No. 19-55376 [USDC-SDCA # 3:17-cv-01017-BEN-JLB]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGINIA DUNCAN, et al.,
Plaintiffs - Appellees,

vs.

XAVIER BECERRA,
Attorney General of California,
Defendants - Appellant.

APPEAL FROM THE
UNITED STATES DISTRICT COURT for
THE SOUTHERN DISTRICT OF CALIFORNIA
HON. ROGER T. BENITEZ,
District Judge, Presiding

BRIEF *AMICUS CURIAE* OF THE MADISON SOCIETY, INC., IN SUPPORT OF AFFIRMANCE

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September 23, 2019

CORPORATE DISCLOSURE STATEMENT

The Madison Society, Inc., has no parent corporations. No publicly traded company owns more than 10% *amicus* corporation's stock.

Dated: September 23, 2019

/s/ Donald Kilmer
Counsel for *Amicus Curiae*

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Statement of *Amicus Curiae*

The Madison Society Foundation, Inc., (MSF) is a not-for-profit 501(c)(3) corporation based in California. It promotes and preserves the purposes of the Constitution of the United States, in particular the right to keep and bear arms. MSF provides the general public and its members with education and training on this important right. MSF contends that this right includes the right to carry firearms in public (subject only to constitutionally valid regulation) for self-defense.

Amicus Relationship to Parties

No counsel for any party in this matter has authored this brief in whole or in part. No party or counsel for any party has contributed money intended to fund the preparation of this brief. No person(s), other than *amicus curiae* and its members have funded the preparation of the brief.

Consent to File

All parties have consented to the filing of this brief.

Dated: September 23, 2019

/s/ Donald Kilmer
Counsel for *Amicus Curiae*

Introduction

According to some versions, Cain slew Abel with one of the first "weapons of war" – a rock. 4 GENESIS 1-18. Later, David would face Goliath with only this staff, a sling, and five rocks from a brook. 1 SAMUEL 17. Our earliest writings teach us that weapons have no pedigree for good or evil. They are as efficient in the hands of the wicked as they are in the hands of the righteous.

These accounts also remind us the that details for arming one's self against a threat are best left to the person facing the threat. Whether David used all five stones or only one, the general principle is the same: The tools used by the law-abiding among us, should not be limited by the acts of the criminals among us.

The fundamental rights enumerated in our Constitution are but a subset of the rights currently recognized by our constitutional jurisprudence, which are – in turn – only a subset of the rights retained by the people. NINTH AMENDMENT, U.S. CONSTITUTION. That is why:

> The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." *Poe v. Ullman,* 367 U.S. 497, 542, [...] (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the

> person so fundamental that the State must accord them its respect. See *ibid*. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. See *Lawrence [v. Texas,* 530 U.S. 530*], supra, at* 572, [...]. That method respects our history and learns from it without allowing the past alone to rule the present.
>
> *Obergefell v. Hodges*,
> 576 U.S. ___, 135 S. Ct. 2584, 2598 (2015)

"Reasoned judgment" led the District Court to the inescapable conclusion that the SECOND AMENDMENT is not a second-class right. The trial court did not succumb to the temptation of relegating the "right to keep and bear arms" into a stingy, begrudging judicial tolerance. That court treated the SECOND AMENDMENT as full member of the constitutional commandments setting boundaries on government action – to ensure that government shall not infringe, shall not abridge, shall not violate, the fundamental rights it was created to uphold. This is even more critical when that government acts through untempered majorities seeking to trade ancient rights for populist, phantom promises of security and safety. The "reasoned judgment" by the District Court should be affirmed.

Statement of the Case

California Penal Code § 32310 criminalizes possession of a "large capacity magazines" or "LCM." This was not always the case. This evolution has been accomplished in stages. In a recent dissent from an *en banc* opinion in this Circuit, Judge Tallman lamented how, "Our cases continue to slowly carve away the fundamental right to keep and bear arms. Today's decision further lacerates the Second Amendment, deepens the wound, and resembles the Death by a Thousand Cuts." *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 694 (9th Cir. 2017), *cert. denied sub nom. Teixeira v. Alameda Cty.,*138 S. Ct. 1988 (2018).

This banning of common and ordinary accouterments for common and ordinary firearms has been a prolonged blood-letting. The first cut came a legislative act in 2000 that was signed into law. That law permitted existing LCMs to remain in the hands of the law-abiding, but banned new acquisition and new manufacturing. The next cut came in 2016 when a ballot initiative competed with, and overtook a similar (though arguably weaker) concurrent legislative act. *See: Appellees' Answering Brief*, pgs. 7-8. The new law now also abrogates the rights of those with grand-fathered LCMs by banning possession of all LCMs.

Plaintiffs sought the protection of the courts to stem the wounds to their fundamental rights against a rampaging populism.

The new LCM ban under Penal Code § 32310 was found to be unconstitutional by the trial court and declaratory and injunctive relief was granted. The government has appealed.

Argument

A. Magazines Holding More Than 10 Rounds are Protected.

Though its interpretation by subsequent courts was noted and critiqued in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the earlier case of *United States v. Miller*, 307 U.S. 174 (1939) was the only U.S. Supreme Court case that even came close to (mis)interpreting the Second Amendment until 2008's *Heller* decision. *Miller* was a somewhat opaque decision, which is probably why it had wrongly come to stand for the proposition that the SECOND AMENDMENT was a collective right that could only be exercised by members of a state-sanctioned militia. The *Heller* Court made the necessary corrections without overruling it.

> The judgment in the case upheld against a Second Amendment challenge two men's federal indictment for transporting an unregistered short-barreled shotgun in interstate commerce, in violation of the National Firearms

Act, 48 Stat. 1236. It is entirely clear that the Court's basis for saying that the Second Amendment did not apply was not that the defendants were "bear[ing] arms" not "for . . . military purposes" but for "nonmilitary use," post, *at* 637, 171 L. Ed. 2d, at 685. Rather, it was that the type of weapon at issue was not eligible for Second Amendment protection: "In the absence of any evidence tending to show that the possession or use of a [short-barreled shotgun] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." 307 U.S., at 178, 59 S. Ct. 816, 83 L. Ed. 1206 (emphasis added). "Certainly," the Court continued, "it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense." *Ibid*. Beyond that, the opinion provided no explanation of the content of the right.

District of Columbia v Heller, 554 *at* 621

The *Heller* Court went on:

This holding is not only consistent with, but positively suggests, that the Second Amendment confers an individual right to keep and bear arms (though only arms that "have some reasonable relationship to the preservation or efficiency of a well regulated militia"). Had the Court believed that the Second Amendment protects only those serving in the militia, it would have been odd to examine the character of the weapon rather than simply note that the two crooks were not militiamen.

District of Columbia v Heller, 554 *at* 622

This mode of analysis used by the *Heller* Court, and again in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), has been carried forward (in part) by even this Court when it recognized that the "right to keep and bear arms" rests upon a rationale from colonial times of having arms for self-protection, the common defense, and as a check on tyranny. *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 686 (9th Cir. 2017).

The holding of *Miller*, ratified by *Heller*, is that the rights embodied in the Second Amendment can **simultaneously** uphold an individual right independent of militia service, **and** protect the possession of arms and accouterments that are ordinarily and commonly used by militias. In other words, a finding that LCMs are common and ordinary in the civilian marketplace (and they are) is only one of the justifications for a ruling that LCMs are a protected arm. A second justification is whether LCMs are "part of the ordinary military equipment or that its use could contribute to the common defense." *Miller,* 307 U.S. at 178.

The Supreme Court in *Heller* adopted a simple, categorical test to determine whether possession of a particular arm by an individual is protected by the SECOND AMENDMENT. That category includes any arm

that is not unusual, and is "in common use" "for lawful purposes like self-defense." *District of Columbia v. Heller*, 554 U.S. 570, 624 (2008).

Recall, Penal Code § 32310 does not merely "regulate" LCMs. It does not require a 10-day waiting period to acquire them. *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016), *cert denied,* 138 S. Ct. 945 (2018). It does not require that LCMs be serialized. *United States v. Marzzarella*, 614 F.3d 85, 101 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 958 (2011). It does not regulate the manner of carrying LCMs outside of the home. *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc) *cert. denied*, 137 S. Ct. 1995 (2017).

Penal Code § 32310 bans possession of all new LCMs and requires dispossession of existing LCMs that were previously lawfully possessed. Whether any regulations of LCMs short of declaring them contraband would burden the SECOND AMENDMENT is beside the point. That issue is not before the Court nor fairly briefed by the parties.

But what is not controversial is whether LCMs are a protected arm. That they are common and ordinary in the civilian marketplace is beyond dispute. What bears emphasis is they are also "part of the ordinary military equipment [..] that [..] could contribute to the common defense." *Miller, at* 178.

B. Magazines are Already Well Regulated.

California's gun laws germinated under a state constitution that contains no SECOND AMENDMENT analog. *In re Rameriz* (1924) 193 Cal. 633, 651. It took *Heller* (2008) and *McDonald* (2010) to bootstrap California into constitutional compliance. Both cases were decided after California's first attempt to ban LCMs by attrition in 2000.

California's gun laws had become so comprehensive and so complex by 2009, that even the California legislature felt compelled to reorganize and renumber them.[1] This re-codification grew out of a comprehensive study that concluded California's gun laws had morphed into a maze of regulations so complex that ordinary citizens needed to consult lawyers to exercise a fundamental right.[2]

The regulatory scheme required a 60-page single-spaced cross-reference table[3] to keep track of the old and new statute numbers.

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[1] The Deadly Weapons Recodification Act of 2010 (SB 1080 (Committee on Public Safety), 2010 Cal. Stat. ch. 711)

[2] California Law Revision Commission - Nonsubstantive Reorganization of Deadly Weapons Statutes. June 2009 ed. Available at: http://www.clrc.ca.gov/pub/Printed-Reports/Pub233.pdf

[3] http://smartgunlaws.org/wp-content/uploads/2012/01/California_Disposition_Table.pdf

The point being, California has already enacted every conceivable regulation to ensure that only law-abiding citizens can "keep and bear arms." California imposes the same restrictions on keeping and acquiring ammunition. Penal Code § 30305. Now, if magazines are only useful as an integral part of a functioning firearm, and magazines are only useful for feeding ammunition into a functioning firearms, and if both firearms and ammunition and already verboten to broad categories[4] of felons, ordinary criminals, minors, restrained parties, persons with mental illnesses and domestic violence misdemeanants – then by definition the LCM ban is targeting only the law-abiding.

Would it make sense to install an ignition interlock device on every vehicle in the state because some people commit vehicular manslaughter by driving drunk? Penal Code § 23575. No. This would be an intolerable act assuming it could even become law. But, the LCM ban is actually worse, and comes closer to installing a device that will not permit any vehicle to exceed 10 miles per hour because that will

[4] See generally California Penal Code §§ 29800-29825, 29900; Welf. & Inst. Code §§ 8100, 8103, California Family Code § 6218 and California Code of Civil Procedure §§ 527.6 and 527.8. See also: 18 U.S.C. § 922(g).

"somehow" reduce traffic fatalities for everyone, by limiting the carnage imposed by drivers breaking the rules by driving while drunk.

Moreover, driving an automobile on California's highways is a mere privilege. Surely fundamental rights enumerated in the United States Constitution should be subject to more rigorous review. More than a decade ago this Circuit started down a false path when it declined to view the SECOND AMENDMENT as a fundamental individual right in the cases of *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002); *Hickman v. Block*, 81 F.3d 98 (9th Cir.1996); and *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723 (9th Cir. 1992).

But even after the Supreme Court issued its *Heller* and *McDonald* decisions, several other circuit courts (with a cluster of cases from this circuit) have continued to relegate second-class status to the SECOND AMENDMENT in decisions that have drawn rebukes from several Justices of the Supreme Court in dissents from denial of certiorari. *See: Jackson v. City & Cnty. of San Francisco*, ___ U.S. ___, 135 S. Ct. 2799 (2015); *Friedman v. City of Highland Park*, ___ U.S. ___, 136 S. Ct. 447 (2015); *Peruta v. California*, ___ U.S. ___, 137 S. Ct. 1995 (2017), *Silvester v. Becerra*, ___ U.S. ___, 138 S. Ct. 945 (2018).

It is an open question whether these Courts are misinterpreting the SECOND AMENDMENT out of inertia and judicial conservatism – or whether they are staging an open rebellion against the plain text of the Constitution and Supreme Court precedent.

Background Checks [*Silvester*] and Safe Storage Laws [*Jackson*], have the virtue of being novel ideas and not being specifically mentioned in *Heller* or *McDonald*. That is not the case here. Possession of common and ordinary equipment, useful for exercising the right of self-defense is a protected right, especially when possessed by known law-abiding citizens who have already been vetted and had their "right to keep and bear arms" comprehensively regulated by California.

Conclusion

The U.S. Supreme Court left no room in *Heller* or *McDonald* for the states (or this Court) to subject to the SECOND AMENDMENT to death by a thousands cuts. Stated another way – David's use of five rocks from the brook when he faced Goliath, should not be limited by Cain's use of a rock against Abel.

Respectfully Submitted on September 23, 2019.

/s/ Donald Kilmer
For Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of this Circuit because it consists of 2458 words and because this brief has been prepared in proportionally spaced typeface using WordPerfect Version X8 in Century Schoolbook 14 point font.

Dated: September 23, 2019

/s/ Donald Kilmer
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

On September 23, 2019, I served the foregoing BRIEF *AMICUS CURIAE* OF THE MADISON SOCIETY, INC., IN SUPPORT OF AFFIRMANCE by electronically filing it with the Court's ECF/CM system, which generated a Notice of Filing and effects service upon counsel for all parties in the case. I declare under penalty of perjury that the foregoing is true and correct. Executed September 23, 2019.

/s/ Donald Kilmer
Attorney for Amicus Curiae