No. 17-56081

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGINIA DUNCAN, et al.,
Plaintiffs-Appellees,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of California, No. 3:17-cv-01017-BEN-JLB

BRIEF OF AMICUS CURIAE EVERYTOWN FOR GUN SAFETY IN SUPPORT OF DEFENDANT-APPELLANT

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Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for amicus curiae Everytown for Gun Safety certifies that amicus is not a publicly held corporation, that amicus does not have a parent corporation, and that no publicly held corporation owns 10 percent or more of amicus's stock.

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STATEMENT, IDENTITY, AND INTEREST OF AMICUS CURIAE[1]

Everytown for Gun Safety ("Everytown") is the nation's largest gun violence prevention organization, with supporters in every state, including tens of thousands of California residents and the mayors of forty California cities. It was founded in 2014 as the combined effort of Mayors Against Illegal Guns, a national, bipartisan coalition of mayors combating illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, an organization formed in the wake of the murder of twenty-six children and six adults in an elementary school in Newtown, Connecticut, by an individual using a firearm with a large-capacity magazine ("LCM"). Everytown's mission includes defending gun laws through the filing of amicus briefs providing historical context and doctrinal analysis that might otherwise be overlooked.[2]

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[1] The parties have provided consent pursuant to Rule 29(a)(2), and amicus curiae file this brief pursuant to that authority. No counsel for a party authored this brief in whole or in part, and no person other than the amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Everytown has filed such briefs in several recent cases. *See, e.g.*, *Wiese v. Becerra*, No. 2:17-cv-00903-WBS-KJN (E.D. Cal. Oct. 4, 2017); *Flanagan v. Becerra*, No. 2:16-cv-06164-JAK-AS (C.D. Cal. Sept. 18, 2017); *Wrenn v. District of Columbia*, No. 16-7025, 2016 WL 3928913 (D.C. Cir. July 20, 2016); *Peña v. Lindley*, No. 15-15449, 2015 WL 5706896 (9th Cir. Sept. 28, 2015); *Peruta v. County of San Diego*, Nos. 10-56971, 11-16255, 2015 WL 2064206 (9th Cir. Apr. 30, 2015); *Silvester v. Harris*, No. 14-16840, 2015 WL 1606313 (9th Cir. Apr. 1, 2015).

INTRODUCTION

This case is about the people of California's right to be free from gun violence and their power to pass laws to protect that freedom. Faced with the increasing toll of mass shootings, and, in particular, responding to a massacre at a San Bernardino office party, the people of California chose to take steps to limit their risk of dying in another one of these horrific crimes. Proposition 63 is the measure that the people chose. Neither the Second nor Fourteenth Amendment prevent them from doing so.

Everytown submits this amicus brief in support of Defendant-Appellant, the California Attorney General, to address three serious flaws in the district court's order.[3] First, the district court erred in its assessment of a 2013 Mayors Against Illegal Guns survey of recent mass shootings (the "Survey"). That Survey, written by Everytown's predecessor organization, was the sole empirical data set relied upon by the district court to determine reasonable fit. The district court failed to understand that the Survey did not purport to show, for every mass shooting listed, whether a LCM was used or not; rather, the Survey simply included information about magazine capacity in mass shootings in the small percentage of cases where that information was publicly available. Properly understood, the Survey shows

[3] *Duncan v. Becerra*, No. 3:17-cv-1017-BEN, 2017 WL 2813727 (S.D. Cal. June 29, 2017) (order granting preliminary injunction) (hereinafter, Order).

that LCMs make mass shootings more deadly and thus supports—rather than undermines—the reasonable fit of Proposition 63 in addressing a serious public safety concern.

Second, the district court's Second Amendment analysis fails to properly consider a long historical tradition of regulating or prohibiting weapons that legislatures have determined to be unacceptably dangerous—including a century of restrictions on firearms similar to those addressed by Proposition 63.

Finally, the district court endorsed a flawed test for assessing the constitutionality of firearm restrictions, relying solely on the national popularity of a firearm or accessory. This popularity test is illogical, circular, and inconsistent with the fundamental notions of federalism on which the United States was founded.

I. The District Court Erred in Its Analysis of the Mayors Against Illegal Guns Report

The District Court relied exclusively on the 2013 Mayors Against Illegal Guns Survey of recent mass shootings to justify its conclusion that "§ 32310 makes for an uncomfortably poor fit" with the state's goal of reducing mass shootings. Order at 33. The Court analyzed the Survey to find that as few as six of the Survey's ninety-two documented mass shootings involved the use of LCMs. Order at 35-37. The district court relied on this conclusion to determine that the LCM prohibition "appears on this record to be a haphazard solution likely to have no

effect on an exceedingly rare problem." Order at 33. In arriving at this erroneous conclusion, the district court made several critical errors.

First, in analyzing the survey, the district court assumed that every mass shooting where the Survey did not contain information about magazine capacity did not involve a LCM. Order at 34-36. This assumption is incorrect. In fact, the Survey expressly states that the information on magazine capacity is incomplete. In over two thirds of the mass shootings listed—sixty-six of the ninety-two cases—the category "ammo details" is listed as "unknown." Survey at 6-35. While the researchers responsible for producing the Survey made every effort to be comprehensive, the reality in America is that mass shootings are so frequent that, as Everytown's own tracking indicates, most fail to garner sufficient press coverage to provide a record of details of the crime like magazine capacity. [4] Accordingly, the absence of an indication of a LCM in the Survey, along with the label "unknown" under "ammo details," does not mean no such magazine was

[4] Everytown continues to track mass shootings (incidents in which four or more people are killed with a firearm, not including the shooter). From 2009 to 2016, there were 156 mass shootings, resulting in 848 people shot and killed and 339 people shot and injured. Many of these shootings received only local media coverage. *See* Everytown for Gun Safety, Mass Shootings in the United States: 2009-2016 (Apr. 11, 2017), http://every.tw/1XVAmcc.

used, as the district court erroneously assumed, but only that such information was not available.[5]

The district court itself acknowledged that LCMs are "common pistol and rifle magazines." Order at 19. Many popular handguns and rifles are sold with magazines qualifying as LCMs as a standard feature.[6] Accordingly, many of the mass shootings in the Survey where magazine capacity was unknown likely involved LCMs.[7]

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[5] This is definitely true in at least one of the cases. For the Fort Hood shooting, the Survey does not indicate whether LCMs were used, but later reporting showed that the shooter used several LCMs to kill thirteen and wound thirty. Survey, at 30; Rick Jervis & Doug Stanglin, *Nidal Hasan Found Guilty in Fort Hood Killings*, USA Today (Aug. 23, 2013), https://usat.ly/2gMymFZ (noting the use of several high-capacity magazines).

[6] *See, e.g.*, *Glock 19*, Glock, http://bit.ly/1UYJ1vZ (last visited Oct. 18, 2017) (listing magazine capacity as 15 rounds); *Glock 17*, Glock, http://bit.ly/1OOg2HH (last visited Oct. 18, 2017) (17 rounds); *Beretta M9 Pistols*, Cabela's, http://bit.ly/2xMx2IW (last visited Oct. 18, 2017) (15 rounds).

[7] In fact, in twelve of the incidents that the court cited for not involving LCMs, a weapon was used that frequently comes standard with a LCM. *See* Survey, at 2-13 (listing the weapons used in incidents as follows: Hialeah, Fla. 7/16/13 ("Glock 17"); Albuquerque, N.M. 1/19/13 ("AR-15"); Minneapolis, Minn. 9/27/12 ("Glock 9mm"); Oak Creek, Wis. 8/5/12 (three 19-round magazines); Seattle, Wash. 5/20/12 ("Para Ordinance .45"); Carson City, Nev. 9/6/2011 ("Norinco Mak 90. . . Romarm/Cugir AK-47 . . . Glock 26"); Washington, D.C. 3/30/10 ("AK-47"); Appomattox, Va. 1/19/10 ("high-powered rifle"); Osage, Kan. 11/28/09 ("Assault Rifle"); Fort Hood, Tex. 11/5/09 ("FN Five-Seven"); Mount Airy, N.C. 11/1/09 ("Assault Rifle"); Geneva Cty., Ala. 3/10/09 ("Bushmaster AR-15, SKS Rifle")).

While the Survey and Everytown's subsequent research do not present a comprehensive dataset of the magazines used in mass shootings—and the district court's assumption to the contrary was erroneous—to the extent conclusions can be drawn from the Survey, they indicate that LCMs make shootings significantly more deadly. The Survey shows that on average, shooters who use LCMs, or assault weapons which are typically equipped with LCMs, shoot more than twice as many victims (151% more) and kill 63% more victims as compared to other mass shootings. Survey at 3. Data from Everytown's continued tracking of mass shootings also shows that where an assault weapon was used,[8] twice as many people were killed on average (10.1 per shooting vs. 4.9) and ten times as many were shot and injured (11.4 per shooting vs. 1.1). *See* Mass Shootings, *supra* note 4; *see also* Louis Klarevas, *Rampage Nation: Securing America from Mass Shootings* 221 (2016) (finding the use of LCMs in mass shootings increased the death toll by 17%, while the combination of LCMs and light-weight assault weapons resulted in a 33% increase in deaths).

The district court also ignored mass shootings involving LCMs that occurred outside of the Survey's January 2009 to September 2013 time frame, including the

[8] Assault weapons, which are generally sold with LCMs, serve as a reasonable proxy for LCMs. (Everytown stopped tracking magazine capacity after the 2013 report due to the difficulty of obtaining comprehensive data discussed above.)

shooting in San Bernardino, California, that resulted in 14 deaths and 22 injuries, as well as the massacre of 49 people and wounding of 53 more in a nightclub in Orlando, Florida.[9] The October 1, 2017, attack in Las Vegas, in which the shooter used dozens of LCMs to fire hundreds of rounds into a concert crowd resulting in the death of 59 people and the injury of over 500 more, is only the most recent example of the carnage that attacks carried out with LCMs can cause. *See* Jackie Valley et al., *No Clear Motive in Las Vegas Strip Shooting That Killed 59, Injured 527*, Nevada Independent (Oct. 2, 2017), http://bit.ly/2x4m4is.

The district court also failed to consider the unique impact of the mass shootings involving LCMs that it did identify. Mass shootings like those that occurred in Aurora, Sandy Hook, and Tucson sear themselves into the national consciousness and affect the way people live their everyday lives. *See* Alana Abramson, *After Newtown, Schools Across the Country Crack Down on Security*, ABC News (Aug. 21, 2013), http://abcn.ws/1KwN9Ls (comparing the impact of the Sandy Hook shooting on school security to that of 9/11 on airport security and noting school districts have spent tens of millions of dollars on security improvements). While mass shootings on the scale of Las Vegas, Orlando,

[9] Information about these shootings was before the district court. *See* Declaration of Alexandra Robert Gordon in Support of Defendant Attorney General Xavier Becerra's Opposition to Plaintiff's Motion for Preliminary Injunction, Exhibit 76, at 3, 6, *Duncan v. Becerra*, No. 3:17-cv-1017-BEN (S.D. Cal. June 13, 2017).

Aurora, and Sandy Hook are statistically rare, their enormous impact reinforces the justifications for California's law.

Additional social science research supports the conclusion reached by both the people of California and the State Legislature: that LCMs pose a significant danger to public safety. A study of LCM sales in California indicates that they are more likely to be purchased by individuals with a criminal background. *See* Garen J. Wintemute et al., *Criminal Activity and Assault-Type Handguns: A Study of Young Adults*, 32 Annals Emer. Med. 44, 44-50 (1998), http://bit.ly/2ymFodM (finding assault pistols were selected by 2% of purchasers with no criminal record, 6.5% of purchasers with a prior gun charge, and 10% of purchasers with two or more previous violent felonies). In addition, an analysis of the murders of police officers in the year prior to the federal prohibition on LCMs found that LCMs were used in approximately one third of the murders. *See* W.C. Adler et al., *Cops Under Fire: Law Enforcement Officers Killed with Assault Weapons or Guns with High Capacity Magazines* (1995) (finding that assault weapons were used in 16% of the murders and that a firearm with a LCM was used to shoot 31-41% of the police officers murdered).

In sum, the district court erred in its assumptions about what the Survey reflected and the inferences about LCMs that can and cannot reasonably be drawn therefrom. The Survey's actual conclusion suggests that mass shootings involving

LCMs are substantially more dangerous than those where LCMs were not involved. This finding is further supported by additional publicly available research, much of which the district court chose to ignore. Proposition 63 is an appropriately tailored reaction to the significant public safety threat presented by LCMs and is therefore constitutional.

II. California's Prohibition of LCMs Is Part of a Longstanding History of Identical and Analogous Prohibitions

As the district court correctly noted in its Order, this Circuit analyzes Second Amendment challenges through a two-step process: first by assessing "whether the challenged law burdens conduct protected by the Second Amendment" and then by "apply[ing] an appropriate level of scrutiny." Order at 20 (citing *Bauer v. Becerra*, 858 F.3d 1216 (9th Cir. 2017)); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013).

One way to determine whether a law burdens the Second Amendment right is to assess the law based on a "historical understanding of the scope of the right," *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008), and consider whether the law is within a tradition of "restrictions . . . rooted in history" that "were left intact by the Second Amendment and by *Heller*." *United States v. Rene E.*, 583 F.3d 8, 12 (1st Cir. 2009). *Heller* identified several "examples" of such regulations, including "prohibitions on the possession of firearms by felons and the mentally ill" and "laws imposing conditions and qualifications on the commercial sale of

arms," which are "presum[ed]" not to violate the Second Amendment right because of their historical acceptance as consistent with its protections. *Heller*, 554 U.S. at 626-27, 628 n.26. Such "longstanding" laws, the Supreme Court explained, are treated as tradition-based "exceptions" by virtue of their "historical justifications." *Id*. at 626, 635; *see Fyock v. Sunnyvale*, 779 F.3d 991, 996 (9th Cir. 2015) ("[L]ongstanding prohibitions" are "traditionally understood to be outside the scope of the Second Amendment."); *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) ("Longstanding limitations are exceptions to the right to bear arms.").

While neither the Supreme Court nor this Circuit has established a precise standard for what is required for a law to be found longstanding, most courts to consider the issue have found it does not require that a law "mirror limits that were on the books in 1791." *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc). To the contrary, laws may qualify as longstanding even if they "cannot boast a precise founding-era analogue," *Nat'l Rifle Ass'n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 196 (5th Cir. 2012)—as was the case with the "early twentieth century regulations" prohibiting firearm possession by felons and the mentally ill and regulating the commercial sale of arms deemed longstanding in *Heller*. *See Fyock*, 779 F.3d at 997 ("Although not from the founding era, these early twentieth century regulations

might nevertheless demonstrate a history of longstanding regulation if their historical prevalence and significance is properly developed in the record.").

Proposition 63 is part of a long tradition of regulating or prohibiting weapons that legislatures have determined to be unacceptably dangerous—including a century of restrictions enacted shortly after semi-automatic weapons became commercially available on firearms capable of firing a large number of rounds without reloading. *See* Robert 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 invented, but when they began to circulate widely in society"). Many of these laws were first passed at the same time as the prohibitions on sales to felons and the mentally ill and the restrictions on the commercial sale of arms that were identified in *Heller* as longstanding. *See id.* (discussing passage of prohibitions on possession of firearms by felons and the mentally ill in the early 20th century and the possession of semi-automatic weapons with LCMs in the 1920s and 1930s). Such a historical tradition alone is sufficient for this Court to find Proposition 63 constitutional under *Heller*. *See Heller*, 554 U.S. at 626-27 ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms . . . or laws imposing conditions and qualifications on the commercial sale of arms."); *Teixeira v. County of Alameda*, 2017 WL 4509038, at

*2, *10 (9th Cir. 2017) (en banc) (using "a textual and historical analysis" to show that "the Second Amendment . . . does not confer a freestanding right . . . to sell firearms").

A. California's Prohibition on LCMs is Consistent with a Century-Long Tradition of Regulation

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

During this same period, national legal organizations circulated model laws prohibiting possession of semi-automatic firearms with large magazine capacities.

Both the 1927 National Crime Commission Firearm Act and the 1928 Uniform Firearms Act criminalized possession of "any firearm which shoots more than twelve shots semi-automatically without reloading." Report of Firearms Committee, 38th Conference Handbook of the National Conference on Uniform State Laws and Proceedings of the Annual Meeting 422-23 (1928). Shortly thereafter, the federal government enacted a similar prohibition applicable to the District of Columbia. *See* 47 Stat. 650, ch. 465, §§ 1, 14 (1932) (making it a crime to "possess any machine gun," which it defined as "any firearm which shoots . . . semiautomatically more than twelve shots without loading").

California first passed a prohibition on automatic weapons in 1927[10] and expanded such legislation in 1933 through a statute prohibiting the sale or possession of "all firearms . . . capable of discharging automatically" and "all firearms which are automatically fed after each discharge from or by means of clips, discs, drums, belts or other separable mechanical device having a capacity of greater than ten cartridges." 1933 Cal. Acts 1170, § 3. These statutes were more

[10] *See* An Act to Prohibit the Possession of Machine Rifles, Machine Guns and Submachine Guns Capable of Automatically and Continuously Discharging Loaded Ammunition of any Caliber in Which the Ammunition Is Fed to Such Guns from or by Means of Clips, Disks, Drums, Belts or Other Separable Mechanical Device, and Providing a Penalty for Violation Thereof, 1927 Cal. Stat. 938, ch. 552, §§ 1-2 (prohibiting "all firearms known as machine rifles, machine guns or submachine guns capable of discharging automatically and continuously loaded ammunition of any caliber in which the ammunition is fed to such gun from or by means of clips, disks, drums, belts or other separable mechanical device").

restrictive than Proposition 63, as the 1933 law prohibited *firearms* capable of receiving LCMs, rather than the LCMs themselves that are at issue here. *See id.* Several other states, including Minnesota, Ohio, and Virginia, also prohibited or regulated firearms based on magazine capacity.[11] Other states passed laws limiting possession of automatic weapons based on the number of rounds that a firearm could discharge without reloading.[12]

The federal government embraced such regulations in 1934 when Congress enacted the National Firearms Act. *See* 48 Stat. 1236, 1246 (1934) (requiring the registration of automatic weapons, short-barreled rifles and shotguns, certain explosives, and a variety of concealable and disguised firearms, and imposing a significant transfer tax on the regulated weapons). The Supreme Court unanimously upheld the National Firearms Act in one of its few pre-*Heller* Second

[11] *See* 1933 Minn. Laws 232, § 1 (banning "[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 Laws 189, § 1 (regulating "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").

[12] These limitations were more stringent than California's current magazine prohibition of more than ten rounds. *See, e.g.*, 1933 S.D. Sess. Laws 245, § 1 (five rounds); 1933 Tex. Gen. Laws 219, § 1 (five rounds); 1934 Va. Acts 137, § 1 (seven rounds for automatics, 16 for semi-automatics); 1931 Ill. Laws 452, § 1 (eight rounds); 1932 La. Acts 337, § 1 (eight rounds); 1934 S.C. Acts 1288, § 1 (eight rounds).

Amendment cases. See *United States v. Miller*, 307 U.S. 174, 178 (1939) (holding that it is not evident that short-barreled shotguns are "part of the ordinary military equipment or that [their] use could contribute to the common defense" and therefore "we cannot say that the Second Amendment guarantees the right to keep and bear such [] instrument[s]").

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

The statute at issue here is also a continuation of a long history of government prohibition of weapons that threaten public safety, either because the weapons themselves are uniquely lethal or because they are especially suited to criminal use.

Prohibitions on weapons deemed especially dangerous date back to early English legal history, beginning with the 1383 prohibition of launcegays (a particularly lethal type of spear) and the 1541 prohibition of crossbows and firearms less than a yard long. *See* 7 Ric. 2, 35, ch. 13 (1383); 33 Hen. 8, ch. 6, § 1 (1541). The regulation of unusually dangerous firearms continued as the American colonies and first states adapted the English tradition. *See generally* 1763-1775 N.J. Laws 346 (prohibiting set or trap guns); The Laws of Plymouth Colony (1671) (same); Records of the Colony of New Plymouth in New England 230 (Boston 1861).

States continued to pass prohibitions or regulations on unreasonably dangerous weapons after ratification of the Second Amendment. For example, several states prohibited or placed prohibitively high taxes on Bowie knives,[13] the assault weapons of their time, which were determined to be "instrument[s] of almost certain death." *See Cockrum v. State*, 24 Tex. 394, 402 (1859) (finding Bowie knives are "differ[ent] from [guns, pistols, or swords] in [their] device and design" and are therefore more accurate and lethal than other contemporary weapons). In addition, a number of states prohibited certain types of small and easily concealable handguns, which were determined to be ideal for criminal use.[14]

Throughout the early twentieth century, many states passed laws prohibiting unusually dangerous weapons or weapon features, such as silencers, as the technology of firearms and other dangerous weapons evolved.[15] At least twenty-

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[13] *See, e.g.*, 1837 Ala. Acts 7, § 1 (prohibitively taxing sales of Bowie knives); 1837 Ga. Acts 90 (banning Bowie knives); 1837-1838 Tenn. Pub. Acts 200 (prohibiting the sale of Bowie knives); *Aymette v. State*, 21 Tenn. 154, 158 (1840) (justifying a prohibition on Bowie knives on the basis that they are "weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin").

[14] *See, e.g.*, 1881 Ark. Laws § 1909 (banning pocket pistols and "any kind of cartridge for any pistol"); 1879 Tenn. 135, ch. 96, § 1 (banning sale and transport of "belt or pocket pistols, or revolvers, or any other kind of pistols, except army or navy pistols"); 1907 Ala. Acts 80, § 1 (similar); 1903 S.C. Sess. Laws 127, § 1 (similar).

[15] *See, e.g.*, 1909 Me. Laws 141 (prohibiting silencers); 1912 Vt. Laws 310, § 1 (same); 1913 Minn. Laws 55 (same); 1916 N.Y. Laws 338-39, ch. 137, § 1
(….continued)

eight states passed prohibitions on automatic weapons in the 1920s and 1930s, as well as the restrictions on large capacity semi-automatic weapons discussed above. *See supra* Part II.

When viewed with appropriate historical context, California's prohibition on LCMs can be understood as the latest chapter in a longstanding tradition of government prohibition or regulation of unusually dangerous weapons. This long history of analogous regulation reinforces the conclusion that Proposition 63, like other longstanding prohibitions, does not burden a "right secured by the Second Amendment." *Heller*, 554 U.S. at 626.

III. The Court Should Reject The "Common Use" Test Endorsed by the District Court

In its June 29, 2017 Order, the district court characterized the Second Amendment test used by courts in this Circuit as "an overly complex analysis that people of ordinary intelligence cannot be expected to understand" and that "obfuscates as it extirpates," and instead praised the "simple *Heller* test," which

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(continued….)

(same); 1926 Mass. Acts 256, ch. 261 (same); 1927 Mich. Pub. Acts 887-89, § 3 (same); 1927 R.I. Pub. Laws 256, § 8 (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, blackjacks, slung-shots, billy clubs, brass knuckles, and bludgeons).

"asks whether the law bans types of firearms commonly used for a lawful purpose— regardless of whether alternatives exist." Order at 18-19.[16] However, this test is illogical, circular, and violative of the principals of federalism that underpin our form of government. This is true whether the test is applied categorically, as the district court would prefer, or as a threshold question at step one.

The argument that LCMs must be afforded Second Amendment protection because they are in use "in at least 43 states and under federal law" and "number in the millions," Order at 19, deeply misconstrues the Supreme Court's decision in *Heller* to suggest that a sufficiently large presence in the national market triggers Second Amendment protection. The *Heller* Court held that the Second Amendment "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns," 554 U.S. at 625, but it *did not* hold the converse to be true—that the Second Amendment necessarily protects weapons typically possessed by law-abiding citizens for lawful

[16] We note that this understanding of the test that the district court characterizes as being "used by the Supreme Court in *Heller*" is a formulation that was articulated by only two justices dissenting from a denial of certiorari in *Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from denial of certiorari). This formulation has not been adopted by a majority of the Supreme Court.

purposes. *See Kolbe v. Hogan*, 849 F.3d 114, 142 (4th Cir. 2017) ("The *Heller* majority said nothing to confirm that it was sponsoring the popularity test.").[17]

In addition to lacking a legal foundation, the district court's formulation of the "common use" test is hopelessly circular. Following this approach would allow the constitutionality of weapons prohibitions to be decided not by how dangerous a weapon is, but rather by "how widely it is circulated to law-abiding citizens by the time a bar on its private possession has been enacted and challenged." *Id.* at 141. As the district court acknowledged, "it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn't commonly owned." *Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015); *see* Order at 19. So too would it be absurd to allow the fact that a law previously did not exist—thereby enabling ownership to become commonplace—to stand as a constitutional bar to its enactment. *See* Joseph Blocher & Darrell A.H. Miller, *Lethality, Public Carry, and Adequate*

[17] The district court also fails to clarify whether "common use" should be determined by considering the number of LCMs produced or sold, or the number of law-abiding owners of the same. This distinction is critical in light of the fact that firearm ownership is extremely concentrated, with 3% of American adults possessing 50% of guns. Lois Beckett, *Meet America's Gun Super-Owners — With An Average of 17 Firearms Each*, The Trace (Sept. 20, 2016), http://bit.ly/2d89dGH. If production or sales numbers form the basis of the common use analysis, then this small group of gun owners would be essentially placed in control of the meaning of the Second Amendment. This tyranny by a tiny minority cannot be what the *Heller* Court intended.

Alternatives, 53 Harv. J. on Legis. 279, 288 (2016) (discussing the "central circularity" that plagues the "common use" test: "what is common depends largely on what is, and has been, subject to regulation"). Yet this is what the district court's version of the "common use" test would dictate here.

A constitutional analysis driven by the ubiquity of the prohibited firearm creates perverse incentives for the firearm industry, giving it the unilateral ability to bestow highly dangerous firearms, and firearm features, with Second Amendment protection "simply by manufacturing and heavily marketing them" before the government has had the chance to assess their danger and determine whether to regulate them. Cody J. Jacobs, *End the Popularity Contest: A Proposal for Second Amendment "Type of Weapon" Analysis*, 83 Tenn. L. Rev. 231, 265 (2015). Such an analysis also raises federalism concerns, as states that fail to immediately regulate new and potentially dangerous firearms or firearm features would risk losing the ability to do so as they are adopted into common use in other states.[18] Thus, firearm safety decisions made in some states would render the laws of other states "more or less open to challenge under the Second Amendment," and

[18] A counterfactual further demonstrates why the "common use" test is inappropriate: If Congress had renewed the federal prohibition on LCMs 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 the district court's version of the "common use" test.

"would imply that no jurisdiction other than the United States as a whole can regulate firearms." *Friedman*, 784 F.3d at 408, 412. But *Heller* "does not foreclose *all* possibility of experimentation" by state and local governments, *id.* Rather, it permits the states to do what they have long done in the realm of firearm legislation: "experiment with solutions to admittedly serious problems," *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 966 (9th Cir. 2014) (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986)).

Rather than following a "common use" test, the Court should be guided by the Fourth Circuit sitting en banc in *Kolbe* and consider whether the firearm or firearm component at issue is appropriate for self-defense or is a weapon designed to produce mass casualties. *See* 849 F.3d at 121. The *Kolbe* court found that "large-capacity magazines . . . [that] allow a shooter to fire more than ten rounds without having to pause to reload . . . 'are particularly designed and most suitable for military and law enforcement applications' [as they] 'enhance' a shooter's 'capacity to shoot multiple human targets very rapidly.'" *Id.* at 125 (internal citations omitted); *accord* H.R. Rep. No. 103-489, at 18 (1994) (finding that LCM features are not just "'cosmetic' in effect" but are "semiautomatic versions of military machineguns" (internal citation omitted)). Balancing the danger of LCMs against their limited usefulness in self-defense, the *Kolbe* court held that "large-capacity magazines are clearly most useful in military service, [and so] we are

compelled by *Heller* to recognize that those weapons and magazines are not constitutionally protected." 849 F.3d at 137. The same reasoning should apply here. *See also New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 256 (2d Cir. 2015) (noting that *Heller* permitted the prohibition of military-grade weapons "without implicating the Second Amendment"); *Friedman*, 784 F.3d at 408 (noting that, under *Heller*, the Second Amendment does not protect "military-grade weapons" or "weapons especially attractive to criminals").

CONCLUSION

The district court's June 29, 2017 Order clearly erred in interpreting the Survey to conclude that Proposition 63 "do[es] not provide a reasonable fit to accomplish California's important goal of protecting the public from violent gun crime." Order at 42. In addition, the district court failed to properly consider the long history of prohibitions similar to Proposition 63 and improperly relied on a "common use" test based on national popularity. For the reasons stated above, and in the State's brief, Everytown respectfully urges reversal of the district court's July 29, 2017 Order.

Dated: October 19, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

Counsel for amicus curiae certifies that on October 19, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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