XAVIER BECERRA
Attorney General of California
MARK R. BECKINGTON
Supervising Deputy Attorney General
JOHN D. ECHEVERRIA
Deputy Attorney General
PETER H. CHANG
Deputy Attorney General
State Bar No. 241467
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 510-3776
Fax: (415) 703-1234
E-mail: Peter.Chang@doj.ca.gov
Attorneys for Defendant Xavier Becerra

IN THE UNITED STATES DISTRICT COURT

FOR THE 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, et al.,** Defendants.	8:17-cv-00746-JLS-JDE **DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [ECF NO. 77]** Date: May 31, 2019 Time: 10:30 a.m. Courtroom: 10A Judge: Hon. Josephine L. Staton Trial Date: N/A Action Filed: April 24, 2017

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INTRODUCTION

The restrictions California has placed on assault rifles under the Assault Weapons Control Act ("AWCA") are constitutional. Assault rifles—semiautomatic, centerfire rifles that qualify as "assault weapons" under the AWCA—fall outside the scope of the Second Amendment. Unlike the handguns at issue in *District of Columbia v. Heller*, 554 U.S. 570 (2008), assault rifles, like the M-16 and similar weapons of war, are "most useful in military service" and are not commonly used for self-defense in the home. Even assuming that the Second Amendment is implicated, the AWCA comports with the Second Amendment because, under intermediate scrutiny, the challenged restrictions have a "reasonable fit" with the State's important public-safety objectives.

Five federal circuit courts have now upheld similar assault-weapon restrictions, with the First Circuit recently joining the emerging consensus that assault-weapon restrictions do not offend the Second Amendment. *See Worman v. Healey*, No. 18-1545, __ F.3d __, 2019 WL 1872902 (1st Cir. Apr. 26, 2019); *Kolbe v. Hogan*, 849 F.3d 114, 140-41 (4th Cir. 2017) (en banc); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 262-64 (2d Cir. 2015) (*NYSRPA*); *Friedman v. City of Highland Park*, 784 F.3d 406, 411-12 (7th Cir. 2015); *Heller v. District of Columbia*, 670 F.3d 1244, 1264 (D.C. Cir. 2011) (*Heller II*). Consistent with those cases, the AWCA is constitutional, and Defendant is entitled to summary judgment.

For the following reasons, and the reasons discussed in greater detail in the Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment ("Defendants' Memorandum" or "Def. Mem."), ECF No. 73, the Court should deny Plaintiffs' motion, ECF No. 77, grant Defendant's motion, and enter judgment in favor of Defendant.

ARGUMENT[1]

I. THE SECOND AMENDMENT'S LEGAL FRAMEWORK

The Ninth Circuit uses a two-step inquiry for Second Amendment claims: "first, the court asks whether the challenged law burdens conduct protected by the Second Amendment; and if so, the court must then apply the appropriate level of scrutiny." *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016). The first step considers whether the challenged law burdens conduct protected by the Second Amendment, based on a "historical understanding of the scope of the right." *Id.* at 820 (quoting *Heller*, 554 U.S. at 625). If the challenged law falls outside the historical scope of the Second Amendment, then that law "may be upheld without further analysis." *Id.* at 821 (citation omitted). If the Court determines that the challenged law is subject to the Second Amendment, it then proceeds to the second step of the inquiry to determine the appropriate level of scrutiny to apply, and then to apply that level of scrutiny. *Id*. (citation omitted). This two-step approach to Second Amendment challenges has also been adopted by *all* other courts of appeal that have addressed such challenges. *See Worman*, 2019 WL 1872902, at *3; *NYSRPA*, 804 F.3d at 254; *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *Kolbe*, 849 F.3d at 137-38; *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell v. City of Chicago*, 651 F.3d 684, 703-04 (7th Cir. 2011); *United States v. Adams*, 914 F.3d 602, 610 (8th Cir. 019); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010); *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs*, 788 F.3d 1318, 1322 (11th Cir. 2015); *Heller II*, 670 F.3d at 1252.

[1] To avoid unnecessary redundancy, Defendant incorporates by reference the Defendant's Memorandum, ECF No. 73.

II. PLAINTIFFS URGE THE COURT TO ADOPT A SCOPE-BASED TEST THAT CONTRADICTS THE TEST ADOPTED BY THE NINTH CIRCUIT AND OTHER CIRCUITS AND WAS NOT ENDORSED BY THE SUPREME COURT

A. Plaintiffs' Scope-Based Test Has No Basis in Law

Plaintiffs acknowledge that the Ninth Circuit has adopted the two-step analytical framework described above. Pls. Mem. of Points & Authorities in Supp. of Pls. Mot. for Summ. J. ("Pls. Mem."), ECF No. 77-1, at 17 ("[T]he Ninth Circuit has developed a multi-step framework for adjudicating Second Amendment claims."). Yet they urge this Court to instead adopt a "historical, scope-based analysis" contrary to Ninth Circuit law. Pls. Mem. at 10-12. Plaintiffs' argument plainly fails.

Under Plaintiffs' proposed "historical, scope-based" test, governments may only enact regulations that have historical roots. Pls. Mem. at 11. While "history and tradition" certainly play an important role in the Second Amendment analysis, the Supreme Court has cautioned that the Second Amendment "by no means eliminates" a State's ability "to devise solutions to social problems that suits local needs and values." *McDonald v. City of Chicago*, 561 U.S. 742, 784 (2010); *see id.* (reiterating that "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment" (quotation omitted)); *see also Jackson v. City & Cnty. of San Francisco*, 746 F.3d 593, 969-70 (9th Cir. 2014) (noting that governments "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems").[2] Plaintiffs' test is also directly at odds with the two-step approach adopted by the Ninth Circuit, as it

[2] The District of Columbia and six other states—Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, and New York—have joined California in enacting their own assault-weapon restrictions. *See* Conn. Gen. Stat. §§ 53-202a–53-202d (2013); DC Code Ann. §§ 7-2501.01(3A) (2017), 7-2502.02(a)(6) (2015); Haw. Rev. Stat. Ann. §§ 134-1, 134-4, 134-8; Md. Code Ann., Crim. Law §§ 4-301 (2018), 4-302 (2013), 4-303 (2018), 4-305 (2013), 4-305.1 (2018); Md. Code Ann. Pub. Safety § 5-101(r) (2017); Mass. Gen. Laws Ann. ch. 140, §§ 121 (2018), 131M (2014); N.J. Stat. Ann. §§ 2C:39-1(w) (2018), 2C:39-5(f) (2013), 2C:58-12; N.Y. Penal Law §§ 265.00(22) (2018), 265.02(7) (2013), 265.10 (2008), 400.00(16a) (2018).

collapses the judiciary's inquiry to the first step only: determining whether the challenged regulation implicates the Second Amendment.

Plaintiffs are also wrong in claiming that the Supreme Court rejected a traditional levels-of-scrutiny analysis applied to other enumerated constitutional rights. *See* Pls. Mem. at 12. The kind of "interest-balancing test" rejected by the *Heller* majority was not the same type of levels-of-scrutiny test commonly employed in constitutional cases. *See Heller*, 554 U.S. at 634 (noting that Justice Breyer "proposes . . . none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis), but rather a judge-empowering 'interest-balancing inquiry' . . . ."); *see id.* at 689-90 (Breyer, J. dissenting) (espousing a "proportionality" approach); *Nat'l Rifle Ass'n of Am., Inc.*, 700 F.3d at 197 ("[B]y taking rational basis review off the table, and by faulting a dissenting opinion for proposing an interest-balancing inquiry rather than a traditional level of scrutiny, the [*Heller*] Court's language suggests that intermediate and strict scrutiny are on the table."); *Heller II*, 670 F.3d at 1265 ("If the Supreme Court truly intended to rule out any form of heightened scrutiny for all Second Amendment cases, then it surely would have said at least something to that effect."). Indeed, Plaintiffs' contention that courts may not conduct some level of means-ends scrutiny when reviewing Second Amendment claims cannot be squared with the overwhelming weight of authority, which has explicitly adopted the levels-of-scrutiny approach in this context.

B. The AWCA's Restrictions on Assault Rifles Have Historical Analogs

Plaintiffs' "historical, scope-based test" is simply not the law. And even if it were—and the Court's analysis were restricted to step one of the Second Amendment inquiry—the AWCA would pass that test. The AWCA's restrictions on assault rifles are part of a longstanding history of analogous prohibitions on weapons deemed to be particularly dangerous. *See generally* Br. of Amicus Curiae

Everytown for Gun Safety in Supp. of Def.'s Mot. for Summ. J. ("Everytown Br."), ECF No. 82-1, at 3-8. Moreover, California enacted the AWCA in 1989, not long after assault rifles began to gain popularly with consumers. *See id*. at 12 (the AR-15 rifle "did not catch on in the American market in a significant way until the late 1980s"); *see also* Def. Exh. 35 (1981 Guns & Ammo magazine) (describing a "new breed" of assault rifles); Def. Exh. 16 (Helsley Dep. Tr.) at 825:20-826:12.[3]

Plaintiffs, citing *Staples v. United States*, 511 U.S. 600, 612 (1994), argue that rifles prohibited by the AWCA "traditionally have been widely accepted as lawful possessions." Pls. Mem. at 15-16. The Supreme Court in *Staples*, however, did not hold that such rifles can never be regulated, but addressed the narrow question of whether the absence of federal prohibition on those rifles at the time would have given gun owners sufficient notice of the likelihood of regulation for purposes of establishing *mens rea*. *Staples*, 511 U.S. at 612. The Court did not address whether assault rifles could ever be restricted or, more generally, are within the scope of the Second Amendment. In fact, the Supreme Court acknowledged in *Staples* that the "destructive potential" of assault rifles may be "even greater than" weapons such as machineguns, sawed-off shotguns, artillery pieces, and hand grenades. *Id.* In fact, four months after *Staples* was decided, Congress banned those rifles.[4]

C. Assault Rifles Are Not Commonly Used for Self-Defense of the Home

In addition to their historical arguments, Plaintiffs propose another categorical approach: that any laws restricting firearms that are "in common use" violate the Second Amendment. Pls. Mem. at 12-13 (citing *Heller II*, 670 F.3d at 1287 (Kavanaugh, J., dissenting)). Plaintiffs' "common use" test is not—and cannot

[3] Citations to "Def. Exh." are to the exhibits accompanying the Declaration of Peter H. Chang, ECF No. 76.

[4] In 1994, Congress enacted the "Public Safety and Recreational Firearms Use Protection Act," which banned assault weapons by make and model, and also by feature. Pub. L. no. 103-322; 108 Stat. 1796 (1994). The federal ban was modeled after the original AWCA. *Silveira v. Lockyer*, 312 F.3d 1052, 1057 (9th Cir. 2002). The federal ban expired in 2004.

be—the standard for determining whether a regulation runs afoul of the Second Amendment. *See Kolbe*, 849 F.3d at 141-42 (noting that "the *Heller* majority said nothing to confirm that it was sponsoring the popularity test"). And for good reason. Such an approach would be circular and lead to unreasonable results.

The Fourth Circuit has observed that, under the proposed "common use" test, short-barreled shotguns and machineguns—weapons that are clearly outside the scope of the Second Amendment—"could be sufficiently popular to find safe haven in the Second Amendment" if statutes prohibiting their possession had not been enacted. *Kolbe*, 849 F.3d at 141. And if "a state-of-the-art and extraordinarily lethal new weapon" were invented, under Plaintiffs' proposed test, "[t]hat new weapon would need only be flooded on the market prior to any governmental prohibition in order to ensure it constitutional protection." *Id.*; *see also Friedman*, 784 F.3d at 409 (noting that "it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn't commonly owned"); *Worman*, 2019 WL 1872902, at *5 n.5 (noting that "measuring 'common use' by the sheer number of weapons lawfully owned is somewhat illogical" (citation omitted)).

Simply put, the Second Amendment is not a one-way ratchet, expanding its scope to protect, and restricting the ability of governments to regulate, certain weapons as new firearms are brought to market before governments have had an opportunity to regulate them. To the contrary, governments may decide to regulate dangerous weapons based on public-safety needs, with their regulations being subject to scrutiny depending the burden imposed on the core Second Amendment right of self-defense in the home. Just as governments enacted restrictions on machineguns and semiautomatic firearms with large-capacity magazines after they became popular in organized crime in the 1930s, *see* Everytown Br. at 7-8, California enacted the AWCA in response to the use of assault weapons in public mass shootings, followed shortly thereafter by a similar federal ban.

Furthermore, evidence cited in Defendant's Memorandum demonstrates that assault rifles are neither commonly owned nor commonly used for self-defense. Def. Mem. at 15-16. The assault rifles restricted by the AWCA comprise only a small fraction of all firearms. While Plaintiffs characterize the AWCA as restricting all semiautomatic rifles based on AR-15 and AK-47 designs,[5] the AWCA actually restricts only a particularly dangerous subset of such rifles. The AWCA does not apply to (1) a centerfire semiautomatic rifle without a fixed magazine, provided it is not a prohibited make and model and does not have any of the prohibited features (*i.e.*, a "featureless" rifle); (2) a centerfire semiautomatic rifle with any of the military-style features and with a fixed magazine of 10 rounds or less; or (3) a rimfire semiautomatic rifle even if it includes any or all of the military-style features. Def. Mem. at 17. Plaintiffs provide no evidence of the number of rifles that meet the definition of an assault weapon under the AWCA.

Reliable evidence instead suggests that there are far fewer assault rifles than Plaintiffs estimate. Evidence shows that there are approximately 166,640 assault rifles registered in California. Def. Exh. 18 at 895 (as of Nov. 2, 2018). In a state with approximately 30.84 million adults, even assuming that each of the assault rifles is owned by a separate adult, it would mean that approximately 0.5 percent of adult Californians own an assault rifle, an ownership rate far from what may be considered "common." Def. Exh. 7 at 252, ¶ 18; *see* Def. Exh. 39 at 1511 (Census data). The actual ownership rate is likely less than half of one percent because

[5] Plaintiffs' estimate of the number of assault rifles, as defined by the AWCA, is based primarily on the expert opinion of William English. *See* Pls. Mem. at 6. Professor English, however, formulated his opinion based on the number of "Modern Sporting Rifles," which describes "a range of semiautomatic rifles, most of which are based on the AR-15 and AK-47 designs." Pls. Exh. 2 at 25. Professor English's opinion does not exclude AR-15 rifles that do not meet the definition of assault rifles under the AWCA. Supplemental Decl. of Peter H. Chang in Supp. of Def.'s Opp. to Pls.' Mot. for Summ. J., Exh. 46 at 1554:20-55:6] (agreeing that his estimate of AR-15 rifles in the United States includes rifles configured to be rimfire or are "featureless"). It is, therefore, an overestimation of the number of assault rifles restricted by the AWCA.

ownership of firearms, including assault rifles, is highly concentrated and growing more so. Def. Exh. 7 (Donohue Rebuttal Rpt.) at 252, ¶ 18; Def. Exh. 1 (Donohue Rpt.) at 8, ¶ 22; *see* Def. Stmt. 29-31.[6]

While Plaintiffs claim that assault-rifle purchasers acquire the weapons for self-defense purposes, Pls. Mem. at 15, there is no evidence that assault rifles are commonly *used* for self-defense either inside or outside the home. The rarity with which assault rifles have been used in self-defense is to be expected. They "do not share the features that make handguns well-suited to self-defense in the home." *Worman*, 2019 WL 1872902, at *7; *see* Def. Exh. 1 (Donohue Rpt.) at 43-44, ¶ 107; Def. Exh. 3 (Mersereau Rpt.) at 141-42, ¶ 23. Indeed, assault rifles do not have "any legitimate use as self-defense weapons," and they "in fact increase the danger to law-abiding users and innocent bystanders if kept in the home or used in self-defense situations." *Heller II*, 670 F.3d at 1261 (quotation omitted); *see also* Def. Exh. 20 at 949; Def. Exh. 1 (Donohue Rpt.) at 38-39, ¶ 96; Def. Exh 3 (Mersereau Rpt.) at 141-42, ¶ 23. As Plaintiffs' expert acknowledges, in defensive gun uses, handguns remain the preferred weapon. Def. Exh. 15 (Pls. Exp. Kleck Dep. Tr.) at 672:5-21; *see Heller*, 554 U.S. at 629,

III. PLAINTIFFS' MOTION FAILS BECAUSE THE AWCA'S RESTRICTIONS ON ASSAULT RIFLES DO NOT IMPLICATE THE SECOND AMENDMENT

For the reasons described in Defendant's Memorandum, the AWCA's restrictions on assault rifles fall within the category of firearms restrictions that "may be upheld without further analysis" because assault rifles are not protected by the Second Amendment. *See* Def. Mem. at 7-16. Assault rifles, "like the M-16," are "most useful in military service," and are also not "in common use." The challenged assault-rifle restrictions fall into both of these categories that *Heller* established as outside the scope of the Second Amendment.

[6] Citations to "Def. Stmt." are to Defendant's Statement of Uncontroverted Facts and Conclusions of Law, ECF No. 74.

A. Assault Rifles Are Not Protected by the Second Amendment Because They Are "Like" the M-16 and Other "Weapons That Are Most Useful in Military Service"

In *Heller*, the Supreme Court made clear that Second Amendment protection "extends only to certain types of weapons" and does not encompass a "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 623; *see id*. at 626-27 & n.26. Importantly, it does not protect weapons that are "most useful in military service," such as the "M-16 and the like." *Id.* at 627; *see also Kolbe*, 849 F.3d at 136.

As discussed in Defendant's Memorandum, assault rifles regulated under the AWCA fall outside the scope of the Second Amendment because they, "like" the M16, are "most useful in military service." Def. Mem. at 8-14. Assault rifles were originally developed for military use and are equipped with military-style features designed to serve specific combat needs and to enhance the lethality of the weapons. *See* Def. Stmt. 5-6.

As evidence cited in Defendant's Memorandum shows, assault rifles restricted by the AWCA are nearly identical to the M-16. *See* Def. Mem. at 8-14. The primary difference between the military's M-16 and the civilian AR-15 is that the M-16 is capable of firing in automatic mode while the AR-15 can fire only in semiautomatic mode. *Id.* at 9. That difference, however, is immaterial because semiautomatic weapons such as the AR-15 can be fired at a rapid rate that makes them "virtually indistinguishable in practical effect from machineguns." *Id.*; Def. Stmt. 11-12; *see Heller II*, 670 F.3d at 1263. Indeed, the United States military considers the M-16 to be more effective as a weapon of war when it is fired in semiautomatic mode because automatic fire "is inherently less accurate than semiautomatic fire." Def. Mem. at 9; Def. Exh. 19 at 911; *see* Def. Exh. 14 at 485:6-16. For this reason, the military instructs its solders to normally deploy their M-16 rifles in semiautomatic fire mode. Def. Exh. 19 at 912; *see also Kolbe*, 849 F.3d at 125. Moreover, any difference between the M-16 and the AR-15 is also

immaterial in practice because "it is a relatively simple task to convert a semiautomatic weapon to automatic fire." Def. Exh. 27 (H.R. Rpt. No. 103-489) at 1095; *see Staples*, 511 U.S. at 603; Def. Exh. 3 at 140, ¶ 20; Def. Exh. 15 (Pls. Exp. Kleck Dep. Tr.) at 642:8-10.

Each of the restricted features also serves specific combat functions:

- The ability to accept detachable magazines enables a shooter to "rapidly reload" one magazine after another, Def. Exh. 22 at 1048, and renders the rifle "capable of killing or wounding more people in a shorter amount of time," Def. Exh. 29 (S.B. 880 Rpt.) at 1133.
- A pistol grip or thumbhole stock is a ubiquitous feature of modern military rifles that enables a shooter to maintain accuracy during rapid fire in combat situations. Def. Exh. 3 (Mersereau Rpt.) at 137, ¶ 9; Def. Exh. 2 at 123, ¶ 19 & 5, ¶ 23; Def. Stmt. 16; Def. Exh. 22 (ATF Rpt.) at 1048; Def. Exh. 3 at 137-38, ¶ 9.
- A folding or telescoping stock enhances the portability and concealability of a rifle. Def. Exh. 3 (Mersereau Rpt.) at 138, ¶ 10; Def. Exh. 2 (Graham Rpt.) at 124, ¶ 21; Def. Exh. 22 (ATF Rpt.) at 1048.
- A flash suppressor is a standard feature of the M-16 that can help a shooter to maintain accurate, rapid fire in low-light conditions. Def. Stmt. 22-23; Def. Exh. 22 (ATF Rpt.) at 7. It can also help conceal the shooter's position, especially at night. Def. Stmt. 24; Def. Exh. 22 (ATF Rpt.) at 1049.

See Def. Mem. at 10-13. These features enhance the "capability for lethality—more wounds, more serious, in more victims—far beyond that of other firearms in general, including other semiautomatic guns." Def. Exh. 27 (H.R. Rpt. No. 103-489) at 1096-97.

B. Assault Rifles Are Not Protected by the Second Amendment Because They Are Not Commonly Owned or Used for Purposes Protected by the Second Amendment

The Second Amendment protects only the types of weapons "'in common use at the time' for lawful purposes like self-defense." *Heller*, 554 U.S. at 624 (quoting *U.S. v. Miller*, 307 U.S. 174, 179 (1939)); *see Fyock v. Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015). To establish a cognizable claim under the Second Amendment, Plaintiffs must show that assault rifles are both commonly owned and commonly used for the core Second Amendment purpose of self-defense. They have not, and cannot, do so. Def. Mem. at 14-16; *supra*, § II.C.

IV. THE AWCA'S RESTRICTIONS ON ASSAULT RIFLES ARE CONSTITUTIONAL UNDER INTERMEDIATE SCRUTINY

A. Intermediate Scrutiny Applies Because the AWCA's Prohibition on Assault Rifles Does Not Destroy People's Right to Possess Firearms for Self-Defense in the Home

Even if the Court finds that the AWCA's restrictions on assault rifles implicate the Second Amendment, the Court should review those restrictions under intermediate scrutiny. As this Court held in denying Plaintiffs' motion for a preliminary injunction, "intermediate scrutiny is appropriate" where individuals "remain free to choose any weapon that is *not* restricted by the AWCA or another state law." ECF No. 49 at 23; *see Heller II*, 670 F.3d at 1262 (applying intermediate scrutiny because the challenged law does not "prevent a person from keeping a suitable and commonly used weapon for protection in the home or for hunting"); *see also Worman*, 2019 WL 1872902, at *7 (applying intermediate scrutiny to analyze challenge to Massachusetts law that does not ban all semiautomatic weapons, but proscribes only a set of enumerated semiautomatic assault weapons and semiautomatic assault weapons with certain combat-style features that "do not share the features that make handguns well-suited to self-defense in the home"). For these reasons, the AWCA's restrictions on assault rifles should be analyzed under intermediate scrutiny, consistent with every circuit court

to have selected and applied a level of scrutiny to assault-weapon restrictions. *See Worman*, 2019 WL 1872902, at *7; *Kolbe*, 849 F.3d at 140-41; *NYSRPA*, 804 F.3d at 269; *Heller II*, 670 F.3d at 1263.

Plaintiffs do not argue for a different level of scrutiny. Instead, Plaintiffs argue that the AWCA fails any level of scrutiny because it "flatly ban[s]" firearms protected by the Second Amendment. Pls. Mem. at 18. Contrary to Plaintiffs' argument, the AWCA does not "flatly ban" all firearms, or even all semiautomatic rifles. *See* Def. Mem. at 4-5, 17-18. Californians may select from a range of firearms to engage in lawful self-defense, except for a small subset of particularly dangerous firearms comprising assault weapons. *See Jackson*, 746 F.3d at 961; *see also Worman*, 2019 WL 1872902, at *3 n.2 (rejecting argument that an assault weapons ban that applies to a subset of semiautomatic weapons constitutes an "absolute prohibition" of a "class" of arms because "[b]y this logic . . . virtually any regulation could be considered an 'absolute prohibition' of a class of weapons").

Plaintiffs argue that *Heller* holds that states cannot ban firearms simply because they are used in crimes. Pls. Mem. at 21. That, however, is a misreading of the rationale for the AWCA and of *Heller*. First, the AWCA does not restrict assault rifles simply because they are used in crimes. Rather, as discussed in Defendant's Memorandum and above, California's restrictions apply to weapons that are used disproportionately in mass shootings and murders of police and, when compared to other firearms, increase the number of casualties when used in crimes. Def. Mem. at 19-23. Second, *Heller* invalidated the District of Columbia's ban on handguns because it was a total ban on the possession of handguns, the "quintessential self-defense weapon," for use in self-defense of the home. *Heller*, 554 U.S. at 629, 636. Under Plaintiffs' flawed argument, all firearms—including machineguns, short-barreled shotguns, and other dangerous or unusual firearms—could be used for self-defense, and would thus be protected by the Second

Amendment. Yet, the Supreme Court made clear that the Second Amendment does not protect those types of weapons. *Heller*, 554 U.S. at 627.

B. The AWCA's Restrictions on Assault Rifles Pass Intermediate Scrutiny Because They Have a "Reasonable Fit" with the State's Public-Safety Objectives

A regulation satisfies intermediate scrutiny if (1) the government's stated objective is "significant, substantial, or important"; and (2) there is a "'reasonable fit' between the challenged regulation and the asserted objective." *Silvester*, 843 F.3d at 821-22 (citation omitted).[7] The fit between the challenged regulation and the stated objective does not need to be perfect, nor does it require that the regulation be the least restrictive means of serving the interest. *Jackson*, 746 F.3d at 966. In determining "reasonable fit," the court should consider "the legislative history of the enactment as well as studies in the record or cited in pertinent case law." *Id.* The court must "accord substantial deference to the predictive judgments of the [legislature]." *Peña v. Lindley* 898 F.3d 969, 979-80 (9th Cir. 2018) (citation omitted). Under intermediate scrutiny, the question is not whether the government, as an objective matter, was correct, but whether the evidence supports a "reasonable inference" that the law "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Peruta v. Cnty. of San Diego*, 824 F.3d 919, 942 (9th Cir. 2016) (en banc); *see Peña*, 898 F.3d at 1001. Even when the record contains conflicting "legislative evidence," a court's role when reviewing a law under intermediate scrutiny is to ensure that the government has selected "'among reasonable alternatives in its policy decisions,'" and that the available evidence "fairly support[s]" its conclusions. *Peña*, 898 F.3d at 979-980 (citations omitted); *see also Kolbe*, 849 F.3d at 140 (when reviewing a

[7] Plaintiffs misstate the standard for intermediate scrutiny to the extent they suggest that the state must show a law is both "substantially related" to its interest *and* has a "reasonable fit" with that interest. Pls. Mem. at 19-20. These are two formulations of the same step of the intermediate scrutiny analysis. *See Jackson*, 746 F.3d at 966 (considering whether the challenged law was "substantially related" to government interests by considering "the question of fit").

law under intermediate scrutiny, a court's obligation is "simply 'to assure that, in formulating its judgments, [the government] has drawn reasonable inferences based on substantial evidence'" (citation omitted)).

Plaintiffs concede that the State has an important interest in promoting public safety. Pls. Mem. at 19. The Court, therefore, need only find that there is a "reasonable fit" between the AWCA's prohibition of assault rifles and public safety to deny Plaintiffs' motion. Defendant's Memorandum and the evidence presented therein show that restricting assault rifles has had and will continue to have a significant impact on public safety. Def. Mem. at 18-24. Evidence shows that the use of assault rifles in crime increases casualties, including in mass shootings and against police officers, and that restrictions on assault rifles reduce such casualties. For these reasons and all the reasons explained in Defendant's Memorandum, and consistent with the "unanimous weight of circuit-court authority analyzing Second Amendment challenges to similar laws," *Worman*, 2019 WL 1872902 at *8, the AWCA's restrictions on assault rifles must be upheld under intermediate scrutiny. *See* Def. Mem. at 18-23.

1. The Use of Assault Weapons Increases Casualties

It is undisputed that the use of weapons regulated by the AWCA—particularly assault rifles—increases deaths and injuries in shootings compared to the use of other weapons. *See* Def. Mem. at 18-23; Def. Exh. 6 at 232; *see also Kolbe*, 849 F.3d at 140 ("[S]ince the enactment of the federal assault-weapons ban, semiautomatic assault weapons have been understood to pose unusual risks. When used, these weapons tend to result in more numerous wounds, more serious wounds, and more victims." (quoting *NYSRPA*, 804 F.3d at 262)). The evidence in this case also shows that assault rifles are favored by criminals and used

disproportionately in crime relative to their market presence. Def. Mem. at 19-21.[8] In particular, they are used in a higher share of mass shootings and in the murder of police officers, resulting in more casualties than when other types of firearms are used, particularly when used in conjunction with large-capacity magazines. Def. Mem. at 19-21; *see also* Everytown Br. at 15-16. Evidence also shows that assault rifles inflict more numerous and more extensive injuries in gunshot victims than wounds from handguns. *See* Def. Mem. at 21-23.[9] This evidence is more than sufficient to "fairly support" the State's conclusion that restricting these weapons would enhance the public's safety. *See Peña*, 898 F.3d at 980; *Fyock*, 779 F.3d at 1001 (upholding the district court's denial of preliminary injunction based on evidence that "the use of large-capacity magazines results in more gunshots fired, results in more gunshot wounds per victim, and increases the lethality of gunshot injuries" and that large-capacity magazines are "disproportionately used in mass shootings as well as crimes against law enforcement").

Even Plaintiffs' expert witness acknowledges that "there is a correlation between the use of assault weapons and the number of victims injured or killed." Def. Exh. 15 (Kleck Dep. Tr.) at 681:21-25. Nonetheless, Plaintiffs argue that the AWCA's restrictions on assault rifles do not have a reasonable fit to the State's public-safety objectives because the State cannot identify a causal link between the restrictions and public safety (i.e., assault rifles *cause* gun violence). Pls. Mem. at

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[8] Plaintiffs argues that rifles are "rarely" used in violent crimes. Pls. Mem. at 21-22 (noting that in 2017, rifles accounted for 403 murders while handguns accounted for 7,032 murders). Setting aside the question of whether 403 murders is truly "rare," they are used disproportionately relative to their market share compared to handguns, particularly in mass shootings and the murder of police officers. Def. Mem. at 19-21.

[9] The record on this issue includes the declaration of Dr. Christopher Colwell. Def. Exh. 4 (Colwell Rpt.) at 146. In its recent opinion upholding Massachusetts' assault-weapon restrictions, the First Circuit credited Dr. Colwell's opinion. *Worman*, 2019 WL 1872902 at *8 ("The record also contains the affidavit of a seasoned trauma surgeon [Dr. Colwell], who has treated victims of several mass shootings. This affidavit confirms what common sense suggests: semiautomatic assault weapons cause wounds that 'tend to be higher in complexity with higher complication rates than those injuries from non-assault weapons.'")

19. But the court here is "weighing a legislative judgment, not evidence at a criminal trial." *Peña*, 898 F.3d at 979. And the court's role is accordingly limited to ensuring that the Legislature, in formulating its judgment, drew "reasonable inferences based on substantial evidence." *Worman*, 2019 WL 1872902 at *9 (quotation omitted). For the reasons discussed, the Legislature met that standard here. *See also S.F. Veteran Police Officers Ass'n v. City & Cnty. of San Francisco*, 18 F. Supp. 3d 997, 1003 (N.D. Cal. 2014) (finding that large-capacity magazine restrictions satisfied intermediate scrutiny, even without giving any deference to the legislative judgment of the city, where "[t]he record demonstrates that there is a very high correlation between mass shootings and the use of [large-capacity magazines]"); *cf. Fantasyland Video, Inc. v. Cnty. of San Diego*, 505 F.3d 996, 1002 (9th Cir. 2007) (noting that the government relied on "studies and reports, reported court decisions, and anecdotal testimony to establish a correlation between adult establishments and negative secondary effects" in First Amendment case to justify law under intermediate scrutiny). And although proof of "causation" is not required, Plaintiffs' expert acknowledges that a correlation between two events, which he concedes exists between "the use of assault weapons and the number of victims injured or killed," makes it "[m]ore likely" that the events are causally related. Def. Exh. 15 (Pls. Exp. Kleck Dep. Tr.) at 668:11-16; 681:21-25.[10]

The evidence in the record—which is similar to the evidence presented in the other cases upholding similar assault-weapon restrictions—is more than sufficient to uphold the AWCA under intermediate scrutiny.

2. Assault Weapons Restrictions Reduce Gun Violence

In addition to showing that the use of assault rifles increases casualties in shootings, the evidence also shows that assault weapons restrictions are effective in

[10] Plaintiffs' expert witness believes that causation between the use of assault rifles and increased casualty rates in public mass shootings cannot ever be definitively proven because a researcher cannot control for the variable of the shooter's intent. Def. Exh. 15 at 682:1-7, 683:1-6.

reducing gun violence, particularly violence associated with mass shootings. *See* Def. Mem. at 23-24; Def. Exh. 40 at 1519; Def. Exh. 1 at 4, ¶¶ 12, 23-24, 55-6; Def. Exh. 23 at 1068. In the ten-year period of the federal ban, the number of mass shootings and resulting fatalities were reduced dramatically from the ten-years prior to the ban. Def. Exh. 1 (Donohue Rpt.) at 23-24, ¶¶ 55-56. In the ten-years after the federal ban expired, the number of mass shootings and resulting fatalities increased sharply in contrast with the downward trend in overall crime during the same period of time. *Id.* Furthermore, the AWCA's restrictions on assault rifles are likely to be more effective in reducing gun crimes than did the federal ban because, unlike the federal ban's two-feature test, the AWCA restricts semiautomatic centerfire rifles capable of accepting a detachable magazine if it has one of the military-style features. Def. Stmt. 39. It was reasonable, therefore, for the Legislature to conclude that the AWCA would reduce overall death and injury from the criminal use of guns. *See* Def. Exh. 1 at 31, ¶ 77.

CONCLUSION

For the reasons discussed above and in Defendant's Memorandum, Defendant respectfully requests that the Court deny Plaintiffs' motion for summary judgment, grant Defendant's motion, and enter judgment in Defendant's favor.

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Respectfully submitted,

XAVIER BECERRA
Attorney General of California
MARK R. BECKINGTON
Supervising Deputy Attorney General
JOHN D. ECHEVERRIA
Deputy Attorney General

/s/ Peter H. Chang

PETER H. CHANG
Deputy Attorney General
Attorneys for Defendant Xavier Becerra