No. 19-55376

IN THE

United States Court of Appeals for the Ninth Circuit

VIRGINIA DUNCAN, et al.,
Plaintiffs-Appellees

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California,
Defendant-Appellant.

On Appeal From the United States District Court
For the Southern District of California
No. 17-cv-1017

BRIEF OF *AMICUS CURIAE* GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE IN SUPPORT OF DEFENDANT-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Giffords Law Center to Prevent Gun Violence states that it has no parent corporations. It has no stock, and therefore no publicly held company owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Giffords Law Center to Prevent Gun Violence ("Giffords Law Center") was founded in 1993 in the wake of a gun massacre at a San Francisco law firm, perpetrated by a shooter armed with three semiautomatic pistols equipped with large-capacity magazines ("LCMs"). Under its former names (the Legal Community Against Violence and the Law Center to Prevent Gun Violence), the organization supported the 1994 federal law restricting assault weapons and LCMs; advocated for California's 2000 ban on manufacturing and sale of LCMs; and was the primary drafter and key proponent of Proposition 63, the 2016 ballot initiative that prohibits civilian possession of LCMs. The group was renamed Giffords Law Center in October 2017 after joining forces with the gun-safety organization founded by former Congresswoman Gabrielle Giffords.

Today, Giffords Law Center provides free assistance and expertise to lawmakers, advocates, law enforcement officials, and citizens seeking to make their communities safer from gun violence. Its attorneys track and analyze firearm legislation, evaluate gun-violence-prevention research and policy proposals, and participate in Second Amendment litigation nationwide. Giffords Law Center has

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[1] This brief is filed with the consent of all parties. No counsel for a party authored this brief in whole or in part. No person other than *amicus curiae*, its members, or its counsel contributed money to fund this brief's preparation or submission.

provided informed analysis of social science research and constitutional law as an *amicus* in numerous firearm-related and Second Amendment cases.

INTRODUCTION

On January 8, 2011, a man walked into a Tucson parking lot where Congresswoman Gabrielle Giffords was hosting a constituent meeting. Using a semiautomatic pistol equipped with a 33-round magazine, the man opened fire on Congresswoman Giffords, her staff, and members of the public lined up to meet her. In 15 seconds, he fired all 33 rounds and hit 19 victims, killing six, including a federal judge and a nine-year-old girl named Christina-Taylor Green, who was struck by the 13th bullet fired. The carnage stopped only because, as the shooter paused to reload a second 33-round magazine, he dropped it. During that critical pause, a woman named Patricia Maisch grabbed the magazine, which gave bystanders time to tackle the shooter. If the shooter had instead possessed 10-round magazines, Christina-Taylor Green would be alive today. *See* 159 Cong. Rec. S2743 (daily ed. Apr. 17, 2013) (statement of Sen. Leahy) (quoting Judiciary Committee testimony of Captain Mark Kelly).

Preventable tragedies like what happened in Tucson have become commonplace. Mass shootings are no longer rare, isolated events. Over the past ten years, they have occurred more often and killed more people. These horrific public massacres have repeatedly claimed innocent lives, injured and traumatized survivors and witnesses, and left members of the public afraid to go about their daily routines. Importantly for this lawsuit, and making a lethal difference in the Tucson massacre

that killed Christina-Taylor Green, modern mass shooters often use magazines that allow them to kill more victims than they could with a lower ammunition capacity.

LCMs holding more than 10 rounds of ammunition—in some cases up to 100 rounds—enable shooters to inflict mass casualties by continuously firing without pausing as often to reload. LCMs are the thread linking high-fatality gun massacres, including the 2012 Sandy Hook shooting (154 rounds fired, 26 children and teachers killed); the 2015 San Bernardino shooting (36 people shot, 14 killed); the 2016 Orlando shooting (100 people shot, 49 killed); and the 2017 Las Vegas shooting, where a gunman used LCMs to perpetrate the deadliest mass shooting in modern American history, firing nearly continuously into a crowd for ten minutes, killing 58 people and injuring hundreds. Just last year, gunmen used LCMs in the notorious mass killings in Parkland, Florida (34 students, faculty, and staff shot, 17 killed), and Thousand Oaks, California (22 people shot, 12 killed). For Californians, who have experienced multiple gun massacres in the last five years, the extraordinary lethality of LCMs is a foregone conclusion.

LCMs are uniquely dangerous and produce higher death tolls in gun massacres. With LCMs, shooters can unleash a more constant barrage of fire, allowing even untrained shooters to harm or kill dozens of people. As the record in this case reflects, in many mass shootings, the pause to reload is when lives are saved. For example, survivors of the Thousand Oaks shooting reported that they jumped out of

a window to safety when someone in the crowd yelled, "He's reloading!" Veronica Miracle, *Thousand Oaks Mass Shooting Survivor: "I Heard Somebody Yell, 'He's Reloading,'"* ABC News, Nov. 8, 2018. In Parkland, eight students were able to flee down a stairwell during an approximately 13-second pause while the shooter retrieved and inserted a new magazine. *See* Marjory Stoneman Douglas High School Pub. Safety Comm'n, Initial Report Submitted to the Governor, Speaker of the House of Representatives and Senate President (2019) at 32. In Newtown, "nine children were able to run from a targeted classroom while the gunman paused to change out a large-capacity thirty-round magazine." *Kolbe v. Hogan*, 849 F.3d 114, 128 (4th Cir.), *cert. denied*, 138 S. Ct. 469 (2017). Other rampages where LCMs were not used have also been cut short while shooters reloaded—including incidents where shooters were stopped sooner and killed fewer victims. At Kelly Elementary School in Carlsbad, three construction workers subdued a gunman when he paused to reload, stopping him after he shot and injured two children but before anyone was killed. *See* John Wilkens, *Construction Workers Felt They 'Had To Do Something*,' SAN DIEGO UNION TRIBUNE, Oct. 11, 2010. There are many other similar instances where a shooter's pause to reload stemmed carnage and saved lives.[2] A shooter

[2] During the 2013 massacre at the Washington Navy Yard, a man with a seven-shell shotgun killed twelve people, but while he reloaded, a victim he had cornered was able to crawl to safety. In 2014, a gunman at Seattle Pacific University was tackled

using ten-round magazines will necessarily pause to reload "six to nine" times more frequently than when using 30-, 50-, or 100-round magazines. *Kolbe*, 849 F.3d at 128. While imposing constraints on magazine capacity will not prevent all future mass shootings, the record in this case reflects that "reducing the number of rounds that can be fired without reloading increases the odds that lives will be spared." *Id.*; *see* Appellant's Excerpts of Record ("ER") 360 (Klarevas Rev. Rep.) (providing examples in which active shooters were confronted while reloading).

There is no one-size-fits-all approach to preventing gun violence. Congress and States like California have been chipping away at the low-hanging branches—keeping guns out of the hands of those with criminal records or who have engaged in dangerous behavior, requiring gun and ammunition purchasers to obtain a license or undergo a background check, and, here, ensuring that no one shooter can simply stand in one place and fire 15, 30, 40, or 100 rounds in a virtually unceasing torrent. The district court spent the bulk of its opinion explaining why one of the State's initiatives will not solve the problem of gun violence, and may lead to more problems, and goes so far as to say that the "problem of mass shootings is very small."

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while reloading. The examples go on. *See Deer Creek Middle School Shooting*, HUFFINGTON POST, Apr. 25, 2010 (math teacher "tackled the suspect as he was trying to reload"); Sheila Dewan, *Hatred Said To Motivate Tenn. Shooter*, THE NEW YORK TIMES, Jul. 28, 2008 ("It was when the man paused to reload that several congregants ran to stop him.").

ER 67. It offered examples of instances when homeowners were exposed to dangers that may or may not have been prevented or mitigated if they had been able to fire more than 10 shots at their attackers without reloading. *Id.* at 8–10.[3] The complexity and subtlety of these problems, however, is exactly why we leave such macro-level decisions to elected officials and to the legislative process.

In this case, the court stepped outside of the proper judicial role by holding the State to a higher standard of proof than the law requires. The court vented its own concerns about this Circuit's rulings—which the court saw as encroaching upon the Second Amendment—as it criticized and dismissed highly credentialed experts based on the court's own views and the degree of evidentiary uncertainty that characterizes all complex policy decisions. The court also supplied its own facts, from outside the record, in an attempt to combat arguments raised by the State. In effect, the court sought to circumvent both the judicial and legislative process by applying its own values and concerns to California's restrictions on LCMs. But while legislators, juries, and opposing counsel may express those views, a judge as a neutral arbiter should not. This Court should reverse the decision of the district court and remand with instructions to grant summary judgment for the State.

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[3] In the three stories on which the district court relied, the victims survived their attacks without needing to fire more than ten rounds for self-defense. ER 8-10.

ARGUMENT

I. THE DISTRICT COURT APPLIED INTERMEDIATE SCRUTINY IN NAME ONLY

When the State seeks to legislate LCMs, it stands on solid ground. Prohibiting LCMs restricts "only a subset of magazines," so the impact on lawful self-defense is "not severe." *See Fyock v. City of Sunnyvale*, 779 F.3d 991, 999 (9th Cir. 2015) (affirming district court's finding that the impact of a city ordinance restricting possession of LCMs on Second Amendment right was "not severe"); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 964 (9th Cir. 2014) (law that "burdens only the '*manner* in which persons may exercise their Second Amendment rights' . . . resembles a content-neutral speech restriction") (quoting *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013)). By limiting ammunition capacity, California's law permissibly restricts the "manner" in which firearms may be used; it does not prevent the use of any firearms for self-defense or firing more than 10 rounds in self-defense.

In light of these facts, courts should at most apply only intermediate scrutiny to LCM restrictions. *Jackson*, 746 F.3d at 968. Courts engage in an intermediate scrutiny analysis only to ensure that a challenged law was engendered by "*a significant*, *substantial*, or *important government objective*," and has a "*reasonable fit*" between that objective and the means for meeting it. *Pena v. Lindley*, 898 F.3d 969, 979 (9th Cir. 2018) (emphasis added). As this Court has held, no further inquiry is

appropriate—courts should not assume a legislative role and interrogate the State on its rationale for selecting a particular reasonable method to address a substantial government objective. Rather, courts must respect the State's authority to identify and prevent harm to its citizens. *Cf. id.* at 979–80 ("Nor do we substitute our own policy judgment for that of the legislature.").

After expounding at length upon why it disagreed with this Court's binding precedents concerning weapons regulations, the district court reluctantly turned its attention to intermediate scrutiny. ER 51; *id.* at 43 ("Intermediate scrutiny . . . looks for a 'reasonable fit.' It is an overly complex analysis that people of ordinary intelligence cannot be expected to understand. It is the wrong standard."). The court ostensibly accepted California's substantial interests in "(1) protecting citizens from gun violence; (2) protecting law enforcement from gun violence; (3) protecting the public safety (which is like protecting citizens and law enforcement from gun violence); and (4) preventing crime." *Id.* at 52. So far, so good. But then the court went badly astray when assessing whether there is a "reasonable fit" between Section 32310 and those interests.

The court found that Section 32310 "hardly fits at all" with the State's objectives, because it is designed to address "an exceedingly rare problem" (mass shootings), "while at the same time burdening the Constitutional rights of many other California law-abiding responsible citizen-owners of gun magazines holding more

than 10 rounds." *Id.* at 55. In other words, the court disagreed with the State that preventing and mitigating mass shootings would further the State's interest in protecting the public and law-enforcement and preventing crime. Leaving aside that it strains credulity to suggest that the persistent and increasingly common problem of mass shootings is "exceedingly rare," that is *not* intermediate scrutiny. Intermediate scrutiny does not allow the court to decide what is worth regulating.

For example, in *Pena v. Lindley*, this Court upheld the "reasonable" "legislative judgment that preventing cases of accidental [weapons] discharge outweighs the need for discharging a gun without the magazine in place." 898 F.3d at 980. This Court did *not* find that accidental discharges were not *important* or *prevalent* enough to merit infringing on gun owners' rights. *But see* ER 56 (district court finding that there was no reasonable fit because mass shootings occur too infrequently—"an average of one event every two years in the most populous state in the nation"). Nor did this Court conclude in *Pena* that the State's efforts to prevent unintentional shootings were a waste of time because some unintentional shootings still occur in spite of them. *But see id.* at 54 (the court concluding just this about mass shootings: "[e]ighteen years of a state ban on acquiring large-capacity magazines" have not had a "substantial effect" in preventing them); *and id.* at 56 ("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," as "normally the perpetrator brings multiple weapons"). The court overstepped in disregarding the State's concerns about mass shootings in favor of the court's own view of what problems a successful gun-violence-prevention policy should prioritize.

In deciding that restricting magazine size to prevent mass shootings was *not* a reasonable strategy for preventing violence to the public and law-enforcement, the court attacked the sources—and sources of sources—of the evidence relied upon by the State about LCMs and mass shootings. *See* ER 59–60. Again, the court was operating well outside of its bailiwick. Under this Court's intermediate scrutiny precedent, "in considering a city's justifications for its ordinance, we do not impose an unnecessarily rigid burden of proof so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Mahoney v. Sessions*, 871 F.3d 873, 881 (9th Cir. 2017). The court's role is instead to decide whether the legislature has drawn a "reasonable inference[]" that the "government interest would be achieved less effectively in its absence." *Id.* at 883. A court should evaluate the State's "legislative findings," but should not treat them as "'evidence' in the technical sense"—because legislatures are "not obligated, when enacting their statutes, to make a record of the type that an administrative agency or *court* does to accommodate judicial review." *Pena*, 898 F.3d at 979 (emphasis added); *see also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60 (1973) ("We do not

demand of legislatures 'scientifically certain criteria of legislation.'") (internal citation and quotation omitted).

The district court's assessment of Section 32310 turns that guidance inside out: The court admitted that it "decline[d] to rely on anything beyond" what it deemed "hard facts and reasonable inferences drawn from convincing analysis amounting to substantial evidence based on relevant and accurate data sets." ER 53. In fact, the court explicitly criticized the "soft approach" of *Pena* and *Fyock*. *Id.* at 59. To be sure, the court's *criticism* of a legal standard does not prove that it failed to apply that standard, but in this case, the court was clear that it would not apply it:

> Do the surveys pass the [FRE] 403 test for relevance? Yes. Are the surveys admissible under [FRE] 802? No. They are double or triple hearsay. No foundation has been laid. No authentication attempted. Are they reliable? No. Are they anything more than a selected compilation of news articles—articles which are themselves inadmissible? No. Are the compilers likely to be biased? Yes.

Id. at 60. The court admitted that it "evaluat[ed] the empirical robustness of [the State's] evidence in the same objective way used every day by judges everywhere." *Id*. While that approach is laudable in a courtroom, it gives no credence to the ability of the democratically-elected representatives of the People to evaluate evidence on their own and come to reasonable conclusions, which is required under an intermediate scrutiny analysis.

Fyock illustrates the error in the district court's approach. It is on all fours with this case, but the court here reached a different outcome by incorrectly rejecting

a legislative record on the ground that it failed to meet courtroom evidentiary standards. *Fyock* involved a Sunnyvale, California ordinance that, like Section 32310, banned possession of magazines capable of holding more than 10 rounds. 779 F.3d at 994–95. The record included contradictory sets of evidence: the City's "pages of credible evidence, from study data to expert testimony to the opinions of [city officials]," and the appellants' counter-evidence relating to defensive uses of LCMs. *Id.* at 1000. But the City's reliance on substantial evidence mandated legislative deference. *See id.* at 1001. Emphasizing that local governments must be given "a reasonable opportunity to experiment with solutions to admittedly serious problems," this Court upheld the decision reached by the City. *Id.* (quoting *Jackson*, 746 F.3d at 966). Here too, the record contained hundreds of pages of credible studies, expert declarations, and mass-shooting surveys furnished by the State supporting its decision to restrict possession of LCMs. But instead the court took on the improper role of a legislative clerk—or opposing counsel—in attempting to cast doubt on every source and avoid deferring to California's decision to pass Section 32310.[4]

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[4] Even if *Fyock* might be rendered less potent insofar as it involved a preliminary judgment, this Court has repeatedly applied the same analysis to firearm restrictions more generally. And it has repeatedly upheld them. *See, e.g.*, *Pena*, 898 F.3d at 979 (upholding statute requiring certain safety features for handguns because the legislature wins out "[w]hen policy disagreements exist in the form of conflicting legislative 'evidence'"); *Jackson*, 746 F.3d at 969 (holding that a ban on hollow-point ammunition reasonably fits the articulated purposes because the evidence furnished

II. THE DISTRICT COURT FAILED TO APPLY *TURNER* DEFERENCE

The Supreme Court has held that "courts must accord substantial deference to the predictive judgments of Congress." *Turner Broad. Sys., Inc. v. FCC.*, 512 U.S. 622, 665 (1994). That mandate, now simply referred to as "*Turner* deference," requires that courts "give credence to congressional findings," rather than insisting on "'evidence' in the technical sense." *Minority Television Project, Inc. v. FCC*, 736 F.3d 1192, 1199 (9th Cir. 2013) (en banc); *see id.* (Congress "is a political body that operates through hearings, findings, and legislation; it is not a court of law bound by federal rules of evidence.").

Turner's directive applies to state legislative bodies as much as it does to Congress. *See Peruta v. County of San Diego*, 824 F.3d 919, 945 (9th Cir. 2016) (en banc) (Graber J., concurring) (applying *Turner* to California counties' policies prohibiting carrying concealed firearms without a showing of good cause). Under *Turner*, therefore, courts should defer to a State's policy decision to regulate LCMs so long as the State's decision represents a reasonable predictive judgment.

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by San Francisco "fairly supports" the bullet's lethality). The Supreme Court, too, recognizes that courts should defer to legislatures when contested but credible evidence supports a law. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997) (where psychiatric professionals joined conflicting amicus briefs, their disagreements "do not tie the State's hands" in its policy choices).

Unlike its brief foray with intermediate scrutiny, the court did not even pretend to apply *Turner*. *See, e.g.*, ER 63–66. The court, for example, held that intermediate scrutiny does not allow a State to "employ[] a known failed experiment." *Id*. at 66. According to the court, "Congress tried for a decade the nationwide experiment of prohibiting large capacity magazines. It failed. California has continued the failed experiment for another decade and now suggests that it may continue to do so *ad infinitum* without demonstrating success." *Id.* But, even accepting the court's mistaken characterization of the federal LCM law as "failed,"[5] and California's as having shown no success,[6] *Turner* says that it is precisely the job of the state legislature to experiment, including by modifying regulations if one is not as successful as first projected. *See Minority Television Project, Inc.*, 736 F.3d at 1199 ("Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for

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[5] Research suggests that the federal LCM restrictions successfully reduced the use of LCMs in gun crimes, *see* Appellants' Opening Brief at 46–47, and also helped reduce casualties during the deadliest gun massacres. *See* Louis Klarevas, RAMPAGE NATION: SECURING AMERICA FROM MASS SHOOTINGS 240–43 (2016) (while the federal ban was in effect, fatalities during large-scale mass shootings of six or more victims declined substantially, and spiked again when the ban expired).

[6] The district court appeared to decide that California's LCM restrictions are ineffective because mass shootings have occurred in the State despite them, but this unsupported conclusion fails to account for deaths it is reasonable to assume California's magazine capacity laws prevented during that time.

which complete empirical support may be unavailable.") (quoting *Turner Broad. Sys., Inc.*, 512 U.S. at 665). Even adopting the district court's specious assumption that LCM restrictions are a "failed experiment," California could have reasonably found that circumstances have changed to the extent that a limitation on LCMs would now have a greater impact than before. For example, there are more restrictions on gun access by dangerous individuals, greater security in areas where people congregate, and more sophisticated knowledge by the public and law enforcement that changing magazines may give them the time to hide or fight back against a shooter. The court ignored these explanations—one of the many reasons that we rely on legislatures, not courts, to craft and refine public policy.

The district court's other reasons for avoiding *Turner* deference are just as unsound. The court asserted that "the legislative deference doctrine fits better where the subject is technical and complicated." ER 64. But issues such as the cumulative harm of additional magazines, the average time to reload them, and population studies on the threat that larger magazines cause, among other things, *are* complicated. In fact, the court's own supporting cases refute its argument: In *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102–03 (1973), the U.S. Supreme Court "afford[ed] great weight to the decisions of Congress," because "[b]alancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed

is a task of a great delicacy and difficulty." So too, here. This case may not involve "technical" issues, but it does involve "a complex problem with many hard questions and few easy answers," the exact type of problem for which deference to the legislature is intended.[7] *Id.* at 103. And as in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 402 (2000), "the Court in practice defers to *empirical legislative judgments*" (emphasis added), the exact type of data on which the California legislature relied in passing the LCM restrictions here.

The district court also concluded that the subsections of 32310 regulating possession of LCMs (Sections 32310(c) and (d)) do not merit deference, because they "are the products of a ballot proposition." ER 62; *see also id.* at 82–83 (same). According to the court, "[t]he initiative process inherently lacks the indicia of careful debate that would counsel deference." *Id.* at 62–63. But in this instance, the pertinent provisions were, in fact, debated and adopted by the legislature, so the court should not have used the minor amendments by initiative as a shortcut to ignore the measured legislative decision-making supporting the entire statute. California's bans on acquiring and selling LCMs were initially passed by *the California legislature in 2000*. *See* Cal. Penal Code § 32310; S.B. 23, 1999–2000 Reg. Sess. (Cal.

[7] *See also Marshall v. United States*, 414 U.S. 417, 427 (1974) ("[I]n areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.").

1999) (codified at Cal. Penal Code § 32310); Cal. Penal Code § 16740. In July 2016, the California legislature also prohibited possession of LCMs. Although this was followed by a referendum initiative in November 2016, as Appellees concede, that initiative simply "did the same" as the legislative amendment had just months previously. S.B. 1446, 2015–2016 Reg. Sess. (Cal. 2016); Pls' MSJ at 4 (citing Cal. Penal Code § 32310). Unsurprisingly then, Appellees *never* argued that *Turner* deference did not apply to Sections 32310(c) and (d).[8]

Turner keeps courts from playing the role of elected legislators. As in *Minority Television Project*, a court cannot "[i]gnor[e] fundamental principles of separation of powers . . . rewrite the legislation, ignore the congressional evidence, and substitute pop culture and its own policy judgment for that of Congress." 736 F.3d at 1199; *but see e.g.*, ER 54 nn.44–45; *id.* at 60 n.53 (the court attempting to refute the State's expert testimony with Washington Post, CNN, and NPR articles). The district court is guilty of all four errors here.

[8] In any event, California state courts treat propositions voted upon by the public the same as legislative enactments, including by reviewing their "legislative findings." *People v. McKee*, 223 P.3d 566, 585–86, 588 (Cal. 2010).

III. THE COURT ARBITRARILY REJECTED THE STATE EXPERTS' OPINIONS

When courts evaluate weapons restrictions under intermediate scrutiny, their analysis must reflect that the State has discretion to make policy judgments when "social scientists disagree about the practical effect of modest restrictions on concealed carry of firearms," and there is "inconclusive evidence" supporting either the State's or the gun-proponents' positions. *See Pena*, 898 F.3d at 999 (quoting *Peruta*, 824 F.3d at 944 (Graber, J., concurring)). In *Peruta*, a challenge to San Diego's and Yolo Counties' requirements for obtaining a license to carry concealed handguns, Judge Graber, writing for the en banc concurrence, observed that although there were "studies and data challenging the relationship between handgun ownership by lawful citizens and violent crime," there were also "studies and data demonstrating that widespread access to handguns in public increases the likelihood that felonies will result in death and fundamentally alters the safety and character of public spaces." 824 F.3d at 944–45 (quoting *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 99 (2d Cir. 2012)). The concurring judges did not find that there was *no* reliable evidence of the effects of gun restrictions—rather, it found that in light of "conflicting evidence," "it is the legislature's job, not ours, to weigh [the] evidence and make policy judgments." *Id.*; *see also id.* at 942 (en banc majority noting that if it were to reach the question of intermediate scrutiny, "we would entirely agree with the answer the concurrence provides").

The district court admitted that there is research both supporting and rejecting the efficacy of regulating LCMs. *See* ER 72–85. Even if this were true, and the decision whether to regulate a close call, under this Court's precedents, the State can reasonably choose to legislate despite that uncertainty. *See, e.g.*, *Pena*, 898 F.3d at 979. The existence of conflicting evidence is not a basis for rejecting experts' opinions entirely (as the district court seemed to do here), because "[i]n evaluating [the admissibility] of proffered expert testimony, the trial court is a gatekeeper, not a fact finder," and "is not tasked with deciding whether the expert is right or wrong." *Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 813 (9th Cir. 2014) (internal citations and quotations omitted).[9]

Contrary to this Court's precedent, the lower court stepped out of its proper role as a gatekeeper, even at times assuming the role of an opposing lawmaker who disagrees with the legislature's policy choice. In doing so, the court erred in ways that vindicate this Court's concerns with judges treading into the legislative domain:

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[9] The district court also initially declared that Koper's, Allen's, Donohue's, Klarevas's, and Webster's reports were inadmissible because they failed to meet the requirements of Rule 56(c)(4) and merited no exception, *see* ER 74 n.59, but later considered each expert's report—not in the alternative, but to disprove the State's arguments, *id.* at 72–86. The court cannot consider expert reports only *against* the non-moving party who sought to admit them. *See, e.g.*, *Pyramid Techs*, 752 F.3d at 816 (if rejected expert "report had been admitted, the district court would have been required to view it in the light *most favorable* to" the party not moving for summary judgment) (emphasis added).

Professor Louis Klarevas. The district court implied that Professor Klarevas's report is inconsistent with an article he wrote for *The New Republic* in 2011. *See* ER 72. This is a mistake for two reasons. First, the court relied on a misleading excerpt from the article, which is in fact fully consistent with his report. In both the report and his 2011 article, Klarevas concludes that while LCM constraints may not prevent shootings from occurring, the data suggest that they reduce casualties.[10] Second, the court's critique of Klarevas reached far beyond intermediate scrutiny. The State was entitled to consider Klarevas's scientific research when making policy judgments, especially since Klarevas served as a consultant for the United States Institute of Peace and the FBI and has authored over 20 scholarly articles.

Professor John J. Donohue. Having disagreed with conclusions about gun ownership that Professor John J. Donohue drew from a Pew Research report, the court decided those conclusions should be "discounted." ER 76–77. Again, it was at the legislature's discretion, rather than the court's, to agree or disagree with Donohue's research conclusions. The district court's arbitrary rejection of

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[10] In his 2011 article, Klarevas concludes, "While the assault weapons ban might not have prevented the Tucson shooting, had it been in place, 'we might not have lost a federal judge' and five others." Louis Klarevas, *Closing the Gap*, THE NEW REPUBLIC (Jan. 13, 2011) (internal citation omitted). In conclusion to his expert report, he writes, "While imposing constraints on LCMs will not result in the prevention of all future mass shootings, the data suggest that denying rampage gunmen access to LCMs will result in a significant number of lives being saved." ER 366.

Donohue's expert opinion put the court distinctly out of its wheelhouse, particularly as the expert conclusion the court disputed (the rate of gun ownership) is peripheral to the issue of whether LCM restrictions will reduce the incidence and lethality of mass shootings and gun crimes.

Dr. Christopher Koper. The district court criticized Dr. Koper's findings because they were "tentative" and potentially not applicable to other locations and time periods. *Id.* at 74. But Dr. Koper's acknowledgement of the limitations of his analysis supports the credibility of his conclusions. Moreover, the court's critiques are irrelevant because intermediate scrutiny allows for reasonable discretion when legislatures rely on expert opinions for policy determinations. The State need not require absolute certainty—a rarity in scientific studies—in order to draw reasonable judgments from expert findings. *Accord, e.g.*, *Gould v. Morgan*, 907 F.3d 659, 676 (1st Cir. 2018) ("It would be foolhardy—and wrong—to demand that the legislature support its policy choices with an impregnable wall of unanimous empirical studies.").

Lucy Allen. The district court misinterpreted Ms. Allen's findings to support contrary conclusions about the dangers of LCM use in the home. ER 78. But these are exactly the policy questions reserved to States—whether the State should write its LCM restrictions based on avoiding collateral damage, ensuring homeowners can

protect themselves, or a combination of the two. *Turner Broad. Sys., Inc.*, 512 U.S. at 665.

Professor Daniel W. Webster. The district court characterized Professor Webster's "foundational data" as "vaporous," since Webster acknowledges limitations in gun violence data. ER 75. The court's concern merely confirms that predictive judgments are necessary to decide how best to protect the public. This is exactly the situation in which courts step back and legislatures step up. *Turner Broad. Sys., Inc.*, 512 U.S. at 665.

When applying intermediate scrutiny, the district court took on the role of a legislator. When appraising the State's experts, the court donned the hat of opposing counsel, pointing out in detail minor points of contention or uncertainty in each expert's report. But that has never been the role of the court, even in a typical evidentiary hearing. *See Pena*, 898 F.3d at 979. And regardless, that is certainly not an appropriate role for the court to play here, when this Court has held that California may make policy decisions based on evidence reasonably believed to be relevant. *Mahoney*, 871 F.3d at 881; *see Peruta*, 824 F.3d at 944–45 (Graber, J., concurring). The State was entitled to rely upon the opinions of highly credentialed experts to address a growing and complex issue—the run of mass shootings in areas where our friends, family, and even our children reside.

IV. THE DISTRICT COURT RELIED ON ITS OWN FLAWED FACT-FINDING

In its Order, the court embarked on a fact-finding excursion, developing "facts" that are nowhere to be found in the summary judgment record. And then it relied on those extra-record facts to reach its holdings. As those facts invariably supported Plaintiffs, the district court in effect became lead counsel in the case it was charged to decide.

While the court may (and should) conduct independent *legal* research, the court's reliance on independent *factual* research goes beyond its judicial fiat. *See de Fontbrune v. Wofsy*, 838 F.3d 992, 999 (9th Cir. 2016) (citing Edmund M. Morgan, *Judicial Notice*, 57 Harv. L. Rev. 269, 270–72 (1944) for the proposition that "the judge is not 'permitted to make an independent investigation'"); *see also United States v. Carey*, 2019 WL 2998728, at *11 (9th Cir. 2019) ("[A]lthough we conclude that the magistrate judge avoided the appearance of bias in this case, we admonish him in the future to be more circumspect in referencing or considering facts not properly admitted into evidence.").

In fact, the model rules of judicial conduct forbid such fact-finding exhibitions. Rule 2.9(C) of the Model Code of Judicial Conduct says, "A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed." Judicial fact-finding "turns the court from a neutral decision-maker into an advocate for one side." *Rowe*

v. Gibson, 798 F.3d 622, 641 (7th Cir. 2015) (Hamilton, J., dissenting in part and concurring in part). A court that chooses sides based on its own facts "raises problems much more serious than a possible error in the resolution of one . . . case." *Id.*

This judicial overreach directly affected the court's holding in this case. The district court's off-record facts were fundamental to its holding that Section 32310 did not pass intermediate, or any level, of scrutiny. The court held that even if intermediate scrutiny applied to the California statute, the statute would fail this standard because it lacks a reasonable fit to a substantial government interest. In reaching that holding, the district court purportedly resolved disputed facts about gun violence and mass shootings by conducting its own research and relying on its own intuition. While the State presented evidence that LCMs are disproportionately used in mass shootings, *see, e.g.*, Def's Opp'n to MSJ at 18–19, the district court deemed that evidence unpersuasive in light of its own findings.

First, the district court found that the LCM ban was not a "reasonable fit" with the State's concerns about public and law enforcement safety because—in the court's view—restrictions on LCMs had not worked over "[e]ighteen years." ER 54. The court pointed to the Borderline Bar and Grill shooting, in which the shooter used a "legally purchased pistol with an 'extended magazine,'" and concluded that "[e]ighteen years of a state ban on acquiring large-capacity magazines did not prevent the assailant from obtaining and using the banned devices." *Id.*

Second, the district court found that the ban was not a reasonable fit because—according to the court—it would not prevent many of the mass shootings in California. For example, the court found that "only three of the 17 California mass shooting events reported in the Mother Jones 36-year survey featured a large capacity magazine used by the shooter." ER 57. It also opined that "normally the perpetrator [of a mass shooting] brings multiple weapons," and that "California's large capacity magazine prohibition also had no effect on the three single weapon mass shooting events." *Id.* at 56–57; *see also id.* at 72 ("[T]he Tucson shooting would have likely still happened with a ban on high capacity magazines . . . . [A] person set on inflicting mass casualties will get around any clip prohibitions by having additional clips on his person . . . or by carrying more than one fully loaded weapon."). The court's two conclusions were based on examples it pulled on its own from USA Today and the National Review. *See id.* at 79 nn.63–64.

Based on those independently-found data points, among others, the district court decided that the California ban is not a reasonable fit for achieving the substantial governmental interests of mitigating or reducing gun violence and mass shootings. Playing the role of advocate, the court asserted that LCMs are not used

in enough mass shootings to justify California's ban.[11]

The State further argued that the people and the legislature were justified in banning LCMs because of their disproportionate use against police officers, citing record evidence for this proposition. Def's Opp'n to MSJ at 18. In opposition, the district court *sua sponte* took judicial notice of the fact that in 2016 "the average number of rounds fired by a criminal at a police officer was 9.1. Since 2007, the average number of rounds fired has never exceeded 10, and for seven of the years the average was under 7." ER 80 & n.65. The court's mathematical extrapolations based on those facts are unsupported by those facts: The court concluded that "regardless of the magazine size used by a criminal shooting at a police officer, the average number of rounds fired is 10 or less, suggesting that criminalizing possession of a magazine holding more than 10 will have no effect (on average)." *Id.* at 80. But if the *average* number of rounds is 10 or less, then restricting LCMs will

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[11] Even setting aside the propriety of the district court's fact-finding, the conclusions that the court reached were fallacious. That a 30-round magazine was used at one mass shooting, at a time when California's possession ban on LCMs was not in effect, does not refute the policy judgment that LCM restrictions in the aggregate can prevent or mitigate such events. ER 54. The same logic applies to the district court's sophistic reasoning that the occurrence of *some* mass shootings means that LCM restrictions necessarily have been ineffective for "[e]ighteen years." *Id.* This ignores the carnage that California's LCM restrictions may have *prevented* during that time, and may in the State's judgment prevent in the future.

protect the police officers who have faced criminal shootings involving *more* than 10 rounds.

The State also presented evidence that a "critical pause" during which shooters must reload or switch weapons has been an opportunity for victims to hide, escape, or disable the shooter. Def's Opp'n to MSJ at 19. In response, without citing to any evidence whatsoever, the court opined: "[T]he tenth shot might be called a 'lethal pause,' as it typically takes a victim much longer to re-load (if they can do it at all) than a perpetrator planning an attack." ER 81 (citing nothing). The court also noted one event—the Borderline shooting—in which the "news pieces do not report witnesses describing a 'critical pause' when the shooter re-loaded." *Id.* at 54. The district court relied on a single news story which has been reported to be inaccurate, *see* Appellants' Opening Br. 45–46. The court ignored reports stating precisely the opposite, as well as numerous other examples in the record when a shooter's reloading pause made the difference between life and death for many people, including children.

The district court not only improperly found its own facts, but it also pulled those facts from the same sort of sources—newspapers, magazines, and other media—that the court discounted as unreliable when cited by the State.[12] The sources for the court's purportedly "hard facts" mentioned above included, among others, the Washington Post, CNN, NPR, Fox News, New Republic, USA Today, the National Review, the LA Times, Santa Barbara Independent, 89.3 KPCC, and Mercury News. The court's favorite source, however, was nothing at all other than the court's own unsupported assumptions.

The adversarial judicial system is designed to test biased and erroneous testimony, expert opinion, and evidence. When one side misrepresents the facts, the opposing side, with the adequate incentives to do so, can identify and counter the misrepresentation. But the court here acted as opposing counsel, inserting its own opinions, intuitions, and unvetted evidence that it then chose to credit over the State's evidence. A decision as important as whether to prevent the State from regulating in an area so close to home, where science and policy are intricately intertwined, should not be decided in such a one-sided fashion.

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[12] *See, e.g.*, ER 60 (criticizing State's reliance on "news articles" and efforts to engage in "litigation by inference about whether a pistol or a rifle in a news story might have had an ammunition magazine that held more than 10 rounds").

CONCLUSION

Giffords Law Center respectfully requests that the Court reverse the judgment and direct the district court to enter judgment in favor of the State.

Dated: July 22, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2019, an electronic copy of the foregoing Amicus Brief was filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the Court's CM/ECF system and was served electronically by the Notice of Docket Activity upon registered CM/ECF participants.

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