No. 21-55608

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES MILLER, *et al.*,
Plaintiffs–Appellees,

vs.

ROB BONTA, in his official capacity as
Attorney General of the State of California, *et al.*,
Defendants–Appellants.

On Appeal from the United States District Court
for the Southern District of California
Hon. Roger T. Benitez
Case No. 3:19-cv-01537-BEN-JLB

APPELLEES' OPPOSITION TO APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 TO STAY JUDGMENT PENDING APPEAL

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June 15, 2021

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Plaintiffs-Appellees submit this corporate disclosure and financial interest statement.

San Diego County Gun Owners PAC is a membership organization, with no parent corporation, nor has it issued any stock.

California Gun Rights Foundation is a non-profit foundation with no parent corporation, nor has it issued any stock.

Firearms Policy Coalition, Inc., is a non-profit corporation with no parent corporation, nor has it issued any stock.

Second Amendment Foundation, Inc., is a non-profit corporation with no parent corporation, nor has it issued any stock.

PWGG, L.P. is a limited partnership with no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

Gunfighter Tactical, LLC is a limited liability company with no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs-Appellees James Miller, *et al.* ("Appellees") oppose the Appellants' emergency motion for a stay pending appeal.

After a year-long consideration of Appellees' evidence, including a three-day preliminary evidentiary hearing, a bench trial, and approximately 14,000 pages of evidence and testimony, the District Court found that the State's ban on firearms failed even minimal constitutional scrutiny. The Court made extensive findings, including that:

- The Second Amendment protects "modern rifles," which are commonly owned in large numbers, for lawful purposes, both in the United States generally and in California. (Decision, ECF 115 ("Decision"), 13-17.)
- Modern rifles, including the ubiquitous AR-15 rifle, are commonly owned and are particularly useful for home defense. (Decision, 34-35.)
- The features prohibited by Penal Code § 30515(a) are important to law-abiding citizens for home defense; there was no evidentiary or legal justification for the State's purported interest in reducing firearm accuracy; and the evidence contradicted the State's claim that the

prohibited firearm features were only useful for supposedly illicit "rapid fire." (Decision, 35-41.)

- So-called "featureless" firearms are also ubiquitous, and legal to own, but have disadvantages for law-abiding citizens compared to firearms with California-prohibited features because they are less accurate and risk unintended harm to bystanders. (Decision, 41-43.)
- California's assault weapons ban had no discernible impact on crime generally, nor did it decrease the prevalence or lethality of mass shootings, and assault weapons are not generally used either in crimes or in most mass shootings. (Decision, 43-47; 55-61.)
- The evidence contradicted the State's claim that prohibited California assault weapons create greater wounds, have greater penetrating power, or are a danger to law enforcement more than other legal firearms of the same caliber, including legal "featureless" firearms. (Decision, 61-67.)

Notwithstanding these factual findings, all supported by the record, the Appellants recycle their "greatest hits" of "assault weapon" myths in a crass effort to frighten the public and this Court to push for the "status quo." However, the § 30515(a) status quo does nothing to mitigate the risks of mass shootings or any other type of violence, as the court below expressly found and as amply supported

by the evidence. All the status quo does is threaten and impede law-abiding citizens who seek better and safer firearms for self-defense and other lawful purposes, as is their right under the Second Amendment.

Appellants' alarmist claims that the not-so-sudden reappearance of pistol grips, collapsible stocks, or flash suppressors that were on firearms as recently as 2016 somehow presents a new or increased danger to the public is utterly lacking in factual support and contradicts the facts as found in this case. As the District Court correctly found, as a factual matter, "the prohibited features do not change an AR-15 rifle from a benign weapon into an 'incredibly effective killing machine.'" (Decision, 43:3-4.) As Appellees demonstrated at trial, the Appellants' fearmongering over these features is false and absurd.

The State cannot meet its heavy burden to prove the factors required for a stay under *Nken v. Holder*, 556 U.S. 418, 426 (2009).

II. PROCEDURAL HISTORY

A. DISTRICT COURT PROCEEDINGS

Plaintiffs filed this action on August 15, 2019. Following the State's answer, and the filing of an amended complaint, Plaintiffs moved for a preliminary injunction on December 6, 2019. (ECF 22.)

The District Court scheduled an evidentiary hearing commencing on October 19, 2020, at which time both Plaintiffs' and Defendants' witnesses were produced and examined. (Transcripts at ECF 58 and 59; witness list at ECF 56.)

At the conclusion of the evidentiary hearing, the District Court consolidated Appellees' pending preliminary injunction motion with the trial on the merits, pursuant to FRCP 65(a)(2). (ECF 55; Tx of 10/22/21 Hearing at 115.)

B. TRIAL AND JUDGMENT

Trial commenced on February 3, 2021. Before trial, the parties submitted extensive pre-trial memoranda of contentions of fact and law (ECF 65, 66), proposed findings of fact and conclusions of law (ECF 85-87), witness and exhibit lists, and expert witness deposition transcripts. (ECF 89-90, 95, 98) Approximately 14,000 pages of evidence and testimony were submitted to the Court. Decision, 33:23. At trial, the evidence showed, among many other things, that:

- "Assault weapons" are in common use for lawful purposes. (*See* Declaration of John W. Dillon filed herewith, **Exh. 1** (Def. Exhibit BH) and Declaration of Yvette Glover (Dillon **Exh. 2**), ¶ 6.)
- Modern rifles make good self-defense weapons. (Kapelsohn testimony (Dillon **Exh. 3**), at 25:16 – 26:20, 26:21 – 27:8.)
- Accuracy is critically important for self-defense, a fact which the State did not dispute. (*Id*., at 27:24-28:6; Graham testimony, *id*. at 134:15-18.)

- Modern rifles are not used *disproportionately* in crime. (Dillon **Exhs. 4, 13**.)
- However they may be defined, "mass shootings" do not typically involve a so-called assault weapon. (Allen Decl., Defs. Exh. A, ¶ 30; Def. Exh. BM (Dillon **Exh. 5**), at 1, 3-4.) The most prevalent firearm found at the scene of a mass shooting is a handgun. (Allen Decl., Def. Exh. A, Appendix C; Def. Exh. CW (Dillon **Exh. 6**); Def. Exh. CG (Dillon Exh. 7), at 23; Def. Exh. BM (Dillon **Exh. 5**), at 1.) Most mass shootings involve multiple firearms. (Def. Exh. AC (Dillon **Exh. 12**), at 12 and Lott Depo. (Dillon **Exh. 14**), at 314:1 – 315:25.)
- The AR-15 rifle typically uses lower power cartridges than either military rifles or hunting rifles and the wounds from these rifles are less severe than hunting rifles. (Margulies Depo. (Dillon **Exh. 8**), at 30:7-16, 62:23 – 63:6, 74:20-75:4, 83:2-9; and Def. Exh. AL (Dillon **Exh. 9**), at 11.) Ammunition from so-called "assault rifles" does not penetrate police body armor any more than ammunition from any other rifle. (Def. Exh. AY (Dillon **Exh. 10**), at 5; and Def. Exh. BL (Dillon **Exh. 11**), at p. 3.)

On June 4, 2021, the District Court issued its 94-page Decision (ECF 115) and entered its Judgment thereon. (ECF 116.)

III. ARGUMENT

A. STANDARD OF REVIEW

"'A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant.'" *Index Newspapers LLC v. United States Marshals Service*, 977 F.3d 817, 824 (9th Cir. 2020) (citation omitted). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken v. Holder*, 556 U.S. 418, 433–434 (2009).

A party seeking a stay of a judgment pending appeal is required to show factors similar to those of a preliminary injunction. The moving party must specifically show: (1) whether they have made a strong showing that they are likely to succeed on the merits; (2) whether they will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Nken*, 556 U.S. at 426. Of these four factors, the first two "are the most critical," and the "mere possibility" of success or irreparable injury is insufficient to satisfy them. *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 770 (9th Cir. 2018).

B. APPELLANTS FAIL TO SHOW A STRONG LIKELIHOOD OF PREVAILING ON THE MERITS.

The first factor under *Nken* is whether the moving party has demonstrated a *strong* showing that they are likely to prevail on the merits of their appeal. The "strong showing" that the movant must make to secure a stay pending appeal is

more demanding than the showing of likelihood of success on the merits required to secure a preliminary injunction. *Index Newspapers*, 977 F.3d at 824 ("The bar for obtaining a stay of a preliminary injunction is higher than the *Winter* standard for obtaining injunctive relief."); *Doe #1 v. Trump*, 957 F.3d 1050, 1062 (9th Cir. 2020) ("Here, the government has not met the high standard of showing a *strong* likelihood of success on the merits.").

In deciding whether a party has demonstrated such a strong likelihood of success, this Court must review the District Court's findings of fact for clear error, conduct a *de novo* review of the District Court's legal findings, and consider the scope of the injunction under a deferential abuse of discretion standard. *Index Newspapers*, 977 F.3d at 824 (citing cases).

1. The District Court Correctly Found that Firearms Classified as Assault Weapons Were in Common Use Under *Heller*.

First and foremost, the District Court correctly found that nationally, "modern rifles" (*e.g.*, firearms that would be classified as assault weapons under California law) "are ubiquitous," with an estimate of over 19 million having been manufactured or imported into the United States, and steadily increasing. Decision, 15. This fact alone, among every other estimate Appellees offered at trial, was enough to support the District Court's determination that these types of firearms were "in common use for lawful purposes" under *District of Columbia v. Heller*, 554 U.S. 570 (2008). That finding, not realistically challengeable on appeal,

demonstrates core Second Amendment coverage, making it implausible that the State could make a "strong showing" of prevailing on the merits. As the Court held in *Heller*, a ban that "amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose" cannot withstand constitutional scrutiny under any standard. 554 U.S. at 628-629.

2. The District Court Correctly Found that the Features-Based Prohibitions Were Not a Reasonable Fit to the State's Objectives.

The District Court also correctly found, beyond the categorical, common-use analysis under *Heller*, that the law failed this Circuit's two-part test applying tiered scrutiny as well. While there are ample grounds for holding that California's ban should be subject to strict scrutiny under the test laid out in *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013), the State cannot prevail even under the intermediate scrutiny it proposed.

As the District Court correctly found, "California's modern rifle ban is suspect even under the most lenient form of scrutiny because the 'assault weapons' laws are not a reasonable fit to achieve the State's interests." (Decision, 18:7-9.) After lengthy analysis, the District Court found that "[m]oving through the trial record here, it becomes clear that AWCA's assault weapons ban-by-prohibited-features was not designed to address a real harm, and even if it did, does not alleviate the harm in a material way." (Decision, 24:27-25:2.)

The District Court expressly found that "the prohibited features [of Pen. Code § 30515(a)] do not change an AR-15 rifle from a benign weapon into an 'incredibly effective killing machine.'" (Decision, 43:3-4.) The State, which bore the burden under any level of heightened scrutiny, failed to justify its prohibitions as to these prohibited features with any evidence as to their lack of utility for self-defense, or as to their potential for misuse which would make the firearms unusually dangerous.

We focus here on three of the primary "generic characteristics" at issue in this case: pistol grips, telescoping stocks, and flash suppressors — all of which are prohibited by § 30515(a). The State agreed that these were the most common prohibited features. (Decision, 67:7-9.) The District Court found that these prohibited features are important for home defense. (Decision, 35-39.)

a. Pistol Grips (Pen. Code § 30515(a)(1)(A))

A pistol grip "protrudes conspicuously beneath the action of the weapon." Pen. Code § 30515(a)(1)(A). Plaintiffs presented uncontradicted evidence that pistol grips are the most common of the prohibited features on just about all modern semiautomatic arms. (Curcuruto testimony (Dillon **Exh. 3**), at 65:2-6; and Graham testimony, *id*., at 129:17-12); Decl. of Blake Graham, Def. Exh. D, at ¶ 28.) As the State agreed, pistol grips enhance the ergonomics of the weapon. (Decl. of Blake Graham, Def. Exh. D, ¶ 28; Kapelson Decl. (Dillon **Exh. 17**) at ¶ 28; and

testimony (Dillon **Exh. 3**), at 32:23-33:2.) The pistol grip design enhances the firearm's accuracy. (*Id.*; Def. Exh. BA (Dillon **Exh. 18**), at 9.) Pistol grips have appeared on long guns dating back to at least the 1700s. (Hlebinsky Decl. (Dillon **Exh. 19**), ¶ 17.) The District Court adopted these findings in its Decision, page 36.

b. Telescoping Stocks (Pen. Code § 30515(a)(1)(C))

Folding or telescoping stocks are features prohibited under § 30515(a)(1)(C). On an AR-15 rifle, a telescoping stock is typically an adjustable buttstock capable of between three and six different adjustment positions, thereby changing the length. (Kapelsohn Decl. (Dillon **Exh. 17**), at ¶ 31, and testimony (Dillon **Exh. 3**), at 28:10-23.) This enables the rifle stock to be properly adjusted to fit the user. (Kapelsohn Decl. (Dillon **Exh. 17**), at ¶ 31.) The stock is particularly beneficial to persons of smaller stature, or women. (Kapelsohn testimony (Dillon **Exh. 3**), at 28:24 – 29:1, and Youngman testimony, *id.*,at 88:13-20.) Plaintiff Wendy Hauffen, a firearms trainer, also testified that the telescoping stock is a preferred feature when training women or younger shooters. (Hauffen Decl. (Dillon **Exh. 20**), ¶ 8.) Even when collapsed to their minimum length, however, firearms with telescoping stocks would still have to meet valid state or federal minimum-length requirements and hence having the ability to *exceed* that minimum length would not increase the concealability of the firearm relative to a legal fixed-length firearm. (Decision, 39.)

The District Court adopted these facts when it found that telescoping stocks are useful for home defense and training. (Decision, 38-39.)

c. Flash Suppressors (Pen. Code § 30515(a)(1)(E))

Flash suppressors are prohibited on rifles under § 30515(a)(1)(E). A flash suppressor is a device fitted on the end of a muzzle that diverts the muzzle flash through several slots or holes, most commonly arranged around the axis of the bore. (Kapelsohn Decl. (Dillon **Exh. 17**), ¶ 33.) The primary advantage of a flash suppressor is to reduce muzzle flash. (*Id.*) The use of a rifle without a flash suppressor under low light circumstances is likely to temporarily blind the user or impair the user's vision, placing a law-abiding user at a disadvantage to a criminal attacker. (*Id.*; Kapelsohn Depo. (Dillon **Exh. 21**), at 124:25 – 125:8.) According to the State's own definition under 11 Cal. Code Regs. § 5471(r), a flash suppressor, by definition, is *not* a device intended to conceal a shooter's position.

The District Court adopted these findings that the flash suppressor had utility, in particular, for home defense to prevent the defender from being blinded by her own muzzle flash. (Decision, 37, n. 49.)

Again, these are all findings of fact, which are entitled to substantial deference on appeal, and are reviewed only for clear error. *Index Newspapers*, 977 F.3d at 824. "The clear error standard applies to those findings of fact the district

court adopts from proposed findings submitted by the parties." *Saltarelli v. Bob Baker Grp. Med. Trust*, 35 F.3d 382, 384 (9th Cir. 1994) (citations omitted).

3. The "Serious Legal Questions" Test

Apart from the near impossibility of the State successfully challenging the factual findings of the District Court under ordinary appellate principles, the State does not even raise a meaningful *legal* challenge to the District Court's analysis. To begin with, the court below, although correctly questioning whether a stricter approach ought to apply, ultimately applied the lowest level of heightened scrutiny, thus giving the State no cause for complaint or challenge on such legal matters. The *application* of such intermediate scrutiny to the facts of this case does not raise a serious legal issue, but primarily involves factual issues and the State's failure to satisfy its burden of proof. It is only the *rejection* of the court's factual findings below that would raise a serious legal issue, and that helps the State not at all.

Any challenge on appeal, therefore, would rely primarily on factual disputes rather than legal questions, and the State's motion is replete with factual assertions unsupported by the record and/or rejected by the District Court, and hence not a proper basis for appellate second-guessing, particularly under the heavy burden for seeking a stay pending appeal. Short of applying special appellate rules for Second Amendment cases, or seeking to dilute or overturn the requirement for heightened scrutiny in its entirety, the appeal of this case should not involve many or any legal

issues at all. Unless this Court takes the extraordinary step of interposing its own fact-finding in place of the District Court's or of eschewing genuinely heightened review, the questions are not that serious at all and the result below was the inevitable consequence of actually and finally putting a state to its proof and finding that it came up short.

The State's reliance upon decisions in other circuits upholding so-called assault-weapons bans largely misses the mark because those cases generally did not turn on differences in the legal tests applied, but on factual assumptions and assertions at the circuit level that did not arise from a developed factual record or on review of fact-finding by a district court. *See Wilson v. Cook Cty.*, 937 F.3d 1028, 1036 (7th Cir. 2019) (appeal from grant of motion to dismiss); *Friedman v. City of Highland Park, Ill.*, 784 F.3d 406, 412 (7th Cir. 2015) (no references to district court findings; review of summary judgment in favor of city without trial or factual development and treating all factual issues as legislative, rather than adjudicative, facts)); *Worman v. Healey*, 922 F.3d 26, 38-41 (1st Cir. 2019) (reviewing grant of summary judgment without adjudicative findings or distinctions between large capacity magazines and other features; deferring to legislative assertions); *Kolbe v. Hogan*, 849 F.3d 114, 138-146 (4th Cir. 2017) (en banc) (reviewing summary judgment on an older and far more limited record that cited experts expressly rebutted in the present case); *N.Y. State Rifle & Pistol Ass'n*

v. Cuomo (*NYSRPA*), 804 F.3d 242, 260-263 (2d Cir. 2015) (reviewing partial grant of a motion to dismiss in one case and a grant of summary judgment in another, without apparent judicial fact-finding in either); *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1261-1264 (D.C. Cir. 2011) (reviewing summary judgment and deferring to legislative predictions on a record where "plaintiffs present hardly any evidence that semi-automatic rifles and magazines holding more than ten rounds are well-suited to or preferred for the purpose of self-defense or sport" and other supposed evidence was untested by ordinary trial safeguards).

Mere reliance on the *results* of those cases, without discussion of the reasoning or lack of genuine factual findings behind those results, does not demonstrate a serious *legal* issue in this case. Unlike the bald assertions in cases like *Kolbe* and *Friedman* that the features at issue here are "unnecessary for effective self-defense," (Motion at 17 (citing those cases)), here there was ample evidence supporting the District Court's finding of the utility of these features for self-defense. Similarly, unlike the bald assumptions that a ban on firearms with such features would have a salutary impact on mass murders, there was ample evidence in this case that it has had no demonstrable impact at all. (*Compare* Decision, 59-61, *with* Motion at 19 (misleadingly quoting *Friedman's* speculation on the value of banning high-capacity magazines as if it were a finding of fact).)

Unless this Court plans on usurping the fact-finding function of the District Court, or merely speculating on such matters, there is no serious issue regarding the lack of a genuine problem with firearms having the features the State dislikes or the utility of the State's supposed solution on reducing mass-murder, notwithstanding the State's efforts to relitigate those factual matters in its motion.

C. APPELLANTS HAVE FAILED TO SHOW THE LIKELIHOOD OF IRREPARABLE HARM.

A party seeking a stay must show it will suffer irreparable harm without the stay. Failure to do so results in a denial of the motion "regardless of the [moving party's] proof regarding the other stay factors." *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011); *Doe #1*, 957 F.3d at 1061 ("Our *Nken* analysis could conclude here, given that if a stay applicant cannot show irreparable harm, "a stay may not issue[.]").

Although the four *Nken* factors are presented here in the traditional order, this Circuit has recently suggested that this second requirement of a showing of irreparable injury is the most important factor. *Doe #1*, 957 F.3d at 1062. Indeed, the entire premise of the State's motion is that unless a stay is granted here, "the very weapons that California has deemed too dangerous to allow would flood into the State" (Mot. at p. 8), and that "the status quo could be irrevocably altered by the influx of new assault weapons[.]" (*Id*. at 2.) However, this assertion is misleading in that it necessarily rejects the facts found by the District Court that

prohibited rifles with "features" are no more dangerous or capable of use in mayhem than are permitted "featureless" rifles.

Before deciding this motion, this Court is urged to review the video evidence that the District Court found "particularly interesting." (Decision, 41:23 – 43:16.) The video was prepared and admitted into evidence through the Declaration of Adam Kraut (Dillon **Exh. 22**, ¶¶ 4-14) and can be viewed at: http://publicfiles.firearmspolicy.org/miller-v-becerra/miller-adam.kraut.mp4.

Mr. Kraut, an attorney for Firearms Policy Coalition, also testified at the evidentiary hearing. (Dillon **Exh. 23** at 23–27.) In the video, Mr. Kraut demonstrated the use of the *same* AR-15 rifle, in two different configurations. First, he fired the rifle in a "California-compliant, featureless" form, and then in a standard configuration (*i.e.*, with the prohibited § 30515 features attached). It was *the same rifle*, shot at the same target, at the same distance. (*Id.*, at 23:11 – 24:7.) The purpose of the video was to demonstrate that in either configuration it was possible to shoot a man-sized target at 25 yards *in rapid succession* using either a California featureless rifle or a standard configuration AR-15. (*Id.* at 24:20-25.)

The State concedes that such "featureless" firearms (including "featureless" AR-15s) are legal for purchase, sale, and ownership in California. (*See*, 11 Cal. Code Regs. § 5471, subd. (o) (defining "featureless" as "a semiautomatic firearm (rifle, pistol, or shotgun) lacking the characteristics associated with that weapon, as

listed in Penal Code section 30515"); Mot. at 16.) Another type of "featureless" firearm discussed at trial was the Sturm Ruger Mini-14. As the State's expert conceded, "[t]hese types of rifles are currently legal for sale in California and can be lawfully transferred and possessed by California residents who follow state and federal laws." (Decl. of Blake Graham, Defense Exhibit D, ¶ 45; Graham testimony (Dillon **Exh. 3**) at 137:18-140:9 ("those are available in many gun stores up and down California.").) It is also undisputed that the Ruger Mini-14 fires the same round commonly fired from an AR-15. After considering Appellees' video comparing the same AR-15 rifle with the features removed, and then reattached, the District Court found:

> The results were remarkably similar. Each rifle fired at approximately the same speed and accuracy. Any difference was hardly noticeable. Of course the video was staged for a purpose, but it clearly demonstrates little difference in the operation of a lawful and an unlawful AR-15. The presence or absence of a flash suppressor made no difference in the daylight. It might have, had the demonstration been conducted at night. The person demonstrating modestly described himself as moderately experienced with guns.

(Decision, 42:2-8.) These are factual determinations reviewed here only for clear error. In fact, the District Court's observations about what this video demonstrates were absolutely correct, and the presence or absence of prohibited features has no bearing on public safety, other than their absence reducing the accuracy and control of law-abiding citizens while doing nothing to hinder criminals who care not one whit about accuracy or collateral damage when engaging in mass murder.

The State's scaremongering over the supposed "flood" of rapid-fire semiautomatic rifles we would experience should the Judgment stand is mere misdirection from this simple truth: there is no material difference for someone intent on doing mass harm from using an "assault weapon" with the section 30515(a) features attached, a "featureless" version, or frankly, simply taking a California-legal rifle and illegally attaching the prohibited parts to commit criminal activity.[1]

Ultimately, the video, which the District Court found persuasive, aptly demonstrates that the individual prohibited features discussed above (pistol grips, flash suppressors, collapsible stocks) make *no difference* in the rate of fire, or the ability to perform a reload, to someone intent on doing harm. For the law abiding and responsible citizen, however, the features may make all the difference in terms of accuracy.[2]

As the District Court correctly noted, the State's argument boiled down to this: it wishes to ban firearms that can be fired rapidly *and accurately*. (Decision,

[1]For example, in the San Bernardino terrorist attack in 2015, the shooters converted California-compliant rifles into non-compliant rifles. Given that the prohibited features for centerfire rifles are readily available for some rimfire firearms, they can readily be purchased and illegally attached to centerfire firearms by a committed murderer literally and definitionally unconcerned with the lawlessness of his actions.

[2]"Fast is fine, but accuracy is everything." (Attributed to Wyatt Earp.)

40.) The State repeats that argument here and throughout. (*E.g.*, Mot. at 13.) The State has never claimed that prohibiting the specified features of section 30515(a)(1) prevents rapid fire, only that it prevents *accurate* rapid fire. But that prohibition also prevents accurate fire in all other circumstances, especially the tense situation surrounding the need to defend against home invasion. And while the State argued that "accurate rapid fire" is "not consistent" with lawful use, it *never* presented any evidence to support this empty assertion, and does not do so in its motion.

Regardless, this is an absurd rationale for prohibiting firearm characteristics, and leads to the equally absurd result that the State can prohibit any improvements in firearm technology simply because such improvements would help criminals as well as lawful users. Under this theory, the State could prohibit all modern firearms beyond the musket, as any modern firearm is a *significant* improvement on the musket's firing rate, capacity, accuracy, ergonomics, ballistics, and lethality. The Supreme Court has already rejected the "argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment," *Heller*, 554 U.S. at 582.

The suggestion of "injury," much less irreparable injury, from the availability of improved firearms is not only unsupported, it is an impermissible rejection of the very premise of the Second Amendment – that effective means of

using force at a distance is on-balance so valuable that it must be protected despite the risk of misuse of the same tools. Claiming that certain features must be banned because they allow firearms to be effective at what they are supposed to do is farcical, and the reemergence of the § 30515(a) features does not justify the imposition of a stay. The right to keep and bear arms is recognized and protected precisely because effective arms, including those the State prohibits under its "assault weapons" ban, allow people to project lawful force beyond their own limited physical strength or skill. Protecting the citizenry's right and ability to use or threaten powerful force as a response to unjust force is the very purpose of the Second Amendment.

Therefore, the supposedly safe and secure status quo that the State seeks to maintain is both illusory and unconstitutional in that it deprived citizens of more accurate, effective, and safe defensive firearms. In practical terms, all that the Judgment will do is to bring California in line with a vast majority of the other states that freely sell firearms without the § 30515(a) prohibitions.[3] According to

[3]Furthermore, there was ample historical evidence that California's ban has had no salutary effect. As the District Court noted, even in California (after a 30-year assault weapon ban) there are 185,569 assault weapons currently registered with the State Department of Justice. Decision at 13:11 – 14:1. This figure does not include the numbers of assault weapons personally registered to law enforcement officers. Factoring in those assault weapons, the number exceeds 200,000. (*Id*.)

Even those official figures vastly understate the likely number of assault weapons legally purchased in California. Plaintiff's Exhibit 024 (Dillon **Exh. 24**), admitted at trial, showed that in anticipation of the latest round of assault weapon

Appellees' jurisdictional analysis presented at trial, law-abiding citizens may possess *any* semiautomatic rifle in 44 states, and may possess some semiautomatic rifles in all 50 states. (Mocsary Decl. (Dillon **Exh. 25**), at ¶ 44.) Semiautomatic firearms may be possessed by citizens in all fifty states. Forty-one states treat all semiautomatic firearms the same as every other legal firearm — without any additional restrictions, regardless of the features attached to the firearm. (*Id*.) A measure of the commonality of these types of "assault weapons" is their general legality in other jurisdictions. *Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016) ("The more relevant statistic is that [h]undreds of thousands of Tasers and stun guns have been sold to private citizens, who it appears may lawfully possess them in 45 States.") (Alito, J., concurring) (internal quotations omitted). The ubiquity of these types of firearms throughout the country demonstrates that there will be no sudden catastrophe in California absent a stay pending appeal.

Appellees proved at trial that semiautomatic weapons characterized as "assault weapons" are commonly owned in most other states. If the Judgment and injunction stand, therefore, the only "irreparable harm" that the State faces is that it

registrations in 2018, in connection with a 2017 budget proposal to the Legislature to accommodate online registrations, the California Department of Justice, Bureau of Firearms, had estimated that "1-1.5 million assault weapons will be registered by approximately 250,000 different owners" within the State.

would be forced to join forty-one other states in treating these common firearms as any other common, legal firearm.

D. FAILURE TO ENFORCE THE JUDGMENT WILL RESULT IN CONSTITUTIONAL INJURY TO OTHERS AND HARM THE PUBLIC INTEREST.

Where a government fails to satisfy the first two *Nken* factors, the Court need not reach the final two factors — harm to other parties and to the public interest. *Al Otro Lado v. Wolf*, 952 F.3d 999, 1014–15 (9th Cir. 2020). Often, these last two factors are considered together as a "balance of the equities." *Al Otro Lado*, 952 F.3d at 1015. And where the government is a party to this type of motion, the injury-to-others and the public-interest factors merge. *Index Newspapers*, 977 F.3d at 838, citing *Nken*, 556 U.S. at 435.

"'It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury'" to a party seeking to uphold an injunction. *Index Newspapers*, 977 F.3d at 837–38, citing *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) and *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Here, the District Court found, after a thorough examination of the evidence, that Appellees and others have been and continue to be deprived of their fundamental Second Amendment rights, and are subject to a severe burden on their core right to self-defense in the home. (Decision, 20.) The loss of Second Amendment rights constitutes irreparable injury. *Duncan v. Becerra*, 265 F.Supp.3d 1106, 1135 (S.D. Cal. 2017), citing *Grace v. District of Columbia*, 187 F.Supp.3d 124, 150 (D.D.C.

2016) and *Ezell v. City of Chicago*, 651 F.3d 684, 699, 700 (7th Cir. 2011) (a deprivation of the right to arms is "irreparable," with "no adequate remedy at law").

A party "can suffer a constitutional injury by being forced to comply with an unconstitutional law or else face financial injury or enforcement action." *County of Santa Clara v. Trump*, 250 F.Supp.3d 497, 537 (N.D. Cal. 2017). These concerns are not insubstantial. Facing felony charges and convictions for merely possessing a firearm that may have the "wrong" grip angle or a muzzle device which is actually a muzzle brake but has *some* flash hiding capability is not a minor burden.

On the other hand, nothing will continue to prevent the State from its robust enforcement of firearms statutes generally. Although the State, through its Governor, reacted to the District Court decision by disparaging the District Judge's character,[4] it also boasted that California had the strictest gun laws in the country. In the latter regard, at least, the Governor is correct, and those many other strict laws mean that the risk of leaving the decision in place in this case is minimal at

[4]"We need to call this federal judge out," said the Governor. "He will continue to do damage. Mark my words," Newsom said, calling the judge a "stone-cold ideologue" and a "wholly owned subsidiary of the gun lobby and the National Rifle Association" whose decisions are "press releases on behalf of the gun lobby." Jeremy B. White, *Newsom bashes federal judge as 'wholly-owned subsidiary of the gun lobby'*, Politico (June 10, 2021, 5:21 PM) https://www.politico.com/states/california/story/2021/06/10/newsom-bashes-federal-judge-as-wholly-owned-subsidiary-of-the-gun-lobby-1385704.

best. But the risk faced by law-abiding citizens deprived of accurate and controllable firearms persists every day because, unlike criminals bent on mayhem, the available substitutes are less safe and effective and lawful users are not likely to break the law by modifying a legal "featureless" configuration into an illegal one having prohibited features.

On balance, the public interest favors enforcement of judgments that go to "the core of the Second Amendment," which is "the right of 'law-abiding, responsible citizens to use arms in defense of hearth and home.'" *Heller*, 554 U.S. at 634-35. "[U]pholding the Constitution undeniably promotes the public interest." *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 604 (4th Cir. 2017), vacated and remanded sub nom. *Trump v. Int'l Refugee Assistance*, 138 S.Ct. 353 (2017). *See also*, *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002) ("'it is always in the public interest to prevent the violation of a party's constitutional rights.'").

IV. CONCLUSION

For the foregoing reasons, the State's motion to stay should be denied.

June 15, 2021

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CERTIFICATE OF COMPLIANCE

I am counsel of record for Plaintiffs-Appellees in the above action. I hereby certify that the foregoing APPELLEES' OPPOSITION TO APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 TO STAY JUDGMENT PENDING APPEAL complies with the type-volume limitation of Ninth Circuit Rule 27-1, because it contains 5,596 words, excluding the items exempted by Fed. Rule App. P. 32(f). This Opposition complies with the typeface and type style requirements of Fed. R. App. Pro. 32(a)(6) because it has been prepared in Times New Roman, a proportionally spaced typefont using 14-point font.

Dated: June 15, 2021

SEILER EPSTEIN LLP

s/ George M. Lee
George M. Lee

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

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

I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 15, 2021

s/ George M. Lee
George M. Lee