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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

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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

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INTRODUCTION

In 2007, a criminal armed with a *handgun* opened fire at the campus of the University of Virginia Tech, where thousands were attending classes. The shooter killed thirty-two students and faculty and wounded seventeen more, expending over 175 rounds. Ex. 67. Just months later, with this atrocity still fresh in the American public's mind, the Supreme Court ruled that the Second Amendment protects an individual's right to possess a handgun for self-defense. The Court so held because handguns—despite being also used for evil—are among the arms "typically possessed by law-abiding citizens for lawful purposes," the touchstone for Second Amendment protection. *District of Columbia v. Heller*, 554 U.S. 570, 625, 627 (2008).

Rifles the State has arbitrarily labeled "assault weapons" and banned under the AWCA ("Banned Rifles") are also arms "typically possessed by law-abiding citizens for lawful purposes." *Id.* And their possession is likewise protected under the Second Amendment. The State attempts to cast these rifles as dangerous "military" arms that have no defensive utility and are thus underserving of Second Amendment protections. But the State's case is a flimsy façade of platitudes and cherry-picked data that quickly crumbles under any real scrutiny. The Court should reject it, just as the Southern District of California did when it enjoined California's restrictions on "large capacity magazines" where the State relied on largely the same evidence and experts as it does here.

In any event, as that court held, even if the State's view of these rifles were accurate, completely banning arms in common use for lawful purposes, as California has done with the AWCA, is a policy choice the Second Amendment takes off the table. Thus, this Court should deny the State's summary judgment motion.

ARGUMENT

The Second Amendment protects arms "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. Because the Banned Rifles

meet that standard and because the State cannot identify any longstanding tradition of restricting semiautomatic rifles generally, let alone based on their utilitarian features, the AWCA's ban on them violates the Second Amendment. Even if the Constitution allowed the State to justify the AWCA with evidence of the Banned Rifles' criminal uses—which it does not—the State's evidence of such use falls far short. The Court should therefore deny the State's motion for summary judgment.

I. The AWCA Bans Rifles that the Second Amendment Protects

The State does not dispute that the Second Amendment protects the types of weapons " 'in common use at the time' for lawful purposes like self-defense." Def.'s Mem. Supp. Mot. Summ. J. ("Def's Mot.") at 14 (quoting *Heller*, 554 U.S. at 627). Instead, the State claims that the Banned Rifles are neither in common use nor used for lawful self-defense. *Id.* at 14-16. It also argues that the Banned Rifles should be disqualified from Second Amendment protection because they supposedly are "like" the M-16 machine gun and other "weapons that are most useful in military service." *Id.* at 7-14 (quoting *Heller*, 554 U.S. at 627). The State is wrong on each score. Undisputed evidence and relevant case law show how extremely common the Banned Rifles are for lawful self-defense. And evidence and case law also show that the Banned Rifles are not the sort of military arms *Heller* suggested, in dicta, might lack Second Amendment protection.

A. The Banned Rifles Are in "Common Use" for Lawful Purposes and the Second Amendment Protects Them

1. Millions of Americans Lawfully Possess the Banned Rifles

It is simply undeniable that the Banned Rifles are commonly possessed by the American public. Even conservative estimates place ownership of such firearms in the several million range. Pls.' Statement Uncont. Facts & Conc. Law Supp. Mot. Summ. J. at No. 29 Statement Uncont. Fact ("Pls.' SUF"). According to a survey conducted in 2015, around 47.1% of active hunters and shooters in the country owns a Banned Rifle. Decl. of Sean A. Brady Supp. Pls.' Mot. Summ. J. ("Brady Decl.")

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. The large number of firearm manufacturers making the Banned Rifles and retailers selling them or related accessories confirm the rifles' popularity. *Id.*, 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.[1]

Owned by the millions and lawful to acquire and possess under federal law and in most states, Pls.' SUF No. 68, the Banned Rifles are "common" under any reasonable standard, Pls' SUF Nos. 29, 63-68; *cf. N.Y. State Rifle & Pistol Ass'n*, 804 F.3d 242, 255-57 (2d. Cir. 2015) ("Even accepting the most conservative estimates . . . , the assault weapons . . . at issue are 'in common use' as that term was used in *Heller*." *Hollis v. Lynch*, 827 F.3d 436, 449 (5th Cir. 2016) (defining the term "common" by applying the standard the Supreme Court used in *Caetano* of 200,000 stun guns owned and being legal in 45 states qualifying as "common"); *Heller v. District of Columbia*, 670 F.3d 1244 at 1287 (2011).

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 it 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.

Nevertheless, the State attempts to obfuscate this reality by suggesting that ownership of the Banned Rifles is low based on the relatively small number of such

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[1] See *Build Your DDM4*, Daniel Defense https://build-your-ddm4.danieldefense.com/ (last visited May 2, 2019); see also *Gunstruction*, AR15.com, https://www.ar15.com/gunstruction/ (last visited May 2, 2019).

rifles that have been registered in California. Def.'s Mot. at 14-15. But the number of California "assault weapon" registrations is a terrible barometer for the Banned Rifles' popularity *in the country*. California has had some iteration of the AWCA in effect for the past 30 years, which undoubtedly curtailed the demand for the Banned Rifles in the state. Cal. Penal Code §§ 30600-30605 (former Cal. Penal Code § 12280) (originally adopted in 1989). The State did not provide notice directly to owners of the need to register under any iteration, possibly resulting in countless people failing to register out of ignorance. Def.'s Suppl. Rsp. Pl. Troy Willis's First Set of Interrog., Resp. No. 10; *see also* AG00018310-18320. And countless more people could have lawfully modified their rifles, removed them from the state, or sold them to avoid having to register them. *See, e.g.*, Cal. Penal Code § 30920 (requiring persons who lawfully possessed firearms subsequently declared "assault weapons" to dispossess themselves of their firearms or register them with the California Department of Justice). Indeed, the State itself anticipated over one million registrations in 2016 alone.[2] Accordingly, California's registration numbers do not reflect the number of Banned Rifles (or would-be Banned Rifles) possessed in the state, let alone in the country—which is the proper inquiry.

The State's claim of concentrated gun ownership is also wrong. Def.'s Mot. at 15. First, the number of households in the country owning firearms has not been declining, even according to the very (cherry-picked) sources the State's expert relies on. *See* Ex. 51 at 4-6. At deposition, that expert, Professor John Donohue, admitted that he omitted the most recent result from a survey that contradicted his claim of declining gun ownership, while using that exact survey to make a different point that

[2] *See* Senate Budget Subcommittee #5 May 4th, 2017, Hearing @ 21:45, *available at* https://www.senate.ca.gov/media/senate-budget-subcommittee-2-20170504/video (where the California Department of Justice testified that it anticipated between 1-1.5 million "assault weapon" registrations after the enactment of Senate Bill No. 880).

supported another of his positions—proving himself to be biased, careless, or both. Declaration of Sean A. Brady in Support of Plaintiffs' Motion for Summary Judgment ("Opp'n. Brady Decl."), Ex. 53 at 40-55.[3] Indeed, a court recently criticized Donohue for making this very claim. *Duncan v. Becerra*, No. 17-cv-1017, 2019 WL 1434588 *31 (S.D. Cal. Mar. 31, 2019) (holding that Donohue's "observations should be discounted"). More importantly, Donohue provided no basis for his claim that "assault weapon" ownership is concentrated. Def.'s Ex. 1 at 9, Ex. 51 at 6. Reality is quite to the contrary. The Banned Rifles "are currently the most popular and best selling long-guns in America, and surveys suggest that at least one out of every two active hunters and shooters now owns" one. Opp'n. Brady Decl., Ex. 52 at 7.

2. The Banned Rifles Are Kept for Lawful Self-Defense

One of the main reasons people choose to acquire the Banned Rifles is for self-defense. Pls.' SUF No. 30; Opp'n. Brady Decl., Ex. 62. The State does not and cannot dispute that. Instead, it argues that because those people rarely ever discharge one in self-defense, the Banned Rifles are not protected under the Second Amendment. Def.'s Mot. at 15. The State then goes a step further and claims the Banned Rifles are not even useful for self-defense. *Id*. at 15-16. The State's arguments distort both *Heller* and reality.

First, in *Heller* conditions an arm's Second Amendment protection on its actual rate of use in self-defense situations. Indeed, as the State itself recognizes, the actual firing of a handgun in self-defense is rare. *Id.* at 15, fn. 5. Yet, the *Heller* Court nevertheless voided a handgun ban because: "It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon." *Heller*, 554 U.S. at 629. The Supreme Court

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[3] Donohue incredulously defended the omission as a simple oversight, despite the survey result being at the top of the page, adjacent to a statement Donohue himself relied on. Opp'n. Brady Decl., Ex. 53 at 40-55.

also unanimously held that stun guns are protected by the Second Amendment without inquiring into how often they are defensively used. *Caetano v. Massachusetts*, ___ U.S. ___, 136 S. Ct. 1027 (2016). The relevant question is thus whether an arm is *kept*, not whether it must be used, for self-defense. The State does not even attempt to dispute that the Banned Rifles are. Instead, it argues that those who keep them for self-defense are wrong about their usefulness for that purpose. Def.'s Mot. at 15-16. This point is not only irrelevant under *Heller* but also erroneous.

The State begins with the myth that the Banned Rifles are not suitable for home defense because they endanger innocent bystanders by penetrating walls more so than other firearms. *Id*. To be clear, as conceded by the State's experts, the features used to distinguish a Banned Rifle from other rifles have *nothing* whatsoever to do with the ballistics of a projectile fired from one. Opp'n. Brady Decl., Ex. 50 at 6; Ex. 55 at 51-52. A bullet fired from a Banned Rifle will react exactly as a bullet fired from a rifle lacking the features, assuming identical barrel length and cartridge. *Id.*, Ex. 50 at 6. What's more, 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. Several other self-defense experts agree. *Id.*, Exs. 27-29.

The State, on the other hand, cites no self-defense expert who can dispute the utility of the Banned Rifles for self-defense. Rather, it relies on a biased gun control advocacy group, a Stanford professor whose has never fired one of the Banned

Rifles, Opp'n. Brady Decl., Ex. 53 at 210, and a police officer who has no formal training in self-defense and admits he bases his opinion on talking to people and reading things, Ex. 57 112-13; Def.'s Mot. Summ. J. at 15-16. The State also conveniently omits that the other law enforcement officer expert it relies on believes the Banned Rifles *are* useful for self-defense. Opp'n. Brady Decl., Ex. 56 at 108. It does, however, cite one circuit court opinion supporting its premise that the Banned Rifles pose danger to bystanders and have little defensive utility, but it fails to provide the source from which that court made its determination. *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011). Plaintiffs, on the other hand, provide a report disputing those findings, authored by an individual so qualified on firearms and ballistics that the FBI trusted him to train its agents on firearms and head its ballistics program. Brady Decl., Ex. 1 at 1-4.

In any event, that the Banned Rifles are useful for lawful self-defense is not theoretical. There are various accounts of individuals actually using them in self-defense. Opp'n. Brady Decl., Ex. 58; Ex. 59; Ex. 61 (containing 10 accounts of Banned Rifles used for self-defense just in the last several years). Ironically, in trying to justify a ban on certain rifles the State discounts the relevancy of defensive rifle use because it only accounts for 4.6 percent of self-defense shootings, when that is almost double the percent of unlawful homicides committed with a rifle in 2015. Req. Jud. Notice, Ex. 1 (of the 9,778 homicides committed with a firearm in 2015, only 258 were committed with rifles of all types). In other words, using the State's own evidence, rifles are used for defending innocent life twice as often as they are for taking it.[4]

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[4] Other lawful purposes for which people commonly acquire the Banned Rifles include hunting, competitive shooting, and target shooting. SUF Nos. 31-33.

B. Firearms Are Not Beyond the Second Amendment's Protection Merely for Sharing Characteristics with Military Arms; Regardless, Banned Rifles Are Not "Like" the M-16 in Any Legally Relevant Way

The State also argues that the Second Amendment does not protect the Banned Rifles because they are "like" the M-16 machine gun and "most useful in military service." Def.'s Mot. at 7-14 (quoting *Heller*, 554 U.S. at 627). That argument is baseless. As an initial matter, the discussion about permissible restrictions on the M-16 machine gun and similar arms in *Heller* is dicta; the issue before the Court there was a ban on handguns. 554 U.S. at 628. Setting that aside, while it did acknowledge that the Second Amendment might not protect "sophisticated military arms that are highly unusual in society," *Heller* does not specify what arms other than an M-16 the Court would consider too militaristic for Second Amendment protection. But surely, to qualify as such however an arm must at least be in use by an actual military. Yet, the State does not provide evidence of a single military in the world that employs the Banned Rifles. That should be the end of this inquiry.

The State nevertheless insists that because the features the AWCA prohibits on semiautomatic, centerfire rifles can also be found on the M-16, the Banned Rifles are military arms "like" the M-16. Def.'s Mot. at 7-13. But *Heller* never suggests that arms commonly possessed by the American public are undeserving of Second Amendment protection merely for sharing characteristics with military arms. *See*, 554 U.S. at 627-28 (citing *United States v. Miller*, 307 U.S. 174, 179 (1939)). And for good reason. To make that extension would result in an unbounded, subjective test under which any feature found on a firearm in military service—no matter how benign—could remove a firearm from Second Amendment protection simply for having that same feature, e.g., a simple scope or sling. It is an unworkable standard. Strikingly, only a single circuit court has found that the Second Amendment does not protect the Banned Rifles due to their supposed military utility. *Kolbe v. Hogan*, 849 F.2d 114, 142 (2017). This Court should thus refuse to adopt that outlier position.

In any event, the State's arguments for why the Banned Rifles supposedly function similar to military rifles are unpersuasive. Not one argument is supported by any military expert identified by the State. And many apply equally to *all* semiautomatic rifles, not just the Banned Rifles, making those arguments irrelevant here. *See* Def.'s Mot. at 9-11 (discussing the nature of semiautomatic rifles' rate of fire and the State's concerns about detachable magazines, particularly larger capacity ones, which are neither unique to nor even necessary to operate the Banned Rifles).

The State does attempt to connect the prohibited features to "specific combat functions." Def.'s Mot. at 10-13. But it achieves little more than showing why those features are generally desirable and that prohibiting them is irrational. Other than their incidental ubiquity on rifles used by militaries, the State's sole complaint about "pistol grips" (including thumbhole stocks) is that they allow more control over the rifle, thereby increasing accuracy—as if those are bad things! Def.'s Mot. at 11-12. The State makes the same odd complaint about "flash suppressors," and then goes on to complain that they help conceal a shooter's position. *Id*. at 12-13. But, that is based on a gross misunderstanding of flash suppressors, which—*by definition*—have nothing to do with concealment. *See* 11 C.C.R. § 5471(r) (defining it as a device that reduces flash "from *the shooter's* field of vision") (emphasis added)[5]; *see also* Ex. 3 at 10-12. Finally, the State complains that adjustable stocks allow criminals to more easily conceal a rifle and enter vulnerable areas undetected. Def.'s Mot. at 12. Tellingly, neither the State nor any of its experts cite a single incident where a criminal has done this. This is likely because adjustable stocks *lengthen*—not shorten—a rifle, and generally only by a few inches, always keeping the firearm at a lawful length no matter where the stock is set. Brady Decl., Ex. 3 at 9-10; Opp'n. Brady Decl., Ex. 56 at 89-90, Ex. 57 at 47. What's more, the State wholly ignores the

[5] Curiously, the State includes definitions for the other features but omits this one.

practical, benign purpose of an adjustable stock, which is to allow a rifle to be a comfortable length for a particular user. Brady Decl., Ex. 3 at 9-10; Opp'n. Brady Decl., Ex. 56 at 92-94, Ex. 57 at 37.

In sum, the features are included on rifles not to serve some uniquely military purpose, but rather because they "actually tend to make rifles easier to control and more accurate—making them safer to use." *Murphy v. Guerrero*, No. 14-00026, 2016 WL 5508998, at *18 (D. N. Mar. I. Sept. 28, 2016). 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." *Id.*, Ex. 3 at 6.

Undeterred by this reality, the State nevertheless argues that the prohibited features are more relevant for military purposes than a rifle's rate of fire, stating that there "is not a material difference" between a semiautomatic and automatic rifle. Def.'s Mot. at 9; *see also id*. at 9-10 (trivializing the distinction between semiautomatic and automatic rifles, even going so far as to suggest semiautomatics are more dangerous). The State's position is belied not only by the quantity of longstanding laws restricting automatic firearms contrasted with the dearth of laws restricting semiautomatics, but also by Supreme Court itself. *See Staples v. United States*, 511 U.S. 600 (1994).

Incredibly, in attempting to connect the Banned Rifles to the M-16, the State relies on *Staples*. Unfortunately for the State, that case is decidedly in Plaintiffs' favor. The State starts with a quote from *Staples* that: "[t]he AR-15 is the civilian

version of the military's M-16 rifle . . .." Def.'s Mot. at 8 (quoting *Staples*, 511 U.S. at 603). Setting aside that this quote alone contradicts the State's claim that the Banned Rifles are "military" arms—referring to the AR-15 as a "civilian" firearm—the State omits the very next sentence distinguishing the M-16 from the AR-15. *Id.* ("The M-16, *in contrast*, is a selective fire rifle . . .") (emphasis added). In fact, the entire premise of the *Staples* case was that the AR-15 is so different from a machine gun like the M-16, that it could not be assumed "that Congress did not intend to require proof of *mens rea* to establish an offense" for illegal possession of a machine gun resembling an AR-15–i.e., an M-16. *Id.* at 606. The Court reached that conclusion despite acknowledging that the two rifles have interchangeable parts and that an AR-15 can be converted into a machine gun, *id.* at 603—points the State conveniently cherry-picked out of context from the opinion, giving the impression that the Court found those facts troubling. Def.'s Mot. at 10. What's more, and perhaps the most relevant point of the opinion for this case, *Staples* identified the AR-15 as being among guns that "traditionally have been widely accepted as lawful possessions." 511 U.S. at 612.

Tellingly, the author of *Staples* was Justice Thomas who, joined by the author of the *Heller* opinion, former Justice Scalia, left little doubt where he stands on the constitutionality of laws like the AWCA when dissenting to the Court's refusal to review the Seventh Circuit's upholding of a nearly identical law. *See Friedman v. City of Highland Park*, 136 S. Ct. 447 (2015) (complaining that "several Courts of Appeals . . . have upheld categorical bans on firearms that millions of Americans commonly own for lawful purposes," citing as an example the ordinance at issue because it "criminalizes modern sporting rifles (e.g., AR-style semiautomatic rifles), which many Americans own for lawful purposes like self-defense, hunting, and target shooting"). It is also noteworthy that another current Justice has likewise expressed his view that rifles like the AR-15—and thus the Banned Rifles—are commonly possessed and protected under the Second Amendment. *Heller II*, 670 F.3d at 1288

(Kavanaugh, J., dissenting). And he did so, relying largely on the *Staples* opinion. *Id.* (acknowledging that the Supreme Court in *Staples* "already stated that semi-automatic weapons 'traditionally have been widely accepted as lawful possessions'").

In sum, the Banned Rifles are among the arms most commonly chosen by Americans for lawful purposes, including for the core lawful purpose of self-defense. These rifles are not "sophisticated military arms that are highly unusual in society." *Heller*, 554 U.S. at 627. They are, therefore, protected under the Second Amendment.

II. The AWCA's Ban on Rifles Cannot Survive Second Amendment Scrutiny

A. The AWCA's Ban on Rifles Has No Historical Justification and Thus Violates the Second Amendment

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 II*, 670 F.3d at 1271-74 (Kavanaugh, J., dissenting). If a law burdens conduct protected by the Second Amendment, courts must turn to "text and history" to determine whether the law is analogous to restrictions historically understood as permissible limits on the right to keep and 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 Second Amendment's protections, 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 government to justify its restrictions, based on text, history, and tradition. *See id.* at 634-36.

Faced with a dearth of historical restrictions analogous to the AWCA, the State raises no argument that the AWCA has a historical pedigree that might shield it from Second Amendment scrutiny. Amicus Everytown for Gun Safety, however, attempts to fill that void by shoehorning a variety of statutes into a manufactured category of arms it labels "especially dangerous." Everytown's creative compilation includes

laws concerning everything from trap-guns, to bowie knives, to handguns, to billy clubs, to machine guns. Everytown Br. at 5-6. Noticeably absent, however, are laws specifically restricting semiautomatic rifles because of their features. By Everytown's logic, virtually any firearm ban should avoid constitutional review so long as the firearms are described as being sufficiently dangerous by legislators.

Of course, restrictions on knives and billy clubs bear no resemblance to the AWCA. Prohibitions on trap or "spring" guns make it unlawful to "set *any* loaded gun" in a dangerous manner that would allow it to "discharge itself"–they do not ban any firearm at all. *See, e.g.*, 1763-1775 N.J. Laws 346. And the handgun bans that Everytown attempt to liken to the AWCA's rifle ban show how desperate its analysis is, as those would be unconstitutional under *Heller*. Finally, the "firing capacity" restrictions cited by Everytown that include some semiautomatics have largely been repealed, or they simply provided the definition of a machine gun, or both. *See Duncan*, 2019 WL 1434588 at *12-15 (discussing limited history and reach of state-level machine gun regulations).

At bottom, a review of even Everytown's colorful version of the historical record confirms what the State already effectively concedes—there is simply no longstanding tradition of banning law-abiding citizens from acquiring or possessing the ubiquitous semi-automatic rifles that AWCA prohibits. Because the State does not and cannot make that historical showing, its summary judgment motion cannot be granted.

B. The AWCA's Ban on Rifles Also Fails Any Level of Heightened Scrutiny and Thus Violates the Second Amendment

If the Court believes it necessary to apply a level of means-end review, the AWCA's ban on rifles still cannot survive. Not only is rational basis review off the table here, *Heller*, 554 at 636, but strict scrutiny must be the test. *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); *see, e.g.*, *Duncan*, 2019 WL 1434588 at *17-19; *Heller II*, 670 F.3d at 1284-85 (Kavanaugh, J., dissenting). Because the State does not even pretend that the AWCA's ban on rifles would survive strict scrutiny, its motion necessarily fails under that standard of review.

The State argues that the Court should apply intermediate scrutiny because the AWCA does not substantially burden Second Amendment conduct because it leaves Plaintiffs various alternatives for defensive firearms. Def.'s Mot. at 10. But the Supreme Court expressly rejected the State's reasoning when it struck down a handgun ban, despite the availability of alternative firearms. *Heller*, 554 U.S. at 629 ("It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed."). The *Heller* Court said the same would result under "any of the standards of scrutiny." *Id*. at 628-29.

For that reason, there is no need to decide what level of scrutiny applies here. Flatly banning arms that the Second Amendment protects like the AWCA does must "fail constitutional muster" even under intermediate scrutiny. *Id.*; *see also Duncan*, 2019 WL 1434588 at *20. To meet its burden under that standard, the State must first need to prove 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*, 572 U.S. 185, 199 (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 it surely has important interests in promoting public safety and preventing crime, including mass shootings, the State simply cannot begin to meet its

burden to prove that the AWCA's rifle ban is substantially related, let alone closely drawn, to advancing those interests.

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 reduces criminal violence with firearms. But it is worse than that because the State is admittedly depriving the public of more accurate rifles that are easier to control. Its own experts have opined on the superior performance of these rifles for legitimate purposes. Pls.' 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 also be deprived of them, resulting in fewer victims of violence. Not only is this bold 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.

The State nevertheless insists that evidence shows that "assault weapons restrictions" are effective in reducing violent crime, particularly mass shootings, and that restricting the Banned Rifles, therefore, furthers public safety. Def.'s Mot. at 23. In making its case, the State almost exclusively touts the supposed successes of the federal "assault weapon" ban in reducing violence. "This is not what the best available evidence indicates." Opp'n Brady Decl., Ex. 51 at 6.

The State relies on Congressional findings from before the federal ban took effect. Def.'s Mot. at 19-20. But a Department of Justice study commissioned by the Clinton administration to study the effects of that law concluded, ten years after it

was imposed, that "there [had been] no discernible reduction in the lethality and injuriousness of gun violence." Brady Decl., Ex. 25 at 96. Indeed, "[t]here was no evidence that lives were saved [and] no evidence that criminals fired fewer shots during gun fights." Opp'n Brady Decl., Ex. 49 at 11. The study's authors declared that they could not "clearly credit the ban with any of the nation's recent drop in gun violence," Brady Decl., Ex. 25 at 96, and that, "[s]hould it be renewed, the ban's effects on gun violence are likely to be small at best and perhaps too small for reliable measurement," Opp'n Brady Decl., Ex. 49 at 11; Brady Decl., Ex. 25 at 3. It is no wonder, then, that Congress allowed the ban to expire in 2004. SUF No. 65; Brady Decl., Ex. 25 at 96.

Rather than rely on a study conducted by a seasoned researcher on behalf of the very administration that put the ban into place, the State says we should instead believe a "non-scholarly book" finding the federal ban effective, whose author has "no prior experience or record of publication on guns and violence." Opp'n Brady Decl., Ex. 51 at 7; Def.'s Mot. at 23-24. That "study" merely compares the number of "gun massacres" (shootings with six or more deaths) in the ten-year periods before and after the federal ban with the ten-year period of the ban and "uncritically assumed that any differences in the numbers . . . were attributable to the presence or absence of the AWB." Opp'n Brady Decl., Ex. 51 at 7. Such a correlation does not prove causation and could simply be spurious. *Id*. Compounding the unreliability of such a coincidence is the fact that the Department of Justice study found "[assault weapons] were rarely used in gun crimes even before the ban." Brady Decl., Ex. 25 at 3. Other researchers have shown that the frequency of mass shootings between the years 1992 and 2013 was "basically flat." Opp'n Brady Decl., Ex. 51 at 3. And, "the number of mass shootings (4+ killed) has not increased in the most recent five years for which data are available." *Id*.

If anything, what the 1994 federal experiment proves is that the availability of the Banned Rifles is not causally related to violent crime. That conclusion is

unsurprising. For the notion that a law allowing a rifle with a detachable magazine *and* a pistol grip, but merely prohibiting it from also having a flash suppressor and adjustable stock, would have any real impact is, frankly, silly. Indeed, the State's own expert on that point could not pinpoint how restricting those features directly resulted in any crime decrease. Opp'n Brady Decl., Ex. 53 at 177-178. In fact, he conceded that any positive effect from the federal ban in reducing crime could be wholly attributable to its restriction on magazines, not on the rifles. *Id.*, Ex. 53 at 146-47.

A recent study released by Boston University supports the conclusion that the federal ban did not work. In that report, researcher concluded that "assault weapon" bans have no measurable impact on homicide or suicide rates. Brady Decl., Ex. 69, Ex. 60 (one of the authors explaining that "assault weapon" bans do not have any substantial impact on homicide rates and "are most often based on characteristics of guns that are not directly tied to their lethality").[6]

Finally, the State argues that Australia's "assault weapons" ban shows the AWCA works. Def.'s Mot. at 24. As an initial matter, the State is comparing apples and oranges. Australia did not ban certain rifles with features, it banned *all* semi-automatic firearms. Opp'n Brady Decl., Ex. 51 at 9-11. What's more, the State has the statistics wrong. There were not thirteen mass shootings before the law and zero since its passage. Def.'s Mot. at 24. Rather, "there were no more than seven mass shootings before the NFA and two since then" in Australia. Opp'n Brady Decl., Ex. 51 at 9-10.

In sum, the State's evidence fails to show that the AWCA's ban on rifles furthers any substantial government interest.

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[6] Of note is that the State's expert witness, John Donohue, heavily cites to two of the study's co-authors in his own works. *See* John J. Donohue, *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and A State-Level Synthetic Control Analysis*, Nat'l Bur. of Econ. Research, https://www.nber.org/papers/w23510 (Nov. 2018) (citing works by Michael Siegal).

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. 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). Contrary to the State's assertion, 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. Except individuals who were fortunate enough to have been able to timely register their rifles, the AWCA bans Californians from possessing the Banned Rifles for *any* purpose. And it 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 in the home is *not* the sort of "fit" that survives even intermediate scrutiny.

Nevertheless, the State insists that there is a reasonable "fit" between the AWCA's rifle ban and California's public safety interests because supposedly "assault weapons are used disproportionately in gun crime, particularly mass shootings, and the killing of law enforcement personnel, resulting in increased casualties." Def.'s Mot. at 19. Even if these assertions were relevant to the constitutional analysis—which, as explained below, they are not—they do not reflect reality.

As an initial matter, the State simply cannot determine that the Banned Rifles are used "disproportionately" in the indicated crimes when it has admitted it does not know how many such rifles are owned in the country. Brady Decl., Ex. 8 at 4; Ex. 10 at 8. But even if could, it seems unlikely that Banned Rifles are used disproportionately in crime when, according to the State itself, "assault weapons" are used in no more than 8% of all crimes involving firearms. Def.'s Mot. at 20. That rifles in general—not just Banned Rifles—are used in just a fraction of the homicides that handguns are, casts further doubt on the State's assertion that the Banned Rifles are criminally oriented. Req. Jud. Notice, Ex. 1 (noting that in 2017 "handguns" accounted for 7,032 murders nationwide, while "rifles" of any type accounted for just 403).

Setting the math issues aside, the State also has some technical ones. It claims that rounds from "assault rifles" can penetrate police officers' body armor "that would otherwise stop handgun rounds," and that those rifles inflict more devastating wounds. Def.'s Mot. at 21-22. But, "the projectile making those wounds would have done the same damage whether discharged from an 'assault weapon' or a non-'assault weapon,' as long as the two rifles had similar barrels." Opp'n Brady Decl., Ex. 50 at 6. 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 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. Indeed, Dr. Colwell, the State's medical expert, could not identify what aspect of an "assault rifle" affected the wound. Opp'n Brady Decl., Ex. 55 at 51-55. And he admitted that he could not generally determine whether a wound was made by a projectile fired from an "assault rifle" or other firearm just by looking at it. *Id.*, Ex. 55 at 37, 45. In other words, the State's problem is with *all* rifles, not just the Banned Rifles. However, according to Dr. Colwell, short-range shotgun blasts cause "dramatically" worse wounds than even do "assault rifles." *Id.*, Ex. 55 at 68.

As for mass shootings, the State grossly exaggerates the Banned Rifles' role. Context matters here. These atrocities are fortunately extremely rare, responsible for less than 1% of all murder victims in the country. *Id.*, Ex. 55 at 20. Contrary to the State's depiction, they rarely involve the perpetrator using a Banned Rifle—a Congressional Research Service study found that only 9.78% of mass shootings involved one. *Id.*, Ex. 55 at 9. The State misleadingly inflates that percentage by narrowly focusing on a small, even more rare, subset of mass shootings, *public* mass shootings, artificially inflating the figure to 27.3%. *Id.*, Ex. 55 at 21. But even under the State's dubious narrowed focus, the vast majority of those shootings do not involve Banned Rifles. In other words, Banned Rifles are used in a decided minority of an extremely rare subset of murders, mass shootings.

Regardless, the State contends that the Banned Rifles are still problematic because they are responsible for higher casualty counts when used in mass shootings. Def.'s Mot. at 21. But in making its case, it pulls a sleight of hand—or two. First, the State cites its expert witness, Lucy Allen, who claims the average number of casualties in a shooting where a Banned Rifle was used is 41 versus 11 where one was not used. *Id*. But Allen admitted in her deposition that she would *include* all casualties—whether shot by a handgun, shotgun, or non-"assault weapon" rifle—as

being a casualty in a shooting where a Banned Rifles was used. Opp'n Brady Decl., Ex. 54 at 93:17-97:16. In other words, it is impossible to know whether the higher casualty rate can even be attributed to Banned Rifles. Allen also primarily relies on *Mother Jones*. Def.'s Ex. 5 at 197. That this source is problematic is an understatement. *See Duncan*, 2019 WL 1434588 at *21 n.46 (explaining that courts have criticized this source: "Mother Jones has changed it definition of a mass shooting over time, setting a different minimum number of fatalities or shooters, and may have omitted a significant number of mass shooting incidents." *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 113 (3d Cir. 2018); see also *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Grewal*, No. 317CV10507PGSLHG, 2018 WL 4688345, at *5 (D.N.J. Sept. 28, 2018) (state's expert Lucy Allen admitted that the Mother Jones survey omitted 40% of mass shooting cases)").

Second, the State cites figures for shootings involving both "assault weapons" *and* "large capacity" magazines. *See Id.* (citing Def.'s Ex. 1 at 44, 108; and Def.'s Ex. 23 at 1067). In doing so, the State cannot isolate the Banned Rifles as the culprit for the alleged higher casualty counts; particularly when the State has blamed the "large capacity magazines" for being the problem elsewhere. *See generally Duncan*, 2019 WL 1434588. The reality is that neither the State nor its experts have offered or can offer any explanation rooted in objective science that rules out the possibility that the association between higher casualty counts and a Banned Rifle used in a mass shooting is anything other than spurious, i.e. *not* causal. Opp'n Brady Decl., Ex. 55 at 11, 12, 21. In fact, Lucy Allen, has admitted that the association is at least partially and possibly entirely spurious. *Id.*, Ex. 55 at 21.

In sum, that Banned Rifles are the problem the State makes them out to be in mass shootings is dubious at best. In any event, even if the State's assertions about the criminal use of the Banned Rifles were accurate, it would not change the outcome here. First, the Second Amendment does not tolerate banning constitutionally

protected arms simply because they may often be 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.). In any event, if criminal misuse was not sufficient to ban handguns, it necessarily cannot be enough to justify a ban on commonly owned rifles, which are used much less often in violent crime. Req. Jud. Notice, Ex. 1. As explained above, the State grossly exaggerates the criminal misuse and utility of the Banned Rifles.

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.).

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 with 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).

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CONCLUSION

For these reasons, Plaintiffs request that this Court deny the State's summary judgment in its entirety.

Dated: May 2, 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:

PLAINTIFFS' OPPOSITION TO DEFENDANT'S 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 May 2, 2019.

s/ Laura Palmerin
Laura Palmerin

CERTIFICATE OF SERVICE