No. 25-198

In the Supreme Court of the United States

VIRGINIA DUNCAN, ET AL.,
Petitioners,
v.
ROB BONTA, ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF MONTANA, IDAHO AND 25 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The States of Montana, Idaho, Alabama, Alaska, Arkansas, Florida, Georgia, Iowa, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wyoming, and the Arizona Legislature submit this *amicus* brief to safeguard citizens' constitutional right to keep and bear arms against unnecessary intrusions. That right includes the right to possess and use essential components of modern arms like plus-ten magazines. *Amici* urge this Court to grant certiorari and reverse.*

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* Under Rule 37.2, *amici* provided timely notice of their intention to file this brief.

SUMMARY OF THE ARGUMENT

Though this case is now in its eighth year and on its second trip to this Court, it should not have been hard. The Ninth Circuit below agreed that about "half of privately owned magazines hold more than ten rounds," "[m]ost pistols are manufactured with magazines holding ten to seventeen rounds, and many popular rifles are manufactured with magazines holding twenty or thirty rounds." App. 7. Time and again, this Court has said that the Second Amendment protects the right of citizens to bear arms "that are unquestionably in common use today" for lawful purposes. *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1, 47 (2022). Plus-ten magazines are in common use today. So they are protected by the Second Amendment.

Yet the Ninth Circuit joined several other courts in rewriting the Second Amendment and this Court's precedents to allow hostile jurisdictions to continue infringing on their citizens' core constitutional right to keep and bear arms. The Ninth Circuit claimed that the Second Amendment does not apply at all because California's ban on the possession of plus-ten magazines purportedly does not regulate arms—even though the Second Amendment protects "arms-bearing conduct," including necessary incidents like magazines. *United States v. Rahimi*, 602 U.S. 680, 691 (2024). The Ninth Circuit went on to botch its alternative Second Amendment analysis, implausibly concluding that plus-ten magazines are not in common use and that irrelevant regulations like gunpowder storage rules are historical analogues for California's ban.

This obvious error from the Nation's largest circuit on a core issue of constitutional law warrants this Court's review. More fundamentally, it is time for this Court to address the repeated defiance of this Court's teachings, particularly in the circuits containing most of the jurisdictions that have repeatedly infringed on citizens' Second Amendment rights. The evident errors below and in similar cases manifest a deep hostility to both the Second Amendment itself and this Court's precedents. Only this Court's review can correct these persistent misapplications, which deprive citizens of their fundamental rights, their property, and their ability to defend themselves. The Court should grant certiorari and reverse.

REASONS FOR GRANTING THE WRIT

I. Lower courts in jurisdictions that tend to restrict Second Amendment rights are defying this Court's precedents.

The Ninth Circuit's "dismissive" view of the Second Amendment is no anomaly—it "is emblematic of a larger trend." *Silvester v. Becerra*, 138 S. Ct. 945, 950 (2018) (Thomas, J., dissenting from denial of certiorari). "[L]ower courts in the jurisdictions that" most often restrict Second Amendment rights "appear bent on distorting this Court's Second Amendment precedents." *Snope v. Brown*, 145 S. Ct. 1534, 1538 (2025) (Thomas, J., dissenting from denial of certiorari). Whatever the mechanism—sometimes distorting the term "arms," other times a convoluted understanding of the "common use" test, still other times faulty historical analogies—the effect of these lower court decisions is clear: "to trammel the constitutional liberties" of citizens, especially in

jurisdictions already hostile to Second Amendment rights. *Bianchi* v. *Brown*, 111 F.4th 438, 483 (CA4 2024) (Richardson, J., dissenting). To address this effect of far-reaching defiance of this Court's precedents, certiorari is needed.

Widespread infringement of the Second Amendment is not a hypothetical concern but a reality. Several courts have already upheld outright bans on "America's most common civilian rifle," the AR-15. *Harrel v. Raoul*, 144 S. Ct. 2491, 2493 (2024) (Thomas, J., statement respecting the denial of certiorari); see, *e.g.*, *Nat'l Ass'n for Gun Rights v. Lamont,* Nos. 23-1162, 23-1344, 2025 U.S. App. LEXIS 21570, at *66 (CA2 Aug. 22, 2025); *Capen v. Campbell*, 134 F.4th 660, 677 (CA1 2025); *Bevis v. City of Naperville*, 85 F.4th 1175, 1182 (CA7 2023). Plus-ten magazines have faced similar bans, which have been upheld by the Ninth Circuit below and other courts. See, *e.g.*, *State v. Gator's Custom Guns, Inc.*, 568 P.3d 278, 281 (Wash. 2025); *Lamont*, 2025 U.S. App. LEXIS 21570, at *15, *66; *Ocean State Tactical*, *LLC v. Rhode Island*, 95 F.4th 38, 52 (CA1 2024).

Judicial defiance seemed to drive these outcomes, not a careful application of the *Bruen* framework. Two specific forms of judicial defiance stand out in the lower courts' decisions on arms bans: (A) a convoluted understanding of the "common use" test; and (B) application of the purportedly separate "nuanced approach" to historical analogues.

A. Lower courts are misapplying the "common use" test.

Begin with a brief explanation of the *Bruen* framework of "common use." In *Bruen*, this Court described two steps "for applying the Second Amendment." 597 U.S. at 24. The first step explains that "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Ibid.* Step one is a purely "'textual analysis' focused on the 'normal and ordinary' meaning of the Second Amendment's language." *Id.* at 20 (cleaned up) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 576–77, 578 (2008)); see J. Joel Alicea, Bruen *Was Right*, 174 U. Pa. L. Rev. (forthcoming 2025) (manuscript at 9) ("[T]he first step focuses on the original semantic meaning of the text."). So to succeed at step one, a citizen must show that the object he seeks to possess is an "Arm" according to the "normal and ordinary" meaning of the Second Amendment. *Bruen*, 597 U.S. at 20.

The original "meaning [of 'Arms'] is no different from the meaning today." *Heller*, 554 U.S. at 581. "Arms" are "weapons of offence, or armour of defence." *Ibid.* (cleaned up). Thus, at step one, "it does not matter whether the object in question is a handgun or a machine gun." Alicea, *supra*, at 15 (cleaned up). But it would matter if the relevant object were a banana. A banana receives no presumptive protection under the Second Amendment, but a firearm does.

Bruen step two requires "[t]he government" to "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." 597 U.S. at 24. Courts must use

"analogical reasoning" to assess whether the modern regulation is "relevantly similar" to historical regulations. *Id.* at 28–29. "Why and how the regulation burdens the right are central to this inquiry." *Rahimi*, 602 U.S. at 692. "The law must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'" *Ibid.* (quoting *Bruen*, 597 U.S. at 30).

The "common use" test, in turn, is the test for discerning whether an arm may be regulated according to the "tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Heller*, 554 U.S. at 627. An arm is not "dangerous and unusual" if it is "typically possessed by law-abiding citizens for lawful purposes." *Id.* at 625, 627. Put another way, if an arm is "in common use today" by "American society" for a "lawful purpose," then it cannot be banned. *Id.* at 628; see *Bruen*, 597 U.S. at 47; see also *Hanson v. Smith*, 120 F.4th 223, 271 (CADC 2024) (Walker, J., dissenting) ("*Heller* and its progeny . . . have *already* held that the government cannot ban an arm in common use for lawful purposes.").

The next question is how common an arm must be to receive protection. "Commonality is determined largely by statistics. But a pure statistical inquiry may hide as much as it reveals," for "protected arms may not be numerically common by virtue of an unchallenged, unconstitutional regulation." *Duncan v. Becerra*, 970 F.3d 1133, 1147 (CA9 2020) (App. 584), *rev'd en banc sub. nom.*, *Duncan v. Bonta*, 19 F.4th 1087 (CA9 2021). Courts should "look[] to the usage of the American people to determine which weapons *they* deem most suitable for lawful purposes." *Bianchi*, 111

F.4th at 522 (Richardson, J., dissenting); see *Heller*, 554 U.S. at 629 ("It is enough to note . . . that the American people have considered the handgun to be the quintessential self-defense weapon.").

The "common use" test is best understood as part of *Bruen* step two because it is a limitation on the Second Amendment's scope "supported by the historical tradition" of regulating "dangerous and unusual weapons." *Heller*, 554 U.S. at 627; see *Bianchi*, 111 F.4th at 502 (Richardson, J., dissenting) ("the 'common use' inquiry best fits at *Bruen*'s second step"); see also Alicea, *supra*, at 13. The "common use" test is not part of *Bruen*'s plain-text analysis at step one—whether an arm is "in common use" does not determine whether it is actually an arm. See *Bevis*, 85 F.4th at 1209 (Brennan, J., dissenting) ("The nature of an object does not change based on its popularity, but the regulation of that object can.").

"*Rahimi* confirms this" understanding. *Bianchi*, 111 F.4th at 502 n.29 (Richardson, J., dissenting). This Court considered Mr. Rahimi to be part of the "the people" at step one—despite his violent history that ultimately justified his temporary dispossession at step two—because "the term unambiguously refers to all members of the political community." *Rahimi*, 602 U.S. at 773 (Thomas, J., dissenting) (internal quotation marks omitted). "[J]ust as the term 'the people' includes but is not limited to ordinary, law-abiding, adult citizens, the term 'Arms' includes but is not limited to arms in common use." *Bianchi*, 111 F.4th at 502 n.29 (Richardson, J., dissenting). And it matters which step the "common use" test occurs at

because the burden of proof shifts from the litigant to the government at step two. See *Bruen*, 597 U.S. at 24.

With those principles in mind, turn to the lower courts' treatment of the "common use" test. Considering Maryland's ban on AR-15s, the Fourth Circuit chastised the test as a "trivial counting exercise" and an "ill-conceived popularity test." *Bianchi*, 111 F.4th at 460. Then, the court misapplied an incorrect version of the test at the wrong step to conclude that AR-15s are not "Arms" presumptively protected by the Second Amendment—putting an AR-15 and a banana on equal footing. See *id.* at 452–53. The court reasoned that an individual must *first* demonstrate that a weapon is not "dangerous and unusual" for the weapon to be considered an "Arm" presumptively protected by the Second Amendment. See *id.* at 450–53. Rather than look to common usage among citizens, the Fourth Circuit concocted an interest balancing test that asks whether an arm is "excessively dangerous [and] not reasonably related or proportional to the end of self-defense." *Id.* at 450, 452. In so doing, the court "balance[d] away Second Amendment freedoms" and "decide[d] [for itself] which weapons are most suitable" for Americans. *Id.* at 522, 531 (Richardson, J., dissenting).

Likewise, considering Illinois's ban on AR-15s, the Seventh Circuit warped the "common use" analysis to conclude that AR-15s are not "Arms." See *Bevis*, 85 F.4th at 1195. The court misinterpreted the "common use" test to mean that the government may ban weapons that "may be reserved for military use," simply because *Heller* mentioned that M-16s could be banned. *Id.* at 1194. And the court placed the burden

on the plaintiff to make a showing of "common use" at step one. See *id.* So rather than focus on the "normal and ordinary meaning" of "Arm" historically, the court engaged in a "matching exercise between" "the characteristics of the" AR-15 and the M-16. *Bruen*, 597 U.S. at 20 (internal quotation marks omitted); see *Bevis*, 85 F.4th at 1221–22 (Brennan, J., dissenting). And, in the Seventh Circuit's eyes, "the AR-15 is almost the same gun as the M16 machinegun" used by the military, so the AR-15 is not an arm and can be banned. *Bevis*, 85 F.4th at 1195. But to the extent the M-16 "'may be banned,'" that is "not because of its military use but because of the 'historical tradition of prohibiting the carrying of dangerous and unusual weapons.'" *Hanson*, 120 F.4th at 233 (quoting *Heller*, 554 U.S. at 627); *see Snope*, 145 S. Ct. at 1534 (Kavanaugh, J., statement respecting the denial of certiorari).

Even courts that address the common use test at the right step still confuse the analysis. In a case involving Rhode Island's ban on plus-ten magazines, the First Circuit declared that this Court has not "intimated that a weapon's prevalence in society (as opposed to, say, the degree of harm it causes) is the sole measure of whether it is 'unusual.'" *Ocean State Tactical*, 95 F.4th at 50–51; see also *Capen*, 134 F.4th at 669–71 (upholding Massachusetts's ban of AR-15s based largely on this reasoning). And the First Circuit said that courts should look beyond the "ownership rate of the weapons at issue" to the weapon's "usefulness for self-defense." *Ocean State Tactical*, 95 F.4th at 51. To the contrary, *Heller* concluded that the District of Columbia could not "totally ban[] handgun

possession in the home" because handguns were "overwhelmingly chosen by American *society* for [lawful purposes]." *Heller*, 554 U.S. at 628 (emphasis added). "Our Constitution allows the American people—not the government—to decide which weapons are useful for self-defense." *Snope*, 145 S. Ct. at 1537 (Thomas, J., dissenting from denial of certiorari).

These consistent misapplications of the common use test, especially in jurisdictions most likely to restrict Second Amendment rights, require this Court's attention.

B. The so-called "nuanced approach" gives lower courts an excuse to make loose historical analogies.

Lower courts overseeing hostile jurisdictions—including the Ninth Circuit below—have also erred by distorting *Bruen* to apply a "nuanced approach" that effectively reduces the government's burden at step two. See, *e.g.,* App. 30–31; *Lamont*, 2025 U.S. App. LEXIS 21570, at *27; *Hanson*, 120 F.4th at 240–41; *Capen*, 134 F.4th at 668; *Ocean State Tactical*, 95 F.4th at 44; *Del. State Sportsmen's Ass'n, Inc. v. Del. Dep't of Safety & Homeland Sec.*, 664 F. Supp. 3d 584, 598 (D. Del. 2023), *aff'd*, 108 F.4th 194 (CA3 2024); *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Platkin*, 742 F. Supp. 3d 421, 449 (D.N.J. 2024); *Hartford v. Ferguson*, 676 F. Supp. 3d 897, 907 (W.D. Wash. 2023).

Bruen explained that "the historical analogies here and in *Heller* are relatively simple to draw," while noting that "other cases implicating unprecedented societal concerns or dramatic technological changes

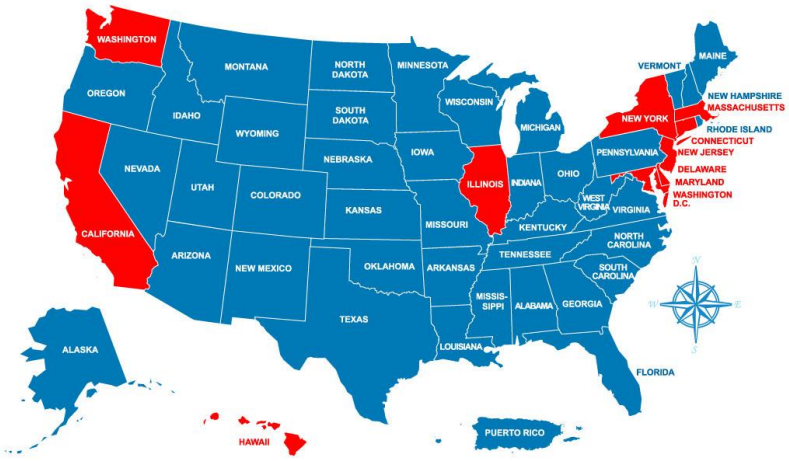
may require a more nuanced approach." 597 U.S. at 27. Several lower courts have taken this passing remark far beyond its limited scope. These courts apply a different version of *Bruen* step two in "cases implicating unprecedented societal concerns or dramatic technological changes." *Hanson*, 120 F.4th at 241. For instance, under the D.C. Circuit's variety, "the government may demonstrate a constitutionally adequate"—meaning, *loose*—"historical analogue for a regulation or ban of an arm implicating either" societal concerns or technological changes. *Ibid.* In a case involving the District of Columbia's plus-ten magazine ban, the D.C. Circuit held that these magazines "implicate unprecedented societal concerns and dramatic technological changes," so "the lack of a 'precise match' does not" matter. *Id.* at 242.

This "nuanced approach" licenses courts to "disregard our historical tradition of firearm regulation whenever a modern regulation seeks to address modern problems or technology." App. 112–13 (Bumatay, J., dissenting). The "single stray line of dicta from *Bruen*" mentioning a "nuanced approach" did not create a different version of the *Bruen* test or erase the "common use" test. *Hanson*, 120 F.4th at 275 (Walker, J., dissenting). Instead, it "was an unremarkable observation that making comparisons to proper historical analogies might be challenging at times." App. 113 (Bumatay, J., dissenting). Under *Bruen*, "analogical reasoning requires" "that the government identify a well-established and representative historical *analogue*." 597 U.S. at 30. To read *Bruen* as creating an alternate, historically lax test would miss the core point of the decision: courts

must "assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *Bruen*, 597 U.S. at 26; see, *e.g.*, *Rahimi*, 602 U.S. at 708 (Gorsuch, J., concurring); *id.* at 717–18 (Kavanaugh, J., concurring); *id.* at 737–39 (Barrett, J., concurring); *id.* at 750–51 (Thomas, J., dissenting).

* * *

Lower courts are not faithfully applying this Court's Second Amendment precedents. Outcomes like upholding blanket bans on "America's most common civilian rifle" did not result from analytical disagreements about historical gun regulation analogues. *Harrel*, 144 S. Ct. at 2493 (statement of Thomas, J.). Instead, too many lower courts use "'cherrypicked language' that is 'mis- and over-applied from the Court's prior precedents' to uphold any firearms regulation that comes before [them]." *United States v. Duarte*, 137 F.4th 743, 782 (CA9 2025) (en banc) (VanDyke, J., concurring). And too many of those decisions come from circuits whose jurisdictions are most likely to restrict their citizens' Second Amendment rights:



U.S. STATES WITH 'ASSAULT WEAPONS' BANS

U.S. STATES WITH MAGAZINE RESTRICTIONS

See U.S. Concealed Carry Ass'n, *Which States Have Assault Weapons Bans?* (June 30, 2025), https://perma.cc/RQ5Y-WDGU; U.S. Concealed Carry Ass'n, *Gun Magazine Capacity Laws by State* (Sept. 25, 2023), https://perma.cc/5JTS-DV86.

This combination of legislative and judicial defiance to the Court's precedents serves as a double whammy to the constitutional rights of law-abiding Americans. It is again time for the Court to step in.

II. The decision below badly erred.

The Ninth Circuit below repeated many of the errors discussed above, perpetuating its under-protection of Second Amendment rights. *First*, it contorted the meaning of "arms" to hold that magazines carrying ammunition necessary to a gun's operation are unprotected by the Second Amendment. *Second*, it held that plus-ten magazines are not in common use—despite their exceedingly widespread private ownership—because they may not often be used directly to fire in self-defense. *Third*, it invoked inapt historical regulations, like gunpowder storage laws, to justify the heavy burden placed by California's law on Second Amendment rights. Each of these moves was egregiously wrong.

A. Magazines are protected by the Second Amendment.

The Second Amendment preserves the right of the people to keep and bear "arms," which "covers modern instruments that facilitate armed self-defense." *Bruen*, 597 U.S. at 28. Its protections extend, "prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Heller*, 554 U.S. at 582.

"Constitutional rights," including those within the Second Amendment, "implicitly protect those closely related acts necessary to their exercise." *Luis v. United States*, 578 U.S. 5, 26 (2016) (Thomas, J.,

concurring). For instance, the Second Amendment includes "necessary concomitant[s]" like "the right to take a gun outside the home for certain purposes." *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 590 U.S. 336, 364 (2020) (Alito, J., dissenting). And it encompasses integral parts of firearms like bullets and magazines. Just as the First Amendment prohibits, for instance, indirect regulation via differential taxes on paper and ink, *Minneapolis Star & Trib. Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 593 (1983), the Second Amendment prohibits regulations that burden the right to keep and bear arms. See *Ezell v. City of Chicago*, 651 F.3d 684, 704 (CA7 2011).

Several courts, both pre- and post-*Bruen*, have recognized that magazines are within the Second Amendment's protections. See *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d 106, 116 (CA3 2018); *Kolbe v. Hogan*, 813 F.3d 160, 175 (CA4 2016). Even the D.C. Circuit, which upheld a plus-ten magazine ban, concluded that magazines are protected. *Hanson*, 120 F.4th at 232. And rightly so. "A magazine is necessary to make meaningful an individual's [Second Amendment] right." *Ibid.* (cleaned up).

As Judge Bumatay explained below, "If magazines and other components weren't included, the Second Amendment would be a shallow right—easily infringed by basic indirect regulation." App. 84 (dissenting op.). Indeed, magazines are inherently tied to the arm itself. "The problem of limited ammunition capacity has plagued rifles since their invention centuries ago." *United States v. Gonzalez*, 792 F.3d

534, 536 (CA5 2015). "The earliest rifles fired a single shot, leaving the user vulnerable during reloading." *Ibid.* "Numerous inventions have sought to eliminate this problem," but "none has proved as effective as the magazine." *Ibid.*

Below, the Ninth Circuit majority claimed that plus-ten "magazine[s] [are] no different than other items that hold additional ammunition, such as cartridge boxes and belts that hold bullets." App. 21. That's true in the same sense that a motor vehicle's gas tank holds additional fuel. It's theoretically possible to operate a gas-powered vehicle without a gas tank, but that would severely limit its functionality and utility. See *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 116 ("[M]agazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended."). Likewise, it's theoretically possible to operate a newspaper by paying higher taxes on ink and paper, but that did not free those taxes from First Amendment scrutiny. See *Minneapolis Star*, 460 U.S. at 583.

As the district court in *Hanson* observed, classifying magazines as mere "accoutrements" would allow states "to ban *all* magazines . . . because a firearm technically does not require *any* magazine to operate; one could simply fire the single bullet in the firearm's chamber." *Hanson v. District of Columbia*, 671 F. Supp. 3d 1, 10 (D.D.C. 2023). And if magazines are not protected by the Second Amendment, "States could make an easy end-run around the Second Amendment by simply banning firearm components." App. 282 (Bumatay, J., dissenting). The Ninth

Circuit's logic would likewise permit states to limit the capacity of revolvers or other firearms without detachable magazines.

Because magazines are integral to "arms," they are protected by the Second Amendment, and California bears the burden of proof under *Bruen*'s history and tradition framework. See *Bruen*, 597 U.S. at 17.

B. California bans magazines typically possessed by law-abiding citizens for lawful purposes.

The Ninth Circuit also botched the "common use" analysis. The Second Amendment protects arms "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625 (cleaned up). This "common use" test accounts for the historical "tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id.* at 627. Arms "in common use today" are not "dangerous and unusual." *Bruen*, 597 U.S. at 47 (internal quotation marks omitted).

So are plus-ten magazines typically possessed by law-abiding citizens for lawful purposes? The answer is unequivocally yes—so they cannot be considered dangerous *and* unusual. Those magazines are commonly used for self-defense, hunting, and sporting purposes. California's restrictions, like similar restrictions in other States, burden the rights of millions of law-abiding citizens to keep and bear magazines (or "arms") that have long been considered appropriate for self-defense.

The district court properly concluded that "[t]here is no American tradition of limiting ammunition capacity and the 10-round limit has no historical

pedigree." App. 307. "It is indisputable in the modern United States that magazines of up to thirty rounds for rifles and up to twenty rounds for handguns are standard equipment for many popular firearms." David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 874 (2015). And they are legal in "at least 38 States and under Federal law." App. 74–75 (Bumatay, J., dissenting). In one comprehensive study, 48% of respondents confirmed that they owned plus-ten magazines. App. 313. Estimates vary, but another study found that Americans own 542 million plus-ten magazines. *Ibid*. So they're not just common, they're *ubiquitous* in common guns, like the Glock 17—one of the most popular firearms on the market—that comes with a standard 17-round magazine. App. 587.

Of course, an arm need not number in the millions to be in common use. This Court held that stun guns are in common use even though only a few hundred thousand citizens own such arms. *Caetano v. Massachusetts*, 577 U.S. 411, 420–21 (2016) (Alito, J., concurring). "While less popular than handguns, stun guns are widely owned and accepted as a legitimate means of self-defense across the country." *Id.* at 420. Thus, the common use threshold is relatively low. And if a few hundred thousand stun guns reach that threshold, then millions of plus-ten magazines far surpass it.

The evidence before the district court was neither surprising nor unique. The district court concluded that plus-ten magazines are "commonly-owned by law-abiding citizens" and are not "dangerous and unusual." App. 346. And courts across the country

have recognized the widespread use of these magazines by law-abiding citizens. See *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuom*o, 804 F.3d 242, 255 (CA2 2015) (agreeing that the "large-capacity magazines at issue are 'in common use'"); *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (CADC 2011) (noting that the record showed that "magazines holding more than ten rounds are indeed in 'common use'").

Moreover, there's a longstanding history and tradition of law-abiding Americans owning and using these magazines for self-defense. A prior panel below aptly explained that "[f]irearms or magazines holding more than ten rounds have been in existence—and owned by American citizens—for centuries. Firearms with greater than ten round capacities existed even before our nation's founding, and the common use of [plus-ten magazines] for self-defense is apparent in our shared national history." *Duncan*, 970 F.3d at 1147 (App. 585); see also App. 284 (Bumatay, J., dissenting) ("In terms of large-scale commercial success, rifle magazines of more than ten rounds had become popular by the time the Fourteenth Amendment was being ratified." (quoting Kopel, *supra*, at 851)).

The majority below concluded that plus-ten magazines are "rarely . . . used in self-defense" and thus may be banned. App. 53. But that's wrong in several respects.

First, though self-defense is a core component of the Second Amendment, *Bruen*, 597 U.S. at 29, the constitutional right to keep and bear arms is not limited to self-defense. The right extends to other

"lawful purpose[s]" too, like community defense, hunting, and sporting. *Heller*, 554 U.S. at 624; see, *e.g.*, *id.* at 599; 15 U.S.C. § 7901(b)(2); William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 Notre Dame L. Rev. 1467, 1498–1502 (2024). And this Court in *Bruen* reiterated that the Second Amendment protects arms "in common use," not merely those in common use *for self-defense*. Bruen, 597 U.S. at 21.

Second, the reasoning below is inconsistent with *Heller*. *Heller* "consider[ed] whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment." 554 U.S. at 573. "Actual firing of a handgun in the District was irrelevant." App. 332. Rather, "[c]onstitutional protection is afforded to weapons 'typically possessed by law-abiding citizens for lawful purposes,' focusing on typicality and possession rather than frequency of firing." *Ibid.* (quoting *Heller*, 554 U.S. at 625).

Third, even if actual firing mattered, the Ninth Circuit would still be wrong. These magazines facilitate armed self-defense. The district court cited a comprehensive study showing that American gun owners use firearms in self-defense roughly 1.7 million times every year. App. 313 (citing William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* 35 (Geo. McDonough Sch. of Bus. Rsch. Paper No. 4109494, 2022)). Another study from the Centers for Disease Control puts that number as high as 3 million. App. 313–14 (citing Inst. of Med. & Nat'l Rsch. Council, *Priorities for Research to Reduce the Threat of*

Firearm-Related Violence 15 (The Nat'l Acads. Press ed., 2013)).

And that's only part of the equation. "[I]t is unnecessary to look at how often a law-abiding citizen fired a firearm more than ten times to fend off an attacker for our inquiry," for "it would be troubling if our constitutional rights hung on such thin evidence." App. 286 (Bumatay, J., dissenting). As discussed, nearly half of gun owners possess plus-ten magazines. And there are likely hundreds of millions of those magazines in circulation—many used in popular firearms such as the Glock 17. So when someone uses a firearm in self-defense, whether to fend off an intruder in the middle of the night or a grizzly bear in the middle of nowhere, there's a good chance that person is "using" a plus-ten magazine. The same is true when individuals use firearms as a deterrent in self-defense situations without firing a shot. The "use" of the firearm isn't limited to firing the weapon. The district court rightly analogized this to wearing a seatbelt in case of collision or using a reserve canopy on a parachute. App. 335. Firing a weapon in self-defense—one time or fifteen times—is always a worst-case scenario. Fortunately, the Second Amendment protects the right of Americans to adequately prepare themselves for those contingencies.

C. The plus-ten magazine ban does not align with this Nation's tradition of firearm regulation.

California's plus-ten magazine ban is not analogous to any of the historical regulations invoked by the Ninth Circuit. "[W]hen the Government regulates arms-bearing conduct, as when the

Government regulates other constitutional rights, it bears the burden to 'justify its regulation.'" *Rahimi*, 602 U.S. at 691. To justify its plus-ten magazine ban, California must demonstrate that "its regulation" "is consistent with the Nation's historical tradition of firearm regulation"—"[o]nly then may a court conclude that" possessing these magazines "falls outside the Second Amendment's 'unqualified command.'" *Bruen*, 597 U.S. at 24.

Courts must follow the course charted by *Heller*, *Bruen*, and *Rahimi* to determine whether modern firearm regulations are consistent with the Second Amendment's text and historical understanding. That analysis requires courts to "ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit." *Rahimi*, 602 U.S. at 692. And relevant similarity exists if "the government identif[ies] a well-established and representative historical *analogue*." *Bruen*, 597 U.S. at 30. "Why and how the regulation burdens the right are central to [the analogical] inquiry." *Rahimi*, 602 U.S. at 692.

Even though California's obligation to respect citizens' right to keep and bear arms flows from the Fourteenth Amendment, not the Second, the rights listed in the Bill of Rights and incorporated against the States after the Fourteenth Amendment's adoption "have the same scope as against the Federal Government." *Bruen*, 597 U.S. at 37. And the scope of that right is generally "pegged to the public understanding of the right when the Bill of Rights was adopted in 1791." *Ibid.* (collecting cases).

The Ninth Circuit majority's "historical tradition" analysis is flawed from the get-go. It made the same

mistake that other courts have in reasoning that "a more nuanced approach applies to cases" "implicating unprecedented societal concerns or dramatic technological changes." App. 30–31 (quoting *Bruen*, 597 U.S. at 27). "Those cases," the Ninth Circuit reasoned, "warrant an even more flexible approach than the Court applied in *Rahimi*." App. 31. And the "nuanced approach [was] appropriate here" because "mass shootings" are a recent "societal concern," and plus-ten magazines "represent a dramatic technological change from the weapons at the Founding." App. 31–32.

But again, the "nuanced approach" is not a separate test. See *Hanson*, 120 F.4th at 275 (Walker, J., dissenting). There is only "*one approach*: the Second Amendment's text and historical understanding always control." App. 113 (Bumatay, J., dissenting).

The Ninth Circuit relied on three historical regulatory regimes: laws regulating the storage of gunpowder, laws regulating trap guns, and laws restricting "weapons after their use by criminals exposed an especially dangerous use of the weapon." App. 34–39. But these historical comparisons are incomplete because firearms with greater than ten-round capacity have existed since 1580 and were well-known to the Founders. See *Duncan*, 970 F.3d at 1147, 1149 (App. 585). In other words, the Ninth Circuit evaluated the modern regulation of apples by analogizing to the historical regulation of oranges. In some cases, that could be necessary. But we have a better historical analogue—the actual regulation of apples (or lack thereof).

A prior Ninth Circuit panel detailed the history of these firearms. See generally *id.* at 1147–49 (App. 585–88). Importantly, "[a]fter the American Revolution . . . new firearm designs proliferated throughout the states and few restrictions were enacted on firing capacities." *Id.* at 1147 (App. 585). The Lewis and Clark Expedition carried the Girandoni air rifle in 1804, which had a 22-round capacity. *Ibid.* In 1867, Winchester introduced its famous Model 66 lever-action rifle able to carry 17 rounds—just like the modern Glock 17. *Id.* at 1148 (App. 586); see also Kopel, *supra*, at 851.

Setting this overlooked history aside, the Ninth Circuit's proposed analogies still fail. Colonial-era regulations on gunpowder storage are inapplicable to magazine-capacity restrictions. "The suggestion that the[se laws] limited the Second Amendment right to keep and bear arms is silly." *Hanson*, 120 F.4th at 235. First, the burden on law-abiding citizens is asymmetric, for "those fire-safety laws" did "not remotely burden the right of self-defense as much as an absolute ban on handguns." *Heller*, 554 U.S. at 632. "While California's magazine ban prohibits using the most popular magazine for self-defense, the gunpowder laws had zero effect on self-defense." App. 110 (Bumatay, J., dissenting). Second, these laws served a different purpose. "The 'why' of the gunpowder regulations was to stop fires resulting from the combustion of stored flammable materials." *Bevis*, 85 F.4th at 1217 (Brennan, J., dissenting). That's different than "California's purpose" here: "reduc[ing] *intentional* gun violence." App. 110 (Bumatay, J., dissenting).

The Ninth Circuit's analogy to trap gun regulations also fails. Trap guns involved "the rigging of a firearm to discharge when a person unwittingly trips a string or wire." App. 35. But trap gun regulations and California's magazine ban do not share "similar reasons" for their enactment. *Rahimi*, 602 U.S. at 692. Setting trap guns is inherently unlawful—it amounts to "tortious activity that lies outside the realm of lawful self-defense." *Hanson*, 120 F.4th at 236. By contrast, California's magazine ban targets actions—owning and using plus-ten magazines—that merely have the potential for unlawful abuse. And the "how" is different because laws against trap guns only banned "the *setting* of the device," unlike California's outright ban on plus-ten magazines. App. 109 (Bumatay, J., dissenting).

Neither does the Ninth Circuit's analogy to anti-carry laws stand up. The court discerned a tradition of banning "especially dangerous uses of weapons" based on historical regulations restricting the carry of weapons like "Bowie knives," "slungshots," and concealable "percussion-cap pistols." App. 34–39. But that "evade[s]" and "recharacteriz[es]" "*Heller*'s clear ruling" that dangerous and unusual arms may be prohibited while those in common use may not. App. 98 (Bumatay, J., dissenting).

Even if the Ninth Circuit correctly identified a tradition of regulating "especially dangerous uses of weapons," it still would not be "relevantly similar" to California's magazine ban. The "how" is different because anti-carry laws restrict the specific "*manner* of carrying," while the magazine ban prohibits possession altogether. *Bianchi*, 111 F.4th at 510

(Richardson, J., dissenting). And the "why" fares no better because the court identified an overly broad historical principle. See *Rahimi*, 602 U.S. at 740 (Barrett, J., concurring) ("[A] court must be careful not to read a principle at such a high level of generality that it waters down the right."). Under "the majority's permissive 'especially dangerous' level of generality" "there always will be a matching 'why' because [of] the inherently dangerous nature of firearms." App. 139–40 (VanDyke, J., dissenting).

The Ninth Circuit's overly broad analogizing, along with its other errors, gives California and other States within that circuit "a regulatory blank check" to chip away at the Second Amendment rights of millions of Americans. *Bruen*, 597 U.S. at 30.

CONCLUSION

The Court should grant the petition and reverse.

Respectfully submitted, SEPTEMBER 18, 2025

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