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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JAMES MILLER, *et al.*,

Plaintiffs,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California, *et al.*,

Defendants.

CASE NO.: 3:19-cv-01537-BEN-JLB

BRIEF OF *AMICUS CURIAE* EVERYTOWN FOR GUN SAFETY SUPPORT FUND IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: February 6, 2020
Hearing Time: 2:00 p.m.
Courtroom: 5A, 5th floor
Judge: Hon. Roger T. Benitez

CORPORATE DISCLOSURE STATEMENT

Everytown for Gun Safety Support Fund has no parent corporations. It has no stock and hence no publicly held company owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*

Everytown for Gun Safety Support Fund ("Everytown") is the education, research, and litigation arm of Everytown for Gun Safety, the nation's largest gun-violence-prevention organization, with nearly six million supporters across all fifty states, including tens of thousands in California. Everytown for Gun Safety was founded in 2014 as the combined effort of Mayors Against Illegal Guns, a national, bipartisan coalition of mayors combating illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, an organization formed after 20 children and six adults were murdered by a gunman with an AR-15 rifle—a weapon regulated by the law challenged here—in an elementary school in Newtown, Connecticut. The mayors of more than fifty California cities are members of Mayors Against Illegal Guns. Everytown also includes a large network of gun-violence survivors who are empowered to share their stories and advocate for responsible gun laws.

Everytown has drawn on its expertise to file briefs in numerous Second Amendment cases, including challenges to assault weapon prohibitions like those at issue in this case, offering historical and doctrinal analysis that might otherwise be overlooked. *See, e.g.*, *Wilson v. Cook Cty.*, No. 18-2686 (7th Cir.); *Worman v. Healey*, No. 18-1545 (1st Cir.); *Kolbe v. Hogan*, No. 14-1945 (4th Cir.) (en banc). Several courts have also cited and expressly relied on Everytown's amicus briefs in deciding Second Amendment and other gun cases. *See Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. N.J.*, 910 F.3d 106, 112 n.8 (3d Cir. 2018); *Rupp v. Becerra*, 401 F. Supp. 3d 978, 991-92 & n.11 (C.D. Cal. 2019), *appeal docketed*, No. 19-56004 (9th Cir. Aug. 28, 2019); *see also Rehaif v. United States*, 139 S. Ct. 2191, 2210-11 & nn.4, 7 (2019) (Alito, J., dissenting).[1]

[1] An appendix of selected, publicly available historical gun laws accompanies this brief. All parties consent to the filing of this brief, and no counsel for any party authored it in whole or part. Apart from *amicus curiae*, no person contributed money intended to fund the brief's preparation and submission. Moreover, as the *(cont'd)*

INTRODUCTION

This case involves a Second Amendment challenge to California's Assault Weapons Control Act ("AWCA"), which prohibits, among other things, the manufacture, possession, transport, sale, offer for sale, and import of assault weapons. Five circuits have heard challenges to similar laws, and all five upheld the laws as constitutional under the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008). *See Worman v. Healey*, 922 F.3d 26, 39-41 (1st Cir. 2019), *petition for cert. docketed*, No. 19-404 (U.S. Sept. 25, 2019); *Kolbe v. Hogan*, 849 F.3d 114, 137-38 (4th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 469 (2017); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo* ("*NYSRPA*"), 804 F.3d 242, 247 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2486 (2016); *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (2015); *Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1264 (D.C. Cir. 2011); *see also Wilson v. Cook Cty.*, 937 F.3d 1028 (7th Cir. 2019) (affirming *Friedman*), *petition for cert. docketed*, No. 19-704 (U.S. Dec. 3, 2019).[2] Since *Heller*, three separate districts of the California Court of Appeal have upheld the law at issue in this case, holding that the AWCA "does not prohibit conduct protected by the Second Amendment." *People v. James*, 174 Cal. App. 4th 662, 677 (2009) (3d Dist.); *see People v. Zondorak*, 220 Cal. App. 4th 829, 835-38 (2013) (4th Dist.); *People v. Gleason*, No. H042771, 2017 WL 6276235, at *5 (Cal. Ct. App. Dec. 11, 2017) (unpublished) (6th Dist.), *cert. denied*, 139 S. Ct. 116 (2018). Moreover, one federal

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Ninth Circuit has stated, there is no requirement that an amicus brief be "disinterested." *Funbus Sys., Inc. v. State of Cal. Pub. Utilities Comm'n*, 801 F.2d 1120, 1125 (9th Cir. 1986). Rather, the focus is on whether it is "helpful." *Earth Island Inst. v. Nash*, 2019 WL 6790682, at *1 (E.D. Cal. Dec. 12, 2019).

[2] Although the Ninth Circuit has not addressed the constitutionality of assault weapons laws under the Second Amendment since *Heller*, it recently cited the consensus of its sister circuits favorably in ruling that a different state law, which prohibits permit holders from possessing firearms on school grounds but allows retired peace officers to do so, did not violate the Equal Protection Clause. *See Gallinger v. Becerra*, 898 F.3d 1012, 1018-19 (9th Cir. 2018) (citing *Kolbe*, *NYSRPA*, *Friedman*, and *Heller II*).

district court in this state has also held that the AWCA is constitutional, finding both that it "does not burden conduct protected by the Second Amendment" and that, even if it did, "there is a reasonable fit between the AWCA and California's public safety interests." *Rupp*, 401 F. Supp. 3d at 988, 990 (C.D. Cal. 2019).

As the State of California's brief shows, these courts got it right. Everytown submits this *amicus curiae* brief to urge this Court to similarly uphold the AWCA here—and, in particular, to make three points:

First, the AWCA is part of a long tradition of regulating weapons that legislatures have determined to be unacceptably dangerous, including a century of restrictions on semi-automatic firearms capable of firing a large number of rounds without reloading. This historical tradition alone is sufficient for this Court to find the law constitutional under the Second Amendment.

Second, this Court should also reject Plaintiffs' argument that the national prevalence of a type of a firearm, like the assault weapons at issue here, necessarily bestows Second Amendment protection on that firearm. Such an approach, under which firearms would become effectively immune from regulation the instant they are deemed in "common use" based on nationwide sales and manufacturing figures, cannot be reconciled with the Supreme Court's decision in *Heller* or with common sense. Indeed, it divorces the Second Amendment from the self-defense right it protects. Further, such a test is inconsistent with core principles of federalism, preventing individual states from determining how to best regulate themselves. Put simply, the "common use" test advocated by Plaintiffs would transform the constitutional analysis into a consumer referendum influenced by the firearms industry's aggressive modern-day marketing and sales strategies. That is not, nor should it be, the law.

Finally, even if the AWCA is found or assumed to regulate conduct protected by the Second Amendment, the Court should grant the State's motion for summary

judgment and dismiss this action because the AWCA survives intermediate scrutiny. In addition to the arguments and evidence advanced in the State's moving papers, Everytown's own research and other relevant social science and statistical evidence bear out California's important interest in preventing and mitigating mass shootings and daily gun violence, and the AWCA's "reasonable fit," *Jackson v. City & Cnty. of S.F.*, 746 F.3d 953, 965 (9th Cir. 2014), with that interest.

ARGUMENT

I. California's Prohibition of Assault Weapons Is Part of a Longstanding History of Analogous Prohibitions.

As both the Supreme Court and the Ninth Circuit have emphasized, "longstanding prohibitions" on the possession of certain types of weapons are "traditionally understood to be outside the scope of the Second Amendment." *Fyock v. City of Sunnyvale*, 779 F.3d 991, 996 (9th Cir. 2015); *see Heller*, 554 U.S. at 626-27, 635 (noting that such "longstanding prohibitions" are treated as tradition-based "exceptions" by virtue of their "historical justifications"). These prohibitions need not "mirror limits that were on the books in 1791." *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc). Instead, courts have found that even "early twentieth century regulations might nevertheless demonstrate a history of longstanding regulation if their historical prevalence and significance is properly developed in the record." *Fyock*, 779 F.3d at 997 (citing *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 196 (5th Cir. 2012)).[3]

The AWCA is not a radical departure from this country's well-established history of firearm regulation. Plaintiffs incorrectly and inaccurately attempt to assert

[3] *See also Friedman*, 784 F.3d at 408 (noting that "*Heller* deemed a ban on private possession of machine guns to be obviously valid" despite the fact that "states didn't begin to regulate private use of machine guns until 1927," and that "regulating machine guns at the federal level" did not begin until 1934); *Skoien*, 614 F.3d at 639- *(cont'd)*

that there is "no historical support" for the AWCA. *See* Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction ("Mot.") at 11 (ECF No. 22-1). Rather, the AWCA is another instance in a long tradition of regulating or prohibiting weapons that lawmakers have concluded are unacceptably dangerous—including a century of restrictions enacted shortly after semi-automatic weapons capable of firing a large number of rounds without reloading became widely available commercially. *See* Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 Law & Contemp. Probs. 55, 68-69, 72 (2017) (explaining that "[firearm] laws were enacted not when these weapons were invented, but when they began to circulate widely in society"). Many of these laws were passed around the same time as the prohibitions on sales to felons and individuals with dangerous mental illnesses, and restrictions on commercial arms sales; all laws that *Heller* identified as "longstanding" and therefore presumptively valid. *See Heller*, 554 U.S. at 626-27, 635; *see also* Spitzer, *supra*, at 72 (discussing the passage of prohibitions on possession of firearms by felons and individuals with mental disabilities in the early twentieth century and the possession of semi-automatic weapons with large-capacity magazines ("LCMs") in the 1920s and 1930s). As further described below, this longstanding historical tradition of regulation in and of itself is sufficient for the Court to find the AWCA constitutional under *Heller*. *See Heller*, 554 U.S. at 626-27; *see also Teixeira v. Cty. of Alameda*, 873 F.3d 670, 673, 682-90 (9th Cir. 2017) (en banc) (applying "[a] textual and historical analysis" to conclude that "the Second Amendment . . . does not confer a freestanding right . . . to sell firearms"), *cert. denied*, 138 S. Ct. 1988 (2018).

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40 (noting that "prohibitions on the possession of firearms by felons and the mentally ill" have been found to be sufficiently longstanding, despite the fact that "[t]he first federal statute disqualifying felons from possessing firearms was not enacted until 1938" and that "the ban on possession by *all* felons was not enacted until 1961") (emphasis in original).

A. The AWCA Is Consistent with Centuries of Laws Prohibiting Weapons Deemed to Be Especially Dangerous Dating from the Colonial Period to the Present Day.

The AWCA is part of a long history of government weapon prohibitions aimed at enhancing public safety either because the weapons themselves are especially dangerous, or because they are particularly suitable for criminal use.[4] In this country, such prohibitions date back to the early colonial period when the American colonies and first states began adopting the English tradition of regulating especially dangerous firearms. *See generally* 1763-1775 N.J. Laws 346 (prohibiting set or trap guns); The Laws of Plymouth Colony (1671) (same); Records of the Colony of New Plymouth in New England 230 (Boston 1861) (same).

The passage of the Bill of Rights did not end this practice. States continued to prohibit or regulate particularly dangerous weapons. For example, several states banned or prohibitively taxed Bowie knives,[5] which were determined to be "instrument[s] of almost certain death." *See Cockrum v. State*, 24 Tex. 394, 402 (1859) (finding Bowie knives are "differ[ent] from [guns, pistols, or swords] in [their] device and design" and are therefore more accurate and lethal than other contemporary weapons). In addition, a number of states prohibited certain types of small and easily concealable handguns, which were deemed ideal for criminal use.[6]

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[4] As the California Court of Appeal stated in upholding the AWCA, "the Legislature was specifically concerned with the unusual and dangerous nature of these weapons." *James*, 174 Cal. App. 4th at 676; *see Gallinger*, 898 F.3d at 1018 (noting the "particular danger posed by assault weapons," which "motivated the Legislature to enact the AWCA").

[5] *See* 1837 Ala. Laws 7 (prohibitively taxing Bowie knives); 1837 Ga. Laws 90 (banning Bowie knives); 1837-1838 Tenn. Pub. Acts 200 (prohibiting the sale of Bowie knives); *Aymette v. State*, 21 Tenn. 154, 158 (1840) (justifying a prohibition on Bowie knives on the basis that they are "weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin").

[6] *See* 1879 Tenn. Pub. Acts 136 (prohibiting "belt or pocket pistols, or revolvers, or any other kind of pistols, except army or navy pistol"); 1881 Ark. Acts 192 *(cont'd)*

Throughout the early twentieth century, many states passed laws prohibiting especially dangerous weapons or weapon features, such as silencers, as the technology of firearms and other dangerous weapons evolved.[7] And, in the 1920s and 1930s, at least twenty-eight states and the federal government passed prohibitions or severe restrictions on automatic weapons, along with the restrictions on large-capacity semi-automatic weapons discussed next. *See* Spitzer, *supra*, at 67-71; Sec. I.B., *infra*.

B. States Have Prohibited Semi-Automatic Firearms Capable of Quickly Firing Multiple Rounds Since the Early Twentieth Century.

States have regulated semi-automatic firearms capable of quickly firing a large number of rounds—the precursor to modern-day assault weapons—since shortly after these firearms first became widely commercially available at the turn of the twentieth century. *See* Robert Johnson & Geoffrey Ingersoll, *It's Incredible How Much Guns Have Advanced Since the Second Amendment*, Business Insider Australia (Dec. 18, 2012), https://bit.ly/30KvgrH (explaining that semi-automatic weapons became commercially available in the early 1900s).[8] Such laws often categorized large-capacity, semi-automatic firearms, along with fully automatic weapons, as

(prohibiting pocket pistols and "any kind of cartridge, for any pistol"); 1903 S.C. Acts 127-28 (similar); *see* 1907 Ala. Sess. Laws 80 (similar).

[7] *See, e.g.*, 1909 Me. Laws 141 (prohibiting silencers); 1912 Vt. Acts & Resolves 310 (same); 1913 Minn. Laws 55 (same); 1916 N.Y. Laws 338-39 (same); 1926 Mass. Acts 256 (same); 1927 Mich. Pub. Acts 888-89 (same); 1927 R.I. Pub. Laws 259 (same). States also banned a wide variety of unusually dangerous weapons, including blackjacks and billy clubs, slung-shots (a metal or stone weight tied to a string), brass knuckles, various kinds of knives, and explosives. *See, e.g.*, 1917 Cal. Stat. 221 (blackjacks and billy clubs); 1911 N.Y. Laws 442 (slung-shots); 1913 Iowa Acts 307 (daggers and similar-length knives); 1917 Minn. Laws 354 (brass knuckles); 1927 Mich. Pub. Acts 888-89 (explosives).

[8] *See also* Declaration of Ashley Hlebinsky in Support of Plaintiffs' Motion for Preliminary Injunction ¶ 28 (ECF No. 22-14) ("By the 20th century, semi-automatic firearms with various combinations of features such as pistol grips, flash hiders, folding/telescoping stocks, and detachable magazines had been modified and perfected to the point of replication in hundreds, possibly thousands, of models by countless manufacturers for both civilian and military markets.").

"machine guns," and imposed restrictions that effectively prohibited them entirely. *See, e.g.*, 1927 R.I. Pub. Laws 256-59 (prohibiting the "manufacture, s[ale], purchase or possess[ion]" of a "machine gun," which it defined as "any weapon which shoots more than twelve shots semi-automatically without reloading"); 1927 Mich. Pub. Acts 888 (prohibiting possession of "any machine gun or firearm which can be fired more than sixteen times without reloading").

In 1928, the National Conference of Commissioners on Uniform State Laws (now the Uniform Law Commission) adopted a model law prohibiting possession of "any firearm which shoots more than twelve shots semi-automatically without reloading," setting the national standard for laws prohibiting possession of semi-automatic firearms with LCMs. *See* Report of Firearms Committee, Handbook of the National Conference on Uniform State Laws and Proceedings of the Thirty-Eighth Annual Meeting 422-23 (1928).[9] Shortly thereafter, the federal government enacted a similar prohibition for the District of Columbia. *See* 72 Cong., ch. 465, §§ 1, 14, 47 Stat. 650-54 (making it a crime to "possess any machine gun," which it defined as "any firearm which shoots . . . semiautomatically more than twelve shots without reloading"). Even the National Rifle Association endorsed passage of the D.C. law, saying, "it is our desire [that] this legislation be enacted for the District of Columbia, in which case it can then be used as a guide throughout the states of the Union." S. Rep. No. 72-575, at 5-6 (1932).

California first prohibited automatic weapons in 1927[10] and expanded this prohibition with a 1933 statute that prohibited the sale or possession of not only "all

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[9] This standard originated with a model law promulgated by the National Crime Commission in 1927. Report of Firearms Committee, at 422-23.

[10] *See* 1927 Cal. Stat. 938 (prohibiting "all firearms known as machine rifles, machine guns or submachine guns capable of discharging automatically and continuously loaded ammunition of any caliber in which the ammunition is fed to such gun from or by means of clips, disks, drums, belts or other separable mechanical device").

firearms . . . capable of discharging automatically," but also "all firearms which are automatically fed after each discharge from or by means of clips, discs, drums, belts or other separable mechanical device having a capacity of greater than ten cartridges." 1933 Cal. Stat. 1170. These statutes were at least as restrictive as the AWCA, and indeed appear *more* restrictive than the AWCA, as the 1933 law prohibited *all* firearms equipped with LCMs, rather than only the assault weapons at issue here (or even the magazines themselves, which are separately regulated under California law). *See id.* Several other states, including Minnesota, Ohio, and Virginia, also prohibited or strictly regulated semi-automatic firearms with LCMs.[11]

These regulations have evolved as the firearm marketplace continually introduces new products and the market embraces certain models or technologies. In their moving papers, Plaintiffs claim that the AWCA and similar laws lack "historical support" and therefore should not be upheld. Mot. at 16. But there are two significant flaws with this argument. First, it ignores the dynamic history of firearm regulation outlined above, of which the AWCA is a natural extension. Second, AR-15s and similar rifles were not commercially available until the second half of the twentieth century and were not popular in the American marketplace until the 1980s. *See* Sec. II.A., *infra*. There can be no centuries-old regulation for a firearm that did not exist. Rather, the passage of the AWCA and other laws prohibiting assault weapons, beginning in the 1980s and 1990s, perfectly aligns with the ascendance of these firearms in American life. *See id.*

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[11] *See* 1933 Minn. Laws 232 (prohibiting "[a]ny firearm capable of automatically reloading after each shot is fired, whether firing singly by separate trigger pressure or firing continuously" if the weapon was modified to allow for a larger magazine capacity); 1933 Ohio Laws 189 (creating prohibitive licensing for "any firearm which shoots more than eighteen shots semi-automatically without reloading"); 1934 Va. Acts 137 (enacting a variety of regulations on the possession or use of weapons "from which more than sixteen shots or bullets may be rapidly, automatically, semi-automatically or otherwise discharged without reloading").

As this historical record shows, the AWCA is the natural continuation of the longstanding tradition of government prohibition or regulation of especially dangerous weapons. This includes nearly a century of restrictions on semi-automatic firearms with the ability to shoot large numbers of rounds in a short time without reloading. These regulations have logically and necessarily progressed along with improvements in firearm technology, growth in firearm popularity, and changes in the national regulatory landscape. Given that broader historical context, any relatively small lapse in the regulation of a certain firearm does not summarily render any and all future regulations unconstitutional, nor does it nullify the entire regulatory history. As such, the AWCA qualifies as a longstanding prohibition, which, accordingly, falls outside the scope of the Second Amendment. *See, e.g.*, *Drake v. Filko*, 724 F.3d 426, 432 (3d Cir. 2013) (finding that a concealed-carry licensing standard that had been in effect "in some form for nearly 90 years" indeed "qualifies as a longstanding, presumptively lawful regulation"); *see also United States v. Class*, 930 F.3d 460, 465 (D.C. Cir. 2019) ("The relevant inquiry is whether a particular *type* of regulation [is] longstanding." (citation omitted)).

II. The "Common Use" Test Proposed by Plaintiffs Is Illogical and Should Not Be Followed.

Plaintiffs assert that assault weapons must be afforded constitutional protection because they are "common, not prohibited in the vast majority of States, and have been used for close to a century . . . for various lawful purposes such as self-defense, hunting, recreation, competition, and collecting." *See* Mot. at 13. Even assuming, arguendo, such descriptions are taken to be true, there is neither firm legal footing nor sound logic in the "common use" test that Plaintiffs advance.

The argument that assault weapons must be afforded Second Amendment protection simply because they are widely available in other states dangerously misconstrues the Supreme Court's decision in *Heller*. While the Second

Amendment "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns," *Heller*, 554 U.S. at 625, it does not logically follow—and neither the Supreme Court nor other courts have held—that the Second Amendment somehow protects *all* weapons that have achieved some preordained degree of commercial success. *See Worman v. Healey*, 293 F. Supp. 3d 251, 266 (D. Mass. 2018) ("[P]resent day popularity is not constitutionally material."), *aff'd*, 922 F.3d 26 (1st Cir. 2019).

A. Plaintiffs' "Common Use" Test Is Logically Circular and Inconsistent with Federalism Principles.

In addition to lacking a firm jurisprudential foundation, Plaintiffs' "common use" test is hopelessly circular. *See Rupp*, 401 F. Supp. 3d at 986 n.5. Plaintiffs' proposed approach would allow the constitutionality of weapons prohibitions to be decided not by how dangerous a weapon is, but rather by "how widely it is circulated to law-abiding citizens by the time a bar on its private possession has been enacted and challenged." *Kolbe*, 849 F.3d at 141. Just as "it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn't commonly owned," *Friedman*, 784 F.3d at 409, it would be similarly absurd to claim that a law is constitutionally barred because it addresses dangerous, but ongoing, activity. *See* Joseph Blocher & Darrell A.H. Miller, *Lethality, Public Carry, and Adequate Alternatives*, 53 Harv. J. on Legis. 279, 288 (2016) (discussing the "central circularity" that plagues the "common use" test: "what is common depends largely on what is, and has been, subject to regulation"). Yet, this is exactly what the application of the "common use" test advocated by Plaintiffs would dictate, both here and elsewhere.

This approach also fails to provide either workable standards or any overarching guidance on whether the "common use" of assault weapons is determined by considering the number produced, the number sold, or the number of

law-abiding owners. *See Kolbe*, 849 F.3d at 135-36. This distinction is critical. Firearm ownership is extremely concentrated, with only 3% of American adults possessing 50% of the country's guns. *See* Lois Beckett, *Meet America's Gun Super-Owners—With An Average of 17 Firearms Each*, The Guardian (Sept. 20, 2016), https://bit.ly/2cs0kFo; *see also* Alex Yablon, *Most Californians Who Own 'Assault Rifles' Have 10+ Guns*, The Trace (Nov. 12, 2018), https://bit.ly/2FFyQJO (reporting research finding that "four out of five assault rifles in [California] are owned by people who own 10 or more guns"). If production or sales numbers form the basis of the common use analysis, then this small group of gun owners would essentially govern the meaning and reach of the Second Amendment. This tyranny of a tiny minority of the population cannot be what either the founding generation understood or the *Heller* Court intended.

A constitutional analysis driven by the prevalence of the prohibited firearm in the market also would create perverse incentives for the firearms industry. Such an analysis grants firearms manufacturers a unilateral ability to insulate highly dangerous firearms with Second Amendment protection "simply by manufacturing and heavily marketing them" before a government could assess their danger, determine whether to regulate them, and build the political momentum to actually do so. Cody J. Jacobs, *End the Popularity Contest: A Proposal for Second Amendment "Type of Weapon" Analysis*, 83 Tenn. L. Rev. 231, 265 (2015); *see Kolbe*, 849 F.3d at 141-42. Plaintiffs' proposed framework would unreasonably "hinder efforts to require consumer safety features on guns." Jacobs, *supra*, at 267, 269. This is because if there is any delay before states are able to mandate a new safety feature, the firearm may reach some undefined level of "common use" sufficient to command Second Amendment protection. Given the emergence of new firearm technology (including, for example, 3D-printed gun components that are undetectable using traditional screening methods), and given the inevitability of future technological

developments, Plaintiffs' common use theory, if endorsed by this Court, would pose a serious threat to public safety. *See* Jacobs, *supra*, at 269.

These concerns about aggressive marketing and sales campaigns by manufacturers are not merely remote or hypothetical; they can be observed by looking at the exact weapons at issue here. For example, the AR-15 rifle—"the most popular of the prohibited assault weapons," *Kolbe*, 849 F.3d at 124—"did not catch on in the American market in a significant way until the late 1980s." Affidavit of Robert Spitzer, Ph.D. at ¶ 8, *Worman v. Healey*, No. 17-cv-10107-WGY (D. Mass. Dec. 15, 2017), ECF No. 61-5; *see also* NRA Staff, *I Have This Old Gun: Colt AR-15 SP1*, *American Rifleman* (July 31, 2014), https://bit.ly/2GexBC4 (statement of Martin K.A. Morgan, at 4:15-5:00). Indeed, it was only *after* the federal prohibition on assault weapons expired in 2004 that the gun industry focused its marketing resources on assault weapons, like the AR-15. The industry first promoted these weapons as "tactical rifles" or "black rifles," and later—after a concerted post-*Heller* campaign launched in 2009 by the firearms industry's chief trade association, the National Shooting Sports Foundation—as "modern sporting rifles."[12] As a result of these coordinated industry efforts, the civilian sales of assault weapons skyrocketed. *See* NRA Staff, *supra*, at 4:15-5:00 (noting that the AR-15's popularity underwent a "fundamental evolution" after 2004, causing civilian sales to "explode[]"). But contemporary and aggressive marketing strategies should have no bearing on the meaning of the United States Constitution. *See Rupp*, 401 F. Supp. 3d at 987 ("Gun manufacturers cannot determine the scope of Second Amendment protection . . . .").

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[12] *Compare, e.g.*, Smith & Wesson 2006 10-K at 3-4, 2007 Smith & Wesson 10-K at 4, 2008 Smith & Wesson 10-K at 4, 2009 Smith & Wesson 10-K at 4, and 2010 Smith & Wesson 10-K at 5, *with, e.g.*, 2011 Smith & Wesson 10-K at 5-6, and 2012 Smith & Wesson 10-K at 4, *available at* http://ir.smith-wesson.com/phoenix.zhtml?c=90977&p=irol-sec&control_selectgroup=Annual%20Filings; *see also* National Shooting Sports Foundation, *The Term 'Modern Sporting Rifle'* (Sept. 19, 2011), https://perma.cc/5KTF-W6B2.

The history of the American firearms industry also makes clear why a market-based "common use" test does not make sense. As recent scholarship has found, "[f]or the nation's first one hundred years, . . . the guns that were in 'common use' were determined" not by manufacturers or consumers, but "by federal subsidization and regulation." Lindsay Schakenbach Regele, *A Different Constitutionality for Gun Regulation*, 46 Hastings Const. L.Q. 523, 528-30 (2019) ("The sum total of this government regulation and subsidization determined what was in the market, and thus what firearms were in 'common use.'"). Thus, contrary to what Plaintiffs' approach here would mandate, "[i]t is not historically sound . . . to allow gun manufacturers and marketers to determine what arms are in common use." *Id.* at 530. As discussed above, *see* Sec. I., *supra*, history instead provides strong support for sensible gun safety measures like the AWCA "that are consistent with the Second Amendment." Regele, *supra*, at 523.

Beyond these logical and historical problems with Plaintiffs' proposed "common use" test, a test that turns on nationwide manufacturing or sales totals would also create significant federalism consequences. Under such a test, whenever a new, potentially dangerous firearm feature became available, states would either have to act immediately, and in unison, to prevent such features from becoming widely available, or else forfeit their ability indefinitely to regulate such weapons going forward. States that might choose to gather more information before regulating would instead be incentivized to regulate reflexively, not reflectively. And if a state's citizens simply had a different position on gun policy, those legislative policy judgments would potentially extend far beyond that state's borders with outsized constitutional effects.

Legislators' decisions in one part of the country should not make laws in other parts any "more or less open to challenge under the Second Amendment." *Friedman*, 784 F.3d at 408. If they did, that "would imply that no jurisdiction other

than the United States as a whole can regulate firearms. But that's not what *Heller* concluded." *Id.* at 412. Because our Constitution "establishes a federal republic where local differences are cherished as elements of liberty," federalism is "no less part of the Constitution than is the Second Amendment." *Id.* The Supreme Court's decision in *Heller* (as applied to the states in *McDonald v. City of Chicago*, 561 U.S. 742 (2010)), "does not foreclose *all* possibility of experimentation" by state and local governments, *Friedman*, 784 F.3d at 412, but rather permits them to do what they have long done in the realm of firearm legislation: "experiment with solutions to admittedly serious problems." *Jackson*, 746 F.3d at 970 (citation omitted); *see also McDonald*, 561 U.S. at 785 (noting that "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment" (alteration in original) (citation omitted)). The Plaintiffs' test would eviscerate their ability to do so.[13]

B. The "Common Use" Test Should Instead Be Used to Evaluate Whether the Weapon Is Necessary for the Core Second Amendment Right of Home Defense.

To the extent that "common use" should play any role in the constitutional analysis, it should be tied to "the purpose of the right to keep and bear arms." Blocher & Miller, *supra*, at 291. The test should focus, in other words, on whether the regulated weapons are commonly used or are reasonably necessary *for self-defense* or, in particular, *self-defense in the home*, which *Heller* holds is the core of the right. *See* 554 U.S. at 635; *see also United States v. Torres*, 911 F.3d 1253, 1262 (9th Cir. 2019) ("*Heller* tells us that the core of the Second Amendment is 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" (emphasis omitted) (citations omitted)). The D.C. Circuit, in upholding a similar

[13] A counterfactual further demonstrates why Plaintiffs' "common use" test is inappropriate: If Congress had renewed the federal prohibition on assault weapons rather than permitting it to lapse in 2004, the weapons prohibited by the AWCA would not be in widespread use today and would therefore not be subject to Second Amendment protection under this "common use" theory.

law, has adopted that approach—and implicitly rejected the plaintiffs' market-share "common use" test—by asking whether assault weapons "are commonly used or are useful specifically for self-defense." *See Heller II*, 670 F.3d at 1261. The court then went on to note that prohibitions on certain semi-automatic weapons do not prohibit "the quintessential self-defense weapon"—the handgun—and do not "prevent a person from keeping a suitable and commonly used weapon for protection in the home or hunting, whether a handgun or a non-automatic long gun." *Id.* at 1261-62 (citation omitted). Meanwhile, the Seventh Circuit noted that it uses a "parallel" consideration, namely "whether law-abiding citizens retain adequate means of self-defense" when upholding a similar assault weapons prohibition. *Wilson*, 937 F.3d at 1036 (citation omitted); *see also Friedman*, 784 F.3d at 410.

As the State demonstrates in its filings, these weapons are "not necessary to engage in lawful self-defense." Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction (ECF No. 33) ("Defs.' Opp.") at 19; *see generally* Declaration of Lucy P. Allen (ECF No. 33-1) (noting, for example, that the average citizen fires 2.2 shots in self-defense and only fired more than 10 bullets in 0.3% of all incidents, with no shots fired in 18.2% of incidents). Indeed, as courts have noted, such weapons are "unquestionably most useful in military service" rather than self-defense. *Kolbe*, 849 F.3d at 137; *see Gallinger*, 898 F.3d at 1018-20 (endorsing *Kolbe*'s reasoning regarding the dangers posed by assault weapons and their minimal usefulness for self-defense). Put simply, and as the evidence before the Court shows, Plaintiffs' assertion that the firearms prohibited by the AWCA fall within the purview of self-defense enunciated in *Heller* is patently wrong.

III. The Use of Assault Weapons Makes Mass Shootings and Other Gun-Violence Incidents Deadlier and It Is in California's Interest to Regulate These Weapons to Protect the Public.

As the Ninth Circuit has recognized, "when 'assault weapons and large-capacity magazines are used, more shots are fired and more fatalities and injuries

result than when shooters use other firearms and magazines.'" *Gallinger*, 898 F.3d at 1019 (quoting *Kolbe*, 849 F.3d at 127); *accord Rupp*, 401 F. Supp. 3d at 991; *see also* Everytown, *Ten Years of Mass Shootings in the United States: An Everytown for Gun Safety Support Fund Analysis* (Nov. 2019) ("Everytown, *Ten Years of Mass Shootings*"), https://every.tw/2JPBIVz (finding that "mass shootings that involved an assault weapon accounted for 32 percent of all mass shooting deaths and 82 percent of injuries" and also "left six times as many people shot than when there was no assault weapon"). But when Plaintiffs state that there is no "demonstrable correlation" between statutes such as the AWCA and reductions in mass shootings (Mot. at 22), this ignores both *Gallinger* and a wealth of peer-reviewed research. Everytown's analysis, as well as other relevant research, demonstrates that the use of assault weapons, particularly when coupled with LCMs, results in more people being shot, more injuries per victim, and more deaths.[14] *See infra*.

Because the AWCA does not implicate nor substantially burden a core Second Amendment right, intermediate scrutiny, at most, is the appropriate standard for this Court to apply. *See Fyock*, 779 F.3d at 998-99. A statute survives intermediate scrutiny under the Second Amendment if: (1) the government's stated objective is "significant, substantial, or important"; and (2) there exists "a reasonable fit between the challenged regulation and the asserted objective." *Id.* at 1000.

According to Plaintiffs, "it is far from clear" that the State would have any significant or important interest in preventing or mitigating "so-called 'mass shootings'" because such events are "rare." Mot. at 22. But this could not be further from the truth. As courts have explicitly stated, in the context of firearms regulations, "[p]ublic safety and crime prevention are compelling government interests." *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1279 (N.D. Cal. 2014),

[14] The Seventh Circuit has noted that courts should consider the "dangerousness of the prohibited weapons by discussing general evidence" of their features. *Wilson*, 937 F.3d at 1034.

aff'd, 779 F.3d 991 (9th Cir. 2015); *see also Friedman*, 784 F.3d at 412 (holding that "reduc[ing] the overall dangerousness of crime" is a "substantial" government interest). As demonstrated by the research outlined below, mass shootings and assault weapons pose a serious threat to the safety of all Californians. California therefore has a significant, substantial, and important public interest in reducing the risk of harm to its residents from such assault weapons, and the AWCA is a reasonably tailored attempt to address this serious public safety concern.

Everytown's research. Relying largely on press coverage, police reports, and FBI data, Everytown has tracked and documented mass shootings since 2009 and has released several reports of its findings. While Everytown's research cannot present a comprehensive dataset of the firearms used in every mass shooting (the reality of American gun violence is that the frequency of mass shootings makes this kind of information not reported or readily available in every instance), the findings indicate that assault weapons make shootings significantly more deadly.

For example, data from Everytown's continued tracking of mass shootings shows that when assault weapons are used, more than twice as many people are killed on average (11.6 per shooting versus 5.0) and more than twenty-one times as many are shot and injured (25.1 per shooting versus 1.2). *See* Everytown, *Ten Years of Mass Shootings*. Everytown's tracking of mass shootings also shows that assault weapons are invariably used in the most deadly and injurious events. The Ninth Circuit has recognized the same. *See Gallinger*, 898 F.3d at 1018-19. Indeed, from 2009 to the present, the seven deadliest mass shooting incidents in America, one of which took place in California, all involved the use of assault weapons.[15]

[15] These shootings are: Las Vegas, Nevada (58 fatalities); Orlando, Florida (49 fatalities); Newtown, Connecticut (27 fatalities); Sutherland Springs, Texas (25 fatalities); El Paso, Texas (22 fatalities); Parkland, Florida (17 fatalities); and San Bernardino, California (14 fatalities). *See* Everytown, *Ten Years of Mass Shootings*; *see also* Bonnie Berkowitz, Chris Alcantara, & Denise Lu, *The Terrible Numbers That Grow With Each Mass Shooting*, WASH. POST (Oct. 1, 2017) (continually updated), https://wapo.st/2CMznZz. Notably, the Parkland shooter specifically *(cont'd)*

Meanwhile, in the ten years from 2009 to 2018, there were at least 26 mass shootings[16] (17 percent of those with known weapon data) that involved the use of an assault weapon, resulting in 302 deaths and 653 injuries. *See* Everytown, *Ten Years of Mass Shootings*. In other words, mass shootings that involved an assault weapon accounted for 32 percent of all mass shootings deaths and 82 percent of injuries. *See id.* And when an assault weapon was used in a mass shooting, it left six times as many people shot than when there was no assault weapon. *See id.*

Mass shootings involving assault weapons are also "highly salient" events that have a unique impact that policymakers may consider when weighing policy choices. *Friedman*, 784 F.3d at 412; *see* Reva Siegel & Joseph Blocher, Commentary, *Why Regulate Guns?*, Take Care (Nov. 30, 2019), https://takecareblog.com/blog/why-regulate-guns (explaining that "the constitutionality of a gun law need not pivot exclusively on how many shootings it can be shown to prevent"). Such shootings like those that occurred at San Bernardino, Newtown, Las Vegas, Parkland, Sutherland Springs, and Aurora sear themselves into the national consciousness and affect the way people live their everyday lives. *See, e.g.*, Nikki Graf, *A Majority of U.S. Teens Fear a Shooting Could Happen at Their School, and Most Parents Share Their Concern*, Pew Research Ctr. (Apr. 18, 2018), https://pewrsr.ch/38tNWi1 (results of a survey conducted in the two months following the Parkland shooting showed that a majority of U.S. teens (57%) fear a shooting could happen at their school, and most parents (63%) share their concern); Sophie Bethune, *APA Stress in America Survey: Generation Z Stressed About Issues in the News but Least Likely to Vote* (Oct. 30, 2018), https://bit.ly/37kodsb (finding that 75% of young people ages

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chose an AR-15 to use in the shooting rather than a different type of a firearm, stating in videos recorded in the days prior to the shooting that "[w]ith the power of my AR you will all know who I am." Marjory Stoneman Douglas High School Public Safety Commission, *Initial Report to the Governor, Speaker of the House of Representatives and Senate President*, at 256 (Jan. 2, 2019), http://www.fdle.state.fl.us/MSDHS/CommissionReport.pdf.

[16] Defined as a shooting which killed four or more individuals.

15-21 say that mass shootings are a significant source of stress); Alana Abramson, *After Newtown, Schools Across the Country Crack Down on Security*, ABC News (Aug. 20, 2013 7:10 A.M.), http://abcn.ws/1KwN9Ls (comparing the impact of the Sandy Hook shooting on school security to that of 9/11 on airport security and noting that school districts have spent tens of millions of dollars on security improvements). While shootings on the scale of these tragedies remain statistically rare compared to the plague of day-to-day gun violence, their enormous impact reinforces the compelling justifications for the AWCA.

Other social science research. Additional research—some of which the Ninth Circuit appears to reference in *Gallinger*, 898 F.3d at 1018-19—supports the State's conclusion that assault weapons pose significant dangers to public safety.

The evidence here is substantial. Assault weapons "tend to result in more numerous wounds, more serious wounds, and more victims." *NYSRPA*, 804 F.3d at 262; *accord Kolbe*, 849 F.3d at 140; s*ee also Gallinger*, 898 F.3d at 1019 (acknowledging the "exceptional lethality of [assault weapons]"). They are designed to fire far more bullets, at a far faster rate than other firearms, with each round from an assault weapon having up to four times the muzzle velocity of a handgun round—and thus able to inflict much greater damage. *See* Peter M. Rhee et al., *Gunshot Wounds: A Review of Ballistics, Bullets, Weapons, and Myths*, 80 J. Trauma & Acute Care Surgery 853 (2016); *see also*, *e.g.*, Heather Sher, *What I Saw Treating the Victims From Parkland Should Change the Debate on Guns*, The Atlantic (Feb. 22, 2018), https://bit.ly/2u0rlr2 ("The injury along the path of the bullet from an AR-15 is vastly different from a low-velocity handgun injury. . . . The high-velocity bullet causes a swath of tissue damage that extends several inches from its path. It does not have to actually hit an artery to damage it and cause catastrophic bleeding. Exit wounds can be the size of an orange."). And, as researchers examining mass shootings between 1982 and 2018 found, the sort of assault weapon rifles challenged

in this case are particularly dangerous, resulting in far more injuries per shooting than handguns (an average of 29.9 injuries for assault rifle long guns and 7.7 injuries for handguns). *See* Joshua D. Brown & Amie J. Goodin, *Mass Casualty Shooting Venues, Types of Firearms, and Age of Perpetrators in the United States, 1982-2018*, 108 Am. J. of Pub. Health 1385, 1386 (Oct. 2018), https://bit.ly/3aIWYtI.

Research regarding mass shootings is most telling here. A study of mass shootings between 1981 and 2017 found that assault weapons accounted for 86% of the 501 fatalities reported in 44 mass-shooting incidents. *See* Charles DiMaggio et al., *Changes in U.S. Mass Shooting Deaths Associated with the 1994-2004 Federal Assault Weapons Ban: Analysis of Open-Source Data*, 86 J. of Trauma and Acute Care Surgery 11, 13 (2018), https://bit.ly/2K44ZzQ; *see also* Adam Lankford & James Silver, *Why Have Public Mass Shootings Become More Deadly?*, Criminology & Pub. Policy 1, 13 (2019), https://bit.ly/2GaGiNF ("Overall, the increased use of semi-automatic rifles and assault weapons is an important reason why public mass shootings have become more deadly over time."). Meanwhile, in 2019 alone, there were over 400 instances of shootings where at least four people were shot, excluding the shooter, resulting in "more mass shootings across the U.S. in 2019 than…days in the year." Jason Silverstein, *There Were More Mass Shootings Than Days in 2019*, CBS News (Jan. 2, 2020 11:45 AM), https://cbsn.ws/2GaNI3v. Plaintiffs put forth that "there is no credible evidence that so-called 'assault weapons' bans have any meaningful effect of reducing gun homicides and no discernable crime-reduction impact." *See* Declaration of John Lott in Support of Plaintiffs' Motion for Preliminary Injunction ("Lott Decl.") at ¶ 6 (ECF No. 22-18). Yet, research suggests that mass shootings were 70% less likely to occur between 1994 and 2004 when the federal prohibition on assault weapons was in effect. *See* DiMaggio, *supra*, at 13. Further, researchers estimate that a prohibition on assault weapons would have prevented 314 of the 448 mass-shooting deaths that

occurred during the studied periods when the federal prohibition was not in effect. *See* DiMaggio, *supra*, at 13; *see also* Louis Klarevas, *Rampage Nation: Securing America from Mass Shootings* 240-43 (2016) (finding that, as compared to the ten-year period before the federal prohibition went into effect, the number of gun massacres where six or more people were shot and killed fell by 37% during the prohibition period; the number of people dying from gun massacres fell by 43%; and gun massacres increased by 183% and massacre deaths by 239% in the decade after the prohibition lapsed); Christopher Ingraham, *It's Time to Bring Back the Assault Weapons Ban, Gun Violence Experts Say*, Wash. Post (Feb. 15, 2018), https://wapo.st/2JjFlSk (discussing Klarevas's research). Moreover, a 2016 survey of experts in the fields of criminology, law, and public health identified assault weapons prohibitions as among the most effective policy measures for preventing mass shootings. *See* Margot Sanger-Katz & Quoctrung Bui, *How to Reduce Mass Shooting Deaths? Experts Rank Gun Laws*, N.Y. Times (Oct. 5, 2017), https://nyti.ms/2yPr0bo. Finally, weapons that would have been outlawed under the federal prohibition killed "at least 234 of the 271 people who died in gun massacres since 2014," John Donohue & Theodora Boulouta, *That Assault Weapon Ban? It Really Did Work*, Opinion, N.Y. Times (Sept. 4, 2019), https://nyti.ms/2HNgFnd, casting serious doubt on Plaintiffs' contention that "a conclusion that assault weapon bans (largely focused on rifles) have any significant effect on reducing mass shooting fatalities is problematic." Lott Decl. ¶ 41.

In addition to mass shootings, a recent study indicates that criminals also use assault weapons in the daily gun violence plaguing this nation, with assault weapons accounting for up to 12% of guns used in all crime and up to 16% of guns used in murders of police. Christopher S. Koper et al., *Criminal Use of Assault Weapons and High-Capacity Semiautomatic Firearms: An Updated Examination of Local and National Sources*, 95 J. Urban Health 313 (Oct. 2018), https://goo.gl/cwgrcq.

Plaintiffs incorrectly assert that gun prohibitions such as the AWCA are ineffective as "criminals do not buy their firearms legally." Lott Decl. ¶ 10. But data compiled by *The Washington Post* found that at least three quarters of the guns used in mass shootings since 1966 *were* purchased legally. Berkowitz, *supra* note 15. Plaintiffs also improperly claim that "the number of mass shootings committed *with assault weapons* is very small compared to the total number of mass shootings." Lott Decl. ¶ 49. But as stated by the Second and Fourth Circuits, assault weapons "are disproportionately used in crime, and particularly in criminal mass shootings," and "are also disproportionately used to kill law enforcement officers." *NYSRPA*, 804 F.3d at 262; *Kolbe*, 849 F.3d at 140.

Thus far, California's legislative and regulatory efforts to curb gun violence have had success. California has among the lowest gun-death rates per capita in the nation despite being the most populous state with the second-highest number of registered guns. *See* Tim Arango & Jennifer Medina, *California Is Already Tough on Guns. After a Mass Shooting, Some Wonder if It's Enough*, N.Y. Times (Nov. 10, 2018), https://nyti.ms/38w24r6. The AWCA continues to be an important element of California's efforts to prevent gun violence. Additional regulations, such as the AWCA amendment to address the bullet-button loophole that contributed to the staggering death toll in the San Bernardino shooting, continue to be constitutional exercises of the State's power to protect the welfare of its citizens.

The State notes the same in its filings, highlighting that weapons covered by the AWCA "are used disproportionately in crime," cause "a substantially greater number of fatalities and injuries" in mass shootings, are "used disproportionately against law enforcement personnel," and that the federal prohibition was effective in reducing mass shootings. Defs.' Opp. at 23, 27, 29; *see generally* Declaration of Professor John J. Donohue (ECF No. 33-3), Declaration of Blake Graham (ECF No. 33-4), Declaration of Professor Louis Klaveras (ECF No. 33-5). Accordingly,

whether this Court looks to the most recent empirical research, conducts a historical analysis of relevant laws, or looks to guidance from other federal circuits and California state courts, the outcome is the same: the AWCA should be upheld.

IV. The Use of Assault Weapons for Self-Defense or Militia Service Does Not Render the AWCA Unconstitutional.

Plaintiffs provide two additional arguments for enjoining enforcement of the AWCA; that the prohibited firearms are either: (1) "ideal for self-defense," or (2) "especially fit for militia service." Mot. at 15-16. Neither argument is persuasive.

Plaintiffs' self-defense argument lacks grounding in fact or logic. Unlike handguns, which *Heller* identified as "the quintessential self-defense weapon" and "the most popular weapon chosen by Americans for self-defense," assault weapons are bulky and difficult to control, making them ill-suited for personal protection. *See Heller*, 554 U.S. at 629 (contrasting handguns with bigger weapons that are difficult "to use for those without the upper-body strength to lift and aim a long gun"); *Worman*, 922 F.3d at 37 ("semiautomatic assault weapons do not share the features that make handguns well-suited to self-defense in the home"). For example, assault weapons are poorly suited for fending off intruders in the home because they are difficult to maneuver in close quarters, and their greater ability to penetrate walls means that every missed shot has the potential to threaten the safety of neighbors and other bystanders. *See Heller II*, 670 F.3d at 1261 (discussing evidence that "assault weapons 'have no legitimate use as self-defense weapons, and would in fact increase the danger to . . . innocent bystanders if . . . used in self-defense situations'") (citation omitted).[17] In light of these limitations, it is unsurprising that assault weapons are, in fact, rarely used for self-defense. *See Worman*, 922 F.3d at 37

[17] *See also* Justin Peters, *The NRA Claims the AR-15 Is Useful for Hunting and Home Defense. Not Exactly.*, Slate (June 12, 2016), https://slate.com/news-and-politics/2016/06/gun-control-ar-15-rifle-the-nra-claims-the-ar-15-rifle-is-for-hunting-and-home-defense-not-exactly.html.

(noting the lack of examples "of the use of an assault weapon for home self-defense"); *NYSRPA*, 804 F.3d at 263 (noting "the dearth of evidence" that assault weapons are used "for self-defense").

Plaintiffs' militia service argument fares no better. *Heller* itself expressly rejected the idea that weapons cannot be regulated if they would aid a citizen in rendering "effective" service in the modern military. 554 U.S. at 627. "M-16 rifles," "bombers," and "tanks" would also be highly useful in militia service, but *Heller* held that those weapons may be banned outright. *See id.*; *Rupp*, 401 F. Supp. 3d at 986 (concluding "that semiautomatic assault rifles are essentially indistinguishable from M-16s, which *Heller* noted could be banned pursuant to longstanding prohibitions on dangerous and unusual weapons"). Indeed, states have long prohibited assault weapons of this type and their precursors, *see* Sec. I.B., *supra*, and *Heller* cast no doubt on these "longstanding prohibitions." 554 U.S. at 626-27.

CONCLUSION

For the foregoing reasons, Everytown respectfully requests that the Court deny Plaintiffs' Motion for Preliminary Injunction.

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