

No. 23-2979

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JAMES MILLER, ET AL.,
Plaintiffs-Appellees,

v.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA, ET AL.,
Defendants-Appellants.

**On Appeal from the United States District Court
for the Southern District of California**

No. 3:19-cv-01537-BEN-JLB
The Honorable Roger T. Benitez

APPELLANTS' SUPPLEMENTAL BRIEF

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ARGUMENT

The Court’s December 12 order directed the parties to address “the impact on this case, if any, of *United States v. Kittson* [161 F.4th 619 (9th Cir. 2025)].” C.A. Dkt. No. 80. As relevant here, *Kittson* rejected a Second Amendment challenge to a federal law prohibiting the possession and transfer of machineguns. 161 F.4th at 630-633; *see* 18 U.S.C. § 922(o). In reaching that conclusion, the Court held that its prior precedent, *United States v. Henry*, 688 F.3d 637, 638 (9th Cir. 2012)—holding that machineguns “are ‘dangerous and unusual’ weapons that are unprotected by the Second Amendment”—is consistent with the text-and-history standard established by *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022), and thus remains good law. *Id.* at 631.

Kittson and *Henry* support reversal of the district court’s judgment in this case. They collectively affirm two principles that are relevant to this appeal: (1) that the Second Amendment only protects certain types of weapons; and (2) that governments may prohibit the possession of “dangerous and unusual” weapons, including weapons with certain combat-oriented features that render them exceptionally lethal, consistent with the Second Amendment. Both principles suggest that the restrictions challenged here, which prohibit a subset of firearms that qualify as assault weapons, *see* Cal. Penal Code § 30515, comport with the Second Amendment. The regulated weapons and weapon features are not

presumptively protected by the Second Amendment, and the challenged restrictions fit within the Nation’s historical tradition of firearms regulation. *See Duncan v. Bonta*, 133 F.4th 852, 876-877 (9th Cir. 2025) (en banc) *pet. pending* No. 25-198.

1. The threshold issue under *Bruen* is whether plaintiffs have established that “the Constitution presumptively protects” their proposed course of conduct, an inquiry that considers both the plain text and “historical background” of the Second Amendment. 597 U.S. at 17, 20 (internal quotation marks omitted); *see* OB 21. *Kittson* affirms that “one ‘important limitation’” to the Second Amendment is that it protects “only certain *types* of weapons.” 161 F.4th at 630 (emphasis added) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)); *see* OB 21. That is because “the [Second Amendment] right ‘is not unlimited,’” and does not confer “‘a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.’” *Kittson*, 161 F.4th at 630 (quoting *Heller*, 554 U.S. at 626). As *Kittson* explains, “‘weapons that are most useful in military service’—M16 rifles and the like—may be banned.” *Id.* at 631. And the Second Amendment also “does not apply” to “highly ‘dangerous and unusual’ weapons,” such as machineguns. *Henry*, 688 F.3d at 337.

In plaintiffs’ view, their only burden at the threshold is to establish that the regulated weapons are bearable “Arms,” meaning that they can be carried and used to strike another person—if so, the Constitution presumptively protects those weapons, and it is the State’s burden to establish that any restriction of their use is constitutional. *See* AB 7-8.¹ Plaintiffs contend that the objective qualities of a weapon are “irrelevant” to the question whether the weapon is protected by the Second Amendment in the first instance, and that a weapon’s development for military use, rather than individual self-defense, represents “a red herring with no place in Second Amendment analysis.” AB 5; *see id.* at 24. But as *Kittson* confirms, while the meaning of the term “Arms” is broad, not every “*type of weapon*” is “eligible for Second Amendment protection.” *Heller*, 554 U.S. at 622 (emphasis added); *see Bianchi v. Brown*, 111 F.4th 438, 441 (4th Cir. 2024) *cert. denied sub. nom. Snope v. Brown*, 145 S. Ct. 1534 (assault weapons “fall outside the ambit of protection offered by the Second Amendment”); *Bevis v. City of Naperville, Illinois*, 85 F.4th 1175, 1203 (7th Cir. 2023) (assault weapons “lie outside the class of Arms to which [the Second Amendment] applies”).

¹ Plaintiffs also challenge certain component-based definitions of an assault weapon. *See* OB 13. As explained in the Attorney General’s prior briefing, those definitions regulate firearms accessories, such as pistol grips, flash suppressors, and telescoping stocks, that are not “Arms” at all, because they are not weapons in and of themselves, or components that are necessary to operate firearms. *See, e.g.*, OB 22-23; C.A. Dkt. 70 at 2-5.

2. *Kittson* also affirms that the State may lawfully restrict weapons that are “dangerous and unusual,” including by prohibiting their possession. 161 F.4th at 631; *see* 18 U.S.C. § 922(o) (prohibiting “transfer *or* possession” of machineguns). In determining that machineguns may be prohibited consistent with the Second Amendment, the Court consulted “sources explaining the history of machinegun usage and the weapon’s characteristics to conclude machineguns are dangerous.” *See Kittson*, 161 F.4th at 631; *see Henry*, 688 F.3d at 640. For instance, the Court observed that the machinegun was ““first widely used during World War I, where it demonstrated its ‘murderously effective firepower.’” 161 F.4th at 631 (quoting *Henry*, 688 F.3d at 640). And today, ““modern machineguns”” enable shooters to fire many rounds in a short period of time, allowing a shooter ““to kill dozens of people within a matter of seconds.”” *Id.*

That analysis suggests that assault weapons may also be prohibited consistent with the Second Amendment. While the historical analysis in *Henry* was “not as exhaustive as some may prefer,” *Kittson*, 161 F.4th at 633, this appeal has been briefed with the benefit of *Bruen*’s standards, and circuit precedent has only further clarified the circumstances in which States may lawfully restrict dangerous weapons. The Attorney General has presented evidence of a “robust tradition—pre-dating the founding—of regulating and even banning weapons with features that make them particularly dangerous or susceptible to criminal use,” including

“after those weapons have proliferated in the commercial market to the point that they present a substantial threat to public safety.” OB 37; *see id.* at 37-47. And in *Duncan*, this Court, after considering the same historical record, affirmed that legislatures may enact “laws to protect innocent persons from especially dangerous uses of weapons,” and may restrict “component[s] necessary to the firing of a firearm” to “protect innocent persons from infrequent but devastating harm.” *Duncan*, 133 F.4th at 876-877; *see C.A. Dkt. 70* at 7.

California’s restrictions on assault weapons fall well within the historical tradition of restricting dangerous weapons. Like machineguns, modern assault weapons contain features that allow a shooter “to murder many victims in a matter of minutes.” OB 50. The record reflects that assault weapons were developed not for self-defense but “as offensive weapons ‘designed and developed for a specific military purpose—laying down a high volume of fire over a wide killing zone.’” OB 25; *see id.* at 25-26 (discussing the “military pedigree” of AR-platform rifles, which are “nearly identical to the M16”). Those capabilities have given rise to “specific threats” to public safety, *Duncan*, 133 F.4th at 882, by increasing the severity of mass shootings. *See, e.g.*, OB 36 (“From 2012 to 2022 there were sixteen [mass shootings]—all but four involving assault weapons”), 51 (“when mass shooters use an assault weapon equipped with a large-capacity magazine, they inflict nearly five-times more deaths and injuries than when they do not”).

Henry also concluded that machineguns are “unusual,” because “private possession of all new machine guns . . . has been unlawful since 1986,” and because “outside of a few government-related uses, machineguns largely exist on the black market.” *Henry*, 688 F.3d at 640. Although *Kittson* mentioned that language in *Henry*, it did not adopt or reaffirm any particular understanding of the term “unusual.” *See Kittson*, 161 F.4th at 631. And to the extent plaintiffs’ attempt to construe that language to support their argument that the number of assault weapons in lawful circulation is “dispositive” of the Second Amendment analysis, AB 21, the Court should reject that understanding under post-*Henry*, post-*Bruen* en banc precedent. In *Duncan*, 133 F.4th at 882-883, an en banc panel rejected the argument that dangerous weapons (or weapons accessories) can be restricted only if the number of those weapons in lawful circulation throughout the country falls below some threshold. So too have other courts.² And for good reason: It would be “absurd” to say that the government’s ability to ban a weapon turns on whether the number of weapons in possession is small because “there is a statute banning it.” *Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015).

² *See, e.g., Hanson v. District of Columbia*, 120 F.4th 223, 233-234 (D.C. Cir. 2024); *Bianchi v. Brown*, 111 F.4th 438, 459-461 (4th Cir. 2024); *United States v. Bridges*, 150 F.4th 517, 527-28 (6th Cir. 2025).

Indeed, plaintiffs' numbers-only approach would substitute statistical data for the careful examination of "historical tradition" commanded by *Bruen* and *Rahimi*. *E.g., Bruen*, 597 U.S. at 17. It would also empower one State or a group of States to dictate firearms policy for the rest of the country. For example, if Congress chose to let the federal ban of machine guns expire, and a group of States legalized those weapons, they could flood onto the market and enter into "common use." *See* AB 30 (suggesting that if "approximately 200,000 civilians owned" a weapon, the weapon would be in common use). In that scenario, "a state-law ban on machine guns [would] suddenly change from constitutional to unconstitutional[.]" *Duncan*, 133 F.4th at 883. That result would be "startling," *Heller*, 554 U.S. at 624, and "illogical," *Worman v. Healey*, 922 F.3d 26, 35 n.5 (1st Cir. 2019). And it would upend our federal system by denying States the "ability to devise solutions to social problems that suit local needs and values." *McDonald v. City of Chicago*, 561 U.S. 742, 785 (2010) (plurality).

As the Attorney General has explained, the better reading of the term is that "unusual" refers to weapons that are unusually or especially dangerous. The Supreme Court has never suggested that its use of the term "dangerous and unusual" establishes a numerical threshold that bars prohibitions on a weapon as soon as a minimum number are in circulation. RB 22; *see id.* at 20-22. And other courts and jurists have persuasively explained that the historical tradition of

banning “dangerous and unusual” weapons encompasses restrictions on weapons that are “unusually dangerous.” *Nat’l Ass’n for Gun Rights v. Lamont*, 153 F.4th 213, 233-234 (2d Cir. 2025); *see also Bridges*, 150 F.4th at 529 (Nalbandian J., concurring in part and concurring in the judgment).

CONCLUSION

Kittson and *Henry* provide further support for the constitutionality of the challenged assault weapon restrictions. The judgment of the district court should be reversed.

Dated: January 12, 2025

Respectfully submitted,

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**UNITED STATES COURT OF APPEALS
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