

**Appeal No. 19-55376**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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VIRGINIA DUNCAN, et al.,

*Plaintiffs-Appellees,*

vs.

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

*Defendant-Appellant.*

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On Appeal From the United States District Court  
for the Southern District of California  
(No. 17-cv-1017-BEN-JLB)

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**BRIEF OF AMICI CURIAE PRIDE FUND TO END GUN  
VIOLENCE, EQUALITY CALIFORNIA, AND GAYS AGAINST  
GUNS IN SUPPORT OF APPELLANT**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule Appellate Procedure 26.1, the Pride Fund to End Gun Violence, Equality California, and Gays Against Guns state that they have no parent corporations. They have no stock, and therefore no publicly held company owns 10% or more of their stock.

/s/ James E. Hough  
James E. Hough

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## **INTEREST OF AMICI CURIAE<sup>1</sup>**

Amici curiae are organizations that work on behalf of the Lesbian, Gay, Bisexual, Transgender, and Queer (“LGBTQ”) community, including by working to reduce hate crimes and gun violence against that community and other vulnerable groups. They have a particular interest in the outcome of this litigation because the LGBTQ community has historically been the target of a disproportionate number of reported hate crimes, and was the victim of one of the deadliest mass shootings in U.S. history. The gunman in that shooting used large-capacity magazines (“LCMs”), which are at issue in this appeal. Descriptions of individual *Amici* are set out in the Appendix.

## **BACKGROUND ON GUN VIOLENCE AND ITS EFFECTS ON THE LGBTQ COMMUNITY**

On June 12, 2016, a heavily-armed mass shooter murdered 49 people and injured 53 others at Pulse, a gay nightclub in Orlando, Florida. Appellant’s Excerpts of Record (ER) 1025. The staggering loss of life was facilitated by the shooter’s use of multiple 30-round magazines. ER 1009. These LCMs allowed the gunman to fire dozens of shots in rapid succession and without pause, indiscriminately spraying Pulse’s patrons and staff—including amicus curiae Pride

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<sup>1</sup> No party’s counsel authored this brief in whole or in part. No party, party’s counsel, or other person contributed any money to fund the preparation or submission of this brief other than amici curiae and its counsel. All parties have consented to the filing of this brief.

Fund’s members and their loved ones—with bullets as they tried to flee. In one audio recording of the event, the attacker is heard firing 24 shots in just nine seconds. ER 1025. The shooter’s use of LCMs limited opportunities for victims to escape or for anyone to overpower the shooter while he reloaded. In fact, as the final shootout with the police began, the gunman taunted, “I’ve got plenty of bullets.”<sup>2</sup>

Until the mass shooting in Las Vegas that took place in October 2017, the Pulse nightclub massacre was the deadliest mass shooting in U.S. history. The Pulse attack was preceded by numerous other mass shootings involving LCMs, including:

- Sandy Hook Elementary School in Newton, Connecticut (21 first-graders and six adults killed and two adults wounded in December 2012);
- Aurora, Colorado movie theater (12 killed and at least 58 wounded in July 2012);
- San Bernardino, California holiday party (14 killed and more than 20 wounded in December 2015);
- Congresswoman Gabby Giffords’ constituent meeting outside a grocery

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<sup>2</sup> Jack Healy & Marc Santora, *Held Hostage in an Orlando Restroom, and Playing Dead to Stay Alive*, N.Y. Times (June 13, 2016), <https://www.nytimes.com/2016/06/14/us/reconstruct-orlando-pulse-shootings.html?mcubz=3>.

store in Tucson, Arizona (six killed and 13 wounded in January 2011);

- U.S. Army base in Fort Hood, Texas (13 killed and more than 30 wounded in November 2009);
- Binghamton, New York immigration center (13 killed and five wounded in April 2009 at an immigration center); and
- Virginia Polytechnic Institute campus in Blacksburg, Virginia (32 killed and at least 17 wounded in April 2007).

*See Kolbe v. Hogan*, 849 F.3d 114, 120 (4th Cir. 2017) (en banc) (describing these and other mass shootings involving magazines holding more than ten rounds), *cert. denied*, 2017 U.S. LEXIS 7002 (U.S., Nov. 27, 2017).

Since the Pulse nightclub massacre, there have been several additional mass shootings involving LCMs:<sup>3</sup>

- First Baptist Church in Sutherland Springs, Texas (27 killed and 20 injured in November 2017);
- Tree of Life – Or L'Simcha Congregation synagogue in Pittsburgh, Pennsylvania (11 killed and seven injured in October 2018); and
- Marjory Stoneman Douglas High School in Parkland, Florida (17 students and staff members killed and 17 injured in February 2018).

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<sup>3</sup> See Violence Policy Center, *High-Capacity Ammunition Magazines are the Common Thread Running Through Most Mass Shootings in the United States* (last visited July 17, 2019), [http://www.vpc.org/fact\\_sht/VPCshootinglist.pdf](http://www.vpc.org/fact_sht/VPCshootinglist.pdf).

As noted, the deadliest of all was the meticulously-planned mass shooting on October 1, 2017, at a country music festival in Las Vegas, Nevada, which left 58 individuals dead and approximately 500 others wounded.<sup>4</sup>

Reducing the prevalence of LCMs, and thereby the violence caused by gun crimes, is of heightened importance to the LGBTQ community. The LGBTQ community has historically been the target of a disproportionate number of reported hate crimes,<sup>5</sup> which have increased in certain communities over time. California as a whole experienced a 15.8% increase in reported hate crimes against the LGBTQ community between 2016 and 2017.<sup>6</sup> Data from the Los Angeles Police Department shows a 24.5% increase between 2015 and 2016.<sup>7</sup> Between 2017 and 2018, overall hate crimes in California increased by 12.5%, with gay

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<sup>4</sup> Meghan Keneally, *47 Guns, Loaded High-Capacity Magazines Found in Vegas Shooter's Hotel Room & Nevada Home*, ABC News (Oct. 4, 2017), <http://abcnews.go.com/US/guns-loaded-high-capacity-magazines-found-vegas-shooters/story?id=50228093>.

<sup>5</sup> Haeyoun Park & Iaryna Mykhyalyshyn, *L.G.B.T. People Are More Likely to Be Targets of Hate Crimes Than Any Other Minority Group*, N.Y. Times (June 16, 2016), <http://nyti.ms/1YtDYV8>; Rebecca Stotzer, *Comparison of Hate Crimes Across Protected & Unprotected Groups – An Update*, at 4 (January 2012), <http://escholarship.org/uc/item/43z1q49r#page-4>.

<sup>6</sup> Xavier Becerra, Attorney General, *Hate Crime in California*, California Department of Justice (2017), <https://data-openjustice.doj.ca.gov/sites/default/files/2019-06/hc17.pdf>.

<sup>7</sup> Brian Levin, *Special Status Report, Hate Crime in the City of Los Angeles 2016*, Center for the Study of Hate & Extremism, Cal. State Univ., San Bernardino, <https://www.courthousenews.com/wp-content/uploads/2018/05/hate-crimes-report.pdf> (last visited July 17, 2019).

males being the most targeted group in Los Angeles.<sup>8</sup> Nationally, attacks involving one or more anti-LGBTQ homicides have increased each year between 2013 and 2017—including a 29% increase in just the first eight months of 2017.<sup>9</sup> In 2017, there were 1,130 anti-LGBT hate crime incidents<sup>10</sup>, including 52 reported homicides – an 86% increase from 2016.<sup>11</sup> Guns were used in almost half of those homicides.<sup>12</sup>

Transgender individuals in particular have been targeted by disproportionate and rising rates of violent crime. From 2013 to 2018, there were more than 130 cases of anti-transgender homicides; four out of five times, the victim was a trans woman of color.<sup>13</sup> In a March 2017 Letter to Attorney General Jefferson Sessions,

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<sup>8</sup> Brian Levin, *Report to the City, Hate Crimes in Los Angeles 2017-2018: A Comparative Analysis with Other Major Cities*, Center for the Study of Hate & Extremism, Cal. State Univ., San Bernardino (Aug. 2018),

[https://csbs.csusb.edu/sites/csusb\\_csbs/files/LA%20City%20Hate%20Crime%20v8.pdf](https://csbs.csusb.edu/sites/csusb_csbs/files/LA%20City%20Hate%20Crime%20v8.pdf).

<sup>9</sup> Emily Waters, et al., *A Crisis of Hate, a Mid Year Report on Lesbian, Gay, Bisexual, Transgender & Queer Hate Violence Homicides*, Nat'l Coalition of Anti-Violence Programs, at 6-7 (2017), <http://avp.org/wp-content/uploads/2017/08/NCAVP-A-Crisis-of-Hate-Final.pdf>.

<sup>10</sup> U.S. Dep't of Justice, *Hate Crime Statistics 2017, Incidents, Offenses, Victims, and Known Offenders, Table 1* (2017), <https://ucr.fbi.gov/hate-crime/2017/topic-pages/tables/table-1.xls>.

<sup>11</sup> Emily Waters et al., *A Crisis of Hate: A Report on Lesbian, Gay, Bisexual, Transgender, and Queer Hate Violence Homicides in 2017*, Nat'l Coalition of Anti-Violence Programs, at 6-7 (2018), <http://avp.org/wp-content/uploads/2018/01/a-crisis-of-hate-january-release-12218.pdf>.

<sup>12</sup> *Id.* at 7.

<sup>13</sup> Human Rights Campaign Foundation, *Dismantling a Culture of Violence, Understanding Anti-Transgender Violence and Ending the Crisis*, at 3, [https://assets2.hrc.org/files/assets/resources/2018AntiTransViolenceReportSHORTENED.pdf?\\_ga=2.85491039.793658794.1563480464-758905052.1563480464](https://assets2.hrc.org/files/assets/resources/2018AntiTransViolenceReportSHORTENED.pdf?_ga=2.85491039.793658794.1563480464-758905052.1563480464) (last visited July

(Footnote continues on next page.)

a group of federal lawmakers observed that “transgender women are over four times more likely to be murdered than the general population of all women,” with the number of reported murders increasing each year since 2014.<sup>14</sup> According to one study, more than half of violent crime fatalities of transgender people in 2017 have been due to gunfire.<sup>15</sup>

### STATUTORY BACKGROUND

To reduce the lethality of mass shootings and other gun violence, on July 1, 2016, California enacted Senate Bill 1446 (“SB 1446”), which amended California Penal Code Section 32310 (“Section 32310”) to ban the possession of LCMs,<sup>16</sup> ER 420. On November 8, 2016, California voters approved Proposition 63, ER 1199, which made amendments to Section 32310 that generally mirror those made under SB 1446. Both SB 1446 and Proposition 63 prohibit the possession of LCMs on or after July 1, 2017 (subject to several exceptions), and both provide options for disposing of LCMs. *See* ER 420-421. Under Section 32310, as amended by

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<sup>14</sup> The Advocate, *A Congressional Plea to Sessions: Do Something About Trans Killings, Letter to the Honorable Jefferson Sessions* (March 10, 2017), <https://www.advocate.com/transgender/2017/3/13/congressional-plea-sessions-do-something-about-trans-killings>.

<sup>15</sup> Human Rights Campaign, *Violence Against the Transgender Community in 2017*, <https://www.hrc.org/resources/violence-against-the-transgender-community-in-2017> (last visited July 17, 2019).

<sup>16</sup> LCMs are defined under California Penal Code § 16740 as any ammunition-feeding device with the capacity to accept more than ten rounds.

Proposition 63, a violation of the ban on possessing LCMs is a misdemeanor.<sup>17</sup> ER 15-16.

Senate Bill 1446 and Proposition 63 built on existing California law that already banned the purchase, sale, transfer, receipt, or manufacture of LCMs. *See* Cal. Stats. 1999, ch. 129, §§ 3, 3.5; Cal. Stats. 2013, ch. 728, § 1. The amendments also followed the expiration of a federal law, the Violent Crime Control and Law Enforcement Act, in 2004. During the ten years it had been in effect, that Act had prohibited the possession or transfer of all “large capacity ammunition feeding devices,” defined as those with the capacity to accept more than ten rounds, except for those lawfully possessed at the time of the law’s enactment. *See* Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No. 103-322 (Sept. 13, 1994), 108 Stat. 1796 (1998-2000) (formerly codified at 18 U.S.C. § 922(w)).

### **SUMMARY OF ARGUMENT**

Assuming that the Second Amendment applies to Section 32310’s restrictions on LCMs (which it does not, for the reasons explained by the State, *see* Appellant’s Opening Brief (AOB) at 23-31), Section 32310 easily passes constitutional muster. The constitutionality of a gun regulation is subject to intermediate scrutiny where it “does not implicate the core Second Amendment

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<sup>17</sup> Because Proposition 63 was enacted after SB 1446, Proposition 63’s amendments are the governing statutory provisions. References to “Section 32310” in this brief are to Section 32310 as amended by Proposition 63.



right *or* does not place a substantial burden on that right.” *Fyock v. Sunnyvale*, 779 F.3d 991, 998-99 (9th Cir. 2015) (citing *Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 964 (9th Cir. 2014)); *see also* *Duncan v. Becerra*, 742 F. App'x 218, 223 (9th Cir. 2018) (same); *Heller v. D.C.*, 670 F.3d 1244, 1261-62 (D.C. Cir. 2011) (“*Heller II*”). Intermediate scrutiny would be appropriate in this case because, as this Court has recognized, “the prohibition of . . . large capacity magazines does not effectively disarm individuals or substantially affect their ability to defend themselves,” and therefore does not place a substantial burden on core Second Amendment rights. *Fyock*, 779 F.3d at 999 (quoting *Heller II*, 670 F.3d at 1262).

“In the context of Second Amendment challenges, intermediate scrutiny requires (1) the government’s stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective.” *Id.* at 1000 (quoting *U.S. v. Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013)). In order to withstand intermediate scrutiny, Section 32310 need only “promote[] a ‘substantial government interest that would be achieved less effectively absent the regulation.’” *Id.* (quoting *Colacurcio v. City of Kent*, 163 F.3d 545, 553 (9th Cir. 1998)).

Section 32310 satisfies both prongs of this inquiry.

*First*, the State has articulated a number of substantial and important interests that Section 32310 advances, including the State’s interest in promoting

public safety and reducing the danger of gun violence, particularly in the context of mass shootings. *See* AOB at 35-38. This Court has deemed it “self-evident” that these interests are substantial and important. *Fyock*, 779 F.3d at 1000. These interests necessarily include the protection of minority groups—such as the LGBTQ community—disproportionately targeted by violence.

*Second*, there plainly exists a “reasonable fit” between Section 32310 and the State’s substantial and important interests. LCMs are especially lethal devices that are disproportionately used in mass shootings. Section 32310 will reduce the lethality of mass shootings like the Pulse nightclub attack by reducing the use of LCMs in such shootings. The ban on LCMs will reduce the number of shots fired in these incidents and will increase the number of opportunities for individuals to escape or subdue the shooter. Indeed, a broad consensus of courts that have considered such a ban has concluded that a ban constitutionally furthers the important objective of reducing gun violence, including reducing the lethality of mass shootings. The district court erred in concluding otherwise, and the permanent injunction on Section 32310’s enforcement should be reversed.

### **ARGUMENT**

As explained in the State’s brief, AOB at 23-27, Section 32310 does not implicate the Second Amendment because LCMs are especially dangerous devices which are not typically possessed by law-abiding citizens for self-defense

purposes. However, even if the Second Amendment were implicated, Section 32310 would survive constitutional scrutiny as it fulfills a substantial and important government interest: protecting citizens, particularly those most likely to be targeted, from lethal gun violence such as that which occurred at the Pulse nightclub.

# **I. INTERMEDIATE SCRUTINY IS THE APPROPRIATE LEVEL OF CONSTITUTIONAL SCRUTINY**

Intermediate scrutiny is appropriate where a regulation either “does not implicate the core Second Amendment right *or* does not place a substantial burden on that right.” *Fyock*, 779 F.3d at 998-99 (citing *Jackson* 746 F.3d at 964). This Court has determined that intermediate scrutiny applies to a prohibition on LCMs, because such regulation “does not effectively disarm individuals or substantially affect their ability to defend themselves.” *Id.* at 999 (internal quotation marks omitted).<sup>18</sup>

Intermediate scrutiny requires “(1) the government’s stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective.” *Id.* at 1000 (quoting *Chovan*,

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<sup>18</sup> Other courts have similarly applied intermediate scrutiny to prohibitions on LCMs. *See, e.g., Kolbe*, 849 F.3d at 138; *Ass’n of N.J. Rifle & Pistol Clubs v. AG N.J.*, 910 F.3d 106 (3d Cir. 2018); *Worman v. Healey*, 922 F.3d 26 (1st Cir. 2019); *N.Y. State Rifle & Pistol Ass’n v. Cuomo* (“*NYSRPA*”), 804 F.3d 242, 260-61 (2d Cir. 2015), *cert denied sub nom, Shew v. Malloy*, 136 S. Ct. 2486 (2016); *Friedman v. City of Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (2015); *Heller II*, 670 F.3d at 1261-62.

735 F.3d at 1139). Intermediate scrutiny does not require that Section 32310 be “the least restrictive means of achieving [the government’s] interest[s].” *Id.* (citing *Jackson*, 746 F.3d at 966). Rather, in order to withstand intermediate scrutiny, Section 32310 need only “promote[] a ‘substantial government interest that would be achieved less effectively absent the regulation.’” *Id.* (quoting *Colacurcio*, 163 F.3d at 553).

## II. SECTION 32310 SURVIVES INTERMEDIATE SCRUTINY

### A. California’s Stated Interests Are Substantial And Important.

The State has articulated a number of substantial and important government interests advanced by Section 32310, including: (1) protecting civilians and law enforcement from gun violence; (2) protecting public safety; and (3) reducing the incidence and lethality of mass shootings. *See* AOB at 2. The district court correctly recognized the State’s interests in protecting citizens and law enforcement from gun violence, protecting public safety, and preventing crime as “important.” ER 52. As this Court has concluded: “It is ‘self-evident’ that [the State’s] interests in promoting public safety and reducing violent crime are substantial and important government interests. . . . So, too, are [the State’s] interests in reducing the harm and lethality of gun injuries in general.” *Fyock*, 779 F.3d at 1000 (citation omitted); *see Jackson*, 746 F.3d at 969 (“It is self-evident that [the State’s] interest in reducing the fatality of shootings is substantial.”), *cert.*

*denied*, 135 S. Ct. 2799 (2015).

The interests articulated by the State are closely related and overlap to a large degree; at their core they embody the State’s fundamental interest in protecting its citizens from violence in general, and gun violence in particular. This broad interest necessarily includes the protection of individual groups—such as the LGBTQ community—who are disproportionately victimized by such violence. As discussed, in the Pulse nightclub shooting on June 12, 2016, the LGBTQ community was attacked in the then-deadliest mass shooting in U.S. history. Other minority groups have been similarly victimized by mass shooters.<sup>19</sup> The State’s interest in reducing the frequency and lethality of gun violence—and of mass shootings in particular—is of undeniable importance with respect to the broader population and these groups in particular.

**B. There Is A Reasonable Fit Between Section 32310 And The State’s Substantial And Important Interests.**

There plainly exists a reasonable fit between Section 32310’s ban on LCMs and the State’s important interests.

The test for a reasonable fit “is not a strict one.” *Silvester v. Harris*, 843 F.3d

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<sup>19</sup> For example, on August 5, 2012, six people were murdered and three others injured in a mass shooting at a Sikh temple in Oak Creek, Wisconsin. *See* ER 983. On June 17, 2015, nine people were murdered when a white supremacist attacked an African American prayer group in Charleston, South Carolina, ER 1030, with the apparent aim to start a “race war.” Ray Sanchez & Ed Payne, *Charleston Church Shooting: Who is Dylann Roof?* CNN (Updated Dec. 16, 2016), <http://www.cnn.com/2015/06/19/us/charleston-church-shooting-suspect/>.

816, 827 (9th Cir. 2016). The fit need not be “airtight.” *Wilson v. Lynch*, 835 F.3d 1083, 1094-95 (9th Cir. 2016), *cert. denied sub nom., Wilson v. Sessions*, 137 S. Ct. 1396 (2017). The test “requires only that the law be ‘substantially related to the important government interest’” which “would be achieved less effectively absent the regulation.” *Silvester*, 843 F.3d at 827-29 (quoting *Fyock*, 779 F.3d at 1000 and *Jackson*, 746 F.3d at 966). The regulation need not be “the least restrictive means of furthering a given end.” *Jackson*, 746 F.3d at 969 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989)).

In determining whether Section 32310 survives intermediate scrutiny, the court must “accord substantial deference to the predictive judgments of [the legislature].” *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195-96 (1997) (“[D]eference must be accorded to [the legislature’s] findings as to the harm to be avoided and to the remedial measures adopted for that end, lest [the Court] infringe on traditional legislative authority to make predictive judgments when enacting [] regulatory policy.”). The State must be allowed to “experiment with solutions” and draw “reasonable [inferences]” from available evidence. *Jackson*, 746 F.3d at 966, 969-70 (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986)). Such evidence may include studies, anecdotes, case law, “history, consensus, and simple common sense.” *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (internal quotation marks omitted) (examining reasonable fit of First Amendment

restrictions subject to intermediate scrutiny). That evidence need only “fairly support the [State’s] rationale.” *Jackson*, 746 F.3d at 969 (quoting *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002) (plurality)).

In addition to the evidence introduced by the State, the reasonable fit between Section 32310’s ban on LCMs and the State’s substantial and important interests is supported by case law, history, consensus, and—perhaps most clearly—by common sense as informed by the experience of the LGBTQ community represented by amici curiae.

The tragic events at Pulse nightclub on June 12, 2016 illustrate the unique carnage that LCMs facilitate. The attack began at approximately 2:02 a.m.,<sup>20</sup> when the shooter entered the nightclub carrying a 9mm semiautomatic pistol, a Sig Sauer MCX rifle, and several 30-round LCMs. ER 958. Upon entering the building, the shooter immediately unleashed a hail of unrelenting gunfire on the crowd of people gathered on the main dance floor of the club.<sup>21</sup> Police and deputies arrived at the club within minutes of these initial shots, witnessing individuals fleeing the

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<sup>20</sup> Orlando Police Department, *Presentation of Chief John Mina*, at 7, [https://media.clickorlando.com/document\\_dev/2017/04/13/Pulse%20Presentation%20Chief%20Mina%20-%20Redacted%20for%20Release\\_1492131632369\\_9440606\\_ver1.0.pdf](https://media.clickorlando.com/document_dev/2017/04/13/Pulse%20Presentation%20Chief%20Mina%20-%20Redacted%20for%20Release_1492131632369_9440606_ver1.0.pdf) (last visited July 17, 2019).

<sup>21</sup> See Gal Tziperman Lotan, *et al.*, *Orlando Nightclub Shooting Timeline: Four Hours of Terror Unfold*, Orlando Sentinel (May 31, 2017), <http://www.orlandosentinel.com/os-orlando-nightclub-shooting-timeline-four-hours-of-terror-unfold-20170530-htmlstory.html>.

building “covered in blood with gunshot wounds.”<sup>22</sup> When law enforcement entered the main dance floor of the club, they reportedly saw so many bodies on the ground that one officer announced “if you’re alive, raise your hand.”<sup>23</sup> At least 20 people were murdered in the room where the shooter unleashed this initial blitz, while others perished in other areas of the building during the three-hour rampage, and still others died later at the hospital and triage center.<sup>24</sup>

The Pulse shooter was able to legally purchase LCMs at a store near his Florida home,<sup>25</sup> facilitating this grotesquely efficient and expeditious attack that left many individuals without opportunity to escape. The attack was far from an isolated incident. LCMs are “disproportionately used in mass shootings.” *Fyock*, 779 F.3d at 1000; *see also Kolbe*, 849 F.3d at 126-27 (“One study of sixty-two mass shootings between 1982 and 2012, for example, found that the perpetrators were armed with . . . large-capacity magazines in 50% or more”).

Because LCMs reduce the need for a shooter to reload, they “enable shooters to inflict mass casualties while depriving victims and law enforcement officers of

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<sup>22</sup> Orange Cty. Sheriff’s Office, *Incident Report* 16-53354, at 6, <https://info.publicintelligence.net/FL-OrlandoShootingReports.pdf> (last visited July 19, 2019).

<sup>23</sup> *Presentation of Chief John Mina* at 24.

<sup>24</sup> *Id.* at 46.

<sup>25</sup> Morgan Winsor, *Many Guns in Mass Shootings Obtained Legally, Including in Congressional Baseball Shooting*, ABC News (June 21, 2017), <http://abcnews.go.com/US/guns-mass-shootings-obtained-legally-including-congressional-baseball/story?id=48055331>.



opportunities to escape or overwhelm the shooters while they reload their weapons.” *Id.* at 127. Even if the reloading process takes only seconds, that period of time can be of decisive significance. In just four seconds, a child can generally run 10-20 yards, and an adult in peak physical condition can run nearly 40 yards.<sup>26</sup> It is plainly apparent that four seconds can be enough time to run across a room, lock a door, turn a corner, grab a weapon, or initiate a tackle. Indeed, the main dance floor of the Pulse nightclub was less than 17 yards across, with exits on either side.<sup>27</sup>

The “reloading pause” has proven to be of critical significance time and time again in shootings around the country. For example, during the October 1, 2017, Las Vegas mass shooting, survivors “wait[ed] until there was a pause in the gunfire,” before they managed to flee for safety.<sup>28</sup> Even a brief pause is significant

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<sup>26</sup> See generally National Strength & Conditioning Ass’n, *12 years Old and under Male Performance Score & Percentile Rank*, <https://vistaridgefootball.com/wp-content/uploads/2018/03/Male-Percentile-Rank-by-Age-Master.pdf> (last visited July 17, 2019); NFL, *Top Performers*, [http://www.nfl.com/combine/top-performers#year=2017&workout=FORTY\\_YARD\\_DASH&position=QB-RB-WR-TE-S-DL-LB-CB-OL-SPEC](http://www.nfl.com/combine/top-performers#year=2017&workout=FORTY_YARD_DASH&position=QB-RB-WR-TE-S-DL-LB-CB-OL-SPEC) (last visited July 17, 2019).

<sup>27</sup> See *Pulse Planning & Permitting Records*, Vol. 1 of 2, at 31, [http://www.cityoforlando.net/cityclerk/wp-content/uploads/sites/12/2016/06/Pulse\\_PlanningPermittingRecords.pdf](http://www.cityoforlando.net/cityclerk/wp-content/uploads/sites/12/2016/06/Pulse_PlanningPermittingRecords.pdf) (showing “Equipment Layout Plan” with dimensions) (last visited July 17, 2019); Michael Edison Hayden, *3 Hours of Horror: Inside the Orlando Nightclub Massacre*, ABC News (June 13, 2016) <http://abcnews.go.com/US/hours-horror-inside-orlando-nightclub-massacre/story?id=39816347>.

<sup>28</sup> See Chris Harris, *‘It Feels Like a Bad Dream’: Las Vegas Concertgoer Recounts Escape From Mass Shooting*, People Magazine (Oct. 2, 2017),

(Footnote continues on next page.)

when considering the potential human cost of each bullet, given that a semiautomatic weapon can expend a 30-round magazine in about five seconds (and less than two seconds for a full automatic weapon). *See* ER 1577.

The district court rejected unrefuted record evidence showing that this “critical pause” gives victims the opportunity to hide, escape or disable a shooter based on nothing but speculation. *See* ER 81. The district court imagined that being forced to re-load a weapon after firing 10 rounds could pose a “lethal pause” on the victim of a home invasion, but cited no evidence that any such victim ever failed to stop an intruder in those circumstances. *Id.*

Likely because LCMs reduce opportunities for escape or intervention, use of LCMs in mass shootings results in “more gunshots fired, results in more gunshot wounds per victim, and increases the lethality of gunshot injuries.” *Fyock*, 779 F.3d at 1000 (emphasis in original); *see also NYSRPA*, 804 F.3d at 263-64 (finding that use of LCMs results in “more shots fired, persons wounded, and wounds per victim than do other gun attacks”) (quoting *Heller II*, 670 F.3d at 1263) (emphasis omitted); ER 575, 702. In one audio recording of Pulse nightclub shooting, the

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(Footnote continued from previous page.)

<http://people.com/crime/las-vegas-shooting-witness-recounts-escape/>; Amanda VanAllen, *Former Reading Officer, Girlfriend Flee Gunfire in Las Vegas*, WFMZ News (Oct. 3, 2017), <http://www.wfmz.com/news/berks/former-reading-officer-girlfriend-flee-gunfire-in-las-vegas/630507135> (“Once the shooting paused, we jumped the barricade and ran”); *see also* ER 651-758 (collecting news reports of numerous instances in which shooters were stopped in the process of reloading); ER 760 (shooter stopped as he tried to reload); ER 1603.

attacker is heard firing 24 shots in just nine seconds. ER 1025.

Similar rates of fire have been recorded in other mass shootings involving LCMs. Recordings indicate that the Las Vegas attacker fired approximately 90 shots in a mere ten seconds on October 1, 2017.<sup>29</sup> During the Fort Hood mass shooting on November 5, 2009, the shooter fired 214 bullets in four minutes.<sup>30</sup> During the December 14, 2012, massacre at Sandy Hook Elementary School, the attacker fired 154 rounds in less than five minutes.<sup>31</sup> During the January 8, 2011, mass shooting in Tucson, Arizona, the attacker fired 30 rounds in just 15 seconds.<sup>32</sup>

History has demonstrated that where LCMs are used, mass shootings are more deadly. Between 1980 and 2017, shooters used LCMs in at least 63% of U.S. mass shootings involving eight or more fatalities since 1980, in at least 75% of U.S. mass shootings involving 12 or more fatalities since 1980,<sup>33</sup> and in all of the

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<sup>29</sup> Larry Buchanan, et al., *Nine Rounds a Second: How the Las Vegas Gunman Outfitted a Rifle to Fire Faster*, N.Y. Times (Updated Oct. 5, 2017), <https://www.nytimes.com/interactive/2017/10/02/us/vegas-guns.html>.

<sup>30</sup> Citizens Crime Commission of New York City, *Initiative: Mass Shooting Incidents in America (1984-2012)*, <http://www.nycrimecommission.org/mass-shooting-incidents-america.php> (last visited July 17, 2019).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See Violence Policy Center, *supra* note 3 (listing mass shootings involving large capacity magazines); CNN, *Deadliest Mass Shootings in Modern US History, Fast Facts*, CNN Library (Updated June 12, 2019), <https://www.cnn.com/2013/09/16/us/20-deadliest-mass-shootings-in-u-s-history-fast-facts/index.html> (listing mass shootings). According to these sources, since 1980, there have been 30 mass shootings involving eight or more fatalities since 1980, of which at least 19 involved the use of LCMs; and 16 mass shootings involving 12 or more fatalities, of which at least 12 involved the use of LCMs.

six deadliest mass shootings in U.S. history.<sup>34</sup> The relative lethality and prevalence of LCMs in mass shootings is to be expected, as rapid gun fire and mass casualty is precisely what these devices are designed to facilitate. *Silvester*, 843 F.3d at 826 (noting that “guns suitable only for use to injure others” include “large-capacity guns that have been used in mass shootings.”); *see also Kolbe*, 849 F.3d at 137 (LCMs “are meant to ‘provide[ ] soldiers with a large ammunition supply and the ability to reload rapidly,’ enabling “a shooter to hit multiple human targets very rapidly.”) (quotations omitted).

Banning LCMs will save lives by reducing the use of LCMs in violent crimes and particularly in mass shootings. This common sense conclusion was affirmed by the people of California when they approved Proposition 63 by a 25% margin.<sup>35</sup> The proposition stated, among other findings, that LCMs “significantly increase a shooter’s ability to kill a lot of people in a short amount of time. That is why these large capacity ammunition magazines are common in many of America’s most horrific mass shootings.” ER 1199-1227. A sizeable consensus of state and local legislatures considering bans on LCMs has evidently arrived at

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<sup>34</sup> *Id.* (October 1, 2017, Route 91 Harvest Festival in Nevada (58 killed); June 12, 2016, Pulse nightclub in Florida (49 killed); April 16, 2017, Virginia Tech in Virginia (32 killed); December 14, 2012, Sandy Hook Elementary School in Connecticut (27 killed); October 16, 1991, Luby’s Cafeteria in Texas (23 killed); July 18, 1984, McDonalds in California (21 killed)).

<sup>35</sup> *See POLITICO, 2016 California Ballot Measures Election Results*, (Dec. 13, 2016), <http://www.politico.com/2016-election/results/map/ballot-measures/california/>.

similar conclusions. *See* AOB at 7 (listing nine states, in addition to the District of Columbia, that have adopted bans).

Given the extreme lethality of LCMs and the role they have played in mass shootings to date, Section 32310's ban on LCMs plainly "promotes a 'substantial government interest that would be achieved less effectively absent the regulation.'" *See Fyock*, 779 F.3d at 1000 (quoting *Colacurcio*, 163 F.3d at 553). Indeed, in affirming an order that denied a preliminary injunction against enforcement of an ordinance banning LCMs, this Court found that the State had presented credible evidence that the ban on LCMs was substantially related to the compelling government interest in public safety. *See id.* That evidence showed that the use of LCMs "results in more gunshots fired, results in more gunshot wounds per victim, and increases the lethality of gunshot injuries," that LCMs "are disproportionately used in mass shootings as well as crimes against law enforcement," and that "a reduction in the number of large-capacity magazines in circulation may decrease the use of such magazines in gun crimes." *See Id.* In another case involving a challenge to Section 32310's ban on LCMs, the district court concluded that the State's interest in reducing the incidence and harm of mass shootings "would be achieved less effectively absent the regulation," and therefore "there is a reasonable fit between the ban and California's important objectives." *Wiese v. Becerra*, 263 F. Supp. 3d 986, 992-93 (E.D. Cal. 2017) (quoting *Fyock*, 779 F.3d at

1000) (denying preliminary injunction of LCM ban under intermediate scrutiny).<sup>36</sup>

Other courts that have considered the constitutionality of bans on LCMs have reached the same conclusion. *See NYSRPA*, 804 F.3d at 264 (banning possession of LCMs has the “greatest potential to prevent and limit shootings in the state over the long run”) (internal quotation marks omitted); *Kolbe*, 849 F.3d at 139-41 (finding a reasonable fit between prohibitions against LCMs and the state’s “interest in protecting public safety”); *Heller II*, 670 F.3d at 1262-64 (same); *Worman*, 922 F.3d at 41 (upholding Massachusetts’s ban on possession of LCMs based on a “web of compelling governmental interests, and the fit between those interests and the restrictions imposed by the Act [being] both close and reasonable”); *Ass’n of New Jersey Rifle & Pistol Clubs, Inc. v. Grewal*, No. 17-10507 (PGS)(LHG), 2018 WL 4688345, at \*13 (D.N.J. Sept. 28, 2018), *aff’d sub nom. Ass’n of N.J. Rifle & Pistol Clubs, Inc.*, 910 F.3d 106 (denying motion to enjoin New Jersey’s LCM law noting that “the government has enacted the LCM law in response to a growing concern over mass shootings and the law, based on the evidence presented, is reasonably tailored to accomplish that objective”); *S.F. Veteran Police Officers Ass’n v. City of S.F.*, 18 F. Supp. 3d 997, 1002-06 (N.D.

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<sup>36</sup> The *Wiese v. Becerra* decision denying a preliminary injunction of Section 32310’s LCM ban occurred before this Court’s earlier decision in this case, which upheld the district court’s injunction of Section 32310’s LCM ban under the abuse of discretion standard. *Duncan v. Becerra*, 742 F. App’x 218 (9th Cir. 2018).

Cal. 2014) (LCM ban would be constitutional even under the least restrictive means test); *Friedman*, 784 F.3d at 411 (affirming denial of preliminary injunction against LCM ban noting “[a] ban on . . . large capacity magazines . . . may reduce the carnage if a mass shooting occurs.”); *Colo. Outfitters Ass’n v. Hickenlooper*, 24 F. Supp. 3d 1050, 1072-73 (D. Colo. 2014) (denying preliminary injunction against LCM ban, noting “large-capacity magazines are frequently used in gun violence and mass shootings, and that often a shooter will shoot continuously until a weapon jams or the shooter runs out of ammunition” and that “[a] pause, of any duration, imposed on the offensive shooter can only be beneficial”), *vacated & remanded for lack of standing*, 823 F.3d 537 (10th Cir. 2016).

Thus, based on studies, history, case law, and common sense, a reasonable fit exists between Section 32310’s ban on LCMs and California’s stated interests in protecting its citizens, promoting public safety, and reducing the lethality of gun violence.

### **CONCLUSION**

The LGBTQ community has experienced firsthand the extraordinary lethality enabled by LCMs. The State has an important interest in protecting its citizens, including members of the particularly vulnerable LGBTQ community, from such gun violence. Section 32310 reasonably carries out this interest, as banning LCMs greatly reduces the potential lethality of gun violence.

In light of the particular dangerousness of LCMs, there can be no question that Section 32310 “promotes a ‘substantial government interest that would be achieved less effectively absent the regulation.” *Fyock*, 779 F.3d at 1000 (quoting *Colacurcio*, 163 F.3d at 553); *Jackson*, 746 F.3d at 966. The district court erred by concluding otherwise. This Court should reverse the district court’s order granting a permanent injunction on Section 32310’s important, life-saving ban on possession of large-capacity magazines.

Dated: July 22, 2019

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## **APPENDIX LIST OF AMICI**

### **Pride Fund to End Gun Violence**

Pride Fund to End Gun Violence (“Pride Fund”) is a national LGBTQ hybrid political action committee focused solely on gun violence prevention. Pride Fund was founded by a gay Iraq War veteran in the days following the June 2016 mass shooting at Pulse, a gay nightclub in Orlando, Florida. A man filled with hate and armed with an assault rifle and large-capacity magazines shot and killed 49 people and injured 53 others. When it occurred, the Pulse nightclub shooting was the deadliest mass shooting in U.S. history. Pride Fund supports sensible gun policy reforms while championing LGBTQ safety and equality. Pride Fund seeks to create policy change by advocating for legislation at the state and federal levels, including legislation that restricts access to assault weapons and large capacity magazines, expands background checks to cover all gun sales, and prevents individuals convicted of hate crimes from purchasing guns. In 2016, Pride Fund endorsed Proposition 63, which is the subject of this appeal. Pride Fund’s board members include the owner of Pulse nightclub, survivors of the shooting, and family members of victims who perished in the shooting. Pride Fund has grown to over 45,000 members nationally since its founding in 2016.

## **Equality California**

Amicus curiae Equality California is the largest statewide LGBTQ civil rights non-profit organization in the United States. Equality California brings the voices of LGBT people and allies to institutions of power in California and across the United States, striving to create a world that is healthy, just, and fully equal for all LGBTQ people. In the wake of the Pulse nightclub attack, Equality California launched its “Safe and Equal” campaign, which made gun law reform one of the organization’s highest priorities. In addition to providing its endorsement of Proposition 63, Equality California has supported over a dozen gun safety bills in California. Equality California advocates for gun safety reform because LGBTQ individuals, particularly transgender women, are disproportionately impacted by gun violence.

## **Gays Against Guns**

Amicus curiae Gays Against Guns is a community of LGBTQ individuals and allies committed to achieving meaningful gun law reform. Gays Against Guns was founded in June 2016 after the Pulse nightclub shooting and currently has seven chapters across the country, including in Los Angeles. The collective advocates for gun law reform through nonviolent direct action and public outreach campaigns. Gays Against Guns advocates for reasonable gun law reform because gun violence is a public health crisis that disproportionately affects people of color, religious minorities, and LGBTQ Americans.

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**Signature** /s/James E. Hough

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### **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing BRIEF OF AMICI CURIAE PRIDE FUND TO END GUN VIOLENCE, EQUALITY CALIFORNIA, AND GAYS AGAINST FUNDS IN SUPPORT 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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