No. 19-55376

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGINIA DUNCAN, ET AL.,
Plaintiffs-Appellees,

v.

ROB BONTA,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of California
No. 17-cv-1017-BEN-JLB
The Honorable Roger T. Benitez, Judge

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INTRODUCTION

Plaintiffs contend that California's restrictions on large-capacity magazines that can hold more than 10 rounds of ammunition (LCMs) violate the Second Amendment. Every other federal court of appeals to address a similar claim has properly rejected it. In this case, however, a divided panel held that each of California's LCM restrictions is among the "policy choices" that are "off the table" under *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008). Plaintiffs and the panel majority are mistaken. Because of the serious threats that modern LCMs pose to public safety and police officers, they have been tightly restricted by many States since soon after they became widely available. Those restrictions do not severely burden the core Second Amendment right so long as gun owners have alternative means to defend themselves—as they surely do in California, where there are no limits on the number of approved firearms or authorized magazines they may possess. And the record here demonstrates a reasonable fit between California's LCM restrictions and the State's compelling interests in combating crime and reducing the number of deaths and injuries resulting from mass shootings.

The State's briefs at the panel stage comprehensively address the legal issues in this appeal, including plaintiffs' claims under the Takings Clause and the Due Process Clause. This supplemental brief addresses certain issues related to

plaintiffs' Second Amendment claim that the Court might consider at the en banc stage, as well as issues raised by the panel's opinion and intervening authority.

STATEMENT

1. California generally allows law-abiding adults to possess and carry firearms in their homes, places of business, and in certain other places and for certain purposes. Cal. Penal Code §§ 23500-34370. Californians who pass a background check may acquire as many approved firearms as they want, *see Silvester v. Harris*, 843 F.3d 816, 823-825 (9th Cir. 2016), and as much ammunition as they want, *see* Cal. Penal Code §§ 30352, 30370.

Like other States and the federal government, California restricts certain especially lethal weapons. Cal. Penal Code §§ 16590, 30210-33690. The restrictions challenged here address LCMs, *id.* § 32310, defined to include most ammunition-feeding devices that can accept more than 10 rounds, *id.* § 16740. As discussed further in the State's opening brief and below, *see* AOB 31-52; *infra* pp. 24-27, modern LCMs create a potent threat to law enforcement and the public by allowing shooters to fire scores of rounds from the same firearm in a short period of time. Although magazines holding more than 10 rounds existed earlier, they did not become widely available to civilians until the 1970s, when technological changes made them less likely to malfunction and cheaper to

manufacture. As their availability increased, so did their use in crime and mass shootings. *See infra* p. 12.

Several States responded by restricting magazine capacity. *See* 1990 N.J. Laws 217, 221, 235 (15 rounds); 1992 Haw. Sess. Laws 740, 742 (20 rounds); 1994 Md. Laws 2119, 2165 (20 rounds). In 1994, the federal government banned the possession of magazines that held "more than 10 rounds of ammunition." Pub. L. No. 103-322, § 110103, 108 Stat. 1796, 1996-2000 (1994); *see also id.* § 110103(6) (exempting the possession or transfer of LCMs lawfully possessed when the law was adopted). Although that law expired in 2004, *id.* § 110105, nine States and the District of Columbia continue to limit the size of magazines available to civilians, *see* AOB 7 n.2.

California adopted its restriction on the manufacture, importation, and sale of LCMs in 2000. *See Fyock v. Sunnyvale*, 779 F.3d 991, 994 (9th Cir. 2015); Opn. 10.[1] Over the next decade, California added other LCM restrictions, including prohibitions on the purchase and receipt of LCMs and provisions allowing police to confiscate and destroy unlawfully possessed LCMs. Opn. 10-11. But those provisions did not bar individuals from possessing LCMs acquired before 2000. Opn. 11. And police could not readily distinguish between

[1] "Opn." refers to Dkt. 97-1, the panel's vacated decision in this case.

magazines that were lawfully grandfathered and those that were prohibited. *See Wiese v. Becerra*, 263 F. Supp. 3d 986, 993 (E.D. Cal. 2017).

California voters addressed that problem in 2016 by passing Proposition 63 (which was preceded by a similar legislative enactment). *See* Opn. 11; 5-ER-1199-227. Among other reforms, Proposition 63 made it unlawful to possess LCMs after June 2017. Cal. Penal Code § 32310(c).[2] It also required individuals who possessed LCMs to dispose of them. *Id.* § 32310(d); *see also id.* § 16740(a). California law now prohibits manufacturing, importing, selling, lending, gifting, purchasing, receiving, or possessing LCMs. *Id.* § 32310(a)-(c). Magazines holding 10 rounds or less remain legal in California, are "widely available," and are "compatible with most, if not all, semiautomatic firearms"—including handguns. 2-ER-256.

2. After the voters passed Proposition 63, plaintiffs filed this lawsuit challenging the constitutionality of Section 32310. *See* 8-ER-1943-65. The district court preliminarily enjoined the new possession ban, *see Duncan v. Becerra*, 742 F. App'x 218 (9th Cir. 2018), and then permanently enjoined *every* provision of Section 32310, *see* 1-ER-7-93.

[2] The law provides exceptions, including for certain law enforcement officials. *See* Opn. 11 n.2.

A divided panel of this Court affirmed the district court's permanent injunction. *See* Opn. 9-81. The majority concluded that Section 32310 "substantially burdens" the right to self-defense because it bans the possession of "half of all magazines in America today" and because LCMs are "used commonly in guns for self-defense." Opn. 40, 42. Applying strict scrutiny, it concluded that California's LCM restrictions were not "narrowly tailored to achieve" the State's compelling interests in protecting its citizens from gun violence. Opn. 56-58. In the alternative, the majority reasoned that Section 32310 would not satisfy intermediate scrutiny. Opn. 58-66. Chief Judge Lynn (sitting by designation) dissented, noting that the panel's decision "conflicts with this Circuit's precedent" and with "decisions in every other Circuit to address the Second Amendment issue presented here." Opn. 67. She would have upheld the law under intermediate scrutiny. *See* Opn. 69-81.

ARGUMENT

I. THE TWO-STEP INQUIRY IS THE PROPER FRAMEWORK FOR EVALUATING PLAINTIFFS' SECOND AMENDMENT CLAIM

Since *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court and others have applied a "two-step framework" to Second Amendment claims. *E.g.*, *Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021) (en banc). The district court below principally resolved plaintiffs' claim based on a different test that would examine only whether a firearm is "commonly owned by law-abiding citizens" for

"lawful purposes." 1-ER-22. Although the district court applied the two-step framework in the alternative, *see* 1-ER-43-88, others have questioned that framework or argued that this Court should abandon it, *see, e.g.*, *Mai v. United States*, 974 F.3d 1082, 1086-1087 (9th Cir. 2020) (Bumatay, J., dissenting from denial of petition for rehearing en banc); Dkt. 145 (Arizona Br.) 4-12. Those arguments should fail.

Under the first step of the two-step framework, courts consider whether the law at issue "affects conduct that is protected by the Second Amendment," principally by looking for "persuasive historical evidence that the regulation does not impinge on the Second Amendment right as it was historically understood" or that it "falls within the presumptively lawful regulatory measures that *Heller* identified." *Young*, 992 F.3d at 783. Restrictions of that sort may be upheld "without further analysis." *Id.* If the regulation does burden conduct protected by the Second Amendment, courts "move to the second step of the analysis and determine the appropriate level of scrutiny" by evaluating how severely the law burdens the core right to self-defense in the home. *Id.* at 784. Laws that "destr[oy]" that core Second Amendment right are unconstitutional under any level of scrutiny. *Id*. Laws that "severely burden[]" it are reviewed under strict scrutiny. *Id.* And laws that affect Second Amendment rights in "some lesser way" are subject to intermediate scrutiny. *Id.*

This two-step framework has "emerged as the prevailing approach" for analyzing Second Amendment claims. *NRA v. ATF*, 700 F.3d 185, 194 (5th Cir. 2012). Indeed, every federal court of appeals to squarely address the proper methodology for Second Amendment scrutiny has adopted it: the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo* (*NYSRPA*), 804 F.3d 242, 254 n.49 (2d Cir. 2015) (collecting cases); *Gould v. Morgan*, 907 F.3d 659, 668-669 (1st Cir. 2018).

This consensus approach is consistent with *Heller*, which made clear that the individual right protected by the Second Amendment is "not unlimited" and is subject to many reasonable regulations. 554 U.S. at 626; *see id.* at 636. The right does not entitle individuals to "keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. Indeed, *Heller* identified a list of "presumptively lawful regulatory measures" and emphasized that the list was "not . . . exhaustive." *Id.* at 627 n.26. Although *Heller* did reject a "freestanding 'interest-balancing' approach" to enforcing the "core protection" of the Second Amendment, it contrasted that approach with the application of intermediate or strict scrutiny. *Id.* at 634; *see id.* at 628-629 & n.27.

As the Fifth Circuit has explained, the "two-step analytical framework . . . comports with the language of *Heller*." *NRA*, 700 F.3d at 197. "As for step one,

Heller itself suggests that the threshold issue is whether the party is entitled to the Second Amendment's protection." *Id.* (citing *Heller*, 554 U.S. at 626-627, 635). And "[a]s for step two, by taking rational basis review off the table, and by faulting a dissenting opinion for proposing an interest-balancing inquiry *rather than* a traditional level of scrutiny, the Court's language suggests that intermediate and strict scrutiny are on the table." *Id.* (citing *Heller*, 554 U.S. at 628 n.27); *see also id.* at 197 n.10. It certainly does not "*foreclose* intermediate or strict scrutiny." *Id.* at 197 (emphasis added).

All agree that the right to keep and bear arms is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion). But there is "no valid reason to treat it *more* deferentially than other important constitutional rights," *Gould*, 907 F.3d at 670 (emphasis added), or to place it "atop our constitutional order," Opn. 33; *see McDonald*, 561 U.S. at 802 (Scalia, J., concurring) ("No fundamental right—not even the First Amendment—is absolute."); *Kolbe v. Hogan*, 849 F.3d 114, 150 (4th Cir. 2017) (en banc) (Wilkinson, J., concurring) (Second Amendment should not enjoy "an unqualified status that the even more emphatic expressions in the First Amendment have not traditionally enjoyed"). And just as a First Amendment analysis does not end with a determination that a law regulates speech or is not neutral with respect to

religion, the constitutional inquiry in this context should not end if a court concludes that the conduct at issue is "entitled to the Second Amendment's protection." *NRA*, 700 F.3d at 197.

II. THE HISTORICAL ANALYSIS REQUIRED AT STEP ONE DEMONSTRATES THAT MODERN LCMS WERE HEAVILY REGULATED SOON AFTER THEY BECAME WIDELY AVAILABLE

At the first step of the analysis, most courts to address the constitutionality of LCM restrictions have assumed (without deciding) that they implicate rights protected by the Second Amendment. *See Worman v. Healey*, 922 F.3d 26, 36 (1st Cir. 2019); *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. N.J.* (*ANJRPC*), 910 F.3d 106, 117 (3d Cir. 2018); *Fyock v. Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015); *NYSRPA*, 804 F.3d at 257; *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1261 (D.C. Cir. 2011). Here, however, the panel "march[ed] through the history of firearms" before concluding that Section 32310 burdens Second Amendment rights. Opn. 25; *see id.* at 22-25. Since the panel's decision, this Court underscored that a proper step-one inquiry requires an "extensive historical analysis" to gain a "historical understanding of the scope of the right." *Young*, 992 F.3d at 783, 784. Whether this Court ultimately resolves plaintiffs' challenge at the first step, *see* AOB 23-31; *Kolbe*, 849 F.3d at 135-137, or proceeds to the second step, that historical inquiry underscores the validity of the challenged restrictions.

1. The panel observed that "[f]irearms or magazines holding more than ten rounds have been in existence . . . for centuries," Opn. 22, and that "no laws restricted ammunition capacity" until the first state limits in 1927, Opn. 28. On that basis, the panel reasoned that "LCMs have never been subject to longstanding prohibitions," Opn. 31, and that LCM prohibitions thus could "not enjoy a presumption of lawfulness," Opn. 29. That analysis misunderstands both the history of LCMs and the proper way to assess whether a regulation is permissible as a "'longstanding prohibition'" or in light of "persuasive historical evidence showing that the regulation does not impinge on the Second Amendment right." *Young*, 992 F.3d at 782, 783.

Although the panel correctly identified some early examples of firearms or magazines that held more than ten rounds, Opn. 22-24, most were not widely available and none presented the same dangers posed by modern LCMs. The "famous Puckle Gun," Opn. 23, for example, was designed to be operated by a crew of soldiers; it was never actually used during combat and only two models were ever produced. *See* Ellis, The Social History of the Machine Gun 13-14 (1975); 1-SER-160. While a 22-round "Girandoni air rifle" was "carried on the Lewis and Clark expedition," Opn. 23, only 1,500 such rifles were produced and they required an air tank that took more than a thousand strokes of a hand pump to charge, *see* Dkt. 17 (Everytown Br.) 13. The Winchester Model 66, 73, and 92

rifles were more prevalent, *see* Opn. 23-24, but users of those weapons were required to pull a lever between shots and could not easily reload empty magazines, 1-SER-101-03, 3-SER-664-65.

The LCMs that prompted States and the federal government to adopt modern capacity restrictions emerged far more recently, are different in nature, and pose a materially greater threat to public safety and to police. 2-ER-356-57, 7-ER-1618. Expanded commercial availability of LCMs beginning in the 1970s resulted from a "confluence of events," 7-ER-1707, including technological improvements in plastic polymer and "double-stack magazine" capabilities that allowed LCMs to become "more reliable," "greatly reduced the risk of misfeed," lowered the cost of manufacturing, and permitted "relatively larger capacity magazines" for "relatively smaller cartridges," Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 862-864 (2015). Around the same time, "double action semiautomatic pistol[s]" with magazines "as large as 19-rounds" became "widely available," 7-ER-1707, and law enforcement agencies received funding to purchase those firearms instead of the six-shot revolvers they had "traditionally used," 7-ER-1707-08. Gun manufacturers then ushered in a similar "revolution" in the civilian firearms market, replacing six-shot revolvers—which "had traditionally been the most popular firearm for personal self-defense"—with

"increasing numbers of pistols with ever-larger-capacity magazines." 4-ER-933; *see also* 7-ER-1509, 7-ER-1708.

States began experiencing problems with LCMs shortly thereafter. During the 1980s and early 1990s, semiautomatic firearms equipped with LCMs were "involved in a number of highly publicized mass murder incidents that first raised public concerns and fears about the accessibility" of weapons that could discharge "high numbers of rounds in a short period of time." 2-ER-402; *see also* 2-ER-402-04 (listing incidents). While LCMs were used in just three shootings in which six or more people died between 1968 and 1981, killing a total of 19 people, they were used in 11 such shootings between 1981 and 1994, killing 113 people. 2-ER-355-56, 2-ER-386. LCMs also presented an increasing threat to police, who had previously been accustomed "to fac[ing] criminals armed with a cheap Saturday Night Special that could fire off six rounds before loading." 5-ER-1154. By the 1990s, police frequently found themselves "look[ing] down the barrel of a TEC-9 with a 32 round clip." 5-ER-1154; *see also* 4-ER-1013-14. The popularity of LCMs among criminals was evidenced by the "rapid rise in the number of trace requests" submitted to the federal government by local police in the early 1990s for weapons equipped with LCMs. 4-ER-824-27.

In response to these and other problems, States began adopting magazine capacity restrictions as early as 1990 and Congress adopted LCM restrictions in

1994. *See supra* p. 3. The federal prohibition expired in 2004, but nine States and the District of Columbia continue to limit the size of magazines available to civilians. *See* AOB 7 n.2 (collecting statutes).

2. The panel dismissed the significance of these widespread restrictions on the ground that they are of a "young[] vintage, only enacted within the last three decades." Opn. 29. But that ignores the fact that modern LCMs—which pose a disproportionately greater threat than the historical examples referenced by the panel—are of a similarly recent vintage. Viewed in light of the relevant timeframe, Section 32310 could indeed "be considered a longstanding regulation that enjoys presumptive legality" under *Heller*. Opn. 28.[3]

As the Fifth Circuit has explained, "a regulation can be deemed 'longstanding' even if it cannot boast a precise founding-era analogue." *NRA*, 700 F.3d at 196. "States adopt laws to address the problems that confront them," and the Constitution does not "require States to regulate for problems that do not exist." *McCullen v. Coakley*, 573 U.S. 464, 481-482 (2014). For example, several of the "longstanding prohibitions" that *Heller* identified as "presumptively lawful" emerged long after the founding. 554 U.S. at 626-627 & n.26; *see NRA*, 700 F.3d

[3] It could also be sustained at step one on the ground that LCMs are "most useful in military service," as the Fourth Circuit held. *Kolbe*, 849 F.3d at 135; *see* AOB 24-27.

at 196 (felon and mentally ill possession bans are "of mid-20th century vintage"). And regulations restricting access to recently-invented firearms or magazines will necessarily lack the kind of "historical pedigree" (1-ER-34) that a court might demand when evaluating a law that regulates a technology or practice that existed at the founding.

When it comes to emerging firearms technologies, the "principal theme[] of the historical record," *Young*, 992 F.3d at 785, is that public authorities have generally regulated new technologies only after they "began to circulate widely in society," Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 Law & Contemp. Probs. 55, 68 (2017) ("Spitzer"); *see generally* Dkt. 17 (Everytown Br.) 10-12 (reviewing historical regulations on crossbows, trap guns, silencers, and other emergent weapons). After semiautomatic firearms became prevalent in the early twentieth century, for example, several States prohibited them or adopted firing-capacity restrictions. *See* Spitzer, *supra,* at 67-71. Such restrictions were "uncontroversial" and "presaged" the LCM restrictions that States would later adopt. *Id.* at 69; *see also* AOB 27-31. When fully automatic firearms became "available for civilian purchase after World War I"—and quickly became a "preferred weapon for gangsters"—a number of States promptly outlawed them. Spitzer, *supra*, at 68. And Congress soon required owners of machineguns to register them and made it illegal to "ship, carry, or

deliver" unregistered machineguns in interstate commerce. Pub. L. No. 73-474, §§ 5, 11, 48 Stat. 1236, 1238, 1239 (1934); *cf. Heller*, 554 U.S. at 627 (it would be "startling" if those federal "restrictions on machineguns" were "unconstitutional").

When an especially dangerous weapon technology emerges, becomes widespread, and is swiftly restricted by the government, that history is relevant to the constitutional analysis. It is powerful evidence that the restrictions are "longstanding," *Fyock*, 779 F.3d at 997—even if their history does not date back to the founding. Of course, the passage of a law regulating new firearms technology does not by itself establish that the law may be sustained at step one of the Second Amendment inquiry. *See, e.g.*, *Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015). But where—as here—governments across the Nation subject a technology to broad and enduring restrictions soon after it becomes widely available to the public, those restrictions can properly be treated as a "part of our legal tradition" at step one. *Young*, 992 F.3d at 786. At a minimum, that history strongly supports subjecting the law to intermediate (not strict) scrutiny and upholding it under that standard.

III. AT STEP TWO OF THE SECOND AMENDMENT INQUIRY, CALIFORNIA'S LCM RESTRICTIONS SATISFY INTERMEDIATE SCRUTINY

Even assuming that Section 32310 implicates conduct protected by the Second Amendment, it satisfies constitutional scrutiny. Every court of appeals to consider a comparable LCM law at step two has applied intermediate scrutiny—on

the basis that the law does not severely burden the core Second Amendment right to defend the home—and has correctly held that the law survives under that standard. *See Worman*, 922 F.3d at 36-38; *ANJRPC*, 910 F.3d at 118; *Kolbe*, 849 F.3d at 138-141; *Heller II*, 670 F.3d at 1262. "[A]s a general rule," this Court "decline[s] to create a circuit split unless there is a compelling reason to do so." *Padilla-Ramirez v. Bible*, 882 F.3d 826, 836 (9th Cir. 2017). There is no such reason here.

A. California's LCM Restrictions Do Not Severely Burden the Core Second Amendment Right

1. As the panel acknowledged, the "'core' Second Amendment right is for law-abiding citizens to defend hearth and home." Opn. 32. In assessing whether a challenged law "burdens that right severely," this Court has asked whether it "leave[s] open alternative channels for self-defense." *Jackson v. City and Cty. of San Francisco*, 746 F.3d 953, 961, 968 (9th Cir. 2014). If so, the law is "less likely to place a severe burden on the Second Amendment right." *Id.* at 961. For that reason, courts have generally applied intermediate scrutiny to laws that do not "substantially prevent law-abiding citizens from using firearms to defend themselves in the home." *Id.* at 964; *see, e.g.*, *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010).

Section 32310 leaves ample alternative means for Californians to defend themselves. Law-abiding adults generally may own as many approved firearms, as

much ammunition, and as many authorized magazines as they want. *See supra* p. 2. Magazines with 10 rounds or fewer are "widely available in the state and are compatible with most, if not all, semiautomatic firearms." 2-ER-256. And when gun owners use firearms for self-defense, they fire an average of only 2.2 shots—a figure that was not disputed by plaintiffs or their experts. 2-ER-286-93. Indeed, the experts in this case could identify just two incidents (both outside of California) in which more than 10 rounds were fired in self-defense. *See* 2-ER-287-88; 3-ER-714; *see also Worman*, 922 F.3d at 37 ("[N]ot one of the plaintiffs or their six experts could identify . . . even a single example of a self-defense episode in which ten or more shots were fired.").

2. The panel's rationales for concluding that California's LCM restrictions "substantially burden[] core Second Amendment rights" (Opn. 33) are not persuasive.

The panel began its burden inquiry with a lengthy discussion of how Black Americans have historically relied on firearms "to defend hearth and home from those who wished them ill." Opn. 37; *see also id.* at 34-39 (discussing the importance of firearms to other communities of color, women, and LGBT communities). We can all agree on the profound importance of the right to self-defense to these and other communities. But that does not establish that the lack of a magazine with 11 or more rounds of ammunition materially inhibits the ability of

members of those communities—or anyone else—to "defend hearth and home." Opn. 50. The panel speculated that some minorities "may rely more on self-defense than the 'average' person in a home invasion," and that "people living in sparsely populated rural counties" or "in high-crime areas where the law enforcement is overtaxed" might "need LCMs" for self-defense. Opn. 50, 51, 52. But it identified no record evidence supporting that speculation.

Next, the panel asserted that it is "plainly obvious" (Opn. 45) that Section 32310 "substantially burdens core Second Amendment rights because of its sweeping scope and breathtaking breadth." Opn. 40. It emphasized that "[h]alf of all magazines in the United States" would be prohibited by Section 32310. Opn. 40. And it reasoned that California has therefore "ban[ned] an 'entire class of "arms"' that is commonly used for self-defense." Opn. 41; *see id.* at 45-46. That reasoning is flawed in several respects.

The panel did not cite any particular source for its assertion that "half" of the magazines in the Nation exceed ten rounds. *E.g.*, Opn. 40. The figure appears to derive from a report by one of plaintiffs' experts—who cautioned that his estimate was based on "extrapolation from indirect sources and cannot be confirmed as unequivocally accurate." 7-ER-1700. Even assuming the accuracy of the figure, it does not reflect other aspects of ownership data that would be necessary to conclude that LCMs are commonly used *for self-defense*. For example, plaintiffs

have not identified "any current social science research providing an estimate for the number of American households that own LCMs," 2-ER-317, or even the percentage of gun owners who possess LCMs. And the State's expert opined that LCM ownership is "likely to be concentrated, with increased numbers of LCMs held by a declining share of households." *Id*. Although LCMs may have a "significant market presence"—resulting primarily from marketing and sales decisions by "the firearms industry"—that does "not necessarily translate into heavy reliance by American gun owners on [LCMs] for self-defense" or reflect "actual gun-owner . . . needs." 4-ER-933; *see also Worman*, 922 F.3d at 35 (record was "sparse as to actual use of" LCMs for "self-defense in the home").

Moreover, as other circuits have explained, measuring common use for self-defense by the "number of weapons lawfully owned is somewhat illogical." *Worman*, 922 F.3d at 35 n.5. In the context of a "new weapon," gun manufacturers "would need only [to] flood[] . . . the market" with the weapon "prior to any governmental prohibition in order to ensure it constitutional protection." *Kolbe*, 849 F.3d at 141. And the panel's assertion that Section 32310 "bans an 'entire class of "arms"'" (Opn. 41) is unsupported. The panel merely "look[ed] to California's statute," concluding that LCMs are "indeed a class of arms" because "[t]he state created this separate class by its definition of what constitutes an LCM." Opn. 41 n.15. That reasoning is "circular" and has been roundly rejected:

it would mean that "whatever group of weapons a regulation prohibits may be deemed a 'class.'" *Worman*, 922 F.3d at 32 n.2.

The panel also concluded that the fact that people "can defend themselves with guns equipped with non-LCMs" was irrelevant to the Second Amendment burden inquiry. Opn. 40. It reasoned that *Heller* precluded it from considering whether Section 32310 leaves open alternative means of self-defense, because the Supreme Court acknowledged that the District of Columbia allowed residents to possess long guns but nevertheless struck down the District's ban on handguns. Opn. 41. But that misunderstands *Heller*. The challenged D.C. law completely prohibited possession of handguns—the "quintessential self-defense weapon." *Heller*, 554 U.S. at 629. That prohibition was an unusually "severe restriction" in historical terms. *Id.* And practical considerations made clear that it would severely burden the right to self-defense in the home: when compared to long guns, handguns are "easier to store in a location that is readily accessible in an emergency"; they "cannot easily be redirected or wrestled away by an attacker"; they are "easier to use for those without the upper-body strength to lift and aim a long gun"; and they can "be pointed at a burglar with one hand while the other hand dials the police." *Id.*; *see also Kolbe*, 849 F.3d at 132.

Section 32310 does not present any similar historical or practical concerns. The American people have not historically considered LCMs "to be the

quintessential self-defense weapon." *Heller*, 554 U.S. at 629. California allows law-abiding adults to possess a wide range of handguns (and other firearms) and to use them for self-defense. They can also possess as many authorized magazines for those firearms as they want. And the best available data shows that the number of rounds they typically need in self-defense situations that require gunfire (just over two, *supra* p. 17) can be fully accommodated by authorized magazines. Nothing about Section 32310 makes it "impossible" for Californians to use firearms for the "core lawful purpose of self-defense." *Heller*, 554 U.S. at 630. The fact that California "bans *possession*" (Opn. 43) of a particular type of magazine that poses extraordinary risks to public safety and police officers does not create a severe burden on the right to self-defense.

Finally, the panel reasoned that cases involving "other fundamental enumerated rights" suggest that the burden inquiry under the Second Amendment should look only at what a "restriction *takes away* rather than" the alternative channels for self-defense that "it leaves behind." Opn. 42, 43. That reasoning is contrary to this Court's precedent—which plainly requires consideration of whether a regulation "leave[s] open alternative channels for self-defense" in determining whether it imposes a substantial burden. *E.g.*, *Jackson*, 746 F.3d at 961. And it is inconsistent with the way the Supreme Court evaluates many other fundamental rights. The Court often begins by asking whether (and to what extent)

the law at issue burdens protected conduct; and it generally applies a less rigorous standard of scrutiny to laws that impose lesser burdens. *See, e.g.*, *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (voting rights); *Zablocki v. Redhail*, 434 U.S. 374, 386-387 (1978) (marriage); *Frisby v. Schultz*, 487 U.S. 474, 481-484 (1992) (speech).

The panel also observed that "no court would hold that the First Amendment allows the government to ban 'extreme' artwork from Mapplethorpe just because the people can still enjoy Monet or Matisse." Opn. 47. To be sure, one cannot "forbid particular words" or particular artwork without "running a substantial risk of suppressing ideas in the process." *Cohen v. California*, 403 U.S. 15, 26 (1971); *see also Rodriguez v. Maricopa Cty. Community Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010) ("The right to provoke, offend and shock lies at the core of the First Amendment"). But there is little to be drawn from that conclusion in the separate context of assessing whether a restriction on firearms (or magazines) substantially burdens the right to self-defense. *See, e.g.*, Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense*, 56 UCLA L. Rev. 1443, 1486 (2009). Among other reasons, "banning some categories of arms might not substantially burden people's right to self-defense, because the remaining categories will be pretty much as effective without being materially harder to use or materially more expensive." *Id.* at 1484. As the record here demonstrates, that is the case with

respect to California's LCM restrictions. *See also id.* at 1489 (reviewing considerations that "probably mean that [a 10-round] magazine size cap would not materially interfere with self-defense" and noting that "the ability to switch magazines in seconds, which nearly all semiautomatic weapons possess, should suffice for the extremely rare instances when more rounds were needed").[4]

B. California's LCM Restrictions Satisfy Intermediate Scrutiny

1. When reviewing a Second Amendment claim under intermediate scrutiny, this Court asks whether the challenged law promotes a "significant, substantial, or important government objective," and whether there is a "'reasonable fit' between the challenged law and the asserted objective." *Pena v. Lindley*, 898 F.3d 969, 979 (9th Cir. 2018). The State must show that the law "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id.* But it need not demonstrate that the regulation is "the 'least restrictive means' of achieving the government's interest," *id.*, or that there is "no burden whatsoever on the individual right in question," *United States v. Masciandaro*, 638 F.3d 458, 474 (4th Cir. 2011).

[4] The more apt First Amendment analogy is to laws that prohibit "certain means of expression—such as residential picketing, or the use of sound trucks"—but do not run a "substantial risk of suppressing ideas." Volokh, *supra*, at 1486. The Supreme Court has held that such means of expression "can indeed be forbidden." *Id.*; *cf. Heller II*, 670 F.3d at 1262 (LCM prohibition "'more accurately characterized as a regulation of the manner in which persons may lawfully exercise their Second Amendment rights'").

Intermediate scrutiny thus accords "substantial deference to the [legislature's] predictive judgments" and does not "impose an 'unnecessarily rigid burden of proof.'" *Pena*, 898 F.3d at 979, 980. It aims to assure that the State, "in formulating its judgments, . . . has drawn reasonable inferences based on substantial evidence." *Id.* at 1001 (Bybee, J., concurring in part and dissenting in part) (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997)); *see also Kolbe*, 849 F.3d at 140 (same); *Drake v. Filko*, 724 F.3d 426, 436-437 (3d Cir. 2013) (same); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012) (same); *Heller II*, 670 F.3d at 1259 (same). And when applying intermediate scrutiny, this Court has given governments "'a reasonable opportunity to experiment with solutions to admittedly serious problems.'" *Jackson*, 746 F.3d at 966; *see also Pena*, 898 F.3d at 998 (Bybee, J., concurring in part and dissenting in part) ("[A] policy's efficacy is *not* something that can be tested in a laboratory; rather, a legislature must implement a law and assess over time whether it had the desired remedial effect.").

2. California's LCM restrictions satisfy intermediate scrutiny. All agree that Section 32310 serves compelling government interests: combating crime, protecting law enforcement, and reducing the number of lives lost and persons wounded during mass shootings. *See* Opn. 57; *cf.* 2-ER-354-55 ("nearly one-third of all gun massacre[s]" between 1968 and 2017 occurred after 2008, accounting for

"over 40 percent of all deaths" from such shootings). And the restrictions on LCMs are "reasonably fit" to those interests. *Pena*, 898 F.3d at 980. The record demonstrates that mass shooters who use LCMs inflict nearly *three-and-a-half* times the number of casualties as those who do not. 3-ER-756-57; *see also* 2-ER-253, 2-ER-294-96, 2-ER-357-58, 2-ER-405-07, 4-ER-971-72, 4-ER-1019-21, 5-ER-1106-07. LCMs allow shooters to "fire a large number of rounds at an extremely quick rate," which increases their chances of "hit[ting] a target in a very short window of opportunity" and of "strik[ing] a human target with more than one round." 2-ER-356. Indeed, LCMs have been the "preferred ammunition feeding devices" in many mass shootings precisely because they "significantly increase a shooter's ability to kill and injure large numbers of people." 2-ER-253.

LCMs also reduce the number of times that assailants must reload to continue firing. 2-ER-360. This too increases the number of people injured by depriving victims of valuable time to escape to safety. *See* 2-ER-358-60. That was one "important lesson learned from Newtown," where nine targeted children escaped "while the gunman paused to change out a large-capacity thirty-round magazine." *Kolbe*, 849 F.3d at 128. Fewer pauses also reduce the opportunities for "bystanders to intervene." *ANJRPC*, 910 F.3d at 119. For example, the gunman who killed Chief Judge John Roll and five others in Tucson in 2011 was tackled

and subdued when he paused to reload—after firing 30 rounds from a large-capacity magazine. 2-ER-320-21; *see also* 3-ER-768-71, 5-ER-1101.

In addition, the record indicates that States with LCM restrictions have "experienc[ed] a far lower rate of incidence" of gun massacres over the past three decades. 2-ER-364. On a per capita basis, those States witnessed fewer mass shootings—and fewer fatalities in the mass shootings that did occur—than other States. *See* 2-ER-360-65, 2-ER-388-89, 4-ER-1018-19; Klarevas et al., *The Effect of Large-Capacity Magazine Bans on High-Fatality Mass Shootings, 1990-2017*, 109 Am. J. Pub. Health 1754 (2019) (peer-reviewed study from State's expert, reporting similar results).

Even apart from mass shootings, the record shows that LCMs "pose a significant threat to law enforcement personnel and the general public." 2-ER-261 (declaration of former Emeryville Police Chief). Evidence demonstrates that LCMs are used at a much higher rate in the murder of police than in the commission of other crimes, 2-ER-405, 2-ER-418, and are "especially appealing to criminals," 4-ER-1008; *see also* 4-ER-815-17. Even when used in self-defense, LCMs can imperil "family members or occupants in attached dwellings" if fired indiscriminately by someone who is "not well-trained and is under stress." 2-ER-318-19; *see also Kolbe*, 849 F.3d at 127. Section 32310 addresses these concerns

by prohibiting possession of LCMs in California in most circumstances. *See* 2-ER-415-16, 7-ER-1589.

This record is more than sufficient to establish that Section 32310 "promotes a 'substantial government interest that would be achieved less effectively absent the regulation.'" *Pena*, 898 F.3d at 979; *see also* Dkt. 13 (Brady Br.) 14-20 (collecting additional studies). Other courts of appeals to address the constitutionality of laws similar to Section 32310 have upheld them based on similar evidence. *See Worman*, 922 F.3d at 36-40; *ANJRPC*, 910 F.3d at 119-124; *Kolbe*, 849 F.3d at 139-141; *NYSRPA*, 804 F.3d at 261-265; *Friedman*, 784 F.3d at 411-412; *Heller II*, 670 F.3d at 1263-1264. There is no reason for a different result here.

3. The panel concluded that Section 32310 would fail intermediate scrutiny, Opn. 63-66, but it misunderstood the legal standard and incorrectly applied that standard to the facts of this case.[5] Despite acknowledging the Court's precedent regarding the degree of deference accorded to state legislatures in applying intermediate scrutiny under the Second Amendment, *see* Opn. 61-62, the panel suggested that it owed no deference to the legislature's views in this context

[5] Indeed, given the compelling state interests in this area, the record evidence bearing on fit, and the history surrounding the regulation of LCMs, Section 32310 would satisfy any level of means-ends scrutiny.

because gun violence "does not involve highly technical or rapidly changing issues," Opn. 62. But deference to legislative judgments is appropriate in this realm not just because of legislative expertise on factual and policy issues, but also because a "state government's most basic task" is "[p]roviding for the safety of citizens within [its] borders." *Kolbe*, 849 F.3d at 150 (Wilkinson, J., concurring). The "inherent risk that firearms pose to the public distinguishes their regulation from that of other fundamental rights," *Young*, 992 F.3d at 827, many of which "can be exercised without creating a direct risk to others," *Bonidy v. U.S. Postal Service*, 790 F.3d 1121, 1126 (10th Cir. 2015). According proper deference "to legislative competence preserves the latitude that representative governments enjoy in responding to changes in facts on the ground"; failing to do so could impair the ability of legislatures to "act prophylactically" and require elected representatives to "bide [their] time until another tragedy is inflicted or irretrievable human damage has once more been done." *Kolbe*, 849 F.3d at 150 (Wilkinson, J., concurring).

The panel also concluded that Section 32310 did not address the State's compelling public safety interests "in a 'material' way." Opn. 64. It first noted that assailants in 14 of California's 17 mass shootings have used more than one weapon. Opn. 65. But the record demonstrates that the average death toll in mass shootings that involve multiple firearms (but no LCM) is less than in shootings in

which LCMs are used. *See* 5-ER-1104-07. The "increased carnage" from shootings that feature more than one gun is "driven more by the use of enhanced weapons"—especially those equipped with LCMs—"than by use of multiple firearms." 5-ER-1106. The panel also observed that the LCMs used in three of California's mass shootings were illegally smuggled into State. Opn. 65. Of course, there is always a possibility that some bad actors "intent on breaking the law" will violate a State's gun safety laws; that "does not make them unconstitutional." *NYSRPA*, 804 F.3d at 263

Finally, the panel asserted that Section 32310's fit was "excessive and sloppy." Opn. 63. It noted that Section 32310 "operates as a blanket ban on all types of LCMs everywhere in California for almost everyone," including "vulnerable groups" and those who "have high degrees of proficiency in their use." Opn. 64. But Section 32310 does not prevent any of those people from using handguns or authorized magazines to defend themselves. And it applies to "almost everyone" in large part because it is difficult to predict in advance whether an individual will use an LCM to commit an atrocity: mass shooters are often law-abiding right up until the moment when they slaughter dozens of their fellow citizens. *See, e.g.*, 2-ER-296 (more than 70% of mass shooters obtained their firearms legally). The panel also emphasized that Section 32310 no longer includes a "grandfather clause." Opn. 64. But California eliminated that provision

only after experience showed that police could not easily distinguish between "grandfathered" and prohibited LCMs. *See supra* pp. 3-4.[6]

On this record, there is no basis for holding that Section 32310 does not "reasonably fit" California's public safety interests. *Pena*, 898 F.3d at 980. Nor can it be said that California's law "'burden[s] substantially more protected activity than is necessary to further the government's interest.'" *Silvester v. Becerra*, 138 S. Ct. 945, 950 (2018) (Thomas, J., dissenting from the denial of certiorari). The only situation in which Section 32310 could "adversely affect[] a law-abiding citizen's right of defense of hearth and home" (Opn. 32) would be in the exceedingly rare scenario in which someone needs to continue firing in self-defense *after* depleting all 10 rounds in a magazine. In that scenario, the person may use additional firearms or swap in a new 10-round magazine. California's decision to set 10 rounds as the threshold beyond which the ability to continue firing bullets without having to reload presents an unacceptable danger to public safety is precisely the kind of "sensitive public policy judgment[]" that the Second Amendment allows the democratic branches of government to make. *Kachalsky*, 701 F.3d at 97.

[6] In any event, if the voters created a constitutional infirmity in Section 32310 by adopting the possession ban in 2016, the proper remedy would be to hold *that* provision unenforceable and sever it from the rest of the law. *See* 7-ER-1670 (severability clause in law adopting possession ban).

CONCLUSION

The district court's judgment should be reversed.

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Respectfully submitted,

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