No. 19-55376

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.

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

BRIEF OF AMICUS CURIAE JOHN CUTONILLI IN SUPPORT OF PLAINTIFFS-APPELLEES

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21 September 2019

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 similar firearm laws. He is unable to successfully bring a lawsuit 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 lower 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. 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 benefits that this amicus brief brings, which are missing in the parties' briefs. This brief provides historical insight into another case that denied the constitutional rights of law-abiding citizens because of the illicit acts of a few. It provides clarifying textual analysis of *Heller v. DC*, 554 U.S. 570 (2008). It provides additional analysis into public safety, the limits of the government's interest in public safety as well as the role individuals play in providing public safety. It also points out the insubstantial nature of the data used by the Attorney General of California (AGCA) and the logical fallacies inherent in the AGCA's analysis of that data, each of which leads the AGCA to make to unreasonable and unfounded inferences.

INTRODUCTION

During World War II the United Stated forced the relocation and incarceration of more than 100,000 Japanese Americans, citing concerns for public safety. The constitutionality of their internment was litigated in *Korematsu v. United States*, 323 US 214 (1944). The Supreme Court found that "exclusion of those of Japanese origin was deemed necessary because of the presence of an un-ascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country" *Id.* at 218. The Court's decision resulted in placing restrictions on the Japanese-American population at large—most of whom were law-abiding citizens—because of the illicit acts of a few.

While the court acknowledged that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," it still asserted that "pressing public necessity may sometimes justify the existence of such restrictions…" *Id.* at 216. While claiming that it applied "the most rigid scrutiny," it appears, particularly in retrospect, that the Court instead simply deferred to the government's findings, stating an unwillingness to "reject as unfounded the judgment of the military authorities." *Id.* at 219.

Importantly, the dissent in Korematsu claimed that in deferring to the government, the Court had failed to rule on a key judicial question. In doing so, it

had permitted the overstepping of "… the allowable limits of military discretion" and failed to define the "definite limits to [the government's] discretion" *Id.* at 234. In a statement that anticipates the future view of the courts and the American public on the Korematsu decision, the dissent further argued that:

> "[I]ndividuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support" *Id.* at 234 (Murphy, J., dissenting).

A subsequent trial held long after the war, *Korematsu v. United States,* 584 F Supp. 1406 (N. D. Cal. 1984), found that there is substantial evidence that the government omitted relevant information from the Court and also provided misleading information. While the Court decided not to determine any errors of law, it did grant a writ of *coram nobi* and cautioned subsequent courts that:

> "It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused." Id. at 1420

The AGCA is presenting a similar case, at a time of marked "distress … hostility and antagonism" in the country, arguing that the government's legitimate public safety interest supersedes constitutional guarantees. The AGCA's case is replete with errors. As in the case of Korematsu, the AGCA's case seeks to punish

law-abiding citizens for the felonious behavior of criminals. It conflates lawful gun ownership with mass murder. It neglects to recognize the critical contribution to public safety made by law-abiding gun owners. It misinterprets precedent, namely Heller, and promulgates misunderstanding and misinformation by relying on faulty data.

Taking into account what has been learned by Korematsu, it is hoped that this court will not simply defer to the legislature without properly evaluating whether the AGCA is making reasonable inferences based on substantial evidence. It is hoped that the court will recognize that the illegal acts of some, however heinous, are insufficient to deny the constitutional rights of law-abiding citizens, whose responsible ownership and use of guns can be an indispensable benefit to both self-defense and public safety. It is hoped that at a time in our nation when critical legal issues are so frequently politicized and sensationalized that this court will be prepared to exercise its authority "to protect all citizens from the petty fears and prejudices that are so easily aroused" *Id.* at 1420.

SUMMARY OF ARGUMENTS

The three arguments presented below demonstrate that the restrictions in section 32310 are not constitutional and do not meet the intermediate scrutiny standard.

Argument 1 – LCMs are protected by the Second Amendment.

While Heller states that not all military arms are protected by the constitution, it upholds the protection of the sort of "small arms" that are commonly "possessed at home" for lawful purposes, such as self-defense (*Id.* at 627). Because large capacity magazines (LCMs) are commonly used small arms, they are not covered by the National Firearms Act (NFA) *Id.* at 625 and are also protected by the Second Amendment. Whether they can be also used for military service is irrelevant. Any LCM that is suitable for military service is also suitable for legitimate self-defense purposes covered by the Second Amendment. The AGCA inadvertently demonstrates this important fact, as we shall see later in this brief.

Argument 2 – Banning LCMs negatively affects the individual's ability to provide for self-defense and contribute to public safety.

Section 32310 negatively affects the public's ability to protect itself. Since the California law in question affects the entire population of that state, the impact of the law should be evaluated on a societal basis in addition to an individual one. An individual's right to self-defense and public safety are related in the same way that the individual and the public are related: the former is a subset of the latter. To the extent that individuals are safer through the lawful possession and use of

firearms, so is the aggregate of individuals—the public—more safe through the lawful possession and use of firearms. While the government has a legitimate interest in public safety, it does not hold itself legally responsible for the safety of every member of the public. To do so would be impractical. Therefore, the government interest in public safety leaves a safety gap for individual citizens. Their safety may be greatly benefitted through the continued protection of the citizen's right to bear arms and the long-standing tradition of law-abiding citizens contributing not only to self-defense but also to the public's safety.

Argument 3 – Insubstantial data leads to unreasonable inferences and a failure to demonstrate that banning LCMs achieves public safety goals.

The AGCA cannot demonstrate that section 32310 will achieve any substantial public safety benefit. Section 32310 will not prevent a public mass shooting or the murder of law enforcement personnel because ten rounds in the hands of a criminal is more than sufficient to commit these acts. Nor can they demonstrate that these acts will be mitigated by section 32310. The data that the AGCA presents demonstrates only correlation. No causation is demonstrated between the use of LCMs and criminal behavior or the use of LCMs and increased fatalities. The AGCA does not demonstrate that past mass shootings would have been any different without LCMs.

ARGUMENTS

1. LCMs are protected by the Second Amendment.

The AGCA's case is based on either a fundamental misunderstanding or a misrepresentation of Heller. Either way, the AGCA's argument rests upon a faulty premise. Heller does not state that "weapons that are most useful in military service … may be banned" *Id*. at 627, as the AGCA claims. Taken out of its linguistic context, the meaning of Heller as suggested by the AGCA is not merely oversimplified, but it is completely reversed. Far from suggesting that weapons should be *excluded* from constitutional protection because of their military usefulness, Heller includes military usefulness among the most fundamental definitions of constitutionally protected weapons. As Heller explains, quoting Miller:

> "We think that Miller's 'ordinary military equipment' language must be read in tandem with what comes after: 'Ordinarily, when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use as that time'" *Id*. at 624.

Heller provides additional explanation of the *military usefulness* of weapons protected by the Second Amendment. Note Heller's inserted definition in brackets, added for clarity: "In the colonial and revolutionary era, [small-arms] weapons used by militiamen and weapons used in self-defense of person and home were one and the same" *Id*. at 624. Here, small-arms weapons used by the militia and small-

arms weapons used in self-defense are presented as equivalents from a constitutional perspective. Small arms are useful in both situations and are constitutionally protected, according to Heller's explanation, regardless of the situation. Heller goes on to assert that this equivalency is as true in the present day as it was in the past, despite the fact that "no amount of small arms could be useful against modern-day bombers and tanks" *Id*. at 627. The evolution in weaponry and the "limited degree of fit between the [Second Amendment's] prefatory clause and the protected right cannot change our interpretation of the right," Heller adds *Id.* at 627. Neither the AGCA, Kolbe or Friedman mentions small arms by name because to do so would be fatal to their arguments.

Because LCMs are considered to be part of the category of weapons commonly referred to as "small arms," they are protected by the Second Amendment. Contrary to the AGCA's suggestions, protected small arms explicitly include those that "were not in existence at the time of the founding" *Id*. at 582, *Caetano v. MA*, 577 US _ (2016) and are not limited to the weapons of the 18th century.

While the AGCA downplays the fact that LCMs are in "common use" in society today, the California legislature has accepted the fact that they play an important role in protecting public safety and property. For this reason, California allows federal, state, and local law enforcement to use LCMs in the course and

scope their official duties. Similarly, armored vehicle employees are also permitted to use LCMs for self-defense and the protection of property. None of these exempted persons use LCMs in connection with military service. Based on these exemptions the court must conclude that there are legitimate "common uses" that have been defined by the California legislature and that these "common uses" include defensive situations. The AGCA fails to mention these defensive uses of LCMs and the benefits they bring to maintaining both public safety and self-defense.

2. Banning LCMs negatively affects the individual's ability to provide for self-defense and contribute to public safety.

The majority in the Korematsu case rationalized its position by claiming it supported the public good. "Pressing public necessity" required the infringement of the rights of some people to protect the rights of others, so the logic went. Similarly, in many Second Amendment cases, the government's interest in public safety is often used as the rationale for curtailing the constitutional rights of legal gun owners. Yet in these cases, not only are the abridgements of the rights of the law-abiding public rationalized away, but the material contribution to public safety made by those very gun owners is left unconsidered.

A long tradition of gun ownership for self- and community protection predates today's arguments for gun rights. When the constitution was written, there

was no organized police force (Breyer dissent in Heller *Id*. at 716). It was not until the middle of the 19th century that most major urban police departments were established.

> "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'" (Maryland State Police website).

Historically, as today, gun owners contribute directly to public safety. They protect themselves and their families, their property, and sometimes the lives and property of members of their community. While many examples of the lawful and, indeed, selfless acts of gun owners can be found in the news, the balance of media coverage is given to illicit gun activity (gang violence, mass murders, etc.) that associates guns with criminal activity and fosters confusion between lawful and unlawful possession and use of firearms. Opponents of gun rights hold that the history of individual citizens contributing to the public safety is now irrelevant. While it is true that police forces make an invaluable contribution to public safety, they cannot be expected to provide for the safety of every individual. 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), 2001, *Castle Rock v. Gonzales*, 545 U.S. 748 (2005), *DeShaney v. Winnebago County*, 489 U.S. 189, (1989)). This includes groups of individuals involved in public mass shooting incidents, such as the Parkland School Shooting (*L.S. v. Peterson*, Case No. 18-cv-61577-BLOOM/Valle (S.D. Fla. Dec. 12, 2018)). The government has no interest in the protection of any specific individual because it cannot deliver protection at the individual level.

It is precisely for this reason that the individual right to self-defense is critical. Not only are lawful gun owners able to fill critical gaps in safety for themselves, but they may also provide protective benefits to the greater public. The self-responsible individual who is able and willing to contribute to his own self-defense is a vital component of public safety. Since an individual is a subset of the

public, the safer individuals are, the greater is the level of general or public safety. The aggregation of each individual's safety contributes to the public's safety. The abridgement of individual rights, therefore, diminishes not only the individual's safety, but the public's safety as well.

Citing examples that run directly counter to its argument, the AGCA describes seven instances in which citizens confronted a shooter and stopped an ongoing attack, likely preventing further injuries and fatalities. It should be noted that in more than half of these examples, members of the public were able to prevent a mass public shooting from occurring. Additionally, the AGCA cites "numerous instances" of citizens providing public safety services for members of the community during mass shooting events (See AGCA's Klarevas Exhibit, p. 11).

3. *Insubstantial data leads to unreasonable inferences and a failure to demonstrate that banning LCMs achieves public safety goals.*

Rather than demonstrate that it has "drawn reasonable inferences based on substantial evidence," *Turner II* 520 US at 195 quoting Turner 512 US at 666, the AGCA appears to expect the court to simply defer to the government's interpretation of facts, as the court did in Korematsu. Yet the lower court found many instances of faulty inferences and insubstantial data, and this court must now hold the AGCA's argument to the proper standard and assess whether the AGCA's

inferences are indeed reasonable and whether its evidence is sufficiently substantial.

In its opening brief, the AGCA claims a public safety interest in "preventing and mitigating gun violence, particularly public mass shootings and the murder of law enforcement personnel," p. 35. It is incumbent upon the court to determine if banning LCMs and limiting magazine capacity to a maximum of 10 rounds will prevent and mitigate this type of gun violence.

It is demonstrated every day that that limiting magazine capacity to 10 rounds will not prevent gun violence. Ten rounds are more than enough to commit a mass shooting or the murder of law enforcement personnel, if that's the intent. In fact, data supplied by the AGCA demonstrates that public mass shootings occur without LCMs. The lower court also makes note of FBI data that demonstrates that the majority of feloniously killed law enforcement personnel are killed with 10 or fewer rounds.

Having demonstrated that limiting magazines to 10 rounds will not prevent mass shootings or the murder of police, it must now be determined whether such a limitation would mitigate mass shootings and police murders and if reasonable inferences were drawn from the data the legislature used to enact the law. The AGCA draws a correlation between the use of LCMs in public mass shootings and

substantive increases in the average number of fatalities and injuries as compared to mass shootings that did not involve LCMs, contending that "LCMs enable a 'shooter to fire more bullets without stopping to reload,'" p. 38. This assertion, however, is based solely on a correlation between the LCMs presence and the resulting casualties, rather than on causation. No additional evidence is provided to demonstrate that the LCMs actually caused an increase in the number of injuries or fatalities. The AGCA makes no attempt to demonstrate that the presence of the LCM was the definitive cause of the increase in injuries and fatalities or to rule out other factors that may have contributed to the outcome. There was no analysis, for example, of whether victims were grouped together or spread apart or whether escape routes had been blocked. In fact, the AGCA fails to demonstrate causation across the board—in its analysis of LCMs in mass public shootings, against law enforcement personnel, in crime, and in self-defense.

The AGCA also asserts that LCMs deprive the public and law enforcement of critical pauses during active shootings when potential victims might escape or the shooter might be attacked and stopped. However, when this assertion is evaluated, it becomes clear that there is very little data on how beneficial such pauses may be. It's known that during the Newtown mass shooting, a pause allowed several victims to escape, but the evidence is inconclusive as to whether the shooter was actually reloading during that time or had paused for another

reason. Other examples introduced by the AGCA serve as excellent examples of heroic citizens exploiting pauses to attack a shooter and protect themselves and others (see Argument 2), but they fall short of providing compelling evidence supporting the AGCA's claim. Fewer than half of the seven instances cited were examples of public mass shootings and, again, there is no evidence to show that the pauses cited were pauses to reload or pauses that occurred for some other reason.

The evidence brought to bear by the AGCA is not substantial enough to sustain intermediate scrutiny. The little data that is available demonstrates that there is minimal public benefit to these pauses. In Newtown, the shooter reloaded at least five times based on the number of rounds fired, yet victims escaped during only one of those pauses. Furthermore, there is indication that the pause during the Newtown shooting was due to the rifle jamming or an error reloading and may have caused a longer than normal pause. During the Virginia Tech mass shooting, there were 17 pauses due to reloading, yet the AGCA provides no data to indicate any public benefit of those pauses. During the Fort Hood mass shooting, there were at least seven pauses, yet there is no data to indicate any benefit of these pauses. In Aurora, a pause occurred when the firearm jammed, but the shooter continued to fire because he had additional firearms. No data has been provided to indicate any benefit of this pause or that such pauses in general had a substantial mitigating effect on the number of injuries or fatalities.

Similarly, the AGCA fails to provide compelling data related to the number of shots fired per self-defense incident. The AGCA attempts to show that civilians do not need LCMs because relatively few shots are fired during instances of self-defense. To support this contention, the AGCA uses the NRA Armed Citizen database as its source. The problem with this approach is that the NRA database typically does not report the number of shots fired. The AGCA relies on reports dated from June 2016-May 2017, finding that that there were 81 self-defense incidents reported during that period. In most of those cases, 64 percent, there was no data regarding the number of shots fired. To make its case, the AGCA simply filled in an average number of shots fired for the data missing in 64 percent of the instances cited—ensuring in the process that any instances of outlier data that may have occurred is replaced with average data that better supports the AGCA's position (See AGCA's Allen Exhibit footnote 3). In doing so, the AGCA altered the data.

The AGCA also relied on a news stories to support its case and, again, when these sources failed to consistently specify the number of shots fired, the AGCA simply posited an average, altering the data (see AGCA's Allen Exhibit footnote 8). Additionally, the AGCA based its findings on a carefully selected subset of 200 news stories out of 35,000 possible stories and, for reasons that are unclear and unexplained, excluded any instances of self-defense that did not occur in the home.

Statistically, such a low sampling number will tend to exclude rare events and skew results. This very well may be evidenced by the fact that there were zero instances of more than 10 rounds being fired in the 200 stories selected by the AGCA to make his case. Conversely, there were two incidents in which more than 10 rounds were fired in the 81 self-defense cases reported in the NRA database during the June 2016-May 2017 timeframe, although that database does not consistently track shots fired. The myriad of flaws in the AGCA's methodology demonstrates that there is a dearth of "substantial evidence" on the subject of rounds fired and that the AGCA's inferences are unreasonable and unfounded.

The California legislature believes that law enforcement personnel should have LCMs. Many other legislatures believe this as well and not only permit, but often require, the use of LCMs among their police forces. However, most police departments do not publish data on the use of LCMs and shots fired. One exception to this rule is New York City, which publishes an annual Use of Force Report[1]. In the country's most densely populated city (approx. 8.5 million people), the police responded to approximately 5.4 million calls for service in 2017, according to the City's most recent report. Those 5.4 million calls for service resulted in 23 incidents of an officer firing during an adversarial conflict. In these 23 incidents,

[1] See https://www1.nyc.gov/site/nypd/stats/reports-analysis/use-of-force.page

32 officers fired a total of 170 rounds, which is 7.4 rounds per incident or 5.3 rounds per officer. Eleven of the officers (34%) only fired one round. Nine officers (28%) fired 2-5 rounds. Seven officers (22%) fired 6-10 rounds. Four officers (13%) fired 11-20 rounds while only one officer (3%) fired 20 rounds or more. These numbers confirm that the police rarely use the more than 10 rounds (6 incidents, ~0.0001% of the total calls). Yet the acceptance of LCMs by the legislature demonstrates that they find public safety benefits to LCMs—even if more than 10 rounds are used in exceedingly rare occurrences.

Assuming that citizens also fire a relatively low number of rounds during self-defense incidents, the same logic should hold true in these instances: more than 10 rounds may sometimes be necessary to provide adequate defense against criminal attacks. Allowing law-abiding citizens to have LCMs allows them to protect themselves in such rare instances—and possibly safeguard others as well.

CONCLUSION

LCMs are protected by the Second Amendment and the restrictions placed on them by section 32310 will not achieve the public safety benefits cited by the AGCA. Heller clearly supports the protection of militarily useful small arms that are in common use. In California, the police and armored car employees demonstrate that LCMs have common uses, including self-defense, public safety,

and the protection of property. The role the government plays in public safety is limited to general protection and does not include protecting any particular member of the public. Protecting the public's safety requires individuals to be involved. Evidence of the individual's contribution to public safety has been provided by the AGCA.

In addition, the AGCA has failed to draw reasonable inferences from substantial data, which the court requires. One of its main arguments confuses correlation with causation and fails to show that banning LCMs will prevent or mitigate injuries or fatalities resulting from mass shootings. The AGCA further fails to demonstrate that banning LCMs will prevent or mitigate the murder of police officers. Far from demonstrating that banning LCMs would improve public safety, the AGCA demonstrates that LCMs contribute significantly to protecting public safety in civilian settings, such as in the case of armored care personnel. The AGCA was unable to demonstrate that pauses during reloading have a substantial beneficial effect on these victims of mass shootings or violence against the police. The data does not support such a conclusion. Nor is the AGCA able to make a case on the basis of shots fired because it altered the evidence from both of its sources, the NRA database and new stories, rendering its findings unclear and unconvincing. Across the board, the AGCA has not based its case on substantial

evidence and it has repeatedly drawn unreasonable inferences from that faulty evidence.

The judgment should be sustained.

Respectfully submitted,

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