

1 Neal A. Potischman (SBN 254862)
2 DAVIS POLK & WARDWELL LLP
3 1600 El Camino Real
4 Menlo Park, California 94025
5 Phone: (650) 752-2000
6 Fax: (650) 752-2156
7 neal.potischman@davispolk.com

8 *Attorneys for Amicus Curiae*
9 *Everytown for Gun Safety*

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

**MEMORANDUM IN SUPPORT OF
EVERYTOWN'S MOTION FOR
LEAVE TO PARTICIPATE AS
AMICUS CURIAE**

Hearing Date: February 19, 2019
Hearing Time: 1:30 p.m.

Filing Date: January 28, 2019

1 **I. INTRODUCTION**

2 Everytown for Gun Safety (“Everytown”) hereby moves for leave to file the attached
3 amicus brief in support of Defendants’ Motion to Dismiss Plaintiffs’ Third Amended Complaint
4 in this constitutional challenge to California Penal Code § 32310 as amended by Proposition 63
5 (hereinafter, “Proposition 63”) prohibiting the possession of large-capacity magazines.¹

6 Everytown is the largest gun violence prevention organization in the country, with supporters in
7 every state, including tens of thousands of California residents and the mayors of 52 California
8 cities. Part of Everytown’s mission is to assist courts in evaluating Second Amendment
9 challenges to common sense gun laws by presenting its substantial research on historical
10 firearms laws and expertise in gun law doctrine.

11 **II. ARGUMENT**

12 It is well settled that district courts have “broad discretion to appoint amici curiae.”
13 *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated on other grounds by Sandin v.*
14 *Conner*, 515 U.S. 472 (1995). An amicus curiae can “assist[] in a case of general public interest,
15 supplement[] the efforts of counsel, and draw[] the court’s attention to law that escaped
16 consideration.” *Miller-Wohl Co. v. Comm’r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir.
17 1982). “District courts frequently welcome amicus briefs from nonparties concerning legal
18 issues that have potential ramifications beyond the parties directly involved or if the amicus has
19 ‘unique information or perspective that can help the court beyond the help that the lawyers for
20 the parties are able to provide.’” *Safari Club Int’l v. Harris*, No. 2:14-cv-01856-GEB-AC, 2015
21 WL 1255491, at *1 (E.D. Cal. Jan. 14, 2015) (citing *NGV Gaming, Ltd. v. Upstream Point*
22 *Molate, LLC*, 355 F. Supp. 2d 1061, 1016 (N.D. Cal. 2005)). “The touchstone is whether the
23 amicus is ‘helpful,’ and there is no requirement ‘that amici must be totally disinterested.’”
24 *California v. U.S. Dep’t of Labor*, No. 2:13-CV-02069-KJM-DAD, 2014 WL 12691095, at *1
25

26 _____
27 ¹ Defendants do not object to the filing of this amicus brief, which is being filed within seven
28 days of the date by which Defendants were required to file their Motion to Dismiss. Plaintiffs indicated that they would not oppose this request if it is consistent with Everytown’s past practices.

1 (E.D. Cal. Jan. 14, 2014) (citing *Hoptowit*, 682 F.2d at 1260). Everytown submits that these
2 standards counsel in favor of the Court exercising its discretion to permit Everytown to file its
3 brief as amicus curiae.

4 Everytown’s proposed amicus brief presents historical analysis that situates Proposition
5 63 in a long tradition of laws prohibiting or regulating weapons that legislatures have determined
6 to be unacceptably dangerous—including a century of restrictions on firearms capable of firing a
7 large number of rounds without reloading. While this historical context alone should be
8 sufficient for this Court to find Proposition 63 to be constitutional under *Heller*, see *District of*
9 *Columbia v. Heller*, 554 U.S. 570, 626-27 (2008), this brief also addresses why the “common
10 use” test suggested by Plaintiffs is circular and should not persuade this Court; and why
11 Proposition 63 survives intermediate scrutiny even if the Second Amendment is held (or
12 assumed) to apply.

13 Everytown’s brief provides a unique perspective and expertise that merits granting
14 Everytown’s Motion here. See *Missouri v. Harris*, No. 2:14-cv-00341-KJM-KJN, 2014 WL
15 2987284, at *2 (E.D. Cal. July 1, 2014) (“An amicus brief should normally be allowed when,
16 among other considerations, the amicus has unique information or perspective that can help the
17 court beyond the help that the lawyers for the parties are able to provide.” (internal citation
18 omitted)). Everytown has provided similar expertise in several recent cases. See, e.g., Brief of
19 *Amicus Curiae* Everytown for Gun Safety in Support of Appellees and Affirmance, *Worman v.*
20 *Healey*, No. 18-1545 (1st Cir. Nov. 13, 2018); Brief of Everytown for Gun Safety as Amicus
21 Curiae in Support of Defendants-Appellees, *Ass’n of N.J. Rifle & Pistol Clubs, Inc. v. Att’y Gen.*
22 *N.J.*, No. 18-3170, 2018 WL 5802625 (3d Cir. Nov. 2, 2018); Brief of Amicus Curiae Everytown
23 for Gun Safety in Support of Defendant’s Opposition to Plaintiffs’ Motion for Summary
24 Judgment or, Alternatively, Partial Summary Judgment, *Duncan v. Becerra*, No. 3:17-cv-01017-
25 BEN-JLB, 2018 WL 2405910 (S.D. Cal. Apr. 18, 2018); Brief of Amicus Curiae Everytown for
26 Gun Safety in Support of Defendant-Appellant, *Duncan v. Becerra*, No. 17-56081 (9th Cir. Nov.
27 22, 2017); Brief of Everytown for Gun Safety as Amicus Curiae in Support of Defendants,
28 *Flanagan v. Becerra*, 2:16-cv-06164-JAK-AS (C.D. Cal. Sept. 18, 2017); Brief of Amicus

1 Curiae Everytown for Gun Safety in Support of Appellees and Affirmance, *Wrenn v. District of*
2 *Columbia*, No. 16-7025, 2016 WL 3928913 (D.C. Cir. July 20, 2016); Brief of Amicus Curiae
3 Everytown for Gun Safety in Support of Appellee and Affirmance, *Peña v. Lindley*, No. 15-
4 15449, 2015 WL 5706896 (9th Cir. Sept. 28, 2015).

5 In addition, the Court should grant leave for Everytown to submit an amicus brief
6 because this case implicates important public interests, including California citizens' interest in
7 public safety, with ramifications beyond the parties directly involved. Proposition 63 was
8 approved by California voters to address serious public safety concerns, giving the voters a direct
9 interest in the outcome of this case. Moreover, the resolution of Defendants' Motion will
10 necessarily involve application of Second Amendment constitutional principles, which will have
11 broader jurisprudence implications for other firearm regulation litigation nationwide. *See*
12 *California v. U.S. Dep't of Labor*, 2014 WL 12691095, at *1 (granting leave to file amicus brief
13 where case implicated constitutional issues and therefore had "potential ramifications beyond the
14 parties directly involved" (internal citation omitted)).

15 **III. CONCLUSION**

16 For the reasons stated above, Everytown respectfully requests that this Court grant leave
17 for it to participate as amicus curiae and submit a brief in support of Defendants' Motion to
18 Dismiss Plaintiffs' Third Amended Complaint.

19 Respectfully submitted,

20 Dated: January 28, 2019

DAVIS POLK & WARDWELL LLP

21 /s/ Neal A. Potischman
22 Neal A. Potischman (SBN 254862)
23 1600 El Camino Real
24 Menlo Park, California 94025
25 Phone: (650) 752-2000
26 Fax: (650) 752-2156
27 neal.potischman@davispolk.com

28 *Attorneys for Amicus Curiae*
Everytown for Gun Safety