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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;
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 SUPERIOR,
in her official capacity as
Acting Chief of the Department
of Justice Bureau of Firearms,

Defendants.

Civ. No. 2:17-903 WBS KJN

MEMORANDUM & ORDER RE: MOTION
TO DISMISS

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1 Before the court is defendants' Motion to dismiss
2 plaintiffs' Second Amended Complaint. (Docket No. 61.) The
3 court held a hearing on the Motion on February 5, 2018.

4 I. Factual and Procedural History

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

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

25 ¹ Large capacity magazines are defined under California
26 Penal Code § 16740 as any ammunition-feeding device with the
27 capacity to accept more than ten rounds, though this section
28 specifically excludes from this definition any "ammunition
feeding device that has been permanently altered so that it
cannot accommodate more than 10 rounds."

1 dealer, or surrender the magazine to a law enforcement agency for
2 its destruction prior to July 1, 2017. Cal. Penal Code §
3 32310(d). The amended version of Section 32310 enacted by
4 Proposition 63 also provides that possession of a large capacity
5 magazine as of July 1, 2017 constitutes an infraction or a
6 misdemeanor punishable by a fine not to exceed \$100 per large
7 capacity magazine and/or imprisonment in a county jail not to
8 exceed one year. Id. at § 32310(c).

9 On April 28, 2017, plaintiffs filed the instant action
10 alleging that Section 32310 is unconstitutional. After the
11 original Complaint was amended, the court denied plaintiffs'
12 request for a temporary restraining order and then denied
13 plaintiffs' request for a preliminary injunction. (Docket Nos.
14 45, 52.) In denying a preliminary injunction, the court held
15 that injunctive relief was not warranted because, among other
16 things, (1) the ban survived intermediate scrutiny under the
17 Second Amendment; (2) a complete ban on personal property deemed
18 by the state to be harmful to the public is likely not a taking
19 for public use requiring compensation; (3) the ban was not void
20 for vagueness because the version of the ban enacted by
21 Proposition 63 controlled, as it was enacted after the passage of
22 SB 1446; (4) the ban was not void for vagueness because it is not
23 paradoxical to exempt possession of large capacity magazines for
24 certain individuals while not allowing these individuals to
25 manufacture, import, sell, transfer, or receive the magazines;
26 and (5) the ban was not unconstitutionally overbroad because the
27 overbreadth doctrine does not apply in the Second Amendment
28 context and the law does not prohibit a substantial amount of

1 constitutionally protected conduct. The court further noted that
2 injunctive relief is generally not available for takings claims
3 and that plaintiffs had not shown that the balance of hardships
4 or public interest weighed in favor of injunctive relief.²

5 Plaintiffs then filed their Second Amended Complaint
6 ("SAC"), which expands on their previously asserted claims and
7 which adds (1) an Equal Protection claim under the U.S. and
8 California Constitutions, based on the exemption for large
9 capacity magazines used as props in movies and television; (2) an
10 allegation that the ban operates as a taking under the California
11 Constitution; and (3) allegations regarding SB 1446's alleged
12 "preamendment" of Proposition 63 in support of their claim that
13 the ban is void for vagueness because of the differences in the
14 two versions of the ban. (Docket No. 59.)

15 II. Discussion

16 A. Second Amendment Challenge

17 To evaluate a Second Amendment claim, the court asks
18 whether the challenged law burdens conduct protected by the
19 Second Amendment, and if so, what level of scrutiny should be
20 applied. Fyock, 779 F.3d at 996 (citing United States v. Chovan,
21 735 F.3d 1127, 1136 (9th Cir. 2013)).

22 a. Burden on Conduct Protected by the Second 23 Amendment

24 Plaintiffs have alleged, and there is no dispute in
25

26 ² Soon after the court's order, the ban on possession of
27 grandfathered large capacity magazines was enjoined by Judge
28 Roger T. Benitez in Duncan v. Becerra, 265 F. Supp. 3d 1106 (S.D.
Cal. 2017). Judge Benitez's injunction remains in effect as of
the date of this Order.

1 this case, that many people inside and outside of California have
2 for many years lawfully possessed large capacity magazines for
3 purposes such as self-defense, target shooting, and hunting.
4 (See SAC ¶¶ 32-34, 46, 48-49, 57; see also Heller v. District of
5 Columbia, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (“Heller II”)
6 (finding that magazines holding more than ten rounds were in
7 “common use”). Thus, notwithstanding California’s existing ban
8 on the purchase, sale, transfer, receipt, or manufacture of such
9 magazines since 2000, plaintiffs have alleged that California’s
10 ban on large capacity magazines burdens conduct protected by the
11 Second Amendment. See Fyock, 779 F.3d at 998 (district court did
12 not clearly err in finding that a regulation on large capacity
13 magazines burdens conduct falling within the scope of the Second
14 Amendment). But see Kolbe v. Hogan, 849 F.3d 114, 135-37 (4th
15 Cir. 2017) (en banc), cert. denied, 138 S. Ct. 469 (2017) (large
16 capacity magazines are not protected by the Second Amendment
17 because they are weapons most useful in military service).³

18 b. Appropriate Level of Scrutiny

19 In determining what level of scrutiny applies to the
20 ban on large capacity magazines, the court considers (1) how
21 closely the law comes to the core of the Second Amendment right,
22 which is self-defense, and (2) how severely, if at all, the law
23 burdens that right. Fyock, 779 F.3d at 998-99 (citing Chovan,
24 735 F.3d at 1138). Intermediate scrutiny is appropriate if the

25 ³ 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 regulation does not implicate the core Second Amendment right or
2 if the regulation does not place a substantial burden on that
3 right. Id. at 998-99 (citing Jackson v. City & County of San
4 Francisco, 746 F.3d 953, 964 (9th Cir. 2014)).

5 Here, as discussed in the court's prior order,
6 intermediate scrutiny is appropriate because "the prohibition of
7 . . . large capacity magazines does not effectively disarm
8 individuals or substantially affect their ability to defend
9 themselves." See Heller II, 670 F.3d at 1262; Fyock, 779 F.3d at
10 999 (quoting Heller II). The ban may implicate the core of the
11 Second Amendment because it restricts the ability of law-abiding
12 citizens to possess large capacity magazines within their homes
13 for self-defense. See Fyock, 779 F.3d at 999. However, the ban
14 "does not affect the ability of law-abiding citizens to possess
15 the 'quintessential self-defense weapon'--the handgun. Rather,
16 [it] restricts possession of only a subset of magazines that are
17 over a certain capacity." Id. (quoting District of Columbia v.
18 Heller, 554 U.S. 570, 629 (2008) ("Heller I").

19 Indeed, virtually every other court to examine large
20 capacity magazine bans has found that intermediate scrutiny is
21 appropriate, assuming these magazines are protected by the Second
22 Amendment. See Fyock, 779 F.3d at 999; Kolbe, 849 F.3d at 138-
23 139; N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d
24 242, 258-60 (2d Cir. 2015); Heller II, 670 F.3d at 1261-62; S.F.
25 Veteran Police Officers Ass'n v. City & County of San Francisco,
26 18 F. Supp. 3d 997, 1002-04 (N.D. Cal. 2014). But see Friedman
27 v. City of Highland Park, 784 F.3d 406 (7th Cir. 2015) (upholding
28 municipal ban on assault weapons and large capacity magazines but

1 declining to determine what level of scrutiny applied).⁴

2 Accordingly, because California's ban does not
3 substantially burden individuals' ability to defend themselves,
4 intermediate scrutiny is appropriate.

5 c. Application of Intermediate Scrutiny

6 Intermediate scrutiny requires "(1) the government's
7 stated objective to be significant, substantial, or important;
8 and (2) a reasonable fit between the challenged regulation and
9 the asserted objective." Fyock, 779 F.3d at 1000 (quoting
10 Chovan, 735 F.3d at 1139). This test does not require that the
11 government's regulation is the least restrictive means of
12 achieving its interests. Rather, the government need only show
13 that the regulation "promotes a substantial government interest
14 that would be achieved less effectively absent the regulation."
15 Id. (citation omitted). In reviewing the fit between the
16 government's stated objective and the regulation, the court may
17 consider legislative history as well as studies in the record or
18 applicable case law. Id. The evidence need only "fairly
19 support" the state's rationale, and in making this determination,
20 courts "afford substantial deference to the predictive judgments
21 of the legislature." N.Y. State Rifle, 804 F.3d at 261
22 (citations omitted); see also Kolbe, 849 F.3d at 140 (court must
23

24 ⁴ The court recognizes plaintiffs' allegation that
25 magazines are an integral part of firearms. However, the fact
26 that plaintiffs or all Californians may not be able to use
27 certain magazines, or even certain firearms for which large
28 capacity magazines are the only available magazines, does not
prevent residents of California from defending themselves using
magazines capable of holding no more than ten rounds, and
handguns compatible with these magazines.

1 give substantial deference to the legislature, because "it is the
2 legislature's job, not ours, to weigh conflicting evidence and
3 make policy judgments") (citations omitted).

4 One stated objective of California's large capacity
5 magazine ban is to reduce the incidence and harm of mass
6 shootings.⁵ (Defs.' Request for Jud. Notice Gordon Decl., Ex. B
7 at 164 § 2, ¶¶ 11-12; § 3, ¶ 8 (Docket No. 61-3).)⁶ There can be
8 no serious argument that this is not a substantial government
9 interest, especially in light of the mass shootings involving
10 large capacity magazines, including the 2012 Aurora movie theater
11 shooting and the 2012 Sandy Hook school shooting, which were
12 discussed in Proposition 63. (Id.)

13 Further, multiple courts have found a reasonable fit
14 between similar bans with similar stated objectives. See Kolbe,
15 849 F.3d at 139-41 (reasonable fit between assault weapon and LCM

16 ⁵ On plaintiffs' request for a preliminary injunction,
17 the court also considered the government's stated objective that
18 the ban on possession was intended to ease enforcement of
19 California's existing ban on the purchase, sale, transfer,
20 receipt, or manufacture of large capacity magazines. The text of
21 Proposition 63 does not specifically refer to this objective and
22 the court does not consider it in deciding the instant Motion to
23 Dismiss.

24 ⁶ The court takes judicial notice of the text of Senate
25 Bill 1446, Proposition 63, the California Official Voter
26 Information Guide for Proposition 63, the California Department
27 of Justice Finding of Emergency and Notice of Proposed Emergency
28 Action regarding Proposition 63, the version of California Penal
Code § 32406 enacted by SB 1446, and the version of § 32406
enacted by Proposition 63, as the text of these documents is not
subject to reasonable dispute, the documents were previously
attached to pleadings in this case, and the court may take
judicial notice of legislative history reports when ruling on a
motion to dismiss. See, e.g., In re Google, Inc. Gmail Litig.,
No. 13-MD-02430-LHK, 2013 WL 5423918, *6 (N.D. Cal. Sept. 26,
2013) (citations omitted).

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

13 As discussed in the court's order denying a preliminary
14 injunction, reasonable minds will differ as to the best way to
15 reduce the incidence and harm of mass shootings. However,
16 defendants are only required to show a reasonable fit between the
17 ban and this important objective, and courts give substantial
18 deference to the predictive judgments of the voters that passed
19 Proposition 63. See Fyock, 779 F.3d at 1000; N.Y. State Rifle,
20 804 F.3d at 261 (citations omitted); Kolbe, 849 F.3d at 140.
21 Thus, notwithstanding plaintiffs' allegations that the ban will
22 not in fact reduce the incidence and harm of mass shootings,
23 California's stated interest of reducing the incidence and harm
24 of mass shootings "would be achieved less effectively absent the
25 regulation," Fyock, 779 F.3d at 1000, and there is a reasonable
26 fit between the ban and California's important objectives.
27 Because of this reasonable fit, plaintiffs have not sufficiently
28 alleged that the large capacity magazine ban fails intermediate

1 scrutiny, and the court will dismiss the Second Amendment claim.
2 See, e.g., Mahoney v. Sessions, 871 F.3d 873, 883 (9th Cir. 2017)
3 (affirming dismissal of Second Amendment claim because the policy
4 at issue survived intermediate scrutiny and was therefore
5 constitutional).

6 B. Takings Clause/Due Process Challenge

7 The Fifth Amendment prohibits the taking of private
8 property for public use without just compensation. U.S. Const.
9 amend. V. The Takings Clause prohibits both “physical” takings
10 and “regulatory” takings. Lingle v. Chevron U.S.A. Inc., 544
11 U.S. 528, 537-38 (2005). A per se physical taking occurs where
12 the government physically invades or takes title to property
13 either directly or by authorizing someone else to do so, while a
14 per se regulatory taking occurs where a regulation of private
15 property is “so onerous that its effect is tantamount to a direct
16 appropriation or ouster.” Loretto v. Teleprompter Manhattan CATV
17 Corp., 458 U.S. 419, 426 (1982); Lingle, 544 U.S. at 537-38.

18 While the Takings Clause of the California Constitution
19 does “protect[] a somewhat broader range of property values than”
20 its federal counterpart, the two clauses have generally been
21 interpreted the same by the California Supreme Court. See San
22 Remo Hotel, L.P. v. City & County of San Francisco, 27 Cal. 4th
23 643, 664 (2002) (noting that art. I § 19 of the California
24 Constitution includes damage to property, but that aside from
25 this difference, “we appear to have construed the clauses
26 congruently”) (citations and internal punctuation omitted);
27 Customer Co. v. City of Sacramento, 10 Cal. 4th 368, 379-80
28 (1995) (“It seems apparent that the addition of the words ‘or

1 damaged' to the 1879 [California] Constitution was intended to
2 clarify that application of the just compensation provision . . .
3 encompasses special and direct damage to adjacent property
4 resulting from the construction of public improvements" and
5 "[t]here is nothing that indicates the provision was intended to
6 expand compensation outside the traditional realm of eminent
7 domain").

8 Plaintiffs argue that the magazine ban operates as an
9 unconstitutional taking under the Fifth and Fourteenth Amendments
10 and the California Constitution because they will have to
11 physically turn over their magazines for destruction or, in the
12 alternative, they will be completely deprived of all beneficial
13 use of their magazines, without just compensation.

14 Notwithstanding plaintiffs' allegations, California's
15 large capacity magazine ban does not operate as a physical
16 taking. The ban does not require that owners turn over their
17 magazines to law enforcement - they may alternatively sell the
18 magazines to licensed gun dealers, remove them from the state, or
19 permanently modify the magazines so that they no longer accept
20 more than 10 rounds. The impracticality of any particular
21 option, such as the alleged lack of a market for these magazines,
22 the burden in removing these magazines from the state, or the
23 lack of guidance on what constitutes a permissible permanent
24 modification does not transform the regulation into a physical
25 taking. Nor does the court accept plaintiffs' assertion that
26 permanently modifying a magazine to accept no more than ten
27 rounds "destroys the functionality" of the magazine, given that
28 plaintiffs do not allege that owners of these magazines will not

1 be able to use their modified magazines, which would then simply
2 have a lower capacity than before the modification.⁷ Because of
3 these alternatives to turning the magazines over to law
4 enforcement, plaintiffs do not plausibly allege that the ban
5 operates as government appropriation of private property for
6 government or public use.

7 Nor does the large capacity magazine ban operate as a
8 regulatory taking, for similar reasons. In the context of real
9 property, the Supreme Court has explained that a regulation does
10 not operate as a compensable taking unless the regulation
11 "completely deprive[s] an owner of all economically beneficial
12 use of her property." Lingle, 544 U.S. at 528 (citing Lucas v.
13 S.C. Coastal Council, 505 U.S. 1003, 1019 (1992)) (internal
14 punctuation omitted).⁸ Because owners may sell their magazines

15
16 ⁷ The court similarly rejects plaintiffs' assertion that
17 requiring large capacity magazines owners to modify the magazine
18 to allow fewer than 11 rounds constitutes "damage" within the
19 meaning of the California Constitution's taking clause, given the
20 California Supreme Court's pronouncements that takings under the
21 United States Constitution and the California Constitution are
22 generally equivalent, notwithstanding the addition of the word
23 "damage" in the California Constitution, which was intended to
24 cover damage to adjacent property resulting from the construction
25 of public improvements. See San Remo Hotel, 27 Cal. 4th at 664;
26 Customer Co., 10 Cal. 4th at 379-80.

27 ⁸ Contrary to plaintiffs' assertion, it is not clear that
28 this rule applies in the context of personal property. See
Lucas, 505 U.S. at 1027-28 ("[I]n the case of personal property,
by reason of the State's traditionally high degree of control
over commercial dealings, [o]ne ought to be aware of the
possibility that a new regulation might even render his property
economically worthless (at least if the property's only
economically productive use is sale or manufacture for sale).").
For the purposes of this motion, however, the court assumes,
without deciding, that the Lucas court's "beneficial use" test
applies in the context of personal property.

1 to licensed dealers or remove them from the state, or even retain
2 the magazines if they are permanently modified to accept fewer
3 than 11 rounds, plaintiffs have not plausibly alleged that the
4 large capacity magazine ban completely deprives them of all
5 economically beneficial use of their property.⁹ Accordingly,
6 plaintiffs have not sufficiently alleged that California's large
7 capacity magazine ban operates as a taking requiring just
8 compensation under the Fifth and Fourteenth Amendments and the
9 California Constitution, and the court will dismiss Count II of
10 the Second Amended Complaint.¹⁰

11 C. Vagueness Claims¹¹

12 The Fifth Amendment also provides that "[n]o person
13 shall . . . be deprived of life, liberty, or property, without
14 due process of law." U.S. Const. amend. V. The government
15

16 ⁹ Further, plaintiffs have not plausibly alleged that the
17 large capacity magazine ban operates as a partial regulatory
18 taking under Penn Central Transportation Co. v. New York City,
19 438 U.S. 104, 124 (1978), given the alternatives for disposal or
20 modification, the state's substantial interest, and the Second
21 Amended Complaint's absence of any plausible facts that the ban
22 interferes with plaintiffs' distinct investment-backed
23 expectations.

24 ¹⁰ Because the court determines that the large capacity
25 magazine ban does not operate as a physical or regulatory taking
26 given the options for disposal or modification, it does not
27 decide whether a complete ban on personal property deemed harmful
28 by the state may be a compensable taking, notwithstanding the
court's prior discussion in its order denying a preliminary
injunction.

¹¹ Plaintiffs claim the large capacity magazine ban is
void for vagueness on multiple grounds, which are alleged in
Count III and Count IV. The court discusses all of plaintiffs'
vagueness contentions in this section.

1 violates due process when it deprives an individual of life,
2 liberty, or property pursuant to an unconstitutionally vague
3 criminal statute. Johnson v. United States, 135 S. Ct. 2551,
4 2556-57 (2015). A statute is unconstitutionally vague when it
5 "fails to provide a person of ordinary intelligence fair notice
6 of what is prohibited, or is so standardless that it authorizes
7 or encourages seriously discriminatory enforcement." United
8 States v. Williams, 553 U.S. 285, 304 (2008).

9 Plaintiffs claim that the large capacity magazine ban
10 is void for vagueness on multiple grounds: (1) SB 1446 and
11 Proposition 63 created two different versions of California Penal
12 Code § 32406, and it is not clear which version applies;¹² (2) the
13 ban exempts possession by certain individuals but does not allow
14 such individuals to give, receive, or bring these magazines into
15 the state; and (3) the options for compliance with the ban, other
16 than turning the magazine over to the state, are not practical
17 and have not been properly defined.¹³

18 ¹² SB 1446 exempts six classes of individuals/entities--
19 (1) honorably retired law enforcement officers, (2) historical
20 societies and museums, (3) persons who find and deliver large
21 capacity magazines to law enforcement agencies, (4) forensic
22 laboratories, (5) trustees and executors, and (6) persons in
23 lawful possession of a firearm acquired prior to 2000 that is
24 only compatible with a large capacity magazine--from the
25 prohibition on possession of these magazines. In contrast, the
26 Proposition 63 only exempts honorably retired law enforcement
27 officers.

28 ¹³ The Second Amended Complaint also contains a brief
allegation that it is unclear whether a magazine is prohibited by
the ban where the magazine accepts different types of ammunition
and is capable of holding more than ten rounds of one type of
ammunition, but the firearm for which the magazine is used does
not accept that ammunition. However, even if the magazine holds
less than 11 rounds when used with a particular firearm, as

1 As discussed by the court in its order denying a
2 preliminary injunction, plaintiffs do not cite, and the court is
3 unaware of, any case that has held an enactment to be void for
4 vagueness because it conflicts with another enactment and it is
5 not clear which enactment controls. The only case of which the
6 court is aware where that argument was made held that such
7 enactments were not void for vagueness. See Karlin v. Foust, 188
8 F.3d 446, 469 (7th Cir. 1999) (holding that the question before
9 the court was whether one enactment impliedly repealed the other,
10 not whether the enactments are void for vagueness). Moreover,
11 under California law, where two conflicting versions of the same
12 statute are enacted at different times, the later-enacted version
13 controls. People v. Bustamante, 57 Cal. App. 4th 693, 701 (2d
14 Dist. 1997) (citing County of Ventura v. Barry, 202 Cal. 550, 556
15 (1927) and People v. Dobbins, 73 Cal. 257, 259 (1887)).

16 Plaintiffs argue that the "later-in-time" rule is
17 merely a presumption and that California law has a seemingly
18 conflicting presumption that "absent clear evidence to the
19 contrary, the later enactment of a law is not intended to repeal
20 or supplant earlier laws on the same subject and instead both
21 statutes are intended to be enforced." (Mot. Opp'n 46 (Docket
22 No. 71) (citing People v. Carter, 131 Cal. App. 177, 181 (1933);
23 W. Mobilehome Ass'n v. County of San Diego, 16 Cal. App. 3d 941,
24 948 (4th Dist. 1971).)

25 However, plaintiffs have not sufficiently alleged why
26 _____
27 stated by Cal. Penal Code § 16740, if the magazine "has a
28 capacity to accept more than 10 rounds," it is prohibited under
the plain language of the statute, and the ban is not void for
vagueness based on this alleged ambiguity.

1 the normal presumption that a later enacted version of a law
2 controls does not apply. The cases relied on by plaintiffs
3 explain that a later enacted statute supersedes the earlier
4 statute if either (1) it is clear that the later statute is
5 intended as a complete revision or substitute for the earlier
6 statute, or (2) if the "object or purpose of the quasi-repealing
7 statute is identical with that of the statute to be so repealed"
8 or there is a "real, or at least apparent, conflict or
9 inconsistency between the two statutes." See Carter, 131 Cal.
10 App. at 181; W. Mobilehome, 16 Cal. App. 3d at 948. Here,
11 Proposition 63's omission of various exceptions for possession,
12 as well as a harsher penalty for noncompliance,¹⁴ shows that the
13 object of the two versions of the ban are identical and that the
14 versions are inconsistent, and thus the later enacted version,
15 the version enacted by Proposition 63, is controlling.

16 Moreover, the Voter Information Guide attached to
17 Proposition 63 included a legislative analysis explaining that
18 "recently enacted law" beginning July 2017, which obviously
19 refers to SB 1446, exempts various individuals, and that
20 "Proposition 63 eliminates several of these exemptions," and
21 "increases the maximum penalty for possessing large capacity
22 magazines." (Mot. Ex. B at 87.) In other words, California
23 voters were told before they passed Proposition 63 that

24
25 ¹⁴ SB 1446 provided that possession of a large capacity
26 magazine in violation of the statute constituted an infraction
27 punishable by fine, while Proposition 63 provided that possession
28 in violation of the statute constitutes an infraction punishable
by fine or a misdemeanor punishable by a fine, imprisonment in a
county jail not to exceed one year, or both.

1 Proposition 63 would replace the version of the large capacity
2 magazine ban enacted by SB 1446, such that it is clear that
3 Proposition 63 was intended to replace SB 1446's version of the
4 ban.¹⁵ Under these circumstances, plaintiffs have not
5 sufficiently pled that the large capacity magazine ban is
6 unconstitutionally vague on account of the passage of both SB
7 1446 and Proposition 63.

8 Plaintiffs once again allege that the large capacity
9 magazine ban is vague because (1) it is an "absurdity" to exempt
10 possession for retired law enforcement officers, and in the case
11 of SB 1446, certain other individuals, while prohibiting them
12 from bringing such magazines into the state or giving or
13 receiving them, and (2) the options for disposal, with the
14 exception of turning the magazines over to the state, are
15 "illusory." (SAC ¶¶ 95-101.) As discussed in the court's denial
16 of the preliminary injunction, any ambiguity on these issues are
17 at most marginal questions regarding a statute whose application
18

19 ¹⁵ Further, plaintiffs' "preamendment" argument, that SB
20 1446 "preamended" Proposition 63, is not persuasive because
21 neither the text nor the legislative history of SB 1446 discussed
22 anything about preamending Proposition 63, notwithstanding the
23 statement of the California Department of Justice in the Finding
24 of Emergency, which was later withdrawn, that SB 1446 was
25 intended to preamend Proposition 63. Notably, the California
26 Legislature included express language in a related bill that the
27 bill would amend the Safety for All Act of 2016 if the Act was
28 enacted by voters. See 2016 Cal. Stats. ch. 55 (SB 1235)
(preamending Proposition 63's requirements regarding the sale of
ammunition). The fact that this language was omitted from SB
1446 tends to show that while the California Legislature was
aware of the possible future passage of Proposition 63, SB 1446
did not preamend Proposition 63 - the legislature intended to ban
possession of large capacity firearms regardless of whether
Proposition 63 passed.

1 is clear in the vast majority of intended applications. See Cal.
2 Teachers Ass'n v. State Bd. of Educ., 271 F.3d 1141, 1151 (9th
3 Cir. 2001) (“[U]ncertainty at a statute’s margins will not
4 warrant facial invalidation if it is clear what the statute
5 proscribes ‘in the vast majority of its intended applications.’”) (quoting Hill v. Colorado, 530 U.S. 703, 733 (2000)).

7 Further, the court once again rejects plaintiffs’
8 contention that it is absurd to allow these individuals to
9 possess these magazines but prohibit them from manufacturing,
10 importing into the state, keeping for sale, offering for sale,
11 giving, lending, buying, or receiving them. It is entirely
12 possible to possess a large capacity magazine without engaging in
13 those other activities. Moreover, the court is unaware of, and
14 plaintiffs have cited no authority holding, that a statute is
15 unconstitutionally vague where one or more methods of compliance
16 are impractical but another method of compliance is not
17 impractical. Any difficulty plaintiffs or the public might have
18 in seeking to sell their magazines to a licensed gun dealer or
19 remove them from the state is not grounds to invalidate the ban
20 as unconstitutionally vague, when it is clear that individuals
21 may comply with the ban by surrendering them to a law enforcement
22 agency for destruction.

23 Because plaintiffs have not sufficiently alleged that
24 the large capacity magazine ban is void for vagueness, the court
25 will dismiss plaintiffs’ vagueness claims in Count III and Count
26 IV.

27 D. Overbreadth Claim

28 Plaintiffs allege that the large capacity magazine ban

1 is unconstitutionally overbroad because there is no evidence that
2 application of the ban to current owners of large capacity
3 magazines would further the objectives of reducing mass shootings
4 and the harm inflicted during those shootings, as well as making
5 the current regulations less difficult to enforce. (SAC ¶ 103.)

6 However, as the court discussed on plaintiffs' Motion
7 for Preliminary Injunction, the court is unaware of any cases
8 applying the overbreadth doctrine in the Second Amendment
9 context, and plaintiffs have provided no authority compelling the
10 court to expand the overbreadth doctrine to the Second Amendment.
11 See United States v. Salerno, 481 U.S. 739, 745 (1987) ("[W]e
12 have not recognized an 'overbreadth' doctrine outside the limited
13 context of the First Amendment." (citation omitted)); Kachalsky
14 v. County of Westchester, 701 F.3d 81, 101 (2d Cir. 2012)
15 ("Overbreadth challenges are generally limited to the First
16 Amendment context."); United States v. Chester, 628 F.3d 673, 688
17 (4th Cir. 2010) (Davis, J., concurring) ("[I]mporting the
18 overbreadth doctrine . . . into the Second Amendment context
19 would be inappropriate.").¹⁶

20 ¹⁶ Plaintiffs' cited cases are not to the contrary. In
21 Powell's Books, Inc. v. Kroger, 622 F.3d 1202, 1207 (9th Cir.
22 2010), a bookstore and other plaintiffs brought an overbreadth
23 challenge to Oregon's law criminalizing the provision of sexually
24 explicit material to minors, where the court found the statute
25 "swe[pt] up a host of material entitled to constitutional
26 protection" under the First Amendment. The other two cases cited
27 by plaintiffs involved both vagueness and overbreadth challenges
28 but the courts addressed only the vagueness claims. While the
petitioner in Phelps v. United States, 831 F.2d 897, 898 (9th
Cir. 1987), brought both a vagueness and overbreadth challenge to
a federal statute regarding the release of persons adjudged not
guilty by reason of insanity, the court addressed only the
vagueness argument, finding the statute was not
unconstitutionally vague because the standard set forth in the

1 Moreover, challenging a law on overbreadth grounds
2 requires a showing that the law prohibits "a substantial amount"
3 of constitutionally protected conduct, Powell's Books, Inc. v.
4 Kroger, 622 F.3d 1202, 1208 (9th Cir. 2010), and plaintiffs fail
5 to allege what constitutionally protected conduct the law
6 substantially prohibits. Because plaintiffs have failed to
7 sufficiently allege that the law violates the Second Amendment,
8 they have similarly failed to sufficiently allege that the law
9 prohibits a substantial amount of constitutionally protected
10 conduct. Accordingly, the court will dismiss plaintiffs'
11 overbreadth claim.

12 E. Equal Protection Claim

13 Plaintiffs' final claim is that the large capacity
14 magazine ban violates the Equal Protection Clause of the U.S.
15 Constitution and the California Constitution because it exempts
16 the use, purchase, or possession of large capacity magazines for
17 use solely as a prop for motion picture, television, or video
18 production, which favors actors and other individuals affiliated
19 with them over other California residents and visitors. (SAC ¶¶
20 107-115.)

21 The Equal Protection Clause of the Fourteenth Amendment
22

23 statute was not too subjective and was applied regularly by
24 judges in a variety of contexts. Similarly, the defendant in
25 United States v. Rodriguez-DeHaro, 192 F. Supp. 2d 1031, 1038-39
26 (E.D. Cal. 2002) (Wanger, J.), challenged an indictment which was
27 based in part on his prior conviction under a California domestic
28 violence statute, raising both overbreadth and vagueness
arguments, but the court specifically addressed only the
vagueness argument, finding that the California statute's
language was "capable of being understood by a person of ordinary
intelligence." (citation omitted).

1 "directs that all persons similarly circumstanced shall be
2 treated alike." Plyer v. Doe, 457 U.S. 202, 216 (1982) (citation
3 and internal punctuation omitted). The court applies strict
4 scrutiny where a law "targets a suspect class or burdens the
5 exercise of a fundamental right," but if the law "does not
6 concern a suspect or semi-suspect class or a fundamental right,"
7 the court applies rational basis review, asking whether the law
8 "is rationally-related to a legitimate government interest."
9 Honolulu Weekly, Inc. v. Harris, 298 F.3d 1037, 1047 (9th Cir.
10 2002) (citations omitted). Where a law does not impermissibly
11 burden the Second Amendment, that law is subject to rational
12 basis review under the Equal Protection Clause. Nordyke v. King,
13 681 F.3d 1041, 1043 n.2 (9th Cir. 2012) (rational basis review
14 applied to plaintiffs' equal protection challenge to county
15 ordinance prohibiting possession of firearms on county property,
16 "because the ordinance does not classify shows or events on the
17 basis of a suspect class, and because we hold that the ordinance
18 does not violate either the First or Second Amendment").

19 Under rational basis review, the court asks whether the
20 ordinance is rationally related to a legitimate government
21 interest, and statutes are generally presumed valid. Honolulu
22 Weekly, 298 F.3d at 1047; Fields v. Legacy Health Sys., 413 F.3d
23 943, 955 (9th Cir. 2005). The burden is on the one attacking the
24 legislative arrangement to negative every conceivable basis which
25 might support it," and the classification "must be upheld against
26 equal protection challenge if there is any reasonably conceivable
27 state of facts that could provide a rational basis for the
28 classification." Heller v. Doe, 509 U.S. 312, 319-20 (1993)

1 (internal punctuation omitted).

2 Equal protection claims under the U.S. Constitution are
3 generally analyzed the same as equal protection claims under the
4 California Constitution, and the rational basis test under
5 California law is no more rigorous than under federal law. See
6 Walgreen Co. v. City and County of San Francisco, 185 Cal. App.
7 4th 424, 434 n.7 (1st Dist. 2010); Serrano v. Priest, 18 Cal.3d
8 728, 763 (1976).

9 California's exemption for use of large capacity
10 magazines as props for motion picture, television, or video
11 production does not involve a suspect class, and the court has
12 already determined that California's ban survives intermediate
13 scrutiny under the Second Amendment. Accordingly, rational basis
14 applies. See Nordyke, 681 F.3d at 1043 n.2; Kwong v. Bloomberg,
15 723 F.3d 160, 170 n.19 (2d Cir. 2013) ("[P]laintiffs should not
16 be allowed to use the Equal Protection Clause 'to obtain review
17 under a more stringent standard' than the standard applicable to
18 their Second Amendment claim. . . . Put another way, an Equal
19 Protection claim that is based on the alleged burdening of one's
20 Second Amendment rights should not be reviewed in isolation;
21 whether one's Second Amendment rights are impermissibly
22 'burdened' is necessarily informed by the underlying Second
23 Amendment analysis.") (citation omitted); Nat'l Rifle Ass'n of
24 Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700
25 F.3d 185, 211-12 (5th Cir. 2012) (federal laws banning handgun
26 sales to individuals under 21 were subject to rational basis
27 review because the laws did not impermissibly interfere with
28 Second Amendment rights and because age was not a suspect

1 classification); Hightower v. City of Boston, 693 F.3d 61, 83
2 (1st Cir. 2012) (“Given that the Second Amendment challenge
3 fails, the equal protection claim is subject to rational basis
4 review.”).

5 Applying rational basis review, plaintiffs have not
6 shown that there is no rational basis for California’s exemption
7 for television, video, and movie props. The court cannot know
8 for certain why this exemption was included. Nevertheless, the
9 California electorate could have rationally believed that large
10 capacity magazines used solely as props were not at risk of being
11 used in mass shootings and that such an exception would benefit
12 an important sector of the California economy. Thus, the
13 exemption survives rational basis review, and plaintiffs have not
14 sufficiently alleged that the exemption violates the Equal
15 Protection Clause of either the U.S. or California Constitution.
16 The court will therefore dismiss Count V.

17 IT IS THEREFORE ORDERED that defendants’ Motion to
18 Dismiss (Docket No. 61) be, and the same hereby is, GRANTED.
19 Plaintiffs have twenty days from the date this Order is signed to
20 file a Third Amended Complaint, if they can do so consistent with
21 this Order.

22 Dated: February 6, 2018


23 **WILLIAM B. SHUBB**
24 **UNITED STATES DISTRICT JUDGE**