No. 17-56081

In the United States Court of Appeals for the Ninth Circuit

VIRGINIA DUNCAN, *ET AL.*,

Plaintiffs–Appellees,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Defendant–Appellant.

Appeal from the United States District Court
For the Southern District of California,
Case No. 3:17-CV-01017-BEN-JLB

BRIEF OF EIGHTEEN STATES AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE OF THE PRELIMINARY INJUNCTION

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STATEMENT OF *AMICI CURIAE*

This brief is filed on behalf of the states of Arizona, Alabama, Arkansas, Georgia, Idaho, Kansas, Louisiana, Michigan, Missouri, Montana, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, and Wyoming. The undersigned are their respective states' chief law enforcement or chief legal officers and have authority to file briefs on behalf of the states they represent. The *Amici* States through their Attorneys General have a unique perspective that should aid the Court in its analysis of the District Court's preliminary injunction.[1]

First, the Attorneys General have experience protecting public safety and citizen interests in states where the affected magazines are lawfully possessed and used. The *Amici* States the Attorneys General serve are among the forty-three states that permit the standard, eleven-plus capacity magazines that Proposition 63 bans (the "Affected Magazines") and have advanced their compelling interests in promoting

[1] The States submit this brief solely as *amici curiae*. The undersigned certifies that no parties' counsel authored this brief, and no person or party other than the undersigned Attorneys General or their offices made a monetary contribution to the brief's preparation or submission.

public safety, preventing crime, and reducing criminal firearm violence without a California-style magazine ban.

The experience in other states shows that these magazines are common to the point of ubiquity among law-abiding gun owners and their use promotes public safety. Calling the Affected Magazines "large-capacity" is a misnomer—they often hold only in the range of eleven to fifteen rounds (in no way a large absolute number), are standard to many of the most popular firearms, and America's one-million-plus law enforcement agents virtually all use handguns holding more than ten rounds. There is nothing sinister in citizens bearing these magazines. Law-abiding citizens bearing these magazines with lawful firearms benefits public safety, counter-balances the threat of illegal gun violence, and helps make our streets safer.

Second, the *Amici* States believe upholding California's Proposition 63 would require applying erroneous constructions of the U.S. Constitution and infringing individual rights, including critical property rights. The Attorneys General submit this brief on behalf of the *Amici* States they serve to provide their unique perspective on these

constitutional questions and protect the critical rights at issue, including the rights and interests of their own citizens.

The *Amici* States join together on this brief not merely because they disagree with California's policy choice, but because the challenged law represents a policy choice that is foreclosed by the Second and Fifth Amendments. States may enact reasonable firearm regulations that do not categorically ban common arms core to the Second Amendment, and may take private property for a public use, provided the government provides just compensation to the property owner. But the challenged law fails on both fronts—it is prohibitive rather than regulatory and affects a permanent physical taking without just compensation. It should remain enjoined permanently. California should not be allowed to invade its own citizens' constitutional rights, and this Court should not imperil the rights of citizens in other states with its analysis here.

SUMMARY OF ARGUMENT

The *Amici* States urge the Court to affirm the preliminary injunction on all grounds. The enjoined provision does not advance public safety, violates the Second Amendment, and effects a taking without just compensation in violation of the Fifth Amendment.

In addition to implementing an unwise policy choice, Proposition 63 fails Second Amendment scrutiny. The Second Amendment guarantees "the individual right … to carry weapons in case of confrontation"—that is, to "'wear, bear, or carry … upon the person or in the clothing or in a pocket, for the purpose … of being armed and ready for offensive or defensive action in a case of conflict with another person.'" *District of Columbia v. Heller*, 554 U.S. 570, 584, 592 (2008). *Heller* stressed that the Constitution elevates law-abiding citizens' right to use ordinary firearms and "takes certain policy choices off the table." *Id.* at 636. "The very enumeration" of the Bill of Rights took "out of the hands of government … the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* at 634 (emphasis in original). Yet California has imposed a blanket ban on ordinary personal firearm magazines, even within the core confines of the home, where "Second Amendment guarantees are at their zenith." *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012). This strikes at the substance of the right to bear arms.

Proposition 63's dispossession requirement also affects an unconstitutional taking of private property without just compensation.

The Fifth Amendment guarantees that the government may not take private property for public use without paying just compensation. And the Fifth Amendment's Takings Clause has been construed to apply to exactly the type of forced expropriation and transfer to a private party that California has sought to impose here. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425-26 (1982).

Put simply, California has improperly infringed on two different constitutional provisions in support of a misguided policy. The District Court properly enjoined the California provision. This Court should protect not only California residents but also the citizens of the *Amici* States by affirming that decision.

ARGUMENT

I. THE SECOND AMENDMENT PROTECTS THE RIGHT TO KEEP AND BEAR ARMS COMMONLY POSSESSED BY LAW-ABIDING CITIZENS FOR LAWFUL PURPOSES, WHICH INCLUDES PROTECTING THE MAGAZINES AFFECTED BY THE ENJOINED REGULATION

California's Proposition 63 strikes at the core of the Second Amendment. The Second Amendment plainly states that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The Second Amendment ensures that law-abiding citizens

may possess "arms 'in common use at the time' for lawful purposes like self-defense." *Heller*, 554 U.S. at 624; *see also McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) ("central holding in *Heller*" was "the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home."). Applying this "common use" test, *Heller* struck down D.C.'s handgun ban because it "amount[ed] to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for [the] lawful purpose [of self-defense]." *Id.* at 628; *see also McDonald*, 561 U.S. at 791 (incorporating Second Amendment against states).

Possessing Affected Magazines is an integral aspect of the right to "keep and bear arms." That California is banning magazines (as opposed to those firearms to which they are standard and integral) changes none of the constitutional analysis. The Affected Magazines are themselves common "arms" typically possessed for lawful purposes by both law enforcement and the general public. *See infra* 7-8. And they are essential to "bear[ing] arms" in that they are standard and integral to some of the most popular firearms. As such, they may be banned no more than those arms. *See, e.g.*, *Luis v. United States*, 136

S. Ct. 1083, 1097 (2016) (Thomas, J., concurring) ("The right to keep and bear arms ... implies a corresponding right to obtain the bullets necessary to use them."); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 967-68 (9th Cir. 2014) ("restrictions on ammunition may burden the core Second Amendment right of self-defense"; "without bullets, the right to bear arms would be meaningless"). Indeed, no court has indulged this illusory distinction between firearms and magazines. *See, e.g.*, *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1276 (N.D. Cal. 2014), *aff'd*, 779 F.3d 991 (9th Cir. 2015) (collecting cases).

As for commonality, the near universal use of Affected Magazines by a million-plus police officers proves that these magazines are "in common use" for "lawful purposes like self-defense." *Heller*, 554 U.S. at 624. If law enforcement officers are almost all issued Affected Magazines for self-defense, it follows that law-abiding laypersons require the same; comparatively, civilians are less prepared for self-defense, so their need is even stronger.[2] And the record reflects as

[2] It is no answer to say that because police are well-armed citizens need not be. That is wrong as a matter of law—because the Second Amendment guarantees individual rights—and belied by fact: police cannot always be on hand to intervene when a citizen is at risk.

much. As the district court noted: "Ammunition magazines that hold more than 10 rounds are popular." Dkt. 28 at 6. Indeed, "[s]ome estimate that as many as 100,000,000 such magazines are currently owned by citizens of the United States." *Id.*

Importantly, the Supreme Court has not drawn the line between permissible firearm regulations and impermissible firearm bans by balancing the individual Second Amendment right against competing government interests (*e.g.*, public safety). The Second Amendment "is the very *product* of an interest balancing by the people," and "[t]he very enumeration of the right takes out of the hands of government … the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." 554 U.S. at 634, 635 (emphasis in original). And the Supreme Court was clear in *Heller*—when dealing with a categorical restriction on a class of common arms, it is inappropriate to engage in either "interest-balancing" or intermediate scrutiny, instead, such restrictions are barred by the Second Amendment. 554 U.S. at 634-35 (invalidating ordinance as unconstitutional; rejecting "interest-balancing" and "intermediate scrutiny" proposed by Justice Breyer's dissent). To the extent the Ninth Circuit has previously applied

alternative tests foreclosed by *Heller*, this is an opportunity to hew to the proper standard for Second Amendment cases.

Regardless, Proposition 63 fails under the Second Amendment because it is a categorical ban on mere possession of Affected Magazines. Civilians often must defend themselves, and the Second Amendment guarantees they may do so with arms "in common use" and "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 624-25. Here, like in *Heller*, the state has outlawed a class of arms "overwhelmingly chosen by American society for [the] lawful purpose [of self-defense]." *Id.* at 628. And not only are categorical bans of common arms repugnant to the individual right to bear arms, but the prohibition here (like in *Heller*) reaches into the home, where "Second Amendment guarantees are at their zenith." *Kachalsky*, 701 F.3d at 89; *see also McDonald*, 561 U.S. at 780 (right to keep and bear arms applied "most notably for self-defense within the home."); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) ("we assume that any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be

subject to strict scrutiny"). Therefore, like D.C.'s regulation in *Heller*, California's regulation should be enjoined as unconstitutional.

II. THE FORCED APPROPRIATION OF OWNERS' ENTIRE POSSESSORY INTEREST IN THE AFFECTED MAGAZINES CONSTITUTES A TAKING, FOR WHICH CALIFORNIA OWES OWNERS JUST COMPENSATION

Beyond violating the Second Amendment, California has crossed a constitutional line under the Fifth Amendment in banning mere possession—and forcing dispossession—of private property that is integral to lawful uses of protected firearms. The Fifth Amendment guarantees that no private property, whether real or personal, may be "taken for public use" without "just compensation" from the government. U.S. Const. amend. V; *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426 (2015). California, through Proposition 63, has effected a taking of private personal property without just compensation in violation of the Takings Clause.

As the Supreme Court has explained, the "physical *appropriation* of property" is enough for "a *per se* taking, without regard to other factors." *Horne*, 135 S. Ct. at 2427 (emphasis in original); *see also id.* at 2429 (citing "physical surrender" requirement as indication taking had occurred); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) ("compel[ing] the

surrender" of property would constitute a taking). In the words of the Supreme Court in *Horne*, "[t]he Government's 'actual taking of possession and control' of the [property] gives rise to a taking"; once the government "requires physical surrender," it triggers "the question of just compensation." 135 S. Ct. at 2428-29. And just compensation is equally owed if the government effects the taking of specific property, regardless of whether the government ever takes possession. *E.g.*, *Kelo v. City New London*, 545 U.S. 469, 473-75 (2005); *Loretto*, 458 U.S. at 426-40.

California effected an actual (*per se*) taking when, through Proposition 63, it took the final step in its regulation of the Affected Magazines and required those who still lawfully possessed these magazines to *dispossess* them or face criminal penalties, including up to one year in jail. *See* Cal. Pen. Code § 32310(c) (as amended by Proposition 63).[3] This is a forced appropriation and physical surrender

[3] Prior to Proposition 63, California prohibited most owners from almost all beneficial uses of these magazines. Cal. Pen. Code § 32310(a). These restrictions on arms commonly possessed by law-abiding citizens for lawful purposes may well have been independent Second Amendment infringements. *See supra* Section I. But they nonetheless represented the type of burden—"a restriction on use"

of the owner's entire property interest—under the provision, a Californian cannot lawfully possess such a magazine (other than those who fall into narrow exceptions for law enforcement officers, armored vehicle employees, and movie actors on set). This places California squarely in the *per se* taking realm.[4]

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without depriving an owner of "all economically beneficial use"—that in the past may have failed to qualify as a taking. *See, e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992); *Andrus*, 444 U.S. at 65-66. At a minimum those limits allowed owners to retain the magazines for an *in extremis* circumstance. But the mandated dispossession here extinguishes any such remaining possessory interest.

[4] California proposes that Proposition 63 does not effect a taking because it is a police power exercise. This is a *non sequitur*. Even when a law affecting private property is firmly "within the State's police power," it may still be a taking. *Loretto*, 458 U.S. at 425-26. The situation may well be different if the affected property were illegal at the federal level, or if the affected property was something novel, or a property type that lacked a background structure of law and regulation, and therefore in which there was no reasonable expectation of some continued property interest. *See*, *e.g.*, *Horne v. Dep't of Agriculture*, 135 S. Ct. 2419, 2430-31 (2015) (discussing importance of the nature of the property at issue in takings questions). But here, the affected property is legal under federal law, protected by the Constitution, and covered by extensive background law that creates a reasonable expectation of a continued property interest given that long-standing, existing regulation of property necessarily entails the underlying assumption that the property is itself legal to own. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 592-594, 628-629, 633-634 (2008) (detailing long history of right to keep arms, from "William and Mary" through Blackstone and into 19th century; emphasizing historical regulation of arms that confirmed core idea of a right to possess arms).

The *per se* nature of the taking here is bolstered by the fact that California not only forces dispossession of the magazines and extinguishment of all possessory interest for California owners, but also forces owners to transfer their ownership and extinguish their rights through certain mandated channels. Section 32310(d), as amended by Proposition 63, provides only three dispossession options: the owner may "remove the large-capacity magazine from the State," "sell the large-capacity magazine to a licensed firearm dealer," or "surrender the large-capacity magazine to a law enforcement agency for destruction." Cal. Pen. Code §§ 32310(d)(1)-(3).

These options confirm that the now-enjoined regulation fits squarely within the Supreme Court's existing *per se* takings precedent. At the outset, mandating that owners "surrender the large-capacity magazine to a law enforcement agency for destruction" without compensation, Cal. Pen. Code § 32310(d)(3), echoes *Horne*. When this path is followed, the forced handover of the magazines is no different than the forced handover of raisins; the owners' possessory interest is fully extinguished and the government (in this case California) obtains the property at issue. *See Horne*, 135 S. Ct. at 2428-29.

It does not alter the takings conclusion that California has, through Cal. Pen. Code §§ 32310(d)(2), given owners a choice between transferring their property to government agents or a tightly controlled subset of private parties. As the Supreme Court has explained in landmark cases, such as *Kelo*, 545 U.S. 469 (2005) and *Loretto*, 458 U.S. 419 (1982), the Takings Clause applies (and the government owes just compensation) even when the government involves a private entity as the ultimate recipient of the affected property. Just compensation is owed if the government effects the taking of specific property (whatever the motive, be it general redistributive desires, animus, or to benefit a private party), regardless of whether the government ever takes possession of the property. *E.g.*, *Kelo*, 545 U.S. at 473-75; *Loretto*, 458 U.S. at 426-40; *Amen v. City of Dearborn*, 718 F.2d 789, 797 (6th Cir. 1983) (compelled sale to government-selected private party no less a taking than forced sale to city); *Richmond Elks Hall Ass'n v. Richmond Redevel. Agency*, 561 F.2d 1327, 1330 (9th Cir. 1977) (taking can occur even if government does not "directly appropriate the title, possession or use of the propert[y]").

Similarly, that the transfer to the chosen private parties might entail some compensation has no bearing on whether there has been a taking requiring just compensation from the government. The state cannot create a limited market for a compelled sale and thereby circumvent its Takings Clause obligations. The state bears the obligation to provide just compensation when it distorts the market and (potentially) enriches certain, selected private parties. A state mandate that all vintage Corvette owners immediately surrender their cars to the state or sell them to a single, state-selected Toyota dealer would be a Fifth Amendment taking. Sales proceeds might factor into the ultimate sum the state would owe. But "just compensation" is "'the market value of the property at the time of the taking,'" not just *some* compensation. *E.g.*, *Horne*, 135 S. Ct. at 2432. A forced sale to a particular subset of private parties (surely for a diminished return given the compelled flooding of the market and artificially constrained set of available buyers) does not itself provide "just compensation" from the government. *See, e.g.*, *id.*; *Carson Harbor Vill., Ltd. v. City of Carson*, 353 F.3d 824, 831 (9th Cir. 2004) (O'Scannlain, J., concurring)

(noting consistent assumption that government is always entity that actually owes just compensation; collecting cases).

These primary channels (handover and compelled sale) fall squarely within existing Supreme Court Taking Clause precedent, and the final option (Cal. Pen. Code §§ 32310(d)(1)) has no bearing on the takings question. A resident of any state could of course always cease residency and move elsewhere. But the fact that a person might not be dispossessed of their possessory interests if they flee to a different jurisdiction does not answer whether the dispossession is a taking requiring just compensation for those that stay. And, as shown above, those who stay within California will have suffered a taking without just compensation if the now-enjoined provision goes into effect.

The District Court reached the right conclusion on the takings question. That decision should be affirmed. California's statutory scheme compels the surrender of the magazines, forcibly appropriating owners' entire possessory interest and necessitating just compensation from California under *Horne*, *Kelo*, and *Loretto*.

* * *

Put simply, California improperly infringed two constitutional provisions with the enjoined law. California has chosen to deviate from the vast majority of states in its approach to firearms regulation. Having states take differing approaches to protecting and empowering citizens in light of criminal activity and criminal gun violence is a proper functioning of our federal system. But the Constitution is an ever-present limit on divergence amongst states. California has ignored two different constitutional limits in pursuing its own path here. In response, the District Court properly enjoined California's law. This Court should affirm that decision in full.

CONCLUSION

For the forgoing reasons, the preliminary injunction should be affirmed in whole.

January 12, 2018

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and Fed. R. App. P. 29(a)(5).

1. This brief is 3,338 words excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century type, which complies with Fed. R. App. P. 32 (a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

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