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## PERSPECTIVE

## Judge ignored facts, law while taking knife to assault weapons ban

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Earlier this month, Judge Roger Benitez of the U.S. District Court for the Southern District of California held in *Miller v. Bonta* that California's Assault Weapons Control Act violated the individual Second Amendment right to bear arms. Characterizing the constitutional challenge as "an average case about average guns used in average ways for average purposes," Judge Benitez found that California's ban on possession of AR-15s does not pass constitutional muster because of the weapon's statewide popularity and because their use in mass shootings is, apparently, an "infinitesimally rare event." To support this latter point, Judge Benitez oddly asserted that more people have been killed by the COVID-19 vaccine than by mass shootings in California.

The court's opinion is fatally flawed for a number of reasons and vastly understates the enormity of the issues — indeed, nothing about this case or these guns is "average." Here, we focus on three main flaws.

First, the opinion grossly minimizes the danger posed by AR-15s. The court points to FBI statistics showing that more Californians were killed by knives and hands/feet in 2019 than by assault weapons. But Judge Benitez ignores the possibility that this is because the ban is working as intended. As the late Justice Ruth Bader Ginsburg observed in her dissent in *Shelby County v. Holder*, discarding a law because it is working is like "throwing away your umbrella in a rainstorm because you are not getting wet." The court also disregarded compelling statistics presented by California in its briefing, including figures showing that assault weapons and semiautomatic weapons with large capacity magazines account for 22-36% of gun crimes, are used in 57% of firearm mass murders, are disproportionately used against law enforcement, and result in higher morbidity and mortality in victims. Despite Judge Benitez's likening of the AR-15 to

"the Swiss Army Knife," there's a reason for the old saying "you don't bring a knife to a gun fight."

Judge Benitez also made unfounded assertions about the safety of assault weapons without citation. For example, in addition to his irrelevant claim that more Californians have died from the COVID-19 vaccine than from AR-15s, Judge Benitez states that mass shootings are "fortunately ... a rare event." This would be news to the victims of 417 mass shootings recorded in the United States in 2019 alone, according to the Gun Violence Archive (defining a mass shooting as an event with at least four people shot). It would also be news to the victims of AR-15 style weapons used in the 2012 Aurora shooting (12 dead), the Tree of Life Synagogue shooting in Pittsburgh (11 dead), the Las Vegas shooting (58 dead, the deadliest shooting in American history), the Pulse nightclub shooting (49 dead), and the Parkland shooting (17 dead).

Second, the opinion mischaracterizes the U.S. Supreme Court's decision in *District of Columbia v. Heller*, which recognized the Second Amendment right to bear arms and the state's long-standing power to regulate the sale and possession of firearms. Judge Benitez disregarded *Heller's* admonition that nothing in its opinion "should be taken to cast doubt on ... laws imposing conditions and qualifications on the commercial sale of arms," and he failed to distinguish the facts in that case. In *Heller*, the District of Columbia had wholly banned the possession of handguns in the home. After finding that the Second Amendment protected the individual right to bear arms for self-defense purposes, the Supreme Court held that D.C.'s ban violated that core right because handguns were the "quintessential self-defense weapon." The Supreme Court noted that handguns are "easier to store in a location that is readily accessible in an emergency," "easier to use for those without the upper body strength to lift and aim a long gun," and "can be pointed at a burglar with one hand while the other hand dials the police."

None of these justifications plausibly apply to AR-15s, and there is no disputing that AR-15s can fire more bullets, more quickly, with fewer reloads, than a handgun. Moreover, California's statute does not categorically prohibit the possession of AR-15s; it only prohibits the possession of assault weapons that are configured in certain dangerous ways (i.e., they are configured to be able to fire numerous rounds without needing to reload). As California observed in its brief to the court, Californians could still purchase AR-15s so long as they did not possess any of the prohibited features or accessories.

Third, Judge Benitez curiously pointed to the popularity of the AR-15 to claim that the "common use" test articulated in *Heller* is satisfied and therefore the judicial inquiry under *Heller* can end right then and there. He observed that AR-15s and rifles generally are more popular than the Ford F-150 and stun guns. Yet, the mere fact that a lot of people own AR-15s does not mean they can and should be allowed to proliferate unregulated or uncontrolled, and nowhere did *Heller* indicate that being more popular than the Ford F-150 automatically

ends the *Heller* inquiry. Both the federal government and state governments heavily restrict the sale and possession of popular products all the time. For example, according to the CDC, there were more than 153,260,450 prescriptions dispensed for opioids in the United States and the overall dispensing rate was 46.7 prescriptions per 100 people, far outstripping purchases of AR-15s. No one would credibly argue that because opioids like fentanyl and oxycodone are so popular, their regulation is unwarranted. Yet, that appeared to be the rationale of the court in striking down the Assault Weapons Control Act.

Judge Benitez's opinion is wrong on both the facts and the law. AR-15s are not Swiss army knives — they are dangerous weapons responsible for some of the most infamous and deadliest mass shooting events in American history. And the AWCA is a reasonable and legitimate regulation that comports with *Heller's* balance between respecting the individual right to possess a gun for self-defense and the state's interest in reducing gun violence. Judge Benitez's opinion disrupts that balance to the detriment of all Californians, and it should be overturned. ■

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