No. 25-198

IN THE
Supreme Court of the United States

VIRGINIA DUNCAN, *ET AL.*, *Petitioners*,

v.

ROB BONTA, in his official capacity as Attorney General of the State of California, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief *Amicus Curiae* of Gun Owners of America, Gun Owners Fdn., Gun Owners of Cal., Heller Foundation, Coalition of N.J. Firearm Owners, Tenn. Firearms Association, Tenn. Firearms Fdn., Va. Citizens Defense League, Va. Citizens Defense Fdn., America's Future, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund in Support of Petitioners

JOHN I. HARRIS III
SCHULMAN, LEROY & BENNETT, P.C.
3310 West End Avenue
Suite 460
Nashville, TN 37203

JEREMIAH L. MORGAN*
WILLIAM J. OLSON
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
**Counsel of Record*
Attorneys for Amici Curiae

September 18, 2025

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INTEREST OF THE *AMICI CURIAE*[1]

Amici Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Inc., Heller Foundation, Coalition of New Jersey Firearm Owners, Tennessee Firearms Association, Tennessee Firearms Foundation, Virginia Citizens Defense League, Virginia Citizens Defense Foundation, America's Future, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Over the past six years, some of these *amici* have filed five previous *amicus* briefs in this case. *See* Brief *Amicus Curiae* of Gun Owners of America, Inc., et al., *Duncan v. Becerra*, Ninth Circuit No. 19-55376 (Sept. 23, 2019); Brief *Amicus Curiae* of Gun Owners of America, Inc., et al., *Duncan v. Bonta*, Ninth Circuit No. 19-55376 (May 21, 2021); Brief *Amicus Curiae* of Gun Owners of America, Inc., et al., *Duncan v. Bonta*,

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[1] It is hereby certified that counsel of record for all parties received timely notice of the intention to file this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

U.S. Supreme Court No. 21-1194 (Apr. 1, 2022); Brief *Amicus Curiae* of Gun Owners of America, Inc., et al., *Duncan v. Bonta*, Ninth Circuit No. 19-55376 (Aug. 23, 2022); and Brief *Amicus Curiae* of Gun Owners of America, Inc., et al., *Duncan v. Bonta*, Ninth Circuit No. 19-55805 (Dec. 28, 2023).

STATEMENT OF THE CASE

In 2000, California prohibited the manufacture, importation, sale, and transfer of so-called "large-capacity magazines," which it defined as "any ammunition feeding device with the capacity to accept more than 10 rounds." California Penal Code § 16740. Then, in July 2016, the California legislature went further and banned the possession of large-capacity magazines, and in November 2016, California voters approved Proposition 63, with the same effect.

Petitioners filed suit, and two days before the ban was to become effective on July 1, 2017, the district court issued a preliminary injunction against enforcement of the law pending a full hearing on the merits. On March 29, 2019, the district court granted summary judgment to the Petitioners.

The district court reached its conclusion by applying two tests. First, it applied the test used in *District of Columbia v. Heller*, 554 U.S. 570 (2008), which asks whether the banned arms are "'in common use' 'for lawful purposes like self-defense.'" *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1142 (S.D. Cal. 2019). Second, the district court applied the Ninth Circuit's two-step test adopted in *United States v. Chovan*, 735

F.3d 1127 (9th Cir. 2013), which the district court described as "a tripartite binary test with a sliding scale and a reasonable fit." *Duncan v. Becerra* at 1155.

On the first appeal to the Ninth Circuit (No. 19-55376), some of these *amici* filed an *amicus* brief urging the panel that the two-step test was "one step too many," a phrase later used by Justice Thomas in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1, 19 (2022). *Amici* urged the panel to apply the simple *Heller* test without interest balancing. Instead, a three-judge panel applied the *Chovan* two-step balancing test, but found that the high-capacity magazine ban failed that test. *See Duncan v. Becerra*, 970 F.3d 1133 (9th Cir. 2020).

The Ninth Circuit quickly granted rehearing *en banc*, vacating the panel's opinion. Some of these *amici* filed a second *amicus* brief urging the *en banc* court to reject the atextual two-step test as wholly incompatible with the Second Amendment and with the Supreme Court's decisions in *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). But this time, the *en banc* panel applied the two-step test and upheld the large-capacity magazine ban. *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021).

Petitioners filed their first petition for writ of certiorari with this Court, which these *amici* supported with their third *amicus* brief. *Amici* urged the Court to grant review to overturn the atextual, judge-empowering interest-balancing two-step test. Following its decision in *Bruen* on June 23, 2022, the Supreme Court granted the petition, vacated the Ninth

Circuit's decision, and remanded. *See Duncan v. Bonta*, 142 S. Ct. 2895 (2022).

On remand from the Supreme Court, the Ninth Circuit requested supplemental briefing in No. 19-55376 about "the effect of *Bruen* on this appeal, including whether the en banc panel should remand this case to the district court for further proceedings in the first instance." These *amici* filed their fourth, supplemental *amicus* brief urging the Ninth Circuit to render a decision based on the *Bruen* analysis. The district court had already rendered a decision using the simple *Heller* test, which was consistent with *Bruen*, and the facts were not in dispute. Nevertheless, the Ninth Circuit remanded the case to the district court, with Judges Bumatay and VanDyke dissenting. *See Duncan v. Bonta*, 49 F.4th 1228 (9th Cir. 2022).

On remand, the district court faithfully applied the *Bruen* analysis and reached the same conclusion it had when it previously applied the simple *Heller* test, finding that the large-capacity magazine ban was unconstitutional. *See Duncan v. Bonta*, 695 F. Supp. 3d 1206 (S.D. Cal. 2023). The Ninth Circuit then reconvened an *en banc* panel from the earlier appeal and issued a stay of the district court's decision. *See Duncan v. Bonta*, 83 F.4th 803 (9th Cir. 2023).

On the merits, the Ninth Circuit *en banc* panel reversed the district court's proper application of *Bruen*. Instead, claiming to apply *Bruen*, the Ninth Circuit relied only on dicta in *Bruen* regarding "cases implicating unprecedented societal concerns or

dramatic technological changes [which] may require a more nuanced approach." *Bruen* at 27. Thus, the split *en banc* panel held that large-capacity magazines are neither "arms" nor otherwise protected as accessories, and thus California's ban does not even implicate the Second Amendment protections. The circuit court also concluded that, even if magazines are arms, California's ban "is relevantly similar to the historical laws in both why and how it burdens the right to armed self-defense." *Duncan v. Bonta*, 133 F.4th 852, 860 (9th Cir. 2025) ("*Duncan 2025*").

SUMMARY OF ARGUMENT

The Petition herein represents the latest chapter in the nearly decade-long battle between California and Californians seeking to exercise their Second Amendment rights. Even so, this challenge is not unique, in that the Ninth Circuit has a lengthy history of rubber stamping California's firearm restrictions by blatantly circumventing this Court's Second Amendment tests, first under *Heller* and now under *Bruen*. It is in that ignominious tradition that the Ninth Circuit upheld California's ban on the most popular firearm magazines in the nation.

The Ninth Circuit's approach allowed the court to simply decree that an integral component of a firearm is not an arm, thereby absolving the government from needing to provide relevant historical analogues from the Founding era. While the Ninth Circuit narrowly construed the term "arm" to avoid protecting *certain* magazines — those whose capacity the panel found objectionable — the court did not apply its ruling to all

magazines, because some sort of magazine is required for a semi-automatic firearm to function. But unsurprisingly, the Ninth Circuit never drew the line — it never specified the maximum capacity at which a magazine purportedly stops being a protected arm.

Of course, the *Bruen* framework rejects the authority of any court to make decisions based on judicial interest balancing, as the Ninth Circuit did below — viewing magazines beyond some undefined capacity limit to simply be too dangerous for the People to possess.

But as this Court has made clear time and again, The Constitution protects *all* bearable arms, not just ones that judges don't feel to be too dangerous. Indeed, all firearms are dangerous. If they were not, they would not serve the purpose envisioned by the Framers, to allow self-defense in all situations, and to provide for a People's Militia which was deemed absolutely "necessary" for the preservation of a free state.

The Petition should be granted to ensure that the lower courts are following the *Bruen* framework, rather than arbitrarily narrowing the definition of "arm" to permit a ban on any class of weapon that offends the sensibilities of federal judges.

ARGUMENT

I. THE NINTH CIRCUIT CONTINUES TO DEFY THIS COURT'S PRONOUNCEMENTS ON THE PROTECTIONS OF THE SECOND AMENDMENT.

From the first words of the circuit court's *en banc* opinion, it was clear that the court's analysis would be grounded in neither the text nor the original public meaning of the Second Amendment, and therefore California's law banning so-called "large capacity" magazines would be upheld. *Duncan 2025* at 859. Judge Graber's opinion began by a discussion of the political and policy context of what should have been a legal and constitutional analysis: "Mass shootings are devastating events for the victims, their families, and the broader community." The circuit court continued by asserting that, while a "large-capacity magazine has little function in armed self-defense ... its use by mass shooters has exacerbated the harm of those horrific events." Beginning in the wrong place, it is no surprise the court ended with the wrong decision.

With simplistic assertions, the circuit signaled that it did not care that the Second Amendment was written to protect the People's right of self-defense against not just individual home intruders, but in all situations, including increasingly prevalent gang violence, and to participate in the citizen's militia, and as the ultimate guard against governments that may one day usurp all their liberties. The circuit court failed to address, in any way, why the Framers

included the militia clause, or why they believed that only a robust Second Amendment could ensure that the "free State" they were creating could be maintained. The circuit court never explained how it could properly address whether "the right of the people to keep and bear arms" had been "infringed" by the California magazine ban, without any consideration of how it affected the Framers' belief that the nation needed "[a] well regulated Militia," which the Framers believed was absolutely "necessary to the security of a free State...." Had the circuit court undertaken a proper analysis, it could never have arrived at what apparently was its desired outcome.

Naturally, the circuit court promised that it would "employ[] the methodology announced in *Bruen* and [*Rahimi*]" (*Duncan 2025* at 860). Yet it asserted that "the Founders protected the right to keep and bear 'Arms,' not a right to keep and bear 'Arms and Accoutrements.'" *Id.* However, if the term "arm" is viewed in this fashion, why would California not be authorized to ban magazines with more than one round?

Then, the circuit court asserted that the magazine ban "falls neatly within the Nation's traditions of protecting innocent persons by prohibiting especially dangerous uses of weapons...." *Id.* In creating this "especially" dangerous test, the court was invoking interest balancing to decide where a 10-round magazine should be placed on its continuum of dangerousness. This is interest balancing, pure and simple, of the same sort that Justice Breyer urged in dissent in *Heller*. There is no question judges are

always tempted to engage in "interest balancing," because it maximizes their discretionary power to set the scope of the Second Amendment, without regard to the text or the initial public meaning. However, Justice Scalia warned about that very approach, calling it:

> a judge-empowering "interest-balancing inquiry" that "asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." [*Heller* at 634 (citation omitted).]

By now, it should not shock a court that firearms are inherently dangerous. But a standard handgun with an accessory used by tens of millions of Americans cannot be deemed by a judge to be "especially" dangerous, and thus unworthy of protection.

When a circuit court opinion so clearly ignores governing law, it is fully deserving of review by this Court.

II. THIS CASE OFFERS A CRITICAL OPPORTUNITY TO END PROLIFERATION OF LOWER-COURT REVISIONISM.

After this Court's landmark decision in *Heller*, it became clear that many lower courts sought to confine that decision to its facts, and to believe this Court had **only** struck down a total ban on handguns in the

home. These courts refused to evaluate firearms challenges based on the individual right to keep and bear arms, but rather believed their job was to uphold against challenge any gun law that seemed "reasonable" to them. As decisions upholding gun laws mounted during the dozen years after *Heller*, many petitions for certiorari were filed in this Court, without success. Looking back over this period, numerous dissents from denial of certiorari expressed frustration that this Court would not act to require lower courts to comply with its rulings.

For example, when the Seventh Circuit's *Friedman* case came before this Court, Justices Thomas and Scalia noted that, "despite" the Court's precedents, during the intervening seven years, "several Courts of Appeals … upheld categorical bans on firearms that millions of Americans commonly own for lawful purposes," and cautioned that "noncompliance with [the Court's] Second Amendment precedents warrants this Court's attention…." *Friedman v. City of Highland Park*, 577 U.S. 1039, 1039 (2015) (Thomas, J., dissenting from denial of certiorari). That same year, faced with a Ninth Circuit decision, Justices Thomas and Scalia stated that, "[d]espite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts, including the ones here, have failed to protect it." *Jackson v. City & County of San Francisco*, 576 U.S. 1013, 1014 (2015) (Thomas, J., dissenting from denial of certiorari).

Two years later, Justices Thomas and Gorsuch called the two-step "approach taken by the en banc

[Ninth Circuit] ... indefensible." *Peruta v. California*, 582 U.S. 943, 945 (2017) (Thomas, J., dissenting from denial of certiorari). And the year after that, Justice Thomas explained that another Ninth Circuit decision was "symptomatic of the lower courts' general failure to afford the Second Amendment the respect due an enumerated constitutional right." *Silvester v. Becerra*, 583 U.S. 1139, 1140 (2018) (Thomas, J., dissenting from denial of certiorari); *see also* at 1149 (Thomas, J., dissenting from denial of certiorari) ("[b]y refusing to review decisions like the one below, [the Court] undermine[s]" the declaration that the "Second Amendment is not a 'second-class right….'").

Then, in 2020, Justices Thomas and Kavanaugh opined that "many courts have resisted our decisions in *Heller* and *McDonald*," believing that the Court had been presented "an opportunity to provide lower courts with much-needed guidance [and] ensure adherence to our precedents…." *Rogers v. Grewal*, 140 S. Ct. 1865, 1866, 1875 (2020) (Thomas, J., dissenting from denial of certiorari). And when this Court **did** grant certiorari in *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 590 U.S. 336 (2020), New York sought to avoid this Court's review by quickly repealing its statute. But Justice Alito was uncomfortable with dismissing the case as moot, noting that "[w]e are told that the mode of review in this case is representative of the way *Heller* has been treated in the lower courts. If that is true, there is cause for concern." *Id.* at 370 (Alito, J., dissenting).

Bruen finally set the record straight, and many lower courts (including the district court below) have

"gotten the message," understanding "[t]he right to keep and bear arms is [not] this Court's constitutional orphan." *Silvester* at 1149 (Thomas, J., dissenting from denial of certiorari). But many courts have not.

Post-*Bruen*, just as post-*Heller*, many courts are again in search of the most expedient ways to avoid this Court's holdings and frustrate the right to keep and bear arms. *See, e.g.*, *NRA v. Bondi*, 61 F.4th 1317, 1322 (11th Cir. 2023) ("Historical sources from the Reconstruction Era are more probative of the Second Amendment's scope than those from the Founding Era"), *vacated on reh'g en banc*, 133 F.4th 1108 (11th Cir. 2025); *Antonyuk v. Chiumento*, 89 F.4th 271 (2d Cir. 2023) (distinguishing *Bruen* as an "exceptional" decision that need not be followed too closely); *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 45 (1st Cir. 2024) ("banning [large-capacity magazines] imposes **no meaningful burden** on the ability of Rhode Island's residents to defend themselves") (emphasis added).

So that the Second Amendment is not again relegated to "second class" status, it is vital that this Court not allow the nation to return to the type of lower-court defiance that followed *Heller*. As Justices Alito and Thomas made clear in a different context, erroneous reasoning by lower courts "is a virus that may spread if not promptly eliminated." *Coal. for TJ*, 2024 U.S. LEXIS 986, at *12 (2024) (Alito, J., dissenting from denial of certiorari).

The Ninth Circuit has decided an important federal question in a way that conflicts with multiple

relevant decisions of this Court. Similar deeply flawed decisions are occurring in other circuits as well. This case presents an excellent vehicle to stop the problem from spreading further, and prevent this Court's *Bruen* decision from being treated with the same disrespect as was shown for over a decade to this Court's decision in *Heller*.

III. CALIFORNIA'S AND THE NINTH CIRCUIT'S HOSTILITY TO FIREARMS NOW EXTENDS TO THIS COURT'S *HELLER* AND *BRUEN* DECISIONS.

In 2022, the Ninth Circuit remanded this case to the district court to address how the *Bruen* decision should be applied to Petitioners' challenge to the California ban on high-capacity magazines. *See Duncan v. Bonta*, 49 F.4th 1228 (9th Cir. 2022) (*en banc*). Both the analysis employed by the district court and its conclusion reached were fully consistent with *Bruen*'s directives. Nevertheless, the Ninth Circuit reversed, at every turn impeding the directives of this Court and impairing the rights of gun owners under *Bruen*. California's infringements on Second Amendment rights must not go uncorrected.

A. California Has Demonstrated Hostility to *Heller* and *Bruen*.

The California government has long demonstrated hostility not just to the "right of the people to keep and bear Arms," but especially to the *Bruen* decision. When *Bruen* was before this Court on the merits, California joined other states in filing an *amicus* brief

urging virtually unlimited latitude for states to restrict gun rights, in stark opposition to the approach eventually taken by the *Bruen* Court.[2] Since the *Bruen* decision was issued, California Governor Gavin Newsom has roundly criticized it, the Supreme Court generally, and those circuit courts that have followed it:

> Newsom slammed last year's landmark US Supreme Court decision expanding gun rights and criticized lower circuit courts that have since overturned gun control measures.[3]
>
> "This Supreme Court is that bad.... The Bruen decision was that bad. When I say code red, this is code red. California's led the nation on common sense gun safety laws."[4]

In fact, Governor Newsom has become so agitated by *Bruen* that he has called upon legislatures of three-quarters of the states to undo that decision by calling

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[2] *See* Brief for the States of California ... as *Amici Curiae*, in Support of Respondents in *New York State Rifle & Pistol Assn. v. Bruen*, No. 20-843 (Sept. 21, 2021) ("[T]here is 'no general right to carry arms into the public square for self-defense....'" *Id*. at 3. "Intermediate Scrutiny Is the Proper Form of Means-Ends Analysis for Public Carry Regulations." *Id*. at 23.)

[3] J. Campbell, "California governor signs gun control measures into law, including nation's first state tax on firearms and ammunition," *CNN* (Sept. 27, 2023).

[4] D. Walters, "Gavin Newsom channels Jerry Brown with constitutional amendment proposal," *Cal Matters* (Aug. 21, 2023).

for an Article V Constitutional Convention to adopt his Proposed 28th Amendment, *inter alia*, which would limit gun rights. The full contours of the proposed amendment have not yet been identified, but they include a prohibition on the sale, loan, or transfer of so-called "assault weapons" and other pejoratively labeled "weapons of war" to private civilians, and since so-called "high-capacity"[5] magazines transform ordinary semiautomatic rifles into "assault weapons" under California law, they could be banned under such an amendment.[6]

By leading an effort to enact a federal constitutional amendment to enable California to ban high-capacity magazines, Governor Newsom can be seen to have implicitly recognized that California's current ban violates the Second Amendment. Of course, not wanting to wait for the Article V constitutional amendment process to play out, it is no surprise that California asked the Ninth Circuit to find a way to evade *Bruen* according to a playbook it has used in the past — by twisting the Supreme Court's guidance in a manner that undermines its decisions — requiring this Court's intervention.

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[5] For the last two decades, most gun owners would consider a magazine that can hold 20, 30, or more rounds as a "standard capacity" magazine. Nevertheless, California considers a magazine that can contain more than 10 rounds a "high-capacity" magazine. That is the same limit applied in the short-lived federal ban on magazines — the "Federal Assault Weapons Ban of 1994" which expired in 2004.

[6] *See* California Senate Joint Resolution 7 (passed Sept. 21, 2023).

B. California and the Ninth Circuit Take a Narrow View of Self-Defense.

California takes a very narrow view of the type of self-defense which the Second Amendment protects. Before *Heller*, California argued that the Second Amendment did not apply to an individual wanting to possess a handgun in the home.[7] And even if the Second Amendment only protected a handgun in the home under *Heller*, so also should the Second Amendment protect a handgun with more than 10 rounds as could be required protecting the home against invasion. *See Duncan*, 695 F. Supp. 3d at 1215, n.25. Such narrow views of the right protected are inconsistent with Americans serving in a militia to defend our government against terrorism or other external threat, and also to resist our government, should it someday become tyrannical, to preserve a "free State." *See Heller* at 597-98.

In the Declaration of Independence, America's founders viewed armed resistance to tyranny as not only a "right," but also a "duty." Having experienced the loss of their rights as Englishmen, the American people were not so sanguine to think that the new governments they were creating could not, themselves, devolve into despotism. Thus, the people of Virginia reaffirmed in their 1776 state constitution "that ... a

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[7] Before *Heller*, California apparently took the "collective rights" position that the Second Amendment only authorized arming a state militia, and did not establish any individual right whatsoever. *See Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002) (cert. denied).

majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish" the very government created by such constitution "in such manner as shall be judged most conducive to the public weal." Sources of Our Liberties (R. Perry and J. Cooper, eds., Am. Bar Fdn., Rev. ed. 1978) at 311. *See also* 1776 Pennsylvania Constitution, Sources at 329. To that end, the Virginia Constitution guaranteed "a well-regulated militia, composed of the body of the people, trained to arms, [as] the proper, natural, and safe defence of a free State...." 1776 Virginia Constitution, Section 13, Sources at 312. To the same end, the Pennsylvania Constitution guaranteed to "the people [the] right to bear arms for the defence of themselves and the state...." 1776 Pennsylvania Constitution, Section XIII, Sources at 330. Self-defense against external threats or government requires robust weapons, sometimes more than those needed for self-defense against a single criminal.

In fact, read in light of *Heller* and *Bruen*, and in stark contrast to California's position, if a bearable arm is useful in militia service, this only **strengthens** the Second Amendment's protection of the firearm under a proper historical analysis. Defense of one's fellow citizens against tyrannical governments and hostile foreign forces was a quintessentially "lawful purpose." As *Heller* noted, King George III had attempted to disarm the Americans in order to ensure superiority of firepower to the British:

> [W]hat the Stuarts had tried to do to their political enemies, George III had tried to do to

> the colonists. In the tumultuous decades of the 1760's and 1770's, the Crown began to disarm the inhabitants of the most rebellious areas. That provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms. [*Heller* at 594.]

Effectuating the lawful purpose of defense against tyrannical government and foreign attackers requires parity of firepower with opposing forces. *Heller* makes this clear. The military nature of a bearable arm not only fails to take the weapon outside the ambit of the Second Amendment, but also was one of the intended purposes for which the Amendment was enshrined. There are many reasons why the militia was thought to be "necessary to the security of a free State," including that, "when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny." *Heller* at 598. The Ninth Circuit's endorsement of California's idea that government may prohibit weapons with any military capability — **because of** that capability — is at direct odds with the purpose and intent of the Second Amendment. As Justice Story noted in his Commentaries:

> The right of the citizens to keep and bear arms has justly been considered as **the palladium of the liberties** of a republic, since it offers a strong moral check against the usurpation and **arbitrary power of rulers**, and will generally, even if these are successful in the first instance, enable the people to **resist and triumph** over them. [Cited in *Heller* at 667-668 (emphasis added).]

California automatically assigns an "offensive" character to military weapons.[8] But in stark contrast to California's position, to the Framers as they drafted the Second Amendment, such military applications were considered defensive, not "offensive." "'In the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same.'" *Heller* at 624-25.

To the degree that a bearable arm has a military application, as California seeks to demonstrate, that only makes it **more useful** for "militia" service, and therefore, even **more** "necessary to the security of a free State...." The military nature of a weapon does not disqualify its constitutional protections — it enhances them. California claimed that "the objective characteristics" of high-capacity magazines make them military in nature, but because they are more related to the militia clause, they are more essential if we are to live in a free country.

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[8] *See, e.g.*, *Duncan 2025* at 865 ("Defendant raises several distinct arguments ... they are most useful in military service...."); and *id*. at 862-63 ("[t]o make it illegal in California to possess the kinds of military-style ammunition magazines....").

IV. "HIGH-CAPACITY" MAGAZINES ARE PROTECTED BY THE PLAIN TEXT OF THE SECOND AMENDMENT, AND CALIFORNIA FAILED TO PROVIDE RELEVANT HISTORICAL ANALOGUES.

In *Bruen*, the U.S. Supreme Court set out the test to be used by reviewing courts:

> In keeping with *Heller*, we hold that when the Second Amendment's **plain text covers an individual's conduct**, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, **the government must demonstrate** that the regulation is **consistent with this Nation's historical tradition** of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command." [*Bruen* at 17 (emphasis added).]

Step one of the discredited two-step test allowed courts to deem that many firearm restrictions fell "outside the scope of the right as originally understood" and thereby circumvented the constitutional text. Thus, courts skeptical of firearms often would make a threshold finding that an obvious restriction on gun rights did not even "implicate" the Second Amendment. Or, sometimes a court would casually "assume without determining" that the

restriction implicated the text only to uphold the restriction using permissive interest balancing under step two.[9]

Bruen banished the two-step test once and for all. It confirmed the preeminence of the Constitution's unadorned, "plain text." In a recently vacated opinion, a Ninth Circuit panel explained in *Teter v. Lopez*, 76 F.4th 938 (9th Cir. 2023), in determining "'whether the plain text of the Second Amendment protects [the plaintiffs'] proposed course of conduct,'" the *Bruen* Court "analyzed only the 'Second Amendment's text,' applying ordinary interpretive principles." *Id*. at 948. Then, it put the burden on the government to show relevant historical analogues of similar restrictions. Here, the Ninth Circuit's acceptance of California's efforts to evade the "plain text" threshold issue should be rejected, as well as its attempt to demonstrate a pattern of similar restrictions by use of a "nuanced" approach.

Since high-capacity magazines are presumptively protected by the Second Amendment, the only remaining issue is whether California has "demonstrate[d] that the regulation is **consistent with this Nation's historical tradition** of firearm regulation." *Bruen* at 17 (emphasis added). There is no means-end scrutiny to be employed and no need or utility for recitations of the dangers and risks of firearms. There is no deference to the legislative branch whatsoever because, "while that judicial

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[9] *See, e.g., United States v. Chapman,* 666 F.3d 220, 226 (4th Cir. 2012).

deference to legislative interest balancing is understandable — and, elsewhere, appropriate — it is not deference that the Constitution demands here. The Second Amendment 'is the very *product* of an interest balancing by the people....'" *Bruen* at 26, citing *Heller* at 635.

A panel of the Ninth Circuit earlier concluded that "[t]he record shows that firearms capable of holding more than ten rounds of ammunition have been available in the United States for well over two centuries." *Duncan v. Becerra*, 970 F.3d 1133, 1149. "In sum, laws restricting ammunition capacity emerged in 1927 and all but one have since been repealed." *Id.* at 1150-51 (citations omitted). Similarly, in *Fyock v. City of Sunnyvale*, 779 F.3d 991 (9th Cir. 2015), the Ninth Circuit reviewed the denial of a preliminary injunction in a challenge to a local ordinance banning magazines with a capacity over 10 rounds, concluding that the ordinance had no historical analogue, that governed magazines were "'**typically possessed by law-abiding citizens for lawful purposes**,'" and that such magazines were not "'**dangerous and unusual weapons**....'" *Id.* at 996-97 (emphasis added). Although *Bruen* abrogated the two-step analysis used in *Fyock*, *Bruen* did not require a change in that factual finding by the Ninth Circuit.

The Ninth Circuit made much out of *Bruen*'s dicta: "cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach." *Duncan 2025* at 870 (citing *Bruen* at 27). The district court gave the Respondent plenty of opportunity to provide historical analogues to

support the high-capacity magazine ban. *See Duncan*, 695 F. Supp. 3d at 1235. The "best historic analogue" that Respondent could provide to the district court was "a New York City gunpowder storage law following the worst city fire in Colonial America," but that had "nothing to do with gun violence. It was *a fire safety regulation*." *Id*. at 1247-48.

Colonial-era gunpowder (classified today as an "explosive"[10]) is unlike smokeless powder (an accelerant or "propellant"[11]) used in modern ammunition. Colonial-era gunpowder was volatile, hazardous, and often resulted in terrible accidents. In contrast, even large quantities of "modern ammunition" do not create such hazards.[12] Those laws had a different "why" (to prevent cataclysmic explosions) from the high-capacity magazine ban, and now fail to establish a relevant historical tradition. *Duncan*, 695 F. Supp. 3d at 1249. If anything, these laws demonstrate the Founders knew how to regulate in this area, yet chose not to do so.

The district court found that Respondent "ignores Founding-era laws that present the best analogue" which are the many early militia laws that required citizens to keep a **minimum** number of rounds of

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[10] *See* https://www.atf.gov/explosives/black-powder.

[11] *See* https://www.atf.gov/explosives/docs/newsletter/explosives-industry-newsletter-june-2013/download (modern gunpowder exempt from federal explosive requirements).

[12] *See* https://www.youtube.com/watch?v=3SlOXowwC4c.

ammunition. *See id.* at 1252. The district court correctly concluded that Respondent "did not succeed in justifying its sweeping ban and dispossession mandate with a relevantly similar historical analogue." *Id.* at 1253.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

JOHN I. HARRIS III
SCHULMAN, LEROY & BENNETT, P.C.
3310 West End Avenue
Suite 460
Nashville, TN 37203

JEREMIAH L. MORGAN*
WILLIAM J. OLSON
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
**Counsel of Record*
Attorneys for Amici Curiae

September 18, 2025