No. 19-55376

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGINIA DUNCAN, *et al.*,
Plaintiffs-Appellees,
v.
XAVIER BECERRA, in his official capacity as Attorney General of the State of California,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of California
No. 3:17-cv-01017-BEN-JLB

BRIEF OF BRADY AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

JONATHAN E. LOWY
T. TANYA SCHARDT
BRADY
840 First Street, N.E., Suite 400
Washington, DC 20002
(202) 370-8101

SCOTT D. DANZIS
THOMAS C. VILLALON
RAFAEL REYNERI
NORA CONNEELY
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20001
sdanzis@cov.com
(202) 662-6000

Counsel for Amicus Curiae Brady

July 21, 2019

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

Brady is the nation's most long-standing nonpartisan, non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. In support of that mission, Brady files this brief as *amicus curiae* in support of Appellant.

Brady has a substantial interest in ensuring that the Second Amendment is not interpreted or applied in a way that would jeopardize the public's interest in protecting individuals, families, and communities from the effects of gun violence. Brady has filed *amicus* briefs in numerous cases involving firearms regulations including *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *United States v. Hayes*, 555 U.S. 415 (2009), and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than Brady or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Armed with misleading and inflammatory anecdotes, cherry-picked data, outdated and discredited social science, and demonstrably false assertions, the district court declared that the State of California is prohibited from protecting its citizens from the very real and unique threat posed by firearms loaded with large capacity magazines ("LCMs"). In doing so, an unelected and democratically unaccountable judge disregarded the considered judgment of the state's democratically elected legislature, as well as the clear preference of the citizens of California. This is not how our democracy is intended to work.

Both before and since the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), federal, state, and local legislatures have wrestled with the complex question of how to reduce the epidemic of gun violence in their communities while balancing the rights of law-abiding citizens to own firearms. Weighing facts, evidence, and policy choices, state and local governments have resolved those difficult issues in different ways.

Those legislative judgments warrant deference from courts. "'In the context of firearm regulation, the legislature is far better equipped than the judiciary to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 261–64 (2d Cir. 2015) (quoting *Kachalsky*

v. Cty. of Westchester, 701 F.3d 81, 97 (2d Cir. 2012)). As this court has said, "[w]hen applying heightened scrutiny, we defer to a legislative body's predictive policy judgments." *See Pena v. Lindley*, 898 F.3d 969, 997 (9th Cir. 2018), *petition for cert. filed sub nom. Pena v. Horan*, No. 18-843 (Jan. 3, 2019). "It should therefore come as no surprise that deference to legislative policy judgments has played a role in several of our post-*Heller* Second Amendment decisions." *Id.* at 998.

Here, the California legislature made a sensible policy choice to safeguard its citizens by enacting California Penal Code § 32310 ("Section 32310"). Section 32310, as enacted by California's elected representatives and later affirmed and strengthened by the citizens themselves, prohibits the manufacture, importation, sale and possession of LCMs. *Heller* and its progeny unequivocally left this policy choice open to California. As the *Heller* Court stated, "the right secured by the Second Amendment is not unlimited . . . [It is] not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. Indeed, the "Constitution leaves [States] a variety of tools for combating [the] problem" of gun violence. *Id.* at 636; *see also Fyock v. Sunnyvale*, 779 F.3d 991, 996 (9th Cir. 2015) ("[T]he right to keep and bear arms is limited, and regulation of the right in keeping with the text and history of the Second Amendment is permissible."). Yet, contrary to precedent, the district court reached the novel conclusion that courts need not afford deference to a state legislature's policy judgment

regarding the complex issue of combating gun violence. Instead, the district court erroneously claimed that "[i]n the United States, the Second Amendment takes the legislative experiment off the table." *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1136 (S.D. Cal. 2019).

The district court's opinion makes clear the danger of not affording deference to legislative judgments. Rather than weighing the available evidence and social science in a balanced manner, the court selectively relied on outdated and discredited social science. In fact, when fairly viewed, the weight—and indeed, the *overwhelming* weight—of social science supports the State's determination that LCMs present a unique public safety threat, and are neither common nor necessary for self-defense; therefore banning their sale, purchase, and possession is the best policy choice to protect the citizens of California. That policy choice easily passes constitutional scrutiny under the precedents of this court, the Supreme Court, and all other circuits that have considered similar issues.

Part I of this brief details the many ways the district court misjudged, misread, and otherwise got it wrong with respect to the available evidence and social science associated with guns generally and LCMs in particular. Part II discusses how that evidence and social science, when properly assessed in an impartial manner, supports California's sensible legislative determinations in enacting Section 32310. Finally, Part III discusses the many reasons why the district court's failure to afford

deference to the policy choices made by California's legislature was contrary to Supreme Court and Ninth Circuit precedent and resulted in the court overstepping its role, with potentially dangerous consequences for the citizens of California.

ARGUMENT

I. The District Court Erroneously Based Its Decision On Unreliable Evidence, Which In Any Event Does Not Support The Court's Findings.

The district court purported to judge Section 32310 by relying on "hard facts and reasonable inferences drawn from convincing analysis." *Duncan*, 366 F. Supp. 3d at 1161. Instead, the court drew illogical inferences from unreliable evidence in order to justify reaching its preferred policy outcome.

The district court made three key findings in concluding that Section 32310 is unconstitutional: (1) defensive gun use is common, (2) LCMs are needed in order to effectively use a gun defensively, and (3) LCMs are not uniquely dangerous. None of these findings are factually supported. The evidence that the court cited in support is anecdotal, outdated, or has been disproven by more reliable evidence. Compounding this error, the district court also drew inferences from this evidence that do not logically follow. The court's failure to properly assess the record before it, and instead selectively rely on weak evidence, demonstrates why courts must tread lightly when faced with complex, empirical policy issues in the context of gun violence prevention.

A. Defensive gun use is not common.

Citing discredited and inconsistent data, the district court overstated the frequency of defensive gun use. *See Duncan*, 366 F. Supp. 3d at 1135. The court then used these exaggerated figures to perform an imbalanced analysis of the extent to which Section 32310 burdens the Second Amendment right to use arms in self-defense in one's home. In fact, defensive gun use is not as common as the district court purports.

The court claimed that "there are 2.2 to 2.5 million defensive gun uses by civilians each year," citing a 1995 study. *Id.* & n.7 (citing Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self–Defense with a Gun*, 86 J. Crim. L. & Criminology 150, 164, 177 (1995)). But more recent and reliable evidence has contradicted this twenty-four-year-old study. Indeed, in the very same discussion, the court also cited a 2013 report from the U.S. Department of Justice finding less than 240,000 defensive gun uses per year—a near ten-fold reduction. *See id.* & n.8 (citing Michael Planty & Jennifer Truman, *Firearm Violence, 1993-2011*, at 11 (2013), https://perma.cc/EH2C-32ZK). Given the large gap between these defensive gun use estimates, the two studies are in obvious conflict. Either the 1995 study was wrong or the need for defensive gun use has plummeted at such a rate that its conclusions are no longer relevant. Subsequent research suggests that

the 1995 study was, indeed, wrong, because Kleck and Gertz's survey methodologies and statistical analysis led to a vast overestimation of defensive gun use. "The K-G survey design contains a huge overestimation bias. The authors do little to reduce the bias or to validate their findings by external measures. All checks for external validity of the Kleck-Gertz finding confirm that their estimate is highly exaggerated." David Hemenway, *Policy And Perspectives: Survey Research And Self-Defense Gun Use: An Explanation of Extreme Overestimates*, 87 J. Crim. L. & Criminology 1430, 1431 (1997), https://perma.cc/WH5A-RCP3. Further, "A National Research Council report also finds that Kleck's estimates appear exaggerated and says that it is almost certain that 'some of what respondents designate as their own self-defense would be construed as aggression by others.'" *Id.* at 1433. There are enough flaws in the data to conclude that the district court erred in relying on the 1995 study.

Besides this scant and unreliable statistical evidence, the district court relied on appeals to emotion and selective anecdotes to find that defensive gun use is common. For example, it recited a series of general crime rates in California, *id.* at 1135, which say nothing regarding the rates of defensive gun use. It also placed disproportionate weight on anecdotal evidence, including news accounts not in the parties' exhibits, describing in detail three instances—all of which took place outside of California—in which guns were used in self-defense. *See id.* at 1134. As discussed in

greater detail below, none of these anecdotes demonstrate the need for LCMs for self-defense. More fundamentally, contradictory statistics, three anecdotes, and a series of platitudes regarding the right to bear arms do not constitute "hard facts" from which one can draw a "convincing analysis" regarding the frequency of defensive gun use, much less invalidate an important state-wide public safety measure.

B. LCMs are not needed to use a gun defensively.

In order to come up with a legitimate use for LCMs, the court found that civilians need these dangerous weapons for self-defense. But this finding is not supported by the record. Rather, the evidence demonstrates that civilians neither commonly use nor need to use LCMs for self-defense in the home.

The court found that the number of LCMs in circulation "and human nature" suggest that LCMs are used for self-defense in one's home. *Duncan*, 366 F. Supp. 3d at 1177. The court's musings on human nature aside, the number of LCMs in circulation says nothing about whether these weapons are used for self-defense in the home. Indeed, even the court's hypothetical use case for LCMs involves an out-of-state hunting trip. *Id.* at 1139 n.25. To the extent LCMs have a legitimate use, it is more plausible that they are used in recreational activities that take place outside the home, rather than self-defense—much less self-defense in one's home.

The court also mischaracterized the three anecdotes that it relied on to assert that civilians commonly use LCMs in self-defense. *See id.* at 1134. Critically, the

court failed to acknowledge that none of the three successful self-defense anecdotes necessarily required an LCM. *See, e.g.*, Robin Reese, *Georgia Mom Shoots Home Invader, Hiding With Her Children*, ABC News (Jan. 8, 2013), https://perma.cc/9J3L-2G7U (victim successfully used gun defensively by firing five times).

Finally, the court erred in finding that any benefits derived from prohibiting LCMs would be outweighed by the harm of not being able to use LCMs defensively—specifically, the need to avoid having to reload while using a gun in self-defense (the "critical pause"). *Duncan*, 366 F. Supp. 3d at 1178-79. That finding is contradicted by the evidence—which the court acknowledged and neither the court nor Plaintiffs rebutted—demonstrating that the average number of shots fired by a victim to ward off an attacker is less than 3. *Id.* at 1177. ("[D]efenders average only 2.3 shots per defensive incident and . . . no one has shot more than 10 rounds in defense."). It was erroneous for the court to find that LCMs are necessary for self-defense when there is no evidence in the record that defensive gun use involves more than 10 shots.

This logical inconsistency is all the more striking given the risk that LCMs pose to officer safety. Unlike the average self-defense scenario, in which civilians fire 2.3 shots, statistical evidence, which the district court accepted, indicates that the average police officer will *face* 9.1 shots. *Id.* at 1178. The court therefore erred

in finding that prohibiting LCMs does not promote officer safety, while at the same time purporting that civilians need LCMs for self-defense.

C. LCMs are uniquely dangerous.

The district court erred in finding that LCMs are not uniquely dangerous, and downplayed the risk that these weapons pose to society by misconstruing the facts regarding the role that LCMs play in mass shootings. Specifically, the district court proclaimed that mass shootings are rare and that the use of LCMs does not increase the danger that such shootings constitute. Both statements are factually incorrect. Tragically, mass shootings are increasingly common, and LCMs are uniquely dangerous precisely because they increase the harm that a mass shooter is able to cause before having to reload.

The district court announced that mass shootings are "exceedingly rare," asserting that none occurred in California in 2017. *Id.* at 1135-37. However, this statement ignores a series of 2017 incidents in which a single shooter killed multiple individuals—mass shootings by any common sense definition of the term.[2] For example, a gunman in Rancho Tehama "went on a shooting rampage . . . that left four

[2] Brady defines a mass shooting as an incident where four or more people, other than the shooter, are shot. Brady uses this definition so as not to exclude, set apart, caveat, or differentiate victims based upon the circumstances in which they were shot. However, Brady acknowledges that the definition of mass shooting can vary, and much of the research in this brief uses alternative definitions that rely on a certain number of fatalities, rather than number of people shot.

people dead" and many more injured. Joseph Serna, *Northern California Shooter Exploited 'Honor System' in Telling Court He Had No Guns*, L.A. Times (Nov. 21 2017), https://perma.cc/TF3Z-FQV7. In Fresno, three men were killed in a "shooting rampage" that nearly killed a fourth. Jim Guy, *Three Dead in Fresno Shooting Rampage; Suspected Gunman Linked to Killing of Motel Guard*, The Fresno Bee (Apr. 18, 2017), https://www.fresnobee.com/news/local/crime/article145234709.html. And in San Francisco, a gunman killed three coworkers and himself. Joseph Serna et al., *Victims of Shooting at San Francisco UPS Facility Are Identified as Families and Co-Workers Mourn*, L.A. Times (June 15, 2017), https://perma.cc/FJ4P-878X.

Rather than taking these tragic and all-too-common incidents into account, the district court failed to acknowledge them. Moreover, the court provided no basis for limiting this inquiry to 2017, which omits, for example, the infamous mass shooting that occurred in San Bernardino in 2015 and left 14 people dead and 22 seriously wounded. Nathan Rott, *San Bernardino Shooting's Signs Have Faded, But Memories Remain Piercing*, NPR (Dec. 2, 2016), https://perma.cc/UR4R-P8A5. Nor did the court explain why it considered only California mass shootings to rebut the State's findings, given that it devoted substantial discussion to anecdotes that occurred outside of the state to justify its own conclusions.

The court also challenged the fact that LCMs make mass shootings more dangerous, stating that a critical pause would not have made a difference in these tragedies. *Duncan*, 366 F. Supp. 3d at 1177-78. However, the district court mischaracterized the mass shooting in Parkland, Florida. Per the court, the Parkland gunman used only 10-round magazines, which purportedly demonstrated that mass shooters do not use LCMs. But according to the official report of the Marjory Stoneman Douglas Public Safety Commission, which was established by the state of Florida, the gunman had eight 30- and 40-round capacity magazines. Fla. Dep't of Law Enforcement, *Marjory Stoneman Douglas High School Public Safety Commission Report*, at 262 (Jan. 2, 2019), https://perma.cc/7WT4-4QJ8. It is true that the gunman also used smaller magazines, but this further underscores the dangerousness of LCMs: It was during a 13-second critical pause, while the shooter retrieved and inserted a new magazine, that a teacher and ten students were able to flee from the massacre. *Id.* at 32. The court similarly got it wrong with respect to the mass shooting in Thousand Oaks, California, incorrectly stating that the gunman did not pause to reload his weapon. *Duncan*, 366 F. Supp. 3d at 1161-62. In fact, it was exactly that pause that allowed several victims to escape with their lives. *See* Joe Curley et al., *People Threw Barstools Through Window to Escape Thousand Oaks, California, Bar During Shooting*, USA Today (Nov. 8, 2018), https://perma.cc/Y75R-D58U ("As the gunman reloaded, [a witness] said he and a few others started throwing

barstools through the window and 'shuffling as many people out as possible.'").

In addition to being factually incorrect, the court's logic does not stand up to scrutiny. Even if the court were correct that a critical pause does not alleviate some of the dangers posed by mass shootings, that finding would contradict the court's finding that LCMs are important for defensive gun use—if pausing during a mass shooting does not decrease the potential harm, then pausing during self-defense also would not impact the potential defense. In reality, the mass shootings in Parkland and Thousand Oaks demonstrate the importance of the critical pause in lessening the number of victims at mass shootings. Importantly, the reverse is not true; because defensive gun use on average involves fewer than three rounds, LCMs are not needed to effectively use a gun in self-defense. On the other hand, mass shootings, by their nature, involve many more gun shots such that prohibiting LCMs will have a real impact on how many people are killed or injured during a mass shooting event.

Relatedly, the court found that Section 32310's prohibition on magazines with more than ten rounds was arbitrary. *Duncan*, 366 F. Supp. 3d at 1180-81. But determining where to set the prohibition's threshold is an inherently policy-based line-drawing exercise that is better left to the legislature. While the difference between ten and eleven might be minor in the district court's view, the legislature must draw a line somewhere. As even the district court noted, a magazine containing as few as 30 rounds would obviously be dangerous. *See id.* at 1143. Thus, any given line

might be "arbitrary" with respect to the next incremental unit but is not arbitrary in limiting the number of rounds that can be fired without reloading. By drawing the line at 10, Section 32310 ensures that law-abiding citizens may continue to use some guns, while removing those that are obviously dangerous to society because of their capacity to kill at a mass scale. These sorts of line drawing exercises are best left to the democratically elected and accountable legislature, as the district court's opinion unfortunately demonstrates.

II. Overwhelming Evidence And Social Science Support The California Legislature's Policy Decision.

A. Evidence and social science show that the defensive use of LCMs is not common.

In contrast to the inflated and outdated numbers relied on by the district court, recent studies have shown that the rate of defensive gun use—including weapons with LCMs—is very low. According to one study, only 0.3% of property crimes and 1.1% of violent crimes involved the defensive use of a gun. *See* Violence Policy Center, *Firearm Justifiable Homicides and Non-Fatal Self-Defense Gun Use*, at 6 (Sept. 2018), https://perma.cc/C4FQ-GD7S. And according to the FBI's Uniform Crime Reporting Program's Supplementary Homicide Report, in 2015, there were only 265 reported instances of justifiable homicides (i.e., self-defense) involving a private citizen using a firearm. *Id*. at 1 (noting that, in the same year, there were 9,027 recorded criminal gun homicides); *see also* Harvard Injury Control Research

Center, *Gun Threats and Self-Defense Gun Use*, Harvard T. H. Chan School of Public Health, https://perma.cc/R3JC-NQQA ("We find that the claim of many millions of annual self-defense gun uses by American citizens is invalid.").

LCMs in particular are not needed for self-defense. The National Rifle Association's own data demonstrates that of 482 incidents involving defensive gun use from a five-year period, the average and median number of shots fired was two. *See* Claude Werner, *The Armed Citizen—A Five Year Analysis*, Guns Save Lives (Mar. 12, 2012), https://perma.cc/QTL7-U8EM. Other circuits have also recognized that LCMs are not typically used in self-defense. *See Hightower v. City of Boston*, 693 F.3d 61, 71 & n.7 (1st Cir. 2012) (noting that large capacity weapons are not "of the type characteristically used to protect the home"); *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (noting the Committee on Public Safety's conclusion that assault weapons (including those equipped with LCMs) "have no legitimate use as self-defense weapons, and would in fact increase the danger to law-abiding users and innocent bystanders if kept in the home or used in self-defense situations." (internal citations omitted)).

B. Regulation of LCMs reduces mass shootings.

The social science data also demonstrates a correlation between the regulation of LCMs and a reduction in mass shooting events. In a study that analyzed mass

shooting data compiled from Stanford University's Mass Shooting Database, researchers found that the six states that restricted the size of magazines (California, Connecticut, Colorado, Maryland, Massachusetts, New Jersey, and New York) had a 63% lower rate of mass shootings than those states that did not regulate magazine capacities. Sam Petulla, *Here Is 1 Correlation Between State Gun Laws and Mass Shootings*, CNN (Oct. 5, 2017), https://perma.cc/G3WM-5FA9 ("[W]hether a state has a large capacity ammunition magazine ban is the single best predictor of the mass shooting rate in that state."); *see also Rocky Mountain Gun Owners v. Hickenlooper*, No. 2013CV33879, 2017 WL 4169712, at *3 (Colo. Dist. Ct. July 28, 2017) (finding that states that have not enacted high capacity magazine bans "experienced mass shooting incidents at a rate three times higher than the states in which such bans are in effect").

Studies have shown that LCMs are disproportionately used in mass shootings compared to other types of weapons. Data from 184 mass shooting, spree shooting, and active shooter events compiled from 1982 to 2015 show that approximately 37% of such incidents involved high-capacity magazines. RAND Corporation, *The Effects of Bans on the Sale of Assault Weapons and High-Capacity Magazines* (Mar. 2, 2018), https://perma.cc/23WR-D67E. Unsurprisingly, these studies have shown that "high-capacity magazines are used disproportionately in mass public shootings and killings of law enforcement officers compared with murders overall." *Id*. Further,

regulating LCMs helps reduce the deadliness of mass shootings because mass shooters often have poor aim, and therefore using LCMs allows these poor shooters to nonetheless seriously injure and kill innocent victims. *See* Christopher S. Koper, *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003*, at 83 (June 2004), https://perma.cc/4D7Z-8MFN ("As a general point, the faster firing rate and larger ammunition capacities of semiautomatics, especially those equipped with LCMs, have the potential to affect the outcomes of many gun attacks because gun offenders are not particularly good shooters.").

Similarly, research has shown that the average number of people killed or wounded in mass shootings *doubles* when assault weapons or semiautomatic guns combined with LCMs are used. *See* Everytown for Gun Safety Support Fund, *Mass Shootings in the United States: 2009-2017*, at 18 (Dec. 6, 2018), https://perma.cc/3A27-FWVZ ("Of mass shootings with known magazine capacity data (60), those that involved the use of [LCMs] resulted in over *twice as many fatalities* and *14 times as many injuries* per incident on average compared to those without." (emphases added)). More recent data shows that assault weapons and other semiautomatics containing LCMs are involved in as many as 57% of mass shootings, and are "particularly prominent in public mass shootings and those resulting in the highest casualty counts." Christopher S. Koper et al., *Criminal Use of*

Assault Weapons and High-Capacity Semiautomatic Firearms: An Updated Examination of Local and National Sources, 95 J. Urb. Health 313, at 319 (June 2018) ("Koper et al. LCM Study"), https://perma.cc/R7FE-EPXZ.

Finally, even the district court previously acknowledged the dangerous role that LCMs frequently play in mass shootings, noting that six mass shootings over a recent five-year period (including two in California) involved LCMs used to murder dozens of innocent people. *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1127, 1131 (S.D. Cal. 2017) ("[H]igh capacity magazines only serve[] to enhance the killing and injuring potential of a firearm. No quarrel there."); *see also Worman v. Healey*, 922 F.3d 26, 39 (1st Cir. 2019) (stating that shooters have used LCMs "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), Newtown (2012), and Aurora (2012).").

C. LCMs are associated with violent crime, including the murder of law enforcement officers.

Beyond the dangers that LCMs pose to the general public in mass shootings, these weapons also pose a distinct threat to law enforcement personnel. Reliable and current social science data also shows a clear correlation between the use of LCMs and murders of police officers. For example, data regarding the murders of law enforcement personnel nationally from 2009 through 2013 shows that "LCM-

compatible firearms more generally constituted 40.6% of the murder weapons, ranging from 35 to 48% annually." *See* Koper et al. LCM Study, at 317. The same study found that "[c]onsistent with prior research . . . LCM firearms are more heavily represented among guns used in murders of police and mass murders [with] LCM weapons overall accounting[ing] for about 41% of these weapons." *Id*. at 319; *see also Kolbe v. Hogan*, 849 F.3d 114, 127 (4th Cir. 2017) (en banc) (noting that LCMs were used in 31-41% of murders of on-duty law enforcement officers in which assault weapons were used).

Even the district court previously acknowledged the threat posed by LCMs to law enforcement, stating that "'possession and use of high capacity magazines by individuals committing criminal acts pose a significant threat to law enforcement personnel and the general public.' No doubt about that." *Duncan*, 265 F. Supp. 3d. at 1131; *see also Friedman v. City of Highland Park*, 784 F.3d 406, 411 (7th Cir. 2015) (stating that laws restricting magazine capacity "reduce the share of gun crimes involving assault weapons is established by data."). Dr. Christopher Koper, who has examined the impact and efficacy of the federal government's bans on assault weapons and LCMs, has testified that incidents involving LCMs had "significantly higher numbers of fatalities and casualties: an average of 10.19 fatalities in LCM cases compared to 6.35 fatalities in non-LCM/unknown cases," and further that "an average of 12.39 people were shot but not killed in public mass shootings

involving LCMs, compared to just 3.55 people shot in the non-LCM/unknown LCM shootings." Suppl. Decl. of Christopher S. Koper at 10, *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 990 F. Supp. 2d 349 (W.D.N.Y. Sept. 24, 2013) (No. 1:13-cv-00291-WMS), *aff'd in part & rev'd in part*, 804 F.3d 242 (2d Cir. 2015). Accordingly, the district court ignored the overwhelming weight of social science demonstrating the very real dangers posed by LCMs.

III. The District Court Failed To Give Proper Deference To California's Legislature And Dangerously Overstepped Its Role.

A. Courts must defer to legislative judgments on complex, empirical policy issues like gun violence prevention.

In addition to relying on inaccurate and unreliable factual support to justify its decision, the district court also disregarded legal precedent and exceeded the scope of the judiciary's expertise. Given the complex policy issues involved in regulating firearms and the legislature's institutional expertise in "amass[ing] and evaluat[ing] the vast amounts of data bearing upon legislative questions," the Ninth Circuit has joined a number of other circuits in holding that courts owe substantial deference to policy judgments made by democratically accountable legislatures in this context. *See Pena v. Lindley*, 898 F.3d 969, 979-80 (9th Cir. 2018), *petition for cert. filed sub nom. Pena v. Horan*, No. 18-843 (Jan. 3, 2019). Despite this binding precedent, the

district court failed to defer to the California legislature's policy judgments and instead improperly substituted its own preferences, exceeding the proper role of the judiciary and jeopardizing the safety of Californians.

As held by every other circuit to consider similar LCM prohibitions, and as aptly explained in the Appellant's Opening Brief, the constitutionality of Section 32310 must be assessed using intermediate scrutiny. *See* Appellant's Opening Br. at 31-32, *Duncan v. Becerra*, No. 19-55376 (9th Cir. July 15, 2019). Intermediate scrutiny requires, in part, that this court determine whether there is "a reasonable fit" between Section 32310 and the "significant, substantial, or important" interests identified by the State (which even the district court acknowledged were important here). *See United States v. Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013); *Duncan*, 366 F. Supp. 3d at 1160-61. In doing so, under Ninth Circuit post-*Heller* jurisprudence, courts owe "substantial deference" to legislative judgments and findings as long as the legislature relies on "material 'reasonably believed to be relevant' to substantiate its interests in gun safety and crime prevention." *See Pena*, 898 F.3d at 979-80 (quoting *Mahoney v. Sessions*, 871 F.3d 873, 881 (9th Cir. 2017)); *see also Fyock*, 779 F.3d at 1000; *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 969 (9th Cir. 2014). A number of other circuits have similarly held that courts owe "substantial deference to the predictive judgments" of state legislatures, especially when reviewing LCM bans. *See Gould v. Morgan*, 907 F.3d 659, 673-76 (1st Cir. 2018),

petition for cert. filed, No. 18-1272 (Apr. 4, 2019) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994)); *Kolbe v. Hogan*, 849 F.3d 114, 140-41 (4th Cir. 2017) (en banc) ("The judgment made by the General Assembly of Maryland in enacting the [ban on large-capacity magazines] is precisely the type of judgment that legislatures are allowed to make without second-guessing by a court."), *cert. denied*, 138 S. Ct. 469 (2017); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 261-64 (2d Cir. 2015) (upholding statute prohibiting possession of LCMs).

Courts owe deference to legislative findings, even in the face of conflicting evidence or policy disagreements, because the legislature is "far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Pena*, 898 F.3d at 979-80 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997)). Even the district court acknowledged this fact. *See Duncan*, 366 F. Supp. 3d at 1167 (quoting *Vivid Entm't, LLC v. Fielding*, 965 F. Supp. 2d 1113, 1127 (C.D. Cal. 2013)). This is particularly true in the context of "fraught issues, such as gun violence." *Gould*, 907 F.3d at 676; *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 261-64 ("In the context of firearm regulation, the legislature is far better equipped than the judiciary to make sensitive public policy judgments (within constitutional limits).") (quoting *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012)).

Yet contrary to the district court's claim that gun violence prevention is not

the type of "technical and complicated" subject that is appropriate for legislative deference, *Duncan*, 366 F. Supp. 3d at 1168, combating gun violence is exactly the type of "complex societal problem" where deference is owed to the legislature's unique ability to "weigh the evidence, choose among conflicting inferences, and make the necessary policy judgments." *See, e.g.*, *Gould*, 907 F.3d at 676. Moreover, "[i]n the wake of increasingly frequent acts of mass violence committed with . . . LCMs, the interests of state and local governments in regulating the possession and use of such weapons are entitled to great weight." *Worman v. Healey*, 922 F.3d 26, 41 (1st Cir. 2019).

Legislatures have unique institutional expertise that makes them better equipped at gathering and assessing data and evidence related to gun violence and making predictive judgments based on that data and evidence. "[W]hen it comes to collecting evidence and drawing factual inferences in this area, the lack of competence on the part of the courts is marked and respect for the Government's conclusions is appropriate." *Gould*, 907 F.3d at 676 (internal quotation marks omitted) (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010)); *see Kachalsky*, 701 F.3d at 97 ("The Supreme Court has long granted deference to legislative findings regarding matters that are beyond the competence of courts."). "[J]udges do not know the answers to the kinds of empirically based questions that will often determine the need for particular forms of gun regulation. Nor do they

have readily available 'tools' for finding and evaluating the technical material submitted by others." *McDonald*, 561 U.S. at 923-26 (Breyer, J., dissenting) (citations omitted).

When reviewing firearm regulations under intermediate scrutiny, the court's role is *only* to ensure that the legislature has "drawn reasonable inferences based on substantial evidence." *Kachalsky*, 701 F.3d at 97 (quoting *Turner*, 512 U.S. at 666). Courts should not impose an "unnecessarily rigid burden of proof," and should consider "the legislative history of the enactment as well as studies in the record or cited in pertinent case law." *Pena*, 898 F.3d at 979 (internal quotations and citations omitted). As discussed in Parts I and II of this brief, the district court failed on both accounts.

The district court maintained that deference to the California legislature is not necessary because that "approach [was] promoted by dissenting Justice Breyer and *rejected* by the Supreme Court's majority in *Heller*." *Duncan*, 366 F. Supp. 3d at 1166 & n.54. The district court misread *Heller*. The majority in *Heller* did not address legislative deference outside the narrow context of a complete ban on the ownership of handguns, which were found to be commonly used for self-defense in the home by responsible, law-abiding citizens. *Heller* 554 U.S. at 626, 636. *Heller*'s holding does not apply to LCMs, which are not commonly used for self-defense in the home and are frequently used in mass shootings.

Moreover, the Court in *Heller* expressly acknowledged that the legislature retains "a variety of tools for combating [the problem of gun violence]." *Heller*, 554 U.S. at 636. And although the district court gave short shrift to this court's post-*Heller* jurisprudence, *see, e.g.*, *Duncan*, 366 F. Supp. at 1165-67 ("[W]hen did we . . . become deferential, if not submissive, to the State when it comes to protecting constitutional rights?"), the Ninth Circuit and many other circuits have made clear that courts owe deference to the legislature's policy judgments when reviewing regulations like Section 32310 that lie outside the narrow category of laws deemed unconstitutional in *Heller*.

B. The district court owed deference even though Section 32310 was enacted, in part, by ballot measure.

According to the district court, it need not and should not have accorded legislative deference here because Sections 32310(c) and (d) were enacted through the referendum process, whereas the rest of the statute was enacted through the legislative process. *Duncan*, 366 F. Supp. 3d at 1167-68. Although a referendum's fact finding generally does not justify the same level of deference as legislative findings, "an undeferential review . . . *does not* equate to an automatic resolution in Plaintiffs' favor." *See Vivid Entm't*, 965 F. Supp. 2d at 1127 (emphasis added).

More importantly, the substance of the ballot measure here did not originate solely in the referendum process. Proposition 63 merely closed a loophole to reaf-

firm and reinforce a policy judgment that the legislature had already made in enacting Section 32310: LCMs should be prohibited in California. *See Hearing on S.B. 1446 Before the Assembly Committee on Public Safety*, 2015-2016 Reg. Sess. (June 14, 2016) ("Since January 1, 2000, California has banned the importation, manufacture and sale of high capacity magazines . . . Possession was not banned but because all other means of obtaining large-capacity magazines has been prohibited since January 1, 2000, large-capacity magazines should have phased out naturally over time."). After the horrific 2015 mass shooting in San Bernardino, both the California legislature and California voters responded by approving a measure to prohibit the possession of LCMs, thus closing an unintended loophole in order to reinforce the legislature's existing ban on LCMs. *See* Tim Arango & Jennifer Medina, *California is Already Tough on Guns. After a Mass Shooting, Some Wonder If It's Enough*, N.Y. Times (Nov. 10, 2018), https://perma.cc/79KM-C2P7.

The district court failed to mention that the amendments to Section 32310 that were enacted by ballot measure on November 8, 2016 closely mirrored Senate Bill 1446, which was enacted by the California legislature and signed by California's governor on July 1, 2016. *See* Bill Chappell, *6 New Gun Control Laws Enacted In California, As Gov. Brown Signs Bills*, NPR (July 1, 2016), https://perma.cc/Z95K-QBV2. Both S.B. 1446 and Proposition 63 had nearly identical provisions and one common purpose: amend Section 32310 to prohibit possession and require disposal

of all LCMs in California. *Compare* S.B. 1446, 2015-2016 Reg. Sess. (Cal. 2016) *with* 2016 Cal. Legis. Serv. Prop. 63 (approved Nov. 8, 2016, eff. Nov. 9, 2016) *and with* Cal. Penal Code § 32310(c)-(d); *see also Wiese v. Becerra*, 263 F. Supp. 3d 986, 990 (E.D. Cal. 2017). Thus, the core content of the ballot measure that California voters overwhelmingly approved in order to amend Section 32310 was *also* approved by the legislature through S.B. 1446. Section 32310 thus reflects the legislature's ability to "amass and evaluate the vast amounts of data bearing upon complex and dynamic issues" and therefore warrants "substantial deference."

C. Courts may not substitute their own policy preferences for the policy judgments of democratically-elected legislatures.

As illustrated by the district court's opinion, failure to afford proper deference to the legislature opens the door for courts to rule based on policy preferences while ignoring credible empirical evidence and legal precedent. Courts may not substitute their own policy preferences for the policy judgments and findings of the democratically-elected and democratically-accountable legislature. *See Pena*, 898 F.3d at 979-80; *Gould*, 907 F.3d at 673 ("This degree of deference forecloses a court from substituting its own appraisal of the facts for a reasonable appraisal made by the legislature."); *see also Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) ("[C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.").

Judges do not have the adequate tools to make these types of complex policy

judgments; nor are there sufficient safeguards to hold them accountable and ensure that their judgments are well-founded and supported by reliable empirical evidence and social science. As this court has found, "[w]hen policy disagreements exist in the form of conflicting legislative evidence,' we owe [the legislature's] findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Pena*, 898 F.3d at 979 (quoting *Turner*, 520 U.S. at 195 (internal citations and quotation marks omitted)).

Judges substituting their own policy preferences for legislative judgments is especially dangerous and inappropriate in the context of gun violence prevention. Due to the inherent safety risks that accompany firearms, the Second Amendment necessarily involves competing liberty interests: the limited right for law-abiding individuals to keep and bear arms recognized in *Heller* vis-à-vis the universal, fundamental right to live. *See Bonidy v. United States Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015); *McDonald*, 561 U.S. at 891 (Stevens, J., dissenting) ("[I]n evaluating an asserted right to be free from particular gun-control regulations, liberty is on both sides of the equation. Guns may be useful for self-defense, as well as for hunting and sport, but they also have a unique potential to facilitate death and destruction and thereby to destabilize ordered liberty.").

The presence of competing rights and interests involved in the prevention of

gun violence is all the more reason courts should defer to the legislature's expertise and unique ability to weigh data and make policy judgments on this complex, empirical issue. The district court confidently asserted that "[t]he judiciary is—and is often the only—protector of individual rights that are at the heart of our democracy." *Duncan*, 366 F. Supp. 3d at 1134 (internal quotations and citation omitted). Yet its opinion contradicts this very statement by elevating the Second Amendment above all other rights and failing to safeguard—much less consider— the more precious and fundamental right to live. *See* Jonathan Lowy & Kelly Sampson, *The Right Not To Be Shot: Public Safety, Private Guns, and The Constellation of Constitutional Liberties*, 14 Geo. L.J. & Pub. Pol'y 187 (2016).

Californians have already witnessed the dangerous impact of a court disregarding reasoned legislative policy judgments (and the direct will of citizens). In the less-than-one-week period between March 29, 2019, when the district court's ruling went into effect, and April 5, 2019, when the court finally granted a stay of its own ruling pending this appeal, a "buying frenzy" likely resulted in hundreds of thousands, perhaps even millions, of LCMs being purchased in California. Matthias Gafni, *For One Week, High-Capacity Ammunition Magazines Were Legal in California. Hundreds of Thousands May Have Been Sold*, S.F. Chronicle (Apr. 11,

2019), https://perma.cc/YWW3-EN3H. Despite these shocking estimates, it is impossible to know just how many LCMs were actually purchased or brought into the state. *Id.*

Considering that mass shootings involving LCMs result in twice as many fatalities and 14 times as many injuries as those that do not, the potential impact of the district court's ruling on public safety is staggering. *See Assault Weapons and High Capacity Magazines*, Everytown for Gun Safety (Mar. 22, 2019), https://perma.cc/59EQ-YKYQ. In a span of less than one week, a single, unelected judge's failure to afford proper legislative deference while substituting his own policy preferences for the legislature's judgments exacerbated the risk that LCMs will be used in a mass shooting in California, jeopardizing the safety of millions of Californians who already voted, either through their elected representatives or through direct ballot measure, to keep these dangerous weapons out of their communities.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Appellant's Opening Brief, the district court's judgment should be vacated and this Court should direct the district court to enter judgment in favor of the Appellant.

Respectfully submitted,

/s/Rafael Reyneri

JONATHAN E. LOWY
T. TANYA SCHARDT
BRADY
840 First Street, N.E., Suite 400
Washington, DC 20002
(202) 370-8101

SCOTT D. DANZIS
THOMAS C. VILLALON
RAFAEL REYNERI
NORA CONNEELY
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, N.W.
Washington, DC 20001
sdanzis@cov.com
(202) 662-6000

Counsel for Amicus Curiae Brady

July 21, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 and Rule 29(a)(4)(A) of the Federal Rules of Appellate Procedure, Brady states that it has no parent corporation, nor does any publicly held corporation have a ten percent or greater ownership interest (such as stock or partnership shares) in Brady.

Date: July 21, 2019

Respectfully submitted,

/s/Rafael Reyneri
Rafael Reyneri

Counsel for Amicus Curiae Brady

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: July 21, 2019

Respectfully submitted,

/s/Rafael Reyneri
Rafael Reyneri

Counsel for Amicus Curiae Brady

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 19-55376

I am the attorney or self-represented party.

This brief contains 6,899 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ◉ is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ○ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ○ it is a joint brief submitted by separately represented parties;
  - ○ a party or parties are filing a single brief in response to multiple briefs; or
  - ○ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated _____.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/Rafael Reyneri **Date** Jul 21, 2019

*(use "*s/[typed name]*" to sign electronically-filed documents)*

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov