

1 John W. Dillon (SBN 296788)
2 jdillon@dillonlawgp.com
3 **DILLON LAW GROUP APC**
4 2647 Gateway Road
5 Suite 105, No. 255
6 Carlsbad, California 92009
7 Phone: (760) 642-7150
8 Fax: (760) 642-7151

7 George M. Lee (SBN 172982)
8 gml@seilerepstein.com
9 **SEILER EPSTEIN LLP**
10 275 Battery Street, Suite 1600
11 San Francisco, California 94111
12 Phone: (415) 979-0500
13 Fax: (415) 979-0511

12 *Attorneys for Plaintiffs*

14 **UNITED STATES DISTRICT COURT**

15 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

16 JAMES MILLER, an individual, et al.,

17
18 Plaintiffs,

19 vs.

20 XAVIER BECERRA, in his official
21 capacity as Attorney General of
22 California, et al.,

23 Defendants.
24

Case No. 3:19-cv-01537-BEN-JLB

**PLAINTIFFS' PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW**

[CivLR 16.1(f)(9)(b)]

Trial: February 3, 2021

Time: 10:00 a.m.

Courtroom 5A

Judge: Hon. Roger T. Benitez

TABLE OF CONTENTS

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

I. Introduction 1

II. Proposed Findings of Fact and Conclusions of Law 1

 A. STIPULATED FACTS 1

 B. UNCONTESTED FACTS 3

 The Parties 3

 Plaintiffs’ Claims 9

 C. PRIMARY CONTENTIONS OF FACT AND LAW 11

 Categorical Analysis Under Heller Should Apply; and Even if It Does Not,
 Defendants’ AWCA Fails All Forms of Scrutiny 11

 Arms Banned By California as “Assault Weapons” are Common and
 Constitutionally Protected 13

 The Arms Banned By California as “Assault Weapons” Are Possessed and
 Used for Lawful Purposes Including Self-Defense 18

 The Burden on Plaintiffs is Not Minor 33

 The Arms Banned By California as “Assault Weapons” Are Not More
 Lethal Than Arms That Are Not Banned 37

 Assault Weapons Bans Have No Discernible Effect on Crime 40

 California’s Continuous Expansion of the Assault Weapon Control Act is
 Proof of its Own Failure 41

 The Arms Banned By California as “Assault Weapons” Are Not Used in
 Most Mass Shootings 43

 Defendants’ Evidence 45

 Conclusions of Law 52

TABLE OF AUTHORITIES

Cases

Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).....55

Bauer v. Becerra, 858 F.3d 1216 (9th Cir. 2017).....53

Caetano v. Massachusetts, 136 S.Ct. 1027 (2016).....*passim*

District of Columbia v. Heller, 554 U.S. 570, 582, 128 S.Ct. 2783 (2008)*passim*

Duncan v. Becerra, 366 F.Supp.3d 1131 (S.D. Cal. 2019),
aff'd, 970 F.3d 1133 (9th Cir. 2020).....*passim*

Edenfield v. Fane, 507 U.S. 761 (1993)55, 58

Friedman v. City of Highland Park, 784 F.3d 406 (7th Cir. 2015).....56

Heller v. District of Columbia (“Heller II”), 670 F.3d 1244 (2011).....14, 17

Jackson v. City and County of San Francisco, 746 F.3d 953 (9th Cir. 2014).....53, 57

McCullen v. Coakley, 134 S.Ct. 2518 (2014)56

Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447 (1978)58

Pena v. Lindley, 898 F.3d 969 (9th Cir. 2018)53

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).....57

Robb v. Hungerbeeler, 370 F.3d 735 (8th Cir. 2004).....55

Rupp v. Becerra, 401 F.Supp.3d 978 (C.D. Cal. 2019).....54, 55

Silvester v. Becerra, 138 S.Ct. 945 (2018)53, 57

Silvester v. Harris, 834 F.3d 816 (9th Cir. 2016).....57

Southeast Promotions Ltd. v. Conrad, 420 U.S. 546 (1975).....55

Stanley v. Georgia, 394 U.S. 557 (1969).....55

Staples v. United States, 511 U.S. 600, 114 S.Ct. 1793 (1994).....16, 17

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994).....56

1 *Tyler v. Hillsdale County Sheriff’s Dept.*, 837 F.3d 678 (6th Cir. 2016)57

2 *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010).....57

3 *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013).....52, 53

4 *United States v. Miller*, 307 U.S. 174 (1939)29

5 *Vincenty v. Bloomberg*, 476 F.3d 74 (2d Cir. 2007).....55

6

7

8 **Statutes**

9 26 U.S.C. § 284523

10 42 U.S.C. § 19839

11 42 U.S.C. § 198810

12

13 Cal. Pen. Code § 16740.....4, 6, 28

14 Cal. Pen. Code § 30500.....3

15 Cal. Pen. Code § 30510.....1

16 Cal. Pen. Code § 30515(a)*passim*

17 Cal. Pen. Code § 30515(b)3, 28

18

19 Cal. Pen. Code § 30600.....1, 10

20 Cal. Pen. Code § 30605.....1, 10

21 Cal. Pen. Code § 30655.....1

22 Cal. Pen. Code § 30800.....3, 10

23 Cal. Pen. Code § 30900.....4

24 Cal. Pen. Code § 30910.....10

25 Cal. Pen. Code § 30915.....10

26 Cal. Pen. Code § 30925.....10, 11

27

28 Cal. Pen. Code § 30945.....10

1 Cal. Pen. Code § 30950.....1, 10
2 Cal. Pen. Code § 31000.....10
3 Cal. Pen. Code § 31005.....10
4 Cal. Pen. Code § 32310.....54
5

6
7 **Regulations**

8 11 Cal. Code Regs. § 5460.....10
9 11 Cal. Code Regs. § 5471.....3, 10, 23, 30
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **I. INTRODUCTION**

2 Pursuant to CivLR 16.1(f)(9)(b), plaintiffs James Miller, *et al.* (“plaintiffs”)
3 hereby submit their Proposed Findings of Fact and Conclusions of Law after the
4 bench trial, which commenced on February 3, 2021, and submitted on February 5,
5 2021, the Honorable Roger T. Benitez, presiding. Plaintiffs have amended and
6 supplemented their proposed findings of fact and conclusions of law [ECF 88] based
7 on the evidence introduced and admitted at trial.

8
9 **II. PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

10 **A. STIPULATED FACTS**

11 By and through submission of their proposed Pretrial Order, submitted to the
12 Court on December 9, 2020, the parties stipulated to the following facts (except as
13 otherwise indicated below):

14 1. California’s Robert-Roos Assault Weapons Control Act of 1989
15 (“AWCA”) was first enacted in 1989. California’s AWCA bans manufacturing,
16 causing to be manufactured, distributing, transporting, importing into the state,
17 keeping for sale, offering, or exposing for sale, giving, lending, possessing,
18 transferring through bequest or intestate succession any assault weapon and bars
19 juveniles from registering or possessing any assault weapon. Cal. Penal Code
20 §§ 30600, 30605, 30655, 30950.

21 2. The original AWCA identified particular assault weapons by make and
22 model. *Id.* § 30510. The AWCA was amended in 2000 to add alternative definitions of
23 assault weapons based on the features or characteristics of certain types of firearms.
24 *Id.* § 30515(a). In relevant part, the definitions found in Penal Code § 30515(a) are as
25 follows:

- 26
- 27 • §30515(a)(1): A semiautomatic, centerfire rifle that does not have a
28 fixed magazine but has any one of the following: A pistol grip that
protrudes conspicuously beneath the action of the weapon; a

1 thumbhole stock; a folding or telescoping stock; a grenade launcher or
2 flare launcher; a flash suppressor; or a forward pistol grip.

- 3 • §30515(a)(2): A semiautomatic, centerfire rifle that has a fixed
4 magazine with the capacity to accept more than 10 rounds.
- 5 • §30515(a)(3): A semiautomatic, centerfire rifle that has an overall
6 length of less than 30 inches.
- 7 • §30515(a)(4): A semiautomatic pistol that does not have a fixed
8 magazine but has any one of the following: a threaded barrel, capable
9 of accepting a flash suppressor, forward handgrip, or silencer; a
10 second handgrip; a shroud that is attached to, or partially or
11 completely encircles, the barrel that allows the bearer to fire the
12 weapon without burning the bearer's hand, except a slide that encloses
13 the barrel; or the capacity to accept a detachable magazine at some
14 location outside of the pistol grip.
- 15 • §30515(a)(5): A semiautomatic pistol with a fixed magazine that has
16 the capacity to accept more than 10 rounds.
- 17 • §30515(a)(6): A semiautomatic shotgun that has both of the
18 following: a folding or telescoping stock, and a pistol grip that
19 protrudes conspicuously beneath the action of the weapon, thumbhole
20 stock, or vertical handgrip.
- 21 • §30515(a)(7): A semiautomatic shotgun that does not have a fixed
22 magazine.
- 23 • §30515(a)(8): Any shotgun with a revolving cylinder.
- 24 • §30515(a)(9): A semiautomatic centerfire firearm that is not a rifle,
25 pistol, or shotgun, that does not have a fixed magazine, but that has
26 any one of the following: a pistol grip that protrudes conspicuously
27 beneath the action of the weapon; a thumbhole stock; a folding or
28 telescoping stock; a grenade launcher or flare launcher; a flash
suppressor; a forward pistol grip; a threaded barrel, capable of
accepting a flash suppressor, forward handgrip, or silencer; a second
handgrip; a shroud that is attached to, or partially or completely
encircles, the barrel that allows the bearer to fire the weapon without
burning the bearer's hand, except a slide that encloses the barrel; or
the capacity to accept a detachable magazine at some location outside

1 of the pistol grip.¹

- 2 • §30515(a)(10): A semiautomatic centerfire firearm that is not a rifle,
- 3 pistol, or shotgun, that has a fixed magazine with the capacity to
- 4 accept more than 10 rounds.²
- 5 • §30515(a)(11): A semiautomatic centerfire firearm that is not a rifle,
- 6 pistol, or shotgun, that has an overall length of less than 30 inches.³

7 3. Penal Code § 30515(b) defines “fixed magazine” to mean “an
8 ammunition feeding device contained in, or permanently attached to, a firearm in such
9 a manner that the device cannot be removed without disassembly of the firearm
10 action.” *See also* 11 Cal. Code Regs. § 5471(p).

11 4. Under the AWCA, the possession of any assault weapon in violation of
12 Penal Code § 30500, et seq. is a public nuisance. Penal Code § 30800.

13
14 **B. UNCONTESTED FACTS**

15 Plaintiffs have submitted the following facts that Defendants did not appear to
16 contest at trial:

17 **The Parties**

18 5. Plaintiff James Miller is a resident of San Diego, California. Plaintiff
19 Miller is not prohibited from owning firearms. (Miller Decl., Plaintiffs’ Exhibit 013,
20 ¶¶ 1-3.) Plaintiff Miller legally owns a semiautomatic centerfire rifle which as one or
21 more of the characteristics listed in Penal Code § 30515(a)(1), specifically, a pistol
22 grip (§ 30515(a)(1)(A)), a telescoping stock (§ 30515(a)(1)(C), and a flash suppressor
23 (§ 30515(a)(1)(E)). This firearm has a “fixed magazine” because it contains an
24 ammunition feeding device that cannot be removed from the firearm without
25

26 _____
27 ¹ Defendants did not stipulate to this fact.

28 ² Defendants did not stipulate to this fact.

³ Defendants did not stipulate to this fact.

1 disassembly of the firearm action. Miller Decl., Plaintiffs’ Exh. 013, ¶ 4. Plaintiff
2 Miller rendered the firearm with a fixed magazine in order to preserve the other
3 features without having to alter, deface or destroy the other characteristics of the
4 firearm. Id., ¶ 5. Plaintiff Miller is also in lawful possession of a “large capacity
5 magazine,” as that term is defined in Penal Code § 16740, as it has the capacity to
6 hold more than ten rounds of ammunition. Miller Decl., Plaintiffs’ Exh. 013, ¶ 6. If
7 Plaintiff Miller were to insert the “large capacity magazine” into the firearm he
8 possesses, it would be prohibited as an assault weapon under Pen. Code §
9 30515(a)(2.) Plaintiff Miller wishes to continue to use his firearm, with the magazine
10 inserted, without being subject to arrest and/or prosecution for possession or
11 manufacture of an assault weapon. Miller Decl., Plaintiffs’ Exh. 013, ¶ 8. Plaintiff
12 Miller also desires to obtain and acquire additional AR-15 pattern firearms that do not
13 have a fixed magazine, but which have some or all of the features listed in Pen. Code
14 § 30515(a)(1). Id., ¶ 9.

15 6. Plaintiff Wendy Hauffen is a resident of San Diego, California. Plaintiff
16 Hauffen is not prohibited from owning firearms. Hauffen Decl., Plaintiffs’ Exh. 014,
17 ¶¶ 1-3. Plaintiff Hauffen is the owner of a semiautomatic centerfire rifle described as
18 an AR-15 pattern rifle. This rifle is “featureless,” in that it does not have any of the
19 features listed in Pen. Code § 30515(a)(1). Hauffen Decl., Plaintiffs’ Exh. 014, ¶ 4.
20 Plaintiff Hauffen rendered the firearm as “features” configuration (under 11 Cal. Code
21 Regs. § 5471(o) in order to avoid having to register the firearm as an “assault weapon”
22 pursuant to Pen. Code § 30900(b). Hauffen Decl., Plaintiffs’ Exh. 014, ¶ 5. She
23 prefers to have the listed features in § 30515(a)(1) reattached to the firearm, but in
24 doing so, would have had to register the firearm as an “assault weapon.” If registered
25 as an assault weapon, it would have prevented Plaintiff Hauffen from transferring the
26 firearm to anyone else or passing it along to her heirs. Hauffen Decl., Plaintiffs’ Exh.
27 014, ¶ 5. She plans to and would like to pass the firearm down to her heirs or to sell
28 them should the need arise. *Id.* Plaintiff Hauffen would like to reattach some or all of

1 the § 30515(a)(1) features to her firearm but fears she would be subject to arrest
2 and/or prosecution for possessing or manufacturing an “assault weapon.” *Id.*, ¶ 6.

3 7. Plaintiff Hauffen is also a firearms trainer, who specializes in training
4 other women in the proficiency of arms and self-defense. *Id.*, ¶ 8. In her experience,
5 the collapsible/telescoping stock, which is common to most AR-15 rifles, makes it an
6 ideal rifle with which to instruct and train women. *Id.* Plaintiff Hauffen herself
7 specifically desires to use the ergonomic features of the firearm, such as the pistol
8 grip, in controlling the firearm and ensuring accuracy while shooting. *Id.* The ability
9 to use standard, thirty-round magazines with low recoil ammunition are among the
10 reasons why she prefers to use and train students with centerfire firearms with the
11 listed features, such as on the AR-15 rifle. *Id.* Plaintiff Hauffen also desires to obtain
12 and acquire additional AR-15 pattern firearms that do not have a fixed magazine, but
13 which have some or all of the features listed in Pen. Code § 30515(a)(1). *Id.*, ¶ 9. Such
14 firearms she would like to acquire also include AR-15 pistols which have many of the
15 same features. *Id.*, Pen. Code § 30515(a)(4)(A)-(D). Plaintiff Hauffen also has a
16 standard Sig Sauer P239 9mm semiautomatic pistol, which she uses both in teaching
17 firearms classes and shooting recreationally. Hauffen Decl., Plaintiffs’ Exh. 014, ¶ 10.
18 She would like to replace the standard barrel with a threaded barrel, which would
19 allow her either to attach a flash suppressor or a muzzle brake to the firearm, assisting
20 her vision, accuracy, and control. *Id.*

21 8. Plaintiff Neil Rutherford is a resident of San Diego, California. Plaintiff
22 Rutherford is not prohibited from owning firearms. Rutherford Decl., Plaintiffs’ Exh.
23 017, ¶¶ 1-3. Plaintiff Rutherford desires to obtain and acquire AR-15 pattern firearms
24 that are sold in other parts of the country, and which have some or all of the features
25 listed in Pen. Code § 30515(a)(1), and which have the capacity to accept detachable
26 magazines. *Id.*, ¶ 4. Plaintiff Rutherford also desires to obtain and acquire other
27 firearms classified as “assault weapons,” including AR pistols, which contain some or
28 all of the features described in Pen. Code § 30515(a)(4)(A)-(D), semiautomatic

1 shotguns which contain some or all of the features listed in Pen. Code § 30515(a)(6)
2 and (a)(7) but is prohibited by those provisions which define such firearms to be
3 “assault weapons” under California law. Rutherford Decl., Plaintiffs’ Exh. 017, ¶ 5.

4 9. Plaintiff Adrian Sevilla is a resident of San Diego, California. Plaintiff
5 Sevilla is not prohibited from owning firearms. Sevilla Decl., Plaintiffs’ Exh. 018, ¶¶
6 1-3. Plaintiff Sevilla desires to obtain and acquire AR-15 pattern firearms that are sold
7 in other parts of the country, and which have some or all of the features listed in Pen.
8 Code § 30515(a)(1), and which have the capacity to accept detachable magazines. *Id.*,
9 ¶ 4. Plaintiff Sevilla also desires to obtain and acquire other firearms classified as
10 “assault weapons,” including AR pistols, which contain some or all of the features
11 described in Pen. Code § 30515(a)(4)(A)-(D), semiautomatic shotguns which contain
12 some or all of the features listed in Pen. Code § 30515(a)(6) and (a)(7) but is
13 prohibited by those provisions which define such firearms to be “assault weapons”
14 under California law. Sevilla Decl., Plaintiffs’ Exh. 018, ¶ 5.

15 10. Plaintiff Ryan Peterson is a resident of San Diego, California. Plaintiff
16 Peterson is not prohibited from owning firearms. Peterson Decl., Plaintiffs’ Exh. 015,
17 ¶¶ 1-3. Plaintiff Peterson is the lawful owner of a semiautomatic pistol with a “fixed
18 magazine,” as it contains an ammunition feeding device that cannot be removed from
19 the firearm without disassembly of the firearm action. *Id.*, ¶ 4.) If Plaintiff Peterson
20 were to remove the fixed magazine, it would be considered to be an assault weapon.
21 Tx of 10/22/20 Hearing, at 11:20 – 12:21. Plaintiff Peterson is also the lawful owner
22 of a large capacity magazine defined under Penal Code section 16740 that is
23 compatible with his semiautomatic fixed magazine pistol. If Plaintiff Peterson were to
24 insert his lawfully owned large capacity magazine into his semiautomatic fixed
25 magazine pistol, it would be considered an assault weapon. Peterson Decl., Plaintiffs’
26 Exh. 015, ¶¶ 5-7.

27 11. Plaintiff Peterson wishes to use his lawfully owned large capacity
28 magazine in his semiautomatic fixed magazine pistol. Plaintiff Peterson also wishes to

1 obtain additional semiautomatic, centerfire firearms, including AR-15 pattern
2 firearms, that either have some or all of the features listed in Penal Code section
3 30515(a)(1) and which do not have a fixed magazine, and/or to obtain and acquire a
4 semiautomatic, centerfire rifle that has a fixed magazine with the capacity to accept
5 more than 10 rounds. Peterson Decl., Plaintiffs' Exh. 015, ¶¶ 7-8.

6 12. Plaintiff Gunfighter Tactical, LLC is a federally and state-licensed
7 firearms retailer in San Diego, California, owned and managed by Plaintiff Peterson.
8 Peterson Decl., Plaintiffs' Exh. 015, at ¶ 9; Tx of 10/22/20 Hearing at 13:9-14.
9 Gunfighter Tactical would like to purchase, sell, and transfer firearms in common use
10 for lawful purposes in other parts of the country, to ordinary, non-prohibited citizens,
11 but which firearms are prohibited because they contain some or all of the features
12 described by Pen. Code § 30515(a)(1). Peterson Decl., Plaintiffs' Exh. 015, ¶ 9.
13 Gunfighter Tactical is prevented from selling common AR-15 pattern rifles with
14 detachable magazines to ordinary citizens. Tx of 10/22/20 Hearing at 13:9-14.

15 13. Plaintiff John Phillips is a resident of San Diego, California. Plaintiff
16 Phillips is not prohibited from owning firearms. Phillips Decl., Plaintiffs' Exh. 016, ¶
17 1. Plaintiff Phillips is the president of Plaintiff PWGG, L.P., doing business as
18 "Poway Weapons & Gear" and "PWG Range," a federally licensed firearms retailer
19 and shooting range in Poway, California. Phillips Decl., Plaintiffs' Exh. 016, ¶ 3.

20 14. Plaintiff Phillips is also a member of organizational Plaintiffs, San Diego
21 County Gun Owners PAC, California Gun Rights Foundation, Second Amendment
22 Foundation, and Firearms Policy Coalition, Inc. Phillips Decl., Plaintiffs' Exh. 016, ¶
23 3.

24 15. Plaintiff PWGG, L.P. holds a "Dangerous Weapons License/Permit"
25 issued and maintained by Defendants through the California Department of Justice,
26 Bureau of Firearms. This permit allows Plaintiff PWGG, L.P. to acquire and sell
27 "assault weapons" as defined by Penal Code section 30515(a) to select exempted
28 recipients, such as law enforcement officers. This permit does not allow Plaintiff

1 PWGG, L.P. to sell, transfer, or rent Penal Code section 30515(a) “assault weapons”
2 to non-exempt agencies or individuals, ordinary, non-prohibited citizens. Phillips
3 Decl., Plaintiffs’ Exh. 016, ¶ 5.

4 16. Plaintiff Phillips and Plaintiff PWGG, L.P. wish to have the business
5 purchase, sell, and transfer firearms in common use for lawful purposes which are
6 defined as “assault weapons” and contain some or all of the features described by
7 Penal Code section 30515(a) — to ordinary, non-prohibited adults through the FFL
8 dealership. Plaintiff Phillips and Plaintiff PWGG, L.P. are prevented from doing so
9 due to state law. Phillips Decl., Plaintiffs’ Exh. 016, ¶ 4.

10 17. Plaintiff San Diego County Gun Owners (SDCGO) is a membership
11 organization which advocates for and advances the Second Amendment rights of
12 residents of San Diego County, California to keep and bear arms. Individual plaintiffs
13 Miller, Hauffen, Rutherford, Sevilla, Peterson and Phillips are members of SDCGO.
14 FAC, ¶¶ 1-10; Schwartz Decl., Plaintiffs’ Exh. 019, ¶¶ 3-4.

15 18. Plaintiff SDCGO has California resident members who wish to acquire
16 and possess common semiautomatic firearms with various characteristics which are
17 defined as “assault weapons” under Penal Code § 30515(a). Schwartz Decl.,
18 Plaintiffs’ Exh. 019, ¶¶ 5-6.

19 19. Plaintiff California Gun Rights Foundation (CGF) is a non-profit
20 foundation which advocates for and advances the Second Amendment rights of
21 residents of California to keep and bear arms. Individual plaintiffs Miller, Hauffen,
22 Rutherford, Sevilla, Peterson and Phillips are members of CGF. FAC, ¶¶ 1-8, 11;
23 Hoffman Decl., Plaintiffs’ Exh. 020, ¶ 3-4.

24 20. Plaintiff CGF has California resident members who wish to acquire and
25 possess common semiautomatic firearms with various characteristics which are
26 defined as “assault weapons” under Penal Code § 30515(a). Hoffman Decl., Plaintiffs’
27 Exh. 020, ¶ 5-6.

28

1 21. Plaintiff Firearms Policy Coalition (FPC) is a non-profit organization
2 which advocates for and advances the Second Amendment rights of residents of
3 around the nation to keep and bear arms. Individual plaintiffs Miller, Hauffen,
4 Rutherford, Sevilla, Peterson, and Phillips are members of FPC. FAC, ¶¶ 1-8, 12;
5 Combs Decl., Plaintiffs' Exh. 022, ¶¶ 3-4.

6 22. Plaintiff FPC has California resident members who wish to acquire and
7 possess common semiautomatic firearms with various characteristics which are
8 defined as "assault weapons" under Penal Code § 30515(a). Combs Decl., Plaintiffs'
9 Exh. 022, ¶¶ 3-4.

10 23. Plaintiff Second Amendment Foundation (SAF) is a non-profit
11 educational foundation which advocates for and advances the Second Amendment
12 rights of residents of around the nation to keep and bear arms. Individual plaintiffs
13 Miller, Hauffen, Rutherford, Sevilla, Peterson, and Phillips are members of SAF.
14 FAC, ¶¶ 1-8, 13; Gottlieb Decl., Plaintiffs' Exh. 021, ¶¶ 3-5.

15 24. Plaintiff SAF has California resident members who wish to acquire and
16 possess common semiautomatic firearms with various characteristics which are
17 defined as "assault weapons" under Penal Code § 30515(a). Gottlieb Decl., Plaintiffs'
18 Exh. 21, ¶¶ 6-7.

19
20 **Plaintiffs' Claims**

21 25. Plaintiffs' claims for relief arise under 42 U.S.C. § 1983, for Defendants'
22 laws, policies, customs, and enforcement practices which violate the right to keep and
23 bear arms under the Second Amendment to the U.S. Constitution. First Amended
24 Complaint [ECF Dkt. 9] ("FAC"), ¶¶ 90-104.

25 26. Plaintiffs seek relief, as pleaded in their First Amended Complaint, as
26 follows:

27 "1. For declaratory relief adjudging that the definitions of
28 "assault weapon" pursuant to Penal Code §§ 30515(a) and (b), and

1 Title 11, California Code of Regulations §§ 5460 and 5471, are
2 unconstitutional on their face and as applied, and violate the Second
3 Amendment, to the extent that the State’s laws and regulations operate
4 to prohibit or prevent Plaintiffs and similarly situated persons from
5 exercising their rights, including acquiring, keeping, bearing,
6 transporting, transferring, and using “assault weapons” for lawful
7 purposes;

8 2. For declaratory relief adjudging that California Penal Code
9 §§ 30600, 30605, 30800, 30910, 30915, 30925, 30945, 30950, 31000,
10 and 31005 are unconstitutional on their face and as applied, and in
11 violation of the Second Amendment, to the extent that the State’s laws
12 and regulations operate to prohibit or prevent Plaintiffs and similarly
13 situated persons from exercising their rights, including acquiring,
14 keeping, bearing, transporting, transferring, and using “assault
15 weapons” for lawful purposes;

16 3. For declaratory relief supporting an injunction, and an order
17 temporarily and permanently enjoining Defendants, their officers,
18 agents, servants, employees, and all persons in active concert or
19 participation with them, who receive actual notice of the injunction,
20 from enforcement or application of Penal Code §§ 30515(a) and (b),
21 30600, 30605, 30800, 30910, 30915, 30925, 30945, 30950, 31000,
22 and 31005, as well as Title 11, California Code of Regulations §§
23 5460 and 5471, against Plaintiffs on an as-applied basis, and against
24 all similarly situated persons;

25 4. For costs of suit, including attorneys’ fees and costs under 42
26 U.S.C. § 1988 and any other applicable law; and

27 5. For any and all further relief to which Plaintiffs may be justly
28 entitled.”

1 FAC, pp. 41-42.

2 27. Plaintiffs have withdrawn their claim as to Pen. Code § 30925.

3

4 **C. PRIMARY CONTENTIONS OF FACT AND LAW**

5 **Categorical Analysis Under Heller Should Apply; and Even if It Does Not,**
6 **Defendants’ AWCA Fails All Forms of Scrutiny**

7 28. The Supreme Court has emphasized that “reasonable” tailoring demands
8 a considerably closer fit than mere rational basis scrutiny; and the AWCA’s sweeping
9 ban on common firearms with common characteristics is not a reasonable fit for
10 achieving the State’s interests.

11 29. In deciding intermediate scrutiny, courts use a First Amendment analysis.
12 Heightened scrutiny in Second Amendment cases is guided by First Amendment
13 principles. *Jackson*, 746 F.3d at 961.

14 30. Thus, if California’s assault weapons ban does not “alleviate the claimed
15 harms to a material degree,” it fails intermediate scrutiny. *Edenfield v. Fane*, 507 U.S.
16 761, 770-71; See Lott Decl. Plaintiffs’ Exh. 010, Exhs. 010-2 through 010-29; See
17 also Lott Decl., Plaintiffs’ Exh. 032.

18 31. Defendants have not provided any credible evidence that the AWCA is
19 effective.

20 32. Any alleged higher incidence of “assault weapons” being used in crimes,
21 mass shootings, and/or police shootings cannot justify the State’ sweeping ban on the
22 lawful possession and use of protected arms, and the lawful use of such arms
23 overwhelmingly outweighs any criminal use. Government “may not regulate the
24 secondary effects of speech by suppressing the speech itself.” *City of Los Angeles v.*
25 *Alameda Books, Inc.*, 535 U.S. 425, 445 (2002) (opinion of Kennedy, J.).

26 33. The U.S. Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570,
27 582, 128 S.Ct. 2783 (2008) rejected such an argument, finding that a ban on
28

1 possessing commonly owned firearms lacked any fit to further the government's
2 interest under any level of scrutiny. *Heller*, 554 U.S. at 628-29.

3 34. Constitutionally protected activities cannot be banned because the
4 activity *could* lead to criminal abuses. See *Southeast Promotions Led. V. Conrad*, 420
5 U.S. 546, 559 (1975); *Vicenty v. Bloomberg*, 476 F.3d 74, 84-85 (2d Cir. 2007); *Robb*
6 *v. Hungerbeeler*, 370 F.3d 735, 743 (8th Cir. 2004); *Ashcroft v. Free Speech Coal.*,
7 535 U.S. 234, 245 (2002); *Stanley v. Georgia*, 394 U.S. 557, 567 (1969).

8 35. Under intermediate scrutiny, “a reasonable fit requires tailoring, and a
9 broad prophylactic ban on acquisition or possession of all” common semiautomatic
10 firearms with common characteristics “for all ordinary, law-abiding, responsible
11 citizens is not tailored at all.” *Duncan v. Becerra*, 366 F.Supp.3d at 1180; see also
12 *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 682-83 (1994) (O’Connor, J.,
13 concurring in part and dissenting in part) (“A regulation is not ‘narrowly tailored’ —
14 even under the more lenient [standard applicable to content neutral restrictions] —
15 where... a substantial portion of the burden on speech does not serve to advance [the
16 State’s content-neutral] goals.... Broad prophylactic rules in the area of free
17 expression are suspect. Precision of regulation must be the touchstone....”) (brackets
18 in original) (citation and quotations omitted).

19 36. “To meet the narrow tailoring requirement ... the government must
20 demonstrate that alternative measures that burden substantially less [of the right]
21 would fail to achieve the government’s interests, not simply that the chosen route is
22 easier.” *McCullen v. Coakley*, 134 S. Ct. 2518, 2524 (2014); see also *Ward v. Rock*
23 *Against Racism*, 491 U.S. 781, 799 (1989).

24 37. “The right to self-defense is largely meaningless if it does not include the
25 right to choose the most effective means of defending oneself.” *Friedman v. City of*
26 *Highland Park*, 784 F.3d 406, 418 (7th Cir. 2015) (Manion, J., dissenting).

27 38. The State’s justification that the self-same characteristics that make the
28 firearms here suitable for lawful use may also make them effective tools for crime if

1 misused, thus necessitating a ban, misses the point and would ultimately gut the
2 Second Amendment.

3 39. The very point of protecting arms, and firearms in particular, is that they
4 allow a law-abiding person to project force against unjust force at a distance, and
5 thereby defend themselves and others against a violent threat as soon as possible with
6 the least amount of damage to those being protected.

7 40. Inevitably, under the State’s reasoning, all firearms that are suitable for
8 any lawful purpose, including self-defense and militia service, are comparably
9 dangerous in the hands of a violent criminal.

10 41. The notion that improvements that make firearms better and safer for
11 lawful use likewise make them comparably better for unlawful use simply leads to the
12 absurdity that firearms may never be improved because the very fact that the firearm
13 is more accurate or lethal outweigh the benefits and justify a ban.

14 42. Importantly, under intermediate scrutiny, if a law is underinclusive, that
15 undermines the purported interest alleged by the State. *Greater New Orleans*
16 *Broadcasting Ass’n v. United States*, 527 U.S. 173, 185-95 (1999). And if it is
17 necessarily underinclusive, because a more inclusive restriction would be
18 unconstitutional, that shows the interest is not valid as framed.

19 43. The State admits that the AWCA does not prohibit all semiautomatic
20 firearms precisely because such a ban would be unconstitutional. As shown below, the
21 AWCA’s continuous expansion of what constitutes an assault weapon has no stopping
22 point. Because the AWCA has no stopping point and the current restriction is
23 necessarily underinclusive, the State’s interest as framed is improper.

24
25 **Arms Banned By California as “Assault Weapons” are Common and**
26 **Constitutionally Protected**

27 44. The Supreme Court has held that “the Second Amendment extends,
28 prima facie, to all instruments that constitute bearable arms, even those that were not

1 in existence at the time of the founding.” *Heller*, 554 U.S. at 582 (2008). The right to
2 keep and bear arms is a right enjoyed by law-abiding citizens to have arms that are “in
3 common use” “for lawful purposes like self-defense.” *Heller*, 554 U.S. at 624; *Heller*
4 *v. District of Columbia* (“*Heller II*”), 670 F.3d 1244, 1271 (2011) (Kavanaugh, J.,
5 dissenting); *Duncan v. Becerra*, 366 F.Supp.3d 1131, 1142 (S.D. Cal. 2019), *aff’d*, 970
6 F.3d 1133 (9th Cir. 2020).

7 45. The Supreme Court’s test for commonality is a nationwide inquiry. The
8 Second Amendment does not mean different things in different parts of the country.
9 The Supreme Court’s analysis in *Heller* asks simply whether the arms are “*both*
10 *dangerous and unusual*.” *Caetano v. Massachusetts*, 136 S.Ct. 1027, 1031 (2016)
11 (Alito, J., joined by Thomas, J., concurring) (*italics original*). And if the firearms are
12 not *both*, it determines if the category of arms are in common use for lawful purposes.
13 *Duncan*, 366 F.Supp.3d at 1142. The text of the Second Amendment, as it is informed
14 by history and tradition, all point in the same direction because “the pertinent Second
15 Amendment inquiry is whether [the banned weapons] are commonly possessed by
16 law-abiding citizens for lawful purposes *today*.” *Caetano, supra*, at 1032 (*italics*
17 *original*).

18 46. The arms banned as “assault weapons” under the AWCA and regulations
19 are not *both* dangerous *and* unusual, as the Supreme Court defined in *Heller*. To the
20 contrary, they are common in all respects: (1) they are common functionally, as they
21 are all semiautomatic in their operation; (2) they are common characteristically, as
22 they are all commercially popular types of arms with various common characteristics
23 like pistol grips and the like; and (3) they are common jurisdictionally, available in the
24 vast majority of states. As further proof, they are common numerically, in that they
25 are owned by citizens by the hundreds of thousands or more. All of the semiautomatic
26 firearms California bans in Penal Code section 30515 meet the *Heller* test and are
27 constitutionally protected.

28 47. While numerical data can be helpful in determining if a particular

1 weapon is commonly used for lawful purposes, the constitutionally-protected status of
2 arms cannot turn on fact-bound sales numbers of particular makes, models, or even
3 specific configurations. Rather, the question is a categorical analysis of type and
4 function, set against a backdrop of permissibility and availability throughout the
5 United States. “While less popular than handguns, stun guns are widely owned and
6 accepted as a legitimate means of self-defense across the country.” *Caetano*, 136 S.
7 Ct. 1027, 1033 (2016) (Alito, J., concurring). So too are semiautomatic firearms in
8 various configurations of characteristics, as California bans. These firearms are
9 commonly used by responsible, law-abiding people for various lawful purposes such
10 as self-defense, hunting, recreation, competition, and collecting. Curcuruto Decl.,
11 Plaintiffs’ Exh. 004, ¶¶ 7-14; Exhs. 004-1 to 004-8.

12 48. The fact that the AWCA may act to ban thousands of discrete
13 configurations of common semiautomatic pistols, shotguns, and rifles held in
14 respectively smaller numbers than the over-arching category of “assault weapons” as a
15 whole is irrelevant to the constitutional inquiry under *Heller*. Mocsary Decl.,
16 Plaintiffs’ Exh. 003, ¶¶ 47-52.

17 49. Another demonstration of the commonality of semiautomatic firearms
18 called “assault weapons” is their general legality in other jurisdictions. *Caetano*, 136
19 S.Ct. at 1032 (“[t]he more relevant statistic is that “[h]undreds of thousands of Tasers
20 and stun guns have been sold to private citizens,” who it appears may lawfully possess
21 them in 45 States”) (Alito, J., concurring).

22 50. Law-abiding citizens may possess any semiautomatic rifle in 44 states
23 and may possess some semiautomatic rifles in all 50 states. Mocsary Decl., Plaintiffs’
24 Exh. 003, at ¶ 44. Semiautomatic firearms may be possessed by citizens in all fifty
25 states. Forty-one states treat all semiautomatic firearms the same as every other legal
26 firearm, without any additional restrictions, regardless of the features attached to the
27 firearm. *Id.*

28 51. Millions of weapons that California defines as “assault weapons” by

1 virtue of the Penal Code section 30515(a)(1) characteristics are legally owned by
2 people in a large majority of the states. Mocsary Decl., Plaintiffs’ Exh. 003, ¶¶ 25-52.

3 52. Assault weapons bans are not longstanding prohibitions. The only federal
4 regulation on semiautomatic firearms having characteristics at issue here did not occur
5 until 1994 in the Public Safety and Recreational Firearms Use Protection Act (the
6 “Federal Assault Weapons Ban”) (103rd Congress (1993-1994)), a subsection of the
7 Violent Crime Control and Law Enforcement Act of 1994 (Pub. L. 103-322), which
8 was allowed to sunset 10 years later due to its lack of effect on crime. Lott Decl,
9 Plaintiffs’ Exh. 010, ¶ 8.

10 53. Firearms defined under California law as “assault weapons” by virtue of
11 the features they contain, as set forth in Pen. Code section 30515(a), are in common
12 use, for lawful purposes, including, recreational and competitive target shooting, self-
13 defense, collecting and hunting, by millions of Americans. Curcuruto Decl., Plaintiffs’
14 Exh. 004, ¶ 7.

15 54. Semiautomatic rifles bearing features prohibited by Pen. Code section
16 30515(a)(1) are widely available and popular. The characteristics most commonly
17 associated with these types of firearms are that they are semiautomatic, with the
18 ability to accept a detachable magazine. Curcuruto testimony, Tx of 10/19/20 Hearing
19 at 62:7-11; Kapelsohn Decl., Plaintiffs’ Exh. 001, ¶ 18. The most popular is the AR
20 platform (or rifles modeled on the AR-15 pattern). Curcuruto testimony, Tx of
21 10/19/20 Hearing at 62:17-18. That is true both nationally and in the State of
22 California. *Id.* at 62:24 – 63:19.

23 55. An AR-15 rifle is a semiautomatic civilian rifle, which means it fires one
24 shot with every pull of the trigger. *Staples v. United States*, 511 U.S. 600, 603, 114
25 S.Ct. 1793 (1994). Kapelsohn testimony, Tx of 10/19/20 hearing at 23:4-9; Curcuruto
26 Decl., Plaintiffs’ Exh. 004, ¶ 7, fn.1. This distinguishes an AR-15 from an M16, which
27 is a “select fire” weapon, that is, it can be either semiautomatic or fully automatic.
28 *Staples*, 511 U.S. at 603; Kapelsohn testimony, Tx of 10/19/20 Hearing at 21:22 -

1 22:5; Curcuruto Decl., Plaintiffs' Exh. 004, ¶ 7. Semiautomatic firearms such as the
2 AR-15 "traditionally have been widely accepted as lawful possessions." *Staples*, 511
3 U.S. at 612; *Heller II*, 670 F.3d at 1288. In general, semiautomatic firearms are widely
4 available and popular; the vast majority of handguns sold today are semiautomatic.
5 *Heller II*, 670 F.3d at 1269 (Kavanaugh, J., dissenting).

6 56. The AR-15 type rifle is a popular, semiautomatic rifle in wide civilian
7 use throughout the United States. *Duncan*, 366 F.Supp.3d at 1145. Curcuruto Decl.,
8 Plaintiffs' Exh. 004, ¶¶ 7-8; Curcuruto testimony, Tx of 10/19/20 Hearing at 63:10-19;
9 Kapelsohn Decl., Plaintiffs' Exh. 001, ¶ 18. The AR-15 is especially popular because
10 of its light weight, mild recoil, and good ergonomics, all of which make it well suited
11 to younger shooters, female shooters, and other shooters of smaller stature, as well as
12 an easy rifle for larger, stronger individuals to use. Kapelsohn Decl, Plaintiffs' Exh.
13 001, ¶ 18.

14 57. The AR-15 rifle has been in existence since being developed by the
15 Armalite company in the 1950s. Hlebinsky Decl., Plaintiffs' Exh. 002, ¶ 28;
16 Kapelsohn Decl., Plaintiffs' Exh. 001, ¶ 18; Curcuruto Decl., Plaintiffs' Exh. 4, ¶ 007,
17 fn.1. Many of the features incorporated into the AR-15 rifle already had been in
18 existence; the only major new features incorporated into the AR-15 were lightweight
19 alloys to synthetic materials that became a popular experimentation across all firearm
20 platforms following World War II. Hlebinsky Decl., Plaintiffs' Exh. 002, ¶ 28.

21 58. United States manufacturers produced approximately 14.7 million AR-
22 platform rifles for the United States commercial marketplace between 1990 and 2018.
23 Curcuruto Decl., Plaintiffs' Exh. 004, ¶ 8; Exh. 004-3. Currently, there are an
24 estimated 19.8 million modern semiautomatic rifles overall produced in the U.S. or
25 imported, between 1990-2018. Curcuruto Decl., Plaintiffs' Exhibit 004, ¶ 15-; Ex.
26 004-8. The most common calibers for modern semiautomatic rifles are .223 (or 5.56 x
27 45mm), 7.62 x 39mm, .22 caliber and .308 caliber. Curcuruto testimony, Tx of
28 10/19/20 hearing at 65:7-10.

1 59. The most common caliber for the AR-15 rifle is the 5.56x45 NATO (or
2 .223) cartridge, which is a centerfire cartridge. Curcuruto testimony, Tx of 10/19/20
3 Hearing at 65:25 – 66:5. The .223 cartridge is essentially the same as the 5.56 x 45mm
4 round, with minor differences in the brass, but having the identical bullet. Depo. of
5 Dr. Robert Margulies, at 52:15 – 53:15.

6 60. Rimfire firearms would make up a small portion of the overall numbers
7 of modern semiautomatic rifles, approximately 15 percent. Curcuruto testimony, Tx of
8 10/19/20 Hearing at 66:9-13. The “vast majority” of modern semiautomatic rifles are
9 centerfire rather than rimfire. Curcuruto Depo., p. 129:14-21.

10 61. Defendants’ own evidence acknowledges that firearms identified as
11 “assault weapons” under Penal Code section 30515(a) are common and prolific
12 throughout the United States. See Defendants’ Exh. BH (depicting hundreds of
13 models of firearms defined as “assault weapons”); see also Glover Decl., Def. Exh.
14 CZ, ¶ 6 (detailing the number of registered assault weapons in California).

15
16 **The Arms Banned By California as “Assault Weapons” Are Possessed and Used**
17 **for Lawful Purposes Including Self-Defense**

18 62. Semiautomatic firearms bearing the Penal Code section 30515(a)
19 characteristics are well-suited for self-defense purposes, which is a lawful use. The
20 AR-15 in particular is an easy firearm to shoot accurately and is generally easier to
21 fire accurately than a handgun. Kapelsohn testimony, Tx of 10/19/20 hearing at 25:16
22 – 26:20. The AR-15 rifle is light in weight, and has good ergonomics, and is suitable
23 for people of all statures and varying levels of strength. *Id.*, at 26:21 – 27:8.

24 63. In its standard configuration, the most popular features of semiautomatic
25 rifles such as the AR-15 rifle, as sold in other parts of the country, are the pistol grip
26 (prohibited by Pen. Code section 30515(a)(1)(A)), the telescoping stock (prohibited by
27 Penal Code section 30515(a)(1)(C)), and a flash suppressor (prohibited by Penal Code
28 section 30515(a)(1)(E)). Graham testimony, Tx of 10/19/20 Hearing at 129:21 –

1 130:1.

2 64. Accuracy is very important for self-defense, because unlike the criminal
3 using a firearm, a civilian or a police officer is accountable for every round they fire.
4 And thus, if they miss the attacker, they will hit something they did not intend to hit,
5 which may be an innocent bystander. Kapelsohn testimony, Tx of 10/19/20 Hearing at
6 27:24 – 28:6. The defense does not dispute the importance of accuracy in self-defense
7 shootings. Graham testimony, Tx of 10/19/20 Hearing at 134:15-18 (“if you’re firing
8 a weapon for self-defense, accuracy would be ideal”).

9 65. Ergonomics is important to accuracy. Kapelsohn testimony, Tx of
10 10/19/20 Hearing at 30:17 – 31:5. In addition, good ergonomics assists the ability of a
11 civilian to train more effectively. *Id.*, at 31:6-10.

12 66. Pistol grips are a prohibited feature under Pen. Code section
13 30515(a)(1)(A). A pistol grip is a grip “that protrudes conspicuously beneath the
14 action of the weapon.” *Id.* Pistol grips are the most common of the prohibited features
15 on just about all modern semiautomatic arms. Curcuruto testimony, Tx of 10/19/20
16 Hearing at 65:2-6; Graham testimony, Tx of 10/19/20 Hearing at 129:17-12; Decl of
17 Blake Graham, Def. Exh. D, at ¶ 28 (“In my experience, this feature is the most
18 prevalent feature of assault rifles prohibited under the AWCA.”). Pistol grips enhance
19 the ergonomics of the weapon. Decl. of Blake Graham, Def. Exh. D, ¶ 28. Pistol grips
20 are therefore important to good ergonomics, particularly on a straight line design rifle
21 such as the AR-15. Kapelsohn Decl., Plaintiffs’ Exh. 001, at ¶ 28; Kapelsohn
22 testimony, Tx of 10/19/20 hearing at 32:23 – 33:2. This enhances the firearm’s
23 accuracy. *Id.*; Decl. of Blake Graham, Def. Exh. D, ¶ 28 (“A shooter using an assault
24 rifle without a pistol grip may shoot less accurately with repeated – and especially
25 rapid – shots if the shooter’s trigger hand is in an awkward position for a significant
26 amount of time”); Def. Exh. BA, p. 9 (pistol grips afford greater control of the rifle
27 during firing).

28 67. Pistol grips have appeared on long guns dating back to at least the 1700s.

1 Hlebinsky Decl., Plaintiffs' Exh. 002, ¶ 17; Exhs. 002-22 to 002-24.

2 68. Thumbhole stocks are a prohibited feature under Penal Code sections
3 30515(a)(1)(B) (on rifles) and 30515(a)(6)(B) (on shotguns). Like pistol grips,
4 thumbhole stocks allow the shooter to gain a comfortable grip on the firearm and can
5 facilitate accurate shooting. Kapelsohn Decl., Plaintiffs' Exh. 001, ¶ 29. By
6 prohibiting both pistol grip stocks and thumbhole stocks, section 30515(a)(1)(B)
7 relegates such firearms to be equipped in a manner that is less comfortable, less
8 accurate, and less safe. Kapelsohn Decl., Plaintiffs' Exh. 001, ¶ 29. Thumbhole stocks
9 are functionally similar to pistol grips. Def. Exh. BA, p. 9.

10 69. Thumbhole stocks have been on rifles for many years. Kapelsohn Decl.,
11 Plaintiffs' Exh. 001, ¶ 29. Rifles featuring thumbhole stocks have been featured on
12 certain Olympic rifles, including several models dating to the 1950s, and are a
13 prominent shooting sports feature. Hlebinsky Decl., Plaintiffs' Exh. 002, ¶ 19, Exh. 2-
14 27; Hlebinsky testimony, Tx of 10/19/20 Hearing at 54:20-23.

15 70. Folding or telescoping stocks are features prohibited under Pen. Code
16 section 30515(a)(1)(C). On an AR-15 rifle, a telescoping stock, prohibited by Penal
17 Code section 30515(a)(1)(C), is typically an adjustable buttstock capable of between
18 three and six different adjustment positions, thereby changing the length. Kapelsohn
19 Decl., Plaintiffs' Exhibit 001, at ¶ 31; Kapelsohn testimony, Tx of 10/19/20 Hearing at
20 28:10-23. This enables the rifle stock to be properly adjusted to fit the user. Kapelsohn
21 Decl., Plaintiffs' Exh. 001, at ¶ 31. This is particularly beneficial to persons of smaller
22 stature, or women. Kapelsohn testimony, Tx of 10/19/20 Hearing at 28:24 – 29:1;
23 Youngman testimony, Tx of 10/19/20 Hearing at 88:13-20. In addition, the ability to
24 change the firearm length is useful for people who need to wear heavier clothing.
25 Kapelsohn testimony, Tx of 10/19/20 Hearing at 29:2-10. Plaintiff Hauffen, a firearms
26 trainer, has indicated that the telescoping stock is preferred, among other ergonomic
27 features, and that she prefers to train women or younger shooters with this feature.
28 Hauffen Decl., Plaintiffs' Exh. 014, ¶ 8.

1 71. A folding stock, though it makes the firearm more portable, does not turn
2 a semiautomatic rifle into a common instrument of crime, since it does not make a
3 rifle easily concealable for most criminal activities. Kapelsohn Decl., Plaintiffs' Exh.
4 001, ¶ 30. As such, most crimes are committed by handguns. (*Id.*) Even without a
5 folding stock, an AR-15 firearm is easily separated into two halves, an upper and a
6 lower receiver, which can be separated by pulling out two pins, and which does not
7 take any specialized training. Graham testimony, Tx of 10/19/20 Hearing at 143:9 –
8 144:13; 146:11-18. Without specialized skill or training, therefore, a person can take
9 apart an AR-15, and make it concealable, in a matter of seconds. *Id.*

10 72. A folding or telescoping stock that meets the minimum overall length
11 requirements for rifles and/or shotguns while collapsed or folded is no more
12 “concealable” than a rifle or shotgun with a fixed stock that meets the minimum
13 overall length requirements.

14 73. Folding or telescoping stocks have been on firearms dating back to the
15 1700s. Hlebinsky Decl., Plaintiffs' Exh. 002, ¶ 20. The flexibility of stock size
16 became important in the civilian market where comfort and having firearms suited for
17 the individual became feasible. *Id.*; Exhs. 002-28 to 002-31.

18 74. A “grenade launcher” is a feature prohibited on rifles under Pen. Code
19 section 30515(1)(D). Grenade launchers on rifles are not numerically common, but
20 that is largely a function of grenades being separately prohibited as “destructive
21 devices” and regulated by federal law. Because the law prohibiting grenades is already
22 addressed in the law, California’s law prohibiting grenade launchers is largely
23 superfluous. Kapelsohn Decl., Plaintiffs' Exh. 001, ¶ 32. Grenade launchers, also
24 known as hand mortars, date to the 1600s and 1700s. The State has not presented any
25 evidence that grenade launchers, attached to a rifle, have ever been used in the
26 commission of a crime. Regardless, if this Court were to eliminate the AWCA in its
27 entirety, the ability for an individual to acquire, let alone attach a grenade launcher to
28 a firearm, would *not* be enhanced in any way as both grenades and grenade launchers

1 are separately regulated under California and Federal law.

2 75. A “flare launcher” is another feature prohibited on rifles under Pen. Code
3 section 30515(1)(D). Yet, Defendants have not provided a single instance in which a
4 flare launcher was ever used in a crime. Flare guns were in use by the 1800s.
5 Hlebinsky Decl., Plaintiffs’ Exh. 002, ¶ 21. Most importantly, flare launchers are
6 signaling devices — nothing more. Kapelsohn Decl., Plaintiffs’ Exh. 001, ¶ 32. They
7 are inherently passive. The State’s interest in “public safety” or decreasing mass
8 shootings are in no way connected to a ban on flare launchers. Moreover, flare
9 launchers are designed to a different diameter than grenade launchers, grenades, or
10 other destructive devices. Thus, no grenade or destructive device could be fired from a
11 flare launcher. Defendants have also not alleged nor provided any evidence that any
12 kind of destructive device could be fired from a flare launcher.

13 76. A flash suppressor is a device that is prohibited on rifles under Penal
14 Code section 30515(a)(1)(E). A flash suppressor is a device fitted on the end of a
15 muzzle which diverts the muzzle flash through several slots or holes, most commonly
16 arranged around the axis of the bore. Kapelsohn Decl., Plaintiffs’ Exh. 001, ¶ 33. The
17 most common type of flash suppressor on AR-15 rifles is the “birdcage” type of
18 device. *Id.*, Exh. 001-14. The primary advantage of a flash suppressor is to reduce
19 muzzle flash so as not to temporarily blind a shooter who is shooting in a dark
20 environment. Kapelsohn Decl., Plaintiffs’ Exh. 001, ¶ 33. The use of a rifle without a
21 flash suppressor under low light circumstances is likely to temporarily blind the user,
22 or impair the user’s vision, placing a law-abiding user at a disadvantage to a criminal
23 attacker. *Id.*; Kapelsohn Depo. at 124:25 – 125:8 (“I have fired ARs that don’t have a
24 flash suppressor and [they] throw out a God awful flame and muzzle blast as a
25 result.”).

26 77. Another advantage of flash suppressors is that they protect the muzzle of
27 a rifle from dirt, sand, or mud that could dangerously plug the muzzle were it to touch
28 the ground outdoors. Kapelsohn Decl., Plaintiffs’ Exh. 001, ¶ 33.

1 78. The State specifically defines a “flash suppressor” as “any device
2 attached to the end of the barrel, that is designed, intended, or functions to perceptibly
3 reduce or redirect muzzle flash from the shooter's field of vision.” 11 Cal. Code Regs.
4 § 5471(r). A flash suppressor is not, by this definition, a device intended to conceal a
5 shooter’s position.

6 79. Flash suppressors have appeared on firearms since the early 20th Century
7 and have appeared on AR platform firearms since they were invented in the 1950s.
8 Hlebinsky Decl., Plaintiffs’ Exhibit 002, ¶ 23; Ex. 2-32; Plaintiffs’ Exh. 001-14.

9 80. A forward pistol grip is prohibited on rifles under Penal Code section
10 30515(a)(1)(F). The State further defines “forward pistol grip” as “a grip that allows
11 for a pistol style grasp forward of the trigger.” 11 Cal. Code Regs. § 5471(t). By its
12 very definition, therefore, a forward pistol grip is designed to enhance control of the
13 firearm. Forward pistol grips on rifles, also called vertical forends, are popular among
14 some shooters in allowing them to control the rifle better for more accurate shooting.
15 Kapelsohn Decl., Plaintiffs’ Exh. 001, ¶ 34. Forward pistol grips may also serve as a
16 “monopod” to assist in stabilizing the rifle for more precision shooting in the prone
17 position. *Id.*

18 81. Forward pistol grips are found on firearms dating back at least to the
19 1860s. Hlebinsky Decl., Plaintiffs’ Exh. 002, ¶ 18; Exh. 002-25.

20 82. Penal Code § 30515(a)(3) provides that “[a] semiautomatic, centerfire
21 rifle that has an overall length of less than 30 inches” is prohibited as an assault
22 weapon. The federal limit on the length of a rifle is 26 inches. Kapelsohn testimony,
23 Tx of 10/19/20 Hearing at 33:9-17; 26 U.S.C. § 2845(a)(4) (defining “firearm” for
24 purposes of compliance with the National Firearms Act to include a weapon made
25 from a rifle that has an overall length of less than 26 inches, or a barrel of less than 16
26 inches in length).

27 83. Rifles that have shorter overall lengths are more advantageous to the
28 user, particularly in close quarters situation, such as the defense of a home, because it

1 enables the user to be more maneuverable moving through doorways and around
2 corners. Kapelsohn testimony, Tx of 10/19/20 Hearing at 33:18 – 34:5; Graham
3 testimony, Tx of 10/19/20 Hearing at 132:13 – 134:6.

4 84. The idea of a “carbine,” which is a shorter rifle, has long been in
5 existence, and typically refers to a rifle with a barrel less than 20 inches. Hlebinsky
6 Decl., Plaintiffs’ Exh. 002, ¶ 22. Rifles with shorter barrel lengths also have the added
7 advantage of having less weight, which would be important from a defensive
8 perspective. Kapelsohn testimony, Tx of 10/19/20 Hearing at 39:14 – 40:4.

9 85. Defendants have not provided any evidence that the Federal minimum
10 overall length for rifles and/or shotguns is insufficient to further the State’s interests.
11 Defendants also have not provided any evidence that a rifle 30 inches long is
12 significantly less concealable than a firearm that is 26 inches long.

13 86. Firearms characterized as assault weapons based upon the Penal Code
14 section 30515(a)(1) characteristics are numerically common, and the features are
15 commonly used for lawful purposes, including self-defense.

16 87. The State’s own evidence pertaining to assault weapon registration bears
17 out the commonality of these types of firearms, even in a restricted jurisdiction such
18 as California. Under the 1989 AWCA, 56,626 “assault weapons” were registered in
19 California. Subsequent additions led to another 91,211 assault weapons registered in
20 California during prior registration periods. Davis Decl., Plaintiffs’ Exh. 008, ¶¶ 6-7.
21 In 2009, a decade before enactment of SB 880 and AB 1135 in 2016, there were
22 already approximately 153,118 registered assault weapons in California. *Id.*

23 88. Prior to the assault weapon registration requirement in 2018, in
24 connection with a 2017 budget proposal to the Legislature to accommodate online
25 registrations, the California Department of Justice, Bureau of Firearms, estimated that
26 “1-1.5 million assault weapons will be registered by approximately 250,000 different
27 owners” within the State. Plaintiffs’ Exh. 024.

28 89. According to the State, currently, there are 200,039 assault weapons

1 registered with the California Department of Justice, of which approximately 180,142
2 are rifles, 16,419 are pistols, and 3,478 are shotguns. Glover Decl., Def. Exh. CZ, ¶ 6.
3 Excluding assault weapons registered to peace officers, there are 185,569 assault
4 weapons currently registered, of which 165,804 are rifles, 16,306 are pistols and 3,459
5 are shotguns. *Id.*, ¶ 7.

6 90. Penal Code section 30515(a)(4) includes in its definition of an “assault
7 weapon” a “semiautomatic pistol that does not have a fixed magazine but has any one
8 of the following: [¶] (A) A threaded barrel, capable of accepting a flash suppressor,
9 forward handgrip, or silencer [¶] (B) A second handgrip [¶] (C) A shroud that is
10 attached to, or partially or completely encircles, the barrel that allows the bearer to fire
11 the weapon without burning the bearer’s hand, except a slide that encloses the barrel
12 [¶] (D) The capacity to accept a detachable magazine at some location outside of the
13 pistol grip.”

14 91. The same rationale that applies to the utility of pistol grips, vertical
15 foregrips, and flash suppressors as they are found on rifles, apply equally to those
16 features that appear on pistols. Kapelsohn Decl., Plaintiffs’ Exh. 001, ¶ 37.

17 92. The purpose of a barrel shroud (Pen. Code § 30515(a)(4)(C)) is to protect
18 the user’s hand from touching the barrel and becoming burned. Kapelsohn Depo. at
19 169:5-21. Defendants have not provided any evidence that extended and/or excessive
20 firing is necessary in order for a firearm’s barrel to reach high temperatures that can
21 burn the user’s hand. A barrel shroud, by definition, is a safety device. Defendants’
22 justifications for prohibiting a barrel shroud would also serve as justification for
23 prohibiting shooters from wearing gloves while shooting.

24 93. Threaded barrels on pistols are common. Ostini Decl., Plaintiffs’ Exh.
25 005, ¶ 10; Exh. 005-1. In addition to being able to accept flash suppressors, threaded
26 barrels can allow a user to attach compensators or muzzle brakes, which are devices
27 that are not prohibited on pistols (if such devices are *permanently attached* to the
28 barrel), and which are in wide use by competition shooters. Kapelsohn testimony, Tx

1 of 10/19/20 Hearing at 40:16 – 41:5. Thus, the State’s prohibition on threaded barrels
2 prevents a shooter from being able to switch muzzle devices depending on the user’s
3 intended need or purpose. While threaded barrels are prohibited on pistols, the AWCA
4 *permits* threaded barrels on rifles. CA Penal Code section 30515(a). No explanation or
5 evidence has been provided by Defendants which can account for prohibiting threaded
6 barrels on pistols, but allowing threaded barrels on rifles, even though silencers, flash
7 suppressors, and compensators or muzzle brakes are equally available for both
8 platforms.

9 94. Plaintiff Hauffen, a firearms trainer in San Diego, would like to replace
10 the standard barrel on her Sig P239 pistol with a threaded barrel, which would allow
11 her either to attach a flash suppressor or a muzzle brake to the firearm, assisting her
12 vision, accuracy, and control. Hauffen Decl., Plaintiffs’ Exh. 014, ¶ 10.

13 95. AR-15 pistols, which also generally fire the .223 round, are also suitable
14 for self-defense, because of their accuracy, light weight, and maneuverability in close
15 quarters. Kapelsohn testimony, Tx of 10/19/20 hearing at 42:22 – 44:6. AR-15 pistols
16 would be prohibited under Penal Code section 30515(a)(4)(D) because they generally
17 accept detachable magazines outside of the pistol grip.

18 96. The Court asked the parties to supply information pertaining to the
19 commonality of assault weapon pistols and assault weapon shotguns. Tx of 10/22/20
20 Hearing at 37:14 – 38:10.

21 97. According to the State’s evidence pertaining solely to registered assault
22 weapons, there are currently 16,419 pistols registered as assault weapons, and 3,478
23 shotguns registered as assault weapons. Glover Decl., Def. Exh. CZ, ¶ 6.

24 98. Plaintiffs’ witness Joseph Ostini surveyed the websites and catalog
25 information from 73 different firearm manufacturers in the United States and found
26 that of the 61 pistol manufacturers, there are at least 356 different models of firearms
27 offered for sale defined as an “assault weapon” pistol under Penal Code section
28 30515. Ostini Decl., Plaintiffs’ Exh. 005), ¶¶ 4-12. Some manufacturers, such as

1 CMMG, offer 38 different models of California-prohibited “assault pistols.” Some of
2 these manufacturers, such as Ruger, Sig Sauer, Springfield Armory, and Beretta,—
3 each of which offer several models of pistols considered by California to be “assault
4 weapons” — are widely held as some of the largest firearm manufacturers in the
5 United States. *Id.*, Exh. 005-1.

6 99. Ruger, and other manufacturers, sell threaded pistol barrels for their
7 handguns. Ostini Decl., Plaintiffs’ Exh. 005, ¶ 13; Exh 005-3.

8 100. Penal Code section 30515(a)(6)-(8) includes in its definition of an
9 “assault weapon” as: “(6) A semiautomatic shotgun that has both of the following: [¶]
10 (A) A folding or telescoping stock [¶] (B) A pistol grip that protrudes conspicuously
11 beneath the action of the weapon, thumbhole stock, or vertical handgrip. [¶] (7) A
12 semiautomatic shotgun that has the ability to accept a detachable magazine.
13 (8) Any shotgun with a revolving cylinder.”

14 101. The same rationale that applies to the utility of pistol grips, and
15 telescoping stocks as they are found on rifles, apply equally to those features that
16 appear on shotguns. Kapelsohn Decl., Plaintiffs’ Exh. 001, ¶ 31. Furthermore, a
17 shotgun with pistol grips, collapsible stocks and detachable magazines would make
18 excellent firearms for home defense. Kapelsohn testimony, Tx of 10/19/20 38:24 –
19 39:6. In fact, some shotguns use telescoping buttstocks that absorb recoil, like a shock
20 absorber, which is particularly useful to dampen the heavy recoil of a shotgun. *Id.* at
21 44:8-23; Kapelsohn Depo. at 195:8 – 198:7; 199:8 – 200:3.

22 102. Following the evidentiary hearing, Plaintiffs offered evidence regarding
23 the commonality of shotgun features that would make them “assault weapons” under
24 Penal Code section 30515(a)(6). First, as to his survey, Plaintiffs’ witness Ostini
25 found that popular shotgun choices include the AK47/Kalashnikov action shotguns
26 like the Lynx 12 or Kalashnikov USA KS-12 Shotgun.” Ostini Decl., Plaintiffs’ Exh.
27 005, ¶ 13, Ex. 005-17. Of the 96 different “tactical shotgun” models offered on
28 Atlantic Firearms’ website, for example, 56 of those models would be classified as

1 “assault weapon” shotguns under Penal Code section 30515.

2 103. Plaintiffs also offered industry data pertaining to semiautomatic
3 shotguns, using distribution information pertaining to the Benelli M1014, a popular
4 semiautomatic shotgun popular in the United States. In California, it is prohibited for
5 sale to citizens as it is considered an assault weapon because of the existence of both a
6 pistol grip and a telescoping stock. Plaintiffs’ Exh. 007-1. According to Plaintiffs’
7 witness Kenneth Brown, looking the distribution data for various models of this
8 shotgun, from 2016 to 2020, there were several thousand of this particular model of
9 shotgun (containing the California-prohibited features) distributed/sold in his western
10 region alone. Brown Decl., Plaintiffs’ Exh. 007, ¶¶ 16-19.

11 104. Plaintiffs have shown that pistols and shotguns that would be classified
12 as “assault weapons” under Pen. Code section 30515(a)(4), (6), (7) and (8) are
13 common in the United States.

14 105. Penal Code section 30515(a)(2) also defines as an assault weapon a
15 “semiautomatic, centerfire rifle that has a fixed magazine with the capacity to accept
16 more than 10 rounds.” Likewise, Penal Code section 30515(a)(5) defines as an assault
17 weapon a “semiautomatic pistol with a fixed magazine that has the capacity to accept
18 more than 10 rounds.”

19 106. A fixed magazine is “an ammunition feeding device contained in, or
20 permanently attached to, a firearm in such a manner that the device cannot be
21 removed without disassembly of the firearm action.” Pen. Code § 30515(b). Once a
22 firearm with a fixed magazine has expended its ammunition, it cannot be reloaded
23 without disassembly of the firearm action.

24 107. This Court has already addressed the legality of laws, which prohibit the
25 possession of “large capacity magazines,” as that term is defined by Pen. Code section
26 16740. *Duncan v. Becerra*, 366 F.Supp.3d 1131, 1142 (S.D. Cal. 2019), *aff’d*, 970
27 F.3d 1133 (9th Cir. 2020). The State cannot otherwise prohibit possession of large
28 capacity magazines by calling firearms “assault weapons” because they are attached to

1 them.

2 108. The State has presented no evidence of any crimes being committed with
3 a rifle or pistol that contained a fixed magazine with the ability to accept more than
4 ten rounds of ammunition.

5 109. The State has presented no evidence of any mass shootings being
6 committed with a rifle or pistol that contained a fixed magazine with the ability to
7 accept more than ten rounds of ammunition. Depo. of Lucy Allen, 179:4-24.

8 110. “*Heller* recognized that militia members traditionally reported for duty
9 carrying “the sorts of lawful weapons that they possessed at home,” and that the
10 Second Amendment therefore protects such weapons as a class, regardless of any
11 particular weapon's suitability for military use.” *Caetano*, 136 S.Ct. at 1032 (Alito, J.,
12 concurring) (citing *Heller*, 554 U.S. at 627).

13 111. Plaintiffs have also shown that firearms characterized as assault weapons
14 under the AWCA are particularly useful for service in a militia.

15 112. It was clearly understood, from the early founding of the Republic, that
16 the unorganized militia consisted of the people themselves. *Heller*, 554 U.S. at 595-
17 596, 128 S.Ct. at 1799 (that “the Militia comprised of all males physically capable of
18 acting in concert for the common defense[.]” comports with founding-era sources)
19 (citing *Miller*, 307 U.S. at 179). In *Heller*, the majority rejected a narrower view of the
20 militia as having been limited to state and congressionally-regulated military forces.
21 554 U.S. at 596, 128 S.Ct. at 2799-2800. From the outset, “[t]he republican militia
22 was the armed populace at large, not a select militia or standing army.” Stephen P.
23 Halbrook, *The Founders’ Second Amendment: Origins of the Right to Bear Arms*, 226
24 (2008) (citing Elliot, 3 Debates in the Several State Conventions on the Adoption of
25 the Federal Constitution 379 (1836)).

26 113. Plaintiffs have shown that the AR-15 firearm in its standard configuration
27 – prohibited by California law as an “assault weapon” – is useful for service in the
28 militia.

1 114. In particular, Plaintiffs have shown that the AR-15 rifle, with
2 standardized and interchangeable component parts, is well-suited for militia service.
3 (Youngman Decl., Plaintiffs' Exh. 009, ¶ 14; Youngman testimony, Tx of 10/19/20
4 Hearing at 85:16-23 ("It would be the ideal weapon for the militia.")). The AR-15's
5 use of standardized ("STANAG") magazines and common ammunition, and its
6 reliability, low cost, and light weight, serve the same purposes sought to be achieved
7 by the drafters of our Founding Era militia acts. Furthermore, the modularity and
8 standardization of the AR-15, its ubiquity, commonality, and widespread ownership in
9 common chamberings as .223 and 5.56 x 45mm, and the interchangeability of parts,
10 including magazines, makes it an ideal firearm for militia service. (Youngman Decl.,
11 Plaintiffs' Exh. 009, ¶¶ 15-19).

12 115. "[...] *Heller* recognized that militia members traditionally reported for
13 duty carrying "the sorts of lawful weapons that they possessed at home," and that the
14 Second Amendment therefore protects such weapons as a class, regardless of any
15 particular weapon's suitability for military use." *Caetano*, 136 S.Ct. at 1032 (Alito, J.,
16 concurring) (citing *Heller*, 554 U.S. at 627).

17 116. A "featureless firearm" is a semiautomatic firearm (rifle, pistol, or
18 shotgun) lacking the characteristics associated with that weapon, as listed in Penal
19 Code section 30515. 11 Cal. Code Regs. § 5471(o).

20 117. The very qualities that make the Penal Code section 30515(a)(1)
21 characteristics advantageous for purposes of self-defense would tend to make rifles
22 that lack those characteristics less advantageous, such as reduced ergonomics and
23 accuracy.

24 118. A Ruger Mini-14 ranch rifle, such as the first kind depicted in Defense
25 Exhibit D, ¶ 45, is legal to purchase and own in California because it is featureless.
26 Graham Decl., Def. Exh. D, ¶ 45; Graham testimony, Tx of 10/19/20 Hearing at
27 137:18 – 140:9 ("those are available in many gun stores up and down California.")

28 119. AR-type firearms may also be made "featureless," in that some of the key

1 components of a standard AR-15, such as the pistol grip, telescoping stock, or flash
2 suppressor, may be removed and replaced by other devices. Kraut Del., Plaintiffs’
3 Exh. 011, ¶¶ 5-6. On video, Plaintiff’s witness Adam Kraut demonstrated the use of a
4 “featureless” AR-15 rifle by shooting the same rifle in two different strings of fire,
5 one in the standard configuration, and one in the “featureless” condition. *Id.*; Kraut
6 testimony, Tx of 10/22/20 Hearing at 23:11 – 24:7. The purpose of the video was to
7 demonstrate that in either configuration it was possible to shoot a man-sized target at
8 25 yards in rapid succession using either a California featureless rifle or a standard
9 configuration AR-15. *Id.* at 24:20-25.

10 120. To a criminal, therefore, or to someone who is intent upon committing
11 crimes, the existence of the prohibited features may not make any difference. A
12 person can commit a crime with a weapon just as easily without a pistol grip.
13 Kapelsohn testimony, Tx of 10/19/20 Hearing at 46:8-10. Moreover, a criminal or
14 mass shooter is not concerned with the consequences of being inaccurate, while a
15 lawful citizen is. A mass shooter may intend to kill as many people as possible. The
16 legal consequences for a negligent shot or hitting an unintended target are entirely
17 inconsequential to a mass murder. On the other hand, lawful citizens are responsible
18 for every shot fired and features that enhance a firearm’s accuracy or comfort (even to
19 a minimal degree) are vitally important, for the effectiveness of the weapon, the
20 ability of the citizen to train with it, and to ensure that only the thing that is fired upon
21 is the intended target.

22 121. Because California assault weapon ban is largely based on the
23 characteristics that are attached to the firearm, nothing prevents a determined
24 individual from purchasing a featureless rifle, purchasing one or more of these
25 otherwise-legal features that can be used on a fixed-magazine or rimfire firearm (*e.g.*,
26 pistol grip, collapsible stock, non-fixed magazine release, *etc.*), and then unlawfully
27 converting the featureless firearm into an illegal configuration to commit a crime. This
28 is similar to what was done in the San Bernardino terrorist attack in 2015, when the

1 shooters converted compliant rifles into non-compliant rifles. Lott Decl., Plaintiffs’
2 Exh. 010, ¶ 12.

3 122. Without a pistol grip, a featureless firearm is less ergonomic and less
4 accurate. A featureless AR-15 rifle that lacks a standard pistol grip is not as
5 ergonomic and is a poor design. Kapelsohn Depo., at 124:3-18. A pistol grip allows a
6 shooter to manage recoil better than a rifle with a traditional stock design, particularly
7 on an AR-type rifle. Kapelsohn Depo., at 179:24 – 183:4.

8 123. Plaintiff Wendy Hauffen owns a featureless firearm, which she
9 accomplished by removing the features prohibited by § 30515(a)(1). Hauffen Decl.,
10 Plaintiffs’ Exh. 014, ¶ 5. Plaintiff Hauffen would prefer to have standard AR-15 with
11 ergonomic features, such as a pistol grip or a forward vertical grip, to assist in
12 controlling the firearm. *Id.*, ¶ 8. In addition, she would prefer to use and train other
13 women shooters with a telescoping stock, which can accommodate smaller shooters.
14 *Id.*

15 124. Another drawback to the featureless AR-15 rifle is that the lack of a
16 pistol grip makes it less safe when it comes to clearing malfunctions. On an AR-15
17 rifle, the process for clearing a malfunction or ammunition jam is hindered by one’s
18 inability to wrap their hand around a pistol grip because one does not maintain the
19 same degree of control when performing the malfunction clearance procedures.
20 Kapelsohn Depo. at 188:11 – 194:19.

21 125. For the same reasons that show that the prohibited characteristics of
22 Penal Code section 30515(a)(1) are common, preferred, and useful for lawful
23 purposes such as self-defense, the State has not shown that ordinary citizens must
24 resort to “featureless” versions of AR-15 rifles that lack those characteristics.

25 126. While Defendants continue to deny the decades of lawful use of firearms
26 defined as “assault weapons” pursuant to California law, Defendants’ evidence
27 explicitly contradicts Defendants’ contentions.

28 127. For example, Defendants’ evidence shows that rifles characterized as

1 “assault”-type rifles are also called “sporting rifles.” Defendants’ Exh. BA, p. 3.

2 128. Defendants’ evidence also shows that so-called “military-type rifles” are
3 typically chambered in .223 Remington, a caliber common for varmint or coyote
4 hunting. Defendants’ Exh. BA, p. 6.128.

5 129. Defendants’ evidence also shows that flash hidens are common and
6 commercially available to sportsmen for sporting purposes. Defendants’ Exh. BA, p.
7 7.

8 130. Defendants’ evidence also shows that pistol grips are common and
9 widely adaptable to a wide range of shooters. Defendants’ Exh. BA, p. 9.

10 131. Defendants’ evidence shows that AR-platform rifles have supplanted 30
11 caliber rifles in target competitions. Defendants’ Exh. BI, p. 3. The AR-platform rifle
12 is now accepted as a law enforcement tool, and is embraced by many as an entirely
13 suitable defensive firearm. Id.

14 132. “[T]here is perhaps no rifle on the face of the planet for which you can
15 buy more gear, accessories, add-ons, improvements and just plain ‘stuff’ Indeed,
16 target shooters add plain old lead weights to bring their ARs up past 15 pounds, to
17 make them more stable for long shots.” Defendants’ Exh. BI, p. 4.

18 133. Defendants’ evidence acknowledges the use of “assault weapons” in
19 competition: “If you wanted to be competitive you had to leave your tuned M-14 in
20 the rack, with its heavy recoil, and get an AR-15 race-gun or Service Rifle for
21 competition.” Defendants’ Exh. BI, p. 6. This same article describes four different
22 shooting competitions in which “assault weapons” are used: Benchrest, Short-Range
23 Run and Gun, USPSA, and Long-Range shooting competitions. Defendants’ Exh. BI,
24 pp. 8-11.

25
26 **The Burden on Plaintiffs is Not Minor**

27 134. Defendants contend that the AWCA is a “minor burden” because it
28 merely limits a subset of semiautomatic rifles that California citizens are able to

1 choose from. Not only does this misstate the severe burden placed by the AWCA, but
2 such a rationale has already been rejected by *Heller* which expressly rejected the
3 notion that the ability to acquire other sorts of firearms justifies a ban on protected
4 arms.

5 135. The AWCA denies Californians the ability to use the safest, most
6 controllable, and accurate firearms owned by millions of law-abiding citizens for
7 lawful purposes across the Country. The AWCA prohibits gun owners from the choice
8 of selecting the best characteristics for their firearm to fill that individual’s specific
9 needs and intended uses. Just like the government may not regulate the choice of
10 words to express an idea protected by the First Amendment, the government cannot
11 regulate the choice of configuration of characteristics on firearms used for lawful
12 purposes.

13 136. For the same reasons the State deems “assault weapons” as “too lethal” in
14 the hands of a criminal, those very same characteristics allow lawful citizens to
15 configure their firearms in a manner that best suits their specific use — whether that
16 be self-defense or numerous other lawful uses. Kapelsohn Decl., Plaintiffs’ Exh. 001
17 ¶¶ 17-38.

18 137. Lawful gun owners have more reason both in defending from criminal
19 action and engaging in lawful uses like sporting and hunting activities to ensure
20 accurate, rapid fire of their firearms (see paragraphs 160-165 below).

21 138. Moreover, the AWCA demands severe criminal penalties for any
22 violation of the many technical and minute definitions — regardless of the intent of
23 the gun owner. Penal Code §§ 30515, 30600, 30605(a).

24 139. If a California gun owner purchases the wrong muzzle device (even one
25 labeled as a legal muzzle brake) that is later determined to reduce the muzzle flash
26 when the firearm is fired, they are subject to one or more felony charges because their
27 muzzle device could be considered a “flash hider.” There is no need for any kind of
28 violent criminal action or criminal intent. Penal Code §§ 30515, 30600, 30605(a); see

1 also Title 11, California Code of Regulations § 5471(r).

2 140. If a California gun owner’s stock is not fixed into place properly, so that
3 it allows even minor play back and forth, the stock could be considered an unlawful
4 “telescoping” or adjustable stock. Brown Decl., Plaintiffs’ Exh. 007, Exh. 007-1
5 (California Department of Justice letter to Benelli dated June 23, 2003). Again, felony
6 charges await gun owners for such an oversight. Penal Code §§ 30515, 30600,
7 30605(a); see also Title 11, California Code of Regulations § 5471(mm), (nn) and
8 (oo).

9 141. If even intending to comply with the law, if a gun owner installs a grip on
10 their rifle that is not angled enough to completely prevent the webbing of the shooter’s
11 trigger hand from falling below the topmost exposed portion of the trigger when
12 firing, they could be convicted of both *creating and possessing* an assault weapon —
13 two separate felony charges. Penal Code §§ 30515, 30600, 30605(a); see also Title 11,
14 California Code of Regulations § 5471(z).

15 142. Taking a lawfully owned “large capacity magazine” out of a lawful
16 “featureless” rifle and then inserting that same magazine into a lawfully owned “fixed-
17 magazine” rifle or pistol will likewise result in felony charges. Penal Code § 30515,
18 30600, 30605(a); see also Title 11, California Code of Regulations § 5471(a), (m), (n),
19 (o), (p), and (w).

20 143. A parent who wishes to teach their children (under 18 years old) firearm
21 safety could face severe criminal penalties for permitting their children to merely
22 possess an “assault weapon” even under the parents’ direct supervision. Penal Code
23 §§ 30515, 30600, 30605(a).

24 144. These same felony charges apply without exception to those who merely
25 attach a “barrel shroud” to their pistol to keep their hands from being burned. They
26 apply to those who wish to have a collapsible stock and pistol grip on their
27 semiautomatic shotgun for better control. Penal Code §§ 30515, 30600, 30605(a).

28 145. Felony charges and convictions for merely possessing a firearm that may

1 have the “wrong” grip or “muzzle device” are not “minor” burdens. Felony
2 convictions are life changing and result not only in prison sentences, but they strip
3 fundamental constitutional rights from individuals for life. They also have significant
4 effect on the ability to acquire employment after such a conviction.

5 146. The AWCA provides no exception for those that may have physical or
6 medical reasons for seeking certain characteristics on their firearms. Those of small
7 stature or strength may need an adjustable stock, pistol grip, or vertical foregrip to
8 maintain proper control of their firearm. For those that have trouble handling the
9 recoil of a pistol, the choices are to: (1) continue to use a firearm that cannot be
10 properly controlled; (2) choose a different and potentially inferior firearm; or (3) face
11 felony charges for adding a threaded barrel to their pistol to accommodate a muzzle
12 brake. Penal Code §§ 30515, 30600, 30605(a).

13 147. Those with medical disabilities are left to operate firearms that
14 intentionally do not have characteristics that would make the firearm more
15 comfortable or easier to operate. There is no exception for them. Penal Code §§
16 30515, 30600, 30605.

17 148. Additionally, Defendants contend that the AWCA is only a minor burden
18 because it allows for “assault weapons” to be used in competition. However,
19 Defendants omit the fact that the exempted firearms are “pistols that are designed
20 expressly for use in Olympic target shooting events,” which consist of largely rimfire
21 or other small caliber pistols and are only those *specifically* “sanctioned by the
22 International Olympic Committee and by USA Shooting.” Penal Code § 30515(d)(2).
23 Most lawful gun owners are not Olympic athletes, nor do they ever contemplate
24 competing in the Olympics. This exemption is inapplicable to everyday lawful gun
25 owners and ignores the vast amount of firearm competitions that are held throughout
26 the United States and California that use commonly-owned rifles, pistols, and
27 shotguns, which fall under the definition of “assault weapons.” See Defendants’ Exh.
28 BI.

1 149. While the AWCA allows of out-of-state gun owners to come into
 2 California and compete with firearms defined as “assault weapons,” there is no such
 3 exemption for California residents. Penal Code § 30665. Defendants provide no
 4 explanation or evidence for allowing “assault weapons” in competitions by non-
 5 residents, while at the same time prohibiting California residents in those very same
 6 competitions.

7
 8 **The Arms Banned By California as “Assault Weapons” Are Not More Lethal**
 9 **Than Arms That Are Not Banned**

10 150. The State has not demonstrated that assault weapons bans are justified
 11 because the features prohibited by Pen. Code section 30515(a) make the firearm more
 12 lethal.

13 151. Contrary to what the State argues and implies (see Decl. of Blake
 14 Graham, Def. Exhibit D, at ¶ 22), the ammunition that is fired from “assault weapons”
 15 bearing the prohibited section 30515(a) characteristics is not inherently more “lethal”
 16 than those fired from non-assault weapons.

17 152. According to Defendants’ own evidence, “AW-type firearms do not
 18 operate differently than other comparable semiautomatics, nor do they fire more lethal
 19 ammunition.” Defendants’ Exh. BL, p. 3.

20 153. As one of the experts in the field of wound ballistics, Dr. Vincent J.M.
 21 DiMaio stated in his influential book *Gunshot Wounds, Practical Aspects of Firearms,*
 22 *Ballistics, and Forensic Techniques*, stated:

23 One of the common fallacies about assault rifles is that the wounds
 24 produced by them are more severe than those due to regular military rifle
 25 and hunting rifles. In fact, the wounds are less severe, even when
 26 compared to such venerable hunting rifles as the Winchester M-94
 (introduced in 1894) and its cartridge the .30-30 (introduced in 1895).

27 Margulies Decl., Plaintiffs’ Exh. 012, ¶ 11; Exh. 012-2.

28 154. Defendants concede that wounds cannot be distinguished simply by the

1 type of weapon that fired them. Colwell testimony, Tx of 10/22/20 Hearing at 29:20 –
2 30:14. A wound from a .223/5.56 round fired from a California-defined “assault
3 weapon” bearing the features or characteristics found in section 30515(a) would not
4 present a greater profile from a non-assault weapon, using the same round, and using
5 the same barrel length. Margulies Decl., Plaintiffs’ Exh. 014, ¶ 14. Defendants also
6 concede that shotgun wounds at close range are, generally speaking, more devastating
7 than rifle rounds. *Id.* at 31:20 – 33:16.

8 155. The severity of the wound is determined, to a great degree, by the amount
9 of kinetic energy. The intermediate cartridges commonly used in “assault weapons”
10 (such as the .223/5.56 caliber, or the 7.62 x 39mm cartridges) contain far less kinetic
11 energy than traditional hunting cartridges such as the .308 Winchester. Margulies
12 Decl., ¶¶ 10-11; Exh. 011-2.

13 156. Body armor worn by law enforcement is generally intended to protect
14 from handgun bullets, and not rifle bullets. Margulies Decl., Plaintiffs’ Exh. 012, ¶ 13;
15 Exh. 012-2, p. 007; Youngman testimony, Tx of 10/19/20 Hearing at 94:4-15; Def.
16 Exh. AY, p. 5 (“Soft armor is designed to offer protection against assaults with
17 handguns. It is intended for daily wear. It is the type of body armor that officers would
18 typically wear while executing their daily duties.”). Any rifle rounds, including the
19 intermediate cartridges of .223/5.56 or 7.62x39mm, will penetrate body armor
20 typically worn by law enforcement unless the body armor is specifically rated to
21 withstand it. Youngman testimony, Tx of 10/19/20 Hearing at 94:4-15; Margulies
22 Decl., Plaintiffs’ Exh. 012, ¶ 13; Defense Exhibit AY, pp. 12-13. This is true
23 regardless of whether the rifle has characteristics that would qualify it as an “assault
24 weapon” under California law.

25 157. The State’s stated concern is not merely with rapid fire, but the ability of
26 a shooter to fire rapidly and maintain accuracy. Tx of 10/19/20 Hearing at 187:18 –
27 188:2. But the answer is not to say that firearms should be less accurate. That
28 penalizes the law-abiding citizen from denying him or her the ability to use accurate

1 firearms, where accountability for each shot is of the utmost concern. Kapelsohn
2 testimony, Tx of 10/19/20 Hearing at 27:24 – 28:6. The State does not claim that
3 prohibiting the specified features of section 30515(a)(1) prevents rapid fire, only that
4 it prevents accurate rapid fire. However, regardless of the characteristics installed on
5 the firearm, with training, a shooter can pull the trigger of any semiautomatic pistol or
6 rifle of five to seven rounds per second. Kapelsohn testimony, Tx of 10/19/20 Hearing
7 at 23:4-22.

8 158. A featureless version of an AR-15 rifle may be used to shoot a man-sized
9 target at 25 yards in rapid succession. Kraut Decl., Plaintiffs’ Exh. 011; Kraut
10 testimony, Tx of 10/22/20 Hearing at 23:11 – 24:7; 24:20-25.

11 159. Semiautomatic firearms with the regulated characteristics are not more
12 deadly in the hands of a criminal than a firearm without those characteristics. Many
13 notable crimes and mass shootings have been committed by criminals with
14 semiautomatic firearms that did not have the regulated characteristics. Kapelsohn
15 Decl., Plaintiffs’ Exh. 001, ¶ 34. For example, the 2007 shooting at Virginia Tech, in
16 which 32 victims were killed, and 17 others injured, the shooter used handguns which
17 are legal to own and purchase in California. Depo. of Lucy Allen, p. 219:8 – 220:13;
18 Def. Exh. A, Appendix C, line 80.

19 160. Moreover, while Defendants contend that “accurate rapid fire” of
20 firearms is “not consistent” with lawful use, Defendants have provided no evidence to
21 support such a contention.

22 161. To the contrary, common sense demands that “accurate rapid fire” may
23 be needed to defend one’s life from an imminent lethal threat.

24 162. “Accurate rapid fire” is both desired and necessary in sporting use such
25 as competitions.

26 163. “Accurate rapid fire” is both desired and necessary in the lawful activity
27 of firearms training.

28

1 164. Defendants have offered no evidence that any criminal or mass shooter in
2 California has ever been prevented from delivering lethal “rapid fire” as a result of the
3 prohibitions in AWCA since its inception in 1989. Defendants have likewise
4 presented no evidence mass shooters place a premium on accuracy as opposed to
5 indiscriminate mayhem. Even if Defendants could find one or two anecdotal
6 examples, they would not justify such a ban under any kind of heightened scrutiny
7 analysis.

8 165. At any rate, certainly “accurate rapid fire” is preferable to inaccurate
9 rapid fire. And it is the latter that is promoted by California’s ban, as the banned
10 characteristics promote accuracy and do nothing to enhance the rapidity with which a
11 firearm may be fired.

12
13 **Assault Weapons Bans Have No Discernible Effect on Crime**

14 166. Generally, firearm bans have little effect on preventing criminals from
15 obtaining guns. Lott Decl., Plaintiffs’ Exh. 010, ¶ 13.

16 167. In fact, research shows that all places that have banned guns (either all
17 firearms or all handguns) has seen murder rates go up. Lott Decl., Plaintiffs’ Exh. 010,
18 ¶ 13.

19 168. There is no evidence that “assault weapons” bans had any meaningful
20 effect on reducing gun homicides and no discernable crime reduction impact. Several
21 studies have shown no discernable crime-reduction impact. Lott Decl., Plaintiffs’ Exh.
22 010, ¶ 63.

23 169. According to Defendants’ evidence “[M]any experts doubt the ban had
24 any significant impact before it expired in 2004.” Defendants’ Exh. CE, p. 2.

25 170. Defendants’ evidence acknowledges that the federal “feature-based ban”
26 had no real-world effect and assault weapons bans in general are a “distraction.”

27 Though assault weapons have become a potent symbol of mass
28 shootings, bans of that style of gun are a “distraction,” said Adam
Winkler, a UCLA law professor, and the author of Gunfight. For starters,

1 he says, it didn't actually stop manufacturers from selling assault rifles.
2 Because the 1994 ban defined weapons based on "cosmetic" features like
3 pistol grips or collapsible stocks, gun makers evaded these restrictions by
4 removing just enough design features so as to not trigger the ban.
5 Meanwhile, the weapons remained semiautomatic and could still accept
6 magazines of any size.

7 Defendants' Exh. CE, p.2.

8 171. "Although the ban has been successful in reducing crimes with AWs, any
9 benefits from this reduction are likely to have been outweighed by steady or rising use
10 of non-banned semiautomatics with LCMs, which are used in crime much more
11 frequently than AWs. Therefore, we cannot clearly credit the ban with any of the
12 nation's recent drop in gun violence. And, indeed, there has been no discernible
13 reduction in the lethality and injuriousness of gun violence, based on indicators like
14 the percentage of gun crimes resulting in death or the share of gunfire incidents
15 resulting in injury, as we might have expected had the ban reduced crimes with both
16 AWs and LCMs." Defendants' Exh. BJ, p. 96.

17 172. A state assault weapon ban is even less likely to be effective than a
18 federal ban because the banned firearms *will remain legally available* in the vast
19 majority of the states in the country. Defendants' Exh. BJ, fn 95.

20 **California's Continuous Expansion of the Assault Weapon Control Act is Proof 21 of its Own Failure**

22 173. In 1989, the State of California imposed its first "assault" weapons ban in
23 the Roberti-Roos Assault Weapons Control Act of 1989. This legislation established a
24 list of firearms that are specifically named by type, series, and model and that are now
25 found at Penal Code section 30510(a) [rifles], (b) [pistols] and (c) [shotguns]. These
26 are referred as "Category I" assault weapons.

27 174. By 1999, AWCA Category I and II assault weapons lists based on the
28 specific makes and models of firearms were necessarily deemed to be insufficient. In
1999, the Legislature enacted Senate Bill 23, which expressly stated that "this bill

1 would further define ‘assault weapon’ by providing descriptive definitions concerning
2 the capacity and function of the weapon.” This bill expanded the definition of an
3 “assault weapon” for the third time, attempting to proscribe a specified list of “generic
4 features,” which are now found at Penal Code section 30515(a).

5 175. Thus, from 2000 to 2016, the AWCA restricted firearms classified as
6 assault weapons pursuant to Category I and II assault weapons, and through the
7 “generic feature” definition in Category III assault weapons.

8 176. Firearm technology continued to progress during this time, and products
9 were offered that would allow firearms normally considered “assault weapons” to be
10 lawfully purchased, possessed, and used largely through items called the “bullet
11 button.” A firearm using a “bullet button” or similar product, was considered to have a
12 “fixed magazine” under the current California definition of “fixed magazine.” Thus, it
13 could have any number of the characteristics listed in Penal Code section 30515.

14 177. Lawful sales of bullet button firearms (including rifles, shotguns, and
15 pistols) continued throughout California for at least 9 years.

16 178. In 2016, the California Legislature again determined that the current
17 AWCA was insufficient and needed to be expanded. Senate Bill 880, and Assembly
18 Bill 1135 were passed on July 1, 2016. These bills expanded the definition of “assault
19 weapon” to include the new category of “bullet button assault weapons” by redefining
20 the term “fixed magazine” among other definitions. According to the June 25, 2016,
21 Assembly Floor analysis, “[a]bsent this bill, the assault weapon ban is severely
22 weakened, and these types of military-style firearms will continue to proliferate on our
23 streets and in our neighborhoods.”⁴

24
25
26
27 ⁴ In a single sentence, the California Legislature admits to both the AWCA’s
28 ineffectiveness in stopping the sale of so-called “assault weapons” and to the
commonality of firearms deemed “assault weapons” — by conceding that these
“firearms will continue to proliferate.”

1 179. Thus, the AWCA, which already had two significant amendments to
2 expand the definition of “assault weapon,” was amended again after at least 9 years of
3 operating in a “severely weakened” state. This new definition of “assault weapon”
4 resulted in tens of thousands of newly registered “assault weapons.” Decl. of Yvette
5 Glover, Defendants’ Exh. CZ.

6 180. This lawsuit was initiated in 2019. Since that time, the AWCA has
7 undergone yet another amendment to expand the definition of “assault weapon.” The
8 expanded definition now includes “assault firearms,” which are not legally defined as
9 rifles, pistols, or shotguns.

10 181. In the 39 years since it was originally enacted, the AWCA has been
11 expanded at least four times. Each time, the current definition of “assault weapon” has
12 been deemed insufficient by the Legislature. With each amendment, vast numbers of
13 ordinary, commonly owned, and lawfully purchased firearms are redefined as illegal
14 “assault weapons.” With each amendment, the State necessarily admits that the
15 AWCA is incomplete and insufficient.

16 182. While a state may be permitted to experiment, California has been
17 permitted to experiment with the AWCA for nearly 40 years. Over and over again, the
18 AWCA has been expanded because the then current definition of “assault weapon”
19 has been deemed insufficient by the California Legislature. The experiment has failed.

20
21 **The Arms Banned By California as “Assault Weapons” Are Not Used in Most
22 Mass Shootings**

23 183. All credible research on the effectiveness of “assault weapon” bans in
24 reducing gun violence, or mass shootings, shows no demonstrable correlation between
25 the two. Decl. of John R. Lott, Plaintiffs’ Exh. 010, ¶¶ 6-65, Exhs. 10-2 to 10-19.

26 184. Assault Weapons are not used in a majority of mass shootings. According
27 to defense witness Lucy Allen, in her analysis of 161 incidents constituting “public
28 mass shootings” (as she defined that term), “assault weapons” were used in 32 of them

1 (22%) where the type of weapon could be determined. Allen Decl., Def. Exh. A, ¶ 30.
2 Thus, it is fair to conclude that most mass shootings that the defense analyzed did not
3 involve the use of assault weapons.

4 185. Looking at Ms. Allen’s analysis, it appears that the most prevalent
5 firearm that is found at the scene of a mass shooting is a handgun. Allen Decl., Def.
6 Exh. A, Appendix C; see also Def. Exh. CW (pictorial look at the weapons used in 19
7 mass shootings); Def. Exh. CG (Mother Jones 2012 article, at p. 23: “In the 62 mass
8 shootings we analyzed, 54 of the killers had handguns – including in all 15 of the
9 mass shootings since the surge of pro-gun laws began in 2009); Def. Exh. BM, p. 1:
10 “Contrary to popular belief, however, assault rifles were not the predominant type of
11 weapon used in these types of crimes. In fact, according to a recent study, handguns
12 were the most commonly used type of firearm in mass shootings.”

13 186. Over time, the rate of mass shootings or mass public shootings may rise
14 or fall for many reasons. But regardless of any other factors, if the federal assault
15 weapons ban reduced these attacks, the share of attacks committed with “assault
16 weapons” should have decreased as a direct result of the ban. Lott Decl., Plaintiffs’
17 Exh. 010, ¶¶ 6-65; Exhs. 010-2 to 010-19 and Plaintiffs’ Exh. 032, ¶¶ 8-13, 44-55.

18 187. In fact, the percentage of mass shootings committed with “assault
19 weapons” did not decrease during the Federal Assault Weapons Ban. Nor did this
20 percentage increase after the Federal Assault Weapons Ban ended. Plaintiffs’ Exhs.
21 010 and 032.

22 188. This fact is true regardless of the data set that is analyzed — whether it
23 be from Rampage Nation, Mother Jones, or Crime Prevention Research Center.
24 Plaintiffs’ Exhs. 010, ¶¶ 49-53 and 032, ¶¶ 8-13, 44-55.

25 189. Defendants attempt to dismiss this fact stating that spillover effects and
26 substitution effects have not been accounted for in Dr. Lott’s percentage analysis.
27 Incorrect. Defendants’ Exh. K, ¶ 44; Lott Decl., Plaintiffs’ Exh. 032, ¶¶ 8-13, 44-55.

28 190. Plaintiffs are the only parties that have provided an explanation of any

1 kind of substitution effects of the Federal Assault Weapons Ban. These substitution
2 effects support Plaintiffs' contention that the Federal Assault Weapon Ban was
3 ineffective. Lott Decl., Plaintiffs' Exh. 032, ¶¶ 8-13, 44-55.

4 191. Considering substitution effects of the Federal Assault Weapons Ban, *if*
5 *the ban were effective*, some killers would refrain from committing a mass shooting
6 with an assault weapon, while others would substitute other kinds of firearms. In both
7 instances, the percentage of attacks committed with assault weapons would decrease.
8 Lott Decl., Plaintiffs' Exh. 032, ¶¶ 8-13, 44-55.

9 192. Defendants have not provided any evidence there was a statistically
10 significant decline in the percentage of attacks with assault weapons during the ban or
11 a statistically significant increase after the ban. Lott Decl., Plaintiffs' Exh. 032, ¶¶ 8-
12 13, 44-55.

13 193. Using data from the Book Rampage Nation, and data collected by Mother
14 Jones, the share of attacks committed with assault weapons continued to drop even
15 after the federal assault weapons ban expired. The ten years after the end of the assault
16 weapons ban (September 2004 to August 2014) saw the lowest share of shootings
17 involving assault weapons. Lott Decl., Plaintiffs' Exh. 010, ¶ 53.

18 19 **Defendants' Evidence**

20 194. Defendants have not provided any evidence that any mass shooter has
21 ever selected any firearm that could be classified as an "assault weapon" under
22 California Penal Code section 30515 *because* the firearm in question had any of the
23 characteristics listed in Penal Code 30515(a).

24 195. Defendants have not provided any evidence that a mass shooter in
25 California has ever refrained from committing a mass shooting (or any criminal act)
26 because the shooter could not obtain a firearm that had any of the characteristics listed
27 in California Penal Code section 30515(a).

28

1 196. Defendants have not provided any evidence that a use of a pistol grip on
2 a firearm defined as an “assault weapon” pursuant to California Penal Code section
3 30515(a) had any determining effect on any mass shooting committed in or outside of
4 California.

5 197. Defendants have not provided any evidence that a use of a forward
6 vertical grip on a firearm defined as an “assault weapon” pursuant to California Penal
7 Code section 30515(a) had any determining effect on any mass shooting committed in
8 or outside of California.

9 198. Defendants have not provided any evidence that a use of a flash hider on
10 a firearm defined as an “assault weapon” pursuant to California Penal Code section
11 30515(a) had any determining effect on any mass shooting committed *in or outside of*
12 *California*.

13 199. Defendants have not provided any evidence that a use of a collapsible
14 stock on a firearm defined as an “assault weapon” pursuant to California Penal Code
15 section 30515(a) had any determining effect on any mass shooting committed *in or*
16 *outside of California*.

17 200. Defendants have not provided any evidence that a use of a folding stock
18 on a firearm defined as an “assault weapon” pursuant to California Penal Code section
19 30515(a) had any determining effect on any mass shooting committed *in or outside of*
20 *California*.

21 201. Defendants have not provided any evidence that a use of a flare launcher
22 on a firearm defined as an “assault weapon” pursuant to California Penal Code section
23 30515(a) had any determining effect on any mass shooting committed *in or outside*
24 *California*.

25 202. Defendants have not provided any evidence that a flare launcher attached
26 to a firearm has *ever* been used in the commission of any crime.

27 203. Defendants have not provided any evidence that a use of a grenade
28 launcher on a firearm defined as an “assault weapon” pursuant to California Penal

1 Code section 30515(a) had any determining effect on any mass shooting committed *in*
2 *or outside of California.*

3 204. Defendants have not provided any evidence that a use of a barrel shroud
4 on a firearm defined as an “assault weapon” pursuant to California Penal Code section
5 30515(a) had any determining effect on any mass shooting committed *in or outside of*
6 *California.*

7 205. Defendants have not provided any evidence that a use of a magazine well
8 outside of the pistol grip of a pistol defined as an “assault weapon” pursuant to
9 California Penal Code section 30515(a) had any determining effect on any mass
10 shooting committed *in or outside of California.*

11 206. Defendants have not provided any evidence that a use of a threaded
12 barrel on a pistol defined as an “assault weapon” pursuant to California Penal Code
13 section 30515(a) had any determining effect on any mass shooting committed *in or*
14 *outside of California.*

15 207. Defendants have not provided any evidence that a use of a both a pistol
16 grip and collapsible stock on a semiautomatic shotgun defined as an “assault weapon”
17 pursuant to California Penal Code section 30515(a) had any determining effect on any
18 mass shooting committed *in or outside of California.*

19 208. Defendants have not provided any evidence that a use of a rifle with an
20 overall length of less than 30 inches defined as an “assault weapon” pursuant to
21 California Penal Code section 30515(a) had any determining effect on any mass
22 shooting committed *in or outside of California.*

23 209. Defendants have not provided any evidence that a use of a rifle with a
24 California defined “fixed magazine” and a “large capacity magazine” in any mass
25 shooting had any determining effect on any mass shooting committed in or outside of
26 California.

27 210. Defendants’ evidence showing a mere correlation between assault
28 weapons and a higher fatality rate in mass shootings cannot distinguish which

1 unidentified various combinations of the characteristics listed in Penal Code section
2 30515 on a semiautomatic firearm caused any such correlation. Nor does Defendants'
3 evidence identify which specific characteristics were used in mass shootings with
4 higher fatalities.

5 211. Defendants' evidence cannot distinguish between "assault weapons" and
6 other semiautomatic firearms used in mass shootings. See Defendants' Exhibit AC
7 ("Multiple data sources indicate that active and public mass shootings committed with
8 semiautomatic rifles and assault weapons result in more victims killed, on average,
9 than attacks with less powerful weapons. de Jager et al., 2018; Follman, Aronsen, &
10 Pan, 2018; Klarevas, 2016)."; Def. Exhibit BK, p. 2 ("mass shootings and other
11 crimes committed with high-capacity semiautomatics (including assault weapons and
12 other models) [...] Def. Exh. BL, p. 1 ("[t]his article examines the use, impacts, and
13 regulation of assault weapons and other high-capacity semiautomatic firearms as they
14 pertain to the problem of mass shootings in the United States.").

15 212. Defendants' Exhibit Y suffers from the same lack of distinction between
16 so-called "assault weapons" and semiautomatic firearms. See Defendants' Exhibit Y,
17 pg. 1-9 ("This study investigates current levels of criminal activity with assault
18 weapons and other high-capacity semiautomatics in the USA....").

19 213. Without providing evidence regarding what features were specifically
20 used in any mass shooting or distinguishing between "assault weapons" and "other
21 high-capacity semiautomatic" firearms, Defendants high fatality correlation is
22 empirically meaningless.

23 214. Defendants' evidence showing a correlation between "assault weapons"
24 and higher fatalities rates in mass shootings also does not account for other significant
25 factors that are correlated with higher fatalities rates. Defendants own evidence
26 admits, "[t]o date, no one has provided a clear and compelling explanation for why
27 public mass shootings have become deadlier over time." Defendants' Exhibit AC.
28

1 215. The fatality correlation asserted by Defendants does not account for
2 whether multiple guns were used in the shootings. This is a significant factor that
3 Defendants entirely ignore. However, Defendants’ evidence shows that “previous
4 research findings have revealed that active and public mass shootings committed by
5 perpetrators with multiple firearms also result in more victims killed, on average,
6 compared with attacks with a single firearm (Klarevas, 2016; Lankford, 2015,
7 2016a). Defendants’ Exhibit AC, p. 12.

8 216. This fact is consistent with Plaintiffs’ expert witness John R. Lott, Jr.,
9 who also stated that a more relevant factor in higher fatalities in mass shootings is
10 whether multiple firearms were used. Deposition of John R. Lott, Jr., at 314:1-315:25.

11 217. The fatality correlation asserted by Defendants also does not account for
12 whether multiple magazines were used in the shootings.

13 218. Defendants contentions that assault weapons are responsible for higher
14 fatalities in mass shootings ignores their own evidence, which shows that society’s
15 “increased desires for fame and attention” and a “blurring of the distinction between
16 fame and infamy” have resulted in mass shooters seeking fame by increasing the
17 number of people killed, conducting more extensive attack strategies, extending
18 planning periods, and acquiring and using more guns — all of which result in an
19 increase in the fatality numbers of mass shootings. Defendants’ Exhibit AC.

20 219. In the article, “Why Have Public Mass Shootings Become More
21 Deadly?” Table 2 provides a comparison of high-fatality public mass shootings before
22 and after 2010. Notably, from 2010-2019, 56% of “high fatality incidents” (resulting
23 in 8 or more victims killed) involved a “semiautomatic rifle or assault weapon.”
24 (Defendants’ Exh. AC, p. 7). No distinction is offered between semiautomatic rifles
25 and “assault weapons.”

26 220. Further, this same study offered by Defendants shows that 78% of those
27 same incidents involved multiple firearms. Further, 67% involved a “perpetrator
28 below 30 years old,” 56% of the incidents showed “explicit evidence of fame-seeking

1 or attention seeking,” 50% of the incidents involved “direct evidence that perpetrator
2 was influenced by another specific attacker or attackers,” 50% of the shooters
3 “planned mass shooting for more than 1 year,” and in 61% of the incidents, an “attack
4 strategy was developed to increase fatalities. Defendants Exh. AC.)

5 221. Thus, there is a correlation between many different factors and high
6 fatality rates in mass shootings. Defendants ignore these other factors to justify their
7 desired result — a ban on commonly owned firearms.

8 222. The desire to seek infamy through committing high fatality mass
9 shootings is also seen in Defendants’ Exhibit AG, U.S. Department of Justice, Federal
10 Bureau of Investigation, “Key Findings of the Behavioral Analysis Unit’s Las Vegas
11 Review Panel (LVRP):

12
13 The LVRP concludes that Paddock’s intention to die by suicide was
14 compounded by his **desire to attain a certain degree of infamy via a
15 mass casualty attack....**

16 Paddock’s exploration of other potential sites suggests that his final
17 selection was based on the identification of a tactically-advantageous
18 location from which to attack. His selected position in a hotel room on
19 the 32nd floor enabled Paddock to shoot at a densely-packed crowd of
20 unsuspecting and vulnerable people. Further, it provided sufficient
21 privacy for Paddock to prepare for and execute the attack, all within
22 driving distance of his residence in Mesquite....

23 Once Paddock decided to attack, **he characteristically devoted time,
24 attention, and energy to the shooting.** Paddock engaged in detailed
25 preparations for the attack, including a year-long burst of firearms and
26 ammunition acquisition. The planning and preparation—in and of itself—
27 was likely satisfying to Paddock as it provided a sense of direction and
28 control despite his mental and physical decline. He engaged insignificant,
methodical, Internet-based research regarding site selection, police tactics
and response, and ballistics. Paddock conducted in-person site
surveillance and engaged in end-of-life planning....

Defendants’ Exhibit AG, p.2.

1 223. As stated above, a dedicated mass murderer who commits to long-term
2 planning (as many mass shooters do) would not be prevented by the AWCA in
3 purchasing California “complaint” firearms and then converting them to “assault
4 weapons” (e.g., taking a featureless rifle and adding prohibited characteristics). The
5 high correlation between planning and mass murder also shows that the AWCA has
6 no realistic prospect of success in preventing the use of “assault weapons” in mass
7 shootings.

8 224. Although during the bench trial on February 5, 2021, Defendants’
9 counsel denied the ability to consider a shooter’s intent when analyzing factors that
10 lead to an increase in fatalities from mass shootings, Defendants’ evidence says
11 otherwise. Any simple correlation between assault weapons and higher fatalities in
12 mass shootings (which Defendants have not established since their data does not
13 isolate assault weapons) does not account for or distinguish between these other
14 factors. Thus, without defining the *extent* of the correlation or considering the many
15 other factors that also have an effect on fatalities, Defendants cannot justify the
16 AWCA’s ban under any form of heightened scrutiny as their evidence, at best,
17 amounts to speculation.

18 225. Notably, Defendants have not provided any evidence that firearms
19 classified as “assault pistols” pursuant to California Penal Code section 30515(a) are
20 even used in the military, let alone “most useful in military service.” However,
21 Plaintiffs have provided evidence that “assault pistols” are widely available,
22 numerically common, and lawful in most jurisdictions. Ostini Decl., Plaintiffs’ Exh.
23 005; Exh. 005-1 through 005-28; Kapelsohn testimony, Tx of 10/19/20 Hearing at
24 40:16 – 41:5.

25 226. Defendants have also not provided any evidence that firearms classified
26 as “assault shotguns” pursuant to California Penal Code section 30515(a) are used in
27 the military, let alone “most useful in military service.” However, Plaintiffs’ have
28 provided evidence that “assault shotguns” are widely available, numerically common,

1 and lawful in most jurisdictions. Ostini Decl., Plaintiffs’ Exh. 005; Exh. 005-1 through
2 005-28; Brown Decl., Plaintiffs’ Exh. 007, 007-1.

3 4 **Conclusions of Law**

5 227. Firearms with the prohibited section 30515(a) characteristics are in
6 common use, for lawful purposes, and are protected under *Heller*.

7 228. The Supreme Court’s test for commonality is a nationwide inquiry. The
8 Second Amendment does not mean different things in different parts of the country.
9 The Supreme Court’s *Heller*’s analysis asks simply whether the arms are “both
10 dangerous *and* unusual,” *Caetano*, 136 S.Ct. at 1031 (2016) (Alito, J., joined by
11 Thomas, J., concurring) (italics original), and if they are not both, it determines if the
12 category of arms are in common use for lawful purposes. *Duncan v. Becerra*, 366
13 F.Supp.3d at 1142. The text of the Second Amendment, as it is informed by history
14 and tradition, all point in the same direction because “the pertinent Second
15 Amendment inquiry is whether [the banned weapons] are commonly possessed by
16 law-abiding citizens for lawful purposes *today*.” *Caetano*, at 1032 (italics original).

17 229. The arms banned as “assault weapons” under the AWCA are not both
18 dangerous and unusual, as the Supreme Court defined in *Heller*. To the contrary, they
19 are common in all respects: 1) They are common functionally, as they are all
20 semiautomatic in their operation; 2) they are common characteristically, as they are all
21 commercially popular types of arms with various common firearm characteristics; and
22 3) they are common jurisdictionally, available in the majority of the states. They are
23 common numerically; in that they are owned by citizens by the millions. All of the
24 semiautomatic firearms prohibited by the characteristics found in Pen. Code §
25 30515(a) meet the *Heller* test and are constitutionally protected.

26 230. Because the semiautomatic firearms banned by California are
27 constitutionally protected, the ban is unconstitutional under *Heller*. Indeed, *McDonald*
28 confirmed *Heller*’s holding that firearms in common use cannot be banned: having

1 “found that [the Second Amendment] right applies to handguns,” *Heller* therefore
2 “concluded, citizens must be permitted to use handguns for the core lawful purpose of
3 self-defense.” *McDonald*, 561 U.S. at 767-68.

4 231. Beyond the categorical, common-use analysis, the AWCA also and
5 separately fails the Ninth Circuit’s two-part test applying tiered scrutiny as well. If an
6 interest-balancing test is required, the challenged provisions still fail any level of
7 “heightened scrutiny” as required in Second Amendment cases by *Heller*.

8 232. Under this approach, the Ninth Circuit applies a two-part test to Second
9 Amendment challenges. *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013). This
10 “inquiry ‘(1) asks whether the challenged law burdens conduct protected by the
11 Second Amendment and (2) if so, directs courts to apply an appropriate level of
12 scrutiny.’” *Bauer v. Becerra*, 858 F.3d 1216, 1221 (9th Cir. 2017) (quoting *Jackson v.*
13 *City and County of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014). The level of
14 scrutiny to be applied depends on the closeness to the core and “the severity of the
15 law’s burden,” on the Second Amendment. *Chovan*, 735 F.3d at 1138.

16 233. Semiautomatic firearms with common characteristics proscribed by the
17 AWCA are in common use for lawful purposes and thus protected under the
18 fundamental, individual right to keep and bear arms. The State’s ban thus “amounts to
19 a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American
20 society for lawful purposes, including for possession in the home, where the need for
21 defense of self, family, and property is most acute.” *Heller*, 554 U.S. at 628.

22 Furthermore, the state bans such firearms for reasons that conflict with the very
23 essence of the Second Amendment, essentially claiming that more accurate, effective,
24 and safe firearms can be banned because they are too good at the central purpose of
25 firearms—projecting force when needed—and thus benefit those who would misuse
26 such firearms just as well as those who use them lawfully.

27 234. The AWCA imposes a substantial burden on Second Amendment rights,
28 and thus deserves strict scrutiny “to afford the Second Amendment the respect due an

1 enumerated constitutional right.” *Silvester v. Becerra*, 138 S.Ct. 945, 945 (2018)
2 (Thomas, J., dissenting from denial of certiorari); *Pena v. Lindley*, 898 F.3d 969, 977
3 (9th Cir. 2018) (“We strictly scrutinize a ‘law that implicates the core of the Second
4 Amendment right and severely burdens that right”).

5 235. The AWCA strikes at the “core” of the Second Amendment—and to be
6 sure, the core of the Second Amendment is defined by its text, namely, the “right to
7 keep and bear arms” which “shall not be infringed”—because its effect is to prohibit
8 an entire category of semiautomatic firearms—common pistols, shotguns, and rifles—
9 that are overwhelmingly kept and used for lawful purposes throughout the United
10 States. The State prohibits these categories of firearms not merely in spite of their
11 being useful in self-defense, but apparently, because firearms with those
12 characteristics are effective in the first place. The State’s apparent rationale that “we
13 don’t want people to be able to shoot accurately, rapidly,” is not and cannot be a
14 legitimate state interest at all, let alone a compelling one. A blanket prohibition on
15 common firearms that are “too accurate,” or do their jobs “too effectively” by
16 allowing citizens to defend their lives “too well,” severely infringes upon Second
17 Amendment rights and cannot survive strict scrutiny.

18 236. Any claimed governmental interest in reducing the quality and
19 effectiveness of firearms is on its face illegitimate and contrary to the balance already
20 struck by the framers and ratifiers of the Second Amendment. Such a purported
21 interest requires the same categorical or strict scrutiny analysis that content- or
22 viewpoint-based restrictions are given under the First Amendment. In *Duncan v.*
23 *Becerra*, 970 F.3d 1133 (9th Cir. 2020), the Ninth Circuit, in affirming this Court’s
24 judgment, held that, because the large-capacity magazine ban, Penal Code § 32310,
25 “substantially burdens core Second Amendment rights,” it was subject to review under
26 strict scrutiny. 970 F.3d at 1152.

27 237. Even under intermediate scrutiny, the State has not demonstrated a
28 “reasonable fit” between its interests and the law. Assuming the importance of the

1 State’s generalized claimed interests in public safety and reducing “gun violence,”
2 those interests must “rely on . . . hard facts and reasonable inferences drawn from
3 convincing analysis amounting to substantial evidence based on relevant and accurate
4 data sets.” *Duncan*, 366 F.Supp.3d at 1161. If the State’s claimed interest is instead a
5 more specific desire to prevent or mitigate so-called “mass shootings,” *Rupp v.*
6 *Becerra*, 401 F.Supp.3d 978, 991 (C.D. Cal. 2019), then it is far from clear that an
7 interest directed at such rare events is significant and/or important enough to justify a
8 sweeping prohibitions affecting many millions of firearms owned and used for lawful
9 purposes. The occasional libel or incitement to violence would not be a sufficiently
10 important interest to justify banning the internet, for example, regardless whether such
11 means of speech inevitably were used for ill in addition to for such lawful purposes.
12 Nevertheless, even assuming the importance of the interest at either level of
13 generality, the AWCA’s sweeping ban on common firearms with common
14 characteristics is not a reasonable fit for achieving these interests.

15 238. The AWCA’s broad ban on common semiautomatic firearms and lawful
16 conduct with them is not a reasonable fit to any legitimate government interest. First,
17 the ban does not “alleviate [the claimed harms] to a material degree.” *Edenfield v.*
18 *Fane*, 507 U.S. 761, 770-71 (1993).

19 239. Any correlation between different crimes and the weapons used does not
20 establish a reasonable fit for a ban on all such weapons. Thus, notwithstanding the
21 District Court’s findings in *Rupp*, that “such weapons are disproportionately used in
22 mass shootings,” 401 F.Supp.3d at 993, such findings do not even suggest that a ban
23 would do anything other than divert such criminals to alternative legal or illegal
24 weapons, or would in any way mitigate the problems. In *Heller* itself, it was
25 accurately observed that handguns are involved in the vast majority of all firearm-
26 related deaths and the government argued that such fact established the government’s
27 interest in banning handguns to prevent or mitigate firearm-related homicides. *Heller*,
28 554 U.S. at 695-696 (Breyer, J., dissenting). The Court rejected that argument, finding

1 that a ban on possessing commonly owned firearms lacked any fit to further the
2 government’s interest under any level of scrutiny. *Heller*, 554 U.S. at 628-29.

3 240. Constitutionally protected activities cannot be banned because the
4 activity could lead to criminal abuses. See *Southeast Promotions Ltd. v. Conrad*, 420
5 U.S. 546, 559 (1975); accord *Vincenty v. Bloomberg*, 476 F.3d 74, 84-85 (2d Cir.
6 2007); *Robb v. Hungerbeeler*, 370 F.3d 735, 743 (8th Cir. 2004); *Ashcroft v. Free*
7 *Speech Coal.*, 535 U.S. 234, 245 (2002); *Stanley v. Georgia*, 394 U.S. 557, 567
8 (1969).

9 241. The AWCA burdens far more protected activity than necessary by
10 imposing a complete ban on an ordinary, law abiding individual’s acquisition,
11 purchase, transfer, and use of a common class of arms. Even under intermediate
12 scrutiny, “a reasonable fit requires tailoring, and a broad prophylactic ban on
13 acquisition or possession of all” common semiautomatics with common
14 characteristics “for all ordinary, law-biding, responsible citizens is not tailored at all.”
15 *Duncan*, 366 F.Supp.3d at 1180; see also *Turner Broadcasting System, Inc. v. FCC*,
16 512 U.S. 622, 682-83 (1994) (O’Connor, J., concurring in part and dissenting in part)
17 (“A regulation is not ‘narrowly tailored’—even under the more lenient [standard
18 applicable to content neutral restrictions]—where ... a substantial portion of the
19 burden on speech does not serve to advance [the State's content-neutral] goals....
20 Broad prophylactic rules in the area of free expression are suspect. Precision of
21 regulation must be the touchstone....”) (brackets in original) (citations and quotations
22 omitted). “To meet the narrow tailoring requirement, ... the government must
23 demonstrate that alternative measures that burden substantially less [of the right]
24 would fail to achieve the government's interests, not simply that the chosen route is
25 easier.” *McCullen v. Coakley*, 134 S.Ct. 2518, 2524 (2014). By prohibiting even fully
26 background-checked and law-abiding citizens from possessing a common and
27 effective class of firearms, the law imposes considerably more burden than is
28 warranted by the rare instances of criminal violence using such firearms. “The right to

1 self-defense is largely meaningless if it does not include the right to choose the most
2 effective means of defending oneself.” *Friedman v. City of Highland Park*, 784 F.3d
3 406, 418 (7th Cir. 2015) (Manion, J., dissenting).

4 242. The challenged provisions of the AWCA undermines public safety and
5 do not materially advance any legitimate public interest. The State’s justification that
6 the self-same characteristics that make the firearms here suitable for lawful self-
7 defense may also make them effective tools for crime if misused, thus necessitating a
8 ban, would undermine the Second Amendment. The very point of protecting arms,
9 and firearms in particular, is that they allow law-abiding people to project force
10 against unjust force at a distance, and thereby defend themselves and others against a
11 violent threat as soon as possible with the least amount of damage to those being
12 protected. Inevitably, all firearms that are at all suitable for self-defense or militia
13 service are comparably dangerous in the hands of a violent criminal. The notion that
14 improvements that make firearms better and safer for lawful use likewise make them
15 comparably better for unlawful use simply leads to the absurdity that firearms may
16 never be improved because the harms ipso facto outweigh the benefits and justify a
17 ban. However, the Second Amendment itself has already balanced the need for and
18 dangers from arms that can effectively project force against another. As “the very
19 product of an interest balancing by the people,” the Second Amendment “elevates
20 above all other interests the right of law-abiding, responsible citizens to use arms in
21 defense of hearth and home.” *Heller*, 554 U.S. at 634-35. “Constitutional rights are
22 enshrined with the scope they were understood to have when the people adopted them,
23 whether or not future legislatures . . . think that scope too broad.” *Id.*

24 243. Thus, even under intermediate scrutiny, Defendants’ AWCA and
25 regulations fail. The intermediate scrutiny to be applied is the same as, and is drawn
26 from, the First Amendment context. *Jackson*, 746 F.3d at 961 (heightened scrutiny in
27 Second Amendment cases is “guided by First Amendment principles”); *Silvester v.*
28 *Harris*, 834 F.3d 816, 821 (9th Cir. 2016) (applying in Second Amendment case “the

1 test for intermediate scrutiny from First Amendment cases”), cert. denied, *Silvester v.*
2 *Becerra*, 138 S.Ct. 945 (2018). At all times under any form of heightened scrutiny, the
3 government bears the burden of justifying its restrictions. See, e.g., *R.A.V. v. City of*
4 *St. Paul*, 505 U.S. 377, 382 (1992) (content-based speech regulations are
5 presumptively invalid); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010)
6 (unless conduct “not protected by the Second Amendment at all, the [g]overnment
7 bears the burden of justifying the constitutional validity of the law.”); *Tyler v.*
8 *Hillsdale County Sheriff’s Dept.*, 837 F.3d 678, 694 (6th Cir. 2016) (“the burden of
9 justification is demanding and it rests entirely on the State.”) (citation omitted).

10 244. The government’s burden of justifying its restriction on constitutional
11 rights “is not satisfied by mere speculation or conjecture; rather, a governmental body
12 seeking to sustain a restriction on commercial speech must demonstrate that the harms
13 it recites are real and that its restriction will in fact alleviate them to a material
14 degree.” *Edenfield*, 507 U.S. at 770-71 (emphasis added). Restrictions on
15 constitutional rights must be analyzed in their specific context, and “will depend upon
16 the identity of the parties and the precise circumstances of the” protected activity.
17 *Edenfield*, 507 U.S. at 774. Generalized risk does not warrant restrictions as to all
18 persons, and “a preventative rule” aimed at such generic hazards is “justified only in
19 situations ‘inherently conducive to’” the specific dangers identified. *Id.* (quoting
20 *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 449 (1978)).

21 245. Under the actual “demanding” standard for intermediate scrutiny, the
22 AWCA fails, as the State does not advance an important governmental objective nor
23 offer any sort of reasonable fit.

24 246. Plaintiffs have shown that the State’s AWCA and regulations, and their
25 enforcement thereof, are unconstitutional. Plaintiffs are entitled to declaratory,
26 permanent injunctive, and other relief as prayed for in their First Amended Complaint.
27
28

1 Dated: February 16, 2020

SEILER EPSTEIN LLP

2
3 /s/ George M. Lee
George M. Lee

4 **DILLON LAW GROUP APC**

5
6 /s/ John W. Dillon
7 John W. Dillon

8 Attorneys for Plaintiffs

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28