

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

VIRGINIA DUNCAN, et al.,  
Plaintiffs,  
v.  
ROB BONTA, in his capacity as Attorney  
General of the State of California,  
Defendant.

Case No.: 17-cv-1017-BEN (JLB)  
**DECISION**

We begin at the end. California’s ban and mandatory dispossession of firearm magazines holding more than 10 rounds (California Penal Code § 32310(c) and (d)), as amended by Proposition 63, was preliminarily enjoined in 2017.<sup>1</sup> That decision was affirmed on appeal.<sup>2</sup> In 2019, summary judgment was granted in favor of Plaintiffs and § 32310 in its entirety was judged to be unconstitutional.<sup>3</sup> Initially, that decision was also

---

<sup>1</sup> *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1138 (S.D. Cal. 2017).  
<sup>2</sup> *Duncan v. Becerra*, 742 F. App’x 218, 221 (9th Cir. 2018).  
<sup>3</sup> *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1133 (S.D. Cal. 2019).

1 affirmed on appeal.<sup>4</sup> However, the decision was re-heard and reversed by the court of  
2 appeals *en banc*.<sup>5</sup> In 2022, the United States Supreme Court granted certiorari, vacated  
3 the appellate *en banc* decision, and remanded the case.<sup>6</sup> The court of appeals, in turn,  
4 remanded the case to this Court “for further proceedings consistent with *New York State*  
5 *Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).”<sup>7</sup> All relevant findings of fact  
6 and conclusions of law set forth in the prior decision concluding § 32310 is  
7 unconstitutional are incorporated herein.

8 **I. INTRODUCTION**

9 “There is a long tradition of widespread lawful gun ownership by private  
10 individuals in this country,” according to the United States Supreme Court.<sup>8</sup> Americans  
11 have an individual right to keep and bear firearms.<sup>9</sup> The Second Amendment to the  
12 United States Constitution “guarantee[s] the individual right to possess and carry  
13 weapons in case of confrontation.”<sup>10</sup> This guarantee is fully binding on the States and  
14 limits their ability to devise solutions to social problems.<sup>11</sup> And the guarantee protects  
15 “the possession of weapons that are ‘in common use,’”<sup>12</sup> or arms that are “typically  
16  
17  
18

---

19 <sup>4</sup> *Duncan v. Becerra*, 970 F.3d 1133, 1147 (9th Cir. 2020), *reh’g en banc granted*,  
20 *opinion vacated*, 988 F.3d 1209 (9th Cir. 2021).

21 <sup>5</sup> *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021) (*en banc*).

22 <sup>6</sup> *Duncan v. Bonta*, 142 S. Ct. 2895 (2022).

23 <sup>7</sup> *Duncan v. Bonta*, 49 F.4th 1228, 1231 (9th Cir. 2022).

24 <sup>8</sup> *Staples v. United States*, 511 U.S. 600, 610 (1994).

25 <sup>9</sup> *District of Columbia v. Heller*, 554 U.S. 570, 630 (1980).

26 <sup>10</sup> *Id.* at 606 (quoting 2 Tucker’s Blackstone 143) (“This may be considered as the true  
27 palladium of liberty .... The right to self defence is the first law of nature: in most  
28 governments it has been the study of rulers to confine the right within the narrowest  
limits possible.”).

<sup>11</sup> *McDonald v. City of Chicago, Illinois*, 561 U.S. 742, 785 (2010) (emphasis in  
original).

<sup>12</sup> *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2128 (2022).

1 possessed by law-abiding citizens for lawful purposes.”<sup>13</sup> These are the decisions this  
2 Court is bound to apply. “It’s our duty as judges to interpret the Constitution based on  
3 the text and original understanding of the relevant provision—not on public policy  
4 considerations, or worse, fear of public opprobrium or criticism from the political  
5 branches.”<sup>14</sup>

6 This case is about a California state law that makes it a crime to keep and bear  
7 common firearm magazines typically possessed for lawful purposes. Based on the text,  
8 history, and tradition of the Second Amendment, this law is clearly unconstitutional.

9 The detachable firearm magazine solved a problem with historic firearms: running  
10 out of ammunition and having to slowly reload a gun.<sup>15</sup> When more ammunition is  
11 needed in case of confrontation, a larger the magazine is required. Many gun owners  
12 want to have ready more than 10 rounds in their guns. As a result, in the realm of  
13 firearms, magazines that hold more than 10 rounds are possibly the most commonly  
14 owned thing in America. These larger magazines number over one hundred million. For  
15 handguns, the most popular sizes range up to 17 rounds; the most popular size for rifles is  
16  
17  
18

---

19  
20 <sup>13</sup> *Caetano v. Massachusetts*, 577 U.S. 411, 416 (Alito and Thomas concurring) (quoting  
21 *Heller*, 554 U.S. at 625, in turn quoting *United States v. Miller*, 307 U.S. 174, 179  
22 (1939)) (“We therefore read *Miller* to say only that the Second Amendment does not  
23 protect those weapons not typically possessed by law-abiding citizens for lawful  
24 purposes.”)

24 <sup>14</sup> *United States v. Rahimi*, 61 F.4th 443, 462 (5th Cir. 2023) (Ho, J., concurring)  
(citations omitted).

25 <sup>15</sup> *United States v. Gonzalez*, 792 F. 3d. 534, 536–37 (5th Cir. 2015) (“The problem of  
26 limited ammunition capacity has plagued rifles since their invention centuries ago. The  
27 earliest rifles fired a single shot, leaving the user vulnerable during reloading. Numerous  
28 inventions have sought to eliminate this problem. But from repeating rifles to clips, none  
has proved as effective as the magazine.”) (citing David B. Kopel, *The History of  
Firearm Magazines and Magazine Prohibitions*, 78 ALB. L. R. 849 (2015)).

1 30 rounds. Yet, regardless of the overwhelming popularity of larger magazines,  
2 California continues to prohibit any magazine capable of holding more than 10 rounds.<sup>16</sup>

3 There is no American tradition of limiting ammunition capacity and the 10-round  
4 limit has no historical pedigree and it is arbitrary and capricious. It is extreme. Our  
5 federal government and most states impose no limits<sup>17</sup> and in the states where limits are  
6 imposed, there is no consensus. Delaware landed on a 17-round magazine limit.<sup>18</sup>  
7 Illinois and Vermont picked limits of 15 rounds for handguns and 10 rounds for a rifles.<sup>19</sup>  
8 Colorado went with a 15-round limit for handguns and rifles, and a 28-inch tube limit for  
9 shotguns.<sup>20</sup> New York tried its luck at a 7-round limit; that did not work out.<sup>21</sup> New  
10 Jersey started with a 15-round limit and then reduced the limit to 10-rounds.<sup>22</sup> The fact  
11  
12

---

13  
14 <sup>16</sup> See Cal. Penal Code § 32310 and § 16740. The term “large-capacity magazine” is  
15 defined in California Penal Code § 16740 as “any ammunition feeding device with the  
16 capacity to accept more than 10 rounds,” but excludes: (a) a “feeding device that has been  
17 permanently altered so that it cannot accommodate more than 10 rounds,” (b) a “.22  
18 caliber tube ammunition feeding device,” and (c) a “tubular magazine that is contained in  
19 a lever-action firearm.”

20 <sup>17</sup> Federal law imposes only a sentencing enhancement. United States Sentencing  
21 Guideline § 2K2.1(a)(4)(B) increases the base offense level for a violation of 18 U.S.C. §  
22 922(g)(1) (felon in possession) when the offense involves a firearm with an attached  
23 magazine larger than 15 rounds. *United States v. Lucas*, No. 22-50064, 2023 U.S. App.  
LEXIS 14768, at \*7 (9th Cir. June 14, 2023).

24 <sup>18</sup> *Del. State Sportsmen’s Ass’n, Inc. v. Del. Dep’t of Safety & Homeland Sec.*, Civil  
25 Action No. 22-951-RGA, 2023 U.S. Dist. LEXIS 51322, at \*4 (D. Del. Mar. 27, 2023)  
26 (“Large-capacity magazine[s]’ are those ‘capable of accepting, or that can readily be  
27 converted to hold, more than 17 rounds of ammunition.’”).

28 <sup>19</sup> 720 ILCS 5/24-1.10(a); Vt. Stat. Ann. tit. 13, § 4021.

<sup>20</sup> Colo. Rev. Stat. Ann. § 18-12-301.

<sup>21</sup> The 7-round limit was found to be unconstitutional. *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 269 (2d Cir. 2015).

<sup>22</sup> “New Jersey once imposed a fifteen-round limit on magazine capacity. Now it claims a lower limit of ten is essential for public safety. The Second Amendment demands more than back-of-the-envelope math.” *Ass’n of N.J. Rifle & Pistol Clubs Inc. v. AG N.J.*, 974 F.3d 237, 260 (3d Cir. 2020) (Matey, J. dissenting).

1 that there are so many different numerical limits demonstrates the arbitrary nature of  
2 magazine capacity limits.

3 In a stealth return to the interest balancing test rejected by *Heller* and *Bruen*, the  
4 State ostensibly justifies its magazine limits by deeming the smaller magazines “well-  
5 suited” for its citizens.<sup>23</sup> Suitability, in turn, is based on concocted statistics about what a  
6 hypothetical average person needs to defend against an attacker or attackers in an average  
7 self-defense situation. Based on this hypothetical statistically average case scenario, the  
8 State permits its citizen to have a gun, but the State decides the number of rounds in the  
9 gun that it finds suitable.<sup>24</sup>

---

11 <sup>23</sup> At least a dozen times in its briefing before this Court, the State of California insists  
12 magazines larger than 10 rounds are unsuitable. Here are some examples. “[T]he  
13 Attorney General has demonstrated that LCMs are not necessary or even *suitable* to  
14 engage in private self-defense.” Dkt. 145, at 9. “Nor are LCMs particularly *suitable* for  
15 self-defense.” Dkt. 142, at 8. “[T]he accessory at issue here (an LCM) is not *well-suited*  
16 for lawful self-defense.” *Id.*

17 <sup>24</sup> And be grateful for 10 rounds. *Duncan*, 19 F.4th at 1168 n.10, *cert. granted, judgment*  
18 *vacated*, 142 S. Ct. 2895 (2022), *and vacated and remanded*, 49 F.4th 1228 (9th Cir.  
19 2022) (Bumatay, J., dissenting) (“California currently allows more than 2.2 rounds in a  
20 magazine, and does not prohibit carrying multiple magazines. But don’t be fooled.  
21 Under the majority’s Version 2.2 of the Second Amendment, there is no reason a state  
22 couldn’t limit its citizens to carrying a (generous) 3 rounds total for self-defense.”).

23 As this Court explained in its prior decision, “[a]rtificial limits will eventually lead  
24 to disarmament. It is an insidious plan to disarm the populace and it depends on for its  
25 success a subjective standard of ‘necessary’ lethality. It does not take the imagination of  
26 Jules Verne to predict that if all magazines over 10 rounds are somehow eliminated from  
27 California, the next mass shooting will be accomplished with guns holding only 10  
28 rounds. To reduce gun violence, the state will close the newly christened 10-round  
‘loophole’ and use it as a justification to outlaw magazines holding more than 7 rounds.  
The legislature will determine that no more than 7 rounds are ‘necessary.’ Then the next  
mass shooting will be accomplished with guns holding 7 rounds. To reduce the new gun  
violence, the state will close the 7-round ‘loophole’ and outlaw magazines holding more  
than 5 rounds determining that no more than 5 rounds are ‘suitable.’ And so it goes, until  
the only lawful firearm law-abiding responsible citizens will be permitted to possess is a  
single-shot handgun. Or perhaps, one gun, but no ammunition. Or ammunition issued  
only to persons deemed trustworthy.” *Duncan*, 366 F. Supp. 3d at 1146 n.33.

1 In so doing, the State denies a citizen the federal constitutional right to use  
2 common weapons of their own choosing for self-defense. There have been, and there  
3 will be, times where many more than 10 rounds are needed to stop attackers.<sup>25</sup> Yet,  
4

5  
6 <sup>25</sup> Some have wishfully believed “there is no evidence that anyone ever has been unable  
7 to defend his or her home and family due to the lack of a large-capacity magazine,” or  
8 that more than 10 rounds is ever needed. But there is actually the evidence to support  
9 this. In fact, the State’s own expert reports otherwise.

10 *See Duncan*, 366 F. Supp. 3d at 1134 (“As two masked and armed men broke in,  
11 Susan Gonzalez was shot in the chest. She made it back to her bedroom and found her  
12 husband’s .22 caliber pistol. Wasting the first rounds on warning shots, she then emptied  
13 the single pistol at one attacker. Unfortunately, now out of ammunition, she was shot  
14 again by the other armed attacker. She was not able to re-load or use a second gun. Both  
15 she and her husband were shot twice. Forty-two bullets in all were fired. The gunman  
16 fled from the house—but returned. He put his gun to Susan Gonzalez’s head and  
17 demanded the keys to the couple’s truck.

18 When three armed intruders carrying what look like semi-automatic pistols broke  
19 into the home of a single woman at 3:44 a.m., she dialed 911. No answer. Feng Zhu  
20 Chen, dressed in pajamas, held a phone in one hand and took up her pistol in the other  
21 and began shooting. She fired numerous shots. She had no place to carry an extra  
22 magazine and no way to reload because her left hand held the phone with which she was  
23 still trying to call 911. After the shooting was over and two of the armed suspects got  
24 away and one lay dead, she did get through to the police. The home security camera  
25 video is dramatic.

26 A mother, Melinda Herman, and her nine-year-old twins were at home when an  
27 intruder broke in. She and her twins retreated to an upstairs crawl space and hid.  
28 Fortunately, she had a .38 caliber revolver. She would need it. The intruder worked his  
way upstairs, broke through a locked bedroom door and a locked bathroom door, and  
opened the crawl space door. The family was cornered with no place to run. He stood  
staring at her and her two children. The mother shot six times, hitting the intruder five  
times, when she ran out of ammunition. Though injured, the intruder was not  
incapacitated. Fortunately, he decided to flee.”) (Citations omitted).

More examples have been reported since those words were written. When four  
suspects in a stolen car with stolen guns and ammunition used stolen house keys to enter  
the victims’ home in Tallahassee, Florida at 3:37 a.m., the victim fired 25 rounds before  
the suspects retreated out of the home. *Police: Tallahassee homeowner shot 2 out of 4  
home invasion suspects, all 4 charged*, ABC27 WTXL (May 24, 2019)  
<https://www.wtxl.com/news/local-news/tpd-investigating-home-invasion-robbery>  
[\[https://perma.cc/AQ36-S2ZH\]](https://perma.cc/AQ36-S2ZH).

1 under this statute, the State says “too bad.” It says, if you think you need more than 10  
2 chances to defend yourself against criminal attackers, you must carry more magazines.  
3 Or carry more bullets to hand reload and fumble into your small magazine while the  
4 attackers take advantage of your pause. On the other hand, you can become a criminal,  
5 too. So, the previously law-abiding California citizen who buys and keeps at her bedside  
6 a nationally popular Glock 17 (with its standard 17-round magazine) becomes the  
7 criminal, because the State dictates that a gun with a 17-round magazine is not well-  
8 suited for home defense.<sup>26</sup>

9  
10  
11  
12  
13  
14  
15  
16 In Kentucky, when a home intruder wearing a bulletproof vest shot and killed one  
17 daughter asleep in her bed, the father awoke and needed to fire 11 shots from one gun and  
18 8 shots from a second gun, while suffering 3 gunshot wounds himself, to protect his other  
19 daughter, his wife, and himself. Krista Johnson and Hayes Gardner, *Jordan Morgan’s*  
20 *death: Suspect Shannon Gilday arrested in Madison County*, Louisville Courier J. (Feb.  
21 28, 2022), [https://www.courier-journal.com/story/news/local/2022/02/28/shannon-gilday-](https://www.courier-journal.com/story/news/local/2022/02/28/shannon-gilday-arrested-in-jordan-morgan-richmond-ky-shooting/6941351001/)  
22 [arrested-in-jordan-morgan-richmond-ky-shooting/6941351001/](https://www.courier-journal.com/story/news/local/2022/02/28/shannon-gilday-arrested-in-jordan-morgan-richmond-ky-shooting/6941351001/) [[https://perma.cc/Q49M-](https://perma.cc/Q49M-ZFF9)  
23 [ZFF9](https://perma.cc/Q49M-ZFF9)].

24 On a Chicago train this year, a citizen was robbed at gunpoint by a suspect who  
25 had been previously arrested 32 times. The victim, a bank security guard, shot back 18  
26 times (4 of the rounds jammed) before the suspect retreated off the train. *Arrested 32*  
27 *times since 2014, man allegedly engaged in a ‘firefight’ with a concealed carry holder on*  
28 *a CTA train*, CWBChicago (Jan. 22, 2023), [https://cwbchicago.com/2023/01/arrested-32-](https://cwbchicago.com/2023/01/arrested-32-times-since-2014-man-allegedly-engaged-in-a-firefight-with-a-concealed-carry-holder-on-a-cta-train.html)  
[times-since-2014-man-allegedly-engaged-in-a-firefight-with-a-concealed-carry-holder-](https://cwbchicago.com/2023/01/arrested-32-times-since-2014-man-allegedly-engaged-in-a-firefight-with-a-concealed-carry-holder-on-a-cta-train.html)  
[on-a-cta-train.html](https://cwbchicago.com/2023/01/arrested-32-times-since-2014-man-allegedly-engaged-in-a-firefight-with-a-concealed-carry-holder-on-a-cta-train.html) [<https://perma.cc/EAV2-8F2E>].

<sup>26</sup> Criminals sometimes do not abide by gun regulations and pass around “gang guns”  
with magazines larger than 10 rounds. *See, e.g., People v. Cyrus*, No. E075271, 2023  
Cal. App. Unpub. LEXIS 1301, at \*5 (Mar. 3, 2023) (describing a Glock .40 cal. handgun  
and 29-round magazine and explaining, “[a] ‘gang gun’ is a gun that is passed around the  
gang and used by numerous gang members to commit crimes.).

1 Numbers vary, but some estimate that 81 million Americans own between 415<sup>27</sup>  
 2 and 456<sup>28</sup> million firearms. Further, millions of Americans across the country own large  
 3 capacity magazines. “One estimate . . . shows that . . . civilians possessed about 115  
 4 million LCMs out of a total of 230 million magazines in circulation. Put another way,  
 5 half of all magazines in America hold more than 10 rounds.”<sup>29</sup> A more recent large-scale  
 6 survey estimates that Americans today own 542 million rifle and handgun magazines that  
 7 hold more than 10 rounds.<sup>30</sup> Home defense and target shooting are the two most  
 8 common reasons for owning these larger magazines.<sup>31</sup> Moreover, the survey reports 48%  
 9 of gun owners have owned a handgun or rifle magazine that holds more than 10 rounds.<sup>32</sup>  
 10 But California bans these typically possessed magazines kept and used for self-defense.

11 Why are larger magazines chosen for self-defense? Crime happens a lot. One  
 12 recent estimate holds that guns are needed defensively approximately 1,670,000 times a  
 13 year.<sup>33</sup> Another report, originally commissioned and long cited by the Centers for  
 14 Disease Control and Prevention estimated that there are between 500,000 and 3,000,000  
 15

---

16  
 17 <sup>27</sup> William English, *2021 National Firearms Survey: Updated Analysis Including Types*  
 18 *of Firearms Owned* 7 (Geo. McDonough Sch. of Bus. Rsch. Paper No. 4109494, 2022),  
 available at <https://ssrn.com/abstract=4109494> [<https://perma.cc/83XT-75YG>].

19 <sup>28</sup> See Suppl. Decl. of Louis Klarevas, Dkt. 137-5 (“Suppl. Klarevas Decl.”), at ¶ 15 and  
 20 n.13.

21 <sup>29</sup> *Duncan*, 970 F.3d at 1142, *reh’g en banc granted, opinion vacated*, 988 F.3d 1209 (9th  
 22 Cir. 2021), *and on reh’g en banc sub nom. Duncan v. Bonta*, 19 F.4th 1087 (9th Cir.  
 23 2021), *cert. granted, judgment vacated*, 142 S. Ct. 2895 (2022), *and vacated and*  
 24 *remanded*, 49 F.4th 1228 (9th Cir. 2022).

25 <sup>30</sup> English, *supra*, at 25 (“These estimates suggest that Americans have owned some 542  
 26 million rifle and handgun magazines that hold over 10 rounds.”). Plaintiff’s expert,  
 27 Stephen Helsley, a retired California Department of Justice Assistant Director of the  
 28 Division of Law Enforcement, estimates there are between 500 million and one billion  
 magazines able to hold more than 10 rounds. See Declaration of Helsley in Support of  
 Plfs.’ Suppl. Br., Exh. 10, Dkt. 132-4, at ¶ 11.

<sup>31</sup> English, *supra*, at 23.

<sup>32</sup> *Id.* at 22.

<sup>33</sup> *Id.* at 35.



1 defensive gun uses in the United States every year.<sup>34</sup> Woe to the victim who runs out of  
 2 ammunition before armed attackers do. The police will mark the ground with chalk,  
 3 count the number of shell casings, and file the report.

4 All of this was decided earlier.

5 What remains to be done? California Penal Code § 32310 must be assessed in  
 6 light of *Bruen*. Now, on remand, the State has to justify this ban under *Bruen*, which  
 7 makes clear that “[t]o justify its regulation, the government may not simply posit that the  
 8 regulation promotes an important interest.”<sup>35</sup> After all, “the very enumeration of the  
 9 right takes out of the hands of government—even the Third Branch of Government—the  
 10 power to decide on a case-by-case basis whether the right is really worth insisting  
 11 upon.”<sup>36</sup> So, the State must demonstrate that its extreme ban is consistent with this  
 12 Nation’s historical tradition of firearms regulation. As explained below, there is no  
 13 national tradition of prohibiting or regulating firearms based on firing capacity or  
 14 ammunition capacity.

## 15 **II. CONSTITUTIONAL STANDARDS**

16 The Second Amendment provides: “A well regulated Militia, being necessary to  
 17 the security of a free State, the right of the people to *keep and bear* Arms, shall not be  
 18

---

19  
 20 <sup>34</sup> See Inst. of Med. & Nat’l Rsch. Council, *Priorities for Research to Reduce the Threat*  
 21 *of Firearm-Related Violence* 15 (The Nat’l Acads. Press ed., 2013),  
 22 <https://doi.org/10.17226/18319> [<https://perma.cc/K3N4-FEXQ>]. For many years the  
 23 CDC’s “fast facts” webpage referred to this report. The report itself had two different  
 24 ranges. The second range estimated from 60,000 to 2,500,000 annual defensive gun uses  
 25 in America. See Internet Archive Wayback Machine, CDC Firearm Violence Prevention,  
 26 captured July 26, 2021,  
 27 [https://web.archive.org/web/20210726233739/https://www.cdc.gov/violenceprevention/fi](https://web.archive.org/web/20210726233739/https://www.cdc.gov/violenceprevention/firearms/fastfact.html)  
 28 [rearms/fastfact.html](https://web.archive.org/web/20210726233739/https://www.cdc.gov/violenceprevention/firearms/fastfact.html). The Court notes that the CDC has changed its reporting to delete  
 reference to this study and the Court will not comment on how or why that happened as  
 the CDC website does not reflect why it was deleted.

<sup>35</sup> *Bruen*, 142 S. Ct. at 2126.

<sup>36</sup> *Id.* at 2129 (quoting *Heller*, 554 U.S. at 634).

1 infringed.”<sup>37</sup> “[T]he Second Amendment extends, prima facie, to all instruments that  
 2 constitute bearable arms, even those that were not in existence at the time of the  
 3 founding.”<sup>38</sup> According to *Heller*, “[t]he Second Amendment is naturally divided into  
 4 two parts: its prefatory clause and its operative clause. The former does not limit the  
 5 latter grammatically, but rather announces a purpose. The Amendment could be  
 6 rephrased, ‘Because a well regulated Militia is necessary to the security of a free State,  
 7 the right of the people to keep and bear Arms shall not be infringed.’”<sup>39</sup> “The first salient  
 8 feature . . . is that it codifies a ‘right of the people.’”<sup>40</sup> *Heller* then examines the  
 9 substance of the constitutional right, the verbs *to keep* and *to bear* and their object: *arms*.  
 10 So, what does it mean to keep and bear arms?

11 The Supreme Court concludes, “[t]he 18th-century meaning [of “arms”] is no  
 12 different from the meaning today. The 1773 edition of Samuel Johnson’s dictionary  
 13 defined ‘arms’ as ‘weapons of offence, or armour of defence.’ Timothy Cunningham’s  
 14 important 1771 legal dictionary defined ‘arms’ as ‘any thing that a man wears for his  
 15 defence, or takes into his hands, or useth in wrath to cast at or strike another.’”<sup>41</sup> In the  
 16 past, the term “arms” included weapons that were not specifically designed for military  
 17 use and were not employed in a military capacity. “Although one founding-era thesaurus  
 18 limited ‘arms’ . . . to ‘instruments of offence generally made use of in war,’ even that  
 19 source stated that all firearms constituted ‘arms,’” according to *Heller*.<sup>42</sup> And it is now  
 20 clear that “the Second Amendment extends, prima facie, to all instruments that constitute  
 21 bearable arms, even those that were not in existence at the time of the founding.”<sup>43</sup>

---

24 <sup>37</sup> U.S. Const. amend. II (emphasis added).

25 <sup>38</sup> *Caetano*, 577 U.S. 411 (quoting *Heller*, 554 U.S. at 581).

26 <sup>39</sup> *Heller*, 554 U.S. at 577 (citations omitted).

27 <sup>40</sup> *Heller*, 554 U.S. at 579.

28 <sup>41</sup> *Heller*, 554 U.S. at 581 (citations omitted).

<sup>42</sup> *Heller*, 554 U.S. at 581 (citations omitted).

<sup>43</sup> *Heller*, 554 U.S. at 582.

1 *Heller* later describes the types and kinds of arms that are guaranteed Second  
2 Amendment protection. But first, *Heller* describes the meanings of “to keep” and “to  
3 bear” arms.

4 “We turn to the phrases ‘keep arms’ and ‘bear arms.’ Johnson defined ‘keep’ as,  
5 most relevantly, ‘to retain; not to lose,’ and ‘to have in custody.’ Webster defined it as  
6 ‘to hold; to retain in one’s power or possession’ . . . Thus the most natural reading of  
7 ‘keep Arms’ in the Second Amendment is to ‘have weapons.’”<sup>44</sup> “Keep arms,” according  
8 to *Heller*, “was simply a common way of referring to possessing arms, for militiamen and  
9 everyone else.”<sup>45</sup> “To bear” meant to carry for the purpose of being armed and ready in  
10 case of conflict with another person. *Heller* even cited with approval the meaning of the  
11 phrase “carries a firearm” proposed by Justice Ginsburg in *Muscarello v. United States*:  
12 “as the Constitution’s Second Amendment indicates: ‘wear, bear, or carry upon the  
13 person or in the clothing or in a pocket, for the purpose of being armed and ready for  
14 offensive or defensive action in a case of conflict with another person.’”<sup>46</sup> Providing our  
15 modern understanding of the Second Amendment’s text, *Heller* concludes, “[p]utting all  
16 of these textual elements together, we find that they *guarantee the individual right to*  
17 *possess and carry weapons in case of confrontation.*”<sup>47</sup>

18 Very important in the past, still important in the future, *Heller* describes the  
19 concept of America’s militia. “In *Miller*, we explained that ‘the Militia comprised all  
20

---

21  
22 <sup>44</sup> *Heller*, 554 U.S. at 582 (citations omitted).

23 <sup>45</sup> *Heller*, 554 U.S. at 583.

24 <sup>46</sup> *Heller*, 554 U.S. at 584 (quoting *Muscarello*, 524 U.S. 125, 143 (1998) (Ginsburg, J.  
dissenting)).

25 <sup>47</sup> *Heller*, 554 U.S. at 592 (emphasis added). “As the most important early American  
26 edition of Blackstone’s Commentaries (by the law professor and former Antifederalist St.  
27 George Tucker) made clear in the notes to the description of the arms right, Americans  
28 understood the ‘right of self-preservation’ as permitting a citizen to ‘repel force by force’  
when ‘the intervention of society in his behalf, may be too late to prevent an injury.’” *Id.*  
at 595 (quoting 1 Blackstone’s Commentaries, 145-46, n.42 (1803)).

1 males physically capable of acting in concert for the common defense.”<sup>48</sup> And *Heller*  
 2 explains why the militia was important. Two of the three reasons remain important  
 3 today. “There are many reasons why the militia was thought to be ‘necessary to the  
 4 security of a free State.’ First, of course, it is useful in repelling invasions and  
 5 suppressing insurrections. . . . Third, when the able-bodied men of a nation are trained in  
 6 arms and organized, they are better able to resist tyranny.”<sup>49</sup> Once one understands the  
 7 history of tyrants resorting to taking away people’s arms to suppress political opposition,  
 8 *Heller* explains, one can see that the militia clause fits perfectly with the operative clause.  
 9 *Heller* teaches,

10 We reach the question, then: Does the preface fit with an  
 11 operative clause that creates an individual right to keep and bear  
 12 arms? It fits perfectly, once one knows the history that the  
 13 founding generation knew and that we have described above.  
 14 That history showed that the way tyrants had eliminated a  
 15 militia consisting of all the able-bodied men was not by  
 16 banning the militia but simply by taking away the people’s  
 17 arms, enabling a select militia or standing army to suppress  
 18 political opponents. This is what had occurred in England that  
 19 prompted codification of the right to have arms in the English  
 20 Bill of Rights.<sup>50</sup>

18 While the protection of a citizen militia was important, most people regarded the  
 19 Second Amendment as even more important for its protection of self-defense and  
 20 hunting. “The prefatory clause does not suggest that preserving the militia was the only  
 21 reason Americans valued the ancient right; *most undoubtedly thought it even more*  
 22 *important for self-defense and hunting.*”<sup>51</sup> After all, “[t]he right to self defence is the  
 23 first law of nature: in most governments it has been the study of rulers to confine the right  
 24

---

25  
 26 <sup>48</sup> *Heller*, 554 U.S. at 595.

27 <sup>49</sup> *Heller*, 554 U.S. at 598 (citations omitted).

28 <sup>50</sup> *Heller*, 554 U.S. at 598.

<sup>51</sup> *Heller*, 554 U.S. at 599 (emphasis added).

1 within the narrowest limits possible. Wherever standing armies are kept up, and the right  
2 of the people to keep and bear arms is, under any colour or pretext whatsoever,  
3 prohibited, liberty, if not already annihilated, is on the brink of destruction.”<sup>52</sup> As one  
4 commentator wrote at the time the Fourteenth Amendment was adopted in 1868, “[t]he  
5 purpose of the Second Amendment is to secure a well-armed militia. . . . But a militia  
6 would be useless unless the citizens were enabled to exercise themselves in the use of  
7 warlike weapons.”<sup>53</sup> In this way, a general public knowledge and skill with weapons of  
8 war is beneficial to the nation at large and is protected by the Second Amendment. “No  
9 doubt, a citizen who keeps a gun or pistol under judicious precautions, practices in safe  
10 places the use of it, and in due time teaches his sons to do the same, exercises his  
11 individual right.”<sup>54</sup> And “[t]he right to bear arms has always been the distinctive privilege  
12 of freemen.”<sup>55</sup> In the end, the Supreme Court deems the Second Amendment as valuable  
13 for both preserving the militia and for self-defense – which is the heart of the right.

14 *McDonald* put it this way:

15           In *Heller*, we recognized that the codification of this right was  
16           prompted by fear that the Federal Government would disarm  
17           and thus disable the militias, but we rejected the suggestion that  
18           the right was valued only as a means of preserving the militias.  
19           On the contrary, we stressed that the right was also valued  
20           because the possession of firearms was thought to be essential  
21           for self-defense. As we put it, self-defense was “the  
22           central component of the right itself.”<sup>56</sup>

---

23 <sup>52</sup> *Heller*, 554 U.S. at 606 (citation omitted).

24 <sup>53</sup> *Heller*, 554 U.S. at 618 (quoting J. Pomeroy, *An Introduction to the Constitutional Law*  
25 *of the United States* §239, pp. 152-153 (1868)).

26 <sup>54</sup> *Heller*, 554 U.S. at 619 (quoting B. Abbott, *Judge and Jury: A Popular Explanation of*  
27 *the Leading Topics in the Law of the Land* 333 (1880)).

28 <sup>55</sup> *Heller*, 554 U.S. at 619 (quoting J. Ordronaux, *Constitutional Legislation in the United*  
*States* 241-242 (1891)).

<sup>56</sup> *McDonald*, 561 U.S. at 926-27.

1           *Heller* specifically considered “whether a District of Columbia prohibition on the  
 2 possession of *usable* handguns in the home violates the Second Amendment to the  
 3 Constitution.”<sup>57</sup> And “District of Columbia law also require[d] residents to keep their  
 4 lawfully owned firearms, such as registered long guns, ‘unloaded and disassembled or  
 5 bound by a trigger lock or similar device’ unless they are located in a place of business or  
 6 are being used for lawful recreational activities.”<sup>58</sup> In the end, the Supreme Court struck  
 7 down both parts of the statute. “In sum, we hold that the District’s ban on handgun  
 8 possession in the home violates the Second Amendment, as does its prohibition against  
 9 rendering any lawful firearm in the home operable for the purpose of immediate self-  
 10 defense.”<sup>59</sup> While reaching its conclusion, the Supreme Court considered what types of  
 11 firearms were, and were not, protected by the Constitution. Highlighting the central  
 12 tenant of the Second Amendment, the Supreme Court wrote,

13           We may as well consider at this point (for we will have to  
 14 consider eventually) what types of weapons *Miller* permits.  
 15 Read in isolation, *Miller*’s phrase “part of ordinary military  
 16 equipment” could mean that only those weapons useful in  
 17 warfare are protected. That would be a startling reading of the  
 18 opinion, since it would mean that the National Firearms Act’s  
 19 restrictions on machineguns (not challenged in *Miller*) might be  
 20 unconstitutional, machineguns being useful in warfare in 1939.  
 21 We think that *Miller*’s “ordinary military equipment” language  
 22 must be read in tandem with what comes after: “Ordinarily  
 23 when called for militia service able-bodied men were expected  
 24 to appear bearing arms supplied by themselves and of the kind  
 25 in common use at the time.” The traditional militia was formed  
 26 from a pool of men bringing arms “in common use at the time”  
 27 for lawful purposes like self-defense. “In the colonial and  
 28 revolutionary war era, small-arms weapons<sup>60</sup> used by

---

25 <sup>57</sup> *Heller*, 554 U.S. at 573 (emphasis added).

26 <sup>58</sup> *Heller*, 554 U.S. at 575. The Court declared both aspects of the statute to be in  
 27 violation of the Second Amendment.

28 <sup>59</sup> *Heller*, 554 U.S. at 635.

<sup>60</sup> Not cannons or mortars.

1           militiamen and weapons used in defense of person and home  
2           were one and the same.” . . . We therefore read *Miller* to say  
3           only that the Second Amendment does not protect those  
4           weapons not typically possessed by law-abiding citizens for  
5           lawful purposes.<sup>61</sup>

6           Since it was “the conception of the militia at the time of the Second Amendment’s  
7           ratification [that] the body of all citizens capable of military service, [citizens] would  
8           bring the sorts of lawful weapons that they possessed at home to militia duty,”<sup>62</sup> the right  
9           to keep and carry arms means “the sorts of weapons protected were those ‘in common  
10          use at the time.’”<sup>63</sup>

#### 11           **A. Magazines Are Protected “Arms”**

12          The State argues that larger capacity magazines are not “arms.” First, the State  
13          argues that magazines are not essential to the use of firearms and consequently would  
14          have been thought of as accessories. But magazines are “integral components to vast  
15          categories of guns.” *Fyock v. City of Sunnyvale*, 25 F.Supp.3d 1267, 1276 (N.D. Cal.  
16          2014), *aff’d sub nom. Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015). “Most pistols  
17          are manufactured with magazines holding ten to seventeen rounds, and many popular  
18          rifles are manufactured with magazines holding twenty or thirty rounds.” *Kolbe v.*  
19          *Hogan*, 849 F.3d 114, 129 (4th Cir. 2017) (*en banc*). While the Second Amendment does  
20          not explicitly mention ammunition or magazines supplying ammunition, “without bullets,  
21          the right to bear arms would be meaningless.”<sup>64</sup> This is because the right to keep firearms

---

22  
23  
24  
25          <sup>61</sup> *Heller*, 554 U.S. at 624-25 (citations omitted). If it existed at the time and were in  
26          common use, as it is today, would a militia member bring a firearm with a magazine that  
27          holds more than 10 rounds? The answer is, yes, of course.

28          <sup>62</sup> *Heller*, 554 U.S. at 627.

<sup>63</sup> *Heller*, 554 U.S. at 627 citation omitted).

<sup>64</sup> *Jackson v. City & County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014)

1 for protection implies a corresponding right to obtain the bullets necessary to use them.  
2 “The possession of arms also implied the possession of ammunition.”<sup>65</sup>

3 By extension, “arms” includes the magazine component necessary to supply the  
4 bullet into the chamber of the gun. “[O]ur case law supports the conclusion that there  
5 must also be some corollary, albeit not unfettered, right to possess the magazines  
6 necessary to render those firearms operable.”<sup>66</sup> “It is hard to imagine something more  
7 closely correlated to the right to use a firearm in self-defense than the ability to  
8 effectively load ammunition into the firearm.”<sup>67</sup>

9 Put more broadly, “the Second Amendment protects ancillary rights necessary to  
10 the realization of the core right to possess a firearm for self-defense.”<sup>68</sup> Consequently,  
11 whether thought of as a firearm able to fire a certain number of rounds because of its  
12 inserted magazine, or as a separate ammunition feeding component, magazines are usable  
13 “arms” within the meaning of the Second Amendment. As the Third Circuit Court of  
14 Appeals found, “[w]e therefore must first determine whether the regulated item is an arm  
15 under the Second Amendment. The law challenged here regulates magazines, and so the  
16 question is whether a magazine is an arm under the Second Amendment. The answer is  
17 yes.”<sup>69</sup>

18 Proffering two subsidiary arguments, the State says: (1) a magazine of some size  
19 may be necessary, but a magazine larger than 10 rounds is not necessary to operate a  
20 firearm and thus a larger magazine is not a protected “arm”; and (2) statistically people  
21 rarely fire more than 10 rounds in self-defense so it can be said that a magazine larger  
22  
23

---

24  
25 <sup>65</sup> *United States v. Miller*, 307 U.S. 174, 180 (1939).

26 <sup>66</sup> *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015)

27 <sup>67</sup> *Barnett v. Raoul*, 2023 U.S. Dist. LEXIS 74756, \*26 (S.D. Ill. Apr. 28, 2023).

28 <sup>68</sup> *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017).

<sup>69</sup> *Ass’n of N.J. Rifle & Pistol Clubs v. Att’y Gen. of N.J.*, 910 F.3d 106, 116 (3d Cir. 2018).



1 than 10 rounds is rarely *used* for self-defense, and if a larger magazine is not commonly  
2 *used* for self-defense then it is not a protected “arm.”

3 For the first argument, the State claims that if a standard 17-round magazine is  
4 detached from a standard Glock 17 pistol, the 17-round magazine is no longer a weapon  
5 (by itself) and because the Glock 17 pistol could still function with a substitute 10-round  
6 magazine, then the 17-round standard Glock magazine does not come within the  
7 definition of “arms” that the Second Amendment protects.<sup>70</sup> In contrast, according to the  
8 State, a magazine holding 10 or less may qualify as a protected “arm,” but a magazine  
9 able to hold 11 or more is not a protected “arm.” What the State seems to be really  
10 saying is that a magazine may be a protected arm, but only the State has the right to pick  
11 the number of rounds a citizen may have in his gun.

12 This Court disagrees. The Supreme Court has not described protected arms in  
13 subdivided categories. When *Heller* found handguns were protected, it did not  
14 distinguish between semiautomatic pistols and revolvers. *Heller* did not classify  
15 protected handguns according to the number of rounds one could hold or the caliber of  
16 the ammunition that could be fired. It did not suggest that typically possessed arms could  
17 be subcategorized and subjected to judicial ad hoc constitutional determinations.  
18 Whether thought of holistically as a “handgun” irrespective of magazine size as *Heller*  
19 does, or as an entirely separate attachment, both firearms and their magazines (of all  
20 typical sizes) are “arms” covered by the text of the Second Amendment. “This is not  
21 even a close call.”<sup>71</sup> As this Court has said before, “[n]either magazines, nor rounds of  
22

---

23 <sup>70</sup> Of course, the argument admits, *sub silentio*, that some magazines are necessary to  
24 operate a gun. The State says: “To be sure, some type of magazine is essential to the use  
25 of many handguns. But there is no evidence in this record . . . that a magazine capable of  
26 firing more than 10 rounds without reloading is necessary to the function of any modern  
27 firearm.” Def’s Suppl. Br., Dkt. 118 at n.10.

28 <sup>71</sup> *Barnett v. Raoul*, No. 3:23-cv-00209-SPM, 2023 U.S. Dist. LEXIS 74756, at \*26–27  
(S.D. Ill. Apr. 28, 2023); *Hanson v. District of Columbia*, Civil Action No. 22-2256  
(RC), 2023 U.S. Dist. LEXIS 68782, at \*17 (D.D.C. Apr. 20, 2023) (“At least three

1 ammunition, nor triggers, nor barrels are specifically mentioned in the Second  
 2 Amendment . . . But without a right to keep and bear triggers, or barrels, or ammunition  
 3 and the magazines that hold ammunition, the Second Amendment right would be  
 4 meaningless.”<sup>72</sup> Using reasoning that is still persuasive, the Ninth Circuit agreed,  
 5 explaining “[p]ut simply, a regulation cannot permissibly ban a protected firearm’s  
 6 components critical to its operation.” More recently, counsel for California’s Governor  
 7 in a related fee-shifting case agreed while pointing out that “[t]he large-capacity  
 8 magazines ban appears in the Penal Code’s title on ‘Firearms,’” and “a restriction on the  
 9 ammunition that may be used in a firearm is a restriction on firearms.”<sup>73</sup> Leaving no  
 10 doubt, even the (vacated) Ninth Circuit’s *en banc* decision assumed that § 32310  
 11 implicates the Second Amendment.<sup>74</sup>

12 Relatedly, the State argues that it is only restricting a firearm component or an  
 13 accessory.<sup>75</sup> “LCMs are not weapons in themselves,” says the State, “nor are they  
 14

---

15 Courts of Appeals have concluded that LCMs are “arms” within the meaning of the  
 16 Second Amendment.”); *Del. State Sportsmen’s Ass’n, Inc. v. Del. Dep’t of Safety &*  
 17 *Homeland Sec.*, Civil Action No. 22-951-RGA, 2023 U.S. Dist. LEXIS 51322, at \*19 (D.  
 18 Del. Mar. 27, 2023); *contra, Ocean State Tactical, LLC v. Rhode Island*, No. 22-cv-246  
 19 *JJM-PAS*, 2022 U.S. Dist. LEXIS 227097, at \*33–34 (D.R.I. Dec. 14, 2022); *Or.*  
 20 *Firearms Fed’n, Inc. v. Brown*, No. 2:22-cv-01815-IM, 2022 U.S. Dist. LEXIS 219391,  
 21 at \*23–25 (D. Or. Dec. 6, 2022).

<sup>72</sup> *Duncan*, 366 F. Supp. 3d at 1142–43 (citing *Fyock v. City of Sunnyvale*, 779 F.3d 991,  
 998 (9th Cir. 2015); *Teixeira v. Cty. Of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (en  
 22 *banc*); *Ass’n of N.J. Rifle & Pistol Clubs v. A.G. N.J.*, 910 F.3d 106, 116 (3d Cir. 2018).

<sup>73</sup> *Miller v. Bonta*, 22cv1446-BEN (JLB), Intervenor-Def’s Suppl. Br., Dkt. 35, at 14.

<sup>74</sup> *Duncan*, 19 F.4th at 1103, *cert. granted, judgment vacated*, 213 L. Ed. 2d 1109, 142 S.  
 23 Ct. 2895 (2022).

<sup>75</sup> Instead of isolating the magazine from the gun, the better understanding is to consider  
 24 the magazine as part of the gun. There is a federal law analogue leading to the  
 25 conclusion that a magazine is correctly regarded as a component part of a gun. The Arms  
 26 Control Export Act criminalizes the unlicensed export of firearms and their components.  
 27 22 U.S.C. § 2778(b). Firearm magazines come within the Act because “a magazine is  
 28 ‘useful’ only when used in conjunction with that end-item [a rifle]: its sole purpose is to  
 load cartridges into the breech so that they can be fired . . . .”<sup>75</sup> In this view, the

1 necessary to operate any firearm for self-defense.” California residents who purchased  
 2 new pistols in the last decade are probably surprised to hear that magazines are not  
 3 necessary to operate a pistol. After all, another state law known as the Unsafe Handgun  
 4 Act requires new semiautomatic pistols to have an integrated magazine-disconnect  
 5 mechanism in order to be sold to the public.<sup>76</sup>

6 A magazine-disconnect mechanism prevents a pistol from firing at all, even if one  
 7 round is left loaded in the chamber, if the magazine is not inserted into the pistol. The  
 8 state-mandated magazine-disconnect mechanism thus prevents the operation of the  
 9 firearm without its magazine.<sup>77</sup> While rifles are not required to have a magazine-  
 10 disconnect mechanism, the State must concede that at least for semiautomatic handguns  
 11 the State deems “not unsafe,” firearms for self-defense will not function without a  
 12 magazine.<sup>78</sup> Modern magazines, submits the State, are more like founding-era cartridge  
 13 boxes or “ancillary equipment associated with soldiering” that were not strictly necessary  
 14 to fire a gun. Today, however, as pointed out above, some semiautomatic firearms will  
 15 not function at all without a magazine, while others can fire no more than one round. As  
 16  
 17

---

18  
 19 magazine is a necessary component part of a gun which, in turn, would obviously fall  
 20 under the text of the Second Amendment protection of “arms.”

21 <sup>76</sup> “California’s Unsafe Handgun Act (the ‘UHA’) seeks to prevent accidental discharges  
 22 by requiring handguns to have particular safety features . . . [t]he UHA requires certain  
 23 handguns to have a magazine disconnect mechanism (“MDM”), which prevents a  
 24 handgun from being fired if the magazine is not fully inserted.” *Boland v. Bonta*, No.  
 25 SACV2201421CJCADSX, 2023 WL 2588565, at \*1 (C.D. Cal. Mar. 20, 2023) (citing  
 26 Cal. Penal Code §§ 16900, 31910(b)(5)).

27 <sup>77</sup> Semiautomatic pistols elsewhere in the nation usually do not have a magazine-  
 28 disconnect mechanism so a pistol can still fire one chambered round without its  
 magazine. Of course, one need not go too far out on a limb to say that a semi-automatic  
 pistol that can fire only 1-round is not the sort of self-defense weapon most people would  
 choose.

<sup>78</sup> To be precise, revolvers are handguns that do not require a magazine-disconnect  
 mechanism, but that is because a revolver does not have a detachable magazine.

1 such, a magazine is an essential component without which a semiautomatic firearm is  
2 useless for self-defense. Therefore, a magazine falls within the meaning of “arms.”<sup>79</sup>

3 **B. LCMs Are Used for Self-Defense**

4 Notwithstanding that the Second Amendment protects the right to “keep and bear,”  
5 the State’s more troubling argument is that magazines holding more than 10 rounds are  
6 not being *used* for self-defense. By “used,” the State means actually fired. The State  
7 asserts, “there is no evidence that LCMs are frequently used in self-defense.”  
8 Continuing, the State asserts, “[t]o the contrary, the record reflects that it is exceedingly  
9 rare for an individual, in a self-defense situation, to fire more than ten rounds.” But  
10 without conceding the accuracy of the State’s position, infrequent use or “exceedingly  
11 rare” is not the same as *never*. To support the State’s argument, it relies on a  
12 statistician’s conclusion that an average of only 2.2 rounds are fired in an average self-  
13 defense situation. Because more than 10 rounds in the average situation are not being  
14 fired for self-defense, the argument goes, magazines holding more than 10 rounds are not  
15 *used* or needed for self-defense. And because the Second Amendment protects  
16 (according to the State) only those arms commonly “used” for self-defense, the State says  
17  
18

---

19 <sup>79</sup> See e.g., *Hanson v. D.C.*, No. CV 22-2256 (RC), 2023 WL 3019777, at \*7 (D.D.C.  
20 Apr. 20, 2023) (“The District’s logic, by contrast, would allow it to ban *all* magazines  
21 (not just LCMs) — a result even the District does not endorse here — because a firearm  
22 technically does not require *any* magazine to operate; one could simply fire the single  
23 bullet in the firearm’s chamber. The Court will therefore follow the persuasive reasoning  
24 of *ANJRPC*, *Kolbe*, and *Duncan* in concluding that LCMs are “arms” within the meaning  
25 of the Second Amendment.”); see also *Barnett v. Raoul*, No. 3:23-CV-00141-SPM, 2023  
26 WL 3160285, at \*8 (S.D. Ill. Apr. 28, 2023) (“Defendants’ argument is not persuasive.  
27 The Seventh Circuit has recognized the Second Amendment as extending to “corollaries  
28 to the meaningful exercise of the core right to possess firearms for self-defense.” It is  
hard to imagine something more closely correlated to the right to use a firearm in self-  
defense than the ability to effectively load ammunition into the firearm.”).

1 larger capacity magazines are not commonly “used,” and therefore they are not protected  
2 arms.<sup>80</sup>

3 It is a remarkable reading of *Heller*, *McDonald*, *Caetano*, and *Bruen* to say that if a  
4 gun is not fired more than 10 times in self-defense then the gun’s larger magazine is not  
5 being “used” in self-defense, and if not “used” in self-defense, then not protected by the  
6 Second Amendment. Yet, this is the State’s theme.

7 In this Court’s view, it is a crabbed reading of the Supreme Court’s Second  
8 Amendment decisions and not relevant to the text, history and tradition test. The  
9 Supreme Court uses several descriptive phrases to describe the kinds of firearms that are  
10 protected by the Constitution. But common to all is the notion that to be protected, an  
11 arm needs only to be regarded as *typically* possessed or carried, or *commonly* kept, by  
12 citizens to be ready for use, if needed. The Supreme Court has not said that the actual  
13 firing of a gun is any part of the test. Indeed, the Second Amendment does not say that  
14 the right of the People to keep only such firearms as they actually shoot, shall not be  
15 infringed.

16 *McDonald* begins, “[t]wo years ago, in *District of Columbia v. Heller*, we held that  
17 the Second Amendment protects the right to keep and bear arms *for the purpose of self-*  
18 *defense*, and we struck down a District of Columbia law that banned the possession of  
19 handguns in the home.”<sup>81</sup> What mattered is the purpose for which handguns were  
20 possessed, not necessarily the actual use.

---

21  
22  
23 <sup>80</sup> A similar argument was made by the State in *N.A. for Gun Rights v. Lamont*, Case No.  
24 22-1118 (JBA), 2023 U.S. Dist. LEXIS 134880, \*40 (D. Conn. Aug. 3, 2023)  
25 (“Defendants maintain that after *Bruen*, Plaintiffs must show not only that the weapons  
26 and accoutrements are commonly owned, but they are commonly possessed and used *for*  
27 *self-defense* base on *Bruen*’s repeated use of the phrase ‘common use’ for self-defense.”)  
28 (emphasis added), and in *Oregon Firearms Federation v. Kotek*, Case No. 22cv1815-IM,  
\*67 (D. Ore. July 14, 2023) (“Defendants ... argue for an interpretation of ‘use’ that  
includes some objective metric of an LCM’s actual use in self-defense.”).

<sup>81</sup> 561 U.S. at 749-50 (citation omitted) (emphasis added).

1           The State puts its weight on the words “use,” “uses,” and “used.” One problem  
2 with the State’s view is that it treats the Supreme Court’s opinion language like the  
3 language of a statute. That is a mistake. “Because ‘opinions, unlike statutes, are not  
4 usually written with the knowledge or expectation that each and every word may be the  
5 subject of searching analysis,’ we do not follow statutory canons of construction with  
6 their focus on ‘textual precision’ when interpreting judicial opinions.”<sup>82</sup>

7           Under the State’s reading, a homeowner who displays a handgun with a 17-round  
8 magazine to scare away home invaders, has not “used” the 17-round magazine. Under  
9 the State’s reading, even a citizen who fires his semiautomatic firearm 10 times or less to  
10 defend himself, has not *used* his 17-round magazine in self-defense. Admittedly, one can  
11 find different meanings of the term “use.” For example, in the context of a criminal  
12 statute, the Supreme Court acknowledged “use” offers different possible meanings.  
13 “[T]he word ‘use’ poses some interpretational difficulties because of the different  
14 meanings attributable to it. Consider the paradoxical statement: ‘I *use* a gun to protect  
15 my house, but I’ve never had to *use* it.’”<sup>83</sup> Consequently, context is important, whether  
16 interpreting a statute or understanding an opinion.<sup>84</sup>

17           So, considering the words “use” or “used” in context, the State’s notion is far  
18 removed from the meaning indicated by the Supreme Court. *Heller* considered merely  
19 the simple possession of *usable* handguns in the home. Focusing on the right to possess a  
20 usable arm, *Heller* said, “[w]e consider whether a District of Columbia prohibition on the  
21 possession of *usable* handguns in the home violates the Second Amendment to the  
22  
23

---

24  
25 <sup>82</sup> *Upper Skagit Indian Tribe v. Sauk-Suiattle Indian Tribe*, 66 F.4th 766, 770 (9th Cir.  
26 2023) (citations omitted).

27 <sup>83</sup> *Bailey v. United States*, 516 U.S. 137, 143 (1996) (emphasis in original).

28 <sup>84</sup> *Muscarello v. United States*, 524 U.S. 125, 144 (1998) (“Noting the paradoxical  
statement, ‘I *use* a gun to protect my house, but I’ve never had to *use* it,’ the Court in  
*Bailey* emphasized the importance of context.”)

1 Constitution.”<sup>85</sup> Actual firing of a handgun in the District was irrelevant. Statistical  
 2 surveys of shots fired in self-defense were not determinative – they were not even  
 3 mentioned. *Heller* used a simpler test. Constitutional protection is afforded to weapons  
 4 “typically possessed by law-abiding citizens for lawful purposes,” focusing on typicality  
 5 and possession rather than frequency of firing.<sup>86</sup>

6 *McDonald* says “the right was also valued because the possession of firearms was  
 7 thought to be essential for self-defense.” *McDonald*’s focus is on possession.<sup>87</sup> And  
 8 *McDonald* says the right applies “to handguns because they are ‘the most preferred  
 9 firearm in the nation to ‘keep’ and use for protection of one’s home and family,’”  
 10 focusing on a national subjective preference for handguns.<sup>88</sup> There was no effort by the  
 11 Supreme Court to condition the constitutional right upon some objective metric of actual  
 12 handgun firing in self-defense.

13 *Bruen* says, “[t]he Second Amendment guaranteed to ‘all Americans’ the right to  
 14 bear commonly used arms in public.” *Bruen* appears to focus on commonality.<sup>89</sup> *Bruen*  
 15 injects some ambiguity with the following phraseology, “the Second Amendment  
 16 protects the possession and use of weapons that are ‘in common use at the time.’”<sup>90</sup>  
 17 *Bruen* noted that in that case, no party disputed that handguns are weapons “in common  
 18 use” today for self-defense, but did not say what it meant by “use.”<sup>91</sup> So, what does the  
 19 Supreme Court mean by its phrase “in common use?” Is the focus placed on a weapon’s  
 20 commonality in society or the frequency of a weapon’s firing? *Bruen* answers the  
 21 question elsewhere in its opinion. Commonality is the focus. Consider the following  
 22

---

23 <sup>85</sup> 554 U.S. at 573 (emphasis added).

24 <sup>86</sup> 554 U.S. at 625; *see also* at 720 (Breyer, J., dissenting) (describing the majority test in  
 25 the same terms).

26 <sup>87</sup> 561 U.S. at 787.

27 <sup>88</sup> *Id.* at 767 (citations omitted).

28 <sup>89</sup> 142 S. Ct. at 2156 (citing *Heller*, 554 U.S. at 581).

<sup>90</sup> *Id.* at 2128 (citing *Heller*, 554 U.S. at 627).

<sup>91</sup> *Id.* at 2134.

1 sentence from *Bruen*: “Drawing from this historical tradition, we explained there that the  
 2 Second Amendment protects only the carrying of weapons that are those ‘in common use  
 3 at the time,’ *as opposed to those that ‘are highly unusual in society at large.’*”<sup>92</sup> Or  
 4 consider this sentence from *Bruen*’s footnote 13: “Even assuming that pocket pistols  
 5 were, as East Jersey in 1686 deemed them, ‘unusual or unlawful,’ it appears that they  
 6 were commonly used at least by the founding.”<sup>93</sup> *Bruen* contrasts common pistols against  
 7 unusual pistols. The focus remains on commonality, not the frequency of actual  
 8 discharge in self-defense scenarios. Put simply, Second Amendment protection envelops  
 9 weapons commonly or typically subjectively chosen by citizens to keep in case of  
 10 confrontation.

11 From *Bruen*, it is evident that the Supreme Court’s focus is on whether a weapon is  
 12 common (or unusual) amongst the citizenry. This, in turn, requires some sort of  
 13 generalized numerical estimation of citizen ownership or gauge of present popularity. In  
 14 *Caetano*, the concurring Justices explained that, “[t]he more relevant statistic is that  
 15 ‘hundreds of thousands of Tasers and stun guns have been sold to private citizens,’ who it  
 16 appears may lawfully possess them in 45 States.”<sup>94</sup> That Ms. Caetano did not actually  
 17 energize and fire her stun gun made no difference to the Supreme Court. In her case, she  
 18 did no more than display the weapon. “She stood her ground [and] displayed the stun  
 19 gun.”<sup>95</sup> Absent from the opinion is any discussion about the average number of times a  
 20 stun gun is energized in an average self-defense scenario. Absent from the opinion is any  
 21 objective metric counting the frequency with which stun guns have been fired. The  
 22  
 23

---

24 <sup>92</sup> *Id.* at 2143 (emphasis added).

25 <sup>93</sup> *Id.* at n.13 (citation omitted).

26 <sup>94</sup> 577 U.S. at 420 (citations omitted) (“While less popular than handguns, stun guns are  
 27 widely owned and accepted as a legitimate means of self-defense across the country.  
 28 Massachusetts’ categorical ban of such weapons therefore violates the Second  
 Amendment.”).

<sup>95</sup> *Id.* at 413, (Alito, J., concurring).



1 measure of constitutional protection was that the stun gun was “used” in the sense that  
2 stun guns are widely *owned* to satisfy a subjective need for protection and that the  
3 number in existence was in the hundreds of thousands.

4 Applying the same measure to magazines, because it is the case that magazines  
5 holding more than 10 rounds are owned and possessed by millions of Americans to meet  
6 a subjective need for self-defense, this fact alone entitles such magazines to Second  
7 Amendment protection. When a magazine is commonly owned by Americans with the  
8 subjective intention of using it for self-defense, it is enough to say that it is in common  
9 use (or typically used) for self-defense, as the Supreme Court employs the phrase in its  
10 opinions.<sup>96</sup>

11 Probably the vast majority of Americans that own magazines of 11 rounds or more  
12 keep them and use them for self-defense in the same way that a driver puts on and uses a  
13 seat belt in the case of a collision. Though collisions rarely happen, the seat belt is used  
14 for protection and to be ready for the unexpected collision. A reserve canopy is being  
15 used on a parachute jump, although it is not deployed, in case the main parachute fails. A  
16 cell phone in one’s pocket is being used when waiting for a telephone call or in the event  
17 one needs to make a call. In the same way, a firearm kept on one’s nightstand is used for  
18 self-defense even when the night is quiet. It is kept and used in case of confrontation. A  
19 person may happily live a lifetime without needing to fire their gun in self-defense. But  
20 that is not to say that such a person does not *use* their gun for self-defense when he or she  
21 keeps it under the bed with a hope and a prayer that it never has to be fired.

22 In 2016, an 81-year old Uniontown, Pennsylvania man and his elderly sister were  
23 at home when at night an intruder broke in. In the ensuing struggle, the older man fired  
24

---

25  
26 <sup>96</sup> At the margin, there may be a weapon that is commonly owned that is not commonly  
27 used for self-defense. One could imagine perhaps a reproduction of an 18<sup>th</sup> century  
28 flintlock or a World War II German Luger being commonly owned, but used only as  
curios or museum pieces.

1 one shot from his gun at his attacker. The victim said he had never before fired his gun  
 2 and that it had been sitting on his nightstand for thirty years.<sup>97</sup> California would say that  
 3 the victim did not *use* his gun for self-defense on any day of those preceding thirty years.  
 4 And if his gun had a magazine with eleven or more rounds in it (the news report does not  
 5 say), California would argue that the victim never did *use* his large capacity magazine in  
 6 self-defense. This Court would say that the victim *used* his gun every night of the thirty  
 7 years he subjectively kept it on his bedroom nightstand in case of confrontation,  
 8 including the night of the burglary. And if his gun had been equipped with a large  
 9 capacity magazine, it could correctly be said that he also *used* the large capacity  
 10 magazine for self-defense every night of the thirty years he subjectively kept it on his  
 11 bedroom nightstand in case of confrontation.

### 12 **C. The Invention of the 2.2 Shot Average**

13 Without agreeing that when the Supreme Court discusses firearms “in common  
 14 use” it means commonly fired, even if it did, the State’s statistic is suspect. California  
 15 relies entirely on the opinion of its statistician for the hypothesis that defenders fire an  
 16 average of only 2.2 shots in cases of confrontation.

17 Where does the 2.2 shot average originate? There is no national or state  
 18 government data report on shots fired in self-defense events. There is no public  
 19 government database. One would expect to see investigatory police reports as the most  
 20 likely source to accurately capture data on shots fired or number of shell casings found,  
 21 although not every use of a gun in self-defense is reported to the police. As between the  
 22 two sides, while in the better position to collect and produce such reports, the State’s  
 23  
 24  
 25

---

26 <sup>97</sup> *81-year-old fatally shoots home invasion suspect, says gun had never been used in 30*  
 27 *years*, WXPI-TV 11 News (Nov. 4, 2016), [https://www.wpxi.com/news/81-year-old-](https://www.wpxi.com/news/81-year-old-fatally-shoots-home-invasion-suspect-says-gun-had-never-been-used-in-30-years/464100332/)  
 28 [fatally-shoots-home-invasion-suspect-says-gun-had-never-been-used-in-30-](https://www.wpxi.com/news/81-year-old-fatally-shoots-home-invasion-suspect-says-gun-had-never-been-used-in-30-years/464100332/)  
[years/464100332/](https://www.wpxi.com/news/81-year-old-fatally-shoots-home-invasion-suspect-says-gun-had-never-been-used-in-30-years/464100332/) [<https://perma.cc/FRP6-MA9P>].

1 Attorney General has not provided a single police report to the Court or to his own  
2 expert.<sup>98</sup>

3 Without investigatory reports, the State’s expert turns to anecdotal statements,  
4 often from bystanders, reported in news media, and selectively studied. She indicates she  
5 conducted two studies.<sup>99</sup> Based on these two studies of newspaper stories, she opines that  
6 it is statistically rare for a person to fire more than 10 rounds in self-defense and that only  
7 2.2 shots are fired on average.<sup>100</sup> Unfortunately, her opinion lacks classic indicia of  
8 reliability and her two studies cannot be reproduced and are not peer-reviewed.  
9 “Reliability and validity are two aspects of accuracy in measurement. In statistics,  
10 reliability refers to reproducibility of results.”<sup>101</sup> Her studies cannot be tested because she  
11

---

12  
13  
14 <sup>98</sup> Allen asked the State for police reports, but she did not receive them. *See* Transcript,  
15 Preliminary Injunction Hearing, 10/19/20, 153:1-16:

16 “THE COURT: Let me ask you a question. Did you ever ask, for example,  
17 [Deputy Attorney General] Mr. Echeverria if he would get you the law enforcement  
18 reports of home defense shootings that may have occurred where the homeowner or the  
19 person at home fired shots at someone that was intruding?

20 THE WITNESS: Yes. So I did ask both from the State of California as well as  
21 from a number of other states that I have worked for, I have asked for data on incidents of  
22 exactly that, or whether there was a broader set of data that they had that I could then  
23 review.

24 THE COURT: And did you get that from the State of California?

25 THE WITNESS: I did not. It was my understanding that the State of California  
26 did not have that data or did not have that in a way that it could be reviewed. That that is  
27 not -- that is not a type of data that is collected.”

28 <sup>99</sup> Lucy Allen Supp. Decl. Dkt 118-1.

<sup>100</sup> Allen Supp. Decl. Dkt 118-1, at ¶10. Of course, though one may assume that “LCMs”  
are only used .3% of the time, for the unfortunate homeowner who makes up part of the  
.3%, it is 100% of his time.

<sup>101</sup> Federal Judicial Center, *Reference Manual on Scientific Evidence* (3d ed.), 211  
Reference Guide on Statistics, 2011 WL 7724256, 10 and n.37 (“*Daubert v. Merrell  
Dow Pharms., Inc.*, 509 U.S. 579, 590 n.9 (1993), for example, distinguishes “evidentiary  
reliability” from reliability in the technical sense of giving consistent results. We use  
“reliability” to denote the latter.”).

1 has not disclosed her data. Her studies have not been replicated. In fact, the formula  
2 used to select 200 news stories for the Factiva study is incomprehensible.

3 For one study, Allen says she conducted a search of stories published in the NRA  
4 Institute for Legislative Action magazine (known as the Armed Citizen Database)  
5 between 2011 and 2017. There is no explanation for the choice to use 2011 for the  
6 beginning. After all, the collection of news stories goes back to 1958. Elsewhere in her  
7 declaration she studies mass shooting events but for that chooses a much longer time  
8 period reaching back to 1982. Likewise, there is no explanation for not updating the  
9 study after 2017.

10 However it is that they were chosen, some 736 incidents in the Armed Citizen  
11 Database were said to be analyzed and the number of shots tabulated, but details are  
12 completely absent. Allen does not list the 736 stories. Nor does she reveal how she  
13 assigned the number of shots fired in self-defense when the news accounts use phrases  
14 like “the intruder was shot” but no number of shots was reported, or “there was an  
15 exchange of gunfire,” or “multiple rounds were fired.” She includes in her 2.2 average of  
16 defensive shots fired, incidents where no shots were fired.<sup>102</sup> One would expect the  
17 impact of Allen’s choice to include a zero for a no-shot event to be significant because  
18 (even using her number) 32.1% of the events in the home in California were no-shot  
19 events.<sup>103</sup> She also reported no incidents in California where more than 10 shots were  
20 fired in self-defense among the stories she reviewed. It seems obvious that in a state  
21 where magazines holding more than 10 rounds have been illegal to buy or sell for twenty  
22 years, law-abiding citizens are using the smaller magazines that the law requires for self-  
23 defense. Absent from the expert opinion is a statistic reporting the average number of  
24  
25

---

26  
27 <sup>102</sup> Allen Supp. Decl. Dkt 118-1 n.10 (“[T]he average includes instances when no shots  
28 are fired.”).

<sup>103</sup> Allen Supp. Decl. Dkt 118-1 at ¶ 12 (table).

1 shots fired by criminals. Also absent is the number of intruders or whether the  
2 homeowner was able to escape unharmed.

3 In another example, it is not evident from the study how she counted the number of  
4 shots fired for one story in the collection where a homeowner “fired back” and three  
5 intruders suffered eight gunshot wounds. Considering most victims miss some of their  
6 shots, one would expect in defending against three attackers that more than eight shots  
7 were fired in self-defense. Instead, all that the Court is told is:

8 When the exact number of shots fired was not specified, we  
9 used the average for the most relevant incidents with [a] known  
10 number of shots. For example, if the story stated that “shots  
11 were fired” this would indicate that at least two shots were fired  
12 and thus we used the average number of shots fired in all  
13 incidents in which two or more shots were fired and the number  
14 of shots was specified.<sup>104</sup>

15 She does not reveal the imputed number substitute value that she used where the exact  
16 number of shots fired was not specified, so her result cannot be reproduced.

17 Interestingly, substituting an imputed average value for all of the times the number of  
18 shots fired is unknown, tends to bring the overall average of shots fired down towards  
19 2.2. For example if there are ten incidents of self-defense where nine times the victim  
20 fired two shots and one time the victim fired thirteen shots, the average number of shots  
21 fired would be 3.1 but the percentage of times more than ten shots were needed for self-  
22 defense would be 10%.

23 For a second study, Allen says she conducted a word search of a news aggregator  
24 called Factiva. Factiva is a commercial database behind a paywall to which the Court  
25 and the public have no access. Even if one did have access to the Factiva database, one  
26 could not repeat her study. Allen’s methodology for the Factiva study is  
27 incomprehensible. For the Factiva database of 70 million news stories, her word search

---

28 <sup>104</sup> Allen Supp. Decl. Dkt 118-1 n.8.

1 returned 35,000 stories.<sup>105</sup> From there she somehow selected 200 stories of defensive gun  
2 use in the home and set out to analyze the events.<sup>106</sup> As with the Armed Citizen study,  
3 Allen does not provide a list of the 200 stories she analyzed. Compare that to the long,  
4 detailed list of 179 mass shooting stories she includes in the second part of her  
5 declaration. For the Factiva study, there is no way to check her analysis or her math.  
6 And once again she includes in the averages those events where no shots were fired,  
7 bringing the overall average down.<sup>107</sup>

8 Had a table of the stories she and her team analyzed been supplied, it would  
9 certainly reveal important information. For example, this Court randomly selected two  
10 pages from Allen's mass shooting table: pages 10 and 14. From looking at these two  
11 pages (assuming that the sources for the reports were accurate and unbiased) the Court is  
12 able to make statistical observations, including the observation that the number of shots  
13 fired were unknown 69.04% of the time. Without a similar table for the NRA or Factiva  
14 studies, this Court cannot ascertain the number of shots fired in each incident, the number  
15 of times a homeowner possessed a LCM, the number of times the number of shots fired  
16 were unknown, whether the homeowner was unharmed, or the number of intruders.

17 Allen's 2.2 shot average is suspect for larger reasons. The whole statistical  
18 exercise is based on hearsay (anecdotes) upon hearsay news reporting, rather than police  
19 investigatory reports. A database of news articles lacks the usual indicia of accuracy and  
20 reliability of admissible evidence. According to fifteen national polls conducted by non-  
21 law enforcement agencies, there may be from 760,000 defensive handgun uses to  
22

---

23  
24 <sup>105</sup> Exh. A at ¶18.

25 <sup>106</sup> *Id.* at ¶ 19.

26 <sup>107</sup> Allen Depo. Jan. 12, 2021 at 119:10-18 (“Q. So numerically speaking, inclusion of  
27 incidents where the number is zero would tend to drag the average number of shots fired  
28 down; would you tend to agree with that? A. So it includes those with zero. That’s  
correct. Q. Okay. And have you ever looked at the average number of shots fired when  
shots were fired? A. No.”).

1 3,600,000 defensive uses each year.<sup>108</sup> Compared to the comprehensive details given for  
 2 her study on mass shooting events, the NRA and Factiva studies are curiously lacking in  
 3 depth and breadth and causes the Court to deeply discount her opinion.

4 The Court is aware of its obligation to act as a gatekeeper to keep out junk science  
 5 where it does not meet the reliability standard of *Daubert v. Merrell Dow*  
 6 *Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and Federal Rule of Evidence 702.<sup>109</sup> In a  
 7 bench trial, the relevancy bar is low and Rule 702 is to be applied with a liberal thrust  
 8 favoring admission.<sup>110</sup> While opinions and evidence may have been deemed admissible,  
 9 in some cases, the evidence has been given very little weight or no weight at all. This is  
 10 the fact finder's role.<sup>111</sup> "Challenges that go to the weight of the evidence are within the  
 11 province of a fact finder . . . ."<sup>112</sup> So, while questionable expert testimony was admitted, it  
 12 has now been weighed in light of all of the evidence.

13 In assessing expert witness opinion, a court looks to see whether the opinion given  
 14 is newly made or whether it grew naturally out of research conducted outside of the  
 15 litigation.<sup>113</sup> Bias may be evident, according to legal authorities, where the expert forms  
 16  
 17

---

18 <sup>108</sup> Plaintiffs' Exh. 10-10, John R. Lott, Jr., *More Guns, Less Crime* 3d. (2010), at 12.

19 <sup>109</sup> *See Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463 (9th Cir.2014),  
 20 *overruled on other grounds, United States v. Bacon*, 976 F.3d 766 (9th Cir. 2020) (en  
 21 banc) (duty falls squarely upon the district court to act as gatekeeper to exclude junk  
 22 science).

22 <sup>110</sup> *Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014).

23 <sup>111</sup> *Primiano v. Cook*, 598 F.3d 558, 568 (9th Cir. 2010) (though opinion of doctor is  
 24 admitted, jury may reject the opinion); *see also, e.g., United States v. Vallejo*, 237 F.3d  
 25 1008, 1021 (9th Cir. 2001) (admissibility of expert opinion different than weight to be  
 26 accorded).

25 <sup>112</sup> *City of Pomona v. SQM North Am. Corp.*, 750 F.3d 1036, 1044 (9th Cir. 2014).

26 <sup>113</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) (after  
 27 remand) ("One very significant fact to be considered is whether the experts are proposing  
 28 to testify about matters growing naturally and directly out of research they have  
 conducted independent of the litigation, or whether they have developed their opinions  
 expressly for purposes of testifying."); *Cabrera v. Cordis Corp.*, 134 F.3d 1418, 1422

1 an opinion without peer-reviewed scientific support or before examining sufficient  
 2 data.<sup>114</sup> Bias may also be evident where an expert opinion is formed solely for the  
 3 purposes of litigation. Here, the Court is mindful that, “[f]or scientific evidence to be  
 4 admissible, the proponent must show the assertion is ‘derived by a scientific method,’”  
 5 and “[o]pinion based on ‘unsubstantiated and undocumented information is the antithesis  
 6 of scientifically reliable expert opinion.’ “The court must assess the expert's reasoning or  
 7 methodology, using as appropriate criteria such as testability, publication in peer-  
 8 reviewed literature, known or potential error rate, and general acceptance.”<sup>115</sup> Methods  
 9 and procedures must be followed and undisciplined speculation is not science.<sup>116</sup>

10 “To aid courts in exercising this gatekeeping role, the Supreme Court has  
 11 suggested a non-exclusive and flexible list of factors that a court may consider when  
 12 determining the reliability of expert testimony, including: (1) whether a theory or  
 13 technique can be tested; (2) whether it has been subjected to peer review and publication;  
 14 (3) the known or potential error rate of the theory or technique; and (4) whether the  
 15 theory or technique enjoys general acceptance within the relevant scientific  
 16 community.”<sup>117</sup> Allen’s study relies on unverified, uncorroborated second or third hand  
 17 anecdotal information. Normally, “a witness may testify to a matter only if evidence is  
 18 introduced sufficient to support a finding that the witness has personal knowledge of the  
 19  
 20  
 21

---

22  
 23 (9th Cir.1998) (expert's development of opinion expressly for purposes of testifying is a  
 24 significant consideration in evaluating opinion).

25 <sup>114</sup> B. Black & P. Lee, *Expert Evidence* (West 1997), Ch. 4(IV)(B), at 147.

26 <sup>115</sup> *Id.*

27 <sup>116</sup> *Daubert*, 509 U.S. at 589–90. (“The subject of an expert’s testimony must be  
 28 ‘scientific . . . knowledge.’ The adjective ‘scientific’ implies a grounding in the methods  
 and procedures of science. Similarly, the word ‘knowledge’ connotes more than  
 subjective belief or unsupported speculation.”).

<sup>117</sup> *Messick*, 747 F.3d at 1197 (quoting *Daubert*, 509 U.S. at 592–94).



1 matter.”<sup>118</sup> Assuming its relevance in the first instance for *Bruen* purposes, the statistical  
2 analysis has minimal indicia of accuracy or reliability.

3 In the end, Allen opines that an average of 2.2 shots are fired in self-defense gun  
4 scenarios and only .3% of such incidents involve more than 10 shots fired. Yet, even .3%  
5 is a lot in terms of actual times a citizen needs to fire his gun in self-defense. Using the  
6 estimate from the Centers for Disease Control mentioned earlier of 500,000 to 3,000,000  
7 times per year nationally, and extrapolating the .3% where more than 10 shots were fired  
8 (per Allen’s report), would mean defensive gun uses of more than 10 shots happen  
9 between 1,500 and 9,000 times, every year (based on the CDC annual number of  
10 defensive gun uses cited on the website Allen cited and relied on<sup>119</sup>).

11 **D. Magazines Holding More Than 10 Rounds Are Not Dangerous and Unusual**

12 Taking another tack, the State reframes the “dangerous and unusual” test as a  
13 “dangerous *or* unusual” test and then objects that magazines able to hold more than 10  
14 rounds are unusually dangerous. As the Court has stated, all guns and ammunition are  
15 dangerous.<sup>120</sup> However, magazines holding more than 10 rounds are not both “dangerous  
16 and unusual,” which is the Supreme Court’s test. So-called large capacity magazines  
17  
18  
19  
20  
21

---

22  
23 <sup>118</sup> Federal Rule of Evidence 602.

24 <sup>119</sup> In her Supplemental Declaration, at footnote 4, Dkt. 118-1, Allen cites a Heritage  
25 Foundation online visual database:  
26 <https://datavisualizations.heritage.org/firearms/defensive-gun-uses-inthe-us>. If one looks  
27 at the Heritage Foundation description of its visual database research, one would see that  
28 it acknowledges the CDC report that Americans use their firearms defensively between  
500,000 and 3,000,000 million times each year.

<sup>120</sup> *Staples*, 511 U.S. at 611 (“Despite their potential for harm, guns generally can be  
owned in perfect innocence.”).

1 banned in California are commonly-owned by law-abiding citizens across the nation<sup>121</sup>  
2 and number in the millions.<sup>122</sup>

3 **E. The Most-Useful-for-Military-Service Nostrum**

4 The State argues, and some courts have reasoned, that magazines holding more  
5 than 10 rounds are “most useful in military service” and therefore, can be banned.<sup>123</sup> The  
6 Supreme Court said no such thing.<sup>124</sup> *Caetano* addresses this question and says, “*Heller*  
7 rejected the proposition ‘that only those weapons useful in warfare are protected.’”<sup>125</sup>  
8 *Heller* was explaining *United States v. Miller*.<sup>126</sup> In *Miller*, the Supreme Court applied a  
9 reasonable-relationship-to-militia-use test to a short-barreled shotgun, asking whether the  
10 shotgun would have a reasonable relationship to the preservation or efficiency of a well-  
11 regulated militia. Finding none, it decided the Second Amendment did not guarantee the  
12 right to keep that particular firearm.<sup>127</sup> *Miller*’s realm of Second Amendment protection  
13 encircled a firearm if it was reasonably related to militia use. This “reasonably-related”  
14 construct received a nod again in *Lewis v. U.S.*,<sup>128</sup> where the Supreme Court sang *Miller*’s

---

15  
16  
17 <sup>121</sup> “It is indisputable in the modern United States that magazines of up to thirty rounds  
18 for rifles and up to twenty rounds for handguns are standard equipment for many popular  
19 firearms.” Kopel, *supra*, *The History of Firearm Magazines*, at 874, Declaration of Anna  
20 M. Barvir in Support of Plfs.’ Suppl. Br., Exh. 39, Dkt. 132-6, at 125.

21 <sup>122</sup> See nn. 28-31, *supra*, and accompanying text.

22 <sup>123</sup> See, e.g., *Hanson v. D.C.*, No. CV 22-2256-RC, 2023 WL 3019777, at \*28–29  
23 (D.D.C. Apr. 20, 2023) (“LCMs are not covered by the Second Amendment because they  
24 are most useful in military service.”).

25 <sup>124</sup> See, e.g., *Bevis v. City of Naperville*, No. 22 C 4775, 2023 U.S. Dist. LEXIS 27308, at  
26 \*22 (N.D. Ill. Feb. 17, 2023) (“Relatedly, the Supreme Court has unequivocally  
27 dismissed the argument that ‘only those weapons useful in warfare are protected.’ To the  
28 extent that the Seventh Circuit classified the weapon as either ‘civilian’ or ‘military,’ the  
classification has little relevance.”) (citation omitted).

<sup>125</sup> *Caetano*, 577 U.S. at 412 (quoting *Heller*, 554 U.S. at 624–25).

<sup>126</sup> 307 U.S. 174 (1939)

<sup>127</sup> *Id.* (“Certainly it is not within judicial notice that this weapon is any part of the  
ordinary military equipment or that its use could contribute to the common defense.”).

<sup>128</sup> 445 U.S. 55, 65 n.8 (1980).

1 refrain, “the Second Amendment guarantees no right to keep and bear a firearm that does  
2 not have ‘some reasonable relationship to the preservation or efficiency of a well  
3 regulated militia.’” There was no undercutting of *Miller* in the *Heller* or *Bruen* decisions.  
4 Rather, *Heller* embraced *Miller* and said “[w]e therefore read *Miller* to say only that the  
5 Second Amendment does not protect those weapons not typically possessed by law-  
6 abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with  
7 the historical understanding of the scope of the right.”<sup>129</sup> And *Bruen* “quoted, explained,  
8 re-affirmed, and then applied” *Miller*.<sup>130</sup> *Heller* took the already expansive zone of  
9 protection for weapons that could be used by the militia and focused on the core use of  
10 firearms for self-defense.

11 In other words, *Heller* made the logical connection between weapons commonly  
12 possessed by law-abiding citizens for lawful purposes that would also be useful, if  
13 necessary, for military purposes, *i.e.*, in the militia. Since *Miller*, the Supreme Court has  
14 enlarged the breadth of firearms protected by the Second Amendment to include  
15 commonly owned firearms useful for the core right of self-defense and other lawful  
16 purposes like hunting, sporting, and target shooting. Until the Supreme Court clearly  
17 says otherwise, commonly owned weapons that are useful for war and are reasonably  
18 related to militia use are also fully protected, so long as they are not useful solely for  
19 military purposes. Firearms with magazines holding more than 10 rounds are such  
20 reasonably-related arms. Even *Miller* understood the Constitution to protect the  
21 possession of ammunition. For the militia system to function, “[t]he possession of arms  
22 also implied the possession of ammunition, and the authorities paid quite as much  
23 attention to the latter as to the former.”<sup>131</sup> All considered, the best reading of “arms”  
24

---

25 <sup>129</sup> *Heller*, 554 U.S. at 625.

26 <sup>130</sup> *United States v. Saleem*, No. 3:21-cr-00086-FDW-DSC, 2023 WL 2334417, at \*7  
27 (W.D.N.C. Mar. 2, 2023).

28 <sup>131</sup> *Miller*, 307 U.S. at 180 (quoting *The American Colonies In The 17<sup>th</sup> Century*, Osgood,  
Vol. 1, ch. XIII).

1 includes magazines.<sup>132</sup>

### 2 **III. BRUEN AND THE MAGAZINE CAPACITY LIMIT**

3 Plaintiffs challenge § 32310, which prohibits manufacturing, importing, keeping  
4 for sale, offering for sale, giving, lending, buying, receiving or possessing a magazine  
5 able to hold more than 10 rounds. For simple possession of a magazine holding more  
6 than 10 rounds, the crime is an infraction under § 32310(c). It is a much more serious  
7 crime to acquire a magazine holding more than 10 rounds in California by importing,  
8 buying, borrowing, receiving, or manufacturing. These acts may be punished as a  
9 misdemeanor or a felony under § 32310(a). Under the subsection’s provision, “or  
10 imprisonment pursuant to subdivision (h) of Section 1170,” punishment may be either a  
11 misdemeanor or a felony.

12 This Court concludes, once again, that manufacturing, importing, selling, giving,  
13 loaning buying, receiving, acquiring,<sup>133</sup> possessing, storing, or using commonly-owned  
14 magazines capable of holding more than 10 rounds for self-defense at home or in public  
15 is protected by the Second Amendment. Whether 50-round, 75-round, or 100-round  
16 drum magazines are constitutionally protected is a different question because they may be  
17 much less common and may be unusual.

#### 18 **A. Remand for Bruen Review**

19 This case was remanded from the United States Court of Appeals for the Ninth  
20 Circuit in order to consider the challenged laws under the recent Supreme Court decision  
21

---

22  
23 <sup>132</sup> *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 968 (9th Cir. 2014) (“Because  
24 restrictions on ammunition may burden the core Second Amendment right of self-defense  
25 and the record contains no persuasive historical evidence suggesting otherwise, section  
26 613.10(g) regulates conduct within the scope of the Second Amendment.”).

27 <sup>133</sup> “This acquisition right is protected as an ‘ancillary right’ necessary to the realization  
28 of the core right to possess a firearm for self-defense.” *Renna v. Becerra*, No. 20-cv-  
02190-DMS (DEB), 2021 WL 1597933, at \*6 (S.D. Cal. Apr. 23, 2021) (quoting  
*Teixeira v. County of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017)) (*en banc*) (core  
Second Amendment right “wouldn’t mean much” without ability to acquire arms).

1 in *Bruen*. Under *Bruen*, the government must affirmatively prove that its firearm  
 2 regulation is part of a constitutional historical tradition. It is the same text, history, and  
 3 tradition standard the Court used in *Heller* and *McDonald*. What is different is that the  
 4 old means-end, interest balancing, tiers-of-scrutiny test is no longer viable.<sup>134</sup> The State  
 5 now has a second chance to defend its large capacity magazine ban and must do so  
 6 applying the *Bruen* test.

7 *Bruen* says,

8 When the Second Amendment’s plain text covers an  
 9 individual’s conduct, the Constitution presumptively protects  
 10 that conduct. *The government must then justify its regulation*  
 11 *by demonstrating that it is consistent with the Nation’s*  
 12 *historical tradition of firearm regulation. Only then may a*  
 13 *court conclude that the individual’s conduct falls outside the*  
 14 *Second Amendment’s “unqualified command.”*<sup>135</sup>

15 And *Bruen* confirms, once again, that the Second Amendment applies to modern arms.  
 16 “Thus, even though the Second Amendment’s definition of ‘arms’ is fixed according to  
 17 its historical understanding, that general definition covers modern instruments that  
 18 facilitate armed self-defense,” like magazines able to hold more than 10 rounds.<sup>136</sup>

19 **i. Already Determined: No Historical Pedigree**

20 This Court previously determined that a ban on magazines able to hold more than  
 21 10 rounds has no historical pedigree. Detachable magazines were invented in the late  
 22 19th Century.<sup>137</sup> In 1990, New Jersey introduced the first ban on detachable magazines,

---

23 <sup>134</sup> *Baird v. Bonta*, 2023 WL 5763345, \*5 (9th Cir. Sept. 7, 2023) (“In *Bruen*, the  
 24 Supreme Court expressly rejected the use of such ‘means-end scrutiny in the Second  
 25 Amendment context’ and described the two-step approach as ‘one step too many.’”).

<sup>135</sup> 142 S. Ct. at 2129–30 (emphasis added).

<sup>136</sup> *Id.* at 2132.

<sup>137</sup> “In 1879, Remington introduced the first ‘modern’ detachable rifle magazine. In the  
 26 1890s, semiautomatic pistols with detachable magazines followed. During WWI,  
 27 detachable magazines with capacities of 25 to 32-rounds were introduced.” Plaintiff’s  
 28 Exh. 2 (Stephen Helsley Report), at 4.

1 initially imposing a 15-round limit and later a 10-round limit. California put its ban in  
2 place in the year 2000. A historical tradition of magazine bans, this is not.

3 Before *Bruen*, the State unpersuasively argued that its magazine capacity  
4 restriction was analogous to a handful of state machinegun firing-capacity regulations  
5 from the 1920's and 1930's and one District of Columbia law from 1932—a law the  
6 Supreme Court ignored while dismantling the District of Columbia's handgun ban in  
7 *Heller*. That argument remains unpersuasive today. That was pre-*Bruen*. *Bruen* invites  
8 a look farther back into the Nation's history.

9 **ii. The State Asked for Time for Discovery**

10 Because the *Bruen* approach places the burden upon the government to justify its  
11 firearm restrictions by demonstrating that they are consistent with the Nation's historical  
12 tradition of firearm regulation as understood at the founding, and because judicial review  
13 under the *Bruen* standard is in its infancy, the State has been given generous time and  
14 leeway to satisfy its new burden. The State's experts have been studying historic firearm  
15 regulations for more than 20 years.<sup>138</sup> This Court has reviewed all of the declarations of  
16 the State's experts and historians as well as many of their cited sources, and finds no  
17 support for the State's ban.

---

18  
19  
20 <sup>138</sup> The State's expert, professor Robert Spitzer, has studied gun policy for 30 years. *See*  
21 *Decl. of Robert Spitzer*, Dkt. 137-8 ("Spitzer Decl."), at ¶ 5. The State's expert,  
22 professor Saul Cornell, said that he has been studying gun regulations for 20 years. That  
23 was in 2017. *See* Saul Cornell, *Five Types of Gun Laws the Founding Fathers Loved*,  
24 *Salon* (Oct. 22, 2017, 7:29 a.m.), [https://www.salon.com/2017/10/22/five-types-of-gun-](https://www.salon.com/2017/10/22/five-types-of-gun-laws-the-founding-fathers-loved_partner/)  
25 [laws-the-founding-fathers-loved\\_partner/ \[https://perma.cc/73SL-VAKV\]](https://perma.cc/73SL-VAKV). Ten years  
26 ago, Mark Anthony Frassetto compiled a list of over 1,000 historical gun laws spanning  
27 the years 1607 to 1934 and available on the Social Science Research Network.  
28 [<https://perma.cc/Q2L8-SW6U>]. His law collection was not unknown. It was described  
in detail in 2017 by professor Spitzer in his article *Gun Law History in the United States*  
*and Second Amendment Rights*, 80 *L. & Contemp. Probs.* 55 (2017), and included in  
professor Cornell's Compendium of Works cited in his Declaration, Dkt. 154-3, at 1707–  
33.

1                   **iii. Some Text, History, and Tradition Analysis is Already Done**

2                   Some of the time spent analyzing text, history, and tradition, has already been done  
3 by the Supreme Court. To begin, “the ‘textual elements’ of the Second Amendment’s  
4 operative clause—‘the right of the people to keep and bear Arms, shall not be  
5 infringed’—‘guarantee the individual right to possess and carry weapons in case of  
6 confrontation.’”<sup>139</sup> Further, “the right to ‘bear arms’ refers to the right to ‘wear, bear, or  
7 carry ... upon the person or in the clothing or in a pocket, for the purpose ... of being  
8 armed and ready for offensive or defensive action in a case of conflict with another  
9 person.”<sup>140</sup> The Supreme Court explains that the terms “keep” and “bear” mean that the  
10 Second Amendment’s text protects a citizen’s right to “‘keep’ firearms in their home, at  
11 the ready for self-defense,” and to carry arms on one’s person in and outside the home in  
12 case of confrontation.<sup>141</sup> As to the types of weapons the Second Amendment protects,  
13 *Bruen* echoes *Heller*, *McDonald*, *Caetano*, *Miller*, and Blackstone, pronouncing that it  
14 “protects the possession and use of weapons that are ‘in common use at the time.’”<sup>142</sup>

15                   In this case, Plaintiffs are law-abiding citizens who want to possess (or keep) and  
16 carry (or bear), magazines able to hold more than 10 rounds commonly-owned for lawful  
17 purposes. Plaintiffs’ proposed conduct is covered by the plain text of the Second  
18 Amendment. Under the plain text, the State’s statute infringes on the constitutional rights  
19 of American citizens. Therefore, Plaintiffs have met their burden of showing that the  
20 prohibited magazines fall within the Second Amendment’s text.

21                   *Bruen* next instructs courts to assess whether the initial conclusion is confirmed by  
22 the historical understanding of the Second Amendment. *Bruen* has already confirmed  
23 that the Second Amendment protects an individual right to armed self-defense. It repeats  
24

---

25  
26 <sup>139</sup> *Bruen*, 142 S. Ct. at 2134 (quoting *Heller*, 554 U.S. at 592).

27 <sup>140</sup> *Bruen*, 142 S. Ct. at 2134 (quoting *Heller*, 554 U.S. at 584).

28 <sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 2128 (citations omitted).

1 *Heller*'s lesson to not engage in means-end scrutiny, because, "[a] constitutional  
 2 guarantee subject to future judges' assessments of its usefulness is no constitutional  
 3 guarantee at all."<sup>143</sup> After all, "[t]he Second Amendment 'is the very product of an  
 4 interest balancing by the people' and it 'surely elevates above all other interests the right  
 5 of law-abiding, responsible citizens to use arms' for self-defense. It is this balance—  
 6 struck by the traditions of the American people—that demands our unqualified  
 7 deference."<sup>144</sup>

8 **B. Bruen's Guidelines for Historical Inquiry**

9 For conducting a historical inquiry, *Bruen* identifies a number of guidelines. First,  
 10 "when a challenged regulation addresses a general societal problem that has persisted  
 11 since the 18th century, the lack of a distinctly similar historical regulation addressing that  
 12 problem is relevant evidence that the challenged regulation is inconsistent with the  
 13 Second Amendment."<sup>145</sup> Second, "if earlier generations addressed the societal problem,  
 14 but did so through materially different means, that also could be evidence that a modern  
 15 regulation is unconstitutional."<sup>146</sup> Third, "if some jurisdictions actually attempted to  
 16 enact analogous regulations during this timeframe, but those proposals were rejected on  
 17 constitutional grounds, that rejection surely would provide some probative evidence of  
 18 unconstitutionality."<sup>147</sup> Fourth, "cases implicating unprecedented societal concerns or  
 19 dramatic technological changes may require a more nuanced approach."<sup>148</sup> Fifth, "[w]hen  
 20 confronting such present-day firearm regulations, this historical inquiry that courts must  
 21 conduct will often involve reasoning by analogy."<sup>149</sup> "Determining whether a historical  
 22  
 23

---

24 <sup>143</sup> *Id.* at 2129 (quoting *Heller*, 554 U.S. at 634).

25 <sup>144</sup> *Bruen*, 142 S. Ct. at 2131 (quoting *Heller*, 554 U.S. at 635).

26 <sup>145</sup> *Bruen*, 142 S. Ct. at 2131.

27 <sup>146</sup> *Id.*

28 <sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 2132.

<sup>149</sup> *Id.*



1 regulation is a proper analogue for a distinctly modern firearm regulation requires a  
2 determination of whether the two regulations are ‘relevantly similar.’”<sup>150</sup> *Bruen* notes,

3 analogical reasoning under the Second Amendment is neither a  
4 regulatory straightjacket nor a regulatory blank check. On the  
5 one hand, courts should not “uphold every modern law that  
6 remotely resembles a historical analogue,” because doing so  
7 “risks endorsing outliers that our ancestors would never have  
8 accepted.” On the other hand, analogical reasoning requires  
9 only that the government identify a well-established and  
10 representative historical analogue, not a historical twin. So  
11 even if a modern-day regulation is not a dead ringer for  
12 historical precursors, it still may be analogous enough to pass  
13 constitutional muster.<sup>151</sup>

14 In surveying American history, the task is to stay within *Bruen*’s guardrails. As to the  
15 road ahead, it is a road back to 1791.

16 **i. The Significant Time Period—1791 to 1868**

17 *Bruen* teaches the most significant historical evidence comes from 1791, and  
18 secondarily 1868. For the Second Amendment (and other protections in the Bill of  
19 Rights), “Constitutional rights are enshrined with the scope they were understood to have  
20 *when the people adopted them.*”<sup>152</sup> The Second Amendment was adopted in 1791.  
21 “[W]e have generally assumed that the scope of the [Second Amendment] protection  
22 applicable to the Federal Government and States is pegged to the public understanding of

---

23 <sup>150</sup> *Id.*

24 <sup>151</sup> *Id.* at 2133.

25 <sup>152</sup> *Id.* at 2136 (quoting *Heller*, 554 U.S. at 634–35); *cf. Kennedy v. Bremerton*, 142 S. Ct.  
26 2407, 2428 (2022) (“[T]his Court has instructed that the Establishment Clause must be  
27 interpreted by reference to historical practices and understandings. The line . . . has to  
28 accord with history and faithfully reflect the understanding of the Founding Fathers.”)  
(cleaned up); *Riley v. California*, 573 U.S. 373, 403 (2014) (“Our cases have recognized  
that the Fourth Amendment was the founding generation’s response to the reviled  
‘general warrants’ and ‘writs of assistance’ of the colonial era.”).

1 the right when the Bill of Rights was adopted in 1791.”<sup>153</sup> Consequently, whatever  
2 evolving standards of gun regulation the state legislature thought was good policy in the  
3 year 2000 (when it decided 11 rounds is not well-suited for a person to have in a gun) or  
4 the year 2016 (when it was amended by Proposition 63), or today, is not the test for  
5 constitutional scrutiny.

6 Courts are to “afford greater weight to historical analogues more contemporaneous  
7 to the Second Amendment’s ratification.”<sup>154</sup> British sources pre-dating the Constitution  
8 are not particularly instructive because the American Revolution was a rejection of  
9 British rule. Sources post-enactment are also less helpful.<sup>155</sup> “[T]o the extent later  
10 history contradicts what the text says, the text controls . . . . Thus, post-ratification  
11 adoption or acceptance of laws that are inconsistent with the original meaning of the  
12 constitutional text obviously cannot overcome or alter that text.”<sup>156</sup> Late 19th century  
13 evidence is not particularly instructive, “because post-Civil War discussions of the right  
14 to keep and bear arms ‘took place 75 years after the ratification of the Second  
15 Amendment, they do not provide as much insight into its original meaning as earlier  
16 sources.’”<sup>157</sup> Even so, evidence from the time period enforces the claim that the right to  
17

---

18  
19 <sup>153</sup> *Bruen*, 142 S. Ct. at 2137.

20 <sup>154</sup> *Rahimi*, 61 F.4th at 456; *contra Nat’l Rifle Ass’n v. Bondi*, 61 F.4th 1317, 1323 (11th  
21 Cir. 2023) (“For most cases, the Fourteenth Amendment Ratification Era understanding  
22 of the right to keep and bear arms will differ from the 1789 understanding. And in those  
23 cases, the more appropriate barometer is the public understanding of the right when the  
States ratified the Fourteenth Amendment and made the Second Amendment applicable  
to the States.”).

24 <sup>155</sup> *Bruen*, 142 S. Ct. at 2136 (“Similarly, we must also guard against giving  
postenactment history more weight than it can rightly bear.”).

25 <sup>156</sup> *Id.* at 2137 (citations omitted) (cleaned up).

26 <sup>157</sup> *Id.* (quoting *Heller*, 554 U.S. at 614). There is little reason to rely on laws from the  
27 later part of the 1800’s or the 1900’s rather than ones put into effect at the time of the  
founding in view of *Bruen*’s central question about the meaning of the Second  
28 Amendment as understood by the people who adopted it. *See Worth v. Harrington*, No.  
21-cv-01348-KMM-LIB, 2023 WL 2745673, at \*12 (D. Minn. Mar. 31, 2023) (“But the

1 keep and bear arms continued to be regarded as a fundamental right. The Supreme Court  
 2 gauged the most explicit evidence appeared in the Freedmen’s Bureau Act of 1866. “The  
 3 most explicit evidence of Congress’ aim,” according to *McDonald*, “appears in § 14 of  
 4 the Freedmen’s Bureau Act of 1866, which provided that ‘the right . . . to have full and  
 5 equal benefit of all laws and proceedings concerning personal liberty, personal security  
 6 [and] . . . including the constitutional right to bear arms, shall be secured to and enjoyed  
 7 by all the citizens.’”<sup>158</sup> *McDonald* points to one senator’s description of the right to bear  
 8 arms for one’s defense as an “indispensable safeguard of liberty.” *McDonald* writes,

9 “Every man . . . should have the right to bear arms  
 10 for the defense of himself and family and his  
 11 homestead. And if the cabin door of the freedman  
 12 is broken open and the intruder enters for purposes  
 13 as vile as were known to slavery, then should a  
 14 well-loaded musket be in the hand of the occupant  
 15 to send the polluted wretch to another world,  
 16 where his wretchedness will forever remain  
 17 complete.”<sup>159</sup>

18 Thus, it can be said that, even at the time of the Fourteenth Amendment, the right to keep  
 19 and bear guns was a necessary right to preserve. “In sum, it is clear that the Framers and

20  
 21 Commissioner offers no persuasive reason why this Court should rely upon laws from the  
 22 second half of the nineteenth century to the exclusion of those in effect at the time of the  
 23 founding in light of *Bruen*’s warnings not to give post-Civil War history more weight  
 24 than it can rightly bear.”); *Firearms Pol’y Coalition, Inc. v. McCraw*, No. 4:21-cv-01245-  
 25 P, 2022 WL 3656996, at \*11 (N.D. Tex. Aug. 25, 2022); *United States v. Harrison*, No.  
 26 CR 22-00328-PRW, 2023 WL 1771138, at \*8 (W.D. Okla. Feb. 3, 2023) (quoting *Bruen*,  
 27 142 S. Ct. at 2136 (Barrett, J., concurring) (“[T]oday’s decision should not be understood  
 28 to endorse freewheeling reliance on historical practice from the mid-to-late 19th century  
 to establish the original meaning of the Bill of Rights.”)); *contra Hanson*, No. CV 22-  
 2256-RC, 2023 WL 3019777, at \*16 (“In this case, it is appropriate to apply 20th century  
 history to the regulation at issue.”).

<sup>158</sup> *McDonald*, 561 U.S. at 773.

<sup>159</sup> *McDonald*, 561 U.S. at 775-76 (citation omitted).

1 ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among  
2 those fundamental rights necessary to our system of ordered liberty.”<sup>160</sup>

3 *Bruen* and *Heller* have already considered some of the historical firearm statutes.  
4 Consequently, we know that colonial laws restricting handguns that were dangerous and  
5 unusual in the 1690’s do not justify modern laws restricting handguns. The Court  
6 explains that even if handguns were considered “dangerous and unusual” in the 1690’s, it  
7 would not matter because handguns are common today. As *Bruen* puts it,

8           Whatever the likelihood that handguns were considered  
9 “dangerous and unusual” during the colonial period, they are  
10 indisputably in “common use” for self-defense today. They are,  
11 in fact, “the quintessential self-defense weapon.” Thus, even if  
12 these colonial laws prohibited the carrying of handguns because  
13 they were considered “dangerous and unusual weapons” in the  
14 1690s, they provide no justification for laws restricting the  
15 public carry of weapons that are unquestionably in common  
16 use.

### 15 C. The State’s List of Relevant Laws

16 To aid in the task of looking for a national “historical tradition of firearm  
17 regulation,” the State was directed to create a list of relevant laws regulating arms dating  
18 from the time of the Second Amendment (1791) to 20 years after the Fourteenth  
19 Amendment (1868 + 20). This was not an acknowledgement that 20 years after the  
20 Fourteenth Amendment is a relevant period. Twenty years after the Fourteenth  
21 Amendment is an admittedly arbitrary limit and probably includes laws too late to shed  
22 much light.

23 In any event, the State went far beyond. The State produced a list of 316 laws  
24 covering 550 years—from 1383 to 1933.<sup>161</sup> Many of the entries are not relevant because  
25

---

26  
27 <sup>160</sup> *McDonald*, 561 U.S. at 778.

28 <sup>161</sup> See Def’s Survey of Relevant Statutes, Dkt. 139-1 to 3 (citations to the individual law  
entries herein are indicated by brackets [--]).

1 they came much earlier or later than the most significant time period of 1791–1868. The  
2 first fourteen listed laws pre-date the Second Amendment.<sup>162</sup> On the other end, the last  
3 225 laws post-date the adoption of the Fourteenth Amendment. Also, two-thirds of the  
4 State’s list (199 laws) are restrictions on *use*—not on possession or acquisition. Here, the  
5 magazine ban prohibits possession, manufacturing, giving, lending, offering for sale, etc.,  
6 rather than regulating the *use* or *manner* of carrying ammunition or its magazines.  
7 Twenty-two tax laws are included in the State’s historical list, yet the law challenged here  
8 imposes no tax on magazines. The State’s historical list also includes, surprisingly, 38  
9 laws that applied only to particular groups, such as slaves, Blacks, or Mulattos. Those  
10 laws are not relevant to the magazine prohibition challenged in this case. “And  
11 Founding-era statutes that disarmed groups of persons who governments thought might  
12 be dangerous because of their race or religion were not considered analogous to modern  
13 carry prohibitions on released felons also thought to be dangerous: ‘any such analogy  
14 would be far too broad.’”<sup>163</sup> Even if they were, this Court would give such  
15 discriminatory laws little or no weight.

---

16  
17  
18  
19  
20 <sup>162</sup> The State includes in its list a concealed carry statute in East New Jersey from 1686  
21 which treated pocket pistols as “unusual” weapons. [6]. *Bruen* bulldozed that citation.  
22 The East New Jersey statute was too old and too different. *Bruen* found little there to  
23 commend a present-day ban on carrying pistols. The statute prohibited only the  
24 concealed carrying of pocket pistols; it did not prohibit possession or public carrying.  
25 *Bruen*, 142 S. Ct. at 2143. The statute did not apply to all pistols, much less all firearms.  
26 Moreover, even if pocket pistols were uncommon in 1686 in East New Jersey, they were  
27 commonly used by the time of the founding. *Id.* at 2144 and n.13. The statute did not  
28 survive the merger of East and West New Jersey in 1702. Consequently, the Court made  
short work of the history summing it up, “[a]t most eight years of history in half a Colony  
roughly a century before the founding sheds little light on how to properly interpret the  
Second Amendment.” *Id.* at 2144.

<sup>163</sup> *Baird*, 2023 WL 5763345 at \*8 (citations omitted).

1 **IV. IN AMERICA PEOPLE WERE GENERALLY FREE TO CARRY**  
 2 **FIREARMS PUBLICLY AND PEACEABLY FROM 1791 to 1868**

3 **A. Traditions**

4 The history and tradition of the United States is a tradition of widespread gun  
 5 ownership and expertise. *Bruen* says, “those who sought to carry firearms publicly and  
 6 peaceably in antebellum America were generally free to do so.”<sup>164</sup> Thomas Jefferson  
 7 pointed out that our soldiers were good shots because they had practiced with guns since  
 8 they were children. Jefferson wrote,

9 I inclose you a list of the killed, wounded, and captives of the  
 10 enemy from the Commencement of hostilities at Lexington in  
 11 April 1775, until November 1777. since which there has been  
 12 no event of any consequence ... I think that upon the whole it  
 13 has been about one half the number lost by them. In some  
 14 instances more, but in others less. *This difference is ascribed to*  
*our superiority in taking aim when we fire; every soldier in our*  
*army having been intimate with his gun from his infancy.*<sup>165</sup>

15 Then, having firearms was commonplace. Carrying firearms was accepted. Proficiency  
 16 with firearms was encouraged. Readiness with firearms was required. Then, as now,  
 17 terrorizing with a firearm or carrying a firearm with the intent to assault another was  
 18 punishable. But, “[n]one of the [] historical limitations on the right to bear arms . . .  
 19 operated to prevent law-abiding citizens with ordinary self-defense needs from carrying  
 20 arms in public for that purpose.”<sup>166</sup>

21 Notwithstanding having significant time to do so, the State has identified no  
 22  
 23

---

24 <sup>164</sup> 142 S. Ct. at 2146.

25 <sup>165</sup> Letter from Thomas Jefferson, to Giovanni Fabbroni, *Founders Online*, National  
 26 Archives (June 8, 1778), <https://founders.archives.gov/documents/Jefferson/01-02-02-0066> [<https://perma.cc/8VTV-K9HB>]; [Original source: *The Papers of Thomas Jefferson*,  
 27 vol. 2, 1777–18 June 1779, ed. Julian P. Boyd. Princeton: Princeton University Press,  
 1950, pp. 195–98] (emphasis added).

28 <sup>166</sup> *Bruen*, 142 S. Ct. at 2150.

1 historical statute or national tradition of firearm regulation so broad in its coverage or so  
2 far reaching in its effect as its large capacity magazine ban. So, what are the traditions of  
3 firearm regulation evidenced by the State’s law list?

4 Historical regulations are considered chronologically, “mindful that greater weight  
5 attaches to laws nearer in time to the Second Amendment’s ratification.”<sup>167</sup> The Court  
6 has reviewed every law cited in the State’s list. It has sometimes searched for the actual  
7 text of a cited law rather than the parties’ summary in order to understand any legal  
8 nuance. It has reviewed the laws with a view to understanding the tradition of all the  
9 states and their contexts. For example, as the nation expanded old states became interior  
10 states and new states became frontier states. Frontier states often had different social and  
11 security concerns than did the interior of the new nation. The Court sought to understand  
12 how states responded to new technological developments in ammunition, revolvers,  
13 repeaters, and high-capacity, fast-shooting, lever-action rifles.

14 The State’s experts opine that gun laws were plentiful and widespread and firearm  
15 regulation was the norm. But, if the test were to look at gun laws with that level of  
16 generality, no gun law would ever fail scrutiny and *Heller*, *McDonald* and *Bruen* could  
17 not have been decided as they were. Furthermore, as will be shown, it is an exaggeration.  
18 The State also says regulations on dangerous or unusual *weapons* existed throughout  
19 American history. By “weapons,” the State means non-firearms.

20 Relevantly similar regulations are *firearm* prohibitions—not bladed or melee  
21 weapon regulations. And neither “dangerous or unusual” nor “unusually dangerous” is  
22 the test, although the State cannot point to an outright prohibition on even unusual or  
23 unusually dangerous *firearms* until Alabama’s 1868 prohibition on the dangerous and  
24 unusual rifle-walking cane. [87]

25 Because the State cannot find a historic regulation of *firearms*, it turns to the  
26

---

27  
28 <sup>167</sup> *Rahimi*, 61 F.4th at 456.

1 historic regulations of *weapons*, whether bladed weapons, melee weapons, blunt  
2 weapons, or leaded weapons. Yet, the Supreme Court does not look to knife laws when  
3 reviewing a restriction about guns. *Bruen* teaches that a state’s burden is to identify a  
4 historical tradition of *firearm* regulation, not a tradition of knife regulation. Underscoring  
5 the importance of its words, three different times *Bruen* repeats the specific phrase  
6 “firearm regulation,” as in the following instances: (1) “Rather, the government must  
7 demonstrate that the regulation is consistent with this Nation’s historical tradition of  
8 *firearm regulation*;<sup>168</sup> (2) “The government must then justify its regulation by  
9 demonstrating that it is consistent with the Nation’s historical tradition of *firearm*  
10 *regulation*,”<sup>169</sup> and (3) “[T]he burden falls on respondents to show that New York’s  
11 proper-cause requirement is consistent with this Nation’s historical tradition of *firearm*  
12 *regulation*.”<sup>170</sup> In contrast, the *Bruen* majority opinion did not mention bowie knives at  
13 all. The Supreme Court was not interested in traditions of knife regulation or melee  
14 regulation. Even in the dissent, bowie knife laws were hardly mentioned. Consequently,  
15 when the State asserts, “weapons restrictions proliferated,” it misses the mark by  
16 referring to non-firearm weapon restrictions or concealed carrying restrictions.<sup>171</sup>

17 During the most important period of history, there were relatively few firearm  
18 regulations.<sup>172</sup> This conclusion can be drawn from inspecting the State’s historic law list,  
19 and is confirmed by at least one historian: “Between 1607 and 1815 . . . the colonial and  
20

---

21  
22 <sup>168</sup> *Bruen*, 142 S. Ct. at 2126 (emphasis added).

23 <sup>169</sup> *Id.* at 2130 (emphasis added).

24 <sup>170</sup> *Id.* at 2135 (emphasis added).

25 <sup>171</sup> Def’s Br. in Resp., Dkt. 142, at 20.

26 <sup>172</sup> It is true that there were laws criminalizing the *use* of guns for criminal acts such as  
27 carrying a gun with intent to assault another, or displaying a gun in a threatening manner.  
28 These were crimes of violence, not crimes of possession. California, as it should, has  
similar laws today, such as California Penal Code § 245(a)(2) & (3) (assault with a  
deadly weapon - firearm) and § 417(a)(2) (exhibition of a firearm in a rude, angry, or  
threatening manner).



1 state governments of what would become the first fourteen states neglected to exercise  
 2 any police power over the ownership of guns by members of the body politic . . . . These  
 3 limits on colonial and early state regulation of arms ownership outlined a significant zone  
 4 of immunity around the private arms of the individual citizen.”<sup>173</sup> It is a conclusion  
 5 confirmed by the Supreme Court. “Apart from a few late 19th-century outlier  
 6 jurisdictions, American governments simply have not broadly prohibited the public carry  
 7 of commonly used firearms for personal defense.”<sup>174</sup>

8 There were regional differences, no doubt.<sup>175</sup> As the nation aged, northern states  
 9 had virtually no restrictions on guns and none on ammunition while southern states  
 10 tended to mainly prohibit concealed carrying.<sup>176</sup> In short, the State argues that because  
 11 some states have regulated in some ways the use of some *weapons* (primarily knives and  
 12 melee devices), that translates into the State being able to regulate any magazine in any  
 13 way. That is a *non sequitur* and in this particular case—a bridge too far.

14 **i. No Prohibitions on Possessing Guns**

15 It is remarkable to discover that there were no outright prohibitions on keeping or  
 16 possessing guns. No laws of any kind.<sup>177</sup> Based on a close review of the State’s law list  
 17

---

18  
 19 <sup>173</sup> Robert H. Churchill, *Forum: Rethinking the Second Amendment*, 25 L. & Hist. Rev.  
 20 139, 161 (2007).

21 <sup>174</sup> *Bruen*, 142 S. Ct. at 2156.

22 <sup>175</sup> “[T]here were profound regional differences in early America.” Decl. of Saul Cornell,  
 23 Dkt. 118-4 (“Cornell Decl.”) at n.49.

24 <sup>176</sup> Don B. Kates, Jr., *Restricting Handguns* 12 (North River Press ed., 1979), found in  
 25 Compendium Works Cited in Decl. of Randolph Roth, Dkt. 118-8, at n.53 and 0349 (“By  
 26 1850, every Western state barred the carrying of concealed weapons. In contrast, none of  
 27 the Northeastern states adopted even that mild a restriction until nearly the turn of the  
 28 twentieth century. Until 1924, for instance, the only gun law in New Jersey was the  
 prohibition of dueling.”).

<sup>177</sup> According to one scholar, the first prohibition on simple ownership of a gun came in  
 1911. Churchill, *supra*, at 139 n.61 (“The first law restraining gun ownership by citizens  
 mentioned in the secondary literature is New York’s 1911 Sullivan Law, which  
 prohibited the ownership of concealable arms without a police permit.”); *see also* David

1 and the Court’s own analysis, Plaintiffs are correct in asserting that there are no  
 2 Founding-era categorical bans on firearms in this nation’s history. Though it is the  
 3 State’s burden, even after having been offered plenty of opportunity to do so, the State  
 4 has not identified any law, anywhere, at any time, between 1791 and 1868 that prohibited  
 5 simple possession of a gun or its magazine or any container of ammunition (unless the  
 6 possessor was an African-American or a slave or a mulatto).<sup>178</sup>

7 Surely, with 315 other entries in the State’s law list, there must be many other laws  
 8 in the relevant time period of demonstrating a tradition of firearm regulation analogous to  
 9 the large capacity magazine ban. What else is there?

10 **ii. No Gun Laws In The Northern States For 50 Years**

11 From the adoption of the Second Amendment through the next 50 years, there  
 12 were no firearm restrictions in any states north of the Mason-Dixon Line.<sup>179</sup> One could  
 13

---

14  
 15 B. Kopel and Joseph G.S. Greenlee, *This History of Bans on Types of Arms Before 1900*  
 16 50 J. of Legis., Apr. 25, 2023, at 45–46 (2024), <https://ssrn.com/abstract=4393197>  
 17 [<https://perma.cc/P85U-ASTZ>] (“Before, during, and after the Revolution, no state  
 18 banned any type of arm, ammunition, or accessory. Nor did the Continental Congress,  
 19 the Articles of Confederation Congress, or the federal government created by the U.S.  
 20 Constitution in 1787 . . . . There is no evidence that any of the Founders were concerned  
 21 about individuals having too much firepower. After a long, grueling war against the  
 22 world’s strongest military, limiting individuals’ capabilities was not a concern.”).

23 <sup>178</sup> Even before *Bruen* was decided, at least one other judge has applied the text, history,  
 24 and tradition test with analogical reasoning for a 10-round magazine ban, and came to the  
 25 same conclusion. See *Ass’n of N.J. Rifle & Pistol Clubs Inc. v. AG N.J.*, 974 F.3d 237,  
 26 258 (3d Cir. 2020) (Matey, J. dissenting) (“This history reveals a long gap between the  
 27 development and commercial distribution of magazines, on the one hand, and limiting  
 28 regulations, on the other hand. . . . Some will argue there must be an outer boundary to  
 this analysis that, when crossed, renders a magazine dangerous and unusual. If so, it does  
 not appear in the history and traditions of our Nation. . . . As a result, and limited to this  
 record, I would hold that magazines are arms protected by the Second Amendment and  
 an act limiting magazine capacity to 10 rounds burdens the Appellants’ Second  
 Amendment rights.”).

<sup>179</sup> The Mason-Dixon Line established the boundary line between Pennsylvania and  
 Maryland. Beyond its importance as a literal boundary between states, “the Mason-

1 live in any of the northern states without restrictions of almost any kind.<sup>180</sup> A gun owner  
2 enjoyed freedom with no infringing prohibitions from 1789 to 1845 in Pennsylvania,  
3 New York, Connecticut, Massachusetts, New Hampshire, Rhode Island, Vermont, Maine,  
4 Ohio, Illinois, Michigan, or Indiana. One might never be subject to a later surety statute  
5 in Massachusetts (1836) [29] and Maine (1841) [46].<sup>181</sup> If anything, regulations were not  
6 about what kind of firearm one was *not* allowed to keep, but about the kind of firearm  
7 one was *required* to buy and have ready for militia duties.

8 The same was largely true south of the Mason-Dixon Line (disregarding laws  
9 targeting slaves and Indians, neither of which were considered to be citizens by  
10 lawmakers). A citizen could reside in any of the northern states and half of the southern  
11 states for the first fifty years free from state government firearm restrictions. This

---

13 Dixon Line has become known as the boundary between the North and the South. It took  
14 on that association on March 1, 1790, when the Pennsylvania Assembly passed  
15 legislation ending slavery in the state. Thus, the Mason-Dixon Line became the legal and  
16 the philosophical boundary between slave territory and free land, since slavery was still  
17 allowed in Maryland. That was especially true after the Missouri Compromise was  
18 passed in 1820, which prohibited slavery north of the Mason-Dixon Line. To the many  
19 slaves who used whatever means necessary to reach free land, the Mason-Dixon Line  
20 became important to their freedom. For the slaves located in Maryland, they only needed  
21 to get to the state line to secure their freedom, although many continued traveling north in  
22 an attempt to get as far away from their former masters as possible.” Kathryn DeVan,  
23 *Our Most Famous Border: The Mason-Dixon Line*, Pa. St. Univ. (fall 2008),  
24 [https://pabook.libraries.psu.edu/literary-cultural-heritage-map-pa/feature-articles/our-](https://pabook.libraries.psu.edu/literary-cultural-heritage-map-pa/feature-articles/our-most-famous-border-mason-dixon-line)  
25 [most-famous-border-mason-dixon-line](https://pabook.libraries.psu.edu/literary-cultural-heritage-map-pa/feature-articles/our-most-famous-border-mason-dixon-line) [<https://perma.cc/B6WN-DHAC>].

26 <sup>180</sup> The State lists one New Jersey statute from 1799 as a law purportedly prohibiting the  
27 carrying of a pistol with the intent to assault [19], but this appears to be a sentencing  
28 enhancement statute applicable only if one was apprehended for burglary. *See An Act to*  
29 *Describe, Apprehend and Punish Disorderly Persons (1799)*, Duke Ctr. For Firearms L.,  
30 *Charles Nettleton, Laws of the State of New-Jersey Page 474, Image 501 (1821)*  
31 *available at The Making of Modern Law: Primary Sources*,  
32 [https://firearmslaw.duke.edu/laws/charles-nettleton-laws-of-the-state-of-new-jersey-page-](https://firearmslaw.duke.edu/laws/charles-nettleton-laws-of-the-state-of-new-jersey-page-474-image-501-1821-available-at-the-making-of-modern-law-primary-sources/)  
33 [474-image-501-1821-available-at-the-making-of-modern-law-primary-sources/](https://firearmslaw.duke.edu/laws/charles-nettleton-laws-of-the-state-of-new-jersey-page-474-image-501-1821-available-at-the-making-of-modern-law-primary-sources/).

34 <sup>181</sup> That the two states would share similar laws makes sense since Maine was part of the  
35 larger Commonwealth of Massachusetts prior to achieving statehood in 1820.

1 understanding is based on a methodical reading and assessment of the laws set out in the  
2 State’s survey. While the parties’ experts express some disagreements, their contrary  
3 opinions are unpersuasive.

4 In the northern states there were hardly any firearm laws at all, let alone a tradition  
5 of criminalizing the act of keeping or carrying any firearm. For the District of Columbia,  
6 governed by Congress, there were no firearm laws for the first 80 years until a concealed  
7 carry prohibition was enacted in 1871. [97]. Maine enacted its first law, a gunpowder  
8 storage regulation to prevent fires, in 1821. [27]. Massachusetts enacted its first firearm  
9 statute in 1836 as a surety law [29] with Maine following suit in 1841. [46]. *Bruen*  
10 already notes that under the surety laws everyone started out with robust carrying rights  
11 and *Bruen* saw little evidence that the laws were enforced.

12 Illinois was admitted to the Union in 1818. In 1845, Illinois enacted its first  
13 firearm statute criminalizing carrying a gun *with the intent to assault another person*.  
14 [49]. Indiana became a state in 1816. In 1855, Indiana criminalized shooting a gun, or  
15 throwing stones or sticks, at a train. [62]. The law did not concern keeping any gun  
16 whatsoever, or carrying a gun anywhere, in any manner whatsoever.<sup>182</sup> Ohio became a  
17 state in 1808. The State’s law list shows no Ohio state laws respecting firearms until  
18 1859. [70]. Ohioans did not have a gun law until nearly 70 years after the adoption of  
19 the Second Amendment. Its first gun law was one that prohibited carrying a pistol, bowie  
20 knife, dirk, or other dangerous weapon *concealed*. California enacted its first gun  
21 regulation in 1853, which criminalized the act of having “upon him any pistol, gun, knife,  
22

---

23  
24 <sup>182</sup> The State’s law list erroneously describes the 1855 Indiana law as one prohibiting the  
25 carrying of a pistol with the intent to injure another. This appears to be a scrivener’s  
26 error. Although the State does not include it in its law list, Indiana may have enacted an  
27 earlier statute prohibiting carrying a pistol concealed, with an exception made for  
28 travelers. “In *State v. Mitchell*, 3 Blackf. 229, 1833 WL 2617 (Ind. 1833), the Supreme  
Court of Indiana, in a one-sentence opinion, upheld a state statute prohibiting the general  
public from carrying concealed weapons.” *Peruta v. Cnty. of San Diego*, 824 F.3d 919,  
933 (9th Cir. 2016).

1 dirk, bludgeon, or other offensive weapon, with intent to assault any person.” [57].

2 In short, the history and tradition of the northern states, states north of the Mason-  
3 Dixon Line, was to leave firearm ownership and use completely unregulated. From the  
4 time of the adoption of the Second Amendment to the time of the adoption of the  
5 Fourteenth Amendment, there were no state gun laws in Pennsylvania, New York,  
6 Connecticut, Rhode Island, Vermont, New Hampshire, Michigan, Wisconsin, Minnesota,  
7 Iowa, Nebraska, Kansas, Missouri, or the District of Columbia. In Massachusetts and  
8 Maine there were only surety statutes. In New Jersey there was a sentencing  
9 enhancement for carrying a pistol while committing a burglary. In this half of the nation,  
10 keeping and bearing firearms was done freely without government interference.

11 **iii. No Gun Laws In The Southern States For 50 Years**

12 South of the Mason-Dixon Line, where slavery was practiced, there were many  
13 laws restricting firearms for slaves, African-Americans, and Indians. Setting aside that  
14 obviously unconstitutional tradition, among the southern states firearm ownership was  
15 largely unregulated for at least the first 50 years after 1791. Like the northern states,  
16 from 1791 to 1868 there were no state gun laws in Delaware, North Carolina, South  
17 Carolina, Mississippi, Florida, West Virginia, and Texas, according to the State’s law list.

18 The few laws in other southern states that did exist concerned mainly: (1) carrying  
19 a pistol *with the intent to assault another*; and (2) carrying a pistol in a *concealed*  
20 manner. Tennessee enacted the first firearm regulation in the southern states in 1801 in  
21 the form of a surety law—it was a law dismissed by *Bruen*. [20]. A decade later in  
22 1811, Maryland passed the second firearm regulation in the south. [23]. The Maryland  
23 law was, not a prohibition, but a sentencing enhancement for carrying a pistol *with the*  
24 *intent to assault another*.

25 In 1813, Louisiana passed the first law prohibiting the carrying of a *concealed* gun.  
26  
27  
28

1 [24].<sup>183</sup> *Bruen* noticed that a Louisiana court found the prohibition on concealed carrying  
 2 constitutional only because it permitted open carrying of a firearm.<sup>184</sup> Kentucky passed a  
 3 prohibition on carrying a *concealed* pistol that year, although it is omitted from the  
 4 State’s law list. Perhaps it is omitted because Kentucky’s concealed carry law was struck  
 5 down as unconstitutional a short time later. The only other firearm regulation in the  
 6 south during this time period was Georgia’s 1816 law prohibiting the carrying of a pistol  
 7 *with intent to assault* another person. [25].

8         Around 50 years after the Second Amendment, four southern states passed their  
 9 own first firearm regulations, also in the form of *concealed* carry prohibitions. In 1837,  
 10 Arkansas banned carrying a pistol concealed unless on a journey. [32]. In 1837, Georgia  
 11 added its own prohibition on carrying a pistol concealed. [33]. The constitutionality of  
 12 the Georgia law was upheld because open carry was unregulated.<sup>185</sup> In 1838, Virginia  
 13 prohibited carrying a pistol concealed. [40]. In 1839, Alabama prohibited carrying a  
 14 firearm concealed [41], later adding exceptions for self-defense and for travelers. [45].<sup>186</sup>

15         Three more regulations were enacted in the south in the years leading up to the  
 16 Fourteenth Amendment’s adoption. In 1856, Tennessee passed a law affecting only  
 17 minors. [65]. In 1868, Florida prohibited carrying secretly “arms of any kind whatever”  
 18  
 19

---

20 <sup>183</sup> Louisiana reenacted similar, if not the same, statutes two more times, in 1842 and  
 21 again in 1855. [63].

22 <sup>184</sup> 142 S. Ct. at 2146 and n.19 (quoting *State v. Chandler*, 5 La. 489, 490 (1850)  
 23 (“Louisiana concealed-carry prohibition ‘interfered with no man’s right to carry arms (to  
 use its words) ‘in full open view,’ which places men upon an equality’’)).

24 <sup>185</sup> *Nunn v. State*, 1 Ga. 243, 251 (1846) (“We are of the opinion, then, that so far as the  
 25 act of 1837 seeks to suppress the practice of carrying certain weapons secretly, that it is  
 valid, inasmuch as it does not deprive the citizen of his natural right of self-defence, or of  
 26 his constitutional right to keep and bear arms. But that so much of it, as contains a  
 prohibition against bearing arms openly, is in conflict with the Constitution, and void.”).

27 <sup>186</sup> *Lockett v. State*, 47 Ala. 42, 45–46 (1872) (“Nor is it required that he should have any  
 28 necessity for the use of his pistols. It is enough if he was traveling on a journey, long or  
 short.”).

1 and the outright carrying of a pistol or other arm or weapon. [90]. The Florida law was  
2 not scrutinized in a published court decision.<sup>187</sup>

3       Significantly, the first restriction on a *dangerous and unusual* firearm did not occur  
4 until 1868, the year the Fourteenth Amendment was adopted. That year, Alabama  
5 prohibited carrying a rifle walking cane. [87]. A rifle walking cane was a single shot  
6 rifle disguised to appear as a walking cane with a variety of handles. When fired, one  
7 bullet would exit through the bottom of the cane. It was patented in 1858 and  
8 manufactured by the E. Remington & Sons company until approximately 1888, with less  
9 than 2,000 produced.<sup>188</sup> Remington was the only major gun maker to produce a rifle  
10 walking cane gun. California currently has a law prohibiting possession of a “cane gun.”  
11 *See* Cal. Penal Code § 24410.

12       In short, the history and tradition of the states south of the Mason-Dixon Line, was  
13 to leave firearm ownership and use mostly unregulated. At least for the first half of the  
14 century, in this half of the nation, keeping and bearing firearms was done freely, with a  
15 handful of states enacting prohibitions on carrying pistols in public in a concealed  
16 manner, and Maryland and Georgia making it a crime to carry a firearm with the intent to  
17 assault another person.

---

18  
19  
20 <sup>187</sup> However, an 1867 court decision considered an earlier law where only *concealed*  
21 carrying was prohibited. *See Sutton v. State*, 12 Fla. 135, 136 (1867) (“The statute under  
22 which this indictment was found provides, ‘that hereafter it shall not be lawful for any  
23 person in this State to carry arms of any kind secretly on or about their person, &c.:  
24 Provided, that this law shall not be so construed as to prevent any person from carrying  
25 arms openly outside of all their clothes’ . . . . The statute was not intended to infringe  
26 upon the rights of any citizen to bear arms for the ‘common defense.’ It merely directs  
27 how they shall be carried, and prevents individuals from carrying concealed weapons of a  
28 dangerous and deadly character, on or about the person, for the purpose of committing  
some malicious crime, or of taking some undue advantage over an unsuspecting  
adversary.”).

<sup>188</sup> *See* Remington Soc’y of Am., *Remington Cane Guns*,  
<https://www.remingtonsociety.org/remington-cane-guns/> [<https://perma.cc/A74W-EHPT>]  
(last visited May 26, 2023).

1           **iv. Territories**

2           Among the State’s law list is a number of regulations from 19th century territories.  
 3 *Bruen* has already considered such laws and decided they are not particularly helpful for  
 4 several reasons. “First, the bare existence of these localized restrictions cannot overcome  
 5 the overwhelming evidence of an otherwise enduring American tradition . . . .”<sup>189</sup> “These  
 6 territorial ‘legislative improvisations,’ which conflict with the Nation’s earlier approach  
 7 to firearm regulation, are most unlikely to reflect ‘the origins and continuing significance  
 8 of the Second Amendment’ and we do not consider them ‘instructive.’”<sup>190</sup> “Second,  
 9 because these territorial laws were rarely subject to judicial scrutiny, we do not know the  
 10 basis of their perceived legality . . . . we fail to see how they inform ‘the origins and  
 11 continuing significance of the Amendment.’”<sup>191</sup> “Finally, these territorial restrictions  
 12 deserve little weight because they were—consistent with the transitory nature of  
 13 territorial government—short lived . . . . Thus, they appear more as passing regulatory  
 14 efforts by not-yet-mature jurisdictions on the way to statehood, rather than part of an  
 15 enduring American tradition of state regulation.”<sup>192</sup> One commentator disagrees.<sup>193</sup>  
 16 Even so, the territorial regulations suggest an absence of gun bans during the most  
 17 important historical period.

18           None of the territorial regulations from 1791 to 1868 prohibited a firearm. There  
 19 were no prohibitions on owning firearms of any type. There were no prohibitions on  
 20 keeping a firearm of any type for self-defense, whether in the home or in public. The  
 21 first territorial regulation came approximately 47 years after the Second Amendment (in  
 22 1839) and prohibited the carrying of a firearm in a *concealed* manner in the Florida  
 23

---

24  
 25 <sup>189</sup> *Bruen*, 142 S. Ct. at 2154.

26 <sup>190</sup> *Id.* (quoting *Heller*, 554 U.S. at 614).

27 <sup>191</sup> *Bruen*, 142 S. Ct. at 2155 (quoting *Heller*, 554 U.S. at 592).

28 <sup>192</sup> *Id.* (citations omitted).

<sup>193</sup> See Andrew Willinger, *The Territories Under Text, History, and Tradition*, 101 Wash. Univ. L. Rev. (2023), <https://ssrn.com/abstract=4372185>.



1 Territory. [42]. In other words, for the first 40 years of the nation’s history, the only  
2 territorial restriction on firearms, was in the Florida territory taken from Spain in 1819.

3 In 1853, the New Mexico Territory also adopted a *concealed* carrying prohibition.  
4 [58]. In 1854, the Washington Territory prohibited *exhibiting* a pistol in a rude, angry, or  
5 threatening manner, reenacting a similar law in 1859. [60, 71]. The Nebraska Territory  
6 made it a crime to carry a pistol *with the intent to assault* another person in 1858. [68]  
7 The Colorado Territory (in 1862 and again in 1867) and the Montana Territory (in 1864)  
8 restricted the *concealed* carrying of a pistol in a city, town, or village. [75, 79, 84].  
9 While these territorial laws do evidence some later restrictions on the manner of carrying  
10 firearms in some public places, they do not not evidence a history or tradition of  
11 prohibiting any firearms of any type.

12 **v. California’s First Concealed Carry Law Was a Failure**

13 In 1863, California’s homicide rate reached “catastrophic levels.”<sup>194</sup> With no  
14 Second Amendment analogue in the state constitution, California’s solution was to ban  
15 carrying concealed weapons. The experiment failed. In 1870, the legislature repealed the  
16 law, because it disarmed the good citizen, but the law was not followed by “the vast  
17 majority of roughs, fighting men, and predatory characters,”<sup>195</sup> and the police were “apt  
18 to arrest any quiet citizen” with a concealed weapon.<sup>196</sup>

19 **B. Historical Twins**

20 *Bruen* concluded that “[n]one of these historical limitations on the right to bear  
21 arms approach New York’s proper-cause requirement because none operated to prevent  
22  
23

---

24 <sup>194</sup> Decl. of Randolph Roth, Dkt. 118-8 (“Roth Decl.”), at ¶ 36.

25 <sup>195</sup> *Id.* at ¶ 37 and n.84 (citing Clayton E. Cramer and Joseph E. Olson, *The Racist*  
26 *Origins of California’s Concealed Weapon Permit Law*, SSRN (Aug. 12, 2016) (quoting  
27 *The Carrying of Concealed Weapons*, Daily Alta (San Francisco) California, March 13,  
1869, at 2, and *Concealed Deadly Weapons*, Sacramento Daily Union, December 16,  
1870, at 2.)).

28 <sup>196</sup> *Id.*

1 law-abiding citizens with ordinary self-defense needs from carrying arms in public for  
2 that purpose.”<sup>197</sup> The same can be said about California’s magazine ban. To paraphrase  
3 the Supreme Court, none of these historical limitations on the right to bear arms approach  
4 California’s complete ban on magazines able to hold more than 10 rounds. None  
5 operated to prevent law-abiding citizens from possessing as much ammunition as they  
6 thought best.

7 A historical twin is not unimaginable. It could have been the case that the early  
8 states prohibited having large capacity gunpowder sacks, or, they might have prohibited  
9 carrying more than 10 lead bullets. There were no such restrictions. There are no  
10 Founding-era dead ringers or historical twins. Of course, the State does not need to find a  
11 historical twin, but a second cousin twice-removed, is not enough.

## 12 **V. ANALOGUES**

13 Although the State does not identify any historical twins of its restrictions on  
14 magazines, it may not have to. A history and tradition of a relevantly similar firearm  
15 regulation could suffice. After all, it can be argued that removable magazines represent a  
16 dramatic change in technology and the State is attempting to address a modern societal  
17 concern. In such cases, *Bruen* allows a more nuanced approach. On one hand, compared  
18 to muskets of the colonial era, a Glock 17 with its 17-round magazine clearly represents a  
19 dramatic technological advancement. On the other hand, the lever-action repeating  
20 Henry and Winchester rifles popular at the time of the Fourteenth Amendment were  
21 already dramatic technological advancements in firearms. These popular lever-action  
22 rifles had large tubular magazines that held a lot of ammunition and could be fired  
23 multiple times in succession, accurately and quickly. Yet, there are no state prohibitions  
24 on possession or manufacture of these lever-action rifles in the State’s law list.

25 In any event, while California does not need to identify a dead ringer for its  
26

---

27  
28 <sup>197</sup> 142 S. Ct. at 2150.

1 magazine ban, “California cannot satisfy the requirement for a closely analogous  
2 historical regulation by reference to any general firearm regulation California might  
3 unearth.”<sup>198</sup>

4 **A. The State’s Best Historic Analogue? A New York City Gunpowder**  
5 **Storage Law Following the Worst City Fire in Colonial America**

6 Asked to identify the best historic analogue to its sweeping prohibition on large  
7 capacity magazines, the State identified a New York City gunpowder storage law  
8 following the worst city fire in Colonial America. With the assistance of scholars who  
9 have studied historic laws for years the State identified a 1784 statute regulating the  
10 amount of gunpowder that could be stored inside a New York City building.<sup>199</sup> Because  
11 the State has identified this as its best analogue, it deserves closer consideration.

12 The gunpowder storage law has nothing to do with gun violence. It was *a fire*  
13 *safety regulation*. Unsurprisingly, the law was enacted after New York City suffered two  
14 great fires, one of which is described as, “The most destructive fire in colonial North  
15 America.”<sup>200</sup> The first fire, in the year 1776, burned much of Manhattan to the ground  
16 and destroyed 493 houses in its path. In 1778, a second fire swept through the city and  
17 destroyed 54 more houses and several warehouses.<sup>201</sup> After these two terrible fires the  
18 New York State legislature responded with a law for New York City limiting the quantity  
19 of gunpowder that a person could store in any one building to 28 pounds. It applied only  
20  
21  
22

---

23 <sup>198</sup> *Baird*, 2023 WL 5763345, at \*8.

24 <sup>199</sup> See Defendant’s Response Brief in Response to the Court’s Order Entered on  
25 February 7, 2023, Dkt. 143, at 1, identifying 1784 Laws of N.Y. 627, chapter 28.

26 <sup>200</sup> New York City Fire Museum, *The Great New York Fire of 1776* (Mar. 21, 2023),  
27 <https://www.nycfiremuseum.org/greatfire1776> [<https://perma.cc/A3BW-TQRP>].

28 <sup>201</sup> Richard Howe, *Notes on the Great Fires of 1776 and 1778* (2014), The Gotham  
Center for New York City History, <https://www.gothamcenter.org/blog/notes-on-the-great-fires-of-1776-and-1778> [<https://perma.cc/WJ4V-3QKP>].

1 to that part of Manhattan from city hall on the south end to one mile north.<sup>202</sup> Gunpowder  
 2 was to be stored in fireproof stone jugs or tin canisters holding no more than 7 pounds  
 3 each. Reinforcing that the law was enacted to prevent fires, it also required gunpowder  
 4 be contained to prevent spills during transport through the streets.<sup>203</sup>

5 There was much the law did not do. It did not limit the total amount of gunpowder  
 6 a person could own or use, as long as quantities over 28 pounds were kept in the public  
 7 magazine or in additional buildings. It placed no limit on the number of lead bullets a  
 8 person could keep or possess. It did not restrict a person from keeping his firearms  
 9 loaded with gunpowder and bullets in his home, business, or when in public. Beyond the  
 10 one mile stretch of lower Manhattan island, the law had no application anywhere else in  
 11 the state. And 28 pounds is a lot of gunpowder. One New York militia soldier was  
 12 required to bring ¼ pound of gunpowder when called to muster.<sup>204</sup> So, 28 pounds of  
 13 gunpowder could outfit 112 militia men. As the State’s expert Professor Cornell notes,  
 14 “Twenty to thirty pounds of gunpowder is certainly not an inconsiderable amount.”<sup>205</sup>  
 15

---

16  
 17 <sup>202</sup> “[I]t shall not be lawful . . . to have or keep any quantity of gun powder exceeding  
 18 twenty-eight pounds weight, in any one place, less than one mile to the northward of the  
 19 city hall . . . except in the public magazine at the Fresh-water . . . .”

20 <sup>203</sup> The law specified, “[a]nd in order to prevent any fatal consequences which may arise,  
 21 from the carriage of gun powder, in and through the streets of the city of new York, by  
 22 carts, carriages, or by hand, or otherways [sic], it shall be in a tight cask, well headed and  
 23 hooped, and shall be put into bags or leather-cases, and intirely [sic] covered therewith,  
 24 so as that none be spilt or scattered in the passage thereof . . . .” 1784 Laws of N.Y at  
 25 628.

26 <sup>204</sup> See Stats. at Large, New York 1867, Chapter X, Title VII, Article 1, §6, at 287 (eff.  
 27 1835) (penalties for militia men ill-equipped) (“[F]or want of two spare flints and a  
 28 knapsack, twenty four cartridges, shot-pouch, powder-horn, twenty balls, and *a quarter of*  
 29 *a pound of powder*, twenty five cents each . . . .”),  
 30 [https://books.google.com/books/content?id=RkkwAQAAMAAJ&pg=PA287&img=1&zooom=3&hl=en&bul=1&sig=ACfU3U3ooEDz2oBmZb\\_g3qythhk8S6UJOg&ci=99%2C102%2C820%2C820&edge=0](https://books.google.com/books/content?id=RkkwAQAAMAAJ&pg=PA287&img=1&zooom=3&hl=en&bul=1&sig=ACfU3U3ooEDz2oBmZb_g3qythhk8S6UJOg&ci=99%2C102%2C820%2C820&edge=0) [<https://perma.cc/KS72-L87G>].

31 <sup>205</sup> Saul Cornell & Nathan DeNiro, *A Well Regulated Right*, 73 Fordham L. Rev. 487  
 32 n.173 (2004).

1 For nuanced analogues, the New York City gunpowder storage law fails the why  
 2 and how tests.<sup>206</sup> The “why” of the large capacity magazine ban is to introduce a “critical  
 3 pause” into a mass shooter’s unrelenting attack. The “why” of the historic gunpowder  
 4 storage law is to reduce the risk of building fires. The “how” of the large capacity  
 5 magazine ban is limiting the number of ammunition rounds that can be loaded in a gun  
 6 for self-defense. The “how” of the historic gunpowder storage law burden was  
 7 generously limiting the storage (and not the amount loaded into guns for self-defense) of  
 8 gunpowder for a geographic area smaller than one square mile. In the end, the State’s  
 9 proposed analogue is not relevantly similar.

10 One other gunpowder storage law mentioned by the State which applied only in the  
 11 city of Boston, Massachusetts, fares no better. This was also a *fire* safety regulation—  
 12 nothing more.<sup>207</sup> “The ordinance did not prohibit *carrying* loaded firearms within the  
 13 City of Boston—only leaving them unattended in a building—and . . . this law was for  
 14 the protection of those fighting fires.”<sup>208</sup> In fact, one scholar mused, “Strictly speaking,  
 15 the law did not forbid bringing an unloaded gun into a building, and then loading it when  
 16 inside. So, occupants of homes or businesses remained free to keep loaded guns.”<sup>209</sup>  
 17 Moreover, the State offers no evidence that the Massachusetts law was enforced. A  
 18 search of *Thacher’s Reports*, a collection of reports of criminal cases tried in the City of  
 19 Boston Municipal Court from 1823–1843 reveals no such prosecutions.<sup>210</sup>

---

21 <sup>206</sup> Courts should examine “how and why the regulations burden a law-abiding citizens’  
 22 right to armed self-defense.” *Bruen*, 142 S. Ct. at 2132-33.

23 <sup>207</sup> See *Renna*, 20-cv-2190-DMS-DEB, 2023 WL 2846937, \*12–13 (citing *Jackson v.*  
 24 *City & Cnty. of San Francisco*, 746 F.3d 953, 963 (9th Cir. 2014) (stating “Boston’s  
 25 firearm-and-gunpowder storage law is historically distinct from the challenged firearm  
 regulation in light of *Heller*”).

26 <sup>208</sup> Clayton E. Cramer and Joseph Edward Olson, *Pistols, Crime, and Public: Safety in*  
*Early America*, 44 Willamette L. Rev. 699, 705 (2008) (emphasis in original).

27 <sup>209</sup> *Id.*

28 <sup>210</sup> *Thacher’s Reports* may be found at <https://www.mass.gov/info-details/historical-massachusetts-cases#1800-1899->.

1 This whole gunpowder storage argument has been raised before and it has been  
2 rejected before. It was raised a dissent in *Heller* and relied on the same laws of New  
3 York and Massachusetts, and the same writings of Cornell.<sup>211</sup> The *Heller* majority was  
4 unimpressed. *Heller* says,

5 The other laws Justice Breyer cites are gunpowder-storage laws  
6 that he concedes did not clearly prohibit loaded weapons, but  
7 required only that excess gunpowder be kept in a special  
8 container or on the top floor of the home. Nothing about those  
9 fire-safety laws undermines our analysis; they do not remotely  
burden the right of self-defense as much as an absolute ban on  
handguns.<sup>212</sup>

10 Applying the same reasoning to this case, the early fire-safety gunpowder storage laws do  
11 not remotely burden the self-defense right as much as an absolute ban on magazines  
12 holding more than 10 rounds.

13 **B. The State's Historic Analogue No. 2: Concealed Carry Laws**

14 Next, the State turns to historic laws regulating the *concealed* carrying of bowie  
15 knives, dirks, sword canes, and some pistols, as analogues.

16 **i. Pocket Pistols**

17 Some historic laws prohibited carrying a pocket pistol in a concealed manner. By  
18 1868, about a dozen states had laws prohibiting carrying concealed pistols. Importantly,  
19 the concealed carry laws did not prohibit either keeping pistols for all lawful purposes or  
20 carrying all guns openly. And none included long guns or ammunition containers in their  
21 restrictions. Pocket pistols were entirely lawful to keep and use at home for self-defense.

22 Prohibiting the concealed carrying of a pistol was constitutionally permissible only  
23 when a citizen could freely keep and carry the same gun openly. The statutes were often  
24 tested in court, suggesting that any broad carrying restriction ran close to the  
25

26  
27  
28 <sup>211</sup> *Heller*, 554 U.S. at 684–86 (Breyer, J., dissenting).

<sup>212</sup> *Id.* at 631–32.

1 constitutional line. Today’s large capacity magazine ban prohibits carrying magazines in  
2 any manner -- and even more restrictively prohibits simple possession.

3 Historic concealed carry laws for pistols have a different “why” and “how” than do  
4 the State’s large capacity magazine ban. The “why” of a concealed carry law was to  
5 prevent unfair surprise attacks by a person who appeared to be unarmed. The “how” of  
6 the historic concealed carry prohibitions was to proscribe the manner of carrying a pocket  
7 pistol and only when in public. The substantial burden imposed by the large capacity  
8 magazine ban is not analogous to the burden created by a concealed carry restriction for  
9 public carrying of a pocket pistol. Such a history and tradition of concealed carry  
10 prohibitions are not nuanced analogues for California’s magazine ban as they are not  
11 relevantly similar.

12 **ii. Dirks, Daggers, Sword Canes, and Bowie Knives**

13 The State now asks the Court to compare firearms equipped with large capacity  
14 magazines to knives. Undoubtedly, dirks, daggers, and bowie knives are dangerous. But  
15 dirks, daggers, sword canes, and bowie knives were not firearms; they were bladed  
16 instruments. *Bruen* says the state’s burden is to identify a historical *firearm* regulation,  
17 not a knife regulation. In the dissent, knives were cited only where territorial laws also  
18 affected the carrying of pistols, presumably because of the pistols.<sup>213</sup> *Heller* did not  
19 mention knife laws at all in evaluating the District of Columbia’s handgun ban. And the  
20 Supreme Court’s plurality did not mention bowie knives in evaluating Chicago’s  
21 handgun ban, except as an example of Reconstruction-era efforts to disarm African-  
22 Americans.<sup>214</sup> This is not to say that bowie knives are not “arms” imbued with Second  
23

---

24  
25 <sup>213</sup> *Id.* at 2186 (Breyer, J. dissenting) (“For example, Georgia made it unlawful to carry,  
26 ‘unless in an open manner and fully exposed to view, any pistol, (except horseman's  
27 pistols,) dirk, sword in a cane, spear, bowie-knife, or any other kind of knives,  
28 manufactured and sold for the purpose of offence and defence.’ Ga. Code § 4413  
(1861).”).

<sup>214</sup> *McDonald*, 561 U.S. at 771.

1 Amendment protection.<sup>215</sup> Historical knife laws would be relevant in evaluating a modern  
 2 prohibition on knives. It is simply to say that historical *firearm* regulations are obviously  
 3 more likely to be relevant analogues for modern *firearm* restrictions.

4 Even if knife regulations were relevant, they would not help the State much.<sup>216</sup>  
 5 There were laws restricting bowie knives in some states in the 1800's, but not the vast  
 6 majority of states. There is also little evidence of actual prosecutions for simply  
 7

---

8  
 9 <sup>215</sup> See, e.g., David B. Kopel, Clayton E. Cramer and Joseph E. Olson, *Knives and the*  
 10 *Second Amendment*, 47 U. Mich. J. L. Reform 167, 168 (2013); Defs.' Compendium of  
 11 Works, Dkt. 158-2, at 65, 67 ("This Article analyzes Second Amendment protection for  
 the most common 'arm' in the United States – the knife.").

12 <sup>216</sup> This opinion is shared by two historians. See David B. Kopel and Joseph G.S.  
 13 Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. of Legis., Apr. 25,  
 14 2023, at 168–69 (2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4393197](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4393197)  
 15 [<https://perma.cc/P85U-ASTZ>] ("Bans on modern rifles and magazines cannot be rescued  
 16 by diverting attention away from the legal history of firearms law, and instead pointing to  
 laws about other arms. Dozens of state and territorial legislatures enacted laws about  
 17 Bowie knives, as well as dirks and daggers. Prohibitory laws for these blades are fewer  
 than the number of bans on carrying handguns, and *Bruen* found the handgun laws  
 insufficient to establish a tradition constricting the Second Amendment.

18 As for other non-blade impact weapons, the sales and manufacture bans in a  
 19 minority of states for slungshots and knuckles could be considered as involving arms "not  
 typically possessed by law-abiding citizens for lawful purposes."

20 Other flexible impact arms, most notably blackjacks, were "typically possessed by  
 law-abiding citizens for lawful purposes," especially by law enforcement officers.  
 21 Likewise, modern semiautomatic rifles and standard magazines are also highly preferred  
 by today's law enforcement officers.

22 For blackjacks and sand clubs, only one state, New York, enacted a sales and  
 23 manufacture ban. That came at a time when the legislature was unencumbered by a  
 Second Amendment enforceable against the states or by a state constitution right to arms.  
 24 As *Bruen* teaches, a lone eccentric state does not create a national legal tradition.

25 For every arm surveyed in this article, the mainstream American legal tradition  
 26 was to limit the mode of carry (no concealed carry), to limit sales to minors (either with  
 bans or requirements for parental permission), and/or to impose extra punishment for use  
 27 in a crime.

28 The fact that most states banned concealed carry of Bowie knives is not a  
 precedent to criminalize the mere possession of modern rifles and magazines.").



1 possessing a bowie knife, much less a judicial opinion on constitutionality. One court  
2 observed that a Tennessee bowie knife law was generally disregarded.<sup>217</sup>

3 The argument that a cluster of laws prohibiting the carrying of dangerous knives  
4 could justify a gun ban, lost its wind in *McDonald*. If the regulation of knives was not a  
5 sufficient analogue for restricting handguns in Chicago, neither are regulations of dirks,  
6 daggers, sword canes, and bowie knives useful analogues for prohibiting modern  
7 magazines.

### 8 **C. The State's Historic Analogue No. 3: Guns Set as Traps**

9 Historic laws prohibiting trap guns are proposed as a third analogue by the State.  
10 What the State does not admit or seem to recognize is that “trap guns” are not guns at all.  
11 They are a method by which a gun, any gun, can be set up to fire indiscriminately  
12 through the use of springs, strings, or other atypical triggering mechanism without  
13 needing an operator. Nonetheless, absent from our history is a tradition of trap gun  
14 restrictions in the important years between the 1791 and 1868. The 1771 New Jersey trap  
15 gun law, upon which the State relies, predates the Declaration of Independence, New  
16 Jersey statehood,<sup>218</sup> and the Second Amendment. Ninety-five years passed before a  
17 second restriction on trap gun was enacted and that one applied only to the Utah Territory  
18 (1865). [80]. Within the states, the first regulation on setting a trap gun, was enacted in  
19 Minnesota in 1873. [109]. Two states followed later in 1875 (Michigan) and 1884  
20

---

21  
22 <sup>217</sup> See, e.g., *Day v. State*, 37 Tenn. 496, 499 (Tenn. 1858) (“It is a matter of surprise that  
23 these sections of this act, so severe in their penalties, *are so generally disregarded* in our  
24 cities and towns.”) (describing state law prohibiting the concealed carrying of bowie  
25 knives) (emphasis added).

26 <sup>218</sup> New Jersey was one of the few states that did not have in its state constitution a  
27 provision like the Second Amendment. (Six states do not have provisions protecting a  
28 right to arms in their state constitutions: California, New Jersey, New York, Maryland,  
Minnesota, and Iowa.) See David B. Kopel and Clayton E. Cramer, *State Court  
Standards of Review for the Right to Keep and Bear Arms*, 50 Santa Clara L. Rev 1113,  
1145 n.51 (2010).

1 (Vermont). In other words, trap guns were not prohibited by law in the District of  
 2 Columbia or 36 of the 37 states (then existing), until 1873. California did not enact its  
 3 own trap gun law until 1957.<sup>219</sup> Court decisions between 1791 and 1868 recognized that  
 4 it was entirely lawful to use trap guns (or spring guns, as they were sometimes called) to  
 5 defend one’s property.<sup>220</sup> If this is what a national tradition of trap gun regulation looks  
 6 like, it is a strange look, indeed.

7 Claiming trap guns were “dangerous weapons commonly used for criminal  
 8 behavior and not for self-defense,”<sup>221</sup> the State has a problem with the facts. There is  
 9 little historical evidence that trap guns were used for criminal behavior. Rather, guns  
 10

---

11 <sup>219</sup> See Cal. Fish & Game Code § 2007.

12 <sup>220</sup> See, e.g., *Gray v. Combs*, 7 J. J. Marsh, 478 (Ky. 1832) (one who sets traps or spring  
 13 guns to protect valuable property by means of which another is killed while attempting to  
 14 enter the premises is guilty of no crime); *Loomis v. Terry*, 1837 WL 2808 (N.Y. Sup. Ct.  
 15 1837) (“It is not like setting spring guns with public notice of the fact; for even that has  
 16 been held warrantable as being necessary (*Ilott v. Wilkes*, 3 Barn. & Ald. 304.)”); *State v.*  
 17 *Moore*, 31 Conn. 479, 479–80 (Conn. 1863) (“Breaking and entering a shop in the night  
 18 season with intent to steal, is by our law burglary, and the placing of spring guns in such  
 19 a shop for its defense, would be justified if a burglar should be killed by them.”);  
 20 *Maenner v. Carroll*, 46 Md. 193, 208 (Md. Ct. App. 1877) (“While it is decided that  
 21 traps, spring-guns, and other dangerous instruments, may be lawfully placed on private  
 22 grounds, for the purpose of deterring trespassers or catching strange animals doing  
 23 damage . . . .”); see also *Simpson*, 59 Ala. at 18 (citing *Moore*, 31 Conn. at 479) (“The  
 24 setting a spring-gun on his premises, by the owner, is culpable only because of the intent  
 25 with which it is done. Unless the public safety is thereby endangered, it is not indictable.  
 26 If dangerous to the public, it is indictable as a nuisance.”); *United States v. Gilliam*, 25 F.  
 27 Cas. 1319, 1320 and n.2 (D.C. Crim. Ct. 1882) (“The setting of a spring-gun as a  
 28 protection for property, though not in itself unlawful and indictable, is certainly  
 undeserving of encouragement. . . .”) (citing English common law and the court of King’s  
 Bench, *Ilott v. Wilkes*, 3 Barn. & Ald. 304 (‘A trespasser, having knowledge that there are  
 spring-guns in a wood, although he may be ignorant of the particular spots where they are  
 placed, cannot maintain an action for an injury received in consequence of his accidental  
 treading on the latent wire connecting with the gun, and thereby letting it off.’)).

<sup>221</sup> Defs’ Br. in Resp., Dkt. 145, at 10 (quoting *Oregon Firearms Fed’n, Inc. v. Brown*,  
 No. 2:22-cv-01815-IM, 2022 WL 17454829, at \*13 (D. Or. Dec. 6, 2022), *appeal*  
*dismissed*, No. 22-36011, 2022 WL 18956023 (9th Cir. Dec. 12, 2022)).

1 were set as traps by common people to protect their property from thieves and sometimes  
 2 for self-defense against burglars. Perhaps just as often trap guns were used to hunt game.  
 3 Historian and expert witness for the State, Robert Spitzer opines about trap guns: (1)  
 4 “[t]hose who set gun traps typically did so to defend their places of business, properties,  
 5 or possessions;” and (2) “opinion was more divided . . . with some arguing that thieves or  
 6 criminals hurt or killed by the devices had it coming.”<sup>222</sup> So, when the State claims trap  
 7 guns were used by criminals and not for self-defense, it gets the facts backwards. The  
 8 how and why of the two types of regulations are not relevantly similar, thus trap gun laws  
 9 are not useful analogues for prohibiting modern magazines.

10 **D. The Best Analogue: Laws Requiring Citizens to Keep and Carry**  
 11 **Sufficient Bullets and Gunpowder for Service in the Militia**

12 California ignores Founding-era laws that present the best analogue to its present-  
 13 day magazine law. These are the manifold early militia laws requiring each citizen, not  
 14 to limit the amount of ammunition he could keep, but to arm himself with *enough*  
 15 ammunition: at least 20 rounds.<sup>223</sup>

16 Government remains fixed on the notion that it alone can decide that anything  
 17 larger than a 10-round magazine is not “suitable” for a citizen to have. But, there are no  
 18 analogous cases in our history. There are no cases where American government dictated  
 19 that lever-action rifles were unsuitable because single shot rifles were good enough, or  
 20  
 21

---

22  
 23 <sup>222</sup> (U.S.D.C. Oregon Dkt. 17-2 at ¶¶ 34–53) (first filed in the instant case).

24 <sup>223</sup> See, e.g., 1784 Mass. Acts 142; 1786 N. Y. Laws 228; 1785 Va. Statutes at Large 12  
 25 (12 Hening c. 1); 1 Stat. 271 (1792) (Militia Act); Herbert L. Osgood, *The American*  
 26 *Colonies in the Seventeenth Century*, 499–500 (1904) (explaining that states often  
 27 required citizens to equip themselves with adequate firearms and ammunition, including  
 28 between 20 and 24 cartridges at minimum); *Silveira v. Lockyer*, 328 F.3d 567, 586 (9th  
 Cir. 2003) (“Much as building codes today require smoke detectors in the home, a man  
 had to have a bullet mould, a pound of powder, four pounds of lead, and twenty bull<sup>et</sup>s, to  
 be produced when called for by a militia officer.”) (Kleinfeld, J., dissenting).

1 revolvers were unsuitable because derringers were good enough.<sup>224</sup> These choices have  
2 always belonged to the People to decide for themselves how much firepower they need.

3 The right to have firearms for social security was important at the time the  
4 Constitution was adopted. There were many enemies of the young nation. An armed  
5 citizenry provided a much-needed deterrent effect. Early citizens remembered how the  
6 Minutemen of Lexington and Concord, Massachusetts, by assembling as a militia, fought  
7 back against the hostile British march to take away guns and gunpowder in April 1776.

8 During the Nation’s founding-era, federal and state governments enacted laws for  
9 the formation and maintenance of citizen militias. Three such statutes are described in  
10 *Miller*.<sup>225</sup> Rather than restricting too much firing capacity, the laws mandated a  
11 minimum firing capacity. These statutes required citizens to arm themselves with arms  
12 and a minimum quantity of bullets and gunpowder, not to disarm themselves. When  
13 Congress passed the Militia Act in 1792,<sup>226</sup> the law required a citizen to be equipped to  
14 fire at least 20 to 24 shots.<sup>227</sup> A 1786 New York law required “no less than Twenty-four  
15 Cartridges,” and a 1785 Virginia law required a cartridge box and “four pounds of lead,  
16

---

17  
18 <sup>224</sup> “I surveyed the gun regulations in the Duke Historical Database from the early  
19 medieval period through 1885 to see what terminology was used. None of the laws that  
20 prohibit weapons, aside from the Maryland statute above, specifies a gun part or  
21 ammunition case or accoutrements of any kind. Although many present a list of banned  
22 or prohibited weapons – usually without defining them [the assumption is that the reader  
23 knows what they refer to], none of the laws mention cartridge boxes, bullets, barrels, or  
24 other parts of any weapons.” Declaration of Dennis Baron, Dkt. 118-2, at ¶ 56.

<sup>225</sup> 307 U.S. 174 (1939)

<sup>226</sup> 1 Stat. 271, 2 Cong. Ch. 33.

<sup>227</sup> “That every citizen so enrolled and notified, shall, within six months thereafter,  
25 provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare  
26 flints, and a knapsack, a pouch with a box therein to contain not less than *twenty-four*  
27 *cartridges*, suited to the bore of his musket or firelock, each cartridge to contain a proper  
28 quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn,  
*twenty balls* suited to the bore of his rifle and a quarter of a pound of powder.”  
(Emphasis added).

1 including twenty blind cartridges.” In 1776, Paul Revere’s Minutemen were required to  
2 have 30 bullets and gunpowder.

3 These and other citizen militia laws demonstrate that, contrary to the idea of a  
4 firing-capacity upper limit on the number of rounds permitted, there was a legal  
5 obligation for the average citizen to have at least 20 rounds available for immediate  
6 use.<sup>228</sup> There were no upper limits like § 32310; there were floors and the floors were  
7 well above 10 rounds.<sup>229</sup> California’s large capacity magazine ban is a diametrically  
8 opposed analogue.

9 As one court explained, “[u]nder *Bruen*, the Second Amendment does not ‘forbid  
10 all laws other than those that *actually existed* at or around the time of the Second  
11 Amendment’s adoption,’ but rather ‘the Second Amendment must, at most, forbid laws  
12 that could not have existed under the understanding of the right to bear arms that  
13 prevailed at the time.’”<sup>230</sup> California’s large capacity magazine ban did not exist and  
14 could not have existed under the understanding of the Second Amendment at the time of  
15 the Founding. This is clear because militia laws of the federal and state governments  
16 required citizens to keep and carry more ammunition supplies than 10 rounds. A  
17 prohibition like § 32310 would have been impossible to enforce and runs contrary to  
18 legal commands for militia readiness.

## 19 **VI. CONCLUSION**

20 Removable firearm magazines of all sizes are necessary components of  
21 semiautomatic firearms. Therefore, magazines come within the text of the constitutional  
22

---

23  
24 <sup>228</sup> *Teixeira v. Cty. Of Alameda*, 873 F.3d 670, 685 (9th Cir. 2017) (citing Joyce Lee  
25 Malcolm, *To Keep and Bear Arms* 139 (1994)) (“the colonial militia played a primarily  
26 defensive role . . . . The dangers all the colonies faced . . . were so great that not only  
27 militia members but all householders were ordered to be armed.”).

28 <sup>229</sup> *Duncan*, 366 F. Supp. at 1150.

<sup>230</sup> Def’s Br. in Resp., Dkt. 142 at 16 (quoting *United States v. Kelly*, No. 3:22-cr-00037,  
2022 U.S. Dist. LEXIS 215189, at \*14 n.7 (M.D. Tenn. Nov. 16, 2022)).

1 declaration that the right to keep and bear arms shall not be infringed. Because millions  
2 of removable firearm magazines able to hold between 10 and 30 rounds are commonly  
3 owned by law-abiding citizens for lawful purposes, including self-defense, and because  
4 they are reasonably related to service in the militia, the magazines are presumptively  
5 within the protection of the Second Amendment. There is no American history or  
6 tradition of regulating firearms based on the number of rounds they can shoot, or of  
7 regulating the amount of ammunition that can be kept and carried. The best analogue that  
8 can be drawn from historical gun laws are the early militia equipment regulations that  
9 required all able-bodied citizens to equip themselves with a gun and a minimum amount  
10 of ammunition in excess of 10 rounds.

11 Because the State did not succeed in justifying its sweeping ban and dispossession  
12 mandate with a relevantly similar historical analogue, California Penal Code § 32310, as  
13 amended by Proposition 63, is hereby declared to be unconstitutional in its entirety and  
14 shall be enjoined. At this time, the Court's declaration does not reach the definition of a  
15 large capacity magazine in California Penal Code § 16740 where it is used in other parts  
16 of the Penal Code to define other gun-related crimes or enhance criminal penalties.

17 One government solution to a few mad men with guns is a law that makes into  
18 criminals responsible, law-abiding people wanting larger magazines simply to protect  
19 themselves. The history and tradition of the Second Amendment clearly supports state  
20 laws against the use or misuse of firearms with unlawful intent, but not the disarmament  
21 of the law-abiding citizen. That kind of a solution is an infringement on the  
22 Constitutional right of citizens to keep and bear arms. The adoption of the Second  
23 Amendment was a freedom calculus decided long ago by our first citizens who cherished  
24 individual freedom with its risks more than the subservient security of a British ruler or  
25 the smothering safety of domestic lawmakers. The freedom they fought for was worth  
26 fighting for then, and that freedom is entitled to be preserved still.

27 The Attorney General respectfully requests a stay of any judgment in Plaintiffs'  
28 favor for a sufficient period to seek a stay from the Court of Appeals. Dkt. 118 at 61–63;

1 Dkt. 142 at 25. That request is granted. Therefore, the enforcement of the injunction is  
2 hereby stayed for ten days.

3 **IT IS HEREBY ORDERED** that:

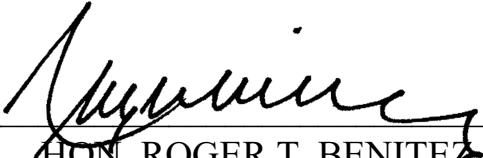
4 1. Defendant Attorney General Rob Bonta, and his officers, agents, servants,  
5 employees, and attorneys, and those persons in active concert or participation with him,  
6 and those duly sworn state peace officers and federal law enforcement officers who gain  
7 knowledge of this injunction order, or know of the existence of this injunction order, are  
8 enjoined from enforcing California Penal Code § 32310.

9 2. Defendant Rob Bonta shall provide, by personal service or otherwise, actual  
10 notice of this order to all law enforcement personnel who are responsible for  
11 implementing or enforcing the enjoined statute.

12 3. This injunction is stayed for ten (10) days from the date of this Order.

13 **IT IS SO ORDERED.**

14 Date: September 22, 2023

15   
16 HON. ROGER T. BENITEZ  
17 United States District Judge  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28