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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

STEVEN RUPP, et al.,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California,

Defendant.

Case No.: 8:17-cv-00746-JLS-JDE

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Hearing Date: May 31, 2019
Hearing Time: 10:30 a.m.
Courtroom: 10A
Judge: Josephine L. Staton

[Filed concurrently with Notice of Motion for Summary Judgment, Statement of Uncontroverted Facts and Conclusions of Law, Request for Judicial Notice, Declarations of Sean A. Brady, Steven Rupp, Steven Dember, Cheryl Johnson, Christopher Seifert, Alfonso Valencia, Troy Willis, Michael Jones, Dennis Martin, and Richard Travis]

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INTRODUCTION

Law-abiding Americans, by the millions, choose to own semiautomatic, centerfire rifles that have ergonomic, function-improving features like detachable magazines, pistol grips, and adjustable stocks. Even so, California has taken the extraordinary step of banning the acquisition, transfer, and, except for those fortunate enough to have been allowed to timely register one before the deadline, possession of rifles with those features. This functional ban on what are almost certainly the most commonly owned rifles in the country, those "typically possessed for lawful purposes" of all sorts, including self-defense in the home, violates the Second Amendment. *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008).

Heller is clear that bans on entire classes of common arms are unconstitutional per se—regardless of criminal misuse of the particular arm or whether alternative types of arms remain available. California thus cannot identify any justification sufficient to survive heightened scrutiny for banning rifles lawfully and safely owned by millions of Americans to defend themselves. This Court should enter summary judgment in Plaintiffs' favor and vindicate the rights of law-abiding adult Californians to bear these banned arms.

FACTUAL BACKGROUND

I. CALIFORNIA'S ASSAULT WEAPON CONTROL ACT

A. General Restrictions

California's Roberti-Roos Assault Weapons Control Act of 1989 ("AWCA") generally makes it a felony to manufacture or cause to be manufactured, distribute, transport, or import into the state for sale, keep for sale, offer or expose for sale, or give, or lend an "assault weapon." Cal. Penal Code § 30600(a). It also generally makes illegal possession of any firearm declared an "assault weapon" punishable up to a felony. Cal. Penal Code § 30605(a).

The AWCA contains a Byzantine grandfathering provision under which individuals who lawfully possessed a firearm before it was considered an "assault

weapon" may continue to possess it, if timely registered with DOJ on or before the respective statutory deadline. The deadline varies depending on when the firearm was brought within the "assault weapons" definition.[1] Now, other than authorized peace officers, it is no longer legally possible to acquire or register firearms identified as "assault weapons" under any of the AWCA's various definitions of that term.[2]

B. Applicable Definitions for the Banned Rifles

1. Make and Model List

California has created various definitions of "assault weapon" over the years. As originally enacted in 1989, the AWCA made a list of specific firearms that it declared as "assault weapons" based on their make and model. *See* Cal. Penal Code § 30510 (former Penal Code §12276).[3] The Legislature amended the AWCA in 1991 to expand the list, with DOJ expanding it again by regulation in 2000. See Sen. Bill No. 263 (1991-1992 Reg. Sess.); *see also* 11 C.C.R. §§ 5495, 5499.

2. Features-based Definition

In 1999, the legislature again amended the AWCA's definition of an "assault weapon." Rather than identify firearms as "assault weapons" by their make and model the amended law identified them based on their physical features. In relevant part, it defined as an "assault weapon" any:

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[1] *See* Cal. Penal Code § 30960(a) (former Cal. Penal Code § 12285(f)); Cal. Penal Code § 30520 (former Cal. Penal Code § 12276.5) (added by Assemb. B. 2718, 2005-2006 Reg. Sess. (Cal. 2006), 2006 Cal. Stat. 6342-43); Cal. Penal Code § 30515 (former Cal. Penal Code § 12276.1) (added by Sen. B. 123, 1999-2000 Reg. Sess. (Cal. 1999), 1999 Cal. Stat. 1805-06); Cal. Penal Code § 30900(b) (former Cal. Penal Code § 30900(c) (2012-2016); former Cal. Penal Code § 12285(a)); *see also* Compl. ¶¶ 25-47.

[2] See Cal. Penal Code § 30900(b)(1) (requiring registration for the most recent classification of firearms to be submitted before July 1, 2018).

[3] In 2010, the legislature reorganized, without substantive change, all Penal Code sections relating to "deadly weapons," including those relating to "assault weapons." *See* Sen. B. 1080, 2009-2010 Reg. Sess. (Cal. 2010).

> Semiautomatic,[4] centerfire[5] rifle that has the capacity to accept a detachable magazine and any one of the following:
> A pistol grip that protrudes conspicuously beneath the action of the weapon;
> A thumbhole stock;
> A folding or telescoping stock;
> A grenade launcher or flare launcher;
> A flash suppressor; or,
> A forward pistol grip;
>
> Semiautomatic, centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds; or
>
> Semiautomatic, centerfire rifle that has an overall length of less than 30 inches.

Cal. Penal Code § 30515(a)(1-3) (former Penal Code section 12276.1(a)(1-3)).[6]

In 2016, the legislature again amended the definition of "assault weapon" to include any semiautomatic, centerfire rifle that does *not* have a "fixed magazine," if it has at least one of the features enumerated in California Penal Code section 30515(a). It defined "fixed magazine" to mean "an ammunition feeding device contained in, or permanently attached to, a firearm in such a manner that the device cannot be removed without disassembly of the firearm action." Cal. Penal Code § 30515(b).[7]

The purpose of this change was to prohibit explicitly the use of magazine locking devices[8] to alter a rifle so it no longer has a "detachable magazine" and thus no longer meets the definition of an "assault weapon" when it has the features

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[4] DOJ defines "semiautomatic, in relevant part, as "a firearm functionally able to fire a single cartridge, eject the empty case, and reload the chamber each time the trigger is pulled and released." 11 C.C.R. § 5471(hh).

[5] DOJ defines "centerfire" as "a cartridge with its primer located in the center of the base of the case," 11 C.C.R. § 5471(j), as opposed to a "rimfire," which has "a rimmed or flanged cartridge with the priming mixture located in the rim of the case." 11 C.C.R. § 5471(ff).

[6] Some pistols and shotguns were also classified as "assault weapons" under subdivisions (a)(4)-(8) of Penal Code section 30515 but are not relevant here.

[7] "Disassembly of the firearm action" means the fire control assembly is detached from the action so that the action has been interrupted and will not function. For example, disassembling the action on a two-part receiver, like that on an AR-15 style firearm, would require the rear take down pin to be removed, the upper receiver lifted upwards and away from the lower receiver using the front pivot pin as the fulcrum, before the magazine may be removed. 11 C.C.R. § 5471(n).

[8] They are commonly known as "bullet buttons."

enumerated in California Penal Code section 30515(a). Typical "detachable magazines" are released with the push of a finger on a button. A magazine lock replaces the release button with a device that cannot be operated without a tool. Because a tool was needed to release the magazine, and because California did not consider a magazine to be "detachable" if a tool was required, a firearm with a magazine lock did not qualify as having "the capacity to accept a detachable magazine" and thus did not fall under Penal Code section 30515(a)'s definition for an "assault weapon." Following the most recent amendment, that is no longer the case. Now a semiautomatic, centerfire rifle having the mentioned features must have a fixed magazine or it is an illegal "assault weapon."

In addition to the statutory change, DOJ adopted new definitions for the terms used in Penal Code section 30515, including for "semiautomatic," "centerfire," "detachable magazine," "pistol grip," "flash suppressor," and various types of "stocks" used on firearms. *See* 11 C.C.R. § 5471(j),(m),(r),(z),(nn),(oo),(qq).

Plaintiffs' challenge is to the AWCA's restrictions on all rifles, whether listed as "assault weapons" by their make and model or defined as "assault weapons" by their features (collectively referred to here as the "Banned Rifles").

C. Nature of the Restricted Features

It is not entirely clear from the legislative history why the State prohibits some rifles from having a "pistol grip" (or "forward pistol grip"), a "thumbhole stock," a "flash suppressor," or an adjustable ("telescoping") stock, unless it has a "fixed magazine." Cal. Penal Code § 30515. Many rifles come standard with—or can be modified with common aftermarket products to have—those features.[9] None

[9] *See, e.g.*, *Build Your DDM4*, Daniel Defense https://danieldefense.com/build-your-ddm4 (last visited March 24, 2019); Gunstruction, AR15.com, https://www.ar15.com/gunstruction/ (last visited March 24, 2019). Websites and manufacturers such as this allow individuals to customize fully and configure a rifle with different gas systems, barrels, muzzle devices, sights, grips, and other upgrades and accessories.

increases a rifle's "rate of fire and capacity for firepower," which is what the AWCA claims it seeks to address. *Id.* § 30505(a). That is, none of the features that convert an otherwise lawful semiautomatic, centerfire rifle with a detachable magazine into a Banned Rifle has any effect on the rifle's rate of fire, its capacity to accept ammunition, or the power of the projectile it discharges and thus the trauma that projectile causes on impact. Brady Decl., Ex. 1 at 5-7; Ex. 3 at 6. None "of them [are] dangerous per se or when used in conjunction with any of the other features." *Id.*, Ex. 3 at 6. Instead, the features are "designed to both independently, and in conjunction with other features, make a rifle more user friendly and thus safer to operate—whether for target practice or in the critically important moments where self-defense is necessary." Brady Decl., Ex. 3 at 6.

A "pistol grip" (including a "thumbhole stock") is a part that, if well designed, merely "allows for safe and comfortable operation of a firearm." *Id.*, Ex. 1 at 9. It positions the "trigger finger" for optimum trigger control and helps absorb recoil. *Id.*, Ex. 3 at 7. Because it allows the operator to use the rifle with one hand, the pistol grip not only allows the user options like holding a flashlight or calling police, *Id.*, Ex. 1 at 12, but can also be an accommodation for a disabled person, *id.*, Ex. 3 at 9.

A so-called "telescoping stock" merely allows the user of the rifle to adjust the length a few inches to a comfortable size, as conditions dictate, and has no material effect on the concealability of the rifle. SUF Nos. 49-50. People of different statures need different length stocks, and a single person's needs could change based on little more than what clothing they are wearing. SUF Nos. 51-52.

A "flash suppressor" as DOJ has defined it is a device that reduces the visible signature ("flash") when a bullet exits the barrel's muzzle "from the shooter's field of vision." *See* 11 C.C.R. § 5471(r). Thus, by definition and in practice, it does not hide the flash from those in the direct line of fire. SUF No. 55. It only has an effect in low-light conditions by reducing the impact on a shooter's "night vision." SUF No. 56.

None of these features serves any role in a rifle's mechanical function. Instead,

each is designed to make a rifle more comfortable or easier for a user to operate accurately, facilitating the rifle's safe and effective operation. SUF Nos. 59-62. Both individuals the State designated as expert witnesses on the subject of the Banned Rifles have opined that these features increase accuracy and the user's control of the rifle. SUF Nos. 61-62

D. Prevalence of the Banned Rifles in America

Millions of rifles banned by the AWCA are in the hands of the American people. SUF No. 29. While the precise number cannot be known—as regulators do not track the types of firearms sold—it can be estimated with some degree of confidence "by drawing on publicly available government records, industry reports, and survey responses." Brady Decl., Ex. 2 at 4. Having performed that very analysis, Plaintiffs' expert witness, Professor William English, estimates that Americans possess a minimum of 9 million such firearms—and possibly around 15 million or more. *Id*., Ex. 2 at 2-6. According to a survey conducted in 2015, around 47.1% of active hunters and shooters in the country owns a Banned Rifle. *Id*., Ex. 2 at 3-4; Ex. 19. And a 2017 survey of 226 firearm retailers, revealed that 92.9% of them sell Banned Rifles and that they are the most popular selling long-guns. *Id*., Ex. 2 at 4; Ex. 21.

Even a superficial glance at firearm industry materials corroborates Professor English's findings that the Banned Rifles are extremely popular. Countless catalogs and websites advertise the Banned Rifles or their various parts or accessories, made by countless manufactures. *See, e.g.*, Gunstruction, AR15.com, https://www.ar15.com/gunstruction/ (last visited March 24, 2019). And books, articles, and internet forums dedicated to these rifles from firearm enthusiast circles likewise show the Banned Rifles' undeniable popularity. *See, e.g.*, www.AR15.com; Patrick Sweeney, *The Gun Digest Book of the AR-15*, F+W Media, Inc. (2005); Duncan Long, *The AR-15/M16: A Practical Guide*, Paladin Press (1985).

The Banned Rifles' popularity is no fad. The American public has, for more

than a century, had access to semiautomatic, centerfire rifles with detachable (not "fixed") magazines. SUF No. 34. Indeed, the federal government, through the Director of Civilian Marksmanship—which was later replaced by the quasi-privatized Civilian Marksmanship Program in 1996 and is still in operation today—would sell these rifles directly to the public. SUF No. 69. The only difference between those rifles and the Banned Rifles are the former mostly lacked the features described in the preceding section—although, some of those rifles would be banned under the AWCA. Brady Decl., Ex. 3 at 5; Ex. 43. What's more, similar technology has been understood—albeit not implemented—for a very long time. *Id.*, Ex. 3 at 3-6. Even the Founding Fathers were aware of—and coveted—multi-shot rifles with detachable magazines. *Id.*, Ex. 3 at 3-4. More specifically, the AR-15 rifle was introduced to America nearly 60 years ago, and its popularity has steadily increased ever since. SUF No. 35. It was reviewed in a 1959 issue of *The American Rifleman*, one of the most widely circulated firearm magazines. *Id.*, Ex. 3 at 6, Ex. 2 at 3. And, by 2017, Banned Rifles were reportedly the most popular selling long-guns in the country, outperforming all other rifles and shotguns. *Id.*, Ex. 2 at 3.

The State does not know how many Banned Rifles are possessed in the United States. *Id.*, Ex. 8 at 4. And it "does not have sufficient information to estimate the approximate number" of them. *Id.*, Ex. 10 at 8. State-designated expert Blake Graham, however, based on his extensive experience as a peace officer enforcing firearm laws, acknowledged that the Banned Rifles are common. *Id.*, Ex. 7 at 20:8.

E. Typical, Lawful Uses of the Banned Rifles

Purchasers of the Banned Rifles consistently report that one of the main reasons for their purchase of this class of rifle is self-defense. SUF No. 30. And for good reason. A former FBI agent, turned FBI firearm instructor, who became the primary special agent overseeing the FBI's Ballistic Research Facility, has opined that when "using appropriate ammunition," AR-15 platform rifles, likely the most popular type of the Banned Rifles, "are well suited for use in home defense." Brady

Decl., Ex. 1 at 5. In fact, he opines that, based on his extensive experience training, in the field, and conducting tests, such rifles are easier to operate, more effective at stopping threats, and, when using the correct ammunition, pose a lower risk of danger to innocent bystanders, than are other firearms like handguns and shotguns. *Id*., Ex. 1 at 5-11, Ex. 27. He is not alone; several self-defense experts agree. *Id.*, Exs. 28-29.

Other lawful purposes for which people commonly acquire the Banned Rifles include hunting, competitive shooting, and target shooting. SUF Nos. 31-33. Indeed, there are many publications dedicated to hunting with the Banned Rifles. Brady Decl., Exs. 30-33. And they are used in some of the most popular competitive shooting sports in America, including shooting's "World Series." Brady Decl., Ex. 2 at 6, Ex. 3 at 4; *see also* International Practical Shooting Confederation, http://www.ipsc.org; Chad Adams, *Complete Guide to 3-Gun Competition* 89 (2012).

The State cannot dispute that Americans typically possess the Banned Rifles for these lawful purposes. It "lacks sufficient information or belief" about whether law-abiding Americans typically use the Banned Rifles for lawful self-defense, hunting, or competition, Brady Decl., Ex. 8 at 15-16, 18-19, 22-23, and expressly does not dispute they are used for lawful target practice. *Id*., Ex. 8 at 20-21.

F. History of Restrictions on the Banned Rifles

As a historical matter, no evidence suggests a tradition of government regulation targeting rifles for having features like those restricted by the AWCA. The original iteration of California's AWCA, adopted in 1989, was the first law in the country's history specifically targeting semiautomatic rifles of any sort, let alone those with detachable magazines having certain features. SUF No. 63. Today, nearly all states place *no* restrictions on such rifles, let alone one like the AWCA that subjects violators to a felony conviction punishable by a prison sentence. The handful of restrictions that *are* in place are of recent vintage, and they vary as to what constitutes a restricted "assault weapon." SUF No. 68.

The federal government takes the same approach as most states. That is, it has

not regulated rifles just because they are semiautomatic or have a detachable magazine or a pistol grip, flash suppressor, or adjustable stock—with one recent and short-lived exception. In 1994, Congress adopted a nationwide prospective ban on semiautomatic, centerfire rifles having a detachable magazine and any two of a list of certain features resembling California's Penal Code § 30515(a). SUF No. 64; Req. Jud. Ntc., ¶ 8, Ex. 8. Ten years later, Congress allowed that ban to expire after a study commissioned by the Department of Justice revealed that the law had failed to effect any "discernible reduction in the lethality and injuriousness of gun violence." SUF No. 65; Brady Decl., Ex. 25 at 96; *What Should America Do About Gun Violence?: Hearing Before U.S. S. Comm. on Judiciary*, 113th Cong. 11 (2013). Today, both the possession and acquisition of the Banned Rifles remains legal under federal law.

G. Plaintiffs' Injury

The individual Plaintiffs are responsible, law-abiding adult California residents who are legally eligible to possess firearms. SUF Nos. 1-3. Some do not currently own any Banned Rifles but wish to, and would immediately acquire one for lawful purposes, including self-defense, but refrain from doing so for fear of prosecution under the AWCA. SUF No. 13. Others have parts that they wish to, and immediately would, assemble into a Banned Rifle to use for lawful purposes, including self-defense, but refrain from doing so for fear of prosecution under the AWCA. SUF Nos. 7, 9-10. Some already own at least one Banned Rifle and wish to be free from the transfer and use restrictions that the AWCA places on those rifles, under threat of criminal penalty. SUF Nos. 5-6, 8. Plaintiff California Rifle & Pistol Association, Incorporated (CRPA), represents its countless thousands of law-abiding members, who are similarly situated to the individual plaintiffs. SUF Nos. 17-28.

LEGAL STANDARD

Summary judgment is proper when the record shows there is "no genuine dispute as to any material fact . . . and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317,

323-24 (1986). Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* First, the moving party must show the lack of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If the movant meets its burden, the nonmoving party must produce sufficient evidence to rebut the movant's claim and create a genuine issue of material fact. *Id.* at 322-23.

ARGUMENT

The Second Amendment provides that "the right of the people to keep and bear Arms . . . shall not be infringed." After an exhaustive textual and historical analysis, the Supreme Court made clear in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment protects an "individual right to possess and carry weapons" for self-defense. *Id.* at 592. The Court thus invalidated a District of Columbia ordinance banning the possession of operable handguns in the home, holding that the possession ban violated the Second Amendment under "any of the standards of scrutiny that we have applied to enumerated constitutional rights"—that is, any standard stricter than rational basis review. *Id.* at 628 & n.27.

In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Court held that the "right to keep and bear arms for the purpose of self-defense" recognized in *Heller* is "fully applicable to the States," *id.* at 750, because it is "among those fundamental rights necessary to our system of ordered liberty," *id.* at 778. State and municipal actors must thus respect the individual right the Second Amendment protects and may not "enact any gun control law that they deem to be reasonable." *Id.* at 783 (plurality opinion); *see also Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016).

I. THE AWCA VIOLATES THE SECOND AMENDMENT UNDER THE SCOPE-BASED ANALYSIS ENDORSED BY *HELLER* AND *MCDONALD*

A. *Heller* and *McDonald* Endorse a Scope-based Analysis, not a Means-End Test that Requires a Balancing of Interests

The Supreme Court, while not settling on an analytical framework for all

Second Amendment challenges, has left little doubt that courts are to assess gun laws based on history and tradition, and *not* by resorting to interest-balancing tests. *Heller*, 554 U.S. at 628 n.27, 634-35; *see also Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1271-74 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). Indeed, *Heller* advances an approach that first focuses on "examination of a variety of legal and other sources to determine *the public understanding* of [the] legal text," 554 U.S. at 605, with particular focus on "the founding period," *id*. at 604, to determine whether a restricted activity falls within the scope of the Second Amendment. *Heller II*, 670 F.3d at 1275 (Kavanaugh, J., dissenting). If it does, the court turns again to "text and history" to determine whether the restriction is analogous to laws historically understood as permissible limits on the right to bear arms. *Heller*, 554 U.S. at 595. In short, if sufficient "historical justification" exists for a restriction on activity falling within the scope of the right, the restriction is valid; if not, it is invalid. *See id.* at 634-35. The presumption is that activity within the scope of the Second Amendment "shall not be infringed," with the burden on the government to justify its restrictions, based on text, history, and tradition. *See id.* at 634-36.

The government, arguing *Heller* before the Supreme Court, urged the Court to employ "intermediate scrutiny" in reviewing the District's handgun ban and locked-storage law, believing if that standard were employed, the laws would be upheld. Brady Decl., Ex. 47 at 44-45. Chief Justice Roberts appeared suspicious of such "an all-encompassing standard," asking why it would not be "enough to determine the scope of the existing right . . . , look at the various regulations that were available at the time [of the founding] . . . , and determine how . . . this restriction and the scope of this right looks in relation to those." *Id.* The Chief Justice was suggesting that courts simply ask whether the law restricts activity falling within the scope of the right as originally understood. If it does, the law is *presumed* invalid unless the government can show its restriction is so commonplace in our history and traditions that the right be understood in light of it. But there would be no "balancing test" or

weighing of burdens and benefits.

This scope-based approach was, in large part, the approach the Supreme Court adopted—after expressly rejecting Justice Breyer's interest-balancing test. 554 U.S. at 634-35. Notably absent from *Heller's* analysis was any discussion of "compelling interests," "narrowly tailored" laws, or any other standard of review jargon. Nor were there discussions of the District's "legislative findings" purporting to justify the restrictions. Instead, *Heller* focused on whether the laws restricted the right to keep and bear arms as that right was understood by those who drafted and enacted both the Second and Fourteenth Amendments. *Id.* at 626-34. The Court gleaned that understanding from its examination of the textual and historical narrative surrounding the pre-existing right to arms, to define, at least in broad terms, the scope of the Second Amendment. *Id.* at 605-19.

The Court's later decision in *McDonald v. City of Chicago*, 561 U.S. 742, (2010), further underscored the notion that history and tradition, rather than burdens and benefits, should guide analyses of Second Amendment challenges. Like *Heller*, *McDonald* did not use balancing tests, and it expressly rejected judicial assessment of "the costs and benefits of firearms restrictions." *Id.* at 790-91. This language is compelling. Means-end tests necessarily require the assessment of the "costs and benefits" of government regulations, as well as "difficult empirical judgments" about their effectiveness. The Court's clear rejection of such inquiries is incompatible with a means-end approach to Second Amendment challenges.

B. The AWCA Cannot Survive the Historical, Scope-based Analysis

Under *Heller*'s historical, scope-based analysis, the Second Amendment protects those firearms that are "typically possessed by law-abiding citizens for lawful purposes," *Heller*, 554 U.S. at 624-25, and which have not been traditionally banned. A straight-forward application of this test compels the conclusion that the AWCA is unconstitutional because "semi-automatic rifles have not traditionally been banned and are in common use [for lawful purposes] today." *Heller II*, 670 F.3d at

1287 (Kavanaugh, J., dissenting). Indeed, the Supreme Court has explained that rifles prohibited by the AWCA, "traditionally have been widely accepted as lawful possessions." *Staples v. United States*, 511 U.S. 600, 612 (1994) (referring to AR-15 platform rifles, which meet California's "assault weapon" definition).

1. The Banned Firearms Are in "Common Use" for Lawful Purposes

The American public has had access to semiautomatic rifles with detachable magazines for more than a century. SUF No. 34. "The first commercially available semiautomatic rifles, the Winchester Models 1903 and 1905 and the Remington Model 8, entered the market between 1903 and 1906." *Heller II*, 670 F.3d at 1287 (Kavanaugh, J., dissenting) (citing John Henwood, *The 8 and the 81: A History of Remington's Pioneer Autoloading Rifles* 5 (1993); John Henwood, *The Forgotten Winchesters: A History of the Models 1905, 1907, and 1910 Self-Loading Rifles* 2-6 (1995)). Winchester's first commercially successful semiautomatic shotgun entered the market in 1905. *Id.* (citing *The 8 and the 81*, *supra*, at 4). And other gun makers soon introduced their own semiautomatic rifles. *See id.* (citing *The 8 and the 81*, *supra*, at 64-69). As early as 1907, Americans began using ten-round magazines with their semiautomatic rifles. *Id.* (citing *The Forgotten Winchesters*, *supra*, at 22-23). And they even had access to early semiautomatic rifles with pistol grips. *Id.* (citing *The Forgotten Winchesters*, *supra*, at 117-24). At the time, these firearms were primarily designed and marketed for use as hunting rifles. *Id.* (citing *The 8 and the 81*, *supra*, at 115-21).

"Semi-automatic rifles remain in common use today, as even" courts that have upheld "assault weapons" bans have conceded. *Id.* (quoting 670 F.3d at 1261 (maj. opinion) ("We think it clear enough in the record that semiautomatic rifles . . . are indeed in 'common use,' as the plaintiffs contend."")). Even conservative estimates place ownership of such firearms in the several million range. SUF No. 29. The extremely large number of firearm manufacturers making the Banned Rifles and

retailers selling them or related accessories confirm the rifles' popularity. Brady Decl., Ex. 2 at 4, Exs. 18-21. Such a market simply would not exist without a corresponding demand. The existence and large scope of that market is undeniable given the ubiquitous firearm catalogs and other industry materials that have been filled with the Banned Rifles for decades. *See Heller II*, 670 F.3d at 1287 (Kavanagh J., dissenting) (A "brief perusal of the website of a popular American gun seller underscores the point that semi-automatic rifles are quite common in the United States.").

High ownership rates of the Banned Rifles exist despite being banned in California, the most populous state, and a handful of other populous states and municipalities, like New York and Cook County, Illinois. But for the restrictions in those outlier jurisdictions, millions more Americans would almost certainly own these rifles. In any event, they are already owned by the millions and are lawful to acquire and possess under federal law and in most states, making them "common" under any reasonable standard. SUF Nos. 29, 63-68; *cf. Hollis v. Lynch*, 827 F.3d 436, 449 (5th Cir. 2016) (defining the term "common" by applying the Supreme Court test in *Caetano* of 200,000 stun guns owned and legal in 45 states being "common"); *Heller II*, 670 F.3d at 1287; *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d 242, 255-57 (2d. Cir. 2015) ("Even accepting the most conservative . . . , the assault weapons . . . at issue are 'in common use' as that term was used in *Heller*.")

The State cannot dispute this. For it has already admitted that it does not know how many Banned Rifles are possessed in the United States, Brady Decl., Ex. 8 at 4, and revealed that it "does not have sufficient information to estimate the approximate number" of them, *id.*, Ex. 10 at 8. Nor has the State produced an expert to estimate how many Banned Rifles there are in circulation. To the contrary, its own expert corroborates the popularity of the Banned Rifles. *Id.*, Ex. 7 at 20:8.

That popularity is unsurprising. For the Banned Rifles undisputedly provide better ergonomics, more control, high reliability, lower recoil, ease of use, and

lightness in weight. *See* Factual Background, Part I, *supra*; *see also Murphy v. Guerrero*, No. 14-00026, 2016 WL 5508998, at *18 (D. N. Mar. I. Sept. 28, 2016) (the features "actually tend to make rifles easier to control and more accurate—making them safer to use"). Those qualities also make it easier for by persons of varying skill, age, and physical ability to use the firearms. SUF Nos. 44-46, 49-52, 55-56, 59-62. It is thus no wonder that their popularity has only grown over the last several decades. SUF No. 36.

What's more, the Banned Rifles are overwhelmingly chosen by Americans for lawful purposes. One of the main reasons people choose to acquire these rifles is for self-defense. SUF No. 30. Many firearm experts not only choose the Banned Rifles for self-defense but find that they can be profoundly better suited for self-defense purposes, including within the home, than handguns or shotguns. Brady Decl., Ex. 1 at 5-11; Exs. 27-29. Among those experts is an individual who was entrusted for years to not only train FBI agents on firearms, but to run the FBI's ballistics-testing facility. *Id.*, Ex. 1. The banned rifles are also commonly chosen by Americans for use in hunting, competitive shooting, and target shooting. SUF Nos. 30-33. All these typical lawful uses are reflected in manufacturers' marketing of the Banned Rifles.

The State cannot and does not dispute that the Banned Rifles are typically possessed for lawful purposes. All it can do is point to the statistically rare criminal misuse of the rifles. But that does not change that they are overwhelmingly used for lawful purposes. Nor, as explained below, is it relevant to the constitutional question presented here.

In sum, rifles possessing the features that trigger the AWCA's "assault weapon" definition are among the most popular firearms chosen by law-abiding Americans for lawful purposes, including for the core lawful purpose of self-defense.

2. There Is No "Historical Justification" for Laws Banning Semiautomatic Rifles

California's broad restriction does not "resemble prohibitions historically

exempted from the Second Amendment." *Fyock v. Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015). The Banned Rifles have not been "the subject of longstanding, accepted regulation." *Id.* To the contrary, the Supreme Court has specifically explained that rifles prohibited by the AWCA, "traditionally have been widely accepted as lawful possessions." *Staples v. United States*, 511 U.S. 600, 612 (1994) (referring to AR-15 platform rifles, which generally meet California's "assault weapon" definition). The few restrictions on such rifles in the country are of extremely recent vintage. In addition to California, only six other states and the District of Columbia have adopted "assault weapon" laws targeting these rifles, all of which were adopted in the 1990s or later. SUF Nos. 67-68. And the federal law adopted barely twenty-five years ago, was allowed to expire just ten years later. *See* Pub. L. No. 103-322, Title XI, § 110105(2). Each less than 30 years old, it is indisputable that the now-lapsed federal ban and these modern state restrictions are not "longstanding." *See Heller*, 554 U.S. at 635 (overturning 33-year-old handgun ban). *See Heller II*, 670 F.3d at 1260 ("We are not aware of evidence that prohibitions on either semi-automatic rifles or large-capacity rifles are longstanding and thereby deserving of a presumption of validity.")

The rarity of laws regulating the Banned Rifles or their similarly functioning predecessors historically cannot be attributed to the lack of such rifles in the American marketplace. For the AR-15 platform rifle has been available to the American public for over 60 years. SUF No. 35. And semiautomatic, centerfire rifles with detachable magazines have been mass produced and widely available to the public for another about 60 years before that. Brady Decl., Ex. 3 at 4-6. What's more, even the Founding Fathers were aware of—and coveted—multi-shot rifles with detachable magazines. *Id.*, Ex. 3 at 3-4. The Banned Riles would not be that foreign to them—certainly less so than a smart phone, which enjoys Fourth Amendment protections. *Carpenter v. United States*, __ U.S. __, 138 S. Ct. 2206, 2217 (2018). The utter rarity of laws specifically targeting semiautomatic rifles to ban, throughout history and today, therefore, not only establishes that the conduct restricted by the

AWCA is protected, but also casts even more doubt on the constitutionality of such bans. *See Kerr v. Hickenlooper*, 744 F.3d 1156, 1178 (10th Cir. 2014).

II. ALTERNATIVELY, THE AWCA VIOLATES THE SECOND AMENDMENT UNDER THE NINTH CIRCUIT'S TWO-TIERED, MEANS-END ANALYSIS

In the years since *Heller* and *McDonald*, the Ninth Circuit has developed a multi-step framework for adjudicating Second Amendment claims. First, a court "asks if the challenged law burdens conduct protected by the Second Amendment, based on a historical understanding of the scope of the right." *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016) (citing *Heller*, 554 U.S. at 625). If it does, a court must analyze the law under heightened scrutiny, with the degree of scrutiny varying depending on "how close the challenged law comes to the core of the Second Amendment right, and . . . the severity of the law's burden on that right." *Id.* (citing *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 960-61 (9th Cir. 2014)). Unlike the scope-based analysis described above, the two-tiered, means-end analysis "employs history and tradition only as a threshold screen to determine whether the law in question implicates the individual right." *Heller II*, 670 F.3d at 1276 (Kavanaugh, J., dissenting).

When the Second Amendment "right applies to" certain types of firearms, "citizens *must* be permitted to use [them] for the core lawful purpose of self-defense." *McDonald*, 561 U.S. at 767-68 (emphases added) (quotation marks omitted). Because California's ban on "assault weapons" prohibits law-abiding citizens from acquiring and keeping commonly possessed arms within the sanctity of their homes for the core purpose of self-defense, it wholly forecloses Second Amendment protected conduct and is unconstitutional under any level of scrutiny. Regardless, the AWCA cannot withstand any level of means-end review.[10]

[10] While this Court may find it is bound to apply the two-tiered, means-end analysis, there is no need to decide what level of scrutiny applies here because the

A. The AWCA Plainly Implicates Second Amendment Conduct

Again, the Second Amendment protects the possession and acquisition of those "arms" that are "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 624-25; *see also Caetano*, 136 S. Ct. at 1027-28. Applying that test here is straightforward. As described above, the AWCA bans semiautomatic firearms that are, and throughout history have been, commonly used by law-abiding citizens for lawful purposes, including self-defense in the home. *See* Argument, Part I.B.1, *supra*. And, as also described above, there is no longstanding history in this country of laws banning their acquisition, possession, and use. *See id.*, Part I.B.2, *supra*. For these reasons, the Banned Firearms are within the scope of the Second Amendment and restrictions on them are subject to means-end review.

B. The AWCA Cannot Survive *Any* Level of Means-end Review

Because the AWCA's ban on a class of popular rifles burdens conduct protected by the Second Amendment, it must satisfy some form of heightened scrutiny. *See Heller*, 554 U.S. at 628. And under either form of heightened scrutiny, a challenged law is *presumed* unconstitutional, and the government bears the burden of justifying it. *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (content-based speech regulations are presumptively invalid); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) ("unless the conduct at issue is not protected by the Second Amendment at all, the government bears the burden of justifying the constitutional validity of the law").

Here, there is no need to decide what level of scrutiny applies, however, because a law, like the AWCA, flatly banning arms that the Second Amendment protects must "fail constitutional muster" under "any of the standards of scrutiny." *Heller*, 554 U.S. at 628-29. That said, the State could not meet its burden even if a

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AWCA imposes a complete ban on arms commonly used for lawful purposes and is therefore categorically invalid. *See Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas & Scalia, Js., dissenting from denial of certiorari).

traditional scrutiny analysis were necessary. To justify a burden on a constitutionally protected right, the government must prove that it is sufficiently tailored to advance a sufficiently important end.[11] Under intermediate scrutiny, the government must prove, first, that the law is "substantially related" to an important government interest. *See Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993); *see United States v. Chovan*, 735 F.3d 1127, 1139-40 (9th Cir. 2013). It must then prove that its chosen means are "closely drawn" to achieve that end without "unnecessary abridgment" of constitutionally protected conduct. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1456-57 (2014) (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)); *see Jackson*, 746 F.3d at 961 (noting that Second Amendment heightened scrutiny is "guided by First Amendment principles"). While the government has an admittedly important interest in promoting public safety and preventing crime, it cannot begin to prove that the ban is substantially related and closely drawn to advancing that interest.

1. The AWCA Is Not "Substantially Related" to the State's Public Safety Interests

For a law to be substantially related to the government's interests, the government must prove that its "restriction will in fact alleviate" its concerns. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001). It is not enough for the government to rely on "mere speculation or conjecture." *Id.* But here, the state cannot identify a causal link between the ills California seeks to remedy and the Banned Rifles. Instead, the State offers only "mere speculation" that its ban will reduce criminal violence with firearms. But it is worse than that because the State is admittedly depriving the public of more accurate, easier to control rifles. Its own

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[11] If the Court selects a level of means-end review, strict scrutiny must be the test. *See, e.g., Heller II*, 670 F.3d at 1284-85 (Kavanaugh, J., dissenting); *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 544 (9th Cir. 2004) ("[A] law is subject to strict scrutiny . . . when that law impacts a fundamental right, not when it infringes it."); *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 54 (1983) (similar).

experts have opined on the superior performance of these rifles for legitimate purposes. SUF No. 61. They just apparently believe that normal people should have lower performing and less user-friendly rifles in the hopes evil doers will likewise be deprived of them and that such deprivations will translate into fewer victims of violence. Not only is that the epitome of speculation but diminishing law-abiding peoples' accuracy or physical control of a firearm cannot be said to further any legitimate state interest—if anything, it harms public safety.

2. The AWCA Lacks a Reasonable "Fit" with the State's Interest in Preventing Criminal Misuse

Even if the law does advance the state's public safety interests, "intermediate scrutiny requires a 'reasonable fit' between the law's ends and means." *Silvester v. Becerra*, No. 17-342, 2018 WL 943032 *4 (U.S. Sup. Ct. Feb. 20, 2018) (Thomas, J., dissenting from denial of certiorari) (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993)); *see also Chovan*, 735 F.3d at 1136, 1139. This means that the law must be "narrowly tailored" to serve the government's interest. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014).

The rationale behind this requirement is to ensure that the encroachment on liberty is "not more extensive than necessary" to serve the government's interest. *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 816 (9th Cir. 2013). The government thus bears the burden of establishing that the law is "closely drawn to avoid unnecessary abridgment" of constitutional rights, *McCutcheon*, 134 S. Ct. at 1456; *see Ward v. Rock Against Racism*, 491 U.S. 781, 782-83 (1989). The government is entitled to *no deference* when assessing the fit between its purported interests and the means selected to advance them. *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 214 (1997). Instead, the government must *prove* that those means do not burden the right "substantially more" than "necessary to further [its important] interest." *Id.*

Here, the state has chosen the opposite of tailoring. The AWCA bans Californians—except those who were fortunate enough to be able to timely register

their rifles—from possessing the Banned Rifles, and bars everyone, even those already entrusted with lawfully owning one, from acquiring them. *See Jackson*, 746 F.3d at 964 (contrasting "complete ban" with regulations). Such a law "serves as the bluntest of instruments, banning a class of weapons outright, and restricting the rights of its citizens to select the means by which they defend their homes and families." *Friedman v. City of Highland Park*, 784 F.3d 406, 419 (7th Cir. 2015) (Manion, J., dissenting). Simply obliterating the right to acquire, keep, and use these common rifles for any lawful purpose, including self-defense is *not* the sort of "fit" that survives even intermediate scrutiny.

First, as a legal matter, the Second Amendment does not tolerate banning constitutionally protected arms simply because they are often involved in some crimes, even serious ones like mass shootings. In *Heller*, the District of Columbia tried to justify its handgun ban because handguns are involved in the clear majority of firearm-related homicides in the United States. 554 U.S. at 696 (Breyer, J., dissenting) (collecting statistics). Despite the government's clear and compelling interest in preventing homicides, the Supreme Court held that a ban on possession of those common arms by law-abiding citizens lacks the required fit to further that goal "[u]nder any of the standards of scrutiny." *Id.* at 628-29 (maj. op.).

Heller similarly rejected the argument that protected arms may be prohibited because criminals might misuse them. Again, there, the government argued that handguns made up a significant majority of all stolen guns and that they were overwhelmingly used in violent crimes. *Id.* at 698 (Breyer, J., dissenting). But despite the government's clear interest in keeping handguns out of the hands of criminals and unauthorized users, the Supreme Court rejected that argument, too, concluding that a ban on possession by law-abiding citizens is not a permissible means of preventing misuse by criminals. *Id.* at 628-29 (maj. op.). In any event, even if criminal misuse were relevant, unlike handguns, FBI data show that rifles are rarely used in violent crime. *See, e.g., 2017 Crime in the United States: Expanded Homicide Data Table 8*,

Federal Bureau of Investigation, https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/expanded-homicide-data-table-8.xls (last visited Mar. 24, 2019) (noting that in 2017 "handguns" accounted for 7,032 murders nationwide, while "rifles" of any type accounted for 403 murders nationwide that same year).

Heller follows a long history of cases rejecting the notion that the government may ban constitutionally protected activity because the activity could lead to abuses. *See, e.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002) (government cannot ban virtual child pornography because it might lead to child abuse because "[t]he prospect of crime" "does not justify laws suppressing protected speech"); *Edenfield*, 507 U.S. at 770-71 (state cannot impose a "flat ban" on solicitations by public accountants because solicitations "create[] the dangers of fraud, overreaching, or compromised independence"); *Stanley v. Georgia*, 394 U.S. 557, 567 (1969) ("the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits"). That extreme degree of prophylaxis is incompatible with the decision to give the activity constitutional protection. California's over inclusive approach violates the basic principle that "a free society prefers to punish the few who abuse [their] rights . . . after they break the law than to throttle them and all others beforehand." *Se. Promotions Ltd. v. Conrad*, 420 U.S. 546, 559 (1975); *accord Vincenty v. Bloomberg*, 476 F.3d 74, 84-85 (2d Cir. 2007); *Robb v. Hungerbeeler*, 370 F.3d 735, 743 (8th Cir. 2004).

Ultimately, the state can only justify its extraordinary ban on the ground that it reflects the *non plus ultra* of its policy choice about the types of arms it desires its residents to use. But that argument simply ignores the Framers' judgments reflected in the Bill of Rights. Surely the most effective way to eliminate defamation is to prohibit printing presses, the most effective way to eliminate crime is to empower

police officers with unlimited search authority, and so on. But the Constitution prohibits such extreme measures by giving protection to free speech and the privacy of the home. The right to arms is no different. *Heller* made clear that the Second Amendment "necessarily takes certain policy choices off the table." 554 U.S. at 636. California's ban on these rifles is one of them, both because it is far too sweeping to reflect any sort of reasonable fit to the state's interest, and because the state's rationale, "taken to its logical conclusion," would "justify a total ban on firearms kept in the home." *Heller v. District of Columbia* (*Heller III*), 801 F.3d 264, 280 (D.C. Cir. 2015).

CONCLUSION

For these reasons, Plaintiffs request that this Court grant summary judgment as to their Second Amendment claim against the AWCA.

Dated: April 26, 2019

MICHEL & ASSOCIATES, P.C.

/s/ Sean A. Brady
Sean A. Brady
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE
IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Case Name: *Rupp, et al. v. Becerra*
Case No.: 8:17-cv-00746-JLS-JDE

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

I am not a party to the above-entitled action. I have caused service of:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed April 26, 2019.

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