NO. 14-15408

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEONARD FYOCK, et al.,
Plaintiffs-Appellants,

v.

CITY OF SUNNYVALE, et al.
Defendants-Appellees.

Appeal from United States District Court for the Northern District of California
Civil Case No. 5:13-CV-05807-RMW (Honorable Ronald M. Whyte)

BRIEF OF AMICUS CURIAE PINK PISTOLS IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pink Pistols is an unincorporated association.

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INTEREST OF AMICUS CURIAE

Pink Pistols is a shooting society that honors diversity and is open to all. It has chapters throughout the United States; the newest chapter is in Salt Lake City, Utah. The parties have granted permission for the filing of this brief.[1]

Pink Pistols advocates the responsible and lawful use of firearms for self-defense. This issue is of particular concern to sexual minorities—whether gay, lesbian, bisexual, or transgender—because they are particularly subject to violence based on discriminatory animus. In response, Congress enacted the Matthew Shepard/James Byrd, Jr. Hate Crimes Prevention Act of 2009, which expanded the scope of the federal hate crimes statute to include violence driven by the perpetrator's animus toward the victim's actual or perceived sexual orientation or gender identity. *See* 18 U.S.C. § 249(a)(2). The FBI reports that approximately one-fifth of all hate crimes are motivated by such bias, which makes this category of hate crime second only to crimes based on racial animus.[2]

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[1] This brief was not authored in whole or in part by a party's counsel, nor has a party or a party's counsel contributed money to fund its submission. No one other than amicus, its members and its counsel funded this submission.

[2] *See* FBI, *2012 Hate Crime Statistics, Incidents and Offenses*, www.fbi.gov/about-us/cjis/ucr/hate-crime/2012/topic-pages/incidents-and-offenses/incidentsandoffenses_final.

INTRODUCTION

Sunnyvale Municipal Code §9.44.050(a) ("the Ordinance" or "the Ban") criminalizes the possession of any "large-capacity magazine," defined as "any detachable ammunition feeding device with the capacity to accept more than ten (10) rounds." Banned magazines must be removed from the City, surrendered to the police, or relinquished to a licensed firearms dealer. §9.44.050(b). Sunnyvale thus bars its citizens from protecting themselves, their families, and their homes with firearms equipped with standard-issue ammunition magazines that the City deems to be of dangerously "large" capacity. Under *District of Columbia v. Heller*, Sunnyvale can justify its ban only if it can prove that the banned magazines are "not typically possessed by law-abiding citizens for lawful purposes." 554 U.S. 570, 625 (2008).

That is a hopeless task. Magazines holding more than ten rounds are ubiquitous. The district court found that " 'it is safe to say that whatever the actual number of such magazines in United States consumers' hands is, it is in the tens-of-millions,' " *Fyock v. City of Sunnyvale*, No. 13-5807, 2014 WL 984162, at *4 (N.D. Cal. Mar. 5, 2014). The court also found that "the American public in general prefers many of the firearms that take magazines having a capacity to accept more than ten rounds as standard." *Id*. at *6. The appeal is obvious: a law-abiding citizen who runs out of ammunition before an assailant does will become a crime

victim, and it is more likely that this will happen if the gun owner is stuck with a substandard-capacity magazine.

Yet, despite its ruling that the "Sunnyvale ordinance prohibits average, law-abiding citizens from possessing *protected arms that are not dangerous and unusual*," 2014 WL 984162, at *5,[3] the district court held that Plaintiffs' Second Amendment claim is unlikely to succeed. *Heller* precludes this result because it "found that [the Second Amendment] right *applies* to handguns," and it therefore ruled that "citizens *must* be permitted to use" them. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010) (quotation marks omitted). The same result should obtain here, and it is unnecessary for this Court to apply a levels-of-scrutiny analysis to strike down Sunnyvale's ban.

Although the district court held that the Ordinance survives intermediate scrutiny, *Heller* also forecloses that result. Handguns "are the overwhelmingly favorite weapon of armed criminals." 554 U.S. at 682 (Breyer, J., dissenting). Yet the Supreme Court nevertheless held that the D.C. ordinance banning handguns "would fail constitutional muster" under *any* standard of heightened scrutiny. *Id.* at 629. The same must be true for Sunnyvale's ban on magazines that, supposedly, are favored by criminals.

Because laws banning protected arms are "off the table," *id.* at 636, the dis-

[3] Unless otherwise noted, all emphases in quotations in this brief have been added by amicus Pink Pistols.

trict court erred in determining that Plaintiffs' claim is unlikely to succeed. This Court should reverse.

ARGUMENT

I. THE SECOND AMENDMENT PROTECTS OWNERSHIP OF FIREARMS THAT ARE IN COMMON USE FOR LAWFUL PURPOSES, AND THAT INCLUDES MAGAZINES HOLDING MORE THAN TEN ROUNDS OF AMMUNITION.

A. The Second Amendment Protects the Individual Right To Keep and Bear Firearms that Are Commonly Used by Law-Abiding Citizens for Lawful Purposes.

In *Heller* the Supreme Court laid down an explicit and unambiguous rule defining the firearms that citizens have a Second Amendment "right to keep and bear": firearms that are "typically possessed by law-abiding citizens for lawful purposes." 554 U.S. at 625. Put another way, the Constitution guarantees the right to keep and bear firearms that are " 'in common use at the time' for lawful purposes like self-defense." *Id.* at 624.

B. Firearms Do Not Work Without Ammunition; Therefore, a Ban on Magazines Holding More than Ten Rounds of Ammo Implicates the Second Amendment.

Sunnyvale argued below that the Ordinance does not even implicate the Second Amendment because it does not regulate *firearms* as such: it regulates only ammunition *magazines*. The district court gave this bit of sophistry the back of its hand: "if Sunnyvale is right that magazines and ammunition are not 'arms,' any jurisdiction could effectively ban all weapons simply by forbidding magazines and

ammunition. This argument's logic would abrogate all Second Amendment protections." *Fyock*, 2014 WL 984162, at *5. As the court below observed, the judicial repudiation of Sunnyvale's argument has been universal—"no court has found that such magazines do not qualify as 'arms' under the Second Amendment." *Id*. (collecting cases).

C. Magazines Holding More than Ten Rounds Are Commonplace and Preferred by a Vast Population of Citizens Who Use Firearms for the Lawful Purpose of Self-Defense.

The next issue is whether magazines that contain more than ten rounds of ammunition are "in common use" for "lawful purposes like self-defense." *Heller*, 554 U.S. at 624. This is not a close question. Sunnyvale's label, "Large Capacity Magazines," is a tendentious and misleading misnomer. In truth, it is substandard magazines holding only ten or fewer rounds that are the anomaly when it comes to most standard-sized semiautomatics. The district court's findings are as follows:

1. " '[I]t is safe to say that whatever the actual number of such magazines in United States consumers' hands is, it is in the tens-of-millions, even under the most conservative estimates.' " 2014 WL 984162, at *4.
2. "[M]any handguns kept for self-defense come standard with magazines having the prohibited capacity." *Id*. at *6.

3. "[M]agazines having a capacity to accept more than ten rounds are often used with relatively ordinary handguns that individuals use for self-defense both inside and outside the home." *Id*.
4. "[T]he American public in general prefers many of the firearms that take magazines having a capacity to accept more than ten rounds as standard." *Id*.
5. "[M]agazines having a capacity to accept more than ten rounds are in common use, and are therefore not dangerous and unusual." *Id*. at *4.

To paraphrase *Heller*, Sunnyvale's ban on standard magazines of more than ten rounds "amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for [the] lawful purpose [of self-defense]." 554 U.S. at 628. The Supreme Court repeatedly stressed that the Second Amendment's protection encompasses firearms whose features are "in common use," "typically possessed," and "preferred" by law-abiding Americans for lawful purposes. *Id.* at 624, 625, 628-29. The court below embraced this ineluctable logic and ruled that the "Sunnyvale ordinance prohibits average, law-abiding citizens from possessing *protected arms that are not dangerous and unusual*." 2014 WL 984162, at *5.

With all due respect to the district court, this is where the constitutional inquiry should have ended, because the determination that a firearm is in common

use for lawful purposes *is the decisive issue under Heller*, *see* 554 U.S. at 624-25, 627; it is not merely a threshold to the application of intermediate scrutiny.

II. *HELLER* AND *MCDONALD* FORBID ANY FORM OF INTEREST BALANCING WHEN THE CHALLENGED LAW IS A BAN ON PARTICULAR FIREARMS OR FIREARMS FEATURES THAT AFFECTS THE RIGHTS OF LAW-ABIDING CITIZENS.

The Supreme Court ruled that the line between permissible regulations and impermissible bans on firearms *is not* to be established by balancing the individual right protected by the Second Amendment against competing government interests such as public safety, *because that balance has already been struck*: the Second Amendment itself "is the very *product* of an interest-balancing by the people," and "[t]he very enumeration of the right takes out of the hands of government … the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634, 635 (original emphasis).

In *Heller* the Court could find no historical justification for a total ban on possession of handguns in the home. The same rule applies when the challenged law is not a ban on a class of firearms, but a ban on a class of vital firearms features, such as "large" magazine capacity or other features that determine the utility of the weapon's use for self-defense and other lawful purposes. Hence, *Heller categorically* invalidated not only D.C.'s handgun ban, but also D.C.'s requirement "that firearms in the home be rendered and kept inoperable at all times" by adding some variety of "trigger lock" mechanism to the gun—and the Court did so *without*

subjecting that trigger-lock requirement to any of the tiers, standards or levels of judicial scrutiny familiar in other areas of constitutional doctrine. 554 U.S. at 630. Indeed, the Supreme Court *expressly disavowed* the "interest-balancing" proposed by Justice Breyer's dissent, *see id.* at 634-35, an approach that was in substance, if not in name, a form of intermediate scrutiny forbidden in Second Amendment analysis. *See id.* at 704-05 (Breyer, J., dissenting) (urging the Court to apply "intermediate scrutiny"). Thus the Court made a deliberate decision not to employ "intermediate" or any other standard of judicial scrutiny.

If there were any lingering doubt that interest-balancing, "intermediate" or otherwise, is foreclosed by *Heller*, the Court dispelled it in *McDonald*, when it confirmed that *Heller* "expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing." 130 S. Ct. at 3047 (controlling opinion of Alito, J.). *McDonald* emphasized that resolving Second Amendment cases *would not* "require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise." *Id*. at 3050. Thus "*the Supreme Court made clear in Heller that it wasn't going to make the right to bear arms depend on casualty counts.*" *Moore v. Madigan*, 702 F.3d 933, 939 (7th Cir. 2012).

In the face of the Supreme Court's unambiguous rejection of both intermediate scrutiny and judicial interest-balancing, and despite its own ruling that "the

Sunnyvale law burdens conduct near the core of the Second Amendment right," 2014 WL 984162, at *7, the court below nonetheless applied intermediate scrutiny and balanced the Second Amendment rights of law-abiding citizens against the "compelling government interests" in "[p]ublic safety and crime prevention." *Id.* at *8. This was error. The invocation of public safety made no difference to the Supreme Court's constitutional analysis in either *Heller* or *McDonald*, despite the fact that it is universally recognized that public safety is among the most compelling government interests.

In *Heller*, D.C. invoked public safety, arguing that handguns can be outlawed because they "are the overwhelmingly favorite weapon of armed criminals." 554 U.S. at 682 (Breyer, J., dissenting). Yet the Court nevertheless held that the D.C. ban on handguns "would fail constitutional muster" under *any* standard of heightened scrutiny. *Id.* at 629. The same must be true for Sunnyvale's ban on magazines that are supposedly favored by armed criminals. *See* 2014 WL 984162, at *5.

In *McDonald*, where Chicago defended its ordinance on grounds of public safety, the Court was similarly unpersuaded. Justice Alito reminded the parties that the "right to keep and bear arms … is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes"—such

as the Fourth Amendment exclusionary rule—"fall into the same category," because they inflict " 'substantial social costs' " by " 'return[ing] a killer, a rapist or other criminal to the streets ... to repeat his crime.' " 130 S. Ct. at 3045 (collecting cases) (citations omitted). The need for public safety has not been weighed against the people's rights under the Fourth, Fifth, or Sixth Amendments, nor should courts be allowed to "balance" away the people's rights under the Second Amendment.

III. EVEN IF SOME FORM OF INTEREST-BALANCING WERE APPROPRIATE HERE, THE ORDINANCE WOULD BE SUBJECT TO STRICT SCRUTINY.

This Court has distinguished between claims by individuals who fall outside the "core of the Second Amendment right," such as those with a "criminal history"—whose claims are subject to "intermediate rather than strict scrutiny"—and claims by " 'law-abiding, responsible citizens' "—whose Second Amendment claims " 'are entitled to full solicitude under *Heller*.' " *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013). The Seventh Circuit has likewise rejected intermediate scrutiny where the challenged law affected "the gun rights of the entire law-abiding adult population of Illinois." *Moore* 702 F.3d at 940. The plaintiffs here are "law-abiding, responsible citizens," *Heller*, 554 U.S. at 635, and Sunnyvale's Ordinance restricting their Second Amendment rights is therefore subject to the most exacting Second Amendment scrutiny.

Even if the standard were intermediate scrutiny, "[t]he burden of justifica-

tion is demanding and it rests entirely on the State." *United States v. Virginia*, 518 U.S. 515, 533 (1996). The government must mount a "pragmatic defense" of its regulation and "marshal *extensive empirical evidence*" that the law "[i]s *vital to public safety*." *Moore*, 702 F.3d at 939-40. "[T]he government may not rely upon mere anecdote and supposition;" it must defend the law with "tangible evidence" rather than "unsupported intuitions." *United States v. Carter*, 669 F.3d 411, 418 (4th Cir. 2012) (internal quotation marks omitted). Sunnyvale cannot "get away with shoddy data or reasoning." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) (plurality).

Sunnyvale has not made the necessary showing.

IV. SUNNYVALE HAS NOT MADE A RECORD SUFFICIENT TO SUPPORT THE ORDINANCE, EVEN IF MERE INTERMEDIATE SCRUTINY WERE APPLIED.

A. The Ordinance Cannot Be Redeemed by Pointing to Magazines that It Does *Not* Ban.

In its balancing of interests, the court below tried to minimize the burden that the Ordinance imposes with the observation that "[i]ndividuals have countless other handgun and magazine options to exercise their Second Amendment rights." 2014 WL 984162, at *7. This reasoning is precisely backwards. Moreover, *Heller* already rejected it: "It is no answer to say … that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed." *Heller*, 554 U.S. at 629. "[R]estating the Second Amendment right in

terms of what IS LEFT after the regulation … is exactly backward from *Heller*'s reasoning." *National Rifle Ass'n of America, Inc. v. BATFE*, 714 F.3d 334, 345 (5th Cir. 2013) (Jones, J.; joined by Jolly, Smith, Clement, Owen, and Elrod, JJ., dissenting from denial of rehearing en banc) (emphasis in original).

B. The Act's Ban Cannot Be Redeemed by Assertions that Citizens Never Need Magazines Holding More than Ten Rounds To Defend Themselves from Criminal Violence.

The court below asserted that "[m]agazines having a capacity to accept more than ten rounds are *hardly crucial* for citizens to exercise their right to bear arms." 2014 WL 984162, at *7. *But that is not the test that the Court established in Heller*. The use of particular firearms is protected under the Second Amendment if those arms are "in common use" for "lawful purposes like self-defense." *Heller*, 554 U.S. at 624. As explained above, the district court itself "determin[ed] that the banned magazines are in common use" for "self-defense both inside and outside the home." 2014 WL 984162, at *6. The court below thus did precisely what *Heller* said it could not: "The very enumeration of the right takes out of the hands of government … the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." 554 U.S. at 634, 635 (original emphasis).

C. Sunnyvale Tacitly Concedes that Magazines Holding More than Ten Rounds Are Necessary for Self-Defense Against Armed Criminals.

Even if the test under *Heller* were whether a particular class of firearms is "crucial for citizens to exercise their right to bear arms," 2014 WL 984162, at *7, Sunnyvale would still lose because magazines holding more than ten rounds are important self-defense tools. *Sunnyvale tacitly—but unavoidably—concedes this point by arming its own police exclusively with firearms equipped with standard-issue magazines holding more than ten rounds*. The handguns used by the Sunnyvale police are the Glock 17 (standard magazine holds 17 rounds), Glock 19 (15 rounds), Glock 22 (15 rounds), Glock 23 (13 rounds), and the Glock 21SF (13 rounds).[4] This is typical: police departments throughout the nation issue handguns with magazines that hold more than ten rounds. *See* ER77; ER80.[5] Sunnyvale has also issued a legal memorandum purporting to exempt police officers (whether employed by Sunnyvale or any other jurisdiction) from the Ordinance's magazine restriction *even when they are off-duty and are keeping and bearing arms for self-defense*. ER386; ER388. Plainly, Sunnyvale agrees that such magazines are suita-

[4] *See Sunnyvale Public Records Production* at 80, 82, 84, 86, 88, 91, 93, 94, 97; *Glock Pistol Models*, www.glock.com/english/index_pistols.htm (click "Models" on the lefthand menu and then select the appropriate model from the list).

[5] America's one million law enforcement agents are virtually all armed with handguns holding more than ten rounds of ammunition. *See* MASSAD AYOOB, THE COMPLETE BOOK OF HANDGUNS 50, 87, 89-90 (2013).

ble for self-defense—it just wishes to deny to most of its citizens the right to utilize them. That offends the Second Amendment, which reserves the right to bear arms to "the people," not to the off-duty police.

The police deem such firepower essential in encounters with criminals in part because, even at close range, officers (like anyone else in the crisis of being attacked) miss their assailants far more often than they hit them. Years of data reveal that shots fired by police officers generally miss 83% of the time when the assailant is within 21 feet, and *62% of the time when the assailant is within six feet.*[6] Consequently, police shoot-outs with suspects often involve lots of shots fired by the police officer and that makes magazines holding more than ten rounds essential. For example, in 2011 New York City police officers fired more than ten rounds in defense of themselves and others in 29% of such incidents.[7]

Another reason for the preference (shared by civilians and police officers alike) for magazines holding more than ten rounds is the high frequency of attacks by more than one assailant. It is no answer to say that, because the police are well-

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[6] *See* Thomas J. Aveni, *Officer-Involved Shootings: What We Didn't Know Has Hurt Us*, POLICE POLICY STUDIES COUNCIL, at 7 (2002), www.theppsc.org/Staff_Views/Aveni/OIS.pdf; Brian McCombie, *An Inside Look at FBI Handgun Training*, GUNS & AMMO: HANDGUNS (June 20, 2013), www.handgunsmag.com/2013/06/20/new-fbi-handgun-training/ (last visited May 23, 2014).

[7] NEW YORK CITY POLICE DEPARTMENT, ANNUAL FIREARMS DISCHARGE REPORT 2011 17, 23 (2012), www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/nypd_annual_firearms_discharge_report_2011.pdf (last visited May 23, 2014).

armed, citizens need not be. That is wrong as a matter of law—because the Second Amendment guarantees the rights of *individuals*—and tragically false as a matter of fact. No citizen enjoys a constitutional right to police protection,[8] and unfortunately the police are often not around when a citizen is being attacked.[9] "Defensive gun use" is very common, with the leading study estimating that "each year in the U.S. there are about 2.2 to 2.5 million [defensive gun uses] of all types by civilians against humans."[10]

There is nothing sinister in private citizens arming themselves with the same firearms and magazines that ordinary police carry. "While any handgun can be used for self-defense, some are clearly better than others because of their caliber, *capacity*, method of operation and quality of construction," and the best exemplars

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[8] *See, e.g., Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756-67 (2005); *Warren v. District of Columbia*, 444 A.2d 1, 3 (D.C. 1981).

[9] Consider these statistics: in 2012 the police were unable to protect citizens from 14,827 murders; 84,376 rapes; 354,520 robberies; and 760,739 aggravated assaults. *Crime in the United States 2012, Violent Crime*, FBI, www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/violent-crime/violent-crime (last visited May 5, 2014) (browse by violent crime category).

[10] Gary Kleck & Marc Gertz, *Armed Resistance to Crime*, 86 J. CRIM. L. & CRIMINOLOGY 150, 164 (1995); *see also* ER561-62. Nothing changes even if we assume arguendo that the average gun owner is unlikely to need to fire more than ten rounds to protect himself on any given occasion. That proves nothing: the average gun owner will not need to fire a *single* round in self-defense in his life simply because most people are not victimized by an armed assault. Moreover, merely revealing that one is armed is often sufficient to deter would-be assailants. And if a citizen is attacked, there is a significant risk he will be attacked by multiple criminals: in 2008 nearly 800,000 violent crimes (17.4% of the total) involved multiple offenders. ER560.

of this are the actual "sidearms carried by law enforcement officers."[11] "These handguns have a solid reputation for reliability and serviceability and are almost always good choices for citizens …."[12]

If police need standard-issue magazines holding 15 to 17 rounds, *a fortiori* law-abiding citizens need the same firepower, if not more.[13] Police have many advantages over civilians: (1) they wear bullet-proof vests; (2) they carry extra magazines; (3) they usually carry a hidden back-up pistol; (4) they have additional firepower in their cars, such as a shotgun or a patrol rifle (and the latter is usually an AR-15 with a 30-round magazine); (5) they have additional weapons on their belts, including Tasers, truncheons, and Mace or pepper spray; (6) they often have a partner in the car who is similarly armed; and (7) reinforcements, including paramilitary SWAT teams, are only a radio call away. Civilians lack such resources, so their need for standard magazines that hold as many rounds as possible is both acute and undeniable. Civilians are, unfortunately, usually left to defend themselves, and the Second Amendment guarantees that they may do so with firearms and magazines that are "in common use" and "typically possessed by law-abiding

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[11] Nick Jacobellis, *Carry A Cop Gun*, HANDGUNS MAGAZINE (Sept. 24, 2010), www.handgunsmag.com/2010/09/24/featured_handguns_copcarry_122206. Mr. Jacobellis is a retired U.S. Customs Agent and New York police officer. *Id*.

[12] *Id.*

[13] *See* David B. Kopel, "*Assault Weapons*," *in* GUNS: WHO SHOULD HAVE THEM 202 (David B. Kopel ed., 1995).

citizens for lawful purposes." *Heller*, 554 U.S. at 624, 625. As in *Heller*, the Ordinance challenged here outlaws a class of arms "overwhelmingly chosen by American society for [the] lawful purpose [of self-defense]." *Id*. at 628.

D. Sunnyvale Has Not Demonstrated that Its Restriction on Magazine Capacity Will Reduce Firearms Violence.

There is no empirical evidence for the proposition that restricting magazines to ten rounds reduces criminal firearms violence. As Sunnyvale's expert, Professor Christopher Koper, recently acknowledged, his research for the Department of Justice on the 10-year federal magazine ban[14] showed "no discernible reduction in the lethality and injuriousness of gun violence" while the ban was in effect. ER343. Professor Koper has also conceded (repeatedly) that discerning patterns "in LCM use is much more difficult because there was, and is, no national data source on crimes with LCMs." ER236; *see also* ER234; ER369. Koper's final report on the federal magazine ban concluded that the ban could not be "clearly credit[ed] … with any of the nation's recent drop in gun violence" and that, "[s]hould it be renewed, the ban's effects on gun violence are likely to be small at best and perhaps too small for reliable measurement." ER249-50.[15]

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[14] Title XI of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994). The federal ban expired in 2004.

[15] Professor Koper also acknowledged that there are "studies suggest[ing] that state-level [magazine] bans have not reduced crime," ER328 n.95, and he admitted that "the available data in the four cities [he] investigated were too limited

The intractable problem, according to Sunnyvale's own expert, is that criminals and madmen denied magazines holding more than ten rounds will simply substitute other magazines: "Because offenders can substitute … small magazines for banned … LCMs, there is not a clear rationale for expecting the ban to reduce assaults and robberies with guns." ER328. This is true *a fortiori* for Sunnyvale's ban, because all anyone has to do to steal a magazine that holds more than ten rounds is to drive to any neighboring town which does not outlaw such magazines. A criminal could also purchase one in a nearby state that does not ban the sale of such magazines. *See* ER328 n.95. In an essay in 2013, Professor Koper again stressed substitution as an inherent weakness of any restriction on magazine capacity, ER368, and he concluded that his own "analyses showed no discernible reduction in the lethality or injuriousness of gun violence during the post-ban years." ER368.

The failure of the federal magazine ban to have *any* discernible effect on gun violence has been confirmed by the National Research Council, which conducted a comprehensive review of *all* the published literature on firearms violence, including Professor Koper's research. The NRC explained that "the premise of the ban" on magazines holding more than ten rounds "was that a decrease in their use may reduce gunshot victimization, particularly victimizations involving multiple

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and inconsistent to draw any clear overall conclusions" as to whether crimes with LCMs diminished during the federal ban. ER236-37.

wounds or multiple victims"—but in fact the data "did not reveal any clear impacts on gun violence outcomes."[16]

E. Sunnyvale Has Not Demonstrated that Its Restriction on Magazine Capacity Will Reduce the Threat that Armed Criminals Pose to Police Officers.

The district court reasoned that the magazines banned by the Ordinance pose a particular threat to police officers. 2014 WL 984162, at *8. But the data do not support this proposition. To the contrary, "the most common weapon used to murder" police officers is the five- or six-shot "revolver."[17]

The FBI's statistics likewise reveal no disproportionate risk to the police from magazines holding more than ten rounds.[18] In 2010 there were 56 law enforcement officer ("LEO") homicides nationwide, but the incident reports identify only one firearm possessed by a perpetrator that would likely fall within Sunnyvale's magazine restriction, and it was a semiautomatic rifle that had been illegally converted to fire in fully automatic mode; the rifle was therefore already illegal under both federal and California law, wholly independent of the Ordinance

[16] *See* NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 96-97 (Charles F. Wellford et al. eds., 2005).

[17] *See* Kopel, *in* GUNS: WHO SHOULD HAVE THEM, *supra* note 13, at 182 (citing a report in THE JOURNAL OF CALIFORNIA LAW ENFORCEMENT).

[18] LAW ENFORCEMENT OFFICERS KILLED & ASSAULTED: 2010 ("LEOKA 2010"), www.fbi.gov/about-us/cjis/ucr/leoka/2010.

challenged here.[19] Several of the murder weapons were probably handguns with magazines holding more than ten rounds, but these were the victims' own police-service handguns, which the perpetrator wrestled away from the officer.[20] None of the other incident reports indicates that magazines holding more than ten rounds were even involved, let alone that the firepower of such a magazine was necessary to kill the police officer.

A review of the FBI data thus indicates that, in 2010, a police officer was eight times more likely to be murdered with a revolver than with a firearm equipped with a magazine holding more than ten rounds, eight times more likely to be killed with his own service pistol, three times as likely to be killed by a "fire-arms mishap" during police training (whether by his own hand or that of a fellow officer), and 72 times as likely to be killed in the line of duty accidentally—usually by being run over by another motorist while the officer was on a roadside issuing a traffic ticket.[21] The statistics for 2011 are similar.[22]

Finally, in the vast majority of these homicides, the perpetrator had a criminal record and was likely already barred from owning *any* firearm.[23] No law is go-

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[19] *See id.*

[20] *See id.*

[21] *See id.*

[22] LAW ENFORCEMENT OFFICERS KILLED & ASSAULTED: 2011, www.fbi.gov/about-us/cjis/ucr/leoka/2011.

[23] *See* LEOKA 2010, *supra* note 18.

ing to affect a felon's decision whether to use a firearm with a magazine holding more than ten rounds or to substitute a firearm with an unbanned magazine instead, *because for felons there are no legal firearms, regardless of the size of the magazine.* The stubborn fact is that criminals are not deterred by firearms regulations—the criminal penalty for whatever crime they commit with an illegal firearm magazine will virtually always be far more severe than the penalty for a violation of the magazine-restriction law. Therefore the only people affected by bans such as Sunnyvale's are law-abiding citizens. Thus we are told that the Second Amendment rights of law-abiding citizens may be restricted based not on fears about what *they* will do with the firearms and magazines they purchase, but on the violence that the government anticipates from *others*. But to ban firearms or magazines because criminals use them is to tell law-abiding citizens that their liberties depend not on their own conduct, but on the conduct of the lawless, and that the law can vouchsafe the law-abiding only such rights as the lawless will allow. Surely this cannot be. Just as "[t]he first amendment knows no heckler's veto," *Robb v. Hungerbeeler*, 370 F.3d 735, 743 (8th Cir. 2004), the Second Amendment cannot tolerate restrictions on law-abiding citizens' right to keep and bear arms based on the threat to public safety posed not by those citizens, but by criminals.

F. Sunnyvale Has Not Demonstrated that Its Restriction on Magazine Capacity Will Reduce the Carnage from Mass Shootings.

Since there is no empirical evidence that magazine restrictions have ever had any effect on firearms violence, Sunnyvale and the court below are left with only the notion—or perhaps the hope—that a ban on standard magazines holding more than ten rounds might furnish some relief from mass killings such as that at the Newtown school in 2012. *See* 2014 WL 984162, at *9. This is a false hope. The Justice Department's research on the federal magazine ban—conducted by Professor Koper when he was doing contract research for the Justice Department, before he became a professional witness for state and local governments enacting magazine restrictions—concluded not only that the lack of data has made it "*impossible* to make definitive assessments of the [federal magazine] ban's impact on gun violence," but also that it is *even more difficult* "to judge the ban's effects on the more specific problem of mass shootings." ER369.

The theory is simple enough: larger magazines enable mass killers to fire more shots than if they were limited to using smaller magazines. To support this theory, Professor Koper cited data supposedly indicating that mass shooters using "large capacity" magazines kill and injure more victims than other mass shooters. ER228. Even if we take the admittedly sparse and unrepresentative data at face value, they would not show that these mass killers were able to commit their atrocities *because* they used large magazines. The more likely explanation is that

they *chose* such magazines because they intended to shoot a lot of people. *See* ER120-21. And if that is the case, had these shooters been thwarted in obtaining magazines of more than ten rounds they would simply have carried more ten-round magazines or additional firearms. The vast majority of mass killers carry multiple guns, as Professor Koper's own examples indicate. ER226-27.

Professor Koper and the court below rely on this kind of anecdotal evidence because the statistical evidence does not support their theory. "There are no mass shootings in which the details indicate that the shooter needed a[] ['large capacity' magazine] to inflict the amount of harm he inflicted." ER121. A study of mass shooting incidents from 1984 to 1993 found that the killer's "rate of fire never was faster than about one round every two seconds, and was usually much slower than that." ER130. Thus "[n]one of the mass killers maintained a sustained rate of fire that could not also have been maintained—even taking reloading time into account—with either multiple guns or with an ordinary six-shot revolver and the common loading devices known as 'speedloaders.' " *Id*. "The killer in every single mass shooting was either armed with multiple guns, had multiple magazines, or actually reloaded during the incident." ER555-56.

As the National Research Council recently reported, although mass killings "are a highly visible and moving tragedy," they are statistically so rare that "there is no conclusive information about which policies and enforcement and prevention

strategies might be effective" in reducing their number and severity.[24] This problem is highlighted by Professor Koper's repeated use of terms like "tentative," "suggests," and "appear to." *See, e.g.*, ER230. Under any standard of heightened review, this is not enough. Sunnyvale "had to provide … more than merely a rational basis for believing that its uniquely sweeping ban is justified by an increase in public safety. It has failed to meet this burden," and its ban must be struck down. *Moore*, 702 F.3d at 942.

The latest scholarly research reveals that, despite the horrors of recent massacres, the truth is that "[m]ass shootings have not increased in number or in overall death toll, at least not over the past several decades." James Alan Fox et al., *Mass Shootings in America: Moving Beyond Newtown*, 18 HOMICIDE STUDIES 128 (2013).[25] The *only* thing that "has increased with regard to mass murder … is the public's fear, anxiety, and widely held belief that the problem is getting worse." *Id*. at 130. Professor Fox concluded that the proposition that reenacting the federal ban would prevent these horrible crimes is a "myth." *Id*. at 136. "[A] comparison

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[24] INSTITUTE OF MEDICINE AND NATIONAL RESEARCH COUNCIL, PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE 31, 47 (Alan I. Leshner et al. eds., 2013).

[25] The journal is available at hsx.sagepub.com/content/18/1/125. Professor Fox systematically dismantled an article published by a journalist—not a criminologist—in a news magazine called *Mother Jones*, on which Sunnyvale's expert, Professor Koper, heavily relied (ER226-29 & nn.7, 9, 11): Mark Follman et al., *A Guide to Mass Shootings in America*, MOTHER JONES (Feb. 27, 2013), www.motherjones.com/politics/2012/07/mass-shootings-map.

of the incidence of mass shootings during the 10-year window" when the federal legislation was in force "against the time periods before implementation and after expiration shows that the legislation had virtually no effect" on mass shootings. *Id.* The problem is that "these mass murderers … easily could have identified an alternate means of mass casualty if that were necessary." *Id.* "Eliminating the risk of mass murder would involve extreme steps that we are unable or unwilling to take—abolishing the Second Amendment … and rounding up anyone who looks or acts at all suspicious." *Id.* at 141.

The tragic truth is that Sunnyvale's Ordinance would not have prevented the atrocity that spawned it—the massacre at the Newtown School in Sandy Hook, Connecticut. Sunnyvale's magazine restriction does not affect revolvers, lever-action rifles, or most shotguns, any of which would have been just as deadly.

Limiting magazines to ten rounds would have made no difference: Adam Lanza used 30-round magazines for his AR-15 rifle, but he changed them out before they were exhausted and could just as readily have used 10-round magazines[26] that the Ordinance permits. That is precisely what killer Eric Harris did at Colum-

[26] N.R. Kleinfield et al., *Newtown Killer's Obsessions, in Chilling Detail*, N.Y. TIMES, Mar. 28, 2013, at A1.

bine High School on April 20, 1999, where he fired 96 shots from a rifle using 10-round magazines.[27]

Instead of reloading his rifle, Lanza could have employed the two handguns that he was carrying or the shotgun that he took to the school but left in his car.[28] The mass-killers at Virginia Tech, Columbine, and Aurora likewise carried multiple firearms. Nobody charged them while they were reloading.

Nor did the rate of fire of Lanza's AR-15 make a difference, *because it was the same as every other semiautomatic rifle*—one bullet for each pull of the trigger. Even if *all* semiautomatic firearms and their magazines (of whatever size) were outlawed, Lanza could have maintained a comparable rate of fire using 150-year-old lever-action cowboy rifles such as the Volcanic, the Henry, or the Winchester—all of which are exempt under §9.44.050(a)(3) of the Ordinance, despite the fact that the Volcanic has a 30-round magazine and the Henry and Winchester

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[27] *How They Were Equipped That Day*, Jefferson County Sheriff's Office (2000), www.cnn.com/SPECIALS/2000/columbine.cd/Pages/EQUIPMENT_TEXT.htm; *Sandy Hook Elementary School Shooting*, WIKIPEDIA, http://en.wikipedia.org/wiki/Sandy_Hook_Elementary_School_shooting (last visited May 23, 2014). Similarly, the Ordinance would not have hindered Seung-Hui Cho, who killed 32 people at Virginia Tech on April 16, 2007, using 10- and 15-round magazines. The official inquiry concluded that exclusive use of "10-round magazines that were legal would have not made much difference in the incident." *Report of Virginia Tech Review Panel*, Chapter VI, at 71, 74, *available at* www.governor.virginia.gov/tempcontent/techPanelReport-docs/10%20CHAPTER%20VI%20GUN%20PURCHASE%20AND%20CAMPUS%20GUN%20POLICIES.pdf.

[28] *See How They Were Equipped That Day*, *supra* note 27.

hold 16 rounds each.[29] Lanza fired 154 shots in five minutes—about 30 shots per minute.[30] That same rate of fire can be achieved with a Winchester[31] or Volcanic[32] lever-action rifle. Lanza had a Henry lever-action rifle at home,[33] and even in its 19th-century form the Henry was advertised as capable of firing 60 shots per minute, which is *twice as fast* as Lanza fired his AR-15 rifle.[34]

A bolt-action rifle from World War One would also have fired just as rapidly, and Lanza had one at home.[35] A person practiced in using the bolt-action Enfield rifle with its ten-round magazine—entirely legal under the Ordinance—can fire 37 aimed shots per minute.[36]

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[29] *See* MILITARY SMALL ARMS 146-47 (Graham Smith ed., 1994).

[30] *See* Mary Ellen Clark & Noreen O'Donnell, *Newtown School Gunman Fired 154 Rounds in Less than Five Minutes*, REUTERS U.S. EDITION (Mar. 28, 2013), www.reuters.com/article/2013/03/28/us-usa-shooting-connecticut-idUSBRE92R0EM20130328; N.R. Kleinfield et al., *Newtown Killer's Obsessions*, *supra* note 26.

[31] *See* GUN: A VISUAL HISTORY 174 (Chris Stone ed., 2012).

[32] *See* MILITARY SMALL ARMS, *supra* note 62, at 146.

[33] *See* Matt Apuzzo & Pete Yost, *Connecticut Shooter Adam Lanza's Guns Were Registered To Mother Nancy Lanza*, HUFFINGTON POST (Dec. 15, 2012), www.huffingtonpost.com/2012/12/15/connecticut-shooter-guns_n_2306913.html.

[34] *See* K.D. KIRKLAND, AMERICA'S GUNMAKERS: WINCHESTER 8 (2013).

[35] *See* Clark, *supra* note 30 ("Enfield bolt-action rifle" among firearms in Lanza home).

[36] *See* WILL FOWLER & PATRICK SWEENEY, WORLD ENCYCLOPEDIA OF RIFLES AND MACHINE GUNS 40 (2012); Kopel, *in* GUNS: WHO SHOULD HAVE THEM, *supra* note 13, at 166 ("Even including time for reloading, a simple revolver or a bolt-action hunting rifle can easily fire [as] fast" as Patrick Purdy did in 1989, when he murdered children at a schoolyard with a semiautomatic rifle).

Finally, Lanza could have accomplished his atrocities with a simple revolver, which can be rapidly reloaded with the use of devices called "speed-loaders."[37] Further evidence of this comes from *The Public Inquiry into the Shootings at Dunblane Primary School on 13 March 1996*.[38] On that day, a madman named Thomas Hamilton walked into a school in Scotland and, within four minutes, shot 30 teachers and children with a 9mm pistol before killing himself.[39] Hamilton shot his victims with a Browning semiautomatic pistol that he reloaded with 20-round magazines (he fired 105 shots).[40] However, the *Public Inquiry* concluded that Hamilton could have inflicted the same bloodshed with the two revolvers that he was carrying, because "it is possible to maintain a speed of firing which approaches that of the self-loading pistol" by using "a speedloader" which "would enable a whole set of cartridges to be removed and replaced very quickly."[41]

The *Public Inquiry* concluded that the death toll would have been far worse if the madman had been armed with a shotgun. The *Public Inquiry* calculated that, within the same span of time, Hamilton could have fired and reloaded an old-

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[37] *See* Joseph von Benedikt, *Double Down: Get Your DA Revolver Skills Up to Snuff with These Pro Tips*, *in* GUNS & AMMO: HANDGUNS 62-63 (Aug./Sept. 2013).

[38] *Available at* www.ssaa.org.au/research/1996/1996-10-16_public-inquiry-dunblane-lord-cullen.pdf.

[39] *See id.* ¶¶1.3, 6.10.

[40] *Id.* ¶3.39.

[41] *Id.* ¶9.51.

fashioned double-barreled shotgun 105 times—the same number of shots that he fired with his pistols—but with a much higher death toll because that many shotgun shells would have saturated the school with up to 1,000 buckshot projectiles.[42] As a result of the Dunblane massacre, the British government outlawed virtually all private ownership of handguns—an option that the Second Amendment forbids.

Thus firearms technology that is 150 years old and unaffected by the Ordinance would have wrought the same carnage at the Newtown school as the rifle and 30-round magazines that Lanza used. The monstrosity at Newtown was not a particular firearm or magazine, but the depraved individual who wielded it.

CONCLUSION

The challenged provisions of the Ordinance should be enjoined.

May 23, 2014

Respectfully submitted,

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[42] *Id.* at ¶9.53.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains 6,932 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

Dated: May 23, 2014

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 27, 2014.

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