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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 VIRGINIA DUNCAN, RICHARD
11 LEWIS, PATRICK LOVETTE, DAVID
MARGUGLIO, CHRISTOPHER
12 WADDELL, CALIFORNIA RIFLE &
PISTOL ASSOCIATION,
13 INCORPORATED, a California
corporation,

14 Plaintiffs,

15 v.

16 XAVIER BECERRA, in his official
17 capacity as Attorney General of the State
of California; and DOES 1-10,
18

19 Defendant.
20

Case No: 17-cv-1017-BEN-JLB

JOINT DISCOVERY PLAN

1 On July 14, 2017, Plaintiffs Virginia Duncan, Richard Lewis, Patrick Lovette,
2 David Marguglio, Christopher Waddell, the California Rifle & Pistol Association,
3 Incorporated (“Plaintiffs”) and Defendant Xavier Becerra (“Defendant”) held a
4 conference in accordance with Federal Rule of Civil Procedure 26(f), the Court’s July 6,
5 2017 Order for Telephonic Counsel-Only Early Neutral Evaluation Conference, and the
6 Civil Chamber Rules of the Honorable Jill L. Burkhardt.

7 During that conference, the parties discussed the matters required by Federal Rule
8 26(f), the Civil Chambers Rules, and orders of this Court. The parties now submit this
9 Joint Discovery Plan.

10 **I. RULE 26(F) DISCOVERY ISSUES**

11 **A. Rule 26(a) Disclosures (FRCP 26(f)(3)(A))**

12 Pursuant to the Court’s July 6 order, the service of initial disclosures shall occur on
13 or before July 21, 2017. The parties do not anticipate any changes to the timing, form, or
14 requirement for such disclosures.

15 **B. Anticipated Scope of Discovery (FRCP 26(f)(3)(B))**

16 In accordance with Federal Rule 26(f)(3)(B), the parties agree that discovery will
17 be conducted on the allegations and claims contained within Plaintiffs’ Complaint and the
18 denials and defenses raised in Defendants’ Answer. The parties will not conduct
19 discovery in phases, and the discovery will not be limited to particular issues.

20 The parties intend to propound written discovery in the form of interrogatories,
21 requests for production, and requests for admissions as authorized by the Federal Rules.
22 The parties also intend to conduct the depositions of certain plaintiffs, as well as persons
23 most knowledgeable at the California Attorney General’s Office and the California Rifle
24 & Pistol Association and various third parties (including expert and lay witnesses).

25 Plaintiffs

26 Plaintiffs currently intend to serve written discovery concerning California Penal
27 Code section 32310, the challenged statute that Defendant is charged with implementing
28 and enforcing, including the purported justifications for the law and all information that

1 Defendant may rely upon to support those justifications. Plaintiffs also intend to take
2 discovery concerning the nature of the fit of the challenged statute with the purported
3 justifications, as well as the scope and impact the law has on the ability of law-abiding
4 citizens to acquire, possess, and use constitutionally protected arms for lawful purposes.

5 As described in further detail below, Plaintiffs also intend to notice the deposition
6 of Defendant's person most knowledgeable concerning these topics, as well as any expert
7 witness(es) that may be designated by Defendant.

8 Plaintiffs are contemplating serving document and deposition subpoenas on non-
9 party witnesses responsible for drafting and advocating for the adoption of Proposition 63
10 and the challenged statute.

11 Defendant

12 Defendant currently intends to serve written discovery, including interrogatories,
13 requests for production of documents, and requests for admission, relevant to the factual
14 basis, if any, for the allegations and legal theories in the Complaint as well as assertions
15 made in support of Plaintiffs' Motion for Preliminary Injunction. As described in further
16 detail below, Defendant also intends to notice the depositions of some or all of the
17 individual Plaintiffs, the person or persons most knowledgeable concerning Plaintiffs'
18 Second Amendment, takings, and due process claims, individuals who submitted
19 declarations in support of Plaintiffs' Motion for Preliminary Injunction, as well as any
20 expert witness(es) that may be designated by Plaintiffs. The Attorney General anticipates
21 that the need for further discovery and additional topics may be identified during the
22 course of the discovery process.

23 **C. Electronically Stored Information (FRCP 26(f)(3)(C))**

24 In accordance with Federal Rule 26(f)(3)(C), the parties have discussed
25 electronically stored information. As guiding principles, the parties agree to meet and
26 confer in good faith concerning issues that arise with respect to the disclosure or
27 discovery of electronically stored information, and to use their best efforts to produce
28 electronically stored information in the format preferred by the requesting party,

1 including reasonable requests for production of such information with metadata intact.

2 **D. Privilege Issues (FRCP 26(f)(3)(D))**

3 In accordance with Federal Rule 26(f)(3)(D), the parties have discussed privilege
4 and protection issues. They are negotiating a Stipulated Protective Order, which the
5 parties anticipate filing with the Court in the next few weeks.

6 **E. Changes to Discovery Limitations (FRCP 26(f)(3)(E))**

7 The parties do not anticipate any changes to the rules on discovery limitations and
8 adopt the default limitations on discovery imposed by the Federal Rules of Civil
9 Procedure, local rules, and applicable case law. The parties do, however, reserve the right
10 to seek leave of Court to exceed these discovery limitations if necessary.

11 **F. Other Discovery & Scheduling Orders (FRCP 26(f)(3)(F))**

12 In accordance with Federal Rule 26(f)(3)(F), the parties have discussed the need
13 for other discovery or scheduling orders under Rule 26(c), 16(b), and 16(c). The parties
14 do not currently request any other orders, though they may seek additional orders as
15 discovery proceeds and if the need arises.

16 The parties do, however, anticipate that Defendant will appeal the preliminary
17 injunction this Court entered on June 29, 2017, and will move to stay proceedings in this
18 case pending resolution of that appeal. Plaintiffs oppose any such stay.

19 **II. ADDITIONAL DISCOVERY ISSUES (CHAMBER RULES)**

20 **A. Witnesses the Parties Intend to Depose (Chamber Rule III.B.1)**

21 Pursuant to the Civil Chambers Rules, the parties have disclosed the identities of
22 all witnesses they intend to depose and have discussed, briefly, the reasons they seek to
23 take those depositions. Neither party currently anticipates opposing the deposition of any
24 specific witness, but each reserves the right to object to all or part of any deposition if
25 necessary.

26 Plaintiffs

27 Plaintiffs intend to notice the deposition of Defendant by way of his person most
28 knowledgeable in order to test the allegations in Defendant's Answer and those made in

1 support of Defendant’s Opposition to Motion for Preliminary Injunction. Plaintiffs also
2 seek to secure evidence relevant to the claims and defenses asserted in this action,
3 including evidence concerning the scope and impact of Penal Code section 32310, the
4 challenged statute that Defendant is charged with implementing and enforcing.

5 Plaintiffs also intend to notice the deposition of each of Defendants’ non-party
6 witnesses concerning the testimony each provided in opposition to Plaintiffs’ Motion for
7 Preliminary Injunction, as well as any other subjects on which they intend to opine in
8 support of Defendant’s defenses to Plaintiffs’ claims. Plaintiffs currently expect those
9 individuals to include:

- 10 ■ Lucy P. Allen, Managing Director of NERA Economic Consulting
- 11 ■ John J. Donohue, Professor of Law at Stanford Law School
- 12 ■ Blake Graham, Special Agent Supervisor, California Department of Justice,
13 Bureau of Firearms
- 14 ■ Ken James, Retired Law Enforcement Officer, Emeryville Police
15 Department
- 16 ■ Daniel W. Webster, Professor of Health & Policy Management, Co-Director
17 for Research at the Center for the Prevention of Youth Violence, and
18 Director of the Johns Hopkins Center for Gun Policy & Research

19 Plaintiffs may identify other witnesses via document production or written
20 discovery whose deposition may be necessary.

21 Defendant

22 Defendant Attorney General intends to take the depositions of some or all the
23 Plaintiffs in this action, Plaintiffs Virginia Duncan, Richard Lewis, Patrick Lovette,
24 David Marguglio, and/or Christopher Waddell, in order to test the factual allegations in
25 Plaintiffs’ Complaint and/or those made in support of Plaintiffs’ Motion for Preliminary
26 Injunction as well as to discover evidence relevant to the claims and defenses asserted in
27 this action. In addition, the Attorney General intends to take the deposition of Plaintiff
28 California Rifle & Pistol Association, Incorporated, through the person or persons most

1 knowledgeable to determine whether associational standing exists, test the factual
2 allegations in Plaintiffs' Complaint and/or those made in support of Plaintiffs' Motion for
3 Preliminary Injunction, and to discover evidence relevant to the claims and defenses
4 asserted in this action.

5 The Attorney General intends to take the depositions of some or each of Plaintiffs'
6 non-party witnesses concerning the testimony each provided in support of Plaintiffs'
7 Motion for Preliminary Injunction, as well as any other subjects on which they intend to
8 opine in support of Plaintiffs' claims or as may be relevant to this action. The Attorney
9 General currently expects those deponents to include:

- 10 ■ Massad Ayoob
- 11 ■ James Curcuruto, Director, Industry Research & Analysis, National
12 Shooting Sports Foundation
- 13 ■ Gary Kleck, Emeritus Professor of Criminology & Criminal Justice, Florida
14 State University
- 15 ■ Stephen Helsley, Retired Peace Officer, California Department of Justice

16 The Attorney General may identify other witnesses via document production or
17 written discovery whose deposition may be necessary.

18 **B. Documents Requested for Production (Chamber Rule III.B.2)**

19 Pursuant to the Civil Chambers Rules, the parties have disclosed the categories of
20 documents they intend to request for production. Neither party currently anticipates
21 objecting to any of the broad categories of documents disclosed below, but each reserves
22 the right to object to all or part of any specific request for production if necessary.

23 Plaintiffs

24 Plaintiffs expect to request the following categories of documents from
25 Defendants:

26 All documents in support of the defenses raised in Defendant's Answer, as well as
27 all factual allegations made in support of Defendant's Opposition to Motion for
28 Preliminary Injunction, including:

- 1 ▪ All documents referencing the California Legislature’s official
- 2 justification(s) for adopting Penal Code section 32310.
- 3 ▪ All documents constituting evidence that Defendants may rely on in
- 4 asserting that restrictions on magazines capable of holding over ten rounds
- 5 of ammunition further public safety.
- 6 ▪ All documents constituting evidence that Defendants may rely on in
- 7 asserting that the possession, manufacture, transfer, or sale of magazines
- 8 over ten rounds harms public safety.
- 9 ▪ All documents constituting evidence that Defendants may rely on in
- 10 asserting that magazines over ten rounds are not useful or necessary for
- 11 personal defense.

12 Plaintiffs may identify and seek additional categories of relevant documents as
13 discovery proceeds.

14 Defendant

15 Defendant expects to request the following categories of documents from
16 Plaintiffs:

17 All documents in support of the factual allegations made in Plaintiffs’ Complaint
18 and Motion for Preliminary Injunction, including, but not limited to:

- 19 ▪ Plaintiffs’ allegations made in support of their Second Amendment claim,
20 such as those allegations regarding the history and prevalence of large-
21 capacity magazines, use of large-capacity magazines, and necessity of large-
22 capacity magazines for self-defense, as well as Plaintiffs’ allegations
23 regarding the purported difficulty of utilizing alternatives to large-capacity
24 magazines;
- 25 ▪ Plaintiffs’ allegations that Section 32310 amounts to a taking of property for
26 which compensation is required; and
- 27 ▪ Plaintiffs’ allegations in support of its claim that Section 32310 violates due
28 process;

- 1 ▪ Plaintiffs’ allegations regarding irreparable injury purportedly caused by
- 2 Section 32310; and
- 3 ▪ Plaintiffs’ allegations regarding how the public interest would be served by
- 4 enjoining Section 32310.

5 The Attorney General may identify and seek additional categories of relevant
6 documents as discovery proceeds.

7 **C. Discovery to Enable Settlement Evaluation (Chamber Rule III.B.3)**

8 The parties do not believe any discovery would enable the parties to settle this
9 dispute. Indeed, the parties have discussed the possibility of settlement and do not believe
10 this case has any potential of settling. Plaintiffs believe that California Penal Code section
11 32310 violates various constitutional rights, and Defendant believes the law is
12 constitutional.

13 Plaintiffs have no intention of dismissing this lawsuit unless Defendant allows all
14 law-abiding citizens to own, possess, purchase, and transfer magazines over ten rounds.

15 It is Defendant’s position that Section 32310 is a constitutional and duly enacted
16 statute. Given the Attorney General’s sworn duty to uphold the laws of the State, the
17 Attorney General cannot excuse Plaintiffs from compliance with Section 32310 or
18 otherwise refuse to enforce it. Cal. Const., art. III, § 3.5.

19 **D. Issues Implicating Expert Evidence & Anticipated *Daubert* Objections**
20 **(Chamber Rule III.B.4)**

21 Issues that Implicate Expert Evidence

22 The parties agree that the following issues in this case likely implicate expert
23 evidence:

24 Whether firearm magazines capable of holding more than ten rounds of
25 ammunition are protected by the Second Amendment. This issue will likely involve
26 expert evidence regarding the ubiquity of magazines over ten rounds the United States, as
27 well as the historical prevalence of such magazines in the United States and/or laws
28 regulating them.

1 Whether there is a “reasonable fit” between the state’s ban on firearm magazines
2 capable of holding more than ten rounds of ammunition and its public safety interests.
3 This issue may involve expert evidence regarding the impact of the law on mass shooting
4 incidents, violent crime, public safety, and law enforcement safety, as well as the impact
5 of the law on citizen’s ability to engage in self-defense.

6 Anticipated *Daubert* Objections

7 Without having yet exchanged expert designations or having investigated the
8 grounds for their opinions, the parties agree that it is premature to determine whether any
9 *Daubert* objection is likely. The parties reserve their right to raise the issue as necessary.

10 **E. Threshold Legal Issues for Motion for Summary Judgment (Chamber**
11 **Rule III.B.5)**

12 Because this case primarily raises questions of constitutional law, the parties
13 believe it will likely be resolved on summary judgment.

14 **F. Procedure for Claims of Privilege (Chamber Rule III.B.6)**

15 Pursuant to the Chamber Rules, the parties agree to the following procedure for
16 asserting claims of privilege in response to discovery requests:

17 The party asserting privilege must serve a “privilege log” within a reasonable time
18 from service of responses. The parties agree that the privilege log shall include all
19 information required by Federal Rules of Civil Procedure 26(b)(5) and 34(b)(2)(C).

20 **G. Anticipated Protective Orders (Chamber Rule III.B.7)**

21 As described above, the parties are negotiating a Stipulated Protective Order,
22 which they anticipate filing with the Court in the next few weeks.

23 **H. Proposed Schedule (Chamber Rule III.B.8)**

24 The parties agree that the Court’s tentative schedule is not likely to be met by the
25 parties in this case, particularly as to the dates for completion of fact/expert witness
26 discovery and dispositive motions. The parties were, however, unable to agree on a
27 proposed schedule for the reasons described below.

28 ///

1 Plaintiffs

2 The number of depositions required in this case and the fact that the Court's
3 tentative schedule would require counsel to manage the availability of more than a dozen
4 deponents over the course of the holiday season justify modifying the tentative schedule
5 to provide an additional two months for expert/fact discovery. Plaintiffs further believe
6 that the breadth of discovery here, as well as the fact that this case is likely to be disposed
7 of on summary judgment, justify providing the parties with an additional month to
8 prepare dispositive motions that will be most helpful to the Court's handling of this
9 matter.

10 Plaintiffs dispute Defendant's contention that even more time is required because
11 they do not believe that Defendant's preliminary injunction appeal is likely to provide
12 any guidance likely to impact this case or the scope of discovery. They believe that it is
13 preferable to move forward with discovery at this time.

14 As such, Plaintiffs propose the following schedule:

15 Deadline	16 Tentative Date	17 Plaintiffs' Proposal
18 File motions to amend and/or add parties	September 1, 2017	September 1, 2017
19 Completion of fact and expert witness 20 discovery	December 1, 2017	February 2, 2018
21 Designation and service of expert witness 22 reports	October 6, 2017	October 6, 2017
23 Supplemental designation and service of 24 rebuttal expert reports	November 3, 2017	November 3, 2017
25 Filing of dispositive motions (inclusive of 26 <i>Daubert</i> motions)	December 29, 2017	April 6, 2018
27 Motions in limine are to be filed as directed in the Local Rules, or as otherwise set by 28 the Court		
Mandatory Settlement Conference	February 6, 2018	May 1, 2018
Pretrial Conference before Judge Benitez	April 30, 2018	July 23, 2018

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Defendant

The Attorney General agrees that the number of depositions required in this case as well as the likelihood that this case will be resolved on summary judgment, justifies modifying the tentative schedule for fact and expert discovery proposed by the Court.

The Attorney General submits that good cause exists to extend all of the dates set forth in the Court’s tentative schedule by six months for the additional reason that he intends to appeal the preliminary injunction entered in this case and believes that the appeal is likely to provide substantial guidance, if not rulings of law, that will materially affect the scope of this case, including the scope of discovery. For that reason, and to avoid unnecessary discovery and motion practice regarding discovery, the Attorney General has met and conferred with Plaintiffs regarding a stay of district court proceedings pending appeal.

Should that process prove unsuccessful and should the Court deny a motion to stay, the Attorney General proposes the following schedule:

Deadline	Tentative Date	¶¶’s Proposal
File motions to amend and/or add parties	September 1, 2017	September 1, 2017
Completion of fact and expert witness discovery	December 1, 2017	April 2, 2018
Designation and service of expert witness reports	October 6, 2017	April 6, 2018
Supplemental designation and service of rebuttal expert reports	November 3, 2017	May 2, 2018
Filing of dispositive motions (inclusive of <i>Daubert</i> motions)	December 29, 2017	April 30, 2018
Motions in limine are to be filed as directed in the Local Rules, or as otherwise set by the Court		
Mandatory Settlement Conference	February 6, 2018	August 6, 2018
Pretrial Conference before Judge Benitez	April 30, 2018	October 30, 2018

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1 Dated: July 19, 2017

MICHEL & ASSOCIATES, P.C.

2
3 /s/ Anna M. Barvir

4 Anna M. Barvir
5 Email: abarvir@michellawyers.com
6 Attorneys for Plaintiffs

7 Dated: July 19, 2017

XAVIER BECERRA
Attorney General of California
TAMAR PACHTER
Supervising Deputy Attorney General

9
10 /s/ Anthony P. O'Brien

11 ANTHONY P. O'BRIEN
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13 ALEXANDRA ROBERT GORDON
14 Email: alexandra.robertgordon@doj.ca.gov
15 Deputy Attorneys General
16 Attorneys for Defendant Xavier Becerra

17 Pursuant to Local Rule 2(f)(4), the below filer attests that concurrence in the filing
18 of this document has been obtained from the above signatories.

19 Dated: July 19, 2017

20 /s/ Anna M. Barvir
21 Anna M. Barvir

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

VIRGINIA DUNCAN, RICHARD
LEWIS, PATRICK LOVETTE, DAVID
MARGUGLIO, CHRISTOPHER
WADDELL, CALIFORNIA RIFLE &
PISTOL ASSOCIATION,
INCORPORATED, a California
corporation,

Plaintiffs,

v.

XAVIER BECERRA, in his official
capacity as Attorney General of the State
of California; and DOES 1-10,

Defendant.

Case No: 17-cv-1017-BEN-JLB

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, declare under penalty of perjury that I am a citizen of the United States over 18 years of age. My business address is 180 East Ocean Boulevard, Suite 200 Long Beach, CA 90802. I am not a party to the above-entitled action.

I have caused service of the following documents, described as:

JOINT DISCOVERY PLAN

on the following parties by electronically filing the foregoing on July 19, 2017, with the Clerk of the District Court using its ECF System, which electronically notifies them.

Ms. Alexandra Robert Gordon
Deputy Attorney General
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San Francisco, CA 94102-7004

Mr. Anthony P. O'Brien
Deputy Attorney General
anthony.obrien@doj.ca.gov
1300 I Street, Suite 125
Sacramento, CA 95814

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 19, 2017, at Long Beach, CA.


Laura Palmerin