

1 Anthony Schoenberg (State Bar No. 203714)  
tschoenberg@fbm.com  
2 Rebecca H. Stephens (State Bar No. 299234)  
rstephens@fbm.com  
3 Farella Braun + Martel LLP  
4 235 Montgomery Street, 17<sup>th</sup> Floor  
San Francisco, California 94104  
5 Telephone: (415) 954-4400  
Facsimile: (415) 954-4480  
6

7 Attorneys for *Amicus Curiae*  
Law Center to Prevent Gun Violence  
8

9 UNITED STATES DISTRICT COURT  
10 EASTERN DISTRICT OF CALIFORNIA  
11

12 WILLIAM WIESE, an individual;  
JEERMIAH MORRIS, an individual;  
13 LANCE COWLEY, an individual;  
14 SHERMAN MACASTON, an  
individual; ADAM RICHARDS, in his  
15 capacity as Trustee of the Magazine  
Ban Lawsuit Trust; CLIFFORD  
16 FLORES, individually and as trustee of  
the Flores Family Trust; L.Q. DANG,  
17 an individual; FRANK FEDEREAU, an  
individual; ALAN NORMANDY, an  
18 individual; TODD NIELSEN, an  
individual; THE CALGUNS  
19 FOUNDATION; FIREARMS POLICY  
20 FOUNDATION; FIREARMS POLICY  
21 FOUNDATION; and SECOND  
AMENDMENT FOUNDATION,  
22

23 Plaintiffs,

24 vs.

25 XAVIER BECERRA, in his official  
capacity as Attorney General of the  
26 State of California; and DOES 1-10,  
27

28 Defendants.

Case No. 2:17-903 WBS KJN

**BRIEF OF *AMICUS CURIAE* LAW  
CENTER TO PREVENT GUN  
VIOLENCE IN SUPPORT OF  
DEFENDANT’S OPPOSITION TO  
PLAINTIFFS’ MOTION FOR A  
PRELIMINARY INJUNCTION**

Hon. William B. Shubb

Date: June 29, 2017  
Time: 9:00 a.m.  
Location: Courtroom 5, 14<sup>th</sup> Floor

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
INTEREST OF <i>AMICUS CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	5
I. The Challenged Amendments to California’s Large-Capacity Magazine Restrictions Close a Dangerous Loophole in Existing Law .....	5
A. California’s LCM Laws and the “Grandfathering” Loophole .....	5
B. The Need for Proposition 63 .....	7
C. Enactment of California’s LCM Possession Ban .....	11
D. Proposition 63 is the Controlling Version of the Possession Ban .....	11
II. The LCM Possession Ban is Constitutional Because It Regulates Activity Outside the Scope of the Second Amendment’s Protections .....	12
A. LCMs Are Not Second Amendment-Protected “Arms” .....	14
B. Even If LCMs Are Arms, They Are Unprotected by the Second Amendment Because They Are “Dangerous and Unusual” .....	16
1. LCMs Are Dangerous .....	16
2. LCMs are “Unusual,” in California and Nationwide .....	16
C. LCMs Are Unprotected by the Second Amendment Because They Are Most Suitable for Military Use .....	19
D. LCM Restrictions Are “Longstanding” and Outside the Scope of the Second Amendment .....	20
III. CONCLUSION .....	23

**TABLE OF AUTHORITIES**

**Page**

**Federal Court Cases**

1  
2  
3  
4 *District of Columbia v. Heller*,  
5 554 U.S. 570 (2008) .....*passim*  
6 *Friedman v. City of Highland Park*,  
7 784 F.3d 406 (7th Cir. 2015) ..... 13, 17  
8 *Fyock v. City of Sunnyvale*,  
9 779 F.3d 991 (9th Cir. 2015) .....*passim*  
10 *Hightower v. City of Boston*,  
11 693 F.3d 61 (1st Cir. 2012) ..... 20  
12 *Jackson v. San Francisco*,  
13 746 F.3d 953 (9th Cir. 2014) ..... 15  
14 *Kolbe v. Hogan*,  
15 849 F.3d 114 (4th Cir. Feb. 21, 2017) ..... 1, 18, 19  
16 *Kolbe v. O’Malley*,  
17 42 F. Supp. 3d 768 (D. Md. Aug. 12, 2014) ..... 18  
18 *McDonald v. City of Chicago*,  
19 561 U.S. 742 (2010) ..... 1  
20 *Miller v. California*,  
21 413 U.S. 15 (1973) ..... 17  
22 *New York State Rifle & Pistol Association v. Cuomo*,  
23 804 F.3d 242 (2d Cir. 2015) ..... 7, 13  
24 *Peruta v. San Diego*,  
25 824 F.3d 919 (9th Cir. 2016) ..... 1  
26 *San Francisco Veteran Police Officers Ass’n et al. v. San Francisco*,  
27 No. 13-cv-05351-WHA (N.D. Cal. Jan. 16, 2014) ..... 11  
28 *Silvester v. Harris*,  
843 F.3d 816 (9th Cir. 2016) ..... 5, 20, 23

**State Court Cases**

27 *People v. Bustamante*,  
28 57 Cal. App. 4th 693 (Cal. Ct. App. 1997) ..... 11, 12

1 *People v. Dobbins*,  
 2 73 Cal. 257 (Cal. 1887)..... 12

**State Statutory Authorities**

3 Act for Regulating and Disciplining the Militia, 1785 Va. Acts ch. 1, § 3, p. 2..... 15

4 Cal. Gov. Code § 9605 ..... 12

**Regulations**

6 14 Cal. Code Reg. §353(d) ..... 18

**Legislative Materials**

8 159 Cong. Rec. S2743 (daily ed. Apr. 17, 2013) ..... 2

**Additional Authorities**

10

11 *Accessories*, ATLANTIC FIREARMS,  
 12 [www.atlanticfirearms.com/accessories.html](http://www.atlanticfirearms.com/accessories.html) (last visited Jun. 21, 2017) ..... 14

13 *Accessories*, PALMETTO STATE ARMORY,  
 14 [palmettostatearmory.com/index.php/accessories.html](http://palmettostatearmory.com/index.php/accessories.html) (last visited Jun.  
 21, 2017) ..... 14

15 Bill Analysis for 2013 Cal. SB 396 (quoting L.A. County Sheriff’s  
 16 Department) ..... 6

17 Brian Freskos, Baltimore Police Are Recovering More Guns Loaded With  
 18 High-Capacity Magazines, Despite Ban on Sales, THE TRACE, Mar. 27,  
 2017, [https://www.thetrace.org/2017/03/high-capacity-magazine-ban-  
 19 baltimore-police/](https://www.thetrace.org/2017/03/high-capacity-magazine-ban-baltimore-police/)..... 6, 10, 14, 16

20 John Wilkens, *Construction Workers Felt They ‘Had To Do Something*, San  
 21 Diego Union-Tribune, Oct. 11, 2010,  
[http://www.sandiegouniontribune.com/sdut-hailed-as-heroes-  
 22 construction-workers-who-stopped-2010oct11-htmlstory.html](http://www.sandiegouniontribune.com/sdut-hailed-as-heroes-construction-workers-who-stopped-2010oct11-htmlstory.html)..... 3

23 Joanna Molloy, Ex-NYPD Top Cop Bill Bratton Pushing for Overdue Ban  
 24 on Assault-Weapons Ammo Clips, N.Y. DAILY NEWS, May 19, 2011,  
[http://www.nydailynews.com/news/crime/ex-nypd-top-bill-bratton-  
 25 pushing-overdue-ban-assault-weapons-ammo-clips-article-1.142101](http://www.nydailynews.com/news/crime/ex-nypd-top-bill-bratton-pushing-overdue-ban-assault-weapons-ammo-clips-article-1.142101). ..... 4

26 Law Center to Prevent Gun Violence, *Large Capacity Magazines*,  
[http://smartgunlaws.org/gun-laws/policy-areas/classes-of-weapons/large-  
 27 capacity-magazines/#state](http://smartgunlaws.org/gun-laws/policy-areas/classes-of-weapons/large-capacity-magazines/#state) (last accessed Jun. 18, 2017) ..... 7

28 Louis Klarevas, *Rampage Nation: Securing America From  
 Mass Shootings* (2016) ..... 8

1 Mayors Against Illegal Guns, *Analysis of Recent Mass Shootings* ,  
 2 [http://libcloud.s3.amazonaws.com/9/56/4/1242/1/analysis-of-recent-](http://libcloud.s3.amazonaws.com/9/56/4/1242/1/analysis-of-recent-mass-shootings.pdf)  
 3 [mass-shootings.pdf](http://libcloud.s3.amazonaws.com/9/56/4/1242/1/analysis-of-recent-mass-shootings.pdf). (Jan. 2013) ..... 8

4 Press Release, Citizens Crime Commission of New York City, NYC & LA  
 5 City Councils Introduce Rezo for Federal Ban on Large Capacity  
 6 Magazines 2 (Mar. 2, 2011),  
 7 <http://www.nycrimecommission.org/pdfs/CrimeCmsnNYCLACouncils.pdf>  
 8 ..... 6

9 Rick Jervis, Gun Control Advocates Target High-Capacity Magazines, USA  
 10 Today (Jul. 31, 2012)..... 10

11 Robert Spitzer, Gun Law History in the United States and Second  
 12 Amendment Rights, 80 Law & Cont. Probs. 55, 68 (2017),  
 13 [http://lcp.law.duke.edu/article/gun-law-history-in-the-united-states-and-](http://lcp.law.duke.edu/article/gun-law-history-in-the-united-states-and-second-amendment-rights-spitzer-vol80-iss2/)  
 14 [second-amendment-rights-spitzer-vol80-iss2/](http://lcp.law.duke.edu/article/gun-law-history-in-the-united-states-and-second-amendment-rights-spitzer-vol80-iss2/) ..... 14, 21

15 Shaila Dewan, *Hatred Said to Motivate Tenn. Shooter*, N.Y. Times, Jul. 28,  
 16 2008, <http://www.nytimes.com/2008/07/28/us/28shooting.html> ..... 3

17 Steven D. Levitt, Understanding Why Crime Fell in the 1990s—Four  
 18 Factors that Explain the Decline and Six That Do Not, 18 J. ECON.  
 19 PERSP. 163, 171, 177-81 (2004) ..... 9

20 Thomas Watkins, *LA Police Chief Supports Ban on Big Ammo Magazines*,  
 21 San Diego Union-Tribune, Mar. 2, 2011,  
 22 [http://www.sandiegouniontribune.com/sdut-la-police-chief-supports-ban-](http://www.sandiegouniontribune.com/sdut-la-police-chief-supports-ban-on-big-ammo-magazines-2011mar02-story.html)  
 23 [on-big-ammo-magazines-2011mar02-story.html](http://www.sandiegouniontribune.com/sdut-la-police-chief-supports-ban-on-big-ammo-magazines-2011mar02-story.html)..... 2

24 Violence Policy Center, Backgrounder on Glock 19 Pistol and Ammunition  
 25 Magazines Used in Attack on Representative Gabrielle Giffords And  
 26 Others 1 (Jan. 2011), [http://www.vpc.org/fact\\_sht/AZbackgrounder.pdf](http://www.vpc.org/fact_sht/AZbackgrounder.pdf). ..... 5

20  
21  
22  
23  
24  
25  
26  
27  
28

**INTEREST OF AMICUS CURIAE<sup>1</sup>**

1  
2 *Amicus curiae* the Law Center to Prevent Gun Violence (“Law Center”) is a  
3 national, nonprofit organization dedicated to reducing gun violence. The Law Center  
4 was founded in 1993 in the wake of an assault weapon massacre at the downtown  
5 San Francisco law firm Pettit & Martin, perpetrated by a shooter who was armed  
6 with semiautomatic pistols and large-capacity ammunition magazines. The Law  
7 Center’s founding attorneys later advised on and supported the enactment of the  
8 1994 federal law restricting assault weapons and large-capacity magazines.

9 Today, the Law Center provides comprehensive legal expertise in support of  
10 effective gun safety regulations. Law Center attorneys track and analyze firearms  
11 legislation, evaluate gun violence prevention research and policy proposals, and  
12 participate in Second Amendment litigation nationwide.

13 In 2015, the Law Center advised California’s Lieutenant Governor, Gavin  
14 Newsom, on dangerous gaps that existed in California’s gun laws, including those  
15 regulating military-style ammunition magazines. The Law Center then partnered  
16 with the Lieutenant Governor to draft Proposition 63, a comprehensive package of  
17 gun safety reforms that included a provision prohibiting private possession of large-  
18 capacity magazines. As primary drafter and a key proponent of Proposition 63, the  
19 Law Center has a special interest in participating as an *amicus curiae* in this  
20 constitutional challenge to a key component of the initiative.

21 The Law Center has offered informed analysis as an *amicus curiae* in many  
22 firearm-related cases, including *District of Columbia v. Heller*, 554 U.S. 570 (2008),  
23 *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *Fyock v. City of Sunnyvale*, 779  
24 F.3d 991 (9th Cir. 2015), *Peruta v. San Diego*, 824 F.3d 919 (9th Cir. 2016) (en  
25 banc), and *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc).

26  
27 <sup>1</sup> The Law Center has filed a motion for leave to appear as an *amicus curiae*, but  
28 submits its proposed brief to the Court concurrently to facilitate its consideration  
with Plaintiffs’ preliminary injunction motion.

1 **SUMMARY OF ARGUMENT**

2 On January 8, 2011, a man walked into a grocery store parking lot in Tucson  
3 where U.S. Congresswoman Gabrielle Giffords was hosting a constituent meeting  
4 called “Congress On Your Corner.” Carrying a semiautomatic pistol equipped with  
5 a 33-round magazine, the man opened fire on Congresswoman Giffords, her staff,  
6 and the crowd lined up to meet her. In 15 seconds, he fired 33 rounds and hit 19  
7 victims, killing six, including a nine-year-old girl named Christina-Taylor Green.

8 Congresswoman Giffords’s husband, retired Navy Captain Mark Kelly, later  
9 testified before Congress that, in his view, a law banning ammunition magazines  
10 with a capacity greater than 10 rounds would have saved the young girl’s life:

11 The shooter in Tucson showed up with two 33-round magazines, one of  
12 which was in his 9 millimeter. He unloaded the contents of that  
13 magazine in 15 seconds. Very quickly. It all happened very, very fast.  
14 The first bullet went into Gabby’s head. Bullet number 13 went into a  
15 nine-year-old girl named Christina-Taylor Green, who was very  
16 interested in democracy and our Government and really deserved a full  
17 life committed to advancing those ideas. If he had a 10-round  
18 magazine—well, let me back up. When he tried to reload one 33-round  
19 magazine with another 33-round magazine, he dropped it. And a woman  
20 named Patricia Maisch grabbed it, and it gave bystanders a time to tackle  
21 him. I contend if that same thing happened when he was trying to reload  
22 one 10-round magazine with another 10-round magazine, meaning he  
23 did not have access to a high-capacity magazine, and the same thing  
24 happened, Christina-Taylor Green would be alive today.<sup>2</sup>

25 Unfortunately, preventable tragedies like the one Captain Kelly describes  
26 have become commonplace. Large-capacity magazines (“LCMs”) holding more  
27 than 10 rounds of ammunition—in some cases up to 100 rounds—allow shooters to  
28 inflict mass casualties by continuously firing bullets without pausing to reload. The  
29 Los Angeles Police Chief explains that these extended magazines change a gun  
30 “into a weapon of mass death rather than a home-protection-type device.”<sup>3</sup>

31 \_\_\_\_\_  
32 <sup>2</sup> 159 Cong. Rec. S2743 (daily ed. Apr. 17, 2013) (statement of Sen. Leahy)  
33 (quoting Judiciary Committee testimony of Captain Mark Kelly).

34 <sup>3</sup> Thomas Watkins, *LA Police Chief Supports Ban on Big Ammo Magazines*, SAN  
35 DIEGO UNION-TRIBUNE, Mar. 2, 2011, <http://www.sandiegouniontribune.com/sdut->

1 LCMs are the thread linking numerous recent high-fatality gun massacres,  
 2 including the 2012 Aurora movie theater shooting, where a gunman shot 70 people  
 3 in ten minutes; the 2012 Sandy Hook Elementary shooting, where a gunman fired  
 4 154 rounds, killing 26 children and teachers, in under five minutes; the 2015 San  
 5 Bernardino shooting, where assailants shot 36 people in four minutes; and the 2016  
 6 Orlando nightclub shooting, where a gunman shot over 100 people and killed 49.

7 These horrific events reflect the fact that LCMs are incredibly lethal in the  
 8 hands of mass murderers, enabling even untrained shooters to enter crowded spaces  
 9 and harm many dozens of people in minutes—without the possibility of interruption  
 10 while they are reloading. It is the latter point that makes LCMs so dangerous. In a  
 11 mass shooting, the pause when the shooter reloads is when lives get saved. In  
 12 contrast to the examples above, there are other recent high-profile shootings where  
 13 LCMs were not used, and shooters were apprehended or thwarted from killing  
 14 others while they reloaded, resulting in fewer fatalities.<sup>4</sup>

15 To help prevent the occurrence of high-fatality mass shootings like Aurora,  
 16 Sandy Hook, and Orlando, and to reduce the bloodshed when such tragedies do  
 17 occur, in 2016, California outlawed possession of magazines that can hold more  
 18 than ten rounds of ammunition. As fully discussed below, this measure (the “LCM

19 \_\_\_\_\_  
 20 [la-police-chief-supports-ban-on-big-ammo-magazines-2011mar02-story.html](http://www.sandiegouniontribune.com/sdut-hailed-as-heroes-construction-workers-who-stopped-2010oct11-htlstory.html).

21 <sup>4</sup> For example, in the 2013 massacre at Washington Navy Yard, a man with a seven-  
 22 shell shotgun killed twelve people, but while he reloaded, a victim he had cornered  
 23 was able to crawl to safety. In 2014, a gunman at Seattle Pacific University was  
 24 tackled while he reloaded his shotgun. Other examples abound. *E.g.*, John Wilkens,  
 25 *Construction Workers Felt They ‘Had To Do Something,’* SAN DIEGO UNION-  
 26 TRIBUNE, Oct. 11, 2010, <http://www.sandiegouniontribune.com/sdut-hailed-as-heroes-construction-workers-who-stopped-2010oct11-htlstory.html> (after gunman  
 27 wounded two students, “workers chased after him as he stopped to reload, knocked  
 28 him” down “and held him until police arrived”); *Deer Creek Middle School Shooting: At Least Two Shot in Incident in Littleton, Colorado*, HUFFINGTON POST, Apr. 25, 2010, [http://www.huffingtonpost.com/2010/02/23/deer-creek-middle-school\\_n\\_473943.html](http://www.huffingtonpost.com/2010/02/23/deer-creek-middle-school_n_473943.html) (math teacher “tackled the suspect as he was trying to reload his weapon”); Shaila Dewan, *Hatred Said to Motivate Tenn. Shooter*, N.Y. TIMES, Jul. 28, 2008, <http://www.nytimes.com/2008/07/28/us/28shooting.html> (“It was when the man paused to reload that several congregants ran to stop him.”).



1 possession ban”) was first enacted by the Legislature in July 2016; in November  
2 2016, by a more than 25-point margin, California voters adopted the later,  
3 controlling version (“Proposition 63”).

4 California’s LCM possession ban is a lifesaving gun safety measure that is  
5 fully consistent with the Second Amendment. In *District of Columbia v. Heller*, 554  
6 U.S. 570 (2008), the Supreme Court recognized that law-abiding, responsible  
7 citizens have a right to keep an operable handgun in the home for self-defense.  
8 *Heller* held that “[l]ike most rights, the right secured by the Second Amendment is  
9 not unlimited.” It is “not a right to keep and carry any weapon whatsoever in any  
10 manner whatsoever and for whatever purpose.” 554 U.S. at 626. *Heller* approved the  
11 tradition of banning “‘dangerous and unusual weapons,’” and confirmed that other  
12 “‘longstanding” types of gun regulations are lawful. *Id.* at 626-27 & n. 26.

13 California’s ban on high-powered magazines that are frequently used in mass  
14 shootings does not violate the Second Amendment. Californians remain free to  
15 possess a wide variety of guns and ammunition for self-defense. But LCMs are, in  
16 the words of another law enforcement official, “designed as weapons of war . . . to  
17 kill as many people as possible in the shortest period of time.”<sup>5</sup> Restricting these  
18 destructive devices is unlike the handgun ban invalidated in *Heller*. To suggest  
19 otherwise would read *Heller*’s recognition that people are not entitled to “any  
20 weapon whatsoever in any manner whatsoever” out of that landmark opinion. The  
21 Constitution does not guarantee a right to possess an exceedingly dangerous  
22 accessory that is designed, and has repeatedly been used, to inflict mass casualties  
23 before anyone has time to intervene.

24 Plaintiffs’ Second Amendment challenge fails because California’s LCM  
25 possession ban does not burden Second Amendment-protected activity. Large-

26 \_\_\_\_\_  
27 <sup>5</sup> Joanna Molloy, Ex-NYPD Top Cop Bill Bratton Pushing for Overdue Ban on  
28 <http://www.nydailynews.com/news/crime/ex-nypd-top-bill-bratton-pushing-overdue-ban-assault-weapons-ammo-clips-article-1.142101>.

1 capacity magazines are a lethal accessory, not a protected “arm,” but either way,  
2 they may be constitutionally prohibited because they are dangerous and unusual, and  
3 best suited for military applications rather than self-defense. California’s LCM ban  
4 also has “longstanding” antecedents and thus falls outside the scope of the Second  
5 Amendment’s protections. Because Plaintiffs cannot succeed on the merits of their  
6 Second Amendment claim,<sup>6</sup> the Court should deny their motion for a preliminary  
7 injunction.<sup>7</sup>

## 8 ARGUMENT

### 9 **I. THE CHALLENGED AMENDMENTS TO CALIFORNIA’S LARGE- 10 CAPACITY MAGAZINE RESTRICTIONS CLOSE A DANGEROUS LOOPHOLE IN EXISTING LAW**

#### 11 **A. California’s LCM Laws and the “Grandfathering” Loophole**

12 Recognizing the need to regulate the exceedingly lethal magazines used to  
13 devastating effect by mass shooters, the California Legislature first restricted access  
14 to LCMs over seventeen years ago. Starting in January 2000, California prohibited  
15 the manufacture, importation, sale, and transfer of magazines accepting more than  
16 10 rounds of ammunition. This state law—like the federal LCM restrictions in place  
17 from 1994 to 2004—was adopted soon after LCMs started to surge in popularity.  
18 Prior to the 1980s, the only handgun most American gun owners possessed was a  
19 revolver, which typically held six rounds.<sup>8</sup> It was not until the 1980s that the gun  
20

21 <sup>6</sup> As the State’s briefs demonstrate, even if the LCM possession ban implicates the  
22 Second Amendment’s protections, the law easily withstands the applicable standard  
23 of intermediate scrutiny. The State’s evidence amply shows that the ban is  
24 “substantially related to the important government interest of reducing firearm-  
related deaths and injuries.” *Silvester v. Harris*, 843 F.3d 816, 827 (9th Cir. 2016)  
(quotation omitted). Sources cited in this brief support that conclusion, as well.

25 <sup>7</sup> The State’s briefs also correctly explain why the LCM possession ban is not  
unconstitutionally vague or a government “taking.” The Law Center joins those  
arguments in full.

26 <sup>8</sup> Violence Policy Center, *Backgrounder on Glock 19 Pistol and Ammunition*  
27 *Magazines Used in Attack on Representative Gabrielle Giffords And Others* 1 (Jan.  
28 2011), [http://www.vpc.org/fact\\_sht/AZbackgrounder.pdf](http://www.vpc.org/fact_sht/AZbackgrounder.pdf). This means that, before  
the 1980s, average Americans relied on six round revolvers for self-defense.  
Plaintiffs point to no evidence that revolvers were believed inadequate then.

1 industry aggressively produced and promoted pistols that can be equipped with  
 2 larger magazines.<sup>9</sup> In the 1980s and 1990s, jurisdictions—including California—  
 3 saw that widespread access to extended-capacity magazines posed a significant  
 4 danger to police and the public, and modern LCM restrictions came into being.

5 Although the state banned the manufacture, sale, and transfer of LCMs in  
 6 2000, California initially did not ban *possession* of these LCMs, instead  
 7 grandfathering in possession of LCMs obtained before 2000. Instead of serving as a  
 8 limited exception, the grandfathering clause actually made California’s LCM  
 9 restrictions nearly impossible to implement. Because LCMs lack identifying marks  
 10 to indicate when they were manufactured or sold, grandfathering meant that police  
 11 officers who came upon LCMs could not determine whether they were legally  
 12 obtained. The Los Angeles County Sheriff’s Department has explained that the  
 13 state’s LCM “law is difficult to enforce since the date of acquisition is nearly  
 14 impossible to prove,” and magazines “acquired before the ban, or illegally  
 15 purchased in other states since the ban, are usually indistinguishable. A ban on the  
 16 possession of high capacity magazines will help address this issue.”<sup>10</sup>

17 Reflecting the sheer difficulty of enforcement, the Los Angeles Police  
 18 Department continued to recover drastically *larger* numbers of crime guns loaded  
 19 with LCMs in the years after the enactment of the 2000 restrictions, suggesting the  
 20 law was not having its intended effect. The LAPD’s numbers for recovered LCMs  
 21 rose from 38 in 2003 to anywhere from 151 to 940 in each year between 2004 and  
 22 2010, an increase of between 297% and 2,374%.<sup>11</sup> Other states that have prohibited  
 23 the sale, but not possession, of LCMs have observed a similar trend.<sup>12</sup>

24 \_\_\_\_\_  
 25 <sup>9</sup> *Id.*

26 <sup>10</sup> Bill Analysis for 2013 Cal. SB 396 (quoting L.A. County Sheriff’s Department).

27 <sup>11</sup> Press Release, Citizens Crime Commission of New York City, NYC & LA City  
 Councils Introduce Rezo for Federal Ban on Large Capacity Magazines 2 (Mar. 2,  
 2011), <http://www.nycrimecommission.org/pdfs/CrimeCmsnNYCLACouncils.pdf>.

28 <sup>12</sup> Brian Freskos, *Baltimore Police Are Recovering More Guns Loaded With High-Capacity Magazines, Despite Ban on Sales*, THE TRACE, Mar. 27, 2017,

1 To address the troubling proliferation of LCMs in California despite a ban on  
 2 their sale or transfer, in 2015, the Law Center drafted—and Lieutenant Governor  
 3 Gavin Newsom introduced—Proposition 63 (also called the “Safety For All Act of  
 4 2016”), a voter initiative that appeared on the November 2016 ballot. The measure  
 5 encompassed several proposed improvements to California’s gun laws, including  
 6 provisions to generally prohibit possession of large-capacity ammunition magazines  
 7 by closing the state’s grandfathering loophole.

8 **B. The Need for Proposition 63**

9 When considering and ultimately approving legislation to prohibit possession  
 10 of LCMs, California drew on the experiences of other states that have enacted this  
 11 policy.<sup>13</sup> In each instance, LCM restrictions were adopted to protect the public from  
 12 the devastating use of LCMs in shootings involving multiple victims, including  
 13 mass shootings in public places and attacks on police officers. When LCMs are used  
 14 in mass attacks, the outcome is far more lethal. On average, shooters who use LCMs  
 15 or assault weapons shoot more than twice as many victims (151% more) and kill

16 \_\_\_\_\_  
 17 <https://www.thetrace.org/2017/03/high-capacity-magazine-ban-baltimore-police/>.

18 <sup>13</sup> Plaintiffs’ claim that California’s possession ban is “more severe” than many  
 19 other states’ laws (Pls. Mem. P & A at 15) is erroneous, as the descriptions they  
 20 provide this Court of those laws are factually incorrect. For instance, Plaintiffs say  
 21 that New York’s law is unlike California’s because it grandfathers LCMs possessed  
 22 before 1994 (*id.*), but New York ended grandfathering in 2013. *New York State Rifle*  
 23 *& Pistol Ass’n v. Cuomo*, 804 F.3d 242, 249 (2d Cir. 2015) (“Although New York  
 24 had restricted possession of such magazines since 2000, the [2013] SAFE Act  
 25 eliminated a grandfather clause for magazines manufactured before September  
 26 1994.”). Plaintiffs are similarly mistaken that New Jersey and D.C. have weaker  
 27 laws. New Jersey has generally prohibited possession of LCMs, with no  
 28 grandfathering, since 1992 (1992 N.J. S.N. 1440, § 1 (creating N.J. Stat § 2C:39-  
 3(j))); and Washington D.C. has done so since 2009. D.C. § Code 7-2506.01(b); *id.*  
 § 5-133.16. In fact, New York, New Jersey, and Washington D.C. generally ban  
 LCM possession with no grandfathering, Hawaii bans possession of LCMs usable in  
 handguns with no grandfathering, and Colorado, Connecticut, Maryland, and  
 Massachusetts ban LCM possession with some form of grandfathering. Law Center  
 to Prevent Gun Violence, *Large Capacity Magazines*, [http://smartgunlaws.org/gun-](http://smartgunlaws.org/gun-laws/policy-areas/classes-of-weapons/large-capacity-magazines/#state)  
[laws/policy-areas/classes-of-weapons/large-capacity-magazines/#state](http://smartgunlaws.org/gun-laws/policy-areas/classes-of-weapons/large-capacity-magazines/#state) (last accessed  
 Jun. 18, 2017). Many of these laws have been upheld against Second Amendment  
 challenges (and none have been struck down). *See infra* n. 29.

1 63% more victims as compared to other mass shootings.<sup>14</sup>

2 Plaintiffs try to minimize these statistics by arguing that “mass shootings  
3 comprise a small percentage of all firearm-related crimes.” (Pls. Mem. P & A at 17.)  
4 The relative rarity of mass shootings (and prevalence of other firearm crimes) does  
5 not diminish the importance of legislative efforts to stem fatalities, injuries, and  
6 community trauma resulting from them. But in fact mass shootings are getting less  
7 rare, and have sharply increased over the last decade. Dr. Louis Klarevas recently  
8 surveyed high-fatality mass shootings (where at least 6 people were killed) between  
9 1966 and 2015, and concluded that such massacres have markedly increased in  
10 incidence and lethality, reaching “unprecedented levels in the past ten years.”<sup>15</sup>  
11 Because “mass shooting” is often defined to include incidents where four or more  
12 are killed, Dr. Klarevas also conducted an analysis using that definition. He found  
13 that from 2013 to 2015, an average of 433 Americans were killed annually in four-  
14 or-more-victim attacks—a figure that greatly outstrips annual U.S. fatalities from  
15 terrorist attacks.<sup>16</sup>

16 Plaintiffs also attempt to diminish California’s compelling public safety  
17 interest in reducing mass shooting fatalities by arguing that banning LCM  
18 possession will “have no discernable effect on the incidence or effectiveness of mass  
19 shootings, or violent crime rates in general.” (Pls. Mem. P&A at 18 (citing Moody  
20 Decl., ¶¶ 6, 9).) It is true that LCM restrictions may not reduce violent crime rates  
21 overall, because there are many types of violent crime, and many factors have been  
22

---

23 <sup>14</sup> Mayors Against Illegal Guns, *Analysis of Recent Mass Shootings* 3 (Jan. 2013),  
24 <http://libcloud.s3.amazonaws.com/9/56/4/1242/1/analysis-of-recent-mass-shootings.pdf>.

25 <sup>15</sup> Louis Klarevas, RAMPAGE NATION: SECURING AMERICA FROM MASS SHOOTINGS  
26 215, 78-79 (2016) (Ex. A, at 9); *id.* at 76-77 (Ex. A. at 8) (table showing 41 high-  
27 fatality shootings between 2005 and 2015). The relevant excerpts from Dr.  
28 Klarevas’s book have been attached to this brief as Exhibit A.

<sup>16</sup> *Id.* at 85-86 (Ex. A at 12-13). For example, in the decade after 9/11, terrorists  
killed 27 people in America—the same number of children and educators killed at  
Sandy Hook Elementary in one morning in 2012. *Id.*

1 demonstrated to affect crime rates in America.<sup>17</sup> But the purpose of laws restricting  
2 access to LCMs is to reduce the capacity for firepower, and thus the lethality, of  
3 firearms used in unlawful shootings in particular.<sup>18</sup> And contrary to Plaintiffs’  
4 baseless contention, LCM restrictions have been shown to reduce the incidence and  
5 lethality of shootings in crowded spaces where, absent enforceable ammunition  
6 capacity restrictions, killers are able to inflict mass casualties without interruption.

7 Dr. Klarevas’s recent analysis of major mass shootings demonstrates that  
8 LCM restrictions like California’s are well designed to reduce fatalities during gun  
9 massacres. Analyzing the factors most associated with mass shooting deaths over  
10 nearly five decades, Dr. Klarevas found that the sharpest increase in fatalities is  
11 driven by access to LCMs that allow shooters to hit more targets in a shorter time  
12 before needing to reload. Specifically, he found that “the factor most associated with  
13 high death tolls in gun massacres is the use of a magazine holding more than ten  
14 bullets. If such magazines were completely removed from circulation, the bloodshed  
15 would be drastically reduced.”<sup>19</sup>

16 In fact, Dr. Klarevas found, reduced bloodshed is exactly what occurred  
17 between 1994 and 2004, when federal law restricted sale and possession of LCMs.  
18 The federal ban on assault weapons and LCMs did not necessarily impact violent  
19 crime as a general category, but Dr. Klarevas found that it achieved dramatic  
20 reductions in fatalities resulting from mass shootings.<sup>20</sup> Specifically, he observed:

21 During the ten-year period that the [federal ban] was in effect, the  
22 numbers [of fatalities per mass shooting] declined substantially, with  
only twelve gun massacres, resulting in eighty-nine deaths, for an

23 <sup>17</sup> See, e.g., Steven D. Levitt, *Understanding Why Crime Fell in the 1990s—Four*  
24 *Factors that Explain the Decline and Six That Do Not*, 18 J. ECON. PERSP. 163, 171,  
25 177-81 (2004) (finding that policing and incarceration, combined with reduced use  
of crack-cocaine, led to reduced crime rates in the 1990s).

26 <sup>18</sup> It makes no sense to expect LCM laws to reduce violent crime generally, as  
“violent crime” is much broader than gun crime (or crimes committed with LCMs).

27 <sup>19</sup> *Id.* at 257 (Ex. A, at 24); see also *id.* 215-25 (Ex. A, at 15-20) (calculating impact  
of LCM use on fatalities).

28 <sup>20</sup> *Id.* at 240-43 (Ex. A, at 22-23) (ban was “extremely successful” in reducing  
rampage violence).

1 average of 7.4 fatalities per incident. What’s particularly astounding  
2 about this time period is that during the first four and a half years of the  
3 ban, there wasn’t a single gun massacre in the United States. Not one.  
4 This is unprecedented in modern American history.<sup>21</sup>

4 When the federal ban expired in 2004, fatality rates connected to large-scale  
5 shootings spiked once more, “further evidenc[ing] the [ban’s] effectiveness.”<sup>22</sup>

6 Just as laws restricting access to LCMs can reduce citizen death tolls in mass  
7 shootings, such laws also can reduce the lethality of day-to-day shootings. In  
8 Maryland, where current LCM restrictions are difficult to enforce because state law  
9 has a grandfathering clause, police officers observed that “larger magazines have  
10 surged in popularity among criminals because they can squeeze off more shots  
11 without reloading.”<sup>23</sup> A police spokesman reported that it is “not uncommon for  
12 officers to pull up at crime scenes and find the street littered with spent shell  
13 casings,” and a Baltimore Sun investigation found that in the past ten years, the  
14 number of corpses at the state medical examiner’s office with 10 or more bullet  
15 wounds doubled.<sup>24</sup> This suggests that LCMs are selected for many gun crimes (not  
16 just high-profile mass shootings) for their lethal propensities.

17 Finally, LCM restrictions help protect the police officers who are most likely  
18 to confront heavily armed criminals and killers. Opining on the commonplace use of  
19 LCMs by criminals, the Philadelphia Police Commissioner said simply: “something  
20 needs to happen,” because “[w]e’re outgunned.”<sup>25</sup> In a declaration submitted in  
21 litigation over San Francisco’s LCM ban, Police Captain David Lazar similarly  
22 explained that LCMs pose a heightened danger to police officers. Captain Lazar  
23 cited examples of police officers being targeted by suspects with LCMs or even  
24

25 \_\_\_\_\_  
<sup>21</sup> *Id.* at 243 (Ex. A, at 23).

26 <sup>22</sup> *Id.*

27 <sup>23</sup> Freskos, *supra* n. 12.

28 <sup>24</sup> *Id.*

<sup>25</sup> Rick Jervis, *Gun Control Advocates Target High-Capacity Magazines*, USA TODAY (Jul. 31, 2012) (quoting Police Commissioner Charles Ramsey).

1 being outgunned by a shooter with over 100 rounds of ammunition.<sup>26</sup>

2 In sum, the LCM legislation that California considered, and ultimately  
3 enacted, is an evidence-based measure aimed at reducing the rising death toll from  
4 mass shootings and mitigating the documented risks that the proliferation of LCMs  
5 poses for citizens and law enforcement officers.

6 **C. Enactment of California’s LCM Possession Ban**

7 Proposition 63’s language was finalized in December 2015 and readied for  
8 the November 2016 ballot. However, in the months after Proposition 63’s text  
9 became final, lawmakers galvanized by the recent mass shooting in San Bernardino  
10 introduced dozens of new gun safety bills in the California Legislature. Most of  
11 those bills sought to implement reforms that were not included in Prop 63, but a few  
12 sought to address some of the same loopholes targeted by the earlier-drafted  
13 initiative. On July 1, 2016, Governor Brown signed SB 1446, which, like  
14 Proposition 63, generally prohibits possession of LCMs in California. In November  
15 2016, California voters approved Proposition 63 and enacted it into law.

16 **D. Proposition 63 is the Controlling Version of the Possession Ban**

17 Because Proposition 63 was enacted after SB 1446, and both amend the same  
18 code sections in sometimes inconsistent ways, Proposition 63’s amendments  
19 supersede SB 1446’s amendments. *See People v. Bustamante*, 57 Cal. App. 4th 693,  
20 701 (Cal. Ct. App. 1997).

21 In *Bustamante*, the California Court of Appeal addressed the exact scenario at  
22 issue here, considering two “dueling penal code sections”: one enacted by the  
23 legislature and signed by the Governor in September 1994, and another adopted by  
24 voters in a November 1994 ballot initiative. 57 Cal. App. 4th at 695-96. Neither  
25 code section acknowledged the other (*see id.* at 700)—perhaps due to the same  
26 timing issue that required Proposition 63’s text to be finalized long before both the

27 <sup>26</sup> Decl. of Captain David S. Lazar ISO San Francisco’s Opp. To Plaintiffs’ Motion  
28 for Prelim. Inj. at ¶¶ 8-9, *San Francisco Veteran Police Officers Ass’n et al. v. San Francisco*, No. 13-cv-05351-WHA (N.D. Cal. Jan. 16, 2014), ECF No. 38.



1 November election and the end of the state legislative session. In resolving which of  
2 the dueling sections controlled, the Court of Appeal noted that basic inconsistencies  
3 between the sections made “concurrent operation of these two statutes impossible,”  
4 so pursuant to well-established statutory interpretation rules, “the later act [the voter  
5 initiative] prevails,” and impliedly repealed the earlier law. *Id.* at 699-701.<sup>27</sup>

6 The statutory interpretation principle recognized in *Bustamante* means that  
7 even if Plaintiffs’ vagueness challenge could overcome the other infirmities  
8 discussed in the State’s brief, it still fails. Proposition 63’s LCM provisions, and its  
9 exceptions, are the ones that apply to the Plaintiffs. Their attempt to claim confusion  
10 based on inconsistencies between Proposition 63 and SB 1446 (which they belatedly  
11 raise in a constitutional challenge brought many months after both laws were  
12 passed) only confirms that Proposition 63 controls, based on California’s well-  
13 established rule that a later-enacted law supersedes an earlier conflicting one—even  
14 if both have been codified into “dueling” code sections.

15 The key component of Plaintiffs’ constitutional challenge, their claim that  
16 prohibiting LCM possession violates the Second Amendment, fares no better. As set  
17 forth below, Plaintiffs’ Second Amendment challenge is as meritless as their  
18 vagueness claim. Proposition 63’s LCM possession ban does not violate the Second  
19 Amendment.

20 **II. THE LCM POSSESSION BAN IS CONSTITUTIONAL BECAUSE IT**  
21 **REGULATES ACTIVITY OUTSIDE THE SCOPE OF THE SECOND**  
22 **AMENDMENT’S PROTECTIONS**

23 California’s LCM possession ban is a necessary public safety measure that is

---

24 <sup>27</sup> Other authorities readily confirm that when inconsistent laws are enacted at  
25 different times, the later version controls. *E.g., People v. Dobbins*, 73 Cal. 257, 259  
26 (Cal. 1887) (resolving a conflict between two laws amending the same penal code  
27 section, and concluding, “It is an old and well-settled rule that when two laws upon  
28 the same subject, passed at different times, are inconsistent with each other, the one  
last passed must prevail”); accord Cal. Gov. Code § 9605 (“In the absence of an  
express provision to the contrary in the statute which is enacted last, it shall be  
conclusively presumed that the statute which is enacted last is intended to prevail  
over statutes which are enacted earlier at the same [legislative] session.”).

1 fully consistent with the Second Amendment. Courts addressing laws like  
2 California’s have overwhelmingly concluded that the Constitution does not protect a  
3 right to possess extraordinarily dangerous magazines commonly used by mass  
4 shooters to quickly kill and injure large numbers of people.<sup>28</sup>

5 In *Fyock v. City of Sunnyvale*, the Ninth Circuit heard a Second Amendment  
6 challenge to a local ordinance prohibiting possession of LCMs, and affirmed the  
7 district court’s denial of the challengers’ motion for a preliminary injunction. 779  
8 F.3d 991, 1001 (9th Cir. 2015). The district court had determined that “the  
9 Sunnyvale ordinance imposes some burden on Second Amendment rights” (after  
10 finding that LCMs are in “common use,” and protected by the Amendment); but  
11 then the court concluded that even so, the burden was “slight,” and Sunnyvale  
12 presented sufficient evidence to show that the law was constitutional under  
13 intermediate scrutiny. *Fyock*, 25 F. Supp. 3d 1267, 1281 (N.D. Cal. 2014).

14 In its affirmance, the Ninth Circuit agreed that Sunnyvale’s law passes  
15 intermediate scrutiny, but expressly did *not* decide whether the Second Amendment  
16 protects LCM possession. *E.g.*, *Fyock*, 779 F.3d at 997 (“we need not determine at  
17 this juncture whether firing-capacity regulations are among the longstanding  
18 prohibitions that fall outside of the Second Amendment’s scope”). Instead, the Court  
19 held only that based on the record below, the district court did not abuse its  
20 discretion. *See id.* at 998 (evidence “does not necessarily show that large-capacity  
21 magazines are in fact commonly possessed by law-abiding citizens,” but “we cannot  
22 say that the district court abused its discretion by inferring from the evidence of  
23 record that, at a minimum, magazines are in common use”).

24 After the district court and Ninth Circuit issued their rulings in *Fyock*, new  
25 research on LCM restrictions and their potential to reduce gun violence became

26 \_\_\_\_\_  
27 <sup>28</sup> *E.g.*, *Kolbe v. Hogan*, 849 F.3d 114, 135 (4th Cir. Feb. 21, 2017) (en banc);  
28 *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015); *N.Y. State  
Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 261-64 (2d Cir. 2015); *Heller v.  
District of Columbia (“Heller II”)*, 670 F.3d 1244, 1260-64 (D.C. Cir. 2011).

1 available. This important work includes Dr. Klarevas’s study of high-fatality mass  
 2 shootings, described above,<sup>29</sup> investigations showing that LCMs are still being  
 3 recovered in large numbers in a state with a “grandfathering” loophole,<sup>30</sup> and a  
 4 survey of historical gun laws demonstrating the ubiquity of early twentieth-century  
 5 laws prohibiting particularly dangerous weapons.<sup>31</sup> In addition to confirming that  
 6 California’s LCM ban, like Sunnyvale’s, easily survives intermediate scrutiny, this  
 7 new research also suggests that, in fact, the Second Amendment does *not* protect  
 8 civilian possession of LCMs.

9 In light of this new research and the overall record in this case, California’s  
 10 LCM ban is constitutional because LCMs fall outside the scope of the Second  
 11 Amendment’s protections. There are four independent reasons why this is true.

12 **A. LCMs Are Not Second Amendment-Protected “Arms”**

13 First, the right protected under the Second Amendment applies only to  
 14 “arms.” *Heller*, 554 U.S. at 581. The *Heller* Court relied on a 1773 dictionary  
 15 defining “arms” as “weapons of offence, or armour of defence.” 554 U.S. at 581  
 16 (citing 1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978)). An  
 17 LCM is not a “weapon of offence” or “armour of defence.” Rather, an LCM is an  
 18 ammunition storage device that enhances a gun’s ability to fire without reloading,  
 19 but is in no way an essential functional part of most lawful firearms.

20 The gun industry already draws this distinction by offering magazines for sale  
 21 as “accessories,” not firearms or ammunition.<sup>32</sup> Historical sources also support the  
 22 conclusion that accessories that merely enhance an already functional firearm are

23 \_\_\_\_\_  
 24 <sup>29</sup> Klarevas, *supra* n. 15.

25 <sup>30</sup> Freskos, *supra* n. 12.

26 <sup>31</sup> Spitzer, *infra* n. 41.

27 <sup>32</sup> For instance, Atlantic Firearms differentiates firearms and “ammo” in its online  
 28 store, selling magazines in an entirely separate “accessories” category. *Accessories*,  
 ATLANTIC FIREARMS, [www.atlanticfirearms.com/accessories.html](http://www.atlanticfirearms.com/accessories.html) (last visited Jun.  
 21, 2017). Palmetto State Armory also classifies magazines as “accessories,” not  
 “firearms” or “ammunition.” *Accessories*, PALMETTO STATE ARMORY,  
[palmettostatearmory.com/index.php/accessories.html](http://palmettostatearmory.com/index.php/accessories.html) (last visited Jun. 21, 2017).

1 not “arms.” In his dissent in *Heller*, Justice Stevens cited a Virginia militia law that  
2 “ordered that ‘every one of the said officers . . . shall constantly keep the aforesaid  
3 arms, accoutrements, and ammunition, ready to be produced whenever called  
4 for....’ 554 U.S. at 650 (Stevens, J., dissenting) (quoting Act for Regulating and  
5 Disciplining the Militia, 1785 Va. Acts ch. 1, § 3, p. 2). This founding-era source  
6 clearly distinguished between “arms,” “ammunition,” and a third category,  
7 “accoutrements,” analogous to accessories like expanded-capacity magazines.

8 That is not to say that *ammunition* should never be grouped with “arms” for  
9 purposes of the Second Amendment, or that magazines with a maximum capacity of  
10 ten rounds are not “arms,” either. A magazine that is necessary to provide a  
11 constitutionally protected firearm with some number of bullets might be considered  
12 part of the “arm” because it is essential to the firearm’s core function. *Accord*  
13 *Jackson v. San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (“A regulation  
14 eliminating a person's ability to obtain or use ammunition could thereby make it  
15 impossible to use firearms for their core purpose.”); *Fyock*, 779 F.3d at 998  
16 (recognizing corollary “but not unfettered” right to ammunition that is “necessary to  
17 render [constitutionally protected] firearms operable”).

18 But the argument that some amount of ammunition is “integral” to a gun’s  
19 function has no application to a magazine that enhances ammunition capacity far  
20 beyond what would ordinarily be available. Indeed, LCMs serve a totally separate  
21 purpose from the ammunition needed to operate protected arms—they drastically  
22 enhance ammunition storage for guns equipped with them. This separate function of  
23 an LCM supports categorizing it separately from both arms and ammunition.

24 LCMs are not arms or ammunition, but are non-essential accessories, like  
25 scopes or silencers. Such accessories, which are not essential for most guns’ core  
26 operation, are not “arms” and are not protected by the Second Amendment.

27  
28

1           **B.     Even If LCMs Are Arms, They Are Unprotected by the Second**  
2           **Amendment Because They Are “Dangerous and Unusual”**

3           Even if LCMs are “arms,” the Second Amendment does not protect them  
4 because they are “dangerous and unusual.” *See Fyock*, 779 F.3d at 997.

5           **1.     LCMs Are Dangerous**

6           In *Fyock*, the Ninth Circuit stated that LCMs could be prohibited on the  
7 grounds that they are “dangerous and unusual” if there is sufficient evidence that  
8 LCMs pose an “increased danger” and are “unusual.” *See id.* at 998.

9           Large-capacity magazines, which can fire as many as 100 rounds at once,  
10 pose a vastly “increased danger” because they substantially boost the lethality of the  
11 firearms using them. The evidence presented above shows that LCMs are  
12 catastrophic when employed in a confined area packed with people, because the  
13 best, or only, opportunity to stop such shooters is when they reload. Moreover, a  
14 recent study (discussed *supra* at pp. 8-9) shows that major mass shootings have  
15 increased in frequency, and more lives are being lost—the latter trend attributable to  
16 the use of LCMs. Such magazines are also being used more in day-to-day crimes on  
17 city streets. In whatever context in which they are used, LCMs are more lethal; they  
18 “increase [criminals’] odds of a kill.”<sup>33</sup>

19           As the firearm accessory most responsible for driving up murder rates during  
20 mass shootings and other gun crimes, LCMs are uniquely dangerous.

21           **2.     LCMs are “Unusual,” in California and Nationwide**

22           Since the manufacture, importation, sale, and transfer of magazines accepting  
23 more than 10 rounds has been prohibited in California since 2000, lawful possession  
24 and use of LCMs is rare within the state. Indeed, there can be little question that  
25 lawfully owned LCMs are unusual in California because legal possession is  
26 generally limited to magazines covered by the grandfathering clause.

27           Plaintiffs, however appear to suggest that the terms “unusual,” and “common

28           <sup>33</sup> *Freskos, supra* n. 12.

1 use,” must be defined by examining aggregate, national possession patterns.<sup>34</sup> But  
 2 *Heller* did not address or decide whether a statewide firearms law must be assessed  
 3 with a national frame of reference, and most lower courts have not addressed (and  
 4 certainly have reached no consensus on) whether a national frame of reference is  
 5 appropriate.<sup>35</sup>

6 Ample reason exists to adopt a localized “common use” standard. Other  
 7 constitutional rights are reviewed on a local basis to account for diversity among the  
 8 states. In the First Amendment context, whether material is obscene depends on  
 9 standards of the relevant community. The Supreme Court has held, “[i]t is neither  
 10 realistic nor constitutionally sound to read the First Amendment as requiring that the  
 11 people of Maine or Mississippi accept public depiction of conduct found tolerable in  
 12 Las Vegas, or New York City,” as “[p]eople in different States vary in their tastes  
 13 and attitudes, and this diversity is not to be strangled by the absolutism of imposed  
 14 uniformity.” *Miller v. California*, 413 U.S. 15, 32-33 (1973); accord *Friedman v.*  
 15 *City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015) (Easterbrook, J.) (“[T]he  
 16 Constitution establishes a federal republic where local differences are cherished as  
 17 elements of liberty, rather than eliminated in a search for national uniformity.”).

18 Similarly, it is neither realistic nor sound to read the Second Amendment to  
 19 thwart California from prohibiting dangerous devices that are already unusual within  
 20 the state, just because not enough other states have enacted this lifesaving measure.  
 21 As many have noted, firearms legislation should be tailored to the safety needs of

---

22 <sup>34</sup> In attempting to establish the prevalence of LCM possession, Plaintiffs also rely  
 23 on a non-binding concurrence to a per curiam Supreme Court opinion in *Caetano*,  
 24 which suggested that stun guns are in “common use” because hundreds of thousands  
 25 have been sold. (Pls. Mem. P & A at 11.) Plaintiffs fail to note that this  
 26 interpretation of “common use” garnered the votes of but two justices, and is not  
 27 binding Supreme Court law.

28 <sup>35</sup> The district court in *Fyock* considered this issue and found that “common use”  
 should be assessed nationally. But on appeal, the Ninth Circuit held only that this  
 was not an abuse of discretion; its opinion did not mandate a national “common use”  
 test. Compare *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1281 (N.D. Cal.  
 2014), with *Fyock v. City of Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015).

1 communities. *E.g.*, *Kolbe v. Hogan*, 849 F.3d 114, 150 (4th Cir. 2017) (en banc)  
2 (Wilkinson, J., concurring). California should be permitted to exercise legislative  
3 judgment to ban dangerous devices that are unusual in its borders.

4       Though the Court can and should take a localized approach to assess whether  
5 LCMs are commonly used for lawful purposes, LCMs are also “unusual”  
6 nationwide. National polling suggests that a solid majority of Americans have never  
7 owned and have no use for LCMs, which alone suggests that LCMs are unusual.<sup>36</sup>  
8 Many experts have testified that it is extremely rare to fire more than ten rounds in  
9 self-defense,<sup>37</sup> and LCM use in hunting is often banned.<sup>38</sup>

10       Examined in isolation, national LCM sales data might suggest that this is a  
11 commonplace accessory in America. However, this may also reflect the popularity  
12 of semiautomatic pistols that can accept ammunition magazines (though those are  
13 itself a recent phenomenon, as such pistols were uncommon until the 1980s). The  
14 popularity of pistols that can *accept* LCMs does not mean LCMs are commonly  
15 used for lawful purposes, such as home defense or hunting. Indeed, there is simply  
16 no evidence that LCMs are “commonly” employed for such lawful purposes. The  
17 fact that LCMs were not widely available until relatively recently, are a destructive  
18 tool linked to rising fatalities in mass shootings, and are not necessary for self-  
19 defense suggests, to the contrary, that they are “unusual.”

20       Regardless of how many LCMs may have been sold, self-defense by  
21

22 <sup>36</sup> CNN/ORC International Poll, *December 17-18 – Gun Rights* 3 (Dec. 2012), at  
23 <http://i2.cdn.turner.com/cnn/2012/images/12/19/cnnpoll.december19.4p.pdf> (in  
24 December 2012 national poll, 62% of respondents favored a ban on the “sale and  
25 possession” of LCMs allowing guns to shoot more than 10 rounds before a reload).

26 <sup>37</sup> *See, e.g., Kolbe v. O’Malley*, 42 F. Supp. 3d 768, 787 (D. Md. Aug. 12, 2014)  
27 (expert found “that it is rare for a self-defender to fire more than ten rounds”; on  
28 average, 2.1 bullets were fired), *aff’d*, 849 F.3d 114 (4th Cir. 2017) (en banc); *Fyock*  
29 *v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1281 (N.D. Cal. Mar. 5, 2014) (fact that  
30 “Plaintiffs only present anecdotal examples rather than quantitative studies”  
31 suggests it is very rarely “necessary to possess a larger magazine in self-defense”).

32 <sup>38</sup> For instance, California prohibits hunting deer with shotguns holding more than  
33 three shells. 14 Cal. Code Reg. §353(d).

1 responsible Americans does not depend on continuously firing tens to hundreds of  
2 bullets without reloading. LCMs are “dangerous and unusual” accessories and are  
3 neither necessary nor well suited for ordinary self-defense. As such, they are  
4 unprotected by the Second Amendment.

5 **C. LCMs Are Unprotected by the Second Amendment Because They**  
6 **Are Most Suitable for Military Use**

7 In *Heller*, the Supreme Court recognized the “tradition of prohibiting the  
8 carrying of dangerous and unusual weapons.” 554 U.S. at 625. The Court also  
9 recognized that “weapons that are most useful in military service—M-16 rifles and  
10 the like—may be banned” without violating the Second Amendment. *Id.* at 627.

11 In *Kolbe v. Hogan*, the en banc Fourth Circuit ruled that weapons and  
12 accessories that are “like” “M-16 rifles”—in that they “are most useful in military  
13 service”—fall outside the scope of the Second Amendment, and may be prohibited.  
14 849 F.3d 114, 135 (4th Cir. 2017) (en banc) (“Because the banned assault weapons  
15 and large capacity magazines are ‘like’ ‘M-16 rifles’—‘weapons that are most  
16 useful in military service’—they are among those arms that the Second Amendment  
17 does not shield.”). The Fourth Circuit treated this as a separate question from  
18 whether a weapon or accessory is in common use, because *Heller*’s statement—  
19 “weapons that are most useful in military service” may be banned—contained no  
20 caveat that such weapons may only be banned if they are uncommon. The *Kolbe*  
21 Court held that assault weapons and LCMs fall outside the scope of the Second  
22 Amendment because they are similar to M-16s and *most* suitable for military  
23 applications, regardless of other “potential uses” in self-defense. *See id.* at 136-37.<sup>39</sup>

24 The same is true here with respect to LCMs. Whatever LCMs’ *potential*  
25 application for self-defense, overwhelming evidence (cited elsewhere in this brief)  
26 demonstrates that proliferation of LCMs gives civilians military-level firepower that

27 <sup>39</sup> In *Fyock*, the Ninth Circuit was not presented with and did not address the  
28 argument that LCMs are most useful in military service. *See Fyock v. City of*  
*Sunnyvale*, 779 F.3d 991, 997-98 (9th Cir. 2015).



1 enables them to turn public spaces into battlefields where they can quickly kill and  
2 disable many people. As the *Kolbe* Court recognized, magazines that allow firing  
3 more than ten rounds without reloading are “particularly designed and most suitable  
4 for military and law enforcement applications,” 849 F.3d at 137, where there is a  
5 need to “enhance” a shooter’s “capacity to shoot multiple human targets very  
6 rapidly.” *Id.*

7 LCMs’ lethality suits them to military and police use, but this same  
8 characteristic makes them popular with criminals who may target the military or  
9 police, and also makes them poorly adapted for civilian defense. *Kolbe*, 849 F.3d at  
10 127 (“[e]ven in the hands of law-abiding citizens, large-capacity magazines are  
11 particularly dangerous”; “inadequately trained civilians...tend to fire more rounds  
12 than necessary and thus endanger more bystanders”); *see also Hightower v. City of*  
13 *Boston*, 693 F.3d 61, 71 (1st Cir. 2012) (noting that “large capacity weapons” are  
14 not “of the type characteristically used to protect the home”). It is for this reason that  
15 LCMs are more analogous to M-16s than to any of the protected weaponry  
16 recognized in *Heller*, and why LCMs are unprotected by the Second Amendment.

17 **D. LCM Restrictions Are “Longstanding” and Outside the Scope of**  
18 **the Second Amendment**

19 *Heller* “recognized that the Second Amendment does not preclude certain  
20 ‘longstanding’ provisions . . . which it termed ‘presumptively lawful regulatory  
21 measures.’” *Silvester*, 843 F.3d at 820 (quoting *Heller*, 554 U.S. at 627 n.26). If a  
22 law “resemble[s] prohibitions historically exempted from the Second Amendment,”  
23 and its “historical prevalence and significance is properly developed in the record,”  
24 *Fyock*, 779 F.3d at 997, then the law is constitutional. Because *Heller*’s examples of  
25 “longstanding” regulations included laws from the twentieth century, *see Silvester*,  
26 843 F.3d at 831, a similarly modern law “can be deemed ‘longstanding’ even if it  
27 cannot boast a precise founding-era analogue.” *Id.* (quotation omitted); *see also*  
28 *Fyock*, 779 F.3d at 997 (“early twentieth century regulations might nevertheless

1 demonstrate a history of longstanding regulation”).

2 Naturally, there are no Founding-era or nineteenth century laws prohibiting  
 3 LCMs, since it was not until much later that semiautomatic pistols that can accept  
 4 such magazines attained a high percentage of the American gun market.<sup>40</sup> LCM  
 5 prohibitions, however, do have exact antecedents in several early twentieth century  
 6 laws prohibiting weapons based on ammunition capacity. In 1932, for example  
 7 Congress enacted a law prohibiting weapons that can fire 12 or more times without  
 8 reloading in the District of Columbia; previously in 1927, Michigan and Rhode  
 9 Island enacted bans with 16- and 12-round caps.<sup>41</sup> Other close, if not identical,  
 10 antecedents include laws from the same time period prohibiting other weapons  
 11 perceived as highly dangerous, including semiautomatic weapons (restricted in as  
 12 many as 10 states in the 1920s and 1930s), and machine guns (restricted in at least  
 13 28 states in about the same period).<sup>42</sup>

14 In a recent article cataloguing colonial and state firearm laws enacted from  
 15 1607 to 1934, Professor Robert Spitzer explains that state laws “identify[ing] certain  
 16 weapons as dangerous or unusual” began appearing in the early part of the 1900s  
 17 with greater frequency.<sup>43</sup> These measures had roots in earlier state laws prohibiting  
 18 spring-loaded gun “traps” and concealed pistols (the latter type of law was  
 19 particularly widespread).<sup>44</sup> Starting in about the 1920s, states “moved aggressively  
 20 to outlaw” a wider range of weapons perceived to be highly dangerous, including  
 21

22 <sup>40</sup> See *supra* n. 8 (“In the 1980s, a very significant shift in gun design and marketing  
 23 occurred: high-capacity semiautomatic pistols became the dominant product line”).

24 <sup>41</sup> Robert Spitzer, *Gun Law History in the United States and Second Amendment*  
 25 *Rights*, 80 *Law & Cont. Probs.* 55, 68 (2017), [http://lcp.law.duke.edu/article/gun-](http://lcp.law.duke.edu/article/gun-law-history-in-the-united-states-and-second-amendment-rights-spitzer-vol80-iss2/)  
 26 [law-history-in-the-united-states-and-second-amendment-rights-spitzer-vol80-iss2/](http://lcp.law.duke.edu/article/gun-law-history-in-the-united-states-and-second-amendment-rights-spitzer-vol80-iss2/)  
 27 (describing Michigan and Rhode Island laws); Act of July 8, 1932, ch. 465, §§ 1, 8,  
 28 47 Stat. 650, 650, 652 (D.C. law).

<sup>42</sup> *Id.* at 68-69 (describing “successful, and at the time obviously uncontroversial,  
 regulation of semi-automatic weapons in the 1920s and 1930s”); *id.* at 67  
 (describing a “concerted national push to regulate ... gangster-type weapons”).

<sup>43</sup> See *id.* at 67.

<sup>44</sup> See *id.* at 67, 63-65.

1 machine guns, silencers, sawed-off shotguns, mechanisms that rigged a gun to fire  
 2 without a trigger pull, and other “pistols, weapons and mechanisms that allowed  
 3 firearms to be fired a certain number of times rapidly without reloading.”<sup>45</sup> These  
 4 new, more aggressive regulatory efforts included the laws (mentioned above)  
 5 restricting certain LCMs, semiautomatic weapons, and machine guns. Dr. Spitzer  
 6 attributes these laws to an increasing awareness that certain weapons preferred by  
 7 gangsters had started to “spread in the civilian population in the mid-to-late  
 8 1920s.”<sup>46</sup> Given Plaintiffs’ acknowledgment that “[a]mmunition magazines and  
 9 feeding devices ... were designed, developed, produced and sold in large quantities  
 10 starting in the early 20th century,” (Amended Complaint ¶ 33) (emphasis added),  
 11 the fact that prohibitions on their possession emerged contemporaneously with the  
 12 new technology underscores that LCM prohibitions are “longstanding” under  
 13 *Heller*.

14 True, this wave of laws in the 1920s and 1930s—including the LCM  
 15 prohibitions mentioned in Michigan, Rhode Island, and the District of Columbia—  
 16 post-dated the *invention* of LCMs, but they emerged as soon as the technology  
 17 began to capture market share. Thus, the “laws were enacted not when these  
 18 weapons were invented, but when they began to circulate widely in society”; their  
 19 timing reflects that throughout “gun regulation history . . . new technologies bred  
 20 new laws when circumstances warranted.”<sup>47</sup>

21 *Fyock* stated that early twentieth century laws could be “longstanding” “if  
 22 their historical prevalence and significance” is developed. 779 F.3d at 997. The  
 23 early twentieth century state laws restricting unusually dangerous weapons meet this  
 24 standard. The laws are prevalent, having been enacted by more than half of states  
 25 (namely: LCM bans in three jurisdictions, machine gun bans in 28 states, and  
 26 semiautomatic weapons restrictions in at least seven but up to as many as ten

---

27 <sup>45</sup> *Id.* at 67.

28 <sup>46</sup> *Id.* at 68.

<sup>47</sup> *Id.*

1 states).<sup>48</sup> And the laws are historically significant, reflecting a “concerted national  
2 push to regulate . . . gangster-type weapons”<sup>49</sup> and others that were perceived as  
3 highly dangerous, at the moment when legislators became aware that the weapons  
4 might start spreading to the civilian public.

5 No law regulating a technology that did not exist at the time of the Founding  
6 will boast a precise Founding-era analogue, and this is true of California’s LCM  
7 possession ban. But the law fits comfortably within a robust early twentieth century  
8 tradition of states prohibiting firearms perceived as highly dangerous when new  
9 technologies threatened to become more widespread. And because this tradition  
10 dates from the 1920s and 1930s—and is older than some categories of regulations  
11 which *Heller* itself termed “longstanding,” *see Silvester*, 843 F.3d at 831—  
12 California’s LCM possession ban is “longstanding,” and therefore constitutional.

13 **III. CONCLUSION**

14 Because large-capacity magazine possession falls outside the scope of the  
15 Second Amendment’s protections, the challenged California law is constitutional.  
16 For the foregoing reasons, and the reasons stated in the State’s opposition brief, the  
17 Court should deny Plaintiffs’ motion for a preliminary injunction.

18 Dated: June 23, 2017

FARELLA BRAUN + MARTEL LLP

19  
20 By: \_\_\_\_\_ /s Anthony Schoenberg

21 Anthony Schoenberg  
22 Email: tschoenberg@fbm.com

23 Attorneys for *Amicus Curiae*  
24 Law Center to Prevent Gun Violence  
25  
26  
27

28 <sup>48</sup> *Id.* at 67-71.

<sup>49</sup> *Id.* at 67.