Case No. 19-56004

In the United States Court of Appeals
for the Ninth Circuit

STEVEN RUPP, et al.,
Plaintiffs-Appellants,

v.

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

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

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The Supreme Court tells us that where there is a ban, as opposed to a mere regulation, on arms " 'in common use at the time' for lawful purposes like self-defense," there is no need to apply any scrutiny—the restriction fails per se. *District of Columbia v. Heller*, 554 U.S. 570, 627; *see also id.* at 624-25; *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1027-28 (2016). This Court also asks whether an arm has historically been restricted; if it has, it may fall outside the Second Amendment's scope. *Fyock v. City of Sunnyvale*, 779 F.3d 991, 996-97 (9th Cir. 2015). The Banned Rifles are in exceptionally common use for lawful purposes, including self-defense. And the State puts forth no argument that the Banned Rifles have historically been restricted. The AWCA's ban on them is thus necessarily unconstitutional.

The State resists that reality by first arguing that the Banned Rifles are "dangerous and unusual" and thus not protected by the Second Amendment. Answering Br. Def.-Appellee ("State's Br.") 11. To be sure, the Second Amendment does not protect "dangerous and unusual" arms. *Heller*, 554 U.S. at 627. But the State has failed to show that Banned Rifles are either "dangerous" or "unusual," when it must show they are both "dangerous *and* unusual" to prevail. *Fyock*, 779 F.3d at 998; *see also Caetano*, 136 S. Ct. at 1031 (Alito, J., concurring). While the State relies on another circuit's opinion to claim that it is Appellants' burden to show that the Banned Rifles are not "dangerous and unusual," State's Br. 30, *Heller* decisively places the burden on the State to show that they are, 554 U.S. at 582 (noting that the Second Amendment extends "prima facie, to all instruments that constitute bearable arms"). In any event, Appellants have put forth ample evidence to prove that Banned Rifles

are not only extremely popular among the law-abiding American public (not "unusual") but that the features that qualify them as prohibited facilitate the safe use of a rifle, improving public safety (not "dangerous"). The State, on the other hand, has put forth platitudes, innuendo, and mostly unreliable, third-party evidence.

The State then resists constitutional order itself by arguing that even if the Second Amendment protects the Banned Rifles, they can still be banned. State's Br. 40-41. Not only does this flout the Supreme Court's reasoning in *Heller*, but it also renders meaningless constitutional protection if "protected" items can be banned, particularly when the bar to ban them is so low. Because both of the State's arguments fail, the AWCA's rifle ban is unconstitutional.

ARGUMENT

I. THE AWCA BANS SECOND AMENDMENT PROTECTED ARMS

The State advances two arguments for why the Banned Rifles are "dangerous and unusual" and thus not protected under the Second Amendment. First, it advocates the district court's view that the Banned Rifles are "dangerous and unusual" because they "are virtually indistinguishable from M-16 [machine gun]s . . .." State's Br. 17-29. Next, the State claims that in determining Second Amendment protection *Heller* "asks whether the weapon is particularly susceptible to misuse, or criminal use," not whether it is in common use. *Id.* at 30-33. But then the State puzzlingly concludes that the Banned Rifles fail that test because Appellants did not show that they "are typically possessed by law-abiding citizens for lawful purposes." *Id.* at 33-40. Both of the State's arguments miss the mark.

A. The Banned Rifles Are Not Legally "Like" M-16 Machine Guns

Heller's passage noting that "weapons that are most useful in military service—M-16 rifles and the like—may be banned" cannot be the sort of test the State and the district court make it out to be. State's Br. 18-30 (citing *Heller*, 554 U.S. at 627). It is far too vague and amorphous to be extended to any arm beyond the M-16. And reason dictates that to even be considered a weapon "most useful in military service," the weapon must at least be in use by an actual military. Yet the State does not point to a single military that actually employs Banned Rifles. Nor does the State offer a military arms expert to support its claim that they are most useful in military service. That should be the end of this inquiry.

Heller's author, former Justice Scalia, did not share the State's interpretation of his opinion that Banned Rifles are so "like" the M-16 that they lack Second Amendment protection. Otherwise, he would not have joined a dissent to the Supreme Court's refusal to review a Seventh Circuit opinion upholding a law nearly identical to the AWCA, complaining that "several Courts of Appeals . . . have upheld categorical bans on firearms that millions of Americans commonly own for lawful purposes," citing as an example the law at issue because it "criminalizes modern sporting rifles (e.g., AR-style semiautomatic rifles), which many Americans own for lawful purposes like self-defense, hunting, and target shooting." *Friedman v. City of Highland Park*, 136 S. Ct. 447 (2015).

The author of that dissent, Justice Thomas, was also the author of *Staples v. United States*, 511 U.S. 600 (1994). It is thus unsurprising that the State's reliance on

Staples to argue that the Banned Rifles are "military arms" unworthy of Second Amendment protection is misplaced. State's Br. 19. Indeed, that case identified the AR-15 as being among those firearms that "traditionally have been widely accepted as lawful possessions," *Staples*, 511 U.S. at 612, and in fact *distinguished* the AR-15 from the M-16, calling it a "*civilian* version," *id.* at 603 (emphasis added). Such a rifle simply cannot be described as "essentially the same as the M-16." State's Br. 19.

1. Semiautomatic Rifles Are Vastly Different from Fully Automatic M-16s

The most obvious, and critical, distinction is that the Banned Rifles are semiautomatic, while the M-16 is fully automatic. *Staples*, 511 U.S. at 603 (noting the AR-15 is "a semiautomatic weapon," while the "M-16, in contrast, is a selective fire rifle," meaning it can produce "automatic fire"). The State claims there is no meaningful difference between semiautomatic and fully automatic rates of fire. State's Br. 21. It first points to Congressional testimony claiming that semiautomatic weapons "can be fired at rates of 300 to 500 rounds per minute." State's Br. 21 (citing E.R.XX 4160). But that testimony appears to have been made in the context of a firearm converted to automatic fire. E.R.XX 4160 (also discussing conversion of semiautomatic firearms to automatic fire). In any event, there is no evidence that any person has conducted a test firing a semiautomatic at such a rate. It is a theoretical rate that ignores endurance of the rifle or the shooter, let alone the need for multiple intervening magazine changes. To illustrate, it is like saying Usain Bolt's rate for running the mile is 2.5-3 minutes based on his world record 9.58 second 100-meter dash. As great as Mr. Bolt is, nobody thinks he could run a mile at that pace.

The State also points to an ATF report recounting a third-party claim that "a 30-round magazine was emptied in slightly less than two seconds on full automatic, while the same magazine was emptied in just five seconds on semiautomatic." State's Br. 21-22. Even accepting this rate of fire as an accurate portrayal of semiautomatics (it is not), it means that semiautomatics fire at less than half the rate of fully automatics. To say that two things are "identical" when one operates at half the speed as the other in performing their essential function is at best a stretch of the definition of "identical." But these are extremely exaggerated rates of fire that do not reflect normal conditions. The State has not shown that it is humanly possible to manipulate a trigger, control recoil, and manipulate a trigger again 30 times within a 5-second period (i.e., six trigger pulls per second). Those who supposedly achieved this rate of fire with a semiautomatic surely used a device such as a bump stock to artificially increase the firearm's rate of fire; it is thus not a true semiautomatic.

The different rate of fire between semiautomatics and fully automatics is a critical distinction because, as the State notes, semiautomatics are undisputedly more accurate than fully automatics. State's Br. 22. Indeed, the State contends their increased accuracy is precisely why the Banned Rifles should be prohibited. State's Br. 11-12. Appellants contend, however, that greater accuracy increases public safety by lessening the risk to bystanders. E.R.X 1744-45, 1760-69. The State's own expert made this self-evident point when he testified that every round fired has potential for consequences. E.R.X 1814. What's more, accuracy is obviously important for a person engaged in self-defense.

2. The Enumerated Features Serve Legitimate Self-Defense Purposes

Some Banned Rifles may share similar features with the M-16 (i.e., a pistol grip, adjustable stock, and flash suppressor). State's Br. 3, n.1. But that is irrelevant. First, *Heller* never suggests commonly possessed arms are undeserving of Second Amendment protection merely for sharing characteristics with military arms. If anything, it suggests the opposite. *See Heller*, 554 U.S. at 627-28 (noting that militia used arms kept at home). In any event, those features are included on rifles not to serve some uniquely military purpose as the State contends. State's Br. 27 (citing E.R.XX 4108). None of the features that convert an otherwise lawful rifle into a Banned Rifle has any effect on the rifle's rate of fire, its capacity to accept ammunition, or the power of the projectile it discharges. E.R.X 1740-42, 1763. And none of the features are "dangerous per se or when used in conjunction with any of the other features." E.R.X 1763. To the contrary, they "actually tend to make rifles easier to control and more accurate—making them safer to use." *Murphy v. Guerrero*, No. 14-00026, 2016 WL 5508998, at *18 (D. N. Mar. I. Sept. 28, 2016; *see also* E.R.II 113-44, E.R.X 1760-69.

The State concedes that the Enumerated Features are designed to increase a rifle's accuracy. State's Br. 27 (citing E.R.XVI 3178-79). But again, the State simply believes that increased accuracy for the Banned Rifles is a bad thing. It has not, however, put forth any direct evidence showing how the difference in accuracy between a Banned Rifle and a rifle lacking the Enumerated Features made a difference in any mass shooting. When pressed, the State's expert could not think of any. E.R.VIII 120-31.

The State's attempt to connect the Enumerated Features to its claim that the M-16 and the Banned Rifles are essentially identical ignores the fact that not all Banned Rifles possess Enumerated Features. *See* Cal. Penal Code § 30510(a)(11). Similarly, the State argues about the supposed ease with which one can convert an AR-15 to a fully automatic M-16. State's Br. 23-24. There is no evidence in the record about exactly how "easy" such a process is, but that has nothing to do with the AWCA. The AWCA restricts the Enumerated Features. It does not restrict AR-15 receivers, which would have the quality the State complains about irrespective of the Enumerated Features.

In sum, the State's position that the Banned Rifles lose their Second Amendment protection because their beneficial qualities can be used for ill finds no basis in authority. To the contrary, as *Heller* recognized, the qualities that make the handgun the "quintessential" self-defense weapon—and thus unequivocally protected by the Second Amendment—simultaneously make it well-suited for criminal use. 554 U.S. at 629. The *Heller* Court listed several reasons handguns are preferred, noting that they are easy to store for ready access, they cannot be easily wrestled away, and they can be pointed at a burglar with one hand while the other hand dials the phone for police. *Id.* One could have just as easily explained that handguns are preferred by burglars because they are easy to conceal from the victim until the moment of attack, they cannot be easily wrestled away if a victim fights back, and they can be pointed at a victim while the other hand collects the loot. But the *Heller* Court did not focus on the criminal applications of handguns in declaring them protected. Instead, it focused

solely on whether handguns are in common use for lawful purposes. *Heller*, 554 U.S. at 628-29.

B. Banned Rifles Are Commonly Acquired and Kept for Purposes Protected by the Second Amendment, Including Self-Defense, and Are Thus Neither "Dangerous" nor "Unusual"

To begin, Appellants do not argue, as the State claims, that "any restriction" on arms that law-abiding citizens commonly possess for lawful purposes "is per se unconstitutional." State's Br. 30-31. Appellants instead argue that, such arms are per se protected and cannot be *banned*. *Id.* at 31. That does not mean they are not subject to constitutionally permissible restrictions. But a ban is not such a restriction.

Appellants read *Heller* as saying that the Second Amendment right "extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding," *id.* at 582, and that the right protects all such arms that are "typically possessed by law-abiding citizens for lawful purposes," i.e., those in "common use." *Id.* at 625, 627. The State rejects this view of *Heller*, arguing that common possession for lawful purposes is not enough to establish Second Amendment protection. State's Br. 30-31. According to the State, *Heller* "asks whether the weapon is particularly susceptible to misuse, or criminal use." State's Br. 30-33. The State is wrong.

The test set forth by the State is found nowhere in *Heller*. For good reason. Had the Court relied on such a test, *Heller* would have almost certainly been decided the other way. In *Heller*, the District of Columbia sought to justify its handgun ban on the ground that handguns were involved in most firearm-related homicides in the

United States. 554 U.S. at 696 (Breyer, J., dissenting) (collecting statistics). Despite that grim fact, the *Heller* Court held that handguns are protected. *Id.* at 636.

To be sure, whether an arm is "dangerous" *can be* relevant to whether it is protected by the Second Amendment. But that is only half of the analysis. As this Court's precedent confirms, even if an arm is considered "dangerous" it remains within the Second Amendment's scope as long as it is not *also* "unusual." *Fyock*, 779 F.3d at 998 (noting that the government presented evidence the arms at issue were "dangerous," but failed to show they were "unusual"); *see also Caetano*, 136 S. Ct. at 1031 (Alito, J., concurring) (reasoning that "[a] weapon may not be banned unless it is both dangerous and unusual"). In other words, an arm that is not "unusual," i.e., an arm "in common use," remains protected. *Heller*, 554 U.S. at 624; *Caetano*, 136 S. Ct. at 1032 (noting that "the pertinent Second Amendment inquiry is whether [arms] are commonly possessed by law-abiding citizens for lawful purposes today"). The State's argument to the contrary *expressly* depends on rejecting this Court's precedent in favor of another circuit's. *See* State's Br. 31-32 (citing *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 large-capacity magazines are "dangerous and unusual weapons" by examining whether they have "uniquely dangerous propensities" *and* are "commonly possessed by law-abiding citizens for lawful purposes").

This Court does add an inquiry beyond *Heller*'s "commonly possessed" test to determine Second Amendment protection of an arm, asking whether the arm has historically been restricted. *Fyock*, 779 F.3d at 996-97. The State, however, does not

even attempt to make that historical showing, despite Appellants inviting the State to do so in their brief. Appellants' Opening Br. ("A.O.B.") 16, 23-24. The sole question before this Court, therefore, is whether the Banned Rifles are "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. They are—at least, the State has failed to meet its burden to show otherwise.

Even though it is not their burden to prove common use, Appellants have put forth ample evidence showing that conservative estimates place American ownership of the Banned Rifles in the several millions and that restrictions on them are rare. A.O.B 7; *see also* E.R.IX 1600, E.R.X 1750-54. The Banned Rifles thus qualify as "common" under any reasonable definition of that term. *See Hollis v. Lynch*, 827 F.3d 436, 449 (5th Cir. 2016) (defining the term "common" by applying the Supreme Court test in *Caetano* of 200,000 stun guns owned nationwide and legal in 45 states being "common"); *Heller v. District of Columbia*, 670 F.3d 1244, 1287 ("*Heller II*"); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 255-57 (2d. Cir. 2015) ("Even accepting the most conservative estimates. . . , the assault weapons . . . at issue are 'in common use' as that term was used in *Heller*.") Appellants are unaware of a single circuit that has found the Banned Rifles are not commonly owned.

The State does not and cannot dispute that millions of Banned Rifles owned by law-abiding citizens qualifies as "common." Instead, the State attempts to discredit Appellants' figure of 9-15 million Banned Rifles possessed by the American public as an "overestimation." State's Br. 30-40. It claims that Appellants' expert, Professor William English, inflates the number of Banned Rifles possessed by Americans because his estimate includes AR-15 rifles that have been configured to be

"featureless" or are rimfire, neither of which is prohibited under the AWCA. *Id.* at 35-36. But the State ignores Professor English's testimony that only 4% of AR-platform rifles in the United States are rimfire. E.R.IX 1564. So, not counting rimfire rifles, there are still around 8.6-14.4 million AR-platform rifles in the United States. And "featureless" rifles generally only exist as a response to states with restrictive laws like the AWCA. Such firearms are manufactured as normal AR-platform rifles and then modified to conform to state law. They should be counted. Professor English's estimate does not include rifles built from parts, which are popular, nor do they include the significant number of Banned Rifles that are not AR or AK platforms. E.R.X 1753. If anything, his estimate is low.

The State argues the fact that only about 166,640 Banned Rifles have been registered in California as of 2018 shows "that [Appellants'] estimate is likely a gross overestimate." State's Br. 36-37. The State knows better. The number of California registrations is a terrible barometer for the Banned Rifles' popularity *in the country*, which is the relevant question. *Caetano*, 136 S. Ct. at 1027-1028. This is particularly true because (1) California has had the AWCA in place for 30 years; (2) Californians had various legal options to avoid registration, such as modification; and (3) many people were ignorant of the need to register their firearms at all. A.O.B. 2-5; E.R.XXI 4542-55. Of course, those factors have significantly depressed not only the number of registrations but also the number of Banned Rifles that would have otherwise been purchased in the state. Tellingly, the State itself anticipated over one million registrations in 2016 alone. E.R.IX 1487, 1493. In any event, even accepting the State's claim that only 166,640 Banned Rifles are owned by Californians, that is

enough to qualify as "common" in the Supreme Court's eyes. *Caetano*, 136 S. Ct. at 1027-1028 (accepting 200,000 stun guns possessed nationwide as meeting the "common use" standard). The State does not, and could not, dispute that there are at least 40,000 more Banned Rifles owned in the rest of the country out of the millions sold, assuming that would be necessary.

The State then argues that even assuming millions of Banned Rifles have been sold, "that does not mean that they are distributed such that millions of law-abiding citizens own them." State's Br. 37. The State relies on this Court's precedent that "marketing materials and sales statistics [do] not necessarily show" an arm is "in fact commonly possessed by law-abiding citizens for lawful purposes." *Id.* (citing *Fyock*, 779 F.3d at 998). By saying such evidence does not "necessarily" show common use, this Court suggests that it can. The overwhelming evidence Appellants have provided about the vast market for Banned Rifles should meet that standard. A.O.B. 6-7. In any event, contrary to the State's claim, Appellants have shown an estimate for how many law-abiding citizens possess Banned Rifles. *Id.* at 7 (noting that based on "a survey conducted in 2015, around 47.1% of active hunters and shooters in the country owned a Banned Rifle").

The State's arguments that Banned Rifles are not commonly owned because the millions of them in circulation are supposedly becoming more concentrated among a small group of gun owners is not only unsubstantiated but unbelievable. The most recent Gallup Poll conducted in 2017 found that 43% of American households own firearms, and even polls with trends deviating sharply from this and other

National surveys show no significant change in the past 20 years of the percentage of American households reporting gun ownership (32-36%). E.R.II 149.

As for the Banned Rifles specifically, the State's suggestion of increased concentration of ownership presents no evidence that the number of American households that own Banned Rifles is decreasing, only that households that currently own such firearms are acquiring more. ER 3711. What's more, the evidence relied on by the State shows that the rate of ownership of Banned Rifles "has increased dramatically since 2010." ER 4511. And as noted by Amicus NSSF, of the nearly 100 million long guns produced in the United States between 1990 and 2018, about 17.8 million are Banned Rifles. Br. Amicus Curie Nat'l Shooting Sports Found., Inc. Supp. Pls.'-Appellants at 14. There can be doubt, therefore, that the Banned Rifles are commonly owned.

The State finally argues that even if the Banned Rifles are "common," Appellants have failed to show that that they are "typically possessed for self-defense." State's Br. 39. As an initial matter, arms need only be possessed for "lawful purposes," not just self-defense. *Heller*, 554 U.S. at 625. The State does not dispute the various lawful purposes for which Americans acquire Banned Rifles that Appellants have articulated. A.O.B. 8. Additionally, it is the State's burden to show the arms are not so possessed, not Appellants'. *Heller*, 554 U.S. at 582.

In any event, the State does not really argue that Appellants have failed to show that the Banned Rifles are "typically *possessed* for self-defense," because Appellants have. A.O.B. 7-8 (noting that purchasers of Banned Rifles consistently report that one of the top reasons for their purchase is self-defense). Instead, the State claims that

Appellants "offered no evidence" to show the Banned Rifles "are commonly *used* for self-defense." State's Br. 39. But *Heller* does not condition an arm's Second Amendment protection on its actual rate of use in self-defense situations. To the contrary, it found that handguns are protected simply because "the American people have considered the handgun to be the quintessential self-defense weapon." *Heller*, 554 U.S. at 629; *see also Caetano* (unanimously holding that the Second Amendment protects stun guns without inquiring into their rate of defensive use). The relevant question is whether an arm is *kept* for self-defense—not how often it must be *used* for that purpose. The State does not even attempt to dispute that the Banned Rifles meet this test.

Finally, the State submits that the Banned Rifles are not suitable for self-defense. State's Br. 40. But Appellants put forth the testimony of self-defense experts—including a former FBI agent, turned FBI firearm instructor, who became the primary special agent overseeing the FBI's Ballistic Research Facility, and a former California Department of Justice bureau chief and peace officer—touting the self-defense functions of the Banned Rifles, while the State has provided nothing in rebuttal. A.O.B. 7-8; *see also* E.R.X 1760-69. To the contrary, its own expert believes the Banned Rifles *are* useful for self-defense. E.R.VII 941.

In the end, the State's arguments depend on assumptions about the number of Banned Rifles in circulation. State's Br. 35-40. But the State admits that it does not know how many Banned Rifles are in circulation. State's Br. 36, 49-50. And it presents no expert opinion or government report establishing that number. The State thus cannot prove that Banned Rifles are not "typically possessed by law-abiding citizens

for lawful purposes," as it must to prevail here. Because the banned rifles are protected by the Second Amendment, the AWCA is unconstitutional per se. A.O.B. 22-25.

II. EVEN IF MEANS-END SCRUTINY IS APPROPRIATE, THE STATE CANNOT MEET ITS BURDEN TO JUSTIFY THE AWCA'S RIFLE BAN UNDER ANY APPLICABLE STANDARD OF REVIEW

The State disagrees with Appellants that strict scrutiny should apply, insisting that only intermediate scrutiny could be appropriate. State's Br. 41-47. The State's dispute with Appellants over the proper standard of review here is ultimately much ado about nothing because the AWCA's restriction on the Banned Rifles fails even intermediate scrutiny, the lowest scrutiny that can be applied here. *United States v. Chovan*, 735 F.3d 1127, 1139-40 (9th Cir. 2013).

Under intermediate scrutiny, the State has the burden to prove a "substantial relationship" between the law and an important government objective. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). What's more, the "law must be 'narrowly tailored to serve a significant governmental interest.'" *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (quoting *McCullen v. Coakley*, 573 U.S. 464, 486 (2014)). Because the AWCA bans—not merely regulates—protected rifles, there is no need to proceed in the analysis. Such a ban would fail for lacking the required tailoring. *Heller*, 544 U.S. at 628 & n.27. But even setting aside the question of tailoring, the State has failed to meet its burden to show that the AWCA's ban on rifles advances it goal.

A. The AWCA's Rifle Ban Is Not Sufficiently Tailored

The State does not respond to any of Appellants' arguments on why the AWCA's rifle ban is insufficiently tailored. A.O.B. 28-30. Instead, it contends that the "narrowly tailored" standard is inapplicable because it does not rely on any "Second Amendment jurisprudence." State's Br. 48, n.22. But the Supreme Court authority

that Appellants cite does not include a caveat to the "narrow tailoring" requirement. *Packingham*,137 S. Ct. at 1736. To the extent there is some special "Second Amendment jurisprudence" on this subject, Supreme Court authority supersedes it. *McDonald v. City of Chicago*, 561 U.S. 742, 778-79 (2010) (rejecting "special—and specially unfavorable—treatment" of the Second Amendment).

The State then complains that Appellants have not suggested how the State might tailor the AWCA. State's Br. 48, n.22. But Appellants need not assume the role of legislators or regulatory counsel here. It is axiomatic that there are several regulations available short of a ban. The State emphasizes that "substantial deference to the predictive judgments of the [legislature]" is owed. State's Br. 48 (quoting *Pena v. Lindley*, 898 F.3d 969, 979-80 (9th Cir. 2018)). But that is not the case for evaluating narrow tailoring; it is only relevant to whether the State has a legitimate interest. *Turner Broad. Sys., Inc. v. FCC*, 520 US. 180, 214 (1997) (holding government must prove that means do not burden the right "substantially more" than necessary to further [its important] interest"). Because California has chosen a ban instead of regulation, the State fails to meet its burden under intermediate scrutiny for the reasons Appellants have explained. A.O.B. 28-30.

B. The State Failed to Prove That the AWCA's Rifle Ban Meaningfully Furthers Its Proffered Public Safety Interests

While the State no doubt has an important interest in promoting public safety and reducing gun violence and mass shootings, that does not mean that the State necessarily has an important interest in imposing the AWCA's rifle ban. *See McDonald*, 561 U.S. at 783 (rejecting the notion that governments may "enact any gun control law that they deem to be reasonable"). As Appellants have explained, the government does not necessarily have an interest in enforcing a restriction that has not been traditionally imposed or is not commonly imposed. A.O.B. 31. The State does not dispute that the AWCA's rifle ban is novel and rare among the states of this nation.

State's Br. 5-9. What's more, the State concedes that the AWCA does not restrict how rapidly a rifle can fire, but merely restricts how *accurately* one can fire. State's Br. 11-12, 57. The logical conclusion of its position is that the State asserts that public safety is furthered by *inaccurate* fire. Appellants dispute that reducing a firearm's accuracy is ever a legitimate interest. To the contrary, it undermines public safety, as the State's expert has stated. E.R.X 1814.

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

As a general matter, the State's arguments justifying the AWCA's rifle ban fail because they rely exclusively on pointing to the criminal misuse of Banned Rifles. As Appellants have made clear, *Heller* rejects the argument that the government may ban protected arms simply because criminals might misuse them. A.O.B. 30. The State does not dispute that *Heller* disregarded the criminal misuse of handguns, which far outweighs that of the Banned Rifles, in concluding that handguns are protected. It nevertheless rests its entire case on the criminal misuse of Banned Rifles. Even assuming the criminal use of Banned Rifles is relevant, the State's arguments fail.

1. The State's Claims that Banned Rifles Are Disproportionately Used in Crime Are Unfounded

Despite admitting that it "does not have a record of how many assault rifles are in the United States," State Br. at 36, the State argues that Banned Rifles are used "disproportionately" in gun crime, *id.* at 49-50. It is a mystery how the State can

determine their proportional use in crime without knowing how many rifles are in circulation. Its reliance on 30-year-old congressional testimony lacking any reference to evidence is unhelpful. State's Br. 49. Even if the State could figure out their market share, it is unlikely the Banned Rifles are used disproportionately in crime when the State itself says they are used in, at most, less than 8% of all crimes involving firearms. *Id.* at 51.

As for mass shootings, the State grossly exaggerates the Banned Rifles' role. Contrary to the State's depiction, perpetrators of these particular crimes rarely use a Banned Rifle. Indeed, a Congressional Research Service study found that only 9.78% of mass shootings involved one. E.R.II 154. The State artificially inflates that percentage to 27.3% by narrowly focusing on a small subset of mass shootings, *public* mass shootings. E.R.II 166. But even under the State's misleading and narrowed focus, Banned Rifles are used in a decided minority of an extremely rare subset of murders, public mass shootings.

In any event, the State contends that the Banned Rifles are still problematic because they are responsible for higher casualty counts when used in mass shootings. State's Br. 53-54. But in making its case, the State relies the fatally flawed analysis of its expert, Lucy Allen. As Appellants have explained, Allen included individuals who were shot by a non-"assault rifle" in her count for "assault rifle" mass shooting victims, which artificially inflated the number of "assault rifle" casualties in her report, while simultaneously reducing the number of non-"assault rifle" casualties by keeping them in the "assault rifle" category. A.O.B. 36-37. The State does not dispute this. Nor does the State dispute that 19 of the 27 shootings Allen analyzed involved multiple types of firearms. *Id.* at 37. Yet, the State continues to rely on Allen's irreparably contaminated and unreliable figures in making its case to this Court. State's Br. 54, n.27. This Court should not simply accept such findings as reliable.

The State's other supposed evidence that Banned Rifles lead to more casualties when used in mass shootings cite figures for shootings involving both "assault weapons" *and* "large capacity" magazines. State's Br. 54-55 (citing E.R.XX 4128). Because it does so, even assuming those numbers are accurate, the State cannot isolate the Banned Rifles as the culprit for the alleged higher casualty counts—particularly when the State has blamed "large capacity magazines" for the problem elsewhere. *See generally Duncan v. Becerra*, 366 F. Supp. 3d 1131 (S. D. Cal. 2019). The reality is that neither the State nor its experts can offer any explanation rooted in objective science that rules out the possibility that the association between higher casualty counts and a Banned Rifle used in a mass shooting is anything but spurious, i.e., not causal. E.R.II 156-157, 166.

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

2. The State's Evidence Does Not Show That Banned Rifles Cause More or Greater Wounds

The State does not dispute that, as a matter of physics, shots fired from a semiautomatic firearm are no more powerful than shots fired from a non-semiautomatic firearm using the same ammunition. A.O.B. 39. Nor does it dispute that the Enumerated Features have zero effect on the power of the projectile a rifle discharges and thus the trauma that projectile causes on impact. *Id.* Yet the State continues to argue that use of the Banned Rifles leads to more and worse wounds than a rifle without Enumerated Features. State's Br. 55-56.

The State simply cannot claim that Banned Rifles cause worse wounds, given the undisputed fact that neither the Enumerated Features nor semiautomatic function affect a bullet's impact. The State obscures this reality by comparing wounds from Banned Rifles and handguns. State's Br. 56-57. The comparison is apples and oranges.

Any difference in the resulting wounds applies to *all* rifles, not just Banned Rifles. *See* E.R.II 113-44.

As for its claim that use of Banned Rifles lead to more wounds, the State's entire premise assumes that rapid fire was necessary or even occurred when there are multiple injuries. But nothing in the record supports that. Indeed, Dr. Colwell admitted that he cannot tell how quickly shots are fired merely by looking at wounds. E.R.VI 777. What's more, Dr. Colwell cannot confirm that any wound he opines on is from a Banned Rifle just by looking at it. E.R.VI 770, 778-79. He requires other people to tell him what firearm was used to determine whether an "assault rifle" was used in a shooting. E.R.VI 755. But that third party may have a different definition of the term "assault rifle" or they could be wrong. Or Dr. Colwell himself could be confused, based on his admitted ignorance on the subject of firearm technicalities. E.R.VI 770-71, 774. What's more, he has been informed of the type of firearm in this unreliable way in about 30-40% of the wounds he has treated. E.R.VI 779. And he is recalling all of this from memory over many years. E.R.VI 755. He has not provided documentation for any of these observations. This is simply not reliable evidence that the Banned Rifles cause more wounds.

3. Experience with the Federal "Assault Weapon" Ban Does Not Support the State's Position

The State touts the supposed successes of the federal "assault weapon" ban in reducing violence. "This is not what the best available evidence indicates." E.R.II 151-52. A Department of Justice study commissioned by the Clinton administration to study the effects of that law concluded, ten years after it was imposed, that "there [had been] no discernible reduction in the lethality and injuriousness of gun violence." E.R.XIII 2639; Brady Decl., Ex. 25 at 96. Indeed, "[t]here was no evidence that lives were saved [and] no evidence that criminals fired fewer shots during gun fights." E.R.II 82. The study's authors declared that they could not "clearly credit the ban with

any of the nation's recent drop in gun violence," E.R.XIII 2639, and that "[s]hould it be renewed, the ban's effects on gun violence are likely to be small at best and perhaps too small for reliable measurement," E.R.II 82, E.R.XIII 2546.

The State tells the Court to ignore this official government study commissioned by the very administration that put the ban into place and, instead to focus on a more recent, private study conducted by one of its authors. State's Br. 60. But that study merely speculates that the federal ban "*may have* had preventive effects on gunshot victimization." *Id.* at 61. It provides no firm conclusions, let alone serious data supporting the State's view that the federal ban succeeded. What's more, that study fails to identify what effect—*if any*—restrictions on Enumerated Features might have. Instead, the study insists "[large capacity magazine] restrictions are arguably the most important component of AW laws." E.R.XX 4124.

The State suggests that Appellants' expert, Professor Gary Kleck, agrees that the federal ban was effective by referencing his admission that criminal use of "assault weapons" decreased during the ban. State's Br. 59-60. He does not. As he pointed out, while fewer criminals used firearms meeting the ban's very technical definition of "assault weapon," criminals "substituted mechanically identical *un*banned semiauto firearms that could be fired just as fast, could also accept easily changed detachable magazines, and were just as lethal as the banned guns. Consequently, reduced use of the banned models of firearms did not produce any reduction in the number or seriousness of violent crimes." E.R.II 157-58 (citing E.R.XIII 2539); *see also* E.R.II 151-52 (disputing that the federal ban saved lives or reduced mass shootings).

The only other evidence the State puts forth is a "non-scholarly book" concluding that the federal ban was effective, whose author has "no prior experience or record of publication on guns and violence." E.R.II 152; *see also* State's Br. 60. That "study" merely compares the number of "gun massacres" (defined as shootings with six or more deaths) in the ten-year periods before and after the federal ban with the

ten-year period of the ban and "uncritically assumed that any differences in the numbers . . . were attributable to the presence or absence of the [ban]." E.R.II 152. Such a correlation does not prove causation and could simply be spurious. *Id.* Indeed, the Department of Justice study found "[assault weapons] were rarely used in gun crimes even before the ban." E.R.XIII 2546. Other researchers have shown that the frequency of mass shootings between the years 1992 and 2013 was "basically flat." E.R.II 148. And "the number of mass shootings (4+ killed) has not increased in the most recent five years for which data are available." *Id.*

A more recent and serious study conducted by Boston University concluded that "assault weapon" bans have no significant effect on homicide or suicide rates. E.R.IX 1472-79; s*ee also* E.R.VIII 1299-1301. The State's only response to this is that its author conceded that New Zealand's recent law banning semiautomatic weapons "will likely reduce casualties from mass shootings." State's Br. 62-63. Of course, a complete ban on semiautomatic weapons is irrelevant in analyzing the AWCA, which only bans Enumerated Features on some semiautomatic rifles.

In sum, that Banned Rifles are the problem the State makes them out to be in mass shootings is dubious at best.

CONCLUSION

Appellants request that this Court reverse and direct the district court to grant Appellants' requested declaratory and injunctive relief.

Dated: July 16, 2020

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Dated: July 16, 2020

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