

No. 19-56004

**In The United States Court of Appeals
for the Ninth Circuit**

STEVEN RUPP, ET AL.,

Plaintiffs-Appellants,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE
OF CALIFORNIA,

Defendant-Appellee

On Appeal from the United States District Court
Central District of California, Southern Division

The Honorable Josephine L. Staton

No. 8:17-cv-00746-JLS-JDE

**BRIEF OF AMICUS CURIAE EVERYTOWN FOR GUN SAFETY SUPPORT
FUND IN SUPPORT OF DEFENDANT AND AFFIRMATION
FILED WITH THE CONSENT OF ALL PARTIES**

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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 twenty children and six adults were murdered by a gunman with an AR-15 rifle—one type of assault 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., Duncan v. Becerra*, No. 19-55376 (9th Cir.); *Wilson v. Cook County*, 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, including the district court below, have also cited and expressly relied on Everytown’s amicus briefs in deciding

Second Amendment and other gun cases. *See, e.g.*, E.R.I 21-22; *Ass’n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. N.J.*, 910 F.3d 106, 112 n.8 (3d Cir. 2018); *see also Rehaif v. United States*, 139 S. Ct. 2191, 2210-11 & nn.4 & 7 (2019) (Alito, J., dissenting).¹

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.² 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) (upholding Massachusetts’ ban on certain semiautomatic assault weapons and large-capacity magazines), *petition for cert. filed*, No. 19-404 (U.S. Sept. 23, 2019); *Kolbe v. Hogan*, 849 F.3d 114, 137-38 (4th Cir. 2017) (en banc) (upholding Maryland’s ban on AR-15 and other military-style rifles and shotguns,

¹ An addendum 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 in part. Apart from *amicus curiae*, no person contributed money intended to fund the brief’s preparation and submission.

² In particular, this case challenges the AWCA’s restrictions on rifles classified as assault weapons. As Appellants concede, the law’s regulation of pistols and shotguns is “not at issue” here. Appellants’ Opening Brief 3 n.2, ECF No. 23 (“App. Br.”).

as well as detachable large-capacity magazines), *cert. denied*, 138 S. Ct. 469 (2017); *N.Y. State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 804 F.3d 242, 247 (2d Cir. 2015) (“*NYSRPA*”) (upholding New York’s ban on semiautomatic assault rifles with one or more military-style features and large-capacity magazines, while striking down other regulations), *cert. denied*, 136 S. Ct. 2486 (2016); *Friedman v. City of Highland Park, Ill.*, 784 F.3d 406, 412 (7th Cir. 2015) (upholding a municipal ordinance prohibiting the possession, sale, or manufacture of semiautomatic assault weapons and high-capacity magazines), *cert. denied*, 136 S. Ct. 447 (2015); *Heller v. District of Columbia*, 670 F.3d 1244, 1264 (D.C. Cir. 2011) (“*Heller II*”) (upholding District of Columbia law prohibiting semiautomatic assault weapons and high-capacity magazines); *see also Wilson v. Cook County*, 937 F.3d 1028 (7th Cir. 2019) (reaffirming *Friedman*), *petition for cert. filed*, No. 19-704 (U.S. Nov. 27, 2019).³ 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.

³ Although this Court 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*).

Ct. App. Dec. 11, 2017) (unpublished) (6th Dist.), *cert. denied*, 139 S. Ct. 116 (2018). Moreover, the district court below 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.” E.R.I. at 16, 20.

Quite simply, 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 semiautomatic 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 Appellants’ argument that the national prevalence of a type of a firearm, like the assault weapons at issue here, 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 either the Supreme Court’s decision in *Heller* or with common sense.

Finally, even if the AWCA is found or assumed to regulate conduct protected by the Second Amendment, this Court should still affirm the lower court’s decision because the AWCA survives intermediate scrutiny. In addition to the arguments and evidence advanced in the State’s brief, 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 & County of San Francisco*, 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 this Court 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)).

Appellants claim that “there is no evidence suggesting any longstanding tradition of government regulation similar to the AWCA.” App. Br. 8, 24. They are mistaken. The AWCA sits firmly within this country’s well-established history of firearm regulation. Specifically, it 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 semiautomatic 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, 68-72 (2017), shorturl.at/efoGL (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 date to the same period as early prohibitions on sales to felons and individuals with dangerous mental illnesses and early restrictions on commercial arms sales—all of which are laws that *Heller* identified as “longstanding” and therefore presumptively valid. See *Heller*, 554 U.S. at 626-27, 635; Spitzer, *supra*, at 68-71, 75 (discussing prohibitions on possession of semiautomatic weapons with large-capacity magazines (“LCMs”) in the 1920s and 1930s and restrictions on

commercial arms sales in the early twentieth century); *Skoien*, 614 F.3d at 639-40 (courts have found “prohibitions on the possession of firearms by felons and the mentally ill” to be sufficiently longstanding even though “[t]he first federal statute disqualifying felons from possessing firearms was not enacted until 1938” and “the ban on possession by *all* felons was not enacted until 1961”); *see also Friedman*, 784 F.3d at 408 (“*Heller* deemed a ban on private possession of machine guns to be obviously valid” even though “states didn’t begin to regulate private use of machine guns until 1927” and “regulating machine guns at the federal level” did not begin until 1934.). Thus, regulating semiautomatic weapons with LCMs has a longstanding historical tradition, and, as further described below, this longstanding tradition by 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. County 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).

A. The AWCA Is Consistent with Centuries of Laws Prohibiting Weapons Deemed to Be Especially Dangerous.

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 or unusual weapons. *See, e.g.*, 1763-1775 N.J. Laws 346 (prohibiting set or trap guns); The Laws of Plymouth Colony (1671) (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 prohibited or prohibitively taxed Bowie knives,⁵ which were determined to be “instrument[s] of almost certain death.” *Cockrum v. State*, 24 Tex. 394, 402-03 (1859). In addition, a number of states prohibited certain types of small and easily concealable handguns, which were deemed ideal for criminal use.⁶

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 (prohibiting Bowie knives); 1838 Tenn. Pub. Acts 200 (same); *Aymette v. State*, 21 Tenn. 154, 158-60 (1840) (justifying a prohibition on Bowie knives, as they are “weapons which are usually employed in private broils, and which are efficient only in the hands of the robber and the assassin,” and further stating that prohibitions on concealed firearms would also be constitutional, as preventing the State from regulating arms would create a “social evil of infinitely greater extent to society than would result from abandoning the right [to bear arms] itself”).

⁶ *See* 1879 Tenn. Pub. Acts 135, 135-36 (prohibiting “belt or pocket pistols, or revolvers, or any other kind of pistols, except army or navy pistol”); 1881 Ark.

(*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 semiautomatic weapons discussed next. *See Spitzer, supra*, at 67-71; Sec. I.B., *infra*.

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

Semiautomatic firearms capable of quickly firing a large number of rounds—the precursor to modern-day assault weapons—first became widely commercially available at the turn of the twentieth century. *See Heller II*, 670 F.3d at 1287 (Kavanaugh, J., dissenting) (“The first commercially available semi-automatic

Acts 191, 191-12 (similar); 1903 S.C. Acts 127, 127-28 (similar); 1907 Ala. 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, 338-39 (same); 1926 Mass. Acts 256 (same); 1927 Mich. Pub. Acts 887, 888-89 (same); 1927 R. I. Pub. Laws 256, 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 (prohibiting blackjacks, billy clubs, slung-shots, metal knuckles, daggers and similar knives, and bombs); 1911 N.Y. Laws 442 (similar); 1913 Iowa Acts 307 (similar); 1917 Minn. Laws 354 (similar); 1927 Mich. Pub. Acts at 888-89 (similar).

rifles ... entered the market between 1903 and 1906.”). States began regulating those firearms soon after. Such laws often categorized large-capacity, semiautomatic firearms, along with fully automatic weapons, as “machine guns,” and imposed restrictions that effectively prohibited them entirely. *See, e.g.*, 1927 R.I. Pub. Laws 256, 256-57 (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 887, 888 (prohibiting possession of “any machine gun or firearm which can be fired more than sixteen times without reloading”); *see generally* Spitzer, *supra*, at 67-71.

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 semiautomatic 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).⁸ Shortly thereafter, the federal government enacted a similar prohibition for the District of Columbia. *See* H.R. 8754, 72d Cong. §§ 1, 14 (1932) (making it a crime to “possess any machine gun,” which it defined

⁸ This standard originated with a model law promulgated by the National Crime Commission in 1927. Report of Firearms Committee, *supra*, at 422-23.

as “any firearm which shoots automatically *or semiautomatically* more than twelve shots without reloading” (emphasis added)). 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 1927⁹ and expanded this prohibition with a 1933 statute that prohibited the sale or possession of not only “all 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. 1169, 1170. These statutes were at least as restrictive as the AWCA, and indeed appear *more* restrictive, 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

⁹ *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”).

(*cont'd*)

other states, including Minnesota, Ohio, and Virginia, also prohibited or strictly regulated semiautomatic firearms with LCMs in the early twentieth century.¹⁰

Appellants assert that no law in U.S. history “specifically target[ed]” semiautomatic rifles prior to 1989. *See* App. Br. 8. That is bewildering: State laws specifically regulating semiautomatic weapons have existed for nearly a century. *See, e.g.*, 1927 R.I. Pub. Laws at 256-57; 1933 Ohio Laws at 189-90; 1934 Va. Acts at 137-40. Elsewhere, Appellants appear to concede that such regulations existed, but seek to dismiss them because they also regulated *other* weapons. *See* App. Br. 16 (deeming historical regulations “not relevant” because they “targeted non-firearms and machine guns” with “clumsy definitions” that “happened to include some semiautomatics”). But Appellants cannot change the reach of historical statutes by baselessly ascribing inadvertence to the legislatures that enacted them. And the fact that longstanding state laws prohibited an even broader array of firearms than the AWCA, as Appellants concede, is hardly evidence that the AWCA is invalid.

¹⁰ *See* 1933 Minn. Laws 231, 232-33 (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, 189-90 (creating prohibitive licensing for “any firearm which shoots more than eighteen shots semi-automatically without reloading”); 1934 Va. Acts 137, 137-40 (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”).

See Heller, 554 U.S. at 626-27, 635 (holding that “longstanding prohibitions” are presumptively valid).

Relatedly, Appellants claim that the AWCA and similar laws are of a “recent vintage” and therefore should not be upheld. App. Br. 9. 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, modern assault weapons with military-style features, like AR-15s, were not commercially available until the second half of the twentieth century and were not popular in the American marketplace until the late 1980s. *See* Affidavit of Robert Spitzer, Ph.D. ¶ 8, *Worman v. Healey*, No. 17-cv-10107-WGY (D. Mass. Dec. 15, 2017), ECF No. 61-5. Obviously, there could be no centuries-old regulation of firearms that did not exist or were not widely available until fairly recently. Rather, the “recent vintage” of the 1980s and 1990s laws, when the AWCA and other modern laws prohibiting assault weapons emerged, perfectly aligns with the ascendance of these firearms in American life.

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 semiautomatic firearms with the ability to shoot large numbers of rounds in a short time without reloading. These regulations have logically and necessarily progressed alongside

developments in firearm technology, growth in firearm popularity, and changes in the national regulatory landscape. Given that broader historical context, a brief period without regulation of a certain firearm does not summarily nullify the entire regulatory history nor render any future regulation of that firearm unconstitutional. 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. Appellants’ “Common Use” Test Is Illogical and Should Not Be Followed.

Appellants assert that assault weapons must be afforded constitutional protection and cannot be “ban[ned]” because they are “owned by the millions” and remain lawful in states other than California. *See* App. Br. 15-16, 22-24. There is neither firm legal footing nor sound logic in the “common use” test that Appellants advance.

The argument that assault weapons must receive Second Amendment protection simply because they are widely available in other states dangerously misconstrues the Supreme Court’s decision in *Heller*. *Heller* read *United States v.*

Miller, 307 U.S. 174 (1939), to say that 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. But 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 *Kolbe v. Hogan*, 849 F.3d 114, 142 (4th Cir. 2017) (“[T]he *Heller* majority said nothing to confirm that it was sponsoring the popularity test.”); *Worman v. Healey*, 293 F. Supp. 3d 251, 266 (D. Mass. 2018) (“[P]resent day popularity is not constitutionally material.”), *aff’d on other grounds*, 922 F.3d 26 (1st Cir. 2019), *petition for cert. filed*, No. 19-404 (U.S. Sept. 23, 2019). Nor does it logically follow—and again, no authoritative decision has held—that if a weapon is in “common use,” then the Second Amendment grants it complete constitutional immunity, regardless of how important the government’s interest in regulation. See, e.g., *Worman v. Healey*, 922 F.3d 26, 34 (1st Cir. 2019) (discussing “common use” under *Heller* only as relevant to a *limitation on* constitutional protection: “an important limitation on the right to keep and carry arms is that the sorts of weapons protected were those in common use at the time” (citations omitted)), *petition for cert. filed*, No. 19-404 (U.S. Sept. 23, 2019). Accordingly, this Court should reject Appellants’ baseless “common use” argument. See also Answering Br. of Defendant-Appellee 30-33, 46-47, ECF No. 39 (“AG Br.”).

Instead, and for the reasons set out in the Attorney General’s brief, this Court should conclude that the assault weapons regulated by the AWCA are not protected by the Second Amendment. *See* AG Br. at 17-40.

III. The AWCA Properly Advances California’s Significant Public Interest in Promoting Public Safety and Reducing Gun Violence

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; E.R.I 17-18; AG Br. 41-47. 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.” *Fyock*, 779 F.3d at 1000 (citation omitted).

The AWCA easily satisfies this test. *First*, California has a substantial interest in promoting public safety and reducing gun violence—as Appellants conceded below. *See* E.R.I 19 (noting plaintiffs’ concession and calling California’s public interest “beyond question”). *Second*, as the Attorney General has explained (AG Br. 48-64) and for the reasons that follow, there is a “reasonable fit” between the AWCA and California’s substantial interest. The AWCA is reasonably tailored to address the State’s serious public safety concerns because the use of assault weapons makes mass shootings and other gun violence incidents deadlier.

As this Court 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 v. Becerra*, 898 F.3d 1012, 1019 (9th Cir. 2018) (quoting *Kolbe*, 849 F.3d at 127); *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”). Everytown’s analysis, as well as other relevant research, demonstrates that the use of assault weapons, particularly with LCMs, results in more people being shot, more injuries per victim, and more deaths.¹¹ Despite Appellants’ attempts to downplay the significant role that assault weapons play in worsening gun violence (App. Br. 32-34), the research described below confirms the California legislature’s findings and the data marshaled by the State in its briefing. The district court correctly found this evidence more than sufficient to establish a reasonable fit between the AWCA and the State’s indisputable public interest. *See* E.R.I 20-25.

¹¹ The Seventh Circuit has noted that courts should consider the “dangerousness of the prohibited weapons by discussing general evidence” of their features. *Wilson v. Cook County*, 937 F.3d 1028, 1034 (7th Cir. 2019), *petition for cert. filed*, No. 19-704 (U.S. Nov. 27, 2019).

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. This Court 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.¹² Meanwhile, in the ten

¹² These shootings are: Las Vegas, Nevada (58 fatalities); Orlando, Florida (49 fatalities); Newtown, Connecticut (27 fatalities); Sutherland Springs, Texas (25 fatalities); El Paso, Texas (23 fatalities); Parkland, Texas (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)

(cont'd)

years from 2009 to 2018, there were at least 26 mass shootings¹³ (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 v. City of Highland Park, Ill.*, 784 F.3d 406, 412 (7th Cir. 2015); *see* Reva Siegel & Joseph Blocher, Commentary, *Why Regulate Guns?*, Duke Center For Firearms Law (Dec. 3, 2019), <https://bit.ly/2U0C4iT> (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

(frequently updated), <https://wapo.st/2CMznZz>; AP, *El Paso Walmart Shooting Victim Dies, Raising Death Toll to 23*, NBCNews.com (Apr. 26, 2020), [nbcnews.com/2Bdgn8L](https://www.nbcnews.com/2Bdgn8L). Notably, the Parkland shooter specifically 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>.

¹³ Defined as a shooting that killed four or more individuals.

Bernardino, Newtown, Las Vegas, Parkland, Sutherland Springs, and Aurora sear themselves into the national consciousness and affect how people live their everyday lives. *See, e.g.*, Sarah R. Lowe & Sandra Galea, *The Mental Health Consequences of Mass Shootings*, 18 *Trauma, Violence & Abuse* 62 (2017) (reviewing empirical literature on the mental health impact of mass shootings, in which studies indicate that mass shootings harm the mental health of both direct survivors and community members, including through post-traumatic stress and depression, and adversely affect even those living far away, who can experience increased fear of crime or victimization and uncertainty about their safety at school and in the community).¹⁴

While shootings of this scale remain statistically rare compared to the plague of day-to-day gun violence, their enormous impact reinforces the compelling justifications for the AWCA.

¹⁴ *See also* 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*, Am. Psychological Ass'n (Oct. 30, 2018), <https://bit.ly/37kodsB> (finding that 75% of young people ages 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), <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).

Other social science research. Additional research—some of which this Court 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 242, 262 (2d Cir. 2015); accord *Kolbe*, 849 F.3d at 140; see also *Gallinger*, 898 F.3d at 1019 (acknowledging the “exceptional lethality of [assault weapons]”). They are capable of firing far more bullets at a far faster rate than many 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., Scott Pelley, *What Makes the AR-15 Style Rifle the Weapon of Choice for Mass Shooters*, 60 Minutes (June 23, 2019), <https://cbsn.ws/2TOSoTW> (noting that “[t]here’s going to be a lot more damage [from an AR-15] to the tissues, both bones, organs, whatever gets kind of even near this bullet path” (statement of Cynthia Bir, Ph.D., Professor at the Viterbi School of Engineering at the University of Southern California)); 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.”); *Worman*, 922 F.3d at 39-40 (citing additional studies). 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 (2019), <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), <https://cbsn.ws/2GaNI3v>. Further, 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. And 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 shootings 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 & Quoc Trung 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*, N.Y. Times (Sept. 4, 2019), <https://nyti.ms/2HNgFnd>; *see also* John J. Donahue III & Theodora Boulouta, *The Assault Weapon Ban Saved Lives*, Stanford Law School Blog (Oct. 15, 2019), <https://stanford.io/2ZVU7e1> (refuting challenge to this analysis).

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, despite comprising a significantly lower percentage of the overall guns in use. 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>. 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; *accord 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.

In sum, California has a robust basis to conclude that restricting access to assault weapons advances the State's substantial interest in reducing gun violence. The AWCA should be upheld.

CONCLUSION

For the foregoing reasons, Everytown respectfully requests that the Court affirm the District Court's ruling.

Dated: June 2, 2020

Respectfully submitted,

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