

No. 19-55376

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

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VIRGINIA DUNCAN, et al.,

*Plaintiffs-Appellees,*

v.

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

*Defendant-Appellant.*

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Appeal from the U.S. District Court for the Southern District of California,  
No. 3:17-cv-01017-BEN-JLB, Hon. Roger T. Benitez

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**BRIEF OF AMICI CURIAE PRIDE FUND TO END GUN VIOLENCE,  
EQUALITY CALIFORNIA, AND GAYS AGAINST GUNS  
IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING EN  
BANC**

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SEPTEMBER 8, 2020

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, the Pride Fund to End Gun Violence, Equality California, and Gays Against Guns state that they have no parent corporations. They have no stock, and therefore no publicly held company owns 10% or more of their stock.

Dated: September 8, 2020

s/ James E. Hough

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James E. Hough

## TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT .....	i
TABLE OF AUTHORITIES .....	iii
INTEREST OF AMICI CURIAE.....	1
INTRODUCTION AND SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	4
I. THE PANEL MAJORITY’S DECISION WOULD HAMSTRING CALIFORNIA’S ABILITY TO PROTECT THE LGBTQ COMMUNITY FROM MASS VIOLENCE.....	4
II. THE PANEL MAJORITY’S DECISION CONFLICTS WITH THIS COURT’S PRECEDENT AND DECISIONS FROM OTHER CIRCUITS .....	13
CONCLUSION .....	15

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Akopyan v. Barnhart</i> , 296 F.3d 852 (9th Cir. 2002) .....	14
<i>Ass’n of N.J. Rifle &amp; Pistol Clubs, Inc. v. Att’y Gen. N.J.</i> , 910 F.3d 106 (3d Cir. 2018) .....	15
<i>Friedman v. City of Highland Park</i> , 784 F.3d 406 (7th Cir. 2015) .....	15
<i>Fyock v. City of Sunnyvale</i> , 779 F.3d 991 (9th Cir. 2015) .....	6, 13, 14
<i>Heller v. District of Columbia</i> , 670 F.3d 1244 (D.C. Cir. 2011) .....	14
<i>Kolbe v. Hogan</i> , 849 F.3d 114 (4th Cir. 2017) .....	6, 7, 8, 14
<i>N.Y. State Rifle &amp; Pistol Ass’n, Inc. v. Cuomo</i> , 804 F.3d 242 (2d Cir. 2015) .....	14
<i>Silvester v. Harris</i> , 843 F.3d 816 (9th Cir. 2016) .....	7
<i>Worman v. Healey</i> , 922 F.3d 26 (1st Cir. 2019) .....	15
<b>Rules</b>	
Fed. R. App. P. 35(b)(1)(A) .....	13
Fed. R. App. P. 35(b)(1)(B) .....	4, 14

## Other Authorities

- Brian Levin, *Hate Crimes in Los Angeles 2017-2018: A Comparative Analysis with Other Major Cities* Ctr. for the Study of Hate & Extremism, Cal. State Univ., San Bernardino (2018), [https://csbs.csusb.edu/sites/csusb\\_csbs/files/LA%20City%20Hate%20Crime%20v8.pdf](https://csbs.csusb.edu/sites/csusb_csbs/files/LA%20City%20Hate%20Crime%20v8.pdf) .....10
- CNN Editorial Research, *Mass Shootings in the US Fast Facts*, CNN, <https://www.cnn.com/2013/09/16/us/20-deadliest-mass-shootings-in-u-s-history-fast-facts/index.html> (last updated May 3, 2020).....6, 7, 8
- Emily Waters & Sue Yacka-Bible, *A Crisis of Hate: A Mid Year Report on Lesbian, Gay, Bisexual, Transgender and Queer Hate Violence Homicides*, Nat’l Coalition of Anti-Violence Programs (2017), <http://avp.org/wp-content/uploads/2017/08/NCAVP-A-Crisis-of-Hate-Final.pdf>.....10
- Emily Waters et al., *A Crisis of Hate: A Report on Lesbian, Gay, Bisexual, Transgender, and Queer Hate Violence Homicides in 2017*, Nat’l Coalition of Anti-Violence Programs (2018), <http://avp.org/wp-content/uploads/2018/01/a-crisis-of-hate-january-release-12218.pdf> .....10, 12
- Fed. Bureau of Investigation, *2017 Hate Crime Statistics: Incidents, Offenses, Victims, and Known Offenders by Bias Motivation* (2018), <https://ucr.fbi.gov/hate-crime/2017/topic-pages/tables/table-1.xls> .....10
- Fed. Bureau of Investigation, *2018 Hate Crime Statistics: Incidents, Offenses, Victims, and Known Offenders by Bias Motivation* (2019), <https://ucr.fbi.gov/hate-crime/2018/tables/table-1.xls> .....10
- Haeyoun Park & Iaryna Mykhyalyshyn, *L.G.B.T. People Are More Likely to Be Targets of Hate Crimes Than Any Other Minority Group*, N.Y. TIMES (June 16, 2016), <http://nyti.ms/1YtDYV8> .....9

Human Rights Campaign Foundation, <i>Dismantling a Culture of Violence: Understanding Anti-Transgender Violence and Ending the Crisis</i> , <a href="https://assets2.hrc.org/files/assets/resources/2018AntiTransViolenceReportSHORTENED.pdf?_ga=2.85491039.793658794.1563480464-758905052.1563480464">https://assets2.hrc.org/files/assets/resources/2018AntiTransViolenceReportSHORTENED.pdf?_ga=2.85491039.793658794.1563480464-758905052.1563480464</a> (last visited July 18, 2019) .....	11, 12
Human Rights Campaign, <i>Violence Against the Transgender Community in 2017</i> , <a href="https://www.hrc.org/resources/violence-against-the-transgender-community-in-2017">https://www.hrc.org/resources/violence-against-the-transgender-community-in-2017</a> (last visited July 17, 2019) .....	11
Human Rights Campaign, <i>Violence Against the Transgender Community in 2020</i> , <a href="https://www.hrc.org/resources/violence-against-the-trans-and-gender-non-conforming-community-in-2020">https://www.hrc.org/resources/violence-against-the-trans-and-gender-non-conforming-community-in-2020</a> (last visited Aug. 31, 2020).....	11, 12
Jack Healy & Marc Santora, <i>Held Hostage in an Orlando Restroom, and Playing Dead to Stay Alive</i> , N.Y. TIMES (June 13, 2016), <a href="https://www.nytimes.com/2016/06/14/us/reconstruct-orlando-pulse-shootings.html?mcubz=3">https://www.nytimes.com/2016/06/14/us/reconstruct-orlando-pulse-shootings.html?mcubz=3</a> .....	5
Keith Ellison et al., <i>A Congressional Plea to Sessions: Do Something About Trans Killings, Letter to the Honorable Jefferson Sessions</i> , The Advocate (Mar. 10, 2017), <a href="https://www.advocate.com/transgender/2017/3/13/congressional-plea-sessions-do-something-about-trans-killings">https://www.advocate.com/transgender/2017/3/13/congressional-plea-sessions-do-something-about-trans-killings</a> .....	11
Los Angeles County Commission on Human Relations, <i>2018 Hate Crime Report</i> (2019), <a href="https://hrc.lacounty.gov/wp-content/uploads/2019/09/2018-Hate-Crime-Report.pdf">https://hrc.lacounty.gov/wp-content/uploads/2019/09/2018-Hate-Crime-Report.pdf</a> .....	9
Meghan Keneally, <i>47 Guns, Loaded High-Capacity Magazines Found in Vegas Shooter’s Hotel Suite and Nevada Home</i> , ABC NEWS (Oct. 4, 2017), <a href="http://abcnews.go.com/US/guns-loaded-high-capacity-magazines-found-vegas-shooters/story?id=50228093">http://abcnews.go.com/US/guns-loaded-high-capacity-magazines-found-vegas-shooters/story?id=50228093</a> .....	9
Orange County Sheriff’s Office, <i>Incident Report 16-53354</i> , <a href="https://info.publicintelligence.net/FL-OrlandoShootingReports.pdf">https://info.publicintelligence.net/FL-OrlandoShootingReports.pdf</a> (last visited July 19, 2019).....	5

Orlando Police Department, <i>Presentation of Chief John Mina</i> , <a href="https://media.clickorlando.com/document_dev/2017/04/13/Pulse%20Presentation%20Chief%20Mina%20-%20Redacted%20for%20Release_1492131632369_9440606_ver1.0.pdf">https://media.clickorlando.com/document_dev/2017/04/13/Pulse%20Presentation%20Chief%20Mina%20-%20Redacted%20for%20Release_1492131632369_9440606_ver1.0.pdf</a> (last visited July 17, 2019).....	6
Rebecca Stotzer, <i>Comparison of Hate Crimes Across Protected and Unprotected Groups—An Update</i> (2012), <a href="http://escholarship.org/uc/item/43z1q49r#page-4">http://escholarship.org/uc/item/43z1q49r#page-4</a> .....	9
Steven W. Thrasher, <i>Latino Community Mourns Pulse Shooting Victims: ‘90% Were Hispanic,’</i> GUARDIAN (June 14, 2016), <a href="https://www.theguardian.com/us-news/2016/jun/14/latino-hispanic-orlando-shooting-victims">https://www.theguardian.com/us-news/2016/jun/14/latino-hispanic-orlando-shooting-victims</a> .....	12
Violence Policy Center, <i>Large Capacity Ammunition Magazines</i> , <a href="http://www.vpc.org/fact_sht/VPCshootinglist.pdf">http://www.vpc.org/fact_sht/VPCshootinglist.pdf</a> (last updated Feb. 13, 2020) .....	6, 8
Xavier Becerra, Attorney General, <i>Hate Crime in California</i> , CAL. DEP’T OF JUSTICE (2017), <a href="https://data-openjustice.doj.ca.gov/sites/default/files/2019-06/hc17.pdf">https://data-openjustice.doj.ca.gov/sites/default/files/2019-06/hc17.pdf</a> .....	9

## INTEREST OF AMICI CURIAE<sup>1</sup>

Amici curiae are three organizations that work on behalf of the Lesbian, Gay, Bisexual, Transgender, and Queer (“LGBTQ”) community, including by working to reduce hate crimes and gun violence against that community and other vulnerable groups.

Amicus curiae **Pride Fund to End Gun Violence** (“Pride Fund”) is a national LGBTQ hybrid political action committee focused solely on gun violence prevention. Pride Fund was founded by a gay Iraq War veteran in the days following the June 2016 mass shooting at Pulse, a gay nightclub in Orlando, Florida. In that incident, a man filled with hate and armed with an assault rifle and numerous large-capacity magazines (“LCMs”) of the sort at issue here shot and killed 49 people and injured 53 others. When it occurred, the Pulse nightclub shooting was the deadliest mass shooting in U.S. history. Pride Fund supports sensible gun policy reforms while championing LGBTQ safety and equality. Pride Fund seeks to create policy change by advocating for legislation at the state and federal levels, including legislation that restricts access to assault weapons and LCMs, expands background checks to cover all gun sales, and prevents individuals convicted of hate crimes from

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<sup>1</sup> No party’s counsel authored this brief in whole or in part. No party, party’s counsel, or other person contributed any money to fund the preparation or submission of this brief other than amici curiae and their counsel. All parties have consented to the filing of this brief.



purchasing guns. In 2016, Pride Fund endorsed Proposition 63, which enacted the LCM restrictions at issue in this litigation.

Amicus curiae **Equality California** is the largest statewide LGBTQ civil rights non-profit organization in the United States. Equality California brings the voices of LGBTQ people and allies to institutions of power in California and across the United States, striving to create a world that is healthy, just, and fully equal for all LGBTQ people. In the wake of the Pulse nightclub attack, Equality California launched its “Safe and Equal” campaign, which made gun law reform one of the organization’s highest priorities. Equality California endorsed Proposition 63 and has supported over a dozen gun safety bills in California. Equality California advocates for gun safety reform because LGBTQ individuals, particularly transgender women, are disproportionately impacted by gun violence.

Amicus curiae **Gays Against Guns** is a community of LGBTQ individuals and allies committed to achieving meaningful gun law reform. Gays Against Guns was founded in June 2016 after the Pulse nightclub shooting. The collective advocates for gun law reform through nonviolent direct action and public outreach campaigns. Gays Against Guns advocates for reasonable gun law reform because gun violence is a public health crisis that disproportionately affects people of color, religious minorities, and LGBTQ Americans.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

This Court should grant en banc review because this case presents an exceptionally important question about the ability of voters and legislators to address gun violence—which disproportionately affects amici’s members and the communities they serve. Indeed, the panel majority’s conclusions regarding the interests of the LGBTQ community turn reality on its head.

If not corrected, the panel’s errors would put the LGBTQ community at elevated risk of injury and death. It is beyond debate that the interests advanced by California’s prohibition on LCMs—including promoting public safety and reducing the incidence and lethality of mass shootings—are critically important. Yet the panel’s decision would severely impair the ability of California voters and legislators to adopt policies to further those interests.

En banc review is especially needed because the panel’s decision is irreconcilable with decisions from this Court and its sister circuits. This Court has previously upheld a nearly identical LCM restriction. And every other court of appeals to address LCM prohibitions has concluded they comport with the Second Amendment. En banc review is necessary to restore consistency in this Court’s precedents and repair this unwarranted and harmful circuit split.

## ARGUMENT

### I. THE PANEL MAJORITY’S DECISION WOULD HAMSTRING CALIFORNIA’S ABILITY TO PROTECT THE LGBTQ COMMUNITY FROM MASS VIOLENCE

This case presents a question of exceptional importance—indeed, one of life or death for the LGBTQ community. *See* Fed. R. App. P. 35(b)(1)(B). The panel majority correctly recognized that members of the LGBTQ community are disproportionately the victims of hate crimes. *Op.* at 39. It went on to conclude, however, that armed self-defense could deter attacks against LGBTQ community members. *Id.* Yet the majority cited no data or evidence in support of that claim—only a bare assertion in an amicus brief. *Id.* (citing *Pink Pistols et al. Amicus Br.* at 2).

There is no evidence, within or outside the record, that any LGBTQ American has ever needed to fire more than ten shots without reloading to engage in self-defense. Nor is there any evidence that magazines holding as many as ten rounds are inadequate for members of the LGBTQ community (or anyone else) to practice armed self-defense. But there *is* evidence—unfortunately, extensive evidence—that access to LCMs increases the odds that LGBTQ people and other Americans will suffer injury or death at the hands of a mass shooter.

This threat was illustrated most clearly on June 12, 2016, when a heavily-armed mass shooter murdered 49 people and injured 53 others at Pulse, a gay

nightclub in Orlando, Florida. ER1025. The staggering loss of life was facilitated by the shooter's use of multiple 30-round magazines. ER1009. These LCMs allowed the gunman, upon entering Pulse, to unleash a hail of unrelenting gunfire on the crowd of people gathered on the club's dancefloor. He fired dozens of shots in rapid succession and without pause, indiscriminately spraying Pulse's patrons and staff—including amicus curiae Pride Fund's members and their loved ones—with bullets as they tried to flee. In one audio recording of the event, the attacker is heard firing 24 shots in just nine seconds. ER1025. The shooter's use of LCMs curtailed opportunities for victims to escape or for anyone to overpower him while he reloaded. In fact, as the final shootout with the police began, the gunman taunted, "I've got plenty of bullets."<sup>2</sup>

Police and deputies arrived at the club within minutes of these initial shots. They witnessed individuals fleeing the building "covered in blood with gunshot wounds."<sup>3</sup> When law enforcement entered the main dance floor of the club, they reportedly saw so many bodies on the ground that one officer announced "if you're

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<sup>2</sup> Jack Healy & Marc Santora, *Held Hostage in an Orlando Restroom, and Playing Dead to Stay Alive*, N.Y. TIMES (June 13, 2016), <https://www.nytimes.com/2016/06/14/us/reconstruct-orlando-pulse-shootings.html?mcubz=3>.

<sup>3</sup> Orange Cnty. Sheriff's Office, *Incident Report 16-53354*, at 6, <https://info.publicintelligence.net/FL-OrlandoShootingReports.pdf> (last visited July 19, 2019).

alive, raise your hand.”<sup>4</sup> At least 20 people were murdered in the room where the shooter unleashed this initial blitz. Others perished in different areas of the building during the three-hour rampage. Still more died later at the hospital and triage center.<sup>5</sup>

Until the mass shooting in Las Vegas that took place in October 2017, the Pulse nightclub massacre was the deadliest mass shooting in U.S. history. But the attack was far from an isolated incident. LCMs are “disproportionately used in mass shootings.” *Fyock v. City of Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015); *see also Kolbe v. Hogan*, 849 F.3d 114, 126-27 (4th Cir. 2017) (en banc) (noting studies have shown most mass shootings involve LCMs). Since 1980, shooters used LCMs in 81% of U.S. mass shootings involving eight or more fatalities, and 71% of U.S. mass shootings involving 12 or more fatalities.<sup>6</sup> Shooters used LCMs in *all* of the six

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<sup>4</sup> Orlando Police Dep’t, *Presentation of Chief John Mina*, at 24, [https://media.clickorlando.com/document\\_dev/2017/04/13/Pulse%20Presentation%20Chief%20Mina%20-%20Redacted%20for%20Release\\_1492131632369\\_9440606\\_ver1.0.pdf](https://media.clickorlando.com/document_dev/2017/04/13/Pulse%20Presentation%20Chief%20Mina%20-%20Redacted%20for%20Release_1492131632369_9440606_ver1.0.pdf) (last visited July 17, 2019).

<sup>5</sup> *Id.* at 46.

<sup>6</sup> *See* Violence Policy Center, *Large Capacity Ammunition Magazines*, [http://www.vpc.org/fact\\_sht/VPCshootinglist.pdf](http://www.vpc.org/fact_sht/VPCshootinglist.pdf) (last updated Feb. 13, 2020) (listing mass shootings involving LCMs); CNN Editorial Research, *Mass Shootings in the US Fast Facts*, CNN, <https://www.cnn.com/2013/09/16/us/20-deadliest-mass-shootings-in-u-s-history-fast-facts/index.html> (last updated May 3, 2020) (listing mass shootings). According to these sources, since 1980, there have been 32 mass shootings involving eight or more fatalities, of which at least 26 involved the use of LCMs; and 21 mass shootings involving 12 more fatalities, of which at least 15 involved the use of LCMs.

deadliest mass shootings in U.S. history.<sup>7</sup> The relative lethality and prevalence of LCMs in mass shootings is unsurprising: rapid gunfire and mass casualties are precisely what these devices are designed for. *Silvester v. Harris*, 843 F.3d 816, 826 (9th Cir. 2016) (“large-capacity guns that have been used in mass shootings” are “suitable only for use to injure others”); *see also Kolbe*, 849 F.3d at 137 (LCMs “are meant to provide soldiers with a large ammunition supply and the ability to reload rapidly,” enabling “a shooter to hit multiple human targets very rapidly” (internal quotation marks and alteration omitted)).

The Pulse attack was not, of course, the first mass shooting perpetrated with LCMs. It came on the heels of several others:

- Sandy Hook Elementary School in Newtown, Connecticut (20 first-graders and six adults killed and two adults wounded in December 2012);
- Aurora, Colorado movie theater (12 killed and at least 58 wounded in July 2012);
- San Bernardino, California holiday party (14 killed and more than 20 wounded in December 2015);

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<sup>7</sup> *Id.* (October 1, 2017, Route 91 Harvest Festival in Nevada (58 killed); June 12, 2016, Pulse nightclub in Florida (49 killed); April 16, 2017, Virginia Tech in Virginia (32 killed); December 14, 2012, Sandy Hook Elementary School in Connecticut (27 killed); October 16, 1991, Luby’s Cafeteria in Texas (23 killed); July 18, 1984, McDonald’s in California (21 killed)).

- Congresswoman Gabby Giffords' constituent meeting outside a grocery store in Tucson, Arizona (six killed and 13 wounded in January 2011);
- U.S. Army base in Fort Hood, Texas (13 killed and more than 30 wounded in November 2009);
- Binghamton, New York immigration center (13 killed and five wounded in April 2009); and
- Virginia Polytechnic Institute campus in Blacksburg, Virginia (32 killed and at least 17 wounded in April 2007).

*See Kolbe*, 849 F.3d at 120 (describing these and other mass shootings involving magazines holding more than ten rounds).

And Pulse was not the last. Numerous mass shootings involving LCMs have occurred in the years since, including:<sup>8</sup>

- First Baptist Church in Sutherland Springs, Texas (27 killed and 20 injured in November 2017);
- Tree of Life—Or L'Simcha Congregation synagogue in Pittsburgh, Pennsylvania (11 killed and seven injured in October 2018); and
- Marjory Stoneman Douglas High School in Parkland, Florida (17 students and staff members killed and 17 injured in February 2018).

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<sup>8</sup> *See* Violence Policy Center, *supra* note 6; CNN Editorial Research, *supra* note 6.

As noted, the deadliest of all was the meticulously planned mass shooting on October 1, 2017, at a country music festival in Las Vegas, Nevada. This shooting left 58 people dead and more than 500 others wounded.<sup>9</sup>

Reducing the prevalence of LCMs—and thereby the violence caused by gun crimes—is of heightened importance to the LGBTQ community. The LGBTQ community has historically been the target of a disproportionate number of reported hate crimes.<sup>10</sup> In many areas, these have only increased over time. California as a whole experienced a 18.8% increase in reported hate crimes against the LGBTQ community between 2016 and 2017.<sup>11</sup> Data from the Los Angeles County Commission on Human Relations shows a 20% increase between 2017 and 2018.<sup>12</sup>

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<sup>9</sup> Meghan Keneally, *47 Guns, Loaded High-Capacity Magazines Found in Vegas Shooter's Hotel Suite and Nevada Home*, ABC NEWS (Oct. 4, 2017), <http://abcnews.go.com/US/guns-loaded-high-capacity-magazines-found-vegas-shooters/story?id=50228093>.

<sup>10</sup> Haeyoun Park & Iaryna Mykhyalyshyn, *L.G.B.T. People Are More Likely to Be Targets of Hate Crimes Than Any Other Minority Group*, N.Y. TIMES (June 16, 2016), <http://nyti.ms/1YtDYV8>; Rebecca Stotzer, *Comparison of Hate Crimes Across Protected and Unprotected Groups—An Update 4* (2012), <http://escholarship.org/uc/item/43z1q49r#page-4>.

<sup>11</sup> Xavier Becerra, Attorney General, *Hate Crime in California*, CAL. DEP'T OF JUSTICE 1 (2017), <https://data-openjustice.doj.ca.gov/sites/default/files/2019-06/hc17.pdf>.

<sup>12</sup> L.A. Cnty. Comm'n on Hum. Rels., *2018 Hate Crime Report* 31 (2019), <https://hrc.lacounty.gov/wp-content/uploads/2019/09/2018-Hate-Crime-Report.pdf>.



Between 2016 and 2017, overall hate crimes in California increased by 17.4%, with gay males being the most targeted group in Los Angeles.<sup>13</sup> Nationally, attacks involving one or more anti-LGBTQ homicides have increased each year between 2013 and 2017—including a 29% increase in just the first eight months of 2017.<sup>14</sup> In 2017, there were 1,130 anti-LGBTQ hate crime incidents,<sup>15</sup> including 52 reported homicides—an 86% increase from 2016.<sup>16</sup> Guns were used in almost 60% of those homicides.<sup>17</sup> And in 2018, anti-LGBTQ hate crimes in the U.S. rose again to 1,196 incidents, a nearly 6% increase from 2017.<sup>18</sup>

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<sup>13</sup> Brian Levin, *Hate Crimes in Los Angeles 2017-2018: A Comparative Analysis with Other Major Cities*, Ctr. for the Study of Hate & Extremism, Cal. State Univ., San Bernardino 9, 12 (2018), [https://csbs.csusb.edu/sites/csusb\\_csbs/files/LA%20City%20Hate%20Crime%20v8.pdf](https://csbs.csusb.edu/sites/csusb_csbs/files/LA%20City%20Hate%20Crime%20v8.pdf).

<sup>14</sup> Emily Waters & Sue Yacka-Bible, *A Crisis of Hate: A Mid Year Report on Lesbian, Gay, Bisexual, Transgender and Queer Hate Violence Homicides*, Nat'l Coalition of Anti-Violence Programs 6-7 (2017), <http://avp.org/wp-content/uploads/2017/08/NCAVP-A-Crisis-of-Hate-Final.pdf>.

<sup>15</sup> Fed. Bureau of Investigation, *2017 Hate Crime Statistics: Incidents, Offenses, Victims, and Known Offenders by Bias Motivation* (2018), <https://ucr.fbi.gov/hate-crime/2017/topic-pages/tables/table-1.xls>.

<sup>16</sup> Emily Waters et al., *A Crisis of Hate: A Report on Lesbian, Gay, Bisexual, Transgender, and Queer Hate Violence Homicides in 2017*, Nat'l Coalition of Anti-Violence Programs 6-7 (2018), <http://avp.org/wp-content/uploads/2018/01/a-crisis-of-hate-january-release-12218.pdf>.

<sup>17</sup> *Id.* at 7.

<sup>18</sup> Fed. Bureau of Investigation, *2018 Hate Crime Statistics: Incidents, Offenses, Victims, and Known Offenders by Bias Motivation* (2019), <https://ucr.fbi.gov/hate-crime/2018/tables/table-1.xls>.

Transgender individuals in particular have been targeted by disproportionate and rising rates of violent crime. From 2013 to 2018, there were more than 130 cases of anti-transgender homicides in the U.S.<sup>19</sup> There have already been at least 26 homicides of transgender individuals nationally in 2020.<sup>20</sup> In a March 2017 letter to the Attorney General, a group of federal lawmakers observed that “[t]ransgender women are over four times more likely to be murdered than the general population of all women,” with the number of reported murders increasing each year since 2014.<sup>21</sup> According to one study, more than half of violent crime fatalities of transgender people in 2017 in the U.S. were due to gunfire.<sup>22</sup> And the actual

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<sup>19</sup> Hum. Rts. Campaign Found., *Dismantling a Culture of Violence: Understanding Anti-Transgender Violence and Ending the Crisis* 3, [https://assets2.hrc.org/files/assets/resources/2018AntiTransViolenceReportSHORTENED.pdf?\\_ga=2.85491039.793658794.1563480464-758905052.1563480464](https://assets2.hrc.org/files/assets/resources/2018AntiTransViolenceReportSHORTENED.pdf?_ga=2.85491039.793658794.1563480464-758905052.1563480464) (last visited July 18, 2019).

<sup>20</sup> Hum. Rts. Campaign, *Violence Against the Transgender Community in 2020*, <https://www.hrc.org/resources/violence-against-the-trans-and-gender-non-conforming-community-in-2020> (last visited Aug. 31, 2020).

<sup>21</sup> Keith Ellison et al., *A Congressional Plea to Sessions: Do Something About Trans Killings, Letter to the Honorable Jefferson Sessions*, The Advocate (Mar. 10, 2017), <https://www.advocate.com/transgender/2017/3/13/congressional-plea-sessions-do-something-about-trans-killings>.

<sup>22</sup> Hum. Rts. Campaign, *Violence Against the Transgender Community in 2017*, <https://www.hrc.org/resources/violence-against-the-transgender-community-in-2017> (last visited July 17, 2019).

prevalence of anti-transgender violence is likely even higher, as such incidents often go unreported or misreported.<sup>23</sup>

LGBTQ people of color face especially heightened risks of hate crime victimization. About 90% of the victims of the Pulse shooting were members of the Latinx community.<sup>24</sup> And more than 70% of the reported anti-LGBTQ homicides in 2017 were committed against people of color.<sup>25</sup> In particular, transgender women of color have experienced “a consistent and steadily rising number” of homicides—at least 22 in 2017.<sup>26</sup> In about 80% of anti-transgender homicides between 2013 and 2018, the victim was a trans woman of color.<sup>27</sup>

The panel majority thus got it exactly backward in concluding that the threat of violence to the LGBTQ community justifies striking down California’s LCM prohibition. On the contrary, the ready availability of LCMs puts the LGBTQ community at serious risk of another tragedy like the one perpetrated at Pulse.

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<sup>23</sup> Hum. Rts. Campaign, *supra* note 20.

<sup>24</sup> Steven W. Thrasher, *Latino Community Mourns Pulse Shooting Victims: ‘90% Were Hispanic,’* GUARDIAN (June 14, 2016), <https://www.theguardian.com/us-news/2016/jun/14/latino-hispanic-orlando-shooting-victims>.

<sup>25</sup> Waters et al., *supra* note 16, at 9.

<sup>26</sup> *Id.* at 7.

<sup>27</sup> Hum. Rts. Campaign Found., *supra* note 19, at 3.

The panel's decision leaves states in this Circuit powerless to limit access to the class of magazines that demonstrably fuels death counts in mass shootings. And the panel's reasoning has grave implications for states' ability to enact laws regulating other dangerous weaponry. The panel majority's holding serves to handcuff future legislators and voters from taking steps to address gun violence, including violence against members of the LGBTQ community. These exceptionally important issues warrant en banc review.

## **II. THE PANEL MAJORITY'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT AND DECISIONS FROM OTHER CIRCUITS**

En banc review is also necessary to ensure uniformity of this Court's decisions. *See* Fed. R. App. P. 35(b)(1)(A). As the panel dissent makes clear, the majority's opinion conflicts irreconcilably with this Court's decision in *Fyock v. City of Sunnyvale*. *Op.* at 67 (Lynn, J., dissenting). *Fyock* involved a challenge to a materially indistinguishable ban on the possession of LCMs holding more than ten rounds of ammunition. 779 F.3d at 994-95. This Court held that LCM prohibitions are properly reviewed under intermediate scrutiny, as they "restrict[] possession of only a subset of magazines" and do not "affect the ability of law-abiding citizens to possess" handguns and magazines altogether. *Id.* at 999.

The panel majority's attempts to distinguish *Fyock* are unpersuasive. The majority emphasized that the *Fyock* Court reviewed the denial of a preliminary

injunction and thus conducted an abuse of discretion, rather than de novo, review. Op. 53-54. But had the district court committed an error of law by applying intermediate scrutiny, that necessarily would have “constitute[d] an abuse of discretion” requiring reversal. *Akopyan v. Barnhart*, 296 F.3d 852, 856 (9th Cir. 2002). *Fyock*’s holding that the district court did *not* abuse its discretion thus establishes that LCM bans are subject to intermediate scrutiny. *See* 779 F.3d at 999. Indeed, the *Fyock* Court expressly “agree[d] that intermediate scrutiny is appropriate” in reviewing LCM prohibitions. *Id.* The panel majority’s conclusion here that strict rather than intermediate scrutiny should apply in evaluating an LCM ban thus contravenes *Fyock*. En banc review should be granted to restore consistency in this Court’s Second Amendment jurisprudence.

En banc review is additionally warranted because the panel’s decision cannot be reconciled with the decisions of six other courts of appeal that have considered—and unanimously affirmed—the constitutionality of LCM bans. *See* Fed. R. App. P. 35(b)(1)(B). All but one of these courts also expressly held that intermediate scrutiny applies. *See N.Y. State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 804 F.3d 242, 264 (2d Cir. 2015) (banning possession of LCMs “has the greatest potential to prevent and limit shootings in the state over the long-run” (internal quotation marks omitted)); *Kolbe*, 849 F.3d at 139-41 (finding a reasonable fit between prohibitions against LCMs and the state’s “interest in protecting public safety”); *Heller v. District*

*of Columbia*, 670 F.3d 1244, 1262-64 (D.C. Cir. 2011) (same); *Worman v. Healey*, 922 F.3d 26, 41 (1st Cir. 2019) (upholding Massachusetts’s ban on possession of LCMs based on a “web of compelling governmental interests, and the fit between those interests and the restrictions imposed by the Act [being] both close and reasonable”); *Ass’n of N.J. Rifle & Pistol Clubs, Inc. v. Att’y Gen. N.J.*, 910 F.3d 106, 119 (3d Cir. 2018) (“New Jersey’s LCM ban reasonably fits the State’s interest in promoting public safety” because “LCMs are used in mass shootings,” and an LCM ban “reduces the number of shots that can be fired from one gun” and “present[s] opportunities for victims to flee and bystanders to intervene”). The Seventh Circuit declined to decide “what ‘level’ of scrutiny applies,” but it likewise upheld the LCM prohibition at issue. *Friedman v. City of Highland Park*, 784 F.3d 406, 410-11 (7th Cir. 2015) (affirming denial of preliminary injunction against LCM ban and noting that “[a] ban on . . . large-capacity magazines . . . may reduce the carnage if a mass shooting occurs”). En banc rehearing is thus necessary to bring this Court in line with its sister circuits.

## CONCLUSION

The LGBTQ community has experienced firsthand the extraordinary lethality enabled by LCMs. The State has an important interest in protecting its citizens, including members of the particularly vulnerable LGBTQ community, from such gun violence. California has advanced that interest by banning LCMs, greatly

reducing the potential lethality of gun violence. The panel majority's decision denies the State and its voters the ability to enact such lifesaving restrictions. And the decision's logic would present significant hurdles to adopting other reasonable gun laws that preserve the right to self-defense while protecting public safety. The panel decision also conflicts with precedent from this Court and other circuits, making en banc rehearing even more imperative.

The petition for rehearing en banc should be granted.

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### **CERTIFICATE OF COMPLIANCE**

This brief complies with Ninth Circuit Rule 29-2(c)(3) because it contains 3,377 words excluding those parts authorized by Fed. R. App. P. 27(a)(2)(B) and 32(f).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2016 in 14-point Times New Roman font.

Dated: September 8, 2020

s/ James E. Hough

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James E. Hough



**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on September 8, 2020.

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