No. 19-55376

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGINIA DUNCAN et al.,
Plaintiffs and Respondents,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Defendant and Appellant.

***AMICI CURIAE* BRIEF FOR NATIONAL AFRICAN AMERICAN GUN ASSOCIATION, INC. AND PINK PISTOLS IN SUPPORT OF APPELLEES AND IN SUPPORT OF AFFIRMANCE**

Appeal from the U.S. District Court
for the Southern District of California
No. 17-cv-1017-BEN-JLB
The Honorable Roger T. Benitez, Judge

Stephen P. Halbrook
3925 Chain Bridge Road
Suite 403
Fairfax, VA 22030
(703) 352-7276
protell@aol.com

Nezida S. Davis
Davis Bakari Law LLC
2915 Pleasant Ridge Dr.
Decatur, GA 30034
(404) 771-1832
nsdavis@davisbakarilaw.com

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

The National African American Gun Association, Inc., is a nonprofit association that has no parent corporations. Since it has no stock, no publicly held company owns 10% or more of its stock. The Pink Pistols is a nonprofit organization that has no parent corporations, but is affiliated with Operation Blazing Sword, Inc., which is a nonprofit association. Since neither has any stock, no publicly held company owns 10% or more of its stock.

Date: September 20, 2019

Respectfully Submitted,

/s/ Stephen P. Halbrook
Counsel for Amici Curiae
National African American Gun Association, Inc.
Pink Pistols

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES Page

CONSTITUTIONS

STATUTES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

IDENTITY OF THE AMICI CURIAE

The National African American Gun Association, Inc. (NAAGA) is a nonprofit association with headquarters in Griffin, Georgia, and is organized under Internal Revenue Code § 501(c)(4).[1] NAAGA was founded in 2015 to defend the Second Amendment rights of members of the African American community. NAAGA has seventy chapters with approximately 30,000 members in thirty States.

NAAGA's mission is to establish a fellowship by educating on the rich legacy of gun ownership by African Americans, offering training that supports safe gun use for self defense and sportsmanship, and advocating for the inalienable right to self defense for African Americans. Its goal is to have every African American introduced to firearm use for home protection, competitive shooting, and outdoor recreation. NAAGA welcomes people of all religious, social, and racial perspectives, including African American members of law enforcement and active/retired military. NAAGA chapters in California include the Bobby Seale Gun & Rifle Club in Los Angeles and four other clubs throughout the state.[2]

The Pink Pistols, which was founded in 2000, is a nationwide, grass-roots

---

[1]No counsel for a party authored this brief in whole or in part nor did such counsel or any party make a monetary contribution to fund the preparation or submission of this brief. Preparation and submission of this brief was funded by the NRA Civil Rights Defense Fund.

[2]See https://naaga.co/chapters/.

shooting society that honors gender and sexual diversity and advocates the responsible use of firearms for self-defense. It is affiliated with Operation Blazing Sword, Inc., which is headquartered in Palm Coast, Florida. Pink Pistols represents members of the Lesbian, Gay, Bisexual or Transgender community ("LGBT"), who are disproportionately the victims of hate crimes and other types of criminal violence. Its creed is that, "Without self-defense, there *are* no gay rights." It is the largest LGBT self-defense organization in the world, with over 45 chapters and thousands of members throughout the United States. Pink Pistols is open to all without regard to gender identity or sexual orientation.

The Pink Pistols meet monthly at local firing ranges to practice shooting, and to acquaint people new to firearms with them. Their goal is change the public perception of the sexual minorities, such that those who have in the past perceived them as safe targets for violence and hateful acts – beatings, assaults, rapes, murders – will realize that a segment of the sexual minority population is now armed and effective with those arms.[3]

NAAGA and Pink Pistols will bring before the Court matter not brought to its attention by the parties. All parties have consented to the filing of this amicus curiae brief.

---

[3]See http://www.pinkpistols.org/about-the-pink-pistols/.

SUMMARY OF ARGUMENT

Magazines are encompassed in the textual reference to "arms" in the Second Amendment. The Founding arms guarantees were adopted at the dawn of the development of repeating firearms. The Second Amendment was understood to protect a robust right to have "arms." The Militia Act of 1792 reflects the understanding that the right to bear "arms" includes militia-type arms.

Improved repeating firearms were included in the understanding of the right to bear arms in the early Republic. Prohibitions on the keeping and bearing of arms by African Americans reflected their status as slaves or non-citizens. Repeating firearms with extended magazines were in common use when the Fourteenth Amendment was adopted in part to protect the right to bear arms from state infringement. The Civil Rights Act of 1871 was designed in part as a remedy for infringement on the right to bear arms.

Restrictions on repeating firearms were prompted by Jim Crow laws and Prohibition, but they were outliers. Firearms with detachable magazines have been commonly used for lawful purposes for well over a century. Finally, minority communities have a special interest in recognition of full Second Amendment rights, including the right to possess standard magazines.

ARGUMENT

Introduction

Receipt of a large-capacity magazine is punishable by imprisonment not exceeding one year or imprisonment pursuant to § 1170(h). California Penal Code § 32310(a). Section 1170(h)(1), in turn, makes the offense punishable by a term of imprisonment in a county jail for 16 months, or two or three years. Possession of such magazine is an infraction punishable by a $100 fine per magazine or a misdemeanor punishable by imprisonment not exceeding one year, or both.

"'[L]arge-capacity magazine' means any ammunition feeding device with the capacity to accept more than 10 rounds . . . ." § 16740. The number ten appears to have been arbitrarily chosen. In reality, there is nothing "large" about magazines that hold over ten rounds, as they come standard with many firearms and are commonplace.

I. MAGAZINES ARE "ARMS" UNDER THE TEXT AND ORIGINAL UNDERSTANDING

A. Magazines are Encompassed in the Textual Reference to "Arms" in the Second Amendment

Standard capacity magazines, including those that hold more than ten cartridges, are "arms" in the meaning of the Second Amendment, which provides: "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." The magazine ban infringes on the right guaranteed therein.

In addition to magazines being in the scope of the generic term "arms," arms useful in a militia are presumptively protected. The term "bear arms" suggests that the right includes such hand-held arms as a person could "bear," such as rifles, shotguns, and pistols, but not heavy ordnance which one could not carry.

The "arms" protected by the Second Amendment, without any revision to the text, keeps pace with modern technology. "Just as the First Amendment protects modern forms of communications, . . . and the Fourth Amendment applies to modern forms of search, . . . the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008).

While there is a historical tradition of "prohibiting the carrying of 'dangerous and unusual weapons,'" a weapon is not "unusual" because it is "a thoroughly modern invention." *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028 (2016) (*per curiam*). Moreover, "the weapons most commonly used today for self-defense, namely, revolvers and semiautomatic pistols," did not exist at the end of the 18th century. *Id*. at 1031 (Alito, J., concurring). "Revolvers were virtually

unknown until well into the 19th century, and semiautomatic pistols were not invented until near the end of that century." *Id*. at 1030-31. Yet they are protected by the Second Amendment despite that they fire multiple rounds or have detachable magazines.

B. The Founding Arms Guarantees were Adopted at the Dawn of the Development of Repeating Firearms

State constitutional guarantees of the right to keep and bear arms began to be adopted in 1776, continued to be adopted as new states were admitted to the United States, and continued to be revised and strengthened through current times.[4] This process was ongoing with every step of development of firearms technology, from single shots through repeaters using first, tubular magazines, and then, detachable magazines. This constant rejuvenation of arms guarantees alongside of constant improvement in arms technology demonstrates the understanding that modern arms maintain constitutional protection.

The perceived need to guarantee the right to bear arms stemmed in part from the confiscation of arms by the British. "In the tumultuous decades of the 1760's and 1770's, the Crown began to disarm the inhabitants of the most rebellious areas." *Heller*, 554 U.S. at 594. When General Gage ordered the people of Boston

[4]See "State Constitutional Right to Keep and Bear Arms Provisions," http://www2.law.ucla.edu/volokh/beararms/statecon.htm.

to surrender their arms in 1775, a contemporaneous account recorded that "the people delivered to the selectmen 1778 fire-arms, 634 pistols, 973 bayonets, and 38 blunderbusses." Richard Frothingham, *History of the Siege of Boston* 95 (1903). As the combination of firearms and bayonets reflects, many military and civilian arms were one and the same.

The first state declarations of rights reacted to the confiscation of arms, an endeavor in which California is now engaged through its magazine ban. Two state constitutions provided: "That the people have a right to bear arms for the defense of themselves, and the state . . . ." Pa. Dec. of Rights, Art. XIII (1776); Vt. Const., Art. I, § 15 (1777). See also N.C. Dec. of Rights, Art. XVII (1776) ("That the people have a right to bear arms for the defense of the state"; Mass. Dec. of Rights, XVII (1780) ("The people have a right to keep and bear arms for the common defence.").

While most firearms at the Founding had to be reloaded after each shot, repeating firearms – guns that fire multiple rounds without reloading – had been developed two centuries before that.[5] John Cookson of Boston advertised

[5]Around 1590, a 16-shot wheel-lock, .67-caliber rifle was being made. "A Sixteenth Century 16-Shooter," https://www.nrablog.com/articles/2017/11/a-sixteenth-century-16-shooter/. Invented sometime in the 1600s, Kalthoff repeating flintlock muskets were manufactured with the capacity to fire 12 and even 30 shots. "The Kalthoff Repeater," https://firearmshistory.blogspot.com/2014/02/the-

repeating firearms that fired nine shots in the *Boston Gazette* in 1756. Eleven shot repeaters were also made.[6]

Repeating firearms continued to be developed during the American Revolution. In 1777, Joseph Belton wrote to the Continental Congress: "I have discovered an improvement in the use of Small Armes, wherein a common small arm may be maid to discharge eight balls one after another, in eight, five or three seconds of time . . . ." Robert Held, *The Belton Systems, 1758 and 1784-86: America's First Repeating Firearms* 17 (1986). Belton conducted test firing to members of Congress, which then authorized Belton to make 100 muskets "which will discharge eight rounds with once loading . . . ." *Id*.

Belton then improved the musket to fire 16 or 20 rounds, and a Congressional commission reported to Congress that they had "examined Mr. Belton's new Constructed Musket from which the discharg'd sixteen balls loaded at one time," and recommended that it be taken into the service. *Id*. at 37.

As this and other examples reflect, the Founding generation was aware of improvements in firearms technology that allowed repeated shots to be fired

---

kalthoff-repeater.html.

[6]"Cookson repeater," https://www.secret-bases.co.uk/wiki/Cookson_repeater."Pim, John," http://american-firearms.com/american-firearms/z-html/company-P/Pim,%20John/Pim,%20John.html.

without reloading. Such firearms were well within the right to bear "arms" for defense of self and state declared in the first state constitutions.

C. The Second Amendment was Understood to Protect a Robust Right to Have "Arms"

"The right to keep and bear arms was considered . . . fundamental by those who drafted and ratified the Bill of Rights." *McDonald v. City of Chicago*, 561 U.S. 742, 768 (2010), citing, *inter alia*, S. Halbrook, *The Founders' Second Amendment* 171-278 (2008). The Court characterized the right as "fundamental" through the periods of American history from the founding through current times. *Id*. at 767-91.

When the federal Constitution was proposed without a bill of rights in 1787, the Federalists argued that none was needed because rights were inherent and the people were armed to protect their rights. Noah Webster suggested that the people would have arms that would be on a par with those of a standing army: "The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any band of regular troops that can be, on any pretence, raised in the United States." Noah Webster, *An Examination of the Leading Principles of the Federal Constitution* 43 (1787).

The Anti-Federalists demanded a bill of rights. The Pennsylvania Dissent of

Minority proposed: "That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game . . . ." 2 *Documentary History of the Ratification of the Constitution* 623-24 (1976).

Such demands were not limited to Anti-Federalists. Samuel Adams proposed in the Massachusetts convention "that the said Constitution be never construed . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms . . . ." *Id.*, vol. 6, at 1453 (2000). New Hampshire proposed that "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion. *Id.*, vol. 18, at 188 (1995).

In *The Federalist* No. 46, James Madison heralded "the advantage of being armed, which the Americans possess over the people of almost every other nation," adding: "Notwithstanding the military establishments in the several kingdoms of Europe, . . . the governments are afraid to trust the people with arms." *Id.*, vol. 15, at 492-93.

The Second Amendment's militia clause dictates the type of "arms" that are guaranteed in the substantive guarantee. A well regulated militia was seen as necessary to repel invasions, suppress insurrections, and resist tyranny. Historically, "tyrants had eliminated a militia consisting of all the able-bodied men

. . . simply by taking away the people's arms . . . ." *Heller*, 554 U.S. at 598. Preservation of the militia was thus the Amendment's stated purpose, although most valued the right more for self-defense and hunting. *Id*. at 598-99.

The Second Amendment embodies a firm trust of the people with arms. Today, California trusts no ordinary citizen so much as to possess a magazine with eleven rounds. That is wholly inconsistent with the Amendment's guarantee.

D. The Militia Act of 1792 Reflects the Understanding that the Right to Bear "Arms" Includes Militia-Type Arms

The federal Militia Act of 1792 particularized the meaning of a "well regulated militia" and of the "arms" the people had a right to keep and bear. In debate, Rep. James Jackson explained: "In a Republic every man ought to be a soldier, and be prepared to resist tyranny and usurpation, as well as invasion . . . ." 14 *Documentary History of the First Federal Congress* 73-74 (1996). Similarly, Rep. Roger Sherman "conceived it to be the privilege of every citizen, and one of his most essential rights, to bear arms, and to resist every attack upon his liberty or property, by whomsoever made." *Id*. at 92-3.

The Militia Act required enrollment of "each and every free able-bodied white[7] male citizen" aged 18 to 44 years old. § 1, 1 Stat. 271 (1792). Each

[7]In 1867, the term "white" was deleted. 14 Stat. 422, 423 (1867).

militiaman was required to arm himself as follows:

> That every citizen so enrolled and notified, shall . . . provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle and a quarter of a pound of powder . . . .

Id.

A "musket" and "firelock" were defined in part as as "a species of fire-arms used in war . . . ." Noah Webster, *An American Dictionary of the English Language* (1828). The ammunition quantities of twenty-four and twenty rounds respectively were minimums – no maximum was set.

With bayonets, ammunition never gives out, so-to-speak. An edged weapon can be used without end as long as the user is in proximity to the targets and has the upper hand, without any need to "reload."

In sum, the militia arms to which every citizen was entitled included firearms, multiple rounds of ammunition, and bayonets. The magazine ban is inconsistent with his historical tradition.

II. FIREARMS WITH MAGAZINES WERE CONSIDERED "ARMS" PROTECTED BY THE FOURTEENTH AMENDMENT

A. Improved Repeating Firearms were Included in the Right to Bear Arms in the Early Republic

St. George Tucker wrote that "wherever the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction." 1 Tucker, *Blackstone's Commentaries*, App., 300 (1803). California's pretext for the magazine ban is that the people must be disarmed for their own good.

The same year that Tucker wrote the above, Meriwether Lewis acquired a repeating air rifle with a magazine capacity of twenty-two balls that could be fired rapidly. Invented in 1778, it was used by the Austrian military. Its repeated use in the Lewis and Clark expedition was recorded in their diaries.[8]

Antebellum judicial decisions reflected the broad scope of protected arms. *Nunn v. State*, 1 Ga. 243, 251 (1846), explained:

> The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free

[8] "The Girandoni Air Rifle," *Defense Media Network*, May 14, 2013, https://www.defensemedianetwork.com/stories/the-girandoni-air-rifle/.

State.

The above explanation "perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause . . . ." *Heller*, 554 U.S. at 612. The magazine ban frustrates that purpose.

B. Prohibitions on the Keeping and Bearing of Arms by African Americans Reflected Their Status as Slaves or Non-Citizens

From colonial times, slaves could not "keep or carry a gun," one of the many disabilities they suffered. St. George Tucker, *A Dissertation on Slavery* 65 (1796). Moreover, free blacks were prohibited from possessing arms, especially defensive or militia-type arms, without a license, which was subject to an official's discretion. Such laws reflected that African Americans were not recognized to be among "the people" with the rights of citizens.

Virginia law provided that "[n]o negro or mulatto slave whatsoever shall keep or carry any gun, powder, shot, club or other weapon whatsoever, offensive or defensive . . . ." Va. 1819, c. 111, § 7. Further, "[n]o free negro or mulatto, shall be suffered to keep or carry any fire-lock of any kind, any military weapon, or any powder or lead, without first obtaining a license . . . ." *Id*. § 8.

As a Virginia court held, among the "numerous restrictions imposed on this class of people [free blacks] in our Statute Book, many of which are inconsistent

with the letter and spirit of the Constitution, both of this State and of the United States," was the restriction "upon their right to bear arms." *Aldridge v. Commonwealth*, 2 Va. 447, 449 (Gen. Ct. 1824).

Maryland made it unlawful "for any negro or mulatto . . . to keep any . . . gun, except he be a free negro or mulatto . . . ." Chap. 86, § I (1806), in 3 Laws of Maryland 297 (1811). But possession of militia-type arms by free persons of color required a license: "No free negro shall be suffered to keep or carry a firelock of any kind, any military weapon, or any powder or lead, without first obtaining a license . . . ." Art. 66, § 73, 1 Maryland Code 464 (1860).

North Carolina made it unlawful "if any free negro, mulatto, or free person of color, shall wear or carry about his or her person, or keep in his or her house, any shot gun, musket, rifle, pistol, sword, dagger or bowie-knife, unless he or she shall have obtained a licence . . . ." *State v. Newsom*, 27 N.C. 250, 207 (1844) (Act of 1840, ch. 30). This was held to be constitutional because "free people of color cannot be considered as citizens . . . ." *Id*. at 254.

Similar statements were made by other state courts. "Free persons of color have never been recognized here as citizens; they are not entitled to bear arms . . . ." *Cooper v. Savannah*, 4 Ga. 72 (1848). The police power was said to justify restrictions such as "the prohibition of free negroes to own or have in possession

fire arms or warlike instruments." *State v. Allmond*, 7 Del. 612, 641 (Gen. Sess. 1856).

Scott v. Sanford, 60 U.S. (19 How.) 393 (1857), notoriously held that African Americans had no rights that must be respected. It argued against recognition of their citizenship because it "would give to persons of the negro race . . . the full liberty of speech . . ., and to keep and carry arms wherever they went." *Id.* at 417.

In sum, having no arms right was an incident of slavery. Even free blacks were required to obtain a license to possess a firearm, particularly a militia-type arm. Such laws were based on the denial of the rights of citizenship to African Americans.

C. Repeating Firearms with Extended Magazines were in Common Use when the Fourteenth Amendment was Adopted in Part to Protect the Right to Bear Arms from State Infringement

One of the rights understood to be protected by the Fourteenth Amendment was the right to keep and bear arms, deprivation of which African Americans were subjected even after the abolition of slavery. Among the commonly-possessed arms in this epoch were repeating rifles with magazines holding far more than ten cartridges.

The invention of fixed cartridges paved the way for mass production of

repeating, lever-action firearms with magazines of various capacities. The Volcanic rifle, designed in 1856, had a magazine, depending on barrel size, holding 20, 25, or 30 cartridges. Robert F. Williamson, *Winchester: The Gun that Won the West* 9-13 (1952).

The design developed into the Henry Repeating Rifle in 1860, which evolved into the Winchester Model 1866. The rifle version held 17 rounds and the carbine held 12. *Id*. at 22, 49.

Simultaneous with such developments in firearms technology was the extension of the right to keep and bear arms to African Americans. "In the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves." *Heller*, 554 U.S. at 614, citing S. Halbrook, *Freedmen, the Fourteenth Amendment, & the Right to Bear Arms, 1866-1876* (1998).

The first state law noted in *McDonald* as typical of what the Fourteenth Amendment would invalidate required a license to have a firearm that an official had discretion to deny. Mississippi provided that "no freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry

fire-arms of any kind . . . ." Certain Offenses of Freedmen, 1865 Miss. Laws p. 165, § 1, quoted in *McDonald*, 561 U.S. at 771.

South Carolina provided that no person of color "shall, without permission in writing from the District Judge or Magistrate, be allowed to keep a fire arm," except "the owner of a farm, may keep a shot gun or rifle, such as is ordinarily used in hunting, but not a pistol, musket, or other fire arm or weapon appropriate for purposes of war." S.C. Stat., No. 4730, § XIII, 250 (1865). An African American convention in South Carolina resolved that "the late efforts of the Legislature of this State to pass an act to deprive us of arms be forbidden, as a plain violation of the Constitution . . . ." 2 *Proceedings of the Black State Conventions, 1840-1865*, 302 (1980).

Through Gen. D. E. Sickles' General Order No. 1, the Freedmen's Bureau nullified South Carolina's gun ban as follows:

> The constitutional rights of all loyal and well disposed inhabitants to bear arms, will not be infringed; nevertheless this shall not be construed to sanction the unlawful practice of carrying concealed weapons; nor to authorize any person to enter with arms on the premises of another without his consent.

Cong. Globe, 39th Cong., 1st Sess., 908-09 (1866).

This order was repeatedly printed in the *Loyal Georgian*, a black newspaper, beginning with the issue of Feb. 3, 1866, at 1. That issue also stated: "All men,

without distinction of color, have the right to keep and bear arms to defend their homes, families or themselves." *Id.* at 3. See also *Heller*, 554 U.S. at 615.

"In debating the Fourteenth Amendment, the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection." *McDonald*, 561 U.S. at 775. Senator Samuel Pomeroy noted that the "safeguards of liberty" included "the right to bear arms for the defense of himself and family and his homestead." *Id*., citing Cong. Globe, 39th Cong., 1st Sess., 1182 (1866).

Such Second Amendment deprivations were debated in bills leading to enactment of the Freedmen's Bureau Act and the Civil Rights Act of 1866. Rep. Thomas Eliot, sponsor of the former, explained that the bill would render void laws like that of Opelousas, Louisiana, providing that no freedman "shall be allowed to carry fire-arms" without permission. Cong. Globe, 39th Cong., 1st Sess. 517 (1866). He quoted from a report that in Kentucky "[t]he civil law prohibits the colored man from bearing arms . . . ." *Id*. at 657.

As passed, the Freedmen's Bureau Act, § 14, declared that:

> the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such State or district without respect to race or color or previous condition of slavery.

14 Stat. 173, 176-77 (1866).

"Section 14 thus explicitly guaranteed that 'all the citizens,' black and white, would have 'the constitutional right to bear arms.'" *McDonald*, 561 U.S. at 773. It is worth repeating that the "arms" of that epoch included repeating firearms, including rifles with magazines holding as many as thirty rounds.

Introducing the Fourteenth Amendment in the Senate, Jacob Howard referred to "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as . . . the right to keep and bear arms . . . ." Cong. Globe, 39th Cong., 1st Sess. 2765 (1866). He averred: "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id*. at 2766.

"In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." *McDonald*, 561 U.S. at 777. As such, the right of a law-abiding person to have standard magazines for firearms may not be prohibited.

D. The Right to Bear Arms Was Understood as Protected by the Civil Rights Act of 1871

"[I]n debating the Civil Rights Act of 1871, Congress routinely referred to the right to keep and bear arms and decried the continued disarmament of blacks in

the South." *McDonald*, 561 U.S. at 776, citing Halbrook, *Freedmen* 120-131. Today's 42 U.S.C. § 1983, the Act provides that any person who, under color of State law, subjects a person "to the deprivation of any rights, privileges, or immunities secured by the Constitution" is civilly liable. 17 Stat. 13 (1871).

"[I]n passing § 1, Congress assigned to the federal courts a paramount role in protecting constitutional rights." *Patsy v. Board of Regents*, 457 U.S. 496, 503 (1982). Rep. Henry Dawes explained how the federal courts would protect "these rights, privileges, and immunities . . . ." *Id*., quoting Cong. Globe, 42d Cong., 1st Sess., 476 (1871). Dawes had just noted that the citizen "has secured to him the right to keep and bear arms in his defense." Cong. Globe, supra, at 475-76. See *McDonald*, 561 U.S. at 835 (Thomas, J., concurring).

What "arms" were considered to be protected in this era? *Andrews v. State*, 50 Tenn. 165, 179 (1871) (endorsed by *Heller*, 554 U.S. at 629), responded:

> Such, then, as are found to make up the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defense of his own liberties, as well as of the State. Under this head, with a knowledge of the habits of our people, and of the arms in the use of which a soldier should be trained, we would hold, that the rifle of all descriptions, the shot gun, the musket, and repeater, are such arms; and that under the Constitution the right to keep such arms, can not be infringed or forbidden by the Legislature.

In sum, the rights of the citizen protected from state action by the Fourteenth Amendment were understood to include the right to possess repeating arms with

magazines.

III. DETACHABLE MAGAZINES HAVE MET THE "COMMON USE" TEST FOR WELL OVER A CENTURY

A. Restrictions Prompted by Jim Crow Laws and Prohibition

The ban on magazines is but one of an array of restrictions that discourage firearm ownership, particularly among the poor and minorities. Historically such restrictions have functioned to repress exercise of Second Amendment rights.

The Fourteenth Amendment did away with actually naming African Americans in laws prohibiting the right to keep and bear arms. Instead, in the Jim Crow era, facially-neutral laws imposed prohibitive fees and restrictions on the poor and were selectively enforced in ways to deny the right of black citizens to possess and carry arms.

Besides handguns, repeating rifles were targeted. In 1893, Florida made it a crime for a person to carry or have in one's manual possession "a pistol, Winchester rifle or other repeating rifle" without a license. *Watson v. Stone*, 148 Fla. 516, 519, 4 So. 2d 700 (1941). It was explained:

> The original Act of 1893 was passed when there was a great influx of negro laborers in this State . . . . [T]he Act was passed for the purpose of disarming the negro laborers . . . . The statute was never intended to be applied to the white population and in practice has never been so applied.

Id. at 524 (Buford, J., concurring).

It was estimated that "80% of the white men living in the rural sections of Florida have violated this statute," not more than 5% of the men in Florida who own pistols and repeating refles have ever applied" for a license, and that "there had never been . . . any effort to enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention of the Constitution . . . ." *Id*. It was unlikely that the poor, especially African Americans, could have afforded a license or that it would have been issued to them.

During Prohibition, restrictions on firearms that would shoot more than a certain number of rounds before reloading were enacted in three states, only to be repealed. In 1927, Michigan banned firearms that could fire more than sixteen times without reloading,[9] and Rhode Island banned firearms that shot more than twelve shots semiautomatically.[10] In 1933, Ohio enacted a law requiring a special permit for, but not banning, a firearm that fired more than eighteen shots semiautomatically.[11]

These laws did not restrict magazines as such, and no other states enacted similar laws, which were exceptional outliers. For the first time in American history,

---

[9]Act No. 373, § 3, 1927 Mich. Pub. Acts 888-89; repealed, Act No. 175, sec. 1, § 224, 1959 Mich. Pub. Acts 249, 250.

[10]Ch. 1052, §§ 1, 4, 1927 R.I. Acts & Resolves 256, 256–57; repealed, Ch. 278, sec. 1, § 11-47-2, 1975 R.I Pub. Laws 738, 738–39, 742.

[11]Act No. 166, sec. 1, §§ 12819-3, -4, 1933 Ohio Laws 189, 189; repealed, H.B. 234, § 1, 2014 Ohio Laws File 165.

in 1990 New Jersey prohibited detachable magazines holding more than the arbitrarily-chosen number of 15 rounds.[12] There is simply no historic tradition of restricting magazines or firearms with magazines.

B. Firearms with Detachable Magazines Have Been Commonly Used for Lawful Purposes for Well Over a Century

Rifles and pistols with detachable magazines came into wide use toward the end of the nineteenth century. After decades of more models with various magazine capacities, Winchester began making semiautomatic rifles with detachable magazines beginning with the Model 1907. Williamson, *Winchester* at 434.

In the early twentieth century, protected arms were held to include "the rifle, the musket, the shotgun, and the pistol," i.e., "all 'arms' as were in common use, and borne by the people as such when this provision was adopted." *State v. Kerner*, 181 N.C. 574, 107 S.E. 222, 224 (1921).

Semiautomatic rifles with magazines holding 10, 15, 20, and 30 cartridges became common for use in target shooting, competitions, hunting, self-protection, protection of livestock, law enforcement, military use, and other lawful purposes. Also in the twentieth century, semiautomatic pistols with magazines holding between eight and twenty cartridges came into general use for civilian and military purposes.

---

[12]N.J. L. 1990, c. 32, § 10 (1990), enacting N.J.S. §§ 2C:39-3(j) (banning possession), 2C:39-9(h) (banning sale).

See generally D. Kopel, "The History of Firearm Magazines & Magazine Prohibitions," 78 *Albany L. Rev*. 849 (2015).

Protected arms were said to be those that "are commonly kept and used by law-abiding people for hunting purposes or for the protection of their persons and property, such as semi-automatic shotguns, semi-automatic pistols and rifles." *Rinzler v. Carson*, 262 So. 2d 661, 666 (Fla. 1972). Magazines are essential parts of these firearms.

Regarding protected arms, *Heller* looked back to the Court's 1939 opinion in *United States v. Miller*, which held that judicial notice could not be taken that a short-barreled shotgun "is any part of the ordinary military equipment or that its use could contribute to the common defense," precluding it from deciding "that the Second Amendment guarantees the right to keep and bear such an instrument." *United States v. Miller*, 307 U.S. 174, 178 (1939) (quoted in *Heller*, 554 U.S. at 622). *Heller* explained:

> We think that *Miller*'s "ordinary military equipment" language must be read in tandem with what comes after: "[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."[13] . . . The traditional militia was formed from a pool of men bringing arms "in common use at the time" for lawful purposes like self-defense. . . . We therefore read *Miller* to say only that the Second Amendment does

[13]Quoting *Miller*, 307 U.S. at 179.

> not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.

Heller, 554 U.S. at 624-25.

Heller added 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.'" *Id*. at 627. No question exists that magazines holding over ten rounds are "in common use" and are "typically possessed by law-abiding citizens for lawful purposes."

Declaring the District's law unconstitutional, *Heller* observed: "Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban." *Id*. at 629. California's magazine ban here is in the same status and is equally unconstitutional.

IV. MINORITY COMMUNITIES HAVE A SPECIAL INTEREST IN RECOGNITION OF FULL SECOND AMENDMENT RIGHTS, INCLUDING THE RIGHT TO POSSESS STANDARD MAGAZINES

While the Bill of Rights protects the majority from govermental tyranny, it also protects minority communities from the tyranny of the majority. The bitter lessons of history features hate crimes,[14] lynchings, terrorist attacks, mob and gang violence,

[14]In 2017, 8,828 victims of hate crimes were reported. Some 60% were targeted because of the offenders' bias against race/ethnicity/ancestry, and 16% were targeted because of bias against sexual orientation. Uniform Crime Reporting (UCR) Program, 2017 Hate Crime Statistics, https://ucr.fbi.gov/hate-crime/2017/topic-pages/victims.

and all kinds of criminality. Oftentimes, immediate armed self-defense is the only protection. Depriving victims of standard magazines may make the difference between life and death.

McDonald states about governments that disarm and subject minorities to criminal attack:

> Amici supporting incorporation of the right to keep and bear arms contend that the right is especially important for women and members of other groups that may be especially vulnerable to violent crime. If, as petitioners believe, their safety and the safety of other law-abiding members of the community would be enhanced by the possession of handguns in the home for self-defense, then the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials.

McDonald, 561 U.S. at 790 & n.33 (citing, *inter alia*, Brief of Pink Pistols).

Such deprivations are not new in California, which historically "denied Chinese immigrants the right to bear arms." Assembly Concurrent Res. No. 42, Ch. 79, Relative to Chinese Americans in California (2009).[15] Its racist law against arms possession by non-naturalized residents, while deemed unconstitutional, allegedly had a "salutary effect in checking tong wars among the Chinese and vendettas among our people who are of Latin descent." "New Firearms Law Effective on August 7," *San Francisco Chronicle*, July 15, 1923, at 3.

---

[15]https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=20092 0100ACR42.

African American communities have at different times in history been subjected to lynchings, racist attacks, and gang violence. Law-abiding African Americans, including civil rights icons, have a long tradition of use of firearms to protect themselves and their communities.[16] Ida B. Wells wrote that a "Winchester rifle should have a place of honor in every black home, and it should be used for that protection which the law refuses to give."[17]

The Pride Fund to End Gun Violence, Equality California, and Gays Against Guns state: "They have a particular interest in the outcome of this litigation because the LGBTQ community has historically been the target of a disproportionate number of reported hate crimes, and was the victim of one of the deadliest mass shootings in U.S. history. The gunman in that shooting used large capacity magazines . . . ." Amici Brief at 1 (commenting on the 2016 Pulse nightclub shooting in Orlando).

"This is exactly the kind of heinous act that justifies our existence," commented Pink Pistols spokesperson Gwendolyn Patton, adding that if "someone hated gay people so much they were ready to kill or injure so many," then "they must be stopped

---

[16]*See* Nicholas Johnson, *Negroes and the Gun: The Black Tradition of Arms* (2014); Charles E. Cobb, Jr., *This Nonviolent Stuff'll Get You Killed* (2014).

[17]Ida B. Wells, *Southern Horrors: Lynch Law in All its Phases* 16 (1892).

as fast as someone tries to start them."[18] While the terrorist murderer would have thought nothing of a magazine restriction, had a patron at the club had a firearm, would it have been best to restrict it to a ten-round magazine?

Pride Fund claims that "Section 32310 will reduce the lethality of mass shootings like the Pulse nightclub attack by reducing the use of LCMs in such shootings." Br. at 9. There are untold millions of such magazines available in the United States, and a determined terrorist or madman would care less about § 32310.

We are told that police "arrived at the club within minutes of these initial shots," and that "[e]ven if the reloading process takes only seconds, that period of time can be of decisive significance." Pride Br. at 15-16. The facts tell a different story.

"At 2:02 a.m. . . ., a gunman traded shots with an off-duty police officer, slipped into a nightclub with a rifle and killed at least 50 people . . . . At 5:05 a.m., a tactical unit stormed the club and the shooter was killed."[19] So there was a three hour period in which the killer could leisurely change magazines. Patrons armed with firearms with standard magazines could have ended the carnage much earlier

---

[18]"Pink Pistols Saddened by Attack on Orlando Club," http://www.pinkpistols.org/2016/06/12/pink-pistols-saddened-by-attack-on-orlando-club/.

[19]"Police face questions about delayed response to Orlando shooting," https://www.latimes.com/nation/la-na-orlando-nightclub-police-20160612-snap-story.html.

Moreover, when the killer "entered the women's room, his rifle jammed, so he used his handgun."[20] Since he came armed with multiple firearms, at that point his rifle magazines became utterly irrelevant.

In short, the Pulse victims could be massacred because no one was armed. California's ban on standard magazines, coupled with its infringement on the right to bear arms, allows perpetrators to repeat such tragedies against defenseless victims.

One can go down the list of every horrible mass shooting and will find virtually no instance in which any difference would have been made regarding whether the shooter used ten round magazines or those that held more. The 2018 Parkland school shooter used only ten round magazines.[21] The impact of California's magazine ban is simply to deprive potential victims of the ability to defend themselves.

Professor Gary Kleck studied 23 instances in 1994-2013 in which over six victims were shot and "large capacity magazines" (LCMs) were used. Only one incident was found in which the perpetrator "may" have been stopped during a

---

[20]"'They took too damn long': Inside the police response to the Orlando shooting,"https://www.washingtonpost.com/world/national-security/they-took-too-damn-long-inside-the-police-response-to-the-orlando-shooting/2016/08/01/67a66130-5447-11e6-88eb-7dda4e2f2aec_story.html.

[21]"Parkland Shooter Did Not Use High-Capacity Magazines," https://www.nationalreview.com/2018/03/report-parkland-shooter-did-not-use-high-capacity-magazines/.

magazine change. The study concluded:

> In all of these 23 incidents, the shooter possessed either multiple guns or multiple magazines, meaning that the shooter, even if denied LCMs, could have continued firing without significant interruption by either switching loaded guns or changing smaller loaded magazines with only a 2- to 4-seconds delay for each magazine change. Finally, the data indicate that mass shooters maintain such slow rates of fire that the time needed to reload would not increase the time between shots and thus the time available for prospective victims to escape.

Gary Kleck, "Large-Capacity Magazines and the Casualty Counts in Mass Shootings," 17(1) *Justice Research and Policy* (2016).[22]

"Recognizing the occasional tyrannies of governing majorities, they [the Founders] amended the Constitution so that free speech and assembly should be guaranteed. Fear of serious injury cannot alone justify suppression of free speech and assembly." *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring). The Founders also amended the Constitution so that the right to keep and bear arms should be guaranteed. Irrational fear of exercise of the right by law-abiding citizens cannot justify suppression of the right.

CONCLUSION

This Court should affirm the judgment of the lower court.

[22]https://journals.sagepub.com/doi/abs/10.1177/1525107116674926.

Date: September 20, 2019

Respectfully Submitted,
National African American Gun Association, Inc.
Pink Pistols
Amici Curiae

By Counsel

/s/ Stephen P. Halbrook
Stephen P. Halbrook
3925 Chain Bridge Road, Suite 403
Fairfax, VA 22030
(703) 352-7276
protell@aol.com

Nezida S. Davis
Davis Bakari Law LLC
2915 Pleasant Ridge Drive
Decatur, GA 30034
(404) 771-1832
nsdavis@davisbakarilaw.com

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(B) and Ninth Circuit Rule 32-1, the attached amici curiae brief is proportionately spaced, has a typeface of 14 points and contains 6972 words.

/s/ Stephen P. Halbrook
Stephen P. Halbrook

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 September 20, 2019.

Participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Date: September 20, 2019

/s/ Stephen P. Halbrook
Stephen P. Halbrook