No. 17-56081

In the United States Court of Appeals for the Ninth Circuit

VIRGINIA DUNCAN, *et al.*,

Plaintiffs–Appellees,

v.

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

Defendant–Appellant.

Appeal from the United States District Court
for the Southern District of California
The Honorable Roger T. Benitez
Case No. 3:17-cv-1017-BEN

BRIEF OF *AMICI CURIAE* DOCTORS FOR RESPONSIBLE GUN OWNERSHIP, INDEPENDENCE INSTITUTE, AND MILLENNIAL POLICY CENTER IN SUPPORT OF APPELLEES AND AFFIRMANCE

David B. Kopel
Independence Institute
727 East 16th Avenue
Denver, CO 80203
(303) 279-6536
david@i2i.org

Joseph G.S. Greenlee*
Millennial Policy Center
3443 S. Galena Street, Suite 120
Denver, CO 80231
(970) 485-3303
josephgreenlee@gmail.com

Counsel for Amici Curiae

January 8, 2018

QUESTION PRESENTED

Can a state confiscate arms that are in common use by law-abiding citizens?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* Doctors for Responsible Gun Ownership states that it is a project of the Second Amendment Foundation, a non-profit organization that has no parent companies and issues no stock.

Amicus Curiae Independence Institute states that it is a non-profit corporation, incorporated in Colorado. Independence Institute has no parent corporations, nor is there any publicly held corporation that owns more than 10% of its stock.

Amicus Curiae Millennial Policy Center states that it is a non-profit corporation, incorporated in Colorado. Millennial Policy Center has no parent corporations, nor is there any publicly held corporation that owns more than 10% of its stock.

/s/ *Joseph G.S. Greenlee*
Joseph G.S. Greenlee
Millennial Policy Center
Counsel of Record

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Supreme Court Cases

Federal Cases

Statutes and Regulations

Other Authorities

STATEMENT OF *AMICI CURIAE*

Founded in 1994, Doctors for Responsible Gun Ownership ("DRGO") is now a project of the Second Amendment Foundation. DRGO is a nationwide network of healthcare professionals, doctors, scientists, and others who support safe and lawful use of firearms. DRGO provides commentary on policy and medical literature dealing with firearms ownership as part of its mission.

The Independence Institute is a non-profit Colorado educational public policy research organization founded in 1984 on the eternal truths of the Declaration of Independence. The Institute's amicus briefs in *District of Columbia v. Heller* and *McDonald v. Chicago* (under the name of lead amicus, International Law Enforcement Educators & Trainers Association ("ILEETA")) were cited by Justices Breyer (*Heller*), Alito (*McDonald*), and Stevens (*McDonald*). The research of Institute Research Director David Kopel has been cited by this Court in *Teixeira v. County of Alameda* (2017) (en banc) (Tallman, J., concurring in part and dissenting in part); *Peruta v. County of San Diego* (2016) (en banc) (majority); *Teixeira v. County of Alameda* (2016) (panel); *Peruta v. County*

of San Diego (2014) (panel); and *Silveira v. Lockyer* (2003) (Kleinfield, J., dissenting from denial of petition for rehearing).

Millennial Policy Center ("MPC") is a research and educational center whose mission is to develop and promote policy solutions that advance freedom, opportunity, and economic vitality for the Millennial Generation. To secure liberty for younger and future generations, MPC has a keen interest in the long-term viability of the constitutionally-protected right to keep and bear arms.

CONSENT TO FILE

All parties have consented to the filing of this brief.[1]

SUMMARY OF ARGUMENT

This case presents the issue of whether confiscation of arms in common use—Large Capacity Magazines ("LCMs")—violates the Second Amendment.[2]

---

[1] No counsel for a party in this case authored this brief in whole or in part. No party or counsel for a party contributed money intended to fund the preparation and submission of this brief. No person other than amici and their members contributed money intended to fund preparing or submitting this brief.

[2] Cal. Penal Code § 32310. This law is extraordinary—even among bans—for prohibiting the mere possession of LCMs. It confiscates lawfully owned arms.

Under Supreme Court precedent, arms prohibitions are straightforward. If arms are "in common use," they are constitutionally-protected and cannot be banned. If arms are "dangerous and unusual," or thus not "in common use," the arms are not constitutionally-protected and can be banned.

The Supreme Court has addressed arms prohibitions more than any other Second Amendment issue—a total of four times. The Court has never indicated that an interest-balancing approach is appropriate. Indeed, the Court has twice expressly rejected such an approach. The Court has repeatedly made clear that bans on constitutionally-protected arms are categorically unconstitutional, while bans on unprotected arms are permissible.

Thus, the dispositive issue in this case is whether the banned magazines are "in common use."

Over 100 million magazines capable of holding more than 10 rounds are owned nationwide by tens of millions of Americans. Appellant, who bears the burden of proving that the magazines are not "in common use," offered no evidence and *did not even argue* that the banned magazines

are uncommon. Therefore, the ban is unconstitutional and should be enjoined.

ARGUMENT

I. THE SECOND AMENDMENT PROTECTS LARGE-CAPACITY MAGAZINES.

A. The Supreme Court held that the Second Amendment protects arms "in common use."

The Supreme Court specifically addressed "*what* types of weapons" the right to keep and bear arms protects. *District of Columbia v. Heller*, 554 U.S. 570, 624 (2008) (emphasis in original). The Court concluded that the right protects arms that are "typically possessed by law-abiding citizens for lawful purposes." *Id.* at 625. In other words, as "[*United States v. Miller*, 307 U.S. 174 (1939)] said … the sorts of weapons protected were those 'in common use at the time.'" *Heller*, 554 U.S. at 627 (quoting *Miller*, 307 U.S. at 179).

As the Court explained, in the Founding Era, "when called for militia service able-bodied men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *Heller*, 554 U.S. at 624 (quoting *Miller*, 307 U.S. at 179) (brackets omitted). Thus, "[t]he traditional militia was formed from a pool of men bringing arms 'in

common use at the time' for lawful purposes like self-defense." *Heller*, 554 U.S. at 624. Because "weapons used by militiamen and weapons used in defense of person and home were one and the same," protecting arms in common use is "precisely the way in which the Second Amendment's operative clause furthers the purpose announced in its preface." *Id.* at 625 (citations omitted).

Put simply, "the pertinent Second Amendment inquiry is whether [the arms in question] are commonly possessed by law-abiding citizens for lawful purposes today." *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1032 (2016) (Alito, J., concurring) (emphasis omitted).

B. The Supreme Court held that the Second Amendment does not protect weapons "not typically possessed by law-abiding citizens," including "dangerous and unusual weapons."

In addition to defining what arms *are* protected by the right (i.e., arms "in common use"), the *Heller* Court defined what arms are not protected: "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." 554 U.S. at 625. *See Fyock v. Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015) ("Regulation of a weapon not typically possessed by law-abiding citizens for lawful purposes does not implicate the Second Amendment").

The *Heller* Court explained that this means "dangerous and unusual weapons." *Heller*, 554 U.S. at 627. A weapon that is "unusual" is the antithesis of a weapon that is "common." Thus, an arm "in common use" cannot be "dangerous and unusual," and is therefore protected. *See Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015) (if "the banned weapons are commonly owned … then they are not unusual.").

C. Large-Capacity Magazines are "in common use."

"The Second Amendment extends, prima facie, to all instruments that constitute bearable arms." *Heller*, 554 U.S. at 582. "In other words, it identifies a presumption in favor of Second Amendment protection, which the State bears the initial burden of rebutting." *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 257 n.73 (2d Cir. 2015) ("*NYSRPA*").[3] *See Virginia v. Black*, 538 U.S. 343, 369 (2003) (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part) (defining "prima facie evidence" as "sufficient to establish a given

[3] In *NYSRPA*, the Second Circuit struck down a ban on a pump-action rifle because the state focused exclusively on semi-automatic weapons and "the presumption that the Amendment applies remain[ed] unrebutted." 804 F.3d at 257.

fact" and "if unexplained or uncontradicted … sufficient to sustain a judgment in favor of the issue which it supports.") (quoting BLACK'S LAW DICTIONARY 1190 (6th ed. 1990)).

The Supreme Court has not precisely defined "common use." In *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Court struck down bans on handguns, "the most popular weapon chosen by Americans for self-defense in the home," so a detailed examination of their commonality was unnecessary. *Heller*, 554 U.S. at 629. In *Miller*, the district court had quashed the indictment, so neither side had an opportunity to present evidence regarding the commonality of short-barreled shotguns. Because the commonality of these arms was not within judicial notice, the Supreme Court remanded. In *Caetano*, the concurring opinion declared that "[t]he more relevant statistic is that hundreds of thousands of Tasers and stun guns have been sold to private citizens, who it appears may lawfully possess them in 45 States." 136 S. Ct. at 1032 (Alito, J., concurring) (quotations and brackets omitted). Because "stun guns are widely owned and accepted as a legitimate means of self-defense across the country," they were common enough for protection under the Second Amendment. *Id.* at 1033.

In the federal Circuit Courts, "[e]very post-*Heller* case to grapple with whether a weapon is 'popular' enough to be considered 'in common use' has relied on statistical data of some form, creating a consensus that common use is an objective and largely statistical inquiry." *Hollis v. Lynch*, 827 F.3d 436, 449 (5th Cir. 2016) (quotations omitted). Nevertheless, "[t]here is considerable variety across the circuits as to what the relevant statistic is and what threshold is sufficient for a showing of common use." *Id.*

Total Number: "Some courts have taken the view that the total number of a particular weapon is the relevant inquiry." *Id.*

The Second Circuit determined that LCMs "are 'in common use' as that term was used in *Heller*" because "statistics suggest that about 25 million large-capacity magazines were available in 1995 … and nearly 50 million such magazines—or nearly two large-capacity magazines for each gun capable of accepting one—were approved for import by 2000." *NYSRPA*, 804 F.3d at 255.

The D.C. Circuit found that LCMs were "in common use" because "approximately 4.7 million more such magazines were imported into the United States between 1995 and 2000." *Heller v. D.C.*, 670 F.3d 1244,

1261 (D.C. Cir. 2011) ("*Heller II*"). The court concluded its analysis by stating "[t]here may well be some capacity above which magazines are not in common use but … that capacity surely is not ten." *Id.*[4]

The Fourth Circuit determined it "need not answer" whether LCMs are "in common use," but it acknowledged "evidence that in the United States between 1990 and 2012, magazines capable of holding more than ten rounds numbered around 75 million." *Kolbe v. Hogan*, 849 F.3d 114, 129, 136 (4th Cir. 2017) (en banc).

Percentage of Total: Some courts have looked at what percentage a specific arm makes up of the total nationwide arms stock to determine whether it is "in common use." The Second Circuit found that weapons that "only represent about two percent of the nation's firearms" were "in common use." *NYSRPA*, 804 F.3d at 255. By comparison, the Fourth Circuit acknowledged that LCMs represent "46% of all magazines owned." *Kolbe*, 849 F.3d at 129. The D.C. Circuit found LCMs "in common

[4] For simplicity, this brief uses the statutory term "large-capacity magazine." However, the term is a misnomer. The vast majority of banned magazines are the *standard* magazines supplied by the manufacturer of the firearm. If the statute only applied to unusually large magazines, such as after-market magazines that turn a 13-round handgun into a 35-round handgun, the factual and legal analysis would be very different.

use" because "fully 18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds." *Heller II*, 670 F.3d at 1261.

Number of Jurisdictions: As explained *supra*, the concurrence in *Caetano* identified "the more relevant statistic" as the raw number of arms and the number of jurisdictions in which they are lawful.[5] The Fifth Circuit followed this approach (among others) in *Hollis*. Whereas the concurrence in *Caetano* determined stun guns were "in common use" since hundreds of thousands had been sold nationwide and they were lawful in 45 states, the Fifth Circuit determined machineguns were unprotected: only 175,977 were in existence and "34 states and the District of Columbia prohibit possessing machineguns." *Caetano*, 136 S.Ct. at 1032 (Alito, J., concurring); *Hollis*, 827 F.3d at 450.[6] Using these guidelines, the district court correctly determined LCMs "are common"

[5] In striking down a ban on carrying arms in public, the Seventh Circuit was attentive to other jurisdictions, and repeatedly noted that the challenged statute was the most restrictive in the nation. *Moore v. Madigan*, 702 F.3d 933, 940, 941, 942 (7th Cir. 2012). California's magazine ban is similarly the most restrictive in the nation.

[6] The *Hollis* court's state law count was incorrect, but it demonstrates the use of state laws in assessing "common use."

because they are "[l]awful in at least 43 states and under federal law," and because "these magazines number in the millions." ER 7.

In *Fyock v. Sunnyvale*, this Court determined the district court did not abuse its discretion by finding that "at a minimum, [LCMs] are in common use." 779 F.3d at 998. Fyock "presented sales statistics indicating that millions of magazines, some of which [] were magazines fitting Sunnyvale's definition of large-capacity magazines, have been sold over the last two decades in the United States." *Id.* Additionally:

> to the extent that certain firearms capable of use with a magazine—e.g., certain semiautomatic handguns—are commonly possessed by law-abiding citizens for lawful purposes, our case law supports the conclusion that there must also be some corollary, albeit not unfettered, right to possess the magazines necessary to render those firearms operable.

Id.

By any metric LCMs are "in common use." Furthermore, countless firearms capable of use with LCMs are "in common use." The magazines California bans are constitutionally-protected arms.

1. What matters is that the ban dispossesses law-abiding citizens.

Appellant argues that "prohibiting possession makes theft of LCMs far less likely." *OpeningBr.* at 53 n.22. Amici Physicians argue that the ban should be upheld because "the Statute will dispossess criminals of LCMs." *PhysiciansBr.* at 23. The Supreme Court rejected the notion that law-abiding citizens can be dispossessed of protected arms so that criminals can likewise be dispossessed. Justice Breyer's *Heller* dissent accurately stated that handguns "are the overwhelmingly favorite weapon of armed criminals." 554 U.S. at 682 (Breyer, J., dissenting). But the *Heller* Court only cared that handguns are "the most preferred firearm in the nation" among law-abiding citizens. Consequently, the handgun ban "would fail constitutional muster" under "any of the standards of scrutiny." *Heller*, 554 U.S. at 628–629.

As the district court explained, "[t]he problem is the bludgeon [i.e., the magazine confiscation] indiscriminately hammers all that is in its path. Here, it also hammers magazines out of the hands of long time law-abiding citizens." ER 55. The statute may have been intended to dispossess criminals, but it sweeps too broadly and dispossesses millions of law-abiding Californians—nearly every single one.

Appellant provides the same rationale for a ban that Justice Breyer provided in his *Heller* dissent: restrictions, as opposed to a prohibition, are less effective and are difficult to enforce. *OpeningBr.* at 10–12. Justice Breyer observed that "even if guns are initially restricted to law-abiding citizens, they might be stolen and thereby placed in the hands of criminals." *Heller*, 554 U.S. at 712 (Breyer, J., dissenting). Justice Breyer concluded: "although there may be less restrictive, *less effective* substitutes for an outright ban, there is no less restrictive *equivalent* of an outright ban." *Id.* (emphasis in original). The *Heller* majority responded by explaining:

> The Constitution leaves the District of Columbia a variety of tools for combating [handgun violence], including some measures regulating handguns. But *the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home.*

Heller, 554 U.S. at 636 (2008) (citation omitted) (emphasis added). Likewise, the Constitution leaves California a variety of tools. But according to the Supreme Court, banning constitutionally-protected arms

from law-abiding citizens to attempt to prevent criminal misuse is "off the table."[7]

2. The ban will not dispossess criminals.

Appellant states the ban is required to "address the proliferation of LCMs in California despite a ban on their sale or transfer"—implying that the new ban is required because criminals are not abiding by the current ban. *OpeningBr.* at 11. It is illogical to believe that criminals willing to violate one magazine ban would abide by another—and Appellant fails to present any rationale.

The Santa Monica murderer behaved the way violent criminals do—without regard for the law. The evil man intent on murder is believed to have acquired his LCMs outside the state in violation of California law. As the district court stated, "[i]t is hard to imagine that the shooter, having already evaded California law to acquire large capacity magazines, would have dispossessed himself of the illegally acquired

[7] Other bans have been held unconstitutional because they forbade all lawful uses. *E.g.*, *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808–09 (1984) (city cannot ban handbilling just because some people litter); *Vincenty v. Bloomberg*, 476 F.3d 74 (2d Cir. 2007) (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975)) (city cannot ban spray paint and markers by young people just because some people criminally graffiti).

large capacity magazines if the existing law had included the new Proposition 63 amendments to § 32310." ER 37.

D. Large-Capacity Magazines are not "dangerous and unusual."

To qualify as "dangerous and unusual," a weapon must be both, dangerous *and* unusual. This Court set forth the requirements in *Fyock*: "[t]o determine [whether a weapon is 'dangerous and unusual'], we consider whether the weapon has uniquely dangerous propensities *and* whether the weapon is commonly possessed by law-abiding citizens for lawful purposes." 779 F.3d 991, 997 (9th Cir. 2015) (emphasis added). The Fifth Circuit took the same approach in *Hollis*, conducting an analysis first to determine whether machineguns are uniquely dangerous, and then conducting another to determine whether machineguns are also unusual. 827 F.3d 436 (5th Cir. 2016).

In *Caetano*, the Supreme Court confirmed that this is the correct approach. The *Caetano* Court declined to consider the dangerousness of stun guns because it had already determined that the lower court's unusualness analysis was flawed. 136 S. Ct. at 1028. The concurrence elaborated:

> As the *per curiam* opinion recognizes, this is a conjunctive test: A weapon may not be banned unless it is *both* dangerous *and* unusual. Because the Court rejects the lower court's conclusion that stun guns are "unusual," it does not need to consider the lower court's conclusion that they are also "dangerous."

Id. at 1031 (Alito, J., concurring) (emphasis in original).

As explained above, LCMs are among the most popular arms in the country. "In fact, these magazines are so common that they are standard." *Kolbe v. Hogan*, 813 F.3d 160, 174 (4th Cir. 2017), *reversed on reh'g en banc*, 849 F.3d 114 (4th Cir. 2017). Indeed, the only dispute between the parties is whether the magazines number in the tens or *hundreds* of millions. Whatever the exact number, it is beyond dispute that such arms are "in common use." Being "in common use," the magazines are necessarily *not* unusual, and therefore are not "dangerous and unusual."

Amici Physicians argue that "[t]he Second Amendment does not protect a right to possess LCMs, which are especially dangerous and unusual weapons." *PhysiciansBr.* at 8. Amici present various arguments why LCMs are allegedly dangerous, but conspicuously absent from their brief is any argument that LCMs are unusual. Likewise, any such

argument is absent from Appellant's Opening Brief. Indeed, such an argument could not seriously be made. Even if Physicians had proven that LCMs are "unusual," their arguments about dangerousness do not withstand scrutiny.

1. Large-Capacity Magazines are not frequently used in mass shootings.

Amici Physicians argue that "LCMs are frequently used in mass shootings." *PhysiciansBr.* at 10, 25. Amici complain that "the district court's finding vastly understates the frequency with which shooters armed with LCMs engage in mass shootings." *Id.* at 12. Specifically, both Appellant and Amici point to a survey conducted by the gun-control group, Mayors Against Illegal Guns ("MAIG"), which detailed 93 mass shootings. *OpeningBr.* at 37; *PhysiciansBr.* at 12–13; ER 1194–1229. Amici Physicians complain that the district court "inexplicably concluded that many of the shootings the survey identified have no relevance to this case." Amici declare that the court's "conclusion is erroneous." *PhysiciansBr.* at 12. Yet after asserting that the district court acted "inexplicably" and reached an "erroneous" conclusion, Amici offer no rebuttal to any point made in the district court's analysis.

Instead, Amici miscite the MAIG survey, arguing that "in mass shootings between January 2009 and January 2013, 135% more people were shot and 57% more people killed in incidents where assault weapons *or* LCMs were used." *PhysiciansBr.* at 13 (emphasis added). Amici undersold their own point, as the survey actually stated that the incidents involving assault weapons *or* LCMs resulted in 151% more people shot and 63% more deaths. ER 1197. Nevertheless, this statistic proves nothing. For all the Court knows from either Appellant's Brief or Amici Physicians' Brief—or the survey itself—assault weapons were entirely responsible for the higher rate of persons shot and killed and LCMs had no effect whatever.

More telling is what Appellant and Amici Physicians elide: of the 93 incidents included in the survey, LCMs were used in only *six* of those incidents.[8] In at least one of those incidents—the Santa Monica,

[8] These are East Oakland, California on 3/21/09, Binghamton, New York on 4/3/09, Tucson, Arizona on 1/8/11, Aurora, Colorado on 7/20/12, Newtown, Connecticut on 12/14/12, and Santa Monica, California on 6/7/13. The survey indicates that the Oak Creek, Wisconsin shooter "reportedly bought three 19-round magazines when he purchased the gun," but it does not indicate whether the magazines were used in the shooting. ER 1208.

California shooting—the magazines were obtained illegally, indicating the futility of a ban.

Indeed, Appellant and Amici Physicians vastly *overstated* the frequency with which criminals with LCMs engage in mass shootings. The district court correctly concluded that many of the surveyed shootings were irrelevant, since 87 of the 93 incidents did not involve LCMs. This MAIG survey Appellant and Amici rely on contradicts the argument that "LCMs are frequently used in mass shootings." As the district court stated, the survey "tends to prove the opposite of a justification for § 32310 (c) & (d), i.e., it tends to prove there is no need to dispossess and criminalize law-abiding responsible citizens currently possessing magazines holding more than 10 rounds." ER 28.

Amici also cite an article from Mother Jones magazine, stating that "[o]f 62 mass shootings from 1982 to 2012, LCMs were recovered in 50% of incidents."[9] *PhysiciansBr.* at 13. As the district court correctly stated,

[9] Significantly, while these arms were recovered from the scenes, "not all of them were used in the crimes." Jaeah Lee et al., *More Than Half of Mass Shooters Used Assault Weapons and High-Capacity Magazines*, MOTHER JONES, Feb. 27, 2013, http://www.motherjones.com/politics/2013/02/assault-weapons-high-capacity-magazines-mass-shootings-feinstein/.

"Mother Jones magazine has rarely been mentioned by any court as reliable evidence." ER 27.[10] Moreover, it is unremarkable that LCMs, which represent "46% of all magazines owned," *Kolbe*, 849 F.3d at 129, were recovered at 50% of the shootings. That LCMs makeup roughly half of all magazines in the country and were recovered at roughly half of the mass shootings involving a magazine actually demonstrates that LCMs are *not* used disproportionately in mass shootings.

This contrasts with handguns. Although handguns are about one-third of the gun supply, they "are the overwhelmingly favorite of armed criminals." *Heller*, 554 U.S. at 682 (Breyer, J., dissenting). Notwithstanding disproportionate use in crime, handguns may not be

[10] Mother Jones missed more than 40 percent of the cases that met its selection criteria, and did not consistently follow its own criteria. Grant Duwe, *The Truth About Mass Public Shootings*, REASON, Oct. 28, 2014, http://reason.com/archives/2014/10/28/the-truth-about-mass-public-shootings#.esuljj:16Hi; James Fox, *Mass shootings not trending*, BOSTON GLOBE, Jan. 23, 2013, http://www.boston.com/community/blogs/crime_punishment/2013/01/mass_shootings_not_trending.html. Duwe is author of *Mass Murder in the United States: A History* (2007), a leading scholarly book on the subject. Fox is professor of criminology at Northeastern University, formerly the Dean, and author of 15 books, including *Extreme Killing: Understanding Serial and Mass Murder* (2d ed. 2014).

banned. *A fortiori*, LCMs, which are *not* disproportionately used in crime, may not be banned.

While handgun crime (robberies, domestic shootings, and so on) is common, Amici Physicians' sources emphasize how rare mass shootings are. Appellant contends that the MAIG survey "confirms … that mass shootings are not rare." *OpeningBr.* at 53. In fact, the MAIG survey states that "[m]ass shootings represent a small share of total U.S. firearm related homicides" and that "[l]ess than one percent of gun murder victims recorded by the FBI in 2010 were killed in [mass shootings]." ER 1197. Mother Jones magazine states, "Mass shootings represent only a sliver of America's overall gun violence." ER 637. A law that dispossess virtually every law-abiding Californian of a constitutionally-protected arm is a poor fit for a law aimed at addressing only "a sliver of America's overall gun violence."

2. What matters is that the ban will reduce defensive shots fired by law-abiding victims.

Appellant and Amici Physicians argue that LCMs result in more shots fired, more wounds, and more fatalities. *OpeningBr.* at 20, 37–38; *PhysiciansBr.* at 16. For proof, they rely on expert Christopher Koper. *OpeningBr.* at 37–39; *PhysiciansBr.* at 17, 18. Koper conducted a study

commissioned by the Department of Justice to analyze the effects of the federal ban on LCMs from 1994–2003. Koper concluded that "there [had] been no discernible reduction in the lethality and injuriousness of gun violence." ER 1502. As the district court explained, Koper summarized: "it is not clear how often the ability to fire more than 10 shots without reloading (the current magazine capacity limit) affects the outcome of gun attacks. All of this suggests that *the ban's impact on gun violence is likely to be small*." ER 28 (citing ER 1425) (emphasis added).

A study of crime guns seized by Virginia police between 1993 and 2013 reached a similar conclusion:

> we are unable to find any effect of LCMs or the Federal LCM ban on lethality measured as the number of murders, the murder rate, the number of gun homicides, the gun homicide rate, or deaths and injury caused by public shootings. Large capacity magazines appear to have little to do with homicide, public or private, and laws banning these products apparently have no effect.

Carlisle Moody, *Large Capacity Magazines and Homicide* at 7 (WM. & MARY, Dep't of Econ., Working Paper No. 160, Feb. 2015).[11]

[11] http://ssrn.com/abstract=2592728.

Dr. Gary Kleck submitted a Declaration in which he detailed his analyses of mass shootings between 1984–1993, then 1994–2013. He found that:

> all the shooters in these incidents possessed either multiple guns or multiple magazines. *There was not a single mass shooting in which the offender used an LCM, and possessed just one gun and just one magazine in his immediate possession.* Thus, even if LCMs had not been available, all of the shooters could have fired large numbers of rounds without significant interruption simply by firing multiple guns or using a single gun but changing smaller capacity magazines – an action that takes only 2-4 seconds.

ER 2439 (emphasis in original). Kleck's statement supports the Department of Justice and Virginia studies, which concluded that magazine bans have no discernable impact.

More fundamentally, "[t]he Supreme Court made clear in *Heller* that it wasn't going to make the right to bear arms depend on casualty counts." Otherwise, "*Heller* would have been decided the other way." *Moore*, 702 F.3d at 939 (citing *Heller* 554 U.S. at 636). Rather, the right depends on the ability of "citizens to use [protected arms] for the core lawful purpose of self-defense." *Heller*, 554 U.S. at 630.

California's ban is particularly problematic because it reduces defensive fire, impeding the ability of citizens to defend themselves.[12] The ban is thus "designed to strike at the right itself." *Gonzales v. Carhart*, 550 U.S. 124, 157-58 (2007). "The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute." *Heller*, 554 U.S. at 628.

Appellant argues that "there is no credible proof that magazines holding more than ten rounds are necessary or regularly used for self-defense." *OpeningBr.* at 31. Whether arms are "necessary" for self-defense is of no concern to the government; what matters is whether arms are commonly chosen by the people for that purpose. As Justice Stevens explained, "[t]he Court struck down the District of Columbia's handgun ban not because of the *utility* of handguns for lawful self-defense, but rather because of their *popularity* for that purpose." *McDonald*, 561 U.S. at 890 n.33 (Stevens J., dissenting) (emphasis in original). Indeed, "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-

[12] In this sense the magazine ban is more burdensome than a handgun ban, since it also diminishes defensive long gun fire in the home.

case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634 (emphasis in original). "To limit self-defense to only those methods acceptable to the government is to effect an enormous transfer of authority from the citizens of this country to the government—a result directly contrary to our constitution and to our political tradition." *Friedman*, 784 F.3d at 413 (Manion, J., dissenting).

Nor does the right depend on how regularly arms are used in self-defense. The bizarre result would be that the safer the country became, the less rights the people would have, because fewer arms would be used in self-defense. Constitutional protection is not contingent on the number of times people use arms in self-defense; what matters is the commonality of arms that are kept by people for that purpose. Tens of millions of Americans keep countless millions of LCMs for self-defense.

Their choices are prudent for several reasons:

Not every shot hits the target: Even the most highly trained shooters miss their target. For instance, a study on police officer shootings found that "[b]etween 1998 and 2006, the average hit rate [for NYPD officers] was 18 percent for gunfights. Between 1998 and 2006, the average hit rate [for NYPD officers] in situations in which fire was not returned was

30 percent." BERNARD D. ROSTKER ET AL., EVALUATION OF THE NEW YORK CITY POLICE DEPARTMENT FIREARM TRAINING AND FIREARM-DISCHARGE REVIEW PROCESS 14 (2008).[13]

In a gun fight with an attempted murder suspect in 2013, NYPD officers shot 84 times, and hit him only once. Sebastian Murdock, *NYPD Officers Fire 84 Shots At Suspect, Miss 83 Times*, HUFFINGTON POST, Sept. 6, 2015.[14] Awoken in the dark of night, victims of home invasions cannot be expected to always stop an attacker with a single shot either.

Not every shot that hits the target disables the target: Unlike in the movies, a single shot does not always stop an attacker. "Doctors who have treated gunshot victims say that being shot is not automatically a death sentence." John Eligon, *One Bullet Can Kill, but Sometimes 20 Don't, Survivors Show*, N.Y. TIMES, Apr. 3, 2008.[15] Rather, Dr. Martin L. Fackler, a former military surgeon, says that "shots to roughly 80 percent of the body would not be fatal blows." *Id.*

---

[13] http://www.nyc.gov/html/nypd/downloads/pdf/public_information/RAND_FirearmEvaluation.pdf.

[14] http://www.huffingtonpost.com/entry/nypd-84-shots-brooklyn_us_55ec4b31e4b093be51bbb978.

[15] http://nyti.ms/2tmTmq7.

Recently, a Georgia home invader was shot five times and managed to flee the scene. After breaking through multiple locked doors, the home invader encountered a mother hiding in an attic with her children. The mother emptied a six-shot revolver, hitting the invader five times. Neither party realized the gun was empty, so by keeping it pointed at the invader the mother and her children were able to safely escape. The invader then fled in his SUV. Had the invader realized the mother was out of ammunition and thereby defenseless, the ending could have been tragic. Rich Phillips, *Gun Rights Groups say Georgia home invasion proves their point*, CNN, Jan. 11, 2013.[16]

Sometimes there is more than one attacker: Public attacks and home invasions are often conducted by multiple criminals. As Kleck reported, "the 2008 U.S. Department of Justice's National Crime Victimization survey, indicated that 17.4% of violent crimes in the United States involved two or more offenders, and that nearly 800,000 violent crimes occurred in 2008 in which the victim faced multiple offenders." ER 2441.

[16] http://www.cnn.com/2013/01/10/us/home-invasion-gun-rights/index.html.

In a recent example, a Detroit woman fended off five home invaders with her 9mm Glock. Holly Fournier & George Hunter, *Woman fires at home burglars: 'I let loose on them'*, DETROIT NEWS, June 9, 2015.[17] Notably, the most popular 9mm Glock comes with a standard magazine of 17 rounds.[18]

A 61-year-old Texan woman was less fortunate. Awoken at night by two home invaders, the woman managed to shoot one of the burglars, but "when the woman's gun ran out of bullets, she said the uninjured burglar attacked her." "He must have heard me clicking it [from running out of ammunition] because that's when he came back and beat me up really bad," the woman said. Brian New, *61-Year-Old Woman Shoots Intruder, then Burglars Attack her*, CBSDFW, Mar. 28, 2016.[19]

Reserve Capacity: The awareness that a defensive shooter is capable of firing enough rounds to defuse the threat affects every party to a

---

[17] http://www.detroitnews.com/story/news/local/detroit-city/2015/06/09/woman-hospital-gunfight-home-invaders/28727561/.

[18] *See Glock 17*, GLOCK, https://us.glock.com/products/model/g17gen4 (last visited Dec. 23, 2017) (listing standard magazine capacity as 17-rounds).

[19] http://dfw.cbslocal.com/2016/03/28/61-year-old-woman-shoots-intruder-then-burglars-attack-her/.

potential attack. Reserve capacity is a credible deterrent to criminals—especially for a victim confronted by multiple assailants. For example, the five criminals chased off by the Detroit woman in the example above would have had less reason to fear her if she had only a 5-shot revolver. Additionally, a defensive shooter can confidently act knowing she will not suddenly exhaust her ammunition and become a defenseless victim—like the Texan woman in the example above.

Violent confrontations are inherently unpredictable. As Kleck explained, "victims of crimes generally cannot plan for or anticipate crimes to occur at a specific time and place … Victims who wish to defend themselves with firearms usually have to make do with a single available gun and its ammunition capacity." ER 2441. If a victim sees one assailant, she cannot know if a second assailant may be hiding nearby. If she sees two, there may be three. When a defender has a greater reserve, she will fire more shots at the first attacker knowing that she will have sufficient ammunition to deal with a possible second or third attacker. Obviously, the more shots the defender fires, the greater the possibility that the attacker(s) will be injured and the lesser the chance that the defender will be injured.

Moreover, when a defender has only a limited number of shots, she must make a calculation before each shot to determine whether she can successfully make a threat-ending shot now or whether it is worth the risk to wait a few moments in hopes of a better opportunity. These critical moments the defender spends hesitating and analyzing the situation could be the difference between life and death. By constricting reserve capacity, California's ban increases the risk of injury for victims and reduces it for attackers. That is the opposite of the Second Amendment's intent and purpose.

II. *HELLER*'S CATEGORICAL BAN, RATHER THAN THE TWO-PART TEST, IS REQUIRED FOR PROHIBITIONS ON CONSTITUTIONALLY-PROTECTED ARMS.

A. Bans on constitutionally-protected arms are categorically unconstitutional.

Heller mandates that California's magazine confiscation be held categorically unconstitutional.

Under *Heller*, two types of laws are categorically invalid: (1) laws that prohibit the exercise of the right to keep and bear arms; and (2) laws that ban arms "in common use." Such laws do not receive heightened scrutiny analyses; they are flatly unconstitutional. This is certain, because it is

precisely the approach taken by the *Heller* Court when confronted with these very laws.

Laws that prohibit the exercise of the right: The *Heller* Court held a law prohibiting functional firearms in the home categorically invalid, since it destroyed the right to self-defense inside the home. Following *Heller*, the Seventh Circuit held a prohibition on carrying arms in public categorically invalid, since it destroyed the right to self-defense outside the home. *Moore*, 702 F.3d at 933. The Seventh Circuit dismissed the idea of a heightened scrutiny analysis for such a severe ban. *Id.* at 941 ("Our analysis is not based on degrees of scrutiny").

Laws that ban arms "in common use": The *Heller* Court held a handgun ban categorically invalid. The Court explained that since handguns are constitutionally-protected arms, "a complete prohibition of their use is invalid." *Heller*, 554 U.S. at 629. The Court applied no tiered scrutiny analysis, included no data or studies about the costs or benefits of the ban, and expressly rejected the intermediate scrutiny-like balancing test proposed by Justice Breyer's dissent. After all, the *Heller* Court explained, "[w]e know of no other enumerated constitutional right

whose core protection has been subjected to a freestanding 'interest-balancing' approach." *Id.* at 634.

Bright-line rules that categorically invalidate government actions (without any means/ends test) are common in constitutional law. *See* David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 303–04 (2017) (providing examples for the First, Fifth, Sixth, Eighth, Tenth, and Fourteenth Amendments).

In *McDonald*, the Supreme Court again held a handgun ban categorically unconstitutional. And the Court again refused to adopt an interest-balancing approach in a challenge to a ban on constitutionally-protected arms:

> Municipal respondents assert that, although most state constitutions protect firearms rights, state courts have held that these rights are subject to "interest-balancing" and have sustained a variety of restrictions. Brief for Municipal Respondents 23–31. In *Heller,* however, we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing.

Id. at 785.

The Seventh Circuit recognized that "[b]oth *Heller* and *McDonald* suggest that broadly prohibitory laws restricting the core Second Amendment right—like the handgun bans at issue in those cases, which prohibited handgun possession even in the home—are *categorically unconstitutional*." *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) (emphasis added).

The *Caetano* concurrence confirmed this is the correct application of Supreme Court precedent. In *Caetano*, the Court issued a *per curiam* opinion summarily reversing and remanding an opinion of the Massachusetts Supreme Judicial Court that upheld a ban on stun guns. Justice Alito's concurring opinion, joined by Justice Thomas, conveyed the correct approach to a ban on arms in common use: "stun guns are widely owned and accepted as a legitimate means of self-defense across the country. Massachusetts' categorical ban of such weapons therefore violates the Second Amendment." 136 S.Ct. at 1033.

B. The Two-Part Test is inapplicable to confiscation of constitutionally-protected arms.

This Court adopted a Two-Part Test for Second Amendment challenges in *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013). "The two-step Second Amendment inquiry we adopt (1) asks whether the

challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny." *Id.* at 1136–37. This Two-Part Test was developed and adopted throughout the federal Circuit Courts to resolve issues not directly addressed by the *Heller* Court.[20] *See Heller*, 554 U.S. at 635 ("since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field"). For instance, this Court adopted the test to resolve a challenge to a firearms ban applied to domestic violence misdemeanants. But the Two-Part Test is precluded when a court reviews a type of law held categorically unconstitutional in *Heller*, in which case the court is bound by Supreme Court precedent:

> Both *Heller* and *McDonald* suggest that broadly prohibitory laws restricting the core Second Amendment right—like the handgun bans at issue in those cases, which prohibited handgun possession even in the home—are categorically unconstitutional. … *For all other cases*, however, we are left to choose an appropriate standard of review from among the heightened standards of scrutiny the Court applies to governmental actions alleged to infringe enumerated constitutional rights.

[20] The Two-Part Test was created by the Third Circuit in *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

Ezell, 651 F.3d at 703 (emphasis added).

The Supreme Court has addressed arms prohibitions on four separate occasions, and it has *never once* indicated that an interest-balancing approach—such as a heightened scrutiny analysis—is the appropriate method of review. In fact, the Court has twice expressly rejected such an approach. *Heller,* 554 U.S. at 628–35; *McDonald*, 561 U.S. at 785.

As detailed *supra*, the Court held handgun bans categorically invalid in *Heller* and *McDonald* solely because the arms were "in common use." In *Caetano*, the Court reversed a lower court decision upholding a stun gun ban; the lower court had wrongly thought prohibition was lawful because stun guns were not contemplated or in common use in 1789, and are not readily adaptable for military use. 136 S.Ct. at 127–28. The concurrence stated that since stun guns are in common use today, the ban was categorically invalid. *Id.* at 1033. In *Miller*, the Court reversed a district court decision striking an indictment for violating a registration law on short-barreled shotguns, because there was no evidence whether such guns were "in common use." 307 U.S. at 179.

To apply an interest-balancing test to a prohibition of common arms would directly contradict Supreme Court precedent.

Appellant and Amici argue that this Court should uphold the ban under intermediate scrutiny because this and other Circuit Courts have upheld magazine bans under that standard in the past. *OpeningBr.* at 24-25, 29-30; *PhysiciansBr.* at 6, 9. But Appellant and Amici have no answer for the fact that Supreme Court precedent mandates a different result. Amici even argue that the Supreme Court supports the intermediate scrutiny approach adopted by some Circuit Courts because "[t]he Supreme Court has left these decisions in place by denying review." *PhysiciansBr.* at 6.

Claiming that the Supreme Court speaks more authoritatively through its denials of certiorari than its opinions is itself contrary to binding Supreme Court precedent. *E.g.*, *Teague v. Lane*, 489 U.S. 288, 296 (1989); *United States v. Carver*, 260 U.S. 482, 490 (1923). By attempting to elevate certiorari denials over Supreme Court opinions, Amici Physicians implicitly concede that their position is contrary to precedent.

Infidelity to Supreme Court precedent is not justified because other courts have been unfaithful, or because the Court did not reverse a violation of it. *Heller* is binding precedent and it requires that bans on

constitutionally-protected arms be categorically invalidated, rather than upheld under a weak version of intermediate scrutiny.

CONCLUSION

The district court's injunction should be affirmed.

Respectfully submitted,

/s/ *Joseph G.S. Greenlee*
Joseph G.S. Greenlee
Counsel of Record
Millennial Policy Center
3443 S. Galena Street, Suite 120
Denver, CO 80231
(970) 485-3303
josephgreenlee@gmail.com

David B. Kopel
Independence Institute
727 East 16th Avenue
Denver, CO 80203
(303) 279-6536
david@i2i.org

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 6,999 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(f).

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14-point, proportionately spaced Century Schoolbook font.

Dated this 8th day of January 2018.

/s/ *Joseph G.S. Greenlee*
Joseph G.S. Greenlee
Millennial Policy Center
Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2018, I served the foregoing brief via the CM/ECF system for the United States Court of Appeals for the Ninth Circuit, which will distribute the brief to all attorneys of record in this case. No privacy redactions were necessary.

Dated this 8th day of January 2018.

/s/ *Joseph G.S. Greenlee*
Joseph G.S. Greenlee
Millennial Policy Center
Counsel of Record