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15 Attorneys for Plaintiffs

16 UNITED STATES DISTRICT COURT
17 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

18 JAMES MILLER, an individual;
19 PATRICK RUSS, an individual;
20 RYAN PETERSON, an individual; and
21 SAN DIEGO COUNTY GUN OWNERS
22 POLITICAL ACTION COMMITTEE, a
23 membership organization,

24 Plaintiffs,

25 vs.

26 XAVIER BECERRA, in his official
27 capacity as Attorney General of
28 California; and MARTIN HORAN, in
his official capacity as Chief of the
Department of Justice Bureau of
Firearms,

Defendants.

Case No. '19CV1537 JAH AGS

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

1 Plaintiffs, JAMES MILLER, PATRICK RUSS, RYAN PETERSON, and
2 SAN DIEGO COUNTY GUN OWNERS POLITICAL ACTION COMMITTEE
3 (PAC) (“Plaintiffs”), by and through their undersigned counsel, hereby allege as
4 follows:
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7 **INTRODUCTION**

8 1. This is a facial and as applied constitutional challenge to California
9 Penal Code §§ 30515(a)(2) and 30515(a)(5), California Code of Regulations
10 § 5471, subdivs. (b), (n), and (p), and Defendants policies, practices, customs, and
11 enforcement of said law, which define and prohibit certain firearms as “assault
12 weapons” solely because they feature “large-capacity” magazines (capable of
13 holding more than ten rounds of ammunition) as defined by Pen. Code § 16740 and
14 regulated under the now-enjoined Penal Code § 32310. *Duncan v. Becerra*, Case
15 No. 3:17-cv-1017-BEN-JLB (ECF No. 87). Subdivisions (a)(2) and (a)(5) of Penal
16 Code § 30515 violate the Second Amendment to the United States Constitution by
17 prohibiting law-abiding citizens, including these individual plaintiffs, from
18 obtaining, acquiring, possessing, manufacturing or transferring firearms in
19 common use for lawful purposes such as self-defense inside and outside the home,
20 competition, sport, and hunting. To the extent that other provisions of the Penal
21 Code limit, prevent, or otherwise punish activity premised upon the legal definition
22 of “assault weapon” under Penal Code §§ 30515(a)(2) and 30515(a)(5), injunctive
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1 relief should also be granted to prevent enforcement of them, through Penal Code
2 §§ 30600 (prohibiting manufacture, transportation), 30605 (prohibiting
3 possession), 30800 (permitting seizure as a “nuisance”), 30910 (prohibiting sale),
4 30915 (prohibiting transfer by bequest/inheritance), 30945 (limiting use), and
5 31000 (requiring permits for use).
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8 2. This District Court already has ruled the state’s prohibition on the
9 possession of large-capacity magazines is unconstitutional, and has enjoined and
10 prohibited enforcement of those provisions of the Penal Code that would have
11 prohibited their possession. Both implicit and explicit in this District Court’s
12 ruling was the ability to *use* such lawfully possessed magazines in otherwise
13 lawfully possessed firearms. Thus, the prohibitions that attach to the possession
14 and use of a certain legislatively-invented class of otherwise commonly used,
15 constitutionally protected non-“assault weapon” firearms, but for and emanating
16 solely from their use in conjunction with a constitutionally protected magazine, are
17 likewise invalid and should be stricken.
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22 **THE PARTIES**

23 3. Plaintiff James Miller is an individual, and a law-abiding California
24 resident of the County of San Diego, California. Mr. Miller holds an active license
25 to carry a concealed weapon (“CCW”) issued by his County sheriff, after proving
26 “good cause” and “good moral character” to his licensing authority; successfully
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1 completing a course of training on the law and firearms proficiency; and passing an
2 extensive Live Scan-based background check and placement into the State’s
3 system for monitoring law enforcement contact, arrests, and criminal convictions
4 (“Rap Back”). Plaintiff Miller is the owner of a semi-automatic centerfire rifle,
5 expressly not defined as an assault weapon under California law by virtue of it
6 having a “fixed magazine” as defined by Cal. Pen. Code § 30515(b). Plaintiff
7 Miller further has legally acquired and currently possesses so-called “large-
8 capacity magazines,” as that term is defined by Pen. Code § 16740 and regulated
9 under the now-enjoined Penal Code § 32310. Plaintiff Miller seeks to use his
10 lawfully acquired large-capacity magazine(s) in his California-compliant, “fixed
11 magazine rifle.” However, Plaintiff Miller is prevented from lawfully doing so
12 without risk of persecution resulting in injury to his life and liberty; and the
13 unlawful confiscation and loss of his personal property because said use would
14 reclassify his rifle as a prohibited “assault weapon” as defined by Pen. Code
15 § 30515(a)(2). Plaintiff Miller herein would like to exercise his rights guaranteed
16 by the Second Amendment to keep and bear arms, by possessing a semiautomatic,
17 centerfire rifle, in common use for lawful purposes, but which the State considers
18 an “assault weapon” solely by virtue of its magazine capacity. Plaintiff Miller is a
19 member and Board Member of Plaintiff San Diego County Gun Owners PAC.
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27 4. Plaintiff Patrick Russ is an individual, and a law-abiding California
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1 resident of the County of San Diego, California. Mr. Russ holds an active license
2 to carry a concealed weapon (“CCW”) issued by his County sheriff, after proving
3 “good cause” and “good moral character” to his licensing authority; successfully
4 completing a course of training on the law and firearms proficiency; and passing an
5 extensive Live Scan-based background check and placement into the State’s
6 system for monitoring law enforcement contact, arrests, and criminal convictions
7 (“Rap Back”). Plaintiff Russ is the owner of a centerfire rifle, expressly not
8 defined as an assault weapon under California law by virtue of it having a “fixed
9 magazine” as defined by Cal. Pen. Code § 30515(b). Plaintiff Russ further has
10 legally acquired and currently possesses so-called “large-capacity magazines,” as
11 that term is defined by Pen. Code § 16740 and regulated under the now-enjoined
12 Penal Code § 32310. Plaintiff Russ seeks to use his lawfully acquired
13 “large-capacity” magazine(s) in his California-compliant, fixed magazine rifle.
14 However, Plaintiff Russ is prevented from lawfully doing so without risk of
15 persecution resulting in injury to his life and liberty; and the unlawful confiscation
16 and loss of his personal property because said use would reclassify his rifle as a
17 prohibited “assault weapon” as defined by Pen. Code § 30515(a)(2). Plaintiff Russ
18 herein would like to exercise his rights guaranteed by the Second Amendment to
19 keep and bear arms, by possessing a semiautomatic, centerfire rifle, in common use
20 for lawful purposes, but which the State considers an “assault weapon” solely by
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1 virtue of its magazine capacity. Plaintiff Russ is a member of Plaintiff San Diego
2 County Gun Owners PAC.

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4 5. Plaintiff Ryan Peterson is an individual, and a law-abiding California
5 resident of the County of San Diego, California. Mr. Peterson holds an active
6 license to carry a concealed weapon (“CCW”) issued by his County sheriff, after
7 proving “good cause” and “good moral character” to his licensing authority;
8 successfully completing a course of training on the law and firearms proficiency;
9 and passing an extensive Live Scan-based background check and placement into
10 the State’s system for monitoring law enforcement contact, arrests, and criminal
11 convictions (“Rap Back”). Plaintiff Peterson is the owner of a pistol, expressly *not*
12 defined as an assault weapon under California law by virtue of it having a “fixed
13 magazine” as defined by Cal. Pen. Code § 30515(b). Plaintiff Peterson further has
14 legally acquired and currently possesses so-called “large-capacity magazines,” as
15 that term is defined by Pen. Code § 16740 and regulated under the now-enjoined
16 Penal Code § 32310. Plaintiff Peterson seeks to use his lawfully acquired
17 large-capacity magazine(s) in his California-compliant, fixed magazine pistol.
18 However, Plaintiff Peterson is prevented from lawfully doing so without risk of
19 persecution resulting in injury to his life and liberty; and the unlawful confiscation
20 and loss of his personal property because said use would reclassify his pistol as an
21 “assault weapon” as defined by Pen. Code § 30515(a)(5). Plaintiff Peterson herein
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1 would like to exercise his rights guaranteed by the Second Amendment to keep and
2 bear arms, by possessing a firearm, in common use for lawful purposes, but which
3 the State considers an “assault weapon” solely by virtue of its magazine capacity.
4 Plaintiff Peterson is a member and Board Member of Plaintiff San Diego County
5 Gun Owners PAC.
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8 6. Plaintiff San Diego County Gun Owners PAC (SDCGO) is a non-
9 profit membership organization whose purpose is to protect and advance the
10 Second Amendment rights of residents of San Diego County, California. SDCGO’s
11 membership consists of Second Amendment supporters, people who own guns for
12 self-defense or sport, firearms dealers, shooting ranges, and elected officials who
13 want to restore and protect the right to keep and bear arms in California. The
14 interests that SDCGO seeks to protect in this lawsuit are germane to the
15 organization’s purposes, and, therefore, SDCGO sues on its own behalf, and on
16 behalf of its members, including individual Plaintiffs named herein.
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19 7. Defendant Xavier Becerra is the Attorney General of the State of
20 California, and is sued herein in his official capacity. Under Article 5, § 13 of the
21 California Constitution, Attorney General Becerra is the “chief law officer of the
22 State,” with a duty “to see that the laws of the state are uniformly and adequately
23 enforced.” Defendant Becerra is the head of the California Department of Justice
24 (“DOJ”). The DOJ and its Bureau of Firearms regulate and enforce state law
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1 related to the sales, transfer, possession, and ownership of firearms. The Attorney
2 General and DOJ maintain an office in San Diego, California.

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4 8. Defendant Martin Horan is the Chief of the DOJ's Bureau of
5 Firearms. On information and belief, Defendant Horan reports to Attorney General
6 Becerra, and he is responsible for the various operations of the Bureau of Firearms,
7 including the implementation and enforcement of the statutes, regulations and
8 policies regarding assault weapons. Defendant Horan is sued in his official
9 capacity.
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12 JURISDICTION AND VENUE

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14 9. This Court has jurisdiction over all claims for relief pursuant to
15 28 U.S.C. §§ 1331, 1343, 2201, 2202 and 42 U.S.C. §§ 1983 and 1988, as this
16 action seeks to redress the deprivation under color of the laws, statutes, ordinances,
17 regulations, customs, and usages of the State of California, of the rights, privileges
18 or immunities secured by the United States Constitution.
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21 10. Venue is proper under 28 U.S.C. § 1391(b), as the events giving rise
22 to Plaintiffs' causes of action arose or exist in this district in which the action is
23 brought. Venue is also proper under 28 U.S.C. § 1391, as the venue rules of this
24 State specifically would permit this action to be filed in San Diego, since the
25 Attorney General and California Department of Justice maintain an office within
26 this Division; Cal. Code of Civ. Pro. § 401(1).
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1 to modern forms of search, e.g., *Kyllo v. United States*, 533 U.S. 27, 35-36, 121 S.
2 Ct. 2038, 150 L.Ed.2d 94 (2001), the Second Amendment extends, *prima facie*, to
3 all instruments that constitute bearable arms, even those that were not in existence
4 at the time of the founding.” *Heller*, 128 S. Ct. 2783, at 2791-2792.
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7 14. The firearms that the law in question prohibits are, in virtually every
8 state of the Union, exactly the sorts of lawful weapons in common use that law-
9 abiding people possess at home for lawful purposes; and exactly what they would
10 bring to service in militia duty should such cause be necessary. *See, e.g., Colorado*
11 *Outfitters Ass’n v. Hickenlooper*, 24 F. Supp. 3d 1050, 1068 (D. Colo. 2014)
12 (concluding that statute “affects the use of firearms that are both widespread and
13 commonly used for self-defense,” because “lawfully owned semi-automatic
14 firearms using a magazine with the capacity of greater than 15 rounds number in
15 the tens of millions”); *Shew v. Malloy*, 994 F. Supp. 2d 234, 246 (D. Conn. 2014)
16 (concluding that semi-automatic rifles such as the AR-15 as well as magazines with
17 a capacity greater than 10 rounds “are ‘in common use’ within the meaning of
18 *Heller* and, presumably, used for lawful purposes”); *Friedman v. City of Highland*
19 *Park*, 577 U.S. ___, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from denial
20 of certiorari) (“Roughly five million Americans own AR-style semiautomatic
21 rifles”).
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27 15. Indeed, the California Department of Justice itself estimated that there
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1 were as many as 250,000 gun owners with “Bullet Button Assault Weapons,”
2 possessing as many as 1.5 million such firearms¹ – the vast majority of which are
3 AR-15 style rifles – in California alone.
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5 16. The firearms that the Plaintiffs wish to acquire, keep and lawfully
6 possess, but are prevented from doing so, are exactly the type of instruments that
7 are afforded protection under the Second Amendment for the preservation of self
8 and the state by law-abiding people in times of extreme danger.
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10 17. The Second Amendment is not a second-class guarantee buried in the
11 fine print at the bottom of our Constitution. As the Court held, “it is clear that the
12 Framers and ratifiers of the Fourteenth Amendment counted the right to keep and
13 bear arms among those *fundamental* rights necessary to our system of ordered
14 liberty.” *Id.* at 3043 (emphasis added).
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16 18. Despite California’s apparent legislative policy preferences and
17 animus towards Second Amendment rights (and, by extension, those who would
18 lawfully seek to assert and exercise them), “the enshrinement of constitutional
19 rights necessarily takes certain policy choices off the table.” *Heller*, 554 U.S., at
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25 ¹ This estimate is merely a subset of the common variations of the firearms in
26 question, as it does not include the estimated numbers of fixed magazine firearms
27 that are expressly not defined as “Bullet-Button Assault Weapons” lawfully
28 possessed in California.

1 636, 128 S. Ct., at 2822. Indeed, the Court “expressly rejected the argument that
2 the scope of the Second Amendment right should be determined by judicial interest
3 balancing,” *McDonald*, 561 U.S. at 785, 130 S. Ct. at 3047 (quoting *Heller*,
4 554 U.S., at 634-636, 128 S. Ct., at 2820-2821).

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6 ***California’s Assault Weapons Control Act***
7 ***SB 23 “Features” Weapons***
8 ***(Pen. Code § 30515)***

9 19. California has had a lengthy struggle with its ongoing attempt to brand
10 and restrict normal firearms, that are in common use for lawful purposes and not
11 both “dangerous and unusual,” as so-called “assault weapons,” a
12 politically-concocted pejorative term designed to suggest that there is an inherently
13 unlawful or illegitimate basis for owning otherwise common firearms protected by
14 the Second Amendment.
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17 20. Penal Code section 16200 currently states that the term “assault
18 weapon” is governed by sections 30510 and 30515. But as stated, California’s
19 attempt to define specifically what constitutes an “assault weapon” has been
20 problematic. The first two categories of assault weapons were specifically named
21 firearms contained within a statutory list of firearms, by make and model, first
22 enacted pursuant to the Roberti-Roos Assault Weapons Control Act of 1989.
23 These firearms are currently found at Penal Code § 30510(a)-(c) (formerly found at
24 Penal Code § 12276). The second “category” of assault weapons were the “AR and
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1 AK series” weapons promulgated by the DOJ following *Kasler v. Lockyer*,
2 23 Cal.4th 472 (2000), presently found at 11 Cal. Code of Regs. § 5499. These
3
4 first two categories of assault weapons were required to be registered within a
5 certain period of time, and if they were not registered, they could no longer be
6 owned legally within the State of California.
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8 21. The third category of assault weapons followed the Legislature’s
9 attempt to define “assault weapon” not by specific firearm make/model, but by a
10 list of features, now generally found in Pen. Code § 30515. This
11 characteristics-based attempt to define “assault weapon” followed passage of
12 Senate Bill 23 (SB 23) in 1999, and featured, most prominently, a ban on the
13 possession, sale, and manufacture of semiautomatic, centerfire rifles that had “the
14 ability to accept a detachable magazine,” and some cosmetic features, such as a
15 flash hider, a pistol grip, or a collapsible stock.
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19 22. In 2016, in order to remedy what it perceived to be a “loophole” in its
20 flawed definition, the Legislature again tinkered with the Penal Code § 30515
21 definition of “assault weapon” by eliminating (most) references to “ability to
22 accept a detachable magazine,” and requiring all semiautomatic centerfire rifles to
23 have “fixed magazines” instead. See Pen. Code § 30515(b). This was enacted
24 pursuant to Senate Bill 880 and Assembly Bill 1135. And likewise, if certain
25 legally possessed firearms which did not have “fixed magazines” (as defined by
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1 section 30515(b)) were not registered by June 30, 2018, they could no longer be
2 possessed, transported, manufactured, or sold.

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4 23. Additionally, SB 23 (1999), which contained the first characteristics-
5 based attempt to define the term “assault weapon,” also enacted the first
6 restrictions on “large-capacity magazines,” including the now-enjoined Penal Code
7 § 32310, as a major part of the Act. Indeed, Legislative Counsel’s digest
8 accompanying passage of SB 23 stated: “[t]his bill would further define the term
9 ‘assault weapon’ by providing descriptive definitions concerning *the capacity* and
10 function of the weapon” (emphasis added). Thus, SB 23 attempted to define
11 “assault weapon” not merely by the cosmetic or functional features of the firearm,
12 but in some instances, solely by the magazine capacity of the firearm.

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16 24. When the Legislature enacted SB 880 and AB 1135 in 2016,
17 therefore, it continued to presume that certain firearms – even if they were not
18 otherwise assault weapons by definition – could fall within the definition of assault
19 weapon by their capacity alone under Penal Code § 30515(a)(2) and (a)(5).
20 Specifically, Penal Code 30515(a)(2) defines “assault weapon” as:
21 “[a] semiautomatic, centerfire rifle that has a fixed magazine with the capacity to
22 accept more than 10 rounds. And, similarly, section 30515(a)(5) also defines an
23 “assault weapon” as: “[a] semiautomatic pistol with a fixed magazine that has the
24 capacity to accept more than 10 rounds.”
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1 control assembly is detached from the action in such a way that the action has been
2 interrupted and will not function. For example, disassembling the action on a
3 two-part receiver, like that on an AR-15 style firearm, would require the rear take
4 down pin to be removed, the upper receiver lifted upwards and away from the
5 lower receiver using the front pivot pin as the fulcrum, before the magazine may be
6 removed.” 11 CCR § 5471, subdivs. (b), (n), and (p).
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9 28. Plaintiffs Miller, Russ and Peterson own firearms that are “AR-15
10 style firearms” that have fixed magazines as defined by Penal Code § 30515(b) and
11 11 CCR § 5471(n), (p). Said firearms are loaded and unloaded by using a device
12 requiring the user to physically release and separate the upper and the lower
13 receivers, in the manner described by 11 CCR § 5471(n), (p), before the magazines
14 may be removed. Accordingly, these are *not* assault weapons as defined by statute.
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17 29. Plaintiffs Miller, Russ and Peterson also have legally acquired and
18 currently possess so-called “large-capacity magazines” (as that term is defined by
19 Penal Code § 16740), that would, if used, operate in these firearms. They desire to
20 use these “large-capacity magazines” within their respective firearms, for purposes
21 of defense in the home, and for all other lawful purposes such as target shooting
22 and training.
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26 30. The Penal Code expressly considers these firearms *not* to be assault
27 weapons by virtue of having fixed magazines. The only feature of the firearm that
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1 would “make” it an “assault weapon” under California law would be the insertion
2 of a large-capacity magazine, which would be prohibited in Plaintiffs Miller and
3 Russ’s cases by Penal Code § 30515(a)(2), and in Plaintiff Peterson’s case by
4 Penal Code § 30515(a)(5).
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7 31. However, this Court has already adjudicated and determined that
8 possession of so-called large-capacity magazines is protected by the Second
9 Amendment, and has struck down enforcement of California’s prohibition on the
10 possession of said magazines. See, *Duncan v. Becerra*, 366 F.Supp.3d 1131
11 (S.D. Cal. 2019), S.D. Case No. 3:17-cv-1017-BEN-JLB (ECF No. 87) (granting
12 summary judgment in favor of plaintiffs, and granting injunctive relief from
13 enforcement of Pen. Code § 32310). Express and implied within this District
14 Court’s ruling was the right to *use* such magazines within otherwise legally owned
15 firearms.
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19 32. Plaintiffs therefore seek declaratory and injunctive relief from
20 enforcement of Pen. Code §§ 30600 (prohibiting manufacture, transportation),
21 30605 (prohibiting possession), 30800 (permitting seizure as a “nuisance”),
22 30910 (prohibiting sale), 30915 (prohibiting transfer by bequest/inheritance),
23 30945 (limiting use), and 31000 (requiring permits for use), to the extent that such
24 prohibitions as to “assault weapons” emanate solely from the legal definition of
25 assault weapon under sections 30515(a)(2) and 30515(a)(5).
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1 violates the Second Amendment;

2 2. For an order permanently enjoining Defendants, their officers, agents,
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4 servants, employees, and all persons in active concert or participation with them
5 who receive actual notice of the injunction, from enforcement or application of
6 Pen. Code §§ 30600, 30605, 30800, 30910, 30915, 30945, and 31000, against
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8 Plaintiffs on an as-applied basis, and against all others, to the extent that such
9 prohibitions as to “assault weapons” emanate solely from the legal definition of
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11 assault weapon under sections 30515(a)(2) and 30515(a)(5);

12 3. For costs of suit, including attorneys’ fees and costs under
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14 42 U.S.C. § 1988 and any other applicable law; and

15 4. For any and all further relief to which Plaintiffs may be justly entitled.
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17
18 August 15, 2019

GATZKE DILLON & BALANCE LLP

19
20 /s John W. Dillon
John W. Dillon

21
22 August 15, 2019

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28 Attorneys for Plaintiffs