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 (Benitez, J.)

BRIEF FOR THE BRADY CENTER TO PREVENT GUN VIOLENCE AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLANT

JONATHAN E. LOWY
MARIEL GOETZ
BRADY CENTER TO PREVENT GUN VIOLENCE
840 First Street, NE, Suite 400
Washington, DC 20002
(202) 370-8101

PAUL R.Q. WOLFSON
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000

ALLISON TRZOP*
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800

BRETT HAMMON
WILMER CUTLER PICKERING
HALE AND DORR LLP
950 Page Mill Road
Palo Alto, CA 94304
(650) 858-6000

October 18, 2017

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STATEMENT OF IDENTITY AND INTEREST[1]

The Brady Center to Prevent Gun Violence is the nation's largest nonpartisan, non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. In support of that mission, the Brady Center files this brief as amicus curiae in support of Appellant.

The Brady Center has a substantial interest in ensuring that the Second Amendment is not interpreted or applied in a way that would jeopardize the public's interest in protecting individuals, families, and communities from the effects of gun violence. Through its Legal Action Project, the Brady Center has filed amicus briefs in numerous cases involving firearms regulations, including *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *United States v. Hayes*, 555 U.S. 415 (2009), and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

[1] All parties consent to the filing of this brief. Amicus curiae states that no party or party's counsel authored this brief in whole or in part. No party, party's counsel, or any person other than amicus curiae or its counsel contributed money intended to fund preparing or submitting this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

On the morning of December 2, 2015, two shooters dressed entirely in black entered a conference room decorated for the holidays and opened fire on approximately 80 staff members of the San Bernardino County Environmental Health Department. Rizwan Farook and Tashfeen Malik ultimately fired more than 100 rounds in two to three minutes, killing 14 and wounding 22 more of Farook's coworkers. The two shooters, who had equipped themselves with multiple large-capacity magazines ("LCMs") and more than a thousand rounds of ammunition, fired an additional 81 rounds at police officers during a gunfight hours later.[2]

Although the San Bernardino mass killing garnered national headlines, it was preceded by a wave of mass shootings and active shooter incidents in California in each of the four previous years. Those included a 2013 incident that left five dead when a gunman strapped 30-round magazines to his body and sprayed bystanders with gunfire during a public rampage that ended at Santa Monica College, and the 2011 murder of three co-workers in Sunnyvale after

[2] *See generally* Braziel et al., *Bringing Calm to Chaos: A Critical Incident Review of the San Bernardino Public Safety Response to the December 2, 2015, Terrorist Shooting Incident at the Inland Regional Center*, Critical Response Initiative (2016), https://www.justice.gov/usao-cdca/file/891996/download.

which police took down a man in possession of LCMs.[3] Outside California as well, assailants have increasingly armed themselves with LCMs in recent years, including at Sandy Hook Elementary School in Connecticut, outside a supermarket in Tucson, and inside a movie theater in Aurora, Colorado.[4]

Recognizing the rising threat of mass shootings and the propensity of shooters to use LCMs, California—first through its legislature and then through a ballot initiative approved by the electorate—prohibited the possession of LCMs. Section 32310 reflects the latest effort in a longstanding series of laws designed to reduce the risk posed by LCMs, which have been "regulated in California for

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[3] *See* Blankstein, *Santa Monica Gunman Strapped Ammo to Chest, Thighs, Sources Say*, L.A. Times (June 10, 2013), http://articles.latimes.com/2013/jun/10/local/la-me-ln-santa-monica-gunman-had-over-3-dozen-30round-ammunition-clips-20130610; *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1283 (N.D. Cal. 2014), *aff'd*, 779 F.3d 991 (9th Cir. 2015); *see also Isla Vista Mass Murder: Investigative Summary*, Santa Barbara County Sheriff's Office (May 23, 2014), http://www.sbsheriff.us/documents/ISLAVISTAINVESTIGATIVESUMMARY.pdf (six killed, fourteen wounded in Isla Vista in 2014); Hayes, *Memorial Honors Victims in California College Shooting as Police Search for Gun*, CNN (Apr. 4, 2012), http://www.cnn.com/2012/04/03/us/california-shooting/index.html?hpt=hp_t3 (seven killed, three wounded at Oikos University in 2012).

[4] Steinhauer, *Pro-Gun Lawmakers Are Open to Limits on Size of Magazines*, N.Y. Times (Feb. 18, 2013), http://www.nytimes.com/2013/02/19/us/politics/lawmakers-look-at-ban-on-high-capacity-gun-magazines.html.

approximately twenty years through a combination of federal and state laws." *Fyock v. Sunnyvale*, 779 F.3d 991, 994 (9th Cir. 2015).

Beginning in 1994, the federal Violent Crime Control and Enforcement Act proscribed possession of LCMs capable of accepting more than ten rounds of ammunition. California filled the interstices by criminalizing the manufacture, sale, purchase, transfer, and receipt of LCMs within the State. When the federal prohibition on possession lapsed in 2004, it left a temporary loophole allowing possession of LCMs in California—a vacuum that California lawmakers had never intended to exist. *Fyock*, 779 F.3d at 994. In 2016, less than a month after the country witnessed one of the deadliest mass shootings in its history at Orlando's Pulse nightclub, the California Legislature enacted legislation to close that loophole. Shortly afterward, California voters approved Proposition 63, the "Safety for All Act of 2016," with the intent of further amending state law to ensure that the loophole that had left "communities throughout the state vulnerable to gun violence and mass shootings" remained closed. Excerpts of Record ("ER") 2132-2133.

Section 32310, as amended by Proposition 63, represents a sensible approach to the distinct dangers posed by LCMs without trenching on the core right to self-defense that the Supreme Court has found is protected by the Second Amendment. The highly dangerous features of LCMs render them suitable for

armed assaults and have long made them subject to intensive regulation and even prohibition in many jurisdictions. Accordingly, LCMs should fall outside the scope of the Second Amendment's coverage for firearms necessary and commonly used for self-protection. But even if Section 32310 is subject to Second Amendment scrutiny, it easily survives intermediate scrutiny, the standard that Appellees agreed below is the appropriate one under Ninth Circuit precedent. As every other court that has considered the issue has held to date—including Judge Shubb's decision in *Wiese*, decided the same day as *Duncan*—state action to promote public safety through the reduction or elimination of LCMs is constitutionally sound. Indeed, it represents an exercise of one of California's broadest and most fundamental state powers—its police power to act to keep its citizens safe.

ARGUMENT

I. THE SECOND AMENDMENT DOES NOT DISABLE THE STATES FROM TAKING REASONABLE MEASURES TO PROTECT PUBLIC SAFETY, INCLUDING THE RIGHT OF INDIVIDUALS NOT TO BE KILLED BY FIREARMS

The inherent risk that accompanies firearms "distinguishes the Second Amendment right from other fundamental rights … [that] can be exercised without creating a direct risk to others." *Bonidy v. United States Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 1486 (2016). Large-capacity magazines ("LCMs") exacerbate the risk that firearms pose, particularly in the

hands of a shooter intent on mass fatalities. That is why nearly half of all mass shootings involve LCMs; when such incidents occur, LCMs dramatically increase the number of those shot as well as the number of bullets striking each victim. *Rocky Mountain Gun Owners v. Hickenlooper*, No. 2013-CV-33879, 2017 WL 4169712, at *2 (Colo. Dist. Ct., Denver Cty. July 28, 2017); *see also San Francisco Veteran Police Officers Ass'n v. City & Cty. of San Francisco*, 18 F. Supp. 3d 997, 1003, 1005 (N.D. Cal. 2014). Even in the hands of law-abiding citizens, LCMs can result in more rounds fired than intended, thereby "endanger[ing] more bystanders." *See Kolbe v. Hogan*, 849 F.3d 114, 127 (4th Cir. 2017) (en banc), *petition for cert. filed*, No. 17-127 (U.S. July 21, 2017); *see also Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1263-1264 (D.C. Cir. 2011) ("[LCMs] are dangerous in self-defense situations because the tendency is for defenders to keep firing until all bullets have been expended, which poses grave risks to others in the household, passersby, and bystanders."); Mem. ISO Pls.' Mot. for Prelim. Inj. 3-4, ECF No. 6-1 (acknowledging that shots fired in self-defense do not actually hit intended targets).

Because of the risk that firearms pose to others, their possession and use have long been subject to close regulation and, in proper circumstances, prohibition. The courts have long recognized that, although the Second Amendment in some circumstances protects the right to possess firearms for the

purpose of self-defense, the government may also act to protect the right of individuals to live their lives unmolested by the dangers posed by firearms. The insight behind such regulation, neither new nor complicated, may be summarized by paraphrasing one legal philosopher: The right of a person to swing his arms ends where another's nose begins. Chafee, Jr., *Freedom of Speech in War Time*, 32 Harv. L. Rev. 932, 957 (1919). Indeed, Blackstone lauded the protection of every individual's "free enjoyment of his life" in the same volume in which he described the "crime against the public peace" of "terrifying the good people of the land" by "riding or going armed[] with dangerous or unusual weapons." 4 Blackstone, *Commentaries on the Laws of England* 148-149, 417 (1st ed. 1769). Consistent with this reasoning, the Supreme Court identified "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" as valid restrictions. *District of Columbia v. Heller*, 554 U.S. 570, 626-627 (2008) (citing Blackstone).

California has an "important interest in promoting public safety and preventing crime," as Appellees acknowledged below. (Mem. ISO Pls.' Mot. for Prelim. Inj. 9, ECF No. 6-1 (citing *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 768 (1994).) Encompassed within that scope is California's interest in protecting the right of individuals not to fall victim to gun violence. Someone who is "wrongly killed," of course, "cannot be compensated by resurrection."

Piszczatoski v. Filko, 840 F. Supp. 2d 813, 816 (D.N.J. 2012), *aff'd sub nom. Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013). The individual "right not to be shot" is so "clearly established" that courts have held that it protects even suspects fleeing arrest, provided the suspect does not pose a threat to police officers or to the public. *Robinson v. Bibb*, 840 F.2d 349, 350-351 (6th Cir. 1988) (relying on *Tennessee v. Garner*, 471 U.S. 1 (1985)).[5]

The States may therefore enact reasonable firearms regulation, including regulation designed to "prevent … mass shootings," Mem. ISO Pls.' Mot. for Prelim. Inj. 9, ECF No. 6-1—in other words, mass violation of the public's right not to be shot—while accommodating the right to self-defense. And in enacting that regulation, States are not required to blind themselves to the unique risks that firearms present to law enforcement and the public. Guns are used to kill more than 36,000 people and to injure an additional 84,000 every year in this country.[6] For law enforcement, gun violence presents a recurring and grave threat. Firearms

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[5] *See generally* Lowy & Sampson, *The Right Not to Be Shot: Public Safety, Private Guns, and the Constellation of Constitutional Liberties*, 14 Geo. J.L. & Pub. Pol'y 187 (2016).

[6] Centers for Disease Control and Prevention ("CDC"), *WISQARS Fatal Injury Reports, National, Regional and State, 1981-2015*, https://webappa.cdc.gov/sasweb/ncipc/mortrate.html ("All Intents" and "Firearm" and "2015"); CDC, *WISQARS Nonfatal Injury Reports, 2000-2015*, https://webappa.cdc.gov/sasweb/ncipc/nfirates.html ("All Intents" and "Firearm" and "2015").

were used in nearly 94 percent of felonious deaths of police officers in 2016, a year that saw an overall increase of 61 percent in the number of officers feloniously killed in the line of duty.[7] Mass shootings as one manifestation of gun violence have increased in both "prevalence and deadliness" in recent years, with the rate of incidents per year quadrupling since the 1970s.[8] The two deadliest mass shootings in this country's history have occurred in the past two years, in Las Vegas and in Orlando.[9]

As the frequency of mass shootings has risen, LCMs have made those incidents more lethal. *Rocky Mountain Gun Owners*, 2017 WL 4169712, at *2 ("The use of LCMs statistically increases the fatality rate by about 40%, [and] it dramatically increases the number of people who are shot by a factor of roughly two to three times."); Appellant's Br. 36-37. Shootings involving LCMs result in more deaths than those in which LCMs are not used. *Id.*[10] Similar to assault

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[7] FBI National Press Office, *FBI Releases 2016 Preliminary Statistics For Law Enforcement Officers Killed In The Line Of Duty* (May 15, 2017), https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2016-preliminary-statistics-for-law-enforcement-officers-killed-in-the-line-of-duty.

[8] Congressional Research Service, *Mass Murder With Firearms: Incidents And Victims, 1999-2013*, at 2 (July 30, 2015), https://fas.org/sgp/crs/misc/R44126.pdf.

[9] Criss, *The Las Vegas Attack Is the Deadliest Mass Shooting in Modern US History*, CNN (Oct. 2, 2017), http://edition.cnn.com/2017/10/02/us/las-vegas-attack-deadliest-us-mass-shooting-trnd/index.html.

[10] *See also* Everytown For Gun Safety, *Analysis of Recent Mass Shootings* 4 (August 2015), https://everytownresearch.org/documents/2015/09/analysis-mass-

weapons, LCMs "result in more shots fired, persons wounded, and wounds per victim than do other gun attacks." *New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 263-264 (2d Cir. 2015), *cert. denied sub nom. Shew v. Malloy*, 136 S. Ct. 2486 (2016). LCMs, however, "may present even greater dangers to crime and violence than assault weapons alone," because they can be used "in both assault weapons and non-assault weapons." *Id.* at 263 (quotation marks omitted).

Because of the inherent dangers in the possession and use of firearms, state regulation of firearms "'has always been more robust' than analogous regulation of other constitutional rights." *See New York State Rifle & Pistol*, 804 F.3d at 261 (quoting *Kachalsky v. County of Westchester*, 701 F.3d 81, 100 (2d Cir. 2012)). Thus, whereas "no law could prohibit felons or the mentally ill from speaking on a particular topic or exercising their religious freedom," *Kachalsky*, 701 F.3d at 100,[11] the government has long prohibited certain classes of persons from possessing firearms in light of the increased danger to the public that would follow were they allowed to do so, and the Supreme Court has recognized those laws are

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shootings.pdf (analyzing 133 mass shootings that occurred between January 2009 and July 2015; incidents in which LCMs or assault weapons likely equipped with LCMs were used resulted in 155 percent more victims shot and 47 percent more deaths).

[11] *See also Packingham v. North Carolina*, 137 S. Ct. 1730, 1733, 1738 (2017) (striking down state law making it a felony for a registered sex offender to access social networking sites).

compatible with the Second Amendment, *Heller*, 554 U.S. at 626. So too, although free speech rights are not shed at the schoolhouse gate, "[l]aws prohibiting the exercise of the right to bear arms … by law-abiding citizens in certain locations including public schools, are, according to *Heller*, 'presumptively lawful.'" *Kachalsky*, 701 F.3d at 100 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

Even First Amendment rights may be subject to reasonable regulation in circumstances that hold implications for public safety. The Supreme Court has upheld efforts by local governments to maintain "orderly movement" of crowds in public venues,[12] as well as efforts devoted "to preserv[ing] the quality of urban life."[13] Moreover, the Supreme Court has recognized that certain speech that has inherently dangerous properties lies entirely outside the First Amendment: incitement,[14] "fighting words,"[15] and speech integral to criminal conduct.[16] Given that even speech may be regulated or restricted for the purpose of maintaining the

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12 *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 652 (1981).

13 *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986).

14 *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

15 *Chaplinsky v. State of N.H.*, 315 U.S. 568, 571-572 (1942).

16 *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

peace, the possession of firearms certainly is subject to reasonable regulations without running afoul of the Second Amendment.

II. BECAUSE OF THEIR UNUSUALLY DANGEROUS CHARACTERISTICS, LARGE CAPACITY MAGAZINES SHOULD LIE OUTSIDE THE SECOND AMENDMENT

This Court employs a two-prong test in evaluating Second Amendment claims: "(1) the court 'asks whether the challenged law burdens conduct protected by the Second Amendment'; and (2) if so, what level of scrutiny should be applied." *Fyock v. City of Sunnyvale*, 779 F.3d 991, 996 (9th Cir. 2015) (quoting *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013)). In *Fyock*, a panel concluded, based on the limited record before it, that the district court had not abused its discretion by inferring that LCMs are "in common use" and therefore covered by the Second Amendment. *See id.* at 998. As explained below, *supra* Part III, even if LCMs are covered by the Second Amendment, California's prohibition on their possession is valid. But this Court could also conclude that LCMs are not covered by the Second Amendment at all, particularly in light of events post-dating *Fyock* that underscore the particular lethality of LCMs and the elevated risks they pose to the public.

The Second Amendment right is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. Indeed, as the Supreme Court in *Heller* explained, an "important limitation" on what the Second Amendment protects is that only weapons "in

common use at the time for lawful purposes like self-defense" lie within its purview, a limitation supported by the historical prohibition of weapons that are "dangerous and unusual." *Id.* at 624, 627 (quotation marks omitted).

As the Supreme Court explained in overturning a flat ban on the possession of handguns even in the home, the handgun is the firearm "overwhelmingly chosen by American society for [the] lawful purpose" of self-defense. *Heller*, 554 U.S. at 628. Yet the Court took pains to caution that even handguns are still subject to limitation, including "longstanding prohibitions" on who may possess handguns or where those guns may be taken, as well as "laws imposing conditions and qualifications on the[ir] commercial sale[.]" *Id.* at 626-627, 629. Further, the *Heller* Court drew a line between the handgun as "the quintessential self-defense weapon" and "weapons that are most useful in military service," including "M-16 rifles and the like," which may be prohibited without implicating the Second Amendment *at all*. *See id.* at 627, 629. After *Heller*, weapons fall outside of the Second Amendment's scope if they are "dangerous and unusual" or if they are "like" M-16 rifles and other weapons "most useful in military service." LCMs check both boxes.

A. LCMs Are Dangerous And Unusual

To assess whether LCMs are "dangerous and unusual," this Court looks to "whether the weapon has uniquely dangerous propensities and whether the weapon

is commonly possessed by law-abiding citizens for lawful purposes." *Fyock*, 779 F.3d at 997 (citing *United States v. Henry*, 688 F.3d 637, 640 (9th Cir. 2012)).

1. LCMs plainly meet this Court's definition of "dangerous"—*i.e.*, "likely to cause serious bodily harm." *Henry*, 688 F.3d at 640; *see also Fyock*, 779 F.3d at 1000 (affirming district court's reliance on "evidence that the use of large-capacity magazines results in more gunshots fired, results in more gunshot wounds per victim, and increases the lethality of gunshot injuries"). LCMs "greatly increase the firepower of mass shooters" and "pose a danger to innocent people and particularly to police officers." *Heller II*, 670 F.3d at 1263-1264. The fact that the district court below listed LCMs alongside "machine guns, hand grenades and pipe bombs" as the instrumentalities of "[p]ersons with violent intentions" accurately captures their unique, and terror-inspiring, lethality. *See Duncan v. Becerra*, No. 17-1017, 2017 WL 2813727, at *16 (S.D. Cal. June 29, 2017).

2. LCMs are also not commonly possessed by law-abiding citizens for self-defense, the "central component" of the Second Amendment right as identified by *Heller*. *See* 554 U.S. at 599. "Self-defense is what matters" in the constitutional analysis, not "the fact that a clip with more than ten rounds may be handy in target practice or competitions." *San Francisco Veteran Police Officers Ass'n*, 18 F. Supp. 3d at 1004.

California has outlawed the manufacture of new LCMs and the new ownership of LCMs for decades. Yet in attacking California's 2016 amendment prohibiting *possession* of LCMs, Appellees below failed to identify how many LCMs could possibly still remain in use by law-abiding Californians for self-defense. Rather, Appellees argued (similar to Appellants' argument in *Fyock*) that there are tens of millions of LCMs in the United States generally, that LCMs are "standard equipment," and that "[m]anufacturers[] specifically market them" for self-defense. *Compare* Mem. ISO Pls.' Mot. for Prelim. Inj. 3, ECF No. 6-1, *with* Appellants' Br. 5-7 & n.5, No. 14-15408, ECF 22. But as this Court explained in *Fyock*, "marketing materials and sales statistics" "do[] not necessarily show that large-capacity magazines are in fact commonly possessed by law-abiding citizens for lawful purposes." 779 F.3d at 998. Accordingly, district courts in this Circuit have also found such material unpersuasive:

> The record provided by counsel does not actually show that such magazines are common or prevalent among law-abiding citizens (as opposed to criminals and law enforcement). The record shows only that a large number of such magazines have been made and sold, but does not break down how they are possessed.

San Francisco Veteran Police Officers Ass'n, 18 F. Supp. 3d at 1003. Further, as California pointed out below, the ownership of firearms, and by implication LCMs, is concentrated in increasingly fewer hands, Opp'n to Pls.' Mot. for Prelim. Inj. 13

n.11, ECF 9. Appellees have thus failed to substantiate the notion that LCMs are "commonly possessed," particularly in California.

Nor did Appellees offer sufficient evidence to support their claim that LCMs are commonly possessed (or necessary) *for the purpose of self-defense*, in California or otherwise. Instead they invoked the specter of "multiple assailants" or "an assailant [who] keeps coming, though riddled with bullets," *San Francisco Veteran Police Officers Ass'n*, 18 F. Supp. 3d at 1003, even while acknowledging that "a limited number of individuals actually have occasion to fire more than 10 times in self-defense," Pls.' Reply 3, ECF 23.[17] But those speculations hardly establish that those who possess LCMs generally do so, or need to do so, for self-defense purposes. On the other hand, from Orlando to Newtown, lawfully owned LCMs have been deployed, not for self-defense, but to assault, murder, and terrify the public.

B. LCMs Are "Like" M-16 Rifles

In considering whether LCMs fall within the scope of the Second Amendment, courts also consider whether the regulated firearms are *like* M-16

[17] Analogously, hollow-point ammunition is designed to offer enhanced stopping power with less accompanying risk of ricochet, features that might be very attractive to home defenders, yet this Court upheld San Francisco's regulation to reduce the availability of such lethal ammunition for use in public or in the home in part because "[t]here [was] no evidence in the record indicating that ordinary bullets are ineffective for self-defense." *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 968 (9th Cir. 2014).

rifles—that is, are LCMs most useful in military service, rather than for self-defense? "The answer to that dispositive and relatively easy inquiry," the Fourth Circuit responded earlier this year, "is plainly in the affirmative." *Kolbe*, 849 F.3d at 136. The Fourth Circuit assessed that LCMs "enable a shooter to hit multiple human targets very rapidly; contribute to the unique function of any assault weapon to deliver extraordinary firepower; and are a uniquely military feature[] of both the banned assault weapons and other firearms to which they may be attached." *Id.* at 137; *see also Springfield, Inc. v. Buckles*, 292 F.3d 813, 816 (D.C. Cir. 2002) ("large capacity magazines are indicative of military firearms").[18] The record compiled by California here compels the same determination: The prohibited magazines "are not constitutionally protected." *Kolbe*, 849 F.3d at 137.

III. THE LCM PROHIBITION SATISFIES SCRUTINY UNDER THE SECOND AMENDMENT

Even if this Court were to conclude that Section 32310 does implicate the Second Amendment, that provision easily survives constitutional scrutiny.

[18] *See also* U.S. Dep't of Treasury, *Department of the Treasury Study on the Sporting Suitability of Modified Semiautomatic Assault Rifles* 1, 36 (Apr. 1998), https://www.atf.gov/file/57521/download.

A. Under Intermediate Scrutiny, The States Have Broad Authority To Address The Dangers of Gun Violence As Long As The Core Right Of Self-Defense Is Not Infringed

To begin, the Second Amendment leaves broad leeway for states to address the special dangers of gun violence through reasonable firearms restrictions. Both *Heller* and *McDonald* make clear that reasonable firearms regulations comport with the Second Amendment. Contrary to Appellees' arguments below, the Second Amendment does not "protect the right of citizens to carry arms for *any sort* of confrontation." *Heller*, 554 U.S. at 595. Rather, as this Court has explained, *Heller* "underscored the tools that remain[] available to [localities] to regulate firearms," *Peruta v. County of San Diego*, 824 F.3d 919, 928 (9th Cir. 2016) (en banc), *cert. denied sub nom. Peruta v. California*, 137 S. Ct. 1995 (2017), while observing "that the core of the Second Amendment is the right of law-abiding, responsible citizens to use arms in defense of hearth and home," *Chovan*, 735 F.3d at 1138 (quotation marks omitted); *see also Teixeira v. County of Alameda*, No. 13-17132, 2017 WL 4509038, at *14 (9th Cir. Oct. 10, 2017) (en banc).

California has not impaired individuals' legitimate right of self-defense. It has not banned all magazines, nor has it even regulated the total number of magazines that a law-abiding citizen may possess. California's LCM regulations still afford law-abiding citizens the right to possess firearms, including handguns,

necessary for self-defense and other lawful purposes. As this Court recognized in *Fyock*, the "prohibition of ... large-capacity magazines does not effectively disarm individuals or substantially affect their ability to defend themselves." 779 F.3d at 999 (quoting *Heller II*, 670 F.3d at 1262). Although Appellees below attempted to draw equivalence between a ban on handguns and a ban on LCMs (Mem. ISO Pls.' Mot. for Prelim. Inj. 1, ECF No. 6-1), this Court and other circuits have uniformly dismissed such equivalence. *See* 779 F.3d at 999 (concluding that Sunnyvale's LCM ban was "simply not as sweeping as the complete handgun ban at issue in *Heller* and does not warrant a finding that it cannot survive constitutional scrutiny"); *Heller II*, 670 F.3d at 1261-1262.

Here too, there is a deficit of evidentiary support for Appellees' argument that the firearms available to them are somehow ineffective for self-defense. To the contrary, as both the district court and Appellees acknowledged below, the evidence shows that law-abiding citizens have no need for LCMs to defend themselves. *See Duncan*, 2017 WL 2813727, at *16 ("the average defensive gun use involves firing 2.2 rounds"); Pls.' Reply 3, ECF 23; *see also San Francisco Veteran Police Officers Ass'n*, 18 F. Supp. 3d at 1003 ("[T]he number of instances in which more than ten rounds have been fired in self-defense (in our entire country) by civilians is exceedingly rare[.]"); *Rocky Mountain Gun Owners*, 2017 WL 4169712, at *12 ("The evidence presented established that the need to fire

more than 15 rounds of ammunition without reloading does not arise in [self-defense] situations[.]").

But while California has left unimpaired the individual right of self-defense at the core of the Second Amendment, the State, like other jurisdictions, has reasonably concluded that prohibiting the private possession of LCMs will reduce the frequency and lethality of gun violence. At least seven other States, the District of Columbia, and multiple local jurisdictions within and outside of California have similarly—and reasonably—sought to limit LCM possession.[19] Including California, more than 90 million Americans now reside in a jurisdiction that regulates LCMs.[20] The other Circuits (and district courts) to consider this

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[19] *See* Haw. Rev. Stat. § 134-8(c); Mass. Gen. Laws Ann. ch. 140, §§ 121, 131M (enacted as 1998 Mass. Stats. ch. 180, § 8); Md. Code, Crim. Law § 4-305; N.J. Stat. Ann. §§ 2C:39-1(y), 39-3(j), 39-9(h); N.Y. Penal Law §§ 265.00(23), 265.02(8), 265.10, 265.11, 265.20(7-f), 265.36-265.37; Conn. Gen. Stat. §§ 53-202w-202x; Colo. Rev. Stat. §§ 18-12-301, 18-12-302, 18-12-303; D.C. Code § 7-2506.01; *see also* [in California] Sunnyvale, Cal. Muni. Code, § 9.44.050; Los Angeles, Cal. Muni. Code §§ 46.30, 55.13; San Francisco, Cal. Pol. Code Art. 9, § 619; Oakland, Cal. Code of Ordinances, § 9.38.030-9.38.040 (Ord. No. 13352, § 1(D), 1-19-2016); [outside California] Aurora, Ill., Code of Ordinances § 29-49(a); Buffalo, N.Y., City Code § 180-1(F); Cook County, Ill. Code of Ordinances, § 54.212 (Ord. No. 13-O-32, 7-17-2013.); Denver, Colo., Muni. Code § 38-130(e); Franklin Park, Ill. Code of Ordinances, § 3-13G-3; N.Y.C., N.Y., Admin. Code § 10-303.1; Oak Park, Ill. Muni. Code, § 27-2-1; Rochester, N.Y., Muni. Code No. 47-5(F).

[20] *See* U.S. Census Bureau, *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2016*,

issue have upheld the democratic process in concluding that limits on LCM possession survive constitutional scrutiny. *See Kolbe*, 849 F.3d at 139-141; *New York State Rifle & Pistol*, 804 F.3d at 263-264; *Heller II*, 670 F.3d at 1262-1264; *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (2015); *San Francisco Veteran Police Officers Ass'n*, 18 F. Supp. 3d at 1003-1004; *Colorado Outfitters Ass'n v. Hickenlooper*, 24 F. Supp. 3d 1050, 1072 (D. Colo. 2014), *vacated and remanded on other grounds*, 823 F.3d 537 (10th Cir. 2016). This Court should do so as well.

In addition, the federal Violent Crime Control and Law Enforcement Act of 1994 prohibited the possession of magazines with capacity for more than ten rounds. *See* Pub. L. No. 103-322, 108 Stat. 1796, 1998-2000 (1994) (formerly codified at 18 U.S.C. § 922(w)). During the Act's lifespan, the possession of LCMs by criminals declined. *Rocky Mountain Gun Owners*, 2017 WL 4169712, at *3.[21] At the more local level, States without LCM bans experience mass shootings

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https://www.census.gov/data/tables/2016/demo/popest/state-total.html (last visited Oct. 16, 2017).

[21] *See also* Fallis, *Data Indicate Drop in High-Capacity Magazines During Federal Gun Ban*, Wash. Post (Jan. 10, 2013), https://www.washingtonpost.com/investigations/data-point-to-drop-in-high-capacity-magazines-during-federal-gun-ban/2013/01/10/d56d3bb6-4b91-11e2-a6a6-aabac85e8036_story.html?utm_term=.39d413e3993f.

at a rate "three times higher" than those States with such bans in effect. *Id.*; *see also Friedman*, 784 F.3d at 411.[22]

In any event, intermediate scrutiny does not require definitive proof of the law's effectiveness prior to its enactment. Under that test, California must show only that Section 32310 promotes a "'substantial government interest that would be achieved less effectively absent the regulation.'" *Fyock*, 779 F.3d at 1000 (quoting *Colacurcio v. City of Kent*, 163 F.3d 545, 553 (9th Cir. 1998)). "The evidence need only 'fairly support' the state's rationale, and in making this determination, courts 'afford substantial deference to the predictive judgments of the legislature.'" *Wiese v. Becerra*, No. 17-903, 2017 WL 2813218, at *3 (E.D. Cal. June 29, 2017) (quoting *New York State Rifle & Pistol*, 804 F.3d at 261); *see also* Appellant's Br. 51-53.

Deference to legislative decisionmaking is particularly appropriate in this realm. *See Heller*, 554 U.S. at 636 (the Constitution provides legislatures with "a variety of tools for combating" gun violence); *see also Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976). Gun violence is a complex problem that has eluded many efforts at control, and while many potential solutions have been

[22] *See also* Petulla, *Here Is 1 Correlation Between State Gun Laws and Mass Shootings*, CNN (Oct. 5, 2017), http://www.cnn.com/2017/10/05/politics/gun-laws-magazines-las-vegas/index.html.

pursued, experts disagree on the most effective means of ameliorating the gun violence epidemic. Given the difficulty and the urgency of the problem, the States should not be hampered in their efforts to find solutions, as long as they leave intact the core right of self-defense. *Cf. Fisher v. University of Tex. at Austin*, 136 S. Ct. 2198, 2214 (2016) (States may serve as "laboratories for experimentation"); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Firearms regulations clearly further the "promotion of safety of persons and property"—thus, they are "unquestionably at the core of the State's police power." *See Kelley v. Johnson*, 425 U.S. 238, 247 (1976); *see also McDonald v. City of Chicago*, 561 U.S. 742, 785 (2010) (legislatures may craft reasonable firearms regulations that offer "solutions to social problems that suit local needs and values"); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 961, 969-970 (9th Cir. 2014) (localities "'must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems'") (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986)).

Moreover, the "best way to evaluate the relation among assault weapons, crime, and self-defense is through the political process and scholarly debate," and it should be recognized that the "central role of representative democracy is no less part of the Constitution than is the Second Amendment." *Friedman*, 784 F.3d at 412. Courts have routinely recognized that legislatures are "'far better equipped

than the judiciary' to make sensitive public policy judgments" addressing the dangers of gun violence. *Kachalsky*, 701 F.3d at 97 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994)); *see also Ewing v. California*, 538 U.S. 11, 28 (2003) (federal courts "do not sit as … 'superlegislature[s]' to second-guess … policy choices"). States have the leeway to make informed, predictive judgments about how to curb gun violence, including incidents of mass shootings.

The district court erred both factually and legally in its assessment that mass shootings represent "an incredibly rare danger" and that Section 32310 "do[es] not provide a reasonable fit" in accomplishing California's goal of mitigating such danger. *Compare Duncan*, 2017 WL 2813727, at *15-16, *with Wiese*, 2017 WL 2813218, at *3 ("There can be no serious argument that [reducing the incidence and harm of mass shootings] is not a substantial government interest, especially in light of several recent high profile mass shootings involving large capacity magazines[.]").

B. California's LCM Possession Ban Readily Withstands Intermediate Scrutiny

Even if LCMs are covered by the Second Amendment, Section 32310 easily withstands intermediate scrutiny.[23] California's purpose in banning LCM

[23] Contrary to the district court's admonishment that Section 32310 "adds one more layer of complexity" to California's "complicated" gun laws, 2017 WL 2813727, at *2, Section 32310 in fact simplifies California's gun laws with respect to LCMs. There would be no need under the new regime, for example, for law

possession—mitigating the risks of mass shootings—is without question a substantial, indeed compelling, interest. And California submitted ample evidence that, absent Section 32310, its purpose would be achieved less effectively. *See supra* pp. 25-28.

The democratic process plainly should not be displaced in this instance, particularly given California's "substantial interest in preventing and limiting gun violence, as well as in enforcing validly enacted statutes," an "interest [that] is especially strong here, where the ban was enacted first by the state legislature and then through a state-wide proposition approved by a majority of voters." *Wiese*, 2017 WL 2813218, at *5 (citing *Maryland v. King*, 567 U.S. 1301 (2012)).

California enacted Section 32310 based on substantial, credible evidence that Section 32310 would save lives. Empirical evidence demonstrates that LCMs pose distinctive risks to the public and to law enforcement because LCMs allow shooters to keep shooting without the need to stop and reload. LCMs thus result in more shots fired, more persons hit, and more wounds inflicted per victim.

1. Evidence relied upon by California

In strengthening longstanding state regulation of LCMs, California relied on substantial evidence demonstrating that LCMs are extraordinarily dangerous. The

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enforcement to inquire as to a magazine's history—possession of an LCM would simply be unlawful, regardless of how and when it was acquired.

State established that LCMs are overrepresented in the mass killings of innocent civilians and law enforcement.[24] Specifically, LCMs have been used in between 31 to 41 percent of gun murders of police.[25] That enhanced lethality results from the fact that LCMs provide shooters "a large ammunition supply."[26]

Those conclusions are bolstered by evidence from multiple experts, including evidence that "the average number of persons shot when the shooter had a LCM or assault weapon that likely included a LCM was 2.5 times higher and the number killed 47% higher than when no LCM was used,"[27] and that there has been an average of 22 fatalities or injuries per mass shooting with an LCM compared to only 9 without.[28] Another expert explained that (as noted above) LCMs' unique features account for this enhanced lethality: "Because magazines carrying more than l0 rounds at a time allow for uninterrupted shooting, such LCMs have been

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[24] ER 0467-0579 (Koper, *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003* (June 2004)), at ER 0473.

[25] ER 0581-0598 (Koper, *America's Experience With the Federal Assault Weapons Ban, 1994-2004: Key Findings and Implications* (from *Reducing Gun Violence in America: Informing Policy With Evidence and Analysis* (Webster & Vernick eds., 2013))), at ER 0589.

[26] ER 1361-1393 (U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives, *ATF Study on the Importability of Certain Shotguns*, (Jan. 2011)), at ER 1375.

[27] ER 0214-0232 (Declaration of Professor Daniel W. Webster), at ER 0220.

[28] ER 0176-0188 (Declaration of Lucy P. Allen), at ER 0182.

the preferred ammunition feeding devices in several mass shootings in California and elsewhere."[29]

Among the "anthology of evidence" presented by California below, the district court most sharply scrutinized the Mayors' Against Illegal Guns survey. *Duncan*, 2017 WL 2813727, at *11-16. Specifically, the court focused on the fact that "[o]nly ten of the 92 mass shootings in the survey took place in California." *Id.* at *12. But the district court's criticism is unfounded.

First, even accepting that the overall majority of mass shootings in this country have occurred outside of California, the fact remains that multiple mass shootings have occurred within the State, plainly justifying reasonable regulation aimed at mitigating both the rate and the risk of further tragedies. *Cf. Friedman*, 784 F.3d at 411 ("A ban on assault weapons and large-capacity magazines might not prevent shootings in Highland Park (where they are already rare), but it may reduce the carnage if a mass shooting occurs."). *Second*, the landscapes of the other 49 States are not so distinct that mass shootings that occur outside California cannot legitimately influence the factors considered by legislators and voters within California when assessing the dangers of LCMs. California "was entitled to rely on the experiences of" other states and municipalities "so long as whatever

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[29] ER 0202-0209 (Declaration of Blake Graham), at ER 0205.

evidence … relie[d] upon is reasonably believed to be relevant to the problem [being] addresse[d]." *See City of Renton*, 475 U.S. at 51-52.

2. Additional evidence

There is additional evidence that regulating LCMs will advance California's interest in public safety because of the unique dangers that LCMs pose to law enforcement and members of the public alike. This past summer, to consider one tragic example, a sheriff's deputy with more than two decades serving Sacramento County was slain by a man armed with a high-powered rifle and large-capacity magazine; the man initially began firing at law enforcement through the walls and front door of a motel room the officers had staked out.[30]

Because LCMs allow shooters to keep firing without the need to stop and reload, LCMs are especially lethal. As the Fourth Circuit recently noted, LCMs enable infliction of "mass casualties while depriving victims and law enforcement officers of opportunities to escape or overwhelm the shooters while they reload their weapons." *Kolbe*, 849 F.3d at 127. California's regulation would force a shooter to reload an expended magazine after ten rounds, creating a "2 or 3 second pause," which "can be of critical benefit to law enforcement." *Heller II*, 670 F.3d at 1264; *see also Colorado Outfitters*, 24 F. Supp. 3d at 1072 (the "critical pause"

[30] *Bay Area Man Kills Deputy, Injures 2 CHP Officers in Sacramento Shootout*, CBS SF Bay Area (Aug. 30, 2017), http://sanfrancisco.cbslocal.com/2017/08/30/3-officers-shot-in-sacramento/.

"gives potential victims an opportunity to hide, escape, or attack the shooter"). This "critical pause" is what provided a retired Army colonel the opportunity to incapacitate Congresswoman Gabrielle Gifford's shooter in Tucson, Arizona,[31] and what gave eleven children the chance to flee Sandy Hook Elementary School unharmed.[32]

C. California Has Latitude To Implement Regulations Where There Is A Reasonable Fit Between Such Regulations And California's Interest In Protecting Law Enforcement And The Public

Here, first the legislature, and then the voting public, exercised their right to experiment by closing the loophole on the possession of LCMs in California. In this case, as in other circuits that have examined LCM restrictions, "the evidence demonstrates that large-capacity magazines tend to pose a danger to innocent people and particularly to police officers," supporting the government's "claim that a ban on such magazines is likely to promote its important governmental interests." *Heller II*, 670 F.3d at 1264.

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[31] *Man Who Tackled Shooter in Gabrielle Giffords Attack Dies*, CBS News (Mar. 12, 2015), https://www.cbsnews.com/news/man-who-tackled-shooter-in-gabrielle-giffords-attack-dies/.

[32] Pratt, *Newtown Parents Join Quinn to Call for Ban on High-Capacity Ammo Magazines*, Chi. Trib. (May 19, 2013), http://www.chicagotribune.com/news/local/breaking/chi-newtown-parents-join-quinn-to-call-for-ban-on-highcapacity-ammo-magazines-20130519-story.html.

Intermediate scrutiny does not require definitive proof that the regulation at issue *will* have its intended consequences; such a burden of proof would always be fatal. Instead, the inquiry is whether the regulation is substantially related to an important state interest. The "fit" between prohibiting the possession of LCMs and protecting lives is more than reasonable. *See Wiese*, 2017 WL 2813218, at *4 (listing cases where "courts have found a reasonable fit between similar bans with similar stated objectives"). LCMs are less likely to kill or injure people in California if possession of LCMs is prohibited in California. *See Friedman*, 784 F.3d at 412 ("Local crimes are most likely to be committed by local residents, who are less likely to have access to firearms banned by a local ordinance.").

It is no answer to say that Section 32310 will not prevent *all* incidents of mass shootings. The Constitution does not require California to guarantee perfect results from its regulations; no provision is likely to prevent all incidents of violence. Targeted steps to achieve incremental results are precisely the kinds of reasonable regulations that are both constitutionally permissible and necessitated by the rising threat of mass shootings. *Cf. City of Renton*, 475 U.S. at 52-53 (local government may choose "first to address" "one particular kind" of problem giving rise to undesirable secondary effects). "[T]here can be no doubt" that a prohibition on LCMs "tend[s] to diminish an evil." *See Roschen v. Ward*, 279 U.S. 337, 339

(1929). California's well founded response to the crisis of mass shootings should be upheld as constitutional.

CONCLUSION

The district court's grant of a preliminary injunction should be reversed.

Respectfully submitted,

/s/ Paul R.Q. Wolfson

JONATHAN E. LOWY
MARIEL GOETZ
BRADY CENTER TO PREVENT GUN VIOLENCE
840 First Street, NE, Suite 400
Washington, DC 20002
(202) 370-8101

PAUL R.Q. WOLFSON
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6000

ALLISON TRZOP*
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800

BRETT HAMMON
WILMER CUTLER PICKERING
HALE AND DORR LLP
950 Page Mill Road
Palo Alto, CA 94304
(650) 858-6000

* *Admitted to practice only in Massachusetts. Supervised by members of the firm who are members of the New York bar.*

October 18, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B)(i).

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/s/ Paul R.Q. Wolfson
PAUL R.Q. WOLFSON

October 18, 2017

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Paul R.Q. Wolfson
PAUL R.Q. WOLFSON