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9

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
12 CIVIL DIVISION
13

14 **JAMES MILLER et al.,**

15 Plaintiffs,

16 **v.**

17
18 **CALIFORNIA ATTORNEY**
GENERAL ROB BONTA et al.,

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

**DEFENDANTS' RESPONSE TO
PLAINTIFFS' ADDITIONAL
BRIEF RE NEW YORK STATE
RIFLE & PISTOL ASS'N V. BRUEN**

Courtroom: 5A
Judge: Hon. Roger T. Benitez

Action Filed: August 15, 2019

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INTRODUCTION

As explained in Defendants’ supplemental brief and supporting declarations, Dkt. 137, California’s Assault Weapons Control Act (“AWCA”) satisfies the text-and-history standard adopted in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). Plaintiffs’ additional brief does not dispel those arguments and ignores the portions of *Bruen* that support the AWCA’s constitutionality. The challenged provisions of the AWCA do not burden conduct protected by the plain text of the Second Amendment, and even if they did, Defendants have amply demonstrated that the provisions are consistent with long-accepted traditions of regulating firearms and other dangerous weapons. Throughout American history, state and local governments have retained broad authority to restrict access to, and possession of, weapons deemed to pose significant public-safety risks at the time, as demonstrated by the legion of dangerous weapons restrictions and limitations on the storage and configuration of firearms enacted since the founding.

The AWCA provisions challenged here are consistent with the Nation’s traditions of regulating firearms and other weapons and thus are consistent with the Second Amendment itself. Just as the historical analogues singled out specific weapons for regulation while leaving alternative weapons available for effective self-defense, the AWCA merely restricts the use of certain combat-oriented accessories with certain firearms and does not prohibit possession of those underlying firearms, such as featureless AR-platform rifles, or a range of other firearms that may be used for self-defense. And that slight burden is comparable to the burdens imposed by the historical analogues and justified by comparable public-safety goals. Accordingly, at both the textual and historical stages of the analysis, the AWCA is consistent with the Second Amendment and should be upheld.¹

¹ In their additional brief, Plaintiffs ask for judgment without further proceedings. *See* Pls.’ Add’l Br. re *New York State Rifle & Pistol Ass’n v. Bruen* (“Pls.’ Add’l Br.”) at 1. As explained in Defendants’ Supplemental Brief, this is

I. PLAINTIFFS CANNOT DEMONSTRATE THAT THE PLAIN TEXT OF THE SECOND AMENDMENT COVERS THE COMBAT-ORIENTED ACCESSORIES OR CONFIGURATIONS REGULATED UNDER THE AWCA

At the textual stage of the analysis, Plaintiffs cannot establish that the firearms accessories and tactical configurations regulated by the AWCA are protected by the Second Amendment.² Before Defendants can be required to bear the burden of justifying the law based on history, Plaintiffs must first show that the Second Amendment’s plain text covers the manufacture, importation, sale, and possession of firearms equipped with certain combat-oriented accessories. Only “when the Second Amendment’s plain text covers an individual’s conduct” is the government required to “demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation.” Pls. Suppl. Br. at 1 (quoting *Bruen*, 142 S. Ct. at 2126).³ Here, Plaintiffs cannot show that the regulated accessories are “bearable arms” and that they are in “common use” for self-defense.

not an appropriate course of action. Defs.’ Suppl. Br. in Resp. to the Court’s Order of Aug. 29, 2022 (“Defendants’ Supplemental Brief” or “Defs.’ Suppl. Br.”) at 5–6, 74–75. But if the Court is inclined to enter judgment, Defendants respectfully request that the Court stay enforcement of any such judgment until Defendants have had an opportunity to seek a stay pending appeal from the Ninth Circuit. This case still “involves serious questions going to the merits,” and a stay would be in the public interest while any appeal proceeds, consistent with past practice in this litigation. *Miller v. Bonta*, 542 F. Supp. 3d 1009, 1069 (S.D. Cal. 2001), *vacated*, No. 21-55608, 2022 WL 3095986, at *1 (9th Cir. Aug. 1, 2022).

² Because the definitions in Penal Code section 30515 are severable, Cal. Penal Code § 30515(e), Plaintiffs must satisfy their burden as to *each* of the discrete definitions of an “assault weapon,” including each of the accessories listed in the statute and the configurations defining a rifle, pistol, or shotgun as an assault weapon.

³ See also Tentative Ruling on Mot. for Prelim. Inj. at 5 n.5, *Def. Distributed v. Bonta*, No. 22-cv-6200-GW (AGRx) (C.D. Cal. Oct. 21, 2022) (Dkt. 19) (“*Defense Distributed* Ruling”) (explaining that *Bruen* requires “plain-text analysis *first, then history if necessary*”). The district court adopted its tentative ruling denying the motion for preliminary injunction. Order, *Def. Distributed v. Bonta*, No. 22-cv-6200-GW (AGRx) (C.D. Cal. Oct. 24, 2022) (Dkt. 21).

A. The Accessories Regulated Under the AWCA Are Not Bearable Arms Subject to Second Amendment Protection

Plaintiffs acknowledge that the Second Amendment protects only *bearable* arms. Pls. Suppl. Br. at 3. As explained in Defendant’s supplemental briefing, however, nothing in Penal Code section 30515 prevents Californians from acquiring or possessing any bearable arms, including AR-platform rifles, so long as they are not semiautomatic centerfire rifles, semiautomatic pistols, or shotguns equipped with any of the qualifying combat-oriented accessories, or are not semiautomatic centerfire rifles less than 30 inches in length (which can be accomplished by equipping a firearm with either a shortened barrel, a collapsible stock, or both). *See* Busse Decl. ¶¶ 13–24 & Ex. A; Kapelsohn Dep. at 124 (“[T]here are clearly these featureless rifles in California that exist, that can be fired. If one practices with them enough, one can get good with them.”). In their additional brief, Plaintiffs argue that Penal Code section 30515 merely “describe[s] the ‘largely cosmetic features’ found on modern semi-automatic firearms.” Pls.’ Add’l Br. at 8 (quoting Hlebinsky Dep. at 21–22); *accord id.* at 9 (claiming that firearms with or without certain “exterior physical attributes,” such as certain stocks, pistol grips, muzzle devices, and barrel lengths, “are, in all relevant respects, the same”). In so arguing, Plaintiffs effectively *agree* that section 30515 regulates the use of certain accessories with certain types of firearms, without prohibiting the acquisition or possession of the underlying firearms themselves. Those accessories are not “bearable arms” warranting Second Amendment protection, nor are they necessary (like ammunition) to operate any firearm as designed. Defs.’ Suppl. Br. at 23–41; Busse Decl. ¶ 12.

This distinction between “Arms” that may be protected by the Second Amendment, and accessories that are not protected, is further supported by recent corpus linguistics analysis performed by Professor Dennis Baron, which was submitted on October 14, 2022 in a different Second Amendment case in the

1 District of Rhode Island. *See* Decl. of Dennis Baron, Ex. 2 (“Baron *Ocean State*
 2 Decl.”), *Ocean State Tactical, LLC v. Rhode Island*, No. 22-cv-00246-JJM-PAS
 3 (D.R.I.) (Dkt. 19-7) (filed Oct. 14, 2022).⁴ Corpus linguistics is a field that
 4 examines patterns in the meaning and usage of words in large databases of text
 5 (referred to in the field as “corpora”). Thomas R. Lee & James C. Phillips, *Data-*
 6 *Driven Originalism*, 167 U. Pa. L. Rev. 261, 267 (2019). These corpora contain
 7 digitized and searchable compilations of real-world sources, including books,
 8 newspapers, speeches, and transcripts, “drawn from a particular speech
 9 community” during particular times in history. *Id.* at 290. Professor Baron’s new
 10 corpus linguistics research is relevant to further understanding the original public
 11 meaning of the terms used in the Second Amendment.

12 Professor Baron’s corpus linguistics analysis was performed using three
 13 corpora containing text written around the time that the Second Amendment was
 14 ratified: the Corpus of Founding Era American English (“COFEA”) and the
 15 Corpus of Early Modern English (“COEME”).⁵ Baron *Ocean State* Decl. ¶ 14.
 16 COFEA includes close to 137 million words from over 126,000 sources written
 17 from 1760–1799, and COEME includes over 1 billion words from over 40,000 texts
 18 written from 1475–1800. *Id.* Professor Baron also examined several corpora
 19 containing text written around the time that the Fourteenth Amendment was
 20 ratified, including COEME and the Corpus of Historical American English
 21 (“COHA”),⁶ which contains 475 million words of text written from 1820–2020.

23 ⁴ A true and correct copy of Professor Baron’s declaration in *Ocean State*
 24 *Tactical, LLC v. Rhode Island* is attached hereto as Exhibit A. Its contents are
 25 incorporated by reference herein.

26 ⁵ Several corpora, including COFEA and COEME, are maintained by
 Brigham Young University. *See* <http://lawcorpus.byu.edu>.

27 ⁶ COHA, <https://www.english-corpora.org/coha/>.

1 *Id.*⁷ Professor Baron’s analysis examined the use of the terms “arms” and
 2 “accoutrements” in the respective corpora. *Id.* ¶¶ 24–48. Based on relevant corpus
 3 linguistics data, Professor Baron concluded that ammunition magazines would not
 4 fall within the historical meaning of the term “arms,” but rather would have been
 5 considered “accoutrements,” a term used during the relevant periods to refer to
 6 “ancillary equipment associated with soldiering, or service in the military.” *Id.*
 7 ¶ 24.⁸ Professor Baron reports that the “vast majority of examples” found in the
 8 corpora involve “accoutrements” functioning as “a catch-all term for military
 9 equipment *separate* from, and not including, *arms*.” *Id.* And he found no data
 10 indicating that the term “arms” included “accoutrements, magazines, or any other
 11 parts of weapons.” *Id.* ¶ 61 (emphasis omitted). Consistent with this corpus
 12 linguistics analysis, the various accessories listed in Penal Code section 30515—
 13 and a shortened barrel that could be used to render a semiautomatic centerfire rifle
 14 less than 30 inches in length—are not bearable “arms” as the term was understood
 15 when the Second and Fourteenth Amendments were ratified.

16 By legislative design, Penal Code section 30515 restricts only certain uses of
 17 certain firearm accessories or parts, which are not themselves bearable arms subject
 18 to Second Amendment protection. Just as a silencer is not a protected arm, *see*
 19 Defs.’ Suppl. Br. at 23–24, the accessories regulated under section 30515 are not
 20 subject to Second Amendment protection.

21 **B. Firearms Equipped with Accessories Prohibited Under the**
 22 **AWCA Are Not in Common Use for Self-Defense**

23 Even if the regulated accessories could qualify as bearable arms, Plaintiffs
 24 have not shown that they are “arms” in “common use” for self-defense and thus

25 ⁷ Professor Baron also relied on five digitized newspaper databases covering
 26 the years 1750–1900. Baron *Ocean State Decl.* ¶¶ 16, 20.

27 ⁸ Notably, the term “[a]ccoutrements often occurs in a list alongside, but
 28 separate from, ammunition: *arms, accoutrements, (and) ammunition.*” Baron Decl.
 ¶ 28.

1 covered by the plain text of the Second Amendment. Although Plaintiffs
 2 characterize the accessories listed in Penal Code section 30515 as “largely
 3 cosmetic,” Pls.’ Add’l Br. at 8 (citation omitted)—conceding that Plaintiffs do not
 4 view the listed accessories as necessary to operate a firearm or to use a firearm
 5 effectively for self-defense—Defendants have shown that these accessories serve
 6 specific combat-oriented functions or are uniquely susceptible to criminal misuse.
 7 Plaintiffs cannot show that they are in common use for self-defense, based on the
 8 prevalence, suitability, and actual uses of weapons equipped with those accessories.
 9 *See* Defs.’ Suppl. Br. at 26–41.

10 Plaintiffs rely chiefly on this Court’s prior decision in this case, which applied
 11 a “*Heller* test” based on the Court’s interpretation of *District of Columbia v. Heller*,
 12 554 U.S. 570 (2008), and concluded that “modern rifle[s]” in general are in
 13 “common use” based on a finding that they are “commonly owned.” Pls. Add’l Br.
 14 at 2 (quoting *Miller*, 542 F. Supp. 3d at 1021). But as explained in Defendants’
 15 Supplemental Brief, that prior analysis has been significantly impacted by *Bruen*’s
 16 clarifications of the applicable standard. Defs.’ Suppl. Br. at 26–28. *Bruen*
 17 indicates that mere ownership is not enough to qualify a weapon for protection
 18 under the Second Amendment; rather, the weapon must be suitable for use in self-
 19 defense and be “commonly *used*” for that purpose in practice. *Id.* at 39–40. In
 20 contrast to handguns, military-style rifles like AR-platform rifles—which the
 21 National Shooting Sports Foundation now refers to as “modern sporting rifles”—
 22 are not commonly owned, comprising less than 5% of the total American gun stock
 23 compared to 50% for handguns. *Id.* at 30; Suppl. Klarevas Decl. ¶¶ 15–17. And
 24 such rifles are not well-suited for self-defense. Defs.’ Suppl. Br. at 32–39.
 25 Tellingly, Plaintiffs point to no evidence, such as survey data or studies, showing
 26 that military-style rifles, let alone such rifles equipped with qualifying accessories,
 27 are used frequently in self-defense or have ever been needed to engage in effective
 28 self-defense. *See Kolbe*, 849 F.3d at 127 (noting that neither “plaintiffs nor

1 Maryland law enforcement officials could identify a single incident in which a
 2 Marylander has used a military-style rifle or shotgun”). While most defensive gun
 3 uses involve handguns, data indicate that approximately 2–4% of all such uses
 4 involved any type of rifle, meaning that an even smaller percentage involved a
 5 military-style rifle or, more specifically, such a rifle equipped with qualifying
 6 accessories. Defs.’ Suppl. Br. at 40–41 (citing Suppl. Allen Decl. ¶ 10). And there
 7 is no evidence concerning the actual uses of pistols or shotguns that would qualify
 8 as “assault weapons” under the AWCA. *Id.* at 31, 40; *Miller*, 542 F. Supp. 3d at
 9 1029 (“[T]here is very little evidence regarding the commonality of AK-47 type
 10 rifles, or semiautomatic shotguns, or ‘assault pistols.’”).⁹ Again, because Penal
 11 Code section 30515 is severable, Plaintiffs must show that *each* restricted weapons
 12

13
 14 ⁹ Prior federal circuit court opinions examining assault weapon restrictions
 15 under the now-defunct two-step framework for Second Amendment claims
 16 typically either assumed that the challenged law burdened protected conduct or
 17 determined that the law regulated weapons in “common use” without significant
 18 analysis prior to upholding those laws under intermediate scrutiny. *See, e.g., N.Y.*
 19 *State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 257 (2d Cir. 2015) (“assum[ing]
 20 for the sake of argument that these ‘commonly used’ weapons and magazines are
 21 also ‘typically possessed by law-abiding citizens for lawful purposes’” and noting
 22 that this assumption was “warranted at this stage” because the statutes “largely pass
 23 constitutional muster”); *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C.
 24 Cir. 2011) (noting that the court could “not be certain whether [assault] weapons
 25 are commonly used or are useful specifically for self-defense or hunting and
 26 therefore whether the prohibitions of certain semi-automatic rifles . . . meaningfully
 27 affect the right to keep and bear arms,” before proceeding to uphold the challenged
 28 restrictions under intermediate scrutiny at step two). *But see Kolbe v. Hogan*, 849
 F.3d 114, 136 (4th Cir. 2017) (en banc) (holding that assault weapon restrictions
 did not burden protected conduct at step one), *abrogated on other grounds by*
Bruen, 142 S. Ct. 2111. To the extent prior federal circuit decisions held that
 assault weapon restrictions regulate weapons in “common use” at step one before
 going on to hold that those restrictions survived constitutional scrutiny at step two,
 those assumptions lack persuasive value with respect to the “common use” inquiry
 in the wake of *Bruen*.

1 configuration—not just semiautomatic rifles or “modern sporting rifles” in
2 general—are in “common use” for self-defense. *See supra* at pp. 2 n.2.

3 As explained in Defendants’ Supplemental Brief, the weapons accessories
4 regulated under the AWCA are not protected by the Second Amendment; rather,
5 semiautomatic centerfire rifles equipped with those accessories are “like” the M16
6 and other select-fire and fully automatic military rifles in terms of their functional
7 design, rate of fire, and muzzle velocity. *See* Defs.’ Suppl. Br. at 32. Plaintiffs’
8 continued reliance on *Staples v. United States*, 511 U.S. 600, 603 (1994), is
9 misplaced. *See* Pls.’ Add’l Br. at 7. That case was not a Second Amendment case
10 and did not hold that all semiautomatic weapons are necessarily in “common use”
11 as that phrase was subsequently used in *Heller*. *Staples* merely held that the
12 government was required to prove that the criminal defendant in that case
13 knowingly possessed a fully automatic weapon for purposes of establishing *mens*
14 *rea*. 511 U.S. at 619. Indeed, as the *Staples* majority explained, its “holding [was]
15 a narrow one.” *Id.* If anything, *Staples* confirms how easy it is to convert a
16 semiautomatic rifle into a fully automatic machine gun. *Id.* at 603 (explaining how
17 “[m]any M-16 parts are interchangeable with those in the AR-15 and can be used to
18 convert the AR-15 into an automatic weapon”).

19 As a practical matter, there is little meaningful difference between the rates of
20 fire of semiautomatic and automatic weapons. Defs.’ Suppl. Br. at 35–36 (citing
21 Kapelsohn Dep. at 81–82). Both utilize a similar gas system that enhances their
22 rate of fire. The gas system “redirects some of the gas used to propel [a] bullet out
23 of [a] rifle’s barrel and back toward the bolt carrier group to re-cock the hammer,
24 eject the spent casing, and load the next round from the magazine all in one fell
25 motion from just gas,” “allowing for a much higher firing rate.”¹⁰ The AR-platform

26 ¹⁰ 5D Tactical.com, AR-15 Gas Systems Guide (Feb. 2021),
27 <https://bit.ly/3SQ55JA>; *see also* Dep’t of the Army, Rifle and Carbine (TC 3-22.9),
28 at 2-4 (May 2016) (explaining that “semiautomatic and automatic weapons require

1 is “virtually indistinguishable in practical effect from” the military-issue M16 rifle
 2 and M4 carbine,¹¹ save for the fact that it can fire only semiautomatically (without
 3 modifications). *Kolbe*, 849 F.3d at 125 (citation omitted). And soldiers equipped
 4 with M16s or M4s are trained and advised to use semiautomatic fire over fully
 5 automatic fire or burst fire “because it is more accurate and lethal than automatic
 6 fire in many combat and law enforcement situations.” *Id.*; *see also* Defs.’ Suppl.
 7 Br. at 36.

8 The high rate of fire is not the only similarity between AR-platform rifles and
 9 the M16. Both rifles also exhibit the same “straight-line design” in which the
 10 rifle’s barrel and stock are in-line, which transmits recoil backwards into the
 11 shooter’s shoulder. *See* Pls.’ Trial Ex. A (Kapelsohn Decl.) ¶ 28. The straight-line
 12 design differentiates the M16 and AR-15 from a traditional sporting rifle (like the
 13 Mini-14), which typically has a stock “angle[d] downward toward the user’s
 14 shoulder” with the action and barrel situated “up near the user’s eye,” causing the
 15 firearm to recoil upwards after each shot. Kapelsohn Dep. at 122. When fired
 16 rapidly, these “conventionally-stocked rifles” “typically exhibit a great deal of
 17 muzzle rise, making it hard to keep them on target.” Pls.’ Trial Ex. A (Kapelsohn
 18 Decl.) ¶ 28. The purpose of the straight-line design is to significantly reduce
 19 muzzle rise and maintain fire on target when the weapon is fired rapidly. Pls.’ Trial

20 _____
 21 a *system of operation* to complete the cycle of function” and that M4- and M16-
 22 series weapons “use[] a portion of the high pressure gas from the cartridge being
 23 fired to physically move the assemblies and subassemblies in order to complete the
 24 cycle of function” and ready the next round for firing), *available at*
<https://bit.ly/3gV9U75>.

25 ¹¹ The M4 carbine is a “shortened variant” of the M16 rifle. M4 Carbine,
 26 Military.com, <https://bit.ly/3TZshGh> (“Equipped with a shorter barrel, collapsible
 27 stock and detachable carrying handle (with a built-in accessory rail) [the M4]
 28 provides soldiers operating in close quarters with improved handling and the
 capability to rapidly and accurately engage targets at extended range, day or
 night.”).

Ex. A (Kapelsohn Decl.) ¶¶ 14–15; Kapelsohn Dep. at 123. Because fully automatic weapons, like the M16 and M4, may be banned consistent with the Second Amendment, *Heller*, 554 U.S. at 627, California may restrict similar semiautomatic weapons, like AR-platform rifles, equipped with combat-oriented accessories consistent with the Second Amendment.

Firearms equipped with the accessories regulated under the Penal Code section 30515 are not in “common use” for self-defense. Thus, Plaintiffs have failed to meet their threshold burden in this case, and their challenge to the AWCA fails at the textual stage of the *Bruen* analysis.

II. THE CHALLENGED PROVISIONS OF THE AWCA ARE CONSISTENT WITH THE NATION’S HISTORICAL TRADITIONS OF FIREARMS AND WEAPONS REGULATION

Even if Plaintiffs could sustain their threshold burden at the textual stage of the analysis, Defendants have amply demonstrated the AWCA’s restrictions are historically justified under *Bruen*.¹² Defendants have submitted numerous historical analogues spanning the history of the Nation, including the pre-founding

¹² As explained in Defendant’s Supplemental Brief, the current expedited remand proceedings prejudice Defendants and impair their ability to adequately assemble and evaluate the historical record, as required under *Bruen*. Defs.’ Suppl. Br. at 73–77. The type of historical research called for by *Bruen* is difficult and requires time, resources, and expertise. While Defendants have been able to marshal a substantial historical record on an accelerated timetable, relevant historical analogues remain to be discovered and interpreted through further historical research. *See* Cornell Decl. ¶ 14 (explaining that “much more work needs to be done to fill out th[e] picture” of the “history of arms regulation in the Anglo-American legal tradition”); *State v. Philpotts*, 194 N.E.3d 371, 372 (Ohio 2022) (Brunner, J., dissenting) (describing the complexities of history and historical research, which is not a “once-and-for-all process that will eventually produce a single, final version of what happened in the past”); *Defense Distributed* Ruling at 8 n.9 (“There is no possibility this Court would expect [the California Attorney General] to be able to present the type of historical analysis conducted in *Bruen* on 31 days’ notice (or even 54 days’ notice).”). Defendants maintain that additional time is warranted.

1 colonial and English periods, demonstrating that the government’s traditional police
 2 powers have long been understood to encompass the type of regulation at issue
 3 here: restrictions targeting certain types of weapons or devices that are susceptible
 4 to criminal misuse and are not well-suited to constitutionally protected uses like
 5 self-defense. *See* Defs.’ Suppl. Br. at 41–73. Like the AWCA, these analogues
 6 imposed a modest burden on the constitutional right to armed self-defense and were
 7 enacted in response to prevailing threats to public safety at that time. *See id.*

8 **A. If the AWCA Burdens Conduct Covered by the Plain Text of**
 9 **the Second Amendment, the Court Must Examine the Historical**
 10 **Analogues**

11 In their additional brief, Plaintiffs argue that judicial review of the AWCA
 12 should end at the textual stage without examining any relevant history supporting
 13 its constitutionality. They argue that any weapon in “common use” cannot be
 14 “banned,” Pls.’ Add’l Br. at 2, and thus “[t]here is no need for any further historical
 15 analysis,” *id.* at 3. Setting aside the fact that the particular weapons and accessories
 16 regulated under the AWCA are not in common use for self-defense, *see supra* at
 17 pp. 5–10, and that the challenged AWCA provisions do not operate as a *ban* on any
 18 particular weapon, *see supra* at p. 3, *Bruen* expressly requires an examination of
 19 relevant history when the plain text of the Second Amendment covers a plaintiff’s
 20 proposed course of conduct, *Bruen*, 142 S. Ct. at 2134. Whether a firearm is in
 21 “common use” is determined at the textual stage of the analysis, as *Bruen*
 22 demonstrates, and this inquiry is focused on how the challenged law operates today.
 23 Defs.’ Suppl. Br. at 22 n.29. If the plain text of the Second Amendment covers
 24 “arms” (because they are in common use), those arms are only “*presumptively*”
 25 protected. *Bruen*, 142 S. Ct. at 2134, 2126 (emphasis added). They are not entitled
 26 to absolute protection, beyond the reach of government regulation. The analysis
 27 then proceeds to a comparison of the challenged law to historical analogues—an
 28 inquiry focuses on accepted limitations on the scope of the right to keep and bear
 arms as that right was understood in the past.

Even though *Bruen* determined at the textual stage that New York’s public-carry law burdened conduct related to “Arms” in “common use” today (handguns), *id.* at 2134, that was not the end of the analysis. The Court proceeded to evaluate relevant historical analogues, concluding that “American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense.” *Id.* at 2156. The handgun bans struck down in *Heller*, *McDonald*, and *Bruen* involved a weapon that was not only in “common use”—it was deemed to be the “quintessential self-defense weapon.” *Id.* at 2143. The Court noted that historical restrictions on pistols did not support New York’s law because in contrast to the pistols regulated in the past, modern handguns are commonly used for self-defense today. *See* Pls. Suppl. Br. at 3 (citing *Bruen*, 142 S. Ct. at 2143). Because modern handguns are the “quintessential self-defense weapon,” *Heller*, 554 U.S. at 629, the burdens on the right to armed self-defense imposed by New York’s law were not comparable to historical laws restricting pistols under *Bruen*. However, less burdensome regulations, like the AWCA’s restrictions challenged here, can be relevantly similar to other comparably burdensome historical analogues and thus be upheld at the historical stage of the analysis. Here, even if the AWCA burdens conduct protected by the plain text of the Second Amendment, Defendants have demonstrated that the AWCA’s restrictions are comparable in terms of burden and justification as the historical analogues.

B. The AWCA Is Relevantly Similar to Historical Analogues

The ubiquity of state and local restrictions on certain enumerated weapons deemed to be especially dangerous at the time of those restrictions, including Bowie knives, clubs, and pistols, demonstrate that California retains the power to restrict certain types of firearms equipped with certain military-grade accessories. *See* Spitzer Decl., Exs. C, E.¹³ Those restrictions are traceable to the founding

¹³ The Supreme Court has not set a minimum number of analogues that are

1 generation, and even earlier to the 1689 English Bill of Rights, which allowed
 2 certain individuals to possess arms, but only “as allowed by law.” Defs.’ Suppl. Br.
 3 at 50. For example, in 1686, New Jersey enacted a restriction on the carrying of
 4 “dangerous or unlawful weapons,” which induced “great fear and quarrels.” Spitzer
 5 Decl. ¶ 49. Most of these dangerous weapons restrictions, particularly those
 6 targeting Bowie knives and other fighting knives and billies, were enacted around
 7 the ratification of the Fourteenth Amendment. In the 1830s, the country was
 8 experiencing a “panic over the Bowie knife,” David B. Kopel et al., *Knives and the*
 9 *Second Amendment*, 47 U. Mich. J.L. Reform 167, 179 (Fall 2013), which led to a
 10 flurry of state and local attempts to restrict these especially dangerous, concealable
 11 weapons.¹⁴ See Defs.’ Suppl. Br. at 56–63. For example, in 1887, Iowa banned the

12 _____
 13 required to establish a sufficient tradition of firearms regulation, but it did explain
 14 that even a few can suffice if the record does not indicate that there was significant
 15 dispute over the constitutionality of the historical analogue. *Bruen*, 142 S. Ct. at
 16 2133. Even though there were “relatively few” historical prohibitions on the
 17 carrying of firearms in “sensitive places,” the Court nevertheless “assume[d] it
 18 settled” that those locations qualified as “‘sensitive places’ where arms carrying
 19 could be prohibited consistent with the Second Amendment.” *Id.* (citing David B.
 20 Kopel & Joseph G.S. Greenlee, *The “Sensitive Places” Doctrine*, 13 Charleston L.
 21 Rev. 205, 235 (2018)). Here, in contrast to the “few” sensitive-places analogues
 22 discussed in *Bruen*, Defendants have cited laws and ordinances enacted by
 23 numerous states and localities during the relevant time periods.

24 ¹⁴ See, e.g., 1837 Ala. Laws 7, No. 11, § 2 (prohibitive tax on Bowie knives)
 25 (quoted in Spitzer Decl., Ex. E at 1); 1837 Ga. Laws 90, § 1 (prohibiting sale and
 26 possession of Bowie and other kinds of knives as well as “pistols, dirks, sword
 27 canes, [and] spears”); 1837-1838 Tenn. Pub. Acts 200-01, §§ 1–2 (prohibiting sale
 28 and carrying of Bowie knives, Arkansas toothpicks, and other fighting knives)
 (quoted in Spitzer Decl., Ex. E at 65); 1838 Fla. Laws 36, No. 24, § 1 (prohibitive
 tax on sale and possession of pocket pistols, sword canes, and Bowie knives); 1838
 Va. Acts 76, ch. 101, § 1 (banning “keep[ing] or carry[ing]” Bowie knives and
 other deadly weapons); 1839 Ala. Acts 67, ch. 77 (banning the concealed carry of
 Bowie knives and other deadly weapons) (quoted in Spitzer Decl., Ex. E at 1); 1850
 Mass. Acts 401, ch. 194 (prohibiting the manufacture or sale of slung-shots)
 (quoted in Spitzer Decl., Ex. E at 33); 1858-1859 N.C. Sess. Laws 34-36, Pub.

1 possession of Bowie knives in addition to other “dangerous or deadly weapon[s].
 2 Spitzer Decl., Ex. E at 24. Similarly, California’s restrictions on billies and other
 3 concealable weapons were justified by concerns that these weapons were “common
 4 to the criminal’s arsenal” and “ordinarily used for criminal and unlawful purposes.”
 5 *People v. Grubb*, 63 Cal. 2d 614, 620 (1965), *superseded on other grounds by*
 6 *statute*. Even though the AWCA’s restrictions target different weapons and devices
 7 and address different threats to public safety, they impose a comparably minimal
 8 burden on the right to armed self-defense, given the range of alternative weapons
 9 available for effective self-defense, and that minimal burden is comparably
 10 justified. *See* Defs.’ Suppl. Br. at 66–73.

11 Plaintiffs argue that Defendants must show that the weapons equipped with
 12 combat-oriented accessories are “dangerous and unusual.” Pls.’ Add’l Br. at 6. As
 13 explained in Defendants’ Supplemental Brief, however, the source for the Supreme
 14 Court’s reference to “dangerous and unusual weapons” was Blackstone, who used
 15 the disjunctive formulation of this traditional firearms regulation: “dangerous *or*
 16 unusual weapons.” Defs.’ Suppl. Br. at 41 n.59 (emphasis added) (quoting
 17 4 Blackstone 148–49 (1769)). Notably, laws enacted to regulate the possession and
 18 carrying of dangerous weapons characterize those weapons in different ways. *See*
 19 *Bruen*, 142 S. Ct. at 2143 (noting that the 1686 New Jersey concealed weapons
 20 restriction applied to the carrying of “dangerous *or unlawful* weapons” (emphasis
 21 added)); *id.* at 2144 (describing 1801 Tennessee statute prohibiting any person from
 22 “privately carry[ing] any dirk, large knife, pistol or *any other dangerous weapon*, to
 23 the fear or terror of any person” (emphasis added) (quoting 1801 Tenn. Acts

24 _____
 25 Laws., ch. 25, § 27, pt. 15 (imposing \$1.25 tax on “[e]very dirk, bowie-knife, pistol,
 26 sword-cane, dirk-cane and rifle cane,” while exempting weapons “used for
 27 mustering”); 1868 Ala. Laws 11 (prohibiting the “carrying of hostile deadly
 28 weapons” known as “‘rifle’ walking canes” or “‘gunshot’ walking canes”); 1868
 Fla. Laws 95, ch. 7, § 11 (prohibiting the manufacture or selling of slung shots or
 metallic knuckles).

pp. 260–61)). And it does not appear that cases interpreting and applying those analogues made explicit findings that the regulated weapons, such as Bowie knives or Arkansas toothpicks, were both “dangerous” and “unusual.” For example, in *Andrews v. State*, the Tennessee Supreme Court held that a law prohibiting anyone “either publicly or privately to carry a dirk, sword cane, Spanish stiletto, belt or pocket pistol” was constitutional, without any analysis of whether each of these weapons is “dangerous and unusual” or explanation of what that phrase may mean. 50 Tenn. 165, 186 (1871).

The Supreme Court has not explained the meaning of the phrase “dangerous and unusual” as it relates to weapons, or suggested that the phrase imposes rigid requirements on governments attempting to regulate such weapons. In any event, it appears that the phrase is a hendiadys—a figure of speech like “cruel and unusual” and “necessary and proper,” which involve “two terms, separated by a conjunction, [that] are melded together to form a single complex expression.” Samuel L. Bray, “*Necessary and Proper*” and “*Cruel and Unusual*”: *Hendiadys in the Constitution*, 102 Va. L. Rev. 687, 695 (2016); *see also* Cornell Decl. ¶ 9 n.9. For example, if the phrase “cruel and unusual” in regards to punishment is read as a hendiadys, the phrase would mean punishment that is “unusually cruel” or “innovatively cruel,” rather than “ask[ing] first whether a punishment is cruel and then whether it is unusual, treating the two as distinct and unrelated inquiries.” Samuel L. Bray, *supra*, at 812. Similarly, if viewed as a hendiadys, “dangerous and unusual” would be read as “unusually dangerous.”

In addition to the dangerous weapons laws cited by Defendants, since the founding era, state and local governments have imposed restrictions on certain weapons configurations deemed to be especially dangerous, including trap guns, spring guns, and “infernal machines.” Spitzer Decl., Ex. F. The first such restriction appears to have been enacted by New Jersey in 1771. Defs.’ Suppl. Br. at 54. Similar restrictions were enacted throughout the mid- to late-19th century,

1 and continued well into the 20th century. *See* Spitzer Decl., Ex. F.¹⁵ These
 2 restrictions regulated the manner in which law-abiding citizens could keep their
 3 firearms in their home, by prohibiting them from affixing to their firearms string or
 4 other devices that would enable the firearm to discharge remotely. Similarly,
 5 colonial era restrictions regulated the way in which individuals were able to store
 6 gunpowder, an essential component to operate a musket, in the home, or even
 7 prohibited the keeping of loaded firearms inside the home. Defs.’ Suppl. Br. at 53–
 8 54; Cornell Decl. ¶¶ 35–37, 40. These historical restrictions impose a comparable
 9 (or even greater) burden on the right to armed self-defense that the AWCA, and that
 10 burden is comparably justified by similar public safety interests.

11 The historical record shows that the AWCA is a permissible exercise of
 12 California’s police powers, consistent with the scope of the Second Amendment as
 13 originally understood. In defending this law, Defendants are not required to point
 14 to regulations of semiautomatic firearms equipped with the accessories regulated by
 15 the AWCA at the founding or after the Civil War. That would not be possible, of
 16 course, because semiautomatic weapons did not exist in the period immediately
 17 after ratification of the Fourteenth Amendment. *See* Pls.’ Add’l Br. at 8 (“The first
 18

19 ¹⁵ *See, e.g.*, 1869 Minn. Laws 50-51, ch. 39 § 1 (prohibiting “[t]he setting of a
 20 so-called trap or spring gun, pistol, rifle or other deadly weapon”); 1873 Minn.
 21 Stats. 993 (prohibiting the “setting of a so-called trap or spring gun, pistol, rifle, or
 22 other deadly weapon in this state”) (quoted in Spitzer Decl., Ex. F at 2); John
 23 Lellyett, Ordinances of the City of Nashville 244 (1872) (§ 9) (prohibiting any
 24 “sling gun, or spring shot, made from India rubber, or other elastic substances,
 25 attached to a forked stick, or other brace, to throw or shoot pebbles, gravel, shot,
 26 bullets, or other hard substances, or to use a bow and arrow”); 1875 Mich. Pub.
 27 Acts 136, No. 97 § 1 (prohibiting the setting of “any spring or other gun, or any trap
 28 or device operating by the firing or explosion of gunpowder or any other
 explosive”) (quoted in Spitzer Decl., Ex. F at 1); Revised Codes of the State of
 N.D. 1895 (prohibiting the “set[ting of] any spring or other gun or trap or device
 operating by the firing or exploding of gunpowder or any other explosive, and
 leaves or permits the same to be left”) (quoted in Spitzer Decl., Ex. F at 4).

1 rifle accredited to be a semi-automatic action was the Mannlicher rifle, developed
 2 in the early 1890s” (quoting Hlebinsky Dep. at 34)). And that is not Defendants’
 3 burden under *Bruen*. Instead, Defendants may rely on other types of weapons
 4 restrictions that are comparably burdensome and justified.

5 In arguing that the AWCA is not justified by history, Plaintiffs bypass a
 6 crucial step in *Bruen*’s analytical process, which requires “a more nuanced
 7 approach” when a challenged law addresses “unprecedented societal concerns or
 8 dramatic technological changes.” *Bruen*, 142 S. Ct. at 2132. Here, Defendants
 9 have shown that the AWCA regulates firearms technology that was dramatically
 10 different from the technology available around the time that the Second or
 11 Fourteenth Amendments were ratified. *See* Defs.’ Suppl. Br. at 43–46; Spitzer
 12 Decl. ¶¶ 18–28. Plaintiffs claim that the particular accessories existed long before
 13 the enactment of the AWCA, but they did not exist in combination with
 14 semiautomatic and automatic firing mechanisms. And while Plaintiffs claim that
 15 repeating rifles existed before semiautomatic weapons, Pls.’ Add’l Br. at 8, the
 16 Henry and Winchester repeating rifles were not comparable to modern
 17 semiautomatic weapons. They were lever-action rifles that were not widely
 18 adopted until the 1880s. Spitzer Decl. ¶¶ 28–29. And Professor Michael
 19 Vorenberg explains that legislative regulation of repeater rifles after the Civil War
 20 was not necessary because the U.S. military effectively restricted the ability of
 21 civilians to obtain them. Vorenberg Decl. ¶¶ 8–10. In regulating the use of certain
 22 accessories with certain semiautomatic weapons, the AWCA addresses dramatically
 23 different firearms technologies than those that were widely available at the
 24 founding or around the time of the ratification of the Fourteenth Amendment.

25 In addition to regulating dramatically new firearms technologies, the AWCA
 26 was also enacted to address a societal concern that did not exist around the time that
 27 the Second or Fourteenth Amendments were ratified: mass shootings. Although
 28 mass murder has been a reality throughout American history, it was generally

1 perpetrated by groups of people due to technological limitations; the development
 2 of more advanced weaponry, including semiautomatic and automatic firearms,
 3 made it possible for individuals to conduct mass violence. Roth Decl. ¶ 38. As
 4 explained in Defendants’ Supplemental Brief, firearms and other weapons
 5 restrictions are generally enacted as regulatory needs arise, as seen by the
 6 proliferation of dangerous weapons laws that were passed only after homicide rates
 7 began to rise in the mid- to late-19th century. Defs.’ Suppl. Br. at 44; Roth Decl.
 8 ¶ 14 (“[D]uring the lifetimes of Jefferson, Adams, Marshall, and Madison, the
 9 Founding Generation passed laws in a number of states that restricted the use or
 10 ownership of certain types of weapons after it became obvious that those weapons,
 11 including certain fighting knives and percussion-cap pistols, were being used in
 12 crime by people who carried them concealed on their persons and were thus
 13 contributing to rising crime rates.”). The AWCA is consistent with this regulatory
 14 approach and is historically justified. Defs.’ Suppl. Br. at 44.

15 Contrary to Plaintiffs’ argument, the Court’s historical analysis is not limited
 16 to regulations enacted during the founding period. As argued in Defendants’
 17 Supplemental Brief, the period around the ratification of the Fourteenth
 18 Amendment is particularly relevant to determining the scope of the Second
 19 Amendment and the limits of the states’ police powers, given that it was at this time
 20 that the right to keep and bear arms was incorporated and made applicable to the
 21 states. The Second Amendment’s limitations on traditional state police powers
 22 “depends on how the right was understood when the Fourteenth Amendment was
 23 ratified.” *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011). At a
 24 minimum, any originalist interpretation of the historical record must account for the
 25 public understandings and historical analogues in existence around the time that the
 26 Second Amendment was made applicable to the states. In any event, as in *Bruen*,
 27 the record here includes similar laws enacted around the ratification of both the
 28 Second and Fourteenth Amendments. *Bruen*, 142 S. Ct. at 2138 (“We need not

1 address this issue today because, as we explain below, the public understanding of
 2 the right to keep and bear arms in both 1791 and 1868 was, for all relevant
 3 purposes, the same with respect to public carry.”).

4 Defendants have also shown that the dangerous weapons laws enacted during
 5 the 18th and 19th centuries were consistent with laws enacted in the early 20th
 6 century targeting semiautomatic and automatic weapons after they began to
 7 circulate widely in society, leading to increased criminal use of these weapons. The
 8 AWCA is a modern-day application of those traditions to the contemporary
 9 problem of mass shootings and other forms of gun violence, which are exacerbated
 10 by rapid-fire semiautomatic rifles, pistols, and shotguns that are designed to kill or
 11 maim as many people as efficiently as possible. Defs.’ Suppl. Br. at 32–35. And
 12 here, the AWCA targets certain accessories that enhance the lethality and potential
 13 criminal uses of those already extremely dangerous firearms. These 20th century
 14 laws—which are very similar to the restrictions at issue here in regulating the
 15 manufacture, sale, and possession of automatic, and even semiautomatic,
 16 firearms—may be considered in assessing the scope of the Second Amendment
 17 because they do not “contradict[] early evidence.” *Id.* at 2154 & n.28.

18 California is not alone in enacting assault weapon restrictions like the AWCA.
 19 Far from being the outlier that Plaintiffs suggest, Pls.’ Br. at 10, similar assault
 20 weapon restrictions have been enacted by a total of nine jurisdictions, representing
 21 over a quarter of the U.S. population. Spitzer Decl. ¶ 1. And the federal
 22 government enforced a federal assault weapons ban for a decade from 1994 to
 23 2004, and the U.S. House of Representatives recently passed a renewed federal
 24 assault weapons ban. *Id.* That the remaining states do not restrict weapons that
 25 qualify as “assault weapons” *today*, is not relevant to whether those restrictions are
 26 justified *historically* under an originalist framework. Simply counting the number
 27 of states that have enacted (or refrained from enacting) certain firearms laws today,
 28 as Plaintiffs suggest, is not a historically grounded approach for determining what

1 laws a state may enact consistent with the Second Amendment. Such an approach
 2 would also stifle state and local innovation in responding to gun violence. As states
 3 and localities experiment with different types of gun-safety laws, some jurisdictions
 4 will necessarily be early adopters and stand-out from the majority of jurisdictions.
 5 Even if their laws are different from a majority of state laws *today*, however, they
 6 will still satisfy the text-and-history standard if they are “consistent with this
 7 Nation’s *historical tradition* of firearm regulation.” *Bruen*, 142 S. Ct. at 2126
 8 (emphasis added). Principles of federalism permit variation among the states in
 9 addressing matters of public safety and concern, consistent with the Second
 10 Amendment. Indeed, in determining that the Second Amendment applies to the
 11 states, the Court explained that “[s]tate and local experimentation with reasonable
 12 firearms regulations will continue under the Second Amendment.” *McDonald v.*
 13 *City of Chi.*, 561 U.S. 742, 784 (2010) (plurality opinion). The right to keep and
 14 bear arms is not a “regulatory straightjacket,” *Bruen*, 142 U.S. at 2133, and it
 15 accommodates state and local variation in “devis[ing] solutions to social problems
 16 that suit local needs and values,” *McDonald*, 561 U.S. at 784 (plurality opinion).

17 The AWCA is consistent with historical regulations of certain dangerous
 18 weapons and firearm configurations. The challenged provisions of the AWCA
 19 comport with the scope of the Second Amendment and are a permissible exercise of
 20 long-accepted and traditional police powers to promote public safety. Defs.’ Suppl.
 21 Br. at 42.

22 CONCLUSION

23 For these reasons, the AWCA comports with the Second Amendment.
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