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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 REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT [ECF NO. 73]** 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

Plaintiffs do not attempt to distinguish this case from any of the five circuit-court cases that have held that assault-rifle restrictions, like those imposed by the AWCA, comport with the Second Amendment. Nor could they. There are no meaningful distinctions between this case and those applying intermediate scrutiny to assault-weapons restrictions, as this Court is bound to do under Ninth Circuit precedent. Instead, Plaintiffs cite dissenting opinions from a certiorari denial in *Friedman*, which upheld a municipal assault-weapons ban, and from *Heller II*, which upheld the District of Columbia's assault-weapons ban. *See, e.g.*, Pls.' Opp. to Def.'s Mot. for Summ. J. ("Pls. Opp.") at 11-12 (citing *Friedman v. City of Highland Park*, 136 S. Ct. 447, 447 (2015) (Thomas, J., dissenting), and *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1288 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)). Plaintiffs ask this Court to predict how two of the nine justices might rule in a future appeal, but such speculation is not a basis for invalidating the AWCA. Unless and until the Supreme Court holds otherwise, the Supreme Court's decisions in *Heller* and *McDonald*, the Ninth Circuit's Second Amendment precedents, and the "unanimous weight of circuit-court authority" upholding assault-weapons bans under the Second Amendment, *Worman v. Healey*, 922 F.3d 26, 39 (1st Cir. 2019), confirm that the AWCA's assault-rifle restrictions comport with the Second Amendment. The Court should grant Defendant's motion, ECF No. 73, deny Plaintiffs' motion, ECF No. 77, and enter judgment in favor of Defendant.

ARGUMENT[1]

I. THE AWCA'S ASSAULT-RIFLE RESTRICTIONS DO NOT IMPLICATE THE SECOND AMENDMENT

At the first step of the Ninth Circuit's two-step inquiry for Second Amendment claims, the Court asks a threshold question: "whether the challenged law burdens conduct protected by the Second Amendment." *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016). At this first step, Plaintiffs have failed to satisfy their burden to show that the Second Amendment is implicated by the AWCA's restrictions on military-style assault rifles. *See Binderup v. Att'y Gen. U.S.A.*, 836 F.3d 336, 347 (3d Cir. 2016) (explaining that the party asserting a Second Amendment claim has the burden of proof at the first step). Assault rifles regulated by the AWCA are not protected by the Second Amendment. *See* Def. Mem. at 7-16; Def. Opp. at 8-11. Assault rifles may be banned because they are, like the M-16, "weapons that are most useful in military service," *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008), and they are also not "in common use" for lawful purposes like self-defense, *id.* at 624. The challenged assault-rifle restrictions fall into both of these categories that *Heller* delineated as outside the scope of the Second Amendment.

A. Assault Rifles Are "Like" the M-16 and Other "Weapons That Are Most Useful in Military Service"

As Defendant has established, assault rifles regulated under the AWCA fall outside the scope of the Second Amendment because they, "like" the M-16 and similar military-style rifles, 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

[1] To avoid unnecessary redundancy, Defendant incorporates by reference the Defendant's Opposition to Plaintiffs' Motion for Summary Judgment, ECF No. 88 ("Defendant's Opposition" or "Def. Opp."). Capitalized terms used but not defined herein have the same meanings assigned to them in Defendant's Opposition.

the lethality of the weapons. *See id.*; Def. Stmt. 5-6; Pls. Exh. 18 at 3 (noting that the AR-15 was "designed for close, confusing combat"); Pls. Exh. 19 at 2 (noting that a "variant of [the AR-15] was chosen by the U.S. military and saw its first major-scale deployment within the Vietnam War"); Pls. Exh. 20 at 2 (referring to the AR-15 as the "civilian sibling of a military assault rifle"); *see also Gallinger v. Becerra*, 898 F.3d 1012, 1018 (9th Cir. 2018) (referencing "mass shootings perpetrated by individuals with *military-style rifles*" (emphasis added)).

Plaintiffs argue that there is no evidence that any military actually employs assault rifles and that this "should be the end of this inquiry." Pls. Opp. at 8. The Court, however, need look no further than the United States military. Plaintiffs' own evidence demonstrates that "[t]he armed forces are using more [AR-15s] than they have in more than a generation." Pls. Exh. 12 (Gun Digest Book of the AR-15) at 5. And when the United States military uses the M-16 in its semiautomatic mode, which is the mode that the Army recommends for the M-16 to "normally be employed," Def. Exh. 19 at 912, it is functionally *identical* to an AR-15 assault rifle. Def. Mem. at 8-10. The evidence in the record also shows that assault rifles can be fired at such a rapid rate that makes them "virtually indistinguishable in practical effect from machineguns," Def. Exh. 27 (H.R Rpt. No. 103-489) at 1095, making them "most useful in military service." Def. Stmt. 11-12; Def. Mem. at 9; *see Heller II*, 670 F.3d at 1263.

Plaintiffs do not dispute that the restricted features serve specific combat functions. Instead, they argue that those features are included on the rifles not to serve a "uniquely" military purpose but to make the rifles easier to control and more accurate. Pls. Opp. at 10. But under *Heller*, weapons fall outside the scope of Second Amendment protection if they are "most"—not "uniquely" or "only"—"useful in military service." *Heller*, 554 U.S. at 627. Indeed, under Plaintiffs' flawed reasoning, a machinegun would be protected by the Second Amendment because it *can* be used for self-defense and is thus not "uniquely" useful for military

service. But that would be clearly contrary to settled law. *See Friedman*, 784 F.3d at 408 (noting that, according to *Heller*, "military-grade weapons (the sort that would be in a militia's armory), such as machineguns, . . . are not" protected by the Second Amendment). Plaintiffs' concern that this standard is somehow "unworkable" and could apply to a firearm that has other features in common with military-grade firearms, such as a "simple scope or sling," Pls. Opp. at 8, is unfounded; those features have long been associated with traditional hunting rifles and are, thus, not most useful in military service. *See* Pls. Exh. 26 (AR-15/M16 Practical Guide) at 126 (stating that the "standard AR-15 . . . is often used in combat with the sling removed"). In any event, the Court need not grapple with Plaintiffs' slippery-slope concerns because the AWCA restricts features that render assault rifles most useful in military service.

Plaintiffs' argument that a single round fired from a semiautomatic, center-fire rifle without any restricted features may cause the same damage to human tissue as a single round fired from the same rifle with one or more restricted features is irrelevant. *See* Pls. Opp. at 9. It is the fact that the military-style features make an assault rifle easier to control and more accurate during rapid fire that makes these weapons particularly suitable in combat situations (and for those who intend to commit mass shootings). *See Kolbe v. Hogan*, 849 F.3d 114, 137 (4th Cir. 2017) (en banc) ("The very features that qualify a firearm as a banned assault weapon—such as flash suppressors, barrel shrouds, folding and telescoping stocks, pistol grips, grenade launchers, night sights, and the ability to accept bayonets and large-capacity magazines—'serve specific, combat-functional ends.'" (citation omitted)); *see also* Def. Exh. 11 (Mersereau Dep. Tr.) at 349:15-350:3 (more control over a firearm is "a very bad thing if it's in the hands of somebody who wants to use it in a[n] unlawful way, as we see with all the mass shootings that involve AR15s").

The restricted features enhance the rifle's "capability for lethality" when the rifle is used to fire rapidly. *See* Def. Mem. at 10-14; Def. Opp. at 10; Def. Exh. 27

(H.R. Rpt. No. 103-489) at 1096-97; Def. Exh. 22 (ATF Rpt.) at 1048 (noting that rifle pistol grips "were designed to assist in controlling machineguns during automatic fire"); Def. Exh. 16 (Helsley Dep. Tr.) at 844:6-15 (acknowledging that a pistol grip prohibited under the AWCA could "be more effective in stabilizing the weapon during rapid fire than other forms of pistol grips"); *id.* at 855:9-14 (agreeing that "where a person [is] firing multiple shots from a rifle in low light conditions, a flash suppressor may help that shooter fire that firearm more accurately"); *see also* Pls. Exh. 25 at 8 (noting that the capability of accepting large-capacity magazines "[p]ermits [a] shooter to fire dozens of rounds of ammunition without reloading" and a pistol grip "[a]llows the weapon to be 'spray fired' from the hip" and "helps stabilize the weapon during rapid fire").[2]

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. Opp. at 11. The Supreme Court in *Staples* addressed the narrow question—not presented here—of whether the absence of federal prohibition on those rifles at the time would have given a gun owner 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 may be restricted or, more generally, whether they are within the scope of the Second Amendment. In fact, the Supreme Court acknowledged in *Staples* that the "destructive potential" of assault

[2] Other proscribed features enhance the concealability of the weapon or shooter for tactical purposes. *See* Pls. Exh. 25 at 8 (noting that a flash suppressor "allow[s] the shooter to remain concealed when shooting at night" and a folding stock "[s]acrifices accuracy for concealability and mobility in combat situations"). Curiously, Plaintiffs claim that "adjustable stocks," including telescoping and folding stocks, "*lengthen*—not shorten—a rifle." Pls. Opp. at 9. Adjustable stocks can certainly be used to reduce the length of a rifle to enhance its concealability, even if (at least with respect to telescoping stocks) the reduction is "only by a few inches." *Id.* In any event, Plaintiffs' evidence confirms that adjustable stocks are not necessary for the safe operation of a rifle, as fixed-length stocks are available. Pls. Exh. 26 at 124 (noting that "[m]any tall shooters find the stock to be about an inch too short," but a different fixed-length stock can be installed that "is three-quarters of an inch longer than the standard stock and seems just the right length for those folks who are taller than five feet five inches").

rifles may be "even greater than" weapons such as machineguns, sawed-off shotguns, artillery pieces, and hand grenades. *Id.* And four months after *Staples* was decided, Congress enacted the federal ban on assault weapons.

Plaintiffs argue that the State is depriving people of superior rifles for self-defense purposes. Pls. Opp. at 15. Not so. The restricted assault rifles are not suitable for self-defense. *See* Def. Mem. at 16; *Kolbe*, 849 F.3d at 127 ("The State has also underscored the lack of evidence that the banned assault weapons and large-capacity magazines are well-suited to self-defense."); *Gallinger*, 898 F.3d at 1019 (noting the lack of evidence that assault weapons are well-suited for self-defense, in contrast to handguns, and the "inherent risks that accompany carrying assault weapons for self-defense" (citing *Kolbe*, 849 F.3d at 127)). The handful of anecdotes in which people have purportedly used or brandished assault rifles in self-defense situations, *see* Pls. Opp. at 7, does not demonstrate that assault rifles are, in fact, well suited to self-defense. *See* Def. Exh. 15 (Kleck Dep. Tr.) at 672:22-673:4 (Q: "[Y]ou do note . . . that there have been instances in which an AR-15 has been used in self-defense; is that correct?" A: "Correct, and these are just isolated anecdotes. So yeah, they've occurred, and that's about all you can say. You can't say anything about their frequency."); *id.* at 600:15-21 (testifying that "argumentation by anecdote has no scholarly legitimacy"). "Although self-defense is a conceivable use of the banned assault weapons," *Kolbe*, 849 F.3d at 127, the evidence in the record demonstrates that assault rifles are most useful in military service and thus fall outside the scope of Second Amendment protection.

B. Assault Rifles Are Not Commonly Owned, Let Alone Commonly Used, for Purposes Protected by the Second Amendment

Assault rifles restricted by the AWCA are outside the scope of the Second Amendment for the additional reason that they are not commonly owned or used for the core Second Amendment purpose of self-defense in the home. Def. Mem. at 14-16.

1. Assault Rifles Are Not Commonly Owned for Self-Defense

Plaintiffs argue that the relevant question for the Court is not whether assault rifles are commonly *used* for lawful purposes, but rather whether they are commonly "kept." Pls. Opp. at 6.[3] They do not cite any authority for this proposition.[4] And it is contrary to the plain text of *Heller*: "We also recognize another important limitation on the right to keep and carry arms. . . . [T]he sorts of weapons protected were those 'in common *use* at the time.'" *Heller*, 554 U.S. at 627 (emphasis added). But even assuming Plaintiffs were correct, they have not demonstrated that assault rifles proscribed under the AWCA are commonly possessed for lawful purposes like self-defense.

Plaintiffs speculate that "millions" of Americans possess assault rifles, but their evidence shows, at most, that many such rifles have been marketed and sold by firearms manufacturers and retailers. *See* Pls. Opp. at 2-3. Plaintiffs ask the Court to *infer* widespread civilian ownership of assault rifles based on industry surveys and advertisements in "firearm catalogs and other industry materials." *See id.* at 3. But that is not sufficient or competent evidence to satisfy Plaintiffs' burden at the first step of the Second Amendment inquiry. *See Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015) (noting that "marketing materials and sales statistics

[3] Furthermore, as discussed in Defendant's Opposition, Plaintiffs' contention that a firearm becomes protected by the Second Amendment simply if it is "popular" is illogical and cannot be correct. Def. Opp. at 5-7.

[4] Plaintiffs suggest that *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016), supports this view, claiming that the Supreme Court in that case "unanimously held that stun guns are protected by the Second Amendment without inquiring into how often they are defensively used." Pls. Opp. at 5-6. *Caetano* is a *per curiam* opinion that simply reversed a Massachusetts Supreme Judicial Court opinion that held stun guns were not protected by the Second Amendment because they are a modern invention not in common use at the time of the Second Amendment's enactment and not adaptable for use in the military. *Caetano*, 136 S. Ct. at 1027-28. The Supreme Court held that the state court decision was clearly contrary to *Heller* and remanded the case for further proceedings. *Id.* at 1028. It appears that Plaintiffs are referencing the concurrence in *Caetano*, *see id.* at 1028-33 (Alito, J., and Thomas, J., concurring), which does not reflect the holding of the Court. Moreover, even if Plaintiffs' characterization of *Caetano* were correct, stun-guns are plainly non-lethal defensive weapons, in contrast to military-style assault rifles. *See id.* at 1029 n.2 (noting that stun guns are "'non-lethal force' 'designed to incapacitate'—'not kill'—a target").

[do] not necessarily show that [certain firearm accessories] are in fact commonly possessed by law-abiding citizens for lawful purposes"). They contend that the State cannot dispute their claim that assault rifles are commonly owned because it "does not know how many Banned Rifles are possessed in the United States," Pls. Opp. at 3, but it is their burden, and not Defendant's, to demonstrate that the AWCA's restrictions on assault rifles implicate the Second Amendment.

Further, even assuming that "millions" of assault rifles have been sold, that does not mean that millions of law-abiding citizens own them. To the contrary, the evidence strongly suggests that these rifles are not "commonly owned" because ownership of firearms, including assault rifles, is highly concentrated and increasingly more so. Def. Mem. at 15; Def. Opp. at 7-8. This is shown by surveys that Plaintiffs' own expert witness relied upon. Def. Stmt. 30-31 (66 percent of owners of AR- or AK-platform rifles own two or more such rifles; over 30 percent of owners own three or more such rifles; and over 25 percent of owners own four or more such rifles); Def. Exh. 42 at 1532 (showing owners of "modern sporting rifles" owned an average of 2.6 such rifles in 2010 and an average of 3.1 such rifles in 2013).

Plaintiffs do not dispute the results of these surveys or other evidence. *See* Def. Mem. 14-15. Instead, Plaintiffs insinuate that the work of Defendant's expert witness, Professor John Donohue, was biased because he did not reference in his report a more current Pew survey. Pls. Opp. at 4-5. Professor Donohue testified that he had not seen those survey results prior to his deposition, Pls. Exh. 53 at 36:16-19, but would have included them in his report had he seen them, *id.* at 39:14-22. In any event, the Pew survey results confirm Professor Donohue's conclusion that there is a long-term downward trend in gun ownership. *Id.* at 52:19-25; *see* Def. Exh. 1 (Donohue Rpt.) at 6-8, ¶¶18-21.

2. Assault Rifles Are Not Commonly Used for Self-Defense

The assault rifles proscribed by the AWCA are not suitable for self-defense and are not commonly used for that purpose. Plaintiffs mischaracterize Defendant's position as arguing that assault rifles are "not even useful" for self-defense. Pls. Opp. at 5. Defendant's position is and has been that assault rifles are not *suitable* for self-defense in the home, and certainly less suitable than handguns. Def. Mem. at 16. Indeed, as discussed above, any weapon can be "useful" for self-defense, depending on the circumstances, including a machinegun. But that does not mean they are well-suited for self-defense or protected by the Second Amendment. Assault rifles lack the features that the Supreme Court found make the handgun the "quintessential self-defense weapon" and particularly well-suited for home-defense: "[A handgun] is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police." *Heller*, 554 U.S. at 629.

Plaintiffs rely on an opinion of their expert witness to argue that assault rifles are more suitable for home-defense than handguns. Pls. Opp. at 6 (citing Pls. Exh. 1 at 5-11). That opinion, however, is based on outdated information. Plaintiffs' expert based his opinion primarily on a test he performed while he was with the FBI that showed a particular 9-mm handgun round did not penetrate the human body in the optimal depth range. Pls. Exh. 1 at 6-7. However, Plaintiffs' expert left the FBI in 2012, and the FBI has since published a report showing that the performance of 9-mm handgun rounds has "dramatically increased." Def. Exh. 44 at 1538 ("9mm Luger offers higher magazine capacities, less recoil, lower cost . . . and higher functional reliability rates (in FBI weapons)"). During his deposition, Plaintiffs' expert acknowledged that a handgun firing the modern 9-mm handgun rounds tested by the FBI after his departure would penetrate the optimal

depth range. Def. Exh. 14 (Boone Dep. Tr.) at 497:16-498:12. Even assuming that assault rifles are suitable for self-defense, Plaintiffs' expert witness admits that all the reasons that allegedly make an assault rifle suitable for defensive purposes would apply to certain semiautomatic rifles not restricted by the AWCA; for example, a semiautomatic, centerfire rifle with a fixed magazine, which Californians are free to acquire for lawful purposes. *Id.* at 569:15-20.

II. THE AWCA'S RESTRICTIONS ON ASSAULT RIFLES ARE CONSTITUTIONAL UNDER THE NINTH CIRCUIT'S INTERMEDIATE-SCRUTINY STANDARD

A. Plaintiffs' Scope-Based Test Is Not the Law and Was Not Endorsed by the Supreme Court

Plaintiffs acknowledge that the Ninth Circuit has adopted the two-step analytical framework for adjudicating Second Amendment claims. Pls. Mem. at 17. Yet they again urge this Court to adopt a test based solely on "history and tradition," under which states would be permitted to enact only those regulations that have historical roots or analogs. Pls. Opp. at 12. Plaintiffs' argument plainly fails. As discussed at length in Defendant's Opposition, Plaintiffs' historical, scope-based test is not the law and would produce untenable results. Def. Opp. at 3-6. And they are wrong that the Ninth Circuit's two-step approach employs impermissible "interest-balancing tests." Pls. Opp. at 12; *see* Def. Opp. at 4.

Even if Plaintiffs' historical, scope-based test were the law in this Circuit—or any circuit for that matter—the AWCA's restrictions on assault rifles are part of a longstanding history of analogous federal and state prohibitions of weapons deemed to be particularly dangerous based on their features. *See* Def. Opp. at 4-5; Everytown Br. at 3-8. In addition to the historical pattern of regulating uniquely dangerous weapons like Bowie knives, brass knuckles, and firearm silencers, *see* Everytown Br. at 6 & nn.6-8,[5] the record discloses a long history of state

[5] While Plaintiffs characterize some of these laws as "restrictions on knives" to claim that they bear no resemblance to the AWCA, Pls. Opp. at 13, the effect of these restrictions are clearly analogous. These laws prohibited a uniquely

regulations of firearms based on firing capacity dating back to the 1920s, *id.* at 7-9. These regulations do not need to trace back to the ratification of the Second or Fourteenth Amendments. *Fyock*, 779 F.3d at 997. As suggested by the Ninth Circuit, these "early twentieth century [firing-capacity] regulations might nevertheless demonstrate a history of longstanding regulation," which would confirm that assault rifles fall outside the historical scope of the Second Amendment. *Id.*[6]

In claiming that there are no historical analogs for the AWCA, Plaintiffs rely on the recent district court decision in *Duncan v. Becerra*, 366 F. Supp. 3d 1131 (S.D. Cal. 2019), *appeal docketed*, No. 19-55376 (9th Cir. Apr. 4, 2019). Pls. Opp. at 13. In *Duncan*, the district court sought to distinguish these firing-capacity restrictions on the grounds that many were repealed or set different capacity limitations. 366 F. Supp. 3d at 1150-53. But even that court acknowledged that the District of Columbia's "firing-capacity restriction has been in place since the 1930s." *Id.* at 1153.[7] Nevertheless, the court distinguished the District of Columbia's firing-capacity law because its 12-round "limit was not as low as

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dangerous subset of knives, just as the AWCA prohibits a uniquely dangerous subset of semiautomatic rifles.

[6] This conclusion is also relevant to the first step of the Court's Second Amendment analysis. *See Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 196 (5th Cir. 2012) ("[W]e state that a longstanding, presumptively lawful regulatory measure—whether or not it is specified on *Heller*'s illustrative list—would likely fall outside the ambit of the Second Amendment; that is, such a measure would likely be upheld at step one of our framework."); *Silvester*, 843 F.3d at 829 (Thomas, C.J., concurring) (noting that the challenged law "can be resolved at step one of our Second Amendment jurisprudence" based on longstanding regulations dating back to the 1920s); *Fyock*, 779 F.3d at 997 & n.3 (confirming that analysis of firing-capacity regulations are relevant to the first step of the Second Amendment inquiry while declining to determine, based on a preliminary injunction record, "whether firing-capacity regulations are among the longstanding prohibitions that fall outside of the Second Amendment's scope").

[7] Most of the firing-capacity laws were repealed in the 1970s after being in effect since the 1920s and 1930s. *Ass'n of N.J. Rifle & Pistol Clubs v. Attorney General N.J.*) (*ANJRPC*), 910 F.3d 106, 117 n.18 (3d Cir. 2018). The 19-year gap between their repeal in the 1970s and the enactment of the AWCA in 1989, however, should not render these firing-capacity restrictions insufficiently "longstanding," especially where the District of Columbia has maintained the restrictions without interruption since the 1930s.

California's limit of 10 rounds." *Id.* But for purposes of the historical analysis, the difference of two rounds is not a material distinction because the challenged law need not "mirror" the historical regulations. *See United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc). Setting aside the precise capacity limits, the District of Columbia's firing-capacity law applies to the same types of semiautomatic weapons regulated by the AWCA: "any firearm which shoots . . . semiautomatically" many rounds of ammunition without reloading. Everytown Br. at 7-8.

Plaintiffs' reliance on the *Duncan* ruling is not limited to the discussion of firing-capacity restrictions. *See* Pls. Opp'n at 1, 5, 14, 21. But *Duncan*'s reasoning fails to support Plaintiffs' claim in this case. In *Duncan*, the district court held that California's two-decade ban on large-capacity magazines, Cal. Penal Code § 32310, violates the Second Amendment. 366 F. Supp. 3d at 1182-83. In so holding, the decision contradicts Ninth Circuit precedent, *see, e.g.*, *id.* at 1165 (criticizing several Ninth Circuit cases applying intermediate scrutiny), and conflicts with the holdings of six federal circuit courts that have upheld similar magazine restrictions on the merits on substantially identical records, *see Worman*, 922 F.3d at 40-41; *ANJRPC*, 910 F.3d at 122 (upholding amendment to state large-capacity magazine ban); *Kolbe*, 849 F.3d at 140-41; *N.Y. State Rifle & Pistol Ass'n v. Cuomo* (*NYSRPA*), 804 F.3d 242, 262-64 (2d Cir. 2015); *Friedman*, 784 F.3d at 411-12; *Heller II*, 670 F.3d at 1264. In fact, the district court in *Duncan* stayed its judgment pending appeal, acknowledging that its "decision cuts a less-traveled path." *Duncan v. Becerra*, No. 17-cv-1017-BEN-JLB, 2019 WL 1510340, at *1 (Apr. 4, 2019).

B. 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 at the first step of the Second Amendment inquiry that the AWCA's restrictions on assault rifles implicate the Second Amendment, or

assumes that they do, the Court should review those restrictions under intermediate scrutiny. Def. Mot. at 16-18; Def. Opp. at 11-13.

Plaintiffs argue that the AWCA fails to satisfy any level of scrutiny because it "flatly ban[s]" firearms protected by the Second Amendment. Pls. Opp. at 14. To the contrary, Californians may select from a range of firearms, including a wide range of semiautomatic rifles, to engage in lawful self-defense, except for a small subset of particularly dangerous firearms comprising assault weapons. *See* Def. Mem. at 4-5, 17-18; Def. Opp. at 12. As this Court held, "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.

Plaintiffs argue that the Supreme Court rejected this argument when it struck down a handgun ban in *Heller* despite the availability of alternative firearms. Pls. Opp. at 14 (citing *Heller*, 554 U.S. at 629). *Heller*, however, struck down the District of Columbia's "complete" handgun ban because it prohibited the possession and use of the "most popular weapon chosen by Americans for self-defense in the home." *Heller*, 554 U.S. at 629. In the Court's view, the availability of alternative firearms for home-defense, i.e., long guns, would not permit a complete ban on handguns, the "quintessential self-defense weapon." *See id.* In contrast, there are alternatives to assault rifles restricted by the AWCA, including handguns—which are already owned by over 90 percent of all owners of AR- or AK-platform rifles, Def. Exh. 42 at 1533—and semiautomatic rifles not restricted by the AWCA.

C. 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). Plaintiffs concede that the State has an important

interest in "promoting public safety and preventing crime, including mass shootings." Pls. Opp. at 14; *see* Pls. Mem. at 19. The Court, therefore, need only determine that there is a "reasonable fit" between the AWCA's prohibition of assault rifles and public safety, as every circuit court to have considered the issue has held, to deny Plaintiffs' motion.[8]

1. The Use of Assault Rifles Increases Casualties

Evidence shows that the use of weapons regulated by the AWCA—particularly assault rifles—increases the numbers of deaths and injuries in public mass shootings on average when compared to the use of other weapons. *See* Def. Mem. at 18-23; Def. Exh. 6 at 232. This is not surprising, given that the 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. Evidence further shows that assault rifles are favored by criminals and are used disproportionately in crime relative to their market presence. Def. Mem. at 19-21. 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. In light of this evidence, it was reasonable for the Legislature to conclude that restricting these weapons would enhance the public's safety. *See Peña*, 898 F.3d at 980 (noting that, even when the record contains "conflicting legislative evidence," intermediate scrutiny "allow[s] the government to select among reasonable alternatives in its policy decisions"

[8] Plaintiffs again argue that, in addition to demonstrating an important government interest, the State must show a law is "substantially related" to its interest and *then* prove that the means is "closely drawn" to achieve that end, Pls. Opp. at 14, converting the intermediate scrutiny analysis into a three-step test. To the contrary, the second and third steps that Plaintiffs propose are different formulations of the same "reasonable fit" step of the intermediate scrutiny analysis. Def. Opp. at 13 n.7; *see also Heller II*, 670 F.3d at 1262 (noting that, under intermediate scrutiny, "the Government has the burden of showing there is a substantial relationship or reasonable 'fit'").

(quoting *Peruta v. Cnty. of San Diego*, 824 F.3d 919, 944 (9th Cir. 2016) (en banc) (Graber, J., concurring))); *see also Fyock*, 779 F.3d at 1000.

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. Opp. at 15. But such a link is not required. Def. Opp. at 15-16. The court here is "weighing a legislative judgment, not evidence in 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*, 922 F.3d at 40 (quotation omitted).

Plaintiffs go even further in arguing that Defendant is required to present evidence "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." Pls. Opp. at 21 (emphasis added).[9] But even their own expert acknowledges that "you can never prove a negative." Def. Exh. 15 (Kleck Dep. Tr.) at 682:8-12.[10] Although Defendant is not required to prove a causal link (or to prove a negative), Plaintiffs' own expert witness acknowledged that "there is a correlation between the use of assault weapons and the number of victims injured or killed," and that such correlation makes that

[9] Plaintiffs incorrectly claim that Defendant's expert, "Lucy Allen, has admitted that the association is at least partially and possibly entirely spurious." *See* Pls. Opp. at 21 (citing Pls. Exh. 55 at 21). It appears that Plaintiffs intended to cite to page 21 of Plaintiffs' Exhibit 51, their own expert's report, as this mistake was made elsewhere in their opposition, *see* Pls. Opp. at 20:13-18. This supposed "admission" was actually made by Plaintiffs' own expert, Gary Kleck. Pls. Exh. 51 at 21. Ms. Allen actually disagreed with Kleck's supposition during her deposition. *See* Pls. Exh. 54 (Allen Dep. Tr.) at 85:20-86:24.

[10] Plaintiffs' standard also could not be met because ethical experiments cannot be conducted to determine whether assault weapons, or assault rifles in particular, *cause* the increased casualty figures. *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 U.C.L.A. L. Rev. 1443, 1465-67 (2009) ("There are no controlled experiments that can practically and ethically be run.").

"[m]ore likely" that the events are casually related. Def. Exh. 15 (Kleck Dep. Tr.) at 668:11-16, 681:21-25. The correlation between the use of assault weapons and higher casualty figures in mass shootings is thus undisputed.

The evidence in the record—which is similar to the evidence presented in the other cases upholding similar assault-weapons restrictions—is more than sufficient to uphold the AWCA under intermediate scrutiny. Evidence cited by Defendant conclusively shows that assault weapons are favored by criminal gangs, hate groups, drug traffickers, and "mentally deranged persons bent on mass murder," and are used disproportionately in mass murders and against law enforcement officers relative to their market presence. Def. Mem. at 19-21 (citing Congressional and legislative findings, peer-reviewed studies, and expert analysis).

Plaintiffs do not dispute the far more destructive damage that rifle ammunition does to a human's body compared with handgun ammunition, or that rifle ammunition can penetrate police officers' body armor. *See* Def. Mem. at 21-22. Instead, Plaintiffs argue that such destruction can be caused by the same ammunition fired out of a non-assault rifle. Pls. Opp. at 19-20. As discussed above, however, that is not germane. While a single shot from an assault rifle and a non-assault rifle may both cause the same level of destruction, an assault rifle has, as previously discussed, an enhanced "capability for lethality" based on its ability to be fired more accurately during rapid fire, causing "more wounds, more serious, in more victims." Def. Exh. 27 (H.R. Rpt. No. 103-489) at 1096-97.

That the assault rifles prohibited under the AWCA are uniquely dangerous is demonstrated by the evidence correlating their use in public mass shootings with higher average fatality and injury figures when compared to public mass shootings involving different weapons—here, a nearly 300 percent increase in average casualties. *See* Def. Exh. 6 (updated table of public mass-shooting statistics) at 232 (finding that public mass shootings involving an assault rifle resulted in an average of 41 deaths and injuries compared to an average of 11 when other weapons are

used); Def. Mem. at 20-21. This analysis is based on two compilations of public mass shootings prepared by *Mother Jones* and the Citizens Crime Commission of New York City. *See* Def. Exh. 5 (Allen Rpt.) at 197-98, ¶¶ 8-9.

Plaintiffs criticize one of those sources, *Mother Jones*, because, in 2013, *Mother Jones* changed the minimum number of fatalities required to qualify as a mass shooting from four to three victims. Pls. Opp. at 21. However, *Mother Jones* reduced the fatality threshold in response to a change in the definition of a mass shooting for federal law enforcement authorities made by Congress. Def. Exh. 5 at 197, ¶ 9; *see* Pub. Law 112-265, § 2; 126 Stat. 2435. The fact that *Mother Jones* changed its definition does not undermine the reliability of its data or Lucy Allen's analysis of that data. If anything, this definitional change depresses the average number of fatalities in public mass shootings because it captures shootings with lower fatality counts, including those that involved assault rifles. *See* Def. Exh. 15 (Kleck Dep. Tr.) at 714:4-15.

Indeed, *Mother Jones* has been cited favorably by several courts. *See, e.g.*, *N.Y.S. Rifle & Pistol Ass'n v. Cuomo*, 990 F. Supp. 2d 349, 369 (W.D.N.Y. 2013) (referring to *Mother Jones'* study as "exhaustive" and discussing some of the included shootings), *aff'd in part and rev'd in part by NYSRPA*, 804 F.3d 242; *Kolbe v. O'Malley*, 42 F. Supp. 3d 768, 781 n.17 (D. Md. 2014) ("To the extent the plaintiffs challenge Allen's reliance on the *Mother Jones* data, their challenge must fail. . . . [T]he data was subject to independent review by Koper and his graduate student."), *aff'd by Kolbe*, 849 F.3d 114. In any event, Plaintiffs do not challenge the reliability of the Citizens Crime Commission data, which was also relied upon by Ms. Allen in compiling her list of public mass shootings.

Plaintiffs' other arguments also fail:

First, Plaintiffs argue that public mass shootings do not pose a unique public safety threat because such incidents are relatively rare. *See* Pls. Opp. at 20. The State, however, is well within its authority to address this issue with a legislative

response, and courts have routinely cited public mass shootings in upholding assault-weapons bans. *See, e.g.*, *Worman*, 922 F.3d at 39 (noting that "AR-15s equipped with LCMs have been the weapons of choice in many of the deadliest mass shootings in recent history, including horrific events in Pittsburgh (2018), Parkland (2018), Las Vegas (2017), Sutherland Springs (2017), Orlando (2016), Newton (2012), and Aurora (2012)").

Second, Plaintiffs claim that Defendant cannot "isolate" assault rifles as the culprit for higher casualty counts because some figures cited by Defendant are for shootings that involve both assault weapons and large-capacity magazines. Pls. Opp. at 21. Evidence, however, shows that *both* assault rifles *and* large-capacity magazines are uniquely dangerous and are associated with higher casualties in public mass shootings. Notably, public mass shootings involving an assault weapon or assault rifle with a large-capacity magazine resulted in greater number of fatalities and injuries than those involving a non-assault weapon with a large-capacity magazine. *See* Def. Exh. 6 at 232 (41 (assault weapon) or 44 (assault rifle) fatalities on average compared with 16 fatalities on average), 239-42. And both resulted in greater number of fatalities and injuries than public mass shootings involving a non-assault weapon without a large-capacity magazine (9 fatalities on average). *Id.* Furthermore, as discussed above, this is consistent with evidence that clearly shows that the military-style features of assault rifles are designed to serve specific combat needs and to enhance the lethality of those weapons.

Assault weapons and large-capacity magazines are often regulated together, as was the case with the federal assault weapons ban, and constitutional challenges to these restrictions are often brought in a single case. The fact that Plaintiffs chose, as part of their litigation strategy, to challenge California's assault-rifle restrictions and large-capacity magazine restrictions in separate cases does not change the evidence that Defendant is entitled to rely on in this case. *See Fyock*, 779 F.3d at 1000 (noting that the government is "entitled to rely on any evidence 'reasonably

believed to be relevant' to substantiate its important interests"). In every case upholding similar assault-rifle restrictions, the courts did not demand that the defendants "isolate" the different variables involved in each public mass shooting.

2. Assault-Weapon 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 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 and 23-24, ¶¶ 55-56; Def. Exh. 23 at 1068. The number of shootings and resulting fatalities were reduced dramatically during the federal ban, but increased sharply after the ban expired. Def. Exh. 1 (Donohue Rpt.) at 23-24, ¶¶ 55-56. Furthermore, the AWCA's restrictions on assault rifles are likely to be more effective than the federal ban in reducing and mitigating gun crime because, unlike the federal ban's two-feature test, the AWCA restricts semiautomatic centerfire rifles capable of accepting a detachable magazine if it has just one of the enumerated 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.

Plaintiffs make a number of other arguments that do not withstand scrutiny:

First, Plaintiffs rely on a 2004 study commissioned by the U.S. Department of Justice, published immediately after the federal assault-weapons ban expired in 2003, to claim that the federal ban had no discernable effect on gun violence. Pls. Opp. at 15-16 (citing Pls. Exh. 25). Plaintiffs, however, overlook the study's disclaimer that more time was needed to assess the ban's efficacy and that "it [was] premature to make definitive assessments of the ban's impact on gun crime." Pls. Ex. 25 at 2 (capitalization removed). Indeed, the sentence immediately following the one Plaintiffs quoted in their opposition brief states, "However, the ban's exemption of millions of pre-ban [assault weapons] and [large-capacity magazines]

ensured that the effects of the law would occur only gradually. Those effects are still unfolding and may not be fully felt for several years into the future." Pls. Exh. 25 at 2-3; *see also id.* at 96 (noting that "the grandfathering provision of the [federal] ban guaranteed that the effects of this law would occur only gradually over time"). The 2004 study thus "recommend[ed] continued study of trends in the availability and criminal use of [assault weapons] and [large-capacity magazines]." *Id.* at 98.

Evidence proffered by Defendant consists of recent studies that more accurately capture the effects of the federal ban, Def. Mem. at 23-24, including an updated study by the principal author of the 2004 U.S. Department of Justice study, Christopher Koper, whom Plaintiffs acknowledge to be a "seasoned researcher," Pls. Opp. at 16. Dr. Koper's updated study confirmed that the criminal use of assault weapons and large-capacity magazines declined during the years of the federal ban and increased after its expiration in 2004. Def. Exh. 23 (Koper article) at 1069. The study concluded that it "provides further evidence that the federal ban curbed the spread of high-capacity semiautomatic weapons when it was in place, and in so doing, may have had preventive effects on gunshot victimization." *Id.*; *accord* Def. Exh. 26 at 1074 ("'I was skeptical that the [federal] ban would be effective, and I was wrong,' said Garen Wintemute, head of the Violence Prevention Research Program at the University of California at Davis School of Medicine. The database analysis offers 'about as clear an example as we could ask for of evidence that the ban was working.'"); *see also Kolbe*, 849 F.3d at 129 n.8 (noting that "Dr. Koper ultimately concluded, however, that . . . the federal ban had some success and could have had more had it remained in effect").

Dr. Koper's updated study further found that, in contrast to the period prior to the federal ban, assault rifles, rather than assault pistols, "now account for the substantial majority of [assault weapons] used in crime," which "implies an increase over time in the average lethality of [assault weapons] used in violence."

Def. Exh. 23 at 1067-68. And the updated study further confirmed that assault weapons and large-capacity magazine "firearms are more heavily represented among guns used in the murders of police and mass murders." *Id.* at 1068. Significantly, the updated study found that "[g]rowth in the use of such weapons could have important implications for public health as these weapons tend to produce more lethal and injurious outcomes when used in gun violence." *Id.* at 1063.

Second, Plaintiffs do not challenge the accuracy of Defendant's evidence showing that mass shootings with six or more deaths were lower in the ten-year periods before and after the federal ban, but instead argue that the evidence was based on a book that shows only correlation and not causation. Pls. Opp. at 16. As an initial matter, the accuracy of this evidence is confirmed by Dr. Koper's recent peer-reviewed study, as discussed above. Furthermore, as discussed above, proof of causation is not required. *See* Def. Opp. at 15-16.

Third, Plaintiffs are wrong to suggest that Defendant's expert witness, John Donohue, "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." Pls. Opp. at 17 (citing Pls. Exh. 53 at 146-147). Professor Donohue actually testified that while he cannot parse out the effects of assault weapons ban from those of the large-capacity magazine ban for the reduction in shooting casualties, "the reduction in the number of episodes [of mass shootings], probably comes purely through the . . . gun effect as opposed to the gun-plus-high-capacity-magazine effect." Pls. Exh. 53 at 147:13-148:10.

Fourth, Plaintiffs cite a single study to argue that assault-weapons bans have no measurable impact on homicide or suicide rates. Pls. Opp. at 17. Even if this study were correct, however, the Legislature's judgment in enacting the AWCA is supported by substantial evidence and reasonable inferences; under intermediate scrutiny, courts do not weigh conflicting legislative evidence. *See Peña*, 898 F.3d

at 980 ("Our role is not to re-litigate a policy disagreement that the California legislature already settled, and we lack the means to resolve that dispute. Fortunately, that is not our task."). In any event, the principal author of that study conceded that New Zealand's recent national ban on semiautomatic weapons and large-capacity magazines "will likely reduce casualties from mass shootings." Pls. Exh. 60 at 3.

Fifth, Plaintiffs dispute Defendant's evidence that there were seven mass shootings in Australia before its ban on assault weapons and none since, contending that there were actually two mass shootings since Australia enacted its ban. Pls. Opp. at 17. Those two mass shootings, however, were not in public spaces but were instead incidents of domestic violence. Def. Exh. 15 (Kleck Dep. Tr.) at 676:23-678:12. Plaintiffs' expert acknowledged that there were no *public* mass shootings in Australia since it banned assault weapons. *Id.* at 678:9-12.[11]

CONCLUSION

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

[11] Ironically, during his deposition, which took place before the Christchurch public mass shooting, Plaintiffs' expert had pointed to New Zealand as a country without an assault-weapons ban that had not experienced any public mass shootings. Pls. Exh. 51 at 10.

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