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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

STEVEN RUPP, et al.,

Plaintiffs,

vs.

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

Defendant.

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

PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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

I. PLAINTIFFS ADVANCE THE CORRECT METHOD FOR ANALYZING SECOND AMENDMENT CLAIMS

Heller tells us that where there is a ban, as opposed to a mere regulation, on arms "'in common use at the time' for lawful purposes like self-defense," there is no need to apply any scrutiny—the restriction fails per se. *District of Columbia v. Heller*, 554 U.S. 570, 627; *see also Id.* at 624-25; and *Caetano v. Massachusetts*, 136 S.Ct. 1027, 1027-28 (2016). In its motion for summary judgment, the State acknowledges this. Def.'s Mem. Supp. Mot. Summ. J. ("Def.'s Mot.") at 14. Yet, in opposing Plaintiffs' motion, the State now argues the "common use" test is unworkable. Def's Opp. to Pls. Mot. Summ. J. ("Def.'s Opp'n") at 5-6. The State fails, however, to explain what *Heller* meant. In fact, the State tellingly avoids any reference to *Heller*, instead relying exclusively on out-of-circuit opinions interpreting *Heller*. *Id*. at 6. More puzzling, the State continues to argue that the Banned Rifles lack Second Amendment protection precisely because they are not in "common use"—which makes no sense if no "common use" test exists. *Id*. at 5-6.

In all events, the State's dispute with Plaintiffs over the proper standard of review here is ultimately much ado about nothing because, as explained in detail below in Section IV, the AWCA's restriction on the Banned Rifles fails even intermediate scrutiny, the lowest scrutiny available under *Chovan*. *United States v. Chovan*, 735 F.3d 1127, 1139-40 (9th Cir. 2013).

II. THE BANNED RIFLES IMPLICATE THE SECOND AMENDMENT

A. The AWCA's Restriction on Rifles Has No Historical Analog

Relying entirely on the brief of Amicus Everytown for Gun Safety, the State argues that the Banned Rifles fall outside the Second Amendment because restricting them is "part of a longstanding history of analogous prohibitions." Def.'s Opp. at 4. The laws Everytown lists, however, bear no resemblance to the AWCA, concerning everything from trap-guns, to bowie knives, to handguns, to billy clubs, to machine guns. Everytown Br. at 5-6. While the "firing capacity" laws Everytown

cites include some semiautomatics, those have largely been repealed or amended, for having an odd definition of machine gun never generally accepted. *See Duncan v. Becerra*, no.17-cv-1017, 2019 WL 1434588 at *12-15 (S.D. Cal. Mar. 29, 2019) (discussing limited reach of state-level machine gun regulations). This hodgepodge of arms restrictions shows no "longstanding history" of regulating the Banned Rifles.

B. Firearms Are Not Beyond Second Amendment Protection Merely for Sharing Characteristics with Military Arms; Regardless, the Banned Rifles Are Not Legally "Like" Purely Military Weapons

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 Opp'n at 9 (quoting *Heller*, 554 U.S. at 627). That argument is baseless. While *Heller* acknowledged, in dicta, 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. *Id*. at 627. But surely, to qualify as such an arm must at least be in use by an actual military. Yet, the State provides no evidence of a single military that employs Banned Rifles. That should be the end of this inquiry.

Regardless, the State insists that the Banned Rifles are "like" the M-16 because they share similar features (a pistol grip, adjustable stock, and flash suppressor). Def.'s Opp'n at 9-10. But *Heller* never suggests commonly possessed arms 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)). In any event, those features are included on rifles not to serve some uniquely military purpose, but 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 rifle 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. Decl. Sean Brady Supp. Mot. Summ. J. ("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.

C. The Banned Rifles Are Commonly Acquired and Kept for Purposes Protected by the Second Amendment, Including Self-Defense

The State claims that "Plaintiffs provide no evidence of the number of rifles that meet the definition of an assault weapon under the AWCA." Def.'s Opp'n at 7. Even if it were Plaintiffs' burden to prove that the Banned Rifles are commonly owned, this is simply not true. Plaintiffs have put forth ample evidence showing that conservative estimates place American ownership of the Banned Rifles in the millions. Pls.' Statement Uncont. Facts & Conc. Law Supp. Mot. Summ. J. at No. 29 Statement Uncont. Fact ("Pls.' SUF").

The State's attempt to discredit that figure as an "overestimation" by claiming it includes "featureless" and rimfire rifles is a disingenuous exaggeration. Def.'s Opp'n at 7 fn. 5. The State claims Plaintiffs' expert, Professor William English, inflates the number of Banned Rifles possessed by Americans because his estimates include AR-15 rifles that have been configured to be "featureless" or rimfire and thus not prohibited under the AWCA. *Id*. But the State ignores his testimony that the reports upon which he relies find that only 4 percent of AR-platform rifles in the United States are rimfire. Def.'s Opp'n, Ex. 46 at 1553:2-16. In other words, over 14.4 million of the estimated 15 million AR-platform rifles in the United States are *not* rimfire. Professor English also testified that "featureless" rifles are merely a response to states with restrictive laws like the AWCA. Decl. Sean Brady Supp. Reply Def.'s Opp'n Pls.' Mot Summ. J. ("Reply Brady Decl."), Ex. 70 at 170:7-10. Such firearms have already been manufactured and are simply modified to conform to state law. If anything, his estimates are low. *See* Brady Decl., Ex. 2; Reply Brady Decl., Ex. 72 at 177:13-22.

The State's claims that ownership of the Banned Rifles is low based on the relatively small number of such rifles that have been registered in California is even more egregious. Def.'s Mot. at 7-8. Indeed, the number of California "assault weapon" registrations is a terrible barometer for the Banned Rifles' popularity *in the country*. This is particularly true because (1) California has had the AWCA in place for 30 years; (2) Californians had various legal options to avoid registration; and (3) many people were ignorant of the need to register their firearms at all. What's more, the claim is disingenuous. The State itself anticipated over one million registrations in 2016 alone. Pls. Req. Jud. Not. Supp. Pls. Opp. Def's Mot. Summ. J. ("Pls.' RJN") at 2. And the State's expert whose work is firearm law enforcement admitted that the Banned Rifles are common. Reply Brady Decl., Ex. 72 at 21:16-20; 174:4-10; 24-25; 175:1-19.

The undisputed evidence also shows one of the main reasons people choose to acquire a Banned Rifle is for self-defense. Pls.' SUF No. 30; Decl. Sean Brady Supp. Pls.' Mot. Summ. J. ("Opp'n Brady Decl."), Ex. 62. According to the State, that is not enough to warrant Second Amendment protection. Instead, it contends, the rifles must actually be *used*—whatever that means—in self-defense commonly to garner such protection. Def.'s Mot. at 5-8. But nothing in *Heller* conditions an arm's Second Amendment protection on its actual rate of use in self-defense situations. To the contrary, it found that handguns are protected merely because "the American people have considered the handgun to be the quintessential self-defense weapon." *Heller*, 554 U.S. at 629; *see also Caetano v. Massachusetts*, ___ U.S. ___, 136 S. Ct. 1027 (2016) (unanimously holding that the Second Amendment protects stun guns without inquiring into their rate of defensive use). The relevant question is whether an arm is *kept* for self-defense—not how often it must be *used* for that purpose. The State does not even attempt to dispute that the Banned Rifles meet this test.

Instead, the State claims that the Banned Rifles are not useful for self-defense. Def.'s Opp'n at 8. But a former FBI agent, turned FBI firearm instructor, who

became the primary special agent overseeing the FBI's Ballistic Research Facility, disagrees. Based on his extensive experience, he opined that 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. Brady Decl., Ex. 1 at 1-11, Ex. 27. Several other self-defense experts agree. *Id.*, Exs. 27-29. The State cites no self-defense or ballistics expert who can dispute this. To the contrary, its own expert believes the Banned Rifles *are* useful for self-defense. Opp'n Brady Decl., Ex. 56 at 108. Finally, there are various accounts of individuals actually using Banned Rifles 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).

III. THE AWCA'S RESTRICTION ON THE BANNED RIFLES VIOLATES THE SECOND AMENDMENT UNDER ANY HEIGHTENED SCRUTINY

While Plaintiffs do not believe intermediate scrutiny is appropriate here, they would prevail even under that test, which places the burden on the government to prove a "substantial relationship" between the law and an important government objective. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). What's more, the "law must be 'narrowly tailored to serve a significant governmental interest.' " *Packingham v. North Carolina*, ___U.S.___, 137 S. Ct. 1730, 1736 (quoting *McCullen v. Coakley*, ___U.S.___, 134 S. Ct. 2518, 2534 (2014)). Because the AWCA bans—not merely regulates—the rifles, there is no need to proceed in the analysis. Such a ban would necessarily fail for lacking the required tailoring. *Heller*, 544 U.S. at 628 & n.27. But even setting aside the question of tailoring, the State has likewise failed to meet its burden that the AWCA's ban on rifles would even advance its goal.

A. The State Advances a Watered-down Version of Intermediate Scrutiny

The State's opposition places heavy emphasis on circuit court decisions affording "substantial deference to the predictive judgments of the [legislature]."

Defs.' Opp'n at 13 (quoting *Pena v. Lindley*, 898 F.3d 969, 979-80 (9th Cir. 2018)). And, from there, presses for a standard of review so weak it is "heightened review" in name only. Indeed, the State's view is that courts lack the authority to disturb the "predictive judgments" of the legislature. But the legislature is not entitled to trample on the rights of the People under the cover of "substantial deference." *Kolbe v. Hogan* 849 F.3d 114 (4th Cir. 2017). A legislature's laws are not edicts. They must pass constitutional muster under the applicable standard of review. While it is not the role of a court to replace the considered judgment of the legislature with its own, that does not mean that it must rubber stamp whatever the legislature decrees. *See Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1259 (D.C. Cir. 2011) (quoting *Turner Broad. Sys., Inc. v. FCC* ("*Turner II*"), 520 U.S. 180, 195 (1997); *Turner Broad. Sys. v. FCC* ("*Turner I*"), 512 U.S. 622, 666 (1994) (plurality opinion)) (internal quotations omitted)) (recognizing that, even with "substantial deference," the government "is not thereby insulated from meaningful judicial review").

It is the courts' role to "assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence." *Turner I*, 512 U.S. at 666; *see also Kachalsky v. Cnty. of Westchester* 701 F.3d 81 (2d Cir. 2012). This necessarily requires courts to consider carefully the government's evidence and make an independent judgment about the reasonableness of the inferences drawn from it. *See Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989); *see also Turner I*, 512 U.S. at 666-68 (granting legislative deference but reversing judgment because Congress had not presented substantial evidence supporting its claims). As discussed below, there is nothing reasonable about the inferences the state has made.

B. The AWCA's Rifle Ban Lacks the Proper Fit

The State claims that it is undisputed that the use of Banned Rifles increases deaths and injuries, compared to other weapons. Def.'s Opp'n at 14. Plaintiffs

dispute that. As does a recent study released by Boston University—that the State ignores. Opp'n Brady Decl., Ex. 69, Ex. 60. The State further claims that the Banned Rifles are used "disproportionately" in gun crime. Def.'s Opp'n at 14-15. But it is a mystery how it can determine their proportional use, when the State has admitted it does not know how many rifles are out there. Brady Decl., Ex. 8 at 4, Ex. 10 at 8.[1]

Even if the State could figure out their market share, it is unlikely the Banned Rifles are used disproportionately in crime when the State itself says "assault weapons" are used in no more than 8% of all crimes involving firearms. Def.'s Mot. at 20. That rifles generally are used in just a fraction of the homicides that handguns are casts further doubt on the State's claim that the Banned Rifles are criminally oriented. Pls.' RJN, Ex. 1 (noting that in 2017 "handguns" accounted for 7,032 murders nationwide, while "rifles" of any type accounted for just 403).

The State also claims that the Banned 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" would have an impact on the type of wound produced. 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

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[1] As an initial matter, the State does not provide specific citations to evidence it is relying on in making most of its arguments. Rather, it simply references page ranges from its summary judgment motion. *See, e.g., id.* at 14-16. As a result, it is difficult to know exactly what evidence the State is relying on for any given point. Whether such general citations are appropriate is a question for this Court. But, in responding, Plaintiffs assume the State relies on the same evidence in its motion.

words, the State's problem is with *all* rifles, not just the Banned Rifles. And, 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. 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 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, public 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 relies on its expert witness, Lucy Allen, who claims the average number of casualties in a shooting are higher where a Banned Rifle was 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 of a Banned Rifle shooting. 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 its 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. Def.'s Mot. at 5 (citing Def.'s Ex. 1 at 44, 108; Def.'s Ex. 23 at 1067). Because it does 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.

The State 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. 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. Pls.' 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*. Indeed, 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*.

In sum, that Banned Rifles are the problem the State makes them out to be in mass shootings is dubious at best.

CONCLUSION

For the foregoing reasons, and those in Plaintiffs' Motion for Summary Judgment, the State cannot meet its burden to justify the AWCA's ban on rifles, and Plaintiff's motion should therefore be granted.

Dated: May 17, 2019

MICHEL & ASSOCIATES, P.C.

/s/ Sean A. Brady
Sean A. Brady
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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' REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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

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

Executed May 17, 2019.

/s/ Laura Palmerin
Laura Palmerin