

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

ASSOCIATION OF NEW JERSEY)	
RIFLE & PISTOL CLUBS, INC., <i>et</i>)	Hon. Peter G. Sheridan, U.S.D.J.
<i>al.</i> ,)	Hon. Lois H. Goodman, U.S.M.J.
)	Civil Action No. 18-cv-10507
<i>Plaintiffs,</i>)	
v.)	
)	Oral Argument Requested
GURBIR GREWAL, <i>et al.</i> ,)	
)	Motion Date: July 12, 2018
<i>Defendants.</i>)	
)	<u>CIVIL ACTION</u>
)	
)	(ELECTRONICALLY FILED)
)	

**PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR
MOTION FOR PRELIMINARY INJUNCTION**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. Plaintiffs Are Likely To Succeed on Their Second Amendment Claim.....	1
II. Plaintiffs Are Likely To Succeed on Their Equal Protection Claim.....	13
III. Plaintiffs Are Likely To Succeed on Their Takings Claim.....	15
IV. The Remaining Factors Favor Injunctive Relief	20
CONCLUSION	20

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Akins v. United States</i> , 82 Fed. Cl. 619 (2008).....	17
<i>AmeriSource Corp. v. United States</i> , 525 F.3d 1149 (Fed. Cir. 2008).....	17
<i>Andrus v. Allard</i> , 444 U.S. 51 (1979).....	18
<i>Binderup v. Attorney Gen. United States of America</i> , 836 F.3d 336 (3d Cir. 2016)	6, 8
<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 134 S. Ct. 2751 (2014)	13
<i>Caetano v. Massachusetts</i> , 136 S. Ct. 1027 (2016).....	1, 3
<i>Clark v. Jeter</i> , 486 U.S. 456 (1988).....	13, 14
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008)	<i>passim</i>
<i>Duncan v. Becerra</i> , 265 F. Supp. 3d 1106 (S.D. Cal. 2017)	1, 9, 12, 17, 19
<i>Ezell v. City of Chicago</i> , 651 F.3d 684 (7th Cir. 2011)	2, 19, 20
<i>Fesjian v. Jefferson</i> , 399 A.2d 861 (D.C. 1979).....	18
<i>Friedman v. City of Highland Park</i> , 136 S. Ct. 447 (2015)	12
<i>Friedman v. City of Highland Park</i> , 784 F.3d 406 (7th Cir. 2015).....	5, 12
<i>Gordon v. Holder</i> , 721 F.3d 638 (D.C. Cir. 2013)	20
<i>Heller v. District of Columbia</i> , 670 F.3d 1244 (D.C. Cir. 2011).....	12
<i>Heller v. District of Columbia</i> , 801 F.3d 264 (D.C. Cir. 2015).....	10
<i>Horne v. Department of Agriculture</i> , 135 S. Ct. 2419 (2015).....	17, 19
<i>Jackson v. City & County of San Francisco</i> , 746 F.3d 953 (9th Cir. 2014)	1
<i>K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.</i> , 710 F.3d 99 (3d Cir. 2013).	20
<i>Katz v. United States</i> , 389 U.S. 347 (1967)	4
<i>Kelo v. City of New London</i> , 545 U.S. 469 (2005)	18
<i>Kolbe v. Hogan</i> , 849 F.3d 114 (4th Cir. 2017).....	2, 12
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982).....	15
<i>Lucas v. South Carolina Coastal Council</i> , 505 U.S. 1003 (1992)	16, 17, 18

McCullen v. Coakley, 134 S. Ct. 2518 (2014)13, 14
Mugler v. Kansas, 123 U.S. 623 (1887)16, 17
Nken v. Holder, 556 U.S. 418 (2009)20
Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007).....12
Reilly v. City of Harrisburg, 858 F.3d 173 (3d Cir. 2017)20
Silveira v. Lockyer, 328 F.3d 567 (9th Cir. 2003)5
Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994)7
United States v. Barton, 633 F.3d 168 (3d Cir. 2011)6
United States v. Marzzarella, 614 F.3d 85 (3d Cir. 2010).....7, 13
Yancey v. United States, 915 F.2d 1534 (Fed. Cir. 1990).....15, 17, 19

Statutory Provisions

18 U.S.C. § 926C15
A2761
 § 3.....19
 § 5(a)19
N.J.S.A. 2C:39-3(g)19
N.J.A.C.
 § 13:55-4.115
 § 13:55-4.215

Other

James Alan Fox & Monica J. DeLateur, *Mass Shootings in America*,
18 HOMICIDE STUDIES 125 (2014), available at <https://goo.gl/bz4Jv7>9, 11
NICHOLAS J. JOHNSON, ET AL., FIREARMS LAW AND THE SECOND AMENDMENT:
REGULATION, RIGHTS, AND POLICY (2018), <https://goo.gl/wboJWC>5
CHRISTOPHER S. KOPER, ET AL., AN UPDATED ASSESSMENT OF THE FEDERAL
ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE,
1994–2003, REP. TO THE NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE
(2004), <https://goo.gl/44V3zp>.....11
Nick Wing, *Banning High Capacity Magazines Should Absolutely Be a Winnable
Issue*, HUFFPOST (Mar. 14, 2018), <https://goo.gl/RBiqmW>8

The Second Amendment “elevates above *all other interests* the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (emphasis added). The State does not dispute that standard-capacity magazines are “arms,” and there is no doubt that its magazine ban forbids “law-abiding, responsible citizens” the right to use an entire category of commonly possessed arms “in defense of hearth and home.” *Id.* That is sufficient to hold that Act A2761 violates the Second Amendment. Furthermore, the statute’s exception for retired law enforcement officers and indifference towards private property rights violates the Equal Protection Clause and the Takings Clause.

ARGUMENT

I. Plaintiffs Are Likely To Succeed on Their Second Amendment Claim.

“[T]he Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” *Heller*, 554 U.S. at 582; *see also Caetano v. Massachusetts*, 136 S. Ct. 1027, 1027 (2016) (per curiam). The State does not dispute that standard-capacity magazines are “Arms” within the meaning of the Second Amendment.¹ The

¹ The Giffords Law Center contends that standard-capacity magazines are “accessories” rather than “Arms” because their function is to “enhance[] ammunition capacity far beyond what is needed.” Giffords Br. 16–18. But ammunition is necessary to the exercise of the Second Amendment, *see Jackson v. City & County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014); *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1116 (S.D. Cal. 2017), and limiting magazine capacity limits the amount of ammunition that can be used. If New Jersey had a law

magazines are therefore presumptively within the Second Amendment’s protection, and the burden shifts to the State to prove that an exception to the Second Amendment applies. *See Ezell v. City of Chicago*, 651 F.3d 684, 702–03 (7th Cir. 2011). The State offers two possible exceptions: the exception for dangerous and unusual weapons and the exception for longstanding regulations supported by historical tradition. Neither argument succeeds.

First, the State contends that *Heller* establishes an “exception [to the Second Amendment] for ‘dangerous weapons,’ ” State Br. 9, and it invokes the Fourth Circuit’s opinion in *Kolbe v. Hogan* for the notion that the “dispositive” test is whether an arm is “most useful in military service,” 849 F.3d 114, 137 (4th Cir. 2017). But this free-floating “dangerousness” test is “clearly at odds with the Supreme Court’s approach in *Heller*.” *Id.* at 155 (Traxler, J., dissenting). *Heller* did not leave the scope of the Second Amendment up to judicial determinations of whether an arm is too “dangerous” to warrant constitutional protection. *See* 554 U.S. at 634 (Judges do not have “the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.” (emphasis in original)). Thus, even though handguns were “the overwhelmingly favorite weapon of armed criminals,” and even though crimes committed with handguns were “7 times more likely to be lethal than

limiting the number of books its citizens could read, that would infringe the First Amendment, even if the State thought its citizens wanted to read books “beyond what [the State thought was] needed.” *Id.*

a crime committed with any other weapon,” *id.* at 682, 695 (Breyer, J., dissenting), *Heller* nonetheless held that handguns were protected by the Second Amendment and invalidated the D.C. handgun ban, *id.* at 636.

Indeed, *Heller* was clear about the test for determining whether arms are within the Second Amendment’s scope: “the sorts of weapons protected” are those “in common use.” *Id.* at 627; *see also id.* at 624–25. The Court acknowledged the “historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons,’ ” but it did so *in contrast with* those arms in common use. *Id.* In other words, if an arm is in “common use,” by definition it cannot be dangerous *and unusual*. *See Caetano*, 136 S. Ct. at 1031 (Alito, J., concurring). Therefore, so long as standard-capacity magazines are in common use, the “dangerous and unusual” exception does not apply. Because the State does not (and could not plausibly) dispute that standard-capacity magazines *are* in common use,² the State’s assertions regarding the “dangerousness” of such magazines are irrelevant, *see* State Br. 9–12, and the magazines receive full constitutional protection.

The State and Everytown for Gun Safety respond that the common-use test is “circular” and “illogical,” *id.* at 12–13; Everytown Br. 9–12, but the Supreme Court

² The Giffords Law Center suggests that the relevant standard is whether standard-capacity magazines are in common use *in New Jersey*, but *Heller* looked nationwide to determine common use. *See* 554 U.S. at 628. In any event, standard-capacity magazines are in common use in New Jersey. *See* Bach Decl. ¶ 13.

rejected those arguments when Justice Breyer raised them in his *Heller* dissent, *see Heller*, 554 U.S. at 721–22 (Breyer, J., dissenting). In any event, the common-use test is not circular. Just as the scope of the Fourth Amendment is tied to the People’s “reasonable expectation of privacy,” *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring), the Second Amendment relies on the People’s exercise of sound judgment as to which arms to use for lawful purposes.

The State falls back to asserting that, even if standard-capacity magazines are in common use, there is no evidence that they are “typically possessed by law-abiding citizens for lawful purposes.” State Br. 13–14 (quoting *Heller*, 554 U.S. at 625). But it would be implausible to claim that the approximately *133 million* standard-capacity magazines in the United States—approximately half the magazines in circulation—are *typically* possessed for *unlawful* purposes. One would have to believe that America was overrun by armed criminals. Undaunted, the State demands that Plaintiffs show “how many households” possess, or “what type of person” has, standard-capacity magazines. *Id.* at 14. Yet the Supreme Court in *Heller* provided no such information in holding that handguns were in common use and typically possessed for lawful purposes. Nor did it matter to the Court that “gun ownership . . . is concentrated.” *Id.* And the Court spent *no* time examining how often handguns were actually used in self-defense.³ *See id.* at 14–15. Rather, the fact

³ The relevant question is whether arms are *possessed* for lawful purposes, *see*

that handguns were an extremely popular firearm was sufficient for the Court to conclude that they were typically possessed for lawful purposes. *See Heller*, 554 U.S. at 628–29. The same is true here. *See Friedman v. City of Highland Park*, 784 F.3d 406, 416 (7th Cir. 2015) (Manion, J., dissenting).

Next, the State and its amici assert that New Jersey’s standard-capacity magazine ban is a longstanding regulatory measure that is “presumptively lawful.” State Br. 16–18; Everytown Br. 4–9; *see also* Giffords Br. 24–26. In addition to the states noted in Plaintiffs’ opening brief, New Jersey and its amici have identified two jurisdictions (California and Virginia) that enacted laws restricting magazine capacity during the Prohibition Era.⁴ But both states—like Rhode Island and Michigan—had repealed those laws by the 1970s. *See* NICHOLAS J. JOHNSON, ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 529 (2018), <https://goo.gl/wboJWC>. It remains undisputed that the few laws

Heller, 554 U.S. at 625, not how often citizens are forced to *use* them for lawful purposes, *see Silveira v. Lockyer*, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting) (“The Second Amendment is a doomsday provision . . .”). And the fact that the State exempts retired police officers (who are civilians) shows that it believes it will often-enough be necessary for civilians to lawfully use standard-capacity magazines. *Compare* Kleck *Duncan* Decl. ¶¶ 9–18 (Exhibit A to Schmutter Decl.) *with* Allen Decl. ¶¶ 7–19.

⁴ The State also cites laws from Illinois, Louisiana, South Carolina, South Dakota, and Texas, but as Everytown for Gun Safety correctly points out, these laws only prohibited certain types of automatic firearms. *See* Everytown Br. 6 n.11. They were not broadly applicable laws restricting magazine capacity.

regulating magazine capacity were recent and short-lived.

Even if the type of magazine ban at issue in this case *were* longstanding and were not a minority position, that would only establish a *presumption* in favor of its constitutionality, and “the presumption may be rebutted.” *United States v. Barton*, 633 F.3d 168, 173 (3d Cir. 2011); *see also Binderup v. Attorney Gen. United States of America*, 836 F.3d 336, 347 (3d Cir. 2016) (en banc) (Ambro, J.); *id.* at 358 (Hardiman, J., concurring in part and concurring in the judgments). *Heller* made clear that any such presumption must be based on “historical justifications,” 554 U.S. at 635, and it likewise made clear that “[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them,” *id.* at 634–35. For those reasons, the Third Circuit looks to “our founding era” for any “historical justifications” that support a presumption of constitutionality. *See Binderup*, 836 F.3d at 348–49 (Ambro, J.); *id.* at 367–74 (Hardiman, J.). And *Heller* establishes what founding-era justification exists for banning a certain type of weapon: that it is dangerous *and* unusual. Standard-capacity magazines are neither. There is, therefore, no historical justification for New Jersey’s magazine ban, and any presumption of its lawfulness is rebutted based on uncontested evidence.

Alternatively, the State argues that its standard-capacity magazine ban survives applicable scrutiny. It argues that Act A2761 is not a ban and does not severely burden the Second Amendment because the law allows citizens to possess

other types of magazines. State Br. 19, 26. But the handgun ban invalidated in *Heller* permitted D.C. residents to own other types of firearms, yet the Supreme Court nonetheless held that this was “no answer” to the reality that handguns were banned despite being in common use. 554 U.S. at 629. In the same way, the fact that other types of magazines are permitted is “no answer” to banning a class of magazines in common use. Under *Heller*, that suffices to invalidate the State’s ban without resorting to a tiers-of-scrutiny analysis. *See* Pls.’ Br. 15–18.

As the State acknowledges, “if a law burdens the core of the right conferred upon individuals by the Second Amendment, strict scrutiny is required.” State Br. 19 (quotation marks omitted). The State mischaracterizes the “core” of the right as limited to handguns, *id.*, but because Act A2761 is a ban on possession of standard-capacity magazines *even in the home*, it “implicates [citizens’] interest in the defense of hearth and home,” which indisputably is part of “the core protection of the Second Amendment,” *Marzzarella*, 614 F.3d at 94; *see also* Pls.’ Br. 19–20.

But even if intermediate scrutiny applies, the magazine ban must fall. The State downplays its burden under intermediate scrutiny by cherry-picking quotes from various cases, *see* State Br. 20–21, but the State “must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will *in fact* alleviate these harms in a direct and material way,” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (emphasis added). Notwithstanding the deference owed to

legislatures, the State must “present some meaningful evidence, not mere assertions, to justify its predictive judgments.” *Binderup*, 836 F.3d at 354 (Ambro, J.) (alteration omitted); *id.* at 378–79 (Hardiman, J.).

Here, the State’s burden is especially onerous because the question is *not* whether *any* limitation on magazine capacity passes scrutiny; the question is whether *changing* the State’s limitation from 15 rounds to 10 rounds passes scrutiny. This is a critical point that the State overlooks in its brief. The State offers *no evidence at all* that its interest in public safety will be advanced by lowering the magazine limit from 15 rounds to 10. The State does not claim, let alone *prove*, that any of the mass shootings surveyed by its experts would have been prevented or made less deadly by a 10-round limit rather than a 15-round limit. Indeed, the opening paragraph of the State’s brief undercuts any such assertion, since all of the mass shootings it cites either involved magazines exceeding New Jersey’s *previous* 15-round limit or compliant with the new 10-round ban.⁵ This failure of proof is decisive.

The State and its amici make several assertions in favor of the ban’s constitutionality, but none of them holds up. First, they claim that there is a correlation between standard-capacity magazines and mass shootings. *See* State Br. 9–10, 23; Everytown Br. 13–15; Giffords Br. 3–4, 10–11. There are serious issues

⁵ It is unclear whether the Parkland shooter used 10- or 30-round magazines. *See* Nick Wing, *Banning High Capacity Magazines Should Absolutely Be a Winnable Issue*, HUFFPOST (Mar. 14, 2018), <https://goo.gl/RBiqmW>.

with this claim, but it is irrelevant in any event. *Heller* struck down D.C.’s handgun ban even though handguns were the “overwhelmingly favorite weapon of armed criminals,” 554 U.S. at 682 (Breyer, J., dissenting), so a correlation between a particular arm and criminal behavior cannot save the State’s ban.

Of course, correlation does not prove causation, and there are significant problems with the State’s evidence. For example, Lucy Allen’s correlation relies on a *Mother Jones* database, Allen Decl. ¶¶ 20–22, whose methodology has been described by scholars as “hard to defend,” see James Alan Fox & Monica J. DeLateur, *Mass Shootings in America*, 18 HOMICIDE STUDIES 125, 129 (2014), available at <https://goo.gl/bz4Jv7>; see also *Duncan*, 265 F. Supp. 3d at 1122; Kleck *Duncan* Decl. ¶¶ 25–27. A sounder analysis showed no correlation between mass shootings and the use of standard-capacity magazines. See *id.* ¶¶ 28–29.

Second, the State and its amici assert that forcing mass shooters to use lower-capacity magazines will result in fewer shots fired and create reloading “pauses” that will allow victims to escape or subdue their attackers.⁶ See State Br. 10–11, 22; Everytown Br. 13–16; Giffords Br. 2–4, 11. But the State never explains why 10 rounds, versus some other number, is the proper limit. And this argument proves too

⁶ The State also asserts that it is dangerous to entrust average citizens with standard-capacity magazines because they could shoot indiscriminately and hurt someone. State Br. 10–11. There is no evidence that this is a real risk—as demonstrated by the State’s own assertions about the average number of rounds fired by citizens in self-defense. See Kleck *Duncan* Decl. ¶¶ 19–22; State Br. 14.

much. If the State’s ban could be justified by its assertion that reductions in magazine capacity lead to fewer deaths, there is no logical reason why the State could not ban magazines *altogether*, yet that plainly would be unconstitutional. *See Heller v. District of Columbia*, 801 F.3d 264, 280 (D.C. Cir. 2015). Moreover, the State never addresses Dr. Kleck’s analysis demonstrating that reloading generally will not slow a mass-shooter’s rate of fire or provide “pauses” that enable victims to escape.⁷ Kleck Decl. ¶¶ 23–25, 30–31; *see also* Kleck *Duncan* Decl. ¶¶ 30–44. Nor has the State disproven Dr. Kleck’s conclusion that between 1984 and 2013 there was only one known instance of a victim subduing a mass shooter who used a standard-capacity magazine. Kleck Decl. ¶¶ 24–29. Instead, the State and its amici rely on misleading calculations⁸ and contestable⁹ or irrelevant¹⁰ anecdotes.

⁷ Everytown for Gun Safety asserts that Dr. Kleck’s analysis has been refuted by an expert in *Duncan*, *see* Everytown Br. 19, but the District Court in that case did not question Dr. Kleck’s conclusions. Rather, the court questioned the credibility of the expert that Everytown relies upon. *See Duncan*, 265 F. Supp. 3d at 1128–29. As for the alleged debunking of Dr. Kleck’s defensive-gun-use statistics, *see* Everytown Br. 18, Kleck has debunked the debunkers, *see* Kleck *Duncan* Decl. ¶¶ 1–8.

⁸ *See, e.g.*, Allen Decl. ¶ 23 (using *Mother Jones* database); *compare* Everytown Br. 13 (alleging correlation between standard-capacity magazine use and number of deaths), *with* Kleck *Duncan* Decl. ¶¶ 35–44 (finding no causation).

⁹ *Compare* Donahue Decl. ¶ 30 (asserting that children escaped during a reloading pause at the Newtown massacre and that a bystander tackled the Tucson shooter when he was reloading), *with* Kleck *Duncan* Decl. ¶ 32 (unclear if children escaped during a reloading pause), *and* Kleck Decl. ¶ 27 (unclear if Tucson shooter tackled during a reloading pause).

¹⁰ *See, e.g.*, Giffords Br. 4 n.2 (citing the reloading pause of the Washington

Third, the State and the Giffords Law Center assert that the number of mass shootings has increased over time, especially since the lapse of the federal ban on standard-capacity magazines.¹¹ *See* State Br. 24; Giffords Br. 12–14. That is simply false, *see* Fox & DeLateur, *supra*, at 128–30, and even if it were true, it would not prove that standard-capacity magazines cause mass shootings.¹²

Fourth, the State contends that Act A2761 will reduce criminals’ access to standard-capacity magazines. State Br. 21–22. But even if that were true, the State does not dispute that criminals almost never fire more than 10 rounds in a gun crime, *see* Kleck Decl. ¶ 20, and because the mass shooters who do would generally be unaffected by the need to reload, *see supra* pp. 9–10, the magazine ban would do little for the State’s interest in public safety even if it succeeded in depriving criminals of access. Of course, the reality is that the ban will *not* deprive them of

Navy Yard shooter, even though a shotgun would be unaffected by a magazine ban).

¹¹ The State notes that Christopher Koper, who authored the official report concluding that the federal ban could not be credited with any of the drop in gun violence, also said that the “effects of the law would occur only gradually.” State Br. 24. But Koper went on to say that, even with the benefit of more time, “the ban’s impact on gun violence is likely to be small at best, and perhaps too small for reliable measurement.” CHRISTOPHER S. KOPER, ET AL., AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE, 1994–2003, REP. TO THE NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE 97 (2004), <https://goo.gl/44V3zp>.

¹² The State also asserts, without any evidence, that a state-level ban is more likely to be effective than the federal ban. *See* State Br. 25 n.9. That is implausible, since a state ban can be circumvented by criminals purchasing magazines legally in other states. *See* KOPER, *supra*, at 81 n.95.

access, since standard-capacity magazines remain legal in 43 States and, in any event, criminals have no problem breaking the law to obtain their arms of choice.¹³

The State's last rationale is that every federal appellate court to address the issue has upheld a standard-capacity magazine ban. *See* State Br. 23–24. This argument-from-authority is thin. *Kolbe*, *Friedman*, and *Heller II* were contrary to Supreme Court precedent and elicited forceful dissents, *see Kolbe*, 849 F.3d at 155–57 (Traxler, J., joined by three other judges, dissenting); *Friedman*, 784 F.3d at 413–14 (Manion, J., dissenting); *Heller v. District of Columbia*, 670 F.3d 1244, 1271–82 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), and *Friedman* earned a dissent from the denial of certiorari, *see Friedman v. City of Highland Park*, 136 S. Ct. 447 (2015) (Thomas, J., dissenting from the denial of certiorari). The courts of appeals do not have a great track record in this area. *See Parker v. District of Columbia*, 478 F.3d 370, 380 n.4 (D.C. Cir. 2007) (listing nine courts of appeals that had rejected the individual-right interpretation of the Second Amendment vindicated by *Heller*). Moreover, a California district court has issued a preliminary injunction against a standard-capacity magazine ban, so this Court would not be the first. *See Duncan*, 265 F. Supp. 3d at 1139–40.

¹³ Puzzlingly, the State responds by pointing to the allegedly widespread theft of law-abiding citizens' firearms as a source for criminals, but even if true, this fact actually *proves* that criminals are willing to break laws like the magazine ban to obtain the arms that they want. *See* State Br. 21.

Finally, the State's ban can only be upheld under intermediate scrutiny if it burdens no more conduct than is reasonably necessary. *Marzzarella*, 614 F.3d at 98. The State has offered no explanation for why its ban extends to possession of standard-capacity magazines in the home—the core of the Second Amendment right—given that the alleged harm that it seeks to remedy (mass shootings) typically occurs outside the home. That alone suffices to invalidate the ban under intermediate scrutiny. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2537 (2014). The unduly broad reach of the State's ban is further demonstrated by additional alternatives the State could have pursued but did not, including a licensing requirement, a training requirement, and requiring magazines to be stored in a secure way when not in use.¹⁴

II. Plaintiffs Are Likely To Succeed on Their Equal Protection Claim.

The State has failed to provide a justification for the retired law enforcement officer exception that can survive heightened scrutiny. The State asserts that, if Plaintiffs' Second Amendment challenge fails, Act A2761 is subject to rational-basis review. That is incorrect. So long as standard-capacity magazines are in common use (as they undoubtedly are), they are protected by the right to keep and bear arms, and even if the ban does not *violate* that right, it certainly *affects and limits* that right, which is all that is required for strict scrutiny to apply. *See Clark v. Jeter*, 486 U.S.

¹⁴ Plaintiffs do not take a position on the constitutionality of these alternatives, but this Court can nonetheless take the State's failure to pursue them into account. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781–82 (2014).

456, 461 (1988). The State’s sole basis for distinguishing between retired police officers and average, law-abiding citizens is that the retired officers are better trained, but even assuming that 15-round magazines require specialized training that 10-round magazines do not (an implicit premise of the State’s argument that it never acknowledges or defends), it is radically disproportionate to address that problem by *banning* standard-capacity magazines. An obvious—and far less burdensome—solution could have been to require citizens to undertake mandatory training in order to possess such magazines, yet the State gives no hint that it even *considered* that solution. *See McCullen*, 134 S. Ct. at 2537.

The State’s training rationale fares even worse as applied to retired members of the armed forces. The State claims that the “firearms training” of its law enforcement officers is “vastly different” than the equivalent training in the armed forces and that military officers receive “little, if any, handgun training.” Stanton Decl. ¶¶ 22–23. But Act A2761 bans the use of *standard-capacity magazines*, not handguns in particular or firearms in general, so any specialized *handgun* training is irrelevant. The only potentially relevant distinction the State offers is that its officers “are accountable for every round fired and are instructed to avoid the indiscriminate destruction of property.” *Id.* ¶ 24. But does the State truly believe that members of the armed forces are *not* trained to “avoid the indiscriminate destruction of

property”? The suggestion is as astonishing as it is implausible.¹⁵ The import of “civilian” training is further undermined by the failure to exempt security guards, who are required to undertake ongoing training. *See* N.J.A.C. §§ 13:55-4.1, -4.2.

III. Plaintiffs Are Likely To Succeed on Their Takings Claim.

By dispossessing owners of their lawfully-acquired property without compensation, Act A2761 violates the Takings Clause.

Supreme Court precedent forecloses the State’s primary response: that the State may confiscate property without compensation if it acts pursuant to its police power. State Br. 27–28. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court held that a law requiring physical occupation of private property was both “within the State’s police power” *and* an unconstitutional taking, *id.* at 425. The Court expressly stated that whether a law effects a taking is a “separate question” from whether the State has the police power to enact it, for an uncompensated taking is unconstitutional “without regard to the public interests that it may serve.” *Id.* at 425–26. “The Government’s proper exercise of regulatory authority does not automatically preclude a finding that such action is a compensable taking.” *Yancey v. United States*, 915 F.2d 1534, 1540 (Fed. Cir. 1990).

The State nevertheless insists that there is an exception to this rule for “state

¹⁵ The State suggests that Plaintiffs’ argument would require invalidation of 18 U.S.C. § 926C, but concealed carry laws raise a distinct set of justifications and equal-protection questions. *See Heller*, 554 U.S. at 626–27.

laws prohibiting the possession of dangerous products.” State Br. 27. In support, the State cites a line of cases beginning with *Mugler v. Kansas*, 123 U.S. 623 (1887), upholding regulations on the use of property. State Br. 27. As an initial matter, the Supreme Court squarely rejected the argument that *Mugler* carved out a “noxious use” exception to the Takings Clause in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). There, the Council argued unsuccessfully that its uncompensated per se taking was permissible because it “involved an exercise of South Carolina’s ‘police powers’ to mitigate the harm to the public interest that petitioner’s use of his land might occasion.” 505 U.S. at 1020–21. Cabining *Mugler* and its progeny as “early formulation[s] of the police power justification necessary to sustain . . . any regulatory diminution in value,” the Court found it “self-evident that noxious-use logic cannot serve as a touchstone to distinguish” takings that require compensation “from regulatory deprivations that do not.” *Id.* at 1026.

The Takings Clause would afford little protection to property rights if the government could evade its compensation requirement by claiming it is taking property not to provide for “public use” but instead to protect the public from some danger. Because “the distinction between ‘harm-preventing’ and ‘benefit-conferring’ regulation is often in the eye of the beholder,” a wide range of confiscations could be justified under this rubric. *Id.* at 1024. Critically, the *Lucas* Court pointed out that it had *never* “employed the logic of ‘harmful use’ prevention

to sustain” an uncompensated *per se* taking. *Id.* at 1026. Neither should this Court.¹⁶

In any event, unlike the laws at issue in *Mugler* and its progeny, A2761 does not simply regulate the use of Plaintiffs’ property. Instead, it prohibits Plaintiffs from continuing to possess their lawfully-acquired property, thereby working a physical taking of that property. *See Horne v. Department of Agriculture*, 135 S. Ct. 2419, 2429 (2015). Apart from recent decisions analyzing takings challenges to arms bans in a preliminary injunction posture,¹⁷ the State’s cited decisions do not involve bans on the continued possession of lawfully acquired property. *See Mugler*, 123 U.S. at 669 (restriction on the use of property for particular purposes); *Akins v. United States*, 82 Fed. Cl. 619, 622–23 (2008) (registration requirement); *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1153 (Fed. Cir. 2008) (confiscation of

¹⁶ The State seeks to limit *Lucas* to real property. State Br. 29–30. True, *Lucas* allowed that uncompensated restrictions on the *sale* of personal property were more likely to be upheld under the Court’s regulatory takings analysis in light of “the State’s traditionally high degree of control over commercial dealings,” *Lucas*, 505 U.S. at 1027, but it never suggested that the Takings Clause does not require compensation for State regulation of personal property under the police power. To the contrary, “[n]othing in the text or history of the Takings Clause . . . suggests that the rule is any different when it comes to appropriation of personal property.” *Horne v. Department of Agriculture*, 135 S. Ct. 2419, 2426 (2015); *Yancey*, 915 F.2d at 1541 (regulatory takings).

¹⁷ Courts have divided on the status of confiscatory magazine bans under the Takings Clause. Contrary to the State’s contention, however, the district court in *Duncan* squarely confronted and rejected a police-power exception to takings, and its analysis did not rely on its separate conclusion that magazines are protected by the Second Amendment. 265 F. Supp. 3d at 1136–37.

property in connection with criminal proceeding). The sole exception—a forty-year-old D.C. Court of Appeals decision that predated *Loretto*, *Lucas*, and *Horne*—summarily rejected a takings challenge based on the now-discredited assumption that exercises of the police power are categorically exempt from the Takings Clause. *Fesjian v. Jefferson*, 399 A.2d 861, 866 (D.C. 1979).¹⁸

Next, the State also argues that A2761 does not effect a taking because Plaintiffs may choose to be dispossessed of their property by means other than a direct appropriation. State Br. 31. For the reasons set out in Plaintiffs’ opening brief—none of which the State addresses—these options do not render the law anything other than a taking. Forcing Plaintiffs to transfer their property to a third party is no less a taking than if the State seized it. The gravamen of a physical taking is the dispossession of property. Whether the government edict forces the owner to hand the property over to the government or to a third party, there is still a taking. *See Kelo v. City of New London*, 545 U.S. 469, 473–75 (2005). Affording Plaintiffs the opportunity to alter or destroy their property does not save the law, either. It is

¹⁸ The power to abate nuisances is not a justification for the ban. Governments may act to abate nuisances without paying compensation only to the extent consistent with preexisting, background principles of nuisance law “inhere in the title itself.” *Lucas*, 505 U.S. at 1029–30. The State makes no argument that A2761 “expressly prohibit[s]” that which was “*always* unlawful,” *id.* at 1030–31, and a duty to compensate arises when the State criminalizes continued possession of *lawfully*-owned property. This is likely why governments often exempt existing owners from possession bans. *See, e.g., Andrus v. Allard*, 444 U.S. 51, 56 (1979).

often the case that parties can evade a confiscatory regulation by altering their property, but the Supreme Court has admonished that “property rights cannot be so easily manipulated.” *Horne*, 135 S. Ct. at 2430 (quotation marks omitted).

A2761 fares no better when analyzed as a regulatory taking. The State insists that it does not deprive Plaintiffs of all economically beneficial use of their property. But even if it does not result in a complete loss in value, regulatory action may constitute a taking if it interferes with a property owner’s reasonable, investment-backed expectations. Whatever else property owners may expect, they “do not expect their property, real or personal, to be actually occupied or taken away.” *Horne*, 135 S. Ct. at 2427; *see also Duncan*, 265 F. Supp. 3d at 1138. Nor do they expect to be forced to sell, destroy, or alter property. *See Yancey*, 915 F.2d at 1540.

Finally, even if Plaintiffs may obtain *some* compensation for their property by selling it, A2761 does not secure Just Compensation, which is what the Constitution requires. To the contrary, A2761 virtually guarantees that any sale would return less than just compensation by providing for an influx of magazines into a limited market of those “entitled to own or possess” them. A2761 § 5(a). That is a narrow class, consisting primarily of retired and active police officers and active military personnel and dealers who sell to them. N.J.S.A. 2C:39-3(g); A2761 § 3.¹⁹

¹⁹ To the extent an out-of-State sale is possible, New Jersey cannot justify its ban by the less restrictive laws of other jurisdictions. *See Ezell*, 651 F.3d at 697.

IV. The Remaining Factors Favor Injunctive Relief.

While Plaintiffs need only show that irreparable harm is “more likely than not,” *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017), here it is certain for “a prospective violation of a constitutional right constitutes irreparable injury. *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013); *see also Ezell*, 651 F.3d at 699. The remaining two factors “merge when the Government is the opposing party,” *Nken v. Holder*, 556 U.S. 418, 455 (2009), and they favor Plaintiffs because “the enforcement of an unconstitutional law vindicates no public interest,” *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 114 (3d Cir. 2013).

CONCLUSION

Plaintiffs respectfully request that the Court enter a preliminary injunction.

Dated: July 9, 2018

Respectfully submitted,

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* Admitted *pro hac vice*

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

ASSOCIATION OF NEW JERSEY)
RIFLE & PISTOL CLUBS, INC.,)

BLAKE ELLMAN, *and*)

ALEXANDER DEMBOWSKI,)
Plaintiffs,)

v.)

GURBIR GREWAL, in his official)
capacity as Attorney General of New)
Jersey,)

PATRICK J. CALLAHAN, in his)
official capacity as Superintendent of)
the New Jersey Division of State)
Police,)

THOMAS WILLIVER, in his official)
capacity as Chief of Police of the)
Chester Police Department, *and*)

JAMES B. O’CONNOR, in his official)
capacity as Chief of Police of the)
Lyndhurst Police Department,)

Defendants.

HON. PETER G. SHERIDAN,
U.S.D.J.

HON. LOIS H. GOODMAN,
U.S.M.J.

CIVIL ACTION NO. 18-cv-10507

CIVIL ACTION

(ELECTRONICALLY FILED)

**REPLY DECLARATION OF DANIEL L. SCHMUTTER IN
FURTHER SUPPORT OF PLAINTIFFS’ MOTION FOR
PRELIMINARY INJUNCTION**

1. I, Daniel L. Schmutter, am an attorney at the law firm of Hartman & Winnicki, P.C., attorneys of record for Plaintiffs in the above-titled action. I am

licensed to practice law before the United States District Court for the District of New Jersey. I have personal knowledge of the facts set forth herein and, if called and sworn as a witness, could and would testify competently thereto.

2. A true and correct copy of the Supplemental Declaration of Gary Kleck submitted in *Duncan v. Becerra*, No. 17-cv-1017 (S.D. Cal.), is attached as **Exhibit A**.

I declare under penalty of perjury that the foregoing is true and correct.

Executed within the United States.

/s/ DANIEL L. SCHMUTTER

July 9, 2018

Daniel L. Schmutter

Date

EXHIBIT A

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7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 VIRGINIA DUNCAN, RICHARD
11 LEWIS, PATRICK LOVETTE, DAVID
MARGUGLIO, CHRISTOPHER
12 WADDELL, CALIFORNIA RIFLE &
PISTOL ASSOCIATION,
13 INCORPORATED, a California
corporation,

14 Plaintiffs,

15 v.

16 XAVIER BECERRA, in his official
capacity as Attorney General of the State
17 of California; and DOES 1-10,

18 Defendant.

Case No: 17-cv-1017-BEN-JLB

**SUPPLEMENTAL DECLARATION
OF GARY KLECK IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Date: June 13, 2017
Time: 10:00 a.m.
Dept: 5A
Judge: Hon. Roger T. Benitez

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DECLARATION OF GARY KLECK

Americans Frequently Use Guns for Self-Protection

1. Defendant expert Alexandra Gordon cites (in her Exhibit 71) a report produced by a gun control advocacy organization, the Violence Policy Center, which claims that estimates of DGU frequency generated by Kleck and Gertz (1995) have been discredited. The VPC report relies for this claim on critiques by David Hemenway (Violence Policy Center 2017, pp. 4-5). What the VPC authors did not share with their readers is that *every single one* of Hemenway's criticisms of the Kleck-Gertz estimates of DGU frequency, as well as all other published criticisms, have been decisively rebutted. These rebuttals have been published and widely available for years, and none of them have been refuted, or even responded to, by the critics of this survey. A handy source compiling all of the rebuttals into one place is Chapter 6 of the 2001 book Armed (Kleck and Kates 2001). None of the defendant's experts or sources cited by the defendants have refuted a single one of these rebuttals.

2. Every single claim made by David Hemenway in his critique of the Kleck-Gertz survey has been shown to be false (Kleck 2001). For example, that survey did not, as Hemenway claimed, "show 132,000 perpetrators killed or wounded by defenders each year," and thus there could not be any conflict between our survey results and hospital data on numbers killed or injured. We had too few DGU sample incidents (n=213, unweighted) to reliably estimate the share that resulted in wounded offenders, so our survey did not imply any particular number of "perpetrators killed or wounded by defenders each year," and we did not report any such estimates (Kleck and Gertz 1995). Therefore it was impossible to show any contradiction between our estimates and hospital data.

3. Likewise, the Kleck-Gertz survey did not show, as Hemenway claimed, that "more guns are wielded to defend against rapes each year than there are actual rapes or attempted rapes each year," for the simple and indisputable reason that we do not know the actual number of such crimes that occur each year (among many other problems with

1 Hemenway’s claim). It is universally understood among criminologists that neither the
2 National Crime Victims Survey (“NCVS”) nor any other source can tell us the total
3 number of sexual assaults or any other crime, because the true number of crimes is almost
4 certainly larger than the number that respondents to the NCVS are willing to report.
5 Hemenway also compared data on the wrong universe of sexual assaults, citing figures
6 that pertained to a smaller, noncomparable, subset of these crimes, artificially creating an
7 “inconsistency” between NCVS-based estimates and our estimates through his own error
8 (Kleck and Kates 2001, Chapter 6).

9 4. Hemenway falsely claimed the every external check of the validity of this
10 survey’s estimates failed to support those estimates, when in fact the opposite was true –
11 every single alternative measure of DGU frequency supported the Kleck-Gertz estimates.
12 The latter estimates were not only completely consistent with hospital data on numbers of
13 persons medically treated for gunshot wounds, and estimates of the frequency of sexual
14 assaults and other crimes, but have also been consistently confirmed by the results of
15 every other professionally conducted national surveys of representative samples of the
16 U.S. adult population. By 2001 there were at least 20 such surveys that *all* indicated
17 huge numbers of DGUs each year, ranging from 0.5 million to over 3 million, and
18 exceeding the number of crimes in which offenders used guns (Kleck and Kates 2001,
19 Chapter 6).

20 5. There is no valid scholarly foundation for the claim that the Kleck-Gertz or
21 other survey-based estimates of DGU frequency are even slightly too high. Quite the
22 contrary, the overwhelming weight of scholarly evidence on survey research
23 methodology favors the proposition that surveys are more likely to *underestimate* the
24 frequency of this sort of crime-related experience than to overestimate it. In order to
25 report a DGU in a survey, a respondent who has genuinely had such an experience must
26 be willing to report (1) a victimization experience (otherwise there could not have been a
27 defensive reaction to a crime), (2) their possession of a gun (otherwise the defensive
28 action could not be classified as a defensive use of a gun), and (3) (usually) the crime of

1 unlawful possession of a firearm in a public place (since most DGUs occur in public
2 places where, in 1993, it was unlawful for all but a tiny percent of the population to
3 possess a gun). The scientific literature on survey response errors *uniformly* indicates
4 that survey respondents in the general adult population on net underreport (1) crime
5 victimizations, (2) gun possession, and (3) unlawful behaviors by the respondent (see
6 Kleck 2001 for supporting citations). Consequently, estimates of DGU frequency are
7 more likely to be too low than too high.

8 6. Advocates of the theory that DGUs are actually quite rare invariably rely on
9 the National Crime Victimization Survey (NCVS) as their sole source of support,
10 ignoring the 20-plus national surveys that have consistently yielded far higher estimates.
11 Alexandra Gordon cites, in her Exhibit 71, a propaganda report produced by a gun
12 control advocacy organization, the Violence Policy Center (Gordon, p. 11). That report's
13 sole support for the proposition that DGUs are rare is the NCVS.

14 7. As has long been known, this survey radically underestimates the frequency
15 of DGUs, because it never asks any respondents specifically about DGUs, is a
16 nonanonymous survey, and is conducted by the federal government on behalf of the
17 Justice Department, the law enforcement branch of the U. S. government (Kleck 2001).
18 NCVS interviewers never ask respondents specifically about defensive use of guns;
19 instead they only ask broadly about any self-protection actions the crime victim might
20 have taken, giving respondents the opportunity to volunteer the specific information that
21 their self-protective actions included use of a gun. As the Research Director of the
22 National Opinion Research Center, Tom Smith, noted, "indirect questions that rely on a
23 respondent volunteering a specific element as part of a broad and unfocused inquiry
24 uniformly lead to undercounts of the particular of interest" (Smith 1997, p.p. 1462-1463).

25 8. Further, reporting a DGU in this survey may often require admitting to
26 unlawful possession of a gun in a public place (where most DGUs occur), so the facts
27 that (a) the respondent's identity is known to interviewers and that (b) respondents are
28 told that their information is being reported to the Justice Department strongly

1 discourages reporting of DGUs in the NCVS. Most decisively of all, NCVS estimates of
2 DGU frequency are radically lower (c. 100,000 per year) than estimates generated by
3 every other national survey that has asked about DGU (0.5-3 million per year) (Kleck
4 2001). Thus, the NCVS cannot be used to support any claim about the frequency of
5 DGU.

6 **Lucy Allen’s Analysis of NRA-Selected Defensive Gun Uses (DGUs) Can Tell**
7 **Us Nothing About How Often DGUs in General Involve Firing More than 10**
8 **Rounds**

9 9. Defendant’s expert Lucy Allen analyzed a sample of 736 DGUs selected by
10 the NRA for inclusion in the American Rifleman “Armed Citizen” column, and
11 concluded that DGUs virtually never involve a crime victim firing over 10 rounds (pp. 3-
12 4). There is no foundation for believing that these incidents are representative of the full
13 set of DGUs, and therefore her analysis can tell us nothing about the share of the full
14 population of DGUs that involve use of LCMs. The NRA’s database of “armed citizen”
15 stories is not a representative sample of defensive gun uses (DGUs), nor does the NRA
16 even claim it to be so. Findings from any analysis of this sample therefore cannot be
17 generalized to the larger population of DGUs. Allen admits the sample was “not
18 compiled scientifically,” but then proceeds to hint that the large size of the sample
19 somehow makes up for this problem (p. 3). It does not. Larger sample size cannot in any

20 10. Allen even concedes that the sample is “biased,” but speculates that
21 selection biases would favor inclusion of cases with many shots fired because such
22 incidents would put DGUs “in the best possible light.” This is counterintuitive. It is just
23 as plausible that NRA compilers who wanted to put DGU in a favorable light would
24 scarcely want to select DGUs in which the defenders appeared to indiscriminately “fling
25 lead,” firing arguably excessive numbers of rounds that might endanger bystanders.
26 Instead, NRA staff arguably would better serve their alleged political agenda by selecting
27 stories of responsible gun uses in which the defenders used the minimum amount of force
28 needed to defend themselves, firing the fewest rounds needed to serve that purpose. This

1 would bias the sample of selected DGUs in the direction of *excluding* cases in which
2 many rounds were fired. Allen's sample would therefore understate the frequency of
3 DGUs in which large numbers of shots were fired by the defender.

4 **Allen's Analysis of NRA-selected DGUs Nevertheless Confirms that DGUs**
5 **with Large Numbers of Rounds Fired Do Occur, Possibly Thousands of Times**
6 **Per Year**

7 11. Allen's own findings, while seemingly indicating that DGUs with over 10
8 rounds fired are rare, also indicated that they do occur. She found 2 such incidents in her
9 sample of 736 DGU's, a 0.3% share. Consider the implications, for example, if 0.3% of
10 all DGUs involved over 10 rounds being fired. National surveys that have specifically
11 asked about DGU have indicated 0.5-3.5 million DGUs per year (Kleck 2001), so it
12 would be reasonable to assume an average of at least 1 million DGUs per year in the U.S.
13 If this were the total frequency of DGUs, 0.3% would imply a number of DGU incidents
14 with over 10 rounds fired that was huge in absolute terms – about 3,000 per year – based
15 on Allen's own figures. Thus, the percent of DGUs involving many rounds fired does
16 not have to be very large in order for it to imply a huge absolute number of incidents.

17 12. Indeed, given how small Allen's sample was (n=736), her finding of 0.3% of
18 DGUs with over 10 rounds fired *in her small sample of DGUs* is actually not statistically
19 inconsistent with the hypothesis that 1% of the *entire population* of DGUs involve over
20 10 rounds fired, since the 0.3% result is well within the bounds of what one could
21 reasonably expect as a sample result in a randomly selected sample of just 736 cases if
22 1% of all DGUs involved more than 10 rounds fired. Samples selected from larger
23 populations of events do not all perfectly resemble the population, since they are always
24 subject to random sampling error. That is, due to the random character of the sampling
25 process, an analyst may, by pure chance, obtain a sample that contains either more or
26 fewer of the events of interest than would be the case if the sample resembled the
27 population perfectly.

28 13. The 95% confidence interval (CI) estimate of the percent of DGUs with over
10 rounds fired (symbolized as **p**) is the range in which one would expect to find 95% of

1 all the estimates one would obtain if one selected an infinite number of samples of a
2 given size. If one assumes that the true population percentage is 1% ($p=.01$), the 95% CI
3 is 0.28% to 1.719%.

4 14. This is the result of the following computations. The formula for the 95%
5 CI is: p plus or minus 1.96 (square root of $((p \times q)/n)$, where $q=1-p$ and n is the sample
6 size. If $p=.01$, then the 95% CI is 0.01 ± 1.96 (square root of $(.01 \times .99)/736$) = 0.01
7 ± 0.00719 , or 0.0028 to .01719, or 0.28% to 1.719%. This means that if the true
8 population percentage of DGUs with over 10 rounds fired were 1%, and one took an
9 infinite number of random samples, each with 736 DGUs, one would expect 95% of
10 sample estimates of this percentage to be between 0.28% and 1.719%.

11 15. In plain English, what this means is that even if 1% of all DGUs involved
12 over 10 rounds, one could nevertheless realistically expect to get a percentage of 0.3% in
13 a sample of 736 DGUs, due solely to random sampling error. Thus, getting a sample
14 result of 0.3%, as Allen did, is statistically consistent with the idea that the actual
15 percentage all DGUs with over 10 rounds fired *in the full population* of DGUs is 1%.

16 16. Ignoring Allen's fatally flawed analysis, no one really knows how many
17 times LCMs are used defensively. We can say, however, that there are probably at least
18 1 million defensive gun uses (DGUs) of all kinds per year (Kleck 2001). Therefore, even
19 if just 0.3% of DGUs involved LCM use (as Allen's results indicate), this would imply
20 3,000 defensive uses of LCMs per year. And if the Defendants chose to assert that it is
21 reasonable to describe this many defensive uses of LCMs as "rare," the exact same
22 characterization would apply with even greater force to the number of times LCMs were
23 used in mass shootings and were likely to have affected the number of victims hurt in
24 those incidents, since (as is demonstrated later) this number is close to zero.

25 **Are LCMs Ever Needed for Defense Against Criminals?**

26 17. One reason why crime victims might need an LCM in order to effectively
27 defend themselves or others against criminals would be if they confronted a large number
28 of offenders, such as the members of a street gang or a rioting mob. A crime victim who

1 had to shoot X number of offenders to preserve their safety, however, would need to be
2 able to fire more than X number of rounds, since recently released data from the FBI
3 indicate that even police officers are able to hit the offenders at which they shoot with
4 only 18.7% of the shots they fire (FBI 2016, Table 18). Similar per shot hit rates have
5 been reported in other studies of police shooting (Geller and Scott 1992, pp. 105-106).
6 Under the assumption that the average civilian crime victim is unlikely to be a superior
7 marksman under stressful real-world circumstances, he is unlikely to strike his intended
8 targets more than one-sixth of the time. Thus, victims facing four offenders would need
9 24 rounds to hit all four, 18 rounds to hit three of them, and 12 rounds to hit just two of
10 them. Indeed, the average crime victim armed with a single magazine holding only 10 or
11 fewer rounds would not be able to fire enough rounds to shoot more than a single
12 offender.

13 18. Is it a realistic prospect for a crime victim to face four or more attackers? I
14 examined an NCVS dataset I happened to have on my hard drive, covering the period
15 1992-1994. My analysis of that dataset indicated that the NCVS estimated, for the
16 United States in 1992-1994, that there were 30,497,554 violent crimes in which victims
17 directly confronted offenders and could state the number of offenders. Of these,
18 6,368,235 involved multiple offenders. Of these, 1,997,481 involved four or more
19 offenders. Since this total pertained to a three-year period, the average for the U.S. was
20 2.1 million violent crimes with multiple offenders per year, and about 0.67 million per
21 year involving over four offenders. This was a peak crime period, but even if there were
22 half as many such incidents in recent years, the annual totals would still be one million
23 and 0.33 million respectively. In short, by any reasonable standard, it is a frequent
24 occurrence that American crime victims face four or more offenders in a violent crime.

25 **LCM Use in DGUs and Innocent Bystanders**

26 19. Alexandra Gordon cites a passage from a study (Koper 2004) that she cites
27 as her Exhibit 66, which argues that “the ability to deliver more shots rapidly should raise
28 the likelihood that offenders hit their targets, not to mention innocent bystanders” (Koper

1 2004, p. 83). To be sure, it is a logical possibility that defensive use of guns equipped
2 with LCMs *could* result in the accidental shooting of innocent bystanders, this is a serious
3 concern only if defenders using guns with LCMs actually *do* shoot innocent bystanders.
4 Neither Gordon nor any of the Defendant’s experts cite any cases of this actually
5 happening, nor any evidence that it happens frequently.

6 20. The best available evidence indicates that accidental shooting of bystanders
7 in connection with any kind of DGU – with or without LCMs - is virtually nonexistent.
8 My review of the literature on firearms accidents (Kleck 1997, pp. 309-310) found that
9 accidental shootings linked with DGU were so rare that most studies of gun accidents that
10 classified the circumstances in which the accidents occurred did not even include a
11 category for accidents linked with defensive uses, even when their classifications of the
12 circumstances of gun accidents included categories that included as little as 1% of the
13 accidents. One exceptional study was conducted by the Metropolitan Life Insurance
14 Company (1968), which found just two cases of accidental firearms deaths linked with
15 defensive gun use (“searching for prowlers”) out of 143 total accidental gun deaths, or
16 1.4%. Since other gun accident studies did not report *any* DGU-linked accidents, this
17 1.4% should probably be regarded as an upper limit on the share of accidental gun deaths
18 linked with DGU.

19 21. In 2014 there were 461 total accidental firearms deaths in the U.S., so 1.4%
20 of this total would be 6.4 accidental deaths. That is, there were probably no more than
21 six fatal accidents involving DGU in the entire nation in 2014. National surveys that
22 directly ask about DGU indicate there are probably over 1 million DGUs per year. This
23 means that someone is accidentally killed in connection with fewer than six out of every
24 million DGUs. The number linked with just DGUs involving LCMs is almost certainly
25 substantially lower than six since, as the Defendant’s expert Lucy Allen (pp. 4-5)
26 acknowledges, relatively few DGUs entail large numbers of rounds being fired, and thus
27 only a small share are likely to have involved LCM use.

28 22. In any case, none of the Defendant’s experts cite even one real-life incident

1 in which a person attempting to use a gun defensively accidentally killed an innocent
2 bystander. While innocent bystanders sometimes are shot, e.g. in connection with street
3 gang violence, there is no evidence known to me that any significant number are shot as a
4 byproduct of defensive gun use.

5 **How Large a Share of Mass Shootings Involve the Use of an LCM?**

6 23. Laura Allen makes the remarkable claim that “large-capacity magazines
7 were used in the majority of mass shootings *with known magazine capacity* since 1982
8 (44 of 50 mass shootings)” (p. 7, emphasis added). To support this claim, she relied on
9 compilations of mass shootings that were in turn based on news media accounts (p. 6).
10 Reporters inform their audience, by definition, of information that is believed to be
11 newsworthy. In a period when there was intense public interest and political debate over
12 LCMs, the involvement of LCMs in mass shootings was clearly newsworthy. Thus, there
13 is strong reason to expect that at least one news outlet would note the use of LCMs in
14 every, or virtually every, mass shooting in which it was believed that the shooter used an
15 LCM. In contrast, there is nothing newsworthy about shooters using lower-capacity
16 magazines, and thus no reason for reporters to state this fact in their stories about mass
17 shootings. In short, magazine capacity will ordinarily be mentioned in a story only if the
18 capacity was unusually large. This is consistent with the old news adage that “man bites
19 dog” is news; “dog bites man” is not.

20 24. In this light the only thing remarkable about Allen’s finding is that there
21 were *any* mass shootings for which magazine capacity was reported in news stories but
22 the capacity was *not* large. Her findings can tell us nothing about the share of *all* mass
23 shootings that involved shooters using LCMs because she uses a sample of incidents
24 biased to include almost entirely incidents for which news stories reported the use of
25 LCMs.

26 25. Allen sustained her erroneous claim by relying on grossly incomplete
27 compilations of mass shootings, which actually encompass only a tiny share of all mass
28 shootings, and which grossly overstate the prevalence of LCM use. She used two

1 sources of mass shootings which she erroneously characterized as “comprehensive” (p.
2 5). In fact these sources cover only a tiny minority of mass shootings, those in which
3 four or more persons were killed and that also had various other attributes such as
4 occurring in public places. By counting only a small share of the mass shootings, Allen
5 grossly overstated the percent that involved LCMs by making the denominator of the
6 percentage far too small.

7 26. There is no comprehensive listing of all mass shootings available, but the
8 most extensive one by far of which I am aware is at the Shootingtracker.com website.
9 For 2014-2016 (all the complete years available), the compilers identified 992 incidents
10 with four or more victims shot, fatally or nonfatally, or about 331 per year. They did not
11 arbitrarily confine their sample of mass shootings to those occurring in public or that
12 involved four or more victims killed. In contrast, Allen’s supposedly “comprehensive”
13 Mother Jones compilation covered just 86 mass shootings over the far longer 37-year
14 period from 1982 to 2017, or about 2.3 per year, while her Citizens Crime Commission
15 compilation covered just 33 mass shootings from 1984 to 2012, or about 1.1 per year. As
16 a result, Allen’s sources covered well under one percent of the total number of mass
17 shootings.

18 27. Thus, Allen managed to conclude that 88% (44 of 50) of mass killings
19 involved LCMs (p. 7) by focusing only on a tiny unrepresentative subset of mass
20 shootings, those with four or more deaths, and only on those where sources stated the
21 capacity of magazines used. For the same 2014-2016 period covered by the
22 ShootingTracker dataset, the Violence Policy Center (2015) identified just *nine* incidents
23 with four or more victims (excluding the shooter) in which a shooter was known to have
24 used a magazine with a capacity exceeding ten rounds. The Violence Policy Center
25 (VPC) advocates for restrictions on magazine capacity, so its staffers are strongly
26 motivated to identify every single mass shootings in which an LCM was used. To be
27 sure, VPC staffers would miss an LCM-involved mass shooting if not a single news
28 outlet available to them reported the LCM use, but there is no empirical evidence

1 whatsoever that such incidents are common. Webster argues that VPC compilation of
2 LCM-involved mass shootings is incomplete (p. 9), but does not offer a scintilla of
3 empirical evidence that it is *significantly* incomplete. As far as he or anyone else knows,
4 the VPC compilation of LCM-involved mass shootings is the most comprehensive
5 available.

6 28. Based on this “best available evidence,” the data indicate that there were at
7 least 992 mass shootings (four or more victims) in the U.S. in 2014-2016
8 (ShootingTracker.com 2017), but only 9 mass shootings in which an LCM was known to
9 have been used (Violence Policy Center 2017). These more comprehensive data
10 therefore imply that *only about 8/100th of one percent of mass shootings were known to*
11 *involve the use of magazines with a capacity exceeding ten rounds.* – a far cry from the
12 Defendant’s experts claims that *most* mass shootings involve LCM use.

13 29. One could speculate that there are huge numbers of mass shootings that
14 involved LCMs but that not a single news source known to VPC reported the LCM
15 involvement, but one should not lose sight of the fact that this is just guesswork, not
16 evidence. My conclusions are based on the best available empirical evidence. In any
17 case, even if the true number of LCM-involved mass shootings was double or triple the
18 number indicated by the VPC data, the conclusion that mass shootings rarely involve use
19 of LCMs would still be valid. For example, if VPC staff discovered only one third of
20 such incidents, it would imply there were 27 such incidents in 2014-2016 rather than
21 nine, making the LCM-involved share of mass shootings 2.72% (27 of 992). Either way,
22 the claim by Allen that 88% of mass shootings involve LCMs is wildly inaccurate, and
23 even a vaguer claim that LCMs are involved in a large share of mass shootings is not
24 supported. Even with substantial undercounting of LCM-linked incidents, the evidence
25 would still indicate that mass shootings rarely involve LCMs.

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1
2 **The Use of LCMs Has No Known Causal Effect on the Number of Persons**
3 **Shot in Mass Shooting Incidents**

4 30. Advocates of LCM bans note that the use of LCMs allows offenders in mass
5 shootings to fire many rounds without reloading, and argue that reloading is relevant to
6 the casualty count in mass shootings because either (1) reloading gives bystanders an
7 opportunity to tackle the shooter and stop the shooting, or (2) reloading provides
8 nonshooting intervals when potential victims can escape. For example, Defense expert
9 John Donahue argues that “bans on large capacity magazines can help save lives by
10 forcing mass shooters to pause and reload ammunition” (p. 5). Close examination of the
11 way mass shootings actually proceed indicates that bystanders in mass shootings having
12 tackled mass shooters while they were reloading only once, or possibly twice, in the past
13 30 years, and that reloading detachable magazines does not make nonshooting intervals
14 in these incidents any longer than when the shooter is not reloading (Kleck 2016).

15 31. John Donahue (pp. 6-7) claimed to know of at least 20 mass shooting
16 incidents in which bystanders tackled the shooter while he was “stopping to reload his
17 weapon” (p. 6), based on “a review of the resolution of mass shootings in the U.S.”
18 Since Donahue does not cite any other person’s review, this is presumably a review he
19 conducted himself. He failed, however, to describe or even briefly outline the methods
20 by which he conducted the review, making it impossible to judge whether it was
21 competently done. Competent scholars describe their methods and cite sources.
22 Notwithstanding his allusion to 20 incidents, Donahue was actually able to cite just *four*
23 specific mass shooting incidents occurring within the past thirty years, in which
24 bystanders allegedly tackled shooters while they were reloading (p. 6). One of them,
25 which I have reported in previous research (Kleck 1997; 2016) genuinely qualifies – in
26 the 1993 Long Island railroad incident bystanders did tackle the shooter while he was
27 attempting to reload, though he was trying to reload individual rounds rather than an
28 entire magazine. On the other hand, a 1994 shooting near the White House cited by
Donahue does not remotely qualify, since it was not even a mass shooting. The

1 perpetrator did not shoot a single person, never mind a large number. The 1998 Oregon
2 incident cited by Donahue also does not qualify because the shooter was not reloading
3 when he was tackled (Kleck 2016). Finally, it is uncertain whether Donahue's fourth
4 cited incident, the Gabrielle Giffords shooting in Tucson, qualifies, since it is unclear
5 from media accounts whether bystanders were able to subdue the shooter because (1) he
6 was reloading (Donahue's position), or because (2) his magazine had failed due to a
7 broken spring and he was unable to fire (Kleck 2016). Since such magazine defects
8 would disrupt a mass shooter's firing regardless of whether the magazine's capacity was
9 large or small, interpretation (2) would not support the position that use of smaller
10 capacity magazines would have reduced the casualty count. In short, there may be only a
11 single unique mass shooting incident in the past 30 years (the 1993 Long Island shooting)
12 that clearly involved the shooter being tackled while reloading, and none in the past 20
13 years.

14 32. Donahue (pp. 6-7) padded out his list of mass shooting incidents in which
15 magazine changes purportedly affected the casualty count by citing the Sandy Hook
16 shooting, arguing that potential victims escaped "while the shooter was switching
17 magazines." While he claims that there have been "many" mass shooting incidents in
18 which this happened, the Sandy Hook shooting is the only one he could cite. He flatly
19 stated that "11 children at Sandy Hook Elementary School were able to escape while
20 Adam Lanza reloaded his 30 round LCM" (p. 7). Donahue's sole support for this claim
21 is an article in the *Hartford Courant*. That article, however, made it clear that this claim
22 was nothing more than a speculation made by an unnamed source. Some children did
23 escape, and there was a pause in the shooting, but according to the official report of the
24 incident, investigators could not establish either (1) that the children escaped during the
25 pause, or (2) that the shooter was reloading during the pause (State's Attorney Report
26 2013).

27 33. Indeed, it is unlikely that the Sandy Hook shooter even needed to reload.
28 Crime scene investigators found multiple magazines that had cartridges still left in them,

1 indicating that even when the shooter did change magazines, he did not do so because he
2 *had to*, i.e. because he had exhausted the magazines. Instead, the shooter had *chosen* to
3 change magazines when he could have continued firing with the same magazine (State’s
4 Attorney Report, p. 21). The significance of this is that at the time the children were
5 escaping, the shooter could have chosen to fire at them by simply continuing to fire the
6 remaining rounds in the unexpended magazine in his gun, rather than changing
7 magazines “prematurely” while they still contained live rounds, as he evidently
8 repeatedly did. This means even *if* the children escaped during the pause (which is not
9 known), and even *if* the pause was due to a magazine change (which is also not known),
10 one could still not reliably conclude that the children escaped because the shooter had to
11 change a magazine. In sum, there was no factual foundation whatsoever for the
12 speculation that a need to reload saved any lives in the Sandy Hook incident.

13 34. In sum, Donahue could cite only one genuinely supportive incident (the
14 1993 Long Island shooting), and one possibly supportive case (the Gabby Giffords
15 shooting), over a period of 30 years, to support his claim that citizens have “frequently”
16 subdued shooters while they stopped to reload. One or two cases in 30 years in the entire
17 nation probably would not fit most people’s notions of what “frequently” means.
18 Regarding his claim that there have been “at least 20 separate shootings” where this
19 happened, Donahue provided no documentation at all. Twenty cases in thirty years, in a
20 nation with over 300 million people, would not be very frequent either, but Donahue did
21 not supply supporting evidence of this many relevant incidents or even half this many.

22 35. Webster (p. 7) and Allen (p. 7) both accurately note that there are, on
23 average, more casualties in mass shootings in which LCMs are used than in those in
24 which they are not used, but go on to infer that LCM use *caused* shooters to inflict more
25 casualties. This simple statistical association, by itself, cannot establish that LCM use
26 causes a higher casualty count. Unless the use of LCMs has an actual *causal effect*, to at
27 least some degree, on the number of victims harmed in crime incidents, there is no
28 scientific basis for believing that restrictions on LCMs would cause a reduction in the

1 number of casualties in such incidents. Instead, all evidence known to me, including all
2 evidence presented by the Defendant's experts, is completely consistent with the
3 proposition that LCM use has *no* causal effect of its own on the number of people killed
4 or injured in mass shooting incidents, and that the association between LCM use and
5 casualty count is a spurious (noncausal) association, due to the fact the shooter's
6 preexisting desire or intent to shoot many people affects both (1) the decision to acquire
7 and use LCMs, and (2) the number of people the shooter in fact ends up shooting.
8 Regarding the first effect, mass shootings are typically planned, and thought about by the
9 shooter for a long time, offering ample time for offenders to make preparations such as
10 acquiring guns, ammunition, and magazines (Kleck 2016). Indeed, the very reasons the
11 Defendant's experts offer for why mass shooters prefer to use LCMs confirm the
12 proposition that a desire to hurt many victims motivates mass shooters to acquire and use
13 LCMs. Donahue, for example, noted that one mass shooter sought to get a weapon with
14 the highest magazine capacity and commented that "this is exactly what one would do if
15 one wanted to simply kill as many people as possible" (p. 9). Exactly so – lethality of
16 intent affects choice of weaponry.

17 36. Regarding the second effect, the intentions of a mass shooter to hurt many
18 people surely has some effect on how many people he in fact ends up hurting. This must
19 be true unless one is willing to believe that there is no connection whatsoever between
20 human intentions and actions. I am not aware of any scholar, including the Defendant's
21 experts, who has disputed either causal effect (1) or (2). Thus, as far as those experts
22 know, the association between LCM use and casualty count may be entirely spurious, i.e.
23 noncausal.

24 37. The claim that LCM use has an actual causal effect of its own on victim
25 count in mass shootings would become more plausible if close analysis of the details of
26 actual incidents indicated the LCM use was actually necessary or significantly helpful for
27 inflicting as many injuries as were inflicted in LCM-involved mass shootings. This sort
28 of analysis, however, indicates precisely the opposite (Kleck 2016).

1 38. My close study of every known LCM-involved mass shooting of the past 20
2 years indicated that there have been *no* mass shootings in the U.S. in the past 20 years in
3 which (1) it was known that LCMs were used and (2) the details of the incident indicated
4 that the shooter needed an LCM to hurt the number of people he killed or injured.
5 Instead, in all incidents where the relevant information was available, mass shooters
6 possessed either multiple guns or multiple magazines, and thus could easily fire many
7 rounds either without reloading at all or by quickly reloading a detachable magazine in a
8 few seconds (Kleck 2016).

9 39. The details likewise show that even if shooters had lower capacity
10 magazines and had to reload more often, this would not slow their rate of fire, since the
11 killers in actual mass shootings average so low a rate of fire that the 2-4 seconds it takes
12 to reload would be no longer a time period than the average interval between shots
13 actually fired in mass shootings, even when the offender was not reloading (Kleck 2016).
14 Thus, the details of actual mass shootings do not support the hypothesis that, in the
15 absence of LCMs, more victims would have time to escape because the shooters were
16 making more magazine changes.

17 40. Webster objects to my limiting my analysis of mass shootings to those with
18 more than six victims killed or wounding, arguing that such a limitation fails to take
19 account of the possibility that LCMs could also affect the casualty count in incidents with
20 “one to five victims as well” (p. 8). This observation is utterly irrelevant to the validity
21 of the analysis I performed or my conclusions. Webster withholds my explicitly stated
22 rationale for analyzing only incidents with many victims. I did so in an effort to give
23 every possible benefit of the doubt to the proposition that mass shooters’ use of LCMs
24 *does* cause an increase in casualty counts. I did this by intentionally limiting my sample
25 of LCM-involved shooting incidents to those in which LCMs were most likely to have
26 made a difference – those in which many people were shot and many shots were
27 presumably fired.

28 ///

1 41. The very fact that advocates of LCM bans focus so heavily on mass
2 shootings rather than on ordinary crimes with few victims (e.g., Violence Policy Center
3 2015) is attributable to the widespread belief that it is the shootings with many victims
4 where LCM use is most likely to matter. While LCM use might affect casualty counts
5 even in incidents in few victims, it is relatively *more* likely to affect casualty counts in
6 incidents with many victims.

7 42. As I explained at length in my research report (Kleck 2016, p. 33), by
8 analyzing only incidents with a large number of victims, I was intentionally biasing the
9 sample *in favor of* the hypothesis that LCM use increases casualty counts. Had I included
10 cases with few victims, as Webster seems to be recommending, this would necessarily
11 have weakened support for this hypothesis, by including many incidents in which it was
12 much less likely that the shooter needed an LCM to hurt as many people as he did.

13 43. Webster falsely claims that I “made an argument ammunition capacity is
14 only logically relevant in incidents in which there is a high rate of fire over a short span
15 of time” (p. 9). I never made such a bizarre argument, and Webster was unable to quote
16 or cite any passage where I made this argument.

17 44. Webster also makes yet another false claim about my research: “lost in
18 Kleck’s analysis and consideration is the fact that there is no way to measure the
19 incidents where there was the potential for a large number of casualties in a shooting but
20 fewer occurred *due to the absence of a LCM*” (p. 9). This point was in no way “lost” in
21 my research, given that I explicitly stressed this possibility in the published report of my
22 analysis: “one might also speculate that incidents that did *not* end up with many shooting
23 victims turned out that way because the shooter did *not* use an LCM” (Kleck 2016, p.
24 45). Unlike Webster, however, I correctly stressed that this is only a speculation, not a
25 fact. Basing policy analysis on idle speculation while dismissing or downplaying known
26 empirical evidence is irresponsible and unlikely to yield accurate conclusions.

27 **Allen’s Misleading Analysis of the Details of Mass Shootings**

28 45. Allen obscures the reality just outlined by describing mass shootings just one

1 attribute at a time. For example, she states the percent of mass shooters that used only
2 one gun, but does not say how many of those shooters also had just one magazine.
3 Likewise, she reports the percent who had only one magazine, but does not say how
4 many of those also had a single gun. Thus, there is nothing in her analysis to refute the
5 proposition that all mass shooters had *either* multiple guns or multiple magazines – either
6 of which would enable a shooter to fire many rounds with little or no interruption due to
7 reloading.

8 46. Allen also misleads the reader by computing these percentages based on all
9 88 mass shootings in her dataset, not just the 44 known to have involved LCMs. This is
10 clearly inappropriate because it is an indisputable logical point that LCMs could have
11 affected the casualty counts only in incidents in which an LCM was actually used. Thus,
12 fully half of Allen’s sample incidents (44 of 88 cases) were, as far as Allen could tell,
13 irrelevant to a test of whether LCM use affects the casualty count in mass shootings.
14 Significantly, Allen does not report the share of incidents with a single gun and/or a
15 single magazine among just mass shootings known to have involved use of LCMs, i.e.
16 within the set of mass shootings known to be relevant to an inquiry as to the impact of
17 LCM use on casualty counts.

18 47. All this clearly matters, because when the analysis more appropriately
19 focuses on the share of mass shootings in which the shooter had *either* multiple
20 magazines *or* multiple guns, and is more appropriately confined to incidents in which an
21 LCM was known to have been used, the results are quite different from those generated
22 by Allen’s misleading analysis. My analysis indicated that U.S. mass shooters who used
23 LCMs *all* possessed either multiple guns or multiple magazines, and thus did not need an
24 LCM to fire many rounds without significant interruption (Kleck 2016).

25 48. It is significant how Webster words his opinion about the impact of LCM
26 use on casualty counts: “LCMs *can* increase the ability of criminal and those attempting
27 to kill or wound large numbers of innocent people” (p. 17, emphasis added). To be sure,
28 it is a hypothetical *possibility* that LCM use *might* increase the ability of criminals to hurt

1 many people, but the best available evidence indicates that, over the past 20 years in the
2 U. S., LCM use has not *actually* caused an increase in the number of people killed or
3 injured in mass shootings (Kleck 2016). One could justify even the most ineffective
4 public policies to reduce violence by speculating about how crimes *might* occur, but this
5 is surely not a responsible basis for implementing policies that could have serious
6 harmful effects on the public.

7 49. Attached as “Exhibit QQ” to the declaration of Anna M. Barvir in Support
8 of Motion for Preliminary Injunction filed on May 26, 2017, is a true and correct copy of
9 Kleck (2016).

10
11 **What Koper Actually Concluded Regarding the Impact of the Federal LCM
Ban on Crime**

12 50. Webster insists (p. 11) that Christopher Koper did not conclude that the
13 federal ban on LCMs was ineffective, and that opponents of the ban have misrepresented
14 his conclusions: “Some claim that bans of assault weapons and LCMs do not work;
15 however, this is not the conclusion of Christopher Koper.” This claim is easily refuted,
16 simply by directly quoting Koper. Here is Koper’s conclusion, as conveyed in his last
17 published report (Koper 2013) on the impact of the ban on crime:

18 “On balance, these analyses showed no discernible reduction in the lethality
19 or injuriousness of gun violence during the post-ban years (see Koper 2004,
20 Koper and Roth 2001, and Roth and Koper 1997). Nationally, for example,
21 the percentage of violent gun crimes resulting in death (based on gun
22 homicides, gun assaults, and gun robberies reported to the Uniform Crime
23 Reports) was the same for the period 2001-2002 (2.9%) as it was for the
24 immediate pre-ban period 1992-1993 (Koper 2004, 82, 92). Accordingly, it
25 was difficult to credit the ban with contributing to the general decline in gun
26 crime and gun homicide that occurred during the 1990s” (Koper 2013, p.
27 165).”

28 51. The way Webster manages to suggest that Koper actually found the ban to
be effective is by selectively stressing Koper’s speculative conclusions about possible
future effects of a revised AW ban, and discounting his evidence-based conclusions.

1 Koper’s main evidence-based conclusion about the impact of the AW/LCM ban on crime
2 is the one quoted above. Koper also, however, *speculated* about the “*potential* long-term
3 effects of banning assault weapons and large-capacity magazines” on violent crime that
4 might be experienced if only various weaknesses of the ban were corrected (Koper 2013,
5 p. 166, emphasis added). Webster echoes these optimistic speculations (pp. 12-14).

6 52. Webster pads out apparent support for the effectiveness of the AW/LCM ban
7 by referring to the supposed effects of the AW ban that Koper found on “the percentage
8 of guns recovered by police that were *assault weapons*,” but this is a red herring that has
9 no relevance to the topic of current interest, i.e. whether the LCM ban reduced the
10 criminal use of *LCMs*. As Webster concedes (p. 12), Koper “saw no evidence of a
11 decline in LCM use in crime.”

12 13 **Webster’s Analyses Do Not Establish Any Effect of the AW/LCM Ban on Mass Shootings**

14 53. Webster professes to perceive a “temporal pattern” in mass shootings
15 occurring in public “that is consistent with a hypothesized protective effect of the ...
16 LCM ban” (p. 15), relying on the data displayed in his Figure 1. He does not explain
17 how the ban could have caused a reduction in killings involving LCMs if the ban did not
18 cause a reduction in criminal use or possession of LCMs, as Koper’s research indicated.
19 Webster’s crude visual examination of trends in the frequency of mass shootings can tell
20 us nothing about the impact of the LCM ban because it does nothing to separate the
21 effects of the ban from those of the many other factors that affect violence.

22 54. At best, the simple examination of trends in mass shootings can only be used
23 to check whether declines in mass shootings coincided with the time the AW/LCM ban
24 was implemented. In fact, what is most striking about the patterns in Figure 1 is declines
25 in mass shootings did *not* even approximately coincide with the time that the AW/LCM
26 ban went into effect. Indeed, mass shootings substantially *increased* after the ban was
27 implemented in 1994, and continued to do so right through 1999. Webster excuses this
28 by speculating that all the ban’s effects were “delayed” (p. 14), and suggests that later

1 declines in mass shootings reflected the impact of the ban. Unfortunately, under this line
2 of reasoning, literally *any* drop in violence, at *any* time after 1994, could be attributed to
3 the ban, no matter how ineffective the ban actually was. Leaving aside this sort of
4 fruitless speculation, the only conclusion we can definitely derive from Figure 1 is that
5 declines in mass shootings did not begin when the LCM ban went into effect. In any
6 case, Webster’s claims are purely speculative.

7 55. None of Webster’s crude “negative binomial regression analyses” reported
8 on pp. 16-17 do anything to establish *why* the number of victims per mass shooting
9 changed over the 1982-2016, or whether the LCM ban had any effect. They do no more
10 than what a crude visual examination of the trends shown in Figure 2 (p. 16) could do
11 because they do not control for the effects of any other factors that affect violence. That
12 is, these simplistic univariate analyses do nothing to establish that the LCM had any
13 causal effect on these trends, as opposed to effects produced by thousands of other
14 possibly relevant factors. Webster’s claim that his results suggest a protective effect of
15 the LCM ban is sheer guesswork.

16
17 **The Virginia Data Cannot be Used to Support the Claim that The AW Ban
Was Effective in Reducing Criminal Use of LCMs**

18 56. Webster (pp. 12-13) tried to buttress his claim that the AW/LCM ban was
19 actually effective by citing a Washington Post article to the effect that the ban, in effect
20 from 1994 to 2004, caused a reduction in LCM use, and that when the ban sunsetted,
21 LCM use went back up. (From this point forward, Webster simply ignores Koper’s
22 finding that the LCM ban did not reduce the use of LCMs in crime.) Webster concludes
23 that the AW ban was therefore effective in reducing LCM use in crime while it was in
24 effect.

25 57. The Virginia data cannot sustain Webster’s conclusions. Webster failed to
26 inform his readers of two critical facts about the Virginia data source. First, the data
27 source does not even concern guns *used to commit* violent crimes, but merely guns
28 recovered by police (even though Webster explicitly alludes to LCM “use in crime,” p.

1 13). This is not a minor quibble, since the vast majority of guns recovered by police were
2 not used in violent crimes, but rather were recovered in connection with violations of gun
3 control laws, such as “unlawful possession” (Kleck and Wang 2009). Thus, the data
4 cited by Webster say nothing whatsoever about trends in the criminal use of LCMs
5 among violent criminals. This is crucial because guns used in violent crimes are quite
6 different from those connected only with unlawful possession charges (Kleck and Wang
7 2009). One therefore cannot infer the characteristics of guns used to commit violent
8 crimes from the characteristics of all guns recovered by police, only a small fraction of
9 which were used to commit violent crimes.

10 58. Second, the Virginia data cannot even be used to establish trends in criminal
11 *possession* of guns equipped with LCMs, because it was strictly *optional* whether
12 Virginia police officers chose to record the presence of an LCM in connection with
13 firearms recovered. They were not required to always record the capacity of every
14 magazine with which recovered firearms were equipped. The inclination of police to
15 record the presence of an LCM can change over time, reflecting the ebbs and flows of
16 police and public concern about LCMs rather than trends in the actual prevalence of
17 LCMs among guns used to commit violent crimes. As public debate and news media
18 focus on LCMs rose in the 1980s and early 1990s, we would expect that this increased
19 the likelihood that police recorded the presence of LCMs among guns they recovered.
20 Then when the AW ban was enacted in 1994, if police concern about LCMs declined
21 because the LCM problem had supposedly been at least partly “solved” by the LCM ban,
22 this would have reduced the likelihood that police officers would record the presence of
23 an LCM – even if the actual prevalence of LCMs among recovered violent crime guns
24 had remained unchanged. Finally, after the AW ban sunsetted out of existence in 2004,
25 media attention and public concern would have increased once again, encouraging police
26 officers to record the presence of LCMs in more gun recoveries.

27 59. This possibility is not mere speculation. Prior evidence indicates that when
28 the national debate over “assault weapons” (AWs) was at its peak, the guns chosen by

1 police to be traced by the Bureau of Alcohol, Tobacco and Firearms (ATF) grossly
2 overrepresented the prevalence of AWs in the full population of crime guns. Studies of
3 *all* the guns recovered by police typically indicated that less than 2% were AWs, but fully
4 14% of guns submitted by police for ATF tracing in 1986-1990 were AWs (Kleck 1997,
5 pp. 112, 141-143). Thus, police decisions about which subset of recovered guns to
6 submit for tracing resulted in the overrepresentation of AWs by a factor of *over seven*.
7 Police clearly preferred to request traces on the origins of AWs far more than they did for
8 other types of guns. That is, when popular and political interest in AWs was high, police
9 focused their attention disproportionately on AWs. By the same token, when popular and
10 political interest in LCMs became similarly intense, one would expect the same kind of
11 disproportionate police focus on guns equipped with LCMs.

12 60. The only thing about the Washington Post data that might have weakly
13 suggested a causal connection between the LCM ban and the prevalence criminal LCM
14 possession was the supposed temporal correspondence between the span of years when
15 the ban was in effect and the timing of increases and decreases in LCM prevalence. As it
16 happens, the Virginia data did not display any such correspondence. The start of the drop
17 in LCM prevalence among Virginia recovered “crime guns” did *not* correspond with the
18 year the year the federal LCM ban went into effect, 1994. From 1994 through 1998,
19 there was no consistent pattern of decline in LCM prevalence among recovered VA crime
20 guns. *The decline only began in 1999, long after the ban went into effect.*

21 61. Although some of the effects of the ban may well have been lagged, as
22 Webster speculates, there nevertheless should have been some immediate reduction in
23 LCM use if the AW ban actually caused such a reduction. The ban *immediately* stopped
24 the inflow of new LCMs the instant it became effective in 1994, so some of its effects
25 should likewise have begun to become evident immediately, even if its full effects would
26 only become evident later. Thus, even if one charitably interpreted the Virginia data as
27 reflecting actual changes in criminal use of LCMs (or at least in criminals’ possession of
28 LCMs), the timing of changes in LCM trends do not support Webster’s thesis that the

1 AW caused a reduction in criminal LCM use while it was in effect.

2 **LCMs Are Almost Never Used to Kill Police Officers**

3 62. Webster (p. 10) cites a study produced by Handgun Control Inc., the
4 previous name of the gun control advocacy organization now known as the Brady
5 Campaign to Prevent Gun Violence (see his fn. 11). (The study Webster cited in his fn.
6 12 has no information of the use of LCMs.) This study purportedly indicated that an
7 astounding 31-41% of police officers murdered in 1994 were killed with a firearm
8 equipped with a LCM (see his fn. 11). The cited study is no longer available on the
9 organization’s website, if it ever was, and I could not find a copy anywhere else on the
10 Internet, so I cannot evaluate its merits. Certainly there is reason to question why
11 analysts would focus on a single year’s worth of cases when data on killings of police are
12 available for far more years.

13 63. I therefore examined the summaries of felonious killings of police officers
14 found on the FBI’s website (U. S. Federal Bureau of Investigation 2016) to establish how
15 often LCMs were used in these murders for the most recent 10-year period for which data
16 are available, 2006-2015. There were *no* cases where it was clear that a LCM was used.
17 A case occurring in Marlin, TX on 11-1-15 was described involving an offender with a
18 “.38 caliber revolver” that supposedly had a “magazine ...which was designed to hold 15
19 rounds.” Revolvers do not have magazines; they hold cartridges in a revolving cylinder.
20 Further, revolver cylinders do not hold 15 rounds; they usually hold just six rounds and
21 almost never more than nine. Thus, this account was almost certainly erroneous, but it is
22 possible that the authors of the account meant to describe a semi-automatic pistol, which
23 could hold 15 rounds. Nevertheless, the account also indicated that the magazine still had
24 14 rounds in it when recovered by police, indicating that the shooter made no use of the
25 supposed large capacity of the magazine. If a LCM was used at all in this incident, it
26 clearly did not contribute to the killing of the police officer.

27 64. I found seven other incidents in which LCMs *might* have been used, based
28 on the fact that offenders fired more than 10 rounds, with no explicit mention of

1 reloading or use of multiple guns or multiple magazines (see the incidents occurring in
2 Puerto Rico on 3-10-14 and 12-7-06; in Tallahassee, FL on 11-22-14; in San Antonio, TX
3 on 5-28-11; in Greene County, NC on 7-28-10; in Tucson, AZ on 6-1-9; and in Bastrop,
4 LA on 8-10-07). Even in these seven cases, however, LCM use is uncertain because it is
5 unknown whether the shooters merely reloaded smaller-capacity magazines or used
6 multiple guns. Still, if we generously classify all seven of these incidents as cases in
7 which LCMs were used to kill police officers, this means that no more than 1.4% of the
8 491 police officers killed in the U. S. in 2006-2015 were killed by offenders using LCMs.

9 65. This is a long way from Webster's claimed LCM share of "31% to 41% of
10 police officers murdered" (p. 10). It would be more accurate to say that LCMs are almost
11 never used in the killing of police officers. Further, it should be noted that, as with mass
12 shootings, we do not know that offenders *needed* LCMs to kill police officers. It is
13 possible that the offenders who happened to use LCMs could just as easily have killed the
14 officers using multiple guns or multiple smaller-capacity magazines – an issue that
15 neither Webster nor the other Defendant's experts address.

16 17 **References**

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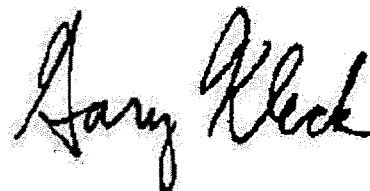
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18 Vizzard, William J. Shots in the Dark: The Policy, Politics, and Symbolism of Gun

19 Control. Lanham, MD: Rowman and Littlefield.

20
21 I declare under penalty of perjury that the foregoing is true and correct. Executed
22 within the United States on June 9, 2017.

23
24
25
26
27
28


Gary Kleck

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF CALIFORNIA

3 VIRGINIA DUNCAN, RICHARD
4 LEWIS, PATRICK LOVETTE, DAVID
5 MARGUGLIO, CHRISTOPHER
6 WADDELL, CALIFORNIA RIFLE &
7 PISTOL ASSOCIATION,
8 INCORPORATED, a California
9 corporation,

10 Plaintiffs,

11 v.

12 XAVIER BECERRA, in his official
13 capacity as Attorney General of the State
14 of California; and DOES 1-10,

15 Defendant.

Case No: 17cv1017

CERTIFICATE OF SERVICE

16 IT IS HEREBY CERTIFIED THAT:

17 I, the undersigned, declare under penalty of perjury that I am a citizen of the
18 United States over 18 years of age. My business address is 180 East Ocean Boulevard,
19 Suite 200 Long Beach, CA 90802. I am not a party to the above-entitled action.

20 I have caused service of the following documents, described as:

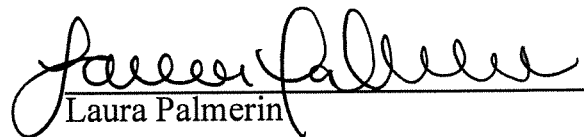
21 **SUPPLEMENTAL DECLARATION OF GARY KLECK IN SUPPORT OF**
22 **PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

23 on the following parties by electronically filing the foregoing on June 9, 2017, with the
24 Clerk of the District Court using its ECF System, which electronically notifies them.

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I declare under penalty of perjury that the foregoing is true and correct. Executed
on June 9, 2017, at Long Beach, CA.


Laura Palmerin

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

ASSOCIATION OF NEW JERSEY)
RIFLE & PISTOL CLUBS, INC.,)
)
BLAKE ELLMAN, and)
)
ALEXANDER DEMBOWSKI,)

Hon. Peter G. Sheridan, U.S.D.J.
Hon. Lois H. Goodman, U.S.M.J.
Civil Action No. 18-cv-10507

Plaintiffs,

Oral Argument Requested

v.

Motion Date: July 12, 2018

GURBIR GREWAL, in his official)
capacity as Attorney General of New)
Jersey,)

CIVIL ACTION

(ELECTRONICALLY FILED)

PATRICK J. CALLAHAN, in his)
official capacity as Superintendent of)
the New Jersey Division of State)
Police,)

CERTIFICATION OF SERVICE

THOMAS WILLIVER, in his official)
capacity as Chief of Police of the)
Chester Police Department, *and*)

JAMES B. O'CONNOR, in his official)
capacity as Chief of Police of the)
Lyndhurst Police Department,)

Defendants.

I hereby certify that on July 9, 2018, I electronically filed the following documents with the Clerk of the Court using the CM/ECF system:

1. Plaintiffs' Reply Brief in Support of Their Motion For Preliminary Injunction

2. Declaration of Daniel L. Schmutter

I further certify that one copy of the foregoing documents are being served
as follows on this 9th day of July, 2018 on the following persons:

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By ECF

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I hereby certify that the foregoing statements are true. I understand that if any of the foregoing statements made by me are willfully false that I am subject to punishment.

July 9, 2018

/s/ Daniel L. Schmutter
Daniel L. Schmutter