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 7 Firearms*

11 IN THE UNITED STATES DISTRICT COURT  
 12 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

16 **JAMES MILLER; PATRICK RUSS;  
 WENDY HAUFFEN; NEIL  
 17 RUTHERFORD; ADRIAN  
 SEVILLA; RYAN PETERSON;  
 18 GUNFIGHTER TACTICAL, LLC;  
 JOHN PHILLIPS; PWGG, L.P.; SAN  
 19 DIEGO COUNTY GUN OWNERS  
 PAC; CALIFORNIA GUN RIGHTS  
 20 FOUNDATION; SECOND  
 AMENDMENT FOUNDATION; and  
 21 FIREARMS POLICY COALITION,  
 INC.,**

22 Plaintiffs,

23 v.

25 **CALIFORNIA ATTORNEY  
 GENERAL XAVIER BECERRA;  
 26 and DOJ BUREAU OF FIREARMS  
 DIRECTOR BRENT ORICK,**

27 Defendants.  
 28

19-cv-1537 BEN-JLB

**DEFENDANTS' EX PARTE  
 APPLICATION TO  
 TEMPORARILY STAY THE  
 HEARING AND BRIEFING  
 SCHEDULE ON MOTION FOR  
 PRELIMINARY INJUNCTION [22]  
 AND MOTION TO DISMISS [16]  
 PENDING RULING ON  
 DEFENDANTS' MOTION TO  
 STAY [25]**

Judge: Hon. Roger T. Benitez  
 Courtroom: 5A  
 Action Filed: August 15, 2019

1 **TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that Defendants Xavier Becerra, in his official  
3 capacity as Attorney General of the State of California, and Brent E. Orick, in his  
4 official capacity as Interim Director of the Department of Justice Bureau of  
5 Firearms (together, “Defendants”), hereby apply to this Court for an order, under  
6 Federal Rule of Civil Procedure 6(b)(1), to temporarily stay the hearing and  
7 briefing on Plaintiffs’ Motion for Preliminary Injunction, Dkt. 22, and Defendants’  
8 Motion to Dismiss Certain Claims in First Amended Complaint, Dkt. 16, both  
9 currently set for January 16, 2020, until the Court has ruled on Defendants’ Motion  
10 to Stay Proceedings Pending Resolution of Related Appeals, Dkt. 25, currently set  
11 for hearing on January 27, 2020. Plaintiffs oppose Defendants’ motion to stay and  
12 oppose the instant ex parte request for a temporary stay pending the Court’s ruling  
13 on the broader motion to stay the proceedings.

14 **REASONS FOR THE REQUESTED TEMPORARY STAY**

15 As discussed in Defendants’ motion to stay, Dkt. 25-1, the Court has the  
16 inherent power to stay proceedings, which is “incidental to the power inherent in  
17 every court to control the disposition of the causes on its docket with economy of  
18 time and effort for itself, for counsel and for litigants.” *Landis v. N. Am. Co.*, 299  
19 U.S. 248, 254 (1936). In connection with the pending motion to stay this action,  
20 Defendants request a temporary stay of the hearing and briefing schedule on  
21 Plaintiffs’ motion for preliminary injunction and Defendants’ motion to dismiss  
22 until the Court has ruled on the propriety of staying the action pending resolution of  
23 the Ninth Circuit appeals in *Rupp v. Becerra*, No. 19-56004 (9th Cir.), and *Duncan*  
24 *v. Becerra*, No. 19-55376 (9th Cir.).

25 Separate from this application, on December 18, 2020, the parties filed a Joint  
26 Motion and Stipulation to Continue Hearing on Motion for Preliminary Injunction  
27 and Motion to Dismiss, requesting a continuance of the January 16, 2020 hearing to  
28 January 30, 2020. Dkt. 26. Defendants requested that Plaintiffs stipulate to a

1 continuance because—despite repeated requests by counsel to meet and confer on a  
2 hearing date that would be convenient for all parties, *see* Echeverria Decl. ¶¶ 6-9—  
3 Plaintiffs noticed the motion for preliminary injunction for January 16, 2020, a date  
4 that would make Defendants’ opposition due the day after the New Years’ holiday,  
5 January 2, 2020, leaving Defendants insufficient time to adequately respond to a  
6 voluminous and complex motion.

7 The only continuance that Plaintiffs would agree to was a two-week  
8 continuance of the hearing to January 30, 2020. Defendants agreed to stipulate to  
9 that continuance due to their urgent need for relief from the burdensome briefing  
10 schedule imposed by Plaintiffs’ motion for preliminary injunction. The joint  
11 motion was made without prejudice to the instant application for a stay of the  
12 hearing and briefing schedule on the motions until the Court has ruled on  
13 Defendants’ motion to stay. *See* Dkt. 26 at 4:1-4.

14 Concurrent with the parties’ discussions concerning the joint motion for a two-  
15 week continuance, Defendants proposed that the parties stipulate to extend the  
16 hearing and briefing on these motions until after the Court rules on Defendants’  
17 motion to stay the action. Plaintiffs declined to stipulate to that relief. But that  
18 leaves two motions on calendar, subject to further briefing and hearing, in a case in  
19 which the Court has been presented with a stay motion. Defendants submit that the  
20 following makes the most practical sense for the Court and the parties: (1) the  
21 Court should *temporarily* stay the hearing and briefing schedule on Plaintiffs’  
22 motion for preliminary injunction and Defendants’ motion to dismiss until the  
23 Court has ruled on Defendants’ broader motion to stay the action, currently set for  
24 hearing on January 27, 2020; and (2) if the Court declines to stay the action, the  
25 Court should set a new hearing date and briefing schedule on Plaintiffs’ motion for  
26 preliminary injunction and Defendants’ motion to dismiss.

27 As discussed in Defendants’ motion to stay, Dkt. 25-1, the appeals in *Rupp v.*  
28 *Becerra*, No. 19-56004 (9th Cir.), and *Duncan v. Becerra*, No. 19-55376 (9th Cir.),

1 currently pending before the Ninth Circuit Court of Appeals, bear directly on the  
2 core constitutional question presented in this case: whether the Assault Weapons  
3 Control Act (“AWCA”) comports with the Second Amendment. In evaluating the  
4 constitutionality of the AWCA and California’s restrictions on large-capacity  
5 magazines (“LCMs”), the Ninth Circuit will have to determine whether California’s  
6 restrictions on assault weapons and LCMs burden the Second Amendment, what  
7 level of scrutiny applies to those restrictions, and what evidentiary showing is  
8 required to satisfy that level of scrutiny, including the sufficiency of the State’s  
9 evidence in those cases. There is no need to rush the briefing and hearing on  
10 Plaintiffs’ motion for a preliminary injunction while this Court considers the  
11 propriety of a stay pending resolution of the related *Rupp* and *Duncan* appeals.<sup>1</sup>

### 12 **GOOD CAUSE EXISTS FOR THE REQUESTED RELIEF**

13 As discussed in the accompanying declaration of counsel, Defendants bring  
14 this ex parte application for good cause to avoid the unnecessary expenditure of  
15 time and resources in litigating the motion for preliminary injunction and motion to  
16 dismiss while the Court rules on the motion to stay. *See* Echeverria Decl. ¶¶ 19-22.  
17 Plaintiffs will not be prejudiced by temporary stay of the hearing and briefing on  
18 the motions pending the ruling on the motion to stay, which is set to be heard by the  
19 Court on January 27, 2020. The provisions of the AWCA challenged in this action  
20 have been in effect for nearly two decades, and Plaintiffs waited until August 15,  
21 2019 to file suit and an additional four months to seek a preliminary injunction of  
22 the law. An additional, limited delay of the hearing on Plaintiffs’ motion for  
23 preliminary injunction will in no way prejudice them.

24  
25  
26 <sup>1</sup> In fact, Plaintiffs acknowledge that their motion for a preliminary injunction  
27 “is a logical result of *Duncan*’s analysis,” Dkt. 22-1 at 2, and they rely heavily on  
28 this Court’s order in that case, *see id.* at 1, 2, 11, 12, 13, 14, 16, 22, 23, 26.  
Plaintiffs also challenge the district court’s order in *Rupp*, which upheld the AWCA  
under the Second Amendment. *See id.* at 22, 23, 25. Given the undeniable overlap  
between those appeals and this action, this action should be stayed.

1 Defendants acted diligently in seeking a stay of the case and in seeking the  
2 temporary stay requested herein. The case is still in the pleadings stage, and  
3 Defendants filed a motion to dismiss to clarify the scope of Plaintiffs' claims. Once  
4 Plaintiffs filed a motion for preliminary injunction, seeking to enjoin the AWCA  
5 before Defendants answered the First Amended Complaint, Defendants proceeded  
6 expeditiously in seeking a stay of the action, filing the motion to stay one week  
7 after Plaintiffs filed their motion for preliminary injunction. The instant application  
8 was filed shortly after the filing of the joint motion for a continuance and after  
9 Plaintiffs represented that they would not agree to any additional extension of time  
10 on the hearing and briefing schedule on their motion for preliminary injunction.

11 To prevent undue hardship to Defendants and to promote the interest of  
12 judicial economy, Defendants respectfully request that the Court temporarily stay  
13 the briefing and hearing date on the motion for preliminary injunction and the  
14 motion to dismiss until the Court rules on the pending motion to stay the action.

15 This application is based on the instant notice, the concurrently filed  
16 declaration of counsel, and the papers and pleadings on file in this action.

17 Dated: December 19, 2019

Respectfully Submitted,

18 XAVIER BECERRA  
19 Attorney General of California  
20 MARK R. BECKINGTON  
Supervising Deputy Attorney General

21 /s/ John D. Echeverria

22  
23 JOHN D. ECHEVERRIA  
24 Deputy Attorney General  
25 *Attorneys for Defendants Xavier*  
26 *Becerra, in his official capacity as*  
27 *Attorney General of the State of*  
28 *California, and Brent E. Orick, in his*  
*official capacity as Interim Director*  
*of the Department of Justice Bureau*  
*of Firearms*

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19-cv-1537 BEN-JLB

**DECLARATION OF JOHN D.  
 ECHEVERRIA IN SUPPORT OF  
 DEFENDANTS' EX PARTE  
 APPLICATION TO  
 TEMPORARILY STAY THE  
 HEARING AND BRIEFING  
 SCHEDULE ON MOTION FOR  
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Judge: Hon. Roger T. Benitez  
 Courtroom: 5A  
 Action Filed: August 15, 2019

**DECLARATION OF JOHN D. ECHEVERRIA**

I, John D. Echeverria, declare:

1. I am a Deputy Attorney General with the California Department of Justice and represent Defendants Xavier Becerra, in his official capacity as Attorney General of the State of California, and Brent E. Orick, in his official capacity as Interim Director of the Department of Justice Bureau of Firearms (together, “Defendants”), in the above-captioned matter.

2. Except as otherwise stated, I have personal knowledge of the facts set forth in this declaration, and if called upon as a witness I could testify competently as to those facts. I make this declaration in support of Defendant’s Ex Parte Application to Temporarily Stay the Hearing and Briefing Schedule on Motion for Preliminary Injunction and Motion to Dismiss Pending Ruling on Motion to Stay, filed concurrently herewith.

3. On August 15, 2019, Plaintiffs James Miller, Patrick Russ, Ryan Peterson, and San Diego County Gun Owners Political Action Committee filed a complaint, asserting a Second Amendment challenge the Assault Weapons Control Act’s (the “AWCA”) restrictions on semiautomatic, centerfire rifles and semiautomatic pistols that qualify as “assault weapons” due to the presence of a fixed large-capacity magazine (“LCM”), Cal. Penal Code §§ 30515(a)(2), (a)(5). Dkt. 1.

4. On September 27, 2019, Plaintiffs filed the operative First Amended Complaint for Declaratory and Injunctive Relief, challenging the AWCA’s restrictions on all firearms that qualify as “assault weapons” under the Second Amendment, Cal. Penal Code §§ 30515(a), (b). Dkt. 9.

5. On October 25, 2019, Defendants filed a motion to dismiss certain claims asserted in the First Amended Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Dkt. 16. Defendants noticed the motion to

1 dismiss for hearing on December 16, 2019, and Plaintiffs filed an opposition on  
2 December 4, 2019. Dkt. 21.

3 6. Nearly two months after the filing of the First Amended Complaint, on  
4 November 19, 2019, I was informed by Plaintiffs' counsel by telephone that  
5 Plaintiffs intended to file a motion for a preliminary injunction. Counsel requested  
6 Defendants' stipulation to a seven-page extension to the page limitation for the  
7 memorandum of points and authorities that would be filed in support of the motion.  
8 I agreed to the request. In light of the forthcoming Thanksgiving, Christmas, and  
9 New Year's holidays, I also asked that Plaintiffs meet and confer with me in  
10 advance of the filing of the preliminary injunction motion so that the parties could  
11 agree to a hearing date and briefing schedule that would be convenient for all  
12 parties and the Court.

13 7. Later on November 19, 2019, Plaintiffs' counsel sent me an email with  
14 a draft joint motion to exceed the page limitations. I responded with revisions to  
15 the joint motion, authorizing counsel to add my electronic signature to the joint  
16 motion and to file it on my behalf if the changes were acceptable to them. In that  
17 email, I asked counsel to inform me when they will be available to discuss the  
18 hearing date and briefing schedule on the proposed motion for a preliminary  
19 injunction. Thereafter, counsel filed the joint motion, Dkt. 17, but did not respond  
20 to my email.

21 8. In the evening of Friday, December 6, 2019, Plaintiffs filed the motion  
22 for a preliminary injunction, seeking to enjoin enforcement of the Assault Weapons  
23 Control Act. Dkt. 22. Plaintiffs noticed the motion for hearing on January 16,  
24 2020, resulting in a deadline for Defendants' opposition of January 2, 2019.  
25 L.R. 7.1(e)(2).

26 9. Plaintiffs' counsel did not meet and confer with me or anyone at the  
27 California Attorney General's Office regarding the hearing date prior to filing the  
28 motion for a preliminary injunction.



1           10. On Monday morning, December 9, 2019, I contacted Plaintiffs’  
2 counsel by telephone to request a continuance of the hearing on the preliminary  
3 injunction motion. I explained that Defendants needed additional time to review  
4 Plaintiffs’ motion and supporting materials, which span more than 1,800 pages, and  
5 to gather evidence and expert witnesses to oppose the motion. I also explained that  
6 the current schedule—with a January 2, 2020 deadline for opposition papers—is  
7 particularly difficult for Defendants and our expert witnesses due to the Christmas  
8 and New Year’s holidays. Plaintiffs’ counsel responded that he would need to  
9 consult with his co-counsel and that the parties could schedule a conference call to  
10 discuss the scheduling for the motion.

11           11. Later on December 9, 2019, I sent an email to Plaintiffs’ counsel  
12 asking if counsel were available for a telephone call to discuss the hearing date and  
13 briefing schedule for the preliminary injunction motion. I reiterated in the email, as  
14 I explained during the telephone call, that the current January 16, 2020 hearing date  
15 will cause significant scheduling issues for our office and our expert witnesses.

16           12. Several hours after sending my email, Plaintiffs’ counsel responded by  
17 email stating that Plaintiffs would stipulate to extending the briefing and hearing  
18 schedule for the preliminary injunction by two weeks, resulting in a hearing date of  
19 January 30, 2020, a deadline for Defendants’ opposition of January 16, 2020, and a  
20 deadline for Plaintiffs’ reply of January 23, 2020. Plaintiffs’ offer was conditioned  
21 on Defendants’ agreement not to argue undue delay relating to the two-week  
22 extension.

23           13. On the morning of December 10, 2019, I telephoned Plaintiffs’  
24 counsel to discuss Plaintiffs’ proposed two-week extension. During the call, I  
25 explained that a longer extension would be preferable, but given the current  
26 compressed briefing schedule, Defendants would need to agree, at a minimum, to  
27 the proposed two-week extension. I also explained that Defendants were planning  
28 to file a motion to stay the action pending resolution of *Rupp v. Becerra*,

1 No. 19-56004 (9th Cir.), and *Duncan v. Becerra*, No. 19-55376 (9th Cir.), which  
2 are currently pending before the Ninth Circuit Court of Appeals. I asked whether  
3 Plaintiffs would agree to a stay of the action or, alternatively, a continuance of the  
4 hearing and briefing schedule on the preliminary injunction motion until the Court  
5 rules on the motion to stay. Counsel indicated that Plaintiffs would not agree to a  
6 stay of the action or to a further continuance of the hearing and briefing schedule on  
7 their preliminary injunction motion beyond their two-week proposal.

8 14. On December 10, 2019, the Court changed the hearing date on  
9 Defendants' pending Motion to Dismiss Certain Claims in First Amended  
10 Complaint, Dkt. 16, to January 16, 2020, the same date for the hearing on  
11 Plaintiffs' motion for a preliminary injunction. Dkt. 23.

12 15. To seek a two-week continuance as soon as possible, on December 11,  
13 2019, I emailed Plaintiffs' counsel a draft joint motion to continue the hearing on  
14 motion for preliminary injunction and motion to dismiss to January 30, 2020 as  
15 stipulated. I received revisions to the joint motion from Plaintiffs' counsel on  
16 December 13, 2019.

17 16. Later on December 13, 2019, Defendants filed the motion to stay  
18 proceedings pending resolution of the *Rupp* and *Duncan* appeals. Dkt. 25. Soon  
19 thereafter, I emailed Plaintiffs' counsel a revised joint motion, incorporating  
20 counsel's revisions to the prior draft and accounting for the motion to stay that had  
21 just been filed.

22 17. After Plaintiffs' counsel failed to respond, on December 18, 2019, I  
23 emailed Plaintiffs' counsel requesting a response by 5:00 p.m. that day, either  
24 authorizing me to file the joint motion or providing additional revisions to the joint  
25 motion. This email provided notice that, if Plaintiffs did not respond by 5:00 p.m.  
26 on December 18, 2019, Defendants would be applying ex parte the following day  
27 with a request to continue the hearing on the motion for preliminary injunction and  
28 motion to dismiss, as previously agreed to by the parties, and as an alternative, the

1 ex parte application would request that the Court vacate the hearing date on both  
2 motions pending the Court's ruling on Defendants' motion to stay. I also informed  
3 counsel that if the joint motion is filed that day, Defendants still intended to apply  
4 ex parte the following day, December 19, 2019, to request that the Court vacate the  
5 hearing date and briefing schedule on both motions pending the Court's ruling on  
6 the motion to stay. The email concluded with a request to confirm whether  
7 Plaintiffs will oppose the application to vacate the hearing and briefing schedule on  
8 the motion for preliminary injunction and the motion to dismiss.

9 18. Plaintiffs' counsel responded with revisions to the joint motion and a  
10 representation that they will oppose the ex parte application. The joint motion was  
11 filed on December 18, 2019. Dkt. 26.

12 19. Good cause exists for granting the ex parte application. A temporary  
13 stay of the hearing and briefing on the motion for preliminary injunction and  
14 motion to dismiss will avoid undue prejudice to Defendants and promote the  
15 interest of judicial economy. The current schedule on the motions—and the  
16 alternative January 30, 2020 hearing date requested in the parties' joint motion—  
17 would result in the unnecessary expenditure of time and resources while the Court  
18 considers the propriety of staying the action pending resolution of the *Rupp* and  
19 *Duncan* appeals, which bear directly on the constitutional claims raised in this case.

20 20. Defendants proceeded expeditiously in seeking a stay of the action.  
21 The case is still in the pleadings stage, and Defendants filed a motion to dismiss to  
22 clarify the scope of Plaintiffs' claims. Dkt. 16. Once Plaintiffs filed a motion for  
23 preliminary injunction, seeking to enjoin the AWCA before Defendants answered  
24 the First Amended Complaint, Defendants proceeded expeditiously in seeking a  
25 stay of the action, filing the motion to stay one week after Plaintiffs filed their  
26 motion for preliminary injunction.

27 21. Defendants also proceeded expeditiously in seeking the temporary stay  
28 requested in the instant ex parte application. Due to the urgent need to continue the

1 preliminary injunction hearing, Defendants prioritized the filing of the joint motion  
2 to continue that, despite the parties' agreement to continue the hearing by two  
3 weeks, took more than a week to finalize and file. Defendants filed this instant ex  
4 parte application shortly after the joint motion was filed.

5 22. Plaintiffs will not be prejudiced by a temporary stay pending the  
6 Court's ruling on the stay motion. Although the assault-weapon restrictions  
7 challenged in this action have been in effect for nearly twenty years, Plaintiffs  
8 waited until August 15, 2019 to file their initial complaint, September 27, 2019 to  
9 file the First Amended Complaint, and December 6, 2019—on the eve of the  
10 holiday schedule—to seek a preliminary injunction. Plaintiffs will not be  
11 prejudiced by a temporary stay of the hearing and briefing on the hearing for a  
12 preliminary injunction while the Court considers the propriety of the stay motion.  
13 Absent a temporary stay, Defendants will be significantly prejudiced if they are  
14 required to oppose the preliminary injunction motion before the Court decides  
15 whether to stay the action.

16 I declare under penalty of perjury under the laws of the United States of  
17 America that the foregoing is true and correct.

18 Executed on December 19, 2019, at Los Angeles, California.

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/s/ John D. Echeverria  
John D. Echeverria