No. 14-15408

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEONARD FYOCK, ET AL.,
Plaintiffs-Appellants

v.

CITY OF SUNNYVALE, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
Civil Case (CV 13-05807-RMW)

BRIEF OF AMICI CURIAE LAW CENTER TO PREVENT GUN VIOLENCE & CLEVELAND SCHOOL REMEMBERS ON BEHALF OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26., Amicus Law Center to Prevent Gun Violence states that it is not a publicly held corporation, does not have a parent corporation, does not issue stock and therefore, no publicly held corporation owns 10% or more of its stock.

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INTEREST OF AMICI CURIAE

Amicus curiae Law Center to Prevent Gun Violence ("Law Center") is a nonprofit, national law center dedicated to reducing gun violence. The Law Center provides comprehensive legal expertise to promote smart gun laws, including tracking all Second Amendment litigation nationwide and providing support to jurisdictions facing legal challenges to their firearm regulations. As an amicus, the Law Center has provided informed analysis in a variety of firearm-related cases, including in the Supreme Court.

The Law Center, formed in the wake of an assault weapon massacre at the San Francisco law firm of Pettit & Martin on July 1, 1993, has a particular interest in this litigation. This rampage ended with nine dead—including the shooter—and six wounded. That gunman was armed with two assault weapons and multiple large capacity ammunition magazines, some capable of holding up to 50 rounds.

Since its formation, the Law Center has worked for passage of strong gun laws nationally, for example, supporting the enactment of the 1994 federal law banning assault weapons and large capacity ammunition magazines (allowed to expire in 2004) and assisting state legislators nationwide. The Law Center has also provided legal support across California to communities seeking to adopt or defend common sense local gun regulations. Law Center services have contributed to adoption of hundreds of local laws to reduce gun violence in California, many of

which inspired state legislation placing California at the forefront of gun policy reform in America.

Amicus curiae Cleveland School Remembers ("CSR") is a grassroots group, organized in the aftermath of the December 2012 Sandy Hook School shooting. Founding members worked at Cleveland Elementary School in Stockton, California in January 1989, when a gunman used a semiautomatic assault weapon equipped with large capacity magazines to murder five students and wound 31 others in just three minutes. Following the Cleveland School shooting, California's Legislature enacted an assault weapons ban. In 2001, it banned sale of large capacity ammunition magazines.

CSR works to bring about strong, enforceable gun violence prevention legislation through affiliations with education, law enforcement, and other organizations. It supports laws prohibiting large capacity magazines.

Pursuant to Fed. R. App. P. 29(a), this brief is filed with the consent of all the parties to this appeal.[1]

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae, or their counsel, made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an issue of significant importance, namely, whether the City of Sunnyvale's regulation of the possession of particularly dangerous types of ammunition magazines in Municipal Code Section 9.44.050 (the "Ordinance") is consistent with the Second Amendment. The Ordinance, which codified Measure C—a ballot initiative passed by approximately two-thirds of voters—prohibits possession of large capacity magazines ("LCMs"), defined as detachable magazines with the capacity to accept more than ten rounds of ammunition. The continued use of LCMs in mass shootings across the nation—several of which have occurred since this litigation was filed—underscores that reasonable regulation in this area is essential.

This Court should uphold the district court's denial of Appellants' motion for preliminary injunction. The Ordinance's prohibition on LCMs—the manufacture and sale of which have long been banned under a combination of state and federal law—is fully consistent with the Second Amendment, with similar laws having been upheld by every other court addressing the issue. *See Heller v. District of Columbia ("Heller II"),* 670 F.3d 1244 (D.C. Cir. 2011); *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo,* C-13-291S, 2013 WL 6909955 (W.D.N.Y. Dec. 31, 2013); *Shew v. Malloy,* C-13-739 AVC, 2014 WL 346859 (D. Conn. Jan. 30, 2014).

In the landmark decision, *District of Columbia v. Heller*, 554 U.S. 570 (2008) ("*Heller*"), the Supreme Court's narrow holding was that the Second Amendment protects an individual's right to possess an *operable handgun* in the home *for self-defense*. *Heller*, 554 U.S. at 635. In striking down Washington D.C.'s broad ban on all handguns—including those possessed in the home—the Court was careful to explain that the Second Amendment right is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id*. at 626. Moreover, that right only protects individuals' ability to defend themselves with arms "in common use at the time," a limitation "supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id*. at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939); 4 Blackstone 148–149 (1769)). Finally, the Court noted:

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. The Court was careful to point out that this list was not exhaustive; other presumptively valid laws exist.

Shortly thereafter, in *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010) ("*McDonald*"), the Court held that the Second Amendment is applicable to individual states and local governments. In striking down Chicago's broad

handgun ban, the Court reaffirmed the *Heller* holding's narrow nature. *McDonald*, 130 S. at 3047 (*Heller* "recognized that the right to keep and bear arms is not 'a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.'… We repeat those assurances here.") (quoting *Heller*, 554 U.S at 626).

Interpreting *Heller* and *McDonald*, this Court has developed a two-part inquiry for analyzing Second Amendment challenges. *United States v. Chovan,* 735 F.3d 1127, 1136 (9th Cir. 2013). It "(1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny." *Id*. ("We believe this two-step inquiry reflects the Supreme Court's holding in *Heller* that, while the Second Amendment protects an individual right to keep and bear arms, the scope of that right is not unlimited.").

Applying this test, the constitutionality of the Ordinance is clear. The Ordinance does not burden the Second Amendment right as LCMs are not "arms," and in any case, they are not in common use. Moreover, even if this Court finds that the Ordinance burdens the Second Amendment, it is still constitutional because it easily satisfies intermediate scrutiny as a law reasonably tailored to serve the important governmental interests of crime prevention and the protection of public safety. Sunnyvale's brief details why intermediate scrutiny would be the

appropriate level of scrutiny to apply, and sets forth why the Ordinance easily satisfies that test. Amici support Sunnyvale's analysis and conclusion. Rather than reiterate arguments already before the Court, Amici simply expand on certain key points in this regard.

Under the Ordinance, Sunnyvale residents may lawfully continue to possess an operable handgun for self-defense. Moreover, they have access to a vast array of standard capacity ammunition magazines, which they may lawfully purchase and possess in any number for self-defense.[2] Appellants are not satisfied, however, and demand that this Court significantly expand the Supreme Court's holding in *Heller* to guarantee an individual's ability to possess *LCMs*, devices of military origin specifically designed to facilitate killing large numbers of people with both speed and efficiency.

Neither *Heller* nor its progeny support such an expansion. As every court examining this issue has ruled, laws prohibiting LCMs, which are frequently employed in mass shootings and attacks on law enforcement officers and are not suitable for individual self-defense purposes, do not infringe the Second Amendment. In fact, because of their nature, LCMs may actually place members

[2] The few firearms that function only with the use of LCMs are specifically exempted under the Ordinance if obtained prior to 2000. Sunnyvale, Cal. Mun. Code § 9.44.050(c)(8).

of a household at greater risk of an accidental shooting. The Ordinance does not even come close to imposing a total ban on possessing magazines for self-defense, and in fact allows for the purchase and possession of the majority of available magazines.

ARGUMENT

I. THE SECOND AMENDMENT RIGHT RECOGNIZED IN *HELLER* DOES NOT INCLUDE A RIGHT TO POSSESS LCMs.

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. As noted in *Heller,* the Second Amendment right "is not unlimited." *Heller*, 554 U.S. at 626. Sunnyvale's Ordinance regulates only LCMs, possession of which falls outside of the narrow Second Amendment right identified in *Heller*. First, the Second Amendment protects only the possession of "arms." LCMs do not qualify as "arms" and are properly classified as secondary accessories, such as scopes or silencers, not necessary to the core functionality of firearms.

Further, the Second Amendment only protects possession of weapons that are in "common use." LCMs are not in "common use" at the state or local level as their sale and transfer have been banned in California for roughly two decades. Finally, LCMs are "dangerous and unusual" as they are used disproportionately in mass shootings and are not suited to a lawful self-defense purpose.

1. LCMs Are Not "Arms," and Therefore the Right to Bear Them Is Not Protected by the Second Amendment.

The right protected under the Second Amendment is not "unlimited" and applies only to "arms." *See Heller,* 554 U.S. at 626. The initial question, therefore, must be whether the Ordinance, which defines LCMs to mean "any detachable ammunition feeding device with the capacity to accept more than ten (10) rounds,…" regulates "arms." Sunnyvale, Cal. Mun. Code § 9.44.050. If it does not, that ends the Second Amendment inquiry.

While the district court observed that no court has affirmatively found that LCMs *do not* qualify as "arms" (as it proceeded to uphold the Ordinance under intermediate scrutiny), the fact is none of Appellants' cited cases even addressed the question. Other courts have simply made the implicit assumption that LCMs are arms. *See Heller II,* 670 F.3d at 1260, 1264; *San Francisco Veteran Police Officers Ass'n v. City & Cnty of San Francisco,* C-13-05351 WHA, 2014 WL 644395, at *7 (N.D. Cal. Feb. 19, 2014); *New York State Rifle & Pistol Ass'n, Inc.* 2013 WL 6909955, at *18; *Shew,* 2014 WL 346859, at *9. This argument has not been addressed by the Ninth Circuit, and is therefore an open question for this Court.

The *Heller* majority undertook to define "arms," looking first to the 1773 edition of Samuel Johnson's dictionary, which defined "arms" as "weapons of offence, or armour of defence." 554 U.S. at 581 (citing 1 Dictionary of the English

Language 106 (4th ed.) (reprinted 1978)). The district court applied this definition to conclude "the prohibited magazines are 'weapons of offence, or armour of defence,' as they are *integral components to vast categories of guns*." (ER000009, Order Denying Preliminary Injunction, Case No. C-13-5807-RMW at 9) (citing *Heller*, 554 U.S. at 581) (emphasis added). This was error. An LCM is a special type of magazine, acting to enhance the weapon's basic features (in this case, the ability to fire more rounds without reloading); it is neither an "integral" nor necessary component of the vast majority of firearms. "The operation … of any firearm designed and manufactured to accept a detachable magazine will function regardless of the capacity of the magazine itself. … This includes the vast majority of Handguns and Shoulder Fired firearms so designed and manufactured." Yurgealitis Decl. at ¶5., Case No. C-13-5807-RMW, Doc. 41. In other words, while a magazine necessary to supply a firearm with *some* bullets may be considered "integral" to core functionality, a magazine that expands that supply beyond 10 rounds is certainly not. This notion is grounded in America's historical experience with handguns. Prior to the 1980s, the most common type of handgun was the revolver, which typically holds only six rounds of ammunition in a rotating cylinder. It was only during the 1980s that the firearms industry began mass producing semiautomatic pistols, which can accept larger ammunition magazines.[3]

[3] Violence Policy Center, *Backgrounder on Glock 19 Pistol and Ammunition*

The *Heller* majority also relied on Cunningham's legal dictionary, which illustrated the usage of the term "arms:" "Servants and labourers shall use bows and arrows on Sundays, … and not bear other arms." *Heller*, 554 U.S. at 581 (citing Timothy Cunningham, A New and Complete Law Dictionary (2d ed. 1771)). Cunningham, and thus *Heller*, are instructive in that they do not include the archer's quiver that would hold the arrows within the definition of "arms." While Appellants might argue that the quiver is unlike the magazine in that it is not attached—LCMs are detachable "super-quivers" and are simply not arms.

Instead, LCMs are most appropriately characterized as firearm *accessories*. The bows and arrows in the Cunningham legal dictionary example are analogous to guns and ammunition. And, just as quivers (repositories of many arrows) are not "arms," neither are LCMs (repositories of many bullets). Both large capacity quivers and LCMs fit neatly into the category of *accessories*.

Other historical sources support the conclusion that accessories used along with firearms are separate and distinct from the concept of "arms." In Justice Stevens' *Heller* dissent, he cited The Act for Regulating and Disciplining the Militia, 1785 Va. Acts ch. 1, § 3, p. 2, stating: "The Virginia military law, for example, ordered that 'every one of the said officers … shall constantly *keep* the

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Magazines Used in Attack on Representative Gabrielle Giffords and Others (Jan. 2011), *available at* http://www.vpc.org/fact_sht/AZbackgrounder.pdf.

aforesaid arms, accoutrements, and ammunition, ready to be produced whenever called for…." *Heller*, 554 U.S. at 650 (Stevens, J., dissenting). This source specifically differentiates between "arms," "ammunition," and "accoutrements." In this regard, LCMs are not arms, nor are they ammunition. Indeed, they fall most readily and accurately into the category of accoutrements—*i.e.*, accessories, more akin to today's detachable scopes, silencers, and vests allowing the wearer to carry more magazines on his body. Because accoutrements, particularly accoutrements that do not affect the weapon's core functionality, are not "arms," their use falls outside of the Second Amendment's scope.

Indeed, the firearm industry itself categorizes magazines as *accessories*, *not as firearms or guns*. A simple search of online firearm retailers shows that businesses intimately involved in the firearm industry classify magazines as accessories. For instance, Mississippi Auto Arms, Inc., offers for sale "guns" and "gun-related items."[4] It organizes its online store by item type, differentiating between items such as "firearms" and "ammunition," offering magazines for sale under an entirely separate category: "accessories."[5] Atlantic Firearms, Guns America, and Palmetto State Armory similarly categorize magazines as

[4] Mississippi Auto Arms, Inc., *available at* http://www.mississippiautoarms.com/.
[5] *See id.* at http://www.mississippiautoarms.com/sort-by-item-magazines-c-169_177.html.

accessories, not firearms.[6] Where the firearm industry itself defines a magazine as an accessory rather than an "arm," it bends credulity to assume otherwise.

The district court expressed concern that if magazines and ammunition are not "arms" then any jurisdiction could effectively ban firearms simply by forbidding all magazines. This concern is misplaced. First, LCMs *are not* ammunition. To use the earlier analogy, they are super-quivers, holding many arrows. As mere accessories designed to hold extra-large amounts of ammunition, LCMs are not integral to the functioning of the vast majority of firearms. Unlike ammunition, most firearms are completely operable without LCMs, functioning perfectly well with standard capacity magazines holding 10 or fewer rounds. *See* Yurgealitis Decl. at ¶ 5, Case No. C-13-5807-RMW, Doc. 41 ("Generally speaking, any firearm capable of accepting a detachable 'Large Capacity Magazine' as defined under the Ordinance will readily accept a magazine with a maximum capacity of ten (10) rounds. This includes the vast majority of Handguns and Shoulder Fired firearms so designed and manufactured."). Finally, drawing a principled distinction between LCMs (accessories unnecessary to a firearm's core

[6] *See* Atlantic Firearms, *available at* http://www.atlanticfirearms.com/accessories.html; Guns America, *available at* http://www.gunsamerica.com/BrowseSpecificCategory/Parent/Non-Guns/ViewAll.htm; Palmetto State Armory, *available at* http://palmettostatearmory.com/index.php/accessories.html.

functionality as historically understood)[7] and standard magazines (which may compromise core functionality), prevents the slippery slope effect that concerned the district court.

Amici are not contending here that ammunition is not "arms," nor that magazines integral to the functioning of firearms are not arms. Rather, Amici's point is that magazines that can hold especially large amounts of ammunition are not arms. This Court observed that without the ability to obtain ammunition "the right to bear arms would be meaningless" by "mak[ing] it impossible to use firearms for their *core purpose*." *Jackson v. San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (citation omitted) (emphasis added). The same cannot be said of LCMs. A prohibition on LCMs does not make "meaningless" the right to bear arms because prohibiting LCMs has no impact whatsoever on the core functionality of the vast majority of firearms.

Finally, the few firearms that function only with the use of LCMs are specifically exempted under the Ordinance if obtained prior to 2000. Sunnyvale, Cal. Mun. Code § 9.44.050(c)(8). Standard magazines comport much more closely to the general and historical understanding of a functional firearm, and, to the extent that they are integral to the functioning of firearms, may be considered to be

[7] *See, supra,* n. 3.

"arms." Nonetheless, for the reasons stated above, LCMs are not "arms," the possession of which is subject to Second Amendment protection. Just as the Second Amendment does not protect a person's right to own other non-essential accessories, like a silencer or scope, it does not protect LCMs. This position is entirely consistent with the district court's conclusion that a magazine's "capacity to accept more than ten rounds" is "*hardly crucial* for citizens to exercise their right to bear arms." (ER000011-12, Order Denying Preliminary Injunction, Case No. C-13-5807-RMW, at 11-12) (emphasis added).

2. The Second Amendment Protects the Right to Bear Only Arms in "Common Use" and LCMs Are Not in "Common Use."

Heller held that one "important limitation on the right to keep and carry arms," is that "the sorts of weapons protected were those 'in common use at the time.' We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Heller*, 554 U.S. at 627 (quoting *Miller*, 307 U.S. at 179); *see also United States v. Decastro*, 682 F.3d 160, 165 n.4 (2d Cir. 2012) ("[T]he Second Amendment right does not encompass all weapons, but only those 'typically possessed by law-abiding citizens for lawful purposes' and thus does not include the right to possess 'dangerous and unusual weapons.'") (quoting *Heller*, 544 U.S. at 625, 627). Therefore, even accepting *arguendo* that LCMs are "arms," their possession still falls outside Second

Amendment protection because they are not in "common use." In evaluating common use, courts look to whether a weapon is typically possessed by law-abiding citizens for lawful purposes. *See Miller*, 307 U.S. at 179.

a) The common use test should be applied locally.

Amici do not concede that LCMs are in common use nationwide, and indeed, Appellants admittedly supply only speculation in support of this contention. Still, there can be little question that LCMs are not in common use either in California or Sunnyvale. Although the district court applied a national common use test (*see* ER000007, Order Denying Preliminary Injunction, Case No. C-13-5807-RMW, at 7), no federal appellate court has addressed the question of the proper geographical frame of reference for determining common use under the Second Amendment. Ample reason exists to adopt a community-based (local) common use standard.

While *Heller* discussed the common use of handguns in the national context, and highlighted the popularity of handguns for self-defense, 554 U.S. at 628-29 ("the most preferred firearm in the nation… for protection of one's home and family"), it did not decide the appropriate geographical test for common use inquiries generally. In any event, *Heller's* facts and circumstances are distinguishable from the present case. There, the ordinance restricted possession of an "entire class" of arms: handguns. The Sunnyvale Ordinance, in contrast,

restricts only a subset of magazines based on a size categorization. The breadth of the former's restriction made it reviewable on a national scale given the fact that handgun ownership is widespread across the nation. But LCMs do not implicate that level of use and certainly do not represent an "entire class" of firearm accessory. Given the unique factual circumstances here, the mere fact that the common use test has been applied nationally for handguns does not compel this Court to use that test when the local community standard is more appropriate for determining common use on these facts.

The Constitution does not require blind adherence to national norms. Indeed, other constitutional rights are reviewed on a local, community basis. For example, certain First Amendment questions implicate community-based standards. Obscenity is a category of speech unprotected by the First Amendment, but a comprehensive, legal definition of obscenity has been difficult to establish. *See Roth v. United States,* 354 U.S. 476 (1957); *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572-73 (1942). Currently, obscenity generally is evaluated using a tripartite standard established by *Miller v. California*, 413 U.S. 15 (1973). The *Miller* test judges obscenity based on, *inter alia*, whether the average person, applying contemporary *community* standards would find that the work, taken as a whole, appeals to prurient interests.

Under *Miller*, juries are asked to apply contemporary standards of the community where they sit to determine if material is obscene and therefore unprotected by the First Amendment. *Id.* Thus, an adult magazine or other material could be categorized as obscene in one community, but found acceptable in another: "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City," and "[p]eople in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Id.* at 32-33.

The same community-based approach should be applied to the Second Amendment's common use inquiry. First, courts may and do look to interpretations of other constitutional rights when evaluating restrictions under the Second Amendment when instructive and useful to do so. For instance, *Heller* referenced case law under the First and Fourth Amendments to justify application of the Second Amendment to protect arms not in existence at the nation's founding and to define the "people" for whom the Second Amendment protections apply:

> There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not …. Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.

Heller, 554 U.S. at 595 (internal citation omitted); *see id.* at 579-80, 582. Likewise, how protections under the First Amendment are determined is instructive in examining how protections under the Second Amendment should be evaluated where there are relevant, important factual similarities between the impacts of regulations (such as availability of alternatives), as there are here. '"Both *Heller* and *McDonald* suggest that First Amendment analogies are more appropriate, and on the strength of that suggestion, we and other circuits have already begun to adapt First Amendment doctrine to the Second Amendment context."' *Jackson*, 746 F.3d at 960 (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 702-03, 706 (7th Cir. 2011)).

Second, a local approach for determining whether certain firearm-related accessories are in common use is consistent with the rationale of *Miller* and its progeny. Like the right to free speech, the right to keep and bear arms is not unlimited. Just as the First Amendment does not protect obscenity, so are dangerous and unusual weapons excluded from Second Amendment protection. *See Heller*, 554 U.S. at 627. At the outset, therefore, the Court must determine whether the equipment in question is unusual, akin to the predicate obscenity determination required by the First Amendment. Here, just as the people of "Maine or Mississippi" should not be forced to "accept depiction of conduct [that is] tolerable in Las Vegas or New York City," neither should Californians or the

citizens of Sunnyvale be forced to tolerate the presence of "dangerous and unusual" firearm accessories not in "common use," even if such accessories are embraced elsewhere.[8] *Miller*, 413 U.S. 32-33.

The *Miller* majority reasoned that while "fundamental First Amendment limitations on the powers of the States do not vary from community to community … this does not mean that there are, or should or can be, fixed, uniform national standards" regarding what constitutes obscenity. *Id. at* 30. Questions of what "appeals to the prurient interest" or is "patently offensive" are questions of fact, and "our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 states in a single formulation." *Id.* The "fundamental First Amendment limitations" restrict states from burdening expression of free speech unless the speech in question falls within the category of the lewd and obscene or encroaches upon the limited area of more important interests. *See id.* at 20.

[8] While Amici argue that LCMs are not in common use in California or Sunnyvale, Amici in no way concede that LCMs are in common use nationally. Gun sales in America have risen but the percentage of households owning guns has dropped, a trend reflecting that sales of more weapons and more powerful weapons are being sold to an increasingly smaller group of gun enthusiasts, thereby concentrating gun ownership. (*See* ER000390-92, Declaration of J. Donahue at ¶¶ 3-8.) It is likely LCMs are similarly collected by a small, concentrated number of enthusiasts. (*See id.* at ¶¶ 9-10, ER000392.)

Similarly, in the context of firearm regulation, just as the First Amendment does not protect lewd or obscene speech, the Second Amendment does not protect "dangerous and unusual" arms. These inquiries can be read in parallel: they are both "fact based," and the "Nation is simply too big and too diverse" for this Court to apply or assess a nation-wide common use inquiry. Finally, a long history of different communities treating firearms differently exists,[9] much as there is a long history of different communities treating speech differently in the obscenity context. It, therefore, is appropriate to review common use on a local level, or *at least* at the state level.

b) LCMs are not in common use either in Sunnyvale or in California.

Regardless of any claimed national prevalence, LCMs are plainly not in common use in California or in Sunnyvale. This can hardly be disputed because a combination of federal and state law has banned the sale, purchase, and transfer of LCMs within California since 1994. *See* Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No. 103–322 § 110103(a), 108 Stat. 1796

[9] Eight states and Washington D.C. have banned LCMs, seven of which also banned assault weapons: California, Cal. Penal Code §§ 16350, 16740, 16890, 32310-32450; Colorado, Colo. Rev. Stat. §§ 18-12-301, 18-12-302; Connecticut, Conn. Gen. Stat. §§ 53-202w, 53-202x; District of Columbia, D.C. Code § 7-2506.01(b); Hawaii, Haw. Rev. Stat. § 134-8(c); Maryland, Md. Code Ann., Crim. Law § 4-305; Massachusetts, Mass. Gen. Laws ch. 140, §§ 121, 131M; New Jersey, N.J. Stat. Ann. §§ 2C:39-1(y), 2C:39-3(j), 2C:39-9(h); New York, N.Y. Penal Law §§ 265.00(23), 265.02(8), 265.10, 265.11, 265.20(7-f), 265.36-265.37.

(adding 18 U.S.C. § 922(w) prohibiting transfer or possession of large capacity ammunition feeding devices).[10] California's ban on LCM sale and manufacture became effective in 2000, continuing the federal ban's relevant prohibitions after it expired. *See* Cal. Stats. 1999, ch. 129 §§ 3, 3.5, codified as Cal. Penal Code § 32310. Together, these restrictions have served to significantly curtail LCM acquisition in California and in Sunnyvale. For nearly two decades, law-abiding Californians have been unable to acquire LCMs; therefore they cannot be in "common use." Nor can LCMs be said to be in common use for self-defense purposes: "in the case of high capacity magazines, significant market presence does not necessarily translate into heavy reliance by American gun owners on those magazines for self-defense." Thompson Decl., Case No. C-13-5807-RMW, Doc. 42, at Ex. 11, Test. of L. Tribe at 14. (Feb. 12, 2013). Plaintiffs offer no direct evidence to the contrary.

Applying either a local- or state-based inquiry for LCM use clearly reveals that in Sunnyvale and California, generally, these extremely dangerous accessories are *not* in common use, and therefore not subject to Second Amendment protections. Plaintiffs themselves acknowledge that their evidence regarding the ownership of LCMs is vague, and they clearly speculate, as evidenced by their use

[10] This Act's sunset provision repealed this amendment 10 years after Sept. 13, 1994. *Id*. at § 110105(2).

of terms like "difficult to calculate" and "perhaps" in claiming common use. Plaintiffs' Motion for a Preliminary Injunction, at 4, Case No. C-13-5807-RMW, Doc. 32-1.

3. The Second Amendment Does Not Protect a Right to Possess LCMs, Which Are Dangerous and Unusual Weapons and Unsuitable for Responsible Self-Defense in the Home.

The Second Amendment does not include the "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. Rather, it is the '"inherent right of self-defense [that] has been central to the Second Amendment Right"' and '"whatever else it leaves to future evaluation, [the Second Amendment] surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."' *Jackson*, 746 F.3d at 959, 961 (quoting *Heller*, 554 U.S. at 628, 635). In addition, "[t]he firearm must also be possessed for lawful purposes, like self-defense." *New York State Rifle & Pistol Ass'n,* 2013 WL 6909955 at *11 (citations omitted).

Even if LCMs are determined to constitute "arms" and to be in common use, their exceedingly dangerous nature makes them an inappropriate choice for self-defense in the home. *See, e.g., Hightower v. City of Boston*, 693 F.3d 61, 66, 71 & n.7 (1st Cir. 2012) (noting that "large capacity weapons" are not "of the type

characteristically used to protect the home."). In the words of a former Baltimore Police Colonel:

> [t]he typical self-defense scenario in a home does not require more ammunition than is available in a standard 6-shot revolver or 6-10 round semiautomatic pistol. In fact, because of potential harm to others in the household, passersby, and bystanders, too much firepower is a hazard.[11]

Responsible self-defense should not include the ability to spray dozens of additional bullets in a home where others may be easily placed in jeopardy. LCMs actually exacerbate concerns about stray bullets because "the tendency for defenders [is] to keep firing until all bullets have been expended." *Id.*

Not suitable for home-based self-defense, LCMs often play a devastating role in mass shootings in California, and elsewhere. In fact, of 62 mass shootings from 1982 to 2012, LCMs were recovered in 50% of incidents.[12] Similarly, in mass shootings between January 2009 and January 2013, 135% more people were shot and 57% more people killed in incidents where assault weapons or LCMs

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[11] Brian J. Siebel, Brady Ctr. To Prevent Gun Violence, *Assault Weapons: Mass Produced Mayhem* at 16 (Oct. 2008), *available at* http://www.bradycampaign.org/sites/default/files/mass-produced-mayhem.pdf.

[12] Mark Follman, Gavin Aronsen, & Jaeah Lee, *More Than Half of Mass Shooters Used Assault Weapons and High-Capacity Magazines*, Mother Jones (Feb. 27, 2013), *available at* http://www.motherjones.com/politics/2013/02/assault-weapons-high-capacity-magazines-mass-shootings-feinstein.

were used.[13] Criminals choose LCMs to attack law enforcement; prohibitions on LCMs protect officers because gun users must reload more often. For officers confronting dangerous shootouts, the '"2 or 3 second pause' during which a criminal reloads his firearm 'can be of critical benefit to law enforcement."' *Heller II*, 670 F.3d at 1264. For example, in January 2011, police only subdued Jared Lee Loughner during the mass shooting in Tucson after he was forced to pause to reload.[14] Similarly, the interruption to reload is what prevented Colin Ferguson from continuing his 1995 Long Island Rail Road shooting spree that killed six people and injured 19 more.[15] The importance of the opportunity to disarm during reloading was also illustrated just this past month with John Meis' actions to neutralize a shooter in Washington state.[16] LCMs are dangerous and

[13] Law Ctr. To Prevent Gun Violence, *Large Capacity Ammunition Magazines Policy Summary*, (May 31, 2013), *available at* http://smartgunlaws.org/large-capacity-ammunition-magazines-policy-summary/.

[14] *See* Sam Quinones & Nicole Santa Cruz, *Crowd Members Took Gunman Down*, L.A. Times, (Jan. 9, 2011), *available at* http://articles.latimes.com/2011/jan/09/nation/la-na-arizona-shooting-heroes-20110110.

[15] Pat Milton, *Colin Ferguson Convicted of Murdering Six in Train Massacre*, AP News Archive, (Feb. 18, 1995), *available at* http://www.apnewsarchive.com/1995/Colin-Ferguson-Convicted-of-Murdering-Six-in-Train-Massaclre/id-49433c4650ab4c17b9b412fe0a8717d6.

[16] Seattle Times, *1 dead, others hurt in shooting at Seattle Pacific University before student tackles gunman*, (June 5, 2014), *available at* http://seattletimes.com/html/localnews/2023778865_spushootingxml.html.

unusual weapons not possessed for lawful self-defense purposes and therefore not protected under the Second Amendment.

II. EVEN IF PROHIBITIONS ON LCMs DO IMPLICATE THE SECOND AMENDMENT, SUNNYVALE'S ORDINANCE IS CONSTITUTIONAL.

Appellants' failure to establish a Second Amendment right to possess LCMs should end this Court's inquiry. *See, e.g., Jackson*, 746 F.3d at 960. If the Court nonetheless proceeds to apply a Second Amendment analysis to the Ordinance, *Chovan,* 735 F.3d at 1136, it surely passes constitutional muster, and intermediate scrutiny would be the appropriate level of review. The district court properly held that the Ordinance easily meets this standard, and Amici support Sunnyvale's analysis and review of this issue.

As Sunnyvale details, if heightened scrutiny is necessary to evaluate this challenge to the Ordinance, strict scrutiny is inappropriate because of the state's profound interest in protecting citizens from gun violence and ensuring public safety, combined with the extremely light burden which the Ordinance places on Second Amendment rights. *See Jackson*, 746 F.3d at 966. The Supreme Court's own holdings suggest that the application of strict scrutiny is incongruous with extant, presumptively valid restrictions, s*ee United States v. Marzzarella*, 595 F. Supp. 2d 596, 604. (W.D. Pa. 2009); *Heller v. District of Columbia*, 698 F. Supp. 2d 179, 187 (D.D.C. 2010) *aff'd in part, vacated in part*, *Heller II*, 670 F.3d. 1244,

and binding Ninth Circuit authority in fact shows that intermediate scrutiny is generally the appropriate level of review in Second Amendment cases. *Jackson*, 746 F.3d at 963-66, 968-69.

Sunnyvale's Ordinance affects only a subset of ammunition magazines that may be possessed for the purpose of responsible self-defense in the home. Since 2000, when California's law banning the purchase of LCMs came into effect, manufacturers have been making California-compliant ammunition magazines, resulting in the widespread availability of such magazines.

> Following the enactment of California Penal Code Section 32310 regulating the Manufacture, Import or Sale of Large Capacity Magazines, numerous Firearm Manufacturers have produced firearms compliant with the legislation. For example Smith and Wesson currently markets specific models of AR-15 type rifles and Semi Automatic pistols compliant with California Law(s). Beretta, Glock, Colt, Sturm Ruger, Sigarms and numerous other manufacturers have produced and marketed specific models of firearms in California after minor changes to their design or component parts. In general firearm magazines with a maximum capacity of ten (10) rounds have been mass produced since the mid 1990's and are readily available to the public.

Yurgealitis Decl. at ¶ 6., Case No. C-13-5807-RMW Doc. 41. Guns that can use LCMs can also use standard capacity magazines, so the Ordinance does not burden or hinder the use of firearms of nearly any type.[17] The Ordinance consequently

[17] For those very few firearms that function only with the use of large capacity magazines, they are exempted under the Ordinance if obtained prior to 2000. Sunnyvale, Cal. Mun. Code § 9.44.050(c)(8).

does not restrict or prohibit the use of any particular type of firearm, nor does it restrict the volume of ammunition that can be possessed by any individual—the only thing that is affected is the container in which the ammunition is held pending discharge—therefore, intermediate scrutiny is the most appropriate level of review.

This Court established intermediate scrutiny as the appropriate level of review to be applied "if a challenged law does not implicate a core Second Amendment right, or does not place a substantial burden on the Second Amendment right," applying that level of review to San Francisco's ordinance regulating handgun storage and ammunition sales. *Jackson,* 746 F.3d at 960-966. Other courts have also applied intermediate scrutiny to review regulations restricting LCMs. *See Heller II*, 670 F.3d at 1261-62; *Shew*, 2014 WL 346859 at *7-9. Intermediate scrutiny applies here as well.

Intermediate scrutiny requires a showing that the asserted governmental end is "significant," "substantial," or "important." *See, e.g., Turner Broad. Sys., Inc. v. F.C.C.,* 512 U.S. 622, 662 (1994). As Sunnyvale details, the Ordinance easily satisfies intermediate scrutiny as it is reasonably related to important governmental interests such as preservation of public safety and the prevention of crime. *See, e.g., United States v. Salerno*, 481 U.S. 739, 748-50 (1987); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976). As described above, LCMs jeopardize public safety by allowing the rapid fire of ammunition without the need to reload as often, are

frequently used in mass public shootings, and jeopardize the law enforcement officers who serve and protect the citizenry. Sunnyvale has an interest in preventing devastating attacks committed with LCMs against its citizens and personnel. Given the real, immediate, and ongoing threats to the safety of the public and law enforcement caused by LCMs, Sunnyvale has made a reasonable choice to reduce these threats by prohibiting their possession with a regulation that overwhelmingly passed with nearly two-thirds voter approval. Since the most effective way to eliminate the danger and destruction caused by LCMs is to prohibit their possession, a substantial relationship clearly exists between the Ordinance and the government's significant interests in preserving public safety.

CONCLUSION

This Court should affirm the holding of the district court.

Respectfully submitted,

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/s/Shannon S. Broome
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Dated: June 24, 2014

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of Law Center to Prevent Gun Violence and Cleveland School Remembers Amici Curiae on Behalf of Appellees with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 24, 2014.

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