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15  
16 IN THE UNITED STATES DISTRICT COURT  
17 FOR THE EASTERN DISTRICT OF CALIFORNIA  
18 SACRAMENTO DIVISION

19  
20 **WILLIAM WIESE, et al.,**

21 Plaintiff,

22 v.

23 **XAVIER BECERRA, et al.,**

24 Defendant.

2:17-cv-00903-WBS-KJN

**JOINT STATUS REPORT**

25  
Date: September 24, 2018  
Time: 1:30 p.m.  
26 Courtroom: 5, 14th Floor  
27 Judge: Hon. William B. Shubb  
Trial Date: None Set  
28 Action Filed: April 28, 2017

26 Pursuant to the Court’s Minute Order entered on July 26, 2018 (Dkt. No. 87), and in  
27 accordance with this Court’s April 28, 2017 Order re Status (Pretrial Scheduling Conference)  
28

1 (Dkt. No. 4) (the “April 28 Order”), the parties hereby jointly submit this Joint Status Report in  
2 advance of the Scheduling Conference presently set for September 24, 2018, at 1:30 p.m.

3 **I. THE PARTIES’ RESPECTIVE POSITIONS ON LIFTING THE STAY IN LIGHT OF THE**  
4 **NINTH CIRCUIT’S DECISION IN *DUNCAN*.**

5 On July 20, 2018, the Court extended the stay of the instant proceedings pending the  
6 outcome of the California Attorney General’s appeal of the grant of a preliminary injunction in  
7 *Duncan v. Becerra*, Ninth Circuit Case No. 17-56081, through and until the Scheduling  
8 Conference set for September 24, 2018. (Dkt. No. 85.) A divided panel of the Ninth Circuit has  
9 issued a decision in the appeal, affirming the grant of the preliminary injunction. (*See*  
10 Supplement to Joint Status Report, Ex. A (Dkt. No. 86).) Neither party to the appeal requested a  
11 panel rehearing or rehearing en banc. On August 22, 2018, the Ninth Circuit issued an order  
12 informing the parties that a judge of the Ninth Circuit has called for a vote to determine whether  
13 the case will be reheard en banc and ordering the parties to file simultaneous briefs by September  
14 12, 2018, addressing whether the case should be heard en banc. A true and correct copy of the  
15 Court’s order is attached hereto as Exhibit A. The parties do not agree on whether the stay of  
16 proceedings in this case should be lifted in light of the panel decision and possible en banc  
17 rehearing in *Duncan*.<sup>1</sup>

18 **Plaintiffs’ Position:**

19 In light of the Ninth Circuit’s recent order to the parties in the *Duncan* appeal to submit  
20 briefs regarding en banc rehearing [Exhibit A], Plaintiffs here believe it would be prudent and  
21 economical to await a final decision by the Ninth Circuit regarding the possibility of en banc  
22 review and hearing before proceeding further with the instant matter. Though Plaintiffs agree that  
23 the stay should eventually be lifted to allow the Defendants to file a motion to dismiss, if that is  
24 their intention, the stay should be extended at least until the possibility of en banc review has  
25 been exhausted. Again, the original rationale for the parties’ stipulated stay in the first place was  
26 to provide additional time to allow a potential Ninth Circuit decision to provide precedent and/or

27 <sup>1</sup> While the parties do not agree on whether the stay of all proceedings in this case should  
28 be lifted, they agree that the stay on discovery should be maintained pending resolution of  
Defendants’ planned motion to dismiss Plaintiffs’ Third Amended Complaint. (Order Staying  
Discovery (Dkt. No. 80).)

1 guidance with respect to the instant matter. It would thus follow that a possible en banc rehearing  
2 and superseding opinion may still warrant a further stay. Indeed, the prospect of en banc  
3 rehearing necessarily involves the possibility that one or more judges believe that the matter must  
4 be resolved either “to secure or maintain uniformity of the court’s decisions,” or that the matter  
5 “involves a question of exceptional importance” pursuant to FRAP 35(a), and may therefore  
6 result in a published opinion. And moreover, if en banc rehearing is granted, then “[t]he three-  
7 judge panel opinion shall not be cited as precedent by or to [...] any district court of the Ninth  
8 Circuit, except to the extent adopted by the en banc court.” (Circuit Advisory Committee Note to  
9 Circuit Rules 35-1 to 35-3.) Accordingly, Plaintiffs believe that the possibility of en banc review  
10 continues to warrant a stay of these proceedings. Plaintiffs would propose extending the stay  
11 through a further status conference of forty-five (45) days or more to determine whether en banc  
12 review in *Duncan* has been ordered.

13 **Defendants’ Position:**

14 Now that the Ninth Circuit has issued a decision in *Duncan*, Defendants propose lifting the  
15 stay to permit them to file a motion to dismiss Plaintiffs’ Third Amended Complaint. As noted in  
16 the previous Joint Status Report, the parties requested the extension of the stay “[t]o provide  
17 additional time for the Ninth Circuit to issue a decision in the [*Duncan*] appeal,” and because  
18 such a decision might have provided guidance to this Court in ruling on Defendants’ planned  
19 motion to dismiss. (Dkt. No. 84 at 2:10-11; *see also id.* at 2:20-21 (requesting an extension of the  
20 stay “to accommodate the forthcoming Ninth Circuit decision in *Duncan*”).) The Ninth Circuit  
21 has issued a decision in the *Duncan* appeal.<sup>2</sup> Although a judge of the Ninth Circuit has requested  
22 a vote on whether the appeal should be reheard en banc, it is unclear when such a vote will occur  
23 and whether the appeal will be reheard en banc. In light of the panel decision in *Duncan*, and to  
24 avoid additional delay of this case, Defendants propose lifting the stay following the Scheduling  
25

26 \_\_\_\_\_  
27 <sup>2</sup> Because the panel decision was an unpublished memorandum, it has no precedential  
28 effect and does not provide guidance to this Court in ruling on Defendants’ planned motion to  
dismiss. *See* 9th Cir. R. 36-3(a) (“Unpublished dispositions and orders of this Court are not  
precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion  
or issue preclusion.”).

1 Conference and permitting them to file a motion to dismiss the Third Amended Complaint within  
2 21 days of the lifting of the stay.

3 **II. STATEMENTS ON SUBJECTS LISTED IN THE APRIL 28 ORDER.**

4 In addition to advising the Court of the parties' respective positions on the stay, the parties  
5 hereby provide statements on the subjects listed in paragraph 2 of the April 28 Order:

6 **a. Summary of the Claims**

7 Plaintiffs challenge California's prohibition on the possession of firearm magazines that can  
8 hold more than ten rounds of ammunition, or "large-capacity magazines," as set forth in  
9 California Penal Code § 32310. Plaintiffs claim that the prohibition (1) violates the Second  
10 Amendment to the U.S. Constitution, (2) violates the Takings Clauses of the U.S. and California  
11 Constitutions and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution,  
12 (3) is unconstitutionally vague, (4) is unconstitutionally vague and overbroad, and (5) violates the  
13 Equal Protection Clauses of the U.S. and California Constitutions.

14 **b. Status of Service**

15 All Defendants have been served with the Third Amended Complaint. There are no cross-  
16 defendants in this action.

17 **c. Possible Joinder of Additional Parties**

18 The parties do not anticipate joining any additional parties in this action.

19 **d. Contemplated Amendments to the Pleadings**

20 Plaintiffs have filed a Third Amended Complaint and do not plan to further amend the  
21 pleadings in this action.

22 **e. Jurisdiction and Venue**

23 The Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367(a). Venue is proper  
24 under 28 U.S.C. § 1391(b).

25 **f. Proposed Discovery Plan**

26 Pursuant to the Court's Order issued on March 12, 2018 (Dkt. No. 80), discovery in this  
27 action has been stayed pending resolution of Defendants' planned motion to dismiss the Third  
28 Amended Complaint. If the Third Amended Complaint survives a motion to dismiss, and the stay

1 on discovery is lifted, the parties will submit a discovery plan after resolution of the motion to  
2 dismiss.

3 **g. Proposed Discovery Cut-Off Date**

4 Pursuant to the Court's Order issued on March 12, 2018 (Dkt. No. 80), discovery in this  
5 action has been stayed pending resolution of Defendants' planned motion to dismiss the Third  
6 Amended Complaint. If the Third Amended Complaint survives a motion to dismiss, and the stay  
7 on discovery is lifted, the parties will submit a proposed discovery cut-off date after resolution of  
8 the motion to dismiss.

9 **h. Proposed Cut-Off Date for All Motions**

10 Pursuant to the Court's Order issued on March 12, 2018 (Dkt. No. 80), discovery in this  
11 action has been stayed pending resolution of Defendants' planned motion to dismiss the Third  
12 Amended Complaint. If the Third Amended Complaint survives a motion to dismiss, and the stay  
13 on discovery is lifted, the parties will submit proposed motion cut-off dates after resolution of the  
14 motion to dismiss.

15 **i. Proposed Modification of Standard Pretrial Proceedings**

16 The parties do not anticipate proposing any modifications to the standard pretrial  
17 proceedings due to any special nature of this action.

18 **j. Estimated Length of Trial**

19 If the action is not dismissed, and the case proceeds to trial, the parties estimate a bench  
20 trial of up to seven (7) days.

21 **k. Statement of Related Cases**

22 There are no related cases pending in the Eastern District of California.

23 This case makes claims similar to those in *Duncan v. Becerra*, No. 17-cv-01017-BEN-JLB,  
24 which is pending before the Honorable Roger T. Benitez in the United States District Court for  
25 the Southern District of California.

1           **I. Other Matters Discussed in Local Rule 240**

2           As discussed in Section I, *supra*, the parties disagree about whether the stay of proceedings  
3 should be lifted. There are no other matters discussed in Local Rule 240 that may add to the just  
4 and expeditious disposition of this matter.

5           **m. Nongovernmental Corporate Disclosure Statement**

6           On June 5, 2017, Plaintiffs filed a Corporate Disclosure Statement pursuant to Federal Rule  
7 of Civil Procedure 7.1. (Dkt. No. 8.) There have been no changes to the information contained in  
8 the Corporate Disclosure Statement. In accordance with the April 28 Order, and for the  
9 convenience of the Court, Plaintiffs provide the following information contained in their  
10 Corporate Disclosure Statement:

- 11           • Plaintiff The Calguns Foundation, Inc. is a non-profit membership organization,  
12           incorporated under the laws of California. This plaintiff does not have a parent  
13           corporation, and no publicly held corporation owns 10% or more of its stock or  
14           membership interest.
- 15           • Plaintiff Firearms Policy Coalition, Inc. is a non-profit membership organization,  
16           incorporated under the laws of Delaware. This plaintiff does not have a parent  
17           corporation, and no publicly held corporation owns 10% or more of its stock or  
18           membership interest.
- 19           • Plaintiff Firearms Policy Foundation, Inc. is a non-profit membership organization,  
20           incorporated under the laws of Delaware. This plaintiff does not have a parent  
21           corporation, and no publicly held corporation owns 10% or more of its stock or  
22           membership interest.
- 23           • Plaintiff Second Amendment Foundation, Inc. is a non-profit membership  
24           organization, incorporated under the laws of Washington. This plaintiff does not  
25           have a parent corporation, and no publicly held corporation owns 10% or more of its  
26           stock or membership interest.

1 Dated: September 10, 2018

XAVIER BECERRA  
Attorney General of California  
MARK R. BECKINGTON  
Supervising Deputy Attorney General

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/s/ John D. Echeverria

JOHN D. ECHEVERRIA  
Deputy Attorney General  
*Attorneys for Defendants*

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9 Dated: September 10, 2018

SEILER EPSTEIN ZIEGLER &  
APPLEGATE LLP

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/s/ George M. Lee  
(as authorized on September 10, 2018)

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George M. Lee  
*Attorneys for Plaintiffs*

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**EXHIBIT A**



**FILED**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

AUG 22 2018

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

VIRGINIA DUNCAN; et al.,

Plaintiffs-Appellees,

v.

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

Defendant-Appellant.

No. 17-56081

D.C. No.

3:17-cv-01017-BEN-JLB

Southern District of California,  
San Diego

ORDER

Before: WALLACE and N.R. SMITH, Circuit Judges, and BATTI,\* District Judge.

A judge of this court has called for a vote to determine whether this case will be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a). Within 21 days of the filed date of this order, the parties shall file simultaneous briefs addressing their respective positions on whether this case should be reheard en banc.

Parties who are registered for ECF must file the response electronically

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\* The Honorable Deborah A. Batts, United States District Judge for the Southern District of New York, sitting by designation.

without submission of paper copies. Parties who are not registered for ECF must file the original response plus 50 paper copies.

**CERTIFICATE OF SERVICE**

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

I hereby certify that on September 10, 2018, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**JOINT STATUS REPORT**

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 10, 2018, at Los Angeles, California.

Beth Capulong  
Declarant

/s/ Beth Capulong  
Signature