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 11
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13 IN THE UNITED STATES DISTRICT COURT
 14 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
 15
 16

17 **JAMES MILLER, et al.,**
 18
 Plaintiffs,
 19
 v.
 20
 21 **CALIFORNIA ATTORNEY
 GENERAL XAVIER BECERRA,
 et al.,**
 22
 Defendants.
 23
 24

19-cv-1537 BEN-JLB

**DEFENDANTS' OPPOSITION TO
 PLAINTIFFS' MOTION FOR
 PRELIMINARY INJUNCTION**

Date: February 6, 2020
 Time: 2:00 p.m.
 Courtroom: 5A
 Judge: Hon. Roger T. Benitez
 Trial Date: None Set
 Action Filed: August 15, 2019

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INTRODUCTION

1
2 In response to mass shootings and escalating gun violence, the Legislature
3 enacted the Roberti-Roos Assault Weapons Control Act (the “AWCA”) in 1989 to
4 prohibit the possession, sale, transportation, or importation of assault weapons.
5 Since then, California has amended the AWCA to add a features-based definition
6 that designates certain semiautomatic rifles, pistols, and shotguns as assault
7 weapons if they possess particular features or characteristics. Plaintiffs claim that
8 this features-based definition and a broad range of enforcement statutes and
9 regulations that apply to assault weapons violate the Second Amendment. Plaintiffs
10 seek a wide-ranging preliminary injunction of these provisions, even though the
11 AWCA has been in effect for decades. Their motion should be denied.

12 As a threshold matter, Plaintiffs’ motion is deeply flawed, seeking a vastly
13 overbroad injunction against a laundry list of statutes. Many of the provisions that
14 Plaintiffs seek to enjoin are not meaningfully discussed or even mentioned in their
15 supporting papers, and some of them apply to firearm restrictions not challenged by
16 Plaintiffs. Plaintiffs barely discuss assault pistols and assault shotguns, and, even
17 with respect to assault rifles, Plaintiffs fail to present any evidence concerning some
18 of the features or characteristics that may qualify a rifle as an assault weapon.
19 Because Plaintiffs’ motion lacks any tailoring, it should be denied in its entirety.

20 Moreover, Plaintiffs cannot satisfy the heightened standard for *mandatory*
21 preliminary injunctions. There is nothing “preliminary” about Plaintiffs’ requested
22 relief. Plaintiffs seek to upend the status quo and obtain the ultimate relief they
23 seek in this action—a broad injunction of the AWCA. In stark contrast to the
24 *prohibitory* preliminary injunction issued in *Duncan v. Becerra*—which preserved
25 the status quo during litigation by preventing enforcement of newly enacted
26 provisions of the Penal Code that had yet to go into effect—Plaintiffs’ motion seeks
27 to alter a status quo that has existed for decades. As such, in addition to satisfying
28 the equitable factors for a preliminary injunction, Plaintiffs must show that the facts

1 and the law *clearly favor* a preliminary injunction. Plaintiffs cannot make that
2 showing because *every* federal circuit court that has reviewed the constitutionality
3 of assault-weapon restrictions like the AWCA (five thus far) has upheld them.

4 Even under the standard applicable to prohibitory preliminary injunctions,
5 Plaintiffs' motion should be denied. Plaintiffs cannot establish that they are likely
6 to succeed on the merits under the Ninth Circuit's two-step framework for Second
7 Amendment claims. The AWCA does not burden conduct protected by the Second
8 Amendment, and even if it does, the challenged provisions satisfy the applicable
9 level of scrutiny—intermediate scrutiny. The Legislature's decision to restrict
10 assault weapons is supported by evidence showing that, *inter alia*, they are used
11 frequently in mass shootings, resulting in substantially more deaths and injuries.

12 The remaining factors for a preliminary injunction also weigh against
13 Plaintiffs' motion. Plaintiffs cannot demonstrate that they will be irreparably
14 harmed in the absence of a preliminary injunction given Plaintiffs' inexplicable,
15 multi-year delay in challenging the AWCA, which reflects a lack of urgency, and
16 their access to hundreds of other firearms not subject to the AWCA. The balance of
17 the equities and the public interest also weigh decisively against a preliminary
18 injunction. If assault weapons that have been restricted for decades are permitted to
19 enter the State as this case is litigated—and at the same time the State is defending
20 the AWCA in a nearly identical Second Amendment case before the Ninth
21 Circuit¹—the State would suffer irreparable injury. A preliminary injunction would
22 cause a massive disruption to the enforcement of California's gun-safety laws and
23 cause significant public confusion and concern; and if the AWCA is ultimately
24 upheld, the status quo would be difficult to restore. Accordingly, Plaintiffs have
25 failed to meet their burden under any standard for preliminary injunctions.

26
27 ¹ See *Rupp v. Becerra*, 401 F. Supp. 3d 978 (C.D. Cal. 2019) (upholding the
28 AWCA), *appeal docketed*, No. 19-56004 (9th Cir. Aug. 28, 2019). The deadline
for the opening brief is January 27, 2020.

BACKGROUND

I. THE ASSAULT WEAPONS CONTROL ACT

The AWCA initially defined as assault weapons certain semiautomatic rifles, pistols, and shotguns identified by make and model. *See* Cal. Penal Code § 30510; *see also* Graham Decl. ¶ 15. In enacting the AWCA, the Legislature found that an assault weapon “has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings.” Cal. Pen. Code § 30505(a).² The AWCA rendered it a felony to manufacture, import, sell, or possess any of the listed firearms without a permit. *Silveira v. Lockyer*, 312 F.3d 1052, 1057 (9th Cir. 2002), *abrogated on other grounds by District of Columbia v. Heller*, 554 U.S. 570 (2008). After the Legislature enacted the AWCA, gun manufacturers began to produce “copycat” weapons to evade the statute’s restrictions. *Id.* at 1058 n.5. In response, the Legislature enacted Senate Bill 23 to add a flexible, features-based definition of “assault weapons” to the AWCA, now codified at California Penal Code section 30515(a), *see* DX-1 at 4-5 (providing background on the AWCA),³ and restrictions large-capacity magazines (“LCMs”).

Under section 30515(a), a rifle qualifies as an “assault weapon” if it is (1) a semiautomatic, centerfire rifle that does not have a fixed magazine,⁴ but has any one of the following features: a pistol grip that protrudes conspicuously beneath the action of the rifle, a thumbhole stock, a folding or telescoping stock, a grenade or flare launcher, a flash suppressor, or a forward pistol grip; (2) a semiautomatic,

² Plaintiffs do not challenge the make-and-model definition of an assault weapon.

³ Defendants’ exhibits are attached to the accompanying Declaration of John D. Echeverria, and citations to those exhibits are to “DX” followed by exhibit number; the pages of Defendants’ exhibits have been numbered in consecutive numerical order. *See* L.R. 5.1(e).

⁴ A “fixed magazine” is “an ammunition feeding device contained in, or permanently attached to, a firearm in such a manner that the device cannot be removed without disassembly of the firearm action.” Cal. Penal Code § 30515(b).

1 centerfire rifle that has a fixed LCM; or (3) a semiautomatic, centerfire rifle that has
2 an overall length of less than 30 inches. Cal. Penal Code § 30515(a)(1)-(3).

3 A pistol qualifies as an “assault weapon” under section 30515(a) if it is (1) a
4 semiautomatic pistol that does not have a fixed magazine, but has one or more of
5 the following features: a threaded barrel (capable of accepting a flash suppressor, a
6 forward handgrip, or a silencer), a second handgrip, a barrel shroud, or the capacity
7 to accept a detachable magazine outside of the pistol grip; or (2) a semiautomatic
8 pistol with a fixed LCM.⁵ Cal. Penal Code § 30515(a)(4)-(5).

9 A shotgun qualifies as an “assault weapon” under section 30515(a) if it is (1) a
10 semiautomatic shotgun that has an adjustable stock and one of the following
11 features: a pistol grip that protrudes conspicuously beneath the action of the
12 weapon, a thumbhole stock, or a vertical handgrip; (2) a semiautomatic shotgun that
13 has the ability to accept a detachable magazine; or (3) a shotgun that has a
14 revolving cylinder. Cal. Penal Code § 30515(a)(6)-(8).

15 For the past two decades, California has restricted the manufacture,
16 distribution, transportation, importation, sale, lending, and possession of firearms
17 that qualify as “assault weapons” under the AWCA. *See* Cal. Penal Code
18 §§ 30600(a), 30605(a).

19 **II. THE PRESENT ACTION**

20 The initial complaint, filed on August 15, 2019, asserted a Second
21 Amendment challenge to the AWCA’s restrictions on semiautomatic, centerfire
22 rifles and semiautomatic pistols with fixed LCMs. On September 27, 2019,
23 Plaintiffs filed a First Amended Complaint, expanding their challenge to *all* of the
24 definitions in California Penal Code section 30515(a) and a range of California
25 statutes and regulations relating to assault weapons: California Penal Code sections
26 30600, 30605, 30800, 30910, 30915, 30925, 30945, 30950, 31000, and 31005 and

27 _____
28 ⁵ Assault pistols “designed expressly for use in Olympic target shooting
events” are exempted from the AWCA. Cal. Penal Code § 30515(c).

1 sections 5460 and 5471 of title 11 of the California Code of Regulations. Dkt. 9
2 at 41-42. Plaintiffs purport to challenge these provisions on their face and as
3 applied to them and similarly situated individuals. *Id.* On December 6, 2019,
4 Plaintiffs filed their motion for a preliminary injunction. Dkt. 22.

5 **LEGAL STANDARD**

6 “A preliminary injunction is an extraordinary remedy never awarded as of
7 right.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Plaintiffs
8 requesting a preliminary injunction must establish that (1) they are likely to succeed
9 on the merits; (2) they will likely suffer irreparable harm in the absence of
10 preliminary relief; (3) the balance of equities tips in their favor; and (4) an
11 injunction is in the public interest. *Id.* at 20. Alternatively, plaintiffs may
12 demonstrate that “serious questions going to the merits were raised and the balance
13 of hardships tips sharply in [plaintiffs’] favor,” if they also show a likelihood of
14 irreparable injury and that the injunction is in the public interest. *All. for the Wild*
15 *Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011) (quotation omitted).

16 **ARGUMENT**

17 **I. PLAINTIFFS SEEK AN OVERBROAD PRELIMINARY INJUNCTION**

18 It is well-settled that a preliminary injunction “must be tailored to remedy the
19 specific harm alleged” and that an “overbroad injunction is an abuse of discretion.”
20 *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991)
21 (citations omitted). Here, Plaintiffs seek to enjoin numerous provisions of the
22 AWCA and regulations relating to assault weapons, even though many of those
23 provisions are not meaningfully discussed (or even mentioned) in their supporting
24 papers.⁶ Plaintiffs’ requested injunction is overbroad in at least four respects.

25
26 ⁶ Plaintiffs’ memorandum does not cite to or even mention California Penal
27 Code sections 30910, 30915, 30925, 30945, and 30950, and section 5460 of title 11
28 of the California Code of Regulations. Plaintiffs even seek to enjoin Penal Code
section 30925, Dkt. 22 at 2, despite their representation that they will voluntarily
dismiss their challenge to that section, *see* Dkt. 21 at 12.

1 First, critically, Plaintiffs do not challenge the make-and-model definitions in
2 California Penal Code section 30510 or section 5499 of title 11 of the California
3 Code of Regulations, leaving those listed assault weapons subject to regulation
4 under the AWCA. Yet, they seek to enjoin enforcement of the AWCA as to those
5 listed assault weapons. This is a fundamental defect in Plaintiffs' requested relief.

6 Second, many of the challenged provisions also regulate .50 BMG rifles, and
7 thus should not be enjoined in their entirety. *See* Cal. Penal Code §§ 30600, 30800,
8 30945, 30950, 31000, 31005.

9 Third, Plaintiffs do not attempt to even suggest how other activities proscribed
10 by the challenged provisions violate the Second Amendment, yet they seek to
11 enjoin their enforcement. *See* Cal. Penal Code §§ 30800(d) (deeming an assault
12 weapon as a public nuisance if it was involved in a misdemeanor or felony that
13 resulted in a conviction), 30945 (authorizing uses for registered assault weapons),
14 30950 (prohibiting possession of assault weapons by prohibited persons and
15 juveniles), 31000 (authorizing additional uses for registered assault weapons with
16 permit), 31005 (authorizing manufacture or sale of assault weapons with permit).

17 Fourth, to the extent Plaintiffs are challenging the features-based definition in
18 California Penal Code section 30515(a), Plaintiffs offer scant evidence or argument
19 concerning assault pistols and assault shotguns. Aside from the general description
20 of the AWCA's definitions of assault pistols and assault shotguns, *see* Pls.' Mem.
21 of P. & A. in Supp. of Mot. for Prelim. Inj. ("Pls. Mem.") at 3, and the declarations
22 from certain individual Plaintiffs that they want to obtain such assault weapons, *see*,
23 *e.g.*, *id.* at 8, Plaintiffs' supporting papers do not identify how restrictions of those
24 firearms violate the Second Amendment. And Plaintiffs do not cite any evidence
25 concerning some of the prohibited features or characteristics (*e.g.*, grenade
26 launchers, threaded barrels, or lengths of less than 30 inches). An injunction of
27
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1 California Penal Code section 30515(a) without argument and evidence concerning
2 *each* listed feature and characteristic would be overbroad.⁷

3 The injunction that Plaintiffs seek would be overbroad and lacking in
4 evidentiary support. Accordingly, the Court should deny their motion.

5
6 **II. PLAINTIFFS FAIL TO SATISFY THE HEIGHTENED STANDARD FOR A
MANDATORY INJUNCTION THAT WOULD ALTER THE STATUS QUO**

7 Properly characterized, Plaintiffs seek a mandatory, rather than a prohibitory,
8 preliminary injunction because it would dramatically alter the status quo. In
9 contrast to prohibitory injunctions designed to preserve the status quo during
10 litigation, “mandatory” injunctions “go well beyond simply maintaining the status
11 quo *pendent lite*.” *Stanley v. Univ. of So. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994)
12 (quotation omitted); *see, e.g., Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053,
13 1061 (9th Cir. 2014) (holding that requested preliminary injunction was prohibitory
14 “like other injunctions that prohibit enforcement of a new law or policy”).
15 Preliminary injunctions that would alter the status quo are “particularly disfavored.”
16 *Stanley*, 13 F.3d at 1320 (quotation omitted). “It is so well settled as not to require
17 citation of authority that the usual function of a preliminary injunction is to preserve
18 the status quo ante litem pending a determination of the action on the merits.”
19 *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808 (9th Cir. 1963).

20 Here, Plaintiffs’ requested injunction would completely change the status quo.
21 Plaintiffs seek to try their claims on affidavits and obtain the ultimate relief sought
22 in this action—a broad injunction of the AWCA. Pls. Mem. at 30. Plaintiffs may
23 claim that, in seeking to “prohibit” the enforcement of the AWCA, they are

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25 _____
26 ⁷ Perhaps these features and characteristics are discussed somewhere in the
27 more than 1,800 pages of supporting material, but Plaintiffs do not adequately tie
28 their evidence to the particular provisions they seek to enjoin. It is not Defendants’
obligation, and especially the Court’s, to find evidence that may support Plaintiffs’
requested injunction. *See Indep. Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th
Cir. 2003) (faulting the plaintiff’s “spaghetti approach” and declining “to sort
through the noodles in search of [the party’s] claim”).

1 requesting a “prohibitory” injunction, but the *effects* of such an injunction prove
2 otherwise. *See Saddiq v. Trinity Servs. Grp.*, No. 13-01671-PHX-ROS (MHB),
3 2015 WL 13684701, at *2 (D. Ariz. Nov. 3, 2015) (noting that a request for a
4 preliminary “injunction ‘prohibiting [defendants’] revoking of [plaintiff’s] Halal
5 diet” “appears to seek a prohibitory injunction, or one that seeks only to maintain
6 the status quo,” but the “wording is misleading” as it would be “a mandatory
7 injunction that would overrule an administrative decision already in effect”).

8 Plaintiffs’ requested injunction would have sweeping, irreversible
9 consequences, which confirm its mandatory nature. If granted, Plaintiffs’ motion
10 would impose significant administrative burdens on law enforcement agencies at
11 multiple levels of government, generate significant public confusion and concern,
12 and amplify the existing public-safety risks posed by assault weapons by increasing
13 their availability, and likely prevalence, in the State. *See Graham Decl.* ¶¶ 72-77.
14 Plaintiffs’ requested preliminary injunction “has the character of a mandatory
15 injunction” because it “would alter the status quo by requiring California to alter its
16 regulatory scheme and practices as they pertain to firearms.” *Tracy Rifle & Pistol*
17 *LLC v. Harris*, 118 F. Supp. 3d 1182, 1194-95 (E.D. Cal. 2015). Those burdens
18 should not be imposed on the State at this early stage of litigation, especially where
19 the challenged law has been in effect for so long.

20 Plaintiffs’ requested mandatory injunction is subject to a heightened standard.
21 In addition to satisfying the equitable factors for a preliminary injunction, Plaintiffs
22 must meet a “doubly demanding” burden: they “must establish that the law and
23 facts *clearly favor* [their] position.” *Garcia v. Google*, 786 F.3d 733, 740 (9th Cir.
24 2015) (en banc). Plaintiffs cannot make this showing because *every* federal circuit
25 court to have examined assault-weapon restrictions like the AWCA—the First,
26 Second, Fourth, Seventh, and D.C. Circuits—has upheld them under intermediate
27 scrutiny. *See Wilson v. Cook Cnty.*, 937 F.3d 1028, 1036 (7th Cir. 2019) (following
28 *Friedman v. City of Highland Park, Ill.*, 784 F.3d 406, 412 (7th Cir. 2015)), *cert.*

1 *petition filed*, No. 19-704 (Dec. 3, 2019); *Worman v. Healey*, 922 F.3d 26, 38-41
2 (1st Cir. 2019), *cert. petition filed*, No. 19-404 (Sept. 25, 2019); *Kolbe v. Hogan*,
3 849 F.3d 114, 138-46 (4th Cir. 2017) (en banc); *N.Y. State Rifle & Pistol Ass’n v.*
4 *Cuomo (NYSRPA)*, 804 F.3d 242, 260-63 (2d Cir. 2015); *Heller v. District of*
5 *Columbia (Heller II)*, 670 F.3d 1244, 1261-64 (D.C. Cir. 2011).

6 And in *Rupp v. Becerra*, the district court upheld the AWCA’s restrictions on
7 semiautomatic rifles. *Rupp*, 401 F. Supp. 3d at 988, 993. The court held that the
8 AWCA does not burden conduct protected by the Second Amendment because
9 “semiautomatic rifles within the AWCA’s scope are virtually indistinguishable
10 from M-16s and thus are not protected by the Second Amendment.” *Id.* at 988.
11 Alternatively, the court held that the AWCA is subject to intermediate scrutiny,
12 because it does not “severely burden the core of the Second Amendment right,” and
13 that the Attorney General “more than met his burden” under intermediate scrutiny.
14 *Id.* at 989, 993. *Rupp* and the chorus of extra-circuit authority show that an
15 injunction of the AWCA is clearly *disfavored*.

16 Plaintiffs rely heavily on this Court’s decision in *Duncan v. Becerra*, which
17 held that California’s LCM restrictions violated the Second Amendment and is
18 currently on appeal. *Duncan v. Becerra*, 366 F. Supp. 3d 1131 (S.D. Cal. 2019),
19 *appeal docketed*, No. 19-55376 (9th Cir. Apr. 4, 2019).⁸ That decision does not
20 show that the facts and the law clearly favor granting a *preliminary injunction* in
21 this case. Indeed, this Court stayed the effect of its grant of a *permanent injunction*
22 in that case in light of the “immeasurable societal benefit of maintaining the
23 immediate status quo while the process of judicial review takes place.” *Duncan v.*
24 *Becerra*, No. 17-cv-1017-BEN-JLB, 2019 WL 1510340, at *4 (S.D. Cal. Apr. 4,
25 2019). And even with respect to Plaintiffs’ challenge to California Penal Code
26 section 30515(a)(2) and (a)(5), which concern fixed LCMs, this Court’s decision in
27

28 ⁸ The Ninth Circuit has scheduled oral argument for April 2, 2020.

1 *Duncan* is not dispositive; this case concerns the sufficiency of different evidence
 2 concerning assault weapons under intermediate scrutiny. Whatever the outcome of
 3 *Duncan*, the State has compelling reasons to restrict fixed LCMs *in certain*
 4 *firearms*, such as semiautomatic firearms with militaristic features.

5 In sum, Plaintiffs seek a mandatory preliminary injunction, but they cannot
 6 show that the law and the facts *clearly* support their motion. For this reason alone,
 7 the Court should deny Plaintiffs' motion.

8 **III. PLAINTIFFS FAIL TO SATISFY THE EQUITABLE FACTORS FOR** 9 **PRELIMINARY INJUNCTIONS**

10 In addition to failing to meet the heightened standard controlling mandatory
 11 injunctions, Plaintiffs' motion fails to establish any of the equitable factors courts
 12 traditionally apply in weighing the issuance of a preliminary injunction. Whether
 13 Plaintiffs' motion is viewed as seeking mandatory or prohibitory relief, each of the
 14 *Winter* factors weighs against a preliminary injunction of the AWCA.

15 **A. Plaintiffs Are Not Likely to Succeed on the Merits**

16 Plaintiffs have failed to meet their burden of establishing a likelihood of
 17 success on the merits. As previously discussed, each of the five federal circuit
 18 courts to have considered the constitutionality of assault-weapon restrictions like
 19 the AWCA has upheld them under the same two-step framework adopted by the
 20 Ninth Circuit. As in those cases, the AWCA is constitutional.

21 **1. The Two-Step Framework for Second Amendment Claims**

22 The Second Amendment provides, "A well regulated Militia, being necessary
 23 to the security of a free State, the right of the people to keep and bear Arms, shall
 24 not be infringed." U.S. Const. amend. II. In *District of Columbia v. Heller*, the
 25 Supreme Court held that the Second Amendment protects an individual right to
 26 keep and bear arms. 554 U.S. at 595. While the Court in *Heller* invalidated a
 27 prohibition of all handguns—which the Court characterized as "the quintessential
 28 self-defense weapon," *id.* at 629—the Court made clear that "the right secured by

1 the Second Amendment is not unlimited” and does not extend to “a right to keep
 2 and carry any weapon whatsoever in any manner whatsoever and for whatever
 3 purpose,” *id.* at 626 (citations omitted). The Court cautioned that the Second
 4 Amendment “by no means eliminates” a state’s “ability to devise solutions to social
 5 problems that suit local needs and values,” emphasizing that “[s]tate and local
 6 experimentation with reasonable firearms regulations will continue under the
 7 Second Amendment.” *McDonald v. City of Chicago*, 561 U.S. 742, 785 (2010)
 8 (plurality opinion) (quotation omitted).

9 The Ninth Circuit has adopted a two-step approach to evaluating the
 10 constitutionality of gun-safety laws under the Second Amendment. *See Silvester v.*
 11 *Harris*, 843 F.3d 816, 820-21 (9th Cir. 2016). The first step considers whether the
 12 challenged law burdens conduct protected by the Second Amendment, based on a
 13 “historical understanding of the scope of the right.” *Id.* at 821 (quotation omitted).
 14 If it does not, the law “may be upheld without further analysis.” *Id.* (citation
 15 omitted). If the Court determines that the law burdens conduct protected by the
 16 Second Amendment, it proceeds to the second step of the inquiry to determine the
 17 appropriate level of scrutiny to apply, and then to apply that level of scrutiny. *Id.*
 18 (citation omitted). The AWCA passes constitutional muster at each step.

20 **2. Step One: The AWCA Does Not Burden Conduct 21 Protected by the Second Amendment**

22 Plaintiffs have failed to demonstrate that the AWCA burdens conduct
 23 protected by the Second Amendment at the first step. Assault weapons are not
 24 protected by the Second Amendment because they are not in common use for self-
 25 defense, are military weapons, and have been subject to longstanding regulation.

26 **a. Assault Weapons Are Not in Common Use for Lawful 27 Purposes, Such as Self-Defense**

28 The Supreme Court has explained that the Second Amendment does not
 protect firearms unless they are “in common use” for lawful purposes like self-

1 defense.⁹ Plaintiffs flatly contend that “the semiautomatic firearms banned by
2 California are common,” Pls. Mem. at 13, but the record fails to support this
3 assertion. To begin with, Plaintiffs fail to present *any* evidence that assault pistols
4 or assault shotguns are in common use for lawful purposes. *See id.* at 13-14.
5 Plaintiffs do not even attempt to offer an estimate of how many assault pistols or
6 assault shotguns there may be in the United States; the limited data offered by
7 Plaintiffs concerning the production of pistols and shotguns do not necessarily
8 reflect the production or ownership of *assault* pistols and shotguns. *See* Curcuruto
9 Decl. ¶ 15. Contrary to Plaintiffs’ conclusory assertions, assault pistols and assault
10 shotguns are not common. *See* Graham Decl. ¶¶ 57, 62.

11 Plaintiffs have also failed to show that assault rifles are in common use.¹⁰
12 Estimates of the number of “modern sporting rifles” manufactured, imported, or
13 owned, Pls. Mem. at 14, do not necessarily concern assault rifles, as not all modern
14 sporting rifles are restricted under the AWCA—*e.g.*, semiautomatic, rimfire or
15 “featureless” rifles. *See* Donohue Decl. ¶ 140. And Plaintiffs do not account for
16 the increasing concentration of gun ownership in the United States. *See id.* ¶ 142.

17 Even assuming assault weapons are commonly owned, they are not commonly
18 *used* for self-defense and are not well-suited for that purpose. Once again, as to

19 _____
20 ⁹ Plaintiffs also argue that assault weapons are well-suited for militia service,
21 “as contemplated by the Second Amendment’s prefatory clause and history.” Pls.
22 Mem. at 15. The Supreme Court, however, has explained that the prefatory clause
23 is irrelevant to determining whether the Second Amendment applies to certain
24 arms. *Heller*, 554 U.S. at 627 (“[T]he fact that modern developments have limited
25 the degree of fit between the prefatory clause and the protected right cannot change
26 our interpretation of the right.”). If anything, the suitability of assault weapons for
27 militia or other military service supports a finding that assault weapons are not
28 protected by the Second Amendment. *See infra* Section III.A.2.b at pp. 13-16.

¹⁰ Plaintiffs claim that that the AR-15 and other semiautomatic weapons
“traditionally have been widely accepted as lawful possessions,” citing *Staples v.*
United States, 511 U.S. 600, 612 (1994). Pls. Mem. at 17. The Court in that case
addressed the narrow question of whether the lack of federal prohibition on those
weapons at the time gave gun owners sufficient notice of the likelihood of
regulation for purposes of establishing *mens rea*. *Staples*, 511 U.S. at 618-19. The
Staples Court did not hold a government may not ban assault rifles; indeed,
Congress did so four months later. *Rupp*, 401 F. Supp. 3d at 988 n.7.

1 assault pistols or assault shotguns, Plaintiffs have provided no evidence that these
2 firearms have been used in self-defense or are particularly useful for self-defense.
3 Furthermore, rifles of any type (assault or non-assault) are rarely used in self-
4 defense. *See* DX-2 at 30 (rifles are used in 4.6 percent of justifiable homicides in
5 self-defense). And even if rifles have been used in self-defense in some
6 circumstances (assuming they qualify as assault weapons) that does not
7 demonstrate that they are particularly useful for that purpose. Any weapon could
8 conceivably be useful for self-defense, such as a machine gun or grenade launcher,
9 but that does not make them well-suited for that purpose. *See* Graham Decl. ¶ 48.

10 The rarity with which assault rifles have been used in self-defense is to be
11 expected. Handguns are by far the preferred weapon for self-defense and have
12 several advantages over rifles for home-defense. *See Heller*, 554 U.S. at 629; *see*
13 *also Gallinger v. Becerra*, 898 F.3d 1012, 1019 (9th Cir. 2018) (noting the lack of
14 evidence that assault weapons are well-suited for self-defense, in contrast to
15 handguns, and the “inherent risks that accompany carrying assault weapons for self-
16 defense” (citation omitted)). For that reason, police and other law enforcement
17 officers recommend handguns and not rifles (let alone assault rifles) for home-
18 defense. *See* Donohue Decl. ¶ 111. Plaintiffs have failed to show that assault
19 weapons are commonly owned or commonly used for self-defense.

20 **b. Assault Weapons Are Most Useful in Military Service**

21 Assault weapons fall outside the scope of the Second Amendment also
22 because they are, like the M-16, most useful in military service. In *Heller*, the
23 Supreme Court made clear that the Second Amendment does not protect weapons
24 that are “most useful in military service,” such as the “M-16 and the like.” *Heller*,
25 554 U.S. at 627; *Kolbe*, 849 F.3d at 136. Assault weapons are “most useful in
26 military service” due to their ability to accept ammunition from fixed or detachable
27 LCMs and their combat-oriented features. *See Kolbe*, 849 F.3d at 137 (“Whatever
28 their other potential uses—including self-defense—the AR-15, other assault

1 weapons, and large-capacity magazines . . . are unquestionably most useful in
2 military service.”); *Gallinger*, 898 F.3d at 1018 (referencing “mass shootings
3 perpetrated by individuals with *military-style rifles*” (emphasis added)); *see also*
4 *infra* Section III.A.3.b.1 at pp. 21-26 (discussing combat-functionality of each
5 assault-weapon feature); *supra* note 9 (discussing militia suitability).

6 The Supreme Court has highlighted the M-16 as exemplifying a “dangerous
7 and unusual” weapon that falls outside the protection of the Second Amendment.
8 *Heller*, 554 U.S. at 627. Assault weapons have a military pedigree and are nearly
9 identical to the M-16. *Staples*, 511 U.S. at 603 (“The AR-15 is the civilian version
10 of the military’s M-16 rifle”); *Kolbe*, 849 F.3d at 136 (“Because the banned
11 assault weapons and large-capacity magazines are ‘like’ ‘M-16 rifles’—‘weapons
12 that are most useful in military service’—they are among those arms that the
13 Second Amendment does not shield” (citing *Heller*, 554 U.S. at 627)); *Rupp*, 401 F.
14 Supp. 3d at 988 (“[T]he Court concludes that semiautomatic rifles within the
15 AWCA’s scope are virtually indistinguishable from M-16s”); DX-3 at 38
16 (describing “military features and characteristics . . . carried over to semiautomatic
17 versions of the original military rifle”); Graham Decl. ¶ 44; Youngman Decl. ¶ 14
18 (“The AR-15 pattern of rifle . . . is a firearm not just well-suited, but *ideal* for
19 militia service.” (emphasis added)).

20 The primary difference between the M-16 and an assault weapon is that the
21 M-16 is a select-fire weapon that allows the shooter to fire in either automatic or
22 semiautomatic mode, while an assault weapon fires only in semiautomatic mode.
23 DX-4 at 53. This is not a material difference. Semiautomatic weapons can “still
24 fire almost as rapidly as automatics.” *See Heller II*, 670 F.3d at 1263; DX-5 at 72;
25 DX-6 at 109 (a 30-round magazine empties in less than two seconds on automatic,
26 while the same magazine empties in just five seconds on semiautomatic). In fact,
27 soldiers issued M-16 rifles are instructed to generally use “rapid semiautomatic
28 fire,” because fully automatic fire is “inherently less accurate.” DX-7 at 171. And

1 assault rifles, such as the AR-15, are easily converted to fire automatically.
2 *Staples*, 511 U.S. at 603 (noting that “[m]any M-16 parts are interchangeable with
3 those in the AR-15 and can be used to convert the AR-15 into an automatic
4 weapon”); DX-5 at 72 (“[I]t is a relatively simple task to convert a semiautomatic
5 weapon to automatic fire”); DX-8 at 195-96, ¶ 20.

6 As with assault rifles, assault pistols and assault shotguns are most useful in
7 military service and are not well-suited for civilian self-defense. *See Kolbe*, 849
8 F.3d at 136 (holding that “the banned assault weapons” are most useful in military
9 service);¹¹ *Friedman v. City of Highland Park*, 68 F. Supp. 3d 895, 908 (N.D. Ill.
10 2014) (noting that submachine guns are “the analog for a civilian assault pistol” and
11 “facilitate the assault and capture of a military objective” (citation omitted)); DX-9
12 at 232 (noting that assault pistols are “for the most part simply semiautomatic
13 versions of submachine guns”); DX-10 at 258 (discussing shotgun features that “are
14 most appropriate for military or law enforcement use,” including adjustable stocks
15 and forward pistol grips).¹²

16 The military utility of assault weapons is confirmed by the manufacturers of
17 such weapons, which advertise them to civilians as military-grade firearms. *See*
18 *Kolbe*, 849 F.3d at 125 (“Several manufacturers of the banned assault weapons, in
19 advertising them to the civilian market, tout their products’ battlefield prowess.”);
20 Donohue Decl. ¶¶ 72-82; DX-11 at 289, DX-12 at 291 (Colt advertisements).
21 Beginning in the 1980s, the gun industry began to market heavily military-style
22 rifles to the civilian gun market, DX-9 at 205, using the term “assault rifles” to

23
24 ¹¹ *Kolbe* upheld restrictions on assault rifles and assault shotguns. *Kolbe*, 849
25 F.3d at 122 n.2. The court’s analysis would apply logically to assault pistols. *Rupp*
26 upheld the AWCA’s restrictions on assault rifles because they are “like” M-16
27 rifles and, thus, are “dangerous and unusual” weapons. *Rupp*, 401 F. Supp. 3d at
28 986. Assault pistols and assault shotguns are similarly dangerous and unusual.

¹² Though the ATF Working Group examining shotgun features determined
that pistol grips for the trigger hand are prevalent on shotguns, DX-10 at 270, the
AWCA does not apply to a shotgun with such a pistol grip unless it also has an
adjustable stock, Cal. Penal Code § 30515(a)(6).

1 describe these military-style weapons, DX-13 at 294, 296, 302 (July 1981 Guns &
2 Ammo Magazine) (variously describing a “new breed of assault rifles” as
3 “[s]pawed in the crucible of war,” “military-type,” “military-style,” and “military
4 autoloaders”).

5 As in *Kolbe* and *Rupp*, this Court should hold that assault weapons restricted
6 under the AWCA are “like” the M-16, most useful in military service, and beyond
7 the scope of Second Amendment protection.

8
9 **c. The AWCA Is Analogous to Longstanding Firing-
Capacity Regulations**

10 Plaintiffs are also unlikely to succeed on the merits at the first step of the
11 Second Amendment analysis because the AWCA is a “‘presumptively lawful
12 measure[]’ falling outside the scope of Second Amendment protection.” *Silvester*,
13 843 F.3d at 830 (Thomas, C.J., concurring) (quoting *Heller*, 554 U.S. at 626,
14 627 n.26). In restricting firearms capable of firing numerous rounds without
15 reloading—either because they can accept detachable LCMs or have fixed LCMs—
16 the AWCA is analogous to “regulations from the early twentieth century that
17 restricted the possession of firearms based on the number of rounds that the firearm
18 could discharge automatically or semi-automatically without reloading.” *Fyock v.*
19 *Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015).¹³ In the 1920s and 1930s, Michigan,
20 Rhode Island, and Ohio enacted restrictions on semiautomatic weapons capable of
21 firing sixteen, twelve, and eighteen shots, respectively, without reloading. DX-14
22 at 309 (Michigan); DX-15 at 316 (Rhode Island); DX-16 at 319 (Ohio). And in
23 1932, Congress enacted a twelve-shot restriction on semiautomatic weapons in the
24 District of Columbia—one of the few jurisdictions subject to the Second
25

26 ¹³ The Ninth Circuit has observed that, “[a]lthough not from the founding era,
27 these early twentieth century regulations might nevertheless demonstrate a history
28 of longstanding regulation if their historical prevalence and significance is properly
developed in the record.” *Fyock*, 779 F.3d at 997.

1 Amendment at that time, before it was incorporated into the Fourteenth
2 Amendment in 2010—and this restriction has remained in effect ever since. DX-17
3 at 321.¹⁴

4 In regulating firearms based on their capacity for enhanced firepower, these
5 laws provide a historical analog to the AWCA. *See United States v. Skoien*, 614
6 F.3d 638, 641 (7th Cir. 2010) (en banc) (noting that the challenged regulation need
7 not “mirror” the historical regulation); *see, e.g., Silvester*, 843 F.3d at 823-24, 831
8 (Thomas, C.J., concurring) (citing original iteration of California’s waiting-period
9 law, which provided a *single-day* waiting period, in determining that California’s
10 longer, ten-day waiting period was presumptively lawful). And these laws are
11 sufficient analogs despite their adoption by “several states.” *See id.* at 831
12 (Thomas, C.J., concurring) (citing just three states that enacted waiting-period
13 statutes in the 1920s). In sum, the political debate concerning the regulation of
14 assault weapons “was presaged by the successful, and at the time obviously
15 uncontroversial, regulation of semi-automatic weapons in the 1920s and 1930s.”
16 DX-18 at 341; *see also* DX-19 at 371-73. For this additional reason, the AWCA
17 does not burden the Second Amendment.

18 **3. Step Two: The AWCA Is Subject to and Satisfies** 19 **Intermediate Scrutiny**

20 **a. The AWCA Is Subject to Intermediate Scrutiny.**

21 Even if the AWCA burdens the Second Amendment, that is not the end of the
22 Court’s inquiry. Contrary to Plaintiffs’ suggestion, *Heller* did not endorse a
23 “categorical analysis” that asks “simply whether the arms being regulated or banned
24 are in common use for lawful purposes.” Pls.’ Mem. at 12. “Common use” is not

25 _____
26 ¹⁴ Many other states imposed firing-capacity restrictions on fully automatic
27 weapons, DX-18 at 342-43, which, as discussed, can have similar firing rates as
28 semiautomatic weapons, *Heller II*, 670 F.3d at 1263. While most of the firing-
capacity laws were repealed by the 1970s, *Ass’n of N.J. Rifle & Pistol Clubs, Inc. v.*
Attorney General N.J. (ANJRPC), 910 F.3d 106, 117 n.18 (3d Cir. 2018), the
District of Columbia has maintained its restrictions.

1 dispositive in determining whether a regulation of firearms violates the Second
2 Amendment. *See Kolbe*, 849 F.3d at 141-42 (noting that “the *Heller* majority said
3 nothing to confirm that it was sponsoring the popularity test”); *Worman*, 922 F.3d
4 at 35 n.5 (noting that “measuring ‘common use’ by the sheer number of weapons
5 lawfully owned is somewhat illogical” (citing *Friedman*, 784 F.3d at 409)). If a
6 regulation burdens the Second Amendment right, the Court proceeds to select an
7 appropriate level of scrutiny, depending on “(1) how close the law comes to the
8 core of the Second Amendment right, and (2) the severity of the law’s burden on
9 that right.” *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 960-61 (9th
10 Cir. 2014) (quotation omitted). Intermediate scrutiny applies unless the challenged
11 law severely burdens that core Second Amendment right of “law-abiding,
12 responsible citizens to use arms in defense of hearth and home.” *Bauer v. Becerra*,
13 858 F.3d 1216, 1222 (9th Cir. 2017) (quoting *Heller*, 554 U.S. at 635).

14 Every federal circuit court that has selected a level of scrutiny to apply to
15 assault-weapon restrictions, like the AWCA, has determined that intermediate
16 scrutiny applies because they do not rise to the level of a “substantial burden” on
17 the core right protected by the Second Amendment. *See Wilson*, 937 F.3d at 1036;
18 *Worman*, 922 F.3d at 38; *Kolbe*, 849 F.3d at 138-39; *NYSRPA*, 804 F.3d at 257-61;
19 *Heller II*, 670 F.3d at 1261-62. Similarly, the district court in *Rupp* determined that
20 intermediate scrutiny is appropriate because the AWCA does not severely burden
21 the core Second Amendment right, given the range of other firearms available to
22 Californians that are not restricted by the AWCA, including a variety of handguns.
23 *Rupp*, 401 F. Supp. 3d at 989. Indeed, the court determined that assault rifles—the
24 focus of Plaintiffs’ claims in this action—are “ill-suited for self-defense” and that
25 self-defense is not the reason why most “modern sporting rifles” are acquired. *Id.*
26 Consistent with *Rupp* and the myriad circuit cases upholding assault-weapon
27 restrictions, intermediate scrutiny applies to the AWCA.
28

1 The AWCA regulates, at most, the *manner* in which persons may exercise
2 their Second Amendment rights. Californians are free to possess a range of rifles,
3 pistols, and shotguns to engage in lawful self-defense, except for a small subset of
4 firearms that qualify as assault weapons. *See Jackson*, 746 F.3d at 961 (“[F]irearm
5 regulations which leave open alternative channels for self-defense are less likely to
6 place a severe burden on the Second Amendment right than those which do not.”).
7 Contrary to Plaintiffs’ claim, Pls. Mem. at 19, the AWCA does not restrict an
8 “entire class” of arms that could warrant strict scrutiny. *See NYSRPA*, 804 F.3d at
9 260. It does not ban all rifles, pistols, or shotguns, or even all semiautomatic
10 versions of those firearms. To the contrary, Californians may lawfully acquire an
11 array of semiautomatic rifles for lawful purposes, such as a centerfire
12 semiautomatic rifle without a fixed magazine, provided it is not a prohibited make
13 and model and does not have any of the prohibited features, a centerfire
14 semiautomatic rifle with any of the militaristic features and with a fixed magazine
15 of 10 rounds or less, or a rimfire semiautomatic rifle with any of the listed
16 features.¹⁵ They may also possess a range of handguns and shotguns, including
17 semiautomatic versions that lack any of the prohibited features or characteristics.¹⁶

18 Plaintiffs fail to show that assault weapons with any of the prohibited features
19 are necessary for effective self-defense. On average, approximately *two rounds* are
20 fired when firearms are used in self-defense, Allen Decl. ¶¶ 15, 22, confirming that
21 assault weapons—particularly those with LCMs—are not necessary to engage in
22 lawful self-defense. Because the AWCA restricts a “subset” of particularly lethal
23 rifles, pistols, and shotguns that are not necessary for effective self-defense,

24 _____
25 ¹⁵ A rimfire rifle fires rimfire cartridges, such as .22 caliber rounds. Graham
Decl. ¶ 21.

26 ¹⁶ In fact, many of the individual plaintiffs own California-compliant
27 firearms, *see* Miller Decl. ¶ 4; Hauffen Decl. ¶ 4; Peterson Decl. ¶ 4, and the
28 AWCA does not prevent the other individual plaintiffs from acquiring California-
compliant firearms for lawful purposes.

1 intermediate scrutiny applies. *Fyock*, 779 F.3d at 999-1000 (applying intermediate
2 scrutiny to LCM restrictions); *see also Rupp*, 401 F. Supp. 3d at 988-89.¹⁷

3 **b. The AWCA Satisfies Intermediate Scrutiny Because It**
4 **Is Reasonably Fitted to Important Government**
5 **Interests**

6 A regulation satisfies intermediate scrutiny if (1) the government’s stated
7 objective is “significant, substantial, or important”; and (2) there is a “‘reasonable
8 fit’ between the challenged regulation and the asserted objective.” *Silvester*, 843
9 F.3d at 821-22 (citation omitted). Intermediate scrutiny does not require the fit
10 between the challenged regulation and the stated objective to be perfect, nor does it
11 require that the regulation be the least restrictive means of serving the interest.
12 *Jackson*, 746 F.3d at 969. Rather, the government “must be allowed a reasonable
13 opportunity to experiment with solutions to admittedly serious problems.” *Id.* at
14 969-70 (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986)).

15 In determining applying intermediate scrutiny, courts “afford substantial
16 deference to the predictive judgments of the legislature.” *Pena v. Lindley*, 898 F.3d
17 969, 979 (9th Cir. 2018) (quotation omitted). Even when the record contains
18 “conflicting legislative evidence,” intermediate scrutiny “allow[s] the government
19 to select among reasonable alternatives in its policy decisions.” *Id.* (quotation
20 omitted). Deferential review is appropriate here because “the legislature is ‘far
21 better equipped than the judiciary’ to make sensitive public policy judgments
22 (within constitutional limits) concerning the dangers in carrying firearms and the

23 ¹⁷ Intermediate scrutiny is the proper standard to apply under Ninth Circuit
24 precedent; in fact, the Ninth Circuit has never applied strict scrutiny to a gun-safety
25 law. But the AWCA is constitutional even under strict scrutiny. The State’s
26 public-safety interests are compelling. *See, e.g.,* Donohue Decl. ¶ 28-36
27 (discussing growing threat of mass shootings); Klarevas Decl. ¶ 9-11 (discussing
28 rise in gun massacres); DX-20 at 387, 393 (finding disproportionate use of assault
weapons in murders of law enforcement personnel). The law is narrowly tailored to
those interests by restricting weapons frequently used in mass shootings—and
which cause substantially more fatalities and injuries on average—and by defining
assault weapons based on particular features that, individually or combined,
enhance the lethality of those weapons in mass shootings and violence against law
enforcement personnel.

1 manner to combat those risks.” *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 97
 2 (2d Cir. 2012) (quotation omitted). Under intermediate scrutiny, the government
 3 may “rely on any evidence ‘reasonably believed to be relevant’ to substantiate its
 4 important interests,” and the Court “may consider ‘the legislative history of the
 5 enactment as well as studies in the record or cited in pertinent case law.’” *Fyock*,
 6 779 F.3d at 1000 (quotations omitted). Such “evidence need only ‘fairly support[]’
 7 [the government’s] conclusions.” *Pena*, 898 F.3d at 982 (quotation omitted).

8 “It is beyond question that the government’s interest in promoting public
 9 safety and reducing gun violence is important or substantial.” *Rupp*, 401 F. Supp.
 10 3d at 990 (quotation omitted); *see, e.g., Fyock*, 779 F.3d at 1000; *Chovan*, 735 F.3d
 11 at 1135. The AWCA satisfies intermediate scrutiny because it furthers the State’s
 12 important interests by restricting a particularly dangerous subset of firearms that
 13 pose an acute danger to the public and law enforcement.

14 **(1) The Prohibited Features Enhance the Lethality**
 15 **and Criminal Utility of Already Dangerous**
 16 **Firearms**

17 The features listed in California Penal Code section 30515(a) are not merely
 18 “cosmetic,” as suggested by one of Plaintiffs’ declarants. *See* Kapelsohn Decl.
 19 ¶ 38. Indeed, if they were, Plaintiffs would have no claim that the AWCA violates
 20 the Second Amendment. To the contrary, each of the prohibited features enhances
 21 the ability of rifles, pistols, and shotguns to serve specific, combat-oriented
 22 functions, which increase the lethality of those weapons and make them more
 23 effective in certain types of crime, such mass shootings and standoffs with law
 24 enforcement personnel. *See* Graham Decl. ¶¶ 28-62; DX-21 at 421; DX-5 at 72
 25 (“[T]he features that characterize a semiautomatic weapon as an assault weapon are
 26 not merely cosmetic, but do serve specific, combat-functional ends.”). Those
 27 features are found on many of the assault weapons listed in California Penal Code
 28 section 30510. Graham Decl. ¶ 18.

1 Contrary to Plaintiffs’ suggestion that the prohibited features make assault
2 weapons “better and safer for lawful use,” Pls.’ Mem. at 27, the State has already
3 weighed the competing interests, and its decision to restrict firearms based on the
4 prohibited features is supported by the evidence. *Rupp*, 401 F. Supp. 3d at 993
5 (noting that “[p]laintiffs miss the point” in arguing that the AWCA is depriving the
6 public of more accurate rifles because “[s]emiautomatic rifles with non-fixed
7 magazines, along with the other enumerated features, are incredibly effective
8 killing machines,” and “California has permissibly weighed [the self-defense]
9 interests against the weapons’ propensity for being used for mass violence”);
10 *NYSRPA*, 804 F.3d at 262 (noting that the contention that “these features improve a
11 firearm’s ‘accuracy,’ ‘comfort,’ and ‘utility’” is “a milder way of saying that these
12 features make the weapons more deadly”). As discussed below, each of the
13 prohibited features renders already dangerous firearms more lethal and more
14 concealable, and thus more useful in crime.

15 (a) **Detachable Magazines**

16 The capability to accept detachable magazines is a threshold requirement for
17 certain rifles and pistols to qualify as an assault weapon, Cal. Penal Code
18 § 30515(a)(1), (4), and it is sufficient to designate a shotgun as an assault weapon,
19 *id.* § 30515(a)(7). That feature renders a semiautomatic weapons “capable of
20 killing or wounding more people in a shorter amount of time.” DX-1 at 7.

21 Additionally, a pistol capable of accepting a detachable magazine at some location
22 other than the pistol grip, Cal. Penal Code § 30515(a)(4)(D), can help a shooter
23 reload a pistol quicker and maintain aim during rapid fire. Graham Decl. ¶ 29.

24 A weapon lacking a fixed magazine is also capable of accepting detachable
25 *LCMs*, which “allow a shooter to fire more than ten rounds without having to pause
26 to reload.” *Kolbe*, 849 F.3d at 125. *LCMs* “are particularly designed and most
27 suitable for military and law enforcement applications” and “are a feature common,
28 but not unique, to the banned assault weapons, many of which are capable of

1 accepting magazines of thirty, fifty, or even 100 rounds.” *Id.* LCMs “are indicative
2 of military firearms.” DX-3 at 38. Shotguns capable of firing more than five
3 shotgun rounds without reloading, such as those with a revolving cylinder, are also
4 indicative of military arms. *See* DX-10 at 268-69 (discussing drum magazines).

5 Detachable magazines, and especially detachable LCMs, are not necessary to
6 engage in effective self-defense. On average, approximately two rounds—far fewer
7 than the number of rounds that can be fired with LCMs—are fired when a firearm is
8 used in self-defense. *See* Allen Decl. ¶¶ 15, 22. On the other hand, the use of
9 LCM-equipped firearms in mass shootings results in a substantially greater number
10 of fatalities and injuries than mass shootings not involving LCMs (27 vs. 9), and
11 especially when LCMs are used in conjunction with assault weapons (43 vs. 8).
12 *See id.* ¶¶ 33-34; *see also* Klarevas Decl. ¶ 17 (discussing higher death toll for gun
13 massacres involving LCMs). LCMs also feature prominently in gun violence
14 against law enforcement, as LCM-equipped assault weapons can enable a shooter to
15 engage law enforcement in prolonged standoffs, and such weapons fire ammunition
16 that is capable of penetrating police body armor. *See* Graham Decl. ¶¶ 22-23, 41.

17 (b) Fixed LCMs

18 Certain rifles and pistols qualify as assault weapons if they have fixed LCMs.
19 Cal. Penal Code § 30515(a)(2), (5). As discussed, LCMs are uniquely dangerous
20 firearm accessories that are not necessary for self-defense, pose a threat to public
21 safety even when used in self-defense, cause more death and injury when used in
22 mass shootings, and are used frequently in gun violence against law enforcement
23 personnel. Even if an LCM is incorporated into a rifle or pistol as a fixed
24 magazine, the weapon would still be capable of firing repeatedly without needing to
25 reload. And rifles and pistols can be modified to allow a shooter to reload a fixed
26 magazine nearly as quickly as a detachable magazine. Graham Decl. ¶ 42.

27 Every federal circuit court to have considered 10-round magazine limits (six
28 thus far) has upheld them under the Second Amendment. *See supra* Section II at

1 pp. 8-9 (citing cases); *see also ANJRPC*, 910 F.3d at 122-23. *But see Duncan*, 366
2 F. Supp. 3d at 1182-83 (holding that California Penal Code section 32310 violates
3 the Second Amendment). *Duncan* did not address the constitutionality of
4 restrictions on fixed LCMs in certain assault weapons. Even if it is ultimately held
5 that California cannot limit magazines to ten rounds, constitutional applications of
6 California Penal Code section 30515(a)(2) and (a)(5) would remain—*e.g.*,
7 semiautomatic, centerfire rifles *with a fixed LCM* and one or more of the features
8 listed in the AWCA.

9
10 (c) **Pistol Grips, Thumbhole Stocks, or
Barrel Shrouds**

11 Certain rifles, pistols, and shotguns can qualify as assault weapons if they have
12 pistol grips (either beneath the action or located in a forward position) or thumbhole
13 stocks. Cal. Penal Code § 30515(a)(1)(A), (1)(B), (1)(F), (4)(B), (6)(B). Both
14 features enable a shooter to maintain accuracy during repeated firing. A pistol grip
15 “allows for a pistol style grasp in which the web of the trigger hand (between the
16 thumb and index finger) can be placed beneath or below the top of the exposed
17 portion of the trigger while firing,” and a thumbhole stock allows for a similar grip.
18 *See Graham Decl.* ¶¶ 28-30. Pistol grips can help counteract muzzle rise during
19 repeated firing, and a forward pistol grip can similarly help a shooter stabilize a
20 weapon during repeated semiautomatic fire. *Id.*; DX-3 at 38 (“[Pistol] grips were
21 designed to assist in controlling machineguns during automatic fire.”). A pistol
22 grip can enable a shooter to maintain aim and even fire while reloading a
23 detachable magazine. *Graham Decl.* ¶ 29. A forward pistol grip on any firearm can
24 also help insulate the non-trigger hand from heat during rapid fire. *Id.* ¶ 53. As
25 with forward pistol grips, a “barrel shroud” on assault pistols, Cal. Penal Code
26 § 30515(a)(4)(C), “serve a combat-functional purpose” by cooling the barrel and
27 insulating the non-trigger hand during rapid fire. DX-5 at 73.

28

1 (d) **Folding or Telescoping Stocks and Rifles**
 2 **Shorter than 30 Inches**

3 Certain rifles and shotguns may qualify as an assault weapon if they have an
 4 adjustable stock. Cal. Penal Code § 30515(a)(1)(C), (6)(A). A folding or
 5 telescoping stock enhances the portability and concealability of a rifle. *See* Cal.
 6 Code Regs. tit. 11, § 5471(nn), (oo). As described by ATF, the “predominant
 7 advantage” of a folding or telescoping stock “is for military purposes, and it is not
 8 normally found on the traditional sporting rifle.” DX-3 at 38. Moreover, in
 9 military and law enforcement contexts, an adjustable stock may enable law
 10 enforcement personnel to conduct room-to-room searches and maintain the element
 11 of surprise. Graham Decl. ¶ 32. As with adjustable stocks, semiautomatic
 12 centerfire rifles with lengths of less than 30 inches, Cal. Penal Code § 30515(a)(3),
 13 are more concealable and may allow a shooter to smuggle a rifle undetected in
 14 public. Graham Decl. ¶¶ 43, 59; DX-8 at 193, ¶ 10.

15 (e) **Flash Suppressors**

16 A flash suppressor is a listed feature in the definition of an assault rifle. Cal.
 17 Penal Code § 30515(a)(1)(E). A flash suppressor is a device attached to the muzzle
 18 of a rifle to reduce the flash emitted upon firing. Cal. Code Regs. tit. 11, § 5471(r).
 19 It is a standard feature of the M-16 that can aid a shooter to maintain accurate, rapid
 20 fire in low-light conditions, and can also counteract “muzzle climb” during rapid
 21 fire. DX-3 at 39; Graham Decl. ¶ 37. A flash suppressor can help conceal the
 22 shooter’s position, especially at night. DX-3 at 39; Graham Decl. ¶ 37.

23 (f) **Threaded Pistol Barrels**

24 A semiautomatic, centerfire pistol without a fixed magazine qualifies as an
 25 assault weapon if it has a threaded barrel capable of accepting a flash suppressor,
 26 forward pistol grip, or silencer. Cal. Penal Code § 30515(a)(4)(A). A threaded
 27 barrel enables a shooter to quickly affix militaristic features (*i.e.*, a flash suppressor,
 28 a forward pistol grip, or a silencer) to a pistol. Graham Decl. ¶ 53. As discussed

1 above, a flash suppressor and forward pistol grip enhance the lethality or
2 concealability of a firearm. And a silencer can be affixed to a pistol to reduce the
3 sound it emits upon firing, which can help a shooter maintain a tactical advantage
4 by concealing the shooter’s position or the fact that a shot was even fired. *Id.*
5 (noting Virginia Beach workplace shooting that involved a silencer-equipped
6 handgun). Silencers are not protected by the Second Amendment, *United States v.*
7 *Cox*, 906 F.3d 1170, 1186 (10th Cir. 2018) (“[B]ecause silencers are not ‘bearable
8 arms,’ they fall outside the Second Amendment’s guarantee.”), *cert denied*, 139 S.
9 Ct. 2690 (June 10, 2019), so prohibiting threaded barrels capable of accepting a
10 silencer would not burden conduct protected by the Second Amendment.

11 Notably, Plaintiffs offer no evidence that a threaded barrel is needed for self-
12 defense, nor do they provide evidence that a flash suppressor, forward pistol grip,
13 or silencer *on a pistol* serves any legitimate self-defense function. Applying the
14 AWCA to pistols with threaded barrels ensures that non-assault pistols cannot be
15 quickly converted into more dangerous assault weapons and returned to non-assault
16 status, which would render the AWCA’s assault-pistol restrictions less effective.
17 *See Fyock*, 779 F.3d at 1000 (noting that intermediate scrutiny requires a showing
18 only “that [the regulation] promotes a ‘substantial government interest that would
19 be achieved less effectively absent the regulation’” (quotation omitted)).

20 (g) **Grenade or Flare Launchers**

21 A semiautomatic, centerfire rifle without a fixed magazine qualifies as an
22 assault rifle if it is equipped with a grenade launcher or a flare launcher. Cal. Penal
23 Code § 30515(a)(1)(D). Neither serve any legitimate civilian need on a rifle.
24 Graham Decl. ¶¶ 34-35. A grenade launcher is a destructive device under the
25 National Firearms Act, Kapelsohn Decl. ¶ 32, and while a flare launcher may serve
26 legitimate safety and rescue purposes “on ships and other watercraft,” *id.*, there is
27 no legitimate civilian need to launch flares from a rifle. Graham Decl. ¶ 35.

28

1 shootings involving four or more fatalities has resulted in an average of 38 fatalities
2 or injuries compared to 10 without assault weapons, *see* Allen Decl. ¶ 31—a 280
3 percent increase in average casualties.¹⁸ The disparity is more pronounced when
4 comparing public mass shootings with assault weapons *and* LCMs (an average of
5 43 fatalities or injuries) with mass shootings not involving assault weapons or
6 LCMs (an average of 8 fatalities or injuries), *id.* ¶ 34—an approximately 440
7 percent increase. This correlation holds when examining mass shootings involving
8 six or more fatalities (regardless of the location of the shooting). *See* Klarevas
9 Decl. ¶ 17 (finding a 159 percent increase in casualties in the past ten years).

10 Notably, in *Rupp v. Becerra*, one of the plaintiffs’ proffered expert witnesses,
11 Gary Kleck, acknowledged that assault weapons correlate with greater casualties.
12 DX-25 at 522:21-523:7 (agreeing with Professor Donohue), 524:20-24 (agreeing
13 with Lucy Allen). Mr. Kleck acknowledged that “‘a correlation between the use of
14 assault weapons and the number of victims injured or killed’ makes it ‘[m]ore
15 likely’ that there is a causal relationship.” *Rupp*, 401 F. Supp. 3d at 993 (quoting
16 DX-25 at 521:15-16). Such correlative evidence is sufficient to show a reasonable
17 fit under intermediate scrutiny. *See id.* (“Even assuming there is not direct *causal*
18 evidence between mass shootings and higher casualty rates and rifles within the
19 scope of the AWCA, California is entitled to make ‘reasonable inferences’ from the
20 available data that shows a correlation.” (quoting *Worman*, 922 F.3d at 40)); *S.F.*
21 *Veteran Police Officers Ass’n v. City & Cnty. of San Francisco*, 18 F. Supp. 3d 997,
22 1003 (N.D. Cal. 2014) (upholding LCM restrictions based on “a very high
23 correlation between mass shootings and the use of [LCMs]”); *see also Fantasyland*
24 *Video, Inc. v. Cnty. of San Diego*, 505 F.3d 996, 1002 (9th Cir. 2007) (upholding
25 law under First Amendment based on “studies and reports, reported court decisions,

26 ¹⁸ This analysis was based on 161 public mass shootings since 1982,
27 involving four or more fatalities (excluding the shooter), that were identified by the
28 following four sources: Mother Jones, the Citizens Crime Commission of New
York City, the Washington Post, and the Violence Project. *See* Allen Decl. ¶¶ 25,
26 n.27 & app. B.

1 and anecdotal testimony” supporting a “correlation between adult establishments
2 and negative secondary effects” under intermediate scrutiny).

3
4 **(3) The AWCA Furthers the State’s Important
Public Safety Interests**

5 Restricting the possession of assault weapons has had and will continue to
6 have a significant impact on public safety. Evidence shows that assault weapons
7 restrictions are effective in reducing gun violence, particularly violence associated
8 with mass shootings. DX-26 at 529. For example, the federal assault weapons ban
9 was effective in reducing the prevalence of the banned assault weapons in gun
10 crime. DX-20 at 393; Donohue Decl. ¶ 119. The federal ban was also effective in
11 reducing the incidence and lethality of mass shootings. *See* Klarevas Decl. ¶¶ 23-
12 24 & tbl. 3 (finding a 37 percent decline in gun massacres during the federal ban,
13 and a 49 percent decline in gun-massacre fatalities, followed by a 183 percent
14 increase in gun massacres after its expiration, and a 209 percent increase in gun-
15 massacre fatalities). This trend has been replicated in states that have enacted
16 assault-weapon restrictions, like California. *Id.* ¶ 27; DX-26 at 531.

17 In prohibiting law-abiding citizens from acquiring assault weapons, the
18 AWCA is reasonably fitted to the State’s important public-safety interests.
19 Contrary to the view of John Lott, who claims that prohibitions do not stop
20 criminals from acquiring assault weapons, Lott Decl. ¶¶ 10-12, mass shooters
21 purchased their firearms legally or stole them from individuals who did so, *see*
22 Allen Decl. ¶ 38; Donohue Decl. ¶¶ 123, 131-33; *see also* *Worman*, 922 F.3d at 40.

23
24 **B. Plaintiffs Have Failed to Demonstrate that They Will Suffer
Irreparable Harm in the Absence of a Preliminary Injunction**

25 Plaintiffs have not, and cannot, establish that they will suffer any irreparable
26 harm in the absence of preliminary injunctive relief. Plaintiffs’ mere assertion of
27 constitutional claims is not dispositive on this factor, even if they could establish a
28 likelihood of success on the merits (which they have not). *See Hohe v. Casey*, 868

1 F.2d 69, 73 (3d Cir. 1989) (noting that “[c]onstitutional harm is not necessarily
2 synonymous with the irreparable harm necessary for issuance of a preliminary
3 injunction” even in the First Amendment context (citing *City of Los Angeles v.*
4 *Lyons*, 461 U.S. 95, 112-13 (1983))). And, Plaintiffs cannot show that *each*
5 challenged provision of the AWCA will harm them (let alone irreparably) in the
6 absence of an injunction.

7 As has been the case since the enactment of the AWCA decades ago, the
8 individual Plaintiffs are free to arm themselves with other weapons, including non-
9 assault rifles, pistols, or shotguns, to engage in lawful self-defense. They may arm
10 themselves with semiautomatic, rimfire rifles, or semiautomatic, centerfire rifles
11 that do not have any of the militaristic features of an assault rifle. In restricting
12 access to a uniquely dangerous subset of military-grade firearms, the AWCA will
13 not irreparably harm Plaintiffs during this litigation.

14 Plaintiffs also cannot show irreparable harm because they waited an inordinate
15 amount of time before seeking a preliminary injunction. The challenged provisions
16 of the AWCA have been in effect since 2000. If Plaintiffs’ purported injuries were
17 truly irreparable, they should have sought injunctive relief long ago. Instead,
18 Plaintiffs waited until August of 2019 to commence this action, nearly twenty years
19 after the enactment of the challenged provisions in the AWCA and nearly ten years
20 after the Supreme Court incorporated the Second Amendment right against the
21 states. *See McDonald*, 561 U.S. at 790. And they waited an additional four months
22 after commencing this action to file their motion for a preliminary injunction. *See*
23 *Wiese v. Becerra*, No. 2:17-cv-903-WBS-KJN, 2017 WL 2619110, at *2 (E.D. Cal.
24 June 16, 2017) (denying preliminary injunction motion because plaintiffs failed to
25 “immediately move[] for a preliminary injunction upon filing suit”); *see also*
26 *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985)
27 (“Plaintiff’s long delay before seeking a preliminary injunction implies a lack of
28 urgency and irreparable harm.”). In fact, Plaintiffs’ original complaint did not even

1 challenge many of the provisions they now claim are causing irreparable harm.¹⁹
 2 Plaintiffs’ ability to retain firearms for lawful purposes and their inexplicable delay
 3 in seeking a preliminary injunction demonstrate that Plaintiffs will not be
 4 irreparably harmed if this case proceeds without a preliminary injunction.

5
 6 **C. The Balance of the Equities and the Public Interest Both Weigh
 Against Preliminary Injunctive Relief**

7 A district court “must balance the competing claims of injury and consider the
 8 effect” of the requested relief, paying “particular regard for the public consequences
 9 in employing the extraordinary remedy of injunction.” *Winter*, 555 U.S. at 24
 10 (quotation omitted). The balance of the equities and the public interest “merge
 11 when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435
 12 (2009). Indeed, “[t]he Ninth Circuit instructs that when balancing the hardships ‘of
 13 the public interest against a private interest, the public interest should receive
 14 greater weight.’” *Rupp v. Becerra*, No. 17-cv-00746-JLS-JDE, 2018 WL 2138452,
 15 at *13 (C.D. Cal. May 9, 2018) (quotation omitted).

16 Plaintiffs cannot demonstrate that it is in the public interest to enjoin a duly-
 17 enacted law designed to protect the public from gun violence that has been in effect
 18 for two decades; with human lives on the line, the stakes for public safety are just
 19 too high, especially where five federal circuit courts have found that assault
 20 weapons pose an acute public-safety risk. *See United States v. Masciandaro*, 638
 21 F.3d 458, 475-76 (4th Cir. 2011) (cautioning that “miscalculat[ion] as to Second
 22 Amendment rights” could lead to an “unspeakably tragic act of mayhem”);
 23 *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers) (“[A]ny time
 24

25 _____
 26 ¹⁹ Since filing their motion, Plaintiffs have claimed that “[t]his case became
 27 necessary” after the Legislature enacted Senate Bill 880 in 2016 to close the “bullet
 28 button” loophole. Dkt. 30 at 2. That amendment did not create the features-based
 definition or the various enforcement statutes challenged in this case, and Plaintiffs
 barely mentioned it in the First Amendment Complaint or in the materials
 supporting their motion. In any event, Plaintiffs waited more than *three years* after
 the enactment of Senate Bill 880 to seek a preliminary injunction.

1 a State is enjoined by a court from effectuating statutes enacted by representatives
 2 of its people, it suffers a form of irreparable injury.” (quotation omitted)). Here, the
 3 State’s injury would be compounded by the fact that the AWCA has been in place
 4 for two decades; enjoining it now on a preliminary record would wreak havoc on
 5 California’s gun-safety laws and cause potentially irreversible harm if the AWCA is
 6 eventually upheld. *See* Graham Decl. ¶¶ 72-77. Accordingly, the law, the balance
 7 of harms, and the public interest all weigh decisively a preliminary injunction here.

8
 9 **IV. THE COURT SHOULD STAY ENFORCEMENT OF ANY PRELIMINARY
 INJUNCTION PENDING AN INTERLOCUTORY APPEAL**

10 Although Plaintiffs’ motion should be denied for the reasons stated above, if
 11 the Court is inclined to grant the motion for any reason, either in whole or in part,
 12 Defendants request that the Court also issue an immediate stay of enforcement of
 13 any preliminary injunction to preserve the status quo during any subsequent
 14 interlocutory appeal. In *Duncan*, this Court entered a stay of the judgment to
 15 preserve the status quo pending the Attorney General’s appeal, recognizing that
 16 “[t]here is immeasurable societal benefit of maintaining the immediate status quo
 17 while the process of judicial review takes place.” *Duncan*, 2019 WL 1510340, at
 18 *2-3. As in *Duncan*, the four factors that the courts consider in determining
 19 whether to stay an order or judgment pending appeal would weigh in favor of a
 20 stay. *See id.* at *2. To effectively preserve the status quo pending appeal, an
 21 *immediate* stay would be necessary, without further motion practice, to prevent the
 22 influx of new assault weapons in the interim between the issuance of any
 23 preliminary injunction and the entry of a stay. A stay is especially appropriate here
 24 because the Ninth Circuit will be considering the issues presented in this case
 25 shortly in *Rupp*. *See supra* note 1.

26 **CONCLUSION**

27 For the foregoing reasons, and particularly to preserve the status quo, the
 28 Court should deny Plaintiffs’ motion for a preliminary injunction of the AWCA.

1 Dated: January 23, 2020

Respectfully Submitted,

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