

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Sep 26, 2024

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

AMANDA BANTA, et al.,

Plaintiffs,

v.

ROBERT W. FERGUSON, Attorney
General of the State of Washington, et al.,

Defendants,

ALLIANCE FOR GUN
RESPONSIBILITY,

Defendant-Intervenor.

No. 2:23-CV-00112-MKD

ORDER DENYING PLAINTIFFS’
MOTION FOR INJUNCTIVE
AND DECLARATORY RELIEF

ECF No. 16

Before the Court is Plaintiffs’ Motion for Preliminary Injunction, ECF No. 16. On August 18, 2023, the Court held a hearing on the motion. ECF No. 47. Matthew D. Rowen and Steven Fogg appeared on behalf of Plaintiffs Amanda Banta, Sharp Shooting Indoor Range & Gun Shop, Inc. (“Sharp Shooting”), The Range, LLC (“The Range”), Aero Precision, LLC (“Aero”), and the National Shooting Sports Foundation, Inc. (“NSSF”). Andrew W. Hughes appeared on

1 behalf of Defendants Robert W. Ferguson, Washington’s Attorney General, and
2 John R. Batiste, Chief of the Washington State Patrol. Zachary Pekelis and Meha
3 Goyal appeared on behalf of Defendant-Intervenor Alliance for Gun
4 Responsibility.

5 Plaintiffs challenge the constitutionality of Substitute House Bill 1240
6 (“SHB 1240”), 2023 Wash. Sess. Laws, ch. 162. ECF No. 1. The instant motion
7 seeks a preliminary injunction to enjoin enforcement of SHB 1240 while the
8 litigation in this case is ongoing. ECF No. 16. For the reasons stated below, the
9 motion is denied.

10 **BACKGROUND**

11 Amanda Banta is a law-abiding citizen and a shooting-sports Olympian.
12 ECF No. 1 at 4 ¶ 11. Sharp Shooting and The Range are federally licensed retail
13 firearms businesses. *Id.* at 4-5 ¶¶ 12-13. Aero is a firearms and firearm-parts
14 manufacturer. *Id.* at 5 ¶ 14. NSSF is “the trade association for the firearm,
15 ammunition, and hunting and shooting sports industry.” *Id.* at 5-6 ¶ 15. NSSF
16 “has a membership of more than 10,000 throughout the United States (including
17 Washington), including manufacturers, distributors, and retailers of firearms,
18 ammunition, and related products, as well as other industry members.” *Id.*

19 On April 25, 2023, Washington Governor Jay Inslee signed SHB 1240 into
20 law. 2023 Wash. Sess. Laws, ch. 162. SHB 1240 amends RCW ch. 9.41,

1 pertaining to crimes and punishments for firearms and dangerous weapons. *Id.* In
2 relevant part, Section 3 of SHB 1240 criminalizes the manufacture, import,
3 distribution, or sale of any “assault weapon,” as defined in Section 2(2) of SHB
4 1240. A violation is a gross misdemeanor, *id.* at § 3(4), and may also constitute a
5 civil violation of Washington’s Consumer Protection Act,¹ *id.* at § 4. Limited
6 exceptions are provided for assault weapons manufactured, sold, etc., to the armed
7 forces, law enforcement, or out-of-state individuals, and where an assault weapon
8 is received by operation of law upon the death of the owner. *Id.* at § 3(2).

9 SHB 1240 identifies sixty-two specific categories of firearms as “assault
10 weapons,” including the AR-15, AK-47, and Springfield Armory M1A. *Id.* at
11 § 2(a)(i). In addition, SHB 1240 defines “assault weapon” to include any of the
12 following:

13 (ii) A semiautomatic rifle that has an overall length of less
14 than 30 inches;

15 (iii) A conversion kit, part, or combination of parts, from
16 which an assault weapon can be assembled or from which
17 a firearm can be converted into an assault weapon if those
18 parts are in the possession or under the control of the same
19 person; or

(iv) A semiautomatic, center fire rifle that has the capacity
to accept a detachable magazine and has one or more of
the following:

19 ¹ Plaintiffs do not raise any challenge to the provisions of SHB 1240 concerning
20 civil liability in the instant motion. *See* ECF No. 16.

1 (A) A grip that is independent or detached from
2 the stock that protrudes conspicuously beneath the
3 action of the weapon. The addition of a fin
4 attaching the grip to the stock does not exempt the
5 grip if it otherwise resembles the grip found on a
6 pistol;

7 (B) Thumbhole stock;

8 (C) Folding or telescoping stock;

9 (D) Forward pistol, vertical, angled, or other grip
10 designed for use by the nonfiring hand to improve
11 control;

12 (E) Flash suppressor, flash guard, flash eliminator,
13 flash hider, sound suppressor, silencer, or any item
14 designed to reduce the visual or audio signature of
15 the firearm;

16 (F) Muzzle brake, recoil compensator, or any item
17 designed to be affixed to the barrel to reduce recoil
18 or muzzle rise;

19 (G) Threaded barrel designed to attach a flash
20 suppressor, sound suppressor, muzzle break, or
similar item;

(H) Grenade launcher or flare launcher; or

(I) A shroud that encircles either all or part of the
barrel designed to shield the bearer's hand from
heat, except a solid forearm of a stock that covers
only the bottom of the barrel;

(v) A semiautomatic, center fire rifle that has a fixed
magazine with the capacity to accept more than 10 rounds;

(vi) A semiautomatic pistol that has the capacity to accept
a detachable magazine and has one or more of the
following:

(A) A threaded barrel, capable of accepting a flash
suppressor, forward handgrip, or silencer;

(B) A second hand grip;

1 (C) A shroud that encircles either all or part of the
2 barrel designed to shield the bearer’s hand from
heat, except a solid forearm of a stock that covers
only the bottom of the barrel; or

3 (D) The capacity to accept a detachable magazine at
4 some location outside of the pistol grip;

5 (vii) A semiautomatic shotgun that has any of the
following:

6 (A) A folding or telescoping stock;

7 (B) A grip that is independent or detached from the
8 stock that protrudes conspicuously beneath the
9 action of the weapon. The addition of a fin
attaching the grip to the stock does not exempt the
grip if it otherwise resembles the grip found on a
pistol;

10 (C) A thumbhole stock;

11 (D) A forward pistol, vertical, angled, or other grip
designed for use by the nonfiring hand to improve
control;

12 (E) A fixed magazine in excess of seven rounds; or

13 (F) A revolving cylinder shotgun.

14 *Id.* at § 2(2)(a).

15 Ms. Banta states that “[b]ut for [SHB 1240], she would be in the market for
16 one or more new firearms that fall within the scope of what is banned under [S]HB
17 1240.” ECF No. 1 at 4 ¶ 11. NSSF states that its members include
18 “manufacturers, distributors, and retailers of firearms, ammunition, and related
19 products, as well as other industry members” across the United States and
20 including Washington, who have been injured by SHB 1240. *Id.* at 5-6 ¶ 15.

1 Before SHB 1240 became law, Sharp Shooting, The Range, and Aero (collectively,
2 the “Industry Plaintiffs”) sold or manufactured firearms falling within SHB 1240’s
3 definition of assault weapons in Washington and state they would have continued
4 to do so but for SHB 1240. ECF No. 1 at 4-5 ¶¶ 12-14.

5 **LEGAL STANDARD**

6 Fed. R. Civ. P. 65(a) provides for preliminary injunctions. “A preliminary
7 injunction is an extraordinary remedy never awarded as of right.” *Winter v. Nat.*
8 *Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted). To obtain a
9 preliminary injunction, a movant must establish “that (1) [s]he is likely to succeed
10 on the merits of [her] claim, (2) [s]he is likely to suffer irreparable harm absent the
11 preliminary injunction, (3) the balance of equities tips in [her] favor, and (4) a
12 preliminary injunction is in the public interest.” *Baird v. Bonta*, 81 F.4th 1036,
13 1040 (9th Cir. 2023) (citing *Winter*, 555 U.S. at 20). “When . . . the nonmovant is
14 the government, the last two *Winter* factors ‘merge.’” *Id.* (quoting *Nken v. Holder*,
15 556 U.S. 418, 435 (2009)). The first factor is considered “a threshold inquiry” and
16 “the most important factor.” *Id.* (quoting *Env’t Prot. Info. Ctr. v. Carlson*, 968
17 F.3d 985, 989 (9th Cir. 2020)) (quotation marks omitted). “As a general matter,
18 district courts must consider all four *Winter* factors,” although “a court need not
19 consider the other factors if a movant fails to show a likelihood of success on the
20 merits.” *Id.* (quotation marks, alterations, and citations omitted). Further, the

1 Ninth Circuit applies a “sliding scale” approach to these factors, whereby “a
2 stronger showing of one element may offset a weaker showing of another.”
3 *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82
4 F.4th 664, 684 (9th Cir. 2023) (citation and quotation marks omitted). If a plaintiff
5 demonstrates that the “balance of equities ‘tips sharply in [her] favor,’ the plaintiff
6 must raise only ‘serious questions’ on the merits—a lesser showing than likelihood
7 of success.” *Id.* (quoting *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135
8 (9th Cir. 2011)).

9 Where a plaintiff alleges a constitutional injury, “the first factor is especially
10 important.” *Baird*, 81 F.4th at 1040. The likelihood of success on the merits for
11 such a plaintiff is usually sufficient to establish the other factors. *Id.* (quoting
12 *Riley’s Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 731 (9th Cir. 2022)) (other
13 citations omitted). However, a district court should “pay particular regard for the
14 public consequences in employing the extraordinary remedy of injunction.”
15 *Winter*, 555 U.S. at 24 (citation and quotation marks omitted).

16 DISCUSSION

17 A. Likelihood of Success on the Merits

18 Plaintiffs’ Complaint seeks a declaratory judgment that SHB 1240 is
19 unconstitutional and an injunction to prevent its enforcement. ECF No. 1 at 23.
20 Plaintiffs argue that a preliminary injunction is warranted because they are likely to

1 establish that SHB 1240 violates the Second Amendment of the United States
2 Constitution. ECF No. 16 at 8-9.

3 The Second Amendment states: “A well regulated Militia, being necessary
4 to the security of a free State, the right of the people to keep and bear Arms, shall
5 not be infringed.” U.S. Const. amend. II. In *District of Columbia v. Heller*
6 (*Heller I*), the Supreme Court clarified that the Second Amendment right is “an
7 individual right to keep and bear arms” and that self-defense is “the central
8 component of the right itself.” 554 U.S. 570, 595, 599 (2008) (emphasis omitted).
9 In *McDonald v. City of Chicago*, the Court held that “the Second Amendment right
10 is fully applicable to the States.” 561 U.S. 742, 750 (2010). In *N.Y. State Rifle &*
11 *Pistol Ass’n, Inc. v. Bruen*, the Court articulated a test for Second Amendment
12 challenges to firearm regulations. 597 U.S. 1, 17 (2022). The Ninth Circuit has
13 explained this test as follows:

14 We first consider whether the Second Amendment’s plain
15 text covers an individual’s proposed course of conduct. . . .
16 If so, the Second Amendment presumptively protects that
17 conduct. . . . The Government then bears the burden of
18 justifying the challenged regulation by showing that it is
19 consistent with our nation’s ‘historical tradition of firearm
20 regulation.’ . . . Only then may we conclude that the
regulation is constitutional.

United States v. Perez-Garcia, 96 F.4th 1166, 1178 (9th Cir. 2024) (quoting *Bruen*,
597 U.S. at 24); *see also United States v. Alaniz*, 69 F.4th 1124, 1128 (9th Cir.
2023) (citation omitted).

1 The “burdens at the preliminary injunction stage track the burdens at trial.”
2 *Baird*, 81 F.4th at 1044 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao*
3 *do Vegetal*, 546 U.S. 418, 429 (2006)) (quotation marks omitted). Here, it is
4 Plaintiffs’ burden to first demonstrate that the Second Amendment protects their
5 proposed course of conduct. *See Perez-Garcia*, 96 F.4th at 1178; *Baird*, 81 F.4th
6 at 1046. If Plaintiffs succeed, the burden shifts to the State Defendants to
7 demonstrate that SHB 1240 is “part of the historical tradition that delimits the outer
8 bounds of the right to keep and bear arms.” *See Baird*, 81 F.4th at 1043 (quoting
9 *Bruen*, 597 U.S. at 19) (quotation marks omitted).

10 *1. Plain Text of the Second Amendment*

11 The plain text of the Second Amendment has three components: (1) the right
12 of the people (2) to keep and bear (3) Arms. *See* U.S. Const. amend. II; *Heller I*,
13 554 U.S. at 579-92. Although the meaning of the Second Amendment is
14 “historically fixed,” its protections “appl[y] to new circumstances.” *Bruen*, 597
15 U.S. at 28 (citing *Heller I*, 554 U.S. at 582). Below, the Court looks to post-*Bruen*
16 authority to apply the Second Amendment’s plain text, and pre-*Bruen* authority
17 that is not incongruent with *Bruen*.

18 a. “The People” & “Keep and Bear”

19 The parties do not dispute that SHB 1240 implicates the Second Amendment
20 right to the extent it regulates “the people” and conduct amounting to “keep[ing]

1 and bear[ing].” *See generally* ECF Nos. 16, 30, 36. “[O]rdinary, law-abiding,
2 adult citizens . . . are part of ‘the people’ whom the Second Amendment protects.”
3 *Bruen*, 597 U.S. at 31-32 (citing *Heller I*, 554 U.S. at 580); *see also Perez-Garcia*,
4 96 F.4th at 1178-79, 1179 n.9. Further, the Second Amendment right “‘wouldn’t
5 mean much’ without the ability to acquire arms.” *Teixeira v. Cnty. of Alameda*,
6 873 F.3d 670, 677 (9th Cir. 2017) (quoting *Ezell v. City of Chicago*, 651 F.3d 684,
7 704 (7th Cir. 2011)). “[T]he right to keep and bear arms includes the right to
8 purchase them. And thus laws that burden the ability to purchase arms burden
9 Second Amendment rights.” *Jones v. Bonta*, 34 F.4th 704, 716 (9th Cir. 2022),
10 *vacated and remanded*, 47 F.4th 1124 (9th Cir. 2022) (citation omitted); *see also*
11 *Luis v. United States*, 578 U.S. 5, 26 (2016) (“Constitutional rights thus implicitly
12 protect those closely related acts necessary to their exercise.”) (Thomas, J.,
13 concurring). However, “the Second Amendment does not independently protect a
14 proprietor’s right to sell firearms.” *Teixeira*, 873 F.3d at 690.

15 Ms. Banta is an ordinary, law-abiding adult citizen. ECF No. 1 at 4 ¶ 11. In
16 contrast, the Industry Plaintiffs are businesses, and NSSF represents 10,000
17 unnamed industry members. *Id.* at 4-6 ¶¶ 12-15. The Second Amendment’s plain
18 text concerns firearm makers and sellers only to the extent that the individual
19 citizen relies upon makers and sellers to exercise their individual Second
20 Amendment right. *See Teixeira*, 873 F.3d at 689-90. In short, the below

1 discussion should not be construed to include the Industry Plaintiffs under “the
2 people,” or commercial activities under “keep and bear,” separate and apart from
3 the individual’s right to keep and bear arms.

4 b. “Arms”

5 The parties disagree sharply as to whether SHB 1240’s “assault weapons”
6 are “arms” for the purposes of the Second Amendment’s plain text. ECF No. 16 at
7 15-25; ECF No. 30 at 11-18; ECF No. 36 at 8-11.

8 “Arms” are “weapons of offence, or armour of defence,” or “any thing that a
9 man wears for his defense, or takes into his hands, or useth in wrath to cast at or
10 strike another.” *Heller I*, 544 U.S. at 581 (quoting 1773 and 1771 dictionaries)
11 (alterations and quotation marks omitted). At the time of the founding, it was
12 understood that “all firearms constituted ‘arms.’” *Id.* (citing a 1794 thesaurus).
13 “The Court has held that ‘the Second Amendment extends, prima facie, to all
14 instruments that constitute bearable arms, even those that were not in existence at
15 the time of the founding[.]’” *Caetano v. Massachusetts*, 577 U.S. 411, 411 (2016)
16 (per curiam) (quoting *Heller I*, 554 U.S. at 582). In *Bruen*, the Court explained
17 “that general definition covers modern instruments that facilitate armed self-
18 defense.” 597 U.S. at 28 (citing *Caetano*, 577 U.S. at 411-12).

19 It is well established that modern handguns are protected. *Perez-Garcia*, 96
20 F.4th at 1180 (citing *Bruen*, 597 U.S. at 9-10); *Alaniz*, 69 F.4th at 1127 (quoting

1 *McDonald*, 561 U.S. at 767-68). Beyond handguns, the Court is without binding
2 authority as to what other weapons the Second Amendment protects as “arms.”
3 Justice Thomas recently noted that the Supreme Court has not “squarely addressed
4 what types of weapons are ‘Arms’ protected by the Second Amendment.” *Harrel*
5 *v. Raoul*, 144 S. Ct. 2491, 2492 (2024) (statement respecting a denial of certiorari).
6 He further noted that the state of the authority on this issue “leaves open essential
7 questions such as what makes a weapon ‘bearable,’ ‘dangerous,’ or ‘unusual.’” *Id.*

8 At this stage of the analysis, Plaintiffs bear the burden to demonstrate they
9 are likely to succeed in establishing the conduct at issue is covered by the text of
10 the Second Amendment. *See Baird*, 81 F.4th at 1044. To evaluate that
11 proposition, the Court reviews the existing authority, then considers Plaintiffs’
12 evidentiary showing in light of that authority.

13 i. State of the Authority

14 There is no post-*Bruen* Ninth Circuit authority offering guidance on the
15 Second Amendment’s definition of “arms” or which arms do or do not fall under
16 its protections.²

18 ² *Teter v. Lopez*, a panel decision involving butterfly knives, was vacated pending
19 rehearing en banc. No. 20-15948, 2024 WL 719051 (9th Cir. Feb. 22, 2024).

20 *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021), an en banc decision involving

1 The circuit courts that have applied *Bruen* to category-of-weapon restrictions
2 have found that the Second Amendment’s definition of “arms” does not include
3 certain weapons. The Fourth Circuit has excluded arms “not reasonably related or
4 proportional to the end of self-defense” and “better suited for offensive criminal or
5 military purposes.” *Bianchi v. Brown*, 111 F.4th 438, 450 (4th Cir. 2024) (en
6 banc), *petition for cert. filed sub nom., Snope v. Brown*, No. 24-203 (2024). The
7 Seventh Circuit has excluded “weapons that may be reserved for military use.”
8 *Bevis v. City of Naperville*, 85 F.4th 1175, 1194 (7th Cir. 2023). A concurring
9 judge of the Third Circuit would have excluded “dangerous and unusual weapons.”
10 *Del. State Sportsmen’s Ass’n, Inc. v. Del. Dep’t of Safety & Homeland Sec.*, 108
11 F.4th 194, 209 (3rd Cir. 2024) (Roth, J., concurring).

12 District courts in this circuit, while not unanimously, have largely reached
13 the same conclusion as these circuit courts. A court in the Central District of
14 _____
15 large-capacity magazines, was vacated and remanded, 49 F.4th 1228 (9th Cir.
16 2022), and is now awaiting en banc decision, *see* Notice, No. 23-55805 (9th Cir.
17 Mar. 19, 2024), ECF No. 82. *Miller v. Bonta (Miller II)*, 699 F. Supp. 3d 956
18 (S.D. Cal. 2023), a case involving assault weapons, is awaiting a panel decision
19 and has been stayed pending *Duncan*. No. 23-2979, 2024 WL 1929016 (9th Cir.
20 Jan. 26, 2024).

1 California excluded “dangerous and unusual” weapons from the definition of
2 “arms.” *See, Rupp v. Bonta*, No. 17-cv-746, 2024 WL 1142061, at *7-9 (C.D. Cal.
3 Mar. 15, 2024). A court in the Western District of Washington has explained that
4 “*Heller* [I] does not hold that access to all weapons ‘in common use’ are
5 automatically entitled to Second Amendment protection without limitation.”
6 *Hartford v. Ferguson*, 676 F. Supp. 3d 897, 903 (W.D. Wash. 2023). A court in
7 the District of Oregon has noted that regulations of dangerous and unusual
8 weapons were presumptively lawful, and considered the dangerousness of the
9 weapon at issue to determine that they were not “in common use for lawful
10 purposes like self-defense.” *Or. Firearms Fed’n, Inc. v. Brown*, 644 F. Supp. 3d
11 782, 798, 801 (D. Or. 2022) (citations, alteration, and quotation marks omitted). In
12 contrast, a court in the Southern District of California applied a “dangerous and
13 unusual” analysis only to determine whether historical regulations were analogous
14 to the regulation at issue at *Bruen* step two. *Miller II*, 699 F. Supp. 3d at 969-70,
15 977, 985, 1007.

16 The majority of the existing authority favors a Second Amendment test
17 requiring Plaintiffs to demonstrate that the weapons at issue are not only in
18 common use for self-defense but also tailored to that end, or that the weapons at
19 issue are otherwise not too dangerous or unusual.

1 ii. Assault Weapons Subject to SHB 1240

2 SHB 1240’s definition of “assault weapons” is wide in scope. It
3 encompasses a long list of specific and general categories of firearms with various
4 features, capabilities, calibers, attachments, shapes, and sizes. *See* 2023 Wash.
5 Sess. Laws, ch. 162, at § 2(2)(a). The law explains that “[a]ssault weapons are
6 civilian versions of weapons created for the military and are designed to kill
7 humans quickly and efficiently” and that the state legislature has found assault
8 weapons to be “most useful in military service.” *Id.* at § 1.

9 Plaintiffs protest that this “sweeping definition captures nearly any modern
10 rifle,” ECF No. 16 at 11, although Plaintiffs seek to enjoin SHB 1240 with regard
11 to more than just rifles, *id.* at 9. Plaintiffs argue that the Second Amendment’s
12 plain text “obviously includes the rifles, pistols, and shotguns that SHB 1240 bans,
13 regardless of whether they possess the various features that SHB 1240 singles out
14 as supposedly problematic.” *Id.* at 15-16. The Court disagrees that the current
15 state of authority provides an “obvious” answer on what types of weapons are or
16 are not included in the Second Amendment right. *See Heller I*, 554 U.S. at 623
17 (“the Second Amendment right, whatever its nature, extends only to certain types
18 of weapons”); *Harrel*, 144 S. Ct. at 2492.

19 Plaintiffs repeatedly assert, without supporting evidence, that many of the
20 firearms and features that SHB 1240 bans are not highly unusual and are common,

1 ubiquitous, and used for lawful purposes. ECF No. 16 at 20-21; ECF No. 39 at 5,
2 10. In contrast, Plaintiffs acknowledge they are not challenging SHB 1240’s ban
3 on the sale of grenade launcher attachments, noting without evidentiary support
4 that “[g]renade launchers’ are very rare . . . as are grenades themselves.” ECF
5 No. 16 at 11 n.1. The Court will not deem a firearm in common use today for self-
6 defense without a proffer of evidence explaining what the firearm is, how
7 commonly Americans use it, and for what purpose(s) it is used.³ Plaintiffs have
8 failed to meet their burden to demonstrate that the bulk of the arms that SHB 1240
9 identifies are covered by the Second Amendment.

10 There is one type of firearm for which Plaintiffs present sufficient evidence

11
12 ³ Plaintiffs briefly suggest that “pistol braces” are “unquestionably common in
13 modern America,” citing a news article that describes pistol braces as “a
14 commonly owned and used accessory” and estimating there are 10 to 40 million
15 privately owned pistol braces. ECF No. 16 at 20 (citing Ben Johnson, *ATF*
16 *Announces Pistol Brace Ban Affecting Millions of Gun Owners*, The Salem News
17 Online (Jan. 31, 2023)). The article cites to the Congressional Research Service
18 for the conclusion. It is not clear whether SHB 1240 covers pistol braces, and
19 Plaintiffs do not otherwise explain how these statistics bear on the analysis for
20 firearms that are clearly covered by SHB 1240.

1 and data to enable a *Bruen* inquiry—the AR-15 rifle. Plaintiffs offer information
2 relating to the commonality and lawful uses of AR-15 rifles. ECF No. 16 at 18-23.
3 The State Defendants’ experts also provide information on these points. *See, e.g.*,
4 ECF No. 32 at 10-13, 14-16, 19-20 (Busse Declaration); ECF No. 33 at 33-41
5 (Klaveras Declaration). Moreover, the commonality and use of the AR-15 has
6 been analyzed by other courts. *See Rupp*, 2024 WL 1142061, at *9-19; *Miller II*,
7 699 F. Supp. 3d at 965-68; *see also Staples v. United States*, 511 U.S. 600, 603
8 (1994).

9 Plaintiffs cite NSSF data indicating that, from 1990 to 2018, 19.79 million
10 modern sporting rifles have been produced in or imported into the United States.
11 NSSF, *Firearm Production in the United States* 7 (2020), available at
12 [https://www.nssf.org/wp-content/uploads/2020/11/IIR-2020-Firearms-Production-](https://www.nssf.org/wp-content/uploads/2020/11/IIR-2020-Firearms-Production-v14.pdf)
13 [v14.pdf](https://www.nssf.org/wp-content/uploads/2020/11/IIR-2020-Firearms-Production-v14.pdf). In 2018, 1.72 million modern sporting rifles, which are mostly AR-15s
14 and AK-style rifles, were produced in the United States, constituting 48% of all
15 rifles produced that year.⁴ *Id.* at 7, 18; *see also* ATF, *National Firearms*

17 ⁴ For comparison, 3.8 million pistols were manufactured in the United States in
18 2018. NSSF, *Firearm Production in the United States*, *supra*, at 2; *see also* ATF,
19 *Firearms Commerce in the United States: Annual Statistical Update* 3 (2021),
20 available at <https://www.atf.gov/firearms/docs/report/2021-firearms-commerce->

1 *Commerce and Trafficking Assessment: Firearms in Commerce* 149 (May 5,
2 2022), available at [https://www.atf.gov/firearms/docs/report/national-firearms-
4 commerce-and-trafficking-assessment-firearms-commerce-volume](https://www.atf.gov/firearms/docs/report/national-firearms-
3 commerce-and-trafficking-assessment-firearms-commerce-volume) (noting that
5 AR-type rifles “are now commonly referred to as ‘modern sporting rifles’”). In
6 2022, NSSF estimated that 24.44 million modern sporting rifles had been produced
7 in or imported into the United States since 1990. NSSF, *Commonly Owned: NSSF
8 Announces over 24 Million MSRs in Circulation* (July 20, 2022), available at
9 [https://www.nssf.org/articles/commonly-owned-nssf-announces-over-24-million-
11 msrs-in-circulation/](https://www.nssf.org/articles/commonly-owned-nssf-announces-over-24-million-
10 msrs-in-circulation/). 97% of modern sporting rifle owners own an AR-platform
12 rifle. NSSF, *Ownership, Usage and Attitudes Toward AR- and AK-Platform
13 Modern Sporting Rifles* 12 (July 14, 2022), available at
14 [https://www3.nssf.org/share/PDF/pubs/NSSF-MSR-Comprehensive-Consumer-
16 Report.pdf](https://www3.nssf.org/share/PDF/pubs/NSSF-MSR-Comprehensive-Consumer-
15 Report.pdf).

17 The State Defendants offer an expert opinion from Louis Klarevas, a
18 security policy analyst and research professor in the field of gun massacres. ECF
19 No. 33 at 1-3. Klarevas opines that “only 6.4 million gun owners—out of an
20 estimated 81 million Americans who own at least one personal firearm—own
modern sporting rifles.” ECF No. 33 at 34 ¶ 26. Klarevas opines that this

[report/download](#).

1 represents “less than 8% of all civilian gun owners in the United States” and “less
2 than 2% of all Americans.” *Id.* at 34-35 ¶ 26; *see also* ECF No. 33-9 at 2 (Philip J.
3 Cook & John J. Donohue, *Regulating Assault Weapons and Large-Capacity*
4 *Magazines for Ammunition*, 328 JAMA 1191, 1191 (2022) (“Current estimates
5 suggest that approximately 20 million assault weapons are owned by private
6 individuals in the US, with millions of new assault weapons manufactured and
7 imported each year.”)).

8 Plaintiffs also cite a 2021 paper that indicates “82.7% of gun owners report
9 owning a handgun” and 30.2% reported having owned an AR-15. ECF No. 16 at
10 19 (citing William English, *2021 National Firearms Survey: Updated Analysis*
11 *Including Types of Firearms Owned* 20, (Georgetown McDonough School of
12 Business Research Paper No. 4109494, May 2022), available at
13 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4109494).⁵

14
15 ⁵ Klarevas challenges the English paper on the grounds that “it fails to identify the
16 source of sponsorship funding and it fails to fully disclose the measurement tools.”
17 ECF No. 33 at 38 ¶ 27 n.26. The Court “is not strictly bound by all rules of
18 evidence” when considering a preliminary injunction. *See Ticketmaster LLC v.*
19 *RMG Techs., Inc.*, 507 F. Supp. 2d 1096, 1103 n.2 (C.D. Cal. 2007) (citing *Flynt*
20 *Distrib. Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984)). Evidentiary

1 In a 2021 survey of firearms retailers, 86.9% of respondents indicated they
2 offer new handguns for sale, and 82.1% offer new “AR-style/modern sporting
3 rifles.” NSSF, *Firearms Retailer Survey Report 7* (2021), available at
4 <https://www3.nssf.org/share/PDF/pubs/Firearms-Retailer-Survey-Report-2021.pdf>.
5 Retailers were asked to approximate 2020 sales by firearm type: the largest
6 category of reported sales was semiautomatic pistols (44.2%), and the second
7 largest was AR/modern sporting rifles (20.3%). *Id.* at 12.

8 The figures cited are broadly consistent with the findings by other courts. A
9
10 standards are relaxed to accommodate “[t]he urgency of obtaining a preliminary
11 injunction [which] necessitates a prompt determination and makes it difficult to
12 obtain affidavits from persons who would be competent to testify at trial.” *Harvey*,
13 734 F.2d at 1394. “The trial court may give even inadmissible evidence some
14 weight, when to do so serves the purpose of preventing irreparable harm before
15 trial.” *Id.* (citations omitted); *see also Republic of Philippines v. Marcos*, 862 F.2d
16 1355, 1363 (9th Cir. 1988) (“It was within the discretion of the district court to
17 accept this hearsay for purposes of deciding whether to issue the preliminary
18 injunction.”). The English study is broadly consistent with the other information
19 presented. However, this Order should not be construed as an evidentiary ruling
20 on the admissibility of the English study in future proceedings.

1 court in the Southern District of California found in 2021 that “[o]ver the last three
2 decades, 19,797,000 modern rifles have been manufactured or imported into the
3 United States” *Miller v. Bonta (Miller I)*, 542 F. Supp. 3d 1009, 1020 (S.D.
4 Cal. 2021), *vacated and remanded*, No. 21-55608, 2022 WL 3095986 (9th Cir.
5 Aug. 1, 2022) (citations omitted). That same court also found that “[a]lmost one-
6 half of all rifles (48%) produced in 2018 were modern rifles.” ECF No. 16 at 18
7 (citation omitted); *see also Miller II*, 699 F. Supp. 3d at 1009 (“Today, the AR-15
8 is the best-selling rifle in the United States, industry figures indicate. About 1 in
9 20 United States adults—or roughly 16 million people—own at least one AR-15,
10 according to polling data from The Washington Post and Ipsos.” (quoting Todd C.
11 Frankel et al., *The Gun That Divides a Nation*, Washington Post, Mar. 27, 2023))
12 (quotation marks omitted). In March 2024, a court in the Central District of
13 California found that “the number of AR-type-rifle owners” is “about 10.31
14 million—about 4% of the adult population.” *Rupp*, 2024 WL 1142061, at *16; *see*
15 *also Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1261 (D.C. Cir.
16 2011) (“Approximately 1.6 million AR-15s alone have been manufactured since
17 1986, and in 2007 this one popular model accounted for 5.5 percent of all firearms,
18 and 14.4 percent of all rifles, produced in the U.S. for the domestic market.”).

19 As to *why* Americans own AR-15s, NSSF consumer survey data shows that
20 “[h]ome/self-defense” is the second-highest reason cited for modern sporting rifle

1 ownership, behind “[r]ecreational target shooting.” NSSF, *Ownership, Usage and*
2 *Attitudes Toward AR- and AK-Platform Modern Sporting Rifles*, *supra* at 18.

3 In sum, the data presented suggests that AR-15s are commonly owned, and
4 some who own them do so for self-defense. However, as explained above, most
5 courts analyzing this issue have found commonality is not enough. In fact, most
6 courts that have considered whether the AR-15 falls under the Second
7 Amendment’s plain text have concluded that it does not.

8 The Fourth Circuit found that the AR-15 “lies outside the scope of the
9 Second Amendment” because “the Second Amendment protects only those
10 weapons that are typically possessed by average Americans for the purpose of self-
11 preservation and are not ill-suited and disproportionate to achieving that end.”
12 *Bianchi*, 111 F.4th at 461. The court reasoned that the AR-15 was intended for
13 offensive combat rather than individual self-defense. *Id.* at 454 (citation omitted).
14 The court noted the AR-15’s likeness to the M16, a rifle with “phenomenal
15 lethality and reliability”; features that “make[] the AR-15 ‘uniquely dangerous’
16 compared to other high-powered rifles”; disproportionate use in mass shootings,
17 and the increased death toll that results; and factors that make “AR-15s and similar
18 assault rifles . . . ‘uniquely dangerous to law enforcement.’” *Id.* at 451, 456-57
19 (citations omitted). The court explained that it had “described the AR-15’s
20 capacities in abundant detail to demonstrate just how far outside the animating

1 purposes of the Second Amendment this weapon lies.” *Id.* at 458.

2 In *Bevis*, a consolidated appeal, the Seventh Circuit held that challengers to
3 Illinois’s assault weapons ban had failed to demonstrate a likelihood of success in
4 showing that the AR-15 is protected by the Second Amendment. 85 F.4th at 1197.
5 The court affirmed the district courts’ denials of a preliminary injunction, finding
6 that “the Arms protected by the Second Amendment do not include weapons that
7 may be reserved for military use.” *Id.* at 1194. The court explained that “the AR-
8 15 is almost the same gun as the M16 machinegun,” *id.* at 1195, and that “*Heller*
9 [I] informs us that the latter weapon is not protected by the Second Amendment,”
10 such that both M16s and AR-15s “may be regulated or banned . . . without
11 offending the Second Amendment,” *id.* at 1197. But the court “stress[ed] that this
12 is just a preliminary look at the subject” and “d[id] not rule out the possibility that
13 the plaintiffs will find other evidence that shows a sharper distinction between AR-
14 15s and M16s (and each one’s relatives) than the present record reveals.” *Id.*

15 District courts in this circuit have analyzed the constitutionality of AR-15
16 bans. No challenge to such a ban has succeeded in obtaining an injunction that
17 currently remains in force. In *Rupp*, a court in the Central District of California
18 found that the challengers failed to meet their burden at *Bruen* step one, at the
19 summary judgment stage. 2024 WL 1142061, at *19. In *Hartford*, a court in the
20 Western District of Washington found that the challengers failed to meet their

1 burden at *Bruen* step one, in seeking a preliminary injunction against SHB 1240,
2 the same statute at issue here. 676 F. Supp. 3d at 904. In *Miller II*, the district
3 court in the Southern District of California granted a permanent injunction, 699 F.
4 Supp. 3d at 1011, which the Ninth Circuit administratively stayed, 2023 WL
5 11229998.

6 These cases are stayed pending an en banc decision in *Duncan v. Bonta*. In
7 *Duncan*, the plaintiffs brought a Second Amendment challenge to a California law
8 banning the manufacture of firearm magazines accepting more than 10 rounds as
9 inconsistent with the Second Amendment. *See* 83 F.4th 803, 805 (9th Cir. 2023).
10 The district court issued a preliminary injunction, *Duncan v. Becerra*, 265 F. Supp.
11 3d 1106, 1139 (S.D. Cal. 2017), and a permanent injunction at summary judgment,
12 366 F. Supp. 3d 1131, 1185-86 (S.D. Cal. 2019). After a Ninth Circuit panel
13 affirmed, 970 F.3d 1133, 1169 (9th Cir. 2020), an en banc panel reversed and
14 remanded for entry of judgment in favor of the government defendant, *Duncan v.*
15 *Bonta*, 19 F.4th 1087, 1113 (9th Cir. 2021). After *Bruen* was decided, the
16 Supreme Court vacated the *Duncan* en banc decision. 142 S. Ct. 2895 (2022).
17 Upon remand, the district court issued another injunction. 695 F. Supp. 3d 1206,
18 1254-55 (S.D. Cal. 2023). On appeal, the Ninth Circuit stayed the injunction, 83
19 F.4th at 807, and heard the case en banc on March 19, 2024, *see* Notice, No. 23-
20 55805 (9th Cir. Mar. 19, 2024), ECF No. 82.

1 *Duncan* is likely to be instructive on the question of what “arms” are
2 included under the Second Amendment’s plain text. However, the Court must rely
3 on the scant authority that exists. And, as summarized above, that authority
4 weighs against Plaintiffs’ claim. The most relevant authority available, although
5 not directly on point, is the *Duncan* court’s stay of the injunction issued in that
6 case. *See* 83 F.4th at 805-06. The court found that the government defendant was
7 likely to succeed on the merits, i.e., by demonstrating that California’s large-
8 capacity magazine ban is constitutional. *Id.*

9 Finally, the operative legal standard here is the standard for a preliminary
10 injunction, “an extraordinary remedy never awarded as of right.” *Winter*, 555 U.S.
11 at 24. Plaintiffs cannot point to an injunction that has been upheld on appeal akin
12 to the one they seek. Plaintiffs fail to meet the high standard required for issuance
13 of a preliminary injunction. However, because the relief currently sought is
14 preliminary and extraordinary, this analysis does not control a later determination
15 of the merits, either on summary judgment or following a trial. *See Bevis*, 85 F.4th
16 at 1197.

17 2. *Historical Tradition of Firearms Regulation*

18 Should the Court assume that the Second Amendment’s plain text covers
19 AR-15s, the State Defendants must then demonstrate that SHB 1240 comports with
20 “the Nation’s historical tradition of firearm regulation.” *See Bruen*, 597 U.S. at 24.

1 The Supreme Court has stated that the historical analysis is “fairly
2 straightforward” in cases involving a firearms regulation that “addresses a general
3 societal problem that has persisted since the 18th century.” *See id.* at 26. In such a
4 case, “the lack of a distinctly similar historical regulation addressing that problem
5 is relevant evidence that the challenged regulation is inconsistent with the Second
6 Amendment.” *Id.* Conversely, if “earlier generations addressed the societal
7 problem . . . through materially different means,” that may also signify that the
8 “modern regulation is unconstitutional.” *Id.* at 26-27. But “other cases implicating
9 unprecedented societal concerns or dramatic technological changes may require a
10 more nuanced approach.” *Id.* at 27. “When confronting such present-day firearm
11 regulations, this historical inquiry that courts must conduct will often involve
12 reasoning by analogy[.]” *Id.* at 28. Under *Heller II* and *McDonald*, a court should
13 consider “how and why the regulations burden a law-abiding citizen’s right to
14 armed self-defense,” relative to past regulations. *Id.* at 29.

15 Similar to the above discussion of *Bruen* step one, there is little authority to
16 guide the Court’s analysis at *Bruen* step two. However, what authority exists tends
17 to weigh against Plaintiffs’ challenge. SHB 1240 is a prohibition on the
18 manufacture, import, distribution, or sale of a weapon the legislature deemed
19 dangerous. *See* 2023 Wash. Sess. Laws, ch. 162, §§ 1, 3. While no Ninth Circuit
20 case to date has reviewed a similar law, other circuit courts and other district courts

1 in this circuit have done so.

2 In *Bianchi*, the Fourth Circuit likened Maryland’s assault weapons ban to
3 historical restrictions on carry and possession, observing that “over the course of
4 the 19th century and into the early 20th century, nearly every single state would
5 either regulate the carry of certain firearms or place severe restrictions on their
6 possession.” 111 F.4th at 466. The court highlighted regulations targeting
7 “excessively dangerous weapons such as Bowie knives, dirks, sword canes, metal
8 knuckles, slungshots, and sand clubs,” which were weapons “particularly suitable
9 for fighting and ‘popular with street criminals.’” *Id.* at 466-67 (footnotes,
10 alteration, and citations omitted). The court also found regulations banning the
11 possession of explosives and automatic or semiautomatic weapons in the early 20th
12 century to be persuasive. *Id.* at 470.

13 The Seventh Circuit found convincing parallels between Illinois’s assault
14 weapons ban and 18th- and 19th-century regulations banning the discharge of
15 weapons in city limits, banning the sale of various bladed weapons and pistols, and
16 restricting carry of certain “dangerous and concealable” weapons, as well as more
17 recent federal gun control laws. *Bevis*, 85 F.4th at 1201-02 (citations omitted).

18 The First Circuit found convincing parallels between Rhode Island’s large-
19 capacity magazine ban and historical regulations of sawed-off shotguns and Bowie
20 knives, in addition to a broader tradition of restricting access to certain dangerous

1 weapons in response to “growing societal concern[s] about violent crime.” *Ocean*
2 *State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 46-50 (1st Cir. 2024).

3 Finally, the district courts in *Rupp*, 2024 WL 1142061, at *35-36; *Hartford*,
4 676 F. Supp. 3d at 904-07; and *Or. Firearms Fed’n*, 644 F. Supp. 3d at 802-04,
5 each found a sufficient historical analogy to the category-of-weapons regulations at
6 issue in the cases before them.

7 Here, the State Defendants offer a number of proposed analogues to
8 demonstrate that SHB 1240 is within this Nation’s historical tradition of gun
9 regulations. *See* ECF No. 30 at 20-24; ECF No. 34 at 3-33; ECF No. 35 at 3-107.
10 These analogues include restrictions on the sale, carrying, concealment,
11 brandishing, possession, and certain types of uses of certain weapons, in the form
12 of taxes, fines, and criminal penalties. These analogues include some that circuit
13 courts of appeal have found persuasive in comparable cases, such as regulations of
14 Bowie knives and other dangerous weapons. *See* ECF No. 34 at 22-26 (citing 19th
15 century laws and court decisions from a variety of states).

16 Therefore, even if the Court were to continue to *Bruen* step two, it appears
17 that the State Defendants are likely to meet their burden, under the currently
18 available authority.

19 **B. Remaining Winter Factors**

20 The remaining *Winter* factors inquire whether Plaintiffs are likely to suffer

1 irreparable harm and whether the merged balance of equities and public interest
2 analysis weighs in Plaintiffs' favor. *See Baird*, 81 F.4th at 1040. Plaintiffs have
3 failed to demonstrate a likelihood of success on the merits—the most important
4 *Winter* factor. *See id.* Therefore, the Court need not consider the other factors.
5 *See id.*

6 Accordingly, **IT IS HEREBY ORDERED:**

- 7 **1.** Plaintiffs' Motion for Preliminary Injunction, **ECF No. 16**, is
8 **DENIED.**
- 9 **2.** The parties are directed to confer and file a joint status report
10 with a proposed schedule for further proceedings in this matter **by**
11 **October 10, 2024**, including their positions on whether this case should be
12 stayed pending the Ninth Circuit's decision in *Duncan*, No. 23-55805 (9th
13 Cir. argued Mar. 19, 2024). *See, e.g., Miller v. Bonta*, No. 23-2979 (9th Cir.
14 stayed Jan. 26, 2024).

15 **IT IS SO ORDERED.** The District Court Executive is directed to
16 file this order and provide copies to the parties.

17 DATED September 26, 2024.

18 *s/Mary K. Dimke*
19 MARY K. DIMKE
20 UNITED STATES DISTRICT JUDGE