
No. 19-55376

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
Civil Case (3:17-cv-1017-BEN)

BRIEF OF *AMICI CURIAE*
CALIFORNIA CHAPTER OF THE AMERICAN
COLLEGE OF EMERGENCY PHYSICIANS, AMERICAN
ACADEMY OF PEDIATRICS, CALIFORNIA, &
CALIFORNIA ACADEMY OF FAMILY
PHYSICIANS ON BEHALF OF APPELLANT

Jonathan K. Baum*
KATTEN MUCHIN ROSENMAN LLP
525 W. Monroe Street
Chicago, IL 60661
(312) 902-5479

Mark T. Ciani
KATTEN MUCHIN ROSENMAN LLP
575 Madison Avenue
New York, NY 10022
(212) 940-8800

*Counsel for Amici Curiae California Chapter of
the American College of Emergency Physicians,
American Academy of Pediatrics, California,
and California Academy of Family Physicians*

July 22, 2019

*Counsel of Record

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26, *Amicus Curiae* California Chapter of the American College of Emergency Physicians states that it is not a publicly held corporation, does not have a parent corporation, does not issue stock and therefore, no publicly held corporation owns 10% or more of its stock.

Pursuant to Fed. R. App. P. 26, *Amicus* American Academy of Pediatrics, California, states that it is not a publicly held corporation, does not have a parent corporation, does not issue stock and therefore, no publicly held corporation owns 10% or more of its stock.

Pursuant to Fed. R. App. P. 26, *Amicus* California Academy of Family Physicians states that it is not a publicly held corporation, does not have a parent corporation, does not issue stock and therefore, no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

	<u>Page</u>
CORPORATE DISCLOSURE STATEMENT	i
INTEREST OF <i>AMICI CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. EVERY LCM BAN REVIEWED BY AN APPELLATE COURT HAS BEEN UPHELD, BECAUSE LCMs ARE PARTICULARLY DANGEROUS.....	5
II. THE SECOND AMENDMENT DOES NOT PROTECT A RIGHT TO POSSESS LCMS, WHICH ARE ESPECIALLY DANGEROUS AND UNUSUAL WEAPONS.....	8
1. LCMs are frequently used in mass shootings.....	10
2. The use of LCMs results in more shots fired, more wounds, and more fatalities.	15
3. Amici Have Directly Experienced The Carnage Wrought By LCMs.	19
4. Weapons with LCMs pose a significant threat to law enforcement personnel and the general public.	21
III. THE LCMS BANNED BY THE ACT ARE NOT “ARMS” SUBJECT TO SECOND AMENDMENT SCRUTINY.	24
CONCLUSION	26
CERTIFICATE OF COMPLIANCE.....	27

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Ass’n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney General New Jersey</i> , 910 F.3d 106 (3rd Cir. 2018)	<i>passim</i>
<i>City of Indianapolis v. Edmond</i> , 531 U.S. 32 (2000).....	14
<i>Colacurcio v. City of Kent</i> , 163 F.3d 545 (9th Cir. 1998)	6
<i>Colorado Outfitters Ass’n v. Hickenlooper</i> , 823 F.3d 537 (10th Cir. 2016)	3
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....	5, 8
<i>Duncan v. Becerra</i> , 265 F. Supp. 3d 1106 (S.D. Cal. 2017), <i>aff’d</i> , 742 F. App’x 218 (9th Cir. 2018)	12, 13
<i>Duncan v. Becerra</i> , 366 F. Supp. 3d 1131 (S.D. Cal. 2019).....	<i>passim</i>
<i>Elec. Privacy Info. Ctr. v. U.S. Dept. of Homeland Sec.</i> , 653 F.3d 1 (D.C. Cir. 2011).....	14
<i>Friedman v. City of Highland Park</i> , 136 S. Ct. 447 (2015).....	6
<i>Friedman v. City of Highland Park</i> , 784 F.3d 406 (7th Cir. 2015)	3, 6
<i>Fyock v. Sunnyvale</i> , 779 F.3d 991 (9th Cir. 2015)	<i>passim</i>
<i>Heller v. District of Columbia</i> , 670 F.3d 1244 (D.C. Cir. 2011).....	3, 6, 9, 22

Hightower v. City of Boston,
693 F.3d 61 (1st Cir. 2012).....25

Jackson v. San Francisco,
746 F.3d 953 (9th Cir. 2014)8, 24

Kelley v. Johnson,
425 U.S. 238 (1976).....9

Kennedy v. Mendoza-Martinez,
372 U.S. 144 (1963).....13

Kolbe v. Hogan,
849 F.3d 114 (4th Cir. 2017)3, 6, 7

Kolbe v. Hogan,
138 S.Ct. 469 (2017).....6

New York State Rifle & Pistol Ass’n, Inc. v. Cuomo,
804 F.3d 242 (2d Cir. 2015)3, 6, 7, 17

Shew v. Malloy,
136 S. Ct. 2486 (2016).....6

Staples v. United States,
511 U.S. 600 (1994).....16

Turner Broad. Sys., Inc. v. F.C.C.,
512 U.S. 622 (1994).....9, 16

United States v. Cox,
906 F.3d 1170 (10th Cir. 2018)24

United States v. Decastro,
682 F.3d 160 (2d Cir. 2012)8

United States v. Miller,
307 U.S. 174 (1939).....8

United States v. Salerno,
481 U.S. 739 (1987).....9

Whitlow v. California,
203 F. Supp. 3d 1079 (S.D. Cal. 2016)..... 14-15

Worman v. Healey,
922 F.3d 26 (1st Cir. 2019)3, 6

Constitutions

U.S. Const. amend. II.....31

U.S. Const. amend. IV13, 21

Statutes

Cal. Penal Code § 32310.....2

Cal. Penal Code § 16740 (West 2012).....16

Cal. Penal Code § 12020 (West 2000).....16

Cal. Penal Code § 12079 (West 2000).....16

Other Authorities

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INTEREST OF *AMICI CURIAE*

As physicians, *amici curiae* work every day to preserve human life and health. It is for this reason that *amici* advocated for the enactment of Proposition 63, banning the possession of large capacity ammunition magazines. And it is for this reason that *amici* appear in this case to defend the ability of states to protect public safety and health by prohibiting possession of these uniquely dangerous instrumentalities.

Amicus curiae California Chapter of the American College of Emergency Physicians (“California ACEP”) supports emergency physicians in providing the highest quality of care to all patients and to their communities. California ACEP’s members routinely treat victims of shootings involving large capacity magazines. Accordingly, California ACEP and its members can provide the Court with critical information about the horrific consequences that result from having large capacity magazines in lawful circulation.

Amicus curiae American Academy of Pediatrics, California, (“AAP”) seeks to attain optimal physical, mental, and social health and well-being for all infants, children, adolescents, and young adults. Founded in 1930 by 35 pediatricians to serve as an independent forum to address children’s health needs, AAP and its members can provide an analysis to this Court regarding the havoc that large capacity magazines wreak on California’s children. AAP has expertise and

experience that can assist the Court in understanding the unique dangers posed by large capacity magazines.

Amicus curiae California Academy of Family Physicians (“CAFP”) is the only organization solely dedicated to advancing the specialty of family medicine in California. CAFP focuses on family physicians’ professional challenges and health policy concerns through advocacy and education. Like California ACEP and AAP, CAFP and its members are uniquely positioned to educate the Court on the danger and destruction that large capacity magazines cause.

Pursuant to Fed. R. App. P. 29(a), this brief is filed with the consent of all the parties to this appeal.¹

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an issue of significant importance, namely, whether California’s ban on the possession of particularly dangerous types of ammunition magazines, enacted through ballot initiative Proposition 63, is consistent with the Second Amendment. The Statute, Cal. Penal Code § 32310 (the “Statute”) prohibits possession of large capacity magazines (“LCMs”), defined as firearm magazines with the capacity to accept more than ten rounds of ammunition. The continued use, with particularly lethal consequences, of LCMs in gun violence,

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission.

including mass shootings across the nation, underscores the reasonableness of this prohibition.

This Court should reverse the summary judgment order granted by the district court. The Statute’s prohibition on LCMs—the manufacture and sale of which have long been banned under a combination of state and federal law—is fully consistent with the Second Amendment, with similar laws having been upheld by every Court of Appeals addressing the issue, including this one. *See Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015); *Worman v. Healey*, 922 F.3d 26 (1st Cir. 2019); *Ass’n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney General New Jersey*, 910 F.3d 106 (3rd Cir. 2018); *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017); *Colorado Outfitters Ass’n v. Hickenlooper*, 823 F.3d 537 (10th Cir. 2016);² *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015); *New York State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015); *Heller v. District of Columbia* (“*Heller II*”), 670 F.3d 1244 (D.C. Cir. 2011). In each case, courts have explained that eliminating LCMs serves the important government interest of promoting public safety, due to the particular danger posed by LCMs. Indeed, the district court itself acknowledged that “[f]ew would say that a 100 or 50-round rifle

² In *Colorado Outfitters*, the district court held such a prohibition consistent with the Second Amendment, and the Tenth Circuit Court of Appeals dismissed both the plaintiffs’ appeal, and the underlying case, on the basis of lack of standing.

magazine in the hands of a murderer is a good idea.” *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1137 (S.D. Cal. 2019).

There can be no dispute that LCMs are, in fact, dangerous. They are frequently used in mass shootings and gun murders of law enforcement personnel. The record evidence shows that LCMs result in more shots fired, more victims, and more death. Testimony from Dr. Marc Futernick, a Los Angeles emergency room physician with extensive experience treating gunshot-wound victims, summarized *infra* at 19-20, demonstrates the severe public health risk LCMs pose to innocent civilians. As Dr. Futernick explains, victims with multiple gunshot wounds fare worse than those with a single wound, as “[e]ach additional gunshot wound increases the likelihood of injuring an organ or large blood vessel that could lead to massive hemorrhage and irreversible shock.” (Decl. of Dr. Marc Futernick, ¶ 4.)³ The extraordinary power of weapons equipped with LCMs thus makes them impractical and dangerous for self-defense.

The district court acknowledged the danger to public safety posed by LCMs, but held that the benefit to the public was outweighed by the Statute’s imposition on gun owners. Under the Statute, however, California residents may lawfully continue to possess an operable handgun for self-defense. Moreover, they have access to a vast array of standard capacity ammunition magazines, which they may

³ The Declaration of Dr. Marc Futernick is attached hereto as Appendix A.

lawfully purchase and possess in any number for self-defense. Appellees are not satisfied, however, and demand that this Court significantly expand the Supreme Court's holding in *District of Columbia v. Heller* (“*Heller*”), 554 U.S. 570 (2008), to guarantee an individual's ability to possess LCMs, devices of military origin specifically designed to facilitate killing large numbers of people with both speed and efficiency.

Laws prohibiting LCMs, which are frequently employed in mass shootings and attacks on law enforcement officers and are not suitable for individual self-defense purposes, do not infringe the Second Amendment.

ARGUMENT

I. EVERY LCM BAN REVIEWED BY AN APPELLATE COURT HAS BEEN UPHeld, BECAUSE LCMs ARE PARTICULARLY DANGEROUS.

The Second Amendment does not confer a “right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Heller*, 554 U.S. at 626. The Statute prohibits possessing only a single weapon, LCMs, possession of which falls outside the Second Amendment right identified in *Heller*.

Similar bans on LCMs have been challenged in other states and municipalities, including in the Cities of Sunnyvale, California and Highland Park, Illinois, and the States of New York, Connecticut, Maryland, Colorado, Massachusetts, and New Jersey. In those instances, seven separate Courts of

Appeals, including this Court, applied intermediate scrutiny to bans on LCMs and upheld the laws as achieving a “substantial government interest that would be achieved less effectively absent the” bans. *See Fyock*, 779 F.3d at 1000 (quoting *Colacurcio v. City of Kent*, 163 F.3d 545, 553 (9th Cir. 1998)) (internal quotations omitted); *see also Heller*, 670 F.3d at 1264; *New York State Rifle & Pistol Ass’n*, 804 F.3d at 252-53; *Friedman*, 784 F.3d at 412; *Kolbe*, 849 F.3d at 137; *Worman*, 922 F.3d at 41; *Ass’n of New Jersey Rifle & Pistol Clubs*, 910 F.3d at 123-24. The Supreme Court has left these decisions in place by denying review. *See Kolbe v. Hogan*, 138 S.Ct. 469 (2017); *Shew v. Malloy*, 136 S.Ct. 2486 (2016); *Friedman v. City of Highland Park*, 136 S.Ct. 447 (2015).

In upholding these bans, these courts, including this one, have focused on the extreme dangerousness of LCMs—to which *amici*, as physicians, can personally attest. *See, infra*, at 19-21. In *Fyock*, this Court specifically predicated its holding on evidence of LCMs’ lethality and inherent dangerousness:

[The] use of large-capacity magazines result[s] in more gunshots fired, result[s] in more gunshot wounds per victim, and increase[s] the lethality of gunshot injuries [and] [] large-capacity magazines [are] disproportionately used in mass shootings as well as crimes against law enforcement.

Fyock, 779 F.3d at 1000-01.

The other federal courts of appeal have relied on the same finding. *See Worman*, 922 F.3d at 39 (“The record contains ample evidence of the unique

dangers posed by the proscribed weapons. Semiautomatic assault weapons permit a shooter to fire multiple rounds very quickly, allowing him to hit more victims in a shorter period of time. LCMs exacerbate this danger, allowing the shooter to fire more bullets without attempting to reload . . . The plaintiffs do not dispute the extensive evidence regarding the lethality of the proscribed weapons”); *Ass’n of New Jersey Rifle & Pistol Clubs*, 910 F.3d at 119 (“LCMs allow for more shots to be fired from a single weapon and thus more casualties to occur when they are used By prohibiting LCMs, the Act reduces the number of shots that can be fired from one gun, making numerous injuries less likely.”); *Kolbe*, 849 F.3d at 127 (“[W]hen the banned assault weapons and large-capacity magazines are used, more shots are fired and more fatalities and injuries result than when shooters use other firearms and magazines Even in the hands of law-abiding citizens, large-capacity magazines are particularly dangerous.”); *New York State Rifle & Pistol Ass’n*, 804 F.3d at 263-64 (“The record evidence suggests that large-capacity magazines may ‘present even greater dangers to crime and violence than assault weapons alone’ [L]arge-capacity magazines result in ‘more shots fired, persons wounded, and wounds per victim than do other gun attacks.’”) (citations omitted).

Below *amici* provide additional evidence of just how particularly dangerous LCMs are. Based on this, this Court should follow its own sound reasoning, and that of its sister circuits, and reverse the district court’s issuance of a permanent

injunction, allowing the statewide ban on LCMs—enacted by the people of the State of California—to take effect.

II. THE SECOND AMENDMENT DOES NOT PROTECT A RIGHT TO POSSESS LCMS, WHICH ARE ESPECIALLY DANGEROUS AND UNUSUAL WEAPONS.

Consistent with its recognition that the Second Amendment does not include the “right to keep and carry any weapon whatsoever,” the Supreme Court in *Heller* emphasized “the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’” 554 U.S. at 627 (citing *United States v. Miller*, 307 U.S. 174, 179 (1939)); *see also United States v. Decastro*, 682 F.3d 160, 165 n.4 (2d Cir. 2012) (“[T]he Second Amendment right does not encompass all weapons, but only those ‘typically possessed by law-abiding citizens for lawful purposes’ and thus does not include the right to possess ‘dangerous and unusual weapons.’”) (quoting *Heller*, 544 U.S. at 625, 627).

Moreover, this Court has established intermediate scrutiny as the appropriate level of review to be applied “if a challenged law does not implicate a core Second Amendment right, or does not place a substantial burden on the Second Amendment right,” applying that level of review to San Francisco’s ordinance regulating handgun storage and ammunition sales, as well as the ban on LCMs at issue in *Fyock*. *See Jackson v. San Francisco*, 746 F.3d 953, 960-66 (9th Cir. 2014); *see also Fyock*, 779 F.3d at 1000-01; *Duncan*, 366 F. Supp. 3d at 1160

(recognizing principle). As noted above, other Courts of Appeals have also applied intermediate scrutiny to review regulations restricting LCMs. *See supra* at 6. Intermediate scrutiny requires a showing that the law at issue is related to an asserted governmental end that is “significant,” “substantial,” or “important.” *See, e.g., Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994).

The Statute easily satisfies intermediate scrutiny precisely because LCMs are so uniquely dangerous that a ban prohibiting individuals from possessing them serves the important government interests of preserving public safety and preventing crime. *See, e.g., United States v. Salerno*, 481 U.S. 739, 748-50 (1987); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976).

Despite acknowledging that “mass shooters often use large capacity magazines precisely because they inflict maximum damage on as many people as possible,” the district court stunningly asserts that because mass shootings are, by its estimation, “rare,” it is “not at all clear” that the state has a “compelling” interest in preventing them. *Duncan*, 366 F. Supp. 3d at 1136, 1160, 1177. On this basis the district court cavalierly dismissed much of the evidence advanced by Appellant—including a 36-year survey of shooting incidents that may be the most comprehensive report on mass shootings currently available. *Id.* at 1162-63. The district court observed that 17 of 98 mass shootings over a 36-year period took place in California. *Id.*

The district court disregards its own important concessions because, in its words, “[n]othing in the Second Amendment makes lethality a factor to consider.” *Id.* at 1145-46. The district court asserts that bans on machine guns, grenades, and shoulder-fired rocket launchers are constitutional not because of the peculiar lethality of these devices, but solely because they are not “commonly possessed by law-abiding citizens for lawful purposes.” *Id.* This is manifestly incorrect. As discussed above, the decisions of this Court and the other appellate courts to reject Second Amendment challenges to LCM bans have uniformly relied, at least in part, on how LCMs enhance the lethality of the firearms to which they are attached. Accordingly, the district court’s concessions, coupled with the record evidence supporting them, lead to the inescapable conclusion that—using the appropriate test of intermediate scrutiny—the Statute serves an important government interest that would not be achieved as effectively without the Statute.

1. LCMs are frequently used in mass shootings.

Mass shootings are not rare. It is not unusual to see headlines of mass shootings on a routine basis. Some of these incidents in recent years haunt the national conscience. Those incidents require only the mention of the location in which they occurred to conjure memories of heavily-armed shooters and the horrors they wrought on innocent victims: Santa Monica, California; Sandy Hook Elementary School; Aurora, Colorado; Tucson, Arizona; Binghamton, New York;

East Oakland, California; Alexandria, Virginia; Parkland, Florida; Las Vegas, Nevada; Bakersfield, California; Virginia Beach; Thousand Oaks, California.⁴

Any one of these incidents is the kind of ghastly horror that legislatures could and should take every action to prevent. For example, in Santa Monica, the shooter murdered his father and brother. Then, in a 13-minute shooting spree, armed with an AR-15, a revolver, three zip guns, and *forty* 30-round LCMs, the shooter travelled to the Santa Monica College library, killing one and injuring others along the way. When he arrived at the library, the shooter unloaded over 70 bullets, killing two more people and injuring more. In total, five people died and four more were injured.⁵

⁴ As the district court highlighted, the Santa Monica shooter, who killed five people and injured four more before being killed by law enforcement, purchased LCMs illegally from outside of California. *Duncan*, 366 F. Supp. 3d at 1164. While California law enforcement could not detect the shooter's illicit purchases, the Statute provides law enforcement with an increased chance of preventing mass shootings: if the Statute were in effect at the time, law enforcement could have stopped the Santa Monica shooter, before his rampage began, simply for possessing an LCM.

⁵ See Robin Abcarian, et al., *Santa Monica shooter's background steeped in trauma, violence*, L.A. Times (June 10, 2013), <http://articles.latimes.com/2013/jun/10/local/la-me-0611-santa-monica-shooting-20130611>; Matt Stevens, *Remorse, but not hate, in note left by Santa Monica gunman*, L.A. Times (June 13, 2013), <http://articles.latimes.com/2013/jun/13/local/la-me-0614-santa-monica-shooting-20130614>; Kevin Herrera, *Santa Monica shooter assembled rifle used in rampage, left 'farewell' note*, Malibu Times (June 14, 2013), http://www.malibutimes.com/news/article_53db2262-d4c0-11e2-9ede-0019bb2963f4.html

The district court identified a survey identifying 98 mass shootings in a 36-year period, some of which involved the use of LCMs, but inexplicably concluded that its contents did not demonstrate a substantial need for the ban on LCMs. *Duncan*, 366 F. Supp. at 1162-65. That conclusion is erroneous. LCMs are used disproportionately in mass shootings.⁶ LCMs often play a devastating role in mass shootings in California and elsewhere. Of the 60 mass shootings from which information on magazine capacity is available from 2009 to 2017, LCMs were recovered in 58% of incidents.⁷ Similarly, in mass shootings between January 2009 and July 2015, 155% more people were shot and 47% more people killed in incidents where assault weapons or LCMs were used.⁸

Even if the district court were correct to conclude from the record that the lethal violence perpetrated with LCMs is “rare,” what if such violence could be made even rarer? Is it not a substantial government interest to prevent such attacks from occurring, even if they don’t happen very often? How many of these horrific

⁶ See Decl. of L. Allen at 6-7, (“[L]arge-capacity magazines were used in the majority of mass shootings with known magazine capacity since 1982 (44 out of 50 mass shootings).”); SJ Ex. 18 at 62-63 (listing mass shootings where shooter used LCM).

⁷ See *Mass Shootings in the United States: 2009-2017*, Everytown for Gun Safety (Dec. 6, 2018), https://everytownresearch.org/reports/mass-shootings-analysis/#foot_note_54.

⁸ See Everytown for Gun Safety, *Analysis of Recent Mass Shootings* at 3 (Aug. 2015), <https://everytownresearch.org/documents/2015/04/analysis-of-recent-mass-shootings.pdf/>.

deaths must California endure before the government interest at stake is high enough for a ban on the possession of LCMs to pass intermediate scrutiny? As a prominent expert relied on by many courts facing the same issues, Christopher Koper, notes, “while rare, incidents in which more than ten shots are fired are especially lethal and injurious.” (PI Ex. 107 at 462.)²

When the harm to the public is particularly heinous—particularly shocking to the collective conscience of the citizenry, as Proposition 63’s passage indicates—constitutional protections are flexible enough to accommodate governmental solutions to the problems. “[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.” *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). Every day, Americans go through a level of airport security that, there being no reason to believe that they will disable or destroy an aircraft or do violence to its passengers or crew, would otherwise be an intolerable violation of their Fourth Amendment right to be “secure in their persons . . . against unreasonable searches.” U.S. Const. amend. IV. But the carnage wrought from that infinitesimal number of instances of airplanes being blown up or their inhabitants being massacred is so horrific that these suspicionless airport

² All citations to “PI Ex. #” refer to exhibits to the Declaration of Alexandra Robert Gordon in Support of Defendant Attorney General Xavier Becerra’s Opposition to Plaintiffs’ Motion for Preliminary Injunction, *Duncan v. Becerra*, 265 F. Supp. 3d 1106 (S.D. Cal. 2017) (No. 3:17-cv-01017). Page numbers in the citations refer to the full PDF file, not any individual exhibit’s page numbers.

searches become reasonable under the circumstances, no matter how rare the calamity to be prevented may be. *See, e.g., Elec. Privacy Info. Ctr. v. U.S. Dept. of Homeland Sec.*, 653 F.3d 1, 10 (D.C. Cir. 2011) (finding that the use of so-called “full body scanners” in airport security does not violate the Fourth Amendment because “the need to search airline passengers ‘to ensure public safety can be particularly acute.’”) (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 47-48 (2000)).

Similarly, millions of American schoolchildren must be immunized against contagious diseases before they are allowed to attend public and private schools each year, even if vaccinations violate their sincerely held religious beliefs (or the beliefs of their parents). That it is very “rare” that any of them will infect or be infected by a fellow student does not preclude the state from engaging in this invasive action to protect against the possibility of a broadly lethal epidemic. In *Whitlow v. California*, 203 F. Supp. 3d 1079, 1090-92 (S.D. Cal. 2016), the court upheld the repeal of California’s personal-belief exemption to its immunization requirements, even though the repeal was not prompted by an actual disease outbreak. As the court reasoned, “the State’s interest in protecting the public health and safety, particularly the health and safety of children, does not depend on or need to correlate with the existence of a public health emergency.” *Id.*; *see also id.* at 1091 (“While removing the [personal-belief exemption] is an aggressive step,

so, too, is the goal of providing a means for the eventual achievement of total immunization. An aggressive goal requires aggressive measures, and the State of California has opted for both here.”). The *Whitlow* court pointed to a raft of U.S. Supreme Court, federal appellate court, and California Supreme Court precedent compelling its decision to uphold the repeal of the personal-belief exemption. *Id.* at 1083-85. This Court should similarly recognize the State of California’s right to take “aggressive measures” to safeguard “the public health and safety” by reducing gun violence wrought by LCMs, even if such violence is as “rare” as the district court found it to be.

2. The use of LCMs results in more shots fired, more wounds, and more fatalities.

LCMs make weapons more deadly. Multiple studies in the trial court record have shown that attacks with LCMs are “particularly lethal and injurious.” (SJ Ex. 4 at 269.)¹⁰ It stands to reason that a ban on the possession of LCMs will result in fewer deaths. Although this evidence supplies more than adequate justification for the LCM possession ban under intermediate scrutiny, the district court completely disregarded it. While acknowledging that it “may be correct that a 100-round magazine is uniquely dangerous,” and that even a “complete ban” on 50-round

¹⁰ All citations to “SJ Ex. #” refer to exhibits to the Declaration of John D. Echeverria in Support of Defendant’s Opposition to Plaintiff’s Motion for Summary Judgement, *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1137 (S.D. Cal. 2019) (No. 3:17-cv-01017). Page numbers in the citations refer to the full PDF file, not any individual exhibit’s page numbers.

magazines “may be a mild burden,” *Duncan*, 366 F. Supp. 3d at 1156, 1173, the district court rejected the 10-round limit in the Statute at issue here as “arbitrary.” *Id.* at 1181. Having conceded that the Second Amendment is no barrier to some line being drawn between permissible ammunition magazines and excessively dangerous ones, it was not for the district court to overrule the State’s determination of where that line should be drawn. The Second Amendment does not grant the judiciary the right to make that decision. If LCMs are uniquely dangerous and therefore the reasonable subject of a ban, then the State should be permitted to draw the line where it deems appropriate. And, in fact, it has. Significantly, the California legislature (not, as suggested by the district court, the voters of California) chose a 10-round limit in 1999 and enacted a statute implementing it in 2000. *See* Cal. Penal Code § 16740 (West 2012) (continuing Cal. Penal Code § 12020(c)(25) (West 2000) and 12079(b) (West 2000) without substantive change). The referendum at issue merely strengthened the protections against LCMs—defined by pre-existing statute to include the 10-round limit—already enacted by the legislature, whose choices are, of course, entitled to judicial deference. *See Turner*, 512 U.S. at 665–66.

In critiquing the State’s rationale for banning LCMs, the district court blithely observed that “every gun is dangerous.” *Duncan*, 366 F. Supp. 3d at 1146. This truism does not negate the reality that every gun is *much more* dangerous

when equipped with an LCM. *See, e.g., New York State Rifle & Pistol Ass’n*, 804 F.3d at 263 (“[L]arge-capacity magazines may ‘present even greater dangers to crime and violence than assault weapons alone.’”) (citation omitted). Indeed, before enacting the federal ban on assault weapons, one Congressional report described weapons capable of accepting LCMs as having “a military configuration characteristic that is not ‘merely cosmetic,’ but ‘serve[s] specific, combat-functional ends.’”¹¹ (SJ Ex. 13 at 52.)

Unsurprisingly, as weapons serving “combat-functional ends,” firearms paired with LCMs are far more dangerous than their unenhanced counterparts. As expert Christopher Koper has explained, “[f]irearms with LCMs, both assault-type and non-assault-type . . . are more destructive and cause more death and injury in gun crime,” and “result in more shots fired, more victims, and more wounds per victim.” (PI Ex. 107 at 451-52; *see also* PI Ex. 14 at 410.) Koper describes a recent study analyzing mass shootings in which the researcher concluded that

¹¹ In the wake of the Las Vegas massacre, some members of Congress successfully advocated for a ban on bump stocks on the ground that they make automatic and semi-automatic weapons more deadly because they enable shooters to fire more rounds more quickly. *See* Russell Berman, *Why a Congressional Ban on Bump Stock Is Unlikely*, *The Atlantic* (Oct. 7, 2017), <https://www.theatlantic.com/politics/archive/2017/10/vegas-shooter-bump-stocks/542313/>. This is the same basis for California’s ban on LCMs. Indeed, bump stocks make semi-automatic weapons more deadly only when they are paired with LCMs to provide a plentiful supply of bullets. *See* Bump-Stock-Type Devices, 83 Fed. Reg. 66514-01 (December 26, 2018) (codified in CFR Parts 447, 478, and 479) (Department of Justice clarifies that “bump fire” stocks and similar devices are “machineguns”).

shooters with LCMs caused 10.19 fatalities compared to 6.35 fatalities caused by shooters without LCMs, and 12.39 people shot compared to 3.55 hit by non-LCM shooters. (PI Ex. 107 at 451; *see also* PI Ex. 14 at 275.) In other words, where LCMs were employed, there were 60% more fatalities on average and more than three times as many persons with nonfatal gunshot wounds. (SJ Ex. 18 at 65.)

Koper also found that guns used in incidents where a victim was shot were 17% to 26% more likely to have LCMs than guns used in gunfire cases with no wounded victims. (PI Ex. 107 at 452; *see also* PI Ex. 14 at 276; SJ Ex. 4 at 270.) Attackers armed with weapons equipped with LCMs tend to shoot their victims an average of three times, while attackers who wielded guns without an LCM shot their victims an average of two times. (SJ Ex. 4 at 163; *see also* PI Ex. 14 at 276.) Not only do shooters armed with LCMs shoot more bullets, but the lethality of those additional shots can be exponentially greater than the impact of a weapon without an LCM because the bullets can ricochet and hit multiple people. For example, in the Aurora, Colorado movie theater shooting, the shooter fired 76 shots, but investigators identified 240 “impacts” from those bullets.¹²

¹² *See* Larry Ryckman, *Aurora theater shooting trial, the latest from Day 13*, Denver Post (May 14, 2015), <http://www.denverpost.com/2015/05/14/aurora-theater-shooting-trial-the-latest-from-day-13/>.

3. Amici Have Directly Experienced The Carnage Wrought By LCMs.

Because LCMs result in more gunshot wounds, they are more lethal. This ineluctable conclusion is borne out in the testimony of doctors who care for victims of gunshot wounds. In the attached Appendix, Dr. Marc Futernick, an experienced and active Attending Emergency Physician at California Hospital Medical Center, and a past president of *amicus* California ACEP, describes the suffering endured by victims of gun violence, and the frequent need for those with multiple gunshot wounds to undergo “life-saving interventions, such as massive blood transfusions and emergency surgery, to give them any chance for survival.” (Decl. of Dr. Marc Futernick, ¶ 3.)

Dr. Futernick explains that victims of multiple gunshot wounds face significantly more challenging medical crises than those who have only suffered a single gunshot wound because “[e]ach additional gunshot wound increases the likelihood of injuring an organ or large vessel that could lead to massive hemorrhage and irreversible shock.” (*Id.* at ¶ 4.) In testimony that could only come from someone who is “among the most experienced in the nation in the care of gunshot-wound victims,” Dr. Futernick writes that the physicians in his ER have saved many victims of single gunshots, while losing many more to multiple gunshot wounds. (*Id.* at ¶¶ 2, 4.) He describes, for example, how caring for patients who have injuries to both the brain and the torso is particularly

challenging, as “[t]he care required for these two types of injuries can negatively impact the other, and such patients have higher rates of complications and poor outcomes.” (*Id.* at ¶ 5.) Beyond the impact on the victims and their families, the time and resources devoted to these injuries also negatively impact the resources that emergency rooms can devote to other patients. (*Id.* at ¶ 6.)

Dr. Futernick’s observations have been echoed by his peers in medical literature recently and frequently.¹³ Mass shootings present an “overwhelming” experience for the physicians who treat victims of them.¹⁴ David MacIntyre, a trauma surgeon at Las Vegas’ Sunrise Hospital, wrote about his experience treating 214 people (including 70-80 within the first hour) on the evening of the massacre there.¹⁵ Dr. MacIntyre observed 10 gunshot wounds to the head, 8 to the chest, 13 in the abdominal area, 17 orthopedic injuries, and 33 “others” that all required

¹³ See Panagiotis K. Stefanopoulos, et al., *Gunshot Wounds: A Review of Ballistics Related to Penetrating Trauma*, 3 J. Acute Disease 178, 181-82 (2014); Gina Kolata & C.J. Chivers, *Wounds from Military-Style Rifles? ‘A Ghastly Thing to See’*, N.Y. Times (Mar. 4, 2018),

<https://www.nytimes.com/2018/03/04/health/parkland-shooting-victims-ar15.html>; Tim Craig et al., *As the Wounded Kept Coming, Hospitals Dealt with Injuries Rarely Seen in U.S.*, Wash. Post (Oct. 3, 2017), https://www.washingtonpost.com/national/health-science/as-the-wounded-kept-coming-hospitals-dealt-with-injuries-rarely-seen-in-the-us/2017/10/03/06210b86-a883-11e7-b3aa-c0e2e1d41e38_story.html?utm_term=.5a659eec267b.

¹⁴ See Jeremy Stahl, *What It Was Like to Be a Surgeon in Las Vegas’ Busiest Trauma Unit After Sunday’s Massacre*, Slate.com (Oct. 3, 2017), http://www.slate.com/blogs/the_slatest/2017/10/03/a_surgeon_s_story_from_sunrise_hospital_in_las_vegas.html.

¹⁵ *Id.*

surgery.¹⁶ Dr. MacIntyre also described 15 fatalities, some of which occurred before the victims even arrived at the hospital.¹⁷

The above evidence shows there can be no question that LCMs make guns more dangerous. The particular lethality of LCMs, and other military weapons used in civilian settings, led the American College of Emergency Physicians to create a task force to address “the challenges of reducing morbidity and mortality from active shooting incidents and terrorist attacks,” including through the “[t]ranslation of military emergency medicine and out-of-hospital (EMS) lessons learned to the civilian setting.”¹⁸

4. Weapons with LCMs pose a significant threat to law enforcement personnel and the general public.

LCMs are not only dangerous because they are frequently involved in mass shootings and enhance the lethality of firearms. They are also particularly dangerous because criminals often use them. An estimated 25% of gun homicides are committed with guns equipped with LCMs. (SJ Ex. 4 at 72.)

LCMs are used in a significant portion of *all* gun crimes. Evidence shows that LCMs were used in approximately 13% to 26% of all gun crime in the ten

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Press Release, American College of Emergency Physicians, Announcing the new ACEP High Threat Emergency Casualty Care Task Force (2016), <http://www.thecentralline.com/?p=3212>.

years prior to the enactment of the federal assault weapon and LCM ban in 1994. (SJ Ex. 4 at 201, 300, 302; PI Ex. 107 at 450.) Moreover, Christopher Koper has completed research showing that firearms equipped with LCMs “have grown substantially as a share of crime guns since the expiration of the federal ban” on assault weapons and LCMs.¹⁹

Criminals often choose LCMs to attack law enforcement. Before the enactment of the federal assault weapon ban, 31% to 41% of gun murders of police involved the use of LCMs. (PI Ex. 107 at 450; Ex. SJ Ex. 4 at 300.) Prohibitions on LCMs protect officers because gun users must reload more often. For officers confronting dangerous shootouts, the “‘2 or 3 second pause’ during which a criminal reloads his firearm ‘can be of critical benefit to law enforcement.’” *Heller*, 670 F.3d at 1264; *see also Ass’n of New Jersey Rifle & Pistol Clubs*, 910 F.3d at 120. For example, in January 2011, bystanders subdued Jared Lee Loughner during the mass shooting in Tucson only after he was forced to pause to reload.²⁰ Similarly, the interruption to reload is what prevented Colin Ferguson from continuing his 1995 Long Island Rail Road shooting spree that killed six

¹⁹ Christopher S. Koper et al., *Criminal Use of Assault Weapons and High-Capacity Semiautomatic Firearms: an Updated Examination of Local and National Sources*, J. Urban Health, Oct. 2, 2017, <https://www.ncbi.nlm.nih.gov/pubmed/28971349>.

²⁰ *See* Sam Quinones & Nicole Santa Cruz, *Crowd Members Took Gunman Down*, L.A. Times (Jan. 9, 2011), <http://articles.latimes.com/2011/jan/09/nation/la-na-arizona-shooting-heroes-20110110>.

people and injured 19 more.²¹ The importance of the opportunity to disarm during reloading was also illustrated with John Meis' actions to neutralize a shooter in Washington State.²²

LCMs jeopardize public safety by allowing the rapid fire of ammunition without the need to reload as often, are frequently used in mass public shootings, and jeopardize the law enforcement officers who serve and protect the citizenry. California has an interest in preventing devastating attacks committed with LCMs against its citizens and personnel. Given the real, immediate, and ongoing threats to the safety of the public and law enforcement caused by LCMs, California has made a reasonable choice to reduce these threats by prohibiting their possession. Since the most effective way to eliminate the danger and destruction caused by LCMs is to prohibit their possession, a substantial relationship clearly exists between the Statute and the government's significant interests in preserving public safety.

²¹ See Pat Milton, *Colin Ferguson Convicted of Murdering Six in Train Massacre*, AP News Archive (Feb. 18, 1995), <http://www.apnewsarchive.com/1995/Colin-Ferguson-Convicted-of-Murdering-Six-in-Train-Massacre/id-49433c4650ab4c17b9b412fe0a8717d6>.

²² Seattle Times, *1 dead, others hurt in shooting at Seattle Pacific University before student tackles gunman* (June 5, 2014), <https://www.seattletimes.com/seattle-news/1-dead-others-hurt-in-shooting-at-seattle-pacific-university-before-student-tackles-gunman/>.

III. THE LCMS BANNED BY THE ACT ARE NOT “ARMS” SUBJECT TO SECOND AMENDMENT SCRUTINY.

As demonstrated above, LCMS are so extremely dangerous—so destructive of human life and health—that a ban on civilian ownership of them should survive even the most heightened Second Amendment scrutiny. But they should not be subject to Second Amendment scrutiny at all. The Second Amendment guarantees the right to keep and bear only “arms.” U.S. Const. amend. II. By the terms of the *Heller* decision itself, LCMS are not “arms.” In *Heller*, the Court defined “arms” as “weapons of offence, or armour of defense.” 554 U.S. at 581 (quoting 1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978)). Unlike guns, LCMS are not weapons, they are firearm accessories. *See United States v. Cox*, 906 F.3d 1170, 1186 (10th Cir. 2018) (“A silencer is a firearm accessory; it is not a weapon in itself (nor is it ‘armour of defense’). Accordingly, it can’t be a ‘bearable arm’ protected by the Second Amendment.”).

The reach of the Second Amendment may extend beyond firearms themselves to include certain items, such as bullets, that are “necessary” to the functionality of firearms. *See Jackson*, 746 F.3d at 967. But an LCM is a device that is used to enhance the weapon’s basic features by providing quick and easy access to very large supplies of bullets. It is thus more like a silencer—a non-essential add-on to a firearm—which the Tenth Circuit held was an “accessory,” not an “arm” protected by the Second Amendment. *See Cox*, 906 F.3d at 1186.

The district court's legal conclusion that "the same analytical approach ought to be applied to both firearms and the ammunition magazines" banned by the law at issue in this case, is thus wrong because it is based on a false premise: that the banned LCMs are "necessary to render those firearms [protected by the Second Amendment] operable." *Duncan*, 366 F. Supp. 3d at 1143-44. The Third Circuit, in rejecting a Second Amendment challenge to New Jersey's LCM ban, squarely refuted this, finding that the ban "does not render the arm at issue here incapable of operating as intended. New Jersey citizens may still possess and utilize magazines, simply with five fewer rounds per magazine." *Ass'n of New Jersey Rifle & Pistol Clubs*, 910 F.3d. at 118.

Some magazine may, as the district court observes, be "an essential mechanical part of a firearm," *Duncan*, 366 F. Supp. 3d at 1142, but a detachable magazine holding 15 or 20 or 50 or 100 rounds of ammunition is not. Indeed, the district court implicitly acknowledges as much. For example, the district court recognizes that "fully 18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds." *Id.* at 1144 (citing *Heller*, 670 F.3d at 1261). In other words, 82 percent of those firearms were functioning perfectly well with a magazine of 10 rounds or less! Similarly, the district court observes that "[o]ne of the most popular youth rifles in America over the last 60 years has been the Ruger 10/22 . . . [which] is designed to use

magazines manufactured by Ruger in a variety of sizes: *10-round*, 15-round, and 25-round.” *Id.* at 1145 (emphasis added).

Because the LCMs banned by the law at issue here are not “arms” coming within the ambit of the Second Amendment at all, they are not properly subject to any level of Second Amendment scrutiny. But, in any event, the district court certainly erred in holding that “the same analytical approach ought to be applied” in assessing the constitutionality of firearms and of these devices that so unnecessarily magnify their lethality.

CONCLUSION

For the reasons set forth above, this Court should reverse the decision of the district court.

July 22, 2019

Respectfully submitted,

/s/Jonathan K. Baum

Jonathan K. Baum
KATTEN MUCHIN ROSENMAN LLP
525 W. Monroe Street
Chicago, IL 60661
(312) 902-5479

Mark T. Ciani
KATTEN MUCHIN ROSENMAN LLP
575 Madison Avenue
New York, NY 10022
(212) 940-8800

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of *Amici Curiae* California Chapter of the American College of Emergency Physicians, American Academy of Pediatrics, California, and California Academy of Family Physicians on Behalf of Appellant with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 22, 2019.

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/s/Jonathan K. Baum

Jonathan J. Baum

Appendix A

No. 19-55376

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
Civil Case (3:17-cv-1017-BEN)

DECLARATION OF MARC FUTERNICK, MD

I, Marc Futernick, MD, declare under penalty of perjury that the foregoing is true and correct:

1. I am the Chairman of the Board of Directors for VEP Healthcare, Inc., and the Regional Medical Director of Emergency Services and an active Attending Emergency Physician at California Hospital Medical Center (“CHMC”) in Los Angeles, California. I formerly served as the President, and currently serve on the Board of Directors, of *amicus* California Chapter of the American College of Emergency Physicians.

2. CHMC’s Emergency Department cared for more than 80,000 patients in 2018 and serves as a Level II trauma center. CHMC’s trauma center treats more patients than any other private facility in Los Angeles, and frequently treats the highest percentage of penetrating

traumas in the city. Penetrating traumas include gunshots and stab wounds. As a result, CHMC's physicians are among the most experienced in the nation in the care of gunshot-wound victims.

3. Having worked at CHMC for over a decade, I have personally cared for many gunshot-wound victims and regularly witnessed the severity of their injuries. I have also witnessed the devastating impact these life-changing events have on patients and their families. The pain and suffering of these patients is tremendous. We routinely care for vibrant, healthy young adults howling in misery from isolated injuries such as extremity gunshot wounds. Unfortunately, we also frequently treat patients with multiple wounds who are too critically ill to cry out at all. These patients require life-saving interventions, such as massive blood transfusions and emergency surgery, to give them any chance for survival.

4. Although it is intuitively obvious, I want to focus on the impact of multiple gunshot wounds and the increased morbidity and mortality these patients face. Each additional gunshot wound increases the likelihood of injuring an organ or large blood vessel that could lead to massive hemorrhage and irreversible shock. Catastrophic injuries are far more common when patients have multiple wounds. We have saved many patients with single gunshot wounds, but lost many more patients who suffered multiple wounds.

5. Some of the most challenging patients are those who have gunshot-wound injuries to both the brain and the torso. The care required for these two types of injuries can negatively impact the other, and such patients have higher rates of complications and poor outcomes. Unfortunately, resuscitating these patients is often unsuccessful, but the personnel and resources (*e.g.*, blood) dedicated to these efforts are the same regardless of the expected outcome.

6. There are also potential ramifications for other patients suffering emergency conditions, including those in pre-hospital settings. Patients suffering from non-traumatic

illnesses, which can be equally time-sensitive as traumatic ones, may suffer delays in care or therapy due to the intense focus of resources dedicated to victims of multiple gunshot wounds. For example, a blood bank can process only a limited number of blood transfusion units at one time, and the demand becomes more acute with multiple patients. Although staff and physicians do their best to manage all critical patients simultaneously, the impact of caring for patients with multiple gunshot wounds can have ripple effects across the community.

7. I have personally treated hundreds of victims of gun violence, including dozens of patients with five or more wounds. To restate the obvious, patients with multiple gunshot wounds are much more likely to die, or suffer permanent sequelae, such as paralysis, coma, amputations, and chronic gastrointestinal complications.

8. I am haunted by the anguish and tears of my patients' loved ones as they mourn the sudden death of their young and healthy children, spouses, or parents. All of their lives are changed in an instant.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 22nd day of July, 2019.

/s/ Marc Futernick

Marc Futernick, MD