No. 19-55376

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

VIRGINIA DUNCAN et al.,

Plaintiffs-Appellees,

v.

XAVIER BECERRA,

in his official capacity as
Attorney General of the State of California,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of California,
No. 3:17-cv-01017-BEN-JLB

BRIEF OF AMICUS CURIAE JOHN CUTONILLI IN OPPOSITION TO PETITION FOR REHEARING *EN BANC*

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28 September 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus John Cutonilli certifies that the amicus is not a publicly held corporation, that the amicus does not have a parent corporation, and that no publicly held corporation owns 10 percent or more of amicus's stock.

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INTEREST OF AMICUS CURIAE

Cutonilli is a resident of Maryland and is subject to laws like those under consideration in the California case. As he is unable to bring suit against Maryland due to the precedent set in *Kolbe v. Hogan,* 849 F.3d 114 (4th Cir. 2017), he seeks to provide additional insight into other aspects of the law that were neither addressed in Kolbe nor in the court's decision in this case. His intent is to help this court avoid previous errors so that other fellow Americans are not subject to such laws, which are detrimental to public safety. No counsel for any party authored this brief in whole or in part. Apart from amicus curiae, no person contributed money to fund this brief's preparation and submission.

There are several key considerations that this amicus brief brings to light, which are missing in the parties' briefs. It provides a different explanation as to why there is no intra- or inter-circuit conflict. It points out the insubstantial nature of the data used by California to justify the law in question and the logical fallacies inherent in their analysis of that data, which is why the law will not alleviate the harms in a direct and material way. It provides additional analysis into public safety, the limits of the government's interest in public safety as well as the role law-abiding individuals play in providing public safety.

Using the Korematsu case as an object lesson and infamous legal precedent, this brief underscores (1) the detrimental effects that arise when the constitutional rights of law-abiding citizens are unjustly curtailed because of the illicit acts of a few and (2) the vital role that the courts play in ensuring that government actions receive the "close scrutiny and accountability" needed to promote public safety while protecting the rights of law-abiding citizens.

INTRODUCTION

During World War II the United Stated forced the relocation and incarceration of more than 100,000 Japanese Americans, citing concerns for public safety. The constitutionality of their internment was litigated in *Korematsu v. United States,* 323 U.S. 214 (1944). The Supreme Court found that "exclusion of those of Japanese origin was deemed necessary because of the presence of an un-ascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country," *Id.* at 218. The Court's decision resulted in placing restrictions on the Japanese American population at large—most of whom were law-abiding citizens—because of the illicit acts of a few.

While the Court acknowledged that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," it still asserted that "pressing public necessity may sometimes justify the existence of such

restrictions…," *Id.* at 216. While claiming that it applied "the most rigid scrutiny," instead the Court deferred to the government's findings, stating an unwillingness to "reject as unfounded the judgment of the military authorities," *Id.* at 219.

Importantly, the dissent in Korematsu claimed that in deferring to the government, the Court had failed to rule on a key judicial question. In doing so, it had permitted the overstepping of "… the allowable limits of military discretion" and failed to impose "definite limits to [the government's] discretion," *Id.* at 234. In a statement that anticipates the future view of the courts and the American public on the Korematsu decision, the dissent further argued that:

> "[I]ndividuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support," *Id.* at 234 (Murphy, J., dissenting).

A subsequent trial held long after the war, *Korematsu v. United States,* 584 F Supp. 1406 (N. D. Cal. 1984), found that there is substantial evidence that the government omitted relevant information from the Court and also provided misleading information. While the Court decided not to determine any errors of law, it did grant a writ of *coram nobi* and cautioned subsequent courts that:

> "It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared

> to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused," *Id*. at 1420.

During a time of marked "distress … hostility and antagonism" over Second Amendment rights, California presents a similar case, arguing that the government's public safety interest supersedes constitutional guarantees. As in the case of Korematsu, California punishes law-abiding citizens for the felonious behavior of criminals. However, California fails to understand the limits of the government's public safety interests. It neglects to recognize the critical contribution to public safety made by law-abiding gun owners. It misinterprets precedent, and it promulgates misunderstanding and misinformation by relying on faulty data.

Considering what has been learned by Korematsu, it is hoped that this court will properly evaluate the legal merits of the case and, specifically, whether California makes reasonable inferences based on substantial evidence and meets the standard of intermediate scrutiny. It is hoped that the court will recognize that the illegal acts of some, however heinous, are insufficient to deny the constitutional rights of law-abiding citizens, whose responsible ownership and use of guns can be an indispensable benefit to both self-defense and public safety. It is hoped that at a time in our nation when critical legal issues are so frequently politicized and sensationalized that this court will be prepared to exercise its

authority "to protect all citizens from the petty fears and prejudices that are so easily aroused," *Id.* at 1420.

ARGUMENTS

1. There is no intra- or inter-circuit conflict

The Attorney General of California (AGCA) and the dissenting judge claim that the panel's decision conflicts with this Court's decision in *Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015) as well as "every other Circuit to address the Second Amendment issue presented here." Opn. 67 (Lynn, J., dissenting). They cite similarities in the various laws that prohibit the use of LCMs and similarity of the evidence used to defend the laws in question. Further, they claim that the opinions in the various cases are based on evidentiary records that are "nearly identical" and involve "many of the same experts and studies" Opn. 80-81 (Lynn, J., dissenting).

While the panel provided many ways to distinguish these cases and demonstrate that there is no intra- or inter-circuit conflict, there is an additional way to distinguish this case that warrants recognition and further demonstrates that there really is no intra- or inter-circuit conflict. Even if the claim of a "nearly identical" evidentiary record is accepted, the decisions lauded by the AGCA share a common distinguishing fault: none of them was based on effective scrutiny of the evidence presented by the government. In each case, sub-par evidence was either

accepted, overlooked, or the judge deferred the matter back to the legislature. This effectively circumvents intermediate scrutiny. This pattern is wholly unacceptable in cases in which laws limit a constitutional right and where intermediate scrutiny, at a minimum, is the accepted standard *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

In Fyock, the panel offers no independent analysis or critique of the government's evidence. Rather it simply quotes the district court's finding that the evidence "indicates" it meets intermediate scrutiny, Fyock 1000. The panel further concedes that "we decline to substitute our own discretion for that of the district court," Fyock 1001. The District Courts does not appear to really challenge the evidence for fear of making policy judgments better left to legislatures. Furthermore, there is no indication in any of these other circuit cases that the government's evidence was directly challenged or that there were any deficiencies found in the evidence the government presented.

Breaking with this pattern, the panel examined and directly challenged the government's evidence and found it to be "remarkably thin" Opn. 64-65. Supporting the panel's findings, the district court had earlier cited numerous examples of deficiencies in the government's evidence. While the panel did not expand on the district court's findings, these findings of evidential deficiency form the basis of its opinion.

Evidence is especially important to intermediate scrutiny because at a minimum the government "must demonstrate . . . that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994). When courts fail to uphold these requirements, they fail to maintain the standards of intermediate scrutiny. Without substantial evidence, the intermediate scrutiny standard devolves to the lower rational basis standard, which does not require substantial evidence. Instead, rational basis cases may be decided on "rational speculation unsupported by evidence or empirical data." *FCC v. Beach Communications, Inc.* 508 U.S. 307, 315 (1993) Rational basis is not appropriate for fundamental rights such as those of the Second Amendment, *Heller* at 628. As was the case many years ago with the Korematsu decision, the court failed to properly evaluate the evidence and instead deferred the evaluation of the evidence to the government. This compromised the constitutional rights of American citizens rather than protecting them.

Once the panel determined that this case was not based on a policy issue, Opn. 61, the panel constrained the legislature to the Constitution[1]. The panel got

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[1] "'The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.' Marbury v. Madison, 1 Cranch 137, 176, 2 L. Ed. 60 (1803). Our respect for Congress's policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed. 'The peculiar circumstances of the

this right: they applied the appropriate levels of scrutiny, found the government's evidence sorely lacking, and correctly ruled against the State of California in this case.

2. *The evidence fails to demonstrate that banning LCMs will achieve the stated public safety goals in a direct and material way.*

In its opening brief, the AGCA claims a public safety interest in "preventing and mitigating gun violence, particularly public mass shootings and the murder of law enforcement personnel," Opening Brief pg 35. It is incumbent upon this court, therefore, to determine if banning LCMs and limiting magazine capacity to a maximum of 10 rounds will prevent and mitigate this type of gun violence. The examples below show that the data used by the AGCA fails to *directly and materially* demonstrate that the proposed prospective and retrospective ban on LCMs with prevent or mitigate gun violence.

Reason 1: Data Shows that the Proposed Ten-Round Limit will not Prevent Gun Violence

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moment may render a measure more or less wise, but cannot render it more or less constitutional.' Chief Justice John Marshall, A Friend of the Constitution No. V, Alexandria Gazette, July 5, 1819, in John Marshall's Defense of McCulloch v. Maryland 190–191 (G. Gunther ed. 1969). And there can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits. Marbury v. Madison, supra, at 175–176." *Nat'l Fed'n of Indep. Bus. v. Sebelius* 567 U.S. 519, 538(2012)

It is demonstrated every day that that limiting magazine capacity to 10 rounds does not *prevent* gun violence. Ten rounds are more than enough to commit a mass shooting or the murder of law enforcement personnel. In fact, data supplied by the AGCA demonstrates that many public mass shootings are perpetrated without LCMs. Additionally, the lower court makes note of FBI data that demonstrates that the majority of feloniously killed law enforcement personnel are killed with 10 or fewer rounds. This evidence demonstrates that limiting magazines to 10 rounds does not prevent mass shootings or the murder of police personnel.

Reason 2: Insufficient Data to Demonstrate that Banning LCMs will Mitigate Gun Violence

It is further incumbent on the Court to demonstrate whether its proposed limitations would *mitigate* mass shootings and police murders alleviate these harms in a direct and material way. The AGCA contends that "LCMs enable a 'shooter to fire more bullets without stopping to reload,'" resulting in substantive increases in the average number of fatalities and injuries as compared to mass shootings that do not involve LCMs, Opening Brief pg 38. However, his assertion is unfounded. The AGCA provides no evidence that LCMs *caused* an increase in the number of injuries or fatalities or to rule out other factors that may have contributed to the outcome. For example, the AGCA provides no analysis of whether victims were grouped together, whether escape routes had been blocked

at the time of the shooting, or whether multiple guns may have been used, each of which might easily increase the number of people injured or killed. At best, the AGCA's assertions show correlation; they fail to demonstrate causation. The AGCA fails to demonstrate causation across the board—in its analysis of LCMs in mass public shootings, against law enforcement personnel, in crime, and in self-defense.

The AGCA further asserts that LCMs deprive the public and law enforcement of critical pauses during active shootings when potential victims might escape or the shooter might be stopped. However, there is very little data on how beneficial such pauses may be. It is known that during the Newtown mass shooting, for example, a pause allowed several victims to escape, but the evidence is inconclusive as to whether the shooter was reloading during that time or had paused for another reason. What is known is that the Newtown shooter reloaded at least five times based on the number of rounds fired, yet victims escaped during only one of those pauses, calling into question the true benefit of pauses in mitigating harm. Furthermore, there is indication that the pauses in this case were due to the rifle jamming or an error reloading, which may have caused a longer than normal pauses. During the Virginia Tech mass shooting, there were 17 pauses due to reloading, yet the AGCA provides no data to indicate any public benefit of those pauses. During the Fort Hood mass shooting, there were at least seven

pauses, yet there is no data to indicate any benefit of these pauses. In Aurora, a pause occurred when the firearm jammed, but the shooter continued to fire because he had additional firearms. No data has been provided to indicate any benefit of this pause.

The evidence brought to bear by the AGCA is not substantial enough to meet the standard of intermediate scrutiny. The little data that is available demonstrates that there is minimal public benefit to pauses. Other examples introduced by the AGCA serve as excellent examples of heroic citizens exploiting pauses to attack a shooter and protect themselves and others (see Argument 3), but they fall short of providing compelling evidence supporting the AGCA's specific claim that pauses to reload reduce injuries and fatalities. Fewer than half of the seven instances cited by the AGCA were examples of public mass shootings and the AGCA failed to provide evidence to show that the pauses cited were actually pauses to reload or pauses that occurred for some other reason.

Reason 3 – Data on the Number of Shots Fired is Based on Incomplete Data and Unfounded Assumptions

Similarly, the AGCA fails to provide compelling data related to the number of shots fired per self-defense incident. The AGCA attempts to show that civilians do not need LCMs because relatively few shots are fired during instances of self-

defense. To support this contention, the AGCA uses the NRA Armed Citizen database as its source for data. Problematically for the AGCA, this database typically does not report the number of shots fired. For example, the AGCA relies on reports dated from June 2016-May 2017, finding that that there were 81 self-defense incidents reported during that period. In most of those cases, however, a full *64 percent,* there was no data regarding the number of shots fired. Undeterred by a dearth of evidence, the AGCA took a dubious course and simply *assumed* an average number of shots fired in 64 percent of the instances cited—ensuring in the process that any instances of outlier data that may have occurred is replaced with average data that would better support the AGCA's position (See AGCA's Allen Exhibit footnote 3).

The AGCA also relies on a news stories, notoriously unreliable, to support its case. Again, when these sources fail to specify the number of shots fired, the AGCA simply posits an average (see AGCA's Allen Exhibit footnote 8) and draws conclusions sympathetic to its argument. Additionally, the AGCA bases its findings on a very limited subset of 200 news stories out of 35,000 possible stories. For reasons that are unclear and unexplained, the AGCA excluded any instances of self-defense that occurred outside the home. Statistically, such a low sampling number is likely to exclude rare events. This statistical fact very well may be evidenced by the fact that there are no instances of more than 10 rounds fired in the

200 stories selected by the AGCA to make its case. Interestingly, although the NRA database does not specifically track shots fired, of the 81 self-defense cases reported during the June 2016-May 2017 timeframe, there were only two incidents in which more than 10 rounds were fired. The myriad of flaws in the AGCA's methodology demonstrate that the AGCA's inferences are unfounded. There is currently a dearth of "substantial evidence" on the subject of rounds fired and insufficient evidence to draw reasonable inferences that these restrictions will alleviate these harms in a direct and material way.

Reason 4: LCMs are rarely used by NYC Law Enforcement Personnel, yet are still beneficial

While denying citizens the right to defend themselves using LCMs, the California legislature believes that law enforcement personnel should have LCMs. LCMs are also permitted for use by New York City police and that police department is among the few that publish data on the number of shots fired. The city's most recent *Use of Force Report* shows that in 2017, police in the most densely populated U.S. city (approx. 8.5 million people) responded to approximately 5.4 million calls for service[2]. Those 5.4 million calls for service resulted in 23 incidents of an officer firing during an adversarial conflict. During

[2] See https://www1.nyc.gov/site/nypd/stats/reports-analysis/use-of-force.page

these 23 incidents, 32 officers fired a total of 170 rounds, which equates to 7.4 rounds per incident or 5.3 rounds per officer. Eleven of the officers (34%) only fired one round. Nine officers (28%) fired 2-5 rounds. Seven officers (22%) fired 6-10 rounds. Four officers (13%) fired 11-20 rounds and one officer (3%) fired 20 rounds or more. These numbers confirm that the police rarely use the more than 10 rounds (6 incidents, ~0.0001% of the total calls). Yet the acceptance of LCMs by the California legislature demonstrates that they find public safety benefits to LCMs—even if more than 10 rounds are rarely used.

The same consideration ought to be given to law-abiding citizens providing for their self-defense. It may be a rare occurrence that requires more than 10 rounds, but the availability of additional rounds afforded by an LCM may be the difference between life and death. As is demonstrated in data from New York City, more than 10 rounds may be necessary to provide adequate defense against criminal attacks. Allowing law-abiding citizens to have LCMs allows them to protect themselves in such rare instances—and possibly protect others as well.

3. Public safety is provided by the people

The majority in the Korematsu case rationalized its position by claiming it supported the public good. “Pressing public necessity” 323 U.S. at 216 required the infringement of the rights of some people to protect the rights of others, or so the argument went at the time. Similarly, in many Second Amendment cases, the

government's interest in public safety is often used as a rationale for curtailing the constitutional rights of legal gun owners. Yet in these cases, not only are the abridgements of the rights of the law-abiding public rationalized away, but the material contribution to public safety made by those very gun owners is left unconsidered.

A long tradition of gun ownership for self- and community protection predates today's arguments for gun rights. This tradition can be traced to the 1285 Statue of Winchester, which required most men to maintain arms and actively keep the peace. When the Constitution was written, there was no organized police force, and it was not until the middle of the 19th century that most major urban police departments were established (Breyer dissent in *District of Columbia v. Heller* 554 US 570, 716 (2008)). Society depended on the armed, law-abiding citizen to protect the public peace. The Maryland State Police force pays homage to this long-standing tradition on its website:

> "Under English common law, every person had an active responsibility for keeping the peace…The responsibility included crime prevention through vigilance and the apprehension of suspected lawbreakers by groups of persons raising the 'hue and cry' or the more official 'posse comitatus.'"

Historically, as today, gun owners contribute directly to public safety. They protect themselves and their families, their property, and sometimes the lives and property of members of their community. While many examples of the lawful and,

indeed, selfless acts of gun owners can be found in the news, the balance of media coverage is given to illicit gun activity (gang violence, mass murders, etc.) that associates guns with criminal activity and fosters confusion between lawful and unlawful possession and use of firearms. Opponents of gun rights hold that the history of individual citizens contributing to the public safety is now irrelevant. While it is true that police forces make an invaluable contribution to public safety, they cannot be expected to provide for the safety of every individual.

Because the government has limited resources, there are limits to the degree of safety the government can provide. This is not merely a practical issue; it is a legal issue as well. As explained in *Warren v. DC,* 444 A. 2d 1 (DCCA 1981), "…courts have without exception concluded that when a municipality or other governmental entity undertakes to furnish police services, it assumes a duty only to the public at large and not to individual members of the community" *Id*. at 4. In that case, the District of Columbia was found to have based its case on the "uniformly accepted rule…that a government and its agents are under no general duty to provide public services, such as police protection, to any particular individual citizen" *Id.* at 4.

Consistently, courts have ruled that public safety, through the government's police power interests, is owed to the public at large and not to any specific individual. (*Warren v. DC,* 444 A. 2d 1 (DCCA 1981), .*Fried v. Archer,* 775 A. 2d

430 (Md. Ct. Spec. App.), 2001, *Castle Rock v. Gonzales,* 545 U.S. 748 (2005), *DeShaney v. Winnebago County,* 489 U.S. 189 (1989)). Therefore, the government has no interest in the protection of any specific individual because it cannot deliver protection at the individual level.

It is precisely for this reason that the individual right to self-defense is critical. Not only are lawful gun owners able to fill critical gaps in safety for their own benefit, but they may also provide protective benefits to the greater public. The self-responsible individual who is able and willing to contribute to his own self-defense is a vital component of public safety. Since an individual is a subset of the public, the safer individuals are, the greater is the level of general or public safety. The aggregation of each individual's safety contributes to the public's safety. The abridgement of individual rights, therefore, diminishes not only the individual's safety, but the public's safety as well.

CONCLUSION

This case can be readily distinguished from the other cases the AGCA and the dissenting judge claim are in conflict. Past courts have not properly scrutinized the data in previous cases. As in Korematsu, these courts punish law abiding citizens for the acts of criminals. Often, the government conflates correlation with causation and fails to show that the law in question will alleviate the stated harms

in a direct and material way. Additionally, the role the government plays in public safety is limited to general protection and does not include protecting any particular member of the public. Public safety, therefore, benefits from law-abiding citizens providing for their own self-defense and their ability to come to the aid of their neighbors.

The petition for rehearing en banc should be denied.

Respectfully submitted,

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28 September 2020

CERTIFICATE OF COMPLIANCE

1. This amicus brief complies with the length limits permitted by Ninth Circuit Rule 32-1 because the amicus brief contains 4137 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type.

Dated: 28 September 2020

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CERTIFICATE OF SERVICE

I hereby certify that on 28 September 2020, I electronically filed this document with the Clerk of the Court by using the CM/ECF system. I certify that the participants of this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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