No. 19-55376

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGINIA DUNCAN, *et al.*,
PLAINTIFFS-APPELLEES,

v.

XAVIER BECERRA, in his official capacity as
Attorney General of the State of California
DEFENDANT-APPELLANT.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE DISTRICT OF COLUMBIA, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, MARYLAND, MASSACHUSETTS, NEW JERSEY, NEW MEXICO, NEW YORK, MICHIGAN, MINNESOTA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

KARL A. RACINE
Attorney General for the District of Columbia

LOREN L. ALIKHAN
Solicitor General

CAROLINE S. VAN ZILE
Deputy Solicitor General

SONYA L. LEBSACK
Assistant Attorney General
Office of the Solicitor General
441 4th Street, NW, Suite 630 South
Washington, D.C. 20001
(202) 724-5667
sonya.lebsack@dc.gov

Additional counsel listed on signature page

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INTEREST OF *AMICI CURIAE*

The District of Columbia and the States of Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, New Jersey, New Mexico, New York, Michigan, Minnesota, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington ("*Amici* States") file this brief under Rule 29(a)(2) of the Federal Rules of Appellate Procedure. Together, the *Amici* States seek to protect their governmental prerogative to enact and implement legislation that promotes public safety and prevents or reduces the incidence and lethality of gun violence, including mass shootings that have become all too prevalent. The *Amici* States have each taken different approaches to addressing gun violence based on their own determinations about the measures that will best meet the needs of their citizens. They join this brief not because they necessarily believe that California's prohibition on large-capacity ammunition magazines would be optimal for them, but to emphasize that the challenged law represents a policy choice that California is constitutionally free to adopt.

Well-reasoned decisions from a number of federal courts of appeals, including this Court, are in accord: Reasonable firearm regulations are fully compatible with the right to keep and bear arms protected by the Second Amendment. The erroneous interpretation advanced by the court below breaks sharply from these precedents. Its

reasoning and non-deferential review of legislative judgments, if adopted by this Court, would tie States' hands in responding to threats to public safety and impermissibly impinge on States' policymaking authority. The *Amici* States urge this Court to defer to California's well-considered judgment in enacting laws that limit the spread of particularly lethal weapons and protects its residents and law enforcement officers.

SUMMARY OF ARGUMENT

Since 2000, the State of California has prohibited the manufacture, importation, and sale of large-capacity magazines ("LCMs"). In 2016, both the California legislature *and* the California electorate (by voter-approved initiative) proscribed the possession of LCMs that hold more than ten rounds of ammunition to improve enforcement efforts and to further stem the proliferation of LCMs in the State.

California determined that these restrictions would reduce the lethality of firearms used in unlawful activity and advance public safety without significantly burdening the core Second Amendment right to self-defense within the home. That conclusion is consistent with those reached by nine other States and the District of Columbia. It is also consistent with the conclusion of numerous federal courts of appeals that have upheld those laws. *See Worman v. Healey*, 922 F.3d 26, 30-31 (1st Cir. 2019); *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d

106, 110 (3d Cir. 2018) (affirming the denial of a preliminary injunction); *Kolbe v. Hogan*, 849 F.3d 114, 135, 138 (4th Cir.) (en banc), *cert. denied*, 138 S. Ct. 469 (2017); *Fyock v. City of Sunnyvale*, 779 F.3d 991, 1001 (9th Cir. 2015) (affirming the denial of a preliminary injunction); *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir.), *cert. denied*, 136 S. Ct. 447 (2015); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 261-64 (2d Cir. 2015), *cert. denied sub nom*. *Shew v. Malloy*, 136 S. Ct. 2486 (2016); *Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1260-64 (D.C. Cir. 2011). *But see Duncan v. Becerra*, 742 F. App'x 218, 221 (9th Cir. 2018) (affirming the grant of a preliminary injunction) (non-precedential). As it stands, *every* circuit to have reviewed an LCM prohibition on the merits has upheld it against a Second Amendment challenge.

The court below, departing from these precedents, struck down California's prohibition in total, holding that it is the "kind of government experimentation[] the Second Amendment flatly prohibits." ER 66. But as the Supreme Court and this Court have recognized, States may—and indeed are encouraged to—reach different conclusions about how best to respond to gun violence within their borders. *See McDonald v. City of Chicago*, 561 U.S. 742, 784-85 (2010) (plurality op.) (within the Second Amendment's "limits," "[s]tate and local experimentation with reasonable firearms regulations will continue"); *Pena v. Lindley*, 898 F.3d 969, 980 (9th Cir. 2018) ("'It is not our function to appraise the wisdom of [California's]

decision to require' new semiautomatic gun models manufactured in-state to incorporate new technology; instead, 'the state must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.'" (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986)), *cert. petition filed sub nom. Pena v. Horan* (Dec. 28, 2018).[1] Limiting the use or possession of a particular type of firearm or firearm feature, even assuming such limits burden Second Amendment rights, is well within the realm of permissible public safety regulation recognized in *McDonald*.[2]

Moreover, in reviewing such solutions, courts "accord substantial deference" to a State's "predictive judgment[]." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) ("*Turner I*"). Just as in applying intermediate or strict scrutiny in other constitutional contexts, the proper inquiry is not whether the court would reach the same decision as the policymaker, but whether there is sufficient evidence showing that the policymaker's choice was reasonable. *Id*. at 666. The record evidence here

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[1] In referring to "States," *amici* include the District of Columbia and, as relevant, localities with the authority to regulate firearms.

[2] For the reasons stated by California (at 23-31) and other *amici*, it is not clear that LCMs are entitled to Second Amendment protection. *See, e.g.*, *Kolbe*, 849 F.3d at 135-37 (LCMs are not constitutionally protected because they are "like M-16 rifles"—*i.e.*, "weapons that are most useful in military service"). However, even if LCMs are protected under the Second Amendment, California's prohibition survives constitutional scrutiny. *See supra* pp. 2-3 (citing cases).

supports California's quintessentially legislative and public-policy judgment that prohibiting LCMs would reduce the threat to public safety from gun violence. This Court should not second-guess that determination.

ARGUMENT

I. The Second Amendment Authorizes A Range Of State-Law Measures To Address Gun Violence And Gun Fatalities.

The Supreme Court has determined that the Second Amendment confers an individual right to bear arms, but that right "is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). It does not amount to "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id*. Rather, the Second Amendment "protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." *McDonald*, 561 U.S. at 780 (plurality op.); *Heller*, 554 U.S. at 626-27, 636; *see also Peruta v. County of San Diego*, 824 F.3d 919, 928 (9th Cir. 2016) (en banc) ("The Court in *Heller* was careful to limit the scope of its holding."). Within that constitutional limit, the Court explained, "experimentation with reasonable firearms regulations will continue." *McDonald*, 561 U.S. at 785 (plurality op.). The Second Amendment thus does not bar States from adopting reasonable measures to reduce firearm violence, including restrictions on the possession of and market for LCMs. The reasoning of the district

court deprives States of the flexibility to address the problem of gun violence in a manner consistent with local needs and values.

A. The Second Amendment preserves States' authority to enact firearm restrictions in furtherance of public safety.

States have primary responsibility for ensuring public safety, which includes a duty to reduce the likelihood that their citizens will fall victim to preventable firearm violence, and to minimize fatalities and injuries when that violence does occur. *See United States v. Morrison*, 529 U.S. 598, 618 (2000) ("[W]e can think of no better example of the police power . . . reposed in the States[] than the suppression of violent crime and vindication of its victims."). As this Court has explained, "[i]t is self-evident that public safety is an important government interest, and reducing gun-related injury and death promotes" that interest. *Bauer v. Becerra*, 858 F.3d 1216, 1223 (9th Cir. 2017) (internal quotation marks omitted); *cf. Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 119 ("New Jersey's LCM ban reasonably fits the State's interest in promoting public safety."). As States address the problem of firearm violence—and the lethality of mass shootings involving LCMs specifically[3]—"the theory and utility of our federalism are revealed, for the States may perform their

[3] Since 1980, LCMs have been involved in at least 71 mass shootings, resulting in 684 fatalities and 1,052 persons injured. *See* Violence Policy Ctr., *High-Capacity Ammunition Magazines* (June 3, 2019), http://vpc.org/fact_sht/ VPCshootinglist.pdf (last visited July 16, 2019).

role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

Indeed, the Supreme Court has stated that codification of the right to keep and bear arms in the Second Amendment, and the incorporation of that right against the States through the Fourteenth Amendment, may impose some "limits" on policy alternatives but "by no means eliminates" States' "ability to devise solutions to social problems that suit local needs and values." *McDonald*, 561 U.S. at 785 (plurality op.). Policymakers, the Court explained, retain "a variety of tools for combating [gun violence]." *Heller*, 554 U.S. at 636. The Second Amendment does not "protect the right of citizens to carry arms for *any sort* of confrontation, just as . . . the First Amendment [does not] protect the right of citizens to speak for *any purpose*." *Id*. at 595 (emphasis in original); *cf*. *McDonald*, 561 U.S. at 802 (Scalia, J., concurring) ("No fundamental right—not even the First Amendment—is absolute."). The Court accordingly generated a list—which did "not purport to be exhaustive"—of "presumptively lawful" regulations, such as prohibitions on carrying concealed weapons, bans on the possession of firearms by felons and the mentally ill, bans on carrying firearms in sensitive places, and, as relevant here, bans on weapons "not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625, 626-27 & n.26. Moreover, even where the conduct at issue

may burden the protected right, the regulation may survive where it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Fyock*, 779 F.3d at 1000 (internal quotation marks omitted).[4]

The Supreme Court's confirmation in *McDonald* that State experimentation with firearm regulations could continue is entirely consistent with its recent jurisprudence addressing other constitutional provisions. *See, e.g.*, *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 301, 314 (2014) (affirming State "innovation and experimentation" with respect to "whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in . . . school admissions"); *Oregon v. Ice*, 555 U.S. 160, 164 (2009) (leaving to state judges the determination of certain facts that dictate whether a court may impose consecutive as opposed to concurrent sentences). In the Second Amendment context, just as in others, States may pursue a range of policy preferences. Within basic constitutional limits, they are not barred from considering policies that might

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[4] No federal court of appeals has applied strict scrutiny to an LCM regulation. *See supra* pp. 2-3. Doing so here would not only be unwarranted, it could impede state legislatures from responding effectively to a variety of threats to public safety. *See United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011) (applying strict scrutiny would "handcuff[] lawmakers' ability to prevent armed mayhem in public places, and depriv[e] them of a variety of tools for combating th[e] problem" (internal quotation marks, citations, and original brackets omitted)).

in some way limit the use or possession of a particular type of firearm or firearm feature.

Consistent with that flexibility, States have addressed the threat to public safety posed by firearm violence along a variety of tracks, reflecting that, while firearm violence is a national phenomenon, "conditions and problems differ from locality to locality," *McDonald*, 561 U.S. at 783 (plurality op.). The Federal Bureau of Investigation ("FBI") has identified numerous factors "known to affect the volume and type of crime occurring from place to place," including population density, composition and stability of the population, and the extent of urbanization; economic conditions, including median income, poverty level, and job availability; the effective strength of law enforcement; and the policies of other components of the criminal-justice system, including prosecutors, courts, and probation and correctional agencies.[5] These factors, among others, vary widely across States. As a result, there are significant variations from State to State in, for example, the number of murders and aggravated assaults committed with firearms.[6] There are

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[5] FBI, Uniform Crime Reporting Statistics: Their Proper Use (May 2017), https://ucr.fbi.gov/ucr-statistics-their-proper-use (last visited July 9, 2019).

[6] *See* FBI, Murder: Crime in the United States 2017, tbl. 20, https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topicpages/tables/table-20 (last visited July 9, 2019); FBI, Aggravated Assault: Crime in the United

also regional variations in the number of law enforcement officers killed by firearms in the line of duty.[7] Given the unique conditions in each State, an approach that may be appropriate or effective in one State may not be appropriate or effective in another.

These differences help explain policymakers' varied responses to firearm violence. Thirty-five States and the District of Columbia, for example, require a permit to carry a concealed firearm, but they afford different degrees of discretion to licensing authorities.[8] Twenty-one States and the District of Columbia require some form of background check for certain firearms transactions.[9] And nine States (including California) and the District of Columbia have enacted laws that restrict assault weapons, large-capacity magazines, or both.[10]

States 2017, tbl. 22, https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-22 (last visited July 9, 2019).

[7] *See* FBI, Law Enforcement Officers Feloniously Killed 2017, https://ucr.fbi.gov/leoka/2017/topic-pages/felonious_topic_page_-2017 (last visited July 9, 2019).

[8] Law Ctr. To Prevent Gun Violence, Concealed Carry: Summary of State Law, http://smartgunlaws.org/gun-laws/policy-areas/guns-in-public/concealed-carry/#state (last visited July 9, 2019).

[9] Law Ctr. To Prevent Gun Violence, Universal Background Checks: Summary of State Law, http://smartgunlaws.org/gun-laws/policy-areas/background-checks/universal-background-checks/#state (last visited July 9, 2019).

[10] Law Ctr. To Prevent Gun Violence, Large Capacity Magazines: Summary of State Law, http://smartgunlaws.org/gun-laws/policy-areas/hardware-ammunition/large-capacity-magazines/#state (last visited July 9, 2019).

Whatever measures a State may adopt, all States have an interest in maintaining the flexibility, within the constraints established by the U.S. Constitution and their own State constitutions, to enact regulations aimed at minimizing the adverse effects of gun violence while preserving the right of law-abiding, responsible citizens to use arms in defense of hearth and home. *See Friedman*, 784 F.3d at 412 ("Within the limits established by the Justices in *Heller* and *McDonald*, federalism and diversity still have a claim."). Indeed, a State's ability to craft the kind of innovative solutions acknowledged by this Court is most pronounced in areas, like police powers and criminal justice, where States have long been understood to possess special competencies. *See Ice*, 555 U.S. at 170-71. Courts should thus "not lightly construe the Constitution so as to intrude upon" a State's crime-fighting efforts. *Patterson v. New York*, 432 U.S. 197, 201 (1977).

In the end, it is not possible "to draw from the profound ambiguities of the Second Amendment an invitation to courts to preempt this most volatile of political subjects and arrogate to themselves decisions that have been historically assigned to other, more democratic, actors." *Kolbe*, 849 F.3d at 150 (Wilkinson, J., concurring); *see also Friedman*, 784 F.3d at 412. Contrary to the district court's decision (ER 61), neither the policy choices of other States, nor the policy preferences of plaintiffs here, should limit California's ability to respond to gun violence within its borders.

B. The decision below jeopardizes States' ability to enact permissible public safety regulations.

The district court's erroneous conclusion that California's LCM prohibition is "flatly prohibit[ed]" (ER 66) threatens States' ability to enact permissible public safety regulations in several significant ways.

First, the conclusion (ER 24-30) that LCMs cannot be banned because they are in "common use" would impede regulation of any firearm or firearm feature that is *prevalent*. The Supreme Court has not adopted that test, and doing so would lead to an unworkable result: States could enact regulations only in the narrow window after a firearm or firearm feature becomes a problem but before it becomes widespread. It would also permit the absence of a particular firearm regulation in a plurality of States to render the laws of other States "more or less open to [Second Amendment] challenge," *Friedman*, 784 F.3d at 408, 412—precisely the opposite of the federalism-driven diversity the Supreme Court praised in *McDonald*.

Second, the lower court's rationale (ER 26-27, 46-47)—likening the regulation of magazines that hold more than ten rounds to the "total ban" of the "quintessential self-defense weapon" at issue in *Heller*, 554 U.S. at 629—would take out of States' hands *most* questions about which weapons are appropriate for self-defense. But *Heller*'s reasoning does not equate a prohibition on a subset of magazines with a "prohibition of an entire class of 'arms.'" *Id*. at 628. Rather, as

this Court has recognized, prohibiting LCM posession does not "render any lawfully possessed firearms inoperable, nor does it restrict the number of magazines that an individual may possess." *Fyock*, 779 F.3d at 999; *Cuomo*, 804 F.3d at 260 (same); *Heller II*, 670 F.3d at 1261-62 (same). It is thus not a "destruction of the Second Amendment right." *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016).

Finally, the lower court's reasoning (ER 56-58) would foreclose States' ability to regulate firearms or firearm features whenever it could be argued that criminals, including mass shooters, will subvert the law by "bring[ing] multiple weapons" or obtaining LCMs elsewhere. As an initial matter, "[t]he mere possibility that some subset of people intent on breaking the law will indeed ignore [firearm regulations] does not make them unconstitutional." *Cuomo*, 804 F.3d at 263. But even if criminal ingenuity were a legitimate consideration in determining the constitutionality of a firearm regulation, it would not render the impact of California's prohibition negligible here because LCM restrictions *do* reduce the lethality of gun violence, particularly as to mass shootings. *See, e.g.*, Cal. Br. 38-42, 46-48. In any event, States need not demonstrate the efficacy of a regulation—such as the prohibition on LCM possession—not yet in place. *See infra* pp. 17, 19-20.

Contrary to the lower court's sweeping conclusions, the best way to evaluate how crime, self-defense, and LCMs relate to each other "is through the political process and scholarly debate." *Friedman*, 784 F.3d at 412. The Supreme Court's

precedents, of course, "set limits on the regulation of firearms; but within those limits, they leave matters open." *Id*. Adopting the reasoning of the decision below, however, may prevent States "from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). That "would be the gravest and most serious of steps," as it would "impair the ability of government to act prophylactically" on a "life and death subject." *Kolbe*, 849 F.3d at 150 (Wilkinson, J., concurring); *cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("Denial of the right to experiment may be fraught with serious consequences to the nation.").

II. Courts Applying Intermediate Scrutiny Must Defer To A State's Policy Judgments.

Every federal court of appeals that has applied a level of scrutiny to an LCM prohibition—including this one—has chosen intermediate scrutiny. *See supra* pp. 2-3; *Worman*, 922 F.3d at 39 (noting the "unanimous weight of circuit-court authority").

To survive intermediate scrutiny, the government must show that (1) its "stated objective [is] significant, substantial, or important," and (2) there is a "reasonable fit between the challenged regulation and the asserted objective." *United States v. Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013). A firearm regulation

satisfies that standard when it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Fyock*, 779 F.3d at 1000 (internal quotation marks omitted); *Pena*, 898 F.3d at 979. Drawing from cases applying intermediate scrutiny to content-neutral regulations under the First Amendment, this Court has instructed that the "fit" required between the challenged firearm regulation and the governmental interest need not employ "the least restrictive means of furthering a given end"; rather, it need only "substantially relate[] to the important government interest of reducing firearm-related deaths and injuries." *Silvester*, 843 F.3d at 827 (quoting *Jackson v. City & County of San Francisco*, 746 F.3d 953, 966 (9th Cir. 2014)).

A. A deferential standard governs judicial review of a legislature's policy judgments.

In determining whether a law satisfies intermediate scrutiny, both this Court and the Supreme Court "accord substantial deference" to the legislature's judgments and limit their review of the fit between the challenged regulation and governmental interest to "assur[ing] that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) ("*Turner II*"); *Pena*, 898 F.3d at 979-80.[11]

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[11] Although *Turner II* involved the predictive judgment of Congress, its reasoning applies with equal force to the judgments of State and local legislatures.

Specifically, in reviewing those legislative judgments, the court may not "reweigh the evidence de novo, or . . . replace [the legislature's] factual predictions with [the court's] own"; instead, the court should defer to a legislative finding even if two different conclusions could be drawn from the supporting evidence. *Turner II*, 520 U.S. at 195. Such a high degree of deference is appropriate, the Court explained, both "out of respect for [the State's] authority to exercise the legislative power" and because legislatures are "far better equipped than the judiciary to amass and evaluate . . . data bearing upon legislative questions." *Id*. at 195, 196 (internal

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Like Congress, such legislatures "are better qualified to weigh and evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts." *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987) (internal quotation marks omitted); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (plurality op.) ("[W]e must acknowledge that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems.").

Here, the California legislature, which had already banned the manufacture, importation, and sale of LCMs, also prohibited their possession on July 1, 2016. ER 917-19 (S.B. 1446). On November 8, 2016, California voters passed a substantially identical prohibition by ballot initiative. ER 1199-201, 1659-60. Although the later-enacted initiative governs any inconsistencies in the laws, *see People v. Bustamante*, 57 Cal. App. 4th 693, 701 (2d Dist. 1997), the electorate's *agreement* with the legislature that LCM possession should be prohibited does not deprive the legislature of the deference to which it is entitled. The district court's contrary suggestion (ER 62-65), is misplaced. *Cf. Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936) ("[A]t least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same, from the time of the first enactment."). In any event, this Court has had little difficulty determining that the record made by a State in support of a ballot initiative was sufficient. *See, e.g.*, *Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1092-93, 1098 (9th Cir. 2003).

quotation marks and citations omitted); *see also, e.g.*, *Worman*, 922 F.3d at 41 ("[W]e are obliged to cede some degree of deference to the decision of the Massachusetts legislature about how best to regulate the possession and use of [LCMs]."); *Pena*, 898 F.3d at 980 (principles of deference "apply equally to benchmarking the efficacy as well as the technological feasibility of the [firearm] regulations").

In arriving at its predictive policy judgment, a legislature may rely on a range of authority. For example, while its judgment *can* be based on empirical evidence, it need not be; it can also be based on "history, consensus, and simple common sense." *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995); *see also G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1073 (9th Cir. 2006) (citing "dialogue with the City's residents and businesses" and "the experience of other cities" as "legitimate and relevant bases"). That is in part because "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of . . . events based on deductions and inferences for which complete empirical support may be unavailable." *Turner I*, 512 U.S. at 665.

Moreover, in the event a legislature relies on empirical evidence, that evidence need not come with "sample size[s] or selection procedures." *Went For It, Inc.*, 515 U.S. at 628; *Pena*, 898 F.3d at 979 ("allow[ing] California to rely on any material reasonably believed to be relevant to substantiate its interests in gun safety and crime

prevention" (internal quotation marks omitted)); *Gammoh v. City of La Habra*, 395 F.3d 1114, 1127 (9th Cir. 2005) ("[W]e . . . will not specify the methodological standards to which [the City's] evidence must conform."); *see also Jackson*, 746 F.3d at 969 (even if the evidence suggests that "the lethality of hollow-point bullets is an open question," that is "insufficient to discredit San Francisco's reasonable conclusions").[12] A legislature need not "conduct new studies or produce evidence independent of that already generated by other[s] . . . , so long as whatever evidence [it] relies upon is reasonably believed to be relevant to the problem that the [legislature] addresses." *Renton*, 475 U.S. at 51-52; *see also United States v. Jimenez*, 895 F.3d 228, 236 (2d Cir. 2018) (the government need not "present any statistical evidence about the propensity for violence among the dishonorably discharged" and may "rel[y] on the fact that those convicted of felonies have been widely found to be more dangerous with deadly weapons"). Indeed, a legislature

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[12] *Went For It* addressed the constitutionality of a Florida Bar rule that prohibited lawyers from using direct mail to solicit personal injury or wrongful death clients within 30 days of an accident. Applying intermediate scrutiny, the Court credited a "106-page summary of [the Florida Bar's] 2-year study" and an "anecdotal record" that included newspaper editorial pages. 515 U.S. at 623-24, 625-27. The Court contrasted the sufficiency of that record with the one it reviewed in *Edenfield v. Fane*, 507 U.S. 761, 768 (1993), where the Florida Board of Accountancy "presented no studies" and "the record did not disclose any anecdotal evidence from Florida or any other State." *Went For It, Inc.*, 515 U.S. at 626 (brackets omitted).

may rely on "studies and anecdotes pertaining to different locales altogether." *Went For It, Inc.*, 515 U.S. at 628.

Applying these principles, the Supreme Court in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), expressly rejected the argument that Los Angeles needed to "demonstrate, not merely by appeal to common sense, but also with empirical data, that its ordinance will successfully lower crime." *Id*. at 439 (plurality op.) (sustaining a municipal ordinance regulating adult businesses). "Our cases," the Court explained, "have never required that municipalities make such a showing, certainly not without actual and convincing evidence from plaintiffs to the contrary." *Id*. In fact, "[a] municipality considering an innovative solution may not have data that could demonstrate the efficacy of its proposal because the solution would, by definition, not have been implemented previously." *Id.* at 439-40. Accordingly, a legislature may "rely on any evidence that is reasonably believed to be relevant for demonstrating a connection between [what is being regulated] and a substantial, independent government interest." *Id*. at 438 (internal quotation marks omitted); *see also id*. at 451 (Kennedy, J., concurring) ("[W]e have consistently held

that a city must have latitude to experiment, at least at the outset, and that very little evidence is required.").[13]

Deference to a legislature's judgment is particularly apt in the context of firearm regulation, where the legislature is "far better equipped than the judiciary" to make sensitive public-policy judgments. *Turner I*, 512 U.S. at 665; *see Pena*, 898 F.3d at 979-80 (applying *Turner*'s instruction to firearm safety regulations); *Kachalsky v. County of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012) (extending "substantial deference" with respect to a concealed-carry law); *Worman*, 922 F.3d at 40-41 (same with respect to an LCM regulation).

In examining a prohibition on LCM possession substantially identical to the one at issue here, this Court stated that the City of Sunnyvale was "entitled to rely on any evidence reasonably believed to be relevant to substantiate its important interests." *Fyock*, 779 F.3d at 1000 (internal quotation marks omitted). Moreover, it concluded that the evidence Sunnyvale presented—that LCMs result in more gunshots fired and more gunshot wounds per victim, that LCMs are

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[13] Indeed, even in applying strict scrutiny, the Supreme Court has emphasized that a legislature's predictive judgments are entitled to deference. *See, e.g.*, *Burson v. Freeman*, 504 U.S. 191, 209 (1992) (stating, while upholding a voting regulation prohibiting electioneering within 100 feet of a polling place, that legislatures "should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights").

disproportionally used in mass shootings and against law enforcement officers, and that most defensive gun use incidents involved fewer than ten rounds of ammunition—was enough to substantiate the city's interest at the preliminary injunction stage. *Id.* at 1000-01.[14] The Fourth Circuit similarly determined on the merits that Maryland's legislative judgment—that reducing the availability of LCMs would "lessen their use in mass shootings, other crimes, and firearms accidents"—is "precisely the type of judgment that legislatures are allowed to make without second-guessing by a court." *Kolbe*, 849 F.3d at 140.

Here, California may rely not only on the legislative records amassed by Maryland, New York, and other jurisdictions, *see Went For It, Inc.*, 515 U.S. at 628; *Renton*, 475 U.S. at 51-52, but also on the judicial decisions incorporating those records.[15] A number of federal courts of appeals have reviewed—and upheld—

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[14] This Court has upheld lower court rulings both denying and granting preliminary injunctions against LCM laws. *Compare Fyock*, 779 F.3d at 1000, *with Duncan*, 742 F. App'x at 221-22. *Duncan*, however, is non-precedential. The divided panel relied heavily on the abuse of discretion standard of review and refused to reweigh the district court's evidentiary determinations. *Duncan*, 742 F. App'x at 221-22.

[15] *See*, *e.g.*, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 297 (2000) (recognizing that the City of Erie "could reasonably rely on the evidentiary foundation set forth in *Renton* and [*Young v.*] *American Mini Theatres*[, *Inc.*, 427 U.S. 50 (1976)]"); *Kachalsky*, 701 F.3d at 98 (noting that "[t]he connection between promoting public safety and regulating handgun possession in public is not just a conclusion reached by New York[,] [i]t has served as the basis for other States' handgun regulations, as

LCM prohibitions, crediting the same or similar evidence. In *Cuomo*, the Second Circuit credited evidence that LCMs are "disproportionately used in mass shootings" and "result in 'more shots fired, persons wounded, and more wounds per victim.'" 804 F.3d at 263, 264. In *Heller II*, the D.C. Circuit similarly observed that LCMs "greatly increase the firepower of mass shooters," increase resulting injuries, and "tend to pose a danger to innocent people and particularly to police officers." 670 F.3d at 1263, 1264. And in *Kolbe*, the Fourth Circuit—based partly on the evidence discussed in *Cuomo*—was "satisfied that there is substantial evidence" that "by reducing the availability of [LCMs], the [challenged law] will curtail their availability to criminals." 849 F.3d at 139-41. This consensus demonstrates the substantial records underlying the predictive judgments involved.

B. California made a considered and well-supported judgment in prohibiting LCMs.

Here, both the California legislature *and* the California electorate determined that LCMs should be prohibited in the State. The long history of legislative findings and determinations regarding the lethality of LCMs provides a substantial basis for California's judgments.

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recognized by various lower courts"); *Chovan*, 735 F.3d at 1140 (crediting the government's reliance on evidence presented to the Seventh Circuit).

Specifically, California's LCM prohibition is an important, incremental improvement on more than two decades of federal and state legislative measures seeking to address the particular risks that LCMs pose to public safety. As discussed in more detail in California's brief (at 6-12), the legislature and the electorate acted against the background of earlier State and federal attempts to regulate LCMs, and were informed by its experiences with those prior approaches. Specifically, the LCM possession prohibition was enacted (1) to close a "loophole" left open by prior laws that banned only the manufacture, importation, and sale of "military-style" LCMs—but not their possession—and (2) because LCMs "significantly increase a shooter's ability to kill a lot of people in a short amount of time" and are "common in many of America's most horrific mass shootings." ER 1200 (Prop. 63 § 2, ¶¶ 11-12); *accord* ER 917-19 (S.B. 1446 Third Reading Analysis); *see also* ER 294-95, 756-57 (Allen Expert Rep. ¶¶ 20-24 (LCMs are "often used in mass shootings" and "casualties were higher in the mass shootings that involved [LCMs]")); ER 255-58 (Graham Decl. ¶¶ 20-32 (discussing the challenges previously faced by law enforcement in identifying legally possessed LCMs)).

The record developed in this litigation confirms the validity of California's policy judgment that prohibiting LCMs, including their possession, will reduce firearm injuries and fatalities. As an initial matter, LCMs—by design—increase the number of bullets fired in a short period, resulting in more shots fired, more victims

wounded, and more wounds per victim. *See, e.g.*, ER 400, 404-08 (Koper Expert Rep.); ER 1011 (Webster Decl. ¶ 12); ER 357-58 (Klarevas Rev. Rep.); *Heller II*, 670 F.3d at 1263-64. LCMs are thus particularly attractive to mass shooters and other criminals, and pose heightened risks to both civilians and law enforcement. ER 400, 404-05 (Koper Expert Rep.); ER 1008, 1013-14 (Webster Decl. ¶¶ 8, 15). In the last thirty years, not only has there been a proliferation of mass shootings, but, in instances where the magazine capacity used by the killer could be determined, researchers found that 86 percent of those incidents involved an LCM. ER 404-05 (Koper Expert Rep.). Mass shooters using LCMs have caused significantly greater numbers of injuries and fatalities than shooters not using them. ER 419 (Koper Expert Rep.); ER 1011 (Webster Decl. ¶ 12 (citing studies)).

Empirical evidence and common sense suggest that prohibiting LCMs will reduce the number of crimes in which LCMs are used and reduce the lethality and devastation of gun crime when it does occur. *See, e.g.*, ER 1020-22 (Webster Decl. ¶¶ 24-26); ER 399, 414-16, 422-23 (Koper Expert Rep.); ER 261-62 (James Decl. ¶¶ 6-9). Indeed, in *Cuomo*, the Second Circuit credited expert testimony that banning possession of LCMs may "prevent and limit shootings in the state over the long run." 804 F.3d at 264. At the same time, there is no proof that LCMs are necessary—or even commonly used—for self-defense. *See, e.g.*, ER 286-88 (Allen Expert Rep. ¶¶ 8-10 (citing National Rifle Association reports that individuals

engaging in self-defense fired on average 2.2 shots)); ER 1014 (Webster Decl. ¶ 16 ("aware of no study or systematic data that indicate that LCMs are necessary for personal defense more so than firearms that do not have a LCM").

In sum, California has amply demonstrated that prohibiting LCMs is a reasonable "fit" to achieve its goal of reducing the incidence and lethality of mass shootings. *See Pena*, 898 F.3d at 979; *Jackson*, 746 F.3d at 966 (requiring only a "reasonable inference" that the challenged law will "increase public safety and reduce firearm casualties" in order to establish the required "fit").

In dismissing California's reliance on the empirical and anecdotal evidence before it, the court below applied a cramped and overly demanding standard, and eliminated the deference to which California's predictive judgments are entitled. *See, e.g.*, ER 53 ("declin[ing] to rely on *anything* beyond hard facts and reasonable inferences drawn from convincing analysis" (emphasis added)); ER 55 n.46 (noting that a survey was "probably not peer-reviewed"). Its decision substantially and unnecessarily hobbles California's ability to enact public safety legislation and "impos[es] [a] judicial formula[] so rigid that [it] become[s] a straitjacket that disables government from responding to serious problems." *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996) (Breyer, J., concurring in part and concurring in the judgment). That approach is unwarranted, contrary to precedent, and should be rejected here.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

LOREN L. ALIKHAN
Solicitor General

CAROLINE S. VAN ZILE
Deputy Solicitor General

/s/ Sonya L. Lebsack
SONYA L. LEBSACK
Assistant Attorney General
Office of the Solicitor General

Office of the Attorney General
441 4th Street, NW, Suite 630 South
Washington, D.C. 20001
(202) 724-5667
(202) 730-1450 (fax)
sonya.lebsack@dc.gov

July 2019

WILLIAM TONG
Attorney General
State of Connecticut
55 Elm Street
Hartford, CT 06106

KATHLEEN JENNINGS
Attorney General
State of Delaware
820 North French Street
Wilmington, DE 19801

CLARE E. CONNORS
Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813

KWAME RAOUL
Attorney General
State of Illinois
100 West Randolph Street
Chicago, IL 60601

BRIAN E. FROSH
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Place, 20th Floor
Boston, MA 02108

GURBIR S. GREWAL
Attorney General
State of New Jersey
R.J. Hughes Justice Complex
P.O. Box 080
Trenton, NJ 08625

HECTOR BALDERAS
Attorney General
State of New Mexico
408 Galisteo Street
Santa Fe, NM 87501

LETITIA JAMES
Attorney General
State of New York
28 Liberty Street
New York, NY 10005

DANA NESSEL
Attorney General
State of Michigan
P.O. Box 30212
Lansing, MI 48909

KEITH ELLISON
Attorney General
State of Minnesota
75 Rev. Dr. Martin Luther
King Jr. Blvd.
St. Paul, MN 55155

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court Street NE
Salem, OR 97301

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania
Strawberry Square
Harrisburg, PA 17120

PETER F. NERONHA
Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609

MARK R. HERRING
Attorney General
Commonwealth of Virginia
202 North Ninth Street
Richmond, VA 23219

ROBERT W. FERGUSON
Attorney General
State of Washington
P.O. Box 40100
Olympia, WA 98504

CERTIFICATE OF SERVICE

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/s/ Sonya L. Lebsack
SONYA L. LEBSACK

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