Case No. 19-56004

In the United States Court of Appeals
for the Ninth Circuit

STEVEN RUPP, et al.,
Plaintiffs-Appellants,

v.

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

On Appeal from the United States District Court
for the Central District of California
Case No. 8:17-cv-00746-JLS-JDE

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1(a), the California Rifle & Pistol Association, Inc., certifies that it is a nonprofit organization. It has no parent corporation and no stock, so no publicly held corporation owns more than ten percent of its stock.

Date: January 27, 2020

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants request oral argument. This case provides an opportunity for the Court to analyze California's Assault Weapons Control Act ("the AWCA") through the prism of the Second and Fourteenth Amendments. The Court has not decided the important constitutional issues that this appeal raises since the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S 570 (2008), and counsel's responses to inquiries from the Court may aid the Court in its decisional process. *See* Fed. R. App. P. 34(a)(1).

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JURISDICTIONAL STATEMENT

Because this suit arises under the Constitution and laws of the United States, the district court had original jurisdiction under 28 U.S.C. § 1331. E.R.XXI 4536-71. Because this is a 42 U.S.C. § 1983 action, brought to redress the deprivation of constitutional rights under the color of law, the lower court also had jurisdiction under 28 U.S.C. § 1343(a)(3). E.R.XXI 4536-71.

The district court entered summary judgment in favor of Appellee Xavier Becerra and denied Appellants' summary judgment motion on July 22, 2019. E.R.I 3-28. Final judgment was entered on July 31, 2019. E.R.I 1. Appellants filed a notice of appeal on August 30, 2019, pursuant to Federal Rules of Appellate Procedure 3 and 4 and Ninth Circuit Rules 3-1–3-2. E.R.II 26-29. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because the order on review is an appealable, final decision. *See Catlin v. United States*, 324 U.S. 229, 233 (1945).

STATEMENT REGARDING ADDENDUM

An addendum reproducing relevant constitutional, statutory, and regulatory provisions is bound with this brief.

STATEMENT OF THE ISSUE PRESENTED

The Second Amendment prohibits the government from banning bearable arms that are typically possessed by law-abiding, responsible citizens for lawful purposes. California bans a class of firearms that are typically possessed by millions of Americans for lawful purposes, including self-defense, hunting, and target shooting. Is California's ban unconstitutional under the Second Amendment?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. California's Assault Weapons Control Act ("AWCA")

The AWCA generally makes it a felony to manufacture, distribute, transport, or import into the state, sell or offer to sell, or give or lend an "assault weapon." Cal. Penal Code § 30600(a). It also punishes possession of an unregistered "assault weapon" as a crime up to a felony. Cal. Penal Code § 30605(a).

Since California first enacted the AWCA in 1989, the state has adopted various definitions of "assault weapon," continually adding to what qualifies as such. *See* Cal. Penal Code § 30510 (former Cal. Penal Code § 12276) (listing "assault weapons" by make and model); Sen. B. 263 (1991-1992 Reg. Sess.) (Cal. 1991) (expanding make/model list of "assault weapons"); 11 C.C.R. §§ 5495, 5499 (further expanding the list); Cal. Penal Code § 30515(a)(1-3) (former Cal. Penal Code § 12276.1(a)(1-3) (identifying "assault weapons" by features).[1] The latest definition was created in 2016. Cal. Penal Code § 30515 (added by Assemb. B. 1135, 2015-2016 Reg. Sess. (Cal. 2016); Sen. B. 880, 2015-2016 Reg. Sess. (Cal. 2016)) (defining "assault weapon" as any semiautomatic, centerfire rifle that does *not* have a "fixed magazine," if it has at least one of the features enumerated in section 30515(a)).

[1] In 2010, the legislature reorganized, without substantive change, all Penal Code sections relating to "deadly weapons," including those relating to "assault weapons." *See* Sen. B. 1080, 2009-2010 Reg. Sess. (Cal. 2010).

Essentially, there are now two ways a rifle[2] can qualify as an "assault weapon" under California law. One, if it is semiautomatic and statutorily listed by make and model. Cal. Penal Code § 30510; Cal. Code Regs. tit. 11, §§ 5495-5499. And two, if it has certain enumerated features. A semiautomatic, centerfire rifle that does *not* have a "fixed magazine" is an "assault weapon" if it has one of these features: a pistol grip that protrudes conspicuously beneath the action of the weapon; a forward pistol grip; a thumbhole stock; a folding or telescoping stock; or a "flash suppressor." Cal. Penal Code § 30515(a)(1)(A)-(F).[3]

A rifle is "semiautomatic" if it fires a single cartridge with each separate trigger pull. *See* Cal. Code Regs. tit. 11, § 5471(hh). "Centerfire" is the type of ammunition, which excludes mostly smaller "rimfire" cartridges, like .22 LR. *See* Cal. Code Regs. tit. 11, § 5471(j). A "fixed magazine" is "an ammunition feeding device contained in, or permanently attached to, a firearm in such a manner that the device cannot be removed without disassembly of the firearm action." Cal. Penal Code § 30515(b).[4] This is unlike a "detachable magazine," which is a separate component typically

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[2] Though not at issue, some pistols and shotguns are also "assault weapons" under the AWCA.

[3] A "grenade launcher or flare launcher" will also cause such rifles to fall under the "assault weapon" definition, but Appellants do not challenge that provision. Cal. Penal Code § 30515(a)(1)(D).

[4] "'Disassembly of the firearm action' means the fire control assembly is detached from the action in such a way that the action has been interrupted and will not function. For example, disassembling the action on a two-part receiver, like that on an AR-15 style firearm, would require the rear take down pin to be removed, the upper receiver lifted upwards and away from the lower receiver using the front pivot pin as the fulcrum, before the magazine may be removed." 11 C.C.R. § 5471(n).

removed from the rifle for loading with the push of a finger on a button. *See* Cal. Code Regs. tit. 11, § 5471(m); *see also* E.R.X 1757-87. The additional features needed to trigger the "assault weapon" designation for a semiautomatic, centerfire rifle ("the Enumerated Features") are defined by regulation. E.R.I 5-6; *see also* Cal. Code Regs. tit. 11, § 5471(z) (defining "pistol grip"); Cal. Code Regs. tit. 11, § 5471(t) (defining "forward pistol grip"); Cal. Code Regs. tit. 11, § 5471 (qq) (defining "thumbhole stock"); Cal. Code Regs. tit. 11, § 5471(r) (defining "flash suppressor"); Cal. Code Regs. tit. 11, § 5471(oo) (defining "telescoping stock"); Cal. Code Regs. tit. 11, § 5471(nn) (defining "folding stock"). "A semiautomatic, centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds," is also an "assault weapon" even if it *lacks* the Enumerated Features. Cal. Pen. Code § 30515(a)(2). So is any semiautomatic, centerfire rifle measuring fewer than 30 inches in overall length, regardless of its features or magazine function or capacity. *Id.* § 30515(a)(3).[5]

The AWCA contains a byzantine grandfathering provision under which individuals who lawfully possessed a firearm before it was considered an "assault weapon" may continue to possess it, if timely registered with the California Department of Justice ("DOJ") by the applicable statutory deadline, which varies depending on when the firearm was brought within the "assault weapon" definition.[6]

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[5] When determining length, the "[f]olding and telescoping stocks shall be collapsed prior to measurement." Cal. Code Regs. tit. 11, § 5471(x).

[6] *See* Cal. Penal Code § 30960(a) (former § 12285(f)); *id.* § 30520 (former § 12276.5) (added by Assemb. B. 2718, 2005-2006 Reg. Sess. (Cal. 2006), 2006 Cal. Stat. 6342-43); *id.* § 30515 (former § 12276.1) (added by Sen. B. 123, 1999-2000 Reg. Sess. (Cal. 1999), 1999 Cal. Stat. 1805-06); *id.* § 30900(b) (former § 30900(c) (2012-2016); former § 12285(a)).

Unless one is an authorized peace officer, Californians can no longer legally acquire or register firearms identified as "assault weapons" under any of the AWCA's various definitions. *See id.* §§ 30680, 30900(b)(1) (limiting registration to those firearms lawfully acquired between January 1, 2001 and December 31, 2016 and ending registration on July 1, 2018); *see also id.* §§ 30625-30630 (exempting law enforcement agencies and authorized peace officers from "assault weapon" restrictions).

Those who do possess a registered "assault weapon" are subject to strict limitations on its use. *Id.* § 30945. They are also limited on how they can lawfully dispose of it. Indeed, they can generally only sell or transfer their firearm out of state, surrender it to law enforcement, permanently alter it so that it no longer meets the definition of an "assault weapon," or permanently render it inoperable. *See id.* § 30920(a); *see also* Cal. Code Regs tit. 11, § 5478. If the owner of an "assault weapon" bequeaths it, the devisee has 90 days to render it permanently inoperable, sell it to a licensed firearms dealer, obtain an annual discretionary permit from DOJ to keep it,[7] or remove it from the state. Cal. Penal Code § 30915.

B. The AWCA Bars Acquisition or Possession of Rifles in Common Use by Law-Abiding Americans for Lawful Purposes

Semiautomatic, centerfire rifles with detachable (not "fixed") magazines are not novel. Americans have had access to, and have commonly kept, them for over a

[7] The DOJ only issues a "dangerous weapons permit" to applicants who can establish "good cause," which requires a showing of clear and convincing evidence that there is a "bona fide market or public necessity for the issuance" and that the applicant "can satisfy that need without endangering public safety." Cal. Code Regs. tit. 11, § 4128(c). Acceptable "good cause" includes sales to law enforcement or the military, training or manufacturing under a government contract, or use as props in commercial entertainment. Cal. Code Regs. tit. 11, §§ 4132-4137.

century. E.R.IX 1600. Similar technology has been understood—though not widely implemented—well beyond that. E.R.IX 1600, E.R.X 1760-63. Even the Founding Fathers were aware of—and coveted—multi-shot rifles with detachable magazines. E.R.IX 1600, E.R.X 1760-61. Following World War II, both surplus military and new commercial semiautomatic, centerfire rifles with detachable magazines became widely available to the public. E.R.IX 1600, E.R.X 1762. In the early 1960s, the federal government, through the Director of Civilian Marksmanship—later replaced by the quasi-privatized Civilian Marksmanship Program ("CMP") in 1996 and still in operation today—began selling such rifles directly to the public. E.R.IX 1600, E.R.X 1762. Some of these firearms the AWCA would ban. E.R.IX 1605, E.R.X 1757, E.R.XI 1974, E.R.XII 2876-77, 2879. To date, the CMP continues to sell such rifles directly to the public, as state law allows. E.R.X 1762.

Rifles restricted under the AWCA ("Banned Rifles") include the most recent iteration in the evolution of these common rifles.[8] The AR-15 platform rifle, likely the most popular type of the Banned Rifles and "perhaps the most popular single model of rifle in the country," E.R.XI 1977, was introduced to the American public nearly 60 years ago, E.R.IX 1601, E.R.X 1751, 1763. It was reviewed in a 1959 issue of *The American Rifleman*, one of the most widely circulated firearm magazines. E.R.X 1751, 1763. Since then, the popularity of the AR-15 platform and similar Banned Rifles has

[8] While most rifles designated as "assault weapons" by make and model have the Enumerated Features, some, like the SKS with a detachable magazine, do not. Cal. Pen. Code § 30510(a)(11); *see also* California Attorney General, *Assault Weapons Identification Guide* at 29, https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/forms/awguide.pdf (3d ed., Nov. 2001).

steadily increased. Indeed, by 2017, Banned Rifles were reportedly the most popular selling long guns in the country, outperforming all other rifles and shotguns. E.R.X 1751, E.R.XI 2021. A 2017 survey of 226 firearm retailers revealed that 92.9% of them sell Banned Rifles. E.R.X 1753, E.R.XI 2021. What's more, according to a survey conducted in 2015, around 47.1% of active hunters and shooters in the country owned a Banned Rifle. E.R.X 1751-52, E.R.XI 1994-1996. To date, conservative estimates informed by industry and government data put the number of Banned Rifles possessed by the American people at around 9-15 million, possibly more. E.R.IX 1600, E.R.X 1750-54.

The State has admitted that it does not know how many Banned Rifles are possessed in the United States. E.R.X 1888. And, it "does not have sufficient information to estimate the approximate number" of them. E.R.XI 1912. The State presented no expert witness to dispute the Banned Rifles' popularity among the American people. To the contrary, the State's designated expert, Blake Graham, acknowledged—based on his extensive experience as a DOJ peace officer enforcing California firearm laws, including the AWCA—that the Banned Rifles are common. E.R.X 1801-15, 1851.

Purchasers of the Banned Rifles consistently report that one of the top reasons for their purchase of this class of rifle is self-defense. E.R.IX 1600, E.R.X 1740, 1768-69, E.R.XI 2026, E.R.XIV 2691-700, 2702-04. A former FBI agent, turned FBI firearm instructor, who became the primary special agent overseeing the FBI's Ballistic Research Facility, has opined that when "using appropriate ammunition," AR-15 platform rifles "are well suited for use in home defense." E.R.X 1740. In fact,

he opines that, based on his extensive experience training and conducting field tests, such rifles are easier to operate, more effective at stopping threats, and when using the correct ammunition, pose a lower risk of danger to innocent bystanders than do other firearms like handguns and shotguns. E.R.X 1740-46, E.R.XIII 2659-88. He is not alone. Several self-defense experts agree about the self-defense capabilities of the Banned Rifles. E.R.XIV 2689-704. The State's own expert, a DOJ peace officer with extensive firearms training, also admits that the Banned Rifles are useful for self-defense. E.R.X 1801-15, 1872.

Other lawful purposes for which people commonly acquire the Banned Rifles include hunting, target shooting, and competitive shooting. E.R.IX 1600, E.R.X 1740, 1751-52, 1763, 1768-69, E.R.XI 2026, E.R.XIV 2691-700, 2702-04, 2706-11, 2715-17, 2719-24, 2726-27. Indeed, they are used in some of the most popular competitive shooting sports in America, including shooting's "World Series." E.R.X 1763, *see also* International Practical Shooting Confederation, http://www.ipsc.org; Chad Adams, *Complete Guide to 3-Gun Competition*, 89 (2012).

C. The AWCA Has No Historical Analogue

As a historical matter, there is no evidence suggesting any longstanding tradition of government regulation similar to the AWCA. The original iteration of California's AWCA, adopted in 1989, was the first law in the country's history specifically targeting semiautomatic rifles of any sort, let alone those with detachable magazines having certain features. E.R.IX 1604, E.R.X 1709-25. That was three decades after the introduction of the AR-15 into the American market. E.R.X 1763. Today, nearly all states place *no* restrictions on such rifles, let alone one like the

AWCA that subjects violators to a felony conviction punishable by a prison sentence. The handful of state restrictions that *are* in place are of recent vintage, and they vary over what is considered an "assault weapon" under the law. E.R.IX 1604, 1612-31, 1633-44, 1646-49, 1651-58, 1660-65, 1667-82, 1684-707, 1709-25.[9]

The federal government takes the same approach as most states. That is, it has not regulated rifles just because they are semiautomatic or have a detachable magazine or the Enumerated Features—with one recent and short-lived exception. In 1994, Congress adopted a nationwide prospective ban on semiautomatic, centerfire rifles having a detachable magazine and any two features from a list resembling California's Penal Code section 30515(a). E.R.IX 1604, E.R.X 1708-25. Ten years later, Congress allowed that ban to expire after a study commissioned by the federal Department of Justice revealed that the law had failed to effect any "discernible reduction in the lethality and injuriousness of gun violence." E.R.IX 1604, E.R.XIII 2639; *What Should America Do About Gun Violence?: Hearing Before U.S. S. Comm. on Judiciary*, 113th Cong. 11 (2013). Today, both possession and acquisition of the Banned Rifles remain legal under federal law.

[9] Conn. Gen. Stat. §§53-202a–53-202k (first enacted in 1993); D.C. Code Ann. §§7-2501.01(3A), 7-2502.02 (a)(6) (enacted in 2008); Haw. Rev. Stat. Ann. §§ 134-1, 134-8 (first enacted in 1992); Md. Code Ann., Crim. Law §§ 4-301, 4-303(first enacted in 2002); N.J. Stat. Ann.§§ 2C:39-1w, 2C:39-3 (first enacted in 1999); N.Y. Penal Law §§ 265.00(22), 265.02(7) (first enacted in 1998)).

D. Appellants Include Law-Abiding, Responsible Adult Citizens Seeking to Exercise Their Fundamental Rights

The individual appellants are responsible, adult California residents who are legally eligible to possess firearms. E.R.IX 1594, E.R.XV 3002, 3006, 3009, 3012, 3016, 3019, 3023, 3027. Some do not currently own any Banned Rifles but wish to, and would acquire one for lawful purposes, including self-defense, but refrain from doing so for fear of prosecution under the AWCA. E.R.IX 1596, E.R.XV 3006, 3009, 3016. Others have parts they wish to, and immediately would, assemble into a Banned Rifle to use for lawful purposes, including self-defense, but refrain from doing so for fear of prosecution under the AWCA. E.R.IX 1595-96, E.R.XV 3002, 3012, 3027-28. Some already own at least one Banned Rifle and wish to be free from the transfer and use restrictions that the AWCA places on those rifles, under threat of criminal penalty. E.R.IX1594-95, E.R.XV 3012-13, 3019-20, 3027-28. Appellant California Rifle & Pistol Association, Incorporated is a non-profit membership organization that represents its thousands of law-abiding members, who are similarly situated to the individual appellants. E.R.IX1597-1600, E.R.XV 3031-32. Appellants facially challenge the AWCA's restrictions on the Banned Rifles as a violation of the Second Amendment and the Due Process Clause.

II. PROCEDURAL HISTORY AND THE DECISION ON APPEAL

The district court denied Appellants' summary judgment motion on their Second Amendment claim and granted the State's cross-motion. E.R.I 3-25. In rejecting Appellants' Second Amendment claim, the district court applied this Court's two-step inquiry, under which "(1) the court 'asks whether the challenged law burdens conduct protected by the Second Amendment' and (2) if so, what level of scrutiny

should be applied." E.R.I 9-10; *Fyock v. City of Sunnyvale*, 779 F.3d 991, 996 (9th Cir. 2015) (quoting *United States v. Chovan*, 735 F.3d 1127, 1136, 1136 (9th Cir. 2013)). Purporting to rely on *Heller*, the district court held that Appellants' challenge fails under the first prong because the "semiautomatic rifles within the AWCA's scope are virtually indistinguishable from M-16s and thus are not protected by the Second Amendment." E.R.I 16 (citing *Heller*, 554 U.S. at 627). The district court alternatively found, under the second prong, that even if the AWCA's restriction on the Banned Rifles does implicate the Second Amendment, it would only warrant intermediate scrutiny and that it passes muster under that standard. E.R.I 16-24. According to the district court, lesser scrutiny is appropriate because "the AWCA does not severely burden the core of the Second Amendment right." E.R.I 16-18. The district court then held that the State carried its burden to show that the AWCA meets intermediate scrutiny based on the State's proffered "evidence." E.R.I 20-24.

Before the district court's ruling on the parties' summary judgment motions, Appellants filed *Daubert* motions challenging the experts the State relied on and who the district court found persuasive in ruling for the State. E.R.II 56-67. The district court never ruled on those motions and ignored the concerns they raise in its analysis of the parties' summary judgment motions. E.R.XXII 4620-30.

The district court also dismissed Appellants' facial due process and takings claims and denied their preliminary injunction motion asserting an as applied due process claim challenging aspects of the State's criteria for registration of Banned Rifles. E.R.I 3. Appellants do not raise their due process or takings claims on appeal.

On July 31, 2019, the district court entered judgment in favor of Defendant California Attorney General and against Appellants on each and every claim, stating that "Plaintiffs shall take nothing by way of their Third Amended Complaint from Defendant" and declaring Defendant the prevailing party. E.R.I 1-2.

SUMMARY OF ARGUMENT

Law-abiding Americans, by the millions, choose to own semiautomatic, centerfire rifles with detachable magazines having one or more of the accuracy and control enhancing Enumerated Features, none of which alters a rifle's rate of fire, the power of the bullet it discharges, or its ammunition capacity. Second-guessing their decision, California has taken the extraordinary step of generally banning acquisition and possession of those rifles. Such a ban on what are likely the most commonly owned rifles in the country and "typically possessed for lawful purposes" of various sorts, including self-defense in the home, violates the Second Amendment. *Heller*, 554 U.S. at 625.

To be sure, California has an interest in keeping firearms out of the hands of criminals and protecting public safety. But depriving law-abiding citizens of the right to access constitutionally protected arms to defend themselves and their families is not a permissible means of achieving that end. That conclusion follows not just from *Heller*, but from a long line of cases rejecting efforts to ban constitutionally protected conduct on the ground that it could lead to abuses. Any other conclusion would render the Second Amendment the second-class right that the Supreme Court has admonished it is not. Even if the State could theoretically conger some justification to

ban these rifles, the evidence is has presented here does not approach meeting its high burden to make such a showing.

The district court thus incorrectly concluded that the AWCA's restrictions on the Banned Rifles does not violate the Second Amendment. Accordingly, this Court should reverse the district court's decision upholding California's ban and rule in Appellants' favor.

ARGUMENT

The AWCA imposes the most severe burden a law can effect on the exercise of a constitutional right—a ban. It prohibits acquisition and, unless registered before the now-expired deadline, possession of rifles protected by the Second Amendment. Such a ban is unconstitutional under any form of constitutional scrutiny. For the State cannot prohibit what the Constitution protects. The district court upheld the ban on the flawed premise that the Second Amendment does not protect the Banned Rifles and, even if it did, the State could justify its ban under intermediate scrutiny. E.R. 6, 25. Even if resorting to tiers of scrutiny were appropriate, the district court erred not only in selecting intermediate scrutiny, but in finding that the State met its burden of providing credible, reliable, and admissible evidence that the AWCA's ban furthers its asserted interest, let alone showing that a ban on the affected rifles is sufficiently tailored under that standard to achieve those interests.

I. THE SECOND AMENDMENT PROTECTS BEARABLE ARMS THAT ARE TYPICALLY POSSESSED BY LAW-ABIDING, RESPONSIBLE CITIZENS FOR LAWFUL PURPOSES, LIKE THE BANNED RIFLES

The Second Amendment provides that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *Heller*, the Supreme

Court extensively analyzed the Second Amendment's text, history, and tradition to conclude "that the Second Amendment confer[s] an individual right to keep and bear arms." *Id.* at 595. That right, the Court held, "extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.* at 582. And it protects all such arms that are "typically possessed by law-abiding citizens for lawful purposes." *Id.* at 625, 627. "*Heller* defined the Arms *covered by* the Second Amendment to include 'any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.'" *Caetano v. Massachusetts*, -- U.S. --, 136 S. Ct. 1027, 1031 (2016) (Alito, J., concurring) (quoting *Heller*, 554 U.S. at 581). It also, on the other hand, expressly omitted "dangerous and unusual weapons" from Second Amendment protection. *Heller*, 554 U.S. at 627. Based on this understanding of the right, the Court struck down District of Columbia's laws banning possession of all handguns and requiring that all long guns remain inoperable as violating it. *Id.* at 574, 629-36.

Two years after its decision in *Heller*, the Supreme Court reviewed another Second Amendment challenge to two municipal handgun bans in *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Upon finding that "the right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty," the Court held "that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*." *Id.* at 778, 791. Thus, states and municipalities must protect the individual right protected by the Second Amendment and may not simply "enact any gun control law that they deem to be reasonable." *Id.* at 783.

The Supreme Court has thus "provided a simple Second Amendment test in crystal clear language . . . that anyone can understand": If law-abiding citizens commonly possess an arm for lawful purposes, it is protected. *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1142 (S.D. Cal. 2019) (citing *Heller*, 554 U.S. at 624; *Caetano*, 136 S. Ct. at 1032) (holding that "the pertinent Second Amendment inquiry is whether [arms] are commonly possessed by law-abiding citizens for lawful purposes *today*"); *see also Friedman v. City of Highland Park*, -- U.S. --, 136 S. Ct. 447 (2015) (Thomas & Scalia, Js., dissenting from denial of certiorari). In addition to *Heller*'s "commonly owned" test, however, this Court also asks whether an arm has historically been restricted. *Fyock*, 779 F.3d at 996-97. The answers to both questions favor Second Amendment protection of the Banned Rifles.

There is no reasonable dispute that the Banned Rifles are typically possessed for lawful purposes, including for self-defense in the home. They are owned by the millions. E.R.IX 1600, E.R.X 1751-54, 1852, 1856, 1859, E.R.XI 1916-45, 1949-62, 1964, 1966-68, 1970-72, 1974, 1976-78, 1980-92, 1994-96, 2000-12, 2014-148, E.R.XII 2152-242, 2246-431, E.R.XIII 2435-36, 2538-651; *see Hollis v. Lynch*, 827 F.3d 436, 449 (5th Cir. 2016) (defining the term "common" by applying the Supreme Court test in *Caetano* of 200,000 stun guns owned and legal in 45 states being "common"); *Heller v. District of Columbia*, 670 F.3d 1244, 1287 ("*Heller II*"); *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d 242, 255-57 (2d. Cir. 2015) ("Even accepting the most conservative estimates. . . , the assault weapons . . . at issue are 'in common use' as that term was used in *Heller*.") Here, the district court did not even dispute that they are common. It had no basis to. For the State admitted that it "lacks sufficient information or belief"

about whether law-abiding Americans typically use the Banned Rifles for lawful self-defense, hunting, or competition, E.R.XI 1898-902, 1904-05.[10] And none of its expert witnesses disputed that contention.

No evidence suggests a historical tradition of government regulation targeting semiautomatic rifles specifically or the Enumerated Features. After it saw the amicus curiae brief filed by Everytown for Gun Safety, the State cited a few examples of laws it claims show that the AWCA has a historical pedigree. Defs.' Opp'n to Pls.' Mot. Summ. J. ("Defs.' Opp'n") at 4, ECF No. 88; Amicus Curiae Br. of Everytown for Gun Safety ("Everytown Br.") at 5-6, ECF No. 82-1. But, as Appellants pointed out in response, those laws targeted non-firearms and machine guns whose clumsy definitions happened to include some semiautomatics. Pls.' Reply to Defs.' Opp'n to Pls.' Mot. Summ. J. at 2-3. None of the laws targeted semiautomatic rifles specifically, let alone ones with the Enumerated Features, and thus were not relevant. *Id.*; *see also Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1150-53 (S.D. Cal. 2019) (discussing limited reach of state-level machine gun regulations). The district court did not find that the AWCA "resemble[s] prohibitions historically exempted from the Second Amendment." *Fyock*, 779 F.3d at 997. Without a historical justification for excluding the Banned Rifles from Second Amendment protection as this Court demands, the only question that remains under *Heller* is whether they are among the arms typically possessed for lawful purposes. Because the law-abiding American public indisputedly

[10] The State also expressly does not dispute that Banned Rifles are used for lawful target practice. E.R.XI 1902-03.

chooses to own the Banned Rifles by the millions for lawful purposes, they are, like the handguns in *Heller*, protected under the Second Amendment.

The district court disregarded the undisputed evidence that law-abiding Americans own the Banned Rifles for lawful purposes because it wrongly found that question irrelevant here. E.R.I 12. According to the district court, the "semiautomatic rifles within the AWCA's scope are virtually indistinguishable from M-16s and thus are not protected by the Second Amendment" even if they are commonly possessed by law-abiding citizens for lawful purposes. E.R.I 16 (citing *Heller*, 554 U.S. at 627 (noting that "weapons that are most useful in military service—M-16 rifles and the like—may be banned")). The district court reasoned that *Heller* "plainly provide(s) that the M-16—and weapons 'like' it—can be banned as dangerous and unusual weapons." E.R.I 13. But the district court misreads *Heller*. And, in any event, the court's reasoning for why the semiautomatic Banned Rifles should be treated "like" the fully automatic M-16 is baseless.

While *Heller* acknowledged that the Second Amendment might not protect "weapons that are most useful in military service," it did not specify what arms, if any, other than the M-16 the Supreme Court might hold meet that standard. *Heller*, 554 U.S. at 627. In explaining that limitation, however, the Court excludes "the sorts of lawful weapons that [people] possessed at home [for] militia duty," distinguishing them from "sophisticated [military] arms that are highly unusual in society." *Id.* The Banned Rifles are not "highly unusual in society"; indeed, they're not "unusual" at all. *Id.* To the contrary, they are among the most popular firearms in American society today. *See supra* Statement of the Case, Part I.B. And, under this Court's precedent, to

fall outside the Second Amendment's protection, an arm must be *both* "dangerous *and* unusual." *Fyock*, 779 F.3d at 998 (noting that the government presented evidence the arms at issue were "dangerous," but failed to show they were "unusual"); *see also Caetano*, 136 S. Ct. at 1031 (Alito, J., concurring) (reasoning that "[a] weapon may not be banned unless it is *both* dangerous *and* unusual"). So whatever arms, beyond the fully automatic M-16, might fall outside of the Second Amendment's scope, the immensely popular semiautomatic Banned Rifles cannot be among them. The district court erred in holding otherwise.

In any event, the Banned Rifles are not "almost the same as the M-16" and thus cannot be considered "dangerous" either. E.R.I 14. The district court acknowledges that the M-16 is fully automatic and the Banned Rifles are merely semiautomatic, but discounts that difference as meaningless. E.R.I 14. It relies on a supposed finding by Congress that semiautomatic rifles have a rate of fire of 300-500 per minute, making them "virtually indistinguishable" from machineguns. E.R.I 14. But Congress never made such a finding. Rather, that figure is the State's extrapolation from Congress's actual finding that semiautomatic firearms could empty a 30-round magazine in five seconds. Defs.' Mem. Supp. Mot. Summ. J. at 9, ECF No. 73; E.R. XIX 3992, XX 4155. While the State's math might work, its manufactured finding is not a correct translation of Congress's. It ignores endurance of the rifle or the shooter, let alone the need for multiple intervening magazine changes. There is no evidence that any person has conducted a test firing a semiautomatic rifle at such a rate. Indeed, there is no evidentiary grounds for this theoretical finding at all, assuming it is even relevant.

But even if the State's claim had any basis in reality, it would apply to all semiautomatics, not just the Banned Rifles, which fire no faster than other semiautomatics. E.R.II 158, E.R.X 1763-68. The State has not argued, nor did the district court find, that semiautomatic firearms in general fall outside the Second Amendment's protection. And, tellingly, Appellants are aware of *no* state or federal law specifically targeting semiautomatic rifles with detachable magazines that do not have the Enumerated Features. The Banned Rifles' rate of fire, being no greater than other legal arms, is thus irrelevant.

The district court also found relevant that the U.S. Army manual advises soldiers to use the M-16 in semiautomatic mode for better accuracy and that Congress found that it is simple to convert a semiautomatic to automatic or, as the State pointed out, to attach illegal components like "bumpstocks" and "multiburst trigger activators" to increase a semiautomatic's rate of fire. E.R.I 15. But again, each of these arguments applies equally to *all* semiautomatic rifles, not just the Banned Rifles. And, while the district court tries to connect the Enumerated Features to its conclusion that the M-16 and the Banned Rifles are essentially identical, it fails to account for the fact that not all Banned Rifles possess Enumerated Features. *See* Cal. Pen. Code § 30510(a)(11); *see also supra* n.8.

The district court also held that Appellants "present[ed] no evidence to meaningfully distinguish the semiautomatic rifles at issue from the M-16." E.R.I 16. Setting aside that the burden is on the State to show the Banned Rifles are "dangerous and unusual," because the Second Amendment extends "prima facie, to all instruments that constitute bearable arms," *Heller*, 554 U.S. at 582, the district court

itself provides the evidence it asserts is absent by noting that semiautomatics are "more accurate" than fully automatics and that they only fire "*almost* as rapidly as fully automatics" (at about half the rate according to its own findings). E.R.I 14-15 (emphasis added). What's more, it is the district court, not Appellants, that has the evidentiary problem. Not one of its justifications is supported by testimony from any military or firearms expert in the record, assuming it is even relevant. Appellants' views of the Banned Rifles as common and safe, on the other hand, are supported by experts in the fields of firearms and self-defense. E.R.IX 1600-05.

Perhaps more important, the district court's position is belied not only by the quantity of longstanding laws restricting fully automatic firearms contrasted with the dearth of laws restricting semiautomatics like the Banned Rifles, *see, e.g.*, Gun Control Act of 1968, 82 Stat. 1213 (1968), Firearm Owners' Protection Act, 100 Stat, 449 (1986), but also by the Supreme Court itself, *see Staples v. United States*, 511 U.S. 600 (1994). As *Staples* points out, "[t]he AR-15 is the civilian version of the military's M-16 rifle" because it is "a semiautomatic weapon." *Id.* at 603. "The M-16, *in contrast*, is a selective fire rifle," meaning it can also produce "automatic fire," like a machine gun. *Id.* (emphasis added). The entire premise of *Staples* was that the AR-15 is so different from the M-16 that it could not be assumed "that Congress did not intend to require proof of *mens rea* to establish an offense" for illegal possession of a machine gun physically (but not functionally) resembling an AR-15, like an M-16. *Id.* at 606. The Court reached that conclusion despite acknowledging that the two rifles have interchangeable parts and that an AR-15 can be converted into a machine gun, *id.* at 603. What's more, and perhaps the most relevant point for this case, *Staples* identified

the AR-15 as being among guns that "traditionally have been widely accepted as lawful possessions." 511 U.S. at 612. Such a rifle simply cannot fall within any reasonable definition of an "unusual" arm.

In short, the record below undisputedly shows that the Banned Rifles are arms commonly chosen by Americans for lawful purposes, including for the core lawful purpose of self-defense. They are not "sophisticated [military] arms that are highly unusual in society." *Heller*, 554 U.S. at 627. The Banned Rifles are thus protected under the Second Amendment and the district court erred in holding that they are not.

II. THE AWCA'S BAN ON CERTAIN RIFLES CANNOT WITHSTAND SECOND AMENDMENT SCRUTINY

When analyzing Second Amendment claims, this Court conducts a two-step inquiry under which it first asks whether the challenged law burdens conduct protected by the Second Amendment and, if so, determines what level of scrutiny should be applied. *Fyock*, 779 F.3d at 996 (quoting *Chovan*, 735 F.3d at 1136). Because the Second Amendment protects the Banned Rifles, the AWCA's categorical ban on them, like the handgun ban in *Heller*, violates the Second Amendment "[u]nder any of the standards of scrutiny" that courts apply in reviewing restrictions on constitutional rights. *Heller*, 554 U.S. at 628. Thus, whether the AWCA's rifle ban is treated as a categorical ban like the ordinance struck down in *Heller* or is analyzed under heightened scrutiny, the result is the same—it is unconstitutional.

A. Bans on Protected Arms Are Categorically Unconstitutional

Simply put, the government cannot flatly prohibit something the Constitution protects. That conclusion follows not just from *Heller*, but from a long line of cases rejecting the notion that the government may ban constitutionally protected activity on the ground that it could lead to abuses. *See, e.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002) (holding that the government cannot ban virtual child pornography on the ground that it might lead to child abuse because "[t]he prospect of crime" "does not justify laws suppressing protected speech"); *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (holding that the state cannot impose a "flat ban" on solicitations by public accountants on the ground that solicitations "create[] the dangers of fraud, overreaching, or compromised independence"). Such extreme degree of prophylaxis is incompatible with the decision to afford the activity constitutional protection. The AWCA's overinclusive approach violates the basic principle that "a free society prefers to punish the few who abuse [their] rights … after they break the law than to throttle them and all others beforehand." *Se. Promotions Ltd. v. Conrad*, 420 U.S. 546, 559 (1975); *accord Vincenty v. Bloomberg*, 476 F.3d 74, 84-85 (2d Cir. 2007); *Robb v. Hungerbeeler*, 370 F.3d 735, 743 (8th Cir. 2004).

Indeed, when it comes to constitutional rights, the government does not get to resort to the most draconian means of achieving its objectives, even if they are the most effective. Surely the most effective way to eliminate defamation is to prohibit printing presses, and the most effective way to eliminate crime is to empower police officers with unlimited search authority, and so on. But by protecting free speech and the privacy of the home and personal effects, the Constitution prohibits such extreme

measures, because the framers valued liberty above the complete elimination of defamation or crime. The Supreme Court has made clear that the Second Amendment is no different. *McDonald* 561 U.S. at 780 (refusing "to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other [incorporated] Bill of Rights guarantees"). The Court also made clear that the Second Amendment "necessarily takes certain policy choices off the table." 554 U.S. at 636. Outright prohibiting arms that the Second Amendment protects like the Banned Rifles is one of those choices.

Nevertheless, the district court held that a ban on Second Amendment protected arms can be justified and that the AWCA's rifle ban survives intermediate scrutiny. In doing so, the district court does not explain what precedent or doctrine authorizes the complete banning of constitutionally protected activity. Instead, it merely points to other circuits that have likewise upheld "assault weapon" bans on the grounds that they meet intermediate scrutiny. E.R.I 10. But those courts provide no basis for the notion that the government can flatly ban constitutionally protected arms either.

The district court criticized Appellants' reliance on *Heller*'s text, history, and tradition analysis to determine the scope of Second Amendment rights and permissible restrictions on those rights. E.R.I 10. Its criticism, however, is based on a misunderstanding of that analysis. Appellants do not contend that "if there is no historical justification, the regulation is per se invalid." E.R.I 10. Instead, they contend that the *Heller* Court has established—after looking to text, history, and tradition—that the Second Amendment protects those arms that are "typically possessed by law-

abiding citizens for lawful purposes," and that no lower court may second guess that determination. *Heller*, 554 U.S. at 624-25. Appellants' explanation for why there is no "historical justification" for laws like the AWCA is not used as a sword to strike the law down. Instead, it is a shield forged from this Court's precedent, which asks whether arms "have been the subject of longstanding, accepted regulation" to determine whether laws restricting them "resemble[ ] prohibitions historically exempted from the Second Amendment." *Fyock*, 779 F.3d at 997. As explained above, the AWCA's rifle ban has no such historical pedigree. *See supra* Statement of the Case, Part I.C.

Lack of a historical basis for a regulation may not be dispositive when reviewing all Second Amendment challenges. But it certainly is when reviewing *bans* on bearable arms. This approach is not inconsistent with this Court's two-step analysis for Second Amendment challenges. It simply recognizes that *Heller* says a ban on protected arms cannot withstand any level of scrutiny; so there is no point in applying any. Absent from *Heller's* analysis of a handgun ban was any discussion of "compelling interests," "narrowly tailored" laws, or any other standard-of-review jargon. Nor were there discussions of the District's "legislative findings" purporting to justify the restrictions. There is thus no need to subject the AWCA's ban to tiers of scrutiny because it is a ban on protected arms.

In sum, the AWCA's rifle ban violates the fundamental principle enshrined in the Second Amendment's text, history, and tradition: As long as bearable arms are typically possessed by law-abiding, responsible citizens for lawful purposes, the Second Amendment protects them, and the government cannot ban them. *See Heller*,

554 U.S. at 626-27, 634-35. This is the result even if the Court applies heightened scrutiny.

B. The AWCA's Ban on Certain Rifles Fails Heightened Scrutiny

Under this Court's precedent, "the level of scrutiny should depend on (1) 'how close the law comes to the core of the Second Amendment right,' and (2) 'the severity of the law's burden on the right.'" *Chovan*, 735 F.3d at 1138, quoting *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011). If this Court finds it necessary to apply a level of scrutiny here, only strict scrutiny could suffice. For such a "serious encroachment on the core right" as the AWCA imposes by banning popular arms demands an equivalent justification, accompanied by the narrowest of tailoring. *Jackson v. City and Cty. of San Francisco*, 746 F.3d 953, 964 (9th Cir. 2014). But this Court need not make that decision because the AWCA's rifle ban fails even intermediate scrutiny.

1. Strict scrutiny Applies, Dooming the AWCA's Rifle Ban

The AWCA's rifle ban demands strict scrutiny. *See Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 544 (9th Cir. 2004) ("[A] law is subject to strict scrutiny . . . when that law impacts a fundamental right, not when it infringes it."); *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 54 (1983)(similar); *see also*, *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1158 (S.D. Cal. 2019) (applying strict scrutiny to analyze a magazine ban); *Heller II*, 670 F.3d at 1284-85 (Kavanaugh, J., dissenting). Because the State does not even pretend that it would survive strict scrutiny, the AWCA's rifle ban necessarily fails under that standard of review.

The district court gave three reasons justifying its decision to apply intermediate scrutiny. None of them is convincing. First, the trial court discounts the AWCA's burden because there are alternatives to the Banned Rifles. E.R.I 17-18. But the Supreme Court expressly rejected that reasoning. *Heller*, 554 U.S. at 629 ("It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed."). The *Heller* Court conveyed that such bans are extremely burdensome, saying it would have struck down a handgun ban under "any of the standards of scrutiny." *Id.* at 628-29; *see also Caetano*, 136 S. Ct. at 1031 (Alito, J., concurring) ("If *Heller* tells us anything, it is that firearms cannot be categorically prohibited just because they are dangerous").

Second, the district court discounted the constitutional significance of the Banned Rifles by relying on the State's evidence that the court found showed they are ill-suited for self-defense. E.R.I 17-19. That evidence consisted of (1) a report from a gun control advocacy group cited in an amicus brief written by Brian J. Siebel, who discloses no background in defensive use of firearms, E.R.I 18, E.R.XIX 3987-4047; and (2) a vague statement made by a police superintendent from another state in another case that "assault weapons" are "*less likely*" to be effective "in *many* home defense situations," not that they are ill-suited for that purpose, E.R.I 18. One piece of evidence is from a biased, unqualified source and the other is unhelpful. Yet, the district court accepted it, while completely ignoring the objectively superior evidence from Appellants that the Banned Rifles are well-suited for self-defense, including an expert report from a former FBI agent, turned FBI firearm instructor, who became the primary special agent overseeing the FBI's Ballistic Research Facility and

statements by other self-defense experts saying as much. E.R.X 1736. The State provided no expert to refute them. To the contrary, its own expert agreed that the Banned Rifles are useful for self-defense. E.R.X 1872.

Finally, the district court found relevant that less than a majority of people who bought Banned Rifles did so *primarily* for self-defense. E.R.I 17-18. But the record shows a significant percentage of Banned Rifle purchasers acquire them for self-defense as their primary reason and a clear majority acquire them when their first two reasons are considered. E.R.III 1752; *see also* E.R. X 2026. Thus, at least millions of people are burdened by the AWCA's rifle ban.

Ultimately, none of the reasons the trial court gave for discounting the AWCA's burden is valid. The AWCA imposes a ban, not just a regulation, on the core of the right to possess protected arms for self-defense. E.R.I 3-25. So if means-end scrutiny is appropriate at all, strict scrutiny must be the test. Because neither the district court nor the State suggest that the AWCA's rifle ban meets strict scrutiny, Appellants necessarily prevail.

2. The AWCA's Rifle Ban Fails Even Intermediate Scrutiny

Even if intermediate scrutiny applies, Appellants prevail. It requires government to prove that its law is "narrowly tailored to serve a significant governmental interest," *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017). "The burden of justification is demanding and it rests entirely on the State." *United States v. Virginia*, 518 U.S. 515, 533 (1996). The State has come nowhere near meeting either of these burdens in defending the AWCA's rifle ban. Because the AWCA bans—not merely regulates—the rifles, there is no need to proceed in the analysis.

Such a ban would necessarily fail for lacking the required tailoring. *Heller*, 544 U.S. at 628 & n.27. But even setting aside the question of tailoring, the State has likewise failed to meet its burden that the AWCA's ban on rifles would advance its goal. The district court erred by failing to hold the State to those burdens.

a. The State failed to prove that the "fit" between its chosen means and its proffered ends is reasonable.

To prove a law is narrowly tailored, the government must prove that the law "avoid[s] unnecessary abridgement" of constitutional rights, *McCutcheon v. FEC*, 572 U.S. 185, 221 (2014) (plurality op.); *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014); *Valle Del Sol Inc. v. Whitting*, 709 F.3d 808, 816 (9th Cir. 2013). Even if the AWCA's rifle ban meaningfully advances the State's proffered interests—which, as explained below, it does not—it simply curtails too much constitutionally protected conduct to pass any means-end scrutiny. Intermediate scrutiny's narrow-tailoring requirement seeks to ensure that the encroachment on liberty is "not more extensive than necessary" to serve the government's interest. *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 816 (9th Cir. 2013). The State is entitled to no deference when assessing the fit between its purported interests and the means selected to advance them. *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 214 (1997). Instead, it must prove that those means in fact do not burden the right "substantially more" than "necessary to further [its important] interest." *Id.*

California's approach is the polar opposite of tailoring. The AWCA flatly bars possession of the Banned Rifles for *any* purpose, except by individuals who were fortunate enough to have been able to timely register their rifles, who are still subject

to severe regulation. E.R.I 5. And it bars everyone, even those already entrusted with lawfully owning one, from acquiring them. Such a law "serves as the bluntest of instruments, banning a class of weapons outright, and restricting the rights of its citizens to select the means by which they defend their homes and families." *Friedman v. City of Highland Park*, 784 F.3d 406, 419 (7th Cir. 2015) (Manion, J., dissenting); *see also Jackson*, 746 F.3d at 964 (contrasting a "complete ban" with regulations). That is not the sort of "fit" that can survive any form of heightened scrutiny. *See, e.g.*, *Avitabile v. Beach*, 368 F. Supp. 3d 404 (N.D.N.Y. 2019) (taser ban fails even intermediate scrutiny); *Maloney v. Singas*, 351 F. Supp. 3d 222 (E.D.N.Y. 2018) (nunchaku ban fails even intermediate scrutiny).

Concluding that there is a "reasonable fit" between the AWCA's rifle ban and California's public safety interests, the district court did not even attempt to explain how the AWCA is sufficiently tailored. Instead, the court found such a "fit" existed because the State supposedly provided evidence that the AWCA *might* work to reduce criminal mass shootings and that the State is entitled to deference in determining how to combat this violence. E.R.I 19. But setting aside that tailoring rather than efficacy decides the "fit" question and that the State is not entitled to any deference in determining "fit," *see Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 214 (1997), the district court's analysis largely mirrors a view that the Supreme Court considered—and rejected—in *Heller*. Specifically, *Heller* makes clear beyond cavil that the Second Amendment does not tolerate banning the possession of constitutionally protected arms just because they may be frequently involved in or help further certain kinds of crime, even serious ones. *Heller*, 554 U.S. at 636.

In *Heller*, the District of Columbia sought to justify its handgun ban on the ground that handguns were involved in most firearm-related homicides in the United States. 554 U.S. at 696 (Breyer, J., dissenting) (collecting statistics). The Court did not question that premise, but still held that banning those protected arms was not an option open to the District "[u]nder any of the standards of scrutiny." *Id.* at 628-29 (majority opinion). *Heller* similarly rejected the argument that protected arms may be banned on the ground that criminals might misuse them. The District argued that handguns make up a significant majority of all stolen guns and that they are overwhelmingly used in violent crimes. *Id.* at 636; *see also id.* at 698 (Breyer, J., dissenting). But despite the government's clear interest in keeping handguns out of the hands of criminals and unauthorized users, the Court rejected that argument too, concluding that a ban on possession of handguns by *all* citizens is far too blunt an instrument for preventing their misuse by criminals. *Id.* at 628-29 (majority opinion).

At bottom, then, the State cannot escape the problem that the means it has selected are simply far too draconian where constitutional rights are concerned. Indeed, "taken to its logical conclusion," the State's defense of the AWCA's rifle ban would "justify a total ban on firearms kept in the home." *Heller v. District of Columbia*, 801 F.3d 264, 280 (D.C. Cir. 2015). Whatever the state may think about that result as a policy matter, any theory that supports it is one that the Second Amendment "necessarily takes . . . off the table." *Heller*, 554 U.S. at 636.

b. The State failed to prove that the AWCA's rifle ban meaningfully furthers its proffered public safety interests.

At the outset, while the State no doubt has an important interest in promoting public safety and preventing crime, that does not mean that the State necessarily has an important interest in every firearm-related restriction it imposes. *See McDonald* 561 U.S. at 783 (rejecting the notion that governments may "enact any gun control law that they deem to be reasonable."). After all, "it would be hard to persuasively say that the government has an interest sufficiently weighty to justify a regulation that infringes constitutionally guaranteed Second Amendment rights if the Federal Government and the states have not traditionally imposed—and even now do not commonly impose—such a regulation." *Heller II*, 670 F.3d at 1294 (Kavanaugh, J., dissenting). That is precisely the case here.

Restrictions specifically targeting semiautomatic rifles, let alone ones with the accuracy and control-enhancing features targeted by the AWCA, were virtually unheard of until 1989, even though such rifles have existed for over a century and their similar predecessors well beyond that. *See supra* Statement of the Case, Part I.B-C. Even today, the overwhelming majority of states do not impose "assault weapon" restrictions targeting the Banned Rifles, and with the exception of a brief failed effort a few decades ago, which did not go as far as the AWCA, neither does the federal government. E.R.IX 1604. That the State has an interest in this particular restriction is even more dubious because its very purpose is to deprive the public of more accurate and controllable, and thus safer, rifles. E.R.I 24 (noting "that the rifles are more accurate and easier to control is precisely why California has chosen to ban them").

In any event, for a law to be substantially related to a government interest, the government must demonstrate that the "restriction will in fact alleviate" its concerns. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001). Government cannot meet that burden by relying on "mere speculation or conjecture." *Id.* Instead, it must offer evidence demonstrating that the restriction it seeks to impose will in fact further its stated interests. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 437 (2002). The State cannot "get away with shoddy data or reasoning." *Id.* at 438.

Here, the State fell well short of meeting its burden. Yet, the district court wrongly held that the State carried that burden based on the State's proffered "evidence" consisting of:

(1) An unverified finding by Congress in adopting the 1994 federal "assault weapon" ban that "assault weapons" are the "weapon of choice" of serious criminals and "disproportionately used in crimes," E.R.I 20;

(2) An unverified finding by California in adopting the original AWCA that the frequency of use of "semiautomatic weapons" in drive-by shootings and against law enforcement officers was high, E. E.R.I 20;

(3) Reports by the State's expert, Lucy Allen, and Amicus Everytown for Gun Safety, claiming that "assault weapons" are "often" used in mass shootings and when they are more casualties result, as well as courts accepting those findings, E.R.I 20-21;

(4) Reports by the State's expert, Dr. Christopher Colwell, and Amicus Everytown for Gun Safety that "assault weapons" cause worse wounds and more of them when used in a shooting, E.R.I 20-21;

(5) The undisputed fact that the Enumerated Features increase the user's accuracy and control, finding that such allows a criminal to inflict more damage, E.R.I 22; and

(6) Statements about the federal "assault weapon" ban the court found show that such bans "appear to be effective" in reducing violence, E.R.I 23-24.

Remarkably, the district court noted incorrectly that Appellants "do not truly dispute any of the Attorney General's evidence." E.R.I 24. Not only did Appellants provide evidence disputing the State's, they filed *Daubert* motions questioning the experts the State relied on, which the district court ignored. E.R.II 56-67, E.R.XXII 4620-30. It is thus more accurate to say that the district court did not truly consider any (or much) of Appellants' evidence or their disputes with the State's evidence. In any event, the State's evidence was woefully inadequate.

i. Congress's and California's "findings" are irrelevant

Even assuming the veracity of Congress's "finding" that "assault weapons" are favored by criminals—which Appellants dispute as lacking foundation—*Heller* rejected the notion that protected arms may be banned on the ground that they are used in crime. 554 U.S. at 636. This finding is thus irrelevant here and the district court erred in relying on it in justifying the AWCA's rifle ban. For the same reasons, California's "finding" that the frequency of "semiautomatic weapons" used in drive-by shootings and against law enforcement officers was high is likewise irrelevant. It is even less relevant than Congress's finding because it refers to "semiautomatic weapons" generally and makes no link to the Banned Rifles specifically. In any event, the notion that criminals prefer the Banned Rifles is belied by the record. Rifles generally account for a small fraction of gun crime, meaning that the Banned Rifles account for even less, at most 8% according to the State itself. E.R.II 82.

ii. The State's statistics concerning Banned Rifle use in mass shootings are irrelevant and unreliable.

The rate of "assault weapon" use in mass shootings is irrelevant for the same reasons their supposed use in other crimes is, as explained above. What's more, the district court's analysis exaggerated both their use in such shootings and their impact on casualties when used. The court concluded that the State's evidence "strongly suggests" that Banned Rifles "are disproportionately used in mass shootings" and "when they are used, more people are injured and killed." E.R.I 25. It found relevant that Banned Rifles were used in 26 of 109 public mass shootings examined by the State's expert, Lucy Allen. E.R.I 20. It also relied on Allen to conclude that, when an "assault weapon" is used in a mass shooting, more casualties result. E.R.I 20.

As an initial matter, even assuming Allen's findings were accurate, they do not bear on the constitutional analysis here because "the relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes." *Caetano*, 136 S. Ct. at 1031 (Alito, J., concurring). Indeed, *Heller* disregarded the fact that handguns are overwhelmingly used in crime. 554 U.S. at 636. Setting that aside, Allen's findings are unreliable, and the district court erred in relying on them.

The district court acknowledged, but unceremoniously dismissed, Appellants' concerns about the source of Allen's underlying data being *Mother Jones*. E.R.I 20. The court pointed to other courts having rejected objections to Allen's use of *Mother Jones*. E.R.I 20. But some courts have gone the other way, discounting Allen's analysis expressly because it relies on *Mother Jones*. *See Duncan*, 366 F. Supp. 3d at 1162, n.46

(explaining that courts have criticized this source: "Mother Jones has changed its definition of a mass shooting over time, setting a different minimum number of fatalities or shooters, and may have omitted a significant number of mass shooting incidents."); *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 113 (3d Cir. 2018); *see also Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Grewal*, No. 17-cv-10507, 2018 WL 4688345, at *5 (D. N.J. Sept. 28, 2018) (state's expert, Lucy Allen, admitted that the *Mother Jones* survey omitted 40% of mass shooting cases).

The district court wholly ignores those other courts' concerns, as well as Appellants' additional ones. That the *Mother Jones* analysis, and thus Allen's, omits a significant number, if not the majority of mass shootings, by only looking at *public* mass shootings (excluding those occurring in private places) is a major problem because it skews the prevalence and impact of "assault weapon" use in mass shootings. E.R.II 165-66. A Congressional Research Service study found that only 9.78% of all mass shootings involved an "assault weapon". E.R.II 166. Yet, by narrowly focusing on the small subset of *public* mass shootings, a subset of an already rare event, Allen misleadingly inflates that figure by more than double. E.R.II 166. Allen justifies limiting her analysis to *public* mass shootings by citing her understanding that California enacted the AWCA "in part" to address such shootings. E.R.II 165, E.R.V 622. But Allen cites to nothing in the AWCA or its legislative history suggesting California's focus was so limited. E.R.II 165.

Even under Allen's exaggerated version of facts, a Banned Rifle was used in less than a quarter of the *public* mass shootings she examined. E.R. E.R.I 20 (26 of 109 shootings). To conclude that Banned Rifles "are disproportionately used in mass

shootings," as the district court did, E.R.I 25, based on those figures is speculative at best. This is especially true considering that the State admits it does not know the proportion of Banned Rifles and thus, by definition, cannot determine disproportionate use. E.R.II 46-47; E.R.X 1888.

In any event, Allen's reliance on *Mother Jones* is only one problematic aspect of her analysis. Another one of the State's expert witnesses, Los Angeles Police Department Detective Michael Mersereau, testified that there is an "expertise needed to determine whether a weapon is actually an assault weapon" under the AWCA, one that even plenty of his fellow officers lack. E.R.VIII 1191-95; Pls.' Mem. Supp. Mot. to Exclude Lucy Allen at 5-6, ECF No. 103-1 ("Mot. to Exclude Allen"); Decl. of Sean A. Brady Supp. Pls.' Mot. to Exclude Lucy Allen, ECF No. 103-2 ("Brady Decl."), Exs. 3-4. Yet Allen claims to have conducted research to corroborate *Mother Jones*' findings, even though she admits her knowledge of firearm technicalities is limited and cannot say whether her research team had any such knowledge. Pls.' Mot. to Exclude Allen at 5-6; Brady Decl., Ex. 2 at 10:1-6, 11:15-17, 33:13-16.

Uniquely fatal to Allen's analysis is the fact that she included in the "assault rifle" category of mass shooting victims individuals who were shot by a non-"assault rifle" as long as the shooter used an "assault rifle" at some point during the shooting. E.R.XVI 3235-44. Not only does this approach artificially inflate the number of "assault rifle" casualties, it simultaneously artificially reduces the number of non-"assault rifle" casualties by keeping them in the "assault rifle" category. This double impact dooms Allen's entire analysis, even assuming it is relevant. Without segregating out which weapon caused an individual death, all of Allen's findings on the average

number of casualties associated with each category of weapon in mass shootings are irreparably contaminated and unreliable. To illustrate the problem, the Aurora theater shooter used an "assault rifle," a shotgun, and a handgun. Brady Decl., Ex. 1, appx. B at 2, appx. C at 5. Despite some victims in that shooting having been injured or killed by a shotgun or handgun, Allen nevertheless counted them as "assault rifle" victims. E.R.V 608. This problem is not an isolated incident, but rather indicative of Allen's entire analysis. Of the 27 shootings involving an "assault rifle" that Allen analyzed, 19 of them involved the shooter using other non-"assault rifle" firearms. Brady Decl., Ex. 1, appx. B & C.

The district court did not address any of these criticisms. Instead, it generally dismissed any issue with Allen's analysis, asserting that it did not even need it to find that Banned Rifles are problematic in mass shootings because other evidence is sufficient. E.R.I 20. But the district court relies entirely on unvetted, inadmissible evidence from amici supporting the State and other courts that have improperly accepted that same evidence. *See In re Oracle Corp. Securities Litig.*, 627 F.3d 376, 385 (9th Cir. 2010) ("A district court's ruling on a motion for summary judgment may only be based on admissible evidence.").[11] The amicus brief is based on hearsay, compiled by an organization critical of firearm ownership, and is of highly questionable reliability even on its own terms.

[11] Despite the district court noting the Attorney General provided additional evidence on this issue, none is cited. E.R.I 20.

In sum, the premise that use of a Banned Rifle in a mass shooting causes more casualties is not supported by any reliable evidence, but is based on speculation.

iii. Assertions that Banned Rifles cause more or greater wounds are demonstrably wrong.

The district court nevertheless attributed a perceived increased casualty rate in mass shootings involving Banned Rifles to its finding that "[g]unshot wounds from assault rifles, such as AR-15s and AK-47s, tend to be higher in complexity with higher complication rates than such injuries from non-assault weapons, increasing the likelihood of morbidity in patients that present injuries from assault rifles." E.R.I 21. The premise that the Banned Rifles cause worse wounds is objectively and demonstrably wrong. It cannot be disputed that the characteristics used in this matter to define an "assault weapon" have nothing to do with the velocity at which the weapon launches a projectile. E.R.II 114. Indeed, except for barrel design, "the firearm does not alter muzzle velocity or what effect a projectile has on an object upon impact." E.R.II 114.

Because barrel design is irrelevant as to whether a rifle falls under the "assault weapon" definition, as a matter of law, the claim that "assault weapons" cause more damage than non-"assault weapons" is objectively false. For a non-"assault weapon" rifle (e.g., an AR-platform rifle *without* Enumerated Features) having an identical barrel to and firing the identical cartridge as an "assault weapon" will have virtually the same effect on a target upon impact. E.R.II 114; E.R.X 1741.

For the same reason, the district court's finding that the Banned Rifles have "four times the muzzle velocity of a handgun round" and that rounds from one "can

penetrate the body armor worn by police that is designed to stop common handgun rounds" is irrelevant. E.R.I 21-22. That is the case for virtually all centerfire rifles, regardless of whether they have the features that qualify them as "assault weapons." E.R.II 114. Curiously, the district court observed that "Plaintiffs argued at the hearing, with no evidentiary support, that shots fired from semiautomatic rifles are no more powerful than shots fired from standard rifles," calling it an "unsupported assertion." E.R.I 22. Setting aside that the court did not explain what a "standard rifle" is, nor is that term defined anywhere in the law or briefing, the record before the district court shows that the features that make a rifle an "assault weapon" have zero impact on what a bullet does. E.R.II 113-15, E.R.X 1741, 1763. Nor do Banned Rifles use unique ammunition; a single-shot rifle chambered in the same caliber uses the same ammunition and would shoot identically, or more powerfully, if the barrel is longer. E.R.II 115-16, E.R.X 1741. Indeed, that shots fired from a semiautomatic firearm are no more powerful than shots fired from a non-semiautomatic firearm using the same ammunition is an indisputable matter of physics. E.R.II 113-15, E.R.X 1741.

The district court says even granting Appellants that fact—which it must—it would not change anything because "semiautomatic weapons fire more bullets at faster rates, and thus inflict greater and more complex damage than a standard rifle." E.R.I 22. But again, just as the features that make a rifle an "assault weapon" have no impact on muzzle velocity, nor do they have any effect on how many bullets a rifle can fire or at what rate they are fired. E.R.II 158, E.R.X 1763-68. A semiautomatic rifle with a detachable magazine that lacks the "assault weapon" features—and thus is not a Banned Rifle—can fire just as many (or more with a larger magazine) rounds

and at the identical rate as a Banned Rifle. E.R.II 158, E.R.X 1763-68. Thus, it is simply false that "assault weapons" fire more bullets at a far faster rate than a "standard rifle," whatever that is.

iv. Restricting the Enumerated Features does not further the State's interests.

There is little dispute among the parties about what the Enumerated Features do—although "flash suppressors" do *not*, by definition, help conceal a shooter's position, as the district court found. E.R.I 23. There is agreement that those features increase accuracy and control of a rifle. E.R.IX 1590, 1604. They make a rifle more comfortable or easier for a user to operate, facilitating its safe and effective operation. E.R.IX 1589-90, 1603-04. What is in dispute, however, is the impact the features have on a rifle's capacity to inflict harm—assuming that is even relevant here, which it is not. The district court exaggerates the relevancy of the Enumerated Features, as if criminal shooters would not be able to inflict the same level of harm without them. There is no study or even anecdotal evidence cited to in the record showing how the features played a specific role in worsening any specific shooting. Detective Mersereau, the State's expert, could not specify how any Enumerated Feature was responsible for increasing the number of casualties in any particular shooting. Pls.' Mem. Supp. Mot. to Exclude Det. Michael Mersereau at 3-4, ECF No. 106-1.

In short, there is simply no evidence suggesting that a lack of the Enumerated Features would have made a difference in any mass shooting.

v. Experience with the federal "assault weapon" ban does not support the State's position.

Finally, the district court's conclusion that "bans on assault weapons *appear* to be effective means for reducing violence" is by definition sheer speculation. E.R.I 23 (emphasis added). The only example of such an "effective" law that the court cited is the now-expired federal ban. E.R.I 23. But, as Appellants explained in their briefing, this is not what the best available evidence indicates. E.R.II 51. A Department of Justice study commissioned by the Clinton administration to study the effects of that law concluded, ten years after it was imposed, that "there [had been] no discernible reduction in the lethality and injuriousness of gun violence." E.R.XIII 2539. Indeed, "[t]here was no evidence that lives were saved [and] no evidence that criminals fired fewer shots during gun fights." E.R.II 82. The study's authors declared that they could not "clearly credit the ban with any of the nation's recent drop in gun violence," E.R.XIII 2639, and that, "[s]hould it be renewed, the ban's effects on gun violence are likely to be small at best and perhaps too small for reliable measurement," E.R.II 82, XIII 2546.

The district court discounted those factual aspects of the study, deciding instead to focus on its admonitions that it was premature to form conclusions about the ban's impact on gun crime. E.R.I 23. But it is the State's burden to prove that a law works. Those qualifiers about the study's limitation do nothing to help the State meet its burden. The district court also chose to give more weight to a subsequent report by that study's author saying the federal ban "*may have* had preventive effects on gunshot victimization." E.R.I 23 (emphasis added). But that is the epitome of speculation.

The district court also ignored additional evidence Appellants provided that supports the conclusion that the federal ban did not work in the form of a recent study released by Boston University, an undisputedly neutral third party. In that report, researchers concluded that "assault weapon" bans have no significant impact on homicide or suicide rates. E.R.IX 1472-79; *see also* E.R.VIII 1299-1301 (one of the study's authors explaining that "assault weapon" bans do not have any substantial impact on homicide rates and "are most often based on characteristics of guns that are not directly tied to their lethality." The district court apparently found more relevant amici curiae briefs from patently biased gun control groups supporting "assault weapon" bans than a university study conducted by researchers who the State's own expert has relied on. E.R.I 20.[12]

Finally, the district court's assertion that Appellants' expert Professor Kleck admits that the criminal use of "assault weapons" was reduced during the federal ban omits the point he was making, which was while rifles meeting the technical definition of "assault weapon" were not being used as much during the ban, virtually identical rifles were still being used (e.g., an AR-platform missing a flash suppressor and adjustable stock). That says nothing about the reduction of crime generally. For good reason, the notion that such a slight change to a rifle would create a measurable decrease in overall crime is implausible and likely impossible to discern.

[12] The State's expert witness, John Donohue, heavily cites to two of the study's co-authors in his own works. *See* John J. Donohue, *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and A State-Level Synthetic Control Analysis*, Nat'l Bur. of Econ. Research, https://www.nber.org/papers/w23510 (Nov. 2018) (citing works by Michael Siegal and David Hemenway).

In sum, California's speculation that the AWCA's rifle ban furthers public safety is more wishful thinking than justification and cannot save its intrusion on the rights of law-abiding, responsible citizens to defend themselves, their families, and their homes with constitutionally protected firearms.

* * *

Appellants "do not take lightly the problem of gun violence," *Young v. Hawaii*, 896 F.3d 1044, 1074 (9th Cir. 2018), or seek to foreclose the State from regulating Second Amendment rights in a manner consistent with the Constitution. "But the enshrinement of constitutional rights necessarily takes certain policy choices off the table," *Heller*, 554 U.S. at 634-65, and depriving ordinary, law-abiding citizens of their right to access arms that are overwhelmingly chosen for self-defense and other lawful purposes is one of them. Because the AWCA's rifle ban does just that, it is unconstitutional.

CONCLUSION

For all these reasons, Appellants request that this Court reverse the judgment of the district court and declare unconstitutional California Penal Code sections 30510(a), 30515(a)(1)(A)-(C), (E)-(F), 30515(a)(3), 30520, 30600, 330605, 30925, and 30945, along with California Code of Regulations, title 11, section 5499.

Dated: January 27, 2020

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ADDENDUM

ADDENDUM

U.S. Const. amend. II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Cal. Penal Code § 30510

As used in this chapter and in Sections 16780, 17000, and 27555, "assault weapon" means the following designated semiautomatic firearms:

(a) All of the following specified rifles:
- (1) All AK series including, but not limited to, the models identified as follows:
  - (A) Made in China AK, AKM, AKS, AK47, AK47S, 56, 56S, 84S, and 86S.
  - (B) Norinco 56, 56S, 84S, and 86S.
  - (C) Poly Technologies AKS and AK47.
  - (D) MAADI AK47 and ARM.
- (2) UZI and Galil.
- (3) Beretta AR-70.
- (4) CETME Sporter.
- (5) Colt AR-15 series.
- (6) Daewoo K-1, K-2, Max 1, Max 2, AR 100, and AR 110C.
- (7) Fabrique Nationale FAL, LAR, FNC, 308 Match, and Sporter.
- (8) MAS 223.
- (9) HK-91, HK-93, HK-94, and HK-PSG-1.
- (10) The following MAC types:
  - (A) RPB Industries Inc. sM10 and sM11.
  - (B) SWD Incorporated M11.
- (11) SKS with detachable magazine.
- (12) SIG AMT, PE-57, SG 550, and SG 551.
- (13) Springfield Armory BM59 and SAR-48.
- (14) Sterling MK-6.
- (15) Steyer AUG.
- (16) Valmet M62S, M71S, and M78S.
- (17) Armalite AR-180.
- (18) Bushmaster Assault Rifle.
- (19) Calico M-900.
- (20) J&R ENG M-68.
- (21) Weaver Arms Nighthawk.

(b) All of the following specified pistols:
- (1) UZI.
- (2) Encom MP-9 and MP-45.

(3) The following MAC types:
(A) RPB Industries Inc. sM10 and sM11.
(B) SWD Incorporated M-11.
(C) Advance Armament Inc. M-11.
(D) Military Armament Corp. Ingram M-11.
(4) Intratec TEC-9.
(5) Sites Spectre.
(6) Sterling MK-7.
(7) Calico M-950.
(8) Bushmaster Pistol.

(c) All of the following specified shotguns:
(1) Franchi SPAS 12 and LAW 12.
(2) Striker 12.
(3) The Streetsweeper type S/S Inc. SS/12.

(d) Any firearm declared to be an assault weapon by the court pursuant to former Section 12276.5, as it read in Section 3 of Chapter 19 of the Statutes of 1989, Section 1 of Chapter 874 of the Statutes of 1990, or Section 3 of Chapter 954 of the Statutes of 1991, which is specified as an assault weapon in a list promulgated pursuant to former Section 12276.5, as it read in Section 3 of Chapter 954 of the Statutes of 1991.

(e) This section is declaratory of existing law and a clarification of the law and the Legislature's intent which bans the weapons enumerated in this section, the weapons included in the list promulgated by the Attorney General pursuant to former Section 12276.5, as it read in Section 3 of Chapter 954 of the Statutes of 1991, and any other models that are only variations of those weapons with minor differences, regardless of the manufacturer. The Legislature has defined assault weapons as the types, series, and models listed in this section because it was the most effective way to identify and restrict a specific class of semiautomatic weapons.

(f) As used in this section, "series" includes all other models that are only variations, with minor differences, of those models listed in subdivision (a), regardless of the manufacturer.

Cal. Penal Code § 30515

(a) Notwithstanding Section 30510, "assault weapon" also means any of the following:
(1) A semiautomatic, centerfire rifle that does not have a fixed magazine but has any one of the following:
(A) A pistol grip that protrudes conspicuously beneath the action of the weapon.
(B) A thumbhole stock.
(C) A folding or telescoping stock.
(D) A grenade launcher or flare launcher.
(E) A flash suppressor.
(F) A forward pistol grip.
(2) A semiautomatic, centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds.
(3) A semiautomatic, centerfire rifle that has an overall length of less than 30 inches.
(4) A semiautomatic pistol that does not have a fixed magazine but has any one of the following:
(A) A threaded barrel, capable of accepting a flash suppressor, forward handgrip, or silencer.
(B) A second handgrip.
(C) A shroud that is attached to, or partially or completely encircles, the barrel that allows the bearer to fire the weapon without burning the bearer's hand, except a slide that encloses the barrel.
(D) The capacity to accept a detachable magazine at some location outside of the pistol grip.

(5) A semiautomatic pistol with a fixed magazine that has the capacity to accept more than 10 rounds.
(6) A semiautomatic shotgun that has both of the following:
(A) A folding or telescoping stock.
(B) A pistol grip that protrudes conspicuously beneath the action of the weapon, thumbhole stock, or vertical handgrip.
(7) A semiautomatic shotgun that has the ability to accept a detachable magazine.
(8) Any shotgun with a revolving cylinder.

(b) For purposes of this section, "fixed magazine" means an ammunition feeding device contained in, or permanently attached to, a firearm in such a manner that the device cannot be removed without disassembly of the firearm action.

(c) The Legislature finds a significant public purpose in exempting from the definition of "assault weapon" pistols that are designed expressly for use in Olympic target shooting events. Therefore, those pistols that are sanctioned by the International Olympic Committee and by USA Shooting, the national governing body for international shooting competition in the United States, and that were used for Olympic target shooting purposes as of January 1, 2001, and that would otherwise fall within the definition of "assault weapon" pursuant to this section are exempt, as provided in subdivision (d).

(d) "Assault weapon" does not include either of the following:
(1) Any antique firearm.
(2) Any of the following pistols, because they are consistent with the significant public purpose expressed in subdivision (c):

MANUFACTURER	MODEL	CALIBER
BENELLI	MP90	.22LR
BENELLI	MP90	.32 S&W LONG
BENELLI	MP95	.22LR
BENELLI	MP95	.32 S&W LONG
HAMMERLI	280	.22LR
HAMMERLI	280	.32 S&W LONG
HAMMERLI	SP20	.22LR
HAMMERLI	SP20	.32 S&W LONG
PARDINI	GPO	.22 SHORT
PARDINI	GP-SCHUMANN	.22 SHORT
PARDINI	HP	.32 S&W LONG
PARDINI	MP	.32 S&W LONG
PARDINI	SP	.22LR
PARDINI	SPE	.22LR
WALTHER	GSP	.22LR
WALTHER	GSP	.32 S&W LONG
WALTHER	OSP	.22 SHORT
WALTHER	OSP-2000	.22 SHORT

(3) The Department of Justice shall create a program that is consistent with the purposes stated in subdivision (c) to exempt new models of competitive pistols that would otherwise fall within the definition of "assault weapon" pursuant to this section from being classified as an assault weapon. The exempt competitive pistols may be based on recommendations by USA Shooting consistent with the regulations contained in the USA Shooting Official Rules or may be based on the recommendation or rules of any other organization that the department deems relevant.

Cal. Penal Code § 30520

(a) The Attorney General shall prepare a description for identification purposes, including a picture or diagram, of each assault weapon listed in Section 30510, and any firearm declared to be an assault weapon pursuant to former Section 12276.5, as it read in Section 3 of Chapter 19 of the Statutes of 1989, Section 1 of Chapter 874 of the Statutes of 1990, or Section 3 of Chapter 954 of the Statutes of 1991, and shall distribute the description to all law enforcement agencies responsible for enforcement of this chapter. Those law enforcement agencies shall make the description available to all agency personnel.

(b)

(1) Until January 1, 2007, the Attorney General shall promulgate a list that specifies all firearms designated as assault weapons in former Section 12276, as it read in Section 2 of Chapter 954 of the Statutes of 1991, Section 134 of Chapter 427 of the Statutes of 1992, or Section 19 of Chapter 606 of the Statutes of 1993, or declared to be assault weapons pursuant to former Section 12276.5, as it read in Section 3 of Chapter 19 of the Statutes of 1989, Section 1 of Chapter 874 of the Statutes of 1990, or Section 3 of Chapter 954 of the Statutes of 1991. The Attorney General shall file that list with the Secretary of State for publication in the California Code of Regulations. Any declaration that a specified firearm is an assault weapon shall be implemented by the Attorney General who, within 90 days, shall promulgate an amended list which shall include the specified firearm declared to be an assault weapon. The Attorney General shall file the amended list with the Secretary of State for publication in the California Code of Regulations. Any firearm declared to be an assault weapon prior to January 1, 2007, shall remain on the list filed with the Secretary of State.

(2) Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, pertaining to the adoption of rules and regulations, shall not apply to any list of assault weapons promulgated pursuant to this section.

(c) The Attorney General shall adopt those rules and regulations that may be necessary or proper to carry out the purposes and intent of this chapter.

Cal. Penal Code § 30600

(a) Any person who, within this state, manufactures or causes to be manufactured, distributes, transports, or imports into the state, keeps for sale, or offers or exposes for sale, or who gives or lends any assault weapon or any .50 BMG rifle, except as provided by this chapter, is guilty of a felony, and upon conviction shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for four, six, or eight years.

(b) In addition and consecutive to the punishment imposed under subdivision (a), any person who transfers, lends, sells, or gives any assault weapon or any .50 BMG rifle to a minor in violation of subdivision (a) shall receive an enhancement of imprisonment pursuant to subdivision (h) of Section 1170 of one year.

(c) Except in the case of a first violation involving not more than two firearms as provided in Sections 30605 and 30610, for purposes of this article, if more than one assault weapon or .50 BMG rifle is involved in any violation of this article, there shall be a distinct and separate offense for each.

Cal. Penal Code § 330605

(a) Any person who, within this state, possesses any assault weapon, except as provided in this chapter, shall be punished by imprisonment in a county jail for a period not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170.

(b) Notwithstanding subdivision (a), a first violation of these provisions is punishable by a fine not exceeding five hundred dollars ($500) if the person was found in possession of no more than two firearms in compliance with Section 30945 and the person meets all of the following conditions:

(1) The person proves that he or she lawfully possessed the assault weapon prior to the date it was defined as an assault weapon.
(2) The person has not previously been convicted of a violation of this article.
(3) The person was found to be in possession of the assault weapon within one year following the end of the one-year registration period established pursuant to Section 30900.
(4) The person relinquished the firearm pursuant to Section 31100, in which case the assault weapon shall be destroyed pursuant to Sections 18000 and 18005.

Cal. Penal Code § 30925

A person moving into this state, otherwise in lawful possession of an assault weapon, shall do one of the following:

(a) Prior to bringing the assault weapon into this state, that person shall first obtain a permit from the Department of Justice in the same manner as specified in Article 3 (commencing with Section 32650) of Chapter 6.

(b) The person shall cause the assault weapon to be delivered to a licensed gun dealer in this state in accordance with Chapter 44 (commencing with Section 921) of Title 18 of the United States Code and the regulations issued pursuant thereto. If the person obtains a permit from the Department of Justice in the same manner as specified in Article 3 (commencing with Section 32650) of Chapter 6, the dealer shall redeliver that assault weapon to the person. If the licensed gun dealer is prohibited from delivering the assault weapon to a person pursuant to this section, the dealer shall possess or dispose of the assault weapon as allowed by this chapter.

Cal. Penal Code § 30945

Unless a permit allowing additional uses is first obtained under Section 31000, a person who has registered an assault weapon or registered a .50 BMG rifle under this article may possess it only under any of the following conditions:

(a) At that person's residence, place of business, or other property owned by that person, or on property owned by another with the owner's express permission.

(b) While on the premises of a target range of a public or private club or organization organized for the purpose of practicing shooting at targets.

(c) While on a target range that holds a regulatory or business license for the purpose of practicing shooting at that target range.

(d) While on the premises of a shooting club that is licensed pursuant to the Fish and Game Code.

(e) While attending any exhibition, display, or educational project that is about firearms and that is sponsored by, conducted under the auspices of, or approved by a law enforcement agency or a nationally or state recognized entity that fosters proficiency in, or promotes education about, firearms.

(f) While on publicly owned land, if the possession and use of a firearm described in Section 30510, 30515, 30520, or 30530, is specifically permitted by the managing agency of the land.

(g) While transporting the assault weapon or .50 BMG rifle between any of the places mentioned in this section, or to any licensed gun dealer, for servicing or repair pursuant to Section 31050, if the assault weapon is transported as required by Sections 16850 and 25610.

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2020, an electronic PDF of APPELLANTS' OPENING BRIEF was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

Dated: January 27, 2020

Respectfully submitted,

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