

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. 17-cv-1017-BEN-JLB
The Honorable Roger T. Benitez, Judge**

**BRIEF OF *AMICI CURIAE* LAW ENFORCEMENT GROUPS
AND STATE AND LOCAL FIREARMS RIGHTS GROUPS
IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE
(*AMICI* LISTED ON INSIDE COVER)**

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The following law enforcement groups and state and local firearms rights groups are *amici curiae* in this case: National Association of Chiefs of Police, Western States Sheriffs' Association, California Reserve Peace Officers Association, San Francisco Veteran Police Officers Association, International Law Enforcement Educators and Trainers Association, Law Enforcement Legal Defense Fund, California State Sheriffs' Association, New Mexico Sheriffs' Association, Association of New Jersey Rifle & Pistol Clubs, Inc., Bridgeville Rifle & Pistol Club, Connecticut Citizens Defense League, Delaware State Sportsmen's Association, Gun Owners' Action League Massachusetts, Gun Owners of California, Maryland State Rifle & Pistol Association, New York State Rifle & Pistol Association, Vermont Federation of Sportsmen's Clubs, Vermont State Rifle & Pistol Association, and Virginia Shooting Sports Association.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amici curiae* certifies that none of the *amici* has a parent corporation and no publicly held corporation owns 10% or more of the stock of any of the *amici*.

STATEMENT OF INTEREST OF AMICI CURIAE

The mission of the National Association of Chiefs of Police (“NACOP”), a non-profit organization founded in 1967, is to promote and support the law enforcement profession. Membership is limited to command staff officers, and it currently has over 7,000 members. Among many other activities, NACOP provides frequent handgun training for law enforcement personnel and civilians.

The Western States Sheriffs’ Association was established in 1993, and consists of more than three hundred members from seventeen member states throughout the Western United States. Its mission is to assist sheriffs and their offices with federal and state legislative issues, address policy and procedural matters, and work together to keep the office of sheriff strong.

The California Reserve Peace Officers Association was founded in 1974, and CRPOA members dedicate their time to community service by working as part-time employees with law enforcement agencies both on a compensated and non-compensated basis. Approximately 600 law enforcement agencies currently employ more than 5,000 reserve law enforcement officers in California.

The San Francisco Veteran Police Officers Association is an organization that represents the interests of veteran police officers in the City and County of San Francisco, including the exercise of their members' rights to keep and bear arms under the Second Amendment.

The International Law Enforcement Educators and Trainers Association is a professional association of 4,000 persons committed to the reduction of law enforcement risk and to saving lives of police officers and the general citizenry through the provision of training enhancements for criminal justice practitioners.

The Law Enforcement Legal Defense Fund is a non-profit organization headquartered in Alexandria, Virginia, that provides legal assistance to law enforcement officers. It has aided nearly one hundred officers, many of whom have been acquitted, mostly in cases where officers have faced legal action for otherwise authorized and legal activity in the line of duty.

The California State Sheriffs' Association is a nonprofit professional organization that represents each of the fifty-eight California sheriffs. It was formed to allow the sharing of information and resources between sheriffs and departmental personnel, in order to improve law enforcement throughout the state.

The New Mexico Sheriffs' Association is a professional and educational organization dedicated to keeping the peace and to protecting the lives and property of the citizens of New Mexico. The elected New Mexico Sheriffs have the

responsibility for upholding the laws of the state of New Mexico and of the United States of America, including the United States Constitution and the Second Amendment. The Association serves the people and communities of New Mexico through professional assistance, education, and unity.

The following are state and local groups that promote the shooting sports, provide firearms safety training, enhance marksmanship, educate the public about firearms, and raise awareness about and defend the rights protected by the Second Amendment: Association of New Jersey Rifle & Pistol Clubs, Inc., Bridgeville Rifle & Pistol Club, Connecticut Citizens Defense League, Delaware State Sportsmen's Association, Gun Owners' Action League Massachusetts, Gun Owners of California, Maryland State Rifle & Pistol Association, New York State Rifle & Pistol Association, Vermont Federation of Sportsmen's Clubs, Vermont State Rifle & Pistol Association, and Virginia Shooting Sports Association.

Amici believe that the perspective of front line law enforcement personnel, law enforcement organizations, and organizations that are knowledgeable about firearms should be of assistance to this Court in evaluating whether any interest in public safety is served by California's ban on the possession of standard capacity magazines holding more than 10 rounds.

SUMMARY OF ARGUMENT

California's ban on possession of magazines capable of holding more than 10 rounds will do nothing to advance the asserted government interests of protecting public safety, reducing mass shootings, and protecting law enforcement officers from criminal attacks.

Most "large capacity magazines" are simply the standard magazines that come with ordinary, full-size semi-automatic pistols and popular semi-automatic rifles. Beginning in the 1970s, many law enforcement agencies began to adopt semi-automatic pistols instead of revolvers as their standard sidearm, and these pistols gained increasing popularity among civilians as well. Not only did they have a greater capacity than revolvers, but new designs made them safe to carry with a round loaded in the chamber. As a consequence, during the last three decades more than three times as many pistols as revolvers have been produced in this country, and it is estimated that half the magazines currently possessed can hold more than 10 rounds.

California banned the sale or transfer of magazines holding more than 10 rounds in the year 2000, and there was a now-expired federal ban that began in 1994. Consequently, almost all such magazines that are now legally possessed in California have been held by law-abiding citizens for at least 25 years without being used in crimes. Criminals and mass shooters can easily obtain magazines of more

than 10 rounds illegally in other states. Section 32310 will thus affect only the law-abiding, not criminals.

Studies estimate that citizens use firearms to defend themselves against criminal attacks hundreds of thousands or millions of times each year. Criminal attackers generally plan their attacks, have the advantage of surprise, and may have multiple weapons or magazines. The innocent victim is likely to have only the number of rounds contained in a single magazine. There are documented instances in which having more than 10 rounds has been of critical importance in stopping a deadly attack. Law enforcement officers overwhelmingly believe that even a federal ban on magazines of more than 10 rounds would not reduce violent crime.

The state has not shown that banning possession of magazines over 10 rounds would reduce mass shootings or the number of deaths or injuries in such shootings. It relies on deeply flawed reports by advocacy groups, and even those reports do not show that magazines over 10 rounds are over-represented in mass shootings. A large scale survey shows that law enforcement professionals agree that restrictions on magazines would be ineffective in preventing public mass shootings.

The state's brief does not present reliable evidence that § 32310 would reduce killings of law enforcement officers. Instead, reliable data demonstrate that from the 1970s to the present, the time period when magazines over 10 rounds have become far more prevalent, officer deaths from shootings have declined by almost 60%.

ARGUMENT¹

The bans imposed by Cal. Penal Code § 32310 on sale, transfer and mere possession of magazines holding more than 10 rounds should be held to violate the Second Amendment under the Supreme Court’s decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

As set forth in Appellees’ Answering Brief, there is no historical tradition of banning magazines or limiting their size, and § 32310 certainly implicates, and indeed violates, the Second Amendment. Under heightened scrutiny, the state must show either that the ban is narrowly tailored to advance a compelling governmental interest, or that there is a close fit between the statute and advancing an important or substantial interest.² The state argues that the government interests to be served under heightened scrutiny are “public safety interests in preventing and mitigating gun violence, particularly public mass shootings and the murder of law enforcement personnel.” Appellant’s Opening Brief (“Opening Br.”) 35. Valid as those interests would be, § 32310 does nothing to advance them.

¹ No party’s counsel authored this brief in whole or in part. No party or party’s counsel, and no person other than *amici*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

² *Amici* do not address the standard of constitutional review in this brief, but presume it will be a form of heightened scrutiny.

I. SECTION 32310 WILL NOT REDUCE VIOLENT CRIME AND WILL INCREASE THE DANGER TO VICTIMS OF CRIMINAL ATTACK.

A. Magazines holding more than 10 rounds are not “large capacity” but are standard-issue on commonly owned, lawfully possessed pistols and rifles.

In order to put in proper context the state’s claims about the use of “large capacity” magazines in crimes, including mass shootings and shootings of law enforcement officers, it is first important to understand that magazines that hold over 10 rounds are not “large capacity” but rather are the standard magazines that come with most full-size pistols, as well as with the most popular class of rifles in America, the AR-15 platform.

As noted by Stephen Helsley, a veteran peace officer from the California Department of Justice who held several high level positions with that agency, law enforcement agencies beginning in the 1970s transitioned from six shot revolvers to double action semi-automatic pistols as issue sidearms. ER001707-1708. These pistols have standard magazines which will hold as many as 19 rounds. *Id.* An important reason why both civilians and law enforcement agencies widely adopted semi-automatic handguns was not only magazine capacity, but new “double action” or “striker fired” pistol designs. That means that these handguns do not have to be carried in a “cocked” state, which can be dangerous, but instead are “safe to carry

fully loaded with a round in the chamber.”³ SER613; *see also* ER001707-1708. As noted by Mr. Helsley:

The home-owner and the concealed weapon permit holder want a pistol that can hold significantly more cartridges than a revolver for the same reason a law enforcement officer or soldier wants one—to increase his or her chances of staying alive. ... For this reason, armed citizens have historically modeled their choice of firearms on what police carry.

Id. at 1708.

Firearms, tactics, and police expert Massad Ayoob notes that the first Glock, the Glock 17 chambered for 9mm ammunition, established itself as “a ‘service pistol’ par excellence.” SER613. The Glock 17 holds 17 rounds “in its standard magazine.” *Id.* Not long after, the Glock 22 was introduced, chambered for the .40 caliber S & W round. “Its standard magazine capacity is 15.” *Id.* This pistol “is believed to be in use by more American police departments than any other....” *Id.* The New York Police Department issues the 16-shot Glock 19 as its predominant sidearm. SER614. The FBI, after employing several different handguns with over ten round magazine capacities over the past few decades, recently adopted the Glock

³ Semi-automatic pistols using the older single-action design must either be carried without a round in the barrel’s chamber, thus requiring the user to manually chamber a round before the pistol can be fired, or be carried “cocked and locked,” which means that the pistol must rely on a safety device—sometimes fallible—to keep it from being discharged.

19M, which can also be loaded with 16 rounds, as its standard sidearm.⁴ Besides being “the most popular police handgun in America,” the Glock pistol is also “hugely popular for action pistol competition and home and personal defense.” SER615. Nearly all major handgun manufacturers produce semi-automatic handguns with standard magazine capacities over 10 rounds—Ruger, Smith & Wesson, Glock, Beretta, Heckler & Koch, Springfield Armory, CZ, SIG-Sauer, Browning, and others. SER485-520 With the exception of the Colt Model 1911A1, a pistol originally entering service before World War I, most full-size pistols (as opposed to those designed with concealment in mind) are designed by the factory with magazine capacities of over 10 cartridges.

The number of semi-automatic pistols manufactured or imported for domestic use has been rising over recent decades, resulting in both a proportionate and an absolute increase in handguns that can hold more than 10 rounds. As shown by the record in this case, “According to the Bureau of Alcohol Tobacco Firearms and Explosives, in 1986, 663,000 pistols were sold in the United States versus 761,000 revolvers. In 2010, revolver sales had dropped to 559,000 while pistol sales had grown to 2,258,000.” ER001708.⁵ Thus, in that 25 year period, the ratio of sales of

⁴ Bob Pilgrim, *FBI Issues New Pistol: Glock 19M*, S.W.A.T. MAGAZINE, <https://www.swatmag.com/article/fbi-issues-new-pistol-glock-19m/>.

⁵ *Citing* UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, FIREARMS COMMERCE IN THE UNITED STATES, ANNUAL

revolvers (which don't use magazines) to pistols (which do use magazines) went from a significantly larger number of revolvers being sold in 1986, to a four-to-one ratio in favor of pistols. In 2017, the latest year for which data is available, 3,691,010 pistols were manufactured domestically, and only 720,917 revolvers—more than a five-to-one ratio.⁶ From 1986 through 2017, a total of 56,606,214 pistols were produced, and 16,820,198 revolvers.⁷ Of all handguns domestically manufactured in that 32 year period, well over three times as many pistols as revolvers have been produced, with higher ratios recently. *See also* David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALBANY L. REV. 849, 850 n.6 (2015). ER001801. Thus, in the handgun sector of the market, semi-automatics have come to dominate numerically over revolvers.

A knowledgeable firearms industry expert has estimated that “230 million pistol and rifle magazines were in the possession of United States consumers between 1990 and 2015.” ER001700. Analysis of governmental data supporting that

STATISTICAL UPDATE 2012. The figures cited are number of firearms manufactured, not sold, though manufacturing is a good proxy for sales.

⁶ UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, FIREARMS COMMERCE IN THE UNITED STATES, ANNUAL STATISTICAL UPDATE 2019, Exhibit 1. The figures reported in this paragraph include handguns manufactured for export, but not imports. Far more handguns are imported than exported. *See, e.g., id.*, Exhibits 3, 5 (297,100 total handguns exported in 2017; 3,287,842 imported).

⁷ *Id.*, Exhibit 1.

estimate shows that “magazines capable of holding more than 10 rounds of ammunition accounted for approximately 115 million or approximately half of all magazines owned.” *Id.*

Because of the relative eclipse of the revolver, and the fact that magazines holding over 10 rounds make up about half of the magazine stock, it is unsurprising to find a large representation of firearms with what California calls “large capacity magazines” in any context in which firearms are used: from sport to home defense to law enforcement, and even in crimes. In any crimes committed with semi-automatic firearms, one would expect about half to involve so-called “large capacity” magazines.

But they are not “large capacity.” They are standard capacity and fully legal in the vast majority of states. By way of analogy, suppose half of American automobiles have 150 horsepower or less, and half come from the factory with more than 150 horsepower. A law is passed that arbitrarily designates any car with more than 150 horsepower as a “high powered vehicle.” No one would be shocked to discover that half of all car accidents, or half of all vehicle fatalities, involve “high powered vehicles.” The situation is similar with the magazines that the state labels as “large capacity.” It has simply arbitrarily designated them as such, even though they are common, ordinary, and provided as standard equipment from the manufacturer with full size handguns and with the most popular rifle platform in

America, the AR-15. If a legislature arbitrarily designated magazines holding more than 5 rounds as “large capacity,” then virtually all magazines would be illegal and when semi-automatic pistols or rifles are used, virtually all crimes, mass shootings, and attacks on police would be committed with “large capacity” magazines.

B. A ban on magazines already possessed will not increase public safety because it will affect only the law-abiding.

Though much of the state’s brief focuses on the alleged harms supposedly caused by magazines holding over 10 rounds, it is important to remember that those magazines have not been legally available to purchase in California since 1994. In that year, the federal Violent Crime Control and Law Enforcement Act banned possession, and most importantly transfer, of any “large capacity ammunition feeding device.” 18 U.S.C. § 922(w)(1) (expired). However, that Act allowed the possession and transfer of magazines that were lawfully possessed prior to the date of the law’s enactment. 18 U.S.C. § 922(w)(2).

In 2000, California provided that any person within the state who “manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, buys, or receives” a magazine that can hold more than ten rounds” is guilty of a criminal offense. Cal. Penal Code § 32310(a). Greater than 10 round magazines that existed in California at that time could not legally be transferred by the possessor of such magazines. If they were to

remain in private hands in the state, they had to be retained by the original possessor.

In 2017, § 32310(c) and (d) required citizens to turn in those grandfathered magazines. It seems unlikely that anyone who has lawfully possessed a magazine holding more than 10 rounds for decades, without committing any sort of violent crime with it, would now use that magazine to “massacre civilians and law enforcement personnel,” as the state has contended. State Opening Br. 53 on preliminary injunction appeal (“PI appeal”). Yet those law-abiding people are the ones who will be required by § 32310 to divest themselves of them or be subject to prosecution.

On the other hand, hardened criminals, terrorists, or individuals planning a mass attack will have no trouble obtaining magazines holding over 10 rounds should they prefer them. The vast majority of states do not regulate magazine capacity or purchases, and neither does the federal government. A person wanting to obtain such magazines to bring them illegally into California need only drive across the border to Arizona, Nevada, or Oregon. Magazines are light, small, and easy to transport. They are generally made of metal and/or plastic and don’t give off tell-tale odors like drugs. One doesn’t have to cross international borders to get them. They are far easier to obtain and smuggle than liquor during prohibition, or drugs now.

This is, in fact, what has happened when mass shooters in California have recently used magazines of over ten round capacity. In the Santa Monica event,

which took place in 2013, the shooter possessed forty 30 round magazines, presumably acquired out of state.⁸ The shooter was 23 years old, and thus was four years old when the federal ban went into effect. Similarly, in the Thousand Oaks shooting in 2018, the shooter was “armed with LCMs.” Opening Br. 6. Press reports have indicated he had seven 30 round magazines for his handgun.⁹ That shooter was 28 years old, and would also have been four years of age when the federal ban went into effect. Where did these mass shooters get these stacks of 30 round magazines? Surely not legally in California, and surely not when they were four years old. But that didn’t stop them, as it will not stop most deranged, evil individuals bent on mass murder, from finding a way around the law.

From a law enforcement perspective, it is unrealistic to suppose, as one of the *amicus* briefs in support of the state does, that the mere existence of a law banning possession of magazines holding over ten rounds will somehow prevent such magazines from being used in mass shootings. As noted, the Santa Monica shooter possessed numerous 30 round magazines in 2013. The brief asserts that “if the

⁸ Pamela Engel, *The Santa Monica Shooter Had A Troubled Past*, BUSINESS INSIDER, (Jun. 11, 2013), <https://www.businessinsider.com/john-zawahri-had-a-troubled-past-2013-6>.

⁹ Emily Shapiro, *New details emerge in Thousand Oaks mass shooting, including gunman's possession of 7 high-capacity magazines*, ABC NEWS (Nov. 27, 2018), <https://abcnews.go.com/US/thousand-oaks-gunman-high-capacity-magazines-illegal-california/story?id=59440205>.

Statute were in effect at the time, law enforcement could have stopped the Santa Monica shooter, before his rampage began, simply for possessing an LCM.” Brief of *Amici Curiae* California Chapter of the American College of Emergency Physicians *et al.* 11 n.4.

But law enforcement officers can only search individuals or residences when they have probable cause, or there is other legal justification to do so. Privately held magazines are generally stored at residences, which are not usually open to view by law enforcement, and law enforcement officers are exceedingly unlikely to be aware of such magazines before a violent crime is committed. In fact, in the case of the Santa Monica shooter, the perpetrator began by killing his father and brother and burning their home down before going on the spree. Op. 48-49 n. 46 (ER000055-56).¹⁰ Section 32310 will not prevent mass shootings or other crimes in which banned magazines are used, but will unquestionably lead to criminalizing ordinary citizens who are not aware of the ban, or have somehow failed to dispose of magazines that they have lawfully possessed for decades under prior law.

¹⁰ Citing SCPR.org, *Santa Monica shooting: John Zawahri ID'd as shooter; Marcela Franco, CSU Dominguez Hills student, dies* (June 9, 2013), <https://www.scpr.org/news/2013/06/09/37636/police-look-for-motive-in-santa-monica-shooting-on/>.

C. The magazine ban will jeopardize the ability of citizens to defend themselves against criminal attack.

The speculative risk that individuals who have safely possessed magazines over 10 rounds for decades will become mass shooters must be balanced against the very real harm that can be caused to those individuals if their ability to defend themselves or loved ones against criminal attack is impaired. Although firearms can be misused to commit crimes of violence, they can also be used by ordinary people to repel assaults by criminals and thereby save innocent lives.

The number of these defensive gun uses (“DGUs”) per year can only be estimated, but a number of studies have tried to do just that. Gary Kleck and Mark Gertz conducted an especially thorough survey in 1993, with stringent safeguards to weed out respondents who might misdescribe or misdate a DGU report. Kleck and Gertz found results indicating between 2.2 and 2.5 million DGUs annually.¹¹

Philip Cook of Duke and Jens Ludwig of Georgetown were skeptical of Kleck’s results, so they conducted their own survey for the Police Foundation. That

¹¹ Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. Crim. L. & Criminol. 150 (1995). The Kleck/Gertz survey found that most defensive uses involved handguns, and the large majority of defensive uses do not involve firing the weapon, but merely displaying it to deter an attacker. *Id.* at 175 (80 percent of DGUs are with handguns; 76 percent do not involve a shot being fired).

survey produced an estimate of 1.46 million DGUs.¹² In the mid-1990s, the Centers for Disease Control did well-designed research (though they did not publicize the results) that supports a finding of something over 1 million DGUs a year.¹³ The National Opinion Research Center argues that the actual annual DGU figure is in the range of 256,500 to 1,210,000.¹⁴

Kleck states that by 2001 there were 20 professionally conducted national surveys of representative samples of the U.S. adult population, and all of them showed large numbers of DGUs per year, ranging from 0.5 million to over 3 million. SER52 (PI appeal). In other words, by almost all measures, the use of firearms in defense of self, home, or others is very frequent.

What is the significance of this large number of defensive uses of a firearm? As noted, most DGUs do not result in a shot being fired, and many will have shots fired that either miss unintentionally, or are intended to scare off an attacker. In other instances, several shots may be required to defeat a criminal attack. But in some cases a great many shots are exchanged. Limiting the magazine capacity of innocent

¹² PHILIP COOK & JENS LUDWIG, GUNS IN AMERICA: RESULTS OF A COMPREHENSIVE NATIONAL SURVEY OF FIREARMS OWNERSHIP AND USE (1996).

¹³ Brian Doherty, *A Second Look at a Controversial Study About Defensive Gun Use*, REASON (Sep. 4, 2018), <https://reason.com/2018/09/04/what-the-cdcs-mid-90s-surveys-on-defensi>.

¹⁴ Tom W. Smith, *A Call for a Truce in the DGU War*, 87 J. Crim. L. & Criminol. 1462 (1997).

people, while giving violent criminals the additional advantage of having more shots at their disposal, can have fatal results.

Attackers already have the advantage of preparation and surprise. In anticipation of a confrontation, they may be carrying multiple weapons or multiple magazines. There may be more than one attacker—that is frequently the case in robberies, burglaries, and home invasions—and all of them may be armed. Coupled with the victim’s likely shock and disorientation caused by an unexpected attack, the perpetrator(s) already have an enormous advantage over the victim.

When an individual is under attack in the home, there will generally be no opportunity to gather extra magazines or firearms. ER2386, PI appeal (Declaration of Massad Ayoob, District Ct. Dkt. No. 6-8). The victim trying to defend himself, herself, or loved ones, will be lucky to be able to retrieve a single firearm, and will only have whatever ammunition is already in the gun. *Id.*

It is rarely possible to know exactly how many shots were fired in an armed encounter between a law-abiding citizen and a criminal attacker, because written accounts generally do not report that information, saying instead things like “multiple rounds fired.” ER2382, PI appeal (Declaration of Massad Ayoob, District Ct. Dkt. No. 6-8). But there are some well-documented cases in which a large number of rounds were necessary to stop an attack and save the life of the intended victim.

The District Court's opinion cites the harrowing cases of Susan Gonzales, Feng Zhu Chen, and Melinda Herman, all of whom used firearms to fight off home invasions, and in which large numbers of rounds needed to be fired to incapacitate or kill the intruders and save innocent life. ER000008-ER000010.

These are not isolated instances, as shown by the record in this case. Further examples include a Baltimore man who discharged 16 rounds from a handgun he was licensed to carry to successfully end an attack by three men while he was in his car carrying thousands of dollars in cash to the bank; a pizza delivery man, who fired 15 rounds in self-defense before the armed, surprise attacker succumbed to his wounds; and a Los Angeles watch shop owner who fired approximately 19 shots before the last of his multiple attackers ceased attempting to murder him. ER 2383-85, PI appeal (Declaration of Massad Ayoob, District Ct. Dkt. No. 6-8).

In deadly confrontations with criminals, law enforcement officers carry full-size magazines holding more than 10 rounds, often several of them, because greater continuity of fire contributes to officer survivability. If police officers—who have body armor, arriving backup officers, and more extensive training than most civilians—want the advantage of more ammunition in their firearms, it makes no sense to put law-abiding citizens at a disadvantage to criminals who will not obey a 10 round restriction.

D. Law enforcement professionals overwhelmingly recognize that magazine bans are not effective in fighting crime.

The national law enforcement organization PoliceOne conducted its Gun Policy & Law Enforcement survey in 2013, receiving 15,595 responses from verified police professionals across all ranks and department sizes.¹⁵ Respondents were asked, “Do you think a federal ban on manufacture and sale of ammunition magazines that hold more than ten rounds would reduce violent crime?” PoliceOne Survey, Question 6. The results were overwhelming: 95.7% (14,013) of the respondents said “no,” only 2.7% (391) said “yes,” and 1.6% (238) were unsure. This extraordinary consensus by law enforcement professionals that even a *nationwide* ban on magazines will not reduce violent crime is in stark contrast to the state’s position that banning magazines already possessed by law-abiding citizens is somehow a solution to violent crime.

II. THE STATE HAS NOT SHOWN THAT BANNING POSSESSION OF MAGAZINES HOLDING OVER 10 ROUNDS WILL REDUCE MASS SHOOTINGS OR THEIR LETHALITY.

To try to show that magazines over ten rounds are disproportionately used in mass shootings, and increase deaths and injuries, the state relies on a report on mass

¹⁵ PoliceOne, *Gun Policy & Law Enforcement Survey* (2013), http://ddq74coujkl1i.cloudfront.net/p1_gunsurveysummary_2013.pdf (“PoliceOne Survey”).

shootings prepared by Mayors Against Illegal Guns (“MAIG report”)¹⁶ and an ongoing online “investigation” into mass shootings by the political magazine and website *Mother Jones*.

A. Studies cited by the state do not show that magazines of over 10 round capacity are disproportionately used in mass shootings.

The District Court’s opinion regarding the preliminary injunction analyzed each California shooting in the report on mass shootings in the MAIG report, and those findings were adopted in the summary judgment opinion. The District Court reaffirmed its original finding:

To sum up, of the 92 mass killings occurring across the 50 states between 2013 and 2009, only ten occurred in California. Of those ten, the criminalization and dispossession requirements of § 32310 would have had no effect on eight of the shootings, and only marginal good effects had it been in effect at the time of the remaining two shootings. On this evidence, § 32310 is not a reasonable fit. It hardly fits at all.

ER000054-ER000055.

Looking at the entire report, of the 93 mass shootings identified, there are *only seven* (7.5% of the total) in which magazines of over ten rounds are specifically identified as having been used or possessed by the shooter (Santa Monica, CA, 6/7/13; Newtown, CT, 12/14/12; Oak Creek, WI, 8/5/12; Aurora, CO, 7/20/12;

¹⁶ Mayors Against Illegal Guns is currently part of Everytown for Gun Safety, a gun control group. See <https://everytown.org/mayors/>.

Tucson, AZ, 1/8/11; Binghamton, NY, 4/3/09; East Oakland, CA, 3/21/09).¹⁷ Rather than being disproportionately used in mass shootings, that 7.5% rate is far *lower* than one would expect given the numbers of pistols vs. revolvers produced in the past three decades, and the percentage of all magazines (about half) that hold over 10 rounds. See Part I., above.

The MAIG report contends that in about 14 of those 93 shootings (15%), LCMs or assault weapons¹⁸ were used. ER000972. In other words, the MAIG report combines instances in which LCMs were used, and those in which so-called assault weapons were used. That inflates the percentage above the 7.5% revealed by actually counting the instances in which an LCM was possessed or used. In most of those cases, the shooter also had multiple firearms in his possession, and under those circumstances it frequently cannot be determined from the MAIG report which firearms or magazines were actually used by the shooter. Even 15% is lower than what one would expect given the prevalence of magazines over 10 rounds.

The state also cites the *Mother Jones* “investigation” as supporting a disproportionately high usage of magazines over 10 rounds in mass shootings, and complains that the District Court dismissed that investigation as “a survey of news

¹⁷ The MAIG report is at ER000970-ER001004.

¹⁸ So-called “assault weapons”—a term with differing definitions in the expired federal law, and in the laws of the states that regulate them—may accept magazines of greater than ten rounds or of ten rounds or under.

articles collected by a biased interest group.” Opening Br. 40. In any event, the *Mother Jones* investigation is unscientific and unreliable.

The distinction between “mass shootings” and “mass public shootings” is highly important, but the *Mother Jones* investigation blurs it. A recent report by the Congressional Research Service adopts the customary definition of a “mass shooting” as a “multiple homicide incident in which four or more victims are murdered with firearms—not including the offender(s)—within one event, and in one or more locations in close geographical proximity.”¹⁹

A “mass *public* shooting,” by contrast is “a multiple homicide incident in which four or more victims are murdered with firearms—not including the offender(s)—within one event, and at least some of the murders occurred in a public location or locations in close geographical proximity ... and the murders are not attributable to any other underlying criminal activity or commonplace circumstance....” CRS Report 16. During the period 1999-2013, mass *public* shootings constituted a small subset (about 4.4 incidents per year) of the average of approximately 21 mass shootings per year. CRS Report 16.

The *Mother Jones* investigation, performed by an agenda-driven advocacy

¹⁹ William J. Krouse and Daniel J. Richardson, Congressional Research Service, *Mass Murder with Firearms: Incidents and Victims 1999-2013* 13 (Jul. 30, 2015) (“CRS Report”).

publication, is nearly useless as valid criminological or social science research. It uses a definition of “assault weapon” that has never been enacted into law by any jurisdiction.²⁰ It does not disclose the research credentials (apparently none) of the persons conducting it. Furthermore, it focuses chiefly on mass *public* shootings, not “mass shootings” as a whole, although their criteria for inclusion of an event as a mass public shooting are apparently quite subjective and ad hoc.

“Mass shootings,” including “mass public shootings,” are also generally distinguished from “spree” killings, in which a perpetrator kills a number of people over a period of time in various locations. CRS Report 6. *Mother Jones* admits this but then includes incidents which it classifies as spree killings. It arbitrarily excludes crimes of armed robbery, gang violence, or domestic violence, which account for most mass shootings. For some years it uses a definition of three or more individuals killed, and for other years it uses a definition of four or more individuals killed.²¹

All of that said, the *Mother Jones* investigation does not establish that magazines holding over 10 rounds are disproportionately used even in the cherry-picked subset of mass shootings that *Mother Jones* has compiled. The *Mother Jones* spreadsheet included at ER000956-969 shows 98 selected shootings from 1982 to

²⁰ It employs a definition of “assault weapon” contained in a bill introduced by Sen. Dianne Feinstein in 2013 that was not enacted.

²¹ See <http://www.motherjones.com/mojo/2012/08/what-is-a-mass-shooting>.

March 9, 2018. It identifies magazines with a stated capacity of over ten rounds, or “large capacity” or “high capacity” magazines in *only 8 incidents*, or 8.16%.²² That is a far cry from the 50% one would expect for shootings involving semi-automatics, which today heavily predominate among handguns and are very popular for rifles as well.

Despite this low percentage in which *Mother Jones* identified magazines over 10 rounds as having been possessed or used, the state’s expert witness Lucy Allen, relying on the *Mother Jones* data, opined that “a majority of public mass shootings involved LCMs.” Opening Br. 38, citing ER000756. How is that possible?

Allen combined information from the *Mother Jones* investigation with “data” from an initiative prepared by the Citizens Crime Commission of New York City, which purported to present an overview of “significant” mass shooting incidents in America...all of which involved large capacity ammunition magazines.”²³ But that “initiative” by a gun control advocacy group *cites no sources for its data whatsoever* other than that it is compiled from “publicly available news sources.” It contains not a single citation to any data source.

²² The spreadsheet is available at <http://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data/>.

²³ Citizens Crime Commission of New York City, *Mass Shooting Incidents in America(1984-2012)*, <http://www.nycrimecommission.org/mass-shooting-incidents-america.php>

Thus, none of these sources present reliable, verifiable data by which one could conclude that magazines over ten rounds are overrepresented in mass shootings.

Without such proof, the state has failed to carry its burden of establishing factually that Section 32310's infringement on the Second Amendment rights of law-abiding citizens is justified by the state's expressed goal of reducing mass shootings.

B. The information cited by the state does not establish that mass shootings involving the magazines in question result in greater casualties.

The state asserts that the MAIG report “determined that, when assault weapons or LCMs are used in mass shootings, 151 percent more victims are shot and 63 percent more victims are killed.” (citing ER 000972.)

This MAIG report, however, does not identify those instances in which it claims that “assault weapons or LCMs” were used, and provides no supporting calculations whatsoever for these claims about lethality.²⁴ Furthermore, it aggregates the type of weapon used with the capacity of the magazines used, and cannot therefore lead to any reliable conclusions about the effect of the use of magazines

²⁴ It does provide synopses of the 93 incidents, but does not tie these to its conclusions.

over ten rounds.²⁵ The assertions cannot be verified without analysis by the reader of all 93 incidents, and making similar assumptions to the (unknown) assumptions made by the report's unnamed authors. Furthermore, the 14 instances in which "assault weapons" or magazines over ten rounds were used, is too tiny a sample to arrive at any valid conclusions. Most importantly, indeed fatally, that report provides *no citations whatsoever to the data sources it allegedly relied on*. It states only that the authors "reviewed" mass shootings in "the FBI's Supplementary Homicide Reports from 2009-2011, the most recent data available, and searched the media for further details about these incidents as well as for mass shootings that occurred in 2012 and 2013." ER000971. There are no citations either to specific FBI data or to any of the media reports used as a basis for the report, so the information presented is incapable of verification. The MAIG report is not reliable social science, but propaganda by an anti-Second Amendment advocacy group.

C. Law enforcement professionals agree that magazine restrictions would be ineffective in reducing mass shootings.

In the PoliceOne survey described above, a large nationwide sample of law enforcement officers was asked, "What would help most in preventing large scale

²⁵ Centerfire rifles, which make up the vast majority of firearms classified as "assault weapons" by virtually all definitions, generally use ammunition that is much more powerful than standard handgun ammunition, so the inclusion of "or assault weapons" is not insignificant.

shootings in public? Choose the selection you feel would have the most impact.” The respondents were offered eight choices, including such things as better background checks, more aggressive institutionalization of the mentally ill, longer prison terms, and more armed guards/paid security personnel. Of the eight selections, the least effective method of preventing mass shootings was “More legislative restrictions on ‘assault weapons’ and ammo magazines.” Only 0.9% of the law enforcement officers surveyed believed that to be the most effective solution. In the eyes of law enforcement, magazine size is not the problem, either with mass shootings or with crime generally.

III. THE BANNED MAGAZINES ARE NOT DISPROPORTIONATELY USED IN ATTACKS ON LAW ENFORCEMENT OFFICERS.

To attempt to support the ban, the state contends that “LCMs have also featured prominently in violence against law enforcement personnel.” Opening Br. 43. It cites the Koper Report (ER000418) for the proposition that “For the period of 2009 through 2013, LCM firearms constituted 41% of guns used in murders of police, with annual estimates ranging from 35% to 48%.” Even if true, this statement is unremarkable, given the preponderance of semi-automatic pistols over revolvers in recent times and the widespread popularity of the AR-15 platform rifle among civilians. Koper tacitly admits as much, noting that “crime guns” in general in police databases showed a slightly lower rate of “LCM firearms,” but that “LCM firearms”

were sometimes estimated at “upwards of 40% *for cases involving shootings.*” ER000418 (emphasis added). That is the same rate he cited for police *murders*.

The state further contends that “data from prior to the federal [assault weapons] ban indicated that LCMs were used in 31% to 41% of gun murders of police in contrast to their use in 13-26% of gun crimes overall.” ER000405 (Koper Rep.) At least two points are pertinent here. First, this data is so old (prior to 1994) that it is unlikely to reflect the current situation, given the increased prevalence of semi-automatic magazines for full-sized handguns in general. Second, the statement compares gun *murders* of police to gun *crimes* overall. Persons committing lesser gun crimes may employ different firearms than persons intent on committing murder.²⁶

The state contends that the increase in the number of magazines capable of holding over 10 rounds leads to “massacres” of law enforcement officers. State Br. 34, 53 (PI appeal). But the facts show that this has not occurred. According to the National Law Enforcement Officers Memorial Fund (“NLEOMF”), which has

²⁶ Indeed, tracing the 13-26% figure for “gun crimes” back to its original source reveals that it is based on fragmentary data from a handful of cities, and may refer to such disparate descriptions as “all guns recovered by police” in Baltimore, “handguns used in serious crimes” in Anchorage, and “guns recovered from juveniles” in Washington, D.C. In other words, the kinds of data for “gun crimes” are not remotely comparable to the data for homicides of law enforcement officers. ER00590.

tracked deaths of law enforcement personnel back to 1791, law enforcement officer deaths by firearms have been decreasing dramatically since the 1970s, the very period during which magazines with capacities over 10 rounds began to be much more numerous.

According to that group, the number of firearms-related law enforcement fatalities in the first half of 2019 was 27.²⁷ For comparison purposes, the NLEOMF has also listed the average number of officer deaths by decade resulting from shootings, using first half of the year data. In the 1970s the average number was 63. In the 1980s it was 44; in the 1990s it was 35; in the 2000s it was 29; and in the 2010s it was 27. *Id.*²⁸ Overall, the number of officers killed in the line of duty in 2017 was the second lowest in more than 50 years.²⁹

As groups consisting of or supporting law enforcement officers, the safety of

²⁷ National Law Enforcement Officers Memorial Fund, *2019 Mid-Year Preliminary Law Enforcement Officers Fatalities Report*, https://nleomf.org/wp-content/uploads/2019/07/2019-Mid-Year-Fatality-Report_final_web_073019.pdf.

²⁸ These are absolute numbers, and this decline has occurred despite the increase in population and in the number of law enforcement officers. As noted, the figures for each year will have to be roughly doubled to arrive at the annual numbers. National Law Enforcement Officers Memorial Fund, *Causes of Law Enforcement Deaths (2009-2018)*, <https://nleomf.org/wp-content/uploads/2019/05/Causes-Law-Enforcement-Deaths-2009-2018.pdf>.

²⁹ Christal Hayes, *Number of officers killed hits 2nd-lowest in more than 50 years*, USA TODAY, (Dec. 29, 2017), <https://www.usatoday.com/story/news/2017/12/28/number-officers-killed-2017-hits-nearly-50-year-low/984477001/>.

officers performing their duties is of paramount concern to *amici*. But banning magazines holding more than 10 rounds will not achieve that goal.

CONCLUSION

For the reasons stated above, the District Court's decision should be affirmed.

Respectfully submitted,

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Date: September 23, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief *Amici Curiae* of Law Enforcement Groups and State and Local Firearms Rights Groups complies with Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure. According to the word count feature of the word-processing system used to prepare the brief, it contains 6,975 words, exclusive of those matters that may be omitted under Rule 32(a)(7)(B)(iii).

I further certify that the attached brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6). It was prepared in a proportionately spaced typeface using 14-point Times New Roman font in Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2019, an electronic PDF of the foregoing Brief *Amici Curiae* of Law Enforcement Groups and State and Local Firearms Rights Groups was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

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