98-99 (2d Cir. 2012) (giving “substantial deference” to the state legislature’s “belief” that the
15 regulation would serve a public safety interest); *Drake v. Filco*, 724 F.3d 426, 435-37 (3d Cir.
16 2010) (applying “intermediate scrutiny” to uphold New York’s “justifiable need” requirement
17 for concealed carry licenses by essentially just deferring to the state’s generic justification that
18 the law helped ensure public safety); *Kolbe v. Hogan*, 849 F.3d 114, 141 (4th Cir. 2017) (readily
19 acceding to the state’s proffered “policy judgments” that the restrictions at issue were necessary
20 to “protect[] public safety”); *Heller II*, 670 F.3d at 1258 (accepting as adequate to pass muster
21 under intermediate scrutiny the District of Columbia’s claim that the firearm registration
22 requirement at issue advanced the general interests of “protect[ing] police officers and . . .
23 aid[ing] in crime control,” even while the court itself recognized that the District had presented
24 this justification “incompletely” and “almost cursorily”); *NRA v. BATFE*, 700 F.3d 185 (5th Cir.
25 2012) (upholding a statute prohibiting the sale of handguns to people ages 18–20 under
26 intermediate scrutiny, despite the indisputable severity of establishing an almost total handgun
27 prohibition against an entire class of adults).

28 This is, of course, the prevailing methodology in the Ninth Circuit as well, where the test

1 for the appropriate standard of review as applied to Second Amendment claims is currently
 2 drawn from *Chovan*, 735 F.3d at 1136. Under *Chovan*, the court is supposed to ask “whether the
 3 challenged law burdens conduct protected by the Second Amendment,” and if it does, determine
 4 the “appropriate level of scrutiny.” *Id.* The resulting analysis permits a court to conduct the
 5 prohibited balancing of interests, which in turn inevitably permits upholding the regulation so
 6 long as the burden could reasonably be perceived as relatively insubstantial in comparison to the
 7 proffered state interest.⁶ And even where Second Amendment conduct is implicated, it is
 8 nevertheless routinely minimized and dismissed – since, as noted, the proffered justification for
 9 such restrictions is generally just a variation of the generic “public safety” theme, which this
 10 improper methodology encourages courts to readily accept. *See e.g., Silvester v. Harris*, 843 F.3d
 11 816, 827 (9th Cir. 2016) (where the Ninth Circuit, purporting to apply intermediate scrutiny,
 12 marginalized the actual burden on the plaintiffs, reasoning that “[t]he actual effect of the [waiting
 13 period laws] on Plaintiffs is very small,” and minimized the government’s burden by
 14 emphasizing that “the [reasonable fit] test is not a strict one ... and scrutiny does not require the
 15 least restrictive means of furthering a given end” – regardless of the trial court’s findings of fact
 16 and conclusions of law to the contrary).

17 While the Supreme Court has yet to denounce with one voice this judicial obstructionism
 18 against the Second Amendment currently prevailing in the lower courts, it has at least signaled
 19 recognition that the Ninth Circuit has gone awry in its use of supposed “intermediate scrutiny” to
 20 decide these cases. *See Jackson v. City and County of San Francisco*, ___ U.S. ___, 135 S.Ct.
 21 2799, 2801 (2015) (Thomas, J., dissenting from denial of cert.) (“[N]othing in our decision in
 22 *Heller* suggested that a law must rise to the level of the absolute prohibition at issue in that case
 23

24
 25 ⁶Dissenting in *Teixeira*, Judge Bea made the point that the majority had improperly evaluated the
 26 *degree* of the burden, and not simply whether the ordinance at issue burdened Second
 27 Amendment rights at all. “*Chovan* did not require the burden to be ‘meaningful’ or ‘substantial’
 28 to proceed to the second step in the analysis, the ‘severity’ of the burden. It required only that the
 right be burdened. Second, *Chovan* explicitly required the ‘severity’ of the burden to be
 examined at its second step, as necessary to choose the level of judicial scrutiny to be applied.”
Teixeira, 873 F.3d at 695 (9th Cir. 2017) (Bea, J., dissenting) (quoting *Chovan*, 735 F.3d at
 1138).

1 to constitute a ‘substantial burden’ on the core of the Second Amendment right. And when a law
2 burdens a constitutionally protected right, we have generally required a higher showing than the
3 Court of Appeals demanded here.”). Indeed, the Ninth Circuit’s opinion in *Jackson* is flawed for
4 several reasons, the primary of which is that it applied intermediate scrutiny even though it found
5 that the statute at issue burdened the Second Amendment’s core right to possess firearms in the
6 home, for self-defense purposes. Also, it found that firearm storage laws do not “severely
7 burden” the core right – a proposition that Justice Thomas has specifically called into question.
8 Cf. *McDonald*, 561 U.S. at 790–91 (2010) (noting that *Heller* and *McDonald* reject a quantitative
9 “costs and benefits” approach).

10 Here, this Court’s order denying Plaintiffs’ motion for a preliminary injunction found that
11 intermediate scrutiny applies because Penal Code section 32310 “does not affect the ability of
12 law-abiding citizens to possess the ‘quintessential self-defense weapon’ – the handgun. Rather,
13 [it] restricts possession of only a subset of magazines that are over a certain capacity.”
14 (MEMORANDUM AND ORDER RE: MOTION FOR PRELIMINARY INJUNCTION (Dkt. #52) (“Order”) at
15 6:21-25 (citing *Heller*, 554 U.S. at 629).) Irrefutably, however, the ban implicates the core of the
16 Second Amendment right. *Fyock*, 779 F.3d at 999. Further, “[c]onstitutional rights
17 [...]implicitly protect those closely related acts necessary to their exercise. ‘There comes a point
18 ... at which the regulation of action intimately and unavoidably connected with [a right] is a
19 regulation of [the right] itself.’” *Luis v. United States*, ___ U.S. ___, 136 S. Ct. 1083, 1097 (2016)
20 (Thomas, J., concurring) (quoting *Hill v. Colorado*, 530 U.S. 703, 745 (2000) (Scalia, J.,
21 dissenting)). “The right to keep and bear arms, for example, ‘implies a corresponding right to
22 obtain the bullets necessary to use them[.]’” *Luis*, 136 S.Ct. at 1097 (quoting *Jackson v. City and*
23 *County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014)).

24 But if a statute that implicates a core exercise of the Second Amendment right, or
25 prohibits activity essential to an exercise of the right such as the possession of large-capacity
26 magazines – which are not “only a subset” of magazines in general, but in Plaintiffs’
27 circumstances are integral to the functioning of their firearms – can nevertheless be upheld
28 merely because there is *some articulable* governmental justification for it, then true

1 “intermediate scrutiny” ceases to exist. For when it comes to firearms, a government can always
2 at least articulate, on paper, some “reasonable”-sounding, generic public safety concern –
3 irrespective of the actual effects of the law. That is not the standard for intermediate scrutiny.
4 *See, Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994) (“[the government] must
5 demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in
6 fact alleviate these harms in a direct and material way”). *Actual* intermediate scrutiny – not just
7 that of the watered-down variety being improperly applied by too many courts in Second
8 Amendment cases – means the government bears a real burden, which it must meet with
9 *substantial* evidence. The State cannot carry that burden here.

10 **3. Defendants Bear a True Evidentiary Burden Under *Actual* Intermediate**
11 **Scrutiny, Which They Cannot Overcome in Their Motion to Dismiss.**

12 Consistent with the prevailing distortions of the Second Amendment jurisprudence, the
13 State’s apparent position is that it bears no evidentiary burden to justify the existence of its LCM
14 ban – even as applied to owners of pre-ban, grandfathered magazines – and even while giving lip
15 service to an “intermediate scrutiny” standard. This practice of wholly ignoring or minimizing
16 the traditional governmental burdens under purportedly legitimate forms of constitutional
17 scrutiny demonstrates that “intermediate scrutiny” in this context has devolved into something
18 functionally and practically indistinguishable from the *Heller*-prohibited rational basis review.

19 One of the fundamental differences between rational basis scrutiny and intermediate
20 scrutiny of a challenged governmental action is supposed to be the evidence required to
21 reasonably justify the action. Under rational basis review, the burden rests with the challenger to
22 negate every conceivable basis that might support a challenged law. *Lehnhausen v. Lake Shore*
23 *Auto Parts Co.*, 410 U.S. 356, 364 (1973). And no evidence is required. *F.C.C. v. Beach*
24 *Communications, Inc.*, 508 U.S. 307, 313-315 (1993).

25 By contrast, when a heightened level of scrutiny is used, the requirements change, and
26 rational speculation is no longer good enough. Under *actual* intermediate scrutiny, the
27 government bears the burden of proof to demonstrate a reasonable fit between the challenged
28 regulation and a *substantial* governmental objective that the law ostensibly advances. *Board of*

1 *Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480–81 (1989). To carry this burden,
 2 the government must not only present evidence, but “*substantial* evidence” drawn from
 3 “*reasonable* inferences” that actually support its proffered justification. *Turner Broad. Sys., Inc.*,
 4 520 U.S. 180, 195 (1997) (emphasis added); *see also City of Renton*, 475 U.S. at 51–52 (the
 5 evidence that the lawmakers rely upon must be “reasonably believed to be relevant to the
 6 problem” the government is addressing). And the regulation must often be more than merely
 7 “relevant” to the problem at hand. Indeed, in the related First Amendment context, the
 8 government is typically put to the evidentiary test to show that the harms it recites are not only
 9 real, but “that [the speech] restriction will in fact alleviate them to a material degree.” *Italian*
 10 *Colors Rest. v. Becerra*, No. 15-15873, 2018 WL 266332, at *9 (9th Cir. Jan. 3, 2018) (citing
 11 *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 188 (1999) (quoting
 12 *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)). This same evidentiary burden should apply
 13 with equal force to Second Amendment cases, where equally fundamental rights are similarly at
 14 stake. *See Ezell v. City of Chicago*, 651 F.3d 684, 706–07 (7th Cir. 2011) (“Both *Heller* and
 15 *McDonald* suggest that First Amendment analogues are more appropriate, [...] and on the
 16 strength of that suggestion, we and other circuits have already begun to adapt First Amendment
 17 doctrine to the Second Amendment context[.]”) (citing *Heller*, 554 U.S. at 582, 595, 635;
 18 *McDonald*, 130 S.Ct. at 3045).

19 In this case, however, the State essentially flips this evidentiary burden on its head,
 20 arguing that Plaintiffs’ complaint “does not, and cannot, allege that Section 32310 does not
 21 advance the State’s compelling interests in protecting civilians and law enforcement from gun
 22 violence and protecting the public safety.” (Motion, at 11:12-14.) Further, the State asserts that
 23 “common sense [...] suggests that the most effective way to eliminate the threat of death, injury,
 24 and destruction caused by LCMs is to prohibit their possession,” and that “the evidence shows
 25 that banning possession of LCMs has the greatest potential to ‘prevent and limit shootings in the
 26 state over the long run.’” (Motion at 11:17-21, citing *NYSPPRA*, 804 F.3d at 264.) So there we
 27 have it. Not only does the State’s motion suggest that *Plaintiffs* bear the evidentiary burden of
 28

1 showing that the law will *not* advance “public safety,”⁷ but it treats its own stated justifications
 2 as simply presumptively true. If, as the State claims, laws can survive intermediate scrutiny by
 3 merely appealing to some people’s idea of “common sense” (Motion at 11:17), then, again, true
 4 intermediate scrutiny does exist in Second Amendment cases, because it has devolved into
 5 nothing more than rational basis review masquerading as “heightened” constitutional scrutiny.

6 Frankly, these are simply not issues that can be resolved on a motion to dismiss under
 7 Rule 12. The government may or may not eventually be able to clear required hurdles to survive
 8 appropriately-applied, *real* heightened scrutiny, but still, it must do so with *real* evidence and not
 9 mere speculation. *See e.g., Ezell*, 651 F.3d at 709 (in analogous First Amendment contexts, “the
 10 government must supply actual, reliable evidence to justify restricting protected expression based
 11 upon secondary public-safety effects”); *City of Renton*, 475 U.S. at 51–52.

12 Finally, it is worth noting – as the Attorney General was fond of pointing out at the
 13 hearing on Plaintiffs’ motion for a preliminary injunction – that, to date, apparently no circuit
 14 court has actually reviewed a Second Amendment case under strict scrutiny – at least not *en*
 15 *banc*. The two opinions that actually deigned to apply strict scrutiny to Second Amendment
 16 claims were quickly reversed by *en banc* panels. *See Kolbe v. Hogan; Tyler v. Hillsdale County*
 17 *Sheriff’s Department*, 837 F.3d 678 (6th Cir. 2016). What does this tell us? Simply, that many
 18 of our circuit courts are hostile to the fundamental, individual right of private firearm ownership
 19 recognized in *Heller*, and that Second Amendment challenges to government restrictions,
 20 especially in this Circuit, virtually always resolve in favor of the government. Therefore, we
 21 ruefully conclude that “heightened scrutiny” means only “intermediate scrutiny” in Second
 22 Amendment cases – and a watered-down version of it at that, resembling analytical devices
 23 materially indistinguishable from the rational basis review that *Heller* forbade. The danger of
 24 such distorted analyses jeopardizing the core of the fundamental rights recognized in *Heller* is
 25 particularly acute where (as here) the government believes it has no particular burden to
 26 demonstrate Legislative propriety, aside from offering generic platitudes to “public safety.”

27 _____
 28 ⁷Indeed, what firearm law doesn’t somehow *claim* to advance “public safety?”

1 Thus, should this Court ultimately decide to apply intermediate scrutiny here, we implore the
2 Court to put the government to the test and hold it to the exacting standards of *actual*
3 intermediate scrutiny.

4 **4. Should There Be Any “Interest-Balancing,” Strict Scrutiny is Actually the**
5 **More Appropriate Test.**

6 In actuality, strict scrutiny is the more appropriate standard should this Court engage in
7 any “interest-balancing.” Plaintiffs’ claims undisputedly implicate the core of the Second
8 Amendment right. *See Fyock*, 779 F.3d at 999; *N.Y. State Rifle & Pistol Ass’n, Inc. v. Cuomo*,
9 804 F.3d 242, 255 (2d Cir. 2015); *Friedman*, 784 F.3d at 415; *Heller II*, 670 F.3d at 1261. While
10 the Ninth Circuit applied intermediate scrutiny in upholding Sunnyvale’s ban of large-capacity
11 magazines in *Fyock*, that decision does not preclude application of strict scrutiny here. The
12 *Fyock* court found the burden of that ban was not substantial enough to invoke strict scrutiny,
13 *Fyock*, 779 F.3d at 999-1000, but the burden to be imposed by this ban is notably more
14 significant. That ban is merely a *citywide* restriction on the possession of large-capacity
15 magazines: one need only step across the border of Sunnyvale City limits to be entirely free of its
16 proscription. The ban here applies across California entirely; there is no escaping its proscription
17 anywhere within this state. And moreover, as a simple matter of scale, this statewide ban would
18 affect far many more people, many of whom live in outlying counties who are unlikely to even
19 realize that the ban was enacted, and who may often have the greatest need for the LCMs that the
20 State seeks ban since their homes tend to be located relatively far from law enforcement agencies
21 and emergency responders.

22 “The core of the *Heller* analysis is its conclusion that the Second Amendment protects the
23 right to self-defense in the home. The Court said that the home is ‘where the need for defense of
24 self, family, and property is most acute,’ and thus, the Second Amendment must protect private
25 firearms ownership.” *Silvester v. Harris*, 843 F.3d 816, 820 (9th Cir. 2016) (*Silvester*) (quoting
26 *Heller*, 554 U.S at 628). This is why the Second Amendment protects “arms . . . of the kind in
27 common use . . . for lawful purposes like self-defense,” *Heller*, 554 U.S. at 624, and “elevates
28 above all other interests the right of law-abiding, responsible citizens to use arms in defense of

1 hearth and home,” *id.* at 624; *Caetano*, 136 S.Ct. at 1028 (quoting *McDonald v. Chicago*, 561
2 U.S. 742, 767 (2010) (“That right vindicates the ‘basic right’ of ‘individual self-defense.’”).

3 The LCM ban unquestionably places a substantial burden upon the right to self-defense
4 under the Second Amendment. If nothing else, as Plaintiffs’ complaint persuasively alleges with
5 no realistic possibility of refutation by the State, these magazines are integral operating parts of
6 the modern day semi-automatic firearms for which they are routinely produced, such that many,
7 if not most, firearms are essentially inoperable without them.⁸ This ban would therefore and
8 necessarily impair “the right of law-abiding, responsible citizens to use arms in defense of hearth
9 and home,” *Heller*, 554 U.S. at 624, which is “the core of the Second Amendment right,”
10 *Silvester*, 843 F.3d. at 821. The countless Californians who have reasonably relied upon the
11 continuing ability to possess these magazines for self-defense would be forced to acquire
12 substitute magazines, and perhaps even substitute firearms if their current firearms only
13 accommodate magazines holding more than ten rounds, in order to salvage some form of their
14 constitutionally-protected right to possess and use firearms for defensive and other lawful means.

15 The expense of replacing these magazines with substitute magazines or firearms could be
16 substantial in many cases, entirely cost-prohibitive in others, or even render the firearms
17 completely useless in still others, such as where a person has multiple such magazines or simply
18 cannot afford to make the new purchases necessary to replace his or her existing ammunition or
19 firearms subject to the ban. And some such magazines are simply irreplaceable. (SAC, ¶¶ 11,
20 12, 13.) At best, potentially scores these individuals would be left with a lesser level of firearm
21 protection; at worst, some would be left with no firearm protection at all.

22 In the real world, magazine capacity makes a difference. Whether or not documented
23 instances of firearm self-defense (where the number of shots fired has actually been recorded)
24

25
26 ⁸In fact, California law *requires* many models of new pistols sold at retail to have “magazine
27 disconnect mechanisms,” which means that these firearms are literally incapable of being fired
28 without a magazine. *See* Pen. Code §§ 31910(b)(4)-(6), 32000, and 16900 (defining “magazine
disconnect mechanism” as “a mechanism that prevents a semiautomatic pistol that has a
detachable magazine from operating to strike the primer of ammunition in the firing chamber
when a detachable magazine is not inserted in the semiautomatic pistol”).

1 have involved more ten rounds of fire is beside the point. The fact that few people may actually
2 require large-capacity magazine for self-defense “should be celebrated, and not seen as a reason
3 to except magazines having a capacity to accept more than ten rounds from Second Amendment
4 protection.” *Fyock v. City of Sunnyvale*, 25 F.Supp.3d 1267, 1276 (N.D. Cal. 2014). Again, “the
5 court will not judge whether the public’s firearm choices are often used for self-defense, or even
6 whether they are effective for self-defense – the firearms must merely be preferred.” *Id.* at 1278;
7 *see Caetano*, 136 S.Ct. at 1028-29 (Ms. Caetano’s mere possession of a stun gun in an encounter
8 with her violent ex-boyfriend “may have saved her life,” even though she never deployed it[.]”).
9 Unquestionably, having a large-capacity magazine at one’s disposal certainly *could*, and likely
10 *would*, provide a greater level of protection in a self-defense situation given the simple, yet
11 significant fact that one has a greater number of rounds available to fire. Plaintiffs will show,
12 through expert testimony, that this is particularly true for average citizens who, unlike many
13 trained and highly-equipped law enforcement personnel, are generally not as ready to efficiently
14 confront an armed criminal. Citizens faced with such peril are likely to have a single firearm and
15 a single magazine at their disposal, and may be more susceptible to the psychological effects of
16 fear, anxiety, and stress that naturally occur when faced with the threat of deadly violence and
17 tend to deprive one of the focus and clarity of mind necessary to make accurate shots at the
18 attacker. For example, the evidence will show that, in home invasion situations, while average
19 citizens may be able to retrieve their loaded firearms, they typically struggle to properly equip
20 themselves with any additional ammunition. Uniformed police, on the other hand, are usually
21 armed against the very same criminals with two spare magazines, each containing seventeen
22 rounds or more of 9mm, or fifteen rounds of .40 caliber cartridges. Plaintiffs will show that
23 collective law enforcement experience has determined this to be critical to officer survival in
24 confrontations with armed criminals. That is, the threat from the criminals is the same, and the
25 constitutional right to armed self-defense – if it is to afford meaningful protection – must be
26 construed to preserve for average citizens the ability to *defend* themselves just the same.

27
28 Especially when coupled with the reality that this ban would effectuate, essentially, a

1 *confiscation* of valuable personal property intrinsic to countless protected firearms, “it amounts
2 to a destruction of the Second Amendment right . . . unconstitutional under any level of
3 scrutiny.” *Bauer v. Becerra*, 2017 U.S. App. LEXIS 9658, at *11 (quoting *Silvester*, 843 F.3d at
4 821). At the very least, this confiscatory ban “implicates the core of the Second Amendment
5 right and severely burdens that right.” *Id.* And for that reason, if this law is to be evaluated with
6 an “interest-balancing” test, it should be subjected to strict scrutiny review. Because the
7 government cannot demonstrate that the ban is *narrowly* tailored to achieve a *compelling* state
8 interest and that no less restrictive alternative exists to achieve the same end, as it must show
9 under this standard, *United States v. Alvarez*, 617 F.3d 1198, 1216 (9th Cir. 2010), it cannot
10 carry its burden and the motion to dismiss this claim should be denied.

11
12 **B. PLAINTIFFS STATE A CAUSE OF ACTION FOR TAKINGS.**

13 Penal Code § 32310(c) and (d), which as of July 1, 2017, would require individual
14 plaintiffs, and a large class of similarly-affected individuals who lawfully own pre-ban
15 magazines, to dispose of, destroy, or “surrender” their constitutionally-protected personal
16 property, thereby resulting in a taking of such property for which no compensation has been or
17 would be provided, in violation of both the Takings and Due Process Clauses of the United
18 States Constitution and the California Constitution.

19 The Takings Clause of the United States Constitution guarantees property owners “just
20 compensation” when their property is “taken for public use.” U.S. Const., 5th Amend. The Due
21 Process Clause likewise guarantees property owners due process of law when the State
22 “deprive[s] [them] of ... property.” U.S. Const., 14th Amend., § 1. And the California
23 Constitution also provides that “Private property may be taken *or damaged*⁹ for a public use and
24

25
26 _____
27 ⁹Plaintiffs’ takings claim based upon damage to personal property arises from a suggestion by
28 the State that the magazines may be permanently modified to render them incapable of accepting
more than ten rounds of ammunition. (Motion, 15:19-20). However, the State’s only argument
here is an oblique reference Penal Code § 32425(a) which does not mention permanent
modifications at all, Pen. Code, § 32425 (providing an exception to section 32310 for “[t]he
lending or giving of any large-capacity magazine to, or possession of that magazine by, a person

1 *only* when just compensation, ascertained by a jury unless waived, has first been paid to, or into
2 court for, the owner.” Cal. Const., Art. I, § 19 (emphasis added).

3 As in this case, a plaintiff suffering an unconstitutional taking without compensation may
4 seek declaratory and injunctive relief as a remedy. *See e.g., Lingle v. Chevron U.S.A. Inc.*, 544
5 U.S. 528, 528 (2005) (plaintiffs brought suit seeking a declaration that a rent cap effected an
6 unconstitutional taking of its property, and sought injunctive relief against application of the
7 cap); *San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal.4th 643, 649 (2002)
8 (plaintiffs challenged ordinance under California constitution by petition for writ of mandate);
9 *Jefferson Street Industries, LLC v. City of Indio*, 236 Cal.App.4th 1175, 1195 (2015) (a facial
10 challenge to an ordinance alleged to effect a regulatory taking may be brought through an action
11 for declaratory relief). In its Order, this Court denied Plaintiffs’ motion for a preliminary
12 injunction, in part, based on the proposition that preliminary injunctive relief is not generally
13 available for a takings claim. (Order at 16:12 – 17:18). Having already cited to *Babbitt v.*
14 *Youpee*, 519 U.S. 234 (1997) (affirming lower courts’ grant of injunctive and declaratory relief,
15 where statute violated the Takings Clause), we respectfully disagree with that determination, but
16 find that this should have no bearing on the instant motion to dismiss. *See also, Golden Gate*
17 *Hotel Assn. v. City & County of San Francisco*, 836 F.Supp. 707, 709 (N.D. Cal. 1993) (granting
18 injunction enjoining city from enforcing city hotel conversion ordinance constituting a taking)
19 (reversed on other grounds, 18 F.3d 1482 (9th Cir. 1994)). A court also has jurisdiction to enjoin
20 the taking of private property before the amount of compensation has been determined. *Felton*
21 *Water Co. v. Superior Court*, 82 Cal.App. 382, 388 (1927).

22
23 This action is being brought by individual plaintiffs, all of whom are law-abiding owners
24 of pre-ban (grandfathered) magazines, for themselves and on behalf of those in a class who are

25
26 licensed pursuant to Sections 26700 to 26915, inclusive, or to a gunsmith, for the purposes of
27 maintenance, repair, or modification of that large-capacity magazine”). However, the DOJ has
28 withdrawn its proposed “emergency regulations” that had specified permissible forms of
permanent modifications to large-capacity magazines. (RJN, Exhs. G and H.) Thus, California
citizens have no formal guidance whatsoever as to what sort of “modifications” suffice to satisfy
the exception.

1 similarly situated, in a representative capacity pursuant to state law. *See e.g., Residents of*
2 *Beverly Glen, Inc. v. City of Los Angeles*, 34 Cal.App.3d 117 (1973) (plaintiffs had standing to
3 bring takings-type challenge to ordinance, in a representative capacity under state law).

4 **1. The Retroactive Magazine Possession Ban Constitutes a *Per Se* Taking.**

5 A “classic taking” is well understood to be one in which “the government directly
6 appropriates private property for its own use.” *Tahoe-Sierra Preservation Council, Inc. v. Tahoe*
7 *Regional Planning Agency*, 535 U.S. 302, 324 (2002). And likewise, a “paradigmatic taking,”
8 has also been equally well understood to be “a direct government appropriation or physical
9 invasion of private property.” *Lingle*, 544 U.S. at 537. Such takings – where the government
10 directly appropriates the property itself – are *per se* takings for which just compensation must be
11 provided, without regard to factors regarding the economic impact of the regulation or the nature
12 or character of the government action. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458
13 U.S. 419, 426 (1982).

14 The law has further developed to recognize another type of *per se* taking, one in which
15 government regulation of private property may be so onerous that its effect *is tantamount* to a
16 direct appropriation or ouster. These regulations are also compensable takings under the Fifth
17 Amendment, and occur when such regulations “completely deprive an owner of ‘*all*
18 economically beneficial us[e]’ of her property.” *Lingle*, 544 U.S. at 538 (citing *Lucas v. South*
19 *Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992) (*Lucas*)).

20 Where there has been a *per se* taking, under either theory, compensation *must* be paid to
21 the property owner, *irrespective* of the perceived public good. *See, e.g., Loretto*, 458 U.S. at
22 426; *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979) (“[T]here is no question but that
23 Congress could assure the public a free right of access [...] if it so chose. Whether a statute or
24 regulation that went so far amounted to a ‘taking,’ however, is an entirely separate question.”);
25 *Nat’l Wildlife Fed’n v. I.C.C.*, 850 F.2d 694, 706 (D.C. Cir. 1988) (“government action that
26 causes a permanent physical occupation of real property amounts to a taking ‘without regard to
27 whether the action achieves an important public benefit or has only minimal economic impact on
28

1 the owner”).

2 Here, Penal Code § 32310(c) and (d) as amended constitutes both a direct physical
3 appropriation of Plaintiffs’ personal property and a scheme so onerous that it deprives Plaintiffs
4 of all economically beneficial use of their property. It therefore amounts to a *per se* taking, for
5 which compensation *must* be provided.

6 **a. Section 32310(d) is a Taking Because It Compels the Physical**
7 **Appropriation of Property.**

8 There can be no question that the statute itself *provides* for the direct physical
9 appropriation of tangible property by the government through forced physical surrender. The
10 question is whether that is the only practical, viable (and intended) result. Penal Code §
11 32310(d) as enacted, states:

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

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

18 Of these three purported “options,” the third option (“surrender”), we contend, is the true
19 option which the State intends to compel, and to which its statutory scheme would effectively
20 relegate most owners of pre-ban magazines who wish to comply with the law. And as Plaintiffs
21 will show, it is the only economically viable option for the vast majority of California pre-ban
22 magazine holders to remain in compliance with the law.

23 To illustrate, the first purported “option” under subdivision (d), which is to “remove the
24 large-capacity magazine from the state,” is simply not viable for the vast majority of the class,
25 i.e., lawful pre-ban magazine holders. In the first place, the State has taken great pains to prevent
26 or prohibit the sale of such items to others within the confines of this State. Subdivision (a) of
27 section 32310 specifically states: “[A]ny person in this state who [...] *offers or exposes for sale,*
28 [...] any large-capacity magazine is punishable by imprisonment in a county jail not exceeding
one year or imprisonment pursuant to subdivision (h) of Section 1170.” (Emphasis added.)

1 Therefore, conscientious California pre-ban large capacity magazine holders who wish to dispose
2 of their property using the first “option” apparently may not go on the Internet, offer it for sale,
3 or even call a prospective purchaser in another state to arrange for the sale. They must, by
4 statute, physically drive to a border state before they may even begin to offer or expose it for
5 sale, or even begin to *look* for a willing buyer or receiver. This is simply, economically and
6 practically, untenable. Indeed, the notion that an actual market exists for 18+ year-old firearms
7 parts is, in itself, highly doubtful.

8 It is apparent that the Legislature and drafters of Proposition 63 simply and callously
9 assumed (or were simply indifferent to the fact) that any lawful pre-ban large-capacity magazine
10 holder wishing to take the magazine out of state to preserve his or her constitutionally-protected
11 right to *keep* and bear arms has a friend, relative, or other recipient willing to take or bear the
12 costs of storing firearms or firearms parts on the holder’s behalf. This is simply unrealistic. Yet,
13 this is the only option available to the class of pre-ban magazine holders who actually wish to
14 *keep* their firearms, intact or otherwise.¹⁰ If such owners wish to keep their firearms intact, they
15 must essentially lose access to them – a substantial deprivation of their rights and interests in the
16 property that in itself constitutes a taking. *See Nixon v. United States*, 978 F.2d 1269, 1285 (D.C.
17 Cir. 1992) (“The retention of some access rights by the former owner of property does not
18 preclude the finding of a *per se* taking.”). .

19
20 The second purported “option” under § 32310(d) – to sell to a “licensed firearms dealer”
21 – is equally illusory and (from a takings perspective) suffers from the same defect as the first
22 option, i.e., it simply presupposes that there is an actual market for such items. That is not only a
23 callous assumption, but it is a false one. There is no guarantee (or reason to assume) that
24 licensed firearms dealers would even be willing to participate in this state-endorsed confiscation
25 scheme, forcing upon California gun owners the gross indignity of disassembling and selling
26

27 ¹⁰Again, and as will be proven at trial, ammunition magazines are not separate artifacts, but are
28 considered to be and are inherent operating parts of functioning firearms; semi-automatic
firearms are essentially inoperable without them. (SAC, ¶ 32).

1 away valuable firearms parts they have lawfully held for years. And moreover, from a purely
2 economic point of view, there is no reason to assume that licensed firearms dealers would even
3 be willing to buy such items, at cost, or even at all. Indeed, there are very few people within the
4 State to whom licensed firearms dealers could resell such items, except for the small class of
5 exempt people such as law enforcement officers. *See* Pen. Code § 32450(c).

6 But in the bigger picture, of course, the government’s dispossession of personal property,
7 by *forcing* its sale to third parties, must itself be considered no less than a taking in the first
8 place. At one time, during a *bona fide* national emergency/World War, the government routinely
9 did just this, forcing property owners to relinquish valuable materiel in forcing its sale to third
10 parties for wartime use. And in such instances, the courts routinely held these commandments to
11 be takings, whether or not the property was directly appropriated by the government. *See Dore*
12 *v. United States*, 97 F. Supp. 239, 242 (Ct. Cl. 1951) (“When, as here, the United States exercises
13 its authority to order delivery and in its sovereign capacity forces the ‘sale’ of property to it for
14 public use there is, in our opinion, a ‘taking’ and just compensation must be made.”); *Edward P.*
15 *Stahel & Co. v. United States*, 78 F. Supp. 800, 804 (Ct. Cl. 1948) (“But to say that when the
16 Government forbids an owner of property to make any other use of it, and requires him to sell it,
17 upon request, to the Government, or its designee who will use it for a Government purpose, is
18 not a taking of the property for public use, would be to make the constitutional right contingent
19 upon the form by which the Government chose to acquire the use of the property.”).

20
21 And therefore, the State cannot simply defer, deflect, or “outsource” its duty to provide
22 just compensation under the Takings Clause, by just *assuming* that a market for such forced sales
23 exist. “A ‘sale’ implies willing consent to the bargain. A transaction although in the form of a
24 sale, but under compulsion or duress, is not a sale.” *Dore*, 97 F. Supp. at 242. “‘Just
25 compensation,’” we have held, means in most cases the fair market value of the property on the
26 date it is appropriated. [...] ‘Under this standard, the owner is entitled to receive ‘what a willing
27 buyer would pay in cash to a willing seller’ at the time of the taking.’” *Kirby Forest Indus., Inc.*
28 *v. United States*, 467 U.S. 1, 10, 104 S.Ct. 2187, 2194 (1984) (citation omitted). A true market

1 for these old pre-ban magazines – comprised of *voluntary* buyers and sellers – simply does not
2 exist.

3 There being no viable, true market for these pre-ban magazines, (again, which essentially
4 cannot be offered for sale while within this State), that leaves only one plausible, practical option
5 for a conscientious pre-ban magazine holder to comply with the law: to “surrender” it to a law
6 enforcement agency for destruction. And let us make no mistake: this is the option which the
7 State wants, for (a) it is the only viable option as discussed above, and (b) it is hard to imagine
8 that such large-capacity magazines which the State believes “are disproportionately used in
9 crime, and feature prominently in some of the most serious crime, including homicides, mass
10 shootings, and killings of law enforcement officers,” (Motion at 11), are somehow acceptable to
11 export to other parts of the country. And the destruction option is, for purposes of this
12 discussion, a direct physical appropriation of previously lawfully-held property, whether the
13 government takes title to it or not. It is therefore a taking, for which compensation has not even
14 been considered, or would be provided.¹¹

15 Therefore, by enactment of this confiscatory statutory scheme, the State has or will have
16 engaged in a taking. “[T]o constitute a taking under the Fifth Amendment it is not necessary that
17 property be absolutely ‘taken’ in the narrow sense of that word to come within the protection of
18 this constitutional provision; it is sufficient if the action by the government involves a direct
19 interference with or disturbance of property rights. [...] Nor need the government directly
20 appropriate the title, possession or use of the properties[.]” *Richmond Elks Hall Ass'n v.*
21 *Richmond Redevelopment Agency*, 561 F.2d 1327, 1330 (9th Cir. 1977) (citations omitted);
22 *Kaiser Aetna*, 444 U.S. at 175 (“[T]his Court has observed that ‘[c]onfiscation may result from a
23

24
25 ¹¹ The Legislature, in enacting SB 1446, never even considered the question of compensation at
26 all, nor did it consider the question of a viable market for the forced sale of these items. We
27 know this because the Legislative analysis simply assumed, as discussed below, that the
28 retroactive magazine ban was not a taking in the first place, but was a valid exercise of its police
power. (See Senate Rules Committee Analysis dated 5/19/16 regarding SB 1446, at pp. 4-5,
Plaintiffs’ Req. for Jud. Notice, Exhibit B.) Moreover, there is nothing in the legislative history
of SB 1446, or Proposition 63, that indicates that the drafters/proponents ever even considered a
study of compensation, or a viable market for the forced sale of these items.

1 taking of the use of property without compensation quite as well as from the taking of the
2 title[.]” (quoting *Chicago, R. I. & P. R. Co. v. United States*, 284 U.S. 80, 96 (1931)).

3 **b. The Effect of Section 32310(c) and (d) Constitutes a Taking Because**
4 **the Statutory Scheme Completely Deprives the Owners of All**
5 **Economically Beneficial Use of Their Property.**

6 Irrespective of whether the statute as amended will substantially result in direct physical
7 appropriation of the pre-ban magazines, one thing is clear: it is, in any event, compelling
8 *dispossession* of this property. And thus, it amounts to a compensable taking because the law
9 will have completely deprived the owners of *all* economically beneficial use of their property.
10 *Lucas*, 505 U.S. at 1019; *Lingle*, 544 U.S. at 538. In doing so, the State has deprived plaintiffs
11 and those similarly situated of “the entire ‘bundle’ of property rights,” i.e., their rights to possess,
12 use, and dispose of these items as they see fit. *Horne v. Department of Agriculture*, ___ U.S.
13 ___, 135 S.Ct. 2419, 2428 (2015).

14 In *Horne*, the Supreme Court confirmed that the Takings Clause applies to direct
15 appropriations of personal property, included within its description of a “paradigmatic” taking.
16 That this was the first time that the Supreme Court squarely addressed the issue of whether
17 personal property was subject to the Takings Clause is somewhat remarkable because it is self-
18 evident. However, it has long been established that laws or regulations which essentially destroy
19 the value of personal property, or require its surrender, may and often do constitute a taking,
20 thereby entitling the property owner to compensation or other relief.

21 In fact, some 40 years ago, in *Andrus v. Allard*, 44 U.S. 51 (1979) (*Allard*), the Supreme
22 Court considered the question of whether a law that affected the value of personal property could
23 be challenged, among other grounds, for the reason that it constituted a taking without
24 compensation – or more precisely, whether it violated the plaintiffs’ property rights under the
25 Fifth Amendment.¹² The specific question presented to the court was whether federal

26 _____
27 ¹²The court noted that although the argument was cast in terms of “economic substantive due
28 process,” the language used by the district court was consistent with the terminology of the
Takings Clause. 444 U.S. at 64, n. 21.

1 conservation statutes designed to prevent the destruction of certain species of birds violated the
2 Fifth Amendment rights of the plaintiffs. The conservation statutes in question prohibited
3 generally the sale of protected bird parts, but not the possession thereof. The plaintiffs were
4 engaged in the trade of Indian artifacts, and in fact, had been prosecuted and fined for *selling*
5 such artifacts which contained the feathers of protected birds. 444 U.S. at 54-55. Ultimately, the
6 court, considering the merits of the claim, concluded that the conservation statutes did not
7 amount to a taking, the primary reasons for which had to do with the enduring economic value of
8 the property, and that the laws did not completely destroy that bundle of property rights to
9 deprive the owners of any use whatsoever. But in this regard, the court stated:

10 The regulations challenged here do not compel the surrender of the artifacts, and
11 there is no physical invasion or restraint upon them. Rather, a significant
12 restriction has been imposed on one means of disposing of the artifacts. But the
13 denial of one traditional property right does not always amount to a taking. At
14 least where an owner possesses a full “bundle” of property rights, the destruction
15 of one “strand” of the bundle is not a taking, because the aggregate must be
viewed in its entirety. [. . .] In this case, it is crucial that appellees retain the
rights to possess and transport their property, and to donate or devise the protected
birds.

16 444 U.S. at 65–66 (internal citations omitted).

17 Unlike the regulations in *Allard*, the relevant portions of the LCM Ban, specifically §
18 32310(c) and (d) as amended, *do indeed* compel the surrender of lawfully-held personal
19 property. The magazine ban as enacted is a complete and retroactive ban on the *possession* of
20 previously lawfully-held, and constitutionally-protected, personal property. Unlike the plaintiffs
21 in *Allard*, but like the plaintiffs in *Horne*, the retroactive ban on the possession of pre-ban
22 magazines in fact causes Plaintiffs here to “lose the entire ‘bundle’ of property rights in these
23 items. The distinction from *Allard* that Chief Justice Roberts drew in *Horne* directly applies
24 here: “*Allard* is a very different case. [...] [T]he owners in that case retained the rights to
25 possess, donate, and devise their property. In finding no taking, the Court emphasized that the
26 Government did not ‘compel the surrender of the artifacts, and there [was] no physical invasion
27 or restraint upon them.’ [...] Here of course the raisin program requires physical surrender of the
28

1 raisins and transfer of title, and the growers lose any right to control their disposition.” *Horne*,
2 135 S.Ct. at 2429 (citing *Allard*, 444 U.S. at 65-66).

3 Again, this statutory scheme is built upon the assumption that all “pre-ban” large-
4 capacity magazine holders in this State simply have the means and the ability to store their
5 personal property out of State, or could simply sell the magazines to a licensed firearm dealer –
6 with no supporting analysis of the likely burdens or costs for such out-of-state storage or the
7 existence of a market for such forced sales. This reveals the State’s true motive here: to force
8 law-abiding gun owners to surrender these valuable and integral components of their firearms.¹³
9 In other words, the State’s ultimate goal is simply confiscation and destruction of Plaintiffs’
10 lawfully-held personal property.

11 **c. The Statute is Not a Valid Exercise of Police Power.**

12 Defendants ultimately argue that the ban on possession of ammunition magazines is not a
13 taking in character, but a valid exercise of the State’s police power “to protect the safety, health
14 and general welfare of the public.” (Motion at 14:7-8.) This is the heart of this matter, and we
15 would point out two things: First, the authority upon which the State relies is entirely inapposite
16 because it pre-dates the paradigmatic shifts in *Heller* and *Lucas*. Second, the State’s call to
17 “police power” is largely irrelevant if this Court finds this statutory scheme to be a *per se* taking.
18 Again, *per se* takings require compensation – irrespective of any “public good” that is asserted or
19 achieved. *See Loretto*, 458 U.S. at 425 (Assuming a valid exercise of the state’s police power,
20 the court stated: “It is a separate question, however, whether an otherwise valid regulation so
21 frustrates property rights that compensation must be paid.”).

22
23 On the first point, regarding the purported police power to regulate “dangerous weapons,”
24 the case upon which the Legislature primarily relied in determining that it had the unilateral
25 authority to enact this ban without running afoul of the Takings Clause is *Fesjian v. Jefferson*,

26
27 ¹³Defendants admit as much in their motion, where they state that “the purpose of the statute is to
28 remove LCMs from circulation, not to transfer title to the government or an agent of the
government for use in service of the public good.” (Motion at 15:1-3.)

1 399 A.2d 861 (D.C. Ct. App. 1979). (*See* Plaintiffs’ Req. for Jud. Notice, Exhibit B, at p. 6.)
2 This pre-*Heller* decision applied a simple rational basis test to an important fundamental right,
3 albeit on equal protection grounds. 399 A.2d at 864. After *Heller*, the proper inquiry would be
4 whether the firearms themselves are in common use, for lawful purposes, and are not dangerous
5 and unusual. *Heller*, 554 U.S. at 627. And as to the specific takings argument, it could fairly be
6 said that in *Fesjian* the D.C. Court of Appeals simply gave short shrift to the takings argument
7 based on the assumption that *all* firearms could be summarily banned in a pre-*Heller* District of
8 Columbia. In one paragraph, where the court assumed *arguendo* that the D.C. statute prohibiting
9 the plaintiffs (representing themselves in pro per) from registering their weapons was a taking,
10 the court simply concluded that “a taking for the public benefit under a power of eminent domain
11 is, however, to be distinguished from a proper exercise of police power to prevent a perceived
12 public harm, which does not require compensation. [...] That the statute in question is an
13 exercise of legislative police power and not of eminent domain is beyond dispute.” *Fesjian*, 399
14 A.2d at 866. There was no discussion or analysis whatsoever as to whether the D.C. statute
15 amounted to forced dispossession, or deprived plaintiffs of the economically beneficial use of
16 their property, constituting a *per se* taking. Those Supreme Court takings cases, of course, came
17 later.

18
19 Indeed, *Heller* completely changes the landscape as to takings cases involving firearms
20 since courts may no longer simply assume that *all* firearms could be banned within any given
21 jurisdiction. For example, in *Quilici v. Vill. of Morton Grove*, 532 F.Supp. 1169 (N.D. Ill. 1981),
22 the district court ruled that a village ordinance which completely banned possession of handguns
23 except by peace officers, members of armed forces, and licensed gun collectors, but which
24 allowed continued recreational use of handguns at licensed gun clubs, was a reasonable exercise
25 of police power. As in *Fesjian* (and in fact, citing to it), the district court made short work of the
26 takings argument, summarily reasoning: “It is well established that a Fifth Amendment taking
27 can occur through the exercise of the police power regulating property rights. In order for a
28 regulatory taking to require compensation, however, the exercise of the police power must result

1 in the destruction of the use and enjoyment of a legitimate private property right.” *Quilici*, 532
2 F.Supp. at 1183-84, aff’d, 695 F.2d 261 (7th Cir. 1982). If a court believes it can simply uphold
3 a ban *all* firearms without regard to the Second Amendment, it is a short step to dismiss a related
4 takings claim as being a valid exercise of police power. All pre-*Heller* takings cases involving
5 firearms, including *Fesjian*, are inherently suspect for this very reason alone. Understanding this
6 to be the argument, the State has cited one post-*Heller* case which upheld a firearm seizure and
7 dismissed the plaintiff’s takings claim, *Burns v. Mukasey*, 2009 WL 8756489 at *5 (E.D. Cal.
8 2009) (Motion at 14:20-24). But in *Burns*, the district court did not believe at the time that the
9 Second Amendment was applicable to the states (as the decision pre-dated *McDonald*), *id.*, at *4.
10 Furthermore, the district court in *Burns* similarly gave short shrift to the plaintiff’s takings claim,
11 limited to a discussion of whether his firearm constituted a taking for “public use,” and there was
12 no discussion regarding the alleged police power of the state. *Id.*, at *5. *Burns* therefore has no
13 applicability here.

14 The second point of significance is, while we do not concede that the retroactive LCM
15 ban involves an exercise of “police power,” *it simply does not matter* if it does. Any reliance
16 upon older, pre-*Lucas* cases in adopting some type of bright-line rule regarding the payment of
17 compensation is, today, a fools’ errand, just as any reliance upon hoary cases that attempted to
18 draw such lines is insufficient to uphold this ban. Notably, *Lucas*, the very case that gives us its
19 eponymous test regarding deprivation of all economically beneficial use of a claimant’s property,
20 also involved the alleged exercise of a state’s “police power.” In *Lucas*, the owner of two
21 beachfront lots intended to build houses there, but was prohibited by a statute forbidding any
22 permanent inhabitable structures on the land in question. 505 U.S. at 1008. The plaintiff sued in
23 state court, and the South Carolina Supreme Court ultimately rejected his challenge under the
24 Takings Clause, holding that in the legitimate exercise of its police power, the state could restrict
25 his ability to use the land in order “to mitigate the harm to the public interest that [such a] use of
26 his land might occasion.” *Id.*, at 1020–21. The *Lucas* Court disagreed. It held that, when “the
27 State seeks to sustain regulation that deprives land of all economically beneficial use, ... it may
28

1 resist compensation only if the logically antecedent inquiry into the nature of the owner's estate
2 shows that the proscribed use interests were not part of his title to begin with.” *Id.*, at 1027. And
3 thus, the high court remanded the case for the state courts to determine, under state law, whether
4 “background principles of ... property law” prohibited the future uses that the owner intended.
5 *Id.*, at 1031.

6 The rule post-*Lucas* now and simply boils down to this: Does the regulation result in the
7 complete elimination of the property’s value or beneficial use? If so, it amounts to the
8 equivalent of a physical appropriation, *see Lucas*, 505 U.S. at 1017; *Lingle*, 544 U.S. at 539–40,
9 and compensation must be paid. The *Lucas* court itself strongly implied that “many of [its] prior
10 opinions” which wrestled with the concept of “‘harmful or noxious uses’ of property” were
11 simply “early attempt[s] to describe in theoretical terms why government may, consistent with
12 the Takings Clause, affect property values by regulation without incurring an obligation to
13 compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the
14 State’s police power.” *Lucas*, 505 U.S. at 1022–23. With regard to these early cases, the court
15 stated:

16
17 When it is understood that “prevention of harmful use” was merely our early
18 formulation of the police power justification necessary to sustain (without
19 compensation) any regulatory diminution in value; and that the distinction
20 between regulation that “prevents harmful use” and that which “confers benefits”
21 is difficult, if not impossible, to discern on an objective, value-free basis; *it*
becomes self-evident that noxious-use logic cannot serve as a touchstone to
distinguish regulatory “takings”—which require compensation—from regulatory
deprivations that do not require compensation.

22 505 U.S. at 1026 (emphasis added.) Accordingly, the older line of cases, starting with *Mugler v.*
23 *Kansas*, 123 U.S. 623 (1887), which attempted to distinguish between valid exercises of “police
24 powers” and takings, simply does not result in a bright-line rule today. In fact, it is quite likely
25 that *Mugler* – decided under today’s standards – would have a different result, and it certainly
26 would be subject to a different analysis. The dispositive fact upon which the court relied in
27 *Mugler* was that the plaintiff had not been deprived of his property. “He still has possession of
28 it. He still has the right to sell it. Nor is it claimed that he is deprived of its use generally. The

1 only claim is that he is deprived of the privilege to use it for the manufacture of liquors for sale
 2 as a beverage.” *Mugler*, 123 U.S. 623, 8 S.Ct. at 285–86. So it was easy for the court simply to
 3 conclude, as a binary matter, that “[t]he law was within the police power of the state.” *Id.*, at
 4 286. Today, of course, the analysis would hinge not upon physical possession, but whether the
 5 plaintiff was deprived of all economically beneficial use thereof. *Lucas*, 505 U.S. at 1019.¹⁴

6 The State’s Motion suggests that *Lucas* is limited to land use cases, and “it is not clear
 7 that it is applicable here.” (Motion at 15:10-11). But that is not correct. *See, Bair v. United*
 8 *States*, 515 F.3d 1323, 1328 (Fed. Cir. 2008) (“In cases of personal property, the background
 9 principles are defined by the law existing at the time that the property came into existence. Any
 10 lawful regulation defining the scope of the property interest that predates the creation of that
 11 interest will ‘inhere in the title’ to the property.”). Moreover, *Lucas* merely restated a preexisting
 12 general principle that any limitation on the use of any property so severe could not be *newly*
 13 *legislated or decreed* without providing compensation. *See, United States v. Security Industrial*
 14 *Bank*, 459 U.S. 70, 78 (1982) (there was “substantial doubt” as to whether the retroactive
 15 destruction of creditors’ liens could comport with the Takings Clause).

16 Here, there is no question – and the State cannot legitimately dispute – that Plaintiffs and
 17 similarly-situated, pre-ban magazine holders (of whom there may be hundreds of thousands – *see*
 18 Req. for Jud. Notice Exhibit A), have and have had a valid possessory interest in their personal
 19 property, lawfully and legally held, without controversy for many years – 17 years or more.
 20 *Their* property was not a nuisance 17 years ago, and it is not today. There is no evidence that
 21 *any* legal “pre-ban” magazine holders are using or ever have used their property in noxious or
 22 dangerous ways. Instead, the statute is a categorical ban on possession itself, designed to punish
 23 Plaintiffs and others similarly situated, as a supposed remedy to the tragedies of mass shootings
 24

25
 26 ¹⁴And even if the prohibitory liquor law were found not to deprive the plaintiff of *all*
 27 economically beneficial use of the distillery, that would not end the story either. The law’s effect
 28 would still be subject to the regulatory takings analysis required by *Penn Central Transportation*
Co. v. City of New York, 438 U.S. 104 (1978), as discussed below.

1 and other incidents of “gun violence” – when there is no evidence that any of these “pre-ban”
2 magazines, especially those owned by Plaintiffs, are or have been used in such incidents.
3 Plaintiffs are being completely dispossessed of this lawfully-held, and Constitutionally-protected
4 property either as a forced physical surrender or its equivalent by the destruction of all beneficial
5 use thereof. It is, quite simply, a *per se* taking for which compensation must be provided,
6 irrespective of the purported public good or the police power of the State.

7 **2. The Retroactive Magazine Possession Ban Constitutes a Burdensome**
8 **Regulatory Taking.**

9 The same analysis alternatively supports a conclusion that the retroactive ban on the
10 prohibition of these grandfathered, pre-ban magazines constitutes an unreasonably burdensome
11 regulatory taking, which also requires compensation. Aside from the direct appropriations of
12 and interference with property constituting *per se* takings, discussed above, the Supreme Court
13 has held, starting with *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), that compensation
14 is also required for a “regulatory taking” – a restriction on the use of property that goes “too far.”
15 260 U.S. at 415; *Horne*, 135 S.Ct. at 2427. “And in *Penn Central Transp. Co. v. New York City*,
16 [...], the Court clarified that the test for how far was ‘too far’ required an ‘ad hoc’ factual
17 inquiry.” *Horne*, 135 S.Ct. at 2427. “Primary among those factors [in *Penn Central*] are ‘[t]he
18 economic impact of the regulation on the claimant and, particularly, the extent to which the
19 regulation has interfered with distinct investment-backed expectations.’ [...] In addition, the
20 ‘character of the governmental action – for instance whether it amounts to a physical invasion or
21 instead merely affects property interests through ‘some public program adjusting the benefits and
22 burdens of economic life to promote the common good’ – may be relevant in discerning whether
23 a taking has occurred.” *Lingle*, 544 U.S. at 539; *Palazzolo v. Rhode Island*, 533 U.S. 606, 617
24 (2001).

25 In essence, the “principal guidelines” under *Penn Central* are the economic impact on the
26 regulation and the character of the government action. Each test focuses on the severity of the
27 burden that the government imposes upon these private property rights. Here, the economic
28

1 burden on the Plaintiffs, and upon the class of similarly-situated individuals they represent, is
 2 substantial. As discussed above, to the extent that the forced dispossession of the magazines is
 3 not a taking *per se*, there is no viable market for the “forced sale” of these items. In some cases,
 4 the value of these “pre-ban,” “grandfathered” magazines is substantial. (SAC, ¶ 11-13.) Some
 5 of these magazines are substantial in value because they are the only type of magazine that was
 6 ever made for that particular firearm (*id.*, ¶ 13) or the manufacturer never made original ten-
 7 round or fewer magazines for that firearm (*id.*, ¶ 11, 13). Ironically, the very thing that makes all
 8 of these magazines so valuable and essentially irreplaceable is the fact that their further
 9 acquisition and importation into the State is illegal under § 32310(a).

10 And again, even generously assuming that some semblance of a market exists, the law
 11 does not permit the offering for sale of these items while within the confines of this State. Pen.
 12 Code § 32310(a). And unlike the plaintiffs in *Fyock*, this is not simply a matter of taking items
 13 of personal property to a neighboring township a few miles away in order to escape the
 14 prohibition. The statewide scale, combined with a restrictive law preventing the interstate or
 15 extra-state sale of these items, makes the burden of compliance far more substantial. Contrast
 16 the case of *Quilici v. Vill. of Morton Grove*, 532 F. Supp. 1169 (N.D. Ill. 1981), where, in
 17 rejecting the takings challenge to a village-wide ban on handguns, the district court concluded:
 18 “The Morton Grove ordinance does not go that far. The geographic reach of the ordinance is
 19 limited; gun owners who wish to may sell or otherwise dispose of their handguns outside of
 20 Morton Grove.” 532 F.Supp at 1184. Such is clearly not the case here.

21 We measure these severe burdens upon the Plaintiffs, of course, against the character of
 22 the government’s action. Here, there can be no substantial or legitimate justification for the
 23 retroactive confiscation of large-capacity magazines that are now at least 17 years old, and in
 24 many cases, even older. The stated, express justification for this massive retroactive ban is to
 25 prevent the incidence of horrific mass shootings that have occurred over the past few years, most
 26 notably culminating in the terrorist attacks in San Bernardino in 2015. But an objective and
 27 careful examination of the data shows that to the extent mass shootings occur in California, pre-
 28

1 ban, large-capacity magazines lawfully held in California since well before 2000 have not been
2 and are not the instrumentality. Plaintiffs will indeed show at trial that there is little or no data to
3 support any conclusion that pre-SB 23 “grandfathered” large-capacity magazines have been
4 involved in such incidents. And when large-capacity magazines have been used (e.g., in San
5 Bernardino), they were imported illegally in contravention of existing law prohibiting their
6 importation. The data indicate an extremely low probability that any of the large-capacity
7 magazines used in mass shootings since 2000 were grandfathered magazines. Thus, there is
8 virtually no benefit to be gained in (or legitimate justification for) banning possession of large-
9 capacity magazines that have been legally and peaceably owned since 2000. There is indeed no
10 evidence that large-capacity magazine bans in general have anything to do with reducing murder
11 rates, or gun homicides in particular.

12 In sum, whether the retroactive ban on the continued possession of personal property,
13 legally held for at least 17 years and more, constitutes direct appropriation, completely
14 eliminates their value, or substantially interferes with Plaintiffs’ property rights rising to the level
15 of a regulatory taking, compensation must be provided. In this case, the State never even
16 considered that it might need to provide compensation as a taking, instead presumptively
17 assuming that it could simply dispossess Plaintiffs of long-held, lawfully-owned, and integral
18 parts of firearms under its “police powers.” It was wrong in so assuming, and should therefore
19 be prevented from enforcing this retroactive ban, unless and until it provides for such
20 compensation or amends the law to keep grandfathered magazines legal within this State.

21
22
23 **C. PLAINTIFFS STATE CAUSES OF ACTION FOR VAGUENESS AND OVERBREADTH (COUNTS
III & V).**

24 **1. The Vagueness Claims Stand On Their Own In Stating Colorable Claims For
25 Relief That Easily Survive The State’s Motion To Dismiss.**

26 The State’s main strategy for dealing with the vagueness and overbreadth problems
27 remains one of mere avoidance – claiming that both Counts III and IV, and the numerous
28

1 specifically-articulated concerns underlying those counts, should be entirely ignored simply
 2 because they do not implicate free speech rights under the First Amendment. (Motion at 17:20-
 3 21.) This idea flies in the face of the fundamental principles upholding the constitutional right of
 4 due process – as well as common sense – which ensure that all laws, and especially criminal
 5 laws, provide fair notice of what conduct is prohibited with language sufficiently “definite” to
 6 afford such notice and to prevent or at least not encourage “discriminatory and arbitrary
 7 enforcement.” *Hotel & Motel Assn. of Oakland v. City of Oakland*, 344 F.3d 959, 971 (9th Cir.
 8 2003). The list of illustrative cases applying these principles to test the constitutionality of laws
 9 entirely unrelated to First Amendment free speech rights – which the State conveniently
 10 overlooks – is legion. See e.g., *Skilling v. U.S.*, 561 U.S. 358, 408-09 (2010); *Kolender v.*
 11 *Lawson*, 461 U.S. 352, 353-54 (1983); *Rose v. Locke*, 423 U.S. 48, 49-50 (1975); *U.S. v. JDT*,
 12 762 F.3d 984, 998-99 (9th Cir. 2014); *Phelps v. U.S.*, 831 F.2d 897, 898 (9th Cir. 1987); *Kolbe v.*
 13 *Hogan*, 849 F.3d at 148; *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d at 265.

14 The State even overlooks the irony of its reliance upon *Karlin v. Foust*, 188 F.3d 446 (9th
 15 Cir. 1999). *Karlin* is yet another case that resolved a void for vagueness claim completely
 16 untethered from the First Amendment, based upon “the basic principle of due process that a law
 17 is unconstitutional ‘if its prohibitions are not clearly defined.’” *Id.* at 458 (quoting *Grayned v.*
 18 *City of Rockford*, 408 U.S. 104, 108 (1972)). Harnessing the high court’s commanding analysis
 19 in *Grayned*, the Ninth Circuit emphasized the core concerns underlying the void for vagueness
 20 doctrine, which form the heart of Plaintiffs’ challenges to the LCM ban in this case:

21
 22 Vague laws offend several important values. First, because we assume that man is
 23 free to steer between lawful and unlawful conduct, we insist that laws give the
 24 person of ordinary intelligence a reasonable opportunity to know what is
 25 prohibited, so that he may act accordingly. Vague laws may trap the innocent by
 26 not providing fair warning. Second, if arbitrary and discriminatory enforcement is
 27 to be prevented, laws must provide explicit standards for those who apply them. A
 28 vague law impermissibly delegates basic policy matters to policemen, judges, and
 juries for resolution on an ad hoc and subjective basis, with the attendant dangers
 of arbitrary and discriminatory application.

Karlin at 458 (quoting *Grayned* at 108-09).

1 Thus, “there are two means by which a statute can operate in an unconstitutionally vague
2 manner.” *Karlin*, 188 F.3d at 458. “First, a statute is void for vagueness if it fails to provide ‘fair
3 warning’ as to what conduct will subject a person to liability.” *Id.* “Second, a statute must
4 contain an explicit and ascertainable standard to prevent those charged with enforcing the
5 statute’s provisions from engaging in ‘arbitrary and discriminatory’ enforcement.” *Id.* at 458-59.
6 The statutory scheme at issue here woefully fails these fundamental requirements of due process,
7 and there is no basis for the State’s setting aside of those concerns simply because the claims
8 implicate fundamental rights other than free speech.¹⁵

9 **2. The DOJ’s Own Findings Poignantly Demonstrate the Serious Vagueness**
10 **Problems that the State Seeks to Bypass in Ignoring This Evidence.**

11 In another telling oversight, the State completely ignores compelling evidence that the
12 DOJ itself – the very arm of the State charged with the crucial task of enforcing the LCM ban
13 against California citizens – has publicly acknowledged that the ban as written failed to satisfy
14 either requirement of due process. The DOJ went on record to declare that “emergency
15 regulations” were necessary to “provide guidance to California residents” on the most basic and
16 fundamental enforcement issue – “how to comply with the ban” – and that without such
17 guidance, citizens would not understand the core provisions delineating the “options for disposal
18 of large-capacity magazines” or the option of “reducing the capacity of a large-capacity
19 magazine.” (SAC, Exh. A at 1-2, 3, 5). In the DOJ’s own words, this clarification was
20 necessary to “avert serious harm to public peace, health, safety, or general welfare” that would
21 ensue should the LCM ban be enforced without such emergency regulations. *Id.* at 2.

22
23 ¹⁵Notably too, while the allegations of the SAC fully support both the facial and as-applied
24 vagueness challenges that Plaintiffs raise, as discussed further herein, the State has made no
25 attempt to address – much less directly contest – Plaintiffs’ as-applied claim with respect to
26 Count III; instead, it characterizes Count III as solely a “facial” claim. (Motion at 17). This
27 failure to respond with any reasoned analysis to the as-applied claim in that count is a concession
28 that the SAC does indeed sufficiently state a case for unconstitutional vagueness as-applied to
Plaintiffs – which it does anyway. (See e.g., SAC ¶¶ 84-86, 90; *Ramirez v. Ghilotti Bros.*, 941 F.
Supp. 2d 1197, 1210, n. 8 (N.D. Cal. 2013) (“absent unusual circumstances, failure to respond to
argument on merits [is] viewed as grounds for waiver or concession of the argument).

1 But after issuing such “emergency regulations,” it later retracted them after receiving
2 criticism that it had failed to comply with the ordinary notice and comment process. And,
3 crucially, the DOJ has never publicly retracted any of its pronouncements that effectively
4 declared the LCM ban unconstitutionally vague and ambiguous because, in its own schooled
5 opinion, it was not possible to enforce this law in a clear, consistent, and non-discriminatory
6 manner based upon the face of the LCM ban alone. This is compelling evidence of inherent
7 vagueness, coming directly from the DOJ, and starkly exposes the reality the State seeks to avoid
8 in blithely claiming that “[t]here can be no question that section 32310 reasonably apprises the
9 public as to what conduct is prohibited from under the statute.” (Motion at 17.)

10 **3. The Legislative and Initiative History Inevitably Compel the Conclusion that**
11 **the Two Conflicting Versions of the LCM Ban Both Remain in Effect.**

12 The DOJ had much reason for the urgent concerns that spurred its “emergency” response
13 to the “serious harms” posed by the LCM ban’s lack of clarity in enforcement. Material
14 uncertainties and inconsistencies abound within the statutory scheme. The starting point is
15 inevitably the two parallel versions of the scheme under SB 1446 and Proposition 63, which have
16 become a major subject of debate in this litigation. The State continues to insist that the
17 significant substantive differences between the two versions may be swept aside with the general
18 principle that a later enacted law typically prevails over an earlier law on the same subject.
19 (Motion at 18-19). But no such simplistic solution exists for this problem. In fact, the primary
20 authority the State cites in support of its proposition is the opinion in *People v. Bustamante*, 57
21 Cal.App.4th 693 (1997), which drew its analysis from decisional and statutory law that can only
22 undermine the State’s position.

23 The *Bustamante* court relied upon the California Supreme Court case of *People v.*
24 *Dobbins*, 73 Cal. 257 (1887) and Government Code § 9605, to conclude that a later-enacted
25 criminal statute prevailed over an earlier criminal statute defining the same general criminal
26 offense. *Bustamante*, 57 Cal.App.4th at 701. Both of these authorities make clear this general
27 rule about later-enacted statutes is actually a rebuttable presumption that dissolves in the face of
28

1 evidence that the later-enacted law is not intended to prevail over earlier laws on the same
 2 subject. *Dobbins*, at 259 (explaining that this rule creates a “presumption” that “when two laws
 3 upon the same subject, passed at different times, are inconsistent with each other, the one passed
 4 last must prevail,” rebuttable with evidence of contrary legislative intent regarding which
 5 prevails); Govt. Code, § 9605 (“In the absence of any express provision to the contrary in the
 6 statute which is enacted last, it shall be conclusively presumed that the statute which is enacted
 7 last is intended to prevail over statutes which are enacted earlier at the same session . . .”).

8 Something else the *Bustamante* decision does not mention is the closely related
 9 presumption of statutory interpretation that, absent clear evidence to the contrary, the later
 10 enactment of a law is not intended to repeal or supplant earlier laws on the same subject and
 11 instead both statutes are intended to be enforced. *People v. Carter*, 131 Cal.App.3d 177, 181
 12 (1933); *Western Mobile Assn. v. County of San Diego*, 16 Cal.App.3d 941, 948 (1971). Unless it
 13 is clear that a repeal was intended, no such intent will be implied, and “the courts are bound to
 14 maintain the integrity of both statutes” insofar as they may reasonably be read to stand together.
 15 *Western Mobile*, at 948. Here, there is no suggestion in the relevant history that Proposition 63
 16 was intended to repeal or prevail over SB 1446 in establishing the LCM ban. If anything, the
 17 history indicates to the contrary, that SB 1446 was intended to modify Proposition 63 or at least
 18 remain simultaneously in effect. The DOJ made its own assessment of this issue, publicly
 19 declaring in its Finding of Emergency, issued on December 15, 2016, after Proposition 63 had
 20 become effective, that “[i]n anticipation of [Proposition 63’s] passages [sic], the Legislature pre-
 21 amended Proposition 63 with the passage of Senate Bill 1446 . . . and [t]he clarifying
 22 amendments take effect on January 1, 2017.” (Req. for Jud. Notice, Exh. A at p. 1 (italics
 23 added)). The State tries to water down the impact of this declaration from its law enforcement
 24 arm, arguing it is not clear that the pre-amendment was “in any respect material to this
 25 litigation,” but it notably does not dispute (and thus effectively concedes) the key factual point
 26 that this uncontroverted evidence establishes – i.e., that “SB 1446 pre-amended Proposition 63.”
 27 (Motion at 19).
 28

1 Indeed, the Legislature was fully aware of the initiative’s final content in drafting SB
 2 1446, since that version had been established since December 2015 – several months before SB
 3 1446 was enacted into law – and yet nothing in the history indicates any intent to repeal that law
 4 or render its effectiveness subject to the fate of Proposition 63. The content of SB 1446 itself
 5 evinces an intent for that law to remain in effect. For instance, the version of § 32406 under SB
 6 1446 establishes five exemptions to the ban that are absent from the version enacted under
 7 Proposition 63. These protect: historical societies that keep large-capacity magazines
 8 “unloaded, properly housed within secured premises, and secured from authorized handling;”
 9 one who “finds a large-capacity magazine, if the person is not prohibited from possessing
 10 firearms or ammunition, and possessed it no longer than necessary to deliver or transport it to the
 11 nearest law enforcement agency;” forensic laboratories, and their agents or employees, “in the
 12 course and scope of [their] authorized activities;” “[t]he receipt or disposition of a large-capacity
 13 magazine by a trustee of a trust, or an executor or administrator of an estate, including an estate
 14 that is subject to probate, that includes a large-capacity magazine;” and “[a] person lawfully in
 15 possession of a firearm that the person obtained prior to January 1, 2000, if no magazine that
 16 holds 10 or fewer rounds of ammunition is compatible with that firearm and the person possesses
 17 the large-capacity magazine solely for use with that firearm.” § 32406(b)-(f) (S.B. 1446). One
 18 could scarcely argue that these exemptions should not exist and that people in possession of
 19 LCMs under such circumstances *should* be subject to criminal sanction for that possession.
 20

21 The Legislature’s careful crafting of these eminently reasonable exemptions when fully
 22 aware of the more limited scope of exemptions under the Proposition 63 version – coupled with
 23 the evident lack of an intent to repeal SB 1446 – can only evince an intent for the SB 1446
 24 version to remain in effect despite the enactment of Proposition 63. Thus, the timing of
 25 Proposition 63 as the “later-enacted” of the two laws cannot support the State’s contention that
 26 Proposition 63 supplanted SB 1446 in to-to. Rather, we must presume that both laws were
 27 intended to remain in effect, *Western Mobile Assn.*, 16 Cal.App.3d at 948 – either as separate
 28 schemes or as one collective scheme in which the Proposition 63 version was “pre-amended” by

1 SB 1446, such that the SB 1446 version prevails to the extent of any inconsistency, unless and
2 until the Legislature takes the affirmative step of repealing the SB 1446 version in order to install
3 the Proposition 63 version as solely controlling.

4 In fact, when the Legislature has intended to effect a repeal of a statute that runs parallel
5 to a different version of the same statute enacted under Proposition 63, it has done so
6 affirmatively. Last year, through Assembly Bill 103, the Legislature expressly recognized that
7 two parallel versions of Penal Code § 29805 (generally concerning firearm restrictions for
8 certain misdemeanants) existed “as a result of Proposition 63” (AB 103, Leg. Counsel Digest, §
9 21), and it went on to retain both versions as operative in making individual amendments to both
10 (effectively mirroring each section’s language with the other) (*id.* ¶¶ 45-46). Then, a few months
11 later, the Legislature decided to actually repeal the version of section 29805 that pre-dated the
12 one enacted under Proposition 63 (Stats 2017 ch 784 § 1 (AB 785)), expressly stating its intent to
13 render the old version “obsolete” (AB 785, Leg. Counsel Digest). This additional compelling
14 evidence showing the Legislature does and will take affirmative action to repeal a law that runs
15 parallel to the version of the same law enacted under Proposition 63 solidifies Plaintiffs’ position
16 that, unless and until the Legislature takes such action, both versions must be considered to
17 remain in effect and meanwhile, to the extent of any inconsistency between the two versions, the
18 later-*effective* version (SB 1446) controls.¹⁶

19 //

20 //

21
22
23 ¹⁶The State’s reference to the Proposition 63 Voter Information Guide does not change this
24 analysis. (Motion at 18.) The single brief statement that the State extracts from the lengthy
25 Guide reads: “Beginning July 2017, recently enacted law [SB 1446] will prohibit most of these
26 individuals [who acquired their LCMs before 2000] from possessing these magazines.
27 Individuals who do not comply are guilty of an infraction. However, there are various
28 individuals who will be exempt from this requirement – such as an individual who owns a
firearm (obtained before 2000) that can only be used with a large capacity magazine. Proposition
63 eliminates several of these exemptions, as well as increases the maximum penalty for
possessing large-capacity magazines.” (Exh. C. to Motion at p. 87). If anything, the description
of the SB 1446 version in terms of its *future* application – i.e., the effect the law *will* have
beginning July 2017 and who *will* be exempt under it – indicates that the initiative backers also
contemplated a simultaneous operation of these laws.

1 **4. The Resulting Conflicts and Confusion Within the LCM Ban Strongly**
2 **Support Plaintiffs’ Claim that the Scheme is Unconstitutionally Vague.**

3 Naturally, whether the two versions of the LCM ban exist as separate schemes or as one
4 collective scheme in which the Proposition 63 version was “pre-amended” by SB 1446, the
5 resulting scheme fails to ensure “‘fair warning’ as to what conduct will subject a person to
6 liability” with “an explicit and ascertainable standard.” *Karlin v. Foust*, 188 F.3d at 458. Either
7 there are two parallel statutory schemes purporting to establish the same LCM ban under quite
8 different terms and conditions, or only one is in operation and we have a contentious debate
9 about which prevails over the other in whole or in part. In the meantime, those who fall within
10 the legislatively-crafted exemptions specific to the SB 1446 version are left with uncertainty as
11 to whether the ban actually applies to them, and those charged with enforcing the ban are left
12 with the power to enforce it “on an ad hoc and subjective basis, with the attendant dangers of
13 arbitrary and discriminatory application.” *Id.* at 458. And even more generally, with the lack of
14 the “guidance” that the DOJ itself deemed urgently necessary to avert “the serious harm”
15 inevitably flowing from the ban’s intrinsic vagueness, the average citizen will not only not know
16 “how to comply with the ban,” but also will not understand the core provisions establishing the
17 “options for disposal” of LCMs or how to reduce the capacity of LCMs to “the acceptable
18 minimum level of permanence.” (RJN, Exh. A at 1-2, 3, 5.) In fact, many citizens will be left
19 not even knowing whether their particular magazines fall within the LCM ban in the first place,
20 like those in the position of Plaintiff Federau who has one or more magazines for use with his
21 lawfully-possessed AR-15 platform model rifle. (SAC ¶ 15.) That rifle is only chambered for
22 .458 SOCOM ammunition, and the magazines at issue can hold no more than 10 rounds of *that*
23 ammunition. (*Id.*) However, the magazines *could* hold more than 10 rounds of a *different* caliber
24 ammunition (e.g., 30 rounds of 5.56 x 45 mm). (*Id.*) So Federau and potentially countless other
25 similarly situated citizens are stuck in the position of having no certainty about whether their
26 magazines are or would be considered “large-capacity” magazines simply because they could
27 hold more than 10 rounds of some *other* ammunition for which their firearms are not calibrated
28

SEILER EPSTEIN ZIEGLER & APPEGATE LLP
Attorneys at Law

1 or which they have no intention of using.

2 The allegations in support of this claim are “well-pleaded factual allegations,”
3 specifically delineating both the nature of the vagueness at issue and how it affects the parties
4 and all those similarly situated. Thus, the Court “should assume their veracity and then
5 determine whether they plausibly give rise to an entitlement to relief.” *Ashcroft v. Iqbal*, 556
6 U.S. 662, 679 (2009). This standard is met so long as the allegations and reasonable inferences
7 therefrom “are plausibly suggestive of a claim entitling the plaintiff to relief.” *John Doe I v.*
8 *Nestle USA*, 766 F.3d 1013, 1025 (9th Cir. 2014). Given the serious conflicts and confusion
9 subsisting in the LCM ban that the State’s own law enforcement arm has recognized as
10 dangerous to the public welfare in its current state, the allegations are not just “plausibly
11 suggestive of a claim” – they are palpable.

12 **5. The State Fails in Its Attempt to Brush Off Plaintiffs’ Viable Claims of**
13 **Vagueness and Overbreadth in Count IV.**

14 The State also attempts to brush off the related vagueness and overbreadth claims in
15 Count IV as readily dismissible on the basis that Plaintiffs “have not alleged a First Amendment
16 challenge” and the claims are just “redundant” and “duplicative” of their failed Second
17 Amendment claim. (Motion at 20-21). But again, this is not how it works. These challenges are
18 neither dependent upon Plaintiffs’ alleging a First Amendment free speech claim nor prevailing
19 on their Second Amendment claim. Such claims are properly grounded in the independent,
20 fundamental due process protections designed to ensure fair warning, consistent and non-
21 arbitrary application, and to prevent the enforcement of laws that improperly sweep up ““a
22 substantial amount of constitutionally protected conduct”” under the guise of a legislative goal
23 that ““does not match the text of the statutes.”” *Powell’s Books, Inc. v. Kroger*, 622 F.3d 1202,
24 1207 (9th Cir. 2010) (quoting *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 397 (1998)); see
25 e.g., *Phelps v. U.S.*, 831 F.2d at 898 (vagueness and overbreadth challenge to a statute governing
26 the release of persons adjudged not guilty of a crime by reason of insanity); *U.S. v. Rodriguez-*
27 *Deharo*, 192 F.Supp.2d 1031, 1038-39 (E.D. Cal. 2002) (vagueness and overbreadth challenge to
28

1 a domestic violence statute).

2 Given the nature of the State’s conclusory, surface-level assertions here, it has failed to
3 present any reasoned analysis or argument to refute or even contest any of the Plaintiffs’
4 allegations in support of Count IV. That is a problem for the State, as the moving party who
5 bears the general burden here: “In considering a motion to dismiss for failure to state a claim, the
6 court generally accepts as true the factual allegations of the complaint in question, construes the
7 pleading in the light most favorable to the party opposing the motion, and resolves all doubts in
8 the pleader’s favor.” *Robinson v. Salazar*, 885 F.Supp.2d 1002, 1014 (E.D. Cal. 2012). Having
9 made no effort to meet any of the specific allegations in this count, the State motion’s necessarily
10 fails under this standard.

11 Moreover, even if the State had offered some sort of argument in support of its
12 conclusory contention that the allegations fail to state a claim, this count would survive under the
13 general standards designed to test for such adequacy. As with Count III, the allegations in
14 support of this count comprise “more than an unadorned, the-defendant-unlawfully-harmed-me
15 accusation,” *Iqbal*, 556 U.S. at 678, and instead contain more than “sufficient factual matter”
16 that, “accepted as true,” “state claim to relief that is plausible on its face,” *Iqbal* at 678 (quoting
17 *Twombly*, 550 U.S. at 570). The SAC specifically alleges, in detail, that: the purported disposal
18 options of selling the prohibited LCMs to a firearms dealer and removing them from the state are
19 illusory and utterly impractical options that could trap the unwary by exposing them to criminal
20 liability in attempting to comply with the LCM ban through these purported disposal options (¶¶
21 94-96); the purported exceptions for “honorably retired police officers,” trustees of a trust, and
22 administrators of an estate are of similarly illusory protection given how they also invite arbitrary
23 and discriminatory enforcement by their terms (¶¶ 97-99); and the ban is unconstitutionally
24 overbroad because, as Plaintiffs will demonstrate at trial, the retroactive application of the LCM
25 ban to current, legal owners of such magazines in no way advances the stated objectives of the
26 law (¶ 100). These allegations are, at the very least, “plausibly suggestive of a claim entitling the
27 plaintiff to relief.” *John Doe I*, 766 F.3d at 1025. And again, notably, the State does not claim
28

SEILER EPSTEIN ZIEGLER & APPEGATE LLP
Attorneys at Law

1 otherwise. The State has failed to carry its burden in this motion to dismiss Counts III and IV,
2 and therefore they must proceed to trial on the merits with the rest of Plaintiffs’ colorable claims.

3
4 **D. PLAINTIFFS HAVE STATED A CLAIM THAT THIS STATUTORY SCHEME VIOLATES THE**
5 **EQUAL PROTECTION CLAUSE.**

6 Under the Equal Protection Clause of the Fourteenth Amendment, no state shall “deny to
7 any person within its jurisdiction the equal protection of the laws,” U.S. Const. amend. XIV, § 1,
8 which is “essentially a directive that all persons similarly situated should be treated alike,” *City*
9 *of Cleburne, Texas v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). “The Equal Protection
10 Clause . . . den[ies] to States the power to legislate that different treatment be accorded to
11 persons placed by a statute into different classes on the basis of criteria wholly unrelated to the
12 objective of that statute. A classification ‘must be reasonable, not arbitrary, and must rest upon
13 some ground of difference having a fair and substantial relation to the object of the legislation, so
14 that all persons similarly circumstanced shall be treated alike.’” *Reed v. Reed*, 404 U.S. 71, 75–
15 76 (1971) (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

16 Here, the State rotely recites standards applicable to the evaluation of equal protection
17 claims while blithely assuming that no fundamental right is at stake, and in the end, never even
18 gets around to justifying or explaining why exactly one class of ordinary citizens should be
19 allowed to receive and possess large-capacity magazines as some kind of special privilege when
20 other ordinary law-abiding citizens should be denied the same right – especially for lawful
21 purposes like self-defense. Indeed, under this “Hollywood exception,” even honorably retired
22 peace officers such as Plaintiffs Alan Normandy (SAC, ¶ 15) and Todd Nielsen (*id.*, ¶ 16), who
23 reside out of state, and who often participate in firearms training programs, are precluded from
24 simply *bringing* their LCMs into California for entirely lawful purposes. (*Id.*, ¶ 99.) As
25 Plaintiffs’ SAC alleges, Penal Code § 32445 provides for an exception to possession of an LCM
26 “for use solely as a prop for a motion picture, television, or video production.” (SAC, ¶ 110.)
27 And, in order to use an LCM as a movie or television prop “an exempted holder of a special
28

SEILER EPSTEIN ZIEGLER & APPEGATE LLP
Attorneys at Law

1 weapons permit (under § 32450(a)) would necessarily need to give possession of a proscribed
 2 magazine to a non-exempted actor or actress (under section 32445) – in order words, someone
 3 just like the average law-abiding California gun owner or visitor.” (*Id.*, ¶ 111.) “However,
 4 under this section, the receiver of the large-capacity magazine may even be a prohibited person
 5 since there is no requirement of a background check through the Department of Justice, or even
 6 any other form of evidencing the statutorily-exempted receiver’s eligibility to possess or acquire
 7 firearms or firearm parts – indeed, placing everyone on the same footing.” (*Id.*)

8 But the State’s presumption that rational basis review should apply in the first place is
 9 questionable. “When a state statute burdens a fundamental right or targets a suspect class, that
 10 statute receives heightened scrutiny under the Fourteenth Amendment’s Equal Protection
 11 Clause.” *Silveira v. Lockyer*, 312 F.3d 1052, 1087 (9th Cir. 2002) (citing *Romer v. Evans*, 517
 12 U.S. 620, 631 (1996)). “Statutes infringing on fundamental rights are subject to the same
 13 searching review.” *Silveira*, 312 F.3d at 1088. And here, it has already been established that a
 14 law that restricts the ability of law-abiding citizens to possess large-capacity magazines within
 15 their homes for the purpose of self-defense implicates the core of the Second Amendment.
 16 *Fyock*, 779 F.3d at 999. Thus, a fundamental right is at stake, and the law requires heightened
 17 review.

18 Furthermore, even under rational basis review, that standard, although deferential, “is not
 19 a toothless one,” *Mathews v. Lucas*, 427 U.S. 495, 510 (1976), and “even the standard of
 20 rationality . . . must find some footing in the realities of the subject addressed by the legislation.”
 21 *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993). When conducting rational-basis review, it is
 22 this Court’s “duty to scrutinize the connection, if any, between the goal of a legislative act and
 23 the way in which individuals are classified in order to achieve that goal.” *Silveira*, 312 F.3d at
 24 1088. And because “[t]he search for the link between classification and objective gives substance
 25 to the Equal Protection Clause,” *Romer*, 517 U.S. at 632, courts “insist on knowing the relation
 26 between the classification adopted and the object to be attained.” *Id.* at 633. To that end, the
 27 question is focused “whether there is a rational basis for the *distinction*, rather than the
 28

1 underlying government action.” *Gerhart v. Lake County Montana*, 637 F.3d 1013, 1023 (9th Cir.
2 2011), *cert. denied*, 132 S. Ct. 249 (2011) (italics added).

3 Under any standard, however, the State offers absolutely no justification whatsoever for
4 the differential treatment under the Hollywood exception. So what, exactly, is or could be the
5 supposed governmental interest advanced in allowing television and movie actors to receive and
6 possess LCMs while denying ordinary citizens the same? Perhaps the State indeed simply
7 desires to “cater[] to its privileged, rich elite, concentrating in film and television hubs in
8 Hollywood and the Los Angeles Area,” as Plaintiffs have alleged (SAC, ¶ 112). And the State
9 could have also simply admitted that its legislators *want* Hollywood entertainment producers to
10 have access to large-capacity magazines (in addition to any other form of weaponry they want),
11 to give or lend to people as they wish for whatever entertainment purpose, so that Hollywood
12 actors such as Matt Damon can continue to make violent movies glorifying illegal gunplay,
13 while at the same time, the State *distrusts* its ordinary citizens to have the same privileges (which
14 is quite obvious from its Motion). There appears to be no other conceivable justification for this
15 classification.

16 Because the State has not offered any justification – or even suggested that a legitimate
17 justification exists, and because no conceivably *rational* basis could justify this disparate
18 treatment as somehow advancing the claimed governmental objective, its motion to dismiss
19 Plaintiffs’ fifth cause of action must be denied.
20

21
22 **IV. CONCLUSION**

23 For the foregoing reasons, plaintiffs respectfully request that defendants’ motion to
24 dismiss be denied.

25 //
26 //
27 //
28 //

1 Dated: January 22, 2018

SEILER EPSTEIN ZIEGLER & APPLGATE LLP

2 /s/ George M. Lee

3 George M. Lee

4 **LAW OFFICES OF RAYMOND MARK**
5 **DiGUSEPPE, PLLC**

6 /s/ Raymond M. DiGuseppe

7 Raymond M. DiGuseppe

8 Attorneys for Plaintiffs

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
SEILER EPSTEIN ZIEGLER & APPLGATE LLP
Attorneys at Law