NO. 20-55437

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KIM RHODE, 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. 3:18-cv-00802 BEN JLB
The Honorable Roger T. Benitez, Judge

BRIEF OF AMICI CURIAE ILLINOIS, CONNECTICUT, DELAWARE, THE DISTRICT OF COLUMBIA, HAWAII, MARYLAND, MASSACHUSETTS, MICHIGAN, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, PENNSYLVANIA, RHODE ISLAND, VIRGINIA, AND WASHINGTON IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL

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IDENTITY AND INTEREST OF AMICI STATES

The amici States of Illinois, Connecticut, Delaware, the District of Columbia, Hawaii, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Virginia, and Washington submit this brief in support of Defendant-Appellant California Attorney General Xavier Becerra ("California") pursuant to Federal Rule of Appellate Procedure 29(a)(2). The amici States have a substantial interest in the public health, safety, and welfare, which includes an interest in protecting their residents from the harmful effects of gun violence.

To serve that compelling interest, the amici States have long exercised their governmental prerogative to craft and implement measures that prevent dangerous persons from accessing firearms and ammunition. Although the amici States have reached different conclusions on how best to regulate firearms and ammunition within their borders, they share an interest in protecting their right to address the problem of gun violence in a way that is tailored to the specific circumstances in each of their States. The district court here improperly rejected this longstanding state authority when it enjoined

enforcement of two California ammunition regulations. Accordingly, the amici States urge this Court to vacate the district court's injunction.

SUMMARY OF ARGUMENT

In 2016, California voters approved a multifaceted ballot initiative regulating ammunition sales. At issue here are its requirements that gun dealers conduct background checks prior to all ammunition sales and that all ammunition sales occur face-to-face. *See* Cal. Pen. Code §§ 30312, 30352, 30370. As California's opening brief explains, these requirements—which prevent dangerous persons from obtaining ammunition—promote compelling state interests without imposing a severe burden on Second Amendment rights. *See* AT Br. 38-40. The district court improperly concluded otherwise.

The amici States agree with California that the district court's decision should be reversed because the district court misapplied the intermediate scrutiny analysis, among other reasons. *See id.* at 22-23. They write separately, however, to address two aspects of that analysis. First, the amici States object to the district court's conclusion that the Second Amendment constrained California's ability to enact the ammunition regulations at issue here. As the Supreme Court has recognized, the Second Amendment allows States to address the harmful effects of gun violence through new regulations. And

California's ammunition regulations—which are similar to numerous laws across the country—are an appropriate exercise of that prerogative. Second, the amici States disagree with the district court's apparent view that California's interests in public safety and crime prevention cannot be substantiated by the types of evidence presented here. On the contrary, it is settled that States may support their interests in public safety and crime prevention with a wide range of evidence, including social science studies and legislative findings.

ARGUMENT

I. The Second Amendment Preserves State Authority To Enact Ammunition Regulations.

A. The Second Amendment allows States and localities to enact new measures in response to gun violence.

The amici States have long exercised their police power to protect the health, safety, and welfare of their residents. In fact, "the States possess primary authority for defining and enforcing the criminal law," *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (internal quotations omitted), and have "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (internal quotations omitted). These responsibilities include enacting measures

to prevent crime and minimize gun violence within their borders. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 618 (2000) ("Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."). In the amici States' experience, these measures are more effective when tailored to the individual needs of each State or locality.

The district court, however, rejected California's ammunition laws, as well as its argument that the background check and face-to-face regulations were within the proper scope of state variation. ER 66-67; *see also* AT Br. at 40. According to the district court, these regulations ran afoul of the Second Amendment and the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008). ER 95. This is incorrect.

As Judge Wilkinson explained in a similar context, the *Heller* Court's establishment of "the 'right of law-abiding, responsible citizens to use arms in defense of hearth and home,'" did not "abrogate" the States' "core responsibility" of "[p]roviding for the safety of citizens within their borders." *Kolbe v. Hogan*, 849 F.3d 114, 150 (4th Cir. 2017)

(en banc) (Wilkinson, J., concurring) (quoting *Heller*, 554 U.S. at 635). On the contrary, the Court in *Heller*—and then again in *McDonald v. City of Chicago*, 561 U.S. 742 (2010)—expressly acknowledged the important role that States and localities play in protecting their residents from the harms of gun violence.

To begin, *Heller* made clear that the Second Amendment right to keep and bear arms is "not unlimited." 554 U.S. at 595; *see also McDonald*, 561 U.S. at 802 ("No fundamental right—not even the First Amendment—is absolute."). Although government entities may not ban handgun possession in the home or impose similarly severe burdens on the Second Amendment right, States still possess "a variety of tools" to combat the problem of gun violence via regulation. *Heller*, 554 U.S. at 636. The States may, for example, implement measures prohibiting "the possession of firearms by felons and the mentally ill" or "imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27; *see also Peruta v. Cnty. of San Diego*, 824 F.3d 919, 928 (9th Cir. 2016) (en banc) (noting that the *Heller* Court "emphasized the limited scope of its holding, and underscored the tools that remained available to the District of Columbia to regulate firearms").

And in *McDonald*, the Court reiterated that the Second Amendment "by no means eliminates" the States' "ability to devise solutions to social problems that suit local needs and values." 561 U.S. at 785. Rather, the Court recognized "that conditions and problems differ from locality to locality." *Id.* at 783. Indeed, according to the Federal Bureau of Investigation, a wide variety of factors "affect the volume and type of crime occurring from place to place," including population density, the degree of urbanization, poverty level, job availability, modes of transportation, climate, criminal justice system policies, and educational and recreational characteristics.[1] These factors, which vary from State to State, produce disparities in the number and characteristics of firearm-related murders and other crimes.[2] Given States' unique conditions and needs, requiring all of them to use the same solution to address gun violence would, as both *Heller* and *McDonald* acknowledged, unduly obstruct them from

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[1] FBI, *Uniform Crime Reporting Statistics: Their Proper Use* (May 2017), https://ucr.fbi.gov/ucr-statistics-their-proper-use.

[2] *See, e.g.*, FBI, *Murder: Crime in the United States 2018, tbl. 20*, https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-20.

enacting measures necessary to protect the health and safety of their residents.

In line with these principles, this Court and others have consistently upheld firearm and ammunition regulations tailored to individual States' circumstances. For instance, the court recently approved California's "decision to require new semiautomatic gun models manufactured in-state to incorporate new technology" because "the state must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Pena v. Lindley*, 898 F.3d 969, 979 (9th Cir. 2018) (cleaned up); *see also Peruta*, 824 F.3d at 945 (Graber, J., concurring) (explaining that "the government must be allowed to experiment with solutions to serious problems") (citing *Jackson v. City of San Francisco*, 746 F.3d 953, 966 (9th Cir. 2014)).

Other circuits, too, have applied the principles outlined in *Heller* and *McDonald* to state and local firearm and ammunition regulations. In *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015), for instance, the Seventh Circuit upheld a local government's ban on assault weapons and large-capacity magazines, noting that although "*Heller* and *McDonald* set limits on the regulation of firearms," they did

not "take all questions about which weapons are appropriate for self-defense out of the people's hands." *Id.* at 412. As the court explained, "the Constitution establishes a federal republic where local differences are cherished as elements of liberty, rather than eliminated in a search for national uniformity." *Id.*

Likewise, in *Kolbe*, the Fourth Circuit rejected a challenge to Maryland's ban on assault weapons and large-capacity magazines. 849 F.3d at 121. In concurrence, Judge Wilkinson highlighted the need for courts to refrain from relying on *Heller*'s handgun exemption to "disable[ ] legislatures from addressing the wholly separate subject of assault weapons suitable for use by military forces around the globe." *Id.* at 150 (Wilkinson, J., concurring). Indeed, courts must reject the temptation to "empower the judiciary and leave Congress, the Executive, state legislatures, and everyone else on the sidelines." *Id.* Judge Wilkinson thus did not draw from *Heller* or "the profound ambiguities of the Second Amendment an invitation to courts to preempt this most volatile of political subjects and arrogate to themselves decisions that have been historically assigned to other, more democratic, actors." *Id.*

These same principles—which build on the States' responsibility to protect the health and safety of their residents and their ability to utilize innovative measures when doing so—should apply here.

B. The California ammunition regulations, which protect the public health and safety, are consistent with measures taken by other States.

California's decision to regulate ammunition sales is well within its governmental prerogative under the parameters just discussed. As an initial matter, neither the mandatory background check nor the face-to-face requirement imposes a ban akin to the "absolute prohibition" on handgun possession that the *Heller* Court determined was an impermissible policy choice. 554 U.S. at 636. Instead, these laws provide a regulatory mechanism to prevent dangerous persons—such as felons and the mentally ill—from purchasing ammunition. The amici States thus agree with California, *see* AT Br. 40-41, that the district court wrongly treated these regulations as imposing a "complete ban" on law-abiding California residents, *see* ER 56.

Of equal consequence to the amici States, however, is the district court's improper determination that California's background check and face-to-face sale requirements are outlier regulations that exceed the

bounds of permissible experimentation. *See, e.g.*, ER 56, 67, 95, 117. The measured approach taken by California to prevent dangerous persons from obtaining ammunition is consistent with numerous state laws regulating ammunition sales and imposing background checks, as well as the Supreme Court's conception of continued and varied state regulation in the Second Amendment context.

As an initial matter, background checks are a common component of firearm regulations across the country. Federally licensed firearms dealers are required to conduct them for all firearm sales, and 22 States and the District of Columbia impose background check requirements on certain categories of private sales.[3] Relevant here, a number of States have also extended background checks or similar requirements to ammunition sales within their jurisdictions. Indeed, four States in addition to California require some form of background check to purchase ammunition. Connecticut, Illinois, Massachusetts, and New Jersey currently require that individuals possess a license or firearms

[3] Giffords Law Center, *Universal Background Checks*, https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/universal-background-checks/#federal.

identification card—which requires passing a background check—before purchasing ammunition.[4]

The District of Columbia also imposes restrictions on ammunition sales; District residents may only purchase ammunition if they are listed as a registered owner of a firearm of the same caliber or gauge as the ammunition they seek to purchase. D.C. Code Ann. §§ 7-2505.02(d), 7-2506.01. Nonresidents seeking to purchase ammunition must demonstrate that they lawfully possess a firearm of the same caliber or gauge. *Id.* § 7-2505.02(d). And like California, the District also requires all ammunition sales to be conducted in-person. *Id.*

Laws regulating the point of sale or requiring background checks further a common policy goal of many States: restricting access to ammunition by dangerous or prohibited persons. *See Pena*, 898 F.3d at 1009 n.19 (Bybee, J., concurring) ("Other point-of-sale restrictions such as background checks and waiting periods are better characterized as regulations in support of *who* may lawfully possess (much less purchase) firearms. Such restrictions are conveniently enforced at the

[4] Conn. Gen. Stat. §§ 28-38n-39-38p; 430 ILCS 65/2(a)(2), (b); *id.* 65/4; *id.* 65/8; Mass. Gen. Laws ch. 140 §§ 129B, 129C, 131, 131A, 131E, and ch. 269, §10(h)(1); N.J. Stat. Ann. § 2C:58-3.3.

point of sale but are more easily defended as restrictions on 'the possession of firearms by felons and the mentally ill.'") (quoting *Heller*, 554 U.S. at 626).

As one example, a number of States ban the sale of ammunition to certain categories of persons. Seventeen States (Arizona, California, Connecticut, Delaware, the District of Columbia, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Rhode Island, and Vermont) prohibit some or all minors from purchasing or possessing ammunition.[5] Similarly, 20 States (California, Connecticut, Delaware, the District of Columbia, Florida, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Jersey, New York, South Carolina, Tennessee, Texas, and Virginia) preclude certain categories of dangerous persons, such as felons and the mentally ill, from purchasing or possessing ammunition.[6]

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[5] Giffords Law Center, *Ammunition Regulation*, https://lawcenter.giffords.org/gun-laws/policy-areas/hardware-ammunition/ammunition-regulation/#state.

[6] *Id.*

California's decision to implement procedures to ensure that these prohibited individuals cannot purchase ammunition does not place it outside of the constitutional range. Instead, it reflects a workable solution to a public safety problem faced by California. *See* AT Br. 38-40. And in implementing this policy, California does not impose any requirements on its residents that are inconsistent with those that already exist in other jurisdictions. There is thus no basis for the district court's conclusion that California's ammunition regulations should be viewed as outliers.

Indeed, in reaching its decision, the district court did not take the wide variety of these other state statutes into account. Instead, it focused almost exclusively on Congress's decision in 1986 to repeal portions of the Federal Gun Control Act of 1968. *See* ER 67, 90. In particular, the court highlighted Congress' decision to eliminate (1) the requirement that federally licensed firearm dealers maintain records of all ammunition sales and (2) the ban on interstate ammunition sales to unlicensed individuals. ER 67. The court thus faulted California for not "tak[ing] into account the lessons from this national Gun Control

Act experiment." ER 68. This conclusion, as well as the underlying reasoning, is flawed for several reasons.

At the threshold, States are not limited to implementing measures that already exist or that have been approved by the federal government. As explained, *see supra* Section I.A., States may exercise their police power to protect their residents through measures tailored to the needs of their communities. It is also within their prerogative to implement laws that other jurisdictions, including the federal government, have declined to adopt or have repealed as a matter of policy.

In any event, the federal provisions cited by the district court are not identical to the California requirements challenged here. For instance, the federal government's repeal of a requirement that gun dealers record ammunition sales does not control whether dealers may be required to complete a background check prior to purchase.

Furthermore, the congressional record excerpts cited by the district court to support its view that "ammunition recordkeeping had no substantial law enforcement value," ER 68 (emphasis omitted), do not alter the analysis. As the district court acknowledged in a footnote,

the reason given by the Bureau of Alcohol Tobacco and Firearms for this assertion was that ammunition cannot be traced. ER 68 n.39. But, as California has explained, the background check and face-to-face sales requirements were not implemented to trace ammunition after a crime has been committed; they were enacted to prevent dangerous persons from purchasing ammunition in the first place. AT Br. 38.

Accordingly, assuming that the repeal of the federal ammunition recordkeeping requirement could be considered relevant, that repeal is not inconsistent with the California regulations challenged here. Nor does it limit California's policy choices. The district court's decision to the contrary should be reversed.

II. California Has Demonstrated A Compelling State Interest In Promoting Public Safety And Preventing Gun Violence.

California enacted Proposition 63 "to 'keep ammunition out of the hands of convicted felons, the dangerously mentally ill, and other persons who are prohibited by law from possessing firearms and ammunition.'" ER 983 (quoting Prop. 63 § 3.2). By preventing dangerous or other prohibited persons from obtaining ammunition, the law "protect[s] public safety and prevent[s] crime." *Id.* As California explains, these interests—which were substantiated with several

different types of evidence—should be credited by this Court. *See, e.g.*, AT Br. at 38-42. This case is not, as the district court suggested, one where a State "run[s] roughshod over constitutionally protected rights" by asserting, without the requisite substantiation, that the regulations at issue "promote the government interest." ER 61.

A. States have a legitimate and compelling interest in preventing crime and protecting their residents from gun violence.

As an initial matter, the state interests proffered by California—promoting public safety and protecting its residents from violence, *see* AT Br. 38-40—have long been accepted as a "primary concern of every government," *United States v. Salerno*, 481 U.S. 739, 755 (1987) (discussing government interest in "the safety and indeed the lives of its citizens"). As one example, this Court has recognized as "self-evident" that "promoting public safety and reducing violent crime are substantial and important government interests." *Fyock v. City of Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015). More specifically, the court has acknowledged the state interests in reducing the many deleterious effects of improper or illegal access to firearms, including "the harm of intentional and accidental gun use"; violent crime; "the

danger of gun violence, particularly in the context of mass shootings and crimes against law enforcement"; and "the harm and lethality of gun injuries in general, and in particular as against law enforcement officers." *Id.* (internal citations omitted).

Other circuits, too, have reached this same conclusion. *See, e.g.*, *Wilson v. Cook Cnty.*, 937 F.3d 1028, 1036 (7th Cir. 2019) ("reducing the overall dangerousness of crime and making the public feel safer were substantial interests") (cleaned up); *Gould v. Morgan*, 907 F.3d 659, 673 (1st Cir. 2018) ("In point of fact, few interests are more central to a state government than protecting the safety and well-being of its citizens."); *Woollard v. Gallagher*, 712 F.3d 865, 877 (4th Cir. 2014) ("protecting public safety and preventing crime . . . are substantial governmental interests"); *Drake v. Filko*, 724 F.3d 426, 437 (3d Cir. 2013) (identifying "a significant, substantial and important interest in protecting its citizens' safety").

In short, California has asserted compelling state interests. And despite the district court's concerns, this case is not one where the judicial branch is being asked to give "deferential treatment" to state laws based on insubstantial or unsubstantiated interests. ER 60-61.

As the amici States can attest, promoting public safety and preventing crime are legitimate and important state responsibilities. Although the amici States take different approaches in regulating firearms and ammunition, *see supra* I.B., they all share the common interest in protecting their residents from gun violence. California's compelling state interests—which, as now explained, were properly substantiated—should be confirmed by this Court.

B. States may rely on a wide variety of evidence to substantiate their state interests.

The district court further erred by disregarding the evidence set forth by California in support of its interest in public safety. In its briefing before the district court, California explained that, in enacting laws, States are not required "to make a record of the type that an administrative agency or court does to accommodate judicial review." ER 66 (internal quotations omitted). Although the district court concluded otherwise, ER 66-67; *see also* ER 77 (reiterating California's argument and distinguishing it), and rejected California's reliance on

social science studies and legislative findings, ER 77-79, California correctly stated the law.[7]

As this Court has explained, governments are "entitled to rely on any evidence 'reasonably believed to be relevant' to substantiate [their] important interests." *Fyock*, 779 F.3d at 1000 (quoting *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 52 (1986)). This evidence may include "the legislative history of the enactment as well as studies in the record or cited in pertinent case law." *Jackson*, 746 F.3d at 966; *see also Pena*, 898 F.3d at 979 (courts do not "impose an 'unnecessarily rigid burden of proof'" on state justifications for a statute) (quoting *Mahoney v. Sessions*, 871 F.3d 873, 881 (9th Cir. 2018)).

Furthermore, courts "must accord substantial deference to the predictive judgments of the legislature." *Kolbe*, 849 F.3d at 140 (cleaned up) (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994) (*Turner I*)). Whereas the legislature is responsible for "weigh[ing] conflicting evidence and mak[ing] policy judgments," the

[7] Indeed, elsewhere in its opinion, the district court appeared to acknowledge that this is the correct legal standard, noting that "courts should not conflate legislative findings with evidence in the technical sense." ER 72 (cleaned up).

courts' "obligation is simply 'to assure that, in formulating its judgments, the legislature has drawn reasonable inferences based on substantial evidence.'" *Id.* (cleaned up) (quoting *Turner I*, 512 U.S. at 666). And in reviewing a legislative judgment, courts must remain cognizant of the fact that "legislatures are 'not obligated, when enacting their statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review.'" *Pena*, 898 F.3d at 979 (quoting *Minority Television Project, Inc. v. FCC*, 736 F.3d 1192, 1199 (9th Cir. 2013)) (alterations omitted).

Here, however, the district court improperly rejected the predictive judgment of the California legislature (and California's voters) that background checks and face-to-face sales requirements for ammunition promote public safety and will deter crime. *See* ER 72-78. Instead, it concluded that background checks, "ammunition recordkeeping[,] and anti-importation laws do not work" because "criminals (and those bent on committing crimes)" will not abide by the law. ER 93. In fact, the district court even outlined its own "predictions" about the "unintended effects of the ammunition background check system and its burdens." ER 29-33. Among other

predictions, the court speculated that the challenged regulations would produce increased ammunition sales (a fact controverted by the record, *see* ER 36), encourage additional illicit conduct, and make future criminals "more careful," ER 30-32.

This was improper: it is well established that courts should not "substitute [their] own policy judgment for that of the legislature," including in Second Amendment cases. *Pena*, 898 F.3d at 979 (citing *Minority Television Project, Inc.*, 736 F.3d at 1199). And if there are policy disagreements "in the form of conflicting legislative 'evidence,'" courts "'owe the legislature's findings deference in part because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions.'" *Pena*, 898 F.3d at 979 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997)) (alterations omitted); *see also, e.g.*, *Kachalsky v. Cnty of Westchester*, 701 F.3d 81, 99 (2d Cir. 2012) ("It is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments.").

This is especially true where, as here, both the legislature and the voters approved the regulations at issue, including the factual findings

supporting them. The district court's decision to disregard these findings thus is a unilateral rejection of the legislature's predictive judgments, as well as determinations made by a majority of California voters. As Judge Wilkinson explained in *Kolbe*, such a result is untenable: "To say in the wake of so many mass shootings in so many localities across this country that the people themselves are now to be rendered newly powerless, that all they can do is stand by and watch as federal courts design their destiny—this would deliver a body blow to democracy as we have known it since the very founding of this nation." 849 F.3d at 150 (Wilkinson, J., concurring).

In sum, the district court's decision to reject longstanding principles established by this Court, as well as the sound conclusion of California voters and that State's legislature, should be vacated.

CONCLUSION

For these reasons, this Court should vacate the district court order granting injunctive relief.

RESPECTFULLY SUBMITTED this 19th day of June 2020.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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