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10  
11 **UNITED STATES DISTRICT COURT**  
12 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

13 WILLIAM WIESE, et al.,  
14  
15 Plaintiffs,  
16  
17 - v. -  
18  
19 XAVIER BECERRA, et al.,  
20  
21 Defendants.

No. 2:17-cv-00903-WBS-KJN

**BRIEF OF AMICUS CURIAE  
EVERYTOWN FOR GUN SAFETY  
IN SUPPORT OF DEFENDANTS'  
MOTION TO DISMISS  
PLAINTIFFS' THIRD AMENDED  
COMPLAINT**

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**CORPORATE DISCLOSURE STATEMENT**

Everytown for Gun Safety has no parent corporations. It has no stock and hence no publicly held company owns 10% or more of its stock.

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1 **INTEREST OF AMICUS CURIAE**

2 Everytown for Gun Safety (“Everytown”) is the nation’s largest gun violence prevention  
3 organization, with supporters in every state, including tens of thousands in California. It was  
4 founded in 2014 as the combined effort of Mayors Against Illegal Guns, a national, bipartisan  
5 coalition of mayors combating illegal guns and gun trafficking, and Moms Demand Action for  
6 Gun Sense in America, an organization formed in the wake of the murder of twenty children and  
7 six adults in an elementary school in Newtown, Connecticut by an individual using a firearm  
8 with a large-capacity magazine (“LCM”). Currently, the mayors of more than 50 California  
9 cities are members of Mayors Against Illegal Guns. Everytown also includes a large network of  
10 gun-violence survivors who are empowered to share their stories and advocate for responsible  
11 gun laws.

12 Everytown has drawn on its expertise to file briefs in numerous Second Amendment  
13 cases, including challenges to LCM prohibitions like those at issue in this case, offering  
14 historical and doctrinal analysis that might otherwise be overlooked. *See, e.g.*, Brief of *Amicus*  
15 *Curiae* Everytown for Gun Safety in Support of Appellees and Affirmance, *Worman v. Healey*,  
16 No. 18-1545 (1st Cir. Nov. 13, 2018); Brief of Everytown for Gun Safety as Amicus Curiae in  
17 Support of Defendants-Appellees, *Ass’n of N.J. Rifle & Pistol Clubs, Inc. v. Att’y Gen. N.J.*, No.  
18 18-3170, 2018 WL 5802625 (3d Cir. Nov. 2, 2018); Brief of Amicus Curiae Everytown for Gun  
19 Safety in Support of Defendant-Appellant, *Duncan v. Becerra*, No. 17-56081 (9th Cir. Nov. 22,  
20 2017); Brief of Amicus Curiae Everytown for Gun Safety in Support of Defendant’s Opposition  
21 to Plaintiffs’ Motion for Summary Judgment or, Alternatively, Partial Summary Judgment,  
22 *Duncan v. Becerra*, No. 3:17-cv-01017-BEN-JLB, 2018 WL 2405910 (S.D. Cal. Apr. 18,  
23 2018).<sup>1</sup> It seeks to do the same here.<sup>2</sup>

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27 <sup>1</sup> Everytown previously moved for leave to file an amicus brief in this case in support of  
28 Defendants’ Motion to Dismiss Plaintiffs’ Second Amended Complaint, which the Court denied  
as moot on February 6, 2018 (Dkt. No. 75) after granting Defendants’ Motion (Dkt. No. 74).

<sup>2</sup> An addendum of historical gun laws accompanies this brief.

## INTRODUCTION

1  
2 This case concerns California residents’ right to be free from gun violence and their  
3 power to enact laws protecting that right. In light of the increasing toll of mass shootings, and in  
4 response to a massacre at a 2015 San Bernardino office party, the people of California sought  
5 legislation that would limit their risk of dying in one of these horrific crimes. Their efforts  
6 resulted in California Proposition 63 (“Proposition 63”), which amends California Penal Code  
7 § 32310 to prohibit the possession of LCMs of the type used in the Newtown and San  
8 Bernardino mass shootings—and many others.<sup>3</sup>

9 All five federal courts of appeals to have considered challenges to similar laws on the  
10 merits have upheld such laws as constitutional under the Supreme Court’s decision in *District of*  
11 *Columbia v. Heller*, 554 U.S. 570 (2008). See *Ass’n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney*  
12 *Gen. New Jersey*, 910 F.3d 106, 123 (3d Cir. 2018); *Kolbe v. Hogan*, 849 F.3d 114, 137-38 (4th  
13 Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 469 (2017); *N.Y. State Rifle & Pistol Ass’n, Inc. v.*  
14 *Cuomo*, 804 F.3d 242, 247 (2d Cir. 2015), *cert. denied sub nom. Shew v. Malloy*, 136 S. Ct. 2486  
15 (2016); *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015), *cert. denied*, 136  
16 S. Ct. 447 (2015); *Heller v. District of Columbia*, 670 F.3d 1244, 1264 (D.C. Cir. 2011) (*Heller*  
17 *II*). And while the Ninth Circuit has not yet definitively ruled on the merits of an LCM  
18 restriction, in its only published decision reviewing a Second Amendment challenge to an LCM  
19 law, it upheld the denial of a preliminary injunction of a local ordinance that, like the state law at  
20 issue here, prohibits the possession of LCMs that accept more than ten rounds. See *Fyock v. City*  
21 *of Sunnyvale*, 779 F.3d 991, 1001 (9th Cir. 2015).<sup>4</sup>

22  
23 <sup>3</sup> See Mary Ellen Clark & Noreen O’Donnell, *Newtown school gunman fired 154 rounds in less*  
24 *than 5 minutes*, Reuters (Mar. 28, 2013), [http://www.reuters.com/article/us-usa-shooting-](http://www.reuters.com/article/us-usa-shooting-connecticut/newtown-school-gunman-fired-154-rounds-in-less-than-5-minutes-idUSBRE92R0EM20130328)  
25 *connecticut/newtown-school-gunman-fired-154-rounds-in-less-than-5-minutes-*  
*idUSBRE92R0EM20130328*; Mike McIntire, *Weapons in San Bernardino Shootings Were*  
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26 <sup>4</sup> In *Duncan v. Becerra*, 742 F. App’x 218 (9th Cir. 2018), an unpublished decision, the Ninth  
27 Circuit affirmed, under an abuse-of-discretion standard, the district court’s grant of a preliminary  
28 injunction of the same law at issue in this case. Other courts have placed little weight on  
*Duncan*, recognizing that the outcome was tethered to the specific evidentiary record before the  
district court and that the majority’s opinion was “not a general pronouncement about whether  
LCM bans violate the Second Amendment.” *Ass’n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 123,

1 As the Defendants’ brief shows, these courts got it right. Everytown submits this amicus  
2 brief to urge this Court to similarly uphold the law here—and, in particular, to make three points.

3 *First*, California’s LCM prohibition is part of a long tradition of regulating weapons that  
4 legislatures have determined to be unacceptably dangerous—including a century of restrictions  
5 on firearms capable of firing a large number of rounds without reloading. This historical  
6 tradition alone—which the Court has yet to examine in this case, *see* Mem. & Order Re: Mot. to  
7 Dismiss (“MTD Order”) (Dkt. No. 74), at 5 n.3—is sufficient for this Court to dismiss Plaintiffs’  
8 Second Amendment claims.  
9

10 *Second*, this Court should also reject Plaintiffs’ assertion in their Third Amended  
11 Complaint that the national prevalence of a firearm feature, like the LCMs at issue here,  
12 somehow gives that feature Second Amendment protection. *See* Third Am. Compl. ¶¶ 6, 28, 45,  
13 48, 52, 56 (Dkt. 76). Such an approach cannot be reconciled with the Second Amendment  
14 exceptions articulated by the Supreme Court in *Heller* or by those circuits that have addressed  
15 this issue. Put simply, the “common use” test advocated for by Plaintiffs would transform the  
16 constitutional analysis into a consumer referendum and render existing firearms and firearm  
17 features like LCMs effectively immune from regulation. That is not the law.  
18

19 *Finally*, even if California’s LCM prohibition were found or assumed to regulate conduct  
20 protected by the Second Amendment, the prohibition survives intermediate scrutiny. Research  
21 conducted by Everytown, as well as other relevant social science and statistical evidence,  
22 demonstrates that LCMs make both mass shootings and day-to-day gun violence more deadly,  
23 which supports the conclusion that there is a reasonable fit between the LCM prohibition and the  
24 important objective of reducing gun violence.  
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28 n.29. A decision on the merits in *Duncan* remains pending in the district court. *See Duncan v. Becerra*, No. 3:17-cv-01017-BEN-JLB (S.D. Cal.).

**ARGUMENT**

**I. California’s Prohibition of Large-Capacity Magazines Is Part of a Longstanding History of Analogous Prohibitions**

Both the Supreme Court and the Ninth Circuit have emphasized that “longstanding prohibitions” on the possession of certain types of weapons are “traditionally understood to be outside the scope of the Second Amendment.” *Fyock*, 779 F.3d at 996; *Heller*, 554 U.S. at 626-27, 635 (noting that such “longstanding prohibitions” are treated as tradition-based “exceptions” by virtue of their “historical justifications”).<sup>5</sup> These longstanding prohibitions need not “mirror limits that were on the books in 1791.” *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc). Instead, courts have found that even “early twentieth century regulations might nevertheless demonstrate a history of longstanding regulation if their historical prevalence and significance is properly developed in the record.” *Fyock*, 779 F.3d at 997 (citing *Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 196 (5th Cir. 2012)).<sup>6</sup>

Proposition 63 is part of a long tradition of regulating or prohibiting weapons that lawmakers have determined to be unacceptably dangerous—including a century of restrictions enacted shortly after semi-automatic weapons capable of firing a large number of rounds without reloading became widely available in the commercial market. *See* Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 *Law & Contemp. Probs.* 55, 68-69, 72 (2017) (explaining that “[firearm] laws were enacted not when these weapons were

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<sup>5</sup> *See also United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) (noting that “longstanding limitations are exceptions to the right to bear arms”); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (noting that a law does not violate the Second Amendment if it does not infringe upon “conduct that was within the scope of the Second Amendment as historically understood”).

<sup>6</sup> *See also Friedman*, 784 F.3d at 408 (noting that “*Heller* deemed a ban on private possession of machine guns to be obviously valid” despite the fact that “states didn’t begin to regulate private use of machine guns until 1927,” and that “regulating machine guns at the federal level” did not begin until 1934); *Skoien*, 614 F.3d at 639-40 (noting that “prohibitions on the possession of firearms by felons and the mentally ill” have been found to be sufficiently longstanding, despite the fact that “[t]he first federal statute disqualifying felons from possessing firearms was not enacted until 1938” and that “the ban on possession by *all* felons was not enacted until 1961” (internal quotations and citation omitted)).

1 invented, but when they began to circulate widely in society”). Many of these laws were passed  
2 around the same time as the prohibitions on sales to felons and the mentally ill and restrictions  
3 on the commercial sale of arms that *Heller* identified as longstanding and therefore  
4 presumptively valid. *See id.* at 82 (discussing the passage of prohibitions on possession of  
5 firearms by felons and the mentally ill in the early 20th century and the possession of semi-  
6 automatic weapons with LCMs in the 1920s and 1930s). As further described below, this  
7 historical tradition alone is sufficient for the Court to hold that Proposition 63 is constitutional  
8 under *Heller*. *See Heller*, 554 U.S. at 626-27; *see also Teixeira v. Cty. of Alameda*, 873 F.3d  
9 670, 673, 682-90 (9th Cir. 2017) (en banc) (applying “a textual and historical analysis” to  
10 conclude that “the Second Amendment . . . does not confer a freestanding right . . . to sell  
11 firearms”), *cert. denied*, 138 S. Ct. 1988 (2018).

12 **A. There Is a Longstanding Tradition of Prohibiting Firearms Capable**  
13 **of Quickly Firing Multiple Rounds Without Reloading**

14 States have regulated the ammunition capacity of semi-automatic firearms since these  
15 firearms first became widely commercially available at the turn of the twentieth century. *See*  
16 Robert Johnson & Geoffrey Ingersoll, *It’s Incredible How Much Guns Have Advanced Since the*  
17 *Second Amendment*, Business Insider: Military & Defense (Dec. 17, 2012),  
18 <http://read.bi/2x12PpU> (explaining that semi-automatic weapons became commercially available  
19 in the early 1900s). Such laws often categorized large-capacity, semi-automatic firearms, along  
20 with fully automatic weapons, as “machine guns,” and imposed restrictions that effectively  
21 amounted to outright prohibitions. *See, e.g.*, 1927 R.I. Pub. Laws 256, §§ 1, 4 (prohibiting the  
22 “manufacture, s[ale], purchase or possess[ion]” of a “machine gun,” which it defined as “any  
23 weapon which shoots more than twelve shots semi-automatically without reloading”); 1927  
24 Mich. Pub. Acts 887, § 3 (prohibiting possession of “any machine gun or firearm which can be  
25 fired more than sixteen times without reloading”).

26 In 1928, the National Conference on Uniform State Laws (now the Uniform Law  
27 Commission) adopted a model law prohibiting possession of “any firearm which shoots more  
28 than twelve shots semi-automatically without reloading,” setting the national standard for laws

1 prohibiting possession of semi-automatic firearms with large magazine capacities. *See Report of*  
2 *Firearms Committee*, 38th Conference Handbook of the National Conference on Uniform State  
3 Laws and Proceedings of the Annual Meeting 422-23 (1928).<sup>7</sup> Shortly thereafter, the federal  
4 government enacted a similar prohibition for the District of Columbia. *See* 47 Stat. 650, ch. 465,  
5 §§ 1, 14 (1932) (making it a crime to “possess any machine gun,” which it defined as “any  
6 firearm which shoots . . . semiautomatically more than twelve shots without loading”). Even the  
7 National Rifle Association endorsed passage of the D.C. law, saying, “it is our desire [that] this  
8 legislation be enacted for the District of Columbia, in which case it can then be used as a guide  
9 throughout the states of the Union.” S. Rep. No. 72-575, at 5-6 (1932).

10 California first prohibited automatic weapons in 1927<sup>8</sup> and expanded this prohibition  
11 with a 1933 statute that prohibited the sale or possession of not only “all firearms . . . capable of  
12 discharging automatically,” but also “all firearms which are automatically fed after each  
13 discharge from or by means of clips, discs, drums, belts or other separable mechanical device  
14 *having a capacity of greater than ten cartridges.*” 1933 Cal. Acts 1170, § 3 (emphasis added).  
15 These statutes were at least as restrictive as Proposition 63, and indeed appear more restrictive,  
16 as the 1933 law prohibited *firearms* capable of receiving large-capacity magazines, rather than  
17 only the LCMs at issue here. *See id.* Several other states, including Minnesota, Ohio, and  
18 Virginia, also prohibited or regulated firearms based on magazine capacity.<sup>9</sup> Still other states  
19  
20

21 \_\_\_\_\_  
22 <sup>7</sup> This standard originated with a model law promulgated by the National Crime Commission in  
23 1927. *Report of Firearms Committee*, at 422-23.

24 <sup>8</sup> *See* 1927 Cal. Stat. 938, ch. 552, §§ 1-2 (prohibiting “all firearms known as machine rifles,  
25 machine guns or submachine guns capable of discharging automatically and continuously loaded  
26 ammunition of any caliber in which the ammunition is fed to such gun from or by means of clips,  
27 disks, drums, belts or other separable mechanical device”).

28 <sup>9</sup> *See* 1933 Minn. Laws 231, § 1 (prohibiting “[a]ny firearm capable of automatically reloading  
after each shot is fired, whether firing singly by separate trigger pressure or firing continuously”  
if the weapon was modified to allow for a larger magazine capacity); 1933 Ohio 189, § 1  
(requiring a \$5000 bond to possess “any firearm which shoots more than eighteen shots semi-  
automatically without reloading”); 1934 Va. Acts 137, § 1 (effectively prohibiting possession or  
use of weapons . . . from which more than sixteen shots or bullets may be rapidly, automatically,  
semi-automatically or otherwise discharged without reloading”).

1 passed laws limiting possession of automatic weapons based on the number of rounds that a  
2 firearm could discharge without reloading.<sup>10</sup>

3 As this historical record demonstrates, Proposition 63 is the continuation of nearly a  
4 century of valid restrictions based on the ability of a firearm to shoot large numbers of rounds in  
5 a short period of time without reloading. As such, the statute qualifies as a longstanding  
6 prohibition and does not burden conduct that is protected by the Second Amendment. *See, e.g.,*  
7 *Drake v. Filko*, 724 F.3d 426, 432 (3d Cir. 2013) (finding that a concealed-carry licensing  
8 standard that had been in effect “in some form for nearly 90 years” “qualifies as a longstanding,  
9 presumptively lawful regulation” (internal quotations and citation omitted)).

10 **B. Proposition 63 Is Consistent with Centuries of Laws Prohibiting**  
11 **Weapons Deemed to Be Especially Dangerous**

12 Proposition 63 is also part of a long history of government prohibition of weapons that  
13 threaten public safety, either because the weapons themselves are especially dangerous or  
14 because they are particularly suitable for criminal use. Such prohibitions date back to early  
15 English legal history, beginning with the 1383 prohibition of launcegays (a particularly lethal  
16 type of spear) and the 1541 prohibition of crossbows and firearms less than a yard long. *See*  
17 *7 Ric. 2, 35, ch. 13 (1383); 33 Hen. 8, ch. 6, § 1 (1541)*. The regulation of especially dangerous  
18 firearms continued as the American colonies and first states adapted the English tradition. *See*  
19 *generally 1763-1775 N.J. Laws 346 (prohibiting set or trap guns); The Laws of Plymouth*  
20 *Colony (1671) (same); Records of the Colony of New Plymouth in New England 230 (Boston*  
21 *1861)*.

22 States continued to pass prohibitions or regulations on such weapons after the ratification  
23 of the Second Amendment. For example, several states barred or prohibitively taxed Bowie  
24 knives,<sup>11</sup> which were determined to be “instrument[s] of almost certain death.” *See Cockrum v.*

25 <sup>10</sup> These limitations were more stringent than California’s current magazine prohibition of ten  
26 rounds. *See 1933 S.D. Sess. Laws 245, § 1 (five rounds); 1933 Tex. Gen. Laws 219, § 1 (five*  
27 *rounds); 1934 Va. Acts 137, § 1 (seven rounds for automatics, 16 for semi-automatics); 1931 Ill.*  
28 *Laws 452, § 1 (eight rounds); 1932 La. Acts 336, § 1 (eight rounds); 1934 S.C. Acts 1288, § 1*  
*(eight rounds)*.

<sup>11</sup> *See 1837 Ala. Acts 7, § 1 (prohibitively taxing Bowie knives); 1837 Ga. Acts 90 (banning*  
*Bowie knives); 1837-1838 Tenn. Pub. Acts 200 (prohibiting the sale of Bowie knives); Aymette*

1 *State*, 24 Tex. 394, 402 (1859) (finding Bowie knives are “differ[ent] from [guns, pistols, or  
2 swords] in [their] device and design” and are therefore more accurate and lethal than other  
3 contemporary weapons). In addition, a number of states prohibited certain types of small and  
4 easily concealable handguns, which were determined to be ideal for criminal use.<sup>12</sup>

5 Throughout the early twentieth century, many states passed laws prohibiting especially  
6 dangerous weapons or weapon features, such as silencers, as the technology of firearms and  
7 other dangerous weapons evolved.<sup>13</sup> And, in the 1920s and 1930s, at least 28 states and the  
8 federal government passed prohibitions or severe restrictions on automatic weapons, along with  
9 the restrictions on large-capacity semi-automatic weapons discussed above. *See supra* Part I.A.

10 Within this historical context, California’s prohibition on LCMs should be understood as  
11 a continuation of a longstanding tradition of government prohibition or regulation of especially  
12 dangerous weapons. This long history of analogous regulation further supports the conclusion  
13 that Proposition 63 does not burden a “right secured by the Second Amendment.” *Heller*, 554  
14 U.S. at 626-27.

## 15 **II. The “Common Use” Test Proposed by Plaintiffs Is Illogical and Should Not Be** 16 **Followed**

17 Plaintiffs assert that LCMs must be afforded constitutional protection because they are  
18 used “in virtually every other state of the Union,” Third Am. Compl. ¶ 48 (Dkt. 76), echoing  
19 their previous argument that the Court should consider the “prevalence, popularity, and common

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20 *v. State*, 21 Tenn. 154, 158 (1840) (justifying a prohibition on Bowie knives on the basis that  
21 they are “weapons which are usually employed in private broils, and which are efficient only in  
22 the hands of the robber and the assassin”).

23 <sup>12</sup> *See* 1881 Ark. Laws § 1909 (pocket pistols and “any kind of cartridge for any pistol”); 1879  
24 Tenn. 135, ch. 96, § 1 (“belt or pocket pistols, or revolvers, or any other kind of pistols, except  
25 army or navy pistol”); 1907 Ala. Acts 80, § 1 (similar); 1903 S.C. 127, § 1 (similar).

26 <sup>13</sup> *See, e.g.*, 1909 Me. Laws 141 (prohibiting silencers); 1912 Vt. Laws 310, § 1 (same); 1913  
27 Minn. Laws 55 (same); 1916 N.Y. Laws 338-39, ch. 137, § 1 (same); 1926 Mass. Acts 256, ch.  
28 261 (same); 1927 Mich. Pub. Acts 887-89, § 3 (same); 1927 R. I. Pub. Laws 256, § 1 (same).  
States also banned a wide variety of unusually dangerous weapons, including blackjacks and  
billy clubs, slung-shots (a metal or stone weight tied to a string), brass knuckles, various kinds of  
knives, and explosives. *See e.g.*, 1917 Cal. Stat. 221, ch. 145, § 1 (blackjacks and billy clubs);  
1911 N.Y. Laws 442, ch. 195, § 1 (slung-shots); 1917 Minn. Laws 614, ch. 243, § 1 (brass  
knuckles); 1913 Iowa Acts 307, ch. 297, § 2 (daggers and similar-length knives); 1927 Mich.  
Pub. Acts 887, No. 372, § 3 (explosives).



1 use” of LCMs at the first step of its Second Amendment analysis, and that the ubiquity of such  
2 magazines requires the Court to subject Proposition 63 to strict scrutiny. Pls.’ Mem. in Support  
3 of Mot. for Prelim. Inj. at 12 (Dkt. 10). There is neither firm legal footing—nor sound logic—in  
4 the “common use” test that Plaintiffs advance.

5 The argument that LCMs must be afforded Second Amendment protection because they  
6 are widely available misconstrues the Supreme Court’s decision in *Heller* to suggest that a  
7 product’s significant presence in the national market triggers Second Amendment protection.  
8 *Heller* held that the Second Amendment “does not protect those weapons not typically possessed  
9 by law-abiding citizens for lawful purposes, such as short-barreled shotguns.” 554 U.S. at 625.  
10 But it does not logically follow—and neither the Supreme Court nor other courts have held—that  
11 the Second Amendment somehow protects *all* weapons that have achieved a degree of  
12 commercial success. *See Kolbe*, 849 F.3d at 142 (“[T]he *Heller* majority said nothing to confirm  
13 that it was sponsoring the popularity test.”); *Worman v. Healey*, 293 F. Supp. 3d 251, 266 (D.  
14 Mass. 2018), *appeal docketed*, No. 18-1545 (1st Cir. June 19, 2018) (“[P]resent day popularity is  
15 not constitutionally material.”).

16 In addition to lacking a firm jurisprudential foundation, the “common use” test is  
17 hopelessly circular. This approach would permit the constitutionality of weapons prohibitions to  
18 be decided not by how dangerous a weapon is, but rather by “how widely it is circulated to law-  
19 abiding citizens by the time a bar on its private possession has been enacted and challenged.”  
20 *Kolbe*, 849 F.3d at 141. Just as “[i]t would be absurd to say that the reason why a particular  
21 weapon can be banned is that there is a statute banning it, so that it isn’t commonly owned,”  
22 *Friedman*, 784 F.3d at 409, it would be similarly absurd to allow the fact that a law previously  
23 did not exist to stand as a constitutional bar to its enactment. *See* Joseph Blocher & Darrell A.H.  
24 Miller, *Lethality, Public Carry, and Adequate Alternatives*, 53 Harv. J. on Legis. 279, 288 (2016)  
25 (discussing the “central circularity” that plagues the “common use” test: “[W]hat is common  
26 depends largely on what is, and has been, subject to regulation”). Yet this is precisely what the  
27 “common use” test advocated by Plaintiffs would dictate, both here and elsewhere.  
28

1 Plaintiffs’ approach also fails to provide workable standards—or any guidance, for that  
2 matter—as to whether “common use” is determined by considering the number of weapons or  
3 weapons features produced or sold, or by the number of law-abiding owners. *See Kolbe*, 849  
4 F.3d at 135-36. This distinction is critical because firearm ownership is extremely concentrated,  
5 with just 3% of American adults possessing half of the total stock of civilian-owned guns. *See*  
6 Lois Beckett, *Meet America’s Gun Super-Owners—With An Average of 17 Firearms Each*, The  
7 Trace (Sept. 20, 2016), <http://bit.ly/2d89dGH>; *see also* Alex Yablon, *Most Californians Who*  
8 *Own ‘Assault Rifles’ Have 10+ Guns*, The Trace (Nov. 12, 2018), <https://goo.gl/aKEtmi>  
9 (reporting research finding that “four out of five assault rifles in [California] are owned by  
10 people who own 10 or more guns”). If production or sales numbers form the basis of the  
11 common use analysis, this small group of gun owners would effectively control the scope of the  
12 Second Amendment. This tyranny by a tiny minority cannot be what the *Heller* Court intended.

13 Indeed, a constitutional analysis driven by the prevalence of a firearm in the market  
14 would create perverse incentives for the firearms industry, giving gun makers the unilateral  
15 ability to insulate highly dangerous firearms or firearm features with Second Amendment  
16 protection “simply by manufacturing and heavily marketing them” before a government could  
17 assess their danger, determine whether to regulate them, and build the political momentum to  
18 actually do so. *See* Cody J. Jacobs, *End the Popularity Contest: A Proposal for Second*  
19 *Amendment “Type of Weapon” Analysis*, 83 *Tenn. L. Rev.* 231, 265 (2015). These corporate  
20 profit-driven choices cannot and should not define the meaning of the Second Amendment. *See*  
21 *Kolbe*, 849 F.3d at 141-42 (rejecting such a test).

22 Such an approach also raises federalism concerns, as states that fail to immediately  
23 regulate new firearms or firearm features could lose the ability to do so if such products are  
24 quickly adopted by consumers anywhere in the country.<sup>14</sup> Thus, firearm safety decisions made  
25

26 \_\_\_\_\_  
27 <sup>14</sup> A counterfactual further demonstrates why the “common use” test is inappropriate: If  
28 Congress had renewed the federal prohibition on large-capacity magazines rather than permitting  
it to lapse in 2004, the weapons prohibited by Proposition 63 would not be in widespread use  
today and would therefore not be subject to Second Amendment protection under Plaintiffs’  
“common use” theory.

1 in some states would render the laws of other states “more or less open to challenge under the  
 2 Second Amendment,” and “would imply that no jurisdiction other than the United States as a  
 3 whole can regulate firearms.” *Friedman*, 784 F.3d at 408, 412. But *Heller* “does not foreclose  
 4 all possibility of experimentation” by state and local governments. *Id.* at 412. To the contrary, it  
 5 permits states and localities to do what they have long done in the realm of firearm legislation:  
 6 to “experiment with solutions to admittedly serious problems.” *Jackson v. City & Cty. of San*  
 7 *Francisco*, 746 F.3d 953, 966 (9th Cir. 2014) (quoting *City of Renton v. Playtime Theatres*, 475  
 8 U.S. 41, 52 (1986)).

9 To the extent that “common use” should play any role in the constitutional analysis  
 10 outside the context of a total prohibition on a class of arms (like the handgun prohibition at issue  
 11 in *Heller*), it should be tied to “the purpose of the right to keep and bear arms.” Blocher &  
 12 Miller, *Lethality*, at 291. The test should focus, in other words, on whether the regulated  
 13 weapons are commonly used or are reasonably necessary for *self-defense* or, in particular, *self-*  
 14 *defense in the home*, which *Heller* holds is the core of the right. See 554 U.S. at 635. The D.C.  
 15 Circuit adopted that approach in upholding a similar law, and implicitly rejected Plaintiffs’  
 16 market-share “common-use” test. See *Heller II*, 670 F.3d at 1261. This Court should follow the  
 17 D.C. Circuit’s lead and, if it considers “common use” at all, ask whether LCMs “are commonly  
 18 used or are used specifically for self-defense.” *Id.* The allegations in the Third Amended  
 19 Complaint—which nowhere assert that Plaintiffs or anyone else have ever actually needed to use  
 20 more than ten rounds for self-defense—do not, and cannot, meet such a test.<sup>15</sup>

### 21 **III. The Use of Large-Capacity Magazines Makes Mass Shootings and Other Gun** 22 **Violence Incidents Deadlier**

23 The use of LCMs, whether in mass shootings or in daily gun violence, results in more  
 24 people being shot, more injuries per victim, and more deaths. Both Everytown’s analysis and the  
 25 relevant social science research indicate that the use of LCMs makes shootings more dangerous

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26 <sup>15</sup> The Court has recognized as much in its prior rulings in this case. See MTD Order at 6 (noting  
 27 that “the prohibition of . . . large capacity magazines does not effectively disarm individuals or  
 28 substantially affect their ability to defend themselves” (quoting *Heller II*, 670 F.3d at 1262)  
 (internal quotation marks omitted)); Mem. & Order Re: Mot. for Prelim. Inj. (“PI Order”) at 6  
 (Dkt. 52) (same).

1 and more deadly. By prohibiting the possession and use of LCMs throughout California,  
2 Proposition 63 is a reasonably tailored attempt to address this serious public safety concern.  
3 Thus, as this Court has already concluded in this case, even if the LCM prohibition burdens  
4 constitutionally protected conduct, it nevertheless survives intermediate scrutiny. *See* MTD  
5 Order at 5-10 (following the lead of “virtually every other court to examine large capacity  
6 magazine bans” in applying intermediate scrutiny and upholding the law); PI Order at 6-10  
7 (applying intermediate scrutiny in concluding that Plaintiffs failed to demonstrate a likelihood of  
8 success of their Second Amendment claim).

9 **A. Everytown’s Analysis of Mass Shootings Shows That the Use of LCMs**  
10 **Results in More Deaths and More Injuries**

11 Relying largely on press coverage, police reports, and FBI data, Everytown has tracked  
12 and documented mass shootings since 2013 and has released several reports summarizing this  
13 data.<sup>16</sup> While Everytown cannot present a comprehensive dataset of the magazines used in every  
14 mass shooting (the reality of gun violence is that mass shootings are so frequent that this  
15 information is not available in every instance), the information that is available indicates that  
16 LCMs make shootings significantly more deadly.

17 Data compiled by Everytown and its predecessor organization consistently indicate that  
18 mass shooting incidents involving LCMs or assault weapons, which are typically equipped with  
19 LCMs, result in significantly more shooting victims and significantly more deaths. A report that  
20 Everytown issued just last month, which analyzed mass shooting data from 2009 to 2017, shows  
21 that 58% of mass shootings where magazine size can be verified involved LCMs, and those  
22 incidents led to 14 times as many injuries and twice as many deaths. Everytown for Gun Safety,  
23 *Mass Shootings in the United States: 2009-2017* (Dec. 2018), [https://everytownresearch.org/](https://everytownresearch.org/reports/mass-shootings-analysis/)  
24 [reports/mass-shootings-analysis/](https://everytownresearch.org/reports/mass-shootings-analysis/); *see also Gallinger v. Becerra*, 898 F.3d 1012, 1019 (9th Cir.  
25 2018) (noting that where assault weapons and LCMs are used, “more shots are fired and more  
26 fatalities and injuries result than when shooters use other firearms and magazines” (quoting

27 \_\_\_\_\_  
28 <sup>16</sup> Everytown published its most recent mass shootings report in December 2018. *See* Everytown  
for Gun Safety, *Mass Shootings in the United States: 2009-2017* (Dec. 2018),  
<https://everytownresearch.org/reports/mass-shootings-analysis/>.

1 *Kolbe*, 849 F.3d at 127)); *Friedman*, 784 F.3d at 409 (noting that “guns with large-capacity  
2 magazines enable shooters to fire bullets faster than handguns equipped with smaller  
3 magazines”).

4 Everytown’s research also demonstrates that LCMs are almost always used in the most  
5 deadly and injurious shooting events—including, for example:

- 6 • The attack at an office party in San Bernardino, California, that resulted in 14  
7 deaths and 22 injuries;
- 8 • The shooting at a country-western bar in Thousand Oaks, California, that left 12  
9 dead and at least ten injured;
- 10 • The shooting at a movie theater in Aurora, Colorado that killed 12 and injured 70;
- 11 • The attack on a school in Newtown, Connecticut that killed 26 people;
- 12 • The massacre of 49 people and wounding of 53 more in a nightclub in Orlando,  
13 Florida;
- 14 • The attack in Las Vegas, Nevada in which the shooter used dozens of assault  
15 weapons and LCMs to fire hundreds of rounds into a concert crowd resulting in  
16 the death of 59 people and the injury of over 500 more;
- 17 • The attack on a church in Sutherland Springs, Texas that resulted in 26 deaths and  
18 20 injuries; and
- The attack on a high school in Parkland, Florida that resulted in the death of 17  
people and wounding of 17 more.<sup>17</sup>

19 Indeed, in each of the ten deadliest mass shootings in modern American history, an LCM was  
20 used to perpetrate the crime.<sup>18</sup>

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21  
22 <sup>17</sup> See Everytown, *Appendix to Mass Shootings*, at 3, 6; Marjory Stoneman Douglas High School  
23 Public Safety Commission, *Initial Report to the Governor, Speaker of the House of  
24 Representatives and Senate President*, at 262-63 (Jan. 2, 2019),  
25 <http://www.fdle.state.fl.us/MSDHS/CommissionReport.pdf>; Jackie Valley et al., *No Clear  
26 Motive in Las Vegas Strip Shooting That Killed 59, Injured 527, Nevada Independent* (Oct. 2,  
27 2017), <http://bit.ly/2x4m4is>; Jason Hanna & Holly Yan, *Sutherland Springs church shooting:  
28 What we know*, CNN.com (Nov. 7, 2017), <https://cnn.it/2HlsfV6>; Emily Shapiro, *New Details  
Emerge in Thousand Oaks Mass Shooting, Including Gunman’s Possession of 7 High-Capacity  
Magazines*, ABC News (Nov. 27, 2018), [https://abcnews.go.com/beta-story-  
container/US/thousand-oaks-gunman-high-capacity-magazines-illegal-  
california/story?id=59440205](https://abcnews.go.com/beta-story-<br/>container/US/thousand-oaks-gunman-high-capacity-magazines-illegal-<br/>california/story?id=59440205); Marjory Stoneman Douglas High School Public Safety  
Commission, *Initial Report*, at 262-63.

1 In addition to the sheer magnitude of death and injury, mass shootings like those that  
 2 occurred at San Bernardino, Thousand Oaks, Virginia Tech, Aurora, Newtown, Tucson, Orlando,  
 3 Las Vegas, Sutherland Springs, Parkland, and elsewhere sear themselves into the national  
 4 consciousness and affect the way people live their everyday lives. *See* Alana Abramson, *After*  
 5 *Newtown, Schools Across the Country Crack Down on Security*, ABC News (Aug. 21, 2013),  
 6 <http://abcn.ws/1KwN9Ls> (comparing the impact of the Sandy Hook shooting on school security  
 7 to that of 9/11 on airport security and noting that school districts have spent tens of millions of  
 8 dollars on security improvements); *see also* *Friedman*, 784 F.3d at 412 (noting that mass  
 9 shootings are “highly salient”). While shootings on the scale of these tragedies remain  
 10 statistically rare compared to the plague of daily gun violence, their enormous impacts reinforce  
 11 the significant and compelling justifications behind California’s prohibition on LCMs.

12 **B. Social Science Research Shows that Large-Capacity Magazines Pose a**  
 13 **Serious Risk to Public Safety**

14 Additional research supports the conclusion reached by both the people of California and  
 15 the State Legislature: that LCMs pose a significant danger to public safety.

16 Whether a state prohibits LCMs is the single best predictor of mass shooting rates. Sam  
 17 Petulla, *Here is 1 Correlation Between State Gun Laws and Mass Shootings*, CNN.com (Oct. 5,  
 18 2017), <https://cnn.it/2J4sWCC> (noting that, according to analysis by Boston University Professor  
 19 Michael Siegel, state prohibitions on LCMs are associated with a 63% lower rate of mass  
 20 shootings). Indeed, during the period between 1994 and 2004, when the federal prohibition on  
 21 LCMs and assault weapons was in effect, mass shootings were 70% less likely to occur. Charles  
 22 DiMaggio et al., *Changes in U.S. Mass Shooting Deaths Associated with the 1994-2004 Federal*  
 23 *Assault Weapons Ban: Analysis of Open-Source Data*, 86 J. of Trauma and Acute Care Surgery  
 24 11, 13 (2018), <https://bit.ly/2NKmLtC>; *see also* Louis Klarevas, *Rampage Nation: Securing*

25 <sup>18</sup> Las Vegas, Nev. (58 fatalities); Orlando, Fla. (49); Blacksburg, Va. (32); Newtown, Conn.  
 26 (26); Sutherland Springs, Tex. (26); Killeen, Tex. (23); San Ysidro, Cal. (21); Austin, Tex. (17);  
 27 Parkland, Fla. (17); San Bernardino, Cal. (14). *See* Violence Policy Center, *High-Capacity*  
 28 *Ammunition Magazines* (Dec. 17, 2018), [http://vpc.org/fact\\_sht/VPCshootinglist.pdf](http://vpc.org/fact_sht/VPCshootinglist.pdf); Tom Dart,  
*As Campus Carry Becomes Texas law, Memories of UT Tower Massacre Linger*, *The Guardian*  
 (July 31, 2016), <https://www.theguardian.com/us-news/2016/jul/31/campus-carry-texas-law-ut-tower-massacre-anniversary>.

1 *America from Mass Shootings* 240-43 (2016) (finding that the number of gun massacres in which  
2 six or more people were killed fell by 37% during the period in which the federal prohibition was  
3 in effect; and that, after it lapsed, gun massacres increased by 183% and deaths increased by  
4 239%); Christopher Ingraham, *It's time to bring back the assault weapons ban, gun violence*  
5 *experts say*, Wash. Post (Feb. 14, 2018), <https://wapo.st/2JjFISk> (discussing Klarevas's research).

6 Studies also indicate that criminals increasingly use LCMs in daily gun violence, as  
7 evidenced by the number of LCMs recovered by police. *See, e.g.*, David Fallis, *Data Indicate*  
8 *Drop in High Capacity Magazines During Federal Gun Ban*, Washington Post, Jan. 10, 2013,  
9 <http://wapo.st/2wV9EMX> (noting that the number of LCMs recovered by Virginia police more  
10 than doubled between 2004, when the federal LCM prohibition expired, and 2013). Indeed, a  
11 recent study found that “LCM firearms . . . appear to account for 22 to 36% of crime guns in  
12 most places, with some estimates upwards of 40% for cases involving serious violence.”  
13 Christopher S. Koper et al., *Criminal Use of Assault Weapons and High-Capacity Semiautomatic*  
14 *Firearms: An Updated Examination of Local and National Sources*, J. Urban Health (Oct. 2017),  
15 <https://bit.ly/2MRVqkd>.

16 Furthermore, when criminals use LCMs, they generally fire more shots and cause more  
17 injuries.<sup>19</sup> For example, a study of Milwaukee homicides found that those killed with guns  
18 containing LCMs had on average one additional gunshot injury than when a gun without an  
19 LCM was used, and the Maryland medical examiner's office reported that the number of  
20 cadavers with ten or more bullets more than doubled between 2006 and 2016. *See, e.g.*, Jeffrey  
21 Roth & Christopher Koper, *Impact Evaluation of the Public Safety and Recreational Firearms*  
22 *Use Protection Act of 1994: Final Report*, Urban Institute (1997), <http://urbn.is/2wQKkrA>;  
23 Justin George, *Shoot to Kill: Why Baltimore is One of The Most Lethal Cities in America*,  
24 Baltimore Sun (Sept. 30, 2016), <https://bsun.md/2da4nci>. Shootings with more injuries also

25  
26 \_\_\_\_\_  
27 <sup>19</sup> Christopher Koper et al., *An Updated Assessment of the Federal Assault Weapons Ban:*  
28 *Impacts on Gun Markets and Gun Violence, 1994-2003*, National Institute of Justice (2004),  
<http://bit.ly/2vBTGTx> (finding that handguns associated with gunshot injuries are up to 50%  
more likely to have LCMs than handguns used in other crimes and that guns used in shootings  
resulting in injuries are nearly 26% more likely to have LCMs).

1 invariably lead to more deaths. One study found that gunshot victims shot twice are 60% more  
2 likely to die than those shot once. *See Koper, An Updated Assessment, supra* note 19, at 87; *see*  
3 *also* Daniel W. Webster et al., *Epidemiologic changes in gunshot wounds in Washington, D.C.*  
4 *1983-1990*, 127 *Archives of Surgery* 694 (1992) (finding that the fatality rate for multiple chest  
5 wounds is 61% higher than the fatality rate for a single chest wound). This finding is supported  
6 by the correlation between the prevalence of LCMs and increases in lethal shootings reported in  
7 several American cities. *See* Rachael Rettner, *Gunshot Wounds Are Getting Deadlier, One*  
8 *Hospital Finds*, LiveScience.com (June 14, 2016), <https://bit.ly/2HBnMO9> (asserting that  
9 increases in gunshot death rates could be connected to the use of LCMs).<sup>20</sup>

10 As courts have recognized, because they result in more shots being fired, LCMs also  
11 create the opportunity for a dramatic increase in the number of errant shots. *See Kolbe*, 849 F.3d  
12 at 127 (“[W]hen inadequately trained civilians fire weapons equipped with large-capacity  
13 magazines, they tend to fire more rounds than necessary and thus endanger more bystanders.”);  
14 *Heller II*, 670 F.3d at 1263-64. One recent study tracking stray-bullet shooting events concluded  
15 that, during a one-year period alone, there were 284 stray-bullet shooting events, during which  
16 65 people died and an additional 252 people were injured. Garen J. Wintemute, et al.,  
17 *Epidemiology and Clinical Aspects of Stray Bullet Shootings in the United States*, 73 *J. of*  
18 *Trauma and Acute Care Surgery* 215 (2012). This is not a small concern in California—the most  
19 densely populated state in the western United States, with several of the most densely populated  
20 metropolitan areas in the nation—where the victims of shootings are often not the intended  
21 targets. *See, e.g.,* Ali Tadayon, *6-Year-Old Girl Struck by Stray Bullet in East Oakland* (Jan. 1,  
22 2019), <https://bayareane.ws/2R83GhK>; *Man Arrested in Death of Long Beach Woman Struck by*  
23 *Stray Bullet*, CBS L.A. (Dec. 9, 2018), [https://losangeles.cbslocal.com/2018/12/09/arrest-long-](https://losangeles.cbslocal.com/2018/12/09/arrest-long-beach-fatal-stray-bullet/)  
24 [beach-fatal-stray-bullet/](https://losangeles.cbslocal.com/2018/12/09/arrest-long-beach-fatal-stray-bullet/); *3-Year-Old Boy Injured by Stray Bullet in Oakland Shooting*, CBS S.F.  
25 (Oct. 29, 2018), [https://sanfrancisco.cbslocal.com/2018/10/29/oakland-police-investigate-](https://sanfrancisco.cbslocal.com/2018/10/29/oakland-police-investigate-shooting-that-injured-child/)  
26 [shooting-that-injured-child/](https://sanfrancisco.cbslocal.com/2018/10/29/oakland-police-investigate-shooting-that-injured-child/).

27  
28 <sup>20</sup> *See also* George, *supra*, p. 17 (attributing increased shooting lethality, in part, to increasingly lethal tactics enabled by LCMs).



1 Another study, conducted in California, indicates that assault pistols equipped with  
2 LCMs are more likely to be purchased by individuals with a criminal background. See Garen J.  
3 Wintemute et al., *Criminal Activity and Assault-Type Handguns: A Study of Young Adults*, 32  
4 *Annals Emer. Med.* 44 (1998), <http://bit.ly/2ymFodM> (finding that assault pistols were selected  
5 by 2% of purchasers with no criminal record, 6.6% of purchasers with a prior gun charge, and  
6 10.2% of purchasers with two or more previous violent felonies). LCMs also pose a threat to  
7 California’s law enforcement community. A recent analysis found that “LCM weapons overall  
8 account for 41% of the guns used to kill [police] officers.” See Koper et al., *Criminal Use of*  
9 *Assault Weapons*, at 7.

10 In sum, Everytown’s research makes clear that mass shootings involving LCMs are  
11 substantially more dangerous than those in which LCMs are not involved; and additional social  
12 science research demonstrates that LCMs exacerbate the dangers of gun crime, even outside the  
13 particularly tragic context of mass shootings.

14 **CONCLUSION**

15 For the foregoing reasons, Everytown respectfully requests that the Court grant  
16 Defendants’ Motion to Dismiss Plaintiffs’ Third Amended Complaint.

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Respectfully submitted,

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