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17 UNITED STATES DISTRICT COURT

18 FOR THE EASTERN DISTRICT OF CALIFORNIA

19 WILLIAM WIESE, et al.,
20
21 Plaintiffs,

22 vs.

23 ROB BONTA, in his official capacity as
24 Attorney General of California, et al.,

25 Defendants.

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

**PLAINTIFFS’ RESPONSE TO DEFENDANTS’
STATEMENT OF UNDISPUTED FACTS IN
SUPPORT OF THEIR COUNTER-MOTION
FOR SUMMARY JUDGMENT**

[FRCP 56]

Date: July 10, 2023
Time: 1:30 p.m.
Courtroom 5, 14th Floor
Judge: Hon. William B. Shubb

26 Pursuant to Fed. Rule Civ. Pro. 56, and E.D. Cal. L.R. 260(a), plaintiffs William Wiese,
27 Jeremiah Morris, Lance Cowley, Sherman Macaston, Clifford Flores, L.Q. Dang, Frank
28 Federeau, Alan Normandy, Todd Nielsen, The Calguns Foundation, Firearms Policy Coalition,
Firearms Policy Foundation, and Second Amendment Foundation (“Plaintiffs”) hereby respond

1 to the Defendants' Statement of Undisputed Material Facts in Support of Their Counter-Motion
2 for Summary Judgment [Dkt. 125-4], as follows.

3
4 GENERAL OBJECTION

5 Plaintiffs object to the Defendants' presentation of the purported facts herein, on the
6 grounds that the only facts relevant to resolution of this case are "legislative facts" regarding the
7 history of magazine regulation in this country, and as such all facts and history are subject to
8 historical citations and judicial notice as set forth in the parties' briefing and argument, without
9 the need for expert or other evidence adduced through traditional party discovery methods. *See*
10 *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) (ordering entry of judgment for plaintiffs on
11 review of order granting motion to dismiss because "[t]he constitutionality of the challenged
12 statutory provisions does not present factual questions for determination in a trial Only
13 adjudicative facts are determined in trials, and only legislative facts are relevant to the
14 constitutionality of the Illinois gun law.") Subject to this stated objection(s), Plaintiffs respond to
15 the Defendants' offered facts on the grounds set forth below.

16
17 RESPONSES TO DEFENDANTS' STATEMENT OF UNDISPUTED FACTS

18 **DEFENDANTS' FACT NO. 1**

19 *Fact*: "LCMs are not weapons in and of themselves."

20 *Cited support*: Busse Decl., ¶ 13; Lee Decl., Dkt. 123-4, at 5-6

21 **PLAINTIFFS' RESPONSE**

22 *Disputed*

23 *Bases for Dispute*:

24 A. A magazine is an inherent operating part of a functioning firearm. Youngman
25 Decl., ¶ 7.

26 B. Many standard firearms are sold with LCMs as a standard part thereof. This fact
27 is not subject to genuine or reasonable dispute. *Far Out Productions, Inc. v. Oskar*, 247 F.3d
28 986, 992 (9th Cir. 2001) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986))

1 (“An issue is ‘genuine’ only if there is sufficient evidence for a reasonable fact finder to find for
2 the non-moving party”).

3 C. Further, Plaintiffs object that the question of whether or not magazines are “arms”
4 within the meaning of the Second Amendment is a purely legal question that is inappropriate for
5 *factual* assertions like this:

6 Magazines are “arms” within the Second Amendment’s protection. As the
7 Supreme Court explained just last term, “even though the Second Amendment’s
8 definition of “arms” is fixed according to its historical understanding, *that general*
9 *definition covers modern instruments that facilitate armed self-defense.” New*
10 *York State Rifle & Pistol Association v. Bruen*, 142 S.Ct. 2132 (emphasis added).
11 And it cannot seriously be disputed that magazines are “modern instruments that
12 facilitate armed self-defense.” To “facilitate” is to “make easier,” and the
13 repeated-fire capability magazines offer make armed self-defense far easier than
14 being restricted to single-shot firearms. *See* “Facilitate” in Merriam-Webster.

15 Even setting aside *Heller* and *Bruen*, as the State attempts to do in
16 asserting that magazines are not arms, does not result in granting the State the
17 ability to ban magazines of or over a certain arbitrary capacity. As the Ninth
18 Circuit has observed, “The Second Amendment protects “arms,” “weapons,” and
19 “firearms”; it does not explicitly protect ammunition. “Nevertheless, without
20 bullets, the right to bear arms would be meaningless. A regulation eliminating a
21 person’s ability to obtain or use ammunition could thereby make it impossible to
22 use firearms for their core purpose.” *Jackson v. City & Cty. of San Francisco*, 746
23 F.3d 953, 967 (9th Cir. 2014) (citing *District of Columbia v. Heller*, 554 U.S. 570,
24 630 (2008)). And, since a constitutional right “implicitly protect[s] those closely
25 related acts necessary to their exercise,” *Luis v. United States*, 578 U.S. 5, 26
26 (2016) (Thomas, J., concurring in the judgment), ammunition containers and
27 loaders, commonly termed “magazines,” are no less protected than ammunition as
28 necessary prerequisites for the normal and intended function of constitutionally

1 protected semiautomatic firearms. Indeed, semiautomatic firearms definitionally
2 fire and chamber a round with each pull of the trigger and thus have exactly the
3 same inherent rate of fire: “Once one pulls the trigger and fires a round, another
4 round loads itself and may be fired by another pull of the trigger.” Stephen P.
5 Halbrook, *America’s Rifle: The Case for the AR-15* at 206 (Google Books ed.
6 2022).

7 The Supreme Court has recognized that semiautomatic firearms
8 “traditionally have been widely accepted as lawful possessions.” *Staples v. United*
9 *States*, 511 U.S. 600, 612 (1994). Furthermore, semiautomatic firearms number in
10 the multitude of millions and are indisputably “in common use.” Since
11 semiautomatic firearms, plainly protected by the Second Amendment, cannot
12 function as such without magazines, to restrict or burden the effectuation of the
13 semiautomatic mechanism is an infringement of the Second Amendment. The
14 Ninth Circuit’s analysis in *Jackson* compels this conclusion, as two other courts
15 of appeals have agreed. Noting that *Jackson*’s analysis applies to magazines, a
16 panel of the Fourth Circuit reasoned that “[t]o the extent that firearms equipped
17 with detachable magazines are commonly possessed by law-abiding citizens for
18 lawful purposes, there must also be an ancillary right to possess the magazines
19 necessary to render those firearms operable.” *Kolbe v. Hogan*, 813 F.3d 160, 175
20 (4th Cir. 2016). While this panel opinion was vacated by the en banc Fourth
21 Circuit, *Kolbe v. Hogan*, 849 F. 3d 114, 133 (CA4 2017), *Bruen* abrogated that en
22 banc opinion by name. 142 S.Ct. 2126-27.

23 The Third Circuit reads *Jackson* similarly: “We therefore must first
24 determine whether the regulated item is an arm under the Second Amendment.
25 The law challenged here regulates magazines, and so the question is whether a
26 magazine is an arm under the Second Amendment. The answer is yes. A
27 magazine is a device that holds cartridges or ammunition.... Regulations that
28 eliminate ‘a person’s ability to obtain or use ammunition could thereby make it

1 impossible to use firearms for their core purpose.” *Association of New Jersey*
2 *Rifle and Pistol Clubs, Inc. v. Attorney General New Jersey*, 910 F.3d 106, 116
3 (3d Cir. 2018) (quoting Jackson, 746 F.3d at 967. “Because magazines feed
4 ammunition into certain guns, and ammunition is necessary for such a gun to
5 function as intended, magazines are ‘arms’ within the meaning of the Second
6 Amendment. *Id.* (citing *United States v. Miller*, 307 U.S. 174, 180 (1939), where
7 the Court relied on 17th century commentary on gun use in America that “[t]he
8 possession of arms also implied the possession of ammunition”).

9 The commonly used magazines that the State labels “large-capacity” are
10 no different from any other of their kind—they function no differently and permit
11 the firearm to fire no faster. More importantly, the line the State attempts to draw
12 between “large capacity” magazines and other magazines is as arbitrary as it is
13 unprincipled. It is arbitrary because the State picks a number of rounds that render
14 a magazine capacity “large.” There is no limiting principle to that line because a
15 State that can limit the capacity of a magazine at all can limit it to five or two—or
16 even one. At that point, a semiautomatic firearm is not one at all—it is a single-
17 shot firearm that becomes a single-use hand projectile when its shot is spent.

18 Magazines of any capacity are within the plain text of the Second
19 Amendment due to their facilitating armed self-defense. The State therefore must
20 demonstrate that any restriction on magazine capacity therefore must be
21 consistent with the Nation’s history of firearm regulation to be sustained.

22 **DEFENDANTS’ FACT NO. 2**

23 *Fact:* “An LCM is not necessary to operate any firearm, much less any firearm commonly used
24 for self-defense.”

25 *Cited support:* Busse Decl., ¶ 18

26 **PLAINTIFFS’ RESPONSE**

27 *Disputed.*
28

1 *Bases for Dispute:*

2 A. This purported fact is immaterial. *See* Plaintiffs’ SOUMF (Dkt. 123-2) Nos. 16-
3 18.

4 B. Further, Plaintiffs dispute this fact. Magazines are integral to the functioning of
5 semiautomatic firearms. Without a magazine, such a firearm can only fire one shot without
6 reloading, and it cannot function semiautomatically at all. And semiautomatic firearms are
7 commonly used for lawful purposes—including self-defense. Given that 39 million people have
8 owned as many as half a billion magazines capable of holding over ten rounds, the magazines the
9 State has arbitrarily banned for being “large capacity” are arms in common use and, therefore,
10 protected by the Second Amendment. William English, *2021 National Firearms Survey:
11 Updated Analysis Including Types of Firearms Owned*, Social Science Research Network, May
12 13, 2022, p. 20; *see also* National Shooting Sports Foundation, *Firearm Production in the United
13 States 7* (2020), online at [https://www.nssf.org/wp-content/uploads/2020/11/IIR-2020-Firearms-
14 Production-v14.pdf](https://www.nssf.org/wp-content/uploads/2020/11/IIR-2020-Firearms-Production-v14.pdf) (finding that over 304 million detachable magazines had been purchased by
15 Americans between 1990 and 2018, over half of which—160 million—could hold more than ten
16 rounds of ammunition). The English survey further found that 41.7% of respondents said they
17 owned the magazines the State has banned for defense outside the home, while 62.4% said they
18 owned them for home defense. English, *2021 National Firearms Survey* at 23.

19
20 **DEFENDANTS’ FACT NO. 3**

21 *Fact:* “Section 32310’s restrictions on large capacity magazines do not restrict possession of any
22 firearm and leave other magazines available for lawful self-defense.”

23 *Cited support:* Busse Decl., ¶¶ 17-18, 21

24 **PLAINTIFFS’ RESPONSE**

25 *Disputed.*

26 *Bases for Dispute:*

27 A. This purported fact is immaterial. “It is no answer to say [...] that it is permissible
28 to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is

1 allowed.” *Heller*, 554 U.S. at 629; see also, *Parker v. District of Columbia*, 478 F.3d 370, 400
2 (D.C. Cir. 2007) (“The District contends that since it only bans one type of firearm, ‘residents
3 still have access to hundreds more,’ and thus its prohibition does not implicate the Second
4 Amendment because it does not threaten total disarmament. We think that argument frivolous. It
5 could be similarly contended that all firearms may be banned so long as sabers were
6 permitted.”), *aff’d sub nom. Heller*, 554 U.S. 570.

7 B. See Response to Defendants’ Fact No. 1. Magazines are arms protected by the
8 Second Amendment. If the State can ban magazines over an arbitrarily determined capacity, it
9 can ban those under that capacity; that it has not yet done so does not render the magazines it has
10 banned any less protected. Both *Heller* and *Bruen* made clear that the Second Amendment
11 protects the right to be armed with arms in common use; how many arms the State has *not*
12 banned cannot augment the constitutionality of its bans on arms in common use.

13
14 **DEFENDANTS’ FACT NO. 4**

15 *Fact*: “An analysis of incidents reported in the NRA Armed Citizens database compiled from
16 January 2011 through May 2017 reveals that it is rare for individuals to defend themselves using
17 more than ten rounds; on average, only 2.2 shots were fired by defenders.”

18 *Cited support*: Allen Supp. Decl., ¶10.

19 **PLAINTIFFS’ RESPONSE**

20 *Disputed*.

21 *Bases for Dispute*:

22 A. This fact is immaterial. “Second Amendment rights do not depend on how often
23 the magazines are used. Indeed, the standard is whether the prohibited magazines are ‘typically
24 possessed by law-abiding citizens for lawful purposes,’ not whether the magazines are often *used*
25 for self-defense.” *Fyock v. City of Sunnyvale*, 25 F. Supp.3d 1267, 1276 (N.D. Cal. 2014)
26 (emphasis original, citing *Heller*, 554 U.S. at 625), *aff’d sub nom. Fyock v. Sunnyvale*, 779 F.3d
27 991 (9th Cir. 2015).

28 B. Further, the purported “NRA Armed Citizens database” is simply a collection of

1 magazine articles. Ms. Allen’s study was not compiled scientifically. *See Duncan v. Becerra*,
2 265 F. Supp.3d 1106, 1129 (S.D. Cal. 2017); *Miller v. Bonta*, 542 F. Supp.3d 1009, 1044-45
3 (S.D. Cal. 2021) (“[a]s she acknowledged in her declaration submitted in *Duncan v. Becerra*, the
4 NRA-ILA Armed Citizen Database is not compiled scientifically”), vacated and remanded, 2022
5 WL 3095986 (9th Cir. Aug. 1, 2022); *Ass’n of New Jersey Rifle & Pistol Clubs, Inc. v. Grewal*,
6 No. 3:17-cv-10507-PGS-LHG, 2018 WL 4688345 (“*ANJRPC*”), at *5 (D.N.J. Sept. 28, 2018)
7 (“Allen conceded that the NRA Armed Citizen Database is not a scientific study and is not
8 representative of overall statistics on the use of arms in self-defense.”), *aff’d sub nom. Ass’n of*
9 *New Jersey Rifle & Pistol Clubs, Inc. v. Att’y Gen. New Jersey*, 910 F.3d 106 (3d Cir. 2018). *See*
10 *also Miller v. Bonta*, 542 F. Supp.3d at 1042-45 (“Allen’s opinion about the number of shots
11 fired in self-defense is entitled to little weight and fails the scientific method.”); *see also*
12 *ANJRPC*, 2018 WL 4688345, at *12 (finding that Allen had not “provided a clear analysis”
13 based on the various studies). Allen’s analysis, based on an NRA report, does not support with
14 statistical reliability her claim that individuals only use an average of 2.2 or 2.3 bullets when
15 using handguns in self-defense.”

16 C. Further, that 39 million people have owned as many as half a billion magazines of
17 the kind the State bans shows their utility. *See English, supra*, Resp. to Defendants’ Fact No. 1,
18 at 20. The reasons for which an arm is in common use are left to the determination of the
19 American people; it is not left to the State to judge whether those reasons are sufficient, sensible,
20 or otherwise in line with its current legislative priorities. That said, when respondents were asked
21 in a survey whether they had “ever been in a situation in which” magazines of the kind the State
22 has banned “would have been useful for defensive purposes,” several answered in the affirmative
23 and recounted specific incidents. Some of those, reproduced verbatim, are as follows:

24 “I got jumped by multiple people in a carjacking in front of our apartments
25 with my wife and children.” *Id.*, at 28.

26 “I was robbed on a street 1 time by a group of about 6 people that at least
27 I was armed and I wasn’t. It took about 6 hours of emergency surgery to g[e]t my
28 bones in face jaws and skull back in place form being beaten in the head face

1 kicked all over. Damn near killed me.” *Id.*, at 28.

2 “Three men attempted to rob me outside my home, with the intention of
3 entering my home thereafter. My wife and child were inside the home at the time.
4 That was in California with a magazine that only held 7 shots. I am a great shot,
5 prior military and other firearms training, but I hate to only have 7 shots with
6 three people. In such a situation, very well trained people, pumped up with
7 adrenalin[e] can and do miss their target.” *Id.*, at 28.

8 “I was in Illinois, which does not honor Indiana concealed carry. I had to
9 leave my firearm at home. This was truly the only time in my life I felt I needed
10 to actually use a firearm, but almost was killed. 4 men (3 with guns displayed and
11 1 with a knife in his hand) were walking up to me fast in a parking lot screaming
12 stop and give me everything you have. The parking lot was near empty, and dark
13 outside. I was able to unlock my car while running, start the car and speed off.
14 Just as I got in the car, I had just enough time to lock the door before the 3 men
15 pointed there [*sic*] guns at the car and the other was stabbing the window with a
16 knife. They intended to rob and kill me. I couple rounds were fired as I sped off. I
17 would have needed minimally 10 rounds if I had discharged given their
18 distancing. I almost died because of Illinois law and my street smarts and luck
19 was the only thing that saved me.” *Id.*, at 31-32.

20 D. Furthermore, magazines of the kind the State bans are particularly useful
21 when one is confronted by multiple assailants. Indeed, 51.2 percent of all self-defense
22 incidents annually involve two or more attackers, while 20.4 percent of such incidents
23 involve three or more attackers. English *Survey* at 15. Indeed, “[m]ultiple-offender
24 homicides in particular are becoming increasingly common: In 2008, roughly one of
25 every five homicides involved multiple offenders.” Amy Swearer, *If You Can’t Beat ‘Em,
26 Lie About ‘Em: How Gun Control Advocates Twist Heritage’s Defensive Gun Use
27 Database in the “Large-Capacity” Magazine Debate*, The Heritage Foundation, May 17,
28 2023, at 7, online at <https://www.heritage.org/firearms/report/if-you-cant-beat-em-lie->

1 [about-em-how-gun-control-advocates-twist-heritages](#) (citing Alexia Cooper & Erica L.
2 Smith, Homicide Trends in the United States, 1980–2008, Bureau of Justice Statistics
3 NCJ 236018 (Nov. 2011), at 24).

4 E. Studies show that high-stress situations like self-defense encounters affect
5 the ability of even well-trained shooters to fully hit their mark. According to one study,
6 police officers—for whom routine firearms training and proficiency is part of the job—
7 saw a 20 percent drop in firing accuracy “when officers were exposed to high anxiety.”

8 Christopher M. Donner and Nicole Popovich, *Hitting (or Missing) the Mark: An*
9 *Examination of Police Shooting Accuracy in Officer-Involved Shooting Incidents*,

10 *Policing: An International Journal* 42, no. 3 (2019): online at

11 <https://www.emerald.com/insight/content/doi/10.1108/PIJPSM-05-2018-0060/full/html>.

12 Indeed, “police departments rarely ever achieve a 50 percent hit rate,” with matters

13 usually far worse. The Dallas Police Department’s officers landed on target 35 percent of
14 their fired shots from 2003 to 2017, with half of the officers missing every fired shot. *Id.*

15 A study also shows New York Police Department (NYPD) officers’ firing accuracy in the
16 field hovering around 22 percent. *Id.*; see also Thomas J. Aveni, *Officer-Involved*

17 *Shootings: What We Didn’t Know Has Hurt Us* at 5, Police Policy Studies Council, 2003,
18 online at http://www.theppsc.org/Staff_Views/Aveni/OIS-

19 [%20What%20We%20Didn't%20Know%20Hurt%20Us.pdf](#). Of the 9,899 shots NYPD

20 officers fired in the line of duty over the course of 14 years, they hit their targets with

21 2,203 shots. It is hardly a wonder, then, that among law enforcement agencies, “the most
22 common magazine capacity was 15 rounds (purchased by 63 percent of agencies).”

23 Police Department Service Weapon Survey, Police Executive Research Forum, 2013,

24 [https://www.policeforum.org/assets/docs/Free_Online_Documents/Gun_Violence_Reduc](https://www.policeforum.org/assets/docs/Free_Online_Documents/Gun_Violence_Reduction/police%20department%20service%20weapon%20survey%202013.pdf)
25 [tion/police%20department%20service%20weapon%20survey%202013.pdf](#).

26 F. The State itself appears to understand the utility of these magazines in civilian
27 self-defense contexts, as evinced by the exception it carves out of its ban for law enforcement
28 officers: “Section 32310 does not apply to the sale to, lending to, transfer to, purchase by, receipt

1 of, possession of, or importation into this state of, a large-capacity magazine by a sworn peace
2 officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, or sworn
3 federal law enforcement officer, who is authorized to carry a firearm in the course and scope of
4 that officer's duties.” Cal. Penal Code § 32405; *see also State Exemptions for Authorized Peace*
5 *Officers*, Office of the Attorney General, State of California,
6 <https://oag.ca.gov/firearms/exemptpo>.

7 G. Police officers engage in defense of self and others on precisely the same terms
8 and conditions as other civilians. Despite their training, their accuracy suffers in both routine and
9 stressful contexts, as noted above. That is why most agencies issue their officers precisely the
10 kind of magazines the State bans, and why the State itself exempts law enforcement officers
11 from the ambit of its ban. Civilians have no less acute a need to effectively defend themselves
12 than police officers do, and it would be incomprehensible to expect the general populace to fire
13 with greater accuracy than those whose duties and livelihoods depend on it. Joan N. Vickers and
14 William J. Lewinski, *Performing Under Pressure: Gaze Control, Decision Making, and*
15 *Shooting Performance of Elite and Rookie Police Officers*, *Human Movement Science* 31, no. 1
16 (February 2012), <https://www.sciencedirect.com/science/article/abs/pii/S0167945711000571>;
17 Audrey Honig and William J. Lewinski, *A Survey of the Research on Human Factors Related to*
18 *Lethal Force Encounters: Implications for Law Enforcement Training, Tactics, and Testimony*,
19 *Law Enforcement Executive Forum* 8, no. 4 (July 2008), online at
20 <https://iletsbeiforumjournal.com/images/Issues/FreeIssues/ILEEF%202008-8.4.pdf>

21 H. Finally, the number of rounds actually fired in a given self-defense scenario
22 depends on a number of factors. It depends, inter alia, on whether the assailant is armed, how the
23 assailant is armed, the range of the encounter, whether the assailant fires or flees in response to
24 armed self-defense, and whether the defender is wounded or killed. Whether, and how, those
25 factors align in particular, fact-specific incidents are immaterial to the rights of those who wish
26 to use a common and protected arm to enlarge their own, and others’ chances of survival should
27 they face such an incident of their own.

28

1 **DEFENDANTS' FACT NO. 5**

2 *Fact:* "An analysis of incidents from the NRA Armed Citizens database found that more than 10
3 bullets were fired in only 2 out of 736 self-defense incidents in the United States."

4 *Cited support:* Allen Supp. Decl., ¶10.

5 **PLAINTIFFS' RESPONSE**

6 *Disputed.*

7 *Bases for Dispute:* Plaintiffs' responses to Defendants' Fact No. 4 are equally applicable to
8 Defendants' Fact No. 5 and thus Plaintiffs incorporate those responses as though stated herein.

9

10 **DEFENDANTS' FACT NO. 6**

11 *Fact:* "An analysis of published news stories revealed a similar number of average shots per
12 incident of self-defense (i.e., 2.34)."

13 *Cited support:* Allen Supp. Decl., ¶18

14 **PLAINTIFFS' RESPONSE**

15 *Disputed.*

16 *Bases for Dispute:* Plaintiffs' responses to Defendants' Fact No. 4 are equally applicable to
17 Defendants' Fact No. 6 and thus Plaintiffs incorporate those responses as though stated herein.

18 Further, the contents of any such "news stories" constitute hearsay and Defendants, as the
19 proponents of this evidence, have not identified any applicable exception to the hearsay rule.

20

21 **DEFENDANTS' FACT NO. 7**

22 *Fact:* "An analysis of published news stories found that in 97.3% of incidents the defender fired
23 5 or fewer shots, and that there were no incidents where the defender was reported to have fired
24 more than 10 bullets."

25 *Cited support:* Allen Supp. Decl., ¶19

26 **PLAINTIFFS' RESPONSE**

27 *Disputed.*

28 *Bases for Dispute:* Plaintiffs' responses to Defendants' Fact No. 4 are equally applicable to

1 Defendants' Fact No. 7 and thus Plaintiffs incorporate those responses as though stated herein.
2 Further, the contents of any such "news stories" constitute hearsay and Defendants, as the
3 proponents of this evidence, have not identified any applicable exception to the hearsay rule.
4

5 **DEFENDANTS' FACT NO. 8**

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

13 *Cited support:* Tucker Decl., ¶ 16

14 **PLAINTIFFS' RESPONSE**

15 *Disputed.*

16 *Bases for Dispute:*

17 A. Plaintiffs' responses to Defendants' Fact No. 4 are equally applicable to
18 Defendants' Fact No. 8 and thus Plaintiffs incorporate those responses as though stated herein.

19 B. Further, the fact that 39 million people have owned as many as over half a billion
20 such magazines, as noted, is itself evidence of "a need" felt by that many people. Furthermore,
21 the capacity of a magazine in no way affects the rate of fire of a semiautomatic firearm, which is
22 dependent only on the speed with which the operator is able to pull the trigger.

23 C. To the extent the State stresses the lack of a pause during the changing of
24 magazines, this cuts against the State's position because it is unclear why, if changing magazines
25 is a rapid process, the State believes that limiting the capacity of magazines is at all effective at
26 reducing the severity of criminal misuse of semiautomatic firearms.

27 D. Indeed, most people do not have the benefit of having learned from the Marines
28 "the most important individual skill" taught to them. If anything, the fact that most people are not

1 combat Marines *augments* their need for the magazines the State bans because, even if they
2 carried multiple magazines, it is unlikely they will be as calm or accurate under pressure as a
3 “combat rifleman.” Furthermore, law-abiding citizens seldom carry multiple magazines on their
4 person in everyday contexts and are left in a self-defense scenario to react with the ammunition
5 they have in their firearm. By contrast, it is the aggressor who, by benefit of planning and
6 forethought, has the option of transporting an armory to the scene of his intended crime. For
7 example, the Uvalde school shooter brought 58 magazines, and nearly a thousand rounds of
8 ammunition, to the school. Caitlin O’Kane, *The gunman in Uvalde carried more ammunition*
9 *into Robb Elementary School than a U.S. soldier carries into combat*, May 27, 2022,
10 [https://www.cbsnews.com/news/uvalde-shooting-more-ammunition-than-us-soldiers-carry-](https://www.cbsnews.com/news/uvalde-shooting-more-ammunition-than-us-soldiers-carry-rounds-into-combat/)
11 [rounds-into-combat/](https://www.cbsnews.com/news/uvalde-shooting-more-ammunition-than-us-soldiers-carry-rounds-into-combat/).

12 E. The banned magazines permit individuals to have a firearm equipped with
13 sufficient ammunition to effectively defend themselves in many situations without reloading.
14 Indeed, “from the perspective of a victim trying to defend her home and family, the time required
15 to re-load a pistol after the tenth shot might be called a ‘lethal pause,’ as it typically takes a
16 victim much longer to re-load (if they can do it at all) than a perpetrator planning an attack. In
17 other words, the re-loading ‘pause’ the State seeks in hopes of stopping a mass shooter, also
18 tends to create an even more dangerous time for every victim who must try to defend herself
19 with a small-capacity magazine. The need to reload and the lengthy pause that comes with
20 banning all but small-capacity magazines is especially unforgiving for victims who are disabled,
21 who have arthritis, or who are trying to hold a phone in their off-hand while attempting to call
22 for police help. The good that a re-loading pause might do in the extremely rare mass shooting
23 incident is vastly outweighed by the harm visited on manifold law-abiding, citizen-victims who
24 must also pause while under attack.” *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1178–79 (S.D.
25 Cal. 2019); see also Gary Kleck, *Large-Capacity Magazines and the Casualty Counts in Mass*
26 *Shootings: The Plausibility of Linkages*, 17 J. Res. & Pol’y 28, 42–44 (2016), online at
27 [https://www.hoplophobia.info/wp-content/uploads/2018/02/2016-Large-Capacity-Magazines-and-](https://www.hoplophobia.info/wp-content/uploads/2018/02/2016-Large-Capacity-Magazines-and-Mass-Shootings.pdf)
28 [Mass-Shootings.pdf](https://www.hoplophobia.info/wp-content/uploads/2018/02/2016-Large-Capacity-Magazines-and-Mass-Shootings.pdf).

1 F. Finally, the in-common-use test established by *Heller* and confirmed by *Bruen*
2 permits neither states nor courts to inquire into the “need” of an arm in common use. That it is in
3 common use is a categorical shield against its ban. Indeed, laws and policies based on
4 demonstration of a “need” apart from the mere intention to engage in the lawful exercise of one’s
5 Second Amendment rights are cut from the same cloth as the “special need” requirement of New
6 York’s carry licensing scheme that was struck down in *Bruen* as unconstitutional.

7
8 **DEFENDANTS’ FACT NO. 9**

9 *Fact*: “LCMs enable an individual to have a sustained rate of 45 rounds per minute, and fire 180
10 rounds on semi-automatic in four minutes.”

11 *Cited support*: Tucker Decl., ¶ 16; Roth Decl., ¶ 49

12 **PLAINTIFFS’ RESPONSE**

13 *Disputed*.

14 *Bases for Dispute*: Plaintiffs’ responses to Defendants’ Fact Nos. 4 and 8 are equally applicable
15 to Defendants’ Fact No. 9 and thus Plaintiffs incorporate those responses as though stated herein.

16
17 **DEFENDANTS’ FACT NO. 10**

18 *Fact*: “Many LCMs are detachable, which enables a sustained rate of fire over a period of
19 minutes.”

20 *Cited support*: Tucker Decl., ¶ 16; Roth Decl., ¶ 49

21 **PLAINTIFFS’ RESPONSE**

22 *Admitted* that many of the banned magazines are detachable.

23 *Disputed* that ordinary users can maintain a sustained rate of fire over a period of several
24 minutes.

25 *Bases for Dispute*: Plaintiffs’ responses to Defendants’ Fact Nos. 4 and 8 are equally applicable
26 to Defendants’ Fact No. 10 and thus Plaintiffs incorporate those responses as though stated
27 herein.

28

1 **DEFENDANTS’ FACT NO. 11**

2 *Fact:* “LCMs can be quickly and easily changed to maintain ‘a sustained or rapid sustained rate
3 of fire.’”

4 *Cited support:* Tucker Decl., ¶ 15

5 **PLAINTIFFS’ RESPONSE**

6 *Disputed.*

7 *Bases for Dispute:* Plaintiffs’ responses to Defendants’ Fact Nos. 4 and 8 are equally applicable
8 to Defendants’ Fact No. 11 and thus Plaintiffs incorporate those responses as though stated
9 herein.

10

11 **DEFENDANTS’ FACT NO. 12**

12 *Fact:* “When LCMs began to circulate more widely in the 1980s, they were regarded as military
13 accessories.”

14 *Cited support:* Busse Decl., ¶ 36

15 **PLAINTIFFS’ RESPONSE**

16 *Disputed.*

17 *Bases for Dispute:* This statement is too subjective and open-ended to be responded to on a
18 factual basis. In any event, the true distinction between military and civilian arms has nothing to
19 do with magazines and everything to do with the firearm itself. Having thoroughly reviewed
20 industry and military manuals, former Army officer and infantryman Dennis Chapman
21 concludes, “Semiautomatic rifles such as the AR-15 cannot even approximate—much less
22 replicate—the effective rates of fire of machineguns or selective-fire weapons, and they cannot
23 even remotely approach the extreme capabilities that some poorly informed commentators
24 attribute to them.” Dennis P. Chapman, *The AR-15 Controversy: Semiautomatic Rifles and the*
25 *Second Amendment* at 34 (2nd ed. 2022). Indeed, as the very history of firearms development
26 shows, “At the end of the 19th Century and the beginning of the 20th, a new technology emerged
27 that would set out a clear line of demarcation between firearms adapted solely to military
28 applications and those useful in other shooting applications—technology that would, for the first

1 time, set apart “weapons of war” from other firearms. That technology was automatic fire: the
2 ability to fire more than one round, whether in a continuous stream or in a burst, with each pull
3 of the trigger.” Chapman, *supra* at 110-111.

4
5 **DEFENDANTS’ FACT NO. 13**

6 *Fact*: “Today, a ‘new semiautomatic handgun can be purchased for less than \$200 and equipped
7 with a 33-round magazine for less than \$15.’”

8 *Cited support*: Roth Decl., ¶ 50

9 **PLAINTIFFS’ RESPONSE**

10 *Response*: While plaintiffs presently lack knowledge of the California firearms market and, on
11 that basis, decline to dispute at this time, they note that the supply, demand, and market value of
12 firearms and accessories fluctuates and rarely can be asserted as a blanket statement.

13
14 **DEFENDANTS’ FACT NO. 14**

15 *Fact*: “Historically, the term ‘Arms’ referred to ‘weapons such as swords, knives, rifles, and
16 pistols,’ and did not include ‘accoutrements,’ like ‘ammunition containers, flints, scabbards,
17 holsters, or ‘parts’ of weapons.’”

18 *Cited support*: Baron Decl., ¶ 8

19 **PLAINTIFFS’ RESPONSE**

20 *Disputed*.

21 *Bases for Dispute*: Writing in 1842 about the historical meaning of “arms” under the Second
22 Amendment, the Supreme Court of Arkansas said, the term “in its most comprehensive
23 signification, probably includes every description of weapon or thing which may be used
24 offensively or defensively, and in the most restricted sense, includes guns or firearms of every
25 description, as well as powder, lead and flints, *and such other things as are necessarily used in*
26 *loading and discharging them, so as to render them effective as instruments of offense or*
27 *defense*, and without which their efficiency for these purposes would be greatly diminished, if
28 not destroyed.” *State v. Buzzard*, 4 Ark. 18, 21-22 (1842) (italics added). And, again, as outlined

1 in response to Defendants’ Fact No. 1, incorporated herein, the modern judicial precedent
2 establishes that the magazines at issue are covered by the Second Amendment as parts integral to
3 the operation of arms in common use for lawful purposes.
4

5 **DEFENDANTS’ FACT NO. 15**

6 *Fact:* “Founding-era ‘magazines,’ which at the time were storehouses used for storing
7 gunpowder.”

8 *Cited support:* Baron Decl. ¶ 23

9 **PLAINTIFFS’ RESPONSE**

10 *Disputed.*

11 *Bases for Dispute:* This “undisputed fact” is not a fact at all, but a sentence fragment which does
12 not describe any alleged fact and which, for the same reason, is irrelevant and immaterial to the
13 issues in dispute.
14

15 **DEFENDANTS’ FACT NO. 16**

16 *Fact:* “It was time-consuming to load a gun in the late 18th and early 19th century.”

17 *Cited support:* Cornell Decl., ¶ 29

18 **PLAINTIFFS’ RESPONSE**

19 *Disputed.*

20 *Bases for Dispute:* Reloading any firearm consumes time. The meaning of “time-consuming” as
21 used in this assertion is vague and ambiguous and calls for an opinion or subjective judgment; it
22 is not a fact. Therefore, this assertion of fact is irrelevant and immaterial to the issues in dispute.
23

24 **DEFENDANTS’ FACT NO. 17**

25 *Fact:* The early repeaters were “extraordinarily rare.”

26 *Cited support:* Sweeney Decl., ¶ 23; Cornell Decl., ¶ 26; DeLay Decl., ¶ 7

27 **PLAINTIFFS’ RESPONSE**

28 *Disputed.*

1 *Bases for Dispute:*

2 A. ¶ 23 of the Sweeney Decl. reveals that he based his conclusion on research in
3 newspapers, which will not necessarily disclose the rarity (or not) of repeaters; the Sweeney
4 Decl. also largely ignores other kinds of multi-shot weapons, and ignores repeaters such as the
5 Kalthoff repeaters that were widely produced in Europe.

6 B. ¶ 26 of Cornell Decl. does not address alleged rarity of early repeaters.

7 C. ¶ 7 of Delay Decl. addresses rarity, but only in conclusory form. Seventeenth
8 century Kalthoff repeaters (up to thirty shots from internal magazines) were made by at least 19
9 gunmakers all over Europe. Harold L. Peterson, *The Treasury of the Gun* at 230 (1962).

10 D. In fact, “[t]he desire for . . . repeating weapons is almost as old as the history of
11 firearms, and there were numerous attempts to achieve this goal, beginning at least as early as the
12 opening years of the 16th century.” David B. Kopel & Joseph G.S. Greenlee, *The History of*
13 *Bans on Types of Arms Before 1900*, 50 J. LEGIS. (forthcoming 2024), manuscript available at
14 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4393197, at 10 (quoting Harold L. Peterson,
15 *Arms and Armor in Colonial America 1526–1783*, at 215 (1956)). “‘Successful systems’ of
16 repeating arms ‘definitely had developed by 1640, and within the next twenty years they had
17 spread throughout most of Western Europe and even to Moscow.’” *Id.* at 12 (quoting Peterson,
18 *The Treasury of the Gun* at 229 (1962)). “The Lorenzoni also was developed during the first half
19 of the Seventeenth Century. . . . The gun’s repeating mechanism quickly spread throughout
20 Europe and to the American colonies, and the mechanism was soon applied to rifles as well.” *Id.*
21 at 13. “When the Second Amendment was ratified, the state-of-the-art repeater was the Girardoni
22 air rifle. It could consecutively shoot 21 or 22 rounds in .46 or .49 caliber, utilizing a tubular
23 spring-loaded magazine. Although an air gun, the Girardoni was ballistically equal to a powder
24 gun.” *Id.* at 39. “During the nineteenth century, repeating arms became some of America’s most
25 popular arms.” *Id.* at 54. “Over 720,000 [Winchester] Model 1873s were produced by 1919.” *Id.*
26 at 60. “The final quarter of the nineteenth century saw more iconic Winchesters, namely the
27 Model 1886, and then the Model 1892, made legendary by Annie Oakley, and later by John
28 Wayne. These arms had a capacity of 15 rounds. Over a million were produced from 1892 to

1 1941.” *Id.* at 61.

2

3 **DEFENDANTS’ FACT NO. 18**

4 *Fact:* “There is no evidence that many early repeating firearms were commercially available.”

5 *Cited support:* Sweeney Decl., ¶¶ 24, 28, 29, 49; DeLay Decl., ¶ 36

6 **PLAINTIFFS’ RESPONSE**

7 *Disputed.*

8 *Bases for Dispute:* This alleged fact is too vague because of the uncertain meaning of “many”
9 and the lack of any definitive time frame. In any event, repeating firearms were commercially
10 available before the American Revolution. *See* Plaintiffs’ responses to Defendants’ Fact No. 17,
11 as responsive to this asserted fact as well. As additional sources demonstrate, “[t]he first
12 repeaters to be built in large quantities appear to be the 1646 Danish flintlocks that used a pair of
13 tubular magazines, and could fire 30 shots without reloading.” David Kopel, *Firearms*
14 *technology and the original meaning of the Second Amendment*, The Washington Post, April 3,
15 2017, online at [https://fee.org/articles/firearms-technology-and-the-original-meaning-of-the-](https://fee.org/articles/firearms-technology-and-the-original-meaning-of-the-second-amendment/)
16 [second-amendment/](https://fee.org/articles/firearms-technology-and-the-original-meaning-of-the-second-amendment/). Meanwhile, in colonial America, “repeating arms were available for people
17 who could afford them, or who were skilled enough to make their own. For example, in
18 September 1722, John Pim of Boston entertained some Indians by demonstrating a firearm he
19 had made. Although “loaded but once,” it “was discharged eleven times following, with bullets
20 in the space of two minutes each which went through a double door at fifty yards’ distance.”
21 Samuel Niles, *A Summary Historical Narrative of the Wars in New England*, Massachusetts
22 Historical Society Collections, 4th ser., vol. 5, 347 (1837). Pim’s gun may have been a type of
23 the repeating flintlock that became “popular in England from the third quarter of the 17th
24 century,” and was manufactured in Massachusetts starting in the early eighteenth. Harold L.
25 Peterson, *Arms and Armor in Colonial America 1526-1783*, 215-17 (Dover reprint 2000)
26 (Smithsonian Institution 1956). Another repeating flintlock, invented by Philadelphia’s Joseph
27 Belton, could fire eight shots in three seconds. *Id.* at 217. Pim also owned a .52 caliber six-shot
28 flintlock revolver, similar to the revolvers that had been made in England since the turn of the

1 century. M.L. Brown, FIREARMS IN COLONIAL AMERICA: THE IMPACT ON HISTORY AND
2 TECHNOLOGY, 1492-1792 (1980) at 255. A variety of multi-shot pistols from the late eighteenth
3 century have been preserved, holding two to four rounds. Charles Winthrop Sawyer, Firearms in
4 American History: 1600 to 1800, 194-98, 215-16 (1910).” *Id.*

5
6 **DEFENDANTS’ FACT NO. 19**

7 *Fact*: “Early attempts at repeating firearms had a paltry rate of fire.”

8 *Cited support*: Sweeney Decl., ¶¶ 24, 34, 45

9 **PLAINTIFFS’ RESPONSE**

10 *Disputed*.

11 *Bases for Dispute*: “Paltry” is a subjective characterization or opinion, not a fact. In any event,
12 any suggestion of “paltry” rate of fire is inaccurate and misleading. *See* Plaintiffs’ responses to
13 Defendants’ Fact No. 17, as responsive to this asserted fact as well. Also, superposed firearms
14 had a high rate of fire. *Newly invented muskets*, N.Y. Evening Post, Apr. 10, 1822, in Alexander
15 Tilloch, *The Philosophical Magazine and Journal: Comprehending the Various Branches of*
16 *Science, the Liberal and Fine Arts, Geology, Agriculture, Manufactures, and Commerce*, 467-68
17 (Richard Taylor ed. 1822), <http://bit.ly/2tn4raZ> (describing firing a firearm “from two to twelve
18 times” at a rate of two seconds per shot). The repeater described in Sweeney Decl. ¶ 24 fired
19 “Eleven Bullets successively in about Two Minutes after being loaded only once,” which is
20 hardly “paltry” for 1723 or even later. The firearm described at Sweeney Decl. ¶ 34 was
21 characterized only as “not a rapid-fire repeating arm,” simply because of the need to cock and
22 prime between each shot. But until the development of double-action pepperboxes (beginning in
23 the 1830s), *see* Lewis Winant, PEPPERBOX FIREARMS 20–30 (1952) and double action revolvers
24 (post-Civil War), *see e.g.* FLAYDERMAN’S GUIDE TO ANTIQUE AMERICAN FIREARMS 108–09,
25 378–79 (9th ed. 2019) (noting development of Starr double action revolvers beginning in 1858
26 and Colt double action revolvers beginning in 1878), all firearms required at least one manual
27 intervention by the shooter before the next shot could be fired. *See What Revolver Action Is Your*
28 *Type?*, Firearms Legal Protection (Apr. 22, 2022), available at [– 21 –](https://firearmslegal.com/what-</p></div><div data-bbox=)

1 [revolver-action-is-your-type/](#) (explaining that unlike a single action revolver, pulling the trigger
2 on a double action revolver both rotates the cylinder and cocks the hammer, relieving the need
3 for the shooter to cock the firearm). Sweeney Decl. ¶ 45 dismisses the Puckle Gun as having a
4 firing rate of “only 9 rounds per minute.” Again, that is not “paltry.”

5
6 **DEFENDANTS’ FACT NO. 20**

7 *Fact*: “It is difficult to even estimate the cost of these early repeaters, given their rarity.”

8 *Cited support*: Sweeney Decl., ¶ 47

9 **PLAINTIFFS’ RESPONSE**

10 *Disputed*.

11 *Bases for Dispute*: Sweeney Decl. ¶ 47 does not even mention cost or difficulty in estimating
12 cost. Also, because the time and place of this alleged difficulty is not specified, this statement of
13 alleged fact is hopelessly vague. Further, *see* Plaintiffs’ responses to Defendants’ Fact No. 17, as
14 responsive to this asserted fact as well and as refuting the general notion of “rarity” here.

15
16 **DEFENDANTS’ FACT NO. 21**

17 *Fact*: “Reloading the early repeaters identified by Plaintiffs was an arduous process.”

18 *Cited support*: Cornell Decl., ¶¶ 29, 44; DeLay Decl., ¶ 31; Sweeney Decl. ¶ 24 n.48; Spitzer
19 Decl., ¶28

20 **PLAINTIFFS’ RESPONSE**

21 *Disputed*.

22 *Bases for Dispute*: Characterizing a reloading process as “arduous” is an opinion or subjective
23 judgment, not a fact. Defendants also do not state to what firearms they are comparing the
24 reloading process of repeaters. Cornell Decl. ¶ 29 only asserts that muzzleloading weapons “took
25 too long to load and were therefore seldom used to commit crimes.” Regardless of the truth of
26 this dubious and subjective assertion about how much time is “too long” or how much effort is
27 too “arduous,” it says nothing about repeaters specifically. Cornell Decl. ¶ 44 only refers to the
28 number of strokes necessary to charge the storage reservoir on a Girandoni air rifle, which could

1 thereafter shoot 22 times. Regarding reloading, Delay Decl. ¶ 31 simply repeats the number of
2 strokes for the Girandoni. Sweeney Decl. ¶ 24 n.48 says only that “Primm’s [sic] pistol could
3 deliver six shots after being loaded once, but it was not a rapid-fire weapon, and it took time to
4 reload the individual chambers with powder and ball.” All flintlock weapons had to be reloaded
5 (whether single shot or multi-shot) with powder and ball. See, e.g., Chris Wright, *How To Load
6 and Fire A Black Powder Rifle*, Gear Patrol, January 21, 2015, online at
7 <https://www.gearpatrol.com/outdoors/a116394/how-to-load-and-fir-a-black-powder-rifle/>; see
8 also Jeremiah Knupp, *Blackpowder Basics: How To Shoot An Old-School Muzzleloading Rifle*,
9 American Rifleman, March 26, 2022, online at
10 [https://www.americanrifleman.org/content/blackpowder-basics-how-to-shoot-an-old-school-
11 muzzleloading-rifle/](https://www.americanrifleman.org/content/blackpowder-basics-how-to-shoot-an-old-school-muzzleloading-rifle/). Spitzer Decl. ¶ 28 says nothing about the loading of repeaters, but only
12 makes a brief reference to how muzzleloading firearms were loaded.

13
14 **DEFENDANTS’ FACT NO. 22**

15 *Fact*: “In 1800, it ‘was still not possible to manufacture with precision and in any quantity
16 firearms with closely fitting parts that could contain the destructive explosive potential
17 associated with the use of black powder gunpowder’ that repeaters required.”

18 *Cited support*: Sweeney Decl., ¶ 50

19 **PLAINTIFFS’ RESPONSE**

20 *Disputed*.

21 *Bases for Dispute*: See Plaintiffs’ responses to Defendants’ Fact No. 17, as responsive to this
22 asserted fact as well. Further, all firearms used black powder at that time. See Philip Schreier, *A
23 Short History of the Semiautomatic Firearm*, America’s 1st Freedom (June 28, 2022), available
24 at <https://www.americas1stfreedom.org/content/a-short-history-of-the-semi-automatic-firearm/>.

25 Nevertheless, firearms were made in quantity and with sufficient precision to contain the
26 “destructive explosive potential” of blackpowder. These included muzzleloading muskets such
27 as the British “Brown Bess,” the French Charleville Musket, and the American 1795 Musket,
28 described as “the first mass produced American military small arm.” They also included

1 repeaters such as the Kalthoff and Cookson guns, which were successfully produced in relatively
2 large numbers. Indeed, “[d]uring the seventeenth century, Kalthoff repeaters were copied by
3 gunsmiths from London to Moscow.” David Kopel, *Magazines over 10 rounds were well-known*
4 *to the Founders*, Reason, February 11, 2020, online at
5 [https://reason.com/volokh/2020/02/11/magazines-over-10-rounds-were-well-known-to-the-](https://reason.com/volokh/2020/02/11/magazines-over-10-rounds-were-well-known-to-the-founders/)
6 [founders/](https://reason.com/volokh/2020/02/11/magazines-over-10-rounds-were-well-known-to-the-founders/); see also <https://www.battlefields.org/learn/articles/small-arms-across-three-wars>.

7
8 **DEFENDANTS’ FACT NO. 23**

9 *Fact*: “The early attempts at repeating rifles in some ways more closely resemble trap guns than
10 LCMs.”

11 *Cited support*: Sweeney Decl., ¶¶ 31, 46

12 **PLAINTIFFS’ RESPONSE**

13 *Disputed*.

14 *Bases for Dispute*: Sweeney Decl., ¶¶ 31, 46 say nothing about trap guns, and there is nothing in
15 those paragraphs that can even remotely be construed to compare repeating rifles either to trap
16 guns or LCMs. Thus, this unsupported asserted fact is irrelevant and immaterial to the issues.

17
18 **DEFENDANTS’ FACT NO. 24**

19 *Fact*: “The historical record is replete with reference to faultiness of these repeaters.”

20 *Cited support*: Cornell Decl., ¶ 44; Sweeney Decl., ¶ 27, 37, 43; DeLay Decl., ¶¶ 15, 30

21 **PLAINTIFFS’ RESPONSE**

22 *Disputed*.

23 *Bases for Dispute*: See Plaintiffs’ responses to Defendants’ Fact No. 17, as responsive to this
24 asserted fact as well, in showing the wide popularity and ubiquitous use of repeaters during the
25 relevant time period, which necessarily undermines any claim that they were generally faulty.
26 The “first really successful centerfire repeating rifle,” the Winchester Model 1873, “was an
27 accurate, ergonomic, reliable rifle chambered for revolver-compatible cartridges so that shooters
28 could carry one type of ammo for both their long gun and their sidearm.” Joseph von Benedikt,

1 *Winchester Model 1873 Rifle Review*, Shooting Times, June 18, 2013, online at
2 <https://www.shootingtimes.com/editorial/winchester-model-1873-rifle-review/99446>. Other
3 popular repeaters that, despite being from over a century ago, “are still the best lever action rifles
4 ever produced.” David E. Petzal, *The 8 Best Lever Action Rifles Ever Made*, Field & Stream,
5 November 3, 2022, online at <https://www.fieldandstream.com/guns/best-lever-action-rifles/>.

6
7 **DEFENDANTS’ FACT NO. 25**

8 *Fact*: “Similarly, ‘high-capacity firearms,’ like the Henry and Winchester rifles, were understood
9 during the era of Reconstruction to be weapons of war or anti-insurrection, not weapons of
10 individual self-defense.”

11 *Cited support*: Vorenberg Decl., ¶ 7

12 **PLAINTIFFS’ RESPONSE**

13 *Disputed*.

14 *Bases for Dispute*: How certain weapons were “understood” in a given period, by unknown
15 persons, is a matter of opinion or subjective judgment, not fact. And firearms like the Winchester
16 Repeating Rifle were possessed by citizens, as they “proved the ideal weapon for settlers and
17 cowboys...[a]s it didn’t need to be reloaded, [and] it was especially handy when fighting on
18 horseback.” *The man who created the ‘Gun That Won the West’—and how he never lost a wink*
19 *of sleep*, Country Life, January 12, 2017. Also, Vorenberg provides no proof of any such
20 understanding. Further, any such perception of these arms as being exclusive to militia purposes
21 is aligned with the “collective right” side of the Second Amendment rejected in *Heller*, which
22 declared that the Second Amendment guarantees an *individual* right to keep and bear arms in
23 common use for self-defense and other lawful purposes. *See Heller*, 554 U.S. at 579-580.

24
25 **DEFENDANTS’ FACT NO. 26**

26 *Fact*: “During Reconstruction, the only bearable, high-capacity firearms capable of firing more
27 than 10 rounds were the lever-action Henry Rifle and the Winchester Repeating Rifle (the
28 Winchester 66 and Winchester 73 models), which were capable of holding 15 rounds in a fixed

1 chamber within the firearm.”

2 *Cited support:* Vorenberg Decl., ¶¶ 20-21

3 **PLAINTIFFS’ RESPONSE**

4 *Disputed.*

5 *Bases for Dispute:* Reconstruction lasted from 1865 into 1877. The Henry and the Winchester
6 Models 1866 and 1873 were not the only bearable firearms capable of firing more than 10 rounds
7 at that time. The Evans Lever Action Rifles made during that period had magazine capacities of
8 34 rounds (“Old Model,” produced 1874 to 1876, and “Transition Model,” produced 1876 to
9 1877) and 28 rounds (“New Model,” produced 1877 to 1879). The Henry rifle had a 15 round
10 magazine and could hold one more round in the chamber for a total of 16 rounds. The magazine
11 capacity of the Winchester Model 1866 was not 15 rounds, but 13 rounds for carbines and 17
12 rounds for rifles and muskets. For the Model 1873, the magazine capacity in .44-40 (the original
13 standard cartridge) was 12 rounds for the carbine, 15 for standard rifles, and 16 for standard
14 muskets. Vorenberg does not mention the Winchester Model 1876, which was originally
15 chambered for the .45-75 cartridge, much more powerful than the earlier models, and held 9
16 rounds in the magazine for standard carbines, 12 rounds for the standard sporting rifles, and 13
17 rounds for the standard muskets. Vorenberg’s description of the Henry and Model 1866 as
18 “holding 15 rounds in a fixed chamber within the firearm” is odd to say the least, since both of
19 these had an underbarrel-mounted tubular magazine, which is not a “chamber” “within” the
20 firearm. For Evans rifles, see *Flayderman’s Guide to Antique American Firearms* at 694-95
21 (Ninth ed. 2019). For the Henry rifles, see R. Bruce McDowell, *Evolution of the Winchester* at
22 119 (1985). For the Model 1866, see *McDowell* at 138. For the Model 1873, see *McDowell* at
23 155. For the Model 1876, see *McDowell* at 160.

24

25 **DEFENDANTS’ FACT NO. 27**

26 *Fact:* “The Henry and Winchester repeaters were not adopted by the Union or Confederate
27 militaries during the Civil War and were not commonly acquired by soldiers returning from the
28 Civil War.”

1 *Cited support:* Vorenberg Decl., ¶¶ 24

2 **PLAINTIFFS’ RESPONSE**

3 *Disputed.*

4 *Bases for Dispute:*

5 A. It would have been difficult for Winchester repeaters, the earliest of which is the
6 Model 1866, to have been adopted by the Union or Confederate militaries, or to have been
7 commonly acquired by returning soldiers, since it was not put on the market until 1866 at the
8 very earliest, a year after the Civil War ended. The Henry repeater was formally adopted by the
9 Union military beginning in 1863 and several orders were placed for it by the U.S. Ordnance
10 Department. The Confederacy could not formally adopt it because it was manufactured in the
11 North, and the Union was not likely to supply their wartime adversary with arms. Numerous
12 sales were made directly to Northern cavalry and infantry officers and troops, to volunteers, and
13 to state militia forces. Altogether, about 10,000 Henry rifles were supplied to Union forces
14 through all means. *See* Harold F. Williamson, *Winchester, The Gun that Won the West* at 49
15 (1952) (“A few” of the Model 1866s “were made during 1866, but manufacture really began the
16 following year,” when production was moved to a new factory); regarding Ordnance
17 Department, *see* Williamson at 35; regarding 10,000, *see McDowell* at 116.

18 B. Further, Vorenberg states in ¶ 27 that approximately 7,500 Henrys were kept by
19 Union soldiers following the war. That is about 75% of all Henrys used in the war by Union
20 soldiers.

21

22 **DEFENDANTS’ FACT NO. 28**

23 *Fact:* “Following the Civil War, the circulation of Henry and Winchester lever-action repeating
24 rifles remained low, with few documented instances of possession by civilians.”

25 *Cited support:* Vorenberg Decl., ¶ 27

26 **PLAINTIFFS’ RESPONSE**

27 *Disputed.*

28 *Bases for Dispute:* *See* Plaintiffs’ responses to Defendants’ Fact No. 17, as responsive to this

1 asserted fact as well, in generally showing the wide popularity and ubiquitous use of repeaters
2 during the relevant time period. Further, Vorenberg does not discuss in ¶ 27 how many civilians
3 possessed Henry rifles following the Civil War, except returning soldiers. He does not discuss in
4 ¶ 27 how many civilians possessed lever-action Winchesters following the Civil War. Of
5 Winchester lever-action models first introduced between 1866 and 1899, production numbers are
6 approximately as follows: Model 1866: 170,101; Model 1873: 720,610; Model 1876: 63,871;
7 Model 1886: 159,994; Model 1892: 1,004, 067; Model 1894: in excess of 3 million to 1975.
8 *Flayderman's Guide, supra*, at 306-313.

9
10 **DEFENDANTS' FACT NO. 29**

11 *Fact*: “By the time the Fourteenth Amendment was ratified, the commercial viability of the
12 Winchester Model 1866 was due ‘almost entirely to sales to foreign armies,’ not to Americans.”
13 *Cited support*: Vorenberg Decl., ¶ 50; DeLay Decl., ¶ 67

14 **PLAINTIFFS' RESPONSE**

15 *Disputed*.

16 *Bases for Dispute*: See Plaintiffs' responses to Defendants' Fact No. 17, as responsive to this
17 asserted fact as well, in generally showing the wide popularity and ubiquitous use of repeaters
18 during the relevant time period. In any event, the time of ratification of the Fourteenth
19 Amendment has no significance to any issue in this case. See *Bruen*, 142 S.Ct. at 2136 (“we must
20 also guard against giving postenactment history more weight than it can rightly bear,” because
21 “post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning
22 of the constitutional text obviously cannot overcome or alter that text”) (internal quotation marks
23 omitted). Furthermore, the Fourteenth Amendment was ratified in 1868, one year after the Model
24 1866 went into significant production in 1867. See response to No. 27, above. So that is an
25 insignificant amount of time to judge the extent to which Winchester relied on foreign sales.
26 Additionally, the quote from Vorenberg in ¶ 50 refers not to the time the Fourteenth Amendment
27 was ratified, but to “prior to the end of Reconstruction,” which ended in 1877. Vorenberg ¶ 7.
28 Delay's Decl. at 67 is also unrepresentative because it is tailored to include a period ending in

1 1871, which included two anomalously large sales to Turkey. Despite these two large contracts,
2 it has been estimated that “a third or more of the Company’s output went into the non-military or
3 sporting-goods market” during these years. *See Williamson, supra*, at 56-57 for the one-third or
4 more non-military.

5
6 **DEFENDANTS’ FACT NO. 30**

7 *Fact*: “In 1868 these repeating rifles accounted for less than 0.002% of guns in the United
8 States.”

9 *Cited support*: DeLay Decl., ¶ 7

10 **PLAINTIFFS’ RESPONSE**

11 *Disputed.*

12 *Bases for Dispute*: DeLay does not purport to calculate the number of repeating rifles in 1868.
13 Instead, his calculation is for 1871. He does not show his calculation, but even if the low figure
14 of 9,294 is used (see DeLay Decl. ¶ 67), divided by five million, the percentage of “high
15 capacity” rifles is .2%, not .002%. It also picks a date that is very early in the production
16 Winchester lever-action rifles, many of which had capacities over ten rounds. *See* response to
17 No. 28, above. Additionally, as noted, the time of ratification of the Fourteenth Amendment has
18 no significance to any issue in this case.

19
20 **DEFENDANTS’ FACT NO. 31**

21 *Fact*: “There are no known shooting incidents involving ten or more fatalities before 1949, and
22 the number of such double-digit mass shootings increased dramatically in the period before and
23 after the federal assault weapons ban, mass shootings being defined as shootings resulting in four
24 or more victims being shot (fatally or nonfatally), regardless of location or underlying motive.”

25 *Cited support*: Klarevas Decl., ¶¶ 16-19 & n.7, tbl. 4

26
27 **PLAINTIFFS’ RESPONSE**

28 *Disputed.*

1 *Bases for Dispute:*

2 A. There were shooting incidents involving ten or more fatalities before 1949, such
3 as the murder of 11 people by Leung Ying in California on August 22, 1928. For Leung Ying see
4 <https://murderpedia.org/male.Y/y/ying-leung.htm>.

5 B. Also, the data compiled by Klarevas unjustifiably excludes “large-scale,
6 intergroup violence such as mob violence, rioting, combat or battle skirmishes, and attacks
7 initiated by authorities acting in their official capacity....” Of these, there are numerous incidents
8 of “double digit” mass killings. Many were killed by firearms and other media in the infamous
9 Tulsa Race Massacre of 1921. See Anna Codutti, *Tulsa Race Massacre graves search: ‘Major
10 scientific breakthrough’ made in DNA investigation*, Tulsa World, April 12, 2023, online at
11 [https://tulsaworld.com/news/local/racemassacre/tulsa-race-massacre-graves-search-major-
12 scientific-breakthrough-made-in-dna-investigation/article_2ed50126-d93e-11ed-abd1-](https://tulsaworld.com/news/local/racemassacre/tulsa-race-massacre-graves-search-major-scientific-breakthrough-made-in-dna-investigation/article_2ed50126-d93e-11ed-abd1-b7cb157513c8.html)

13 [b7cb157513c8.html](https://tulsaworld.com/news/local/racemassacre/tulsa-race-massacre-graves-search-major-scientific-breakthrough-made-in-dna-investigation/article_2ed50126-d93e-11ed-abd1-b7cb157513c8.html). The Herrin Massacre resulted in the killings of 21 people, in what President
14 Warren Harding called “a shocking crime, barbarity, butchery, rot and madness.” *The Herrin
15 Massacre*, Southern Illinois University, online at
16 https://www.cs.siu.edu/csday/2009_1/herrin_massacre.htm. Mass killings also are not novel
17 phenomena. For example, on March 22, 1622, Native Americans killed 347 English settlers,
18 wiping out over a quarter of the Jamestown population. Joshua J. Mark, *Indian Massacre of
19 1622*, World History Encyclopedia, March 2, 2021, online at

20 https://www.worldhistory.org/Indian_Massacre_of_1622/. A Lenape raid in October 1755
21 claimed fourteen lives along Penn’s Creek, Pennsylvania. John B. Deans, *The Penn’s Creek
22 Massacre*, Union County Sesquicentennial: The Story of a County, 1813–1963 (1963).

23 C. The list of similar mass atrocities goes on. Also, whether double-digit mass
24 shootings before and after the assault weapon ban “increased dramatically” is a matter of
25 opinion, not fact. Indeed, a Rand Corporation study found that “[e]vidence that high-capacity
26 magazine bans may decrease mass shootings is limited.” *Effects of Assault Weapon and High-
27 Capacity Magazine Bans on Mass Shootings*, RAND CORP., January 10, 2023, online at
28 <https://www.rand.org/research/gun-policy/analysis/ban-assault-weapons/mass-shootings.html>.

1 **DEFENDANTS’ FACT NO. 32**

2 *Fact:* “From the colonial period to the early 20th century, mass killings were generally
3 committed by groups of people because technological limitations constrained the ability of a
4 single person to commit mass murder.”

5 *Cited support:* Roth Decl., ¶ 41

6 **PLAINTIFFS’ RESPONSE**

7 *Disputed.*

8 *Bases for Dispute:* The undefined term of “technological limitations” is vague and ambiguous as
9 used herein. In any event, whether any “technological limitations” had anything to do with
10 changes in killings by groups versus individuals is not a fact, but an opinion. Changes in whether
11 mass killings were committed by groups vs. individuals may be explained equally, or better, by
12 societal attitudes, personal values, deteriorating social and psychological health, and a host of
13 other factors that Roth’s declaration fails to take into account in reaching the cited conclusion.

14

15 **DEFENDANTS’ FACT NO. 33**

16 *Fact:* “The development and proliferation of semiautomatic and automatic firearms technologies
17 in the 1920s and 1930s substantially increased the amount of carnage an individual could inflict,
18 which led to government regulation of those technologies.”

19 *Cited support:* Spitzer Decl., ¶¶ 50-51; Roth Decl., ¶ 47

20 **PLAINTIFFS’ RESPONSE**

21 *Disputed.*

22 *Bases for Dispute:*

23 A. The Spitzer Decl. ¶¶ 50-51 does not mention semiautomatic and automatic
24 firearms in the 1920s and 1930s, or government regulation of those technologies. The Roth Decl.
25 ¶ 47 states that “Thirteen states restricted the capacity of ammunition magazines for
26 semiautomatic and automatic firearms between 1927 and 1934.” But the source on which Roth
27 relies (an article by Spitzer, see n.106) cites only seven states as restricting firearms capacity (not
28 magazines) for semiautomatics. The seven states cited are Massachusetts, Rhode Island,

1 Michigan, Minnesota, Ohio, South Dakota, and Virginia. Rhode Island included firearms that
2 could shoot more than twelve shots semiautomatically as machine guns. But at that time virtually
3 no semiautomatic centerfire rifles or pistols could shoot more than twelve rounds without
4 reloading. Michigan had an even higher limit of more than 16 rounds. Minnesota did not ban
5 semiautomatics as they came from the manufacturer, but only if they had been “changed, altered
6 or modified to increase the magazine capacity from the original design as manufactured” or
7 otherwise changed to allow additional capacity. Ohio classified as a “machine gun” any “firearm
8 which shoots more than eighteen shots semi-automatically without reloading.” But it did not ban
9 them; it merely established a permitting system. South Dakota only banned firearms that could
10 discharge more than five shots “by a single function of the firing device”; that is, true fully
11 automatic machine guns. Virginia had a complex law that purported to cover some
12 semiautomatics, but was worded in such a way as to only ban Thompson submachine guns. Full
13 powered machine guns firing rifle cartridges could be possessed and used as long as it was for a
14 “purpose manifestly not aggressive or offensive.” The Spitzer article relied on by Roth suggests
15 that laws in Illinois, Louisiana, and South Carolina included “language that may also have
16 extended regulations to semi-automatic weapons.” But the laws in those three states applied
17 only to fully automatic firearms. Within a few decades, all of the above laws had been repealed.
18 “Only the District of Columbia’s 1932 ban (more than 10 rounds) has endured, and the District is
19 no model for conscientious compliance with the Second Amendment.” David Kopel, *The history*
20 *of magazines holding 11 or more rounds: Amicus brief in 9th Circuit*, The Washington Post,
21 May 29, 2014, online at [https://www.guns.com/news/2014/06/03/the-history-of-magazines-](https://www.guns.com/news/2014/06/03/the-history-of-magazines-holding-11-or-more-rounds-a-response-to-californias-magazine-ban)
22 [holding-11-or-more-rounds-a-response-to-californias-magazine-ban](https://www.guns.com/news/2014/06/03/the-history-of-magazines-holding-11-or-more-rounds-a-response-to-californias-magazine-ban); see also Robert J. Spitzer,
23 *Gun Accessories and the Second Amendment: Assault Weapons, Magazines, and Silencers, Law*
24 *and Contemporary Problems* at 83 (2020), online at
25 <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4970&context=lcp>.

26 B. Further, and more fundamentally, firearms laws and regulations first enacted in
27 the 20th Century are entirely irrelevant and cannot be relied upon as forming part of any
28 “relevantly similar” national tradition that could justify the challenged ban. *Bruen*, 142 S.Ct. at

1 2154 n.28 (“We will not address any of the 20th-century historical evidence brought to bear by
2 respondents or their amici. As with their late-19th-century evidence, the 20th-century evidence
3 presented by respondents and their amici does not provide insight into the meaning of the Second
4 Amendment when it contradicts earlier evidence.”).

5
6 **DEFENDANTS’ FACT NO. 34**

7 *Fact*: “This increased lethality has only accelerated over the past several decades.”

8 *Cited support*: Donohue Decl., ¶ 54

9 **PLAINTIFFS’ RESPONSE**

10 *Disputed*.

11 *Bases for Dispute*: Dispute to the extent this statement implies that semiautomatic firearms
12 function with any “increased lethality.” Indeed, according to a renowned forensic pathologist,
13 former medical examiner, and former member of the Justice Department’s National Commission
14 on Forensic Science, “[o]ne of the common fallacies about assault rifles is that the wounds
15 produced by them are more severe than those due to regular military rifle and hunting rifles. In
16 fact, the wounds are less severe, even when compared to such venerable hunting rifles as the
17 Winchester M-94 (introduced in 1894) and its cartridge the .30-30 (introduced in 1895).” *See*
18 Vincent J.M. DiMaio, *Gunshot Wounds: Practical Aspects of Firearms, Ballistics, and Forensic*
19 *Techniques* at 196 (2nd ed. 1999). Furthermore, the bullets fired by an AR-style rifle are far
20 smaller than those used since before the Founding: “Muskets, which were being transitioned
21 from matchlocks to flintlocks, were typically .75 caliber. That was a powerful, deadly weapon
22 that could create a three-quarters-of-an-inch wound. By comparison, today’s AR-15 rifle
23 typically fires a .223 caliber bullet, which is less than a quarter of an inch in diameter. In other
24 words, the seventeenth-century musket fired a bullet three times larger in diameter than the bullet
25 usually fired by the AR-15.” Stephen P. Halbrook, *America’s Rifle: The Case for the AR-15* at
26 104 (Google Books ed. 2022). All semiautomatic firearms have exactly the same inherent rate of
27 fire because the number of bullets that exit the muzzle in a unit of time depends entirely on how
28 fast its operator pulls the trigger: “Once one pulls the trigger and fires a round, another round

1 loads itself and may be fired by another pull of the trigger.” See Halbrook, *supra*, at 206.

2
3 **DEFENDANTS’ FACT NO. 35**

4 *Fact*: “LCMs in particular have greatly enhanced the lethality of mass shootings when they
5 occur.”

6 *Cited support*: Supp. Allen Decl., ¶¶ 27-28; Roth Decl., ¶¶ 49-51; Klarevas Decl., ¶ 14

7 **PLAINTIFFS’ RESPONSE**

8 *Disputed*.

9 *Bases for Dispute*:

10 A. This is a broad and subjective statement of opinion that cannot be responded to on
11 a factual basis. Of particular note, it is unclear what Defendants mean by “mass shootings.” Not
12 only is there “no standard definition of what constitutes a mass shooting,” with “different data
13 sources—such as media outlets, academic researchers, and law enforcement agencies—
14 frequently us[ing] different definitions when discussing and analyzing mass shootings,” the
15 soundness of Defendants’ statistical observation dispositively turns on what they choose to
16 define as a “mass shooting.” Rosanna Smart & Terry L. Schell, *Mass Shootings in the United*
17 *States*, Rand Corp. (Apr. 15, 2021), <https://bit.ly/3L9kzH4>.

18 B. But, even if mass shootings could be definitively defined, they involve so many
19 factors that their lethality cannot be broadly traced to the capacity of a particular magazine. For
20 example, *every single mass shooter*, as defined by a 2017 study, who used a so-called large
21 capacity magazine between 1994 and 2013 also brought to the scene of the shooting multiple
22 firearms and magazines—an average of 5.78 magazines in each instance. Gary Kleck, *Large-*
23 *Capacity Magazines and the Casualty Counts in Mass Shootings: The Plausibility of Linkages*,
24 17 J. Res. & Pol’y 28, 31-32, 40-42 (2016); see also *Mass Shooting Incidents in America (1984–*
25 *2012)*, Citizens Crime Commission of New York City at 6, 8 (2017), online at
26 <http://www.nycrimecommission.org/mass-shooting-incidents-america.php>. By contrast, citizens
27 plainly do not and cannot go about the demands of everyday life with multiple firearms and six
28 magazines on their person. As noted, a Rand Corporation study found that “[e]vidence that high-

1 capacity magazine bans may decrease mass shootings is limited.” *Effects of Assault Weapon and*
2 *High-Capacity Magazine Bans on Mass Shootings*, Rand Corp., January 10, 2023.

3 C. Criminals misusing firearms will always have a tactical advantage bestowed by
4 their planning and forethought. Meanwhile, it is those reacting to an aggressor who are limited
5 by what they can carry in the course of their everyday lives. The actions of criminals do not
6 affect the rights of those who wish to avail themselves of the advantages that common firearms
7 and magazines offer for defense of self, others, and home.

8
9 **DEFENDANTS’ FACT NO. 36**

10 *Fact*: “Of all the shootings in American history involving 14 or more fatalities, 100% involved
11 the use of LCMs.”

12 *Cited support*: Klarevas Decl. ¶ 14 & tbl. 4

13 **PLAINTIFFS’ RESPONSE**

14 *Response*: While Plaintiffs decline to dispute at this time because they do not presently have
15 knowledge of the number of shootings involving an arbitrary number of fatalities and the kinds
16 of magazines used in them, this appears to be a framing contrived to arrive at a statistic the State
17 finds favorable to its position. Moreover, regardless of whether this assertion is accurate, it
18 misconstrues and mischaracterizes the issue in dispute: the extent to any of the arms at issue
19 might be used for harmful purposes in the hands of criminals or wrongdoers cannot justify the
20 restrictions being imposed against Plaintiffs and the law-abiding citizens they represent in this
21 case who indisputably wish to use such arms for the *lawful* purposes secured for law-abiding
22 citizens under the Second Amendment. Just as the State could not justify a general ban against
23 the use of popular fora for free speech (like Facebook and Instagram) based on the risk that *some*
24 may misuse those fora to perpetrate or facilitate criminal conduct, it cannot justify a general ban
25 against LCMs based on the risk that some use them to commit criminal acts. Likewise, in
26 attempting to justify the general LCM ban based on the State’s interest in combatting such risks,
27 any such assertion runs afoul of *Bruen*’s clear mandate that courts must abandon any “judge-
28 empowering ‘interest-balancing inquiry’ that ‘asks whether the statute burdens a protected

1 interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon
2 other important governmental interests.’ ” *Bruen*, 142 S.Ct. at 2129 (quoting *Heller*, 554 U.S. at
3 634.) Therefore, this assertion of fact is irrelevant and immaterial to the issues in dispute.

4
5 **DEFENDANTS’ FACT NO. 37**

6 *Fact*: “If one looks at the deadliest acts of intentional mass violence in the United States since
7 9/11, they all share one feature. The killer in every case used a weapon equipped with a high-
8 capacity magazine.”

9 *Cited support*: Donohue Decl., ¶ 30

10 **PLAINTIFFS’ RESPONSE**

11 *Disputed*.

12 *Bases for Dispute*: This statement is too subjective to be responded to on a factual basis. Of note,
13 it is unclear what qualifies as a “deadl[y] act[] of intentional mass violence” or to how many of
14 them the State is referring. As with Defendants’ Fact No. 36, this appears to be a framing
15 contrived to arrive at a statistic the State finds favorable to its position. And, just like
16 Defendants’ Fact No. 36, this assertion of fact essentially focuses on the rate or incidence of
17 misuse of LCMs and its “salutary effects upon other important governmental interests,” which is
18 irrelevant and immaterial to the issues in dispute as explained in response to Fact No. 36.

19
20 **DEFENDANTS’ FACT NO. 38**

21 *Fact*: “Just in the past two years, the United States has experienced numerous, devastating mass
22 shootings with firearms equipped with large-capacity magazines, including the March 16, 2021
23 Atlanta spa shootings (8 killed), the March 22, 2021 shooting at King Soopers supermarket in
24 Boulder, Colorado (10 killed); the April 15, 2021 shooting at an Indianapolis FedEx warehouse
25 (8 killed); the May 26, 2021 shooting at a transportation authority facility in San Jose, California
26 (9 killed); the May 14, 2022 supermarket shooting in Buffalo, New York (10 killed); the May 24,
27 2022 shooting at Robb Elementary School in Uvalde, Texas (19 children and 2 adults killed); the
28 July 4, 2022 shooting at a Fourth of July parade in Highland Park, Illinois (7 killed), the

1 November 20, 2022 shooting in a Colorado Springs nightclub in which five people were killed
2 and 17 wounded, the November 22, 2022 shooting at a Virginia Walmart that left 7 dead, the
3 January 2023 shooting at a dance studio in Monterey Park, California that killed 11 and wounded
4 nine others, the March 2023 shooting at the elementary school in Nashville that killed six,
5 including three 9-year-old children; and the April 10, 2023 shooting at a Louisville bank that
6 killed five.”

7 *Cited support:* Donohue Decl., ¶ 22

8
9 **PLAINTIFFS’ RESPONSE**

10 *Admitted* to the extent the facts of the listed shootings speak for themselves.

11 *Disputed* to the extent this statement implies certain magazines cause shootings such as these.

12 Further, as with Defendants’ Fact Nos. 36 and 37, this assertion focuses on the rate or incidence
13 of misuse of LCMs and its “salutary effects upon other important governmental interests,” which
14 is irrelevant and immaterial to the issues in dispute as explained in response to Fact No. 36.

15
16 **DEFENDANTS’ FACT NO. 39**

17 *Fact:* “In the 18th and 19th centuries, laws required gunpowder to be stored on the top floor of a
18 building and permitted government officials to remove it when necessary to prevent explosions
19 and to transfer the powder to the public magazine.”

20 *Cited support:* See Cornell Decl., ¶ 47

21 **PLAINTIFFS’ RESPONSE**

22 *Admitted* to the extent that laws of this general nature existed during the 18th and 19th centuries.

23 *Disputed* that these laws have any material bearing on the analysis as constituting any sort of
24 “relevantly similar” historical analogue. Neither the “how” nor the “why” of the burdens these
25 regulations imposed on a law-abiding citizen’s right to armed self-defense—regulations on the
26 *storage* of gunpowder to reduce the incidence of fires and explosions from unmonitored
27 stockpiles—could demonstrate that a broad prohibition of LCMs otherwise in common use for
28 lawful purposes, i.e., for purposes that do *not* inflict any societal harm, is “part of an enduring

1 American tradition of state regulation.” *Bruen*, 142 S.Ct. at 2155. In fact, examples of these
2 gunpowder regulations show that they did not *blanketly* prohibit or compel forfeitures of
3 offending stockpiles, but rather provided an opportunity for a hearing, at which the owner was
4 allowed “to appear, and show cause why the gun powder, so seized or taken, should not be
5 adjudged forfeit,” before the supply would be deemed forfeited or the owner would be penalized.
6 *See e.g.*, 1821 Me. L. chap. 25, p. 98-100 (attached as Exhibit A); 1832 Conn. L. chap. 25, p.
7 391-2 (attached as Exhibit B) (providing that “if any person shall consider himself aggrieved
8 by the doings of the select-men [state actors charged with removing and relocating such
9 gunpowder], he may petition the next county court, which may grant the proper relief”).

10
11 **DEFENDANTS’ FACT NO. 40**

12 *Fact*: “During the colonial period, states began to enact restrictions on ‘trap guns,’ laws that
13 proliferated in the 19th century.”

14 *Cited support*: Spitzer Decl., ¶¶ 72-75, & Exs. B & F

15 **PLAINTIFFS’ RESPONSE**

16 *Admitted* to the extent that laws of this general nature existed during the 18th and 19th centuries.

17 *Disputed* that these laws have any material bearing on the analysis as constituting any sort of
18 “relevantly similar” historical analogue. Neither the “how” nor the “why” of the burdens these
19 regulations imposed on a law-abiding citizen’s right to armed self-defense—regulations designed
20 to reduce the incidence of death or injury from a “*trap*” gun designed to protect a person’s
21 property by indiscriminately firing at whomever happened to traverse the protected area—could
22 demonstrate that a broad prohibition of LCMs otherwise in common use for lawful purposes, i.e.,
23 for purposes that do *not* inflict any societal harm, is “part of an enduring American tradition of
24 state regulation.” *Bruen*, 142 S.Ct. at 2155. Therefore, this assertion of fact is irrelevant and
25 immaterial to the issues in dispute.

26
27 **DEFENDANTS’ FACT NO. 41**

28 *Fact*: “A trap gun was a firearm that was configured in a way to fire remotely (without the user

1 operating the firearm), typically by rigging the firearm to be fired by a string or wire when
2 tripped.”

3 *Cited support:* Spitzer Decl., ¶ 72

4 **PLAINTIFFS’ RESPONSE**

5 *Response:* see Plaintiffs’ response to Defendants’ Fact No. 40, incorporated herein as equally
6 applicable and responsive to Defendants’ Fact No. 41.

7

8 **DEFENDANTS’ FACT NO. 42**

9 *Fact:* “Trap guns were used to protect personal or commercial property.”

10 *Cited support:* Spitzer Decl., ¶ 73

11 **PLAINTIFFS’ RESPONSE**

12 *Response:* see Plaintiffs’ response to Defendants’ Fact No. 40, incorporated herein as equally
13 applicable and responsive to Defendants’ Fact No. 42.

14

15 **DEFENDANTS’ FACT NO. 43**

16 *Fact:* “Just as Massachusetts prohibited the storage of loaded guns inside the home to prevent
17 accidental harm, trap gun laws regulated the manner in which firearms could be kept and
18 configured to protect the public from harm.”

19 *Cited support:* Spitzer Decl., 75 & Exs. B & F

20 **PLAINTIFFS’ RESPONSE**

21 *Response:* see Plaintiffs’ response to Defendants’ Fact No. 40, incorporated herein as equally
22 applicable and responsive to Defendants’ Fact No. 43.

23

24 **DEFENDANTS’ FACT NO. 44**

25 *Fact:* “As homicide rates increased in the South in the early 1800s, states began restricting the
26 carrying of certain concealable weapons.”

27 *Cited support:* Roth Decl., ¶ 23; Spitzer Decl., ¶ 55; Rivas Decl., ¶¶ 15-17

28 **PLAINTIFFS’ RESPONSE**

1 *Disputed*. The documented homicide rates were generally lower in the South during this time.
2 *See* RANDOLPH ROTH, AMERICAN HOMICIDE 180–83 (2009) (attached as Exhibit C).
3 Further, restrictions on carry rights during this period cannot constitute any sort of “relevantly
4 similar” historical analogue that would justify the LCM ban. Laws prohibiting the concealed
5 carry of firearms and other weapons existed in only a small number of colonies during this
6 period, those that were challenged and upheld were sustained based on militia-centric
7 interpretations of the right to keep and bear arms later rejected in *Heller*, and most others were
8 repudiated by the people of the affected territories as soon as they could form their own
9 constitutions. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*
10 at 163. Excluding the militia-centric laws and those repudiated by the affected people, “[t]he list
11 of precedential carry bans is thus reduced to ‘half a colony’ for eight years (East Jersey), and one
12 state instruction to local governments that was ignored (Kansas),” thus leaving only two carry
13 bans precedents potentially relevant to the Second Amendment. *Id.* “That is surely too slender a
14 reed on which to hang a historical tradition,” *Bruen*, 142 S.Ct. at 2149, particularly when this
15 precedent concerns *carry* restrictions, not a ban on *firearm magazines of a certain capacity*, the
16 “how and why” which are fundamentally different. In fact, many of the laws and regulations
17 restricting firearm carry rights involved *complete* bans on carrying in public—i.e., both
18 concealed *and* open carry. *Id.* at 85-116. *Bruen* made clear that such blanket prohibitions are
19 themselves unconstitutional, as “outliers.” 142 S.Ct. at 2150. Here, the LCM ban has *no*
20 historical counterpart and thus cannot even be said to be a part of group of historically relevant
21 “outliers.” Such laws are outliers *today*, given the wide availability and ubiquitous use for lawful
22 purposes across the country. *See* English, *National Firearms Survey* at 1-2 (“48.0% of gun
23 owners – about 39 million individuals – have owned magazines that hold over 10 rounds (up to
24 542 million such magazines in total and “approximately 171 million handguns”), but the point is,
25 the historical restrictions on carry rights cannot establish that the LCM ban is part of a relevant
26 historical tradition of firearms regulation.

27
28

1 **DEFENDANTS’ FACT NO. 45**

2 *Fact:* “These concealed weapons laws targeted the specific types of weapons that were
3 commonly used in the murders and serious assaults that caused an alarming rise in homicides at
4 the time.”

5 *Cited support:* Roth Decl., ¶ 23

6 **PLAINTIFFS’ RESPONSE**

7 *Disputed.*

8 *Bases for Dispute:* See Plaintiffs’ response to Defendants’ Fact No. 44, incorporated herein as
9 equally applicable and responsive to Defendants’ Fact No. 45.

10

11 **DEFENDANTS’ FACT NO. 46**

12 *Fact:* “Throughout this period, states enacted a range of laws restricting the carrying of blunt
13 weapons: 12 states restricted ‘bludgeons’; 14 states restricted ‘billies’; seven states restricted
14 ‘clubs’; 43 states restricted ‘slungshots’; six states restricted ‘sandbags’; and 12 states broadly
15 restricted any concealed weapon. “

16 *Cited support:* Spitzer Decl., ¶¶ 56-62 & Ex. C

17 **PLAINTIFFS’ RESPONSE**

18 *Disputed.*

19 *Bases for Dispute:* See Plaintiffs’ response to Defendants’ Fact No. 44, incorporated herein as
20 equally applicable and responsive to Defendants’ Fact No. 46 which relies upon historical
21 regulations “broadly” restricting concealed weapons.

22

23 **DEFENDANTS’ FACT NO. 47**

24 *Fact:* “From 1813 to the Mexican War, numerous states and territories also restricted the
25 concealed carrying of particular weapons. These concealed weapons laws were intended to
26 specifically address the rise in murders and assaults throughout the South at that time.”

27 *Cited support:* Roth Decl., ¶ 23

28

1 **PLAINTIFFS’ RESPONSE**

2 *Disputed.*

3 *Bases for Dispute:* See Plaintiffs’ response to Defendants’ Fact No. 44, incorporated herein as
4 equally applicable and responsive to Defendants’ Fact No. 47 which relies upon regulations
5 against the concealed carrying of weapons.

6
7 **DEFENDANTS’ FACT NO. 48**

8 *Fact:* “Class and racial tensions led to a dramatic increase in the number of deadly quarrels,
9 property disputes, duels, and interracial killing during the period, and individuals turned to
10 concealable weapons to ambush both ordinary citizens and political rivals, to bully or intimidate
11 law-abiding citizens, and to seize the advantage in fist fights.”

12 *Cited support:* Roth Decl., ¶¶ 23-24

13
14 **PLAINTIFFS’ RESPONSE**

15 *Disputed.*

16 *Bases for Dispute:* See Plaintiffs’ response to Defendants’ Fact No. 44, incorporated herein as
17 equally applicable and responsive to Defendants’ Fact No. 48 which relies upon regulations
18 against the concealed carrying of weapons.

19
20 **DEFENDANTS’ FACT NO. 49**

21 *Fact:* “In addition to prohibiting concealable, blunt weapons—which are dangerous weapons
22 used mainly for criminal mischief—49 states (all except for New Hampshire) enacted restrictions
23 on Bowie knives and other ‘fighting knives’ in the 19th century, including around the time that
24 the Fourteenth Amendment was ratified.”

25 *Cited support:* Spitzer Decl., ¶ 60 & Ex. C

26 **PLAINTIFFS’ RESPONSE**

27 *Disputed.*

28 *Bases for Dispute:* See Plaintiffs’ response to Defendants’ Fact No. 44, incorporated herein as

1 equally applicable and responsive to Defendants’ Fact No. 49 which relies upon historical
2 regulations restricting “dangerous weapons used mainly for criminal mischief.” Further, as
3 asserted and demonstrated throughout Plaintiffs’ briefing and evidence, the arms at issue are
4 neither “dangerous” nor “unusual” so as to be subject to a ban and, again, even if a weapon
5 might have been considered “dangerous and unusual” at one point in time, that does not prevent
6 it from becoming protected as “common.” *See Bruen*, 142 S.Ct. 2143 (“even if these colonial
7 laws prohibited the carrying of handguns because they were considered ‘dangerous and unusual
8 weapons’ in the 1690s, they provide no justification for laws restricting the public carry of
9 weapons that are unquestionably in common use today”). The LCMs targeted by the ban are
10 unquestionably in common use for lawful purposes today. *National Firearms Survey* at 1-2.

11
12 **DEFENDANTS’ FACT NO. 50**

13 *Fact*: “Many state laws enacted during the 19th century also included revolvers and pistols in
14 their lists of proscribed weapons.”

15 *Cited support*: Roth Decl., ¶ 26

16 **PLAINTIFFS’ RESPONSE**

17 *Disputed*.

18 *Bases for Dispute*: *See* Plaintiffs’ response to Defendants’ Fact No. 44, incorporated herein as
19 equally applicable and responsive to Defendants’ Fact No. 50, insofar as this assertion concerns
20 restrictions on the carrying or concealment of weapons. Plaintiffs further incorporate herein their
21 response to Defendants’ Fact No. 49 as equally applicable and responsive insofar it illustrates
22 that, regardless of the nature and scope of such historical restrictions against other arms, the arms
23 at issue cannot be banned because they are in common use today.

24
25 **DEFENDANTS’ FACT NO. 51**

26 *Fact*: “These laws aimed to curb the use of concealable weapons that exacerbated rising
27 homicide rates in the South and its borderlands.”

28 *Cited support*: Roth Decl., ¶ 26

1 **PLAINTIFFS’ RESPONSE**

2 *Disputed.*

3 *Bases for Dispute:* See Plaintiffs’ response to Defendants’ Fact No. 44, incorporated herein as
4 equally applicable and responsive to Defendants’ Fact No. 51.

5
6 **DEFENDANTS’ FACT NO. 52**

7 *Fact:* “State constitutions adopted during Reconstruction expressly linked the right to keep and
8 bear arms to the state’s authority to regulate arms: ‘Every person shall have the right to keep and
9 bear arms, in the lawful defence of himself or the government, under such regulations as the
10 Legislature may prescribe.’”

11 *Cited support:* Cornell Decl., ¶ 22 n.73; id. at ¶ 49

12 **PLAINTIFFS’ RESPONSE**

13 *Admitted* that constitutional provisions of this nature existed during that time frame.

14 *Disputed* that the existence of such provisions is materially relevant to any fact in dispute here.
15 Until *Heller*, it wasn’t settled that the nature of the right to keep and bear arms was *individual* in
16 nature and not simply a “collective” right, and the notion that it was limited to the latter form of
17 right influenced constitutional provisions of this nature. See Kopel & Joseph G.S. Greenlee, *The*
18 *History of Bans on Types of Arms Before 1900* at 71. Further, although *Heller* already made this
19 clear, the *Bruen* opinion erased any lingering doubt that the individual Second Amendment is not
20 and cannot be interpreted *subject to* “such regulations as the Legislature may prescribe.” Any
21 such rationale would endorse the framework that *Bruen* took pains to reject in declaring that the
22 Second Amendment’s “unqualified command” is what ultimately controls, not the policy
23 judgments of future legislatures or judges as to whether “the right is *really worth* insisting upon.”
24 *Bruen*, 142 S.Ct. at 2129 (quoting *Heller*, 554 U.S. at 634).

25
26 **DEFENDANTS’ FACT NO. 53**

27 *Fact:* “During this period, the federal government regulated access to particularly dangerous
28 weapons, including the Henry and Winchester lever-action repeating rifles that began to circulate

1 in the postbellum period, and along with state militias sought to prevent access to those weapons
2 to insurrectionary groups and Native Americans.”

3 *Cited support:* Vorenberg Decl., ¶¶ 7-10, 21-22, 63-64

4 **PLAINTIFFS’ RESPONSE**

5 *Disputed.*

6 *Bases for Dispute:* As asserted and demonstrated throughout Plaintiffs’ briefing and evidence,
7 the arms at issue are neither “dangerous” nor “unusual” so as to be subject to a ban and, again,
8 even if a weapon might have been considered “dangerous and unusual” at one point in time, that
9 does not prevent it from becoming protected as “common.” *See Bruen*, 142 S.Ct. 2143 (“even if
10 these colonial laws prohibited the carrying of handguns because they were considered
11 ‘dangerous and unusual weapons’ in the 1690s, they provide no justification for laws restricting
12 the public carry of weapons that are unquestionably in common use today”). The LCMs targeted
13 by the ban are unquestionably in common use for lawful purposes today. *National Firearms*
14 *Survey* at 1-2. Further, as outlined above in response to Defendants’ Fact No. 24, repeaters were
15 wide popularity and ubiquitously used during the relevant time period, which necessarily
16 undermines any claim that the governments meaningfully “regulated” or “prevented” ordinary
17 people from obtaining and using them, much less outright banned them like the LCM ban.

18
19 **DEFENDANTS’ FACT NO. 54**

20 *Fact:* “Notably, when semiautomatic and automatic weapons began to circulate more widely in
21 society and appear more frequently in crime in the 1920s, states began to regulate semiautomatic
22 and automatic weapons capable of firing a certain number of rounds successively and weapons
23 capable of receiving ammunition from feeding devices.”

24 *Cited support:* Spitzer Decl., ¶¶ 11, 13

25 **PLAINTIFFS’ RESPONSE**

26 *Disputed.*

27 *Bases for Dispute:* Again, as *Bruen* makes clear, firearms laws and regulations first enacted in
28 the 20th Century are entirely irrelevant and cannot be relied upon as forming part of any

1 “relevantly similar” national tradition that could justify the challenged ban. *Bruen*, 142 S.Ct. at
2 2154 n.28 (“We will not address any of the 20th-century historical evidence brought to bear by
3 respondents or their amici. As with their late-19th-century evidence, the 20th-century evidence
4 presented by respondents and their amici does not provide insight into the meaning of the Second
5 Amendment when it contradicts earlier evidence.”). Further, *assuming* they bear any relevance,
6 Defendants’ inclusion of laws and regulations concerning *automatic* weapons misleadingly
7 inflates the number of such restrictions, since the challenge at issue concerns only *semiautomatic*
8 weapons. In any event, the timeframe of such laws renders them irrelevant to the analysis. *Id.*

9
10 **DEFENDANTS’ FACT NO. 55**

11 *Fact*: “Thirteen states enacted restrictions on semiautomatic or fully automatic firearms capable
12 of firing a certain number of rounds without reloading; eight states regulated fully automatic
13 weapons, defined as a firearm capable of firing a certain number of rounds without reloading or
14 accepting an ammunition feeding device; and four states restricted all guns that could receive any
15 type of ammunition feeding mechanism or round feeding device and fire them continuously in a
16 fully automatic manner, including a 1927 California law.”

17 *Cited support*: Spitzer Decl., ¶¶ 13–14

18 **PLAINTIFFS’ RESPONSE**

19 *Disputed*.

20 *Bases for Dispute*: See Plaintiffs’ response to Defendants’ Fact No. 54, incorporated herein as
21 equally applicable and responsive to Defendants’ Fact No. 55.

22
23 **DEFENDANTS’ FACT NO. 56**

24 *Fact*: “These early 20th century firearm regulations followed the same regulatory pattern of state
25 and federal restrictions on large-capacity magazines in the late 20th century after the rise in mass
26 shootings.”

27 *Cited support*: Spitzer Decl., ¶¶ 9-10

28

1 **PLAINTIFFS’ RESPONSE**

2 *Disputed.*

3 *Bases for Dispute:* See Plaintiffs’ response to Defendants’ Fact No. 54, incorporated herein as
4 equally applicable and responsive to Defendants’ Fact No. 56. Plaintiffs also again note the
5 inherent ambiguity of the term “mass shooting” as discussed in their response to Defendants’
6 Fact No. 35.

7
8 **DEFENDANTS’ FACT NO. 57**

9 *Fact:* “Section 32310 is justified because it regulates a weapon accessory that is used frequently
10 in mass shootings and leads to greater numbers of casualties when that accessory is used.”

11 *Cited support:* Roth Decl., ¶ 23; Klarevas Decl., ¶¶ 13-14 & figs. 3-4

12 **PLAINTIFFS’ RESPONSE**

13 *Disputed.*

14 *Bases for Dispute:* This purported factual assertion is a *legal* conclusion regarding the meaning
15 and application of the LCM ban and must be disregarded as such. Further, *see* Plaintiffs’
16 response to Defendants’ Fact No. 35, incorporated herein as equally applicable and responsive to
17 Defendants’ Fact No. 57, insofar as it makes *factual* assertions regarding the incidence of “mass
18 shootings” and fatalities related to the use of LCMs. Additionally, Defendants’ assertion that the
19 LCM ban is and can be justified based on the claimed risks and concerns about “mass shootings”
20 and “greater number of casualties when that accessory is used” entirely misconstrues and
21 misapplies the test that *Bruen* mandates. As Defendants concede elsewhere, under *Bruen*, they
22 must show the LCM is part of “part of an enduring American tradition of state regulation”
23 stemming from historical analogues during the *relevant* time period that are *relevantly similar*
24 based on the “how and why” of their burden on the Second Amendment rights at stake. *Bruen*,
25 142 S.Ct. at 2155. They cannot and have not done so.

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THE DIGUISEPPE LAW FIRM, P.C.

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