No. 19-55376

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGINIA DUNCAN, RICHARD LEWIS, PATRICK LOVETTE, DAVID MARGUGLIO, CHRISTOPHER WADDELL, AND CALIFORNIA RIFLE & PISTOL ASSOCIATION, INC., A CALIFORNIA CORPORATION,
Plaintiffs and Respondents,

V.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Defendant and Appellant.

On Appeal from the United States District Court
for the Southern District of California
No. 17-cv-1017-BEN-JLB
The Honorable Roger T. Benitez, Judge

APPELLANT'S OPENING BRIEF

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INTRODUCTION

In response to escalating mass shootings and gun violence, the State of California enacted restrictions on civilian access to firearm magazines capable of holding more than ten rounds of ammunition, codified at California Penal Code section 32310.[1] Such large-capacity magazines (LCMs) enable a shooter to maintain fire without having to reload, resulting in more shots fired in a given period of time, more victims wounded, more wounds per victim, and more fatalities. LCMs feature prominently in some of the most serious gun crimes, including public mass shootings and the murder of law enforcement personnel. Section 32310 originally restricted the manufacture, importation, and sale of LCMs, but did not prohibit their possession and, thus, allowed individuals who owned LCMs at the time of enactment to keep them. In 2016, the people of California passed Proposition 63 to strengthen section 32310 by prohibiting the possession of LCMs, including LCMs that were previously grandfathered.

Plaintiffs—California residents who either possess grandfathered LCMs or wish to acquire new ones, as well as the California Rifle and Pistol

[1] All subsequent statutory references are to the California Penal Code, unless otherwise noted. The full text of section 32310 is set forth in the accompanying addendum of statutory authority.

Association—filed suit against the Attorney General of the State of California, contending that section 32310 is facially unconstitutional under the Second Amendment and that the new possession ban also violates the Takings Clause and the Due Process Clause. The district court granted Plaintiffs' motion for summary judgment and entered judgment, enjoining enforcement of section 32310 in its entirety. In striking down this important public safety measure, the district court became the first federal court in the nation to invalidate LCM restrictions.

All six circuits that have examined the constitutionality of similar LCM restrictions on the merits have upheld them, and five of those circuits (the First, Second, Third, Fourth, and D.C. Circuits) have applied the same intermediate scrutiny standard adopted by this Circuit. There is no meaningful difference between section 32310 and the LCM restrictions at issue in those cases. Nor is there any significant difference between the record developed by the parties in this action and the evidence considered in those cases. Breaking from this judicial consensus, however, the district court invalidated California's similar ten-round LCM restrictions.

In doing so, the district court committed numerous legal and factual errors and failed to afford due deference to the Legislature's and the people's evidence-based policy judgment that LCMs pose a unique threat to

public safety. Given the sheer weight of authority, the district court's decision is an outlier. Indeed, in staying its judgment pending resolution of this appeal, the district court acknowledged that its "decision cuts a less-traveled path." Appellant's Excerpts of Record (ER) 220:25-26.

This Court should reverse the district court's judgment and join its six sister circuits by holding that ten-round LCM restrictions, like section 32310's restrictions, are constitutional. Because the summary judgment record demonstrates that section 32310 is constitutional as a matter of law, this Court should direct the district court to enter judgment in favor of the Attorney General.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this case under 28 U.S.C. § 1331. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

The district court's final judgment was entered on March 29, 2019. ER 7. The Attorney General timely filed a notice of appeal on April 4, 2019. ER 1-6; *see also* Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES

1. Do California's restrictions on the manufacture, importation, keeping for sale, offering or exposing for sale, giving, lending, buying, receipt, and possession of large-capacity magazines, Cal. Penal Code

§ 32310(a)-(c), comport with the Second Amendment to the United States Constitution, where the evidence indicates that LCMs are not necessary for self-defense and, when used in public mass shootings, result in substantially more casualties than other magazines?

2. Do California's restrictions on the possession of LCMs, Cal. Penal Code § 32310(c)-(d), constitute a compensable taking of private property for public use under the Takings Clause of the United States Constitution, where those restrictions were enacted to promote public safety under the State's police powers and, in any event, allow an owner of a previously grandfathered LCM to retain ownership of the magazine if it is permanently modified to hold no more than ten rounds?

3. Do California's restrictions on the possession of LCMs, Cal. Penal Code § 32310(c)-(d), comport with the Due Process Clause of the Fourteenth Amendment to the United States Constitution, where those restrictions were enacted to promote public safety under the State's police powers and do not retroactively punish LCM possession?

STATEMENT OF THE CASE

I. LARGE-CAPACITY MAGAZINES ARE UNIQUELY DANGEROUS FIREARM ACCESSORIES THAT ARE USED FREQUENTLY IN PUBLIC MASS SHOOTINGS

As this Court has repeatedly observed, LCMs enable a shooter to fire more rounds in a given period of time without reloading, and when used in crime, "more shots are fired and more fatalities and injuries result than when shooters use other firearms and magazines." *Gallinger v. Becerra*, 898 F.3d 1012, 1019 (9th Cir. 2018) (quoting *Kolbe v. Hogan*, 849 F.3d 114, 127 (4th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 469 (2017)); *see also Fyock v. Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015) (noting "evidence that the use of large-capacity magazines results in more gunshots fired, results in more gunshot wounds per victim, and increases the lethality of gunshot injuries"); *Silveira v. Lockyer*, 312 F.3d 1052, 1057 n.1 (9th Cir. 2002) (noting that LCMs "require the user of the weapon to cease firing to reload relatively infrequently because the magazines contain so much ammunition" and that "users of such weapons can 'spray-fire' multiple rounds of ammunition, with potentially devastating effects"), *abrogated on other grounds by District of Columbia v. Heller*, 554 U.S. 570 (2008); *Silvester v. Harris*, 843 F.3d 816, 828 (9th Cir. 2016) (noting that someone "may want to purchase a larger capacity weapon that will do more damage when fired into a crowd").

Shooters have used LCMs to kill and injure their victims on a record scale, "including horrific events in Pittsburgh (2018), Parkland (2018), Las Vegas (2017), Sutherland Springs (2017), Orlando (2016), Newtown (2012), and Aurora (2012)." *Worman v. Healey*, 922 F.3d 26, 39 (1st Cir. 2019). LCMs were also used in the massacres "at Virginia Tech (thirty-two killed and at least seventeen wounded in April 2007) and Fort Hood, Texas (thirteen killed and more than thirty wounded in November 2009), as well as Binghamton, New York (thirteen killed and four wounded in April 2009 at an immigration center), and Tucson, Arizona (six killed and thirteen wounded in January 2011 at a congresswoman's constituent meeting in a grocery store parking lot)." *Kolbe*, 849 F.3d at 120. And on November 7, 2018, a shooter armed with LCMs murdered 12 individuals at the Borderline Bar and Grill in Thousand Oaks, California. ER 54:10-18.

II. HISTORY OF CALIFORNIA'S LARGE-CAPACITY MAGAZINE RESTRICTIONS

Because of their enhanced lethality and prevalence in gun violence, LCMs have been extensively regulated in the United States for decades. Federal law restricted the possession and transfer of LCMs nationally from 1994 to 2004 as part of the federal assault weapons ban. ER 1123-98 (H.R. Rep. No. 103-489 (1994)); 108 Stat. 1796 (1994). The federal ban did

not, however, apply to LCMs that were lawfully possessed on the date of enactment. 18 U.S.C. § 922(w)(2) (repealed 2004). Before the federal ban expired in 2004 under its sunset provision, *see* 108 Stat. at 2000, California enacted its own LCM restrictions in 2000 and has continued to strengthen those measures ever since.

Currently, nine states and the District of Columbia restrict civilian access to LCMs.[2] As with most of these jurisdictions, California defines an LCM as any ammunition-feeding device with the capacity to accept more than ten rounds. Cal. Penal Code § 16740. California's definition of an LCM excludes any "feeding device that has been permanently altered so that it cannot accommodate more than 10 rounds." *Id.* § 16740(a). It also excludes a ".22 caliber tube ammunition feeding device" and a "tubular magazine that is contained in a lever-action firearm." *Id.* § 16740(b), (c).

[2] *See* Cal. Penal Code § 32310 (California); Colo. Rev. Stat. §§ 18-12-301-302 (Colorado); Conn. Gen. Stat. § 53-202w (Connecticut); D.C. Code § 7-2506.01(b) (District of Columbia); Haw. Rev. Stat. § 134-8(c) (Hawaii); Mass Gen. Laws Ann. Ch. 140, §§ 121, 131(a) (Massachusetts); Md. Code, Crim. Law § 4-305(b) (Maryland); N.J. Stat. Ann. §§ 2C:39-1(y), 39-3(j), 39-9(h) (New Jersey); N.Y. Pen. Law §§ 265.00, 265.36 (New York); 13 V.S.A. § 4021 (Vermont).

A. California's Original Large-Capacity Magazine Restrictions

In its original law, enacted in 2000, California prohibited the manufacture, importation, sale, keeping for sale, offering or exposing for sale, giving, and lending of any LCM. *See* 1999 Cal. Stat. 1781, §§ 3, 3.5 (S.B. 23) (now codified at Cal. Penal Code § 32310(a)). The Legislature enhanced these restrictions over time. In 2010, California declared unlawfully possessed LCMs to be a "nuisance," subject to confiscation and summary destruction by law enforcement under section 18010(b). 2010 Cal. Stat. 4035, § 6 (S.B. 1080) (codified at Cal. Penal Code § 32390). In 2013, California extended the LCM restrictions to the purchase or receipt of LCMs. *See* 2013 Cal. Stat. 5299, § 1 (A.B. 48) (amending Cal. Penal Code § 32310(a)). The Legislature also addressed the problem of "LCM repair kits," which were being used to assemble illegal LCMs, *see* ER 257 (Graham Decl. ¶¶ 28-30); 2013 Cal. Stat. 5299, § 1 (A.B. 48) (codified at Cal. Penal Code §§ 32310(b), 32311).

B. California's Ban on the Possession of Large-Capacity Magazines

California's original LCM restrictions did not prohibit the *possession* of LCMs. As a result, those individuals who lawfully possessed LCMs on January 1, 2000 were permitted to keep it, though they were not authorized

to sell or otherwise transfer their grandfathered LCMs, nor were they permitted to manufacture or acquire new LCMs. *See* Cal. Penal Code § 32310(a). The expiration of the federal assault weapons ban in 2004, which had prohibited the possession of non-grandfathered LCMs, left "a 'loophole' permitting the possession of [LCMs] in California." *Fyock*, 779 F.3d at 994. This "loophole" enabled the continued proliferation LCMs in the State because the mere possession of non-grandfathered LCMs was no longer illegal and there was "no way for law enforcement to determine which magazines were 'grandfathered' and which were illegally transferred or modified to accept more than ten rounds after January 1, 2000." *Wiese v. Becerra*, 263 F. Supp. 3d 986, 993 (E.D. Cal. 2017). As a result, California's original LCM restrictions on the manufacture and importation of LCMs were "very difficult to enforce." ER 919; *see also* S. Rules Comm., Off. of S. Floor Analyses, 3d reading analysis of S.B. 1446 (2015-2016 Reg. Sess.) as amended Mar. 28, 2016, at 9 (noting comments in support of the bill that "[i]t is nearly impossible to prove when a[n LCM] was acquired or whether the magazine was illegally purchased [or

transferred] after the 2000 ban" and that prohibiting the possession of LCMs "would enable the enforcement of existing law regarding [LCMs]").[3]

On July 1, 2016, the Legislature enacted Senate Bill 1446 to prohibit the possession of LCMs—both new and previously grandfathered LCMs—beginning on July 1, 2017. 2016 Cal. Stat. 1549, § 1 (S.B. 1446). Several months later, on November 8, 2016, the people of California enacted Proposition 63, the Safety for All Act of 2016, which, among other things, also prohibited the possession of all LCMs beginning on July 1, 2017. *See* ER 1199-227. The people found that "[m]ilitary-style large-capacity ammunition magazines . . . significantly increase a shooter's ability to kill a lot of people in a short amount of time" and "are common in many of America's most horrific mass shootings." ER 1200 (Prop. 63 § 2, ¶ 11). The people elected to "close that loophole." *Id.* (Prop. 63 § 2, ¶ 12). Proposition 63's amendments to California's LCM restrictions largely mirrored Senate Bill 1446, but eliminated certain exemptions to the possession ban and enhanced the penalties for unlawful possession.

[3] A true and correct copy of this legislative history is attached as Exhibit 1 to the accompanying Appellant's Motion to Take Judicial Notice.

ER 1652 (Voter Information Guide).[4] Proposition 63 was approved by 63.1 percent of the electorate.[5]

Section 32310(a) currently provides that "any person in this state who manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, buys, or receives" an LCM is guilty of a misdemeanor or a felony. Cal. Penal Code § 32310(a). Proposition 63 added section 32310(c) and (d) and amended other provisions of the Penal Code relating to LCMs. *See* ER 1205-08 (Prop. 63 § 6). Section 32310(c) provides that the possession of an LCM on or after July 1, 2017 is an infraction or a misdemeanor punishable by a fine not to exceed $100 per LCM or imprisonment in a county jail not to exceed one year, or both. Cal. Penal Code § 32310(c). Section 32310(d) addresses previously

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[4] Because Proposition 63's amendments were enacted after Senate Bill 1446, they are the governing provisions. *See Wiese*, 263 F. Supp. 3d at 997 (citing *People v. Bustamante*, 57 Cal. App. 4th 693, 701 (2d Dist. 1997)); *accord Wiese v. Becerra*, 306 F. Supp. 3d 1190, 1200 (E.D. Cal. 2018). Accordingly, references to section 32310 and related statutes in this brief are to the statutes as amended by Proposition 63.

[5] *See* Cal. Secretary of State, Supplement to the Statement of Vote, Statewide Summary by County for Ballot Measures (Nov. 8, 2016), at 114, *available at* https://elections.cdn.sos.ca.gov/sov/2016-general/ssov/ssov-complete.pdf. Relevant excerpts of the Supplement to the Statement of Vote are attached as Exhibit 2 to the accompanying Motion to Take Judicial Notice.

grandfathered LCMs, providing that anyone not authorized to possess LCMs must, before July 1, 2017, (1) remove the LCM from the state, (2) sell the LCM to a licensed firearms dealer, or (3) surrender the LCM to law enforcement for destruction. *Id.* § 32310(d). Alternatively, an owner of an LCM may permanently modify the magazine "so that it cannot accommodate more than 10 rounds." *Id.* § 16740(a); *see also id.* § 32425 (exempting from section 32310 the "giving of any [LCM] to . . . a gunsmith, for the purposes of . . . modification of that [LCM]").

As amended, section 32310 does not apply to, *inter alia*, any federal, state, or local law enforcement agencies, Cal. Penal Code § 32400, any sworn peace officers who are authorized to carry a firearm in the course and scope of their official duties, *id.* § 32405, any honorably retired sworn peace officers or federal law enforcement officers who were authorized to carry a firearm in the course and scope of their official duties, *id.* § 32406, any entity that operates an armored vehicle business or any authorized employee of that business, *id.* § 32435, the manufacture of LCMs for law enforcement, government agencies, or the military, *id.* § 32440, the loan of an LCM for use solely as a prop in film production, *id.* § 32445, or any holder of a special weapons permit for limited purposes, *id.* § 32450.

III. PROCEDURAL HISTORY

A. Plaintiffs' Constitutional Challenge to Section 32310

On May 17, 2017, less than two months before California's ban on possession of large-capacity magazines was to go into effect, *see* Cal. Penal Code § 32310(c), Plaintiffs filed suit against the Attorney General. ER 1943-64. The complaint asserted that section 32310, in its entirety, violates the Second Amendment and that the possession ban codified at section 32310(c) and (d) also violates the Takings Clause and the Due Process Clause. ER 1959-60 (Compl. ¶¶ 64-76).

B. The District Court's Preliminary Injunction of California's Ban on the Possession of Large-Capacity Magazines

On May 26, 2017, Plaintiffs filed a motion for a preliminary injunction to enjoin enforcement of the newly enacted ban on LCM possession. ER 1969 (Dkt. 6). On June 29, 2017—two days before the effective date of the possession ban—the district court issued a preliminary injunction, enjoining enforcement of section 32310(c) and (d). ER 1971 (Dkt. 28).

On July 17, 2018, a divided panel of this Court affirmed the preliminary injunction in an unpublished memorandum. *See Duncan v. Becerra*, 742 Fed. App'x 218, 221-22 (9th Cir. 2018). The panel majority held that the district court did not abuse its discretion, but made clear that it

was not passing on the merits of this case; it "'determine[d] only whether the district court correctly distilled the applicable rules of law and exercised permissible discretion in applying those rules to the facts at hand.'" *Id.* at 220 (quoting *Fyock*, 779 F.3d at 995). The dissent did "not consider it a close call to conclude the district court abused its discretion in finding Plaintiffs were likely to succeed on the merits of their constitutional challenges to California's LCM ban." *Id.* at 226 (Wallace, J., dissenting).

C. The District Court's Grant of Plaintiffs' Motion for Summary Judgment and Entry of Judgment

On March 6, 2018, while the interlocutory appeal was pending, Plaintiffs filed a motion for summary judgment on all claims. ER 1972-73. The Attorney General opposed the motion, submitting the reports of four expert witnesses, ER 280-708, declarations of two law enforcement officials, ER 250-66, excerpts from deposition transcripts, ER 709-71, and various reports, studies, articles, and legislative materials, ER 772-1678.

After full briefing and oral argument, *see* ER 94-218 (hearing transcript), on March 29, 2019, the district court issued an order granting Plaintiffs' motion for summary judgment, ER 8-93, and entered judgment in favor of Plaintiffs, ER 7.

1. Summary of the District Court's Order

The district court held that section 32310 is unconstitutional under the Second Amendment and the Takings Clause. While the court acknowledged that "the goal of preventing mass shootings is laudable," it concluded that restricting magazine capacity to ten rounds is "an unconstitutional experiment that poorly fits the goal." ER 12. The court surmised that the State's "'solution' for preventing a mass shooting exacts a high toll on the everyday freedom of law-abiding citizens" and that making LCMs available to the public may be "part of the solution." ER 14.[6]

In evaluating section 32310 under the Second Amendment, the district court applied what it termed the "simple *Heller* test," citing dissenting opinions from cases upholding LCM restrictions and from denials of petitions for writs of certiorari. ER 22-24 (citing *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney General N.J.* (*ANJRPC*), 910 F.3d 106, 127 (3d Cir. 2018) (Bibas, J., dissenting); *Friedman v. City of Highland Park*, 136 S. Ct. 447, 447 (2015) (Thomas, J.,

[6] The court suggested that California's LCM restrictions are part of "an insidious plan to disarm the populace," ER 29 n.33, drawing comparisons with disarmament under the Nazis, ER 12 n.13 (discussing *Kristallnacht*).

and Scalia, J., dissenting); *Jackson v. City & Cnty. of San Francisco*, 135 S. Ct. 2799 (2015) (Thomas, J., dissenting)). The court described its test as protecting "arms that are not unusual 'in common use' 'for lawful purposes like self-defense.'" *Id.* (quoting *Heller*, 554 U.S. at 624). Concluding that LCMs are in "common use," the court ruled that "[t]his is enough to decide that a magazine able to hold more than 10 rounds passes the *Heller* test and is protected by the Second Amendment." *Id.*

The district court acknowledged, however, that this Court has not adopted the "simple *Heller* test" and instead applies constitutional scrutiny to firearms laws that burden conduct protected by the Second Amendment. ER 43. Applying that standard of review, the court determined that section 32310 bans "an entire class of 'arms'" and thus fails "[u]nder any level of heightened scrutiny," like the complete handgun bans held unconstitutional in *Heller*, 554 U.S. 570, and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). ER 42. The court alternatively held that, if a level of scrutiny were selected, section 32310 should be subject to strict scrutiny review, and that it fails under that standard. ER 49-50.

The court deemed intermediate scrutiny "the wrong standard," characterizing it as "an overly complex analysis that people of ordinary intelligence cannot be expected to understand." ER 43; *see also* ER 52.

Nonetheless, the court alternatively applied that standard. ER 51-88. The court determined that the State's evidence failed to demonstrate a reasonable fit between section 32310 and the State's important government interests, ER 67, highlighting mass shootings that did not involve LCMs and others that section 32310 failed to prevent, ER 54.

Finally, the district court held that the LCM-possession ban, including the various compliance options listed in section 32310(d), constitutes a "rare hybrid taking." ER 90. The court determined that section 32310(d)(3), which permits owners of grandfathered LCMs to surrender them to a law enforcement agency for destruction, "forces a *per se* [physical] taking requiring just compensation." ER 90-91 (citing *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2427 (2015)). The court also concluded that section 32310 effects a regulatory taking requiring just compensation. ER 90 (citing *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017)).[7]

2. The District Court's Judgment

The district court entered final judgment, enjoining enforcement of section 32310 in its entirety, ER 7, effective immediately upon entry, Fed. R. Civ. P. 62(c)(1), allowing retailers to begin importing LCMs into the State.

[7] The district court's order did not address Plaintiffs' due process claim.

ER 235 ("The ruling has prompted a massive shipment of high-capacity magazines to California."); *see also* ER 238 (Wylie Decl. ¶ 4), 227-28 (Barvir Decl. ¶ 7-8), 248 (Echeverria Decl., Ex. 1). The court granted the Attorney General's ex parte application to stay the judgment pending appeal on April 4, 2019, effective the following day, but permitted anyone who acquired LCMs in the interim to keep them during the appeal. ER 224. On April 4, 2019, the Attorney General filed a notice of appeal. ER 1-6.

SUMMARY OF THE ARGUMENT

This Court should reverse the district court's final judgment invalidating section 32310. Every federal circuit court that has considered the constitutionality of similar LCM restrictions has held that they are constitutional. *See Worman*, 922 F.3d at 40-41 (upholding ten-round LCM restrictions under intermediate scrutiny); *ANJRPC*, 910 F.3d at 122-24 (upholding ten-round LCM restrictions under intermediate scrutiny and rejecting Takings Clause challenge to ban on previously lawful LCMs); *Kolbe*, 849 F.3d at 137-38, 140-41 (holding that ten-round LCM restrictions do not burden the Second Amendment and, alternatively, that such restrictions satisfy intermediate scrutiny); *N.Y. State Rifle & Pistol Ass'n v. Cuomo* (*NYSRPA*), 804 F.3d 242, 262-64 (2d Cir. 2015) (upholding ten-round LCM restrictions under intermediate scrutiny), *cert. denied*,

136 S. Ct. 2486 (2016); *Friedman v. City of Highland Park*, 784 F.3d 406, 411-12 (7th Cir. 2015) (upholding ten-round LCM restrictions where ordinance affords gun owners adequate means of defense), *cert. denied*, 136 S. Ct. 447 (2015); *Heller II*, 670 F.3d at 1264 (upholding ten-round LCM restrictions under intermediate scrutiny).

Consistent with the overwhelming weight of authority, section 32310 comports with the Second Amendment. As a threshold matter, section 32310 does not burden conduct protected by the Second Amendment; LCMs fall outside the historical scope of the Second Amendment, and section 32310 is similar to longstanding firing-capacity restrictions. And even if section 32310 does burden conduct protected by the Second Amendment, the statute satisfies the applicable level of scrutiny—intermediate scrutiny—because it is reasonably fitted to important, and indeed compelling, public safety interests in mitigating the lethality of gun violence, particularly public mass shootings and the murder of law enforcement officers. The State has "select[ed] among reasonable alternatives in its policy decisions," notwithstanding differences of opinion and "conflicting legislative evidence." *Pena v. Lindley*, 898 F.3d 969, 980 (9th Cir. 2018) (quoting *Peruta v. Cnty. of San Diego*, 824 F.3d 919, 944

(9th Cir. 2016) (en banc) (Graber, J., concurring)), *cert. petition filed sub nom. Pena v. Horan*, No. 18-843 (Dec. 28, 2018).

At a minimum, the State's evidence demonstrates a reasonable fit between section 32310 and the State's important public safety interests, including uncontroverted evidence showing that the use of LCMs in public mass shootings results in nearly 250 percent more deaths and injuries on average than when smaller magazines are used. ER 756-57 (Allen Rev. Rep. ¶ 24). The State's evidence is virtually identical to evidence that has been characterized by this Court—in its only published case examining LCM restrictions—as "precisely the type of evidence that [a government is] permitted to rely upon to substantiate its interest" and demonstrate a reasonable fit under intermediate scrutiny. *Fyock*, 779 F.3d at 1001.

The LCM-possession ban in section 32310(c) and (d) also does not constitute an unconstitutional taking. The statute does not effect a taking of private property for public use because it was an exercise of the State's police powers to protect the public from dangerous firearm accessories. Moreover, owners of grandfathered LCMs may keep them if modified permanently to hold no more than ten rounds, retaining the core function of the magazines. Cal. Penal Code § 16740(a). The possession ban, thus, does not physically confiscate grandfathered LCMs to effect a physical

taking, nor does it eliminate the use or value of the magazines to give rise to a regulatory takings claim, even if a regulatory taking could occur in the case of personal property.

Finally, the LCM-possession ban does not violate the Due Process Clause. It is not retroactive and does not criminalize past LCM possession. And consistent with the Second Amendment and takings analysis, the possession ban was enacted under the State's police powers in pursuit of plainly legitimate government objectives.

STANDARD OF REVIEW

This Court reviews de novo a district court's decision to grant a motion for summary judgment. *Children's Hosp. Med. Ctr. v. Cal. Nurses Ass'n*, 283 F.3d 1188, 1191 (9th Cir. 2002).

ARGUMENT

I. CALIFORNIA'S LARGE-CAPACITY MAGAZINE RESTRICTIONS COMPORT WITH THE SECOND AMENDMENT.

The Second Amendment provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment protects an individual right to keep and bear arms. 554 U.S. at 595. This

right is incorporated against the states through the Fourteenth Amendment. *See McDonald*, 561 U.S. at 790-91 (plurality opinion).

While the Court in *Heller* and *McDonald* invalidated strict laws that effectively prohibited the possession of handguns—which the Court characterized as "the quintessential self-defense weapon," *Heller*, 554 U.S. at 629—the Court made clear that "the right secured by the Second Amendment is not unlimited" and does not extend to "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose," *id.* at 626 (citations omitted); *see also Peruta*, 824 F.3d at 928 ("The Court in *Heller* was careful to limit the scope of its holding."). The Court cautioned that the Second Amendment "by no means eliminates" a state's ability "to devise solutions to social problems that suit local needs and values," emphasizing that "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment." *McDonald*, 561 U.S. at 785 (quotation omitted) (plurality opinion).

Since *Heller* and *McDonald*, this Circuit has adopted a two-step approach to evaluating the constitutionality of gun-safety laws under the Second Amendment. *See Silvester*, 843 F.3d at 820-21. The first step considers whether the challenged law burdens conduct protected by the

Second Amendment, based on a "historical understanding of the scope of the right." *Id.* at 821 (quoting *Heller*, 554 U.S. at 625). If it does not, then the law "may be upheld without further analysis." *Id.* (citation omitted). If, however, the Court determines that the law burdens conduct protected by the Second Amendment, it then proceeds to the second step of the inquiry to determine the appropriate level of scrutiny to apply, and then to apply that level of scrutiny. *Id*. (citation omitted). Section 32310 passes constitutional muster at each step of this analysis.

A. Section 32310 Does Not Burden Conduct Protected by the Second Amendment

This Court has recognized that the Second Amendment affords some protection to ammunition and that, by extension, "there must be some corollary, *albeit not unfettered*, right to possess the magazines necessary to render [semiautomatic] firearms operable." *Fyock*, 779 F.3d at 998 (emphasis added) (citing *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014)). That does not mean, however, that the Second Amendment protects all magazines of any capacity or design. At the first step of the Court's Second Amendment inquiry, Plaintiffs failed to establish that the Second Amendment protects magazines capable of holding more than ten rounds. *See Binderup v. Att'y Gen. U.S.A.*, 836 F.3d 336, 347 (3d

Cir. 2016) (explaining that the party asserting a Second Amendment claim has the burden of proof at the first step).

1. Large-Capacity Magazines Are Most Useful in Military Service and Are Not Suitable for Self-Defense

In sketching the boundaries of the Second Amendment, the Supreme Court identified an "important limitation on the right to keep and carry arms": the Second Amendment does not extend to "weapons that are most useful in military service—M-16 rifles and the like," which "may be banned." *Heller*, 554 U.S. at 627. Whatever their other conceivable uses, including self-defense, LCMs "are particularly designed and most suitable for military and law enforcement applications" and thus fall outside the scope of the Second Amendment. *Kolbe*, 849 F.3d at 137 (quotation omitted). All firearms, even machine guns, could conceivably be used for self-defense, but machine guns are clearly not the sort of weapon that a citizen militia member might possess at home in the 18th century, *see Heller*, 554 U.S. at 627, and thus are not protected by the Second Amendment, *see Friedman*, 784 F.3d at 408 (noting that, according to *Heller*, "military-grade weapons (the sort that would be in a militia's armory), such as machine guns, . . . are not" protected by the Second Amendment).

LCMs comprise a subset of magazines that "permit[] a shooter to fire more than ten rounds without reloading," which "greatly increase[s] the firepower of mass shooters." *Heller II*, 670 F.3d at 1262 (quotation omitted). LCMs afford soldiers in the battlefield an ample and readily available supply of ammunition for combat, enabling them to expend large numbers of rounds without pausing to reload their weapons. *Kolbe*, 849 F.3d at 137; *see also* ER 777 (1989 ATF Rep.) ("[L]arge capacity magazines are indicative of military firearms."); ER 793-94 (1998 ATF Rep.) (noting that "detachable large capacity magazine[s were] originally designed and produced for . . . military assault rifles" and referring to them as "large capacity *military* magazines" (emphasis added)); ER 919 (legislative history of S.B. 1446) ("High capacity magazines are military designed devices. They are designed for one purpose only—to allow a shooter to fire a large number of bullets in a short period of time."); ER 1707 (Helsley Rep.) (discussing "transition" of LCM-equipped firearms from "military to civilian use for sport or self-defense").

Because of their offensive and high-causality capabilities, LCMs are not "weapons of the type characteristically used to protect the home." *Hightower v. City of Boston*, 693 F.3d 61, 71 (1st Cir. 2012). Indeed, firearms equipped with magazines holding ten or fewer rounds are more than

adequate to serve an individual's need for self defense. A study by the State's expert of the National Rifle Association's Armed Citizen reports from 2011 to 2017 confirms that, when people use firearms for self-defense, far fewer than ten rounds are expended. ER 287 (Allen Rep. ¶ 10) (finding that an average of 2.2 shots were fired in 736 self-defense incidents and that no shots were fired in 18.2 percent of the incidents); *see also* ER 1642-43 (study of Armed Citizen reports from 1997 to 2001 finding an average of 2 shots fired in self-defense). The expert also reviewed news reports of defensive gun-use in the home, finding a similar average of 2.34 shots fired in self-defense in the home. ER 289-93 (Allen Rep. ¶¶ 12-19).

In response to this data, the district court surmised that some individuals *might* need more than ten rounds to defend themselves and that those individuals *might* not have other magazines available for self-defense. *See, e.g.*, ER 45 ("When a person has fired the permitted 10 rounds and the danger persists, a statute limiting magazine size to only 10 rounds severely burdens that core right to self-defense.").[8] However, "[w]hatever their other

[8] None of the three self-defense stories discussed by the district court show that LCMs are necessary for self-defense. ER 8-10. Each of the victims survived their attacks without apparently needing more than ten rounds. Notably, these individuals resided in jurisdictions that do not restrict

potential uses," including self-defense, LCMs are "unquestionably most useful in military service" because they "are designed to 'kill[] or disabl[e] the enemy' on the battlefield," and are thus not within the right secured by the Second Amendment. *Kolbe*, 849 F.3d at 136-37 (citation omitted). For this reason, this Court may hold that Plaintiffs' Second Amendment claim fails at the first step of the analysis.

2. Section 32310 Is Consistent with Longstanding Firing-Capacity Regulations

Plaintiffs' Second Amendment challenge fails at the first step for an additional reason: section 32310 is a presumptively lawful regulation. *Heller* "identified a non-exhaustive list of 'longstanding prohibitions,' which can be considered 'presumptively lawful regulatory measures' falling outside the scope of Second Amendment protection." *Silvester*, 843 F.3d at 830 (Thomas, C.J., concurring) (quoting *Heller*, 554 U.S. at 626, 627 n.26). In restricting the number of rounds that can be fired without reloading, section 32310 is analogous to "regulations from the early twentieth century that restricted the possession of firearms based on the

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civilian access to LCMs—Florida and Georgia—and they chose the firearms and magazines that they used to successfully defend themselves.

number of rounds that the firearm could discharge automatically or semi-automatically without reloading." *Fyock*, 779 F.3d at 997.[9]

Here, the record demonstrates that section 32310 is consistent with several firing-capacity restrictions enacted in the 1920s and 1930s. *See* ER 1121. Notably, Michigan, Rhode Island, and Ohio restricted semiautomatic weapons capable of firing sixteen, twelve, and eighteen shots, respectively, without reloading. ER 1841-50. And the U.S. Congress enacted a twelve-shot restriction on semiautomatic weapons in the District of Columbia—one of the few jurisdictions subject to the Second Amendment at that time, before the Amendment's incorporation into the Fourteenth Amendment in 2010. ER 1851-55. The district court acknowledged that the District of Columbia's "firing-capacity restriction has been in place since the 1930s." ER 40.[10]

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[9] This Court observed that, "[a]lthough not from the founding era, these early twentieth century regulations might nevertheless demonstrate a history of longstanding regulation if their historical prevalence and significance is properly developed in the record." *Fyock*, 779 F.3d at 997; *see also id.* at 997 n.3.

[10] Most of the firing-capacity laws were repealed by the 1970s. *ANJRPC*, 910 F.3d at 117 n.18. But any gap between their repeal and the enactment of the federal assault weapons ban in 1994 should not render these firing-capacity restrictions insufficiently "longstanding," especially where the District of Columbia has maintained its restrictions without interruption since the 1930s.

It does not matter that "[n]one of these laws set the limit as low as ten" or that they were adopted by a "handful" of jurisdictions. ER 36. The difference of a few rounds is not a material distinction because the challenged law need not "mirror" the historical regulations. *See United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc); *see, e.g.*, *Silvester*, 843 F.3d at 831 (Thomas, C.J., concurring) (citing original iteration of California's waiting-period law, which provided a *single-day* waiting period, in concluding that California's ten-day waiting period for successive firearm purchases was presumptively lawful); *see also id.* at 823-24 (noting that California's first waiting period law, enacted in 1923, prohibited delivery of a firearm on the day of sale, which was later extended to three days in 1955 and five days in 1965). And the historical regulations may be sufficiently longstanding if adopted by "several states." *See Silvester*, 843 F.3d at 831 (Thomas, C.J., concurring) (citing three states that enacted waiting-period statutes in the 1920s).

Additionally, in 1933, California enacted its own firing-capacity restrictions when it amended the Machine Gun Law of 1927 to apply to "all firearms which are automatically fed after each discharge from or by means of clips, discs, drums, belts or other separable mechanical device having a capacity of greater than *ten cartridges*." 1933 Cal. Stat. 1170, § 3 (codified

at former Cal. Penal Code § 12200) (emphasis added); ER 84 (referencing "a 10-round limit [that] was included in [California's] firing-capacity legislation prohibiting machine guns in 1933"). Contrary to the district court's view, ER 38-39, firing-capacity restrictions imposed on automatic weapons are relevant because automatic and semiautomatic weapons can fire at "nearly identical" rates and, "in many situations," semiautomatic fire "is more accurate and lethal." *Kolbe*, 849 F.3d at 136. In regulating LCMs, which can be used in automatic and semiautomatic weapons alike, California does not distinguish between automatic and semiautomatic weapons.

In concluding that there is "no historical pedigree" for LCM restrictions, ER 34, the district court cited founding-era laws requiring citizens to equip themselves with a minimum quantity of bullets for militia service, ER 35-36, 40:21-24. Those laws, however, pertained to military service and did not mandate a minimum number of bullets that must be stored in magazines or loaded into a firearm and, thus, did not relate to a weapon's capacity to fire repeatedly without reloading.

In sum, the magazine-capacity restrictions at issue in this case were "presaged by the successful, and at the time obviously uncontroversial," firing-capacity regulations of the 1920s and 1930s. ER 1120 (excerpt from Robert J. Spitzer, *Gun Law History in the United States and Second*

Amendment Rights, 80 Law & Contemporary Problems 55, 69 (2017)). Section 32310 is a presumptively lawful measure at the first step of the Court's analysis.[11]

B. Section 32310 Satisfies Intermediate Scrutiny Under the Second Amendment

Even assuming that section 32310 burdens some conduct protected by the Second Amendment, the statute satisfies the applicable level of scrutiny—intermediate scrutiny—and is thus constitutional.

1. Intermediate Scrutiny Applies to Section 32310 Because the Statute Does Not Severely Burden the Core Second Amendment Right

In determining the appropriate level of scrutiny to apply to a Second Amendment challenge, the Court must consider "(1) how close the law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on that right." *Jackson*, 746 F.3d at 960-61 (quoting *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013)). The core of

[11] *Fyock* does not foreclose the conclusion that section 32310 does not burden conduct protected by the Second Amendment. In *Fyock*, this Court held that the lower court in that case "did not clearly err in finding, *based on the record before it*, that a regulation restricting possession of certain types of magazines burdens conduct falling within the scope of the Second Amendment." 779 F.3d at 998 (emphasis added). The record here demonstrates that California's LCM restrictions do not burden conduct protected by the Second Amendment.

the Second Amendment is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Bauer v. Becerra*, 858 F.3d 1216, 1222 (9th Cir. 2017) (quoting *Heller*, 554 U.S. at 635). Intermediate scrutiny applies unless the challenged law severely burdens that core Second Amendment right. *Id.*

Every federal circuit court that has selected a level of scrutiny to apply to ten-round LCM restrictions, including this Circuit, has chosen intermediate scrutiny. *See Fyock*, 779 F.3d at 999 (holding that "intermediate scrutiny is appropriate" to evaluate ten-round LCM restrictions); *Worman*, 922 F.3d at 38 (same); *ANJRPC*, 910 F.3d at 117-18 (same); *Kolbe*, 849 F.3d at 138 (same); *NYSRPA*, 804 F.3d at 260-61 (same); *Heller II*, 670 F.3d at 1262 (same).[12] In fact, in affirming the district court's preliminary injunction earlier in this litigation, this Court confirmed that intermediate scrutiny applies to section 32310. *See Duncan*, 742 Fed. App'x at 221 (holding that the district court did not apply an "incorrect level of

[12] The Seventh Circuit did not apply any level of scrutiny in upholding similar LCM restrictions. Rather, the court considered "whether [the] regulation bans weapons that were common at the time of ratification or those that have 'some reasonable relationship to the preservation or efficiency of a well regulated militia,' and whether law-abiding citizens retain adequate means of self-defense." *Friedman*, 784 F.3d at 410 (citations omitted).

scrutiny" where it alternatively applied intermediate scrutiny, which "follows the applicable legal principles").

In *Fyock*, this Court agreed with the lower court's conclusion "that intermediate scrutiny is appropriate" in evaluating ten-round LCM restrictions, noting that its holding is "[c]onsistent with the reasoning of [the D.C. Circuit in *Heller II*]." 779 F.3d at 999. This Court did so because the ordinance at issue was "simply not as sweeping as the complete handgun ban at issue in *Heller*," did not prevent law-abiding citizens from possessing handguns for self-defense, and "restrict[ed] possession of only a subset of magazines that are over a certain capacity." *Id.* That reasoning applies to section 32310 even though it is a statewide measure and does not include every exception reflected in the ordinance.

Section 32310 does not ban any firearm that a person may wish to use for self-defense, but instead restricts a particular accessory that enables a semiautomatic or automatic weapon to fire more than ten rounds repeatedly without reloading. Section 32310 does not prohibit all firearm magazines; it merely limits magazine capacity to ten rounds. Nor does it limit the number of ten-round magazines that law-abiding citizens may possess for lawful purposes like self-defense. Because law-abiding citizens may continue to use any lawful firearm of their choice, and may equip themselves with as

many ten-round magazines as they desire, to engage in lawful self-defense, section 32310 does not severely burden the core Second Amendment right. *See Jackson*, 746 F.3d at 961 ("[F]irearm regulations which leave open alternative channels for self-defense are less likely to place a severe burden on the Second Amendment right than those which do not.").

The district court incorrectly determined that section 32310 imposes a severe burden on the core Second Amendment right and should thus be subject to strict scrutiny. ER 48. The court speculated that someone might need more than ten rounds in a single magazine to engage in self-defense. *See* ER 47 (referencing extreme cases of civil unrest and a hypothetical home invasion). But the record does not contain evidence that LCM restrictions have caused anyone to be unable to defend themselves. To the contrary, the State's evidence reflects that, on average, individuals use far fewer than ten rounds when engaged in self-defense with a firearm. ER 287 (Allen Rep. ¶ 10) (finding that an average of 2.2 rounds are expended during defensive gun uses); *accord Fyock*, 779 F.3d at 1000 (noting evidence that "most defensive gun use incidents involved fewer than ten rounds of ammunition").

The district court minimized *Fyock*'s holding, claiming that it "did not decide that all magazine bans merit only intermediate scrutiny." ER 49.

True, in *Fyock*, this Court *did not* hold that intermediate scrutiny applies to "all magazine bans," no matter how low the capacity limitations and without considering any other relevant limitations, but this Court did hold that ten-round restrictions, such as section 32310 and the LCM restrictions at issue in *Heller II*, warrant intermediate scrutiny. Accordingly, intermediate scrutiny applies to section 32310.

2. Section 32310 Is Reasonably Fitted to Important Government Interests

Intermediate scrutiny requires that (1) the government's stated objective must be "significant, substantial, or important," and (2) there must be a "reasonable fit" between the challenged regulation and the asserted objective. *Chovan*, 735 F.3d at 1139. The challenged regulation must be "substantially related" to an important government interest. *Id.* at 1140. Here, the public safety interests in preventing and mitigating gun violence, particularly public mass shootings and the murder of law enforcement personnel, are important, and indeed compelling, government interests. *Worman*, 992 F.3d at 39 (noting that "few interests are more central to a state government" (quotation omitted)). The district court agreed that the State's asserted interests are important. ER 52.

In assessing the reasonableness of the fit to those important public safety interests, intermediate scrutiny does not require a perfect fit, nor does it require that the regulation be the least restrictive means of serving the government's interest. *Jackson*, 746 F.3d at 969; *Fyock*, 779 F.3d at 1000. The "question is not whether [the government], as an objective matter, was correct." *Turner Broad. Sys., Inc. v. FCC* (*Turner II*), 520 U.S. 180, 211 (1997); *see also Jackson*, 746 F.3d at 966 ("At most, [plaintiff's] evidence suggests that the lethality of hollow-point bullets is an open question, which is insufficient to discredit San Francisco's reasonable conclusions."). Rather, the government "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Jackson*, 746 F.3d at 969-70 (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986)). In applying intermediate scrutiny, the Court must "accord substantial deference to the predictive judgments of the [legislature]." *Turner II*, 520 U.S. at 195 (quotation omitted). Even when the record contains conflicting evidence, "[i]t is the legislature's job, not [the courts'], to weigh conflicting evidence and make policy judgments." *Pena*, 898 F.3d at 980 (quoting *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 99 (2d Cir. 2012)).

Where, as here, the constitutionality of a statute is at issue, the Court's decision "must be based largely on legislative, as opposed to adjudicative, facts." *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 455-56 (1st Cir. 2000) (citation omitted); *accord Massachusetts v. Dep't of Health & Human Servs.*, 682 F.3d 1, 7 (1st Cir. 2012) ("[T]he issues presented are themselves legal in character, even though informed by background information as to legislative purpose and 'legislative facts' bearing upon the rationality or adequacy of distinctions drawn by statutes"); *Pena*, 898 F.3d at 979 ("It is important to note that we are weighing a legislative judgment, not evidence in a criminal trial. Because legislatures are not obligated, when enacting [their] statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review, we should not conflate legislative findings with 'evidence' in the technical sense." (quotation omitted)). Legislative facts, as opposed to adjudicative facts, are "facts of which courts take particular notice when interpreting a statute or considering whether [the legislature] has acted within its constitutional authority." *Korematsu v. United States*, 584 F. Supp. 1406, 1414 (N.D. Cal. 1984).

Under intermediate scrutiny, the State may "rely on any evidence 'reasonably believed to be relevant' to substantiate its important interests,"

and the reviewing court "may consider 'the legislative history of the enactment as well as studies in the record or cited in pertinent case law.'" *Fyock*, 779 F.3d at 1000 (quoting *City of Renton*, 475 U.S. at 51-52). Properly analyzed in accordance with this Court's precedents, and consistent with the determinations of the five federal circuit courts evaluating ten-round LCM restrictions under intermediate scrutiny, section 32310 is constitutional.

a. Large-Capacity Magazines Feature Prominently in Public Mass Shootings and Lead to Increased Casualties

The same evidence showing that LCMs are most useful in military service, *see supra* Section I.A.1, demonstrate that they are uniquely dangerous firearm accessories. LCMs enable a "shooter to fire more bullets without stopping to reload." *Worman*, 922 F.3d at 39; *Kolbe*, 849 F.3d at 137 (noting that LCMs enable a shooter to hit "multiple human targets very rapidly" and "contribute to the unique function of any assault weapon to deliver extraordinary firepower"). It is not surprising, then, that LCMs have been used frequently in public mass shootings. The State's expert, Lucy Allen, noted that a majority of public mass shootings involved LCMs.

ER 756 (Allen Rev. Rep. ¶ 22).[13] The use of an LCM in those shootings resulted in a nearly 250 percent increase in the average number of fatalities and injuries compared to public mass shootings that did not involve an LCM. ER 756-57 (Allen Rev. Rep. ¶ 24) (determining that public mass shootings with LCMs resulted in an average of 31 fatalities or injuries compared to 9 fatalities or injuries for public mass shootings without LCMs).[14] Another of the States' experts, Louis Klarevas, found an increase in the number of fatalities when LCMs are used in public mass shootings, even when limited to high-fatality incidents resulting in six or more

[13] The district court referenced the February 14, 2018 mass shooting in Parkland, Florida—which occurred after the close of discovery and was not referenced in the summary judgment record—claiming that the shooter "reject[ed]" LCMs in favor of smaller magazines, citing an article published by the National Review. ER 79:18-19 & n.64. That article was incorrect. The Parkland shooting involved "[e]ight 30- and 40-round capacity magazines," making it yet another example of an LCM-involved mass shooting. *See* Marjory Stoneman Douglas High School Pub. Safety Comm'n, Initial Report Submitted to the Governor, Speaker of the House of Representatives and Senate President (2019) at 262. True and correct copies of relevant excerpts from this report are attached as Exhibit 3 to the accompanying Motion to Take Judicial Notice.

[14] In finding that LCMs result in substantially more causalities, the State's expert examined 96 public mass shootings from 1982 to October 2017 identified by *Mother Jones* and the Citizens Crime Commission of New York City. ER 294. This expert's analysis has been cited favorably in other LCM cases. *See, e.g.*, *Fyock v. Sunnyvale*, 25 F. Supp. 3d 1267, 1280-81 (N.D. Cal. 2014), *aff'd*, 779 F.3d 991.

fatalities. *See* ER 357-58 (Klarevas Rev. Rep.). Similarly, a 2013 study by Mayor's Against Illegal Guns determined that, when assault weapons or LCMs are used in mass shootings, 151 percent more victims are shot and 63 percent more victims are killed. ER 972.

The district court stated that this correlation between LCM use in public mass shootings and increased casualty rates "may or may not be true." ER 28. Neither Plaintiffs nor the district court, however, disputed the calculations of the State's experts. Instead, the district court challenged the reliability of the list of public mass shootings compiled by *Mother Jones*, characterizing the list as "a survey of news articles collected by a biased interest group." ER 59.[15] The district court also faulted the Attorney

[15] Contrary to the district court's claim, ER 55 n.46, the *Mother Jones* compilation of mass shootings has been cited favorably by multiple courts. *See N.Y.S. Rifle & Pistol Ass'n v. Cuomo*, 990 F. Supp. 2d 349, 369 (W.D.N.Y. 2013) (referring to *Mother Jones'* study as "exhaustive" and discussing some of the included shootings), *aff'd in part and rev'd in part by NYSRPA*, 804 F.3d 242; *Kolbe v. O'Malley*, 42 F. Supp. 3d 768, 780, 781 n.17 (D. Md. 2014) (concluding that "plaintiffs have offered nothing to suggest the *Mother Jones* data are unreliable or inaccurate" and that "the information on which [the expert] relies in forming his expert opinion is reliable"), *aff'd by Kolbe*, 849 F.3d 114; *see also Shew v. Malloy*, 994 F. Supp. 2d 234, 249 n.53 (D. Conn. 2014) (crediting the district court's finding in *NYSRPA* about weapons used in mass shootings, which in turn was based on the *Mother Jones* data), *aff'd in part and rev'd in part on other grounds by NYSRPA*, 804 F.3d 242. In any event, the State's expert also relied on an alternative list of public mass shootings to identify any

General for not presenting "actual police investigation reports" proving that LCMs were used in particular mass shootings. ER 60. Setting aside that such proof—effectively a mini-trial for each shooting—would make the defense of many gun-safety laws cost-prohibitive for many jurisdictions, such a high level of proof is not legally required. This Court has noted that, under intermediate scrutiny, "we are weighing a legislative judgment, not evidence in a criminal trial," and "we should not conflate legislative findings with 'evidence' in the technical sense." *Pena*, 898 F.3d at 979 (quotation omitted).

This Court has already held that the evidence presented by the State is "precisely the type of evidence that [a government is] permitted to rely upon to substantiate its interest" under intermediate scrutiny. *Fyock*, 779 F.3d at 1001 (citing *City of Renton*, 475 U.S. at 51-52). The State's evidence has also been credited by other courts upholding similar LCM restrictions. *See, e.g.*, *Kolbe*, 42 F. Supp. 3d at 778-81, 781 n.17 (considering opinions of Christopher Koper, Daniel Webster, and Lucy Allen and the *Mother Jones*

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shootings that were not identified by *Mother Jones*. ER 294-95 (Allen Rep. ¶¶ 21-22).

compilation of mass shootings). The district court improperly rejected the State's evidence.[16]

The conclusion that LCMs pose a significant public safety risk is not "facially implausible" and is "fairly support[ed]" by the State's evidence. *Jackson*, 746 F.3d at 969 (quotation omitted). This evidence is more than sufficient to demonstrate that the Legislature and the people "have drawn reasonable inferences based on substantial evidence," *Pena*, 898 F.3d at 1001 (quoting *Turner II*, 520 U.S. at 195), that LCMs contribute to more fatalities and injuries in public mass shootings.

[16] Notably, the district court *sua sponte* rejected all of the State's expert reports on the ground that they—as were those of Plaintiffs, who did not object to the reports—were unsworn and not made on personal knowledge. ER 74 n.59. The district court's unprompted evidentiary ruling was error. Expert reports need not be sworn under penalty of perjury, nor based on personal knowledge. Fed. R. Civ. P. 26(a)(2)(B); Fed. R. Evid. 702. And even if there were "formal defects" in the reports, under Federal Rule of Civil Procedure 56, they "are waived absent a motion to strike or other objection." *See Scharf v. U.S. Attorney Gen.*, 597 F.2d 1240, 1243 (9th Cir. 1979). In any event, each of the expert witnesses was deposed in this action, offering the same opinions under oath and subject to cross-examination by Plaintiffs' counsel. Compounding this error, the district court favorably cited Plaintiffs' similarly unsworn expert reports. *See, e.g.*, ER 24, 34, 35. The district court's disparate treatment of the expert reports further demonstrates that the court failed to evaluate properly section 32310.

b. Large-Capacity Magazines Are Disproportionately Used in Gun Violence Against Law Enforcement Personnel

The dangers of LCMs are not limited to public mass shootings. LCMs have also featured prominently in violence against law enforcement personnel. *See Kolbe*, 849 F.3d at 127; *Heller II*, 670 F.3d at 1263; ER 418 (Koper Rep.) ("For the period of 2009 through 2013, LCM firearms constituted 41% of guns used in murders of police, with annual estimates ranging from 35% to 48%."); ER 254-55 (Graham Decl. ¶¶ 19(c)-(d), (f)) (discussing three incidents in which law enforcement officers were killed with firearms equipped with LCMs); ER 261 (James Decl. ¶ 7); ER 722-73 (Graham Dep.) (testifying about murder of sheriff's deputy with an LCM-equipped firearm that involved "a single stream of 17 rounds"). The evidence also shows that LCMs are overrepresented in gun violence against law enforcement when compared to their use in gun crime generally. ER 405 (Koper Rep.) (noting that "data from prior to the federal [assault weapons] ban indicated that LCMs were used in 31% to 41% of gun murders of police in contrast to their use in 13-26% of gun crimes overall").

Plaintiffs did not dispute the State's evidence concerning the overrepresentation of LCMs in gun violence against law enforcement personnel. Instead, the district court took judicial notice of a 2016 report of

the Federal Bureau of Investigation, indicating that the average number of rounds fired when law enforcement officers were killed and assaulted that year was 9.1 and "has never exceeded 10" since 2007. ER 80. The court inferred from this report that, "regardless of the magazine size used by a criminal shooting at a police officer, the average number of rounds fired is 10 or less, suggesting that criminalizing possession of a magazine holding more than 10 will have no effect (on average)." *Id.* The court's reliance on an *average* close to the ten-round limit does not negate the substantial benefits to law enforcement officers of imposing a ten-round limit in all circumstances, especially where that average suggests that more than ten rounds are, in fact, fired in at least some incidents in which officers are killed or injured. In any event, it is the province of the Legislature and the electorate—and not the courts—to weigh conflicting evidence and competing inferences in determining whether to restrict LCMs. *See Pena*, 898 F.3d at 980.

c. Large-Capacity Magazines Deprive the Public and Law Enforcement of Critical Pauses During Active Shootings

LCMs are particularly lethal because they enable a shooter to fire more rounds without having to reload—i.e., release the spent magazine, retrieve a replacement magazine, load the new magazine, re-acquire the target, and

resume firing. The ability to sustain fire reduces the "opportunities for victims to flee and bystanders to intervene," *ANJRPC*, 910 F.3d at 119, as well as opportunities for the shooter to fumble a new magazine or otherwise struggle to reload the weapon, *see* ER 360 (Klarevas Rev. Rep.) (providing examples in which active shooters were confronted while reloading). Forcing shooters to reload can, and has, afforded victims and law enforcement officers the opportunity to flee, hide, or intervene, and these critical pauses have saved lives. *See Kolbe*, 849 F.3d at 128 (referencing "important lesson learned from Newtown (where nine children were able to run from a targeted classroom while the gunman paused to change out a large-capacity thirty-round magazine)"); *see also Heller II*, 670 F.3d at 1264 (discussing "critical benefit" of "2 or 3 second pause" in mass shootings).

The district court discussed the mass shooting in Thousand Oaks, California—which occurred after the submission of Plaintiffs' motion—and claimed that "news pieces do not report witnesses describing a 'critical pause' when the shooter reloaded." ER 54:16-17. To the contrary, numerous news reports did indicate that victims were able to escape when the shooter reloaded his firearm. *See* Veronica Miracle, *Thousand Oaks Mass Shooting Survivor: "I Heard Somebody Yell, 'He's Reloading,'"* ABC News, Nov. 8, 2018 ("I heard somebody yell, 'He's reloading!' and that was

when a good chunk of us had jumped up and went and followed the rest of the people out the window."); USA Today Network Staff, *People Threw Barstools Through Window to Escape Thousand Oaks, California, Bar During Shooting*, USA Today, Nov. 8, 2018 ("At that point I grabbed as many people around me as I could and grabbed them down under the pool table we were closest to until he ran out of bullets for that magazine and had to reload.").[17]

d. Restrictions on Large-Capacity Magazines Are Effective in Reducing Their Use in Crime

Because LCMs can be used in a range of semiautomatic firearms—including both handguns and long guns—LCM restrictions have the greatest potential to "prevent and limit shootings in the state over the long-run." *NYSRPA*, 804 F.3d at 264 (citing the opinion of the State's expert, Christopher Koper); *accord Wiese*, 263 F. Supp. 3d at 992-93; ER 399, 411-12 (Koper Rep.); ER 1021-22 (Webster Decl. ¶¶ 25-26).

Contrary to the district court's declaration that the federal assault weapons ban was a "known failed experiment," ER 66, a comprehensive study of the ban demonstrated that it successfully reduced the use of LCMs

[17] True and correct copies of these news articles are attached as Exhibits 4 and 5 to the accompanying Motion to Take Judicial Notice.

in gun crimes. ER 414-16 (Koper Rep.); ER 1015, 1022 (Webster Decl. ¶¶ 17-26). While the use of LCMs initially remained steady or increased after the federal ban went into effect, due in large part to the massive stock of grandfathered and imported magazines exempted under the ban, LCM use in crime appeared to be decreasing by the early 2000s. ER 414-15 (Koper Rep.). A later investigation by the *Washington Post*, using more current data on criminal use of LCMs in Virginia, found that while the federal ban was in effect, crime guns with LCMs recovered by police declined from between thirteen percent to sixteen percent in 1994 to a low of nine percent by 2004. ER 415-16 (Koper Rep.). Once the federal ban expired in 2004, however, the number of recovered crime guns with LCMs more than doubled. *Id.* Section 32310, which is far more robust than the federal ban by, *inter alia*, eliminating all grandfathering of LCMs, can reasonably be expected to be more effective in reducing LCM use and its consequent harms. ER 422 (Koper Rep.).

The fact that there arguably might be less restrictive means to pursue the State's objectives does not undermine the constitutionality of section 32310. *See, e.g.*, ER 68-69 (suggesting various alternatives that California could adopt to enhance public safety, such as permitting honorably discharged members of the military or concealed-carry permit

holders to possess LCMs). The State's adopted means need not be the "least restrictive" means of serving its interests, *Jackson*, 746 F.3d at 969, nor does the fit need to be "perfect," *Kolbe*, 849 F.3d at 140. Moreover, the State's goals here would be achieved "less effectively" if the district court's preferred LCM restrictions were implemented. *See Silvester*, 843 F.3d at 829 (quoting *Fyock*, 779 F.3d at 1000). Allowing LCMs to be maintained in certain parts of the State at certain times, *see* ER 47, or adding exemptions for individuals to acquire and possess LCMs, *see* ER 68-69, would undermine the public safety objectives of section 32310 because even legally owned LCMs can be used in crime. *See e.g.*, ER 980-81 (Mayors Against Illegal Guns study) (noting that the Sandy Hook shooter stole his mother's lawfully acquired guns and LCMs before murdering her and 26 other victims); ER 296 (Allen Rep. ¶ 25) (finding that "shooters in at least 71% of mass shootings in the past 35 years obtained their guns legally (at least 68 of the 96 mass shootings) and at least 76% of the guns used in these 96 mass shootings were obtained legally (at least 170 of the 224 guns)").

e. Large-Capacity Magazines Can Endanger the Public Even When Used in Self-Defense

The evidence also indicates that, even if used in self-defense, LCMs can endanger the lives of others. Generally, when a gun is fired in self-

defense, individuals tend to fire until the magazine is empty. *See* ER 1642 ("When more than 2 shots were fired, it generally appeared that the initial response was to fire until empty"); ER 76 (noting that in two of the self-defense stories highlighted by the district court, each of the victims "empt[ied] her gun"). The firing of more bullets than necessary endangers the lives of bystanders. *See Kolbe*, 849 F.3d at 127 ("The State's evidence demonstrates that, when inadequately trained civilians fire weapons equipped with large-capacity magazines, they tend to fire more rounds than necessary and thus endanger more bystanders."); ER 1536 (Brady Report) ("In fact, because of potential harm to others in the household, passersby, and bystanders, too much firepower is a hazard. Indeed, in most-self-defense scenarios, the tendency is for defenders to keep firing until all bullets have been expended."); ER 1582 (same).

The district court dismissed this "collateral damage" concern by relying on the State's evidence that far fewer than ten rounds are fired in self-defense. ER 78-79. The court surmised that an LCM used in self-defense would not "translate into any greater risk of bystander injury . . . since it will likely be used only for brandishing or for the average 2.3 shots." ER 78-79. In that case, however, there would also be no need for an LCM to engage in self-defense. The district court also viewed the "worrisome scenario" of

stray rounds being fired in self-defense as "improbable and hypothetical," based on the low number of rounds fired in self-defense. ER 79. But according to that logic, the need for LCMs to engage in self-defense would be equally "improbable and hypothetical," further supporting the reasonable fit of section 32310.

f. California's Policy Reasons for Restricting Large-Capacity Magazines Are Entitled to Deference

Under intermediate scrutiny, the courts do not "substitute [their] own policy judgment for that of the legislature." *Pena*, 898 F.3d at 979. Yet that in effect is what the district court has done. ER 87 (acknowledging that its conclusions "are ultimately informed judgment calls"). In the court's view, the federal assault weapons ban "did not stop mass shootings nationally," section 32310 has "not stopped mass shootings in California, and it "is a failed policy experiment that has not achieved its goal." ER 69. It is not a court's role to "appraise the wisdom of [California's] decision to" restrict civilian access to LCMs. *Pena*, 898 F.3d at 980 (quoting *City of Renton*, 475 U.S. at 52). And the constitutionality of section 32310 cannot be judged solely on whether it "stopped mass shootings in California," ER 69, especially where the law also aims to *mitigate* the lethality of such shootings when they occur.

The district court concluded that the problem of burglary-related homicides is a greater problem than public mass shootings. *See* ER 10-11; *see also* ER 14 ("[M]ass shootings can seem to be a common problem, but in fact, are exceedingly rare. At the same time robberies, rapes, and murders of individuals are common, but draw little public notice."). The court surmised that, in a mass shooter's hands, a twelve- or fifteen-round LCM "enables a shooter to fire *slightly* more rounds, resulting only *sometimes* in *slightly* more rounds fired, or *slightly* more victims wounded, or *slightly* more wounds per victim, or *slightly* more fatalities," but in the hands of a homeowner defending "herself from a group of attacking invaders," the extra rounds "may be the slight, but saving, difference." ER 72 (emphasis added).[18] Contrary to the court's speculation on the need for LCMs in self-defense, the record and applicable case law are replete with studies showing

[18] The court claimed that "[c]itizens often use a gun to defend against criminal attack," citing a 1995 study of one of Plaintiffs' experts estimating that there are 2.2 to 2.5 million defensive gun uses by civilians each year. ER 10 & n.7. However, that expert has admitted that the current rate is much lower, without providing any factual basis or explanation for the discrepancy. *See Ass'n of N.J. Rifle & Pistol Clubs, Inc.*, No. 3:17-cv-10507, 2018 WL 4688345, at *8 (D.N.J. Sept. 28, 2018), *aff'd by ANJRPC*, 910 F.3d 106.

that, when LCMs are used in mass shootings, the additional rounds make the lethal difference and result in more causalities on average.

Similarly, the district court inferred from the State's evidence concerning the importance of the "critical pause" in mass shootings that, "from the perspective of a victim trying to defend her home and family, the time required to re-load a pistol after the tenth shot might be called a 'lethal pause.'" ER 81. In effect, the district court determined that LCMs are "'ideal' for domestic self-defense for many of the same reasons that such weapons are ideal for mass shootings"—e.g., LCMs enable more rounds to be fired and minimize pauses when reloading—and that "any regulation prohibiting law-abiding, responsible citizens from possessing [LCMs] sweeps too broadly." *Worman*, 922 F.3d at 40. This argument, however, "is too facile by half" and gives "short shrift to the legislature's prerogative . . . to weigh the evidence, choose among conflicting inferences, and make the necessary policy judgments," *id.* (quotation omitted), as the Legislature and the people did in enacting and enhancing section 32310. Viewed under the lens of intermediate scrutiny, and according due deference to the State, section 32310 does not violate the Second Amendment.

II. SECTION 32310 DOES NOT CONSTITUTE AN UNCONSTITUTIONAL TAKING

The district court held that the LCM possession ban imposes a "hybrid taking" and that, "the Takings Clause prevents [the State] from compelling the physical dispossession" of grandfathered LCMs "without just compensation." ER 90-91. Although section 32310(c) prohibits all LCM possession in the State, Plaintiffs are challenging the possession ban under the Takings Clause only as it applies to owners of previously grandfathered LCMs. ER 1960. This claim fails as a matter of law.[19]

Section 32310, which applies to personal property and not any interest in land, was enacted in accordance with the State's police powers—not its eminent domain powers. The use and enjoyment of personal property may be "restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; '[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power,'" without requiring compensation under the Takings Clause. *Lucas*

[19] Even if Plaintiffs could demonstrate that section 32310 effects a taking, "just compensation," and not a permanent injunction of a duly enacted law, would be an appropriate remedy. *See Knick v. Twp. of Scott, Penn.*, 139 S. Ct. 2162, 2179 (2019) ("Governments need not fear that our holding will lead federal courts to invalidate their regulations as unconstitutional. As long as just compensation remedies are available—as they have been for nearly 150 years—injunctive relief will be foreclosed.").

v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992) (citation omitted). In addition, section 32310 does not dispossess any individuals of their grandfathered LCMs, nor does it eliminate the value or utility of their magazines, in light of the various compliance options, including permanent modification of an LCM to hold no more than ten rounds.

A. Takings Claims Under the Fifth Amendment

The Takings Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides that private property shall not "be taken for public use, without just compensation." *Lingle v. Chevron U.S.A., Inc*., 544 U.S. 528, 536 (2005). Its purpose is to prohibit the "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transp. Co. v. City of N.Y.*, 438 U.S. 104, 123 (1978) (quotation omitted). Where, by contrast, the government exercises its police powers to protect the safety, health, and general welfare of the public, no compensable taking has occurred. *See Chi., B. & Q. R. Co. v. Illinois*, 200 U.S. 561, 593-594 (1906) ("It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is given." (quotation omitted)).

Takings claims are generally divided into two classes: physical and regulatory takings. A physical taking occurs when the government physically invades or takes title to property either directly or by authorizing others to do so. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). By contrast, a regulatory taking occurs where "government regulation of private property [is] so onerous that its effect is tantamount to a direct appropriation or ouster." *Lingle*, 544 U.S. at 537. The party asserting a facial takings challenge bears the burden of proof at trial. *Garneau v. City of Seattle*, 147 F.3d 802, 807 (9th Cir. 1998) (citations omitted). As explained below, section 32310 effects neither a physical nor a regulatory taking. *See Wiese*, 263 F. Supp. 3d at 995-97.

B. Section 32310 Is Not a Physical Taking

In a physical taking, the government exercises its eminent domain power to take private property for "public use." S*ee Lingle*, 544 U.S. at 536. However, courts have rejected takings challenges to laws banning the possession of dangerous weapons under a state's police powers. *See Akins v. United States*, 82 Fed. Cl. 619, 623-24 (2008) (holding that restrictions on sale and possession of device deemed to be a machine gun is not a taking (collecting cases)); *Fesjian v. Jefferson*, 399 A.2d 861, 865-66 (D.C. Ct. App. 1979) (holding that a ban on machine guns with various disposal

options is not a taking); *Maryland Shall Issue v. Hogan*, 353 F. Supp. 3d 400, 408-09 (D. Md. 2018) (rejecting theory that "a state may never ban possession of *any* item that is already lawfully owned" because "[t]his theory would entail a radical curtailment of traditional state police powers, one that flies in the face of a long history of government prohibitions of hazardous contraband"), *appeal docketed*, No. 18-2474 (4th Cir. Dec. 13, 2018).

Unlike those cases in which the government has permanently and physically occupied or appropriated private property for its own use, *see Horne*, 135 S. Ct. at 2427-29; *Loretto*, 458 U.S. at 432, 434-35, section 32310 is a valid exercise of the State's police powers to protect the public by eliminating the dangers posed by LCMs. *See supra* Section I.B.2 (discussing how section 32310 advances compelling public safety interests). The purpose of the statute is to remove LCMs from circulation in the State, not to transfer title to the government or an agent of the government for use in service of the public good. Cal. Penal Code § 32310(d). The Third Circuit rejected a similar takings challenge to New Jersey's LCM law prohibiting previously legal LCMs, observing that the state's "LCM ban seeks to protect public safety and therefore it is not a taking at all." *ANJRPC*, 910 F.3d at 124 n.32.

Moreover, even if a takings claim were cognizable here, only one of the disposal options listed in section 32310(d) would result in the transfer of grandfathered LCMs to the government—for destruction and not *use* by law enforcement. Owners of grandfathered LCMs have other options to comply with the statute, including modifying their LCMs permanently to hold no more than ten rounds. Cal. Penal Code § 16740(a).[20] Because LCM owners can keep their property and comply with section 32310, "[t]here is no actual taking." *ANJRPC*, 910 F.3d at 124; *see, e.g.*, *Wilkins v. Daniels*, 744 F.3d 409, 418-19 (6th Cir. 2014) (rejecting physical takings challenge to ban on possession of wild animals where owners could keep the animals if microchipped).

The State's LCM restrictions stand in stark contrast to the regulation challenged in *Horne*, which required raisin growers to relinquish a specific

[20] The district court determined that the other options listed in section 32310(d) force a physical taking because they are impractical. ER 90-91. The modification option, however, is a practical alternative that the court did not consider. Counsel for Plaintiffs has previously represented in correspondence to the Attorney General that "firearm dealers, manufactures, and members of the public, have, for years, been 'permanently altering' LCMs according to make them 'California compliant.'" ER 1921 (Dkt. 18). In any event, the "impracticality of any particular option . . . does not transform the regulation into a physical taking." *Wiese*, 306 F. Supp. 3d at 1198.

portion of their raisins to the government for sale, donation, or disposal. 135 S. Ct. at 2430. In *Horne*, the government argued that the regulation did not effect a taking because "if raisin growers don't like it, they can 'plant different crops,' or 'sell their raisin-variety grapes as table grapes or for use in juice or wine.'" *Id.* The Court rejected this "Let them sell wine" option because the property owner would be required to engage in a completely different commercial market. *See id.*; *see also id.* (noting that, in *Loretto*, the Court "rejected the argument that the New York law was not a taking because a landlord could avoid the requirement by ceasing to be a landlord" (citing *Loretto*, 458 U.S. at 439 n.17). Here, by contrast, owners of grandfathered LCMs may keep their magazines for lawful use in firearms, albeit with reduced capacity. *ANJRPC*, 910 F.3d at 124-25 ("Simply modifying the magazine to hold fewer rounds of ammunition than before does not 'destroy[] the functionality of the magazine." (quoting *Wiese*, 306 F. Supp. 3d at 1198)).[21]

[21] Although the New Jersey statute included an exception not present in section 32310, for a firearm that is "incapable of being modified to accommodate 10 or less rounds" and registered with the government, that exception was not material to the Third Circuit's determination. *ANJRPC*, 910 F.3d at 124-25. In any event, none of the Plaintiffs claim to possess a firearm that *requires* an LCM to operate.

C. Section 32310 Is Not a Regulatory Taking

Government regulations that "completely deprive an owner of '*all* economically beneficial us[e]' of her property" can constitute a compensable, regulatory taking. *Lingle*, 544 U.S. at 538 (quoting *Lucas*, 505 U.S. at 1019). But unlike physical takings, regulatory takings have only been recognized in the context of real property and do not occur when the value or use of personal property is diminished. *See Horne*, 135 S. Ct. at 2427 ("*Lucas* recognized that while an owner of personal property 'ought to be aware of the possibility that new regulation might even render his property economically worthless,' such an 'implied limitation' was not reasonable in the case of land." (quoting *Lucas*, 505 U.S. at 1027-28)); *Wiese*, 306 F. Supp. 3d at 1199 n.8 (questioning whether the regulatory takings analysis applies to personal property). Thus, even if section 32310 were to render previously grandfathered LCMs economically worthless or unusable, such an effect on *personal property* would not effect a regulatory taking. *See Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404, 411 (4th Cir. 2007) (rejecting regulatory takings challenge to state law banning the possession of video gambling machines by business that owned and distributed such machines). Any regulatory takings claim here should be rejected on that basis alone.

Even if a regulatory taking were cognizable in the context of personal property, section 32310 does not effect a regulatory taking for the same reasons it does not effect a physical taking. Section 32310 was an exercise of the State's police powers to promote public safety. "[G]overnment regulation—by definition—involves the adjustment of rights," but to require compensation whenever a regulation curtails the use or value of property "would effectively compel the government to regulate by *purchase*." *Andrus v. Allard*, 444 U.S. 51, 65 (1979). Because section 32310 was a proper exercise of the State's police powers, it cannot be a regulatory taking, even if it might "render [personal property] economically worthless" or unusable. *Lucas*, 505 U.S. at 1027-28.

In any event, section 32310 does not completely eliminate the use or value of grandfathered LCMs, as owners of grandfathered LCMs may modify their magazines to hold ten or fewer rounds. Cal. Penal Code §§ 16740, 32425(a). Such modifications preserve the core function of those magazines for use in firearms and enable the owners to sell or transfer those magazines in the State. *See Am. Sav. & Loan Ass'n v. Cnty. of Marin*, 653 F.2d 364, 368 (9th Cir. 1981) ("If the regulation is a valid exercise of the police power, it is not a taking if a reasonable use of the property remains." (citation omitted)).

For these reasons, section 32310 does not effect a physical or a regulatory taking as a matter of law.[22]

III. SECTION 32310 DOES NOT VIOLATE THE DUE PROCESS CLAUSE

Plaintiffs' due process challenge to the possession ban in section 32310(c) and (d) also fails as a matter of law.[23] Plaintiffs bear the burden of proof at trial on their due process claim. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Plaintiffs contend that the possession ban "changes the law retroactively" and "deprives an owner of private property without a permissible justification." ER 1951-52 (Compl. ¶¶ 33-34). Not so. The law applies *prospectively* and would penalize individuals who fail to comply with section 32310(d) by a future date; the

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[22] A regulatory taking may also occur when a regulation is the "functional equivalent to the classic [physical] taking in which government directly appropriates private property or ousts the owner," depending on "the regulation's economic impact on the claimant, the extent to which the regulation interferes with distinct investment-based expectations, and the character of the government action." *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013) (quoting *Lingle*, 544 U.S. at 539); *see also Penn Central Transp. Co.*, 438 U.S. at 124. The record does not contain any evidence concerning section 32310's economic impact or any owner's investment-based expectations.

[23] Although Plaintiffs' moved for summary judgment on their due process claim, the district court did not expressly rule on it. Nevertheless, the court ordered and adjudged that "Plaintiffs' motion for summary judgment is granted," ER 7, which necessarily included judgment on the due process claim.

statute does not penalize anyone for past conduct. Cal. Penal Code § 32310(c).

Section 32310 also serves compelling public safety goals. A regulation that fails to serve *any* legitimate governmental objective may be so arbitrary that it violates the Due Process Clause. But regulations "survive a substantive due process challenge if they were *designed to* accomplish an objective within the government's police power, and if a rational relationship existed between the provisions and purpose" of the regulations. *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 690 (9th Cir. 1993) (quotation omitted). In light of the evidence supporting the constitutionality of section 32310, when California voters passed Proposition 63, they "could have rationally believed at the time of enactment that the law would promote its objective." *MHC Fin. Ltd. P'ship*, 714 F.3d at 1130-31 (quotation omitted).

The possession ban was especially needed to address challenges to the effective enforcement of section 32310's original LCM restrictions. Because LCMs lack unique identifying features, it was difficult for law enforcement authorities to distinguish between grandfathered LCMs and illegally manufactured or imported LCMs. ER 257 (Graham Decl. ¶ 31); *see also Wiese*, 263 F. Supp. 3d at 993 (noting that "there was no way for law

enforcement to determine which magazines were 'grandfathered' and which were illegally transferred or modified to accept more than ten rounds after January 1, 2000" and that "a ban on the possession of [LCMs] will help address this enforcement issue"). If the ban on possession of formerly grandfathered LCMs is struck down, this enforcement issue will be exacerbated by the influx of new LCMs into the State before the district court's stay of the judgment, underscoring the importance of a comprehensive ban. Plaintiffs' due process claim fails as a matter of law.

IV. THE COURT SHOULD DIRECT THE DISTRICT COURT TO ENTER JUDGMENT IN FAVOR OF THE ATTORNEY GENERAL BECAUSE SECTION 32310 IS CONSTITUTIONAL AS A MATTER OF LAW

The record demonstrates that section 32310 is constitutional as a matter of law. Although the Attorney General did not move the district court for summary judgment, if this Court determines that section 32310 is constitutional based on the evidence in the record and the holdings of the six circuit courts upholding similar LCM restrictions, this Court should direct the district court to enter judgment for the Attorney General. *See Albino v. Baca*, 747 F.3d 1162, 1176-77 (9th Cir. 2014) (reversing grant of summary judgment with instructions for district court to enter judgment for nonmoving party that did not file a cross-motion for summary judgment); *see also Gonzalez v. CarMax Auto Superstores, LLC*, 840 F.3d 644, 655 (9th

Cir. 2016) (same); *Nozzi v. Hous. Auth.*, 806 F.3d 1178, 1199 (9th Cir. 2015) (same).

CONCLUSION

This Court should reverse the judgment and direct the district court to enter judgment in favor of the Attorney General.

Dated: July 15, 2019

Respectfully submitted,

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STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

ADDENDUM OF STATUTORY AUTHORITY

PENAL CODE
Part 6. Control of Deadly Weapons
Title 4. Firearms
Division 10. Special Rules Relating to Particular Types of Firearms or Firearm Equipment
Chapter 5. Large-Capacity Magazine
Article 1. Rules Governing Large-Capacity Magazines

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

(a) Except as provided in Article 2 (commencing with Section 32400) of this chapter and in Chapter 1 (commencing with Section 17700) of Division 2 of Title 2, any person in this state who manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, buys, or receives 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.

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

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

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

(1) Remove the large-capacity magazine from the state;

(2) Sell the large-capacity magazine to a licensed firearms dealer; or

(3) Surrender the large-capacity magazine to a law enforcement agency for destruction.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I hereby certify that on July 15, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

APPELLANT'S OPENING BRIEF

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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 July 15, 2019, at Los Angeles, California.

Beth L. Gratz	*s/ Beth L. Gratz*
Declarant	Signature

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