No. 17-56081

IN THE 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. 17-cv-01017 (Benitez, J.)

BRIEF OF *AMICI CURIAE* GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE AND CALIFORNIA LIEUTENANT GOVERNOR GAVIN NEWSOM IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Giffords Law Center to Prevent Gun Violence states that it has no parent corporations. It has no stock, and therefore, no publicly held company owns 10% or more of its stock.

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INTEREST OF *AMICI CURIAE*

Amicus curiae Giffords Law Center to Prevent Gun Violence ("Law Center"), formerly the Law Center to Prevent Gun Violence, is a national, nonprofit organization dedicated to reducing gun deaths in America. The organization was founded in 1993 after a gun massacre at a San Francisco law firm, perpetrated by a shooter armed with semiautomatic pistols and large-capacity magazines, and was renamed Giffords Law Center in October 2017. Today, Giffords Law Center provides legal expertise in support of effective gun safety laws, and has filed *amicus* briefs in *District of Columbia v. Heller*, 554 U.S. 570 (2008), *Fyock v. City of Sunnyvale*, 779 F.3d 991 (9th Cir. 2015), and numerous other cases.

Amicus curiae Gavin Newsom is the Lieutenant Governor of the State of California, a former two-term Mayor of San Francisco, and a leading advocate for sensible firearm policies. As Lieutenant Governor, Mr. Newsom partnered with *amicus* Giffords Law Center to draft and advocate for Proposition 63 (the "Safety for All" Act), which included the prohibition on possession of large-capacity magazines enjoined by the district court in this case. As authors and key proponents of Proposition 63, *amici* have a special interest in participating in this constitutional challenge.

INTRODUCTION AND SUMMARY OF ARGUMENT[1]

On January 8, 2011, a man walked into a Tucson parking lot where Congresswoman Gabrielle Giffords was hosting a constituent meeting. Using a semiautomatic pistol equipped with a 33-round magazine, the man opened fire on Congresswoman Giffords, her staff, and members of the public lined up to meet her. In 15 seconds, he fired 33 rounds and hit 19 victims, killing six, including a young girl named Christina-Taylor Green. Congresswoman Giffords's husband, retired Navy Captain Mark Kelly, later testified that a law prohibiting ammunition magazines holding more than 10 rounds could have saved the girl's life:

> The shooter in Tucson . . . unloaded the contents of [his 33-round] magazine in 15 seconds. Very quickly. It all happened very, very fast. The first bullet went into Gabby's head. Bullet number 13 went into a nine-year-old girl named Christina-Taylor Green, who was very interested in democracy and our Government and really deserved a full life committed to advancing those ideas. …. When [the shooter] tried to reload one 33-round magazine with another 33-round magazine, he dropped it. And a woman named Patricia Maisch grabbed it, and it gave bystanders a time to tackle him. I contend if that same thing happened when he was trying to reload one 10-round magazine with another 10-round magazine, meaning he did not have access to a high-capacity magazine, and the same thing happened, Christina-Taylor Green would be alive today.[2]

Unfortunately, preventable tragedies like the one Captain Kelly describes have

[1] All parties have consented to or stated they do not oppose the filing of this brief. No counsel for a party authored this brief in whole or in part. No person other than *amici*, their members, or their counsel contributed money to fund this brief's preparation or submission.

[2] 159 Cong. Rec. S2743 (daily ed. Apr. 17, 2013) (statement of Sen. Leahy) (quoting Judiciary Committee testimony of Captain Mark Kelly).

become commonplace. Large-capacity magazines ("LCMs") holding more than 10 rounds of ammunition—in some cases up to 100 rounds—allow shooters to inflict mass casualties by continuously firing without pausing to reload. LCMs are the thread linking notorious high-fatality gun massacres, including the 2012 Sandy Hook shooting, where a gunman fired 154 rounds, killing 26 children and teachers; the 2015 San Bernardino shooting, where assailants shot 36 people and killed 14; and the 2016 Orlando shooting, where a gunman shot over 100 people and killed 49. And this month, a shooter in Las Vegas used LCMs to perpetrate the deadliest mass shooting in modern American history, firing near-continuously into a crowd for ten minutes, killing 58 people and injuring 489.[3]

These horrific events underscore the extraordinary lethality of LCMs—how they enable even untrained shooters to take down dozens of people, and how they eliminate the possibility of interruption while shooters reload. It is the latter point, in particular, that makes LCMs so dangerous. In many mass shootings, the pause to reload is when lives are saved. Other incidents in which LCMs holding more than 10 rounds were not used—and rampages were cut short while shooters reloaded—stand in stark contrast to the examples above.[4]

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[3] Alex Horton, *Las Vegas Shooter Modified a Dozen Rifles to Shoot Like Automatic Weapons*, THE WASHINGTON 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/.

[4] During the 2013 massacre at Washington Navy Yard, a man with a seven-shell

To help prevent the occurrence of high-fatality gun massacres, and to reduce the bloodshed when these tragedies occur, California outlawed possession of magazines holding more than 10 rounds of ammunition (the "LCM possession ban"). As discussed below, this measure was first enacted by the Legislature in July 2016, and in November 2016, by a 25-point margin, California voters adopted the later, controlling version of the policy ("Proposition 63").

Proposition's 63's LCM possession ban is an evidence-based measure that is consistent with the Second Amendment. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that law-abiding citizens have a right to keep a handgun in the home for self-defense but recognized that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." It is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 U.S. at 626. *Heller* approved banning "dangerous and unusual weapons," and confirmed that other "longstanding" regulations are

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shotgun killed twelve people, but while he reloaded, a victim he had cornered was able to crawl to safety. In 2014, a gunman at Seattle Pacific University was tackled while reloading. Other examples abound. John Wilkens, *Construction Workers Felt They 'Had To Do Something,'* SAN DIEGO UNION-TRIBUNE, Oct. 11, 2010, http://www.sandiegouniontribune.com/sdut-hailed-as-heroes-construction-workers-who-stopped-2010oct11-htmlstory.html (workers stopped gunman "as he stopped to reload"); *Deer Creek Middle School Shooting*, HUFFINGTON POST, Apr. 25, 2010, http://www.huffingtonpost.com/2010/02/23/deer-creek-middle-school_n_473943.html (math teacher "tackled the suspect as he was trying to reload"); Sheila Dewan, *Hatred Said to Motivate Tenn. Shooter*, THE NEW YORK TIMES, Jul. 28, 2008, http://www.nytimes.com/2008/07/28/us/28shooting.html ("It was when the man paused to reload that several congregants ran to stop him.").

constitutional. *Id.* at 626-27 & n.26.

California's LCM possession ban is unlike the handgun ban *Heller* invalidated. To suggest otherwise would ignore *Heller*'s recognition that people are not entitled to "any weapon whatsoever." Plaintiffs-Appellees' ("Plaintiffs'") Second Amendment claim fails because the law they challenge does not burden Second Amendment-protected activity. LCMs are an accessory, not a protected "arm," but either way, their possession may be banned because they are dangerous, unusual devices best suited for military purposes, and have historically been restricted. Even if LCMs were constitutionally protected, the State's evidence amply shows that the ban survives intermediate scrutiny. Because Plaintiffs' Second Amendment claim cannot succeed, the Court should reverse the preliminary injunction order.[5]

ARGUMENT

I. The LCM Possession Ban Closes a Dangerous Loophole in Existing Law

A. California's Gun Laws and "Grandfathering" Loophole

Over the last two decades, California has comprehensively addressed illegal gun use and reduced firearm homicides and accidents. The district court critiqued California's "matrix of gun control laws [as] among the harshest in the nation." 1ER-0005. To the contrary, California's laws are among the nation's most

[5] The State also correctly explains why the possession ban affords due process and is not an unlawful "taking." *Amici* join those arguments in full.

effective. Between 1993 and 2015, the state passed laws regulating gun shows; restricting "junk" handguns, assault weapons, and LCMs; and creating a system to identify purchasers who later became prohibited from gun possession.[6] Over those same 22 years, California's gun death rate decreased by 56%[7] – more than double the national decline. Centers for Disease Control and Prevention, Web-based Injury Statistics Query and Reporting System (WISQARS), *Fatal Injury Data*, https://www.cdc.gov/injury/wisqars (visited September 12, 2017). Today, with its strong gun laws, California has a much lower firearm death rate than the rest of the nation – 7.4 gun deaths per 100,000, compared to the national average of 10.2. Nat'l Ctr. for Health Statistics, *Stats of the State of California* (Jun. 2016), https://www.cdc.gov/nchs/pressroom/states/california.htm.

Among the state's lifesaving polices are laws designed to stem the proliferation of military-grade magazines. California first restricted access to LCMs in 2000, by prohibiting the manufacture, importation, sale, and transfer of magazines holding more than 10 rounds. This law—like the 1994 federal ban—was enacted soon after the gun industry began packaging LCMs with newer semiautomatic firearm models. Before the 1980s, the only handgun most

[6] Giffords Law Center, *California's Smart Gun Laws: A Blueprint for the Nation*, http://lawcenter.giffords.org/californias-smart-gun-laws-a-blueprint-for-the-nation/.

[7] *Id.* n.2 (CDC data shows that California's gun death rate fell from 17.48 per 100,000 residents in 1993 to 7.65 per 100,000 residents in 2015).

Americans owned was a revolver, usually holding six rounds of ammunition. Violence Policy Center, *Backgrounder on Glock 19 Pistol and Ammunition Magazines Used in Attack on Representative Gabrielle Giffords And Others* 1 (Jan. 2011), http://www.vpc.org/fact_sht/AZbackgrounder.pdf. Police also used six-round revolvers, which were "seen as adequate for officers' defensive needs." Eugene Volokh, *Are Laws Limiting Magazine Capacity to 10 Rounds Constitutional?*, VOLOKH CONSPIRACY (Mar. 6, 2014), https://washingtonpost.com/news/volokh-conspiracy/wp/2014/03/06/are-laws-limiting-magazine-capacity-to-10-rounds-constitutional/. But in the 1980s, the gun industry began aggressively promoting a new generation of pistols that can be equipped with larger magazines. In the 1980s and 1990s, more jurisdictions—including California—recognized that access to the LCMs marketed with these guns endangered the public, and modern LCM restrictions came into being.

Although the state prohibited the manufacture and sale of LCMs, California initially did not ban possession of LCMs obtained before the prohibition took effect in 2000. But instead of serving as a limited exception, this "grandfathering" exception swallowed the rule by making the LCM restrictions impossible to implement. LCMs lack identifying marks to indicate when they were manufactured or sold, meaning police could not tell when recovered LCMs were acquired or manufactured—and thus whether they were legal. *See* 9ER-2123 (law enforcement

officials believed a possession ban was needed to enforce existing LCM restrictions). Reflecting the sheer difficulty of enforcement, Los Angeles police started to recover *more* crime guns loaded with LCMs after the 2000 restrictions took effect, suggesting the law was not having its intended effect. Press Release, Citizens Crime Commission of New York City, *NYC & LA City Councils Introduce Rezo for Federal Ban on Large Capacity Magazines* (Mar. 2, 2011), http://www.nycrimecommission.org/pdfs/CrimeCmsnNYCLACouncils.pdf.

To address the troubling proliferation of LCMs in California despite a ban on their sale or transfer, in 2015, *amici* drafted Proposition 63, which proposed to close the LCM grandfathering loophole (among other provisions). Proposition 63 was carefully drafted to ease the burdens of compliance. For example, by incorporating California's existing definition of an LCM, codified in California Penal Code § 16740, Proposition 63 allows LCM owners to comply by permanently altering LCMs so that they cannot hold more than 10 rounds. Indeed, Plaintiff California Rifle & Pistol Association previously submitted a letter to the state calling attention to this simple option. 3ER-0608-21.

B. The Need for Proposition 63

California's LCM possession ban was adopted to protect the public from the devastating use of LCMs in mass shootings and everyday crimes. When LCMs are used in shootings, the outcome is far more lethal, because more shots are fired and

bystanders' opportunities to intervene are limited. On average, shooters who use LCMs or assault weapons shoot more than twice as many victims compared to other mass shootings. Everytown Research, *Analysis of Recent Mass Shootings*, at 4 (Aug. 2015), https://everytownresearch.org/documents/2015/09/analysis-mass-shootings.pdf. Use of LCMs or assault weapons correlates with 47% more victims killed, *id.*, and medical research corroborates the unsurprising fact that shootings involving LCMs are deadlier. Jen Christensen, *Gunshot Wounds Are Deadlier Than Ever As Guns Become Increasingly Powerful*, CNN, Jun. 14, 2016, http://www.cnn.com/2016/06/14/health/gun-injuries-more-deadly/.

The district court discounted the State's interest in reducing mass shooting deaths by finding that the LCM ban is a "haphazard solution likely to have no effect on an exceedingly rare problem." 1ER-0033. The relative rarity of mass shootings does not diminish the importance of efforts to stem injuries and community trauma resulting from them, especially in light of their increasing frequency and lethality. Indeed, the district court overlooked evidence that mass shootings are not "exceedingly rare," and are becoming more commonplace. Dr. Louis Klarevas recently surveyed high-fatality mass shootings (with at least six fatalities) between 1966 and 2015, and found that they have risen in incidence and lethality to "unprecedented levels in the past ten years." Louis Klarevas, RAMPAGE NATION: SECURING AMERICA FROM MASS SHOOTINGS 215, 76-79 (2016) (Ex. A at

8-9).[8] Because some researchers have defined "mass shootings" to include incidents where four or more are killed, Dr. Klarevas also analyzed the universe of such incidents – which are also increasing. *E.g.*, Tanya Basu, *Mass Public Shootings in the U.S. Have Risen*, TIME, Aug. 4, 2015, http://time.com/3983557/mass-shootings-america-increasing (citing analysis by the Congressional Research Service). Dr. Klarevas found that from 2013-2015, an average of 433 Americans were killed annually in four-or-more-fatality attacks. *Id.* at 85-86 (Ex. A at 12-13). This greatly outstrips U.S. fatalities from terrorist attacks. In the decade after 9/11, terrorists killed 27 people —the same number of children and educators killed at Sandy Hook in one morning. *Id.*

Dr. Klarevas's analysis also corroborates other experts' conclusion that banning LCMs is likely to reduce gun deaths. 2ER-0230-31. (Webster Decl. ¶ 26) ("good reason to believe" LCM ban will "lead to modest reductions in gun violence"); 2ER-0191 (Donohue Decl. ¶ 10) ("LCM ban is well-tailored to limit … violent criminal behavior"). Dr. Klarevas found that "the factor most associated with high death tolls in gun massacres" is use of a "magazine holding more than ten bullets." RAMPAGE NATION, *supra*, at 257 (EX. A at 24). "If such magazines were completely removed from circulation, the bloodshed" during mass shootings

[8] The Law Center submitted excerpts from Dr. Klarevas's mass shooting survey to the district court. Those excerpts are also appended here as Exhibit A.

"would be drastically reduced." *Id.* 215-25 (Ex. A at 15-20).[9]

The above evidence, and that submitted by the State, shows that banning LCMs can be expected to reduce the incidence and lethality of gun massacres. The evidence also shows that California's prior LCM restrictions, with a grandfathering exception that swallowed the general prohibition, did not fully achieve the state's desired safety gains. Proposition 63 proposed to end grandfathering, and accordingly, to reduce death tolls during mass shootings and other homicides.

C. Proposition 63's Enactment

Proposition 63's language was finalized in December 2015 and readied for the November 2016 ballot. However, after the deadline to finalize the initiative's text passed, lawmakers galvanized by the San Bernardino shooting introduced new gun safety bills. On July 1, 2016, Governor Brown signed SB 1446, which, like Proposition 63, ends grandfathering by prohibiting LCM possession. In November 2016, California voters approved Proposition 63. Since Proposition 63 was enacted later and amends the same code sections, Proposition 63 supersedes SB 1446. *See People v. Bustamante*, 57 Cal. App. 4th 693, 701 (Cal. Ct. App. 1997).

The voter initiative is "one of the most precious rights of [California's]

[9] In fact, reduced bloodshed is exactly what Dr. Klarevas found occurred between 1994 and 2004, when federal law restricted LCM possession. RAMPAGE NATION, *supra*, at 240-43 (Ex. A at 22-23). While the federal ban was in effect, fatalities during large-scale mass shootings declined substantially, and spiked again when the ban expired. *Id*. at 243 (Ex. A at 23).

democratic process." *Brosnahan v. Brown*, 32 Cal. 3d 236, 261-62 (Cal. 1982). When considering constitutional challenges to a ballot measure, courts are empowered to "resolv[e] reasonable doubts in favor of the people's" initiative right. *Id.* While voters cannot pass an unconstitutional measure, in this case, it remains appropriate to safeguard the people's initiative power by faithfully applying *Heller* and this Court's precedents. *Heller*, 554 U.S. at 626 (the Second Amendment is "not a right to keep and carry any weapon whatsoever"); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 966 (9th Cir. 2014) (crediting city's "reasonable inference" from evidence supporting gun law's efficacy).

Under those precedents, Plaintiffs' Second Amendment challenge cannot succeed. The district court erred in holding otherwise.

II. The LCM Possession Ban is Constitutional Because It Regulates Activity Outside the Second Amendment's Scope

California's LCM possession ban is constitutional as a matter of law because it prohibits only one class of uniquely dangerous accessories that are unprotected by the Second Amendment. As other courts have ruled, the Constitution does not guarantee the right to possess magazines often selected by mass shooters to quickly kill and injure many people. *Kolbe v. Hogan*, 849 F.3d 114, 135 (4th Cir. 2017) (en banc) ("the Second Amendment does not shield" LCMs); *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015) (upholding LCM ban and observing "at least some categorical limits on the kinds of weapons that can be

possessed are proper").

In *Fyock v. City of Sunnyvale*, this Court heard a challenge to an ordinance banning LCM possession, and affirmed the denial of the challengers' motion for a preliminary injunction. 779 F.3d at 1001. The district court held that while the ordinance imposes a "slight" burden on Second Amendment rights, it survived intermediate scrutiny. *Fyock*, 25 F. Supp. 3d 1267, 1281 (N.D. Cal. 2014). This Court affirmed the intermediate scrutiny ruling, but did not decide whether the Second Amendment protects LCMs, holding only that the district court's ruling on that score was not an abuse of discretion. *Fyock*, 779 F.3d at 997-98.

After this Court's ruling in *Fyock*, new research on LCMs became available, including Dr. Klarevas's survey of mass shootings (discussed *supra* pp. 9-10), and a historical analysis showing the ubiquity of laws like LCM bans (discussed *infra* pp. 22-23). This important work suggests that this Court need not even reach the question of whether California's LCM prohibition survives intermediate scrutiny, because the Second Amendment does not protect LCM possession in the first instance. There are four independent reasons why this is true.

A. LCMs Are Not Protected "Arms"

First, the Second Amendment applies to "arms," which *Heller* defined 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 neither—it is

an ammunition storage device. 1ER-0155 (Complaint ¶ 1 & n.1). When LCMs are used, they increase the number of rounds a gun may fire before it is necessary to reload, but a gun will still function with a legal magazine (it will just fire no more than 10 rounds without reloading). Because they are optional devices, LCMs are better categorized as an accessory than as offensive or defensive weaponry.[10]

The district court concluded that LCMs are arms, but its reasoning shows only that *some* kind of magazine is essential to a firearm that accepts magazines. 1ER-0016 ("Most, if not all, pistols and many rifles are designed to function with detachable magazines."). It is true that a magazine is required to operate many arms. It is also true that an LCM that can hold more than 10 rounds is an option for such arms, and may even come standard as the "factory-issued" magazine. But such arms will also function with a legal magazine holding 10 or fewer rounds, meaning an LCM that can accept more than ten rounds is still only an *option*. 1ER-0165 (Complaint ¶ 44) ("Firearm users have had the choice of magazine types and capacity for over 130 years"). It is not an essential part, and the district court's reasoning does not prove otherwise. An LCM can be swapped for a lower-capacity

[10] Historical sources support the conclusion that accessories like LCMs are not "arms." A founding-era militia law distinguished "arms" and "ammunition" from a third category, "accoutrements"—analogous to accessories that enhance an already-functional firearm. *Heller*, 554 U.S. at 650 (Stevens, J., dissenting) (quoting Act for Regulating and Disciplining the Militia, 1785 Va. Acts ch. 1, § 3, p. 2). The gun industry draws this distinction today, selling magazines as "accessories," not firearms or ammunition. *E.g.*, *Accessories*, ATLANTIC FIREARMS, www.atlanticfirearms.com/accessories.html (visited Jun. 21, 2017).

magazine, or it can be permanently modified so that it can only store 10 rounds. California Penal Code § 16740. Plaintiffs agree. 3ER-0613 ("There are countless articles and videos online on how to modify LCMs to hold 10 rounds").

That is not to say that *ammunition*, or magazines with a maximum capacity of 10 rounds, should never be considered protected by the Second Amendment. *Cf.* 1ER-0016 (PI Order at 16). A magazine necessary to provide a constitutionally-protected firearm with bullets that facilitate its intended use may be essential to the arm's core function, unlike LCMs. *See Jackson*, 746 F.3d at 967 ("A regulation eliminating a person's ability to obtain or use ammunition could" "make it impossible to use firearms for their core purpose."); *Fyock*, 779 F.3d at 998 (recognizing corollary "but not unfettered" right to ammunition "necessary to render firearms operable"). But the argument that ammunition is integral to a gun's function is inapplicable to a magazine that enhances ammunition capacity far beyond what is needed to make a firearm operable for lawful purposes, such as self-defense.

LCMs are not protected "arms" because they optionally enhance ammunition storage beyond what is constitutionally required. Like scopes or silencers, LCMs are not arms or ammunition, but non-essential accessories. *See United States v. Cox*, 235 F. Supp. 3d 1221, 1221 (D. Kan. 2017) (silencers "are outside the scope of Second Amendment protection").

B. Even if LCMs Were Arms, They Are Unprotected Because They Are "Dangerous and Unusual"

LCMs are also unprotected by the Second Amendment because they are "dangerous and unusual." *Fyock*, 779 F.3d at 997.

1. LCMs Are Dangerous

Fyock confirmed that under *Heller*, LCMs may be prohibited if there is sufficient evidence that they pose an "increased danger" and are unusual. 779 F.3d at 998. LCMs pose a vastly "increased danger" because they boost the firepower and lethality of firearms using them. As discussed above, LCMs are catastrophic when employed by a mass shooter; a recent study (*supra* pp. 9-10) shows that LCM use during massacres is the variable most responsible for increased fatalities.

2. LCMs Are "Unusual"

The district court erred in rejecting the argument that LCMs are "unusual" for two independent reasons. First, the district court concluded that the term must be defined based on nationwide possession rates, 1ER-0019, when the proper basis for this Court's inquiry is how unusual LCMs are in California, where they are rarely possessed. But even if LCMs were commonly *possessed*, it is amply clear they are not commonly *used for self-defense*—in California or elsewhere. Because LCMs' use for any constitutionally protected purpose is highly unusual, they do not enjoy Second Amendment protection.

As an initial matter, this Court should use a localized standard in assessing

whether possession of LCMs is common or unusual. Other rights are reviewed on a local basis to account for interstate diversity. Whether material is obscene under the First Amendment, for example, depends on standards of the relevant community, because "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." *Miller v. California*, 413 U.S. 15, 32-33 (1973). So, too, here.

Decisions of out-of-state regulators cannot cast doubt on California's ability to exercise its judgment to ban devices that are already unusual in its borders. To read the Second Amendment to thwart California from prohibiting dangerous devices that are unusual within the state, just because not enough other states have enacted this lifesaving measure, violates core principles of federalism. As many have noted, gun policies should be tailored to the safety needs of individual states and communities. *E.g.*, *Kolbe*, 849 F.3d at 150 (Wilkinson, J., concurring); *Friedman*, 784 F.3d at 412 ("*McDonald* … does not foreclose all possibility of experimentation" by states). *Heller* did not dictate that a weapon's commonality must be assessed nationally. And while the district court in *Fyock* found that "common use" should be examined nationally, this Court affirmed that ruling without mandating a national test. *See Fyock*, 779 F.3d at 998.

Though the Court can and should take a localized approach, LCM

possession is also "unusual" nationwide. As the State's expert observed, LCM ownership is concentrated among a small subset of gun owners. 2ER-0191-92 (Donohue Decl. ¶ 11). This is confirmed by national polling showing that 62% of Americans support banning LCM possession, suggesting that a sizable majority—nearly two-thirds—of Americans do not own an LCM and never plan to own or use one. CNN/ORC Poll, *December 17-18 – Gun Rights* 3 (Dec. 2012), at http://i2.cdn.turner.com/cnn/2012/images/12/19/cnnpoll.december19.4p.pdf.[11]

Moreover, the State has presented strong evidence that it is quite unusual for LCMs to actually be used—or ever needed—for self-defense, the core purpose from which any constitutional protection of LCMs must derive. Plaintiffs imagine scenarios in which LCMs are needed to defend against groups of home invaders, but self-reports from gun owners reveal that such scenarios are purely hypothetical, since it is highly unusual for anyone to fire more than ten defensive rounds. 2ER-0178 (Allen Decl. ¶¶ 6-7). The average number of shots fired in self-defense is about *two*. *Id.*; *see also* 2ER-0212 (James Decl. ¶ 8) (40-year law enforcement veteran unaware of any victim firing more than ten defensive shots).

[11] Sales data, like that cited by the district court, does not prove that LCMs are typically possessed. That data may reflect the popularity of semiautomatic pistols with factory-issued LCMs; it does not mean that LCMs, specifically, are obtained or possessed for lawful purposes. At most, the data is inconclusive. *Fyock*, 779 F.3d at 998 ("Because Fyock relies primarily on marketing materials and sales statistics, his evidence does not necessarily show that large-capacity magazines are in fact commonly possessed by law-abiding citizens for lawful purposes."); *accord N.Y. Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 256-57 (2d Cir. 2015).

Regardless of how many LCMs have been sold, the State's evidence proves that LCMs are not commonly used for constitutionally-protected purposes, because responsible self-defense does not necessitate continuously firing bullets. *Heller* and its progeny make clear that to the extent the Second Amendment protects any firearms, accessories, or ammunition, it is because of those devices' utility for self-defense. Even if gun-industry data suggests many LCMs have been sold, the State's evidence establishes that they are rarely used for self-defense and are possessed by only a subset of gun owners. LCMs are thus "unusual" in addition to being dangerous, and constitutionally unprotected.

C. LCMs Are Not Protected by the Second Amendment Because They Are Most Suitable for Military Use

LCMs are also unprotected because they are best suited for military use, not civilian self-defense. *Heller* recognized that "weapons that are most useful in military service—M-16 rifles and the like—may be banned" without violating the Second Amendment. 554 U.S. at 627. In *Kolbe v. Hogan*, the *en banc* Fourth Circuit held that LCMs are "like" the M-16, and therefore may be prohibited even if commonly owned by Americans—because *Heller*'s statement had no caveat that such items may be banned only if they are uncommon. 849 F.3d at 136-37.[12]

The district court erred in rejecting the Fourth Circuit's reasoning. The court

[12] In *Fyock*, the Court was not presented with and did not address the argument that LCMs may be prohibited because they are most useful in military service.

drew from *Heller* and *United States v. Miller*, 307 U.S. 174 (1939), the untenably broad holding that the Constitution guarantees "possession by a law-abiding citizen of a weapon that could be part of the ordinary military equipment for a militia member.'" 1ER-0014. The court then cited *Kolbe,* apparently to suggest that it contradicts *Miller* and *Heller*. 1ER-0015. But contrary to the district court, *Heller* held that governments *may* prohibit "sophisticated arms" that would "be useful against modern-day bombers and tanks"—even if a modern-day militia might desire such arms. 554 U.S. at 627 (recognizing that "modern developments have limited the degree of fit between the prefatory clause," regarding well-regulated militias, "and the protected right").

The Fourth Circuit's decision in *Kolbe* is consistent with this section of *Heller*, while the district court's reasoning is to the contrary. If followed, the district court's logic would mean that civilians have an absolute right to possess machine guns, bombers, and tanks, so that theoretical private militias can keep pace with the military. This is plainly wrong. Indeed, the district court acknowledged that its rationale might invalidate a ban on *100-round magazines*. 1ER-0038 ("criminalization of possession of 100-round drum magazines would seem to be a reasonable fit . . . On the other hand, it may be the type of weapon that would be protected by the Second Amendment for militia use under *Miller*").

This cannot be squared with *Heller*.[13]

Kolbe correctly concluded that LCMs may be banned because, like machine guns, they are *most* suited for military use, regardless of potential self-defense uses. The same is true here. Plaintiffs hypothesize that LCMs have self-defense utility in civilian hands. But this theoretical utility pales in comparison to the State's evidence that LCMs give criminals military-level firepower, enabling shooters to turn public spaces into war zones. *E.g.*, 5ER-0922-1069 (ability to accept an LCM characterizes military firearms, and serves no sporting purpose); 2ER-0178, 0182 (Allen Decl. ¶¶ 6-7, 14) (the average number of shots fired in self-defense is about *two*, while on average, shooters who used LCMs fired *75 shots*).

As the Fourth Circuit recognized, magazines that allow firing more than 10 rounds at once are "designed and most suitable for military and law enforcement applications," 849 F.3d at 137, where there is an actual need to "enhance" shooters' "capacity to shoot multiple human targets very rapidly." *Id.* LCMs' lethality suits them to military use, but also makes them the preferred choice of criminals trying to inflict maximum carnage. 2ER-0197 (Donohue Decl. ¶ 25). Because LCMs are most suitable for military purposes—and killers seeking to

[13] In addition to contradicting *Heller*, the district court's reasoning contravenes *Presser v. Illinois*, which provides that militia membership is governed by state law and is not an individual right. 116 U.S. 252, 267 (1886). Under *Presser*, there can be no private right to form a militia using weaponry the state prohibits. *Cf. Heller*, 554 U.S. at 620 ("no one supporting" the individual rights interpretation of the Second Amendment argues "States may not ban" unauthorized militias).

emulate military firepower—they are unprotected by the Second Amendment.

D. LCM Restrictions are "Longstanding" And Thus Outside the Scope of the Second Amendment

In addition to approving prohibitions on military-grade weapons, *Heller* "recognized that the Second Amendment does not preclude certain 'longstanding'" regulations. *Silvester v. Harris*, 843 F.3d 816, 820 (9th Cir. 2016). A twentieth-century law can be "longstanding," and constitutional, "even if it cannot boast a precise founding-era analogue." *Id.* at 831.

Naturally, no Founding-era law prohibited LCMs, because it was not until much later that firearms accepting such magazines attained any significant market share. LCM bans do, however, have antecedents in early twentieth century laws restricting weapons based on ammunition capacity. In 1932, Congress prohibited weapons that can fire 12 or more times without reloading in the District of Columbia. Act of July 8, 1932, ch. 465, §§ 1, 8, 47 Stat. 650, 650, 652. Previously, in 1927, Michigan and Rhode Island enacted bans with 16- and 12-round caps. Robert Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 Law & Cont. Probs. 55, 68 (2017). Other close antecedents included laws prohibiting highly dangerous firearms, like semiautomatic weapons (restricted in as many as 10 states in the 1920s-30s), and machine guns (restricted in at least 28 states). *See id.* at 67-69 (describing "concerted national push to regulate … gangster-type weapons" that had begun to "spread in the civilian population in the

mid-to-late 1920s").

Fyock recognized that twentieth century laws can be "longstanding" "if their historical prevalence and significance" is developed. 779 F.3d at 997. The above laws are prevalent, having been enacted by more than half of states. Spitzer, *supra*, at 67-71 (LCM bans enacted in three jurisdictions, machine gun bans in 28, and semiautomatic weapon restrictions in at least seven). And they are significant, reflecting a "national push" to restrict the preferred tools of gangsters. *Id.* at 67. California's LCM possession ban is constitutional because it reflects the tradition of prohibiting dangerous weaponry that has come to be misused.

III. California's LCM Possession Ban Withstands Intermediate Scrutiny

Even if the Court were to decide that LCM possession is constitutionally protected, California's ban at most slightly burdens Second Amendment rights. *Fyock*, 779 F.3d at 999 (affirming determination that LCM ban on "only a subset of magazines" is not a severe restriction). Accordingly, were this Court to find that heightened scrutiny is required, it should apply intermediate scrutiny. *Id.*

The intermediate scrutiny "test is not a strict one." *Silvester*, 843 F.3d at 827. The challenged law need not be the "least restrictive means of furthering a given end," *id.*, but must "promote[] 'a substantial government interest that would be achieved less effectively absent the regulation.'" *Fyock*, 779 F.3d at 1000 (citation omitted). The State may use "any evidence 'reasonably believed to be relevant' to

substantiate its important interests." *Id.* (quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986)). "[R]easonable inference[s]" from such evidence should be credited. *Mahoney v. Sessions*, No. 14-35970, 2017 U.S. App. LEXIS 18149, at *18 (9th Cir. Sep. 19, 2017); *see also Wiese v. Becerra*, No. 2:17-903-WBS, 2017 U.S. Dist. LEXIS 101522, at *10 (E.D. Cal. Jun. 29, 2017) (crediting the State's interpretation of evidence, though "[r]easonable minds will always differ" on how to "reduce the incidence and harm of mass shootings").

By rejecting evidence the State reasonably determined relevant, and requiring a perfect fit between the ban and the State's interests, the district court effectively applied strict rather than intermediate scrutiny. This was error.

A. The District Court Erred by Failing to Credit Reasonable Evidentiary Inferences

The district court explained its departure from *Fyock* by observing that the State submitted an unpersuasive factual record, consisting of "incomplete studies from unreliable sources." 1ER-0023-24. The court rejected each of the State's experts after finding that they lacked a specific enough foundation for their opinions. 1ER-0042-49.

The court's rationale for disregarding the experts was erroneous, because it failed to credit reasonable inferences from competent evidence. *Fyock*, 779 F.3d at 1000 (Sunnyvale "entitled to rely on any evidence 'reasonably believed to be relevant' to substantiate its important interests"). For example, the court rejected

Daniel Webster's inferences from studies examining both assault weapon and LCM use (1ER-0042-43), even though Dr. Webster reasonably explained why it can be assumed from these studies that prohibiting LCMs had the larger public safety effect. 2ER-0230 (Webster Decl. ¶ 25). The court also refused to credit expert analysis based on data collected by news magazine *Mother Jones*, noting the "magazine has rarely been mentioned by any court as reliable" scientific evidence. 1ER-0027. But the court nowhere explains why, even if *Mother Jones* is not a scientific publication, its factual accounts of shootings—which actually did occur—were unreliable. The State's experts appropriately used reporting from *Mother Jones* as the basis for their own analyses of whether LCMs contributed to the documented deaths. *E.g.*, 2ER-0310 (Dr. Koper explaining statistical analysis of incidents reported by *Mother Jones*); 2ER-0227-29 (Webster Decl. ¶¶ 22-23) (Dr. Webster explaining same).

The district court further erred by discounting evidence from other states and international jurisdictions, *e.g.*, 1ER-0027, 30, and critiquing evidence that was over four years old. 1ER-0026. Under intermediate scrutiny, one jurisdiction may rely on relevant experiences of other jurisdictions, and on older data. *Renton*, 475 U.S. at 51 (to satisfy First Amendment intermediate scrutiny, the City of Renton could rely on evidence from "Seattle and other cities"); *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 436, 430 (2002) (plurality opinion) (upholding

zoning law supported by one 1977 study).

The district court ultimately refused to credit *any* inference the State and its experts drew from evidence, instead holding it to be self-evident that "[g]uns in the hands of criminals are dangerous; guns in the hands of law-abiding responsible citizens ameliorate that danger." 1ER-0051. But the record adequately supports the competing inference that LCMs are employed to devastating effect by mass shooters, and are not needed by law-abiding, responsible citizens for self-defense. *See supra* pp. 9-10, 18-19 (describing this evidence). The record also supports the inference that in past mass shootings, use of a magazine holding no more than 10 rounds would have saved lives. *Supra* p. 1 & n.2 (Christina-Taylor Green was struck by the thirteenth bullet). Under intermediate scrutiny, the court may not simply assume the truth of the opposite conclusion and use that to discount the State's reasoned inferences.

B. The District Court Erred By Requiring a Perfect Fit

In the end, the district court limited itself to considering a single survey of mass shootings. 1ER-0028-29 & n.9. The court then speculated that none of the shootings would have been stopped had LCMs been prohibited, either because an LCM was not used, the magazine type was unknown, because shooters would have simply used an *illegal* magazine, or because shooters would have simply used a *legal* magazine. *E.g.*, 1ER-0037 (of a Santa Monica mass shooting: "It is hard to

imagine that the shooter . . . would have dispossessed himself of the illegally acquired large capacity magazines"); *id.* at 38 (of the Colorado movie theater shooting: California's law "would not have prevented the shooter from acquiring and using the shotgun and pistols loaded with smaller 10-round magazines").

This is not how intermediate scrutiny works. By requiring evidence that some number of past shootings would have been averted under any conceivable set of facts, the district court improperly required a perfect fit between the regulation and its public safety goals. *Cf. Wiese*, 2017 U.S. Dist. LEXIS 101522 at *11-12 (reasonable fit does not require showing LCM ban would stop "past incidents of gun violence"). And by rejecting the hypothesis that California's ban would deter any shooter from either using illegal LCMs or committing the same murders with smaller magazines, the district court again failed to credit logical inferences the State made from evidence that showed the requisite "reasonable fit."

To be sure, one *could* rationalize that since mass shooters are lawbreakers, prohibiting LCM possession may not provide "any additional protection" beyond existing law. 1ER-0032. But it was at least equally reasonable, if not much more reasonable, for the State to conclude that gun laws do impact the behavior of criminals—a sensible conclusion in a state that for two decades has enacted stronger gun laws and seen its firearm death rate plummet. *See supra* pp. 5-6 & n.6. Although the ability of any law to deter criminals can be second-guessed, it

was still reasonable for the State to determine that criminalizing LCMs would force some shooters to change weapons and inflict fewer injuries. *E.g.*, 2ER-0195 (Donohue Decl. ¶ 21) ("bans on large capacity magazines can help save lives by forcing mass shooters to pause and reload"); 2ER-0183 (Allen Decl. ¶ 17) ("the majority of guns used in mass shootings were obtained legally," so laws may impact weapon choices). It was reasonable, too, for the State to conclude that while shooters might obtain an illegal LCM, it will be harder to do so if police are able to identify illegal LCMs. *See, e.g.*, 9ER-2120 (Ex. 92 to Gordon Decl.).

The district court also ignored the State's argument that LCMs are more lethal when used and instead speculated that "[i]f magazines holding more than 10 rounds are banned," shooters will simply "use multiple 10-round magazines." *E.g.*, 1ER-0032. Even if this is true, lives could still be saved. 2ER-0191 (Donohue Decl. ¶ 7) ("every reason to believe" the Sandy Hook shooter "would have killed fewer individuals if he had to persistently reload"). By focusing on whether a given shooter would have completely abandoned criminal plans, the court improperly ignored the State's interest in reducing the number of lives lost.

In one instance—the Tucson shooting targeting Congresswoman Giffords—the district court did not offer any explanation as to why an LCM possession ban would have been ineffectual. 1ER-0038. Instead, the court simply noted that the shooter's Glock was a "quintessential self-defense weapon." *Id.* Even if the State

was required to show specific lives could have been saved during a past shooting—which was not the State's burden—the Tucson massacre satisfies this obligation. *Supra* p. 1 & n.2 (LCM ban could have saved Christina-Taylor Green, the nine-year-old killed in Tucson).

CONCLUSION

For the above reasons, the Court should reverse the preliminary injunction order.

Dated: October 19, 2017

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I hereby certify that:

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Dated: October 19, 2017

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 19, 2017.

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