

17-56081

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IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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VIRGINIA DUNCAN; RICHARD LEWIS; PATRICK LOVETTE;  
DAVID MARGUGLIO; CHRISTOPHER WADDELL; CALIFORNIA RIFLE &  
PISTOL ASSOCIATION, INC., a California corporation,

*Plaintiffs-Appellees,*

—v.—

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS  
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SAN DIEGO  
CIVIL CASE (3:17-CV-1017-BEN)

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**BRIEF OF *AMICI CURIAE* CALIFORNIA CHAPTER OF THE  
AMERICAN COLLEGE OF EMERGENCY PHYSICIANS, AMERICAN  
ACADEMY OF PEDIATRICS, CALIFORNIA, AND CALIFORNIA  
ACADEMY OF FAMILY PHYSICIANS ON BEHALF OF APPELLANT**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26, *Amicus Curiae* California Chapter of the American College of Emergency Physicians states that it is not a publicly held corporation, does not have a parent corporation, does not issue stock and therefore, no publicly held corporation owns 10% or more of its stock.

Pursuant to Fed. R. App. P. 26, *Amicus* American Academy of Pediatrics, California, states that it is not a publicly held corporation, does not have a parent corporation, does not issue stock and therefore, no publicly held corporation owns 10% or more of its stock.

Pursuant to Fed. R. App. P. 26, *Amicus* California Academy of Family Physicians states that it is not a publicly held corporation, does not have a parent corporation, does not issue stock and therefore, no publicly held corporation owns 10% or more of its stock.

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### **INTEREST OF *AMICI CURIAE***

As physicians, *amici curiae* work every day to preserve human life and health. It is for this reason that *amici* advocated for the enactment of Proposition 63, banning the possession of large capacity ammunition magazines. And it is for this reason that *amici* appear in this case to defend the ability of states to protect public safety and health by prohibiting possession of these uniquely dangerous instrumentalities.

*Amicus curiae* California Chapter of the American College of Emergency Physicians (“California ACEP”) supports emergency physicians in providing the highest quality of care to all patients and to their communities. California ACEP’s members routinely treat victims of shootings involving large capacity magazines. Accordingly, California ACEP and its members can provide the Court with critical information about the horrific consequences that result from having large capacity magazines in lawful circulation.

*Amicus curiae* American Academy of Pediatrics, California, (“AAP”) seeks to attain optimal physical, mental, and social health and well-being for all infants, children, adolescents, and young adults. Founded in 1930 by 35 pediatricians to serve as an independent forum to address children’s health needs, AAP and its members can provide an analysis to this Court regarding the havoc that large capacity magazines wreak on California’s children. AAP has expertise and

experience that can assist the Court in understanding the unique dangers posed by large capacity magazines.

*Amicus curiae* California Academy of Family Physicians (“CAFP”) is the only organization solely dedicated to advancing the specialty of family medicine in California. CAFP focuses on family physicians’ professional challenges and health policy concerns through advocacy and education. Like California ACEP and AAP, CAFP and its members are uniquely positioned to educate the Court on the danger and destruction that large capacity magazines cause.

Pursuant to Fed. R. App. P. 29(a), this brief is filed with the consent of all the parties to this appeal.<sup>1</sup>

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

This case presents an issue of significant importance, namely, whether California’s ban on the possession of particularly dangerous types of ammunition magazines, enacted through ballot initiative Proposition 63, is consistent with the Second Amendment. The Statute, California Penal Code § 32310 (the “Statute”) prohibits possession of large capacity magazines (“LCMs”), defined as firearm magazines with the capacity to accept more than ten rounds of ammunition. The continued use, with particularly lethal consequences, of LCMs in gun violence,

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission.

including mass shootings across the nation, underscores the reasonableness of this prohibition.

This Court should reverse the preliminary injunction granted by the district court. The Statute’s prohibition on LCMs—the manufacture and sale of which have long been banned under a combination of state and federal law—is fully consistent with the Second Amendment, with similar laws having been upheld by every Court of Appeals addressing the issue, including this one. *See Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015); *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017); *Colorado Outfitters Ass’n v. Hickenlooper*, 823 F.3d 537 (10th Cir. 2016);<sup>2</sup> *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015); *New York State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015); *Heller v. District of Columbia* (“*Heller II*”), 670 F.3d 1244 (D.C. Cir. 2011). In each case, courts have explained that eliminating LCMs serves the important government interest of promoting public safety, due to the particular danger posed by LCMs.

There can be no dispute that LCMs are, in fact, dangerous. They are frequently used in mass shootings and gun murders of law enforcement personnel. The record evidence shows that LCMs result in more shots fired, more victims, and more death. Testimony from Dr. Marc Futernick, a Los Angeles emergency room

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<sup>2</sup> In *Colorado Outfitters*, the district court held such a prohibition consistent with the Second Amendment, and the Tenth Circuit Court of Appeals dismissed both the plaintiffs’ appeal, and the underlying case, on the basis of lack of standing.

physician with extensive experience treating gunshot-wound victims, summarized *infra* at 19-20, demonstrates the severe public health risk LCMs pose to innocent civilians. As Dr. Futernick explains, victims with multiple gunshot wounds fare worse than those with a single wound, as “[e]ach additional gunshot wound increases the likelihood of injuring an organ or large blood vessel that could lead to massive hemorrhage and irreversible shock.” The extraordinary power of weapons equipped with LCMs thus makes them impractical and dangerous for self-defense.

The district court acknowledged the danger to public safety posed by LCMs, but held that the benefit to the public was outweighed by the Statute’s imposition on gun owners. Under the Statute, however, California residents may lawfully continue to possess an operable handgun for self-defense. Moreover, they have access to a vast array of standard capacity ammunition magazines, which they may lawfully purchase and possess in any number for self-defense. Appellees are not satisfied, however, and demand that this Court significantly expand the Supreme Court’s holding in *Heller* to guarantee an individual’s ability to possess *LCMs*, devices of military origin specifically designed to facilitate killing large numbers of people with both speed and efficiency.

As every Court of Appeals examining this issue has ruled, laws prohibiting LCMs, which are frequently employed in mass shootings and attacks on law

enforcement officers and are not suitable for individual self-defense purposes, do not infringe the Second Amendment.

## ARGUMENT

### **I. EVERY APPELLATE COURT TO CONSIDER THE ISSUE HAS CONCLUDED THAT BANS ON THE POSSESSION OF LCMs ARE CONSISTENT WITH THE SECOND AMENDMENT.**

The Second Amendment does not confer a “right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). The Statute prohibits possessing only a single weapon, LCMs, possession of which falls outside the Second Amendment right identified in *Heller*.<sup>3</sup>

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<sup>3</sup> LCMs, which are firearm accessories, are not actually “arms” at all, as that term is used in the Second Amendment. The *Heller* majority defined “arms” as “weapons of offence, or armour of defence.” 554 U.S. at 581 (citing 1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978)). An LCM is a special type of magazine, acting to enhance the weapon’s basic features (in this case, the ability to fire more rounds without reloading); it is neither an “integral” nor necessary component of the vast majority of firearms. While a magazine necessary to supply a firearm with *some* bullets may be considered “integral” to core functionality, see *Jackson v. San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014), a magazine that expands that supply beyond 10 rounds is certainly not. The *Heller* majority also relied on Cunningham’s legal dictionary, which illustrated the usage of the term “arms”: “Servants and labourers shall use bows and arrows on Sundays . . . and not bear other arms.” *Heller*, 554 U.S. at 581 (citing Timothy Cunningham, A New and Complete Law Dictionary (2d ed. 1771)). The bows and arrows in the Cunningham legal dictionary example are analogous to guns and ammunition. And just as quivers (repositories of many arrows) are not “arms,” neither are LCMs (repositories of many bullets).

Similar bans on LCMs have been challenged in other states and municipalities, including in the Cities of Sunnyvale, California and Highland Park, Illinois, and the States of New York, Connecticut, Maryland, and Colorado. In those instances, five separate Courts of Appeals, including this Court, applied intermediate scrutiny to bans on LCMs and upheld the laws as achieving “a substantial government interest that would be achieved less effectively absent the” bans. *See Fyock*, 779 F.3d at 1000 (quoting *Colacurcio v. City of Kent*, 163 F.3d 545, 553 (9th Cir. 1998)). *See also Heller II*, 670 F.3d at 1264; *New York State Rifle & Pistol Ass’n, Inc.*, 804 F.3d at 252-53; *Friedman*, 784 F.3d at 412; *Kolbe*, 849 F.3d at 137. The Supreme Court has left these decisions in place by denying review. *See Shew v. Malloy*, 136 S. Ct. 2486 (2016); *Friedman v. City of Highland Park*, 136 S. Ct. 447 (2015).

In *Fyock*, this Court affirmed the district court’s denial of a preliminary injunction upholding the City of Sunnyvale’s restriction on the possession of LCMs. *Fyock*, 773 F.3d at 994. Citing *Heller*, this Court began its analysis by stating that “the regulation of the right [to keep and bear arms] in keeping with the text and history of the Second Amendment is permissible,” noting that “longstanding prohibitions on the possession of ‘dangerous and unusual weapons’ have uniformly been recognized as falling outside the scope of the Second Amendment.” *Id.* at 996-97. Applying intermediate scrutiny, this Court held that

the ban on LCMs served the substantial government interests of “promoting public safety and reducing violent crime.” *Id.* at 1000. The Court predicated its holding on evidence of LCMs’ lethality and inherent dangerousness:

[T]he use of large-capacity magazines results in more gunshots fired, results in more gunshot wounds per victim, and increases the lethality of gunshot injuries. . . . large-capacity magazines are disproportionately used in mass shootings as well as crimes against law enforcement, and . . . studies show[] that a reduction in the number of large-capacity magazines in circulation may decrease the use of such magazines in gun crimes.

*Id.* at 1000-01.

The district court’s attempt to distinguish *Fyock* is unavailing. The district court reasons that the Sunnyvale ordinance did not raise the same concerns as a ban covering the entire State of California. Explaining its position, the district court wrote:

In a dense population municipality where the local government has uniquely cross-trained emergency personnel that can quickly respond to crime, perhaps a law-abiding citizen can make do with a maximum of ten rounds for self-defense. And perhaps there is a higher risk of stray bullets penetrating walls and wounding bystanders. And perhaps there are few elderly or disabled single adults living alone and far from help in Sunnyvale. Perhaps residents are wealthy enough to purchase multiple firearms or live in gated, security-guarded enclaves.

*Duncan v. Becerra*, No. 3:17-cv-1017-BEN, slip op. at 49 (S.D. Cal. June 29, 2017). The district court’s speculative reasoning that a ban on LCMs may be constitutional in some California communities, but not others, defies logic and is unsupported by any evidence in the record. This Court’s conclusion in *Fyock* that

a ban on LCMs was a reasonable fit to “promot[e] public safety and reduc[e] violent crime” did not rest on any facts unique to the City of Sunnyvale. 773 F.3d at 1000-01. To the contrary, this Court looked to evidence chronicling gun crimes across the nation to conclude that LCMs lead to more gun shots fired, more wounds per victim, more lethality per incident, and are disproportionately used in mass shootings and violence against law enforcement personnel.<sup>4</sup> *Id.*

Accordingly, this Court should follow its own sound reasoning and reverse the district court’s issuance of a preliminary injunction, and allow the statewide ban on LCMs—enacted by the people of the State of California—to take effect.

## **II. THE SECOND AMENDMENT DOES NOT PROTECT A RIGHT TO POSSESS LCMS, WHICH ARE ESPECIALLY DANGEROUS AND UNUSUAL WEAPONS.**

Consistent with its recognition that the Second Amendment does not include the “right to keep and carry any weapon whatsoever,” the Supreme Court in *Heller* emphasized “the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’” 554 U.S. at 627 (citing *United States v. Miller*, 307 U.S. 174, 179 (1939)); *see also United States v. Decastro*, 682 F.3d 160, 165 n.4 (2d Cir. 2012) (“[T]he Second Amendment right does not encompass all weapons, but only those ‘typically possessed by law-abiding citizens for lawful purposes’ and thus

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<sup>4</sup> The district court also attempted to distinguish this case from *Fyock* by asserting that the *Fyock* court was presented with a superior evidentiary record. *Duncan*, slip op. at 23-24. In fact, the evidentiary records in the two cases are quite similar.



does not include the right to possess ‘dangerous and unusual weapons.’”) (quoting *Heller*, 544 U.S. at 625, 627).

Moreover, this Court has established intermediate scrutiny as the appropriate level of review to be applied “if a challenged law does not implicate a core Second Amendment right, or does not place a substantial burden on the Second Amendment right,” applying that level of review to San Francisco’s ordinance regulating handgun storage and ammunition sales, as well as the ban on LCMs at issue in *Fyock*. See *Jackson*, 746 F.3d at 960-66; see also *Fyock*, 773 F.3d at 1000-01. As noted above, other Courts of Appeals have also applied intermediate scrutiny to review regulations restricting LCMs. See *supra* at 6. Intermediate scrutiny requires a showing that the law at issue is related to an asserted governmental end that is “significant,” “substantial,” or “important.” See, e.g., *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994).

The Statute easily satisfies intermediate scrutiny precisely because LCMs are so uniquely dangerous that a ban prohibiting individuals from possessing them serves the important government interests of preserving public safety and preventing crime. See, e.g., *United States v. Salerno*, 481 U.S. 739, 748-50 (1987); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976).

The district court cavalierly dismissed much of the evidence advanced by Appellant—including a 35-year survey of shooting incidents that may be the most

comprehensive report on mass shootings currently available—with the observation that such incidents are “rare.” *Duncan*, slip op. at 23-24, 33, 39. After all, observed the district court, “[o]nly ten of the 92 mass shootings in the survey took place in California.” *Id.* at 17 (emphasis supplied). And, besides, the district court noted, “a criminal firing 40 rounds *does not always* result in a mass shooting disaster or wounded bystanders.” *Id.* at 48 (emphasis supplied). Still, in four concessions, each corroborated by supporting evidence in the record, the district court—though wrong in its ultimate decision—correctly found that LCMs are uniquely dangerous and that the Statute would reduce the risk that California’s citizens and personnel are exposed to that danger. These judicial findings, coupled with the record evidence supporting them, lead to the inescapable conclusion that the Statute serves an important government interest that would not be achieved as effectively without the Statute.

**1. LCMs are frequently used in mass shootings.**

The district court concedes that six mass shootings over a recent five-year period (including two in California) involved shooters carrying LCMs, resulting in dozens of deaths. *Id.* at 36-39. Each of those incidents require only the mention of the location in which they occurred to conjure memories of heavily-armed shooters and the horrors they wrought on innocent victims: Santa Monica, California; Sandy Hook Elementary School; Aurora, Colorado; Tucson, Arizona; Binghamton, New

York; and East Oakland, California.<sup>5</sup> *Id.* The shooter in this June’s Congressional baseball practice incident in Alexandria, VA, was armed with LCMs.<sup>6</sup> Two 40-round magazines he was able to carry on his person enabled him to fire at least 70 rounds at the members of Congress, their staff, and intervening law enforcement personnel.<sup>7</sup> And in the very month this brief is being filed, on October 1, Stephen Paddock killed 58 people from the 32nd floor of the Mandalay Bay Resort in Las Vegas, Nevada—here in the Ninth Circuit—armed with an arsenal that included a dozen LCMs,<sup>8</sup> including at least one reported to hold 60 to 100 rounds of ammunition.<sup>9</sup>

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<sup>5</sup> As the district court highlighted, the Santa Monica shooter, who killed five people and injured four more before being killed by law enforcement, purchased LCMs illegally from outside of California. *Id.* at 37. While California law enforcement could not detect the shooter’s illicit purchases, the Statute provides law enforcement with an increased chance of preventing mass shootings: if the Statute were in effect at the time, law enforcement could have stopped the Santa Monica shooter, before his rampage began, simply for possessing an LCM.

<sup>6</sup> Office of the Commonwealth’s Attorney, City of Alexandria, *Use of Force Investigation and Analysis*, at 3-4, 10-11 (Oct. 6, 2017), <https://www.alexandriava.gov/uploadedFiles/commattorney/info/17-001%20-%20Simpson%20Field%20Shooting%20-%20FINAL%2010.06.17.pdf>

<sup>7</sup> *Id.*

<sup>8</sup> See Larry Buchanan, *Inside the Las Vegas Gunman’s Mandalay Bay Hotel Suite*, N.Y. Times (Oct. 4, 2017), [https://www.nytimes.com/interactive/2017/10/04/us/vegas-shooting-hotel-room.html?\\_r=0](https://www.nytimes.com/interactive/2017/10/04/us/vegas-shooting-hotel-room.html?_r=0).

<sup>9</sup> See Alex Horton, *The Las Vegas shooter modified a dozen rifles to shoot like automatic weapons*, Wash. Post (Oct. 3, 2017), <https://www.washingtonpost.com/news/checkpoint/wp/2017/10/02/video-from-las-vegas-suggests-automatic-gunfire-heres-what-makes-machine-guns-different>.

Any one of these incidents is the kind of ghastly horror that legislatures could and should take every action to prevent. For example, in Santa Monica, the shooter murdered his father and brother. Then, in a 13-minute shooting spree, armed with an AR-15, a revolver, three zip guns, and *forty* 30-round LCMs, the shooter travelled to the Santa Monica College library, killing one and injuring others along the way. When he arrived at the library, the shooter unloaded over 70 bullets, killing two more people and injuring more. In total, five people died and four more were injured.<sup>10</sup>

While eight mass shootings in five years is an intolerable phenomenon that in and of itself justifies the Statute as a means to prevent future mass shootings, the district court's finding vastly understates the frequency with which shooters armed with LCMs engage in mass shootings. The district court credited a survey identifying 92 mass shootings in a five-year period from 2009 to 2013, but inexplicably concluded that many of the shootings the survey identified have no relevance to this case. *Duncan*, slip op. at 30-40. That conclusion is erroneous.

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<sup>10</sup> See Robin Abcarian, et al., *Santa Monica shooter's background steeped in trauma, violence*, L.A. Times (June 10, 2013), <http://articles.latimes.com/2013/jun/10/local/la-me-0611-santa-monica-shooting-20130611>; Matt Stevens, *Remorse, but not hate, in note left by Santa Monica gunman*, L.A. Times (June 13, 2013), <http://articles.latimes.com/2013/jun/13/local/la-me-0614-santa-monica-shooting-20130614>; Kevin Herrera, *Santa Monica shooter assembled rifle used in rampage, left 'farewell' note*, Malibu Times (June 14, 2013), [http://www.malibutimes.com/news/article\\_53db2262-d4c0-11e2-9ede-0019bb2963f4.html](http://www.malibutimes.com/news/article_53db2262-d4c0-11e2-9ede-0019bb2963f4.html)

LCMs are used disproportionately in mass shootings. LCMs often play a devastating role in mass shootings in California and elsewhere. Of 62 mass shootings from 1982 to 2012, LCMs were recovered in 50% of incidents.<sup>11</sup> Similarly, in mass shootings between January 2009 and January 2013, 135% more people were shot and 57% more people killed in incidents where assault weapons or LCMs were used.<sup>12</sup>

Even if the district court was correct to conclude from the record that lethal violence perpetrated with LCMs is “rare,” what if such violence could be made even more rare? Is it not a substantial government interest to prevent such attacks from occurring, even if they don’t happen very often? How many of these horrific deaths must California endure before the government interest at stake is high enough for a ban on the possession of LCMs to pass intermediate scrutiny? The district court found credible the fact that shooters armed with weapons with LCMs carried out six mass shootings in a five-year period, resulting in the pointless

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<sup>11</sup> See Mark Follman, et al., *More Than Half of Mass Shooters Used Assault Weapons and High-Capacity Magazines*, Mother Jones (Feb. 27, 2013), <http://www.motherjones.com/politics/2013/02/assault-weapons-high-capacity-magazines-mass-shootings-feinstein>.

<sup>12</sup> See Law Ctr. To Prevent Gun Violence, *Large Capacity Ammunition Magazines Policy Summary* (May 31, 2013), <http://smartgunlaws.org/large-capacity-ammunition-magazines-policy-summary/>; Declarations of Lucy Allen and Professor Daniel W. Webster in Support of Defendant Xavier Becerra’s Opposition to Plaintiff’s Motion for Preliminary Injunction, *Duncan*, No. 3:17-cv-1017-BEN (S.D. Cal. June 5, 2017), ECF No. 11 at 7 n.12, ECF No. 15 at 7.

deaths of dozens of people. As Koper opines, “while rare, incidents in which more than ten shots are fired are especially lethal and injurious.” (Ex. 107 ¶ 86.)

When the harm to the public is particularly heinous—particularly shocking to the collective conscience of the citizenry, as Proposition 63’s passage indicates—constitutional protections are flexible enough to accommodate governmental solutions to the problems. “[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.” *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). Every day, Americans go through a level of airport security that, there being no reason to believe that they will disable or destroy an aircraft or do violence to its passengers or crew, would otherwise be an intolerable violation of their Fourth Amendment right to be “secure in their persons . . . against unreasonable searches.” But the carnage wrought from that infinitesimal number of instances of airplanes being blown up or their inhabitants being massacred is so horrific that these suspicionless airport searches become reasonable under the circumstances, no matter how rare the calamity to be prevented may be. *See, e.g., Elec. Privacy Info. Ctr. v. U.S. Dept. of Homeland Sec.*, 653 F.3d 1, 10 (D.C. Cir. 2011) (finding that the use of so-called “full body scanners” in airport security does not violate the Fourth Amendment because “the need to search airline passengers ‘to ensure public safety can be particularly acute.’”) (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 47-48 (2000)).

Similarly, millions of American schoolchildren must be immunized against contagious diseases before they are allowed to attend public and private schools each year, even if vaccinations violate their sincerely held religious beliefs (or the beliefs of their parents). That it is very “rare” that any of them will infect or be infected by a fellow student does not preclude the state from engaging in this invasive action to protect against the possibility of a broadly lethal epidemic. In *Whitlow v. California*, 203 F. Supp. 3d 1079, 1090 (S.D. Cal. 2016), the court upheld the repeal of California’s personal-belief exemption to its immunization requirements, even though the repeal was not prompted by an actual disease outbreak. As the court reasoned, “the State’s interest in protecting the public health and safety, particularly the health and safety of children, does not depend on or need to correlate with the existence of a public health emergency.” *Id.*; *see also id.* at 1091 (“While removing the [personal-belief exemption] is an aggressive step, so, too, is the goal of providing a means for the eventual achievement of total immunization. An aggressive goal requires aggressive measures, and the State of California has opted for both here.”). The *Whitlow* court pointed to a raft of U.S. Supreme Court, federal appellate court, and California Supreme Court precedent compelling its decision to uphold the repeal of the personal-belief exemption. *Id.* at 1083-85. This Court should similarly recognize the State of California’s right to take “aggressive measures” to safeguard “the public health and safety” by reducing

gun violence wrought by LCMs, even if such violence is as “rare” as the district court found it to be.

**2. The use of LCMs results in more shots fired, more wounds, and more fatalities.**

LCMs make weapons more deadly. Multiple studies in the trial court record have shown that attacks with LCMs are “particularly lethal and injurious.” (Ex. 66, p.141.) It stands to reason that a ban on the possession of LCMs will result in fewer deaths. Although this evidence supplies more than adequate justification for the LCM possession ban under intermediate scrutiny, the district court completely disregarded it. Rather than considering the State’s evidence that LCMs are more lethal when they are used, the district court appeared to consider only the improperly narrow question of whether an LCM possession ban would definitively prevent any mass shooter from carrying out an attack in the first place.

In critiquing the State’s rationale for banning LCMs, the district court simplistically observed that *all* “[g]uns in the hands of criminals are dangerous,” and that, nevertheless, “[g]uns in general are not ‘deleterious devices or products.’” *Duncan*, slip op. at 51, 59 (quoting *Staples v. United States*, 511 U.S. 600, 610 (1994)) (emphasis supplied). This approach missed the key point: LCMs are *particularly* dangerous, much more so than guns not equipped with them. Indeed, LCMs are not only more dangerous than run-of-the-mill guns, they “appear to present even greater dangers to crime and violence than assault weapons alone,



in part because they are more prevalent and can be and are used as ammunition feeding devices in both assault weapons and non-assault weapons.” (Ex. 107 at 7.)

Significantly, the district court did not, in fact, dispute the special deadliness of LCMs. In agreeing with one of the Appellant’s experts, the district court stated: “high capacity magazines only serve[] to enhance the killing and injuring potential of a firearm. No quarrel there.” *Duncan*, slip op. at 48. Indeed, before enacting the federal ban on assault weapons, one Congressional report described weapons capable of accepting LCMs as having “a military configuration characteristic that is not ‘merely cosmetic,’ but ‘serve[s] specific, combat-functional ends.’”<sup>13</sup> (Ex. 56 at 23.)

Unsurprisingly, as weapons serving “combat-functional ends,” firearms paired with LCMs are far more dangerous than their unenhanced counterparts. It is true, as expert Christopher Koper has explained, that “[f]irearms with LCMs, both assault-type and non-assault-type, . . . are more destructive and cause more death and injury in gun crime,” and “result in more shots fired, more victims, and more

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<sup>13</sup> In the wake of the Las Vegas massacre, some members of Congress are now advocating for a ban on bump stocks on the ground that they make automatic and semi-automatic weapons more deadly because they enable shooters to fire more rounds more quickly. See Russell Berman, *Why a Congressional Ban on Bump Stock Is Unlikely*, The Atlantic (Oct. 7, 2017), <https://www.theatlantic.com/politics/archive/2017/10/vegas-shooter-bump-stocks/542313/>. This is the same basis for California’s ban on LCMs. Indeed, bump stocks make semi-automatic weapons more deadly only when they are paired with LCMs to provide a plentiful supply of bullets.

wounds per victim.” (Ex. 107 ¶¶ 32, 38; *see also* Ex. 14 at 410.) Koper describes a recent study analyzing mass shootings in which the researcher concluded that shooters with LCMs caused 10.19 fatalities compared to 6.35 fatalities caused by shooters without LCMs, and 12.39 people shot compared to 3.55 hit by non-LCM shooters. (Ex. 107 ¶ 33; *see also* Ex. 14 at 275.) In other words, where LCMs were employed, there were 60% more fatalities on average and more than three times as many persons with nonfatal gunshot wounds. (Webster Decl., p.7.)

Koper also found that guns used in incidents where a victim was shot were 17% to 26% more likely to have LCMs than guns used in gunfire cases with no wounded victims. (Ex. 107 ¶ 37; *see also* Ex. 14 at 276; Ex. 66 at 142.) Attackers armed with weapons equipped with LCMs tend to shoot their victims an average of three times, while a person killed by an attacker who wields a gun without an LCM is shot an average of two times. (Ex. 74 at 97; *see also* Ex. 14 at 276.) Not only do shooters armed with LCMs shoot more bullets, but the lethality of those additional shots can be exponentially greater than the impact of a weapon without an LCM because the bullets can ricochet and hit multiple people. For example, in the Aurora, Colorado movie theater shooting, the shooter fired 76 shots, but investigators identified 240 “impacts” from those bullets.<sup>14</sup>

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<sup>14</sup> See Larry Ryckman, *Aurora theater shooting trial, the latest from Day 13*, Denver Post (May 14, 2015), <http://www.denverpost.com/2015/05/14/aurora-theater-shooting-trial-the-latest-from-day-13/>.

Because LCMs result in more gunshot wounds, they are more lethal. This ineluctable conclusion is borne out in the testimony of doctors who care for victims of gunshot wounds. In the attached Appendix, Dr. Marc Futernick, an experienced and active Attending Emergency Physician at California Hospital Medical Center, and a past president of *amicus* California ACEP, describes the suffering endured by victims of gun violence, and the frequent need for those with multiple gunshot wounds to undergo “life-saving interventions, such as massive blood transfusions and emergency surgery, to give them any chance for survival.” (Decl. of Dr. Marc Futernick, ¶ 3.) Dr. Futernick explains that victims of multiple gunshot wounds face significantly more challenging medical crises than those who have only suffered a single gunshot wound because “[e]ach additional gunshot wound increases the likelihood of injuring an organ or large vessel that could lead to massive hemorrhage and irreversible shock.” *Id.* ¶ 4. In testimony that could only come from someone who is “among the most experienced in the nation in the care of gunshot-wound victims,” Dr. Futernick writes that the physicians in his ER have saved many victims of single gunshots, while losing many more to multiple gunshot wounds. *Id.* ¶¶ 2, 4. He describes, for example, how caring for patients who have injuries to both the brain and the torso is particularly challenging, as “[t]he care required for these two types of injuries can negatively impact the other, and such patients have higher rates of complications and poor outcomes.” *Id.* ¶ 5.

Beyond the impact on the victims and their families, the time and resources devoted to these injuries also negatively impact the resources that emergency rooms can devote to other patients. *Id.* ¶ 6.

Mass shootings present an “overwhelming” experience for the physicians who treat victims of them.<sup>15</sup> David MacIntyre, a trauma surgeon at Las Vegas’ Sunrise Hospital, recently wrote about his experience treating 214 people (including 70-80 within the first hour) on the evening of the recent massacre.<sup>16</sup> Dr. MacIntyre observed 10 gunshot wounds to the head, 8 to the chest, 13 in the abdominal area, 17 orthopedic injuries, and 33 “others” that all required surgery.<sup>17</sup> Dr. MacIntyre also described 15 fatalities, some of which occurred before the victims even arrived at the hospital.<sup>18</sup>

The above evidence shows there can be no question that LCMs make guns more dangerous. The particular lethality of LCMs, and other military weapons used in civilian settings, led the American College of Emergency Physicians to create a task force to address “the challenges of reducing morbidity and mortality from active shooting incidents and terrorist attacks,” including through the

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<sup>15</sup> See Jeremy Stahl, *What It Was Like to Be a Surgeon in Las Vegas’ Busiest Trauma Unit After Sunday’s Massacre*, Slate.com (Oct. 3, 2017), [http://www.slate.com/blogs/the\\_slatest/2017/10/03/a\\_surgeon\\_s\\_story\\_from\\_sunrise\\_hospital\\_in\\_las\\_vegas.html](http://www.slate.com/blogs/the_slatest/2017/10/03/a_surgeon_s_story_from_sunrise_hospital_in_las_vegas.html).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

“[t]ranslation of military emergency medicine and out-of-hospital (EMS) lessons learned to the civilian setting.”<sup>19</sup>

In *Fyock*, this Court explained that a ban on LCMs was constitutional because of their inherent dangerousness. Echoing the evidence presented in this case, this Court found that LCMs result in “more gunshots fired, . . . more gunshot wounds per victim, and increase[d]. . . lethality of gunshot injuries.” *Fyock*, 773 F.3d at 1001.<sup>20</sup> This is no less true today that it was when this Court said it in *Fyock*.

**3. Weapons with LCMs pose a significant threat to law enforcement personnel and the general public.**

LCMs are not only dangerous because they are frequently involved in mass shootings and enhance the lethality of firearms. They are also particularly dangerous because criminals often use them. An estimated 25% of gun homicides are committed with guns equipped with LCMs. (Ex. 74 at 28.) As the district court wrote, “possession and use of high capacity magazines by individuals committing

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<sup>19</sup> Press Release, American College of Emergency Physicians, Announcing the new ACEP High Threat Emergency Casualty Care Task Force (2016), <http://www.thecentralline.com/?p=3212>.

<sup>20</sup> An analysis of criminal firearm use in Baltimore, for example, found that “attacks with semiautomatics, particularly those equipped with LCMs, result in more shots fired, leading both to more injuries and injuries of greater severity. Such attacks also appear to result in more wounds per victim. This is significant because gunshot victims who are shot more than once are 60% more likely to die than victims who receive only one gunshot wound.” (Ex. 14 at 276.)

criminal acts pose a significant threat to law enforcement personnel and the general public. No doubt about that.” *Duncan*, slip op. at 48.

Indeed, LCMs are used in a significant portion of *all* gun crimes. Evidence shows that LCMs were used in approximately 13% to 26% of all gun crime in the ten years prior to the enactment of the federal assault weapon and LCM ban in 1994. (Ex. 75 at 119; Ex. 66 at 18; Ex. 107 ¶ 28; Ex. 75 at 162.)<sup>21</sup> Moreover, since the district court issued its decision, Christopher Koper has completed new research showing that firearms equipped with LCMs “have grown substantially as a share of crime guns since the expiration of the federal ban” on assault weapons and LCMs.<sup>22</sup>

Criminals choose LCMs to attack law enforcement. Before the enactment of the federal assault weapon ban, 31% to 41% of gun murders of police involved the use of LCMs. (Ex. 107 ¶ 30; Ex. 75 at 162.) Prohibitions on LCMs protect officers because gun users must reload more often. For officers confronting dangerous shootouts, the “‘2 or 3 second pause’ during which a criminal reloads

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<sup>21</sup> All citations to exhibits refer to exhibits to the Declaration of Alexandra Robert Gordon in Support of Defendant Attorney General Xavier Becerra’s Opposition to Plaintiffs’ Motion for Preliminary Injunction. *Duncan*, No. 3:17-cv-1017-BEN (S.D. Cal. June 5, 2017), ECF Nos. 17–18-9.

<sup>22</sup> Christopher S. Koper et al., *Criminal Use of Assault Weapons and High-Capacity Semiautomatic Firearms: an Updated Examination of Local and National Sources*, J. Urban Health, Oct. 2, 2017, <https://www.ncbi.nlm.nih.gov/pubmed/28971349>.

his firearm ‘can be of critical benefit to law enforcement.’” *Heller II*, 670 F.3d at 1264. For example, in January 2011, bystanders subdued Jared Lee Loughner during the mass shooting in Tucson only after he was forced to pause to reload.<sup>23</sup> Similarly, the interruption to reload is what prevented Colin Ferguson from continuing his 1995 Long Island Rail Road shooting spree that killed six people and injured 19 more.<sup>24</sup> The importance of the opportunity to disarm during reloading was also illustrated with John Meis’ actions to neutralize a shooter in Washington State.<sup>25</sup>

#### **4. The Statute will dispossess criminals of LCMs.**

Finally, the district court concedes that the Statute will either “knock large capacity magazines out of the hands of criminals” or criminals “will be thrown in jail while the magazines are destroyed as a public nuisance.” *Duncan*, slip op. at 55. The district court agrees that LCMs have been used to kill dozens of people in grotesque acts of violence more than once each year, that LCMs help to enhance

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<sup>23</sup> See Sam Quinones & Nicole Santa Cruz, *Crowd Members Took Gunman Down*, L.A. Times (Jan. 9, 2011), <http://articles.latimes.com/2011/jan/09/nation/la-na-arizona-shooting-heroes-20110110>.

<sup>24</sup> See Pat Milton, *Colin Ferguson Convicted of Murdering Six in Train Massacre*, AP News Archive (Feb. 18, 1995), <http://www.apnewsarchive.com/1995/Colin-Ferguson-Convicted-of-Murdering-Six-in-Train-Massacre/id-49433c4650ab4c17b9b412fe0a8717d6>.

<sup>25</sup> Seattle Times, *1 dead, others hurt in shooting at Seattle Pacific University before student tackles gunman* (June 5, 2014), <https://www.seattletimes.com/seattle-news/1-dead-others-hurt-in-shooting-at-seattle-pacific-university-before-student-tackles-gunman/>.

the lethality of those who use them, and that the general public and members of law enforcement are at risk as a result of criminals and would-be criminals who possess them.

Given the danger LCMs pose to law enforcement and the general public, it is clear, as Christopher Koper suggests, that a ban on the possession of LCMs “can potentially reduce the number and lethality of gunshot victimizations by forcing criminals to substitute assault weapons and other weapons with LCMs with less destructive firearms.”<sup>26</sup> (Ex. 107 ¶ 83.) In a recent analysis, CNN concluded that states that have enacted bans on LCMs are associated with a 63% lower rate of mass shootings than their counterparts that do not have such bans in place.<sup>27</sup>

The district court, however, held that achieving this indisputable public good is impermissible because the Statute “hammers magazines out of the hands of long time law-abiding citizens.” *Duncan*, slip op. at 55. Underlying the district court’s concern is the belief that “[d]efensive gun violence may be the only way a law-abiding citizen can avoid becoming a victim.” *Id.* That is not so.

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<sup>26</sup> Even a small reduction in shootings is a societal benefit, not only because fewer people will be shot and killed, but also because assault-related gunshot injuries result in average medical costs of \$28,894 per injury. (Ex. 75 at 124.) If shootings are reduced just 1%, there would be 650 fewer shootings, saving total medical costs of \$18,781,100 annually. (*Id.*)

<sup>27</sup> Sam 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>.



Contrary to the district court's suggestion, possessing LCMs does not prevent law-abiding citizens from being victims of crime. Just the opposite. The exceedingly dangerous nature of LCMs make them an inappropriate choice for self-defense in the home. *See, e.g., Hightower v. City of Boston*, 693 F.3d 61, 66, 71 & n.7 (1st Cir. 2012) (noting that "large capacity weapons" are not "of the type characteristically used to protect the home.>"). In the words of a former Baltimore Police Colonel:

[t]he typical self-defense scenario in a home does not require more ammunition than is available in a standard 6-shot revolver or 6-10 round semiautomatic pistol. In fact, because of potential harm to others in the household, passersby, and bystanders, too much firepower is a hazard.<sup>28</sup>

Responsible self-defense should not include the ability to spray dozens of additional bullets in a home where others may be easily placed in jeopardy. LCMs actually exacerbate concerns about stray bullets because "the tendency for defenders [is] to keep firing until all bullets have been expended." *Id.*

LCMs jeopardize public safety by allowing the rapid fire of ammunition without the need to reload as often, are frequently used in mass public shootings, and jeopardize the law enforcement officers who serve and protect the citizenry. California has an interest in preventing devastating attacks committed with LCMs

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<sup>28</sup> Brian J. Siebel, Brady Ctr. To Prevent Gun Violence, *Assault Weapons: Mass Produced Mayhem* at 16 (Oct. 2008), <http://www.bradycampaign.org/sites/default/files/mass-produced-mayhem.pdf>.

against its citizens and personnel. Given the real, immediate, and ongoing threats to the safety of the public and law enforcement caused by LCMs, California has made a reasonable choice to reduce these threats by prohibiting their possession. Since the most effective way to eliminate the danger and destruction caused by LCMs is to prohibit their possession, a substantial relationship clearly exists between the Statute and the government's significant interests in preserving public safety.

### **CONCLUSION**

For the reasons set forth above, this Court should reverse the decision of the district court and lift the preliminary injunction it imposed.

October 19, 2017

Respectfully submitted,

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Jonathan K. Baum

*Counsel for Amici Curiae California  
Chapter of the American College of  
Emergency Physicians, American  
Academy of Pediatrics, California, and  
California Academy of Family Physicians*

Dated: October 19, 2017

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing Brief of *Amici Curiae* California Chapter of the American College of Emergency Physicians, American Academy of Pediatrics, California, and California Academy of Family Physicians on Behalf of Appellant with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 19, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/Jonathan K. Baum

Jonathan J. Baum

## **APPENDIX**

**No. 17-56081**

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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VIRGINIA DUNCAN, ET AL.,  
*Plaintiffs-Appellees*

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY  
AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,  
*Defendant-Appellant.*

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On Appeal from the United States District Court  
for the Southern District of California  
Civil Case (3:17-cv-1017-BEN)

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**DECLARATION OF MARC FUTERNICK, MD**

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I, Marc Futernick, MD, declare under penalty of perjury that the foregoing is true and correct:

1. I am the Medical Director of Emergency Services and an active Attending Emergency Physician at California Hospital Medical Center (“CHMC”) in Los Angeles, California. I formerly served as the President of *amicus* California Chapter of the American College of Emergency Physicians.

2. CHMC’s Emergency Department cared for more than 80,000 patients in 2016 and serves as a Level II trauma center. CHMC’s trauma center treats more patients than any other private facility in Los Angeles, and frequently treats the highest percentage of penetrating

traumas in the city. Penetrating traumas include gunshots and stab wounds. As a result, CHMC's physicians are among the most experienced in the nation in the care of gunshot-wound victims.

3. Having worked at CHMC for over a decade, I have personally cared for many gunshot-wound victims and regularly witnessed the severity of their injuries. I have also witnessed the devastating impact these life-changing events have on patients and their families. The pain and suffering of these patients is tremendous. We routinely care for vibrant, healthy young adults howling in misery from isolated injuries such as extremity gunshot wounds. Unfortunately, we also frequently treat patients with multiple wounds who are too critically ill to cry out at all. These patients require life-saving interventions, such as massive blood transfusions and emergency surgery, to give them any chance for survival.

4. Although it is intuitively obvious, I want to focus on the impact of multiple gunshot wounds and the increased morbidity and mortality these patients face. Each additional gunshot wound increases the likelihood of injuring an organ or large blood vessel that could lead to massive hemorrhage and irreversible shock. Catastrophic injuries are far more common when patients have multiple wounds. We have saved many patients with single gunshot wounds, but lost many more patients who suffered multiple wounds.

5. Some of the most challenging patients are those who have gunshot-wound injuries to both the brain and the torso. The care required for these two types of injuries can negatively impact the other, and such patients have higher rates of complications and poor outcomes. Unfortunately, resuscitating these patients is often unsuccessful, but the personnel and resources (*e.g.*, blood) dedicated to these efforts are the same regardless of the expected outcome.

6. There are also potential ramifications for other patients suffering emergency conditions, including those in pre-hospital settings. Patients suffering from non-traumatic

illnesses, which can be equally time-sensitive as traumatic ones, may suffer delays in care or therapy due to the intense focus of resources dedicated to victims of multiple gunshot wounds. For example, a blood bank can process only a limited number of blood transfusion units at one time, and the demand becomes more acute with multiple patients. Although staff and physicians do their best to manage all critical patients simultaneously, the impact of caring for patients with multiple gunshot wounds can have ripple effects across the community.

7. I have personally treated hundreds of victims of gun violence, including dozens of patients with five or more wounds. To restate the obvious, patients with multiple gunshot wounds are much more likely to die, or suffer permanent sequelae, such as paralysis, coma, amputations, and chronic gastrointestinal complications.

8. I am haunted by the anguish and tears of my patients' loved ones as they mourn the sudden death of their young and healthy children, spouses, or parents. All of their lives are changed in an instant.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 17th day of October, 2017.

/s/ Marc Futernick  
\_\_\_\_\_  
Marc Futernick, MD