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

BRIEF OF NATIONAL ASSOCIATION FOR GUN RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS

The right to keep and bear arms is a fundamental right that existed prior to the Constitution. The right is not in any sense granted by the Constitution. Nor does it depend on the Constitution for its existence. Rather, the Second Amendment declares that the pre-existing "right of the people to keep and bear Arms shall not be infringed." The National Association for Gun Rights ("NAGR")[1] is a nonprofit membership and donor-supported organization with hundreds of thousands of members nationwide. The sole reason for NAGR's existence is to defend American citizens' right to keep and bear arms. In pursuit of this goal, NAGR has filed numerous lawsuits seeking to uphold Americans' Second Amendment rights. NAGR has a strong interest in this case because the guidance the Court will provide in its resolution of this matter will have a major impact on NAGR's ongoing litigation efforts in support of Americans' fundamental right to keep and bear arms.

SUMMARY OF ARGUMENT

There is no need to await further percolation in the lower courts before assessing the constitutionality of California's ban on so-called large-capacity magazines. In *D.C. v. Heller*, 554 U.S. 570, 624 (2008), the Court held that the Second Amendment protects arms in common

1. No counsel for a party authored this brief in whole or in part, and no entity or person, other than amicus curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Amicus curiae provided timely notice to the parties of its intention to file this brief.

use for lawful purposes. Large-capacity magazines are manifestly in common use for lawful purposes. Indeed, law-abiding citizens possess hundreds of millions of the type of magazines banned by the challenged statute.

Unfortunately, compliance with *Heller's* clear mandate has never been a top priority of the circuit courts. From 2008 to 2022, every circuit court failed to apply *Heller* properly. In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), the Court called for a course correction. Regrettably, after *Bruen*, the lower courts continue to be "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). With respect to arms bans, no circuit split developed before *Bruen*, and it is evident that no circuit split is going to develop after *Bruen*. In light of this history, "further percolation is of little value." *Id.*

The circuit court upheld California's arms ban because criminals sometimes use the banned magazines. As this Court has recognized on several occasions, however, criminals' use of a firearm is not a reason to ban law-abiding citizens from using them. The potential for abuse of a freedom is the price we pay for that freedom.

The circuit court held that certain magazines may be banned because, without an accompanying firearm, they are benign and useless in combat. This argument proves too much, because no essential component of a firearm is, standing alone, an arm. Thus, under the circuit court's reasoning, the state could ban all vital firearm components and render the right to keep and bear firearms meaningless.

The circuit court distinguished between certain magazines, which it acknowledged are protected arms, and other magazines, which it characterized as unprotected "accoutrements." The difference? Magazines in the latter category have had an additional "magic bullet" added to their capacity. But which bullet is the magic one that transmogrifies a magazine from the category "protected arm" to the category "unprotected accoutrement"? The circuit court did not say, and it turns out that there is no principled way to distinguish between the two categories.

Instead of trying to define its way to a preferred result, the circuit court should have applied both steps of the *Bruen* test. Under the plain text step, all magazines are obviously instruments that facilitate armed self-defense and thus the statute is presumptively unconstitutional. Moreover, the state is unable to rebut that presumption because it cannot demonstrate that its arms ban is consistent with the Nation's history and tradition of firearms regulation. Law-abiding citizens own hundreds of millions of magazines with a capacity in excess of ten rounds. Consequently, the state cannot demonstrate that they are dangerous and unusual.

Finally, in distinguishing protected arms and unprotected accoutrements, the circuit court drew on material presented by "corpus linguistics" expert Dennis Baron. But Professor Baron's evidence proves nothing of any relevance to the Second Amendment analysis. Indeed, in *Heller*, Justice Scalia described the conclusions drawn by the dissent based on Baron's and his colleagues' work as "worthy of the Mad Hatter." Nothing has changed. Magazines are not mere inert boxes analogous to Founding-era cartridge boxes, as Professor Baron would

have it. Rather, they are dynamic components essential to the operation of all semiautomatic firearms. As such, they are clearly covered by the plain text of the Second Amendment.

ARGUMENT

A. "Further Percolation is of Little Value"

In *D.C. v. Heller*, 554 U.S. 570, 624 (2008), the Court held that the Second Amendment protects arms in common use for lawful purposes. The lower courts responded to *Heller* by organizing a mutually reinforcing resistance to both its specific holding and the analytical framework it established. Consequently, in the years that followed, every circuit court that considered a Second Amendment challenge failed to apply *Heller* properly. See *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 18-20 and n. 4 (2022). In *Bruen*, this Court called for a course correction in the lower courts and abrogated the following court cases either expressly or by implication: *Association of N. J. Rifle & Pistol Clubs, Inc. v. Attorney General N. J.*, 910 F.3d 106 (3rd Cir. 2018); *Worman v. Healey*, 922 F.3d 26 (1st Cir. 2019); *Libertarian Party of Erie Cty. v. Cuomo*, 970 F.3d 106 (2nd Cir. 2020); *Harley v. Wilkinson*, 988 F.3d 766 (4th Cir. 2021); *National Rifle Assn. of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510 (6th Cir. 2012); *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019); *Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021); *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244 (11th Cir. 2012); *United States v. Class*, 930 F.3d 460 (D.C. Cir. 2019); *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017);

Gould v. Morgan, 907 F.3d 659 (1st Cir. 2018); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011); *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015); *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011); and *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015).

The post-*Heller* resistance cannot be laid at the feet of understandable confusion about the analytical framework *Heller* established. *Heller's* "text and history" test for assessing the constitutionality of firearms regulations and its rejection of a judge-empowering interest-balancing inquiry were obvious. *Bruen*, 597 U.S. at 22. The lower courts that ignored *Heller's* plain holding were fully aware of what they were doing, as then-judge Kavanaugh noted early on in his dissent in *Heller v. D.C.*, 670 F.3d 1244 (D.C. Cir. 2011): "*Heller* and *McDonald* leave *little doubt* that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny." *Id.* at 1271 (Kavanaugh, J., dissenting) (emphasis added).

The courts participating in the post-*Heller* resistance were highly successful in thwarting Second Amendment plaintiffs, particularly in cases such as this one, which arose in the Ninth Circuit. In *United States v. Rahimi*, 602 U.S. 680 (2024), Justice Gorsuch reflected on the history of post-*Heller* Second Amendment challenges: "How did the government fare under [the two-step interest-balancing] regime? In [the Ninth Circuit], it had an 'undefeated, 50–0 record.'" *Id.* at 712 (Gorsuch, J., concurring), quoting

Duncan v. Bonta, 19 F.4th 1087, 1167 n. 8 (9th Cir. 2021) (en banc) (VanDyke, J., dissenting).

In *Bruen*, the Court called out the resistance and emphatically demanded that the lower courts stop undermining *Heller*. The Court was particularly critical of the courts that had denied Second Amendment claims because they believed the citizens did not really need the banned arms. The Court reminded the inferior courts that "'[t]he very enumeration of the right [to keep and bear arms] takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.' *Heller*, 554 U.S. at 634, 128 S.Ct. 2783. . . . 'A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.' *Ibid.*" *Id.* at 23 (emphasis in the original).

Sadly, *Bruen's* admonitions fell on deaf ears. The lower courts continue to be "bent on distorting this Court's Second Amendment precedents." See *Snope v. Brown*, 145 S. Ct. 1534, 1538 (2025) (Thomas, J., dissenting from denial of certiorari). Justice Thomas's lament is understandable, as the government has won **100%** of the post-*Bruen* challenges to firearms bans. See:

- *Bianchi v. Brown*, 111 F.4th 438 (4th Cir. 2024), cert. denied sub nom. *Snope v. Brown* (2025) (rejecting challenge to Maryland's assault weapon[2] ban).

2. The term "assault weapon" is not a term used in the firearms industry or community for firearms commonly available to civilians. Instead, the term is a rhetorically charged political term meant to stir the passions of the public against those persons who choose to exercise their constitutional right to possess certain

- *Hanson v. D.C.*, 120 F.4th 223 (D.C. Cir. 2024), cert. denied (2025) (rejecting challenge to D.C.'s magazine ban).

- *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38 (1st Cir. 2024) cert. denied (2025) (rejecting challenge to Rhode Island magazine ban).

- *Delaware State Sportsmen's Ass'n, Inc. v. Delaware Dep't of Safety & Homeland Sec.*, 108 F.4th 194 (3d Cir. 2024), cert. denied sub nom. *Gray v. Jennings* (2025) (rejecting challenge to Delaware's assault weapon and magazine bans).

- *Bevis v. City of Naperville, Illinois*, 85 F.4th 1175 (7th Cir. 2023), *cert. denied sub nom. Harrel v. Raoul* (2024) (rejecting challenge to Illinois's assault weapon and magazine bans); see also *Barnett v. Raoul*, No. 24-3060 (7th Cir, 2024) (staying permanent injunction entered by district court after remand).

- *Duncan v. Bonta*, 133 F.4th 852 (9th Cir. 2025) (en banc), cert. petition pending (upholding California's magazine ban).

- *Viramontes v. Cnty. of Cook*, 2025 WL 1553896 (7th Cir. 2025), cert. petition pending (rejecting challenge to Cook County's assault weapon and magazine bans).

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semi-automatic firearms that are commonly owned by millions of law-abiding American citizens for lawful purposes. However, as this is the term used in the cases, NAGR will use it as well rather than belabor this brief with the more appropriate phrase "so-called assault weapon."

- *Nat'l Ass'n for Gun Rts. v. Lamont*, 2025 WL 2423599 (2d Cir. Aug. 22, 2025) (rejecting challenge to Connecticut's assault weapon and magazine bans).

- *Capen v. Campbell*, 134 F.4th 660 (1st Cir. 2025) (rejecting challenge to Massachusetts's assault weapon and magazine bans).

- *Miller v. Bonta*, 2023 WL 11229998 (9th Cir. 2023) (staying injunction of California's assault weapon ban).

- *United States v. Bridges*, 2025 WL 2250109 (6th Cir. Aug. 7, 2025) (rejecting challenge to automatic weapon ban).

- *Or. Firearms Fed'n v. Kotek*, 682 F. Supp. 3d 874 (D. Or. 2023) (rejecting challenge to Oregon's law restricting magazines).

- *Hartford v. Ferguson*, 676 F. Supp. 3d 897 (W.D. Wash. 2023) (rejecting challenge to Washington's assault weapon law).

- *Vermont Fed'n of Sportsmen's Clubs v. Birmingham*, 741 F. Supp. 3d 172 (D. Vt. 2024) (rejecting challenge to Vermont magazine ban).

- *Or. Firearms Fed'n v. Brown*, 644 F. Supp. 3d 782 (D. Or. 2022) (rejecting challenge to Oregon's magazine ban).

- *Brumback v. Ferguson*, 2023 WL 6221425 (E.D. Wash. Sept. 25, 2023) (rejecting challenge to Washington's law restricting magazines).

- *Goldman v. City of Highland Park, Illinois*, 2024 WL 98429 (N.D. Ill. Jan. 9, 2024) (rejecting challenge to city's assault weapon and magazine bans).

- *Rupp v. Bonta*, 723 F. Supp. 3d 837 (C.D. Cal. 2024) (rejecting challenge to California assault weapon ban).

- *Banta v. Ferguson*, 2024 WL 4314788 (E.D. Wash. Sept. 26, 2024) (rejecting challenge to Washington's assault weapon ban).

- *Granata v. Campbell*, 2025 WL 2495956 (D. Mass. Aug. 29, 2025) (rejecting challenge to Massachusetts's ban of certain handguns).

In summary, the circuit courts unanimously defied *Heller* from 2008 to 2022. Even though those courts were egregiously wrong, there was no circuit split, and a split was obviously never going to develop. *Bruen* called for a course correction, but nothing changed. The lower courts that have addressed firearms bans since *Bruen* have, without exception, continued to distort *Heller*. Again, there is no circuit split, and there is little reason to expect one will develop. In light of this history, there cannot be the slightest doubt that Justice Thomas was correct when he said that "[f]urther percolation is of little value." *Snope*, *supra*, at 1538 (Thomas, J., dissenting from denial

of certiorari). And that is the primary reason this Court should grant the petition.

B. The Potential Abuse of Freedom is the Price of Freedom

When a judicial opinion begins with an emotional appeal instead of a legal analysis, hold onto your wallet. Justice Breyer began his dissent in *Bruen* as follows: "In 2020, 45,222 Americans were killed by firearms. [] Since the start of this year (2022), there have been 277 reported mass shootings . . . " 597 U.S. at 83 (Breyer, J., dissenting). The *Bruen* majority responded to Justice Breyer as follows:

> Rather than begin with its view of the governing legal framework, the dissent chronicles, in painstaking detail, evidence of crimes committed by individuals with firearms. [] The dissent invokes all of these statistics presumably to justify granting States greater leeway in restricting firearm ownership and use. But, as Members of the Court have already explained, "[t]he right to keep and bear arms . . . is not the only constitutional right that has controversial public safety implications." *McDonald v. Chicago*, 561 U.S. 742, 783, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (plurality opinion).

Id., 597 U.S. 1, 17, n.3.

The circuit court did not get the message. This is the first sentence of its opinion: "Mass shootings are

devastating events for the victims, their families, and the broader community." *Duncan*, 133 F.4th at 859. The circuit court, like Justice Breyer, was presumably trying to justify granting California greater leeway in restricting ownership and use of firearm magazines. But as this Court has repeatedly stated, many constitutional rights have controversial public safety implications, and the fact that criminals abuse a freedom is not a reason to deny that freedom to law-abiding citizens.

Moreover, as this Court has stated in the First Amendment context, "a free society prefers to punish the few who abuse rights [] after they break the law [rather] than to throttle them and all others beforehand." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). *Bruen* held that First Amendment principles apply equally to the Second Amendment, because the latter is not a "second-class right." 597 U.S. at 70, citing *McDonald*, 561 U.S. at 780.

C. The Circuit Court's Theory Proves Too Much

The circuit court started on the right track when it stated:

> [F]or the right to bear arms to have meaning, the Amendment's text must carry an implicit, corollary right to bear the components or accessories necessary for the ordinary functioning of a firearm.

Duncan v. Bonta, 133 F.4th 852, 866 (9th Cir. 2025). But then the court went off the rails when it stated:

> A large-capacity magazine is a box that, by itself, is harmless. It cannot reasonably be described as an item that a person "takes into his hands, or useth in wrath to cast at or strike another." *Heller*, 554 U.S. at 581, 128 S.Ct. 2783. Nor can it be reasonably described, by itself, as a "weapon[] of offence, or armour of defence." *Id*. Without an accompanying firearm, a large-capacity magazine is benign, useless in combat for either offense or defense.

Id. at 867.

This argument proves too much, and it is easy to see why. Substitute any other vital component of a firearm into the last sentence of the above quotation:

- "Without an accompanying firearm, a [barrel] is benign, useless in combat for either offense or defense."
- "Without an accompanying firearm, a [trigger] is benign, useless in combat for either offense or defense."
- "Without an accompanying firearm, a [hammer] is benign, useless in combat for either offense or defense."
- "Without an accompanying firearm, a [bullet] is benign, useless in combat for either offense or defense."

Examples could be multiplied. The point is that *every component* of a firearm is, standing by itself, "benign" and "useless in combat for either offense or defense." Yet, no one argues that barrels, triggers, hammers, and bullets can be banned. It surely follows that the circuit court erred when it assessed California's ban of a firearm component in isolation from that component's integration into a firearm as a whole.

D. The Court Should Reject the Circuit Court's "Magic Bullet" Theory

The circuit court acknowledged that some firearms require the use of a magazine to function properly. *Duncan*, 133 F.4th at 867. It further recognized that "[f]or that reason, the Second Amendment's text necessarily encompasses the corollary right to possess a magazine for firearms that require one, just as it protects the right to possess ammunition and triggers. Otherwise, the right to bear arms, including firearms that require the use of a magazine, would be diminished." *Id.*, 133 F.4th at 867–68. Combining these two factors appears to lead to the conclusion that the plain text covers detachable magazines, and, therefore, the statute is presumptively unconstitutional. Surprisingly, according to the circuit court, that conclusion does not follow. See *Id.*, 133 F.4th at 868. Instead, the circuit court held that the plain text covers some magazines but not others. *Id.*

The circuit court reached this startling conclusion by invoking its "magic bullet" theory.[3] Under this theory, the plain text means one thing with respect to magazine

3. See *Duncan*, 133 F.4th at 899 (Bumatay, J., dissenting).

X (which is a protected "arm") but something completely different with respect to magazine Y (which is an unprotected "accoutrement"). The difference? Magazine Y has had an additional magic bullet added to its capacity. But which bullet is the magic one that transmogrifies a magazine from the category "protected arm" to the category "unprotected accoutrement"? Is it the third? The fifth? The eleventh? And what is it about that magic bullet that when it is added to a magazine, it becomes radically different from magazines that do not have it? The circuit court did not say.[4] The court held that banning magazines with a capacity greater than ten rounds is permitted; however, it conspicuously did not say whether it is permissible for California to lower that threshold. The circuit court assures us that a magic bullet exists, but, inexplicably, it left citizens to guess which bullet is the magic one.

To be sure, the court hinted (but did not actually hold) that the dividing line between "covered by the text" and "not covered by the text" may be based on minimal functionality. See *Id.*, 133 F.4th at 868 (firearms function with magazines that have a capacity of ten or fewer rounds). The obvious problem with this argument is that minimal functionality can also be achieved with magazines that have a capacity of nine or fewer rounds, eight or fewer rounds, seven or fewer rounds, and so on, all the way down to two or fewer rounds. Surely, the circuit court did not mean to imply that California has the

4. Indeed, it was impossible for the circuit court to say, because, as the district court noted, every capacity cutoff is arbitrary, which is why the states that have banned magazines have used widely varying cutoff points. See *Duncan v. Bonta*, 695 F. Supp. 3d 1206, 1214–15 (S.D. Cal. 2023).

power to limit the capacity of semiautomatic firearms to two rounds. Indeed, minimum functionality is achieved even if magazine capacity is limited to one round and the operator is required to replace the magazine after each shot. It would be truly astounding, however, if the lower court believed the government has the power to require all semiautomatic firearms to be converted into the functional equivalent of single-shot breechloaders. But nothing in its opinion limits California from doing precisely that.

The court also hinted (but, again, did not actually hold) that the dividing line between "covered by the text" and "not covered by the text" is based on the government's assessment of which magazines are typically used in self-defense situations as opposed to those magazines that are "rarely" used in self-defense situations. *Duncan*, 133 F.4th at 883. California asserted that in the typical self-defense situation, citizens fire 2.2 rounds.[5] This implies that the government believes citizens rarely need to fire more than three rounds in self-defense. Under the circuit court's reasoning, this leads to the conclusion that magazines with a capacity in excess of three rounds may be banned. But that would be an absurd conclusion. If that were the case, the government would have the power to ban *all* of the hundreds of millions of magazines currently possessed by American citizens, all of which have a capacity greater than three rounds.[6] Surely, the Second Amendment

5. *Duncan v. Bonta*, 695 F. Supp. 3d 1206, 1228 (S.D. Cal. 2023) (discussing the government's evidence regarding the number of rounds used in the typical self-defense situation).

6. NAGR is unaware of any manufacturer that produces a magazine with a capacity of one, two, or three rounds. Indeed, such low capacities defeat the obvious purpose of magazines.

prevents the government from banning all magazines currently possessed by the American people.

E. The Circuit Court Should Have Moved to *Bruen* Step Two

Instead of making an unprincipled ad hoc determination that the plain text covers some magazines but not others, the circuit court should have applied both steps of the *Bruen* analysis. Under that analysis, the "Second Amendment extends, prima facie, to *all instruments* that constitute bearable arms, even those that were not in existence at the time of the founding." *Bruen*, 597 U.S. at 28 (citation omitted; emphasis added). As such, it "covers modern instruments that facilitate armed self-defense." *Id.* There cannot be the slightest doubt that detachable firearm magazines (which even the circuit court admitted were essential for the operation of some firearms) are instruments that facilitate armed self-defense. Thus, the plain text covers the plaintiffs' proposed conduct, which means that the California law is presumptively unconstitutional. *Id.*, 597 U.S. at 17.

The state can rebut that presumption only if it demonstrates that its law is consistent with the Nation's history and tradition of firearms regulation. *Id.* The usual way governments attempt to do this is to argue that the banned arm is "dangerous and unusual." This is a conjunctive test.[7] *Caetano v. Massachusetts*, 577 U.S. 411,

7. All arms are dangerous. That is the point of arms. Thus, a rule that allows a court to uphold an arms ban any time it subjectively determines that the banned arms are too "dangerous" is a license to ban all arms.

417 (2016) (Alito, J., concurring). See also *Heller*, 554 U.S. at 627 (test cast in the conjunctive); *Snope v. Brown*, 145 S. Ct. 1534, 1537 (2025) (Thomas, J., dissenting from denial of certiorari) (citing *Caetano*); *United States v. Rahimi*, 602 U.S. 680, 714 (2024) (Kavanaugh, J., concurring); and *Bruen*, 597 U.S. at 21 (test cast in the conjunctive, citing *Heller*). "In other words, whether a weapon is 'dangerous and unusual' or 'in common use' are different sides of the same coin." *Duncan*, 133 F.4th at 903 (Bumatay, J., dissenting). If a weapon is in common use, it cannot also be both dangerous and unusual.

In this case, the district court found that American citizens possess over a hundred million magazines with a capacity exceeding ten rounds. *Duncan v. Bonta*, 695 F. Supp. 3d 1206, 1216–17 (S.D. Cal. 2023), and the circuit court did not dispute these numbers. *Duncan*, 133 F.4th at 862 (conceding that approximately half of magazines in the nation have a capacity greater than 10). See also Nat'l Shooting Sports Found., *Detachable Magazine Report, 1990-2021* (2024), (available at https://tinyurl.com/4p2j5xbz) (hundreds of millions of magazines have a capacity greater than ten rounds). This utterly precludes any finding that such magazines are dangerous and unusual. Thus, the State cannot meet its step two burden. The statute is unconstitutional.[8]

8. As the district court noted, this does not necessarily mean that all magazines are protected. Whether 50-round, 75-round, or 100-round drum magazines are protected is a different question, as they may be much less common and therefore unusual. *Duncan v. Bonta*, 695 F. Supp. 3d 1206, 1234 (S.D. Cal. 2023). There may well be some capacity above which magazines are not in common use, but whatever that capacity is, it "surely is not ten." *Heller v. D.C.*, 670 F.3d 1244, 1261 (D.C. Cir. 2011), abrogated on other grounds by *Bruen*.

F. A Magazine is Not a Mere Ammunition Storage Box

As discussed above, based on its magic bullet theory, the circuit court held that the plain text covers some magazines, but magazines over a certain (unspecified) capacity are not covered because they are mere "accoutrements." *Duncan*, 133 F.4th at 867. In drawing this distinction between protected arms and unprotected accoutrements, the court drew on material presented by an expert on "corpus linguistics." *Id.* at 889 (Berzon, J., concurring). That expert was Dennis Baron. *Duncan v. Bonta*, 695 F. Supp. 3d 1206, 1253, n. 224 (S.D. Cal. 2023) (discussing Professor Baron's findings).

The circuit court erred in relying on Professor Baron's evidence because that evidence proves nothing of any relevance to the Second Amendment analysis. Instead, it demonstrates why the "counting words" approach of corpus linguistics advocates like Baron is all but worthless for constitutional analysis.[9] Indeed, in *Heller*, Justice Scalia described the conclusions drawn by the dissent based on Baron's and his colleagues' work as "worthy of the Mad Hatter." *Id.*, 554 U.S. at 589. Nothing has changed since then.

The circuit court held that large-capacity magazines are analogous to boxes in which cartridges were stored in the Founding Era. *Duncan*, 133 F.4th at 867. If a magazine were merely a box containing ammunition, no one would

9. *See generally* Mark W. Smith & Dan M. Peterson, *Big Data Comes for Textualism: The Use and Abuse of Corpus Linguistics in Second Amendment Litigation*, 70 Drake L. Rev. 387 (2022).

argue that it is an arm. But that is obviously not the case. Instead, magazines are dynamic components that are essential to the operation of semiautomatic firearms. As the Third Circuit has stated, magazines actively "feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended, [therefore] magazines are 'arms' within the meaning of the Second Amendment." *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Att'y Gen. New Jersey*, 910 F.3d 106, 116 (3d Cir. 2018), abrogated on other grounds by *Bruen*. Accordingly, the conclusions reached by the circuit court based on Professor Baron's corpus linguistics evidence are unsound.

CONCLUSION

For the reasons set forth herein, NAGR respectfully requests the Court to grant the petition for writ of certiorari.

Respectfully submitted,

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