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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-55376

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

Plaintiffs-Appellees,

v.

ROB BONTA, in his official capacity as Attorney General of the State of California,

Defendant-Appellant.

Argued and Submitted En Banc: June 22, 2021
Filed: Nov. 30, 2021

Before: Sidney R. Thomas, Chief Judge, and Susan P. Graber, Richard A. Paez, Marsha S. Berzon, Sandra S. Ikuta, Mary H. Murguia, Paul J. Watford, Andrew D. Hurwitz, Ryan D. Nelson, Patrick J. Bumatay and Lawrence VanDyke, Circuit Judges.

OPINION

GRABER, Circuit Judge:

In response to mass shootings throughout the nation and in California, the California legislature enacted Senate Bill 1446, and California voters adopted Proposition 63. Those laws amended California Penal Code section 32310 to prohibit possession of large-capacity magazines, defined as those that can hold more than ten rounds of ammunition. California law allows owners of large-capacity magazines to modify them to accept ten rounds or fewer. Owners also may sell their magazines to firearm dealers or remove them from the state. And the law provides several exceptions to the ban on large-capacity magazines, including possession by active or retired law enforcement officers, security guards for armored vehicles, and holders of special weapons permits.

Plaintiffs, who include persons who previously acquired large-capacity magazines lawfully, bring a facial challenge to California Penal Code section 32310. They argue that the statute violates the Second Amendment, the Takings Clause, and the Due Process Clause. We disagree.

Reviewing de novo the district court's grant of summary judgment to Plaintiffs, *Salisbury v. City of Santa Monica*, 998 F.3d 852, 857 (9th Cir. 2021), we hold: (1) Under the Second Amendment, intermediate scrutiny applies, and section 32310 is a reasonable fit for the important government interest of reducing gun violence. The statute outlaws no weapon, but only limits the size of the magazine that may be used with firearms, and the record demonstrates (a) that the limitation interferes only minimally with the core

right of self-defense, as there is no evidence that anyone ever has been unable to defend his or her home and family due to the lack of a large-capacity magazine; and (b) that the limitation saves lives. About three-quarters of mass shooters possess their weapons and large-capacity magazines lawfully. In the past half-century, large-capacity magazines have been used in about three-quarters of gun massacres with 10 or more deaths and in 100 percent of gun massacres with 20 or more deaths, and more than twice as many people have been killed or injured in mass shootings that involved a large-capacity magazine as compared with mass shootings that involved a smaller-capacity magazine. Accordingly, the ban on legal possession of large-capacity magazines reasonably supports California's effort to reduce the devastating damage wrought by mass shootings. (2) Section 32310 does not, on its face, effect a taking. The government acquires nothing by virtue of the limitation on the capacity of magazines, and because owners may modify or sell their nonconforming magazines, the law does not deprive owners of all economic use. (3) Plaintiffs' due process claim essentially restates the takings claim, and it fails for the same reasons. Accordingly, we reverse the judgment of the district court and remand for entry of judgment in favor of Defendant Rob Bonta, Attorney General for the State of California.

FACTUAL AND PROCEDURAL HISTORY

A. *Large-Capacity Magazines*

A magazine is an "ammunition feeding device" for a firearm. Cal. Penal Code § 16890. On its own, a magazine is practically harmless and poses no threat

to life or limb. But when filled with bullets and attached to a firearm, its deadliness is equally obvious. A magazine enables a shooter to fire repeatedly—a number of times up to the ammunition capacity of the magazine—without reloading. Once a magazine is empty, the shooter may continue to fire only after pausing to change magazines or to reload the original magazine. The time it takes to change magazines ranges from about two to ten seconds, depending on the skill of the shooter and the surrounding circumstances. *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J. ("ANJRPC")*, 910 F.3d 106, 113 (3d Cir. 2018).

California and many other jurisdictions define a "large-capacity magazine" as a magazine capable of holding more than ten rounds of ammunition. *E.g.*, Cal. Penal Code § 16740; 18 U.S.C. § 921(a)(31)(A) (1994); Conn. Gen. Stat. § 53-202w(a)(1); D.C. Code § 7-2506.01(b); N.J. Stat. Ann. § 2C:39-1(y). Large-capacity magazines thus allow a shooter to fire more than ten rounds without any pause in shooting.

Most, but not all, firearms use magazines. For those firearms that accept magazines, manufacturers often include large-capacity magazines as a standard part of a purchase of a firearm. "Most pistols are manufactured with magazines holding ten to seventeen rounds, and many popular rifles are manufactured with magazines holding twenty or thirty rounds." *Kolbe v. Hogan*, 849 F.3d 114, 129 (4th Cir. 2017) (en banc). Although data on magazine ownership are imprecise, some experts estimate that approximately half of all privately owned magazines

in the United States have a capacity greater than ten rounds. *Id.*

As we will discuss in detail below, Defendant introduced evidence that mass shootings often involve large-capacity magazines, to devastating effect. Shooters who use large-capacity magazines cause significantly more deaths and injuries than those shooters who are equipped with magazines of smaller capacity. Intended victims and law enforcement officers use brief pauses in shooting to flee or to fight back. Because shooters who are equipped with large-capacity magazines may fire many bullets without pause, shooters are able to—and do—inflict far more damage using those magazines than they otherwise could.

B. *California's Ban*

In 1994, Congress banned the possession or transfer of large-capacity magazines. Pub. L. 103-322, § 110103, Sept. 13, 1994, 108 Stat. 1796, 1998-2000 (formerly codified at 18 U.S.C. § 922(w)). The federal ban exempted those magazines that were legally possessed before the date of enactment. *Id.* The law expired ten years later, in 2004. *Id.* § 110105(2).

California began regulating large-capacity magazines in 2000, prohibiting their manufacture, importation, or sale in the state. Cal. Penal Code § 12020(a)(2) (2000). After the expiration of the federal ban, California strengthened its law in 2010 and again in 2013 by, among other things, prohibiting the purchase or receipt of large-capacity magazines. Cal. Penal Code § 32310(a) (2013). But possession of large-capacity magazines remained legal, and law enforcement officers reported to the California

legislature that, as a result, enforcement of the existing laws was "very difficult."

In 2016, the California legislature enacted Senate Bill 1446, which barred possession of large-capacity magazines as of July 1, 2017, and imposed a fine for failing to comply. 2016 Cal. Stat. ch. 58, § 1. Later in 2016, voters in California approved Proposition 63, also known as the Safety for All Act of 2016, which subsumed Senate Bill 1446 and added provisions that imposed a possible criminal penalty of imprisonment for up to a year for unlawful possession of large-capacity magazines after July 1, 2017. Cal. Penal Code § 32310(c). Proposition 63 declared that large-capacity magazines "significantly increase a shooter's ability to kill a lot of people in a short amount of time." Prop. 63 § 2(11). "No one except trained law enforcement should be able to possess these dangerous ammunition magazines," and the present law's lack of a ban on possession constituted a "loophole." *Id.* § 2(12). The law's stated purpose is "[t]o make it illegal in California to possess the kinds of military-style ammunition magazines that enable mass killings like those at Sandy Hook Elementary School; a movie theater in Aurora, Colorado; Columbine High School; and an office building at 101 California Street in San Francisco, California." *Id.* § 3(8).

California law defines a "large-capacity magazine" as

> any ammunition feeding device with the capacity to accept more than 10 rounds, but shall not be construed to include any of the following:

> (a) A feeding device that has been permanently altered so that it cannot accommodate more than 10 rounds.
>
> (b) A .22 caliber tube ammunition feeding device.
>
> (c) A tubular magazine that is contained in a lever-action firearm.

Cal. Penal Code § 16740. The ban on possession of large-capacity magazines exempts persons who are active or retired law enforcement officers, security guards for armored vehicles, and holders of special weapons permits for limited purposes; the law also allows the manufacture of magazines for government use and the use of magazines as props in film production. *Id.* §§ 32400-55. Finally:

> Any person who may not lawfully possess a large-capacity magazine commencing July 1, 2017 shall, prior to July 1, 2017:
>
> (1) Remove the large-capacity magazine from the state;
>
> (2) Sell the large-capacity magazine to a licensed firearms dealer; or
>
> (3) Surrender the large-capacity magazine to a law enforcement agency for destruction.

Id. § 32310(d).

California is not alone in banning the possession of large-capacity magazines after the federal prohibition expired in 2004. The District of Columbia and eight other states have imposed significant restrictions on large-capacity magazines. Colo. Rev. Stat. §§ 18-12-301, 302; Conn. Gen. Stat. § 53-202w;

D.C. Code § 7-2506.01(b); Haw. Rev. Stat. § 134-8(c); Mass. Gen. Laws Ann. ch. 140, §§ 121, 131(a), 131M; Md. Code Ann., Crim. Law § 4-305(b); N.J. Stat. Ann. §§ 2C:39-1(y), 39-3(j), 39-9(h); N.Y. Penal Law §§ 265.00, 265.36; 13 Vt. Stat. Ann. § 4021. Municipalities, too, have banned the possession of large-capacity magazines. *E.g.*, Highland Park, Ill. City Code § 136.005; Sunnyvale, Cal. Mun. Code § 9.44.050 (enacted before the statewide ban).

C. *Procedural History*

Plaintiffs brought this action in 2017, arguing that California's prohibition on the possession of large-capacity magazines violates the Second Amendment, the Fifth Amendment's Takings Clause, and the Fourteenth Amendment's Due Process Clause. Plaintiffs own, or represent those who own, large-capacity magazines, and they do not want to comply with California's requirement that they modify the magazines to accept ten or fewer rounds, remove the magazines from the state, sell them to a licensed firearms dealer, or allow state authorities to destroy them.

Shortly before July 1, 2017, the district court preliminarily enjoined the state from enforcing the law, holding that Plaintiffs were likely to succeed on their claims under the Second Amendment and the Takings Clause. *Duncan v. Becerra*, 265 F. Supp. 3d 1106 (S.D. Cal. 2017). On appeal to this court, a two-judge majority affirmed the preliminary injunction, concluding that the district court did not abuse its discretion in holding that Plaintiffs had shown a likelihood of success on their claims. *Duncan v. Becerra*, 742 F. App'x 218, 221-22 (9th Cir. 2018)

(unpublished); *see also id.* at 220 ("We do not determine the ultimate merits, but rather determine only whether the district court correctly distilled the applicable rules of law and exercised permissible discretion in applying those rules to the facts at hand." (internal quotation marks omitted)). Judge Wallace dissented. *Id.* at 223-26. He acknowledged the deferential standard of review on appeal from a preliminary injunction but he "d[id] not consider it a close call to conclude the district court abused its discretion in finding Plaintiffs were likely to succeed on the merits of their constitutional challenges." *Id.* at 226 (Wallace, J., dissenting). Judge Wallace reasoned that "California's evidence—which included statistical studies, expert testimony, and surveys of mass shootings showing that the use of [large-capacity magazines] increases the lethality of gun violence—was more than sufficient to satisfy intermediate scrutiny." *Id.* at 223. And he further concluded that the California law did not violate the Takings Clause, because there is no physical taking and no evidence that alteration or sale of large-capacity magazines would be economically infeasible. *Id.* at 225.

In 2019, the district court granted summary judgment to Plaintiffs on the Second Amendment and takings claims and permanently enjoined Defendant from enforcing the law. *Duncan v. Becerra*, 366 F. Supp. 3d 1131 (S.D. Cal. 2019). On appeal, a divided panel affirmed the district court's grant of summary judgment as to the Second Amendment claim. *Duncan v. Becerra*, 970 F.3d 1133 (9th Cir. 2020). Chief District Judge Lynn dissented; she would have rejected Plaintiffs' Second Amendment claim. *Id.* at 1169-76.

The panel majority's opinion conflicted with decisions by all six circuit courts to have considered—and rejected—Second Amendment challenges to similar laws. *Worman v. Healey*, 922 F.3d 26 (1st Cir. 2019), *cert. denied*, 141 S. Ct. 109 (2020); *ANJRPC*, 910 F.3d 106; *Kolbe*, 849 F.3d 114; *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo ("NYSRPA")*, 804 F.3d 242 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015); *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) ("*Heller II*"). We granted rehearing en banc and, pursuant to our ordinary practice, vacated the panel's opinion. *Duncan v. Becerra*, 988 F.3d 1209 (9th Cir. 2021) (order); Ninth Cir. Rules 35-1 to 35-3, Adv. Comm. Note 3.

DISCUSSION

We address (A) the Second Amendment claim and (B) the takings claim.[1]

A. *Second Amendment Claim*

The Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The Second Amendment "protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010). The Second Amendment "is fully applicable to the States." *Id.* at 750.

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[1] In a footnote, Plaintiffs state that summary judgment was proper in their favor on the due process claim "[f]or all the same reasons" that apply to the takings claim. Because we reject the takings claim, we reject the due process claim.

In *District of Columbia v. Heller*, 554 U.S. 570, 574, 628 (2008), the Supreme Court struck down, as inconsistent with the Second Amendment right to keep and bear arms, the District of Columbia's laws that "generally prohibit[ed] the possession of handguns" and "totally ban[ned] handgun possession in the home." The Court declined to define the applicable framework for addressing Second Amendment claims, holding that the handgun ban failed "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." *Id.* at 628.

"Following *Heller* and *McDonald*, we have created a two-step framework to review Second Amendment challenges." *Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021) (en banc), *petition for cert. filed*, (U.S. May 11, 2021) (No. 20-1639). We first ask "if the challenged law affects conduct that is protected by the Second Amendment." *Id.* If not, then the law is constitutional, and our analysis ends. *Id.* If, on the other hand, the law implicates the Second Amendment, we next choose and apply an appropriate level of scrutiny. *Id.* at 784. Ten of our sister circuits have adopted a substantially similar two-step test. *Gould v. Morgan*, 907 F.3d 659, 668-69 (1st Cir. 2018), *cert. denied*, 141 S. Ct. 108 (2020); *NYSRPA*, 804 F.3d at 254; *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs*, 788 F.3d 1318, 1322 (11th Cir. 2015); *see Young*, 992 F.3d at 783 (listing cases from the Third, Fourth, Fifth, Sixth, Seventh, Tenth and D.C. Circuits that apply a similar two-step framework).

Judge Bumatay's dissent would jettison the two-step framework adopted by us and our sister circuits,

in favor of a "text, history, and tradition" test. Dissent by J. Bumatay at 108. Plaintiffs have not sought this test, despite having filed supplemental briefs after we granted rehearing en banc, and Defendant has not had a chance to respond. The dissent nevertheless asks us to disrupt a decade of caselaw and to create a circuit split with ten of our sister circuits, not because of any recent development in the law, but because of the dissent's preferred reading of the same Supreme Court cases that we have applied many times. We reject the dissent's invitation. Our test is fully consistent with every other circuit court's approach and, for the reasons that follow, we agree with those decisions that have thoroughly and persuasively rejected the dissent's alternative approach to Second Amendment claims. *E.g.*, *NYSRPA*, 804 F.3d at 257 n.74; *Heller II*, 670 F.3d at 1264-67.

Our two-step inquiry faithfully adheres to the Supreme Court's guidance in *Heller* and *McDonald*. The Court looked extensively to history, text, and tradition in discussing the scope of the Second Amendment right. Accordingly, history, text, and tradition greatly inform step one of the analysis, where we ask whether the challenged law implicates the Second Amendment. *See, e.g.*, *Young*, 992 F.3d at 784-826 (undertaking a detailed historical review); *Teixeira v. County of Alameda*, 873 F.3d 670, 682-87 (9th Cir. 2017) (en banc) (reviewing historical materials at length). Those sources also inform step two, where we choose strict scrutiny, intermediate scrutiny, or no scrutiny at all (as in *Heller*) by examining the effect of the law on the core of the Second Amendment right as traditionally understood.

E.g., *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013).

But we do not read the Supreme Court's cases as foreclosing the application of heightened scrutiny as the final step of the analysis. The Court expressly held that rational basis review is never appropriate. *Heller*, 554 U.S. at 628 n.27. Had the Court intended to foreclose the other forms of traditional review, it could have so held. Instead, and to the contrary, the Court referred specifically to "the standards of scrutiny that we have applied to enumerated constitutional rights" and held that application of heightened scrutiny is unnecessary when the law at issue "would fail constitutional muster" under any standard of scrutiny. *Id.* at 628-29.

The Court clearly rejected Justice Breyer's "judge-empowering 'interest balancing inquiry'" that, rather than corresponding to any of "the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis)," asked instead "'whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'" *Id.* at 634 (citing *id.* at 689-90 (Breyer, J., dissenting)). But the standards that we apply—strict and intermediate scrutiny—plainly are the traditional tests and are not the interest-balancing test proposed by Justice Breyer. In *Heller*, the Court emphasized that the Second Amendment, "[l]ike the First, . . . is the very *product* of an interest balancing by the people." *Id.* at 635. The Court regularly assesses First Amendment challenges using intermediate and strict scrutiny, depending on the nature of the law and the

context of the challenge. *E.g.*, *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017); *Reed v. Town of Gilbert*, 576 U.S. 155, 163-65 (2015). We see no reason why those same standards do not apply to Second Amendment challenges as well. Unless and until the Supreme Court tells us and the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits that, for a decade or more, we all have fundamentally misunderstood the basic framework for assessing Second Amendment challenges, we reaffirm our two-step approach.

Here, Plaintiffs bring a facial Second Amendment challenge to California's ban on large-capacity magazines. Accordingly, Plaintiffs "must show that no set of circumstances exists under which the [statute] would be valid." *Young*, 992 F.3d at 779 (alteration in original) (internal quotation marks omitted). Our review is "limited to the text of the statute itself," and Plaintiffs' (and amici's) individual circumstances do not factor into our analysis. *Id.*

We are guided by the decisions of six of our sister circuits, all of which upheld laws banning or restricting large-capacity magazines as consistent with the Second Amendment. *Worman*, 922 F.3d 26; *ANJRPC*, 910 F.3d 106; *Kolbe*, 849 F.3d 114; *NYSRPA*, 804 F.3d 242; *Friedman*, 784 F.3d 406; *Heller II*, 670 F.3d 1244; *see Fyock v. City of Sunnyvale*, 779 F.3d 991 (9th Cir. 2015) (affirming the denial of a preliminary injunction in a case in which the plaintiffs challenged a municipal ban on large-capacity magazines). Most of those decisions applied the same general two-step approach that guides us and reached the same conclusions that we reach. In

particular, they assumed without deciding, at step one, that the law implicated the Second Amendment; and held, at step two, that intermediate scrutiny applied and that the ban or restrictions survived that form of review. *Worman*, 922 F.3d at 33-40; *ANJRPC*, 910 F.3d at 116-24; *NYSRPA*, 804 F.3d at 254-64; *Heller II*, 670 F.3d at 1260-64; *see Fyock*, 779 F.3d at 996-1001 (following that same general approach in the context of an appeal from a preliminary injunction).[2]

1. *Step One: Whether the Challenged Law Implicates the Second Amendment*

At step one, we ask whether the challenged law affects conduct that the Second Amendment protests. *Young*, 992 F.3d at 783. Defendant argues that California's ban withstands scrutiny at this step for two reasons. First, Defendant asks us to follow the lead of the Fourth Circuit and hold that large-capacity magazines lack Second Amendment protection because they are similar to "'M-16 rifles and the like,'

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[2] Sitting en banc, the Fourth Circuit reached two alternative holdings in upholding Maryland's ban on large-capacity magazines. It first held, at step one, that bans on large-capacity magazines do *not* implicate the Second Amendment. *Kolbe*, 849 F.3d at 135–37. The court next held, in the alternative and in accord with the four decisions cited in the text that, assuming any scrutiny was warranted, intermediate scrutiny applied and that the ban withstood such scrutiny. *Id.* at 138–41.

For its part, the Seventh Circuit declined to apply that court's ordinary two-step inquiry, holding instead that a municipal ban on large-capacity magazines was constitutional because those magazines were not common at the time of ratification, and the ordinance leaves residents "ample means to exercise the inherent right of self-defense that the Second Amendment protects." *Friedman*, 784 F.3d at 411 (internal quotation marks omitted).

i.e., 'weapons that are most useful in military service.'" *Kolbe*, 849 F.3d at 142 (quoting *Heller*, 554 U.S. at 627). Second, Defendant argues that longstanding regulations have governed magazine capacity such that California's ban on large-capacity magazines survives scrutiny at this initial step of the analysis. *See Young*, 992 F.3d at 783 (holding that, if longstanding, accepted regulations have governed the subject of the challenged law, then the Second Amendment is not implicated).

Both arguments appear to have significant merit. As we describe below, large-capacity magazines have limited lawful, civilian benefits, whereas they provide significant benefits in a military setting. Accordingly, the magazines likely are "most useful in military service," at least in an ordinary understanding of that phrase. *Kolbe*, 849 F.3d at 135-37.

Moreover, Congress and some states have imposed firing-capacity restrictions for nearly a century. In 1932, Congress banned, in the District of Columbia, "any firearm which shoots automatically or semiautomatically more than twelve shots without reloading." Around the same time, several states, including California, enacted bans on firearms that could fire automatically or semi-automatically more than 10, 12, 16, or 18 bullets. 1933 Cal. Stat. 1170, § 3. The state bans were later repealed, but the District of Columbia's ban appears to have remained in place in some form continuously since 1932. We also take note of the more recent bans, first imposed by Congress in 1994 and later imposed by nine states and some municipalities after the federal ban expired in 2004. *Cf. United States v. Henry*, 688 F.3d 637, 640 (9th Cir.

2012) (holding, nine years ago, that machine guns are "unusual" because they had been banned since 1986, a total of 26 years). In addition, governments long have imposed magazine capacity limits on hunters. *See, e.g.*, 50 C.F.R. § 20.21(b) (prohibiting the hunting of most migratory game birds "[w]ith a shotgun of any description capable of holding more than three shells, unless it is plugged with a one-piece filler, incapable of removal without disassembling the gun, so its total capacity does not exceed three shells"); Cal. Fish & Game Code § 2010 ("It is unlawful . . . to use or possess a shotgun capable of holding more than six cartridges at one time, to take a mammal or bird.").

Ultimately, though, we decline to decide those two sub-issues definitively. Neither we nor the Supreme Court has decided whether the passage in *Heller* pertaining to weapons "most useful in military service" should be read as establishing a legal standard and, if so, how to interpret that phrase for purposes of step one of the constitutional analysis. *See Heller*, 554 U.S. at 627 ("It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause."). Similarly, determining whether sufficiently longstanding regulations have governed large-capacity magazines likely would require an extensive historical inquiry. *See, e.g.*, *Young*, 992 F.3d at 784-826 (undertaking a detailed historical review of regulations concerning the open carrying of arms); *Teixeira*, 873 F.3d at 682-87 (reviewing historical materials in determining whether the Second Amendment encompasses a right to sell firearms).

In many cases raising Second Amendment challenges, particularly where resolution of step one is uncertain and where the case raises "large and complicated" questions, *United States v. Torres*, 911 F.3d 1253, 1261 (9th Cir. 2019), we have assumed, without deciding, that the challenged law implicates the Second Amendment. *E.g.*, *United States v. Singh*, 979 F.3d 697, 725 (9th Cir. 2020), *cert. denied*, *Matsura v. United States*, 2021 WL 2044557, No. 20-1167 (U.S. May 24, 2021); *Mai v. United States*, 952 F.3d 1106, 1114-15 (9th Cir. 2020), *cert. denied*, 2021 WL 1602649, No. 20-819 (U.S. Apr. 26, 2021); *Pena v. Lindley*, 898 F.3d 969, 976 (9th Cir. 2018), *cert. denied*, 141 S. Ct. 108 (2020). Our sister circuits have followed this approach specifically with respect to laws restricting large-capacity magazines. *See Worman*, 922 F.3d at 36 (assuming, without deciding, at step one due to "reluctan[ce] to plunge into this factbound morass"); *ANJRPC*, 910 F.3d at 117 (assuming, without deciding, at step one); *NYSRPA*, 804 F.3d at 257 (assuming, without deciding, at step one "[i]n the absence of clearer guidance from the Supreme Court or stronger evidence in the record"); *Heller II*, 670 F.3d at 1261 (assuming, without deciding, at step one because "we cannot be certain whether" the requirements at this step are met). Accordingly, we follow the "well-trodden and 'judicious course'" of assuming, without deciding, that California's law implicates the Second Amendment. *Pena*, 898 F.3d at 976 (quoting *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013)).

2. *Step Two: Application of an Appropriate Level of Scrutiny*

a. *Determination of the Appropriate Level of Scrutiny*

At step two, we first determine the appropriate level of scrutiny. *Torres*, 911 F.3d at 1262. "[L]aws burdening Second Amendment rights must withstand more searching scrutiny than rational basis review." *Id.* We apply either strict scrutiny, which requires both narrow tailoring to a compelling governmental interest and the use of the least-restrictive means, *Victory Processing, LLC v. Fox*, 937 F.3d 1218, 1226-28 (9th Cir. 2019), or intermediate scrutiny, which requires a reasonable fit with an important governmental interest, *Torres*, 911 F.3d at 1263.

"The precise level of heightened scrutiny depends 'on (1) how close the law comes to the core of the Second Amendment right and (2) the severity of the law's burden on the right.'" *Mai*, 952 F.3d at 1115 (quoting *Chovan*, 735 F.3d at 1138). "Strict scrutiny applies only to laws that both implicate a core Second Amendment right and place a substantial burden on that right." *Id.* Intermediate scrutiny applies to laws that either do not implicate a core Second Amendment right or do not place a substantial burden on that right. *Id.*

Defendant does not dispute that California's ban on large-capacity magazines implicates, at least in some measure, the core Second Amendment right of self-defense in the home. *See, e.g.*, *Pena*, 898 F.3d at 977 (assuming without deciding that firearm regulations implicate the core right); *see also Worman*, 922 F.3d at 30, 36 (assuming without deciding that

Massachusetts' ban on large-capacity magazines implicates the core right); *Heller II*, 670 F.3d at 332 (declining to decide whether the District of Columbia's prohibition on large-capacity magazines "impinge[s] at all upon the core right protected by the Second Amendment"). Instead, Defendant argues that the ban imposes only a small burden on the Second Amendment right and that, accordingly, intermediate scrutiny is the appropriate lens through which to view California's law. We agree. Just as our sister circuits unanimously have applied intermediate scrutiny to other laws banning or restricting large-capacity magazines,[3] we hold that intermediate scrutiny applies to California's ban.

California's ban on large-capacity magazines imposes only a minimal burden on the exercise of the Second Amendment right. The law has no effect whatsoever on which firearms may be owned; as far as the challenged statute is concerned, anyone may own any firearm at all. Owners of firearms also may

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[3] *Worman*, 922 F.3d at 36–38; *ANJRPC*, 910 F.3d at 117–18; *Kolbe*, 849 F.3d at 138–39; *NYSRPA*, 804 F.3d at 257–61; *Heller II*, 670 F.3d at 1261–62; *see Fyock*, 779 F.3d at 998–999 (holding that the district court did not abuse its discretion in applying intermediate scrutiny to a municipal ban on large-capacity magazines).

As we described in note 2, the Seventh Circuit did not apply, at least by name, any of the traditional levels of scrutiny. *Friedman*, 784 F.3d at 410–12. But in upholding the municipal ban on large-capacity magazines, the court plainly applied a standard far less demanding than strict scrutiny, and its analysis is fully consistent with our selection of intermediate scrutiny. *See, e.g.*, *id.* at 411 (holding that the ordinance leaves residents "ample means to exercise the inherent right of self-defense that the Second Amendment protects" (internal quotations omitted)).

possess as many firearms, bullets, and magazines as they choose. *See ANJRPC*, 910 F.3d at 118 (holding that intermediate scrutiny applied, in part because the challenged law "has no impact on the many other firearm options that individuals have to defend themselves in their home"); *Kolbe*, 849 F.3d at 138 (same: "citizens [remain] free to protect themselves with a plethora of other firearms and ammunition"); *NYSRPA*, 804 F.3d at 260 (same: "while citizens may not acquire high-capacity magazines, they can purchase any number of magazines with a capacity of ten or fewer rounds").

Owners of firearms also may *use* those items at will. They may fire as many bullets as they would like for whatever lawful purpose they choose. The ban on large-capacity magazines has the sole practical effect of requiring shooters to pause for a few seconds after firing ten bullets, to reload or to replace the spent magazine.

Nothing in the record suggests that the restriction imposes any more than a minimal burden on the Second Amendment right to keep and bear arms. Plaintiffs do not point to any evidence that a short pause after firing ten bullets during target practice or while hunting imposes any practical burden on those activities, both of which fall outside the core Second Amendment right in any event.

Similarly, the record suggests at most a minimal burden, if any burden at all, on the right of self-defense in the home. Experts in this case and other cases report that "most homeowners only use two to three rounds of ammunition in self-defense." *ANJRPC*, 910 F.3d at 121 n.25. The use of more than

ten bullets in defense of the home is "rare," *Kolbe*, 849 F.3d at 127, or non-existent, *see Worman*, 922 F.3d at 37 (noting that neither the plaintiffs nor their experts "could . . . identify even a single example of a self-defense episode in which ten or more shots were fired"). An expert in this case found that, using varying methodologies and data sets, more than ten bullets were used in either 0% or fewer than 0.5% of reported incidents of self-defense of the home. Even in those situations, the record does not disclose whether the shooter fired all shots from the same weapon, whether the shooter fired in short succession such that reloading or replacing a spent cartridge was impractical, or whether the additional bullets had any practical effect after the first ten shots. In other words, the record here, as in other cases, does not disclose whether the added benefit of a large-capacity magazine—being able to fire more than ten bullets in rapid succession—has *ever* been realized in self-defense in the home. *See ANJRPC*, 910 F.3d at 118 ("The record here demonstrates that [large-capacity magazines] are not well-suited for self-defense."); *Kolbe*, 849 F.3d at 138 (noting the "scant evidence . . . [that] large-capacity magazines are possessed, or even suitable, for self-protection"); *Heller II*, 670 F.3d at 1262 (pointing to the lack of evidence that "magazines holding more than ten rounds are well-suited to or preferred for the purpose of self-defense or sport"). Indeed, Plaintiffs have not pointed to a single instance in this record (or elsewhere) of a

homeowner who was unable to defend himself or herself because of a lack of a large-capacity magazine.[4]

Evidence supports the common-sense conclusion that the benefits of a large-capacity magazine are most helpful to a soldier: "the use of large-capacity

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[4] Judge VanDyke's dissent faults us for relying on the rarity of instances of self-defense that use more than ten bullets while not giving enough weight to the infrequency of mass shootings, which the dissent describes as "statistically very rare." Dissent by J. VanDyke at 160. To the extent that the dissent concludes that reducing the harm caused by mass shootings is not an "important" governmental objective at step two of the analysis, we disagree. Focusing solely on the frequency of mass shootings omits the second, critical part of the analysis set out below at pages 42 to 46[C]: the incredible harm caused by mass shootings. We do not ignore the relative infrequency of mass shootings. We instead conclude—and Plaintiffs do not dispute—that, considering the frequency of mass shootings *in combination with* the harm that those events cause, reducing the number of deaths and injuries caused by mass shootings is an important goal. The dissent's analogy to commercial flights, [Dissent by J. VanDyke at 161 n.11, is illustrative: Although accidents involving commercial flights are rare, legislatures recognize that the serious harm caused by even a single crash justifies extensive regulation of the industry.

To the extent that the dissent asks us to balance the interests of the lawful use of large-capacity magazines against the interests of the State in reducing the deaths and injuries caused by mass shootings, we disagree for two independent reasons. First, the Supreme Court expressly rejected that type of interest balancing. *Heller*, 554 U.S. at 634. Second, to the extent that an interest-balancing inquiry is relevant, we reiterate that Plaintiffs have not pointed to a single instance—in California or elsewhere, recently or ever—in which someone was unable to defend himself or herself due to a lack of a large-capacity magazine, whereas the record describes the many deaths and injuries caused by criminals' use of large-capacity magazines during mass shootings.

magazines results in more gunshots fired, results in more gunshot wounds per victim, and increases the lethality of gunshot injuries." *Fyock*, 779 F.3d at 1000; *see Kolbe*, 849 F.3d at 137 ("Large-capacity magazines enable a shooter to hit 'multiple human targets very rapidly.'"); *NYSRPA*, 804 F.3d at 263-64 ("Like assault weapons, large-capacity magazines result in 'more shots fired, persons wounded, and wounds per victim than do other gun attacks.'" (quoting *Heller II*, 670 F.3d at 1263)). A 1989 report by the Bureau of Alcohol, Tobacco, and Firearms concluded that "large capacity magazines are indicative of military firearms," in part because they "provide[] the soldier with a fairly large ammunition supply." A 1998 report by that agency found that "detachable large capacity magazine[s] [were] originally designed and produced for . . . military assault rifles." The Fourth Circuit concluded that, "[w]hatever their other potential uses . . . large-capacity magazines . . . are unquestionably most useful in military service." *Kolbe*, 849 F.3d at 137.

Recent experience has shown repeatedly that the same deadly effectiveness of a soldier's use of large-capacity magazines can be exploited by criminals, to tragic result. In Thousand Oaks, California, a shooter equipped with large-capacity magazines murdered twelve people at a bar in 2018. Firearms equipped with large-capacity magazines "have been the weapons of choice in many of the deadliest mass shootings in recent history, including horrific events in Pittsburgh (2018), Parkland (2018), Las Vegas (2017), Sutherland Springs (2017), Orlando (2016), Newtown (2012), and Aurora (2012)." *Worman*, 922 F.3d at 39. As the Fourth Circuit explained:

> Other massacres have been carried out with handguns equipped with magazines holding more than ten rounds, including those at Virginia Tech (thirty-two killed and at least seventeen wounded in April 2007) and Fort Hood, Texas (thirteen killed and more than thirty wounded in November 2009), as well as in Binghamton, New York (thirteen killed and four wounded in April 2009 at an immigration center), and Tucson, Arizona (six killed and thirteen wounded in January 2011 at a congresswoman's constituent meeting in a grocery store parking lot).

Kolbe, 849 F.3d at 120.

In sum, large-capacity magazines provide significant benefit to soldiers and criminals who wish to kill many people rapidly. But the magazines provide at most a minimal benefit for civilian, lawful purposes. Because California's ban on large-capacity magazines imposes only a minimal burden on the Second Amendment right to keep and bear arms, we apply intermediate scrutiny.

Before applying intermediate scrutiny, we address Plaintiffs' argument that we need not apply any scrutiny at all. Plaintiffs assert that California's law falls within the category of regulations, like the handgun ban at issue in *Heller*, 554 U.S. at 628, that fail "[u]nder any of the standards of scrutiny." We have held that the only laws that are necessarily unconstitutional in this way are those laws that "amount[] to a destruction of the Second Amendment right." *Young*, 992 F.3d at 784 (quoting *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016)). Because

California's law imposes, as explained above, only a slight burden on the Second Amendment right, the law plainly does not destroy the right.

The handgun ban at issue in *Heller* failed under any level of scrutiny because it "amount[ed] to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society" for the lawful purpose of self-defense, including in the home. 554 U.S. at 628. The Supreme Court explained:

> There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.

Id. at 629.

California's prohibition on large-capacity magazines is entirely different from the handgun ban at issue in *Heller*. The law at issue here does not ban any firearm at all. It bans merely a subset (large-capacity) of a part (a magazine) that some (but not all) firearms use.[5] *Heller* clearly did not prohibit

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[5] Judge VanDyke's dissent suggests that California's ban on large-capacity magazines is akin to a ban on all cars or on large vehicles. Dissent by J. VanDyke at 151–152. But those analogies

governments from banning some subset of weapons. *See, e.g.*, *Pena*, 898 F.3d at 978 (applying intermediate scrutiny to a ban on the commercial sale of handguns lacking certain safety features and upholding the ban); *Kolbe*, 849 F.3d at 138-39 (holding that *Heller*'s "special consideration" for handguns "does not mean that a categorical ban on any particular type of bearable arm is unconstitutional"); *Friedman*, 784 F.3d at 410 ("[A]t least some categorical limits on the kinds of weapons that can be possessed are proper.").

Nor does the fact that, among the magazines in circulation, approximately half are of large capacity alter our conclusion. As an initial matter, we question whether circulation percentages of a part that comes

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are inapt. A ban on large-capacity magazines cannot reasonably be considered a ban on firearms any more than a ban on leaded gasoline, a ban on dangerously designed gas tanks, or speed limits could be considered a ban on cars. *E.g.*, 42 U.S.C. § 7545(n); 49 C.F.R. § 393.67; Cal. Veh. Code § 22348. Like a ban on large-capacity magazines with respect to firearms, those laws retain the basic functionality of cars—driving within reasonable limits—while preventing specific societal harms from known dangers.

The same reasoning applies to the dissent's analogy to a ban on all commercial flights. Dissent by J. VanDyke at 161 n.11. A ban on large-capacity magazines cannot reasonably be considered a ban on firearms any more than the existing, extensive regulations of commercial airlines, aircraft, pilots, and so on could be considered a ban on commercial flights. All of the dissent's analogies start from the false premise that a ban on large-capacity magazines somehow amounts to a ban on the basic functionality of all firearms, despite the fact that, as we have explained, many firearms do not use magazines; all firearms may be used with magazines of ten or fewer rounds; and no limit applies to the number of firearms or magazines that a person may possess and use.

standard with many firearm purchases meaningfully reflect an affirmative choice by consumers. More to the point, *Heller*'s ruling that handguns, "the quintessential self-defense weapon," cannot be prohibited rested on the premise that consumers overwhelmingly chose to purchase handguns *for the purpose of self-defense in the home*. *Heller*, 554 U.S. at 628-29; *see Kolbe*, 849 F.3d at 138 (emphasizing this point). By contrast, and as described in detail above, Plaintiffs have offered little evidence that large-capacity magazines are commonly used, or even suitable, for that purpose. *See Worman*, 922 F.3d at 36-37 (holding that, unlike "the unique popularity of the handgun as a means of self-defense," "the record . . . offers no indication that [large-capacity magazines] have commonly been used for home self-defensive purposes"); *Kolbe*, 849 F.3d at 138-39 ("The handgun, of course, is 'the quintessential self-defense weapon.' In contrast, there is scant evidence . . . that . . . large-capacity magazines are possessed, or even suitable, for self-protection." (citation omitted)); *NYSRPA*, 804 F.3d at 260 n.98 ("*Heller* . . . explain[ed] that handguns are protected as 'the most popular weapon chosen by Americans for self-defense in the home.' Of course, the same cannot be said of [large-capacity magazines]." (citation omitted)).

In sum, we decline to read *Heller*'s rejection of an outright ban on the most popular self-defense weapon as meaning that governments may not impose a much narrower ban on an accessory that is a feature of some weapons and that has little to no usefulness in self-defense. We therefore reject Plaintiffs' entreaty that we strike down California's law without applying any

scrutiny at all. Because California's law imposes only a minimal burden on the Second Amendment right, we apply intermediate scrutiny.

b. *Application of Intermediate Scrutiny*

"To satisfy intermediate scrutiny, the government's statutory objective must be 'significant, substantial, or important,' and there must be a 'reasonable fit' between the challenged law and that objective." *Mai*, 952 F.3d at 1115 (quoting *Silvester*, 843 F.3d at 821-22). The legislature must have drawn "reasonable" conclusions, and the evidence must "fairly support" the legislative judgment. *Pena*, 898 F.3d at 979-80.

"The test is not a strict one," and the government need not use the "least restrictive means." *Silvester*, 843 F.3d at 827 (internal quotation marks omitted). "[W]e are weighing a legislative judgment, not evidence in a criminal trial," *Pena*, 898 F.3d at 979, so "we do not impose an 'unnecessarily rigid burden of proof,'" *id.* (quoting *Mahoney v. Sessions*, 871 F.3d 873, 881 (9th Cir. 2017)), and "we do not require scientific precision," *Mai*, 952 F.3d at 1118 (internal quotation marks omitted). We may consider "the legislative history of the enactment as well as studies in the record or cited in pertinent case law." *Fyock*, 779 F.3d at 1000 (quoting *Jackson*, 746 F.3d at 966).

We defer to reasonable legislative judgments. *Pena*, 898 F.3d at 979. "[I]n the face of policy disagreements, or even conflicting legislative evidence, 'we must allow the government to select among reasonable alternatives in its policy decisions.'" *Id.* at 980 (quoting *Peruta v. County of San Diego*, 824 F.3d 919, 944 (9th Cir. 2016) (en banc) (Graber, J.,

concurring)). "Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Mai*, 952 F.3d at 1118 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994)); *see also Jackson*, 746 F.3d at 969 (holding that, even if the relevant science were "an open question," that conclusion "is insufficient to discredit [a legislative body's] reasonable conclusions").

Both dissents suggest that, because we have not struck down any state or federal law under the Second Amendment, we have "give[n] a blank check to lawmakers to infringe on the Second Amendment right." Dissent by J. Bumatay at 111-112; *accord* Dissent by J. VanDyke at 169. To the contrary, we have carefully examined each challenge on its own merit. The Constitution binds legislators just as it binds us. That Congress and state legislatures located in our circuit have legislated within constitutional bounds is, properly viewed, a credit to those legislatures, not evidence of an abdication of our duty. Notably, California's law is more restrained than similar laws considered by our sister circuits. *See, e.g.*, *Worman*, 922 F.3d 26 (considering a Massachusetts law that bans large-capacity magazines *and assault weapons*); *Kolbe*, 849 F.3d 114 (same: Maryland law); *NYSRPA*, 804 F.3d 242 (same: New York law & Connecticut law); *Friedman*, 784 F.3d 406 (same: City of Highland Park, Illinois law); *Heller II*, 670 F.3d 1244 (same: District of Columbia law). And our sister circuits, applying the same two-step inquiry that we apply today, have not hesitated to strike down provisions that go too far. *See, e.g.*, *NYSRPA*, 804 F.3d

at 264 (striking down, under intermediate scrutiny, a provision of New York law that prohibited the loading of a magazine with more than seven rounds of ammunition).

The California legislature, and the people of California, enacted the ban on large-capacity magazines to prevent and mitigate gun violence. As Plaintiffs properly concede and, as we have recognized before, that interest is undoubtedly important. *E.g.*, *Wilson v. Lynch*, 835 F.3d 1083, 1093 (9th Cir. 2016). California's law aims to reduce gun violence primarily by reducing the harm caused by mass shootings. Although mass shootings may be an irregular occurrence, the harm that flows from them is extensive. We readily conclude that reducing the harm caused by mass shootings is an important governmental objective. The only question, then, is whether California's ban is a "reasonable fit" for reducing the harm caused by mass shootings. *Silvester*, 843 F.3d at 821.

Many mass shootings involve large-capacity magazines, and large-capacity magazines tragically exacerbate the harm caused by mass shootings.[6] One expert reported that "it is common for offenders to fire more than ten rounds when using a gun with a large-capacity magazine in mass shootings. In particular, in

[6] Plaintiffs dispute the reliability of Defendant's experts and the underlying data, all of which are identical or similar to the reports and data that our sister circuits have cited. *E.g.*, *ANJRPC*, 910 F.3d at 121; *Kolbe*, 849 F.3d at 124 n.3. We conclude that the evidence is sufficiently reliable for purposes of weighing California's legislative judgment. *Pena*, 898 F.3d at 979–80.

mass shootings that involved use of large-capacity magazine guns, the average number of shots fired was 99." More than twice as many people were killed or injured in mass shootings that involved a large-capacity magazine compared to mass shootings where the shooter had magazines with a smaller capacity. One expert looked solely at fatalities and the deadliest mass shootings (those with at least six deaths), and he discovered that the number of fatalities from mass shootings that involved a large-capacity magazine was at least 50% greater than the number of fatalities from those shootings that involved smaller magazines. "Moreover, since 1968, [large-capacity magazines] have been used in 74 percent of all gun massacres with 10 or more deaths, as well as in 100 percent of all gun massacres with 20 or more deaths."

The reasons are simple and verified by events: large-capacity magazines allow a shooter to fire more bullets from a single firearm uninterrupted, and a murderer's pause to reload or switch weapons allows potential victims and law enforcement officers to flee or to confront the attacker. One expert described the period after a shooter has exhausted the current magazine as "precious down-time" that "affords those in the line of fire with a chance to flee, hide, or fight back." *Accord ANJRPC*, 910 F.3d at 119 ("Weapon changes and reloading result in a pause in shooting and provide an opportunity for bystanders or police to intervene and victims to flee."); *Kolbe*, 849 F.3d at 128 ("[R]educing the number of rounds that can be fired without reloading increases the odds that lives will be spared in a mass shooting . . . [because there are] more chances for bystanders or law enforcement to intervene during a pause in firing, . . . more chances

for the shooter to have problems quickly changing a magazine under intense pressure, and . . . more chances for potential victims to find safety." (internal quotation marks omitted)).

As other courts have pointed out, and as the record here establishes, examples abound of the harm caused by shooters using large-capacity magazines and of people fleeing, hiding, or fighting back during a shooter's pause. The Fourth Circuit noted high-profile examples in "Newtown (where nine children were able to run from a targeted classroom while the gunman paused to change out a large-capacity thirty-round magazine), Tucson (where the shooter was finally tackled and restrained by bystanders while reloading his firearm), and Aurora (where a 100-round drum magazine was emptied without any significant break in firing)." *Kolbe*, 849 F.3d at 128. The Third Circuit updated that list a year later by noting that "[v]ideos from the Las Vegas shooting in 2017 show that concert attendees would use the pauses in firing when the shooter's high capacity magazines were spent to flee." *ANJRPC*, 910 F.3d at 120 (internal quotation marks omitted). We provide yet another intervening example: after the 2018 shooting in Thousand Oaks, California, news outlets reported survivors' accounts of escaping when the shooter paused firing. *See Thousand Oaks Mass Shooting Survivor: "I Heard Somebody Yell, 'He's Reloading,'"* (ABC News, Nov. 8, 2018), https://abc7.com/thousand-oaks-ca-shooting-california/4649166/ ("I heard somebody yell, 'He's reloading!' and that was when a good chunk of us had jumped up and went and followed the rest of the people out the window."); *People Threw Barstools Through Window to Escape Thousand Oaks,*

California, Bar During Shooting, (USA Today, Nov. 8, 2018), https://www.usatoday.com/story/news/nation-now/2018/11/08/thousand-oaks-bar-shooting-people-broke-windows-stools-escape/1928031002/ ("At that point I grabbed as many people around me as I could and grabbed them down under the pool table we were closest to until he ran out of bullets for that magazine and had to reload."). The record contains additional examples of persons confronting a shooter or escaping during a pause in firing. *See also ANJRPC*, 910 F.3d at 120 & n.24 (listing other examples).

Approximately three-quarters of mass shooters possessed their weapons, as well as their large-capacity magazines, *lawfully*. Removing the ability of potential mass shooters to possess those magazines legally thus reasonably supports California's effort to reduce the devastating harm caused by mass shootings. "[L]imiting a shooter to a ten-round magazine could mean the difference between life and death for many people." *Kolbe*, 849 F.3d at 128 (internal quotation marks omitted). Moreover, removing all large-capacity magazines from circulation reduces the opportunities for criminals to steal them. *See, e.g.*, *id.* at 140 (noting the "evidence that, by reducing the availability of . . . [large-capacity] magazines overall, the [challenged law] will curtail their availability to criminals and lessen their use in mass shootings, other crimes, and firearms accidents"). For example, the shooter who targeted Sandy Hook's elementary school stole his mother's lawfully-possessed weapons and large-capacity magazines, which he then used to kill more than two dozen people, including twenty children.

Just as our sister circuits have concluded in assessing the fit between restrictions on large-capacity magazines and the goal of reducing gun violence, we conclude that California's ban is a reasonable fit, even if an imperfect one, for its compelling goal of reducing the number of deaths and injuries caused by mass shootings. *Worman*, 922 F.3d at 39-40; *ANJRPC*, 910 F.3d at 119-22; *Kolbe*, 849 F.3d at 139-41; *NYSRPA*, 804 F.3d at 263-64; *Heller II*, 670 F.3d at 1263-64. Because we apply intermediate scrutiny, the law need not be the least restrictive means, and some measure of over-inclusiveness is permissible. *E.g.*, *Torres*, 911 F.3d at 1264 n.6. Plaintiffs and their experts speculate about hypothetical situations in which a person might want to use a large-capacity magazine for self-defense. But Plaintiffs' speculation, not backed by any real-world examples, comes nowhere near overcoming the deference that we must give to the reasonable legislative judgment, supported by both data and common sense, that large-capacity magazines significantly increase the devastating harm caused by mass shootings and that removing those magazines from circulation will likely reduce deaths and serious injuries. *See, e.g.*, *Worman*, 922 F.3d at 40 (rejecting, as "too facile by half," the argument that a ban on large-capacity magazines sweeps too broadly because it bars law-abiding citizens from possessing them); *Pena*, 898 F.3d at 980 (upholding a firearm-safety restriction because of the deference we owe to "[t]he legislative judgment that preventing cases of accidental discharge outweighs the need for discharging a gun" in the "rare instance" where the

safety restriction "disables a gun capable of providing self-defense").

Because California's ban on large-capacity magazines is a reasonable fit for the compelling goal of reducing gun violence, we reverse the district court's grant of summary judgment to Plaintiffs on their Second Amendment claim.

B. *Takings Claim*

The Fifth Amendment provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. "There are two types of 'per se' takings: (1) permanent physical invasion of the property, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); and (2) a deprivation of all economically beneficial use of the property, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015-16 (1992)." *Laurel Park Cmty., LLC v. City of Tumwater*, 698 F.3d 1180, 1188 (9th Cir. 2012). Alternatively, a regulatory taking may occur if the regulation goes "too far." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). "[R]egulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005); *see generally Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071-72 (2021) (describing these concepts).

Because Plaintiffs bring a facial takings claim, they must show that "the mere enactment of [California's law] constituted a taking." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 318 (2002). Plaintiffs must demonstrate that "no set of circumstances exists under which the [law]

would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

California's law requires an owner of a large-capacity magazine to choose one of four options: (1) modify the magazine so that it accommodates ten rounds or fewer; (2) sell the magazine to a firearms dealer; (3) remove the magazine to another state (where, depending on that state's laws, the owner may lawfully possess it or sell it to any third party); or (4) turn it over to a law enforcement agency for destruction.[7] Cal. Penal Code §§ 16740(a), 32310(d)(1)-(3). California's law plainly does not deprive an owner of "all economically beneficial use of the property." *Laurel Park*, 698 F.3d at 1188. For example, Plaintiffs have neither asserted nor introduced evidence that no firearms dealer will pay for a magazine or that modification of a magazine is economically impractical.

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[7] Judge Bumatay's dissent begins by asserting that, "[i]f California's law applied nationwide, it would require confiscating half of all existing firearms magazines in this country." Dissent by J. Bumatay at 103. That dramatic assertion is inaccurate. The government seizes nothing; many owners are unaffected entirely; and all owners have several choices other than voluntary relinquishment of large-capacity magazines for destruction. More specifically, if every state adopted California's law, many owners of large-capacity magazines, such as current and retired law enforcement officers, would be able to keep them. Other owners would retain many options. For instance, they could modify the magazines to accommodate ten or fewer rounds; or they could sell the magazines to a firearms dealer (who could sell the magazines to buyers abroad or to those who remain authorized to possess them, such as the thousands of current and retired law enforcement officers in this country).

Plaintiffs' facial regulatory takings claim fails for similar reasons. Assuming, without deciding, that a facial regulatory takings claim is ever cognizable, *id.* at 1189, Plaintiffs' claim fails because they have not introduced evidence of the "economic impact of the regulation on," or the "investment-backed expectations" of, any owner of a large-capacity magazine. *Penn Cent.*, 438 U.S. at 124. Whatever merit there may be to an individual's *as-applied* regulatory takings claim, an issue that we do not reach in connection with this facial challenge, we cannot say on this record that a regulatory taking has necessarily occurred with respect to every owner of a large-capacity magazine.

Nor does the law on its face effect a physical taking. California reasonably chose to prohibit the possession of large-capacity magazines due to the danger that they pose to society. Nothing in the case law suggests that any time a state adds to its list of contraband—for example, by adding a drug to its schedule of controlled substances—it must pay all owners for the newly proscribed item. To the contrary, the Supreme Court has made clear that "the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." *Lucas*, 505 U.S. at 1027. Here, an owner of a large-capacity magazine may continue to use the magazine, either by modifying it to accept a smaller number of bullets or by moving it out of state, or the owner may sell it. On review of a facial challenge, we fail to see how those options are necessarily inadequate in all circumstances.

We do not read the Supreme Court's decisions in *Loretto*, 458 U.S. 419, and *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), as expansively as Plaintiffs do. In *Loretto*, 458 U.S. at 426, the Court held that a mandated physical invasion of a landlord's real property for the installation of cable-television devices constituted a taking. The Court rejected, as "prov[ing] too much," the argument that a landlord could avoid the regulation by ceasing to rent the property. *Id.* at 439 n.17. Similarly, in *Horne*, 576 U.S. at 361, the Court held that a requirement that raisin growers and handlers grant the government possession and title to a certain percentage of raisins constituted a physical taking. The Court rejected the argument, "at least in this case," that no taking had occurred because grape farmers could avoid the raisin market altogether by, for example, making wine instead of raisins. *Id.* at 365.

Those cases differ from this one in at least two material ways. First, unlike in *Loretto* and *Horne*, the government here in no meaningful sense takes title to, or possession of, the item, even if the owner of a magazine chooses not to modify the magazine, remove it from the state, or sell it. That California opted to assist owners in the safe disposal of large-capacity magazines by empowering law enforcement agencies to accept magazines voluntarily tendered "for destruction," Cal. Penal Code § 32310(d)(3), does not convert the law into a categorical physical taking.

Second, *Loretto* and *Horne* concerned regulations of non-dangerous, ordinary items—rental buildings and raisins, "a healthy snack." *Id.* at 366. Like the Third Circuit, *ANJRPC*, 910 F.3d at 124 & n.32, we do

not read *Loretto* and *Horne* as requiring a government to pay whenever it concludes that certain items are too dangerous to society for persons to possess without a modest modification that leaves intact the basic functionality of the item. *See Loretto*, 458 U.S. at 436 (holding that a taking had occurred because the owner "can make no nonpossessory use of the property"). Mandating the sale, transfer, modification, or destruction of a dangerous item cannot reasonably be considered a taking akin to a physical invasion of a rental building or the physical confiscation of raisins. *See ANJRPC*, 910 F.3d at 124 (rejecting a similar takings challenge to a ban on large-capacity magazines because the owners can, among other things, sell or transfer the magazines or modify them to accept fewer rounds).

Because Plaintiffs' facial takings claim fails, we reverse the district court's grant of summary judgment to Plaintiffs on their takings claim.

REVERSED and REMANDED for entry of judgment in favor of Defendant.

GRABER, Circuit Judge, concurring:

As the majority opinion explains, *District of Columbia v. Heller*, 554 U.S. 570 (2008), does not provide a clear framework for deciding whether a statute does or does not violate the Second Amendment. Indeed, the Court recognized as much when it wrote:

> Justice BREYER chides us for leaving so many applications of the right to keep and bear arms in doubt . . . . But since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than *Reynolds v. United States*, 98 U.S. 145 (1879), our first in-depth Free Exercise Clause case, left that area in a state of utter certainty.

Id. at 635. But *Heller* does strongly suggest an analogy to the free speech guarantee of the First Amendment. For example:

-"Just as the First Amendment protects modern forms of communications, *e.g.*, *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849 (1997), . . . the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.* at 582.

-In regard to the extent of the Second Amendment right, the Court observed: "Of course the right [to keep and bear arms] was *not unlimited, just as the First Amendment's right of free speech was not*, *see*, *e.g.*, *United States v. Williams*, 553 U.S. 285 (2008)." *Id.* at 595 (emphasis added).

-"Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods. This Court first held a law to violate the First Amendment's guarantee of freedom of speech in 1931, almost 150 years after the Amendment was ratified . . . . Even a question as basic as the scope of proscribable libel was not addressed by this Court until 1964, nearly two centuries after the founding." *Id.* at 625-26 (citations omitted).

-Rational-basis scrutiny cannot "be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech . . . or the right to keep and bear arms." *Id.* at 628 n. 27.

-And, finally:

> *The First Amendment contains the freedom-of-speech guarantee* that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong[-]headed views. *The Second Amendment is no different.* Like the First, it is the very *product* of an interest balancing by the people.

Id. at 635 (first and second emphases added).

Under the First Amendment, we review laws that regulate speech under the standard of intermediate scrutiny; laws that "leave open ample alternative channels for communication of the information" and that place "reasonable restrictions on the time, place, or manner of protected speech" are permissible. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). By repeatedly drawing an analogy to the First

Amendment's Free Speech Clause, *Heller* strongly suggests that intermediate scrutiny can apply to the Second Amendment, too. Accordingly, reasonable restrictions on the time, place, or manner of exercising the Second Amendment right to keep and bear arms are permissible if they leave open ample alternative means of exercising that right, the central component of which is individual self-defense. *Heller*, 554 U.S. at 599.

Other courts, including ours, have applied the First Amendment analogy to analyze a Second Amendment challenge. We held in *Jackson v. City & County of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014), that "First Amendment principles" inform our analysis. In particular, "firearm regulations which leave open alternative channels for self-defense are less likely to place a severe burden on the Second Amendment right than those which do not," and "laws which regulate only the '*manner* in which persons may exercise their Second Amendment rights' are less burdensome than those which bar firearm possession completely." *Id.* (quoting *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013)); *accord Hirschfield v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 5 F.4th 407, 415 (4th Cir. 2021) ("Just as the First Amendment employs strict scrutiny for content-based restrictions but intermediate scrutiny for time, place, and manner regulations, the scrutiny in [the Second Amendment] context depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right." (internal quotation marks omitted)); *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 198 (5th Cir. 2012) ("In harmony with well-developed

principles that have guided our interpretation of the First Amendment, we believe that a law impinging upon the Second Amendment right must be reviewed under a properly tuned level of scrutiny—i.e., a level that is proportionate to the severity of the burden that the law imposes on the right."); *United States v. Decastro*, 682 F.3d 160, 167 (2d Cir. 2012) ("In deciding whether a law substantially burdens Second Amendment rights, it is therefore appropriate to consult principles from other areas of constitutional law, including the First Amendment (to which *Heller* adverted repeatedly)."); *Heller v. District of Columbia*, 670 F.3d 1244, 1257 (D.C. Cir. 2011) ("*Heller II*") ("As with the First Amendment, the level of scrutiny applicable under the Second Amendment surely depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right." (internal quotation marks omitted)); *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) ("Borrowing from the Court's First Amendment doctrine" in formulating an appropriate test for Second Amendment challenges); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (looking to "the First Amendment speech context" in applying intermediate scrutiny to a law that "is more accurately characterized as a regulation of the manner in which persons may lawfully exercise their Second Amendment rights").

Applying those principles here, intermediate scrutiny is the appropriate standard for assessing California's ban on large-capacity magazines. Other circuits have recognized, and I agree, that a ban on large-capacity magazines leaves open ample alternative means of self-defense. *Ass'n of N.J. Rifle &*

Pistol Clubs, Inc. v. Att'y Gen. N.J., 910 F.3d 106, 118 (3d Cir. 2018) *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 260 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406, 411 (7th Cir. 2015). As the majority opinion describes more fully, citizens have a nearly unlimited array of weapons that they may use, and very close to 100% of instances of self-defense use fewer—typically far fewer—bullets than ten. But even considering a rare situation in which someone defending a home wishes to fire more than ten bullets in a short period of time, alternatives nevertheless remain: the shooter may carry more than one firearm, more than one magazine, or extra bullets for reloading the magazine. Because of the inconvenience of carrying more than one firearm or the delay of a few seconds while a magazine is changed, those options are not a perfect substitute for a single magazine loaded with scores of bullets. But alternative-means analysis does not require an exact match. *See, e.g.*, *Jackson*, 746 F.3d at 964 (applying intermediate scrutiny to San Francisco's requirement that a gun be kept in a safe at home when not carried on the person because "a modern gun safe may be opened quickly" and because "San Franciscans are not required to secure their handguns while carrying them on their person"); *Mastrovincenzo v. City of New York*, 435 F.3d 78, 101 (2d Cir. 2006) ("The requirement that ample alternative channels exist does not imply that alternative channels must be perfect substitutes for those channels denied to plaintiffs by the regulation at hand." (internal quotation marks omitted)). Individuals plainly have ample alternative means for self-defense.

And, because the only practical effect of California's law is the inability of a shooter to fire more than ten bullets without pause, the regulation is akin to a reasonable manner restriction. As far as the challenged statute is concerned, a shooter may fire any firearm at all and as many times as the shooter chooses, but only in a manner that requires briefly pausing after ten shots. *See Heller II*, 670 F.3d at 1262 (holding that D.C.'s ban on large-capacity magazines was akin to a regulation of the manner in which speech takes place). In conclusion, because California's ban on large-capacity magazines imposes only a minimal burden on the Second Amendment right to keep and bear arms, intermediate scrutiny applies. The majority opinion explains why California's law meets that constitutional standard.

To be sure, the First Amendment and the Second Amendment differ in many important respects (including text and purpose), and the analogy is imperfect at best. *See Young v. Hawaii*, 992 F.3d 765, 827-28 (9th Cir. 2021) (en banc), *petition for cert filed*, (U.S. May 11, 2021) (No. 20-1639) (rejecting analogy to the First Amendment's "prior restraint" doctrine when analyzing firearms-licensing laws). Among other things, firearms present an inherent risk of violence toward others that is absent in most First Amendment cases. *See Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015) (distinguishing the Second Amendment right from other fundamental rights on this ground, as one justification for refusing to apply strict scrutiny). Nonetheless, in my view *Heller* suggests that we should apply that analogy when appropriate. And I think that it is appropriate here to conclude that the challenged law is similar to

a permissible "manner" restriction on protected speech.

BERZON, Circuit Judge, with whom THOMAS, Chief Judge, and PAEZ, MURGUIA, WATFORD, and HURWITZ, Circuit Judges, join, concurring:

I concur in Judge Graber's principal opinion for the Court. I write separately to respond to the substance of the "text, history, and tradition" approach to Second Amendment legal claims, laid out in detail and advocated by Judge Bumatay's Dissent. Bumatay Dissent at 103-143. In connection with that response, I shall offer a brief theoretical and historical defense of the two-step, tiered scrutiny approach used by eleven of the federal courts of appeal in Second Amendment cases. *See* Principal Opinion at 23-24 (referencing cases from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits).

As I hope to demonstrate, the notion that judges can avoid so-called subjectivity—meaning, I gather, adjudging the validity of an arms-control regulation on the basis of their own biases rather than on the basis of ascertainable, self-limiting standards and procedures—more successfully under the "text, history, and tradition" approach than under the two-step, tiered scrutiny analysis is a simplistic illusion. Unlike the "text, history, and tradition" approach, the two-step, tiered scrutiny approach requires courts to show their work, so to speak, both to themselves and to readers and other courts. It incorporates historical analysis at the initial stage—that is, in considering whether a given kind of arms-related behavior falls within the scope of Second Amendment's protection at all. *See, e.g.*, *Young v. Hawaii*, 992 F.3d 765, 783-84 (9th Cir. 2021) (en banc), *petition for cert. filed* (U.S.

May 11, 2021) (No. 20-1639); *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017) (en banc); *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014). But where the available historical materials are either indeterminate, as here, Principal Opinion at 30, or indicate that the particular behavior *does* fall within the scope of the "right of law-abiding, responsible citizens to use arms in defense of hearth and home" that the Second Amendment was intended to protect, *District of Columbia v. Heller*, 554 U.S. 570, 616, 628, 635 (2008), a court applying the two-step approach moves on to the second stage of the inquiry. That stage requires the court expressly to consider and carefully to calibrate the nature of the challenged regulation and the government interests at hand, exposing the court's analysis and interpretive choices to plain view.

In contrast, resort to text, history, and tradition alone when assessing the constitutionality of particular, discrete arms regulations (as opposed to when assessing broader questions regarding the general reach of the Second Amendment, as was undertaken in *Heller*, 554 U.S. at 576-628) obscures the myriad decisions that underlie coming to a resolution regarding the validity of a specific arms regulation using such an analysis. And so, far from limiting judicial discretion, the "text, history, and tradition" approach draws a veil over a series of decisions that are not preordained and that materially impact the outcome in any given case.

Additionally, the notion that text, history, and, especially, "tradition" are objectively ascertainable disregards what linguists, historians, and

anthropologists have long recognized: language can be indeterminate, especially as time passes; ascertaining what happened in the past is contingent and variable, because both the data available and the means of structuring and analyzing that data vary over time; and "tradition" is a term with little stable meaning, both as to the time period it takes for a "tradition" to become established and as to the individuals or communities whose habits and behaviors are said to establish a "tradition."

In short, the appeal to objectivity in the Bumatay Dissent, while alluring, is spurious, as the "text, history, and tradition" approach is ultimately an exercise in wishful thinking. There is good reason that jurists have come to favor application of the tiered scrutiny approach to many forms of constitutional adjudication, including in Second Amendment cases. The tiered scrutiny approach requires judges carefully to attend to their own thought processes, keeping their eyes open, rather than closed, to the aspiration of bias-free and objective decisionmaking.

I.

An evaluation of the text of the Second Amendment and the history and traditions of our nation are assuredly important considerations in any case involving the Second Amendment. "[T]he Supreme Court's guidance in *Heller* and *McDonald* . . . looked extensively to history, text, and tradition in discussing the scope of the Second Amendment right." Principal Opinion at 25; *see also Young*, 992 F.3d at 783-84; *Teixeira*, 873 F.3d at 682; *Jackson*, 746 F.3d at 960. The principal opinion recognizes the important role that text, history, and

tradition play in a Second Amendment case, noting that those considerations factor into both parts of the Court's two-step analysis. Principal Opinion at 25. Specifically, text, history, and tradition "greatly inform step one of the analysis, where we ask whether the challenged law implicates the Second Amendment," and they "also inform step two, where we choose strict scrutiny, intermediate scrutiny, or no scrutiny at all (as in *Heller*) by examining the effect of" a disputed law "on the core of the Second Amendment right as traditionally understood." *Id.*

Judge Bumatay agrees that the text, history, and tradition of the Second Amendment should guide our inquiry with respect to the overall scope of the Second Amendment. Bumatay Dissent at 104, 109-110. But his proposition is that those three factors must also be *dispositive* with respect to the question whether any given gun regulation, no matter how discrete, is constitutional. *Id.* In other words, under his view, *every* Second Amendment case should begin *and end* with an examination of text, history, and tradition. *Id.*

According to the Bumatay Dissent, precedent directs us to "dispense[]" with the principal opinion's two-step, tiered scrutiny approach and replace it with the "text, history, and tradition" test. *See, e.g.*, Bumatay Dissent at 104-105, 108, 111-112. Judge Graber's opinion for the Court explains why that precedent-based argument is mistaken, Principal Opinion at 25-26, as does Judge Ginsburg's majority opinion for the D.C. Circuit in *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1264-67 (D.C. Cir. 2011). I do not repeat that discussion.

Aside from the incorrect precedent argument, the Bumatay Dissent maintains, principally, that the "text, history, and tradition" test should govern Second Amendment legal disputes because it is inherently more objective and less subject to manipulation than the two-step approach. *See, e.g.*, Bumatay Dissent at 109-112, 121-125. Contrary to that assertion, there are several reasons why text and history and, especially, tradition fall short of the judge-constraining attributes with which they are endowed by Judge Bumatay and the (uniformly non-controlling) appellate opinions on which he relies. *See* Bumatay Dissent at 115-118. This concurrence will explain why a framework that relies exclusively on text, history, and tradition to adjudicate Second Amendment claims provides only the aura, but not the reality, of objectivity and resistance to manipulation based on a judge's supposed biases when applied to discrete regulations governing activity that falls within the scope of the Second Amendment, as that scope was determined by *Heller*.[1]

A.

Beginning with the "text" prong of the "text, history, and tradition" framework, the evolution of language over time poses a significant problem. Words do not have inherent meaning. To the contrary, the

[1] There is no reason to think that "personal motives" such as a distaste for firearms or a lack of familiarity with firearms influenced the outcome of this case. Hurwitz Concurrence at 100–103. A judge's obligation is to be aware of their biases and vigorously avoid using them to decide cases, not to bleach their minds, an impossibility. *See, e.g.*, *Miles v. Ryan*, 697 F.3d 1090, 1090–91 (9th Cir. 2012).

meaning of a text depends in large part on "how the interpretive community alive at the time of the text's adoption understood" the words as they were used in the text, and that understanding is unlikely to match the understanding of a future interpretive community. Frank H. Easterbrook, *Foreword* to Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts xxv (2012).

This problem arises frequently in textual interpretation cases involving "statutes of long-standing vintage." *United States v. Kimsey*, 668 F.3d 691, 699-701 (9th Cir. 2012). To be sure, it is not impossible to navigate this difficulty and avoid erring in some such cases, *see, e.g.*, *id.* But the older a text is, the more distant we become from the interpretive community alive at the time of the text's adoption, and the less able we are to approach a text through the perspective of such people. Easterbrook, *supra*, at xxv. There comes a point where the original meaning of the text "is no longer recoverable reliably," as it has simply been lost to the passage of time. *Id.* When problems of this kind surface in Second Amendment cases involving the constitutionality of discrete firearm regulations, the text of the Second Amendment is unlikely to offer a dependable solution.

More importantly for present purposes, although the word "text" appears in the title of the Bumatay Dissent's "text, history, and tradition" test, the language of the Second Amendment does not play much of an operative role in the Dissent's application of that test to the large-capacity magazine regulation here challenged, and for good reason.

As the reasoning of the Dissent illustrates, the primary focus of the "text, history, and tradition" framework, as applied to specific regulations, is, unsurprisingly, on evidence of our nation's history and traditions. Bumatay Dissent at 125-142. The language of the Constitution was necessarily drafted at a high level of abstraction. Its broad language becomes less informative the more specific the inquiry at issue, and textual analysis therefore often plays only a minimal role in analyzing how a constitutional provision applies to a specific regulation. Put differently, although the language of the Second Amendment played a vital role in determining the overall scope of the Amendment in *Heller*, 554 U.S. at 576-603, the Amendment's text is unlikely to provide much guidance in cases involving the validity of discrete regulations. The "text" prong of the "text, history, and tradition" approach is therefore unlikely to yield ascertainable answers in cases where the Second Amendment's general language is applied to narrow, particular regulations targeting modern arms devices. I therefore concentrate my critique on the "history" and "tradition" prongs of the Bumatay Dissent's "text, history, and tradition" approach.

B.

The "history" prong, when relied upon as a mandatory, independently dispositive element of the "text, history, and tradition" approach, as applied to discrete regulations, has considerable shortcomings. To begin, without expressing any opinion regarding the actual accuracy of the historical analysis embedded in the *Heller* decision—which would be inappropriate, given that *Heller* is controlling

precedent—I note that many "historians, scholars, and judges have...express[ed] the view that the [Supreme Court's] historical account was flawed." *McDonald v. City of Chicago*, 561 U.S. 742, 914 (2010) (Breyer, J., dissenting) (citing David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. Rev. 1295 (2009); Paul Finkelman, *It Really Was About a Well Regulated Militia*, 59 Syracuse L. Rev. 267 (2008); Patrick J. Charles, *The Second Amendment: The Intent and Its Interpretation by the States and the Supreme Court* (2009); William G. Merkel, *The District of Columbia v. Heller and Antonin Scalia's Perverse Sense of Originalism*, 13 Lewis & Clark L. Rev. 349 (2009); Nathan Kozuskanich, *Originalism in a Digital Age: An Inquiry Into the Right to Bear Arms*, 29 J. Early Republic 585 (2009); Saul Cornell, *St. George Tucker's Lecture Notes, the Second Amendment, and Originalist Methodology: A Critical Comment*, 103 Nw. U. L. Rev. 1541 (2009); Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, New Republic, Aug. 26, 2008 ("In Defense of Looseness"); Richard A. Epstein, *A Structural Interpretation of the Second Amendment: Why* Heller *Is (Probably) Wrong on Originalist Grounds*, 59 Syracuse L. Rev. 171 (2008)); see also Robert J. Spitzer, *Saving the Constitution from Lawyers: How Legal Training and Law Reviews Distort Constitutional Meaning* 146-48 (2008); Dennis Baron, *Corpus Evidence Illuminates the Meaning of Bear Arms*, 46 Hastings Const. L.Q. 509, 510-11, 513 (2009); Noah Shusterman, *Armed Citizens* 223-24 (2020).

We are, of course, bound by the conclusion *Heller* drew from historical materials regarding the protection accorded by the Second Amendment to the individual right to keep and bear arms for self-defense, and I do not mean to suggest that that conclusion should be revisited. Rather, the salient fact for present purposes is that many jurists and scholars well-educated on the subject fundamentally disagree with the Supreme Court's historical analysis in *Heller*, demonstrating that Second Amendment history is very much open to dispute.

The Bumatay Dissent nonetheless characterizes history as both certain and static, as if we can obtain an enduring understanding of what happened in the past after engaging in a single, meticulous review of cut-and-dried evidence. *See, e.g.*, Bumatay Dissent at 120-121. But our understanding of history is, in fact, ever-changing. For one thing, we unearth new historical documents over time, and those documents sometimes lead us to revise our earlier understandings of history. *Cf.* Josh Blackman & James C. Phillips, *Corpus Linguistics and the Second Amendment*, Harv. L. Rev. Blog, Aug. 7, 2018. The advent of the internet and other tools has also dramatically changed our ability to access and systematically review historical documents. When *Heller* was decided, for example, the Supreme Court had access to "only a fairly narrow range of sources" regarding the common usage of the Second Amendment's terms at the time the Second Amendment was drafted. *Id*. Now, there are enormous databases of historical documents, including one overseen by Brigham Young University that comprises about one hundred thousand works

produced between 1760 and 1799, such as letters, newspapers, sermons, books, and journals. *Id.* The ability to perform electronic searches using such databases has led to substantial new discoveries regarding our nation's history, including hypotheses related to the meaning of the term "keep and bear arms" in the Second Amendment. *Id.*

Society also progresses over time, resulting in changed attitudes that may in turn affect our view of history. Take the Reconstruction Era as an example. A "traditional portrait" of the era, showcased in films like *Birth of a Nation* and embraced for much of the twentieth century, framed President Andrew Johnson as a hero who restored home rule and honest government to the South in a triumph over radical Northerners, who sought to plunder the spoils of the region, and childlike freedmen, who were not prepared to exercise the political power that had been foisted upon them. Eric Foner, *Reconstruction Revisited*, 10 Revs. Am. Hist. 82, 82-83 (1982). But in the 1960s, following the Second Reconstruction and a change in attitude toward people of color, the narrative flipped. Freedmen were recast as heroes, white Southerners as villains, and the Reconstruction governments as far more competent than had previously been let on. *Id.* at 83-84. A decade later, wary of exaggerating the faults and virtues of the people of the time, historians rejected both accounts and began questioning whether "much of importance happened at all" during the Reconstruction Era. *Id.* at 84-85. The dominant account of the Reconstruction Era has continued to evolve over time, both because new scholars, many of them scholars of color, have contributed to the conversation, and because the events of the period

appear quite different from the vantage point of passing time. *Id.* at 86-95. In other words, interpreting history is not as simple as compiling and processing stacks of paper. *See also, e.g.*, David W. Blight, *Historians and "Memory*," Common Place, Apr. 2002; Jonathan Gienapp, *Constitutional Originalism and History*, Process: A Blog for American History (Mar. 20, 2017), http://www.processhistory.org/ originalism-history/.

Additionally, judges are not trained historians, and the study of history is rife with potential methodological stumbling blocks. The volume of available historical evidence related to the legal question in any discrete Second Amendment controversy, for example, will vary enormously and may often be either vast or quite sparse.

On the one hand, for legal questions as to which there is a wealth of historical evidence, an imprecise research methodology can lead to what has been "derisively referred to . . . as 'law office history.'" *In Defense of Looseness*, *supra*. As then-Judge Posner explained it, "law office history" refers to a process by which a judge or advocate "sends his law clerks" or associates "scurrying to the library and to the Web for bits and pieces of historical documentation" that will support a given position on a legal issue. *Id.* When the clerks or associates are "numerous and able," when they "enjoy[] the assistance of . . . capable staffs" such as the staff at the Supreme Court library, or when they can rely on similar labor distilled into "dozens and sometimes hundreds of amicus curiae briefs," it becomes "a simple matter . . . to write a plausible historical defense" of the desired position. *Id.*

Accordingly, even if an opinion appears to rely on a "breathtaking" number of historical references, the underlying analysis may not constitute "disinterested historical inquiry," but may instead represent "the ability of well-staffed courts" or firms to pick from among the available historical sources those most conducive to a given proposition. *Id.*

To so recognize is not to suggest that judicial inquiries under the "text, history, and tradition" test—as opposed to the inquiries of advocates, which are necessarily result-driven—would be directed in advance at reaching a foreordained result. Rather, the inquiries would be directed at reaching *a* result, which necessitates marshaling the available historical materials such that they support a single legal conclusion. *See, e.g.*, Avani Mehta Sood, *Motivated Cognition in Legal Judgments—An Analytic Review*, 9 Ann. Rev. L. & Soc. Scis. 307, 308-10 (2013). But history, assessed in a genuinely neutral fashion, may not support one conclusion. Instead, it may support conflicting conclusions or no conclusion at all.

Although a historical account with a thesis or viewpoint may read better than one that acknowledges ambiguity or irresolution, historians are trained to sift through materials with an underlying acceptance that the materials may or may not support one conclusion or another, or that the conclusions that can be drawn from the evidence may evolve over time. Put differently, historians need not resolve apparent contradictions and may follow the evidence where it leads. *See* Gienapp, *supra*. Courts do not have that luxury. Judges must definitively answer specific, detailed legal questions—here, whether the

Second Amendment permits states to ban high-capacity magazines that allow a weapon to fire more than ten rounds without reloading. That need to provide an answer—referred to in the literature as "motivated thinking" or "motivated reasoning," *see, e.g.*, Sood, *supra*—can skew a court's historical analysis, much as scientific research can be undermined by the desire to make some discovery rather than none, *see, e.g.*, Danielle Fanelli & John P. A. Ioannidis, *U.S. Studies May Overestimate Effect Sizes in Softer Research*, Proc. Nat'l Acad. Scis. U.S., Sept. 10, 2013, at 1-6.

On the other hand, an inquiry into some legal questions—such as the question whether a specific contemporary arms regulation is lawful under the "text, history, and tradition" test—may turn on a very narrow array of available historical resources. As the Supreme Court recognized in the context of a Title VII dispute, "small sample size may, of course, detract from the value" of evidence. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977). This Court has so recognized as well, noting that if an inquiry relies on an unduly small number of data points, it will have "little predictive value and must be disregarded." *Morita v. S. Cal. Permanente Med. Grp.*, 541 F.2d 217, 220 (9th Cir. 1976). This "small sample size" problem has been discussed in numerous scholarly contexts, including with respect to historical analyses involving firearms. *See, e.g.*, James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 Wm. & Mary L. Rev. 1777, 1826 (2002) (maintaining that a scholar published a book that made unsubstantiated claims about gun ownership in America based on faulty science, including a failure to

account for and report sample sizes). So there may be occasions in which the universe of available historical evidence is too small for courts to draw reliable conclusions, rendering the "history" prong of the "text, history, and tradition" framework inoperable.

Sample size issues and the drive to draw a single legal conclusion are not the only potential methodological pitfalls for the "text, history, and tradition" test. Cognitive biases ranging from confirmation bias to anchoring bias, *see, e.g.*, Daniel Kahneman, *Thinking Fast and Slow* 80-81, 119-28, 324, 333 (2011), can cloud a judge's analysis.[2]

And very few judges have received formal training on technical elements of historiographical research design, such as the importance of drawing from varied sources and assessing sources to ferret out potential bias imparted by the author. The risk that error will result from these imperfections in the "history" prong of the "text, history, and tradition" framework counsels against adopting the framework as the *controlling* test for *all* Second Amendment disputes, as opposed to relying on history as a useful tool embedded in a structured, sequential inquiry such as the two-step, tiered scrutiny approach.

C.

As flawed as the suppositions of objectivity and certainty are for the "text" and "history" prongs of the

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[2] Confirmation bias refers to the tendency to interpret new information as confirmation of one's pre-existing assumptions or theories. Anchoring bias refers to the tendency to over-rely on the initial evidence we discover as we learn about a given topic. *See id.*

Bumatay Dissent's proposed framework, as applied to discrete regulations, the focus on "tradition" is even more problematic with regard to those supposed virtues. Courts have "vast discretion in deciding which traditions to take into account" and "substantial discretion in determining how to define the tradition at issue." John C. Toro, *The Charade of Tradition-Based Substantive Due Process*, 4 N.Y.U. J. L. & Liberty 172, 181 (2009). Additionally, even if a court finds that tradition does support a given legal outcome, the court "must take the further step of determining whether" that tradition "*should* receive modern-day protection—an inquiry which depends heavily" on the court making a contextual judgment that accounts for the contemporary legal milieu. *Id.*

In particular, a foundational question plaguing any tradition-based framework is "[w]hose traditions count." *Id.* at 181. For example, in several substantive due process cases such as *Lawrence v. Texas*, 539 U.S. 558, 567-68 (2003), the Supreme Court appealed to historical attitudes going back to ancient times to support its interpretation. Toro, *supra*, at 181-83. But when determining in *Washington v. Glucksberg*, 521 U.S. 702 (1997), whether individuals have a right to physician-assisted suicide, the Supreme Court disregarded a trove of ancient history supporting the practice even though that history had been extensively referenced in the opinion on review, and instead began its analysis by citing commentators from the thirteenth century. *Id.* at 710; *see also* Toro, *supra*, at 183-85. Whereas ancient authorities were, by and large, tolerant of suicide, St. Augustine's interpretation of the demands of the Fifth Commandment drastically reshaped the way Western

societies viewed the subject by the time of the thirteenth century. Toro, *supra*, at 184-85. The Supreme Court chose to begin its analysis at that point and, accordingly, held that the right to physician-assisted suicide is not deeply rooted in tradition. *Glucksberg*, 521 U.S. at 735.

As this example illuminates, a framework that relies heavily on tradition is inherently indeterminate, because it often depends upon the choice of traditions on which to rely. My point is not that such choices are illegitimate—courts have to make decisions between competing legal positions, and such decisions necessarily require choices—but instead that there *are* choices that must be made in appealing to tradition. Without transparency as to those choices and a structured procedure for making those choices, the pretense of objectivity collapses.

Moreover, there are frequently traditions that support each side of a constitutional controversy. *Id.* at 186. A framework focused predominantly on tradition leaves litigants free to cherry-pick from those traditions to justify their preferred results. *Id.*

In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), for example, the Supreme Court addressed the constitutionality under the Fourteenth Amendment's Due Process Clause of a California statute providing that "a child born to a married woman living with her husband is presumed to be a child of the marriage." *Id.* at 113 (plurality opinion). The natural father of an adulterously conceived child brought suit, arguing that the law infringed upon his and the child's due process right to maintain a relationship with one another. *Id.* Justice Scalia, writing for the plurality,

disagreed, concluding that "our traditions have protected the marital family" and have generally declined to afford rights to the natural father of an adulterously conceived child. *Id.* at 124-27 & n.6.

Justice Brennan, in dissent, maintained that rather than focusing on historical traditions related to the rights of an adulterous natural father, the Court should instead focus on the historical tradition of affording great respect to the parent-child relationship. *Id.* at 139. In defending that position, Justice Brennan noted that the concept of tradition "can be as malleable and as elusive as 'liberty' itself," and admonished the plurality for "pretend[ing] that tradition places a discernible border around the Constitution." *Id.* at 137. Although that "pretense is seductive" because "it would be comforting to believe that a search for 'tradition' involves nothing more idiosyncratic or complicated than poring through dusty volumes on American history," "reasonable people can disagree about the content of particular traditions" and about "which traditions are relevant." *Id.*

With respect to the Second Amendment, historical sources from the Founding Era through the late nineteenth century indicate that members of the public held vastly different views on gun ownership and gun regulation depending on where they lived, both in terms of geographical region and in terms of whether the individual lived in an urban or rural environment. *See, e.g.*, Joseph Blocher & Darrell A. H. Miller, *The Positive Second Amendment: Rights, Regulation, and the Future of* Heller 20, 29-35 (2018); Joseph Blocher, *Firearm Localism*, 123 Yale L.J. 82,

112-21 (2013). Because a litigant who advocates a certain outcome may cite predominantly to authorities from a region or locality that tends to support the litigant's view, the "tradition" prong of the "text, history, and tradition" test is highly manipulable. Indeed, this aspect of the approach renders it akin, in many ways, to an analysis of legislative intent—a practice rejected by textualists because the "legislature is a hydra-headed body whose members may not" share a common view. Richard A. Posner, *Reflections on Judging* 189 (2013); *see also* Gienapp, *supra*. Similarly, the annals of history and lore rarely divulge a common view on what practices qualify as traditional.

Relatedly, there are often permissive and restrictive traditions that "cut in opposite directions." Toro, *supra*, 189. In the context of a case involving a patient's right to refuse life-prolonging medical treatment, for example, the Supreme Court had to choose between two traditions—one permissive tradition of allowing the state to regulate suicide, and one restrictive tradition of forbidding states from interfering in private medical decisions involving refusal of treatment. *Cruzan ex rel. Cruzan v. Dir., Mo. Dept. Health*, 497 U.S. 261, 269-82 (1990). The Supreme Court ultimately ruled in favor of the restrictive tradition, but, from the perspective of adhering to our nation's traditions, the opposite conclusion would have also been justified.

So far, no jurist or academic has come forward with a workable method of choosing between conflicting restrictive and permissive traditions. *See* Toro, *supra*, at 190-91. Crucially, for our purposes, the

"text, history, and tradition" test provides no guideposts on how a court should navigate indistinct traditions or weigh between conflicting traditions, and it therefore cannot provide a workably objective or bias-filtering framework for adjudicating Second Amendment controversies regarding discrete, specific regulations.

Even if there is only one relevant tradition at issue within a given case, there is still the problem of deciding how narrowly or broadly to define the tradition. That choice can be outcome determinative regarding the court's assessment of the impact of the given tradition on, for example, the validity of a specific arms regulation. *Id.* at 186. A historical prohibition on carrying firearms in "fairs, markets, and in the presence of the King's ministers," for example, "could support regulations of wildly different scope: wherever people congregate, wherever the state is in control, wherever people buy things, or wherever government agents are stationed." Blocher & Miller, *supra*, at 130; *see also* Peter J. Smith, *Originalism and Level of Generality*, 51 Ga. L. Rev. 485, 487 (2017); Frank H. Easterbrook, *Abstraction and Authority*, 59 U. Chi. L. Rev. 349, 358 (1992).

According to an analysis of fifty recent Second Amendment opinions, a court's decision to use a higher level of generality when describing the core legal question in a given dispute usually supported striking down a challenged arms regulation, whereas a court's decision to use a lower degree of generality typically led to the law being upheld. Mark Anthony Frassetto, *Judging History: How Judicial Discretion in Applying Originalist Methodology Affects the*

*Outcome of Post-*Heller *Second Amendment Cases*, 29 Wm. & Mary Bill Rights J. 413, 415, 438-39 (2020). In the context of public carry disputes, for example, the study found that "[j]udges favoring a broad right to carry in public have generally framed the question as whether the Second Amendment protects a right to carry arms in public at all," whereas "judges who have favored upholding public carry restrictions have" phrased the question more narrowly, characterizing the question as "whether carrying a concealed weapon in public was understood to be within the scope of the right protected by the Second Amendment at the time of ratification." *Id.* at 439-41 (citation omitted). As this discussion highlights, several factors inherent in the "tradition" inquiry can have a dispositive impact on the outcome of a legal dispute. A mandatory, rigid "text, history, and tradition" framework, contrary to the assertions of its proponents, provides no objective method for navigating such factors that would ensure objectivity and consistency in the law.

Next, even if an asserted right does find support in a relevant tradition and even if courts can agree on the proper way to characterize that tradition, courts would still be left with the problem of determining whether a particular tradition should be carried forward as constitutionally sanctioned. That determination necessarily involves, albeit behind a veil, policy and value-balancing judgments of the kind that the Bumatay Dissent claims the "text, history, and tradition" test would avoid.

Our nation's history includes many traditions that would not now be accorded constitutional protection. *See* Toro, *supra*, at 193. One example that

has been given is the now-rejected assumption that a woman is subject to her husband's control and governance, a concept that gave rise to the widespread doctrinal rule at common law that a husband could not be convicted of sexually assaulting his wife. *Id.* If a man sought constitutional protection for "the right to have forcible intercourse" with his wife, his claim would, unfortunately, find ample support in our nation's history and traditions. *Id.*; *see also, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257-62 (1964) (holding that private race discrimination in places of public accommodation, although traditional at the time, could be constitutionally forbidden). A test that places great weight on historical traditions can undermine the very bedrock of constitutional governance, by overriding later, well-accepted legislative policies and by precluding the judiciary from deriving and applying principles of constitutional interpretation capable of adjudging when our practices, however traditional, have deviated from our nation's precepts.

Considering in this regard the Second Amendment in particular, racially discriminatory gun regulations have been commonplace throughout our nation's history, ranging from statutes that expressly singled out people of color in their text, to statutes that disproportionately impacted people of color, such as prohibitions on the sale of certain less costly guns. Br. of Amicus Curiae Rutherford Institute in Supp. Of Pet'rs at 13-18, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, No. 20-843 (July 20, 2021). Although a court would invalidate such a law in the modern day under the Equal Protection Clause, it is notable that the "text, history, and tradition" test itself provides no

mechanism to distinguish unjust or unconstitutional traditions, such as the tradition of having race-based arms restrictions, from other traditions.

In short, the tradition prong of the "text, history, and tradition" test offers even less guidance on the validity of discrete arms regulations under the Second Amendment than the already inadequate "text" and "history" prongs. It thereby invites inconsistency in the law and reliance of judges on their own personal policy preferences, contrary to the purported attributes of the approach touted by Judge Bumatay and by others who have supported the adoption of the "text, history, and tradition" test.

D.

The "text, history, and tradition" approach, as laid out in the Bumatay Dissent, suffers from two major additional defects. First, a key aspect of the rubric—the one most emphasized by the Dissent, *see* Bumatay Dissent at 127-137—is whether a particular weapon, ammunition, or other arms-related hardware is "in common use at the time." *Heller*, 554 U.S. at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)). If so, the Bumatay Dissent posits, the device should receive Second Amendment protection.

But *when* must a device be in "common use" to receive protection? Apparently, at the time of a court's decision. Bumatay Dissent at 103, 105, 134--137 (reasoning that large-capacity magazines "are owned by millions of people nationwide" and "enjoy widespread popularity today"); *see also* VanDyke Dissent at 165-167 (discussing the present-day popularity of high-capacity weapons and relying on that evidence when assessing which weapons are "in

common use"). Federal courts of appeal have indeed largely relied upon present-day statistical data when discussing whether a weapon qualifies as "in common use at the time." Blocher & Miller, *supra*, at 89 & n.126.[3] But, as our colleagues on the Seventh Circuit explained, "relying on how common a weapon is at the time of litigation would be circular." *Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015). "[I]t would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it" which, in turn, prevented the weapon from becoming commonly owned. *Id.* In other words, "[a] law's existence can't be the source of its own constitutional validity." *Id.*; *see also* Blocher & Miller, *supra*, at 89 ("law-abiding people [must] choose weapons from among the weapons that are lawful to possess, leading to the seemingly circular result that what is protected by the Constitution depends on what has been regulated by the government").

To regard an arms-related device's popularity as "the source of its own constitutional[ity]" is no less circular. Devices may become popular before their

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[3] An unanswered question regarding this interpretation of the "common use" inquiry is what metric a court should apply when determining whether a weapon qualifies as in common use. "One can come to quite a range of conclusions" regarding the prevalence of the same weapon "depending on whether one calculates common use by absolute numbers, by absolute dollars, or by the percentage of the market," whether that be the market for firearms in general, for the specific type of firearm at issue, "or for all self-defense technology." Blocher & Miller, *supra*, at 89 (citing Eugene Volokh, Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda, 56 UCLA L. Rev. 1443, 1480 (2009)).

danger is recognized and regulated, or the danger of a particular device may be exacerbated by external conditions that change over time. And a device may become popular because of marketing decisions made by manufacturers that limit the available choices. Here, for example, large-capacity magazines come as a standard part on many models of firearms, so a consumer who wants to buy those models has no choice regarding whether the weapon will include a magazine that can fire more than ten rounds without reloading. Principal Opinion at 17, 39-40. In any event, the prevalence of a particular device *now* is not informative of what the Second Amendment encompassed when adopted, or when the Fourteenth Amendment was added to the Constitution, or when the Second Amendment was declared incorporated into the Fourteenth Amendment and so applicable to state and local governments in *McDonald*, 561 U.S. at 791 (plurality opinion).

This is not to say that new weapons do not receive Second Amendment protection. To the contrary, *Heller* makes clear that the Second Amendment protects "all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Heller*, 554 U.S. at 582; *see also Caetano v. Massachusetts*, 577 U.S. 411, 411-12 (2016). And an assessment of prevalence must play *some* role in a court's analysis; *Heller* explained that the Second Amendment's protection extends only to those weapons commonly used "by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 624-25, 627; *see also Fyock v. Sunnyvale*, 779 F.3d 991, 997-98 (9th Cir. 2015).

Notably, however, *Heller* focused not just on the prevalence of a weapon, but on the primary use or purpose of that weapon. The Supreme Court explained that, at the time of the Second Amendment's adoption, "all citizens capable of military service . . . would bring the sorts of lawful weapons that they possessed at home to militia duty" and although "[i]t may well be true today that a militia, to be as effective as militias in the [eighteenth] century, would require [more] sophisticated arms," such "modern developments" cannot change the scope of the Second Amendment right, which remains rooted in that original rationale. *Id.* at 627-28. The Bumatay Dissent's excessive focus on the current prevalence of high-capacity magazines is therefore misplaced, as a proper analysis must account for the purpose and use of a weapon in addition to its current popularity.

This discussion also surfaces another defect in the "text, history, and tradition" test—namely, the framework provides courts with little to no guidance in cases involving the regulation of new and emerging weapons technologies. Presumably, history and tradition will either be silent on or offer very little insight into the constitutionality of measures aimed at such weapons, since, by definition, the weapons lack a historical pedigree.

Heller approves of the practice of adopting new regulations in the face of new technologies, as it expressly indicates that bans on the private possession of machine guns are valid. 554 U.S. at 624. Such bans arose gradually in the 1920s and 1930s after machine guns became widespread, more than 130 years after the states ratified the Second

Amendment. *Friedman*, 784 F.3d at 408. And "[n]othing in *Heller* suggests that a constitutional challenge to bans on private possession of machine guns brought during the 1930s, soon after their enactment, should have succeeded." *Id.*

It appears likely that in many Second Amendment cases, courts will be called upon to assess whether a regulation targeting new and emerging weapons technologies adheres to the commands of the Second Amendment. Now-Justice Kavanaugh, in *Heller II*, responded to this concern by stating that courts must "reason by analogy from history and tradition." *Heller II*, 670 F.3d at 1275. But resort to analogy can go only so far, as it does not provide room to account for contemporary circumstances not foreseeable at the time of the Second Amendment's adoption or incorporation. Additionally, reasoning by analogy in these circumstances would have no guiderails and would be subject to the "level of generality" concerns discussed above. *See supra* pp. 73-74.

In sum, because the "text, history, and tradition" test does not adequately account for the primary purpose of currently popular weapons technologies and does not speak to how courts should analyze regulations targeting new and emerging technologies, the framework is, for those reasons as well, inadequate for addressing the constitutionality of specific gun regulations.

* * *

We are, of course, bound by *Heller*, which directs us to consider the text of the Second Amendment and our country's history and traditions when determining

the general scope of the Second Amendment right. But a framework that relies exclusively on those considerations simply does not provide an administrable framework for adjudicating Second Amendment controversies once a court's analysis moves beyond the overall scope of the Second Amendment and into the constitutionality of specific gun measures. As the Supreme Court of Ohio helpfully summarized, the "text, history, and tradition" test is not workable because it leaves the following critical questions unanswered:

> What should a court do when [text, history, and tradition] do not provide a clear answer? If the [district court] reviewed this case again and found the historical record unclear, would we not be right back where we started? More generally, how would the dissenting opinion address the concern that historical evidence can be viewed in different ways by different people? How would it deal with an argument that changed circumstances make reliance on certain Framing Era practices unjustified? Would it reject that notion reflexively on the ground that modern concerns are wholly irrelevant under the text-history-and-tradition-based approach? Or does it acknowledge that present-day judgments have a role to play? . . . Does one simply look for an historical analogue to the law at issue? And if analogues exist, how widespread must they be? How does one deal with modern technologies and circumstances that did not exist at the time of the Founding?

State v. Weber, 163 Ohio St. 3d 125, 139-40 (2020), *cert. denied*, --- S. Ct. --- (2021). Because the "text, history, and tradition" approach does not fill these gaps, it cannot supply both a necessary *and sufficient* condition for striking down a law which seeks to regulate the Second Amendment right. Nor, for the reasons I have surveyed, is the "text, history, and tradition" test the objective, principled method for adjudicating Second Amendment legal controversies that the Bumatay Dissent repeatedly insists that it is.

In contrast, the two-step, tiered scrutiny framework—which I discuss more fully in Part III—consistently applied in Second Amendment cases in this Court and in ten other Circuits, *see* Principal Opinion at 23-24, offers two cures for the key defects in the propounded "test, history, and tradition" approach. Specifically, under the two-step approach, a court may forthrightly recognize that, as to a specific form of contemporary regulation, the historical record is thin or inconclusive. The court may then move forward with its analysis by assuming without deciding that the Second Amendment is nevertheless implicated by the policy or regulation at issue, as the principal opinion does here. Principal Opinion at 30 (citing several additional examples). Moreover, the two-step approach provides guidance regarding a court's proper steps once ambiguity in the available materials is acknowledged, thereby *constraining* judicial discretion at that juncture. Once a court moves on to step two, it must decide what level of heightened scrutiny applies, and then engage in a relevant, above-board, tiered analysis. *Id.* at 23-24, 30-46. Under the "text, history, and tradition" approach, by contrast, the well runs dry as soon as the court has

exhausted the text of the Second Amendment and evidence of our nation's history and traditions, even when those factors are, by any fair evaluation, indeterminate. The "text, history, and tradition" approach therefore obscures, rather than reveals and channels, the pivotal decisionmaking process, leaving judges with unfettered and unexamined discretion once a court's regulation-specific Second Amendment analysis moves beyond incontestable history and tradition, as it is often bound to do.

II.

The Bumatay Dissent provides a powerful illustration of the shortcomings of the "text, history, and tradition" approach. Beginning with the "common use" inquiry, the Dissent repeatedly emphasizes that large-capacity magazines are currently prevalent, but it spends close to no time discussing the primary purpose or use of such weapons, instead simply asserting that the weapons are "commonly used by Americans for lawful purposes." *See, e.g.*, Bumatay Dissent at 103, 108, 127-131, 134-137. Relatedly, in response to the principal opinion's observation that high-capacity magazines are specifically suited for large-scale military use rather than for self-defense, Principal Opinion at 28, 35-37, Judge VanDyke avers that, "almost every attribute of a weapon that makes it more effective for military purposes also makes it more effective for self-defense: more accurate, faster firing, the ability to engage multiple targets quickly—these are all characteristics of a weapon that make it better for *both* military and self-defense purposes." VanDyke Dissent at 162-163.

But, as Judge Gould explained in his concurrence in *Nordyke v. King*, 644 F.3d 776 (9th Cir. 2011) (Gould, J., concurring), *on reh'g en banc*, 681 F.3d 1041 (9th Cir. 2012), although "laws barring possession of military-grade weapons might be argued to substantially burden the right to have weapons," such laws "are indisputably permissible because they do not tread on the Second Amendment's core purposes." *Id.* at 797 n.6. "I do not mean to be facetious," Judge Gould wrote, "but to me it is obvious that the Second Amendment does not protect the right to keep a nuclear weapon in one's basement, or a chemical or biological weapon in one's attic." *Id.* Although nuclear bombs and chemical and biological weapons are, of course, in a completely different class of weapon than large-capacity magazines in terms of the level of danger they pose, and they are thankfully nowhere near as widespread as large-capacity magazines, neither of those observations gets to the heart of what the primary purpose or use of a large-capacity magazine *is*. Arguably, the primary use of a large-capacity magazine, by design, is for effective combat engagement in a theater of war. Principal Opinion at 28, 35-37. If true, then regardless of their prevalence in society, large-capacity magazines would not fall within the shelter of the Second Amendment.

Turning to the subject of assessing the constitutionality of regulations addressing new or emerging technologies, Judge Bumatay's analysis again misses the mark. As California and amici supporting the government explain, restrictions on semi-automatic weapons capable of firing a large number of rounds without reloading were enacted nationally and in several states shortly after such

weapons became widely commercially available. Opening Br. at 27-31; Reply Br. at 10-12; Br. of Amicus Curiae Everytown for Gun Safety in Supp. Of Def.-Appellant at 4-9; *see also* Blocher & Miller, *supra*, at 42-45; Robert J. Spitzer, *America Used to Be Good at Gun Control*, N.Y. Times (Oct. 3, 2017). Historically, gun regulation has followed that pattern, with regulations arising not when a new technology is *invented*, but instead when the technology begins "to circulate widely in society." Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 Law & Contemp. Probs. 55, 67-71 (2017). The ban on high-capacity magazines at issue in this case therefore represents a "continuation of nearly a century" of arms regulations targeting weapons that can fire a large number of rounds without reloading, Br. of Amicus Curiae Everytown for Gun Safety in Supp. Of Def.-Appellant at 9. The statute thereby arguably constitutes a longstanding prohibition that should not be disturbed by application of the Second Amendment, at least as long as the "longstanding prohibition" inquiry accounts for the date when the target of a restriction became commonplace. And based on *Heller*'s commentary regarding machine guns, 554 U.S. at 624; *see also supra* p. 79, the inquiry should account for that factor.

The Bumatay Dissent ignores this context. It asserts that large-capacity magazines have not been "subject to longstanding regulatory measures," and that it is "not a close question" whether the statute at issue must accordingly be struck down. Bumatay Dissent at 108. In support, the Dissent provides scattered examples of weapons with similar firing capacities that date back as far as 1580, but it does not

contend that such weapons were widely commercially available at the time, arguing only that such weapons had become common "by the time of the Second Amendment's incorporation," apparently referring to 1868. Bumatay Dissent at 132-134 (citing David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 851 (2015)). Judge Bumatay nevertheless declares that, because regulations targeting high-capacity magazines did not exist during the Founding Era, they cannot be considered longstanding regulations under the "text, history, and tradition" test. *Id.* at 140-141; *see also id.* at 137-142.

But, as explained, even taking a generous (to the Bumatay Dissent) view on what qualifies as "common," and even relying on the same source cited by the Dissent, high-capacity magazines did not become common until the late nineteenth century or early twentieth century. *See* Br. of Amicus Curiae Everytown for Gun Safety in Supp. Of Def.-Appellant at 4-9; Kopel, *supra*, at 851. The Bumatay Dissent's "text, history, and tradition" framework would thereby require states to adopt regulations before circumstances warrant, sometimes before a problem even exists. Such a requirement would hamstring the ability of states to regulate nearly any new or emerging weapons technologies. The "text, history, and tradition" test, as a result, would fail to comply with *McDonald*'s instruction that the Second Amendment must be construed such that states retain the ability to "devise solutions to social problems that suit local needs and values" and to "experiment[] with

reasonable firearms regulations." 561 U.S. at 785 (plurality opinion).[4]

In terms of methodology, Judge Bumatay does not explain how he approached the historical research underlying the observations made in his opinion. Although such methodological disclosures are not common in judicial opinions, they are standard in academic articles, and for good reason. As explained above, *see supra* pp. 65-68, even slightly defective methodology can undermine the persuasive force of research, and historiographical research is full of potential methodological pitfalls. How large is the pool of available evidence that the Bumatay Dissent drew upon? Is it large enough that we may glean reliable conclusions from it? Did the Dissent draw from that pool in a fashion that would reflect the range of differing opinions throughout history on gun ownership and gun regulation, such as by ensuring that its sources came from differing geographical regions and from both urban and rural areas? Is it possible the Bumatay Dissent relies upon inaccurate sources, or sources that include bias imparted by the

[4] The dissents assert that the Second Amendment right has been treated as if it were "disfavored." *See, e.g.*, Bumatay Dissent at 111–112; VanDyke Dissent at 145–146. But in terms of what the Second Amendment protects, the Supreme Court explained in *Heller* that the Second Amendment right has long existed in harmony with reasonable regulation, and the Court approved a non-exhaustive range of presumptively lawful regulations, without announcing any criteria for determining whether non-listed kinds of arms regulations are or are not lawful. 554 U.S. at 626–27; *see also, e.g.*, Blocher & Miller, *supra*, at 185. And there are several prominent examples of state and federal courts striking down gun regulations that press those indistinct boundaries. *Id.* at 185–86; *see also* Principal Opinion at 41–42.

author? Is it possible that Judge Bumatay approached the research with a desire to find *a* clear answer—not any particular clear answer—to the legal question in this case, such that the research process itself became skewed? Were the individuals who performed the key research tasks for the Bumatay Dissent aware of cognitive biases like confirmation bias and anchoring bias, and did those individuals actively seek to counteract the impact of such biases on their research?

The truth is, we simply do not know the answer to those questions, and the "text, history, and tradition" test is not designed to supply readers with those answers. As a result, we cannot be confident in the validity of the observations made in the Bumatay Dissent. In contrast, the two-step, tiered scrutiny approach embraced by the principal opinion, as I will explain in more detail in Part III, relies on a familiar, well-established methodology that requires judges to expressly disclose, on the public record, the reasoning that guides their decision in any given case. And it is designed to accommodate situations where evidence of history and tradition is conflicting or inconclusive. In this respect, the two-step, tiered scrutiny approach represents a superior framework for adjudicating Second Amendment controversies involving the constitutionality of discrete regulations.

III.

Looking in detail at the attributes of the two-step, tiered scrutiny approach more broadly, I begin from the established proposition that the Second Amendment is "not unlimited." *Heller*, 554 U.S. at 595. Although its reach extends to modern weapons just as the First Amendment protects modern forms of

speech and the Fourth Amendment applies to searches of modern forms of technology, *id.* at 582, the Second Amendment has multiple limitations. It does not prevent regulation aimed at "dangerous or unusual" weapons, including complete bans on such weapons. *Id.* at 623, 627. It does not undermine the validity of "longstanding prohibitions" such as laws that prevent firearms from being carried into schools. *Id.* at 626-27. And it "by no means eliminates" a state's ability "to devise solutions to social problems that suit local needs and values," and to "experiment[] with reasonable firearms regulations." *McDonald*, 561 U.S. at 785 (plurality opinion). Because the Second Amendment provides nuanced, not absolute, protection to individuals' right to keep and bear arms for self-defense, and because, for the reasons I surveyed, the "text, history, and tradition" test cannot meaningfully and predictably resolve which discrete regulations accord with the Amendment's protections, *see supra* Parts I, II, some other method of structuring judicial inquiry into that question is needed.

As the principal opinion explains, the two-step approach—which provides for *both* a historical inquiry and a tiered scrutiny inquiry similar to that used to apply other constitutional protections to discrete and variable regulations—has been embraced by the federal courts of appeal. Principal Opinion at 23-24. A consideration of the theoretical and historical underpinnings of the tiers of scrutiny indicates that the two-step approach represents a well-established framework for guiding and openly communicating, as opposed to hiding, a court's dual attention to historical background as well as to the real-world burdens and the governmental concerns at stake. The principal

opinion's two-step, tiered scrutiny approach, in particular, is in no way the free-for-all vehicle for sanitizing judges' policy preferences that Judge Bumatay makes it out to be. To the contrary, the set of prescribed steps embedded in the tiers of scrutiny demand self-awareness on the part of judges and lead to a public-facing decisionmaking process grounded in an evidentiary record.

A.

Lochner v. New York, 198 U.S. 45 (1905), can be viewed as the "starting point" for the development of each of the three tiers of scrutiny. *See* Donald L. Beschle, *No More Tiers?*: *Proportionality as an Alternative to Multiple Levels of Scrutiny in Individual Rights Cases*, 38 Pace L. Rev. 384, 387-88 (2018); *see also* Moshe Cohen-Eliya & Iddo Porat, *American Balancing and German Proportionality: The Historical Origins*, 8 Int'l J. Const. L. 263, 280 (2010). There were three opinions in *Lochner*. Justice Peckham's opinion for the majority held that the "right" of employers and employees to contract with one another regarding working conditions was subsumed within the Fourteenth Amendment's Due Process Clause. *Lochner*, 198 U.S. at 53-54. For New York's statute limiting the working hours of bakers to survive review, Justice Peckham wrote, the government would need to satisfy an exacting test: demonstrating that the statute had a "direct relation" and was "necessary" to serve an "appropriate and legitimate" state interest, such as the state's interest in health and safety. *Id.* at 56-58. The opinion went on to invalidate the statute, concluding that the government failed to carry its burden under that test.

Id. at 64-65. Over time, Justice Peckham's somewhat familiar test "evolve[d] into the modern strict scrutiny test." Beschle, *supra*, at 388.

Justice Holmes, in dissent, advocated on behalf of a substantially more deferential approach, whereby the statute would be invalidated only if it was clear that any "rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles." *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting). The Holmes dissent may therefore be viewed as an early predecessor of the rational basis test. Justice Harlan, also in dissent, struck a middle ground. He agreed with Justice Holmes that any "liberty of contract" implicit in the Constitution may be constitutionally subject to regulation that "the state may reasonably prescribe for the common good and the well-being of society." *Id.* at 68 (Harlan, J., dissenting). But his proposed approach was not nearly as deferential as Justice Holmes's. Instead, he would have required the state to produce a reasonable amount of evidence in support of the regulation before it could be found valid. *Id.* at 69-74. This middle-of-the-road alternative can be characterized as a forebear to intermediate scrutiny.

Although *Lochner* did not survive the test of time, "a significant question remained" regarding whether the analytical frameworks employed by Justices Peckham, Holmes, and Harlan were themselves inappropriate, as opposed to being inappropriately applied in that case. *Id.* at 389. The Supreme Court began addressing this question in the late 1930s, ultimately embracing the use of heightened scrutiny in a variety of cases. *Id.*; Cohen-Eliya & Porat, *supra*,

at 282-83. In *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), for instance, the Supreme Court clarified that heightened scrutiny is appropriate when a court evaluates any one of three types of legislation: a statute in conflict with a fundamental right such as those enumerated in the Bill of Rights, a statute that undermines the healthy functioning of our democracy, or a statute that harms "discrete and insular minorities." *Id.* at 152 n.4.

From the 1960s through the 1980s, the strict scrutiny test became entrenched in constitutional decisionmaking and was gradually shaped into the familiar two-part standard that requires government actors to demonstrate that a statute has a compelling underlying purpose, and that the statute is necessary—meaning there are not any less restrictive alternatives—to achieve the relevant purpose. *See, e.g.*, *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290-91 (1978); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966); *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307-08 (1964); *see also* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1273-85 (2007). The earliest applications of the strict scrutiny test included, among other subjects, racial discrimination cases involving the Equal Protection Clause, *e.g.*, *Palmore*, 466 U.S. at 432-33, free speech cases, *e.g.*, *Flowers*, 377 U.S. at 307-08, and voting rights cases, *e.g.*, *Harper*, 383 U.S. at 670. Each application fell within at least one of the three buckets outlined in the *Carolene Products* footnote four. Rational basis review also became widespread during

the same period, applying in essentially all other cases. *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981); *N.D. State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 164-67 (1973); *Ferguson v. Skrupa*, 372 U.S. 726, 728-29 (1963).

Around this time, constitutional scholars such as Professor Gerald Gunther voiced a concern that strict scrutiny was overly harsh, as it was "strict in theory, [but] fatal in fact." Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 794 (2006). Others lamented that rational basis scrutiny veered too far in the opposite direction, leading to essentially per se findings of validity in every case where it applied. Beschle, *supra*, at 392. There was a sense that the two-tiered system of judicial scrutiny was lacking, and that some middle ground was needed. *Id.* at 393. After a series of cases in which the Supreme Court nominally applied rational basis review to gender discrimination claims but engaged in an analysis that appeared much more like strict scrutiny review, *see Weinberger v. Weisenfeld*, 420 U.S. 636, 642-45, 648-53 (1975); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-48 (1974); *Reed v. Reed*, 404 U.S. 71, 74-77 (1971), the Supreme Court eventually expressly adopted a new tier of scrutiny, one that was less exacting than strict scrutiny but more rigorous than rational basis review, *see Craig v. Boren*, 429 U.S. 190, 197-98 (1976); *see also Plyler v. Doe*, 457 U.S. 202, 215-21 (1982). The middle-ground approach that had its roots in Justice Harlan's *Lochner* dissent developed into what is now referred to as intermediate scrutiny. Beschle, *supra*, at 393-94.

Although the development of intermediate scrutiny created a more nuanced version of the tiered system of judicial scrutiny in constitutional cases, a perception persisted that it may be useful for the tiers of scrutiny both to become less rigid and to include more context-specific guidance. *Id.* at 394-97. Over time, these critiques were met with changes to the tiered scrutiny method of analysis. For example, differing tests that embed a tiered scrutiny method of review have arisen in free speech cases, such that a slightly different structure of analysis applies depending on whether the speech is commercial in nature or occurs in a public forum, as well as whether a disputed regulation targets specific speech-related content, including by targeting a specific viewpoint. *See, e.g.*, *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (commercial speech regulation); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (public forum speech regulation); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (content-neutral speech regulation); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 48-49 (1983) (content-based speech regulation); *see also* R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and "Reasonableness" Balancing*, 8 Elon L. Rev. 291, 292-95 (2016). Numerous cases have also applied strict scrutiny and rational basis review more flexibly, such that per se findings of validity and invalidity have become less common. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 631-36 (1996); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-42 (1985); *Grutter v. Bollinger*, 539 U.S. 306, 326-44 (2003); *see also* Marcy Strauss,

Reevaluating Suspect Classification, 35 Seattle U. L. Rev. 135, 135-36 n.5 (2011). Thus, more than one hundred years after *Lochner* first aired the predecessors of the various available approaches, the tiered scrutiny method of analysis has developed into a framework that serves to guide and constrain judicial decisionmaking across a variety of scenarios. Although imperfect, the tiered scrutiny method of analysis has risen to the challenge of providing a structured framework for adjudicating cases involving individual rights.

B.

Today, a heightened tier of scrutiny applies when courts evaluate a wide range of legal claims, including equal protection claims involving suspect and quasi-suspect classifications; claims involving fundamental rights such as the right to vote, the right to free speech, and the right to freely exercise one's religion; and claims involving the inverse commerce clause. *See, e.g.*, *Loving*, 388 U.S. at 11 (race discrimination); *Craig*, 429 U.S. at 197-98 (gender discrimination); *Clark v. Jeter*, 486 U.S. 456, 465 (1988) (legitimate parenthood discrimination); *Burdick v. Takushi*, 504 U.S. 428, 432-34 (1992) (right to vote); *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566 (commercial speech regulation); *Turner Broad. Sys., Inc.*, 520 U.S. at 189 (content-neutral speech regulation); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876-77 (2021) (free exercise of religion); *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2467-68 & n.11, 2473-74 (2019) (inverse commerce clause); *see also* Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* 510-11 (2012).

The second stage of the principal opinion's two-step approach, as mentioned, analyzes the degree to which an arms-related regulation burdens the Second Amendment right when determining whether to apply strict scrutiny, intermediate scrutiny, or "no scrutiny at all (as in *Heller*)." Principal Opinion at 25. Of the established, non-Second Amendment tiered scrutiny frameworks, this aspect of the two-step, tiered scrutiny approach is perhaps most analogous to the *Anderson-Burdick* doctrine used for election and voting rights cases. Under that doctrine, the rigor of a court's inquiry into the validity of an election-related regulation depends upon the extent to which the challenged regulation burdens constitutional rights, such as the right to vote. *Burdick*, 504 U.S. at 432-34. If the right to vote is severely burdened, strict scrutiny applies. *Id.* If the right to vote is burdened in a "reasonable" manner, then less rigorous scrutiny applies instead. *Id.*; *see also Dean Milk Co. v. City of Madison*, 340 U.S. 349, 353-54 (1951) (applying a similar framework to disputes involving the inverse commerce clause).

Use of the two-step, tiered scrutiny approach for Second Amendment cases, then, represents yet another instantiation of the tiered method of analysis evolving to meet the filtering needs of various contextual scenarios involving constitutional rights. No reason has been suggested, in the dissents in this case or elsewhere, as to why a well-established structure for constitutional adjudication should apply to a wide range of constitutional protections but not to the Second Amendment.

We adopted the two-step approach for Second Amendment claims in *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013). There, we reviewed and analyzed other Circuits' application of the two-step inquiry and explained that the two-step approach "reflects the Supreme Court's holding in *Heller* that, while the Second Amendment protects an individual right to keep and bear arms, the scope of that right is not unlimited." *Id.* at 1136. As *Chovan* suggests, we adopted the two-step approach because it provides crucial guideposts that assist and constrain our inquiry once we move beyond assessing the overall scope of the Second Amendment and into applying the Amendment to a specific measure or regulation. This aspect of the two-step approach is, indeed, its greatest asset. The elements of a heightened scrutiny analysis are fixed and widely known, lending themselves to a mode of reasoning and explication on the part of judges that disciplines the judicial inquiry and is accessible to the litigants and the public. Application of the two-step approach to the Second Amendment is therefore likely to promote both judicial introspection and public insight into the judicial decisionmaking process.

Use of the two-step approach may also encourage participation in the development of an understanding about the constitutional reach of the Second Amendment by the other branches of government, nationally and locally. Because the tiers of scrutiny offer a clear structure that communicates to the audiences of judicial opinions the type and sequence of arguments that must be made to ensure that a piece of legislation or other governmental enactment survives constitutional review, application of the

tiered scrutiny approach may encourage legislators and other government actors carefully to assess whether their actions have a proper purpose and are appropriately tailored to serving that purpose. In other words, judicial review under the two-step, tiered scrutiny approach would have a disciplining effect not only on the judiciary, but on lawmakers as well.

The tiered method of scrutiny may also assist courts in isolating "process failures" in the legislative process. Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 Yale L.J. 3094, 3151 (2015). As the Bumatay Dissent acknowledges, *see* Bumatay Dissent at 103-104, 110, one of the primary functions of the judiciary is to ensure that the legislative process is not systemically infected by "process failures," which arise when lawmakers, either consciously or subconsciously, allow prejudice or discrimination to shape the law. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 102-04 (1980). But as I have explained, the "text, history, and tradition" approach is ill-suited to that end. *See supra* Parts I, II.

In contrast, at the second stage of the two-step, tiered scrutiny approach, a court must carefully consider—as the principal opinion does here, *see* Principal Opinion at 30-40—the parties' submissions and the evidentiary and legislative record to assess the degree of impact a particular regulation has on the Second Amendment right. Having done so, the court then chooses which level of scrutiny is appropriate and applies the prescribed level of rigor to its assessment of both the interests that gave rise to the regulation and—again, after detailed attention to the parties'

submissions and the evidentiary and legislative records—the degree to which the regulation advances that asserted interest. Because heightened scrutiny requires the government to both articulate a justification for its disputed action and provide an evidentiary record supporting that justification, it is likely to smoke out process failures. At the same time, because legislators are aware of this fact, application of the two-step approach may also produce front-end incentives that prevent many process failures from occurring in the first place. Application of the tiered scrutiny approach may thereby facilitate judicial oversight into whether the legislative branch is acting impartially and responsibly, with due regard to the underlying constitutional protection.

Rejecting this process-oriented mode of protecting constitutional rights as unreliable, Judge Bumatay characterizes the two-step, tiered scrutiny approach as "nothing more than a black box used by judges to uphold favored laws and strike down disfavored ones." Bumatay Dissent at 104. He is mistaken. For the reasons explained, the two-step approach is not an invitation to engage in freewheeling judicial decisionmaking or generalized interest-balancing. Instead, it prescribes a careful, structured evaluation that is preserved for posterity and based on an evidentiary record. The two-step, tiered scrutiny approach thus places a heavy burden on the state to justify any intrusions into individual rights and, again, requires judges to explain their decisions in an accessible, transparent fashion that encourages public oversight.

To be sure, analyses of this kind can be poorly done, and in any specific instance may or may not succeed in uncovering and minimizing the impact of judges' policy preferences on the outcome of the case. But where there is such failure, the failure will be exposed via ascertainable lapses in the court's logical or factual analysis, giving rise to either critiques by other courts or reversal on appeal. So the process-structuring aspects of the tiered scrutiny approach constrain the ability of the judicial system *as a whole* to allow personal policy preferences to determine outcomes, whether or not the process has the same success in each opinion written. The "text, history, and tradition" framework offers none of these benefits. It provides no guidelines for the many cases in which the historical record is inconclusive, and thereby both invites biased decisionmaking and shrouds that decisionmaking in secrecy.

The Bumatay Dissent further asserts that the Supreme Court already rejected the two-step, tiered scrutiny approach when it "bristled" at the suggestion in Justice Breyer's dissent that courts should engage in a "freestanding 'interest balancing' approach" when adjudicating Second Amendment cases. *Id.* at 112-115 & n.10 (quoting *Heller*, 554 U.S. at 634). But, in fact, Justice Breyer's proposal was a thinly veiled reference to the proportionality test, the dominant international framework for adjudicating gun rights cases. *See, e.g.*, Moshe Cohen-Eliya & Iddo Porat, *The Hidden Foreign Law Debate in* Heller: *The Proportionality Approach in American Constitutional Law*, 46 San Diego L. Rev. 368, 369-70 (2009). Although the proportionality test has some broad similarities to the tiers of scrutiny, comparative law theorists note that the tiered

scrutiny approach offers substantial benefits that the proportionality approach lacks. Namely, the proportionality approach directs judges to engage in a case-by-case weighing analysis that assesses whether the benefits of a disputed policy outweigh or are sufficient to justify the degree of intrusion into the right at issue in the case. *Id.* at 380-81. The tiers of scrutiny, in contrast, supply a pre-determined weighing calculus triggered by the details of each case. Barak, *supra*, at 512, 521-22. In other words, the tiered scrutiny approach provides a real check on judicial power, because much of the central weighing analysis in each case is not within the control of individual judges and is instead "bounded" by a pre-existing categorical framework. *Id.* Once again, this aspect of the tiered scrutiny approach cabins judicial discretion and promotes long-run objective decisionmaking, to the degree such decisionmaking is possible.

Finally, the Bumatay Dissent states that this Circuit's precedent regarding intermediate scrutiny in Second Amendment cases has "dispense[d] with the requirement of narrow tailoring" by adopting a "reasonable fit" tailoring requirement. Bumatay Dissent at 111 n.8. But *Vivid Entertainment, LLC v. Fielding*, 774 F.3d 566 (9th Cir. 2014), the case cited by the Dissent for the proposition that intermediate scrutiny ordinarily requires "narrow tailoring," clarified that "[i]n order to be narrowly tailored for purposes of intermediate scrutiny," the regulation need not be the least restrictive means of achieving the government interest, as the requirement is "satisfied so long as the regulation promotes a substantial government interest that would be

achieved less effectively absent the regulation." *Id.* at 580. Our Second Amendment case law defines the "reasonable fit" requirement in exactly the same way, noting that although a firearm regulation need not utilize the least restrictive means of achieving its underlying objective, it must "promote a substantial government interest that would be achieved less effectively absent the regulation." *See, e.g.*, *Mai v. United States*, 952 F.3d 1106, 1116 (9th Cir. 2020), *reh'g denied*, 974 F.3d 1082 (2020), *cert. denied*, 141 S. Ct. 2566 (2021); *United States v. Torres*, 911 F.3d 1253, 1263 (9th Cir. 2019); *Fyock*, 799 F.3d at 1000. There is therefore no merit to the suggestion that the Ninth Circuit's application of intermediate scrutiny in Second Amendment cases is somehow less exacting than its application of the standard in other kinds of cases.

Further, Judge Bumatay cites no precedent in support of his assertion that intermediate scrutiny review would allow the government to justify a policy on grounds that are not "genuine." Bumatay Dissent at 111 n.8. To the contrary, in cases where intermediate scrutiny applies, the burden falls on the government to demonstrate that an important interest underlies the policy, and that interest "must be genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996); *see also, e.g.*, *Karnoski v. Trump*, 926 F.3d 1180, 1199-1202 (9th Cir. 2019).

CONCLUSION

Rather than representing a "much less subjective" framework for decisionmaking in Second Amendment cases involving discrete arms regulations, Bumatay

Dissent at 121, the "text, history, and tradition" test obscures the myriad indeterminate choices that will arise in most such cases. The tiered scrutiny approach, in contrast, serves to guide and constrain a court's analysis in Second Amendment disputes regarding discrete arms regulations, as it has done for numerous other constitutional provisions. I therefore have no doubt that the principal opinion in this case properly rejects the Bumatay Dissent's invitation to abandon the tiered scrutiny approach for adjudicating Second Amendment controversies involving discrete regulations in favor of the "text, history, and tradition" approach. We are very wise not to do so, for all of the reasons I have explained.

HURWITZ, Circuit Judge, concurring:

I join Judge Graber's opinion for the Court unreservedly. I ordinarily would not say more, but I am reluctantly compelled to respond to the dissent of my brother Judge VanDyke, who contends that the "majority of our court distrusts gun owners and thinks the Second Amendment is a vestigial organ of their living constitution." That language is no more appropriate (and no more founded in fact) than would be a statement by the majority that today's dissenters are willing to rewrite the Constitution because of their personal infatuation with firearms. Our colleagues on both sides of the issue deserve better.

I recognize that colorful language captures the attention of pundits and partisans, and there is nothing wrong with using hyperbole to make a point. But my colleague has no basis for attacking the personal motives of his sisters and brothers on this Court. His contention that prior decisions of this Circuit—involving different laws and decided by different panels—somehow demonstrate the personal motives of today's majority fails to withstand even cursory analysis. By such reasoning, one also would have to conclude that my friends in today's minority who, like me, are deciding a Second Amendment case for the first time, are also driven by personal motives.

Judge VanDyke has no way of knowing the personal views of other members of the Court about firearms. Indeed, members of the Court not among today's dissenters have firearms in their homes. Members of this Court not among today's dissenters have volunteered for service in the active military or the National Guard (the modern "well regulated

Militia") and bore arms during that service. But those personal experiences—or the lack of them—do not drive the decision on the important issue at hand. That issue is whether the people of the State of California are forbidden by the United States Constitution to enact measures like the contested statute to protect themselves from gun violence.

Reasonable judges can disagree as to whether the California statute crosses a constitutional line. I believe that Judge Graber has persuasively explained why it does not. But I do not question the personal motives of those on the other side of that issue. On the seriousness of the problem that California seeks to address, however, there should be no dispute. However infrequent mass shootings may be, hardly anyone is untouched by their devastation. The Ninth Circuit lost one of its own, Chief Judge Roll of the District of Arizona, to precisely such a shooting, notwithstanding Judge VanDyke's assumption that federal judges are somehow immune from such dangers. Other members of the Court have lost family and friends to gun violence. I recount these matters of common knowledge not, as Judge VanDyke suggests, to import my personal experiences into the decision-making process in this case, but instead to emphasize that despite the alleged "infrequency" of mass shootings, they have effects far beyond the moment that are the proper subject of legislative consideration. And, to the extent that the frequency of such carnage is relevant, surely the people and their elected representatives are far better situated in the first instance than we to make that determination. The people of California should not be precluded from attempting to prevent mass murders simply because

they don't occur regularly enough in the eyes of an unelected Article III judge.

The crucial issue here is what level of scrutiny to apply to the California law. We can respectfully disagree whether the measures California has adopted violate the Second Amendment. But an attack on the personal motives of the members of this Court who reach the same result in this case as every other Circuit to address this issue neither advances our discourse nor gives intellectual support to the legal positions argued by my respected dissenting colleagues. I start from the assumption that Judge VanDyke, whose dissent displays an admirable knowledge of firearms and ammunition, dissents today not because of his personal experiences or policy preferences but instead because he sincerely believes that his oath of fidelity to the Constitution requires that we invalidate what our colleague Judge Lee described in the now-vacated majority opinion for the three-judge panel as a "well-intentioned" law designed by the sovereign state of California to "curb the scourge of gun violence." *Duncan v. Becerra*, 970 F.3d 1133, 1140-41 (9th Cir. 2020). I simply ask that today's majority, each of whom took the very same oath, be treated with the same level of respect.

BUMATAY, Circuit Judge, with whom IKUTA, and R. NELSON, Circuit Judges, join, dissenting:

When Justice Brandeis observed that states are the laboratories of democracy, he didn't mean that states can experiment with the People's rights. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). But that's what California does here. The state bans magazines that can carry over ten rounds—a firearm component with a long historical lineage commonly used by Americans for lawful purposes, like self-defense. Indeed, these magazines are lawfully owned by millions of people nationwide and come standard on the most popular firearms sold today. If California's law applied nationwide, it would require confiscating half of all existing firearms magazines in this country. California nevertheless prevents its citizens from owning these magazines. But the Constitution protects the right of law-abiding citizens to keep and bear arms typically possessed for lawful purposes. On en banc review, we should have struck down the law.

Contrary to the Second Amendment, however, our court upholds California's sweeping ban on so-called large-capacity magazines.[1] It can't be because these magazines lack constitutional protection. The majority assumes they are. And it can't be because the ban is longstanding. California's law is of recent vintage. Rather, the law survives because the majority

[1] We use the term "large-capacity magazine" for consistency with the majority but note that magazines with the capacity to accept more than ten rounds of ammunition are standard issue for many firearms. Thus, we would be more correct to refer to California's ban on "standard-capacity magazines."

has decided that the costs of enforcing the Second Amendment's promise are too high. The majority achieves this result by resorting to the tiers-of-scrutiny approach adopted by this court years ago. Under that balancing test, the government can infringe on a fundamental right so long as the regulation is a "reasonable fit" with the government's objective.

In reality, this tiers-of-scrutiny approach functions as nothing more than a black box used by judges to uphold favored laws and strike down disfavored ones. But that is not our role. While we acknowledge that California asserts a public safety interest, we cannot bend the law to acquiesce to a policy that contravenes the clear decision made by the American people when they ratified the Second Amendment.

In *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the Supreme Court held that the Second Amendment confers "an individual right to keep and bear arms." This watershed case provided clear guidance to lower courts on the proper analytical framework for adjudicating the scope of the Second Amendment right. That approach requires an extensive analysis of the text, tradition, and history of the Second Amendment. Our court should have dispensed with our interest-balancing approach and hewed to what the Supreme Court told us to do. Under that approach, the outcome is clear. Firearms and magazines capable of firing more than ten rounds have existed since before the Founding of the nation. They enjoyed widespread use throughout the nineteenth and twentieth centuries. They number in

the millions in the country today. With no longstanding prohibitions against them, large-capacity magazines are thus entitled to the Second Amendment's protection. It's the People's decision in ratifying the Constitution, not California's, that dictates the result here.

For these reasons, we respectfully dissent.

I. Factual Background

In California, a "large-capacity magazine" is "any ammunition feeding device with the capacity to accept more than 10 rounds." Cal. Penal Code § 16740. Since 2000, California has prohibited the manufacture, importation, and sale of large-capacity magazines. *See* Act of July 19, 1999, ch. 129, 1999 Cal. Stat. §§ 3, 3.5. Thirteen years later, the California legislature prohibited the receipt and purchase of large-capacity magazines. *See* 2013 Cal. Stat. 5299, § 1. And three years after that, the California legislature made it unlawful to possess large-capacity magazines. *See* 2016 Cal. Stat. 1549, § 1; Cal. Penal Code § 32310(a), (c). Shortly after, California voters adopted Proposition 63, which strengthened California's magazine ban by making possession punishable by up to one year in prison. *See* Cal. Penal Code § 32310(c). There's no grandfather clause—the law applies no matter when or how the magazine was acquired. *See id.*

Today, California citizens who possess large-capacity magazines have four options: remove the magazine from the state; sell the magazine to a licensed firearms dealer; surrender the magazine to a law enforcement agency for destruction; or permanently alter the magazine so that it cannot

accept more than ten rounds. *Id.* §§ 16740(a), 32310(d).

The question before us is whether California's magazine ban violates the Second Amendment. It does.

II. Legal Background

The Second Amendment commands that the "right of the people to keep and bear Arms, shall not be infringed." U.S. Const. Amend. II. At the outset, it's worth emphasis that the Second Amendment guarantees a pre-existing, fundamental, natural right. That's because it is necessary to "protect and maintain inviolate the three great and primary rights of personal security, personal liberty, and private property." 1 William Blackstone, Commentaries on the Laws of England, *136, *139. In other words, the right is among "that residuum of human rights, which is not intended to be given up to society, and which indeed is not necessary to be given for any good social purpose."[2]

The Second Amendment's fundamental nature follows from its close connection to the right of self-defense. As John Adams explained:

> Resistance to sudden violence, for the preservation not only of my person, my limbs and life, but of my property, is an indisputable right of nature which I have never surrendered to the public by the

[2] Letter from Richard Henry Lee to Governor Edmund Randolph (Oct. 16, 1787), https://archive.csac.history.wisc.edu/Richard_Henry_Lee_to_Edmund_Randolph.pdf.

> compact of society, and which perhaps, I could not surrender if I would.[3]

Judge George Thatcher, a member of the First United States Congress, contrasted rights conferred by law with those that are natural; the right of "keeping and bearing arms" belonged in the latter category as it is "coeval with man."[4]

The fundamental nature of the Second Amendment has been well recognized by the Supreme Court. At its core, the Court held, the Second Amendment protects the "right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635. The protection is an individual one and extends to all bearable arms that are typically possessed by law-abiding citizens for lawful purposes, like self-defense. *Id.* at 582, 595, 625. Moreover, the right is so "fundamental" and "deeply rooted in this Nation's history and tradition," that it is "fully applicable to the States." *McDonald v. City of Chicago*, 561 U.S. 742, 750, 767 (2010) (simplified).

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[3] Boston Gazette, Sept. 5, 1763, *reprinted in* 3 The Works of John Adams 438 (Charles F. Adams ed., 1851), in Anthony J. Dennis, *Clearing the Smoke from the Right to Bear Arms and the Second Amendment*, 29 Akron L. Rev. 57, 73 (1995).

[4] Scribble-Scrabble, Cumberland Gazette, Jan. 26, 1787, *reprinted in* Firearms Law and the Second Amendment: Regulation, Rights, and Policy, Johnson et al. 300 (2d ed. 2017). Scribble-Scrabble was the pen name of George Thatcher. *See* Patrick J. Charles, *Scribble Scrabble, the Second Amendment, and Historical Guideposts: A Short Reply to Lawrence Rosenthal and Joyce Lee Malcolm*, 105 Nw. U. L. Rev. 1821, 1825 (2011).

III. California's Large-Capacity Magazine Ban Is Unconstitutional

From this background, we turn to the Second Amendment's application to this case. From the start, the majority misses the mark, the most fundamental error being the use of an improper framework to analyze Second Amendment challenges. Once again, our court applies a two-step, tiers-of-scrutiny approach. But that approach is inconsistent with what the Second Amendment commands and what the Supreme Court requires. On en banc review, we should have scrapped this regime and adopted what the Supreme Court tells us is the proper analytical framework—one that looks to the text, history, and tradition of the Second Amendment.

Under that analytical framework, California's ban on large-capacity magazines cannot withstand a Second Amendment challenge. Large-capacity magazines are bearable arms that are commonly owned for lawful purposes, and not subject to longstanding regulatory measures. This is not a close question. It flows directly from *Heller*.

A. *Heller*'s Analytical Framework

1. The Supreme Court Rejected an Interest-Balancing Test

Before turning to what *Heller* did, it's important to understand what it did not do. *Heller* did not give lower courts license to pursue their own conception of the Second Amendment guarantee. While *Heller* did not answer all questions for all times, as discussed below, it provided a framework for analyzing Second Amendment issues without resorting to the familiar tiers-of-scrutiny approach. Instead of recognizing this,

lower courts, including our own, routinely narrow *Heller* and fill the supposed vacuum with their own ahistorical and atextual balancing regime. This contradicts *Heller*'s express instructions.

The majority continues this error by reaffirming our court's two-step Second Amendment inquiry. Maj. Op. 23-24. Under that test, we ask two questions: (1) "if the challenged law affects conduct that is protected by the Second Amendment"; and if so, (2) we "choose and apply an appropriate level of scrutiny." *Id.* (simplified).

The step one inquiry often pays lip service to *Heller*: it asks whether the law "burdens conduct protected by the Second Amendment," *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013), "based on a historical understanding of the scope of the [Second Amendment] right," *Jackson v. City & Cnty. Of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (simplified). To determine whether the challenged law falls outside the scope of the Amendment, we look to whether "persuasive historical evidence show[s] that the regulation [at issue] does not impinge on the Second Amendment right as it was historically understood." *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016). Thus, the first step asks if the conduct is protected by the Second Amendment as a historical matter.[5]

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[5] The majority does not bother to do the hard work of examining the historical record and merely assumes that the magazine ban infringes on the Second Amendment. Such an analytical step blinds the majority to the long historical tradition of weapons capable of firing more than ten rounds in this country and the exceptional nature of California's ban here. *Cf. Mai v. United*

It is at step two where our court goes astray. Instead of ending the inquiry based on history and tradition, our court layers on a tier of scrutiny—an exercise fraught with subjective decision-making. In picking the appropriate tier, we operate a "sliding scale" depending on the severity of the infringement. *Id.* Practically speaking, that means putting a thumb on that scale for "intermediate scrutiny." In over a dozen post-*Heller* Second Amendment cases, we have never adopted strict scrutiny for any regulation.[6] That's because our court interprets the sliding scale to require intermediate scrutiny so long as there are "alternative channels for self-defense." *Jackson*, 746 F.3d at 961.[7]

States, 974 F.3d 1082, 1091 (Bumatay, J., dissenting from the denial of reh'g en banc) ("By punting the analysis of the historical scope of the Second Amendment . . . , we let false assumptions cloud our judgment and distort our precedent even further from the original understanding of the Constitution.").

[6] *See Young v. Hawaii*, 992 F.3d 765, 773 (9th Cir. 2021) (en banc); *United States v. Singh*, 979 F.3d 697, 725 (9th Cir. 2020); *Mai v. United States*, 952 F.3d 1106, 1115 (9th Cir. 2020); *United States v. Torres*, 911 F.3d 1253, 1263 (9th Cir. 2019); *Pena v. Lindley*, 898 F.3d 969, 979 (9th Cir. 2018); *Teixeira v. County of Alameda*, 873 F.3d 670, 678 (9th Cir. 2017) (en banc); *Mahoney v. Sessions*, 871 F.3d 873, 881 (9th Cir. 2017); *Bauer v. Becerra*, 858 F.3d 1216, 1221 (9th Cir. 2017); *Fisher v. Kealoha*, 855 F.3d 1067, 1070–71 (9th Cir. 2017); *Fortson v. L.A. City Attorney's Office*, 852 F.3d 1190, 1194 (9th Cir. 2017); *Silvester*, 843 F.3d at 827; *Wilson v. Lynch*, 835 F.3d 1083, 1093 (9th Cir. 2016); *Peruta v. Cnty. of San Diego*, 824 F.3d 919, 942 (9th Cir. 2016) (en banc); *Fyock v. City of Sunnyvale*, 779 F.3d 991, 999 (9th Cir. 2015); *Jackson*, 746 F.3d at 965; *Chovan*, 735 F.3d at 1138.

[7] Once again, our court fails to pay attention to *Heller* with this type of analysis. *Heller* expressly says, "[i]t is no answer to say . . . that it is permissible to ban the possession of handguns

What's more, we often employ a toothless "intermediate scrutiny," upholding the regulation if it "reasonabl[y] fit[s]" the state's asserted public-safety objective.[8] Maj. Op. 15. In other words, so long as a

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so long as the possession of other firearms (i.e., long guns) is allowed." 554 U.S. at 629; *see also Caetano v. Massachusetts*, 577 U.S. 411, 421 (2016) (Alito, J., concurring) ("But the right to bear other weapons is 'no answer' to a ban on the possession of protected arms."). Likewise, it is no answer to say—as Judge Graber's concurrence explicitly does—that citizens may defend their homes during an attack with multiple firearms or magazines or by reloading their firearms instead of using a large-capacity magazine. Graber Concurrence 54–55. While the concurrence calls the burden of carrying multiple firearms or magazines and the delay of reloading magazines mere "inconvenience[s]," *id*., the record shows that such alternatives impair the ability of citizens to defend themselves. Stated simply, the unpredictable and sudden nature of violent attacks may preclude the effective use of multiple firearms and magazines and the ability to reload weapons. Limiting self-defense to these alternate means would disadvantage law-abiding citizens, who may not have proper training to reload firearms or gather multiple armaments under the trauma and stress of a violent attack.

[8] The "reasonable fit" modification to intermediate scrutiny dispenses with the requirement of narrow tailoring. *See, e.g.*, *Vivid Entertainment, LLC v. Fielding*, 774 F.3d 566, 580 (9th Cir. 2014) (holding that a statute must be "narrowly tailored" to survive intermediate scrutiny). We appropriated the "reasonable fit" standard from "a specific, and very different context" under the First Amendment: "*facially neutral* regulations that *incidentally* burden freedom of speech in a way that is *no greater than is essential*." *Mai*, 974 F.3d at 1101 (VanDyke, J., dissenting from the denial of reh'g en banc). But tailoring ensures that the government's asserted interest is its "genuine motivation"—that "[t]here is only one goal the classification is likely to fit . . . and that is the goal the legislators actually had in mind." Brief for J. Joel Alicea as Amicus Curiae Supporting Petitioners at 20, *N.Y.*

firearms regulation aims to achieve a conceivably wise policy measure, the Second Amendment won't stand in the way. In effect, this means we simply give a blank check to lawmakers to infringe on the Second Amendment right. Indeed, post-*Heller*, we have never struck down a single firearms regulation.[9]

All this interest balancing is in blatant disregard of the Court's instructions. Nowhere in *Heller* or *McDonald* did the Supreme Court pick a tier of scrutiny for Second Amendment challenges. Nor did the Court compare the relative costs of firearms regulations to their potential public-safety benefits, adopt a sliding scale, look at alternative channels of self-defense, or see if there was a reasonable fit between the regulation and the state's objective. The absence of these balancing tools was not accidental. The Court made clear that such judicial balancing is simply incompatible with the guarantees of a fundamental right. Time and time again, the Supreme Court expressly rejected the means-end balancing approach inherent in the two-step test applied by our court. We should have followed their directions.

First was *Heller*. In that case, the Court soundly rejected any sort of interest-balancing in assessing a handgun ban. In dissent, Justice Breyer criticized the majority for declining to establish a level of scrutiny to evaluate Second Amendment restrictions. He then

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State Rifle & Pistol Ass'n v. Bruen, (July 20, 2021) (No. 20-843) (quoting John Hart Ely, Democracy and Distrust 146 (1980)). Dispensing with narrow tailoring thus abdicates our responsibility to test the government's true interest in a regulation.

[9] *See* footnote 6.

proposed adopting an "interest-balancing inquiry" for Second Amendment questions, weighing the "salutary effects" of a regulation against its "burdens." *Heller*, 554 U.S. at 689-90 (Breyer, J., dissenting). In response, the Court bristled at the suggestion that a constitutional right could hinge on the cost-benefit analysis of unelected judges:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.

Heller, 554 U.S. at 634 (majority opinion). Rather than entertaining what tier of scrutiny should apply to the Second Amendment, the Court noted that the Amendment itself was "the very *product* of an interest balancing by the people," and that courts are simply not permitted to "conduct [that balancing] anew." *Id.* at 635 (emphasis in original). In sum, *Heller* struck down the handgun ban at issue because those firearms are commonly used by law-abiding citizens for lawful purposes, not because the ban failed intermediate scrutiny.[10]

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[10] The majority asserts that *Heller* rejected Justice Breyer's "interest balancing inquiry"—not because of the Court's disapproval of tiers of scrutiny—but because Justice Breyer did

Two years later came *McDonald*. There, the Court was again emphatic that the Second Amendment right was not subject to "interest balancing." 561 U.S. at 785. *McDonald* reiterated the Court's "express[] reject[ion]" of "the argument that the scope of the Second Amendment right should be determined by judicial interest balancing." *Id.* (citing *Heller*, 554 U.S. at 633-35). The Court explicitly rejected some state courts' approach to permit balancing tests for firearm rights. *Id.* The Court reasoned that the Fourteenth Amendment did not apply "only a watered-down, subjective version of the individual guarantees of the Bill of Rights" against the States. *Id.* (simplified).

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not use the precise words "intermediate scrutiny." Maj. Op. 25–26. We do not think the Court would be so focused on form over substance to reject Justice Breyer's argument because of nomenclature. Indeed, the type of inquiry the majority engages in—such as weighing the ban's effect on mass shooters, *id.* at 46—is exactly the kind of balancing between "government public-safety concerns" and Second Amendment interests that Justice Breyer called for, *see Heller*, 554 U.S. at 689 (Breyer, J., dissenting).

The majority also relies on *Heller*'s passing reference to D.C.'s handgun ban failing "under any standard of scrutiny" as license to engage in the judicial-interest balancing adopted by this court. Maj. Op. 25. But that misreads the statement. As then-Judge Kavanaugh noted, "that [reference] was more of a gilding-the-lily observation about the extreme nature of D.C.'s law—and appears to have been a pointed comment that the dissenters should have found D.C.'s law unconstitutional even under their own suggested balancing approach—than a statement that courts may or should apply strict or intermediate scrutiny in Second Amendment cases." *Heller v. District of Columbia ("Heller II")*, 670 F.3d 1244, 1277–78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

Once again responding to Justice Breyer, *McDonald* disclaimed the notion that the Amendment is to be assessed by calculating its benefits and costs. Justice Breyer, in dissent, noted that incorporating the Second Amendment against the States would require judges to face "complex empirically based questions," such as a gun regulation's impact on murder rates, which are better left to legislatures. *Id.* at 922-26 (Breyer, J., dissenting). The Court answered that Justice Breyer was "incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise." *Id.* at 790-91. On the contrary, rejecting any "interest-balancing test" for the Second Amendment right obviates the courts from making those "difficult empirical judgments." *Id.* (citing *Heller*, 554 U.S. at 634).

Most recently, *Caetano* demonstrated the Court's application of *Heller* and, unsurprisingly, that case did not involve interest balancing. *See* 577 U.S. 411. *Caetano* viewed *Heller* as announcing rules for determining the constitutionality of firearms regulations and applied these rules to a state ban on stun guns. *See* 577 U.S. at 411. There, the Court drew three takeaways from *Heller*: (1) the Second Amendment protects arms "not in existence at the time of the founding"; (2) a weapon not "in common use at the time of the Second Amendment's enactment" does not render it "unusual"; and (3) the Second Amendment protects more than "only those weapons useful in warfare." *Id.* at 411-12 (simplified). The Court held the state court's reasoning contradicted *Heller*'s "clear statement[s]" and vacated its decision.

Id. at 412. Notably, *Caetano* did not adopt a tier of scrutiny or otherwise engage in interest balancing. It certainly did not ask whether the stun gun ban was a "reasonable fit" with the state's public safety objective.

That the Court has uniformly rejected "interest balancing" when it comes to the Second Amendment is nothing new. Then-Judge Kavanaugh understood as much shortly after *Heller* and *McDonald* were decided. As he explained, the Supreme Court "set forth fairly precise guidance to govern" Second Amendment challenges. *Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting). "*Heller* and *McDonald*," he said, "leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny." *Id.* More recently, Justice Kavanaugh has articulated his "concern that some federal and state courts may not be properly applying *Heller* and *McDonald*." *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1527 (2020) (Kavanaugh, J., concurring).

Other justices have similarly questioned the continued use of tiers of scrutiny by lower courts. Justice Thomas, for instance, observed that many courts of appeals "have resisted [the Court's] decisions in *Heller* and *McDonald*" and sought to "minimize [*Heller*'s] framework." *Rogers v. Grewal*, 140 S. Ct. 1865, 1866 (2020) (Thomas, J., dissenting from the denial of certiorari) (simplified). He emphasized that *Heller* "explicitly rejected the invitation to evaluate Second Amendment challenges under an 'interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental

public-safety concerns on the other.'" *Id.* at 1867 (simplified).

Rogers wasn't the first time that Justice Thomas sounded the alarm on this issue. In *Friedman v. City of Highland Park*, Justice Thomas reiterated that the Court "stressed that the very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon." 136 S. Ct. 447, 448 (2015) (Thomas, J., dissenting from denial of certiorari) (simplified); *see also Silvester v. Becerra*, 138 S. Ct. 945, 948 (2018) (Thomas, J., dissenting from the denial of certiorari) (explaining that *Heller* rejected "weigh[ing] a law's burdens on Second Amendment rights against the governmental interests it promotes"); *Jackson v. City & Cnty. of San Francisco*, 135 S. Ct. 2799, 2802 (2015) (Thomas, J., dissenting from the denial of certiorari). Moreover, Justice Thomas has criticized tiers-of-scrutiny jurisprudence in general as an atextual and ahistorical reading of the Constitution. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2327-28 (2016) (Thomas, J., dissenting) (characterizing the use of "made-up tests" to "displace longstanding national traditions as the primary determinant of what the Constitution means" as illegitimate (simplified).)[11]

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[11] For most of this country's history, judges viewed their role not as "weighing or accommodating competing public and private interests," but instead employing "boundary-defining techniques" which made their job a more "objective, quasi-scientific one." Richard Fallon, Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1274, 1285–86 (2007) (simplified). As Judge Berzon's concurrence demonstrates, the tiers-of-scrutiny

Justices Alito and Gorsuch have also taken issue with how lower courts are applying *Heller*. After determining that the lower court improperly upheld a New York City handgun ordinance under "heightened scrutiny," Justice Alito, joined by Justice Gorsuch, commented, "[w]e are told that the mode of review in this case is representative of the way *Heller* has been treated in the lower courts. If that is true, there is cause for concern." *N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. at 1544 (Alito, J., dissenting).

A chorus of circuit judges from across the country has also rejected the tiers-of-scrutiny approach adopted by this and other courts. *See, e.g.*, *Mai*, 974 F.3d at 1083 (Collins, J., dissenting from the denial of reh'g en banc); *id.* at 1097 (VanDyke, J., dissenting from the denial of reh'g en banc); *Ass'n of N.J. Rifle & Pistol Clubs v. Att'y Gen. N.J.*, 910 F.3d 106, 127 (3d Cir. 2018) (Bibas, J. dissenting); *Mance v. Sessions*, 896 F.3d 390, 394 (5th Cir. 2018) (Elrod, J., joined by Jones, Smith, Willett, Ho, Duncan, and Engelhardt, JJ., dissenting from the denial of reh'g en banc); *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 702 (6th Cir. 2016) (Batchelder, J., concurring); *id.* at 710 (Sutton, J., concurring).

We join this chorus. We cannot "square the type of means-ends weighing of a government regulation inherent in the tiers-of-scrutiny analysis with *Heller*'s directive that a core constitutional protection should

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approach is of recent vintage. Berzon Concurrence 90–91. Judge Berzon, thus, confirms Professor Fallon's view that strict scrutiny (and its rational-basis and intermediate-scrutiny cousins) have no "foundation in the Constitution's original understanding." Fallon, *supra*, at 1268.

not be subjected to a freestanding interest-balancing approach." *Mai*, 974 F.3d at 1086-87 (Bumatay, J., dissenting from the denial of reh'g en banc) (simplified)). That judges are not empowered to recalibrate the rights owed to the people has been stated again and again:

> Our duty as unelected and unaccountable judges is to defer to the view of the people who ratified the Second Amendment, which is itself the "very *product* of an interest balancing by the people." *Heller*, 554 U.S. at 635. By ignoring the balance already struck by the people, and instead subjecting enumerated rights, like the Second Amendment, to our own judicial balancing, "we do violence to the [constitutional] design." *Crawford v. Washington*, 541 U.S. 36, 67-68 (2004).

Id. at 1087. After all, "[t]he People, through ratification, have already weighed the policy tradeoffs that constitutional rights entail." *Luis v. United States*, 136 S. Ct. 1083, 1101 (2016) (Thomas, J., concurring).

Despite these warnings, our court charges ahead in applying the two-step-to-intermediate-scrutiny approach. Application of "intermediate scrutiny" to the large-capacity magazine ban, however, engages in exactly the sort of "costs and benefits" analysis the Court said we should not be doing. *McDonald*, 561 U.S. at 790-91. This approach, moreover, is nothing more than a judicial sleight-of-hand, allowing courts to feign respect to the right to keep and bear arms while "rarely ever actually using it to strike down a

law."[12] Intermediate scrutiny, we fear, is just window dressing for judicial policymaking. Favored policies may be easily supported by cherry-picked data under the tier's black box regime. But whether we personally agree with California's firearms regulations, that is no excuse to disregard the Court's instructions and develop a balancing test for a fundamental right. Our job is not to give effect to our own will, but instead to "the will of the law"—in this case, the Constitution. *Osborn v. Bank of U.S.*, 22 U.S. 738, 866 (1824) (Marshall, C.J.).

Of course, this would not be the first time that our court struggled mightily to understand the Supreme Court's directions. *See, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam) ("This is the fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions

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[12] Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 Geo. Wash. L. Rev. 703, 757 (2012) (explaining that lower courts consistently apply intermediate scrutiny in line with Justice Breyer's dissent despite Heller's rejection of that approach). Even if we were to ignore *Heller* and continue to follow our own misguided precedent, the majority still gets it wrong. As Judge Lee ably pointed out, strict scrutiny should apply because § 32310's categorical ban substantially burdens "the core right of law-abiding citizens to defend hearth and home." *Duncan v. Becerra*, 970 F.3d 1133, 1152 (9th Cir. 2020), reh'g en banc granted, opinion vacated, 988 F.3d 1209 (9th Cir. 2021). As the Supreme Court noted, laws that impinge on a "fundamental right explicitly . . . protected by the constitution" require "strict judicial scrutiny." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("[C]lassifications affecting fundamental rights are given the most exacting scrutiny." (simplified)).

on religious exercise."). We have done so again here, and it is a shame.

2. The Supreme Court Looks to Text, History, and Tradition

Contrary to the majority's reiteration of a tiers-of-scrutiny, sliding scale approach, *Heller* commands that we interpret the scope of the Second Amendment right in light of its text, history, and tradition. That's because constitutional rights "are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Heller*, 554 U.S. at 634-35.

Heller announced a straightforward analytical framework that we are not free to ignore: the Second Amendment encompasses the "right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635. As a "prima facie" matter, that right extends to "all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.* at 582. Any regulation that infringes on the exercise of this right implicates conduct protected by the Second Amendment.

But because the Second Amendment right is "not unlimited," *id.* at 595, regulations that are "historical[ly] justifi[ed]" do not violate the right, *id.* at 635. Primarily, the "Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes," such as M-16s and short-barreled shotguns. *Id.* at 625. In making this inquiry, we look to the "historical tradition," which has excluded "dangerous and unusual" weapons from the Amendment's protection. *Id.* at 627. In the

same way, the Amendment *does* protect weapons in "common us[age]." *Id.* Finally, the Second Amendment does not disturb "longstanding prohibitions" on the sale, possession, or use of guns with sufficient historical antecedents. *Id.* at 626-27.

Rather than rely on our own sense of what is the right balance of freedom and government restraint, then, the Court instructs lower courts to follow the meaning of the People's law as understood at the time it was enacted. Such an approach is more determinate and "much less subjective" because "it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor." *McDonald*, 561 U.S. at 804 (Scalia, J., concurring).

Far from obscuring the decision-making process, as Judge Berzon's concurrence contends, applying the text, history, and tradition approach forces judges to put their cards on the table. It sets out the ground rules under which constitutional decision-making is made. It ensures that only proper sources, datapoints, and considerations are used to determine the scope of the Second Amendment right. Adopting this approach necessarily constrains judges to the text and the historical record rather than to their own policy preferences. To be sure, no mode of judicial decision-making is perfect or can eliminate discretionary calls, but relying on a historical methodology provides discernible rules that "hedge[]" discretion and expose the "misuse of these rules by a crafty or willful judge"

as "an abuse of power."[13] Even if the method requires complicated historical research or interpretative choices, the text, history, and tradition approach offers a common ground to criticize a judge who glosses over the text or misreads history or tradition.[14] Otherwise, we are left with the majority's approach which all too often allows judges to simply pick the policies they like with no clear guardrails.

Moreover, contrary to Judge Berzon's portrayal, the fact that "[w]ords do not have inherent meaning" is a feature—not a bug—of *Heller*'s text-based approach. *See* Berzon Concurrence 61. We agree that the meaning of words may evolve over time. But enumerated rights do not. The People ratified the Second Amendment in 1791 to protect an enduring right—not one subject to the whims of future judges or the evolution of the words used to articulate the right.[15] This view is radical. Chief Justice Marshall

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[13] Frank H. Easterbrook, Foreword to Antonin Scalia and Bryan A. Garner, Reading Law at xxiii (2012).

[14] *See generally* William Baude, *Originalism as a Constraint on Judges*, 84 U. Chi. L. Rev. 2213 (2018).

[15] *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 862 (1989) ("The purpose of constitutional guarantees . . . is precisely to prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable."); *see also* William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev 693, 697 (1976) ("Once we have abandoned the idea that the authority of the courts to declare laws unconstitutional is somehow tied to the language of the Constitution that the people adopted, a judiciary exercising the power of judicial review appears in a quite different light. Judges then are no longer the keepers of the covenant; instead they are a small group of fortunately situated people with a roving commission to second-

expressed a similar sentiment in 1827: The Constitution's words, he said, "are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them." *Ogden v. Saunders*, 25 U.S. 213, 332 (1827) (Marshall, C.J., dissenting).

Without hewing to the meaning of the right as understood at the time of enactment, we alter the rights chosen by the People and risk injecting our own policy judgments into the right's meaning. As for Judge Berzon's concern that the meaning of constitutional text may be "lost to the passage of time," Berzon Concurrence 61, we have been interpreting language going back millennia. As Justice Gorsuch observed, "[j]ust ask any English professor who teaches Shakespeare or Beowulf." Neil M. Gorsuch, A Republic, If You Can Keep It 112 (2020). Simply put, original meaning gives enduring meaning to the Constitution and preserves our rights as they were enshrined at the time of adoption.

The criticisms of history and tradition playing a role in constitutional interpretation fall equally flat. *See* Berzon Concurrence 62-75. As *Heller* shows, by looking to tradition and history, we see how constitutional text came to be and how the People closest to its ratification understood and practiced the right.[16] And by examining a firearm's history of

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guess Congress [and] state legislatures . . . concerning what is best for the country.").

[16] *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 Notre Dame L. Rev. 1,

common usage, we come to see the fundamental nature of the right and illuminate how a modern governmental regulation may infringe on a longstanding protection. Tradition and history may also allow us to take interpretive options off the table: they might say that two possible "answers" to a legal question are permissible, which "is worth something" because courts should not "impose a third possibility."[17] So, tradition and history inform the meaning of constitutional rights in ways that no tier-of-scrutiny can.

For sure, this approach can be difficult. Some of Judge Berzon's process critiques are not all wrong. *See* Berzon Concurrence 57-58 (noting that the "volume of available historical evidence . . . will vary enormously and may often be either vast or quite sparse"). Looking to text, history, and tradition to uncover meaning takes time and careful analysis.[18] And interpreting the meaning of documents and events from long-ago is much harder than simply consulting our own policy views. But it is the high price our Constitution

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28 (2015) ("[T]he original public meaning was, in part, determined by the public context of constitutional communication. Thus, the public at large would have been aware of (or had access to) the basic history of the Constitution.).

[17] Ilan Wurman, *Law Historians' Fallacies*, 91 N.D. L. Rev. 161, 171 (2015).

[18] *See, e.g.*, Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 Const. Comment. 47, 74–75 (2006); William Baude & Jud Campbell, *Early American Constitutional History: A Source Guide* (2021), https://ssrn.com/abstract=2718777 (describing the wide variety of available originalist sources such as ratification debates, dictionaries, treatises, and linguistic corpora).

demands from judges who swear an oath to apply it faithfully. Indeed, the same criticisms leveled by Judge Berzon apply with greater force to the tiers-of-scrutiny approach because there is no historical backdrop to cabin a judge's discretion. While judges may not be historians, neither are we economists, statisticians, criminologists, psychologists, doctors, or actuarialists.[19] But that is exactly the type of expertise judges use to render judgment under the majority's approach. *See, e.g.*, *Mai*, 952 F.3d at 1118-20 (using Swedish statistical studies to justify the deprivation of the Second Amendment right of a formerly mentally ill citizen). While the text, history and tradition methodology may have shortcomings, it is better than the majority's approach.[20] Their judicial black box leaves critics grasping to understand the court's method for balancing policy interests. At the very least, text, history, and tradition has nothing to hide.

B. Under *Heller*, Large-Capacity Magazine Bans Are Unconstitutional

With a firm understanding of the approach directed by *Heller*, we turn to California's large-capacity ban.

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[19] *See* William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 Law and Hist. Rev. 809, 816 (2019) ("[L]egal uncertainty is hardly restricted to matters of history. Judges and juries frequently face questions that might stump expert economists or toxicologists.").

[20] *See* Scalia, *supra*, at 862–63.

1. Large-capacity magazines are "arms" under the Second Amendment.

To begin, when assessing a ban on a category of weapons, we look to whether the regulation infringes on the use of instruments that constitute "bearable arms" under the Second Amendment. *Heller*, 554 U.S. at 582. The Court tells us that the term "bearable arms" includes any "[w]eapons of offence" or "thing that a man wears for his defence, or takes into his hands," that is "carr[ied] . . . for the purpose of offensive or defensive action." *Id.* at 581, 584 (simplified). It doesn't matter if the "arm" was "not in existence at the time of the founding." *See id.* at 582.

At issue here are magazines capable of carrying more than ten rounds. A "magazine" is a firearm compartment that stores ammunition and feeds it into the firearm's chamber.[21] The magazines are integral to the operation of firearms. As a result, many popular firearms would be practically inoperable without magazines.

That the law bans magazines rather than the guns themselves does not alter the Second Amendment inquiry. Constitutional rights "implicitly protect those closely related acts necessary to their exercise." *Luis*, 136 S. Ct. at 1097 (Thomas, J., concurring). "No axiom is more clearly established in law, or in reason, than that wherever the end is

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[21] *See Magazine*, Oxford English Dictionary Online, https://www.oed.com/view/Entry/112144; *Magazine*, Merriam-Webster Online, https://www.merriam-webster.com/dictionary/magazine.

required, the means are authorized[.]" The Federalist No. 44, at 282 (James Madison) (Charles R. Kesler ed., 2003). Without protection of the components that render a firearm operable, the Second Amendment would be meaningless. *See Luis*, 136 S. Ct. at 1098 (Thomas, J., concurring); *see also Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015) (recognizing the "right to possess the magazines necessary to render . . . firearms operable").

Because California's law prohibits the possession of large-capacity magazines, it is within the scope of the Second Amendment's protection.[22]

2. Large-capacity magazines are typically possessed by law-abiding citizens for lawful purposes.

The next step in the Court's analysis requires that we determine whether large-capacity magazines are "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. As we stated, this inquiry examines the historical record to determine

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[22] California asserts that the Second Amendment doesn't extend to weapons "most useful in military service." *Heller* did not establish such an exception. In fact, *Heller* said the opposite: the Amendment's prefatory clause reference to the "conception of the militia" means that the right protects "the sorts of lawful weapons that [citizens] possessed at home [to bring] to militia duty." 554 U.S. at 627. Justice Alito squarely dispensed with California's argument in *Caetano*, stating that the Court has "recognized that militia members traditionally reported for duty carrying the sorts of lawful weapons that they possessed at home, and that the Second Amendment therefore protects such weapons as a class, regardless of any particular weapon's suitability for military use." 577 U.S. at 419 (Alito, J., concurring) (simplified).

whether the weapons are "dangerous and unusual," on the one hand, or whether they are in "common use," on the other. *Id.* at 627 (simplified).[23]

First, a word about "common usage." We start with the well-established premise that the Constitution protects enduring principles: "The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it." *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 404 (1937). Thus, absent amendment, "the relevant [constitutional] principles must be faithfully applied not only to circumstances as they existed in 1787, 1791, and 1868, for example, but also to modern situations that were

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[23] We believe this inquiry is one and the same. *Heller* mentions both in the same breath. Referring to the Court's prior precedent that "the sorts of weapons protected were those 'in common use at the time,'" the Court noted that "that limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" 554 U.S. at 627 (citing *United States v. Miller*, 307 U.S. 174, 179–80 (1939)). As then-Judge Kavanaugh recognized, *Heller* "said that 'dangerous and unusual weapons' are equivalent to those weapons not 'in common use.'" *Heller II*, 670 F.3d at 1272 (Kavanaugh, J., dissenting) (simplified); *see also United States v. Fincher*, 538 F.3d 868, 874 (8th Cir. 2008) ("Machine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use."); *Wilson v. Cnty. of Cook*, 968 N.E.2d 641, 655 (Ill. 2012) ("*Heller* explicitly recognized a historical and long-standing tradition of firearms regulations prohibiting a category of 'dangerous and unusual weapons' that are 'not typically possessed by law-abiding citizens for lawful purposes.'").

unknown to the Constitution's Framers." *Heller II*, 670 F.3d at 1275 (Kavanaugh, J., dissenting).

Here, we look to the Second Amendment's text for its enduring meaning. Its prefatory clause reads: "A well regulated Militia, being necessary to the security of a free State[.]" U.S. Const. amend. II. The Court has told us that this prefatory clause "fits perfectly" with the Amendment's operative clause's individual right to keep and bear arms: "the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents." *Heller*, 554 U.S. at 598. Thus, the prefatory clause "announces the purpose for which the right was codified: to prevent elimination of the militia." *Id.* at 599.

Understanding this background informs the type of weapons protected by the Second Amendment. As the Court wrote:

> In all the colonies, as in England, the militia system was based on the principle of the assize of arms. This implied the general obligation of all adult male inhabitants to possess arms, and, with certain exceptions, to cooperate in the work of defence. The possession of arms also implied the possession of ammunition, and the authorities paid quite as much attention to the latter as to the former.

Miller, 307 U.S. at 179-80 (simplified). The militia system then created a central duty: "ordinarily when called for [militia] service [able-bodied] men were

expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *Id.* at 179. Thus, the lifeblood of militia service was citizens armed with weapons typically possessed at home for lawful purposes. As a result, the Second Amendment protects such weapons *as a class*. *See Heller*, 554 U.S. at 627.

So, the Second Amendment protects the type of bearable weapons commonly used by citizens and at the ready for militia service—whether it be in 1791 or today.[24] What remains is an inquiry that is simultaneously historical and contemporary. The historical inquiry is relevant because we "reason by analogy from history and tradition" when interpreting the Constitution. *Ass'n of N.J. Rifle & Pistol Clubs v. Att'y Gen. N.J.*, 974 F.3d 237, 257 (3d Cir. 2020) (Matey, J., dissenting) (simplified). The Second Amendment right thus extends to "modern-day equivalents" of arms protected at the Founding. *See Parker v. District of Columbia*, 478 F.3d 370, 398 (D.C. Cir. 2007) ("[J]ust as the First Amendment free speech clause covers modern communication devices unknown to the founding generation, e.g., radio and television, and the Fourth Amendment protects telephonic conversation from a 'search,' the Second Amendment protects the possession of the modern-day equivalents of the colonial pistol."), *aff'd sub nom.*,

[24] It is no matter that citizens don't typically serve in militias today, or that the weapons protected by the Second Amendment would be comparatively ineffective in modern warfare. As *Heller* explained, "the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right." *Heller*, 554 U.S. at 627–28.

Heller, 554 U.S. 570. For this reason, even new or relatively unpopular firearms today might enjoy the Second Amendment's protection if they are "modern-day equivalents" of firearms that have been commonly owned for lawful purposes. Of course, the protection extends equally to weapons not in common use as a historical matter, so long as they are "commonly possessed by law-abiding citizens for lawful purposes *today*." *Caetano*, 577 U.S. at 420 (Alito, J., concurring).

Some courts have reviewed that common usage requirement as being "an objective and largely statistical inquiry." *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 256 (2d Cir. 2015). For example, Justice Alito noted the quantity of stun guns (200,000) in circulation as proof that they're commonly owned for lawful purposes. *Caetano*, 577 U.S. at 420 (Alito, J., concurring). But a narrow focus on numbers may not capture all of what it means to be a weapon "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625. As Judge Lee noted, "pure statistical inquiry may hide as much as it reveals." *Duncan*, 970 F.3d at 1147. A straight quantitative inquiry could create line-drawing problems and lead to bizarre results—such as the exclusion of a protectable arm because it is not widely possessed "by virtue of an unchallenged, unconstitutional regulation." *Id.*; *see also Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015) ("Yet it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn't commonly used. A law's existence can't be the source of its own constitutional validity."). Indeed, notably absent from *Heller* is any analysis of the number of handguns in

circulation or the proportion of owned firearms that were handguns. *Heller* instead focused on the purpose for which the firearms are owned and used. *See* 554 U.S. at 629 ("It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon."). Thus, in addition to statistical analysis, some courts also look to "broad patterns of use and the subjective motives of gun owners." *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 256. We need not resolve all these questions today, since large-capacity magazines, as we show below, are "in common use" today under either rubric.

a. Large-capacity magazines enjoy a long historical pedigree.

Looking at the historical record, large-capacity magazines are clear modern-day equivalents of arms in common use by the incorporation of the Second Amendment and are, thus, entitled to constitutional protection. As Judge Lee concluded: "Firearms or magazines holding more than ten rounds have been in existence—and owned by American citizens—for centuries. Firearms with greater than ten round capacities existed even before our nation's founding, and the common use of [large-capacity magazines] for self-defense is apparent in our shared national history." *Duncan*, 970 F.3d at 1147; *see also* David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 851 (2015) ("[I]n terms of large-scale commercial success, rifle magazines of more than ten rounds had become popular by the time the Fourteenth Amendment was being ratified.").

Rather than re-tell the long history of large-capacity magazines in this country, we offer some highlights:

- The first known firearm capable of firing more than ten rounds without reloading was a 16-shooter invented in 1580.
- The earliest record of a repeating firearm in America noted that it fired more than ten rounds: In 1722, Samuel Niles wrote of Indians being entertained by a firearm that "though loaded but once, . . . was discharged eleven times following, with bullets, in the space of two minutes." Harold L. Peterson, Arms and Armor in Colonial America 1526-1783, 215 (2000).
- At the Founding, the state-of the-art firearm was the Girandoni air rifle with a 22-shot magazine capacity.
- In 1777, Joseph Belton demonstrated a 16-shot repeating rifle before the Continental Congress, seeking approval for its manufacture. Robert Held, The Belton Systems, 1758 & 1784-86: America's First Repeating Firearms 37 (1986).
- By the 1830s, "Pepperbox" pistols had been introduced to the American public and became commercially successful. Depending on the model, the Pepperbox could fire 5, 6, 12, 18, or 24 rounds without reloading.
- It took several years for Samuel Colt's revolvers (also invented in the 1830s) to surpass the Pepperbox pistol in the marketplace.

- From the 1830s to the 1850s, several more rifles were invented with large ammunition capacities, ranging from 12- to 38- shot magazines.
- By 1855, Daniel Wesson (of Smith and Wesson fame) and Oliver Winchester collaborated to introduce the lever action rifle, which contained a 30-round magazine that could be emptied in less than one minute. A later iteration of this rifle, the 16-round Henry lever action rifle, became commercially successful, selling about 14,000 from 1860 to 1866.
- By 1866, the first Winchester rifle, the Model 1866, could hold 17 rounds in the magazine and one in the chamber, all of which could be fired in nine seconds. All told, Winchester made over 170,000 copies of the from 1866 to 1898. *See* Norm Flayderman, Flayderman's Guide to Antique Firearms and Their Values 268 (6th ed. 1994).
- A few years later, Winchester produced the M1873, capable of holding 10 to 11 rounds, of which over 720,000 copies were made from 1873 to 1919.

From this history, the clear picture emerges that firearms with large-capacity capabilities were widely possessed by law-abiding citizens by the time of the Second Amendment's incorporation. In that way, today's large-capacity magazines are "modern-day equivalents" of these historical arms, and are entitled to the Second Amendment's protection.

b. Magazines with over ten rounds are widely used for lawful purposes today.

It is also uncontested that ammunition magazines that hold more than ten rounds enjoy widespread popularity today. This is evident from the fact that as many as 100,000,000 such magazines are currently lawfully owned by citizens of this country. It's also apparent from the fact that those magazines are a standard component on many of the nation's most popular firearms, such as the Glock pistol, which comes with a magazine that holds 15 to 17 rounds.[25] They are lawful in at least 41 states and under Federal law. Indeed**,** large-capacity magazines account for *half* of all magazines owned in the United States today. Thus, the record in this case shows that large-capacity magazines are in common use for lawful purposes today, entitling them to Second Amendment protection.

Not only are they ubiquitous, the large-capacity magazines are used for lawful purposes, like home

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[25] We can go on and on with examples. Since 1964, Ruger has sold six million copies of its 10/22 rifles, which is manufactured with 10-round, 15-round, and 25-round magazines. More than five million AR-15 rifles have been sold, typically with 30-round magazines. The commonality of large-capacity magazines is well accepted by other courts. *See, e.g.*, *Heller II*, 670 F.3d at 1261 ("We think it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in 'common use,' as the plaintiffs contend" because "fully 18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds, and approximately 4.7 million more such magazines were imported into the United States between 1995 and 2000.").

defense. Millions of semiautomatic pistols, the "quintessential self-defense weapon" for the American people, *Heller*, 554 U.S. at 629, come standard with magazines carrying over ten rounds. Many citizens rely on a single, large-capacity magazine to respond to an unexpected attack. As one firearms expert put it: firearms equipped with a magazine capable of holding more than ten rounds are "more effective at incapacitating a deadly threat and, under some circumstances, may be necessary to do so." This is why many Americans choose to advantage themselves by possessing a firearm equipped with a large-capacity magazine and why the ownership of those magazines is protected by the Second Amendment.

California does not refute any of this.[26] Indeed, courts throughout the country agree that large-capacity magazines are commonly used for lawful purposes. *See Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 116-17 ("The record shows that millions of magazines are owned, often come factory standard with semi-automatic weapons, are typically possessed by law-abiding citizens for hunting, pest-control, and

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[26] Instead, California points to data suggesting that people using firearms in self-defense fire only "2.2 shots on average." On this basis, California argues that the banned magazines are not useful for self-defense. This is a non-sequitur. That a citizen did not expend the full magazine does not mean that the magazine was not useful for self-defense purposes. It is also immaterial that plaintiffs have not shown when a large-capacity magazine was *necessary* to fend off attackers. That is not the test. *Heller* only looks to the *purpose* of the firearm's ownership—not that it is *effectively used* or *absolutely necessary* for that purpose. In fact, we are hopeful that most law-abiding citizens never have to use their firearms in self-defense.

occasionally self-defense[.]" (simplified)); *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 255 ("[S]tatistics suggest that about 25 million large-capacity magazines were available in 1995, . . . and nearly 50 million such magazines—or nearly two large-capacity magazines for each gun capable of accepting one—were approved for import by 2000.). Even our court has begrudgingly admitted as much. *See Fyock*, 779 F.3d at 998 ("[W]e cannot say that the district court abused its discretion by inferring from the evidence of record that, at a minimum, [large-capacity] magazines are in common use. And, to the extent that certain firearms capable of use with a magazine—e.g., certain semiautomatic handguns—are commonly possessed by law-abiding citizens for lawful purposes, our case law supports the conclusion that there must also be some corollary, albeit not unfettered, right to possess the magazines necessary to render those firearms operable.").

In sum, firearms with magazines capable of firing more than ten rounds are commonplace in America today. And they are widely possessed for the purpose of self-defense, the very core of the Second Amendment. Accordingly, an overwhelming majority of citizens who own and use large-capacity magazines do so for lawful purposes. "Under our precedents, *that is all that is needed* for citizens to have a right under the Second Amendment to keep such weapons." *Friedman*, 136 S. Ct. at 449 (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (emphasis added). So, unless subject to "longstanding prohibition," they are protected by the Second Amendment.

3. Bans on large-capacity magazines are not a presumptively lawful regulatory measure.

After completing its analysis, *Heller* cautioned: "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626-27. The Court also noted that its list of "presumptively lawful regulatory measures" was not "exhaustive." *See id.* at 627 n.26. Thus, it would be wise to ask whether California's law enjoys the endorsement of history. Our task, therefore, is to determine "whether the challenged law traces its lineage to founding-era or Reconstruction-era regulations," *Duncan*, 970 F.3d at 1150, because "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them," *Heller*, 554 U.S. at 634-35. As a preview, California cannot meet this showing: the magazine ban's earliest analogues only show up in the early twentieth century, which doesn't meet the definition of "longstanding" under *Heller*.

The Court's first example of a longstanding and presumptively lawful regulatory measure is the "prohibition[] o[f] the possession of firearms by felons and the mentally ill." *Heller*, 554 U.S. at 626. Prohibiting the possession of arms by those found by the state to be dangerous, like violent criminals, dates

to the Founding[27] And prohibiting the mentally ill from exercising firearms rights also has roots dating to the Founding. *See Mai*, 974 F.3d at 1090 (Bumatay, J., dissenting from the denial of reh'g en banc).

Heller next points to laws that forbid "the carrying of firearms in sensitive places," as an example of longstanding regulatory measures. 554 U.S. at 626. Again, this practice dates to the Founding: "colonial and early state governments routinely exercised their police powers to restrict the time, place, and manner in which Americans used their guns." Robert H.

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[27] *See Kanter v. Barr*, 919 F.3d 437, 464 (7th Cir. 2019) ("History . . . support[s] the proposition that the state can take the right to bear arms away from a category of people that it deems dangerous.") (Barrett, J., dissenting); C. Kevin Marshall, *Why Can't Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 698 (2009) ("'[L]ongstanding' precedent in America and pre-Founding England suggests that a firearms disability can be consistent with the Second Amendment to the extent that . . . its basis credibly indicates a present danger that one will misuse arms against others and the disability redresses that danger."); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to 'Bear Arms'*, 49 Law & Contemp. Probs. 151, 161 (1986) ("[V]iolent criminals, children, and those of unsound mind may be deprived of firearms[.]"); *Binderup v. Att'y Gen. United States of Am.*, 836 F.3d 336, 369 (3d Cir. 2016) (Hardiman, J., concurring in part and concurring in the judgments) ("[T]he historical record leads us to conclude that the public understanding of the scope of the Second Amendment was tethered to the principle that the Constitution permitted the dispossession of persons who demonstrated that they would present a danger to the public if armed."). Because such prohibitions—in their contemporary form—date only to the early twentieth century, *Marshall, supra* at 695, some (including the majority) have mistakenly concluded that *any* firearm regulation dating to that period must be presumptively lawful. *See, e.g.*, Maj. Op. 28–29.

Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 Law & Hist. Rev. 139, 162 (2007). For example, the Delaware Constitution of 1776 stated that "no person shall come armed to any" of the state elections, so as to "prevent any violence or force being used at the said elections." Del. Const., art. 28 (1776). And the multitude of Founding-era laws regulating the times and places in which firearms could be used are well documented. *See* Churchill, *supra* at 161-66.

The final demonstrative category in *Heller* is the imposition of "conditions and qualifications on the commercial sale of arms." 554 U.S. at 627. The historical lineage of such a broad set is necessarily difficult to trace; the more specific the "condition" or "qualification," the more varied the history will be. *Cf. Pena v. Lindley*, 898 F.3d 969, 976 (9th Cir. 2018) ("Our circuit similarly has strained to interpret the phrase 'conditions and qualifications on the commercial sale of arms.'"). Still, in analyzing this category, our circuit has traced its antecedents to the Founding. We've noted that "colonial government regulation included some restrictions on the commercial sale of firearms." *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 685 (9th Cir. 2017) (en banc).[28]

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[28] For example, several colonies "passed laws in the first half of the seventeenth century making it a crime to sell, give, or otherwise deliver firearms or ammunition to Indians." *Teixeira*, 873 F.3d at 685. And, for instance, "Connecticut banned the sale of firearms by its residents outside the colony." *Id.* Connecticut law also required a license to sell gunpowder that had been manufactured in the colony outside the colony. *See* An Act for

As mentioned above, a pattern emerges. *Heller*'s examples of longstanding, presumptively lawful regulations have historical analogues at least dating to the Founding. This makes sense: determining the core of the Second Amendment's protection is, after all, a "historical inquiry [that] seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification." *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010).

That pattern is problematic for California. The first law limiting magazine capacity was enacted by Michigan in 1927, setting an upper limit of 16 rounds. *See* Act of June 2, 1927, No. 373, § 3, 1927 Mich. Public Acts 887, 888 (repealed 1959). Rhode Island passed a similar ban that year, prohibiting any firearm that could shoot more than 12 times without reloading. *See* Act of Apr. 22, 1927, ch. 1052, §§ 1, 4, 1927 R.I. Acts & Resolves 256, 256-57 (amended 1959). In 1932, the District of Columbia prohibited the possession of a firearm that could shoot more than 12 rounds without reloading. *See* Act of July 8, 1932, Pub. L. No. 72-275,

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encouraging the Manufactures of Salt Petre and Gun Powder, December 1775, *reprinted in* The Public Records of the Colony of Connecticut From May, 1775, to June, 1776 191 (Charles J. Hoadly ed., 1890); ("Be it . . . enacted, That no salt petre, nitre or gun-powder made and manufactured, or that shall be made and manufactured in this Colony, shall be exported out of the same by land or water without the licence of the General Assembly or his Honor the Governor and Committee of Safety[.]"). Similarly, New Jersey law required that any gunpowder be inspected and marked before its sale. An Act for the Inspection of Gun-Powder, ch. 6, §1. 1776 N. J. Laws 6. (making it an "Offence" for "any Person" to "offer any Gun-Powder for Sale, without being previously inspected and marked as in herein after directed").

§§ 1, 8, 47 Stat. 650, 650, 652. The next year, Ohio passed a law requiring a permit to possess any firearm with an ammunition capacity over 18 rounds. *See* Act of Apr. 8, 1933, No. 166, sec. 1, §§ 12819-3, -4, 1933 Ohio Laws 189, 189 (amended 1972). California's law, meanwhile, dates only to 1999.

California does not dispute the historical record—it points to the above Prohibition-era laws of Michigan, Rhode Island, and Ohio to defend its own ban's historical pedigree. But such laws aren't nearly old enough to be longstanding. Even if, for the sake of argument, we granted that a regulation need only date to the Reconstruction era to be sufficiently longstanding, California's large-capacity magazine ban still fails. Thus, California's magazine ban is not longstanding or presumptively lawful.[29] *See Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 116-17 ("[T]here is no longstanding history of LCM regulation."); *id.* at 117 n.18 ("LCMs were not regulated until the 1920s, but most of those laws were invalidated by the 1970s. The federal LCM ban was enacted in 1994, but it expired in 2004.") (simplified).

Not only is California's ban not historically longstanding, but it also differs in kind from the

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[29] Sufficient historical pedigree is only capable of establishing a presumption in favor of constitutionality. But that presumption is not dispositive. Thus, even if California's magazine ban dated to a period that would plausibly render it longstanding (*i.e.*, the Founding or Reconstruction), we would still need to answer whether that presumption could be overcome. California's law effectively outlaws massive swaths of firearms chosen by law-abiding citizens for lawful purposes like self-defense. If a court were forced to answer the question, it's possible that the ban's history couldn't save it.

regulatory measures mentioned in *Heller*. Regulations on possession by people dangerous to society, where a firearm may be carried, and how firearms may be exchanged, *see Heller*, 554 U.S. at 626-27, are about the manner or place of use and sale or the condition of the user. California's ban, on the other hand, is much more like a "prohibition on an entire class of 'arms' that is overwhelmingly chosen by American society" for home defense. *Id.* at 628. Also, like the ban in *Heller*, California's ban extends "to the home, where the need for defense of self, family, and property is most acute." *Id.*

In the end, California fails to point to a single Founding-era statute that is even remotely analogous to its magazine ban. Ironically, the closest Founding-era analogues to ammunition regulations appear to be laws *requiring* that citizens arm themselves with particular arms and a specific minimum amount of ammunition. *See* 1784 Mass. Acts 142; 1786 N. Y. Laws 228; 1785 Va. Statutes at Large 12 (12 Hening c. 1); 1 Stat. 271 (1792) (Militia Act); Herbert L. Osgood, *The American Colonies in the Seventeenth Century* 499-500 (1904) (showing that states required citizens to equip themselves with adequate firearms and sufficient ammunition—varying between twenty and twenty-four cartridges *at minimum*). That does not offer historical support for California's ban; in fact, it runs directly counter to California's position.

IV.

California's experiment bans magazines that are commonly owned by millions of law-abiding citizens for lawful purposes. These magazines are neither dangerous and unusual, nor are they subject to

longstanding regulatory measures. In ratifying the Second Amendment, the People determined that such restrictions are beyond the purview of government. Our court reaches the opposite conclusion in contravention of the Constitution and Supreme Court precedent. In so doing, it once again employs analytical tools foreign to the Constitution—grafting terms like "intermediate scrutiny," "alternative channels," and "reasonable fit" that appear nowhere in its text. So yet again, we undermine the judicial role and promote ourselves to the position of a super-legislature—voting on which fundamental rights protected by the Constitution will be honored and which will be dispensed with.

We respectfully dissent.

VANDYKE, Circuit Judge, dissenting:

I largely agree with Judge Bumatay's excellent dissent. And to paraphrase James Madison, if judges were angels, nothing further would need be said. But unfortunately, however else it might be described, our court's Second Amendment jurisprudence can hardly be labeled angelic. Possessed maybe—by a single-minded focus on ensuring that any panel opinions actually enforcing the Second Amendment are quickly reversed. The majority of our court distrusts gun owners and thinks the Second Amendment is a vestigial organ of their living constitution. Those views drive this circuit's caselaw ignoring the original meaning of the Second Amendment and fully exploiting the discretion inherent in the Supreme Court's cases to make certain that *no* government regulation ever fails our laughably "heightened" Second Amendment scrutiny.

This case is par for the course. The majority emphasizes the statistical rarity of law-abiding citizens' need to fire more than an average of 2.2 shots in self-defense, but glosses over the statistical rarity of the harm that California points to as supporting its magazine ban. Instead of requiring the government to make an actual heightened showing, it heavily weighs the government's claim that guns holding more than 10 rounds are "dangerous" (of course they are—all guns are) against a self-defense interest that the majority discounts to effectively nothing. Once again, our court flouts the Supreme Court's exhortation against such "a freestanding 'interest-balancing' approach" to the Second Amendment. *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008).

If the Second Amendment is ever going to provide any real protection, something needs to change. I have some suggestions, which I offer below after first discussing some of the flaws in the majority's analysis of this case.[1] Until the Supreme Court requires us to implement a paradigm shift, the Second Amendment will remain a second-class right—especially here in the Ninth Circuit.

* * *

It should be presumptively unconstitutional to burden constitutional rights. But looking at our court's cases, you would assume that any burden on the right to bear arms is presumptively permitted. I've described before how our circuit's version of Second Amendment "heightened" scrutiny has no height. It is practically indistinguishable from rational basis review. *See Mai v. United States*, 974 F.3d 1082, 1097-106 (9th Cir. 2020) (VanDyke, J., dissenting from denial of rehearing en banc). While our court gives lip service to *Heller*, its practice of effectively applying rational basis review ignores *Heller*'s admonition that if passing rational basis review was "all that was required to overcome the right to keep and bear arms . . . the Second Amendment would be redundant . . . ." *Heller*, 554 U.S. at 628 n.27.

The brokenness of our court's balancing approach is particularly evident in this case, where the majority weighs rarity like lead when it favors the ban, but then weighs rarity like helium when it undermines

[1] Because Judge Bumatay's dissent explains at length the shortcomings of the majority's analysis, I provide only some supplemental observations.

California's asserted interest. On one hand, the majority ignores the fact that California's claimed reason for its ban—mass shootings—involves a harm that, while tragic and attention-grabbing, is thankfully extremely rare by any statistical metric. You are much more likely to be randomly injured or killed by a drunk driver than a mass shooter. But on the other hand, the majority emphasizes the rarity of any individual American's use of ammunition in self-defense, latching onto California's argument that only 2.2 rounds are used on average in a self-defense shooting, and concludes that any more rounds than that are thus outside the "core" of the Second Amendment.

We might call this Version 2.2 of the Second Amendment. It cannot be the right way to analyze an alleged violation of the right to bear arms. The average number of times that any law-abiding citizen *ever* needs to "bear arms" at all in a self-defense situation is far below one—most people will (thankfully) *never* need to use a gun to defend themselves. Thus, applying the majority's rarity analysis, possession of a gun itself falls outside the "core" of the Second Amendment. But we know that cannot be true from *Heller*, where the Supreme Court determined "self-defense . . . was the *central component*" of the Second Amendment, notwithstanding the practical infrequency of any particular person's need to actually defend herself with a gun. 554 U.S. at 599.

So the majority's rarity balancing isn't just lopsided—it starts from the wrong premise. We would never treat fundamental rights we care about this way, particularly those expressly enumerated in the

Constitution. We don't protect the free speech of the taciturn less than the loquacious. We don't protect the free exercise of religion in proportion to how often people go to church. We wouldn't even allow soldiers to be quartered only in those parts of your house you don't use much. Express constitutional rights by their nature draw brighter and more prophylactic lines—precisely because those who recognized them were concerned that people like California's government and the judges on our court will attempt to pare back a right they no longer find useful. This is the sentiment James Madison expressed in extolling "the wisdom of descrying . . . the minute tax of 3 pence on tea, the magnitude of the evil comprized in the precedent. Let [us] exert the same wisdom, in watching agst every evil lurking under plausible disguises, and growing up from small beginnings." *Madison's "Detached Memoranda,"* 3 Wm. & Mary Q. (3d ser.) 534, 557-58 (E. Fleet ed., 1946). The majority here extends our circuit's practice of chipping away at a disfavored constitutional right, replacing the Second Amendment with their 2.2nd Amendment.

This case is the latest demonstration that our circuit's current test is too elastic to impose any discipline on judges who fundamentally disagree with the need to keep and bear arms. I consequently suggest two less manipulable tests the Supreme Court should impose on lower courts for analyzing government regulations burdening Second Amendment rights, replacing the current malleable two-step, two-pronged inquiry with something that would require courts to actually enforce the second provision of the Bill of Rights.

First, the Supreme Court should elevate and clarify *Heller*'s "common use" language and explain that when a firearm product or usage that a state seeks to ban is currently prevalent throughout our nation (like the magazines California has banned here), then strict scrutiny applies. Second, the Court should direct lower courts like ours to compare one state's firearm regulation to what other states do (here a majority of states allow what California bans), and when most other states don't similarly regulate, again, apply strict scrutiny. Where many law-abiding citizens seeking to prepare to defend themselves have embraced a particular product or usage, or the majority of states have not seen a necessity to restrict it, real heightened scrutiny should be required instead of allowing our court to sloppily balance the citizen's "need" against the government's claimed "harm."

No doubt these proposed tests are not perfectly satisfying—doctrinally or academically. Few actual legal tests are, since the application of legal rules happens in the messiness of the real world. Nor would these suggested tests address every situation. Judge Berzon observes, for example, that under the "common use" test I seek to invigorate, gun-adverse states like California will predictably react to new technologies by trying to kill the baby in the cradle—immediately banning any new technology before it can become "commonly used." Perhaps so, but those are difficulties at the margin. Right now, as I discuss further below, we have a Second Amendment test that enables *zero* enforcement in this circuit. Ultimately, Judge Bumatay's and Judge Berzon's opinions converge at one very important point: *neither* our current two-step test *nor* any proposed alternative that allows much

interpretative or balancing discretion will ultimately lead to consistent and rigorous enforcement of the Second Amendment—particularly with the many judges who disagree with its very purpose.[2] It's now beyond obvious that you can't expect our court to faithfully apply any Second Amendment test that allows us to exercise much discretion. Many fundamental rights are protected by more bright-line tests.[3] It's past time we bring that to the Second Amendment.

I. The Majority Takes Our Circuit's "Heightened" Scrutiny to a New Low.

I've observed before how, for Second Amendment cases, our circuit has "watered down the 'reasonable fit' prong of intermediate scrutiny to little more than rational basis review," starting by borrowing an inapt test from the First Amendment context and then weakening it with each passing case upholding government restrictions. *Mai*, 974 F.3d at 1101-04 (VanDyke, J., dissenting from denial of rehearing en

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[2] To be clear, I think Judge Bumatay has penned an exemplary dissent addressing "text, tradition, and history." My objection is not that judges *cannot* do good analysis under this framework, but rather that without a more bright-line test there is far too much opportunity for manipulation, especially with a right as unpopular with some judges as the Second Amendment.

[3] *See* David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U.L.J. 193, 303 (2017) ("Bright-line rules declaring certain government actions categorically unconstitutional, without the need for a means/ends test, are common in constitutional law. They are found in the First Amendment, Fifth Amendment, Sixth Amendment, Eighth Amendment, Tenth Amendment, and Fourteenth Amendment.") (footnotes omitted).

banc). This case furthers that trend. Instead of "demand[ing] a closer regulatory fit for a law that *directly* burdens a fundamental right," our en banc court fails to apply any "real heightened scrutiny, or even just faithfully appl[y] the [heightened scrutiny] test as articulated in" comparable First Amendment jurisprudence. *Id.* at 1104. Indeed, notwithstanding our court's early commitment that "we are . . . guided by First Amendment principles" in applying the Second Amendment, *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014), it is telling that comparisons between the First and Second Amendment in this latest case have largely been dropped by the majority and relegated to concurring opinions—likely because it gets embarrassing and wearisome to constantly rationalize why we treat the Second Amendment so differently than its close constitutional neighbor.

In analyzing whether California's magazine ban violates the Second Amendment, the majority here follows a now well-traveled path. It starts like many of our Second Amendment cases: by assuming, instead of deciding, that the Second Amendment even applies to California's ban. *See, e.g.*, *Mai v. United States*, 952 F.3d 1106, 1114-15 (9th Cir. 2020); *Pena v. Lindley*, 898 F.3d 969, 976 (9th Cir. 2018); *Fyock v. City of Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015).[4] This

[4] The majority claims that the current two-step inquiry "faithfully adheres" to *Heller*, since "history, text, and tradition greatly inform step one of the analysis . . . ." But this only illustrates my point about the malleability of our current framework. Our court consistently uses step one of our test to either: (1) wade through the complicated history to conclude the regulation does *not* burden conduct protected by the Second

itself is very telling. It emphasizes the practical vacuity of the second step in our court's two-step test. The reason it is so effortless for our court to "assume" that the Second Amendment applies is because the plaintiff will always lose at our court's step-two intermediate scrutiny. If we genuinely applied any form of heightened scrutiny, we would have to be more careful and concise about what activity or item warrants protection under the Second Amendment. And something is wrong when most of our court's judges can't bring themselves to say the Second Amendment actually covers anything beyond a *Heller*-style total handgun ban. It's the judicial equivalent of holding your nose.

After the majority here assumes that California's magazine ban "implicates" the Second Amendment at step one of our test, at step two it concludes that banning the most commonly purchased magazine used in handguns for self-defense only places a "small burden" on the exercise of the right to bear arms and thus only intermediate scrutiny applies. And by this point we all know what that means: the regulation

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Amendment at all, *see, e.g.*, *Young v. Hawaii*, 992 F.3d 765, 785 (9th Cir. 2021) (en banc) ("As we might expect in this area, fraught with strong opinions and emotions, history is complicated, and the record is far from uniform."); or (2) as here, side-step this inquiry altogether by *assuming* the conduct implicates the Second Amendment, only to uphold the regulation at step two by applying an extremely loose balancing test (more on that below). It's clear that history, text, and tradition is currently comatose in our circuit's jurisprudence *enforcing* the Second Amendment—we only rely on it when deemed useful to support the conclusion that something falls outside our court's illusory Second Amendment protection.

burdening the citizens' Second Amendment rights *always* wins under our version of Second Amendment "intermediate scrutiny." Repeatedly characterizing the legislation as a "minimal burden," the majority decries any possible need for the banned magazines and relies heavily on the rarity of their full use in self-defense, while giving no weight to the *effectiveness* of such magazines in self-defense.

Building on this rationale, Judge Graber's concurrence provides a list of unrealistic alternatives one could use in lieu of a higher-capacity magazine: carry multiple guns; carry extra magazines; carry some loose rounds in your pocket; carry a cop (okay, I made that last one up). I doubt many who actually carry a gun for self-defense would find these alternatives realistic. And the majority references no "heightened" showing made by the government, other than listing past tragic events across the nation in which criminals misused guns. Those events were, of course, horrific. But citing select (and in this case, statistically very rare) examples of misuse cannot be a basis to overcome the Second Amendment. If it was, then the much more prevalent misuse of guns in criminal activity generally would suffice to ban all guns. That is why, when applying real heightened scrutiny, a "substantial relation is necessary but not sufficient." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021) (applying exacting scrutiny in a First Amendment case).

The truth is that what our court calls "intermediate scrutiny" when reviewing Second Amendment cases doesn't even rise to the level of real rational basis review. That's a bold claim, I know. But

think about it: if your state banned all cars, forcing all its citizens to use bicycles because many people are killed by drunk drivers (not to mention automobile accidents generally), would you think that was rational? No. What if California just banned all *large* vehicles (trucks, vans, etc.) because on rare occasions some crazed individual intentionally drives his car into a group of people, and large cars presumably do more damage? I doubt it. But that is what California has done here—banned a type of firearm magazine that has obvious self-defense benefits when used against a *group* of assailants, based on a purported harm that, while high-profile, is statistically extraordinarily improbable.[5] Much more improbable than harm from misuse of a car. And while cars are not expressly protected by the Constitution, "arms" are.[6]

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[5] By emphasizing their statistical rarity, I do not belittle the tragedy experienced by those affected by a mass shooting (any more than observing that airline crashes are thankfully rare detracts from the heartbreak of those involved when they happen).

[6] Characterizing my car ban analogies as "inapt," the majority says that California's magazine ban is more akin to "speed limits." But in attempting to trade my analogies for a more favorable one, the majority misses the obvious point: that in every context except our distorted Second Amendment jurisprudence, everyone agrees that when you evaluate whether a response to avoid some harm is "rational"—much less a "reasonable fit"—you take into account *both* the gravity of the possible harm *and* the risk of it occurring. The majority here completely ignores the latter. Perhaps if I use the majority's own analogy it might click: If California chose to impose a state-wide 10 mph speed limit to prevent the very real harm of over 3,700 motor-vehicle deaths each year experienced from driving over 10 mph, *no one* would think such a response is rational—precisely

The reason I think most of my colleagues on this court would genuinely struggle more with a car ban than they do with a gun ban is that they naturally see the value in cars. They drive cars. So they are willing to accept some inevitable amount of misuse of cars by others. And my colleagues similarly have no problem protecting speech—even worthless, obnoxious, and hateful speech[7]—because they like and value speech generally. After all, they made their careers from exercising their own speech rights. On the other hand, as clearly demonstrated by this case, most of my colleagues see "limited lawful" value in most things firearm-related.

But the protections our founders enshrined in the Bill of Rights were put there precisely because they worried our future leaders might not sufficiently value them. That is why our court's "intermediate scrutiny" balancing approach to the Second Amendment is no more appropriate here than it would be for any other fundamental right. As the Supreme Court explained in rejecting Justice Breyer's "'interest-balancing' approach," noting that "no other enumerated constitutional right['s] . . . core protection" was subject to such a test,

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because, even though the many deaths from such crashes are terrible, they are a comparatively rare occurrence (although much *more* common than deaths caused by mass shootings).

[7] *See, e.g.*, *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) ("indecent . . . [expression] is protected by the First Amendment"); *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 44 (1977) (per curiam) (protecting the First Amendment rights of Nazis to protest).

> [t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.

Heller, 554 U.S. at 634-35.

The majority repeatedly denies that it is engaging in the type of "judge-empowering interest-balancing inquiry" rejected in *Heller*, insisting instead that it is merely applying our "traditional test" in this case. It's doing both. Our traditional two-part test *is* a "judge-empowering interest-balancing inquiry." It's a convoluted, multi-step balancing test that weighs different considerations at different times so as to give judges maximum discretion and mask when they treat the same considerations differently at the various stages of the balancing (like here). When one steps back and evaluates our current Second Amendment test, it is clear the court is engaging in an interest-balancing test—it's just that the balancing is done in two or more steps instead of all together.

What we call our two-step test really has three parts, since the second "step" is divided into two parts. A play in two acts, so to speak. Step II, Part I: the court determines the proper level of scrutiny, which includes *weighing* "the severity of the law's burden on the right." Step II, Part II: the court then applies the "appropriate" level of scrutiny (which, in our court's case, is always intermediate), where the court *weighs* the government's interest in the regulation (including

"reasonable fit"). An ever-adapting script, it is always these two *competing interests* that drive the court's analysis. Ultimately, the court is *comparing* the plaintiff's burden against the state's interest. If the burden on the plaintiff's Second Amendment rights is great (i.e., near the mythical "core" of the Second Amendment), then the government is (theoretically) required to make a stronger showing of its interest and fit. And vice-versa. Like a good Marvel movie, there's always lots of drama, but the result is fore-ordained.

This particularly pernicious balancing test is a shell game. The balancing is done piecemeal so that the court can use differently weighted scales at each step and obfuscate the stark disparity between how it weighs the impact from the claimed violation of an express constitutional right, versus how it weighs the government's justification and the regulation's fit. When weighing the impact on the elusive "core" of the Second Amendment, the court whips out a scale specially calibrated to always read "minimal burden" (unless the government officials were dumb enough to do exactly the same thing Washington, D.C. and Chicago did in *Heller* and *McDonald*: entirely ban all handguns). But when it comes time to weigh the government's interest and the reasonableness of the regulation's fit under "intermediate scrutiny," the court puts away the first scale and pulls out a different scale calibrated to always read "close enough," even where, as here, the fit between the ban and the ultrarare harm asserted is not even rational.

The majority acknowledges that, applying our super-pliable test, "we have not struck down any state

or federal law under the Second Amendment." But it insists "we have carefully examined each challenge on its own merit." If every case without fail leads to the same anti-firearms conclusion, however, then at some point it begs credulity to deny that something else is driving the outcomes.

Judge Hurwitz has penned a short concurrence respectfully characterizing as inappropriate and hyperbolic my observations regarding how my colleague's personal views influence our court's Second Amendment cases. I agree that it is a troubling charge to posit personal views as a driving force behind judicial decision-making, and not one I make lightly. But whatever else it may be, my claim is hardly hyperbolic. Here are the facts: We are a monstrosity of a court exercising jurisdiction over 20% of the U.S. population and almost one-fifth of the states—including states pushing the most aggressive gun-control restrictions in the nation. By my count, we have had at least 50 Second Amendment challenges since *Heller*—significantly more than any other circuit—*all* of which we have ultimately denied. In those few instances where a panel of our court has *granted* Second Amendment relief, we have *without fail* taken the case en banc to reverse that ruling. This is true regardless of the diverse regulations that have come before us—from storage restrictions to waiting periods to ammunition restrictions to conceal carry bans to open carry bans to magazine capacity prohibitions—the common thread is our court's ready willingness to bless any restriction related to guns. Respectfully, Judge Hurwitz's claim that our judges' personal views about the Second Amendment and

guns have not affected our jurisprudence is simply not plausible. Res ipsa loquitur.

Judge Hurwitz's own concurrence demonstrates this reality. In defending the validity of California's interest, he doesn't dispute that mass shootings are "infrequent," but expressly dismisses that reality as irrelevant. Why? Because, in his view, "hardly anyone is untouched by the[] devastation." His proof? A *very personal* anecdote about losing our beloved colleague to a mass shooting. No one disputes the depth of that tragedy, which is exactly why such uncommon occurrences nonetheless deeply influence my colleagues' views about gun control and the Second Amendment. But the fact that members of our court have been *personally* affected by a mass shooting is not a legitimate reason to ignore the undisputed statistical rarity when weighing the government's interest in its ban—it falls in the same category as choosing to drive instead of flying because you know someone who was tragically killed in a rare commercial airline accident. As a personal psychological phenomenon, such exaggeration of risks is completely understandable. As a legal matter, it should have no place in applying fundamental constitutional rights, including the Second Amendment. And just as irrelevant is Judge Hurwitz's reliance on yet more *personal* anecdotes—that "[o]ther members of the Court have lost family and friends to gun violence"—that are entirely unrelated to mass shootings. Defending California's regulation by sharing such deeply personal examples only demonstrates just how hard it is for any judge, including my esteemed and talented colleagues, to evaluate these cases in the objective and detached

manner required when the legal test itself offers no meaningful guiderails.

It is important to emphasize that I point to my valued colleagues' personal views not to engage in some unrelated ad hominem attack, but rather because the impact of those views is directly relevant to the purpose of this dissent. When judges are effectively told to balance the necessity for some particular gun-control regulation against that regulation's effect on the "core" of the Second Amendment, there isn't much for the judges to work with other than their own personal views about guns and the Second Amendment. Whether judges intend to bring in their personal views or not, those views inescapably control our holdings when applying a test as malleable as our Second Amendment intermediate scrutiny standard. Without rules that actually bind judges, personal intuition inescapably fills the void. The result of individual judges applying a formless test is a world where "equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve . . . ." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989).

Instead of striving to *avoid* this inequality of treatment, the majority *highlights* the inequality among the circuits as a defense of *our* current two-step approach. They do this by citing *one* case to show "our sister circuits, applying the same two-step inquiry that we apply today, have not hesitated to strike down provisions that go too far." This again bolsters my point. Because the prevailing two-step balancing test is so malleable and discretionary, one would expect

that different judges with different conceptions of guns and gun rights would weigh the different considerations differently and come to different conclusions.[8]

II. The Majority's Second Amendment Scales Are Rigged.

Not content to just tilt the rules of the game heavily in the government's favor via our pathetically anemic "intermediate scrutiny," the majority here also stacks the evidentiary deck. The majority balances the average rarity of the use of ammunition in lawful self-defense situations as weighing heavily against its protection under the Second Amendment. Meanwhile, it studiously ignores the rarity of the harm (mass shootings) that California puts forward to support its ban. As explained, such balancing should have no place in a case like this—the founders already settled the weighty interest citizens have in lawfully bearing commonplace self-defense arms like those California has banned here. But the stark disparity between how the majority treats the very same attribute depending on whether it supports or undercuts the majority's desired outcome illustrates well that, even if we

[8] The majority defends our undefeated, 50-0 record against the Second Amendment by pointing out that the states in our circuit simply have "more restrained" gun-control laws than the states in other circuits. While the majority is apparently serious, this claim can't be taken seriously given that our circuit's jurisdiction includes states like California and Hawaii—which have enacted many of the most aggressive gun-control laws in the nation. The majority's failure to comprehend that reality underscores my point that something other than objective and impartial application of the two-part test is driving the outcomes in our Second Amendment cases.

thought balancing might have a proper role in evaluating our Second Amendment rights, we can't expect judges who fundamentally disagree with the Second Amendment to fairly read the scales.

The reality is that essentially everything the Second Amendment is about is rare, for which we all should be very grateful. Government tyranny of the sort to be met by force of arms has been, in the short history of our country, fortunately rare. The actual need for any particular person to use her firearm to defend herself is, again, extremely rare—most of us will thankfully never need to use a gun to defend ourselves during our entire life.[9] And in those rare instances where a firearm is used in self-defense, the amount of ammunition needed is generally very little—oftentimes none at all. It is certainly true that most of us will use exactly zero rounds of ammunition to defend ourselves—ever. So if the Second Amendment protects anything, it is our right to be prepared for dangers that, thankfully, very rarely materialize.

Given that, the majority's focus on the fact that only 2.2 bullets are used *on average* in a self-defense shooting, and concluding that a law banning more than that "interferes only minimally with the core right of self-defense," is grossly misplaced.[10] An

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[9] Observing the rarity does not diminish the fact that thousands of citizens use their firearms for lawful self-defense each year. It simply means that as a percentage of the population generally, or even lawful gun owners, that percentage is tiny.

[10] California currently allows more than 2.2 rounds in a magazine, and does not prohibit carrying multiple magazines. But don't be fooled. Under the majority's Version 2.2 of the

average of 0.0 rounds are fired on average in preventing government tyranny. And the average person will fire an average of 0.0 rounds in self-defense in their entire lifetime. If the rarity alone of *exercising* one's Second Amendment rights cuts so dispositively against their protection, then the Second Amendment protects nothing.

Yet when it comes to the uncommonness of mass shootings—the reason California says it needs its magazine ban—the majority counts *that* as nothing. You would think that if the government seeks to interfere with a fundamental right, the infrequency of the claimed harm would be a very important consideration. For example, if the government sought to ban some type of communication because it very infrequently resulted in harm, we would never countenance that. On the other hand, where some type of communication *frequently* results in harm, it might survive heightened scrutiny (e.g., fighting words).

Here, California relies on a statistically very rare harm as justifying its ban, but a harm that, while infrequent, grabs headlines and is emotionally compelling. The emotional impact of these tragedies does all the work for the government and our court. But if a court was going to balance a fundamental right against a claimed harm, that is precisely where judges must cut through the emotion and do their job of holding the government to its (supposedly

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Second Amendment, there is no reason a state couldn't limit its citizens to carrying a (generous) 3 rounds total for self-defense.

heightened) burden. The majority here doesn't even try.[11]

The majority's uneven treatment of rarity is not the only example where its anti-Second Amendment bias shows through in how it reads the record. The majority questions whether law-abiding citizens even *want* higher capacity magazines for self-defense, speculating "whether circulation percentages of a part that comes standard with many firearm purchases meaningfully reflect an affirmative choice by consumers." But such musings only reveal a clear lack of knowledge about guns—or even basic economics, apparently. In free countries like this one, unless a market is interfered with by regulations like the one at issue in this case, it generally provides what consumers want. The market for self-defense firearms is no exception. Until only a few years ago, if you wanted a "micro-compact" firearm for self-defense (of the type that serves little or no military usage), you were generally limited to a six to eight-round magazine capacity. For example, the KelTec P3AT

[11] The majority implies that by emphasizing the rarity of mass shootings, I omit the other relevant part of the analysis: "the incredible harm caused by mass shootings." I'm not ignoring the "incredible harm"; I'm simply saying that, just as we do with all serious harms, we must evaluate the seriousness of that harm *along with* the probability of it occurring. For example, no one doubts that commercial airline crashes, when they occur, result in "incredible harm." And yet no government has seriously considered banning commercial flights. Why? Because airplane crashes are extremely rare—just like mass shootings. The majority's response—doubling down on its emphasis of the harm while continuing to intentionally avoid its rarity—demonstrates that it is the majority, not me, that "omits . . . [a] critical part of the analysis."

came with a six-round magazine, as did the Ruger LCP, Glock 43, Kimber Solo, and Walther PPK (of James Bond fame). The Kahr PM9 and Sig Sauer P238 offered six or seven-round magazines, while the Smith & Wesson M&P Shield came with seven or eight rounds. Not too long ago, it was basically impossible to find a lightweight, micro-compact firearm even capable of holding 10 rounds in its magazine.

Then, in 2019, Sig Sauer released the P365, which took the self-defense market by storm because suddenly law-abiding citizens could have the same size micro-compact firearm, but now carrying 12 or 15 rounds in its magazine. Other companies quickly followed suit, with Springfield Armory releasing the Hellcat (11 to 13-round magazines), Ruger releasing the Max-9 (12+1), Smith & Wesson releasing the M&P Shield Plus (13+1), and Kimber releasing the R7 Mako (13+1). Aftermarket magazine manufacturers like Shield Arms released flush-fitting magazines holding 15 rounds for diminutive guns like the Glock 43x and 48.

All this has happened in just the past few years, in segment of the firearms market that has essentially no "military" application. It has happened because many law-abiding citizens want higher capacity magazines for one purpose: self-defense. The majority's odd speculation that maybe the self-defense market doesn't want higher capacity magazines is as uninformed as wondering why cruise-control comes standard on their cars since nobody in their urban neighborhood wants it.

While the majority is happy to engage in ill-informed speculation when it comes to limiting gun

rights, it demonstrates a distinct lack of imagination and basic logic when it comes to understanding why so many citizens desire a magazine holding over 10 rounds. First, the majority posits a classic false dilemma (a.k.a. an either-or fallacy) by waxing on at length about how larger magazines "provide significant benefits in a military setting," not self-defense. Of course, almost every attribute of a weapon that makes it more effective for military purposes also makes it more effective for self-defense: more accurate, faster firing, the ability to engage multiple targets quickly—these are all characteristics of a weapon that make it better for *both* military and self-defense purposes. The majority's fixation on the effectiveness of higher-capacity magazines in the military context does not somehow demonstrate that the magazines are not also useful for self-defense.

The majority relatedly adopts California's argument that magazines over 10 rounds are "dangerous" when misused. Again, essentially every attribute of a weapon that makes it more effective for self-defense makes it more dangerous when misused. Good sights on a handgun make it more effective for lawful self-defense—but also make it more dangerous when misused. A pistol that doesn't malfunction is really nice to have in a self-defense situation—but is also more dangerous when misused. Modern hollow-point ammunition, with its dramatically increased stopping potential, has seriously improved the performance of handguns in a self-defense situation—but of course also make the handgun more dangerous when misused. This type of logic, applied the way the majority does, would justify banning all semi-automatics since they are more dangerous than

revolvers, all revolvers since they are more dangerous than derringers, all derringers since they are more dangerous than knives . . . until we are left with toothpicks. That is why the Supreme Court in *Heller* only talked about weapons that are *both* "dangerous ***and*** unusual" being outside the purview of the Second Amendment. 554 U.S. at 627 (emphasis added) (citation omitted). The mere fact that some attribute (like a larger capacity magazine) might make a weapon more "dangerous" when misused cannot be a basis to avoid the Second Amendment—if so, the Second Amendment protects only nerf guns.

The majority also latches onto California's argument that "mass shootings often involve large-capacity magazines." That is hardly surprising, given that, as the majority itself acknowledges, "[m]ost pistols are manufactured with magazines holding ten to seventeen rounds, and many popular rifles are manufactured with magazines holding twenty or thirty rounds" (citation and internal quotation marks omitted). So, in other words, mass shootings involve the most common types of firearms. This is the sort of evidence that suffices to meet our circuit's "heightened" review under the Second Amendment?

The majority also relies on the argument that limiting magazine capacity provides "precious down-time" during reloading, giving "victims and law enforcement officers" time to "fight back." But here again, that same "down-time" applies equally to a mother seeking to protect herself and her children from a gang of criminals breaking into her home, or a law-abiding citizen caught alone by one of the lawless criminal mobs that recently have been terrorizing

cities in our circuit. The majority focuses only on ways higher capacity magazines might cause more harm in the very rare mass shooting, while dismissing the life-threatening impact of being forced to reload in a self-defense situation as a mere "inconvenience," and characterizing as mere "speculat[ion] . . . situations in which a person might want to use a large-capacity magazine for self-defense."

Ultimately, it is not altogether surprising that federal judges, who have armed security protecting their workplace, home security systems supplied at taxpayer expense, and the ability to call an armed marshal to their upper-middleclass home whenever they feel the whiff of a threat, would have trouble relating to why the average person might want a magazine with over ten rounds to defend herself. But this simply reinforces why those same judges shouldn't be expected to fairly balance any Second Amendment test asking whether ordinary law-abiding citizens *really need* some firearm product or usage.

III. The Supreme Court Needs to Constrain Lower Courts' Discretion.

We need tests that require real heightened scrutiny and will pull our courts out of the habit of inverted deference to burdens on Second Amendment rights. In that vein, I propose several less-discretionary tests the Supreme Court should impose to cabin my errant brethren.

A. Common Use

My first proposal is for the Supreme Court to put real teeth into a consideration that has been around since at least as far back as 1939, when the Supreme Court noted that the Second Amendment's reference

to the Militia signified that the "arms" referenced by that provision are those "of the kind in common use at the time." *United States v. Miller*, 307 U.S. 174, 179 (1939). Again in *Heller*, the Court reiterated that "the sorts of weapons protected" by the Second Amendment are "those 'in common use at the time.'" 554 U.S. at 627 (quoting *Miller*, 307 U.S. at 179). Reinforcing this precedent, the Supreme Court should make clear that any regulation that prohibits a firearm product or usage that is "in common use" nationally must pass strict scrutiny. Not only would that curtail lower courts' abuse of their discretion in applying the Second Amendment, but it would also help address a perennial line-drawing difficulty inherent in the right to keep and bear arms.

One of the ongoing problems with defining the contours of any constitutional right is determining how it applies to technologies that did not exist when the constitutional provision was enacted. For example, how does the First Amendment apply to social media or blog posts? But that problem is particularly vexing in applying the Second Amendment because "arms" by their very nature change over time as technology advances. As the Court in *Heller* correctly observed, the Second Amendment does not protect "only those arms in existence in the 18th century . . . . We do not interpret constitutional rights that way." *Id.* at 582. But while we know that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, *even those that were not in existence at the time of the founding*," *id.* (emphasis added), in an age where weapons run the gamut from fighter jets to tanks to fully-automatic machine guns to AR-15s to handguns to pocketknives, which weapons are

protected by the Second Amendment and which are not? As this case and others like it demonstrate, we cannot rely on insular federal judges to weigh which weapons are appropriate for self-defense—they honestly don't have a clue, and their intuitions about firearms are not good. And we can't rely on governments to decide—that's who the Second Amendment was intended to protect against. But as *Heller* discusses, we can look to what weapons law-abiding citizens have chosen to defend themselves—that is, what weapons are currently "in common use . . . for lawful purposes." *Id.* at 624 (internal quotation marks omitted).

Here, law-abiding citizens across the nation have purchased literally millions upon millions of the type of magazines that California has banned. Americans currently possess between seventy to one hundred *million* of those magazines for self-defense.[12] The majority here concludes that banning them is a "small burden" on the Second Amendment because they "provide at most a minimal benefit for civilian, lawful purposes." *Millions* of our fellow Americans disagree with my seven colleagues in the majority, evincing by their purchase and "keep[ing]" of those magazines that they consider them necessary for self-defense. That should count for something—actually, it should

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[12] 67% of gun owners say self-defense is a major reason why they own their firearm. *See* Kim Parker, et al., *The demographics of gun ownership in the U.S.*, PEW RESEARCH CENTER (June 22, 2017), https://www.pewresearch.org/social-trends/2017/06/22/the-demographics-of-gun-ownership/; *see also* Christopher S. Koper et al., *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994–2002*, (June 2004), https://www.ojp.gov/pdffiles1/nij/grants/204431.pdf.

count for a lot, especially for a constitutional guarantee that ostensibly protects "the right of *the people* to keep and bear arms." As the *Heller* Court explained in rejecting the argument that handguns could be banned because rifles weren't, it was "enough to note . . . that the American people have considered the handgun to be the quintessential self-defense weapon." *Id.* at 629. That same rationale should apply for any firearm product or usage that law-abiding citizens across the nation have chosen for self-defense.

B. B. State Law Survey

A government should also have to meet strict scrutiny if it bans a firearm product or usage that is allowed throughout most of our nation. If most of the states in the Union allow a particular item to be used in the course of exercising a Second Amendment right, then the government's justification for forbidding or restricting that item or usage should be subjected to strict scrutiny.

Our court has often cited the practice of other states when it suits its purpose in analyzing constitutional rights. *See, e.g.*, *Young*, 992 F.3d at 805 (analyzing the Second Amendment, the court observed "[i]n contrast to these states, other states—also from the South—upheld good-cause restrictions on the open carry of certain dangerous firearms"); *Family PAC v. McKenna*, 685 F.3d 800, 811 n.12 (9th Cir. 2012) (First Amendment); *S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1131 (9th Cir. 2004) (First Amendment); *Cammack v. Waihee*, 932 F.2d 765, 766-67 (9th Cir. 1991) (Establishment Clause). Indeed, the majority does so here, strangely observing that "California is not alone" because a few other states and

local governments also ban some magazines (even though a super-majority of states don't).

The majority's instinct that it makes sense to look at other states is right; its execution is just wrong. The fact that a handful of states similarly regulate should not help justify infringement of a fundamental right. But the fact that *most* other states—here, 41 states and the federal government—*don't* similarly regulate should cause a court to suspect that maybe the government's supposed justification for its ban is lacking.

Like looking at "common use," considering other states' regulation would have at least one serious incidental side-benefit: it would reduce the troubling balkanization that currently afflicts a fundamental right supposedly protected by the Constitution. Right now, a lawful gun-owner's ability to lawfully "keep and bear arms" is subject to a widely varying patchwork quilt of state and local restrictions and bans that would be an embarrassment for any other constitutional right. Requiring governments to satisfy real heightened scrutiny before they step too far out of line with what is working in most other jurisdictions would help deter states like California from using their "laboratory of democracy" to conduct ongoing experiments on how to subject a fundamental right to death by a thousand cuts. *See Teixeira v. Cty. of Alameda*, 873 F.3d 670, 694 (9th Cir. 2017) (en banc) (Tallman, J., concurring).

* * *

Our court is fond of saying that Second Amendment rights are not absolute. *See, e.g.*, *Young*, 992 F.3d at 793; *Silveira v. Lockyer*, 312 F.3d 1052,

1063 (9th Cir. 2002) *abrogated on other grounds by Heller*, 554 U.S. 570; *United States v. Vongxay*, 594 F.3d 1111, 1117 (9th Cir. 2010). I don't disagree with that truism—I just disagree with our court's reliance on it to uphold every single firearm regulation, ever. Requiring that any regulation that prohibits a firearm product or usage "in common use" must pass strict scrutiny would not mean that a government would be helpless to address substantial genuine threats from weapons or uses protected by the Second Amendment. It would just mean that those governments would actually need to make a real "heightened" showing of harm, and a response that is narrowly tailored to that harm. That shouldn't be asking too much for a constitutionally protected right.

If ever there was a case study illustrating Madison's concern about "evil lurking under plausible disguises, and growing up from small beginnings," it is our circuit's Second Amendment jurisprudence. In the thirteen years since the Supreme Court ruled in *Heller* that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation," 554 U.S. at 592, our court has trimmed back that right at every opportunity—to the point that now, in the nine Western states covered by our court, the right to "keep and bear arms" means, *at most*, you might get to possess one janky handgun and 2.2 rounds of ammunition, and only in your home under lock and key. That's it.

That's ridiculous, and so I must respectfully dissent.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-55376

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

Plaintiffs-Appellees,

v.

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

Defendant-Appellant.

Argued and Submitted: Apr. 2, 2020
Filed: Aug. 14, 2020

Consuelo M. Callahan and Kenneth K. Lee, Circuit Judges, and Barbara M. G. Lynn,[*] District Judge.

OPINION

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[*] The Honorable Barbara M. G. Lynn, United States Chief District Judge for the Northern District of Texas, sitting my designation.

LEE, Circuit Judge:

In the wake of heart-wrenching and highly publicized mass shootings, the state of California barred its citizens from owning so-called "large capacity magazines" (LCMs) that hold more than ten rounds of ammunition. But even well-intentioned laws must pass constitutional muster. California's near-categorical ban of LCMs strikes at the core of the Second Amendment—the right to armed self-defense. Armed self-defense is a fundamental right rooted in tradition and the text of the Second Amendment. Indeed, from pre-colonial times to today's post-modern era, the right to defend hearth and home has remained paramount.

California's law imposes a substantial burden on this right to self-defense. The ban makes it criminal for Californians to own magazines that come standard in Glocks, Berettas, and other handguns that are staples of self-defense. Its scope is so sweeping that half of all magazines in America are now unlawful to own in California. Even law-abiding citizens, regardless of their training and track record, must alter or turn over to the state any LCMs that they may have legally owned for years—or face up to a year in jail.

The state of California has latitude in enacting laws to curb the scourge of gun violence, and has done so by imposing waiting periods and many other limitations. But the Second Amendment limits the state's ability to second-guess a citizen's choice of arms if it imposes a substantial burden on her right to self-defense. Many Californians may find solace in the security of a handgun equipped with an LCM: those

who live in rural areas where the local sheriff may be miles away, law-abiding citizens trapped in high-crime areas, communities that distrust or depend less on law enforcement, and many more who rely on their firearms to protect themselves and their families. California's almost-blanket ban on LCMs goes too far in substantially burdening the people's right to self-defense. We affirm the district court's summary judgment, and hold that California Penal Code section 32310's ban on LCMs runs afoul of the Second Amendment.

BACKGROUND

A. California Penal Code section 32310 prohibits the people from owning LCMs.

In 2016, California amended California Penal Code section 32310 to enact a wholesale ban on the possession of LCMs[1] by almost everyone, everywhere, in the state of California. *See* Cal. Penal Code § 32310(c) (2016) (criminalizing "any person in this state who possesses any large-capacity magazine, regardless of the date the magazine was acquired").

But section 32310 has not always been so broad. As originally enacted in 2000, it prohibited the manufacture, importation, and sale of LCMs. *See* Act of July 19, 1999, ch. 129, 1999 Cal Stat. §§ 3, 3.5 (codified as amended at Cal. Penal Code § 12020(a)(2) (2000)) (superseded by Deadly Weapons

[1] To retain symmetry with the parties' briefing and the statute under review, we employ the term "large capacity magazine" (LCM) to denote any firearm magazine capable of holding more than ten rounds of ammunition. But we note that this definition is purely a function of the statutory framework challenged here.

Recodification Act of 2010, ch. 711, 2010 Cal. Stat. § 6 (codified at Cal. Penal Code § 32310)); *see also* Cal. Penal Code § 16740 (defining what constitutes an LCM). In other words, California at first did not regulate the possession of LCMs.

Ten years later, California declared unlawfully possessed LCMs to be a nuisance subject to confiscation and destruction. *See* Cal. Penal Code § 18010(b); *see also* Deadly Weapons Recodification Act of 2010, ch. 711, 2010 Cal. Stat. § 6 (codified at Cal. Penal Code § 32390). And in 2013, California further extended the law to prohibit the purchase and receipt of LCMs. *See* 2013 Cal. Stat. 5299, § 1 (amending Cal. Penal Code § 32310(a)).

It may seem that after the 2013 amendments, California had completed the circle in regulating LCMs. By then, the state had long since foreclosed the transfer and sale of LCMs. As of 2013, it prohibited their purchase and receipt. But the law still allowed Californians who lawfully bought LCMs well before section 32310's enactment to keep them.

So, in 2016, the California legislature passed Senate Bill 1446 that prohibited possession of LCMs outright after July 1, 2017. *See* 2016 Cal. Stat. 1549, § 1. A few months later, California voters approved Proposition 63, which subsumed S.B. 1446 and strengthened its prohibitions by providing that possession may constitute a misdemeanor offense punishable by up to a year's worth of jail time. *See* Cal. Penal Code § 32310(c). The law as amended also requires citizens who own LCMs to remove the magazines from the state, sell them to a firearms dealer, or surrender them to law enforcement for

destruction.[2] Under Penal Code section 16740(a), LCM owners may permanently modify nonconforming magazines to accept ten rounds or fewer, thus removing those magazines from the definition of what constitutes an LCM.

B. Large capacity magazines are prevalent in America.

Millions of Americans across the country own LCMs. One estimate based in part on government data shows that from 1990 to 2015, civilians possessed about 115 million LCMs out of a total of 230 million magazines in circulation. Put another way, half of all magazines in America hold more than ten rounds. Today, LCMs may be lawfully possessed in 41 states and under federal law.

Notably, LCMs are commonly used in many handguns, which the Supreme Court has recognized as the "quintessential self-defense weapon." *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008). For example, several variants of the Glock pistol—dubbed "America's gun" due to its popularity[3]—come standard

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[2] The Penal Code provides several exceptions to § 32310, including those for active or retired law enforcement officers, *see* Cal. Penal Code §§ 32400, 32405, 32406, 32455, armored vehicle security forces, *see id.* § 32435, manufacture for government use, *see id.* § 32440, holders of special weapons permits for limited purposes, *see id.* § 32450, and use as props in film production, *see id.* § 32445.

[3] *See* Paul M. Barrett, Glock: The Rise of America's Gun (2012); *see also Proposals to Reduce Gun Violence: Protecting our Communities While Respecting the Second Amendment: Hearing Before the Subcomm. on the Constitution, Civil Rights & Human Rights of the S. Comm. on the Judiciary*, 113th Cong. 13-14 (2013)

with a seventeen-round magazine. Almost all Glock models, except for subcompact variants designed for concealed carry, come standard with magazine capacities greater than ten rounds. Another popular handgun used for self-defense is the Beretta Model 92, which entered the market in 1976 and comes standard with a sixteen-round magazine. Indeed, many popular handguns commonly used for self-defense are typically sold with LCMs.[4]

C. Procedural history.

Virginia Duncan and other plaintiffs, who lawfully acquired LCMs or represent those who do (collectively, the "Owners"), brought a constitutional challenge to California Penal Code section 32310. Two days before the possession ban was to take effect, the district court issued a preliminary injunction enjoining enforcement of the law. On appeal, this court affirmed. *See Duncan v. Becerra*, 742 F. App'x 218, 221-22 (9th Cir. 2018).

While the interlocutory appeal was pending, the Owners filed a motion for summary judgment. The district court issued an order granting the Owners' motion, concluding that section 32310 violates the Second Amendment and the Fifth Amendment's Takings Clause.

(statement of Laurence H. Tribe, Carl M. Loeb University Professor, Harvard Law School) (discussing the Glock).

[4] For example, Smith & Wesson (S&W) M&P 9 M2.0 nine-millimeter magazines contain seventeen rounds, and other S&W variants have similar capacities. The Ruger SR9 has a 17-round standard magazine. The Ruger SR9 and SR40 carry between nine and 17 rounds. Springfield Arms XD non-subcompact pistols hold up to 19 rounds.

On the Second Amendment claim, the court rested its extensive decision on three independent holdings. First, it concluded that section 32310 did not satisfy the "simple *Heller* test," which queries whether the firearm or firearm component is commonly owned by law-abiding citizens for lawful purposes. Central to the court's analysis were separate reports by two expert witnesses, James Curcuruto and Stephen Helsley. The Curcuruto report concluded that "[t]here are at least one hundred million magazines of a capacity of more than ten rounds in possession of American citizens, commonly used for various lawful purposes." The Helsley report echoed Curcuruto's findings, noting that after four decades of sales, "millions of semiautomatic pistols with a magazine capacity of more than ten rounds and likely multiple millions of magazines" are in circulation in the United States. The court thus found that "[m]illions of ammunition magazines able to hold more than 10 rounds are in common use by law-abiding responsible citizens for lawful uses like self-defense."

Second, the court held that section 32310 fails under strict scrutiny for lack of narrow tailoring. The court found section 32310's complete prohibition on possession by nearly everyone, everywhere, to be the hallmark of a sloppy fit. Finally, the district court held that, even though it believed intermediate scrutiny was decidedly "the wrong standard" to apply, section 32310 still fails under this more lenient standard because the statute was not a reasonable fit to the important public safety interests that it was enacted to serve. As for the Fifth Amendment claim, the court found that section 32310 effectuates an unconstitutional taking.

Based on these conclusions, the district court found no genuine dispute of material fact that section 32310 violates the Second and Fifth Amendments of the United States Constitution, and ordered summary judgment for the Owners. California timely appealed.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291. We review a district court's grant of summary judgment de novo. *See Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc).

ANALYSIS

The state of California[5] argues that the district court erred by granting summary judgment for the Owners. We disagree with the government's position, and we affirm. California Penal Code section 32310 severely burdens the core of the constitutional right of law-abiding citizens to keep and bear arms. The statute is a poor means to accomplish the state's interests and cannot survive strict scrutiny. But even if we applied intermediate scrutiny, the law would still fail.[6]

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[5] This opinion will also use the terms "the state" or "the government" to refer to the Defendant-Appellant.

[6] We note that the district court's "simple *Heller* test" conflicts with our court's two-step inquiry framework for the Second Amendment. *See infra* at II.A. We are aware of the criticism that the two-step test "appears to be entirely made up" and that "its application has yielded analyses that are entirely inconsistent with *Heller*." *Rogers v. Grewal*, 590 U.S. ___ at 3 (June 15, 2020) (Thomas, J., dissenting from denial of certiorari). But we must follow this court's precedent.

I. The Second Amendment is a fundamental right rooted in both text and tradition.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In 2008, the Supreme Court held that the Second Amendment protects "an individual right to keep and bear arms." *Heller*, 554 U.S. at 595. The Court later incorporated the Second Amendment to the states through the Fourteenth Amendment's Due Process Clause. *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010). A citizen's right to self-defense, the Court held, is "deeply rooted in this Nation's history and tradition," and "fundamental to our scheme of ordered liberty." *Id*. at 767-78. And indeed, history, text, and tradition underscore that the right to armed self-defense is fundamental. As the *McDonald* decision noted, "many legal systems from ancient times to the present day" have recognized the right to defend oneself from aggressors. *Id*. at 767.

From 1639 to 1660, the British people endured a civil war—and the creation and dissolution of a Republic during the Interregnum—until the Stuart Monarchy Restoration. Starting in 1662, the Catholic Stuarts persecuted their political enemies, enacting laws that dispossessed all arms from those deemed "dangerous to the peace of the kingdom." 13 & 14 Car. II c. 3 (1662). In 1670, Charles II further restricted possession of "guns" to the exclusive benefit of the wealthy—the purpose being the "prevention of popular insurrections and resistance to the government, by disarming the bulk of the people." 22

Car. II c. 25 (1670); 2 William Blackstone, Commentaries *412. In the continuing tumult of the Protestant Reformation, James II and VII continued these policies by trying to disarm Protestants while allowing Catholics to maintain arms. Such despotism led to the King's ouster through the Glorious Revolution of 1688, and the enactment of the Declaration of Rights in 1689. Among these "true, ancient and indubitable rights" was the right of "[Protestants] [to] have Arms for their Defence suitable to their Condition, and as are allowed by Law." 1 W. & M., Sess. 2, c.2 (1689); s*ee also Heller*, 554 U.S. at 592-93.

In April 1775 and closer to home, a rag-tag group of private citizens, armed only with their personal firearms and makeshift weapons, fired the "shot heard round the world" in Concord, Massachusetts. Reminders of British efforts to confiscate personal firearms filled the Founders' minds when drafting the Bill of Rights in 1789. During the ratification of the Constitution, Antifederalists raised alarm over a potentially despotic national government that could disarm the people, as occurred under the Stuart Kings and other British regimes. *See McDonald*, 561 U.S. at 768. In response, the Federalists agreed to include a Bill of Rights, which, of course, featured the right to bear arms. *See McDonald*, 561 U.S. at 769.

In sum, self-defense "is a basic right, recognized by many legal systems from ancient times to the present day, and . . . individual self-defense is 'the central component' of the Second Amendment right." *McDonald*, 561 U.S. at 767 (citing *Heller*, 544 U.S. at 599) (emphasis and internal citation omitted). *Heller*'s

holding ultimately led the Court to invalidate a District of Columbia law that virtually banned handgun possession in the home and further required all other firearms to be "unloaded and disassembled or bound by a trigger lock or similar device." 554 U.S. at 630, 635. The Court found the "inherent right to self-defense" to be a critical component of the Second Amendment and that the virtual handgun ban was constitutionally infirm because the handgun is the "quintessential self-defense weapon." *Id.* at 628-29. The Court similarly found the disassembly or trigger-lock requirement unconstitutional because it "makes it impossible for citizens to use [arms] for the core lawful purpose of self-defense." *Id.* at 630.

But the ruling in *Heller* was "not unlimited" and rejected the idea that citizens may "keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. *Heller* thus recognized that certain exceptions to the Second Amendment apply. For example, weapons that are "dangerous and unusual" fall outside the Second Amendment's protection. *Id.* at 627. Furthermore, the Court cited an open-ended list of "presumptively lawful regulatory measures" that constitute acceptable "longstanding prohibitions" on firearm ownership. *Id.* at 626-27, 627 n.26. Such prohibitions include possession of firearms by felons and the mentally ill, prohibitions on carriage in sensitive locations, and conditions or qualifications on the commercial sale of firearms. *Id.*

II. Under this court's precedent, California Penal Code section 32310 runs afoul of the Second Amendment.

Applying this court's precedent, we hold that strict scrutiny is the proper standard of constitutional review. California Penal Code section 32310 cannot withstand this level of scrutiny and is unconstitutional.

A. The Ninth Circuit employs a two-prong test to determine whether firearm regulations violate the Second Amendment.

The Ninth Circuit assesses the constitutionality of firearm regulations under a two-prong test. This inquiry "(1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny." *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013) (internal citations omitted).

To determine whether the law burdens protected conduct, this court appears to ask four questions. First, as a threshold matter, we determine whether the law regulates "arms" for purposes of the Second Amendment. *See Jackson v. City and Cty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014). Second, we ask whether the law regulates an arm that is *both* dangerous *and* unusual. *See United States v. Henry*, 688 F.3d 637, 640 (9th Cir. 2012) (citing *Heller*, 554 U.S. at 627). If the regulated arm is both dangerous and unusual, then the regulation does not burden protected conduct and the inquiry ends. Third, we assess whether the regulation is longstanding and thus presumptively lawful. *See Chovan*, 735 F.3d at

1137. And fourth, we inquire whether there is any persuasive historical evidence in the record showing that the regulation affects rights that fall outside the scope of the Second Amendment. *See Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016). If either of these latter questions is found in the affirmative, the law does not burden protected conduct and the inquiry ends.

If a court finds that a regulation burdens protected conduct, then it must proceed to the second prong of analysis and determine the appropriate level of constitutional scrutiny. *See Chovan*, 735 F.3d at 1136. This, in turn, requires the court to ask two more questions. First, we ask how "close" the challenged law comes to the core right of law-abiding citizens to defend hearth and home. *See id.* at 1138. And second, we analyze whether the law imposes substantial burdens on the core right. *See id*. If a challenged law does not strike at the core Second Amendment right or substantially burden that right, then intermediate scrutiny applies. *See Silvester*, 843 F.3d at 821; *Jackson*, 746 F.3d at 961; *Chovan*, 735 F.3d at 1138. Only where both questions are answered in the affirmative will strict scrutiny apply. *See Silvester*, 843 F.3d at 821.

B. Prong One: California Penal Code section 32310 burdens protected conduct.

With our course now charted, we apply the first prong of the Ninth Circuit's test to determine whether California Penal Code section 32310 burdens protected conduct. We hold that it does.

1. Firearm magazines are protected arms under the Second Amendment.

Firearm magazines are "arms" under the Second Amendment. Magazines enjoy Second Amendment protection for a simple reason: Without a magazine, many weapons would be useless, including "quintessential" self-defense weapons like the handgun. *See Heller*, 554 U.S. at 629. We have opined that where firearms "are commonly possessed by law-abiding citizens for lawful purposes," then "there must be some corollary, albeit not unfettered, right to possess the magazines necessary to render those firearms operable." *Fyock v. City of Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015). In *Jackson*, we held that ammunition is a protected arm because "without bullets, the right to bear arms would be meaningless." 746 F.3d at 967.

We are not alone in this assessment. Our colleagues in the Third Circuit explicitly held that magazines are protected arms. *See Ass'n of New Jersey Rifle and Pistol Clubs v. Attorney Gen. New Jersey*, 910 F.3d 106, 116 (3d Cir. 2018) ("*ANJRPC*"). This was so because "magazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended." *Id.* Put simply, a regulation cannot permissibly ban a protected firearm's components critical to its operation. *See Heller,* 554 U.S. at 630 (holding that a regulation that "makes it impossible for citizens to use [their firearms] for the core lawful purpose of self defense" is unconstitutional).

2. LCMs are not unusual arms.

We next determine whether LCMs are arms that fall outside the scope of the Second Amendment. *Heller* provides that some arms are so dangerous and unusual that they are not afforded Second Amendment protection. *See* 554 U.S. at 627. But not so for LCMs. The record before us amply shows that LCMs are commonly owned and typically used for lawful purposes, *i.e.*, not unusual.

The Second Amendment "guarantees the right to carry weapons 'typically possessed by law-abiding citizens for lawful purposes.'" *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1030 (2016) (Alito, J., concurring) (per curiam) (quoting *Heller*, 554 U.S. at 625). "A weapon may not be banned unless it is *both* dangerous *and* unusual." *Id.* at 1031. In addressing "unusualness," the Supreme Court held that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, *even those that were not in existence at the time of the founding*." *Id.* at 1030 (quoting *Heller*, 554 U.S. at 582). In other words, just because a weapon was not in existence during the founding era does not mean it is "unusual." And, where a "weapon belongs to a class of arms commonly used for lawful purposes," "the relative dangerousness of a weapon is irrelevant." *Id.* at 1031 (citing *Heller*, 554 U.S. at 627).

To determine whether an arm is unusual, courts look to an arm's commonality or whether it is typically possessed by law-abiding citizens for purposes of self-defense. *See, e.g.*, *Silvester*, 843 F.3d at 830 (Thomas, C.J., concurring) (finding that the "right to keep and bear arms is limited to 'the sorts of weapons' that are

'in common use'" (quoting *Heller*, 554 U.S. at 627-28)); *see ANJRPC*, 910 F.3d at 116 (holding that for the first prong inquiry, courts "consider whether the type of arm at issue is commonly owned" (citing *United States v. Marzzarella*, 614 F.3d 85, 90-91) (3d. Cir. 2010)).

Commonality is determined largely by statistics. But a pure statistical inquiry may hide as much as it reveals. In the Second Amendment context, protected arms may not be numerically common by virtue of an unchallenged, unconstitutional regulation. Our colleagues in the Third and Seventh Circuits agree. *See ANJRPC*, 910 F.3d at 116 n.15 (common use alone "is not dispositive" because of an unconstitutional regulation restricting the quantity of protected arms in circulation); *Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015) ("[I]t would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn't commonly owned. A law's existence can't be the source of its own constitutional validity."). Thus, "[w]hile common use is an objective and largely statistical inquiry, typical possession requires us to look into both broad patterns of use and the subjective motives of gun owners." *New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 256 (2d Cir. 2015) ("*NYSRPA*") (internal alterations and quotation marks omitted).

As discussed earlier, nearly half of all magazines in the United States today hold more than ten rounds of ammunition. And the record shows that such magazines are overwhelmingly owned and used for lawful purposes. This is the antithesis of unusual.

That LCMs are commonly used today for lawful purposes ends the inquiry into unusualness. But the record before us goes beyond what is necessary under *Heller*: Firearms or magazines holding more than ten rounds have been in existence—and owned by American citizens—for centuries. Firearms with greater than ten round capacities existed even before our nation's founding, and the common use of LCMs for self-defense is apparent in our shared national history.

Semi-automatic and multi-shot firearms were not novel or unforeseen inventions to the Founders, as the first firearm that could fire more than ten rounds without reloading was invented around 1580. Rapid fire guns, like the famous Puckle Gun, were patented as early as 1718 in London. Moreover, British soldiers were issued magazine-fed repeaters as early as 1658. As a predecessor to modern revolvers, the Pepperbox pistol design pre-dates the American Revolution by nearly one hundred years, with common variants carrying five to seven shots at the ready and with several European variants able to shoot 18 or 24 shots before reloading individual cylinders. Similarly, breech-loading, repeating rifles were conceptualized as early as 1791.

After the American Revolution, the record shows that new firearm designs proliferated throughout the states and few restrictions were enacted on firing capacities. The Girandoni air rifle, developed in 1779, had a 22-round capacity and was famously carried on the Lewis and Clark expedition. In 1821, the Jennings multi-shot flintlock rifle could fire 12 shots without reloading. Around the late antebellum period, one

variant of the Belgian Mariette Repeating Pepperbox could fire 18 shots without reloading. Pepperbox pistols maintained popularity over smaller-capacity revolvers for decades, despite the latter being of newer vintage. At this time, revolving rifles were also developed like the Hall rifle that held 15 shots.

The advent of repeating, cartridge-fed firearms occurred at the earliest in 1855 with the Volcanic Arms lever-action rifle that contained a 30-round tubular magazine, and at the latest in 1867, when Winchester created its Model 66, which was a full-size lever-action rifle capable of carrying 17 rounds. The carbine variant was able to hold 12 rounds. Repeating rifles could fire 18 rounds in half as many seconds, and over 170,000 were sold domestically. The Model 66 Winchester was succeeded by the Model 73 and Model 92, combined selling over 1.7 million total copies between 1873 and 1941.

The innovation of the self-contained cartridge along with stronger steel alloys also fostered development in handguns, making them smaller and increasing their capacities. Various revolver designs from France and Germany enabled up to 20 shots to be fired without reloading. A chain-fed variant, the French Guycot, allowed pistols to carry up to 32 shots and a rifle up to 100 shots. One American manufacturer experimented with a horizontally sliding "row of chambers" (an early stacked magazine) through a common frame, dubbed the Jarre "harmonica" pistol, holding ten rounds and patented in 1862. In 1896, Mauser developed what might be the first semi-automatic, recoil-operated pistol—the "Broomhandle"—with a detachable 20-round

magazine. Luger's semiautomatic pistol hit the market in 1899 and came with seven or eight round magazines, although a 32-round drum magazine was widely available.

In 1935, Browning developed the 13-round Hi-Power pistol which quickly achieved mass-market success. Since then, new semi-automatic pistol designs have replaced the revolver as the common, quintessential, self-defense weapon. Many of these pistol models have increased magazine capacities as a result of double-stacked magazines. One of the most popular handguns in America today is the Glock 17, which comes standard with a magazine able to hold 17 bullets.

Rifle magazine development paralleled that of pistol magazines. In 1927, Auto Ordinance Company released its semi-automatic rifle with a 30-round magazine. A decade and a half later, the M-1 carbine was invented for the "citizen soldier" of WWII. The M-1 remained a common and popular rifle for civilians after the war. In 1963, almost 250,000 M-1s, capable of holding between 15 and 30 rounds, were sold at steeply discounted prices to law-abiding citizens by the federal government. The ultimate successor to the M-1 was the M-16, with a civilian version dubbed the Armalite Model 15, or AR-15. The AR-15 entered the civilian market in 1963 with a standard 20-round magazine and remains today the "most popular rifle in American history." The AR-15 was central to a 1994 Supreme Court case in which the Court noted that semiautomatic rifles capable of firing "only one shot with each pull of the trigger" "traditionally have been widely accepted as lawful possessions." *Staples v.*

United States, 511 U.S. 600, 602 n.1, 603, 612 (1994). By the early-1970s, the AR-15 had competition from other American rifle models, each sold with manufacturer-standard 20-round or greater magazines. By 1980, comparable European models with similar capacities entered the American market.

The point of our long march through the history of firearms is this: The record shows that firearms capable of holding more than ten rounds of ammunition have been available in the United States for well over two centuries.[7] While the Supreme Court has ruled that arms need not have been common during the founding era to receive protection under the Second Amendment, the historical prevalence of firearms capable of holding more than ten bullets underscores the heritage of LCMs in our country's history. *See Heller*, 554 U.S. at 582. Thus, we hold that LCMs are not "unusual" arms. And because LCMs are not "unusual," we need not opine on their dangerousness under our court's test.[8]

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[7] For a comprehensive discussion on the history of firearms and magazines, *see* Clayton E. Cramer and Joseph Edward Olson, *Pistols, Crime, and Public: Safety In Early America*, 44 Willamette L. Rev. 699 (2008); *see also* David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849 (2015).

[8] Dangerousness is a more difficult question because weapons are necessarily dangerous. The "very attributes that make handguns particularly useful for self-defense are also what make them particularly dangerous." *Heller*, 554 U.S. at 711 (Breyer, J., dissenting). While we do not opine on the dangerousness of LCMs, we note that statistics in the record show that criminal use of LCMs is relatively low compared to their market saturation. Despite nearly 115 million LCMs in circulation in America today, between 1982 and 2012 LCMs were used 31 times

The state claims that LCMs fall outside the scope of the Second Amendment because they are "most useful in military service." But that claim misses its mark. The state relies on a Fourth Circuit case in which a sharply divided court held that LCMs are not arms protected by the Second Amendment because they are "most useful in military service." *Kolbe v. Hogan*, 849 F.3d 114, 137 (4th Cir. 2017). *Kolbe* remains an outlier, and other circuits have rejected its analysis. *See, e.g.*, *Worman v. Healey*, 922 F.3d 26, 35 (1st Cir. 2019) (rejecting the test); *NYSRPA*, 804 F.3d at 256 (finding the test to be "difficult to manage in practice"). We reaffirm the test announced by the Supreme Court in *Heller* and *Caetano*: Arms are not unusual if commonly owned and typically used by law-abiding citizens for lawful purposes. *See Caetano*, 136 S. Ct. at 1030 (Alito, J., concurring); *see also Heller*, 554 U.S. at 621-25.

3. LCM prohibitions are not longstanding regulations and do not enjoy a presumption of lawfulness.

Some firearm prohibitions are presumptively lawful because of their longstanding nature. *Heller* lists three types of permissible regulations that are

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in an incident where four or more people were killed. Let us be perfectly clear: We do not cite these statistics to downplay the gravity of these tragic and heartbreaking events. Rather, they are necessary to discern the "broad patterns of use and subjective motives of gun owners" when assessing whether "typical possession" is for lawful purposes. *See New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 256 (2d Cir. 2015). Based on the statistics in the record, we conclude that LCMs are in fact both commonly owned and typically possessed for lawful purposes.

presumptively consistent with the Second Amendment: prohibitions on possession by the mentally ill or felons, laws forbidding carriage in sensitive places, and laws that place qualifications on commercial sales of firearms. 554 U.S. at 626-27.[9] But because this list was held to be non-exhaustive by *Heller* and later affirmed in *McDonald*, 561 U.S. at 786, a court reviewing other types of laws must determine whether those laws are sufficiently longstanding regulations.

This, of course, raises the question of what constitutes a sufficiently longstanding regulation. In our circuit, we have looked for evidence showing whether the challenged law traces its lineage to founding-era or Reconstruction-era regulations. In *Chovan*, for example, we expressed strong doubts that bans on firearm possession for violent offenders were sufficiently longstanding because the first known restriction was not enacted until 1938. *See* 735 F.3d at

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[9] *Heller* did not clarify whether these "presumptively lawful" restrictions are rebuttable. *See* 554 U.S. at 626–27, 627 n.26. Our court has not directly addressed this issue. *See United States v. Phillips*, 827 F.3d 1171, 1176 n.5 (9th Cir. 2016) (noting that it "remains to be seen" whether someone can challenge a felon-in-possession charge if the felony predicate is "stealing a lollipop"). Several of our sister circuits, however, have held that a litigant may be able to raise an as-applied challenge to such laws. *See Binderup v. Attorney Gen. U.S.*, 836 F.3d 336, 343–44 (3d Cir. 2016) (en banc); *Schrader v. Holder*, 704 F.3d 980, 988–89 (D.C. Cir. 2013); *United States v. Moore*, 666 F.3d 313, 316 (4th Cir. 2012); *United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011); *United States v. Williams*, 616 F.3d 685, 691–92 (7th Cir. 2010); *see also United States v. Woolsey*, 759 F.3d 905, 909 (8th Cir. 2014) (hearing as-applied challenge to § 922(g)(1) but not mentioning *Heller*).

1137 (citing C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 698, 708 (2008)). In *Jackson*, we reviewed regulations on handgun storage and sales of certain ammunition, keying our analysis to analogues in founding-era and Reconstruction-era fire safety laws. 746 F.3d at 962-63.

Section 32310 cannot be considered a longstanding regulation that enjoys presumptive legality. As noted above, when the Founders ratified the Second Amendment, no laws restricted ammunition capacity despite multi-shot firearms having been in existence for some 200 years. Only during Prohibition did a handful of state legislatures enact capacity restrictions.[10] As the Third Circuit in *ANJRPC* noted, "LCMs were not regulated until the 1920s, but most of those laws were invalidated by the 1970s." 910 F.3d at 117 n.18.

At the federal level, Congress chose to impose the strictest regulations on fully automatic machine guns with the National Firearms Act of 1934. *See* Pub. L. No. 73-474, 48 Stat. 1236. But despite its strong regulations, the law imposed no similar restrictions on magazine possession. Congress briefly prohibited LCMs with capacities greater than ten rounds when it enacted the Violent Crime Control and Law

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[10] These states included Michigan (1927, repealed in 1959), Rhode Island (1927, repealed in 1975), and Ohio (1933, repealed in 2014). It is important to note that the Rhode Island and Michigan statutes applied only to weapons rather than magazines, and the Ohio statute was interpreted to only forbid the *simultaneous* purchase of a firearm and compatible 18-round magazine.

Enforcement Act of 1994. *See* Pub. L. No. 103-322, 108 Stat. 1796 (codified at 18 U.S.C. §§ 921(a)(31)(A), 922(w)(1) (expired 2004)). But even during the ten years between the federal ban's enactment and expiration, a grandfather clause allowed continued possession for previously purchased LCMs. *See id*. § 922(w)(2) (expired 2004). In fact, the *only* statute regulating LCMs that has been in continuous existence, and only since 1932, is found in the District of Columbia, which prohibits possession of a firearm that "shoots automatically or semi-automatically more than twelve shots without reloading." Act of July 8, 1932, Pub. L. No. 72-275, 47 Stat. 650. Only recently, and in apparent conjunction with the 1994 federal experiment banning assault weapons, have a small smattering of states experimented with various LCM regulations.

In sum, laws restricting ammunition capacity emerged in 1927 and all but one have since been repealed. *Cf. Heller*, 554 U.S. at 632 ("[W]e would not stake our interpretation of the Second Amendment upon a single law . . . that contradicts the overwhelming weight of other evidence regarding the [Second Amendment]."). Modern LCM restrictions are of an even younger vintage, only enacted within the last three decades. Thus, the LCM restrictions of section 32310 cannot be considered longstanding, and thus do not enjoy a presumption of lawfulness.[11]

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[11] *See Ass'n of New Jersey Rifle and Pistol Clubs v. Attorney Gen. New Jersey*, 910 F.3d 106, 116, 117 n. 18 (3d Cir. 2018) ("While a lack of longstanding history does not mean that the regulation is unlawful, the lack of such a history deprives us of reliance on *Heller*'s presumption that such regulation is lawful.");

4. There is no persuasive historical evidence in the record showing LCM possession falls outside the ambit of Second Amendment protection.

In a similar vein, courts may assess historical understandings to determine whether a challenged law is a permissible regulation. To do so, we must look for "persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment." *Jackson*, 746 F.3d at 960; *see also Peruta v. Cty. of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (en banc) (holding that carriage of concealed weapons outside the home was beyond the scope of the Second Amendment after engaging in a lengthy historical analysis spanning the late English medieval period through Supreme Court precedent in the late 1800s); *Chovan*, 735 F. 3d at 1137 (noting the lack of historical evidence that the Second Amendment did not apply to domestic violence misdemeanants).

The record before us provides no persuasive historical evidence showing that LCM possession is understood to fall outside the scope of the Second Amendment. As discussed above, the historical record shows that LCM restrictions are modern creations.

Heller v. District of Columbia, 670 F.3d 1244, 1260 (D.C. Cir. 2011) ("*Heller II*") ("We are not aware of evidence that prohibitions on either semi-automatic rifles or large-capacity magazines are longstanding and thereby deserving of a presumption of validity."); *see also Chovan*, 735 F.3d at1137 (doubting whether a restriction was longstanding because similar restrictions were enacted starting in 1938).

The Seventh Circuit in *Ezell v. City of Chicago* reached a similar conclusion. That case involved a municipal ordinance that required firing-range training as a prerequisite to gun ownership while prohibiting all firing ranges in the City of Chicago. 651 F.3d 684, 704-05 (7th Cir. 2011). The *Ezell* court was presented with two laws from 1826 and 1831 that were relevant to its analysis. *Id.* at 706. These laws fell "far short of establishing that target practice is wholly outside the Second Amendment as it was understood when incorporated as a limitation on the States." *Id.* *Compare with Peruta*, 824 F.3d at 939 (noting an unbroken lineage of prohibitions on concealed carriage since 1541).

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As for prong one of our analysis, the record shows that LCMs are not subject to the exceptions announced in *Heller*. Magazines are protected arms, and larger capacity magazines are not unusual. LCMs have never been subject to longstanding prohibitions. And a historic analysis fails to persuade that LCMs otherwise fall outside constitutional protections. We hold that California Penal Code section 32310 burdens protected conduct and proceed to the second prong of the analysis.

C. Prong Two: Strict scrutiny is the appropriate standard to apply.

Because California Penal Code section 32310 burdens protected conduct, we must now determine what standard of constitutional scrutiny applies. Section 32310 strikes at the core right of law-abiding citizens to defend hearth and home, and the burden imposed on the core right is substantial. As this court

has held, where a burden on the core right is substantial, strict scrutiny is appropriate. *See Silvester*, 843 F.3d at 821.

1. California Penal Code section 32310 strikes at the core right of law-abiding citizens to self-defend by banning LCM possession within the home.

Heller held that the "core" Second Amendment right is for law-abiding citizens to defend hearth and home. 554 U.S. at 635; *see also Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) ("Second Amendment guarantees are at their zenith within the home."). This is a simple inquiry: If a law regulating arms adversely affects a law-abiding citizen's right of defense of hearth and home, that law strikes at the core Second Amendment right. *See Jackson*, 746 F.3d at 963 (finding that a challenged law "[o]n its face . . . implicates the core because it applies to law-abiding citizens and imposes restrictions on the use of handguns within the home").

Section 32310 strikes at core Second Amendment rights. By banning LCMs everywhere for nearly everyone, it necessarily bans possession of LCMs within the home where protections are "at their zenith." *Kachalsky*, 701 F.3d at 89. We stated in *Fyock* that because Sunnyvale's LCM ordinance "restricts the ability of law-abiding citizens to possess large-capacity magazines within their homes for the purpose of self-defense, . . . [the ordinance] may implicate the core of the Second Amendment." 779 F.3d at 999. The Second Circuit in *NYSRPA* was more explicit. That court held that LCM restrictions "[b]y

their terms . . . implicate the core of the Second Amendment's protection by extending into the home, 'where the need for defense of self, family and property is most acute.'" 804 F.3d at 258 (citing *Heller*, 554 U.S. at 628). So too here.

2. California Penal Code section 32310 substantially burdens core Second Amendment rights.

Section 32310 burdens core Second Amendment rights in a substantial way, requiring us to review it under strict scrutiny. The law categorically bars the possession of magazines that are commonly used in handguns, the "quintessential self-defense weapon." *Heller*, 554 U.S. at 629. And it bans LCM possession for nearly everyone, everywhere in California. Simply put, any law that comes close to categorically banning the possession of arms that are commonly used for self-defense imposes a substantial burden on the Second Amendment.

a. *Self-defense is a fundamental right rooted in our national history.*

While the political branches enjoy latitude to craft legislation to stamp out gun violence, their powers are not limitless if they encroach on an enumerated right enshrined in our Constitution. Moreover, the Second Amendment is more than just a right guaranteed in our Bill of Rights. As the Supreme Court has held, self-defense is a "fundamental" individual right that is "necessary to our system of ordered liberty." *See McDonald*, 561 U.S. at 778. It is also pre-existing. "This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence." *United States v.*

Cruikshank, 92 U.S. 542, 553 (1875). In short, the right of armed self-defense sits atop our constitutional order and remains rooted in our country's history. Any law that limits this right of self-defense must be evaluated under this constitutional and historical backdrop.

The seeds of the modern right to defend oneself germinated from fertile ground long ago. The English Bill of Rights, considered the predecessor to our own, conferred an individual right to self-defense. *See Heller*, 554 U.S. at 593. "[T]he right secured in 1689 as a result of the Stuarts' abuses was by the time of the founding understood to be an individual right protecting against both public and private violence." *Id.* And "[b]y the time of the founding, the right to have arms had become fundamental for English subjects." *Id.*

American colonists similarly understood their rights to include the "'right of self-preservation' as permitting a citizen to 'repe[l] force by force' when 'the intervention of society in his behalf, may be too late to prevent an injury.'" *Id.* at 594-95 (citing 1 William Blackstone, Commentaries *145-146, n. 42). This belief was galvanized by George III's attempt to disarm the colonists just as the Stuarts attempted to disarm Protestants. *Id.* at 594.

Before our federal Bill of Rights was ratified, at least four states—Pennsylvania, Vermont, North Carolina, and Massachusetts—included within their state constitutions, or "Declaration of Rights," a guarantee to keep and bear arms. See *Heller*, 554 U.S. at 601, 595 n. 8. Shortly after the ratification of our Constitution, at least nine state constitutions

"enshrined a right of citizens to 'bear arms in defense of themselves and the state' or 'bear arms in defense of himself and the state.'" *Id.* at 584-85, 585 n.8.

Perhaps the most poignant and persuasive reminder of the fundamental right to self-defense rests in the denial of that right to Black Americans during tragic chapters of our country's history. After the founding, Southern states often severely limited, or outright prohibited, firearm possession by slaves, freedmen, and others.[12] The judicial branch, too, played a role in denying this fundamental right of self-defense to Blacks. In the infamous *Dred Scott v. Sanford* decision, Chief Justice Taney recited a parade of horribles if Black Americans were to be considered citizens: it would give Blacks the "right to enter every other State whenever they pleased," to exercise "full liberty of speech," to "hold public meetings upon political affairs," and "to keep and carry arms wherever they went." 60 U.S. 393, 417 (1857).

It did not get much better even after a bloody war that tore the country apart. Post-Civil War state legislation and the Black Codes in the South deprived newly freed slaves of their Second Amendment rights. *McDonald*, 561 U.S. at 771. Meanwhile, armed bands of ex-Confederates roamed the countryside forcibly disarming and terrorizing African-Americans. *See id.* at 772-73. The Radical Republicans in Congress

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[12] *See, e.g.*, Act of Mar. 2, 1819, ch. 111, § 7, 1819 Va. Acts 423 (repealed); Act of Nov. 1, 1806, ch. 81, § 1, 1811 Md. Laws 297 (repealed); *State v. Newsom*, 27 N.C. 250, 207 (N.C. 1844) (quoting Act of Jan. 11, 1841, ch.30, 1840 N.C. Sess. Laws 61) (repealed); Act of Dec. 19, 1865, vol. 8, Ch. 13, No. 4731, 1865 S.C. Acts 250 (S.C. 1865) (repealed).

fought back against these "systematic efforts . . . to disarm" Black Americans by enacting the Freedmen's Bureau Act of 1866 and the Civil Rights Acts of 1866, both of which guaranteed all persons the right of self-defense. *Id.* at 771-74.

But laws promising protection and equality for African-Americans rang hollow because, in the post-Reconstruction era, the Ku Klux Klan and other marauding bands of terrorists slaughtered thousands of unarmed Black Americans. *See generally* Allen W. Trelease, White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction (1971); *see also* Robert J. Kaczorowski, *Federal Enforcement of Civil Rights During the First Reconstruction*, 23 Fordham Urb. L. J. 155, 156-57 (1995). Not surprisingly, Black Americans embraced their right to self-defense, understanding that protections offered by the state may be promising in theory but fatal in fact. Ida B. Wells—the crusading journalist who co-founded the NAACP—wrote that "a Winchester rifle should have a place of honor in every black home, and it should be used for that protection which the law refuses to give." Ida B. Wells, *Southern Horrors and Other Writings: The Anti-Lynching Campaign of Ida B. Wells, 1892-1900* 70 (Jacqueline Jones Royster ed., 1997). Martin Luther King, Jr., despite his non-violent approach to protest, owned numerous firearms and hired armed men to guard his house during the Montgomery Bus Boycott in 1956. *See* Annelieke Dirks, *Between Threat and Reality: The National Association for the Advancement of Colored People and the Emergence of Armed Self-Defense in Clarksdale and Natchez, Mississippi, 1960-1965*, 1 J. for the Study of Radicalism 71, 73 (2007). One civil rights activist who

visited Dr. King's home during that time described the house as an "arsenal." *Id.*

Stories of other civil rights activists exercising their right to self-defense are legion. While the NAACP espoused nonviolence, many of its members carried firearms for self-protection, and for good reason. *See id.* at 71. Aaron Henry, then a branch president of the NAACP, would openly display his firearm after his house was firebombed in 1963. *See id.* When NAACP activist Hartman Turnbow tried to register to vote, nightriders lit his house on fire with Molotov cocktails. *See id.* at 72. Turnbow recounted that he grabbed his rifle, escaped the burning building, and exchanged gunfire with two white men waiting outside. *See id.* The men fled once Turnbow started shooting back. *See id.* Ida B. Wells documented that "[o]f the many inhuman outrages of [that] year, the only case where the proposed lynching did *not* occur, was where the men armed themselves . . . and prevented it. The only times an Afro-American who was assaulted [and] got away has been when he had a gun and used it in self-defense." Ida B. Wells, *supra.*

During the crucible of the civil rights movement, Black American veterans from World War II and the Korean War founded the Deacons for Defense and Justice to protect Black people from racial violence at the hands of the Ku Klux Klan. *See generally* Lance Hill, The Deacons for Defense: Armed Resistance and the Civil Rights Movement (Univ. of N.C. Press ed., 2004). In 1966, the small Louisiana town of Bogalusa integrated the local junior high school to the ire of the local Klan. *See id.* at 1. Armed with guns, this roving band of racist terrorists arrived at the junior high

school. *See id.* Their intentions were obvious: In that small town, two African-Americans, one of whom was a deputy sheriff, had been recently killed by white people. *See id.* But this time around, the Klan encountered something unexpected at the entrance of the school: The Deacons for Defense and Justice—armed with revolvers and rifles, and rooted in righteousness and resolution. Outgunned by the Deacons, the Klan fled. *See id.* As one member of the Deacons noted afterwards, "From that day forward, we didn't have too many more problems." *Id.* at 2.

These terrible events did not occur long ago in faraway lands. They occurred on American soil, some less than sixty years ago. And tragically, they are not unique. Indeed, Black Americans' experience throughout the civil rights movement was just the latest iteration in an ongoing struggle to defend hearth and home from those who wished them ill. *See* Dirks, *supra*, at 72-73 ("This was part of a long-standing tradition of revolts, armed resistance, and self-defense that developed during slavery and continued after emancipation when Reconstruction failed to deliver political and social equality for Black Americans.").

Our country's history has shown that communities of color have a particularly compelling interest in exercising their Second Amendment rights. The Second Amendment provides one last line of defense for people of color when the state cannot—or will not—step in to protect them. This remains true today across all communities of color. For example, amid the COVID-19 pandemic, Asian-Americans have become the target of physical attacks by those who

scapegoat them for the virus. *See* Sabrina Tavernise and Richard A. Oppel, Jr., *Spit On, Yelled At, Attacked: Chinese-Americans Fear for Their Safety*, N.Y. Times, Mar. 24, 2020, at A1. In response to these assaults and threats to their lives, Asian-Americans have begun arming themselves. *See id.* When one Asian mother was asked why she was buying a pistol, she replied in tears, "[t]o protect my daughter." *Id.* Another Asian immigrant purchasing an AR-15 rifle feared violence should COVID-19 deaths continue to mount: "And when all these bad things come, I am a minority. People can see my face is Chinese, clearly. My son, when he goes out, they will know his parents are Chinese." *Id.*

People of color are not alone in relying on the Second Amendment to protect themselves when the state's protections fail them. We need look no further than the facts of the Supreme Court's *Caetano* decision. Jaime Caetano had obtained multiple restraining orders against her abusive boyfriend after he had put her in the hospital. *See Caetano*, 136 S. Ct. at 1028-29 (Alito, J., concurring). Unfortunately, restraining orders meant little to her abuser. *See id.* He continued to stalk and menace her. One day, he waited for her outside her workplace, but this time she came armed. *See id.* The abusive boyfriend "got scared and he left [her] alone." *Id.* Her story is not unique. For many women, a firearm may be the equalizer against their abusers and assailants when the state fails to protect them.[13]

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[13] *See McDonald v. City of Chicago*, 561 U.S. 742, 78–90, 790 n.33 (2010) (citing, among others, Brief for Pink Pistols as Amici Curiae) ("Amici . . . contend that the right is especially important

So, too, for members of the lesbian, gay, bisexual, and transgender (LGBT) communities. They are "disproportionately the victims of hate crimes and other types of criminal violence" because they are "perceived . . . as safe targets for violence and hateful acts." Brief for Pink Pistols, et al. as Amici Curiae Supporting Plaintiffs-Appellees at 2. As amici Pink Pistols explain in their brief, armed self-defense can dispel those perceptions and deter such attacks against LGBT members. *See id.*

We mention these examples to drive home the point that the Second Amendment is not a second-class right. *See McDonald*, 561 U.S. at 780-81. Nor is self-defense a dispensation granted at the state's mercy. Rather, the Second Amendment is a fundamental constitutional right guaranteed to the people—especially those who may not be equally protected by the state. Moreover, the Second Amendment is not a relic relevant only during the era of Publius and parchments. It is a right that is exercised hundreds of times on any given day. The parties and amici disagree on the number of times that guns are used for defensive purposes, offering anywhere from 240,000 to 2.5 million times a year.

That means that an average of 657 Americans—and perhaps up to 6,849 Americans—use guns to defend themselves every single day of the year. We take notice of this fact in recognizing the fundamental right of self-defense.

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for women and members of other groups that may be especially vulnerable to violent crime.").

b. *California Penal Code section 32310 substantially burdens Second Amendment rights.*

California Penal Code section 32310 substantially burdens core Second Amendment rights because of its sweeping scope and breathtaking breadth. Half of all magazines in the United States are now illegal to own in California. It does not matter that these magazines are not unusual and are used commonly in guns for self-defense. Law-abiding citizens must alter or turn them over—or else the government may forcibly confiscate them from their homes and imprison them up to a year. The law's prohibitions apply everywhere in the state and to practically everyone. It offers no meaningful exceptions at all for law-abiding citizens. These features are the hallmark of substantial burden.

The state argues that its law does not impose a substantial burden on the Second Amendment because citizens still can defend themselves with guns equipped with non-LCMs. But the Supreme Court in *Heller* rejected that type of policy argument when it comes to a fundamental constitutional right. We know from that case that a regulation may impose a substantial burden on the Second Amendment, even though the restriction does not foreclose the right to self-defense. *See Heller*, 554 U.S. at 574.[14] The District of Columbia law banning possession of handguns did not prevent citizens from defending themselves

[14] As discussed earlier (n.6), *Heller* itself does not mention "substantial burden," but this court has construed *Heller* to require a two-step analysis that includes a substantial burden component.

because, as the District argued, they could still use a shotgun or a variety of other arms to defend themselves. But the Supreme Court rejected the argument that "it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed." *Heller*, 554 U.S. at 629. Because the law banned an "entire class of 'arms' that is overwhelmingly chosen by American society" for self-defense—a handgun, in that case—the restriction was "severe" and ran afoul of the Second Amendment. *Id.* at 628. California's law, too, bans an "entire class of 'arms'" that is commonly used for self-defense and thus infringes on the Second Amendment.[15]

The state essentially invites us to engage in a policy decision that weighs the pros and cons of an LCM ban to determine "substantial burden." That is exactly what the dissent in *Heller* proposed: Ask "whether the statute burdens a protected interest in a way or to an

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[15] The dissent concludes that LCMs do not qualify as a separate class of arms, but rather "are simply larger magazines." Dissent Op. at 71. But we need only to look at California's statute to conclude that it is indeed a class of arms: The state created this separate class by its definition of what constitutes an LCM under Penal Code section 16740. Moreover, LCMs cannot be fairly characterized as a mere subset of magazines because they account for half the magazines in America. Finally, the dissent concludes that the LCM restriction is more akin to a manner restriction because it only affects how one can exercise her Second Amendment right. But in the First Amendment context, no court would uphold a state's ban on half of all parks and sidewalks for public protest because the other half remained available for use. We thus do not agree that prohibiting possession of one of every two otherwise protected arms constitutes a mere regulation on the manner in which one exercises her Second Amendment rights.

extent that is out of proportion to the statute's salutary effects upon other important governmental interests." *Id.* at 689-90 (Breyer, J., dissenting). But the Supreme Court in *Heller* took any such policy-balancing notion off the table: "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Id.* at 634-35.

Put another way, a "substantial burden" on the Second Amendment is viewed not through a policy prism but through the lens of a fundamental and enumerated constitutional right. We would be looking through the wrong end of a sight-glass if we asked whether the government permits the people to retain some of the core fundamental and enumerated right. Instead, *Heller* counsels us to look at whether the government regulation restricts the core fundamental right from the outset. In other words, we look to what a restriction *takes away* rather than what it leaves behind. Here, California's law takes away a substantial swath of the core constitutional right of self-defense because it bans possession of half of all magazines in America today, even though they are common in guns used for self-defense. In short, a law that takes away a substantial portion of arms

commonly used by citizens for self-defense imposes a substantial burden on the Second Amendment.

Notably, the Supreme Court has taken a similar approach in a kaleidoscope of cases involving other fundamental enumerated rights. The Court does not look away from a governmental restriction on the people's liberty just because the state did not impose a full-tilt limitation on a fundamental and enumerated right. Rather, in assessing a governmental imposition on a fundamental right, the Court shuns policy-balancing and focuses on the erosion of the people's liberties. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) ("Undoubtedly, the right [to vote] . . . is a fundamental matter in a free and democratic society. . . [A]ny alleged infringement of the right . . . must be carefully and meticulously scrutinized."); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."); *Jacob v. City of N.Y.*, 315 U.S. 752, 752-53 (1942) ("A right [to jury trial] so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."). We find ourselves in good company in declining the state's invitation to hold otherwise.

Our decision today is in keeping with Ninth Circuit precedent. While we have not articulated a precise standard for what constitutes a substantial burden on core Second Amendment rights, we have consistently stated that a law that bans *possession* of a commonly used arm for self-defense—with no meaningful exception for law-abiding citizens—likely imposes a substantial burden on the Second Amendment.[16] And for good reason: The Supreme Court has scrutinized with a gimlet eye any limitation of a fundamental right exercised at home because such an imposition, by its nature, severely restricts individual liberty. Here, the state effectively intrudes into the homes of law-abiding citizens to forcibly confiscate arms that they rely on for self-defense. If the Supreme Court has made one thing clear time and again, it is that the home is a sanctuary and the government should be chary to intrude. *Cf. Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home.").

So, in *Jackson*, we held that a bar on the *sale* of hollow-point ammunition within city limits was not a severe burden because San Francisco residents could still *own* that ammunition within the home. 746 F.3d at 968. We thus applied intermediate scrutiny to the regulation. *See id.* Stated differently, we implied that strict scrutiny likely applies if a law completely bans

[16] We are not articulating a universal principle but are providing one circumstance where strict scrutiny applies.

the possession of a certain class of ammunition (there, hollow-point bullets).

Two years later in *Silvester*, we applied intermediate scrutiny to a ten-day waiting period because it did not completely ban possession. 843 F.3d at 827. We held that such regulations were more akin to time, place, or manner restrictions in the First Amendment context. *See id.* In doing so, we implied that a complete ban on possession likely merits a more stringent review than intermediate scrutiny.

Then in 2018 in *Pena*, our court reaffirmed that possession bans on arms are strong medicine likely requiring strict scrutiny. We held that a grandfather provision was "important[]" to our decision to apply intermediate scrutiny. 898 F.3d at 977.[17] Put differently, the lack of a grandfather provision likely requires strict scrutiny because governmental bans on possession cut deeply into the core constitutional right to protect hearth and home.

Perhaps this point was made most clear in *Chovan*. 735 F.3d at 1138. While we applied intermediate scrutiny on a ban on arms for domestic violence misdemeanants, we made clear that the standard was different for law-abiding citizens. *See id.* If a ban on arms borders on a "total prohibition" of ownership for law-abiding citizens, the burden is substantial. *See id.*[18]

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[17] In *Worman v. Healy*, the Fourth Circuit similarly applied intermediate scrutiny to a law containing a grandfather clause for weapons owned lawfully before its enactment. *See* 922 F.3d 26, 31–32.

[18] Other courts have adopted similar analysis. The Third Circuit has held, for example, that a ban on possessing firearms

Turning to whether section 32310 imposes a substantial burden on the Second Amendment, the record makes that answer plainly obvious. Half of all magazines in America are prohibited under section 32310. The state threatens imprisonment if law-abiding citizens do not alter or turn them over. It does not matter that LCMs come standard for guns commonly used for self-defense, or that law-abiding citizens may have owned them lawfully for years or even decades. When the government bans tens of millions of protected arms that are staples of self-defense and threatens to confiscate them from the homes of law-abiding citizens, that imposes a substantial burden on core Second Amendment rights.

Moreover, California's law has no meaningful exceptions for law-abiding citizens. There is no grandfather clause that *Pena* found "important" to avoid strict scrutiny. 898 F.3d at 977. None of the limited exceptions in the statute speak to the average law-abiding citizen, and none mitigate the severe burdens imposed by section 32310 on core Second Amendment rights. California's LCM ban applies to almost everyone, everywhere, and to nearly every weapon that can be reasonably expected for use in self-defense. If a far-reaching law restricting arms contains no meaningful exceptions for law-abiding

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with obliterated serial numbers did not generate significant burdens because a gun owner remains free to possess any firearm they choose so long as it has an intact serial number. *See United States v. Marzzarella*, 614 F.3d 85, 97 (3d. Cir. 2010); *see also Kolbe v. Hogan*, 849 F.3d 114, 123 (4th Cir. 2017) (noting that the law under review "does not ban the possession of a large-capacity magazine").

citizens who use them for self-defense, it invites strict scrutiny.

Section 32310 also cannot be considered merely a time, place, or manner regulation. Unlike *Jackson*'s storage requirements, a wholesale statewide prohibition on possession of one out of every two magazines is greater in scope and severity. And *Pena*'s microstamping requirement for guns could properly be considered a manner restriction because it did not dispossess owners of nonconforming weapons. The same can be said for the law in *Silvester* that otherwise did not affect how a citizen exercises her Second Amendment rights after completing the ten-day waiting period.

Section 32310 instead appears to be more like the firing-range restrictions that the Seventh Circuit in *Ezell* struck down. The City of Chicago had banned firing ranges within city limits, which the Seventh Circuit held was "a serious encroachment" on the right to self-defense. 651 F.3d at 708-09. This, the court held, constituted more than a restriction on the manner in which those rights were exercised because of the importance of having weapons training and proficiency among the firearm-owning public. *Id.* at 708. The magazine restrictions here, as in *Ezell*, amount to a "serious encroachment." *Cf. Jackson v. City and Cty. of San Francisco*, 135 S. Ct. 2799, 2801 (2015) (Thomas, J., dissenting from denial of certiorari) (considering the burden "significant" where residents are prohibited from keeping handguns operable for immediate self-defense via storage requirements).

More fundamentally, no court would ever countenance similar restrictions for other fundamental rights. The nub of the state's position is that even though it bars Californians from owning one of every two magazines in the United States, that restriction is not substantially burdensome because Californians can still possess other magazines. But no court would hold that the First Amendment allows the government to ban "extreme" artwork from Mapplethorpe just because the people can still enjoy Monet or Matisse. Nor would a court ever allow the government to outlaw so-called "dangerous" music by, say, Dr. Dre, merely because the state has chosen not to outlaw Debussy.[19] And we would never sanction governmental banning of allegedly "inflammatory" views expressed in Daily Kos or Breitbart on the grounds that the people can still read the New York Times or the Wall Street Journal.[20]

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[19] *Cf.* Rebecca Laurence, *NWA: 'The World's Most Dangerous Group'?*, BBC (Aug. 13, 2015), http://www.bbc.com/culture/story/20150813-nwa-the-worlds-most-dangerous-group (discussing failed efforts to limit "dangerous" gangster rap music).

[20] The state's implicit suggestion that the Second Amendment deserves less protection than the First Amendment conflicts with precedent that we look to the First Amendment for guidance in fleshing out jurisprudence for the Second Amendment. *See, e.g., Jackson*, 746 F.3d at 960 (the Second Amendment "inquiry bears strong analogies to the Supreme Court's free-speech caselaw"); *Ezell*, 651 F.3d at 706–07 ("*Heller* and *McDonald* suggest that First Amendment analogues are more appropriate, and . . . have already begun to adapt First Amendment doctrine to the Second Amendment context." (internal citations omitted)). The state's approach is also at odds with the Supreme Court's framework for other rights. *Cf., e.g., June Med. Servs. LLC v. Russo*, 591 U.S. ___ at 35 (June 29, 2020) (invalidating a state law as unduly

The state relies on the fallback position that the Second Amendment deserves less protection because it allegedly poses an inherent danger to public safety that other rights do not. But individual rights often impose at least some risk on public safety. "The right to keep and bear arms . . . is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category." *McDonald*, 561 U.S. at 783 (internal citations omitted).

The exclusionary rule in criminal procedure is a clear example. Under that doctrine, "the criminal is to go free because the constable has blundered." *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (internal quotations and citation omitted). Surely, too, the government's efforts to secure damning criminal confessions has been hobbled since *Miranda v. Arizona*. "The most basic function of any government is to provide for the security of the individual and of his property. . . . The rule announced today will measurably weaken the ability of the criminal law to perform these tasks." *Miranda v. Arizon*a, 384 U.S. 436, 539-41 (1966) (White, J., dissenting). This is not hypothetical. Criminals sometimes go free because our society prioritizes individual constitutional rights over

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burdensome on a woman's right to abortion because it would have reduced the state's abortion capacity by over half); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2312 (2016) (invalidating as unduly burdensome a similar law that reduced the number of abortion clinics "from about 40 to about 20" within the state).

concerns that freed offenders may commit crimes again. *See, e.g.*, Jim Haner, Kimberly A.C. Wilson, & John B. O'Donnell, *Cases Crumble, Killers Go Free*, Balt. Sun, Sept. 29, 2002, at 1A (discussing a group of 83 defendants who had charges for homicide dropped due to technical error and were later rearrested for new crimes, "including 24 indicted in fresh murders or attempted murders").

There is also no stopping point to the state's argument. Under its logic, California could limit magazines to as few as three bullets and not substantially burden Second Amendment rights because, on average, 2.2 bullets are used in every defensive encounter according to one study.[21] But the threat to life does not occur in an average act in the abstract; self-defense takes place in messy, unpredictable, and extreme events. And what's more, the state's logic is in no way limited to restricting the number of bullets in a magazine. If it is not substantially burdensome to limit magazines to ten rounds because the average defensive shooter uses fewer bullets, then there is no reason it could not impose a one-gun-per-person rule. In fact, there is a more compelling case to impose a one-gun policy under the state's theory. After all, the study relied on by the state also shows that an overwhelming majority of mass shootings involved the use of multiple guns

[21] At oral argument, counsel for the state conceded that there is a threshold below which some capacity "does actually impose a severe burden on the core right of self-defense" and would be "too low." When asked whether the state could permissibly restrict magazines to contain zero bullets, allowing for one round in the firearm's chamber, counsel offered only a qualified concession: "I think that might be too low. Hypothetically."

while a relative few definitively involved LCMs. This cannot be right. We would never uphold such a draconian limitation on other fundamental and enumerated constitutional rights.

More broadly, the government's argument misses the mark because the Second Amendment limits the state's ability to second-guess the people's choice of arms if it imposes a substantial burden on the right to self-defense. As discussed above, "substantial burden" cannot be a policy-balancing inquiry because it implicates a fundamental constitutional right. Banning the ownership of half the magazines in America inflicts a substantial burden on the Second Amendment.

In any event, it does not take a wild imagination to conclude that citizens may need LCMs to defend hearth and home. While Hollywood and the Bay Area symbolize California to the world, the Golden State is in fact a much more diverse and vibrant place, with people living in sparsely populated rural counties, seemingly deserted desert towns, and majestic mountain villages. In such places, the closest law enforcement may be far, far away—and it may take substantial time for the county sheriff to respond. And it is no guarantee that the things that go bump in the night come alone; indeed, burglars often ply their trade in groups recognizing strength in numbers. *See* Carl E. Pope, Law Enf't Assistance Admin., U.S. Dep't of Justice, 148223, Crime-Specific Analysis: An Empirical Examination of Burglary Offenses and Offender Characteristics 48 (1977) (finding that 70% of burglars operate in groups); *see also* Andy Hochstetler, *Opportunities and Decisions:*

Interactional Dynamics in Robbery and Burglary Groups, 39 Criminology 737, 746-56 (2001) (suggesting that burgling in groups reduces anxiety of punishment). Law-abiding citizens in these places may find security in a gun that comes standard with an LCM.

Further, some people, especially in communities of color, do not trust law enforcement and are less likely—over 40% less likely, according to one study—to call 911 even during emergencies. *See* 163 Cong. Rec. S1257-58 (daily ed. Feb. 16, 2017) (statement of Sen. Kamala Harris) (discussing a study showing that certain ethnic groups are over 40% less likely to call 911 in an emergency); *see also* Nik Theodore & Robert Habans, *Policing Immigrant Communities: Latino Perceptions of Police Involvement in Immigration Enforcement*, 42 J. of Ethnic and Migration Stud. 970 (2016). These citizens may rely more on self-defense than the "average" person in a home invasion or some other emergency.

Law-abiding citizens trapped in high-crime areas where the law enforcement is overtaxed may defend themselves in their homes with a handgun outfitted with LCMs. And in incidents of mass chaos and unrest, law enforcement simply may be unable to protect the people, leaving them solely responsible for their own safety in a seemingly Hobbesian world. Finally, many citizens will not take any chances or compromise their ability to defend themselves and

their families, and they may place their trust in guns equipped with LCMs as a last resort.[22]

Simply put, the guardrails found in our precedent that limit the government's intrusion on the Second Amendment right do not exist in California's near-categorical ban of LCMs. It imposes a substantial burden on the people's Second Amendment rights. Strict scrutiny applies. *See Jackson*, 746 F.3d at 961.

3. Decisions in other circuits are distinguishable.

The state attempts to seek refuge in the holdings of extra-circuit authority. But those decisions present myriad distinctions and are inapposite.

To begin, many of the other states' laws are not as sweeping as section 32310. For example, the Maryland state law in the Fourth Circuit's decision in *Kolbe* did not ban possession of LCMs, but only barred the sale of them. *See* 849 F.3d at 122-23. Similarly, the Massachusetts state law in *Worman* had a grandfather clause that allowed owners of LCMs to keep them. *See* 922 F.3d at 31. As our court has explained, laws that only ban the sale of arms or include a grandfather clause impose a lesser burden. *See Pena*, 898 F.3d 969, 977-78 (grandfather clause was an "important" reason for applying intermediate scrutiny); *see also Jackson*, 746 F.3d 964-65 (intermediate scrutiny applies when law only banned

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[22] This, of course, does not mean that a citizen has a right to own any weapon solely because it will aid her in self-defense. As *Heller* pointed out, if a weapon is "dangerous and unusual," then it does not fall within the Second Amendment's ambit. 554 U.S. at 627.

sale of hollow-point ammunition and did not ban possession).

Moreover, almost all the other state laws banned *both* LCMs *and* assault weapons. As a result, the decisions too often conflated the analysis between the two. For example, the D.C. Circuit in *Heller v. District of Columbia* ("*Heller II*") upheld the ban on assault weapons and LCMs because the record reflected that assault weapons are not typically used for self-defense, quoting a study that "revolvers and *semi-automatic pistols* are together used almost 80% of the time in incidents of self-defense with a gun." 670 F.3d 1244, 1262 (D.C. Cir. 2011) (emphasis added). But "semi-automatic pistols" used for self-defense—such as a Glock—routinely use LCMs, and, in fact, an LCM is the standard magazine that comes equipped with the gun. The analysis in many of these cases is thus rendered unsound for our purposes today, as we only opine on the validity of California's LCM ban.[23]

4. Fyock v. City of Sunnyvale does not obligate us to apply intermediate scrutiny.

The state relies on this court's decision in *Fyock v. City of Sunnyvale* to maintain that intermediate scrutiny applies here. But it hangs too heavy a hat on too small a hook. *Fyock* does not hold that as a matter

[23] We also note that most extra-circuit decisions were split with dissents that strongly disagreed. *See ANJRPC*, 910 F.3d at 126–34 (Bibas, J., dissenting); *Kolbe*, 849 F.3d at 151–63 (Traxler, J., dissenting, joined by Niemeyer, Shedd, and Agee); *Friedman v. City of Highland Park*, 784 F.3d 406, 412–21 (7th Cir. 2015) (Manion, J., dissenting); *Heller II*, 670 F.3d at 1269–96 (Kavanaugh, J., dissenting).

of law intermediate scrutiny applies to LCM regulations.

In *Fyock,* we did not reach the merits of the case, but instead were asked to review a preliminary injunction denial relating to an LCM ban in the City of Sunnyvale based on a limited record. Critically, we acknowledged that we were merely "consider[ing] whether the district court *abused its discretion by applying intermediate scrutiny*." *Fyock*, 779 F.3d at 998 (emphasis added). We held only that the district court did not abuse its discretion by choosing intermediate scrutiny based on the limited record before it on a preliminary injunction appeal. *Id.* at 1001. The abuse of discretion standard, of course, is highly deferential, and an appellate court can reverse only if the trial court made "a clear error of judgment." *DISH Network Corp. v. F.C.C.*, 653 F.3d 771, 776 (9th Cir. 2011). The limited nature of that opinion is self-evident; in its eight pages, it referenced the abuse of discretion standard twelve times, and it repeatedly emphasized the narrow scope of the ruling. *See, e.g.*, *Fyock*, 779 F.3d at 995 ("our disposition of appeals from most preliminary injunctions may provide little guidance as to the appropriate disposition on the merits"); *id.* at 997 n.3 (noting the "undeveloped record" before it and stating that the record will be developed at the merits stage); *id.* at 1001 ("we decline to substitute our own discretion for that of the district court").

It is perhaps understandable why our court in *Fyock* ruled as it did in light of the deferential standard of review and the unique facts presented in the case. Sunnyvale is a small and affluent

community. Its violent crime rate is less than half of the statewide violent crime rate. *Compare* City of Sunnyvale, *Sunnyvale Uniform Crime Report 2018* (1.7 incidents per 1,000 people), *with* Cal. Dep't of Justice, *Crime in California 2018*, Criminal Justice Statistics Center Publications at 1, 10 (4.4 incidents per 1,000 people).[24] Sunnyvale also boasts one of the largest combined public safety departments in the United States. *See* Erika Towne, *Sunnyvale's Department of Public Safety is One of the Largest Combined Departments in the U.S.*, Santa Clara Weekly (Apr. 10, 2019), at 9. We are not in Sunnyvale anymore.[25]

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California Penal Code section 32310 substantially burdens core Second Amendment rights. It bans LCMs that come standard in guns commonly used for

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[24] Available at https://sunnyvale.ca.gov/civicax/filebank/blobdload.aspx?BlobID= 22968 (last updated Apr. 22, 2020), and https://data-openjustice.doj.ca.gov/sites/default/files/2019-07/Crime%20In%20CA%202018%2020190701.pdf (last visited June 12, 2020).

[25] The dissent suggests that we are engaging in policy-based judgments by reciting these facts. But this is not so. We only mention these considerations to provide some context in understanding why the *Fyock* court may have ruled as it did, based on the highly deferential standard of review that court applied while reviewing a preliminary injunction with a limited record before it. Even Justice Breyer's dissent in *Heller* recognized that laws that are limited in geographic scope may reduce burdens compared to restrictions that burden the broader public. *See Heller*, 554 U.S. at 682 (voting to uphold DC's law in part because "[t]he law is tailored to the urban crime problem in that it is local in scope and thus affects only a geographic area both limited in size and entirely urban") (Breyer, J., dissenting).

self-defense in the home. Its scope is broad and indiscriminate. And it provides no meaningful exceptions for law-abiding citizens. Strict scrutiny applies under the reasoning of our prior decisions: "A law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny." *Silvester*, 843 F.3d at 821, 827; *see also Pena*, 898 F.3d at 977, 978-79; *Jackson*, 746 F.3d at 961, 964; *Chovan*, 735 F.3d at 1138.

Apart from this circuit's two-prong analysis for tiers of scrutiny, our approach is in keeping with how we generally address fundamental rights in our Constitution. As the Supreme Court held, the Second Amendment is a "fundamental" right that is "necessary to our system of ordered liberty." *McDonald*, 561 U.S. at 778. When the government tries to limit the people's fundamental rights, the Supreme Court typically presumes that strict scrutiny applies. *See, e.g.*, *Glucksberg*, 521 U.S. at 721 (strict scrutiny applies to "fundamental" liberty interests); *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting) (laws affecting "fundamental aspect[s] of liberty" are "subjected to strict scrutiny") (internal quotations omitted).[26] And it makes sense to do so. If the government imposes a substantial limitation on the most sacred and fundamental rights enumerated in our Constitution, then such a law restricting the people's liberty should face the highest tier of scrutiny.

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[26] We recognize that the Supreme Court, for example, applies intermediate scrutiny for time, place, or manner restrictions on First Amendment rights, but as noted above, section II.C.2.ii, the restriction here is not a time, place, or manner regulation.

D. California Penal Code section 32310 does not survive strict scrutiny review.

Strict scrutiny is the "most rigorous and exacting standard of constitutional review," and requires that a state law be "narrowly tailored to achieve a compelling interest." *Miller v. Johnson*, 515 U.S. 900, 920 (1995); *see also Kolbe*, 849 F.3d at 133. "[I]f there are other, reasonable ways to achieve [a compelling state purpose] with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 909-10 (1986) (citing *Dunn v. Blumstein,* 405 U.S. 330, 343 (1972)) (alterations original).

1. *The state interests advanced here are compelling.*

In the court below, the state advanced four interests underlying California Penal Code section 32321: protecting citizens from gun violence, protecting law enforcement from gun violence, protecting public safety, and preventing crime. The district court found these interests to be "important." On appeal, the Attorney General does not explicitly enumerate these four interests but does stylize them as "interests in preventing and mitigating gun violence, particularly public mass shootings and the murder of law enforcement personnel." The state claims that these interests are compelling. We agree.[27]

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[27] We remind future litigants that it is still necessary to show that the stated interest is compelling and may not simply be presumed.

See Schall v. Martin, 467 U.S. 253, 264 (1984) ("The 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted.").

2. *California Penal Code section 32310 is not narrowly tailored to achieve the compelling state interests it purports to serve.*

California Penal Code section 32310 cannot withstand strict scrutiny analysis because the state's chosen method—a statewide blanket ban on possession everywhere and for nearly everyone—is not the least restrictive means of achieving the compelling interests.

As discussed above, section 32310 provides few meaningful exceptions for the class of persons whose fundamental rights to self-defense are burdened. The scope of section 32310 likewise dooms its validity. Section 32310 applies statewide. It necessarily covers areas from the most affluent to the least. It prohibits possession by citizens who may be in the greatest need of self-defense like those in rural areas or places with high crime rates and limited police resources. It applies to nearly everyone. It is indiscriminating in its prohibition. Nor is the law limited to firearms that are not commonly used for self-defense. These are not features of a statute upheld by courts under the least restrictive means standard.[28]

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[28] *See, e.g.*, *Holt v. Hobbs*, 574 U.S. 352, 364–65 (2015) (restriction preventing beard growth for religious practitioners to half of an inch not the least restrictive means of furthering prison safety and security); *United States v. Alvarez*, 567 U.S. 709, 729 (2012) (Stolen Valor Act held unconstitutional because other less speech-restrictive means were available to the government to

E. Even if intermediate scrutiny were to apply, California Penal Code section 32310 would still fail.

As made plain by our earlier discussion, intermediate scrutiny is the wrong standard to apply. But even if we were to apply it today, California Penal Code section 32310 would still fail. While that provision doubtless purports to serve important state interests, the means chosen by the state are not substantially related to serving those interests.

1. Intermediate scrutiny as traditionally understood has bite.

Courts apply intermediate scrutiny in a variety of contexts. Broadly speaking, to survive intermediate scrutiny a statute "must be substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

Recently, the Supreme Court emphasized the potent nature of intermediate scrutiny. In *Packingham v. North Carolina*, the Court held that to survive intermediate scrutiny "a law must be 'narrowly tailored to serve a significant governmental

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combat fraudulent Medal of Honor recipient claims); *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 816–27 (2000) (statute regulating the hours for sexually oriented cable channel programming to shield children from pornography held unconstitutional because other plausible less restrictive means were readily available); *Reno v. ACLU*, 521 U.S. 844, 874–75 (1997) (statute that criminalized "indecent" or "patently offensive" speech on the internet was unconstitutional because it was "an unnecessarily broad suppression" of free speech rights and therefore not the least restrictive means).

interest." 137 S. Ct. 1730, 1736 (2017) (quoting *McCullen v. Coakley*, 573 U.S. 464, 486 (2014)).

While the precise contours of intermediate scrutiny may vary, this much is certain: It has bite. It is a demanding test. While its application is neither fatal nor feeble, it still requires a reviewing court to scrutinize a challenged law with a healthy dose of skepticism. Indeed, the law must address "harms" that "are real" in a "material" way. *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). At its core, intermediate scrutiny is a searching inquiry.

2. Appellate courts have not settled on a particular intermediate scrutiny formulation for Second Amendment challenges.

This circuit has used seemingly varying formulations of intermediate scrutiny in the Second Amendment context.

Chovan provides that intermediate scrutiny requires "(1) the government's stated objective be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective." 735 F.3d at 1139. But in *Silvester*, we stated that gun regulations need only promote a "substantial government interest that would be achieved less effectively absent the regulation." 843 F.3d at 829. We cited *both* standards in *Pena*, though that decision appears to interpret the latter as a means to assess the fit prong of the former. 898 F.3d at 979.

Other decisions within our court and elsewhere have used language that suggests varying intensities of "bite." Some applications of intermediate scrutiny

are severe. *See, e.g.*, *Jackson*, 746 F.3d at 966 (whether the challenged restriction is "substantially related to the important government interest of reducing firearm-related deaths and injuries"); *Heller II*, 670 F.3d at 1258 (requiring "a tight 'fit' between the [regulation] and an important or substantial government interest, a fit 'that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective'"). Others appear less stringent. *See, e.g.*, *Worman*, 922 F.3d at 38-39 ("there must be a 'reasonable fit' between the restrictions imposed by the law and the government's valid objectives, 'such that the law does not burden more conduct than is reasonably necessary'"); *ANJRPC*, 910 F.3d at 119 (same). A few fall somewhere in between. *See, e.g.*, *Kolbe*, 849 F.3d at 139 (restriction passes intermediate scrutiny if "reasonably adapted to a substantial government interest") (citation omitted).

3. Some courts have applied a diluted form of intermediate scrutiny that approximates rational basis, which Heller forbids.

Whatever its precise contours might be, intermediate scrutiny cannot approximate the deference of rational basis review. *Heller* forecloses any such notion. *See Heller*, 554 U.S. at 628 n.27. Yet the state asserts that the deferential standard presented by the case of *Turner Broadcasting System, Inc. v. F.C.C.* applies here. But reliance on this line of cases is misplaced. While some courts have analyzed Second Amendment regulations under the highly deferential *Turner* standard, it has been

inconsistently applied and ultimately remains inapplicable.

Turner deference stems from two Supreme Court cases that addressed certain rules imposed on cable television companies. *See Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622 (1994) ("*Turner I*"); *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180 (1997) ("*Turner II*"). These cases establish a general rule that where "policy disagreements exist in the form of conflicting legislative 'evidence,'" courts "'owe [the legislature's] findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions.'" *Pena*, 898 F.3d at 979 (quoting *Turner II*, 520 U.S. at 195). A few courts have imported this deference to analyze Second Amendment claims. *See, e.g.*, *Kolbe*, 849 F.3d at 140 (applying *Turner* deference to LCM restrictions); *NYSRPA*, 804 F.3d at 261 (same); *Drake v. Filko*, 724 F.3d 426, 436-37 (3d Cir. 2013) (same, for public carriage restrictions). But courts in our own circuit have been inconsistent in its application. In *Pena*, we applied *Turner* deference. *See* 898 F.3d at 979-80. But in *Silvester*, *Fyock*, *Jackson*, and *Chovan* we did not. *See generally* 843 F.3d at 817-29; 779 F.3d at 994-1001; 746 F.3d at 957-70; 735 F.3d at 1129-42.

The latter opinions get it right. *Turner* is an inappropriate standard for a simple reason: That line of cases addressed a very different set of laws and circumstances. There, cable television operators challenged the constitutionality of must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992. *See Turner I*,

512 U.S. at 626-27. As the Court explained in *Turner II*, the deferential principle outlined in *Turner I* applies mainly in "cases . . . involving congressional judgments concerning *regulatory schemes of inherent complexity and assessments about the likely interaction of industries undergoing rapid economic and technological change.* Though different in degree, the deference to Congress is in one respect akin to deference owed to administrative agencies because of their expertise." *Turner II*, 520 U.S. at 196 (emphasis added).

Not so here. While the issue of gun violence is important and emotionally charged, it does not involve highly technical or rapidly changing issues requiring such deference. The state cannot infringe on the people's Second Amendment right, and then ask the courts to defer to its alleged "expertise" once its laws are challenged. Put another way, intermediate scrutiny cannot mean *Chevron*-like deference. Indeed, this very argument advanced by the state was roundly rejected by the majority in *Heller*. Despite Justice Breyer's dissenting opinion explicitly advancing *Turner* deference, *see* 554 U.S. at 690-91, 704-05, the majority in *Heller* did not once mention *Turner* and its progeny. To apply *Turner* today would amount to an abdication of our judicial independence and we refuse to do so. And in any event, the *Turner I* Court emphasized that deference does "not foreclose our independent judgment of the facts bearing on an issue of constitutional law." *Id.* at 666 (citation omitted).

4. California Penal Code section 32310 would still fail to pass constitutional muster under an intermediate scrutiny analysis.

Even if we were to apply intermediate scrutiny, California Penal Code section 32310 would still fail. While the interests expressed by the state no doubt qualify as "important," *Chovan*, 735 F.3d at 1139, the means chosen to advance those interests are not substantially related to their service.

Section 32310 fails intermediate scrutiny for many of the same reasons it fails strict scrutiny. Even with the greater latitude offered by this less demanding standard, section 32310's fit is excessive and sloppy. In his dissent in *Heller*, Justice Breyer would have upheld D.C.'s law under his interest-balancing test because the law was "tailored to the urban crime problem [] that is local in scope and thus affects only a geographic area both limited in size and entirely urban." *Heller*, 554 U.S. at 682 (Breyer, J., dissenting). Not so here. The statute operates as a blanket ban on all types of LCMs everywhere in California for almost everyone. It applies to rural and urban areas, in places with low crime rates and high crime rates, areas where law enforcement response times may be significant, to those who may have high degrees of proficiency in their use for self-defense, and to vulnerable groups who are in the greatest need of self-defense. The law also prohibits possession outright. And it applies to all firearms, including handguns that are the "quintessential self-defense weapon." *Heller*, 554 U.S. at 629.

Section 32310's failure to incorporate a grandfather clause is another red flag. We do not write on a blank slate on this matter. This court has already held that grandfather clauses are "important[]" in reducing burdens generated by a restriction. *Pena*, 898 F.3d at 977. It follows that grandfather clauses are also important to assess fit. Without such a clause, law-abiding citizens who legally possessed LCMs before enactment are deprived of the right to use those arms for lawful ends. These law-abiding citizens could have owned LCM for decades, and perhaps even used them for self-defense in the past. But none of that matters under California law. They must turn them over—or face a year in jail. Based on the record before us, there is no apparent justification or support for the lack of a grandfather exception. *See New York State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1543 (2020) (Alito, J., dissenting from denial of certiorari) ("a court engaged in any serious form of scrutiny would . . . question[] the absence of evidence").

The state speculates that a complete prohibition is necessary to avoid legally owned LCMs from falling into the wrong hands. But the flaws of that argument are obvious. The state could ban virtually anything if the test is merely whether something causes social ills when someone other than its lawful owner misuses it. Adopting such a radical position would give the government carte blanche to restrict the people's liberties under the guise of protecting them.

While the harms that California attempts to address are no doubt real, section 32310 does not address them in a "material" way. *Edenfield*, 507 U.S.

at 770-71. The data relied on by the state in defense of section 32310 is, as the trial court found, "remarkably thin." California primarily cites two unofficial surveys to support dispossessing law-abiding Californians of millions of magazines. But the district court pointed out that these surveys hardly show that section 32310 is effective—and in any event, they cannot save that provision. One of the surveys documents that in 14 of the 17 mass shootings in California, assailants brought multiple weapons.[29] This undercuts the state's claim, as noted by the district court, that LCMs shoulder much of the blame for casualties because the more weapons brought to a shooting incident, the greater the capacity for casualties.

But more than that, the district court pointed out that only three of these incidents definitively involved LCMs. And for each, the assailant brought high capacity magazines that were illegally smuggled into California. In other words, section 32310 would have had little effect on the outcomes in these tragic events. Many incidents do not appear to have involved LCMs, and for those that did, the LCMs appear to have been

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[29] Our dissenting colleague notes that we analyze the fit of section 32310 using statewide statistics, yet we look to national statistics to determine common ownership. Our colleague's point is well taken. But we must necessarily look to national statistics in that analysis because, as discussed earlier, LCM prohibitions in California have been operative for years. As the Seventh Circuit agrees, "it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn't commonly owned." *Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015). When it comes to *fit* however, we look to state statistics to determine how the challenged law operates in practice within the jurisdiction of its operation.

smuggled into the state. *See Scott v. Harris*, 550 U.S. 372, 380-81 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.").

Put simply, California fails to show a reasonable fit between Penal Code section 32310's sweeping restrictions and its asserted interests. Were we to apply intermediate scrutiny, section 32310 would still fail.

CONCLUSION

Let us be clear: We are keenly aware of the perils of gun violence. The heartbreak and devastation caused by criminals wielding guns cannot be overstated. And we also understand the importance of allowing state governments the ability to fashion solutions to curb gun violence. We have thus held that California can, for example, impose waiting periods, *Silvester*, 843 F.3d at 829, require microstamping of guns, *Pena*, 898 F.3d at 986, and forbid felons, the mentally ill, or misdemeanants convicted of domestic violence from owning firearms, *Chovan*, 735 F.3d at 1141.

We also want to make clear that our decision today does not address issues not before us. We do not opine on bans on so-called "assault weapons," nor do we speculate about the legitimacy of bans on magazines holding far larger quantities of ammunition. Instead, we only address California's ban on LCMs as it appears before us. We understand the purpose in passing this law. But even the laudable

goal of reducing gun violence must comply with the Constitution. California's near-categorical ban of LCMs infringes on the fundamental right to self-defense. It criminalizes the possession of half of all magazines in America today. It makes unlawful magazines that are commonly used in handguns by law-abiding citizens for self-defense. And it substantially burdens the core right of self-defense guaranteed to the people under the Second Amendment. It cannot stand.

We **AFFIRM** the district court's grant of summary judgment for plaintiffs-appellees.

LYNN, District Judge, dissenting:

The majority opinion conflicts with this Circuit's precedent in *Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015), and with decisions in every other Circuit to address the Second Amendment issue presented here. I am willing to at least assume that the law at issue implicates conduct protected by the Second Amendment, but I part ways with the majority regarding the appropriate level of scrutiny and its application in this case. I would reverse the district court's grant of summary judgment. I respectfully dissent.

ANALYSIS

California was not the first city or state to ban the possession of large capacity magazines ("LCMs"), and this panel is not the first (even within this Circuit) to address the constitutionality of such bans. A panel of this Court previously affirmed a district court's refusal to preliminarily enjoin the City of Sunnyvale's ban on LCMs, and six of our sister Circuits have held that various LCM restrictions are constitutional. *See Fyock*, 779 F.3d 991; *see also Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244 (D.C. Cir. 2011); *Worman v. Healey*, 922 F.3d 26 (1st Cir. 2019); *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015) ("*NYSRPA*"); *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d 106 (3d Cir. 2018); *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc); *Friedman v. City of Highland Park, Ill.*, 784 F.3d 406 (7th Cir. 2015). Thus, this panel is not writing on a blank slate. I would reach the same result as the *Fyock* panel and our sister Circuits and

hold that California's ban on LCMs does not violate the Second Amendment.

To determine whether a challenged law violates the Second Amendment, this Court "employs a two-prong test: (1) the court 'asks whether the challenged law burdens conduct protected by the Second Amendment'; and (2) if so, what level of scrutiny should be applied." *Fyock*, 779 F.3d at 996 (quoting *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013)).

I. Whether § 32310 Affects Second Amendment-Protected Conduct

California argues that § 32310 does not burden conduct protected by the Second Amendment. Rejecting those arguments, the majority holds that it does. I assume this holding to be correct. As this Court previously held, "our case law supports the conclusion that there must also be some corollary, albeit not unfettered, right to possess the magazines necessary to render those firearms operable." *Fyock*, 779 F.3d at 998. Additionally, there is no serious dispute that millions of LCMs are in circulation. *See* Maj. Op. at 12. Given my determination below that § 32310 withstands the applicable level of scrutiny, however, I find it unnecessary to further analyze whether it burdens protected conduct. I therefore assume, without deciding, that the challenged law burdens Second Amendment rights. *See Pena v. Lindley*, 898 F.3d 969, 976 (9th Cir. 2018) ("We assume without deciding that the challenged UHA provisions burden conduct protected by the Second Amendment because we conclude that the statute is constitutional irrespective of that determination."); *Bauer v. Becerra*,

858 F.3d 1216, 1221 (9th Cir. 2017) ("[F]or purposes of this analysis, we assume, without deciding, that the challenged fee burdens conduct falling within the scope of the Second Amendment."); *Silvester v. Harris*, 843 F.3d 816, 826-27 (9th Cir. 2016) ("We assume, without deciding, that the regulation is within the scope of the Amendment and is not the type of regulation that must be considered presumptively valid.").[1]

II. The Appropriate Level of Scrutiny

The next question is which level of scrutiny applies. In making that determination, "the court must consider (1) how closely the law comes to the core of the Second Amendment right; and (2) how severely, if at all, the law burdens that right." *Fyock*, 779 F.3d at 998 (citing *Chovan*, 735 F.3d at 1138). "Intermediate scrutiny is appropriate if the regulation at issue does not implicate the core Second Amendment right *or* does not place a substantial

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[1] This approach also is consistent with that used by several Circuits in deciding similar cases. *See, e.g.*, *Heller II*, 670 F.3d at 1261 (declining to resolve whether laws banning LCMs and assault weapons implicate the Second Amendment, because "even assuming they do impinge upon the right protected by the Second Amendment, we think intermediate scrutiny is the appropriate standard of review and the prohibitions survive that standard"); *Worman*, 922 F.3d at 30 ("We assume, without deciding, that the proscribed weapons have some degree of protection under the Second Amendment."); *NYSRPA*, 804 F.3d at 257 ("[W]e proceed on the assumption that these laws ban weapons protected by the Second Amendment."); *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 117 ("We will nonetheless assume without deciding that LCMs are typically possessed by law-abiding citizens for lawful purposes and that they are entitled to Second Amendment protection.").

burden on that right." *Id.* at 998-99 (citing *Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 964 (9th Cir. 2014)).

As to the first prong, I acknowledge that § 32310, like the law at issue in *Fyock*, "may implicate the core of the Second Amendment" regarding self-defense in the home. *Id.* at 999. The majority holds that LCMs may be used "for the core lawful purpose of self-defense." *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008). I need not resolve that question, however, because I cannot agree that § 32310 is a substantial burden on that right.[2]

Section 32310 "restricts possession of only a subset of magazines that are over a certain capacity. It does not restrict the possession of magazines in general such that it would render any lawfully possessed firearms inoperable, nor does it restrict the number of magazines that an individual may possess." *Fyock*, 779 F.3d at 999. Just as "[a] ban on the sale of certain types of ammunition does not prevent the use of handguns or other weapons in self-defense," and "leaves open alternative channels for self-defense in

[2] Again, this approach is consistent with that taken by other courts, who have declined to resolve whether bans on LCMs implicate core Second Amendment rights, because even if they do, the burden is not substantial. *See, e.g.*, *Heller II*, 670 F.3d at 1262 ("Although we cannot be confident the prohibitions impinge at all upon the core right protected by the Second Amendment, we are reasonably certain the prohibitions do not impose a substantial burden upon that right."); *Worman*, 922 F.3d at 38 (finding that an LCM ban "arguably implicates the core Second Amendment right to self-defense in the home but places only a modest burden on that right").

the home," *Jackson*, 746 F.3d at 968,[3] § 32310 does not place a substantial burden on core Second Amendment rights because it does not prevent the use of handguns or other weapons in self-defense.

The majority writes that the existence of alternatives is irrelevant under *Heller*. *See* Maj. Op. at 40-41. Unlike the law at issue in *Heller*, however—and contrary to the majority's characterization of California's law—§ 32310 does not ban an entire "class" of arms. "LCMs" are not a separate "class" of weapons; they are simply larger magazines. *See, e.g.*, *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 117 ("[T]he Act . . . does not categorically ban a class of firearms. The ban applies only to magazines capable of holding more than ten rounds and thus restricts 'possession of only a subset of magazines that are over a certain capacity.'" (quoting *Fyock*, 779 F.3d at 999)). In fact, the claim that § 32310 is a "categorical[] bar[]," Maj. Op. at 33, is circular, because "it amounts to a suggestion that whatever group of weapons a regulation prohibits may be deemed a 'class.'" *Worman*, 922 F.3d at 32 n.2. Understood in that way, "virtually any regulation could be considered an

[3] I disagree that *Jackson* "implied that strict scrutiny likely applies if a law completely bans the possession of a certain class of ammunition." Maj. Op. at 44. While the opinion mentions that the law at issue in that case banned only the sale, not use or possession, of certain ammunition, it also mentioned other factors relevant to its decision, including that other types of bullets could be sold. *Jackson*, 746 F.3d at 968. At bottom, *Jackson* asked whether the regulation left "open alternative channels for *self-defense*" generally, *id.* at 961 (emphasis added), not alternative channels for possessing the same weapon regulated by the law being examined.

'absolute prohibition' of a class of weapons." *Id.* It makes no difference that the weapons at issue are "popular." Just like "being unable to purchase a subset of semiautomatic weapons"—even some of the "most popular models"—"does not significantly burden the right to self-defense in the home," *Pena*, 898 F.3d at 978, so too does being unable to purchase a subset of magazines not significantly burden Second Amendment rights.

In short, although the availability of a different "class" of firearms (like a rifle instead of a handgun) might be "no answer" to a Second Amendment challenge, *Heller*, 554 U.S. at 629, alternatives in the same "class" are relevant to the burden analysis. *See, e.g.*, *Jackson*, 746 F.3d at 961 ("[F]irearm regulations which leave open alternative channels for self-defense are less likely to place a severe burden on the Second Amendment right than those which do not."). The difference between using a handgun versus a rifle for self-defense, for example, is much more significant than the difference between using a magazine that holds eleven rounds versus a magazine that holds ten rounds.[4] For this reason, the prohibition on LCMs is more analogous to a restriction on *how* someone exercises their Second Amendment rights, by restricting the number of bullets a person may shoot from one firearm without reloading. "[L]aws which regulate only the '*manner* in which persons may exercise their Second Amendment rights' are less

[4] For similar reasons, § 32310 is not analogous to a ban on Mapplethorpe in favor of Monet or Matisse, or the majority's other examples. *See* Maj. Op. at 47–48.

burdensome than those which bar firearm possession completely." *Silvester*, 843 F.3d at 827.

Because I would find that § 32310 does not substantially burden the core Second Amendment right, I would apply intermediate scrutiny. This conclusion is consistent with that reached by all of our sister Circuits that chose a level of scrutiny in LCM cases. *See Heller II*, 670 F.3d at 1262 (applying intermediate scrutiny and analogizing to First Amendment time, place, and manner doctrine, because "the prohibition of . . . large-capacity magazines does not effectively disarm individuals or substantially affect their ability to defend themselves."); *Worman*, 922 F.3d at 37 (applying intermediate scrutiny and reasoning that an LCM ban does not heavily burden the core right of self-defense in the home, in part because the law prohibited only "magazines of a particular capacity"); *NYSRPA*, 804 F.3d at 259 ("No 'substantial burden' exists—and hence heightened scrutiny is not triggered—'if adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense.'" (quoting *United States v. Decastro*, 682 F.3d 160, 168 (2d Cir. 2012)); *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 118 (applying intermediate scrutiny because an LCM ban "does not severely burden, and in fact respects, the core of the Second Amendment right.").[5]

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[5] *Kolbe* applied intermediate scrutiny in the alternative, after holding that the Second Amendment does not protect LCMs at all. 849 F.3d at 139 ("[A]ssuming the Second Amendment protects the FSA-banned assault weapons and large-capacity magazines, the FSA is subject to the intermediate scrutiny standard of review."). The Seventh Circuit's decision in *Friedman* is the only LCM ban case in which a court of appeals did not apply

The majority splits with our sister Circuits, claiming that those decisions are distinguishable because the laws at issue in those cases were "not as sweeping" as § 32310 as they banned only sale (not possession) or included grandfather clauses, or because the decisions "too often conflated the analysis between" a ban on assault weapons and a ban on LCMs. Maj. Op. at 52-53. Those distinctions rest on a flimsy firmament. For example, all but one of the laws at issue banned possession, not just sale. *See Heller II*, 670 F.3d at 1249; *Worman*, 922 F.3d at 30; *NYSRPA*, 804 F.3d at 247; *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 110; *Friedman*, 784 F.3d at 407.[6] Only two mention a grandfather clause. *See Worman*, 922 F.3d at 31; *NYSPRA*, 804 F.3d at 251 n.19. None of the cases suggested that these allegedly distinguishing features made a critical difference to the courts' analyses. In fact, *NYSPRA* involved two laws, one of which included a grandfather clause, the other of which did not, but the Second Circuit held that both laws were constitutional. *See* 804 F.3d at 249, 251 n.19. While an exception for possession or grandfathered weapons might be relevant to the burden analysis, we have never held that such exceptions are *required*.[7]

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intermediate scrutiny, but the court in that case did not enunciate any level of scrutiny at all. *See* 784 F.3d 406.

[6] The only exception is the Maryland law at issue in *Kolbe*, 849 F.3d at 122, that the majority cites as an example.

[7] It would be surprising if a person's Second Amendment rights turned on whether a person had the foresight to purchase a later-banned firearm before a law was enacted. Similarly, a ban on sale but not possession makes a practical difference only if nearby jurisdictions allow sale, meaning that under the majority's

As for the majority's comment that decisions from other Circuits conflate assault weapon and LCM bans, I read those cases differently. *Association of New Jersey Rifle & Pistol Clubs*, 910 F.3d 106, involved only an LCM ban, so it could not have improperly "conflated" the analysis. Additionally, even the cases involving multiple types of restrictions separately analyze the distinct bans. In fact, in *Fyock*, we referred to *Heller II* as a "well-reasoned opinion." 779 F.3d at 999. Yet today, the majority effectively ignores *Heller II*. In short, I think the majority's distinctions constitute too thin a reed on which to support a conflict with our sister Circuits.

The majority also departs from our Circuit's decision in *Fyock*, reasoning that *Fyock* was decided on a different record, using a different standard of review.[8] Maj. Op. at 53-55. The relevant undisputed facts here, however, are identical to the facts at issue in *Fyock*. Specifically, the laws at issue "restrict[] possession of only a subset of magazines that are over a certain capacity." *Fyock*, 779 F.3d at 999. The abuse of discretion standard gave the district court leeway in finding those facts, but if the district court had applied the wrong legal standard—such as an incorrect level of scrutiny—"[a]n error of law necessarily constitutes

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analysis, the constitutionality of a law in one jurisdiction would turn on laws enacted in neighboring jurisdictions.

[8] Ironically, the majority's attempt to distinguish *Fyock* on the ground of its "unique facts" based on Sunnyvale's size, affluency, and crime rate is exactly the type of policy judgment in which even the majority acknowledges courts should not engage. Moreover, the *Fyock* decision did not find these facts important enough to mention, so I cannot conclude that they are relevant distinguishing factors.

an abuse of discretion." *Akopyan v. Barnhart*, 296 F.3d 852, 856 (9th Cir. 2002); *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). In other words, if intermediate scrutiny were the wrong legal standard for cases presenting these facts, applying that level of scrutiny necessarily would have been an abuse of discretion. *Fyock* held, however, that intermediate scrutiny was the correct standard. I would hold that *Fyock* requires this panel to apply intermediate scrutiny in this case as well.

III. Applying Intermediate Scrutiny

Having determined that § 32310 is subject to intermediate scrutiny, I also part ways with the majority's alternative holding that § 32310 does not satisfy that standard. Again, the majority's decision conflicts with *Fyock* and all six of our sister Circuits to have addressed the issue.

"Intermediate scrutiny requires (1) a significant, substantial, or important government objective, and (2) a 'reasonable fit' between the challenged law and the asserted objective." *Pena*, 898 F.3d at 979 (quoting *Jackson*, 746 F.3d at 965). While the challenged law must "promote[] a 'substantial government interest that would be achieved less effectively absent the regulation,'" the test does not require that the government choose "the 'least restrictive means' of achieving [its] interest." *Id.* (quoting *Fyock*, 779 F.3d at 1000).

I agree with the majority that California has satisfied the first part of the test by showing a significant, substantial, or important government objective. Maj. Op. at 57, 59, 63. I disagree, however, that § 32310 is not a "reasonable fit" for achieving that

objective, particularly when we are reviewing a summary judgment decision. *See Hayes v. Cty. of San Diego*, 736 F.3d 1223, 1232 (9th Cir. 2013) ("[W]e view the evidence in the light most favorable to Appellant in reviewing summary judgment ....").

"When considering California's justifications for the statute, we do not impose an 'unnecessarily rigid burden of proof,' and we allow California to rely on any material 'reasonably believed to be relevant' to substantiate its interests in gun safety and crime prevention." *Pena*, 898 F.3d at 979 (quoting *Mahoney v. Sessions*, 871 F.3d 873,881 (9th Cir. 2017)). The "analysis of whether there is a 'reasonable fit between the government's stated objective and the regulation' considers 'the legislative history of the enactment as well as studies in the record or cited in pertinent case law.'" *Id.* (quoting *Fyock*, 779 F.3d at 1000) (internal quotation marks omitted). We must "giv[e] the [state] 'a reasonable opportunity to experiment with solutions to admittedly serious problems.'" *Jackson*, 746 F.3d at 966 (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986)).

Like Sunnyvale in *Fyock*, California "presented evidence that the use of large-capacity magazines results in more gunshots fired, results in more gunshot wounds per victim, and increases the lethality of gunshot injuries." 779 F.3d at 1000; Excerpts of Record ("ER")357 ("[T]he use of LCMs in massacres resulted in a 59 percent increase in fatalities per incident."); ER 405 ("[T]he available evidence suggests that gun attacks with semiautomatics—including both assault weapons and guns equipped with LCMs—tend to result in more

shots fired, more persons wounded, and more wounds inflicted per victim than do attacks with other firearms."); ER 756 ("[I]t is common for offenders to fire more than ten rounds when using a gun with a large-capacity magazine in mass shootings."); ER 756-57 ("[C]asualties were higher in the mass shootings that involved large-capacity magazine guns than other mass shootings. In particular, we found an average number of fatalities or injuries of 31 per mass shooting with a large-capacity magazine versus 9 for those without."); ER 972.

It "also presented evidence that large-capacity magazines are disproportionately used in mass shootings as well as crimes against law enforcement, and it presented studies showing that a reduction in the number of large-capacity magazines in circulation may decrease the use of such magazines in gun crimes." *Fyock*, 779 F.3d at 1000; ER 358 ("[S]ince 1968, LCMs have been used in 74 percent of all gun massacres with 10 or more deaths, as well as in 100 percent of all gun massacres with 20 or more deaths—establishing a relationship between LCMs and the deadliest gun massacres."); ER 405 ("It also appears that guns with LCMs have been used disproportionately in murders of police."); ER 418 ("Consistent with prior research, we also found that LCM firearms are more heavily represented among guns used in murders of police and mass murders."); ER 756 ("We found that large-capacity magazines were used in the majority of mass shootings since 1982 . . . ."). "[I]t strains credulity to argue that the fit between the Act and the asserted governmental interest is unreasonable." *Worman*, 922 F.3d at 40. To the extent that the district court weighed this evidence

against contrary evidence, it was inappropriate to do so in the context of a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) ("[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter . . . .").

This evidence is not based on pure speculation. California offered evidence based on different data sources, from multiple experts. California also pointed to evidence that the federal ban on assault weapons and LCMs was beginning to have an effect—and likely would have had a larger effect in the absence of a grandfather clause—when it expired in 2004. *See, e.g.*, ER 415 (opining that the federal ban "may have had a more substantial impact on the supply of LCMs to criminal users by the time it expired in 2004"); ER 419 (discussing an "upward trend in criminal use of LCM firearms" after the 2004 expiration of the LCM ban, suggesting that the federal ban may have had an effect). California's decision to pass a similar law finds support in the past federal experience.

The majority faults § 32310 for being "a blanket ban on all types of LCMs everywhere in California for almost everyone." Maj. Op. at 63. Actually, California offered evidence to explain why the law's scope is a "reasonable fit," notwithstanding its breadth. For example, "the majority of guns used in mass shootings were obtained legally." ER 296. Contrary to the majority's suggestion, this argument would not justify "ban[ning] virtually anything if the test is merely whether something causes social ills when someone other than its lawful owner misuses it." Maj. Op. at 64. It is merely one factor to consider in determining

whether there is a "reasonable fit" between the state's goals and the scope of the law.

Importantly, while § 32310 prohibits certain types of magazines, it leaves many other types of magazines (and firearms) available to law-abiding citizens to use for self-defense. *Cf. Jackson*, 746 F.3d at 968 ("There is no evidence in the record indicating that ordinary bullets are ineffective for self-defense."). Just like the ban on particular types of ammunition in *Jackson* was "a reasonable fit for achieving its objective of reducing the lethality of ammunition because it targets only that class of bullet which exacerbates lethal firearm-related injuries," *id.* at 969, § 32310 is a reasonable fit for achieving the state's objective because it targets only the types of magazines most likely to present increased risk.

That § 32310 will not prevent all mass shootings,[9] or that it is not the least restrictive means of doing so, does not render the law unconstitutional. *See Pena*, 898 F.3d at 979 (explaining that intermediate scrutiny does not require that the government choose "the 'least restrictive means' of achieving [its] interest" (quoting *Fyock*, 779 F.3d at 1000)). This is not to suggest that intermediate scrutiny does not have bite. I agree with the majority that it does.[10] At the same

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[9] If the majority is going to rely on nationwide statistics about the prevalence of LCMs, it stands to reason that it should also use nationwide statistics about the use of LCMs in mass shootings. However, its intermediate scrutiny analysis mentions only 17 shootings in California. *See* Maj. Op. at 65.

[10] It is unnecessary to decide whether "*Turner* deference" is relevant to the question before this Court, because the outcome is the same regardless. But to the extent that the majority identifies any confusion about the applicability of *Turner*

time, the Court should not improperly transform intermediate scrutiny into strict scrutiny. "Our role is not to re-litigate a policy disagreement that the California legislature already settled, and we lack the means to resolve that dispute. Fortunately, that is not our task." *Pena*, 898 F.3d at 980. Because "California's evidence 'fairly support[ed]' its conclusions," *id.* (quoting *Jackson*, 746 F.3d at 969), I would hold that § 32310 satisfies intermediate scrutiny.

This conclusion is consistent with *Fyock* and all our sister Circuits to resolve this question. In every case, the court has held that the LCM restrictions at issue satisfy intermediate scrutiny. *See Heller II*, 670 F.3d at 1264 ("We conclude the District has carried its burden of showing a substantial relationship between the prohibition of . . . magazines holding more than ten rounds and the objectives of protecting police officers and controlling crime."); *Worman*, 922 F.3d at 40 (holding that a ban on LCMs "does not impermissibly intrude upon [Second Amendment] right[s] because it withstands intermediate scrutiny"); *NYSRPA*, 804 F.3d at 264 (holding that a ban on LCMs "survive[s] intermediate scrutiny"); *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 122 ("[T]he Act survives intermediate scrutiny, and like our sister circuits, we hold that laws restricting magazine capacity to ten rounds of ammunition do not violate the Second Amendment."); *Kolbe*, 849 F.3d at 140 ("Being satisfied that there is substantial evidence indicating that the FSA's prohibitions against assault

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deference or the meaning of intermediate scrutiny in this Court's precedents, I respectfully suggest that is reason for the Circuit to consider this case *en banc*.

weapons and large-capacity magazines will advance Maryland's goals, we conclude that the FSA survives intermediate scrutiny.").[11]

The record in this case is nearly identical to the records in those other cases, with many of the same experts and studies. I would not depart from those well-reasoned opinions.

IV. Conclusion

Because I would hold that intermediate scrutiny applies and § 32310 satisfies that standard, I would reverse the district court's grant of summary judgment in Plaintiffs' favor.[12] I respectfully dissent.

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[11]The majority calls *Kolbe* an "outlier" that has been rejected by other Circuits, Maj. Op. at 26, but only with respect to its holding that LCMs are not protected by the Second Amendment. *Kolbe*'s alternative holding—that, assuming LCMs are protected, intermediate scrutiny applies and was satisfied—is consistent with every other Circuit to answer that question, as described in the text above.

[12] Given the majority's opinion on the Second Amendment issue, as a result of which it did not reach the Takings Clause issue, I express no opinion on that issue.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-56081

VIRGINIA DUNCAN, et al.,

Plaintiffs-Appellees,

v.

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

Defendant-Appellant.

Before: WALLACE and N.R. SMITH, *Circuit Judges*, and BATTS, *District Judge.*

Submitted: May 14, 2018
Filed: July 17, 2018

MEMORANDUM**

The State of California ("California"), through its Attorney General, Xavier Becerra, appeals the district court's grant of a preliminary injunction enjoining California from enforcing California Penal Code § § 32310(c) & (d). "We review a district court's

** The Honorable Deborah A. Batts, United States District Judge for the Southern District of New York, sitting by designation.

decision to grant or deny a preliminary injunction for abuse of discretion." *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115 (9th Cir. 2011). We do not "determine the ultimate merits," but rather "determine only whether the district court correctly distilled the applicable rules of law and exercised permissible discretion in applying those rules to the facts at hand." *Fyock v. Sunnyvale*, 779 F.3d 991, 995 (9th Cir. 2015). We have jurisdiction under 28 U.S.C. § 1292(a)(1), and we affirm.[1]

I.

The district court did not abuse its discretion by granting a preliminary injunction on Second Amendment grounds. *Thalheimer*, 645 F.3d 1109 at 1115.

1. The district court did not abuse its discretion by concluding that magazines for a weapon likely fall within the scope of the Second Amendment. First, the district court identified the applicable law, citing

[1] "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). California makes only a cursory argument that the latter three elements are unmet if we find the district court did not abuse its discretion regarding the first element. Because we find the district court did not abuse its discretion, we only address the first element of the preliminary injunction standard for each constitutional question. *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief. ... [A] bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review." (citation omitted)).

United States v. Miller, 307 U.S. 174 (1939), *District of Columbia v. Heller*, 554 U.S. 570 (2008), *Caetano v. Massachusetts*, 136 S.Ct. 1027 (2016) (per curiam), and *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014). Second, it did not exceed its permissible discretion by concluding, based on those cases, that (1) some part of the Second Amendment right likely includes the right to bear a weapon "that has some reasonable relationship to the preservation or efficiency of a well regulated militia," *Miller*, 307 U.S. at 178; *see also Heller*, 554 U.S. at 583, 627-28; *Caetano*, 136 S.Ct. at 1028; and (2) the ammunition for a weapon is similar to the magazine for a weapon, *Jackson* 746 F.3d at 967 ("'[T]he right to possess firearms for protection implies a corresponding right' to obtain the bullets necessary to use them." (quoting *Ezell v. City of Chicago*, 61 F.3d 684, 704 (7th Cir. 2011))).

2. The district court did not abuse its discretion by applying the incorrect level of scrutiny. The district court applied both intermediate scrutiny and what it coined the "simple test" of *Heller*. The district court found Plaintiffs were likely to succeed under either analysis. Although the district court applied two different tests, there is no reversible error if one of those tests follows the applicable legal principles and the district court ultimately reaches the same conclusion in both analyses.

Here, in its intermediate scrutiny analysis, the district court correctly applied the two-part test outlined in *Jackson*. The district court concluded that a ban on ammunition magazines is not a presumptively lawful regulation and that the

prohibition did not have a "historical pedigree." Next, the district court concluded, citing *Fyock*, that section 32310 infringed on the core of the Second Amendment right, but, citing *Silvester v. Harris*, 843 F.3d 816, 823 (9th Cir. 2016), *Fyock*, 779 F.3d at 999, *Jackson*, 746 F.3d at 965, 968, and *Chovan*, 735 F.3d at 1138, that intermediate scrutiny was the appropriate scrutiny level. The district court concluded that California had identified four "important" interests and reasoned that the proper question was "whether the dispossession and criminalization components of [section] 32310's ban on firearm magazines holding any more than 10 rounds is a reasonable fit for achieving these important goals."

Here, in its intermediate scrutiny analysis, the district court correctly applied the two-part test outlined in *Jackson*. The district court concluded that a ban on ammunition magazines is not a presumptively lawful regulation and that the prohibition did not have a "historical pedigree." Next, the district court concluded, citing *Fyock*, that section 32310 infringed on the core of the Second Amendment right, but, citing *Silvester v. Harris*, 843 F.3d 816, 823 (9th Cir. 2016), *Fyock*, 779 F.3d at 999, *Jackson*, 746 F.3d at 965, 968, and *Chovan*, 735 F.3d at 1138, that intermediate scrutiny was the appropriate scrutiny level. The district court concluded that California had identified four "important" interests and reasoned that the proper question was "whether the dispossession and criminalization components of [section] 32310's ban on firearm magazines holding any more than 10 rounds is a reasonable fit for achieving these important goals."

3. The district court did not abuse its discretion by concluding that sections 32310(c) and (d) did not survive intermediate scrutiny. The district court's review of the evidence included numerous judgment calls regarding the quality, type, and reliability of the evidence, as well as repeated credibility determinations. Ultimately, the district court concluded that section 32310 is "not likely to be a reasonable fit." California articulates no actual error made by the district court, but, rather, multiple instances where it disagrees with the district court's conclusion or analysis regarding certain pieces of evidence. This is insufficient to establish that the district court's findings of fact and its application of the legal standard to those facts were "illogical, implausible, or without support in inferences that may be drawn from facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc). In reviewing the district court's grant of a preliminary injunction, we cannot "re-weigh the evidence and overturn the district court's evidentiary determinations—in effect, to substitute our discretion for that of the district court." *Fyock*, 779 F.3d at 1000.[2]

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[2] The dissent *does* re-weigh the evidence. It concludes that "California's evidence ... was more than sufficient to satisfy intermediate scrutiny" and that the "2013 Mayors Against Illegal Guns (MAIG) Survey ... easily satisfies the requirement that the evidence upon which the state relies be 'reasonably believed to be relevant' and 'fairly support' the rationale for the challenged law." These conclusions mean the dissent *is* "substitut[ing] [its] discretion for that of the district court," which is impermissible under the applicable standard of review. *Fyock*, 779 F.3d at 1000-01.

II.

The district court did not abuse its discretion by granting a preliminary injunction on Takings Clause grounds. *Thalheimer*, 645 F.3d at 1115. First, the district court, citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), *Horne v. Department of Agriculture*, 135 S.Ct. 2419 (2015), *Loretta v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), *Murr v. Wisconsin*, 137 S.Ct. 1933 (2017), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), outlined the correct legal principles. Second, the district court did not exceed its discretion by concluding (1) that the three options provided in section 32310(d) (surrender, removal, or sale) fundamentally "deprive Plaintiffs not just of the *use* of their property, but of *possession*, one of the most essential sticks in the bundle of property rights"; and (2) that California could not use the police power to avoid compensation, *Lucas*, 505 U.S. at 1020-29; *Loretto*, 458 U.S. at 426 (holding "a permanent physical occupation authorized by the government is a

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Further, disagreeing with another district court regarding a similar record is not necessarily an abuse of discretion. Here, the district court made evidentiary conclusions regarding the record provided by California, specifically noting that it had provided "incomplete studies from unreliable sources upon which experts base speculative explanation and predictions." These conclusions are not "illogical, implausible, or without support in inferences that may be drawn from facts in the record." *Hinkson*, 585 F.3d at 1251. As noted above, it is not our role to "re-weigh the evidence and overturn the district court's evidentiary determinations—in effect, to substitute our discretion for that of the district court." *Fyock*, 779 F.3d at 1000.

taking without regard to the public interest it may serve").[3]

AFFIRMED.

WALLACE, Circuit Judge, dissenting:

I respectfully dissent. For the reasons stated below, I conclude that the district court abused its discretion in preliminarily enjoining California Penal Code § § 32310(c) & (d).

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[3] The dissent also "re-weigh[s] the evidence" and the district court's conclusions on the Takings Clause question. *Fyock*, 779 F.3d at 1000. The district court concluded that the three options available under section 32310(d) constituted either a physical taking (surrender to the government for destruction) or a regulatory taking (forced sale to a firearms dealer or removal out of state). The dissent first takes issue with the district court's conclusion that storage out of state could be financially prohibitive. It is not "illogical" or "implausible" to conclude that forcing citizens to remove property out of state effectively dispossess the property due to the financial burden of using it again. *Hinkson*, 585 F.3d at 1263. Such removal, as the district court notes, also eliminates use of the Banned Magazines in "self defense." *See Heller*, 554 U.S. at 592 ("[W]e find that [the text of the Second Amendment] guarantee[s] the individual [a] right to possess and carry weapons in case of confrontation."). Second, the dissent argues the district court incorrectly weighed the regulatory takings factors in *Murr*. While the cost ($20 to $50) of the magazine may seem minimal, the district court also noted that the "character of the governmental action," *Murr*, 137 S.Ct. at 1943, was such that "California will deprive Plaintiffs not just of the *use* of their property, but of *possession*," Similarly, this conclusion is not "illogical," "implausible," or "without support in inferences that may be drawn from the facts in the record." *Hinkson*, 585 F.3d at 1263.

I.

In this case, we apply intermediate scrutiny because the challenged law "does not implicate a core Second Amendment right, or . . . place a substantial burden on the Second Amendment right." *Jackson v. City and Cty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014). Under this standard, a challenged law will survive constitutional scrutiny so long as the state establishes a "reasonable fit" between the law and an important government interest. *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). "When reviewing the reasonable fit between the government's stated objective and the regulation at issue, the court may consider 'the legislative history of the enactment as well as studies in the record or cited in pertinent case law.'" *Fyock v. Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015) (quoting *Jackson*, 746 F.3d at 966). California may establish a reasonable fit with "any evidence 'reasonably believed to be relevant' to substantiate its important interests." *Id.*

The majority concludes the district court did not abuse its discretion in concluding California's large-capacity magazine (LCM) possession ban did not survive intermediate scrutiny on the ground that the district court's conclusion was based on "numerous judgment calls regarding the quality, type, and reliability of the evidence." The problem, however, is that the district court's "judgment calls" presupposed a much too high evidentiary burden for the state. Under intermediate scrutiny, the question is not whether the state's evidence satisfies the district court's subjective standard of empiricism, but rather whether the state relies on evidence "reasonably

believed to be relevant" to substantiate its important interests. *Fyock*, 779 F.3d at 1000. So long as the state's evidence "fairly supports" its conclusion that a ban on possession of LCMs would reduce the lethality of gun violence and promote public safety, the ban survives intermediate scrutiny. *Jackson*, 746 F.3d at 969.

California's evidence—which included statistical studies, expert testimony, and surveys of mass shootings showing that the use of LCMs increases the lethality of gun violence—was more than sufficient to satisfy intermediate scrutiny. For example, the September 2013 Mayors Against Illegal Guns (MAIG) Survey, which the district court writes off as inconclusive and irrelevant, easily satisfies the requirement that the evidence upon which the state relies be "reasonably believed to be relevant" and "fairly support" the rationale for the challenged law. The MAIG survey shows that assault weapons or LCMs were used in at least 15 percent of the mass shootings reported, and that in those incidents 151 percent more people were shot, and 63 percent more people died, as compared to other mass shootings surveyed. Even if the MAIG survey also shows that most mass shooting incidents did not involve LCMs, California could draw a "reasonable inference" based on the data that prohibiting possession of LCMs would reduce the lethality of gun violence. *Jackson*, 746 F.3d at 966. Other evidence cited by the state similarly supports the conclusion that mass shootings involving LCMs result in a higher number of shots fired, a higher number of injuries, and a higher number of fatalities than other mass shootings. The district court's characterization of this evidence as insufficient

was based either on clearly erroneous findings of fact or an application of intermediate scrutiny that lacked support in inferences that could be drawn from facts in the record. In either case, it was an abuse of discretion.

It is significant that California, in seeking to establish a reasonable fit between § § 32310(c) & (d) and its interest in reducing the lethality of mass shootings, relied on much of the same evidence presented by the City of Sunnyvale in *Fyock*, a case in which we affirmed the district court's conclusion that Sunnyvale's LCM possession ban was likely to survive intermediate scrutiny. The district court attempts to distinguish the two cases, stressing that an "important difference" between this case and *Fyock* is that the court in *Fyock* "had a sufficiently convincing evidentiary record of a reasonable fit," which "is not the case here." But the evidentiary record in *Fyock* included much of the same evidence the district court here found insufficient—including the aforementioned September 2013 MAIG survey, and expert declarations by Lucy Allen and John Donohue, which the district court dismissed as "defective" and "biased." The district court did not explain why the evidentiary record in *Fyock* was "sufficiently convincing," while a substantially similar evidentiary record here was insufficient. Given the overlap between the records, and the district court's failure to identify any material differences, the district court's contention that the record here is less credible, less reliable, and less relevant than the record in *Fyock* is difficult to accept.

The majority argues in a footnote that in concluding the district court abused its discretion I have impermissibly re-weighed the evidence. That is not so. Our obligation to refrain from re-weighing evidence is meant to ensure we do not overturn a district court's ruling simply because we would have placed more weight on certain pieces of evidence than others. This obligation to refrain presumes the district court has applied the correct legal standard. Here, by contrast, my argument is that the district court did not evaluate the evidence consistent with the applicable legal standard. This is conceptually distinct from the question whether one piece of evidence should have been given more weight vis-à-vis another piece of evidence. Here, the district court was required under intermediate scrutiny to credit evidence "reasonably believed to be relevant" to advancing the state's important interests. *Fyock*, 779 F.3d at 1000. Instead, the district court rejected this standard for a subjective standard of undefined empirical robustness, which it found the state did not satisfy. This it cannot do.

In sum, I conclude the district court abused its discretion in concluding that California had not established a "reasonable fit" between § § 32310(c) & (d) and the state's important interests. On the record before the district court, California's LCM possession ban likely survives intermediate scrutiny. Therefore, Plaintiffs were unlikely to succeed on the merits of their Second Amendment challenge and were not entitled to a preliminary injunction.

II.

The district court also concluded that Plaintiffs were likely to succeed on the merits of their claim under the Takings Clause on the ground that § § 32310(c) & (d) was both a physical appropriation of property and a regulatory taking. In my view, the district court's application of relevant takings doctrine was without support in inferences that could be drawn from facts in the record, and therefore constituted an abuse of discretion.

The district court is correct that a physical appropriation of personal property gives rise to a *per se* taking. *Horne v. Department of Agriculture*, 135 S.Ct. 2419, 2427 (2015). But here, LCM owners can comply with § 32310 without the state physically appropriating their magazines. Under § 32310(d)(1), an LCM owner may "[r]emove the large-capacity magazine from the state," retaining ownership of the LCM, as well as rights to possess and use the magazines out of state. The district court hypothesized that LCM owners may find removal to be more costly than it is worth, but such speculation, while theoretically relevant to the regulatory takings inquiry, does not turn the compulsory removal of LCMs from the state into a "physical appropriation" by the state. *See Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002) (explaining that it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa") (footnote omitted). Given that Plaintiffs do not specify whether they intend to surrender or sell their LCMs, as opposed to

remove them from the state and retain ownership, the availability of the removal option means Plaintiffs are unlikely to succeed on their claim that the LCM possession ban is unconstitutional as a physical taking. *See Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1175 (9th Cir. 2018) (explaining that to succeed on a facial challenge, plaintiffs must show either that "no set of circumstances exists under which the challenged law would be valid," or that the law lacks any "plainly legitimate sweep"); *cf. Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) ("In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases.").

Nor was the district court within its discretion to conclude that § 32310 likely constituted a regulatory taking. Under the relevant *Penn Central* balancing test, a regulatory taking may be found based on "a complex of factors," including "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action." *Murr v. Wisconsin*, 137 S.Ct. 1933, 1943 (2017); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Here, the district court speculated that because the typical retail cost of an LCM is "between $20 and $50," LCM owners may find "the associated costs of removal and storage and retrieval" to be too high to justify retaining their magazines. In my view, this speculation is insufficient to conclude that plaintiffs are likely to succeed on the merits of their regulatory takings claim. Even accepting the district court's finding on the "typical

retail cost" of an LCM, there are no facts in the record from which to draw an inference regarding the overall economic impact of § § 32310(c) & (d) on Plaintiffs, particularly as it relates to Plaintiffs' "distinct investment-backed expectations" for their LCMs. Without this foundation, the district court could not plausibly draw the inference that requiring the removal of LCMs from California was "functionally equivalent" to a direct appropriation and thus constituted a regulatory taking. *Lingle v. Chevron USA Inc.*, 544 U.S. 528, 539 (2005).

III.

"Abuse-of-discretion review is highly deferential to the district court." *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 881 (9th Cir. 2012). In this case, however, I do not consider it a close call to conclude the district court abused its discretion in finding Plaintiffs were likely to succeed on the merits of their constitutional challenges to California's LCM ban. As to Plaintiffs' Second Amendment challenge, the district court clearly misapplied intermediate scrutiny by refusing to credit relevant evidence that fairly supports the state's rationale for its LCM ban. As to Plaintiffs' Takings Clause challenge, the district court offered only speculation on the economic impact of the challenged law and did not assess Plaintiffs' distinct investment-backed expectations for their LCMs. Therefore, I would conclude the district court exceeded the broad range of permissible conclusions it could have drawn from the record. The proper course is to reverse the district court's order granting the preliminary injunction and remand for further proceedings. Accordingly, I dissent.

As a final note, I realize the end result of the district court's rulings are temporary. The district court is to be commended for following our constant admonition not to delay trial preparation awaiting an interim ruling on the preliminary injunction. *See Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 673 (9th Cir. 1988). The district court has properly proceeded with deliberate speed towards a trial, which will allow it to decide this case with a full and complete record and a new review. Thus, although I would reverse the district court's order and remand for further proceedings, I credit the district court for ensuring the case did not stall awaiting disposition of this appeal.

Appendix D

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

No. 3:17cv1017-BEN-JLB

VIRGINIA DUNCAN, et al.,

Plaintiffs,

v.

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

Defendant.

Before: BENITEZ, *District Judge.*

Filed: March 29, 2019

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, DECLARING CALIFORNIA PENAL CODE § 32310 UNCONSTITUTIONAL and ENJOINING ENFORCEMENT

Individual liberty and freedom are *not* outmoded concepts. "The judiciary is—and is often the only—protector of individual rights that are at the heart of

our democracy."—Senator Ted Kennedy, Senate Hearing on the Nomination of Robert Bork, 1987.[1]

I. INTRODUCTION

As two masked and armed men broke in, Susan Gonzalez was shot in the chest. She made it back to her bedroom and found her husband's .22 caliber pistol. Wasting the first rounds on warning shots, she then emptied the single pistol at one attacker. Unfortunately, now out of ammunition, she was shot again by the other armed attacker. She was not able to re-load or use a second gun. Both she and her husband were shot twice. Forty-two bullets in all were fired. The gunman fled from the house—but returned. He put his gun to Susan Gonzalez's head and demanded the keys to the couple's truck.[2]

When three armed intruders carrying what look like semi-automatic pistols broke into the home of a single woman at 3:44 a.m., she dialed 911. No answer. Feng Zhu Chen, dressed in pajamas, held a phone in one hand and took up her pistol in the other and began shooting. She fired numerous shots. She had no place to carry an extra magazine and no way to reload because her left hand held the phone with which she was still trying to call 911. After the shooting was over and two of the armed suspects got away and one lay

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[1] Norma Vieira & Leonard Gross, *Supreme Court Appointments: Judge Bork and the Politicization of Senate Confirmations* 26 (Southern Illinois University Press 1998).

[2] *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1130-31 (S.D. Cal. 2017) (citing *Jacksonville Times-Union*, July 18, 2000).

dead, she did get through to the police. The home security camera video is dramatic.[3]

A mother, Melinda Herman, and her nine-year-old twins were at home when an intruder broke in. She and her twins retreated to an upstairs crawl space and hid. Fortunately, she had a .38 caliber revolver. She would need it. The intruder worked his way upstairs, broke through a locked bedroom door and a locked bathroom door, and opened the crawl space door. The family was cornered with no place to run. He stood staring at her and her two children. The mother shot six times, hitting the intruder five times, when she ran out of ammunition. Though injured, the intruder was not incapacitated. Fortunately, he decided to flee.[4]

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[3] Lindsey Bever, *Armed Intruders Kicked in the Door*, Washington Post (Sept. 24, 2016), https://www.washingtonpost.com/news/true-crime/wp/2016/09/24/armed-intruders-kicked-in-the-door-what-they-found-was-a-woman-opening-fire/?noredirect=on&utm_term=.80336ab1b09e; *see also YouTube*, https://youtu.be/ykiSTkmt5-w (last viewed Mar. 20, 2019); Habersham, Raisa, *Suspect Faces Murder Charge 18 Months After Homeowner Shot at Him, Intruders,* The Atlanta-Journal-Constitution (Mar. 30, 2018) https://www.ajc.com/news/crime--law/suspect-faces-murder-charge-months-after-homeowner-shot-him-intruders/W4CW5wFNFdU6QIEFo0CtGM (last visited Mar. 27, 2019). Although this news account is not in the parties' exhibits, it is illustrative.

[4] Robin Reese, *Georgia Mom Shoots Home Invader, Hiding With Her Children*, ABC News (Jan. 8, 2013), https://abcnews.go.com/US/georgia-mom-hiding-kids-shoots-intruder/story?id=18164812 (last viewed Mar. 22, 2019) (includes video and recording of 911 call). Although this news account is not in the parties' exhibits, it is illustrative.

A. A Need for Self-Defense

In one year in California (2017), a population of 39 million people endured 56,609 robberies, 105,391 aggravated assaults, and 95,942 residential burglaries.[5] There were also 423 homicides in victims' residences.[6] There were no mass shootings in 2017. Nationally, the first study to assess the prevalence of defensive gun use estimated that there are 2.2 to 2.5 million defensive gun uses by civilians each year. Of those, 340,000 to 400,000 defensive gun uses were situations where defenders believed that they had almost certainly saved a life by using the gun.[7] Citizens often use a gun to defend against criminal attack. A Special Report by the U.S. Department of Justice, Bureau of Justice Statistics published in 2013, reported that between 2007 and 2011 "there were 235,700 victimizations where the victim used a firearm to threaten or attack an offender."[8] How many

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[5] Xavier Becerra, *Crime in California (2017)* and *Homicide in California (2017),* (https://openjustice.doj.ca.gov/resources/publications). Under Rules of Evidence 201(b) courts may take judicial notice of some types of public records, including reports of administrative bodies.

[6] *Id.*

[7] *See* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self—Defense with a Gun,* 86 J. Crim. L. & Criminology 150, 164, 177 (1995) (cited in *Heller v. D.C. (Heller II)*, 670 F.3d 1244, 1262 (D.C. Cir. 2011).

[8] *See* Planty, Michael and Truman, Jennifer, *Firearm Violence, 1993-2011* (2013), at p.11 and Table 11 www.bjs.gov/content/pub/pdf/fv9311.pdf (last visited Mar. 19, 2019). Under Rules of Evidence 201(b) courts may take judicial notice of some types of public records, including reports of administrative bodies.

more instances are never reported to, or recorded by, authorities? According to another U.S. Department of Justice, Bureau of Justice Statistics, Special Report, for each year between 2003 and 2007, an estimated 266,560 burglaries occurred during which a person at home became a victim of a violent crime or a "home invasion."[9] "Households composed of single females with children had the highest rate of burglary while someone was at home."[10] Of the burglaries by a stranger where violence occurred, the assailant was armed with a firearm in 73,000 instances annually (on average).[11] During a burglary, rape or sexual assault occurred 6,387 times annually (on average), while a homicide occurred approximately 430 times annually (on average).[12]

Fortunately, the Second Amendment protects a person's right to keep and bear firearms. The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. "As interpreted in recent years by the Supreme Court, the Second Amendment protects 'the right of law-abiding, responsible citizens to use arms in defense of hearth

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[9] Catalano, Shannan, *Victimization During Household Burglary*, U.S. D.O.J., Bureau of Justice Statistics (Sept. 2010) https://www.bjs.gov/content/pub/pdf/vdhb.pdf (last visited Mar. 28, 2019). Under Rules of Evidence 201(b) courts may take judicial notice of some types of public records, including reports of administrative bodies.

[10] *Id.* at p.3.

[11] *Id.* at p.10.

[12] *Id.*

and home.'" *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 676-77 (9th Cir. 2017), *cert. denied sub nom. Teixeira v. Alameda Cty.*, 138 S.Ct. 1988 (2018) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)). At the core of the Second Amendment is a citizen's right to have in his and her home for self-defense common firearms. *Heller*, 554 U.S. at 629. "[O]ur central holding in *Heller* [is] that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010).

As evidenced by California's own crime statistics, the need to protect one's self and family from criminals in one's home has not abated no matter how hard they try. Law enforcement cannot protect everyone. "A police force in a free state cannot provide everyone with bodyguards. Indeed, while some think guns cause violent crime, others think that wide-spread possession of guns on balance reduces violent crime. None of these policy arguments on either side affects what the Second Amendment says, that our Constitution protects 'the right of the people to keep and bear Arms.'" *Silveira v. Lockyer*, 328 F.3d 567, 588 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of rehearing *en banc*). However, California citizens, like United States citizens everywhere, enjoy the right to defend themselves with a firearm, if they so choose. To protect the home and hearth, citizens most often choose a handgun, while some choose rifles or shotguns.

B. Are 10 Rounds Always Enough?

If a law-abiding, responsible citizen in California decides that a handgun or rifle with a magazine larger than 10 rounds is the best choice for defending her hearth and home, may the State deny the choice, declare the magazine a "nuisance," and jail the citizen for the crime of possession? The Attorney General says that is what voters want in hopes of preventing a rare, but horrible, mass shooting. The plaintiffs, who are also citizens and residents of California, say that while the goal of preventing mass shootings is laudable, banning the acquisition and possession of magazines holding more than 10 rounds is an unconstitutional experiment that poorly fits the goal. From a public policy perspective, the choices are difficult and complicated. People may cede liberty to their government in exchange for the promise of safety. Or government may gain compliance from its people by forcibly disarming all.[13] In the United States, the Second Amendment takes the legislative experiment off the table.[14] Regardless of current popularity,

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[13] *E.g.,* on November 10, 1938, the day after the horrific Night of Broken Glass, or *Kristallnacht*, the Nazis issued an order that "Jews may not henceforth buy or carry weapons," and those found in possession of arms "would be sent to concentration camps for twenty years." *First Anti-Jew Laws Issued, Possession of Arms*, New York Times (Nov. 11, 1938).

[14] "To be sure, assault rifles and large capacity magazines are dangerous. But their ability to project large amounts of force accurately is exactly why they are an attractive means of self-defense. While most persons do not require extraordinary means to defend their homes, the fact remains that some do. Ultimately, it is up to the lawful gun owner and not the government to decide these matters. To limit self-defense to only those methods acceptable to the government is to effect an enormous transfer of

neither a legislature nor voters may trench on constitutional rights. "An unconstitutional statute adopted by a dozen jurisdictions is no less unconstitutional by virtue of its popularity." *Silveira*, 312 at 1091.

C. Mass Shooting vs. Common Crimes

When they occur, mass shootings are tragic. Innocent lives are senselessly lost while other lives are scarred forever. Communities are left shaken, frightened, and grieving. The timeline of the tragedy, the events leading up to the shooting, and the repercussions on family and friends after the incident, fill the national media news cycle for days, weeks and years. Who has not heard about the Newtown, Connecticut, mass shooting at Sandy Hook Elementary School, or the one at a high school in Parkland, Florida? But an individual victim gets little, if any, media attention, and the attention he or she gets is local and short-lived. For example, who has heard about the home invasion attack on Melinda Herman and her twin nine-year old daughters in Georgia only one month after the Sandy Hook incident?[15] Who has heard of the attacks on Ms. Zhu

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authority from the citizens of this country to the government—a result directly contrary to our constitution and to our political tradition. The rights contained in the Second Amendment are 'fundamental' and 'necessary to our system of ordered liberty.' The government recognizes these rights; it does not confer them." Friedman v. City of Highland Park, 784 F.3d 406, 417-18 (7th Cir. 2015) (Manion, J., dissenting).

[15] Phillips, Rich, *Armed Mom Takes Down Home Invader*, CNN (Jan. 11, 2013) https://www.cnn.com/2013/01/10/us/home-invasion-gun-rights (includes video) (last visited Mar. 22, 2019).

Chen or Ms. Gonzalez and her husband?[16] Are the lives of these victims worth any less than those lost in a mass shooting? Would their deaths be any less tragic? Unless there are a lot of individual victims together, the tragedy goes largely unnoticed.

That is why mass shootings can seem to be a common problem, but in fact, are exceedingly rare. At the same time robberies, rapes, and murders of individuals are common, but draw little public notice. As in the year 2017, in 2016 there were numerous robberies, rapes, and murders of individuals in California and no mass shootings.[17] Nevertheless, a gubernatorial candidate was successful in sponsoring a statewide ballot measure (Proposition 63). Californians approved the proposition and added criminalization and dispossession elements to existing law prohibiting a citizen from acquiring and keeping a firearm magazine that is able to hold more than 10 rounds. The State now defends the prohibition on magazines, asserting that mass shootings are an urgent problem and that restricting the size of magazines a citizen may possess is part of the solution. Perhaps it is part of the solution.

Few would say that a 100 or 50-round rifle magazine in the hands of a murderer is a good idea. Yet, the "solution" for preventing a mass shooting exacts a high toll on the everyday freedom of ordinary law-abiding citizens. Many individual robberies, rapes, and shootings are not prevented by the State.

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[16] *See* n.2-3, *supra*.

[17] Xavier Becerra, *Crime in California (2016)* and *Homicide in California (2016)*, (https://openjustice.doj.ca.gov/resources/publications).

Unless a law-abiding individual has a firearm for his or her own defense, the police typically arrive after it is too late. With rigor mortis setting in, they mark and bag the evidence, interview bystanders, and draw a chalk outline on the ground. But the victim, nevertheless, is dead, or raped, or robbed, or traumatized.

As Watson County Sheriff Joe Chapman told CNN about Melinda Herman and her twin nine-year-old daughters in the attic (the third incident described above), "[h]ad it not turned out the way that it did, I would possibly be working a triple homicide, not having a clue as to who it is we're looking for."[18] The Second Amendment protects the would-be American victim's freedom and liberty to take matters into one's own hands and protect one's self and family until help arrives.

D. California Law Makes it a Crime to Have More Than 10 Rounds

For all firearms, California law allows only the acquisition and possession of magazines that hold ten rounds or less.[19] Claiming that the *average* defensive use of a gun requires firing only 2.2 rounds, the State's voters and legislators have decided that a responsible, law-abiding citizen *needs* no more than ten rounds to protect one's self, family, home, and property. "No one except trained law enforcement should be able to

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[18] Phillips, Rich, *Armed Mom Takes Down Home Invader*, CNN (Jan. 11, 2013) https://www.cnn.com/2013/01/10/us/home-invasion-gun-rights (includes video) (last visited Mar. 22, 2019)

[19] There is an exception for "tubular" magazines which are typically found in lever action rifles.

possess these dangerous ammunition magazines [which hold more than 10 rounds]." Proposition 63; *A.G.'s Oppo. to P's Motion for Summary Jgt.*, at 20 ("LCMs *are not necessary* to exercise 'the fundamental right of self defense in the home.'") (emphasis added); *A.G.'s Oppo. to P's Motion for Summary Jgt.*, at 21 ("There is simply no study or systematic data to suggest that LCMs are *necessary* for self-defense.") (emphasis added) (citations omitted). Susan Gonzalez and her husband, the single woman awoken in the night, and the mother home alone with her nine-year-old twin daughters all needed to fire considerably more than 2.2 shots to protect themselves.[20] In fact, Gonzalez and the mom of twins ran out of ammunition.

In other words, a Californian may have a pistol with a 10-round magazine in hopes of fighting off a home invasion robbery. But if that Californian grabs a pistol containing a 17-round magazine, it is now the home-defending victim who commits a new crime. That is because California law declares acquisition and possession of a magazine able to hold more than ten rounds (*i.e.,* a "large capacity magazine" or "LCM")

[20] *See* n.2-4, *supra.*

a crime. *See* Cal. Penal Code § 32310;[21] § 16740.[22] For simple possession of a magazine holding more than 10

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[21] Section 32310 states:

(a) Except as provided in Article 2 (commencing with Section 32400) of this chapter and in Chapter 1 (commencing with Section 17700) of Division 2 of Title 2, any person in this state who manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, buys, or receives any large-capacity magazine is punishable by imprisonment in a county jail not exceeding one year or imprisonment pursuant to subdivision (h) of Section 1170.

(b) For purposes of this section, "manufacturing" includes both fabricating a magazine and assembling a magazine from a combination of parts, including, but not limited to, the body, spring, follower, and floor plate or end plate, to be a fully functioning large-capacity magazine.

(c) Except as provided in Article 2 (commencing with Section 32400) of this chapter and in Chapter 1 (commencing with Section 17700) of Division 2 of Title 2, commencing July 1, 2017, any person in this state who possesses any large-capacity magazine, regardless of the date the magazine was acquired, is guilty of an infraction punishable by a fine not to exceed one hundred dollars ($100) per large-capacity magazine, or is guilty of a misdemeanor punishable by a fine not to exceed one hundred dollars ($100) per large-capacity magazine, by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.

(d) Any person who may not lawfully possess a large-capacity magazine commencing July 1, 2017 shall, prior to July 1, 2017:

(1) Remove the large-capacity magazine from the state;

(2) Sell the large-capacity magazine to a licensed firearms dealer; or

(3) Surrender the large-capacity magazine to a law enforcement agency for destruction.

Cal. Penal Code § 32310 (2019) (West).

rounds, the crime is an infraction under § 32310(c). It is a much more serious crime to acquire a magazine holding more than 10-rounds in California by importing, buying, borrowing, receiving, or manufacturing. These acts may be punished as a misdemeanor or a felony under § 32310(a) ("any person in this state who manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, buys, or receives any large-capacity magazine is punishable by imprisonment in a county jail not exceeding one year or imprisonment pursuant to subdivision (h) of Section 1170"). Under the subsection's provision, "or imprisonment pursuant to subdivision (h) of Section 1170," punishment may be either a misdemeanor or a felony.[23] California's gun laws are lengthy and

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[22] Section 16740 states:

As used in this part, "large-capacity magazine" means any ammunition feeding device with the capacity to accept more than 10 rounds, but shall not be construed to include any of the following:

(a) A feeding device that has been permanently altered so that it cannot accommodate more than 10 rounds.

(b) A .22 caliber tube ammunition feeding device.

(c) A tubular magazine that is contained in a lever-action firearm.

Cal. Penal Code § 16740 (2019)(West).

[23] *See e.g., People v. Le Bleu*, 2018 Cal. App. Unpub. LEXIS 7851*1 (Nov. 13, 2018) ("count 5 charged him with felony receipt of a large-capacity magazine (Pen. Code, § 32310, subd. (a))."); *People v. Obrien*, 2018 Cal. App. Unpub. LEXIS 4992*1 (July 23, 2018) (based on handgun with 16 rounds of ammunition found under car seat, "[t]he People charged Obrien in a three-count felony complaint with ... manufacturing, importing, keeping for

complicated.[24] The statutes concerning magazines alone are not simple.[25]

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sale, or giving or receiving a large capacity magazine (§ 32310, subd. (a)).”); *People v. Rodriguez*, 2017 Cal. App. Unpub. LEXIS 5194*1 (July 26, 2017) (“Defendant Santino Rodriguez pleaded no contest to possessing a large-capacity magazine, a felony, and the trial court placed him on probation for three years.”); *People v. Verches*, 2017 Cal. App. Unpub. LEXIS 3238*11-12 (May 9, 2017) (California resident who purchased three 30-round magazines at Nevada gun show and returned to California charged with felony importation of a large capacity magazine under former Cal. Pen. Code § 12020(a)(2)).

[24] In a dissent, Judge Tallman describes as “substantial” the burden imposed by the myriad anti-gun legislation in California and the decisions upholding the legislation. Judge Tallman notes, “Our cases continue to slowly carve away the fundamental right to keep and bear arms. Today’s decision further lacerates the Second Amendment, deepens the wound, and resembles the Death by a Thousand Cuts.” *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 694 (9th Cir. 2017), *cert. denied sub nom. Teixeira v. Alameda Cty., Cal.*, 138 S.Ct. 1988 (2018).

[25] Here is an example of the way in which the state’s firearm laws are so complex as to obfuscate the Second Amendment rights of a citizen who intends to abide by the law. A person contemplating either returning home from an out-of-state hunting trip with a 30-round rifle magazine or who is considering buying, borrowing, or being given, or making his own 15-round handgun magazine, will have to do the following legal research.

First, he or she must find and read § 32310. Hardly a model of clarity, § 32310(a) begins with references to unnamed exceptions at “Article 2 (commencing with Section 32400) of this chapter and in Chapter 1 (commencing with Section 17700) of Division 2 of Title 2.” Once the reader finds the exceptions and determines that he or she is not excepted, he or she must still find the definition of a “large-capacity magazine,” itself something of a misnomer. Section 32310 is no help. “Large-capacity magazines” are defined in a distant section of the Penal Code under § 16740 and defined in terms of an uncommonly small number of rounds

(10). *See* n.22, *supra*. Having found § 16740, and now mentally equipped with the capacity-to-accept-more-than-10-rounds definition of a "large capacity magazine," the citizen reader can return to § 32310(c) and find that mere possession is unlawful and punishable as an increasingly severe infraction.

Unfortunately, he or she may incorrectly believe that criminal possession will be his or her only crime if the hunter brings a large capacity magazine back home from the hunting trip, because that is criminalized as "importing" under § 32310(a).

And § 32310(a) also covers buying, receiving, and making his or her own large capacity magazine. Even if the citizen realizes that he or she commits a crime by importing, buying, receiving, or manufacturing a large capacity magazine, the citizen will probably read § 32310(a) as punishing these crimes as misdemeanors. However, the careful reader who follows up on the odd reference to section (h) of § 1170 may understand that these offenses may also be punished as felonies. Section 1170(h)(1) states, "[e]xcept as provided in paragraph (3), a felony punishable pursuant to this subdivision where the term is not specified in the underlying offense shall be punishable by a term of imprisonment in the county jail for 16 months, or two or three years." California refers to such crimes that may be punished as either felonies or misdemeanors as "wobblers." And is the citizen wrong to think that simply *loaning* a large capacity magazine *is* lawful under § 32415? Section 32415, titled *Loan of lawfully possessed large-capacity magazine between two individuals; application of Section 32310*, states,

> Section 32310 does not apply to the loan of a lawfully possessed large-capacity magazine between two individuals if all of the following conditions are met: (a) The person being loaned the large-capacity magazine is not prohibited by Chapter 1 (commencing with Section 29610), Chapter 2 (commencing with Section 29800), or Chapter 3 (commencing with Section 29900) of Division 9 of this title or Section 8100 or 8103 of the Welfare and Institutions Code from possessing firearms or ammunition[; and] (b) The loan of the large-capacity magazine occurs at a place or location where the possession of the large-capacity magazine is not otherwise prohibited, and the person who lends the large-capacity magazine remains in the

Absent from these provisions is any qualifying language: *all* forms of possession by ordinary citizens are summarily criminalized. For example, the statutes make no distinction between possessing and storing a

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accessible vicinity of the person to whom the large-capacity magazine is loaned.

It is enough to make an angel swear. Suffice it to say that either the law-abiding hunter returning home with a 30-round rifle magazine, or the resident that receives from another a 15-round pistol magazine, or the enthusiast who makes a 12-round magazine out of a 10-round magazine, may be charged not with a minor infraction but with a felony. And perhaps not ironically, conviction as a felon carries with it the complete forfeiture of Second Amendment rights for a lifetime. For Second Amendment rights, statutory complexity of this sort extirpates as it obfuscates. And in the doing, it violates a person's constitutional right to due process. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); *see also United States v. Lanier*, 520 U.S. 259, 266 (1997) (quoting *Connally*).

Unfortunately, firearm regulations are often complex and prolix. For example, U.S. House of Representative Steve Scalise, R-La., remarked that a hunter would need to bring along an attorney to make sure the hunter did not accidently commit a felony under recently proposed federal legislation. According to PBS News Hour, Scalise said, "'What it would do is make criminals out of law-abiding citizens ... . If you go hunting with a friend and your friend wants to borrow your rifle, you better bring your attorney with you because depending on what you do with that gun you may be a felon if you loan it to him.'" Matthew Daly, *Gun control legislation pass House, but faces dim prospects in Senate,* PBS News Hour, https://www.pbs.org/newshour/politics/gun-control-legislation-pass-house-but-faces-dim-prospects-in-senate (last visited Mar. 1, 2019).

15-round magazine at home (a reasonable non-threatening act) and carrying a rifle with a 100-round magazine while sitting outside a movie theatre or school (a potentially threatening and suspicious act). Each constitutes criminal possession and is prohibited outright. *C.f.*, *Friedman v. City of Highland Park*, 784 F.3d 406, 417 (7th Cir. 2015) (Manion, J., dissenting) ("Notably absent from this provision is any qualifying language: *all* forms of possession are summarily prohibited. Other laws notwithstanding, the ordinance makes no distinction between storing large-capacity magazines in a locked safe at home and carrying a loaded assault rifle while walking down Main Street. Both constitute 'possession' and are prohibited outright."). According to the U.S. Supreme Court's reasoning, acquiring, possessing, or storing a commonly-owned 15-round magazine at home for self-defense is protected at the core of the Second Amendment. Possessing a loaded 100-round rifle and magazine in a crowded public area may not be.

All Californians, like all citizens of the United States, have a fundamental Constitutional right to keep and bear common and dangerous arms. The nation's Founders used arms for self-protection, for the common defense, for hunting food, and as a check against tyranny. *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 686 (9th Cir. 2017) (en banc) ("[T]he right to bear arms, under both earlier English law and American law at the time the Second Amendment was adopted, was understood to confer a right upon individuals to have and use weapons for the purpose of self-protection, at least in the home."), and ("The British embargo and the colonists' reaction to it suggest . . . the Founders were aware of the need to

preserve citizen *access* to firearms in light of the risk that a strong government would use its power to disarm the people. Like the British right to bear arms, the right declared in the Second Amendment of the U.S. Constitution was thus 'meant to be a strong moral check against the usurpation and arbitrary power of rulers, and as a necessary and efficient means of regaining rights when temporarily overturned by usurpation.'") (citations omitted).

Today, self-protection is most important. In the future, the common defense may once again be most important. Constitutional rights stand through time holding fast through the ebb and flow of current controversy. Needing a solution to a current law enforcement difficulty cannot be justification for ignoring the Bill of Rights as bad policy. Bad political ideas cannot be stopped by criminalizing bad political speech. Crime waves cannot be broken with warrantless searches and unreasonable seizures. Neither can the government response to a few mad men with guns and ammunition be a law that turns millions of responsible, law-abiding people trying to protect themselves into criminals. Yet, this is the effect of California's large-capacity magazine law.

II. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs have challenged California's firearm magazine law as being unconstitutional. They now move for summary judgment. The standards for evaluating a motion for summary judgment are well known and have changed little since discussed by the U.S. Supreme Court thirty years ago in a trilogy of cases (*Celotex Corp. v. Catrett*, 477 U.S. 317 (1986),

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986)). The standards need not be repeated here.

A. The Second Amendment

Plaintiffs contend that there is no genuine dispute that the Second Amendment to the United States Constitution protects the individual right of every law-abiding citizen to acquire, possess, and keep common firearms and their common magazines holding more than 10 rounds—magazines which are typically possessed for lawful purposes. Plaintiffs also contend that the state of California has not carried its burden to demonstrate a reasonable fit between the flat ban on such magazines and its important interests in public safety. Plaintiffs contend that the state's magazine ban thus cannot survive constitutionally-required heightened scrutiny and they are entitled to declaratory and injunctive relief as a matter of law. Plaintiffs are correct.

1. The Supreme Court's Simple Heller Test

In *Heller,* the U.S. Supreme Court provided a simple Second Amendment test in crystal clear language. It is a test that anyone can understand. The right to keep and bear arms is a right enjoyed by law-abiding citizens to have arms that are not unusual "in common use" "for lawful purposes like self-defense." *District of Columbia v. Heller*, 554 U.S. 570, 624 (2008); *Heller v. District of Columbia ("Heller II")*, 670 F.3d 1244, 1271 (2011) (Kavanaugh, J., dissenting) ("In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations

based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."). It is a hardware test. Is the firearm hardware commonly owned? Is the hardware commonly owned by law-abiding citizens? Is the hardware owned by those citizens for lawful purposes? If the answers are "yes," the test is over. The hardware is protected.

Millions of ammunition magazines able to hold more than 10 rounds are in common use by law-abiding responsible citizens for lawful uses like self-defense. This is enough to decide that a magazine able to hold more than 10 rounds passes the *Heller* test and is protected by the Second Amendment. The simple test applies because a magazine is an essential mechanical part of a firearm. The size limit directly impairs one's ability to defend one's self.

Neither magazines, nor rounds of ammunition, nor triggers, nor barrels are specifically mentioned in the Second Amendment. Neither are they mentioned in *Heller*. But without a right to keep and bear triggers, or barrels, or ammunition and the magazines that hold ammunition, the Second Amendment right would be meaningless. *Fyock v. City of Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015) ("[T]o the extent that certain firearms capable of use with a magazine—*e.g.*, certain semi-automatic handguns—are commonly possessed by law-abiding citizens for lawful purposes, our case law supports the conclusion that there must also be some corollary, albeit not unfettered, right to possess the magazines necessary to render those firearms operable."); *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (en banc) ("We recognized

in *Jackson* that, although the Second Amendment 'does not explicitly protect ammunition, [but] without bullets, the right to bear arms would be meaningless.' *Jackson* thus held that 'the right to possess firearms for protection implies a corresponding right' to obtain the bullets necessary to use them.") (citations omitted); *see also Ass'n of N.J. Rifle & Pistol Clubs v. A.G. N.J.,* 910 F.3d 106, 116 (3rd Cir. 2018) ("The law challenged here regulates magazines, and so the question is whether a magazine is an arm under the Second Amendment. The answer is yes. A magazine is a device that holds cartridges or ammunition. Regulations that eliminate 'a person's ability to obtain or use ammunition could thereby make it impossible to use firearms for their core purpose.' Because magazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended, magazines are 'arms' within the meaning of the Second Amendment.") (citations omitted). Consequently, the same analytical approach ought to be applied to both firearms and the ammunition magazines designed to make firearms function.

Under the simple test of *Heller*, California's § 32310 directly infringes Second Amendment rights. It directly infringes by broadly prohibiting common firearms and their common magazines holding more than 10 rounds, because they are not unusual and are commonly used by responsible, law-abiding citizens for lawful purposes such as self-defense. And "that is all that is needed for citizens to have a right under the Second Amendment to keep such weapons." *Friedman v. City of Highland Park*, 136 S.Ct. 447, 449 (2015) (Justices Thomas and Scalia dissenting from denial of certiorari) (commenting on what *Heller*'s test

requires). Although it may be argued that a 100-round, or a 50-round, or possibly even a 30-round magazine may not pass the *Heller* hardware test, because they are "unusual," the State has proffered no credible evidence that would support such a finding. Using the simple *Heller* test, a decision about firearm hardware regulations could end right here.

This is not to say the simple *Heller* test will apply to non-hardware firearm regulations such as gun store zoning laws,[26] or firearm serial number requirements.[27] *Cf. Ass'n of N.J. Rifle & Pistol Clubs v. A.G. N.J.*, 910 F.3d 106, 127 (3rd Cir. 2018) (Bibas, J., dissenting) ("Not every gun law impairs self-defense. Our precedent applies intermediate scrutiny to laws that do not affect weapons' function, like serial-number requirements. But for laws that do impair self-defense, strict scrutiny is apt.").

2. Commonality

Magazines holding more than 10 rounds are used for self-defense by law-abiding citizens. And they are common.[28] Lawful in at least 41 states and under federal law, these magazines number in the millions.

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[26] *Teixeira,* 873 F.3d at 670.

[27] *United States v. Marzzarella*, 614 F.3d 85, 101 (3d Cir. 2010), *cert. denied*, 131 S.Ct. 958 (2011) ("[W]e hesitate to say Marzzarella's possession of an unmarked firearm [without a serial number] in his home is unprotected conduct. But because § 922(k) would pass muster under either intermediate scrutiny or strict scrutiny, Marzzarella's conviction must stand.").

[28] Some magazine sizes are, no doubt, more common than others. While neither party spends time on it, it is safe to say that 100-round and 75-round magazines are not nearly as common as 30-round rifle magazines and 15-round pistol magazines.

Plaintiff's Exh. 1 (James Curcuruto Report), at 3 ("There are at least *one hundred million* magazines of a capacity of more than ten rounds in possession of American citizens, commonly used for various lawful purposes including, but not limited to, recreational and competitive target shooting, home defense, collecting and hunting.") (emphasis added); Plaintiff's Exh. 2 (Stephen Helsley Report), at 5 ("The result of almost four decades of sales to law enforcement and civilian clients is millions of semiautomatic pistols with a magazine capacity of more than ten rounds and likely *multiple millions* of magazines for them.") (emphasis added); *Fyock,* 779 F.3d at 998 ("[W]e cannot say that the district court abused its discretion by inferring from the evidence of record that, at a minimum, magazines are in common use. And, to the extent that certain firearms capable of use with a magazine—e.g., certain semi-automatic handguns—are commonly possessed by law-abiding citizens for lawful purposes, our case law supports the conclusion that there must also be some corollary, albeit not unfettered, right to possess the magazines necessary to render those firearms operable."); *Ass'n of N.J. Rifle & Pistol Clubs,* 910 F.3d at 116 ("The record shows that *millions of magazines* are owned, often come factory standard with semi-automatic weapons, are typically possessed by law-abiding citizens for hunting, pest-control, and occasionally self-defense and there is no longstanding history of LCM regulation.") (citations omitted) (emphasis added); *NYSR&PA v. Cuomo*, 804 F.3d 242, 255-57 (2nd Cir. 2015) (noting large-capacity magazines are "in common use" as the term is used in *Heller* based on even the most conservative estimates); *Heller v.*

District of Columbia, 670 F.3d 1244, 1261 (D.C. Cir. 2011) ("We think it clear enough in the record that . . . magazines holding more than ten rounds are indeed in 'common use'. . . . As for magazines, fully 18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds, and approximately 4.7 million more such magazines were imported into the United States between 1995 and 2000. *There may well be some capacity above which magazines are not in common use but*, if so, the record is devoid of evidence as to what that capacity is; in any event, *that capacity surely is not ten*.") (emphasis added); *cf. Hollis v. Lynch*, 827 F.3d 436, 449 (5th Cir. 2016) (noting imprecision of the term "common" by applying the Supreme Court test in *Caetano* of 200,000 stun guns owned and legal in 45 states being "common"); *Wiese v. Becerra*, 306 F. Supp. 3d 1190, 1195 n.3 (E.D. Cal. 2018) ("[T]he court holds that California's large capacity magazine ban burdens conduct protected by the Second Amendment because these magazines are commonly possessed by law-abiding citizens for lawful purposes . . . ."); *Ass'n of N.J. Rifle & Pistol Clubs v. Grewal*, 2018 U.S. Dist. LEXIS 167698, at *32-33 (D. N.J. Sep. 28, 2018) ("[T]he Court is satisfied, based on the record presented, that magazines holding more than ten rounds are in common use and, therefore, entitled to Second Amendment protection."); *compare United States v. McCartney*, 357 F. App'x 73, 76 (9th Cir. 2009) ("Silencers, grenades, and directional mines are not 'typically possessed by law-abiding citizens for lawful purposes,' and are less common than either short-barreled shotguns or machine guns. The weapons involved in this case therefore are not

protected by the Second Amendment.") (citations omitted).

The Attorney General argues, even so, that it is permissible to ban common handguns with common magazines holding more than 10 rounds because the possession of firearms with *other* smaller magazines is allowed.[29] But *Heller* says, "[i]t is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed." 554 U.S. at 629; *Caetano v. Massachusetts*, 136 S.Ct. 1027, 1033 (2016) (Alito, J., and Thomas, J., concurring) ("But the right to bear other weapons is 'no answer' to a ban on the possession of protected arms."). *Heller* says, "It is enough . . . that the American people have considered the handgun to be the quintessential self-defense weapon." *Id.* California's complete prohibition of common handguns with commonly-sized magazines able to hold more than 10 rounds is invalid.[30] "A weapon may

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[29] California is now in the unique position of being able to say that many firearms are currently sold with magazines holding 10 rounds or less because it banned selling firearms with larger magazines 20 years ago; since that time the marketplace has adapted. Neither party addresses the larger question of whether a state may infringe on a constitutional right, and then argue that alternatives exist because the marketplace has adjusted over time. The question is not answered here.

[30] "There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a

not be banned unless it is *both* dangerous *and* unusual." *Caetano v. Massachusetts*, 136 S.Ct. 1027, 1031 (2016) (Alito, J., and Thomas, J., concurring) (emphasis in original).

To the extent that magazines holding more than 10 rounds may be less common within California, it would likely be the result of the State long criminalizing the buying, selling, importing, and manufacturing of these magazines. Saying that large capacity magazines are uncommon because they have been banned for so long is something of a tautology. It cannot be used as constitutional support for further banning. *See Friedman v. City of Highland Park, Illinois*, 784 F.3d 406, 409 (7th Cir. 2015) ("Yet it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn't commonly used. A law's existence can't be the source of its own constitutional validity.").

Since the 1980s, one of the most popular handguns in America has been the Glock 17 pistol, which is designed for, and typically sold with, a 17-round magazine. One of the most popular youth rifles in America over the last 60 years has been the Ruger 10/22. Six million have been sold since it was introduced in 1964. It is designed to use magazines manufactured by Ruger in a variety of sizes: 10-round, 15-round, and 25-round. Over the last three decades, one of the most popular civilian rifles in America is the much maligned AR-15 style rifle. Manufactured with

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complete prohibition of their use is invalid." *Heller*, 554 U.S. at 629.

various characteristics by numerous companies, it is estimated that more than five million have been bought since the 1980s. These rifles are typically sold with 30-round magazines. These commonly- owned guns with commonly-sized magazines are protected by the Second Amendment and *Heller*'s simple test for responsible, law-abiding citizens to use for target practice, hunting, and defense.

3. Lethality is Not the Test

Some say that the use of "large capacity magazines" increases the lethality of gun violence. They point out that when large capacity magazines are used in mass shootings, more shots are fired, more people are wounded, and more wounds are fatal than in other mass shootings.[31] That may or may not be true. Certainly, a gun when abused is lethal. A gun holding more than 10 rounds is lethal to more people than a gun holding less than 10 rounds, but it is not constitutionally decisive. Nothing in the Second Amendment makes lethality a factor to consider because a gun's lethality, or dangerousness, is assumed. The Second Amendment does not exist to protect the right to bear down pillows and foam baseball bats. It protects guns and every gun is dangerous. "If *Heller* tells us anything, it is that firearms cannot be categorically prohibited just because they are dangerous." *Caetano v. Massachusetts*, 136 S.Ct. 1027, 1031 (2016) (Alito, J. and Thomas, J., concurring); *Maloney v. Singas*, 2018 U.S. Dist. LEXIS 211546 *19 (E.D.N.Y. Dec. 14, 2018)

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[31] *See generally*, DX-3 Revised Expert Report of Dr. Louis Klarevas.

(striking down 1974 ban on possession of dangerous nunchaku in violation of the Second Amendment and quoting *Caetano*). "[T]he relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes." *Id.*

California law presently permits the lethality of a gun with a 10-round magazine. In other words, a gun with an 11-round magazine or a 15-round magazine is apparently too lethal to be possessed by a law-abiding citizen. A gun with a 10-round magazine is not. Missing is a constitutionally-permissible standard for testing acceptable lethality. The Attorney General offers no objective standard. *Heller* sets out a commonality standard that can be applied to magazine hardware: is the size of the magazine "common"? If so, the size is constitutionally-protected.

If the "too lethal" standard is followed to its logical conclusion, the government may dictate in the future that a magazine of eight rounds is too lethal. And after that, it may dictate that a gun with a magazine holding three rounds is too lethal since a person usually fires only 2.2 rounds in self-defense. This stepped-down approach may continue[32] until the time comes when government declares that only guns holding a single round are sufficiently lacking in

[32] Constitutional rights would become meaningless if states could obliterate them by enacting incrementally more burdensome restrictions while arguing that a reviewing court must evaluate each restriction by itself when determining its constitutionality. *Peruta v. Cty. of San Diego*, 824 F.3d 919, 953 (9th Cir. 2016) (Callahan, J., dissenting).

lethality that they are both "safe" to possess *and* powerful enough to provide a means of self-defense.[33]

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[33] Artificial limits will eventually lead to disarmament. It is an insidious plan to disarm the populace and it depends on for its success a subjective standard of "necessary" lethality. It does not take the imagination of Jules Verne to predict that if all magazines over 10 rounds are somehow eliminated from California, the next mass shooting will be accomplished with guns holding only 10 rounds. To reduce gun violence, the state will close the newly christened 10-round "loophole" and use it as a justification to outlaw magazines holding more than 7 rounds. The legislature will determine that no more than 7 rounds are "necessary." Then the next mass shooting will be accomplished with guns holding 7 rounds. To reduce the new gun violence, the state will close the 7-round "loophole" and outlaw magazines holding more than 5 rounds determining that no more than 5 rounds is "necessary." And so it goes, until the only lawful firearm law-abiding responsible citizens will be permitted to possess is a single-shot handgun. Or perhaps, one gun, but no ammunition. Or ammunition issued only to persons deemed trustworthy.

This is not baseless speculation or scare-mongering. One need only look at New Jersey and New York. In the 1990's, New Jersey instituted a prohibition on what it would label "large capacity ammunition magazines." These were defined as magazines able to hold more than 15 rounds. Slipping down the slope, last year, New Jersey lowered the capacity of permissible magazines from 15 to 10 rounds. *See* Firearms, 2018 N.J. Sess. Law Serv. Ch. 39 (ASSEMBLY No. 2761) (WEST). At least one bill had been offered that would have reduced the allowed capacity to only five rounds. (*See* New Jersey Senate Bill No. 798, introduced in the 2018 Session, amending N.J.S. 2C:39-1(y) definition of large capacity magazine from 15 to 5 rounds.) Less than a decade ago, sliding down the slope ahead of its neighbor, New York prohibited magazines able to hold more than 10 rounds and prohibited citizens from filling those magazines with more than 7 rounds (i.e., a seven round load limit). "New York determined that only magazines containing seven rounds or fewer can be safely possessed." New York State Rifle & Pistol Ass'n v. Cuomo, 804

As a matter of public policy, people can debate who makes the decision about how much lethality a citizen can possess. As policy, the State says a law-abiding, responsible person needs only 10 rounds. If you judge for yourself that you will need more than 10 rounds, however, the crime is yours. And, too bad if you complied with the law but needed 11 rounds to stop an attacker, or a group of attackers, or a mob. Now, you are dead. By living a law-abiding, responsible life, you have just become another "gun violence" statistic. And your statistic may be used to justify further restrictions on gun lethality for future law-abiding citizens.

4. Conclusion Under Heller Test

In *Heller*, the Supreme Court held that the Second Amendment protects an individual right to possess a "lawful firearm in the home operable for the purpose of immediate self-defense.'" *Pena v. Lindley*, 898 F.3d 969, 975 (9th Cir. 2018), *pet'n for cert. filed* (1/3/19) (quoting *Heller*, 554 U.S. at 635). "The Court also wrote that the amendment 'surely elevates above all

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F.3d 242, 264 (2nd Cir. 2015) (declaring unconstitutional New York seven round load limit).

Other than the commonality test, there should be no restriction on how many rounds in a magazine a citizen may use for self-defense or to bring for use in a militia. Otherwise, what the Founders sought to avoid will be accomplished in our lifetime. "The problem the Founders sought to avoid was a disarmed populace. At the margins, the Second Amendment can be read various ways in various cases, but there is no way this Amendment, designed to assure an armed population, can be read to allow government to disarm the population." *Silveira v. Lockyer*, 328 F.3d 567, 588 (9th Cir. 2003) (Kozinski, J., dissenting).

other interests the right of *law-abiding*, *responsible citizens* to use arms in defense of hearth and home.'" *United States v. Torres*, 911 F.3d 1253, 1259 (9th Cir. 2019) *(quoting Heller*, 554 U.S. at 635).

California's law prohibiting acquisition and possession of magazines able to hold any more than 10 rounds places a severe restriction on the core right of self-defense of the home such that it amounts to a destruction of the right and is unconstitutional under any level of scrutiny. *Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 961 (9th Cir. 2014), *cert. denied*, 135 S.Ct. 2799 (2015) ("A law that imposes such a severe restriction on the core right of self-defense that it 'amounts to a destruction of the Second Amendment right,' is unconstitutional under any level of scrutiny.") (citing *Heller*, 554 U.S. at 629); *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016), *cert. denied*, 138 S.Ct. 945 (2018) ("A law that imposes such a severe restriction on the fundamental right of self defense of the home that it amounts to a destruction of the Second Amendment right is unconstitutional under any level of scrutiny.") (citation omitted). The criminalization of a citizen's acquisition and possession of magazines able to hold more than 10 rounds hits directly at the core of the right of self-defense in the home. It is a complete ban on acquisition. It is a complete ban on possession. It is a ban applicable to all ordinary law-abiding responsible citizens. It is a ban on possession that applies inside a home and outside a home.[34]

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[34] "Possession" is a broad concept in California criminal law. Possession may be actual or constructive. "[Possession] does not require that a person be armed or that the weapon [ ] be within a

California's ban goes farther than did the District of Columbia's ordinance in *Heller*. With respect to long guns, in the *Heller* case, while a citizen was required to keep his or her self-defense firearm inoperable, he or she could still possess the rifle—yet it failed the simple *Heller* test. *Jackson v. City & Cty. of San Francisco*, 135 S.Ct. 2799 (2015) (Thomas, J., dissenting from denial of certiorari) ("Less than a decade ago, we explained that an ordinance requiring firearms in the home to be kept inoperable, without an exception for self-defense, conflicted with the Second Amendment because it "made it impossible for citizens to use their firearms for the core lawful purpose of self-defense.") (citing *Heller*). A government regulation that allowed a person to acquire an arm and allowed a

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person's immediate vicinity." *In re Charles G.*, 14 Cal. App. 5th 945, 951 (Ct. App. 2017), *as modified* (Aug. 31, 2017) (citations omitted). "Rather, it encompasses having a weapon in one's bedroom or home or another location under his or her control, even when the individual is not present at the location." *Id.*; *People v. Douglas*, No. B281579, 2019 WL 621284, at *4 (Cal. Ct. App. Feb. 13, 2019) (male defendant had constructive possession of box of ammunition in bedroom dresser drawer where men's clothing was found mixed with girlfriend's clothing); *People v. Osuna*, 225 Cal. App. 4th 1020, 1029 (2014), *disapproved on other grounds, People v. Frierson*, 4 Cal. 5th 225 (2017) ("A defendant possesses a weapon when it is under his dominion and control. A defendant has actual possession when the weapon is in his immediate possession or control. He has constructive possession when the weapon, while not in his actual possession, is nonetheless under his dominion and control, either directly or through others."). The concept of constructive possession of a firearm can also be found in federal criminal law. *See e.g., United States v. Schrag*, 542 F. App'x 583, 584 (9th Cir. 2013) (defendant had constructive possession of wife's pistol found on top of refrigerator in the home in violation of probation condition).

person to possess the arm still failed the *Heller* test. California's law, which neither allows acquisition, nor possession, nor operation, in the home for self-defense must also fail the *Heller* test.

The California ban leaves no room for an ordinary citizen to acquire, keep, or bear a larger capacity magazine for self-defense. There are no permitted alternative means to possess a firearm holding more than 10 rounds for self-defense, regardless of the threat. *Compare, e.g., Wilson v. Lynch*, 835 F.3d 1083, 1093 (9th Cir. 2016) (18 U.S.C. § 922(d)(3) prohibition on selling firearm to marijuana card holder was not severe burden on core Second Amendment rights because the bar applied to "only the sale of firearms to Wilson—not her *possession* of firearms") (emphasis added); *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (describing *Heller II*'s reasoning that the District of Columbia's gun registration requirements were not a severe burden because they do not prevent an individual from *possessing* a firearm in his home or elsewhere). Simply put, § 32310's ban on common magazines able to hold more than 10 rounds flunks the simple *Heller* test. Because it flunks the *Heller* test, there is no need to apply some lower level of scrutiny. *Cf. Wrenn v. D.C.*, 864 F.3d 650, 666 (D.C. Cir. 2017) ("*Heller I*'s categorical approach is appropriate here even though our previous cases have always applied tiers of scrutiny to gun laws.").

In addition to their usefulness for self-defense in the home, of course, larger capacity magazines are also lawful arms from home with which militia members would report for duty. Consequently, possession of a larger capacity magazine is also

categorically protected by the Second Amendment under *United States v. Miller,* 307 U.S. 174 (1939). "*Miller* and *Heller* recognized that militia members traditionally reported for duty carrying 'the sorts of lawful weapons that they possessed at home,' and that the Second Amendment therefore protects such weapons as a class, regardless of any particular weapon's suitability for military use.'" *Caetano v. Massachusetts*, 136 S.Ct. 1027, 1032 (2016) (Alito, J., concurring) (citations omitted).

B. The Historical Prohibitions Exception

The State argues that the *Heller* test is a non-issue because the *Heller* test does not apply to historically-accepted prohibitions on Second Amendment rights. Large capacity magazines have been the subject of regulations since the 1930s according to the State. Based on this view of history, the State asserts that magazine capacity regulations are historically accepted laws beyond the reach of the Second Amendment. If its historical research is accurate, the State would have an argument. "At the first step of the inquiry, 'determining the scope of the Second Amendment's protections requires a textual and historical analysis of the amendment.'" *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017), *cert. denied sub nom. Teixeira v. Alameda Cty., Cal.*, 138 S.Ct. 1988 (2018) (citation omitted). Courts ask whether the challenged law "falls within a 'well-defined and narrowly limited' category of prohibitions 'that have been historically unprotected,'" *Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 960 (9th Cir. 2014) *cert. denied*, 135 S.Ct. 2799 (2015) (citations omitted). "To determine whether a challenged law falls outside

the historical scope of the Second Amendment, we ask whether the regulation is one of the 'presumptively lawful regulatory measures' identified in *Heller*, or whether the record includes persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment." *Id.* (citations omitted).

History shows, however, restrictions on the possession of firearm magazines of any size have no historical pedigree. To begin with the regulation at issue, Cal. Penal Code § 32310, applies to detachable magazines. The detachable magazine was invented in the late 19th Century. "In 1879, Remington introduced the first 'modern' detachable rifle magazine. In the 1890s, semiautomatic pistols with detachable magazines followed. During WWI, detachable magazines with capacities of 25 to 32-rounds were introduced." Plaintiff's Exh. 2 (Stephen Helsley Report), at 4.

The oldest statute limiting the permissible size of a detachable firearm magazine, on the other hand, is quite young. In 1990, New Jersey introduced the first ban on detachable magazines, banning magazines holding more than 15 rounds. N.J.S. 2C:39 (1990). Eight other states eventually followed. The federal government first regulated detachable magazines in 1994. The federal statute addressed magazines holding more than 10 rounds but lapsed in 2004 and has not been replaced.

To sum up, then, while detachable firearm magazines have been common for a century, government regulation of the size of a magazine is a

recent phenomenon and still unregulated in four-fifths of the states. The record is empty of the persuasive historical evidence needed to place a magazine ban outside the ambit of the Second Amendment. Thus, it can be seen that California's prohibition on detachable ammunition magazines larger than 10 rounds is a type of prohibition that has not been historically accommodated by the Second Amendment.

Faced with a dearth of magazine capacity restrictions older than 1990, the Attorney General pivots and tries a different route. He argues that the historical prohibition question is not one of detachable magazine size, but instead is a question of firearm "firing-capacity." With this change of terms and shift of direction, the Attorney General contends that firearm firing-capacity restrictions have been subject to longstanding regulation dating back to the 1920s. Yet, even his new focus falters under a close look at the historical record.

First, firearms with a firing-capacity of more than 10 rounds existed long before the 1920s. Plaintiff's Exh. 2 (Stephen Helsley Report), at 4 ("Firearms with a capacity exceeding10-rounds date to the 'dawn of firearms.' In the late-l5th Century, Leonardo Da Vinci designed a 33-shot weapon. In the late 17th Century, Michele Lorenzoni designed a practical repeating flintlock rifle . . . . Perhaps the most famous rifle in American history is the one used by Lewis and Clark on their 'Corps of Discovery" expedition between 1803 and 1806—the magazine for which held twenty-two .46 caliber balls. Rifles with fixed magazines holding 15-rounds were widely used in the American Civil War. During that same period, revolvers with a

capacity of 20-rounds were available but enjoyed limited popularity because they were so ungainly."). Yet, despite the existence of arms with large firing-capacity during the time of the adoption of the Second Amendment, more than a century passed before a firing-capacity law was passed.

It is interesting to note that during the Nation's founding era, states enacted regulations for the formation and maintenance of citizen militias. Three such statutes are described in *United States v. Miller*, 307 U.S. 174 (1939). Rather than restricting firing capacity, they required firing capacity. These statutes required citizens to equip themselves with arms and a minimum quantity of ammunition for those arms. None placed an upper limit of 10-rounds, as § 32310 does. Far from it. Each imposed a floor of at least 20-rounds. *Id.* at 180-83 (Massachusetts law of 1649 required carrying "twenty bullets," while New York 1786 law required "a Box therein to contain no less than Twenty-four Cartridges," and Virginia law of 1785 required a cartridge box and "four pounds of lead, including twenty blind cartridges"). In 1776, Paul Revere's Minutemen (a special group of the Massachusetts militia) were required to have ready 30 bullets and gunpowder. These early American citizen militia laws suggest that, contrary to the idea of a firing-capacity upper limit on the number of rounds a citizen was permitted to keep with one's arms, there was an obligation that citizens would have at least 20 rounds available for immediate use. Simply put, there were no upper limits; there were floors and the floors were well above 10 rounds.

The Attorney General makes no mention of the founding-era militia firing-capacity minimum requirements. Instead he focuses on a handful of Thompson machine gun-era statutes. In 1927, Michigan passed a restriction on firearms with a firing-capacity over 16 rounds. Rhode Island restricted arms with a firing-capacity over 12 rounds. Ohio began licensing firearms with a firing-capacity over 18 rounds in 1933. All were repealed. The District of Columbia first restricted firearms with a firing-capacity of 12 or more rounds in 1932. None of these laws set the limit as low as ten.

The Attorney General names five additional states that enacted firing-capacity restrictions in the 1930s with capacity limits less than 10 rounds. But he is not entirely accurate. His first example is not an example, at all. For his first example, he says that, "[i]n 1933, South Dakota banned any 'weapon from which more than *five shots* or bullets may be rapidly or automatically, or semi-automatically discharged from a magazine [by a single function of the firing device].'" Def's Oppo. (4/9/18) at 4 (emphasis in original). Actually, this was not a ban. This was South Dakota's definition of a machine gun. S.D. Ch. 206 (S.B. 165) *Enacting Uniform Machine Gun Act*, § 1 (1933), Exh. A to Def.'s Request for Judicial Notice (filed 4/9/18) ("'Machine Gun' applies to and includes a weapon of any description by whatever name known, loaded or unloaded, from which more than five shots or bullets may be rapidly, or automatically, or semi-automatically discharged from a magazine, by a single function of the firing device."). In fact, the statute did not ban machine guns. The statute did not criminalize mere possession (except by a felon or by an

unnaturalized foreign-born person). Unlike Cal. Penal Code § 32310, the South Dakota statute criminalized possession or use of a machine gun only "for offensive or aggressive purpose," (Ch. 206 § 3), and added a harsh penalty for use during a crime of violence. Ch. 206 § 2. Specifically excepted from the regulation was possession of a machine gun for defensive purposes. Ch. 206 § 6(3) ("Nothing contained in this act shall prohibit or interfere with the possession of a machine gun . . . for a purpose manifestly not aggressive or offensive."). The 1933 South Dakota statute protected a law-abiding citizen's right to possess a machine gun with a firing-capacity over five rounds for self-defense and defense of home and family and any other purpose not manifestly aggressive or offensive. California's § 32310, in contrast, criminalizes for all reasons possession of a magazine holding more than 10 rounds. So much for the first example.

The Attorney General's second example of a longstanding firing-capacity prohibition is a Virginia ban enacted in 1934. However, like the first South Dakota example, the second example is not an example, at all. The Attorney General describes the law as a ban on firearms that discharge seven rounds rapidly. It is not ban. It also defines "machine gun."[35]

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[35] "'Machine gun' applies to and includes a weapon ... from which more than seven shots or bullets may be rapidly, or automatically, or semi-automatically discharged from a magazine, by a single function of the firing device, and also applies to and includes weapons ... from which more than sixteen shots or bullets may be rapidly, automatically, semi-automatically or otherwise discharged without reloading." Virginia Ch. 96, § 1(a) (1934), Ex. B to Def.'s Request for Judicial Notice (filed 4/9/18).

It criminalizes the offensive/aggressive possession of a machine gun[36] and it imposes a death penalty for possessing/using a machine gun in the perpetration of a crime of violence.[37] However, most importantly, like the 1933 South Dakota statute, the 1934 Virginia statute protected a law-abiding citizen's right to possess a machine gun for self-defense and defense of home and family and any other purpose not manifestly aggressive or offensive.[38] As discussed above, California's § 32310, in criminalizing possession of magazines holding more than 10 rounds, makes no distinction between use for an offensive purpose and use for a defensive purpose. So much for the second example.

The Attorney General's final three examples are state machine gun bans. The first cited is an Illinois enactment (in 1931) described as, "An Act to Regulate the Sale, Possession and Transportation of Machine Guns." Ex. C to Def.'s Request for Judicial Notice (filed 4/9/18). Louisiana enacted (in 1932) Act No. 80, the second cited, which likewise was passed "to regulate

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[36] "Unlawful possession or use of a machine gun for offensive or aggressive purpose is hereby declared to be a crime. ... " Virginia Ch. 96, § 3 (1934), Ex. B to Def.'s Request for Judicial Notice (filed 4/9/18).

[37] "Possession or use of a machine gun in the perpetration or attempted perpetration of a crime of violence is hereby declared to be a crime punishable by death or by imprisonment ... ." Virginia Ch. 96, § 2 (1934), Ex. B to Def.'s Request for Judicial Notice (filed 4/9/18).

[38] "Nothing contained in this act shall prohibit or interfere with ... The possession of a machine gun ... for a purpose manifestly not aggressive or offensive." Virginia Ch. 96, §6(Third) (1934), Ex. B to Def.'s Request for Judicial Notice (filed 4/9/18).

the sale, possession and transportation of machine guns." Ex. D to Def.'s Request for Judicial Notice (filed 4/9/18). The third cited example is like the first two. It is an Act passed by the South Carolina legislature in 1934 titled, An Act Regulating the Use and Possession of Machine Guns. Ex. E to Def.'s Request for Judicial Notice (filed 4/9/18). These three statutes are examples of machine gun bans that are prohibited because of their ability to continuously fire rounds with a single trigger pull, rather than their overall firing-capacity.

Machine guns[39] have been subject to federal regulation since the enactment of the National Firearms Act of 1934. *See Sonzinsky v. United States*, 300 U.S. 506, 511-12 (1937) ("The term 'firearm' is defined by § 1 [of the National Firearms Act] as meaning a shotgun or a rifle having a barrel less than eighteen inches in length, or any other weapon, except

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[39] The Supreme Court knows the difference between the fully automatic military machine gun M-16 rifle, and the civilian semi-automatic AR-15 rifle. *See Staples v. United States*, 511 U.S. 600, 603 (1994) ("The AR-15 is the civilian version of the military's M-16 rifle, and is, unless modified, a semiautomatic weapon. The M-16, in contrast, is a selective fire rifle that allows the operator, by rotating a selector switch, to choose semiautomatic or automatic fire."); *but see Kolbe v. Hogan*, 849 F.3d 114, 136 (4th Cir. 2017) ("Although an M16 rifle is capable of fully automatic fire and the AR-15 is limited to semiautomatic fire, their rates of fire (two seconds and as little as five seconds, respectively, to empty a thirty-round magazine) are nearly identical. Moreover, in many situations, the semiautomatic fire of an AR-15 is more accurate and lethal than the automatic fire of an M16. Otherwise, the AR-15 shares the military features—the very qualities and characteristics—that make the M16 a devastating and lethal weapon of war.").

a pistol or revolver, from which a shot is discharged by an explosive, if capable of being concealed on the person, *or a machine gun*. . . .") (emphasis added). Since machine guns are not typically possessed by law-abiding citizens for lawful purposes, they are not protected by the Second Amendment. *Heller*, 554 U.S. at 625; *Friedman v. City of Highland Park*, 784 F.3d 406, 408 (7th Cir. 2015) (*Heller* observed, "state militias, when called to service, often had asked members to come armed with the sort of weapons that were 'in common use at the time' and it thought these kinds of weapons (which have changed over the years) are protected by the Second Amendment in private hands, while military-grade weapons (the sort that would be in a militia's armory), such as machine guns, and weapons especially attractive to criminals, such as short-barreled shotguns, are not."). Because machine guns, like grenades and shoulder-fired rocket launchers, are not commonly possessed by law-abiding citizens for lawful purposes, they are specific arms that fall outside the safe harbor of the Second Amendment. Consequently, these machine gun statutes cited by the Attorney General do not stand as proof of long-standing prohibitions on the firing-capacity of Second Amendment-protected commonly possessed firearms.

To reiterate, the earliest regulation of a detachable ammunition magazine limit occurred in New Jersey in 1990 and limited the number of rounds to a maximum of 15. The earliest federal restriction on a detachable magazine was enacted in 1994, limited the maximum number of rounds to 10, and expired after ten years. As to the Attorney General's alternate argument about "firing-capacity," the earliest firing-

capacity regulation appeared in the 1920s and 1930s in three states (Michigan, Rhode Island, and Ohio) and affected firearms able to fire more than 18, 16, or 12 rounds, depending on the state. No regulation on "firing-capacity" set a limit as low as California's 10-round limit. Each was repealed and thus not longstanding. Two more states (North Dakota and Virginia) defined a machine gun. Interestingly, while penalizing machine gun use when purposed for aggressive or offensive use, both states also protected citizen machine gun possession for defensive use or any other use that was not manifestly aggressive or offensive. Three other states (Illinois, Louisiana, and South Carolina) simply defined and banned machine guns altogether. The District of Columbia appears to be the single jurisdiction where a firing-capacity restriction has been in place since the 1930s. Even there, the limit was not as low as California's limit of 10 rounds.

On this record, there is no longstanding historically-accepted prohibition on detachable magazines of any capacity. *Ass'n of N.J. Rifle & Pistol Clubs v. A.G. N.J.*, 910 F.3d 106, n.18 (3rd Cir. 2018) ("LCMs were not regulated until the 1920s, but most of those laws were invalidated by the 1970s. The federal LCM ban was enacted in 1994, but it expired in 2004. While a lack of longstanding history does not mean that the regulation is unlawful, the lack of such a history deprives us of reliance on *Heller*'s presumption that such regulation is lawful.") (citations omitted); *Heller v. D.C.*, 670 F.3d 1244, 1260 (D.C. Cir. 2011) ("We are not aware of evidence that prohibitions on either semi-automatic rifles or large-

capacity magazines are longstanding and thereby deserving of a presumption of validity.").

Moreover, there is no longstanding historically-accepted prohibition on firearms according to their "firing-capacity" except in the case of automatic fire machine guns. On the other hand, there is an indication that founding-era state regulations, rather than restricting ammunition possession, mandated citizens of militia age to equip themselves with ready ammunition in amounts of at least 20 rounds.

C. The Heightened Scrutiny Test

1. Failing the Simple Heller Test

Section 32310 runs afoul of the Second Amendment under the simple *Heller* test. It fails the *Heller* test because it criminalizes a law-abiding citizen's possession of a common magazine that is used for lawful purposes and prohibits its use for self-defense in and around the home. It strikes at the core of the inalienable Constitutional right and disenfranchises approximately 39 million state residents.

This conclusion should not be considered groundbreaking. It is simply a straightforward application of constitutional law to an experimental governmental overreach that goes far beyond traditional boundaries of reasonable gun regulation. That § 32310 was not challenged earlier is due in part to the Ninth Circuit's pre-*Heller* understanding that an individual lacked Second Amendment rights and thus lacked Article III standing to challenge gun regulations. *See Silveira v. Lockyer,* 312 F.3d 1052, 1066-67 (9th Cir. 2002), *as amended* (Jan. 27, 2003) ("Because we hold that the Second Amendment does

not provide an individual right to own or possess guns or other firearms, plaintiffs lack standing to challenge the [California Assault Weapons Control Act]."). That was the state of the law when California passed its first iteration of § 32310[40] with a grandfather clause now called a "loophole" permitting citizens to keep and possess magazines able to hold more than 10 rounds.[41] The lack of an earlier constitutional challenge was also due to the recency of the Supreme Court's decision that the Second Amendment applies to the states. *See McDonald v. City of Chicago*, 561 U.S. 742, 784-85 (2010) ("Under our precedents, if a Bill of Rights guarantee is fundamental from an American perspective . . . that guarantee is fully binding on the States . . . ."). In other words, when California began experimenting with its larger-capacity magazine ban less than twenty years ago, it appeared that the Second Amendment conferred no rights on individual citizens and did not apply to the states, and that an individual lacked Article III standing in federal court to challenge the ban. During that time, California passed more and more gun regulations, constricting individual rights further and further, to the point where state undercover agents surveil California residents attending out-of-state gun shows, obtain search warrants for their homes, and prosecute those returning with a few thirty-round magazines. *See e.g., People v. Verches*, 2017 WL 1880968 (Cal. Ct. App. May 9, 2017) (California resident convicted of

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[40] Former § 12020 was re-codified at § 32310, effective Jan. 1, 2012.

[41] The grandfather clause is now described by the State as a loophole.

marijuana possession and importing three large-capacity magazines purchased at a Reno, Nevada gun show and placed on three years formal felony probation).

The magazine ban arbitrarily selects 10 rounds as the magazine capacity over which possession is unlawful. The magazine ban admits no exceptions, beyond those for law enforcement officers, armored truck guards, and movie stars. The ban does not distinguish between citizens living in densely populated areas and sparsely populated areas of the state. The ban does not distinguish between citizens who have already experienced home invasion robberies, are currently threatened by neighborhood burglary activity, and those who have never been threatened. The ban does not distinguish between the senior citizen, the single parent, and the troubled and angry high school drop-out. Most importantly, the ban does not distinguish between possession in and around one's home, and possession in or around outdoor concerts, baseball fields, or school yards. The ban on magazines that hold more than 10 rounds amounts to a prohibition on an entire class of "arms" that is overwhelmingly chosen by American citizens for the lawful purpose of self-defense. The prohibition extends to one's home where the need to defend self, family, and property is most acute. And like the ban struck down in *Heller*, the California ban threatens citizens, not with a minor fine, but a substantial criminal penalty. *Heller*, 554 U.S. at 634 ("The District law, by contrast, far from imposing a minor fine, threatens citizens with a year in prison (five years for a second violation) for even obtaining a gun in the first place. See D. C. Code § 7-2507.06."). "If a law burdens

conduct protected by the Second Amendment . . . *Heller* mandates some level of heightened scrutiny." *Bauer v. Becerra*, 858 F.3d 1216, 1221 (9th Cir. 2017), *cert. denied,* 138 S.Ct. 982 (2018). Under any level of heightened scrutiny, the ban fails constitutional muster.

2. The Tripartite Binary Test with a Sliding Scale and a Reasonable Fit

Beyond the simple *Heller* test, for a Second Amendment question, the Ninth Circuit uses what might be called a tripartite binary test with a sliding scale and a reasonable fit. In other words, there are three different two-part tests, after which the sliding scale of scrutiny is selected. Most courts select intermediate scrutiny in the end. Intermediate scrutiny, in turn, looks for a "reasonable fit." It is an overly complex analysis that people of ordinary intelligence cannot be expected to understand. It is the wrong standard. But the statute fails anyhow.

a. burden & scrutiny

First, a court must evaluate the burden and then apply the correct scrutiny. *United States v. Torres*, 911 F.3d 1253, 1258 (9th Cir. 2019); *Jackson*, 746 F.3d at 960 (citing *United States v. Chovan*, 735 F.3d 1127, 1136-37 (9th Cir. 2013)). "This two-step inquiry: '(1) asks whether the challenged law burdens conduct protected by the Second Amendment; and (2) if so, directs courts to apply an appropriate level of scrutiny.'" *Bauer v. Becerra*, 858 F.3d 1216, 1221 (9th Cir. 2017), *cert. denied,* 138 S.Ct. 982 (2018) (quoting *Jackson*, 746 F.3d at 960). As discussed, § 32310 burdens conduct protected by the Second Amendment.

b. presumptively lawful or historical regulation

In determining whether a given regulation falls within the scope of the Second Amendment under the first step of this inquiry, another two-step test is used. "[W]e ask whether the regulation is one of the 'presumptively lawful regulatory measures' identified in *Heller*, or whether the record includes persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment." *Id.* (citations omitted). If the regulation is presumptively lawful, the inquiry ends. Likewise, if the regulation is a historically approved prohibition not offensive to the Second Amendment, the inquiry ends.

Section 32310 fails both parts of the test. A complete ban on ammunition magazines of any size is not one of the presumptively lawful regulatory measures identified in *Heller*. As discussed, neither is there any evidence that magazine capacity restrictions have a historical pedigree.

c. closeness to the core and severity of the burden

If the constitutional inquiry may continue, then the correct level of scrutiny must be selected. For that selection a third two-step evaluation is required. The first step measures how close the statute hits at the core of the Second Amendment right. The second step measures how severe the statute burdens the Second Amendment right. "Because *Heller* did not specify a particular level of scrutiny for all Second Amendment challenges, courts determine the appropriate level by considering '(1) how close the challenged law comes to

the core of the Second Amendment right, and (2) the severity of the law's burden on that right.'" *Bauer v. Becerra*, 858 F3d 1216, 1222 (9th Cir. 2017), *cert. denied,* 138 S.Ct. 982 (2018) (quoting *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016)). *Fyock v. City of Sunnydale*, 779 F.3d 991, 999 (9th Cir. 2015), recognized that a regulation restricting law-abiding citizens from possessing large-capacity magazines within their homes hits at the core of the Second Amendment. *Fyock* said, "[b]ecause Measure C restricts the ability of law abiding citizens to possess large capacity magazines within their homes for the purpose of self-defense, we agree with the district court that Measure C may implicate the core of the Second Amendment." *Id.; Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1278 (N.D. Cal. 2014), *aff'd sub nom. Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015) ("[T]he court concludes that the Sunnyvale law burdens conduct near the core of the Second Amendment right."). "No one doubts that under *Heller I* this core protection covers the right of a law-abiding citizen to keep in the home common firearms for self-defense." *Wrenn v. D.C.*, 864 F.3d 650, 657 (D.C. Cir. 2017).[42]

Heller says the core of the Second Amendment is the right of law-abiding, responsible citizens to use arms in defense of their home. 554 U.S. at 635. Guided

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[42] And the core may extend beyond the home. "[W]e conclude: the individual right to carry common firearms beyond the home for self-defense—even in densely populated areas, even for those lacking special self-defense needs—falls within the core of the Second Amendment's protections." *Wrenn v. D.C.*, 864 F.3d 650, 661 (D.C. Cir. 2017).

by this understanding, for selecting the appropriate level of judicial scrutiny, the Ninth Circuit uses a sliding scale. "[O]ur test for the appropriate level of scrutiny amounts to 'a sliding scale.'" *Silvester*, 843 F.3d at 821. "A law that imposes such a severe restriction on the fundamental right of self-defense of the home that it amounts to a destruction of the Second Amendment right is unconstitutional under any level of scrutiny." *Bauer v. Becerra*, 858 F3d 1216, 1222 (9th Cir. 2017), *cert. denied,* 138 S.Ct. 982 (2018) (quoting *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016)). This is the case here.

d. the sliding scale of scrutiny—strict scrutiny

Further down the scale, a law that implicates the core of the Second Amendment right and severely burdens that right warrants *strict scrutiny*. *Pena v. Lindley*, 898 F.3d 969, 977 (9th Cir. 2018) ("We strictly scrutinize a 'law that implicates the core of the Second Amendment right and severely burdens that right.'") (citation omitted). Even if § 32310's complete ban did not amount to a destruction of Second Amendment rights, it would still merit the application of strict scrutiny. A law like § 32310 that prevents a law-abiding citizen from obtaining a firearm with enough rounds to defend self, family, and property in and around the home certainly implicates the core of the Second Amendment. When a person has fired the permitted 10 rounds and the danger persists, a statute limiting magazine size to only 10 rounds severely burdens that core right to self-defense.

A complete ban on a 100-round or 50-round magazine may be a mild burden. An annual limit on

the number of larger capacity magazines that a citizen may purchase might place a moderate burden. A serial number requirement for the future manufacturing, importing, or selling of larger capacity magazines would not be a severe burden. Requiring a background check for purchasers of larger-capacity magazines may or may not be a severe burden. *See e.g., Heller II,* 670 F.3d at 1258 (reasoning that the District of Columbia's gun registration requirements were not a severe burden because they do not prevent an individual from possessing a firearm in his home).

But California's ban is far-reaching, absolute, and permanent. The ban on acquisition and possession on magazines able to hold more than 10 rounds, together with the substantial criminal penalties threatening a law-abiding, responsible, citizen who desires such magazines to protect hearth and home, imposes a burden on the constitutional right that this Court judges as severe. *Cf. Peruta v. Cty. of San Diego*, 824 F.3d 919, 950 (9th Cir. 2016) (en banc) (Callahan, J., dissenting) (courts should consider Second Amendment challenges to firearm restrictions in context to ensure the restrictions are not "tantamount to complete bans on the Second Amendment right to bear arms outside the home for self-defense"), *cert. denied*, 137 S.Ct. 1995 (2017).

Some have said that the burden is minor because there are other choices. *E.g., Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1278 (N.D. Cal. 2014), *aff'd sub nom. Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015) ("Individuals have countless other handgun and magazine options to exercise their Second Amendment rights . . . Accordingly, a prohibition on

possession of magazines having a capacity to accept more than ten rounds applies only the most minor burden on the Second Amendment."). But describing as minor, the burden on responsible, law-abiding citizens who may not possess a 15-round magazine for self-defense because there are other arms permitted with 10 or fewer rounds, is like saying that when government closes a Mormon church it is a minor burden because next door there is a Baptist church or a Hindu temple. Indeed, *Heller* itself rejected this mode of reasoning: "It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.,* long guns) is allowed." 554 U.S. at 629; *see also Parker v. District of Columbia,* 478 F.3d 370, 400 (D.C. Cir. 2007) ("The District contends that since it only bans one type of firearm, 'residents still have access to hundreds more,' and thus its prohibition does not implicate the Second Amendment because it does not threaten total disarmament. We think that argument frivolous. It could be similarly contended that all firearms may be banned so long as sabers were permitted."), *aff'd sub nom. Heller,* 554 U.S. at 570.

Others have acknowledged that the burden on a citizen may be severe but consider it a worthwhile tradeoff. *San Francisco Veteran Police Officers Ass'n v. City & Cty. of San Francisco*, 18 F. Supp. 3d 997, 1005 (N.D. Cal. 2014) ("Nonetheless, in those rare cases, to deprive the citizen of more than ten shots may lead to his or her own death. Let this point be conceded."). In a peaceful society, a 10-round limit may not be severe. When thousands of people are rioting, as happened in Los Angeles in 1992, or more recently with Antifa

members in Berkeley in 2017, a 10-round limit for self-defense is a severe burden. When a group of armed burglars break into a citizen's home at night, and the homeowner in pajamas must choose between using their left hand to grab either a telephone, a flashlight, or an extra 10-round magazine, the burden is severe. When one is far from help in a sparsely populated part of the state, and law enforcement may not be able to respond in a timely manner, the burden of a 10-round limit is severe. When a major earthquake causes power outages, gas and water line ruptures, collapsed bridges and buildings, and chaos, the burden of a 10-round magazine limit is severe. When food distribution channels are disrupted and sustenance becomes scarce while criminals run rampant, the burden of a 10-round magazine limit is severe. Surely, the rights protected by the Second Amendment are not to be trimmed away as unnecessary because today's litigation happens during the best of times. It may be the best of times in Sunnyvale; it may be the worst of times in Bombay Beach or Potrero. California's ban covers the entire state at all times.

While *Chovan* instructs that the level of scrutiny depends on closeness to the core and "the severity of the law's burden," it offers no guide to evaluating the burden. *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013). In *Jackson*, the burden of a regulation was not severe. *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 964 (9th Cir. 2014) ("Section 4512 does not impose the sort of severe burden that requires the higher level of scrutiny."). In *Jackson*, the court found that the ordinance did not substantially prevent law-abiding citizens from using firearms to defend themselves in the home because it only

regulated storage when not carrying them. *Id.* Consequently, the court found that the requirement did not impose a severe burden because, "San Franciscans are not required to secure their handguns while carrying them on their person." *Id.* In contrast, § 32310 imposes a complete ban on the acquisition and possession of a magazine able to hold more than 10 rounds. It is a crime whether a person is keeping and carrying the magazine for self-defense in the home, while using it for target practice to maintain proficiency, while brandishing it to protect property from rioters, or when needing it for hunting dangerous animals. Strict scrutiny applies.[43]

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[43] Strict scrutiny is also called for in the context of an armed defense of hearth and home because a person's privacy interests are protected by the Constitution. The protection for one's privacy may be near its zenith in the home. Other privacy invasions in the home are subjected to strict scrutiny. "This enactment involves ... a most fundamental aspect of 'liberty,' the privacy of the home in its most basic sense, and it is this which requires that the statute be subjected to 'strict scrutiny.'" *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (applying strict scrutiny to a Connecticut contraceptive criminal statute). "The Fourth and Fifth Amendments were described ... as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.' We recently referred ... to the Fourth Amendment as creating a 'right to privacy, no less important than any other right carefully and particularly reserved to the people.'" *Griswold v. Connecticut*, 381 U.S. 479, 484—85 (1965) (applying strict scrutiny to contraceptive law) (citations omitted). Just as we would not allow "the police to search the sacred precincts of the marital bedrooms for telltale signs of the use of contraceptives," (*id.*), we should not allow the police to search the private environs of law-abiding, responsible citizens for self-defense magazines that the State deems too large and dangerous.

The State argues that the Ninth Circuit has already determined as a matter of law that intermediate scrutiny applies to large-capacity magazine bans, citing *Fyock*, 779 F.3d at 999. Def.'s Oppo. to Plaintiff's Mot. for Summary Judgment, at 14. Not so. In the context of an appeal from a preliminary injunction ruling, *Fyock* decided whether the district court had abused its discretion. The district court made a preliminary judgment that the burden was not severe from Sunnyvale's large capacity magazine ban. The district court used its discretion and declined to issue a preliminary injunction. *Fyock* decided that the district court had not abused its discretion. Specifically, the *Fyock* court concluded, "For these reasons, there was no abuse of discretion in finding that the impact Measure C may have on the core Second Amendment right is not severe and that intermediate scrutiny is warranted." *Id.* *Fyock*'s conclusion about the severity of Sunnyvale's large-capacity magazine ban was fact-bound. It did not announce as a matter of law that magazine capacity bans of any kind never impose a severe burden on Second Amendment rights. Nor could it. Even the least searching form of heightened scrutiny (*i.e.,* intermediate scrutiny) requires the government to establish a reasonable fit.

That the assessment of Sunnyvale's ban was fact-bound is illustrated by its immediately preceding sentence, where the Fyock court noted the Sunnyvale ban permitted possession of large-capacity magazines for use with some firearms. Id. ("To the extent that a lawfully possessed firearm could not function with a lower capacity magazine, Measure C contains an exception that would allow possession of a large-

capacity magazine for use with that firearm.") (citing Sunnyvale, Cal. Muni. Code § 9.44.050(c)(8)). It also imposed a minor penalty and did not make an exception for movie props or retired police officers. As this Court reads it, Fyock did not decide that all magazine bans merit only intermediate scrutiny.

Section 32310's wide ranging ban with its acquisition-possession-criminalization components exacts a severe price on a citizen's freedom to defend the home. Consequently, § 32310 merits strict judicial scrutiny. "A law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny." Silvester v. Harris, 843 F.3d 816, 821 (9th Cir. 2016) (citing Chovan, 735 F.3d at 1138); compare United States v. Torres, 911 F.3d 1253, 1262 (9th Cir. 2019) (finding federal ban on firearm possession by an alien while in the United States is not a severe burden because alien may remove himself from the ban by acquiring lawful immigration status); *and Mahoney v. Sessions*, 871 F.3d 873, 879 (9th Cir. 2017), *cert. denied sub nom. Mahoney v. City of Seattle, Wash.*, 138 S.Ct. 1441 (2018) (holding that a city policy regulating the use of department-issued firearms while police officers are *on duty* is not a severe Second Amendment burden).

Strict scrutiny requires the Government to prove that the restriction on a constitutional right furthers a compelling interest and is narrowly tailored to achieve that interest. *Mance v. Sessions*, 896 F.3d 699, 705-06 (5th Cir. 2018), *pet'n for cert. filed* (Nov. 19, 2018) (applying strict scrutiny in Second Amendment case). California's ban on magazines able to hold more than 10 rounds fails strict scrutiny. The State has not

offered a compelling interest for the ban, arguing that intermediate scrutiny should be the test. If preventing mass shootings is the state's interest, it is not at all clear that it would be compelling since such events are exceedingly rare. If the state's interest is in forcing a "pause" during a mass shooting for a shooter to be apprehended, those events are even more rare.

More certain, however, is that the ban is not narrowly tailored or the least restrictive means of achieving these interests. Instead it is a categorical ban on acquisition and possession for all law-abiding, responsible, ordinary citizens. Categorical bans are the opposite of narrowly tailored bans. The § 32310 ban on possession applies to areas in the state where large groups gather and where no one gathers. It applies to young persons with long rap sheets and to old persons with no rap sheets. It applies to draft dodgers and to those who have served our country. It applies to those who would have 1000 large magazines for a conflagration and to those who would have one large magazine for self-defense. It applies to perpetrators as well as it applies to those who have been victims. It applies to magazines holding large, powerful rounds and to magazines holding small, more-impotent rounds. It applies to rifles with bump-stocks and pistols for purses.

Section 32310 is not narrowly tailored; it is not tailored at all. It fits like a burlap bag. It is a single-dimensional, prophylactic, blanket thrown across the population of the state. As such, § 32310 fails strict scrutiny and violates the Second Amendment. *Cf. Mance v. Sessions*, 896 F.3d 390, 405 (5th Cir. 2018) (Ho, J., dissenting from denial of rehearing *en banc*)

("The ban on interstate handgun sales fails strict scrutiny. After all, a categorical ban is precisely the opposite of a narrowly tailored regulation. It applies to all citizens, not just dangerous persons. Instead of requiring citizens to comply with state law, it forbids them from even trying. Nor has the Government demonstrated why it needs a categorical ban to ensure compliance with state handgun laws. Put simply, the way to require compliance with state handgun laws is to require compliance with state handgun laws.").

e. intermediate scrutiny

Even under the lowest formulation of heightened scrutiny, intermediate scrutiny, Section § 32310 fails because it is not a reasonable fit. *Cf. Morris v. U.S. Army Corps of Engineers*, 990 F. Supp. 2d 1082, 1087 (D. Idaho 2014) (banning firearm with ammunition in camping tents imposed *severe burden calling for strict scrutiny but unconstitutional even under intermediate scrutiny*). Where a restriction "does not 'severely burden' or even meaningfully impact the core of the Second Amendment right, . . . intermediate scrutiny is . . . appropriate." *Bauer v. Becerra*, 858 F.3d 1216, 1222 (9th Cir. 2017), *cert. denied,* 138 S.Ct. 982, 200 L. Ed. 2d 249 (2018) (citing *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016) and *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013)) (applying intermediate scrutiny to California's $19 DROS fee). The State argues as a foregone conclusion that intermediate scrutiny is the correct point on the sliding scale for a regulation on magazines. According to the State, *Fyock*'s approval of "intermediate scrutiny" is controlling, and other courts have applied intermediate scrutiny to regulations on large capacity

magazines. As discussed, *supra*, *Fyock* held that the district court did not abuse its discretion in finding Sunnyvale's magazine capacity restriction did not have a severe impact. 779 F.3d at 999. That approach was consistent with past cases analyzing the appropriate level of scrutiny under the second step of *Heller*, as the Ninth Circuit has typically applied intermediate scrutiny—especially for non-hardware Second Amendment cases. *See e.g.*, *Silvester*, 843 F.3d at 823 (applying intermediate scrutiny to ten-day waiting period for the purchase of firearms); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 968 (9th Cir. 2014) (applying intermediate scrutiny to mandatory handgun storage procedures in homes and banning the sale of hollow-point ammunition in San Francisco); *Chovan*, 735 F.3d at 1138 (applying intermediate scrutiny to prohibition on domestic violence misdemeanants possessing firearms). But it is the wrong standard to apply here.

i. tailoring required: "a reasonable fit"

To pass intermediate scrutiny, a statute must still be a reasonable fit. "Our intermediate scrutiny test under the Second Amendment requires that (1) the government's stated objective . . . be significant, substantial, or important; and (2) there . . . be a 'reasonable fit' between the challenged regulation and the asserted objective." *Silvester*, 843 F.3d at 821-22 (quoting *Chovan*, 735 F.3d at 1139).

For intermediate scrutiny "the burden of justification is demanding and it rests entirely on the State." *Tyler v. Hillsdale County Sheriff's Dept.*, 837 F. 3d 678, 694 (6th Cir. 2016) (quoting *United States v.*

Virginia, 518 U.S. 515, 533 (1996) (considering the constitutionality of 18 U.S.C. § 922(g)(4)'s permanent gun ban for person previously treated for mental illness).

ii. four important California interests

In this case, the Attorney General identifies four State interests or objectives. Each is important. The State interests are: (1) protecting citizens from gun violence; (2) protecting law enforcement from gun violence; (3) protecting the public safety (which is like protecting citizens and law enforcement from gun violence); and (4) preventing crime. *See* Oppo. at 9; 17-18. The question then becomes, whether § 32310's ban on acquisition and possession of firearm magazines holding more than 10 rounds is a reasonable fit for achieving these important goals. This Court finds on the evidentiary record before it that § 32310—the prohibition on magazines able to hold more than 10 rounds and the acquisition-possession-criminalization components of § 32310—is not a reasonable fit.

The Attorney General says that empirical evidence is not required to shoulder his burden. Oppo. at 19. He says that the required substantial evidence demonstrating a reasonable fit can take other, softer forms such as "history, consensus, and simple common sense," as well as "correlation evidence" and even simply "intuition." Oppo. at 19-20. Intuition? If this variety of softer "evidence" were enough, all firearm restrictions except an outright ban on all firearms would survive review. Yet, as the Second Circuit cautioned, "on intermediate scrutiny review, the state cannot 'get away with shoddy data or reasoning.' To

survive intermediate scrutiny, the defendants must show '*reasonable* inferences based on *substantial* evidence' that the statutes are substantially related to the governmental interest." *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 264 (2d Cir. 2015), *cert. denied sub nom.*, *Shew v. Malloy*, 136 S.Ct. 2486 (2016) (citations omitted) (emphasis in original) (striking down New York State's 7-round magazine limit). When considering whether to approve a state experiment that has, and will, irrevocably harm law-abiding responsible citizens who want for lawful purposes to have common firearms and common magazines that hold more than 10 rounds, this Court declines to rely on anything beyond hard facts and reasonable inferences drawn from convincing analysis amounting to substantial evidence based on relevant and accurate data sets.

iii. the State's evidence

The State's theoretical and empirical evidence is not persuasive. Why 10 rounds as a limit? The State has no answer. Why is there no thought given to possession in and around a home? It is inconclusive at best. In fact, it is reasonable to infer, based on the State's own evidence, that a right to possess magazines that hold more than 10 rounds may promote self-defense—especially in the home—as well as being ordinarily useful for a citizen's militia use. California must provide more than a rational basis to justify its sweeping ban. *See e.g., Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) ("Illinois had to provide us with more than merely a rational basis for believing that its uniquely sweeping ban [on carrying

guns in public] is justified by an increase in public safety. It has failed to meet this burden.").

Mass shootings are tragic. But they are rare events. And of these rare events, many are committed without large capacity magazines. For example, in the two high school incidents in 2018 one assailant used a shotgun and a .38 revolver (at Santa Fe High School, Santa Fe, Texas) while the other used an AR-15-style rifle but with 10-round magazines (at Stoneman Douglas High School in Parkland, Florida). In the attack at the Capital Gazette newspaper (Annapolis, Maryland), 5 people were killed and 2 injured by an assailant with a shotgun and smoke grenades. The Attorney General has not supplemented the record with a police report of the single mass shooting in California last year (at the Borderline Bar and Grill in Thousand Oaks, California). However, press reports indicate the shooter used a legally purchased pistol with an "extended" magazine.[44] Another report said seven 30-round magazines were found at the scene.[45] Eighteen years of a state ban on acquiring large-capacity magazines did not prevent the assailant from obtaining and using the banned devices. The news pieces do not report witnesses describing a "critical pause" when the shooter re-loaded. And the stories do

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[44] Aarthun, Sarah and Adone, Dakin, *What We Know About the Shooting at Borderline Bar & Grill*, CNN (Nov. 9, 2018) https://www.cnn.com/2018/11/08/us/thousand-oaks-bar-shooting-what-we-know/index.html (last visited Mar. 26, 2019).

[45] *Authorities Describe 'Confusion And Chaos' at Borderline Bar Shooting in California,* NPR (Nov. 28, 2018) https://www.npr.org/2018/11/28/671353612/no-motive-yet-found-for-mass-shooting-at-borderline-bar-and-grill (last visited Mar. 26, 2019).

not say where or how the 30-round magazines were acquired.

The findings from the Mayors Against Illegal Guns survey 2009-2013 (AG Exhibit 17), were addressed in the Order of June 28, 2017. *See also, AG Oppo. To Mot PI*, Gordon Declaration Exh. 59. The observations are still true. "To sum up, of the 92 mass killings occurring across the 50 states between 2013 and 2009, only ten occurred in California. Of those ten, the criminalization and dispossession requirements of § 32310 would have had no effect on eight of the shootings, and only marginal good effects had it been in effect at the time of the remaining two shootings. On this evidence, § 32310 is not a reasonable fit. It hardly fits at all. It appears on this record to be a haphazard solution likely to have no effect on an exceedingly rare problem, while at the same time burdening the Constitutional rights of many other California law-abiding responsible citizen-owners of gun magazines holding more than 10 rounds."

In opposition to the motion for summary judgment, the state attempts to bolster the data from the Mayors' survey with a Mother Jones Magazine 36-year survey of mass shootings from 1982 to 2018. *See Oppo. to MSJ* Exhibit 16.[46] The Mother Jones findings

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[46] This Court has observed that the quality of the evidence relied on by the State is remarkably thin. The State's reliance and the State's experts' reliance on compilations such as the Mother Jones Magazine survey is an example. The survey is found in the Attorney General's Opposition to Plaintiff's Motion for Summary Judgment at Exhibit 37. It purports to be a survey of mass shootings. It does not indicate how its data is selected, or assembled, or tested. It is unaccompanied by any declaration as to its accuracy. It is probably not peer-reviewed. It has no widely-

are even less convincing than those from the Mayors' survey. Mother Jones Magazine lists 98 mass shooting events in the last 36 years. This is an average of 2.72 events per year in the entire United States. Of the 98 events over the last 36 years, 17 took place in California. This is an average of one event every two years in the most populous state in the nation.

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accepted reputation for objectivity. While it might be something that an expert considers in forming an admissible opinion, the survey by itself would be inadmissible under the normal rules of evidence.

The State says that the survey "has been cited favorably in numerous cases," citing three decisions. *Id*. at n. 13. Of the three cases listed, however, the survey is not mentioned at all in one case, mentioned only as something an expert relied on in the second case, and mentioned only in passing as "exhaustive" but without analysis in the third. On the other hand, after the Attorney General's brief was filed, the Third Circuit noted issues with the Mother Jones Magazine survey, remarking, "Mother Jones has changed it definition of a mass shooting over time, setting a different minimum number of fatalities or shooters, and may have omitted a significant number of mass shooting incidents." *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 113 (3d Cir. 2018); see also *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Grewal*, No. 317CV10507PGSLHG, 2018 WL 4688345, at *5 (D.N.J. Sept. 28, 2018) (state's expert Lucy Allen admitted that the Mother Jones survey omitted 40% of mass shooting cases).

In another case about prison conditions, a Mother Jones Magazine article was stricken as inadmissible for purposes of summary judgment, which is how such writings would usually be treated. See *Aaron v. Keith*, No. 1:13-CV-02867, 2017 WL 663209, at *2 (W.D. La. Feb. 14, 2017) (striking a Mother Jones article from the record and remarking, "[t]he case law is consistent: newspaper articles are hearsay and do not constitute competent summary judgment evidence.").

According to data from this 36-year survey of mass shootings, California's prohibition on magazines holding more than 10 rounds would have done nothing to keep a shooter from shooting more than 10 rounds. That is because normally the perpetrator brings multiple weapons.[47] The more weapons, the greater the firepower and the greater the potential for casualties. In 14 of the 17 California mass shooting events, multiple weapons were brought. For example,

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[47] For example each of the following incidents involved multiple firearms: (1) Yountville 3/9/18: shotgun and rifle; (2) Rancho Tehema 11/14/17: two illegally modified rifles; (3) San Francisco 6/14/17: two pistols, one with 30-round magazine stolen in Utah (per http://www.foxnews.com/us/2017/06/24/police-ups-shooter-in-san-francisco-armed-with-stolen-guns.html); (4) Fresno 4/18/17: one revolver; (5) San Bernardino 12/2/15: (terrorists) two rifles, two pistols, and a bomb; (6) Santa Barbara 5/23/14: three pistols and two hunting knives; (7) Alturas 2/20/14: two handguns and a butcher knife; (8) Santa Monica 6/7/13: pistol, rifle assembled from parts, bag of magazines, and vest (per http://www.scpr.org/news/2013/06/09/37636/police-look-for-motive-in-santa-monica-shooting-on/); (9) Oakland 4/2/12: one pistol (with four 10-round magazines, per https://www.mercurynews.com/2012/04/04/oakland-university-shooting-one-goh-charged-with-seven-counts-of-murder-may-be-eligible-for-death-penalty/); (10) Seal Beach 10/12/11: two pistols and a revolver; (11) Goleta 1/30/06: one pistol (shooter lived in New Mexico where pistol and 15-round magazine were legally purchased, per https://www.independent.com/news/2013/jan/31/goleta-postal-murders/); (12) Orange 12/18/97: one rifle (actually a rifle, shotgun, and handgun, per LA Times article at http://articles.latimes.com/1997/dec/19/news/mn-172); (13) San Francisco 7/11/93: three pistols; (14) Olivehurst 5/1/92: sawed-off rifle and a shotgun; (15) Stockton 1/17/89: rifle and pistol; (16) Sunnyvale 2/16/88: two pistols, two revolvers, two shotguns, and a rifle; (17) San Ysidro 7/18/84: one pistol, one rifle, and a shotgun.

in the 1988 mass shooting event in Sunnyvale, the shooter brought two pistols, two revolvers, two shotguns, and a bolt action rifle (all obtained legally). No large capacity magazines were used. *See* AG Exh.16, at 736[48]; DX-10 at 517 (Appendix B, Case No.91).

California's large capacity magazine prohibition also had no effect on the three single weapon mass shooting events. In the Fresno event in April 2017, a revolver was used. For those unschooled on firearms, a revolver does not use a magazine of any size. In the next mass shooting event in Oakland in April 2012, the shooter used a pistol with four California-legal 10-round magazines. In the third mass shooting event in Goleta in January 2006, the shooter did use a pistol with a 15-round magazine.[49] However, the shooter resided in New Mexico. She purchased the firearm and its 15-round magazine legally in New Mexico. She then traveled into California to Goleta to the postal facility where she had been employed three years prior. By 2006, California already prohibited a person from bringing into the state a large capacity magazine, but it did not prevent the Goleta tragedy from taking place.

In fact, only three of the 17 California mass shooting events reported in the Mother Jones 36-year survey featured a large capacity magazine used by the

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[48] The Mother Jones survey does not say that large capacity magazines were used.

[49] The Mother Jones survey does not say that large capacity magazines were used, however newspapers reported a 15-round magazine was found. See https://www.independent.com/news/2013/jan/31/goleta-postal-murders/.

shooter. One is the Goleta event described above where the magazine was legally purchased in another state and illegally brought into California. The second event is like the Goleta event. In San Francisco June 2017, a perpetrator used two pistols, both stolen. One pistol had a 30-round magazine.[50] This firearm was reported stolen in Utah and must have been illegally imported into California.[51] The other pistol had been reported stolen in California, but news reports do not mention a large capacity magazine.[52] It bears noting that California's large capacity magazine prohibition did not prevent these mass shootings.

The third event is the Santa Monica June 2013 event where the shooter was armed with multiple firearms and 40 large-capacity magazines. As the Court pointed out in its earlier order, in the Santa Monica incident, the shooter brought multiple firearms. He used an AR-15, a revolver, and 3 zip guns. He reportedly possessed forty 30-round magazines. He killed five victims. The survey notes that the AR-15 and the illegal magazines may have been illegally imported from outside of California. Receiving and importing magazines holding any more than 10 rounds was already unlawful under California law at the time of the Santa Monica tragedy. In that instance, criminalizing possession of magazines holding any more than 10 rounds likely would not have provided any additional protection from gun

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[50] *See* http://www.foxnews.com/us/2017/06/24/police-ups-shooter-in-san-francisco-armed-with-stolen-guns (last visited Mar. 26, 2019).

[51] *Id.*

[52] *Id.*

violence for citizens or police officers. Nor would it have prevented the crime.

To summarize, the 36-year survey of mass shootings by Mother Jones magazine put forth by the AG as evidence of the State's need for § 32310, undercuts its own argument. The AG's evidence demonstrates that mass shootings in California are rare, and its criminalization of large capacity magazine acquisition and possession has had no effect on reducing the number of shots a perpetrator can fire. The only effect of § 32310 is to make criminals of California's 39 million law-abiding citizens who want to have ready for their self-defense a firearm with more than 10 rounds.

Some would say that this straight up reading and evaluation of the State's main evidence places "too high [an] evidentiary burden for the state.'" *Duncan v. Becerra*, 742 F. App'x 218, 223 (9th Cir. 2018) (dissent). They would say that "the question is not whether the state's evidence satisfies the district court's subjective standard of empiricism." *Id.* These voices would not test the state's evidence. They would not require the same rigor a judge usually employs to test the accuracy and persuasiveness of a party's evidence. Once the state offers any evidence, the evidence would simply be accepted and deemed sufficient to prove the reasonableness of the fit of the regulation for state's experimental solution.

For example, according to this view, the Mayors' survey "easily satisfies" the state's evidentiary burden. *Id.* It can be said that the Mother Jones Magazine survey does meet the very low standard of "relevant." But relevant evidence does not mean

persuasive, substantial, or admissible evidence. That a survey of news articles collected by a biased interest group shows that out of 98 examples, not a single shooter was limited to 10 shots while § 32310 was in effect (or would have been limited to 10 shots if had § 32310 been in effect), is not substantial or persuasive evidence of § 32310's reasonable fit. Certainly, the evidence need not be perfect or overwhelming. But for a statute that trenches on a constitutional right, the state's explanation for such a law needs to have some enduring substance or gravitas, like the Liberty Bell.

Where did this idea come from, the idea that a court is *required* to fully credit evidence only "reasonably believed to be relevant?" *Fyock*, 779 F.3d at 1000. Or the critique that a court errs by employing a "subjective standard of undefined empirical robustness." *Duncan*, 742 F. App'x at 224 (dissent). *Pena v. Lindley*, 898 F.3d 969 (9th Cir. 2018) (*pet'n for cert. filed*) advances this soft approach. "We do not impose an unnecessarily rigid burden of proof." *Id.* at 979. We allow California to rely on any material reasonably believed to be relevant to substantiate its interests." *Id.* "We are weighing a legislative judgment, not evidence in a criminal trial." *Id.* "We should not conflate legislative findings with 'evidence' in the technical sense." *Id.* But, when did we jettison Senator Kennedy's observation and become deferential, if not submissive, to the State when it comes to protecting constitutional rights?

This is federal court. The Attorney General has submitted two unofficial surveys to prove mass shootings are a problem made worse by firearm magazines holding more than 10 rounds. Do the

surveys pass the Federal Rule of Evidence Rule 403 test for relevance? Yes. Are the surveys admissible under Federal Rule of Evidence Rule 802? No. They are double or triple hearsay. No foundation has been laid. No authentication attempted. Are they reliable? No. Are they anything more than a selected compilation of news articles—articles which are themselves inadmissible? No. Are the compilers likely to be biased? Yes.[53]

Where are the actual police investigation reports? The Attorney General, California's top law enforcement officer, has not submitted a single official police report of a shooting. Instead, the Attorney

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[53] The organization that published the Mayors' survey changed its name to Everytown for Gun Safety. Everytown for Gun Safety keeps a running tally of school shootings. A Washington Post piece noted that "Everytown has long inflated its total by including incidents of gunfire that are not really school shootings." The Washington Post identified an example of an Everytown shooting incident. There a 31-year old man committed suicide outside an elementary school that had been closed for seven months. "There were no teachers. There were no students." *See* John Woodward Cox and Steven Rich, *No, There Haven't Been 18 School Shootings in 2018 - That Number is Flat Wrong,* Wash. Post (Feb. 15, 2018) https://www.washingtonpost.com/local/no-there-havent-been-18-school-shooting-in-2018-that-number-is-flat-wrong/2018/02/15/65b6cf72-1264-11e8-8ea1-c1d91fcec3fe_story.html?noredirect=on&utm_term=.4100e2398fa0 (last visited Mar. 26, 2019).

The U.S. Department of Education does no better. It reported nearly 240 school-related shootings in 2015-2016. But NPR did an investigation and could confirm only 11 incidents. *See* Kamenetz, Anya, Arnold, Alexis, and Cardinali, Emily, *The School Shootings That Weren't*, NPR Morning Edition (Aug. 27, 2018), https://www.npr.org/sections/ed/2018/08/27/640323347/the-school-shootings-that-werent (last visited mar. 26, 2019).

General relies on news articles and interest group surveys. Federal Constitutional rights are being subjected to litigation by inference about whether a pistol or a rifle in a news story might have had an ammunition magazine that held more than 10 rounds. This is not conflating legislative findings with evidence in the technical sense. This is simply evaluating the empirical robustness of evidence in the same objective way used every day by judges everywhere. Perhaps this is one more reason why the Second Amendment has been described as "the Rodney Dangerfield of the Bill of Rights." *Mance v. Sessions*, 896 F.3d 390, 396 (5th Cir. 2018) (Willett, J., dissenting). Obeisance to *Heller* and the Second Amendment is offered and then given *Emeritus* status, all while its strength is being sapped from a lack of exercise.

According to *Pena*, "[w]e do not substitute our own policy judgment for that of the legislature," protests the Attorney General. *Pena*, 898 F.3d at 979. "We owe the legislature's findings deference," says the State. *Id.* This case is not about weak-kneed choice between competing policy judgments. Deference in the sphere of pure political policy is understandable. But that is not this case.

This case is about a muscular constitutional right and whether a state can impinge and imprison its citizens for exercising that right. This case is about whether a state objective is possibly important enough to justify the impingement. The problem with according deference to the state legislature in this kind of a case, as in the *Turner Broadcasting* approach, is that it is exactly the approach promoted

by dissenting Justice Breyer and *rejected* by the Supreme Court's majority in *Heller*.[54] Yet, *Turner* deference arguments live on like legal zombies lurching through Second Amendment jurisprudence.

Even with deference, meaningful review is required. "Although we do accord substantial deference to the predictive judgments of the legislature when conducting intermediate scrutiny, the State is not thereby insulated from meaningful judicial review." *Heller v. District of Columbia*, 670 F.3d 1244, 1259 (D.C. Cir. 2011) (quoting *Turner II*, 520 U.S. at 195 & *Turner I*, 512 U.S. at 666) (internal quotations omitted)). Quite the contrary, a court must determine whether the legislature has "based its conclusions upon substantial evidence." *Turner II*, 520 U.S. at 196. Despite whatever deference is owed, the State still bears the burden "affirmatively [to] establish the reasonable fit we require." *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). Simply noting that a study has been offered and experts have opined, is an inadequate application of

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[54] In his dissent, Justice Breyer made the ultimately-rejected deference argument clear: "There is no cause here to depart from the standard set forth in *Turner,* for the District's decision represents the kind of empirically based judgment that legislatures, not courts, are best suited to make. In fact, deference to legislative judgment seems particularly appropriate here, where the judgment has been made by a local legislature, with particular knowledge of local problems and insight into appropriate local solutions. Different localities may seek to solve similar problems in different ways, and a 'city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.'" *District of Columbia v. Heller*, 554 U.S. 570, 704-05 (2008) (Breyer, J., dissenting) (citations omitted).

intermediate scrutiny, even when according deference to the predictive judgment of a legislature. *Turner* itself shows why. There, the Supreme Court extensively analyzed over the course of *twenty pages* the empirical evidence cited by the government, and only then concluded that the government's policy was grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination." *See Turner II*, 520 U.S. at 196-224.

There is another problem with according deference in this case. Strictly put, this case in not solely about legislative judgments because § 32310(c) and (d) are the products of a ballot proposition. No federal court has deferred to the terms of a state ballot proposition where the proposition trenches on a federal constitutional right:

> As one court stated, no court has accorded legislative deference to ballot drafters. Legislatures receive deference because they are better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon complex and dynamic issues. Because the referendum process does not invoke the same type of searching fact finding, a referendum's fact finding does not "justify deference."

Vivid Entm't, LLC v. Fielding, 965 F. Supp. 2d 1113, 1127 (C.D. Cal. 2013), *aff'd*, 774 F.3d 566 (9th Cir. 2014) (citations and internal quotations omitted); *see also California Prolife Council Political Action Comm. v. Scully*, 989 F. Supp. 1282, 1299 (E.D. Cal.1998), *aff'd*, 164 F.3d 1189 (9th Cir. 1999) ("Because the referendum process does not invoke the same type of

searching fact finding, a referendum's fact finding does not justify deference."). The initiative process inherently lacks the indicia of careful debate that would counsel deference. *Carver v. Nixon*, 72 F.3d 633, 645 (8th Cir. 1995) (process of legislative enactment includes deliberation, compromise and amendment, providing substantial reasons for deference that do not exist with respect to ballot measures); *Yniguez v. Arizonans for Official English,* 69 F.3d 920, 945 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 43 (1997) (deference normally accorded legislative findings does not apply with same force when First Amendment rights are at stake; in addition, because measure was a ballot initiative, it was not subjected to extensive hearings or considered legislative analysis before passage); *Daggett v. Webster*, No. 98-223-B-H, 1999 WL 33117158, at *1 (D. Me. May 18, 1999) (no court has given legislative deference to a ballot proposition).

In this case, as in *Scully*, California argues that *Turner Broadcasting* requires deference be given to the predictive judgments embodied in its statute. The *Scully* court rejected the approach. It reasoned persuasively:

> [T]he deference formulation, however, ignores the context of the quotation which requires federal courts to "accord substantial deference to the predictive judgments of Congress." Thus, the deference recognized in *Turner* is the consequence, at least in part, of the constitutional delegation of legislative power to a coordinate branch of government, a factor not present in the instant case. Of

course, this is not to say that the predictive judgments of state legislatures are not entitled to due weight. It would seem odd, however, that this court would be required to give greater deference to the implied predictive judgments of a state's legislation than the state's own courts would. In this regard, California courts accord deference to the predictive judgments of their legislature on a sliding scale, according significant deference to economic judgments, but employing "greater judicial scrutiny" "when an enactment intrudes upon a constitutional right." It is of course true that deference in the federal courts is not simply a function of the separation of powers doctrine. It also rests upon the legislative branch being "better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon . . . complex and dynamic" issues. Once again, given that the statutes at bar are the product of the initiative process, their adoption did not enjoy the fact gathering and evaluation process which in part justifies deference. In any event, the deference federal courts accord legislative predictive judgments "does not mean . . . that they are insulated from meaningful judicial review altogether. On the contrary, we have stressed in First Amendment cases that the deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law.'" Thus, courts are obligated to "assure that, in formulating

> its judgments, Congress has drawn reasonable inferences, based on substantial evidence."

California Prolife Council Political Action Comm, 989 F. Supp. at 1299 (citations omitted). The 2016 amendments to § 32310 were added by ballot measure and are owed no legislative deference by this Court. The remaining part of § 32310 is the product of ordinary legislation. Impinging on a federal constitutional right as it does, it is not insulated from meaningful judicial review.

The legislative deference doctrine fits better where the subject is technical and complicated. One example is the regulation of elections. *See Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 402-03 (2000) ("Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments—at least where that deference does not risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge."). Another is the regulation of public broadcast media. *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 103 (1973) ("That is not to say we 'defer' to the judgment of the Congress and the Commission on a constitutional question, or that we would hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression. The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to

how the other branches of Government have addressed the same problem."). Even in these areas of deference, federal courts do not swallow whole a state's legislative judgment.

> Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Anderson v. Celebrezze, 460 U.S. 780, 789-90 (1983). From broadcasting regulation comes another example of deference. Even so, deference there does not mean merely observant acquiescence when First Amendment rights are concerned. "That Congress' predictive judgments are entitled to substantial deference does not mean, however, that they are insulated from meaningful judicial review altogether. On the contrary, we have stressed in First Amendment cases that the deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law.'" *Sable Communications of Cal., Inc. v. FCC,* 492 U.S. 115, 129 (1989). Threats to

Second Amendment rights ought to be treated with at least the same rigor.

The Attorney General argues that the state "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." This notion was first expressed in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976). The context was a city zoning choice from a different era about where to permit adult theaters. Wrote the Court, "[i]t is not our function to appraise the wisdom of its decision to require adult theaters to be separated rather than concentrated in the same areas." *Id.* "Since what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited" and "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice," the Court accorded the city authority to experiment. *Id.* That is not comparable to the deadly serious question of whether the state may experiment with a low 10-round limit on the number of shots a person may have in her pistol for protection. In any event, should courts be so deferential when the State chooses to experiment with other constitutionally protected rights?

The notion of permitting a city to experiment with zoning decisions about the unwanted secondary effects of adult commercial enterprises, was repeated in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986), and echoed in Jackson v. City and County of San Francisco, 746 F.3d 953, 969 (9th Cir. 2014) (approving a city ban on sales of hollow point ammunition). Jackson was a Second Amendment case

that reasoned that a city prohibition affected "only the sale of hollow-point ammunition within San Francisco, not the use or possession of such bullets" and concluded, "[s]uch a sales prohibition burdens the core right of keeping firearms for self-defense only indirectly, because Jackson is not precluded from using the hollow-point bullets in her home if she purchases such ammunition outside of San Francisco's jurisdiction." The Jackson hollow-point ordinance is far different than California's § 32310. Under § 32310, no person may use a magazine holding more than 10-rounds for self-defense in her home even if she purchases it outside of the state. Instead, she will become a criminal subject to arrest, prosecution, conviction, and incarceration. This kind of government experimentation, the Second Amendment flatly prohibits.

No case has held that intermediate scrutiny would permit a state to impinge even slightly on the Second Amendment right by employing a known failed experiment. Congress tried for a decade the nationwide experiment of prohibiting large capacity magazines. It failed. California has continued the failed experiment for another decade and now suggests that it may continue to do so *ad infinitum* without demonstrating success. That makes no sense.

iv. the important interests of the State

The state has important interests. Public safety. Preventing gun violence. Keeping our police safe. At this level of generality, these interests can justify any law and virtually any restriction. Imagine the crimes that could be solved without the Fourth Amendment.

The state could search for evidence of a crime anywhere on a whim. Without the First Amendment, the state could better police the internet. The state could protect its citizens from child pornography, sex trafficking, and radical terrorists. The state could limit internet use by its law-abiding citizens to, say, 10 hours a day or 10 websites a day. Perhaps it could put an end to Facebook cyberbullying.

The Attorney General articulates four important objectives to justify this new statutory bludgeon. They all swing at reducing "gun violence." The bludgeon swings to knock large capacity magazines out of the hands of criminals. If the bludgeon does not work, then the criminals still clinging to their large capacity magazines will be thrown in jail while the magazines are destroyed as a public nuisance. The problem is the bludgeon indiscriminately hammers all that is in its path. Here, it also hammers magazines out of the hands of long time law-abiding citizens. It hammers the 15—round magazine as well as the 100—round drum. And it throws the law-abiding, self-defending citizen who continues to possess a magazine able to hold more than 10 rounds into the same jail cell as the criminal. Gun violence to carry out crime is horrendous and should be condemned by all and punished harshly. Defensive gun violence may be the only way a law-abiding citizen can avoid becoming a victim. The right to keep and bear arms is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category. *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 783 (2010).

v. an ungainly "fit"

"[T]he next question in our intermediate scrutiny analysis is whether the law is 'narrowly tailored to further that substantial government interest.' . . . As the Supreme Court succinctly noted in a commercial speech case, narrow tailoring requires 'a fit between the legislature's ends and the means chosen to accomplish those ends.'" *Minority Television Project, Inc. v. F.C.C.*, 736 F.3d 1192, 1204 (9th Cir. 2013) (*quoting Bd. of Tr. of the State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989)).

The "fit" of § 32310 is, at best, ungainly and very loose. That is all that it takes to conclude that the statute is unconstitutional. The fit is like that of a father's long raincoat on a little girl for Halloween. The problem of mass shootings is very small. The state's "solution" is a triple extra-large and its untailored drape covers all the law-abiding and responsible of its 39 million citizens. Some of the exceptions make the "fit" even worse. For example, § 32310 makes an exception for retired peace officers, but not for CCW holders or honorably discharged members of the armed forces. There is no evidence that a retired peace officer has better firearms training.[55] And in any event, for whatever training

[55] A similar exception for retired police officers permitting possession and use of otherwise banned assault weapons in California, was declared unconstitutional in *Silveira v. Lockyer*, 312 F.3d 1052, 1091 (9th Cir. 2002) ("We thus can discern no legitimate state interest in permitting retired peace officers to possess and use for their personal pleasure military-style weapons. Rather, the retired officer's exception arbitrarily and unreasonably affords a privilege to one group of individuals that is denied to others, including plaintiffs.").

they receive, does it matter that they are trained to use a 10-round magazine, a 15-round magazine, a 30-round magazine, and if so, what is the difference? The State does not provide any insight. Another example is the exception for movie props. Why in the interest of public safety does the movie industry need to use a genuine large capacity magazine for a prop? Is it too far-fetched to require the Hollywood creators of Mickey Mouse, Jaws, and Star Wars, to use a non-working magazine in place of a genuine large capacity magazine? Most importantly by far, however, is that the cloak of the law needs at least some arm holes to fit. It has none because it ignores the fact that magazines holding more than 10 rounds are commonly possessed by law-abiding, responsible citizens, and it affords no room for these citizens to defend their homes against attack.

A reasonable fit to protect citizens and law enforcement from gun violence and crime, in a state with numerous military bases and service men and service women, would surely permit the honorably discharged member of the U.S. Armed Forces who has lawfully maintained a magazine holding more than 10 rounds for more than twenty years to continue to keep and use his or her magazine. These citizens are perhaps the best among us. They have volunteered to serve and have served and sacrificed to protect our country. They have been specially trained to expertly use firearms in a conflict. They have proven their good citizenship by years of lawfully keeping firearms as civilians. What possibly better citizen candidates to protect the public against violent gun-toting criminals.

Similarly, a reasonable fit would surely make an exception for a Department of Justice-vetted, privately-trained, citizen to whom the local sheriff has granted a permit to carry a concealed weapon, and who owns a weapon with a magazine holding more than 10 rounds. California's statute does not except such proven, law-abiding, trustworthy, gun-owning individuals. Quite the opposite. Under the statute, all these individuals will be subject to criminal prosecution, should they not dispossess themselves of magazines holding more than 10 rounds.

Ten years of a federal ban on large-capacity magazines did not stop mass shootings nationally. Twenty years of a California ban on large capacity magazines have not stopped mass shootings in California. Section 32310 is a failed policy experiment that has not achieved its goal. But it has daily trenched on the federal Constitutional right of self-defense for millions of its citizens. On the full record presented by the Attorney General, and evidence upon which there is no genuine issue, whatever the fit might be, it is not a reasonable fit.

vi. irony

Perhaps the irony of § 32310 escapes notice. The reason for the adoption of the Second Amendment was to protect the citizens of the new nation from the power of an oppressive state. The anti-federalists were worried about the risk of oppression by a standing army. The colonies had witnessed the standing army of England marching through Lexington to Concord, Massachusetts, on a mission to seize the arms and gunpowder of the militia and the Minutemen—an attack that ignited the Revolutionary war. With

Colonists still hurting from the wounds of war, the Second Amendment guaranteed the rights of new American citizens to protect themselves from oppressors foreign and domestic. So, now it is ironic that the State whittles away at the right of its citizens to defend themselves from the possible oppression of their State.

vii. turning the Constitution upside down

In the year 2000, California started its "experiment" in banning magazines holding more than 10-rounds. The statute included a grandfather clause permitting lawful owners of larger magazines to keep them. *See Senate Committee Rpt (Perata) SB 23 (Mar. 1999)*, ("The purpose of this bill is to make all but the possession of 'large-capacity magazines' a crime punishable as an alternative misdemeanor/felony ('wobbler')"; "The bill would make it a crime to do anything with detachable large capacity magazines after January 1, 2000—except possess and personally use them—punishable as a misdemeanor/felony."; "One could still possess those magazines after January 1, 2000.").[56] Relying at least in part on the State's representation, law-abiding citizens did not object. Time passed. Now, these still law-abiding owners of larger magazines are told that the grandfather clause is a dangerous "loophole" that needs closing. Section 2.12 of Proposition 63 declared, "Today, California law prohibits the manufacture, importation and sale of military-style, large capacity

[56] http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml (last visited March 12, 2019).

ammunition magazines, but does not prohibit the general public from possessing them. *We should close that loophole.* No one except trained law enforcement should be able to possess these dangerous ammunition magazines." (Emphasis added.) Plaintiffs who have kept their own larger capacity magazines since 1999, and now face criminal sanctions for continuing to possess them, no doubt feel they have been misled or tricked by their lawmakers.

The Attorney General explains that the grandfathering provision made the prior version of § 32310 very difficult to enforce. Because large capacity magazines lack identifying marks, law enforcement officers are not able to tell the difference between grandfathered magazines and more recently smuggled, or manufactured, illegal magazines.[57] Consequently, explains the Attorney General, "the possession loophole in Section 32310 undermined existing LCM restrictions." Def.'s Oppo. to Ps' MSJ, at 7. In an analogous First Amendment case, the Supreme Court called this approach turning the Constitution upside down. The Court explained:

> We confronted a similar issue in *Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002), in which the Government argued that virtual images of child pornography were difficult to

[57] California could have addressed this concern by requiring a serial number on manufactured or imported large capacity magazines, as did the federal law. *See e.g.,* 27 C.F.R. § 478.92(c)(1) ("Each person who manufactures or imports any large capacity ammunition feeding device manufactured after September 13, 1994, shall legibly identify each such device with a serial number.").

> distinguish from real images. The Government's solution was "to prohibit both kinds of images." We rejected the argument that "protected speech may be banned as a means to ban unprotected speech," concluding that it "turns the First Amendment upside down." As we explained: "The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse."

Federal Election Comm'n v. Wisconsin Right to Life, Inc., 551 U.S. 449, 474-75 (2007) (finding issues advocacy may not be suppressed even though it is sometimes difficult to distinguish it from advocacy for the election or defeat of a candidate which may be regulated). The analog is that the State may not now ban lawfully-kept large capacity magazines owned since 1999 as a means to ban large capacity magazines unlawfully manufactured or imported after January 1, 2000. Lawful arms do not become unprotected merely because they resemble unlawful arms. "The Government's proposed prophylaxis—to protect against the violations of the few, we must burden the constitutional rights of the many—turns the Second Amendment on its head. Our Founders crafted a Constitution to promote the liberty of the individual, not the convenience of the Government." *Mance v. Sessions*, 896 F.3d 390, 405 (5th Cir. 2018) (Ho, J., dissenting from denial of rehearing en banc), *pet'n for cert. filed* (Nov. 21, 2018).

viii. other arguments

(1) uniquely dangerous?

The State argues that magazines able to hold more than 10 rounds are uniquely dangerous because they enable a shooter to fire more rounds in a given period, resulting in more shots fired, more victims wounded, more wounds per victim, and more fatalities. Actually, many larger capacity magazines are not uniquely dangerous because they are not much larger. For example, a 12 or 15-round magazine is commonly owned and only slightly larger than the permitted 10-round magazines and enables a shooter to fire slightly more rounds, resulting only sometimes in slightly more rounds fired, or slightly more victims wounded, or slightly more wounds per victim, or slightly more fatalities. Conversely, a 12 or 15-round magazine may be the slight, but saving, difference needed for an overwhelmed homeowner trying to protect herself from a group of attacking invaders. The State may be correct that a 100-round magazine is uniquely dangerous.

The State relies on expert witness, Professor Louis Klarevas. Professor Klarevas says that banning large capacity magazines will reduce violence and force shooters to take a critical pause. *See* DX-3. However, in a piece by Professor Klarevas dated 2011, he offers that the Tucson shooting would have likely still happened with a ban on high capacity magazines. He wrote, "But, even if . . . the federal government were to ban extended clips, the sad fact is that the Tucson shooting likely still would have happened . . . . Moreover, even if Loughner showed up with a six-bullet revolver as opposed to a 30-round Glock, he

likely still would have shot people. What's more, a person set on inflicting mass casualties will get around any clip prohibitions by having additional clips on his person (as Loughner did anyway) or by carrying more than one fully loaded weapon."[58]

(2) Kolbe v. Hogan

The State rests much of its argument on the decision in *Kolbe v. Hogan*, 849 F.3d 114, 137 (4th Cir. 2017) (en banc), *cert. denied,* 138 S.Ct. 469 (2017). The State cites *Kolbe's* observation that large capacity magazines enable a shooter to hit "multiple human targets very rapidly" and "contribute to the unique function of any assault weapon to deliver extraordinary firepower." Considering this, *Kolbe* found that assault weapons and large capacity magazines are military weapons, and that military weapons are not protected by the Second Amendment. It is interesting to note, that the Maryland statute at issue in that case did not ban the possession of a large capacity magazine. *Id.* at 123 ("The [Firearm Safety Act] does not ban the possession of a large-capacity magazine.").

Kolbe concluded that large capacity magazines were beyond the protection of the Second Amendment. *Id.* at 137. The court reached that conclusion based on the thought that such magazines are "most useful" in military service. *Id*. That large capacity magazines are useful in military service, there is no doubt. But the fact that they may be useful, or even "most useful," for

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[58] Klarevas, Louis, *Closing the Gap*, The New Republic (Jan. 13, 2011), https://newrepublic.com/article/81410/us-gun-law-reform-tucson (las visited May 1, 2018).

military purposes does not nullify their usefulness for law-abiding responsible citizens. It is the fact that they are commonly-possessed by these citizens for lawful purposes that places them directly beneath the umbrella of the Second Amendment. *Kolbe*'s decision that large capacity magazines are outside the ambit of the Second Amendment is an outlier and unpersuasive. Beyond this, this Court is unpersuaded by *Kolbe*'s interpretation of *Miller* finding that weapons most useful for military service are not protected. The dissenting *Kolbe* judges persuasively pointed out that the approach turns Supreme Court precedent upside down. *Id.* at 156-57 (Traxler, Niemeyer, Shedd, and Agee, Js., dissenting) ("Under [that] analysis, a settler's musket, the only weapon he would likely own and bring to militia service, would be most useful in military service—undoubtedly a weapon of war—and therefore not protected by the Second Amendment. This analysis turns *Heller* on its head.").

(3) Dr. Christopher S. Koper

The State relies on an expert, Dr. Christopher S. Koper.[59] Dr. Koper, in turn, relies in part on an

[59] The Attorney General relies on expert reports of Christopher S. Koper, Lucy Allen, John J. Donohue, Louis Klarevas, and Daniel W. Webster. Each of the reports lacks an authenticating declaration. Under Rule 56(c)(4), "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Each of these expert reports fail to comply in several respects. First, the reports are not signed under penalty of perjury. Second, no person certifies that the statements are true and correct. Third, none of the reports are accompanied by

analysis performed by a graduate student. DX-4 at 131. The graduate student, in turn, relies on a collection of data by Mother Jones Magazine from 1982 through 2012. *Id.* The resulting master's thesis is unpublished and unavailable. *Id.* at n.12. Dr. Koper also relies on studies in localities outside of California from the 1990s for which he notes that the "findings may not generalize well to other locations and the current timeframe." *Id.* at n. 14. He describes some of this evidence as "tentative." *Id.* at 133. Dr. Koper concedes that he knows of no studies on the effects on gun violence of California's ban on assault weapons in 1989 and the ban on larger magazines in 2000. *Id.* at n. 15. He notes that "it is difficult to assess trends in LCM use because of limited information." *Id.* at 137. Specifically, Dr. Koper notes the paucity of solid data on the use of large capacity magazines. He explains,

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any separate sworn declaration, an alternative mechanism that courts have found to satisfy Rule 56(c)'s functional concerns. *See, e.g.*, *Am. Federation of Musicians of United States and Canada v. Paramount Pictures Corp.*, 2017 WL 4290742 (9th Cir. Sep. 10, 2018) (finding an unsworn expert report accompanied by the expert's sworn declaration satisfied the functional concerns behind Rule 56(c)(4)).

The Court has reviewed other courts' decisions on similar facts and concludes that these unsworn expert reports do not qualify for an exception, particularly because of those courts that accepted unsworn expert reports the reports otherwise satisfied Rule 56(c)'s requirements. For example, in *Single Chip Systems Corp. v. Intermec IP Corp.*, 2006 WL 4660129 (S.D. Cal. Nov. 6, 2006), the district court admitted unsworn expert reports where the reports stated in their introductions "that the contents were made on personal knowledge, that the facts would be admissible in evidence, and that the affiants [we]re competent to testify to the information contained herein." *Id.* at *6.

"[a]ssessing trends in LCM use is much more difficult because there was, and is, no national data source on crimes with LCMs, and few local jurisdictions maintain this sort of information." *Id.* at 139. He notes, "there is little evidence on how state LCM bans affect the availability and use of LCMs over time." *Id.* at n. 29. He states, "[p]erhaps most importantly, to the best of my knowledge, there have not been any studies examining the effects of LCM laws that ban LCMs without grandfathering, as done by the new California statute. Hence, these studies have limited value in assessing the potential effectiveness of California's new law." *Id.* Finally, Dr. Koper acknowledges that while he does have an opinion, it is *not* based on a study of § 32310. He explains, "I have not undertaken any study or analysis of this law." *Id.* at 146.

(4) Daniel W. Webster

The State also relies on the expert report of Daniel W. Webster, a professor of health policy and management. *See* DX-18 at 775. Professor Webster also has an opinion, but foundational data is vaporous. For example, Webster notes that, "[u]nfortunately, data to more definitively determine the connections between ammunition capacity and gun violence outcomes—the number of shots fired, the rate of fire, the number of victims, the number of wounds per victims, lethality of woundings—have not been collected in any population." *Id.* at 780-81. For his own analysis, Webster relies, in part, on Dr. Koper's re-analysis, of his graduate student's analysis, of Mother Jones Magazine's collection of shooting incidents. *Id.* at 780 ("Similarly, Professor Christopher Koper's re-analysis of his student's data from Mother Jones

magazine's study of public mass murders with firearm. . . ."). Webster also acknowledges the paucity of data-based analysis regarding mass shootings. He admits, "[a]lthough no formal, sophisticated analyses of the data on mass shootings in public places by lone shooters for the period 1982-2012 collected by Mother Jones magazine has been performed to my knowledge, a temporal pattern can be discerned that is consistent with a hypothesized protective effect of the federal assault weapon and LCM ban and a harmful effect of the expiration of that ban." *Id.* at 787-88. He also says, "[t]o date, there are no studies that have examined separately the effects of an assault weapons ban, on the one hand, and a LCM ban, on the other hand . . . ." *Id.* at 790. Webster opines that a magazine limit lower than 10 rounds could be justified. *Id.* at 791.

(5) John J. Donohue

The State also relies on the expert report of John J. Donohue, a professor of law at Stanford Law School. *See* DX-2. According to his report in this case, he also prepared an expert report in the *Fyock* case. *Id.* at ¶ 6. Some of his observations should be discounted. Professor Donohue reports that national surveys "consistently find a persistent decline in household gun ownership," describing a 2013 report from the Pew Research Center. *Id.* at ¶ 14 and n.5. He describes this as reliable social science data. *Id.* at ¶ 15. The Court reviewed the Pew Research piece he cited. The first sentence notes the absence of definitive data, cautioning that, "[t]here is no definitive data source from the government or elsewhere" on gun ownership

rates.[60] It says that surveys provide conflicting results. In the paragraph directly following the portion quoted in Professor Donohue's expert report, the Pew Research report describes a Gallup Organization survey. That survey concludes not that there has been a persistent decline, but rather that the gun ownership rate of 43% is "the same as it was 40 years earlier."[61]

Professor Donohue also opines that private individuals, unlike police officers, "only need to scare off criminals (or hold them off until the police arrive)." *Id.* at ¶ 21. This is obviously a generalization. The generalization would not have been true for Susan Gonzalez or the mother of twins whose assailants were not scared off despite each victim emptying her gun. *See* n.2 & 4, *supra*. Instead of "holding them off till the police arrived," the only assailants remaining at the scene when the police arrived in any of the three incidents described above was a fatally-wounded assailant. Professor Donohue again generalizes in his conclusion opining that a 10-round magazine "is sufficient" and higher capacity magazines are "not required" for defending one's home. Dx-2 at 9. Again, generalizations like these are no more than generalizations, and personal, not expert, opinions. Yet, for such an important context as the defense of self and loved ones, generalizations are dangerous.

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[60] Pew Research Center, *Why Own a Gun? Protection is Now Top Reason, Section 3: Gun Ownership trends and Demographics* (Mar. 12, 2013) http://www.people-press.org/2013/03/12/section-3-gun-ownership-trends-and-demographics (last visited Apr. 30, 2018), at 1.

[61] *Id.* at 2.

Relying on generalizations like these may lead to a thousand underreported tragedies for law-abiding citizen victims who were supposed to need only 2.2 rounds and no more than 10 rounds to scare off criminal assailants.

(6) Carlisle Moody

The State provides the deposition testimony of Carlisle Moody, a professor, who opines that, "[f]irearms fitted with large capacity magazines can be used to cause death and injury in public shooting incidents, and can also result in more rounds fired and more homicides in general than similar firearms with smaller magazines," but concedes this conclusion is simply theoretical. DX-7 at 472-73 (Q. And what is the basis for that statement? How did you arrive at that conclusion? A. Just theoretically."). Furthermore, the same can be said of a 10-round magazine versus a 7-round magazine, or a 7-round magazine versus a 2-round Derringer.

(7) Sandy Hook commission

The State relies on the report of a commission reviewing the Sandy Hook shooting. DX-28. However, it misquotes the commission's findings, saying "[d]ue to their lethality, LCMs 'pose a distinct threat to safety in private settings as well as places of assembly." Def. Opposition to Plaintiff's Motion for Summary Judgment at 11. What was reported is, "[t]he Commission found that certain types of ammunition and magazines that were readily available at the time it issued its Interim Report posed a distinct threat to safety in private settings as well as in places of assembly." *Id.* at 1097. The commission goes on to recommend a ban on armor-piercing and

incendiary bullets (a good idea) as well as large-capacity magazines (without specifying size). *Id.*

(8) large magazines not characteristically used for home?

The State asserts that large capacity magazines are not "weapons of the type characteristically used to protect the home," citing *Hightower v. City of Boston*, 693 F.3d 61, 71 (1st Cir. 2012). *Hightower* was unconcerned with magazine size. Instead, it was a regulatory challenge brought by a former law enforcement officer whose permit to carry a revolver was revoked. Any inference to be drawn about magazines from the one-half sentence quoted is dicta. There is no convincing evidence that magazines holding more than 10 rounds are not characteristically used to protect one's home. The large numbers in circulation and human nature suggests otherwise. "The right to bear arms enables one to possess not only the means to defend oneself but also the self-confidence—and psychic comfort—that comes with knowing one could protect oneself if necessary." *Grace v. District of Columbia*, 187 F.Supp.3d 124, 150 (D.D.C. 2016).

(9) large magazines cause collateral damage?

The State argues that where a larger capacity magazine-equipped firearm is used in lawful self-defense, the magazines can cause collateral damage and injury when civilians fire more rounds than necessary, thereby endangering themselves and bystanders. Yet, one of the State's experts, Lucy P. Allen, opines that defenders average only 2.3 shots per

defensive incident and that no one has shot more than 10 rounds in defense.[62] This implies that on average, a magazine able to hold more than 10 rounds in the hands of a citizen firing in self-defense, will not cause any additional collateral damage and will not increase any danger to themselves or bystanders. State expert John J. Donahue goes farther and opines that private individuals only need to "brandish" a gun to scare off criminals. So, the notion that a stray round may penetrate a wall does not translate into any greater risk of bystander injury when a large capacity magazine is used by a defender since it will likely be used only for brandishing or for the average 2.3 shots. Even safer may be a large capacity magazine on an AR-15 type of rifle as it is likely to be more persuasive when brandished at criminal assailants than would a five-shot revolver. It is worth noting that in evaluating the strength of the government's fear of bystander injury, the State has not identified one incident where a bystander was hurt from a citizen's defensive gun use, much less a defensive use of a gun with a high capacity magazine. The worrisome scenario is improbable and hypothetical.

(10) mass shooters prefer large magazines?

The State argues that mass shooters often use large capacity magazines precisely because they inflict maximum damage on as many people as possible. Perhaps this is true. There are no police investigative

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[62] Gary Kleck testified that no one has researched the question of whether defensive gun use requires more than 10 rounds. Nevertheless, violent crimes where victims face multiple offenders are commonplace and it requires more than one round to shoot one attacker. DX-8 at 490.

reports provided recounting a mass shooter's answer to the question: why select a large-capacity magazine. More importantly, many mass shooters do not select large capacity magazines, at all. The two incidents involving mass shootings at public high schools in 2018 are good examples. Instead of a pistol or rifle and large-capacity magazines, a shotgun and a revolver were the firearms selected by the mass shooter during the 2018 incident at Santa Fe High School in Galveston, Texas.[63] Also rejecting large capacity magazines last year, the shooter in the Parkland, Florida, high school mass shooting carried 150 rounds in 10-round magazines.[64]

Further undercutting the government's fear is the opinion of expert Gary Kleck, who says that mass shooters who do choose a high capacity magazine are mistaken in thinking it will enable them to cause more harm. "Right. They can do everything that that mass shooter might want to do if they had 10-round magazines rather than 30-round magazines. There's a difference between hypothetical potential and the reality of mass shootings . . ." DX-8 at 492.

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[63] https://www.usatoday.com/story/news/2018/05/19/texas-school-shooting-timeline-how-30-minute-attack-unfolded/625913002/ (last visited Mar. 13, 2019).

[64] McCardle, Mairead, *Report: Parkland Shooter Did Not Use High-Capacity Magazines*, National Review (Mar. 1, 2018) https://www.nationalreview.com/2018/03/report-parkland-shooter-did-not-use-high-capacity-magazines/ (last visited Mar. 22, 2019) ("The 19-year-old school shooter who killed 17 in Florida on Valentine's Day had 150 rounds of ammunition in 10-round magazines. Larger ones would not fit in his bag, Florida state senator Lauren Book revealed.").

(11) disproportionately used against police?

The State argues that large-capacity magazines are disproportionately used against police, citing an undated, unsigned, document created by an organization named the Violence Policy Center (DX-20 at 799-807). Def. Opposition to Plaintiff's Motion for Summary Judgment, at 18. The document says nothing about violence against police. Elsewhere, the State itself notes that between 2009 and 2013, large-capacity magazine firearms constituted less than half of the guns used in murders against police (41%). See DX-4 at 143. In the FBI's 2016 report on law enforcement officers killed and assaulted, the average number of rounds fired by a criminal at a police officer was 9.1. Since 2007, the average number of rounds fired has never exceeded 10, and for seven of the years the average was under 7.[65] In other words, regardless of the magazine size used by a criminal shooting at a police officer, the average number of rounds fired is 10 or less, suggesting that criminalizing possession of a magazine holding more than 10 will have no effect (on average).

The statistical average of 9.1 rounds fired is consistent with a declaration of Phan Ngo, Director of the Sunnyvale Department of Public Safety. In his declaration, Ngo states that as a Deputy Chief at the San Jose Police Department he oversaw a 2016

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[65] FBI 2016 Law Enforcement Officers Killed & Assaulted, at Table 18, https://ucr.fbi.gov/leoka/2016/tables/table-18.xls (last visited Mar. 19, 2019). Under Rules of Evidence 201(b) courts may take judicial notice of some types of public records, including reports of administrative bodies.

shooting of a police officer. He stated that "the suspect fired 9 rounds at the officers, with an AR pistol type, semi-automatic weapon."[66] Ngo goes on to state that "also recovered at the scene was a Mag Pro 30 clip (large capacity magazine) that still had 21 [] rounds in the clip."[67] Fortunately, none of the officers were injured.

(12) the critical "pause"

The State argues that smaller magazines create a "critical pause" in the shooting of a mass killer. "The prohibition of LCMs helps create a "critical pause" that has been proven to give victims an opportunity to hide, escape, or disable a shooter." Def. Oppo., at 19. This may be the case for attackers. On the other hand, from the perspective of a victim trying to defend her home and family, the time required to re-load a pistol after the tenth shot might be called a "lethal pause," as it typically takes a victim much longer to re-load (if they can do it at all) than a perpetrator planning an attack. In other words, the re-loading "pause" the State seeks in hopes of stopping a mass shooter, also tends to create an even more dangerous time for every victim who must try to defend herself with a small-capacity magazine. The need to re-load and the lengthy pause that comes with banning all but small-capacity magazines is especially unforgiving for victims who are disabled, or who have arthritis, or who

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[66] Declaration of Chief Phan Ngo, in support of Amici Curiae the City and County of San Francisco, the City of Los Angeles, and the City of Sunnyvale, at para. 7, filed Oct. 19, 2017, in *Duncan v. Becerra*, Ninth Circuit Appeal No 17-56081 (docket 29).

[67] *Id.*

are trying to hold a phone in their off-hand while attempting to call for police help. The good that a re-loading pause might do in the extremely rare mass shooting incident is vastly outweighed by the harm visited on manifold law-abiding, citizen-victims who must also pause while under attack. This blanket ban without any tailoring to these types of needs goes to show § 32310's lack of reasonable fit.

(13) *Turner's* requirement

Lastly, the State argues that it is not required to prove that § 32310 will eliminate or reduce gun violence or mass shootings, or that there is scientific consensus as to the optimal way to reduce the dangerous impact of large-capacity magazines, or that § 32310 will not be circumvented by criminals. All that must be shown, it contends, is that the State "has drawn reasonable inferences based on substantial evidence," citing *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994). Def. Oppo., at n. 14.

Even *Turner* does not expect a judicial milquetoast naivete, but a muscular "meaningful review" and independent judgment of the facts. Remember, the *Turner* Court returned the case to the district court because of an inadequate record. *E.g., id.* at 667-68 ("The paucity of evidence . . . is not the only deficiency in this record. Also lacking are any findings concerning the actual effects . . . [and] the record fails to provide any judicial findings concerning the availability and efficacy of 'constitutionally acceptable less restrictive means' of achieving the Government's asserted interests."); *id.* at 673 (Blackmun, J., concurring) ("Justice Kennedy asks the three-judge panel to take additional evidence on such matters as

whether the must-carry provisions really respond to threatened harms to broadcasters [and] whether § § 4—5 'will in fact alleviate these harms in a direct and material way.'"). Congress had set out numerous "unusually detailed statutory findings" within the Act being reviewed. *Id*. at 646. These "legislative facts" were the product of three years of congressional hearings. *Id*. at 632. It was in this unusual context in which the Court said that the predictive judgments of Congress are entitled to substantial deference.

No similar unusually detailed congressional findings or predictive judgments after years of hearings are present in the case of California Penal Code § 32310. On the contrary, the 2016 criminalization and dispossession amendments added in § 32310 (c) and (d) were not the product of legislative action, at all. These were, instead, the product of a complicated state referendum question known as Proposition 63. *Cf. Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 994-95 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), and *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) ("That the majority of California voters supported Proposition 8 is irrelevant, as 'fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.'"). To the extent one could argue that federal courts owe some judicial deference to the judgment of a state legislature (as opposed to deference to a co-equal branch of the U.S. Congress), in passing the longer-standing part of § 32310, the 1999 California legislature was more concerned with defining assault weapons and judged the possession of a large capacity magazine should remain lawful.

(14) *Turner*-style deference rejected in *Heller*

Turner-style deference for Second Amendment review was specifically argued for by Justice Breyer and rejected by the Court in *Heller*. *See e.g., Heller v. D.C.*, 670 F.3d 1244, 1280 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("It is ironic, moreover, that Justice Breyer's dissent explicitly advocated an approach based on *Turner Broadcasting*; that the *Heller* majority flatly rejected that *Turner Broadcasting*-based approach; and that the majority opinion here nonetheless turns around and relies expressly and repeatedly on *Turner Broadcasting*.").

(15) even *Turner* requires tailoring for a reasonable fit

Even under *Turner*'s intermediate scrutiny, a reasonable fit requires tailoring, and a broad prophylactic ban on acquisition or possession of all magazines holding more than 10 rounds for all ordinary, law-biding, responsible citizens is not tailored at all. *Turner*, 512 U.S. at 682-83 (O'Connor, J., concurring in part and dissenting in part) ("A regulation is not 'narrowly tailored'—even under the more lenient [standard applicable to content-neutral restrictions]—where . . . a substantial portion of the burden on speech does not serve to advance [the State's content-neutral] goals. . . . "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone . . . ."). The State notes that Vermont enacted a recent prohibition on magazines holding more than 10 rounds for rifles or 15 rounds for a handgun. Def.'s

Response to Plaintiffs' Supp. Brief, at n. 2. Vermont's regulation evidences more tailoring than does § 32310 and makes room for a home owner to have 15 rounds (50% more) for defense.

(16) "10" appears to be an arbitrary number

So, how did California arrive at the notion that any firearm magazine size greater than a 10-round magazine is unacceptable? It appears to be an arbitrary judgment. The Attorney General says it is not. Def's Response to Plaintiffs' Supp. Brief, at 9. He notes that other large-capacity magazine bans and the former federal ban settled on 10 rounds. The State does not, however, say why California (or any jurisdiction, for that matter) place the limit at 10. One author surmised from a comparison, that California lawmakers simply "borrowed the large-capacity magazine ban from the federal moratorium." Stricker, Brent W., *Gun Control 2000: Reducing the Firepower*, 31 McGeorge L. Rev. 293, 301. The State notes a 10-round limit was included in its firing-capacity legislation prohibiting machine guns in 1933. The significance of 10 rounds, however, is not addressed. Larger magazines were not commonplace in 1933. By 1999, when California first banned the sale, manufacturing, and importation of magazines able to hold more than 10-rounds (in former § 12020(a)(2)), larger magazines numbered in the millions.

While the State's more recent legislation imposing a ban on magazines able to hold more than 10 rounds (§ 32310(b), 2016 Cal. Legis. Serv. Ch. 58 (S.B. 1446) (WEST)) was superseded by Proposition 63's passage, the Attorney General does not identify any of the

legislative discussions bearing on the 10-round limit. The 1994 federal ban with its 10-round limit lapsed in 2004. Federal law has no limit on permissible magazine size. In U.S. Sentencing Guidelines for firearm offenses (§ 2K2.1(a)) and the comments thereunder, a "large capacity magazine" is defined for purposes of sentencing as a magazine "that could accept more than 15 rounds of ammunition." *See* § 2K2.1 comment n.2 (2018); *United States v. Cherry*, 855 F.3d 813, 815 (7th Cir. 2017) (describing same); *United States v. Henry*, 819 F.3d 856, 867 (6th Cir. 2016) (same).

The State argues only that it is not required to explain why it has selected 10 as the number. Def's Response to Plaintiffs' Supp. Brief, at 9-10. Perhaps not. But the 10-round limit appears to be arbitrary. A reasoned explanation or a considered judgment would tend to demonstrate why the "fit" of a total ban on magazines larger than 10-rounds is reasonable or how the ban is narrowly tailored. Perhaps it is an unintentional legacy from the 1930s when generally larger detachable magazines were rare, our military's popular WW I Colt .45 M1911 pistol held a magazine holding 7-8 rounds, and otherwise 5 or 6 shot revolvers ruled. Surly, *Turner* deference does not mean a federal court is relegated to rubber-stamping a broad-based arbitrary incursion on a constitutional right founded on speculative line-drawing and without any sign of tailoring for fit.

(17) Fyock v. Sunnyvale

So, what about the *Fyock* decision. *Fyock*, like the Ninth Circuit decision in this case, are both appeals from preliminary injunction requests. Preliminary

injunction appeals are reviewed narrowly. *Compare Fyock,* 779 F.3d at 995 ("As we have previously noted, there are limitations to interlocutory appeals of this nature given the narrow scope of our review: In some cases, parties appeal orders granting or denying motions for preliminary injunctions in order to ascertain the views of the appellate court on the merits of the litigation, but . . . due to the limited scope of our review . . . our disposition of appeals from most preliminary injunctions may provide little guidance as to the appropriate disposition on the merits."), *with Duncan v. Becerra*, 742 F. App'x 218, 220 (9th Cir. 2018) ("We do not 'determine the ultimate merits,' but rather 'determine only whether the district court correctly distilled the applicable rules of law and exercised permissible discretion in applying those rules to the facts at hand.'"). Preliminary injunction motions typically present complicated legal and factual questions on an abbreviated time frame. Orders are not final. Appellate review does not go to the merits but to whether the district court properly exercised judicial discretion or made a clear error of judgment. *DISH Network Corp. v. F.C.C.*, 653 F.3d 771, 776 (9th Cir. 2011) ("The grant or denial of a preliminary injunction lies within the discretion of the district court and we may reverse a district court only where it relied on an erroneous legal premise or abused its discretion.").

A preliminary injunction decision is a fact-bound decision. *Fyock* concerned a city ordinance covering only residents of Sunnyvale, California. This case concerns a state-wide statute. The Sunnyvale ordinance carved out exceptions for nine categories, including category eight ("Any person lawfully in

possession of a firearm that the person obtained prior to January 1, 2000, if no magazine that holds fewer than 10 rounds of ammunition is compatible with the firearm and the person possesses the large-capacity magazine solely for use with that firearm."). *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1272 (N.D. Cal. 2014). The state statute § 32310 includes no exception like Sunnyvale's category eight. The Sunnyvale ordinance required non-exempt persons to, *inter alia*, remove their large capacity magazines from the City of Sunnyvale. *Id.* The state statute § 32310 requires non-exempt persons to remove their large-capacity magazines from California. The City of Sunnyvale is a small, populous, municipality with uniquely-trained public safety officers. The State of California is one of the largest states in the Union and includes everything from areas where populations are small and far from emergency services to the second largest city in the United States.

The district court in *Fyock*, found that " magazines having a capacity to accept more than ten rounds are in common use, and are therefore not dangerous and unusual." *Fyock,* 25 F. Supp. 3d 1267 at 1275. The district court found that it does not matter whether large capacity magazines are commonly used for self-defense explaining, "Second Amendment rights do not depend on how often the magazines are used. Indeed, the standard is whether the prohibited magazines are 'typically *possessed* by law-abiding citizens for lawful purposes,' not whether the magazines are often *used* for self-defense." *Id.* at 1276. The district court found that if few people require a particular firearm for self-defense, that should be a cause for celebration, not a reason to place

large capacity magazines beyond Second Amendment protection. *Id.* ("The fact that few people 'will require a particular firearm to effectively defend themselves,'. . . should be celebrated, and not seen as a reason to except magazines having a capacity to accept more than ten rounds from Second Amendment protection."). The district court found that the large capacity magazines qualify as "arms" for purposes of the Second Amendment. *Id.* The district court concluded that the Sunnyvale ordinance banned conduct that is protected by the Second Amendment. *Id.* at 1277. These are all points with which this Court agrees.

The divergence of opinion comes with the selection of the level of heightened scrutiny required. Like this Court's conclusion about § 32310, the district court in *Fyock* found that the Sunnyvale ordinance burdens conduct near the core of the Second Amendment right. *Id.* at 1278. But the district court in *Fyock* judged the burden of the Sunnyvale ordinance to be minor and applied intermediate scrutiny and found the fit of the ordinance to be reasonable. *Id.* at 1278-79. This Court, on the other hand, has considered the burden of the state statute on all the citizens of the state, finds the burden to be severe, and even under intermediate scrutiny, a reasonable fit to be lacking. These are ultimately informed judgment calls. The district court's *Fyock* judgment was preliminary. This Court's judgment is no longer preliminary. If this judgment is appealed, the Court of Appeals will have the opportunity to rule *on the merits*, for the first time.

California Penal Code § 32310 unconstitutionally impinges on the Second Amendment rights of law-abiding responsible ordinary citizens who would like to acquire and possess for lawful purposes firearm magazines able to hold more than 10 rounds. Section 32310 is a complete ban that fails the simple Supreme Court test of *Heller*. Alternatively, § 32310 strikes at the core of the Second Amendment right of self-defense and severely burdens that right, triggering strict scrutiny. Because the statute imposes a broad prophylactic ban that is the opposite of a regulation using the least restrictive means to achieve a compelling interest, § 32310 fails constitutional muster under the test of strict scrutiny. Finally, even under the modest and forgiving standard of intermediate scrutiny, § 32310 is a poor fit to accomplish the State's important interests. It hardly fits at all. Therefore, this statute fails intermediate scrutiny. While, it may be possible to fashion a restriction on uncommonly large magazines that is tailored to the manifold local contexts present across the entire state so as to achieve a reasonable fit, here, the bottom line is clear. The State has not carried its burden to justify the restrictions on firearm magazines protected by the Second Amendment based on the undisputed material facts in evidence. That is not to be lamented. It ought to provide re-assurance. To borrow a phrase, "[j]ust as it is the 'proudest boast of our free speech jurisprudence' that we protect speech that we hate, [and] . . . the proudest boast of our free exercise jurisprudence that we protect religious beliefs that we find offensive," it is the proudest boast of our Second Amendment jurisprudence that we protect a citizen's right to keep

and bear arms that are dangerous and formidable. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719, 1737 (2018).

III. THE TAKINGS CLAUSE

Plaintiffs also contend that the State's confiscatory and retrospective ban on the possession of magazines over ten rounds without government compensation constitutes an unconstitutional taking. "For centuries, the primary meaning of "keep" has been "to retain possession of." There is only one straightforward interpretation of "keep" in the Second Amendment, and that is that "the people" have the right to retain possession of arms, subject to reasonable regulation and restrictions." *Silveira v. Lockyer*, 328 F.3d 567, 573 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of rehearing en banc). The Attorney General asserts that, when the government acts pursuant to its police power to protect the safety, health, and general welfare of the public, a prohibition on possession of property declared to be a public nuisance is not a physical taking. *See* Oppo. at 22, (citing *Chicago, B. & Q. Railway Co. v. Illinois*, 200 U.S. 561, 593-594 (1906) and *Akins v. United States,* 82 Fed. Cl. 619, 622 (2008)). The Attorney General then cites a few courts that have rejected Takings Clause challenges to laws banning the possession of dangerous weapons. *See* Oppo. at 23 (citing *Akins*, 82 Fed. Cl. at 623-24 (restrictions on manufacture and sale of machine guns not a taking) and *Gun South, Inc. v. Brady*, 877 F.2d 858, 869 (11th Cir. 1989) (temporary suspension on importation of assault weapons not a taking)).

California has deemed large-capacity magazines to be a nuisance. *See* Cal. Pen. Code § 32390. That designation is dubious. The Supreme Court recognized a decade before *Heller*, "[g]uns in general are not 'deleterious devices or products or obnoxious waste materials.'" *Staples v. United States*, 511 U.S. 600, 610 (1994) (citation omitted). Casting a common sized firearm magazine able to hold more than 10 rounds as a nuisance, as a way around the Second Amendment, is like banning a book as a nuisance, as a way around the First Amendment. It conjures up images from Ray Bradbury's novel, *Fahrenheit 451*, of firemen setting books on fire, or in this case policemen setting magazines on fire.

Plaintiffs remonstrate that the law's forced, uncompensated, physical dispossession of magazines holding more than 10 rounds as an exercise of its "police power" cannot be defended. Supreme Court precedent casts doubt on the State's contrary theory that an exercise of the police power can never constitute a physical taking. In *Loretto*, the Supreme Court held that a law requiring physical occupation of private property was both "within the State's police power" *and* an unconstitutional physical taking. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Court explained that whether a law amounts to a physical taking is "a separate question" from whether the state has the police power to enact the law. *Id.* at 425-26 ("It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid. We conclude that a permanent physical occupation authorized by government is a taking without regard to the public

interests that it may serve."). In a similar vein, the Supreme Court holds that a law enacted pursuant to the state's "police powers to enjoin a property owner from activities akin to public nuisances" is not immune from scrutiny under the regulatory takings doctrine. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1020-27 (1992). The Court reasoned that it was true "*[a] fortiori*" that the "legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated." *Id.* at 1026.

Recently, the Supreme Court summarized some of the fundamental principles of takings law in *Murr v. Wisconsin*, 137 S.Ct. 1933 (2017). "The Takings Clause of the Fifth Amendment provides that private property shall not be taken for public use, without just compensation. The Clause is made applicable to the States through the Fourteenth Amendment. As this Court has recognized, the plain language of the Takings Clause requires the payment of compensation whenever the government acquires private property for a public purpose, but it does not address in specific terms the imposition of regulatory burdens on private property." *Id.* at 1942 (quotations and citations omitted). *Murr* notes that almost a century ago, the Court held that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

Takings jurisprudence is flexible. There are however, two guides set out by *Murr* for detecting when government regulation is so burdensome that it constitutes a taking. "First, with certain qualifications

a regulation which denies all economically beneficial or productive use of land will require compensation under the Takings Clause. Second, when a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on a complex of factors, including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Murr*, 137 S.Ct. at 1938 (citations and quotation marks omitted). "[A] physical *appropriation* of property g[ives] rise to a *per se* taking, without regard to other factors." *Horne v. Dep't of Agric.*, 135 S.Ct. 2419, 2427 (2015).

The dispossession requirement of § 32310(c) & (d) imposes a rare hybrid taking. Subsection (d)(3) is a type of physical appropriation of property in that it forces owners of large capacity magazines to "surrender" them to a law enforcement agency "for destruction." Thus, (d)(3) forces a *per se* taking requiring just compensation. But there are two other choices. Subsection (d)(2) forces the owner to sell his magazines to a firearms dealer. It is a fair guess that the fair market value of a large capacity magazine I the shadow of a statute that criminalizes commerce and possession in the State of California, will be near zero. Of course, the parties spend little time debating the future fair market value for to-be-relinquished magazines. Subsection (d)(1) forces the owner to "remove" their large capacity magazines "from the state," without specifying a method or supplying a place. This choice obviously requires a place to which the magazines may be lawfully removed. In other

words, (d)(1) relies on other states, in contrast to California, which permit importation and ownership of large capacity magazines. With the typical retail cost of a magazine running between $20 and $50, the associated costs of removal and storage and retrieval may render the process costlier than the fair market value (if there is any) of the magazine itself. Whatever stick of ownership is left in the magazine-owner's "bundle of sticks," it is the short stick.

Here, California will deprive Plaintiffs not just of the *use* of their property, but of *possession*, one of the most essential sticks in the bundle of property rights. Of course, a taking of one stick is not necessarily a taking of the whole bundle. *Murr*, 137 S.Ct. at 1952 (Roberts, C.J., dissenting) ("Where an owner possesses a full 'bundle' of property rights, the destruction of one strand of the bundle is not a taking, because the aggregate must be viewed in its entirety."). Nevertheless, whatever expectations people may have regarding property regulations, they "do not expect their property, real or personal, to be actually occupied or taken away." *Horne*, 135 S.Ct. at 2427. Thus, whatever might be the State's authority to ban the sale or use of magazines over 10 rounds, the Takings Clause prevents it from compelling the physical dispossession of such lawfully-acquired private property without just compensation.

IV. CONCLUSION

Magazines holding more than 10 rounds are "arms." California Penal Code Section 32310, as amended by Proposition 63, burdens the core of the Second Amendment by criminalizing the acquisition and possession of these magazines that are commonly

held by law-abiding citizens for defense of self, home, and state. The regulation is neither presumptively legal nor longstanding. The statute hits at the center of the Second Amendment and its burden is severe. When the simple test of *Heller* is applied, a test that persons of common intelligence can understand, the statute fails and is an unconstitutional abridgment. It criminalizes the otherwise lawful acquisition and possession of common magazines holding more than 10 rounds—magazines that law-abiding responsible citizens would choose for self-defense at home. It also fails the strict scrutiny test because the statute is not narrowly tailored—it is not tailored at all. Even under the more forgiving test of intermediate scrutiny, the statute fails because it is not a reasonable fit. It is not a reasonable fit because, among other things, it prohibits law-abiding concealed carry weapon permit holders and law-abiding U.S Armed Forces veterans from acquiring magazines and instead forces them to dispossess themselves of lawfully-owned gun magazines that hold more than 10 rounds or suffer criminal penalties. Finally, subsections (c) and (d) of § 32310 impose an unconstitutional taking without compensation upon Plaintiffs and all those who lawfully possess magazines able to hold more than 10 rounds.[68]

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[68] This declaration concerns the current version of § 32310. But similar constitutional defects can be found in the prior iterations of the statute. The Court's declaration does not affect the definition of a large-capacity magazine where it is used in other parts of California's Penal Code to define gun-related crimes and to enhance penalties.

Accordingly, based upon the law and the evidence, upon which there is no genuine issue, and for the reasons stated in this opinion, Plaintiffs' motion for summary judgment is granted.[69] California Penal Code § 32310 is hereby declared to be unconstitutional in its entirety and shall be enjoined.

This decision is a freedom calculus decided long ago by Colonists who cherished individual freedom more than the subservient security of a British ruler. The freedom they fought for was not free of cost then, and it is not free now.

IT IS HEREBY ORDERED that:

1. Defendant Attorney General Xavier Becerra, and his officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with him, and those duly sworn state peace officers and federal law enforcement officers who gain knowledge of this injunction order, or know of the existence of this injunction order, are enjoined from enforcing California Penal Code section 32310.

2. Defendant Becerra shall provide, by personal service or otherwise, actual notice of this order to all law enforcement personnel who are responsible for implementing or enforcing the enjoined statute. The

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[69] The Attorney General asks the Court to take judicial notice of exhibits A through Q which are copies of statutes and ordinances from various jurisdictions. (Dkt. No. 53-1.) The request is granted. The Attorney General objects to various declarations submitted by Plaintiffs. (Dkt. No. 53-13.) Those objections are overruled. Plaintiffs object to various declaration and exhibits submitted by the Attorney General. (Dkt. No. 57-2.) Those objections are overruled.

government shall file a declaration establishing proof of such notice.

DATED: March 29, 2019

[handwritten: signature]
HON. ROGER T. BENITEZ
United States District Judge

Appendix E

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

No. 3:17cv1017-BEN-JLB

VIRGINIA DUNCAN, et al.,

Plaintiffs,

v.

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

Defendant.

Before: BENITEZ, *District Judge.*

Filed: June 29, 2017

ORDER GRANTING PRELIMINARY INJUNCTION

I. INTRODUCTION

On July 1, 2017, any previously law-abiding person in California who still possesses a firearm magazine capable of holding more than 10 rounds will begin their new life of crime. That is because California Penal Code § 32310 was amended last fall by the passage of a California ballot initiative, Proposition 63. With this change, § 32310(c) requires persons who lawfully possess these magazines today

to *dispossess* them or face criminal penalties of up to one year in a county jail and a fine of $100 per magazine, or both.[1] Section 32310(d) provides three

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[1] The full text of § 32310 as amended by Proposition 63 is as follows:

§ 32310. *Prohibition on manufacture, import, sale, gift, loan, purchase, receipt, or possession of large-capacity magazines; punishment*

(a) Except as provided in Article 2 (commencing with Section 32400) of this chapter and in Chapter 1 (commencing with Section 17700) of Division 2 of Title 2, any person in this state who manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, buys, or receives any largecapacity magazine is punishable by imprisonment in a county jail not exceeding one year or imprisonment pursuant to subdivision (h) of Section 1170.

(b) For purposes of this section, "manufacturing" includes both fabricating a magazine and assembling a magazine from a combination of parts, including, but not limited to, the body, spring, follower, and floor plate or end plate, to be a fully functioning largecapacity magazine.

(c) Except as provided in Article 2 (commencing with Section 32400) of this chapter and in Chapter 1 (commencing with Section 17700) of Division 2 of Title 2, commencing July 1, 2017, any person in this state who possesses any large-capacity magazine, regardless of the date the magazine was acquired, is guilty of an infraction punishable by a fine not to exceed one hundred dollars ($100) per large-capacity magazine, or is guilty of a misdemeanor punishable by a fine not to exceed one hundred dollars ($100) per large-capacity magazine, by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.

(d) Any person who may not lawfully possess a large-capacity magazine commencing

July 1, 2017 shall, prior to July 1, 2017:

options for dispossession. First, a person may "remove the large-capacity magazine from the State." § 32310(d)(1). Second, a person may "sell the large-capacity magazine to a licensed firearm dealer." § 32310(d)(2). Third, a person may "surrender the large-capacity magazine to a law enforcement agency for destruction." § 32310(d)(3). Naturally, there are statutory exceptions for some individuals such as active and retired law enforcement officers (§ § 32400, 32405, and § 32406). There are also exceptions for employees of armored vehicle businesses (§ 32435) and for movie and television actors when magazines are used as a prop (§ 32445). While there are other exceptions for licensed firearm dealers, manufacturers, and gunsmiths, there are no exceptions made for members of the Armed Forces, or those honorably discharged or retired. Likewise, there are no exceptions for civilian firearms instructors, concealed weapon permit holders, or families who live far from timely help by local law enforcement agencies and who must be self-reliant for their own defense, defense of their families, or of home and property. Finally, there are no exceptions made for citizens who, should the need ever arise, may be called upon to form a militia for the protection of the state from either foreign or domestic enemies.

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(1) Remove the large-capacity magazine from the state;

(2) Sell the large-capacity magazine to a licensed firearms dealer; or

(3) Surrender the large-capacity magazine to a law enforcement agency for destruction.

A. Complexity

California's gun laws are complicated. *See Peruta v. County of San Diego*, 824 F.3d 919, 925 (9th Cir. 2016) (*en banc*), *cert. denied*, 2017 WL 176580 (June 26, 2017) ("California has a multifaceted statutory scheme regulating firearms."). Proposition 63 adds one more layer of complexity. Perhaps too much complexity. *See id.* at 953 (Callahan, J., dissenting) ("The counties and California have chipped away at the Plaintiffs' right to bear arms by enacting first a concealed weapons licensing scheme that is tantamount to a complete ban on concealed weapons, and then by enacting an open carry ban. Constitutional rights would become meaningless if states could obliterate them by enacting incrementally more burdensome restrictions while arguing that a reviewing court must evaluate each restriction by itself when determining constitutionality."). In California, the State has enacted, over the span of two decades, an incrementally more burdensome web of restrictions on the rights of law-abiding responsible gun owners to buy, borrow, acquire, modify, use, or possess ammunition magazines able to hold more than 10 rounds. The language used, the internally referenced provisions, the interplay among them, and the plethora of other gun regulations, have made the State's magazine laws difficult to understand for all but the most learned experts. *See e.g.*, Cal. Pen. Code § 32310(a) (criminalizing manufacturing, importing, keeping for sale, offering for sale, giving, lending, buying or receiving a large capacity magazine while excepting "as provided in Article 2 (commencing with Section 32400) of this chapter and in Chapter 1 (commencing with Section 17700) of Division 2 of Title

2"); § 32310(b) (defining "manufacturing" as fabricating or assembling a magazine from a combination of parts); § 32415(b) (§ 32310 prohibition on lending does not apply to the loan when it "occurs at a place or location where the possession of the large capacity magazine remains in the accessible vicinity of the person to whom the large capacity magazine is loaned"); § 32406(b) (excepting museums and institutional collections open to the public if securely housed and protected from unauthorized handling); § 32406(f) (excepting a "person lawfully in possession of a firearm that the person obtained prior to January 1, 2000, if no magazine that holds 10 or fewer rounds of ammunition is compatible with that firearm and the person possesses the large-capacity magazine solely for use with the firearm"); § 16470 (defining "large capacity magazine" to include an ammunition feeding device with the capacity to accept more than 10 rounds but not including a feeding device "that has been permanently altered so that it cannot accommodate more than 10 rounds," and a .22 caliber tube feeding device and a tubular magazine that is contained in a lever-action firearm); § 32311 (criminalizing manufacturing, importing, keeping for sale, offering for sale, giving, lending, buying, or receiving "any large capacity magazine conversion kit"); § 32390 (declaring any large capacity magazine to be a nuisance); § 18010 (destroying nuisance large capacity magazines). Too much complexity fails to give fair notice and violates due process. "[A] penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . . consonant alike with ordinary notions of

fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); *see also United States v. Lanier*, 520 U.S. 259, 266 (1997) (quoting *Connally*).

At the preliminary injunction hearing, the attorney for the Attorney General, although well prepared, was not able to describe all of the various exceptions to the dispossession and criminalization components of § 32310. Who could blame her? The California matrix of gun control laws is among the harshest in the nation and are filled with criminal law traps for people of common intelligence who desire to obey the law. Statutes must be sufficiently well-defined so that reasonably intelligent citizens can know what conduct is against the law. The plaintiffs, who are law-abiding responsible residents of California, want to keep pistols and rifles and the magazines that are commonly used with their firearms without running afoul of California's gun control statutes. But these statutes are too complicated to give fair notice.

B. Magazines Able to Hold More than 10 Rounds Are Popular

Ammunition magazines that hold more than 10 rounds are popular. Some estimate that as many as 100,000,000 such magazines are currently owned by citizens of the United States. Under federal law, they may be bought, sold, lent, used, and possessed. However, unlike citizens and residents of 43 other

states, and hundreds if not thousands of local jurisdictions, after June 30, 2017, all law-abiding citizens of California will be deemed criminals *if they simply possess* a lawfully acquired magazine capable of holding more than 10 rounds of ammunition.

C. Plaintiffs

Plaintiffs are a group of California residents who either already own magazines holding more than 10 rounds or who want to own magazines holding more than 10 rounds for their defense of self and state. Plaintiff Richard Lewis is a law-abiding citizen and an honorably discharged 22-year United States Marine Corps veteran. For more than 20 years, Lewis has lawfully possessed and continues to possess large capacity magazines. Plaintiff Patrick Lovette is a law-abiding citizen and an honorably retired 22-year United States Navy veteran. For more than 20 years, Lewis has lawfully possessed and continues to possess large capacity magazines. Plaintiffs allege they lawfully possess large capacity magazines for self-defense and other lawful purposes. Plaintiff California Rifle and Pistol Association, Inc, is a membership organization almost as old as the State of California. The organization represents tens of thousands of its California members.

D. Constitutional Challenge and Motion for Preliminary Injunction

Plaintiffs bring facial and as-applied challenges through 42 U.S.C. § 1983 seeking a declaratory judgment that California Penal Code § 32310 (the ban on magazines holding more than 10 rounds) impermissibly infringes on California citizens' federal constitutional right to keep and bear arms, a right

protected by the Second Amendment to the United States Constitution. By this motion for preliminary injunction, Plaintiffs seek only to maintain the *status quo* until a final determination is made on the merits of their constitutional claims, by temporarily restraining the State from enforcing the dispossession requirement and criminal penalties associated with § 32310 (c) & (d).

E. Two Questions

Ultimately, this case asks two questions. "Does a law-abiding responsible citizen have a right to defend his home from criminals using whatever common magazine size he or she judges best suits the situation? Does that same citizen have a right to keep and bear a common magazine that is useful for service in a militia? Because a final decision on the merits is likely to answer both questions "yes," but a final decision will take too long to offer relief, and because the statute will soon visit irrevocable harm on Plaintiffs and all those similarly situated, a state-wide preliminary injunction is necessary and justified to maintain the *status quo*. Because Plaintiffs have demonstrated on this preliminary record a likelihood of success on the merits, a likelihood of irreparable harm, a balance of equities that tips in their favor, and that an injunction would be in the public interest, a preliminary injunction will issue.

II. ARTICLE III STANDING & RIPENESS

Defendant does not challenge Plaintiffs' Article III standing at this time. Nevertheless, federal courts are obligated to satisfy themselves that a plaintiff has standing and that the case is ripe. *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11 (2004)

(reversing because plaintiff lacked standing). To establish Article III standing, a plaintiff must have: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Town of Chester, N.Y. v. Laroe Estates, Inc.*, __ S.Ct. __, 2017 WL 2407473, at *4 (June 5, 2017) (citations and quotation marks omitted). "The same principle applies when there are multiple plaintiffs. At least one plaintiff must have standing to seek each form of relief requested in the complaint." *Id.* at *5. At a minimum, Plaintiffs Lewis and Lovette have standing to challenge the dispossession requirement and criminalization component of California's large capacity magazine ban and their case is ripe.

Article III standing analysis recognizes that, where threatened action by government is concerned, courts do not require a plaintiff to expose himself to criminal liability before bringing suit. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128- 129 (2007); *Steffel v. Thompson*, 415 U.S. 452 (1974). Under the statute at issue here, merely continuing to possess a magazine able to hold more than 10 rounds may be charged as a criminal misdemeanor. The injury will be immediate and concrete. *See Jackson v. City & County of San Francisco,* 829 F. Supp. 2d 867, 871-872 (N.D. Cal. 2011). Ripeness, however, does require a credible threat of prosecution. That requirement is satisfied here as the Attorney General has not indicated that § 32310 (c) & (d) will not be enforced on July 1, 2017. Moreover, the State has vigorously enforced § 32310

in the past.[2] Therefore, the Article III requirements of standing and ripeness are satisfied.

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[2] *See e.g., People v. Verches*, H041967, slip. op., 2017 WL 1880968, at *1-3 (Cal. Ct. App. May 9, 2017). *Verches* describes the California investigation leading up to a prosecution under the predecessor to § 32310 for *importing a large capacity magazine*:

> "On May 21, 2011, a task force of California law enforcement agents, including special agent Bradley Bautista of the California Department of Justice, Bureau of Firearms, surveilled a gun show in Reno, Nevada. Their objective was to identify suspected California residents who entered Nevada to purchase weapons or accessories that would be illegal in California. Agents observed an individual, later identified as Verches, purchase an upper receiver for an assault rifle and three large-capacity automatic rifle magazines capable of holding 30 rounds of ammunition. They also heard Verches ask the vendor if he had a "lower" receiver so he could build an assault rifle. Agent Bautista observed Verches leave the gun show carrying a white plastic bag, which he placed in the rear compartment of a black Mercedes Benz bearing a California license plate. Agent Bautista did not know if the plastic bag contained the items that Verches had purchased. Verches was accompanied by an unidentified man.
>
> Agent Bautista confirmed that the Mercedes was registered to Verches at a residential address in Morgan Hill, California. He observed Verches and the unidentified man drive away in the Mercedes, with Verches in the passenger seat. Agents followed Verches in the Mercedes to various stops around Reno, where Verches exited the vehicle for short periods of time, before eventually arriving at a casino-hotel valet parking lot around 6:33 p.m. Agents twice lost sight of the vehicle during the time they were following it. Agents terminated the surveillance after confirming that Verches was a registered guest at the hotel until

III. STANDARD FOR A PRELIMINARY INJUNCTION

The standard for issuing a preliminary injunction is well established and not in dispute. A plaintiff seeking a preliminary injunction must establish: (1) that he is likely to succeed on the merits; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council,*

May 22, 2011, the next day. However, agents placed an electronic tracking device on the Mercedes. Records from the tracking device show that the Mercedes made 15 stops between leaving the gun show and arriving the next day at Verches's house in Morgan Hill.

Agent Bautista conducted a California Automated Firearms System records check that showed Verches did not have any assault rifles registered in his name. He and another agent also made a positive identification of Verches by comparing his DMV photograph with video taken of Verches's purchase at the gun show. Agent Bautista conducted an automated criminal history check and public database search, and later verified Verches's address with the Morgan Hill Police Department. The address matched the registration address for the Mercedes that agents followed from the gun show. On May 24, 2011, Agent Bautista went to the residence and did not see the Mercedes, but observed Verches exiting the house and leaving in another vehicle that was parked in front and registered in his name. Two days after observing Verches at his house, Agent Bautista obtained a search warrant for unregistered AR—15 type or assault rifles and large-capacity magazines, to be found on Verches's person, in his vehicles, or in his home."

Inc., 555 U.S. 7, 20 (2008); *Doe v. Harris*, 772 F.3d 563, 570 (9th Cir. 2014).

Plaintiffs claim that § 32310 (c) & (d) trenches on their federal Constitutional rights under the Second Amendment and the Takings Clause. Consequently, a judicial evaluation must be made, beginning with a judgment as to whether there is a likelihood that Plaintiffs will ultimately prevail on the merits of their claims. It is a preliminary judgment. It is made on an incomplete evidentiary record. But the evidence presented is important.[3]

A. The Second Amendment—Certain Policy Choices Are off the Table

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court made absolutely clear that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U.S. at 636. The State of California's desire to criminalize simple possession of a firearm magazine able to hold more than 10 rounds is precisely the type of policy choice that the Constitution takes off the table. Because the right to bear arms includes the right to keep and carry ammunition and magazines holding more than 10 rounds for those arms, for both self-defense and to be ready to serve in a militia, the

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[3] "In *Fyock*, we affirmed the district court's denial of a preliminary injunction to enjoin a city ordinance restricting possession of large-capacity magazines ... . We concluded that the ordinance would likely survive intermediate scrutiny *because the city presented sufficient evidence* to show that the ordinance was substantially related to the compelling government interest of public safety." *Silvester v. Harris*, 843 F.3d 816, 822 (9th Cir. 2016) (citations omitted) (emphasis added).

State's criminalization of possession of "large capacity magazines" likely places an unconstitutional burden on the citizen plaintiffs.

1. Likelihood of Success on the Merits

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. Amend. II. Second Amendment rights are not watered-down,[4] second-class rights.[5] "[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 778 (2010). The right to bear arms for a legal purpose is an inherent right pre-dating and transcending the Second Amendment. "The right there specified is that of 'bearing arms for a lawful purpose.' This is not a

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[4] "In *Heller,* however, we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing, and this Court decades ago abandoned 'the notion that the Fourteenth Amendment applies to the States only a *watered-down*, subjective version of the individual guarantees of the Bill of Rights.'" *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 785-86 (2010) (citations omitted) (emphasis added).

[5] "Municipal respondents' remaining arguments are at war with our central holding in *Heller* : that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home. Municipal respondents, in effect, ask us to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause." *McDonald*, 561 U.S. at 780.

right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence." *United States v. Cruikshank,* 92 U.S. 542, 553 (1875), *overruled on other grounds*, *United States v. Miller*, 307 U.S. 174 (1939).

Some may fear that the right to keep and bear arms means citizens hold a right to "possess a deadly implement and thus has implications for public safety," and that "there is intense disagreement on the question whether the private possession of guns in the home increases or decreases gun deaths and injuries." *McDonald*, 561 U.S. at 782-83 (argument of the City of Chicago). True enough. But, public safety interests may not eviscerate the Second Amendment.[6] "The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category." *McDonald*, 561 U.S. at 783 (collecting cases where those likely guilty of a crime are set free because of constitutional rights).

The Supreme Court recognizes an individual's right to keep and bear arms under the Second Amendment for self-defense in the home. *Heller*, 554 U.S. at 636. This right to keep and bear arms is

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[6] For example, the Supreme Court reminds us that, "[o]ur precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role ... the Government's authority and expertise in these matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010).

fundamental and is incorporated against states under the Fourteenth Amendment. *McDonald*, 561 U.S. at 791.

The Supreme Court also recognizes that the Second Amendment guarantee includes firearms that have "some reasonable relationship to the preservation or efficiency of a well regulated militia." *Miller*, 307 U.S. at 178. *Miller* implies that possession by a law-abiding citizen of a weapon that could be part of the ordinary military equipment for a militia member, or that would contribute to the common defense, is protected by the Second Amendment.[7] Concluding that magazines holding more than 10 rounds might be found among today's ordinary military equipment or that such magazines would contribute to the common defense, requires only a modest finding.

a. Self-defense and militia use

Heller and *Miller* are not inconsistent. *Heller* acknowledges that protection for weapons useful to a militia are also useful for defending the home. "It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self defense weapon . . . . Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Heller*,

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[7] In *Miller*, the weapon was a sawed-off shotgun. Because there was little evidence before the district court that a sawed-off shotgun could be "any part of the ordinary military equipment or that its use could contribute to the common defense," possession of the weapon was not protected by the Second Amendment. *Miller*, 307 U.S. at 178 (citation omitted).

554 U.S. at 629. As *McDonald* puts it, "[i]n *Heller,* we recognized that the codification of this right was prompted by fear that the Federal Government would disarm and thus disable the militias, but we rejected the suggestion that the right was valued only as a means of preserving the militias. On the contrary, we stressed that the right was also valued because the possession of firearms was thought to be essential for self-defense. As we put it, self-defense was 'the *central component* of the right itself.'" *McDonald*, 561 U.S. at 742 (emphasis in original).

In *Caetano v. Massachusetts*, the Court underscored these two related points from *Heller* and *McDonald*. First, the Second Amendment extends to common modern firearms useful for self-defense in the home. Second, there is no merit to "the proposition 'that *only* those weapons useful in warfare are protected.'" *See Caetano*, 136 S.Ct. 1027, 1028 (2016) (per curiam) (quoting *Heller*, 554 U.S. at 582, 624-25) (remanding for further consideration of whether Second Amendment protects stun guns) (emphasis added); *contra Kolbe v. Hogan,* 849 F.3d 114, 131 (4th Cir. 2017) (weapons useful in warfare are not protected by the Second Amendment).

b. Ammunition magazines are arms

The Second Amendment protects firearms and the ammunition and magazines that enable arms to fire. The Second Amendment does not explicitly protect ammunition. "Nevertheless, without bullets, the right to bear arms would be meaningless. A regulation eliminating a person's ability to obtain or use ammunition could thereby make it impossible to use firearms for their core purpose." *Jackson,* 746 F.3d at

967. "Thus the right to possess firearms for protection implies a corresponding right to obtain the bullets necessary to use them." *Id.* (citing *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) (holding that the right to possess firearms implied a corresponding right to have access to firing ranges in order to train to be proficient with such firearms). Indeed, *Heller* did not differentiate between regulations governing ammunition and regulations governing the firearms themselves. *Id.* The same is true for magazines. "Constitutional rights thus implicitly protect those closely related acts necessary to their exercise . . . The right to keep and bear arms, for example 'implies a corresponding right to obtain the bullets necessary to use them.'" *Luis v. United States*, 136 S.Ct. 1083, 1097 (2016) (Thomas, J., concurring) (quoting *Jackson*, 746 F.3d at 967). Without protection for the closely related right to keep and bear ammunition magazines for use with the arms designed to use such magazines, "the Second Amendment would be toothless." *Id.*

Most, if not all, pistols and many rifles are designed to function with detachable magazines. They are necessary and integral to the designed operation of these arms. Of course, when a magazine is detached the magazine is not a firearm. It is not dangerous. It may be made of stainless steel or it may be made of polymers, but it cannot fire a single round of ammunition. Its only function is to hold ammunition. Other parts of a firearm are also necessary and integral to the designed operation, but may be separated (*e.g.*, removable gun barrels, gun sights, trigger assemblies, hand grips, etc.). For firearms designed to have magazines, without the magazine

attached, the weapon may be limited to firing a single round in the chamber, or not at all (as is the case with some popular pistols designed for safety reasons to fire only when a magazine is in place). Although the State does not concede the issue, neither does it press its case on the argument that magazines are not "arms" for purposes of Second Amendment analysis. Opposition at 9. Nor has any other court considering the question held that a magazine of any capacity is not subject to Second Amendment review. *See e.g., Fyock v. City of Sunnyvale*, 25 F. Supp. 3d. 1267, 1276 (N.D. Cal. 2014), *aff'd*, 779 F.3d 991 (9th Cir. 2015) ("Rather, the court finds that the prohibited magazines are 'weapons of offence, or armour of defence,' as they are integral components to vast categories of guns."). Thus, that which the State defines as a "large capacity magazine" will be analyzed according to Second Amendment principles. This is the theater of operations in which the constitutional battle will be fought.

2. Second Amendment Tests

a. The tripartite binary test with a sliding scale and a reasonable fit

For a Second Amendment challenge, the Ninth Circuit uses what might be called a tripartite binary test with a sliding scale and a reasonable fit. In other words, there are three different two-part tests, after which the sliding scale of scrutiny is selected. Most courts select intermediate scrutiny in the end. Intermediate scrutiny, in turn, looks for a "reasonable fit." Courts in other circuits tend to also use some variation of a multi-part test with the result that intermediate scrutiny is applied to gun restrictions. It

is, unfortunately, an overly complex analysis that people of ordinary intelligence cannot be expected to understand. These complicated legal tests, which usually result in Second Amendment restrictions passing an intermediate scrutiny test (a test that is little different from a rational basis test), appear to be at odds with the simple test used by the Supreme Court in *Heller*. The *Heller* test is a test that anyone can figure out.

> *Heller* asks whether the law bans types of firearms commonly used for a lawful purpose—regardless of whether alternatives exist. And *Heller* draws a distinction between such firearms and weapons specially adapted to unlawful uses and not in common use, such as sawed-off shotguns.
>
> . . .
>
> Roughly five million Americans own AR-style semiautomatic rifles. The overwhelming majority of citizens who own and use such rifles do so for lawful purposes, including self-defense and target shooting. Under our precedents, *that is all that is needed* for citizens to have a right under the Second Amendment to keep such weapons.

Friedman v. City of Highland Park, 136 S.Ct. 447, 449 (2015) (Justices Thomas and Scalia dissenting from denial of certiorari) (emphasis added) (citations omitted). A complicated Second Amendment test obfuscates as it extirpates, but it is the test that this Court is bound to follow.

b. Constitutionally suspect under the simple test

Under the simple *Heller* test, § 32310 (c) & (d) are highly suspect. They are suspect because they broadly prohibit common pistol and rifle magazines used for lawful purposes. "[T]hat is all that is needed for citizens to have a right under the Second Amendment to keep such weapons." *Friedman*, 136 S.Ct. at 449.

Magazines holding more than 10 rounds are useful for self-defense by law-abiding citizens. And they are common. Lawful in at least 43 states and under federal law, these magazines number in the millions. *Cf. Hollis v. Lynch*, 827 F.3d 436, 449 (5th Cir. 2016) (defining the term "common" by applying the Supreme Court test in *Caetano* of 200,000 stun guns owned and legal in 45 states being "common"); *see also NYSR&PA v. Cuomo*, 804 F.3d 242, 255-57 (2nd Cir. 2015) (noting large-capacity magazines are "in common use" as the term is used in *Heller* based on even the most conservative estimates). To the extent they may be now uncommon within California, it would only be the result of the State long criminalizing the buying, selling, importing, and manufacturing of these magazines. To say the magazines are uncommon because they have been banned for so long is something of a tautology. It cannot be used as constitutional support for further banning. *See Friedman v. City of Highland Park, Illinois*, 784 F3d 406, 409 (7th Cir. 2015) ("Yet it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so the it isn't commonly used. A law's

existence can't be the source of its own constitutional validity.").

Nevertheless, § 32310 (c) & (d) are suspect even under the more complicated analysis employed by the Ninth Circuit Court of Appeals, because the statute is not a reasonable fit as a means to achieve the State's important objectives. To pass muster under the intermediate scrutiny test a statute must have "a reasonable fit" with the State's important interest. The analysis works like this.

c. Constitutionally suspect under the "reasonable fit" test

i. burden & scrutiny

First, a court must evaluate the burden and then apply the correct scrutiny. *Jackson*, 746 F.3d at 960 (citing *United States v. Chovan*, 735 F.3d 1127, 1136-37 (9th Cir. 2013)). "This two-step inquiry: '(1) asks whether the challenged law burdens conduct protected by the Second Amendment; and (2) if so, directs courts to apply an appropriate level of scrutiny.'" *Bauer v. Becerra*, 858 F.3d 1216, 2017 WL 2367988, at *3 (9th Cir. 2017) (quoting *Jackson*, 746 F.3d at 960). As discussed below, § 32310 (c) & (d) burden conduct protected by the Second Amendment.

ii. presumptively lawful or historical regulation

In determining whether a given regulation falls within the scope of the Second Amendment under the first step of this inquiry, another two-step test is used. "[W]e ask whether the regulation is one of the 'presumptively lawful regulatory measures' identified in *Heller*, or whether the record includes persuasive

historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment." *Id.* (citations omitted). If the regulation is presumptively lawful, the inquiry ends. Likewise, if the regulation is a historically approved prohibition not offensive to the Second Amendment, the inquiry ends. Section 32310 (c) & (d) fail both parts of the test. A complete ban on ammunition magazines of any size is not one of the presumptively lawful regulatory measures identified in *Heller*. Neither is there any evidence that magazine capacity restrictions have a historical pedigree.

iii. closeness to the core and severity of the burden

If the constitutional inquiry may continue, then the correct level of scrutiny must be selected. For that selection a third two-step evaluation is required. The first step measures how close the statute hits at the core of the Second Amendment right. The second step measures how severe the statute burdens the Second Amendment right. "Because *Heller* did not specify a particular level of scrutiny for all Second Amendment challenges, courts determine the appropriate level by considering '(1) how close the challenged law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on that right.'" *Bauer*, 2017 WL 2367988, at *4 (quoting *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016)). *Fyock v. City of Sunnydale*, 779 F.3d 991, 999 (9th Cir. 2015), has already recognized that a regulation restricting law-abiding citizens from possessing large-capacity magazines within their homes hits at the core of the Second Amendment. *Fyock* said, "[b]ecause Measure C

restricts the ability of lawabiding citizens to possess large capacity magazines within their homes for the purpose of self-defense, we agree with the district court that Measure C may implicate the core of the Second Amendment." *Id.*

iv. the sliding scale of scrutiny

Heller says the core of the Second Amendment is the right of law-abiding, responsible citizens to use arms in defense of their home. 554 U.S. at 635.

> Guided by this understanding, our test for the appropriate level of scrutiny amounts to 'a sliding scale.' A law that imposes such a severe restriction on the fundamental right of self defense of the home that it amounts to a destruction of the Second Amendment right is unconstitutional under any level of scrutiny. Further down the scale, a law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny. Otherwise, intermediate scrutiny is appropriate.

Bauer, 2017 WL 2367988, at *4 (citations and quotations marks omitted). Where a restriction "...does not 'severely burden' or even meaningfully impact the core of the Second Amendment right, . . . intermediate scrutiny is . . . appropriate." *See id.* (citing *Silvester,* 843 F.3d at 821 and *Chovan*, 735 F.3d at 1138). *Fyock* held that the district court did not abuse its discretion in finding Sunnyvale's magazine capacity restriction did not have a severe impact. "[T]here was no abuse of discretion in finding that the impact Measure C may have on the core

Second Amendment right is not severe and that intermediate scrutiny is warranted." 779 F.3d at 999.

The State argues as a foregone conclusion that intermediate scrutiny is the correct point on the sliding scale for a regulation on magazines. According to the State, *Fyock*'s approval of "intermediate scrutiny" is controlling, and other courts have applied intermediate scrutiny to regulations on large capacity magazines. The approach is consistent with past cases analyzing the appropriate level of scrutiny under the second step of *Heller*, as the Ninth Circuit has repeatedly applied intermediate scrutiny. *See e.g.*, *Silvester*, 843 F.3d at 823 (applying intermediate scrutiny to a law mandating ten-day waiting periods for the purchase of firearms); *Fyock*,779 F.3d at 999 (applying intermediate scrutiny to a law prohibiting the possession of large capacity magazines); *Jackson*, 746 F.3d at 965, 968 (applying intermediate scrutiny to laws mandating certain handgun storage procedures in homes and banning the sale of hollow-point ammunition in San Francisco); *Chovan*, 735 F.3d at 1138 (applying intermediate scrutiny to a law prohibiting domestic violence misdemeanants from possessing firearms). Applying intermediate scrutiny, *Fyock* did find that the plaintiffs were unlikely to succeed on the merits.

The difference here, and it is a important difference, is that the district court in *Fyock* had before it an evidentiary record that was credible, reliable, and on point. *Fyock*, 779 F.3d at 1000 ("Ultimately, the district court found that Sunnyvale submitted pages of credible evidence, from study data to expert testimony to the opinions of Sunnyvale public officials,

indicating that the Sunnyvale ordinance is substantially related to the compelling government interest in public safety."). That is not the case here. Here, the Attorney General has submitted at this preliminary stage incomplete studies from unreliable sources upon which experts base speculative explanations and predictions. The evidentiary record is a potpourri of news pieces, State-generated documents, conflicting definitions of "mass shooting," amorphous harms to be avoided, and a homogenous mass of horrible crimes in jurisdictions near and far for which large capacity magazines were not the cause.

v. tailoring required: "a reasonable fit"

Assuming intermediate scrutiny applies, "a reasonable fit" test is conducted. "Our intermediate scrutiny test under the Second Amendment requires that (1) the government's stated objective . . . be significant, substantial, or important; and (2) there .. . be a 'reasonable fit' between the challenged regulation and the asserted objective." *Silvester*, 843 F.3d at 821-22 (quoting *Chovan*, 735 F.3d at 1139). Under the second prong "intermediate scrutiny does not require the least restrictive means of furthering a given end." *Id.* at 827 (quoting *Jackson*, 746 F.3d at 969).

vi. four important California interests

In this case, the Attorney General identifies four State interests. Each is important. The four articulated State interests are: (1) protecting citizens from gun violence; (2) protecting law enforcement from gun violence; (3) protecting the public safety

(which is similar to protecting citizens and law enforcement from gun violence); and (4) preventing crime. *See* Oppo. at 9; 17-18. The question then becomes, whether the dispossession and criminalization components of § 32310's ban on firearm magazines holding any more than 10 rounds is a reasonable fit for achieving these important goals. For intermediate scrutiny "the burden of justification is demanding and it rests entirely on the State." *Tyler v. Hillsdale County Sheriff's Dept.*, 837 F. 3d 678, 694 (6th Cir. 2016) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996) (considering the constitutionality of 18 U.S.C. § 922(g)(4)'s permanent gun ban for person previously treated for mental illness).

This Court finds on the preliminary evidentiary record before it that the dispossession and criminalization component of § 32310 (c) & (d) *is not a reasonable fit*. It may well be that on a more robust evidentiary showing, made after greater time and testimony is taken, that the State will be able to establish a reasonable fit. But not yet. The Attorney General asserts that empirical evidence is not required. Oppo. at 19. He asserts that the substantial evidence demonstrating a reasonable fit can take other softer forms such as "history, consensus, and simple common sense," as well as "correlation evidence" and even simply "intuition." Oppo. at 19-20. But if this "evidence" were sufficient, all firearm restrictions except an outright ban on all firearms would survive review.

Yet, as the Second Circuit cautioned, "on intermediate scrutiny review, the state cannot 'get away with shoddy data or reasoning.' To survive

intermediate scrutiny, the defendants must show '*reasonable* inferences based on *substantial* evidence' that the statutes are substantially related to the governmental interest." *NYSR&PA*, 804 F.3d at 264 (citations omitted) (emphasis in original) (striking down New York State's 7-round magazine limit). This Court declines to rely on anything beyond hard facts and reasonable inferences drawn from convincing analysis, which amounts to substantial evidence based on relevant and accurate data sets, when considering whether to maintain the *status quo* or permit a state experiment that will irrevocably harm law-abiding responsible magazine-owning citizens.

d. The State's evidence

The State's preliminary theoretical and empirical evidence is inconclusive. In fact, it would be reasonable to infer, based on the State's evidence, that a right to possess magazines that hold more than 10 rounds may *promote* self-defense—especially in the home—and would be ordinarily useful for a citizen's militia use. California must provide more than a rational basis to justify its sweeping ban on mere possession. *See e.g., Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) ("Illinois had to provide us with more than merely a rational basis for believing that its uniquely sweeping ban [on carrying guns in public] is justified by an increase in public safety. It has failed to meet this burden.").

So what is the evidence? The Attorney General has provided expert declarations and 3,100 pages of

exhibits.[8] Much of the evidence submitted is dated. Approximately 75% of the exhibits the Attorney General has submitted are older than 2013. The documents that are more recent include various surveys of shooting incidents, news articles, position pieces, and firearm descriptions. The amalgamation of exhibits often seems irrelevant. For example, Exhibit 37 is a smorgasbord of news articles about guns. Among the offerings is a piece about thirteen separate incidents in Australia going back to 1867 in which there are no mentions of large capacity magazines. Oppo. Gordon Declaration Exh. 37, at 101-04. At Exhibit 37, page 151-52, one finds a news piece about a 17-year-old incident in Brazil involving a submachine gun. News about events in Paris, France and Shfaram, Israel fill pages 162-165 and 175-177, while page 195 tells of a shooter in 2010 using a revolver, and page 132 recounts a shooter using two revolvers.

Another exhibit, the Attorney General's Exhibit 50, appears to be a 100-page, 8- point type, 35-year survey of shooting incidents published by Mother Jones magazine. Oppo. Gordon Declaration at Exh. 50. Mother Jones magazine has rarely been mentioned by any court as reliable evidence. It is fair to say that the magazine survey lacks some of the earmarks of a scientifically designed and unbiased collection of data.

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[8] Both sides interpose evidentiary objections to various documents. The objections are overruled. For a preliminary injunction, a court may "rely on otherwise inadmissible evidence, including hearsay evidence." *San Francisco Veteran Police Officers Ass'n, v. City and County of S.F.*, 18 F. Supp. 3d. 997, 1006 (N.D. Cal. 2014) (citations omitted).

In another example, Attorney General's Exhibit 30 includes an article from Mother Jones Magazine with a headline, "'A Killing Machine': Half of All Mass Shooters Used High- Capacity Magazines." Oppo. Gordon Declaration at Exh. 30. Yet, as will be discussed below, the survey found at Attorney General's Exhibit 59 describes in detail only six incidents out of 92 where a mass shooter used a high capacity magazine. Attorney General's Exhibit 14 contains an expert declaration from Christopher Koper that relies, *inter alia*, on Exhibit 30. The expert then concedes that "[A]ssessing trends in LCM [large capacity magazine] use is much more difficult because *there was, and is, no national data source on crimes with LCMs*, and few local jurisdictions maintain this sort of information." Oppo. Gordon Declaration at Exh. 14, n.7 & ¶ 47. Further illustrating the lack of hard data underlying the muddled evidence, Koper then attaches his own published report in support of his Exhibit 14 declaration. Titled "An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003," Koper summarizes his findings. He states, "it is not clear how often the ability to fire more than 10 shots without reloading (the current magazine capacity limit) affects the outcomes of gun attacks. All of this suggests that the ban's impact on gun violence is likely to be small." *Id.* at Exhibit "C," ¶ 3.3.

i. The Mayors Against Illegal Guns survey

Another example of California's evidence is a survey of mass shooting incidents found in the Attorney General's Exhibit 59. Oppo. Gordon

Declaration at Exh. 59. The Attorney General relies specifically on Exhibit 59 in its brief. Oppo. at 11-12. Yet, Exhibit 59 tends to prove the opposite of a justification for § 32310 (c) & (d), *i.e.*, it tends to prove there is no need to dispossess and criminalize law-abiding responsible citizens currently possessing magazines holding more than 10 rounds.

Exhibit 59 is a shorter survey of mass shooting incidents that occurred between January 2009 and September 2013. The survey was produced by Mayors Against Illegal Guns.[9] Although the survey describes little about the protocols used to select its data, it does describe in helpful detail 92 mass shooting incidents (where a mass shooting is defined using the FBI's definition of an incident where four or more people were killed with a gun). The survey describes itself as relying on FBI reports and media reports. Though the study is not ideal, because gun violence is a deadly serious issue, some empirical data needs to be carefully reviewed for purposes of the motion for preliminary injunction.

Thus, to test the claims made by the Attorney General against a set of data he himself offers in support of his justification of § 32310 (c) & (d), the Court has reviewed closely the 92 incidents described

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[9] Mayors Against Illegal Guns is apparently not a pro-gun rights organization. According to Wikipedia, it was formed by Mayor Michael Bloomberg. Mayor John Tkazik of Poughkeepsie, New York, resigned along with fifty others in 2014, explaining that the organization: "under the guise of helping mayors facing a crime and drug epidemic, MAIG intended to promote confiscation of guns from law-abiding citizens." Later in 2014, it merged with another group and became "Everytown For Gun Safety."

in Ex 59.[10] Exhibit 59, like the rest of the Attorney General's anthology of evidence, does not demonstrate that the ban on possession of magazines holding any more than 10 rounds is a reasonable fit, at least at this preliminary stage of the proceedings.

Intermediate scrutiny requires the State to demonstrate a reasonable fit. A reasonable fit cannot be just any fit. This is not simply a policy decision by the State. This affects a Constitutionally protected right. The State may experiment. The State need not create a tight fit. The State need not choose the least restrictive means to achieve its important goals. But the means must provide a reasonable fit. The Attorney General claims that magazines holding any more than 10 rounds may be useful and appropriate in the military context, but they pose a distinct threat to safety in private settings as well as places of assembly. The Attorney General asserts that the "militarystyle features of LCMs make them particularly attractive to mass shooters and other criminals and pose heightened risks to innocent civilians and law enforcement." Oppo. at 11. He asserts that "LCMs are used disproportionately in mass killings and in murders of police." Oppo. at 11. The Mayors Against Illegal Guns survey (hereinafter "Mayors' survey") belies these assertions. Oppo. Gordon Declaration, Exh. 59.

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[10] Due to limited time and judicial resources, Ex 59 will be the empirical data set relied on by the Court to determine reasonable fit. Other surveys may cover larger time periods and use different parameters. Experts relied on by both parties criticize the reliability and inclusivity of all of the available data sets.

(a) of 92 cases, only 10 are from California

What does the Mayors' survey teach about the fit of California's statute? First, it is noted that 82 of the 92 cases are from jurisdictions beyond California. Only ten of the 92 mass shootings in the survey took place in California. These ten incidents prove very little about whether § 32310 (c) & (d) provide a reasonable fit—or means—of achieving the State's four public safety goals.

(b) the 10 California cases examined

In three of the ten California incidents, the firearm is unknown and the magazine type, if any, is unknown. (#52 Willowbrook (2/11/11), #65 Los Angeles (4/3/10), #92 Wilmington (1/27/09)).[11] In a fourth incident, a revolver was used. (#18 Tule River Reservation (12/8/12)). Revolvers, of course, do not use magazines at all. In a fifth incident, a pistol was used but no mention is made of a magazine holding any more than 10 rounds. (#20 Northridge (12/2/12)). In a sixth incident, a pistol was used with four (legal) 10-round magazines. (#31 Oakland (4/2/12)). This, of course, tends to prove the statute would not have the desired effect. In two more incidents, the pistols used were purchased legally in California. (#40 Seal Beach (10/12/11); #84 Santa Clara (3/29/09)). These would have been sold with California-legal 10-round magazines. No mention is made of larger magazines being used. If that was the case, then again the data

[11] The Court has assigned numbers to the list of incidents in the Mayors' survey for ease of reference.

tends to prove that the statute would have no good effect.

(c) no effect in eight cases

In other words, only ten of 92 mass shootings occurred in California and § 32310 (c) & (d) would have had no effect on eight of those ten. The criminalization of possession of magazines holding more than 10 rounds would have had no effect on mass killings by revolver. It would have had no effect on pistols bought legally in California because they are sold with 10-round magazines. It would have had no effect on shootings where magazines holding any more than 10 rounds were not used.

(d) a closer look at the two magazine cases

Of the 92 mass shootings recorded in the Mayors' survey, only two occurred in California *and* involved the use of illegal magazines. (#7 Santa Monica (6/7/13) and #85 Oakland (3/21/09)). In the Santa Monica incident, the shooter brought multiple firearms, as happens to be the case in almost all "mass shootings." He brought an AR-15, a revolver, and 3 zip guns. He reportedly possessed forty 30-round magazines. He killed five victims. The survey notes that the AR-15 and the illegal magazines may have been illegally imported from *outside* of California. Receiving and importing magazines holding any more than 10 rounds was already unlawful under California law at the time of the Santa Monica tragedy. In that instance, criminalizing possession of magazines holding any more than 10 rounds likely would not have provided additional protection from gun violence for citizens or police officers or prevented the crime.

In the remaining incident, a shooter in Oakland, California also brought multiple guns. He used an SKS assault-type rifle with a magazine holding more than 10 rounds and a pistol. He killed four policemen. He killed the first two policemen with the pistol when officers stopped his car in a traffic stop. He then fled on foot to an apartment. Two more officers were killed with the assault rifle and an illegal large capacity magazine and a third was wounded. The murderer had a lengthy criminal history, according to the Mayors' survey. At the time of the mass shooting, the killer *was on parole for assault with a deadly weapon*. As such, he was *already prohibited from possessing* any kind of gun. As in the Santa Monica example, criminalizing possession of magazines holding any more than 10 rounds likely would not have provided additional protection from gun violence for citizens and police officers or prevented crime in the Oakland example.

(e) conclusions from California cases

To sum up, of the 92 mass killings occurring across the 50 states between 2013 and 2009, only ten occurred in California. Of those ten, the criminalization and dispossession requirements of § 32310 would have had no effect on eight of the shootings, and only marginal good effects had it been in effect at the time of the remaining two shootings. On this evidence, § 32310 is not a reasonable fit. It hardly fits at all. It appears on this record to be a haphazard solution likely to have no effect on an exceedingly rare problem, while at the same time burdening the constitutional rights of other California

law-abiding responsible citizen-owners of gun magazines holding more than 10 rounds.

(f) no effect on revolvers

The evidence surveying the other 82 mass shooting incidents (which occurred outside of California) also suggests § 32310 makes for an uncomfortably poor fit. For example, as noted earlier, some mass shootings involve only *revolvers*—a style for which there are no magazines. (#18 Tule River Reservation, Cal. (12/8/12) 5 dead, #29 Port St. John, Fla. (5/15/12) 4 dead; #37 Bay City, Tex. (11/30/11) 4 dead). California's statute will have no effect on these types of mass shootings.

(g) no effect on shotguns

A number of mass shootings involve a *shotgun* as the weapon of choice. The vast majority of shotguns likewise cannot be equipped with a magazine holding more than 10 rounds. (#1 Washington, D.C., Navy Yard (9/16/13) 12 dead; #11 Manchester, Ill. (4/24/13) 5 dead; #12 Federal Way, Wash. (4/21/13) 4 dead; #14 Herkimer, N.Y. (4/13/13) 4 dead; #30 Gilbert, Ariz. (5/2/12) shotgun & 2 pistols & 6 hand-grenades, 4 dead; #46 Wagener, S.C. (7/3/11) 4 dead; #51 Oak Harbor, Ohio (4/16/11) shotgun & .22 rifle, 4 dead; #57 Jackson, Ky. (9/10/10) 5 dead; #64 Chicago, Ill. (4/14/10) 5 dead; #69 Bellville, Tex. (1/16/10) shotgun & handgun 5 dead; #83 Carthage, N.C. (3/29/09) shotgun & handgun, 8 dead). California's statute will have little or no effect on these types of mass shootings.

(h) no effect on handguns without large capacity magazines

A large number of mass shooting incidents (40 of 92) were the result of shooters using only *pistols or handguns* for which there is no indication in the Mayors' survey that a magazine holding any more than 10 rounds was employed. (#2 Crab Orchard, Tenn. (9/11/13); #3 Oklahoma City, Okla. (8/14/13); #4 Dallas, Tex. (8/7/13); #5 Clarksburg, W.V. (7/26/13) (original assailants pointed gun at victim who wrested away the handgun he used to kill the assailants and 2 others); #6 Hialeah, Fla. (7/16/13); #8 Fernley, Nev. (5/13/13); #16 Tulsa, Okla. (1/7/13); #20 Northridge, Cal. (12/2/12); #22 Minneapolis, Minn. (9/27/12); #27 Seattle, Wash. (5/20/12); #31 Oakland, Cal. (4/2/12); #32 Norcross, Ga. (2/20/12); #33 Villa Park, Ill. (1/17/12); #34 Grapevine, Tex. (12/25/11); #35 Emington, Ill. (12/16/11); #38 Greensboro, N.C. (11/20/11); #39 Liberty, S.C. (10/14/11); #40 Seal Beach, Cal. (10/12/11); #41 Laurel, Ind. (9/26/11); #45 Wheatland, Wyo. (7/30/11); #47 Grand Prairie, Tex. (6/23/11); #48 Medford, N.Y. (6/9/11); #50 Ammon, Id. (5/11/11); #53 Minot, N.D. (1/28/11); #55 Boston, Mass. (9/28/10); #56 Riviera Beach, Fla. (9/27/10); #62 Manchester, Conn. (8/3/10); #63 Hialeah, Fla. (6/6/10); #65 Los Angeles, Cal. (4/3/10); #67 New Orleans, La. (3/26/10); #70 Madison, Wis. (12/3/09); #71 Lakewood, Wash. (11/29/09) (hand gun of slain police officer used to kill other officers); #73 Jupiter, Fla. (11/26/09); #74 Pearcy, Ark. (11/12/09); #75 Oklahoma City, Okla. (11/9/09); #79 Kansas City, Kan. (6/22/09) (2 guns stolen from a police sgt.); #80 Middletown, Md. (4/19/09); #84 Santa Clara, Cal. (3/29/09); #87 Miami, Fla. (3/15/09); #90 Cleveland, Ohio (3/5/09); #91

Brockport, N.Y. (2/14/09)). California's statute will have no effect on these types of mass shootings.

(i) no effects on unknowns and oddities

For 20 of the remaining 92 recorded incidents, the weapon and ammunition used was simply "*unknown*." A few incidents were oddities not easily categorized and not involving a magazine holding any more than 10 rounds. In #4 Dallas, Tex. (8/7/13), the shooter used a handgun and detonated a bomb. New Town, N.D. (#21) (11/18/12) involved a hunting rifle. Oakland, Cal. (#31) (4/2/12) involved a pistol and four 10- round magazines which are lawful in every state. Monongalia, W.V. (#42) (9/6/11) involved a .30-.30 rifle. Carson City, Nev. (#43) (9/6/11) involved an already-illegal machine gun. Appomattox, Va. (#68) (1/19/10) involved a rifle used to shoot at responding police officers. California's statute will have no effect on these types of mass shootings.

(j) conclusions from 80 of 92 cases

Having examined the facts as reported by the Mayor's survey for all of the mass shooting incidents from around the United States over the fairly recent five-year period, it appears that the vast majority of events are identified as not involving either assault-type rifles or large capacity magazines. To reduce or eliminate such incidents requires some means other than § 32310's dispossession and criminalization approach. The § 32310 approach would have had little or no discernable good effect towards reaching California's four important safety objectives.

(k) six assault rifle cases with no large capacity magazines

The twelve remaining incidents involved either assault-type rifles or magazines holding more than 10 rounds. These deserve a closer look. In six cases an *assault-type rifle* was used but there is no data identifying large capacity magazine use. In Albuquerque, N.M. (#15) (1/19/13) the shooter used four guns: two shotguns, a .22 rifle, and an AR-15. In Wagener, S.C. (#46) (7/3/11), although the shooter owned an AK-47, revolvers and pistols, he chose to use only a shotgun. Put another way, given the choice between using an assault rifle or pistols with large capacity magazines, this mass shooter selected a shotgun as his weapon of choice. In Washington, D.C. (#66) (3/30/10) there were three gunmen who among them used two pistols and one AK-47. In Osage, Kan. (#72) (11/28/09) an "assault rifle" was the weapon. Likewise, in Mount Airy, N.C. (#77) (11/1/09) an "assault rifle" was used. While in Geneva County, Ala. (#89) (3/10/09) the shooter used three weapons: an AR-15, an SKS, and a .38 pistol. The survey does not mention large capacity magazines being used in any of these six incidents.

(l) remaining 6 cases involve large capacity magazines

The final group of incidents do involve use of magazines holding more than 10 rounds. Of the 92 mass shooting incidents over the five years from 2009 to 2013, although millions of magazines holding more than 10 rounds are owned by citizens nationwide, according to the Mayors' survey, *only six incidents* involved a magazine holding more than 10 rounds.

Two incidents involved a pistol and a magazine holding more than 10 rounds. Four incidents involved an assault rifle or other weapon and a magazine holding more than 10 rounds.

As noted earlier, the Santa Monica, California incident (#7) on June 7, 2013 involved a shooter with an AR-15, a revolver, and three "zip guns." The shooter carried forty 30-round magazines (probably for use with the AR-15). The AR-15 had no serial number. The shooter was 23-years-old, suggesting that the large capacity magazines he possessed he obtained in violation of California law since he was not old enough to have owned such magazines before California criminalized their purchase or importation. As mentioned earlier, the Mayors' survey notes that the "assault rifle, high-capacity magazines, and several components to modify the firearms *may have been shipped from outside California*." (Emphasis added). It is hard to imagine that the shooter, having already evaded California law to acquire large capacity magazines, would have dispossessed himself of the illegally acquired large capacity magazines if the existing law had included the new Proposition 63 amendments to § 32310.

The next and probably most heinous shooting was the well-publicized Sandy Hook Elementary School shooting in Newtown, Connecticut. (#17) (12/14/12). The shooter carried a variety of weapons and large capacity magazines. Shortly afterwards, the State of Connecticut made acquisition of large capacity magazines unlawful. However, unlike in California, continued possession of pre-ban magazines remained lawful if declared and the magazines were permitted

to be filled to capacity for home protection and shooting range practice. *See* State of Connecticut Department of Emergency Services and Public Protection, Division of State Police, Special Licensing & Firearms Unit: *FAQS REGARDING P.A. 13-3 As Amended by P.A. 13-220* (dated 3/5/14).

The Aurora, Colorado (#24) (7/20/12) movie theater shooting involved the use of a highly unusual 100-round drum magazine on an AR-15, along with a shotgun and two pistols. The criminalization of possession of 100-round drum magazines would seem to be a reasonable fit as a means to achieve California's important safety objectives. On the other hand, it may be the type of weapon that would be protected by the Second Amendment for militia use under *Miller*. In any event, California's § 32310 (c) & (d) would not have prevented the shooter from acquiring and using the shotgun and pistols loaded with smaller 10-round magazines.[12]

The next incident is the Tuscon, Arizona shooting (#54) (1/8/11) in which Chief Judge John Roll, a friend of this Court, was killed. It involved a 33-round magazine for a Glock 19 pistol. Again, a 33-round magazine would seem unusual. But a Glock 19 with its standard magazine would seem to be the quintessential self-defense weapon.

The fifth mass shooting took place in Binghamton, New York (#82) (4/3/09) where two handguns and a 30-round magazine were used in the killing of 14 victims. The survey reports that 98 rounds were fired in the

[12] The Colorado incident is the only case where a truly high capacity 100-round magazine was used.

attack. Since 1994, it has been illegal in New York to purchase a magazine holding more than 10 rounds.

The sixth mass shooting occurred in East Oakland, California (#85) (3/21/09) and involved a pistol and a SKS assault-style rifle with a high-capacity magazine. As mentioned earlier, the shooting took place during a time when the shooter, who had a criminal history, was *on parole for assault with a deadly weapon*.

(m) conclusions from the Mayor's survey

Some conclusions can be drawn from the Mayor's survey submitted by the Attorney General. Of the ten mass shooting events that occurred in California, only two involved the use of a magazine holding more than 10 rounds. In view of the large population of California and the five-year time period studied, it appears that the Prop 63 amendments to § 32310 aim to eliminate that which is an incredibly rare danger to public safety. Moreover, based on this preliminary evidentiary record submitted by the Attorney General, § 32310 is a poor fit as a means to eliminate the types of mass shooting events experienced in California. In other words, § 32310 appears to be a poor fit as a means for the State to achieve its four important objectives.

In East Oakland, the shooter had already demonstrated that he was not a lawabiding responsible gun owner. On the contrary, the Mayors' survey notes that "[t]he shooter had a lengthy criminal history, including a conviction for armed battery, which would have [already] prohibited him from possessing a gun." It notes that "he was on parole for

assault with a deadly weapon at the time of the shooting." It also notes that one month before the mass shooting incident in which police officers were targeted, "[t]he shooter took part in a home invasion robbery . . . in which a rifle was reported stolen." Criminalizing possession of a magazine holding any more than 10 rounds, as the amendments to § 32310 do, likely would have had no effect on this perpetrator.

(n) a slippery slope

What is clear from the preliminary evidence presented is that individuals who intend to engage in mass gun violence typically make plans. They use multiple weapons and come loaded with extra ammunition. They pick the place and the time and do much harm before police can intervene. Persons with violent intentions have used large capacity magazines, machine guns, hand grenades and pipe bombs, notwithstanding laws criminalizing their possession or use. Trying to legislatively outlaw the commonly possessed weapon *de jour* is like wearing flip flops on a slippery slope. A downhill slide is not hard to foresee. Tragically, when 30-round magazines are banned, attackers will use 15 or 17-round magazines. If magazines holding more than 10 rounds are banned they will use multiple 10-round magazines. If all semi-automatic weapons are banned they will use shotguns and revolvers. All of these scenarios already occur. Because revolvers and handguns are the quintessential home defense weapon protected by the Second Amendment and specifically approved in *Heller*, and because the average defensive gun use involves firing 2.2 rounds (according to the State's experts), states could rationalize a ban on possession

of rounds in excess of three per weapon.[13] Criminals intent on violence would then equip themselves with multiple weapons. The State could then rationalize a one-weapon-per-individual law. Since "merely" brandishing a firearm is usually effective as a defense to criminal attack (according to the State's experts), it could be argued that a one-revolver-with-one-round-per-individual ban is a reasonable experiment in state police power as a means to protect citizens and law enforcement officers from gun violence.

Statutes disarming law-abiding responsible citizen gun owners reflect an opinion on gun policy. Courts are not free to impose their own policy choices on sovereign states. But as *Heller* explains, the Second Amendment takes certain policy choices and removes them beyond the realm of debate. Disarming California's law-abiding citizenry is not a constitutionally-permissible policy choice.

To the specific point, a mass shooting accomplished with the use of a gun magazine holding more than 10 rounds of ammunition, or any number of rounds, is an exceedingly tragic event. Fortunately, it is also a rare event. Section 32310's ban and

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[13] In drawing lines and defining how a regulation "fits," this is not so far-fetched. Indeed, in the past New York State drew the line at seven live rounds arguing that since the average citizen expends only two rounds in self-defense, citizens should make do with seven rounds." *See New York State Rifle and Pistol Ass'n v. Cuomo*, 990 F. Supp. 2d 349, 372 (W.D.N.Y. 2013), *aff'd in part and rev'd in part,* 804 F.3d 242 (2nd Cir. 2015) ("Defendants contend, pointing to a study conducted by the NRA, that the average citizen using his or her weapon in self-defense expends only two bullets. Thus, New York argues, citizens do not truly need more than seven rounds.").

criminalization of possession of magazines holding more than 10 rounds is not likely to prevent future mass shootings. And § 32310 (c) & (d) do not provide a reasonable fit to accomplish California's important goal of protecting the public from violent gun crime, as the preliminary data set from the Mayors' survey bears out.

ii. The State's Expert Declarations

The preliminary expert witness declarations submitted by the Attorney General are likewise unpersuasive. They do not constitute evidence reasonably believed to be relevant to substantiate the State's important interests. *Fyock*, 779 F.3d at 1000 (city may rely on evidence reasonably believed to be relevant). On the contrary, the data offered by the Attorney General is made up of anecdotal accounts, collected by biased entities, upon which educated surmises and tautological observations are framed. A statute criminalizing the mere possession of an integral piece of a constitutionally protected firearm, cannot be justified on the basis of defective data or emotion-driven claims. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438—39 (2002) ("This is not to say that a municipality can get away with shoddy data or reasoning.").

(a) Webster

For example, the Attorney General submits the expert declaration of a professor of health policy and management. *See* Declaration of Daniel W. Webster (filed 6/5/17). Although the expert offers many opinions about the public safety threat posed by magazines holding any more than 10 rounds, he concedes that robust supporting data is missing. "*To*

date, there are no studies that have examined separately the effects of an assault weapons ban, on the one hand, and a LCM ban, on the other hand . . . ." *Id.* at ¶ 25 (emphasis added). He then opines that the largest protective effect of these bans comes from restricting magazines holding any more than 10 rounds because "LCMs are used much more frequently than assault weapons." As discussed earlier, however, the Mayor's survey paints a different picture. Without the benefit of unbiased, scientifically collected empirical data, it is unclear upon what evidence Professor Webster is basing his opinions.

The professor also acknowledges, that "*no formal, sophisticated analyses of data on mass shootings in public places by lone shooters for the period 1982-2012 collected by Mother Jones magazine has been performed to my knowledge . . . .*" *Id.* at ¶ 22 (emphasis added). He grudgingly admits in his declaration that "it is possible that the federal ban on assault weapons and magazines holding more than 10 rounds did contribute to a proportionately small yet meaningful reduction in gun violence, *but available data and statistical models are unable to discern the effect*." *Id.* at ¶ 21 (emphasis added). Nevertheless, the professor opines that California's 10-round magazine limit "seems prudent." *Id.* at ¶ 26. In fact, he opines that "[i]ndeed, a lower limit could be justified," based on a complete absence of reliable studies done on formal data sets. *Id.*

(b) Allen

In another example, the Attorney General submits the declaration of an economist who, like the professor of public health, also acknowledges the

shoddy state of empirical research on large capacity magazine use. *See* Declaration of Lucy P. Allen (filed 6/5/17). She found two comprehensive sources detailing mass shootings: (1) data from Mother Jones' investigation published by Mother Jones magazine covering mass shootings from 1982-2017; and (2) a study by the Citizens Crime Commission of New York City covering 1984-2012. *Id.* at ¶ 11. She admits that between the two sources, "[f]or many of the mass shootings, the data does not indicate whether a large-capacity magazine is used." *Id.* at ¶ 13 and n.9. In opining about the use of firearms in self-defense, the economist relies on a data set from the NRA Institute for Legislative Action, but admits that "it is not compiled scientifically." *Id.* at ¶ 6.

(c) Donahue

In yet another example, the Attorney General submits the declaration of a professor with graduate degrees in economics (from Yale) and law (from Harvard University). *See* Declaration of John J. Donahue (filed 6/5/17). Professor Donahue also notes the dearth of solid data, conceding, *"I am not aware of any current social science research providing an estimate for the number of American households that own large-capacity magazines or LCMs . . . or for the number of LCMs in private hands in America.*" *Id.* at ¶ 19 (emphasis added). Citing a few news articles and little more, he opines that, "a review of the resolution of mass shootings in the U.S. suggests that bans on large capacity magazines can help save lives by forcing mass shooters to pause and reload ammunition." *Id.* at ¶ 21.

Ironically, Professor Donahue's declaration was signed, and the preliminary injunction hearing in this case was held, one day before the shooting incident at the baseball field in Alexandria, Virginia. There, a shooter targeted members of a Congressional baseball team firing up to 100 rounds. No one tried to tackle or disarm the shooter while he paused to reload. Instead, it ultimately took two Capitol Police members who were already at the scene to stop the shooter. As Michigan Representative Mike Bishop told CBS News Detroit at the scene,

> "The only reason why any of us walked out of this thing, by the grace of God, one of the folks here had a weapon to fire back and give us a moment to find cover. We were inside the backstop and if we didn't have that cover by a brave person who stood up and took a shot themselves, we would not have gotten out of there and every one of us would have been hit—every single one of us."

See http://detroit.cbslocal.com/2017/06/14/michigan-representative-ok; http://dailymail.co.uk/news/article-4603404. Likewise, the shooting at Fort Hood, Texas, involved a shooter using a FN "Five-seveN" pistol which comes standard with a 10 or 20 round magazine. The shooter fired some 220 rounds, meaning he would have had to stop and re-load a 20-round high capacity magazine ten times. Yet no one, even on a military base, tried to tackle or disarm the shooter while he paused to reload.

The expert witness also belittles the possibility of an elderly or disabled homeowner needing a firearm for self-defense from a violent home invasion that

would hold enough rounds such that reloading was not necessary. The elderly or disabled homeowner suffering a violent home invasion attack may need (more than anyone else) a larger capacity magazine for home protection. That person, the expert decries as "mythical," and "conjured" up by NRA experts, and dismisses as irrelevant. *Id.* at ¶ 28.

Professor Donahue then speculates about how *if* there were a "future case" of a law-abiding citizen who needs a gun for self-defense and needs more than 10 rounds, that citizen "can either re-load the defensive weapon by inserting a new clip or by using a second weapon." *Id.* at ¶ 36. Based upon his own speculation, he then opines that this implies the large capacity magazine ban is "well-tailored" and likely to have little or no impact on self-defense capability. *Id.*

The professor did not need to speculate about some unlikely, hypothetical, future case. The scenario has actually played out in the past. And it turns out that his speculation was a bit off. Among the Attorney General's evidentiary presentation is a news account of a law-abiding woman and her husband who late one night needed to fire a gun in self-defense against armed robbers. Oppo. Gordon Declaration, Exh. 41.

As two armed men broke in, Susan Gonzalez was shot in the chest. She made it back to their bedroom and found her husband's .22 pistol. Wasting the first rounds on warning shots, she then emptied the single pistol at one attacker. Unfortunately, out of ammunition, she was shot again by the other armed attacker. She was not able to re-load or use a second gun. Both her and her husband were shot twice. Forty-two bullets were fired. *Id.,* Exh. 41 (Jacksonville

Times-Union, July 18, 2000) ("Suddenly the door flew open and two masked men burst into the doublewide wearing gloves and camouflage jackets and waving guns . . . . She was shot in the chest . . . dialed 911 . . . then grabbed her husband's Ruger .22 from a drawer . . . fired several shots over the robbers' heads to scare them off . . . saw one of the gunmen . . . crouched near her refrigerator. . . sneaked up behind him and emptied the Ruger, hitting him twice with her seven or eight remaining bullets. The other gunman . . . then shot Susan Gonzalez, now out of ammunition. [The gunman] fled from the house but returned . . . [.] He put a gun to Susan Gonzalez's head and demanded the keys to the couple's truck."); *cf.* Oppo. Gordon Declaration, Exh. 102 at 388 (Washington Post, Jan. 30, 2013, Transcript of Senate Judiciary Committee Hearing on Gun Violence), Senator L. Graham remarks: "I do not know if 10 versus 19 is common or uncommon. I do know that 10 versus 19 in the hands of the wrong person is a complete disaster. I do know that six bullets in that hands [sic] of a woman trying to defend her children may not be enough. . . [.] One bullet in the hands of the wrong person we should all try to prevent. But when you start telling me that I am unreasonable for wanting that woman to have more than six bullets, or to have and AR-15 if people [are] roaming around my neighborhood, I reject the concept."). The Attorney General's own evidence casts doubt on the reliability of his experts' opinions.

(d) James

The Attorney General submits the declaration of a retired police chief of Emeryville, California. *See*

Declaration of Ken James (filed 6/5/17). James relies on his police experience and debriefings of several high profile mass shootings. He says that the existence of high capacity magazines only serves to enhance the killing and injuring potential of a firearm. *Id.* at ¶ 6. No quarrel there. Firearms have the potential to injure and kill.[14] He then opines that "possession and use of high capacity magazines by individuals committing criminal acts pose a significant threat to law enforcement personnel and the general public." No doubt about that. He does not, however, try to explain why forcing law-abiding individuals to disarm and dispossess themselves of magazines holding more than 10-rounds is the solution. He simply suggests that victims have not used them in the past and so they do not need them now. *Id.* at ¶ 8. It is hardly surprising, however, that law-abiding citizens in California, who have been prohibited for years from buying guns with magazines holding more than 10 rounds, would fire no more than 10 rounds in a self-defense situation.

James also describes one professional investigation experience in which he took part. Whatever else James draws from the experience, his experience suggests that a criminal firing 40 rounds does not always result in a mass shooting disaster or wounded bystanders. He describes an Emeryville drive-by shooting where more than 40 shell casings were found at the scene; only one person was killed and no other person was injured. *Id.* at ¶ 7. Having read and viewed news accounts of self-defense gun

[14] At the same time, they have the potential to deter and protect.

use, James then says, "I have performed these reviews to discover evidence that the ability of a victim to fire a large number was necessary." *Id.* at ¶ 8. Perhaps he meant to say the opposite. Lastly, James' declaration relies on a position paper that appears to have been inadvertently omitted.

(e) City of Sunnyvale

In the *Fyock* case, the court had a sufficiently convincing evidentiary record of a reasonable fit. But there are important differences between the City of Sunnyvale and the entire State of California. Sunnyvale is the crown jewel of California's Silicon Valley. It has a population density of approximately 6,173 persons per square mile, according to the 2010 census. Sunnyvale has consistently ranked among the ten safest cities (of similar size) according to the FBI's crime reports. According to a Wikipedia article, "Sunnyvale is one of the few U.S. cities to have a single unified Department of Public Safety, where all personnel are trained as firefighters, police officers, and EMTs, so they can respond to an emergency in any of the three roles." In a dense population municipality where the local government has uniquely cross-trained emergency personnel that can quickly respond to crime, perhaps a law-abiding citizen can make do with a maximum of ten rounds for self-defense. And perhaps there is a higher risk of stray bullets penetrating walls and wounding bystanders. And perhaps there are few elderly or disabled single adults living alone and far from help in Sunnydale. Perhaps residents are wealthy enough to purchase multiple firearms or live in gated, security-guarded enclaves.

Compare this with Imperial County, California, with a population approximately the same as the City of Sunnyvale. There the population density is only 34 persons per square mile. In Alpine County, California, the entire county population is 1,175 people, according to the 2010 census. Population density is two persons per square mile. Law enforcement response times are no doubt longer there. The risk of stray bullets wounding bystanders is probably low. It is likely that many rely on themselves and their lawfullyowned firearms for self-defense. Certainly in suburban and rural settings, there will be occasions when more than 10-rounds are needed for self-defense. Even in San Francisco, with the densest population area in the State (17,858 people per square mile[15]), one court conceded that more than 10 rounds may be needed for defense from criminals. *See San Francisco Police Officers Ass'n v. City and County of S.F.*, 18 F. Supp. 3d 997, 1005 (N.D. Cal. 2014) ("Although there will be some occasions when a law-abiding citizen needs more than ten rounds to defend himself or his family, the record shows that such occasions are rare. This will be even rarer in a dense urban area like San Francisco where police will likely be alerted at the onset of gunfire and come to the aid of the victim. Nonetheless, in those rare cases, to deprive the citizen of more than ten shots may lead to his of her own death. Let this point be conceded.").

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[15] *See* www.sacbee.com/news/politics-government/capitol-alert/article 12486362.html (Mar. 4, 2015).

iii. False Dichotomy

In the end, it is a false dichotomy upon which the Attorney General rests his evidentiary case. The Attorney General argues that any magazine in criminal hands with more than 10 rounds is "unusually dangerous" to law-abiding citizens. ("Unusually dangerous" is not the same as the Second Amendment reference point of "unusual and dangerous.") At the same time he (and his experts) declare that no good law-abiding citizen really *needs* a gun magazine holding more than 10 rounds for self-defense.

As a purely public policy choice, a government may declare that firearms of any capacity are dangerous in the hands of criminals, a proposition with which this Court would certainly agree. At the same time, it can also be the case that firearms with larger than 10-round magazines in the hands of law-abiding citizens makes every individual safer and the public as a whole safer. Guns in the hands of criminals are dangerous; guns in the hands of law-abiding responsible citizens ameliorate that danger. The Second Amendment takes the policy choice away from state government. To give full life to the core right of self-defense of the home, every law-abiding responsible United States citizen has a constitutionally-protected right to keep and bear a handgun (a handgun being the quintessential weapon of choice). Pistols are handguns. Pistols are designed to use magazines of various capacities and some of the most popular come standard with 15 or 17 round magazines.

Using the resources of the criminal justice system against the law-abiding responsible citizen to wrest a heretofore lawfully-possessed magazine holding any more than 10 rounds out of his or her hands, is hardly the reasonable fit required by intermediate scrutiny. The "evidence must fairly support" the "rationale" for the state's statute. *Jackson*, 746 F.3d at 969-70. "[A]nd courts should not credit facially implausible legislative findings." *Id.*

iv. Ballot Initiative Finding

Here, there are no legislative findings as the statutory provisions in effect are the product of a voter initiative. The initiative contains findings. But to the extent the findings are relevant, they expresses a purpose that affronts the over-arching ideal of the Second Amendment. Sections 2.11 and 2.12 of Proposition 63, in the section titled "Findings and Declarations" addresses "military-style large-capacity ammunition magazines." It declares, "*No one except trained law enforcement should be able to possess these dangerous magazines*." (Emphasis added.)

The rationale is anathema to the United States Constitution's Bill of Rights guarantee of a right to keep and bear arms. It is a right naturally possessed by regular, law-abiding responsible citizens, whom are neither reliant upon, nor subservient to, a privileged, powerful, professional police state.[16]

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[16] *See e.g., Silveira v. Lockyer*, 328 F.3d 567, 569-70 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing *en banc*). Judge Kozinski cautions against,

> . . . fall[ing] prey to the delusion—popular in some circles—that ordinary people are too careless and stupid to own guns, and we would be far better off

leaving all weapons in the hands of professionals on the government payroll. But the simple truth—born of experience—is that tyranny thrives best where government need not fear the wrath of an armed people. Our own sorry history bears this out: Disarmament was the tool of choice for subjugating both slaves and free blacks in the South. In Florida, patrols searched blacks' homes for weapons, confiscated those found and punished their owners without judicial process. *See* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration,* 80 Geo. L.J. 309, 338 (1991). In the North, by contrast, blacks exercised their right to bear arms to defend against racial mob violence. *Id.* at 341-42. As Chief Justice Taney well appreciated, the institution of slavery required a class of people who lacked the means to resist. *See Dred Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857) (finding black citizenship unthinkable because it would give blacks the right to "keep and carry arms wherever they went"). A revolt by Nat Turner and a few dozen other armed blacks could be put down without much difficulty; one by four million armed blacks would have meant big trouble.

All too many of the other great tragedies of history—Stalin's atrocities, the killing fields of Cambodia, the Holocaust, to name but a few—were perpetrated by armed troops against unarmed populations. Many could well have been avoided or mitigated, had the perpetrators known their intended victims were equipped with a rifle and twenty bullets apiece, as the Militia Act required here. If a few hundred Jewish fighters in the Warsaw Ghetto could hold off the Wehrmacht for almost a month with only a handful of weapons, six million Jews armed with rifles could not so easily have been herded into cattle cars.

My excellent colleagues have forgotten these bitter lessons of history. The prospect of tyranny may not grab the headlines the way vivid stories of gun crime

A reasonable fit as a means to protect citizens and law enforcement from gun violence and crime, in a state with numerous military bases and service men and service women, would surely permit the honorably discharged member of the Armed Forces who has lawfully maintained a magazine holding more than 10 rounds for more than twenty years to continue to keep and use his magazine. These citizens are perhaps the best among us. They have volunteered to serve and have served and sacrificed to protect our country. They have been specially trained to expertly use firearms in a conflict. Oppo. Gordon Declaration, Exh. 102 at 389 (Washington Post, Jan. 30, 2013, Transcript of Senate Judiciary Committee Hearing on Gun Violence), Senator J. Johnson remarks: "It is my understanding talking with my associates in the military, that public policing mirrors much of what the military does." They have proven their good citizenship by years of lawfully keeping firearms as

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> routinely do. But few saw the Third Reich coming until it was too late. The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once.
>
> Fortunately, the Framers were wise enough to entrench the right of the people to keep and bear arms within our constitutional structure. The purpose and importance of that right was still fresh in their minds, and they spelled it out clearly so it would not be forgotten.

civilians. What possibly better citizen candidates to protect the public against violent gun-toting criminals?

Similarly, a reasonable fit as a means to protect citizens and law enforcement from gun violence and crime, would surely make an exception for a Department of Justicevetted, privately trained citizen to whom the sheriff has granted a permit to carry a concealed weapon, and whom owns a magazine holding more than 10 rounds. California's statute does not except such proven, law-abiding, trustworthy, gun-owning individuals. Quite the opposite. Under the statute, if not enjoined, all of these worthy individuals will become outlaws on July 1, 2017, should they not dispossess themselves of magazines holding 10+ rounds they currently own.[17]

The Attorney General articulates four important objectives to justify this new statutory bludgeon. They all swing at reducing "gun violence." The bludgeon swings to knock large capacity magazines out of the hands of criminals. If the bludgeon does not work, then the criminals still clinging to their large capacity magazines will be thrown in jail while the magazines are destroyed as a public nuisance. The problem is the bludgeon indiscriminately hammers all that is in its

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[17] There is some irony in the fact that these CCW holders have abided by the law. In applying for a concealed weapon permit, they disclose, *inter alia*, their name, physical address, date and place of birth, criminal history, traffic violation history, and the particular type and caliber of firearm (including serial number) they intend to carry. *See* Cal. Pen. Code § 26175. In so doing, they provided a ready-made list of gun-owning citizens and a list of the types of guns they carry, which guns are likely to use magazines holding more than 10 rounds.

path. Here, it also hammers magazines out of the hands of long time law-abiding citizens. It hammers the 15-round magazine as well as the 100-round drum. And it throws the law-abiding, self-defending citizen who continues to possess a magazine able to hold more than 10 rounds into the same jail cell as the criminal. Gun violence to carry out crime is horrendous and should be condemned by all. Defensive gun violence may be the only way a law-abiding citizen can avoid becoming a victim.

Put differently, violent gun use is a constitutionally-protected means for lawabiding citizens to protect themselves from criminals. The phrase "gun violence" may not be invoked as a talismanic incantation to justify any exercise of state power. Implicit in the concept of public safety is the right of law-abiding people to use firearms and the magazines that make them work to protect themselves, their families, their homes, and their state against all armed enemies, foreign and domestic. To borrow a phrase, it would indeed be ironic if, in the name of public safety and reducing gun violence, statutes were permitted to subvert the public's Second Amendment rights—which may repel criminal gun violence and which ultimately ensure the safety of the Republic. *Cf. United States v. Robel*, 389 U.S. 258, 264 (1967) ("Implicit in the term 'national defense' is the notion of defending the values and ideals which set this Nation apart. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.").

2. Irreparable Harm

There are elements of Second Amendment jurisprudence that have First Amendment analogies. *See Jackson*, 746 F.3d at 960. The Ninth Circuit has held that the "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (alteration in original) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). A "colorable First Amendment claim" is "irreparable injury sufficient to merit the grant of relief." *Warsoldier v. Woodford*, 418 F.3d 989, 1001 (9th Cir. 2005) (internal quotation marks omitted). "If the underlying constitutional question is close. . . we should uphold the injunction and remand for trial on the merits." *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 664-65 (2004). The same is true for Second Amendment rights. Their loss constitutes irreparable injury. Perhaps even more so in this context, where additional rounds may save lives, and where Plaintiffs and those like them will irrevocably lose possession and use of their magazines upon delivery to the police to be destroyed, or upon sale to a firearms dealer who will have little market for resale, or upon shipment somewhere out of state. The right to keep and bear arms protects tangible and intangible interests which cannot be compensated by damages. *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 150 (D.D.C. 2016) (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011). "The right to bear arms enables one to possess not only the means to defend oneself but also the self-confidence—and psychic comfort—that comes with knowing one could protect oneself if necessary." *Grace*, 187 F. Supp. 3d at

150. Loss of that peace of mind, the physical magazines, and the enjoyment of Second Amendment rights constitutes irreparable injury.

3. Balance of Hardships

Balancing in the First Amendment context weighs more heavily the chilled rights of individuals, especially when criminal sanctions loom. "As to the balance of equities, we recognize that while the preliminary injunction is pending, there will be some hardship on the State. Nevertheless, the balance of equities favors Appellees, whose First Amendment rights are being chilled. This is especially so because the Act under scrutiny imposes criminal sanctions for failure to comply." *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014). "Where a prosecution is a likely possibility, yet only an affirmative defense is available, speakers may self-censor rather than risk the perils of trial. There is a potential for extraordinary harm and a serious chill upon protected speech." *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 670-71 (2004). The same is true here. While a preliminary injunction is pending, there will be some hardship on the State. Nevertheless, because § 32310 (c) & (d) impose criminal sanctions for a failure to act it poses the potential for extraordinary harm on Plaintiffs, while discounting their Second Amendment rights. The balance of hardships favors Plaintiffs.

4. Public Interest

"Once an applicant satisfies the first two factors [likelihood of success on the merits and irreparable harm], the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest. These factors merge when the

Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009); *U.S. S.E.C. v. Wilde*, 2013 WL 2303761, at *8 (C.D. Cal. May 20, 2013); *Native Songbird Care and Conservation v. LaHood*, 2013 WL 3355657, at *12 (N.D. Cal. July 2, 2013); *Tracy Rifle & Pistol LLC v. Harris,* 118 F. Supp. 3d 1182, 1193 (E.D. Cal. 2015).

The public interest favors the exercise of Second Amendment rights by law-abiding responsible citizens. And it is always in the public interest to prevent the violation of a person's constitutional rights. *Hobby Lobby Stores, Inc. v. Sibelius*, 723 F.3d 1114, 1145 (10th Cir. 2013), *aff'd sub nom., Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014); *Doe*, 772 F.3d at 583 (quoting *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002)) ("Finally, the public interest favors the exercise of First Amendment rights. Although we appreciate the State's significant interest in protecting its citizens from crime, nothing in the record suggests that enjoining the CASE Act would seriously hamper the State's efforts to investigate online sex offenses, as it can still employ other methods to do so. On the other hand, we 'have consistently recognized the significant public interest in upholding First Amendment principles.'"). The balance of equities and the public interest merge when a likely constitutionally infringing statute is preliminarily enjoined to maintain the *status quo*. That is the case here.

B. The Government Takings Claim

The Attorney General asserts that, when the government acts pursuant to its police power to protect the safety, health, and general welfare of the

public, a prohibition on possession of property declared to be a public nuisance is not a physical taking. *See* Oppo. at 22, (citing *Chicago, B. & Q. Railway Co. v. Illinois*, 200 U.S. 561, 593-594 (1906) and *Akins v. United States,* 82 Fed. Cl. 619, 622 (2008)). The Attorney General then cites a number of courts that have rejected Takings Clause challenges to laws banning the possession of dangerous weapons. *See* Oppo. at 23 (citing *Akins*, 82 Fed. Cl. at 623-24 (restrictions on manufacture and sale of machine guns not a taking) and *Gun South, Inc. v. Brady*, 877 F.2d 858, 869 (11th Cir. 1989) (temporary suspension on importation of assault weapons not a taking)). California has deemed large capacity magazines to be a nuisance. *See* Cal. Pen. Code § 32390. That designation is dubious. As the Supreme Court recognized a decade before *Heller*, "[g]uns in general are not 'deleterious devices or products or obnoxious waste materials.'" *Staples v. United States*, 511 U.S. 600, 610 (1994) (citation omitted).

Plaintiffs remonstrate that defending the law's forced, uncompensated, physical dispossession of magazines holding more than 10 rounds as an exercise of its "police power" is not persuasive. Supreme Court precedent casts doubt on the State's theory that an exercise of the police power cannot constitute physical takings. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In *Loretto*—a case the Attorney General does not cite—the Supreme Court held that a law requiring physical occupation of private property was both "within the State's police power" *and* an unconstitutional physical taking. The Court explained that whether a law effects a physical taking is "a separate question" from whether the state

has the police power to enact the law. *Id.* at 425-26 ("It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid. We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.").

In a similar vein, the Supreme Court holds that a law enacted pursuant to the state's "police powers to enjoin a property owner from activities akin to public nuisances" is not immune from scrutiny under the regulatory takings doctrine. *Lucas v. South Carolina Coastal Council* 505 U.S. 1003, 1020-27 (1992). The Court reasoned that it was true "*[a] fortiori*" that the "legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated." *Id.* at 1026.

Recently, the Supreme Court summarized some of the fundamental principles of takings law. *Murr v. Wisconsin*, __ S.Ct. __, 2017 WL 2694699 (Jun. 23, 2017). "The Takings Clause of the Fifth Amendment provides that private property shall not be taken for public use, without just compensation. The Clause is made applicable to the States through the Fourteenth Amendment. As this Court has recognized, the plain language of the Takings Clause requires the payment of compensation whenever the government acquires private property for a public purpose, but it does not address in specific terms the imposition of regulatory burdens on private property." *Id.* at *7 (quotations and citations omitted). *Murr* notes that almost a century ago, the Court held that "while property may be

regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

Takings jurisprudence is flexible. There are however, two guides set out by *Murr* for detecting when government regulation is so burdensome that it constitutes a taking. "First, with certain qualifications a regulation which denies all economically beneficial or productive use of land will require compensation under the Takings Clause. Second, when a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on a complex of factors, including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Murr*, 2017 WL 2694699, at *8 (citations and quotation marks omitted). "[A] physical *appropriation* of property g[ives] rise to a *per se* taking, without regard to other factors." *Horne v. Dep't of Agric.*, 135 S.Ct. 2419, 2427 (2015).

The dispossession requirement of § 32310(c) & (d) imposes a rare hybrid taking. Subsection (d)(3) is a type of physical appropriation of property in that it forces owners of large capacity magazines to "surrender" them to a law enforcement agency "for destruction." Thus, (d)(3) forces a *per se* taking requiring just compensation. But there are two other choices. Subsection (d)(2) forces the owner to sell his magazines to a firearms dealer. It is a fair guess that the fair market value of a large capacity magazine on

or after July 1, 2017, in the State of California, will be near zero. Of course, the parties spend little time debating the future fair market value for the to-be-relinquished magazines. Subsection (d)(1) forces the owner to "remove" their large capacity magazines "from the state," without specifying a method or supplying a place. This choice obviously requires a place to which the magazines may be lawfully removed. In other words, (d)(1) relies on other states, in contrast to California, which permit importation and ownership of large capacity magazines. With the typical retail cost of a magazine running between $20 and $50, the associated costs of removal and storage and retrieval may render the process more costly than the fair market value (if there is any) of the magazine itself. Whatever stick of ownership is left in the magazine-owner's "bundle of sticks," it is the short stick.

Here, California will deprive Plaintiffs not just of the *use* of their property, but of *possession*, one of the most essential sticks in the bundle of property rights. Of course, a taking of one stick is not necessarily a taking of the whole bundle. *Murr*, 2017 WL 2694699, at *19 (Roberts, C.J., dissenting) ("Where an owner possesses a full 'bundle' of property rights, the destruction of one strand of the bundle is not a taking, because the aggregate must be viewed in its entirety."). Nevertheless, whatever expectations people may have regarding property regulations, they "do not expect their property, real or personal, to be actually occupied or taken away." *Horne*, 135 S.Ct. at 2427. Thus, whatever might be the State's authority to ban the sale or use of magazines over 10 rounds, the Takings Clause prevents it from compelling the

physical *dispossession* of such lawfully-acquired private property without just compensation.

Plaintiffs have demonstrated a likelihood of success on the merits of their governmental takings claim. Without compensation, Plaintiffs will be irreparably harmed as they will no longer be able to retrieve or replace their "large" capacity magazines as long as they reside in California. As the law-abiding owner relinquishes his magazine, he or she may also forfeit the self-defense peace of mind that a large capacity magazine had instilled. As in other cases where constitutional rights are likely chilled, the balance of hardships weighs in the citizen's favor. *Doe*, 772 F.3d at 583 ("As to the balance of equities, we recognize that while the preliminary injunction is pending, there will be some hardship on the State.").

The public interest also favors the protection of an individual's core Second Amendment rights and his or her protection from an uncompensated governmental taking that goes too far. Notably, a preliminary injunction will not increase the number of large capacity magazines lawfully present in California. The State may continue to investigate and prosecute the unlawful importation, purchase, sale, manufacturing, etc., of large capacity magazines during the pendency of a preliminary injunction. Regardless of the likelihood of success on Plaintiffs' Second Amendment claims, Plaintiffs are also entitled to a preliminary injunction to maintain the *status quo* and prevent irreparable injury under the Takings Clause of the Constitution.

IV. CONCLUSION

Every injury or death caused by the misuse of a firearm is a tragedy. That the mentally ill and violent criminals choose to misuse firearms is well known. This latest incremental incursion into solving the "gun violence" problem is a reflexively simple solution. But as H.L. Mencken wrote, "There is always a well-known solution to every human problem—neat, plausible, and wrong."[18]

Magazines holding more than 10 rounds are "arms." California Penal Code Section 32310, as amended by Proposition 63, burdens the core of the Second Amendment by criminalizing the mere possession of these magazines that are commonly held by law-abiding citizens for defense of self, home, and state. The regulation is neither presumptively legal nor longstanding. The statute hits close to the core of the Second Amendment and is more than a slight burden. When the simple test of *Heller* is applied, a test that persons of common intelligence can understand, the statute is adjudged an unconstitutional abridgment. Even under the more forgiving test of intermediate scrutiny, the statute is not likely to be a reasonable fit. It is not a reasonable fit because, among other things, it requires law-abiding concealed carry weapon permit holders and Armed Forces veterans to dispossess themselves of lawfully-owned gun magazines that hold more than 10 rounds—or suffer criminal penalties.

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[18] H.L. Mencken, *Prejudices: Second Series*, Alfred A. Knopf, Inc. (1920), p. 158.

The Court does not lightly enjoin a state statute, even on a preliminary basis. However, just as the Court is mindful that a majority of California voters approved Proposition 63 and that the government has a legitimate interest in protecting the public from gun violence, it is equally mindful that the Constitution is a shield from the tyranny of the majority. Plaintiffs' entitlements to enjoy Second Amendment rights and just compensation are not eliminated simply because they possess "unpopular" magazines holding more than 10 rounds.

If this injunction does not issue, hundreds of thousands, if not millions, of otherwise law-abiding citizens will have an untenable choice: become an outlaw or dispossess one's self of lawfully acquired property. That is a choice they should not have to make. Not on this record.

Accordingly, with good cause appearing for the reasons stated in this opinion, Plaintiffs' motion for a preliminary injunction is GRANTED.

IT IS HEREBY ORDERED that:

1. Defendant Attorney General Xavier Becerra, and his officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with him, and those duly sworn state peace officers and federal law enforcement officers who gain knowledge of this injunction order or know of the existence of this injunction order, are enjoined from implementing or enforcing California Penal Code sections 32310 (c) & (d), as enacted by Proposition 63, or from otherwise requiring persons to dispossess themselves of magazines able to hold more than 10 rounds lawfully acquired and possessed.

2. Defendant Becerra shall provide, by personal service or otherwise, actual notice of this order to all law enforcement personnel who are responsible for implementing or enforcing the enjoined statute. The government shall file a declaration establishing proof of such notice.

IT IS SO ORDERED.

DATED: June 29, 2017

[handwritten: signature]
HON. ROGER T. BENITEZ
United States District Judge

Appendix F

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

No. 3:17cv1017-BEN-JLB

VIRGINIA DUNCAN, et al.,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California; and DOES 1-10,

Defendants.

Before: BENITEZ, *District Judge*.

Filed: April 4, 2019

ORDER STAYING IN PART JUDGMENT PENDING APPEAL

On April 1, 2019, Defendant Xavier Becerra, in his official capacity as the Attorney General of the State of California, applied *ex parte* for an order, pursuant to Federal Rule of Civil Procedure 62, staying the Judgment entered in this action on March 29, 2019, pending his appeal to the United States Court of Appeals for the Ninth Circuit. As part of a stay pending appeal, the Attorney General requests reinstatement of the preliminary injunction issued in

2017 enjoining his enforcement of Calif. Penal Code § 32310 (c) and (d). He also notes that the Court has discretion to tailor the stay to account for cases where residents have purchased large-capacity magazines since last Friday.

In deciding whether to grant a stay pending appeal, a court should consider the following four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. "Each factor, however, need not be given equal weight." *Presidio Components, Inc. v. Am. Tech. Ceramics Corp.*, No. 14-cv-2061-H-BGS, 2018 WL 4928041, at *3 (S.D. Cal. Oct. 10, 2018) (citations omitted). The "likelihood of success in the appeal is not a rigid concept." *Id.* "Therefore, to obtain a stay pending appeal, a movant must establish a strong likelihood of success on appeal, or, failing that, " 'demonstrate a substantial case on the merits,' provided the other factors militate in movant's favor." *Id.* (citations omitted).

These considerations are similar to the factors an appellate court should weigh in deciding whether to issue a stay. *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott*, 571 U.S. 1061, 134 S.Ct. 506 (2013) (Scalia, J., concurring in denial of application to stay) ("When deciding whether to issue a stay, the Fifth Circuit had to consider four factors: (1) whether the State made a strong showing that it was likely to succeed on the merits, (2) whether the

State would have been irreparably injured absent a stay, (3) whether issuance of a stay would substantially injure other parties, and (4) where the public interest lay. The first two factors are "the most critical.") (quoting *Nken v. Holder,* 556 U.S. 418, 434 (2009))).

A Substantial Case on the Merits

The Attorney General has not made a strong showing, to this Court, that he is likely to succeed on the merits. Nevertheless, both sides are aware that other courts have come to contrasting conclusions on similar issues. Of course, facts matter and the facts are different. Strong and thoughtful views may be found on both sides of the important legal questions presented by this case. This Court's decision cuts a less-traveled path and the outcome is very important to all citizens.

"There are many ways to articulate the minimum quantum of likely success necessary to justify a stay—be it a 'reasonable probability' or 'fair prospect,' . . . 'a substantial case on the merits,' . . . [or] that 'serious legal questions are raised.' We think these formulations are essentially interchangeable, and that none of them demand a showing that success is more likely than not. Regardless of how one expresses the requirement, the idea is that in order to justify a stay, a petitioner must show, at a minimum, that she has a substantial case for relief on the merits." *Leiva-Perez v. Holder*, 640 F.3d 962, 967-68 (9th Cir. 2011) (citations omitted). In this case, the Attorney General has demonstrated a substantial case on the merits, which favors a stay.

Irreparable Injury to the State

The Attorney General says that a state suffers irreparable injury whenever its laws are enjoined. There is strong support for that claim. *Abbott*, 571 U.S. 1061, 134 S.Ct. at 506 ("With respect to the second factor, the Court of Appeals reasoned that the State faced irreparable harm because '"any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."' *Maryland v. King,* 133 S.Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.,* 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers))."). The Ninth Circuit, however, has never adopted this view. *Latta v. Otter*, 771 F.3d 496, 500 n.1 (9th Cir. 2014) ("Individual justices, in orders issued from chambers, have expressed the view that a state suffers irreparable injury when one of its laws is enjoined. *See Maryland v. King,* 133 S.Ct. 1, 3 (2012) (Roberts, C.J., in chambers); *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.,* 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). No opinion for the Court adopts this view.").

The Attorney General may be correct, but it does not end the inquiry. "As the cited authority suggests, a state may suffer an abstract form of harm whenever one of its acts is enjoined. To the extent that is true, however, it is not dispositive of the balance of harms analysis. If it were, then the rule requiring "balance" of "competing claims of injury" would be eviscerated." *Indep. Living Ctr. of S. California, Inc. v. Maxwell-Jolly*, 572 F.3d 644, 658 (9th Cir. 2009), *vacated on other grounds and remanded sub nom. Douglas v.*

Indep. Living Ctr. of S. California, Inc., 565 U.S. 606 (2012). "Federal courts instead have the power to enjoin state actions, in part, because those actions sometimes offend federal law provisions [or in this case, one of the Bill of Rights], which, like state statutes, are themselves 'enactments of its people or their representatives.'" *Id.* (emphasis in original) (citation omitted).

Injury to Other Parties

Without question, entering a stay pending appeal will harm the Plaintiffs, and all others like the Plaintiffs (who are many), who would choose to acquire and possess a firearm magazine holding more than 10 rounds for self-defense. "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Rodriguez v. Robbins*, 715 F.3d 1127, 1144 (9th Cir. 2013) (quoting *Melendres v. Arpaio,* 695 F.3d 990, 1002 (9th Cir. 2012), quoting *Elrod v. Burns,* 427 U.S. 347, 373 (1976)).

Where the Public Interest Lay

The State's interest in enforcing a law merges with the public interest, where the law is valid. *Nken,* 556 U.S. at 435. At the same time, however, "'it is always in the public interest to prevent the violation of a party's constitutional rights.'" *Am. Beverage Ass'n v. City & Cty. of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) (quoting *Melendres*, 695 F.3d at 1002).

Discussion

The first factor weighs in favor of staying the injunction. The second factor weighs heavily in opposing directions and thus amounts to a draw. The

last two factors weigh against staying the injunction. The first two factors are the most critical. *Abbott*, 571 U.S. 1061. The result of these four factors slightly favors a stay pending appeal.

The Court understands that strong emotions are felt by people of good will on both sides of the Constitutional and social policy questions. The Court understands that thoughtful and law-abiding citizens can and do firmly hold competing opinions on firearm magazine restrictions. These concerns auger in favor of judicial deliberation. There is an immeasurable societal benefit of maintaining the immediate status quo while the process of judicial review takes place.

The power to grant a stay pending appeal is part of a court's "traditional equipment for the administration of justice," and is "a power as old as the judicial system of the nation." *Nken,* 556 U.S. at 427. A partial stay will permit the appellate court to bring its considered judgment to bear—judgment that takes time. "The choice for a reviewing court should not be between justice on the fly" or a moot ceremony. *Id.* A stay pending appeal is a means of ensuring that the reviewing court(s) can thoughtfully fulfill the role of review. *Id.* A stay "simply suspend[s] judicial alteration of the status quo." *Id.* at 429. In this case, that means staying the injunction on subsections (a) and (b) of § 32310 which has been in force since 2000 and continuing in place the injunction on subsection (c) and (d) entered by this Court on June 29, 2017, pending the outcome of the appeal.

In layman's terms, the State of California and the law enforcement agencies therein will be free to re-start the enforcement of Calif. Penal Code § 32310 (a)

and (b) which currently prohibits, among other things, any person in the state from manufacturing, importing into the state, offering for sale, giving, lending, buying, or receiving a firearm magazine able to hold more than 10 rounds (as defined by Calif. Penal Code § 16740). This will continue until the appeal proceedings conclude or the stay is modified or lifted.

At the same time, the State of California and the law enforcement agencies therein will remain enjoined (or prevented) from enforcing Calif. Penal Code § 32310 (c) and (d) which would have criminalized the simple possession of a firearm magazine able to hold more than 10 rounds and required disposing of such magazines. This will also continue until the appeal proceedings conclude or the stay is modified or lifted.

Both parties indicate in briefing that persons and business entities in California may have manufactured, imported, sold, or bought magazines able to hold more than 10 rounds since the entry of this Court's injunction on March 29, 2019 and in reliance on the injunction. Indeed, it is the reason that the Attorney General seeks urgent relief in the form of a stay pending appeal. Both parties suggest that it is appropriate to fashion protection for these law-abiding persons.

THEREFORE, IT IS HEREBY ORDERED that the Judgment is stayed in part pending final resolution of the appeal from the Judgment. The permanent injunction enjoining enforcement of California Penal Code § 32310 (a) and (b) is hereby stayed, effective 5:00 p.m., Friday, April 5, 2019.

IT IS HEREBY FURTHER ORDERED that the preliminary injunction issued on June 29, 2017, enjoining enforcement of California Penal Code § 32310 (c) and (d) shall remain in effect.

IT IS HEREBY FURTHER ORDERED that the permanent injunction enjoining enforcement of California Penal Code § 32310 (a) and (b) shall remain in effect for those persons and business entities who have manufactured, imported, sold, or bought magazines able to hold more than 10 rounds between the entry of this Court's injunction on March 29, 2019 and 5:00 p.m., Friday, April 5, 2019.

DATED: April 4, 2019

[handwritten: signature]
HON. ROGER T. BENITEZ
United States District Judge

Appendix G

RELEVANT STATUTORY PROVISIONS

Cal. Penal Code §32310

(a) Except as provided in Article 2 (commencing with Section 32400) of this chapter and in Chapter 1 (commencing with Section 17700) of Division 2 of Title 2, any person in this state who manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, buys, or receives any large-capacity magazine is punishable by imprisonment in a county jail not exceeding one year or imprisonment pursuant to subdivision (h) of Section 1170.

(b) For purposes of this section, "manufacturing" includes both fabricating a magazine and assembling a magazine from a combination of parts, including, but not limited to, the body, spring, follower, and floor plate or end plate, to be a fully functioning large-capacity magazine.

(c) Except as provided in Article 2 (commencing with Section 32400) of this chapter and in Chapter 1 (commencing with Section 17700) of Division 2 of Title 2, commencing July 1, 2017, any person in this state who possesses any large-capacity magazine, regardless of the date the magazine was acquired, is guilty of an infraction punishable by a fine not to exceed one hundred dollars ($100) per large-capacity magazine, or is guilty of a misdemeanor punishable by a fine not to exceed one hundred dollars ($100) per large-capacity magazine, by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.

(d) Any person who may not lawfully possess a large-capacity magazine commencing July 1, 2017 shall, prior to July 1, 2017:

(1) Remove the large-capacity magazine from the state;

(2) Sell the large-capacity magazine to a licensed firearms dealer; or

(3) Surrender the large-capacity magazine to a law enforcement agency for destruction.

Cal. Penal Code §16740

As used in this part, "large-capacity magazine" means any ammunition feeding device with the capacity to accept more than 10 rounds, but shall not be construed to include any of the following:

(a) A feeding device that has been permanently altered so that it cannot accommodate more than 10 rounds.

(b) A .22 caliber tube ammunition feeding device.

(c) A tubular magazine that is contained in a lever-action firearm.