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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

WILLIAM WIESE, et al., Plaintiffs, **v.** **ROB BONTA, et al.,** Defendants.	2:17-cv-00903-WBS-KJN **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND COUNTER-MOTION FOR SUMMARY JUDGMENT** Date: July 10, 2023 Time: 1:30 p.m. Courtroom: 5, 14th Floor Judge: Hon. William B. Shubb

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INTRODUCTION

Because California's restrictions on large capacity magazines (LCMs)—that is, ammunition-feeding devices that can accept more than ten rounds of ammunition—are constitutional under the "text and history" test set forth by the Supreme Court in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S.Ct. 2111 (2022), Plaintiffs' Motion for Summary Judgment should be denied and Defendants' Counter-Motion for Summary Judgment should be granted. Such a decision would accord with numerous district courts that have considered and rejected challenges to LCM restrictions under the *Bruen* framework. *See Herrera v. Raoul*, 2023 WL 3074799, at *4 (N.D. Ill. Apr. 25, 2023) (denying preliminary injunction of LCM and assault weapon restrictions); *Hanson v. D.C.*, 2023 WL 3019777, --- F. Supp. 3d --- (D.D.C. Apr. 20, 2023) (denying preliminary injunction of LCM restrictions); *Bevis v. City of Naperville, Illinois*, 2023 WL 2077392, at *16 (N.D. Ill. Feb. 17, 2023) (denying preliminary injunction of LCM and assault weapon restrictions); *Oregon Firearms Fed'n, Inc. v. Brown*, 2022 WL 17454829, at *8—11 (D. Or. Dec. 6, 2022), *appeal dismissed*, 2022 WL 18956023 (9th Cir. Dec. 12, 2022) (denying temporary restraining order preventing enforcement of LCM restriction); *Ocean State Tactical, LLC v. State of Rhode Island*, 2022 WL 17721175, at *25 (D.R.I. Dec. 14, 2022) (denying preliminary injunction of LCM restriction).

Under *Bruen*, Plaintiffs must first satisfy a threshold, plain text analysis, *i.e.*, that their proposed course of conduct is covered by the Second Amendment. If Plaintiffs can meet that burden, then Defendants must show that the challenged regulation

is consistent with the Nation's historical tradition of firearm regulations. As explained herein, the voluminous evidence that Defendants have submitted from leading historians and firearms experts establishes that there is no genuine dispute of material fact on either of the analyses *Bruen* requires. Plaintiffs' proposed course of conduct of possessing firearm magazines capable of holding more than ten rounds of ammunition is not covered by the Second Amendment's plain text, and, even if it were, California's law restricting such possession is consistent with the historical tradition of firearms regulation in this country.

First, as to the threshold inquiry, Plaintiffs' proposed conduct, properly understood, is not "keeping and bearing arms," a characterization that would read this threshold inquiry of out the *Bruen* analysis entirely, but rather the possession of LCMs. The Second Amendment does not protect this conduct, however, because LCMs are not "Arms" that fall within the Second Amendment's plain text, but rather are accoutrements or accessories. While regulation of an accessory could trigger Second Amendment scrutiny under a "closely related right" or "corollary" right theory if that accessory were necessary for the operation in self-defense of a firearm that is itself protected by the Second Amendment (*e.g.*, ammunition), that is not the case here because the evidence establishes that LCMs are not necessary for the operation of any firearm, much less the operation of such a firearm for a constitutionally-protected purpose (*i.e.*, self-defense).

Moreover, LCMs are not "Arms" within the meaning of Second Amendment because the evidence establishes that they are not commonly used for self-defense. To the contrary, the evidence Defendants have submitted proves that LCMs are often, and increasingly, used in the devastating mass shootings that have come to plague this Nation. Indeed, the evidence in this case shows that far from being commonly used for self-defense, LCMs are accessories most suitable for military combat and as such are, like M-16s, outside of the scope of the Second Amendment.

Second, even if the Court were to determine that Plaintiffs' proposed course of conduct is protected by the Second Amendment's plain text, Section 32310 is nonetheless constitutional because it is consistent with the Nation's tradition of firearms regulation. Defendants have identified, and provided evidence to contextualize, numerous relevantly similar restrictions enacted around 1791 (*i.e.*, the ratification of the Second Amendment) and 1868 (*i.e.*, the ratification of the Fourteenth Amendment). These relevantly similar restrictions are more than sufficient in a case such as this, where the evidence submitted shows that LCMs represent a "dramatic technological change" and that Section 32310 addresses an "unprecedented societal concern." *Bruen* commands that in cases implicating either such a change *or* such a concern, courts must follow a "*more* nuanced approach" because "[t]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868." *Bruen*, 142 S.Ct. at 2132–33. Applying this more nuanced approach and considering the

evidence in question, this Court should find that Section 32310 fits within the Nation's tradition of firearms regulations.

In the face of Defendants' evidence on all of these points, Plaintiffs present no evidence that the Founders would have considered magazines "Arms," no evidence (beyond non-academic studies based on anecdotes and self-reporting) that LCMs are commonly used in self-defense, no evidence that LCMs bear any significant similarity to early repeating firearms, no evidence that mass shootings facilitated by the recent phenomenon of widely-available LCMs are not an "unprecedented societal concern," and no evidence that Section 32310 does not impose comparable burdens and does not have comparable justifications to the numerous relevantly similar restrictions Defendants identified.

Indeed, Plaintiffs appear to believe that the mere incantation of *Bruen* is both sufficient to strike down any firearms-related regulation and to relieve them of their obligations under Rule 56 to submit evidence in support of their claims. But *Bruen* directs courts to "follow the principle of party presentation," as they should in every case, and "decide a case based on the historical record compiled by the parties." 142 S. Ct. at 2130. In this case, based on the historical record compiled by the parties, the Court should enter judgment for Defendants on Plaintiffs' Second Amendment claim.

Similarly, there is no genuine dispute of material fact on Plaintiffs' Takings and Equal Protections claims. This Court had previously dismissed those claims based on well-established Ninth Circuit precedent, and then had only allowed those claims to

survive in the Third Amended Complaint based on a Ninth Circuit decision in another case, a decision that was subsequently vacated. Nothing in *Bruen* suggests that this Court erred in dismissing those claims at the pleadings stage on Defendants' motion to dismiss the Second Amended Complaint, nor have Plaintiffs presented any evidence to controvert this Court's previous holding. Judgment should thus be entered for Defendants on those claims.

For these reasons, Plaintiffs' motion for summary judgment should be denied and Defendants' counter-motion for summary judgment on all claims should be granted.

STATUTORY BACKGROUND

California law defines an LCM as any ammunition-feeding device with the capacity to accept more than ten rounds. Cal. Penal Code § 16740.[1] LCMs have been extensively regulated in the United States for decades. Federal law prohibited the possession and transfer of any LCM (defined as a magazine capable of accepting more than ten rounds of ammunition) from 1994 to 2004 as part of the federal assault weapons ban. Pub.L. 103–322, Sept. 13, 1994, 108 Stat. 1796, 1998–2000 (formerly codified at 18 U.S.C. §922(w)). The federal ban did not, however, apply to LCMs that were lawfully possessed on the date of enactment. 18 U.S.C. § 922(w)(2) (repealed 2004).

[1] California's definition of an LCM excludes any "feeding device that has been permanently altered so that it cannot accommodate more than 10 rounds." Cal. Penal Code § 16740(a). It also excludes a ".22 caliber tube ammunition feeding device" and a "tubular magazine that is contained in a lever-action firearm." *Id.* at § 16740(b), (c).

In 2000, before the federal ban expired, "California criminalized the manufacture, sale, purchase, transfer, and receipt of large-capacity magazines within the state, but did not specifically criminalize the possession of large-capacity magazines, which was covered at the time by federal law." *Fyock v. Sunnyvale*, 779 F.3d 991, 994 (9th Cir. 2015); 1999 Cal. Stat. 1781, §§ 3, 3.5 (S.B. 23) (now codified at Cal. Penal Code § 32310(a)). Individuals in California who lawfully possessed LCMs on January 1, 2000 were permitted to keep them, though they were not authorized to sell or otherwise transfer their grandfathered LCMs, nor were they permitted to manufacture or acquire new LCMs. *See* Cal. Penal Code § 32310(a). The expiration, in 2004, of the federal prohibition on the possession of non-grandfathered LCMs, left "a 'loophole' permitting the possession of [LCMs] in California." *Fyock*, 779 F.3d at 994. As this Court has noted, the "loophole" enabled the continued proliferation of LCMs in the State because there was "no way for law enforcement to determine which magazines were 'grandfathered' and which were illegally transferred or modified to accept more than ten rounds after January 1, 2000." Dkt. No. 52 (Order re: Preliminary Injunction), at 9. As a result, California's original LCM restrictions on the manufacture and importation of LCMs were "very difficult to enforce." S. Rules Comm., Off. of S. Floor Analyses, 3d Reading Analysis of S.B. 1446 (2015-2016 Reg. Sess.) as amended Mar. 28, 2016, at 9 (noting comments in support of the bill that "[i]t is nearly impossible to prove when a[n LCM] was acquired or whether the magazine was illegally purchased [or transferred] after the

2000 ban" and that prohibiting the possession of LCMs "would enable the enforcement of existing law regarding [LCMs]").

In 2016, California's LCM laws were amended to address this difficulty with enforcement of those laws, by prohibiting the possession of all LCMs—both new and previously grandfathered—beginning on July 1, 2017. *See* 2016 Cal. Stat. 1549, § 1 (S.B. 1446); Prop. 63, "The Safety for All Act of 2016."

California's LCM restrictions are set forth in section 32310 of the California Penal Code. Subsection (a) provides that "any person in this state who manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, buys, or receives" an LCM is guilty of a misdemeanor or a felony. Subsection (c), added in 2016, provides that the possession of an LCM on or after July 1, 2017 is an infraction or a misdemeanor punishable by a fine not to exceed $100 per LCM or imprisonment in a county jail not to exceed one year, or both. Subsection (d), also added in 2016, addresses previously grandfathered LCMs, providing that anyone not authorized to possess LCMs must, before July 1, 2017, (1) remove the LCM from the state, (2) sell the LCM to a licensed firearms dealer, or (3) surrender the LCM to law enforcement for destruction. Alternatively, an owner of an LCM may permanently modify the magazine "so that it cannot accommodate more than 10 rounds." Cal. Penal Code § 16740(a); *see also id.* at § 32425 (exempting from section 32310 the "giving of any [LCM] to . . . a gunsmith, for the purposes of . . . modification of that [LCM]").

California is not alone in imposing limits on magazine capacity. Fourteen states, and the District of Columbia, have

done so to date.[2] As of today, more than one-third of the American population resides in a jurisdiction that has enacted magazine-capacity limits.[3]

PROCEDURAL BACKGROUND

In 2017, Plaintiffs filed this challenge to Section 32310, raising claims under the Second, Fifth, and Fourteenth

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[2] *See* Cal. Penal Code §§ 16740, 32310 (10-round limit); Colo. Rev. Stat. § 18-12-301—303 (15-round limit); Conn. Gen. Stat. §§ 53-202w (10-round limit); Del. Code Ann. tit. 11, §§ 1468(2), 1469(a) (17-round limit); D.C. Code Ann. §§ 7-2506.01(b), 7-2507.06(a)(4) (10-round limit); Haw. Rev. Stat. Ann. § 134-8(c) (10-round limit for handguns); 720 Ill. Comp. Stats. 5/24-1.10 (10-round limit for long guns and 15-round limit for handguns); Md. Code Ann., Crim. Law § 4-305 (10-round limit); Mass. Gen. Laws, ch. 140, §§ 121, 131M (10-round limit); N.J. Stat. Ann. §§ 2C:39-1(y), 2C:39-3(j), 2C:39-9(h) (10-round limit); N.Y. Penal Law §§ 265.00(23), 265.02(8), 265.10, 265.11, 265.37 (10-round limit); 2022 Or. Ballot Measure 114, § 11(d) (10-round limit); R.I. Gen. Laws §§ 11-47.1-2, 11-47.1-3(a) (10-round limit); Vt. Stat. Ann. tit. 13, § 4021 (10-round limit for long guns and 15-round limit for handguns); Wash. Rev. Code tit. 9, §§ 9.41.010(16), 9.41.370 (10-round limit). Illinois's LCM laws (720 Ill. Comp. Stat. § 5/24-1.10) and Oregon's LCM law (2022 Or. Ballot Measure 114, § 11) are currently subject to a temporary restraining order and a preliminary injunction, respectively, issued by state trial courts on state constitutional grounds. *See Accuracy Firearms, LLC v. Pritzker*, No. 5-23-0035, 2023 Ill. App. (5th) 230035, at *17, 35—38 (Jan. 31, 2023) (noting that no Second Amendment claims were alleged but affirming temporary restraining order based on equal protection guarantees in the Illinois Constitution); Opinion Letter at 22—25, *Arnold v. Brown*, No. 22CV41008 (Haney Cnty. Cir. Ct. Dec. 15, 2022) (granting injunction based on the Oregon Constitution), *appeal filed* (Jan. 23, 2023).

[3] The total population in the fifteen jurisdictions with magazine-capacity limits is estimated to be 120,060,105, and the total U.S. population is 333,287,557. *See* U.S. Census, State Population Totals and Components of Change: 2020—2022, http://bit.ly/40yhFSK. All Americans lived with LCM restrictions while the federal assault weapons ban was in effect from 1994 to 2004. *See* H.R. Rep. No. 103-489 (1994).

Amendments. Dkt. No. 1. After the Court denied plaintiffs' request for a preliminary injunction (Dkt. No. 52), Plaintiffs added equal protection and Takings Clause claims in their Second Amended Complaint, which expanded on their previously asserted claims and which added (1) an equal protection claim under the U.S. and California Constitutions; (2) an allegation that the ban operates as a taking under the California Constitution; and (3) additional allegations in support of their vagueness claims. Dkt. No. 59. The Court dismissed the Second Amended Complaint on in its entirety February 7, 2018. Dkt. No. 74. The Court dismissed the Second Amendment claim, relying in part on the two-step test set forth by the Ninth Circuit in *Fyock v. City of Sunnyvale*, 779 F.3d 991 (9th Cir. 2015). Dkt. No. 74 at 4-10. The Court rejected the Takings Clause claim, finding the physical taking allegations to be insufficient, because magazine owners may sell the magazines to licensed gun dealers, remove them from the state, or permanently modify them so they no longer accept more than 10 rounds. *Id.* at 10-13. The Court also found that the regulatory taking allegations fell short because the options for disposing of LCMs left some beneficial use for that property. *Id.* Finally, the Court rejected the claims that the LCM restrictions were void for vagueness or overbroad, and that the exemption for magazines used solely as props in movie, television, or video production violated equal protection. *Id.* at 13-23.

After the dismissal of the Second Amended Complaint, a panel of the Ninth Circuit upheld a preliminary injunction issued by the district court in another case raising a Second Amendment and Takings Clause challenge to California's LCM restrictions, *Duncan*

v. Becerra, 742 F. App'x 218 (9th Cir. 2018). This Court then considered Defendants' motion to dismiss the Third Amended Complaint. Dkt. No. 103. While noting that the "Third Amended Complaint has only minor changes from the Second Amended Complaint, which this court previously found insufficient under Federal Rule of Civil Procedure 12(b)(6)," the Court determined that the Ninth Circuit's affirmance of the preliminary injunction in *Duncan* compelled the Court to deny the motion to dismiss the Second Amendment and Takings Clause claims. *Id.* at 5-6.

After this Court denied the motion to dismiss, the district court in *Duncan* issued a final judgment striking down California's LCM restrictions, *Duncan v. Becerra*, 366 F. Supp. 3d 1131 (S.D. Cal. 2019), which the Attorney General appealed. On May 8, 2019, before discovery in this matter opened, this Court stayed the case pending resolution of the appeal in *Duncan*. Dkt. No. 110; *see also* Dkt. No. 113 (extending the stay until issuance of the mandate by the Ninth Circuit in *Duncan*).

A three-judge panel from the Ninth Circuit affirmed the *Duncan* district court's final judgment. *Duncan v. Becerra*, 970 F.3d 1133 (9th Cir. 2020). An en banc panel ultimately reversed and remanded for entry of judgment in favor of the Attorney General. *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021) (en banc). That en banc opinion was later vacated by the Supreme Court and remanded to the Ninth Circuit for reconsideration in light of *Bruen*. *Duncan v. Bonta*, 142 S.Ct. 2895 (2022). The Ninth Circuit then remanded the case to the district court for further

proceedings consistent with *Bruen*. *Duncan v. Bonta*, 49 F.4th 1228 (9th Cir. 2022).[4]

On September 23, 2022, the mandate in *Duncan* issued, and the parties in this matter filed a joint status report on October 7, 2022. Dkt. No. 115. In that report, Plaintiffs "request[ed] to file a motion for summary judgment as to all claims in this matter." *Id*. at 2. "Plaintiffs oppose[d] discovery in this case," because "[t]he only 'facts' relevant to resolution of this case are 'legislative facts' regarding the history of magazine usage and regulation in this country, and as such all facts can be developed in briefing and argument without the need for expert or other evidence adduced through traditional party discovery methods." *Id*. at 3. Defendants requested "both fact and expert discovery to develop a factual, legal, and historical record in support of this analysis." *Id*. at 5.

On January 13, 2023, the Court issued an order permitting plaintiffs to file their motion for summary judgment "forthwith." Dkt. No. 119. The Court noted, however, that it would consider a "request under Federal Rule of Civil Procedure 56(d) after plaintiffs' motion for summary judgment has been filed, should defendants feel discovery is necessary to respond to plaintiffs' motion." *Id*. at 2. On March 31, 2023, Plaintiffs filed the instant motion. Dkt. No. 123.

[4] Following remand of *Duncan*, the district court issued an order continuing the preliminary injunction of California Penal Codes section 32310(c) and (d), *Duncan v. Bonta*, No. 3:17-cv-01017-BEN-JLB, Dkt. No. 111 (S.D. Cal. Sept. 26, 2022). Accordingly, at this time, enforcement of section 32310(c) and (d) remains enjoined.

LEGAL STANDARD

"A grant of summary judgment is appropriate when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Frlekin v. Apple, Inc.*, 979 F.3d 639, 643 (9th Cir. 2020). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986). Moreover, to survive summary judgment, a party "must establish *evidence* on which a reasonable jury could find for" that party. *United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 330 (9th Cir. 2017).

"A trial court can only consider admissible evidence in ruling on a motion for summary judgment." *See Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002). And a document that "is not attached to any declaration and is unauthenticated and unsworn" cannot be considered on a motion for summary judgment. *Ridgel v. United States*, 2013 WL 2237884, at *2 (C.D. Cal. May 21, 2013).

ARGUMENT

I. CALIFORNIA'S RESTRICTIONS ON LARGE CAPACITY MAGAZINES DO NOT BURDEN CONDUCT COVERED BY THE "PLAIN TEXT" OF THE SECOND AMENDMENT.

A. *Bruen* Requires that Plaintiffs Satisfy a Threshold, Textual Inquiry and Define a Specific Proposed Course of Conduct.

Plaintiffs' challenge to Section 32310 fails at the threshold, textual stage of the *Bruen* analysis. The Court does not proceed to the historical step of the text-and-history standard unless the party challenging the law first establishes that the "plain text" of the Second Amendment covers the conduct

in which the party wishes to engage. "When the Second Amendment's plain text covers an individual's conduct, the . . . government must *then* justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2129–30 (emphasis added); *see also Bevis*, 2023 WL 2077392, at *9 ("Courts must *first* determine whether the Second Amendment's plain text covers an individual's conduct," and only if it does, the "government must then justify its regulation.") (emphasis added); *Ocean State*, 2022 WL 17721175, at *12 ("Although *it is their burden* to show that large-capacity magazines fall within the purview of the Second Amendment, *the plaintiffs* offer no expert opinion on the meaning of the word 'Arms.'") (emphasis added).

Not only do Plaintiffs ignore the threshold inquiry *Bruen* requires, Plaintiffs also describe their course of conduct in such a generalized manner that this threshold inquiry would be rendered a nullity. "To determine whether the plain text of the Amendment covers the conduct regulated by the challenged law, it is necessary to identify and delineate the *specific* course of conduct at issue." *Renna v. Bonta*, 2023 WL 2756981, at *6 (S.D. Cal. Mar. 31, 2023) (emphasis added). Lower courts applying *Bruen* have similarly described courses of conduct with reasonable specificity. *See, e.g., United States v. Reyna*, 2022 WL 17714376, at *4 (N.D. Ind. Dec. 15, 2022) (cautioning against defining the proposed conduct generally as "mere possession," because "any number of other challenged regulations would similarly boil down to mere possession, then promptly and automatically proceed" to the historical stage of the *Bruen* analysis); *Oakland Tactical*

Supply, LLC v. Howell Twp., 2023 WL 2074298, at *3 (E.D. Mich. Feb. 17, 2023) (rejecting plaintiffs' effort to define their course of conduct as "training with firearms" and concluding that the course of conduct is "construction and use of an outdoor, open-air, 1,000-[yard] shooting range"). And in *Bruen* itself, the Supreme Court defined the course of conduct not as merely "keeping and bearing arms," but more specifically as "carrying handguns publicly for self-defense." 142 S. Ct. at 2119.

Contrary to *Bruen*, Plaintiffs define their proposed conduct simply as "keeping and bearing arms." MPA at 1. Such a broad definition would allow any litigant to "promptly and automatically proceed" to the historical stage of the *Bruen* analysis. *See United States v. Reyna*, 2022 WL 17714376, at *4 (N.D. Ind. Dec. 15, 2022); *see also United States v. Trinidad* (D.P.R. Oct. 17, 2022) ("If step one merely required them to say that they wanted to bear arms, then *Bruen*'s analysis about who they were, what they wanted to do, and why they wanted to do it would be gratuitous.").

Bruen requires more. In this case, Plaintiffs' actual proposed course of conduct is the ownership, possession, and use of LCMs. *See, e.g.*, MPA at 10 (arguing that "firearms capable of firing more than ten rounds without reloading are unquestionably 'bearable arms' that are 'in common use' and therefore entitled to protection"); *id.* ("The Second Amendment certainly 'covers an individual's conduct' in owning, possessing, and using these magazines.").

As explained below, because Plaintiffs cannot show that Section 32310 burdens conduct covered by the Second Amendment,

the Court should uphold it at the textual stage of the *Bruen* analysis.

B. Plaintiffs Cannot Demonstrate that LCMs Are "Arms," or that LCM Possession Is a "Closely Related Right."

As an initial matter, there is no dispute among the parties that LCMs are not weapons in and of themselves. *See* Busse Decl., ¶ 13 (magazines are "containers which hold ammunition"); *see* Lee Decl., Dkt. 123-4, at 5-6 (magazines are "ammunition feeding devices" and are "simply a receptacle for a firearm that holds a plurality of cartridges or shells under spring pressure preparatory for feeding into the chamber") (quotation omitted).[5]

Courts both pre- and post-*Bruen* have similarly recognized that magazines are not themselves weapons. As the *Duncan* en banc panel correctly observed, Section 32310 "outlaws *no weapon*, but only limits the size of the magazine that may be used with firearms." 19 F.4th at 1096 (emphasis added);[6] *see also Ocean State*, 2022 WL 17721175, at *12 (same conclusion). "LCMs, like other accessories to weapons, are not used in a way that 'cast[s] at or strike[s] another,'" *Ocean State*, 2022 WL 17721175, at *12, but rather are more properly viewed like silencers and other accessories that "'generally have no use independent of their attachment to a gun.'" *Id.* (quoting *United States v. Hasson*, 2019 WL 4573424, at *2 (D. Md. Sept. 20, 2019)); *see also United States v. Cox*, 906 F.3d 1170, 1186 (10th Cir. 2018) ("A silencer

[5] Indeed, today, dealers list magazines under the "accessories" sections of their websites. *See, e.g.*, Guns.com, Accessories, https://www.guns.com/accessories; *see* Busse Decl. ¶ 25 (noting that LCMs are "characterized as an accessory by the [firearms] industry").

[6] Although this opinion was vacated, it is cited for its persuasive value.

is a firearm accessory; it's not a weapon in itself (nor is it 'armour of defence').").

This conclusion is supported by corpus linguistics analysis; historically, the term "Arms" referred to "weapons such as swords, knives, rifles, and pistols," and did not include "accoutrements," like "ammunition containers, flints, scabbards, holsters, or 'parts' of weapons." *See* Baron Decl., ¶ 8; *Ocean State*, 2022 WL 17721175, at *13 (discussing Professor Barron's credentials and expertise and crediting his testimony). Even the district court in *Duncan*, which concluded pre-*Bruen* that LCMs are protected by the Second Amendment, suggested that LCMs were not "Arms." *See, e.g., Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1117 (S.D. Cal. 2017) (stating that "[o]f course, when a magazine is detached the magazine is not a firearm," "is not dangerous," "cannot fire a single round of ammunition," and has as its "only function . . . to hold ammunition").

This conclusion is also grounded in Supreme Court precedent. From the *Heller* decision on, the Court has always equated "Arms" with weapons, not accessories or other incidents necessary to use them. *See Bruen*, 142 S. Ct. at 2134 ("[T]he 'textual elements' of the Second Amendment's operative clause—'the right of the people to keep and bear Arms, shall not be infringed'—'guarantee the individual right to possess and carry *weapons* in case of confrontation.'") (quoting *Heller*, 554 U.S. 570, 592 (2008)) (emphasis added); *id.* at 2128 (holding that the right secured by the Second Amendment "was not a right to keep and carry any *weapon* whatsoever in any manner whatsoever and for whatever purpose") (quoting *Heller*, 554 U.S. at 626) (emphasis added);

Caetano v. Massachusetts, 577 U.S. 411, 416 (2016) (Alito, J., concurring) (rejecting the notion that "only *weapons* popular in 1789 are covered by the Second Amendment") (emphasis added); *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 786 (2010) (noting that "incorporation does not imperil every law regulating *firearms*") (emphasis added). As the Court in *Heller* put it, "the most natural reading of 'keep Arms' in the Second Amendment is to 'have *weapons*.'" 554 U.S. at 582 (emphasis added). Nothing in *Bruen*, a case that involved a challenge to the manner of carry, suggests that the Court expanded the definition of "Arms" beyond its most natural reading: "weapons."

Plaintiffs argue that "Second Amendment protections would be meaningless if the State could strip away integral component parts of a firearm by claiming that prohibitions against individual component do not constitute a ban on 'arms.'" MPA at 9. Plaintiffs' doomsday prediction is misplaced, however, because the Ninth Circuit has recognized that "the Second Amendment protects ancillary rights necessary to the realization of the core right to possess a firearm for self-defense." *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017); *see Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (finding that "the right to possess firearms for protection implies a corresponding right to obtain the bullets necessary to use them"); *see also Luis v. United States*, 578 U.S. 5, 27 (2016) (Thomas, J., concurring) (stating "[c]onstitutional rights thus

implicitly protect those closely related acts necessary to their exercise").[7]

What can be gleaned from these cases, unchanged by *Bruen*, is that the Second Amendment does not transform mere accessories into "Arms." Instead, the Second Amendment's protection for "Arms" sometimes provides protection for those accessories necessary to operate an "Arm" for self-defense.

Possession of an LCM is not necessary for such a purpose. The evidence submitted establishes that an LCM is not necessary to operate any firearm, much less any firearm commonly used for self-defense. *See* Busse Decl., ¶ 18; *Oregon Firearms*, 2022 WL 17454829, at *9 (crediting declaration of Ryan Busse). Plaintiffs put forward no evidence or argument to the contrary. *See* MPA at 8 (arguing only that "[m]agazines are integral for the operation of many common firearms"). As in *Oregon Firearms*, Plaintiffs' claim fails because "Plaintiffs have not produced evidence that these weapons can *only* operate with magazines that accept more than ten rounds of ammunition and cannot operate with magazines that contain ten or fewer rounds." 2022 WL 17454829, at *9 (cleaned up, emphasis added).

Plaintiffs nonetheless contend "the clear purpose and effect of California's magazine ban provisions are to functionally ban firearms capable of firing more than ten rounds without reloading." MPA at 10. This argument makes little sense, though,

[7] It is significant that Justice Thomas used the adjective "closely" to limit the related rights concept, as courts have rejected efforts to expand the plain text of the Second Amendment. *See, e.g., Defense Distributed*, 2022 WL 15524977, at *4 (rejecting plaintiffs' effort identify a "penumbra" of covered activities beyond keeping and bearing arms, including a right to manufacture firearms).

because California law permits the manufacture, sale, and possession of magazines holding ten or fewer rounds for use in firearms for self-defense, and does not restrict the number of such magazines that may be kept, the manner in which such magazines are stored, or the amount of ammunition that may be kept for use with such magazines.

Accordingly, because LCMs are neither "Arms" nor are they necessary for the use of any firearm for self-defense, Plaintiffs cannot show that their desired conduct falls within the "plain text" of the Second Amendment.

C. Large-Capacity Magazines Are Not Protected "Arms" Because They Are Not Commonly Used for Self-Defense

Even if LCMs were considered "weapons" that could qualify as bearable "Arms," Plaintiffs cannot establish that LCMs are "in common use" for self-defense, such that their possession would be protected by the plain text of the Second Amendment. *See Bruen*, 142 S. Ct. at 2134 (noting that no party disputed that handguns are "in common use" at the textual stage of the analysis).

As an initial matter, Plaintiffs are incorrect that "[i]t is up to the State to prove that the arms are not commonly used." MPA at 11; *id.* (describing the "common use" inquiry as the State's "burden").[8] Whether LCMs are in "common use" is part of

[8] On April 28, 2023, a district court in the Southern District of Illinois granted a preliminary injunction of Illinois' LCM restrictions. *Barnett v. Raoul*, Case 3:23-cv-00209-SPM, Dkt. No. 99. In addition to being an outlier in finding that Plaintiffs were likely to succeed on their Second Amendment challenge to LCM restrictions, *see supra*, p. 1 (collecting cases that refused to enjoin LCM restrictions on Second Amendment grounds post-*Bruen*), the court in *Barnett* also departed from the practice of other district courts applying *Bruen* by engaging in the "common use" as part of the second step (*i.e.*, whether the (continued…)

the threshold textual inquiry that Plaintiffs, not Defendants, bear the burden of satisfying, because the Second Amendment covers only weapons "'in common use' today for self-defense," such as "the quintessential self-defense weapon," the handgun. *Bruen*, 142 S. Ct. at 2134 (citation omitted). But it does not cover a weapon that is "uncommon or unusually dangerous or not typically used by law-abiding people for lawful purposes." *Reyna*, 2022 WL 17714376, at *3 (citing *Bruen*, 142 S. Ct. at 2128).

In this case, the evidence put forth by Defendants establishes that there is no genuine dispute of material fact on the question of whether LCMs are frequently used in self-defense.[9] To the contrary, the record reflects that their use for self-defense is vanishingly rare, to the extent they are used for that purpose at all.

As detailed in Lucy P. Allen's supplemental declaration, two separate recent datasets establish large-capacity magazines are not commonly used in self-defense. First, an analysis of incidents reported in the NRA Armed Citizens database compiled from January 2011 through May 2017 reveal that it is rare for individuals to defend themselves using more than ten rounds; on average, only 2.2 shots were fired by defenders. Allen Supp.

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challenged regulation is consistent with the nation's tradition of firearms regulation). As explained herein, neither the holding of the court in *Barnett* nor its "common use" analysis comport with *Bruen*.

[9] A definition of "common use" based on industry-created production and ownership estimates, *see* MPA at 2-3, 11, would be circular and inconsistent with *Heller*. *See Duncan*, 19 F.4th at 1127 (Berzon, J., concurring) ("Notably, however, *Heller* focused not just on the prevalence of a weapon, but on the primary use or purpose of that weapon.").

Decl., ¶ 10. Moreover, that same analysis of incidents from the NRA Armed Citizens database found that more than 10 bullets were fired in only 2 out of 736 self-defense incidents in the United States. *Id.* And in those two incidents, there is no evidence that the shooter used an LCM, rather than reloading or using another firearm. *See Duncan*, 19 F.4th at 1105 (finding that the record below did not disclose whether "the added benefit of a large-capacity magazine—being able to fire more than ten bullets in rapid succession—has ever been realized in self-defense in the home"). The second analysis involved published news stories. Allen Supp. Decl., ¶¶ 13-14. That analysis revealed a similar number of average shots per incident of self-defense (*i.e.*, 2.34). *Id.* at ¶ 18. And it further found that in 97.3% of incidents the defender fired 5 or fewer shots, and that there were no incidents where the defender was reported to have fired more than 10 bullets. *Id.* at ¶ 19.[10]

The fact that LCMs are not commonly used for self-defense is unsurprising. While any weapon (or accessory) could theoretically be used in self-defense, the accessory at issue here (an LCM) is not well-suited for lawful self-defense. *See Worman v. Healey*, 922 F.3d 26, 37 (1st Cir. 2019) ("[W]ielding the proscribed [assault weapons and LCMs] for self-defense within the home is tantamount to using a sledgehammer to crack open the shell of a peanut."), *abrogated on other grounds by Bruen*, 142 S. Ct. at 2127 n.4. Instead, LCMs were designed for military applications

[10] The court in *Oregon Firearms*, crediting a similar declaration from Ms. Allen, found it "exceedingly rare for an individual, in a self-defense situation, to fire more than ten rounds." *Oregon Firearms*, 2022 WL 2022 WL 17454829, at *10.

and are "particularly suited to military use," as they "'enable a shooter to hit multiple human targets very rapidly.'" *Oregon Firearms*, 2022 WL 17454829, at *11 (citation omitted). As explained in the declaration of Colonel (Ret.) Craig Tucker—a decorated Marine combat veteran who commanded soldiers in both Fallujah battles during the Iraq War—detachable magazines serve specific combat-related purposes:

> Detachable large-capacity magazines . . . allow the combat rifleman to rapidly change magazines in combat, and thus to increase killing efficiency by significantly reducing reload time. Changing magazines during intense combat is the most important individual skill taught to Marines. During intense combat, the detachable magazine provides a rifleman the capability to fire 180 rounds on semi-automatic in four minutes at a high-sustained rate of 45 rounds per minute. In a civilian self-defense context, by contrast, an individual would not have a need for such a high rate of fire.

Tucker Decl., ¶ 16.

Though the Supreme Court's decision in *Heller* did not delineate "the full scope of the Second Amendment," 554 U.S. at 626, it did set at least one guidepost: "weapons that are most useful in military service—M16 rifles and the like—may be banned," *id.* at 627. As the Fourth Circuit held, LCMs are not protected by the Second Amendment because they are "like" "M-16 rifles," "weapons that are most useful in military service," and thus are "beyond the Second Amendment's reach." *Kolbe v. Hogan*, 849 F.3d 114, 121 (4th Cir. 2017) (en banc) (quoting *Heller*, 554 U.S. at 627), *abrogated on other grounds by Bruen*, 142 S. Ct at 2126; *see also Oregon Firearms*, 2022 WL 17454829, at *11 (same); *Hanson*, 2023 WL 3019777, at *9 (finding that "LCMs are most useful in military service," that "LCMs' lethality was popular in

military settings, and [that] indeed many of them were designed specifically for military (and law enforcement) use"). And the *Duncan* en banc panel observed that the analogy to the M16 has "significant merit" because LCMs have limited "lawful, civilian benefits" and "significant benefits in a military setting." *Duncan*, 19 F.4th at 1102. Nothing in *Bruen* calls into question *Heller*'s view that weapons most useful in military service, like the M16 rifle or M4 carbine, may be banned.

Historically, at the founding, such high-capacity firearms were extraordinarily rare, *see* infra, section II.A.1, and were not part of a militiaman's "ordinary military equipment" that he would be expected to bring to muster at that time, *Heller*, 554 U.S. at 624 (quoting *United States v. Miller*, 307 U.S. 174, 178 (1939)). Similarly, "high-capacity firearms," like the Henry and Winchester rifles, were understood during the era of Reconstruction to be "weapons of war or anti-insurrection, not weapons of individual self-defense." Vorenberg Decl., ¶ 7; *Ocean State*, 2022 WL 17721175, at *15 (same); *Hanson*, 2023 WL 3019777, at *13 ("High-capacity firearms became more common in military settings in the second half of the 19th century, but they were still rare."); *see also* Vorenberg Decl., ¶ 9 (noting that "efforts to create a market for high-capacity firearms in the United States during Reconstruction failed miserably" and that "Americans who were not part of legal law enforcement bodies rarely bought high-capacity firearms"). When LCMs began to circulate more widely in the 1980s, they were regarded as military accessories. Busse Decl., ¶ 36. In 1989, the Bureau of Alcohol, Tobacco, and Firearms found that "large-capacity

magazines are indicative of military firearms," and later in 1998, it determined that "detachable large-capacity magazine[s] [were] originally designed and produced for . . . military assault rifles." *Oregon Firearms*, 2022 WL 17454829, at *11 (quoting *Duncan*, 19 F.4th at 1105–06).

Plaintiffs cannot show that LCMs are commonly used in—let alone suitable for—lawful self-defense. Accordingly, these accessories are not protected by the Second Amendment, and Section 32310 should be upheld.

II. CALIFORNIA'S RESTRICTIONS ON LARGE-CAPACITY MAGAZINES ARE CONSISTENT WITH THE NATION'S TRADITIONS OF WEAPONS REGULATION

Even if Plaintiffs could meet their initial burden of showing that the possession of LCMs is an activity covered by the "plain text" of the Second Amendment (they cannot), the uncontroverted evidence Defendants have put forward establishes that California's restrictions on LCMs are consistent with the Nation's traditions of weapons regulation. Defendants have assembled a survey of hundreds of relevant laws and authorities that show that, from pre-founding America through the 1930s, state and local governments regularly enacted restrictions on certain enumerated weapons viewed at the time to be particularly dangerous. *See* Appendix 1. These laws are relevantly similar to Section 32310 because they impose a comparably modest burden on the right to armed self-defense—by restricting weapons and devices that are not particularly useful for self-defense while ensuring access to other arms for effective self-defense—and those minimal burdens are comparably justified by public-safety concerns.

A. This Case Requires a "More Nuanced" Analogical Approach

In a case that proceeds to the historical stage of the *Bruen* analysis, the government need not identify a "historical *twin*" or a "dead ringer"; it can justify a modern restriction by identifying a "relevantly similar" restriction enacted when the Second or Fourteenth Amendments were ratified. *Id.* at 2132–33. When the challenged law addresses "unprecedented societal concerns or dramatic technological changes," the courts should engage in a "*more* nuanced approach" because "[t]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868." *Bruen*, 142 S. Ct. at 2131–32 (emphasis added). Here, unlike the "fairly straightforward" analysis in *Bruen* and *Heller*, *id.* at 2131, a more nuanced approach is required because LCMs implicate dramatic technological change in firearms technology and an unprecedented societal concern (*i.e.*, mass shootings). *See Herrera*, 2023 WL 3074799, at *7 (concluding that a more nuanced approach is required in assessing large-capacity magazine restrictions); *Hanson*, 2023 WL 3019777, at *13 (same).

1. LCMs Represent a Dramatic Technological Change from the Firearms Technologies Widely Available During the Founding and Reconstruction Eras

As an initial matter, Plaintiffs have provided no expert declarations or other evidence for their claims relating to the purportedly long-standing existence of magazines capable of holding more than ten rounds of ammunition. MPA at 19. Plaintiffs have introduced no experts *at all* on the historical pedigree (or

lack thereof) of LCMs, instead merely citing documents (which themselves are largely secondary sources) on the topic. Without expert testimony on the context, reliability, and veracity of these sources, it is impossible for the Court to credit them (much less any of the claims made therein). *See Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002) ("A trial court can only consider admissible evidence in ruling on a motion for summary judgment."). To the extent Plaintiffs contend that the authors of these sources are themselves experts, "it is well established that unsworn expert reports are inadmissible and cannot be used to create a triable issue of fact for purposes of summary judgment." *See Liebling v. Novartis Pharms. Corp.*, 2014 WL 12576619, at *1 (C.D. Cal. Mar. 24, 2014); *see also Ridgel v. United States*, 2013 WL 2237884, at *2 (C.D. Cal. May 21, 2013) (not considering on summary judgment a document that "is not attached to any declaration and is unauthenticated and unsworn").

As the evidence actually submitted in this case establishes, LCMs represent a "dramatic technological change" requiring a more nuanced approach under *Bruen*. Plaintiffs argue that "the Founders and Framers were well aware of the advent, existence, and popularity of magazines capable of holding more than ten rounds of ammunition." MPA at 19. But Plaintiffs' argument fails for two reasons: (1) the early repeaters identified by Plaintiffs were prototypes and curios, to the extent they existed at all; and (2) LCMs are not by any means the same technology as these early repeating rifles.

First, the early repeaters were "extraordinarily rare." Sweeney Decl., ¶ 23; *id.* at ¶ 47 ("[P]eriod probate inventories

and newspapers indicate that repeating firearms were extraordinarily rare in eighteenth-century America."); *see also* Cornell Decl., ¶ 26; DeLay Decl., ¶ 7. Indeed, while Plaintiffs conclude that these weapons were "prevalen[t]" at the time of the Founding (MPA at 19-20), their own briefing indicates that these weapons were rare curiosities. *See id.* at 17 (recounting that three and five-shot repeaters "astonished the Iroquois," a reaction that would seem to be incompatible with the argument that repeaters were common in pre-Revolutionary America); *id.* at 19 (recounting that the Girandoni rifle was "astonishing and surprising" to those who saw its use); *id.* (noting that around 1660, "[a]t least 19 gunsmiths" in an area stretching from London to Moscow (*i.e.*, effectively all of Continental Europe, Russia, and England) made magazines that may have held more than ten rounds,[11] indicating how rare such weapons, given that the population of Europe (even excluding Russia) was more than 74 million people at that time[12]).

While today a "new semiautomatic handgun can be purchased for less than $200 and equipped with a 33-round magazine for less than $15," Roth Decl., ¶ 50, there is no evidence that many early repeating firearms were commercially available. Sweeney Decl., ¶ 29 (no evidence that Belton produced any of the 1777 firearms that he wrote to the Continental Congress about); *id.* at ¶ 28 (evidence suggests that to the extent English-born John Cookson ever made repeaters, he "apparently did not produce repeating

[11] The text Plaintiffs cite describes the magazine in question as having between six and thirty rounds. MPA at 16.

[12] https://www.britannica.com/topic/history-of-Europe/Demographics.

firearms during his 60 years in Boston, and there are no surviving eighteenth-century, American-made Cookson repeaters"); *id.* at ¶ 24 (the Pimm "gun was not being offered for sale; no examples of a repeating long-arm by Pimm survive"). In other words, in contrast to the ease and low cost with which an LCM could be acquired today, in 1791 a repeating firearm (to the extent it was available for purchase at all) would have been hard to acquire and "expensive." Sweeney Decl., ¶ 49; *see also* DeLay Decl., ¶ 36 (only "a paper-thin slice of Europe's political and economic elite" would have access to these weapons; for "almost everyone else at the time, these guns were unknown and irrelevant").[13]

Second, the evidence establishes that LCMs are vastly different from the repeating firearms identified by Plaintiffs. The LCMs regulated by Section 32310 are detachable magazines capable of holding more than ten rounds of ammunition. *Id.* at (a). As Plaintiffs themselves assert, in other states where LCMs are not regulated, many firearms are sold with 30-round magazines. MPA at 3. Those magazines enable an individual to have a sustained rate of 45 rounds per minute, and fire 180 rounds on semi-automatic in four minutes. Tucker Decl., ¶ 16; *see also* Roth Decl., ¶ 49 (noting that the AR-15 can fire 45 rounds per minute); *id.* at ¶ 50 (noting that an entire 30-round clip from a semi-automatic pistol can be fired in five seconds).

The ease of discharging dozens (if not hundreds) of rounds of ammunition in minutes from LCMs regulated by Section 32310

[13] It is difficult to even estimate the cost of these early repeaters, given their rarity (Sweeney Decl., ¶ 47) and thus the absence of any real commercial market.

contrasts sharply with the paltry rate of fire from early attempts at repeating firearms. Sweeney Decl., ¶ 45 (noting that the Puckle "gun had a rate of fire of only 9 rounds per minute"); *id.* at ¶ 24 (noting that the Pimm gun fired 11 rounds in a two-minute period); *id.* at ¶ 34 (noting that the 1786 Belton firearm required the user to cock and prime each time before pulling the trigger and firing the gun).

The differential rate of discharge is only furthered by the fact that LCMs can be quickly and easily changed to maintain "a sustained or rapid sustained rate of fire" (Tucker Decl., ¶ 15), while reloading the early repeaters identified by Plaintiffs was an arduous process. *See* Cornell Decl., ¶ 44 (noting that the Girardoni air gun required 1500 strokes of a pump to prime for use); DeLay Decl., ¶ 31 (stating that the early air-rifles "were time-consuming and onerous to prime"); Sweeney Decl. ¶ 24 n.48 (recounting the 1715 Pimm revolver could deliver six shots after being loaded once, but it was not a rapid-fire weapon, and it took time to reload the individual chambers with powder and ball); Spitzer Decl., ¶28 (noting that "the guns of 1830 were essentially what they had been in 1430: single metal tubes or barrels stuffed with combustible powder and projectiles" where "after every shot, the shooter had to carry out a minimum of three steps: pour powder into the barrel; add a projectile. . .; then ignite the gunpowder and send the projectile on its way").[14]

[14] In fact, the early attempts at repeating rifles in some ways more closely resemble trap guns (*see* Cornell Decl., ¶¶ 72-75) than LCMs. *See* Sweeney Decl., ¶ 46 (the Puckle gun required a tripod to use); *id.* at ¶ 31 (once fired, the "the ensuing discharge of balls" from the Belton "uncontrolled").

And Defendants' evidence shows, to the extent they were produced at all, these early attempts at repeating firearms were far from reliable. As Professor Sweeney's declaration establishes, in 1800, it "was still not possible to manufacture with precision and in any quantity firearms with closely fitting parts that could contain the destructive explosive potential associated with the use of black powder gunpowder" that repeaters required. Sweeney Decl., ¶ 50; DeLay Decl., ¶ 15 ("Early magazine guns demanded an even higher level of craftsmanship in order to create a perfect seal between the rotating breechblock and the stored powder, lest the combustion in the chamber ignite the magazine."). As a result, the historical record is replete with reference to faultiness of these repeaters. *See, e.g.*, Cornell Decl., ¶ 44 (noting that the Austrian military abandoned the Girardoni air rifle due their tendency to malfunction and the fact that they "became inoperable after a very short time"); Sweeney Decl., ¶ 27 ("Catastrophic failures happened because the period's methods of fabrication were not reliably capable of producing the fitting precision parts needed to prevent such malfunctions caused by errant sparks."); *id.* at ¶ 37 (stating that the Chambers firearms could "produce devastating malfunctions" because they "were difficult to load correctly, and if the bullets did not fit tightly, flame could leak around them and set off all the charges at once"); *id.* at ¶ 43 (noting that imported Belgian or French-made Segales pistols which had four rifled barrels were "at risk from a dangerous chain reaction, in which firing one chamber could accidently set off all the others," and "[i]f this happened, the gun would explode in the

shooter's hand"); DeLay Decl., ¶¶ 15, 30 (even famed Italian gunmaker Bartolomo Girardoni, creator of eponymous air rifle, lost his left hand in a magazine explosion).

The repeating rifles available during the Reconstruction period were also materially different than the LCMs regulated today. At that time, the only bearable, high-capacity firearms capable of firing more than 10 rounds were the lever-action Henry Rifle and the Winchester Repeating Rifle (the Winchester 66 and Winchester 73 models), which were capable of holding 15 rounds in a fixed chamber within the firearm. Vorenberg Decl., ¶¶ 20-21. But as explained above, what makes the LCM a dramatic technological change is not merely the number of rounds that it holds but the fact that many such LCMs are detachable, which enables a sustained rate of fire over a period of minutes. *See* Tucker Decl., ¶ 16; Roth Decl., ¶ 49; *see also Hanson*, 2023 WL 3019777, at *13 (noting that "these rifles did not resemble the semiautomatic weapons of today," in part because of their "firing rate [of] . . . about one shot every three seconds"). In any event, those rifles were not widely owned by civilians during Reconstruction. As Professor Vorenberg explains, the Henry and Winchester repeaters were not adopted by the Union or Confederate militaries during the Civil War and were not commonly acquired by soldiers returning from the Civil War. Vorenberg Decl., ¶ 24 ("Production and sales numbers reveal that Henry Rifles and their successors, Winchester Repeating Rifles, were uncommon during the Civil War and Reconstruction compared to other rifles."). Following the Civil War, the circulation of Henry and Winchester lever-action repeating rifles remained low, with few documented

instances of possession by civilians. *Id.* ¶ 27. By the time the Fourteenth Amendment was ratified, the commercial viability of the Winchester Model 1866 was due "almost entirely to sales to foreign armies," not to Americans. *Id.* at ¶ 50; DeLay Decl., ¶ 67 ("[T]he vast majority of these weapons were made to order for foreign armies and shipped abroad."). Indeed, as Professor Delay's declaration establishes, in 1868 these repeating rifles accounted for less than 0.002% of guns in the United States. DeLay Decl., ¶ 7.

Thus, the evidence establishes that the LCMs regulated by Section 32310 represent the type of dramatic technological change recognized in *Bruen* as requiring a more nuanced approach.

2. Section 32310 Addresses the Unprecedented Social Problem of Mass Shootings

Section 32310 also addresses a societal concern that did not exist at the Founding or during Reconstruction: mass shootings. There are no known shooting incidents involving ten or more fatalities before 1949, and the number of such double-digit mass shootings increased dramatically in the period before and after the federal assault weapons ban. *See* Klarevas Decl., ¶¶ 18-19 & tbl. 4; *see Oregon Firearms*, 2022 WL 17454829, at *13 (crediting Professor Klarevas's findings). And as Professor Roth has explained, from the colonial period to the early 20th century, mass killings were generally committed by groups of people because technological limitations constrained the ability of a single person to commit mass murder. *See* Roth Decl., ¶ 41.

The development and proliferation of semiautomatic and automatic firearms technologies in the 1920s and 1930s

substantially increased the amount of carnage an individual could inflict, which led to government regulation of those technologies. *See* Spitzer Decl., ¶¶ 50-51; Roth Decl., ¶ 47. This increased lethality has only accelerated over the past several decades. *See* Donohue Decl., ¶ 54 (contrasting that the 1966 University of Texas memorial tower shootings, in which 14 people were killed, took the shooter, an expert marksman, 90 minutes with the 2009 Fort Hood shooting, in which an inexperienced shooter fired 214 times and killed 13 people at Fort Hood in less than 10 minutes).

LCMs in particular have greatly enhanced the lethality of mass shootings when they occur. *See* Supp. Allen Decl., ¶¶ 27-28; Roth Decl., ¶¶ 49-51; Klarevas Decl., ¶ 14. Of all the shootings in American history involving 14 or more fatalities, 100% involved the use of LCMs. *See* Klarevas Decl. ¶ 14 & tbl. 4; Donohue Decl., ¶ 30 ("[I]f one looks at the deadliest acts of intentional mass violence in the United States since 9/11, they all share one feature. The killer in every case used a weapon equipped with a high-capacity magazine.").[15]

[15] Just in the past two years, the United States has experienced numerous, devastating mass shootings with firearms equipped with large-capacity magazines, including the March 16, 2021 Atlanta spa shootings (8 killed), the March 22, 2021 shooting at King Soopers supermarket in Boulder, Colorado (10 killed); the April 15, 2021 shooting at an Indianapolis FedEx warehouse (8 killed); the May 26, 2021 shooting at a transportation authority facility in San Jose, California (9 killed); the May 14, 2022 supermarket shooting in Buffalo, New York (10 killed); the May 24, 2022 shooting at Robb Elementary School in Uvalde, Texas (19 children and 2 adults killed); the July 4, 2022 shooting at a Fourth of July parade in Highland Park, Illinois (7 killed), the November 20, 2022 shooting in a Colorado Springs nightclub in which five people were killed and 17 wounded, the November 22, 2022 shooting at a Virginia Walmart that left 7 dead, the January 2023 shooting at a dance studio in (continued…)

Therefore, one of the primary concerns addressed by Section 32310—mass shootings—is a modern problem that did not exist in 1791 or 1868. For this additional reason, a more nuanced approach is required.

B. California's Restrictions on Large-Capacity Magazines Are Consistent with Historical Laws Regulating Other Dangerous Weapons

The Attorney General has identified hundreds of laws from pre-founding England and colonial America through the 1930s, including clusters of similar laws enacted around the time that the Second and Fourteenth Amendments were ratified. *See* Appendix 1. Even if Section 32310 were viewed to burden conduct covered by the plain text of the Second Amendment, Defendants have provided "significant historical evidence to overcome the presumption of unconstitutionality of a measure that infringes upon conduct covered by the Second Amendment." *Oregon Firearms*, 2022 WL 17454829, at *12.

In evaluating the relevant similarities of these laws to modern firearm regulations, the identification of relevant laws is the first step. The laws must then be contextualized historically and compared to modern laws within an appropriate analytical framework. The *Bruen* standard focuses "not on a minutely precise analogy to historical prohibitions, but rather an evaluation of the challenged law in light of the broader attitudes and assumptions demonstrated by those historical prohibitions." *United States v. Kelly*, 2022 WL 17336578, at *5

Monterey Park, California that killed 11 and wounded nine others, the March 2023 shooting at the elementary school in Nashville that killed six, including three 9-year-old children; and the April 10, 2023 shooting at a Louisville bank that killed five. See Donohue Decl., ¶ 22.

n.7 (M.D. Tenn. Nov. 16, 2022). The absence of a precise twin in the historical record would not necessarily mean that a modern firearm restriction is inconsistent with the Second Amendment. Under *Bruen*, the Second Amendment does not "forbid all laws other than those that *actually existed* at or around the time of the [Second Amendment's] adoption," but rather "the Second Amendment must, at most, forbid laws that *could not have existed* under the understanding of the right to bear arms that prevailed at the time." *Id.* The laws identified by Defendants are relevantly similar to Section 32310 by the two metrics identified in *Bruen*: "how and why the regulations burden a law-abiding citizen's right to armed self-defense." 142 S. Ct. at 2133.

1. The Survey of Relevant Dangerous Weapons Laws

Defendants have prepared and filed a survey of relevant laws—one from the pre-founding era through the 1930s. *See* Appendix 1.

This survey identifies over 300 state and local laws, including laws enacted by the District of Columbia, and six additional laws and authorities from pre-founding England, which regulated, or authorized the regulation, of certain enumerated weapons and items.[16] This history shows that governments have been

[16] The vast majority of these laws were generally applicable, but some restrictions applied only to certain groups. Twelve of the surveyed laws were based on race, nationality, or enslaved status and were enacted before ratification of the Thirteenth and Fourteenth Amendments [5, 14, 15, 16, 17, 20, 21, 28, 31, 53, 75, 79]. These laws are morally repugnant and would obviously be unconstitutional today. They are provided only as additional examples of laws identifying certain weapons for heightened regulation, and they are consistent in this respect with the other generally applicable laws. Defendants in no way condone laws that target certain groups on the basis of race, gender, nationality, or other protected characteristics, but these laws (continued…)

free to adopt laws like Section 32310, consistent with the Second Amendment—restricting particular weapons and weapons configurations that pose a danger to society and are especially likely to be used by criminals, so long as the restriction leaves available other weapons for constitutionally protected uses. The enactments identified by Defendants show that Section 32310 is a constitutionally permissible exercise of California's police powers.

a. Medieval to Early Modern England (1300—1776)

In pre-founding England, the right to keep and bear arms was limited to arms "allowed by law" [7, 9], and the Crown prohibited the possession of certain enumerated weapons, like launcegays [1, 2], crossbows, handguns, hagbutts, and demy hakes [3, 4]. These laws are part of the tradition inherited from England when the Second Amendment was ratified. *See Bruen*, 142 S. Ct. at 2127 (noting that the Second amendment "codified a right inherited from our English ancestors") (quoting *Heller*, 554 U.S. at 599).

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are part of the history of the Second Amendment and may be relevant to determining the traditions that define its scope, even if they are inconsistent with other constitutional guarantees. *See Bruen*, 142 S. Ct. at 2150—51 (citing *Dred Scott v. Sandford*, 19 How. 393 (1857) (enslaved party)). Reference to a particular historical analogue does not endorse the analogue's *application* in the past. Rather, it can confirm the *existence* of the doctrine and corresponding limitation on the Second Amendment right. *See* William Baude & Stephen E. Sachs, *Originalism & the Law of the Past*, 37 L. & Hist. Rev. 809, 813 (2019) ("Present law typically gives force to past *doctrine*, not to that doctrine's role in past society."); *see also* Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 Harv. L. Rev. F. 537, 539 (2022) ("Yet there will arise situations in which even a racially discriminatory gun law of the past might provide *some* basis for recognizing that lawmakers have a degree of regulatory authority over guns.").

The 1689 English Bill of Rights was the "predecessor to our Second Amendment," *id.* at 2141 (quoting *Heller*, 554 U.S. at 593), and although it was "initially limited" to Protestants and "matured" by the founding, *id.* at 2142, there is no indication that the "as allowed by law" qualification was written out of the right when the Second Amendment was ratified.

Pre-ratification English law is relevant, especially where it is consistent with laws that existed when the Second or Fourteenth Amendments were ratified. *Id.* at 2136 (suggesting that it is permissible for "courts to 'reach back to the 14th century' for English practices that 'prevailed up to the 'period immediately before and after the framing of the Constitution'") (cleaned up); *id.* ("A long, unbroken line of common-law precedent stretching from Bracton to Blackstone is far more likely to be part of our law than a short-lived, 14th-century English practice."). Pre-founding English law was evaluated in *Bruen*, *McDonald*, and *Heller*, and it remains relevant here. *See Bruen*, 142 S. Ct. at 2138-39; *McDonald*, 561 U.S. at 768; *Heller*, 554 U.S. at 593.

b. Colonial and Early Republic (1600—1812)

During the colonial period and the early Republic, several jurisdictions enacted restrictions on the possession of certain weapons and devices, including (a) limitations on the keeping and storing of gunpowder, (b) trap guns, and (c) other enumerated weapons.

First, during the colonial period and at the Founding, governments heavily regulated guns and gunpowder, both to ensure the readiness of the militia, and to protect the public from harm

[339, 340][17]. In particular, governments regulated the storage of gunpowder inside the home. Laws required gunpowder to be stored on the top floor of a building and permitted government officials to remove it when necessary to prevent explosions and to transfer the powder to the public magazine. *See* Cornell Decl., ¶ 47. Under these gun powder storage laws, individuals were not free to stockpile as much gunpowder as they may have wished—or felt necessary for self-protection—nor could they keep the gunpowder in the home in any manner that they wished.[18]

Second, during the colonial period, states began to enact restrictions on "trap guns," laws that proliferated in the 19th century. *See* Spitzer Decl., ¶¶ 72-75, & Exs. B & F. A trap gun was a firearm that was configured in a way to fire remotely (without the user operating the firearm), typically by rigging the firearm to be fired by a string or wire when tripped. Spitzer Decl., ¶ 72. Trap guns were used to protect personal or commercial property. *Id.* at ¶ 73. Just as Massachusetts prohibited the storage of loaded guns inside the home to prevent accidental harm, trap gun laws regulated the manner in which firearms could be kept and configured to protect the public from harm. *Id.* at ¶ 75 & Exs. B & F.

Third, some jurisdictions prohibited the carrying of certain listed weapons, including a 1686 New Jersey law prohibiting the

[17] These references and those bracketed references that follow refer to relevant laws compiled in Appendix 1 and which are identified by number in the left-hand column of Appendix 1.

[18] Maine also enacted a law in 1821, authorizing town officials to enter any building to search for gun powder. Cornell Decl., ¶ 51 (citing 1821 Me. Laws 98, An Act for the Prevention of Damage by Fire, and the Safe Keeping of Gun Powder, chap. 25, § 5).

carrying of any pocket pistol, skein, stiletto, dagger, or dirk [6] and other laws prohibiting the carry of certain weapons in certain circumstances [8, 12, 13, 18, 19, 23]. Such pre-ratification restrictions should "guide [this Court's] interpretation" of the Second Amendment. *Bruen*, 142 S. Ct. at 2137. And laws enacted after ratification of the Second Amendment during this period are relevant in showing the continuing tradition of regulating certain enumerated weapons. Moreover, post-ratification practice can "liquidate" indeterminacies in the meaning of constitutional provisions. *Id.* at 2136 (citation omitted).

c. Antebellum and Reconstruction Periods (1813–1877)

During the antebellum and postbellum period, including around the time that the Fourteenth Amendment was ratified, numerous states restricted weapons deemed to be particularly dangerous or susceptible to criminal misuse.

As homicide rates increased in the South in the early 1800s, states began restricting the carrying of certain concealable weapons. *See* Roth Decl., ¶ 23; Spitzer Decl., ¶ 55; Rivas Decl., ¶¶ 15-17. Throughout this period, states enacted a range of laws restricting the carrying of blunt weapons: 12 states restricted "bludgeons"; 14 states restricted "billies"; seven states restricted "clubs"[19]; 43 states restricted "slungshots"; six

[19] These 19th century laws generally prohibited slaves from carrying clubs, *see* Slaves, in Laws of the Arkansas Territory 521 (J. Steele & J. M'Campbell, Eds., 1835); 1804 Ind. Acts 108, A Law Entitled a Law Respecting Slaves, § 4; 1798 Ky. Acts 106; 1804 Miss. Laws 90, An Act Respecting Slaves, § 4; Collection of All Such Acts of the General Assembly of Virginia, of a Public and Permanent Nature, as Are Now in Force; with a New and (continued…)

states restricted "sandbags"; and 12 states broadly restricted any concealed weapon. *See* Spitzer Decl., ¶¶ 56-62 & Ex. C. Many of these laws were enacted shortly before and after the ratification of the Fourteenth Amendment. *Id.*

From 1813 to the Mexican War, numerous states and territories [25, 34, 36, 39, 43, 44] also restricted the concealed carrying of particular weapons. These concealed weapons laws were intended to specifically address the rise in murders and assaults throughout the South at that time. Roth Decl., ¶ 23. Class and racial tensions in the region led to the region saw a dramatic increase in the number of deadly quarrels, property disputes, duels, and interracial killing during the period, and individuals turned to concealable weapons to ambush both ordinary citizens and political rivals, to bully or intimidate law-abiding citizens, and to seize the advantage in fist fights. *Id.* at ¶¶ 23-24. In addition, several laws regulated the possession of gunpowder [343, 345, 346] and the setting of any trap gun [87].

In addition to prohibiting concealable, blunt weapons—which are dangerous weapons used mainly for criminal mischief—49 states (all except for New Hampshire) enacted restrictions on Bowie knives and other "fighting knives" in the 19th century, including around the time that the Fourteenth Amendment was ratified. *See* Spitzer Decl., ¶ 60 & Ex. C. Many state laws enacted during this

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Complete Index. To Which are Prefixed the Declaration of Rights, and Constitution, or Form of Government Page 187, Image 195 (1803), or prohibited the throwing of clubs at trains or railroad, *see* 1855 Ind. Acts 153, An Act To Provide For The Punishment Of Persons Interfering With Trains or Railroads, chap. 79, § 1; the Revised Statutes of Indiana: Containing, Also, the United States and Indiana Constitutions and an Appendix of Historical Documents (1881); 1905 Ind. Acts 677.

time also included revolvers and pistols in their lists of proscribed weapons. *See* Roth Decl., ¶ 26 (discussing restrictions on the carrying of certain concealable weapons in Kentucky, Louisiana, Indiana, Georgia, and Virginia between 1813 and 1838). These laws aimed to curb the use of concealable weapons that exacerbated rising homicide rates in the South and its borderlands. *Id.*

Regulations from around the time of ratification of the Fourteenth Amendment further demonstrate that states restricted weapons deemed to be particularly dangerous or susceptible to criminal misuse. These regulations bear particular importance, because as noted in *Bruen*, the Second Amendment was made applicable to the states not in 1791, but in 1868, with the ratification of the Fourteenth Amendment. *See* 143 S. Ct. at 2138; *see also Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) ("*McDonald* confirms that when state- or local-government action is challenged, the focus of the original-meaning inquiry is carried forward in time; the Second Amendment's scope as a limitation on the States depends on how the right was understood *when the Fourteenth Amendment was ratified*." (emphasis added)); *Nat'l Rifle Ass'n v. Bondi*, 61 F.4th 1317, 1321 (11th Cir. 2023) (concluding that "Reconstruction Era historical sources are the most relevant to our inquiry on the scope of the right to keep and bear arms").

Just two years before the ratification of the Fourteenth Amendment, New York prohibited "furtively possess[ing]" and carrying any slungshot, billy, sandclub, metal knuckles, or dirk

[88].[20] And after 1868, governments continued to regulate enumerated, unusually dangerous weapons, including trap guns [104], restricting the carrying and use of certain specified weapons [98-143], and taxing certain weapons, like Bowie knives [108, 122, 125, 126, 127].

Further, state constitutions adopted during Reconstruction expressly linked the right to keep and bear arms to the state's authority to regulate arms: "Every person shall have the right to keep and bear arms, in the lawful defence of himself or the government, under such regulations as the Legislature may prescribe." Cornell Decl., ¶ 49 (quoting Tex. Const. of 1868, art. I, § 13); *see also id.* at ¶ 22 n.73 (describing similar constitutional provisions in the Idaho Constitution of 1896 and the Utah Constitution of 1896). Additionally, during this period, the federal government regulated access to particularly dangerous weapons, including the Henry and Winchester lever-action repeating rifles that began to circulate in the postbellum period, and along with state militias sought to prevent access to those weapons to insurrectionary groups and Native Americans. *See* Vorenberg Decl., ¶¶ 7-10, 21-22, 63-64.

Thus, the dangerous weapons laws that proliferated before and after the ratification of the Fourteenth Amendment provide substantial historical support for Section 32310's restrictions

[20] Additionally, laws restricting unauthorized militias "demonstrate[] the government's concern with the danger associated with assembling the amount of firepower capable of threatening public safety—which, given firearm technology in the 1800s, could only arise collectively." *Oregon Firearms*, 2022 WL 17454829, at *14 (discussing *Presser v. People of State of Ill.*, 116 U.S. 252, 253 (1886)).

on large capacity magazines, which do not restrict possession of any firearm and leave other magazines available for lawful self-defense (Busse Decl., ¶¶ 17–18, 21) and thus do not destroy the right protected by the Second Amendment.

d. Late 19th and Early 20th Centuries (1878–1930s)

From the end of Reconstruction to the end of the 19th century, states and localities continued to enact restrictions on certain enumerated weapons deemed to be uniquely dangerous, like slungshots and Bowie knives [145, 153, 154, 171, 206, 210, 211, 214, 217, 221, 222, 224, 236, 243, 250, 252, 269, 273–275]. In 1881, Illinois enacted a prohibition on the possession of a slungshot or metallic knuckles [158]. And in 1885, the Territory of Montana prohibited possession of certain weapons, including dirks and sword canes [183].

During the early 20th century, dangerous weapons laws continued to be enacted, including more prohibitions on the possession of certain weapons. [248, 249, 253, 257, 264–265, 269, 275, 294, 295, 304, 321]. Notably, when semiautomatic and automatic weapons began to circulate more widely in society and appear more frequently in crime in the 1920s, *see* Spitzer Decl., ¶ 11 (describing the St. Valentine's Day Massacre), states began to regulate semiautomatic and automatic weapons capable of firing a certain number of rounds successively and weapons capable of receiving ammunition from feeding devices.

Indeed, thirteen states enacted restrictions on semiautomatic or fully automatic firearms capable of firing a certain number of rounds without reloading; eight states regulated fully automatic

weapons, defined as a firearm capable of firing a certain number of rounds without reloading or accepting an ammunition feeding device; and four states restricted all guns that could receive any type of ammunition feeding mechanism or round feeding device and fire them continuously in a fully automatic manner, including a 1927 California law. *See* Spitzer Decl., ¶¶ 13–14; 1927 Cal. Stat. 938. Additionally, in 1932, Congress enacted a twelve-shot restriction on semiautomatic weapons in the District of Columbia. Pub. L. No. 275, 1932 — 72d Cong., Sess. I, chs. 465, 466. And in 1934, Congress passed the National Firearms Act, significantly restricting fully automatic weapons. Spitzer Decl., ¶ 16.

These early 20th century firearm regulations followed the same regulatory pattern of state and federal restrictions on large-capacity magazines in the late 20th century after the rise in mass shootings. *See* Spitzer Decl., ¶¶ 9-10. These laws were also similar to the regulatory approaches to addressing the prevalence of concealable weapons in crime and homicide before the 20th century and even before the founding, and thus are relevant to the *Bruen* analysis because they are consistent with earlier enacted laws which identified certain types of weapons for heightened regulation. *Cf. Bruen*, 142 S. Ct. at 2154 n.28 (discounting probative value of 20th century laws that "contradict[ed] earlier evidence"). These 20th century laws are uniquely relevant to this case because they were enacted around the time in which comparable firearms technology appeared and began to circulate widely in society. *See Hanson*, WL 3019777, at *16 (finding that "the 1920s and 1930s regulations do not contradict any earlier evidence . . . because semiautomatic and

high-capacity weapons were not technologically feasible and commercially available in meaningful quantities until the early 1900s").

2. The Surveyed Weapons Restrictions Are Relevantly Similar to Section 32310

The surveyed dangerous weapons laws enacted from the pre-founding era through the early 20th century are relevantly similar to Section 32310 in light of their comparable burdens and justifications in at least three significant ways.

First, the gunpowder and loaded-weapon restrictions enacted since the founding-era [339, 340, 343, 344-347] are relevantly similar to the magazine-capacity limit challenged here. The gunpowder restrictions regulated possession, including inside the home. Cornell Decl., ¶ 47. Just as a 10-round magazine capacity limits the amount of firepower that can be used in self-defense (without reloading), historical gunpowder storage requirements limited the firepower that could be exerted for self-defense. But the gunpowder storage laws were far more burdensome than limits on detachable magazines, particularly Massachusetts' 1783 prohibition on the possession of a loaded firearm [339], because the time-consuming nature of having to load a gun (Cornell Decl., ¶ 29) meant that this prohibition imposed a significant burden on one's ability to have a functional firearm available for self-defense in the home. And in a direct parallel to modern magazine-capacity limits, gunpowder storage requirements limited the amount of gunpowder that could be kept in the functional equivalent of founding-era "magazines," which at the time were storehouses used for storing gunpowder. Baron Decl. ¶ 23. By

preventing explosions or fires, these laws sought to protect the public from mass-casualty incidents and minimize the threat of harm.

Second, the dangerous weapons laws [1-4, 6], including the restrictions on concealable weapons enacted during the 1800s are also relevantly similar to the law challenged here. Those restrictions on certain unusually dangerous weapons imposed a comparably modest burden on Second Amendment rights because like the LCM restrictions here, those laws did not restrict weapons that are well suited to self-defense, and they left available alternative weapons to be used for effective and lawful self-defense. *See Oregon Firearms*, 2022 WL 17454829, at *13 (determining that the ban on possession of large-capacity magazines imposed a comparable burden on "the right to self-defense" as laws regulating "certain types of weapons, such as Bowie knives, blunt weapons, slungshots, and trap guns because they were dangerous weapons commonly used for criminal behavior and not for self-defense"); *id.* at n.19 (crediting a substantially similar declaration of Professor Spitzer as the one filed in this case). And these concealed weapons laws targeted the specific types of weapons that were commonly used in the murders and serious assaults that caused an alarming rise in homicides at the time, Roth Decl., ¶ 23, just as Section 32310 is justified because it regulates a weapon accessory that is used frequently in mass shootings and leads to greater numbers of casualties when that accessory is used, Klarevas Decl., ¶¶ 13-14 & figs. 3-4.

Third, the prohibitions on the setting of trap guns are also relevantly similar to LCM restrictions. They regulate possession of firearms, even inside the home, and the manner in which they could be configured [10, 80, 109, 121, 168]. Spitzer Decl. ¶¶ 72-75. But the burden on the right to armed self-defense was minimal because the firearms themselves could still be operated for self-defense without being configured in a way to fire remotely, just as Section 32310 does not prohibit the use of firearms with magazines capable of holding ten or fewer rounds for lawful self-defense. These laws sought to prevent unnecessary gunshot injuries and death, as well as unintended harm. *See Kolbe*, 849 F.3d at 127.

In sum, even assuming that Plaintiffs' proposed course of conduct—the possession and use of LCMS—is covered by the Second Amendment, Section 32310 is consistent with the nation's tradition of firearm regulation. As such, judgment should be entered in Defendants' favor on the Second Amendment claim.

III. THE TAKINGS CLAUSE CLAIM FAILS.

The Ninth Circuit en banc panel in *Duncan* reversed the *Duncan* district court's holding that California's LCM restrictions violated the Takings Clause. 19 F.4th at 1111. In doing so, the en banc panel held that Section 32310 reflects neither a *per se* nor a regulatory taking. *Bruen* did nothing to undermine that holding (which itself was based on long-standing Ninth Circuit precedent), and thus the result here should be the same: Defendants should be granted judgment on Plaintiffs' Takings Claim.

Section 32310 does not effect a *per se* taking. There are two types of "per se" takings: (1) permanent physical invasion of the property; and (2) a deprivation of all economically beneficial use of the property. *Laurel Park Cmty., LLC v. City of Tumwater*, 698 F.3d 1180, 1188 (9th Cir. 2012). First, Section 32310 plainly does not cause the permanent physical invasion of any property. As the Ninth Circuit en banc panel in *Duncan* noted, "the government here in no meaningful sense takes title to, or possession of, the item, even if the owner of a magazine chooses not to modify the magazine, remove it from the state, or sell it." 19 F.4th at 1113. "That California opted to assist owners in the safe disposal of large-capacity magazines by empowering law enforcement agencies to accept magazines voluntarily tendered for destruction does not convert the law into a categorical physical taking." *Id.* (quotation omitted). *Bruen* did not address the Takings Clause, and thus does not undermine the reasoning of the Ninth Circuit's en banc opinion finding that Section 32310 does not affect a physical taking. *See Oregon Firearms*, 2022 WL 17454829, at *16 (relying on the Ninth Circuit's en banc opinion in *Duncan* and finding on a preliminary injunction that Oregon's LCM ban does not give rise to a takings claim).

Even if Section 32310 caused the permanent physical invasion of any property (which it does not), Plaintiffs' per se Takings Clause claim would still fail because, as this Court has previously recognized, "[a] long line of federal cases has authorized the taking or destruction of private property in the exercise of the state's police power without compensation." Dkt. 52 (Order re: PI), at 14 ("Plaintiffs have not cited, and the

court is unaware of, any case holding that a complete ban on personal property deemed harmful to the public by the state is a taking for public use which requires compensation."); *see also Akins v. United States*, 82 Fed. Cl. 619, 623-24 (2008) (holding that restrictions on sale and possession of device deemed to be a machine gun is not a taking (collecting cases)); *Fesjian v. Jefferson*, 399 A.2d 861, 865-66 (D.C. Ct. App. 1979) (holding that a ban on machine guns with various disposal options is not a taking).

Unlike cases in which the government has permanently and physically occupied or appropriated private property for its own use, *see Horne*, 135 S. Ct. at 2427-29; *Loretto*, 458 U.S. at 432, 434-35, Section 32310 is a valid exercise of the State's police powers to protect the public by eliminating the dangers posed by LCMs. *See* supra, pp. II.A.2. The purpose of the statute is to remove LCMs from circulation in the State, not to transfer title to the government or an agent of the government for use in service of the public good. Cal. Penal Code § 32310(d). The Third Circuit rejected a similar takings challenge to New Jersey's law prohibiting previously legal LCMs, observing that the state's "LCM ban seeks to protect public safety and therefore it is not a taking at all." *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Att'y Gen. New Jersey*, 910 F.3d 106, 124 n. 32 (3d Cir. 2018), *abrogated by Bruen*, 142 S. Ct. 2111 (2022).

Moreover, only one of the disposal options listed in section 32310(d) would result in the transfer of grandfathered LCMs to the government—for destruction and not for use by law enforcement. Owners of grandfathered LCMs have other options to

comply with the statute, including modifying their LCMs permanently to hold no more than ten rounds. Cal. Penal Code § 16740(a).[21] Because LCM owners can keep their property and comply with Section 32310, "[t]here is no actual taking." *ANJRPC*, 910 F.3d at 124. And while Plaintiffs argue that sale or removal are "economically and practically, untenable" (MPA at 26), this Court has already found that the "impracticality of any particular option . . . does not transform the regulation into a physical taking." Dkt No. 74 (Order re: MTD), at 11.

In addition, Section 32310 does not affect a regulatory taking, because LCM owners are permitted to sell the LCMs they possess or remove them from the State. In *Duncan* decision, the en banc panel of the Ninth Circuit held that Section 32310 "plainly does not deprive an owner of all economically beneficial use of the property," 19 F.4th at 1112, given that California law gives LCM's owners the right to sell it to a firearms dealer or remove the magazine to another state.

Because Section 32310 effects neither a per se nor a regulatory taking, this Court should enter judgment for Defendants on the Takings Clause claim.

IV. THIS DUE PROCESS CLAIM FAILS.

Judgment should be entered for Defendants on the due process claim because Section 32310 is not retroactive and does not criminalize past LCM possession. And consistent with the Second

[21] Plaintiffs attempt to read the modification option out of Section 17460 by arguing that there are only three options (*i.e.*, removal, sale, or surrender) under the statute (MPA at 4), but the Ninth Circuit has already recognized that modification is one of the four options available to LCM possessors under the law. *Duncan*, 19 F.4th at 1113.

Amendment and Takings Clause analysis, the possession ban was enacted under the State's police powers in pursuit of plainly legitimate government objectives.

Plaintiffs contend that the "ban as enacted is a complete and retroactive ban." MPA at 30. Not so. Instead, the law applies prospectively and would penalize individuals who fail to comply with section 32310(d) in the future; the statute does not penalize anyone for past conduct. Cal. Penal Code § 32310(c).

Contrary to Plaintiffs' assertion that "the State was wrong in baselessly pursuing this ban in a claimed exercise of its 'police power,'" MPA at 32, Section 32310 also serves compelling public safety goals. A regulation that fails to serve any legitimate governmental objective may be so arbitrary that it violates the Due Process Clause, but regulations "survive a substantive due process challenge if they were designed to accomplish an objective within the government's police power, and if a rational relationship existed between the provisions and purpose" of the regulations. *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 690 (9th Cir. 1993) (quotation omitted).

V. THE EQUAL PROTECTION CLAIM FAILS.

In addition, the Court should enter judgment for Defendants on the equal protection claim. This Court had initially ruled in Defendants' favor in dismissing this claim when it was raised in the Second Amended Complaint, finding that rational basis review applied to the equal protection claim, and that the "California electorate could have rationally believed that large capacity magazines used solely as props were not at risk of being used in

mass shootings and that such an exception would benefit an important sector of the California economy." Dkt. No. 74 at 22-23. This Court declined to dismiss the equal protection claim raised in the Third Amended Complaint only because the decision of the three-judge panel in *Duncan* affirming the granting of the preliminary injunction in that case "compel[led] this court to deny defendants' motion to dismiss the Third Amended Complaint's equal protection claim." Dkt. No. 103 at 6. Given that the panel's decision has been vacated (and, in any event, the *Duncan* plaintiffs did not raise an equal protection claim), this Court should adopt its prior holding dismissing this claim (*see* Dkt. No. 74 at 20-23).

VI. IF THE COURT DOES NOT AGREE THAT PLAINTIFFS HAVE FAILED TO SATISFY THE SUMMARY JUDGMENT STANDARD ON ANY OF THEIR CLAIMS, DEFENDANTS REQUIRE DISCOVERY PURSUANT TO RULE 56(D).

As explained above, the evidence establishes there is no genuine dispute of material fact in this case, and the Court should enter judgment for Defendants. If this Court is inclined to grant judgment to Plaintiffs based on the current record, however, it should first grant Defendants the opportunity to conduct discovery in accordance with Rule 56(d).

No discovery has occurred in this case. After the stay in this case was lifted in October of 2022, Defendants sought discovery "both fact and expert discovery to develop a factual, legal, and historical record" prior to summary judgment, because such an approach would allow "a full and fair opportunity to address the new emphasis on historical analogues and to prepare a record responsive to the text-and-history standard." Dkt. No. 115 (Joint Status Report) at 5. The Court granted Plaintiffs' request

to file a motion for summary judgment prior to discovery, but stated that after filing, "[t]he court will then consider request under Federal Rule of Civil Procedure 56(d) after plaintiffs' motion for summary judgment has been filed, should defendants feel discovery is necessary to respond to plaintiffs' motion." Dkt. No. 120 at 2.

In their Separate Statement of Disputed Facts filed herewith, Defendants identify numerous facts that Plaintiffs identify as material but about which Defendants have had no opportunity to take discovery. For example, Defendants have not been able to conduct discovery as to the standing of the individual and organizational plaintiffs (*see, e.g.*, Dkt. Nos. 123-6, 123-15), or as to the methodology and reliability of the NSSF study which Plaintiffs cite (*see id.* at 4-7). The Ninth Circuit has made clear that where, as here, discovery has yet to commence, Rule 56(d) requests are to be granted as a matter of course. *See Burlington N. Santa Fe R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 773 (9th Cir. 2003) ("before a party has had any realistic opportunity to pursue discovery relating to its theory of the case," Rule 56(d) requests should be granted "fairly freely"). If the Court is not inclined to deny Plaintiffs summary judgment, Defendants should be permitted to engage in discovery. *See Texas Partners v. Conrock Co.*, 685 F.2d 1116, 1119 (9th Cir. 1982) (finding that the "district court erred in granting summary judgment for appellees without affording plaintiffs-appellants the opportunity to proceed with discovery").

VII. IF THE COURT FINDS THAT CALIFORNIA'S RESTRICTIONS ON LARGE-CAPACITY MAGAZINES ARE UNCONSTITUTIONAL, THE COURT SHOULD STAY ENFORCEMENT OF THE JUDGMENT PENDING APPEAL.

If the Court is inclined to enter judgment holding that Section 32310 violates the Second Amendment (or another constitutional provision), Defendants respectfully request that the Court stay enforcement of any such judgment pending appeal. All four factors that courts consider in evaluating a request to stay pending appeal weigh in favor of the Defendants' request for a stay. *See Humane Soc'y of U.S. v. Gutierrez*, 558 F.3d 896, 896 (9th Cir. 2009) ("A party seeking a stay must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of relief, [3] that the balance of equities tip in his favor, and [4] that a stay is in the public interest.") (citing *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). On the first factor, the party seeking the stay "need not demonstrate that it is more likely than not they will win on the merits," but rather must show only "a reasonable probability" or "fair prospect" of success. *Fed. Trade Comm'n v. Qualcomm Inc.*, 935 F.3d 752, 755 (9th Cir. 2019) (granting partial stay of injunction pending appeal where the party seeking a stay showed "the presence of serious questions on the merits of the district court's determination").

First, Defendants meet the serious questions going to the merits standard for the Second Amendment claim. Regardless of the outcome, this case will be among the first opportunities for the Ninth Circuit (or any other Circuit) to address the constitutionality of LCM restrictions post-*Bruen*. At a minimum, this case presents a serious and novel question in the Ninth

Circuit, and thus satisfies the first factor for a stay pending appeal where, as here, the equities tip strongly in favor of granting a stay.

Second, absent a stay, Defendants and the State of California will be irreparably injured as a matter of law. LCMs have been illegal to manufacture, import, keep or offer for sale, give, or lend in California since 2000; if the Court were to enter judgment in Plaintiffs' favor, individuals who have been prevented from acquiring large-capacity magazines for nearly twenty years will be able to lawfully acquire them. And significant numbers of LCMs could come into the State, effectively defeating the purpose of the law even if it were later upheld on appeal. *See* Matthew Green, *Gun Groups: More Than a Million High-Capacity Magazines Flooded California During Weeklong Ban Suspension*, KQED.org, Apr. 12, 2019, *available at* https://bit.ly/3wfinEU. Additionally, Defendants suffer irreparable harm when a duly enacted law is enjoined from enforcement during an appeal if the law is ultimately sustained.

Third, the balance of harms favors Defendants. While a stay will delay the relief that Plaintiffs seek in this action, acquisition of LCMs has been unlawful for nearly two decades; any additional delay pending appeal would be comparatively minor and would preserve the status quo until this matter is finally resolved. While any delay in the enjoyment of a constitutional right will involve a burden to those who wish to exercise it, if a judgment issued by this Court in Plaintiffs' favor is affirmed on appeal, any such burden would be relatively modest in comparison to the substantial burden that will be imposed on the

State if the acquisition of new LCMs is permitted during the appeal.

Fourth, the public interest strongly favors staying any judgment pending appeal. A stay pending appeal will preserve the status quo involving an important public-safety law that has been in effect for nearly two decades while the Ninth Circuit considers this complex Second Amendment challenge. *See Boland v. Bonta*, Dkt. No. 7, Case No. 23-55276 (9th Cir. Apr. 3, 2023) (granting the Attorney General's motion for an emergency stay where the district court had granted a preliminary injunction enjoining enforcement of certain requirements in the Unsafe Handgun Act but had not stayed its ruling pending appeal (instead only staying the case to allow time for the State to seek a stay from the Ninth Circuit)).

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' summary judgment motion on all claims and grant judgment in Defendants' favor; or grant Defendants' application under Federal Rule of Civil Procedure 56(d) to defer consideration of Plaintiffs' motion for summary judgment or deny it, or to allow time for Defendants engage in discovery.

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Dated: May 1, 2023

Respectfully submitted,

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