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8 IN THE UNITED STATES DISTRICT COURT
 9 FOR THE EASTERN DISTRICT OF CALIFORNIA
 10 SACRAMENTO DIVISION
 11

12 **WILLIAM WIESE, et al.,**
 13
 Plaintiffs,
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 v.
 15
XAVIER BECERRA, et al.,
 16
 Defendants.
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2:17-cv-00903-WBS-KJN

**DEFENDANTS' REPLY IN SUPPORT
 OF MOTION TO DISMISS THIRD
 AMENDED COMPLAINT**

Date: February 19, 2019
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 Courtroom: 5, 14th Floor
 Judge: Hon. William B. Shubb
 Trial Date: None Set
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INTRODUCTION

Plaintiffs fail to meaningfully address the irremediable pleading deficiencies in the Third Amended Complaint (the “TAC”), deficiencies identical to those that plagued Plaintiffs’ earlier pleadings. This Court thoroughly described these deficiencies in prior rulings denying Plaintiffs’ request for preliminary injunctive relief (the “PI Order”) (Dkt. No. 52) and dismissing the Second Amended Complaint (the “MTD Order”) (Dkt. No. 74). Yet nowhere in their 57-page opposition do Plaintiffs explain how the few new allegations in the TAC are “consistent with th[e MTD] Order” and state any plausible claim for relief. MTD Order at 23:20-21. The TAC and the opposition ignore this Court’s prior rulings.

The fundamental premise of Plaintiffs’ opposition—that they “have alleged and are here prepared to prove at trial that legally-owned (grandfathered) LCMs have not been involved in California mass shootings since the original ban was enacted in 2000,” Pls.’ Opp’n to Defs.’ Mot. to Dismiss TAC (“Opp’n”) at 9:5-8—has already been rejected by this Court. *See* PI Order at 10:8-17. Under intermediate scrutiny, even if “there is no evidence that any [public mass shootings in California] involved grandfathered [LCMs],” California’s LCM possession ban is constitutional. *Id.* at 10:10-11. This Court has held that, even assuming the truth of Plaintiffs’ allegations, California’s LCM possession ban satisfies intermediate scrutiny under the Second Amendment, is not a taking of private property for public use requiring just compensation, is not vague or overbroad, and does not violate the Equal Protection Clause. The Court should do so again and dismiss the TAC without leave to amend.

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ARGUMENT

I. PLAINTIFFS HAVE FAILED TO STATE A PLAUSIBLE CLAIM FOR RELIEF UNDER THE SECOND AMENDMENT.

As the Court has held, Plaintiffs’ Second Amendment claim must fail as a matter of law. *See* MTD Order at 9:21-10:5. Under the Ninth Circuit’s two-step analysis for Second Amendment claims, which asks (1) “whether the challenged law burdens conduct protected by the Second Amendment,” and (2) if so, whether the law satisfies the applicable level of scrutiny,

1 *Fyock v. Sunnyvale*, 779 F.3d 991, 996 (9th Cir. 2015) (quoting *United States v. Chovan*,
 2 735 F.3d 1127, 1136 (9th Cir. 2013)), Plaintiffs’ allegations in the TAC fail to state a claim that
 3 the LCM possession ban violates the Second Amendment.¹

4 **A. Intermediate Scrutiny Applies to California’s LCM Possession Ban.**

5 As this Court has held, because “the prohibition of . . . large-capacity magazines does not
 6 effectively disarm individuals or substantially affect their ability to defend themselves,”
 7 intermediate scrutiny is the appropriate standard. MTD Order at 6:5-9 (quoting *Heller v. District*
 8 *of Columbia (Heller II)*, 670 F.3d 1244, 1262 (D.C. Cir. 2011) and *Fyock*, 779 F.3d at 999); *see*
 9 *also id.* at 6:19-22 (“[V]irtually every other court to examine large capacity magazine bans has
 10 found that intermediate scrutiny is appropriate, assuming these magazines are protected by the
 11 Second Amendment.”). Plaintiffs’ arguments to the contrary, attempting to revisit this question,
 12 are unavailing.

13 **First**, Plaintiffs wrongly contend that California Penal Code section 32310² “amounts to a
 14 prohibition on a significant category of firearms forbidden under *Heller* as a matter of law.”
 15 Opp’n at 11:24-25; *see also id.* at 9:14-16:16. What is “forbidden” under *Heller* is regulation that
 16 amounts to a complete ban on the possession of handguns, which the Court characterized as the
 17 “the quintessential self-defense weapon.” *District of Columbia v. Heller*, 554 U.S. 570, 629
 18 (2008). Section 32310 does not ban any category of firearms nor does it ban the majority of
 19 ammunition magazines that an individual may possess. Section 32310 merely “restricts
 20 possession of only a subset of magazines that are over a certain capacity.” MTD Order at 6:15-17
 21 (quoting *Fyock*, 779 F.3d at 999); *accord* PI Order at 6:23-26. Even if magazines are an integral
 22 part of firearms, *see* TAC ¶ 32, California law does not prohibit all magazines and, thus, “does
 23 not prevent residents of California from defending themselves using magazines capable of
 24 holding no more than ten rounds, and handguns compatible with these [10-round] magazines,”

25 ¹ This Court may assume, for purposes of this motion, that the LCM possession ban
 26 implicates the Second Amendment, because it is constitutional under intermediate scrutiny. *See*
 27 *Bauer v. Becerra*, 858 F.3d 1216, 1221 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 982 (2018);
 28 *Silvester v. Harris*, 843 F.3d 816, 826-27 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 945 (2018).

² All subsequent statutory references are to the California Penal Code, unless otherwise
 noted.

1 MTD Order at 7 n.4. Therefore, California’s LCM possession ban is not subject to “categorical
2 invalidation” under *Heller*, and remains subject to intermediate scrutiny. *See Fyock*, 779 F.3d at
3 999 (stating that municipal ban on LCMs “is simply not as sweeping as the complete handgun
4 ban at issue in *Heller* and does not warrant a finding that it cannot survive constitutional scrutiny
5 of any level”); *S.F. Veteran Police Officers v. City & Cty. of San Francisco*, 18 F. Supp. 3d 997,
6 1002 (N.D. Cal. 2014) (“Given that the San Francisco rule [banning possession of LCMs] is not a
7 total ban on self-defense at home or in public, there is no occasion whatsoever to apply the
8 ‘categorical’ prohibition advanced by plaintiffs, even if such a ‘categorical’ test had ever been
9 adopted by our appellate courts (which has not occurred).”).

10 **Second**, in a related point, Plaintiffs also argue that California’s LCM possession ban
11 is categorically invalid, as was the handgun ban in *Heller*, due to “tradition” and the
12 “common use” of LCMs. Opp’n at 13:4-16:16. These arguments, however, conflate the
13 Supreme Court’s discussion in *Heller* of “common use,” which bears on whether conduct
14 receives any Second Amendment protection at all, *see Heller*, 554 U.S. at 628-29, with the
15 application of traditional levels of scrutiny to regulation of protected conduct. These are
16 distinct inquiries. *See Chovan*, 735 F.3d at 1136 (adopting the two-step Second Amendment
17 inquiry). The cases cited by Plaintiffs noted that LCMs are in common use at the first step
18 of the analysis, but then proceeded to uphold the challenged laws at the second step under
19 intermediate scrutiny. *See Opp’n* at 14:18-15:9 (citing cases); *see also Heller II*, 670 F.3d
20 at 1261-32;³ *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1276-81 (N.D. Cal. 2014).
21 And that is precisely how this Court proceeded in evaluating Plaintiffs’ Second Amended
22 Complaint. *See MTD Order* at 5:7-11 (holding that “plaintiffs have alleged that
23 California’s ban on large capacity magazines burdens conduct protected by the Second
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25 _____
26 ³ Notably, the D.C. Circuit in *Heller II* clarified that “we cannot be certain whether these
27 weapons are commonly used or are useful specifically for self-defense or hunting and therefore
28 whether the prohibitions of certain semi-automatic rifles and magazines holding more than ten
rounds meaningfully affect the right to keep and bear arms.” *Heller II*, 670 F.3d at 1261. The
court merely assumed that the challenged prohibitions implicated the Second Amendment
because they satisfied intermediate scrutiny. *Id.*

1 Amendment”). That determination, however, did not save their Second Amendment claim
2 from dismissal at the second step of the analysis. *Id.* at 9:27-10:5.

3 **Third**, Plaintiffs erroneously contend that the application of intermediate scrutiny to any
4 regulation of firearms would constitute the kind of “interest-balancing test” proposed by Justice
5 Breyer in his *Heller* dissent, 554 U.S. at 689 (Breyer, J., dissenting), and rejected by the majority,
6 *id.* at 634. Opp’n at 16:17-22:1. *Heller*, however, described the impermissible “interest-
7 balancing test” as something other than the levels-of-scrutiny test commonly employed in
8 constitutional cases. *See Heller*, 554 U.S. at 634 (noting that Justice Breyer “proposes . . . none
9 of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis), but
10 rather a judge-empowering ‘interest-balancing inquiry’”); *see also Heller II*, 670 F.3d at
11 1265 (“If the Supreme Court truly intended to rule out any form of heightened scrutiny for all
12 Second Amendment cases, then it surely would have said at least something to that effect.”).
13 Therefore, *Heller* does not foreclose the application of intermediate scrutiny to firearms
14 regulations. *See Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*,
15 700 F.3d 185, 197 (5th Cir. 2012) (“[B]y taking rational basis review off the table, and by faulting
16 a dissenting opinion for proposing an interest-balancing inquiry *rather than* a traditional level of
17 scrutiny, the [*Heller*] Court’s language suggests that intermediate and strict scrutiny are on the
18 table.”).

19 **Fourth**, Plaintiffs also erroneously argue that, if a levels-of-scrutiny approach applies,
20 California’s LCM possession ban must be evaluated under strict scrutiny. Opp’n at 25:13-29:5.
21 As noted above, however, because section 32310 does not restrict the ability of individuals to use
22 “the quintessential self-defense weapon” for purposes of defending their homes, *Heller*, 554 U.S.
23 at 629, this Court, the Ninth Circuit, and every other court to have applied a level of scrutiny to
24 LCM restrictions has held that intermediate scrutiny applies. *See* MTD Order at 6:19-7:4 (citing
25 cases); *see also Bauer*, 858 F.3d at 1222–23 (noting that the Ninth Circuit has “repeatedly applied
26 intermediate scrutiny in [Second Amendment] cases”); *Silvester*, 843 F.3d at 823 (“There is
27 accordingly near unanimity in the post-*Heller* case law that when considering regulations that fall
28 within the scope of the Second Amendment, intermediate scrutiny is appropriate.”). This

1 conclusion is entirely consistent with *Heller*, in which the Supreme Court emphasized that the
2 Second Amendment right is “not unlimited,” and is not a “right to keep and carry any weapon
3 whatsoever in any manner whatsoever and for whatever purpose.” *Heller*, 554 U.S. at 626;
4 *Peruta v. Cty. of San Diego*, 824 F.3d 919, 928 (9th Cir. 2016) (en banc) (“The Court in *Heller*
5 was careful to limit the scope of its holding.”), *cert. denied sub nom. Peruta v. California*,
6 137 S. Ct. 1995 (2017). While the Supreme Court declined to specify what level of scrutiny
7 should apply in Second Amendment cases, it ruled out only rational basis scrutiny, *see Heller*,
8 554 U.S. at 628 & n.27, “thus signaling that courts must at least apply intermediate scrutiny,”
9 *Silvester*, 843 F.3d at 820 (citation omitted). Plaintiffs’ allegations in the TAC do not undermine
10 the conclusion that intermediate scrutiny applies to California’s LCM possession ban as a matter
11 of law. *See* MTD Order at 7:2-4.

12 **B. California’s LCM Possession Ban Satisfies Intermediate Scrutiny.**

13 In addition to arguing that intermediate scrutiny should not apply, Plaintiffs contend that the
14 courts applying intermediate scrutiny, including this Court, are doing so incorrectly. *See* Opp’n
15 at 24:18-25:12. Intermediate scrutiny requires the government to demonstrate that (1) its
16 objective in enacting a firearms regulation is significant, substantial, or important, and (2) there is
17 a “reasonable fit” between the regulation and the asserted objective. *Chovan*, 735 F.3d at 1139.
18 Intermediate scrutiny does not require the fit between the challenged regulation and the stated
19 objective to be “perfect,” *Pena v. Lindley*, 898 F.3d 969, 982 (9th Cir. 2018), *petition for cert.*
20 *docketed sub nom. Pena v. Horan*, No. 18-843 (U.S. Jan. 3, 2019), nor does it require that the
21 regulation be the least restrictive means of serving the interest, *see Jackson v. City & Cnty. of San*
22 *Francisco*, 746 F.3d 953, 969 (9th Cir. 2014).

23 Where a regulation does not severely burden the core Second Amendment right,
24 intermediate scrutiny affords governments “a reasonable opportunity to experiment with solutions
25 to admittedly serious problems.” *Jackson*, 746 F.3d at 969-70 (quoting *City of Renton v. Playtime*
26 *Theatres, Inc.*, 475 U.S. 41, 52 (1986)). Where governments engage in such experimentation,
27 under intermediate scrutiny, courts “afford substantial deference to the predictive judgments of
28 [the legislature].” *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997). Even if Plaintiffs

1 could introduce evidence that conflicts with Defendants’ evidence, “it is the legislature’s job, not
2 [the courts’], to weigh conflicting evidence and make policy judgments.” MTD Order at 8:1-3
3 (quoting *Kolbe v. Hogan*, 849 F.3d 114, 140 (4th Cir. 2017) (en banc)). Deferential review is
4 particularly appropriate “[i]n the context of firearm regulation” because “the legislature is ‘far
5 better equipped than the judiciary’ to make sensitive public policy judgments (within
6 constitutional limits) concerning the dangers in carrying firearms and the manner to combat those
7 risks.” *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012) (quoting *Turner Broad.
8 Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 665 (1994) (plurality)). Therefore, the judiciary’s
9 narrow role under intermediate scrutiny is to “assure that, in formulating its judgments, [the
10 government] has drawn reasonable inferences based on substantial evidence.” *Turner I*, 512 U.S.
11 at 666. That “evidence need only ‘fairly support[]’ [the government’s] conclusions.” *Pena*,
12 898 F.3d at 982 (quoting *Jackson*, 746 F.3d at 969).

13 Plaintiffs contend that the intermediate-scrutiny approach employed by the courts, and
14 adopted by this Court, would lead to a “slippery-slope” in which “States could (and *would*, in
15 places like California) eventually succeed in banning everything except *single* round capacity
16 firearms.” Opp’n at 22:16-19. Such slippery-slope concerns do not save Plaintiffs’ Second
17 Amendment claim from dismissal because, under Article III of the U.S. Constitution, the courts
18 focus on the constitutionality of the law being challenged, not possible future extensions that may
19 pose constitutional problems. *See Chafin v. Chafin*, 568 U.S. 165, 171 (2013) (noting that Article
20 III limits jurisdiction to actual “cases and controversies” and that “[f]ederal courts may not . . .
21 give ‘opinion[s] advising what the law would be upon a hypothetical state of facts’ (citations
22 omitted)); *Martin v. Hunter’s Lessee*, 14 U.S. 304, 345 (1816) (“It is always a doubtful course, to
23 argue against the use or existence of a power, from the possibility of its abuse.”). In any event,
24 the Court’s two-step approach for selecting an appropriate level of scrutiny can address such
25 slippery-slope concerns in future cases, because strict scrutiny may apply if some future capacity
26 restriction goes too far and constitutes a severe burden on the core Second Amendment right. *See*
27 *Silvester*, 843 F.3d at 821 (“A law that implicates the core of the Second Amendment right and
28 severely burdens that right warrants strict scrutiny.” (citing *Chovan*, 735 F.3d at 1138)).

1 As this Court has determined, California’s LCM possession ban satisfies intermediate
2 scrutiny, as that standard has actually been applied by the Ninth Circuit and other courts. *See*
3 MTD Order at 8:4-10:5. “One stated objective of California’s large capacity magazine ban is to
4 reduce the incidence and harm of mass shootings,” and this Court has observed that “[t]here can
5 be no serious argument that this is not a substantial government interest, especially in light of the
6 mass shootings involving large capacity magazines, including the 2012 Aurora movie theater
7 shooting and the 2012 Sandy Hook school shooting, which were discussed in Proposition 63.” *Id.*
8 at 8:4-12. Plaintiffs do not dispute the importance of this government interest. Rather, Plaintiffs
9 claim that the LCM possession ban lacks a reasonable fit to that objective because, in their view,
10 Defendants have the burden of demonstrating “that the ban *will* reduce the incidence or lethality
11 of mass shootings.” Opp’n at 22:10-14 (emphasis added). That, however, is not Defendants’
12 burden under intermediate scrutiny. Defendants need only show that the LCM possession ban
13 “promotes a ‘substantial government interest that would be achieved less effectively absent the
14 regulation.” *Fyock*, 779 F.3d at 1000 (citation omitted). “The test is not a strict one.” *Silvester*,
15 843 F.3d at 827. Here, the people have “drawn [a] reasonable inference” that LCMs pose a
16 significant public safety risk, even those that have been grandfathered under the prior law, “based
17 on substantial evidence.” *See Turner I*, 512 U.S. at 666. This Court has found a reasonable fit
18 between the LCM possession ban and the State’s admittedly important interests based the
19 prevalence of LCMs in public mass shootings, which were mentioned in Proposition 63 itself.
20 MTD Order at 8:7-12.⁴

21 This Court also cited “multiple courts [that] have found a reasonable fit between similar
22 bans with similar stated objectives.” MTD Order at 8:13-9:12 (citing *Kolbe*, 849 F.3d at 139-41;
23 *Fyock*, 779 F.3d at 1000-01; *NYSRPA*, 804 F.3d at 263-64; *Heller II*, 670 F.3d at 1262-64; and

24 _____
25 ⁴ While Plaintiffs dispute that “LCMs ‘are disproportionately used in crime,’” Opp’n
26 at 7:4-5, courts upholding LCM restrictions have made that observation. *See N.Y. State Rifle &*
27 *Pistol Ass’n v. Cuomo (NYSRPA)*, 804 F.3d 242, 263 (2d Cir. 2015) (“Large-capacity magazines
28 are disproportionately used in mass shootings, like the one in Newton, in which the shooter used
multiple large-capacity magazines to fire 154 rounds in less than five minutes.”); *Kolbe*, 849 F.3d
at 126-27 (citing “[o]ne study of sixty-two mass shootings between 1982 and 2012” that “found
that the perpetrators were armed with assault rifles in 21% of the massacres and with large-
capacity magazines in 50% or more”).

1 *S.F. Veteran Police Officers Ass’n v. City & County of San Francisco*, 18 F. Supp. 3d at
2 1003-04). Under intermediate scrutiny, the Court may rely on “studies in the record or *cited in*
3 *pertinent case law.*” *Fyock*, 779 F.3d at 1000 (emphasis added). As observed by the most recent
4 federal circuit court to uphold LCM restrictions under intermediate scrutiny, “LCMs have been
5 used in numerous mass shootings” and their use in such shootings “results in increased fatalities
6 and injuries.” *Ass’n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney General N.J. (ANJRPC)*, 910
7 F.3d 106, 112 (3d Cir. 2018). It is a matter of common sense that LCMs enable a shooter to fire
8 more rounds in a given period of time than smaller magazines, which “gives individuals much
9 less opportunity to either escape or to try to fight back or for police to intervene.” *Id.* The Court
10 is permitted to credit such common-sense rationales proffered by Defendants in defending the
11 State’s LCM restrictions. *See Silvester*, 843 F.3d at 828; *see also Stimmel v. Sessions*, 879 F.3d
12 198, 207-08 (6th Cir. 2018) (noting that “the government may ‘rely on a wide range of sources,
13 including legislative history, empirical evidence, case law, *and even common sense*’ in
14 discharging its burden” under intermediate scrutiny (emphasis added)).

15 In response to this Court’s dismissal of the Second Amended Complaint, Plaintiffs claim
16 that the “amendments [in the TAC] directly allege, [and] make it clear that they intend to prove
17 and can prove, the ultimate fact that the LCM ban *would not* reduce the incidence or lethality of
18 mass shootings.” Opp’n at 8:13-15 (emphasis added). These are not new allegations. This Court
19 has already concluded that California’s LCM possession ban satisfies intermediate scrutiny,
20 “notwithstanding plaintiffs’ allegations that the ban will not in fact reduce the incidence and harm
21 of mass shootings.” MTD Order at 9:21-22. Moreover, the various arguments that Plaintiffs
22 make in support of their allegation are all unavailing. First, Plaintiffs state that the TAC
23 “clarifies” that the expressed purpose of California’s LCM possession ban is “the supposed
24 prevention of mass shootings, and in likewise calling the grandfathered possession exemption a
25 ‘loophole,’” Opp’n at 8:15-17, but it is unclear how that clarification helps Plaintiffs state a claim.
26 If anything, the stated purpose of the LCM possession ban in Proposition 63—“to reduce the
27 incidence and harm of mass shootings,” MTD Order at 8:4-6—demonstrates that the people
28 enacted the measure to further important government interests. Second, Plaintiffs claim that that

1 TAC alleges that “[grandfathered] LCMs have not been used in mass shootings in California
2 since the prohibition was enacted,” as was “stated and discussed at length in connection with
3 [Plaintiffs’] motion for preliminary injunction.” Opp’n at 8:17-19. But the Court, in denying
4 Plaintiffs’ motion for a preliminary injunction, held that Defendants did not need to show that any
5 prior mass shootings involved grandfathered LCMs to justify the LCM possession ban under
6 intermediate scrutiny. *See* PI Order at 10:8-17. Finally, Plaintiffs state the TAC “clarif[ies] their
7 assertion that actual intermediate scrutiny, to the extent that it must be applied, requires the State
8 to prove a reasonable fit between the law and the substantial objective that it ostensibly advances,
9 and that the State has failed to carry this burden.” Opp’n at 9:1-4. Those allegations, however,
10 are legal assertions that are not entitled to any presumption of truth on this motion. *See Ashcroft*
11 *v. Iqbal*, 556 U.S. 662, 678 (2009).⁵

12 Since the dismissal of the Second Amended Complaint, two federal courts have joined the
13 growing consensus that 10-round LCM restrictions are constitutional. Plaintiffs contend that
14 *Worman v. Healey*, 293 F. Supp. 3d 251 (D. Mass. 2018), is distinguishable because the plaintiffs
15 in that case “challenged merely an ‘enforcement notice’” that “presented no demonstrable threat
16 of actual enforcement.” Opp’n at 25 n.8. While Plaintiffs are correct that Count Two in *Worman*
17 challenged the enforcement notice, and was rejected by the court on ripeness grounds, the court
18 also ruled in favor of the state on Count One, which “challenge[d] the constitutionality of the Act
19 itself” under the Second Amendment. *Worman*, 293 F. Supp. 3d at 260. Plaintiffs also attempt to
20 distinguish the Third Circuit’s recent opinion upholding New Jersey’s revised LCM restrictions
21 by noting that the New Jersey law contained an exception that is not present in California’s LCM
22 possession ban. Opp’n at 25 n.8. That exception, however, had no bearing on the court’s holding

23
24 ⁵ Plaintiffs also rely heavily on the order granting a preliminary injunction in *Duncan v.*
25 *Becerra*, 265 F. Supp. 3d 1106, 1139-40 (S.D. Cal. 2017), to claim that this Court cannot dismiss
26 the TAC. *See* Opp’n at 8 n.2, 24:11-17, 47:22-48:3. This Court was fully apprised of the *Duncan*
27 decision when it dismissed Plaintiffs’ Second Amended Complaint, *see* MTD Order at 4 n.2, and
28 in any case, this Court is free to exercise independent judgment in assessing the sufficiency of
Plaintiffs’ allegations in this case. It is axiomatic that while “[a] district judge may not
respectfully (or disrespectfully) disagree with his learned colleagues on his own court of appeals
who have ruled on a controlling legal issue, or with Supreme Court Justices writing for a majority
of the Court,” *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001), a district judge may
certainly disagree with another district judge in the absence of binding authority.

1 that New Jersey’s LCM restrictions satisfied intermediate scrutiny under the Second Amendment.
2 See *ANJRPC*, 910 F.3d at 115-24 (discussing Second Amendment claim).

3 In support of their claims, Plaintiffs also seize on the Supreme Court’s recent grant of a
4 petition for writ of certiorari in *New York State Rifle & Pistol Ass’n v. City of New York*, 883 F.3d
5 45 (2d Cir. 2018), *cert. granted*, ___ S. Ct. ___, 2019 WL 271961 (U.S. Jan. 22, 2019)
6 (No. 18-280). Opp’n at 20:22-21:1. But the Supreme Court’s decision to grant certiorari in
7 another case has no bearing on whether Plaintiffs have stated a claim in this case, which is
8 governed by the prevailing legal standard adopted by the Ninth Circuit. Notwithstanding the
9 grant of certiorari, this Court must apply intermediate scrutiny in accordance with Ninth Circuit
10 precedent “until the Supreme Court rules otherwise.” *United States v. Post*, 607 F.2d 847,
11 851 n.5 (9th Cir. 1979). Moreover, the *New York State Rifle & Pistol Ass’n* case is entirely
12 inapposite; it concerns an ordinance prohibiting individuals from removing their handguns from
13 the address listed on a “premises license,” unless the individual is transporting the handgun to an
14 authorized shooting range, and only if the handgun is unloaded, in a locked container, and stored
15 separately from ammunition. See *N.Y. State Rifle & Pistol Ass’n*, 883 F.3d at 51-52. Such an
16 ordinance bears no resemblance to the LCM restrictions at issue in this case.

17 **C. Plaintiffs’ Second Amendment Claim Is Subject to Dismissal.**

18 Plaintiffs argue that because Defendants have the “evidentiary burden” under intermediate
19 scrutiny, this Court cannot dismiss their Second Amendment claim at the pleadings stage. See
20 Opp’n at 22:2-25:12. It is Plaintiffs’ initial burden, however, to plead a *plausible* cause of action,
21 even in the context of a Second Amendment claim, and courts can and do determine whether a
22 statute passes intermediate scrutiny at the pleadings stage. Where, as here, it is clear from the
23 complaint—and the overwhelming weight of the case law—that a statute is reasonably related to
24 a sufficiently important governmental interest, dismissal is warranted. See *Mahoney v. Sessions*,
25 871 F.3d 873, 883 (9th Cir. 2017) (affirming dismissal of Second Amendment claim where policy
26 “survives intermediate scrutiny and is, therefore, constitutional under the Second Amendment”),
27 *cert. denied*, 138 S. Ct. 1441 (2018); *Wilson v. Lynch*, 835 F.3d 1083, 1094-95 (9th Cir. 2016)
28 (same); *Hall v. Garcia*, No. C 10-03799 RS, 2011 WL 995933, at *5 (N.D. Cal. Mar. 17, 2011)

1 (dismissing Second Amendment claim where official action “bears a substantial relationship to
2 [an] important objective” and thus does not violate the Second Amendment); *see also Bezet v.*
3 *United States*, 276 F. Supp. 3d 576, 612-13 (E.D. La. 2017) (granting motion to dismiss Second
4 Amendment claim where “the ‘practical impact’ and burden of the laws on the core purposes and
5 rights of the Second Amendment are minimal, and the laws are reasonably fitted to the
6 Government’s purpose”); *Stimmel*, 879 F.3d at 207-11 (affirming dismissal of Second
7 Amendment challenge to domestic violence misdemeanor possession ban, a question of first
8 impression for the Sixth Circuit, based on a finding that the law satisfied intermediate scrutiny
9 “[i]n accordance with the unanimous view of those circuits that have addressed the question”).
10 Because California’s LCM possession ban satisfies intermediate scrutiny as a matter of law, the
11 Court should dismiss Count I of the TAC.

12 **II. PLAINTIFFS HAVE FAILED TO STATE A PLAUSIBLE TAKINGS CLAIM.**

13 Plaintiffs’ takings claims under the United States and the California Constitutions also fail
14 as a matter of law. There are no plausible allegations in the TAC that California’s LCM
15 possession ban causes a physical invasion or occupation of private property by the government or
16 its agents. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). The
17 TAC is also devoid of plausible allegations that the challenged statutes, on their face, “completely
18 deprive an owner of ‘all economically beneficial us[e]’ of her property,” *Lingle v. Chevron*
19 *U.S.A., Inc.*, 544 U.S. 528, 537 (2005) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003,
20 1019 (1992)), as would be required to state a regulatory takings claim. The TAC thus does not
21 establish that section 32310 effects a per se physical or regulatory taking.⁶

22 In light of the various compliance options, in addition to the surrender of LCMs to a law
23 enforcement agency, Plaintiffs have failed to state a plausible per se or regulatory takings claim.
24 *See* MTD Order at 12:2-8.⁷ Plaintiffs insist that California’s LCM possession ban is a

25 _____
26 ⁶ Section 32310 also does not “damage” property within the meaning of the Takings
27 Clause of the California Constitution. *See Customer Co. v. City of Sacramento*, 10 Cal. 4th 368,
28 379-80 (1995); MTD Order at 12 n.7.

27 ⁷ In addition, California’s LCM possession ban is not a taking because it was a proper
28 exercise of the State’s police power. *See* Defs.’ Mem. of Points & Auth. in Supp. of Mot. to

1 “paradigmatic taking” because section 32310(d) “*provides* for the direct physical appropriation of
2 tangible property by the government through forced physical surrender.” Opp’n at 31:4, 32:5-13.
3 Even if Plaintiffs are correct that “the only economically viable option for the vast majority of
4 California pre-ban magazine holders to remain in compliance with the law” is to surrender an
5 LCM to a law enforcement agency for destruction in accordance with section 32310(d)(3), Opp’n
6 at 22:21-22, such LCM owners still have the option to modify their magazines under section
7 16740(a). As this Court has already determined, the option to modify an LCM allows owners of
8 grandfathered LCMs to comply with the section 32310(c) while retaining ownership of their
9 magazines. MTD Order at 11:20-12:6. This option does not “destroy[] the functionality” of their
10 magazines, “given that plaintiffs do not allege that owners of these magazines will not be able to
11 use their modified magazines, which would then simply have a lower capacity than before the
12 modification.” *Id.* at 11:27-12:2.

13 Plaintiffs rely on *ANJRPC* to argue that “California’s ban does *not* expressly provide for
14 LCM owners to ‘modify their LCMs “to accept ten rounds or less” or to “register their firearms
15 with LCMs that cannot be modified to accommodate ten rounds or less,”[’] like the New Jersey
16 ban at issue in the *ANJRPC* case.” Opp’n at 32:13-16. This argument suggests that California’s
17 LCM possession ban constitutes a taking because the various compliance options, including
18 modification of an LCM, are not included in the enumerated options listed in section 32310(d).
19 However, contrary to Plaintiffs’ claim that the “New Jersey ban . . . specifically carves out such
20 exceptions within the text of the ban itself,” *id.* at 32:16-17, the exceptions to New Jersey’s LCM
21 ban are contained in different statutes than the ban itself, *see ANJRPC*, 910 F.3d at 110-11; *see*
22 *also* N.J. Stat. Ann. §§ 2C:39-3(j) (banning LCMs), 2C:39-19(b) (exempting LCMs that have
23

24 Dismiss TAC (“Mem.”) at 18 n.13; PI Order at 13:28-14:10. Plaintiffs’ suggestion that the
25 Supreme Court’s decision in *Heller*, 544 U.S. 570, rendered the regulation of LCMs an invalid
26 exercise of police power, Opp’n at 38:16-40:12, is unfounded. *Heller* recognized a core Second
27 Amendment right of individuals to possess an operable handgun in the home for self-defense, but
28 affirmed the longstanding police power of the states to enact reasonable gun regulations. *Heller*,
554 U.S. at 626-29; *McDonald v. City of Chi.*, 561 U.S. 742, 785 (2010) (plurality). *Heller* “said
nothing which could be interpreted as suggesting that a city or state’s ban of a previously lawful
firearm or firearm component would require compensation to existing owners of those firearms or
components.” PI Order at 14:3-10 (citing *Heller*, 554 U.S. at 626-27).

1 been permanently modified to accept ten rounds or less), 2C:39-20(a)(1), (2) (exempting
2 registered firearms with a fixed LCM that cannot be modified or that can only accept a detachable
3 LCM that cannot be modified). Thus, even New Jersey’s law fails to satisfy Plaintiffs’ exacting
4 standards. Here, in addition to the three options listed in section 32310(d), California’s LCM
5 restrictions *do* expressly provide for LCM owners to comply with section 32310(c) if they (1)
6 permanently modify the magazine to accept no more than ten rounds, which would then remove
7 the magazine from the Penal Code’s definition of a “large-capacity magazine,” § 16740(a), or (2)
8 give an LCM to a gunsmith “for the purposes of maintenance, repair, or *modification* of that
9 large-capacity magazine,” § 32425 (emphasis added). While Plaintiffs may wish for the Court to
10 consider only the exceptions listed in section 32310(d), the various provisions of California’s
11 LCM restrictions should be read together. *See Coal. for Sustainable Delta v. John McCamman*,
12 725 F. Supp. 2d 1162, 1199 (E.D. Cal. 2010) (“Courts have ‘a duty to construe statutes
13 harmoniously’ whenever possible.” (citation omitted)).

14 Even if New Jersey’s LCM restrictions were “less burdensome than the ban at issue here,”
15 Opp’n at 25 n.8 (citing *ANJRPC*, 910 F.3d at 111), New Jersey’s registration option appears to be
16 an *additional* reason why New Jersey’s LCM restrictions do not effect a taking. *See ANJRPC*,
17 910 F.3d at 125 (“A gun owner may *also* retain a firearm [that has or requires an LCM that
18 cannot be modified] so long as the firearm is registered.” (emphasis added)).⁸ In fact, the Third
19 Circuit favorably cited this Court’s order dismissing Plaintiffs’ takings claim, even though
20 California does not include a similar exception. *See id.* at 124 (“With these alternatives, ‘[t]he
21 ban does not require that owners turn over their magazines to law enforcement.’” (quoting *Wiese*
22 *v. Becerra*, 306 F. Supp. 3d 1190, 1198 (E.D. Cal. 2018))); *see also id.* at 124-25. In any event,
23 none of the individual Plaintiffs are alleged to own a firearm with a fixed LCM that cannot be

24 _____
25 ⁸ It should be noted that New Jersey’s registration exception is for the firearm, not the
26 magazine. *See* N.J. Stat. Ann. § 2C:39-20 (permitting registration of “a *firearm* with a fixed
27 magazine capacity holding up to 15 rounds which is incapable of being modified to accommodate
28 10 or less rounds” and registration of “a *firearm* which only accepts a detachable magazine with a
capacity of up to 15 rounds which is incapable of being modified to accommodate 10 or less
rounds” (emphasis added)). Thus, it does not appear that New Jersey allows an LCM owner to
register and retain a detachable LCM merely because it cannot be modified; the owner would
have to register a firearm that requires such an LCM to function.

1 modified or a firearm that only accepts a detachable LCM that cannot be modified. *See*
2 TAC ¶¶ 8-16. Because all owners of grandfathered LCMs have the options to “sell their
3 magazines to licensed dealers or remove them from the state,” in addition to modification or
4 surrender, Plaintiffs cannot “plausibly allege that the ban operates as government appropriation of
5 private property for government or public use,” MTD Order at 12:2-6, nor can they “plausibly
6 allege[] that the large capacity magazine ban completely deprives them of all economically
7 beneficial use of their property,” *id.* at 12:14-13:5. Accordingly, the TAC fails to state a plausible
8 per se or regulatory takings claim.

9 To the extent that Plaintiffs are also attempting to allege a “partial regulatory” taking
10 challenge subject to the ad hoc factual analysis set forth in *Penn Central Transportation Co. v.*
11 *City of New York (Penn Central)*, 438 U.S. 104, 124 (1978), Plaintiffs have failed to state a
12 plausible claim for relief. *See* MTD Order at 13 n.9. The TAC does not allege facts
13 demonstrating that section 32310 is a taking in light of (1) its economic impact on Plaintiffs;
14 (2) the extent to which it interferes with “distinct investment-backed expectations”; and (3) the
15 “character of the government action.” *Penn Central*, 438 U.S. at 124. The TAC does not allege
16 either a sufficient loss of value caused by section 32310 nor any meaningful interference with
17 distinct investment-backed expectations in LCMs that were acquired decades ago. *See id.* at 123;
18 *MHC Fin. Ltd. P’ship v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013). Plaintiffs argue
19 that the character of the government’s action does not offset the “severe burdens” purportedly
20 caused by section 32310, asserting “there can be no substantial or legitimate justification for the
21 retroactive confiscation of large-capacity magazines that are now at least 17 years old, and in
22 many cases, even older.” Opp’n at 44:21-24. Even overlooking that the TAC does not plausibly
23 allege that section 32310 causes “severe burdens” or lacks a “legitimate public purpose,” *see*
24 *Penn Central*, 438 U.S. at 125, the stated objectives in enacting section 32310—namely, reducing
25 the incidence and harm of mass shootings—are substantial government interests. “Given the
26 alternatives for disposal or modification, the state’s substantial interest, and the [TAC’s] absence
27 of any plausible facts that the ban interferes with plaintiffs’ distinct investment-backed
28

1 expectations,” Plaintiffs have also failed to state a partial regulatory takings claim under *Penn*
 2 *Central*. MTD Order 13 n.9. The Court should dismiss Count II of the TAC.

3 **III. PLAINTIFFS HAVE FAILED TO STATE A PLAUSIBLE VAGUENESS CLAIM.**

4 As with most of Plaintiffs’ opposition, the arguments raised in defense of their vagueness
 5 claim are nearly identical to those that this Court has already rejected. *See* MTD Order
 6 at 18:23-26. These arguments do not overcome the fundamental principle that “a party
 7 challenging the facial validity of an ordinance on vagueness grounds outside the domain of the
 8 First Amendment must demonstrate that ‘the enactment is impermissibly vague in all of its
 9 applications.’” *Hotel & Motel Ass’n of Oakland v. City of Oakland*, 344 F.3d 959, 972 (9th Cir.
 10 2003). Plaintiffs do not allege or argue that section 32310 is unconstitutional in *all of its*
 11 *applications*.⁹

12 With no inherent ambiguity in the text of the challenged statutes that could plausibly give
 13 rise to a vagueness claim, Plaintiffs principally rest their claim on the existence of two chaptered
 14 versions of section 32406, enacted by SB 1446 and Proposition 63, respectively, which contain
 15 some different exceptions to section 32310. Plaintiffs devote a significant portion of their
 16 opposition to their argument that the version of section 32406 enacted by SB 1446 is still
 17 operative notwithstanding the later enactment of Proposition 63 and its more limited version of
 18 section 32406. *See* Opp’n at 48:4-51:9. Plaintiffs again argue that the rule that a later-enacted
 19 law prevails over an earlier, inconsistent law is a rebuttable presumption. *Id.* at 48:17-49:1. And
 20 yet the TAC does not allege any facts to rebut that presumption. *See* Cal. Gov. Code § 9605 (“In
 21 the absence of any express provision to the contrary in the statute which is enacted last, it shall be
 22 *conclusively presumed* that the statute which is enacted last is intended to prevail over statutes

23 _____
 24 ⁹ Plaintiffs claim that “many citizens will be left not even knowing whether their
 25 particular magazines fall within the LCM ban in the first place,” pointing to a magazine owned by
 26 one of the individual Plaintiffs that holds no more than 10 rounds of a particular caliber of
 27 ammunition, even though the magazine “*could* hold more than 10 rounds of a *different* caliber
 28 ammunition.” Opp’n at 52:7-18. If the magazine in this example is capable of accepting more
 than 10 rounds of ammunition, it qualifies as an LCM under section 16740. *See* MTD Order at
 14 n.13. And even if Plaintiffs can allege that there are some examples in which the statute’s
 application is unclear, “uncertainty at a statute’s margins will not warrant facial invalidation if it
 is clear what the statute proscribes ‘in the vast majority of its intended applications.’” *Cal.*
Teachers Ass’n v. State Bd. of Educ., 271 F.3d 1141, 1151 (9th Cir. 2001).

1 that are enacted earlier at the same session” (emphasis added)); *People v. Bustamante*,
2 57 Cal. App. 4th 693, 701 (2d Dist. 1997). As this Court has found, Plaintiffs’ “preamendment”
3 argument is not persuasive because “neither the text nor the legislative history of SB 1446
4 discussed anything about preamending Proposition 63.” MTD Order at 17 n.15.

5 Plaintiffs again point to the Finding of Emergency that the Department of Justice withdrew
6 as evidence that SB 1446 preamended Proposition 63. Opp’n at 49:13-19. This argument,
7 however, did not save the vagueness claim in the Second Amended Complaint from dismissal.
8 MTD Order at 17 n.15. If there were any question as to which version would govern after the
9 enactment of Proposition 63 (there is not), the Official Voter Information Guide explained to
10 voters before the November 2016 General Election that SB 1446, which at that time was set to go
11 into effect on January 1, 2017, will exempt various individuals from the LCM possession ban and
12 that “Proposition 63 *eliminates* several of these exemptions, as well as *increases* the maximum
13 penalty for possessing [LCMs].” Defs.’ Req. for Judicial Notice, Ex. 2 at 5 (Prop. 63, Analysis
14 by the Legis. Analyst) (emphasis added) (Dkt. No. 95-3). Plaintiffs contend that the Voter
15 Information Guide’s “description of the SB 1446 version in terms of its *future* application . . .
16 indicates that the initiative backers also contemplated a simultaneous operation of these laws.”
17 Opp’n at 51 n.16. This argument is refuted by the text of the Voter Information Guide itself,
18 which states that Proposition 63 *eliminates* some of the exemptions in the SB 1446 version (that
19 was going to go into effect at the time the Voter Guide was distributed) and that Proposition 63
20 *increases* penalties for possessing LCMs. RJN, Ex. at 5. There is no way that these statements
21 support Plaintiffs’ argument that the version of section 32406 enacted by Proposition 63 was
22 intended to operate simultaneously with the SB 1446 version.

23 Plaintiffs also argue that SB 1446 remains in effect notwithstanding the passage of
24 Proposition 63 because, in their view, the SB 1446 version is more preferable. Plaintiffs claim
25 that “[o]ne could scarcely argue that [the exemptions in the SB 1446 version] should not exist and
26 that people in possession of LCMs under such circumstances *should* be subject to criminal
27 sanction for that possession.” Opp’n at 50:8-10. Defendants, however, are not arguing whether
28 the SB 1446 exemptions “should” or “should not” exist; Defendants are arguing that any

1 ambiguity as to whether the exemptions preferred by Plaintiffs *do exist* and survive the enactment
 2 of Proposition 63 simply does not give rise to a vagueness claim. Such an ambiguity would give
 3 rise to a question of statutory construction and implied repeal rather than a vagueness claim. *See*
 4 *Karlin v. Foust*, 188 F.3d 446, 469 (7th Cir. 1999); *see also* MTD Order at 15:5-10; PI Order at
 5 19:9-14. Plaintiffs again ignore this holding in *Karlin*, and instead quote an innocuous passage
 6 from the opinion about the importance of avoiding vague laws that may confuse the public or lead
 7 to arbitrary or discriminatory enforcement. Opp’n at 46:5-26.¹⁰ Far from being “palpable,”
 8 Opp’n at 53:2, Plaintiffs’ vagueness allegations again fail to state a claim. The Court should
 9 dismiss the vagueness claims asserted in Counts III and IV of the TAC.

10 **IV. PLAINTIFFS HAVE FAILED TO STATE A PLAUSIBLE OVERBREADTH CLAIM.**

11 In support of their overbreadth claim, Plaintiffs characterize Defendants’ arguments as
 12 “conclusory” and “surface-level,” and assert that Defendants have “made no effort to meet any of
 13 the specific allegations in this count.” Opp’n at 53:22-24, 54:1-2. But Plaintiffs fail to appreciate
 14 that Defendants’ arguments were based on this Court’s prior orders and legal analysis, finding
 15 Plaintiffs’ overbreadth allegations to be woefully insufficient. *See* Mem. at 21:5-7 (citing MTD
 16 Order at 19:6-19 and PI Order at 22:1-10); *id.* at 21:24-22:2 (quoting MTD Order at 20:4-6).
 17 Even if an overbreadth claim could be cognizable here, *see* MTD Order at 19:7-9 & n.16 (“[T]he
 18 court is unaware of any cases applying the overbreadth doctrine in the Second Amendment
 19 context . . .”), Plaintiffs do not allege or explain how the challenged statutes “improperly sweep
 20 up ‘a substantial amount of constitutionally protected conduct’ under the guise of a legislative
 21 goal that ‘does not match the text of the statutes.’” Opp’n at 53:14-17 (quoting *Powell’s Books,*
 22 *Inc. v. Kroger*, 622 F.3d 1202, 1207 (9th Cir. 2010) (internal quotation marks and citation

23 _____
 24 ¹⁰ In support of their vagueness claim, Plaintiffs again cite to the preliminary injunction
 25 order in *Duncan v. Becerra*, arguing that the *Duncan* court’s discussion about the complexity of
 26 California’s firearms laws somehow demonstrates that Plaintiffs have stated a vagueness claim
 27 here. Opp’n at 47:22-48:3 (quoting *Duncan*, 265 F. Supp. 3d at 1111). Even though the *Duncan*
 28 court prefaced its order by claiming that California law is “so vague that men of common
 intelligence must necessarily guess at its meaning,” *Duncan*, 265 F. Supp. 3d at 1111, that
 statement was dicta and did not relate specifically to California’s LCM restrictions or the
 possession ban in particular. In any case, this Court is not bound by that court’s views on the
 relatively complexity of California’s firearms laws. *See Hart*, 266 F.3d at 1170; *see also supra*
 note 8.

1 omitted)). Plaintiffs argue that the LCM possession “ban is unconstitutionally overbroad because,
2 as they will demonstrate at trial, the retroactive application of the LCM possession ban to current,
3 legal owners of such magazines in no way advances the stated objectives of the law,” Opp’n at
4 54:16-20 (citing TAC ¶ 106), confirming that their overbreadth claim is dependent on their
5 Second Amendment claim, which fails as a matter of law. Because Plaintiffs have failed to
6 plausibly allege that the LCM possession ban “improperly sweep[s] up ‘a substantial amount of
7 constitutionally protected conduct,’” Opp’n at 53:14-17, they have failed to plead an overbreadth
8 claim. The Court should dismiss Count IV of the TAC.

9 **V. PLAINTIFFS HAVE FAILED TO STATE A PLAUSIBLE EQUAL PROTECTION CLAIM.**

10 Plaintiffs argue that heightened scrutiny should apply to their equal protection challenge to
11 sections 32445 and 32450(a), which exempt LCMs used solely as props for motion pictures,
12 television, or video production, because the Second Amendment protects a fundamental right.
13 Opp’n at 55:9-10, 56:1-10. Even though the Supreme Court has recognized the Second
14 Amendment as protecting a fundamental right, *McDonald*, 561 U.S. at 766-78, rational basis
15 scrutiny applies if, as here, the challenged law does not violate that right. *See Nordyke v. King*,
16 681 F.3d 1041, 1043 n.2 (9th Cir. 2012). Plaintiffs do not even address this Court’s prior
17 determination that rational basis scrutiny applies to their equal protection claim because the LCM
18 possession ban satisfies intermediate scrutiny under the Second Amendment. *See MTD Order*
19 *at 22:9-14 (citing Nordyke, 681 F.3d at 1043 n.2).*

20 Plaintiffs claim that “the State offers absolutely no justification whatsoever for the
21 differential treatment under [sections 32445 and 32450(a)].” Opp’n at 56:24-25. However, as
22 Defendants explained in their opening memorandum—citing this Court’s prior order dismissing
23 the equal protection claim—“the Legislature and the electorate ‘could have rationally believed
24 that [LCMs] used solely as props were not at risk of being used in mass shootings and that such
25 an exception would benefit an important sector of the California economy.’” Mem. at 23:4-7
26 (quoting MTD Order at 23:8-12). Under rational basis, it is Plaintiffs’ burden, not Defendants’,
27 “to negative every conceivable basis which might support” the differential treatment. *Heller v.*
28 *Doe*, 509 U.S. 312, 320 (1993) (quotation omitted). They have failed to do so. The TAC fails to

1 plausibly allege the absence of any rational basis for the LCM-prop exceptions, and the TAC’s
2 allegations that the exceptions favor a politically powerful class of people, even if assumed to be
3 true, fail as a matter of law under rational basis scrutiny. *See* Mem. at 23:7-12 (citing *Gallinger*
4 *v. Becerra*, 898 F.3d 1012, 1021 (9th Cir. 2018) (“Accommodating one interest group is not
5 equivalent to intentionally harming another.”)). The Court should thus dismiss Count V of the
6 TAC.¹¹

7
8 **CONCLUSION**

9 For the foregoing reasons, and those discussed in the opening memorandum, Defendants
10 respectfully request that the Court dismiss the Third Amended Complaint in its entirety without
11 leave to amend and dismiss this action with prejudice.

12 Dated: February 12, 2019

Respectfully Submitted,

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14 Attorney General of California
15 MARK R. BECKINGTON
16 Supervising Deputy Attorney General

17 /s/ John D. Echeverria
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20 *Attorneys for Defendants*

21
22
23
24
25
26 ¹¹ Because Plaintiffs have failed to adequately allege any constitutional violation for the
27 reasons set forth above, any claim under 42 U.S.C. § 1983 should be dismissed. *See* Mem. at 10
28 n.10. Plaintiffs do not respond to this argument in their opposition.

CERTIFICATE OF SERVICE

Case Name: **William Wiese, et al. v.
Xavier Becerra, et al.**

Case No.: **2:17-cv-00903-WBS-KJN**

I hereby certify that on February 12, 2019, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS THIRD AMENDED COMPLAINT

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 12, 2019, at Los Angeles, California.

Colby Luong
Declarant

/s/ Colby Luong
Signature