

19-55376

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

VIRGINIA DUNCAN; RICHARD LEWIS; PATRICK LOVETTE;
DAVID MARGUGLIO; CHRISTOPHER WADDELL; CALIFORNIA RIFLE
& PISTOL ASSOCIATION, INC., a California corporation,

Plaintiffs-Appellees,

—v.—

XAVIER BECERRA, in his official capacity as Attorney General of
the State of California,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTHERN CALIFORNIA
CIVIL CASE (3:17-CV-1017-BEN)

**BRIEF OF *AMICI CURIAE* CALIFORNIA CHAPTER OF THE
AMERICAN COLLEGE OF EMERGENCY PHYSICIANS, AMERICAN
ACADEMY OF PEDIATRICS, CALIFORNIA, AND CALIFORNIA
ACADEMY OF FAMILY PHYSICIANS IN SUPPORT OF
APPELLANT’S PETITION FOR REHEARING *EN BANC***

MARK T. CIANI
KATTEN MUCHIN ROSENMAN LLP
575 Madison Avenue
New York, New York 10022
(212) 940-8800

JONATHAN K. BAUM
Counsel of Record
KATTEN MUCHIN ROSENMAN LLP
525 West Monroe Street
Chicago, Illinois 60661
(312) 902-5479

*Counsel for Amici Curiae California Chapter of the American
College of Emergency Physicians, American Academy of Pediatrics,
California, and California Academy of Family Physicians*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26, *Amicus Curiae* California Chapter of the American College of Emergency Physicians states that it is not a publicly held corporation, does not have a parent corporation, does not issue stock and therefore, no publicly held corporation owns 10% or more of its stock.

Pursuant to Fed. R. App. P. 26, *Amicus* American Academy of Pediatrics, California, states that it is not a publicly held corporation, does not have a parent corporation, does not issue stock and therefore, no publicly held corporation owns 10% or more of its stock.

Pursuant to Fed. R. App. P. 26, *Amicus* California Academy of Family Physicians states that it is not a publicly held corporation, does not have a parent corporation, does not issue stock and therefore, no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

	<u>Page</u>
CORPORATE DISCLOSURE STATEMENT	i
INTEREST OF <i>AMICI CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE PANEL CREATES A CONFLICT WITH OTHER CIRCUITS ON THE EXCEPTIONALLY IMPORTANT QUESTION OF SECOND AMENDMENT PROTECTIONS FOR WEAPONS DESIGNED TO INFLICT MASS CASUALTIES.....	4
(1) LCMs are frequently used in mass shootings.	6
(2) The use of LCMs results in more shots fired, more wounds, and more fatalities.	8
(3) Amici Have Directly Experienced The Carnage Wrought By LCMs.....	11
(4) Weapons with LCMs pose a significant threat to law enforcement personnel and the general public.	14
II. THE PANEL’S DANGEROUS ERRORS ARE COMPOUNDED BY THE FACT THAT LCMS ARE NOT EVEN “ARMS,” MUCH LESS AN “ENTIRE CLASS OF ARMS.”	16
CONCLUSION	18

TABLE OF AUTHORITIES

	Page(s)
 Cases	
<i>Ass’n of New Jersey Rifle & Pistol Clubs,</i> 910 F.3d at 120	15
<i>City of Indianapolis v. Edmond,</i> 531 U.S. 32 (2000).....	7
<i>District of Columbia v. Heller,</i> 554 U.S. 570 (2008).....	3, 4, 16, 17
<i>Duncan v. Becerra,</i> -- F.3d --, 2020 WL 4730668 (9th Cir. Aug. 14, 2020).....	4, 5, 9, 17
<i>Duncan v. Becerra,</i> 265 F. Supp. 3d 1106 (S.D. Cal. 2017).....	8
<i>Duncan v. Becerra,</i> 366 F. Supp. 3d 1131 (S.D. Cal. 2019).....	6, 17
<i>Elec. Privacy Info. Ctr. v. U.S. Dept. of Homeland Sec.,</i> 653 F.3d 1 (D.C. Cir. 2011).....	7
<i>Fyock,</i> 779 F.3d at 1000-01	5
<i>Heller v. District of Columbia,</i> 670 F.3d 1244 (D.C. Cir. 2011).....	5, 15, 16, 17
<i>Jackson v. San Francisco,</i> 746 F.3d 953 (9th Cir. 2014)	5
<i>Kelley v. Johnson,</i> 425 U.S. 238 (1976).....	5
<i>Kennedy v. Mendoza-Martinez,</i> 372 U.S. 144 (1963).....	7

<i>Kovacs v. Cooper</i> , 36 U.S. 77 (1949).....	5
<i>New York State Rifle & Pistol Ass’n</i> , 804 F.3d at 263	9
<i>Turner Broad. Sys., Inc. v. F.C.C.</i> , 512 U.S. 622 (1994).....	5, 9
<i>United States v. Cox</i> , 906 F.3d 1170 (10th Cir. 2018)	16, 17
<i>United States v. Miller</i> , 307 U.S. 174 (1939).....	4
<i>United States v. Salerno</i> , 481 U.S. 739 (1987).....	5
Statutes	
Cal. Penal Code § 12020(c)(25).....	8
Cal. Penal Code § 12079(b)	8
Cal. Penal Code § 16740.....	8
Cal. Penal Code § 32310.....	2, 3, 5, 18
Other Authorities	
First Amendment.....	5
Christopher S. Koper et al., <i>Criminal Use of Assault Weapons and High-Capacity Semiautomatic Firearms: an Updated Examination of Local and National Sources</i> , J. Urban Health, Oct. 2, 2017, https://www.ncbi.nlm.nih.gov/pubmed/28971349	15
1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978)	16
Everytown for Gun Safety, <i>Analysis of Recent Mass Shootings</i> (Aug. 2015), https://everytownresearch.org/documents/2015/04/analysis- of-recent-mass-shootings.pdf/	6

Gina Kolata & C.J. Chivers, <i>Wounds from Military-Style Rifles? ‘A Ghastly Thing to See’</i> , N.Y. Times (Mar. 4, 2018), https://www.nytimes.com/2018/03/04/health/parkland-shooting-victims-ar15.html	13
Jeremy Stahl, <i>What It Was Like to Be a Surgeon in Las Vegas’ Busiest Trauma Unit After Sunday’s Massacre</i> , Slate.com (Oct. 3, 2017), http://www.slate.com/blogs/the_slatest/2017/10/03/a_surgeon_s_story_from_sunrise_hospital_in_las_vegas.html	13
John Donohue & Theodora Boulouta, <i>That Assault Weapon Ban? It Really Did Work</i> , N.Y. TIMES (Sep. 4, 2019), https://www.nytimes.com/2019/09/04/opinion/assault-weapon-ban.html	10
Larry Ryckman, <i>Aurora theater shooting trial, the latest from Day 13</i> , Denver Post (May 14, 2015), http://www.denverpost.com/2015/05/14/aurora-theater-shooting-trial-the-latest-from-day-13/	11
Louis Klarevas et al., <i>The Effect of Large-Capacity Magazine Bans on High-Fatality Mass Shootings, 1990–2017</i> , 109 Am. J. Public Health 1754 (Nov. 6, 2019), https://ajph.aphapublications.org/doi/10.2105/AJPH.2019.305311	10
Panagiotis K. Stefanopoulos, et al., <i>Gunshot Wounds: A Review of Ballistics Related to Penetrating Trauma</i> , 3 J. Acute Disease 178, 181-82 (2014).....	13
Pat Milton, <i>Colin Ferguson Convicted of Murdering Six in Train Massacre</i> , AP News Archive (Feb. 18, 1995), http://www.apnewsarchive.com/1995/Colin-Ferguson-Convicted-of-Murdering-Six-in-Train-Massacre/id-49433c4650ab4c17b9b412fe0a8717d6	16
Press Release, American College of Emergency Physicians, <i>Announcing the new ACEP High Threat Emergency Casualty Care Task Force</i> (2016), http://www.thecentralline.com/?p=3212	14

Sam Quinones & Nicole Santa Cruz, <i>Crowd Members Took Gunman Down</i> , L.A. Times (Jan. 9, 2011), http://articles.latimes.com/2011/jan/09/nation/la-na-arizona-shooting-heroes-20110110	15
Seattle Times, <i>1 dead, others hurt in shooting at Seattle Pacific University before student tackles gunman</i> (June 5, 2014), https://www.seattletimes.com/seattle-news/1-dead-others-hurt-in-shooting-at-seattle-pacific-university-before-student-tackles-gunman	16
Tim Craig et al., <i>As the Wounded Kept Coming, Hospitals Dealt with Injuries Rarely Seen in U.S.</i> , Wash. Post (Oct. 3, 2017).....	13
U.S. Const. amend. II.....	<i>passim</i>
U.S. Const. amend. IV	7

INTEREST OF *AMICI CURIAE*

As physicians, *amici curiae* work every day to preserve human life and health. It is for this reason that *amici* advocated for the enactment of Proposition 63, banning the possession of large capacity ammunition magazines. And it is for this reason that *amici* appear in this case to defend the ability of states to protect public safety and health by prohibiting possession of these uniquely dangerous instrumentalities.

Amicus curiae California Chapter of the American College of Emergency Physicians (“California ACEP”) supports emergency physicians in providing the highest quality of care to all patients and to their communities. California ACEP’s members routinely treat victims of shootings involving large capacity magazines. Accordingly, California ACEP and its members can provide the Court with critical information about the horrific consequences that result from having large capacity magazines in lawful circulation.

Amicus curiae American Academy of Pediatrics, California (“AAP”), seeks to attain optimal physical, mental, and social health and well-being for all infants, children, adolescents, and young adults. AAP has expertise and experience that can assist the Court in understanding the unique dangers posed by large capacity magazines.

Amicus curiae California Academy of Family Physicians (“CAFP”) is the only organization solely dedicated to advancing the specialty of family medicine in California. CAFP focuses on family physicians’ professional challenges and health policy concerns through advocacy and education. Like California ACEP and AAP, CAFP and its members are uniquely positioned to educate the Court on the danger and destruction that large capacity magazines cause.

Pursuant to Fed. R. App. P. 29(a), this brief is filed with the consent of all the parties to this appeal.¹

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an issue of significant importance, namely, whether California’s ban on the particularly dangerous types of ammunition magazines, enacted through a 2000 state law and the 2016 ballot initiative Proposition 63, is consistent with the Second Amendment. The Statute, Cal. Penal Code § 32310 (the “Statute”) prohibits the manufacture, sale, transfer, and possession of large capacity magazines (“LCMs”), defined as firearm magazines with the capacity to accept more than ten rounds of ammunition. The continued use, with particularly lethal consequences, of LCMs in gun violence, including mass shootings across the nation, underscores the reasonableness of this prohibition.

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission.

The importance of this issue and the gravity of the panel's (the "Panel") errors in affirming the summary judgment order granted by the district court are compelling reasons to accept this case for *en banc* review. There can be no dispute that LCMs are, in fact, uniquely dangerous. They are frequently used in mass shootings and gun murders of law enforcement personnel. The record evidence shows that LCMs result in more shots fired, more victims, and more death. As discussed, *infra* at Section I.(3), amici have extensive experience treating gunshot-wound victims, and can attest to the unique threat LCMs pose to the public health. The extraordinary power of weapons equipped with LCMs thus makes them impractical and dangerous for self-defense.

Under the Statute, California residents may lawfully continue to possess an operable handgun for self-defense. Moreover, they have access to a vast array of standard capacity ammunition magazines, which they may lawfully purchase and possess in any number for self-defense. The Panel significantly expanded the Supreme Court's holding in *District of Columbia v. Heller* ("*Heller*"), 554 U.S. 570 (2008), to guarantee an individual's ability to manufacture, sell, transfer, and possess LCMs. The Panel's decision employs an extreme, dogmatic and unfounded approach to the Second Amendment, and uses it to prohibit California from restricting military-grade weaponry in defense of its citizens. The Panel's decision is irreconcilable with prior opinions of this Court and of every one of its

sister Courts of Appeals to have addressed this question. Rehearing *en banc* is appropriate for these reasons.

ARGUMENT

I. THE PANEL CREATES A CONFLICT WITH OTHER CIRCUITS ON THE EXCEPTIONALLY IMPORTANT QUESTION OF SECOND AMENDMENT PROTECTIONS FOR WEAPONS DESIGNED TO INFLICT MASS CASUALTIES.

Consistent with its recognition that the Second Amendment does not include the “right to keep and carry any weapon whatsoever,” the Supreme Court in *Heller* emphasized “the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”² 554 U.S. at 627 (citing *United States v. Miller*, 307 U.S. 174, 179 (1939)).

This Court, like many of other Courts of Appeals, has established intermediate scrutiny as the appropriate level of review to be applied “if a challenged law does not implicate a core Second Amendment right, or does not place a substantial burden on the Second Amendment right,” applying that level of review to San Francisco’s ordinance regulating handgun storage and ammunition

² The Panel held that a law must regulate an arm that is “*both dangerous and unusual*” to fall outside the purview of the Second Amendment. *Duncan v. Becerra*, -- F.3d --, 2020 WL 4730668, at *7 (9th Cir. Aug. 14, 2020). The Panel found that LCMs are not “unusual” solely because many of them are sold. *Id.* The constitutional constraints on the State’s authority to regulate weapons of mass destruction cannot be dictated by the ability of gun manufacturers to market such weapons. That LCMs kill rapidly and efficiently and are weapons of military origin renders them unusual, high sales volume notwithstanding.

sales, as well as the ban on LCMs at issue in *Fyock*.³ See *Jackson v. San Francisco*, 746 F.3d 953, 960-66 (9th Cir. 2014); see also *Fyock v. Sunnyvale*, 779 F.3d 991, 1000-01 (2015). Intermediate scrutiny requires a showing that the law at issue is related to an asserted governmental end that is “significant,” “substantial,” or “important.” See, e.g., *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994). The Panel acknowledged that the State’s interests here are not merely important, but “compelling.” *Duncan v. Becerra*, -- F.3d --, 2020 WL 4730668, at *22 (9th Cir. Aug. 14, 2020).

The Statute prohibits manufacturing, selling, transferring, and possessing only a single weapon, LCMs, which falls outside the Second Amendment right identified in *Heller*. Rehearing *en banc* is necessary because LCMs are so uniquely dangerous that a ban prohibiting them serves the compelling government interests of preserving public safety and preventing crime. See, e.g., *United States v. Salerno*, 481 U.S. 739, 748-50 (1987); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976).

³ The Panel incorrectly determined that strict scrutiny should apply to the Statute, asserting that the Statute’s ban on LCMs is comparable, for Second Amendment purposes, to a ban on certain speech based on its content, under the First Amendment. *Duncan*, 2020 WL 4730668, at *17-18. To the contrary, the relevant First Amendment analogy is a limitation on the volume, not the content, of speech. And it is long settled First Amendment law that such limitations are perfectly compatible with the freedom of speech. See, e.g., *Kovacs v. Cooper*, 36 U.S. 77, 86-89 (1949) (upholding ban on sound trucks when alternative “easy means of publicity” were available).

(1) LCMs are frequently used in mass shootings.

Mass shootings have become an almost routine feature of American life. LCMs are used disproportionately in mass shootings.⁴ LCMs often play a devastating role in mass shootings in California and elsewhere. Of the 60 mass shootings from which information on magazine capacity is available from 2009 to 2017, LCMs were recovered in 58% of incidents.⁵ Similarly, in mass shootings between January 2009 and July 2015, 155% more people were shot and 47% more people killed in incidents where assault weapons or LCMs were used.⁶

When the harm to the public is particularly heinous—particularly shocking to the collective conscience of the citizenry, as Proposition 63’s passage indicates—constitutional protections are flexible enough to accommodate governmental solutions to the problems. “[W]hile the Constitution protects against

⁴ See Decl. of L. Allen at 6-7, (“[L]arge-capacity magazines were used in the majority of mass shootings with known magazine capacity since 1982 (44 out of 50 mass shootings).”); SJ Ex. 18 at 62-63 (listing mass shootings where shooter used LCM). All citations to “SJ Ex. #” refer to exhibits to the Declaration of John D. Echeverria in Support of Defendant’s Opposition to Plaintiff’s Motion for Summary Judgement, *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1137 (S.D. Cal. 2019) (No. 3:17-cv-01017). Page numbers in the citations refer to the full PDF file, not any individual exhibit’s page numbers.

⁵ See Everytown for Gun Safety, *Mass Shootings in the United States: 2009-2017* (Dec. 6, 2018), https://everytownresearch.org/reports/mass-shootings-analysis/#foot_note_54.

⁶ See Everytown for Gun Safety, *Analysis of Recent Mass Shootings* at 3 (Aug. 2015), <https://everytownresearch.org/documents/2015/04/analysis-of-recent-mass-shootings.pdf/>.

invasions of individual rights, it is not a suicide pact.” *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). Every day, Americans go through a level of airport security that, there being no reason to believe that they will disable or destroy an aircraft or do violence to its passengers or crew, would otherwise be an intolerable violation of their Fourth Amendment right to be “secure in their persons . . . against unreasonable searches.” U.S. Const. amend. IV. But the carnage wrought from that infinitesimal number of instances of airplanes being blown up or their inhabitants being massacred is so horrific that these suspicionless airport searches become reasonable under the circumstances, no matter how rare the calamity to be prevented may be. *See, e.g., Elec. Privacy Info. Ctr. v. U.S. Dept. of Homeland Sec.*, 653 F.3d 1, 10 (D.C. Cir. 2011) (finding that the use of so-called “full body scanners” in airport security does not violate the Fourth Amendment because “the need to search airline passengers ‘to ensure public safety can be particularly acute.’”) (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 47-48 (2000)).

This Court should similarly recognize the State of California’s right to take “aggressive measures” to safeguard “the public health and safety” by reducing gun violence wrought by LCMs. As a prominent expert relied on by many courts facing the same issues, Christopher Koper notes, “while rare, incidents in which

more than ten shots are fired are especially lethal and injurious.” (PI Ex. 107 at 462.)⁷

(2) The use of LCMs results in more shots fired, more wounds, and more fatalities.

LCMs make weapons more deadly. Multiple studies in the trial court record have shown that attacks with LCMs are “particularly lethal and injurious.” (SJ Ex. 4 at 269.) It stands to reason that a ban on the possession of LCMs will result in fewer deaths. Although this evidence supplies more than adequate justification for the LCM possession ban, the Panel ignored such evidence. If LCMs are uniquely dangerous and therefore the reasonable subject of a ban, then the State should be permitted to draw the line where it deems appropriate. And, in fact, it has. Significantly, the California legislature chose a 10-round limit in 1999 and enacted a statute implementing it in 2000. *See* Cal. Penal Code § 16740 (West 2012) (continuing Cal. Penal Code § 12020(c)(25) (West 2000) and 12079(b) (West 2000) without substantive change). The 2016 referendum merely strengthened the protections against LCMs—defined by pre-existing statute to include the 10-round

⁷ All citations to “PI Ex. #” refer to exhibits to the Declaration of Alexandra Robert Gordon in Support of Defendant Attorney General Xavier Becerra’s Opposition to Plaintiffs’ Motion for Preliminary Injunction, *Duncan v. Becerra*, 265 F. Supp. 3d 1106 (S.D. Cal. 2017) (No. 3:17-cv-01017). Page numbers in the citations refer to the full PDF file, not any individual exhibit’s page numbers.

limit—already enacted by the legislature, whose choices are, of course, entitled to judicial deference. *See Turner*, 512 U.S. at 665–66.

The Panel blithely observed that “weapons are necessarily dangerous.” *Duncan*, 2020 WL 4730668, at *9 n.8. This truism does not negate the reality that every gun is *much more* dangerous when equipped with an LCM. *See, e.g., New York State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 263 (2d Cir. 2015) (“[L]arge-capacity magazines may ‘present even greater dangers to crime and violence than assault weapons alone.’”) (citation omitted). The Supreme Court would not have singled out “dangerous and unusual” arms as uniquely subject to prohibition, notwithstanding the Second Amendment, if all arms were “dangerous.” The word “dangerous” would have been mere surplusage. Rather, the Court must have had in mind *especially* dangerous weaponry, as LCMs unquestionably are.⁸ Indeed, before enacting the federal ban on assault weapons, one Congressional report described weapons capable of accepting LCMs as having “a military configuration characteristic that is not ‘merely cosmetic,’ but ‘serve[s] specific, combat-functional ends.’” (SJ Ex. 13 at 52.)

⁸ The Panel erroneously accused its sister courts of appeals of “conflat[ing]” the Second Amendment analysis of bans on assault weapons with that for LCMs. Slip. Op. at 53. But those courts merely acknowledge that just as assault weapons are deadlier than handguns, assault weapons *with LCMs* are exponentially more dangerous than those without.

Unsurprisingly, as weapons serving “combat-functional ends,” firearms paired with LCMs are far more dangerous than their unenhanced counterparts. As expert Christopher Koper has explained, “[f]irearms with LCMs, both assault-type and non-assault-type . . . are more destructive and cause more death and injury in gun crime,” and “result in more shots fired, more victims, and more wounds per victim.” (PI Ex. 107 at 451-52; *see also* PI Ex. 14 at 410.) Koper describes a recent study analyzing mass shootings in which the researcher concluded that shooters with LCMs caused 10.19 fatalities compared to 6.35 fatalities caused by shooters without LCMs, and 12.39 people shot compared to 3.55 hit by non-LCM shooters. (PI Ex. 107 at 451; *see also* PI Ex. 14 at 275.) In other words, where LCMs were employed, there were 60% more fatalities on average and more than three times as many persons with nonfatal gunshot wounds. (SJ Ex. 18 at 65.)

Koper also found that guns used in incidents where a victim was shot were 17% to 26% more likely to have LCMs than guns used in gunfire cases with no wounded victims. (PI Ex. 107 at 452; *see also* PI Ex. 14 at 276; SJ Ex. 4 at 270.)

Koper’s conclusions are supported by other studies. A recent study found that attacks involving LCMs resulted in a 62% higher mean average death toll.²

² Louis Klarevas et al., *The Effect of Large-Capacity Magazine Bans on High-Fatality Mass Shootings, 1990–2017*, 109 Am. J. Public Health 1754 (Nov. 6, 2019), <https://ajph.aphapublications.org/doi/10.2105/AJPH.2019.305311>; *see also* John Donohue & Theodora Boulouta, *That Assault Weapon Ban? It Really Did*

The incidence of high-fatality mass shootings in states which do not ban LCMs was more than double the rate in states that do; and the annual number of deaths was more than three times higher.¹⁰ In multivariate analyses, states without an LCM ban experienced significantly more high-fatality mass shootings and a higher death rate from such incidents.¹¹

Not only do shooters armed with LCMs shoot more bullets, but the lethality of those additional shots can be exponentially greater than the impact of a weapon without an LCM because the bullets can ricochet and hit multiple people. For example, in the Aurora, Colorado movie theater shooting, the shooter fired 76 shots, but investigators identified 240 “impacts” from those bullets.¹²

(3) Amici Have Directly Experienced The Carnage Wrought By LCMs.

Because LCMs result in more gunshot wounds, they are more lethal. This ineluctable conclusion is borne out in the testimony of doctors who care for victims of gunshot wounds. In the attached Appendix, Dr. Marc Futernick, an experienced and active Attending Emergency Physician at California Hospital Medical Center, and a past president of *amicus* California ACEP, describes the suffering endured

Work, N.Y. Times (Sep. 4, 2019), <https://www.nytimes.com/2019/09/04/opinion/assault-weapon-ban.html>.

¹⁰ *Id.*

¹¹ *Id.*

¹² See Larry Ryckman, *Aurora theater shooting trial, the latest from Day 13*, Denver Post (May 14, 2015), <http://www.denverpost.com/2015/05/14/aurora-theater-shooting-trial-the-latest-from-day-13/>.

by victims of gun violence, and the frequent need for those with multiple gunshot wounds to undergo “life-saving interventions, such as massive blood transfusions and emergency surgery, to give them any chance for survival.” (Decl. of Dr. Marc Futernick, ¶ 3.)

Dr. Futernick explains that victims of multiple gunshot wounds face significantly more challenging medical crises than those who have only suffered a single gunshot wound because “[e]ach additional gunshot wound increases the likelihood of injuring an organ or large vessel that could lead to massive hemorrhage and irreversible shock.” (*Id.* at ¶ 4.) In testimony that could only come from someone who is “among the most experienced in the nation in the care of gunshot-wound victims,” Dr. Futernick writes that the physicians in his ER have saved many victims of single gunshots, while losing many more to multiple gunshot wounds. (*Id.* at ¶¶ 2, 4.) He describes, for example, how caring for patients who have injuries to both the brain and the torso is particularly challenging, as “[t]he care required for these two types of injuries can negatively impact the other, and such patients have higher rates of complications and poor outcomes.” (*Id.* at ¶ 5.) Beyond the impact on the victims and their families, the time and resources devoted to these injuries also negatively impact the resources that emergency rooms can devote to other patients. (*Id.* at ¶ 6.)

Dr. Futernick's observations have been echoed by his peers in medical literature recently and frequently.¹³ Mass shootings present an “overwhelming” experience for the physicians who treat victims of them.¹⁴ David MacIntyre, a trauma surgeon at Las Vegas' Sunrise Hospital, wrote about his experience treating 214 people (including 70-80 within the first hour) on the evening of the massacre there.¹⁵ Dr. MacIntyre observed 10 gunshot wounds to the head, 8 to the chest, 13 in the abdominal area, 17 orthopedic injuries, and 33 “others” that all required surgery.¹⁶ Dr. MacIntyre also described 15 fatalities, some of which occurred before the victims even arrived at the hospital.¹⁷

¹³ See Panagiotis K. Stefanopoulos, et al., *Gunshot Wounds: A Review of Ballistics Related to Penetrating Trauma*, 3 J. Acute Disease 178, 181-82 (2014); Gina Kolata & C.J. Chivers, *Wounds from Military-Style Rifles? 'A Ghastly Thing to See'*, N.Y. Times (Mar. 4, 2018), <https://www.nytimes.com/2018/03/04/health/parkland-shooting-victims-ar15.html>; Tim Craig et al., *As the Wounded Kept Coming, Hospitals Dealt with Injuries Rarely Seen in U.S.*, Wash. Post (Oct. 3, 2017), https://www.washingtonpost.com/national/health-science/as-the-wounded-kept-coming-hospitals-dealt-with-injuries-rarely-seen-in-the-us/2017/10/03/06210b86-a883-11e7-b3aa-c0e2e1d41e38_story.html?utm_term=.5a659eec267b.

¹⁴ See Jeremy Stahl, *What It Was Like to Be a Surgeon in Las Vegas' Busiest Trauma Unit After Sunday's Massacre*, Slate.com (Oct. 3, 2017), http://www.slate.com/blogs/the_slatest/2017/10/03/a_surgeon_s_story_from_sunrise_hospital_in_las_vegas.html.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

The above evidence shows there can be no question that LCMs make guns more dangerous. The particular lethality of LCMs and other military weapons used in civilian settings led the American College of Emergency Physicians to create a task force to address “the challenges of reducing morbidity and mortality from active shooting incidents and terrorist attacks,” including through the “[t]ranslation of military emergency medicine and out-of-hospital (EMS) lessons learned to the civilian setting.”¹⁸

(4) Weapons with LCMs pose a significant threat to law enforcement personnel and the general public.

LCMs are not only dangerous because they are frequently involved in mass shootings and enhance the lethality of firearms. They are also particularly dangerous because criminals often use them. An estimated 25% of gun homicides are committed with guns equipped with LCMs. (SJ Ex. 4 at 72.)

LCMs are used in a significant portion of *all* gun crimes. Evidence shows that LCMs were used in approximately 13% to 26% of all gun crime in the 10 years prior to the enactment of the federal assault weapon and LCM ban in 1994. (SJ Ex. 4 at 201, 300, 302; PI Ex. 107 at 450.) Moreover, Christopher Koper has completed research showing that firearms equipped with LCMs “have

¹⁸ Press Release, American College of Emergency Physicians, Announcing the new ACEP High Threat Emergency Casualty Care Task Force (2016), <http://www.thecentralline.com/?p=3212>.

grown substantially as a share of crime guns since the expiration of the federal ban” on assault weapons and LCMs.¹⁹

Criminals often choose LCMs to attack law enforcement. Before the enactment of the federal assault weapon ban, 31% to 41% of gun murders of police involved the use of LCMs. (PI Ex. 107 at 450; Ex. SJ Ex. 4 at 300.) Prohibitions on LCMs protect officers because gun users must reload more often. For officers confronting dangerous shootouts, the “‘2 or 3 second pause’ during which a criminal reloads his firearm ‘can be of critical benefit to law enforcement.’” *Heller v. Dist. of Columbia*, 670 F.3d 1244, 1264 (D.C. Cir. 2011); *see also Ass’n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. N.J.*, 910 F.3d 106, 120 (3d Cir. 2018). For example, in January 2011, bystanders subdued Jared Lee Loughner during the mass shooting in Tucson only after he was forced to pause to reload.²⁰ Similarly, the interruption to reload is what prevented Colin Ferguson from continuing his 1995 Long Island Rail Road shooting spree that killed six

¹⁹ Christopher S. Koper et al., *Criminal Use of Assault Weapons and High-Capacity Semiautomatic Firearms: an Updated Examination of Local and National Sources*, J. Urban Health, Oct. 2, 2017, <https://www.ncbi.nlm.nih.gov/pubmed/28971349>.

²⁰ *See* Sam Quinones & Nicole Santa Cruz, *Crowd Members Took Gunman Down*, L.A. Times (Jan. 9, 2011), <http://articles.latimes.com/2011/jan/09/nation/la-na-arizona-shooting-heroes-20110110>.

people and injured 19 more.²¹ The importance of the opportunity to disarm during reloading was also illustrated with John Meis’s actions to neutralize a shooter in Washington State.²²

II. THE PANEL’S DANGEROUS ERRORS ARE COMPOUNDED BY THE FACT THAT LCMS ARE NOT EVEN “ARMS,” MUCH LESS AN “ENTIRE CLASS OF ARMS.”

LCMs should not be subject to Second Amendment scrutiny at all. The Second Amendment guarantees the right to keep and bear only “arms.” U.S. Const. amend. II. By the terms of the *Heller* decision itself, LCMs are not “arms.” In *Heller*, the Court defined “arms” as “weapons of offence, or armour of defense.” 554 U.S. at 581 (quoting 1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978)). Unlike guns, LCMs are not weapons, they are firearm accessories. *See United States v. Cox*, 906 F.3d 1170, 1186 (10th Cir. 2018) (“A silencer is a firearm accessory; it is not a weapon in itself (nor is it ‘armour of defense’). Accordingly, it can’t be a ‘bearable arm’ protected by the Second Amendment.”).

²¹ See Pat Milton, *Colin Ferguson Convicted of Murdering Six in Train Massacre*, AP News Archive (Feb. 18, 1995), <http://www.apnewsarchive.com/1995/Colin-Ferguson-Convicted-of-Murdering-Six-in-Train-Massacre/id-49433c4650ab4c17b9b412fe0a8717d6>.

²² Seattle Times, *1 dead, others hurt in shooting at Seattle Pacific University before student tackles gunman* (June 5, 2014), <https://www.seattletimes.com/seattle-news/1-dead-others-hurt-in-shooting-at-seattle-pacific-university-before-student-tackles-gunman/>.

The Panel decided that “[f]irearm magazines are ‘arms’ under the Second Amendment protection for a simple reason: [w]ithout *a* magazine, many weapons would be useless . . .” *Duncan*, 2020 WL 4730668, at *11 (emphasis supplied). While the reach of the Second Amendment may extend beyond firearms themselves to include certain items, such as bullets, that are “necessary” to the functionality of firearms, an LCM is not such an item. An LCM is not necessary for the functioning of a weapon; it is a device that is used to enhance the weapon’s basic features by providing quick and easy access to very large supplies of bullets. It is thus more like a silencer—a non-essential add-on to a firearm—which the Tenth Circuit held was an “accessory,” not an “arm” protected by the Second Amendment. *See Cox*, 906 F.3d at 1186.

A magazine may be “an essential mechanical part of a firearm,” *Duncan*, 366 F. Supp. 3d at 1142, but a detachable magazine holding 15 or 20 or 50 or 100 rounds of ammunition is not.²³ Indeed, magazines holding 10 rounds or less remain “widely available” in California and are “compatible with most, if not all, semiautomatic firearms,” including handguns. (Graham Decl., Dkt. No. 53-2, at ER000256.)

²³ The Panel invokes the *Heller* decision to assert that the availability of alternative magazines is constitutionally irrelevant. *Duncan*, 2020 WL 4730668, at *7. This contorts *Heller*’s actual holding beyond recognition. The Court merely said that the availability of long guns could not save a ban on handguns because “the American people have considered the handgun to be the quintessential self-defense weapon.” *Heller*, 554 U.S. at 629. LCMs enjoy no such exalted status.

Remarkably, the Panel held, contrary to every other federal circuit, that the Statute should be subject to strict scrutiny analysis, because *LCMs* constitute “an entire class of arms” worthy of protection. (Op at 41, Dkt. No. 97). This is preposterous. Even if *LCMs* are “arms,” they are certainly not an “entire class of arms.” The class is “magazines” – of varying capacities. *LCMs* are merely a subset of the class.

While a ban on *LCMs* is not properly subject to any level of Second Amendment scrutiny, it certainly should not be subject to strict scrutiny.

CONCLUSION

For the reasons set forth above, this Court should rehear this appeal *en banc*.

September 8, 2020

Respectfully submitted,

/s/Jonathan K. Baum

Jonathan K. Baum

KATTEN MUCHIN ROSENMAN LLP

525 W. Monroe Street

Chicago, IL 60661

(312) 902-5479

Mark T. Ciani

KATTEN MUCHIN ROSENMAN LLP

575 Madison Avenue

New York, NY 10022

(212) 940-8800

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 8. Certificate of Compliance for Briefs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form08instructions.pdf>

9th Cir. Case Number(s) **No. 19-55376**

I am the attorney or self-represented party.

This brief contains 4,138 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief (*select only one*):

☐ complies with the word limit of Cir. R. 32-1.

☐ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

☒ is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

☐ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

☐ complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):

☐ it is a joint brief submitted by separately represented parties;

☐ a party or parties are filing a single brief in response to multiple briefs; or

☐ a party or parties are filing a single brief in response to a longer joint brief.

☐ complies with the length limit designated by court order dated _____.

☐ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Jonathan K. Baum
(use "s/[typed name]" to sign electronically-filed documents)

Date: Sept. 8, 2020

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of *Amici Curiae* California Chapter of the American College of Emergency Physicians, American Academy of Pediatrics, California, and California Academy of Family Physicians on Behalf of Appellant with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 8, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/Jonathan K. Baum

Jonathan J. Baum

APPENDIX

No. 19-55376

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGINIA DUNCAN, ET AL.,
Plaintiffs-Appellees

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of California
Civil Case (3:17-cv-1017-BEN)

DECLARATION OF MARC FUTERNICK, MD

I, Marc Futernick, MD, declare under penalty of perjury that the foregoing is true and correct:

1. I am the Chairman of the Board of Directors for VEP Healthcare, Inc., and the Regional Medical Director of Emergency Services and an active Attending Emergency Physician at California Hospital Medical Center (“CHMC”) in Los Angeles, California. I formerly served as the President, and currently serve on the Board of Directors, of *amicus* California Chapter of the American College of Emergency Physicians.

2. CHMC’s Emergency Department cared for more than 80,000 patients in 2018 and serves as a Level II trauma center. CHMC’s trauma center treats more patients than any other private facility in Los Angeles, and frequently treats the highest percentage of penetrating

traumas in the city. Penetrating traumas include gunshots and stab wounds. As a result, CHMC's physicians are among the most experienced in the nation in the care of gunshot-wound victims.

3. Having worked at CHMC for over a decade, I have personally cared for many gunshot-wound victims and regularly witnessed the severity of their injuries. I have also witnessed the devastating impact these life-changing events have on patients and their families. The pain and suffering of these patients is tremendous. We routinely care for vibrant, healthy young adults howling in misery from isolated injuries such as extremity gunshot wounds. Unfortunately, we also frequently treat patients with multiple wounds who are too critically ill to cry out at all. These patients require life-saving interventions, such as massive blood transfusions and emergency surgery, to give them any chance for survival.

4. Although it is intuitively obvious, I want to focus on the impact of multiple gunshot wounds and the increased morbidity and mortality these patients face. Each additional gunshot wound increases the likelihood of injuring an organ or large blood vessel that could lead to massive hemorrhage and irreversible shock. Catastrophic injuries are far more common when patients have multiple wounds. We have saved many patients with single gunshot wounds, but lost many more patients who suffered multiple wounds.

5. Some of the most challenging patients are those who have gunshot-wound injuries to both the brain and the torso. The care required for these two types of injuries can negatively impact the other, and such patients have higher rates of complications and poor outcomes. Unfortunately, resuscitating these patients is often unsuccessful, but the personnel and resources (*e.g.*, blood) dedicated to these efforts are the same regardless of the expected outcome.

6. There are also potential ramifications for other patients suffering emergency conditions, including those in pre-hospital settings. Patients suffering from non-traumatic

illnesses, which can be equally time-sensitive as traumatic ones, may suffer delays in care or therapy due to the intense focus of resources dedicated to victims of multiple gunshot wounds. For example, a blood bank can process only a limited number of blood transfusion units at one time, and the demand becomes more acute with multiple patients. Although staff and physicians do their best to manage all critical patients simultaneously, the impact of caring for patients with multiple gunshot wounds can have ripple effects across the community.

7. I have personally treated hundreds of victims of gun violence, including dozens of patients with five or more wounds. To restate the obvious, patients with multiple gunshot wounds are much more likely to die, or suffer permanent sequelae, such as paralysis, coma, amputations, and chronic gastrointestinal complications.

8. I am haunted by the anguish and tears of my patients' loved ones as they mourn the sudden death of their young and healthy children, spouses, or parents. All of their lives are changed in an instant.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 22nd day of July, 2019.

/s/ Marc Futernick

Marc Futernick, MD