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

No. 8:17-cv-00746-JLS-JDE
The Honorable Josephine L. Staton, Judge

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INTRODUCTION

California regulates the possession and transfer of assault rifles—a category of military-style weapons marketed to civilians that are unusually dangerous and not well suited for civilian self-defense. Assault rifles are "virtually indistinguishable in practical effect from machine guns." ER 14. They "fire almost as rapidly"; inflict "greater and more complex damage"; and have enhanced "capability for lethality—more wounds, more serious, in more victims." They are, like the M-16 machinegun, "dangerous and unusual" weapons of modern warfare. Assault rifles are also not a type of weapon traditionally used for lawful, self-defense purposes. California's restrictions therefore do not burden conduct protected by the Second Amendment. In any event, the State's restrictions pass the appropriate level of scrutiny—intermediate scrutiny—because they reasonably fit the State's important public-safety interest in reducing the number of gun deaths and injuries.

The unanimous weight of federal circuit court authority supports the constitutionality of California's assault-rifle restrictions. All five federal circuit courts that have assessed assault-weapon restrictions under the Second Amendment have upheld them. *See Worman v. Healey*, 922 F.3d

26, 40-41 (1st Cir. 2019), *petition for cert. docketed*, (No. 19-404); *Kolbe v. Hogan*, 849 F.3d 114, 140-41 (4th Cir. 2017) (en banc); *N.Y. State Rifle & Pistol Ass'n v. Cuomo* (*NYSRPA*), 804 F.3d 242, 262-64 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406, 411-12 (7th Cir. 2015); *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1264 (D.C. Cir. 2011). Consistent with this authority and the Second Amendment jurisprudence of this Court, the district court's judgment upholding the challenged laws should be affirmed.

JURISDICTIONAL STATEMENT

The district court had original jurisdiction over this case under 28 U.S.C. § 1331. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because the order on review is an appealable, final judgment.

ISSUES PRESENTED FOR REVIEW

1. Whether assault rifles fall outside the protection of the Second Amendment because they are virtually identical to the M-16 rifle, where the Supreme Court has confirmed that "M-16 rifles and the like" may be banned.

2. Assuming assault rifles come under the scope of the Second Amendment, whether challenged law withstands intermediate scrutiny by restricting a particularly dangerous subset of semiautomatic rifles with

militaristic features that are used disproportionately in mass shootings and murders of police officers, thereby furthering California's interest in public safety.

STATEMENT OF THE CASE

I. THE ROBERTI-ROOS ASSAULT WEAPON CONTROL ACT OF 1989

The California Legislature passed the Assault Weapons Control Act (AWCA) in 1989 in response to a proliferation of shootings that involved assault weapons.[1] *See Silveira v. Lockyer*, 312 F.3d 1052, 1057 (9th Cir. 2002), *abrogated on other grounds by District of Columbia v. Heller*, 554 U.S. 570 (2008). In January 1989, a shooter carrying an assault rifle killed five children and wounded 29 others on the yard of a Stockton school. Less than a month later, the California State Assembly convened in an extraordinary session and met as Committee of the Whole.[2] *Kasler v.*

[1] As used in this brief, "assault weapons" are semi-automatic, military-style weapons that appear on the AWCA's prohibited list or contain certain defined militaristic features. These weapons share a number of features with their combat-ready military counterparts that make them particularly effective in wounding and killing others. *See* pp. 24-25, *infra*.

[2] As the Assembly Speaker had noted, "Ordinarily . . . this [type of legislative activity] would be done in a regular committee. On some occasions, when the issue is of such extraordinary importance, and of such immediacy, we [meet as] a Committee of the Whole." *Kasler*, 23 Cal.4th at 482.

Lockyer, 23 Cal.4th 472, 481-82 (Cal. 2000), *abrogated on other grounds by Heller*, 554 U.S. 570. At that hearing, then-California Attorney General John Van de Kamp testified that "semi-automatic military assault rifles" were the "weapons of choice" for gang shootings. *Kasler*, 23 Cal.4th at 484 (citation omitted). A Los Angeles police officer "familiar with gangs and the increasing use of assault weapons" testified that there is "only one reason [gang members] use [military assault rifles], and that is to kill people. They are weapons of war." *Id.* at 588 (citation omitted). Dr. Garen Wintemute of the University of California, Davis, School of Medicine also testified as to the "'special wounding characteristics' of the high velocity ammunition commonly used in assault weapons." *Id.* (citation omitted). As a result, the Legislature found that "the proliferation and use of assault weapons poses a threat to the health, safety, and security of all citizens of this state." Cal. Penal Code § 30505(a) (formerly Cal. Penal Code § 12275.5). The Legislature further found that assault weapons have "such a high rate of fire and capacity for firepower that" their "function as a legitimate sports or recreational firearm is substantially outweighed by the danger that [they] can be used to kill and injure human beings." *Id.*

The AWCA was the first legislative restriction on assault weapons, including the assault rifle, in the nation. *Silveira*, 312 F.3d at 1057. As originally enacted, the AWCA restricted the manufacture, possession, sale, transfer, or importation of 21 models of assault rifles, including "'civilian' models of military weapons that feature slightly less firepower than the military-issue versions, such as the Uzi, an Israeli-made military rifle; the AR-15, a semi-automatic version of the United States military's standard-issue machine gun, the M-16; and the AK-47, a Russian-designed and Chinese-produced military rifle." *Silveira*, 312 F.3d at 1058; *see* Cal. Pen. Code § 30510 (formerly Cal. Pen. Code § 12276). These rifles possess many of the same military-style features, and often use the same ammunition, as their military counterparts. *See* ER 3840:22-3841:9, 3844:10-22. These rifles are sometimes called "Category 1" rifles.

The AWCA formerly included a mechanism for the California Attorney General to seek a judicial declaration in superior court that certain weapons identical to the listed firearms are also deemed "assault weapons" subject to the restrictions of the AWCA. Former Cal. Penal Code § 12276.5(a)(1)-(2); *see Kalser*, 23 Cal.4th at 491-92. Using this procedure, the Attorney General added additional semiautomatic rifles to the prohibited assault

weapons list. Cal. Code Regs. tit. 11, § 5499. These assault rifles are sometimes called "Category 2" rifles. The Attorney General's authority to add weapons to the assault weapons list ended in 2006. *See* 2006 Cal. Stat. ch. 793 (A.B. 2728).

The original AWCA "was the model for a similar federal statute enacted in 1994," *Silveira*, 312 F.3d at 1057, the "Public Safety and Recreational Firearms Use Protection Act," which banned assault weapons by make and model, and also by feature, Pub. L. No. 103-322; 108 Stat. 1796 (1994). The federal assault-weapons ban expired in 2004. *See Kolbe*, 849 F.3d at 126.

II. THE AWCA'S ASSAULT-RIFLE RESTRICTIONS BASED ON MILITARISTIC FEATURES

After the AWCA was enacted, some gun manufacturers began to produce weapons that were "substantially similar to weapons on the prohibited list but differed in some insignificant way, perhaps only the name of the weapon, thereby defeating the intent of the ban." ER 4198 (S.B. 880 Rpt.); *Silveira*, 312 F.3d at 1058 n.5. To address the proliferation of these "copycat" weapons, the Legislature enacted Senate Bill 23 (S.B. 23), 1999 Cal. Stat. ch. 129, to amend the AWCA's definition of assault weapons to include weapons with certain militaristic features similar to those listed as

prohibited Category 1 and 2 weapons. ER 4415-50. In amending the AWCA, the Legislature sought "to broaden its coverage and to render it more flexible in response to technological developments in the manufacture of semi-automatic weapons." *Silveira*, 312 F.3d at 1058; *see* ER 4415.

In S.B. 23, the Legislature defined an assault weapon to include any "semiautomatic, centerfire rifle that has the capacity to accept a detachable magazine" and any one of a list of prohibited features, including a pistol grip beneath the action of the rifle, a thumbhole stock, an adjustable stock, a flash suppressor, a forward pistol grip, or any semiautomatic, centerfire rifle that is less than 30 inches in length regardless of features. ER 4441-42 (S.B. 23, § 7). These assault rifles defined by feature are sometimes called "Category 3" rifles. With S.B. 23, the Legislature also enacted a prohibition on manufacture, importation, and sale of large-capacity magazines (LCMs) capable of holding more than 10 rounds of ammunition. *Id.* at 4415, 4441-42.

A "detachable magazine," as defined by S.B. 23's implementing regulations, excluded magazines detachable from the firearm by a "tool." Thereafter, gun manufacturers began producing "bullet button" rifles to circumvent S.B. 23's detachable-magazine requirement. ER 4199. The

"bullet button" was a minor design change made by gun manufacturers that allows shooters to use the tip of a bullet as a "tool" to push a button to release the ammunition magazine. *Id.* The "bullet button" allows a magazine to be removed from a rifle and replaced in seconds, rendering meaningless the distinction between a magazine that is not "detachable" within the meaning of California law and a magazine that can be readily detached without the use of a tool. *Id.* The Legislature found that such "bullet button" rifles were used in the 2015 San Bernardino shooting and that such rifles were "nearly indistinguishable from illegal assault weapons." *Id.* at 4202.

In 2016, the Legislature enacted Senate Bill 880 (S.B. 880), 2016 Cal. Stat. ch. 48, to address this "bullet button" loophole by focusing on a weapon's absence of a "fixed magazine," rather than on its "capacity to accept a detachable magazine." *See* Cal. Penal Code § 30515(a)(1); *id.* § 30515(b) (defining "fixed magazine").

As a result of these legislative initiatives, the AWCA currently restricts assault rifles identified by make and model, Cal. Penal Code § 30510(a); Cal. Code Regs. tit. 11, § 5499, as well as any centerfire, semiautomatic rifle that both lacks a fixed magazine and has one or more enumerated militaristic

features, such as a conspicuously protruding pistol grip beneath the action, a forward pistol grip, an adjustable stock, or a flash suppressor, or if the rifle is less than 30 inches in length, Cal. Penal Code §§ 30515(a)(1)(A)-(C), (E)-(F), 30515(a)(3). Any person who lawfully possessed a rifle before it was defined as an "assault weapon" under the AWCA may continue to possess it if the owner timely registered the firearm with the State. *See* Cal. Pen. Code §§ 30515, 30520, 30900(b), 30960.

The AWCA still permits possession of some other semiautomatic rifles, including (1) any semiautomatic rifle, provided it is not a prohibited make and model or does not have any of the prohibited features (*i.e.*, is "featureless"); (2) a centerfire semiautomatic rifle with any of the prohibited features and with a fixed magazine of 10 rounds or less; or (3) a rimfire semiautomatic rifle with any prohibited features. ER 3304-05, ¶ 10

III. PROCEDURAL HISTORY AND THE LOWER COURT DECISION

In 2017, Plaintiffs sued to challenge some of AWCA's restrictions and California's assault-rifle registration requirements under the Second Amendment, Due Process Clause, and Takings Clause.[3] The district court

[3] Plaintiffs challenged, and continue to challenge by the last operative complaint, California Penal Code sections 30510(a), 30515(a)(1)(A-C), (continued…)

granted the Attorney General's motion to dismiss Plaintiffs' Takings Clause and Due Process Clause claims, and denied Plaintiffs' motion for a preliminary injunction against the enforcement of certain registration requirements. ECF No. 49. The parties proceeded through discovery and cross moved for summary judgment on Plaintiffs' Second Amendment claim. In July 2019, the district court granted the Attorney General's motion for summary judgment and denied Plaintiffs' cross-motion.[4] ER 3-25.

By this appeal, Plaintiffs challenge only the judgment upholding the AWCA's assault rifle restrictions under the Second Amendment. Plaintiffs do not challenge the district court's dismissal of their Due Process Clause and Takings Clause claims or their challenge to California's assault rifle registration requirements. *See* AOB at 11.

The district court assessed the constitutionality of the AWCA under this Court's "two-step inquiry to Second Amendment challenges": (1) does the challenged regulation burden conduct protected by the Second

30515(a)(1)(E-F), 30515(a)(3), 30520, 30600, 30605, 30925, and 30945, and California Code of Regulations, title 11, section 5499. ER 4570-71.

[4] Plaintiffs assert that the district court ignored their *Daubert* motions. AOB at 11. However, Plaintiffs' motions were filed in violation of Local Rule 7-3 and the issues were not properly presented to the district court.

Amendment; and (2) if so, does it satisfy the applicable level of scrutiny. ER 7. At the first step, the district court determined that assault rifles are not protected by the Second Amendment because they are "virtually indistinguishable from M-16s," and can be banned as "dangerous and unusual weapons." ER 13, 16. The district court reasoned, "[i]t is undisputed that the M-16 is outside the scope of the Second Amendment—thus, if a weapon is essentially the same as the M-16, it is not protected by the Second Amendment merely because gun manufacturers have given it a different model number and dubbed it a 'civilian rifle.'" ER 13-14. The district court concluded that the sole difference between the M-16 and assault rifles—that the M-16 allows the shooter to fire in either semiautomatic or automatic mode, while assault rifles fire only in semiautomatic mode—"is a distinction without a difference." *Id.* at 16. The district court noted that other circuit courts have likewise determined that a semiautomatic rifle's rate of fire is almost the same as that of the M-16. *Id.* (citing *Kolbe*, 849 F.3d at 136 (finding that the rates of fire of automatic and semiautomatic rifles "are nearly identical") and *Heller II*, 670 F.3d at 1263 ("[S]emi-automatics still fire almost as rapidly as automatics.")). Indeed, in many situations, "the semi-automatic fire of an AR-15 is more accurate and

lethal than the automatic fire of an M16." *Id.* at 15 (citing *Kolbe*, 849 F.3d at 136).

At the second step, the district court alternatively concluded that even if the Second Amendment applies to assault rifles as defined in the AWCA, the AWCA withstands intermediate scrutiny because—"in conformity with the 'unanimous weight of circuit authority analyzing Second Amendment challenges to similar laws'"—"there is a reasonable fit between the AWCA and California's public safety interests." ER 20 (citation omitted). The district court applied intermediate scrutiny because it held that the AWCA does not severely burden the core of the Second Amendment. *Id.* at 17-18. The court determined that: the AWCA "leaves individuals with myriad options for self-defense—including the handgun, the 'quintessential' self-defense weapon per *Heller*"; that the assault rifle is "ill-suited for self-defense"; and that "while individuals may sometimes purchase assault rifles for self-defense, it is not the primary purpose for doing so." *Id.*

The district court then determined the Act withstands intermediate scrutiny because the State provided "ample evidence to establish a reasonable fit between the AWCA and California's public safety interest." ER 20. Specifically, the court cited evidence that "in the public mass

shootings where an assault rifle was utilized, there were twice as many fatalities (12 with assault rifles, 6 without any assault weapons), and six times as many injuries (30 with and 5 without)." *Id.* at 20-21. The increased casualty rate is likely due, at least in part, to the fact 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, including the likelihood of morbidity in patients that present injuries from assault rifles." *Id.* at 21 (quoting ER 3188 (Expert Rpt. of Dr. Christopher B. Colwell)). The court further determined that "the enumerated features increase the capabilities of semiautomatic rifles and thereby enhance their capacity for mass violence." *Id.* at 22. Finally, the court determined that "bans on assault weapons appear to be effective means for reducing violence," specifically citing the Plaintiffs' expert's admission that the use of assault weapons in crime was reduced when the federal assault-weapons ban was in effect. *Id.* at 23 (citing ER 3715:14-3716:1 (Pls.' Expert Gary Kleck)). The court observed that Plaintiffs "d[id] not truly dispute any of the Attorney General's evidence, nor d[id] they even attempt to distinguish the AWCA from the laws upheld by other circuits," and concluded that the Attorney General "has more than met his burden to

show that there is a reasonable fit between the AWCA and protecting public safety." ER 24.

STANDARD OF REVIEW

This Court reviews de novo the district court's order granting summary judgment. *Danielson v. Inslee*, 945 F.3d 1096, 1098 (9th Cir. 2019).

SUMMARY OF ARGUMENT

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court recognized that the Second Amendment protects an individual right to keep and bear arms—but that the right extends only to certain types of weapons.

Significantly, the Supreme Court has determined that the Second Amendment does not protect "weapons most useful in military service—M-16 rifles and the like." *Id.* at 627. The assault rifles at issue here are "like" the M-16, and are similarly not protected by the Second Amendment. Assault rifles are civilian versions of the military M-16. They are capable of firing the same centerfire rifle rounds, ER 3168, and possess the same militaristic features that make M-16 rifles effective in combat. ER 4108-09. They may be banned consistent with the Second Amendment.

Assault rifles may also be banned because they are "dangerous and unusual" weapons (*see Heller*, 455 U.S. at 627), akin to firearms that may be outlawed because they are more suitable for nefarious, offensive uses than for the "core lawful purpose of self-defense" (*id.* at 630). As the name implies, assault rifles are particularly suitable as weapons of large-scale offense. They are wholly unlike arms typically possessed for self-defense, such as the handgun. "[T]he Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as the short-barreled shotguns." *Heller*, 554 U.S. at 625. Plaintiffs' attempt to establish that the AWCA's restrictions on assault rifle burdens conduct protected by the Second Amendment fails because (1) manufacturing and sales statistics do not establish that a weapon is typically possessed for self-defense, *see Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015); and (2) it is grounded in an incorrect reading of the AWCA, which does not in fact ban all semiautomatic rifles.

Even assuming that restrictions on assault rifles burden a right covered by the Second Amendment, the AWCA is constitutional. Because the challenged restrictions on assault rifles do not burden the core of the Second Amendment—the right of law-abiding, responsible individuals to defend

themselves in their homes—they are assessed under intermediate scrutiny. The record below demonstrates that there is a reasonable fit between the AWCA's restrictions and an important government interest. Assault rifles are used in public mass shootings, result in more deaths and serious injuries on average than when non-assault weapons are used, and data confirms that restrictions on assault rifles are effective in reducing gun violence, particularly violence associated with mass shootings.

Consistent with all other sister circuits that have considered assault-weapons restrictions, as well as the precedents of this Court, the district court correctly held that the AWCA is constitutional under the Second Amendment. The judgment should be affirmed.

ARGUMENT

I. THE SECOND AMENDMENT LEGAL FRAMEWORK

The Second Amendment provides in full: "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. II. While *Heller* recognized an individual right to keep and bear arms, it also explained that "the right secured by the Second Amendment is not unlimited" and does not extend to "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626 (citations omitted).

The Ninth Circuit thus uses a two-step inquiry in assessing the constitutionality of challenged laws under the Second Amendment. "[F]irst, the court asks whether the challenged law burdens conduct protected by the Second Amendment; and if so, the court must then apply the appropriate level of scrutiny." *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016). The first step considers whether the challenged law burdens conduct protected by the Second Amendment, based on a "historical understanding of the scope of the right." *Id.* at 821 (quoting *Heller*, 554 U.S. at 625). If it does not, then that law "may be upheld without further analysis." *Id.* (citation omitted). If the court determines that the challenged law burdens conduct protected by the Second Amendment, it then proceeds to the second step of the inquiry, determining the appropriate level of scrutiny, and then applying that level of scrutiny. *Id*. (citation omitted).

II. CALIFORNIA'S RESTRICTIONS ON ASSAULT RIFLES DO NOT BURDEN CONDUCT PROTECTED BY THE SECOND AMENDMENT

The assault rifles restricted in the AWCA are not protected by the Second Amendment for two related reasons. First, the assault rifles at issue here are essentially the same as M-16 rifles—weapons the Supreme Court characterized as "most useful in military service" and deemed outside the scope of the Second Amendment, consistent with the historical tradition of

prohibiting dangerous and unusual weapons. *See Heller*, 554 U.S. at 627-28; *Kolbe*, 849 F.3d at 135. Second, the assault rifles are issue here are demonstrably "dangerous and unusual" weapons not "typically possessed" by law-abiding citizens for lawful purposes. Consistent with the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons," the Second Amendment protects only the sort of weapons that are "typically possessed by law-abiding citizens lawful purposes." *Heller*, 554 U.S. at 625; *see also id.* at 627-28.

A. Assault Rifles Are Substantially Similar to the M-16, Which May Be Banned

Assault rifles regulated under the AWCA fall outside the scope of the Second Amendment because they are essentially the same as the M-16 rifle. *See Kolbe*, 849 F.3d at 137 ("Whatever their other potential uses—including self-defense—the AR-15, other assault weapons, and large-capacity magazines . . . are unquestionably most useful in military service."); *accord Worman v. Healey*, 293 F. Supp. 3d 251, 265-66 (D. Mass. 2018) (holding that AR-15s are beyond the scope of the Second Amendment); *People v. James*, 94 Cal. Rptr. 3d 576, 585-86 (Cal. App. 2009) ("*Heller* does not extend Second Amendment protection to assault weapons."). As the district court observed, it is "undisputed that the M-16 is outside the scope of the

Second Amendment—thus if a weapon is essentially the same as the M-16, it is not protected by the Second Amendment merely because gun manufacturers have given it a different model number and dubbed it a 'civilian rifle.'" ER 13-14.

1. Assault Rifles Are Essentially the Same as the M-16

The Supreme Court has identified the M-16 as the prototypical "dangerous and unusual" weapon that falls outside the protection of the Second Amendment. *Heller*, 554 U.S. at 627. The M-16 is a "modern military assault rifle" "designed for killing or disabling the enemy," and has, in "military configuration," features such as the ability to accept a detachable magazine, folding or telescoping stock, pistol grips, and a flash suppressor. ER 4108-09 (Bureau of Alcohol, Tobacco, and Firearm (ATF) Rpt.).

The assault rifles regulated by the AWCA are essentially the same as the M-16, and fall within the class of weapons outside the scope of the Second Amendment contemplated by *Heller* in its discussion of "M-16 rifles and the like." *See Heller*, 554 U.S. at 627. Assault rifles restricted by the AWCA have a military pedigree and are nearly identical to the M-16. *Staples v. United States*, 511 U.S. 600, 603 (1994) ("The AR-15 is the civilian version of the military's M-16 rifle . . ."); *see* ER 3161-62 ¶15

(Expert Rpt. of Blake Graham) (opining that firearms restricted by the AWCA "could be considered semiautomatic versions of military weapons"), *Id.* at 3168 ¶ 34 (opining that assault rifles are capable of firing the same centerfire rifle rounds as U.S. military rifles and "could have the same high capacity for firepower as the military weapons"); *id.* at 3368:3-14; *id.* at 3841:6-10, 3844:10-22, 3872:3-13 (Pls.' Expert Stephen Helsley). Like the M-16, assault rifles are equipped with military-style features designed to serve specific combat needs and to enhance the usefulness (and lethality) of the weapons.[5] Assault rifles incorporate the functional design features that make military assault rifles effective in state-sanctioned combat, which has both offensive and defensive elements. ER 4108-09 (ATF Report); *id.* at 4051 (Dept. of Treasury Study).

[5] *See* ER 4051 (Dept. of Treasury Study) (citing ATF finding "that the [semiautomatic versions of automatic-fire military assault rifles], while no longer machineguns, still had a military configuration that was designed for killing and disabling the enemy and that distinguished the rifles from traditional sporting rifles"); ER1982 (noting that the AR-15 was "designed for close, confusing combat"); *id.* at 1995 (noting that a "variant of [the AR-15] was chosen by the U.S. military and saw its first major-scale deployment within the Vietnam War"); *id.* at 2001 (referring to the AR-15 as the "civilian sibling of a military assault rifle"); *see also Gallinger v. Becerra*, 898 F.3d 1012, 1018 (9th Cir. 2018) (referencing "mass shootings perpetrated by individuals with *military-style rifles*" (emphasis added)).

The primary difference between the M-16 and assault rifles is that the M-16 is a select-fire rifle, meaning that the shooter can elect to fire in either automatic or semiautomatic mode, while the assault rifle allows fire only in semiautomatic mode. *See Staples*, 511 U.S. at 603; ER 4527; ER 3872:3-13 (Pls.' Expert Stephen Helsley). This is not a material difference. While semiautomatic rifles fire only one shot with each pull of the trigger, they can "still fire almost as rapidly as automatics."[6] *Heller II*, 670 F.3d at 1263. In enacting the federal ban on assault weapons, including assault rifles, Congress cited testimony that semiautomatic weapons "can be fired at rates of 300 to 500 rounds per minute, making them virtually indistinguishable in practical effect from machineguns."[7] ER 4160 (H.R. Rep. No. 103-489, at 18 (1994)); *see Heller II*, 670 F.3d at 1263; *see also* ER 3992 (test showed that a 30-second round magazine empties in less than two seconds on

[6] Plaintiffs' argument that the rate of fire of assault rifles is no different than that of semiautomatic rifles that the AWCA does not restrict misses the mark. AOB 19. The AWCA restricts assault rifles not solely because of their high rate of fire but because, in addition to their high rate of fire, they possess other features that combined contribute to an assault rifle's outsized lethality.

[7] Contrary to Plaintiffs' characterization (AOB 18), the rate of fire of semiautomatic weapons in the record is not based on the Attorney General's "extrapolation" of data, but is quoted directly from the Congressional record.

automatic, while the same magazine empties in just five seconds on semiautomatic).

Moreover, military personnel are trained to use their select-fire weapons in *semiautomatic* mode for improved accuracy and control. Indeed, the U.S. Army considers the M-16 to be more effective as an instrument of war when it fired by a trained soldier in semiautomatic mode than when it is fired in automatic mode. According to the Army, automatic fire "is inherently less accurate than semiautomatic fire." ER 3968 (Army Field Manual); *see* ER 3537:6-16 (Pls.' Expert J. Buford Boone, III) ("I can more precisely place shots on semi-automatic than I can on full automatic."). Beyond certain distances, "rapid semiautomatic fire is superior to automatic fire in all measures." ER 3965. For this reason, the Army instructs its solders that their M-16 rifles should "normally be employed in the semiautomatic fire mode." *Id.* at 3969; *see also Kolbe*, 849 F.3d at 125 ("[S]oldiers and police officers are often advised to choose and use semiautomatic fire, because it is more accurate and lethal than automatic fire in many combat and law enforcement situations.").

Any difference between the M-16 and assault rifles is also immaterial in practice because, as Congress found in enacting the federal ban, "it is a

relatively simple task to convert a semiautomatic weapon to automatic fire." ER 4160 (H.R. Rpt. No. 103-489). As the Supreme Court has observed, "[m]any M-16 parts are interchangeable with those in the AR-15 and can be used to convert the AR-15 into an automatic weapon." *Staples*, 511 U.S. at 603. A metal stop on the AR-15, which prevents the installation of an M-16 selector switch, can be easily filed away, as the plaintiff in *Staples* had done to turn a semiautomatic rifle into an automatic machinegun.[8] *Id.* Assault rifles can also be converted to automatic machineguns by adding a few parts or by drilling additional holes in the receiver of the rifle or by installing

[8] Plaintiffs, citing *Staples*, argue that rifles prohibited by the AWCA traditionally have been widely accepted as lawful possessions. AOB at 20-21. The Supreme Court in *Staples*, however, did not address whether AR-15s may be restricted or, more generally, whether they are within the scope of the Second Amendment. Rather, the Court addressed the narrow question—not presented here—of whether the absence of a federal prohibition on those rifles at the time would give a gun owner sufficient notice of regulation for purposes of establishing *mens rea*. *Staples*, 511 U.S. at 612. In fact, the Court acknowledged in *Staples* that the "destructive potential" of AR-15s may be "even greater than" weapons such as machineguns, sawed-off shotguns, artillery pieces, and hand grenades. *Id.*

accessories, such as "bump stocks" or "multiburst trigger activators."[9] ER 3181-82 ¶ 20; ER 3695:5-10 (Pls.' Expert Gary Kleck).

The assault rifles regulated by the AWCA and the M-16 are so similar that manufacturers of those assault rifles market them as functionally similar arms suitable for military use, and tout their military lineage. Beginning in the 1980s, the gun industry began to heavily market military-style rifles to the civilian gun market. ER 4347. It used the aggressive term "assault rifles" to describe these military-style weapons. *See* ER 4453, 4455, 4461 (July 1981 Guns & Ammo) (variously describing a "new breed of assault rifles" as "[s]pawned in the crucible of war," "military-type," "military-style," and "military autoloaders"). Gun manufacturers have continued to market assault rifles to civilians as military-grade weapons, emphasizing their military history and similarity to military rifles. *See Kolbe*, 849 F.3d at 125 ("Several manufacturers of the banned assault weapons, in advertising them to the civilian market, tout their products' battlefield prowess."); ER 3064 ¶¶ 58-59 (Expert Rpt. of John J. Donohue); *see*, *e.g.*, ER 4133, 4135.

[9] Bump stocks were recently banned, *see* 27 C.F.R. §§ 447.11, 478.11, 4798.11, but that ban has been challenged in several lawsuits. Even if upheld, assault rifles could still be equipped with illegal bump stocks or other similar devices to mimic automatic fire.

2. The Prohibited Features, Individually and in Combination, Serve Specific Combat Functions

"[T]he features that characterize a semiautomatic weapon as an assault weapon are not merely cosmetic, but do serve specific, combat-functional ends." ER 4160 (H.R. Rpt. No. 103-489); *see Kolbe*, 849 F.3d at 132. The "net effect of these military combat features is a capability for lethality—more wounds, more serious, in more victims—far beyond that of other firearms in general, including other semiautomatic guns." ER 4161-62; *see* ER 3241-42, ¶¶12-13 (Expert Rpt. of Lucy P. Allen); *see also id.* at 3242-43, ¶¶ 14-17. These features are carried over from the M-16 machinegun, ER 4160-61, and serve to make the assault rifles—marketed to civilians for use outside the parameters of government-sanctioned combat—particularly dangerous.

a. Ability to Accept Detachable Magazines

An assault rifle without a fixed magazine enables the shooter to "rapidly reload" one magazine after another. ER 4108. That feature renders a semiautomatic rifle "capable of killing or wounding more people in a shorter amount of time." ER 4200. Such a rifle is also capable of accepting LCMs, which "allow a shooter to fire more than ten rounds without having to pause to reload." *Kolbe*, 849 F.3d at 125. LCMs "are particularly

designed and most suitable for military and law enforcement applications" and "are a feature common, but not unique, to the banned assault weapons, many of which are capable of accepting magazines of thirty, fifty, or even 100 rounds." *Id.* LCMs "are indicative of military firearms," and the fact "[t]hat a firearm is designed and sold with a large capacity magazine, *e.g.*, 20-30 rounds, is a factor to be considered in determining whether a firearm is a semiautomatic assault rifle." ER 4108. In fact, in 109 domestic public mass shootings from 1982 through September 2018, the use of LCMs resulted in an average of 27 fatalities and injuries compared to 9 fatalities and injuries when no LCMs were used. ER 3276.

b. Pistol Grips and Thumbhole Stocks

A pistol grip or thumbhole stock enables a shooter to maintain accuracy during rapid firing. A pistol grip "allows for a pistol style grasp in which the web of the trigger hand (between the thumb and index finger) can be placed beneath or below the top of the exposed portion of the trigger while firing." Cal. Code Regs. tit. 11, § 5471(z); *see* Cal. Penal Code § 30515(a)(1)(A). A thumbhole stock "allows for a grip similar to that offered by a pistol grip." ER 3163, ¶ 20; *see* Cal. Code Regs. tit. 11, § 5471(qq). A forward pistol grip "allows for a pistol style grasp forward of the trigger," Cal. Code Regs. tit. 11, § 5471(t), which can help insulate the

non-trigger hand from heat during rapid fire. ER 3831:1-5. A forward pistol grip is also a feature of early machineguns. ER 3828:7-12

A pistol grip or thumbhole stock is a ubiquitous feature of modern military rifles. ER 3178, ¶ 9, 3163, ¶ 19, 3165, ¶ 23. A pistol grip or thumbhole stock enables a shooter to maintain accuracy during rapid fire in combat situations. ER 4108 ("[Pistol] grips were designed to assist in controlling machineguns during automatic fire."); ER 3178-79, ¶ 9 ("Pistol grips and thumbhole stocks provide the combatant with more control of the rifle and thus more accuracy during rapid fire."); ER 3898:5-15 (Pets.' Expert Stephen Helsley); ER 3398:11-22.

c. Folding or Telescoping Stocks

A folding or telescoping stock enhances the portability and concealability of a rifle by allowing the stock of the rifle to be shortened. *See* Cal. Code Regs. tit. 11, § 5471(oo), (nn). As described by an ATF study, the "predominant advantage" of a folding or telescoping stock "is for military purposes, and it is not normally found on the traditional sporting rifle." ER 4108. A folding or telescoping stock also renders the rifle more concealable, as would a semiautomatic centerfire rifle that is under 30 inches in length, and allows a shooter to potentially carry a rifle undetected in public. ER 3179, ¶ 10 ("By collapsing the stock, the rifle becomes more

concealable potentially allowing a suspect to introduce the firearm into a vulnerable location."); ER 3164, ¶ 21 (opining that adjustable stocks could "permit the shooter to smuggle the weapon undetected (by, for example, hiding the weapon in a backpack or bag) or to hide in a crowd without telegraphing the shooter's location").

d. Flash Suppressors

A flash suppressor is a device attached to the muzzle of a rifle to reduce the flash emitted upon firing. Cal. Code Regs. tit. 11, § 5471(r). It is a standard feature of the M-16 that can aid a shooter to maintain accurate, rapid fire in low-light conditions. ER 3165, ¶22, 3179, ¶ 11; ER 3827:1-11, 3909:3-14 (Pls.' Expert Stephen Helsley); ER 4109 ("[T]he mere removal of the flash suppressor may have an adverse impact on the accuracy of the firearm."). As the district court correctly found, a flash suppressor can also help conceal the shooter's position, especially at night. ER 23; *see* ER 3165, ¶22; ER 4109 ("[I]n military firearms [a flash suppressor] disperses the muzzle flash when the firearm is fired to help conceal the shooter's position, especially at night.").

3. Assault Rifles Are Not Protected by the Second Amendment

In light of the similarities between the restricted assault weapons and the M-16, the Fourth Circuit en banc concluded that that assault weapons are not protected by the Second Amendment under *Heller*. *Kolbe*, 849 F.3d at 137 ("Because the banned assault weapons and large-capacity magazines are clearly most useful in military service, we are compelled by *Heller* to recognize that those weapons and magazines are not constitutionally protected"). Both this district court and the Massachusetts district court had also reached the same conclusion. ER 16 ("[T]he Court concludes that semiautomatic rifles within the AWCA's scope are virtually indistinguishable from M-16s and thus are not protected by the Second Amendment."); *Worman*, 293 F. Supp. 3d at 266 ("because the undisputed facts convincingly demonstrate that AR-15s and LCMs are most useful in military service, they are beyond the scope of the Second Amendment"). Because the regulated assault rifles are essentially the same as the M-16, they may be restricted consistent with the Second Amendment just as M-16 rifles may be banned.

B. Assault Rifles Are Not Typically Possessed for Lawful Purposes

The Second Amendment "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as the short-barreled shotguns." *Heller*, 554 U.S. at 625; *Fyock*, 779 F.3d at 997 (citing *Heller II*, 670 F.3d at 1260). This articulation of what is protected by the Second Amendment finds its roots in the absence of constitutional protection for "dangerous and unusual" weapons. *Heller*, 554 U.S. at 627. It does not ask whether a weapon could be used lawfully, such as for self-defense; certainly a short-barreled shotgun can be used to protect one's person and home. Rather, it asks whether the weapon is particularly susceptible to misuse, or criminal use, as a sawed-off shotgun or a machine gun are. *See id.* at 625. Semiautomatic rifles that mimic military assault rifles, which are designed to kill and severely injury enemy troops in state-sanction combat, are susceptible to criminal uses, as a long history of mass shootings attest. (*See* pp. 3-4, *supra*.)

Plaintiffs erroneously argue that assault rifles are now commonly possessed and therefore any restriction on assault rifles is per se unconstitutional. AOB at 15, 22. However, *Heller* did not establish a "popularity" test for the Second Amendment, but rather confirmed

limitations on the Second Amendment based on the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons." *Heller*, 554 U.S. at 627. Plaintiffs have failed to show that assault rifles are typically possessed for lawful purposes like self-defense. *See Binderup v. Att'y Gen. U.S.A.*, 836 F.3d 336, 353 (3d Cir. 2016) (explaining that the party asserting a Second Amendment claim has the burden of proof at the first step).

1. The Fact that a Weapon May Be Popular in Some Sense or Aggressively Marketed Does Not Mean It Is Typically Possessed for Lawful Purposes

Plaintiffs advance a flawed argument that if a firearm is commonly owned, any restriction on the firearm is per se unconstitutional. AOB 15 ("If law-abiding citizens commonly possess an arm for lawful purposes, it is protected."); *id.* at 22 ("[T]he government cannot flatly prohibit something the Constitution protects."). As noted, this "popularity" test, however, is not the correct standard for determining whether a regulation runs afoul of the Second Amendment. *See Kolbe*, 849 F.3d at 141-42 (noting that "the *Heller* majority said nothing to confirm that it was sponsoring the popularity test"); *but see Fyock*, 779 F.3d at 997-98 (analyzing whether LCMs are "dangerous and unusual weapons" by examining whether LCMs have "uniquely dangerous propensities" and are "commonly possessed by law-

abiding citizens for lawful purposes"). And for good reason. Such an approach would be circular and lead to untenable results.

The Fourth Circuit has observed that, under Plaintiffs' theory, short-barreled shotguns and machineguns—weapons that are clearly outside the scope of the Second Amendment—"could be sufficiently popular to find safe haven in the Second Amendment" if statutes prohibiting their possession had not been enacted. *Kolbe*, 849 F.3d at 141. That would lead to an absurd result in which the reason a weapon can be banned is because there is a statute banning it, so it is not commonly owned. *Friedman*, 784 F.3d at 409; *see U.S. v. Henry*, 688 F.3d 637, 640 (9th Cir. 2012) (observing that "[a] machine gun is 'unusual' because private possession of all new machine guns, as well as all existing machine guns that were not lawfully possessed before the enactment of [18 U.S.C.] § 922(o), has been outlawed since 1986"); *Fyock*, 779 F.3d at 998 n.4. And if "a state-of-the-art and extraordinarily lethal new weapon" were invented, under Plaintiffs' popularity theory, "[t]hat new weapon would need only be flooded on the market prior to any governmental prohibition in order to ensure it constitutional protection." *Kolbe*, 849 F.3d at 141; *Worman*, 922 F.3d at 34

n.5 ("measuring 'common use' by the sheer number of weapons lawfully owned is somewhat illogical" (citation omitted)).

Simply put, the Second Amendment is not a one-way ratchet, expanding its scope to protect, and restricting the ability of governments to regulate, certain weapons as new firearms are brought to market before governments have had an opportunity to regulate them. The Supreme Court did not establish a popularity test to permit any firearm, no matter how dangerous and unusual, to be protected by the Second Amendment simply because it was marketed effectively. Governments are permitted to regulate dangerous weapons based on public-safety needs. Just as governments could constitutionally ban machineguns *after* they became popular in the 1930s,[10] California may respond to the use of assault weapons in public mass shootings through regulations like the AWCA.

2. Plaintiffs Failed to Show that Assault Rifles are Typically Possessed for Lawful Purposes

Plaintiffs failed to establish that assault rifles are typically possessed by law-abiding citizens for lawful purposes such as self-defense. Plaintiffs

[10] See Robert J. Spitzer, *Guns Were Much More Strictly Regulated in the 1920s and 1930s than They Are Today*, June 14, 2015, https://historynewsnetwork.org/article/159513 (as of May 25, 2020).

estimate that Americans possess "9-15 million" restricted rifles. AOB 7. However, Plaintiffs' estimate is based on flawed evidence, and does not suffice to establish that those highly dangerous firearms possess the characteristics of a weapon in common use for self-defense.[11] In any event, their estimate is based on sales and manufacturing statistics that do not show the distribution of these military-style weapons (which may be particularly appealing to collectors) or how many or what percentage of individuals possess assault rifles for self defense (where an individual may own several guns, each serving different purposes).

As a threshold matter, Plaintiffs' arguments are based on a mischaracterization of the scope of the AWCA. Their estimate of the number of assault rifles in the United States is based on an overly broad definition of "Banned Rifles" that is inconsistent with the AWCA's definition of assault rifles. Plaintiffs broadly sweep into their definition of "Banned Rifles" all AR-15 platform rifles and other rifles that are not necessarily prohibited by the AWCA. *See* AOB 6 ("The AR-15 platform

[11] *But see Heller v. D.C.*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (noting that 1.6 million AR-15s have been manufactured since 1986 and holding that "semi-automatic rifles and magazines holding more than ten rounds" are in "common use").

rifle [is] likely the most popular type of Banned Rifles").[12] Significantly, the AWCA does not restrict all AR-15 platform rifles and not all AR-15 platform rifles are assault rifles under the AWCA. Indeed, most AR-15 platform rifles in California are not assault rifles under the AWCA. ER 3304-05, ¶ 10. A rimfire AR-15 platform rifle, a centerfire AR-15 platform rifle with a fixed magazine, and a centerfire AR-15 platform rifle with detachable magazine that lacks the enumerated militaristic features are all unrestricted by the AWCA even though they are all "AR-15 platform rifles" counted by Plaintiffs as "Banned Rifles." *Id*.

Plaintiffs' estimate of 9 to 15 million "Banned Rifles" sold in the United States rests primarily on their expert's opinion that was reached by erroneously including semiautomatic rifles that do not meet the definition of assault rifles under the AWCA. The opinion of Plaintiffs' expert included "a

[12] The amici supporting Plaintiffs commit the same fundamental error in estimating the number of assault rifles at issue in this case by equating assault rifles prohibited by the AWCA with semiautomatic rifles in general. *See* amici briefs of National African American Gun Association, Inc. (Dkt No. 27) at 23-26 (arguing that "semiautomatic firearms with detachable magazines [meet] the 'common use' test"); National Shooting Sports Foundation, Inc. (Dkt. No. 28) at 3 ("the AWCA is, in essence, a ban on semiautomatic firearms"); Pink Pistols (Dkt No. 29) at 2 (equating "arms banned by the AWCA" with "semiautomatic rifles"); Firearms Policy Coalition (Dkt No. 30) at 14 (discussing the popularity of the "AR platform modern sporting rifle" and AR-15 rifles).

range of semiautomatic rifles, most of which are based on the AR-15 and AK-47 designs" that are not prohibited as assault rifles under the AWCA. ER 1751; SER 10:20-11:6 (Plaintiffs' expert agreeing that his estimate of AR-15 rifles in the United States includes rifles configured to be rimfire or are "featureless"). The opinion on which Plaintiffs rely was based also on surveys that included semiautomatic rifles not restricted under the AWCA, ER 1751-52, and a student paper that was not peer-reviewed and used similarly flawed methodology, ER 3295-3297, ¶¶ 14-19. The estimate provided by this student paper also includes semiautomatic rifles not restricted under the AWCA, as well as firearms that have been exported to or possessed by law enforcement agencies or the military. ER 3292, ¶¶ 6-7, 3294-95, ¶¶ 11-14; ER 3307, ¶¶ 18-19. The AWCA does not prevent individuals from possessing some types of semiautomatic rifles, for self defense or other lawful uses, such as sport.

While California does not have a record of how many assault rifles are in the United States—to the Attorney General's knowledge, such records are not maintained by anyone—its record shows that there were approximately

166,640 assault rifles registered in California as of November 2, 2018.[13] ER 3951. This shows that Plaintiffs' estimate is likely a gross overestimate of the number of assault rifles, as narrowly defined by the AWCA.

Second, even assuming that "millions" of assault rifles have been sold, which Plaintiffs have failed to show, that does not mean that they are distributed such that millions of law-abiding citizens own them. Plaintiffs' estimate is largely based on manufacturing and sales statistics (of all AR platform rifles), ER 1752-54, and would show, at most, that many such rifles have been made and sold by firearms manufacturers and retailers. *See* AOB at 6-7, 15. But that is not sufficient or competent evidence to satisfy Plaintiffs' burden at the first step of the Second Amendment inquiry. *See Fyock*, 779 F.3d at 998 ("marketing materials and sales statistics [do] not necessarily show that [certain firearm accessories] are in fact commonly possessed by law-abiding citizens for lawful purposes"). Notably, Plaintiffs make no attempt to even propose an estimate for how many or what

[13] California has data on lawful assault-rifle ownership because the State had required owners of assault rifles to register those firearms to maintain lawful possession before the rifles become restricted.

percentage of law-abiding citizens possess assault rifles for lawful purposes.[14]

Indeed, the evidence strongly suggests that these rifles are not widely owned, because ownership of firearms, including assault rifles, is highly concentrated. Evidence shows that approximately 20 percent of gun owners own 65 percent of the nation's firearms. ER 3047, ¶ 22. Furthermore, assault rifles appear to attract collectors; evidence that Plaintiffs' expert relied on shows that 66 percent of owners of AR- or AK-platform rifles own two or more such rifles; over 30 percent of owners own three or more such rifles; and over 25 percent of owners own four or more such rifles. ER 4511-12, 4515. And ownership of those rifles is becoming increasingly more concentrated. ER 4512 (showing owners of "modern sporting rifles" owned an average of 2.6 such rifles in 2010 and an average of 3.1 such rifles in 2013); ER 3711:12-22 (Pls.' Expert); ER 3045-49; ER 3297, ¶ 18. The

[14] Plaintiffs incorrectly characterize the Attorney General's expert Blake Graham as having acknowledged that assault rifles are common. AOB at 7. In the excerpt of Mr. Graham's testimony that Plaintiffs rely on, however, he actually stated that he frequently sees AR-platform rifle parts at gun shows but "it's getting less and less common that [he goes] to the out-of-state [gun] shows." ER 1851. Mr. Graham's testimony was unrelated to whether assault rifles are "common."

ownership concentration of assault rifles further weaken any suggestion that assault rifle are typically possessed for self defense.

In any case, Plaintiffs also failed to show that assault rifles are typically possessed for self-defense. The core of the Second Amendment, as described in *Heller*, is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *See Bauer v. Becerra*, 858 F.3d 1216, 1221 (9th Cir. 2017) (quoting *Heller*, 554 U.S. at 635). Though it was their burden, Plaintiffs offered no evidence to show that assault rifles are commonly used for self-defense either inside or outside the home. Nor could they. Indeed, in the extremely rare instances when individuals in the United States fire a gun in self-defense, a defender used a rifle of any type in only 4.6% of those cases (whether assault or non-assault). ER 4412.[15] This is not surprising. Assault rifles are designed to serve modern state-

[15] When confronted with potential violence, the victim used a gun in self-defense in less than one percent of these incidents. ER 3074, ¶ 86. In those rare instances when a gun is used, 98 percent of the time it involves merely brandishing, rather than firing, the gun, which is enough to cause the criminal to stop the attack. *Id.* at 3074-75, ¶¶ 87-88. And brandishing an assault rifle is no more effective in stopping an attack than brandishing a handgun. ER 3353:20-3354:8.

sanctioned combat and offensive purposes (*see* pp. 19-28, *supra*),[16] and do not share the characteristics of weapons in typical use for individual self-defense, like the handgun (*see infra*, pp. 43-44). *See Heller*, 544 U.S. at 629 (citing reasons handguns are preferred for home defense: ""[i]t 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"). The assault rifle thus falls outside the scope of the Second Amendment's protection.

III. EVEN IF THE SECOND AMENDMENT IS IMPLICATED, CALIFORNIA'S RESTRICTIONS ON ASSAULT RIFLES ARE CONSTITUTIONAL

Even if the regulated assault weapons were entitled to some protection under the Second Amendment, the challenged laws are constitutional under

[16] *See supra* Section II.A; ER 3171 ¶ 42 (Def.'s Expert Blake Graham opining that assault rifles are suitable for law-enforcement use because law-enforcement personnel are often required to affirmatively enter dangerous situations to subdue shooters or other criminal suspects to protect civilians); ER 3418:15-22 (LAPD Gun Unit Detective Michael Mersereau opining that assault rifles are "more of a[n] offensive weapon in the sense that you generally deploy them when . . . you know you're going to a possible gunfight").

the applicable level of scrutiny: intermediate scrutiny. As sister courts examining assault-weapon restrictions have concluded, the challenged laws here are assessed under intermediate scrutiny. *See Kolbe*, 849 F.3d at 140-41; *NYSRPA*, 804 F.3d at 269; *Heller II*, 670 F.3d at 1263; *but see Friedman*, 784 F.3d at 410 (upholding assault weapons ban without selecting a level of scrutiny). And the restrictions contained in the AWCA are reasonably tailored to the State's important and substantial interest in public safety and reducing gun violence.

A. Intermediate Scrutiny Is the Appropriate Standard

In determining the appropriate level of scrutiny to apply to a Second Amendment challenge, the Court must consider "(1) how close the challenged law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on that right." *Jackson v. City and County of San Francisco*, 746 F.3d 953, 960-61 (9th Cir. 2014). "A law that imposes such a severe restriction on the fundamental right of self defense of the home that it amounts to a destruction of the Second Amendment right is unconstitutional under any level of scrutiny." *Bauer*, 858 F.3d at 1222. A "law that implicates the core of the Second Amendment right and severely

burdens that right warrants strict scrutiny. Otherwise, intermediate scrutiny is appropriate." *Id.*

The AWCA does not impose such severe restrictions that it amounts to the destruction of the Second Amendment so it would be unconstitutional under any level of scrutiny, as Plaintiffs contend. (AOB 22-24.) Unlike the total ban on handguns at issue in *Heller*, the challenged restrictions impose only de minimus burdens on the Second Amendment because they apply only to a small subset of semiautomatic rifles with particularly dangerous, militaristic features. Californians may still possess and use for self-defense handguns and shotguns—weapons more widely used, better suited, and more effective for self-defense purposes. ER 3182 They may also possess some other semiautomatic rifles, like (1) any semiautomatic rifle, provided it is not a prohibited make and model or does not have any of the prohibited features (*i.e.*, is "featureless"); (2) a centerfire semiautomatic rifle with any of the prohibited features and with a fixed magazine of 10 rounds or less; or (3) a rimfire semiautomatic rifle with any prohibited features. ER 3304-05, ¶ 10.[17] "[F]irearm regulations which leave open alternative channels for

[17] As Plaintiffs' expert admitted, the reasons that allegedly make an assault rifle suitable for defensive purposes applies equally to these non-restricted semiautomatic rifles. ER 3621:15-20.

self-defense are less likely to place a severe burden on the Second Amendment right than those which do not." *Jackson,* 746 F.3d at 961.[18]

Nor do the challenged provisions burden the core of the Second Amendment's right to self-defense. The assault rifles restricted by the AWCA are not well suited for self-defense. They do not share the features that make handguns the "quintessential self-defense weapon" and well-suited to self-defense in the home.[19] *Worman*, 922 F.3d at 36; *see* ER 3082-83, ¶ 107; ER 3182-83, ¶ 23; *cf. Heller*, 554 U.S. at 629. Evidence shows, and as Plaintiffs' expert acknowledged, that in defensive gun uses, handguns are preferred "substantially" more than rifles. *See* ER 3725:5-21; *Heller*, 554 U.S. at 629. This is consistent with the district court's observation that "while individuals may sometimes purchase assault rifles for self-defense, it

[18] Indeed, 90 percent of all owners of AR- or AK-platform rifles own a handgun prior to owning a rifle, ER 4511, which shows that the vast majority of assault-rifle owners have an appropriate firearm for self-defense and strongly suggests that they prefer handguns for self-defense purposes.

[19] To be precise, the State does not argue that assault rifles *cannot* be used for self-defense purposes. Any weapon can be used for self-defense, depending on the circumstances, including a machinegun. But that does not mean it is well-suited for self-defense or protected by the Second Amendment. For this reason, Plaintiffs' characterization of the State's expert as having "admitted" that the militaristic features of an assault rifle may aid shooters in self-defense situations is irrelevant. AOB at 8 (citing ER 1872).

is not the primary purpose for doing so." ER 18; *see* ER 2026 (noting that 30 percent of AR-style rifles were sold in 2016 for "personal-protection purposes," compared to 59.5 percent of handguns for that purpose); ER 1752 ("Recreational target shooting was the most prevalent reason cited for owning a [modern sporting rifle], followed by home defense."). Assault rifles are also less effective in home-defense situations than handguns in part because they are less maneuverable in confined areas such as a home. ER 3082-83, ¶ 107; ER 3182-83, ¶ 23. For these reasons, law enforcement officers recommend handguns and not rifles—let alone assault rifles—for home defense. ER 3082-83, ¶ 107.

Indeed, assault rifles may increase the danger to law-abiding users and innocent bystanders if kept in the home or used in self-defense situations. *See* ER 3172; ER 4007 ("In addition to utilizing military features useful in combat, but which have no legitimate civilian purpose, assault weapons are exceedingly dangerous if used in self defense . . . ."); *Gallinger*, 898 F.3d at 1019 (noting the lack of evidence that assault weapons are well-suited for self-defense, in contrast to handguns, and the "inherent risks that accompany carrying assault weapons for self-defense" (citation omitted); *Kolbe*, 849 F.3d at 127 ("The State has also underscored the lack of evidence that the

banned assault weapons and large-capacity magazines are well-suited to self-defense.").

The handful of anecdotes upon which Plaintiffs rely in which people have purportedly fired or brandished assault rifles in self-defense situations do not demonstrate that assault rifles are, in fact, well suited to self-defense. Indeed, Plaintiffs' expert has acknowledged that instances in which an AR-15 was used in self-defense are "isolated anecdotes," which is "all you can say" about them. *See* ER 3725:22-3726:4; *id.* at 3653:15-21 (testifying that "argumentation by anecdote has no scholarly legitimacy"). "Although self-defense is a conceivable use of the banned assault weapons," *Kolbe*, 849 F.3d at 127, the evidence in the record demonstrates that assault rifles are not suitable for self-defense, are not commonly used for that purpose, but are most useful in military service. Because the challenged laws do not implicate the core of the Second Amendment or severely burden that right, intermediate scrutiny is appropriate. *See Kolbe*, 849 F.3d at 140-41; *NYSRPA*, 804 F.3d at 269; *Heller II*, 670 F.3d at 1263.

Plaintiffs now, for the first time on appeal, contend that strict scrutiny applies because the AWCA imposes a ban, "not just a regulation," on

conduct protected by the Second Amendment.[20] AOB at 25, 27. But just because the challenged restrictions are found to burden conduct protected by the Second Amendment does not mean that strict scrutiny applies. *See Silvester*, 843 F.3d at 821. Instead, the inquiry turns on the nature of the burden; and, as shown above, the core of the Second Amendment is not so burdened in this case that strict scrutiny is warranted.

Plaintiffs also cite no authority under Second Amendment jurisprudence to support their flawed theory that any weapon protected by the Second Amendment cannot be banned. AOB at 22. Instead, Plaintiffs make a failed attempt to draw a parallel to First Amendment cases. *See id*. But it is undisputed that even "freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children." *Ashcroft v. Free*

[20] While Plaintiffs now acknowledge this Court's two-step inquiry to determine the appropriate level of scrutiny, AOB at 25, they had instead urged a "historical, scope-based" test that was correctly rejected by the district court under this Court's precedents. ER 10. Not surprisingly, Plaintiffs have now backpedaled from this position. *Compare* AOB 23 ("Appellants do not contend that 'if there is no historical justification, the regulation is per se invalid'") *with* Pls.' Mem. in Supp. of Mot. Summ. J. ("Pls.' MSJ."), ECF No. 77-1, at 11 ("[I]f sufficient 'historical justification' exists for a restriction on activity falling within the scope of the right, the restriction is valid; if not, it is invalid.").

Speech Coal., 535 U.S. 234, 245-46 (2002). The Second Amendment, too, has its limits. *See Heller*, 544 U.S. at 626-27.

B. The Assault-Rifle Restrictions Withstand Intermediate Scrutiny

The AWCA withstands intermediate scrutiny.[21] Under Second Amendment jurisprudence, a regulation satisfies intermediate scrutiny if (1) the government's stated objective is "significant, substantial, or important"; and (2) there is a "'reasonable fit' between the challenged regulation and the asserted objective." *Silvester*, 843 F.3d at 821-22 (citation omitted). It is beyond question that California's interest in promoting public safety and reducing gun violence and mass shootings is important and substantial. *Fyock*, 779 F.3d at 1000; *United States v. Chovan*, 735 F.3d 1127, 1135 (9th Cir. 2013). Plaintiffs do not dispute this. Instead, they contend only that the AWCA does not reasonably fit the state's interest in reducing gun violence. (AOB 28-43). It does.

[21] The AWCA's restrictions on assault rifles withstands any form of heightened scrutiny, including strict scrutiny. Nonetheless, here, the Attorney General addresses specifically the application of intermediate scrutiny because that is the correct level of scrutiny for this Court to apply and because Plaintiffs did not argue for strict scrutiny below.

Intermediate scrutiny does not require the fit between the challenged regulation and the stated objective to be perfect, nor does it require that the regulation be the least restrictive means of serving the objective.[22] *Jackson*, 746 F.3d at 969. The government "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* at 969-70 (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986)).

Courts "must accord substantial deference to the predictive judgments" of the legislature. *Pena v. Lindley*, 898 F.3d 969, 979-80 (9th Cir. 2018) (quotation omitted), *petition for cert. docketed*, (No. 18-843). The government may "rely on any evidence 'reasonably believed to be relevant' to substantiate its important interests," and the Court "may consider 'the legislative history of the enactment as well as studies in the record or cited in pertinent case law.'" *Fyock*, 779 F.3d at 1000 (quotation omitted). Such

[22] Plaintiffs argue that under intermediate scrutiny, the law must be "narrowly tailored to serve a significant government interest." AOB at 27-28 (citing *Packingham v. North Carolina*, 137 S.Ct. 1730, 1736 (2017)). But Plaintiffs urge an incorrect legal standard under this or any other circuit's Second Amendment jurisprudence. Notably, Plaintiffs rely on no Second Amendment cases, except dissenting opinions, in their arguments. Furthermore, Plaintiffs do not suggest how the challenged restrictions may be narrowly tailored.

"evidence need only 'fairly support[]' [the government's] conclusions." *Pena*, 898 F.3d at 982. Even when the record contains conflicting evidence, intermediate scrutiny "allow[s] the government to select among reasonable alternatives in its policy decisions." *Id.* (quotation omitted); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 99 (2d Cir. 2012) ("It is the legislature's job, not [the courts'], to weigh conflicting evidence and make policy judgments."). Deferential review is particularly appropriate "[i]n the context of firearm regulation" because "the legislature is 'far better equipped than the judiciary' to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks." *Kachalsky*, 701 F.3d at 97 (quotation omitted). The AWCA easily passes scrutiny under this standard.

1. Assault Rifles Are Used Disproportionally in Crime, Particularly in Mass Murders and Against Law Enforcement Officers

In passing the federal assault-weapons ban, Congress found that "semiautomatic assault weapons are the weapons of choice among drug dealers, criminal gangs, hate groups, and mentally deranged persons bent on mass murder." ER 4155. It further found that "[t]he carnage inflicted on the American people [by] criminals and mentally deranged people armed

with . . . semi-automatic assault weapons has been overwhelming and continuing," and the use of those weapons by "criminal gangs, drug-traffickers, and mentally deranged persons continues to grow." *Id.* at 1089-90. The California Legislature—recognizing a gun-violence crisis and meeting as a Committee of the Whole—made similar findings when it enacted the AWCA.[23] *See Kasler*, 23 Cal.4th at 4832 P.3d at 587.

Assault weapons are used disproportionately in crime relative to their market presence. The Director of the ATF testified to Congress that firearms-tracing statistics showed that assault weapons were proportionally used more often in crimes compared to handguns.[24] ER 4155. Congress found these statistics borne out by law enforcement officials' observations on the streets. *Id.* These Congressional findings are bolstered by a recent

[23] Plaintiffs' suggestion that findings made by Congress and the Legislature are irrelevant, AOB 33, is plainly incorrect. *See Fyock*, 779 F.3d at 1000 ("[City] was entitled to rely on any evidence 'reasonably believed to be relevant' to substantiate its important interests." (quotation omitted)).

[24] While many statistics refer only to assault weapons without breaking down the ratio of pistols, rifles, and shotguns, data shows that most assault weapons used in crime are assault rifles. *See* ER 4127. That assault weapons are primarily assault rifles can also be seen by the assault weapon registration numbers in California. As of November 2, 2018, over 90 percent of registered assault weapons are assault rifles. ER 3951 (166,640 assault rifles out of a total assault weapons registration of 184,552).

study that shows assault weapons, predominately assault rifles, are used in up to 8 percent of all crimes involving firearms. ER 4123-24. More generally, assault weapons and other high-capacity semiautomatic weapons account for 22 to 36 percent of guns used in crimes. *Id.*

Assault rifles are also disproportionately used in mass murders. A 2017 study found that approximately one-third of firearm mass murders involved an assault rifle, and assault weapons and other high capacity semiautomatic weapons are used in up to 57 percent of firearm mass murders.[25] ER 4123, 4127. This evidence is confirmed by a recent study by Lucy Allen, one of the Attorney General's experts, who examined 109 public mass shootings and found that an assault rifle was used in 26 of those

[25] These statistics are based on incidents in which sufficient data existed to definitively determine that an assault weapon was used. ER 4127.

incidents.[26] ER 3276. These tragedies are increasing: public mass shootings increased from an average of 2.7 events per year in the 1980s to an average of 4.5 events per year from 2010 to 2013. ER 3051, ¶ 34.

Plaintiffs criticize Ms. Allen's research for focusing on public mass shootings in public settings rather than in private settings. AOB at 35. However, her focus on public mass shootings is consistent with the objective of the AWCA, which was enacted in response to the public mass shooting in Stockton. *See* ER 4197. In any event, evidence shows that 80 percent of

[26] Ms. Allen's analysis was based on data from the Citizens Crime Commission of New York City as well as the *Mother Jones* survey of public mass shootings, which is arguably the most comprehensive compilation of public mass shootings in the country. ER 3240-41, ¶¶ 8-9 & n.9. The *Mother Jones* survey has been cited favorably by numerous courts. *See N.Y.S. Rifle & Pistol Ass'n v. Cuomo*, 990 F. Supp. 2d 349, 369 (W.D.N.Y. 2013), *aff'd in part and rev'd in part by NYSRPA*, 804 F.3d 242; *Kolbe v. O'Malley*, 42 F. Supp. 3d 768, 780 & n.17 (D. Md. 2014), *aff'd by Kolbe*, 849 F.3d 114. Plaintiffs criticize one of Ms. Allen's two sources, *Mother Jones*, for changing in 2013 the minimum number of fatalities required to qualify as a mass shooting from four to three victims. AOB at 34-35. However, *Mother Jones* reduced the fatality threshold in response to Congress's change to the definition of a mass shooting for federal law enforcement authorities. ER 3240-41, ¶ 9; *see* Pub. Law 112-265, § 2; 126 Stat. 2435. The fact that *Mother Jones* aligned its definition with federal law does not undermine the reliability of its data or analysis of that data. If anything, as Plaintiffs' expert acknowledged, this definition depresses the average number of fatalities in public mass shootings because it captures shootings with lower fatality counts. *See* ER 3767:4-15.

mass shootings involving assault weapons and LCMs occur at public locations, ER 4128, while mass shootings in nonpublic locations tend to be incidents of domestic violence, *see* ER 3729:23-3731:12.

Evidence further shows that assault rifles pose particular dangers to law enforcement officers. Assault rifles have been used disproportionally in violence against them compared to other types of firearms. Assault rifle rounds are capable of penetrating the soft armor worn by police officers that would otherwise stop handgun rounds. ER 3603:19-3604:1 (Pls.' Expert J. Buford Boone, III); ER 3419:5-18; *see* ER 4229-30. Evidence also shows that 13 to 16 percent of guns used in the murders of police are assault weapons, virtually all assault rifles. ER 4123, 4129. Between 1998 and 2001, at least one in five law enforcement officers killed in the line of duty was killed with an assault weapon. ER 4318. And assault weapons and high-capacity weapons account for upwards of 40 percent of cases involving serious violence, including murders of police. ER 4123, 4129.

2. Assault Rifles Are More Lethal Than Handguns; Use of Assault Rifles Increases Casualties and Causes More Serious Injuries

Evidence shows that the use of weapons regulated by the AWCA—particularly assault rifles—increases the numbers of deaths and injuries in

public mass shootings on average when compared to the use of other weapons. *See* ER 3276. This is not surprising, given that the evidence also shows that assault rifles inflict more numerous and more extensive injuries in gunshot victims than wounds from handguns. In light of this evidence, it was reasonable for the Legislature to conclude that restricting these weapons would enhance the public's safety.

That the assault rifles are uniquely dangerous is demonstrated by the evidence correlating their use in public mass shootings with higher average fatality and injury figures when compared to public mass shootings involving different weapons. ER 4128; *see* ER 3083-84, ¶ 109; *see also* ER 3083-84, ¶ 109; ER 3276; ER 3781:20-24 (Pls.' Expert Gary Kleck); ER 4128. In 109 public mass shootings examined by Ms. Allen, the average number of fatalities or injuries was 41 per shooting when an assault rifle was used, compared to 11 per shooting in which an assault rifle was not used. ER 3276[27]; *see also* ER 4128 (finding that mass

[27] Plaintiffs suggest that Ms. Allen could not have known which firearms are considered assault rifles for her study. AOB 36. To the contrary, Ms. Allen employed two separate analysts who independently researched whether a rifle used in a mass shooting was an assault rifle under the AWCA. ER 529:17-531:10. Her study counted only rifles that met the AWCA's definition of assault weapon. *Id*.

shootings involving assault weapons and LCMs have resulted in more than twice as many people shot on average compared to other incidents). Plaintiffs' own expert witness acknowledged that "there is a correlation between the use of assault weapons and the number of victims injured or killed," and that such correlation makes it "[m]ore likely" that the two are causally related. ER 3721:11-16, 3734:21-25. The correlation between the use of assault weapons and higher casualty figures in mass shootings is thus undisputed.

Assault rifles also inflict more numerous and more extensive injuries in gunshot victims than wounds from handguns. According to the surgeon who treated victims of two of the country's deadliest mass shootings—Columbine and Aurora, Colorado—"[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." ER 3188. Victims of assault rifles are also "at far greater risk of both immediate and long-term complications," including "higher amputation rates and higher infection rates." *Id.* at 3189.

The "effects of rifle bullets can be far more destructive compared to handguns because of their higher energy" and the "explosive" effects on gunshot victims. ER 4482. When a bullet enters a victim's body, it could create two types of cavities: a permanent cavity where the bullet passes through the tissue, and a temporary cavity (called "cavitation") where the energy of the bullet causes tissue displacement inside the body. ER 4482-83; ER 3560:15-19, 3563:16-24. Cavitation is "considered the most important feature in wound ballistics of high-velocity projectiles." ER 4482. Cavitation occurs when tissue is displaced behind a bullet, causing a temporary cavity that is larger than the permanent cavity of the bullet's path, and causing cycles of tissue expansion and contraction that strains, compresses, and shears the affected tissue. *Id.*

A handgun bullet typically creates only a permanent cavity in its victims where the bullet passes through the tissue. ER 3560:15-19 (Pls.' Expert); ER 4523 ("At the lower velocities of handgun rounds, the temporary cavity is not produced with sufficient velocity to have any wounding effect . . . ."); ER 4534. Handguns typically do not cause cavitation, and when they do, the cavitation they create are typically not as injurious to the tissue and can be more easily treated by a physician. ER

3566:4-23 (Pls.' Expert); ER 4523 ("In order to cause significant injuries to a [body] structure, a pistol bullet must strike that structure directly."). By contrast, a common assault-rifle bullet not only causes cavitation, but creates a larger permanent cavity in the victim's body than the diameter of the bullet because it rotates vertically after it enters the body. ER 3556:11-3557:5.

Plaintiffs miss the point when they argue that a single round fired from a semiautomatic, center-fire rifle without any restricted features may cause the same damage to human tissue as a single round fired from the same rifle with one or more restricted features. *See* AOB at 38-9. The restricted features enhance the rifle's "capability for lethality" when the rifle is used to fire *repeatedly* in rapid succession. *See* ER 4161-62. The military-style features that make an assault rifle easier to control and more accurate during *rapid fire* are precisely the features that make these weapons particularly suitable in combat situations (and for those who intend to commit mass shootings). *See Kolbe*, 849 F.3d at137 ("The very features that qualify a firearm as a banned assault weapon . . . 'serve specific, combat-functional ends.'" (citation omitted)); *see also* ER 3398:15-3399:3 (opining that more control over a firearm is "a very bad thing if it's in the hands of somebody

who wants to use it in a[n] unlawful way, as we see with all the mass shootings that involve AR15s").

For example, rifle pistol grips "were designed to assist in controlling machinguns during automatic rifle." ER 4108. As Plaintiffs' expert acknowledged, a pistol grip prohibited under the AWCA could "be more effective in stabilizing the weapon during rapid fire than other forms of pistol grips." ER 3898:6-15; *see also* ER 2551 (a pistol grip "[a]llows the weapon to be 'spray fired' from the hip" and "helps stabilize the weapon during rapid fire"). Plaintiffs' expert further acknowledged that "where a person [is] firing multiple shots from a rifle in low light conditions, a flash suppressor may help that shooter fire that firearm more accurately." ER 3909:9-14. The capability to accept large-capacity magazines "[p]ermits [a] shooter to fire dozens of rounds of ammunition without reloading," further enabling mass shooters to inflict damage. ER 2551.[28]

Public mass shootings with assault rifles also cause harm to those beyond the direct shooting victims. Social science studies consistently show

[28] Other proscribed features enhance the concealability of the weapon or shooter for tactical purposes. *See* ER 2551 (noting that a flash suppressor "allow[s] the shooter to remain concealed when shooting at night" and a folding stock "[s]acrifices accuracy for concealability and mobility in combat situations").

that mass shootings can lead to increased levels of post-traumatic stress symptoms, anxiety, and depression in survivors long after the shootings, particularly in children. ER 3054-56, ¶¶ 38-41; *see also* ER 4475-77.

3. Evidence Shows that Assault-Rifle Restrictions Are Effective and Thus Further the AWCA's Public Safety Objectives

Restricting the possession and availability of assault rifles has had and will continue to have a significant impact on public safety, confirming that the AWCA's restrictions reasonably fit the State's public safety objectives.

As the district court concluded, evidence in the record shows that assault weapons restrictions *are* effective in reducing gun violence, particularly violence associated with mass shootings.[29] This is most clearly demonstrated by the effect of the federal assault-weapons ban.

Prior to its expiration, the federal ban was effective in reducing the prevalence of the banned weapons in gun crime. As Plaintiffs' expert acknowledged, criminal use of assault weapons declined during the years of the federal ban. ER 3715:15-3716:1 ("I don't at all disagree that the use of [assault weapons during the federal assault weapons ban] . . . in crimes was

[29] Contrary to Plaintiffs' suggestion, AOB 29, the district court's ruling was not based speculation that the AWCA might work, but based on evidence in the record.

reduced, absolutely.") And criminal use of those firearms increased after the ban expired. ER 3043, ¶ 12, 3047-48, ¶¶ 23-24, 3062-63, ¶¶ 55-56; *see* ER 4129. One study comparing data during the ten-year period of the federal ban with preceding ten-year period shows that the number mass shootings (in which at least six people were killed) dropped by 37 percent (from 19 to 12) and the number of fatalities dropped by 43 percent (from 155 to 89). ER 3062-63, ¶¶ 55-56. However, in the ten-year period after the federal ban expired, the use of assault weapons in crime and the number of mass shootings both increased in relation to the ten-year period of the ban. *Id.*; *see* ER 4123, 4129. Mass shootings jumped by 183 percent (from 12 to 34) and the number of fatalities jumped by 239 percent (from 89 to 302). ER 3062-63, ¶¶ 55-56. The sharp increase in mass shootings is in contrast to the general downward trend in overall crime over the same period of time. *Id.*[30]

Plaintiffs rely on an outdated 2004 study, published immediately after the federal ban expired in 2003, to claim that the ban did not reduce gun violence. AOB at 41 (citing 2004 Koper study). Plaintiffs, however,

[30] Plaintiffs suggest, without proffering any supporting evidence, that it is implausible that a slight change to a rifle could "create a measurable decrease in crime." AOB at 42. However, that is precisely what the evidence shows.

overlook that study's disclaimer that more time was needed to assess the ban's efficacy and that "it [was] premature to make definitive assessments of the ban's impact on gun crime." ER 2545. The study cautioned that "the grandfathering provision of the [federal] ban guaranteed that the effects of this law would occur only gradually over time," and the effects of the ban "are still unfolding and may not be fully felt for several years into the future." *Id.* at 2545-46, 2639.

Evidence submitted by the Attorney General and considered by the district court consists of recent studies that more fully capture the effects of the federal ban, including an updated study by the principal author of the 2004 study, Christopher Koper. Dr. Koper's updated study confirmed that the criminal use of assault weapons and large-capacity magazines declined during the years of the federal ban and increased after its expiration in 2004. ER 4130. The study concluded that it "provides further evidence 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.*; *accord* ER 4138; *see also Kolbe*, 849 F.3d at 129 n.8 (noting that "Dr. Koper ultimately concluded, however, that . . . the federal ban had some success and could have had more had it remained in effect").

Dr. Koper's updated study further found that, in contrast to the period prior to the federal ban, assault rifles, rather than assault pistols, "now account for the substantial majority of [assault weapons] used in crime," which "implies an increase over time in the average lethality of [assault weapons] used in violence." ER 4128-29. The updated study further confirmed that assault weapons and LCMs are "more heavily represented among guns used in the murders of police and mass murders." *Id.* at 4129. Significantly, the updated study concluded that "[g]rowth in the use of such weapons could have important implications for public health as these weapons tend to produce more lethal and injurious outcomes when used in gun violence." *Id.* at 4124. Moreover, Dr. Koper has testified in support of other assault-weapon restriction, like the AWCA. *See*, *e.g.*, *Kolbe v. O'Malley*, 42 F. Supp. 3d 768, 778-79 (D. Md. 2014).

In response to the Attorney General's abundant evidence, Plaintiffs cite a single study to argue that assault-weapons bans have had no significant impact on homicide or suicide rates. AOB at 42. The principal author of that study, however, conceded that New Zealand's recent national ban on semiautomatic weapons and large-capacity magazines "will likely reduce

casualties from mass shootings." ER 1301.[31] In any event, California is entitled to make "reasonable inferences" from the available data that—at a minimum—shows a clear correlation between restrictions on assault weapons and reduction in crime and victimization. *See Worman*, 922 F.3d at 40; ER 3721:11–16 ("a correlation between the use of assault weapons and the number of victims injured or killed" makes it "[m]ore likely" that there is a causal relationship). The Legislature's judgment in enacting the AWCA is supported by substantial evidence and reasonable inferences; under intermediate scrutiny, the courts role is not to weigh conflicting legislative evidence. *See Peña*, 898 F.3d at 980 ("Our role is not to re-litigate a policy disagreement that the California legislature already settled, and we lack the means to resolve that dispute. Fortunately, that is not our task.").

The AWCA advances important interests in protecting citizens and law enforcement from gun violence, promoting public safety and preventing

[31] Assault-weapons bans have also been effective in other countries. For example, Australia implemented an assault weapons ban in 1996, following a public mass shooting in Port Arthur Tamania. ER 3078-79, ¶ 98. In the 17-year period before the ban, there were seven public mass shootings in Australia, but none in the 22 years after. *Id.*

crime. Evidence shows that the AWCA's restrictions on assault rifles have also been effective, just as the federal ban was effective. *See* ER 4497 (showing that California's gun-death rate was reduced by 56 percent in the 20 years after the AWCA was enacted). Indeed, the AWCA's restrictions on assault rifles are likely to be more effective in reducing gun crimes than the federal ban because, unlike the federal ban's two-feature test, the AWCA restricts centerfire rifles capable of accepting a detachable magazine and incorporating one of the military-style features. *See also* ER 3663:4-11. The AWCA, therefore, has reduced and can be expected to continue to reduce the overall death and injury from the criminal use of guns. *See* ER 3070, ¶ 77. The challenged restrictions further the State's public safety interests and pass intermediate scrutiny.

CONCLUSION

The district court's judgment should be affirmed.

Dated: May 26, 2020

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FOR THE NINTH CIRCUIT

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