

No. 23-55805

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

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VIRGINIA DUNCAN, ET AL.,  
*Plaintiffs and Appellees,*

V.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS  
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,  
*Defendant and Appellant.*

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**On Appeal from the United States District Court  
for the Southern District of California**  
No. 3:17-cv-01017-BEN-JLB  
The Honorable Roger T. Benitez, Judge

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**APPELLANT’S EXCERPTS OF RECORD  
VOLUME 1 of 17**

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ROB BONTA  
*Attorney General of California*  
MICHAEL J. MONGAN  
*Solicitor General*  
HELEN H. HONG  
*Principal Deputy Solicitor General*  
THOMAS S. PATTERSON  
*Senior Assistant Attorney General*

MICA L. MOORE  
*Deputy Solicitor General*  
R. MATTHEW WISE  
*Supervising Deputy Attorney General*  
ROBERT L. MEYERHOFF  
KEVIN J. KELLY  
JOHN D. ECHEVERRIA  
*Deputy Attorneys General*

CALIFORNIA DEPARTMENT OF JUSTICE  
300 South Spring Street, Suite 1702  
Los Angeles, CA 90013  
(213) 269-6138  
Mica.Moore@doj.ca.gov  
*Attorneys for Defendant and Appellant*

November 21, 2023

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**United States District Court**  
**SOUTHERN DISTRICT OF CALIFORNIA**

Virginia Duncan, et al

**Plaintiff,**

**V.**

Xavier Becerra in his official capacity as  
Attorney General of the State of  
California

**Defendant.**

**Civil Action No.** 17-cv-01017-BEN-JLB

**JUDGMENT IN A CIVIL CASE**

**Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

**IT IS HEREBY ORDERED AND ADJUDGED:**

Judgment is in favor of Plaintiffs' on all claims in accordance with this Court's September 22, 2023, Decision, (Dkt.No.[149]). Case is closed.

**Date:** 10/12/2023

**CLERK OF COURT**  
**JOHN MORRILL, Clerk of Court**  
By: s/ D.Frank

D.Frank, Deputy

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9 UNITED STATES DISTRICT COURT  
10 SOUTHERN DISTRICT OF CALIFORNIA  
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12 VIRGINIA DUNCAN, et al.,  
13 Plaintiffs,

Case No.: 17-cv-1017-BEN (JLB)

14 v.

**DECISION**

15 ROB BONTA, in his capacity as Attorney  
16 General of the State of California,  
17 Defendant.

18 We begin at the end. California's ban and mandatory dispossession of firearm  
19 magazines holding more than 10 rounds (California Penal Code § 32310(c) and (d)), as  
20 amended by Proposition 63, was preliminarily enjoined in 2017.<sup>1</sup> That decision was  
21 affirmed on appeal.<sup>2</sup> In 2019, summary judgment was granted in favor of Plaintiffs and  
22 § 32310 in its entirety was judged to be unconstitutional.<sup>3</sup> Initially, that decision was also  
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27 <sup>1</sup> *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1138 (S.D. Cal. 2017).

28 <sup>2</sup> *Duncan v. Becerra*, 742 F. App'x 218, 221 (9th Cir. 2018).

<sup>3</sup> *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1133 (S.D. Cal. 2019).

1 affirmed on appeal.<sup>4</sup> However, the decision was re-heard and reversed by the court of  
 2 appeals *en banc*.<sup>5</sup> In 2022, the United States Supreme Court granted certiorari, vacated  
 3 the appellate *en banc* decision, and remanded the case.<sup>6</sup> The court of appeals, in turn,  
 4 remanded the case to this Court “for further proceedings consistent with *New York State*  
 5 *Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).”<sup>7</sup> All relevant findings of fact  
 6 and conclusions of law set forth in the prior decision concluding § 32310 is  
 7 unconstitutional are incorporated herein.

## 8 **I. INTRODUCTION**

9 “There is a long tradition of widespread lawful gun ownership by private  
 10 individuals in this country,” according to the United States Supreme Court.<sup>8</sup> Americans  
 11 have an individual right to keep and bear firearms.<sup>9</sup> The Second Amendment to the  
 12 United States Constitution “guarantee[s] the individual right to possess and carry  
 13 weapons in case of confrontation.”<sup>10</sup> This guarantee is fully binding on the States and  
 14 limits their ability to devise solutions to social problems.<sup>11</sup> And the guarantee protects  
 15 “the possession of weapons that are ‘in common use,’”<sup>12</sup> or arms that are “typically  
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19 <sup>4</sup> *Duncan v. Becerra*, 970 F.3d 1133, 1147 (9th Cir. 2020), *reh’g en banc granted*,  
 20 *opinion vacated*, 988 F.3d 1209 (9th Cir. 2021).

21 <sup>5</sup> *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021) (*en banc*).

22 <sup>6</sup> *Duncan v. Bonta*, 142 S. Ct. 2895 (2022).

23 <sup>7</sup> *Duncan v. Bonta*, 49 F.4th 1228, 1231 (9th Cir. 2022).

24 <sup>8</sup> *Staples v. United States*, 511 U.S. 600, 610 (1994).

25 <sup>9</sup> *District of Columbia v. Heller*, 554 U.S. 570, 630 (1980).

26 <sup>10</sup> *Id.* at 606 (quoting 2 Tucker’s Blackstone 143) (“This may be considered as the true  
 27 palladium of liberty .... The right to self defence is the first law of nature: in most  
 28 governments it has been the study of rulers to confine the right within the narrowest  
 limits possible.”).

<sup>11</sup> *McDonald v. City of Chicago, Illinois*, 561 U.S. 742, 785 (2010) (emphasis in  
 original).

<sup>12</sup> *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2128 (2022).

1 possessed by law-abiding citizens for lawful purposes.”<sup>13</sup> These are the decisions this  
2 Court is bound to apply. “It’s our duty as judges to interpret the Constitution based on  
3 the text and original understanding of the relevant provision—not on public policy  
4 considerations, or worse, fear of public opprobrium or criticism from the political  
5 branches.”<sup>14</sup>

6 This case is about a California state law that makes it a crime to keep and bear  
7 common firearm magazines typically possessed for lawful purposes. Based on the text,  
8 history, and tradition of the Second Amendment, this law is clearly unconstitutional.

9 The detachable firearm magazine solved a problem with historic firearms: running  
10 out of ammunition and having to slowly reload a gun.<sup>15</sup> When more ammunition is  
11 needed in case of confrontation, a larger the magazine is required. Many gun owners  
12 want to have ready more than 10 rounds in their guns. As a result, in the realm of  
13 firearms, magazines that hold more than 10 rounds are possibly the most commonly  
14 owned thing in America. These larger magazines number over one hundred million. For  
15 handguns, the most popular sizes range up to 17 rounds; the most popular size for rifles is  
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20 <sup>13</sup> *Caetano v. Massachusetts*, 577 U.S. 411, 416 (Alito and Thomas concurring) (quoting  
21 *Heller*, 554 U.S. at 625, in turn quoting *United States v. Miller*, 307 U.S. 174, 179  
22 (1939)) (“We therefore read *Miller* to say only that the Second Amendment does not  
23 protect those weapons not typically possessed by law-abiding citizens for lawful  
24 purposes.”)

24 <sup>14</sup> *United States v. Rahimi*, 61 F.4th 443, 462 (5th Cir. 2023) (Ho, J., concurring)  
(citations omitted).

25 <sup>15</sup> *United States v. Gonzalez*, 792 F. 3d. 534, 536–37 (5th Cir. 2015) (“The problem of  
26 limited ammunition capacity has plagued rifles since their invention centuries ago. The  
27 earliest rifles fired a single shot, leaving the user vulnerable during reloading. Numerous  
28 inventions have sought to eliminate this problem. But from repeating rifles to clips, none  
has proved as effective as the magazine.”) (citing David B. Kopel, *The History of  
Firearm Magazines and Magazine Prohibitions*, 78 ALB. L. R. 849 (2015)).

1 30 rounds. Yet, regardless of the overwhelming popularity of larger magazines,  
 2 California continues to prohibit any magazine capable of holding more than 10 rounds.<sup>16</sup>

3 There is no American tradition of limiting ammunition capacity and the 10-round  
 4 limit has no historical pedigree and it is arbitrary and capricious. It is extreme. Our  
 5 federal government and most states impose no limits<sup>17</sup> and in the states where limits are  
 6 imposed, there is no consensus. Delaware landed on a 17-round magazine limit.<sup>18</sup>  
 7 Illinois and Vermont picked limits of 15 rounds for handguns and 10 rounds for a rifles.<sup>19</sup>  
 8 Colorado went with a 15-round limit for handguns and rifles, and a 28-inch tube limit for  
 9 shotguns.<sup>20</sup> New York tried its luck at a 7-round limit; that did not work out.<sup>21</sup> New  
 10 Jersey started with a 15-round limit and then reduced the limit to 10-rounds.<sup>22</sup> The fact  
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 14 <sup>16</sup> See Cal. Penal Code § 32310 and § 16740. The term “large-capacity magazine” is  
 15 defined in California Penal Code § 16740 as “any ammunition feeding device with the  
 16 capacity to accept more than 10 rounds,” but excludes: (a) a “feeding device that has been  
 17 permanently altered so that it cannot accommodate more than 10 rounds,” (b) a “.22  
 caliber tube ammunition feeding device,” and (c) a “tubular magazine that is contained in  
 a lever-action firearm.”

18 <sup>17</sup> Federal law imposes only a sentencing enhancement. United States Sentencing  
 19 Guideline § 2K2.1(a)(4)(B) increases the base offense level for a violation of 18 U.S.C. §  
 20 922(g)(1) (felon in possession) when the offense involves a firearm with an attached  
 magazine larger than 15 rounds. *United States v. Lucas*, No. 22-50064, 2023 U.S. App.  
 LEXIS 14768, at \*7 (9th Cir. June 14, 2023).

21 <sup>18</sup> *Del. State Sportsmen’s Ass’n, Inc. v. Del. Dep’t of Safety & Homeland Sec.*, Civil  
 22 Action No. 22-951-RGA, 2023 U.S. Dist. LEXIS 51322, at \*4 (D. Del. Mar. 27, 2023)  
 23 (“‘Large-capacity magazine[s]’ are those ‘capable of accepting, or that can readily be  
 converted to hold, more than 17 rounds of ammunition.’”).

24 <sup>19</sup> 720 ILCS 5/24-1.10(a); Vt. Stat. Ann. tit. 13, § 4021.

<sup>20</sup> Colo. Rev. Stat. Ann. § 18-12-301.

25 <sup>21</sup> The 7-round limit was found to be unconstitutional. *N.Y. State Rifle & Pistol Ass’n v.*  
 26 *Cuomo*, 804 F.3d 242, 269 (2d Cir. 2015).

27 <sup>22</sup> “New Jersey once imposed a fifteen-round limit on magazine capacity. Now it claims  
 28 a lower limit of ten is essential for public safety. The Second Amendment demands more  
 than back-of-the-envelope math.” *Ass’n of N.J. Rifle & Pistol Clubs Inc. v. AG N.J.*, 974  
 F.3d 237, 260 (3d Cir. 2020) (Matey, J. dissenting).

1 that there are so many different numerical limits demonstrates the arbitrary nature of  
2 magazine capacity limits.

3 In a stealth return to the interest balancing test rejected by *Heller* and *Bruen*, the  
4 State ostensibly justifies its magazine limits by deeming the smaller magazines “well-  
5 suited” for its citizens.<sup>23</sup> Suitability, in turn, is based on concocted statistics about what a  
6 hypothetical average person needs to defend against an attacker or attackers in an average  
7 self-defense situation. Based on this hypothetical statistically average case scenario, the  
8 State permits its citizen to have a gun, but the State decides the number of rounds in the  
9 gun that it finds suitable.<sup>24</sup>

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12 <sup>23</sup> At least a dozen times in its briefing before this Court, the State of California insists  
13 magazines larger than 10 rounds are unsuitable. Here are some examples. “[T]he  
14 Attorney General has demonstrated that LCMs are not necessary or even *suitable* to  
15 engage in private self-defense.” Dkt. 145, at 9. “Nor are LCMs particularly *suitable* for  
16 self-defense.” Dkt. 142, at 8. “[T]he accessory at issue here (an LCM) is not *well-suited*  
17 for lawful self-defense.” *Id.*

18 <sup>24</sup> And be grateful for 10 rounds. *Duncan*, 19 F.4th at 1168 n.10, *cert. granted, judgment*  
19 *vacated*, 142 S. Ct. 2895 (2022), *and vacated and remanded*, 49 F.4th 1228 (9th Cir.  
20 2022) (Bumatay, J., dissenting) (“California currently allows more than 2.2 rounds in a  
21 magazine, and does not prohibit carrying multiple magazines. But don’t be fooled.  
22 Under the majority’s Version 2.2 of the Second Amendment, there is no reason a state  
23 couldn’t limit its citizens to carrying a (generous) 3 rounds total for self-defense.”).

24 As this Court explained in its prior decision, “[a]rtificial limits will eventually lead  
25 to disarmament. It is an insidious plan to disarm the populace and it depends on for its  
26 success a subjective standard of ‘necessary’ lethality. It does not take the imagination of  
27 Jules Verne to predict that if all magazines over 10 rounds are somehow eliminated from  
28 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 are ‘suitable.’ 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.” *Duncan*, 366 F. Supp. 3d at 1146 n.33.



1 In so doing, the State denies a citizen the federal constitutional right to use  
 2 common weapons of their own choosing for self-defense. There have been, and there  
 3 will be, times where many more than 10 rounds are needed to stop attackers.<sup>25</sup> Yet,

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 6 <sup>25</sup> Some have wishfully believed “there is no evidence that anyone ever has been unable  
 7 to defend his or her home and family due to the lack of a large-capacity magazine,” or  
 8 that more than 10 rounds is ever needed. But there is actually the evidence to support  
 9 this. In fact, the State’s own expert reports otherwise.

10 *See Duncan*, 366 F. Supp. 3d at 1134 (“As two masked and armed men broke in,  
 11 Susan Gonzalez was shot in the chest. She made it back to her bedroom and found her  
 12 husband’s .22 caliber pistol. Wasting the first rounds on warning shots, she then emptied  
 13 the single pistol at one attacker. Unfortunately, now out of ammunition, she was shot  
 14 again by the other armed attacker. She was not able to re-load or use a second gun. Both  
 15 she and her husband were shot twice. Forty-two bullets in all were fired. The gunman  
 16 fled from the house—but returned. He put his gun to Susan Gonzalez’s head and  
 17 demanded the keys to the couple’s truck.

18 When three armed intruders carrying what look like semi-automatic pistols broke  
 19 into the home of a single woman at 3:44 a.m., she dialed 911. No answer. Feng Zhu  
 20 Chen, dressed in pajamas, held a phone in one hand and took up her pistol in the other  
 21 and began shooting. She fired numerous shots. She had no place to carry an extra  
 22 magazine and no way to reload because her left hand held the phone with which she was  
 23 still trying to call 911. After the shooting was over and two of the armed suspects got  
 24 away and one lay dead, she did get through to the police. The home security camera  
 25 video is dramatic.

26 A mother, Melinda Herman, and her nine-year-old twins were at home when an  
 27 intruder broke in. She and her twins retreated to an upstairs crawl space and hid.  
 28 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.”) (Citations omitted).

More examples have been reported since those words were written. When four  
 suspects in a stolen car with stolen guns and ammunition used stolen house keys to enter  
 the victims’ home in Tallahassee, Florida at 3:37 a.m., the victim fired 25 rounds before  
 the suspects retreated out of the home. *Police: Tallahassee homeowner shot 2 out of 4*  
*home invasion suspects, all 4 charged*, ABC27 WTXL (May 24, 2019)  
<https://www.wtxl.com/news/local-news/tpd-investigating-home-invasion-robbery>  
[\[https://perma.cc/AQ36-S2ZH\]](https://perma.cc/AQ36-S2ZH).



1 under this statute, the State says “too bad.” It says, if you think you need more than 10  
2 chances to defend yourself against criminal attackers, you must carry more magazines.  
3 Or carry more bullets to hand reload and fumble into your small magazine while the  
4 attackers take advantage of your pause. On the other hand, you can become a criminal,  
5 too. So, the previously law-abiding California citizen who buys and keeps at her bedside  
6 a nationally popular Glock 17 (with its standard 17-round magazine) becomes the  
7 criminal, because the State dictates that a gun with a 17-round magazine is not well-  
8 suited for home defense.<sup>26</sup>

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16 In Kentucky, when a home intruder wearing a bulletproof vest shot and killed one  
17 daughter asleep in her bed, the father awoke and needed to fire 11 shots from one gun and  
18 8 shots from a second gun, while suffering 3 gunshot wounds himself, to protect his other  
19 daughter, his wife, and himself. Krista Johnson and Hayes Gardner, *Jordan Morgan’s*  
20 *death: Suspect Shannon Gilday arrested in Madison County*, Louisville Courier J. (Feb.  
21 28, 2022), [https://www.courier-journal.com/story/news/local/2022/02/28/shannon-gilday-](https://www.courier-journal.com/story/news/local/2022/02/28/shannon-gilday-arrested-in-jordan-morgan-richmond-ky-shooting/6941351001/)  
22 [arrested-in-jordan-morgan-richmond-ky-shooting/6941351001/](https://www.courier-journal.com/story/news/local/2022/02/28/shannon-gilday-arrested-in-jordan-morgan-richmond-ky-shooting/6941351001/) [[https://perma.cc/Q49M-](https://perma.cc/Q49M-ZFF9)  
23 [ZFF9](https://perma.cc/Q49M-ZFF9)].

24 On a Chicago train this year, a citizen was robbed at gunpoint by a suspect who  
25 had been previously arrested 32 times. The victim, a bank security guard, shot back 18  
26 times (4 of the rounds jammed) before the suspect retreated off the train. *Arrested 32*  
27 *times since 2014, man allegedly engaged in a ‘firefight’ with a concealed carry holder on*  
28 *a CTA train*, CWBChicago (Jan. 22, 2023), [https://cwbchicago.com/2023/01/arrested-32-](https://cwbchicago.com/2023/01/arrested-32-times-since-2014-man-allegedly-engaged-in-a-firefight-with-a-concealed-carry-holder-on-a-cta-train.html)  
[times-since-2014-man-allegedly-engaged-in-a-firefight-with-a-concealed-carry-holder-](https://cwbchicago.com/2023/01/arrested-32-times-since-2014-man-allegedly-engaged-in-a-firefight-with-a-concealed-carry-holder-on-a-cta-train.html)  
[on-a-cta-train.html](https://cwbchicago.com/2023/01/arrested-32-times-since-2014-man-allegedly-engaged-in-a-firefight-with-a-concealed-carry-holder-on-a-cta-train.html) [<https://perma.cc/EAV2-8F2E>].

<sup>26</sup> Criminals sometimes do not abide by gun regulations and pass around “gang guns”  
with magazines larger than 10 rounds. *See, e.g., People v. Cyrus*, No. E075271, 2023  
Cal. App. Unpub. LEXIS 1301, at \*5 (Mar. 3, 2023) (describing a Glock .40 cal. handgun  
and 29-round magazine and explaining, “[a] ‘gang gun’ is a gun that is passed around the  
gang and used by numerous gang members to commit crimes.).

Numbers vary, but some estimate that 81 million Americans own between 415<sup>27</sup> and 456<sup>28</sup> million firearms. Further, millions of Americans across the country own large capacity magazines. “One estimate . . . shows that . . . 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 10 rounds.”<sup>29</sup> A more recent large-scale survey estimates that Americans today own 542 million rifle and handgun magazines that hold more than 10 rounds.<sup>30</sup> Home defense and target shooting are the two most common reasons for owning these larger magazines.<sup>31</sup> Moreover, the survey reports 48% of gun owners have owned a handgun or rifle magazine that holds more than 10 rounds.<sup>32</sup> But California bans these typically possessed magazines kept and used for self-defense.

Why are larger magazines chosen for self-defense? Crime happens a lot. One recent estimate holds that guns are needed defensively approximately 1,670,000 times a year.<sup>33</sup> Another report, originally commissioned and long cited by the Centers for Disease Control and Prevention estimated that there are between 500,000 and 3,000,000

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<sup>27</sup> William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* 7 (Geo. McDonough Sch. of Bus. Rsch. Paper No. 4109494, 2022), available at <https://ssrn.com/abstract=4109494> [<https://perma.cc/83XT-75YG>].

<sup>28</sup> See Suppl. Decl. of Louis Klarevas, Dkt. 137-5 (“Suppl. Klarevas Decl.”), at ¶ 15 and n.13.

<sup>29</sup> *Duncan*, 970 F.3d at 1142, *reh’g en banc granted, opinion vacated*, 988 F.3d 1209 (9th Cir. 2021), *and on reh’g en banc sub nom. Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021), *cert. granted, judgment vacated*, 142 S. Ct. 2895 (2022), *and vacated and remanded*, 49 F.4th 1228 (9th Cir. 2022).

<sup>30</sup> English, *supra*, at 25 (“These estimates suggest that Americans have owned some 542 million rifle and handgun magazines that hold over 10 rounds.”). Plaintiff’s expert, Stephen Helsley, a retired California Department of Justice Assistant Director of the Division of Law Enforcement, estimates there are between 500 million and one billion magazines able to hold more than 10 rounds. See Declaration of Helsley in Support of Plfs.’ Suppl. Br., Exh. 10, Dkt. 132-4, at ¶ 11.

<sup>31</sup> English, *supra*, at 23.

<sup>32</sup> *Id.* at 22.

<sup>33</sup> *Id.* at 35.

1 defensive gun uses in the United States every year.<sup>34</sup> Woe to the victim who runs out of  
 2 ammunition before armed attackers do. The police will mark the ground with chalk,  
 3 count the number of shell casings, and file the report.

4 All of this was decided earlier.

5 What remains to be done? California Penal Code § 32310 must be assessed in  
 6 light of *Bruen*. Now, on remand, the State has to justify this ban under *Bruen*, which  
 7 makes clear that “[t]o justify its regulation, the government may not simply posit that the  
 8 regulation promotes an important interest.”<sup>35</sup> After all, “the very enumeration of the  
 9 right takes out of the hands of government—even the Third Branch of Government—the  
 10 power to decide on a case-by-case basis whether the right is really worth insisting  
 11 upon.”<sup>36</sup> So, the State must demonstrate that its extreme ban is consistent with this  
 12 Nation’s historical tradition of firearms regulation. As explained below, there is no  
 13 national tradition of prohibiting or regulating firearms based on firing capacity or  
 14 ammunition capacity.

## 15 **II. CONSTITUTIONAL STANDARDS**

16 The Second Amendment provides: “A well regulated Militia, being necessary to  
 17 the security of a free State, the right of the people to *keep and bear* Arms, shall not be  
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 20 <sup>34</sup> See Inst. of Med. & Nat’l Rsch. Council, *Priorities for Research to Reduce the Threat*  
 21 *of Firearm-Related Violence* 15 (The Nat’l Acad. Press ed., 2013),  
 22 <https://doi.org/10.17226/18319> [<https://perma.cc/K3N4-FEXQ>]. For many years the  
 23 CDC’s “fast facts” webpage referred to this report. The report itself had two different  
 24 ranges. The second range estimated from 60,000 to 2,500,000 annual defensive gun uses  
 25 in America. See Internet Archive Wayback Machine, CDC Firearm Violence Prevention,  
 26 [https://web.archive.org/web/20210726233739/https://www.cdc.gov/violenceprevention/fi](https://web.archive.org/web/20210726233739/https://www.cdc.gov/violenceprevention/firearms/fastfact.html)  
 27 [rearms/fastfact.html](https://web.archive.org/web/20210726233739/https://www.cdc.gov/violenceprevention/firearms/fastfact.html). The Court notes that the CDC has changed its reporting to delete  
 28 reference to this study and the Court will not comment on how or why that happened as  
 the CDC website does not reflect why it was deleted.

<sup>35</sup> *Bruen*, 142 S. Ct. at 2126.

<sup>36</sup> *Id.* at 2129 (quoting *Heller*, 554 U.S. at 634).

1 infringed.”<sup>37</sup> “[T]he Second Amendment extends, prima facie, to all instruments that  
2 constitute bearable arms, even those that were not in existence at the time of the  
3 founding.”<sup>38</sup> According to *Heller*, “[t]he Second Amendment is naturally divided into  
4 two parts: its prefatory clause and its operative clause. The former does not limit the  
5 latter grammatically, but rather announces a purpose. The Amendment could be  
6 rephrased, ‘Because a well regulated Militia is necessary to the security of a free State,  
7 the right of the people to keep and bear Arms shall not be infringed.’”<sup>39</sup> “The first salient  
8 feature . . . is that it codifies a ‘right of the people.’”<sup>40</sup> *Heller* then examines the  
9 substance of the constitutional right, the verbs *to keep* and *to bear* and their object: *arms*.  
10 So, what does it mean to keep and bear arms?

11 The Supreme Court concludes, “[t]he 18th-century meaning [of “arms”] is no  
12 different from the meaning today. The 1773 edition of Samuel Johnson’s dictionary  
13 defined ‘arms’ as ‘weapons of offence, or armour of defence.’ Timothy Cunningham’s  
14 important 1771 legal dictionary defined ‘arms’ as ‘any thing that a man wears for his  
15 defence, or takes into his hands, or useth in wrath to cast at or strike another.’”<sup>41</sup> In the  
16 past, the term “arms” included weapons that were not specifically designed for military  
17 use and were not employed in a military capacity. “Although one founding-era thesaurus  
18 limited ‘arms’ . . . to ‘instruments of offence generally made use of in war,’ even that  
19 source stated that all firearms constituted ‘arms,’” according to *Heller*.<sup>42</sup> And it is now  
20 clear that “the Second Amendment extends, prima facie, to all instruments that constitute  
21 bearable arms, even those that were not in existence at the time of the founding.”<sup>43</sup>  
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23  
24 <sup>37</sup> U.S. Const. amend. II (emphasis added).

25 <sup>38</sup> *Caetano*, 577 U.S. 411 (quoting *Heller*, 554 U.S. at 581).

26 <sup>39</sup> *Heller*, 554 U.S. at 577 (citations omitted).

27 <sup>40</sup> *Heller*, 554 U.S. at 579.

28 <sup>41</sup> *Heller*, 554 U.S. at 581 (citations omitted).

<sup>42</sup> *Heller*, 554 U.S. at 581 (citations omitted).

<sup>43</sup> *Heller*, 554 U.S. at 582.

1 *Heller* later describes the types and kinds of arms that are guaranteed Second  
 2 Amendment protection. But first, *Heller* describes the meanings of “to keep” and “to  
 3 bear” arms.

4 “We turn to the phrases ‘keep arms’ and ‘bear arms.’ Johnson defined ‘keep’ as,  
 5 most relevantly, ‘to retain; not to lose,’ and ‘to have in custody.’ Webster defined it as  
 6 ‘to hold; to retain in one’s power or possession’ . . . Thus the most natural reading of  
 7 ‘keep Arms’ in the Second Amendment is to ‘have weapons.’”<sup>44</sup> “Keep arms,” according  
 8 to *Heller*, “was simply a common way of referring to possessing arms, for militiamen and  
 9 everyone else.”<sup>45</sup> “To bear” meant to carry for the purpose of being armed and ready in  
 10 case of conflict with another person. *Heller* even cited with approval the meaning of the  
 11 phrase “carries a firearm” proposed by Justice Ginsburg in *Muscarello v. United States*:  
 12 “as the Constitution’s Second Amendment indicates: ‘wear, bear, or carry upon the  
 13 person or in the clothing or in a pocket, for the purpose of being armed and ready for  
 14 offensive or defensive action in a case of conflict with another person.’”<sup>46</sup> Providing our  
 15 modern understanding of the Second Amendment’s text, *Heller* concludes, “[p]utting all  
 16 of these textual elements together, we find that they *guarantee the individual right to*  
 17 *possess and carry weapons in case of confrontation.*”<sup>47</sup>

18 Very important in the past, still important in the future, *Heller* describes the  
 19 concept of America’s militia. “In *Miller*, we explained that ‘the Militia comprised all  
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 22 <sup>44</sup> *Heller*, 554 U.S. at 582 (citations omitted).

23 <sup>45</sup> *Heller*, 554 U.S. at 583.

24 <sup>46</sup> *Heller*, 554 U.S. at 584 (quoting *Muscarello*, 524 U.S. 125, 143 (1998) (Ginsburg, J.  
 25 dissenting).

26 <sup>47</sup> *Heller*, 554 U.S. at 592 (emphasis added). “As the most important early American  
 27 edition of Blackstone’s Commentaries (by the law professor and former Antifederalist St.  
 28 George Tucker) made clear in the notes to the description of the arms right, Americans  
 understood the ‘right of self-preservation’ as permitting a citizen to ‘repel force by force’  
 when ‘the intervention of society in his behalf, may be too late to prevent an injury.’” *Id.*  
 at 595 (quoting 1 Blackstone’s Commentaries, 145-46, n.42 (1803)).

1 males physically capable of acting in concert for the common defense.”<sup>48</sup> And *Heller*  
 2 explains why the militia was important. Two of the three reasons remain important  
 3 today. “There are many reasons why the militia was thought to be ‘necessary to the  
 4 security of a free State.’ First, of course, it is useful in repelling invasions and  
 5 suppressing insurrections. . . . Third, when the able-bodied men of a nation are trained in  
 6 arms and organized, they are better able to resist tyranny.”<sup>49</sup> Once one understands the  
 7 history of tyrants resorting to taking away people’s arms to suppress political opposition,  
 8 *Heller* explains, one can see that the militia clause fits perfectly with the operative clause.  
 9 *Heller* teaches,

10 We reach the question, then: Does the preface fit with an  
 11 operative clause that creates an individual right to keep and bear  
 12 arms? It fits perfectly, once one knows the history that the  
 13 founding generation knew and that we have described above.  
 14 That history showed that the way tyrants had eliminated a  
 15 militia consisting of all the able-bodied men was not by  
 16 banning the militia but simply by taking away the people’s  
 17 arms, enabling a select militia or standing army to suppress  
 18 political opponents. This is what had occurred in England that  
 19 prompted codification of the right to have arms in the English  
 20 Bill of Rights.<sup>50</sup>

18 While the protection of a citizen militia was important, most people regarded the  
 19 Second Amendment as even more important for its protection of self-defense and  
 20 hunting. “The prefatory clause does not suggest that preserving the militia was the only  
 21 reason Americans valued the ancient right; *most undoubtedly thought it even more*  
 22 *important for self-defense and hunting.*”<sup>51</sup> After all, “[t]he right to self defence is the  
 23 first law of nature: in most governments it has been the study of rulers to confine the right  
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 26 <sup>48</sup> *Heller*, 554 U.S. at 595.

27 <sup>49</sup> *Heller*, 554 U.S. at 598 (citations omitted).

28 <sup>50</sup> *Heller*, 554 U.S. at 598.

<sup>51</sup> *Heller*, 554 U.S. at 599 (emphasis added).

1 within the narrowest limits possible. Wherever standing armies are kept up, and the right  
 2 of the people to keep and bear arms is, under any colour or pretext whatsoever,  
 3 prohibited, liberty, if not already annihilated, is on the brink of destruction.”<sup>52</sup> As one  
 4 commentator wrote at the time the Fourteenth Amendment was adopted in 1868, “[t]he  
 5 purpose of the Second Amendment is to secure a well-armed militia. . . . But a militia  
 6 would be useless unless the citizens were enabled to exercise themselves in the use of  
 7 warlike weapons.”<sup>53</sup> In this way, a general public knowledge and skill with weapons of  
 8 war is beneficial to the nation at large and is protected by the Second Amendment. “No  
 9 doubt, a citizen who keeps a gun or pistol under judicious precautions, practices in safe  
 10 places the use of it, and in due time teaches his sons to do the same, exercises his  
 11 individual right.”<sup>54</sup> And “[t]he right to bear arms has always been the distinctive privilege  
 12 of freemen.”<sup>55</sup> In the end, the Supreme Court deems the Second Amendment as valuable  
 13 for both preserving the militia and for self-defense – which is the heart of the right.

14 *McDonald* put it this way:

15 In *Heller*, we recognized that the codification of this right was  
 16 prompted by fear that the Federal Government would disarm  
 17 and thus disable the militias, but we rejected the suggestion that  
 18 the right was valued only as a means of preserving the militias.  
 19 On the contrary, we stressed that the right was also valued  
 20 because the possession of firearms was thought to be essential  
 21 for self-defense. As we put it, self-defense was “the  
 22 central component of the right itself.”<sup>56</sup>

23 <sup>52</sup> *Heller*, 554 U.S. at 606 (citation omitted).

24 <sup>53</sup> *Heller*, 554 U.S. at 618 (quoting J. Pomeroy, *An Introduction to the Constitutional Law*  
 25 *of the United States* §239, pp. 152-153 (1868)).

26 <sup>54</sup> *Heller*, 554 U.S. at 619 (quoting B. Abbott, *Judge and Jury: A Popular Explanation of*  
 27 *the Leading Topics in the Law of the Land* 333 (1880)).

28 <sup>55</sup> *Heller*, 554 U.S. at 619 (quoting J. Ordronaux, *Constitutional Legislation in the United*  
*States* 241-242 (1891)).

<sup>56</sup> *McDonald*, 561 U.S. at 926-27.



1 *Heller* specifically considered “whether a District of Columbia prohibition on the  
 2 possession of *usable* handguns in the home violates the Second Amendment to the  
 3 Constitution.”<sup>57</sup> And “District of Columbia law also require[d] residents to keep their  
 4 lawfully owned firearms, such as registered long guns, ‘unloaded and disassembled or  
 5 bound by a trigger lock or similar device’ unless they are located in a place of business or  
 6 are being used for lawful recreational activities.”<sup>58</sup> In the end, the Supreme Court struck  
 7 down both parts of the statute. “In sum, we hold that the District’s ban on handgun  
 8 possession in the home violates the Second Amendment, as does its prohibition against  
 9 rendering any lawful firearm in the home operable for the purpose of immediate self-  
 10 defense.”<sup>59</sup> While reaching its conclusion, the Supreme Court considered what types of  
 11 firearms were, and were not, protected by the Constitution. Highlighting the central  
 12 tenant of the Second Amendment, the Supreme Court wrote,

13 We may as well consider at this point (for we will have to  
 14 consider eventually) what types of weapons *Miller* permits.  
 15 Read in isolation, *Miller*’s phrase “part of ordinary military  
 16 equipment” could mean that only those weapons useful in  
 17 warfare are protected. That would be a startling reading of the  
 18 opinion, since it would mean that the National Firearms Act’s  
 19 restrictions on machineguns (not challenged in *Miller*) might be  
 20 unconstitutional, machineguns being useful in warfare in 1939.  
 21 We think that *Miller*’s “ordinary military equipment” language  
 22 must be read in tandem with what comes after: “Ordinarily  
 23 when called for militia service able-bodied men were expected  
 24 to appear bearing arms supplied by themselves and of the kind  
 25 in common use at the time.” The traditional militia was formed  
 26 from a pool of men bringing arms “in common use at the time”  
 27 for lawful purposes like self-defense. “In the colonial and  
 28 revolutionary war era, small-arms weapons<sup>60</sup> used by

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25 <sup>57</sup> *Heller*, 554 U.S. at 573 (emphasis added).

26 <sup>58</sup> *Heller*, 554 U.S. at 575. The Court declared both aspects of the statute to be in  
 27 violation of the Second Amendment.

28 <sup>59</sup> *Heller*, 554 U.S. at 635.

<sup>60</sup> Not cannons or mortars.

1 militiamen and weapons used in defense of person and home  
 2 were one and the same.” . . . We therefore read *Miller* to say  
 3 only that the Second Amendment does not protect those  
 4 weapons not typically possessed by law-abiding citizens for  
 lawful purposes.<sup>61</sup>

5 Since it was “the conception of the militia at the time of the Second Amendment’s  
 6 ratification [that] the body of all citizens capable of military service, [citizens] would  
 7 bring the sorts of lawful weapons that they possessed at home to militia duty,”<sup>62</sup> the right  
 8 to keep and carry arms means “the sorts of weapons protected were those ‘in common  
 9 use at the time.’”<sup>63</sup>

#### 10 **A. Magazines Are Protected “Arms”**

11 The State argues that larger capacity magazines are not “arms.” First, the State  
 12 argues that magazines are not essential to the use of firearms and consequently would  
 13 have been thought of as accessories. But magazines are “integral components to vast  
 14 categories of guns.” *Fyock v. City of Sunnyvale*, 25 F.Supp.3d 1267, 1276 (N.D. Cal.  
 15 2014), *aff’d sub nom. Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015). “Most pistols  
 16 are manufactured with magazines holding ten to seventeen rounds, and many popular  
 17 rifles are manufactured with magazines holding twenty or thirty rounds.” *Kolbe v.*  
 18 *Hogan*, 849 F.3d 114, 129 (4th Cir. 2017) (*en banc*). While the Second Amendment does  
 19 not explicitly mention ammunition or magazines supplying ammunition, “without bullets,  
 20 the right to bear arms would be meaningless.”<sup>64</sup> This is because the right to keep firearms  
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 25 <sup>61</sup> *Heller*, 554 U.S. at 624-25 (citations omitted). If it existed at the time and were in  
 26 common use, as it is today, would a militia member bring a firearm with a magazine that  
 holds more than 10 rounds? The answer is, yes, of course.

27 <sup>62</sup> *Heller*, 554 U.S. at 627.

28 <sup>63</sup> *Heller*, 554 U.S. at 627 citation omitted).

<sup>64</sup> *Jackson v. City & County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014)

1 for protection implies a corresponding right to obtain the bullets necessary to use them.

2 “The possession of arms also implied the possession of ammunition.”<sup>65</sup>

3 By extension, “arms” includes the magazine component necessary to supply the  
4 bullet into the chamber of the gun. “[O]ur case law supports the conclusion that there  
5 must also be some corollary, albeit not unfettered, right to possess the magazines  
6 necessary to render those firearms operable.”<sup>66</sup> “It is hard to imagine something more  
7 closely correlated to the right to use a firearm in self-defense than the ability to  
8 effectively load ammunition into the firearm.”<sup>67</sup>

9 Put more broadly, “the Second Amendment protects ancillary rights necessary to  
10 the realization of the core right to possess a firearm for self-defense.”<sup>68</sup> Consequently,  
11 whether thought of as a firearm able to fire a certain number of rounds because of its  
12 inserted magazine, or as a separate ammunition feeding component, magazines are usable  
13 “arms” within the meaning of the Second Amendment. As the Third Circuit Court of  
14 Appeals found, “[w]e therefore must first determine whether the regulated item is an arm  
15 under the Second Amendment. The law challenged here regulates magazines, and so the  
16 question is whether a magazine is an arm under the Second Amendment. The answer is  
17 yes.”<sup>69</sup>

18 Proffering two subsidiary arguments, the State says: (1) a magazine of some size  
19 may be necessary, but a magazine larger than 10 rounds is not necessary to operate a  
20 firearm and thus a larger magazine is not a protected “arm”; and (2) statistically people  
21 rarely fire more than 10 rounds in self-defense so it can be said that a magazine larger  
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25 <sup>65</sup> *United States v. Miller*, 307 U.S. 174, 180 (1939).

26 <sup>66</sup> *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015)

27 <sup>67</sup> *Barnett v. Raoul*, 2023 U.S. Dist. LEXIS 74756, \*26 (S.D. Ill. Apr. 28, 2023).

28 <sup>68</sup> *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017).

<sup>69</sup> *Ass’n of N.J. Rifle & Pistol Clubs v. Att’y Gen. of N.J.*, 910 F.3d 106, 116 (3d Cir. 2018).

1 than 10 rounds is rarely *used* for self-defense, and if a larger magazine is not commonly  
2 *used* for self-defense then it is not a protected “arm.”

3 For the first argument, the State claims that if a standard 17-round magazine is  
4 detached from a standard Glock 17 pistol, the 17-round magazine is no longer a weapon  
5 (by itself) and because the Glock 17 pistol could still function with a substitute 10-round  
6 magazine, then the 17-round standard Glock magazine does not come within the  
7 definition of “arms” that the Second Amendment protects.<sup>70</sup> In contrast, according to the  
8 State, a magazine holding 10 or less may qualify as a protected “arm,” but a magazine  
9 able to hold 11 or more is not a protected “arm.” What the State seems to be really  
10 saying is that a magazine may be a protected arm, but only the State has the right to pick  
11 the number of rounds a citizen may have in his gun.

12 This Court disagrees. The Supreme Court has not described protected arms in  
13 subdivided categories. When *Heller* found handguns were protected, it did not  
14 distinguish between semiautomatic pistols and revolvers. *Heller* did not classify  
15 protected handguns according to the number of rounds one could hold or the caliber of  
16 the ammunition that could be fired. It did not suggest that typically possessed arms could  
17 be subcategorized and subjected to judicial ad hoc constitutional determinations.  
18 Whether thought of holistically as a “handgun” irrespective of magazine size as *Heller*  
19 does, or as an entirely separate attachment, both firearms and their magazines (of all  
20 typical sizes) are “arms” covered by the text of the Second Amendment. “This is not  
21 even a close call.”<sup>71</sup> As this Court has said before, “[n]either magazines, nor rounds of  
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24 <sup>70</sup> Of course, the argument admits, *sub silentio*, that some magazines are necessary to  
25 operate a gun. The State says: “To be sure, some type of magazine is essential to the use  
26 of many handguns. But there is no evidence in this record . . . that a magazine capable of  
27 firing more than 10 rounds without reloading is necessary to the function of any modern  
28 firearm.” Def’s Suppl. Br., Dkt. 118 at n.10.

<sup>71</sup> *Barnett v. Raoul*, No. 3:23-cv-00209-SPM, 2023 U.S. Dist. LEXIS 74756, at \*26–27  
(S.D. Ill. Apr. 28, 2023); *Hanson v. District of Columbia*, Civil Action No. 22-2256  
(RC), 2023 U.S. Dist. LEXIS 68782, at \*17 (D.D.C. Apr. 20, 2023) (“At least three

ammunition, nor triggers, nor barrels are specifically mentioned in the Second Amendment . . . 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.”<sup>72</sup> Using reasoning that is still persuasive, the Ninth Circuit agreed, explaining “[p]ut simply, a regulation cannot permissibly ban a protected firearm’s components critical to its operation.” More recently, counsel for California’s Governor in a related fee-shifting case agreed while pointing out that “[t]he large-capacity magazines ban appears in the Penal Code’s title on ‘Firearms,’” and “a restriction on the ammunition that may be used in a firearm is a restriction on firearms.”<sup>73</sup> Leaving no doubt, even the (vacated) Ninth Circuit’s *en banc* decision assumed that § 32310 implicates the Second Amendment.<sup>74</sup>

Relatedly, the State argues that it is only restricting a firearm component or an accessory.<sup>75</sup> “LCMs are not weapons in themselves,” says the State, “nor are they

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Courts of Appeals have concluded that LCMs are “arms” within the meaning of the Second Amendment.”); *Del. State Sportsmen’s Ass’n, Inc. v. Del. Dep’t of Safety & Homeland Sec.*, Civil Action No. 22-951-RGA, 2023 U.S. Dist. LEXIS 51322, at \*19 (D. Del. Mar. 27, 2023); *contra*, *Ocean State Tactical, LLC v. Rhode Island*, No. 22-cv-246 JJM-PAS, 2022 U.S. Dist. LEXIS 227097, at \*33–34 (D.R.I. Dec. 14, 2022); *Or. Firearms Fed’n, Inc. v. Brown*, No. 2:22-cv-01815-IM, 2022 U.S. Dist. LEXIS 219391, at \*23–25 (D. Or. Dec. 6, 2022).

<sup>72</sup> *Duncan*, 366 F. Supp. 3d at 1142–43 (citing *Fyock v. City of Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015); *Teixeira v. Cty. Of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (*en banc*); *Ass’n of N.J. Rifle & Pistol Clubs v. A.G. N.J.*, 910 F.3d 106, 116 (3d Cir. 2018).

<sup>73</sup> *Miller v. Bonta*, 22cv1446-BEN (JLB), Intervenor-Def’s Suppl. Br., Dkt. 35, at 14.

<sup>74</sup> *Duncan*, 19 F.4th at 1103, *cert. granted, judgment vacated*, 213 L. Ed. 2d 1109, 142 S. Ct. 2895 (2022).

<sup>75</sup> Instead of isolating the magazine from the gun, the better understanding is to consider the magazine as part of the gun. There is a federal law analogue leading to the conclusion that a magazine is correctly regarded as a component part of a gun. The Arms Control Export Act criminalizes the unlicensed export of firearms and their components. 22 U.S.C. § 2778(b). Firearm magazines come within the Act because “a magazine is ‘useful’ only when used in conjunction with that end-item [a rifle]: its sole purpose is to load cartridges into the breech so that they can be fired . . . .”<sup>75</sup> In this view, the

1 necessary to operate any firearm for self-defense.” California residents who purchased  
2 new pistols in the last decade are probably surprised to hear that magazines are not  
3 necessary to operate a pistol. After all, another state law known as the Unsafe Handgun  
4 Act requires new semiautomatic pistols to have an integrated magazine-disconnect  
5 mechanism in order to be sold to the public.<sup>76</sup>

6 A magazine-disconnect mechanism prevents a pistol from firing at all, even if one  
7 round is left loaded in the chamber, if the magazine is not inserted into the pistol. The  
8 state-mandated magazine-disconnect mechanism thus prevents the operation of the  
9 firearm without its magazine.<sup>77</sup> While rifles are not required to have a magazine-  
10 disconnect mechanism, the State must concede that at least for semiautomatic handguns  
11 the State deems “not unsafe,” firearms for self-defense will not function without a  
12 magazine.<sup>78</sup> Modern magazines, submits the State, are more like founding-era cartridge  
13 boxes or “ancillary equipment associated with soldiering” that were not strictly necessary  
14 to fire a gun. Today, however, as pointed out above, some semiautomatic firearms will  
15 not function at all without a magazine, while others can fire no more than one round. As  
16  
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18  
19 magazine is a necessary component part of a gun which, in turn, would obviously fall  
20 under the text of the Second Amendment protection of “arms.”

21 <sup>76</sup> “California’s Unsafe Handgun Act (the ‘UHA’) seeks to prevent accidental discharges  
22 by requiring handguns to have particular safety features . . . [t]he UHA requires certain  
23 handguns to have a magazine disconnect mechanism (“MDM”), which prevents a  
24 handgun from being fired if the magazine is not fully inserted.” *Boland v. Bonta*, No.  
25 SACV2201421CJCADSX, 2023 WL 2588565, at \*1 (C.D. Cal. Mar. 20, 2023) (citing  
26 Cal. Penal Code §§ 16900, 31910(b)(5)).

27 <sup>77</sup> Semiautomatic pistols elsewhere in the nation usually do not have a magazine-  
28 disconnect mechanism so a pistol can still fire one chambered round without its  
magazine. Of course, one need not go too far out on a limb to say that a semi-automatic  
pistol that can fire only 1-round is not the sort of self-defense weapon most people would  
choose.

<sup>78</sup> To be precise, revolvers are handguns that do not require a magazine-disconnect  
mechanism, but that is because a revolver does not have a detachable magazine.



1 such, a magazine is an essential component without which a semiautomatic firearm is  
2 useless for self-defense. Therefore, a magazine falls within the meaning of “arms.”<sup>79</sup>

3 **B. LCMs Are Used for Self-Defense**

4 Notwithstanding that the Second Amendment protects the right to “keep and bear,”  
5 the State’s more troubling argument is that magazines holding more than 10 rounds are  
6 not being *used* for self-defense. By “used,” the State means actually fired. The State  
7 asserts, “there is no evidence that LCMs are frequently used in self-defense.”  
8 Continuing, the State asserts, “[t]o the contrary, the record reflects that it is exceedingly  
9 rare for an individual, in a self-defense situation, to fire more than ten rounds.” But  
10 without conceding the accuracy of the State’s position, infrequent use or “exceedingly  
11 rare” is not the same as *never*. To support the State’s argument, it relies on a  
12 statistician’s conclusion that an average of only 2.2 rounds are fired in an average self-  
13 defense situation. Because more than 10 rounds in the average situation are not being  
14 fired for self-defense, the argument goes, magazines holding more than 10 rounds are not  
15 *used* or needed for self-defense. And because the Second Amendment protects  
16 (according to the State) only those arms commonly “used” for self-defense, the State says  
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19 <sup>79</sup> See e.g., *Hanson v. D.C.*, No. CV 22-2256 (RC), 2023 WL 3019777, at \*7 (D.D.C.  
20 Apr. 20, 2023) (“The District’s logic, by contrast, would allow it to ban *all* magazines  
21 (not just LCMs) — a result even the District does not endorse here — because a firearm  
22 technically does not require *any* magazine to operate; one could simply fire the single  
23 bullet in the firearm’s chamber. The Court will therefore follow the persuasive reasoning  
24 of *ANJRPC*, *Kolbe*, and *Duncan* in concluding that LCMs are “arms” within the meaning  
25 of the Second Amendment.”); see also *Barnett v. Raoul*, No. 3:23-CV-00141-SPM, 2023  
26 WL 3160285, at \*8 (S.D. Ill. Apr. 28, 2023) (“Defendants’ argument is not persuasive.  
27 The Seventh Circuit has recognized the Second Amendment as extending to “corollaries  
28 to the meaningful exercise of the core right to possess firearms for self-defense.” It is  
hard to imagine something more closely correlated to the right to use a firearm in self-  
defense than the ability to effectively load ammunition into the firearm.”).



1 larger capacity magazines are not commonly “used,” and therefore they are not protected  
2 arms.<sup>80</sup>

3 It is a remarkable reading of *Heller*, *McDonald*, *Caetano*, and *Bruen* to say that if a  
4 gun is not fired more than 10 times in self-defense then the gun’s larger magazine is not  
5 being “used” in self-defense, and if not “used” in self-defense, then not protected by the  
6 Second Amendment. Yet, this is the State’s theme.

7 In this Court’s view, it is a crabbed reading of the Supreme Court’s Second  
8 Amendment decisions and not relevant to the text, history and tradition test. The  
9 Supreme Court uses several descriptive phrases to describe the kinds of firearms that are  
10 protected by the Constitution. But common to all is the notion that to be protected, an  
11 arm needs only to be regarded as *typically* possessed or carried, or *commonly* kept, by  
12 citizens to be ready for use, if needed. The Supreme Court has not said that the actual  
13 firing of a gun is any part of the test. Indeed, the Second Amendment does not say that  
14 the right of the People to keep only such firearms as they actually shoot, shall not be  
15 infringed.

16 *McDonald* begins, “[t]wo years ago, in *District of Columbia v. Heller*, we held that  
17 the Second Amendment protects the right to keep and bear arms *for the purpose of self-*  
18 *defense*, and we struck down a District of Columbia law that banned the possession of  
19 handguns in the home.”<sup>81</sup> What mattered is the purpose for which handguns were  
20 possessed, not necessarily the actual use.

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23 <sup>80</sup> A similar argument was made by the State in *N.A. for Gun Rights v. Lamont*, Case No.  
24 22-1118 (JBA), 2023 U.S. Dist. LEXIS 134880, \*40 (D. Conn. Aug. 3, 2023)  
25 (“Defendants maintain that after *Bruen*, Plaintiffs must show not only that the weapons  
26 and accoutrements are commonly owned, but they are commonly possessed and used *for*  
27 *self-defense* base on *Bruen*’s repeated use of the phrase ‘common use’ for self-defense.”)  
28 (emphasis added), and in *Oregon Firearms Federation v. Kotek*, Case No. 22cv1815-IM,  
\*67 (D. Ore. July 14, 2023) (“Defendants ... argue for an interpretation of ‘use’ that  
includes some objective metric of an LCM’s actual use in self-defense.”).

<sup>81</sup> 561 U.S. at 749-50 (citation omitted) (emphasis added).

1 The State puts its weight on the words “use,” “uses,” and “used.” One problem  
2 with the State’s view is that it treats the Supreme Court’s opinion language like the  
3 language of a statute. That is a mistake. “Because ‘opinions, unlike statutes, are not  
4 usually written with the knowledge or expectation that each and every word may be the  
5 subject of searching analysis,’ we do not follow statutory canons of construction with  
6 their focus on ‘textual precision’ when interpreting judicial opinions.”<sup>82</sup>

7 Under the State’s reading, a homeowner who displays a handgun with a 17-round  
8 magazine to scare away home invaders, has not “used” the 17-round magazine. Under  
9 the State’s reading, even a citizen who fires his semiautomatic firearm 10 times or less to  
10 defend himself, has not *used* his 17-round magazine in self-defense. Admittedly, one can  
11 find different meanings of the term “use.” For example, in the context of a criminal  
12 statute, the Supreme Court acknowledged “use” offers different possible meanings.  
13 “[T]he word ‘use’ poses some interpretational difficulties because of the different  
14 meanings attributable to it. Consider the paradoxical statement: ‘I *use* a gun to protect  
15 my house, but I’ve never had to *use* it.’”<sup>83</sup> Consequently, context is important, whether  
16 interpreting a statute or understanding an opinion.<sup>84</sup>

17 So, considering the words “use” or “used” in context, the State’s notion is far  
18 removed from the meaning indicated by the Supreme Court. *Heller* considered merely  
19 the simple possession of *usable* handguns in the home. Focusing on the right to possess a  
20 usable arm, *Heller* said, “[w]e consider whether a District of Columbia prohibition on the  
21 possession of *usable* handguns in the home violates the Second Amendment to the  
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23

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24  
25 <sup>82</sup> *Upper Skagit Indian Tribe v. Sauk-Suiattle Indian Tribe*, 66 F.4th 766, 770 (9th Cir.  
26 2023) (citations omitted).

27 <sup>83</sup> *Bailey v. United States*, 516 U.S. 137, 143 (1996) (emphasis in original).

28 <sup>84</sup> *Muscarello v. United States*, 524 U.S. 125, 144 (1998) (“Noting the paradoxical  
statement, ‘I *use* a gun to protect my house, but I’ve never had to *use* it,’ the Court in  
*Bailey* emphasized the importance of context.”)

1 Constitution.”<sup>85</sup> Actual firing of a handgun in the District was irrelevant. Statistical  
2 surveys of shots fired in self-defense were not determinative – they were not even  
3 mentioned. *Heller* used a simpler test. Constitutional protection is afforded to weapons  
4 “typically possessed by law-abiding citizens for lawful purposes,” focusing on typicality  
5 and possession rather than frequency of firing.<sup>86</sup>

6 *McDonald* says “the right was also valued because the possession of firearms was  
7 thought to be essential for self-defense.” *McDonald*’s focus is on possession.<sup>87</sup> And  
8 *McDonald* says the right applies “to handguns because they are ‘the most preferred  
9 firearm in the nation to ‘keep’ and use for protection of one’s home and family,”  
10 focusing on a national subjective preference for handguns.<sup>88</sup> There was no effort by the  
11 Supreme Court to condition the constitutional right upon some objective metric of actual  
12 handgun firing in self-defense.

13 *Bruen* says, “[t]he Second Amendment guaranteed to ‘all Americans’ the right to  
14 bear commonly used arms in public.” *Bruen* appears to focus on commonality.<sup>89</sup> *Bruen*  
15 injects some ambiguity with the following phraseology, “the Second Amendment  
16 protects the possession and use of weapons that are ‘in common use at the time.’”<sup>90</sup>  
17 *Bruen* noted that in that case, no party disputed that handguns are weapons “in common  
18 use” today for self-defense, but did not say what it meant by “use.”<sup>91</sup> So, what does the  
19 Supreme Court mean by its phrase “in common use?” Is the focus placed on a weapon’s  
20 commonality in society or the frequency of a weapon’s firing? *Bruen* answers the  
21 question elsewhere in its opinion. Commonality is the focus. Consider the following  
22

23 <sup>85</sup> 554 U.S. at 573 (emphasis added).

24 <sup>86</sup> 554 U.S. at 625; *see also* at 720 (Breyer, J., dissenting) (describing the majority test in  
25 the same terms).

26 <sup>87</sup> 561 U.S. at 787.

27 <sup>88</sup> *Id.* at 767 (citations omitted).

28 <sup>89</sup> 142 S. Ct. at 2156 (citing *Heller*, 554 U.S. at 581).

<sup>90</sup> *Id.* at 2128 (citing *Heller*, 554 U.S. at 627).

<sup>91</sup> *Id.* at 2134.

1 sentence from *Bruen*: “Drawing from this historical tradition, we explained there that the  
 2 Second Amendment protects only the carrying of weapons that are those ‘in common use  
 3 at the time,’ *as opposed to those that ‘are highly unusual in society at large.’*”<sup>92</sup> Or  
 4 consider this sentence from *Bruen*’s footnote 13: “Even assuming that pocket pistols  
 5 were, as East Jersey in 1686 deemed them, ‘unusual or unlawful,’ it appears that they  
 6 were commonly used at least by the founding.”<sup>93</sup> *Bruen* contrasts common pistols against  
 7 unusual pistols. The focus remains on commonality, not the frequency of actual  
 8 discharge in self-defense scenarios. Put simply, Second Amendment protection envelops  
 9 weapons commonly or typically subjectively chosen by citizens to keep in case of  
 10 confrontation.

11 From *Bruen*, it is evident that the Supreme Court’s focus is on whether a weapon is  
 12 common (or unusual) amongst the citizenry. This, in turn, requires some sort of  
 13 generalized numerical estimation of citizen ownership or gauge of present popularity. In  
 14 *Caetano*, the concurring Justices explained that, “[t]he more relevant statistic is that  
 15 ‘hundreds of thousands of Tasers and stun guns have been sold to private citizens,’ who it  
 16 appears may lawfully possess them in 45 States.”<sup>94</sup> That Ms. Caetano did not actually  
 17 energize and fire her stun gun made no difference to the Supreme Court. In her case, she  
 18 did no more than display the weapon. “She stood her ground [and] displayed the stun  
 19 gun.”<sup>95</sup> Absent from the opinion is any discussion about the average number of times a  
 20 stun gun is energized in an average self-defense scenario. Absent from the opinion is any  
 21 objective metric counting the frequency with which stun guns have been fired. The  
 22

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23  
 24 <sup>92</sup> *Id.* at 2143 (emphasis added).

25 <sup>93</sup> *Id.* at n.13 (citation omitted).

26 <sup>94</sup> 577 U.S. at 420 (citations omitted) (“While less popular than handguns, stun guns are  
 27 widely owned and accepted as a legitimate means of self-defense across the country.  
 28 Massachusetts’ categorical ban of such weapons therefore violates the Second  
 Amendment.”).

<sup>95</sup> *Id.* at 413, (Alito, J., concurring).

1 measure of constitutional protection was that the stun gun was “used” in the sense that  
2 stun guns are widely *owned* to satisfy a subjective need for protection and that the  
3 number in existence was in the hundreds of thousands.

4 Applying the same measure to magazines, because it is the case that magazines  
5 holding more than 10 rounds are owned and possessed by millions of Americans to meet  
6 a subjective need for self-defense, this fact alone entitles such magazines to Second  
7 Amendment protection. When a magazine is commonly owned by Americans with the  
8 subjective intention of using it for self-defense, it is enough to say that it is in common  
9 use (or typically used) for self-defense, as the Supreme Court employs the phrase in its  
10 opinions.<sup>96</sup>

11 Probably the vast majority of Americans that own magazines of 11 rounds or more  
12 keep them and use them for self-defense in the same way that a driver puts on and uses a  
13 seat belt in the case of a collision. Though collisions rarely happen, the seat belt is used  
14 for protection and to be ready for the unexpected collision. A reserve canopy is being  
15 used on a parachute jump, although it is not deployed, in case the main parachute fails. A  
16 cell phone in one’s pocket is being used when waiting for a telephone call or in the event  
17 one needs to make a call. In the same way, a firearm kept on one’s nightstand is used for  
18 self-defense even when the night is quiet. It is kept and used in case of confrontation. A  
19 person may happily live a lifetime without needing to fire their gun in self-defense. But  
20 that is not to say that such a person does not *use* their gun for self-defense when he or she  
21 keeps it under the bed with a hope and a prayer that it never has to be fired.

22 In 2016, an 81-year old Uniontown, Pennsylvania man and his elderly sister were  
23 at home when at night an intruder broke in. In the ensuing struggle, the older man fired  
24

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25  
26 <sup>96</sup> At the margin, there may be a weapon that is commonly owned that is not commonly  
27 used for self-defense. One could imagine perhaps a reproduction of an 18<sup>th</sup> century  
28 flintlock or a World War II German Luger being commonly owned, but used only as  
curios or museum pieces.

1 one shot from his gun at his attacker. The victim said he had never before fired his gun  
2 and that it had been sitting on his nightstand for thirty years.<sup>97</sup> California would say that  
3 the victim did not *use* his gun for self-defense on any day of those preceding thirty years.  
4 And if his gun had a magazine with eleven or more rounds in it (the news report does not  
5 say), California would argue that the victim never did *use* his large capacity magazine in  
6 self-defense. This Court would say that the victim *used* his gun every night of the thirty  
7 years he subjectively kept it on his bedroom nightstand in case of confrontation,  
8 including the night of the burglary. And if his gun had been equipped with a large  
9 capacity magazine, it could correctly be said that he also *used* the large capacity  
10 magazine for self-defense every night of the thirty years he subjectively kept it on his  
11 bedroom nightstand in case of confrontation.

### 12 **C. The Invention of the 2.2 Shot Average**

13 Without agreeing that when the Supreme Court discusses firearms “in common  
14 use” it means commonly fired, even if it did, the State’s statistic is suspect. California  
15 relies entirely on the opinion of its statistician for the hypothesis that defenders fire an  
16 average of only 2.2 shots in cases of confrontation.

17 Where does the 2.2 shot average originate? There is no national or state  
18 government data report on shots fired in self-defense events. There is no public  
19 government database. One would expect to see investigatory police reports as the most  
20 likely source to accurately capture data on shots fired or number of shell casings found,  
21 although not every use of a gun in self-defense is reported to the police. As between the  
22 two sides, while in the better position to collect and produce such reports, the State’s  
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26 <sup>97</sup> *81-year-old fatally shoots home invasion suspect, says gun had never been used in 30*  
27 *years*, WXPI-TV 11 News (Nov. 4, 2016), [https://www.wpxi.com/news/81-year-old-](https://www.wpxi.com/news/81-year-old-fatally-shoots-home-invasion-suspect-says-gun-had-never-been-used-in-30-years/464100332/)  
28 *fatally-shoots-home-invasion-suspect-says-gun-had-never-been-used-in-30-*  
*years/464100332/* [<https://perma.cc/FRP6-MA9P>].

1 Attorney General has not provided a single police report to the Court or to his own  
2 expert.<sup>98</sup>

3 Without investigatory reports, the State's expert turns to anecdotal statements,  
4 often from bystanders, reported in news media, and selectively studied. She indicates she  
5 conducted two studies.<sup>99</sup> Based on these two studies of newspaper stories, she opines that  
6 it is statistically rare for a person to fire more than 10 rounds in self-defense and that only  
7 2.2 shots are fired on average.<sup>100</sup> Unfortunately, her opinion lacks classic indicia of  
8 reliability and her two studies cannot be reproduced and are not peer-reviewed.  
9 "Reliability and validity are two aspects of accuracy in measurement. In statistics,  
10 reliability refers to reproducibility of results."<sup>101</sup> Her studies cannot be tested because she  
11

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14 <sup>98</sup> Allen asked the State for police reports, but she did not receive them. *See* Transcript,  
Preliminary Injunction Hearing, 10/19/20, 153:1-16:

15 "THE COURT: Let me ask you a question. Did you ever ask, for example,  
16 [Deputy Attorney General] Mr. Echeverria if he would get you the law enforcement  
17 reports of home defense shootings that may have occurred where the homeowner or the  
person at home fired shots at someone that was intruding?

18 THE WITNESS: Yes. So I did ask both from the State of California as well as  
19 from a number of other states that I have worked for, I have asked for data on incidents of  
20 exactly that, or whether there was a broader set of data that they had that I could then  
review.

21 THE COURT: And did you get that from the State of California?

22 THE WITNESS: I did not. It was my understanding that the State of California  
23 did not have that data or did not have that in a way that it could be reviewed. That that is  
not -- that is not a type of data that is collected."

24 <sup>99</sup> Lucy Allen Supp. Decl. Dkt 118-1.

25 <sup>100</sup> Allen Supp. Decl. Dkt 118-1, at ¶10. Of course, though one may assume that "LCMs"  
are only used .3% of the time, for the unfortunate homeowner who makes up part of the  
.3%, it is 100% of his time.

26 <sup>101</sup> Federal Judicial Center, *Reference Manual on Scientific Evidence* (3d ed.), 211  
Reference Guide on Statistics, 2011 WL 7724256, 10 and n.37 ("Daubert v. Merrell  
27 Dow Pharms., Inc., 509 U.S. 579, 590 n.9 (1993), for example, distinguishes "evidentiary  
28 reliability" from reliability in the technical sense of giving consistent results. We use  
"reliability" to denote the latter.).



1 has not disclosed her data. Her studies have not been replicated. In fact, the formula  
2 used to select 200 news stories for the Factiva study is incomprehensible.

3 For one study, Allen says she conducted a search of stories published in the NRA  
4 Institute for Legislative Action magazine (known as the Armed Citizen Database)  
5 between 2011 and 2017. There is no explanation for the choice to use 2011 for the  
6 beginning. After all, the collection of news stories goes back to 1958. Elsewhere in her  
7 declaration she studies mass shooting events but for that chooses a much longer time  
8 period reaching back to 1982. Likewise, there is no explanation for not updating the  
9 study after 2017.

10 However it is that they were chosen, some 736 incidents in the Armed Citizen  
11 Database were said to be analyzed and the number of shots tabulated, but details are  
12 completely absent. Allen does not list the 736 stories. Nor does she reveal how she  
13 assigned the number of shots fired in self-defense when the news accounts use phrases  
14 like “the intruder was shot” but no number of shots was reported, or “there was an  
15 exchange of gunfire,” or “multiple rounds were fired.” She includes in her 2.2 average of  
16 defensive shots fired, incidents where no shots were fired.<sup>102</sup> One would expect the  
17 impact of Allen’s choice to include a zero for a no-shot event to be significant because  
18 (even using her number) 32.1% of the events in the home in California were no-shot  
19 events.<sup>103</sup> She also reported no incidents in California where more than 10 shots were  
20 fired in self-defense among the stories she reviewed. It seems obvious that in a state  
21 where magazines holding more than 10 rounds have been illegal to buy or sell for twenty  
22 years, law-abiding citizens are using the smaller magazines that the law requires for self-  
23 defense. Absent from the expert opinion is a statistic reporting the average number of  
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27 <sup>102</sup> Allen Supp. Decl. Dkt 118-1 n.10 (“[T]he average includes instances when no shots  
28 are fired.”).

<sup>103</sup> Allen Supp. Decl. Dkt 118-1 at ¶ 12 (table).

1 shots fired by criminals. Also absent is the number of intruders or whether the  
2 homeowner was able to escape unharmed.

3 In another example, it is not evident from the study how she counted the number of  
4 shots fired for one story in the collection where a homeowner “fired back” and three  
5 intruders suffered eight gunshot wounds. Considering most victims miss some of their  
6 shots, one would expect in defending against three attackers that more than eight shots  
7 were fired in self-defense. Instead, all that the Court is told is:

8 When the exact number of shots fired was not specified, we  
9 used the average for the most relevant incidents with [a] known  
10 number of shots. For example, if the story stated that “shots  
11 were fired” this would indicate that at least two shots were fired  
12 and thus we used the average number of shots fired in all  
of shots was specified.<sup>104</sup>

13 She does not reveal the imputed number substitute value that she used where the exact  
14 number of shots fired was not specified, so her result cannot be reproduced.

15 Interestingly, substituting an imputed average value for all of the times the number of  
16 shots fired is unknown, tends to bring the overall average of shots fired down towards  
17 2.2. For example if there are ten incidents of self-defense where nine times the victim  
18 fired two shots and one time the victim fired thirteen shots, the average number of shots  
19 fired would be 3.1 but the percentage of times more than ten shots were needed for self-  
20 defense would be 10%.

21 For a second study, Allen says she conducted a word search of a news aggregator  
22 called Factiva. Factiva is a commercial database behind a paywall to which the Court  
23 and the public have no access. Even if one did have access to the Factiva database, one  
24 could not repeat her study. Allen’s methodology for the Factiva study is  
25 incomprehensible. For the Factiva database of 70 million news stories, her word search  
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28 <sup>104</sup> Allen Supp. Decl. Dkt 118-1 n.8.

1 returned 35,000 stories.<sup>105</sup> From there she somehow selected 200 stories of defensive gun  
2 use in the home and set out to analyze the events.<sup>106</sup> As with the Armed Citizen study,  
3 Allen does not provide a list of the 200 stories she analyzed. Compare that to the long,  
4 detailed list of 179 mass shooting stories she includes in the second part of her  
5 declaration. For the Factiva study, there is no way to check her analysis or her math.  
6 And once again she includes in the averages those events where no shots were fired,  
7 bringing the overall average down.<sup>107</sup>

8 Had a table of the stories she and her team analyzed been supplied, it would  
9 certainly reveal important information. For example, this Court randomly selected two  
10 pages from Allen's mass shooting table: pages 10 and 14. From looking at these two  
11 pages (assuming that the sources for the reports were accurate and unbiased) the Court is  
12 able to make statistical observations, including the observation that the number of shots  
13 fired were unknown 69.04% of the time. Without a similar table for the NRA or Factiva  
14 studies, this Court cannot ascertain the number of shots fired in each incident, the number  
15 of times a homeowner possessed a LCM, the number of times the number of shots fired  
16 were unknown, whether the homeowner was unharmed, or the number of intruders.

17 Allen's 2.2 shot average is suspect for larger reasons. The whole statistical  
18 exercise is based on hearsay (anecdotes) upon hearsay news reporting, rather than police  
19 investigatory reports. A database of news articles lacks the usual indicia of accuracy and  
20 reliability of admissible evidence. According to fifteen national polls conducted by non-  
21 law enforcement agencies, there may be from 760,000 defensive handgun uses to  
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24 <sup>105</sup> Exh. A at ¶18.

25 <sup>106</sup> *Id.* at ¶ 19.

26 <sup>107</sup> Allen Depo. Jan. 12, 2021 at 119:10-18 ("Q. So numerically speaking, inclusion of  
27 incidents where the number is zero would tend to drag the average number of shots fired  
28 down; would you tend to agree with that? A. So it includes those with zero. That's  
correct. Q. Okay. And have you ever looked at the average number of shots fired when  
shots were fired? A. No.").

1 3,600,000 defensive uses each year.<sup>108</sup> Compared to the comprehensive details given for  
 2 her study on mass shooting events, the NRA and Factiva studies are curiously lacking in  
 3 depth and breadth and causes the Court to deeply discount her opinion.

4 The Court is aware of its obligation to act as a gatekeeper to keep out junk science  
 5 where it does not meet the reliability standard of *Daubert v. Merrell Dow*  
 6 *Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and Federal Rule of Evidence 702.<sup>109</sup> In a  
 7 bench trial, the relevancy bar is low and Rule 702 is to be applied with a liberal thrust  
 8 favoring admission.<sup>110</sup> While opinions and evidence may have been deemed admissible,  
 9 in some cases, the evidence has been given very little weight or no weight at all. This is  
 10 the fact finder's role.<sup>111</sup> "Challenges that go to the weight of the evidence are within the  
 11 province of a fact finder . . . ." <sup>112</sup> So, while questionable expert testimony was admitted, it  
 12 has now been weighed in light of all of the evidence.

13 In assessing expert witness opinion, a court looks to see whether the opinion given  
 14 is newly made or whether it grew naturally out of research conducted outside of the  
 15 litigation.<sup>113</sup> Bias may be evident, according to legal authorities, where the expert forms  
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 18 <sup>108</sup> Plaintiffs' Exh. 10-10, John R. Lott, Jr., *More Guns, Less Crime* 3d. (2010), at 12.

19 <sup>109</sup> *See Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463 (9th Cir.2014),  
 20 *overruled on other grounds, United States v. Bacon*, 976 F.3d 766 (9th Cir. 2020) (en  
 21 banc) (duty falls squarely upon the district court to act as gatekeeper to exclude junk  
 science).

22 <sup>110</sup> *Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014).

23 <sup>111</sup> *Primiano v. Cook*, 598 F.3d 558, 568 (9th Cir. 2010) (though opinion of doctor is  
 24 admitted, jury may reject the opinion); *see also, e.g., United States v. Vallejo*, 237 F.3d  
 1008, 1021 (9th Cir. 2001) (admissibility of expert opinion different than weight to be  
 accorded).

25 <sup>112</sup> *City of Pomona v. SQM North Am. Corp.*, 750 F.3d 1036, 1044 (9th Cir. 2014).

26 <sup>113</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) (after  
 27 remand) ("One very significant fact to be considered is whether the experts are proposing  
 28 to testify about matters growing naturally and directly out of research they have  
 conducted independent of the litigation, or whether they have developed their opinions  
 expressly for purposes of testifying."); *Cabrera v. Cordis Corp.*, 134 F.3d 1418, 1422

1 an opinion without peer-reviewed scientific support or before examining sufficient  
2 data.<sup>114</sup> Bias may also be evident where an expert opinion is formed solely for the  
3 purposes of litigation. Here, the Court is mindful that, “[f]or scientific evidence to be  
4 admissible, the proponent must show the assertion is ‘derived by a scientific method,’”  
5 and “[o]pinion based on ‘unsubstantiated and undocumented information is the antithesis  
6 of scientifically reliable expert opinion.’ “The court must assess the expert's reasoning or  
7 methodology, using as appropriate criteria such as testability, publication in peer-  
8 reviewed literature, known or potential error rate, and general acceptance.”<sup>115</sup> Methods  
9 and procedures must be followed and undisciplined speculation is not science.<sup>116</sup>

10 “To aid courts in exercising this gatekeeping role, the Supreme Court has  
11 suggested a non-exclusive and flexible list of factors that a court may consider when  
12 determining the reliability of expert testimony, including: (1) whether a theory or  
13 technique can be tested; (2) whether it has been subjected to peer review and publication;  
14 (3) the known or potential error rate of the theory or technique; and (4) whether the  
15 theory or technique enjoys general acceptance within the relevant scientific  
16 community.”<sup>117</sup> Allen’s study relies on unverified, uncorroborated second or third hand  
17 anecdotal information. Normally, “a witness may testify to a matter only if evidence is  
18 introduced sufficient to support a finding that the witness has personal knowledge of the  
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23 (9th Cir.1998) (expert's development of opinion expressly for purposes of testifying is a  
24 significant consideration in evaluating opinion).

25 <sup>114</sup> B. Black & P. Lee, *Expert Evidence* (West 1997), Ch. 4(IV)(B), at 147.

26 <sup>115</sup> *Id.*

27 <sup>116</sup> *Daubert*, 509 U.S. at 589–90. (“The subject of an expert’s testimony must be  
28 ‘scientific . . . knowledge.’ The adjective ‘scientific’ implies a grounding in the methods  
and procedures of science. Similarly, the word ‘knowledge’ connotes more than  
subjective belief or unsupported speculation.”).

<sup>117</sup> *Messick*, 747 F.3d at 1197 (quoting *Daubert*, 509 U.S. at 592–94).

1 matter.”<sup>118</sup> Assuming its relevance in the first instance for *Bruen* purposes, the statistical  
2 analysis has minimal indicia of accuracy or reliability.

3 In the end, Allen opines that an average of 2.2 shots are fired in self-defense gun  
4 scenarios and only .3% of such incidents involve more than 10 shots fired. Yet, even .3%  
5 is a lot in terms of actual times a citizen needs to fire his gun in self-defense. Using the  
6 estimate from the Centers for Disease Control mentioned earlier of 500,000 to 3,000,000  
7 times per year nationally, and extrapolating the .3% where more than 10 shots were fired  
8 (per Allen’s report), would mean defensive gun uses of more than 10 shots happen  
9 between 1,500 and 9,000 times, every year (based on the CDC annual number of  
10 defensive gun uses cited on the website Allen cited and relied on<sup>119</sup>).

11 **D. Magazines Holding More Than 10 Rounds Are Not Dangerous and Unusual**

12 Taking another tack, the State reframes the “dangerous and unusual” test as a  
13 “dangerous *or* unusual” test and then objects that magazines able to hold more than 10  
14 rounds are unusually dangerous. As the Court has stated, all guns and ammunition are  
15 dangerous.<sup>120</sup> However, magazines holding more than 10 rounds are not both “dangerous  
16 and unusual,” which is the Supreme Court’s test. So-called large capacity magazines  
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23 <sup>118</sup> Federal Rule of Evidence 602.

24 <sup>119</sup> In her Supplemental Declaration, at footnote 4, Dkt. 118-1, Allen cites a Heritage  
25 Foundation online visual database:

26 <https://datavisualizations.heritage.org/firearms/defensive-gun-uses-inthe-us>. If one looks  
27 at the Heritage Foundation description of its visual database research, one would see that  
28 it acknowledges the CDC report that Americans use their firearms defensively between  
500,000 and 3,000,000 million times each year.

<sup>120</sup> *Staples*, 511 U.S. at 611 (“Despite their potential for harm, guns generally can be  
owned in perfect innocence.”).

1 banned in California are commonly-owned by law-abiding citizens across the nation<sup>121</sup>  
 2 and number in the millions.<sup>122</sup>

3 **E. The Most-Useful-for-Military-Service Nostrum**

4 The State argues, and some courts have reasoned, that magazines holding more  
 5 than 10 rounds are “most useful in military service” and therefore, can be banned.<sup>123</sup> The  
 6 Supreme Court said no such thing.<sup>124</sup> *Caetano* addresses this question and says, “*Heller*  
 7 rejected the proposition ‘that only those weapons useful in warfare are protected.’”<sup>125</sup>  
 8 *Heller* was explaining *United States v. Miller*.<sup>126</sup> In *Miller*, the Supreme Court applied a  
 9 reasonable-relationship-to-militia-use test to a short-barreled shotgun, asking whether the  
 10 shotgun would have a reasonable relationship to the preservation or efficiency of a well-  
 11 regulated militia. Finding none, it decided the Second Amendment did not guarantee the  
 12 right to keep that particular firearm.<sup>127</sup> *Miller*’s realm of Second Amendment protection  
 13 encircled a firearm if it was reasonably related to militia use. This “reasonably-related”  
 14 construct received a nod again in *Lewis v. U.S.*,<sup>128</sup> where the Supreme Court sang *Miller*’s

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 17 <sup>121</sup> “It is indisputable in the modern United States that magazines of up to thirty rounds  
 18 for rifles and up to twenty rounds for handguns are standard equipment for many popular  
 19 firearms.” Kopel, *supra*, *The History of Firearm Magazines*, at 874, Declaration of Anna  
 20 M. Barvir in Support of Plfs.’ Suppl. Br., Exh. 39, Dkt. 132-6, at 125.

20 <sup>122</sup> See nn. 28-31, *supra*, and accompanying text.

21 <sup>123</sup> See, e.g., *Hanson v. D.C.*, No. CV 22-2256-RC, 2023 WL 3019777, at \*28–29  
 22 (D.D.C. Apr. 20, 2023) (“LCMs are not covered by the Second Amendment because they  
 23 are most useful in military service.”).

24 <sup>124</sup> See, e.g., *Bevis v. City of Naperville*, No. 22 C 4775, 2023 U.S. Dist. LEXIS 27308, at  
 25 \*22 (N.D. Ill. Feb. 17, 2023) (“Relatedly, the Supreme Court has unequivocally  
 26 dismissed the argument that ‘only those weapons useful in warfare are protected.’ To the  
 27 extent that the Seventh Circuit classified the weapon as either ‘civilian’ or ‘military,’ the  
 28 classification has little relevance.”) (citation omitted).

26 <sup>125</sup> *Caetano*, 577 U.S. at 412 (quoting *Heller*, 554 U.S. at 624–25).

26 <sup>126</sup> 307 U.S. 174 (1939)

27 <sup>127</sup> *Id.* (“Certainly it is not within judicial notice that this weapon is any part of the  
 28 ordinary military equipment or that its use could contribute to the common defense.”).

28 <sup>128</sup> 445 U.S. 55, 65 n.8 (1980).



1 refrain, “the Second Amendment guarantees no right to keep and bear a firearm that does  
2 not have ‘some reasonable relationship to the preservation or efficiency of a well  
3 regulated militia.’” There was no undercutting of *Miller* in the *Heller* or *Bruen* decisions.  
4 Rather, *Heller* embraced *Miller* and said “[w]e therefore read *Miller* to say only that the  
5 Second Amendment does not protect those weapons not typically possessed by law-  
6 abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with  
7 the historical understanding of the scope of the right.”<sup>129</sup> And *Bruen* “quoted, explained,  
8 re-affirmed, and then applied” *Miller*.<sup>130</sup> *Heller* took the already expansive zone of  
9 protection for weapons that could be used by the militia and focused on the core use of  
10 firearms for self-defense.

11 In other words, *Heller* made the logical connection between weapons commonly  
12 possessed by law-abiding citizens for lawful purposes that would also be useful, if  
13 necessary, for military purposes, *i.e.*, in the militia. Since *Miller*, the Supreme Court has  
14 enlarged the breadth of firearms protected by the Second Amendment to include  
15 commonly owned firearms useful for the core right of self-defense and other lawful  
16 purposes like hunting, sporting, and target shooting. Until the Supreme Court clearly  
17 says otherwise, commonly owned weapons that are useful for war and are reasonably  
18 related to militia use are also fully protected, so long as they are not useful solely for  
19 military purposes. Firearms with magazines holding more than 10 rounds are such  
20 reasonably-related arms. Even *Miller* understood the Constitution to protect the  
21 possession of ammunition. For the militia system to function, “[t]he possession of arms  
22 also implied the possession of ammunition, and the authorities paid quite as much  
23 attention to the latter as to the former.”<sup>131</sup> All considered, the best reading of “arms”

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25 <sup>129</sup> *Heller*, 554 U.S. at 625.

26 <sup>130</sup> *United States v. Saleem*, No. 3:21-cr-00086-FDW-DSC, 2023 WL 2334417, at \*7  
27 (W.D.N.C. Mar. 2, 2023).

28 <sup>131</sup> *Miller*, 307 U.S. at 180 (quoting *The American Colonies In The 17<sup>th</sup> Century*, Osgood,  
Vol. 1, ch. XIII).

1 includes magazines.<sup>132</sup>

### 2 **III. BRUEN AND THE MAGAZINE CAPACITY LIMIT**

3 Plaintiffs challenge § 32310, which prohibits manufacturing, importing, keeping  
4 for sale, offering for sale, giving, lending, buying, receiving or possessing a magazine  
5 able to hold more than 10 rounds. For simple possession of a magazine holding more  
6 than 10 rounds, the crime is an infraction under § 32310(c). It is a much more serious  
7 crime to acquire a magazine holding more than 10 rounds in California by importing,  
8 buying, borrowing, receiving, or manufacturing. These acts may be punished as a  
9 misdemeanor or a felony under § 32310(a). Under the subsection's provision, "or  
10 imprisonment pursuant to subdivision (h) of Section 1170," punishment may be either a  
11 misdemeanor or a felony.

12 This Court concludes, once again, that manufacturing, importing, selling, giving,  
13 loaning buying, receiving, acquiring,<sup>133</sup> possessing, storing, or using commonly-owned  
14 magazines capable of holding more than 10 rounds for self-defense at home or in public  
15 is protected by the Second Amendment. Whether 50-round, 75-round, or 100-round  
16 drum magazines are constitutionally protected is a different question because they may be  
17 much less common and may be unusual.

#### 18 **A. Remand for Bruen Review**

19 This case was remanded from the United States Court of Appeals for the Ninth  
20 Circuit in order to consider the challenged laws under the recent Supreme Court decision  
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23 <sup>132</sup> *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 968 (9th Cir. 2014) ("Because  
24 restrictions on ammunition may burden the core Second Amendment right of self-defense  
25 and the record contains no persuasive historical evidence suggesting otherwise, section  
26 613.10(g) regulates conduct within the scope of the Second Amendment.").

27 <sup>133</sup> "This acquisition right is protected as an 'ancillary right' necessary to the realization  
28 of the core right to possess a firearm for self-defense." *Renna v. Becerra*, No. 20-cv-  
02190-DMS (DEB), 2021 WL 1597933, at \*6 (S.D. Cal. Apr. 23, 2021) (quoting  
*Teixeira v. County of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017)) (*en banc*) (core  
Second Amendment right "wouldn't mean much" without ability to acquire arms).

1 in *Bruen*. Under *Bruen*, the government must affirmatively prove that its firearm  
 2 regulation is part of a constitutional historical tradition. It is the same text, history, and  
 3 tradition standard the Court used in *Heller* and *McDonald*. What is different is that the  
 4 old means-end, interest balancing, tiers-of-scrutiny test is no longer viable.<sup>134</sup> The State  
 5 now has a second chance to defend its large capacity magazine ban and must do so  
 6 applying the *Bruen* test.

7 *Bruen* says,

8 When the Second Amendment’s plain text covers an  
 9 individual’s conduct, the Constitution presumptively protects  
 10 that conduct. *The government must then justify its regulation*  
 11 *by demonstrating that it is consistent with the Nation’s*  
 12 *historical tradition of firearm regulation.* Only then may a  
 court conclude that the individual’s conduct falls outside the  
 Second Amendment’s “unqualified command.”<sup>135</sup>

13 And *Bruen* confirms, once again, that the Second Amendment applies to modern arms.  
 14 “Thus, even though the Second Amendment’s definition of ‘arms’ is fixed according to  
 15 its historical understanding, that general definition covers modern instruments that  
 16 facilitate armed self-defense,” like magazines able to hold more than 10 rounds.<sup>136</sup>

17 **i. Already Determined: No Historical Pedigree**

18 This Court previously determined that a ban on magazines able to hold more than  
 19 10 rounds has no historical pedigree. Detachable magazines were invented in the late  
 20 19th Century.<sup>137</sup> In 1990, New Jersey introduced the first ban on detachable magazines,  
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 23 <sup>134</sup> *Baird v. Bonta*, 2023 WL 5763345, \*5 (9th Cir. Sept. 7, 2023) (“In *Bruen*, the  
 24 Supreme Court expressly rejected the use of such ‘means-end scrutiny in the Second  
 Amendment context’ and described the two-step approach as ‘one step too many.’”).

25 <sup>135</sup> 142 S. Ct. at 2129–30 (emphasis added).

26 <sup>136</sup> *Id.* at 2132.

27 <sup>137</sup> “In 1879, Remington introduced the first ‘modern’ detachable rifle magazine. In the  
 28 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.

1 initially imposing a 15-round limit and later a 10-round limit. California put its ban in  
2 place in the year 2000. A historical tradition of magazine bans, this is not.

3 Before *Bruen*, the State unpersuasively argued that its magazine capacity  
4 restriction was analogous to a handful of state machinegun firing-capacity regulations  
5 from the 1920's and 1930's and one District of Columbia law from 1932—a law the  
6 Supreme Court ignored while dismantling the District of Columbia's handgun ban in  
7 *Heller*. That argument remains unpersuasive today. That was pre-*Bruen*. *Bruen* invites  
8 a look farther back into the Nation's history.

9 **ii. The State Asked for Time for Discovery**

10 Because the *Bruen* approach places the burden upon the government to justify its  
11 firearm restrictions by demonstrating that they are consistent with the Nation's historical  
12 tradition of firearm regulation as understood at the founding, and because judicial review  
13 under the *Bruen* standard is in its infancy, the State has been given generous time and  
14 leeway to satisfy its new burden. The State's experts have been studying historic firearm  
15 regulations for more than 20 years.<sup>138</sup> This Court has reviewed all of the declarations of  
16 the State's experts and historians as well as many of their cited sources, and finds no  
17 support for the State's ban.

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20 <sup>138</sup> The State's expert, professor Robert Spitzer, has studied gun policy for 30 years. See  
21 Decl. of Robert Spitzer, Dkt. 137-8 ("Spitzer Decl."), at ¶ 5. The State's expert,  
22 professor Saul Cornell, said that he has been studying gun regulations for 20 years. That  
23 was in 2017. See Saul Cornell, Five Types of Gun Laws the Founding Fathers Loved,  
24 Salon (Oct. 22, 2017, 7:29 a.m.), [https://www.salon.com/2017/10/22/five-types-of-gun-laws-the-founding-fathers-loved\\_partner/](https://www.salon.com/2017/10/22/five-types-of-gun-laws-the-founding-fathers-loved_partner/) [<https://perma.cc/73SL-VAKV>]. Ten years  
25 ago, Mark Anthony Frassetto compiled a list of over 1,000 historical gun laws spanning  
26 the years 1607 to 1934 and available on the Social Science Research Network.  
27 [<https://perma.cc/Q2L8-SW6U>]. His law collection was not unknown. It was described  
28 in detail in 2017 by professor Spitzer in his article *Gun Law History in the United States and Second Amendment Rights*, 80 L. & Contemp. Probs. 55 (2017), and included in professor Cornell's Compendium of Works cited in his Declaration, Dkt. 154-3, at 1707–33.

1                   **iii. Some Text, History, and Tradition Analysis is Already Done**

2                   Some of the time spent analyzing text, history, and tradition, has already been done  
3 by the Supreme Court. To begin, “the ‘textual elements’ of the Second Amendment’s  
4 operative clause—‘the right of the people to keep and bear Arms, shall not be  
5 infringed’—‘guarantee the individual right to possess and carry weapons in case of  
6 confrontation.’”<sup>139</sup> Further, “the right to ‘bear arms’ refers to the right to ‘wear, bear, or  
7 carry ... upon the person or in the clothing or in a pocket, for the purpose ... of being  
8 armed and ready for offensive or defensive action in a case of conflict with another  
9 person.’”<sup>140</sup> The Supreme Court explains that the terms “keep” and “bear” mean that the  
10 Second Amendment’s text protects a citizen’s right to “‘keep’ firearms in their home, at  
11 the ready for self-defense,” and to carry arms on one’s person in and outside the home in  
12 case of confrontation.<sup>141</sup> As to the types of weapons the Second Amendment protects,  
13 *Bruen* echoes *Heller*, *McDonald*, *Caetano*, *Miller*, and *Blackstone*, pronouncing that it  
14 “protects the possession and use of weapons that are ‘in common use at the time.’”<sup>142</sup>

15                   In this case, Plaintiffs are law-abiding citizens who want to possess (or keep) and  
16 carry (or bear), magazines able to hold more than 10 rounds commonly-owned for lawful  
17 purposes. Plaintiffs’ proposed conduct is covered by the plain text of the Second  
18 Amendment. Under the plain text, the State’s statute infringes on the constitutional rights  
19 of American citizens. Therefore, Plaintiffs have met their burden of showing that the  
20 prohibited magazines fall within the Second Amendment’s text.

21                   *Bruen* next instructs courts to assess whether the initial conclusion is confirmed by  
22 the historical understanding of the Second Amendment. *Bruen* has already confirmed  
23 that the Second Amendment protects an individual right to armed self-defense. It repeats  
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26 <sup>139</sup> *Bruen*, 142 S. Ct. at 2134 (quoting *Heller*, 554 U.S. at 592).

27 <sup>140</sup> *Bruen*, 142 S. Ct. at 2134 (quoting *Heller*, 554 U.S. at 584).

28 <sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 2128 (citations omitted).

1 *Heller*’s lesson to not engage in means-end scrutiny, because, “[a] constitutional  
 2 guarantee subject to future judges’ assessments of its usefulness is no constitutional  
 3 guarantee at all.”<sup>143</sup> After all, “[t]he Second Amendment ‘is the very product of an  
 4 interest balancing by the people’ and it ‘surely elevates above all other interests the right  
 5 of law-abiding, responsible citizens to use arms’ for self-defense. It is this balance—  
 6 struck by the traditions of the American people—that demands our unqualified  
 7 deference.”<sup>144</sup>

#### 8 **B. Bruen’s Guidelines for Historical Inquiry**

9 For conducting a historical inquiry, *Bruen* identifies a number of guidelines. First,  
 10 “when a challenged regulation addresses a general societal problem that has persisted  
 11 since the 18th century, the lack of a distinctly similar historical regulation addressing that  
 12 problem is relevant evidence that the challenged regulation is inconsistent with the  
 13 Second Amendment.”<sup>145</sup> Second, “if earlier generations addressed the societal problem,  
 14 but did so through materially different means, that also could be evidence that a modern  
 15 regulation is unconstitutional.”<sup>146</sup> Third, “if some jurisdictions actually attempted to  
 16 enact analogous regulations during this timeframe, but those proposals were rejected on  
 17 constitutional grounds, that rejection surely would provide some probative evidence of  
 18 unconstitutionality.”<sup>147</sup> Fourth, “cases implicating unprecedented societal concerns or  
 19 dramatic technological changes may require a more nuanced approach.”<sup>148</sup> Fifth, “[w]hen  
 20 confronting such present-day firearm regulations, this historical inquiry that courts must  
 21 conduct will often involve reasoning by analogy.”<sup>149</sup> “Determining whether a historical  
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 24 <sup>143</sup> *Id.* at 2129 (quoting *Heller*, 554 U.S. at 634).

25 <sup>144</sup> *Bruen*, 142 S. Ct. at 2131 (quoting *Heller*, 554 U.S. at 635).

26 <sup>145</sup> *Bruen*, 142 S. Ct. at 2131.

27 <sup>146</sup> *Id.*

28 <sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 2132.

<sup>149</sup> *Id.*

1 regulation is a proper analogue for a distinctly modern firearm regulation requires a  
2 determination of whether the two regulations are ‘relevantly similar.’”<sup>150</sup> *Bruen* notes,

3 analogical reasoning under the Second Amendment is neither a  
4 regulatory straightjacket nor a regulatory blank check. On the  
5 one hand, courts should not “uphold every modern law that  
6 remotely resembles a historical analogue,” because doing so  
7 “risks endorsing outliers that our ancestors would never have  
8 accepted.” On the other hand, analogical reasoning requires  
9 only that the government identify a well-established and  
10 representative historical analogue, not a historical twin. So  
even if a modern-day regulation is not a dead ringer for  
historical precursors, it still may be analogous enough to pass  
constitutional muster.<sup>151</sup>

11 In surveying American history, the task is to stay within *Bruen*’s guardrails. As to the  
12 road ahead, it is a road back to 1791.

13 **i. The Significant Time Period—1791 to 1868**

14 *Bruen* teaches the most significant historical evidence comes from 1791, and  
15 secondarily 1868. For the Second Amendment (and other protections in the Bill of  
16 Rights), “Constitutional rights are enshrined with the scope they were understood to have  
17 *when the people adopted them.*”<sup>152</sup> The Second Amendment was adopted in 1791.  
18 “[W]e have generally assumed that the scope of the [Second Amendment] protection  
19 applicable to the Federal Government and States is pegged to the public understanding of  
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23 <sup>150</sup> *Id.*

24 <sup>151</sup> *Id.* at 2133.

25 <sup>152</sup> *Id.* at 2136 (quoting *Heller*, 554 U.S. at 634–35); *cf. Kennedy v. Bremerton*, 142 S. Ct.  
26 2407, 2428 (2022) (“[T]his Court has instructed that the Establishment Clause must be  
27 interpreted by reference to historical practices and understandings. The line . . . has to  
28 accord with history and faithfully reflect the understanding of the Founding Fathers.”)  
(cleaned up); *Riley v. California*, 573 U.S. 373, 403 (2014) (“Our cases have recognized  
that the Fourth Amendment was the founding generation’s response to the reviled  
‘general warrants’ and ‘writs of assistance’ of the colonial era.”).



1 the right when the Bill of Rights was adopted in 1791.”<sup>153</sup> Consequently, whatever  
 2 evolving standards of gun regulation the state legislature thought was good policy in the  
 3 year 2000 (when it decided 11 rounds is not well-suited for a person to have in a gun) or  
 4 the year 2016 (when it was amended by Proposition 63), or today, is not the test for  
 5 constitutional scrutiny.

6 Courts are to “afford greater weight to historical analogues more contemporaneous  
 7 to the Second Amendment’s ratification.”<sup>154</sup> British sources pre-dating the Constitution  
 8 are not particularly instructive because the American Revolution was a rejection of  
 9 British rule. Sources post-enactment are also less helpful.<sup>155</sup> “[T]o the extent later  
 10 history contradicts what the text says, the text controls . . . . Thus, post-ratification  
 11 adoption or acceptance of laws that are inconsistent with the original meaning of the  
 12 constitutional text obviously cannot overcome or alter that text.”<sup>156</sup> Late 19th century  
 13 evidence is not particularly instructive, “because post-Civil War discussions of the right  
 14 to keep and bear arms ‘took place 75 years after the ratification of the Second  
 15 Amendment, they do not provide as much insight into its original meaning as earlier  
 16 sources.’”<sup>157</sup> Even so, evidence from the time period enforces the claim that the right to

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 19 <sup>153</sup> *Bruen*, 142 S. Ct. at 2137.

20 <sup>154</sup> *Rahimi*, 61 F.4th at 456; *contra Nat’l Rifle Ass’n v. Bondi*, 61 F.4th 1317, 1323 (11th  
 21 Cir. 2023) (“For most cases, the Fourteenth Amendment Ratification Era understanding  
 22 of the right to keep and bear arms will differ from the 1789 understanding. And in those  
 23 cases, the more appropriate barometer is the public understanding of the right when the  
 States ratified the Fourteenth Amendment and made the Second Amendment applicable  
 to the States.”).

24 <sup>155</sup> *Bruen*, 142 S. Ct. at 2136 (“Similarly, we must also guard against giving  
 postenactment history more weight than it can rightly bear.”).

25 <sup>156</sup> *Id.* at 2137 (citations omitted) (cleaned up).

26 <sup>157</sup> *Id.* (quoting *Heller*, 554 U.S. at 614). There is little reason to rely on laws from the  
 27 later part of the 1800’s or the 1900’s rather than ones put into effect at the time of the  
 founding in view of *Bruen*’s central question about the meaning of the Second  
 28 Amendment as understood by the people who adopted it. *See Worth v. Harrington*, No.  
 21-cv-01348-KMM-LIB, 2023 WL 2745673, at \*12 (D. Minn. Mar. 31, 2023) (“But the

1 keep and bear arms continued to be regarded as a fundamental right. The Supreme Court  
 2 gauged the most explicit evidence appeared in the Freedmen’s Bureau Act of 1866. “The  
 3 most explicit evidence of Congress’ aim,” according to *McDonald*, “appears in § 14 of  
 4 the Freedmen’s Bureau Act of 1866, which provided that ‘the right . . . to have full and  
 5 equal benefit of all laws and proceedings concerning personal liberty, personal security  
 6 [and] . . . including the constitutional right to bear arms, shall be secured to and enjoyed  
 7 by all the citizens.’”<sup>158</sup> *McDonald* points to one senator’s description of the right to bear  
 8 arms for one’s defense as an “indispensable safeguard of liberty.” *McDonald* writes,

9 “Every man . . . should have the right to bear arms  
 10 for the defense of himself and family and his  
 11 homestead. And if the cabin door of the freedman  
 12 is broken open and the intruder enters for purposes  
 13 as vile as were known to slavery, then should a  
 14 well-loaded musket be in the hand of the occupant  
 15 to send the polluted wretch to another world,  
 where his wretchedness will forever remain  
 complete.”<sup>159</sup>

16 Thus, it can be said that, even at the time of the Fourteenth Amendment, the right to keep  
 17 and bear guns was a necessary right to preserve. “In sum, it is clear that the Framers and  
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19  
 20 Commissioner offers no persuasive reason why this Court should rely upon laws from the  
 21 second half of the nineteenth century to the exclusion of those in effect at the time of the  
 22 founding in light of *Bruen*’s warnings not to give post-Civil War history more weight  
 23 than it can rightly bear.”); *Firearms Pol’y Coalition, Inc. v. McCraw*, No. 4:21-cv-01245-  
 24 P, 2022 WL 3656996, at \*11 (N.D. Tex. Aug. 25, 2022); *United States v. Harrison*, No.  
 25 CR 22-00328-PRW, 2023 WL 1771138, at \*8 (W.D. Okla. Feb. 3, 2023) (quoting *Bruen*,  
 142 S. Ct. at 2136 (Barrett, J., concurring) (“[T]oday’s decision should not be understood  
 26 to endorse freewheeling reliance on historical practice from the mid-to-late 19th century  
 27 to establish the original meaning of the Bill of Rights.”)); *contra Hanson*, No. CV 22-  
 2256-RC, 2023 WL 3019777, at \*16 (“In this case, it is appropriate to apply 20th century  
 history to the regulation at issue.”).

28 <sup>158</sup> *McDonald*, 561 U.S. at 773.

<sup>159</sup> *McDonald*, 561 U.S. at 775-76 (citation omitted).

1 ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among  
2 those fundamental rights necessary to our system of ordered liberty.”<sup>160</sup>

3 *Bruen* and *Heller* have already considered some of the historical firearm statutes.  
4 Consequently, we know that colonial laws restricting handguns that were dangerous and  
5 unusual in the 1690’s do not justify modern laws restricting handguns. The Court  
6 explains that even if handguns were considered “dangerous and unusual” in the 1690’s, it  
7 would not matter because handguns are common today. As *Bruen* puts it,

8 Whatever the likelihood that handguns were considered  
9 “dangerous and unusual” during the colonial period, they are  
10 indisputably in “common use” for self-defense today. They are,  
11 in fact, “the quintessential self-defense weapon.” Thus, even if  
12 these colonial laws prohibited the carrying of handguns because  
13 they were considered “dangerous and unusual weapons” in the  
14 1690s, they provide no justification for laws restricting the  
15 public carry of weapons that are unquestionably in common  
16 use.

### 15 C. The State’s List of Relevant Laws

16 To aid in the task of looking for a national “historical tradition of firearm  
17 regulation,” the State was directed to create a list of relevant laws regulating arms dating  
18 from the time of the Second Amendment (1791) to 20 years after the Fourteenth  
19 Amendment (1868 + 20). This was not an acknowledgement that 20 years after the  
20 Fourteenth Amendment is a relevant period. Twenty years after the Fourteenth  
21 Amendment is an admittedly arbitrary limit and probably includes laws too late to shed  
22 much light.

23 In any event, the State went far beyond. The State produced a list of 316 laws  
24 covering 550 years—from 1383 to 1933.<sup>161</sup> Many of the entries are not relevant because

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27 <sup>160</sup> *McDonald*, 561 U.S. at 778.

28 <sup>161</sup> See Def’s Survey of Relevant Statutes, Dkt. 139-1 to 3 (citations to the individual law  
entries herein are indicated by brackets [--]).

1 they came much earlier or later than the most significant time period of 1791–1868. The  
 2 first fourteen listed laws pre-date the Second Amendment.<sup>162</sup> On the other end, the last  
 3 225 laws post-date the adoption of the Fourteenth Amendment. Also, two-thirds of the  
 4 State’s list (199 laws) are restrictions on *use*—not on possession or acquisition. Here, the  
 5 magazine ban prohibits possession, manufacturing, giving, lending, offering for sale, etc.,  
 6 rather than regulating the *use* or *manner* of carrying ammunition or its magazines.  
 7 Twenty-two tax laws are included in the State’s historical list, yet the law challenged here  
 8 imposes no tax on magazines. The State’s historical list also includes, surprisingly, 38  
 9 laws that applied only to particular groups, such as slaves, Blacks, or Mulattos. Those  
 10 laws are not relevant to the magazine prohibition challenged in this case. “And  
 11 Founding-era statutes that disarmed groups of persons who governments thought might  
 12 be dangerous because of their race or religion were not considered analogous to modern  
 13 carry prohibitions on released felons also thought to be dangerous: ‘any such analogy  
 14 would be far too broad.’”<sup>163</sup> Even if they were, this Court would give such  
 15 discriminatory laws little or no weight.

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 20 <sup>162</sup> The State includes in its list a concealed carry statute in East New Jersey from 1686  
 21 which treated pocket pistols as “unusual” weapons. [6]. *Bruen* bulldozed that citation.  
 22 The East New Jersey statute was too old and too different. *Bruen* found little there to  
 23 commend a present-day ban on carrying pistols. The statute prohibited only the  
 24 concealed carrying of pocket pistols; it did not prohibit possession or public carrying.  
 25 *Bruen*, 142 S. Ct. at 2143. The statute did not apply to all pistols, much less all firearms.  
 26 Moreover, even if pocket pistols were uncommon in 1686 in East New Jersey, they were  
 27 commonly used by the time of the founding. *Id.* at 2144 and n.13. The statute did not  
 28 survive the merger of East and West New Jersey in 1702. Consequently, the Court made  
 short work of the history summing it up, “[a]t most eight years of history in half a Colony  
 roughly a century before the founding sheds little light on how to properly interpret the  
 Second Amendment.” *Id.* at 2144.

<sup>163</sup> *Baird*, 2023 WL 5763345 at \*8 (citations omitted).

1 **IV. IN AMERICA PEOPLE WERE GENERALLY FREE TO CARRY**  
 2 **FIREARMS PUBLICLY AND PEACEABLY FROM 1791 to 1868**

3 **A. Traditions**

4 The history and tradition of the United States is a tradition of widespread gun  
 5 ownership and expertise. *Bruen* says, “those who sought to carry firearms publicly and  
 6 peaceably in antebellum America were generally free to do so.”<sup>164</sup> Thomas Jefferson  
 7 pointed out that our soldiers were good shots because they had practiced with guns since  
 8 they were children. Jefferson wrote,

9 I inclose you a list of the killed, wounded, and captives of the  
 10 enemy from the Commencement of hostilities at Lexington in  
 11 April 1775, until November 1777. since which there has been  
 12 no event of any consequence ... I think that upon the whole it  
 13 has been about one half the number lost by them. In some  
 14 instances more, but in others less. *This difference is ascribed to*  
*our superiority in taking aim when we fire; every soldier in our*  
*army having been intimate with his gun from his infancy.*<sup>165</sup>

15 Then, having firearms was commonplace. Carrying firearms was accepted. Proficiency  
 16 with firearms was encouraged. Readiness with firearms was required. Then, as now,  
 17 terrorizing with a firearm or carrying a firearm with the intent to assault another was  
 18 punishable. But, “[n]one of the [] historical limitations on the right to bear arms . . .  
 19 operated to prevent law-abiding citizens with ordinary self-defense needs from carrying  
 20 arms in public for that purpose.”<sup>166</sup>

21 Notwithstanding having significant time to do so, the State has identified no  
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23  
 24 <sup>164</sup> 142 S. Ct. at 2146.

25 <sup>165</sup> Letter from Thomas Jefferson, to Giovanni Fabbroni, *Founders Online*, National  
 26 Archives (June 8, 1778), [https://founders.archives.gov/documents/Jefferson/01-02-02-](https://founders.archives.gov/documents/Jefferson/01-02-02-0066)  
 27 [0066 \[https://perma.cc/8VTV-K9HB\]](https://perma.cc/8VTV-K9HB); [Original source: *The Papers of Thomas Jefferson*,  
 28 vol. 2, 1777–18 June 1779, ed. Julian P. Boyd. Princeton: Princeton University Press,  
 1950, pp. 195–98] (emphasis added).

<sup>166</sup> *Bruen*, 142 S. Ct. at 2150.

1 historical statute or national tradition of firearm regulation so broad in its coverage or so  
2 far reaching in its effect as its large capacity magazine ban. So, what are the traditions of  
3 firearm regulation evidenced by the State’s law list?

4 Historical regulations are considered chronologically, “mindful that greater weight  
5 attaches to laws nearer in time to the Second Amendment’s ratification.”<sup>167</sup> The Court  
6 has reviewed every law cited in the State’s list. It has sometimes searched for the actual  
7 text of a cited law rather than the parties’ summary in order to understand any legal  
8 nuance. It has reviewed the laws with a view to understanding the tradition of all the  
9 states and their contexts. For example, as the nation expanded old states became interior  
10 states and new states became frontier states. Frontier states often had different social and  
11 security concerns than did the interior of the new nation. The Court sought to understand  
12 how states responded to new technological developments in ammunition, revolvers,  
13 repeaters, and high-capacity, fast-shooting, lever-action rifles.

14 The State’s experts opine that gun laws were plentiful and widespread and firearm  
15 regulation was the norm. But, if the test were to look at gun laws with that level of  
16 generality, no gun law would ever fail scrutiny and *Heller*, *McDonald* and *Bruen* could  
17 not have been decided as they were. Furthermore, as will be shown, it is an exaggeration.  
18 The State also says regulations on dangerous or unusual *weapons* existed throughout  
19 American history. By “weapons,” the State means non-firearms.

20 Relevantly similar regulations are *firearm* prohibitions—not bladed or melee  
21 weapon regulations. And neither “dangerous or unusual” nor “unusually dangerous” is  
22 the test, although the State cannot point to an outright prohibition on even unusual or  
23 unusually dangerous *firearms* until Alabama’s 1868 prohibition on the dangerous and  
24 unusual rifle-walking cane. [87]

25 Because the State cannot find a historic regulation of *firearms*, it turns to the  
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28 <sup>167</sup> *Rahimi*, 61 F.4th at 456.

1 historic regulations of *weapons*, whether bladed weapons, melee weapons, blunt  
 2 weapons, or leaded weapons. Yet, the Supreme Court does not look to knife laws when  
 3 reviewing a restriction about guns. *Bruen* teaches that a state’s burden is to identify a  
 4 historical tradition of *firearm* regulation, not a tradition of knife regulation. Underscoring  
 5 the importance of its words, three different times *Bruen* repeats the specific phrase  
 6 “firearm regulation,” as in the following instances: (1) “Rather, the government must  
 7 demonstrate that the regulation is consistent with this Nation’s historical tradition of  
 8 *firearm regulation*,”<sup>168</sup> (2) “The government must then justify its regulation by  
 9 demonstrating that it is consistent with the Nation’s historical tradition of *firearm*  
 10 *regulation*,”<sup>169</sup> and (3) “[T]he burden falls on respondents to show that New York’s  
 11 proper-cause requirement is consistent with this Nation’s historical tradition of *firearm*  
 12 *regulation*.”<sup>170</sup> In contrast, the *Bruen* majority opinion did not mention bowie knives at  
 13 all. The Supreme Court was not interested in traditions of knife regulation or melee  
 14 regulation. Even in the dissent, bowie knife laws were hardly mentioned. Consequently,  
 15 when the State asserts, “weapons restrictions proliferated,” it misses the mark by  
 16 referring to non-firearm weapon restrictions or concealed carrying restrictions.<sup>171</sup>

17 During the most important period of history, there were relatively few firearm  
 18 regulations.<sup>172</sup> This conclusion can be drawn from inspecting the State’s historic law list,  
 19 and is confirmed by at least one historian: “Between 1607 and 1815 . . . the colonial and  
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 22 <sup>168</sup> *Bruen*, 142 S. Ct. at 2126 (emphasis added).

23 <sup>169</sup> *Id.* at 2130 (emphasis added).

24 <sup>170</sup> *Id.* at 2135 (emphasis added).

25 <sup>171</sup> Def’s Br. in Resp., Dkt. 142, at 20.

26 <sup>172</sup> It is true that there were laws criminalizing the *use* of guns for criminal acts such as  
 27 carrying a gun with intent to assault another, or displaying a gun in a threatening manner.  
 28 These were crimes of violence, not crimes of possession. California, as it should, has  
 similar laws today, such as California Penal Code § 245(a)(2) & (3) (assault with a  
 deadly weapon - firearm) and § 417(a)(2) (exhibition of a firearm in a rude, angry, or  
 threatening manner).



1 state governments of what would become the first fourteen states neglected to exercise  
 2 any police power over the ownership of guns by members of the body politic . . . . These  
 3 limits on colonial and early state regulation of arms ownership outlined a significant zone  
 4 of immunity around the private arms of the individual citizen.”<sup>173</sup> It is a conclusion  
 5 confirmed by the Supreme Court. “Apart from a few late 19th-century outlier  
 6 jurisdictions, American governments simply have not broadly prohibited the public carry  
 7 of commonly used firearms for personal defense.”<sup>174</sup>

8 There were regional differences, no doubt.<sup>175</sup> As the nation aged, northern states  
 9 had virtually no restrictions on guns and none on ammunition while southern states  
 10 tended to mainly prohibit concealed carrying.<sup>176</sup> In short, the State argues that because  
 11 some states have regulated in some ways the use of some *weapons* (primarily knives and  
 12 melee devices), that translates into the State being able to regulate any magazine in any  
 13 way. That is a *non sequitur* and in this particular case—a bridge too far.

14 **i. No Prohibitions on Possessing Guns**

15 It is remarkable to discover that there were no outright prohibitions on keeping or  
 16 possessing guns. No laws of any kind.<sup>177</sup> Based on a close review of the State’s law list  
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 19 <sup>173</sup> Robert H. Churchill, *Forum: Rethinking the Second Amendment*, 25 L. & Hist. Rev.  
 20 139, 161 (2007).

21 <sup>174</sup> *Bruen*, 142 S. Ct. at 2156.

22 <sup>175</sup> “[T]here were profound regional differences in early America.” Decl. of Saul Cornell,  
 23 Dkt. 118-4 (“Cornell Decl.”) at n.49.

24 <sup>176</sup> Don B. Kates, Jr., *Restricting Handguns* 12 (North River Press ed., 1979), found in  
 25 Compendium Works Cited in Decl. of Randolph Roth, Dkt. 118-8, at n.53 and 0349 (“By  
 26 1850, every Western state barred the carrying of concealed weapons. In contrast, none of  
 27 the Northeastern states adopted even that mild a restriction until nearly the turn of the  
 28 twentieth century. Until 1924, for instance, the only gun law in New Jersey was the  
 prohibition of dueling.”).

<sup>177</sup> According to one scholar, the first prohibition on simple ownership of a gun came in  
 1911. Churchill, *supra*, at 139 n.61 (“The first law restraining gun ownership by citizens  
 mentioned in the secondary literature is New York’s 1911 Sullivan Law, which  
 prohibited the ownership of concealable arms without a police permit.”); *see also* David

1 and the Court’s own analysis, Plaintiffs are correct in asserting that there are no  
 2 Founding-era categorical bans on firearms in this nation’s history. Though it is the  
 3 State’s burden, even after having been offered plenty of opportunity to do so, the State  
 4 has not identified any law, anywhere, at any time, between 1791 and 1868 that prohibited  
 5 simple possession of a gun or its magazine or any container of ammunition (unless the  
 6 possessor was an African-American or a slave or a mulatto).<sup>178</sup>

7 Surely, with 315 other entries in the State’s law list, there must be many other laws  
 8 in the relevant time period of demonstrating a tradition of firearm regulation analogous to  
 9 the large capacity magazine ban. What else is there?

10 **ii. No Gun Laws In The Northern States For 50 Years**

11 From the adoption of the Second Amendment through the next 50 years, there  
 12 were no firearm restrictions in any states north of the Mason-Dixon Line.<sup>179</sup> One could  
 13

14  
 15 B. Kopel and Joseph G.S. Greenlee, *This History of Bans on Types of Arms Before 1900*  
 16 50 J. of Legis., Apr. 25, 2023, at 45–46 (2024), <https://ssrn.com/abstract=4393197>  
 17 [https://perma.cc/P85U-ASTZ] (“Before, during, and after the Revolution, no state  
 18 banned any type of arm, ammunition, or accessory. Nor did the Continental Congress,  
 19 the Articles of Confederation Congress, or the federal government created by the U.S.  
 20 Constitution in 1787 . . . . There is no evidence that any of the Founders were concerned  
 21 about individuals having too much firepower. After a long, grueling war against the  
 22 world’s strongest military, limiting individuals’ capabilities was not a concern.”).

23 <sup>178</sup> Even before *Bruen* was decided, at least one other judge has applied the text, history,  
 24 and tradition test with analogical reasoning for a 10-round magazine ban, and came to the  
 25 same conclusion. See *Ass’n of N.J. Rifle & Pistol Clubs Inc. v. AG N.J.*, 974 F.3d 237,  
 26 258 (3d Cir. 2020) (Matey, J. dissenting) (“This history reveals a long gap between the  
 27 development and commercial distribution of magazines, on the one hand, and limiting  
 28 regulations, on the other hand. . . . Some will argue there must be an outer boundary to  
 this analysis that, when crossed, renders a magazine dangerous and unusual. If so, it does  
 not appear in the history and traditions of our Nation. . . . As a result, and limited to this  
 record, I would hold that magazines are arms protected by the Second Amendment and  
 an act limiting magazine capacity to 10 rounds burdens the Appellants’ Second  
 Amendment rights.”).

<sup>179</sup> The Mason-Dixon Line established the boundary line between Pennsylvania and  
 Maryland. Beyond its importance as a literal boundary between states, “the Mason-

live in any of the northern states without restrictions of almost any kind.<sup>180</sup> A gun owner enjoyed freedom with no infringing prohibitions from 1789 to 1845 in Pennsylvania, New York, Connecticut, Massachusetts, New Hampshire, Rhode Island, Vermont, Maine, Ohio, Illinois, Michigan, or Indiana. One might never be subject to a later surety statute in Massachusetts (1836) [29] and Maine (1841) [46].<sup>181</sup> If anything, regulations were not about what kind of firearm one was *not* allowed to keep, but about the kind of firearm one was *required* to buy and have ready for militia duties.

The same was largely true south of the Mason-Dixon Line (disregarding laws targeting slaves and Indians, neither of which were considered to be citizens by lawmakers). A citizen could reside in any of the northern states and half of the southern states for the first fifty years free from state government firearm restrictions. This

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Dixon Line has become known as the boundary between the North and the South. It took on that association on March 1, 1790, when the Pennsylvania Assembly passed legislation ending slavery in the state. Thus, the Mason-Dixon Line became the legal and the philosophical boundary between slave territory and free land, since slavery was still allowed in Maryland. That was especially true after the Missouri Compromise was passed in 1820, which prohibited slavery north of the Mason-Dixon Line. To the many slaves who used whatever means necessary to reach free land, the Mason-Dixon Line became important to their freedom. For the slaves located in Maryland, they only needed to get to the state line to secure their freedom, although many continued traveling north in an attempt to get as far away from their former masters as possible.” Kathryn DeVan, *Our Most Famous Border: The Mason-Dixon Line*, Pa. St. Univ. (fall 2008), <https://pabook.libraries.psu.edu/literary-cultural-heritage-map-pa/feature-articles/our-most-famous-border-mason-dixon-line> [https://perma.cc/B6WN-DHAC].

<sup>180</sup> The State lists one New Jersey statute from 1799 as a law purportedly prohibiting the carrying of a pistol with the intent to assault [19], but this appears to be a sentencing enhancement statute applicable only if one was apprehended for burglary. *See An Act to Describe, Apprehend and Punish Disorderly Persons* (1799), Duke Ctr. For Firearms L., *Charles Nettleton, Laws of the State of New-Jersey Page 474, Image 501 (1821) available at The Making of Modern Law: Primary Sources*, <https://firearmslaw.duke.edu/laws/charles-nettleton-laws-of-the-state-of-new-jersey-page-474-image-501-1821-available-at-the-making-of-modern-law-primary-sources/>.

<sup>181</sup> That the two states would share similar laws makes sense since Maine was part of the larger Commonwealth of Massachusetts prior to achieving statehood in 1820.

1 understanding is based on a methodical reading and assessment of the laws set out in the  
2 State's survey. While the parties' experts express some disagreements, their contrary  
3 opinions are unpersuasive.

4 In the northern states there were hardly any firearm laws at all, let alone a tradition  
5 of criminalizing the act of keeping or carrying any firearm. For the District of Columbia,  
6 governed by Congress, there were no firearm laws for the first 80 years until a concealed  
7 carry prohibition was enacted in 1871. [97]. Maine enacted its first law, a gunpowder  
8 storage regulation to prevent fires, in 1821. [27]. Massachusetts enacted its first firearm  
9 statute in 1836 as a surety law [29] with Maine following suit in 1841. [46]. *Bruen*  
10 already notes that under the surety laws everyone started out with robust carrying rights  
11 and *Bruen* saw little evidence that the laws were enforced.

12 Illinois was admitted to the Union in 1818. In 1845, Illinois enacted its first  
13 firearm statute criminalizing carrying a gun *with the intent to assault another person*.  
14 [49]. Indiana became a state in 1816. In 1855, Indiana criminalized shooting a gun, or  
15 throwing stones or sticks, at a train. [62]. The law did not concern keeping any gun  
16 whatsoever, or carrying a gun anywhere, in any manner whatsoever.<sup>182</sup> Ohio became a  
17 state in 1808. The State's law list shows no Ohio state laws respecting firearms until  
18 1859. [70]. Ohioans did not have a gun law until nearly 70 years after the adoption of  
19 the Second Amendment. Its first gun law was one that prohibited carrying a pistol, bowie  
20 knife, dirk, or other dangerous weapon *concealed*. California enacted its first gun  
21 regulation in 1853, which criminalized the act of having "upon him any pistol, gun, knife,  
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23 <sup>182</sup> The State's law list erroneously describes the 1855 Indiana law as one prohibiting the  
24 carrying of a pistol with the intent to injure another. This appears to be a scrivener's  
25 error. Although the State does not include it in its law list, Indiana may have enacted an  
26 earlier statute prohibiting carrying a pistol concealed, with an exception made for  
27 travelers. "In *State v. Mitchell*, 3 Blackf. 229, 1833 WL 2617 (Ind. 1833), the Supreme  
28 Court of Indiana, in a one-sentence opinion, upheld a state statute prohibiting the general  
public from carrying concealed weapons." *Peruta v. Cnty. of San Diego*, 824 F.3d 919,  
933 (9th Cir. 2016).

1 dirk, bludgeon, or other offensive weapon, with intent to assault any person.” [57].

2 In short, the history and tradition of the northern states, states north of the Mason-  
3 Dixon Line, was to leave firearm ownership and use completely unregulated. From the  
4 time of the adoption of the Second Amendment to the time of the adoption of the  
5 Fourteenth Amendment, there were no state gun laws in Pennsylvania, New York,  
6 Connecticut, Rhode Island, Vermont, New Hampshire, Michigan, Wisconsin, Minnesota,  
7 Iowa, Nebraska, Kansas, Missouri, or the District of Columbia. In Massachusetts and  
8 Maine there were only surety statutes. In New Jersey there was a sentencing  
9 enhancement for carrying a pistol while committing a burglary. In this half of the nation,  
10 keeping and bearing firearms was done freely without government interference.

11 **iii. No Gun Laws In The Southern States For 50 Years**

12 South of the Mason-Dixon Line, where slavery was practiced, there were many  
13 laws restricting firearms for slaves, African-Americans, and Indians. Setting aside that  
14 obviously unconstitutional tradition, among the southern states firearm ownership was  
15 largely unregulated for at least the first 50 years after 1791. Like the northern states,  
16 from 1791 to 1868 there were no state gun laws in Delaware, North Carolina, South  
17 Carolina, Mississippi, Florida, West Virginia, and Texas, according to the State’s law list.

18 The few laws in other southern states that did exist concerned mainly: (1) carrying  
19 a pistol *with the intent to assault another*; and (2) carrying a pistol in a *concealed*  
20 manner. Tennessee enacted the first firearm regulation in the southern states in 1801 in  
21 the form of a surety law—it was a law dismissed by *Bruen*. [20]. A decade later in  
22 1811, Maryland passed the second firearm regulation in the south. [23]. The Maryland  
23 law was, not a prohibition, but a sentencing enhancement for carrying a pistol *with the*  
24 *intent to assault another*.

25 In 1813, Louisiana passed the first law prohibiting the carrying of a *concealed* gun.  
26  
27  
28

[24].<sup>183</sup> *Bruen* noticed that a Louisiana court found the prohibition on concealed carrying constitutional only because it permitted open carrying of a firearm.<sup>184</sup> Kentucky passed a prohibition on carrying a *concealed* pistol that year, although it is omitted from the State’s law list. Perhaps it is omitted because Kentucky’s concealed carry law was struck down as unconstitutional a short time later. The only other firearm regulation in the south during this time period was Georgia’s 1816 law prohibiting the carrying of a pistol *with intent to assault* another person. [25].

Around 50 years after the Second Amendment, four southern states passed their own first firearm regulations, also in the form of *concealed* carry prohibitions. In 1837, Arkansas banned carrying a pistol concealed unless on a journey. [32]. In 1837, Georgia added its own prohibition on carrying a pistol concealed. [33]. The constitutionality of the Georgia law was upheld because open carry was unregulated.<sup>185</sup> In 1838, Virginia prohibited carrying a pistol concealed. [40]. In 1839, Alabama prohibited carrying a firearm concealed [41], later adding exceptions for self-defense and for travelers. [45].<sup>186</sup>

Three more regulations were enacted in the south in the years leading up to the Fourteenth Amendment’s adoption. In 1856, Tennessee passed a law affecting only minors. [65]. In 1868, Florida prohibited carrying secretly “arms of any kind whatever”

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<sup>183</sup> Louisiana reenacted similar, if not the same, statutes two more times, in 1842 and again in 1855. [63].

<sup>184</sup> 142 S. Ct. at 2146 and n.19 (quoting *State v. Chandler*, 5 La. 489, 490 (1850) (“Louisiana concealed-carry prohibition ‘interfered with no man’s right to carry arms (to use its words) “in full open view,” which places men upon an equality”)).

<sup>185</sup> *Nunn v. State*, 1 Ga. 243, 251 (1846) (“We are of the opinion, then, that so far as the act of 1837 seeks to suppress the practice of carrying certain weapons secretly, that it is valid, inasmuch as it does not deprive the citizen of his natural right of self-defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms openly, is in conflict with the Constitution, and void.”).

<sup>186</sup> *Lockett v. State*, 47 Ala. 42, 45–46 (1872) (“Nor is it required that he should have any necessity for the use of his pistols. It is enough if he was traveling on a journey, long or short.”).



1 and the outright carrying of a pistol or other arm or weapon. [90]. The Florida law was  
2 not scrutinized in a published court decision.<sup>187</sup>

3       Significantly, the first restriction on a *dangerous and unusual* firearm did not occur  
4 until 1868, the year the Fourteenth Amendment was adopted. That year, Alabama  
5 prohibited carrying a rifle walking cane. [87]. A rifle walking cane was a single shot  
6 rifle disguised to appear as a walking cane with a variety of handles. When fired, one  
7 bullet would exit through the bottom of the cane. It was patented in 1858 and  
8 manufactured by the E. Remington & Sons company until approximately 1888, with less  
9 than 2,000 produced.<sup>188</sup> Remington was the only major gun maker to produce a rifle  
10 walking cane gun. California currently has a law prohibiting possession of a “cane gun.”  
11 *See* Cal. Penal Code § 24410.

12       In short, the history and tradition of the states south of the Mason-Dixon Line, was  
13 to leave firearm ownership and use mostly unregulated. At least for the first half of the  
14 century, in this half of the nation, keeping and bearing firearms was done freely, with a  
15 handful of states enacting prohibitions on carrying pistols in public in a concealed  
16 manner, and Maryland and Georgia making it a crime to carry a firearm with the intent to  
17 assault another person.

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20 <sup>187</sup> However, an 1867 court decision considered an earlier law where only *concealed*  
21 carrying was prohibited. *See Sutton v. State*, 12 Fla. 135, 136 (1867) (“The statute under  
22 which this indictment was found provides, ‘that hereafter it shall not be lawful for any  
23 person in this State to carry arms of any kind secretly on or about their person, &c.:  
24 Provided, that this law shall not be so construed as to prevent any person from carrying  
25 arms openly outside of all their clothes’ . . . . The statute was not intended to infringe  
26 upon the rights of any citizen to bear arms for the ‘common defense.’ It merely directs  
27 how they shall be carried, and prevents individuals from carrying concealed weapons of a  
28 dangerous and deadly character, on or about the person, for the purpose of committing  
some malicious crime, or of taking some undue advantage over an unsuspecting  
adversary.”).

<sup>188</sup> *See* Remington Soc’y of Am., *Remington Cane Guns*,  
<https://www.remingtonsociety.org/remington-cane-guns/> [<https://perma.cc/A74W-EHPT>]  
(last visited May 26, 2023).



1           **iv. Territories**

2           Among the State’s law list is a number of regulations from 19th century territories.  
 3 *Bruen* has already considered such laws and decided they are not particularly helpful for  
 4 several reasons. “First, the bare existence of these localized restrictions cannot overcome  
 5 the overwhelming evidence of an otherwise enduring American tradition . . . .”<sup>189</sup> “These  
 6 territorial ‘legislative improvisations,’ which conflict with the Nation’s earlier approach  
 7 to firearm regulation, are most unlikely to reflect ‘the origins and continuing significance  
 8 of the Second Amendment’ and we do not consider them ‘instructive.’”<sup>190</sup> “Second,  
 9 because these territorial laws were rarely subject to judicial scrutiny, we do not know the  
 10 basis of their perceived legality . . . . we fail to see how they inform ‘the origins and  
 11 continuing significance of the Amendment.’”<sup>191</sup> “Finally, these territorial restrictions  
 12 deserve little weight because they were—consistent with the transitory nature of  
 13 territorial government—short lived . . . . Thus, they appear more as passing regulatory  
 14 efforts by not-yet-mature jurisdictions on the way to statehood, rather than part of an  
 15 enduring American tradition of state regulation.”<sup>192</sup> One commentator disagrees.<sup>193</sup>  
 16 Even so, the territorial regulations suggest an absence of gun bans during the most  
 17 important historical period.

18           None of the territorial regulations from 1791 to 1868 prohibited a firearm. There  
 19 were no prohibitions on owning firearms of any type. There were no prohibitions on  
 20 keeping a firearm of any type for self-defense, whether in the home or in public. The  
 21 first territorial regulation came approximately 47 years after the Second Amendment (in  
 22 1839) and prohibited the carrying of a firearm in a *concealed* manner in the Florida  
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 25 <sup>189</sup> *Bruen*, 142 S. Ct. at 2154.

26 <sup>190</sup> *Id.* (quoting *Heller*, 554 U.S. at 614).

27 <sup>191</sup> *Bruen*, 142 S. Ct. at 2155 (quoting *Heller*, 554 U.S. at 592).

28 <sup>192</sup> *Id.* (citations omitted).

<sup>193</sup> See Andrew Willinger, *The Territories Under Text, History, and Tradition*, 101 Wash. Univ. L. Rev. (2023), <https://ssrn.com/abstract=4372185>.

Territory. [42]. In other words, for the first 40 years of the nation’s history, the only territorial restriction on firearms, was in the Florida territory taken from Spain in 1819.

In 1853, the New Mexico Territory also adopted a *concealed* carrying prohibition. [58]. In 1854, the Washington Territory prohibited *exhibiting* a pistol in a rude, angry, or threatening manner, reenacting a similar law in 1859. [60, 71]. The Nebraska Territory made it a crime to carry a pistol *with the intent to assault* another person in 1858. [68] The Colorado Territory (in 1862 and again in 1867) and the Montana Territory (in 1864) restricted the *concealed* carrying of a pistol in a city, town, or village. [75, 79, 84]. While these territorial laws do evidence some later restrictions on the manner of carrying firearms in some public places, they do not evidence a history or tradition of prohibiting any firearms of any type.

**v. California’s First Concealed Carry Law Was a Failure**

In 1863, California’s homicide rate reached “catastrophic levels.”<sup>194</sup> With no Second Amendment analogue in the state constitution, California’s solution was to ban carrying concealed weapons. The experiment failed. In 1870, the legislature repealed the law, because it disarmed the good citizen, but the law was not followed by “the vast majority of roughs, fighting men, and predatory characters,”<sup>195</sup> and the police were “apt to arrest any quiet citizen” with a concealed weapon.<sup>196</sup>

**B. Historical Twins**

*Bruen* concluded that “[n]one of these historical limitations on the right to bear arms approach New York’s proper-cause requirement because none operated to prevent

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<sup>194</sup> Decl. of Randolph Roth, Dkt. 118-8 (“Roth Decl.”), at ¶ 36.

<sup>195</sup> *Id.* at ¶ 37 and n.84 (citing Clayton E. Cramer and Joseph E. Olson, *The Racist Origins of California’s Concealed Weapon Permit Law*, SSRN (Aug. 12, 2016) (quoting *The Carrying of Concealed Weapons*, Daily Alta (San Francisco) California, March 13, 1869, at 2, and *Concealed Deadly Weapons*, Sacramento Daily Union, December 16, 1870, at 2.)).

<sup>196</sup> *Id.*

1 law-abiding citizens with ordinary self-defense needs from carrying arms in public for  
2 that purpose.”<sup>197</sup> The same can be said about California’s magazine ban. To paraphrase  
3 the Supreme Court, none of these historical limitations on the right to bear arms approach  
4 California’s complete ban on magazines able to hold more than 10 rounds. None  
5 operated to prevent law-abiding citizens from possessing as much ammunition as they  
6 thought best.

7 A historical twin is not unimaginable. It could have been the case that the early  
8 states prohibited having large capacity gunpowder sacks, or, they might have prohibited  
9 carrying more than 10 lead bullets. There were no such restrictions. There are no  
10 Founding-era dead ringers or historical twins. Of course, the State does not need to find a  
11 historical twin, but a second cousin twice-removed, is not enough.

## 12 **V. ANALOGUES**

13 Although the State does not identify any historical twins of its restrictions on  
14 magazines, it may not have to. A history and tradition of a relevantly similar firearm  
15 regulation could suffice. After all, it can be argued that removable magazines represent a  
16 dramatic change in technology and the State is attempting to address a modern societal  
17 concern. In such cases, *Bruen* allows a more nuanced approach. On one hand, compared  
18 to muskets of the colonial era, a Glock 17 with its 17-round magazine clearly represents a  
19 dramatic technological advancement. On the other hand, the lever-action repeating  
20 Henry and Winchester rifles popular at the time of the Fourteenth Amendment were  
21 already dramatic technological advancements in firearms. These popular lever-action  
22 rifles had large tubular magazines that held a lot of ammunition and could be fired  
23 multiple times in succession, accurately and quickly. Yet, there are no state prohibitions  
24 on possession or manufacture of these lever-action rifles in the State’s law list.

25 In any event, while California does not need to identify a dead ringer for its  
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28 <sup>197</sup> 142 S. Ct. at 2150.

1 magazine ban, “California cannot satisfy the requirement for a closely analogous  
2 historical regulation by reference to any general firearm regulation California might  
3 unearth.”<sup>198</sup>

4 **A. The State’s Best Historic Analogue? A New York City Gunpowder**  
5 **Storage Law Following the Worst City Fire in Colonial America**

6 Asked to identify the best historic analogue to its sweeping prohibition on large  
7 capacity magazines, the State identified a New York City gunpowder storage law  
8 following the worst city fire in Colonial America. With the assistance of scholars who  
9 have studied historic laws for years the State identified a 1784 statute regulating the  
10 amount of gunpowder that could be stored inside a New York City building.<sup>199</sup> Because  
11 the State has identified this as its best analogue, it deserves closer consideration.

12 The gunpowder storage law has nothing to do with gun violence. It was *a fire*  
13 *safety regulation*. Unsurprisingly, the law was enacted after New York City suffered two  
14 great fires, one of which is described as, “The most destructive fire in colonial North  
15 America.”<sup>200</sup> The first fire, in the year 1776, burned much of Manhattan to the ground  
16 and destroyed 493 houses in its path. In 1778, a second fire swept through the city and  
17 destroyed 54 more houses and several warehouses.<sup>201</sup> After these two terrible fires the  
18 New York State legislature responded with a law for New York City limiting the quantity  
19 of gunpowder that a person could store in any one building to 28 pounds. It applied only  
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23 <sup>198</sup> *Baird*, 2023 WL 5763345, at \*8.

24 <sup>199</sup> See Defendant’s Response Brief in Response to the Court’s Order Entered on  
25 February 7, 2023, Dkt. 143, at 1, identifying 1784 Laws of N.Y. 627, chapter 28.

26 <sup>200</sup> New York City Fire Museum, *The Great New York Fire of 1776* (Mar. 21, 2023),  
<https://www.nycfiremuseum.org/greatfire1776> [<https://perma.cc/A3BW-TQRP>].

27 <sup>201</sup> Richard Howe, *Notes on the Great Fires of 1776 and 1778* (2014), The Gotham  
28 Center for New York City History, <https://www.gothamcenter.org/blog/notes-on-the-great-fires-of-1776-and-1778> [<https://perma.cc/WJ4V-3QKP>].

1 to that part of Manhattan from city hall on the south end to one mile north.<sup>202</sup> Gunpowder  
 2 was to be stored in fireproof stone jugs or tin canisters holding no more than 7 pounds  
 3 each. Reinforcing that the law was enacted to prevent fires, it also required gunpowder  
 4 be contained to prevent spills during transport through the streets.<sup>203</sup>

5 There was much the law did not do. It did not limit the total amount of gunpowder  
 6 a person could own or use, as long as quantities over 28 pounds were kept in the public  
 7 magazine or in additional buildings. It placed no limit on the number of lead bullets a  
 8 person could keep or possess. It did not restrict a person from keeping his firearms  
 9 loaded with gunpowder and bullets in his home, business, or when in public. Beyond the  
 10 one mile stretch of lower Manhattan island, the law had no application anywhere else in  
 11 the state. And 28 pounds is a lot of gunpowder. One New York militia soldier was  
 12 required to bring ¼ pound of gunpowder when called to muster.<sup>204</sup> So, 28 pounds of  
 13 gunpowder could outfit 112 militia men. As the State's expert Professor Cornell notes,  
 14 "Twenty to thirty pounds of gunpowder is certainly not an inconsiderable amount."<sup>205</sup>

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16  
 17 <sup>202</sup> "[I]t shall not be lawful . . . to have or keep any quantity of gun powder exceeding  
 18 twenty-eight pounds weight, in any one place, less than one mile to the northward of the  
 19 city hall . . . except in the public magazine at the Fresh-water . . . ."

20 <sup>203</sup> The law specified, "[a]nd in order to prevent any fatal consequences which may arise,  
 21 from the carriage of gun powder, in and through the streets of the city of new York, by  
 22 carts, carriages, or by hand, or otherways [sic], it shall be in a tight cask, well headed and  
 23 hooped, and shall be put into bags or leather-cases, and intirely [sic] covered therewith,  
 24 so as that none be spilt or scattered in the passage thereof . . . ." 1784 Laws of N.Y at  
 25 628.

26 <sup>204</sup> See Stats. at Large, New York 1867, Chapter X, Title VII, Article 1, §6, at 287 (eff.  
 27 1835) (penalties for militia men ill-equipped) ("[F]or want of two spare flints and a  
 28 knapsack, twenty four cartridges, shot-pouch, powder-horn, twenty balls, and *a quarter of*  
 29 *a pound of powder*, twenty five cents each . . . ."),  
[https://books.google.com/books/content?id=RkkwAQAAMAAJ&pg=PA287&img=1&z](https://books.google.com/books/content?id=RkkwAQAAMAAJ&pg=PA287&img=1&zoom=3&hl=en&bul=1&sig=ACfU3U3ooEDz2oBmZb_g3qythhk8S6UJOg&ci=99%2C102%2C820%2C820&edge=0)  
[oom=3&hl=en&bul=1&sig=ACfU3U3ooEDz2oBmZb\\_g3qythhk8S6UJOg&ci=99%2C1](https://books.google.com/books/content?id=RkkwAQAAMAAJ&pg=PA287&img=1&zoom=3&hl=en&bul=1&sig=ACfU3U3ooEDz2oBmZb_g3qythhk8S6UJOg&ci=99%2C102%2C820%2C820&edge=0)  
[02%2C820%2C820&edge=0](https://books.google.com/books/content?id=RkkwAQAAMAAJ&pg=PA287&img=1&zoom=3&hl=en&bul=1&sig=ACfU3U3ooEDz2oBmZb_g3qythhk8S6UJOg&ci=99%2C102%2C820%2C820&edge=0) [https://perma.cc/KS72-L87G].

<sup>205</sup> Saul Cornell & Nathan DeNiro, *A Well Regulated Right*, 73 Fordham L. Rev. 487  
 n.173 (2004).

For nuanced analogues, the New York City gunpowder storage law fails the why and how tests.<sup>206</sup> The “why” of the large capacity magazine ban is to introduce a “critical pause” into a mass shooter’s unrelenting attack. The “why” of the historic gunpowder storage law is to reduce the risk of building fires. The “how” of the large capacity magazine ban is limiting the number of ammunition rounds that can be loaded in a gun for self-defense. The “how” of the historic gunpowder storage law burden was generously limiting the storage (and not the amount loaded into guns for self-defense) of gunpowder for a geographic area smaller than one square mile. In the end, the State’s proposed analogue is not relevantly similar.

One other gunpowder storage law mentioned by the State which applied only in the city of Boston, Massachusetts, fares no better. This was also a *fire* safety regulation—nothing more.<sup>207</sup> “The ordinance did not prohibit *carrying* loaded firearms within the City of Boston—only leaving them unattended in a building—and . . . this law was for the protection of those fighting fires.”<sup>208</sup> In fact, one scholar mused, “Strictly speaking, the law did not forbid bringing an unloaded gun into a building, and then loading it when inside. So, occupants of homes or businesses remained free to keep loaded guns.”<sup>209</sup> Moreover, the State offers no evidence that the Massachusetts law was enforced. A search of *Thacher’s Reports*, a collection of reports of criminal cases tried in the City of Boston Municipal Court from 1823–1843 reveals no such prosecutions.<sup>210</sup>

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<sup>206</sup> Courts should examine “how and why the regulations burden a law-abiding citizens’ right to armed self-defense.” *Bruen*, 142 S. Ct. at 2132-33.

<sup>207</sup> See *Renna*, 20-cv-2190-DMS-DEB, 2023 WL 2846937, \*12–13 (citing *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 963 (9th Cir. 2014) (stating “Boston’s firearm-and-gunpowder storage law is historically distinct from the challenged firearm regulation in light of *Heller*”).

<sup>208</sup> Clayton E. Cramer and Joseph Edward Olson, *Pistols, Crime, and Public: Safety in Early America*, 44 Willamette L. Rev. 699, 705 (2008) (emphasis in original).

<sup>209</sup> *Id.*

<sup>210</sup> *Thacher’s Reports* may be found at <https://www.mass.gov/info-details/historical-massachusetts-cases#1800-1899->.

1 This whole gunpowder storage argument has been raised before and it has been  
 2 rejected before. It was raised a dissent in *Heller* and relied on the same laws of New  
 3 York and Massachusetts, and the same writings of Cornell.<sup>211</sup> The *Heller* majority was  
 4 unimpressed. *Heller* says,

5 The other laws Justice Breyer cites are gunpowder-storage laws  
 6 that he concedes did not clearly prohibit loaded weapons, but  
 7 required only that excess gunpowder be kept in a special  
 8 container or on the top floor of the home. Nothing about those  
 9 fire-safety laws undermines our analysis; they do not remotely  
 burden the right of self-defense as much as an absolute ban on  
 handguns.<sup>212</sup>

10 Applying the same reasoning to this case, the early fire-safety gunpowder storage laws do  
 11 not remotely burden the self-defense right as much as an absolute ban on magazines  
 12 holding more than 10 rounds.

13 **B. The State's Historic Analogue No. 2: Concealed Carry Laws**

14 Next, the State turns to historic laws regulating the *concealed* carrying of bowie  
 15 knives, dirks, sword canes, and some pistols, as analogues.

16 **i. Pocket Pistols**

17 Some historic laws prohibited carrying a pocket pistol in a concealed manner. By  
 18 1868, about a dozen states had laws prohibiting carrying concealed pistols. Importantly,  
 19 the concealed carry laws did not prohibit either keeping pistols for all lawful purposes or  
 20 carrying all guns openly. And none included long guns or ammunition containers in their  
 21 restrictions. Pocket pistols were entirely lawful to keep and use at home for self-defense.

22 Prohibiting the concealed carrying of a pistol was constitutionally permissible only  
 23 when a citizen could freely keep and carry the same gun openly. The statutes were often  
 24 tested in court, suggesting that any broad carrying restriction ran close to the  
 25

26  
 27  
 28 <sup>211</sup> *Heller*, 554 U.S. at 684–86 (Breyer, J., dissenting).

<sup>212</sup> *Id.* at 631–32.



1 constitutional line. Today’s large capacity magazine ban prohibits carrying magazines in  
2 any manner -- and even more restrictively prohibits simple possession.

3 Historic concealed carry laws for pistols have a different “why” and “how” than do  
4 the State’s large capacity magazine ban. The “why” of a concealed carry law was to  
5 prevent unfair surprise attacks by a person who appeared to be unarmed. The “how” of  
6 the historic concealed carry prohibitions was to proscribe the manner of carrying a pocket  
7 pistol and only when in public. The substantial burden imposed by the large capacity  
8 magazine ban is not analogous to the burden created by a concealed carry restriction for  
9 public carrying of a pocket pistol. Such a history and tradition of concealed carry  
10 prohibitions are not nuanced analogues for California’s magazine ban as they are not  
11 relevantly similar.

12 **ii. Dirks, Daggers, Sword Canes, and Bowie Knives**

13 The State now asks the Court to compare firearms equipped with large capacity  
14 magazines to knives. Undoubtedly, dirks, daggers, and bowie knives are dangerous. But  
15 dirks, daggers, sword canes, and bowie knives were not firearms; they were bladed  
16 instruments. *Bruen* says the state’s burden is to identify a historical *firearm* regulation,  
17 not a knife regulation. In the dissent, knives were cited only where territorial laws also  
18 affected the carrying of pistols, presumably because of the pistols.<sup>213</sup> *Heller* did not  
19 mention knife laws at all in evaluating the District of Columbia’s handgun ban. And the  
20 Supreme Court’s plurality did not mention bowie knives in evaluating Chicago’s  
21 handgun ban, except as an example of Reconstruction-era efforts to disarm African-  
22 Americans.<sup>214</sup> This is not to say that bowie knives are not “arms” imbued with Second  
23

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24  
25 <sup>213</sup> *Id.* at 2186 (Breyer, J. dissenting) (“For example, Georgia made it unlawful to carry,  
26 ‘unless in an open manner and fully exposed to view, any pistol, (except horseman’s  
27 pistols,) dirk, sword in a cane, spear, bowie-knife, or any other kind of knives,  
28 manufactured and sold for the purpose of offence and defence.’ Ga. Code § 4413  
(1861).”).

<sup>214</sup> *McDonald*, 561 U.S. at 771.

1 Amendment protection.<sup>215</sup> Historical knife laws would be relevant in evaluating a modern  
2 prohibition on knives. It is simply to say that historical *firearm* regulations are obviously  
3 more likely to be relevant analogues for modern *firearm* restrictions.

4 Even if knife regulations were relevant, they would not help the State much.<sup>216</sup>  
5 There were laws restricting bowie knives in some states in the 1800's, but not the vast  
6 majority of states. There is also little evidence of actual prosecutions for simply  
7

8  
9 <sup>215</sup> See, e.g., David B. Kopel, Clayton E. Cramer and Joseph E. Olson, *Knives and the*  
10 *Second Amendment*, 47 U. Mich. J. L. Reform 167, 168 (2013); Defs.' Compendium of  
11 Works, Dkt. 158-2, at 65, 67 ("This Article analyzes Second Amendment protection for  
the most common 'arm' in the United States – the knife.").

12 <sup>216</sup> This opinion is shared by two historians. See David B. Kopel and Joseph G.S.  
13 Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. of Legis., Apr. 25,  
14 2023, at 168–69 (2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4393197](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4393197)  
15 [<https://perma.cc/P85U-ASTZ>] ("Bans on modern rifles and magazines cannot be rescued  
16 by diverting attention away from the legal history of firearms law, and instead pointing to  
17 laws about other arms. Dozens of state and territorial legislatures enacted laws about  
Bowie knives, as well as dirks and daggers. Prohibitory laws for these blades are fewer  
than the number of bans on carrying handguns, and *Bruen* found the handgun laws  
insufficient to establish a tradition constricting the Second Amendment.

18 As for other non-blade impact weapons, the sales and manufacture bans in a  
19 minority of states for slungshots and knuckles could be considered as involving arms "not  
typically possessed by law-abiding citizens for lawful purposes."

20 Other flexible impact arms, most notably blackjacks, were "typically possessed by  
law-abiding citizens for lawful purposes," especially by law enforcement officers.  
21 Likewise, modern semiautomatic rifles and standard magazines are also highly preferred  
by today's law enforcement officers.

22 For blackjacks and sand clubs, only one state, New York, enacted a sales and  
23 manufacture ban. That came at a time when the legislature was unencumbered by a  
Second Amendment enforceable against the states or by a state constitution right to arms.  
24 As *Bruen* teaches, a lone eccentric state does not create a national legal tradition.

25 For every arm surveyed in this article, the mainstream American legal tradition  
26 was to limit the mode of carry (no concealed carry), to limit sales to minors (either with  
bans or requirements for parental permission), and/or to impose extra punishment for use  
27 in a crime.

28 The fact that most states banned concealed carry of Bowie knives is not a  
precedent to criminalize the mere possession of modern rifles and magazines.").

1 possessing a bowie knife, much less a judicial opinion on constitutionality. One court  
2 observed that a Tennessee bowie knife law was generally disregarded.<sup>217</sup>

3 The argument that a cluster of laws prohibiting the carrying of dangerous knives  
4 could justify a gun ban, lost its wind in *McDonald*. If the regulation of knives was not a  
5 sufficient analogue for restricting handguns in Chicago, neither are regulations of dirks,  
6 daggers, sword canes, and bowie knives useful analogues for prohibiting modern  
7 magazines.

### 8 **C. The State's Historic Analogue No. 3: Guns Set as Traps**

9 Historic laws prohibiting trap guns are proposed as a third analogue by the State.  
10 What the State does not admit or seem to recognize is that “trap guns” are not guns at all.  
11 They are a method by which a gun, any gun, can be set up to fire indiscriminately  
12 through the use of springs, strings, or other atypical triggering mechanism without  
13 needing an operator. Nonetheless, absent from our history is a tradition of trap gun  
14 restrictions in the important years between the 1791 and 1868. The 1771 New Jersey trap  
15 gun law, upon which the State relies, predates the Declaration of Independence, New  
16 Jersey statehood,<sup>218</sup> and the Second Amendment. Ninety-five years passed before a  
17 second restriction on trap gun was enacted and that one applied only to the Utah Territory  
18 (1865). [80]. Within the states, the first regulation on setting a trap gun, was enacted in  
19 Minnesota in 1873. [109]. Two states followed later in 1875 (Michigan) and 1884  
20

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21  
22 <sup>217</sup> See, e.g., *Day v. State*, 37 Tenn. 496, 499 (Tenn. 1858) (“It is a matter of surprise that  
23 these sections of this act, so severe in their penalties, *are so generally disregarded* in our  
24 cities and towns.”) (describing state law prohibiting the concealed carrying of bowie  
knives) (emphasis added).

25 <sup>218</sup> New Jersey was one of the few states that did not have in its state constitution a  
26 provision like the Second Amendment. (Six states do not have provisions protecting a  
27 right to arms in their state constitutions: California, New Jersey, New York, Maryland,  
28 Minnesota, and Iowa.) See David B. Kopel and Clayton E. Cramer, *State Court  
Standards of Review for the Right to Keep and Bear Arms*, 50 Santa Clara L. Rev 1113,  
1145 n.51 (2010).

(Vermont). In other words, trap guns were not prohibited by law in the District of Columbia or 36 of the 37 states (then existing), until 1873. California did not enact its own trap gun law until 1957.<sup>219</sup> Court decisions between 1791 and 1868 recognized that it was entirely lawful to use trap guns (or spring guns, as they were sometimes called) to defend one's property.<sup>220</sup> If this is what a national tradition of trap gun regulation looks like, it is a strange look, indeed.

Claiming trap guns were "dangerous weapons commonly used for criminal behavior and not for self-defense,"<sup>221</sup> the State has a problem with the facts. There is little historical evidence that trap guns were used for criminal behavior. Rather, guns

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<sup>219</sup> See Cal. Fish & Game Code § 2007.

<sup>220</sup> See, e.g., *Gray v. Combs*, 7 J. J. Marsh, 478 (Ky. 1832) (one who sets traps or spring guns to protect valuable property by means of which another is killed while attempting to enter the premises is guilty of no crime); *Loomis v. Terry*, 1837 WL 2808 (N.Y. Sup. Ct. 1837) ("It is not like setting spring guns with public notice of the fact; for even that has been held warrantable as being necessary (*Ilott v. Wilkes*, 3 Barn. & Ald. 304)."); *State v. Moore*, 31 Conn. 479, 479–80 (Conn. 1863) ("Breaking and entering a shop in the night season with intent to steal, is by our law burglary, and the placing of spring guns in such a shop for its defense, would be justified if a burglar should be killed by them."); *Maenner v. Carroll*, 46 Md. 193, 208 (Md. Ct. App. 1877) ("While it is decided that traps, spring-guns, and other dangerous instruments, may be lawfully placed on private grounds, for the purpose of deterring trespassers or catching strange animals doing damage . . ."); see also *Simpson*, 59 Ala. at 18 (citing *Moore*, 31 Conn. at 479) ("The setting a spring-gun on his premises, by the owner, is culpable only because of the intent with which it is done. Unless the public safety is thereby endangered, it is not indictable. If dangerous to the public, it is indictable as a nuisance."); *United States v. Gilliam*, 25 F. Cas. 1319, 1320 and n.2 (D.C. Crim. Ct. 1882) ("The setting of a spring-gun as a protection for property, though not in itself unlawful and indictable, is certainly undeserving of encouragement. . .") (citing English common law and the court of King's Bench, *Ilott v. Wilkes*, 3 Barn. & Ald. 304 ('A trespasser, having knowledge that there are spring-guns in a wood, although he may be ignorant of the particular spots where they are placed, cannot maintain an action for an injury received in consequence of his accidental treading on the latent wire connecting with the gun, and thereby letting it off.')).

<sup>221</sup> Defs' Br. in Resp., Dkt. 145, at 10 (quoting *Oregon Firearms Fed'n, Inc. v. Brown*, No. 2:22-cv-01815-IM, 2022 WL 17454829, at \*13 (D. Or. Dec. 6, 2022), *appeal dismissed*, No. 22-36011, 2022 WL 18956023 (9th Cir. Dec. 12, 2022)).

were set as traps by common people to protect their property from thieves and sometimes for self-defense against burglars. Perhaps just as often trap guns were used to hunt game. Historian and expert witness for the State, Robert Spitzer opines about trap guns: (1) “[t]hose who set gun traps typically did so to defend their places of business, properties, or possessions;” and (2) “opinion was more divided . . . with some arguing that thieves or criminals hurt or killed by the devices had it coming.”<sup>222</sup> So, when the State claims trap guns were used by criminals and not for self-defense, it gets the facts backwards. The how and why of the two types of regulations are not relevantly similar, thus trap gun laws are not useful analogues for prohibiting modern magazines.

**D. The Best Analogue: Laws Requiring Citizens to Keep and Carry Sufficient Bullets and Gunpowder for Service in the Militia**

California ignores Founding-era laws that present the best analogue to its present-day magazine law. These are the manifold early militia laws requiring each citizen, not to limit the amount of ammunition he could keep, but to arm himself with *enough* ammunition: at least 20 rounds.<sup>223</sup>

Government remains fixed on the notion that it alone can decide that anything larger than a 10-round magazine is not “suitable” for a citizen to have. But, there are no analogous cases in our history. There are no cases where American government dictated that lever-action rifles were unsuitable because single shot rifles were good enough, or

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<sup>222</sup> (U.S.D.C. Oregon Dkt. 17-2 at ¶¶ 34–53) (first filed in the instant case).

<sup>223</sup> See, e.g., 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) (explaining that states often required citizens to equip themselves with adequate firearms and ammunition, including between 20 and 24 cartridges at minimum); *Silveira v. Lockyer*, 328 F.3d 567, 586 (9th Cir. 2003) (“Much as building codes today require smoke detectors in the home, a man had to have a bullet mould, a pound of powder, four pounds of lead, and twenty bull<sup>et</sup>s, to be produced when called for by a militia officer.”) (Kleinfeld, J., dissenting).

1 revolvers were unsuitable because derringers were good enough.<sup>224</sup> These choices have  
2 always belonged to the People to decide for themselves how much firepower they need.

3 The right to have firearms for social security was important at the time the  
4 Constitution was adopted. There were many enemies of the young nation. An armed  
5 citizenry provided a much-needed deterrent effect. Early citizens remembered how the  
6 Minutemen of Lexington and Concord, Massachusetts, by assembling as a militia, fought  
7 back against the hostile British march to take away guns and gunpowder in April 1776.

8 During the Nation's founding-era, federal and state governments enacted laws for  
9 the formation and maintenance of citizen militias. Three such statutes are described in  
10 *Miller*.<sup>225</sup> Rather than restricting too much firing capacity, the laws mandated a  
11 minimum firing capacity. These statutes required citizens to arm themselves with arms  
12 and a minimum quantity of bullets and gunpowder, not to disarm themselves. When  
13 Congress passed the Militia Act in 1792,<sup>226</sup> the law required a citizen to be equipped to  
14 fire at least 20 to 24 shots.<sup>227</sup> A 1786 New York law required "no less than Twenty-four  
15 Cartridges," and a 1785 Virginia law required a cartridge box and "four pounds of lead,

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18 <sup>224</sup> "I surveyed the gun regulations in the Duke Historical Database from the early  
19 medieval period through 1885 to see what terminology was used. None of the laws that  
20 prohibit weapons, aside from the Maryland statute above, specifies a gun part or  
21 ammunition case or accoutrements of any kind. Although many present a list of banned  
22 or prohibited weapons – usually without defining them [the assumption is that the reader  
23 knows what they refer to], none of the laws mention cartridge boxes, bullets, barrels, or  
24 other parts of any weapons." Declaration of Dennis Baron, Dkt. 118-2, at ¶ 56.

<sup>225</sup> 307 U.S. 174 (1939)

<sup>226</sup> 1 Stat. 271, 2 Cong. Ch. 33.

25 <sup>227</sup> "That every citizen so enrolled and notified, shall, within six months thereafter,  
26 provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare  
27 flints, and a knapsack, a pouch with a box therein to contain not less than *twenty-four*  
28 *cartridges*, suited to the bore of his musket or firelock, each cartridge to contain a proper  
quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn,  
*twenty balls* suited to the bore of his rifle and a quarter of a pound of powder."  
(Emphasis added).



1 including twenty blind cartridges.” In 1776, Paul Revere’s Minutemen were required to  
2 have 30 bullets and gunpowder.

3       These and other citizen militia laws demonstrate that, contrary to the idea of a  
4 firing-capacity upper limit on the number of rounds permitted, there was a legal  
5 obligation for the average citizen to have at least 20 rounds available for immediate  
6 use.<sup>228</sup> There were no upper limits like § 32310; there were floors and the floors were  
7 well above 10 rounds.<sup>229</sup> California’s large capacity magazine ban is a diametrically  
8 opposed analogue.

9       As one court explained, “[u]nder *Bruen*, the Second Amendment does not ‘forbid  
10 all laws other than those that *actually existed* at or around the time of the Second  
11 Amendment’s adoption,’ but rather ‘the Second Amendment must, at most, forbid laws  
12 that could not have existed under the understanding of the right to bear arms that  
13 prevailed at the time.’”<sup>230</sup> California’s large capacity magazine ban did not exist and  
14 could not have existed under the understanding of the Second Amendment at the time of  
15 the Founding. This is clear because militia laws of the federal and state governments  
16 required citizens to keep and carry more ammunition supplies than 10 rounds. A  
17 prohibition like § 32310 would have been impossible to enforce and runs contrary to  
18 legal commands for militia readiness.

## 19 **VI. CONCLUSION**

20       Removable firearm magazines of all sizes are necessary components of  
21 semiautomatic firearms. Therefore, magazines come within the text of the constitutional  
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24 <sup>228</sup> *Teixeira v. Cty. Of Alameda*, 873 F.3d 670, 685 (9th Cir. 2017) (citing Joyce Lee  
25 Malcolm, *To Keep and Bear Arms* 139 (1994)) (“the colonial militia played a primarily  
26 defensive role . . . . The dangers all the colonies faced . . . were so great that not only  
27 militia members but all householders were ordered to be armed.”).

28 <sup>229</sup> *Duncan*, 366 F. Supp. at 1150.

<sup>230</sup> Def’s Br. in Resp., Dkt. 142 at 16 (quoting *United States v. Kelly*, No. 3:22-cr-00037,  
2022 U.S. Dist. LEXIS 215189, at \*14 n.7 (M.D. Tenn. Nov. 16, 2022)).



1 declaration that the right to keep and bear arms shall not be infringed. Because millions  
2 of removable firearm magazines able to hold between 10 and 30 rounds are commonly  
3 owned by law-abiding citizens for lawful purposes, including self-defense, and because  
4 they are reasonably related to service in the militia, the magazines are presumptively  
5 within the protection of the Second Amendment. There is no American history or  
6 tradition of regulating firearms based on the number of rounds they can shoot, or of  
7 regulating the amount of ammunition that can be kept and carried. The best analogue that  
8 can be drawn from historical gun laws are the early militia equipment regulations that  
9 required all able-bodied citizens to equip themselves with a gun and a minimum amount  
10 of ammunition in excess of 10 rounds.

11 Because the State did not succeed in justifying its sweeping ban and dispossession  
12 mandate with a relevantly similar historical analogue, California Penal Code § 32310, as  
13 amended by Proposition 63, is hereby declared to be unconstitutional in its entirety and  
14 shall be enjoined. At this time, the Court's declaration does not reach the definition of a  
15 large capacity magazine in California Penal Code § 16740 where it is used in other parts  
16 of the Penal Code to define other gun-related crimes or enhance criminal penalties.

17 One government solution to a few mad men with guns is a law that makes into  
18 criminals responsible, law-abiding people wanting larger magazines simply to protect  
19 themselves. The history and tradition of the Second Amendment clearly supports state  
20 laws against the use or misuse of firearms with unlawful intent, but not the disarmament  
21 of the law-abiding citizen. That kind of a solution is an infringement on the  
22 Constitutional right of citizens to keep and bear arms. The adoption of the Second  
23 Amendment was a freedom calculus decided long ago by our first citizens who cherished  
24 individual freedom with its risks more than the subservient security of a British ruler or  
25 the smothering safety of domestic lawmakers. The freedom they fought for was worth  
26 fighting for then, and that freedom is entitled to be preserved still.

27 The Attorney General respectfully requests a stay of any judgment in Plaintiffs'  
28 favor for a sufficient period to seek a stay from the Court of Appeals. Dkt. 118 at 61–63;

1 Dkt. 142 at 25. That request is granted. Therefore, the enforcement of the injunction is  
2 hereby stayed for ten days.

3 **IT IS HEREBY ORDERED** that:

4 1. Defendant Attorney General Rob Bonta, and his officers, agents, servants,  
5 employees, and attorneys, and those persons in active concert or participation with him,  
6 and those duly sworn state peace officers and federal law enforcement officers who gain  
7 knowledge of this injunction order, or know of the existence of this injunction order, are  
8 enjoined from enforcing California Penal Code § 32310.

9 2. Defendant Rob Bonta shall provide, by personal service or otherwise, actual  
10 notice of this order to all law enforcement personnel who are responsible for  
11 implementing or enforcing the enjoined statute.

12 3. This injunction is stayed for ten (10) days from the date of this Order.

13 **IT IS SO ORDERED.**

14 Date: September 22, 2023

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16 HON. ROGER T. BENITEZ  
17 United States District Judge  
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6 UNITED STATES DISTRICT COURT  
7 SOUTHERN DISTRICT OF CALIFORNIA  
8

9 VIRGINIA DUNCAN, et al.,

Case No.: 3:17cv1017-BEN (JLB)

10  
11 Plaintiffs,

**ORDER GRANTING PLAINTIFFS’  
MOTION FOR SUMMARY  
JUDGMENT, DECLARING  
CALIFORNIA PENAL CODE § 32310  
UNCONSTITUTIONAL and  
ENJOINING ENFORCEMENT**

12 v.

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

16 Defendant.  
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18 Individual liberty and freedom are *not* outmoded concepts. “The judiciary is – and  
19 is often the only – protector of individual rights that are at the heart of our democracy.” --  
20 Senator Ted Kennedy, Senate Hearing on the Nomination of Robert Bork, 1987.<sup>1</sup>

21 **I. INTRODUCTION**

22 As two masked and armed men broke in, Susan Gonzalez was shot in the chest.  
23 She made it back to her bedroom and found her husband’s .22 caliber pistol. Wasting the  
24 first rounds on warning shots, she then emptied the single pistol at one attacker.  
25 Unfortunately, now out of ammunition, she was shot again by the other armed attacker.  
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28 <sup>1</sup> Norma Vieira & Leonard Gross, *Supreme Court Appointments: Judge Bork and the Politicization of  
Senate Confirmations* 26 (Southern Illinois University Press 1998).

1 She was not able to re-load or use a second gun. Both she and her husband were shot  
2 twice. Forty-two bullets in all were fired. The gunman fled from the house—but  
3 returned. He put his gun to Susan Gonzalez’s head and demanded the keys to the  
4 couple’s truck.<sup>2</sup>

5 When three armed intruders carrying what look like semi-automatic pistols broke  
6 into the home of a single woman at 3:44 a.m., she dialed 911. No answer. Feng Zhu  
7 Chen, dressed in pajamas, held a phone in one hand and took up her pistol in the other  
8 and began shooting. She fired numerous shots. She had no place to carry an extra  
9 magazine and no way to reload because her left hand held the phone with which she was  
10 still trying to call 911. After the shooting was over and two of the armed suspects got  
11 away and one lay dead, she did get through to the police. The home security camera  
12 video is dramatic.<sup>3</sup>

13 A mother, Melinda Herman, and her nine-year-old twins were at home when an  
14 intruder broke in. She and her twins retreated to an upstairs crawl space and hid.  
15 Fortunately, she had a .38 caliber revolver. She would need it. The intruder worked his  
16 way upstairs, broke through a locked bedroom door and a locked bathroom door, and  
17 opened the crawl space door. The family was cornered with no place to run. He stood  
18 staring at her and her two children. The mother shot six times, hitting the intruder five  
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21 <sup>2</sup> *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1130-31 (S.D. Cal. 2017) (citing *Jacksonville*  
22 *Times-Union*, July 18, 2000).

23 <sup>3</sup> Lindsey Bever, *Armed Intruders Kicked in the Door*, Washington Post (Sept. 24, 2016),  
24 [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](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*,  
25 <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  
26 news account is not in the parties’ exhibits, it is illustrative.  
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1 times, when she ran out of ammunition. Though injured, the intruder was not  
2 incapacitated. Fortunately, he decided to flee.<sup>4</sup>

3 **A. A Need for Self-Defense**

4 In one year in California (2017), a population of 39 million people endured 56,609  
5 robberies, 105,391 aggravated assaults, and 95,942 residential burglaries.<sup>5</sup> There were  
6 also 423 homicides in victims' residences.<sup>6</sup> There were no mass shootings in 2017.  
7 Nationally, the first study to assess the prevalence of defensive gun use estimated that  
8 there are 2.2 to 2.5 million defensive gun uses by civilians each year. Of those, 340,000  
9 to 400,000 defensive gun uses were situations where defenders believed that they had  
10 almost certainly saved a life by using the gun.<sup>7</sup> Citizens often use a gun to defend against  
11 criminal attack. A Special Report by the U.S. Department of Justice, Bureau of Justice  
12 Statistics published in 2013, reported that between 2007 and 2011 "there were 235,700  
13 victimizations where the victim used a firearm to threaten or attack an offender."<sup>8</sup> How  
14 many more instances are never reported to, or recorded by, authorities? According to  
15 another U.S. Department of Justice, Bureau of Justice Statistics, Special Report, for each  
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18 <sup>4</sup> Robin Reese, *Georgia Mom Shoots Home Invader, Hiding With Her Children*, ABC  
19 News (Jan. 8, 2013), [https://abcnews.go.com/US/georgia-mom-hiding-kids-shoots-](https://abcnews.go.com/US/georgia-mom-hiding-kids-shoots-intruder/story?id=18164812)  
20 [intruder/story?id=18164812](https://abcnews.go.com/US/georgia-mom-hiding-kids-shoots-intruder/story?id=18164812) (last viewed Mar. 22, 2019) (includes video and recording of  
21 911 call). Although this news account is not in the parties' exhibits, it is illustrative.

22 <sup>5</sup> Xavier Becerra, *Crime in California (2017)* and *Homicide in California (2017)*,  
23 (<https://openjustice.doj.ca.gov/resources/publications>). Under Rules of Evidence 201(b)  
24 courts may take judicial notice of some types of public records, including reports of  
25 administrative bodies.

26 <sup>6</sup> *Id.*

27 <sup>7</sup> See Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature*  
28 *of Self-Defense with a Gun*, 86 J. Crim. L. & Criminology 150, 164, 177 (1995) (cited in  
29 *Heller v. D.C. (Heller II)*, 670 F.3d 1244, 1262 (D.C. Cir. 2011)).

30 <sup>8</sup> See Planty, Michael and Truman, Jennifer, *Firearm Violence, 1993-2011* (2013), at p.11  
31 and Table 11 [www.bjs.gov/content/pub/pdf/fv9311.pdf](http://www.bjs.gov/content/pub/pdf/fv9311.pdf) (last visited Mar. 19, 2019).  
32 Under Rules of Evidence 201(b) courts may take judicial notice of some types of public  
33 records, including reports of administrative bodies.

1 year between 2003 and 2007, an estimated 266,560 burglaries occurred during which a  
 2 person at home became a victim of a violent crime or a “home invasion.”<sup>9</sup> “Households  
 3 composed of single females with children had the highest rate of burglary while someone  
 4 was at home.”<sup>10</sup> Of the burglaries by a stranger where violence occurred, the assailant  
 5 was armed with a firearm in 73,000 instances annually (on average).<sup>11</sup> During a burglary,  
 6 rape or sexual assault occurred 6,387 times annually (on average), while a homicide  
 7 occurred approximately 430 times annually (on average).<sup>12</sup>

8 Fortunately, the Second Amendment protects a person’s right to keep and bear  
 9 firearms. The Second Amendment provides: “A well regulated Militia, being necessary  
 10 to the security of a free State, the right of the people to keep and bear Arms, shall not be  
 11 infringed.” U.S. Const. amend. II. “As interpreted in recent years by the Supreme Court,  
 12 the Second Amendment protects ‘the right of law-abiding, responsible citizens to use  
 13 arms in defense of hearth and home.’” *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 676–  
 14 77 (9th Cir. 2017), *cert. denied sub nom. Teixeira v. Alameda Cty.*, 138 S. Ct. 1988  
 15 (2018) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)). At the core of  
 16 the Second Amendment is a citizen’s right to have in his and her home for self-defense  
 17 common firearms. *Heller*, 554 U.S. at 629. “[O]ur central holding in *Heller* [is] that the  
 18 Second Amendment protects a personal right to keep and bear arms for lawful purposes,  
 19 most notably for self-defense within the home.” *McDonald v. City of Chicago*, 561 U.S.  
 20 742, 780 (2010).

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24 <sup>9</sup> Catalano, Shannan, *Victimization During Household Burglary*, U.S. D.O.J., Bureau of  
 25 Justice Statistics (Sept. 2010) <https://www.bjs.gov/content/pub/pdf/vdhhb.pdf> (last visited  
 26 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.

27 <sup>10</sup> *Id.* at p.3.

28 <sup>11</sup> *Id.* at p.10.

<sup>12</sup> *Id.*

1 As evidenced by California's own crime statistics, the need to protect one's self  
2 and family from criminals in one's home has not abated no matter how hard they try.  
3 Law enforcement cannot protect everyone. "A police force in a free state cannot provide  
4 everyone with bodyguards. Indeed, while some think guns cause violent crime, others  
5 think that wide-spread possession of guns on balance reduces violent crime. None of  
6 these policy arguments on either side affects what the Second Amendment says, that our  
7 Constitution protects 'the right of the people to keep and bear Arms.'" *Silveira v.*  
8 *Lockyer*, 328 F.3d 567, 588 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of  
9 rehearing *en banc*). However, California citizens, like United States citizens everywhere,  
10 enjoy the right to defend themselves with a firearm, if they so choose. To protect the  
11 home and hearth, citizens most often choose a handgun, while some choose rifles or  
12 shotguns.

### 13 **B. Are 10 Rounds Always Enough?**

14 If a law-abiding, responsible citizen in California decides that a handgun or rifle  
15 with a magazine larger than 10 rounds is the best choice for defending her hearth and  
16 home, may the State deny the choice, declare the magazine a "nuisance," and jail the  
17 citizen for the crime of possession? The Attorney General says that is what voters want  
18 in hopes of preventing a rare, but horrible, mass shooting. The plaintiffs, who are also  
19 citizens and residents of California, say that while the goal of preventing mass shootings  
20 is laudable, banning the acquisition and possession of magazines holding more than 10  
21 rounds is an unconstitutional experiment that poorly fits the goal. From a public policy  
22 perspective, the choices are difficult and complicated. People may cede liberty to their  
23 government in exchange for the promise of safety. Or government may gain compliance  
24 from its people by forcibly disarming all.<sup>13</sup> In the United States, the Second Amendment  
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27 <sup>13</sup> *E.g.*, on November 10, 1938, the day after the horrific Night of Broken Glass, or  
28 *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



1 takes the legislative experiment off the table.<sup>14</sup> Regardless of current popularity, neither a  
 2 legislature nor voters may trench on constitutional rights. “An unconstitutional statute  
 3 adopted by a dozen jurisdictions is no less unconstitutional by virtue of its popularity.”  
 4 *Silveira*, 312 at 1091.

### 5 **C. Mass Shooting vs. Common Crimes**

6 When they occur, mass shootings are tragic. Innocent lives are senselessly lost  
 7 while other lives are scarred forever. Communities are left shaken, frightened, and  
 8 grieving. The timeline of the tragedy, the events leading up to the shooting, and the  
 9 repercussions on family and friends after the incident, fill the national media news cycle  
 10 for days, weeks and years. Who has not heard about the Newtown, Connecticut, mass  
 11 shooting at Sandy Hook Elementary School, or the one at a high school in Parkland,  
 12 Florida? But an individual victim gets little, if any, media attention, and the attention he  
 13 or she gets is local and short-lived. For example, who has heard about the home invasion  
 14 attack on Melinda Herman and her twin nine-year old daughters in Georgia only one  
 15 month after the Sandy Hook incident?<sup>15</sup> Who has heard of the attacks on Ms. Zhu Chen  
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 18 for twenty years.” *First Anti-Jew Laws Issued, Possession of Arms*, New York Times  
 19 (Nov. 11, 1938).

20 <sup>14</sup> “To be sure, assault rifles and large capacity magazines are dangerous. But their  
 21 ability to project large amounts of force accurately is exactly why they are an attractive  
 22 means of self-defense. While most persons do not require extraordinary means to defend  
 23 their homes, the fact remains that some do. Ultimately, it is up to the lawful gun owner  
 24 and not the government to decide these matters. To limit self-defense to only those  
 25 methods acceptable to the government is to effect an enormous transfer of authority from  
 26 the citizens of this country to the government—a result directly contrary to our  
 27 constitution and to our political tradition. The rights contained in the Second  
 28 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).

<sup>15</sup> 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).

1 or Ms. Gonzalez and her husband?<sup>16</sup> Are the lives of these victims worth any less than  
2 those lost in a mass shooting? Would their deaths be any less tragic? Unless there are a  
3 lot of individual victims together, the tragedy goes largely unnoticed.

4 That is why mass shootings can seem to be a common problem, but in fact, are  
5 exceedingly rare. At the same time robberies, rapes, and murders of individuals are  
6 common, but draw little public notice. As in the year 2017, in 2016 there were numerous  
7 robberies, rapes, and murders of individuals in California and no mass shootings.<sup>17</sup>  
8 Nevertheless, a gubernatorial candidate was successful in sponsoring a statewide ballot  
9 measure (Proposition 63). Californians approved the proposition and added  
10 criminalization and dispossession elements to existing law prohibiting a citizen from  
11 acquiring and keeping a firearm magazine that is able to hold more than 10 rounds. The  
12 State now defends the prohibition on magazines, asserting that mass shootings are an  
13 urgent problem and that restricting the size of magazines a citizen may possess is part of  
14 the solution. Perhaps it is part of the solution.

15 Few would say that a 100 or 50-round rifle magazine in the hands of a murderer is  
16 a good idea. Yet, the “solution” for preventing a mass shooting exacts a high toll on the  
17 everyday freedom of ordinary law-abiding citizens. Many individual robberies, rapes,  
18 and shootings are not prevented by the State. Unless a law-abiding individual has a  
19 firearm for his or her own defense, the police typically arrive after it is too late. With  
20 rigor mortis setting in, they mark and bag the evidence, interview bystanders, and draw a  
21 chalk outline on the ground. But the victim, nevertheless, is dead, or raped, or robbed, or  
22 traumatized.

23 As Watson County Sheriff Joe Chapman told CNN about Melinda Herman and her  
24 twin nine-year-old daughters in the attic (the third incident described above), “[h]ad it not  
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27 <sup>16</sup> See n.2-3, *supra*.

28 <sup>17</sup> Xavier Becerra, *Crime in California (2016)* and *Homicide in California (2016)*,  
(<https://openjustice.doj.ca.gov/resources/publications>).

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."<sup>18</sup> 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.<sup>19</sup> 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 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.<sup>20</sup> 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.

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<sup>18</sup> 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)

<sup>19</sup> There is an exception for "tubular" magazines which are typically found in lever action rifles.

<sup>20</sup> See n.2-4, *supra*.

1 That is because California law declares acquisition and possession of a magazine able to  
 2 hold more than ten rounds (*i.e.*, a “large capacity magazine” or “LCM”) a crime. *See*  
 3 Cal. Penal Code § 32310;<sup>21</sup> § 16740.<sup>22</sup> For simple possession of a magazine holding

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 5 <sup>21</sup> Section 32310 states:

6 (a) Except as provided in Article 2 (commencing with Section 32400) of this chapter and  
 7 in Chapter 1 (commencing with Section 17700) of Division 2 of Title 2, any person in  
 8 this state who manufactures or causes to be manufactured, imports into the state, keeps  
 9 for sale, or offers or exposes for sale, or who gives, lends, buys, or receives any large-  
 10 capacity magazine is punishable by imprisonment in a county jail not exceeding one year  
 11 or imprisonment pursuant to subdivision (h) of Section 1170.

12 (b) For purposes of this section, “manufacturing” includes both fabricating a magazine  
 13 and assembling a magazine from a combination of parts, including, but not limited to, the  
 14 body, spring, follower, and floor plate or end plate, to be a fully functioning large-  
 15 capacity magazine.

16 (c) Except as provided in Article 2 (commencing with Section 32400) of this chapter and  
 17 in Chapter 1 (commencing with Section 17700) of Division 2 of Title 2, commencing  
 18 July 1, 2017, any person in this state who possesses any large-capacity magazine,  
 19 regardless of the date the magazine was acquired, is guilty of an infraction punishable by  
 20 a fine not to exceed one hundred dollars (\$100) per large-capacity magazine, or is guilty  
 21 of a misdemeanor punishable by a fine not to exceed one hundred dollars (\$100) per  
 22 large-capacity magazine, by imprisonment in a county jail not to exceed one year, or by  
 23 both that fine and imprisonment.

24 (d) Any person who may not lawfully possess a large-capacity magazine commencing  
 25 July 1, 2017 shall, prior to July 1, 2017:

26 (1) Remove the large-capacity magazine from the state;

27 (2) Sell the large-capacity magazine to a licensed firearms dealer; or

28 (3) Surrender the large-capacity magazine to a law enforcement agency for  
 destruction.

Cal. Penal Code § 32310 (2019)(West).

<sup>22</sup> 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.

1 more than 10 rounds, the crime is an infraction under § 32310(c). It is a much more  
2 serious crime to acquire a magazine holding more than 10-rounds in California by  
3 importing, buying, borrowing, receiving, or manufacturing. These acts may be punished  
4 as a misdemeanor or a felony under § 32310(a) (“any person in this state who  
5 manufactures or causes to be manufactured, imports into the state, keeps for sale, or  
6 offers or exposes for sale, or who gives, lends, buys, or receives any large-capacity  
7 magazine is punishable by imprisonment in a county jail not exceeding one year or  
8 imprisonment pursuant to subdivision (h) of Section 1170”). Under the subsection’s  
9 provision, “or imprisonment pursuant to subdivision (h) of Section 1170,” punishment

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Cal. Penal Code § 16740 (2019)(West).

1 may be either a misdemeanor or a felony.<sup>23</sup> California’s gun laws are lengthy and  
 2 complicated.<sup>24</sup> The statutes concerning magazines alone are not simple.<sup>25</sup>

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 5 <sup>23</sup> See e.g., *People v. Le Bleu*, 2018 Cal. App. Unpub. LEXIS 7851\*1 (Nov. 13, 2018)  
 6 (“count 5 charged him with felony receipt of a large-capacity magazine (Pen. Code, §  
 7 32310, subd. (a)).”); *People v. Obrien*, 2018 Cal. App. Unpub. LEXIS 4992\*1 (July 23,  
 8 2018) (based on handgun with 16 rounds of ammunition found under car seat, “[t]he  
 9 People charged Obrien in a three-count felony complaint with . . . manufacturing,  
 10 importing, keeping for sale, or giving or receiving a large capacity magazine (§ 32310,  
 11 subd. (a)).”); *People v. Rodriguez*, 2017 Cal. App. Unpub. LEXIS 5194\*1 (July 26, 2017)  
 12 (“Defendant Santino Rodriguez pleaded no contest to possessing a large-capacity  
 13 magazine, a felony, and the trial court placed him on probation for three years.”); *People*  
 14 *v. Verches*, 2017 Cal. App. Unpub. LEXIS 3238\*11-12 (May 9, 2017) (California  
 15 resident who purchased three 30-round magazines at Nevada gun show and returned to  
 16 California charged with felony importation of a large capacity magazine under former  
 17 Cal. Pen. Code § 12020(a)(2)).

18 <sup>24</sup> In a dissent, Judge Tallman describes as “substantial” the burden imposed by the  
 19 myriad anti-gun legislation in California and the decisions upholding the legislation.  
 20 Judge Tallman notes, “Our cases continue to slowly carve away the fundamental right to  
 21 keep and bear arms. Today’s decision further lacerates the Second Amendment, deepens  
 22 the wound, and resembles the Death by a Thousand Cuts.” *Teixeira v. Cty. of Alameda*,  
 23 873 F.3d 670, 694 (9th Cir. 2017), *cert. denied sub nom. Teixeira v. Alameda Cty., Cal.*,  
 24 138 S. Ct. 1988 (2018).

25 <sup>25</sup> Here is an example of the way in which the state’s firearm laws are so complex as to  
 26 obfuscate the Second Amendment rights of a citizen who intends to abide by the law. A  
 27 person contemplating either returning home from an out-of-state hunting trip with a 30-  
 28 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.



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3 Unfortunately, he or she may incorrectly believe that criminal possession will be his or  
4 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).

5 And § 32310(a) also covers buying, receiving, and making his or her own large  
6 capacity magazine. Even if the citizen realizes that he or she commits a crime by  
7 importing, buying, receiving, or manufacturing a large capacity magazine, the citizen will  
8 probably read § 32310(a) as punishing these crimes as misdemeanors. However, the  
9 careful reader who follows up on the odd reference to section (h) of § 1170 may  
10 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.”

11 California refers to such crimes that may be punished as either felonies or misdemeanors  
12 as “wobblers.” And is the citizen wrong to think that simply *loaning* a large capacity  
13 magazine is lawful under § 32415? Section 32415, titled *Loan of lawfully possessed*  
*large-capacity magazine between two individuals; application of Section 32310*, states,

14 Section 32310 does not apply to the loan of a lawfully possessed large-  
15 capacity magazine between two individuals if all of the following conditions are  
16 met: (a) The person being loaned the large-capacity magazine is not prohibited by  
17 Chapter 1 (commencing with Section 29610), Chapter 2 (commencing with  
18 Section 29800), or Chapter 3 (commencing with Section 29900) of Division 9 of  
19 this title or Section 8100 or 8103 of the Welfare and Institutions Code from  
20 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 accessible vicinity of the person to whom the large-  
capacity magazine is loaned.

21 It is enough to make an angel swear. Suffice it to say that either the law-abiding  
22 hunter returning home with a 30-round rifle magazine, or the resident that receives from  
23 another a 15-round pistol magazine, or the enthusiast who makes a 12-round magazine  
24 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  
25 forfeiture of Second Amendment rights for a lifetime. For Second Amendment rights,  
26 statutory complexity of this sort extirpates as it obfuscates. And in the doing, it violates a  
27 person’s constitutional right to due process. “[A] statute which either forbids or requires  
28 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*).



1 Absent from these provisions is any qualifying language: *all* forms of possession  
2 by ordinary citizens are summarily criminalized. For example, the statutes make no  
3 distinction between possessing and storing a 15-round magazine at home (a reasonable  
4 non-threatening act) and carrying a rifle with a 100-round magazine while sitting outside  
5 a movie theatre or school (a potentially threatening and suspicious act). Each constitutes  
6 criminal possession and is prohibited outright. *C.f., Friedman v. City of Highland Park*,  
7 784 F.3d 406, 417 (7th Cir. 2015) (Manion, J., dissenting) (“Notably absent from this  
8 provision is any qualifying language: *all* forms of possession are summarily prohibited.  
9 Other laws notwithstanding, the ordinance makes no distinction between storing large-  
10 capacity magazines in a locked safe at home and carrying a loaded assault rifle while  
11 walking down Main Street. Both constitute ‘possession’ and are prohibited outright.”).  
12 According to the U.S. Supreme Court’s reasoning, acquiring, possessing, or storing a  
13 commonly-owned 15-round magazine at home for self-defense is protected at the core of  
14 the Second Amendment. Possessing a loaded 100-round rifle and magazine in a crowded  
15 public area may not be.

16 All Californians, like all citizens of the United States, have a fundamental  
17 Constitutional right to keep and bear common and dangerous arms. The nation’s  
18 Founders used arms for self-protection, for the common defense, for hunting food, and as  
19 a check against tyranny. *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 686 (9th Cir. 2017)  
20

21  
22 Unfortunately, firearm regulations are often complex and prolix. For example,  
23 U.S. House of Representative Steve Scalise, R-La., remarked that a hunter would need to  
24 bring along an attorney to make sure the hunter did not accidentally commit a felony under  
25 recently proposed federal legislation. According to PBS News Hour, Scalise said,  
26 “‘What it would do is make criminals out of law-abiding citizens . . . . If you go hunting  
27 with a friend and your friend wants to borrow your rifle, you better bring your attorney  
28 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](https://www.pbs.org/newshour/politics/gun-control-legislation-pass-house-but-faces-dim-prospects-in-senate) (last visited Mar. 1, 2019).

(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.

1 **A. The Second Amendment**

2 Plaintiffs contend that there is no genuine dispute that the Second Amendment to  
3 the United States Constitution protects the individual right of every law-abiding citizen to  
4 acquire, possess, and keep common firearms and their common magazines holding more  
5 than 10 rounds – magazines which are typically possessed for lawful purposes. Plaintiffs  
6 also contend that the state of California has not carried its burden to demonstrate a  
7 reasonable fit between the flat ban on such magazines and its important interests in public  
8 safety. Plaintiffs contend that the state’s magazine ban thus cannot survive  
9 constitutionally-required heightened scrutiny and they are entitled to declaratory and  
10 injunctive relief as a matter of law. Plaintiffs are correct.

11 ***1. The Supreme Court’s Simple Heller Test***

12 In *Heller*, the U.S. Supreme Court provided a simple Second Amendment test in  
13 crystal clear language. It is a test that anyone can understand. The right to keep and bear  
14 arms is a right enjoyed by law-abiding citizens to have arms that are not unusual “in  
15 common use” “for lawful purposes like self-defense.” *District of Columbia v. Heller*,  
16 554 U.S. 570, 624 (2008); *Heller v. District of Columbia (“Heller II”)*, 670 F.3d 1244,  
17 1271 (2011) (Kavanaugh, J., dissenting) (“In my view, *Heller* and *McDonald* leave little  
18 doubt that courts are to assess gun bans and regulations based on text, history, and  
19 tradition, not by a balancing test such as strict or intermediate scrutiny.”). It is a  
20 hardware test. Is the firearm hardware commonly owned? Is the hardware commonly  
21 owned by law-abiding citizens? Is the hardware owned by those citizens for lawful  
22 purposes? If the answers are “yes,” the test is over. The hardware is protected.

23 Millions of ammunition magazines able to hold more than 10 rounds are in  
24 common use by law-abiding responsible citizens for lawful uses like self-defense. This is  
25 enough to decide that a magazine able to hold more than 10 rounds passes the *Heller* test  
26 and is protected by the Second Amendment. The simple test applies because a magazine  
27 is an essential mechanical part of a firearm. The size limit directly impairs one’s ability  
28 to defend one’s self.

1 Neither magazines, nor rounds of ammunition, nor triggers, nor barrels are  
2 specifically mentioned in the Second Amendment. Neither are they mentioned in *Heller*.  
3 But without a right to keep and bear triggers, or barrels, or ammunition and the  
4 magazines that hold ammunition, the Second Amendment right would be meaningless.  
5 *Fyock v. City of Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015) (“[T]o the extent that  
6 certain firearms capable of use with a magazine—*e.g.*, certain semi-automatic  
7 handguns—are commonly possessed by law-abiding citizens for lawful purposes, our  
8 case law supports the conclusion that there must also be some corollary, albeit not  
9 unfettered, right to possess the magazines necessary to render those firearms operable.”);  
10 *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (en banc) (“We  
11 recognized in *Jackson* that, although the Second Amendment ‘does not explicitly protect  
12 ammunition, [but] without bullets, the right to bear arms would be meaningless.’ *Jackson*  
13 thus held that ‘the right to possess firearms for protection implies a corresponding right’  
14 to obtain the bullets necessary to use them.”) (citations omitted); *see also Ass’n of N.J.*  
15 *Rifle & Pistol Clubs v. A.G. N.J.*, 910 F.3d 106, 116 (3rd Cir. 2018) (“The law challenged  
16 here regulates magazines, and so the question is whether a magazine is an arm under the  
17 Second Amendment. The answer is yes. A magazine is a device that holds cartridges or  
18 ammunition. Regulations that eliminate ‘a person’s ability to obtain or use ammunition  
19 could thereby make it impossible to use firearms for their core purpose.’ Because  
20 magazines feed ammunition into certain guns, and ammunition is necessary for such a  
21 gun to function as intended, magazines are ‘arms’ within the meaning of the Second  
22 Amendment.”) (citations omitted). Consequently, the same analytical approach ought to  
23 be applied to both firearms and the ammunition magazines designed to make firearms  
24 function.

25 Under the simple test of *Heller*, California’s § 32310 directly infringes Second  
26 Amendment rights. It directly infringes by broadly prohibiting common firearms and  
27 their common magazines holding more than 10 rounds, because they are not unusual and  
28 are commonly used by responsible, law-abiding citizens for lawful purposes such as self-

1 defense. And “that is all that is needed for citizens to have a right under the Second  
2 Amendment to keep such weapons.” *Friedman v. City of Highland Park*, 136 S. Ct. 447,  
3 449 (2015) (Justices Thomas and Scalia dissenting from denial of certiorari)  
4 (commenting on what *Heller*’s test requires). Although it may be argued that a 100-  
5 round, or a 50-round, or possibly even a 30-round magazine may not pass the *Heller*  
6 hardware test, because they are “unusual,” the State has proffered no credible evidence  
7 that would support such a finding. Using the simple *Heller* test, a decision about firearm  
8 hardware regulations could end right here.

9 This is not to say the simple *Heller* test will apply to non-hardware firearm  
10 regulations such as gun store zoning laws,<sup>26</sup> or firearm serial number requirements.<sup>27</sup> *Cf.*  
11 *Ass’n of N.J. Rifle & Pistol Clubs v. A.G. N.J.*, 910 F.3d 106, 127 (3rd Cir. 2018) (Bibas,  
12 J., dissenting) (“Not every gun law impairs self-defense. Our precedent applies  
13 intermediate scrutiny to laws that do not affect weapons’ function, like serial-number  
14 requirements. But for laws that do impair self-defense, strict scrutiny is apt.”).

## 15 **2. Commonality**

16 Magazines holding more than 10 rounds are used for self-defense by law-abiding  
17 citizens. And they are common.<sup>28</sup> Lawful in at least 41 states and under federal law,  
18 these magazines number in the millions. Plaintiff’s Exh. 1 (James Curcuruto Report), at  
19 3 (“There are at least *one hundred million* magazines of a capacity of more than ten  
20 rounds in possession of American citizens, commonly used for various lawful purposes  
21

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22  
23 <sup>26</sup> *Teixeira*, 873 F.3d at 670.

24 <sup>27</sup> *United States v. Marzzarella*, 614 F.3d 85, 101 (3d Cir. 2010), *cert. denied*, 131 S. Ct.  
25 958 (2011) (“[W]e hesitate to say Marzzarella’s possession of an unmarked firearm  
26 [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.”).

27 <sup>28</sup> Some magazine sizes are, no doubt, more common than others. While neither party  
28 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.

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.<sup>29</sup> 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

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<sup>29</sup> 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.



1 than 10 rounds is invalid.<sup>30</sup> “A weapon may not be banned unless it is *both* dangerous  
2 *and* unusual.” *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1031 (2016) (Alito, J., and  
3 Thomas, J., concurring) (emphasis in original).

4 To the extent that magazines holding more than 10 rounds may be less common  
5 within California, it would likely be the result of the State long criminalizing the buying,  
6 selling, importing, and manufacturing of these magazines. Saying that large capacity  
7 magazines are uncommon because they have been banned for so long is something of a  
8 tautology. It cannot be used as constitutional support for further banning. *See Friedman*  
9 *v. City of Highland Park, Illinois*, 784 F.3d 406, 409 (7th Cir. 2015) (“Yet it would be  
10 absurd to say that the reason why a particular weapon can be banned is that there is a  
11 statute banning it, so that it isn’t commonly used. A law’s existence can’t be the source  
12 of its own constitutional validity.”).

13 Since the 1980s, one of the most popular handguns in America has been the Glock  
14 17 pistol, which is designed for, and typically sold with, a 17-round magazine. One of  
15 the most popular youth rifles in America over the last 60 years has been the Ruger 10/22.  
16 Six million have been sold since it was introduced in 1964. It is designed to use  
17 magazines manufactured by Ruger in a variety of sizes: 10-round, 15-round, and 25-  
18 round. Over the last three decades, one of the most popular civilian rifles in America is  
19 the much maligned AR-15 style rifle. Manufactured with various characteristics by  
20 numerous companies, it is estimated that more than five million have been bought since  
21 the 1980s. These rifles are typically sold with 30-round magazines. These commonly-

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24 <sup>30</sup> “There are many reasons that a citizen may prefer a handgun for home defense: It is  
25 easier to store in a location that is readily accessible in an emergency; it cannot easily be  
26 redirected or wrestled away by an attacker; it is easier to use for those without the upper-  
27 body strength to lift and aim a long gun; it can be pointed at a burglar with one hand  
28 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.” *Heller*, 554 U.S. at 629.

1 owned guns with commonly-sized magazines are protected by the Second Amendment  
2 and *Heller*'s simple test for responsible, law-abiding citizens to use for target practice,  
3 hunting, and defense.

### 4 ***3. Lethality is Not the Test***

5 Some say that the use of "large capacity magazines" increases the lethality of gun  
6 violence. They point out that when large capacity magazines are used in mass shootings,  
7 more shots are fired, more people are wounded, and more wounds are fatal than in other  
8 mass shootings.<sup>31</sup> That may or may not be true. Certainly, a gun when abused is lethal.  
9 A gun holding more than 10 rounds is lethal to more people than a gun holding less than  
10 10 rounds, but it is not constitutionally decisive. Nothing in the Second Amendment  
11 makes lethality a factor to consider because a gun's lethality, or dangerousness, is  
12 assumed. The Second Amendment does not exist to protect the right to bear down  
13 pillows and foam baseball bats. It protects guns and every gun is dangerous. "If *Heller*  
14 tells us anything, it is that firearms cannot be categorically prohibited just because they  
15 are dangerous." *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1031 (2016) (Alito, J. and  
16 Thomas, J., concurring); *Maloney v. Singas*, 2018 U.S. Dist. LEXIS 211546 \*19  
17 (E.D.N.Y. Dec. 14, 2018) (striking down 1974 ban on possession of dangerous nunchaku  
18 in violation of the Second Amendment and quoting *Caetano*). "[T]he relative  
19 dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms  
20 commonly used for lawful purposes." *Id.*

21 California law presently permits the lethality of a gun with a 10-round magazine.  
22 In other words, a gun with an 11-round magazine or a 15-round magazine is apparently  
23 too lethal to be possessed by a law-abiding citizen. A gun with a 10-round magazine is  
24 not. Missing is a constitutionally-permissible standard for testing acceptable lethality.  
25 The Attorney General offers no objective standard. *Heller* sets out a commonality  
26

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28 <sup>31</sup> See generally, DX-3 Revised Expert Report of Dr. Louis Klarevas.

1 standard that can be applied to magazine hardware: is the size of the magazine  
2 “common”? If so, the size is constitutionally-protected.

3 If the “too lethal” standard is followed to its logical conclusion, the government  
4 may dictate in the future that a magazine of eight rounds is too lethal. And after that, it  
5 may dictate that a gun with a magazine holding three rounds is too lethal since a person  
6 usually fires only 2.2 rounds in self-defense. This stepped-down approach may  
7 continue<sup>32</sup> until the time comes when government declares that only guns holding a single  
8 round are sufficiently lacking in lethality that they are both “safe” to possess *and*  
9 powerful enough to provide a means of self-defense.<sup>33</sup>

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11  
12 <sup>32</sup> Constitutional rights would become meaningless if states could obliterate them by  
13 enacting incrementally more burdensome restrictions while arguing that a reviewing  
14 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).

15 <sup>33</sup> Artificial limits will eventually lead to disarmament. It is an insidious plan to disarm  
16 the populace and it depends on for its success a subjective standard of “necessary”  
17 lethality. It does not take the imagination of Jules Verne to predict that if all magazines  
18 over 10 rounds are somehow eliminated from California, the next mass shooting will be  
19 accomplished with guns holding only 10 rounds. To reduce gun violence, the state will  
20 close the newly christened 10-round “loophole” and use it as a justification to outlaw  
21 magazines holding more than 7 rounds. The legislature will determine that no more than  
22 7 rounds are “necessary.” Then the next mass shooting will be accomplished with guns  
23 holding 7 rounds. To reduce the new gun violence, the state will close the 7-round  
24 “loophole” and outlaw magazines holding more than 5 rounds determining that no more  
25 than 5 rounds is “necessary.” And so it goes, until the only lawful firearm law-abiding  
26 responsible citizens will be permitted to possess is a single-shot handgun. Or perhaps,  
27 one gun, but no ammunition. Or ammunition issued only to persons deemed trustworthy.

28 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)

1 As a matter of public policy, people can debate who makes the decision about how  
 2 much lethality a citizen can possess. As policy, the State says a law-abiding, responsible  
 3 person needs only 10 rounds. If you judge for yourself that you will need more than 10  
 4 rounds, however, the crime is yours. And, too bad if you complied with the law but  
 5 needed 11 rounds to stop an attacker, or a group of attackers, or a mob. Now, you are  
 6 dead. By living a law-abiding, responsible life, you have just become another “gun  
 7 violence” statistic. And your statistic may be used to justify further restrictions on gun  
 8 lethality for future law-abiding citizens.

#### 9 ***4. Conclusion Under Heller Test***

10 In *Heller*, the Supreme Court held that the Second Amendment protects an  
 11 individual right to possess a “lawful firearm in the home operable for the purpose of  
 12 immediate self-defense.” *Pena v. Lindley*, 898 F.3d 969, 975 (9th Cir. 2018), *pet’n for*  
 13 *cert. filed* (1/3/19) (quoting *Heller*, 554 U.S. at 635). “The Court also wrote that the  
 14 amendment ‘surely elevates above all other interests the right of *law-abiding, responsible*  
 15  
 16  
 17

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18 definition of large capacity magazine from 15 to 5 rounds.) Less than a decade ago,  
 19 sliding down the slope ahead of its neighbor, New York prohibited magazines able to  
 20 hold more than 10 rounds *and* prohibited citizens from filling those magazines with more  
 21 than 7 rounds (*i.e.*, a seven round load limit). “New York determined that only  
 22 magazines containing seven rounds or fewer can be safely possessed.” *New York State*  
*Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 264 (2nd Cir. 2015) (declaring  
 23 unconstitutional New York seven round load limit).

24 Other than the commonality test, there should be no restriction on how many  
 25 rounds in a magazine a citizen may use for self-defense or to bring for use in a militia.  
 26 Otherwise, what the Founders sought to avoid will be accomplished in our lifetime. “The  
 27 problem the Founders sought to avoid was a disarmed populace. At the margins, the  
 28 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).

1 *citizens* to use arms in defense of hearth and home.” *United States v. Torres*, 911 F.3d  
2 1253, 1259 (9th Cir. 2019) (quoting *Heller*, 554 U.S. at 635).

3 California’s law prohibiting acquisition and possession of magazines able to hold  
4 any more than 10 rounds places a severe restriction on the core right of self-defense of  
5 the home such that it amounts to a destruction of the right and is unconstitutional under  
6 any level of scrutiny. *Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 961 (9th Cir. 2014),  
7 *cert. denied*, 135 S. Ct. 2799 (2015) (“A law that imposes such a severe restriction on the  
8 core right of self-defense that it ‘amounts to a destruction of the Second Amendment  
9 right,’ is unconstitutional under any level of scrutiny.”) (citing *Heller*, 554 U.S. at 629);  
10 *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 945 (2018)  
11 (“A law that imposes such a severe restriction on the fundamental right of self defense of  
12 the home that it amounts to a destruction of the Second Amendment right is  
13 unconstitutional under any level of scrutiny.”) (citation omitted). The criminalization of  
14 a citizen’s acquisition and possession of magazines able to hold more than 10 rounds hits  
15 directly at the core of the right of self-defense in the home. It is a complete ban on  
16 acquisition. It is a complete ban on possession. It is a ban applicable to all ordinary law-  
17 abiding responsible citizens. It is a ban on possession that applies inside a home and  
18 outside a home.<sup>34</sup>

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21 <sup>34</sup> “Possession” is a broad concept in California criminal law. Possession may be actual  
22 or constructive. “[Possession] does not require that a person be armed or that the weapon  
23 [ ] be within a person’s immediate vicinity.” *In re Charles G.*, 14 Cal. App. 5th 945, 951  
24 (Ct. App. 2017), *as modified* (Aug. 31, 2017) (citations omitted). “Rather, it  
25 encompasses having a weapon in one’s bedroom or home or another location under his or  
26 her control, even when the individual is not present at the location.” *Id.*; *People v.*  
27 *Douglas*, No. B281579, 2019 WL 621284, at \*4 (Cal. Ct. App. Feb. 13, 2019) (male  
28 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

1 California's ban goes farther than did the District of Columbia's ordinance in  
2 *Heller*. With respect to long guns, in the *Heller* case, while a citizen was required to keep  
3 his or her self-defense firearm inoperable, he or she could still possess the rifle – yet it  
4 failed the simple *Heller* test. *Jackson v. City & Cty. of San Francisco*, 135 S. Ct. 2799  
5 (2015) (Thomas, J., dissenting from denial of certiorari) (“Less than a decade ago, we  
6 explained that an ordinance requiring firearms in the home to be kept inoperable, without  
7 an exception for self-defense, conflicted with the Second Amendment because it “made it  
8 impossible for citizens to use their firearms for the core lawful purpose of self-defense.”)  
9 (citing *Heller*). A government regulation that allowed a person to acquire an arm and  
10 allowed a person to possess the arm still failed the *Heller* test. California's law, which  
11 neither allows acquisition, nor possession, nor operation, in the home for self-defense  
12 must also fail the *Heller* test.

13 The California ban leaves no room for an ordinary citizen to acquire, keep, or bear  
14 a larger capacity magazine for self-defense. There are no permitted alternative means to  
15 possess a firearm holding more than 10 rounds for self-defense, regardless of the threat.  
16 Compare, e.g., *Wilson v. Lynch*, 835 F.3d 1083, 1093 (9th Cir. 2016) (18 U.S.C.  
17 § 922(d)(3) prohibition on selling firearm to marijuana card holder was not severe burden  
18 on core Second Amendment rights because the bar applied to “only the sale of firearms to  
19 Wilson — not her *possession* of firearms”) (emphasis added); *United States v. Chovan*,  
20 735 F.3d 1127, 1138 (9th Cir. 2013) (describing *Heller II*'s reasoning that the District of  
21 Columbia's gun registration requirements were not a severe burden because they do not  
22 prevent an individual from *possessing* a firearm in his home or elsewhere). Simply put,

23  
24  
25 possession or control. He has constructive possession when the weapon, while not in his  
26 actual possession, is nonetheless under his dominion and control, either directly or  
27 through others.”). The concept of constructive possession of a firearm can also be found  
28 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).



§ 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



1 law falls outside the historical scope of the Second Amendment, we ask whether the  
2 regulation is one of the ‘presumptively lawful regulatory measures’ identified in *Heller*, or  
3 whether the record includes persuasive historical evidence establishing that the regulation  
4 at issue imposes prohibitions that fall outside the historical scope of the Second  
5 Amendment.” *Id.* (citations omitted).

6 History shows, however, restrictions on the possession of firearm magazines of any  
7 size have no historical pedigree. To begin with the regulation at issue, Cal. Penal Code  
8 § 32310, applies to detachable magazines. The detachable magazine was invented in the  
9 late 19th Century. “In 1879, Remington introduced the first ‘modern’ detachable rifle  
10 magazine. In the 1890s, semiautomatic pistols with detachable magazines followed.  
11 During WWI, detachable magazines with capacities of 25 to 32-rounds were introduced.”  
12 Plaintiff’s Exh. 2 (Stephen Helsley Report), at 4.

13 The oldest statute limiting the permissible size of a detachable firearm magazine, on  
14 the other hand, is quite young. In 1990, New Jersey introduced the first ban on detachable  
15 magazines, banning magazines holding more than 15 rounds. N.J.S. 2C:39 (1990). Eight  
16 other states eventually followed. The federal government first regulated detachable  
17 magazines in 1994. The federal statute addressed magazines holding more than 10 rounds  
18 but lapsed in 2004 and has not been replaced.

19 To sum up, then, while detachable firearm magazines have been common for a  
20 century, government regulation of the size of a magazine is a recent phenomenon and still  
21 unregulated in four-fifths of the states. The record is empty of the persuasive historical  
22 evidence needed to place a magazine ban outside the ambit of the Second Amendment.  
23 Thus, it can be seen that California’s prohibition on detachable ammunition magazines  
24 larger than 10 rounds is a type of prohibition that has not been historically accommodated  
25 by the Second Amendment.

26 Faced with a dearth of magazine capacity restrictions older than 1990, the Attorney  
27 General pivots and tries a different route. He argues that the historical prohibition question  
28 is not one of detachable magazine size, but instead is a question of firearm “firing-

1 capacity.” With this change of terms and shift of direction, the Attorney General contends  
2 that firearm firing-capacity restrictions have been subject to longstanding regulation dating  
3 back to the 1920s. Yet, even his new focus falters under a close look at the historical  
4 record.

5 First, firearms with a firing-capacity of more than 10 rounds existed long before the  
6 1920s. Plaintiff’s Exh. 2 (Stephen Helsley Report), at 4 (“Firearms with a capacity  
7 exceeding 10-rounds date to the ‘dawn of firearms.’ In the late-15th Century, Leonardo Da  
8 Vinci designed a 33-shot weapon. In the late 17th Century, Michele Lorenzoni designed a  
9 practical repeating flintlock rifle . . . . Perhaps the most famous rifle in American history  
10 is the one used by Lewis and Clark on their ‘Corps of Discovery’ expedition between 1803  
11 and 1806—the magazine for which held twenty-two .46 caliber balls. Rifles with fixed  
12 magazines holding 15-rounds were widely used in the American Civil War. During that  
13 same period, revolvers with a capacity of 20-rounds were available but enjoyed limited  
14 popularity because they were so ungainly.”). Yet, despite the existence of arms with large  
15 firing-capacity during the time of the adoption of the Second Amendment, more than a  
16 century passed before a firing-capacity law was passed.

17 It is interesting to note that during the Nation’s founding era, states enacted  
18 regulations for the formation and maintenance of citizen militias. Three such statutes are  
19 described in *United States v. Miller*, 307 U.S. 174 (1939). Rather than restricting firing  
20 capacity, they required firing capacity. These statutes required citizens to equip themselves  
21 with arms and a minimum quantity of ammunition for those arms. None placed an upper  
22 limit of 10-rounds, as § 32310 does. Far from it. Each imposed a floor of at least 20-  
23 rounds. *Id.* at 180-83 (Massachusetts law of 1649 required carrying “twenty bullets,” while  
24 New York 1786 law required “a Box therein to contain no less than Twenty-four  
25 Cartridges,” and Virginia law of 1785 required a cartridge box and “four pounds of lead,  
26 including twenty blind cartridges”). In 1776, Paul Revere’s Minutemen (a special group  
27 of the Massachusetts militia) were required to have ready 30 bullets and gunpowder. These  
28 early American citizen militia laws suggest that, contrary to the idea of a firing-capacity

1 upper limit on the number of rounds a citizen was permitted to keep with one's arms, there  
2 was an obligation that citizens would have at least 20 rounds available for immediate use.  
3 Simply put, there were no upper limits; there were floors and the floors were well above  
4 10 rounds.

5 The Attorney General makes no mention of the founding-era militia firing-capacity  
6 minimum requirements. Instead he focuses on a handful of Thompson machine gun-era  
7 statutes. In 1927, Michigan passed a restriction on firearms with a firing-capacity over 16  
8 rounds. Rhode Island restricted arms with a firing-capacity over 12 rounds. Ohio began  
9 licensing firearms with a firing-capacity over 18 rounds in 1933. All were repealed. The  
10 District of Columbia first restricted firearms with a firing-capacity of 12 or more rounds in  
11 1932. None of these laws set the limit as low as ten.

12 The Attorney General names five additional states that enacted firing-capacity  
13 restrictions in the 1930s with capacity limits less than 10 rounds. But he is not entirely  
14 accurate. His first example is not an example, at all. For his first example, he says that,  
15 "[i]n 1933, South Dakota banned any 'weapon from which more than *five shots* or bullets  
16 may be rapidly or automatically, or semi-automatically discharged from a magazine [by a  
17 single function of the firing device].'" Def's Oppo. (4/9/18) at 4 (emphasis in original).  
18 Actually, this was not a ban. This was South Dakota's definition of a machine gun. S.D.  
19 Ch. 206 (S.B. 165) *Enacting Uniform Machine Gun Act*, § 1 (1933), Exh. A to Def.'s  
20 Request for Judicial Notice (filed 4/9/18) ("Machine Gun' applies to and includes a  
21 weapon of any description by whatever name known, loaded or unloaded, from which more  
22 than five shots or bullets may be rapidly, or automatically, or semi-automatically  
23 discharged from a magazine, by a single function of the firing device."). In fact, the statute  
24 did not ban machine guns. The statute did not criminalize mere possession (except by a  
25 felon or by an unnaturalized foreign-born person). Unlike Cal. Penal Code § 32310, the  
26 South Dakota statute criminalized possession or use of a machine gun only "for offensive  
27 or aggressive purpose," (Ch. 206 § 3), and added a harsh penalty for use during a crime of  
28 violence. Ch. 206 § 2. Specifically excepted from the regulation was possession of a

1 machine gun for defensive purposes. Ch. 206 § 6(3) (“Nothing contained in this act shall  
 2 prohibit or interfere with the possession of a machine gun . . . for a purpose manifestly not  
 3 aggressive or offensive.”). The 1933 South Dakota statute protected a law-abiding  
 4 citizen’s right to possess a machine gun with a firing-capacity over five rounds for self-  
 5 defense and defense of home and family and any other purpose not manifestly aggressive  
 6 or offensive. California’s § 32310, in contrast, criminalizes for all reasons possession of a  
 7 magazine holding more than 10 rounds. So much for the first example.

8 The Attorney General’s second example of a longstanding firing-capacity  
 9 prohibition is a Virginia ban enacted in 1934. However, like the first South Dakota  
 10 example, the second example is not an example, at all. The Attorney General describes the  
 11 law as a ban on firearms that discharge seven rounds rapidly. It is not ban. It also defines  
 12 “machine gun.”<sup>35</sup> It criminalizes the offensive/aggressive possession of a machine gun<sup>36</sup>  
 13 and it imposes a death penalty for possessing/using a machine gun in the perpetration of a  
 14 crime of violence.<sup>37</sup> However, most importantly, like the 1933 South Dakota statute, the  
 15 1934 Virginia statute protected a law-abiding citizen’s right to possess a machine gun for  
 16 self-defense and defense of home and family and any other purpose not manifestly  
 17  
 18  
 19

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20 <sup>35</sup> “‘Machine gun’ applies to and includes a weapon . . . from which more than seven  
 21 shots or bullets may be rapidly, or automatically, or semi-automatically discharged from  
 22 a magazine, by a single function of the firing device, and also applies to and includes  
 23 weapons . . . from which more than sixteen shots or bullets may be rapidly, automatically,  
 24 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).

25 <sup>36</sup> “Unlawful possession or use of a machine gun for offensive or aggressive purpose is  
 26 hereby declared to be a crime. . . .” Virginia Ch. 96, § 3 (1934), Ex. B to Def.’s Request  
 for Judicial Notice (filed 4/9/18).

27 <sup>37</sup> “Possession or use of a machine gun in the perpetration or attempted perpetration of a  
 28 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).

1 aggressive or offensive.<sup>38</sup> As discussed above, California’s § 32310, in criminalizing  
 2 possession of magazines holding more than 10 rounds, makes no distinction between use  
 3 for an offensive purpose and use for a defensive purpose. So much for the second example.

4 The Attorney General’s final three examples are state machine gun bans. The first  
 5 cited is an Illinois enactment (in 1931) described as, “An Act to Regulate the Sale,  
 6 Possession and Transportation of Machine Guns.” Ex. C to Def.’s Request for Judicial  
 7 Notice (filed 4/9/18). Louisiana enacted (in 1932) Act No. 80, the second cited, which  
 8 likewise was passed “to regulate the sale, possession and transportation of machine guns.”  
 9 Ex. D to Def.’s Request for Judicial Notice (filed 4/9/18). The third cited example is like  
 10 the first two. It is an Act passed by the South Carolina legislature in 1934 titled, An Act  
 11 Regulating the Use and Possession of Machine Guns. Ex. E to Def.’s Request for Judicial  
 12 Notice (filed 4/9/18). These three statutes are examples of machine gun bans that are  
 13 prohibited because of their ability to continuously fire rounds with a single trigger pull,  
 14 rather than their overall firing-capacity.

15 Machine guns<sup>39</sup> have been subject to federal regulation since the enactment of the  
 16 National Firearms Act of 1934. *See Sonzinsky v. United States*, 300 U.S. 506, 511-12

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18  
 19  
 20 <sup>38</sup> “Nothing contained in this act shall prohibit or interfere with . . . The possession of a  
 21 machine gun . . . for a purpose manifestly not aggressive or offensive.” Virginia Ch. 96,  
 22 §6(Third) (1934), Ex. B to Def.’s Request for Judicial Notice (filed 4/9/18).

23 <sup>39</sup> The Supreme Court knows the difference between the fully automatic military machine  
 24 gun M-16 rifle, and the civilian semi-automatic AR-15 rifle. *See Staples v. United States*,  
 25 511 U.S. 600, 603 (1994) (“The AR-15 is the civilian version of the military’s M-16 rifle,  
 26 and is, unless modified, a semiautomatic weapon. The M-16, in contrast, is a selective  
 27 fire rifle that allows the operator, by rotating a selector switch, to choose semiautomatic  
 28 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

1 (1937) (“The term ‘firearm’ is defined by § 1 [of the National Firearms Act] as meaning a  
2 shotgun or a rifle having a barrel less than eighteen inches in length, or any other weapon,  
3 except a pistol or revolver, from which a shot is discharged by an explosive, if capable of  
4 being concealed on the person, *or a machine gun. . . .*”) (emphasis added). Since machine  
5 guns are not typically possessed by law-abiding citizens for lawful purposes, they are not  
6 protected by the Second Amendment. *Heller*, 554 U.S. at 625; *Friedman v. City of*  
7 *Highland Park*, 784 F.3d 406, 408 (7th Cir. 2015) (*Heller* observed, “state militias, when  
8 called to service, often had asked members to come armed with the sort of weapons that  
9 were ‘in common use at the time’ and it thought these kinds of weapons (which have  
10 changed over the years) are protected by the Second Amendment in private hands, while  
11 military-grade weapons (the sort that would be in a militia’s armory), such as machine  
12 guns, and weapons especially attractive to criminals, such as short-barreled shotguns, are  
13 not.”). Because machine guns, like grenades and shoulder-fired rocket launchers, are not  
14 commonly possessed by law-abiding citizens for lawful purposes, they are specific arms  
15 that fall outside the safe harbor of the Second Amendment. Consequently, these machine  
16 gun statutes cited by the Attorney General do not stand as proof of long-standing  
17 prohibitions on the firing-capacity of Second Amendment-protected commonly possessed  
18 firearms.

19 To reiterate, the earliest regulation of a detachable ammunition magazine limit  
20 occurred in New Jersey in 1990 and limited the number of rounds to a maximum of 15.  
21 The earliest federal restriction on a detachable magazine was enacted in 1994, limited the  
22 maximum number of rounds to 10, and expired after ten years. As to the Attorney  
23 General’s alternate argument about “firing-capacity,” the earliest firing-capacity regulation  
24 appeared in the 1920s and 1930s in three states (Michigan, Rhode Island, and Ohio) and  
25 affected firearms able to fire more than 18, 16, or 12 rounds, depending on the state. No  
26

27  
28 qualities and characteristics — that make the M16 a devastating and lethal weapon of  
war.”).



1 regulation on “firing-capacity” set a limit as low as California’s 10-round limit. Each was  
2 repealed and thus not longstanding. Two more states (North Dakota and Virginia) defined  
3 a machine gun. Interestingly, while penalizing machine gun use when purposed for  
4 aggressive or offensive use, both states also protected citizen machine gun possession for  
5 defensive use or any other use that was not manifestly aggressive or offensive. Three other  
6 states (Illinois, Louisiana, and South Carolina) simply defined and banned machine guns  
7 altogether. The District of Columbia appears to be the single jurisdiction where a firing-  
8 capacity restriction has been in place since the 1930s. Even there, the limit was not as low  
9 as California’s limit of 10 rounds.

10 On this record, there is no longstanding historically-accepted prohibition on  
11 detachable magazines of any capacity. *Ass’n of N.J. Rifle & Pistol Clubs v. A.G. N.J.*, 910  
12 F.3d 106, n.18 (3rd Cir. 2018) (“LCMs were not regulated until the 1920s, but most of  
13 those laws were invalidated by the 1970s. The federal LCM ban was enacted in 1994, but  
14 it expired in 2004. While a lack of longstanding history does not mean that the regulation  
15 is unlawful, the lack of such a history deprives us of reliance on *Heller*’s presumption that  
16 such regulation is lawful.”) (citations omitted); *Heller v. D.C.*, 670 F.3d 1244, 1260 (D.C.  
17 Cir. 2011) (“We are not aware of evidence that prohibitions on either semi-automatic rifles  
18 or large-capacity magazines are longstanding and thereby deserving of a presumption of  
19 validity.”).

20 Moreover, there is no longstanding historically-accepted prohibition on firearms  
21 according to their “firing-capacity” except in the case of automatic fire machine guns. On  
22 the other hand, there is an indication that founding-era state regulations, rather than  
23 restricting ammunition possession, mandated citizens of militia age to equip themselves  
24 with ready ammunition in amounts of at least 20 rounds.

## 25 **C. The Heightened Scrutiny Test**

### 26 ***1. Failing the Simple Heller Test***

27 Section 32310 runs afoul of the Second Amendment under the simple *Heller* test.  
28 It fails the *Heller* test because it criminalizes a law-abiding citizen’s possession of a



1 common magazine that is used for lawful purposes and prohibits its use for self-defense  
2 in and around the home. It strikes at the core of the inalienable Constitutional right and  
3 disenfranchises approximately 39 million state residents.

4 This conclusion should not be considered groundbreaking. It is simply a  
5 straightforward application of constitutional law to an experimental governmental  
6 overreach that goes far beyond traditional boundaries of reasonable gun regulation. That  
7 § 32310 was not challenged earlier is due in part to the Ninth Circuit’s pre-*Heller*  
8 understanding that an individual lacked Second Amendment rights and thus lacked  
9 Article III standing to challenge gun regulations. *See Silveira v. Lockyer*, 312 F.3d 1052,  
10 1066–67 (9th Cir. 2002), *as amended* (Jan. 27, 2003) (“Because we hold that the Second  
11 Amendment does not provide an individual right to own or possess guns or other  
12 firearms, plaintiffs lack standing to challenge the [California Assault Weapons Control  
13 Act].”). That was the state of the law when California passed its first iteration of  
14 § 32310<sup>40</sup> with a grandfather clause now called a “loophole” permitting citizens to keep  
15 and possess magazines able to hold more than 10 rounds.<sup>41</sup> The lack of an earlier  
16 constitutional challenge was also due to the recency of the Supreme Court’s decision that  
17 the Second Amendment applies to the states. *See McDonald v. City of Chicago*, 561 U.S.  
18 742, 784-85 (2010) (“Under our precedents, if a Bill of Rights guarantee is fundamental  
19 from an American perspective . . . that guarantee is fully binding on the States . . .”). In  
20 other words, when California began experimenting with its larger-capacity magazine ban  
21 less than twenty years ago, it appeared that the Second Amendment conferred no rights  
22 on individual citizens and did not apply to the states, and that an individual lacked Article  
23 III standing in federal court to challenge the ban. During that time, California passed  
24 more and more gun regulations, constricting individual rights further and further, to the  
25 point where state undercover agents surveil California residents attending out-of-state  
26

27 <sup>40</sup> Former § 12020 was re-codified at § 32310, effective Jan. 1, 2012.

28 <sup>41</sup> The grandfather clause is now described by the State as a loophole.

1 gun shows, obtain search warrants for their homes, and prosecute those returning with a  
2 few thirty-round magazines. *See e.g., People v. Verches*, 2017 WL 1880968 (Cal. Ct.  
3 App. May 9, 2017) (California resident convicted of marijuana possession and importing  
4 three large-capacity magazines purchased at a Reno, Nevada gun show and placed on  
5 three years formal felony probation).

6 The magazine ban arbitrarily selects 10 rounds as the magazine capacity over  
7 which possession is unlawful. The magazine ban admits no exceptions, beyond those for  
8 law enforcement officers, armored truck guards, and movie stars. The ban does not  
9 distinguish between citizens living in densely populated areas and sparsely populated  
10 areas of the state. The ban does not distinguish between citizens who have already  
11 experienced home invasion robberies, are currently threatened by neighborhood burglary  
12 activity, and those who have never been threatened. The ban does not distinguish  
13 between the senior citizen, the single parent, and the troubled and angry high school  
14 drop-out. Most importantly, the ban does not distinguish between possession in and  
15 around one's home, and possession in or around outdoor concerts, baseball fields, or  
16 school yards. The ban on magazines that hold more than 10 rounds amounts to a  
17 prohibition on an entire class of "arms" that is overwhelmingly chosen by American  
18 citizens for the lawful purpose of self-defense. The prohibition extends to one's home  
19 where the need to defend self, family, and property is most acute. And like the ban struck  
20 down in *Heller*, the California ban threatens citizens, not with a minor fine, but a  
21 substantial criminal penalty. *Heller*, 554 U.S. at 634 ("The District law, by contrast, far  
22 from imposing a minor fine, threatens citizens with a year in prison (five years for a  
23 second violation) for even obtaining a gun in the first place. See D. C. Code § 7-  
24 2507.06."). "If a law burdens conduct protected by the Second Amendment . . . *Heller*  
25 mandates some level of heightened scrutiny." *Bauer v. Becerra*, 858 F.3d 1216, 1221  
26 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 982 (2018). Under any level of heightened  
27 scrutiny, the ban fails constitutional muster.

1           **2. The Tripartite Binary Test with a Sliding Scale and a Reasonable Fit**

2           Beyond the simple *Heller* test, for a Second Amendment question, the Ninth  
3 Circuit uses what might be called a tripartite binary test with a sliding scale and a  
4 reasonable fit. In other words, there are three different two-part tests, after which the  
5 sliding scale of scrutiny is selected. Most courts select intermediate scrutiny in the end.  
6 Intermediate scrutiny, in turn, looks for a “reasonable fit.” It is an overly complex  
7 analysis that people of ordinary intelligence cannot be expected to understand. It is the  
8 wrong standard. But the statute fails anyhow.

9           **a. burden & scrutiny**

10           First, a court must evaluate the burden and then apply the correct scrutiny. *United*  
11 *States v. Torres*, 911 F.3d 1253, 1258 (9th Cir. 2019); *Jackson*, 746 F.3d at 960 (citing  
12 *United States v. Chovan*, 735 F.3d 1127, 1136-37 (9th Cir. 2013)). “This two-step  
13 inquiry: ‘(1) asks whether the challenged law burdens conduct protected by the Second  
14 Amendment; and (2) if so, directs courts to apply an appropriate level of scrutiny.’”  
15 *Bauer v. Becerra*, 858 F.3d 1216, 1221 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 982  
16 (2018) (quoting *Jackson*, 746 F.3d at 960). As discussed, § 32310 burdens conduct  
17 protected by the Second Amendment.

18           **b. presumptively lawful or historical regulation**

19           In determining whether a given regulation falls within the scope of the Second  
20 Amendment under the first step of this inquiry, another two-step test is used. “[W]e ask  
21 whether the regulation is one of the ‘presumptively lawful regulatory measures’  
22 identified in *Heller*, or whether the record includes persuasive historical evidence  
23 establishing that the regulation at issue imposes prohibitions that fall outside the  
24 historical scope of the Second Amendment.” *Id.* (citations omitted). If the regulation is  
25 presumptively lawful, the inquiry ends. Likewise, if the regulation is a historically  
26 approved prohibition not offensive to the Second Amendment, the inquiry ends.

27           Section 32310 fails both parts of the test. A complete ban on ammunition  
28 magazines of any size is not one of the presumptively lawful regulatory measures

1 identified in *Heller*. As discussed, neither is there any evidence that magazine capacity  
2 restrictions have a historical pedigree.

3 **c. closeness to the core and severity of the burden**

4 If the constitutional inquiry may continue, then the correct level of scrutiny must  
5 be selected. For that selection a third two-step evaluation is required. The first step  
6 measures how close the statute hits at the core of the Second Amendment right. The  
7 second step measures how severe the statute burdens the Second Amendment right.  
8 “Because *Heller* did not specify a particular level of scrutiny for all Second Amendment  
9 challenges, courts determine the appropriate level by considering ‘(1) how close the  
10 challenged law comes to the core of the Second Amendment right, and (2) the severity of  
11 the law’s burden on that right.’” *Bauer v. Becerra*, 858 F.3d 1216, 1222 (9th Cir. 2017),  
12 *cert. denied*, 138 S. Ct. 982 (2018) (quoting *Silvester v. Harris*, 843 F.3d 816, 821 (9th  
13 Cir. 2016)). *Fyock v. City of Sunnydale*, 779 F.3d 991, 999 (9th Cir. 2015), recognized  
14 that a regulation restricting law-abiding citizens from possessing large-capacity  
15 magazines within their homes hits at the core of the Second Amendment. *Fyock* said,  
16 “[b]ecause Measure C restricts the ability of law abiding citizens to possess large  
17 capacity magazines within their homes for the purpose of self-defense, we agree with the  
18 district court that Measure C may implicate the core of the Second Amendment.” *Id.*;  
19 *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1278 (N.D. Cal. 2014), *aff’d sub nom.*  
20 *Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015) (“[T]he court concludes that the  
21 Sunnyvale law burdens conduct near the core of the Second Amendment right.”). “No  
22 one doubts that under *Heller I* this core protection covers the right of a law-abiding  
23 citizen to keep in the home common firearms for self-defense.” *Wrenn v. D.C.*, 864 F.3d  
24 650, 657 (D.C. Cir. 2017).<sup>42</sup>

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25  
26  
27  
28 <sup>42</sup> 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

1 *Heller* says the core of the Second Amendment is the right of law-abiding,  
 2 responsible citizens to use arms in defense of their home. 554 U.S. at 635. Guided by  
 3 this understanding, for selecting the appropriate level of judicial scrutiny, the Ninth  
 4 Circuit uses a sliding scale. “[O]ur test for the appropriate level of scrutiny amounts to ‘a  
 5 sliding scale.’” *Silvester*, 843 F.3d at 821. “A law that imposes such a severe restriction  
 6 on the fundamental right of self-defense of the home that it amounts to a destruction of  
 7 the Second Amendment right is unconstitutional under any level of scrutiny.” *Bauer v.*  
 8 *Becerra*, 858 F.3d 1216, 1222 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 982 (2018)  
 9 (quoting *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016)). This is the case here.

10 **d. the sliding scale of scrutiny – strict scrutiny**

11 Further down the scale, a law that implicates the core of the Second Amendment  
 12 right and severely burdens that right warrants *strict scrutiny*. *Pena v. Lindley*, 898 F.3d  
 13 969, 977 (9th Cir. 2018) (“We strictly scrutinize a ‘law that implicates the core of the  
 14 Second Amendment right and severely burdens that right.’”) (citation omitted). Even if  
 15 § 32310’s complete ban did not amount to a destruction of Second Amendment rights, it  
 16 would still merit the application of strict scrutiny. A law like § 32310 that prevents a  
 17 law-abiding citizen from obtaining a firearm with enough rounds to defend self, family,  
 18 and property in and around the home certainly implicates the core of the Second  
 19 Amendment. When a person has fired the permitted 10 rounds and the danger persists, a  
 20 statute limiting magazine size to only 10 rounds severely burdens that core right to self-  
 21 defense.

22 A complete ban on a 100-round or 50-round magazine may be a mild burden. An  
 23 annual limit on the number of larger capacity magazines that a citizen may purchase  
 24 might place a moderate burden. A serial number requirement for the future  
 25 manufacturing, importing, or selling of larger capacity magazines would not be a severe

26 \_\_\_\_\_  
 27  
 28 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).

1 burden. Requiring a background check for purchasers of larger-capacity magazines may  
2 or may not be a severe burden. *See e.g., Heller II*, 670 F.3d at 1258 (reasoning that the  
3 District of Columbia’s gun registration requirements were not a severe burden because  
4 they do not prevent an individual from possessing a firearm in his home).

5 But California’s ban is far-reaching, absolute, and permanent. The ban on  
6 acquisition and possession on magazines able to hold more than 10 rounds, together with  
7 the substantial criminal penalties threatening a law-abiding, responsible, citizen who  
8 desires such magazines to protect hearth and home, imposes a burden on the  
9 constitutional right that this Court judges as severe. *Cf. Peruta v. Cty. of San Diego*, 824  
10 F.3d 919, 950 (9th Cir. 2016) (en banc) (Callahan, J., dissenting) (courts should consider  
11 Second Amendment challenges to firearm restrictions in context to ensure the restrictions  
12 are not “tantamount to complete bans on the Second Amendment right to bear arms  
13 outside the home for self-defense”), *cert. denied*, 137 S. Ct. 1995 (2017).

14 Some have said that the burden is minor because there are other choices. *E.g.*,  
15 *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1278 (N.D. Cal. 2014), *aff’d sub nom.*  
16 *Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015) (“Individuals have countless other  
17 handgun and magazine options to exercise their Second Amendment rights . . .  
18 Accordingly, a prohibition on possession of magazines having a capacity to accept more  
19 than ten rounds applies only the most minor burden on the Second Amendment.”). But  
20 describing as minor, the burden on responsible, law-abiding citizens who may not possess  
21 a 15-round magazine for self-defense because there are other arms permitted with 10 or  
22 fewer rounds, is like saying that when government closes a Mormon church it is a minor  
23 burden because next door there is a Baptist church or a Hindu temple. Indeed, *Heller*  
24 itself rejected this mode of reasoning: “It is no answer to say, as petitioners do, that it is  
25 permissible to ban the possession of handguns so long as the possession of other firearms  
26 (*i.e.*, long guns) is allowed.” 554 U.S. at 629; *see also Parker v. District of Columbia*,  
27 478 F.3d 370, 400 (D.C. Cir. 2007) (“The District contends that since it only bans one  
28 type of firearm, ‘residents still have access to hundreds more,’ and thus its prohibition

1 does not implicate the Second Amendment because it does not threaten total  
2 disarmament. We think that argument frivolous. It could be similarly contended that all  
3 firearms may be banned so long as sabers were permitted.”), *aff’d sub nom. Heller*, 554  
4 U.S. at 570.

5 Others have acknowledged that the burden on a citizen may be severe but consider  
6 it a worthwhile tradeoff. *San Francisco Veteran Police Officers Ass’n v. City & Cty. of*  
7 *San Francisco*, 18 F. Supp. 3d 997, 1005 (N.D. Cal. 2014) (“Nonetheless, in those rare  
8 cases, to deprive the citizen of more than ten shots may lead to his or her own death. Let  
9 this point be conceded.”). In a peaceful society, a 10-round limit may not be severe.  
10 When thousands of people are rioting, as happened in Los Angeles in 1992, or more  
11 recently with Antifa members in Berkeley in 2017, a 10-round limit for self-defense is a  
12 severe burden. When a group of armed burglars break into a citizen’s home at night, and  
13 the homeowner in pajamas must choose between using their left hand to grab either a  
14 telephone, a flashlight, or an extra 10-round magazine, the burden is severe. When one is  
15 far from help in a sparsely populated part of the state, and law enforcement may not be  
16 able to respond in a timely manner, the burden of a 10-round limit is severe. When a  
17 major earthquake causes power outages, gas and water line ruptures, collapsed bridges  
18 and buildings, and chaos, the burden of a 10-round magazine limit is severe. When food  
19 distribution channels are disrupted and sustenance becomes scarce while criminals run  
20 rampant, the burden of a 10-round magazine limit is severe. Surely, the rights protected  
21 by the Second Amendment are not to be trimmed away as unnecessary because today’s  
22 litigation happens during the best of times. It may be the best of times in Sunnyvale; it  
23 may be the worst of times in Bombay Beach or Potrero. California’s ban covers the  
24 entire state at all times.

25 While *Chovan* instructs that the level of scrutiny depends on closeness to the core  
26 and “the severity of the law’s burden,” it offers no guide to evaluating the burden. *United*  
27 *States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013). In *Jackson*, the burden of a  
28 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.<sup>43</sup>

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

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<sup>43</sup> 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.

1 district court had abused its discretion. The district court made a preliminary judgment  
2 that the burden was not severe from Sunnyvale's large capacity magazine ban. The  
3 district court used its discretion and declined to issue a preliminary injunction. *Fyock*  
4 decided that the district court had not abused its discretion. Specifically, the *Fyock* court  
5 concluded, "For these reasons, there was no abuse of discretion in finding that the impact  
6 Measure C may have on the core Second Amendment right is not severe and that  
7 intermediate scrutiny is warranted." *Id.* *Fyock's* conclusion about the severity of  
8 Sunnyvale's large-capacity magazine ban was fact-bound. It did not announce as a  
9 matter of law that magazine capacity bans of any kind never impose a severe burden on  
10 Second Amendment rights. Nor could it. Even the least searching form of heightened  
11 scrutiny (*i.e.*, intermediate scrutiny) requires the government to establish a reasonable fit.

12 That the assessment of Sunnyvale's ban was fact-bound is illustrated by its  
13 immediately preceding sentence, where the *Fyock* court noted the Sunnyvale ban  
14 permitted possession of large-capacity magazines for use with some firearms. *Id.* ("To  
15 the extent that a lawfully possessed firearm could not function with a lower capacity  
16 magazine, Measure C contains an exception that would allow possession of a large-  
17 capacity magazine for use with that firearm.") (citing Sunnyvale, Cal. Muni. Code §  
18 9.44.050(c)(8)). It also imposed a minor penalty and did not make an exception for  
19 movie props or retired police officers. As this Court reads it, *Fyock* did not decide that  
20 all magazine bans merit only intermediate scrutiny.

21 Section 32310's wide ranging ban with its acquisition-possession-criminalization  
22 components exacts a severe price on a citizen's freedom to defend the home.  
23 Consequently, § 32310 merits strict judicial scrutiny. "A law that implicates the core of  
24 the Second Amendment right and severely burdens that right warrants strict scrutiny."  
25 *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016) (citing *Chovan*, 735 F.3d at 1138);  
26 *compare United States v. Torres*, 911 F.3d 1253, 1262 (9th Cir. 2019) (finding federal  
27 ban on firearm possession by an alien while in the United States is not a severe burden  
28 because alien may remove himself from the ban by acquiring lawful immigration status);

1 *and Mahoney v. Sessions*, 871 F.3d 873, 879 (9th Cir. 2017), *cert. denied sub nom.*  
2 *Mahoney v. City of Seattle, Wash.*, 138 S. Ct. 1441 (2018) (holding that a city policy  
3 regulating the use of department-issued firearms while police officers are *on duty* is not a  
4 severe Second Amendment burden).

5 Strict scrutiny requires the Government to prove that the restriction on a  
6 constitutional right furthers a compelling interest and is narrowly tailored to achieve that  
7 interest. *Mance v. Sessions*, 896 F.3d 699, 705-06 (5th Cir. 2018), *pet'n for cert. filed*  
8 (Nov. 19, 2018) (applying strict scrutiny in Second Amendment case). California's ban  
9 on magazines able to hold more than 10 rounds fails strict scrutiny. The State has not  
10 offered a compelling interest for the ban, arguing that intermediate scrutiny should be the  
11 test. If preventing mass shootings is the state's interest, it is not at all clear that it would  
12 be compelling since such events are exceedingly rare. If the state's interest is in forcing a  
13 "pause" during a mass shooting for a shooter to be apprehended, those events are even  
14 more rare.

15 More certain, however, is that the ban is not narrowly tailored or the least  
16 restrictive means of achieving these interests. Instead it is a categorical ban on  
17 acquisition and possession for all law-abiding, responsible, ordinary citizens. Categorical  
18 bans are the opposite of narrowly tailored bans. The § 32310 ban on possession applies  
19 to areas in the state where large groups gather and where no one gathers. It applies to  
20 young persons with long rap sheets and to old persons with no rap sheets. It applies to  
21 draft dodgers and to those who have served our country. It applies to those who would  
22 have 1000 large magazines for a conflagration and to those who would have one large  
23 magazine for self-defense. It applies to perpetrators as well as it applies to those who  
24 have been victims. It applies to magazines holding large, powerful rounds and to  
25 magazines holding small, more-impotent rounds. It applies to rifles with bump-stocks  
26 and pistols for purses.

27 Section 32310 is not narrowly tailored; it is not tailored at all. It fits like a burlap  
28 bag. It is a single-dimensional, prophylactic, blanket thrown across the population of the

1 state. As such, § 32310 fails strict scrutiny and violates the Second Amendment. *Cf.*  
 2 *Mance v. Sessions*, 896 F.3d 390, 405 (5th Cir. 2018) (Ho, J., dissenting from denial of  
 3 rehearing *en banc*) (“The ban on interstate handgun sales fails strict scrutiny. After all, a  
 4 categorical ban is precisely the opposite of a narrowly tailored regulation. It applies to all  
 5 citizens, not just dangerous persons. Instead of requiring citizens to comply with state  
 6 law, it forbids them from even trying. Nor has the Government demonstrated why it  
 7 needs a categorical ban to ensure compliance with state handgun laws. Put simply, the  
 8 way to require compliance with state handgun laws is to require compliance with state  
 9 handgun laws.”).

#### 10 **e. intermediate scrutiny**

11 Even under the lowest formulation of heightened scrutiny, intermediate scrutiny,  
 12 Section § 32310 fails because it is not a reasonable fit. *Cf. Morris v. U.S. Army Corps of*  
 13 *Engineers*, 990 F. Supp. 2d 1082, 1087 (D. Idaho 2014) (banning firearm with  
 14 ammunition in camping tents imposed *severe burden calling for strict scrutiny but*  
 15 *unconstitutional even under intermediate scrutiny*). Where a restriction “does not  
 16 ‘severely burden’ or even meaningfully impact the core of the Second Amendment right,  
 17 . . . intermediate scrutiny is . . . appropriate.” *Bauer v. Becerra*, 858 F.3d 1216, 1222 (9th  
 18 Cir. 2017), *cert. denied*, 138 S. Ct. 982, 200 L. Ed. 2d 249 (2018) (citing *Silvester v.*  
 19 *Harris*, 843 F.3d 816, 821 (9th Cir. 2016) and *United States v. Chovan*, 735 F.3d 1127,  
 20 1138 (9th Cir. 2013)) (applying intermediate scrutiny to California’s \$19 DROS fee).  
 21 The State argues as a foregone conclusion that intermediate scrutiny is the correct point  
 22 on the sliding scale for a regulation on magazines. According to the State, *Fyock’s*  
 23 approval of “intermediate scrutiny” is controlling, and other courts have applied  
 24 intermediate scrutiny to regulations on large capacity magazines. As discussed, *supra*,  
 25 *Fyock* held that the district court did not abuse its discretion in finding Sunnyvale’s  
 26 magazine capacity restriction did not have a severe impact. 779 F.3d at 999. That  
 27 approach was consistent with past cases analyzing the appropriate level of scrutiny under  
 28 the second step of *Heller*, as the Ninth Circuit has typically applied intermediate scrutiny

1 – especially for non-hardware Second Amendment cases. *See e.g., Silvester*, 843 F.3d at  
2 823 (applying intermediate scrutiny to ten-day waiting period for the purchase of  
3 firearms); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 968 (9th Cir. 2014)  
4 (applying intermediate scrutiny to mandatory handgun storage procedures in homes and  
5 banning the sale of hollow-point ammunition in San Francisco); *Chovan*, 735 F.3d at  
6 1138 (applying intermediate scrutiny to prohibition on domestic violence misdemeanants  
7 possessing firearms). But it is the wrong standard to apply here.

8 ***i. tailoring required: “a reasonable fit”***

9 To pass intermediate scrutiny, a statute must still be a reasonable fit. “Our  
10 intermediate scrutiny test under the Second Amendment requires that (1) the  
11 government’s stated objective . . . be significant, substantial, or important; and (2) there .  
12 . . be a ‘reasonable fit’ between the challenged regulation and the asserted objective.”  
13 *Silvester*, 843 F.3d at 821–22 (quoting *Chovan*, 735 F.3d at 1139).

14 For intermediate scrutiny “the burden of justification is demanding and it rests  
15 entirely on the State.” *Tyler v. Hillsdale County Sheriff’s Dept.*, 837 F. 3d 678, 694 (6th  
16 Cir. 2016) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996) (considering the  
17 constitutionality of 18 U.S.C. § 922(g)(4)’s permanent gun ban for person previously  
18 treated for mental illness).

19 ***ii. four important California interests***

20 In this case, the Attorney General identifies four State interests or objectives. Each  
21 is important. The State interests are: (1) protecting citizens from gun violence; (2)  
22 protecting law enforcement from gun violence; (3) protecting the public safety (which is  
23 like protecting citizens and law enforcement from gun violence); and (4) preventing  
24 crime. *See* Oppo. at 9; 17-18. The question then becomes, whether § 32310’s ban on  
25 acquisition and possession of firearm magazines holding more than 10 rounds is a  
26 reasonable fit for achieving these important goals. This Court finds on the evidentiary  
27 record before it that § 32310—the prohibition on magazines able to hold more than 10  
28

1 rounds and the acquisition-possession-criminalization components of § 32310—is not a  
2 reasonable fit.

3       The Attorney General says that empirical evidence is not required to shoulder his  
4 burden. *Oppo*. at 19. He says that the required substantial evidence demonstrating a  
5 reasonable fit can take other, softer forms such as “history, consensus, and simple  
6 common sense,” as well as “correlation evidence” and even simply “intuition.” *Oppo*. at  
7 19-20. Intuition? If this variety of softer “evidence” were enough, all firearm restrictions  
8 except an outright ban on all firearms would survive review. Yet, as the Second Circuit  
9 cautioned, “on intermediate scrutiny review, the state cannot ‘get away with shoddy data  
10 or reasoning.’ To survive intermediate scrutiny, the defendants must show ‘*reasonable*  
11 *inferences based on substantial evidence*’ that the statutes are substantially related to the  
12 governmental interest.” *New York State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 804 F.3d  
13 242, 264 (2d Cir. 2015), *cert. denied sub nom., Shew v. Malloy*, 136 S. Ct. 2486 (2016)  
14 (citations omitted) (emphasis in original) (striking down New York State’s 7-round  
15 magazine limit). When considering whether to approve a state experiment that has, and  
16 will, irrevocably harm law-abiding responsible citizens who want for lawful purposes to  
17 have common firearms and common magazines that hold more than 10 rounds, this Court  
18 declines to rely on anything beyond hard facts and reasonable inferences drawn from  
19 convincing analysis amounting to substantial evidence based on relevant and accurate  
20 data sets.

21                   ***iii. the State’s evidence***

22       The State’s theoretical and empirical evidence is not persuasive. Why 10 rounds  
23 as a limit? The State has no answer. Why is there no thought given to possession in and  
24 around a home? It is inconclusive at best. In fact, it is reasonable to infer, based on the  
25 State’s own evidence, that a right to possess magazines that hold more than 10 rounds  
26 may promote self-defense – especially in the home – as well as being ordinarily useful  
27 for a citizen’s militia use. California must provide more than a rational basis to justify its  
28 sweeping ban. *See e.g., Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (“Illinois



1 had to provide us with more than merely a rational basis for believing that its uniquely  
2 sweeping ban [on carrying guns in public] is justified by an increase in public safety. It  
3 has failed to meet this burden.”).

4 Mass shootings are tragic. But they are rare events. And of these rare events,  
5 many are committed without large capacity magazines. For example, in the two high  
6 school incidents in 2018 one assailant used a shotgun and a .38 revolver (at Santa Fe  
7 High School, Santa Fe, Texas) while the other used an AR-15-style rifle but with 10-  
8 round magazines (at Stoneman Douglas High School in Parkland, Florida). In the attack  
9 at the Capital Gazette newspaper (Annapolis, Maryland), 5 people were killed and 2  
10 injured by an assailant with a shotgun and smoke grenades. The Attorney General has  
11 not supplemented the record with a police report of the single mass shooting in California  
12 last year (at the Borderline Bar and Grill in Thousand Oaks, California). However, press  
13 reports indicate the shooter used a legally purchased pistol with an “extended”  
14 magazine.<sup>44</sup> Another report said seven 30-round magazines were found at the scene.<sup>45</sup>  
15 Eighteen years of a state ban on acquiring large-capacity magazines did not prevent the  
16 assailant from obtaining and using the banned devices. The news pieces do not report  
17 witnesses describing a “critical pause” when the shooter re-loaded. And the stories do  
18 not say where or how the 30-round magazines were acquired.

19 The findings from the Mayors Against Illegal Guns survey 2009-2013 (AG Exhibit  
20 17), were addressed in the Order of June 28, 2017. *See also, AG Oppo. To Mot PI,*  
21 *Gordon Declaration Exh. 59.* The observations are still true. “To sum up, of the 92 mass  
22 killings occurring across the 50 states between 2013 and 2009, only ten occurred in  
23

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24  
25 <sup>44</sup> Aarthun, Sarah and Adone, Dakin, *What We Know About the Shooting at Borderline*  
26 *Bar & Grill*, CNN (Nov. 9, 2018) [https://www.cnn.com/2018/11/08/us/thousand-oaks-](https://www.cnn.com/2018/11/08/us/thousand-oaks-bar-shooting-what-we-know/index.html)  
27 [bar-shooting-what-we-know/index.html](https://www.cnn.com/2018/11/08/us/thousand-oaks-bar-shooting-what-we-know/index.html) (last visited Mar. 26, 2019).

28 <sup>45</sup> *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-](https://www.npr.org/2018/11/28/671353612/no-motive-yet-found-for-mass-shooting-at-borderline-bar-and-grill)  
[for-mass-shooting-at-borderline-bar-and-grill](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).



1 California. Of those ten, the criminalization and dispossession requirements of § 32310  
 2 would have had no effect on eight of the shootings, and only marginal good effects had it  
 3 been in effect at the time of the remaining two shootings. On this evidence, § 32310 is  
 4 not a reasonable fit. It hardly fits at all. It appears on this record to be a haphazard  
 5 solution likely to have no effect on an exceedingly rare problem, while at the same time  
 6 burdening the Constitutional rights of many other California law-abiding responsible  
 7 citizen-owners of gun magazines holding more than 10 rounds.”

8 In opposition to the motion for summary judgment, the state attempts to bolster the  
 9 data from the Mayors’ survey with a Mother Jones Magazine 36-year survey of mass  
 10 shootings from 1982 to 2018. See *Oppo. to MSJ* Exhibit 16.<sup>46</sup> The Mother Jones  
 11  
 12

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13  
 14 <sup>46</sup> This Court has observed that the quality of the evidence relied on by the State is  
 15 remarkably thin. The State’s reliance and the State’s experts’ reliance on compilations  
 16 such as the Mother Jones Magazine survey is an example. The survey is found in the  
 17 Attorney General’s Opposition to Plaintiff’s Motion for Summary Judgment at Exhibit  
 18 37. It purports to be a survey of mass shootings. It does not indicate how its data is  
 19 selected, or assembled, or tested. It is unaccompanied by any declaration as to its  
 20 accuracy. It is probably not peer-reviewed. It has no widely-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.

21 The State says that the survey “has been cited favorably in numerous cases,” citing  
 22 three decisions. *Id.* at n. 13. Of the three cases listed, however, the survey is not  
 23 mentioned at all in one case, mentioned only as something an expert relied on in the  
 24 second case, and mentioned only in passing as “exhaustive” but without analysis in the  
 25 third. On the other hand, after the Attorney General’s brief was filed, the Third Circuit  
 26 noted issues with the Mother Jones Magazine survey, remarking, “Mother Jones has  
 27 changed its definition of a mass shooting over time, setting a different minimum number  
 28 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).

findings 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.

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.<sup>47</sup> The more weapons, the greater the firepower and the greater

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.").

<sup>47</sup> 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.

1 the potential for casualties. In 14 of the 17 California mass shooting events, multiple  
2 weapons were brought. For example, in the 1988 mass shooting event in Sunnyvale, the  
3 shooter brought two pistols, two revolvers, two shotguns, and a bolt action rifle (all  
4 obtained legally). No large capacity magazines were used. *See* AG Exh.16, at 736<sup>48</sup>;  
5 DX-10 at 517 (Appendix B, Case No.91).

6 California's large capacity magazine prohibition also had no effect on the three  
7 single weapon mass shooting events. In the Fresno event in April 2017, a revolver was  
8 used. For those unschooled on firearms, a revolver does not use a magazine of any size.  
9 In the next mass shooting event in Oakland in April 2012, the shooter used a pistol with  
10 four California-legal 10-round magazines. In the third mass shooting event in Goleta in  
11 January 2006, the shooter did use a pistol with a 15-round magazine.<sup>49</sup> However, the  
12 shooter resided in New Mexico. She purchased the firearm and its 15-round magazine  
13 legally in New Mexico. She then traveled into California to Goleta to the postal facility  
14 where she had been employed three years prior. By 2006, California already prohibited a  
15 person from bringing into the state a large capacity magazine, but it did not prevent the  
16 Goleta tragedy from taking place.

17 In fact, only three of the 17 California mass shooting events reported in the Mother  
18 Jones 36-year survey featured a large capacity magazine used by the shooter. One is the  
19 Goleta event described above where the magazine was legally purchased in another state  
20 and illegally brought into California. The second event is like the Goleta event. In San  
21 Francisco June 2017, a perpetrator used two pistols, both stolen. One pistol had a 30-  
22 round magazine.<sup>50</sup> This firearm was reported stolen in Utah and must have been illegally  
23

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24  
25 <sup>48</sup> The Mother Jones survey does not say that large capacity magazines were used.

26 <sup>49</sup> The Mother Jones survey does not say that large capacity magazines were used,  
27 however newspapers reported a 15-round magazine was found. *See*  
28 <https://www.independent.com/news/2013/jan/31/goleta-postal-murders/>.

<sup>50</sup> *See* <http://www.foxnews.com/us/2017/06/24/police-ops-shooter-in-san-francisco-armed-with-stolen-guns> (last visited Mar. 26, 2019).

1 imported into California.<sup>51</sup> The other pistol had been reported stolen in California, but  
2 news reports do not mention a large capacity magazine.<sup>52</sup> It bears noting that California's  
3 large capacity magazine prohibition did not prevent these mass shootings.

4 The third event is the Santa Monica June 2013 event where the shooter was armed  
5 with multiple firearms and 40 large-capacity magazines. As the Court pointed out in its  
6 earlier order, in the Santa Monica incident, the shooter brought multiple firearms. He  
7 used an AR-15, a revolver, and 3 zip guns. He reportedly possessed forty 30-round  
8 magazines. He killed five victims. The survey notes that the AR-15 and the illegal  
9 magazines may have been illegally imported from outside of California. Receiving and  
10 importing magazines holding any more than 10 rounds was already unlawful under  
11 California law at the time of the Santa Monica tragedy. In that instance, criminalizing  
12 possession of magazines holding any more than 10 rounds likely would not have  
13 provided any additional protection from gun violence for citizens or police officers. Nor  
14 would it have prevented the crime.

15 To summarize, the 36-year survey of mass shootings by Mother Jones magazine  
16 put forth by the AG as evidence of the State's need for § 32310, undercuts its own  
17 argument. The AG's evidence demonstrates that mass shootings in California are rare,  
18 and its criminalization of large capacity magazine acquisition and possession has had no  
19 effect on reducing the number of shots a perpetrator can fire. The only effect of § 32310  
20 is to make criminals of California's 39 million law-abiding citizens who want to have  
21 ready for their self-defense a firearm with more than 10 rounds.

22 Some would say that this straight up reading and evaluation of the State's main  
23 evidence places "too high [an] evidentiary burden for the state." *Duncan v. Becerra*,  
24 742 F. App'x 218, 223 (9th Cir. 2018) (dissent). They would say that "the question is not  
25 whether the state's evidence satisfies the district court's subjective standard of  
26

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27 <sup>51</sup> *Id.*

28 <sup>52</sup> *Id.*

1 empiricism.” *Id.* These voices would not test the state’s evidence. They would not  
2 require the same rigor a judge usually employs to test the accuracy and persuasiveness of  
3 a party’s evidence. Once the state offers any evidence, the evidence would simply be  
4 accepted and deemed sufficient to prove the reasonableness of the fit of the regulation for  
5 state’s experimental solution.

6 For example, according to this view, the Mayors’ survey “easily satisfies” the  
7 state’s evidentiary burden. *Id.* It can be said that the Mother Jones Magazine survey  
8 does meet the very low standard of “relevant.” But relevant evidence does not mean  
9 persuasive, substantial, or admissible evidence. That a survey of news articles collected  
10 by a biased interest group shows that out of 98 examples, not a single shooter was limited  
11 to 10 shots while § 32310 was in effect (or would have been limited to 10 shots if had §  
12 32310 been in effect), is not substantial or persuasive evidence of § 32310’s reasonable  
13 fit. Certainly, the evidence need not be perfect or overwhelming. But for a statute that  
14 trenches on a constitutional right, the state’s explanation for such a law needs to have  
15 some enduring substance or gravitas, like the Liberty Bell.

16 Where did this idea come from, the idea that a court is *required* to fully credit  
17 evidence only “reasonably believed to be relevant?” *Fyock*, 779 F.3d at 1000. Or the  
18 critique that a court errs by employing a “subjective standard of undefined empirical  
19 robustness.” *Duncan*, 742 F. App’x at 224 (dissent). *Pena v. Lindley*, 898 F.3d 969 (9th  
20 Cir. 2018) (*pet’n for cert. filed*) advances this soft approach. “We do not impose an  
21 unnecessarily rigid burden of proof.” *Id.* at 979. We allow California to rely on any  
22 material reasonably believed to be relevant to substantiate its interests.” *Id.* “We are  
23 weighing a legislative judgment, not evidence in a criminal trial.” *Id.* “We should not  
24 conflate legislative findings with ‘evidence’ in the technical sense.” *Id.* But, when did  
25 we jettison Senator Kennedy’s observation and become deferential, if not submissive, to  
26 the State when it comes to protecting constitutional rights?

27 This is federal court. The Attorney General has submitted two unofficial surveys  
28 to prove mass shootings are a problem made worse by firearm magazines holding more

1 than 10 rounds. Do the surveys pass the Federal Rule of Evidence Rule 403 test for  
2 relevance? Yes. Are the surveys admissible under Federal Rule of Evidence Rule 802?  
3 No. They are double or triple hearsay. No foundation has been laid. No authentication  
4 attempted. Are they reliable? No. Are they anything more than a selected compilation  
5 of news articles – articles which are themselves inadmissible? No. Are the compilers  
6 likely to be biased? Yes.<sup>53</sup>

7 Where are the actual police investigation reports? The Attorney General,  
8 California's top law enforcement officer, has not submitted a single official police report  
9 of a shooting. Instead, the Attorney General relies on news articles and interest group  
10 surveys. Federal Constitutional rights are being subjected to litigation by inference about  
11 whether a pistol or a rifle in a news story might have had an ammunition magazine that  
12 held more than 10 rounds. This is not conflating legislative findings with evidence in the  
13 technical sense. This is simply evaluating the empirical robustness of evidence in the  
14 same objective way used every day by judges everywhere. Perhaps this is one more  
15

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16  
17 <sup>53</sup> The organization that published the Mayors' survey changed its name to Everytown for  
18 Gun Safety. Everytown for Gun Safety keeps a running tally of school shootings. A  
19 Washington Post piece noted that "Everytown has long inflated its total by including  
20 incidents of gunfire that are not really school shootings." The Washington Post identified  
21 an example of an Everytown shooting incident. There a 31-year old man committed  
22 suicide outside an elementary school that had been closed for seven months. "There were  
23 no teachers. There were no students." See John Woodward Cox and Steven Rich, *No,  
24 There Haven't Been 18 School Shootings in 2018 - That Number is Flat Wrong*, Wash.  
25 Post (Feb. 15, 2018) [https://www.washingtonpost.com/local/no-there-havent-been-18-  
26 school-shooting-in-2018-that-number-is-flat-wrong/2018/02/15/65b6cf72-1264-11e8-  
27 8ea1-c1d91fcec3fe\\_story.html?noredirect=on&utm\\_term=.4100e2398fa0](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  
28 Mar. 26, 2019).

25 The U.S. Department of Education does no better. It reported nearly 240 school-  
26 related shootings in 2015-2016. But NPR did an investigation and could confirm only 11  
27 incidents. See Kamenetz, Anya, Arnold, Alexis, and Cardinali, Emily, *The School  
28 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).



1 reason why the Second Amendment has been described as “the Rodney Dangerfield of  
2 the Bill of Rights.” *Mance v. Sessions*, 896 F.3d 390, 396 (5th Cir. 2018) (Willett, J.,  
3 dissenting). Obeisance to *Heller* and the Second Amendment is offered and then given  
4 *Emeritus* status, all while its strength is being sapped from a lack of exercise.

5 According to *Pena*, “[w]e do not substitute our own policy judgment for that of the  
6 legislature,” protests the Attorney General. *Pena*, 898 F.3d at 979. “We owe the  
7 legislature’s findings deference,” says the State. *Id.* This case is not about weak-kneed  
8 choice between competing policy judgments. Deference in the sphere of pure political  
9 policy is understandable. But that is not this case.

10 This case is about a muscular constitutional right and whether a state can impinge  
11 and imprison its citizens for exercising that right. This case is about whether a state  
12 objective is possibly important enough to justify the impingement. The problem with  
13 according deference to the state legislature in this kind of a case, as in the *Turner*  
14 *Broadcasting* approach, is that it is exactly the approach promoted by dissenting Justice  
15 Breyer and *rejected* by the Supreme Court’s majority in *Heller*.<sup>54</sup> Yet, *Turner* deference  
16 arguments live on like legal zombies lurching through Second Amendment jurisprudence.

17 Even with deference, meaningful review is required. “Although we do accord  
18 substantial deference to the predictive judgments of the legislature when conducting  
19 intermediate scrutiny, the State is not thereby insulated from meaningful judicial review.”  
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21  
22 <sup>54</sup> In his dissent, Justice Breyer made the ultimately-rejected deference argument clear:  
23 “There is no cause here to depart from the standard set forth in *Turner*, for the District’s  
24 decision represents the kind of empirically based judgment that legislatures, not courts,  
25 are best suited to make. In fact, deference to legislative judgment seems particularly  
26 appropriate here, where the judgment has been made by a local legislature, with  
27 particular knowledge of local problems and insight into appropriate local solutions.  
28 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).



1 *Heller v. District of Columbia*, 670 F.3d 1244, 1259 (D.C. Cir. 2011) (quoting *Turner II*,  
2 520 U.S. at 195 & *Turner I*, 512 U.S. at 666) (internal quotations omitted)). Quite the  
3 contrary, a court must determine whether the legislature has “based its conclusions upon  
4 substantial evidence.” *Turner II*, 520 U.S. at 196. Despite whatever deference is owed,  
5 the State still bears the burden “affirmatively [to] establish the reasonable fit we require.”  
6 *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). Simply noting that a  
7 study has been offered and experts have opined, is an inadequate application of  
8 intermediate scrutiny, even when according deference to the predictive judgment of a  
9 legislature. *Turner* itself shows why. There, the Supreme Court extensively analyzed  
10 over the course of *twenty pages* the empirical evidence cited by the government, and only  
11 then concluded that the government’s policy was grounded on reasonable factual findings  
12 supported by evidence that is substantial for a legislative determination.” *See Turner II*,  
13 520 U.S. at 196-224.

14 There is another problem with according deference in this case. Strictly put, this  
15 case is not solely about legislative judgments because § 32310(c) and (d) are the products  
16 of a ballot proposition. No federal court has deferred to the terms of a state ballot  
17 proposition where the proposition trenches on a federal constitutional right:

18 As one court stated, no court has accorded legislative deference to ballot  
19 drafters. Legislatures receive deference because they are better equipped  
20 than the judiciary to amass and evaluate the vast amounts of data bearing  
21 upon complex and dynamic issues. Because the referendum process does  
22 not invoke the same type of searching fact finding, a referendum’s fact  
23 finding does not “justify deference.”

23 *Vivid Entm’t, LLC v. Fielding*, 965 F. Supp. 2d 1113, 1127 (C.D. Cal. 2013), *aff’d*, 774  
24 F.3d 566 (9th Cir. 2014) (citations and internal quotations omitted); *see also California*  
25 *Prolife Council Political Action Comm. v. Scully*, 989 F. Supp. 1282, 1299 (E.D.  
26 Cal.1998), *aff’d*, 164 F.3d 1189 (9th Cir. 1999) (“Because the referendum process does  
27 not invoke the same type of searching fact finding, a referendum’s fact finding does not  
28 justify deference.”). The initiative process inherently lacks the indicia of careful debate

1 that would counsel deference. *Carver v. Nixon*, 72 F.3d 633, 645 (8th Cir. 1995) (process  
2 of legislative enactment includes deliberation, compromise and amendment, providing  
3 substantial reasons for deference that do not exist with respect to ballot measures);  
4 *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 945 (9th Cir. 1995), *vacated on*  
5 *other grounds*, 520 U.S. 43 (1997) (deference normally accorded legislative findings does  
6 not apply with same force when First Amendment rights are at stake; in addition, because  
7 measure was a ballot initiative, it was not subjected to extensive hearings or considered  
8 legislative analysis before passage); *Daggett v. Webster*, No. 98-223-B-H, 1999 WL  
9 33117158, at \*1 (D. Me. May 18, 1999) (no court has given legislative deference to a  
10 ballot proposition).

11 In this case, as in *Scully*, California argues that *Turner Broadcasting* requires  
12 deference be given to the predictive judgments embodied in its statute. The *Scully* court  
13 rejected the approach. It reasoned persuasively:

14 [T]he deference formulation, however, ignores the context of the quotation  
15 which requires federal courts to “accord substantial deference to the predictive  
16 judgments of Congress.” Thus, the deference recognized in *Turner* is the  
17 consequence, at least in part, of the constitutional delegation of legislative  
18 power to a coordinate branch of government, a factor not present in the instant  
19 case. Of course, this is not to say that the predictive judgments of state  
20 legislatures are not entitled to due weight. It would seem odd, however, that  
21 this court would be required to give greater deference to the implied predictive  
22 judgments of a state’s legislation than the state’s own courts would. In this  
23 regard, California courts accord deference to the predictive judgments of their  
24 legislature on a sliding scale, according significant deference to economic  
25 judgments, but employing “greater judicial scrutiny” “when an enactment  
26 intrudes upon a constitutional right.” It is of course true that deference in the  
27 federal courts is not simply a function of the separation of powers doctrine. It  
28 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

1       afforded to legislative findings does ‘not foreclose our independent judgment  
2       of the facts bearing on an issue of constitutional law.’” Thus, courts are  
3       obligated to “assure that, in formulating its judgments, Congress has drawn  
4       reasonable inferences, based on substantial evidence.”

5       *California Prolife Council Political Action Comm*, 989 F. Supp. at 1299 (citations  
6       omitted). The 2016 amendments to § 32310 were added by ballot measure and are owed  
7       no legislative deference by this Court. The remaining part of § 32310 is the product of  
8       ordinary legislation. Impinging on a federal constitutional right as it does, it is not  
9       insulated from meaningful judicial review.

10       The legislative deference doctrine fits better where the subject is technical and  
11       complicated. One example is the regulation of elections. *See Nixon v. Shrink Missouri*  
12       *Gov’t PAC*, 528 U.S. 377, 402–03 (2000) (“Where a legislature has significantly greater  
13       institutional expertise, as, for example, in the field of election regulation, the Court in  
14       practice defers to empirical legislative judgments—at least where that deference does not  
15       risk such constitutional evils as, say, permitting incumbents to insulate themselves from  
16       effective electoral challenge.”). Another is the regulation of public broadcast media.  
17       *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94,  
18       103 (1973) (“That is not to say we ‘defer’ to the judgment of the Congress and the  
19       Commission on a constitutional question, or that we would hesitate to invoke the  
20       Constitution should we determine that the Commission has not fulfilled its task with  
21       appropriate sensitivity to the interests in free expression. The point is, rather, that when  
22       we face a complex problem with many hard questions and few easy answers we do well  
23       to pay careful attention to how the other branches of Government have addressed the  
24       same problem.”). Even in these areas of deference, federal courts do not swallow whole  
25       a state’s legislative judgment.

26       Instead, a court must resolve such a challenge by an analytical process that  
27       parallels its work in ordinary litigation. It must first consider the character and  
28       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

1       burden imposed by its rule. In passing judgment, the Court must not only  
2       determine the legitimacy and strength of each of those interests; it also must  
3       consider the extent to which those interests make it necessary to burden the  
4       plaintiff's rights.

5       *Anderson v. Celebrezze*, 460 U.S. 780, 789–90 (1983). From broadcasting regulation  
6       comes another example of deference. Even so, deference there does not mean merely  
7       observant acquiescence when First Amendment rights are concerned. “That Congress’  
8       predictive judgments are entitled to substantial deference does not mean, however, that  
9       they are insulated from meaningful judicial review altogether. On the contrary, we have  
10      stressed in First Amendment cases that the deference afforded to legislative findings does  
11      ‘not foreclose our independent judgment of the facts bearing on an issue of constitutional  
12      law.’” *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989). Threats to  
13      Second Amendment rights ought to be treated with at least the same rigor.

14      The Attorney General argues that the state “must be allowed a reasonable  
15      opportunity to experiment with solutions to admittedly serious problems.” This notion  
16      was first expressed in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976).  
17      The context was a city zoning choice from a different era about where to permit adult  
18      theaters. Wrote the Court, “[i]t is not our function to appraise the wisdom of its decision  
19      to require adult theaters to be separated rather than concentrated in the same areas.” *Id.*  
20      “Since what is ultimately at stake is nothing more than a limitation on the place where  
21      adult films may be exhibited” and “few of us would march our sons and daughters off to  
22      war to preserve the citizen’s right to see ‘Specified Sexual Activities’ exhibited in the  
23      theaters of our choice,” the Court accorded the city authority to experiment. *Id.* That is  
24      not comparable to the deadly serious question of whether the state may experiment with a  
25      low 10-round limit on the number of shots a person may have in her pistol for protection.  
26      In any event, should courts be so deferential when the State chooses to experiment with  
27      other constitutionally protected rights?

28      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*

1 *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986), and echoed in *Jackson v. City*  
 2 *and County of San Francisco*, 746 F.3d 953, 969 (9th Cir. 2014) (approving a city ban on  
 3 sales of hollow point ammunition). *Jackson* was a Second Amendment case that  
 4 reasoned that a city prohibition affected “only the sale of hollow-point ammunition  
 5 within San Francisco, not the use or possession of such bullets” and concluded, “[s]uch a  
 6 sales prohibition burdens the core right of keeping firearms for self-defense only  
 7 indirectly, because Jackson is not precluded from using the hollow-point bullets in her  
 8 home if she purchases such ammunition outside of San Francisco’s jurisdiction.” The  
 9 *Jackson* hollow-point ordinance is far different than California’s § 32310. Under  
 10 § 32310, no person may use a magazine holding more than 10-rounds for self-defense in  
 11 her home even if she purchases it outside of the state. Instead, she will become a  
 12 criminal subject to arrest, prosecution, conviction, and incarceration. This kind of  
 13 government experimentation, the Second Amendment flatly prohibits.

14 No case has held that intermediate scrutiny would permit a state to impinge even  
 15 slightly on the Second Amendment right by employing a known failed experiment.  
 16 Congress tried for a decade the nationwide experiment of prohibiting large capacity  
 17 magazines. It failed. California has continued the failed experiment for another decade  
 18 and now suggests that it may continue to do so *ad infinitum* without demonstrating  
 19 success. That makes no sense.

#### 20 ***iv. the important interests of the State***

21 The state has important interests. Public safety. Preventing gun violence.  
 22 Keeping our police safe. At this level of generality, these interests can justify any law  
 23 and virtually any restriction. Imagine the crimes that could be solved without the Fourth  
 24 Amendment. The state could search for evidence of a crime anywhere on a whim.  
 25 Without the First Amendment, the state could better police the internet. The state could  
 26 protect its citizens from child pornography, sex trafficking, and radical terrorists. The  
 27 state could limit internet use by its law-abiding citizens to, say, 10 hours a day or 10  
 28 websites a day. Perhaps it could put an end to Facebook cyberbullying.

1 The Attorney General articulates four important objectives to justify this new  
 2 statutory bludgeon. They all swing at reducing “gun violence.” The bludgeon swings to  
 3 knock large capacity magazines out of the hands of criminals. If the bludgeon does not  
 4 work, then the criminals still clinging to their large capacity magazines will be thrown in  
 5 jail while the magazines are destroyed as a public nuisance. The problem is the bludgeon  
 6 indiscriminately hammers all that is in its path. Here, it also hammers magazines out of  
 7 the hands of long time law-abiding citizens. It hammers the 15–round magazine as well  
 8 as the 100–round drum. And it throws the law-abiding, self-defending citizen who  
 9 continues to possess a magazine able to hold more than 10 rounds into the same jail cell  
 10 as the criminal. Gun violence to carry out crime is horrendous and should be condemned  
 11 by all and punished harshly. Defensive gun violence may be the only way a law-abiding  
 12 citizen can avoid becoming a victim. The right to keep and bear arms is not the only  
 13 constitutional right that has controversial public safety implications. All of the  
 14 constitutional provisions that impose restrictions on law enforcement and on the  
 15 prosecution of crimes fall into the same category. *McDonald v. City of Chicago, Ill.*, 561  
 16 U.S. 742, 783 (2010).

17 ***v. an ungainly “fit”***

18 “[T]he next question in our intermediate scrutiny analysis is whether the law is  
 19 ‘narrowly tailored to further that substantial government interest.’ . . . As the Supreme  
 20 Court succinctly noted in a commercial speech case, narrow tailoring requires ‘a fit  
 21 between the legislature’s ends and the means chosen to accomplish those ends.’”  
 22 *Minority Television Project, Inc. v. F.C.C.*, 736 F.3d 1192, 1204 (9th Cir. 2013) (*quoting*  
 23 *Bd. of Tr. of the State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989)).

24 The “fit” of § 32310 is, at best, ungainly and very loose. That is all that it takes to  
 25 conclude that the statute is unconstitutional. The fit is like that of a father’s long raincoat  
 26 on a little girl for Halloween. The problem of mass shootings is very small. The state’s  
 27 “solution” is a triple extra-large and its untailored drape covers all the law-abiding and  
 28 responsible of its 39 million citizens. Some of the exceptions make the “fit” even worse.



1 For example, § 32310 makes an exception for retired peace officers, but not for CCW  
2 holders or honorably discharged members of the armed forces. There is no evidence that  
3 a retired peace officer has better firearms training.<sup>55</sup> And in any event, for whatever  
4 training they receive, does it matter that they are trained to use a 10-round magazine, a  
5 15-round magazine, a 30-round magazine, and if so, what is the difference? The State  
6 does not provide any insight. Another example is the exception for movie props. Why in  
7 the interest of public safety does the movie industry need to use a genuine large capacity  
8 magazine for a prop? Is it too far-fetched to require the Hollywood creators of Mickey  
9 Mouse, Jaws, and Star Wars, to use a non-working magazine in place of a genuine large  
10 capacity magazine? Most importantly by far, however, is that the cloak of the law needs  
11 at least some arm holes to fit. It has none because it ignores the fact that magazines  
12 holding more than 10 rounds are commonly possessed by law-abiding, responsible  
13 citizens, and it affords no room for these citizens to defend their homes against attack.

14 A reasonable fit to protect citizens and law enforcement from gun violence and  
15 crime, in a state with numerous military bases and service men and service women,  
16 would surely permit the honorably discharged member of the U.S. Armed Forces who  
17 has lawfully maintained a magazine holding more than 10 rounds for more than twenty  
18 years to continue to keep and use his or her magazine. These citizens are perhaps the best  
19 among us. They have volunteered to serve and have served and sacrificed to protect our  
20 country. They have been specially trained to expertly use firearms in a conflict. They  
21 have proven their good citizenship by years of lawfully keeping firearms as civilians.

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22  
23  
24 <sup>55</sup> A similar exception for retired police officers permitting possession and use of  
25 otherwise banned assault weapons in California, was declared unconstitutional in *Silveira*  
26 *v. Lockyer*, 312 F.3d 1052, 1091 (9th Cir. 2002) (“We thus can discern no legitimate state  
27 interest in permitting retired peace officers to possess and use for their personal pleasure  
28 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.”).



1 What possibly better citizen candidates to protect the public against violent gun-toting  
2 criminals.

3 Similarly, a reasonable fit would surely make an exception for a Department of  
4 Justice-vetted, privately-trained, citizen to whom the local sheriff has granted a permit to  
5 carry a concealed weapon, and who owns a weapon with a magazine holding more than  
6 10 rounds. California's statute does not except such proven, law-abiding, trustworthy,  
7 gun-owning individuals. Quite the opposite. Under the statute, all these individuals will  
8 be subject to criminal prosecution, should they not dispossess themselves of magazines  
9 holding more than 10 rounds.

10 Ten years of a federal ban on large-capacity magazines did not stop mass shootings  
11 nationally. Twenty years of a California ban on large capacity magazines have not  
12 stopped mass shootings in California. Section 32310 is a failed policy experiment that  
13 has not achieved its goal. But it has daily trenched on the federal Constitutional right of  
14 self-defense for millions of its citizens. On the full record presented by the Attorney  
15 General, and evidence upon which there is no genuine issue, whatever the fit might be, it  
16 is not a reasonable fit.

17 *vi. irony*

18 Perhaps the irony of § 32310 escapes notice. The reason for the adoption of the  
19 Second Amendment was to protect the citizens of the new nation from the power of an  
20 oppressive state. The anti-federalists were worried about the risk of oppression by a  
21 standing army. The colonies had witnessed the standing army of England marching  
22 through Lexington to Concord, Massachusetts, on a mission to seize the arms and  
23 gunpowder of the militia and the Minutemen—an attack that ignited the Revolutionary  
24 war. With Colonists still hurting from the wounds of war, the Second Amendment  
25 guaranteed the rights of new American citizens to protect themselves from oppressors  
26 foreign and domestic. So, now it is ironic that the State whittles away at the right of its  
27 citizens to defend themselves from the possible oppression of their State.

1 *vii. turning the Constitution upside down*

2 In the year 2000, California started its “experiment” in banning magazines holding  
3 more than 10-rounds. The statute included a grandfather clause permitting lawful owners  
4 of larger magazines to keep them. *See Senate Committee Rpt (Perata) SB 23 (Mar.*  
5 *1999)*, (“The purpose of this bill is to make all but the possession of ‘large-capacity  
6 magazines’ a crime punishable as an alternative misdemeanor/felony (‘wobbler’)”; “The  
7 bill would make it a crime to do anything with detachable large capacity magazines after  
8 January 1, 2000 – except possess and personally use them – punishable as a  
9 misdemeanor/felony.”; “One could still possess those magazines after January 1,  
10 2000.”).<sup>56</sup> Relying at least in part on the State’s representation, law-abiding citizens did  
11 not object. Time passed. Now, these still law-abiding owners of larger magazines are  
12 told that the grandfather clause is a dangerous “loophole” that needs closing. Section  
13 2.12 of Proposition 63 declared, “Today, California law prohibits the manufacture,  
14 importation and sale of military-style, large capacity ammunition magazines, but does not  
15 prohibit the general public from possessing them. *We should close that loophole.* No  
16 one except trained law enforcement should be able to possess these dangerous  
17 ammunition magazines.” (Emphasis added.) Plaintiffs who have kept their own larger  
18 capacity magazines since 1999, and now face criminal sanctions for continuing to possess  
19 them, no doubt feel they have been misled or tricked by their lawmakers.

20 The Attorney General explains that the grandfathering provision made the prior  
21 version of § 32310 very difficult to enforce. Because large capacity magazines lack  
22 identifying marks, law enforcement officers are not able to tell the difference between  
23 grandfathered magazines and more recently smuggled, or manufactured, illegal  
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27 <sup>56</sup> <http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml> (last visited March 12,  
28 2019).

1 magazines.<sup>57</sup> Consequently, explains the Attorney General, “the possession loophole in  
2 Section 32310 undermined existing LCM restrictions.” Def.’s Oppo. to Ps’ MSJ, at 7. In  
3 an analogous First Amendment case, the Supreme Court called this approach turning the  
4 Constitution upside down. The Court explained:

5 We confronted a similar issue in *Ashcroft v. Free Speech Coalition*, 535 U.S.  
6 234 (2002), in which the Government argued that virtual images of child  
7 pornography were difficult to distinguish from real images. The  
8 Government’s solution was “to prohibit both kinds of images.” We rejected  
9 the argument that “protected speech may be banned as a means to ban  
10 unprotected speech,” concluding that it “turns the First Amendment upside  
11 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.”

12 *Federal Election Comm’n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 474–75 (2007)  
13 (finding issues advocacy may not be suppressed even though it is sometimes difficult to  
14 distinguish it from advocacy for the election or defeat of a candidate which may be  
15 regulated). The analog is that the State may not now ban lawfully-kept large capacity  
16 magazines owned since 1999 as a means to ban large capacity magazines unlawfully  
17 manufactured or imported after January 1, 2000. Lawful arms do not become  
18 unprotected merely because they resemble unlawful arms. “The Government’s proposed  
19 prophylaxis – to protect against the violations of the few, we must burden the  
20 constitutional rights of the many – turns the Second Amendment on its head. Our  
21 Founders crafted a Constitution to promote the liberty of the individual, not the  
22 convenience of the Government.” *Mance v. Sessions*, 896 F.3d 390, 405 (5th Cir. 2018)  
23 (Ho, J., dissenting from denial of rehearing en banc), *pet’n for cert. filed* (Nov. 21, 2018).

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26 <sup>57</sup> California could have addressed this concern by requiring a serial number on  
27 manufactured or imported large capacity magazines, as did the federal law. *See e.g.*, 27  
28 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.”).

***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.”<sup>58</sup>

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<sup>58</sup> Klarevas, Louis, *Closing the Gap*, The New Republic (Jan. 13, 2011), <https://newrepublic.com/article/81410/us-gun-law-reform-tucson> (last visited May 1, 2018).

1                                   **(2.) Kolbe v. Hogan**

2           The State rests much of its argument on the decision in *Kolbe v. Hogan*, 849 F.3d  
3 114, 137 (4th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 469 (2017). The State cites  
4 *Kolbe*’s observation that large capacity magazines enable a shooter to hit “multiple  
5 human targets very rapidly” and “contribute to the unique function of any assault weapon  
6 to deliver extraordinary firepower.” Considering this, *Kolbe* found that assault weapons  
7 and large capacity magazines are military weapons, and that military weapons are not  
8 protected by the Second Amendment. It is interesting to note, that the Maryland statute  
9 at issue in that case did not ban the possession of a large capacity magazine. *Id.* at 123  
10 (“The [Firearm Safety Act] does not ban the possession of a large-capacity magazine.”).

11           *Kolbe* concluded that large capacity magazines were beyond the protection of the  
12 Second Amendment. *Id.* at 137. The court reached that conclusion based on the thought  
13 that such magazines are “most useful” in military service. *Id.* That large capacity  
14 magazines are useful in military service, there is no doubt. But the fact that they may be  
15 useful, or even “most useful,” for military purposes does not nullify their usefulness for  
16 law-abiding responsible citizens. It is the fact that they are commonly-possessed by these  
17 citizens for lawful purposes that places them directly beneath the umbrella of the Second  
18 Amendment. *Kolbe*’s decision that large capacity magazines are outside the ambit of the  
19 Second Amendment is an outlier and unpersuasive. Beyond this, this Court is  
20 unpersuaded by *Kolbe*’s interpretation of *Miller* finding that weapons most useful for  
21 military service are not protected. The dissenting *Kolbe* judges persuasively pointed out  
22 that the approach turns Supreme Court precedent upside down. *Id.* at 156-57 (Traxler,  
23 Niemeyer, Shedd, and Agee, Js., dissenting) (“Under [that] analysis, a settler’s musket,  
24 the only weapon he would likely own and bring to militia service, would be most useful  
25 in military service—undoubtedly a weapon of war—and therefore not protected by the  
26 Second Amendment. This analysis turns *Heller* on its head.”).

**(3.) Dr. Christopher S. Koper**

The State relies on an expert, Dr. Christopher S. Koper.<sup>59</sup> Dr. Koper, in turn, relies in part on an 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

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<sup>59</sup> 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 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.

1 use of large capacity magazines. He explains, “[a]ssessing trends in LCM use is much  
2 more difficult because there was, and is, no national data source on crimes with LCMs,  
3 and few local jurisdictions maintain this sort of information.” *Id.* at 139. He notes,  
4 “there is little evidence on how state LCM bans affect the availability and use of LCMs  
5 over time.” *Id.* at n. 29. He states, “[p]erhaps most importantly, to the best of my  
6 knowledge, there have not been any studies examining the effects of LCM laws that ban  
7 LCMs without grandfathering, as done by the new California statute. Hence, these  
8 studies have limited value in assessing the potential effectiveness of California’s new  
9 law.” *Id.* Finally, Dr. Koper acknowledges that while he does have an opinion, it is *not*  
10 based on a study of § 32310. He explains, “I have not undertaken any study or analysis  
11 of this law.” *Id.* at 146.

12 **(4.) Daniel W. Webster**

13 The State also relies on the expert report of Daniel W. Webster, a professor of  
14 health policy and management. *See* DX-18 at 775. Professor Webster also has an  
15 opinion, but foundational data is vaporous. For example, Webster notes that,  
16 “[u]nfortunately, data to more definitively determine the connections between  
17 ammunition capacity and gun violence outcomes—the number of shots fired, the rate of  
18 fire, the number of victims, the number of wounds per victims, lethality of woundings—  
19 have not been collected in any population.” *Id.* at 780-81. For his own analysis, Webster  
20 relies, in part, on Dr. Koper’s re-analysis, of his graduate student’s analysis, of Mother  
21 Jones Magazine’s collection of shooting incidents. *Id.* at 780 (“Similarly, Professor  
22 Christopher Koper’s re-analysis of his student’s data from Mother Jones magazine’s  
23 study of public mass murders with firearm. . .”). Webster also acknowledges the  
24 paucity of data-based analysis regarding mass shootings. He admits, “[a]lthough no  
25 formal, sophisticated analyses of the data on mass shootings in public places by lone  
26 shooters for the period 1982-2012 collected by Mother Jones magazine has been  
27 performed to my knowledge, a temporal pattern can be discerned that is consistent with a  
28 hypothesized protective effect of the federal assault weapon and LCM ban and a harmful



1 effect of the expiration of that ban.” *Id.* at 787-88. He also says, “[t]o date, there are no  
2 studies that have examined separately the effects of an assault weapons ban, on the one  
3 hand, and a LCM ban, on the other hand . . . .” *Id.* at 790. Webster opines that a  
4 magazine limit lower than 10 rounds could be justified. *Id.* at 791.

5 **(5.) John J. Donohue**

6 The State also relies on the expert report of John J. Donohue, a professor of law at  
7 Stanford Law School. *See* DX-2. According to his report in this case, he also prepared  
8 an expert report in the *Fyock* case. *Id.* at ¶ 6. Some of his observations should be  
9 discounted. Professor Donohue reports that national surveys “consistently find a  
10 persistent decline in household gun ownership,” describing a 2013 report from the Pew  
11 Research Center. *Id.* at ¶ 14 and n.5. He describes this as reliable social science data. *Id.*  
12 at ¶ 15. The Court reviewed the Pew Research piece he cited. The first sentence notes  
13 the absence of definitive data, cautioning that, “[t]here is no definitive data source from  
14 the government or elsewhere” on gun ownership rates.<sup>60</sup> It says that surveys provide  
15 conflicting results. In the paragraph directly following the portion quoted in Professor  
16 Donohue’s expert report, the Pew Research report describes a Gallup Organization  
17 survey. That survey concludes not that there has been a persistent decline, but rather that  
18 the gun ownership rate of 43% is “the same as it was 40 years earlier.”<sup>61</sup>

19 Professor Donohue also opines that private individuals, unlike police officers,  
20 “only need to scare off criminals (or hold them off until the police arrive).” *Id.* at ¶ 21.  
21 This is obviously a generalization. The generalization would not have been true for  
22 Susan Gonzalez or the mother of twins whose assailants were not scared off despite each  
23 victim emptying her gun. *See* n.2 & 4, *supra*. Instead of “holding them off till the police  
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25 <sup>60</sup> Pew Research Center, *Why Own a Gun? Protection is Now Top Reason, Section 3:*  
26 *Gun Ownership trends and Demographics* (Mar. 12, 2013) [http://www.people-](http://www.people-press.org/2013/03/12/section-3-gun-ownership-trends-and-demographics)  
27 [press.org/2013/03/12/section-3-gun-ownership-trends-and-demographics](http://www.people-press.org/2013/03/12/section-3-gun-ownership-trends-and-demographics) (last visited  
28 Apr. 30, 2018), at 1.

<sup>61</sup> *Id.* at 2.

1 arrived,” the only assailants remaining at the scene when the police arrived in any of the  
2 three incidents described above was a fatally-wounded assailant. Professor Donohue  
3 again generalizes in his conclusion opining that a 10-round magazine “is sufficient” and  
4 higher capacity magazines are “not required” for defending one’s home. Dx-2 at 9.  
5 Again, generalizations like these are no more than generalizations, and personal, not  
6 expert, opinions. Yet, for such an important context as the defense of self and loved  
7 ones, generalizations are dangerous. Relying on generalizations like these may lead to a  
8 thousand underreported tragedies for law-abiding citizen victims who were supposed to  
9 need only 2.2 rounds and no more than 10 rounds to scare off criminal assailants.

10 **(6.) Carlisle Moody**

11 The State provides the deposition testimony of Carlisle Moody, a professor, who  
12 opines that, “[f]irearms fitted with large capacity magazines can be used to cause death  
13 and injury in public shooting incidents, and can also result in more rounds fired and more  
14 homicides in general than similar firearms with smaller magazines,” but concedes this  
15 conclusion is simply theoretical. DX-7 at 472-73 (Q. And what is the basis for that  
16 statement? How did you arrive at that conclusion? A. Just theoretically.”). Furthermore,  
17 the same can be said of a 10-round magazine versus a 7-round magazine, or a 7-round  
18 magazine versus a 2-round Derringer.

19 **(7.) Sandy Hook commission**

20 The State relies on the report of a commission reviewing the Sandy Hook shooting.  
21 DX-28. However, it misquotes the commission’s findings, saying “[d]ue to their  
22 lethality, LCMs ‘pose a distinct threat to safety in private settings as well as places of  
23 assembly.’” Def. Opposition to Plaintiff’s Motion for Summary Judgment at 11. What  
24 was reported is, “[t]he Commission found that certain types of ammunition and  
25 magazines that were readily available at the time it issued its Interim Report posed a  
26 distinct threat to safety in private settings as well as in places of assembly.” *Id.* at 1097.  
27 The commission goes on to recommend a ban on armor-piercing and incendiary bullets (a  
28 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.<sup>62</sup> 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

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<sup>62</sup> 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.

1 any greater risk of bystander injury when a large capacity magazine is used by a defender  
2 since it will likely be used only for brandishing or for the average 2.3 shots. Even safer  
3 may be a large capacity magazine on an AR-15 type of rifle as it is likely to be more  
4 persuasive when brandished at criminal assailants than would a five-shot revolver. It is  
5 worth noting that in evaluating the strength of the government's fear of bystander injury,  
6 the State has not identified one incident where a bystander was hurt from a citizen's  
7 defensive gun use, much less a defensive use of a gun with a high capacity magazine.  
8 The worrisome scenario is improbable and hypothetical.

9 **(10.) mass shooters prefer large magazines?**

10 The State argues that mass shooters often use large capacity magazines precisely  
11 because they inflict maximum damage on as many people as possible. Perhaps this is  
12 true. There are no police investigative reports provided recounting a mass shooter's  
13 answer to the question: why select a large-capacity magazine. More importantly, many  
14 mass shooters do not select large capacity magazines, at all. The two incidents involving  
15 mass shootings at public high schools in 2018 are good examples. Instead of a pistol or  
16 rifle and large-capacity magazines, a shotgun and a revolver were the firearms selected  
17 by the mass shooter during the 2018 incident at Santa Fe High School in Galveston,  
18 Texas.<sup>63</sup> Also rejecting large capacity magazines last year, the shooter in the Parkland,  
19 Florida, high school mass shooting carried 150 rounds in 10-round magazines.<sup>64</sup>

20 Further undercutting the government's fear is the opinion of expert Gary Kleck,  
21 who says that mass shooters who do choose a high capacity magazine are mistaken in  
22

23  
24 <sup>63</sup> <https://www.usatoday.com/story/news/2018/05/19/texas-school-shooting-timeline-how-30-minute-attack-unfolded/625913002/> (last visited Mar. 13, 2019).

25 <sup>64</sup> McCardle, Mairead, *Report: Parkland Shooter Did Not Use High-Capacity Magazines*,  
26 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  
27 19-year-old school shooter who killed 17 in Florida on Valentine's Day had 150 rounds  
28 of ammunition in 10-round magazines. Larger ones would not fit in his bag, Florida state senator Lauren Book revealed.").

1 thinking it will enable them to cause more harm. “Right. They can do everything that  
2 that mass shooter might want to do if they had 10-round magazines rather than 30-round  
3 magazines. There’s a difference between hypothetical potential and the reality of mass  
4 shootings . . .” DX-8 at 492.

5 **(11.) disproportionately used against police?**

6 The State argues that large-capacity magazines are disproportionately used against  
7 police, citing an undated, unsigned, document created by an organization named the  
8 Violence Policy Center (DX-20 at 799-807). Def. Opposition to Plaintiff’s Motion for  
9 Summary Judgment, at 18. The document says nothing about violence against police.  
10 Elsewhere, the State itself notes that between 2009 and 2013, large-capacity magazine  
11 firearms constituted less than half of the guns used in murders against police (41%). See  
12 DX-4 at 143. In the FBI’s 2016 report on law enforcement officers killed and assaulted,  
13 the average number of rounds fired by a criminal at a police officer was 9.1. Since 2007,  
14 the average number of rounds fired has never exceeded 10, and for seven of the years the  
15 average was under 7.<sup>65</sup> In other words, regardless of the magazine size used by a  
16 criminal shooting at a police officer, the average number of rounds fired is 10 or less,  
17 suggesting that criminalizing possession of a magazine holding more than 10 will have  
18 no effect (on average).

19 The statistical average of 9.1 rounds fired is consistent with a declaration of Phan  
20 Ngo, Director of the Sunnyvale Department of Public Safety. In his declaration, Ngo  
21 states that as a Deputy Chief at the San Jose Police Department he oversaw a 2016  
22 shooting of a police officer. He stated that “the suspect fired 9 rounds at the officers,  
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26 <sup>65</sup> FBI 2016 Law Enforcement Officers Killed & Assaulted, at Table 18,  
27 <https://ucr.fbi.gov/leoka/2016/tables/table-18.xls> (last visited Mar. 19, 2019). Under  
28 Rules of Evidence 201(b) courts may take judicial notice of some types of public records,  
including reports of administrative bodies.

1 with an AR pistol type, semi-automatic weapon.”<sup>66</sup> Ngo goes on to state that “also  
2 recovered at the scene was a Mag Pro 30 clip (large capacity magazine) that still had 21  
3 [] rounds in the clip.”<sup>67</sup> Fortunately, none of the officers were injured.

4 **(12.) the critical “pause”**

5 The State argues that smaller magazines create a “critical pause” in the shooting of  
6 a mass killer. “The prohibition of LCMs helps create a “critical pause” that has been  
7 proven to give victims an opportunity to hide, escape, or disable a shooter.” Def. Oppo.,  
8 at 19. This may be the case for attackers. On the other hand, from the perspective of a  
9 victim trying to defend her home and family, the time required to re-load a pistol after the  
10 tenth shot might be called a “lethal pause,” as it typically takes a victim much longer to  
11 re-load (if they can do it at all) than a perpetrator planning an attack. In other words, the  
12 re-loading “pause” the State seeks in hopes of stopping a mass shooter, also tends to  
13 create an even more dangerous time for every victim who must try to defend herself with  
14 a small-capacity magazine. The need to re-load and the lengthy pause that comes with  
15 banning all but small-capacity magazines is especially unforgiving for victims who are  
16 disabled, or who have arthritis, or who are trying to hold a phone in their off-hand while  
17 attempting to call for police help. The good that a re-loading pause might do in the  
18 extremely rare mass shooting incident is vastly outweighed by the harm visited on  
19 manifold law-abiding, citizen-victims who must also pause while under attack. This  
20 blanket ban without any tailoring to these types of needs goes to show § 32310’s lack of  
21 reasonable fit.

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26 <sup>66</sup> Declaration of Chief Phan Ngo, in support of Amici Curiae the City and County of  
27 San Francisco, the City of Los Angeles, and the City of Sunnyvale, at para. 7, filed Oct.  
28 19, 2017, in *Duncan v. Becerra*, Ninth Circuit Appeal No 17-56081 (docket 29).

<sup>67</sup> *Id.*

1                                   **(13.) *Turner's* requirement**

2           Lastly, the State argues that it is not required to prove that § 32310 will eliminate  
3 or reduce gun violence or mass shootings, or that there is scientific consensus as to the  
4 optimal way to reduce the dangerous impact of large-capacity magazines, or that § 32310  
5 will not be circumvented by criminals. All that must be shown, it contends, is that the  
6 State “has drawn reasonable inferences based on substantial evidence,” citing *Turner*  
7 *Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994). Def. Oppo., at n. 14.

8           Even *Turner* does not expect a judicial milquetoast naivete, but a muscular  
9 “meaningful review” and independent judgment of the facts. Remember, the *Turner*  
10 Court returned the case to the district court because of an inadequate record. *E.g., id.* at  
11 667-68 (“The paucity of evidence . . . is not the only deficiency in this record. Also  
12 lacking are any findings concerning the actual effects . . . [and] the record fails to  
13 provide any judicial findings concerning the availability and efficacy of ‘constitutionally  
14 acceptable less restrictive means’ of achieving the Government’s asserted interests.”); *id.*  
15 at 673 (Blackmun, J., concurring) (“Justice Kennedy asks the three-judge panel to take  
16 additional evidence on such matters as whether the must-carry provisions really respond  
17 to threatened harms to broadcasters [and] whether §§ 4–5 ‘will in fact alleviate these  
18 harms in a direct and material way.’”). Congress had set out numerous “unusually  
19 detailed statutory findings” within the Act being reviewed. *Id.* at 646. These “legislative  
20 facts” were the product of three years of congressional hearings. *Id.* at 632. It was in this  
21 unusual context in which the Court said that the predictive judgments of Congress are  
22 entitled to substantial deference.

23           No similar unusually detailed congressional findings or predictive judgments after  
24 years of hearings are present in the case of California Penal Code § 32310. On the  
25 contrary, the 2016 criminalization and dispossession amendments added in § 32310 (c)  
26 and (d) were not the product of legislative action, at all. These were, instead, the product  
27 of a complicated state referendum question known as Proposition 63. *Cf. Perry v.*  
28 *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

1 tailoring than does § 32310 and makes room for a home owner to have 15 rounds (50%  
2 more) for defense.

3 **(16.) “10” appears to be an arbitrary number**

4 So, how did California arrive at the notion that any firearm magazine size greater  
5 than a 10-round magazine is unacceptable? It appears to be an arbitrary judgment. The  
6 Attorney General says it is not. Def’s Response to Plaintiffs’ Supp. Brief, at 9. He notes  
7 that other large-capacity magazine bans and the former federal ban settled on 10 rounds.  
8 The State does not, however, say why California (or any jurisdiction, for that matter)  
9 place the limit at 10. One author surmised from a comparison, that California lawmakers  
10 simply “borrowed the large-capacity magazine ban from the federal moratorium.”  
11 Stricker, Brent W., *Gun Control 2000: Reducing the Firepower*, 31 McGeorge L. Rev.  
12 293, 301. The State notes a 10-round limit was included in its firing-capacity legislation  
13 prohibiting machine guns in 1933. The significance of 10 rounds, however, is not  
14 addressed. Larger magazines were not commonplace in 1933. By 1999, when California  
15 first banned the sale, manufacturing, and importation of magazines able to hold more  
16 than 10-rounds (in former § 12020(a)(2)), larger magazines numbered in the millions.

17 While the State’s more recent legislation imposing a ban on magazines able to hold  
18 more than 10 rounds (§32310(b), 2016 Cal. Legis. Serv. Ch. 58 (S.B. 1446) (WEST))  
19 was superseded by Proposition 63’s passage, the Attorney General does not identify any  
20 of the legislative discussions bearing on the 10-round limit. The 1994 federal ban with its  
21 10-round limit lapsed in 2004. Federal law has no limit on permissible magazine size. In  
22 U.S. Sentencing Guidelines for firearm offenses (§2K2.1(a)) and the comments  
23 thereunder, a “large capacity magazine” is defined for purposes of sentencing as a  
24 magazine “that could accept more than 15 rounds of ammunition.” See § 2K2.1 comment  
25 n.2 (2018); *United States v. Cherry*, 855 F.3d 813, 815 (7th Cir. 2017) (describing same);  
26 *United States v. Henry*, 819 F.3d 856, 867 (6th Cir. 2016) (same).

27 The State argues only that it is not required to explain why it has selected 10 as the  
28 number. Def’s Response to Plaintiffs’ Supp. Brief, at 9-10. Perhaps not. But the 10-

1 round limit appears to be arbitrary. A reasoned explanation or a considered judgment  
2 would tend to demonstrate why the “fit” of a total ban on magazines larger than 10-  
3 rounds is reasonable or how the ban is narrowly tailored. Perhaps it is an unintentional  
4 legacy from the 1930s when generally larger detachable magazines were rare, our  
5 military’s popular WW I Colt .45 M1911 pistol held a magazine holding 7-8 rounds, and  
6 otherwise 5 or 6 shot revolvers ruled. Surly, *Turner* deference does not mean a federal  
7 court is relegated to rubber-stamping a broad-based arbitrary incursion on a constitutional  
8 right founded on speculative line-drawing and without any sign of tailoring for fit.

9 **(17.) *Fyock v. Sunnyvale***

10 So, what about the *Fyock* decision. *Fyock*, like the Ninth Circuit decision in this  
11 case, are both appeals from preliminary injunction requests. Preliminary injunction  
12 appeals are reviewed narrowly. *Compare Fyock*, 779 F.3d at 995 (“As we have  
13 previously noted, there are limitations to interlocutory appeals of this nature given the  
14 narrow scope of our review: In some cases, parties appeal orders granting or denying  
15 motions for preliminary injunctions in order to ascertain the views of the appellate court  
16 on the merits of the litigation, but . . . due to the limited scope of our review . . . our  
17 disposition of appeals from most preliminary injunctions may provide little guidance as  
18 to the appropriate disposition on the merits.”), *with Duncan v. Becerra*, 742 F. App’x  
19 218, 220 (9th Cir. 2018) (“We do not ‘determine the ultimate merits,’ but rather  
20 ‘determine only whether the district court correctly distilled the applicable rules of law  
21 and exercised permissible discretion in applying those rules to the facts at hand.’”).  
22 Preliminary injunction motions typically present complicated legal and factual questions  
23 on an abbreviated time frame. Orders are not final. Appellate review does not go to the  
24 merits but to whether the district court properly exercised judicial discretion or made a  
25 clear error of judgment. *DISH Network Corp. v. F.C.C.*, 653 F.3d 771, 776 (9th Cir.  
26 2011) (“The grant or denial of a preliminary injunction lies within the discretion of the  
27 district court and we may reverse a district court only where it relied on an erroneous  
28 legal premise or abused its discretion.”).

1 A preliminary injunction decision is a fact-bound decision. *Fyock* concerned a city  
2 ordinance covering only residents of Sunnyvale, California. This case concerns a state-  
3 wide statute. The Sunnyvale ordinance carved out exceptions for nine categories,  
4 including category eight (“Any person lawfully in possession of a firearm that the person  
5 obtained prior to January 1, 2000, if no magazine that holds fewer than 10 rounds of  
6 ammunition is compatible with the firearm and the person possesses the large-capacity  
7 magazine solely for use with that firearm.”). *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d  
8 1267, 1272 (N.D. Cal. 2014). The state statute § 32310 includes no exception like  
9 Sunnyvale’s category eight. The Sunnyvale ordinance required non-exempt persons to,  
10 *inter alia*, remove their large capacity magazines from the City of Sunnyvale. *Id.* The  
11 state statute § 32310 requires non-exempt persons to remove their large-capacity  
12 magazines from California. The City of Sunnyvale is a small, populous, municipality  
13 with uniquely-trained public safety officers. The State of California is one of the largest  
14 states in the Union and includes everything from areas where populations are small and  
15 far from emergency services to the second largest city in the United States.

16 The district court in *Fyock*, found that “magazines having a capacity to accept  
17 more than ten rounds are in common use, and are therefore not dangerous and unusual.”  
18 *Fyock*, 25 F. Supp. 3d 1267 at 1275. The district court found that it does not matter  
19 whether large capacity magazines are commonly used for self-defense explaining,  
20 “Second Amendment rights do not depend on how often the magazines are used. Indeed,  
21 the standard is whether the prohibited magazines are ‘typically *possessed* by law-abiding  
22 citizens for lawful purposes,’ not whether the magazines are often *used* for self-defense.”  
23 *Id.* at 1276. The district court found that if few people require a particular firearm for  
24 self-defense, that should be a cause for celebration, not a reason to place large capacity  
25 magazines beyond Second Amendment protection. *Id.* (“The fact that few people ‘will  
26 require a particular firearm to effectively defend themselves,’ . . . should be celebrated,  
27 and not seen as a reason to except magazines having a capacity to accept more than ten  
28 rounds from Second Amendment protection.”). The district court found that the large

1 capacity magazines qualify as “arms” for purposes of the Second Amendment. *Id.* The  
2 district court concluded that the Sunnyvale ordinance banned conduct that is protected by  
3 the Second Amendment. *Id.* at 1277. These are all points with which this Court agrees.

4 The divergence of opinion comes with the selection of the level of heightened  
5 scrutiny required. Like this Court’s conclusion about § 32310, the district court in *Fyock*  
6 found that the Sunnyvale ordinance burdens conduct near the core of the Second  
7 Amendment right. *Id.* at 1278. But the district court in *Fyock* judged the burden of the  
8 Sunnyvale ordinance to be minor and applied intermediate scrutiny and found the fit of  
9 the ordinance to be reasonable. *Id.* at 1278-79. This Court, on the other hand, has  
10 considered the burden of the state statute on all the citizens of the state, finds the burden  
11 to be severe, and even under intermediate scrutiny, a reasonable fit to be lacking. These  
12 are ultimately informed judgment calls. The district court’s *Fyock* judgment was  
13 preliminary. This Court’s judgment is no longer preliminary. If this judgment is  
14 appealed, the Court of Appeals will have the opportunity to rule *on the merits*, for the  
15 first time.

16 California Penal Code § 32310 unconstitutionally impinges on the Second  
17 Amendment rights of law-abiding responsible ordinary citizens who would like to  
18 acquire and possess for lawful purposes firearm magazines able to hold more than 10  
19 rounds. Section 32310 is a complete ban that fails the simple Supreme Court test of  
20 *Heller*. Alternatively, § 32310 strikes at the core of the Second Amendment right of self-  
21 defense and severely burdens that right, triggering strict scrutiny. Because the statute  
22 imposes a broad prophylactic ban that is the opposite of a regulation using the least  
23 restrictive means to achieve a compelling interest, § 32310 fails constitutional muster  
24 under the test of strict scrutiny. Finally, even under the modest and forgiving standard of  
25 intermediate scrutiny, § 32310 is a poor fit to accomplish the State’s important interests.  
26 It hardly fits at all. Therefore, this statute fails intermediate scrutiny. While, it may be  
27 possible to fashion a restriction on uncommonly large magazines that is tailored to the  
28 manifold local contexts present across the entire state so as to achieve a reasonable fit,

1 here, the bottom line is clear. The State has not carried its burden to justify the  
2 restrictions on firearm magazines protected by the Second Amendment based on the  
3 undisputed material facts in evidence. That is not to be lamented. It ought to provide re-  
4 assurance. To borrow a phrase, “[j]ust as it is the ‘proudest boast of our free speech  
5 jurisprudence’ that we protect speech that we hate, [and] . . . the proudest boast of our  
6 free exercise jurisprudence that we protect religious beliefs that we find offensive,” it is  
7 the proudest boast of our Second Amendment jurisprudence that we protect a citizen’s  
8 right to keep and bear arms that are dangerous and formidable. *See Masterpiece*  
9 *Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1737 (2018).

### 10 III. The Takings Clause

11 Plaintiffs also contend that the State’s confiscatory and retrospective ban on the  
12 possession of magazines over ten rounds without government compensation constitutes  
13 an unconstitutional taking. “For centuries, the primary meaning of “keep” has been “to  
14 retain possession of.” There is only one straightforward interpretation of “keep” in the  
15 Second Amendment, and that is that “the people” have the right to retain possession of  
16 arms, subject to reasonable regulation and restrictions.” *Silveira v. Lockyer*, 328 F.3d  
17 567, 573 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of rehearing en banc). The  
18 Attorney General asserts that, when the government acts pursuant to its police power to  
19 protect the safety, health, and general welfare of the public, a prohibition on possession  
20 of property declared to be a public nuisance is not a physical taking. *See Oppo.* at 22,  
21 (citing *Chicago, B. & Q. Railway Co. v. Illinois*, 200 U.S. 561, 593–594 (1906) and *Akins*  
22 *v. United States*, 82 Fed. Cl. 619, 622 (2008)). The Attorney General then cites a few  
23 courts that have rejected Takings Clause challenges to laws banning the possession of  
24 dangerous weapons. *See Oppo.* at 23 (citing *Akins*, 82 Fed. Cl. at 623–24 (restrictions on  
25 manufacture and sale of machine guns not a taking) and *Gun South, Inc. v. Brady*, 877  
26 F.2d 858, 869 (11th Cir. 1989) (temporary suspension on importation of assault weapons  
27 not a taking)).  
28



1 California has deemed large-capacity magazines to be a nuisance. *See* Cal. Pen.  
2 Code § 32390. That designation is dubious. The Supreme Court recognized a decade  
3 before *Heller*, “[g]uns in general are not ‘deleterious devices or products or obnoxious  
4 waste materials.’” *Staples v. United States*, 511 U.S. 600, 610 (1994) (citation omitted).  
5 Casting a common sized firearm magazine able to hold more than 10 rounds as a  
6 nuisance, as a way around the Second Amendment, is like banning a book as a nuisance,  
7 as a way around the First Amendment. It conjures up images from Ray Bradbury’s  
8 novel, *Fahrenheit 451*, of firemen setting books on fire, or in this case policemen setting  
9 magazines on fire.

10 Plaintiffs remonstrate that the law’s forced, uncompensated, physical dispossession  
11 of magazines holding more than 10 rounds as an exercise of its “police power” cannot be  
12 defended. Supreme Court precedent casts doubt on the State’s contrary theory that an  
13 exercise of the police power can never constitute a physical taking. In *Loretto*, the  
14 Supreme Court held that a law requiring physical occupation of private property was both  
15 “within the State’s police power” *and* an unconstitutional physical taking. *Loretto v.*  
16 *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Court explained that  
17 whether a law amounts to a physical taking is “a separate question” from whether the  
18 state has the police power to enact the law. *Id.* at 425–26 (“It is a separate question,  
19 however, whether an otherwise valid regulation so frustrates property rights that  
20 compensation must be paid. We conclude that a permanent physical occupation  
21 authorized by government is a taking without regard to the public interests that it may  
22 serve.”). In a similar vein, the Supreme Court holds that a law enacted pursuant to the  
23 state’s “police powers to enjoin a property owner from activities akin to public  
24 nuisances” is not immune from scrutiny under the regulatory takings doctrine. *Lucas v.*  
25 *South Carolina Coastal Council*, 505 U.S. 1003, 1020–27 (1992). The Court reasoned  
26 that it was true “[a] fortiori” that the “legislature’s recitation of a noxious-use  
27 justification cannot be the basis for departing from our categorical rule that total  
28 regulatory takings must be compensated.” *Id.* at 1026.



1 Recently, the Supreme Court summarized some of the fundamental principles of  
2 takings law in *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017). “The Takings Clause of the  
3 Fifth Amendment provides that private property shall not be taken for public use, without  
4 just compensation. The Clause is made applicable to the States through the Fourteenth  
5 Amendment. As this Court has recognized, the plain language of the Takings Clause  
6 requires the payment of compensation whenever the government acquires private  
7 property for a public purpose, but it does not address in specific terms the imposition of  
8 regulatory burdens on private property.” *Id.* at 1942 (quotations and citations omitted).  
9 *Murr* notes that almost a century ago, the Court held that “while property may be  
10 regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”  
11 *Id.* (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

12 Takings jurisprudence is flexible. There are however, two guides set out by *Murr*  
13 for detecting when government regulation is so burdensome that it constitutes a taking.  
14 “First, with certain qualifications a regulation which denies all economically beneficial or  
15 productive use of land will require compensation under the Takings Clause. Second,  
16 when a regulation impedes the use of property without depriving the owner of all  
17 economically beneficial use, a taking still may be found based on a complex of factors,  
18 including (1) the economic impact of the regulation on the claimant; (2) the extent to  
19 which the regulation has interfered with distinct investment-backed expectations; and (3)  
20 the character of the governmental action.” *Murr*, 137 S. Ct. at 1938 (citations and  
21 quotation marks omitted). “[A] physical *appropriation* of property g[ives] rise to a *per se*  
22 taking, without regard to other factors.” *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2427  
23 (2015).

24 The dispossession requirement of § 32310(c) & (d) imposes a rare hybrid taking.  
25 Subsection (d)(3) is a type of physical appropriation of property in that it forces owners  
26 of large capacity magazines to “surrender” them to a law enforcement agency “for  
27 destruction.” Thus, (d)(3) forces a *per se* taking requiring just compensation. But there  
28 are two other choices. Subsection (d)(2) forces the owner to sell his magazines to a

1 firearms dealer. It is a fair guess that the fair market value of a large capacity magazine I  
2 the shadow of a statute that criminalizes commerce and possession in the State of  
3 California, will be near zero. Of course, the parties spend little time debating the future  
4 fair market value for to-be-relinquished magazines. Subsection (d)(1) forces the owner to  
5 “remove” their large capacity magazines “from the state,” without specifying a method or  
6 supplying a place. This choice obviously requires a place to which the magazines may be  
7 lawfully removed. In other words, (d)(1) relies on other states, in contrast to California,  
8 which permit importation and ownership of large capacity magazines. With the typical  
9 retail cost of a magazine running between \$20 and \$50, the associated costs of removal  
10 and storage and retrieval may render the process costlier than the fair market value (if  
11 there is any) of the magazine itself. Whatever stick of ownership is left in the magazine-  
12 owner’s “bundle of sticks,” it is the short stick.

13 Here, California will deprive Plaintiffs not just of the *use* of their property, but of  
14 *possession*, one of the most essential sticks in the bundle of property rights. Of course, a  
15 taking of one stick is not necessarily a taking of the whole bundle. *Murr*, 137 S. Ct. at  
16 1952 (Roberts, C.J., dissenting) (“Where an owner possesses a full ‘bundle’ of property  
17 rights, the destruction of one strand of the bundle is not a taking, because the aggregate  
18 must be viewed in its entirety.”). Nevertheless, whatever expectations people may have  
19 regarding property regulations, they “do not expect their property, real or personal, to be  
20 actually occupied or taken away.” *Horne*, 135 S. Ct. at 2427. Thus, whatever might be  
21 the State’s authority to ban the sale or use of magazines over 10 rounds, the Takings  
22 Clause prevents it from compelling the physical dispossession of such lawfully-acquired  
23 private property without just compensation.

#### 24 IV. CONCLUSION

25 Magazines holding more than 10 rounds are “arms.” California Penal Code  
26 Section 32310, as amended by Proposition 63, burdens the core of the Second  
27 Amendment by criminalizing the acquisition and possession of these magazines that are  
28 commonly held by law-abiding citizens for defense of self, home, and state. The

1 regulation is neither presumptively legal nor longstanding. The statute hits at the center  
2 of the Second Amendment and its burden is severe. When the simple test of *Heller* is  
3 applied, a test that persons of common intelligence can understand, the statute fails and is  
4 an unconstitutional abridgment. It criminalizes the otherwise lawful acquisition and  
5 possession of common magazines holding more than 10 rounds – magazines that law-  
6 abiding responsible citizens would choose for self-defense at home. It also fails the strict  
7 scrutiny test because the statute is not narrowly tailored – it is not tailored at all. Even  
8 under the more forgiving test of intermediate scrutiny, the statute fails because it is not a  
9 reasonable fit. It is not a reasonable fit because, among other things, it prohibits law-  
10 abiding concealed carry weapon permit holders and law-abiding U.S Armed Forces  
11 veterans from acquiring magazines and instead forces them to dispossess themselves of  
12 lawfully-owned gun magazines that hold more than 10 rounds or suffer criminal  
13 penalties. Finally, subsections (c) and (d) of § 32310 impose an unconstitutional taking  
14 without compensation upon Plaintiffs and all those who lawfully possess magazines able  
15 to hold more than 10 rounds.<sup>68</sup>

16 Accordingly, based upon the law and the evidence, upon which there is no genuine  
17 issue, and for the reasons stated in this opinion, Plaintiffs’ motion for summary judgment  
18 is granted.<sup>69</sup> California Penal Code § 32310 is hereby declared to be unconstitutional in  
19 its entirety and shall be enjoined.

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21  
22 <sup>68</sup> This declaration concerns the current version of § 32310. But similar constitutional  
23 defects can be found in the prior iterations of the statute. The Court’s declaration does  
24 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.

25 <sup>69</sup> The Attorney General asks the Court to take judicial notice of exhibits A through Q  
26 which are copies of statutes and ordinances from various jurisdictions. (Dkt. No. 53-1.)  
27 The request is granted. The Attorney General objects to various declarations submitted  
28 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.

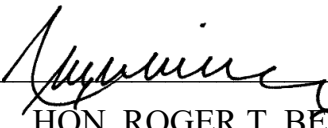
1 This decision is a freedom calculus decided long ago by Colonists who cherished  
2 individual freedom more than the subservient security of a British ruler. The freedom  
3 they fought for was not free of cost then, and it is not free now.

4 **IT IS HEREBY ORDERED** that:

5 1. Defendant Attorney General Xavier Becerra, and his officers, agents, servants,  
6 employees, and attorneys, and those persons in active concert or participation with him,  
7 and those duly sworn state peace officers and federal law enforcement officers who gain  
8 knowledge of this injunction order, or know of the existence of this injunction order, are  
9 enjoined from enforcing California Penal Code section 32310.

10 2. Defendant Becerra shall provide, by personal service or otherwise, actual notice  
11 of this order to all law enforcement personnel who are responsible for implementing or  
12 enforcing the enjoined statute. The government shall file a declaration establishing proof  
13 of such notice.

14 DATED: March 29, 2019

  
HON. ROGER T. BENITEZ  
United States District Judge