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 Appellees,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; AND DOES 1-10,
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 REPLY BRIEF

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INTRODUCTION

Large-capacity magazines (LCMs) enhance the lethality of firearms, enabling a shooter to fire more rounds in a given period of time without reloading, resulting in more shots fired, more shots per victim, and more victims killed. Consistent with the overwhelming weight of authority, the State's decision to enact a reasonable, ten-round capacity-limitation on civilian firearm magazines fully comports with the Second Amendment. And the California electorate's decision to strengthen the State's LCM restrictions by prohibiting the possession of previously grandfathered LCMs does not effect a taking of private property for public use.

First, California Penal Code section 32310 does not burden conduct protected by the Second Amendment. But even if it did, the statute is subject to intermediate scrutiny, as this Court has already held, because it merely restricts civilian access to a subset of magazines and does not substantially impair the ability of law-abiding citizens to use firearms for self-defense in the home. The evidence shows that section 32310 satisfies 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 gun violence against law-enforcement personnel.

In restricting civilian magazines to ten rounds—without limiting the number of ten-round magazines that may be lawfully owned or the manner in which such

magazines may be stored and used—the State has "select[ed] among reasonable alternatives in its policy decisions," notwithstanding Plaintiffs' "conflicting legislative evidence" and competing inferences from the 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). Under intermediate scrutiny, it is not the Court's role "to re-litigate a policy disagreement that the California legislature already settled" nearly two decades ago. *Id.*

Second, Plaintiffs' takings claim also fails. Despite Plaintiffs' refrain that the new possession law "dispossesses" owners of grandfathered LCMs, the fact remains that those individuals may retain possession of their magazines if they permanently modify them to hold no more than ten rounds of ammunition. In any event, the State may, under its police powers, prohibit possession of personal property that threatens public safety without paying just compensation under the Takings Clause, let alone warranting a permanent injunction of an important public-safety measure.

The Court should reverse the judgment and, given that section 32310 is constitutional as a matter of law, direct the district court to enter judgment in the Attorney General's favor.

ARGUMENT

I. CALIFORNIA'S LARGE-CAPACITY MAGAZINE RESTRICTIONS DO NOT VIOLATE THE SECOND AMENDMENT

Under this Court's two-step inquiry for Second Amendment claims, the party challenging a law under the Second Amendment must first show that the law burdens conduct protected by the Second Amendment, and if so, the government must then show that the law satisfies the applicable level of constitutional scrutiny. Opening Br. at 21-23.

Every federal circuit court that has examined LCM restrictions on the merits—six in total—has applied the same two-step framework adopted by this Court, upholding ten-round LCM restrictions, like section 32310, under intermediate scrutiny at step two. *See Worman v. Healey*, 922 F.3d 26, 38-41 (1st Cir. 2019), *cert. petition filed*, No. 19-404 (Sept. 23, 2019); *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney General N.J.* (*ANJRPC*), 910 F.3d 106, 117-24 (3d Cir. 2018);[1] *Kolbe v. Hogan*, 849 F.3d 114, 138-46 (4th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 469 (2017); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*,

[1] Although *ANJRPC* arose from the denial of a preliminary injunction motion, *see* Answering Br. at 45, the district court on remand entered judgment for the state because *ANJRPC* "is binding Third Circuit precedent that the New Jersey law is constitutional." *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Grewal*, No. 18-cv-10507 (PGS) (LHG), 2019 WL 3430101, at *3 (D.N.J. July 29, 2019), *appeal docketed*, No. 19-3142 (3d Cir. Sept. 19, 2019).

804 F.3d 242, 260-61, 263-64 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406, 411-12 (7th Cir. 2015);[2] *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1261-64 (D.C. Cir. 2011). And the Fourth Circuit also held, in the alternative, that Maryland's LCM restrictions are constitutional at step one. *Kolbe*, 849 F.3d at 135-37. Consistent with these cases, section 32310 is constitutional at each step of the Court's analysis.

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

At the threshold question, Plaintiffs have failed to show that section 32310 burdens conduct protected by the Second Amendment. Even if the Second Amendment extends to the possession of magazines "necessary to render [certain semiautomatic] firearms operable," Plaintiffs recognize that a right to such magazines would not be "unfettered." Answering Br. at 16 (quoting *Fyock*, 779 F.3d at 998). While magazines of some capacity may be necessary to operate certain semiautomatic firearms, magazines with capacities in excess of ten rounds

[2] While *Friedman* did not expressly apply intermediate scrutiny, *see* Opening Br. at 32 n.12, the Seventh Circuit recently clarified that *Friedman* did follow the two-step approach, but simply "pretermit[ted] discussion of more general principles concerning level of scrutiny and focus[ed] on the 'concrete' inquiries that had informed [the other circuit] courts' analysis of whether the [assault weapon and LCM] bans violated the Second Amendment." *Wilson v. Cook Cnty.*, __ F.3d __, 2019 WL 4063568, at *6 (7th Cir. Aug. 29, 2019).

are not. *See* Opening Br. at 58 n.21.[3] Nevertheless, Plaintiffs contend that Second Amendment protections extend to LCMs—apparently without any limit on capacity—because they are purportedly "typically possessed by law-abiding citizens for lawful purposes." Answering Br. at 15-16 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 624-25 (2008)). According to Plaintiffs, LCMs are protected by the Second Amendment based on the sheer (and unspecified) number of LCMs owned by civilians. *Id.* at 16.

Echoing the district court's approach, ER 22-24, Plaintiffs describe their test as the "*Heller* test," Answer Br. at 17. Interpreting *Heller* as Plaintiffs urge, however, by defining the scope of the Second Amendment based on "the sheer number of weapons lawfully owned," would be "illogical." *Worman*, 922 F.3d at 35 n.5 (citing *Friedman*, 784 F.3d at 409); *Kolbe*, 849 F.3d at 142 ("[T]he *Heller* majority said nothing to confirm that it was sponsoring the popularity test."). Under Plaintiffs' test, the Second Amendment could conceivably extend to firearms and firearm accessories that are plainly not protected by the Second

[3] It is not the Attorney General's position, as Plaintiffs suggest, that the Second Amendment protects all magazines holding ten rounds or less, with the "constitutional protection cut[ting] off at magazines capable of holding ten rounds." Answering Br. at 16. It is possible that smaller magazines may also fall outside the scope of the Second Amendment, but the Court need not define a minimum capacity that is protected by the Second Amendment to resolve this appeal.

Amendment. For example, the Second Amendment could extend to a "state-of-the-art and extraordinarily lethal new weapon" if sold in sufficient numbers before governments are able to regulate it, or to weapons that unequivocally fall outside the scope of the Second Amendment, such as short-barreled shotguns or machine guns, if governments decided not to regulate them. *Kolbe*, 849 F.3d at 141. The Second Amendment is not a one-way ratchet, expanding in scope as new firearm technologies are brought to market in sufficient numbers, such as when LCM-equipped firearms made the "transition" from "military to civilian use." ER 1707 (Helsley Rep.). Mere commonality is insufficient to confer Second Amendment protection to LCMs.

Regardless of the number of LCMs that may be owned in the United States, the Attorney General has shown that section 32310 does not burden conduct protected by the Second Amendment because (1) LCMs are military-grade firearm accessories that are like the M-16 rifle and are most useful in military service and (2) the statute is analogous to firing-capacity regulations dating back to the Prohibition Era.

1. Large-Capacity Magazines Are Like the M-16 Rifle and Are Most Useful in Military Service

The Second Amendment does not protect LCMs because, like military-issue M-16 rifles, they are "most useful in military service" and thus "may be banned." *Kolbe*, 849 F.3d at 131, 137 (quoting *Heller*, 554 U.S. at 627). While the Second

Amendment was originally ratified to preserve an armed militia, the Second Amendment protects arms commonly used for *self-defense* and does not extend to military-grade weapons. *Heller*, 554 U.S. at 627-28 (noting that "modern developments have limited the degree of fit between the prefatory clause and the protected right"). The evidence confirms that LCMs are most useful in military service because they enable soldiers to maintain rapid fire without pausing to reload their weapons and "are designed to 'kill[] or disabl[e] the enemy' on the battlefield." Opening Br. at 24-27 (quoting *Kolbe*, 849 F.3d at 137); ER 777; ER 793-94; *see also Silveira v. Lockyer*, 312 F.3d 1052, 1057 n.1 (9th Cir. 2002) (noting that firearms equipped with LCMs "can 'spray-fire' multiple rounds of ammunition, with potentially devastating effects"), *abrogated on other grounds by Heller*, 554 U.S. 570.

Plaintiffs claim, without citation, that LCMs were "developed for self- and home-defense." Answering Br. at 5. That is not what the record reflects. According to Plaintiffs' own expert witness, LCM-equipped firearms were developed to supply militaries with weapons capable of enhanced firepower. ER 1707 (Helsley Rep.) (discussing development of LCM-equipped firearms during wars and the "transition" of LCM-equipped firearms from "military to civilian use"). Plaintiffs claim that magazines capable of holding more than ten rounds have been commonly owned since 1862. Answering Br. at 4. But that year

was during the American Civil War, and Plaintiffs' evidence shows that Civil War-era repeating rifles were developed for use in battle. SER 259 ("Like every other gun and ammunition manufacturer at the time, Winchester was interested in supplying the military demand."); SER 263 (reproducing an advertisement for a repeating rifle stating that "[a] man armed with one of these Rifles, can load and discharge one shot every second, so that he is equal to a company every minute, a regiment every ten minutes, a brigade every half hour, and a division every hour").

LCMs are *most* useful in military service because they are not well-suited for self- or home-defense. Even though LCMs and other military-grade weapons and accessories could conceivably be used for self-defense, they are not needed for that purpose: the record shows that an average of just 2.2 rounds are fired when firearms are used in self-defense. ER 287 (Allen Rep. ¶ 10). Plaintiffs do not dispute this evidence. Instead, they highlight the two incidents in that study (out of 736 incidents) in which more than ten rounds were reportedly fired and several anecdotes in which more than ten rounds were fired by civilians in gun fights defending commercial property. Answering Br. at 17-18 (citing ER 287; SER 721-50). A handful of incidents in which more than ten rounds were fired, however, does not support the argument that LCMs are *needed* to fire those rounds, and they do not undermine the conclusion that in the vast majority of self-defense

scenarios, far fewer than ten rounds are needed to engage in effective self-defense with a firearm.

Plaintiffs argue that the Fourth Circuit's en banc opinion in *Kolbe* is an outlier. Answering Br. at 19. *Kolbe*'s holding, however, was grounded in the text of *Heller* itself. *Kolbe*, 849 F.3d at 136 ("*Heller* also presents us with a dispositive and relatively easy inquiry: Are the banned assault weapons and [LCMs] 'like' 'M-16 rifles,' i.e., 'weapons that are most useful in military service,' and thus outside the ambit of the Second Amendment?" (quoting *Heller*, 554 U.S. at 627)).[4] While this Court has not yet adopted this alternative approach, it is based on the text of *Heller* itself.[5]

Plaintiffs also argue that the "most useful in military service" test is too broad. According to Plaintiffs, the Supreme Court's admonition that the Second Amendment does not protect the "M-16 and the like" does not mean that "*all* weapons that are particularly useful to the military categorically fall outside the scope of the Second Amendment." Answering Br. at 19. The Court need not

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[4] The Fourth Circuit viewed this test as distinct from the inquiry concerning "dangerous and unusual" weapons. *Kolbe*, 849 F.3d at 135-36.

[5] Notably, a district court in this Circuit recently followed *Kolbe*'s reasoning and upheld at step one provisions of California's Assault Weapons Control Act regulating semiautomatic rifles. *Rupp v. Becerra*, No. 17-cv-00746-JLS-JDE, __ F. Supp. 3d __, 2019 WL 4742298, at *4-7 (C.D. Cal. July 22, 2019). The court alternatively upheld the challenged provisions under intermediate scrutiny at step two. *Id.* at *7-11.

decide how broad the test is because, at a minimum, LCMs are "like" M-16 rifles. *Kolbe*, 849 F.3d at 143 (noting in the conjunctive that "large-capacity magazines are 'like' 'M-16 rifles' *and* 'most useful in military service'" (emphasis added)); *Rupp*, 2019 WL 4742298, at *5-6. Even under a narrower construction, LCMs are "like" M-16 rifles because M-16 rifles require LCMs to function effectively on the battlefield. ER 777 (1989 ATF Rep.) (noting that virtually all "military firearms are designed to accept large, detachable magazines" to provide "the soldier with a fairly large ammunition supply and the ability to rapidly reload"); ER 595 (referring to "military M-16 rifle magazines"). Because LCMs are "most useful in military service" and, at a minimum, are "like" M-16 rifles, they are not protected by the Second Amendment.

2. Section 32310 Is Analogous to Longstanding Firing-Capacity Restrictions

In restricting civilian magazine capacity to ten rounds, section 32310 is analogous to firing-capacity restrictions first enacted in the 1920s and 1930s, which regulated firearms based on the number of rounds that they are capable of firing semi-automatically without reloading. Opening Br. at 27-31; Br. of Amicus Curiae Everytown for Gun Safety in Supp. of Def.-Appellant (Everytown Br.) (Dkt. 17) at 4-9. Plaintiffs claim that "[t]his Court has already recognized that [LCMs] have not been 'the subject of longstanding, accepted regulation.'" Answering Br. at 20 (citing *Fyock*, 779 F.3d at 997). But the Court left open the

possibility that the Prohibition Era firing-capacity laws could qualify as longstanding regulations that would render analogous LCM restrictions presumptively lawful. *Fyock*, 779 F.3d at 997 (noting that "these early twentieth century regulations might nevertheless demonstrate a history of longstanding regulation").

Plaintiffs acknowledge that the firing-capacity laws enacted in Michigan, Rhode Island, Ohio, and the District of Columbia concern the same subject matter as section 32310. Answering Br. at 6 (discussing the "first laws regulating magazines" "passed in three states and the District of Columbia"), 20 (noting that these early laws are "on the subject" of magazine capacity). Nevertheless, Plaintiffs argue that none of these laws set a capacity limit as low as ten and "all were eventually repealed." Answering Br. at 20 (citing ER 1811). Section 32310 need not set the same capacity limit as these earlier laws. *See United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc) (noting that the challenged law "need not mirror limits that were on the books in 1791"). And while the Michigan, Rhode Island, and Ohio laws were eventually repealed, Opening Br. at 28 n.10, the District of Columbia's 12-round firing-capacity restrictions are still in effect and have been for the past 87 years, since the U.S. Congress first enacted the law in 1932. ER 1812 ("The only longstanding statute banning magazines is found in the District of Columbia."). Notably, the National Rifle Association supported the

District of Columbia's firing-capacity restrictions, which it had hoped would serve "as a guide throughout the states of the Union." *See* Everytown Br. at 7 (quoting S. Rep. No. 72-575, at 5-6 (1932)). And for most of that law's existence, until the Second Amendment was incorporated into the Fourteenth Amendment in 2010, the District of Columbia was one of the few jurisdictions subject to the Second Amendment, indicating that a 12-round capacity limit did not offend the Second Amendment. Opening Br. at 28. Plaintiffs are simply incorrect that "there is no longstanding history of laws in the United States restricting magazine capacity." Answering Br. at 10.

Although these firing-capacity laws were enacted in the Prohibition Era and set limits higher than ten rounds, section 32310 is sufficiently analogous to those laws and is thus a presumptively lawful measure. *See Silvester v. Harris*, 843 F.3d 816, 831 (9th Cir. 2016) (Thomas, C.J., concurring) (citing a single-day waiting period for firearm purchases enacted in 1923 as a sufficiently longstanding regulation supporting the constitutionality of a ten-day waiting period at step one). Accordingly, section 32310 does not burden the Second Amendment, and the law should be upheld at the first step of the Court's analysis.

B. Section 32310 Satisfies Intermediate Scrutiny

Even if section 32310 burdens the Second Amendment, the statute survives constitutional scrutiny at the second step of the required analysis. Plaintiffs argue

that section 32310 fails at step two because it is a "flat ban" that fails under any level of scrutiny, like the complete handgun bans invalidated in *Heller*, 554 U.S. 570, and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and that the statute is subject to strict scrutiny, which they claim it does not satisfy. Answering Br. at 23. Plaintiffs, however, failed to respond to the Attorney General's arguments that this Court already determined in *Fyock* that ten-round LCM restrictions, like section 32310, are subject to intermediate scrutiny. *See* Opening Br. at 32-33 (discussing *Fyock*, 779 F.3d at 999, and *Duncan v. Becerra*, 742 Fed. App'x 218, 221 (9th Cir. 2018) (unpublished)).

Plaintiffs' argument that section 32310 is a "flat ban" is simply not accurate. Every federal circuit court, including this Court in *Fyock*, has concluded that LCM restrictions merely *limit* magazine capacity—rather than ban magazines altogether or impose a limit that trenches too far on the ability to use firearms effectively for self-defense—and thus are subject to intermediate scrutiny. *See, e.g.*, *Fyock*, 779 F.3d at 999; *ANJRPC*, 910 F.3d at 117-18. The instances in which individuals reportedly fired more than ten rounds in self-defense or in defense of property, *see* Answering Br. at 27 (citing SER 721-50), do not demonstrate that LCMs are necessary to engage in self-defense or that limiting capacity to ten rounds substantially burdens the core Second Amendment right. Under this Court's precedents, and consistent with every federal circuit court that has selected a level

of scrutiny to apply to ten-round LCM restrictions, intermediate scrutiny applies here.[6]

Under intermediate scrutiny, a challenged gun-safety law is constitutional if (1) the government's stated objective is "significant, substantial, or important"; and (2) there is a "'reasonable fit' between the challenged regulation and the asserted objective." *Silvester*, 843 F.3d at 821-22 (citation omitted). Plaintiffs acknowledge that the State "undoubtedly has an important interest in promoting public safety and preventing crime," Answering Br. at 23, so the only question for the Court is whether section 32310 is reasonably fitted to that interest.[7]

The summary judgment record in this case contains more than enough evidence to show that section 32310 is reasonably fitted to the State's admittedly important public-safety interests. *See* Opening Br. at 35-52. Plaintiffs do not

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[6] *Fyock* also strongly signaled that ten-round LCM restrictions satisfy intermediate scrutiny. *Fyock*, 779 F.3d at 1000-01. Several federal circuit courts have interpreted the case as upholding the challenged restrictions under the Second Amendment, *see Friedman*, 784 F.3d at 410; *ANJRPC*, 910 F.3d at 123; *Wilson*, 2019 WL 4063568, at *6, including a panel of this Court, *see Pena*, 898 F.3d at 999 ("Applying intermediate scrutiny, we have upheld city ordinances banning large-capacity magazines . . . ." (citing *Fyock*, 779 F.3d at 1000-01)).

[7] Plaintiffs attempt to bifurcate the question of fit into separate inquiries—whether the law "meaningfully furthers" the State's important interests, *id.* at 23, and whether the "fit" is reasonable, *id.* at 29—but these are simply different formulations of the same test rather than separate elements. *See Heller II*, 670 F.3d at 1262 (noting that, under intermediate scrutiny, "the Government has the burden of showing there is a substantial relationship or reasonable 'fit'").

dispute that LCMs are used in a majority of public mass shootings, that the use of LCMs in such shootings results in a nearly 250 percent increase in the average number of fatalities and injuries compared to public mass shootings not involving LCMs, and that breaks in several public mass shootings, including pauses when the shooters reloaded their weapons, have saved lives. ER 756-57 (Allen Rev. Rep. ¶¶ 22, 24); Opening Br. at 44-45.[8] Nor do Plaintiffs dispute that LCMs are used disproportionately in gun violence against law-enforcement personnel. Opening Br. at 43-44.

Instead, Plaintiffs focus their criticism on two purported "centerpieces" of the Attorney General's evidence, the surveys compiled by the organization Mayors Against Illegal Guns and the publication *Mother Jones*, which Plaintiffs claim show "only a small number" of public mass shootings in California. Answering Br. at 28. Plaintiffs do not identify any inaccuracies in these compilations of

[8] Mass shooters continue to arm themselves with LCMs to maximize the number of people killed and injured in their attacks. Weeks after the Attorney General filed his opening brief in this appeal, shooters used LCMs to murder 34 people and injure at least 60 others in separate incidents in Gilroy, California; El Paso, Texas; and Dayton, Ohio. *See* Violence Policy Ctr., High-Capacity Ammunition Magazines, at 2 (last updated Aug. 19, 2019), http://vpc.org/fact_sht/VPCshootinglist.pdf (last visited Oct. 7, 2019). The Dayton shooter reportedly used a 100-round drum magazine to shoot 26 individuals in just 32 seconds, killing nine. *See* Adeel Hassan, *Dayton Gunman Shot 26 People in 32 Seconds, Police Timeline Reveals*, N.Y. Times, Aug. 13, 2019, *available at* https://www.nytimes.com/2019/08/13/us/dayton-shooter-video-timeline.html.

public mass shootings and ignore that the Attorney General's expert witness relied on an alternative source, the Citizens Crime Commission of New York City, to supplement the data about public mass shootings identified by *Mother Jones*. Opening Br. at 39 n.14.

Plaintiffs also argue that the district court properly rejected the news reports and surveys submitted by the Attorney General because they contain hearsay and were prepared by "organziations critical of firearms ownership." Answering Br. at 28 n.1.[9] But as this Court has held, the State may "rely on any evidence 'reasonably believed to be relevant' to substantiate its important interests," and the 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 (citations omitted). Plaintiffs do not dispute that the record in this case is substantially identical to the government's evidence in *Fyock* and the other cases upholding LCM restrictions—evidence that this Court characterized as "precisely the type of evidence that [a government is] permitted to rely upon to substantiate its interest" and to demonstrate a reasonable fit under intermediate scrutiny. *Id.* at 1001. The record shows that the Legislature and the people have "drawn reasonable

[9] Notably, Plaintiffs rely on news reports, *see, e.g.*, Answering Br. at 27 (citing SER 721-50), and sources that support firearm ownership, *see, e.g.*, ER 1704 (Helsley Rep.) (noting that Plaintiffs' expert witness has worked for the National Rifle Association for over twenty years).

inferences based on substantial evidence" in restricting LCMs. *Pena*, 898 F.3d at 1001 (quoting *Turner Broad. Sys., Inc. v. FCC* (*Turner II*), 520 U.S. 180, 195 (1997)).

Plaintiffs do not meaningfully dispute the Attorney General's evidence that LCMs greatly enhance the lethality of gun violence, particularly public mass shootings and violence against law-enforcement personnel. And yet Plaintiffs maintain that LCMs have a "negligible impact on the ability of criminals to carry out violent crimes." Answering Br. at 27 (quoting ER 1708). Such speculation, however, is contradicted by the summary judgment record in this case and by the considered judgment of the six federal circuit courts that have upheld LCM restrictions similar to section 32310. And even if the dangerousness of LCMs were an "open question," Plaintiff's evidence would be "insufficient to discredit [the State's] reasonable conclusions." *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 969 (9th Cir. 2014).

Plaintiffs also argue that individuals using firearms for self-defense might need LCMs because it is "extremely difficult" to change a magazine while defending oneself and that stress can reduce the accuracy of defensive shots. Answering Br. at 27-28. This argument is based on sheer speculation, which pales in comparison to the evidence that LCMs *actually* result in more casualties in public mass shootings and are *actually* used disproportionately in gun violence

against law-enforcement personnel. *See* Opening Br. at 51-52 (discussing the competing inferences concerning "critical pauses" in public mass shootings and defensive gun uses). Even if Plaintiffs' self-defense claims were as credible as the Attorney General's evidence that LCMs are uniquely dangerous, under intermediate scrutiny, the State is entitled to "choose among conflicting inferences." *Worman*, 922 F.3d at 40.

Plaintiffs also contend that the State is not entitled to deference in enacting its LCM restrictions. Answering Br. at 29. But this Court has made clear that, under intermediate scrutiny, courts accord "substantial deference to the predictive judgments" of the political branches. *Pena*, 898 F.3d at 979-80 (quoting *Turner II*, 520 U.S. at 195). Here, the record includes substantial evidence supporting the Legislature's and the people's considered judgment that restricting LCMs will mitigate the lethality of gun violence, particularly public mass shootings and violence against law-enforcement personnel. Opening Br. at 46-48.

In claiming that section 32310 will not be successful in achieving the State's public-safety goals, Plaintiffs selectively quote from the Department of Justice study of the federal assault weapons ban—a study principally authored by the Attorney General's expert witness, Dr. Christopher Koper—to suggest that the federal assault weapons ban "had resulted in no appreciable impact on crime." Answering Br. at 6-7, 25 (quoting ER 668). Plaintiffs, however, ignore the study's

disclaimer that "it [was] premature to make definitive assessments of the [federal] ban's impact on gun crime." ER 574. The study noted that the grandfathering of pre-ban LCMs—which, unlike LCMs grandfathered under California's original LCM law, could be freely transferred—"ensured that the effects of the law would occur only gradually" and that "[t]hose effects are still unfolding and may not be fully felt for several years into the future." ER 574-75. Far from declaring the federal assault weapons ban to be a failure, the researchers "recommend[ed] continued study of trends in the availability and criminal use of [assault weapons] and LCMs." ER 670. Although the federal ban was allowed to expire in 2004, subsequent research has shown that it was effective in reducing the use of LCMs in crime. Opening Br. at 46-47 (citing ER 414-16, 422). And because California's LCM restrictions are more "robust" than the federal ban's, Dr. Koper concluded that California's law "may be more effective more quickly" in protecting public safety. ER 422 (Koper Rep.).

Ultimately, the record confirms 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). Whether and how to limit magazine capacity presents a policy question for the political branches of government (provided, of course, that the restrictions do not severely burden the core right to self-defense in the home). *ANJRPC*, 910 F.3d at 122 n.26 (discussing the "limiting

principle" in restricting LCMs). While reasonable minds might disagree, under intermediate scrutiny, "[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)). Based on the summary judgment record, and the decisions of the six federal circuit courts upholding ten-round LCM restrictions, section 32310 is constitutional under the Second Amendment.

II. CALIFORNIA'S RESTRICTIONS ON THE POSSESSION OF LARGE-CAPACITY MAGAZINES DO NOT CONSTITUTE A TAKING

As an initial matter, Plaintiffs focus exclusively on their claim that the possession restrictions enacted by Proposition 63 effect a *physical* taking, Answering Br. at 33-38, relegating their regulatory takings argument to a short footnote, *id.* at 35 n.2. Thus, Plaintiffs have effectively abandoned their regulatory-takings theory, and the only question remaining for the Court is whether the State's possession restrictions amount to a per se physical taking. *See City of Emeryville v. Robinson*, 621 F.3d 1251, 1262 n.10 (9th Cir. 2020) (noting that contentions raised in a footnote without supporting argument and citations are deemed abandoned (citing *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir. 1992))).

Additionally, Plaintiffs do not respond to the Attorney General's argument that section 32310(c)'s possession restrictions do not implicate the Takings Clause

concerning LCMs manufactured or acquired *after 2000*, including any LCMs obtained during the interim between the judgment in this case and the stay of the judgment pending appeal. Opening Br. at 53 & n.19. The Takings Clause is only implicated regarding individuals who own LCMs grandfathered under the original LCM law. Thus, even if section 32310(c) and (d) effect a physical taking concerning them, the Court should not enjoin section 32310(c) generally if it is otherwise consistent with the Second Amendment. And even for owners of grandfathered LCMs, the Court should not enjoin the new law because Plaintiffs have failed to show the absence of a legal remedy (i.e., just compensation). *See Knick v. Twp. of Scott, Penn.*, 139 S. Ct. 2162, 2179 (2019).

Regarding owners of grandfathered LCMs, Plaintiffs' physical takings claim fails. *See* Opening Br. at 53-58. The State's LCM-possession restrictions cannot constitute a physical taking because, along with the compliance options enumerated in section 32310(d), California law permits owners of grandfathered LCMs to retain ownership of their magazines if permanently modified to hold no more than ten rounds. Cal. Penal Code § 16740(a). The Third Circuit rejected a nearly identical physical takings claim, concluding that the modification option available under New Jersey law compelled a holding that "[t]here is no actual taking." *ANJRPC*, 910 F.3d at 124. Plaintiffs mischaracterize the case by suggesting that the Third Circuit rejected the takings claim based on the state's

police powers alone. Answering Br. at 44-45 & n.4. The court's main reason for rejecting the takings claim, however, was the fact that owners of previously legal LCMs could retain ownership of the magazines if permanently modified to hold no more than ten rounds.

Plaintiffs' physical-takings argument relies principally on *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015), which is readily distinguishable. Opening Br. at 57-58. In *Horne*, a law requiring raisin growers to transfer title of a portion of their raisins to the government constituted a compensable physical taking even though the growers could choose not to enter the raisin market and could instead engage in an entirely different commercial industry, planting different crops or selling their raisin-variety grapes as table grapes or for use in juice or wine. *See id.* at 2430. While letting the raisin farmers sell wine was not a viable "option" in *Horne*, California law allows owners of grandfathered LCMs to keep their magazines if permanently modified to hold no more than ten rounds, which permits them to continue to use those magazines for the same purpose that they served as LCMs—"to hold multiple rounds of ammunition in a single magazine." *ANJRPC*, 910 F.3d at 125. "Simply modifying [a] magazine to hold fewer rounds of ammunition than before does not 'destroy[] the functionality of the magazine.'" *Id.* at 124-25 (quoting *Wiese v. Becerra*, 306 F. Supp. 3d 1190, 1198 (E.D. Cal. 2018)). It strains credulity to suggest that

allowing an owner of a 12-round LCM to reduce the magazine's capacity to ten rounds is "tantamount to ordering the farmer in *Horne* to turn his raisins into wine," Answering Br. at 37, or requiring the landlord in *Loretto* to cease being a landlord, *see Horne*, 135 S. Ct. at 2430 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982)). Because owners of grandfathered LCMs can modify their magazines to comply with section 32310(c), the LCM-possession restrictions do not result in a taking.

Even if the modification option were insufficient to defeat Plaintiffs' physical takings claim, the enactment of section 32310(c) and (d) was a proper exercise of the State's police power to protect the public from harm. As such, section 32310 does not effect a taking. *See* Opening Br. at 54-56 (citing cases).[10] The cases cited by Plaintiffs concerned governmental appropriation of personal property for public use or in furtherance of a public purpose or project. *See, e.g.*, *Nixon v. United States*, 978 F.2d 1269, 1271-72, 1287 (D.C. Cir. 1992) (holding that a statute forcing the dispossession of a former president's papers effected a physical taking

[10] Plaintiffs claim that the Supreme Court first rejected the notion that government action to prevent harm cannot constitute a taking in *Chicago, Burlington & Quincy Railway Co. v. Illinois*, 200 U.S. 561 (1906). Answering Br. at 39-40. To the contrary, the Court in that case concluded: "If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of private property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution." *Chi., Burlington & Quincy Ry. Co.*, 200 U.S. at 593-94.

where the statute was enacted to enable public access to the materials); *Horne*, 135 S. Ct. at 2424, 2430 (holding that market orders for raisins issued to "help maintain stable markets for particular agricultural products" effected a physical taking). That is not the case here.

While Plaintiffs attempt to paint *Horne* as a sweeping decision that overruled prior cases recognizing that a taking does not occur when the government acts to prevent public harm, Answering Br. at 44, the Supreme Court suggested that its holding was limited to the facts of the case before it, *Horne*, 135 S. Ct. at 2430 (holding that a taking occurred "at least in this case"). And the Court acknowledged that, instead of taking title to the raisins, the government could have simply prohibited the sale of the raisins without compensating the farmers. *Id.* at 2428 ("[T]hat distinction flows naturally from the settled difference in our takings jurisprudence between appropriation and regulation.").

In any event, Plaintiffs have failed to identify a case in which a government prohibition of property to promote public safety—as opposed to other public uses or purposes—qualifies as a compensable taking. And they have failed to distinguish recent, analogous cases in which federal courts have rejected similar takings claims. Instead, Plaintiffs note that *Maryland Shall Issue* is on appeal before the Fourth Circuit, that the district court in *Wiese v. Becerra* stayed proceedings pending resolution of this appeal, and that the Third Circuit's

ANJRPC opinion "is simply wrong." Answering Br. at 44-45. They do not meaningfully address the reasoning in these cases.

As the Third Circuit observed, New Jersey's amended LCM law did not effect a taking because "[a] compensable taking does not occur when the state prohibits the use of property as an exercise of its police powers rather than for public use." *ANJRPC*, 910 F.3d at 124 n.32. And recently, the Court of Federal Claims rejected a takings challenge to the federal government's reclassification of "bump stock" devices as machine guns—which required owners of such devices to "either destroy or abandon them" to avoid prosecution under the National Firearms Act—because the regulation was an exercise of the government's police power. *McCutchen v. United States*, No. 18-1965C, __ Fed. Cl. __, 2019 WL 4619754, at *4, *7 (Fed. Cl. Sept. 23, 2019) (citing cases).

The Supreme Court made clear in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-28 (1992), that a government may "eliminate all economically valuable use" of personal property under its police powers. Plaintiffs contend that this statement is limited to restrictions on *commercial* use of personal property, Answering Br. at 42, but the Court did not limit the scope of its observation. While the State does have a "traditionally high degree of control over commercial dealings," *Lucas*, 505 U.S. at 1027, it also has a high degree of control over protecting the public from harmful and noxious property; thus, owners of

personal property should also expect that government regulation may impact their use and enjoyment of potentially injurious property without paying compensation. *See McCutchen*, 2019 WL 4619754, at *11 ("[T]he Supreme Court's observations [in *Lucas*] regarding the relative expectations of owners of personal property (as compared to owners of real property) surely apply to personal property whose ownership itself is subject to pervasive government regulation, as is the ownership of firearms in general . . . .").

While the power of eminent domain has been characterized as a police power, and exercises of that power can result in compensable takings, that does not mean that exercises of police powers to protect the public from harm also give rise to compensable takings. The Supreme Court has not repudiated earlier takings cases indicating that the exercise of the police powers to prevent harm does not give rise to a compensable taking. *Lucas*, 505 U.S. at 1051 n.13 (Blackmun, J., dissenting) ("But it does not follow that the holding of these early [takings] cases—that harmful and noxious uses of property can be forbidden whatever the harm to the property owner and without the payment of compensation—was repudiated. To the contrary, as the Court consciously expanded the scope of the police power beyond preventing harm, it clarified that there was a core of public interests that overrode any private interest." (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 n.20 (1987))).

In sum, section 32310(c) and (d) do not effect a physical taking because owners of grandfathered LCMs are permitted to retain ownership of their magazines if permanently modified to hold no more than ten rounds, and the State is permitted under its police powers to prohibit possession of LCMs to prevent harm without compensation.

III. CALIFORNIA'S RESTRICTIONS ON THE POSSESSION OF LARGE-CAPACITY MAGAZINES DO NOT VIOLATE THE DUE PROCESS CLAUSE

Plaintiffs' due-process arguments are mentioned in a single footnote, which does not respond to the Attorney General's arguments. Answering Br. at 38 n.3. Thus, as with their regulatory takings claim, Plaintiffs have effectively abandoned their due-process claim. *See City of Emeryville*, 621 F.3d at 1262 n.10. As discussed in the opening brief, Plaintiffs' due process claim fails as a matter of law because it is prospective in nature and serves plainly legitimate public-safety goals. *See* Opening Br. at 61-63. Accordingly, section 32310(c) and (d) do not violate the Due Process Clause.

CONCLUSION

For the foregoing reasons, and those discussed in greater detail in the Attorney General's opening brief, the Court should reverse the judgment and direct the district court to enter judgment in the Attorney General's favor.

Dated: October 7, 2019

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Beth L. Gratz	*s/ Beth L. Gratz*
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