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 United States District Court for the
Central District of California
No. 8:17-cv-00746-JLS-JDE
Honorable Josephine L. Staton, United States District Judge

BRIEF OF *AMICUS CURIAE* PINK PISTOLS IN SUPPORT OF PLAINTIFFS-APPELLANTS AND IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1(a) and FED. R. APP. P. 29(a)(4)(A), Amicus Curiae Pink Pistols submits the following disclosure statement:

Pink Pistols is a nonprofit organization that has no parent corporations, but is affiliated with Operation Blazing Sword, Inc., which is a nonprofit association. Since neither has any stock, no publicly held company owns 10% or more of its stock.

Dated: February 3, 2020

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INTEREST OF AMICUS CURIAE

Pink Pistols is a shooting society that honors gender and sexual diversity and advocates the responsible use of firearms for self-defense. It represents members of the Lesbian, Gay, Bisexual or Transgender community ("LGBT"), who are disproportionately the victims of hate crimes and other types of violence. Its creed is that, "without self-defense, there are no gay rights." Although it is the largest LGBT self-defense organization in the world, with thousands of members and chapters throughout the United States and Canada, Pink Pistols is open to all without regard to gender identity or sexual orientation.

The parties have consented to the filing of this brief. This brief was not authored in whole or in part by a party's counsel, a party or a party's counsel has not contributed money that was intended to fund preparing or submitting this brief, and no person other than amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The Framers adopted the Second Amendment with the understanding that securing the People's right to self-defense is an essential component of "protecting against both public and private violence." *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008). This fundamental truth has withstood the test of time, and few today understand it better than members of the LGBT community. Discrimination

against this group is rampant, and they face rising rates of violent hate crimes. LGBT individuals need to be able to arm themselves from the malicious perpetrators who would do them harm. Armed queers don't get bashed.

But California's so-called Assault Weapons Control Act (the "AWCA") unconstitutionally deprives LGBT individuals and other law-abiding citizens of their Second Amendment right to own America's most popular semiautomatic rifles for self-defense. The AWCA is misnamed because "assault weapon" is "a political term, developed by anti-gun publicists" to advance their political agenda. *See Stenberg v. Carhart*, 530 U.S. 914, 1001 n.16 (2000) (Thomas, J., dissenting). It was contrived to demonize civilian, semiautomatic firearms that "traditionally have been widely accepted as lawful possessions." *Staples v. United States*, 511 U.S. 600, 612 (1994). We therefore will not use California's tendentious terminology but will call the law what it is—a ban on semiautomatic rifles.

The AWCA is unconstitutional because it completely bans ownership of arms that are in " 'common use' . . . for lawful purposes like self-defense." *See Heller*, 554 U.S. at 624. And this infringement of citizens' right to self-defense is particularly egregious because it ban arms for protection inside the home. *See id*. at 628; *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010). The arms banned by the AWCA easily meet the "common use" test, as semiautomatic rifles are immensely popular. Indeed, the banned AR-15 rifle is the best-selling rifle in the

Nation. This popularity is well-justified, as the features that distinguish AR-15s from other semiautomatic rifles enhance the user's ability to control them—in other words, to fire them accurately, easily, *and* safely. Perversely, "that the rifles are more accurate and easier to control *is precisely why California has chosen to ban them*." *Rupp v. Becerra*, 401 F. Supp. 3d 978, 993 (C.D. Cal. 2019) (emphasis added). California's flawed reasoning (adopted by the district court) with respect to the advantages of AR-15s and similar semiautomatic rifles is directly at odds with the Supreme Court's reasoning in *Heller* regarding handguns:

> There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police.

Heller, 554 U.S. at 629.

Thus, the Supreme Court in *Heller* reasoned that the greater ease of use of handguns is a reason that cuts *against* banning them, the exact opposite line of reasoning taken by California with respect to AR-15s and other imaginary "assault weapons." Just as handguns have desirable features that make them easier for law-abiding citizens to use for legitimate purposes, AR-15s and similar semiautomatic rifles have desirable features that make them easier and safer for law-abiding citizens to use than other firearms that lack such features. Just as handguns are considered the "quintessential self-defense weapon" in the United States, *Heller*,

554. U.S. at 629, the AR-15 and similar rifles have become America's "quintessential" long gun and are justifiably in common use throughout the Nation. California's AWCA ignores this reality and thus blatantly violates the Second Amendment.

Finally, there is no evidence that bans like California's advance the State's purported public safety interest. Indeed, it has been known for *centuries* that laws restricting the use of firearms make law-abiding citizens *more vulnerable* to the armed criminals who will flout the law and continue to use the restricted arms (or substitutes) in their crimes. As the influential 18-century Italian criminologist Cesare Beccaria understood, such laws therefore make "the situation of the assaulted worse, and of the assailants better, and rather encourages than prevents murder." *See* Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right To Bear Arms*, 49 LAW & CONTEMP. PROBS. 151, 154 (1986) (quoting Beccaria, *An Essay on Crimes and Punishments* 160-62 (1775)). This ancient wisdom is verified by modern social science. Analyses of the now-expired federal semiautomatic rifle ban reveal that it had no discernible impact on firearm violence. Contrary to California's alleged goals, the AWCA only serves to *undermine* public safety by disarming law-abiding, vulnerable citizens such as Pink Pistols members.

ARGUMENT

I. The Right to Bear Arms Is Especially Important for Those Who Are Particularly at Risk for Targeted Violence.

a. The AWCA will impair self-defense.

The AWCA unconstitutionally violates citizens' Second Amendment right to self-defense by banning America's most popular semiautomatic rifles. This violation is especially egregious to the LGBT community, which is particularly vulnerable to hate crimes and targeted violence.

The Supreme Court has unequivocally stated that "individual self-defense is 'the *central component*' of the Second Amendment right." *McDonald*, 561 U.S. at 767 (quoting *Heller*, 554 U.S. at 599). This is just as true today as it was at the founding. And the importance of the right to "individual self-defense is most evident in "the home, where the need for defense of self, family, and property is most acute." *Heller*, 554 U.S. at 599, 628. Indeed, *Heller* explains that the Second Amendment "elevates *above all other interests* the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635 (emphasis added). *McDonald*, in turn, confirmed that law-abiding citizens have an absolute right to possess protected arms in the home: because the Court in *Heller* "found that [the Second Amendment] right applies to handguns," *McDonald* explains, it concluded that "citizens *must* be permitted 'to use [handguns] for the

core lawful purpose of self-defense.' " *McDonald*, 561 U.S. at 767 (quoting *Heller*, 554 U.S. at 630) (emphasis added).

Heller also establishes the test for determining which arms are protected: those in " 'common use' . . . for lawful purposes like self-defense." *Heller*, 554 U.S. at 624. What is important is *that* law-abiding citizens choose to use certain firearms for lawful purposes, not *why* they make that choice. While *Heller* noted that "[t]here are many reasons that a citizen may prefer a handgun for home defense," the dispositive point was that, "[*w*]*hatever the reason*," handguns are commonly chosen by Americans for self-defense in the home. *Id*. at 629 (emphasis added). Thus, "the pertinent Second Amendment inquiry" in a case like this one "is whether [the arms in question] are commonly possessed by law-abiding citizens for lawful purposes *today*." *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1032–33 (2016) (Alito, J., concurring). If the answer is yes, a "categorical ban of such weapons therefore violates the Second Amendment," full stop. *Id.*; *see Ramirez v. Commonwealth*, 94 N.E.3d 809, 815 (Mass. 2018); *People v. Webb*, 2019 IL 122951, ¶ 21 (Ill. 2019).

Despite this clear guidance from the Supreme Court, the district court refused to acknowledge that the AWCA deprives law-abiding citizens of their Second Amendment rights by *completely* banning—even inside the home—firearms commonly used for protection. Instead, the court erroneously concluded it

need not consider the usage of semiautomatic rifles for self-defense because these arms are, in the court's estimation, "essentially indistinguishable from M-16s, which *Heller* noted could be banned pursuant to longstanding prohibitions on dangerous and usual [*sic*] weapons." *Rupp*, 401 F. Supp. 3d at 986. And, in wrongly applying intermediate scrutiny, the court stepped into the shoes of law-abiding citizens and inappropriately considered whether semiautomatic rifles are *truly necessary* for their self-defense. It concluded that the AWCA "does not severely burden the core of the Second Amendment right" because it "leaves individuals with myriad options for self-defense—including the handgun, the 'quintessential' self-defense weapon per *Heller*." *Id.* at 989 (quotation marks omitted). The court further justified its determination by uncritically accepting the State's inaccurate contention that semiautomatic rifles "are ill-suited for self-defense," and citing data showing that while many individuals purchase these arms for self-defense, according to a dealer survey personal protection is not the *primary* reason a majority of buyers purchase them. *See id.* (noting that 30% of semiautomatic rifles were sold for self-defense purposes in 2016). Of course, even if the dealers were correct that 70% of buyers did not purchase these arms primarily for self-defense, it does not follow that self-defense was not *a* purpose for the purchase. Indeed, in another survey in the record semiautomatic rifle owners rated the importance of home defense at 8.15 out of 10 as a reason for their

ownership, second only to recreational target shooting at 8.99. *See* Ex. 23 to Decl. of Sean A. Brady in Supp. of Pls.' Mot. for Summ. J., Doc. 78-8 at 37, *Rupp v. Becerra,* No. 17-00746 (C.D. Cal. Mar. 25, 2019). The popularity of semiautomatic rifles for self-defense is unsurprising, as they are more stable, easier to handle, and more accurate than handguns, making them a better fit for self-defense. AR-15s wielded by law-abiding citizens have saved lives across the country. *See Protecting America from Assault Weapons: Hearing before the H. Comm. on the Judiciary,* 116th Cong. 9 n.32 (2019) [hereinafter *Hearing*] (testimony of Amy E. Swearer), https://bit.ly/37QUiHY.

b. This infringement especially endangers LGBT individuals.

The lower court's refusal to recognize that the AWCA unconstitutionally infringes upon citizens' right to use semiautomatic rifles for self-defense involves more than a legal precedent—it has serious, real-world consequences for people needing protection. Upholding the AWCA especially endangers LGBT individuals, who desperately need effective means to protect themselves from targeted, pervasive violence. In fact, the Supreme Court has acknowledged that the right to self-defense is particularly important for vulnerable populations. In *McDonald*, the Court cited Pink Pistols' amicus brief in noting:

> *Amici* supporting incorporation of the right to keep and bear arms contend that the right is especially important for women and members of other groups that may be especially vulnerable to violent crime. If,

> as petitioners believe, their safety and the safety of other law-abiding members of the community would be enhanced by the possession of handguns in the home for self-defense, then the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials.

McDonald, 561 U.S. at 790. One need not impugn the government's good faith efforts to protect the public to acknowledge that the police cannot always be everywhere. But fortunately the Second Amendment's embrace of armed self-defense is a signature feature of the American culture of self-reliance. The Court recognized these truths in *McDonald* by aptly noting that the Second Amendment provides vulnerable groups the means to protect themselves when law enforcement cannot. *See id*. Among such communities are LGBT individuals, who are especially susceptible to predatory violence based on discriminatory animus. But a gun is the great equalizer.

Discrimination against LGBT individuals is rampant, a fact highlighted by the appalling number of hate crimes perpetrated against this group every year. In 2013, the FBI reported that more than one-fifth of all hate crimes were driven by hostility based on sexual orientation, which made this category of hate crimes second in prevalence only to crimes based on racism. *See 2013 Hate Crime Statistics: Incidents and Offenses*, FBI: UNIFORM CRIME REPORTING PROGRAM, https://bit.ly/2N2oZly. Moreover, incidents motivated by sexual orientation or gender identity bias were consistently reported near this rate relative to other hate

crimes from 2014 to 2018.[1] In 2018, the reported number of hate crimes targeting the LGBT community totaled 1,347, an increase of nearly 10% from the 1,217 reported in 2017. *See 2017 Hate Crime Statistics: Incidents and Offenses*, FBI: UNIFORM CRIME REPORTING PROGRAM, https://bit.ly/39Pf4tj; *2018 Hate Crime Statistics: Incidents and Offenses*, FBI: UNIFORM CRIME REPORTING PROGRAM, https://bit.ly/36A8TaP. And these alarming totals are unlikely to provide the full picture, as many hate crimes go unreported.

In 2016, there were 77 reports of hate-violence-related homicides of LGBT people—the highest number ever recorded and more than triple the death toll for the year before. *See A Crisis of Hate: A Report on Homicides Against Lesbian, Gay, Bisexual and Transgender People,* NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS (2018) at 6, https://bit.ly/35FECWR. There also "appears to be a trend of targeting queer, bi, or gay cisgender men for violence, robbery and homicides" by setting traps for them, through personal ads and online dating applications. *Id.* at 10. Transgender Americans are also increasingly targeted: the National Coalition

[1] *See 2014 Hate Crime Statistics: Incidents and Offenses*, FBI: UNIFORM CRIME REPORTING PROGRAM, https://bit.ly/2Fu4vhl (20%); *2015 Hate Crime Statistics: Incidents and Offenses*, FBI: UNIFORM CRIME REPORTING PROGRAM, https://bit.ly/2N63JLW (19%); *2016 Hate Crime Statistics: Incidents and Offenses*, FBI: UNIFORM CRIME REPORTING PROGRAM, https://bit.ly/2QYoHNH (20%); *2017 Hate Crime Statistics: Incidents and Offenses*, FBI: UNIFORM CRIME REPORTING PROGRAM, https://bit.ly/39Pf4tj (18%); *2018 Hate Crime Statistics: Incidents and Offenses*, FBI: UNIFORM CRIME REPORTING PROGRAM, https://bit.ly/36A8TaP (19%).

of Anti-Violence Programs "collected information on 27 hate-violence related homicides of transgender and gender non-conforming people" in 2017—a 42% increase over 2016. *Id*. at 7.

c. Law-abiding citizens must be their own first responders.

Hate crime statistics only begin to convey the pervasive threats of violence that many LGBT individuals face and show why the right to bear arms for self-defense is so important to this group. LGBT citizens welcome the support of government programs and legislation aimed at securing their public safety. But they *also* wish to exercise their constitutional rights—premised on self-reliance and self-determination—under the Second Amendment. Given the dangers they face, LGBT individuals must be *their own* first responders by arming themselves from the violent perpetrators who would do them harm. As civil rights lawyer and criminologist Don B. Kates Jr. said, "Even if all 500,000 American police officers were assigned to patrol, they could not protect 240 million citizens from upwards of 10 million criminals who enjoy the luxury of deciding when and where to strike . . . but we have nothing like 500,000 patrol officers." *See* Don B. Kates Jr., "*Guns, Murders, and the Constitution: A Realistic Assessment of Gun Control*," PACIFIC RESEARCH INSTITUTE, (Feb. 1990), https://bit.ly/2Nq7XxQ. So law-abiding citizens must provide their own protection.

Even when the police do respond to help victims, safety is not guaranteed. Recent shootings, such as the tragedies at the Pulse gay nightclub and Parkland school, have shown that lives are lost during delayed responses from law enforcement. Accounts of the Pulse nightclub tragedy indicate that wounded victims were trapped for nearly *three hours* and the shooter was able to kill more people while the police stood by trying to resolve the hostage standoff. *See* Adam Goldman & Mark Berman, *'They Took Too Damn Long': Inside the Police Response to the Orlando Shooting*, WASHINGTON POST (Aug. 1, 2016), https://wapo.st/35wCgcs. Police officers at Parkland likewise reportedly stayed outside of the building while a gunman killed students inside the school. *See* Patricia Mazzei, *Slow Police Response and Chaos Contributed to Parkland Massacre, Report Finds*, NEW YORK TIMES (Dec. 12, 2018), https://nyti.ms/2QSYXCl; *see also Initial Report*, MARJORY STONEMAN DOUGLAS HIGH SCHOOL PUBLIC SAFETY COMMISSION (Jan. 1, 2019) at 183–85, https://bit.ly/2FMbzGA (highlighting the ineffective response of the police to the Parkland shooting); *Report 2*, MARJORY STONEMAN DOUGLAS HIGH SCHOOL PUBLIC SAFETY COMMISSION (Oct. 8, 2019) at 74, https://bit.ly/35ShVhY ("Among the deficiencies identified for [Broward County Sheriff's Office] were an ambiguous active shooter policy, inadequate active shooter training, and ineffective command and control."). Contrast these tragedies with the response of

an armed citizen (and firearms instructor), Jack Wilson, who shot and killed a gunman merely *six seconds* after the attacker started firing at a church congregation in Texas. Jake Bleiberg & Jamie Stengle, *Firearms Instructor Took out Gunman at Texas Church Service*, AP NEWS (Dec. 31, 2019), https://bit.ly/303XQEk. Pink Pistols trains its members to use firearms for this specific purpose—to defend themselves and others in the face of violence against them and to no longer be safe targets.

The lower court's blithe dismissals of a robust constitutional right to armed self-defense have the sterile aroma of a cloistered study, untainted by the atmosphere of life as it is actually lived in America's vulnerable communities. "For those . . . who work in marbled halls, guarded constantly by a vigilant and dedicated police force, the guarantees of the Second Amendment might seem antiquated and superfluous. But the Framers made a clear choice: They reserved to all Americans the right to bear arms for self-defense." *Peruta v. California*, 137 S. Ct. 1995, 1999–2000 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari). Regrettably, it is easy for the *already* protected members of society to overlook the safety needs of vulnerable communities they rarely encounter. Facing daily threats of violence is a world they will never know and cannot fathom. As one celebrity humorously and aptly noted, "I'm sick of hearing how we celebrities are in some kind of bubble and we don't understand real life.

When I'm out in public and people approach me, I'm always interested in what they have to say to my security detail." Pat Sajak (@patsajak), TWITTER (Jan. 9, 2020, 8:20 AM), https://bit.ly/39V9Dcs. Pink Pistols does not ask that celebrities and courts leave their "bubble," but that they simply recognize that every-day Americans should be afforded the *same* protection through the unimpeded exercise of their constitutional right to self-defense under the Second Amendment.

II. The Decision Below Unconstitutionally Allows the State to Ban Rifles That Are "In Common Use for Lawful Purposes."

In addition to disregarding the AWCA's clear infringement on self-defense, the lower court also failed to apply the right standard for determining whether a law violates the Second Amendment. *Heller* explicitly stated that the Second Amendment protects arms "in common use . . . for lawful purposes like self-defense." *Heller*, 554 U.S. at 624. In *Caetano*, two members of the Court took pains to reiterate this test: "The pertinent Second Amendment inquiry is whether stun guns are commonly possessed by law-abiding citizens for lawful purposes today." 136 S. Ct. at 1032 (Alito, J., joined by Thomas, J., concurring in the judgment). But the lower court flagrantly defied this rule and incorrectly characterized the common usage inquiry as "circular." *Rupp*, 401 F. Supp. 3d at 986 n.5. Instead, the court erroneously determined that the flipside of the *Heller* test applies here: that the government can ban "dangerous and unusual weapons" that are "highly unusual in society at large." *Heller*, 554 U.S. at 627. The court

reasoned that AR-style, *semiautomatic* arms are "essentially indistinguishable" from M-16 *automatic* rifles, "which *Heller* noted could be banned pursuant to longstanding prohibitions on dangerous and usual [*sic*] weapons." *Rupp*, 401 F. Supp. 3d at 986. The court is wrong on all fronts.

a. Semiautomatic rifles are commonly used for self-defense.

The court likely sought to avoid applying the correct standard because the firearms banned by the AWCA are unequivocally arms in "common use . . . for lawful purposes like self-defense." *Heller*, 554 U.S. at 624. The AR-15, which journalists have dubbed "America's Rifle," is one of the most popular firearms in the United States, accounting for 60% of all civilian rifles sold and a quarter of all firearms sold each year in the United States. *See* Dan Haar, *America's Rifle: Rise of the AR-15*, HARTFORD COURANT (Mar. 9, 2013), https://bit.ly/2ZXYPWu. Based on data from the National Shooting Sports Foundation, some estimate that between 15 and 20 million AR-15 and similar rifles are in circulation. *See* Alex Yablon, *How Many Assault Weapons Do Americans Own?*, THE TRACE (Sept. 22, 2018), https://bit.ly/2SZl1hB. This is in line with the estimate of as high as 15 million proffered by Plaintiffs' expert in this case. *See* Ex. 2 to Decl. of Sean A. Brady in Supp. of Pls.' Mot. for Summ. J., Doc. 78 at 28, *Rupp v. Becerra,* No. 17-00746 (C.D. Cal. Mar. 25, 2019). Citizens in the vast majority of states are able to own these firearms, as only *six* other states have outlier semiautomatic firearm bans like

California. Indeed, the Supreme Court has already determined that semiautomatic rifles of the type the AWCA bans are "civilian" firearms that "traditionally have been widely accepted as lawful possessions." *See Staples*, 511 U.S. at 603, 612.

Several federal appellate courts have also concluded that semiautomatic rifles like those banned by California are in common use. *See New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 255 (2d Cir. 2015); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1261 (D.C. Cir. 2011); *see also Kolbe v. Hogan*, 813 F.3d 160, 174 (4th Cir. 2016), *on reh'g en banc*, 849 F.3d 114 (4th Cir. 2017). And, to the extent it discussed the usage of semiautomatic rifles, the district court did not dispute that they are used for lawful purposes. Indeed, it cited Plaintiffs' evidence that "30% of AR-style rifles were sold in 2016 for 'personal-protection purposes,' " and that "[r]ecreational target shooting was the most prevalent reason cited for owning a [modern sporting rifle], followed by home defense." *Rupp*, 401 F. Supp. 3d at 989. Both are lawful purposes of law-abiding citizens.

b. AR-15s are functionally different from M-16s.

The lower court also wrongly concluded that AR-style civilian rifles are essentially the same as M-16 military rifles. Semiautomatic rifles are not the weapons of war the lower court makes them out to be. Although the AR-15 and M-16 *look* similar, their vast *functional* differences show they cannot be fairly

described as "essentially indistinguishable." The claim that *fully* automatic M-16 service rifle and *semi*-automatic AR-15 sporting rifle are practically identical is

> counter-intuitive because semiautomatic firearms require that the shooter pull the trigger for each shot fired, while fully automatic weapons—otherwise known as 'machine guns'—do not require a pull of the trigger for each shot and will discharge every round in the magazine as long as the trigger is depressed.

Kolbe, 849 F.3d 114, 158 (4th Cir. 2017) (en banc) (Traxler, J., dissenting). Indeed, this is the precise reason why the United States Supreme Court in *Staples* distinguished "lawful" semiautomatic AR-15s from "quasi-suspect" fully automatic "machineguns." *See Staples*, 511 U.S. at 602 n.1, 612. Even the name of these firearms is misunderstood. Many think "AR" is short for assault rifle, but it actually stands for "ArmaLite Rifle," the name of the company that originally developed it. *See Understanding America's Rifle*, NATIONAL SHOOTING SPORTS FOUNDATION, https://bit.ly/30jc6cc.

c. The AR-15's features make it safer than other arms for home defense.

Many of the features of the semiautomatic rifles mentioned by the court do not make the firearm more dangerous but rather make it safer for civilians to use by enhancing the ability to control it and fire it accurately. The lower court itself recognized "that the rifles are more accurate and easier to control." *Rupp*, 401 F. Supp. 3d at 993. A telescoping stock "permits the operator to adjust the length of the stock according to his or her physical size so that the rifle can be held

comfortably." *Kolbe*, 849 F.3d at 159 (Traxler, J., dissenting). A pistol grip "provides comfort, stability, and accuracy." *Id.*; *see also* David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 J. CONTEMP. L. 381, 396 (1994) ("By holding the pistol grip, the shooter keeps the barrel from rising after the first shot, and thereby stays on target for a follow-up shot. The defensive application is obvious, as is the public safety advantage in preventing stray shots."). And the primary function of a flash suppressor is to "prevent[] the shooter from being blinded in low-lighting conditions," *see Kolbe*, 849 F.3d at 159 (Traxler, J., dissenting), while it also can conceal the user's position—both an advantage for someone defending his or her home at night.

None of the features listed by the lower court transform semiautomatic rifles into battle-ready machineguns. Rather, they add to the firearm's safety and usefulness for self-defense. What is more, the Department of Homeland Security has even referred to semiautomatic rifles as "personal defense weapons" in bidding processes for contractors to arm federal law enforcement agents. *See Hearing*, *supra* at 8–9 (testimony of Amy E. Swearer). This is hardly the term one would expect the government to use to describe unusual weapons of war.

In fact, the Department of Homeland Security's description is apt, as semiautomatic rifles are ideal for self-defense. "[T]hey are lighter than many rifles and less dangerous per shot than large-caliber pistols or revolvers. Householders

too frightened or infirm to aim carefully may be able to wield them more effectively than the pistols James Bond preferred." *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406, 411 (7th Cir. 2015). Countless stories show how individuals have protected themselves and their families from untold violence by using or simply brandishing the arms banned by the AWCA. *See e.g.*, David K. Li, *Pregnant Florida Woman Uses AR-15 to Fatally Shoot Armed Intruder*, NBC NEWS (Nov. 4, 2019), https://nbcnews.to/35tTNC7 ("A pregnant Florida woman, armed with a semi-automatic rifle, gunned down one of two home invaders who had broken in and were pistol whipping her husband, officials said Monday."); *RIT Students Accosted by Gunman in Their Home*, ABC 13 (July 13, 2013), https://bit.ly/2tyriGc (Two intruders, one of them armed, fled after one of the occupants brandished his AR-15.). The sexual minorities that amicus represents need the most effective firearms they can obtain, especially when they are attacked by gangs bent on venting hatred. The features of the AR-15 described above provide them with safe, reliable means for lawfully defending themselves. Conversely, the usage of semiautomatic rifles for *unlawful* purposes is exceedingly rare: evidence indicates that "well under 1% [of crime guns] are 'assault rifles.' " GARY KLECK, TARGETING GUNS 112 (1997); *see also* CHRISTOPHER S. KOPER ET AL., AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE, 1994-2003, REP. TO THE NAT'L INST. OF

JUSTICE, U.S. DEP'T OF JUSTICE 15–16 (2004). (explaining that "[assault weapons] are used in a small fraction of gun crimes," likely because they are "more expensive and more difficult to conceal than the types of handguns that are used most frequently in crime"). Indeed, in 2018 homicides in the U.S. were *22 times* more likely to be committed with a handgun than with a rifle of *any* kind. *See Murder Victims by Weapon 2014–2018,* FBI: UNIFORM CRIME REPORTING PROGRAM, https://bit.ly/37NQZRU.

d. Law enforcement's use of semiautomatic rifles underscores their effectiveness for self-defense.

California's ban deprives law-abiding citizens of their right to keep and bear arms commonly used by law enforcement officers for self-defense. California peace officers bought more than 7,600 guns that civilians cannot own—including semiautomatic rifles—in the decade following the 2001 California law allowing such purchases "for law enforcement purposes, whether on or off duty." *See* Don Thompson, *California Lawmen Own Thousands of Assault Guns*, SFGATE (Dec. 22, 2011), https://bit.ly/37T1svp; *see* Cal. Penal Code § 30630 (2012). In 2011, about 1,300 of the nearly 10,000 officers in the Los Angeles Police Department officers owned semiautomatic rifles. *See id.* In fact, the LAPD lists several semiautomatic rifles in its equipment inventory, including the Smith & Wesson M&P15, Colt 6920, and Colt 6940. *LAPD Equipment,* LOS ANGELES POLICE DEPARTMENT, https://bit.ly/2FsUQYE. And the San Diego police department has

authorized its law enforcement officers to purchase and use their own semiautomatic rifles, which have been deployed on several occasions to protect local schools facing security threats. *See* Maureen Magee, *School Police Armed with AR-15s*, THE SAN DIEGO TRIBUNE (Jan. 31, 2013), https://bit.ly/2QvA80D. The police chief bolstered the department's decision by explaining that semiautomatic rifles are "a necessary tool for law enforcement in this era." *Id.* What's more, a survey of semiautomatic rifle owners included in the record showed that respondents with a military or law enforcement background rated the importance of home defense at 8.35 out of 10 as a reason for their ownership, second only to recreational target shooting at 8.86. *See* Ex. 23 to Decl. of Sean A. Brady, *supra* at 38.

If California were correct that semiautomatic firearms are in fact murderous "assault weapons" useful only for mass slaughter of the innocent, then "such killing machines have no place in the hands of domestic law enforcement." *See* DAVID B. KOPEL, "Assault Weapons," in GUNS: WHO SHOULD HAVE THEM 159, 202 (David B. Kopel ed., 1995). It is no answer to contend that because the police are so well-armed, citizens need not be. Not only is that proposition wrong as a matter of law—because the right to bear arms is conferred on private citizens—it is also factually incorrect. No citizen enjoys a constitutional right to police protection from assailants (*see Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 758–67

(2005)), and the police are, unfortunately, usually not around when a citizen is being assaulted, *see 2013 Violent Crime*, FBI: UNIFORM CRIME REPORTING PROGRAM, https://bit.ly/36w7amO (In 2018, the police were unable to protect citizens from over 1.2 million violent crimes nationwide.).

Because semiautomatic rifles are clearly arms in " 'common use' . . . for lawful purposes like self-defense," *Heller*, 554 U.S. at 624, the next step in the constitutional analysis is clear. The AWCA is categorically unconstitutional because it completely bans possession of firearms commonly owned for lawful purposes. *See Heller*, 554 U.S. at 634–35. And the ban is particularly egregious because it applies in "the home, where the need for defense of self, family, and property is most acute." *Id.* at 628. Thus, the lower court erred by not concluding that semiautomatic rifles are protected by the Second Amendment and that, as a result, the AWCA's categorical ban on such arms cannot stand.

III. The Court's Erroneous Interest-Balancing Wrongly Assumes that the AWCA Advances Public Safety.

a. The lower court wrongly applied an interest-balancing test.

The lower court further defied Supreme Court precedent by considering competing policy considerations in its evaluation of the AWCA's constitutionality. The Supreme Court has instructed that when evaluating complete bans on a class of weapons a court need only determine whether they are "arms" afforded

protection under the Second Amendment. *See Heller*, 554 U.S. at 624. The constitutional text forecloses any additional consideration of public policy interest. *See id.* The Court explained:

> A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an "interest-balancing" approach to the prohibition of a peaceful neo-Nazi march through Skokie. . . . The Second Amendment is no different. . . . And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

Id. at 634–35. Thus, the Court *explicitly* rejected an interest-balancing approach—like the one used by the lower court—for determining whether a statute violates the Second Amendment.

After rejecting an interest-balancing test in *Heller*, the Court, as a result, struck down the District of Columbia's ban on the possession of handguns. This was *despite* consistent social science showing that such arms are frequently used in violent crimes—in fact, much more so than the semiautomatic rifles California's statute bans. *Compare id.* at 682 (Breyer, J., dissenting) (noting that "the law concerns handguns, which are specially linked to urban gun deaths and injuries, and which are the overwhelmingly favorite weapon of armed criminals" and that "[f]rom 1993 to 1997, 81% of firearm-homicide victims were killed by a handgun") *with* KLECK, TARGETING GUNS, *supra*, 112 (evidence indicates that

"well under 1% [of crime guns] are 'assault rifles.' "). Justice Breyer advocated for an interest-balancing approach in dissent, discussing at length D.C.'s public safety interest in curbing violence linked to handguns. *See Heller*, 554 U.S. at 696–99 (Breyer, J., dissenting) (noting, among other things, that "[h]andguns are involved in a majority of firearm deaths and injuries"). The social science research showing the pervasiveness of handgun crime made a strong case for considering public policy rationales for firearm bans. Yet the majority opinion deliberately declined to adopt a "judge-empowering 'interest-balancing inquiry.' " *See id.* at 634–35. Rather, the Court only discussed public policy in noting that while "[t]he Constitution leaves the District of Columbia a variety of tools for combating" gun violence, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home." *Id.* at 636.

b. There is no reliable evidence that bans like California's advance public safety.

Even if an interest-balancing test *did apply*, the AWCA would fail any level of heightened scrutiny because the State cannot show that bans like California's advance its purported public safety interest. There is no reliable evidence supporting the lower court's assertion that "bans on assault weapons appear to be effective means for reducing violence." *Rupp*, 401 F. Supp. 3d at 992. Indeed, it has been known for centuries that laws restricting the use of firearms make law-

abiding citizens more vulnerable to the armed criminals who will flout the law and continue to use the restricted arms (or substitutes) in their crimes. In a passage Thomas Jefferson copied into his personal quotation book, the influential Italian criminologist Cesare Beccaria reasoned that laws

> which forbid to wear arms, disarm[ ] those only who are not disposed to commit the crime which the laws mean to prevent. Can it be supposed, that those who have the courage to violate the most sacred laws of humanity, and the most important of the code, will respect the less considerable and arbitrary injunctions, the violation of which is so easy, and of so little comparative importance? . . . [Such a law] certainly makes the situation of the assaulted worse, and of the assailants better, and rather encourages than prevents murder.

See Halbrook, *supra*, at 154. The same reasoning applies to a ban on possession like California's.

What is more, modern social science substantiates this ancient wisdom. Analyses of the now-expired federal statute banning semiautomatic arms reveal that such legislation had no discernible impact on firearms violence. The Justice Department's own study, led by Professor Christopher Koper, explained that:

> [W]e cannot clearly credit the ban with any of the nation's recent drop in gun violence. And, indeed, there has been no discernible reduction in the lethality and injuriousness of gun violence, based on indicators like the percentage of gun crimes resulting in death or the share of gunfire incidents resulting in injury, as we might have expected had the ban reduced crimes with both [assault weapons] and [large capacity magazines].

KOPER ET AL., UPDATED ASSESSMENT, *supra*, at 96.[2] Professor Koper concluded 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." *Id.* at 3. The insurmountable problem is that criminals denied semiautomatic rifles will simply substitute other firearms: "Because offenders can substitute nonbanned guns . . . for banned [assault weapons] . . . there is not a clear rationale for expecting the ban to reduce assaults and robberies with guns." *Id.* at 81 & n.95. Professor Koper reiterated this conclusion in a 2013 paper. *See* Christopher S. Koper, *America's Experience with the Federal Assault Weapons Ban, 1994-2004, in* REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS 165–66 (Daniel W. Webster & Jon S. Vernick eds., 2013).[3]

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[2] While the lower court correctly observed that the study added a few caveats to its conclusions, such as noting that the effects of the ban "are still unfolding and may not be fully felt for several years into the future," Koper (2004), *supra* at 96, such qualifications do not *invalidate* Professor Koper's findings, and they certainly do not constitute data supporting the position that the federal ban was effective in improving public safety.

[3] The lower court further attempted to undermine the findings of Professor Koper's 2004 study by noting that "[t]he updated [2017] study confirmed that the criminal use of assault weapons . . . declined during the years of the federal ban and increased after its expiration in 2004." *Rupp*, 401 F. Supp. 3d at 993. The court also contended that the 2017 study "concluded that 'the federal ban curbed the spread of high-capacity semiautomatic weapons when it was in place, and in so doing, may have had preventive effects on gunshot victimization.' " *Id.* (quoting Christopher S. Koper, et al., *Criminal Use of Assault Weapons and High-Capacity Semiautomatic Firearms: An Updated Examination of Local and National Sources*, 95 J. URBAN HEALTH 313, 320 (2017)). But these assertions are flawed for two main reasons. First, the 2017 study, outside of the conclusory sentence quoted by

The failure of the federal ban to have *any* discernible effect on gun violence has been confirmed by comprehensive reviews of existing published literature on firearms violence, including Professor Koper's research, conducted by the National Research Council and the Centers for Disease Control. The NRC and CDC both found that there is insufficient evidence to conclude that bans on "assault weapons" or other particular firearms or firearm features have had any beneficial effect on gun violence.[4] Another recent systematic study of peer-reviewed articles

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the lower court, notes only once that "[c]riminal use of [assault weapons] declined during the years of the federal ban." Koper, et al., *Criminal Use*, *supra* at 314. And it supports this assertion by citing Professor Koper's *2004* and *2013 studies*, *see id.*, which both concluded that the ban *did not* lead to a decrease in gun violence. Thus, the 2017 study cannot be cited for the court's implicit assumption that Professor Koper changed or reversed his previous findings regarding the ban's effect on gun violence. Second, the conclusion touted by the lower court regarding the *criminal usage rates* of semiautomatic rifles says nothing about the prevalence of *gun violence* or any resulting improvements for public safety. As Professor Koper's 2004 study explains, the federal ban likely had no effect on gun violence because criminals were able to use other firearms. *See* KOPER ET AL., UPDATED ASSESSMENT, *supra* at 81 & n.95.

[4] *See* NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 97 (Charles F. Wellford et al. eds., 2005) ("[G]iven the nature of the [1994 assault weapons ban], the maximum potential effect of the ban on gun violence outcomes would be very small and, if there were any observable effects, very difficult to disentangle from chance yearly variation and other state and local gun violence initiatives that took place simultaneously."); Centers for Disease Control, *Recommendations To Reduce Violence Through Early Childhood Home Visitation, Therapeutic Foster Care, and Firearms Laws*, 28 AM. J. PREV. MED. 6, 7 (2005) (With respect to "bans on specified firearms or ammunition," the CDC Task Force found that "[e]vidence was insufficient to determine the effectiveness of [bans, for] the prevention of violence."); *see also* Robert A. Hahn et al., *Firearms Laws and the Reduction of Violence: A Systematic Review*, 28 AM. J. PREV. MED. 40, 49 (2005).

on firearm laws and homicides published in the Journal of the American Medical Association Internal Medicine also concluded that "data from 4 studies on the effects of the federal assault weapons ban (in effect from 1994 to 2004) do not provide evidence that the ban was associated with a significant decrease in firearm homicides." Lois K. Lee, et al., *Firearm Laws and Firearm Homicides: A Systematic Review*, 177 J. AM. MED. ASSOC. INTERNAL MED. 106, 117 (2017).

The absence of evidence showing that bans like California's reduce violence—along with the commonsense conclusion that criminals will flout the law or use other types of guns to perpetrate crimes—completely undermines California's purported public safety interest. Contrary to the lower court's conclusion, the State has not "met [its] burden to show that there is a reasonable fit" between the AWCA—which totally bans an entire category of firearms—and "protecting public safety." *See Rupp.* 401 F. Supp. 3d at 993. Rather, such a ban only serves to disarm and threaten the safety of law-abiding, vulnerable citizens, such as Pink Pistols members who are in dire need of such arms for self-defense.

CONCLUSION

The district court's erroneous ruling upholding the AWCA should be reversed.

Dated: February 3, 2020

Respectfully submitted,

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