No. 17-56081

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGINIA DUNCAN, *et al.*,
PLAINTIFFS-APPELLEES,

v.

XAVIER BECERRA, in his official capacity as
Attorney General of the State of California
DEFENDANT-APPELLANT.

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE DISTRICT OF COLUMBIA, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, IOWA, MARYLAND, MASSACHUSETTS, NEW YORK, OREGON, RHODE ISLAND, VIRGINIA, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF APPELLANT

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INTEREST OF AMICI CURIAE

Connecticut, Delaware, Hawaii, Illinois, Iowa, Maryland, Massachusetts, New York, Oregon, Rhode Island, Virginia, Washington, and the District of Columbia file this brief under Rule 29(a)(2) of the Federal Rules of Appellate Procedure. Together, the Amici States seek to protect their governmental prerogative and responsibility to enact and implement legislation that promotes public safety, prevents crime, and reduces the harmful effects of firearm violence. The Amici States have each taken different approaches to addressing firearm violence based on their own determinations about the measures that will best meet the needs of their citizens. They join this brief not because they necessarily believe that California's policy approach would be optimal for them, but to underscore that the challenged law represents a policy choice that California is constitutionally free to adopt.

As this Court has recognized on several occasions, the enactment by States of reasonable firearm regulations that are substantially related to the achievement of important governmental interests is fully compatible with the right to keep and bear arms protected by the Second Amendment. The Amici States are concerned that the erroneous interpretation of the Second Amendment advanced by the district court would tie the hands of States in responding to threats to public safety

and, in particular, that the court's non-deferential review of legislative judgments would impermissibly impinge on the States' policymaking authority.

SUMMARY OF ARGUMENT

In 2016, the State of California—first through its legislature and then by voter-approved initiative—prohibited the possession of large-capacity magazines ("LCMs") that hold more than ten rounds of ammunition. California determined that restricting access to LCMs, which are used by mass shooters to quickly kill and injure large numbers of people including law enforcement officers, reduces the lethality and injuriousness of firearms used in unlawful activity, thereby advancing public safety without significantly burdening the core Second Amendment right to self-defense. That conclusion is consistent with those reached by other States and localities that have adopted similar laws—all of which have been deemed constitutional by the federal courts of appeals, including this Court. *See Kolbe v. Hogan*, 849 F.3d 114, 135, 138 (4th Cir. 2017) (en banc), *petition for cert. filed*, 2017 WL 3189043 (U.S. July 21, 2017); *Fyock v. City of Sunnyvale*, 779 F.3d 991, 1001 (9th Cir. 2015) (affirming the denial of a preliminary injunction); *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (2015); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 261-64 (2d Cir. 2015), *cert. denied sub nom. Shew v. Malloy*, 136 S. Ct. 2486 (2016); *Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1260-64 (D.C. Cir. 2011).

The court below, departing from these precedents, preliminarily enjoined California's LCM prohibition, holding that it is "precisely the type of policy choice that the Constitution takes off the table." ER 12. But that is simply not so. As the Supreme Court has recognized, States may—and indeed are encouraged to—reach different conclusions about how best to respond to gun violence within their jurisdictions. *See McDonald v. City of Chicago*, 561 U.S. 742, 784-85 (2010) (plurality op.); *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1630 (2014) ("[O]ur federal structure permits [State] innovation and experimentation . . . ." (internal quotation marks omitted)). Even assuming that LCM prohibitions burden Second Amendment rights, States and localities may enact them—and other reasonable firearm regulations—because they are substantially related to the achievement of important governmental interests.[1] Prohibiting the possession of LCMs represents California's effort to develop innovative solutions to address the complex reality of gun violence within its borders.

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[1] For the reasons stated by California (at 27-28 & n.7) and other amici, it is far from clear that LCMs are protected by the Second Amendment. *See, e.g.*, *Kolbe*, 849 F.3d at 135-37 (LCMs are not constitutionally protected because they are "like M-16 rifles, *i.e.*, weapons that are most useful in military service" (internal quotation marks omitted)). However, even if LCMs are entitled to Second Amendment protection, a ban on their possession survives constitutional scrutiny because it furthers important objectives such as preventing crime and protecting law enforcement officers.

Moreover, in reviewing such solutions, courts "accord substantial deference" to a State's "predictive judgment[]." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) ("*Turner I*"). Just as in other constitutional contexts, the proper inquiry is not whether the court would reach the same decision, but whether there is sufficient evidence showing the State's decision was reasonable. *Id*. at 666. The record evidence here supports California's quintessentially legislative and public-policy judgment that prohibiting LCMs would reduce the threat to public safety from firearm violence. The Court should not second-guess that determination.

ARGUMENT

I. The Second Amendment Authorizes State Experimentation With Measures To Prevent Gun Violence And Gun Fatalities.

The Second Amendment confers an individual right to bear arms, but that right "is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). It does not amount to "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id*.; *see also Peruta v. Cty. of San Diego*, 824 F.3d 919, 928 (9th Cir. 2016) (en banc) ("The Court in *Heller* was careful to limit the scope of its holding."). Rather, the Second Amendment "protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." *McDonald*, 561 U.S. at 780 (plurality op.); *Heller*, 554 U.S. at 634-35. Within that constitutional "limit[]," the Court explained, "[s]tate and local experimentation with reasonable firearms regulations

will continue." *McDonald*, 561 U.S. at 785 (plurality op.). The Second Amendment thus does not bar States from adopting reasonable measures to reduce firearm violence, including restrictions on the possession of LCMs.[2] The reasoning of the district court deprives States of the flexibility to address the problem of gun violence in a manner consistent with local needs and values.

A. The Second Amendment preserves States' authority to enact firearm restrictions in furtherance of public safety.

States have primary responsibility for ensuring public safety, which includes a duty to reduce the likelihood that their citizens will fall victim to preventable firearm violence, and to minimize fatalities and injuries when that violence does occur. *See United States v. Morrison*, 529 U.S. 598, 618 (2000) ("[W]e can think of no better example of the police power . . . reposed in the States[] than the suppression of violent crime and vindication of its victims."). As this Court has explained, "[i]t is self-evident that public safety is an important government interest, and reducing gun-related injury and death promotes" that interest. *Bauer v. Becerra*, 858 F.3d 1216, 1223 (9th Cir. 2017) (internal quotation marks omitted). As States respond creatively to address the problem of firearm violence in light of local conditions, "the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise

[2] In referring to "States," amici include the District of Columbia and, as relevant, localities with the authority to regulate firearms.

various solutions where the best solution is far from clear." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

Indeed, the Supreme Court has made clear that codification of the right to keep and bear arms in the Second Amendment, and the incorporation of that right against the States through the Fourteenth Amendment, may impose some "limits" on policy alternatives but "by no means eliminates" the States' "ability to devise solutions to social problems that suit local needs and values." *McDonald*, 561 U.S. at 785 (plurality op.). Policymakers, the Court explained, retain "a variety of tools for combating [firearm violence]." *Heller*, 554 U.S. at 636. The Second Amendment does not "protect the right of citizens to carry arms for *any sort* of confrontation, just as . . . the First Amendment [does not] protect the right of citizens to speak for *any purpose*." *Id.* at 595; *cf. McDonald*, 561 U.S. at 802 (Scalia, J., concurring) ("No fundamental right—not even the First Amendment—is absolute."). The Court accordingly generated a list—which did "not purport to be exhaustive"—of "presumptively lawful" regulations, such as prohibitions on carrying concealed weapons, bans on the possession of firearms by felons and the mentally ill, bans on carrying firearms in sensitive places, and, as relevant here, bans on carrying "dangerous and unusual weapons," including weapons "not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625, 626-27 & n.26. Moreover, even where the conduct at issue may burden the

protected right, the regulation may survive where it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Peruta*, 824 F.3d at 942; *see Fyock*, 779 F.3d at 1000 (same).[3]

The Supreme Court's confirmation in *McDonald* that State experimentation with firearm regulations could continue is entirely consistent with the Court's recent jurisprudence addressing other constitutional provisions. *See, e.g.*, *Schuette*, 134 S. Ct. at 1630-31 (affirming State "innovation and experimentation" with respect to "whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in . . . school admissions"); *Oregon v. Ice*, 555 U.S. 160, 164 (2009) (leaving to State judges the determination of certain facts that dictate whether a court may impose consecutive as opposed to concurrent sentences). In the Second Amendment context, just as in others, States

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[3] In the court below, plaintiffs acknowledged that "Ninth Circuit precedent likely compels the Court to apply [intermediate scrutiny]." PI Mot. 8 n.4 (Dkt. 6-1); *see also* ER 22-23 ("the Ninth Circuit has repeatedly applied intermediate scrutiny" in other cases); *see, e.g.*, *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 968 (9th Cir. 2014) (applying intermediate scrutiny because "[a] ban on the sale of certain types of ammunition does not prevent the use of handguns or other weapons in self-defense"). Indeed, no court of appeals has applied strict scrutiny to an LCM regulation, *see supra* p. 2, and doing so would be unwarranted and would prevent state legislatures from responding effectively to this substantial threat to public safety. *See United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011) (applying strict scrutiny would "handcuff[]lawmakers' ability to 'prevent armed mayhem' in public places, and depriv[e] them of 'a variety of tools for combating th[e] problem'" (citation and brackets omitted)).

may pursue a range of policy preferences; within basic constitutional limits, they are not barred from considering policies that might in some way limit the use or possession of a particular type of firearm or firearm feature.

Consistent with the flexibility the Second Amendment provides, States have addressed the threat to public safety posed by firearm violence along a variety of tracks. That is unsurprising. While firearm violence is a national phenomenon, "conditions and problems differ from locality to locality," *McDonald*, 561 U.S. at 783 (plurality op.). The Federal Bureau of Investigation ("FBI") has identified numerous factors "known to affect the volume and type of crime occurring from place to place," including population density, composition and stability of the population, and the extent of urbanization; economic conditions, including median income, poverty level, and job availability; the effective strength of law enforcement; and the policies of other components of the criminal-justice system, including prosecutors, courts, and probation and correctional agencies.[4] These factors, among others, vary widely across States. As a result, there are significant variations from State to State in, for example, the number of murders and

[4] FBI, Uniform Crime Reporting Statistics: Their Proper Use (May 2017), *available at* https://ucr.fbi.gov/ucr-statistics-their-proper-use (last visited Oct. 18, 2017).

aggravated assaults committed with firearms.[5] There are also regional variations in the number of law-enforcement officers killed in the line of duty, almost all of whom are killed with firearms.[6] Equally important, given the unique conditions in each State and the "divergent views on the issue of gun control" held by the citizens of those States, *McDonald*, 561 U.S. at 783 (plurality op.), an approach that may be appropriate or effective in one State may not be appropriate or effective in another.

These differences help explain policymakers' varied responses to firearm violence. Thirty-eight States, for example, require a permit to carry a concealed firearm, but they afford different degrees of discretion to licensing authorities.[7] Nineteen States and the District of Columbia require some form of background

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[5] FBI, Murder: Crime in the United States 2015, tbl. 20, *available at* https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-20 (last visited Oct. 18, 2017); FBI, Aggravated Assault: Crime in the United States 2015, tbl. 22, *available at* https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-22 (last visited Oct. 18, 2017).

[6] *See* FBI, Law Enforcement Officers Killed & Assaulted 2015 (noting that, in 2015, "[b]y region, 19 officers were feloniously killed in the South, 9 officers in the West, 5 officers in the Midwest, 4 officers in the Northeast, and 4 officers in Puerto Rico"), *available at* https://ucr.fbi.gov/leoka/2015/officers-feloniously-killed/felonious_topic_page_-2015 (last visited Oct. 18, 2017).

[7] Law Ctr. To Prevent Gun Violence, Concealed Carry: Summary of State Law, *available at* http://smartgunlaws.org/gun-laws/policy-areas/guns-in-public/concealed-carry/#state (last visited Oct. 18, 2017).

check for certain firearms transactions.[8] And eight States (including California) and the District of Columbia restrict assault weapons, large-capacity magazines, or both.[9]

Whatever measures a State may adopt, all States have an interest in maintaining the flexibility, within the constraints established by the United States Constitution and their own State constitutions, to enact common-sense regulations aimed at minimizing the adverse effects of firearm violence while preserving the right of law-abiding, responsible citizens to use arms in defense of hearth and home. *See Friedman*, 784 F.3d at 412 ("Within the limits established by the Justices in *Heller* and *McDonald*, federalism and diversity still have a claim."). Indeed, a State's ability to craft the kind of innovative solutions acknowledged by this Court is most pronounced in areas, like police powers and criminal justice, where States have long been understood to possess special competencies. *See Ice*, 555 U.S. at 170-71 (quoting *Patterson v. New York*, 432 U.S. 197, 201 (1977)). Courts should thus "not lightly construe the Constitution so as to intrude upon" a

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[8] Law Ctr. To Prevent Gun Violence, Universal Background Checks: Summary of State Law, *available at* http://smartgunlaws.org/gun-laws/policy-areas/background-checks/universal-background-checks/#state (last visited Oct. 18, 2017).

[9] Law Ctr. To Prevent Gun Violence, Large Capacity Magazines: Summary of State Law, *available at* http://smartgunlaws.org/gun-laws/policy-areas/hardware-ammunition/large-capacity-magazines/#state (last visited Oct. 18, 2017).

State's crime-fighting efforts. *Patterson*, 432 U.S. at 201. Neither the policy choices of other States, nor the policy preferences of plaintiffs here, should limit California's ability to respond to firearm violence within its borders.

B. The decision below jeopardizes States' ability to experiment with and reform gun laws.

The district court's erroneous conclusion that banning the possession of LCMs is "off the table" threatens the States' continued experimentation with firearms regulation in two significant ways.

First, the decision below risks foreclosing a State's ability to adopt reforms that regulate any firearm or firearm feature whenever it could be argued that "[p]ersons with violent intentions have used [the firearm or firearm feature] . . . notwithstanding laws criminalizing their possession or use"—or that such persons will simply carry out the same crime in a different way. ER 40-42. Here, for example, the court concluded that prohibiting possession of LCMs was a poor "fit"—and thus unconstitutional—because criminals could simply "use multiple 10-round magazines" or "multiple weapons" to carry out the "rare" mass shooting. *Id.*[10] Although the court allowed that perhaps a record *could* be generated to

[10] The court below also suggested that, under *Heller*, the Second Amendment protects *any* firearm or firearm feature "commonly used for a lawful purpose." ER 18. That view, however, has been expressed by only two Justices and is not governing law. *See id.* (quoting *Friedman v. City of Highland Park*, 136 S. Ct.

support an LCM restriction, its flawed logic suggests otherwise, particularly where the court's test would appear to require States to demonstrate the efficacy of a regulation not yet in place. *See infra* pp. 17-18 (citing precedent contradicting that proposition).[11] Moreover, given the time, effort, and compromise necessary to enact gun control reform, imposing a judicial bar few laws could clear might deter States from pursuing or enacting such laws in the first place.

Second, and more fundamentally, the district court's approach would take out of the State's hands *most* questions about which weapons are appropriate for self-defense. But nothing about *Heller* attempts to define the entire scope of the Second Amendment, 554 U.S. at 635-36, and the best way to evaluate the relation among crime, self-defense, and—here—the possession of LCMs "is through the political process and scholarly debate," *Friedman*, 784 F.3d at 412. The Court's

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447, 449 (2015) (Thomas, J., and Scalia, J., dissenting from the denial of certiorari)).

[11] In any event, there is evidence that banning LCMs has a beneficial effect on public health and safety. Between 1994 and 2004, federal law prohibited the transfer or possession of LCMs, but grandfathered in LCMs manufactured before the effective date of the ban. *See* Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796, 1998-2000 (1994). A study of the LCM ban conducted at the request of Congress demonstrated both that LCMs have been frequently and disproportionately used in mass public shootings and murders of law enforcement officers, crimes for which firearms with greater firepower would seem to be particularly desirable and effective, and that LCM use may have started to drop by the early 2000s. *See, e.g.*, ER 2349-2371 (Koper Decl. ¶¶ 5, 7-16, 27-40, 44-45, 54-63); ER 1400-1515 (2004 Study).

precedents, of course, "set limits on the regulation of firearms; but within those limits, they leave matters open." *Id.* Adopting the reasoning of the decision below, however, may prevent California and other jurisdictions "from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise." *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). That "would be the gravest and most serious of steps" and "impair the ability of government to act prophylactically" on a "life and death subject." *Kolbe*, 849 F.3d at 150 (Wilkinson, J., concurring); *cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("Denial of the right to experiment may be fraught with serious consequences to the nation.").

II. Intermediate Scrutiny Does Not Authorize Courts To Second-Guess A State's Policy Judgments.

To survive intermediate scrutiny, this Court's precedents require the government to show that (1) its "stated objective [is] significant, substantial, or important," and (2) that there is a "reasonable fit between the challenged regulation and the asserted objective." *United States v. Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013). Firearm regulations satisfy that standard when they "promote[] a substantial government interest that would be achieved less effectively absent the regulation." *Peruta*, 824 F.3d at 942 (upholding California's concealed-carry law). Drawing from cases applying intermediate scrutiny to content-neutral regulations under the First Amendment, this Court has instructed that the "fit" required

between the challenged firearm regulation and the governmental interest need not employ "the least restrictive means of furthering a given end" available; rather it requires only that the law be "substantially related to the important government interest of reducing firearm-related deaths and injuries." *Silvester v. Harris*, 843 F.3d 816, 827 (9th Cir. 2016) (quoting *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 966 (9th Cir. 2014)).

A. A deferential standard governs judicial review of a legislature's predictive judgments.

In determining whether a law satisfies intermediate scrutiny, both this Court and the Supreme Court "accord substantial deference" to the legislature's judgments, and limit their review of the fit between challenged regulation and governmental interest to "assur[ing] that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) ("*Turner II*"); *Peruta*, 824 F.3d at 945 (Graber, J., concurring).[12] Specifically, in reviewing those

[12] Although *Turner II* involved the predictive judgment of Congress, its reasoning applies with equal force to the judgments of State and local legislatures. Like Congress, such legislatures "are better qualified to weigh and evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts." *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987) (internal quotation marks omitted); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (plurality op.) ("[W]e must acknowledge that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems."). Indeed, deference to

legislative judgments, the court may not "reweigh the evidence de novo, or . . . replace [the legislature's] factual predictions with [the court's] own"; instead, the court should defer to a legislative finding even if two different conclusions could be drawn from the supporting evidence. *Turner II*, 520 U.S. at 195. Such a high degree of deference is appropriate, the Court explained, both "out of respect for [the State's] authority to exercise the legislative power" and because legislatures are "far better equipped than the judiciary to amass and evaluate . . . data bearing upon legislative questions." *Id*. at 195, 196 (citations and internal quotation marks omitted); *see also, e.g.*, *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 841 (9th Cir. 2016) (deferring to legislative findings and affirming the denial of a preliminary injunction), *petition for cert. filed*, 2017 WL 1076379 (U.S. Mar. 20, 2017).

In arriving at its predictive judgment, a legislature may rely on a range of authority. For example, while the legislature's judgment *can* be based on empirical evidence, it need not be: it can also be based on "history, consensus, and simple common sense." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995); *see also G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1073 (9th Cir. 2006) (citing "much legislative deliberation" and accompanying

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State legislative determinations is appropriate even when State laws are subjected to strict scrutiny. *See, e.g.*, *Burson v. Freeman*, 504 U.S. 191, 208-09 (1992).

anecdotal evidence). That is in part because "[s]ound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner I*, 512 U.S. at 665. Moreover, in the event a legislature relies on empirical evidence, that evidence need not need not come with "sample sizes or selection procedures." *Id.*; *Gammoh v. City of La Habra*, 395 F.3d 1114, 1127 (9th Cir. 2005) ("[W]e . . . will not specify the methodological standards to which [the City's] evidence must conform."); *see also Jackson*, 746 F.3d at 969 (even if the evidence suggests that "the lethality of hollow-point bullets is an open question" that is "insufficient to discredit San Francisco's reasonable conclusions"); *Peruta*, 824 F.3d at 944 (Graber, J., concurring) ("[I]n the face of . . . inconclusive [social science] evidence, we must allow the government to select among reasonable alternatives in its policy decisions.").[13] A legislature also need not "conduct new studies or produce evidence independent of that already

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[13] *Went For It* addressed the constitutionality of a Florida Bar rule that prohibited lawyers from using direct mail to solicit personal injury or wrongful death clients within 30 days of an accident. Applying intermediate scrutiny, the Court credited a "106-page summary of [the Florida Bar's] 2-year study" and an "anecdotal record" that included newspaper editorial pages. *See* 515 U.S. at 623-24, 625-27. The Court contrasted the sufficiency of that record with the one it reviewed in *Edenfield v. Fane*, 507 U.S. 761, 768 (1993), where the Florida Board of Accountancy "presented no studies" and "the record did not disclose any anecdotal evidence from Florida or any other State." *Went For It, Inc.*, 515 U.S. at 626 (brackets omitted).

generated by other[s] . . . , so long as whatever evidence [it] relies upon is reasonably believed to be relevant to the problem that the [legislature] addresses." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986). Indeed, a legislature may rely on "studies and anecdotes pertaining to different locales altogether." *Went For It, Inc.*, 515 U.S. at 628.

Applying these principles, the Supreme Court in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), expressly rejected that Los Angeles needed to "demonstrate, not merely by appeal to common sense, but also with empirical data, that its ordinance will successfully lower crime." *Id*. at 439 (plurality op.) (sustaining a municipal ordinance regulating adult businesses). "Our cases," the Court explained, "have never required that municipalities make such a showing, certainly not without actual and convincing evidence from plaintiffs to the contrary." *Id*.; *accord Ctr. for Fair Pub. Policy v. Maricopa Cty., Ariz.*, 336 F.3d 1153, 1168 (9th Cir. 2003) (recognizing that *Alameda Books* "specifically rejected" that "the state needs to come forward with empirical data in support of its rationale"). In fact, "[a] municipality considering an innovative solution may not have data that could demonstrate the efficacy of its proposal because the solution would, by definition, not have been implemented previously." *Alameda Books*, 535 U.S. at 439-40 (plurality op.). Accordingly, while "shoddy data or reasoning" is insufficient, a legislature may "rely on *any* evidence that is

'reasonably believed to be relevant' for demonstrating a connection between [what is being regulated] and a substantial, independent government interest." *Id*. at 438 (emphasis added); *see also id*. at 451 (Kennedy, J., concurring) ("[W]e have consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required."); *accord Gammoh*, 395 F.3d at 1126-27.

Thus, in a wide variety of constitutional contexts, both this Court and the Supreme Court routinely defer to a range of legislative judgments. In *Turner II*, the Supreme Court deferred to Congress's express finding that statutory provisions requiring cable-television systems to carry local stations were necessary to preserve those stations. *See* 520 U.S. at 196 ("[D]eference must be accorded to [legislative] findings as to the harm to be avoided and to the remedial measures adopted for that end . . . ."). In *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), the Court rejected arguments that Missouri lacked "empirical evidence of actually corrupt practices or the perception among Missouri voters [of the same]," and upheld certain campaign contribution limits, finding sufficient the "authority of *Buckley* [*v. Valeo*, 424 U.S. 1 (1976)]," and a record that included a State senator's statement that contributions had the "real potential to buy votes," several media accounts reporting large contributions, and the fact that "74 percent of Missouri voters determined that contribution limits are necessary." 528 U.S. at 390-91, 393-94. In *Montana Right to Life Association v. Eddleman*, 343 F.3d 1085

(9th Cir. 2003), this Court similarly upheld a campaign contribution limitation after determining that "[t]he evidence presented by the State of Montana"—namely the testimony of a Montana legislator, anecdotal evidence, and polling data—was "sufficient to justify the contribution limits imposed." *Id.* at 1092-93.

Indeed, even in applying strict scrutiny, the Supreme Court has emphasized that a legislature's predictive judgments are entitled to deference. In *Burson v. Freeman*, 504 U.S. 191 (1992), the Court upheld as narrowly tailored a voting regulation prohibiting electioneering within 100 feet for a polling place, stating that "this Court never has held a State 'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the voting regulation in question." *Id*. at 209. "Legislature[s]," the Court explained, "should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Id*. The Court accordingly rejected as not of "constitutional dimension" arguments that the boundary line should have been fewer than 100 feet. *Id*. at 210; *see also id*. at 211 ("A long history, a substantial consensus, and simple common sense show that some restricted zone around polling places is necessary . . . [and] requiring solicitors to stand 100 feet from the entrances to polling places does not constitute an unconstitutional compromise.").

Deference to a legislature's predictive judgments is particularly apt in the context of firearm regulation, where the legislature is "far better equipped than the judiciary" to make sensitive public policy judgments. *Turner I*, 512 U.S. at 665; *see Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 97 (2d Cir. 2012) (extending "substantial deference" with respect to a concealed-carry law); *Peruta*, 824 F.3d at 944 (Graber, J., concurring) ("[W]e must allow the government to select among reasonable alternatives in its policy decisions."). In examining a substantially identical prohibition on LCMs, this Court accordingly stated that the City of Sunnyvale was "entitled to rely on any evidence 'reasonably believed to be relevant' to substantiate its important interests" and that the evidence it presented—that LCMs result in more gunshots fired and more gunshot wounds per victim, that LCMs are disproportionally used in mass shootings and against law enforcement officers, and that defensive gun use incidents involved fewer than ten rounds of ammunition—was sufficient to substantiate its interest. *Fyock*, 779 F.3d at 1000-01 (district court did not abuse its discretion in denying a preliminary injunction). The Fourth Circuit similarly determined that Maryland's legislative judgment that reducing the availability of LCMs would "lessen their use in mass shootings, other crimes, and firearms accidents" and "is precisely the type of

judgment that legislatures are allowed to make without second-guessing by a court." *Kolbe*, 849 F.3d at 140.[14]

Here, California may rely on not just the legislative records amassed by Maryland, New York, and other jurisdictions, *Went For It, Inc.*, 515 U.S. at 628; *Renton*, 475 U.S. at 51-52, but also the courts of appeals decisions incorporating those records. *See supra* p. 2.[15] Several courts of appeals have reviewed—and uniformly upheld—LCM prohibitions, crediting the same or similar evidence. In *Cuomo*, the Second Circuit credited evidence that LCMs are "disproportionally

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[14] In enacting the LCM prohibition, the Maryland General Assembly received expert testimony that LCMs are "commonly used in mass shootings" and that restricting LCMs could "reduce the number of victims wounded or killed in mass shootings or other [criminal] events." 5 Joint Appendix 2608, *Kolbe v. Hogan* (No. 14-1945) (4th Cir. Nov. 11, 2014). The legislature was also "aware of recent mass shootings in which the perpetrators were armed with high-capacity detachable magazines and that some of these incidents were interrupted only when the shooter paused to reload." *Id*. at 2610; *see also Kolbe*, 849 F.3d at 150 (Wilkinson, J., concurring) ("The Maryland legislature … could validly determine that [LCMs] in fact facilitate assaults by those who seek to eliminate the need to reload."). Substantially identical evidence is in the record here. *See* Cal. Br. 30-41.

[15] *See also City of Erie v. Pap's A.M.*, 529 U.S. 277, 297 (2000) (recognizing that the City of Erie "could reasonably rely on the evidentiary foundation set forth in *Renton* and [*Young v.*] *American Mini Theatres*[, *Inc.*, 427 U.S. 50 (1976)], to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood"); *Kachalsky*, 701 F.3d at 98 (noting that "[t]he connection between promoting public safety and regulating handgun possession in public is not just a conclusion reached by New York[,] [i]t has served as the basis for other states' handgun regulations, as recognized by various lower courts"); *Chovan*, 735 F.3d at 1140 (crediting the government's reliance on evidence presented to the Seventh Circuit).

used in mass shootings" and "result in 'more shots fired, persons wounded, and more wounds per victim.'" 804 F.3d at 263, 264. In *Heller II*, the D.C. Circuit similarly observed that LCMs "greatly increase the firepower of mass shooters," increase resulting injuries, and "tend to pose a danger to innocent people and particularly to police officers." 670 F.3d at 1263, 1264. And in *Kolbe*, the Fourth Circuit—based partly on the evidence discussed in *Cuomo*, such as studies showing that LCMs are "particularly attractive to mass shooters and other criminals, including those targeting police"—was "satisfied that there is substantial evidence" that "by reducing the availability of [LCMs], the [challenged law] will curtail their availability to criminals." 849 F.3d at 139-41. As a judge in the Eastern District of California observed when denying—on a substantially identical record, *see* Cal. Br. 30 n.8—a preliminary injunction of nearly the same LCM prohibition challenged here, "studies and expert analysis" supported the prohibition, as did the reasoning of the "[m]ultiple courts" that "have found a reasonable fit between similar bans with similar stated objectives." *Wiese v. Becerra*, — F. Supp. 3d —, 2017 WL 2813218, at *4 (E.D. Cal. June 29, 2017).

B. California made a considered and well-supported judgment in prohibiting LCMs.

Here, both the California legislature and the California electorate determined that the possession of LCMs should be prohibited in California. The long history of legislative findings and determinations regarding the lethality and injuriousness

of LCMs provides a substantial basis for California's judgments in enacting the LCM prohibition. *See* Cal. Br. 8-12, 34-41.

California's LCM prohibition is an important, incremental improvement on more than two decades of federal and state legislative measures seeking to address the particular risks that LCMs pose to public safety. As discussed in more detail in California's brief (at 8-12), the legislature and the electorate acted against the background of earlier State and federal attempts to regulate LCMs, and was informed by the experiences with those prior approaches. Specifically, the LCM prohibition was enacted (1) in order to close a "loophole" left open by prior laws that banned only the manufacture, importation, and sale of "military-style" LCMs—but not their possession—and (2) because LCMs "significantly increase a shooter's ability to kill a lot of people in a short amount of time" and are "common in many of America's most horrific mass shootings." ER 2132-33 (Prop. 63 § 2, ¶¶ 11-12); *accord* ER 2121-23 (S.B. No. 1446 Third Reading Analysis); *see also* ER 207-09 (Graham Decl. ¶¶ 20-31).

The record developed in this litigation confirms the validity of California's predictive judgment that prohibiting the possession of LCMs will reduce firearm injuries and fatalities. As an initial matter, LCMs—by design—increase the amount of bullets fired in a short period, resulting in more shots fired, more victims wounded, and more wounds per victim. *See* ER 181-82 (Allen Decl.

¶¶ 13-15); ER 220 (Webster Decl. ¶ 12); *Heller II*, 670 F.3d at 1263. LCMs are thus particularly attractive to mass shooters and other criminals (ER 197 (Donohue Decl. ¶ 25); ER 217 (Webster Decl. ¶ 8)), and pose heightened risks to innocent civilians and law enforcement (ER 222-23 (Webster Decl. ¶ 15)). In the last thirty years, not only has there been a proliferation of mass shootings, but, in instances where the magazine capacity used by the killer could be determined, researchers found that 88 percent of those incidents involved an LCM. *See* ER 181-82 (Allen Decl. ¶¶ 11-14); ER 2107-14 (Violence Policy Study Data); ER 217-20 (Webster Decl. ¶¶ 9-12). Mass-shooters using LCMs have caused significantly greater numbers of injuries and fatalities than shooters not using them—an average of 22 victims killed or injured, as compared with 9 victims killed or injured. ER 182 (Allen Decl. ¶ 15).

Both common sense and empirical evidence suggest that prohibiting LCMs will reduce the number of crimes in which LCMs are used and reduce the lethality and devastation of gun crime when it does occur. *See* ER 229-31 (Webster Decl. ¶¶ 24-26); ER 191, 195-96 (Donahue Decl. ¶¶ 9-10, 21-23 (bans on LCMs "can help save lives by forcing mass shooters to pause and reload")); ER 212-13 (James Decl. ¶¶ 6-9); *Heller II*, 670 F.3d at 1264 (the "two or three second pause during which a criminal reloads his firearm 'can be of critical benefit to law enforcement'"). Indeed, in *Cuomo*, the Second Circuit credited expert testimony—

also in the record in this case, *see* ER 2349-71 (Koper Decl.)—that banning possession of LCMs is likely to "prevent and limit shootings in the state over the long run." 804 F.3d at 264. At the same time, there is no proof that LCMs are necessary—or even commonly used—for self-defense. *See, e.g.*, ER 178-80 (Allen Decl. ¶¶ 8-10 (citing National Rifle Association reports that individuals engaging in self-defense fired on average 2.2 shots)).

In sum, California has amply demonstrated that prohibiting possession of LCMs is a reasonable fit to achieve its goal of reducing the lethality and injuriousness of mass shootings, demonstrating, as relevant here, that plaintiffs are not likely to succeed on the merits and requiring the denial of preliminary injunctive relief. *Cf. Jackson*, 746 F.3d at 970 (citing *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009)); *see also id.* at 966 (requiring only a "reasonable inference" that the challenged law will "increase public safety and reduce firearm casualties" in order to establish the required "fit").

In dismissing California's reliance on the empirical and anecdotal evidence before it, the court below applied a cramped and overly demanding standard of what constitutes substantial evidence and eliminated the deference to which California's predictive judgments are entitled. *See, e.g.*, ER 29 ("Due to limited time and judicial resources, [the Mayors Against Illegal Guns survey] will be the empirical data set relied on by the Court to determine reasonable fit"). By

precluding California from having the flexibility needed to regulate—within the bounds of *Heller* and *MacDonald*—firearm violence, the decision below substantially and unnecessarily hobbles California's ability to enact public safety legislation. It "impos[es] judicial formulas so rigid that they become a straightjacket that disables government from responding to serious problems." *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996) (Breyer, J., concurring in part and concurring in the judgment).

CONCLUSION

The order granting a preliminary injunction should be reversed.

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CERTIFICATE OF SERVICE

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