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8
9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

11 VIRGINIA DUNCAN, et al.,
12
13 Plaintiffs,

14 v.

15 XAVIER BECERRA, in his official
capacity as Attorney General of the State
16 of California, et al.,

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

**PLAINTIFFS’ RESPONSE TO
DEFENDANT’S SUPPLEMENTAL
BRIEFS RE: CHARTS OF
HISTORICAL LAWS (ECF NOS. 142
& 143)**

TABLE OF CONTENTS

Page

1

2

3 Table of Contents i

4 Table of Authorities..... ii

5 Introduction 1

6 Argument..... 1

7 I. California’s Magazine Ban Is Unconstitutional Because It Prohibits Arms That

8 Are “Typically Possessed” for Lawful Purposes; Under *Heller*, No Further

9 Analysis Is Appropriate 1

10 II. There Is No Relevant Historical Tradition..... 5

11 A. The State Is Not Entitled to a “More Nuanced” Approach 5

12 B. The State Has Not Established an Enduring Tradition of *Laws* Banning

13 Arms in Common Use for Lawful Purposes 8

14 Conclusion..... 12

15

16

17

18

19

20

21

22

23

24

25

26

27

28

TABLE OF AUTHORITIES

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

Page(s)

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910 F.3d 106 (3d Cir. 2018).....2

Caetano v. Massachusetts,
577 U.S. 411 (2016)3, 4

Daubert v. Merrell Dow Pharms., Inc.,
509 U.S. 579 (1993)4

District of Columbia v. Heller,
554 U.S. 570 (2008)1, 2, 10

Duncan v. Becerra (“Duncan I”),
265 F. Supp. 3d 1106 (S.D. Cal. 2017)4

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366 F. Supp. 3d 1131 (S.D. Cal. 2019)1

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970 F.3d 1133 (9th Cir. 2020).....4

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779 F.3d 991 (9th Cir. 2015).....2

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-- U.S. --, 139 S. Ct. 1960 (2019).....11

Hardaway v. Nigrelli,
No. 22-cv-771, 2022 U.S. Dist. LEXIS 200813 (W.D.N.Y. Nov. 3, 2022)9

Jackson v. City & Cnty. of San Francisco,
746 F.3d 953 (9th Cir. 2014).....2

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542 F. Supp. 3d 1009 (S.D. Cal. 2021)7

N.Y. State Rife & Pistol Ass’n v. Bruen,
142 S. Ct. 2111 (2022) passim

N.Y. State Rifle & Pistol Ass’n v. Cuomo,
804 F.3d 242 (2d Cir. 2015).....4

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 2 564 U.S. 117 (2011)11

3 *Ocean State Tactical, LLC v. Rhode Island*,
 4 No. 22-cv-246, 2022 WL 17721175 (D.R.I. Dec. 14, 2022)3

5 *Or. Firearms Fed’n, Inc. v. Brown*,
 6 No. 22-cv-01815, 2022 WL 17454829 (D. Or. Dec. 6, 2022).....3

7 *Powell v. Alabama*,
 8 287 U.S. 45 (1932)11

9 *Rupp v. Bonta*,
 10 No. 17-cv-00746 (C.D. Cal. Feb. 3, 2023).....4

11 *Teixeira v. Cnty. of Alameda*,
 12 873 F.3d 670 (9th Cir. 2017).....2

13 *Timbs v. Indiana*,
 14 -- U.S. --. 139 S. Ct. 682 (2019).....11

15 *United States v. Kelly*,
 16 No. 22-cr-00037, 2022 U.S. Dist. LEXIS 215189 (M.D. Tenn. Nov. 16, 2022)9

17 *Virginia v. Moore*,
 18 553 U.S. 164 (2008)11

19 **Rules**

20 Fed. R. Evid. 702.....4

21 **Other Authorities**

22 Ida B. Wells, *Southern Horrors*. N.Y. Age (June 25, 1892).....8

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25 Mairead McCardle, *Report: Parkland Shooter Did Not Use High-Capacity Magazines*,
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INTRODUCTION

At this point, it should be elementary that the State cannot ban arms typically possessed for lawful purposes. This case is thus a very simple one. As this Court reasoned in its order granting Plaintiffs’ motion for summary judgment, the only relevant questions are “Is the firearm hardware commonly owned? Is the hardware commonly owned by law-abiding citizens? Is the hardware owned by those citizens for lawful purposes? If the answers are “yes,” the test is over.” *Duncan v. Becerra* (“*Duncan III*”), 366 F. Supp. 3d 1131, 1142 (S.D. Cal. 2019). Here, the answer to all these questions is a resounding “yes.” Magazines over ten rounds are in common use for lawful purposes by law-abiding Americans. They cannot be banned, full stop.

The State presented an overwhelming number of historical laws, and Plaintiffs painstakingly examined each of them. Not one 19th century or earlier law, not even an outlier, involved a restriction on the capacity of a firearm. Because of that inescapable fact, the State reached for anything it could grasp, including racist laws, laws restricting carry, fire-safety laws, “trap gun” laws, and more. Given that broad sweep, Plaintiffs wonder what the State would argue is *not* an analogue to its modern magazine ban. In any event, the State has failed to meet its burden under *Bruen*. This Court should again enter judgment for the Plaintiffs.

ARGUMENT

I. CALIFORNIA’S MAGAZINE BAN IS UNCONSTITUTIONAL BECAUSE IT PROHIBITS ARMS THAT ARE “TYPICALLY POSSESSED” FOR LAWFUL PURPOSES; UNDER HELLER, NO FURTHER ANALYSIS IS APPROPRIATE

In *Heller*, the Supreme Court laid out “a simple Second Amendment test in crystal clear language. It is a test that anyone can understand. The right to keep and bear arms is a right enjoyed by law-abiding citizens to have arms that are not unusual ‘in common use’ ‘for lawful purposes.’” *Duncan III*, 366 F. Supp. 3d at 1142 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 624 (2008)). *Heller* is clear that an “arm” is “any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.” 554 U.S. at 581. While the Second Amendment does not

1 explicitly list either ammunition or magazines, the Ninth Circuit has repeatedly held
 2 that Second Amendment protection necessarily extends to ammunition and the
 3 components necessary to fire it. *See, e.g., Jackson v. City & Cnty. of San Francisco*,
 4 746 F.3d 953, 967 (9th Cir. 2014); *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir.
 5 2015); *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (en banc).

6 So, as this Court has repeatedly held, magazines meet the definition of “arms”
 7 set forth in *Heller* and elaborated in *Jackson*, *Fyock*, and *Teixeira*. *Duncan III*, 366 F.
 8 Supp. 3d at 1142; Order Re: Prelim. Inj. at 16 (June 29, 2017). They are part of the
 9 firearm that is taken into the hands as a weapon, and they are essential components of
 10 any firearm that uses a magazine. Indeed, “[b]ecause magazines feed ammunition into
 11 certain guns, and ammunition is necessary for such a gun to function as intended,
 12 magazines are ‘arms’ within the meaning of the Second Amendment.” *Ass’n of N.J.*
 13 *Rifle & Pistol Clubs v. Att’y Gen. of N.J.*, 910 F.3d 106, 116 (3d Cir. 2018).

14 The State concedes this fact (as it must), but argues that as long as magazines of
 15 ten rounds or fewer are allowed, the law does not implicate the Second Amendment
 16 because people can defend themselves with these smaller magazines. Dkt.No.142 at 6-
 17 7. But because the test asks only whether the item is an “arm,” the State is apparently
 18 arguing that a magazine *under* ten rounds is an “arm,” but somehow one *over* ten
 19 rounds is *not*. This is not only absurd, but it also empowers the State to determine
 20 exactly where that line is to be drawn.¹ The *Heller* Court, however, has rejected the
 21 idea that Second Amendment rights can be so easily manipulated. *See, e.g., Heller*, 554
 22 U.S. at 629 (“Whatever the reason, handguns are the most popular weapon *chosen by*
 23 *Americans* for self-defense in the home, and a complete prohibition of their use is
 24 invalid.”) (emphasis added); *id.* at 634-35 (“Constitutional rights are enshrined with the
 25 scope they were understood to have when the people adopted them, whether or not
 26

27 ¹ The State looks to other states’ magazine restrictions to justify its law, but
 28 some of those states set different limits, like Delaware’s 17-round limit. *See, e.g., Del.*
Code Ann. tit. 11, §§ 1468(2), 1469(a). Under the State’s logic, a 17-round magazine is
 a protected arm in Delaware, but in California, it is not. That is not how rights work.

1 future legislatures or (yes) even future judges think that scope too broad.”)

2 To be clear, when the State claims the Second Amendment is not implicated
 3 because smaller magazines suffice, it is simply arguing that the burden placed on the
 4 right of armed self-defense is minimal. That is just interest-balancing *disguised* as a
 5 “plain text” argument. Asking if “the Second Amendment’s plain text covers an
 6 individual’s conduct” is far different from asking what burden a law imposes on the
 7 ability to exercise self-defense. Yet the State treats these questions as if they are the
 8 same. And, in doing so, it tries to short-circuit *Bruen* by arguing that the Second
 9 Amendment is irrelevant just because the ability to use some firearm for self-defense
 10 remains intact despite the State’s magazine restriction. But, as we know, “[t]he right to
 11 bear other weapons is ‘no answer’ to a ban on the possession of protected arms.”
 12 *Caetano v. Massachusetts*, 577 U.S. 411, 421 (2016) (Alito, J., concurring).

13 Again, every appellate court to examine this issue has ruled that magazines are
 14 “arms,” or assumed they are. The only contrary authority the State offers are two
 15 recent (and patently incorrect) preliminary injunction orders. Dkt.No.142 at 3 (citing
 16 *Or. Firearms Fed’n, Inc. v. Brown*, No. 22-cv-01815, 2022 WL 17454829, at *6-14
 17 (D. Or. Dec. 6, 2022); *Ocean State Tactical, LLC v. Rhode Island*, No. 22-cv-246,
 18 2022 WL 17721175, at *5-16 (D.R.I. Dec. 14, 2022). Ignoring *Bruen*’s clear rejection
 19 of interest-balancing tests, both district courts held that magazines over ten rounds are
 20 not protected because “a firearm does not *need* a magazine [of that size] to be useful.”
 21 *Ocean State*, 2022 WL 17721175, at *30 (emphasis added); *Brown*, 2022 WL
 22 17454829, at *25 (similarly holding plaintiffs failed to prove that magazines over ten
 23 rounds “are necessary to the use of firearms for lawful purposes such as self-defense”).

24 But the idea that the Second Amendment’s “plain text” covers only what is
 25 *necessary* to exercise self-defense is not in any Supreme Court Second Amendment
 26 decision. Rather, the argument appears to be a sloppy mishmash of two inquiries—
 27 whether a magazine is an “arm” because it is necessary to a functioning firearm and
 28 whether magazines over ten rounds are typically used for lawful purposes, including

1 self-defense. Framed appropriately, neither inquiry could lead to any conclusion except
2 that magazines over ten rounds are protected by the Second Amendment.²

3 What’s more, the magazines that California bans are in “common use” for lawful
4 purposes. This is not even a close call. Millions of them are owned by law-abiding
5 citizens throughout the country. *Duncan v. Becerra* (“*Duncan I*”), 265 F. Supp. 3d
6 1106, 1118, 1143-45 (S.D. Cal. 2017). And they account for “approximately half of all
7 privately owned magazines in the United States.” *Duncan v. Becerra* (“*Duncan IV*”),
8 970 F.3d 1133, 1142 (9th Cir. 2020). This is so although 15 states—representing one-
9 third of the U.S. population—restrict such items. Dkt.No.142 at 1-2. Even under the
10 most conservative estimates, they are common. *N.Y. State Rifle & Pistol Ass’n v.*
11 *Cuomo*, 804 F.3d 242, 255-57 (2d Cir. 2015).

12 The State’s only response is that defining common use based on mere popularity
13 is not enough. Dkt.No.142 at n.12. The claim is unsupported, and it conflicts with
14 Justice Alito’s guidance on what really matters: “[T]he more relevant statistic is that
15 ‘hundreds of thousands of tasers and stun guns have been sold to private citizens,’ who
16 it appears may lawfully possess them in 45 states.” *Caetano*, 577 U.S. at 420 (Alito, J.,
17

18 ² The State improperly smuggles in “expert” testimony from *other matters* to
19 support its claim that magazines over ten rounds are unprotected. Dkt.No.142-1, Ex. 3
20 (report of Colonel Tucker from *Rupp v. Bonta*); Ex. 4 (report of Kevin M. Sweeney
21 from *Oregon Firearms*). **Plaintiff’s object to this eleventh-hour submission.** First, it
22 ignores this Court’s instruction that the parties limit their briefs to the State’s proposed
23 historical analogues, and instead seeks to relitigate the already-settled question about
24 whether the magazines are protected. What’s more, Plaintiffs have had no chance to
25 depose either Colonel Tucker or Professor Sweeney, nor have they had a chance to see
26 the data underlying their opinions.

27 Even setting aside the procedural impropriety, it is obvious from even a cursory
28 read that Tucker is not qualified as an expert on self-defense because his commentary
is not based on sufficient facts or data, nor is it the product of reliable methods. Fed. R.
Evid. 702. This Court should act as a “gatekeeper” to exclude this unreliable expert
testimony. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589-91 (1993). As
just one example of the outlandish claims he makes, Tucker writes that “[a] single
round [of .223] is capable of severing the upper body from the lower body, or
decapitation.” Dkt.No.142-1, Ex. 3 at ¶ 15. As the *Rupp* rebuttal expert put it, Tucker’s
claim “is so ridiculous that it should, and actually does, cast doubt on his qualifications
as an expert in the field of firearms.” Rebuttal Report of J. Buford Boone III, at 7,
Rupp v. Bonta, No. 17-cv-00746 (C.D. Cal. Feb. 3, 2023). If Tucker is this wrong on
very basic wound ballistics, his opinion that magazines over ten rounds are
unnecessary for civilian self-defense is not worth a second look.

1 concurring). Given that the “relevant statistic” is popularity among private citizens, and
2 that stun guns are protected because hundreds of thousands were sold, surely *over 100*
3 *million* magazines are entitled to the same protection. No matter what the State *feels*
4 Californians *need* for self-defense, millions of Americans have chosen magazines over
5 ten rounds for their firearms. They are protected and cannot be banned.

6 **II. THERE IS NO RELEVANT HISTORICAL TRADITION**

7 **A. The State Is Not Entitled to a “More Nuanced” Approach**

8 At the very least, the State must “justify its regulation by demonstrating that it is
9 consistent with the Nation’s historical tradition of firearm regulation.” *Bruen*, 142 S.
10 Ct. at 2126, 2130. The State has come nowhere near meeting its burden. Instead, it
11 contends the magazine ban addresses the “new” social problem of mass shootings,
12 arguing that modern firearms with magazines over ten rounds empower individuals,
13 acting alone, to commit such atrocities. Dkt.No.142 at 12-16. Because its magazine ban
14 addresses this “unprecedented societal concern” and a “dramatic technological
15 change,” the State claims it is entitled to a “more nuanced approach” for identifying a
16 relevant historical tradition of arms regulation. But both the general social problem of
17 mass killing and firearms able to fire multiple rounds before reloading predate the
18 founding. And *Bruen* instructs that “when a challenged regulation addresses a general
19 societal problem that has persisted since the 18th century, the lack of a distinctly
20 similar historical regulation addressing that problem is relevant evidence that the
21 challenged regulation is inconsistent with the Second Amendment.” 142 S. Ct. at 2131.

22 Tragically, mass murder is not some new phenomenon. Indeed, even the State’s
23 own expert concedes that “mass murder has been a fact of life in the United States
24 since the mid-nineteenth century.” Roth Decl. ¶ 40 (“From the 1830s into the early
25 twentieth century, mass killings were common.”); *see also* Cramer Decl. ¶ 24. The
26 State thus contends that the new social problem is the use of *firearms* to commit mass
27 murder. Dkt.No.142 at 15. But there *were* mass shootings dating to at least the 19th
28 century, including the Wounded Knee Massacre where U.S. soldiers murdered nearly

1 300 Lakota people in a botched attempt to disarm them.³

2 So the State makes its criteria *even more specific*, restricting its “unprecedented
3 social problem” to mass shootings with ten or more fatalities committed by a single
4 person. Dkt.No.142 at 14-15. With these arbitrary limitations, the State claims that
5 historical mass killings were not as lethal as the mass public shootings of today.
6 Certainly, every social problem can seem unprecedented if you force the criteria down
7 to such specific facts. Even still, mass killings with ten or more victims committed by a
8 single person *did* occur in the past. Cramer Decl. ¶¶ 32- 34.⁴ And though they often
9 involved explosives or arson, such tragedies did at times involve firearms. *Id.*

10 Finally, the State claims that “[o]f all the shootings in American history
11 involving 14 or more fatalities, 100% involved the use of LCMs.” Dkt.No.142 at 15.
12 “[Fourteen] or more fatalities” is of course, is an oddly specific dividing line. But no
13 matter why the State chose that arbitrary figure, the claim is misleading, at best, and
14 very likely false, at worst. It is misleading because it lumps all magazines over ten
15 rounds together and calls them “LCMs,” then claims such magazines have been used in
16 100% of this very specific type of mass murder. The State could just have well defined
17 “LCMs” as all magazines over three rounds, and the claim would be just as true. Worse
18 yet, the State’s claim cannot be verified. The Parkland shooter, for example, was
19 reported to have killed 17 people and injured another 17, while using only 10-round
20 magazines. Mairead McCardle, *Report: Parkland Shooter Did Not Use High-Capacity*
21 *Magazines*, Nat’l Rev. (Mar.1, 2018), available at <https://tinyurl.com/pudu9kxs>.

22 What’s more, the State’s premise that mass shootings, specifically, are so
23

24 ³ Myles Hudson, *Wounded Knew Massacre: United States History [1890]*,
25 Britannica, <https://www.britannica.com/event/Wounded-Knee-Massacre> (last updated
26 Dec. 22, 2022) (fact-checked by the Editors of Encyclopedia Britannica).

27 ⁴ The State introduces portions of a deposition of Mr. Cramer from a different
28 matter to cast doubt on his opinions. **Plaintiffs object.** *At the State’s request*, this Court
reopened discovery *expressly* to allow the State to take his deposition. For whatever
reason, *the State chose not to*. Plaintiffs did not get to defend Mr. Cramer’s deposition,
and they cannot know the context of the claimed errors in Cramer’s work to address
the State’s characterization of the quotes it plucked from the transcript.

1 common today that they rise to the level of an “unprecedented societal concern” does
 2 not really reflect findings that (even today) such crimes, though horrific, really are rare.
 3 *Miller v. Bonta*, 542 F. Supp. 3d 1009, 1018 (S.D. Cal. 2021) (recognizing that mass
 4 shootings are horrific, but fortunately, rare); *see also* Kleck Decl. ¶ 40 (“[T]he risk of
 5 an American being killed in a ‘gun massacre’ is less than 1/14th of the risk of being
 6 killed by a bolt of lightning—itself a freakishly rare event.”).

7 The State’s argument that the use of magazines over ten rounds represents a
 8 “dramatic technological change” fares no better. Dkt.No.142 at 12-14. To the contrary,
 9 by the founding, “repeating ... firearms had been around for a long time.” Hlebinsky
 10 Decl. ¶ 20. Indeed, “repeaters, including those with magazines, could have capacities
 11 of over ten rounds at least a century before and during the ratification of the Second
 12 Amendment.” *Id.* By the mid-19th century, revolvers able to fire 5-6 shots before
 13 reloading had replaced single-shot flintlock pistols in popularity. *Id.* ¶ 30, n.43. And
 14 slow-to-load muzzleloaders were displaced by lever-action repeater rifles, like the
 15 Henry and Winchester rifles, which could fire up to 16 rounds before reloading. *Id.* ¶¶
 16 30-31. Despite the existence of these technologies, no law in the 18th or 19th centuries
 17 banned such firearms or restricted their capacity.

18 In response to the undeniable commonality of repeating arms, the State
 19 essentially asks us to not believe our eyes, insisting that Henry and Winchester rifles
 20 were uncommon, and that any success was because of sales made to foreign armies.
 21 Dkt.No.142 at 14 (citing Vorenberg Decl. ¶¶ 51). But we know that “between 1861 and
 22 1877, a total of 164,466 Henry and all models of Winchester were made, with [only
 23 about] 56,000 going to foreign governments.” Hlebinsky Decl. ¶ 31. And we know that
 24 it was mostly *individuals* that bought the remainder because the military did not adopt
 25 such rifles until much later. Vorenberg Decl. ¶¶ 25-29.

26 This was true even early on. According to the National Parks Service, Henry
 27 “made about 14,000 of the rifles between 1860 and 1866, but the U.S. Ordnance
 28 Department purchased only about 1,731 of the rifles. However, many soldiers acquired

1 their own....”⁵ The Library of Congress refers to Winchester’s Model 1873 as the “gun
2 that won the west.”⁶ And it is interesting the State cites racist laws restricting firearm
3 ownership by Black Americans since this marginalized group embraced Winchesters to
4 protect themselves, implicitly confirming the 19th century popularity of these rifles.
5 For instance, the Vice President of the National Colored Press Association, encouraged
6 Black people to buy Winchesters to protect their families from the “two-legged
7 animals...growling around your home in the dead of the night.”⁷ Ida B. Wells wrote in
8 1892 that a “Winchester rifle should have a place of honor in every black home, and it
9 should be used for the protection which the law refuses to give.”⁸

10 In short, repeating rifles were popular by the time the Fourteenth Amendment
11 was ratified. Yet the State cannot identify a single law banning the possession of these
12 rifles based on their firing capacity at any time in history. Indeed, as the State has
13 admitted, there simply are no such enactments to be found. This is strong evidence that
14 California’s modern magazine ban is unconstitutional. *Bruen*, 142 S. Ct. at 2131.

15 **B. The State Has Not Established an Enduring Tradition of Laws**
16 **Banning Arms in Common Use for Lawful Purposes**

17 The State has not shown that it should be allowed to proceed to the “more
18 nuanced approach” of analogical inquiry. But even if it had, it has not proven that there
19 was an enduring American tradition of relevantly similar *laws* banning protected arms.
20 Plaintiffs’ supplemental briefs thoroughly addressed the State’s proposed analogues.
21 Dkt.No.141 at 5-22; Dkt.No.132 at 21-43. There is neither reason nor space to do so
22 again here. But Plaintiffs will address several new points the State has raised.

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25 ⁵ U.S. National Parks Service, *Wilson’s Creek National Battlefield Foundation*
Purchases Rare Henry Repeating Rifle for Museum Collection (June 18, 2020),
<https://www.nps.gov/wicr/learn/news/20-15.htm> (last visited Feb. 15, 2023).

26 ⁶ Library of Congress, *American Firearms and Their Makers: A Research*
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27 ⁷ Nicholas J. Johnson, *Firearms Law Second Amendment Regulation, Rights, &*
Policy 521 (3d ed. 2021) (citing Paula J. Giddings, *Ida: A Sword Among Lions* 153-54
28 (2008)).

⁸ *Id.* (citing Ida B. Wells, *Southern Horrors*. N.Y. Age (June 25, 1892)).

1 First, because the State knows it cannot prevail by pointing to constitutionally
2 relevant historical *laws*, it asks the Court to treat the speculative opinions of its biased
3 experts as if they are analogues and demands even *more* time to craft such opinions.
4 Dkt.No.142 at 16. But the *Bruen* Court considered only enacted *laws* as analogues, and
5 district courts applying *Bruen* have agreed: “The historical record itself, and not expert
6 arguments or opinions, informs the analysis.” *Hardaway v. Nigrelli*, No. 22-cv-771,
7 2022 U.S. Dist. LEXIS 200813, at *6 n.6 (W.D.N.Y. Nov. 3, 2022). Perhaps when the
8 meaning or context of an *enacted* historical law is unclear, experts might assist the
9 courts. But when, as here, the meaning and context of the State’s purported analogues
10 are clear, courts can readily determine their relevance under *Bruen*.

11 The State asserts that rather than evaluate what laws existed, we must attempt to
12 divine what might have been believed to be allowed in 1791. Dkt.No.142 at 16-17
13 (citing *United States v. Kelly*, No. 22-cr-00037, 2022 U.S. Dist. LEXIS 215189, at *5
14 (M.D. Tenn. Nov. 16, 2022)). *But the best way we have to know what laws the people*
15 *of a different time would have considered acceptable is by looking at the laws they*
16 *enacted*. The State’s attempt to instead rely on post-Civil War regulation that was
17 never adopted by any legislative body in the country does not constitute the sort of
18 “enduring American tradition of state regulation” that *Bruen* requires. Nor do its
19 speculative explanations for why legislative action was unnecessary. *Bruen* demands
20 that the State identify relevant and well-established historical *laws* evidencing an
21 American tradition of similar regulation—not excuses for why no such laws exist. The
22 State had plenty of time to present its analogues, *and it submitted hundreds of them*.
23 The Court does not need extended expert opinion or more discovery.

24 Second, even the State’s “best analogues” are not relevantly similar to its
25 modern magazine ban. When analogical reasoning is appropriate, *Bruen* teaches that
26 whether a proposed analogue is “relevantly similar” relies on “how and why the
27 regulations burden a law-abiding citizen’s right to armed self-defense.” 142 S. Ct. at
28 2132. All the State’s proposed analogues ignore one or both of these metrics.

1 For instance, what the State calls “dangerous weapon law[s],” Dkt.No.142 at 24-
2 25, were, by and large, restrictions on the *carry* of certain arms, not their mere
3 possession. The State argues that the burden on self-defense is “modest” for both its
4 magazine restriction and historical carry restrictions. *Id.* But, in doing so, the State
5 exposes its misunderstanding of *Bruen*. Whether an analogue is “relevantly similar” is
6 not simply a measure of the subjective *amount* of burden on self-defense compared to
7 the modern law. It is *how* the compared laws burden the right.

8 As discussed in Plaintiffs’ earlier briefs, historical carry laws regulated only the
9 *manner* of carrying certain arms in public. Dkt.No.141 at 14-17; Dkt.No.132 at 28-31.
10 Many included express exemptions for defensive use. Dkt.No.141 at 16. California’s
11 magazine ban restricts even the *possession* of magazines even *in the home* and even for
12 *self-defense* purposes. What’s more, the State does not argue that the “dangerous
13 weapons” these laws targeted were in common use for lawful purposes. So it has not
14 shown that such laws are anything like modern laws banning arms that are.

15 What’s more, the State considers its “best analogue” to be gunpowder-storage
16 laws. It highlights, for example, a 1784 New York restriction on keeping more than 28
17 pounds of gunpowder in one place. Dkt.No.143 at 3-4. The State argues the New York
18 gunpowder limit and its modern magazine ban were both enacted “to prevent
19 significant harm to the public.” *Id.* at 5. But that characterization of the reason for such
20 laws is far too broad. Indeed, just about any arms restriction can be described as
21 necessary to promote public safety or protect life. That does not make it similar in
22 justification for identifying “relevantly similar” historical analogues under *Bruen*. *See*
23 142 S. Ct. at 2132.

24 Besides, the *Heller* majority, responding to Justice Breyer’s citation to this very
25 law, explained that historical gunpowder laws were fire-safety measures; they were not
26 concerned with gun crime at all. *Heller*, 554 U.S. at 631-32. And they “did not clearly
27 prohibit loaded weapons.” *Id.* at 632. As *Heller* explained in the context of D.C.’s
28 handgun ban, “[n]othing about th[e]se fire-safety laws undermines our analysis; they

1 do not remotely burden the right of self-defense as much as an absolute ban on”
 2 protected arms. *Id.* In short, even the State’s claimed best analogue is not “relevantly
 3 similar” to its modern magazine restrictions.

4 Finally, a word about the period this Court should consider when reviewing the
 5 State’s historical record. The *Bruen* Court made a passing mention of an “ongoing
 6 scholarly debate” over whether the analytical focus should be on the laws of the
 7 Founding, the Reconstruction era, or both. 142 S. Ct. at 2138. Plaintiffs are unaware,
 8 however, of a single Supreme Court case that looked to Reconstruction as the period
 9 from which to determine the original meaning of the Bill of Rights. Of course, the
 10 Court need not always consult history to decide cases about incorporated provisions of
 11 the Bill of Rights. But when it has, the Court has always considered the Founding—or
 12 very shortly before or after—to be the principal or exclusive period to examine.⁹
 13 Justice Thomas’s statement in *Bruen* that the Court has “generally assumed that the
 14 scope of the protection applicable to the Federal Government and States is pegged to
 15 the public understanding of the right when the Bill of Rights was adopted in 1791,” is
 16 too modest. *Id.* at 2137. The Court is unlikely to overturn its entire Bill of Rights
 17 jurisprudence based on some “scholarly debate.”

18 In short, the meaning of a constitutional provision is fixed according to the
 19 understanding at the Founding, so the laws of that laws period (not the Reconstruction)
 20 should guide this Court’s analysis. California’s charts identify hundreds of alleged
 21 analogues. But it turns out that *only seven*¹⁰ of these are from the relevant period.
 22 Dkt.No. 139-1 at 2-3. A handful were adopted too early. But most were adopted far too
 23 late, having been adopted during the Civil War period or later. Of the *seven* founding-
 24

25 ⁹ See, e.g., *Nevada Comm’n on Ethics v. Carrigan*, 564 U.S. 117, 122-25 (2011)
 26 (freedom of speech); *Virginia v. Moore*, 553 U.S. 164, 168-69 (2008) (Fourth
 27 Amendment); *Gamble v. United States*, -- U.S. --, 139 S. Ct. 1960, 1965 (2019)
 (double jeopardy); *Powell v. Alabama*, 287 U.S. 45, 60-67 (1932) (right to counsel);
 28 *Timbs v. Indiana*, -- U.S. --, 139 S. Ct. 682, 687-99 (2019) (excessive fines).

¹⁰ Plaintiffs previously miscounted the number of founding-era laws in the
 State’s charts, stating that there were ten such laws and generously included another
 five adopted by the turn of the 19th century. Dkt.No.141 at 9.

1 era laws, one was British law confining the right to Protestants, two were *local*
2 gunpowder laws, one restricted the setting of “trap guns,” and three restricted carry of
3 certain arms while engaged in unlawful activities. *Id.* These can hardly be
4 characterized as anything but irrelevant outliers; they are not evidence of the enduring
5 tradition of regulation *Bruen* demands.

6 **CONCLUSION**

7 For these reasons, and those discussed in Plaintiffs’ earlier briefs, this Court
8 should declare section 32310 unconstitutional and permanently enjoin its enforcement.
9

10 Dated: February 21, 2023

MICHEL & ASSOCIATES, P.C.

11 /s/ Anna M. Barvir

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14 Attorneys for Plaintiffs
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CERTIFICATE OF SERVICE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case Name: *Duncan, et al. v. Becerra*
Case No.: 17-cv-1017-BEN-JLB

IT IS HEREBY CERTIFIED THAT:

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

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

**PLAINTIFFS’ RESPONSE TO DEFENDANT’S SUPPLEMENTAL BRIEFS
RE: CHARTS OF HISTORICAL LAWS (ECF NOS. 142 & 143)**

on the following parties by electronically filing the foregoing on February 21, 2023, with the 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 February 21, 2023, at Long Beach, CA.



Laura Palmerin