

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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VIRGINIA DUNCAN et al.,

*Plaintiffs-Appellees,*

v.

ROB BONTA,

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

*Defendant-Appellant.*

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On Appeal from the United States District Court  
for the Southern District of California,  
No. 3:17-cv-01017-BEN-JLB

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**BRIEF OF AMICUS CURIAE JOHN CUTONILLI  
ON REHEARING *EN BANC*  
IN SUPPORT OF PLAINTIFFS-APPELLEES**

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21 May 2021

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus John Cutonilli certifies that the amicus is not a publicly held corporation, that the amicus does not have a parent corporation, and that no publicly held corporation owns 10 percent or more of amicus's stock.

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## INTEREST OF AMICUS CURIAE

Cutonilli is a resident of Maryland and is subject to laws like those under consideration in the California case. As he is unable to bring suit against Maryland due to the precedent set in *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017), he seeks to provide additional insight into other aspects of the law that were neither addressed in *Kolbe* nor in the court's decision in this case. His intent is to help this court avoid previous errors so that other fellow Americans are not subject to such laws, which are detrimental to public safety. No counsel for any party authored this brief in whole or in part. Apart from amicus curiae, no person contributed money to fund this brief's preparation and submission.

There are several key considerations that this amicus brief brings to light, which are missing in the parties' briefs. It provides a further evidence that Large Capacity Magazines (LCMs) are commonly used. It provides additional analysis of public safety, the limits of the government's interest in public safety as well as the role law-abiding individuals play in providing public safety. It points out the insubstantial nature of the data used by California to justify the law in question and the logical fallacies inherent in their analysis of that data. This brief makes clear why the law will not alleviate the harms it proposes to address in a direct and material way. It also demonstrates the overbroad nature of the California Law.

## ARGUMENTS

### *I. LCMs are in Common Use*

As underscored in *Heller*, the Second Amendment is structurally and grammatically divided into two parts: an operative clause and a prefatory clause. The operative clause guarantees a pre-existing right of the individual to possess and carry weapons in case of confrontation, *Heller v. D.C.*, 556 U.S. 570, 592. The prefatory clause, which refers to this right relate to the formation of militias, is best understood within the context of the Tenth Amendment, which clarifies the respective powers delegated to the federal government or reserved to the states. The Second Amendment was codified to ensure that the federal government does not disarm the militia *Id.*, at 599. It ensures that the federal government does take away the right to keep and bear arms from the people. Other examples of the right to keep and bear arms appear in state declarations of the time, such as the right to possess arms for self-defense or to hunt *Id.* at 642 (Stevens dissenting). These examples are enumerated in state declarations because they apply at the state and not the federal level. Together, the Second Amendment plus the various state-level declarations constitute the full expression of citizens' rights to keep and bear arms.

While the right to keep and bear arms is broader than -- or extends beyond -- the Second Amendment in this way, it is not unlimited. *Heller* at 627, for example, notes the historical prohibition on carrying "dangerous and unusual weapons," a

phrase that originates in the Statute of Northampton. See 4 Blackstone 148–149 (1769). Heller does not elaborate on what is meant by “dangerous and unusual weapons,” and the legal history since Northampton provides little in the way of a clear definition of the phrase. Nonetheless many assumptions and unfounded assertions have been made. Fortunately, a number of 17<sup>th</sup>- and 18<sup>th</sup>-century treatises provide useful interpretive context (W. Blackstone, 4 Commentaries on the Laws of England 148-149 (1769), W. Hawkins, Treatise on the Pleas of the Crown ch 63 § 4 (1716). These texts consistently demonstrate that there was no general prohibition on carrying common arms, but instead a specific prohibition on arms deemed “dangerous and unusual.”

LCMs are in common use in society today. In the context of this case, the California legislature has accepted that they play an important role in protecting public safety and property, though the AGCA attempts to downplay this fact. California allows federal, state, and local law enforcement to use LCMs in the course and scope their official duties. In addition, private security personnel, such as armored vehicle employees, are also permitted to use LCMs in the state of California for self-defense and the protection of property. In allowing the use of LCM’s not only by the police but also by certain private security personnel, the state acknowledges the public safety benefit LCMs provide. Given this, it must be asked why – if LCMs provide a demonstrable and valued public safety benefit in

the hands of the police and certain private security personnel – the same benefit would be denied to law-abiding citizens?

2. California allows private security firms to use LCMs for their protection, but not private citizens – though both groups provide for public safety

Many U.S. laws are rooted in the English legal system and can be illuminated by an appreciation of their lineage. In the English tradition, the average citizen played a central role in providing law enforcement and protection for society. Emerging around the time of King Alfred (c 871), this tradition persisted for hundreds of years and was more formally codified with the Statute of Winchester (1285), which included provisions for arming the people, making arrests, and raising the “hue and cry” to apprehend offenders. The Statute of Winchester also established unpaid constables and watchmen—private citizens who functioned as security for the community.

This system lasted through our founding and was the primary method of law enforcement at the time. One of the roles of the militia in colonial America and after the Revolution was law enforcement. (See Article 1 Section 8 Clause 15.) Professional law enforcement agencies did not arise until the mid-19<sup>th</sup> century, and it was not until 1878, with the passage of the Posse Comitatus Act that military and law enforcement functions were formally separated (*Heller* at 716, Breyer dissent).

The Maryland State Police pays homage to this long-standing tradition on its website:

“Under English common law, every person had an active responsibility for keeping the peace...The responsibility included crime prevention through vigilance and the apprehension of suspected lawbreakers by groups of persons raising the ‘hue and cry’ or the more official ‘posse comitatus.’”

This was the most practical system, given the rural conditions in England and America at the time (J. Malcolm, *To Keep and Bear Arms* 2 (1994)). It was not without its limitations, however, as there was no institutional means to prosecute felons; that was the job of the victim (Beattie, J. M., *Policing and Punishment in London, 1660-1750: Urban Crime and the Limits of Terror*. p. 226 (2001); Sklansky, *The Private Police*, 46 *UCLA L. Rev.* 1165, 1198 (1999)).

With the rise of industrialization in the U.S., many companies began to hire private police to protect their interests, which led to the emergence of private security companies. Today, in fact, in the U.S., the number of security personnel employed by private security companies outnumbers public police by a factor of three to two.

However effective, the role of the police is inherently limited. Because the government has limited resources, there are limits to the degree of safety the government can provide. This is not merely a practical issue; it is a legal issue as

well. As explained in *Warren v. DC*, 444 A. 2d 1 (DCCA 1981), “...courts have without exception concluded that when a municipality or other governmental entity undertakes to furnish police services, it assumes a duty only to the public at large and not to individual members of the community” *Id.* at 4. In that case, the District of Columbia was found to have based its case on the “uniformly accepted rule...that a government and its agents are under no general duty to provide public services, such as police protection, to any particular individual citizen” *Id.* at 4.

Consistently, courts have ruled that public safety, through the government’s police power interests, is owed to the public at large and not to any specific individual. (*Warren v. DC*, 444 A. 2d 1 (DCCA 1981), *Fried v. Archer*, 775 A. 2d 430 (Md. Ct. Spec. App.), 2001, *Castle Rock v. Gonzales*, 545 U.S. 748 (2005), *DeShaney v. Winnebago County*, 489 U.S. 189 (1989)). Therefore, the government has no interest in the protection of any specific individual because it cannot deliver protection at the individual level.

Private security firms address the security gap that police are unable to fill; their services supplement those of the police. In the state of California, both law enforcement and certain private security companies are allowed to use LCMs. For many individuals, particularly those who may not enjoy the protection of private security, the right to keep and bear arms similarly addresses the security gap that police, through no fault of their own, are unable to fill. Yet private citizens – unlike

the personnel employed by certain private security firms – are denied the protections that LCMs provide, as acknowledged by the state of California. This unequal application of the law is unfair and unjustified. It unnecessarily endangers citizens, and it should not be upheld.

3. Data does not demonstrate the regulation will alleviate gun violence in a direct and material way.

It's been established that Second Amendment rights cases are to be held to the standard of intermediate scrutiny, at a minimum (Heller). At the core of this standard is the requirement for the government to draw "reasonable inferences based on substantial evidence" because the government "must demonstrate . . . that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994). When courts fail to uphold this essential requirement, they fail to maintain the standard of intermediate scrutiny. Without substantial evidence, the intermediate scrutiny standard devolves to the lower order of the rational basis standard, which does not require substantial evidence. Instead, rational basis cases may be decided on the basis of "rational speculation *unsupported by evidence or empirical data.*" *FCC v. Beach Communications, Inc.* 508 U.S. 307, 315 (1993) (Emphasis added.) Rational basis inappropriate for fundamental rights, such as those comprised by the Second Amendment, *Heller* at 628. Infamously, in the *Korematsu* decision, the court failed to properly evaluate the evidence and, instead, accepted at face value the

government's assessment of the evidence. This abnegation of the court's proper role compromised the constitutional rights of American citizens rather than protecting them – and serves as both an analogy for past Second Amendment cases and an object lesson for future ones.

Cutonilli's Amicus Brief in Opposition and his panel Amicus Brief enumerates unfounded inferences made by the AGCA and presents four reasons why the evidence presented by the AGCA does not demonstrate that the proposed regulation will in fact alleviate threats that LCMs pose to public safety and police officers. They are:

1. The data shows that the proposed ten-round limit will not prevent gun violence.

2. There is insufficient data to demonstrate that banning LCMs will mitigate gun violence.

3. The data on the number of shots fired is based on incomplete data and unfounded assumptions.

4. LCMs are rarely used by NYC Law Enforcement Personnel yet are still beneficial.

This brief expands on numbers 2 and 3 above, with further information on the data on the number of shots fired as well as the insufficiency of the data used to

demonstrate that banning LCMs will mitigate gun violence. It also enumerated additional faulty inferences made by the AGCA.

For example, one unreasonable inference that the AGCA makes is that the data demonstrates that LCM's are not needed for self-defense. An AGCA expert, Allen, uses the NRA's Armed Citizen database to support this inference. It is critical to recognize that 64% of these reports (June 2016 to May 2017) do not identify the number of rounds fired. Therefore, Court should understand that using this data to demonstrate that 10 or fewer round will effectively provide for all self-defense situations is an unreasonable inference given how little "shots fired" data is in these reports. Note that a copy of the reports from June 2016 to May 2017 is included in the appendix to this brief for the Court's review.

The AGCA makes two additional unreasonable inferences: 1. that pauses in shooting caused by reloading mitigate lethality, and 2. that banning LCMs will increase such pauses. Allen provides data related to 96 mass shootings in Appendix B of her report. However, not all of these shooting can be used to determine if pauses or magazine capacity may be relevant. Only 42 of the 96 (44%) shootings included the number of rounds fired and only 6 of the 42 (14%) of the relevant shootings did not involve LCMs. Based on the subset of relevant shootings, analysis shows the following:

- The number of rounds fired per casualty (killed or wounded) varies between 1 and 20 rounds with an average of around 3.5 rounds per casualty.
- While there are significant variations among the shootings as a whole, there are not significant variations between shootings where LCM are present and where they are not present when evaluated on the number of rounds fired per casualty.
- The variance in the number of deaths between LCM and non-LCM shootings is more attributable to happenstance than to the difference in magazine capacity. This is because the number of deaths is related to the number of rounds fired rather than the size of magazines and the law in question does not restrict the number of rounds that can be fired.
- Fewer than 10% of the cases involved the firing of 10 or fewer rounds while the average number of rounds fired is more than 60.
- The fact that 64 rounds fired is the average would indicate that magazine changes are very common during mass shootings, even when LCMs are used. Almost no data is available on the benefits of those magazine changes.

One of the main pieces of evidence supporting the AGCA's unreasonable inference that reloading pauses mitigate gun violence is the Newtown shooting incident. A more in-depth analysis shows that these pauses are not as useful as the AGCA claims. According to the CT State's Attorney report of the incident, 154

spent rifle cases were recovered along with three empty magazines, three partially empty magazines, and additional ammunition on the shooter. Two live rounds were also found (one in each classroom). The State's Attorney report stated that a "CSP-ESU" (CT State Police Emergency Services Unit) report described that the rifle used appears to have jammed. When the rifle was later tested, it functioned properly. The two live rounds would suggest that some kind of feeding malfunction may have occurred. Based on the rounds fired and the number of partially empty magazines, there would have been six magazine changes during the incident. The two live rounds suggest that two additional pauses occurred. Despite eight likely pauses in the shooting, the AGCA can identify only one instance in which a pause of some kind, perhaps unrelated entirely to reloading, allowed some children to escape. The evidence produced by the AGCA does not demonstrate the precise circumstances or causes that allowed for this escape, though assertions are made. Conversely, given the number of magazine changes based on the number of rounds fired, one might assume based on the AGCA's argument, that reloading pauses proved beneficial to more of these reloadings, yet not such evidence is brought forward.

What is clear from the AGCA's evidence is that is that these mass shootings generally stop when the perpetrator is confronted by police or bystanders. Another AGCA expert, (Klarevas) provides seven examples (including Tucson) of

bystanders stopping the perpetrator. In four of the seven examples, the shooter was prevented from killing more than three people. However, the AGCA fails to connect these beneficial confrontations with pauses to reload, which might have strengthened his case. According to the AGCA's expert, there are a countless number of examples of direct confrontations with shooters leading to cessation of the shooting.

#### 4. The LCM ban is Overbroad

One of the requirements for intermediate scrutiny is that the proposed law be narrowly tailored to the government interest and not burden more of the individual's right than is absolutely necessary. The Turner Broadcasting (*Turner* at 682) case made the point this way:

"A regulation is not 'narrowly tailored' - even under the more lenient [standard applicable to content-neutral restrictions] - where ... a substantial portion of the burden on speech does not serve to advance [the State's content neutral] goals." *Simon & Schuster*, 502 U. S., at 122, n. (internal quotation marks omitted). If the government wants to avoid littering, it may ban littering, but it may not ban all leafleting. *Schneider v. State (Town of Irvington)*, 308 U. S. 147 (1939). If the government wants to avoid fraudulent political fundraising, it may bar the fraud, but it may not in the process prohibit legitimate fundraising. *Schaumburg v. Citizens for a Better Environment*, 444 U. S. 620 (1980); see also *Edenfield v. Fane*, 507 U. S. 761, 776-777 (1993). If the government wants to protect householders from unwanted solicitors, it may enforce "No Soliciting" signs that the householders put up, but it may not cut off access to homes whose residents are willing to hear what the solicitors have to say. *Martin v. City of*

Struthers, 319 U. S. 141 (1943). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone .... " NAACP v. Button, 371 U. S. 415, 438 (1963) (citations omitted).

In some cases, however, a law may appear to be narrowly tailored to the government interest, but still may reduce more of the right than is necessary.

Korematsu provides a relevant object lesson. In this case, the Supreme Court upheld an executive order causing the internment of approximately 120,000 Japanese-Americans. While acknowledging that most of those who were interned were "no doubt were loyal to this country," *Korematsu v. United States*, 323 US 214, 219 (1944) the Court seemed blinded to the fact that the internment order was overbroad.

As with *Korematsu*, where the rights of many law-abiding citizens were drastically compromised because of the criminality of some, it is typical for gun control advocates to seek to deny the rights of law-abiding citizens because of the criminal behavior of others. It may be claimed that a restriction on LCMs places only narrow limitations on Second Amendment rights by banning a specific type of weapon. However, such a restriction cannot be said to be narrowly tailored if it infringes upon the rights of millions of law-abiding gun owners to use a common weapon in widespread use among citizens, private security personnel, and police. The Court should find that these laws are overbroad and not narrowly tailored

because they punish the vast majority of gun owners that possess and use LCMs for lawful purposes.

## CONCLUSION

This brief demonstrates why LCMs are commonly used. It provides additional analysis of public safety, the limits of the government's interest in public safety as well as the role law-abiding individuals play in providing public safety. It points out the insubstantial nature of the data used by California to justify the law in question and the logical fallacies inherent in their analysis of that data. This brief makes clear why the law will not alleviate the harms it proposes to address in a direct and material way. It also demonstrates the overbroad nature of the California Law.

The judgment of the district court should be sustained.

Respectfully submitted,

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## APPENDIX

American Rifleman Armed Citizen June 2016-May 2017