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10  
11 **UNITED STATES DISTRICT COURT**  
12 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

13 WILLIAM WIESE, et al.,

14 Plaintiffs,

15 - v. -

16 XAVIER BECERRA, ATTORNEY GENERAL,  
17 AND MARTHA SUPERNOR, ACTING CHIEF OF  
18 THE DEPARTMENT OF JUSTICE BUREAU OF  
19 FIREARMS,

20 Defendants.

No. 2:17-cv-00903-WBS-KJN

**BRIEF OF AMICUS CURIAE  
EVERYTOWN FOR GUN SAFETY  
IN SUPPORT OF DEFENDANTS'  
MOTION TO DISMISS  
PLAINTIFFS' SECOND AMENDED  
COMPLAINT**

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**CORPORATE DISCLOSURE STATEMENT**

Everytown for Gun Safety has no parent corporations. It has no stock and hence no publicly held company owns 10% or more of its stock.

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1 **INTRODUCTION AND INTEREST OF AMICUS CURIAE**

2 Everytown for Gun Safety (“Everytown”) is the nation’s largest gun violence prevention  
3 organization, with supporters in every state, including tens of thousands of California residents  
4 and the mayors of forty California cities. It was founded in 2014 as the combined effort of  
5 Mayors Against Illegal Guns, a national, bipartisan coalition of mayors combating illegal guns  
6 and gun trafficking, and Moms Demand Action for Gun Sense in America, an organization  
7 formed in the wake of the murder of twenty-six children and six adults in an elementary school  
8 in Newtown, Connecticut by an individual using a firearm with a large-capacity magazine.  
9 Everytown’s mission includes defending laws regulating weapons deemed unreasonably  
10 dangerous though the use of amicus briefs providing historical context and doctrinal analysis that  
11 might otherwise be overlooked.<sup>1</sup>

12 Here, Plaintiffs challenge California Proposition 63 (hereinafter, “Proposition 63”),  
13 which amends the California Penal Code § 32310 to prohibit the sale or possession of large-  
14 capacity magazines of the type used in the Newtown murders.<sup>2</sup> The Ninth Circuit and every  
15 other Court of Appeals that has considered such challenges have found such prohibitions on  
16 large-capacity magazines to be permissible under the Second Amendment.<sup>3</sup> Everytown  
17

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18 <sup>1</sup> Everytown has filed such briefs in several recent cases. *See, e.g.*, Brief of Everytown for Gun  
19 Safety as Amicus Curiae in Support of Defendants, *Flanagan v. Becerra*, 2:16-cv-06164-JAK-  
20 AS (C.D. Cal. Sept. 18, 2017); Brief of Amicus Curiae Everytown for Gun Safety in Support of  
21 Appellees and Affirmance, *Wrenn v. District of Columbia*, No. 16-7025, 2016 WL 3928913  
22 (D.C. Cir. July 20, 2016); Brief of Amicus Curiae Everytown for Gun Safety in Support of  
23 Appellee and Affirmance, *Peña v. Lindley*, No. 15-15449, 2015 WL 5706896 (9th Cir. Sept. 28,  
2015); Brief of Everytown for Gun Safety as Amicus Curiae in Support of Appellees and  
24 Affirmance, *Peruta v. Cty. of San Diego*, Nos. 10-56971, 11-16255, 2015 WL 2064206 (9th Cir.  
25 Apr. 30, 2015); Brief of Amicus Curiae Everytown for Gun Safety in Support of Appellant and  
26 Reversal, *Silvester v. Harris*, No. 14-16840, 2015 WL 1606313 (9th Cir. Apr. 1, 2015).

27 <sup>2</sup> *See* Mary Ellen Clark & Noreen O’Donnell, *Newtown school gunman fired 154 rounds in less*  
28 *than 5 minutes*, Reuters (Mar. 28, 2013, 8:55 AM), <http://www.reuters.com/article/us-usa-shooting-connecticut/newtown-school-gunman-fired-154-rounds-in-less-than-5-minutes-idUSBRE92R0EM20130328>.

<sup>3</sup> *See* *Fyock v. City of Sunnyvale*, 779 F.3d 991, 1001 (9th Cir. 2015) (upholding denial of  
preliminary injunction of local ordinance restricting the possession of large-capacity magazines  
accepting more than ten rounds); *see also* *Kolbe v. Hogan*, 849 F.3d 114, 137-38 (4th Cir. 2017)  
(en banc) (affirming the finding that Maryland’s ban on large-capacity magazines over ten  
rounds was constitutional and holding that such magazines were not protected by the Second  
Amendment); *N.Y. State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 804 F.3d 242, 247 (2d Cir. 2015)

1 respectfully submits that the Court should find similarly here and grant Defendants’ Motion to  
2 Dismiss.

3 As the Court is well aware, courts in this Circuit analyze Second Amendment challenges  
4 through a two-step process: first by assessing “whether the challenged law burdens conduct  
5 protected by the Second Amendment” and then by “apply[ing] an appropriate level of scrutiny.”  
6 *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *Wiese v. Becerra*, Civ. No. 2:17-  
7 903 WBS KJN, 2017 WL 2813218, at \*2 (E.D. Cal. June 29, 2017). Everytown submits this  
8 amicus brief in support of Defendants’ Motion to Dismiss to inform the Court’s first step in this  
9 analysis. Specifically, the Court should consider Proposition 63 as part of a long tradition of  
10 regulating or prohibiting weapons that legislatures have determined to be unacceptably  
11 dangerous—including a century of restrictions on firearms capable of firing a large number of  
12 rounds without reloading. Such a historical tradition alone is sufficient for this Court to find  
13 Proposition 63 constitutional under *Heller*. See *District of Columbia v. Heller*, 554 U.S. 570,  
14 626-27 (2008) (“[N]othing in our opinion should be taken to cast doubt on longstanding  
15 prohibitions on the possession of firearms . . . or laws imposing conditions and qualifications on  
16 the commercial sale of arms.”).

17 In addition, Everytown writes in opposition to Plaintiffs’ suggestion that the Court should  
18 consider the national prevalence of a firearm feature as determinative in the first step of the  
19 Second Amendment analysis. This proposal cannot be reconciled with the Supreme Court’s  
20 decision in *Heller*, or with the law of the circuits that have addressed this issue. See, e.g., *Heller*,  
21 570 U.S. at 627 (recognizing that weapons “most useful in military service—M-16 rifles and the  
22 like—may be banned”); *Kolbe v. Hogan*, 849 F.3d 114, 121 (4th Cir. 2017) (holding that large-  
23 capacity magazines “are among those arms . . . the *Heller* Court singled out as being beyond the  
24

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25 (holding that New York and Connecticut prohibitions on possessing large-capacity magazines  
26 holding over ten rounds did not violate the Second Amendment); *Friedman v. City of Highland  
27 Park*, 784 F.3d 406, 412 (7th Cir. 2015) (holding that local ordinance banning large-capacity  
28 magazines did not violate the Second Amendment); *Heller v. District of Columbia*, 670 F.3d  
1244, 1264 (D.C. Cir. 2011) (upholding D.C. prohibition on large-capacity magazines over ten  
rounds); but see *Duncan v. Becerra*, No. 3:17-cv-1017-BEN, 2017 WL 2813727, at \*25 (S.D.  
Cal. June 29, 2017) (preliminarily enjoining Proposition 63 and noting that Second Amendment  
rights are not eliminated “simply” because high-capacity magazine are “unpopular”).



1 Second Amendment’s reach”); *Friedman v. City of Highland Park*, 784 F.3d 406, 407-08 (7th  
 2 Cir. 2015) (noting that under *Heller*, the Second Amendment does not protect “military-grade  
 3 weapons . . . and weapons especially attractive to criminals”). Moreover, such a “common use”  
 4 test would transform the constitutional analysis into a consumer referendum and render existing  
 5 firearms and firearm features like large-capacity magazines effectively immune from regulation.

## 6 ARGUMENT

### 7 I. California’s Prohibition of Large-Capacity Magazines Is Part of a 8 Longstanding History of Analogous Prohibitions

9 Considering the statute at issue here in historical perspective is critical to an appropriate  
 10 analysis of whether it is constitutional, as “longstanding prohibitions [] fall outside of the Second  
 11 Amendment’s scope” and therefore merit only rational basis review. *Fyock v. Sunnyvale*, 779  
 12 F.3d 991, 997 (9th Cir. 2015).<sup>4</sup> Longstanding prohibitions need not “mirror limits that were on  
 13 the books in 1791.” *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc).  
 14 Instead, courts have held that even early twentieth century regulations can qualify as  
 15 longstanding. *See Fyock*, 779 F.3d at 996-97 (“[E]arly twentieth century regulations might  
 16 nevertheless demonstrate a history of longstanding regulation if their historical prevalence and  
 17 significance is properly developed in the record.”).<sup>5</sup> As discussed below, California’s

18  
 19 <sup>4</sup> *See also Heller*, 554 U.S. at 627, 635 (noting that “longstanding prohibitions” fall outside the  
 20 scope of the Second Amendment as “exceptions” by virtue of their “historical justifications”);  
 21 *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) (noting that “longstanding  
 22 limitations are exceptions to the right to bear arms”); *United States v. Chester*, 628 F.3d 673, 680  
 23 (4th Cir. 2010) (noting that a law does not violate the Second Amendment if it does not infringe  
 24 upon “conduct that was within the scope of the Second Amendment as historically understood”);  
 25 *New York State Rifle and Pistol Association, Inc. v. Cuomo*, 804 F.3d 242, 258 n.76 (2nd Cir.  
 26 2015) (hereinafter “*NYSRPA*”) (“[T]he *Heller* majority identified these . . . measures in an  
 27 attempt to clarify the scope of the Second Amendment’s reach in the first place.”). Such  
 28 exceptions to Constitutional protections are not unique to the Second Amendment context. *See*  
*United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (“‘From 1791 to the present,’ . . . the First  
 Amendment has ‘permitted restrictions upon the content of speech in a few limited areas,’ and  
 has never ‘include[d] a freedom to disregard these traditional limitations.’ These ‘historic and  
 traditional categories long familiar to the bar’—including obscenity, defamation, fraud,  
 incitement, and speech integral to criminal conduct—‘are well-defined and narrowly limited  
 classes of speech, the prevention and punishment of which have never been thought to raise any  
 Constitutional problem.’” (internal citations omitted)).

<sup>5</sup> *See also Friedman*, 784 F.3d at 408 (noting that “*Heller* deemed a ban on private possession of  
 machine guns to be obviously valid” despite the fact that “states didn’t begin to regulate private

1 prohibition on large-capacity magazines is part of a longstanding history of laws prohibiting  
2 firearms capable of firing a large number of rounds in a short time period, and an even longer  
3 tradition of government regulation of weapons deemed to be unusually dangerous.

4 **A. There Is a Longstanding Tradition of Prohibiting Firearms Capable**  
5 **of Quickly Firing Multiple Rounds Without Reloading**

6 Proposition 63 is hardly the first statute to regulate the ammunition capacity of firearms  
7 to prohibit a large number of rounds from being fired in a short period of time. In fact, states  
8 have regulated the ammunition capacity of semiautomatic firearms since these firearms were first  
9 developed at the turn of the twentieth century, often categorizing large-capacity firearms along  
10 with fully automatic weapons as “machine guns,” and have imposed restrictions effectively  
11 prohibiting them entirely.<sup>6</sup> Both the 1927 National Crime Commission Firearm Act and the  
12 1928 Uniform Firearms Act criminalized possession of “any firearm which shoots more than  
13 twelve shots semi-automatically without reloading.” *Report of Firearms Committee*, 38th  
14 Conference Handbook of the National Conference on Uniform State Laws and Proceedings of  
15 the Annual Meeting 422-23 (1928). Shortly thereafter, the federal government enacted a similar  
16 prohibition applicable to the District of Columbia. 47 Stat. 650, ch. 465, §§ 1, 14 (1932)  
17 (making it a crime to “possess any machine gun,” which it defined as “any firearm which shoots  
18 . . . semiautomatically more than twelve shots without loading”).

19 California first passed a ban on automatic weapons in 1927<sup>7</sup> and expanded such  
20 legislation in 1933 through a statute prohibiting the sale or possession of “all firearms . . .

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21 use of machine guns until 1927,” and that “regulating machine guns at the federal level” did not  
22 begin until 1934); *Skoien*, 614 F.3d at 639-41 (noting that “prohibitions on the possession of  
23 firearms by felons and the mentally ill” have been found to be sufficiently longstanding, despite  
24 the fact that “[t]he first federal statute disqualifying felons from possessing firearms was not  
25 enacted until 1938” and that “the ban on possession by *all* felons was not enacted until 1961”).

26 <sup>6</sup> See, e.g., 1927 R.I. Pub. Laws 256, §§ 1, 4 (prohibiting the “manufacture, s[ale], purchase or  
27 possess[ion]” of a “machine gun,” which it defined as “any weapon which shoots more than  
28 twelve shots semi-automatically without reloading”); 1927 Mich. Pub. Acts 887, § 3 (prohibiting  
possession of “any machine gun or firearm which can be fired more than sixteen times without  
reloading”).

<sup>7</sup> See 1927 Cal. Stat. 938, An Act to Prohibit the Possession of Machine Rifles, Machine Guns  
and Submachine Guns Capable of Automatically and Continuously Discharging Loaded  
Ammunition of any Caliber in Which the Ammunition is Fed to Such Guns from or by Means of  
Clips, Disks, Drums, Belts or Other Separable Mechanical Device, and Providing a Penalty for

1 capable of discharging automatically” and “all firearms which are automatically fed after each  
 2 discharge from or by means of clips, discs, drums, belts or other separable mechanical device  
 3 having a capacity of greater than ten cartridges.” 1933 Cal. Acts 1170, § 3. These statutes were  
 4 more restrictive than Proposition 63, as the 1933 law prohibited *firearms* capable of receiving  
 5 large-capacity magazines, rather than the large-capacity *magazines* at issue here. *See id.* Several  
 6 other states, including Minnesota, Ohio, and Virginia, also prohibited or regulated firearms based  
 7 on magazine capacity.<sup>8</sup> Other states passed laws limiting possession of automatic weapons based  
 8 on the number of rounds that a firearm could discharge without reloading.<sup>9</sup> In light of this  
 9 history, Proposition 63 should be properly seen as continuing nearly a century of prohibition of  
 10 firearms or firearm features that enable large numbers of rounds to be fired in a short time  
 11 without reloading.

12 **B. Proposition 63 Is Consistent with Centuries of Laws Prohibiting**  
 13 **Weapons Deemed to Be Especially Dangerous**

14 The statute at issue here is also part of a long history of government prohibition of  
 15 weapons that threaten public safety, either because the weapons themselves are remarkably lethal  
 16 or because they are especially suitable for criminal use. Such prohibitions date back to early  
 17 English legal history, beginning with the 1383 prohibition of launcegays (a particularly lethal  
 18 type of spear) and the 1541 prohibition of crossbows and firearms less than a yard long. *See*

19  
 20 Violation Thereof, ch. 552, §§ 1-2 (prohibiting “all firearms known as machine rifles, machine  
 21 guns or submachine guns capable of discharging automatically and continuously loaded  
 22 ammunition of any caliber in which the ammunition is fed to such gun from or by means of clips,  
 disks, drums, belts or other separable mechanical device”).

23 <sup>8</sup> *See* 1933 Minn. Laws 231, § 1 (banning “[a]ny firearm capable of automatically reloading after  
 24 each shot is fired, whether firing singly by separate trigger pressure or firing continuously” if the  
 25 weapon was modified to allow for a larger magazine capacity); 1933 Ohio 189, § 1 (banning  
 26 “any firearm which shoots more than eighteen shots semi-automatically without reloading”);  
 1934 Va. Acts 137, § 1 (effectively prohibiting possession or use of weapons . . . from which  
 more than sixteen shots or bullets may be rapidly, automatically, semi-automatically or otherwise  
 discharged without reloading”).

27 <sup>9</sup> These limitations were more stringent than California’s current magazine prohibition of ten  
 28 rounds. *See* 1933 S.D. Sess. Laws 245, § 1 (five rounds); 1933 Tex. Gen. Laws 219, § 1 (five  
 rounds); 1934 Va. Acts 137, § 1 (seven rounds for automatics, 16 for semi-automatics); 1931 Ill.  
 Laws 452, § 1 (eight rounds); 1932 La. Acts 336, § 1 (eight rounds); 1934 S.C. Acts 1288, § 1  
 (eight rounds).

1 7 Ric. 2, 35, ch. 13 (1383); 33 Hen. 8, ch. 6, § 1 (1541). The regulation of unusually dangerous  
 2 firearms continued as the American colonies and first states adapted the English tradition. *See*  
 3 *generally* 1763-1775 N.J. Laws 346 (prohibiting set or trap guns); The Laws of Plymouth  
 4 Colony (1671) (same); Records of the Colony of New Plymouth in New England 230 (Boston  
 5 1861).

6 States continued to pass prohibitions or regulations on unreasonably dangerous weapons  
 7 after ratification of the Second Amendment. For example, several states banned or placed  
 8 prohibitively high taxes on Bowie knives,<sup>10</sup> which were determined to be “instrument[s] of  
 9 almost certain death.” *See Cockrum v. State*, 24 Tex. 394, 402 (1859) (finding Bowie knives are  
 10 “differ[ent] from [guns, pistols, or swords] in [their] device and design” and are therefore more  
 11 accurate and lethal than other contemporary weapons). In addition, a number of states prohibited  
 12 certain types of small and easily concealable handguns, which were determined to be ideal for  
 13 criminal use.<sup>11</sup>

14 Throughout the early twentieth century, many states passed laws prohibiting unusually  
 15 dangerous weapons or weapon features, such as silencers.<sup>12</sup> Prohibitions on weapons with large  
 16 ammunition capacities were also passed in the 1930s. The federal government embraced such  
 17 regulations in 1934, when Congress enacted the National Firearms Act. *See* 48 Stat. 1236, 1246  
 18 (1934) (requiring the registration of automatic weapons, short-barreled rifles and shotguns,

19 \_\_\_\_\_  
 20 <sup>10</sup> *See* 1837 Ala. Acts 7, § 1 (prohibitively taxing Bowie knives); 1837 Ga. Acts 90 (banning  
 21 Bowie knives); 1837-1838 Tenn. Pub. Acts 200 (prohibiting the sale of Bowie knives); *Aymette*  
 22 *v. State*, 21 Tenn. 154, 158 (1840) (justifying a prohibition on Bowie knives on the basis that  
 they are “weapons which are usually employed in private broils, and which are efficient only in  
 the hands of the robber and the assassin”).

23 <sup>11</sup> *See* 1881 Ark. Laws § 1909 (pocket pistols and “any kind of cartridge for any pistol”); 1879  
 24 Tenn. 135, ch. 96, § 1 (“belt or pocket pistols, or revolvers, or any other kind of pistols, except  
 25 army or navy pistol”); 1907 Ala. Acts 80, § 1 (similar); 1903 S.C. 127, § 1 (similar).

26 <sup>12</sup> *See, e.g.*, 1909 Me. Laws 141 (prohibiting silencers); 1912 Vt. Laws 310, § 1 (same); 1913  
 27 Minn. Laws 55 (same); 1916 N.Y. Laws 338-39, ch. 137, § 1 (same); 1926 Mass. Acts 256, ch.  
 28 261 (same); 1927 Mich. Pub. Acts 887-89, § 3 (same); 1927 R. I. Pub. Laws 256, § 1 (same).  
 States also banned a wide variety of unusually dangerous weapons, including blackjacks and  
 billy clubs, slung-shots (a metal or stone weight tied to a string), brass knuckles, various kinds of  
 knives, and explosives. *See e.g.*, 1917 Cal. Stat. 221, ch. 145, § 1 (blackjacks and billy clubs);  
 1911 N.Y. Laws 442, ch. 195, § 1 (slung-shots); 1917 Minn. Laws 614, ch. 243, § 1 (brass  
 knuckles); 1913 Iowa Acts 307, ch. 297, § 2 (daggers and similar-length knives); 1927 Mich.  
 Pub. Acts 887, No. 372, § 3 (explosives).

1 certain explosives, and a variety of concealable and disguised firearms, and imposing a  
2 significant transfer tax on the regulated weapons). The Supreme Court unanimously upheld the  
3 National Firearms Act in one of its few pre-*Heller* Second Amendment cases. *See United States*  
4 *v. Miller*, 307 U.S. 174, 178 (1939) (holding that short-barreled shotguns are not “part of the  
5 ordinary military equipment [n]or . . . [can they] contribute to the common defense” and  
6 therefore “we cannot say that the Second Amendment guarantees the right to keep and bear such  
7 [] instrument[s]”).

8 When viewed with appropriate historical context, California’s prohibition on large-  
9 capacity magazines can be understood as merely the latest part of a longstanding tradition of  
10 government prohibition or regulation of unusually dangerous weapons. Accordingly, this Court  
11 should find that Proposition 63, like other longstanding prohibitions, does not burden a “right  
12 secured by the Second Amendment.” *Heller*, 554 U.S. at 626 (referencing prohibitions on  
13 firearm possession by felons and the mentally ill).

## 14 **II. The Court Should Not Adopt Plaintiffs’ Unprecedented and** 15 **Illogical “Common Use” Test**

16 Plaintiffs have argued that the Court should consider the “prevalence, popularity, and  
17 common use” of large-capacity magazines as part of the first step of its Second Amendment  
18 analysis and that the ubiquity of such magazines requires the Court to subject Proposition 63 to  
19 strict scrutiny. Pls.’ Mem. in Support of Mot. for Prelim. Inj. at 12 (Dkt. 10). However, there is  
20 neither firm legal footing—nor sound logic—in the “common use” test that Plaintiffs advance.

21 Plaintiffs maintain that large-capacity magazines must be afforded Second Amendment  
22 protection because they are in use “in virtually every other state of the Union.” Second Am.  
23 Compl. ¶ 46 (Dkt. 59). Yet this argument misconstrues the Supreme Court’s decision in *Heller*  
24 to suggest that a sufficiently large presence in the national market triggers Second Amendment  
25 protection. The Court in *Heller* held that the Second Amendment “does not protect those  
26 weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-  
27 barreled shotguns,” 554 U.S. at 625, but it *did not* hold the converse to be true—that the Second  
28 Amendment necessarily protects weapons typically possessed by law-abiding citizens for lawful

1 purposes. *See Kolbe*, 849 F.3d at 142 (“The *Heller* majority said nothing to confirm that it was  
2 sponsoring the popularity test.”).<sup>13</sup>

3 Instead of focusing on a weapon’s ubiquity, the Court in *Heller* found that “the Second  
4 Amendment right, whatever its nature, extends only to certain types of weapons,” and noted that  
5 “weapons that are most useful in military service . . . may be banned.” *Heller*, 554 U.S. at 623,  
6 627.<sup>14</sup> Here, the California legislature joins the 1994 House of Representatives in finding large-  
7 capacity magazines to be “virtually indistinguishable in practical effect” from the military  
8 service weapons that *Heller* determined were not protected by the Second Amendment. *See* H.R.  
9 Rep. 103-489 at 18 (1994) (stating that large-capacity magazine features are not just “‘cosmetic’  
10 in effect” but are “semiautomatic versions of military machineguns” (internal citation omitted)).  
11 Thus, Plaintiffs err in insisting that *Heller* requires the Court to consider whether the weapon in  
12 question is in “common use” rather than focusing on the nature of the weapon itself.

13 In addition to lacking a legal foundation, the “common use” test that Plaintiffs suggest  
14 invokes circular logic. Following this approach would allow the constitutionality of weapons  
15 prohibitions to be decided not by how dangerous a weapon is, but rather by “how widely it is  
16 circulated to law-abiding citizens by the time a bar on its private possession has been enacted and  
17 challenged.” *Kolbe*, 849 F.3d at 141. But “[a] law’s existence can’t be the source of its own  
18 constitutional validity . . . .” *Id.* at n.15 (quoting *Friedman*, 748 F.3d at 409). Just as “it would  
19 be absurd to say that the reason why a particular weapon can be banned is that there is a statute  
20 banning it, so that it isn’t commonly owned,” *id.*, so too would it be absurd to allow the fact that  
21 a law previously did not exist to stand as a constitutional bar to its enactment. *See* Joseph  
22 Blocher & Darrell A.H. Miller, *Lethality, Public Carry, and Adequate Alternatives*, 53 Harv. J.

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25 <sup>13</sup> Plaintiffs also fail to clarify how the Court should determine “common use,” whether by  
26 considering the number of large-capacity magazines produced or sold, or the number of law-  
27 abiding owners of the same.

28 <sup>14</sup> Several Courts of Appeal have subsequently applied this understanding. *See Kolbe*, 849 F.3d  
at 121 (noting that “large-capacity magazines are among those arms that . . . the *Heller* Court  
singled out as being beyond the Second Amendment’s reach”); *NYSRPA*, 804 F.3d at 256 (noting  
that *Heller* permitted the prohibition of military-grade weapons “without implicating the Second  
Amendment”); *Friedman*, 784 F.3d at 408 (noting that, under *Heller*, the Second Amendment  
does not protect “military-grade weapons” or “weapons especially attractive to criminals”).

1 on Legis. 279, 288 (2016) (discussing the “central circularity” that plagues the “common use”  
2 test: “what is common depends largely on what is, and has been, subject to regulation”). Yet this  
3 is what Plaintiffs are advocating here. *See, e.g.*, Second Am. Compl. ¶ 43 (Dkt. 59).

4 A constitutional analysis driven by the ubiquity of the prohibited firearm also creates  
5 perverse incentives for the firearm industry, giving it the unilateral ability to bestow highly  
6 dangerous firearms, and firearm features, with Second Amendment protection “simply by  
7 manufacturing and heavily marketing them” before the government has had the chance to assess  
8 their danger and determine whether to regulate them. Cody J. Jacobs, *End the Popularity*  
9 *Contest: A Proposal for Second Amendment “Type of Weapon” Analysis*, 83 Tenn. L. Rev. 231,  
10 265 (2015). Such an analysis also raises federalism concerns, as states that fail to immediately  
11 regulate new and potentially dangerous firearms or firearm features would risk forgoing the  
12 ability to do so as they are adopted into common use in other states.<sup>15</sup> Thus, firearm safety  
13 decisions made in some states would render the laws of other states “more or less open to  
14 challenge under the Second Amendment,” and “would imply that no jurisdiction other than the  
15 United States as a whole can regulate firearms.” *Friedman*, 784 F.3d at 408, 412. But as the  
16 Supreme Court stated, *Heller* “does not foreclose *all* possibility of experimentation” by state and  
17 local governments, *id.*, but rather permits them to do what they have long done in the realm of  
18 firearm legislation: “experiment with solutions to admittedly serious problems,” *Jackson v. City*  
19 *& Cty. of San Francisco*, 746 F.3d 953, 966 (9th Cir. 2014) (quoting *City of Renton v. Playtime*  
20 *Theatres*, 475 U.S. 41, 52).

21 Rather than following Plaintiffs’ “common use” test, the Court should be guided by the  
22 Fourth Circuit sitting en banc in *Kolbe* and consider whether the firearm, or firearm component,  
23 at issue is appropriate for self-defense or is a weapon designed to produce mass casualties. *See*  
24 849 F.3d at 121. In *Kolbe*, the Court of Appeals found that “large-capacity magazines . . . [that]

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<sup>15</sup> A counterfactual further demonstrates why the “common use” test is inappropriate: If  
Congress had renewed the federal prohibition on large-capacity magazines rather than permitting  
it to lapse in 2004, the weapons prohibited by Proposition 63 would not be in widespread use  
today and would therefore not be subject to Second Amendment protection under Plaintiffs’  
“common use” theory.

1 allow a shooter to fire more than ten rounds without having to pause to reload . . . ‘are  
2 particularly designed and most suitable for military and law enforcement applications’ [as they]  
3 enhance a shooter’s capacity to shoot multiple human targets very rapidly.” *Id.* at 125 (internal  
4 citations omitted). Balancing the danger of large-capacity magazines against their limited  
5 usefulness in self-defense, the *Kolbe* court held that “large-capacity magazines are clearly most  
6 useful in military service, [and so] we are compelled by *Heller* to recognize that those weapons  
7 and magazines are not constitutionally protected.” *Id.* at 137. Everytown submits that the same  
8 reasoning applies to the first step of the Court’s analysis here.

9 **CONCLUSION**

10 For the foregoing reasons, Everytown respectfully requests that the Court reject  
11 Plaintiffs’ invitation to use the “common use” test and, in light of the long history of similar  
12 prohibitions, find Proposition 63 to be permissible under the Second Amendment and grant  
13 Defendants’ Motion to Dismiss.

14 Dated: October 4, 2017

Respectfully submitted,

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