No. 19-55376

In the United States Court of Appeals for the Ninth Circuit

VIRGINIA DUNCAN, *et al.*,
Plaintiffs–Appellees,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California,
Defendant–Appellant.

Appeal from the United States District Court
for the Southern District of California
The Honorable Roger T. Benitez
Case No. 3:17-cv-1017-BEN

BRIEF OF *AMICI CURIAE* WILLIAM WIESE, JEREMIAH MORRIS, LANCE COWLEY, SHERMAN MACASTON, CLIFFORD FLORES, L.Q. DANG, FRANK FEDERAU, ALAN NORMANDY, TODD NIELSEN, CALIFORNIA GUN RIGHTS FOUNDATION, FIREARMS POLICY COALITION, FIREARMS POLICY FOUNDATION, ARMED EQUALITY, SAN DIEGO COUNTY GUN OWNERS, ORANGE COUNTY GUN OWNERS, RIVERSIDE COUNTY GUN OWNERS, CALIFORNIA COUNTY GUN OWNERS, AND SECOND AMENDMENT FOUNDATION IN SUPPORT OF APPELLEES AND AFFIRMANCE

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September 23, 2019

QUESTION PRESENTED

Does the confiscation of arms that are in common use by law-abiding citizens violate the Second Amendment?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici Curiae* make the following statements:

California Gun Rights Foundation has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

Firearms Policy Coalition has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

Firearms Policy Foundation has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

Armed Equality has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

San Diego County Gun Owners has one parent organization, California County Gun Owners. No publicly held corporation owns more than 10% of its stock.

Orange County Gun Owners has one parent organization, California County Gun Owners. No publicly held corporation owns more than 10% of its stock.

Riverside County Gun Owners has one parent organization, California County Gun Owners. No publicly held corporation owns more than 10% of its stock.

California County Gun Owners has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

Second Amendment Foundation has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

/s/ *Joseph G.S. Greenlee*
Joseph G.S. Greenlee
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STATEMENT OF *AMICI CURIAE*

William Wiese, Jeremiah Morris, Lance Cowley, Sherman Macaston, Clifford Flores, L.Q. Dang, Frank Federau, Alan Normandy, and Todd Nielsen are magazine-owning individuals who brought the original challenge to California's "Large-Capacity Magazine" bans enacted in Proposition 63 (2016) and Senate Bill 1446 (2015 – 2016 Reg. Sess.), in *Wiese, et al. v. Becerra, et al.*, filed in the Eastern District of California on April 28, 2017, Case No. 2:17-cv-00903-WBS-KJN ("*Wiese* action").

California Gun Rights Foundation ("CGF") is a nonprofit organization dedicated to defending the constitutional rights of California gun owners and educating the public about federal, state, and local laws. This Court's interpretation of the Second Amendment directly impacts CGF's organizational interests and the rights of CGF's members and supporters in California. CGF has members and supporters in California, and others who visit California, who own, or wish to own, the banned magazines at issue in this case. CGF is an Institutional Plaintiff in the *Wiese* action.

Firearms Policy Coalition ("FPC") is a nonprofit membership organization that defends constitutional rights—including the right to keep and bear arms—and promotes individual liberty. FPC engages in direct and grassroots advocacy, research, legal efforts, outreach, and education. This Court's interpretation of the Second Amendment directly impacts FPC's organizational interests, as well as FPC's members and supporters in California who own, or wish to own, the prohibited magazines. FPC has a special interest in this case, because the issue presented is germane to litigation and research in which FPC is currently engaged. FPC is an Institutional Plaintiff in the *Wiese* action.

Firearms Policy Foundation ("FPF") is a nonprofit organization that serves its members and the public through charitable programs including research, education, and legal efforts, with a focus on constitutional law and individual rights. FPF has members in California affected by the magazine ban, including many who own, or wish to own, the prohibited magazines. FPF has a special interest in this case, because the issue presented is germane to litigation and research in which FPF is currently engaged. FPF is an Institutional Plaintiff in the *Wiese* action.

Armed Equality ("AE") is an unincorporated organization that serves to promote individual rights and self-defense, especially within the LGBTQ+ community, whose members are at an especially high risk of attacks involving multiple assailants. AE has members in California, and others who visit California, who are affected by the State's Magazine Ban.

San Diego County Gun Owners ("SDCGO"), **Orange County Gun Owners ("OCGO")**, **Riverside County Gun Owners ("RCGO")**, and **California County Gun Owners ("CCGO")** are political membership organizations whose purposes are to protect and advance the Second Amendment rights of residents of California. Their memberships consist of Second Amendment supporters, individuals who own guns for self-defense or sport—including the "Large-Capacity Magazines" at issue here—firearms dealers, shooting ranges, and elected officials who want to protect and restore the right to keep and bear arms in California. Many of these members are affected by the State's Magazine Ban.

Second Amendment Foundation ("SAF") is a nonprofit educational foundation incorporated under the laws of Washington with

its principal place of business in Bellevue, Washington. SAF seeks to preserve the effectiveness of the Second Amendment through educational and legal action programs. SAF has over 650,000 members and supporters nationwide, including thousands of members in California. SAF engages in education, research, publishing, and legal action focused on the constitutional right to keep and bear arms, as well as the consequences of gun control. This Court's interpretation of the Second Amendment directly impacts SAF's organizational interests, and the interests of its members and supporters in California. SAF is a party to the *Wiese* action.

CONSENT TO FILE

All parties have consented to the filing of this brief.[1]

[1] No counsel for a party in this case authored this brief in whole or in part. No party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than *amici* and their members contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case presents the issue of whether the confiscation of arms in common use—so-called "Large-Capacity Magazines" ("LCMs")[2]—violates the Second Amendment.[3]

Under Supreme Court precedent, arms prohibitions are straightforward. If the prohibited arms are "in common use" for lawful purposes, they are constitutionally protected and cannot be banned.

The Supreme Court has addressed arms prohibitions more than any other Second Amendment issue—a total of four times. The Court has never indicated that an interest-balancing approach is appropriate. Indeed, the Court has twice expressly rejected such an approach. Rather, the Court has repeatedly made clear that bans on constitutionally protected arms are categorically unconstitutional.

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[2] For simplicity, this brief uses the statutory term "Large-Capacity Magazine." But the term is a misnomer. The vast majority of banned magazines are the standard magazines supplied by the firearm's manufacturer.

[3] Cal. Pen. Code § 32310. This law is extraordinary—even among bans—for prohibiting the mere possession of LCMs, thereby confiscating lawfully owned arms.

Thus, the dispositive issue in this case is whether the banned magazines are "in common use."

Over 100 million magazines capable of holding more than 10 rounds are owned nationwide by tens of millions of Americans. Every federal circuit court to have considered the issue has recognized that these magazines are indeed common. Appellant, who bears the burden of proving that the magazines are not "in common use," offered no evidence and did not even argue that the banned magazines are uncommon. The ban is therefore unconstitutional—and the decision below should be affirmed.

ARGUMENT

I. *Heller*'s categorical invalidation is required for prohibitions on constitutionally protected arms.

Supreme Court precedent mandates that California's magazine confiscation be held categorically unconstitutional.

Under *District of Columbia v. Heller*, at least two types of laws are categorically invalid: (1) laws that prohibit the exercise of the right to keep and bear arms; and (2) laws that ban arms "in common use." 554 U.S. 570 (2008). Such laws do not receive heightened scrutiny analyses; they are flatly unconstitutional. This is certain, because it is precisely the

approach taken by the *Heller* Court when confronted with these very laws.

Laws that prohibit the exercise of the right: The *Heller* Court held a law prohibiting functional firearms in the home categorically invalid, since it destroyed the right to self-defense inside the home. Following *Heller*, the Seventh Circuit held a prohibition on carrying arms in public categorically invalid, since it destroyed the right to self-defense outside the home. *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012). The Seventh Circuit appropriately dismissed the idea of a heightened scrutiny analysis for such a severe ban. *Id.* at 941 ("Our analysis is not based on degrees of scrutiny").

Laws that ban arms "in common use": The *Heller* Court held a handgun ban categorically invalid. The Court explained that since handguns are constitutionally protected arms, "a complete prohibition of their use is invalid." *Heller*, 554 U.S. at 629. The Court applied no tiered scrutiny analysis, included no data or studies about the costs or benefits of the ban, and expressly rejected the intermediate scrutiny-like balancing test proposed by Justice Breyer's dissent. After all, the Court explained, "[w]e know of no other enumerated constitutional right whose

core protection has been subjected to a freestanding 'interest-balancing' approach." *Id.* at 634.

Bright-line rules that categorically invalidate government actions (without any means/ends test) are common in constitutional law. *See* David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 303–04 (2017) (providing examples for the First, Fifth, Sixth, Eighth, Tenth, and Fourteenth Amendments).

In *McDonald v. City of Chicago*, the Supreme Court again held a handgun ban categorically unconstitutional. 561 U.S. 742 (2010). And the Court again refused to adopt an interest-balancing approach in a challenge to a ban on constitutionally protected arms:

> Municipal respondents assert that, although most state constitutions protect firearms rights, state courts have held that these rights are subject to "interest-balancing" and have sustained a variety of restrictions. Brief for Municipal Respondents 23–31. In *Heller,* however, we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing.

Id. at 785.

The Seventh Circuit recognized that "[b]oth *Heller* and *McDonald* suggest that broadly prohibitory laws restricting the core Second Amendment right—like the handgun bans at issue in those cases, which prohibited handgun possession even in the home—are *categorically unconstitutional*." *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) ("*Ezell I*") (emphasis added).

The concurrence in *Caetano v. Massachusetts*, confirmed that this is the correct application of Supreme Court precedent. 136 S. Ct. 1027 (2016). In *Caetano*, the Court's *per curiam* opinion summarily reversed and remanded an opinion of the Massachusetts Supreme Judicial Court that had upheld a ban on stun guns. Justice Alito's concurring opinion, joined by Justice Thomas, conveyed the correct approach to a ban on arms in common use: "stun guns are widely owned and accepted as a legitimate means of self-defense across the country. Massachusetts' categorical ban of such weapons therefore violates the Second Amendment." 136 S.Ct. at 1033 (Alito, J., concurring).

II. *Heller* held that the Second Amendment protects arms "in common use."

The *Heller* Court specifically addressed "*what* types of weapons" the right to keep and bear arms protects. 554 U.S. at 624 (emphasis in

original). The Court concluded that the right protects arms that are "typically possessed by law-abiding citizens for lawful purposes." *Id.* at 625. In other words, as "[*United States v. Miller*, 307 U.S. 174 (1939)] said … the sorts of weapons protected were those 'in common use at the time.'" *Heller*, 554 U.S. at 627 (quoting *Miller*, 307 U.S. at 179).

As the Court explained, in the Founding Era, "when called for militia service able-bodied men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *Id.* at 624 (quoting *Miller*, 307 U.S. at 179) (brackets omitted). Thus, "[t]he traditional militia was formed from a pool of men bringing arms 'in common use at the time' for lawful purposes like self-defense." *Id.* Because "weapons used by militiamen and weapons used in defense of person and home were one and the same," protecting arms in common use is "precisely the way in which the Second Amendment's operative clause furthers the purpose announced in its preface." *Id.* at 625 (citations omitted).

Put simply, "the pertinent Second Amendment inquiry is whether [the arms in question] are commonly possessed by law-abiding citizens for

lawful purposes today." *Caetano*, 136 S. Ct. at 1032 (Alito, J., concurring) (emphasis omitted).

To be sure, the specific make and model of a particular arm must not be popular in the market to be protected. Rather, the arm must be among "the sorts of weapons" or "of the kind" that are "in common use at the time." *Heller*, 554 U.S. at 624, 627. So it is the function of the arm rather than the exact type of arm that matters. Thus, the *Heller* Court paid no attention to the Colt Buntline nine-shot revolver that Dick Heller sought to possess, and focused on the commonality of handguns in general.

III. Large-Capacity Magazines are "in common use."

A. By every metric employed by federal circuit courts, Large-Capacity Magazines are "in common use."

"The Second Amendment extends, prima facie, to all instruments that constitute bearable arms." *Heller*, 554 U.S. at 582. "In other words, it identifies a presumption in favor of Second Amendment protection, which the State bears the initial burden of rebutting." *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 257 n.73 (2d Cir. 2015) ("*NYSRPA I*").[4] *See Virginia v. Black*, 538 U.S. 343, 369 (2003) (Scalia,

[4] In *NYSRPA I*, the Second Circuit struck down a ban on a pump-action rifle because the state focused exclusively on semi-automatic

J., concurring in part, concurring in the judgment in part, and dissenting in part) (defining "prima facie evidence" as "sufficient to establish a given fact" and "if unexplained or uncontradicted … sufficient to sustain a judgment in favor of the issue which it supports.") (quoting BLACK'S LAW DICTIONARY 1190 (6th ed. 1990)).

The Supreme Court has not precisely defined "common use." In *Heller* and *McDonald*, the Court struck down bans on handguns, "the most popular weapon chosen by Americans for self-defense in the home," so a detailed examination of their commonality was unnecessary. *Heller*, 554 U.S. at 629. In *Miller*, the district court had quashed the indictment, so neither party had an opportunity to present evidence regarding the commonality of short-barreled shotguns. Because the commonality of these arms was not within judicial notice, the Supreme Court remanded. In *Caetano*, the concurring opinion declared that "[t]he more relevant statistic is that hundreds of thousands of Tasers and stun guns have been sold to private citizens, who it appears may lawfully possess them in 45 States." 136 S. Ct. at 1032 (Alito, J., concurring) (quotations and brackets

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weapons and "the presumption that the Amendment applies remain[ed] unrebutted." 804 F.3d at 257.

omitted). Because "stun guns are widely owned and accepted as a legitimate means of self-defense across the country," they were common enough for protection under the Second Amendment. *Id.* at 1033 (Alito, J., concurring).

In the federal circuit courts, "[e]very post-*Heller* case to grapple with whether a weapon is 'popular' enough to be considered 'in common use' has relied on statistical data of some form" to inform their determination of commonality. *Hollis v. Lynch*, 827 F.3d 436, 449 (5th Cir. 2016) (quotations omitted). Nevertheless, "[t]here is considerable variety across the circuits as to what the relevant statistic is." *Id.*

Total Number: "Some courts have taken the view that the total number of a particular weapon is the relevant inquiry." *Id.*

The Second Circuit determined that LCMs "are 'in common use' as that term was used in *Heller*" because "statistics suggest that about 25 million large-capacity magazines were available in 1995 … and nearly 50 million such magazines—or nearly two large-capacity magazines for each gun capable of accepting one—were approved for import by 2000." *NYSRPA I*, 804 F.3d at 255.

The D.C. Circuit found that LCMs were "in common use" because "approximately 4.7 million more such magazines were imported into the United States between 1995 and 2000." *Heller v. D.C.*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) ("*Heller II*"). The court concluded its analysis by stating "[t]here may well be some capacity above which magazines are not in common use but … that capacity surely is not ten." *Id.*

The Fourth Circuit determined it "need not answer" whether LCMs are "in common use," but it acknowledged "evidence that in the United States between 1990 and 2012, magazines capable of holding more than ten rounds numbered around 75 million." *Kolbe v. Hogan*, 849 F.3d 114, 129, 136 (4th Cir. 2017) (en banc).

Percentage of Total: Some courts have looked at what percentage a specific arm makes up of the total nationwide arms stock to determine whether it is "in common use." The Second Circuit found that weapons that "only represent about two percent of the nation's firearms" were "in common use." *NYSRPA I*, 804 F.3d at 255. By comparison, the Fourth Circuit acknowledged that LCMs represent "46% of all magazines owned." *Kolbe*, 849 F.3d at 129. The D.C. Circuit found LCMs "in common use" because "fully 18 percent of all firearms owned by civilians in 1994

were equipped with magazines holding more than ten rounds." *Heller II*, 670 F.3d at 1261.

Number of Jurisdictions: As explained *supra*, the concurrence in *Caetano* identified "the more relevant statistic" as the raw number of arms and the number of jurisdictions in which they are lawful.[5] The Fifth Circuit followed this approach (among others) in *Hollis*. Whereas the concurrence in *Caetano* determined stun guns were "in common use" since hundreds of thousands had been sold nationwide and they were lawful in 45 states, *Caetano*, 136 S.Ct. at 1032 (Alito, J., concurring), the Fifth Circuit determined machineguns were unprotected: only 175,977 were in existence and "34 states and the District of Columbia prohibit possessing machineguns." *Hollis*, 827 F.3d at 450.[6] Using these guidelines, the district court correctly determined LCMs "are common" because they are "[l]awful in at least 41 states and under federal law,"

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[5] In striking down a ban on carrying arms in public, the Seventh Circuit was attentive to other jurisdictions, and repeatedly noted that the challenged statute was the most restrictive in the nation. *Moore*, 702 F.3d at 940, 941, 942. California's magazine ban is similarly the most restrictive in the nation.

[6] The *Hollis* court's state law count was incorrect, but it demonstrates the use of state laws in assessing "common use."

and because "these magazines number in the millions." *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1143 (S.D. Cal. 2019).

In *Fyock v. Sunnyvale*, this Court determined the district court did not abuse its discretion by finding that "at a minimum, [LCMs] are in common use." 779 F.3d 991, 997 (9th Cir. 2015). Fyock "presented sales statistics indicating that millions of magazines, some of which [] were magazines fitting Sunnyvale's definition of large-capacity magazines, have been sold over the last two decades in the United States." *Id.*

By any metric, LCMs are "in common use." "To the extent they may be now uncommon within California, it would only be the result of the State long criminalizing the buying, selling, importing, and manufacturing of these magazines. To say the magazines are uncommon because they have been banned for so long is something of a tautology. It cannot be used as constitutional support for further banning." *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1118 (S.D. Cal. 2017). *See Friedman v. City of Highland Park, Illinois*, 784 F.3d 406, 409 (7th Cir. 2015) ("[I]t would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn't commonly owned. A law's existence can't be the source of its own constitutional validity."). Moreover, the use

of such magazines must be measured by what is commonly used and held in the rest of the country. After all, handguns were not in common use by ordinary, law-abiding citizens within the District of Columbia by the time the Supreme Court struck down the District's thirty-three-year ban on the possession and lawful use of handguns.

Because LCMs are "in common use," and because countless firearms capable of use with LCMs are "in common use," the magazines California bans are constitutionally protected arms.

B. The popularity of arms for the purpose of self-defense, rather than their utility for that purpose, is dispositive.

The State argues that the banned magazines are unprotected because they are not commonly *used* in self-defense. Opening Br. at 25–26. But the relevant inquiry is whether the arms are commonly *selected* for that purpose. As Justice Stevens explained, "[t]he Court struck down the District of Columbia's handgun ban not because of the *utility* of handguns for lawful self-defense, but rather because of their *popularity* for that purpose." *McDonald*, 561 U.S. at 890 n.33 (Stevens J., dissenting) (emphasis in original).

The right cannot depend on how regularly arms are used in self-defense. The bizarre result would be that the safer the country became,

the less rights the people would have, because fewer arms would be used in self-defense. Constitutional protection is not contingent on the number of times people use arms in self-defense—unfired firearms are protected by the Second Amendment just as unread books are protected by the First Amendment. What matters is the commonality of arms that are kept by people for that purpose. And tens of millions of Americans keep countless millions of LCMs for the purpose of self-defense.

In *McDonald*, the Supreme Court explained why it had struck down the handgun ban in *Heller*: "we found that this right applies to handguns because they are the most preferred firearm in the nation to 'keep' and use for protection of one's home and family. Thus, we concluded, citizens must be permitted to use handguns for the core lawful purpose of self-defense." *McDonald*, 561 U.S. at 767–68 (quotations, citations, and brackets omitted). Because handguns are "preferred," they "must be permitted."

C. The People, not the government, determine what arms are necessary for self-defense.

The State argues "that LCMs are not necessary for self-defense." Opening Br. at 4. Whether arms are "necessary" for self-defense is of no concern to the government—if legislatures could decide what is

"necessary," the handgun bans struck down in *Heller* and *McDonald* would have been upheld. Rather, what matters is whether the arms are commonly chosen by the People for that purpose. Indeed, "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634 (emphasis in original). "To limit self-defense to only those methods acceptable to the government is to effect an enormous transfer of authority from the citizens of this country to the government—a result directly contrary to our constitution and to our political tradition." *Friedman*, 784 F.3d at 413 (Manion, J., dissenting).

In the First Amendment context, "the general rule" is "that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). Just as the People have the right to determine the value of the information they exchange; they have the right to determine the value of the arms they keep and bear.

IV. *Heller* explained that the Second Amendment does not protect "dangerous and unusual weapons."

In addition to defining what arms are protected by the right (i.e., arms "in common use"), the *Heller* Court defined what arms are not protected: "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." 554 U.S. at 625. *See Fyock*, 779 F.3d at 997 ("Regulation of a weapon not typically possessed by law-abiding citizens for lawful purposes does not implicate the Second Amendment"). The *Heller* Court elaborated, explaining that it meant "dangerous and unusual weapons." *Heller*, 554 U.S. at 627.

A weapon that is "unusual" is the antithesis of a weapon that is "common." Thus, an arm "in common use" cannot be "dangerous and unusual," and is therefore protected. *See Friedman*, 784 F.3d at 409 (if "the banned weapons are commonly owned … then they are not unusual.").

V. Large-Capacity Magazines are not "dangerous *and* unusual."

To qualify as "dangerous and unusual," a weapon must be both, dangerous *and* unusual. This Court set forth these twin requirements in *Fyock*: "[t]o determine [whether a weapon is 'dangerous and unusual'],

we consider whether the weapon has uniquely dangerous propensities *and* whether the weapon is commonly possessed by law-abiding citizens for lawful purposes." 779 F.3d at 997 (emphasis added). The Fifth Circuit took the same approach in *Hollis*, conducting an analysis first to determine whether machineguns are uniquely dangerous, and then conducting another to determine whether machineguns are also unusual. 827 F.3d 436 (5th Cir. 2016).

In *Caetano*, the Supreme Court confirmed that this is the correct approach. The *Caetano* Court declined to consider the dangerousness of stun guns because it had already determined that the lower court's unusualness analysis was flawed. 136 S. Ct. at 1028. The concurrence elaborated:

> As the *per curiam* opinion recognizes, this is a conjunctive test: A weapon may not be banned unless it is *both* dangerous *and* unusual. Because the Court rejects the lower court's conclusion that stun guns are "unusual," it does not need to consider the lower court's conclusion that they are also "dangerous."

Id. at 1031 (Alito, J., concurring) (emphasis in original).

As explained above, LCMs are among the most popular arms in the country. "In fact, these magazines are so common that they are

standard." *Kolbe v. Hogan*, 813 F.3d 160, 174 (4th Cir. 2017), *reversed on reh'g en banc*, 849 F.3d 114 (4th Cir. 2017). Indeed, the only dispute between the parties is whether the magazines number in the tens or *hundreds* of millions. Whatever the exact number, it is beyond dispute that such arms are "in common use." Being "in common use," the magazines are necessarily *not* unusual, and therefore are not "dangerous and unusual."

VI. Large-Capacity Magazines are arms.

As this Court previously acknowledged, magazines are protected by the Second Amendment: "[T]o the extent that certain firearms capable of use with a magazine—e.g., certain semiautomatic handguns—are commonly possessed by law-abiding citizens for lawful purposes, our case law supports the conclusion that there must also be some corollary, albeit not unfettered, right to possess the magazines necessary to render those firearms operable." *Fyock*, 779 F.3d at 998.

Indeed, magazines are intrinsic parts of all semi-automatic firearms. A magazine is simply "a receptacle for a firearm that holds a plurality of cartridges or shells under spring pressure preparatory for feeding into the chamber." *Glossary*, SPORTING ARMS AND AMMUNITION

MANUFACTURERS' INSTITUTE, https://saami.org/saami-glossary/?letter=M (last visited Sept. 23, 2019). Magazines are inherent operating parts of functioning semi-automatic firearms, because the firearms are essentially inoperable without them. This is particularly true in California, which requires many models of pistols sold at retail to have "magazine disconnect mechanisms"—making these firearms incapable of being fired without a magazine. *See* Cal. Pen. Code §§ 31910(b)(4)-(6), 32000, and 16900 (defining "magazine disconnect mechanism" as "a mechanism that prevents a semiautomatic pistol that has a detachable magazine from operating to strike the primer of ammunition in the firing chamber when a detachable magazine is not inserted in the semiautomatic pistol"). Since California has insisted that modern, semi-automatic firearms be rendered nonfunctional without a magazine, it necessarily follows that the magazine constitutes an inherent operating part of the firearm. "Because magazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended, magazines are 'arms' within the meaning of the Second Amendment." *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 116 (3d Cir. 2018).

VII. The Two-Part Test is inapplicable to the confiscation of constitutionally protected arms.

This Court adopted a Two-Part Test for Second Amendment challenges in *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013). "The two-step Second Amendment inquiry we adopt (1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny." *Id.* at 1136–37. This Two-Part Test was developed and adopted throughout the federal circuit courts to resolve issues not directly addressed by the *Heller* Court.[7] *See Heller*, 554 U.S. at 635 ("since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field"). For instance, this Court adopted the test to resolve a challenge to a firearm ban applied to domestic violence misdemeanants. But the Two-Part Test is precluded when a court reviews a type of law held categorically unconstitutional in *Heller*, in which case the court is bound by Supreme Court precedent:

> Both *Heller* and *McDonald* suggest that broadly prohibitory laws restricting the core Second Amendment right—like the handgun bans at issue in those cases, which prohibited handgun

[7] The Two-Part Test was created by the Third Circuit in *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

> possession even in the home—are categorically unconstitutional. … *For all other cases*, however, we are left to choose an appropriate standard of review from among the heightened standards of scrutiny the Court applies to governmental actions alleged to infringe enumerated constitutional rights.

Ezell I, 651 F.3d at 703 (emphasis added).

The Supreme Court has addressed arms prohibitions on four separate occasions, and it has *never once* indicated that an interest-balancing approach—such as a heightened scrutiny analysis—is the appropriate method of review. In fact, the Court has twice expressly rejected such an approach. *Heller,* 554 U.S. at 628–35; *McDonald*, 561 U.S. at 785.

As detailed *supra*, the Court held handgun bans categorically invalid in *Heller* and *McDonald* solely because the arms were "in common use." In *Caetano*, the Court reversed a lower court decision upholding a stun gun ban; the lower court had wrongly thought prohibition was lawful because stun guns were not contemplated or in common use in 1789, and are not readily adaptable for military use. 136 S.Ct. at 127–28. The concurrence stated that since stun guns are in common use today, the ban was categorically invalid. *Id.* at 1033 (Alito, J., concurring). In *Miller*, the Court reversed a district court decision striking an indictment for

violating a registration law on short-barreled shotguns, because there was no evidence whether such guns were "in common use." 307 U.S. at 179.

To apply an interest-balancing test to a prohibition of common arms would directly contradict Supreme Court precedent.

CONCLUSION

The district court's decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 4,854 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(f).

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14-point, proportionately spaced Century Schoolbook font.

Dated this 23rd day of September 2019.

/s/ *Joseph G.S. Greenlee*
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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2019, I served the foregoing brief via the CM/ECF system for the United States Court of Appeals for the Ninth Circuit, which will distribute the brief to all attorneys of record in this case. No privacy redactions were necessary.

Dated this 23rd day of September 2019.

/s/ *Joseph G.S. Greenlee*
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