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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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WILLIAM WIESE, an individual;
JEERMIAH MORRIS, an individual;
LANCE COWLEY, an individual;
SHERMAN MACASTON, an individual;
ADAM RICHARDS, in his capacity
as Trustee of the Magazine Ban
Lawsuit Trust; CLIFFORD FLORES,
individually and as trustee of
the Flores Family Trust; L.Q.
DANG, an individual; FRANK
FEDEREAU, an individual; ALAN
NORMANDY, an individual; TODD
NIELSEN, an individual; THE
CALGUNS FOUNDATION; FIREARMS
POLICY COALITION; FIREARMS
POLICY FOUNDATION; and SECOND
AMENDMENT FOUNDATION;

Plaintiffs,

v.

XAVIER BECERRA, in his official
capacity as Attorney General of
California; and MARTHA SUPERNOR,
in her official capacity as
Acting Chief of the Department
of Justice Bureau of Firearms;

Defendants.

Civ. No. 2:17-903 WBS KJN

MEMORANDUM AND ORDER RE:
MOTION FOR PRELIMINARY
INJUNCTION

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1
2 Before the court is plaintiffs' Motion for Issuance of
3 Preliminary Injunction. (Docket No. 28.) The court held a
4 hearing on the request for a preliminary injunction on June 29,
5 2017.

6 I. Factual and Procedural History

7 This case concerns a challenge to California's
8 prohibition on the possession of gun magazines that can hold more
9 than ten bullets, or "large capacity" magazines ("LCM").¹
10 Although California had banned the purchase, sale, transfer,
11 receipt, or manufacture of such magazines since 2000, it did not
12 ban the possession of these magazines. Fyock v. City of
13 Sunnyvale, 779 F.3d 991, 994 (9th Cir. 2015). In effect,
14 Californians were allowed to keep large capacity magazines they
15 had obtained prior to 2000, but no one, with a few exceptions
16 such as law enforcement officers, has been allowed to obtain new
17 large capacity magazines since 2000.

18 On July 1, 2016, however, California enacted Senate
19 Bill 1446 ("SB 1446"), which amended California Penal Code §
20 32310, criminalizing the possession of large capacity magazines
21 as of July 1, 2017, regardless of when the magazines were
22 obtained. Then, on November 8, 2016, the California electorate
23 approved Proposition 63, which largely mirrors SB 1446. The
24 amended version of Section 32310 enacted by Proposition 63
25 requires that anyone possessing a large capacity magazine either

26
27 ¹ Large capacity magazines are defined under California
28 Penal Code § 16740 as any ammunition-feeding device with the
capacity to accept more than ten rounds.

1 remove the magazine from the state, sell the magazine to a
2 licensed firearms dealer, or surrender the magazine to a law
3 enforcement agency for its destruction prior to July 1, 2017.
4 Cal. Penal Code § 32310(d). The amended version of Section 32310
5 also provides that possession of a large capacity magazine as of
6 July 1, 2017 constitutes an infraction or a misdemeanor
7 punishable by a fine not exceed \$100 per large capacity magazine
8 and/or imprisonment in a county jail not to exceed one year. Id.
9 § 32310(c).

10 On April 28, 2017, plaintiffs filed the instant action
11 alleging that Section 32310 is unconstitutional. After amending
12 their complaint, plaintiffs filed a motion for a temporary
13 restraining order and preliminary injunction on June 12, 2017 and
14 a renewed motion on June 14, 2017. The court denied the request
15 for a temporary restraining order after a hearing on June 16,
16 2017 based on an insufficient showing of irreparable harm, given
17 plaintiffs' delay in filing suit and the fact that the court
18 would hold a hearing on plaintiffs' request for a preliminary
19 injunction before the large capacity magazine ban took effect on
20 July 1, 2017. (Docket No. 45.) The parties then filed
21 supplemental briefs regarding plaintiffs' request for a
22 preliminary injunction on June 23, 2017.

23 II. Discussion

24 Injunctive relief is "an extraordinary and drastic
25 remedy, one that should not be granted unless the movant, by a
26 clear showing, carries the burden of persuasion." Mazurek v.
27 Armstrong, 520 U.S. 968, 972 (1997) (citation omitted). In order
28 to obtain a preliminary injunction, the moving party must

1 establish (1) it is likely to succeed on the merits, (2) it is
2 likely to suffer irreparable harm in the absence of preliminary
3 relief, (3) the balance of equities tips in its favor, and (4) an
4 injunction is in the public interest. Winter v. Nat. Res. Def.
5 Council, Inc., 555 U.S. 7, 20 (2008); Fyock, 779 F.3d at 995-96.

6 Plaintiffs contend that California's large capacity
7 magazine ban violates the Second Amendment, is an
8 unconstitutional taking under the Fifth and Fourteenth
9 Amendments, is void for vagueness, and is overbroad. The court
10 proceeds to examine plaintiffs' showing with respect to each
11 claim below.

12 A. Second Amendment Challenge

13 1. Likelihood of Success on the Merits

14 To evaluate a Second Amendment claim, the court asks
15 whether the challenged law burdens conduct protected by the
16 Second Amendment, and if so, what level of scrutiny should be
17 applied. Fyock, 779 F.3d at 996 (citing United States v. Chovan,
18 735 F.3d 1127, 1136 (9th Cir. 2013)).

19 a. Burden on Conduct Protected by the Second
20 Amendment

21 There appears to be no dispute in this case that many
22 people inside and outside of California up to this point have
23 lawfully possessed large capacity magazines for lawful purposes.
24 See Heller v. District of Columbia, 670 F.3d 1244, 1261 (D.C.
25 Cir. 2011) ("Heller II") (finding that magazines holding more
26 than ten rounds were in "common use"). Indeed, there is evidence
27 that large capacity magazines are commonly possessed by law-
28 abiding citizens for lawful purposes and have been legally

1 possessed by many Californians for many years, notwithstanding
2 California's ban on the transfer of such magazines since 2000.
3 (See Curcuruto Decl. ¶¶ 6-8 (citing estimate that 114 million
4 magazines with eleven or more rounds were in consumer possession
5 between 1990 and 2015, just under half of the overall 230 million
6 pistol and rifle magazines owned during that time); Pls.' Request
7 for Judicial Notice, Ex. A (Cal. Dep't of Justice Finding of
8 Emergency at 1) ("There are likely hundreds of thousands of
9 large-capacity magazines in California at this time The
10 Department therefore expects many gun owners to be affected by
11 the new ban."); Youngman Decl. ¶ 9 (large capacity magazines are
12 commonly owned by millions of persons in the United States for
13 lawful purposes including target shooting, competition, home
14 defense, collecting, and hunting).)

15 Thus, notwithstanding California's existing ban on the
16 transfer of large capacity magazines, it appears that
17 California's ban on large capacity magazines burdens conduct
18 protected by the Second Amendment. See Fyock, 779 F.3d at 998
19 (district court did not clearly err in finding that a regulation
20 on large capacity magazines burdens conduct falling with the
21 scope of the Second Amendment). But see Kolbe v. Hogan, 849 F.3d
22 114, 135-37 (4th Cir. 2017) (en banc) (large capacity magazines
23 are not protected by the Second Amendment because they are
24 weapons most useful in military service).²

25 ² Because the court holds that California's large
26 capacity magazine ban burdens conduct protected by the Second
27 Amendment because these magazines are commonly possessed by law-
28 abiding citizens for lawful purposes, the court does not examine
whether the ban resembles longstanding provisions historically
exempted from the Second Amendment. See Fyock, 779 F.3d at 997.

1 b. Appropriate Level of Scrutiny

2 In determining what level of scrutiny applies to the
3 ban on large capacity magazines, the court considers (1) how
4 closely the law comes to the core of the Second Amendment right,
5 which is self-defense, and (2) how severely, if at all, the law
6 burdens that right. Fyock, 779 F.3d at 998-99 (citing Chovan,
7 735 F.3d at 1138). Intermediate scrutiny is appropriate if the
8 regulation does not implicate the core Second Amendment right or
9 if the regulation does not place a substantial burden on that
10 right. Id. at 998-99 (citing Jackson v. City & County of San
11 Francisco, 746 F.3d 953, 964 (9th Cir. 2014)).

12 Here, the court finds that intermediate scrutiny is
13 appropriate because “the prohibition of . . . large capacity
14 magazines does not effectively disarm individuals or
15 substantially affect their ability to defend themselves.” Heller
16 v. District of Columbia, 670 F.3d 1244, 1262 (D.C. Cir. 2011)
17 (“Heller II”); Fyock, 779 F.3d at 999 (quoting Heller II). The
18 ban may implicate the core of the Second Amendment because it
19 restricts the ability of law-abiding citizens to possess large
20 capacity magazines within their homes for self-defense. See
21 Fyock, 779 F.3d at 999. However, the ban “does not affect the
22 ability of law-abiding citizens to possess the ‘quintessential
23 self-defense weapon’--the handgun. Rather, [it] restricts
24 possession of only a subset of magazines that are over a certain
25 capacity.” Id. (quoting District of Columbia v. Heller, 554 U.S.
26 570, 629 (2008) (“Heller I”)).

27 Indeed, it appears that virtually every other court to
28 examine large capacity magazine bans has found that intermediate

1 scrutiny is appropriate, assuming these magazines are protected
2 by the Second Amendment. See Fyock, 779 F.3d at 999; Kolbe, 849
3 F.3d at 138-139; N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo,
4 804 F.3d 242, 258-60 (2d Cir. 2015); Heller II, 670 F.3d at 1261-
5 62; S.F. Veteran Police Officers Ass'n v. City & County of San
6 Francisco, 18 F. Supp. 3d 997, 1002-04 (N.D. Cal. 2014). But see
7 Friedman v. City of Highland Park, 784 F.3d 406 (7th Cir. 2015)
8 (upholding municipal ban on assault weapons and large capacity
9 magazines but declining to determine what level of scrutiny
10 applied).

11 Accordingly, because California's ban does not
12 substantially burden individuals' ability to defend themselves,
13 intermediate scrutiny is appropriate.

14 c. Application of Intermediate Scrutiny

15 Intermediate scrutiny requires "(1) the government's
16 stated objective to be significant, substantial, or important;
17 and (2) a reasonable fit between the challenged regulation and
18 the asserted objective." Fyock, 779 F.3d at 1000 (quoting
19 Chovan, 735 F.3d at 1139). This test does not require that the
20 government's regulation is the least restrictive means of
21 achieving its interests. Rather, the government need only show
22 that the regulation "promotes a substantial government interest
23 that would be achieved less effectively absent the regulation."
24 Id. (citation omitted). In reviewing the fit between the
25 government's stated objective and the regulation, the court may
26 consider legislative history as well as studies in the record or
27 applicable case law. Id. The evidence need only "fairly
28 support" the state's rationale, and in making this determination,

1 courts "afford substantial deference to the predictive judgments
2 of the legislature." N.Y. State Rifle, 804 F.3d at 261
3 (citations omitted); see also Kolbe, 849 F.3d at 140 (court must
4 give substantial deference to the legislature, because "it is the
5 legislature's job, not ours, to weigh conflicting evidence and
6 make policy judgments") (citations omitted).

7 One stated objective of California's large capacity
8 magazine ban is to reduce the incidence and harm of mass
9 shootings. (Gordon Decl., Ex. 50 § 2, ¶ 11; § 3, ¶ 8.) There
10 can be no serious argument that this is not a substantial
11 government interest, especially in light of several recent high
12 profile mass shootings involving large capacity magazines,
13 including the 2016 Orlando Pulse nightclub shooting, the 2015 San
14 Bernardino shooting, the 2012 Aurora movie theater shooting, the
15 2012 Sandy Hook school shooting, the 2011 Arizona shooting
16 involving then-U.S. Representative Gabrielle Giffords, and the
17 2007 Virginia Tech shooting, all of which resulted in multiple
18 deaths and injuries. (See Webster Decl. ¶ 10; Graham Decl. ¶ 19;
19 Donohue Decl. ¶ 29.)

20 Further, defendants have provided studies and expert
21 analyses supporting their conclusion that California's ban would
22 further these objectives. (See Gordon Decl., Ex. 34 at 87, 89,
23 97; Webster Decl. ¶¶ 12, 21, 25-26; Donohue Decl. ¶¶ 21, 29;
24 Gordon Decl., Ex. 54 at 2; Gordon Decl., Ex. 62 at 10.) Multiple
25 courts have found a reasonable fit between similar bans with
26 similar stated objectives. See Kolbe, 849 F.3d at 139-41
27 (reasonable fit between assault weapon and LCM ban and interest
28 in reducing harm caused by criminals and preventing unintentional

1 misuse by otherwise law-abiding citizens); Fyock, 779 F.3d at
2 1000-01 (reasonable fit between LCM ban and interests in reducing
3 the harm of intentional and accidental gun use and reducing
4 violent crime); N.Y. State Rifle, 804 F.3d at 263-64 (reasonable
5 fit between assault weapon and LCM ban and interest in
6 controlling crime); Heller II, 670 F.3d at 1262-64 (reasonable
7 fit between assault weapon and large capacity magazine ban and
8 interest in protecting police officers and controlling crime);
9 S.F. Veteran Police Officers, 18 F. Supp. 3d at 1003-04
10 (reasonable fit between LCM ban and goals of protecting public
11 safety and reducing injuries from criminal use of LCMs).

12 Reasonable minds will always differ on such questions
13 as the best way to reduce the incidence and harm of mass
14 shootings, or whether that can even be accomplished at all. In
15 order for there to be a reasonable fit between the objective
16 sought to be achieved and the proposed solution, however, the
17 solution need not be the best possible means of achieving the
18 objective. Defendants are not required to show a perfect fit,
19 only a reasonable fit, between the ban and the important
20 objective of easing enforcement of California's existing ban on
21 the purchase, sale, transfer, or importation of large capacity
22 magazines.

23 The prior ban did not prohibit possession, and there
24 was no way for law enforcement to determine which magazines were
25 "grandfathered" and which were illegally transferred or modified
26 to accept more than ten rounds after January 1, 2000. (Gordon
27 Decl., Ex. 46 at 3; Graham Decl. ¶ 30; Gordon Decl., Ex. 62 at
28 10.) The evidence indicates that a ban on the possession of

1 large capacity magazines will help address this enforcement
2 issue. (See Gordon Decl., Ex. 62 at 10.) Further, after the
3 2004 federal ban on large capacity magazines was lifted, the
4 illegal importation of LCMs into California increased, giving
5 further impetus to California's efforts to ease enforcement of
6 its existing ban. (See Graham Decl. ¶ 23; Gordon Decl., Ex. 63.)
7 The proposed ban will facilitate that effort.

8 The court recognizes plaintiffs' evidence that few
9 California shootings have involved large capacity magazines, that
10 there is no evidence that any of these shootings involved
11 grandfathered large capacity magazines, and that violent
12 criminals might still be capable of inflicting great harm after
13 the enactment of a ban. (See, e.g., Moody Decl. ¶¶ 9-17; Ayooob
14 Decl. ¶¶ 8-12.) However, it is not necessary for defendants to
15 show, or for the court to find, that the proposed ban will
16 eliminate all gun violence in California, or that it would have
17 prevented any of the past incidents of gun violence. Nor is it
18 the role of this court to judge the wisdom of the California
19 legislature in enacting the statutes at issue here. It is only
20 for this court to determine whether those duly enacted statutes
21 pass constitutional muster under the test which the decisions of
22 higher courts require this court to apply. See N.Y. State Rifle,
23 804 F.3d at 261 (citations omitted); Kolbe, 849 F.3d at 140.

24 Overall, it appears that California's stated interests
25 of reducing the incidence and harm of mass shootings and easing
26 enforcement of the state's existing ban "would be achieved less
27 effectively absent the regulation," Fyock, 779 F.3d at 1000, and
28 thus there is a reasonable fit between the ban and California's

1 important objectives. Because of this reasonable fit, plaintiffs
2 have not shown that the large capacity magazine ban fails
3 intermediate scrutiny and have not shown a likelihood of success
4 on the merits on their Second Amendment claim.

5 2. Irreparable Injury, Balance of Hardships, and the
6 Public Interest

7 Because plaintiffs have not met their burden of showing
8 the likelihood of success on the merits of their Second Amendment
9 claim, preliminary injunctive relief must be denied,
10 notwithstanding the court's findings with respect to irreparable
11 injury, balance of hardships or the public interest. See Winter,
12 555 U.S. at 20 ("A plaintiff seeking a preliminary injunction
13 just establish that he is likely to succeed on the merits, that
14 he is likely to suffer irreparable harm in the absence of
15 preliminary relief, that the balance of equities tips in his
16 favor, and that an injunction is in the public interest.")
17 (emphasis added).

18 That said, if plaintiffs are correct that the large
19 capacity magazine ban violates the Second Amendment, it appears
20 that plaintiffs will likely suffer irreparable injury by having
21 to surrender their large capacity magazines, which are
22 irreplaceable due to California's ban on the transfer of large
23 capacity magazines, in violation of their Second Amendment
24 rights. "[C]onstitutional violations cannot be adequately
25 remedied through damages and therefore generally constitute
26 irreparable harm." Am. Trucking Ass'ns v. City of Los Angeles,
27 559 F.3d 1046, 1059 (9th Cir. 2009) (citation omitted); see also
28 Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012) ("[T]he

1 deprivation of constitutional rights 'unquestionably constitutes
2 irreparable injury.'" (quoting Elrod v. Burns, 427 U.S. 347, 373
3 (1976)).

4 While defendants claim there is no irreparable harm
5 because plaintiffs may store their magazines out of state, sell
6 them to licensed dealers, or permanently modify their magazines,
7 there is little evidence as to whether these are in fact viable
8 options for plaintiffs or Californians generally. Accordingly,
9 if plaintiffs were able to show a likelihood of success on the
10 merits of their Second Amendment claim, this factor would weigh
11 in favor of granting a preliminary injunction.

12 The other Winter factors, however, do not weigh in
13 favor of granting preliminary injunctive relief. Withholding an
14 injunction may result in the violation of plaintiffs' Second
15 Amendment rights and the unlawful forced loss of their personal
16 property, but granting an injunction would also result in a
17 substantial hardship to defendants. The State has a substantial
18 interest in preventing and limiting gun violence, as well as in
19 enforcing validly enacted statutes. See Maryland v. King, 133 S.
20 Ct. 1, 3 (2012) ("Any time a State is enjoined by a court from
21 effectuating statutes enacted by representatives of its people,
22 it suffers a form of irreparable injury."). Such interest is
23 especially strong here, where the ban was enacted first by the
24 state legislature and then through a state-wide proposition
25 approved by a majority of voters.

26 Further, while the public's interest is furthered by
27 the protection of individuals' Second Amendment rights, assuming
28 the ban infringes those rights, the public interest is also

1 furthered by preventing and minimizing the harm of gun violence,
2 and in making it easier to enforce California's existing ban on
3 the sale, purchase, transfer, or importation of large capacity
4 magazines, pursuant to a bill enacted by the California
5 Legislature and a proposition approved by the California
6 electorate.

7 Given the substantial hardships that may result to both
8 sides in this litigation based on the granting or withholding of
9 a preliminary injunction, and the dueling substantial public
10 interests, plaintiffs have not shown that the balance of
11 hardships or the public interest favor granting a preliminary
12 injunction. Further, as discussed above, plaintiffs have not
13 shown a likelihood of success on the merits of their Second
14 Amendment claim. Accordingly, the court will deny plaintiffs'
15 request for a preliminary injunction based on their Second
16 Amendment claim.

17 B. Takings Clause/Due Process Challenge

18 The Fifth Amendment prohibits the taking of private
19 property for public use without just compensation. U.S. Const.
20 amend. V. Plaintiffs argue that the magazine ban operates as an
21 unconstitutional taking under the Fifth and Fourteenth Amendments
22 because they will have to physically turn over their magazines
23 for destruction or, in the alternative, they will be completely
24 deprived of all beneficial use of their magazines, without just
25 compensation.

26 Preliminarily, the court is not persuaded that
27 plaintiffs will likely succeed on the merits of their takings
28 claim. Plaintiffs have not cited, and the court is unaware of,

1 any case holding that a complete ban on personal property deemed
2 harmful to the public by the state is a taking for public use
3 which requires compensation. Further, the Supreme Court's
4 decision in Heller I said nothing which could be interpreted as
5 suggesting that a city or state's ban of a previously lawful
6 firearm or firearm component would require compensation to
7 existing owners of those firearms or components. See Heller I,
8 554 U.S. at 626-27 (stating that reasonable gun regulations were
9 permissible and implying that a complete ban on machine guns, for
10 example, was permissible).

11 A long line of federal cases has authorized the taking
12 or destruction of private property in the exercise of the state's
13 police power without compensation. See Mugler v. Kansas, 123
14 U.S. 623, 669 (1887) ("The exercise of the police power by the
15 destruction of property which is itself a public nuisance . . .
16 is very different from taking property for public use In
17 the one case, a nuisance only is abated; in the other,
18 unoffending property is taken away from an innocent owner.");
19 Akins v. United States, 82 Fed. Cl. 619, 622-23 (2008) ("Property
20 seized and retained pursuant to the police power is not taken for
21 a 'public use' in the context of the Takings Clause" and thus no
22 compensation was due where a federal agency ordered, pursuant to
23 federal law, an inventor to surrender a device later classified
24 by the agency as a machine gun) (quoting AmeriSource Corp. v.
25 United States, 525 F.3d 1149, 1153 (Fed. Cir. 2008)); Fesjian v.
26 Jefferson, 399 A.2d 861 (D.C. Ct. App. 1979) (no compensation is
27 due where a municipality bans machine guns or semi-automatic
28 weapons capable of firing more than twelve rounds without manual

1 reloading); accord Wilkins v. Daniels, 744 F.3d 409, 419 (6th
2 Cir. 2014) (law banning wild animals unless they were implanted
3 with microchips did not operate as a physical taking because
4 owners retained the ability to use and possess their animals and
5 the implanted microchips, and the act was "close kin to the
6 general welfare regulations that the Supreme Court ensured were
7 not constitutionally suspect").

8 More importantly, even assuming, without deciding, that
9 the large capacity magazine ban operates as a taking requiring
10 just compensation, injunctive relief is generally not available
11 for takings claims. The Takings Clause "is designed not to limit
12 the governmental interference with property rights per se, but
13 rather to secure compensation in the event of [an] otherwise
14 proper interference amounting to a taking." First English
15 Evangelical Lutheran Church of Glendale v. County of Los Angeles,
16 482 U.S. 304, 315 (1987); see also Lingle v. Chevron, 544 U.S.
17 528, 543 (2005) (Due Process clause "does not bar government from
18 interfering with property rights" but only requires compensation
19 in event of interference amounting to a taking) (citing First
20 English Lutheran Church, 428 U.S. at 315).

21 As explained by one legal scholar, "if a local
22 government is regulating land use to protect the community and
23 the owner has the opportunity to sue for compensation based on
24 any taking that might result, the owner cannot sue to block
25 enforcement of the regulation under the Takings Clause." John D.
26 Echeverria, Eschewing Anticipatory Remedies for Takings: A
27 Response to Professor Merrill, 128 Harv. L. Rev. Forum 202, 204
28

1 (2015).³ Moreover, “[t]he Fifth Amendment does not require that
2 compensation precede the taking.” Ruckelshaus v. Monsanto Co.,
3 467 U.S. 986, 1016 (1984) (citation omitted).

4 Thus, an allegation that a law operates as an illegal
5 taking because there was no just compensation is not ground to
6 void the law, as “the government is not prohibited from taking
7 private property; indeed, the eminent domain clause contemplates
8 that the government will take private property as needed for
9 public purposes, so long as it pays compensation.” Bay View,
10 Inc. v. Ahtna, Inc., 105 F.3d 1281, 1284-85 (9th Cir. 1997)
11 (citing Evangelical Lutheran Church, 482 U.S. at 314).

12 Plaintiffs’ cited cases do not establish that a
13 preliminary injunction is available for a takings claim. Most of
14 the cases involve California courts applying California law.
15 Plaintiffs cite Lingle, 544 U.S. at 528, though as discussed
16 above, that case actually stands for the proposition that
17 injunctive relief is generally not available for an alleged
18 taking. Plaintiffs also cite Golden Gate Hotel Association v.
19 City & County of San Francisco, 836 F. Supp. 707, 709 (N.D. Cal.
20 1993), where an injunction was granted based on a takings claim,
21 but that decision was reversed by the Ninth Circuit based on a
22 statute of limitations issue, 18 F.3d 1482 (9th Cir. 1994).

23 Plaintiffs’ supplemental brief cites Babbitt v. Youpee,
24 519 U.S. 234 (1997), where Native Americans challenged a law
25 providing that certain small interests in Indian lands would
26

27 ³ John D. Echeverria, the author of the quoted article,
28 is a professor at Vermont Law School, not to be confused with
counsel for defendants with the same name.

1 transfer (or "escheat") to the tribe upon the death of the owner
2 of the interest if they did not generate at least \$100 in income
3 to the owner in any one of the five years before it was due to
4 escheat. While that decision provides some support for
5 plaintiffs' position, it did not involve review a preliminary
6 injunction, but rather a summary judgment.

7 Moreover, the Court in Babbitt did not address the rule
8 repeated in numerous cases that injunctive relief is generally
9 not available for a takings claim, or why that rule did not
10 apply. The Court may have found that an injunction was
11 appropriate there because of the speculative nature of the
12 property that was taken--a future interest in land that may or
13 may not be lost depending on future circumstances--meaning that
14 the normal remedy of filing suit to recover the value of the lost
15 property was not a realistic remedy. The Court also noted the
16 "extraordinary character" of the regulation, which "amounted to
17 the virtual abrogation of the right to pass on a certain type of
18 property." Id. at 239-40.

19 Should plaintiffs succeed on their takings claim, their
20 only remedy is money damages, or compensation for the value of
21 the magazines which they are forced to surrender to the state.⁴
22 Accord United States v. Riverside Bayview Homes, Inc., 474 U.S.
23 121, 129 n.6 (1985) (stating that if a federal government action
24 operated as a taking of plaintiff's property, the proper course

25 ⁴ The court expresses no opinion at this time whether
26 this suit would be a proper vehicle for obtaining compensation
27 from the State, though the court notes that the First Amended
28 Complaint only seeks declaratory and injunctive relief with
respect to the Fifth Amendment takings claim. (See, e.g., First
Am. Compl. ¶¶ 79-80.)

1 was to initiate a suit for compensation in the Court of Federal
2 Claims). Accordingly, plaintiffs have not met their burden of
3 showing their entitlement to a preliminary injunction based on
4 their takings claim.

5 C. Vagueness Claim

6 The Fifth Amendment also provides that “[n]o person
7 shall . . . be deprived of life, liberty, or property, without
8 due process of law.” U.S. Const. amend. V. The government
9 violates due process when it deprives an individual of life,
10 liberty, or property pursuant to an “unconstitutionally vague”
11 criminal statute. Johnson v. United States, 135 S. Ct. 2551,
12 2557 (2015). A statute is unconstitutionally vague when it
13 “fails to provide a person of ordinary intelligence fair notice
14 of what is prohibited, or is so standardless that it authorizes
15 or encourages seriously discriminatory enforcement.” United
16 States v. Williams, 553 U.S. 285, 304 (2008).

17 First, plaintiffs claim that the ban is vague because
18 SB 1446 and Proposition 63 created two different versions of
19 California Penal Code § 32406, and it is not clear which version
20 applies. SB 1446 exempts six classes of individuals/entities--
21 (1) honorably retired law enforcement officers, (2) historical
22 societies and museums, (3) persons who find and deliver large
23 capacity magazines to law enforcement agencies, (4) forensic
24 laboratories, (5) trustees and executors, and (6) persons in
25 lawful possession of a firearm acquired prior to 2000 that is
26 only compatible with a large capacity magazines--from the
27 prohibition on possession of these magazines. In contrast, the
28 Proposition 63 version only exempts honorably retired law

1 enforcement officers. (See Pls.' Req. for Judicial Notice, Exs.
2 C (SB 1446 Version of Cal. Penal Code § 32406), and D
3 (Proposition 63 Version of Cal. Penal Code § 32406).) In their
4 view, it is not clear what conduct the ban prohibits, given these
5 dual versions of section 32406.

6 However, plaintiffs do not cite, and the court is
7 unaware of, any case that has held an enactment to be void for
8 vagueness because it conflicts with another enactment and it is
9 not clear which enactment controls. The only case of which the
10 court is aware where that argument was made held that such
11 enactments were not void for vagueness. See Karlin v. Foust, 188
12 F.3d 446, 469 (7th Cir. 1999) (holding that the question before
13 the court was whether one enactment impliedly repealed the other,
14 not whether the enactments are void for vagueness).

15 Even if the court were to depart from Karlin and
16 consider plaintiffs' vagueness challenge on grounds of
17 conflicting enactments, that challenge would fail. Under
18 California law, where two conflicting versions of the same
19 statute are enacted at different times, the later-enacted version
20 controls. People v. Bustamante, 57 Cal. App. 4th 693, 701 (2d
21 Dist. 1997) (citing County of Ventura v. Barry, 202 Cal. 550, 556
22 (1927) and People v. Dobbins, 73 Cal. 257, 259 (1887)). It is
23 not beyond the capacity of individuals with ordinary intelligence
24 to look up the enactment dates of Proposition 63 and SB 1446 and
25 see that Proposition 63 was enacted after SB 1446. As
26 Proposition 63 was passed after SB 1446, its version of
27 California Penal Code § 32406 is controlling. Accordingly, the
28 court rejects plaintiffs' claim that the large capacity magazine

1 ban is unconstitutionally vague on account of the passage of both
2 SB 1446 and Proposition 63.

3 Second, plaintiffs contend that the ban is vague
4 because while it exempts possession for retired law enforcement
5 officers, and in the case of SB 1446, trustees or administrators
6 of estates, it does not exempt these individuals from prosecution
7 for manufacturing, importing, keeping for sale, offering for
8 sell, giving, lending, buying, or receiving large capacity
9 magazines.⁵ See Cal. Penal Code § 32310(a). According to
10 plaintiffs, this "results in a paradoxical situation that retired
11 law enforcement officers [and trustees and executors] are
12 supposedly entrusted with the right to possess large-capacity
13 magazines," but "cannot bring into the state, nor even receive
14 these magazines." (Docket No. 28-1 at 42-43.)

15 Given the court's determination that the Proposition 63

16 ⁵ In addition to this concern, plaintiffs contend that
17 absence of clarification from the California Department of
18 Justice as to a number of questions having to do with application
19 of the magazine ban—those having to do with disposal of
20 magazines, modification of magazines, and magazines which may
21 accommodate different size shells—raise additional "vagueness
22 concerns." (See Docket No. 47 at 23-24.) The court declines to
23 consider such concerns in deciding plaintiffs' request for a
24 preliminary injunction because the concerns were not raised in
25 plaintiffs' moving papers. See Zamani v. Carnes, 491 F.3d 990,
26 997 (9th Cir. 2007) ("The district court need not consider
27 arguments raised for the first time in a reply brief.") (citation
28 omitted). Even if the court were inclined to consider such
concerns, it is not persuaded that the concerns amount to
anything more than marginal questions existing alongside a
statute whose application is clear in the vast majority of
intended applications. See Cal. Teachers Ass'n v. State Bd. of
Educ., 271 F.3d 1141, 1151 (9th Cir. 2001) ("[U]ncertainty at a
statute's margins will not warrant facial invalidation if it is
clear what the statute proscribes 'in the vast majority of its
intended applications.'" (quoting Hill v. Colorado, 530 U.S.
703, 733 (2000))).

1 version of the statute is controlling, SB 1446's exemption for
2 possession of large capacity magazines by trustees or
3 administrators of estates is no longer in effect. Looking to the
4 ban's exemption for possession by retired law enforcement
5 officers, the court rejects plaintiffs' contention that it is
6 "paradoxical" to allow these individuals to possess these
7 magazines but prohibit them from manufacturing, importing into
8 the state, keeping for sale, offering for sale, giving, lending,
9 buying, or receiving them. It is entirely possible to possess a
10 large capacity magazine without engaging in those other
11 activities. Because there is no "paradox" in the application of
12 the 'retired officer' exemption to California Penal Code section
13 32310(a), this exemption does not support plaintiffs' vagueness
14 claim.

15 In sum, plaintiffs have not shown a likelihood of
16 success on the merits as to their vagueness claim. Moreover, for
17 the same reasons discussed above in connection with the Second
18 Amendment claim, plaintiffs have not shown that the balance of
19 hardships or public interest weigh in favor of granting a
20 preliminary injunction. Accordingly, the court will deny
21 plaintiffs' request for a preliminary injunction as to their
22 vagueness claim.

23 D. Overbreadth Claim

24 Plaintiffs argue that the large capacity magazine ban
25 is unconstitutionally overbroad because there is no evidence that
26 application of the ban to current owners of large capacity
27 magazines would further the objectives of reducing mass shootings
28 and the harm inflicted during those shootings.

1 First, the court is unaware of any cases applying the
2 overbreadth doctrine in the Second Amendment context. See United
3 States v. Chester, 628 F.3d 673, 688 (4th Cir. 2010) (Davis, J.,
4 concurring) (“[I]mporting the overbreadth doctrine . . . into the
5 Second Amendment context would be inappropriate.”); cf. United
6 States v. Salerno, 481 U.S. 739, 745 (1987) (“[W]e have not
7 recognized an ‘overbreadth’ doctrine outside the limited context
8 of the First Amendment.” (citation omitted)). Plaintiffs provide
9 no reason for the court to expand the overbreadth doctrine to the
10 Second Amendment.

11 Second, challenging a law on overbreadth grounds
12 requires a showing that the law prohibits “a substantial amount”
13 of constitutionally protected conduct. Powell’s Books, Inc. v.
14 Kroger, 622 F.3d 1202, 1208 (9th Cir. 2010). Plaintiffs fail to
15 show what constitutionally protected conduct the law
16 substantially prohibits. Plaintiffs argue that the law is
17 overbroad because there is no evidence that current owners of
18 large capacity magazines “have ever been involved in mass
19 shootings, gun crimes, or in anything other than purely lawful
20 activities,” (Pls.’ Mot. 44). However, because plaintiffs have
21 not shown a likelihood of success on their Second Amendment claim
22 they are similarly unlikely to succeed on their claim that the
23 law prohibits a substantial amount of constitutionally protected
24 conduct.

25 Further, for the reasons discussed above in connection
26 with the Second Amendment claim, plaintiffs have not shown that
27 the balance of hardships or public interest weigh in favor of
28 granting a preliminary injunction. Accordingly, the court will

1 deny plaintiffs' request for a preliminary injunction as to their
2 overbreadth claim.

3 IT IS THEREFORE ORDERED that plaintiffs' Renewed Motion
4 for Issuance of Preliminary Injunction (Docket No. 28) be, and
5 the same hereby is, DENIED.

6 Dated: June 29, 2017



7 WILLIAM B. SHUBB
8 UNITED STATES DISTRICT JUDGE
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