No. _____

In the
Supreme Court of the United States

VIRGINIA DUNCAN; RICHARD LEWIS;
PATRICK LOVETTE; DAVID MARGUGLIO;
CHRISTOPHER WADDELL; and
CALIFORNIA RIFLE & PISTOL ASSOCIATION, INC.,

Petitioners,

v.

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

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that states may not ban arms that "law-abiding citizens" "typically possess[] … for lawful purposes." *Id.* at 625. And it reiterated in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), that "the Second Amendment protects the possession and use of weapons that are 'in common use at the time.'" *Id.* at 21 (quoting *Heller*, 554 U.S. at 627). California nonetheless persists in banning feeding devices capable of holding more than ten rounds of ammunition, even though tens of millions of law-abiding Americans have long lawfully owned hundreds of millions of these devices as integral components of legal firearms. Adding insult to injury, California's ban applies retrospectively, requiring citizens to dispossess themselves of lawfully acquired property without any compensation from the state. This Court previously GVR'd in light of *Bruen*, but rather than follow this Court's marching orders, a divided en banc panel once again upheld the ban. In doing so, the Ninth Circuit not only doubled down on its pre-*Bruen* precedent, but reached the remarkable conclusion that California's sweeping ban on common arms does not even *implicate* the Second Amendment.

The questions presented are:

1. Whether a ban on the possession of exceedingly common ammunition feeding devices violates the Second Amendment.

2. Whether a law dispossessing citizens, without compensation, of property that they lawfully acquired and long possessed without incident violates the Takings Clause.

PARTIES TO THE PROCEEDING

Virginia Duncan, Richard Lewis, Patrick Lovette, David Marguglio, Christopher Waddell, and the California Rifle & Pistol Association, Inc., are petitioners here and were plaintiffs-appellees below.

Rob Bonta, in his official capacity as Attorney General of California, is respondent here and was defendant-appellant below.

CORPORATE DISCLOSURE STATEMENT

Petitioners Virginia Duncan, Richard Lewis, Patrick Lovette, David Marguglio, and Christopher Waddell are individuals. Petitioner California Rifle & Pistol Association has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

Duncan v. Bonta, No. 23-55805 (9th Cir.) (en banc) (order staying injunction in part issued Oct. 10, 2023; opinion issued Mar. 20, 2025; mandate stayed in part pending certiorari Apr. 10, 2025).

Duncan v. Bonta, No. 17-cv-1017 (S.D. Cal) (order granting summary judgment, declaring California Penal Code §32310 unconstitutional and enjoining enforcement issued Sept. 22, 2023).

Duncan v. Bonta, No. 21-1194 (U.S.) (order granting petition for writ of certiorari, vacating judgment, and remanding for further consideration in light of *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), issued June 30, 2022).

Duncan v. Bonta, No. 19-55376 (9th Cir.) (en banc) (opinion issued Nov. 30, 2021; mandate stayed in part pending certiorari Dec. 20, 2021; petition granted, opinion vacated June 30, 2022; order remanding issued Sept. 23, 2022).

Duncan v. Becerra, No. 19-55376 (9th Cir.) (panel opinion issued Aug. 14, 2020; rehearing en banc granted, opinion vacated Feb. 25, 2021).

Duncan v. Becerra, No. 17-cv-1017 (S.D. Cal.) (order granting preliminary injunction issued June 29, 2017; order granting summary judgment issued Mar. 29, 2019; order staying in part judgment pending appeal issued Apr. 4, 2019).

Duncan v. Becerra, No. 17-56081 (9th Cir.) (memorandum opinion affirming preliminary injunction issued July 17, 2018).

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PETITION FOR WRIT OF CERTIORARI

When this Court vacated and remanded the prior judgment in this case in light of *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), one might have expected the Ninth Circuit to reassess its decision to bless California's sweeping ban on long-lawful magazines. After all, *Bruen* reiterated that "the Second Amendment protects the possession and use of weapons that are 'in common use at the time.'" *Id.* at 21 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)). And given *Bruen*'s reaffirmation of the rule of decision that controlled *Heller*—that states may not ban arms that "law-abiding citizens" "typically possess[] … for lawful purposes," 554 U.S. at 625—it should have been easy to see that California's ban on feeding devices that can accept more than ten rounds of ammunition violates the Second Amendment, as tens of millions of law-abiding Americans lawfully own hundreds of millions of these devices as integral components of constitutionally protected and legal firearms.

For the district court, that was indeed easy to see. But the Ninth Circuit would have none of it. The court bypassed the ordinary panel-review process, reconvened an en banc panel that now consisted mostly of judges not in active service, granted "emergency" relief to the state over the dissent of most of the active judges on that panel, and ultimately held that California's sweeping and confiscatory ban on some of the most common arms in America does not even *implicate* the Second Amendment right to keep and bear arms.

That decision cannot be reconciled with this Court's precedents or the constitutional traditions they embody. Indeed, despite professing surface-level adherence to *Heller*, *Bruen*, and *Rahimi*, the Ninth Circuit ultimately cast those decisions aside, pawning off interest-balancing as careful consideration of constitutional text and historical tradition.

At the outset, the Ninth Circuit engaged in supposed "plain-text" analysis that was anything but. This Court has repeatedly recognized that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms," *Bruen*, 597 U.S. at 28 (quoting *Heller*, 554 U.S. at 582), and made clear that "the Second Amendment's definition of 'arms'" extends to all bearable "instruments that facilitate armed self-defense," *id.* Nevertheless, the Ninth Circuit held that ten-plus-round magazines are not "arms" covered by the plain text, and that ammunition feeding devices are presumptively protected "arms" *only if* their capacity is no greater than "necessary" for self-defense. That decision deepens acknowledged circuit splits over whether these ubiquitous instruments are "Arms" at all, as well as over how to assess which "Arms" are entitled to protection. And it gets a profoundly important constitutional question profoundly wrong.

Things only get worse from there. Although its threshold-textual holding logically meant that the case was over, the Ninth Circuit proceeded to muse about historical tradition—and what it had to say was eerily reminiscent of the interest-balancing approach *Bruen* interred. The court justified California's ban by declaring that the millions of Americans who possess

ten-plus-round magazines do not really *need* them. And it doubled down on its hostility to *Bruen*'s framework, making the claim that even if such magazines are "arms," the very same historical regulations that *Heller* held imposed *no burden on the right at all* suffice to justify California's ban.

That all smacks of a result in search of a reason. And it vividly "illustrates why this Court must provide more guidance" on which arms the Second Amendment protects. *Harrel v. Raoul*, 144 S.Ct. 2491, 2492 (2024) (Thomas, J., respecting the denial of certiorari). Indeed, the Ninth Circuit refused to even engage with the historical tradition this Court has recognized protecting arms in common use, deriding the common-use test as too "simplistic," "undefined," and "speculative," and a "facile invitation" to rely on an "ownership-statistics theory" of the Second Amendment. App.51-54. As that decision makes all too clear, lower courts set on blessing arms bans will continue "contorting what little guidance" they are willing to concede this Court has offered—and the only way to make it stop is to squarely decide the issue once and for all. *Harrel*, 144 S.Ct. at 2492.

Adding insult to injury, California's ban applies retrospectively, turning law-abiding citizens who lawfully acquired magazines decades ago into criminals unless they dispossess themselves of or destroy their property. There is no constitutional tradition in this country of the government simply declaring items lawfully possessed for decades to be contraband—let alone items that the Constitution explicitly entitles the people to "keep." Traditionally, even when the government tried to limit less-common

firearms, it did so only prospectively, out of respect for the Second Amendment, the Fifth Amendment, and the governed. The only thing more patent than California's disrespect for those rights, and the people to whom they belong, is the Ninth Circuit's disrespect for this Court and its place in the Article III hierarchy.

This is an ideal vehicle to resolve these critically important issues. Not only has this case (which began nearly a decade ago) reached final judgment, but it did so after the parties compiled a full record, and the constitutional question was resolved on the merits by an en banc panel. The constitutionality of California's ban is thus finally settled unless and until this Court intervenes. And although the Ninth Circuit has been willing to continue to stay the retrospective aspect of that ban while petitioners seek this Court's review, a denial of certiorari would convert countless law-abiding Californians into criminals overnight. The stakes could not be higher—nor could the need for course correction.

OPINIONS BELOW

The decision below, 133 F.4th 852, is reproduced at App.1-150. The Ninth Circuit's opinion staying the permanent injunction in part, 83 F.4th 803, is reproduced at App.263-303. The district court's opinion granting summary judgment and entering a permanent injunction on remand post-*Bruen*, 695 F.Supp.3d 1206, is reproduced at App.304-96.[1]

[1] The district court's opinion granting a preliminary injunction in 2017, 265 F.Supp.3d 1106, is reproduced at App.781-849. The opinion affirming the 2017 preliminary injunction, 742 F.App'x 218, is reproduced at App.650-64. The district court's 2019 opinion granting summary judgment, 366 F.Supp.3d 1131, is

JURISDICTION

The Ninth Circuit issued the decision below on March 20, 2025. Justice Kagan extended the time to file a petition for writ of certiorari to August 17, 2025. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second, Fifth, and Fourteenth Amendments are reproduced at App.858. California Penal Code §§32310 & 16740 are reproduced at App.859-60.

STATEMENT OF THE CASE

A. Factual and Legal Background

1. Since 2000, California has banned the manufacture, importation, sale, and transfer of any "large-capacity magazine," which the state defines as "any ammunition feeding device with the capacity to accept more than 10 rounds," with some exceptions not relevant here. App.859, 860. The 2000 version of the law prevented future acquisition of prohibited magazines, but it did not ban possession.

In July 2016, however, California decided that this modest nod toward reliance interests and the Takings Clause was actually a "loophole" that needed closing. California thus amended the law to prohibit the continued possession of so-called LCMs, even though everyone affected had possessed the pre-ban

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reproduced at App.665-780. The vacated panel opinion affirming the 2019 grant of summary judgment, 970 F.3d 1133, is reproduced at App.569-649. The Ninth Circuit's first en banc opinion, 19 F.4th 1087, is reproduced at App.398-568. This Court's order GVR'ing that judgment, 142 S.Ct. 2895, is reproduced at App.397.

magazines lawfully and safely since at least 2000. The legislation required those in possession of lawfully acquired (and theretofore lawfully possessed) magazines to surrender, permanently alter, or otherwise dispossess themselves of the magazines. S.B. 1446, 2015-2016 Reg. Sess. (Cal. 2016).

Later that year, voters approved a ballot initiative, Proposition 63, that took a similar approach. *See* App.8-9. Proposition 63 requires Californians currently in possession of a magazine capable of holding more than ten rounds of ammunition to surrender it to law enforcement for destruction, permanently alter it, remove it from the state, or sell it to a licensed firearms dealer, who in turn is subject to the law's transfer and sale restrictions. App.9-10. Failure to dispossess oneself of a lawfully acquired magazine is punishable by up to a year in prison. App.8-9.

2. California's broad (mis)classification of what makes a feeding device "large capacity" captures arms that tens of millions of Americans have long lawfully kept and borne for lawful purposes, including self-defense. Hundreds of millions of ten-plus-round feeding devices have been sold in the past few decades alone, making them far more common than the F-150, the most popular vehicle in the country. *See* Nat'l Shooting Sports Found., *Detachable Magazine Report, 1990-2021* (2024), perma.cc/4VXU-DJWA; Brett Foote, *There Are Currently 16.1 Million Ford F-Series Pickups on U.S. Roads*, Ford Auth. (Apr. 9, 2021), perma.cc/AH7W-MT8G. In fact, the average American gun owner owns *more* ten-plus-round magazines than magazines that hold ten rounds or

fewer. *See* William English, Ph.D., *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* 24-25 (revised Sept. 28, 2022), doi.org/10.2139/ssrn.4109494.

That should come as no surprise. The magazines California bans have long been lawful in most of the country, and they remain lawful in most states today. *See Magazine Gun Laws by State*, XTech Tactical (updated Mar. 18, 2025), perma.cc/2J5Y-UKBS. Tracking consumer preference, many modern handguns—the "quintessential self-defense weapon," *Heller*, 554 U.S. at 629—come standard with such magazines, *see, e.g.*, *Gun Digest 2018* at 386-88, 408 (Jerry Lee & Chris Berens eds., 72d ed. 2017), as do all the best-selling semiautomatic rifles, *see* Nat'l Shooting Sports Found., *Modern Sporting Rifle Comprehensive Consumer Report* 31 (July 14, 2022), perma.cc/SSU7-PR95. *Cf. Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280, 297 (2025) ("The AR-15 is the most popular rifle in the country."); *Garland v. Cargill*, 602 U.S. 406, 429-30 (2024) (Sotomayor, J., dissenting) (noting that "semiautomatic rifles" like AR-15s are "commonly available"). And the most common reasons cited for owning them are target shooting (64.3% of owners), home defense (62.4%), hunting (47%), and defense outside the home (41.7%). English, *supra*, at 23.

What the D.C. Circuit said over a decade ago thus remains true today: "There may well be some capacity above which magazines are not in common use," but "that capacity surely is not ten." *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011). Nevertheless, California not only continues to ban

these common arms, but seeks to confiscate them from law-abiding citizens who lawfully acquired them.

B. Procedural Background

1. Patrick Lovette is an "honorably retired 22-year United States Navy veteran" who has lawfully possessed ten-plus-round magazines for "more than 20 years." App.787. Virginia Duncan, David Marguglio, and Christopher Waddell are law-abiding citizens who would like to acquire one or more magazines that California bans. App.787. California Rife & Pistol Association, Inc., is a nonprofit organization representing similarly situated Californians. App.787.

Shortly before the new possession ban was scheduled to take effect, petitioners brought this lawsuit challenging it under, *inter alia*, the Second Amendment and the Takings Clause. While petitioners challenged the ban in its entirety, they sought a preliminary injunction only of the new possession ban. The district court granted the motion. App.847-48. The state took an interlocutory appeal, and a divided three-judge panel affirmed. App.651-56.

2. Meanwhile, petitioners assembled a thorough factual and historical record. The district court ultimately granted them summary judgment on both claims. App.665.

The case then went back to the Ninth Circuit, where a different divided three-judge panel affirmed. App.569-649. Because the panel held that the law

violates the Second Amendment, it did not reach the takings claim.[2]

3. That validation of Second Amendment rights by the Ninth Circuit was not long for this world. A majority of the circuit's then-active judges voted to rehear the case en banc, App.407, and, in 2021, a divided en banc panel reversed, App.398.

First, the majority applied intermediate scrutiny and the old "two-step" test to reject petitioners' Second Amendment challenge. App.408-12, 417. The majority then held that forcing people to dispossess themselves of lawfully acquired magazines does not effect a physical taking, positing that "[n]othing in the case law suggests that any time a state adds to its list of contraband … it must pay all owners for the newly proscribed item." App.435. The majority tried to distinguish *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), on the grounds that the state is not "tak[ing] title to, or possession of, the" magazine, and because they "concerned regulations of non-dangerous, ordinary items." App.436-37. In the majority's view, the Takings Clause does not "requir[e] a government to pay whenever it concludes that certain items are too dangerous to society for persons to possess." App.437.[3]

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[2] Judge Lynn, sitting by designation, dissented, and would have upheld the ban in its entirety. App.634-49.

[3] Judge Bumatay authored a dissent, joined by Judges Ikuta and R. Nelson. App.497-539. Judge VanDyke separately dissented. App.540-68.

4. Petitioners sought certiorari. While their petition was pending, this Court decided *Bruen*, which clarified the appropriate framework for deciding Second Amendment challenges and reiterated that "the Second Amendment protects the possession and use of weapons that are 'in common use.'" 597 U.S. at 21 (quoting *Heller*, 554 U.S. at 627). The Court then granted that petition, vacated the Ninth Circuit's opinion, and remanded for further consideration in light of *Bruen*. App.397. The Ninth Circuit, in turn, remanded to the district court, over the dissents of Judges Bumatay and VanDyke. 49 F.4th 1228 (9th Cir. 2022).

5. On remand, the parties filed voluminous briefs and factual submissions focused on the issues *Bruen* made central to Second Amendment analysis. The district court then once again granted summary judgment for petitioners and permanently enjoined the state from enforcing its confiscatory ban. App.304-97.

6. The Ninth Circuit, however, once again would have none of it. Bypassing the ordinary motions- and three-judge-panel merits-review processes, the original en banc panel (with one change)[4] reconvened and hastily granted an "emergency" stay of the district court's injunction over the dissent of most of the active judges on that panel. The en banc majority's stay opinion cited *Bruen* only once—for the truism that

[4] Because Judge Watford had left the bench in the interim, Judge Wardlaw was randomly drawn to replace him. *See* App.254 n.1.

"the right secured by the Second Amendment is not unlimited." App.265.[5]

7. Two years later, the same en banc panel—which now consisted mostly of *non*-active judges—reversed again. App.4. The majority first dismissed petitioners' takings claim based on its earlier analysis. App.12-13. And while the majority spilled more ink on the Second Amendment, it ultimately concluded that *Bruen* did not change its bottom line—or much of its analysis, for that matter.

First, the majority held that "[a] large-capacity magazine is … an accessory or accoutrement, not an 'Arm' in itself," and that California's ban therefore does not even *implicate* the Second Amendment. App.3. The majority was forced to concede that the Second Amendment "encompasses a right to possess a magazine for firearms that require one," but it concluded that the Second Amendment does not presumptively protect magazines that hold more than ten rounds—even though they come "standard" with the most "popular" firearms in America, App.7, 20-21—because a magazine does not need a particular number of rounds for a firearm to function.

Although it could have stopped there, the majority proceeded to consider whether California's ban is consistent with historical tradition. At the outset, the majority "readily conclude[d]" that a "more nuanced approach" to historical tradition "is appropriate here,"

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[5] The state did not seek, and the Ninth Circuit did not grant, a stay with respect to the retroactive aspect of the possession ban. App.263-65. That aspect of the ban has therefore never taken effect. *See* CA9.Dkt.104.

positing that this case "implicates *both* unprecedented societal concerns *and* dramatic technological changes." App.31. Ignoring the mass murder perpetrated against enslaved persons and other disfavored groups in American history, the majority deemed "[m]ass shootings" a new "societal concern" that would have been unheard of to the Founding generation. App.31-32. Similarly discounting the progressive advancement of firearm technology over the years, the majority concluded that "[l]arge-capacity magazines, when attached to a semi-automatic firearm, also represent a dramatic technological change" because (like all modern firearms) they are more accurate and efficient than "weapons at the Founding." App.32-33.

The majority nonetheless "declin[ed] to apply the more nuanced approach" and instead professed to take "the *most conservative* path" of conducting a "straightforward" historical "analysis." App.33-34. But it then threw caution out the window. The majority did not identify any tradition of banning firearms, or even feeding devices, commonly owned by law-abiding citizens for lawful purposes (because none exists). It instead derided the "common use" inquiry as a "simplistic approach" and a "facile invitation" to rely on "ownership-statistics" to define the scope of the Second Amendment right. App.51-54. It then deemed California's ban part of two (supposed) broad traditions of laws that sought to "protect innocent persons from infrequent but devastating harm" and "from especially dangerous uses of weapons once those perils have become clear." App.39.

The majority derived the former from early gunpowder-storage regulations, App.41, even though *Heller* specifically rejected the notion that those "fire-safety laws" are analogous to "an absolute ban on [a class of arms]," 554 U.S. at 632. The majority derived the latter from regulations of "trap guns" (which are not bearable arms at all) and concealed-carry laws and other carry-related restrictions. App.44-46. Ultimately, the court held that states may prohibit "technological advances in weapons" whenever "criminals" have (or will) put such improvements to dangerous ends. App.38.

Judges Ikuta, R. Nelson, Bumatay, and VanDyke dissented, as they had the first time around. App.72; *see* n.3, *supra*. Together, they found the majority's plain-text analysis to betray an "ignorance of both firearms operations and constitutional law." App.76. Rebutting the majority's (mis)characterization of magazines as mere "accoutrements," they explained that because "the Second Amendment's protection of 'Arms' must extend to their functional components," by necessity "magazines of all stripes, including those holding more than ten rounds, are protected." App.84-86. Finally, they explained that so-called LCMs "are the *most* common magazines in the country" and that "[n]othing in the historical understanding of the Second Amendment" justifies their prohibition. App.73-75.[6]

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[6] Judges R. Nelson and VanDyke also issued separate dissents. App.70-71, 124-50. Judge Berzon, joined by Chief Judge Murguia and Judges Hurwitz, Paez, S. Thomas, and Wardlaw, in turn issued a concurrence objecting to "Judge VanDyke's novel form of 'dissent'" in particular, because it linked to an informative, self-

REASONS FOR GRANTING THE PETITION

The decision below deepens acknowledged circuit splits over whether magazines capable of holding more than ten rounds are "Arms" within the meaning of the plain text of the Second Amendment and whether they are in common use. Those issues cry out for resolution, as does the related question of whether these common devices may be banned consistent with historical tradition. And this is an especially appropriate case in which to resolve those questions—and not just because the decision below got them patently wrong. Unlike most addressing these issues, the decision below is neither preliminary nor tentative; this lawsuit has been going on for nearly a decade, and it has now reached final judgment on a full record. For this Court to remain on the sideline anyway would send a clear signal that the Second Amendment really is second class, and that the tens of millions of Americans who currently keep and bear for self-defense arms that a handful of states dysphemistically call "LCMs" may continue to do so only by legislative grace, not constitutional right.

While that is more than reason enough for this Court to step in, it is hardly the only reason. The last time California's ban was before it, the Ninth Circuit declared that it would not change its rights-defying tune on the Second Amendment "[u]nless and until the Supreme Court" made it. App.411. This Court seemed to think it had done just that in *Bruen*, by rejecting "interest balancing" as fundamentally flawed and

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made video of Judge VanDyke demonstrating elementary facts about firearms and magazines that the panel (according to the concurrence) rightfully "ignored." App.55-69.

making clear that "the Second Amendment protects the possession and use of weapons that are 'in common use.'" 597 U.S. at 21 (quoting *Heller*, 554 U.S. at 627). But instead of following *Bruen*'s instructions, or even its mood music, the Ninth Circuit resorted to more of the same. Indeed, the decision below is nothing short of "*interest balancing* … masquerading as respect for the Second Amendment's historical scope." App.120 (Bumatay, J., dissenting).

Bruen was not an invitation for lower courts to keep doing what they had been doing for the past decade, just with some new window dressing. But unless this Court holds with the utmost clarity that functional components of firearms are indeed "Arms" and that bans on common arms are indeed unconstitutional, the Ninth Circuit and others intent on returning to the pre-*Heller* regime by any means necessary will continue to defy and deny. That is not a state of affairs this Court should tolerate any longer.

The need for intervention is particularly acute here because this law applies retrospectively. The confiscatory aspect of California's ban has effectively been enjoined since its 2017 inception. But even that longstanding grace (or, less charitably, nod to the basic takings problem with that aspect of the ban) will evaporate if this Court denies certiorari. Unless this Court intervenes now, countless Californians will become criminals overnight simply for having lawfully acquired property that the Constitution expressly protects their right to "keep." Californians have been patiently waiting nearly ten years for this Court to vindicate their constitutional rights once and for all. The time has finally come to do so.

I. This Court Should Resolve Whether States May Ban Commonly Owned Arms.

A. The Decision Below Deepens a Circuit Split Over Whether—and, If So, Which—Magazines Are "Arms."

1. The Ninth Circuit held that so-called "large-capacity magazines are neither 'arms' nor protected accessories," and so are not even *presumptively* protected by the Second Amendment. App.15 (capitalization omitted). The court accepted that "[t]he meaning of 'Arms'" "broadly includes nearly all weapons used for armed self-defense." App.17. Yet, in its view, magazines are "accessories, or accoutrements, rather than arms," because "[w]ithout an accompanying firearm" a magazine is a "harmless" "box," "useless in combat for either offense or defense." App.19. The court thus deemed *all* magazines outside "the category of … arms" presumptively protected by the Second Amendment. App.19. Nevertheless, it held that "the Second Amendment's text necessarily encompasses the corollary right to possess a magazine for firearms that require one." App.20. But because "a *large-capacity* magazine … is not necessary to operate any firearm," the court held that "California's ban on large-capacity magazines does not fall within the plain text of the Second Amendment." App.19-20.

The Seventh Circuit reached the same conclusion about Illinois' analogous ban in *Bevis v. City of Naperville*, 85 F.4th 1175 (7th Cir. 2023), *cert. denied sub nom. Harrel v. Raoul*, 144 S.Ct. 2491 (2024). Illinois bans "feeding devices that have in excess of 10 rounds for a rifle and 15 rounds for a handgun." *Id.* at 1197. The court in *Bevis* held that those ubiquitous

magazines are not "Arms" because it deemed them "more like … military-grade weaponry" than anything that, in its view, people should need for self-defense. *Id.* at 1195, 1197. *But cf. United States v. Bridges*, --- F.4th ----, 2025 WL 2250109, at *5 (6th Cir. Aug. 7, 2025) (holding, *contra Bevis*, that "the Second Amendment's plain text covers [the] possession of a machinegun").

The Washington Supreme Court recently held the same about that state's ten-plus-round-magazine ban in *Washington v. Gator's Custom Guns, Inc.*, 568 P.3d 278 (Wash. 2025), *cert. filed*, No. 25-153 (U.S. Aug. 6, 2025). Like the Ninth Circuit here, the Washington court there held that because so-called "LCMs are not required for a[ny] firearm to function," they "are not 'arms'"—even though "they are designed to be attached to a weapon in order to … increas[e] that firearm's ammunition capacity." *Id.* at 284-86.

2. The D.C. Circuit split from its sister circuits, holding in *Hanson v. District of Columbia*, 120 F.4th 223 (D.C. Cir. 2024), that ten-plus-round magazines "very likely are 'Arms' within the meaning of the plain text of the Second Amendment." *Id.* at 232. "To hold otherwise," the court explained, "would allow the government to sidestep the Second Amendment with a regulation prohibiting possession at the component level, 'such as a firing pin.'" *Id.* (quoting *Kolbe v. Hogan*, 813 F.3d 160, 175 (4th Cir. 2016), *rev'd en banc*, 849 F.3d 114 (4th Cir. 2017)).

The Third Circuit has also held, albeit pre-*Bruen*, that "a magazine," regardless of capacity, is "an arm under the Second Amendment." *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d 106, 116-

17 (3d Cir. 2018). And the First Circuit has "assume[d]" post-*Bruen*, albeit without deciding, "that [magazines] are 'arms' within the scope of the Second Amendment." *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 43 (1st Cir. 2024).

B. The Decision Below Deepens a Circuit Split Over Whether Common Use Is Part of the Plain-Text or the Historical-Tradition Inquiry.

As the decision below noted, courts are also divided over "'whether the common-use issue' is a threshold, textual inquiry or a historical inquiry" and what it entails. App.16 n.2 (quoting *Hanson*, 120 F.4th at 232 n.3).

1. The Second, Fourth, and Tenth Circuits have squarely held that "common use" is part of the plain-text inquiry. *See Rocky Mountain Gun Owners v. Polis*, 121 F.4th 96, 113-14 (10th Cir. 2024); *Antonyuk v. James*, 120 F.4th 941, 981 (2d Cir. 2024); *United States v. Price*, 111 F.4th 392, 400-02 (4th Cir. 2024) (en banc). The Sixth Circuit, by contrast, recently held just as squarely that common use must be evaluated as part of the historical-tradition inquiry at "*Bruen*'s second step." *Bridges*, 2025 WL 2250109, at *5-6.

Other circuits are betwixt and between. The Ninth Circuit initially placed common use in the threshold-textual inquiry in *United States v. Alaniz*, 69 F.4th 1124, 1128 (9th Cir. 2023). Here, however, the en banc majority situated common use "in the historical analysis"—albeit only "out of an abundance of caution" and after claiming it was "not reach[ing] the" where-it-belongs issue. App.16 n.2. The Seventh Circuit took an equally puzzling tack in *Bevis*, where

it first held that the textual "definition of 'bearable Arms' extends only to weapons in common use," 85 F.4th at 1193, but then confusingly "assume[d] (without deciding …) that [common use] is a step two inquiry," *id.* at 1198. The D.C. Circuit is likewise ambivalent. *See Hanson*, 120 F.4th at 232 n.3 ("assum[ing], without deciding, this issue falls under *Bruen* step one").

2. Courts are also divided over what the common-use inquiry entails—and over whether ten-plus-round magazines satisfy it.

The Sixth Circuit has squarely held that whether an arm is "in common use" turns on whether it is "'typically possessed by law-abiding citizens for lawful purposes' like 'self-defense.'" *Bridges*, 2025 WL 2250109, at *6 (quoting *Heller*, 554 U.S. at 624-25). The court thus looks to "[]ownership data" and whether the typical person who owns the arm does so lawfully. *Id.* at *7-8. The D.C. Circuit followed a similar path in *Hanson*, holding that ten-plus-round magazines likely are in common use based on their "sufficiently wide circulation" and evidence "about the[ir] role … for self-defense." 120 F.4th at 233.

Here, however, the Ninth Circuit deemed those same metrics irrelevant to the inquiry, App.51-54, and instead held that ten-plus-round magazines are not in common use because people rarely fire more than ten rounds "in armed self-defense," App.54. In doing so, the Ninth Circuit joined the First, Fourth, and Seventh Circuits in deriding common use and denying its import (despite this Court's holdings and place atop the federal judicial hierarchy). *See Bianchi v. Brown*,

111 F.4th 438, 460 (4th Cir. 2024) (en banc); *Ocean State*, 95 F.4th at 45-51; *Bevis*, 85 F.4th at 1198-99.

* * *

In sum, the circuits are divided both over whether magazines capable of holding more than ten rounds of ammunition are "Arms" at all and over how to determine which "Arms" are ultimately entitled to Second Amendment protection. That vividly "illustrates why this Court must provide more guidance" on those critical questions. *Harrel*, 144 S.Ct. at 2492 (Thomas, J., respecting the denial of certiorari).

C. The Decision Below Cannot Be Reconciled With This Court's Precedent.

1. Under this Court's precedent (not to mention common sense), whether ammunition feeding devices fall within the plain text of the Second Amendment is not a difficult question; they plainly do. Indeed, it is hard to fathom how a device that serves no purpose other than making a constitutionally protected firearm operate as intended could be outside the scope of the Second Amendment entirely.

As *Heller* explained, and *Bruen* and *Rahimi* reiterated, "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms." *Bruen*, 597 U.S. at 28 (quoting *Heller*, 554 U.S. at 582); *accord United States v. Rahimi*, 602 U.S. 680, 691 (2024); *Caetano v. Massachusetts*, 577 U.S. 411, 411 (2016) (per curiam). That presumptive protection covers "any thing that a man … takes into his hands, or useth in wrath to cast at or strike another," *Heller*, 554 U.S. at 581—which an ammunition feeding device surely is. As their name suggests, feeding devices are

not passive holders of ammunition, like cartridge boxes of yore. They are integral to the design of semiautomatic firearms and the mechanism that makes them work, actively feeding ammunition into the firing chamber. App.582.

A semiautomatic firearm equipped with a feeding device containing the ammunition necessary for it to function is thus indisputably a "thing that a man … takes into his hands," *Heller*, 554 U.S. at 581, and a "bearable" instrument that "facilitate[s] armed self-defense," *Bruen*, 597 U.S. at 28. After all, "without bullets, the right to bear arms would be meaningless." *Rhode v. Bonta*, --- F.4th ----, 2025 WL 2080445, at *7 (9th Cir. 2025) (quoting *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014)).

The Ninth Circuit's textual analysis therefore should have been straightforward. Instead, despite claiming to follow this Court's teachings, the court engaged in a threshold inquiry unmoored from the plain text of the Second Amendment and this Court's cases interpreting it. According to the Ninth Circuit, ammunition feeding devices that can hold more than ten rounds are mere "accoutrements" rather than "arms," so banning them does not even *implicate* the Second Amendment. App.3, 15-23.

That holding not only "displays ignorance of both firearms operations and constitutional law," App.76 (Bumatay, J., dissenting), but elides this Court's clear teachings. *Bruen* instructs that what matters under the threshold-textual analysis is the conduct in which the challenger seeks to engage. 597 U.S. at 32. And the conduct in which petitioners want to engage is possessing magazines *to use with their firearms*. It

therefore makes no difference whether a magazine is "harmless" "[w]ithout an accompanying firearm," App.19, as petitioners do not want magazines just for the sake of having them, and the state does not want to prohibit people from keeping them around as empty boxes. Indeed, by the Ninth Circuit's (il)logic, a firearm would not be an "Arm" either, as it too could be deemed "harmless" unless equipped with ammunition and a device to feed it. That is why the threshold inquiry focuses on the conduct in which the individual seeks to engage, not abstract technicalities divorced from the real-world right that the Second Amendment protects.

The Ninth Circuit's backup theory fared no better. While it begrudgingly decided that "the Second Amendment's text necessarily encompasses a right to possess a magazine for firearms that require one," App.20, it put so-called LCMs on the other side of the constitutional line because no firearm requires a ten-plus-round magazine. But nothing in the text of the Second Amendment confines the people to the bare minimum of a functional arm. After all, a bearable instrument that facilitates self-defense in Size Small does not cease accomplishing that end in Size Medium or Large. If anything, having more rounds at the ready *better* facilitates a citizen's ability to defend herself in case of confrontation—regardless of whether she ends up needing to expend every (or any) round. Once again, moreover, the court's (il)logic proves far too much, as a semiautomatic firearm does not typically need a magazine of *any* particular capacity to function; it can function with any capacity magazine that fits, and it can fire a round in the chamber with no magazine at all. And the court failed to explain

why a firearm "needs" a ten-round magazine—or, for that matter, a five-round, or even three-round magazine—but not an 11-round one, thus leaving utterly unclear where (if anywhere) it would draw the constitutional line.

At bottom, the Ninth Circuit's what-do-you-really-need view of the Second Amendment is fundamentally inconsistent with the notion that the Second Amendment protects a fundamental right. That is why, under this Court's precedents, what (some judges or legislators think) is "necessary" for self-defense makes no difference. What matters at the threshold is whether the state is interfering with the people's ability to keep or bear bearable instruments that "facilitate armed self-defense." *Bruen*, 597 U.S. at 28. Magazine bans undisputedly do just that—regardless of whether they set the limit at 15, ten, or something even lower still. The state thus bears the burden of proving that its law comports with historical tradition.

2. The Ninth Circuit's analysis of common use was, if anything, even less consistent with this Court's cases. This Court has made clear that "arms" cannot be prohibited "consistent with this Nation's historical tradition" if they are in "common use today" for lawful purposes, as opposed to "dangerous and unusual." *Bruen*, 597 U.S. at 17, 27, 47; *accord Heller*, 554 U.S. at 625, 629. Arms must be "*both* dangerous *and* unusual" for a ban to comply with the Second Amendment. *Caetano*, 577 U.S. at 417 (Alito, J., concurring in the judgment).

Yet the magazines California has singled out are typically possessed by millions of law-abiding citizens for lawful purposes, including self-defense. Indeed,

"approximately half of [all] privately owned magazines hold more than ten rounds," including magazines that come "standard" with many of the most "popular rifles" and handguns in America. App.7. The amount in circulation today is in the hundreds of millions. *See* App.94-95 (Bumatay, J., dissenting). In short, there can be no serious dispute that ten-plus-round magazines are typically possessed by law-abiding citizens for lawful purposes.

The majority did not deny that reality. Instead, it denied its relevance: The majority dismissed common use entirely, dubbing it too "simplistic," "undefined," "speculative," and "facile." App.51-54. But it is not for inferior federal courts to grade this Court's work, let alone to reject its holdings as unworkable. That goes double when the criticisms have already been ventilated in dissenting opinions, *see Heller*, 554 U.S. at 720-21 (Breyer, J., dissenting), and rejected by a majority of this Court. "[T]he Second Amendment protects those weapons that are in 'common use' by law-abiding citizens," full stop. *Snope v. Brown*, 145 S.Ct. 1534 (2025) (Kavanaugh, J., respecting denial of cert.); *see also id.* ("*Bruen* and *Rahimi* did not disturb the historically based 'common use' test"). The undisputed ubiquity of the arms California bans thus suffices to confirm that the ban is unconstitutional.

3. The same conclusion holds even if one examines the historical record anew. After all, *Heller* and *Bruen* embraced the common-use inquiry precisely because there is no historical tradition in our Nation of flatly banning magazines (or firearms based on their capacity to fire without being reloaded).

Unsurprisingly, the majority did not purport to find one. It instead distorted the "how" and "why" inquiries to achieve its pre-*Bruen* ends. At the outset, the majority "conclude[d]" that a "more nuanced approach" to history "is appropriate here." App.31. Harkening to the *Bruen* dissent, the majority asserted that "[m]ass shootings" are a new "societal concern" unfamiliar to the Founding generation. App.32; *see Bruen*, 597 U.S. at 83 (Breyer, J., dissenting). That white-washed view of history ignores the atrocities perpetrated against enslaved persons and other disfavored groups from before the Founding.

Making matters worse, the court posited that states must be afforded greater leeway when restricting arms that are more accurate and efficient than "weapons at the Founding." App.32-33. But technological advancements that improve the accuracy, capacity, and functionality of firearms are exactly what law-abiding citizens want, as they increase the chances of hitting (or scaring off) one's target and decrease the risk of causing collateral damage in a stressful self-defense situation. Those same qualities unfortunately are also attractive to criminal actors. But if the government could ban any arm that is dangerous in the hands of those who would use it to inflict maximum injury, then it is hard to see what arms it could not ban.

That is precisely why our historical tradition is one of protecting arms that are commonly chosen by law-abiding citizens, not focusing on how dangerous arms would be in the hands of criminals. Simply put, advancements in accuracy and capacity that are welcomed by law-abiding citizens are not the sort of

"dramatic technological changes" with which *Bruen* was concerned—as evidenced by the Court's emphatic focus on whether arms are "in common use *today*." 597 U.S. at 27, 47 (emphasis added); *see* App.30 n.5. Again, that is not to deny that people have misused the arms California bans for unlawful and awful purposes. But that was equally true of the handguns banned in *Heller*. The majority did not dispute that handguns "are specially linked to urban gun deaths and injuries" and "are the overwhelmingly favorite weapon of armed criminals." 554 U.S. at 682 (Breyer, J., dissenting); *see also Bruen*, 597 U.S. at 83 (Breyer, J., dissenting) (highlighting recent "mass shootings"). It just found that irrelevant to whether handguns are constitutionally protected, because that question turns on whether law-abiding citizens commonly own and use them for lawful purposes. *Contra* App.51-54.

Having watered down the historical-tradition inquiry, the Ninth Circuit professed that it was in fact *rejecting* this Court's more "nuanced approach" in favor of a "straightforward" application of *Bruen* and *Rahimi*. App.33-34. But nothing that followed was in line with either decision. Although it purported to compare the mechanics by which historical laws and California's ban operate, the majority could not help but default to its pre-*Bruen* analysis of examining the "*magnitude* of the burden," positing that California's law could not possibly violate the Second Amendment because it purportedly places only a "minimal burden" on the right to keep and bear arms, as "[f]iring more than ten rounds occurs only rarely, if ever, in armed self-defense." App.47 n.11. It was the *dissent* in *Bruen*, however, that advocated for a test focused on "the degree to which the [challenged] law burdens the

Second Amendment right." *Bruen*, 597 U.S. at 131 (Breyer, J., dissenting). The *Bruen* majority embraced a test that examines "how" a law "burdens" the right as compared to its historical analogues, not whether a court thinks the burden a law imposes is very meaningful.

Things got no better when the court finally turned to the historical record. Unable to find any historical capacity limits or laws prohibiting possession of arms in common use for lawful purposes (because there are none), the court purported to divine from three disparate categories of laws two broad "traditions," which it (mis)characterized at a singularly "high level of generality that" completely "water[ed] down the [Second Amendment] right." *See Rahimi*, 602 U.S. at 740 (Barrett, J., concurring).

The first, according to the court, is "of laws seeking to protect innocent persons from infrequent but devastating harm by regulating a component necessary to the firing of a firearm." App.39. The court derived this tradition from laws regulating the storage of gunpowder. App.34-35, 41-43. But *Heller* expressly rejected the argument that "gunpowder-storage laws" support possession bans, as they were self-evidently "fire-safety laws," not efforts to keep law-abiding citizens from keeping or bearing common arms. 554 U.S. at 632. And the D.C. Circuit has aptly explained why that argument "is silly": Laws designed to ensure that combustible material would not *accidentally* combust when *not* in use are self-evidently different from laws that confine what arms citizens may use and possess. *Hanson*, 120 F.4th at 235. Only by ignoring "how" and "why" these

historical laws regulated could the Ninth Circuit deem them analogous to a ban on feeding devices capable of holding more than ten rounds.

The second tradition fares no better. Calling on nineteenth-century laws prohibiting the use (not possession) of (non-bearable) "trap-guns," and the concealed carry (not possession) of *dangerous and unusual* weapons of the time (like "Bowie knives"), the court divined an exceedingly generic tradition of laws that protect people "from especially dangerous uses of weapons once those perils have become clear." App.34, 44-50. That should sound familiar: It is the exact kind of ahistorical tradition this Court *rejected* in *Heller*. *See Heller*, 554 U.S. at 713 (Breyer, J., dissenting) (arguing that an "outright prohibition" is justified "where a governmental body has deemed a particular type of weapon especially dangerous").

In any event, the court's "especially dangerous" principle misconstrues the "how" and "why" of the temporally insignificant laws that purportedly undergird it. Trap guns, unlike magazines, are *not* "necessary to the firing of a firearm." App.49. Indeed, they are not bearable arms at all; they are devices used to rig an independently operable firearm to fire a projectile automatically when a trap (e.g., a trip wire) is triggered. *See* David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. Legis. 223, 365-66 (2024). Laws prohibiting traps thus do not impose *any* "burden [on] a law-abiding citizen's right to armed self-defense," *Bruen*, 597 U.S. at 29; they criminalize the rigging of a firearm with a device to expel a projectile without a human bearing the arm or pulling the trigger. The

"how" is thus fundamentally different from a ban on possession of a bearable arm. So too is the "why." *See* App.109 (Bumatay, J., dissenting) (explaining that "trap gun regulations … were meant to prevent the occasional tripping of trap guns by innocent persons").

As for the restrictions on Bowie knives and the like, those laws almost uniformly either prohibited only the concealed carry of certain weapons (or carry with intent to do harm) or simply provided heightened punishments for using one in the commission of a crime. *See* App.98-102 (Bumatay, J., dissenting). Of course, neither *Bruen* nor *Rahimi* demands "a historical twin." *Rahimi*, 602 U.S. at 692 (quoting *Bruen*, 597 U.S. at 30). But restrictions on how people may carry and use arms are not remotely analogous to laws that not only "broadly restrict arms" lawfully used "by the public generally," but take the extreme step of banning their possession outright. *Id.* at 698. Indeed, *Bruen* concluded that concealed-carry bans could not even justify *carry* bans, 597 U.S. at 48-55; they cannot justify possession bans *a fortiori*. In short, California's confiscatory ban simply does not "work[] in the same way and … for the same reasons" as the court's (mis)identified analogues. *Rahimi*, 602 U.S. at 711 (Gorsuch, J., concurring).[7]

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[7] That holds true even if one accepts the Ninth Circuit's pejorative reframing of the question as whether the Second Amendment protects "the shooting of an eleventh (or successive) round without a brief pause," App.45, as there simply is no tradition of confining people to firearms capable of firing a certain number of rounds successively. *See* App.95-98, 106-07 (Bumatay, J., dissenting). At any rate, California's law does not prohibit firing "eleven" straight shots; a law-abiding citizen could store one bullet in the chamber and insert a ten-round magazine,

In the end, the Ninth Circuit betrayed all pretense of faithful adherence to *Bruen* by positing that the bare fact that "weapons themselves" were subject to *some* historical regulation suffices to justify banning one of their component parts. App.50. Thus, in the Ninth Circuit's view, "the government" may "sidestep the Second Amendment" entirely "with a regulation prohibiting possession at the component level." *Hanson*, 120 F.4th at 232. That cannot possibly be what this Court meant in *Heller*, *Bruen*, or *Rahimi*. It is time to make that clear.

II. This Court Should Resolve Whether States May Compel Law-Abiding Citizens To Dispossess Themselves Of Lawfully Acquired Property Without Compensation.

California's decision not only to prospectively ban commonly owned magazines capable of holding more than ten rounds of ammunition, but to *confiscate* them from law-abiding citizens who lawfully acquired them long before the ban was enacted, is one of the rare government initiatives that violates not one, but two provisions of the Bill of Rights. The Ninth Circuit's contrary holding finding no Takings Clause violation is profoundly wrong.

A physical taking requiring just compensation occurs whenever the government "dispossess[es] the owner" of lawfully acquired property. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 324 n.19 (2002); *Loretto*, 458 U.S. at 435 &

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enabling the firearm to fire 11 shots consecutively without violating California law. That just goes to show how arbitrary the state's cutoff is.

n.12. That is true of personal property no less than real property; the "categorical duty to pay just compensation" applies "when [the state] takes your car, just as when it takes your home." *Horne*, 576 U.S. at 358. California's confiscatory ban runs afoul of those settled principles, as it forces citizens to dispossess themselves of lawfully acquired property without any compensation from the state.

If the confiscatory aspect of California's law takes effect, then citizens who lawfully acquired what the state now deems a "large capacity magazine" will be able to avoid criminal liability only if they "[r]emove [it] from the state," "[s]ell [it] to a licensed firearms dealer," "[s]urrender [it] to a law enforcement agency for destruction," or "permanently alter[] [it] so that it cannot accommodate more than 10 rounds." App.859-60. Obviously, being forced to "[s]urrender" lawfully acquired property is a taking; even the Ninth Circuit did not dispute that much. But because California allows owners to "modify[]" their once-lawful property "to accept a smaller number of bullets," to "mov[e] it out of state," or to "sell it," the court held that the law does not "effect a physical taking." App.435.[8]

But none of those so-called "options" allows law-abiding citizens to keep their property as it was when they lawfully acquired it. A law mandating that private party *A* sell his property to private party *B* effects a physical taking. *See Kelo v. City of New London*, 545 U.S. 469, 473-75 (2005) (so holding); *see also* Taking, *Black's Law Dictionary* (12th ed. 2024)

[8] Because "*Bruen* had no effect on" the initial en banc decision's "takings analysis," the Ninth Circuit "adopt[ed] and affirm[ed] [its] earlier rejection of this claim." App.12-13.

("taking" includes "transfer of possession"). So does a law forcing citizens to "[r]emove" their lawfully acquired property "from the[ir] state" of residence. *See* App.860. After all, a mandatory transfer out of state directly interferes with the owner's right to *possess* the property, not just to use it as she pleases.

Californians' remaining "option"—to permanently alter their magazines to accept fewer than ten rounds—does not change the equation. That is obviously true with respect to magazines that cannot be modified; dispossession is the only option for that property. And even as to magazines that *can* be, the shrink-or-surrender "option" does not eliminate the taking. It made no difference in *Horne* that the raisin growers could have avoided the taking by "plant[ing] different crops" or selling "their raisin-variety grapes as table grapes or for use in juice or wine." 576 U.S. at 365. Likewise, in *Loretto*, it made no difference that the property owner could have avoided the taking by converting her building into something other than an apartment complex. 458 U.S. at 439 n.17. As this Court has repeatedly admonished, "property rights 'cannot be so easily manipulated.'" *Horne*, 576 U.S. at 365 (quoting *Loretto*, 458 U.S. at 439 n.17).[9]

The Ninth Circuit tried to distinguish *Horne* and *Loretto* on the ground that they "concerned regulations of non-dangerous, ordinary items." App.436; App.12-13. Setting aside that the magazines

[9] At a minimum, forcing citizens to permanently alter their property or render it inoperable places an unconstitutional condition on its possession, which itself is a taking for which just compensation must be paid. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 605 (2013).

California bans are ordinary and useful in averting danger, the Takings Clause does not vary in force based on unelected judges' views of the relative merits of different categories of property. Even if it did, surely the Takings Clause would provide *more* protection to the one class of property that the Constitution specifically entitles the people to "keep."

The court's attempt to analogize to regulatory takings cases likewise misses the forest for the trees. *See* App.435. The principal problem with the state's confiscatory ban is not that it deprives market actors of the expected economic use of their property (although it does). It is that it deprives them of possession of their property. A complete deprivation of one's ability to possess one's property as it was when one acquired it is no mere "use" restriction that can be dismissed as a regulatory taking; it is the whole enchilada. *See Andrus v. Allard*, 444 U.S. 51, 65-66 (1979). After all, a person cannot use physical property at all unless she can possess it.

It is bad enough for a court to allow a state to prohibit possessing what the Constitution protects. To hold that states may freely confiscate what the Constitution protects without even providing just compensation adds constitutional insult to constitutional injury. Even if California's ban on common arms could somehow be reconciled with the Second Amendment, there is no Second Amendment exception to the Takings Clause.

III. The Questions Presented Are Exceptionally Important, And This Is An Excellent Vehicle To Resolve Them.

Whether and when the government may ban—and even confiscate from law-abiding citizens—common arms are questions of profound importance. After all, the scope of the right to keep and bear arms depends, first and foremost, on what arms it covers. And that issue has taken on even greater significance since *Bruen*, as several states that expressed open hostility to that decision responded to it by imposing even *greater* restrictions on which arms law-abiding citizens may keep and bear. Yet, as the decision below demonstrates, the same courts that were reversed in *Bruen* for refusing to take *Heller* at face value are now doing the same thing with *Bruen*.

For example, relying explicitly on its own pre-*Bruen* circuit precedent, the Seventh Circuit held that the most common rifle in America is not an "Arm" at all because it looks like an M-16—and then rejected a challenge to a magazine ban without even *mentioning* text or historical tradition. *Bevis*, 85 F.4th at 1197. The First Circuit held that a ban on ten-plus-round magazines does not meaningfully burden Second Amendment rights because "self-defense fusillade[s] of more than ten rounds" are (thankfully) rare. *Ocean State*, 95 F.4th at 45. The Third Circuit, meanwhile, refused to even consider the merits of a challenge to Delaware's ban, on the theory that individuals who wish to possess banned arms would not be entitled to relief *even if the ban is likely unconstitutional*, because "they already own" other arms. *Del. State Sportsmen's Ass'n, Inc. v. Del. Dep't of Pub. Safety & Homeland*

Sec., 108 F.4th 194, 205 (3d Cir. 2024). *But see Heller*, 554 U.S. at 629 ("It is no answer to say … that it is permissible to ban … handguns so long as … other firearms … [are] allowed.").

All of that raises the troubling prospect of déjà vu all over again, with the same courts that distorted *Heller* in service of upholding restrictive carry regimes now distorting *Bruen* and *Rahimi* in service of upholding sweeping arms bans. Indeed, courts are routinely examining arms bans as if the only thing this Court has ever said on the matter is that the Second Amendment right is not unlimited—even though *Heller* not only invalidated a ban on common arms, but explained exactly why historical tradition compelled that result. Yet courts have openly refused to even consider the common-use test that *Heller* employed and *Bruen* reiterated, insisting that this Court cannot possibly have meant what it has (at least) twice said, since that might actually require them to hold some or all these bans unconstitutional.

If courts truly think what this Court has said about assessing the constitutionality of arms bans is too "simplistic," App.51, then it is incumbent upon this Court to say more. And while recent cases to reach this Court have arisen in a preliminary posture, this case does not suffer from that procedural problem. The decision below aptly captures the rights-defying approach of the circuits more broadly, and it is neither preliminary nor tentative. To sit on the sideline in the face of a final judgment holding that states may ban ubiquitous feeding devices that come standard with ubiquitous firearms is to signal that the Second Amendment really is second class. This Court should

instead grant review, provide the guidance that lower courts profess to lack, and ensure that law-abiding citizens in defiant, outlier states are not forced to surrender either their constitutional rights or their property.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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August 15, 2025

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-55805

VIRGINIA DUNCAN; PATRICK LOVETTE; DAVID MARGUGLIO; CHRISTOPHER WADDELL; CALIFORNIA RIFLE & PISTON ASSOCIATION, INC., a California corporation,

Plaintiffs-Appellees,

v.

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

Defendant-Appellant.

Argued & Submitted En Banc: Mar. 19, 2024
Filed: Mar. 20, 2025

Before: Mary H. Murguia, Chief Judge, and Sidney R. Thomas, Susan P. Graber, Kim McLane Wardlaw, Richard A. Paez, Marsha S. Berzon, Sandra S. Ikuta, Andrew D. Hurwitz, Ryan D. Nelson, Patrick J. Bumatay and Lawrence VanDyke, Circuit Judges.

OPINION

GRABER, Circuit Judge:

Mass shootings are devastating events for the victims, their families, and the broader community. The first mass shooting in the United States occurred in 1949, and they have increased in frequency and in lethality, primarily because of the widespread availability of modern firearm technology: semi-automatic firearms equipped with large-capacity magazines. A large-capacity magazine is a device that, when attached to a semi-automatic firearm, allows a shooter to fire more than ten rounds without pausing. A large-capacity magazine has little function in armed self-defense, but its use by mass shooters has exacerbated the harm of those horrific events. Murderers who use large-capacity magazines need not pause between shots until they have fired 20, 30, or even 100 rounds. These pauses are crucial. Victims and law enforcement personnel take advantage of short pauses in firing to flee, take cover, and fight back. A mass shooter's use of large-capacity magazines limits those precious opportunities.

In 2016, following long traditions in our Nation of protecting innocent persons by prohibiting especially dangerous uses of weapons and by regulating components of a firearm that are necessary to the firing of a firearm, the California legislature and California's voters banned the possession of large-capacity magazines in order to address mass shootings. Earlier, lesser measures, such as banning the sale of those magazines, had proved both ineffective and difficult to enforce.

Plaintiffs challenge the constitutionality of California's ban. In *Duncan v. Bonta* ("*Duncan V*"), 19

F.4th 1087 (9th Cir. 2021) (en banc), we upheld the law as consistent with the Second Amendment and other constitutional guarantees. After the Supreme Court introduced a new framework for deciding Second Amendment challenges in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), the Court vacated our decision and remanded for reconsideration. *Duncan v. Bonta*, 142 S. Ct. 2895 (2022).

Employing the methodology announced in *Bruen* and recently applied in *United States v. Rahimi*, 602 U.S. 680 (2024), we again conclude that California's law comports with the Second Amendment, for two independent reasons. First, the Founders protected the right to keep and bear "Arms," not a right to keep and bear "Arms and Accoutrements," a common expression at the time of the Founding. Large-capacity magazines are optional accessories to firearms, and firearms operate as intended without a large-capacity magazine. A large-capacity magazine is thus an accessory or accoutrement, not an "Arm" in itself. Possession of a large-capacity magazine therefore falls outside the text of the Second Amendment. *See Bruen*, 597 U.S. at 24 (instructing courts to ask whether "the Second Amendment's plain text covers an individual's conduct").

Second, even assuming that the text of the Second Amendment encompasses the possession of an optional accessory like a large-capacity magazine, California's law falls neatly within the Nation's traditions of protecting innocent persons by prohibiting especially dangerous uses of weapons and by regulating components necessary to the firing of a

firearm. Plaintiffs understate the extent to which our forebears regulated firearms to promote public safety. California's law is relevantly similar to such historical regulations in both "how" and "why" it burdens the right to armed self-defense. Like those historical laws, California's law restricts an especially dangerous feature of semiautomatic firearms—the ability to use a large-capacity magazine—while allowing all other uses of those firearms. So far as California's law is concerned, persons may own as many bullets, magazines, and firearms as they desire; may fire as many rounds as they like; and may carry their bullets, magazines, and firearms wherever doing so is permissible. The only effect of California's law on armed self-defense is the limitation that a person may fire no more than ten rounds without pausing to reload, something rarely done in self-defense. The justification for California's law—to protect innocent persons from infrequent but devastating events—is also relevantly similar to the justifications for the historical laws. California's law is not a precise match to the historical laws, "but it does not need to be." *Rahimi*, 602 U.S. at 698. By prohibiting only an especially dangerous use of a modern weapon, the law "comport[s] with the principles underlying the Second Amendment." *Id.* at 692. We reverse the district court's contrary conclusion and remand with the instruction to enter judgment in favor of Defendant Rob Bonta, Attorney General of the State of California.

FACTUAL AND PROCEDURAL BACKGROUND[1]

A. Large-Capacity Magazines

A magazine is a device that automatically feeds ammunition into a firearm whenever the shooter fires

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[1] Applying a bedrock principle of federal appellate review, we consider only the factual record developed by the parties. Fed. R. App. P. 10. With exceptions not relevant here, such as judicial notice, "we will not consider facts outside the record developed before the district court." *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992). We therefore do not consider factual information introduced in Judge VanDyke's dissenting opinion.

That dissent fundamentally misunderstands that legal rule by comparing an appellate-judge-made video, which neither the district court nor any party has ever seen or had an opportunity to comment on, to our citation in *Mai v. United States*, 952 F.3d 1106 (9th Cir. 2020), of publicly available scientific studies. Dissent by J. VanDyke at 144. The legal issue in *Mai* required us to assess whether adequate scientific evidence fairly supported a legislative judgment. 952 F.3d at 1118. The plaintiff's primary argument—before us and before the district court—was that we should agree with the Sixth Circuit's analysis of the scientific evidence in *Tyler v. Hillsdale County Sheriff's Department*, 837 F.3d 678 (6th Cir. 2016) (en banc). Both parties in *Mai* discussed *Tyler* at length. In our opinion, we cited and discussed, as had the Sixth Circuit, the primary scientific study relevant to the legal issue. *Mai*, 952 F.3d at 1117-18; *Tyler*, 837 F.3d at 695-96. Our discussion of the publicly available scientific study that underpinned the parties' primary dispute was entirely proper in the context of the legal issue at hand. Indeed, the parties had asked us to assess the scientific evidence. Presumably for that reason, neither the parties nor a single dissent from denial of rehearing en banc asserted that we had cited facts outside the record developed before the district court. *Mai v. United States*, 974 F.3d 1082, 1083 (9th Cir. 2020) (order) (Collins, J., dissenting from the denial of reh'g en banc); *id.* at 1083-97 (Bumatay, J., dissenting from the denial of reh'g en banc); *id.* at 1097-1106

a bullet. Although some magazines are permanently affixed to a firearm, most magazines are detachable. *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 42 (1st Cir. 2024), *petition for cert. filed*, No. 24-131 (U.S. Aug. 2, 2024). When a magazine feeds a semi-automatic firearm, the shooter may continue to fire without pause and without taking any action other than pulling the trigger to fire successive rounds. A shooter thus may fire, repeatedly and without meaningful pause, all bullets in the magazine.

Many jurisdictions, including California, define "large-capacity magazine" to include any magazine or similar automatic feeding device that can hold more than ten rounds of ammunition. *E.g.*, Cal. Penal Code § 16740; Conn. Gen. Stat. § 53-202w(a)(1); Haw. Rev. Stat. § 134-8(c). Large-capacity magazines thus allow a shooter to fire more than ten rounds without reloading.

(VanDyke, J., dissenting from the denial of reh'g en banc). By sharp contrast to that publicly available study, the judge-made video here clearly contains facts outside the record developed before the district court.

Judge VanDyke's dissenting opinion here also cites an offhand footnote in *Mai*. In that footnote, we took judicial notice of the fact that evidence of a certain sort exists in other contexts, we cited a report by the American Cancer Society, and we observed that no similar evidence existed in the context relevant to the case. *Mai*, 952 F.3d at 1118 n.7. Judicial notice was appropriate because we took notice of the existence of evidence of a particular sort, regardless of its accuracy. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010). Judicial notice plainly does not authorize the judge-made video contained in Judge VanDyke's dissenting opinion.

Once a magazine is empty, a shooter may reload bullets into the magazine or may attach a different magazine to the firearm. It takes anywhere from a few to ten seconds for a person to change magazines, depending on the shooter's skill and the surrounding circumstances.

For those firearms that accept magazines, manufacturers often include large-capacity detachable magazines as part of the standard package when the firearm is purchased. "Most pistols are manufactured with magazines holding ten to seventeen rounds, and many popular rifles are manufactured with magazines holding twenty or thirty rounds." *Kolbe v. Hogan*, 849 F.3d 114, 129 (4th Cir. 2017) (en banc), *abrogated in other part by Bruen*, 597 U.S. 1. Although data are imprecise, experts estimate that approximately half of privately owned magazines hold more than ten rounds.

A large-capacity magazine—which enables a shooter to fire more than ten bullets rapidly and without reloading—has almost no utility in the lawful defense of the home, but it has devastating effects in mass shootings. A shooter equipped with a large-capacity magazine may kill and injure many people in rapid succession, not only because the shooter can fire many bullets quickly but also because the shooter can fire without pausing to reload. Those pauses are crucial because they allow intended victims and law enforcement personnel to flee, take cover, and fight back. More than twice as many people have been killed or injured in mass shootings that involved a large-capacity magazine than in mass shootings that involved a smaller-capacity magazine. And in the past

half-century, large-capacity magazines have been used in about three-quarters of gun massacres with ten or more deaths and in every gun massacre with twenty or more deaths.

B. California's Ban

In 1994, Congress banned the possession or transfer of large-capacity magazines. Pub. L. No. 103-322, § 110103, 108 Stat. 1796, 1998-2000 (1994). Like California's law, the federal statute applied to a magazine "that has a capacity of ... more than 10 rounds of ammunition." *Id.* The federal ban exempted magazines that were legally possessed before the date of enactment. *Id.* The law expired ten years later, in 2004. *Id.* § 110105(2).

California began regulating large-capacity magazines in 2000, prohibiting their manufacture, importation, or sale in the state. Cal. Penal Code § 12020(a)(2) (2000). After the expiration of the federal ban, California strengthened its law in 2010 and again in 2013 by, among other things, prohibiting the purchase or receipt of large-capacity magazines. Cal. Penal Code § 32310(a) (2013). But possession of large-capacity magazines remained legal, and law enforcement officers reported to the California legislature that enforcement of the existing laws was "very difficult."

In 2016, the California legislature enacted Senate Bill 1446, which barred possession of large-capacity magazines as of July 1, 2017, and imposed a fine for failing to comply. 2016 Cal. Stat. ch. 58, § 1. Later in 2016, voters in California approved Proposition 63, also known as the Safety for All Act of 2016, which subsumed Senate Bill 1446 and added provisions that

imposed a possible criminal penalty of imprisonment for up to a year for unlawful possession of large-capacity magazines after July 1, 2017. Cal. Penal Code § 32310(c). Proposition 63 declared that large-capacity magazines "significantly increase a shooter's ability to kill a lot of people in a short amount of time." Cal. Prop. 63 § 2(11). "No one except trained law enforcement should be able to possess these dangerous ammunition magazines," and the existing law's lack of a ban on possession constituted a "loophole." *Id.* § 2(12). The law's stated purpose is "[t]o make it illegal in California to possess the kinds of military-style ammunition magazines that enable mass killings like those at Sandy Hook Elementary School; a movie theater in Aurora, Colorado; Columbine High School; and an office building at 101 California Street in San Francisco, California." *Id.* § 3(8).

California law defines a "large-capacity magazine" as any ammunition-feeding device with the capacity to accept more than ten rounds, but does not include any of the following:

> (a) A feeding device that has been permanently altered so that it cannot accommodate more than 10 rounds.
>
> (b) A .22 caliber tube ammunition feeding device.
>
> (c) A tubular magazine that is contained in a lever-action firearm.

Cal. Penal Code § 16740. The ban on possession of large-capacity magazines exempts persons such as active or retired law enforcement officers and security guards for armored vehicles. *Id.* §§ 32400-55. The law requires any current, non-exempt possessor of a large-capacity magazine to (1) remove it from the state,

(2) sell it to a licensed dealer, (3) turn it in to law enforcement for destruction, or (4) permanently alter it so that it can accept no more than ten rounds. *Id.* §§ 16740(a), 32310(d).

The District of Columbia and thirteen other states have imposed similar restrictions on large-capacity magazines. Colo. Rev. Stat. §§ 18-12-301, 302; Conn. Gen. Stat. § 53-202w; Del. Code tit. 11, §§ 1468-69; D.C. Code § 7-2506.01(b); Haw. Rev. Stat. § 134-8(c); 720 Ill. Comp. Stat. 5/24-1.10; Md. Code Ann., Crim. Law § 4-305(b); Mass. Gen. Laws ch. 140, §§ 121, 131(a), 131M; N.J. Stat. Ann. §§ 2C:39-1(y), 39-3(j), 39-9(h); N.Y. Penal Law §§ 265.00, 265.02(8); 2022 Oregon Ballot Measure 114, § 11; R.I. Gen. Laws §§ 11-47.1-2(2), 11-47.1-3; Vt. Stat. Ann. tit. 13, § 4021; Wash. Rev. Code §§ 9.41.010, 9.41.370.

C. Procedural History

Plaintiffs own, or represent those who own, large-capacity magazines, and they do not want to comply with California's law. Plaintiffs brought this action in 2017, arguing that California's prohibition on the possession of large-capacity magazines violates the Second Amendment, the Fifth Amendment's Takings Clause, and the Fourteenth Amendment's Due Process Clause.

The district court preliminarily enjoined Defendant from enforcing the law, holding that Plaintiffs were likely to succeed on their Second Amendment and Takings Clause claims. *Duncan v. Becerra* ("*Duncan I*"), 265 F. Supp. 3d 1106 (S.D. Cal. 2017). On appeal, a divided panel affirmed the preliminary injunction, concluding that the district court did not abuse its discretion in holding that

Plaintiffs had shown a likelihood of success on their claims. *Duncan v. Becerra* ("*Duncan II*"), 742 F. App'x 218, 221-22 (9th Cir. 2018) (unpublished); *see id.* at 223-26 (Wallace, J., dissenting) (voting to reverse the preliminary injunction).

In 2019, the district court granted summary judgment to Plaintiffs on the Second Amendment and takings claims, and the court permanently enjoined enforcement of the law. *Duncan v. Becerra* ("*Duncan III*"), 366 F. Supp. 3d 1131 (S.D. Cal. 2019). On appeal, another divided panel affirmed the summary judgment as to the Second Amendment claim. *Duncan v. Becerra* ("*Duncan IV*"), 970 F.3d 1133 (9th Cir. 2020); *see id.* at 1169-76 (Lynn, D.J., dissenting) (stating that she would reject the Second Amendment claim). A majority of active judges voted to rehear the case en banc. *Duncan v. Becerra*, 988 F.3d 1209 (9th Cir. 2021) (order).

Sitting as the en banc court, we applied the two-part test adopted by all circuit courts at the time, reversed the district court's judgment, and remanded with the instruction to enter judgment for Defendant. *Duncan V*, 19 F.4th 1087. After our ruling, the Supreme Court decided *Bruen*, announcing a new framework for deciding Second Amendment challenges. The Supreme Court then granted certiorari, vacated the judgment, and remanded for further consideration in light of *Bruen*. *Duncan*, 142 S. Ct. 2895. We, in turn, remanded the case to the district court to consider, in the first instance, the effect of *Bruen* on the Second Amendment claim. *Duncan v. Bonta*, 49 F.4th 1228 (9th Cir. 2022) (en banc) (order).

On remand, the district court declined to reopen discovery or to conduct an evidentiary hearing or trial. Instead, the court again granted summary judgment to Plaintiffs on the Second Amendment claim and permanently enjoined Defendant from enforcing the law. *Duncan v. Bonta* ("*Duncan VI*"), 695 F. Supp. 3d 1206 (S.D. Cal. 2023). Defendant timely appealed, and the en banc court chose, pursuant to Ninth Circuit General Order 3.6(b), to address the new appeal. We granted Defendant's motion to stay the permanent injunction pending our resolution of this appeal. *Duncan v. Bonta* ("*Duncan VII*"), 83 F.4th 803 (9th Cir. 2023) (en banc) (order).

After we heard oral argument, the Supreme Court decided *Rahimi*, 602 U.S. 680.

DISCUSSION

A. Takings Claim

The Fifth Amendment provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Plaintiffs assert that, on its face, the statute effects a taking because it requires Plaintiffs either to (1) modify any large-capacity magazines so that they accept ten or fewer rounds, (2) sell them, (3) move them out of the state, or (4) turn them over to state officials for destruction. Cal. Penal Code §§ 16740(a), 32310(d). We rejected that claim in *Duncan V*, 19 F.4th at 1111-13. On remand, the district court did not consider the takings claim but, on appeal, Plaintiffs ask us to affirm on the alternative ground of a takings violation.

The Supreme Court's decision in *Bruen* had no effect on our takings analysis, nor have any other intervening decisions aided Plaintiffs' position. We

adopt and affirm our earlier rejection of this claim. *Id.* at 1111-13. Our ruling is in accord with decisions by the First and Third Circuits. *See Ocean State*, 95 F.4th at 52-53 (holding that the plaintiffs were unlikely to succeed on a takings challenge to Rhode Island's ban on large-capacity magazines); *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.* ("*ANJRPC*"), 910 F.3d 106, 124-25 (3d Cir. 2018) (rejecting a takings challenge to New Jersey's ban on large-capacity magazines), *abrogated in other part by Bruen*, 597 U.S. 1.

B. Second Amendment Claim

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The Amendment creates an individual right to keep and bear arms for self-defense. *District of Columbia v. Heller*, 554 U.S. 570, 599, 602 (2008). The right applies against States via the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010) (plurality opinion).

The Supreme Court has instructed that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Heller*, 554 U.S. at 626. It is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* For example, the Second Amendment protects only those weapons "in common use at the time." *Id.* at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

In *Bruen*, the Supreme Court announced the appropriate general methodology for deciding Second Amendment challenges to state laws:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.

597 U.S. at 24.

Applying that methodology to California's ban on large-capacity magazines, we reject Plaintiffs' Second Amendment challenge for two independent reasons. First, the plain text of the Amendment protects the right to bear "Arms," not accessories to firearms that are neither arms themselves nor necessary to the ordinary functioning of a firearm. Because large-capacity magazines are neither weapons nor accessories that are necessary to the operation of a weapon, the Second Amendment's plain text does not protect possession of large-capacity magazines. Second, even assuming that California's law implicates the text of the Second Amendment, the ban on large-capacity magazines fits comfortably within our "historical tradition of firearm regulation," *Rahimi*, 602 U.S. at 691 (quoting *Bruen*, 597 U.S. at 17). California's law fits within the traditions of protecting innocent persons by restricting a component necessary to the firing of a firearm and by restricting especially dangerous uses of weapons when those uses have proved particularly harmful.

1. Large-Capacity Magazines Are Neither "Arms" Nor Protected Accessories.

We first examine "whether the plain text of the Second Amendment protects [Plaintiffs'] proposed course of conduct." *Bruen*, 597 U.S. at 32. Plaintiffs assert that their proposed conduct—possessing large-capacity magazines—implicates the text of the Second Amendment because, in their view, large-capacity magazines are arms commonly chosen for the purpose of self-defense. Defendant raises several distinct arguments to the contrary: large-capacity magazines are not "Arms" within the meaning of the Second Amendment; they are not in common use for self-defense; they are most useful in military service; and they are dangerous and unusual. *See, e.g.*, *Hanson v. District of Columbia*, 671 F. Supp. 3d 1, 14 (D.D.C. 2023) (holding that large-capacity magazines do not fall within the text of the Second Amendment because "they are most useful in military service"), *aff'd on other grounds*, 120 F.4th 223 (D.C. Cir. 2024); *see also Bianchi v. Brown*, 111 F.4th 438, 461 (4th Cir. 2024) (en banc) ("[T]he AR-15 is a combat rifle that is both ill-suited and disproportionate to self-defense. It thereby lies outside the scope of the Second Amendment."), *petition for cert. filed sub nom. Snope v. Brown*, No. 24-203 (U.S. Aug. 21, 2024). Because we conclude that large-capacity magazines are not "Arms" within the meaning of the Second Amendment, we need not, and do not, reach

Defendant's alternative arguments pertaining to the text of the Second Amendment.[2]

The text of the Second Amendment encompasses "the right of the people to keep and bear Arms." U.S. Const. amend. II. We must look to history to understand the meaning of "Arms." *Bruen*, 597 U.S. at 26. The Second Amendment's "reference to 'arms' does not apply 'only to those arms in existence in the 18th century.'" *Id.* at 28 (brackets omitted) (quoting *Heller*, 554 U.S. at 582). "[T]he 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." *Id.* (quoting *Heller*, 554

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[2] "There is no consensus on whether the common-use issue" is a threshold, textual inquiry or a historical inquiry. *Hanson*, 120 F.4th at 232 n.3 (quoting *Bevis v. City of Naperville*, 85 F.4th 1175, 1198 (7th Cir. 2023), *cert. denied sub nom. Harrel v. Raoul*, 144 S. Ct. 2491 (2024)). In *United States v. Alaniz*, 69 F.4th 1124 (9th Cir. 2023), we placed this question in the initial, textual determination. *Id.* at 1128. Judge Bumatay's dissenting opinion now argues, in direct contrast to his view less than eighteen months ago, that the inquiry belongs instead in the historical analysis. *Compare* Dissent by J. Bumatay at 92-95 (arguing that the inquiry belongs in the historical analysis), with *Duncan VII*, 83 F.4th at 810 (Bumatay, J., dissenting) (placing the inquiry clearly in the textual category). Both views find some support in the text of *Bruen*. *See Bianchi*, 111 F.4th at 501-02 (Richardson, J., dissenting) (describing the support for both approaches). Because we do not reach the issue as presented by Defendant, we need not and do not address the issue here; therefore, *Alaniz* remains good law. To the extent that Plaintiffs' argument about ownership statistics overlaps with, or is identical to, an "in common use today for self-defense" argument, we give Plaintiffs the benefit of the doubt and, out of an abundance of caution, resolve this question in the historical analysis, where Defendant bears the burden of proof. *See* Part B-2-d, below.

U.S. at 582) (internal quotation marks omitted). "Thus, even though the Second Amendment's definition of 'arms' is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense." *Id.*

"The 18th-century meaning [of 'Arms'] is no different from the meaning today." *Heller*, 554 U.S. at 581. Consistent with modern usage, dictionaries from the 18th century defined the term as encompassing "weapons of offence, or armour of defence" and "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." *Id.* (quoting, first, *1 Dictionary of the English Language* 106 (4th ed.) (reprinted 1978) and, second, *1 A New and Complete Law Dictionary* (1771)). The term includes commonplace weapons and is not limited to military weapons. *Id.* The meaning of "Arms" thus broadly includes nearly all weapons used for armed self-defense.

The scope of the Second Amendment is broad in a second sense as well. As we recognized a decade ago, for 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. *See Jackson v. City & County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (holding that, unless understood to protect the corollary right to possess ammunition, "the right to bear arms would be meaningless"), *abrogated in other part by Bruen*, 597 U.S. 1; *see also Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015) (holding that the Second Amendment encompasses a "corollary" right to possess components "necessary to

render ... firearms operable"), *abrogated in other part by Bruen*, 597 U.S. 1; *cf. B & L Prods., Inc. v. Newsom*, 104 F.4th 108, 118 (9th Cir. 2024) (reaffirming, after *Bruen*, that "unless the right to acquire firearms receives some Second Amendment protection, the right to keep and bear firearms would be meaningless" (emphasis omitted)); *id.* ("Ancillary rights are protected to the extent necessary to serve [lawful purposes such as self-defense]; otherwise, the Second Amendment is not implicated by restraints on such rights."). A complete ban on ammunition thus would implicate the Second Amendment, as likely would a ban on, for example, firearm triggers.

But the text of the Second Amendment also reveals an important *limit* on the scope of the right. In particular, the Amendment protects only the right to bear *Arms*. At the time of ratification, a clear distinction was recognized between weapons themselves, referred to as "arms," and accessories of weaponry, referred to as "accoutrements." Common accoutrements included flint, scabbards, holsters, and ammunition containers such as cartridge cases and cartridge boxes. "Accoutrements" were distinct from "arms." For example, the Continental Congress promised to pay States for "[e]very horse and all arms *and* accoutrements, which shall be taken, by the enemy in action." 2 *Public Papers of George Clinton* 828 (Wynkoop Hallenbeck Crawford Co. ed., 1900) (emphasis added). Similarly, the Duke of Wellington described the need "to collect the wounded and their arms and accoutrements" from a battlefield. 10 *The Dispatches of Field Marshal the Duke of Wellington (1799-1818)* 495 (Murray ed., 1838) (emphasis added). Hundreds of examples from the Founding era describe

arms and accoutrements as separate, distinct items of military gear, and the phrase "arms and accoutrements" was common.

By choosing to protect the right to bear "arms," not "arms and accoutrements," the Founders constrained the scope of the Second Amendment. The term "Arms" thus encompasses most weapons used in armed self-defense, and the Second Amendment necessarily protects the components necessary to operate those weapons. But it does not protect the right to bear accoutrements.

Applying those principles here, California's ban on large-capacity magazines does not fall within the plain text of the Second Amendment. 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. 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. Large-capacity magazines thus fall clearly within the category of accessories, or accoutrements, rather than arms.

That straightforward conclusion does not end our analysis, though. We also must consider whether the possession of large-capacity magazines falls within the corollary right to possess accessories that are necessary for the ordinary operation of a protected

weapon.[3] Some (but not all) firearms require the use of a magazine in order to operate. For 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.

But a *large-capacity* magazine—the only type of accessory regulated by California—is not necessary to operate any firearm. Most firearms that accept detachable magazines can be equipped with a large-capacity magazine, but the record contains no example of a firearm that *requires* a large-capacity magazine to function normally. To the contrary, firearms that accept magazines operate as intended when equipped with magazines containing ten or fewer rounds. Accordingly, the Second Amendment's plain text does not encompass a right to possess large-capacity magazines.

Plaintiffs point out that a magazine is attached to the firearm when the shooter fires a shot. Unlike some other accessories, then, a magazine is an integral part of the firing mechanism of some firearms. Plaintiffs contend that, for that reason, the Second Amendment's text necessarily encompasses a right to possess a magazine for firearms that require one. We agree, for the reasons described above, that the Second

[3] We assume for purposes of analysis that Plaintiffs intend to possess weapons that are protected by the text of the Second Amendment.

Amendment's text encompasses a right to possess a magazine in that circumstance.

Plaintiffs further contend, however, that the Amendment's text also encompasses a right to possess a *large-capacity* magazine because, when a shooter chooses to use a large-capacity magazine, it, too, is attached to the firearm when the shooter fires a shot. We reject that reasoning for two independent reasons. First, the function of the large-capacity magazine is completed once the magazine automatically places a new round into the chamber. The large capacity of the magazine plays no role in the firing mechanism of the firearm. In this way, a large-capacity magazine is no different than other items that hold additional ammunition, such as cartridge boxes and belts that hold bullets, yet were classified historically as accoutrements, not arms.

Second, and more fundamentally, Plaintiffs' contention misunderstands the relevant test. The proper inquiry for an item that is not an arm itself is whether the component or accessory is necessary to the ordinary operation of the weapon, not whether, when one voluntarily chooses to use an optional accessory, the accessory is attached to the weapon. Many optional accessories—such as a high-powered scope for a rifle, a gun sling, or a silencer—may be attached to a firearm without necessarily falling within the scope of the text of the Second Amendment. *See, e.g.*, *United States v. Cox*, 906 F.3d 1170, 1186 (10th Cir. 2018) ("A silencer is a firearm accessory; it's not a weapon in itself.").

A large-capacity magazine undoubtedly provides a benefit for a shooter: it allows firing an eleventh

round or more without having to pause for a few seconds to reload. But the enhancement of a person's ability to fight or to defend is a fundamental attribute of any accessory for a weapon. A sword sheathed in a scabbard, a rifle equipped with a high-powered scope, a six-shooter nestled loosely in a holster—all are superior in some way to the same weapons without the accessory. The mere fact that an accessory enhances an attribute of a weapon does not bring the accessory within the scope of the Second Amendment's text.

The Founders limited the Second Amendment's protection to the right to bear arms, not the broader right to bear arms *and accoutrements*. We must respect that limitation, just as we must respect the Founders' choice to protect the right to bear a broad range of arms. *Cf. Rahimi*, 602 U.S. at 691-92 ("[T]he Second Amendment permits more than just those regulations identical to ones that could be found in 1791. Holding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers."). Because the text of the Second Amendment does not encompass the right to possess large-capacity magazines, we hold that Plaintiffs' Second Amendment claim fails. *See Or. Firearms Fed'n v. Kotek*, 682 F. Supp. 3d 874, 911-13 (D. Or. 2023) (explaining why large-capacity magazines are not "Arms" within the meaning of the Second Amendment), *appeals filed*, Nos. 23-35478, 23-35479 (9th Cir. July 17, 2023); *Ocean State Tactical, LLC v. Rhode Island*, 646 F. Supp. 3d 368, 384-88 (D.R.I. 2022) (same), *aff'd on other grounds* 95 F.4th 38; *cf. Bevis*, 85 F.4th at 1195 (concluding, for a different reason, that large-capacity magazines are not "Arms").

2. California's Ban on Large-Capacity Magazines Falls Within the Nation's Historical Tradition of Firearm Regulation.

Plaintiffs' argument fares no better even if we assume that their proposed conduct falls within the plain text of the Second Amendment.

In *Bruen*, the Supreme Court explained that a government must justify a regulation of firearms by demonstrating that it falls within the Nation's tradition of regulating weapons. 597 U.S. at 24. A court's assessment of whether a law comports with a tradition defined by historical laws "will often involve reasoning by analogy." *Id.* at 28. "[D]etermining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are 'relevantly similar.'" *Id.* at 28-29. The two most important considerations are "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 29. More specifically, we must consider whether the regulations "impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified." *Id.*

Analogical reasoning is "neither a regulatory straightjacket nor a regulatory blank check." *Id.* at 30. The government must "identify a well-established and representative historical *analogue*, not a historical *twin*." *Id.* So even if a modern regulation is not a "dead ringer" for a historical analogue, "it still may be analogous enough to pass constitutional muster." *Id.*

The Court gave an example of the longstanding laws prohibiting the carry of firearms in "sensitive

places," such as legislative assemblies and courthouses. *Id.* Although few such historical laws existed, the Court "assume[d] it settled that these locations were 'sensitive places' where arms carrying could be prohibited consistent with the Second Amendment." *Id.* "And courts can use analogies to those historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in new and analogous sensitive places are constitutionally permissible." *Id.* But those historical laws do not justify the conclusion that entire cities are "sensitive places" simply because people congregate there and law enforcement is present. *Id.* at 30-31. That analogy would be "far too broad[]," because it "would eviscerate the general right to publicly carry arms for self-defense." *Id.* at 31.

The Court emphasized that the historical analogies both in *Bruen* and in *Heller* were "relatively simple to draw." *Id.* at 27. *Heller* concerned the District of Columbia's "complete prohibition" on handguns, 554 U.S. at 629, and *Bruen* concerned New York's "may issue" licensing scheme, 597 U.S. at 14. In those cases, the perceived societal problems—firearm violence in densely populated communities and the need to regulate who may possess a firearm—had existed since the Founding, and the regulations that the governments chose to impose—a ban on handguns and a "may issue" licensing scheme—were ones "that the Founders themselves could have adopted" to confront those problems. *Bruen*, 597 U.S. at 27. "[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century," then a modern regulation likely is inconsistent with the Second Amendment if the

Founders either addressed the problem "through materially different means" or did not enact "a distinctly similar historical regulation." *Id.* at 26.

By contrast, the Court explained, "cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach." *Id.* at 27. "The regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868." *Id.* "Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Id.* at 28.

When considering historical sources, "not all history is created equal." *Id.* at 34. Regulations enacted close to the time of ratification are the most relevant, because "[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." *Id.* (quoting *Heller*, 554 U.S. at 634-35) (emphasis in *Bruen*). Historical evidence that long predates, or long postdates, the date of ratification is less illuminating, particularly if it contradicts the text of the Second Amendment or evidence from the time of the ratification.[4] *Id.* at 34-37.

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[4] The Court has made clear that at least one relevant date of ratification is 1791, the year in which the States ratified the Second Amendment. *Bruen*, 597 U.S. at 37. The Second Amendment's protections apply to the States via the Fourteenth Amendment, which was ratified in 1868. *Id.* The Court twice has reserved whether, for laws enacted by States, another relevant

The Supreme Court recently applied *Bruen*'s framework in *Rahimi*, 602 U.S. 680. Eight justices joined the majority opinion, with only Justice Thomas, the author of *Bruen*, dissenting. *Id.* at 683. *Rahimi* concerned a challenge to 18 U.S.C. § 922(g)(8), which criminalizes the possession of a firearm by a person who is subject to a domestic-violence restraining order. *Id.* at 688-89. The Court had "no trouble" concluding that § 922(g)(8), as applied to Rahimi, was consistent with the Second Amendment. *Id.* at 700.

The Court began by noting that some courts had misunderstood *Bruen*'s methodology and had applied it too stringently. *Id.* at 691. The Court emphasized that the methodology was "not meant to suggest a law trapped in amber." *Id.* "[T]he Second Amendment permits more than just those regulations identical to ones that could be found in 1791." *Id.* at 691-92.

Rahimi summarized the methodology as follows: "[T]he appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." *Id.* at 692. "Why and how the regulation burdens the right are central to this inquiry." *Id.* "And when a challenged regulation does not precisely match its historical precursors, 'it still may be analogous enough to pass constitutional muster.'" *Id.* (quoting *Bruen*, 597 U.S. at 30). "The law must comport with the principles underlying the Second Amendment, but it

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date is 1868. *Id.* at 38; *Rahimi*, 602 U.S. at 692 n.1. We need not address that issue here, because the relevant historical traditions, discussed below, all began at the time of the Founding or earlier.

need not be a 'dead ringer' or a 'historical twin.'" *Id.* (quoting *Bruen*, 597 U.S. at 30).

Applying that methodology to § 922(g)(8), *Rahimi* looked to "two distinct legal regimes." *Id.* at 694. The first regime consisted of surety laws, laws that required a person to post a bond that would be forfeited if the person later breached the peace. *Id.* at 695-97. Those laws sometimes applied to persons who carried dangerous weapons publicly. *Id.* at 696. The second regime consisted of "going armed" laws, laws that prohibited "riding or going armed, with dangerous or unusual weapons, to terrify the good people of the land." *Id.* at 697 (quoting 4 Blackstone 149) (brackets omitted).

> Taken together, the surety and going armed laws confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed. Section 922(g)(8) is by no means identical to these founding era regimes, but it does not need to be. *See Bruen*, 597 U.S. at 30. Its prohibition on the possession of firearms by those found by a court to present a threat to others fits neatly within the tradition the surety and going armed laws represent.

Id. at 698.

Section 922(g)(8), the Court held, is "relevantly similar" to the Founding-era regimes in both why and how the law burdens the Second Amendment right. *Id.* (quoting *Bruen*, 597 U.S. at 29). As to "why," both the historical regimes and the modern law "restrict[] gun use to mitigate demonstrated threats of physical

violence." *Id.* As to "how," the historical and modern laws require a judicial determination of whether a defendant "likely would threaten or had threatened another with a weapon." *Id.* at 699. Both the surety laws and the modern law are temporary in duration. *Id.* Finally, the going-armed laws provided for imprisonment, so § 922(g)(8)'s lesser restriction of disarmament is permissible. *Id.*

In dissent, Justice Thomas pointed out that § 922(g)(8) addressed a "societal problem—the risk of interpersonal violence—'that has persisted since the 18th century,' yet was addressed 'through the materially different means' of surety laws." *Id.* at 752-53 (Thomas, J., dissenting) (quoting *Bruen*, 597 U.S. at 26) (brackets omitted). He explained that the historical regulations were "materially different" from § 922(g)(8)'s complete ban on firearm possession arising out of private conduct. *Id.* at 764-71.

Justice Thomas wrote that surety laws had the same "why," but the "how" could not be more different. *Id.* at 764. Surety laws, he noted, had no effect whatsoever on the right to bear arms, either when posting a bond or when forfeiting that bond because of a breach of the peace: "After providing sureties, a person kept possession of all his firearms; could purchase additional firearms; and could carry firearms in public and private. Even if he breached the peace, the only penalty was that he and his sureties had to pay a sum of money." *Id.* "At base, it is difficult to imagine how surety laws can be considered relevantly similar to a complete ban on firearm ownership, possession, and use." *Id.* at 766.

As for the going-armed laws, Justice Thomas noted that they "had a dissimilar burden and justification." *Id.* at 767. Going-armed laws prohibited only distinctly public acts; they "did not prohibit carrying firearms at home or even public carry generally." *Id.* at 769. And those laws "prohibited only carrying certain weapons ('dangerous and unusual') in a particular manner ('terrifying the good people of the land' without a need for self-defense) and in particular places (in public)." *Id.* at 770. Plus, those laws "were criminal statutes that penalized past behavior, whereas § 922(g)(8) is triggered by a civil restraining order that seeks to prevent future behavior." *Id.*

The majority responded to Justice Thomas' critique by stating that it reached the opposite conclusion "[f]or the reasons we have set forth," *id.* at 700 (majority opinion), and reiterating simply that "a 'historical twin' is not required," *id.* at 701 (quoting *Bruen*, 597 U.S. at 30).

Applying the methodology described in *Bruen* and *Rahimi*, we first conclude that (a) the "more nuanced approach" described in *Bruen* applies here. 597 U.S. at 27. We next consider (b) the historical regulations provided by Defendant. Considering "how" and "why" the modern and historical regulations burden the right to armed self-defense, we conclude that (c) California's law fits within the Nation's tradition of regulating firearms. Finally, we reject (d) Plaintiffs' ownership-statistics argument before (e) concluding that California's law is constitutional.

a. The "More Nuanced Approach" Applies Here.

In *Bruen*, the Supreme Court stated that "cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach." 597 U.S. at 27. The parties dispute whether this case implicates unprecedented concerns or dramatic technological changes.

As an initial matter, the precise status of *Bruen*'s "more nuanced approach" statement is unclear following *Rahimi*. *Rahimi* addressed a societal challenge—domestic violence—that has persisted since the Founding. And nothing in the record suggested a dramatic technological change.[5] The dissent insisted that the case, like *Heller* and *Bruen*, fell neatly into the straightforward category, because "§ 922(g)(8) addresses a societal problem—the risk of interpersonal violence—'that has persisted since the 18th century.'" *Rahimi*, 602 U.S. at 752 (Thomas, J., dissenting) (quoting *Bruen*, 597 U.S. at 26). Yet the majority did not address whether that case implicated unprecedented societal concerns or dramatic technological changes.

Notwithstanding the Supreme Court's silence on this topic in *Rahimi*, we will not disregard *Bruen*'s statement that a more nuanced approach applies to cases involving modern problems or dramatic

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[5] The Founders likely could not have imagined the weaponry available today, so in that sense *every* Second Amendment case involves dramatic technological changes. But *Bruen* could not have meant that type of change, because it held that Bruen itself, along with Heller, were cases that did not implicate dramatic technological changes. Bruen, 597 U.S. at 27.

technological changes. Those cases warrant an even more flexible approach than the Court applied in *Rahimi*. To conclude otherwise would be to disregard entirely a statement by the Supreme Court. Even assuming that *Bruen*'s statement was dictum, we do not lightly decline to follow a clear statement by the Supreme Court. *See, e.g.*, *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1129 (9th Cir. 2006) (en banc) ("[A]s a lower federal court, we are advised to follow the Supreme Court's considered dicta." (quoting *Oyebanji v. Gonzales*, 418 F.3d 260, 264-65 (3d Cir. 2005))).

We readily conclude that a more nuanced approach is appropriate here. This case implicates *both* unprecedented societal concerns *and* dramatic technological changes. *See Hanson*, 120 F.4th at 240-42 (holding that the nuanced approach applies to a challenge to a ban on large-capacity magazines); *Ocean State*, 95 F.4th at 44 (same); *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Platkin*, No. CV 18-10507- PGS-JBD, 2024 WL 3585580, at *22 (D.N.J. July 30, 2024) (same), *cross appeals filed*, Nos. 24-2415, 24-2450 (3d Cir. Aug. 6 & 9, 2024); *Capen v. Campbell*, 708 F. Supp. 3d 65, 89-90 (D. Mass. 2023) (same), *appeal filed*, No. 24-1061 (1st Cir. Jan. 17, 2024); *Del. State Sportsmen's Ass'n v. Del. Dep't of Safety & Homeland Sec.* ("*DSSA*"), 664 F. Supp. 3d 584, 598 (D. Del. 2023) (same), *aff'd on other grounds*, 108 F.4th 194 (3d Cir. 2024); *Hanson*, 671 F. Supp. 3d at 17-20 (same); *Herrera v. Raoul*, 670 F. Supp. 3d 665, 675 (N.D. Ill. 2023) (same), *aff'd sub nom. Bevis*, 85 F.4th 1175; Kotek, 682 F. Supp. 3d at 924-27 (same); *Nat'l Ass'n for Gun Rights v. Lamont*, 685 F. Supp. 3d 63, 104-07 (D. Conn. 2023) (same); *cf. Bianchi*, 111 F.4th at 463

(concluding that the "more nuanced approach" applies to a challenge to a ban on assault weapons).

Mass shootings are clearly a societal concern that arose only in the 20th century. The first known mass shooting in the United States resulting in ten or more deaths occurred in 1949. *Ocean State*, 95 F.4th at 44. In the three decades that followed, two such shootings occurred. In 2009 alone, three mass shootings claimed ten or more lives, and many more such shootings occurred in the years that followed. *See, e.g.*, *id.* at 44 n.4 ("The record suggests that mass shootings have become more frequent and more deadly."). In other words, not a single mass shooting occurred until the middle of the 20th century, and we now experience these events regularly. *See Kotek*, 682 F. Supp. 3d at 897-99 (detailing the rise of mass shootings and their increasing lethality, particularly when a large-capacity magazine is used). These tragedies naturally receive significant media attention, and they have spawned legislative action and citizen initiatives. It is hard to imagine a clearer example of an "unprecedented societal concern[]." *Bruen*, 597 U.S. at 27; *see Hanson*, 120 F.4th at 241 ("There can be little doubt that mass shootings are an unprecedented societal concern."); *Bianchi*, 111 F.4th at 463 ("The ripples of fear reverberating throughout our nation in the wake of the horrific mass shootings ... stem from a crisis unheard of and likely unimaginable at the founding.").

Large-capacity magazines, when attached to a semiautomatic firearm, also represent a dramatic technological change from the weapons at the Founding. Semi-automatic firearms equipped with

large-capacity magazines fire with an accuracy, speed, and capacity that differ completely from the accuracy, speed, and capacity of firearms from earlier generations. *Hanson*, 120 F.4th at 242, 248-51; *Ocean State*, 95 F.4th at 44. The single-shot, muzzle-loading firearms common at the Founding required slow, manual reloading. Repeating Henry and Winchester rifles, which became popular in the decades following the Civil War, required a shooter to pump a lever manually, a process that allowed about one shot per three seconds—much slower than the firing rate of a modern semi-automatic firearm. *Hanson*, 671 F. Supp. 3d at 18-19. Notably, California's law *exempts* magazines designed for lever-action rifles. Cal. Penal Code § 16740(c). We have no difficulty in concluding that large-capacity magazines designed for semi-automatic firearms represent a "dramatic technological change[]." *Bruen*, 597 U.S. at 27; *see also Bianchi*, 111 F.4th at 464 ("These are not our forebears' arms.").

For all of those reasons, we hold that a more nuanced approach applies here. At the same time, we emphasize that the result in this case does not hinge on this categorization. Because we reach the same result under *Rahimi*'s straightforward approach, we apply that approach below. But our conclusion is buttressed by the Supreme Court's reservation of a more flexible analogical approach for "unprecedented societal concerns or dramatic technological changes." *Bruen*, 597 U.S. at 27.

Inexplicably, the principal dissenting opinion claims that we contrived a "more nuanced approach" ourselves, Dissent by J. Bumatay at 112-13, when in

fact all we have done is to *quote* the Supreme Court's opinion. *See Bruen*, 597 U.S. at 27 ("[C]ases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach."). Nor is our understanding of Supreme Court precedent an outlier. As just noted, we follow essentially every circuit-court and district-court decision in holding that a more nuanced approach applies in the circumstances. The dissenting opinion also faults us for mentioning, but not utilizing, that approach. Dissent by J. Bumatay at 116. But, because the Court did not flesh out how the "more nuanced approach" operates—for instance, whether more recent analogies should be consulted—we have taken the *most conservative* path in our analysis by declining to apply the more nuanced approach.

b. Three Historical Legal Regimes Are Relevant.

Beginning before the Founding and continuing throughout the Nation's history, legislatures have enacted laws to protect innocent persons from especially dangerous uses of weapons once those perils have become clear. We discern three distinct categories of laws relevant to our analysis.

The first category of laws regulated the storage of gunpowder. Early in the Nation's history, gunpowder was necessary to shoot a firearm. *Kotek*, 682 F. Supp. 3d at 903. But the storage of gunpowder increased the risk of explosions or fires, which posed an obvious threat to innocent persons. *Id.* To mitigate the danger to innocent lives, several colonies and states enacted laws restricting the storage of gunpowder. *E.g.*, 1771-1772 Mass. Province Laws 167, ch. 9; 1772 N.Y. Laws

682, ch. 1549; 1782-1783 Mass. Acts 119-20, ch. 46; 1784 N.Y. Laws 627, ch. 28; 1786 N.H. Laws 383-84; 1798-1813 R.I. Pub. Laws 85, § 2; 1806 Ky. Acts 122, § 3; 1821 Me. Laws 98, ch. 25, § 1; 1825 N.H. Laws 74, ch. 61; 1832 Conn. Acts 391, ch. 25; 1836 Conn. Acts 105, ch. 1, § 20. The laws typically prohibited certain methods of storing gunpowder or restricted the amount of gunpowder that could be stored in one place. One Massachusetts law banned taking a firearm loaded with gunpowder into any house or building in Boston. 1782 Mass. Acts 119, ch. 46. Cities and towns, too, enacted laws requiring that gunpowder be stored in certain containers or on the highest story of the home. Act of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws p. 627; An Act for Erecting the Town of Carlisle, in the County of Cumberland, into a Borough, ch. XIV, § XLII, 1782 Pa. Laws p. 41; An Act for Erecting the Town of Reading, in the County of Berks, into a Borough, ch. LXXVI, § XLII, 1783 Pa. Laws p. 140. In 1803, for example, Boston required that all gunpowder be stored in powder houses. 1801 Mass. Acts 507, ch. 20. In sum, legislatures in the Founding era sought to prevent a specific, infrequent type of harm to innocent persons—fires and explosions from the storage of gunpowder—by significantly restricting how and where persons could store gunpowder.

The second set of laws concerns trap guns—the rigging of a firearm to discharge when a person unwittingly trips a string or wire. People typically set trap guns to defend their businesses, homes, or possessions. When trap guns became popular, some people applauded their use as a deterrent to crime.

But others lamented that trap guns inevitably harmed or killed innocent persons.

Legislatures responded by banning the use of firearms as trap guns. In 1771, the legislature of the Colony of New Jersey found that "a most dangerous Method of setting Guns has too much prevailed in this Province" and criminalized the setting of trap guns. 1763-1775 N.J. Laws 346, ch. 539, § 10. Other jurisdictions followed suit. Nine states banned the setting of trap guns in the 18th and 19th centuries, and nine more states enacted bans early in the 20th century. In sum, the use of firearms as trap guns posed a threat, albeit an infrequent threat, to innocent persons, and legislatures responded by prohibiting what had proved to be an especially dangerous use of firearms: the setting of trap guns.

The third, and most extensive, set of laws consists of significant restrictions on weapons after their use by criminals exposed an especially dangerous use of the weapon. These laws date from long before the Founding and continue to today.

The Statute of Northampton prohibited the carrying of lances, for example, because those weapons generally were appropriate only to engage in lawful combat "or—as most early violations of the Statute show—to breach the peace." *Bruen*, 597 U.S. at 41. In the New World, states and colonies prohibited the concealed carry of some weapons in response to criminals' secretly carrying those weapons to achieve illicit ends. For example, after a period of strife between planters and the colony's proprietors, the Colony of East New Jersey prohibited the concealed carry of "pocket pistol[s], skeins, stilladers, daggers or

dirks, or other unusual or unlawful weapons." *Grants, Concessions, and Original Constitutions of the Province of New Jersey*, 289-90 (1881). Massachusetts enacted similar laws, both as a colony and as an early state. *See* 1750 Mass. Acts 544, ch. 17 § 1 (prohibiting the carry of "clubs and other weapons" in a group of twelve or more persons); 1786 Mass. Acts 87, ch. 38 (prohibiting being armed with a club or other weapon while rioting); *see also Bevis v. City of Naperville*, 657 F. Supp. 3d 1052, 1070 (N.D. Ill.) (describing similar restrictions), *aff'd*, 85 F.4th 1175 (7th Cir. 2023).

As new weapons gained popularity and notoriety for their criminal use, legislatures imposed significant restrictions on them. For example, in 1827, Jim Bowie used a large, specially designed knife in a duel. "Bowie knives," as they came to be called, proliferated in the 1830s. The knives had design features that were particularly suitable for fighting: long blades, crossguards to protect the wielder's hands, and points designed to make it easier to harm a victim. Criminals used them widely in fights and duels. States acted quickly. By 1840, at least five States or territories had enacted laws restricting the carrying of Bowie knives or other fighting knives. By the end of the 19th century, nearly every State had enacted laws restricting Bowie knives, including by outlawing their concealed or unconcealed carry and sale, by enhancing criminal penalties for their use, or by taxing their ownership.

The "slungshot" followed a similar trajectory. A slungshot is a hand-held impact weapon with a weighted object at the end of a flexible strap. Invented in the 1840s, its use by criminals and street gangs

became widespread. States again reacted. In 1849, New York and Vermont prohibited the manufacture, sale, or carry of slungshots, punishable by up to five years' imprisonment. 1849 N.Y. Laws 403, §§ 1-2, ch. 278; 1849 Vt. Acts & Resolves 26, No. 36 §§ 1-2. By the end of the century, nearly every State had enacted anti-slungshot laws.

States also responded to advances in firearm technology. In the first half of the 19th century, percussion-cap pistols and revolvers allowed pistols to remain loaded for longer and to contain up to six bullets. Criminals used such pistols with increasing frequency to resolve interpersonal disputes. Several states responded by restricting the carry of concealable pistols. *E.g.*, 1871 Tenn. Pub. Acts 81, An Act to Preserve the Peace and to Prevent Homicide, ch. 90, § 1; 1881 Ark. Acts 191, An Act to Preserve the Public Peace and Prevent Crime, chap. XCVI, § 1-2.

A clear pattern emerges from a review of this third set of regulations.[6] When criminals took advantage of technological advances in weapons, legislatures acted to restrict an especially dangerous use of those weapons: Bowie knives were designed to—and did—cause significant harm in fights, with little

[6] Although we choose to stop our survey of historical laws in the 19th century, we note that, as technological advances continues to increase the lethality of firearms, legislatures throughout the Nation acted to restrict significantly a range of weapons, including sawed-off shotguns, "Tommy guns," semiautomatic weapons, and automatic weapons. *See, e.g.*, Hanson, 120 F.4th at 239 (describing some of these weapons and the resulting federal regulations); *Kotek*, 682 F. Supp. 3d at 909-11 (describing many of the weapons and resulting regulations by state legislatures and by Congress).

self-defense value, so legislatures banned their carry outside the home; the slungshot proved incredibly useful to criminals but of minimal value in self-defense, so legislatures banned their carry outside the home; and pistols became easy for criminals to conceal, to the detriment of public safety, so legislatures banned their concealed carry. Legislatures sought to prevent a specific type of harm to innocent persons—criminal use of new technology—by prohibiting what had proved to be especially dangerous uses of the new weapons, primarily the ability to carry an extremely deadly weapon concealed from law enforcement and bystanders.

c. California's Ban on Large-Capacity Magazines Falls Within the Nation's Tradition of Firearm Regulation.

We discern two distinct traditions from the legal regimes described above. First, the Founding-era gunpowder-storage regulations established an early tradition of laws seeking to protect innocent persons from infrequent but devastating harm by regulating a component necessary to the firing of a firearm. Second, since the Founding era, legislatures have enacted laws to protect innocent persons from especially dangerous uses of weapons once those perils have become clear. *See Hanson*, 120 F.4th at 237-38 (recognizing the tradition of regulating "weapons that are particularly capable of unprecedented lethality"); *Ocean State*, 95 F.4th at 46 (recognizing the tradition of regulating dangerous aspects of weapons "once their popularity in the hands of murderers became apparent"); *Bevis*, 85 F.4th at 1199 (describing "the long-standing

tradition of regulating the especially dangerous weapons of the time"); *see also Bianchi*, 111 F.4th at 464-72 (extensively discussing "a strong tradition of regulating those weapons that were invented for offensive purposes and were ultimately proven to pose exceptional dangers to innocent civilians").[7] Whether we view those traditions independently or together, California's ban on large-capacity magazines falls well within them. As described below, the ban is "'relevantly similar'" to the historical laws in both "why and how it burdens the Second Amendment right."[8] *Rahimi*, 602 U.S. at 698 (quoting *Bruen*, 597

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[7] The district court in *Kotek* reached the same conclusion after reviewing essentially the same regulations that we consider:

> Throughout this Nation's history, new technologies have led to the creation of particularly dangerous weapons. As those weapons became more common, they became tied with violence and criminality. In response, governments passed laws that sought to address the features of those weapons that made them particularly dangerous to public safety.

682 F. Supp. 3d at 935; *see also Lamont*, 685 F. Supp. 3d at 71 (reaching the same conclusion because, "when a modern innovation in firearm technology results in a particular type of weapon or method of carrying being utilized for unlawful purposes to terrorize and endanger the public, the Nation has a longstanding history and tradition of regulating those aspects of the weapons or manners of carry that correlate with rising firearm violence").

[8] Our analysis below dutifully compares the "why" for the modern law with the "why" for the historical laws and compares the "how" for the modern law with the "how" for the historical laws. To the extent that the principal dissent reaches a different conclusion from that analysis, we respectfully disagree. But we are baffled by the dissent's further suggestion that we somehow "compare the 'how' *to* the 'why.'" Dissent by J. Bumatay at 119.

U.S. at 29). California's law thus "is consistent with the principles that underpin our regulatory tradition." *Id.* at 692.

We first examine the tradition set by the gunpowder-storage laws. Both those early laws and California's modern law share the same justification for burdening the right to armed self-defense: to protect innocent persons from infrequent but devastating harm caused or exacerbated by a component necessary to the firing of a firearm. Gunpowder caused fires and explosions only infrequently, but legislatures nevertheless recognized that those infrequent events could cause devastating harm. The legislatures therefore imposed significant restrictions on how and where gunpowder could be stored, even though gunpowder was a necessary component to the firing of a firearm.

The same justification underpins California's restriction on magazine capacity: to protect innocent persons from infrequent but devastating harm. Mass shootings (at least as defined by shootings resulting in more than ten deaths) are, thankfully, not everyday occurrences. But there is no dispute that mass shootings, when they occur, cause devastating harm. Mass shootings are devastating for the entire community, and large-capacity magazines exacerbate the harm. The short pauses when a shooter must reload a firearm afford intended victims and law enforcement officers a precious opportunity to flee, take cover, and fight back. *Ocean State*, 95 F.4th at 47; *ANJRPC*, 910 F.3d at 119-20 & n.24; *Kolbe*, 849 F.3d at 128; *Kotek*, 682 F. Supp. 3d at 898-99; *Platkin*, 2024 WL 3585580, at *25. Large-capacity magazines

exacerbate the harm caused by mass shootings, and limiting magazine capacity thus prevents or mitigates the harm caused by mass shootings. In sum, both the Founding-era legislatures and California's legislature and voters enacted measures that burdened the Second Amendment right in order to prevent or mitigate a known, albeit infrequent, cause of devastating harm. *See Ocean State*, 95 F.4th at 49 (discussing the relevance of gunpowder-storage laws).

The gunpowder-storage laws and California's law are also "relevantly similar" in how they burden the right to armed self-defense. *Rahimi*, 602 U.S. at 698 (quoting *Bruen*, 597 U.S. at 29). Both the historical laws and California's law target the component that causes or exacerbates the devastating harm, and both affect the speed at which a person can fire a firearm. Founding-era legislatures regulated the storage of gunpowder because that component caused or exacerbated fires and explosions. Similarly, California's legislature and voters regulated the capacity of magazines because, as discussed above, that component causes or exacerbates mass shootings. Both laws also impose a size restriction commensurate with the threat to public safety. Some gunpowder-storage laws imposed a limit on the quantity of gunpowder that could be stored in order to limit the harm caused by a fire or explosion; and California's law limits the quantity of bullets that may be placed in a magazine in order to limit the harm caused by a mass shooting.

Perhaps most pertinently to the analysis here, the laws also plainly affect the speed at which a person could fire a firearm. Laws requiring that gunpowder

be stored on the highest floor of a home, for example, clearly delayed the ability of a resident to respond with a firearm to a ground-floor intruder or to an incident in the street or yard. Towns prohibiting altogether the storage of gunpowder had a much greater effect on the ability of a person to use a firearm with speed; a person wishing to fire a firearm had to retrieve gunpowder from a powder house or a location outside of town. California's law, too, affects a person's ability to respond with speed. California's law permits a person to fire ten rounds without pause but, before firing the eleventh round, the shooter must pause to reload the magazine, use a second magazine, or use a second firearm. Viewed through this lens, California's law has a significantly smaller effect on the speed of armed self-defense. Gunpowder-storage laws could impose delays of minutes before a person could fire a single shot, whereas California's law imposes a delay of only seconds and only after a person has fired up to ten rounds.

In conclusion, California's law falls within the national historical tradition of regulating a component necessary to the firing of a firearm in order to prevent or mitigate devastating harm caused or exacerbated by that component. *See Ocean State*, 95 F.4th at 49 ("It requires no fancy to conclude that those same founding-era communities [that enacted gunpowder-storage laws] may well have responded to today's unprecedented concern about [large-capacity magazine] use just as the Rhode Island General Assembly did: by limiting the number of bullets that could be held in a single magazine.").

We next turn to the national historical tradition of laws represented by trap-gun bans and restrictions on Bowie knives, slungshots, and concealable pistols. Legislatures throughout our Nation's history have banned especially dangerous uses of weapons once the threat to innocent persons has become clear.[9] Both the historical laws and California's law share the same justification: to protect innocent persons from harm from especially dangerous uses of weapons. Legislatures recognized the threat from the use of a firearm as a trap gun by banning that particular, especially dangerous use. Similarly, as criminals increasingly used specific weapons by carrying them outside the home or by concealing them, legislatures banned those particular, especially dangerous uses of the weapons. California's law, too, reflects the growing threat to public safety from the use of large-capacity magazines. As described above, large-capacity magazines cause or exacerbate the harm from mass shootings, and limiting magazine capacity prevents or mitigates the harm from those events because a shooter must pause before firing an eleventh round. California's law bans a particular, especially dangerous use of firearms—the use of a large-capacity magazine—in order to protect public health. *See, e.g.*, *Hanson*, 120 F.4th at 240 (concluding that the

[9] The principal dissent repeatedly mischaracterizes the relevant tradition as a ban on "especially dangerous weapons." Dissent by J. Bumatay at 79, 98-99, 118, 119 (several times), 120 (twice). As we emphasize repeatedly, the relevant tradition identified here is a tradition of banning especially dangerous *uses* of weapons once the perils of those *uses* becomes clear. By mischaracterizing the relevant tradition, the principal dissent spends much effort attacking a nonexistent assertion.

historical laws and a ban on large-capacity magazines "share the same basic purpose: To inhibit then unprecedentedly lethal criminal activity by restricting or banning weapons that are particularly susceptible to, and were widely used for, multiple homicides and mass injuries"); *DSSA*, 664 F. Supp. 3d at 603 (concluding that historical regulations were relevantly similar as to the "why" because those regulations, and a ban on large-capacity magazines, "were enacted in response to pressing public safety concerns regarding weapons determined to be dangerous").

We next examine "how" the regulations burden the Second Amendment right, by considering whether California's law and the historical regulations "impose a comparable burden on the right of armed self-defense." *Bruen*, 597 U.S. at 29. With respect to armed self-defense, the only effect of California's ban on large-capacity magazines is that a person may fire a semi-automatic weapon no more than ten times without a short pause to change magazines (or reload the original magazine or fire a different weapon). In other words, the law prohibits only one very specific use of some firearms: the shooting of an eleventh (or successive) round without a brief pause.[10] The law

[10] Like other courts, we reject the suggestion that a person "uses" a large-capacity magazine even when not firing the weapon. *Ocean State*, 95 F.4th at 45 n.8; *Hanson*, 671 F. Supp. 3d at 15. Whereas brandishing a firearm can have a deterrent effect on would-be attackers, there is no evidence in the record that others can tell that a magazine attached to an unfired weapon is large-capacity or that such magazines would provide any additional deterrent effect. *See Ocean State*, 95 F.4th at 45 n.8 ("[The] plaintiffs claim no plausible scenario in which a threat

imposes no limit whatsoever on the number of magazines a person may own, the number of bullets a person may own, or the number of firearms a person may own. The law also imposes no limit on the number of rounds a person may fire or the number of firearms a person may fire. Nor, despite Plaintiffs' protestations to the contrary, does the law ban any weapon. A person wishing to buy *any* lawful firearm (or other weapon) is free to do so. The owner may possess that firearm at home for self-defense and, so far as this law is concerned, may carry it in any manner, and to any place, that state law allows.

The burden imposed by California's law is comparable to the burden imposed by the historical laws. Each of those laws, like California's law, burdened the right to armed self-defense by prohibiting a specific, particularly dangerous use of a weapon. Like California's law, the trap-gun laws allowed persons to use firearms in every way except one way that proved, at the relevant time, particularly dangerous to innocent persons: the rigging of trap guns. Similarly, various laws throughout the Nation's history regulated the right to armed self-defense by prohibiting specific uses of weapons that had proved particularly dangerous: we have noted the examples of concealed carry, carry more generally, carry of weapons in a group of twelve or more persons, and carry of a weapon while rioting. Those laws, too, prohibited the use of weapons in ways that had proved, in their time, especially dangerous. Legislatures throughout the Nation's history thus

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has proved less effective because the brandished weapon could only fire ten rounds at once without reloading.").

have chosen, as California's legislature and voters have chosen, to impose a confined regulation of armed self-defense by prohibiting a specific, especially dangerous use of a weapon.[11]

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[11] When considering "how" the legislature has burdened the right to armed self-defense, we understand the Supreme Court's focus to be about the *method* of burdening the right, rather than the *magnitude* of the burden. We therefore describe in text how California's law and the historical laws burden the right by prohibiting a specific, particularly dangerous use of a weapon. To the extent that the *magnitude* of the burden is relevant, California's law imposes only a minimal burden on the right of armed self-defense. Firing more than ten rounds occurs only rarely, if ever, in armed self-defense. The evidence in this record, and in other cases, demonstrates that a person seldom shoots more than ten rounds when defending with a firearm. *Hanson*, 120 F.4th at 245; *Ocean State*, 95 F.4th at 45; *Worman v. Healey*, 922 F.3d 26, 37 (1st Cir. 2019), *abrogated in other part by Bruen*, 597 U.S. 1; *Kolbe*, 849 F.3d at 127; *Capen*, 708 F. Supp. 3d at 91; *Kotek*, 682 F. Supp. 3d at 896-97. And even in those extremely rare instances, the record does not disclose whether the shooter fired more than ten bullets in rapid succession, without a short pause that would have allowed reloading or switching weapons. In sum, California's law places a limited burden on the Second Amendment's right to armed self-defense by prohibiting only one specific and rare use of semi-automatic firearms that accept detachable magazines—the firing of more than ten rounds without a short pause after the tenth round.

The magnitude of that burden is relevantly similar to the magnitude of the burden of the historical laws. The trap-gun laws undoubtedly burdened the right to armed self-defense in specific situations. A person worried about a nighttime intruder had to remain awake and alert and could not rely on a trap gun. And the historical restrictions on carrying weapons imposed an even greater burden: A person skilled at using a concealable pistol, Bowie knife, or slungshot could not depend on those weapons when leaving home.

Plaintiffs' primary argument to the contrary is that California's law imposes a materially different burden on armed self-defense than the historical laws because, unlike those laws, California's law prohibits the *possession* of large-capacity magazines. We disagree both with Plaintiffs' reasoning and with their premise.

Most fundamentally, the burden imposed by the modern law need not be an exact match to the burden imposed by historical laws. California's law "is by no means identical to" the relevant historical laws, "but it does not need to be." *Rahimi*, 602 U.S. at 698. Its prohibition on a weapon's component that serves the sole function of enabling a specific, and especially dangerous, use of a firearm fits neatly within the tradition that the historical regulations represent.

Rahimi is instructive. Section 922(g)(8) prohibits persons subject to a domestic-violence restraining order from possessing any firearm. *Id.* at 688-89. The surety laws, as Justice Thomas pointed out, imposed no burden whatsoever on armed self-defense; they required merely posting a bond and, in the case of a breach, forfeiting the bond. *Id.* at 764-67 (Thomas, J., dissenting). Similarly, the going-armed laws burdened armed self-defense only after a jury trial, with all its attendant protections for the accused, and only for public breaches of the peace, whereas the modern law burdened armed self-defense with few procedural protections and for the altogether different conduct of a private threat. *Id.* at 768-71. The *Rahimi* majority rejected those differences as insignificant, explaining that, "[a]s we said in *Bruen*, a 'historical *twin*' is not required." *Id.* at 701 (quoting *Bruen*, 597 U.S. at 30).

California's law fits comfortably into historical tradition. Even accepting Plaintiffs' premise—which we do not, for the reasons described below—that the burden imposed by California's law is different in some way than the burdens imposed by the historical laws, a historical *twin* is not required. Like the historical laws, California's law functionally prohibits a particular, especially dangerous use of a weapon. That law is "relevantly similar" to the historical laws. *Id.* at 698 (quoting *Bruen*, 597 U.S. at 29). Moreover, the regulation of a component necessary to the firing of a firearm is far from unprecedented. As described above, the Founding generation, through gunpowder-storage laws, imposed significant restrictions on a component absolutely necessary at the time to the firing of a firearm.

To the extent that California's law differs meaningfully—again, a premise that we reject—any difference is precisely because of the factors that *Bruen* mentioned. 597 U.S. at 27. The voters of California determined that modern experience had shown that laws short of bans on possession had been ineffective and nearly impossible to enforce, and mass shootings are a uniquely modern phenomenon resulting from dramatic improvements in technology. Prop. 63 §§ 2(12), 3(8). It is inconsistent with the Supreme Court's instructions to reason that, because a ban on the carry of Bowie knives, for example, may have proved sufficient to mitigate criminal use of Bowie knives, legislatures and citizen initiatives are limited to precisely the same restrictions when addressing new technology that enables a new, more devastating type of societal harm. To the contrary, the Supreme Court has cautioned us that its "precedents

were not meant to suggest a law trapped in amber." *Rahimi*, 602 U.S. at 691; *see also id.* at 739-40 (Barrett, J., concurring) ("[I]mposing a test that demands overly specific analogues has serious problems. To name two: It forces 21st-century regulations to follow late-18th-century policy choices, giving us 'a law trapped in amber.' And it assumes that Founding-era legislatures maximally exercised their power to regulate, thereby adopting a 'use it or lose it' view of legislative authority. Such assumptions are flawed, and originalism does not require them." (citation omitted)).

Moreover, Plaintiffs' premise is mistaken; California's law bans no weapon. We reiterate that a large-capacity magazine is not itself a weapon. It is an accessory whose sole function is to provide some firearms with the ability to fire more than ten rounds without a short pause. In this way, California's law imposes less of a burden than the historical laws, which regulated weapons themselves. A person may carry a firearm freely, but Bowie knives and slungshots must be left at home.

In sum, as other courts have concluded with respect to similar bans on large-capacity magazines, we conclude that California's law is "relevantly similar" to historical regulations in "how" it burdens the right to armed self-defense. *Rahimi*, 602 U.S. at 698; *Hanson*, 120 F.4th at 237-38 (discussing historical regulations of the Bowie knife); *Ocean State*, 95 F.4th at 48 (same); *Bevis*, 85 F.4th at 1201 (same); *Platkin*, 2024 WL 3585580, at *20, *24 (same); *DSSA*, 664 F. Supp. 3d at 600-01 (describing historical regulations of the Bowie knife, slungshot, and revolver

pistol); *Kotek*, 682 F. Supp. 3d at 903-10, 928-33 (describing many of the same historical regulations we discuss and explaining why the burden they imposed was relevantly similar to the burden imposed by Oregon's ban on large-capacity magazines); *Bevis*, 657 F. Supp. 3d at 1068-71 (describing historical regulations of the Bowie knife, slungshot, and trap gun); *see also Bianchi*, 111 F.4th at 464-68 (describing historical regulations of gunpowder, the Bowie knife, dirk, sword cane, metal knuckles, slungshot, and sand club and concluding that a ban on assault weapons is relevantly similar to those historical regulations).

In conclusion, California's law is relevantly similar to the historical laws in both why and how it burdens the right to armed self-defense, and it falls within the national historical tradition of regulating a particular, especially dangerous use of a weapon, once that use becomes a specific threat to innocent persons.

d. We Reject Plaintiffs' Ownership-Statistics Argument.

In *Heller*, the Supreme Court overturned a District of Columbia ban on all handguns because it "amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for th[e] lawful purpose" of self-defense. 554 U.S. at 628. Plaintiffs argue that California's law falls into the same category because it, too, is "a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose." *Id.* After all, Plaintiffs point out, many firearm owners own large-capacity magazines. According to Plaintiffs, "that should be the end of the analysis." We reject that simplistic approach.

For the reasons described in Part A, above, *large-capacity* magazines are not "arms." Even assuming the contrary, *large-capacity* magazines remain *optional*, and they remain an *accessory* to some firearms. Accepting Plaintiffs' argument would require concluding that the Second Amendment never permits a legislature to ban any optional accessory to any weapon, provided that enough people purchased enough of them before a legislature could act. We do not read the Supreme Court's precedents in that rigid manner. Instead, we take at face value the instruction that a modern law "must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'" *Rahimi*, 602 U.S. at 692 (quoting *Bruen*, 597 U.S. at 30).

Consider, for example, machine guns. Federal law prohibits their possession except in very limited circumstances. 18 U.S.C. § 922(o). The Supreme Court stated in *Heller* that it would be "startling" to read the Second Amendment as prohibiting a ban on machine guns, and the Court clearly signaled that one machine gun—the M-16—could be banned. 554 U.S. at 624, 627. It is estimated that civilians own more than 176,000 machine guns (and nearly one million machine guns exist in the country, when one counts those owned by law enforcement officers). *DSSA*, 664 F. Supp. 3d at 592. Plaintiffs do not explain why, under their ownership-statistics theory, 176,000 is insufficient while the somewhat larger, but unknown, number of large-capacity magazines suffices.[12]

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[12] In addition to the uncertainty about the total number of large-capacity magazines owned by civilians, we also do not know how many were truly "chosen by American society for th[e] lawful

Moreover, if Congress chose to let the ban on machine guns expire, as Congress did with respect to large-capacity magazines, and if civilians purchased more machine guns, would a state-law ban on machine guns suddenly change from constitutional to unconstitutional? How many more would civilians have to buy before that binary change took effect? We do not read the Constitution or the Supreme Court's precedents to hinge on the necessarily speculative answers to those questions. Instead, we must ask whether Plaintiffs' proposed conduct falls within the text of the Second Amendment and, if so, whether the law "is consistent with the principles that underpin our regulatory tradition." *Rahimi*, 602 U.S. at 692 (citing *Bruen*, 597 U.S. at 26-31).

Heller addressed a true ban on a class of common firearms, including all uses of those weapons, and must be understood in that light. California's law, by contrast, bans only one type of optional accessory to some firearms—functionally prohibiting only one specific use that is rarely, if ever, used in self-defense. The Supreme Court's recent decisions in *Bruen* and

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purpose [of self-defense]." *Heller*, 554 U.S. at 628. Among other questions, we do not know how many purchases were made simply because the large-capacity magazine comes as standard equipment with the purchase of a firearm. *See, e.g.*, *Duncan V*, 19 F.4th at 1126-27 (Berzon, J., concurring) ("[A] device may become popular because of marketing decisions made by manufacturers that limit the available choices. Here, for example, large-capacity magazines come as a standard part on many models of firearms, so a consumer who wants to buy those models has no choice regarding whether the weapon will include a magazine that can fire more than ten rounds without reloading."). Moreover, there is no constitutional right to factory settings.

Rahimi have described at length the approach that we must apply when assessing the constitutionality of modern firearm regulations. We reject Plaintiffs' facile invitation to jettison that approach and hold that, any time an undefined number of people own an undefined number of any optional accessory to any weapon, no legislature may ban that accessory, no matter how rarely that accessory is used in armed self-defense. *See Hanson*, 120 F.4th at 233-34 (explaining why a simplistic ownership-statistics argument conflicts with *Bruen*); *Ocean State*, 95 F.4th at 50-51 (detailing at length many flaws in the same ownership-statistics argument); *Bevis*, 85 F.4th at 1190 (discussing a flaw in the argument); *DSSA*, 664 F. Supp. 3d at 592-93 (rejecting the same ownership-statistics argument); *see also Bianchi*, 111 F.4th at 459-61 (discussing similar flaws in the same ownership-statistics argument for assault weapons).

e. California's Law Fits the Nation's Tradition.

In sum, even assuming that Plaintiffs' proposed conduct of possessing large-capacity magazines implicates the plain text of the Second Amendment, California's law fits within the Nation's tradition of regulating weapons. Accordingly, Plaintiffs' Second Amendment challenge fails for this second, alternative reason.

REVERSED AND REMANDED with the instruction to enter judgment in favor of Defendant.

BERZON, Circuit Judge, with whom MURGUIA, Chief Judge, and HURWITZ, PAEZ, SR THOMAS, and WARDLAW, Circuit Judges, join, concurring:

I concur in full in the majority opinion. Here, I address Judge VanDyke's novel form of "dissent." Judge VanDyke's dissent improperly relies on factual material that is unquestionably outside of the record. *See* Majority Op. at 13-14 n.1. His source for these beyond-the record facts? A video that he recorded, in his own chambers, showing him handling several different handguns and explaining his understanding of their mechanics and operation.

I write separately to point out two fundamental problems with Judge VanDyke's reliance on his self-made video: First, the video is not part of his written dissent and it includes facts outside the record, so the panel is right to ignore it. Second, and more egregiously, Judge VanDyke has in essence appointed himself as an expert witness in this case, providing a factual presentation with the express aim of convincing the readers of his view of the facts without complying with any of the procedural safeguards that usually apply to experts and their testimony, while simultaneously serving on the panel deciding the case. While the facts Judge VanDyke asserts must be ignored, his wildly improper video presentation warrants additional comment, lest the genre proliferate.

I.

Judge VanDyke's video is, in his words, a "*visual* illustration" meant to "aid [his] colleagues and the parties." Dissent at 125. The "amateur" majority, he writes, bases its analysis on "a nonexistent reality."

Dissent at 128, 146. So Judge VanDyke (who, he suggests, does understand these matters) purports to "show[] that this reality doesn't exist" by explaining "how guns are made, sold, used, and commonly modified"—all facts, despite Judge VanDyke's protestations to the contrary. Dissent at 146; Lawrence VanDyke, Video, at 5:09-13 (March 20, 2025), https://www.ca9.uscourts.gov/media/23-55805/opinion.

Judge VanDyke asserts that the video, to which his opinion includes a link, is "part" of his dissent, "deliver[ed] ... orally—via video" rather than in writing. Dissent at 125. But the video is not "part" of his dissent simply because Judge VanDyke says it is. To the contrary, our circuit's general orders require that "the determination of each appeal ... shall be evidenced by a *written* disposition." 9th Cir. Gen. Order 4.5a (emphasis added).[1] Our rules do not allow a video to operate as a "disposition," a term that includes separate opinions.[2]

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[1] Rules and statutes similarly require that decisions by federal district judges be memorialized in writing. For example, the Federal Rules of Civil Procedure contemplate oral decisions when district judges rule on motions or make findings and conclusions in bench trials, but the rules require that any decisions not evidenced by a written opinion or memorandum "be stated on the record" in open court. *See* Fed. R. Civ. P. 52(a)(1), (a)(3). And by statute, all district court sessions must "be recorded verbatim" to enable transcription. 28 U.S.C. § 753(b).

[2] General Order 4.5a refers to the "disposition" and the "majority disposition" as shorthand for "written disposition," including when it refers to "[a]ny separate concurring or dissenting disposition." The General Order thus treats the term "disposition" as referring exclusively to written dispositions.

Of course, in bygone days, before computers, typewriters, cameras, or microphones, judges delivered decisions orally from the bench. Erwin C. Surrency, *Law Reports in the United States*, 25 Am. J. Legal Hist. 48, 55 (1981). But it's not the 1750s anymore. We have long since moved past an "unwritten" system "retained ... by memory and custom." 1 William Blackstone, *Commentaries* *63 (1765). States began requiring courts to reduce opinions to writing as early as 1784. *See, e.g.*, *Acts and Laws of the State of Connecticut in America* 267-68 (1784) (Act of May 2, 1784). In this circuit, written decisions have been part of our practice since our founding in 1891. *See, e.g.*, *United States v. Sutton*, 47 F. 129 (9th Cir. 1891).

So today, we ground our jurisprudence in written precedent. *See* Peter Tiersma, *The Textualization of Precedent*, 82 Notre Dame L. Rev. 1187 (2013). And we do so for good reason: Written opinions promote uniformity, predictability, accountability, and care. "[W]riting seems to have the advantage of inducing greater care," as the Scottish judge Henry Cockburn noted; "Men don't boggle at speaking nonsense which they would hesitate to put permanently down upon paper." 2 *Journal of Henry Cockburn* 154 (Edinburgh, Edmonston & Douglas 1874).

True, times have changed: New technologies might today make it easier to preserve and distribute oral opinions than in centuries past. But even in an age of online videos, written opinions are more clear, useful, and accessible, and there are many potential

challenges with video dispositions.[3] In any event, our entire legal system has long since evolved to one built around written precedent. And in this circuit, our rules require it. Perhaps our written-disposition rule should be reevaluated in light of new technology. But we have a clearly defined process for considering such changes; that process has yet to be invoked toward that end.

Judge VanDyke's video is not, then, technically speaking, "part" of his dissent. So what is it? It is not a video that is itself part of the record. *Cf., e.g.*, *Norse v. City of Santa Cruz*, 629 F.3d 966, 979 (9th Cir. 2010) (Kozinski, J., concurring). It is not a recording of an oral argument or some other court proceeding.[4] *Cf., e.g.*, *Cadena v. Customer Connexx LLC*, 107 F. 4th 902, 914-15 n.11 (9th Cir. 2024). And it is not a link to a video offered as a citation in support of the judicially noticeable fact that the video exists and is available on the internet. *Cf., e.g.*, *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 856 (2011) (Breyer, J., dissenting). Each of these reasons for linking to a video is well-established and permissible. But Judge VanDyke links to his video for a different purpose—to provide facts not in the

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[3] For example, where would videos be hosted for later access? How could their contents be searched and cross-referenced? Would courts and reporters be able to ensure that the recordings remain available indefinitely? Would pro se litigants and prisoners have access to the videos online? Would all the videos be transcribed? If so, how would transcripts capture non-verbal signals like tone and facial expressions, let alone visual demonstrations like Judge VanDyke's?

[4] Judge VanDyke's video contains a short excerpt from the oral argument in this case. I do not take issue with that portion of his recording.

record, by demonstration. The video itself is not part of the record, and the facts asserted therein are not subject to judicial notice.

"Save in unusual circumstances, we consider only the district court record on appeal." *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003); *see also* Fed. R. App. P. 10. There are a few narrow exceptions—for example, to correct inadvertent omissions, to take judicial notice when appropriate, or if new factual developments have rendered a case moot. *Lowry*, 329 F.3d at 1024. I would have thought the proposition obvious, but it apparently bears emphasis that a judge wanting to provide an unrequested "*visual* illustration" to help his "colleagues and the parties" understand the case, Dissent at 125, is not one of these established exceptions. Not even close.[5]

The majority opinion thus considers the video no differently than it would any other factual source that is not in the record and not subject to judicial notice or another of the narrow exceptions: it ignores it.

II.

But there is another, even more troublesome problem with the recording: Judge VanDyke himself appears in the recorded presentation making factual assertions about how guns work and providing physical demonstrations to support his assertions. By doing so, Judge VanDyke casts himself in the role of an expert witness, speaking to the type of "technical"

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[5] If an attorney (rather than a judge) submits and relies on material outside the record, we have held the conduct sanctionable. *See Lowry*, 329 F.3d at 1025-26.

and "specialized" issues that are reserved for witnesses properly "qualified as an expert." *See* Fed. R. Evid. 701, 702. He catalogues according to his own criteria various handgun components, describes their functions, and provides a physical demonstration about how they are attached to a firearm and replaced. He opines on the relative merits of different types of takedown levers, lighter versus heavier grips, and iron sights versus red dot optics. He repeatedly avers that certain features make "the gun more dangerous when it's misused, but also make[] the gun more effective for its intended purpose." Lawrence VanDyke, Video, at 11:11-11:31; 10:01-10:16; 13:07-13:21 (March 20, 2025), https://www.ca9.uscourts.gov/media/23-55805/opinion. And he speaks to his understanding as to whether certain components are factory standard or frequently used.

All these topics are commonly the province of expert testimony. *See, e.g.*, *United States v. Spinner*, 152 F.3d 950, 957 (D.C. Cir. 1998) (expert testimony about technical features of an AR-15 including its grip); *United States v. Meadows*, 91 F.3d 851, 853-54 (7th Cir. 1996) (expert testimony about the components and characteristics of a gun that was converted into a rifle); *Oregon Firearms Fed'n v. Kotek*, 682 F. Supp. 3d 874, 912, 922 (D. Or. 2023) (expert testimony about the mechanics of magazines and the relative merits of high-capacity magazines); *Nat'l Ass'n for Gun Rts. v. Lamont*, 685 F. Supp. 3d 63, 72-75 (D. Conn. 2023) (expert declaration about the mechanics of automatic and semiautomatic firearms); *United States v. Hasson*, No. 19-96, 2019 WL 4573424, at *2 (D. Md. Sept. 20, 2019) (expert testimony about the features of silencers and their interaction with

firearms); *Barnett v. Raoul*, No. 23-CV-00141, 2024 WL 4728375, at *36 (S.D. Ill. Nov. 8, 2024) (expert testimony about the merits of features like "the ability to fire semiautomatically, detachable magazines, pistol grips, forward-protruding grips, thumbhole stocks, adjustable stocks, flash suppressors, barrel shrouds, buffer tubes/braces, and threaded barrels" in facilitating self-defense).

Myriad rules govern the submission and presentation of expert testimony, all of which Judge VanDyke has bypassed by introducing his factual testimony on appeal and alongside his dissent. First, expert testimony must be found to "have a reliable basis in the knowledge and experience of [the expert's] discipline" and be "more than subjective belief or unsupported speculation." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590, 592 (1993). Should a party wish to challenge the reliability of an expert's conclusions, they may move to exclude the expert's testimony. District courts then have an obligation to make an explicit finding as to an expert's reliability before permitting an expert to testify. *United States v. Jawara*, 474 F.3d 565, 583 (9th Cir. 2007). This gatekeeping function is vital "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

Second, parties may contest an expert's admission or move to limit the scope of their testimony on the grounds that the expert is insufficiently qualified to

opine on specific topics. *See* Fed. R. Evid. 702 (requiring that an expert witness be "qualified ... by knowledge, skill, experience, training, or education"). Further, because expert testimony is subject to general evidentiary rules, litigants may also seek to exclude testimony on the basis that it is irrelevant, unduly prejudicial, or otherwise objectionable under the Federal Rules of Evidence. *See, e.g.*, Fed. R. Evid. 401, 403.

Third, various facets of expert testimony must be disclosed during discovery to ensure that the litigants are on notice of what evidence might be provided. These disclosures include the identity of expert witnesses, the subject of their testimony, and a summary of all of the facts or opinions they intend to provide. Fed. R. Civ. P. 26(a)(2). If the witness was specifically retained to provide testimony, they must also provide a written report disclosing, among other things, "a complete statement of all opinions the witness will express and the basis and reasons for them," "the facts or data considered by the witness in forming them," "any exhibits that will be used to summarize or support them," and "the witness's qualifications." Fed. R. Civ. P. 26(a)(2)(B).[6] Additionally, a litigant then has the right to "depose any person who has been identified as an expert whose opinions may be presented at trial." Fed. R. Civ. P. 26(b)(4)(A). These provisions ensure that litigants are aware of the expert evidence that might be

[6] There are additional rules governing the timeliness of such disclosures and requiring that they be updated with pertinent changes as the litigation progresses. Fed. R. Civ. P. 26(a)(2)(B), (D).

introduced, allowing them to marshal objections, responses, or opposing expert testimony.

Aside from these mechanisms of exclusion and notice, litigants have avenues for rebutting the contents of expert testimony. They may cross-examine experts at trial or during a deposition to challenge questionable aspects of their testimony, qualifications, or methodology. *See* Fed. R. Evid. 611(b) (scope of cross-examination); *id.* 705 (disclosure of expert witness's underlying facts or data on cross-examination). They may introduce facts that undercut the expert's credibility. *See* Fed. R. Evid. 607, 608. And they can proffer competing evidence, often in the form of an opposing expert witness. None of those avenues are available when the "expert testimony" appears for the first time in an appellate opinion.

The procedures governing testimony generally and expert testimony in particular are of paramount importance to our adversarial system. Basic fairness demands that parties have the opportunity to challenge the admissibility of expert testimony, cross-examine expert witnesses, and introduce countervailing evidence. Evidentiary and procedural rules allowing parties to robustly analyze and challenge expert witness testimony is critical to ensuring factfinders are able to assess the veracity and reliability of the technical evidence before them. Court evidentiary rules, including the rules governing expert testimony, have evolved over centuries to meet these purposes, adjusted over time and interpreted in judicial opinions as gaps in coverage appeared. *See, e.g.*, *Daubert*, 509 U.S. 579. Permitting anyone—including a judge—to interject their observations and

opinions on technical factual issues without abiding by these carefully developed rules for presentation of expert testimony defangs these procedural safeguards and severely disadvantages the litigants.

Additional rules constrain the presentation of demonstratives such as the firearms and related items that Judge VanDyke features in his recording. Demonstratives may be excluded if the court finds they are not relevant to the matter at hand. *See, e.g.*, *United States v. Ortiz-Martinez*, 1 F.3d 662, 669 (8th Cir. 1993); *United States v. Jones*, 222 F.3d 349, 351 (7th Cir. 2000). A sufficient foundation must be laid to verify that the demonstrative evidence is a fair and accurate representation of what the witness claims it to be. *See, e.g.*, *Keller v. United States*, 38 F.3d 16, 32 n.10 (1st Cir. 1994); *United States v. Myers*, 972 F.2d 1566, 1579 (11th Cir. 1992). Such demonstratives are excluded if the court finds that their use would risk causing undue prejudice, confusion, or delay. *See* Fed. R. Evid. 107, 403. Barring exclusion, opposing counsel may address any inaccuracies with the demonstrative through cross-examination. *See, e.g.*, *Roland v. Langlois*, 945 F.2d 956, 963 (7th Cir. 1991) (affirming use of a life-sized model where it "was admitted only on the express condition that the jury be alerted to the perceived inaccuracies"); *Krause v. Cnty. of Mohave*, 459 F. Supp. 3d 1258, 1272-73 (D. Ariz. 2020) (explaining that an illustrative animation's "purported errors or inaccuracy can be sufficiently addressed through jury instruction and cross-examination"). Such demonstratives are also often subject to disclosure requirements during discovery, to ensure the parties are aware of what evidence might be presented. *See* Fed. R. Civ. P. 26(a)(2)(B)(iii)

(requiring expert reports to include "any exhibits that will be used to summarize or support" the expert witness's opinions); *id.* 26(a)(3)(A)(iii) (requiring disclosure of "each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises").

In providing a physical illustration of how various handgun components function and how to replace them, Judge VanDyke presents demonstratives that have not been subject to the vetting procedures normally afforded such evidence. Like Judge VanDyke's procedurally infirm factually based descriptions, commentary, and opinions, the use of these demonstratives affronts party presentation principles and flouts the rules that govern the introduction of evidence.

III.

Judge VanDyke presents his factual assertions not only in the wrong court, but also with no regard to the well-established requirements governing expert testimony and demonstrative evidence. Moreover, his presentation is doubly concerning because, had he provided his expert testimony in the district court with all of the required safeguards, he almost certainly would have needed to recuse from adjudicating this matter on appeal. This recusal issue most frequently arises in the context of district court judges, who are flatly prohibited from serving as both arbiter and witness. *See* Fed. R. Evid. 605 ("The presiding judge may not testify as a witness at the trial."); *see also Quercia v. United States*, 289 U.S. 466, 470 (1933) (explaining that a presiding judge "may

analyze and dissect the evidence, but he may not either distort it or add to it"); *United States v. Berber-Tinoco*, 510 F.3d 1083, 1091 (9th Cir. 2007) ("[T]he judge may not actually testify in the proceeding or interject facts...."). Moreover, "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). A reasonable observer would be fair to question the impartiality of an appellate judge who served as an expert witness in the proceedings before the district court.

Here, Judge VanDyke attempts to have it both ways: providing a factual presentation with the express aim of convincing both the parties and the panel of the truth of his assertions, while also remaining a member of the panel adjudicating the merits of the case. That Judge VanDyke presents his factual commentary on appeal, as opposed to as an expert witness in the proper forum, exacerbates rather than cures the impropriety of the presentation. The form is no different than it would have been had Judge VanDyke sought to appear as an expert witness in district court, yet the procedural protections the litigants would have had in district court are totally absent.

Contrast Judge VanDyke's approach with that of the majority. The defendants raised the question whether high-capacity magazines may be considered an "accoutrement" rather than an "arm" before the district court. Expert opinions on that question were properly introduced before the district court, are part of the record on appeal, and are relied upon in the

majority opinion. For example, in analyzing the historical distinction between "arms" and "accoutrements," the majority draws from factual material presented by an expert on corpus linguistics. Majority Op. at 26. Likewise, the majority relies on the declaration of a firearms expert for the facts underlying its conclusion that high-capacity magazines are accoutrements rather than arms. Majority Op. at 28.

The plaintiffs also introduced some pertinent evidence on this issue. One of the plaintiffs' experts opined that magazines should not be considered accessories because many firearms cannot function as intended without a magazine during the district court proceedings. Another gave a similar opinion based on his understanding of magazine mechanics.

Instead of relying on the factual material introduced by the parties in the proper forum subject to the applicable procedural rules, Judge VanDyke presents his own testimony on the matter. He attempts to justify his eleventh-hour factual interjections by asserting a need to refute the "factual fantasy" underlying the majority's test. But, as I've noted, the majority's test relied on factual submissions on the accoutrement issue in the district court, record material that Judge VanDyke ignores. Had plaintiffs wished to proffer additional expert testimony, akin to that which Judge VanDyke presents to support their argument against classifying high-capacity magazines as accessories, they had ample opportunity to do so.

"In our adversarial system of adjudication, we follow the principle of party presentation." *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020).

"[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)). In acting as a self-appointed expert, Judge VanDyke oversteps his role as arbiter and robs the parties of their prerogative to develop the record as they see fit, as well as the many procedural protections to which they are entitled.

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Judge VanDyke might well be able to qualify as an expert on guns. But whatever specialized expertise we bring to the bench is irrelevant to our role as judges. Our job is not to provide the facts that support our conclusions but to apply the law to the facts as presented by the parties. Judge VanDyke's factual presentation flips this foundational principle on its head.

The majority is right to ignore the contents of Judge VanDyke's video presentation. These outside-the-record assertions of fact, made by someone not properly admitted as an expert or subject to any of the many procedural safeguards that govern expert and demonstrative testimony, have no bearing on the proper disposition of this appeal. And while Judge VanDyke accuses the majority of "blinding itself" to the facts he presented in his video, Dissent at 143, limiting review to the facts presented by the parties is precisely what appellate courts are required to do. *See* Fed. R. App. P. 10.

True, the prejudice to the parties here is arguably minimal because Judge VanDyke has prepared his video in support of a dissent. But if a dissent can rely

on a judge's recorded factual presentation, nothing prevents a majority opinion from doing the same thing. I therefore write separately in the hope that in the future my colleagues, whether in the majority or dissent, will do exactly and only that: write. And, although I am surprised that it is necessary to do so, I write to reemphasize that as judges, we must decide cases as they are presented to us by the parties, leaving advocacy to the attorneys and testimony to the witnesses, expert and otherwise.

R. NELSON, Circuit Judge, dissenting:

I agree with Judge Bumatay that the majority's decision to reverse the district court on the merits flouts *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022). But the majority didn't just butcher the Second Amendment and give a judicial middle finger to the Supreme Court. It also spurned statutory procedure for en banc proceedings. As explained in my dissent from the order filed concurrently with this opinion, this en banc court lacks statutory jurisdiction to decide this new appeal, years after it remanded the prior appeal to the district court. *See* R. Nelson Dissent to Order at 69-76; *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 627 (1974) (per curiam) (quoting 28 U.S.C. § 46(c)).

Every other circuit applies § 46(c) to require a new en banc vote in a new appeal. As Judge Ikuta points out, the majority's view "is not the best interpretation of this statute, in light of the history and purpose of an en banc consideration." Ikuta Special Concurrence to Order at 56-57. Nor is the majority's retention of this case business as usual. *See* R. Nelson Dissent to Order at 59-60, 81-89. Never before has a court allowed five senior judges to control an en banc decision on behalf of the court's active judges. We shouldn't have been the first, let alone in such an important case. As Judge Bumatay notes, the majority's decision was a misuse even of our own rules. *See* Bumatay Dissent to Order at 102. The result is a precedential Second Amendment opinion that largely reflects the views of five senior judges, not the active judges statutorily entrusted with "determin[ing] the major doctrinal trends of the future" for our court. *Moody*, 417 U.S. at

626 (quoting *United States v. Am.-Foreign S. S. Corp.*, 363 U.S. 685, 690 (1960)). That does not bode well for public confidence in the courts—and our court specifically.

BUMATAY, Circuit Judge, with whom IKUTA, R. NELSON, and VANDYKE, Circuit Judges, join, dissenting:

California is at the forefront of States seeking to limit their citizens' firearm rights. The State says its firearms laws are the strictest in the Nation.[1] From an assault-weapons ban to red-flag laws, from waiting periods to age restrictions and universal background checks, California's gun-control measures significantly reduce its citizens' access to firearms. California believes these restrictions cut firearms-related violence.[2] As a sovereign State, California may of course do what it thinks proper to protect its citizens. But what California may not do is encroach on its citizens' constitutional rights. We cannot ignore that California's actions continually whittle away the Second Amendment guarantee. While California may pass laws to address gun violence, California's choices must give way to the Constitution.

And this is true no matter how well-meaning the gun control measures. It is easy to sympathize with the litany of tragedies that California cites to justify its regulatory actions. We understand California's concern for needless gun violence. We recognize California's desire to curtail mass shootings. And we appreciate that many will vehemently disagree on policy grounds with enforcing the constitutional limits on California's gun-control measures.

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[1] Official Website of the State of California, *FACT SHEET: California's strong gun safety laws continue to save lives*, (Jun. 7, 2024), available at: https://perma.cc/W75M-U4GX.

[2] *Id.*

But, as federal judges, our duty is to uphold the Constitution—no matter how unpopular. After all, the right to keep and bear arms is a "fundamental right necessary to our system of ordered liberty." *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010) (plurality opinion). And through incorporation under the Fourteenth Amendment, the Constitution authorizes only state regulations "consistent with the Second Amendment's text and historical understanding." *N.Y. State Rifle & Pistol Assoc. v. Bruen*, 597 U.S. 1, 26 (2022). So while California seeks to limit its citizens' access to firearms—even with the best of intentions—it is our duty to ensure that the Second Amendment endures and that this ancient right of the people is given the fullest breadth. Otherwise, we abdicate our role to the whims of the political majority of the State.

At issue is California's ban on the possession of firearm magazines capable of accepting more than ten rounds of ammunition. *See* Cal. Penal Code §§ 32310, 16740. California prohibits the sale and purchase of these magazines, *id.* § 32310(a); it punishes the possession of the magazines with a fine and up to one year of imprisonment, *id.* § 32310(c); and it requires those who possessed the magazines before the ban to remove, sell, or surrender them, *id.* § 32310(d).

California calls these magazines "large-capacity magazines." That term suggests that their capacities are greater than the usual magazine. But, in truth, magazines holding more than ten rounds are the *most common* magazines in the country. They come standard with the most popular firearms sold nationwide. As the district court observed, "in the realm of firearms," these magazines "are possibly the

most commonly owned thing in America." *Duncan v. Bonta*, 695 F. Supp. 3d 1206, 1214 (S.D. Cal. 2023) ("*Duncan VIII*"). By the most conservative estimates, more than a hundred million "large-capacity" magazines exist in the country today. To put it into perspective, if California's law applied nationwide, then *half* of all magazines in the United States would be taken from nearly 40 million Americans. And so these magazines should be more accurately termed "standard-capacity magazines." Simply put, the ban deprives Californians of the most popular firearm magazines for self-defense and other lawful purposes. That's what's at stake for California's citizens.

Whatever the moniker, California's absolute ban on magazines with more than ten rounds of ammunition is both "unusual" and an "outlier." *See Bruen*, 597 U.S. at 79 (Kavanaugh, J., concurring). They are lawfully possessed in at least 38 States[3] and

[3] Only twelve States and the District of Columbia ban the outright possession of magazines with more than a certain number of rounds. *See* California (Cal. Penal Code § 32310); Colorado (Colo. Rev. Stat. §§ 18-12-301, 18-12-302) (limits magazine capacity to 15); Connecticut (Conn. Gen. Stat. § 53-202w); Delaware (Del. Code tit. 11, §§ 1468, 1469) (limits magazine capacity to 17); the District of Columbia (D.C. Code § 7-2506.01); Hawaii (Haw. Rev. Stat. § 134-8) (handguns only); Illinois (720 Ill. Comp. Stat. 5/24-1.10) (10 rounds for "long guns" and 15 rounds for handguns); Massachusetts (Mass. Gen. Laws Ch. 140, §§ 121, 131M); New Jersey (N.J. Stat. §§ 2C:39-1, 2C:39-3); New York (N.Y. Penal Law § 265.00, 265.02); Oregon (Or. Rev. Stat. § 166.355); Rhode Island (11 R.I. Gen. Laws §§ 11-47.1-2, 11-47.1-3); and Vermont (Vt. Stat. tit. 13, § 4021) (10 rounds for "long guns" and 15 rounds for handguns). Two other States forbid the manufacture and sale of these magazines. *See* Maryland (Md. Code, Crim. Law § 4-305); and Washington (Wash. Rev. Code §§ 9.41.010, 9.41.370).

under Federal law. And California's law is novel. Aside from some Prohibition-era laws,[4] before 1990, only the District of Columbia restricted law-abiding citizens' possession of feeding devices of any size. California's possession ban just went into effect in 2017, and three States enacted their laws in the last three years.[5]

Nothing in the historical understanding of the Second Amendment warrants California's magazine ban. Even with some latitude in searching for historical analogues, none exist. California points to no historical laws banning the possession of firearms commonly used for self-defense. Other traditional laws—like laws against carrying certain weapons in public, laws against possessing particular weapons, gunpowder storage laws, and laws against setting trap guns—don't remotely resemble the "how" and "why" of California's magazine bans.

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[4] Michigan, Rhode Island, and Minnesota enacted laws limiting magazine capacity in the 1920s and 1930s, but those laws were repealed or amended and do not serve as a ban on magazine capacity today. *See* Act of June 2, 1927, No. 373, § 3, 1927 Mich. Pub. Acts 887, 888 (repealed 1959); Act of Apr. 22, 1927, ch. 1052, §§ 1, 4, 1927 R.I. Acts & Resolves 256, 256-57 (amended 1959); 1933 Minn. Laws ch. 190 (amended 1963). Only the District of Columbia's 1932 restriction of magazine capacity remains operative. *See* Act of July 8, 1932, Pub. L. No. 72-275, §§ 1, 8, 47 Stat. 650, 650, 652. While it appears Virginia may have defined "machine gun" to encompass guns able to fire sixteen bullets without reloading, *see* ch. 96, §§ 1-7, 1934 Va. Acts 137-139, Virginia has since amended the definition and the law no longer includes this language. Va. Code § 18.2-288.

[5] Oregon (2022), Rhode Island (2022), and Illinois (2023). *See* note 3.

Thus, neither the text of the Second Amendment nor our country's historical tradition of firearm regulation supports California's magazine ban. Still, the majority once again upholds California's regulation. In doing so, the majority defies the Supreme Court.

First, the majority takes the extreme position that the Second Amendment doesn't even apply to California's magazine ban. That's because the majority rules that magazines holding more than ten rounds are not even "Arms" under the Second Amendment. So California's law receives no constitutional scrutiny *at all*. And it bases this ruling on the flimsiest ground. Somehow, the majority believes that a "large-capacity magazine is no different than" a "belt[] that hold[s] bullets." Maj. Op. 28-29. Such a belief displays ignorance of both firearms operations and constitutional law. Indeed, the majority bases its "Arms" analysis, in part, on a portion of a district court opinion unanimously reversed by the D.C. Circuit. *See id.* at 23 (citing *Hanson v. District of Columbia*, 671 F. Supp. 3d 1, 14 (D.D.C. 2023), *rev'd in part*, 120 F.4th 223, 232 (D.C. Cir. 2024)). So not surprisingly, no other circuit court has gone as far as the Ninth Circuit has in declaring that some magazines fall outside the scope of the Second Amendment.

Second, the majority makes up a new two-test *Bruen* framework—the so-called "more nuanced approach" and the "straightforward," unnuanced approach. *Id.* at 37-41. While giving little explanation for its invention, under the "more nuanced approach," the majority claims that there is no need to look to

historical analogues whenever we are dealing with technological or societal change because governments are simply entitled to "more flexib[ility]" in limiting the Second Amendment right. *Id.* at 37. And under its "straightforward" *Bruen* test, the majority interest-balances its way into concluding that California's ban conforms with historical analogues. It draws the broadest generalities from California's claimed historical analogues—fashioning a dubious tradition against "especially dangerous" weapons. This supposed tradition is no different from just requiring the State to provide a public-safety rationale. But this ignores the admonition that "court[s] must be careful not to read a principle at such a high level of generality that it waters down the right." *United States v. Rahimi*, 602 U.S. 680, 740 (2024) (Barrett, J., concurring). Ignoring this limitation, the majority then finds a supposed match between that purported tradition and California's ban by improperly minimizing its burden on self-defense. Under either of the majority's created tests, we've returned to interest balancing by another name. So yet again, the majority continues to reject the Supreme Court's Second Amendment jurisprudence.

We have repeatedly sounded the alarm over the affront to the Second Amendment here. *See Duncan v. Bonta*, 19 F.4th 1087, 1140 (9th Cir. 2021) (en banc) ("*Duncan V*") (Bumatay, J., dissenting); *Duncan v. Bonta*, 83 F.4th 803, 808 (9th Cir. 2023) (en banc) ("*Duncan IX*") (Bumatay, J., dissenting).[6] Over the course of this litigation, the majority has taken at least

[6] This case has been up and down the federal courts so often that this is a *fourth* decision by our en banc court in this saga.

three positions on how California's novel ban should be upheld as constitutional. So this is now the *third* time we've had to warn against the majority's violation of Supreme Court instructions. We sound the alarm yet again—but this time, it's more dire given the extreme nature of the majority's ruling. Its implications are vast and lead to a dangerous expansion of government power. In contrast, if our analysis here sounds familiar, it is. Our position has remained the same from the start of this litigation. Adhering to the Second Amendment's text and historical understanding, California's magazine ban is unconstitutional.

Because the majority's ruling again stands in opposition to the Second Amendment's text, history, and tradition, we respectfully dissent.

I.

THE SECOND AMENDMENT FRAMEWORK

The Second Amendment commands that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. This right flows from the inherent right of self-defense—as Blackstone said, it was central to "the natural right" to "self-preservation and defence." *District of Columbia v. Heller*, 554 U.S. 570, 593-94 (2008) (quoting 1 William Blackstone, Commentaries on the Laws of England 139-40 (1765)).

Though the Second Amendment guarantees a preexisting right, it took until *Heller* for the Supreme Court to recognize its rightful place as a fundamental protection of liberty. In *Heller*, the Supreme Court examined the Amendment's "text and history" and

concluded that it "conferred an individual right to keep and bear arms." *Id.* at 595. Although "not unlimited," at its core, the Second Amendment protects the right of "law-abiding citizens" to keep and carry arms for the "lawful purpose of self-defense." *Id.* at 595, 630, 635. This guarantee is at its strongest when "arms" are used "in defense of hearth and home." *Id.* at 635. And because the right is so "deeply rooted in this Nation's history and tradition," it is "fully applicable to the States" under the Fourteenth Amendment. *McDonald*, 561 U.S. at 750, 768 (simplified).

Repeatedly, the Court has rejected "freestanding interest-balancing" to resolve Second Amendment questions. *Heller*, 554 U.S. at 634 (simplified); *see also McDonald*, 561 U.S. at 785 (rejecting "judicial interest balancing"). Despite the Court's clear teachings, in *Heller*'s wake, many courts—including our own—created two-step, interest-balancing tests that inevitably stripped away the Second Amendment right. *See, e.g.*, *Young v. Hawaii*, 992 F.3d 765, 783-84 (9th Cir. 2021) (summarizing our two-step process and collecting cases), *cert. granted, judgment vacated*, 142 S. Ct. 2895 (2022). As we've said, this two-step approach proved to be mere "window dressing for judicial policymaking." *Duncan V*, 19 F.4th at 1148 (Bumatay, J., dissenting). At least in our court, *no* state regulation had ever been ruled unconstitutional before *Bruen*. *See id.* at 1165 (VanDyke, J., dissenting) (observing the Second Amendment's 0-for-50 record in the Ninth Circuit).

Then came *Bruen*. Having had enough of the balancing, *Bruen* established a new framework—one

consistent with the text of the Constitution. *Bruen* expressly declared that the "Constitution demands" that we jettison the use of "interest balancing." 597 U.S. at 26. Instead, it returned us to the "Second Amendment's text and historical understanding." *Id.* First, we look to the Second Amendment's textual elements: Does "the Second Amendment's plain text cover[] an individual's conduct[?]" *Id.* at 17. If so, "the Constitution presumptively protects that conduct." *Id.* Second, to rebut that presumption, the government bears the burden of "justify[ing] its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 24. Put simply, the government "must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 19. If the government fails to do this, the regulation does not pass "constitutional muster." *Id.* at 30.

How do we know if a regulation fits in the historical tradition? Like judges do in every case, we use analogical reasoning. But rather than ask how other federal judges have conducted the interest-balancing calculus, we apply "the balance struck by the founding generation to modern circumstances." *Id.* at 29 n.7. That means the government must "identify a well-established and representative historical analogue," and our task is to decide whether the regulation and historical analogues are "relevantly similar." *Id.* at 29, 30 (simplified). Of course, this "analogical reasoning ... is neither a regulatory straightjacket nor a regulatory blank check"—some regulations will stand, some will fall. *Id.* at 30.

But the key is finding a *relevantly similar* historical analogue. Analogues need not be "twin[s]" or "dead ringer[s]." *Id.* Instead, *Bruen* tells us that our "central" consideration is whether the modern regulation "impose[s] a comparable burden on the right of armed self-defense" and whether "that burden is comparably justified." *Id.* at 29. In other words, we must compare the "how" and the "why" of the government's regulation with the reported historical analogue. *Id.* In this way, the only means-ends scrutiny involved is the "interest balancing by the people" who ratified the Second Amendment. *Heller*, 554 U.S. at 635.

In conducting this inquiry, we shouldn't be overly rigid—we don't have to look for "a law trapped in amber." *Rahimi*, 602 U.S. at 691. Instead, we look to "whether the challenged regulation is consistent with the *principles* that underpin our regulatory tradition." *Id.* at 692 (emphasis added). So what's required is that the modern regulation "works in the same way and does so for the same reasons" as historical regulations. *Id.* at 711 (Gorsuch, J., concurring). Doing this faithfully may reveal guiding principles defining the scope of the right. At the same time, we must also "be careful not to read a principle at such a high level of generality that it waters down the right." *Id.* at 740 (Barrett, J., concurring). After all, extracting principles too far removed from the historical record just returns us to the interest-balancing regime the Court has authoritatively repudiated. And "[h]istory, not policy, is the proper guide." *Id.* at 717 (Kavanaugh, J., concurring).

II.

CALIFORNIA'S MAGAZINE BAN IS UNCONSTITUTIONAL

With this framework in mind, we turn to California's magazine ban.

First, we examine whether the Second Amendment's "plain text" covers the conduct that California regulates. *Bruen*, 597 U.S. at 17. It does. And because California's magazine ban fits within the Amendment's textual elements, it's "presumptively" unconstitutional. *Id.* at 24.

Second, we evaluate whether California has overcome the presumption of unconstitutionality. It must do so by justifying its law under our "historical tradition of firearms regulation[s]." *Id.* It hasn't. Thus, California's magazine ban is unconstitutional.

A. California's Magazine Ban is Presumptively Unconstitutional

California's ban prohibits people from owning, possessing, purchasing, or selling any magazine holding more than ten rounds, and forces people to surrender magazines already in circulation to the government. *See* Cal. Penal Code § 32310. As a result, California's ban infringes on the "right of the people" to "keep" and "bear" magazines. *Bruen*, 597 U.S. at 32 (explaining that "bear" "naturally encompasses" "carrying handguns publicly for self-defense" and, at a minimum, "keep" means the possession of "firearms in the[] home, at the ready for self-defense"). Thus, California's magazine ban easily fits into the Second Amendment's "textual elements," which makes it presumptively unconstitutional. Rather than accept

this obvious conclusion, the majority contends that these magazines are not even "Arms" under the Second Amendment. That's wrong.

1. Magazines Are "Arms"

Magazines—whether they hold ten rounds, more than ten rounds, or fewer than ten rounds—are unquestionably "Arms" under the Second Amendment. As a textual matter, "Arms" include any "[w]eapons of offence, or armour of defence" or "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another," that is "carr[ied] ... for the purpose of offensive or defensive action." *Heller*, 554 U.S. at 581, 584 (simplified). Arms, then, "extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.* at 582. At a minimum, the meaning of Arms "covers modern instruments that facilitate armed self-defense." *Bruen*, 597 U.S. at 28.

California's ban applies to instruments that are necessary to the operation of most modern firearms for self-defense. A magazine is a "container or (detachable) receptacle *in* a repeating rifle, machine-gun, etc., containing a supply of cartridges which are fed automatically to the breech." Oxford English Dictionary Online (2024) (emphasis added). As that definition makes clear, the magazine is a *part* of the firearm. It stores and continuously feeds cartridges into the firearm's chamber. Firearms with detachable magazines—the most commonly owned firearms—simply cannot fire as designed without a magazine. Indeed, some firearms won't fire a single shot without an attached magazine. And so, when a person uses a

firearm in self-defense, the person must operate both the firearm and magazine *together*. Without the magazine, the firearm would be practically useless for self-defense. Because magazines are a necessary component of using firearms in self-defense, they are integral to a bearable "instrument that facilitate[s] armed self-defense." *Bruen*, 597 U.S. at 28.

By its nature, the Second Amendment's protection of "Arms" must extend to their functional components. If magazines and other components weren't included, the Second Amendment would be a shallow right—easily infringed by basic indirect regulation. But our fundamental rights are more robust than that. Simply put, the government can't accomplish through "indirect[] infringement" what would otherwise be a "direct interference with fundamental rights." *See Healy v. James*, 408 U.S. 169, 183 (1972); *see also Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 190 (2024) ("a government official cannot do indirectly what she is barred from doing directly"). Our Constitution thus "implicitly protect[s] ... closely related acts necessary to the exercise" of enumerated rights. *Luis v. United States*, 578 U.S. 5, 26 (2016) (Thomas, J., concurring). After all, "[t]here comes a point ... at which the regulation of action intimately and unavoidably connected with [a right] is a regulation of [the right] itself." *Hill v. Colorado*, 530 U.S. 703, 745 (2000) (Scalia, J., dissenting).

That's why the Second Amendment protects "necessary concomitant[s]" to the right to bear arms. *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 590 U.S. 336, 364 (2020) (Alito, J., dissenting). So the Second Amendment's scope includes corollaries

necessary to firearms' use for self-defense, like the right to learn how to "keep [firearms] ready for their efficient use," *Heller*, 554 U.S. at 707 (Breyer, J., dissenting) (simplified); the right to "obtain bullets necessary to use" firearms, *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014); and the "right to possess the magazines necessary to render ... firearms operable," *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015).

And once properly understood as "Arms," magazines of all stripes, including those holding more than ten rounds, are protected. After all, the government can't limit the people to government-preferred types of magazines any more than it can limit the people to government-preferred types of firearms. *See Heller*, 554 U.S. at 629 (holding that the government can't forbid handguns because long guns are available).

The majority sees things differently. Although the majority begrudgingly concedes that magazines are generally protectable "Arms" and that "large-capacity" magazines "enhance[] ... a person's ability ... to defend" himself, Maj. Op. 29, it nonetheless excludes the "large-capacity" magazine from the protection of the Second Amendment. And it does so using questionable reasoning.

Let's try to explain the majority's analysis. The majority first draws a constitutional distinction between "Arms" and "accoutrements." According to the majority, "Arms" and their necessary components are protected by the Second Amendment, but accoutrements or firearm accessories are not. *Id.* at 26. It then reasons that a magazine by itself isn't an

"Arm[]" protected by the Second Amendment. That's because magazines are "harmless" when not attached to an accompanying firearm and so they can't "reasonably" be described as a "weapon[] of offence, or armour of defence." *Id.* (quoting *Heller*, 554 U.S. at 581). Nor is a "large-capacity" magazine a protected component of a firearm, says the majority, because no firearm "requires" a magazine holding more than ten rounds to "function normally." *Id.* at 28. Stringing this altogether, the majority claims "large-capacity" magazines are not "Arms" under the Second Amendment. The majority's analysis is flawed for at least three reasons.

First, a magazine is simply not an accoutrement—it's a necessary firearm component. No antebellum dictionary describes "accoutrement" to include firearm *components*. Instead, they define "accoutrement" as:

- "Attire, dress, garb, furniture." Nathan Bailey, An Universal Etymological English Dictionary 21 (London, T. Osborne 1763).
- "Dress, equipage, furniture relating to the person; trappings, ornaments." Samuel Johnson, A Dictionary of the English Language 5 (London, W. Strahan 1773).
- "[D]ress, habiliments, particularly after a warlike manner." Thomas Dyche, A New General English Dictionary 24 (London, C. Bathurst 1777).
- "In a military sense, signify habits, equipage, or furniture, of a soldier, such as belts, pouches, cartridge-boxes, saddles, bridles, &c."

William Duane, A Military Dictionary 2-3 (Philadelphia, W. Duane 1810).[7]

- "[I]n a military sense, signify habits, equipage, or furniture of a soldier, such as buffs, belts, pouches, cartridge boxes, &c." Charles James, *An* Universal Military Dictionary 3 (4th ed. 1816).
- "Dress; equipage; trappings; ornaments." Samuel Johnson & John Walker, Johnson & Walker's English Dictionaries 63 (Boston, C. Ewer 1828).
- "Dress; equipage; furniture for the body; appropriately, military dress and arms; equipage for military service." Noah Webster, American Dictionary of the English Language xv (New York, S. Converse 1828).
- "Equipage; trappings; ornaments." Joseph Worcester, Primary Dictionary of the English Language 13 (Boston, Swan, Brewer, and Tileston 1861).

No modern magazine would fit within the definition of "accoutrements." And the size of the magazine wouldn't matter either. As a necessary component of the functioning of a firearm, it's not part of the "habits, equipage, or furniture, of a soldier." Duane, *A Military Dictionary* 2-3. Under these definitions, magazines, including those holding more than ten rounds, are not "accoutrements." Instead, they are protected

[7] In the military context, equipage "is all kinds of furniture made use of by the army," such as "tents, kitchen furniture, saddle horses, baggage wagons, bat horses, &c." *See* Duane, A Military Dictionary 139.

components of "Arms," like triggers and barrels. Ignoring these facts, the majority merely asserts magazines are no different than "cartridge boxes and belts that hold bullets." Maj. Op. 28-29.

Second, the majority's faux-Solomonic splitting of magazines based on the number of rounds they hold makes no sense. The majority concedes that magazines holding ten or fewer rounds are perfectly legal, "integral" components of "Arms"—entitled to the Second Amendment's fullest protection. *Id.* at 28; *see also id.* at 27 ("[T]he Second Amendment's text necessarily encompasses the corollary right to possess a magazine ... just as it protects the right to possess ammunition and triggers."). And common sense dictates that just because a magazine holds more than ten rounds doesn't transform it into an accoutrement. Yet the majority seems to possess magical abilities. *See id.* at 27. As soon as you add one more round—*poof*—the magazine is no longer "integral" and it disappears from the Second Amendment's ambit. Call this the "magic bullet" theory of the Ninth Circuit.

So the majority's "Arms" versus "accoutrements" distinction proves too much. Either a magazine is an "accoutrement," which States may ban completely under the majority's theory. Or it's an "Arm[]" which affords it Second Amendment protection. The majority can't seem to make up its mind on where magazines fit. The majority won't—and can't—go so far to say that magazines may be prohibited outright. But in the next breath it says *some* magazines aren't protected at all. This "accoutrement" distinction is thus baffling and unhelpful. In the end, even the majority abandons the distinction as it concedes that some

"accessories ... are necessary for the ordinary operation of a ... weapon" and fall within the Second Amendment's protection. *Id.* at 27.

Third, the majority misunderstands the Second Amendment inquiry. According to the majority, "[t]he proper inquiry ... is whether the component or accessory is necessary to the ordinary operation of the weapon, not whether, when one voluntarily chooses to use an optional accessory, the accessory is attached to the weapon." *Id.* at 29. But that's wrong. The "relevant test" under the Second Amendment isn't what's strictly "necessary" for self-defense. Rather, the Second Amendment inquiry centers on what the people choose to "facilitate armed self-defense." *Bruen*, 597 U.S. at 28. As we've said before, "[l]awful purpose, not *necessity*, is the test." *Duncan IX*, 83 F.4th at 808 (Bumatay, J., dissenting).

Indeed, the Supreme Court has already rejected the majority's strictly-necessary-for-self-defense theory of the Second Amendment. In *Heller*, the government argued that its handgun ban was permissible because it allowed citizens to use long guns for self-defense. 554 U.S. at 629. So in the government's view, handguns weren't strictly necessary because citizens could defend themselves with other weapons. The Court forcefully rejected that argument,

> It is no answer to say ... that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed. It is enough to note, as we have observed, that the American people have considered the handgun to be the

> quintessential self-defense weapon.... Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.

Id. Thus, the Second Amendment grants citizens the *choice* of commonly owned arms to protect themselves. The government doesn't get to decide for the people.

And we would never be so parsimonious when it comes to other constitutional rights. Imagine granting only what's *strictly necessary* to enjoying the free-speech or free-exercise right. No court would tolerate that. That's like saying that, as long as the government permits speech through print or the airwaves, it may ban speech on social media platforms because they're mere "optional accessories" for spreading information. *See Meyer v. Grant*, 486 U.S. 414, 424 (1988) ("That [people] remain free to employ other means to disseminate their ideas does not take [restrictions on] their speech ... outside the bounds of First Amendment protection."). It's also like saying that the government can ban religious worship at home because it's not strictly "necessary" when churches and synagogues are available. *See Tandon v. Newsom*, 593 U.S. 61 (2021). The examples could go on and on. But it bears repeating—the Second Amendment is no "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Bruen*, 597 U.S. at 70 (simplified).

Thus, the majority's attempt to carve out magazines holding more than ten rounds from the Second Amendment's protection of "Arms" is wrong

both as a matter of firearms operations and constitutional law.

2. Common-Use Question

For its part, California argues that Plaintiffs here failed to satisfy their burden of proving that magazines holding more than ten rounds are "in common use" for self-defense, which it argues is part of *Bruen*'s step-one textual analysis. Plaintiffs counter that the "common use" inquiry only comes into play under *Bruen* step two and thus it's California's burden to prove. Concededly, "*Bruen* is somewhat ambiguous on this point." *Bianchi v. Brown*, 111 F.4th 438, 501 (4th Cir. 2024) (Richardson, J., dissenting). It's mentioned in both the historical and textual steps of the analysis. *See Bruen*, 597 U.S. at 32, 46.

This question has divided panels of our court. *Compare United States v. Alaniz*, 69 F.4th 1124, 1128 (9th Cir. 2023) (step one) *with Teter v. Lopez*, 76 F.4th 938, 949-50 (9th Cir. 2023), *vacated and reh'g en banc granted*, 93 F.4th 1150 (9th Cir. 2024) (step two). Indeed, during the preliminary injunction stage, before the parties briefed this question, we assumed that the "in common use" inquiry was part of the Second Amendment's "textual elements." *Duncan IX*, 83 F.4th at 810 (Bumatay, J., dissenting). Besides, the question of the common usage of these magazines is undebatable—so, for this case, it didn't matter which side carried the burden of proof.

Even so, after further briefing on the matter, we agree with Plaintiffs "that the 'common use' inquiry best fits at *Bruen*'s second step." *Bianchi*, 111 F.4th at 502 (Richardson, J., dissenting). We think this for three reasons.

First, *Bruen* explained that the first step—whether the Second Amendment presumptively protects conduct—comes from determining whether the "plain text" of the Second Amendment covers the conduct at issue. 597 U.S. at 17. And, as a textual matter, nowhere in the text of the Second Amendment does "in common use" appear. *See Bevis v. City of Naperville*, 85 F.4th 1175, 1209 (7th Cir. 2023) (Brennan, J., dissenting) (The Second Amendment should be "read as 'Arms'—not 'Arms in common use at the time.'"). Nor is common usage an inherent part of the definition of "Arm," which looks only at whether it's a bearable "[w]eapon[] of offence, or armour of defence." *Heller*, 554 U.S. at 581. Conducting the common-use inquiry at the first step "would be at odds with the fact that the common-use test is not about the semantic meaning of the Second Amendment's plain text." J. Joel Alicea, *Bruen Was Right*, 174 U. Pa. L. Rev. (forthcoming 2025) (manuscript at 12).[8]

Second, under *Bruen*'s second step, the Second Amendment permits only firearm regulations "consistent with this Nation's historical tradition." 597 U.S. at 17. And whether a firearm is "dangerous and unusual" or "in common use" is borne from the "historical understanding of the Amendment." *Id*. at 21. *Heller* itself directly tied the common-use inquiry to "the historical tradition of prohibiting the carrying of dangerous and unusual weapons." 554 U.S. at 627 (simplified). Indeed, the "in common use" phrase originates from *United States v. Miller*, 307 U.S. 175, 179 (1939), in which the Court described the types of

[8] Available at https://perma.cc/KV22-25HU.

weapons colonial citizens would bring to militia service.

Third, as a matter of constitutional law, it makes sense that California carries the burden of disproving "common use." As the Court has repeatedly said, the Second Amendment is a fundamental individual right. Once a plaintiff makes "a prima facie showing of arguable [fundamental-right] infringement," like in the First Amendment context, the burden shifts to the government to justify the regulation. *See Brock v. Loc. 375, Plumbers Intern. Union of Am., AFL-CIO*, 860 F.2d 346, 349-50 (9th Cir. 1988) (simplified). In the First Amendment context, the government's burden is also "extraordinarily heavy." *ACLU of Nev. v. City of Las Vegas*, 466 F.3d 784, 791 (9th Cir. 2006). So too here. Once a prima facie showing of a Second Amendment infringement occurs (by showing the government regulates conduct within the Amendment's "textual elements"), everything else falls on the government. Since common usage of a firearm isn't necessary to prove a prima facie Second Amendment infringement, it's the government's burden to carry at the second step.

We turn there now.

B. California Fails to Overcome the Presumption of Unconstitutionality

Because the plain text of the Second Amendment protects the possession of magazines capable of feeding more than ten rounds, California's ban is presumptively unconstitutional. To rebut this presumption, California must "justify its regulation" by proving that its ban fits within our "historical tradition of firearm regulation." *Rahimi*, 602 U.S. at

691 (quoting *Bruen*, 597 U.S. at 17, 24). California doesn't meet its burden.

California supports its magazine ban based on five broad categories of historical analogues: (1) the prohibition of "dangerous and unusual" weapons; (2) laws regulating the carry of certain weapons; (3) prohibitions on possessing crossbows, slungshots, and automatic firearms; (4) bans on the setting of trap guns; and (5) regulations on the storage of gunpowder. But given that California strictly bans the ownership, possession, and use of magazines in common use today, these traditions are not "relevantly similar" to justify California's magazine ban.

1. Prohibition of "Dangerous and Unusual" Weapons

Start with prohibitions on "dangerous and unusual" weapons. From *Miller* to *Heller* to *Bruen*, the Supreme Court has recognized that the "Second Amendment protects only the carrying of weapons that are those 'in common use at the time,' as opposed to those that 'are highly unusual in society at large.'" *Bruen*, 597 U.S. at 47 (simplified). As the Court has explained, this understanding is "fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Heller*, 554 U.S. at 627. Thus, the Court has suggested that "dangerous and unusual" weapons fall outside the Second Amendment's protection. So if California can prove that these magazines are "highly unusual" today, then that would be enough to satisfy its burden.

But the magazines California bans are the furthest thing from highly unusual in modern America. In fact, firearms with magazines holding

more than ten rounds are the overwhelming choice of Americans for self-defense and other lawful purposes. While estimates vary, easily more than 100 million of these magazines exist in the country. According to one estimate, these magazines account for *half* of all American magazines—that's 115 million out of 230 million magazines in circulation today. *See Duncan VIII*, 695 F. Supp. 3d at 1217. Another estimate suggests that these magazines are even more prevalent—climbing to a staggering 542 million rifle and handgun magazines in the hands of "millions of Americans across the country." *Id.* at 1216-17. Indeed, Plaintiffs assert, and California doesn't contradict, that nearly 40 million Americans own or have owned magazines with capacity for more than ten rounds—that's more than 10% of the Nation's total population and about half of all American gun owners. *See* William English, Ph.D., 2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned 22-23 (Sept. 28, 2022). Given this widespread ownership, they are *necessarily* used for lawful purposes.

And this common usage is nothing new. As we've said before, a "clear picture emerges [from our history] that firearms with large-capacity capabilities were widely possessed by law-abiding citizens by the time of the Second Amendment's incorporation." *Duncan V*, 19 F.4th at 1155 (Bumatay, J., dissenting). And "large-capacity" magazines had become "common" in this country by *at least* "the late nineteenth century or early twentieth century." *Id.* at 1130 (Berzon, J., concurring). In contrast, regulation of these magazines is unusual and new. As mentioned above, threequarters of all States have no magazine-capacity

limit like California. The federal government's short-lived experiment with a magazine ban lapsed by 2004. *See* Pub. L. No. 103-322, 108 Stat. 1796 (1994) (formerly codified at 18 U.S.C. § 922(w)). Aside from D.C.'s law, most state bans were enacted after the 1990s, with many passed in just the last few years.

Neither California nor the majority seriously challenge that these magazines are "in common use." Instead, the majority buries the data. It claims that looking at "ownership[]statistics" is too "simplistic" and disregards reliance on them as too "rigid." Maj. Op. 57. But, as lower court judges, we are not free to set aside the Supreme Court's directions so easily. *Heller* and *Bruen* were very clear—once a firearm is "in common use," it falls out of the historical tradition of prohibiting "dangerous and unusual" weapons and is entitled to constitutional protection unless restricted by another tradition.

In *Heller*, the Court held that, because "handguns are the most popular weapon chosen by Americans for self-defense in the home," they are protected by the Second Amendment and their "complete prohibition" is "invalid." 554 U.S. at 629; *see also id.* at 628-29 ("[A] prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for [the] lawful purpose" of self-defense "fail[s] constitutional muster."). On the other hand, *Heller* recognized that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes[.]" *Id.* at 625.

Bruen put an even finer point on this question. Assuming that historical laws could show handguns were considered "dangerous and unusual" in our

Nation's past, *Bruen* said that this history wasn't dispositive when handguns are "in 'common use' for self-defense today." 597 U.S. at 47. So, "even if [historical] laws prohibited the carrying of handguns because they were considered 'dangerous and unusual weapons'" sometime in the past, "they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today." *Id.*

So the lesson of *Heller* and *Bruen* is that the historical tradition of banning "dangerous and unusual" weapons can't justify regulation of firearms in common use *today*. And because these magazines are no doubt in common use today, a tradition of banning weapons that "are highly unusual in society at large" can't support California's magazine ban.

Next, the majority tries a different tack. Again, ignoring the Supreme Court's instructions, the majority claims that our historical tradition included dispossessing the people of "especially dangerous" weapons—no matter how commonly they were used for self-defense. Maj. Op. 12. Again, that's wrong. The Court has *always* grouped "dangerous and unusual" together. *See Heller*, 554 U.S. at 627; *Bruen*, 597 U.S. at 21, 47, 51; *see also Caetano v. Massachusetts*, 577 U.S. 411, 417 (2016) (Alito, J., concurring) ("[T]his is a conjunctive test: A weapon may not be banned unless it is *both* dangerous *and* unusual."). In other words, whether a weapon is "dangerous and unusual" or "in common use" are different sides of the same coin. *See Bruen*, 597 U.S. at 47 (contrasting "dangerous and unusual weapons" with those that are "in 'common use' for self-defense today"); *Heller v. District of*

Columbia, 670 F.3d 1244, 1272 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (observing that the Supreme Court "said that 'dangerous and unusual weapons' are equivalent to those weapons not 'in common use'") (simplified).

Indeed, like the majority here, the dissent in *Heller* tried to justify the D.C. handgun ban by arguing that an "outright prohibition" is necessary "where a governmental body has deemed a particular type of weapon especially dangerous." *Heller*, 554 U.S. at 713 (Breyer, J., dissenting). Of course, the Court rejected this view. And since it didn't work against commonly used handguns, it won't work against commonly used magazines. Perhaps trying to evade *Heller*'s clear ruling, the majority tries a new twist—recharacterizing the tradition as a ban on "especially dangerous uses of weapons once the threat to innocent persons has become clear." *See* Maj. Op. 49-50. But that move fools no one. It is simply a retread of the same argument. And the bottom-line is this—neither the majority nor California has identified any historical regulation dispossessing law-abiding citizens of commonly used weapons for self-defense because they were "especially dangerous." So this purported "tradition" is made of thin air.

2. Laws Regulating the Carry of Weapons

California next relies on the tradition of regulating the public carry of certain weapons to justify its regulation. To be sure, these types of laws have been around a while. Anti-carry laws trace back to 14th-century England as well as colonial, Founding-era, and antebellum America. These historical

regulations, of course, differed. Most forbade concealed carry, while some forbade open carry for certain illicit purposes—reflecting the sensibilities of the jurisdiction at the time. Only a few banned all public carry of specific weapons, while others required intent—whether the carry was meant to frighten or threaten. The throughline of all these regulations, however, is that none broadly disarmed law-abiding citizens.

California begins with the Statute of Northampton of 1356. As Blackstone described the English law, the Statute prohibited the "offence of *riding* or *going armed*, with dangerous or unusual weapons," while "terrifying the good people of the land." 4 William Blackstone, Commentaries on the Laws of England, *148-49 (Wilfrid Prest et al. eds., 1st ed. 2016). Although it was "centrally concerned with the wearing of armor," it's accepted that it applied to weapons like the "launcegay." *Bruen*, 597 U.S. at 41. To the Court, the Statute was notable for two reasons. First, the Statute didn't apply to common weapons—like medieval daggers—which would be "most analogous to modern handguns." *Id.* at 42. Second, the Statute applied only to those who carried weapons "with evil intent or malice." *Id.* at 44. Yet, California's ban applies to *everyone*—regardless of intent. All in all, the Court concluded that English law couldn't "justif[y] restricting the right to publicly bear arms," such as handguns, "for self-defense" today. *Id.* at 46.

The earliest American law cited by California dates to 1686. Then, the Quaker province of East New Jersey prohibited the concealed carrying of "pocket pistol[s], skeines, stilladers, daggers or dirks, or other

unusual or unlawful weapons" because they induced "great fear and quarrels." *Grants, Concessions, and Original Constitutions of the Province of New Jersey* 289-290 (1881). Massachusetts followed with other carry regulations—although it only targeted armed groups. *See* An Act for preventing and suppressing of Riots, Routs, and unlawful Assemblies, 1750 Mass. Acts 545, ch. 17 § 1 (prohibiting being armed with "clubs or other weapons" in a group of twelve or more); An Act to Prevent Routs, Riots, and Tumultuous assemblies, and the Evil Consequences Thereof, 1786 Mass. Acts 87, ch. 38, 88 (same). California claims that other States enacted "anti-carry laws" for clubs and other blunt instruments.

California next looks to historical laws limiting the carry of bowie knives, concealed weapons, and pistols. California contends that, by 1840, a handful of States implemented laws regulating the carry of bowie knives,[9] and that those restrictions eventually spread to most States by the end of the 19th century.[10]

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[9] As examples, California points to an 1836 Tennessee statute and 1839 Alabama statute. But neither law was a sweeping ban on the carry of bowie knives. The Tennessee law only prohibited "wear[ing]" a bowie knife "under his clothes" or otherwise "keep[ing it] concealed about his person;" selling bowie knives, and "cut[ting] or stab[bing] another person" with a bowie knife. *See* 1837-38 Tenn. Pub. Acts 200-01, An Act to Suppress the Sale and Use of Bowie Knives and Arkansas Tooth Picks in this State, ch 137, §§ 1, 2, 4. And the Alabama law only regulated the "concealed" carry of "any bowie knife" and "any species of fire arms." 1839 Ala. Acts 67, An Act to Suppress the Evil Practice of Carrying Weapons Secretly, § 1.

[10] California has identified no state laws banning the *possession* of bowie knives. An 1837 Georgia act declared that, along with prohibiting carry, a person cannot "keep, or ... have

California also observes that by 1838, a handful of States had laws banning the concealed carrying of weapons, such as pistols, dirks, sword canes, and spears.[11] Finally, according to California, several States responded to an upswing in violence from the proliferation of "percussion-cap pistols" in the first half of the 19th century by restricting the carry of concealable pistols. The majority identifies two late-19th century laws banning the carry of concealable pistols. *See* Maj. Op. 44 (citing An Act to Preserve the Peace and to Prevent Homicide, 1871 Tenn. Pub. Acts 81, ch. 90, § 1; An Act to Preserve the Public Peace and Prevent Crime, 1881 Ark. Acts 191, chap. XCVI, § 1-2). Interestingly, courts in Tennessee and Arkansas struck down early versions of the laws because they applied to *repeating* or military-style revolvers. *See Andrews v. State*, 50 Tenn. 165, 187 (1871) (holding that if the state law applied to "the pistol known as the repeater," "then the prohibition of the statute is too broad to be allowed to stand"); *Wilson v. State*, 33 Ark.

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about their person or elsewhere ... [a] Bowie, or any other kind of knives." An Act to Guard and Protect the Citizens of this State, Against the Unwarrantable and too Prevalent Use of Deadly Weapons, 1837 Ga. Laws 90, § 1. But in 1846, the Georgia Supreme Court held the act unconstitutional "inasmuch" as it "deprive[d] the citizen of his *natural* right of self-defence." *Nunn v. State,* 1 Ga. 243, 251 (1846) (suggesting the ruling applied to all provisions of the act except concealed carry).

[11] These States were Kentucky (1813), Louisiana (1813), Indiana (1820), Georgia (1837), Arkansas (1838), and Virginia (1838). *See* Clayton E. Cramer, *Concealed Weapons Laws of the Early Republic: Dueling, Southern Violence, and Moral Reform* 143-51 (1st ed. 1999). California also often refers to the Duke Center for Firearms Law's Repository of Historical Gun Laws for sourcing. Available at https://perma.cc/E7FZPANH.

557, 559-60 (1878) (concluding that "prohibit[ing] the citizen from wearing or carrying [an army size pistol, such as are commonly used in warfare,] is an unwarranted restriction upon his constitutional right to keep and bear arms").

Regardless of a tradition to regulate the *carry* of certain weapons, these laws cannot justify California's ban on the *ownership* and *possession* of magazines holding more than ten rounds. *Bruen* dictates this conclusion. In that case, New York relied on the same regulatory history as California to show that States may restrict the public carry of firearms. The Court agreed that "[t]he historical evidence from antebellum America ... demonstrate[s] that the manner of public carry was subject to reasonable regulation." *Bruen*, 597 U.S. at 59 (simplified). Even so, that robust history was not enough "to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public." *Id.* at 60.

The answer is simple then: if historical regulation of the *carry* of certain weapons in certain situations was not "relevantly similar" to a modern law prohibiting the *carry* of all weapons without a license, then those laws cannot be analogous to California's law preventing law-abiding citizens from *possessing* firearms for self-defense purposes. Put differently, if targeted historical carry laws don't justify wide-ranging restrictions on the carry of commonly owned weapons, they don't support the outright ban of commonly owned weapons.

Under *Bruen*, we can't extrapolate from narrow regulations a justification for much broader regulations. While anti-carry laws "limited the intent

for which one could carry arms, the manner by which one carried arms, or the exceptional circumstances under which one could not carry arms," *id.* at 70, California's law prohibits *all conduct* at *all places* at *all times*, even in the privacy of the home. And *Heller* made clear that the need for "defense of self, family, and property is most acute" in "the home." 554 U.S. at 628; *see also id.* at 635 (The Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."). While historical carry restrictions may burden the Second Amendment right in one limited fashion, California's magazine ban is different in scope—it's a complete dispossession of a commonly owned "Arm."

Rahimi further signals the mismatch between the tradition of carry regulations and California's magazine ban. In *Rahimi*, the Court determined that historical "surety laws" and "going armed laws" supported the modern regulation of disarming those under a domestic-violence protection order. *See* 18 U.S.C. § 922(g)(8)(C)(i). That's because both the historical tradition and the modern regulation shared the same "how" and "why." Both served the purpose of disarming "individuals found to threaten the physical safety of another." *Rahimi*, 602 U.S. at 698. And their burdens were comparable—the temporary disarmament after a judicial determination of a "particular defendant['s]" dangerousness. *Id.* at 699. In contrast, *Rahimi* observed that the law struck down in *Bruen* "broadly restrict[ed] arms use by the public generally." *Id.* at 698. So while a tradition of targeted and temporary disarming of dangerous individuals may exist, that wouldn't justify any broad-based,

permanent dispossession. So too here. Limited historical laws designed to prevent confrontation, fear, and terror *in public* can't justify a modern law that prevents all individuals from *ever possessing* a commonly owned arm for self-defense. In other words, we can't extract any "principles" from the tradition of carry laws to *fully* dispossess law-abiding citizens of arms in common usage. *Id.* at 692.

3. Laws Banning Possession of Certain Weapons

California also identifies a handful of laws throughout history that banned the outright possession of a weapon. None are a "relevantly similar" analogue to California's magazine ban.

California cites an English law from 1541 that prohibited persons with an annual income below 100 pounds from possessing a crossbow without a license. *See* An Act Concerning Crossbows and Handguns, 33 Hen. 8, ch. 6, § 1, (1541). This law is closer to California's law since it appears to prohibit outright possession of a weapon—at least for certain classes of people. But by the 1700s, this law was widely considered "obsolete" and so restrictive that the Court considered the law as "not incorporated into the Second Amendment's scope." *Bruen*, 597 U.S. at 43 n.10.

California points to late 19th-century state laws against slungshots. "Slungshots" refers to a wide range of hand-held weapons for striking—often with a metal or stone attached to a flexible strap or handle made of rope, leather, or other material. Between 1849 and 1890, nine jurisdictions prohibited the sales and

manufacture of slungshots.[12] Only Illinois banned their outright possession, while the other jurisdictions prohibited their carry.[13] Most other states enacted laws against the carry of slungshots by the late 19th century.

Even if these laws come from the historically relevant period, they don't serve as proper analogues for California's magazine ban. Simply, slungshots were not commonly used for self-defense. As California's expert observed, they were "widely used by criminals and street gang members," with no noted historical use for self-defense. Indeed, according to one source, while "[c]ourt records of the [1800s] have many cases of civilians ... using slungshots," "a man bringing one out after being threatened comes up rarely." Kopel & Greenlee, 50 J. of Legis. at 345 (quoting Robert Escobar, Saps, Blackjacks, and Slungshots: A History of Forgotten Weapons 131 (2018)). So these slungshot regulations don't evince a historical justification for regulating weapons that are used to "facilitate armed self-defense" or other lawful purposes. *See Bruen*, 597 U.S. at 28. Further, the burdens of slungshot regulations and California's magazine restriction are dissimilar. Historically, most States restricted only the *carry* of slungshots—very different than an outright ban. Just one State banned

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[12] Vermont (1849), New York (1849), Massachusetts (1850), Kentucky (1856), Florida (1868), Dakota Territory (1877), Illinois (1881), Minnesota (1886), and Oklahoma Territory (1890). *See* David Kopel & Joseph Greenlee, History of Bans of Types of Arms Before 1900, 50 J. of Legis. 226, 346 (2024).

[13] *Id.* A Vermont law from 1849 made it a felony to possess or carry a slungshot for the "purpose of using it against another person." *Id.* at 347.

their possession—not enough to suggest a widespread historical tradition. *See Bruen*, 597 U.S. at 67 ("[W]e will not stake our interpretation of the Second Amendment upon a law in effect in a single State, or a single city, 'that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms[.]'" (simplified)).

Finally, California raises 20th-century restrictions on automatic and semi-automatic firearms as historical analogues. According to California, from 1927 to 1934, over a dozen States restricted fully automatic and some semiautomatic firearms. We can make short work of this argument. These laws were enacted nearly *140 years* after the Second Amendment's ratification and *60 years* after its incorporation. That's simply too late to help define the meaning and scope of the Second Amendment right. The Supreme Court has made clear that our inquiry of regulations is *at most* cabined to the period "through the end of the 19th century." *Bruen*, 597 U.S. at 35 (quoting *Heller*, 554 U.S. at 605). And even then, late 19th-century history may be too distant. *See Bruen*, 597 U.S. at 83 (Barrett, J., concurring) ("[T]oday's decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights."). So we can safely say that the 20th century is not a relevant timeframe for this inquiry.

In sum, this survey of history shows no robust historical tradition of disarming law-abiding citizens of commonly owned arms used for self-defense. Indeed, the lack of outright weapons bans is telling in

itself. From colonial America to Founding-era America to antebellum America, save an outlier or two, no laws banned the possession of any type of weapon. It's even starker when looking at firearms bans. As the district court observed, between 17th-century English laws and 19th-century state laws, California "has not identified any law, anywhere, at any time ... that prohibited simple possession of a gun or its magazine or any container of ammunition (unless the possessor was an African-American or a slave or a mulatto)." *Duncan VIII*, 695 F. Supp. at 1242. So if anything is "trapped in amber" here, *Rahimi*, 602 U.S. at 691, perhaps it's the historical understanding that law-abiding citizens may choose *any* commonly owned firearm for self-defense without government interference. *See* Alicea, 174 U. Pa. L. Rev (manuscript at 41) ("[T]he tradition of banning dangerous and unusual weapons—and the absence of a tradition of banning weapons in common use—is very strong (if not dispositive) evidence that prohibiting arms in common use by persons protected under the Second Amendment is *per se* impermissible[.]").

4. Laws Against Trap Guns

California's reliance on trap-gun regulations is even more far afield. Trap guns were contraptions using string, wire, or other contrivances to remotely discharge a firearm. Historically, they were used to thwart thieves from robbing businesses or properties and sometimes for hunting. According to California, only eleven States regulated trap guns before the 20th century.[14] And only one was from the 18th century.

[14] According to California, those States are Michigan (1875), Minnesota (1873), Missouri (1891), New Jersey (1771), New York

New Jersey's 1771 law banned "a most dangerous Method of setting Guns." 1763-1775 N.J. Laws 346, An Act for the Preservation of Deer and Other Game, and to Prevent Trespassing with Guns, ch. 539, § 10. The rest of these laws came into effect in the mid- to late-19th century.

Even assuming these laws are temporally significant, they would not implicate the Second Amendment. Trap-gun mechanisms aren't protectable "Arms" under the Second Amendment's text. To start, they are not "bearable." *See Heller*, 554 U.S. at 582 ("[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms[.]"). On the contrary, the whole design of the trap gun was to allow a firearm to be discharged *without* a person needing to "keep" or "bear" it. So trap guns are not weapons to "wear, bear, or carry ... upon the person or in the clothing or in a pocket, for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person." *Id.* at 584 (simplified). Nor can a person take a trap gun "into his hands, or useth in wrath to cast at or strike another." *Id.* at 581. And they are not integral components of a firearm. So the majority is just simply wrong to claim that the trap guns were used for armed self-defense. Indeed, the majority mistakenly suggests that homeowners rigged trap guns in "defen[se]" of their "homes." Maj. Op. 42. But nothing in the record supports that trap guns were used in such an improper way. Given all this, it's hard to see how trap

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(1870), North Dakota (1891), Rhode Island (1890), South Carolina (1855), Utah (1865), Vermont (1884), and Wisconsin (1872). We assume this record is accurate.

guns fall under the Second Amendment's textual elements.

But even if trap guns constitute "Arms," the burdens of regulating trap-gun mechanisms are not analogous to the burdens of California's magazine ban. First, California identifies no historical regulation that prohibited the *possession* of a trap-gun. Like New Jersey's law, most States prohibited only the *setting* of the device. *See* Kopel & Greenlee, 50 J. of Legis. at 365-366. Other States only forbade their setting for hunting or for injuring another person. *Id.* But the broad dispossession of an arm is different from preventing individuals from rigging a firearm with a contraption to fire it automatically.

The "why" of trap gun regulations is also very different. As the majority must concede, these regulations were meant to prevent the occasional tripping of trap guns by innocent persons. California didn't ban magazines holding more than ten rounds to limit *accidental* firearms deaths. Rather, the purpose of the magazine ban was to respond to *intentional* gun violence.

5. Laws Regulating Gunpowder Storage

Finally, California relies on 18th- and 19th-century gunpowder-storage laws. Concerned with the dangers of massive fires and explosions, these laws prohibited the stockpiling of large quantities of gunpowder in one place. An 18th-century law, for example, made it unlawful in New York City "to have or keep any quantity of gun powder exceeding twenty-eight pounds weight, in any one place, less than one mile to the northward of the city hall[.]" 1784 N.Y.

Laws 627, An Act to Prevent the Danger Arising from the Pernicious Practice of Lodging Gun Powder in Dwelling Houses, Stores, or Other Places, ch. 28. Another 1821 Maine law regulated how much gunpowder could be possessed and stored by a person "for the prevention of damage by Fire." 1821 Me. Laws 98-99, An Act for the Prevention of Damage by Fire, and the Safe Keeping of Gun Powder, ch. 25.

These gunpowder-storage restrictions don't establish a historical tradition supporting California's magazine ban. First, these laws offer no comparable burden on the possession of a firearm. While California's magazine ban prohibits using the most popular magazine for self-defense, the gunpowder laws had zero effect on self-defense. They "did not clearly prohibit loaded weapons" and "required only that *excess* gunpowder be kept in a special container or on the top floor of the home." *Heller*, 554 U.S. at 632 (emphasis added). So they regulated the accumulation of excess explosive material by limiting where it could be stored—they didn't prevent citizens from having ammunition at the ready for self-defense. As the Supreme Court observed when this history was used to defend a handgun ban, "[n]othing about th[e]se fire-safety laws undermines our analysis" because "they do not remotely burden the right of self-defense as much as an absolute ban on handguns." *Id.*

Second, the "why" is also obviously different. These laws targeted the danger of *accidental* explosions and widespread fire posed by improperly stored gunpowder. In contrast, California's purpose in enacting its ban was to reduce *intentional* gun violence.

So this tradition doesn't support California's magazine ban.

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In sum, the right to keep and bear firearms that use a magazine able to hold more than ten rounds is presumptively protected by the text of the Second Amendment. These magazines constitute "Arms" because they are necessary components of firearms and facilitate the firing process. Thus, California had the burden of identifying a historical analogue that is relevantly similar to a ban on these magazines—and has failed to do so. Simply, no historical analogue justifies California's absolute ban on magazines that come standard with most firearms. While "dangerous and unusual" weapons may fall outside the Second Amendment's scope, arms in common use today—like magazines holding more than ten rounds—clearly don't. And though the Second Amendment seemingly permits reasonable restrictions on the public carry of some uncommon weapons, that's not comparable to California's outright prohibition of the most popular magazine for self-defense. And the lack of any historical regulations banning the possession of a common firearm further undermines California's law. Finally, with no impact on armed self-defense at all, the regulations on trap guns and gunpowder storage are not remotely close to the burden and justification for California's ban. Because California failed to meet its burden, California Penal Code § 32310 is unconstitutional.

III.

THE RETURN OF INTEREST BALANCING

The majority upholds California's magazine ban despite *Heller*, *McDonald*, *Bruen*, and *Rahimi*. In doing so, the majority rejects the Supreme Court's Second Amendment framework and reads the Amendment as it wants. First, the majority haphazardly establishes two *Bruen* tests—the so-called more nuanced and unnuanced approaches. If that sounds confusing, it is. In fact, it's so confusing that the majority largely abandons its own creation mid-opinion. Second, rather than examine historical analogues for their similarity with California's regulation, the majority simply cloaks interest balancing under the guise of "tradition." So in the Ninth Circuit, we've returned to the old days of judicial policymaking that the Court has gone out of its way to end.

A. The Majority's Nuanced v. Unnuanced Approaches

To begin, we can't ignore the majority's creation of alternate *Bruen* tests—what it dubs the "more nuanced approach" and the "straightforward," unnuanced approach. Maj. Op. 37, 40. Plucking a few words from *Bruen*, the majority claims it may apply a "more nuanced approach" anytime a regulation involves "unprecedented societal concerns or dramatic technological changes." *Id.* at 37 (quoting *Bruen*, 597 U.S. at 27). Although it's unclear what precisely the majority means by a "more nuanced approach," it appears to mean that we may disregard our historical tradition of firearms regulation whenever a modern regulation seeks to address modern problems or

technology. *Id.* at 37-38. Instead, whenever that is the case, the majority calls for a more "flexible analogical approach." *Id.* at 40. This flexibility apparently means that no analysis of historical analogues is necessary—all that's needed is a determination that there's a difference between technology or societal problems at the Founding compared to today. *See id.* at 39 (analyzing how the magazine ban responds to an "unprecedented societal concern" and the magazines here "represent a dramatic technological change from the weapons at the Founding" but not comparing modern regulations to any historical analogues). So the majority's "more nuanced" approach is more accurately termed the "ahistorical" approach.

There's much to dislike about the majority's creation. First, the Supreme Court has never endorsed a "more nuanced" versus a "straightforward," unnuanced approach. Indeed, it would be remarkable if the Supreme Court were forming two sets of *Bruen* tests without telling anyone. So the majority's test is just its own invention. Instead, there is *one approach*: the Second Amendment's text and historical understanding always control.

The majority claims to just be quoting *Bruen*. But take *Bruen*'s comment in context: "While the historical analogies here and in *Heller* are relatively simple to draw, other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach." *Bruen*, 597 U.S. at 27. The Court's note about the occasional need for a "more nuanced approach" was an unremarkable observation that making comparisons to proper historical analogies might be challenging at times.

Indeed, "[h]istorical analysis can be difficult; it sometimes requires resolving threshold questions and making nuanced judgments about which evidence to consult and how to interpret it." *Id.* at 25 (simplified). That's especially the case when "unprecedented societal concerns or dramatic technological changes" may make analogical reasoning relatively tougher. *Id.* at 27. *Bruen* and *Heller*'s historical analogies, in contrast, were "relatively simple to draw" given the extreme nature of the bans. *Id.* So the Court was simply cautioning lower courts to be careful and thoughtful in scrutinizing the government's claim of historical analogues. Simply, no approach that ignores history adheres to *Bruen*.

But in the majority's telling, *Bruen*'s discussion of a "more nuanced" approach was the Court *silently* embracing a whole new test in cases involving "unprecedented societal concerns or dramatic technological changes." Maj. Op. 40 (quoting *Bruen*, 597 U.S. at 27). And how do we know the majority is wrong in developing its two-test regime? Just read *Rahimi*. That case makes no mention of the majority's nuanced/unnuanced distinction. If this two-test method were so central to *Bruen*, we would expect that the Court would at least say something about it in *its very first* case applying *Bruen*. Instead, we get zilch. Undeterred, the majority plows ahead with its creation. Yet it has no explanation for *Rahimi*'s silence on the two-tests framework. It fails to explain whether *Rahimi* is a nuanced case or an unnuanced case. It skips all of this and just moves forward with its made-up analysis.

But it gets worse. The majority also makes clear that its "more nuanced" test is a repackaging of this circuit's old interest-balancing regime. The majority holds that when governments deal with modern technology or problems, like mass shootings, they need "even more flexib[ility]" and thus the governments' regulations are constitutional. *Id.* at 37. All of this is just code for judicial interest balancing and policymaking. Under this balancing regime, there's no look to the historical meaning of the Second Amendment—only a review of technological or societal change and whether that change justifies the government's regulation. *See id.* at 38-40. So, the "more nuanced" approach appears to be little more than reinvigorated judicial means-ends scrutiny in fancy dress. In the end, we have no doubt this "more nuanced" approach will resemble our old "black box" regime where "judges [simply] uphold favored laws and strike down disfavored ones." *Duncan V*, 19 F.4th at 1140 (Bumatay, J., dissenting).

Besides flouting the Court, this two-test approach makes no constitutional sense. The Constitution enshrines enduring principles. That means that the Constitution doesn't so easily bow to technological or societal change. In any other context, we would scoff at the idea that the Constitution grants broad deference to the government simply based on the modernity of the problem. The free-speech right didn't change when the internet was invented. *See, e.g., Moody v. NetChoice, LLC*, 603 U.S. 707 (2024). The Fourth Amendment right didn't succumb to new technology. *See, e.g.*, *Carpenter v. United States,* 585 U.S. 296 (2018). In none of these cases have courts just thrown up their hands and declared that the

government needs "more flexibility." So the majority's creation is a grave mistake.

In the end, perhaps recognizing its vast departure from the Court's directives, the majority retreats from its two-test approach mid-opinion and purports to apply *Bruen*, as directed by the Court. Maj. Op. 40. Even then, the majority still gets it wrong. We turn there next.

B. Interest Balancing As Analogical Reasoning

By now, it should be clear what courts should do at *Bruen* step two when analyzing the government's justification of its gun control laws. We look to whether the modern regulation "impose[s] a comparable burden on the right of armed self-defense and whether that burden is comparably justified." *Bruen*, 597 U.S. at 29. Our task then is to see if historical analogues point to a limit on the Second Amendment's scope that justifies the regulation. In other words, we decide whether the "how" and the "why" of the government's regulation and purported historical analogue are "relevantly similar." *Id.* Unfortunately, the majority botches this analysis.

Rather than examine historical analogues for their similarity with California's regulation, the majority cloaks interest balancing under the guise of "tradition." But it's easy to see the majority's sleight-of-hand. We break it down step-by-step.

Step One: The majority starts off by assessing the magnitude of California's magazine ban's burden on the right of self-defense. It concludes that the burden is only "minimal." Maj. Op. 52 n.11; *see also id.* at 49 ("California's law has a significantly smaller effect on

the speed of armed self-defense."). The majority asserts that the burden is small because California's law didn't go further. *Id.* at 51 ("The law imposes no limit whatsoever on the number of magazines[,] ... bullets[,] ... or ... firearms a person may own. The law also imposes no limit on the number of rounds a person may fire or the number of firearms a person may fire. Nor ... does the law ban any weapon."). Instead, the majority says that "the law prohibits only one very specific use of some firearms: the shooting of an eleventh (or successive) round" without reloading and concludes the burden minimal. *Id.* at 51. It then claims that people "rarely" use magazines holding ten rounds in armed self-defense. *Id.* at 52 n.11. All this ends with the majority just declaring that these magazines are "no weapon" at all. *Id.* at 55.

The majority again falls for the fallacy that "using a firearm" for self-defense equates to pulling the trigger and firing every round. But the "natural meaning" of "bear arms" is "being armed and ready for offensive or defensive action in a case of conflict with another person." *Heller*, 554 U.S. at 584 (simplified). So the right of self-defense isn't measured by how many bullets are expended. It's determined by how law-abiding citizens choose to "ready" themselves in "case of conflict with another person." *Id.*; *see also Bruen*, 597 U.S. at 74-75 (Alito, J., concurring) (retelling the stories of "potential victim[s who] escaped death or serious injury only" because of armed self-defense without needing to discharge a firearm or shoot the assailant). Our criminal laws don't require a firearm to be discharged for it to be "used." *See, e.g.*, *Smith v. United States*, 508 U.S. 223, 230 (1993).

Cf. Bailey v. United States, 516 U.S. 137, 143 (1996) (acknowledging that "use draws meaning from its context," such that someone can "use a gun to protect [his] house" while "never ha[ving] to use it" (simplified)). All that matters is that California's total ban on possession of magazines capable of holding more than ten rounds "amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for th[e] lawful purpose" of self-defense. *Heller*, 554 U.S. at 628. Even the majority concedes that California bans magazines that "enhance[] ... a person's ability to fight or to defend" himself. Maj. Op. 29. And it's hard to see how the majority's burden analysis is any different from its step-one conclusion that these magazines are not an "Arm[]" at all. So the majority just confuses the step one and step two inquiry.

In any case, we proceed with the majority's interest balancing.

Step Two: Having arrived at its stylized burden, the majority moves on to analyze historical regulations' purported justifications. Misreading history and attempting to extract the broadest of generalities, the majority manufactures a "tradition of regulating a particular, especially dangerous use of a weapon, once that use becomes a specific threat to innocent persons." *Id.* at 56, *see also id.* at 41 ("Beginning before the Founding and continuing throughout the Nation's history, legislatures have enacted laws to protect innocent persons from especially dangerous uses of weapons once those perils have become clear."). As explained above, no historical analogue supports this made-up tradition. And in

reality, the majority just seeks to recognize a broad "public safety" justification for government regulation. Under the majority's view, this justification gives States the ability to regulate any arms for public safety. Such a justification swallows the entire Second Amendment right.

Step Three: The majority then makes a factual leap—finding that magazines holding more than ten rounds fit the bill of an "especially dangerous" weapon. In the majority's view, "[l]arge-capacity magazines exacerbate the harm caused by mass shootings, and limiting magazine capacity thus prevents or mitigates the harm caused by mass shootings." *Id.* at 48. Of course, the majority cites no facts to support this. Even more, it doesn't explain how these magazines are "especially dangerous" firearms or under what baseline it makes this comparison. How are we to decide when a firearm is just "dangerous" versus "especially dangerous"? Only the majority knows.

Step Four: The last step is the majority's comparison of the burden of the magazine ban to the supposed justification for outlawing "especially dangerous" weapons. In the majority's view, because the "same justification underpins California's restriction on magazine capacity" as historical laws and because California's ban imposes "less of a burden" on armed self-defense than some historical laws, it is constitutional. *Id.* at 47, 55-56. In other words, it takes a broad justification (the "why") and compares it with a minimal burden (the "how") and finds a match.

So rather than compare the justifications *and* burdens to "relevantly similar" analogues, the

majority just looks to the fit between a generalized "why" and an in-the-ballpark "how." But this crosses wires. We are not supposed to compare the "how" *to* the "why"; we're supposed to compare the "how and why" of *modern regulations* to the "how and why" of *analogous historical regulations*. If the historical and modern regulations share a common "how and why," then this may reveal that the regulation is outside of the scope of the Second Amendment. Put another way, we must see whether California's magazine ban "works in the same way and does so for the same reasons" as historical regulations. *Rahimi*, 602 U.S. at 711 (Gorsuch, J., concurring). Instead, the majority merely points to some historical "whys" and some historical "hows" and calls it a day. Although they try to disclaim it *now*, make no mistake—this is what the majority has been doing and continues to do.

Take the majority's analysis of Bowie knife and slungshot regulations. The majority claims the regulation of both weapons supports its supposed tradition of regulating "especially dangerous" weapons. But it also acknowledges that the only historical burden on those weapons was to "ban[] their carry outside the home." Maj. Op. 45. So even if the majority were right, the justification of regulating "especially dangerous" weapons only leads to the prohibition of carrying the weapons outside the home—not outright possession bans as California enacts.

If comparing the "how" to the "why" of a regulation sounds familiar, it is. It's *interest balancing 101*—this time masquerading as respect for the Second Amendment's historical scope. The majority's

analysis bears all the hallmarks of judicial means-ends balancing—determining first whether California's interest is compelling, then assessing the severity of the burden, and then evaluating whether California's means fit its end. Look at the majority's language *pre-Bruen* and *post-Bruen* and notice how little has changed (even after the majority attempts to mask its defiance):

Majority Pre-*Bruen*	**Majority Post-*Bruen***
"[L]arge-capacity magazines tragically exacerbate the harm caused by mass shootings." *Duncan*, 19 F.4th at 1109	"Mass shootings are devastating for the entire community, and large-capacity magazines exacerbate the harm." Maj. Op. 47
"California's ban on large-capacity magazines imposes only a minimal burden on the exercise of the Second Amendment right.: *Duncan*, 19 F.4th at 1104	"California's law imposes only a minimal burden on the right of armed self-defense." Maj. Op. 52 n.11

"[W]e conclude that California's ban is a reasonable fit, even if an imperfect one, for its compelling goal of reducing the number of deaths and injuries caused by mass shootings." *Duncan*, 19 F.4th at 1110	"Its prohibition on a weapon's component that serves the sole function of enabling a specific, and especially dangerous, use of a firearm fits neatly within the tradition" of banning especially dangerous weapons. Maj. Op. 53-54
"California's ban on large-capacity magazines is a reasonable fit for the compelling goal of reducing gun violence." *Duncan*, 19 F.4th at 1111	"California's modern law['s] ... justification for burdening the right to armed self-defense" [fits the need] to protect innocent persons from infrequent but devastating harm." Maj. Op. 47

Bruen did two things: (1) it ended judicial interest balancing and (2) it provided a new framework for considering Second Amendment challenges. Despite this revolutionary change, things remain the same at the Ninth Circuit. Faithfully applying *Bruen* requires a course correction that the majority refuses to take. Instead, the majority just declares it knows better and charts its own path. But that disrespects the Supreme Court and the rule of law.

IV.
CONCLUSION

At each step of this case, the majority has made clear its disdain for the Supreme Court's *Heller-McDonald-Bruen-Rahimi* jurisprudence. But our job is to follow even if we disagree. Because California's magazine ban violates the Second Amendment's text, history, and tradition, we respectfully dissent.

VANDYKE, Circuit Judge, dissenting:

Three years ago, the Supreme Court vacated our court's opinion in this very case, presumably because we tried the same tack that *Bruen* rejected in no uncertain terms: engaging in interest balancing after assuming that an activity falls within the scope of the Second Amendment. In other words, our court's reliance on interest balancing (like the Second Circuit's decision in *Bruen*) took "one step too many." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 19 (2022). Because, as the Supreme Court made clear enough in *District of Columbia v. Heller*, the Second Amendment is itself "the very *product* of an interest balancing by the people," it is not our role to "conduct [it] for them anew." 554 U.S. 570, 635 (2008).

Notwithstanding these repeated directives to stop, today's decision doubles down on this court's prior practice of balancing away the rights of law-abiding citizens to bear arms in self-defense—only this time under another name. Rather than balancing *after* concluding that the original understanding of the Second Amendment protects an individual's conduct, the majority now merges its balancing into its determination of *whether* the Second Amendment protects an individual's conduct at all. This reinforces why interest balancing must have no place in applying the Second Amendment. *See Duncan v. Bonta* (*Duncan V*), 19 F.4th 1087, 1159-60 (9th Cir. 2021) (en banc) (VanDyke, J., dissenting), *cert. granted, judgment vacated*, 142 S. Ct. 2895 (2022), *vacated & remanded*, 49 F.4th 1228 (9th Cir. 2022).

I wholeheartedly agree with Judge Bumatay's excellent dissent, which thoroughly demonstrates the

correct approach under the Second Amendment following *Bruen*. I write separately to further highlight some serious flaws in the majority's analysis. If some of what you read below sounds familiar, it is because, consistent with the majority's reuse of balancing by another name, many of the flaws I identify are barely disguised retreads of those I pointed out in our last iteration of this case. *Id.* at 1160-70. Notwithstanding *Bruen*, very little has changed about the Second Amendment out here in the Ninth Circuit.

I.

The majority begins with *Bruen*'s cue to first determine whether "the Second Amendment's plain text covers an individual's conduct." 597 U.S. at 17. One might expect this to be a mechanical or routine part of the analysis, especially considering the Supreme Court's emphasis that there is only *one* step in assessing a Second Amendment claim. *Id.* at 19. But many lower courts, like ours, have instead taken *Bruen*'s guidance to mean there is an extensive first-step, arm-or-not inquiry. According to the majority, California is correct that a larger capacity magazine is not an "arm" within the meaning of the Second Amendment because it is "an accessory, or accoutrement, not an 'Arm' in itself." As a result, the majority concludes the Constitution does not "presumptively protect[]" it.

But whether a firearm component is an inherent and "necessary" part of the arm itself, or instead merely an "optional" and unnecessary accessory to the arm, is a hopelessly indeterminable and inadministrable distinction. As is true for almost any

type of object—from cars to computers to sewing machines to software—there is no Platonic ideal of a firearm from which such distinctions between "inherent" and "optional" parts can be objectively derived. Yet the majority relies on its invented "arms-accessory" distinction as an on/off switch for fundamental constitutional protections. Because that distinction has no basis in reason or reality, what this new test is really cover for is the majority's ipse dixit. A higher capacity magazine is an accessory, and thus unprotected by the Second Amendment, because the majority says so. And a lower capacity magazine (as yet undefined) is a "necessary" part of the arm, and thus protected, again because the majority says so. This is a terribly unprincipled way to analyze constitutional rights.

Initially, I planned to explain my reasons for dissenting on this conceptual point through usual judicial means alone: describing in writing some real-world illustrations to explain how the majority's supposed "arms-accessory" distinction collapses. But at argument it became clear to me that a *visual* illustration would greatly aid my colleagues and the parties in better grasping how this rather obvious conceptual problem specifically applies to firearms. So instead of straining to use written words to explain the many different parts of a gun and how each part could easily be deemed an "accessory" under the majority's vacuous test, I have decided to deliver part of my dissent in this case orally—via video—under the established wisdom that showing is sometimes more effective than telling. Please click the link below and enjoy the presentation:

https://www.ca9.uscourts.gov/media/23-55805/opinion

As I hope the video portion of this dissent helpfully illustrates, an "arm"—just like most other categories of objects known to the human experience—is a broad conceptual term covering an almost limitless variety of configurations within that category. *See Bruen*, 597 U.S. at 28 (explaining that the term "extends, prima facie, to *all* instruments that constitute bearable arms" (emphasis added)). The majority does not and cannot dispute that. It acknowledges that "the meaning of 'Arms' … broadly includes nearly all weapons used for armed self-defense." But the majority nonetheless concludes that in its view some *parts* of a firearm are "necessary to the operation of a weapon" and thus protected by the Second Amendment, while other parts are *not* necessary and therefore not protected "arms." The majority then purports to apply its misguided new test to decide that higher capacity magazines are not arms, while lower capacity magazines are.

The majority's new constitutional test fails at the most basic level possible—the conceptual level. Its failure is not even related to anything particularly unique to firearms. The inherent indeterminability of categorizing constituent parts of a class of objects as either belonging to the class itself or, instead, merely functioning as "unnecessary accessories" to that class should be self-evident for almost everything from cars (doors?) to cellphones (cameras?) to cereal (marshmallows?). Firearms are of course no different. The only difference is that the majority's test as applied to firearms is not just philosophically goofy,

but it also has the very real and troubling result of denying Americans' constitutional rights.

It is so easy to demonstrate the conceptual failings of the majority's new test that even a caveman with just a video recorder and a firearm could do it. For example, while the majority concedes that "triggers" are firearm components due at least some Second Amendment protection, the majority's misguided test cannot support that conclusion. Even something as essential to the firearm as a manufacturer-issued trigger could be considered an unprotected "accessory" under the majority's view because *that particular* trigger is not essential to the function of the firearm, as it could be swapped out for one with less effective, and therefore less "dangerous," attributes.

The problem with the majority's misguided test is no different with respect to larger capacity magazines. My colleagues in the majority reason that "a magazine is an integral part" to the operation of a semi-automatic gun and therefore "that the Second Amendment's text encompasses a right to possess a magazine." I agree. But the majority also contends that a "large-capacity" magazine "is not necessary to operate any firearm" and is therefore not an arm or a protected component. California defines a large-capacity magazine as any magazine holding more than ten rounds. But why stop there? Under the majority's rationale, any magazine that holds more than one round is not "necessary" for the function of the weapon. So presumably California could also ban magazines holding five rounds. Maybe even two.

And why stop at magazines? According to the majority, because "firearms operate as intended

without a large-capacity magazine," and a large-capacity magazine is not "necessary to the ordinary functioning of a firearm," large-capacity magazines are not protected under the Second Amendment. But under that logic, basically every part of a firearm is an "optional component" because each could be replaced with a less effective (aka, less "dangerous") version of that part and the firearm would still "operate" in some sense.

Nor is it at all clear what the majority means by "as intended" and "ordinary functioning." Technically speaking, I suppose that would mean a grip or a sighting system is not a protected component of a firearm because those pieces are "optional components" not strictly necessary to make the gun fire a round. Some handguns come without any sights at all. Those guns are obviously difficult to aim accurately. So does that mean California could ban all grips and sights under the majority's test? After all, just as a magazine is only "a box that, by itself, is harmless," a grip could be characterized as just a piece of polymer, a barrel as just a steel tube, and a bullet as just a small hunk of metal. Each one of those pieces, just like every other individual part of a firearm, "is benign" and "useless in combat for either offense or defense" without the rest of the firearm.

More basically, what do my amateur gunsmithing colleagues mean by "operate as intended?" Take a red dot optic. A firearm equipped with a red dot optic is "intended" to be operated more quickly and accurately than a firearm without one. So I suppose you could say the red dot optic is "necessary" to make the red-dot-optic-equipped firearm "operate as intended." But of

course, like many parts of modern firearms, it is not necessary at all if "operate as intended" means only the bare minimum functionality needed to send a bullet downrange. Is a red dot optic an unprotected accessory or a protected component under the majority's test?

As another example, most modern handguns have an automatic cycling mechanism that, upon firing, expels the spent cartridge, loads a new round, and resets the trigger. But plenty of firearms do not have an automatic cycling mechanism. The automatic cycling mechanism is "necessary" to make a semi-automatic firearm "operate as intended," but it is not necessary to make, say, a revolver or a bolt-action or a single-shot break-action firearm operate. Could California ban all semi-automatic handguns by applying the majority's logic that, because the automatic cycling mechanism is not required to make a handgun work, it's simply not protected by the Second Amendment?[1]

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[1] The majority's historical examples fail to shed light on the bounds of its test. The majority explains that, historically, "accoutrements" like "flint, scabbards, holsters, and ammunition containers" were "distinct from 'arms.'" But under the "necessary to the ordinary functioning" test posited by the majority, one would have assumed flint would clearly be covered as a component part of a firearm. Flint is integral to the actual firing of a flintlock firearm. Akin to how a modern-day striker or firing pin ignites the primer in a cartridge, starting the chain reaction that fires a bullet, flint creates a spark that ignites gunpowder in a flashpan that causes the gun's discharge. Granted, flint is a material that degrades more quickly than the material comprising a modern firing pin and therefore must be replaced with some frequency, but it is absolutely a required part to make

The majority's test produces head-scratching results. On the one hand, the majority gives lip service to the fact that "[t]he meaning of 'Arms' … broadly includes nearly all weapons used for armed self-defense." But on the other, its reasoning inevitably means that only the most dumbed-down or basic version of any component part of a gun is protected—and many parts of a gun are entirely unprotected if they aren't strictly necessary to make a gun go bang. Similarly, the majority acknowledges that the Second Amendment "must carry an implicit, corollary right to bear the components or accessories necessary for the ordinary functioning of a firearm." But the obvious result of the majority's test is that almost all of the component parts of a firearm would fall completely outside the Second Amendment because, in theory, any particular part could be replaced with a dumbed-down version of the same part. In another place, the majority suggests that "any accessory" performs a specific function that "enhance[s] … a person's ability to fight or to defend." So the majority seems to acknowledge that its test devolves to exclude anything that enhances a firearm's operation—or, put more bluntly, anything that works too well. In the end, the majority's test boils down to something like this: the Second Amendment presumptively protects only the jankiest version of a firearm and a little bit of ammunition (2.2 rounds?). Sound familiar? *See Duncan V*, 19 F.4th at 1173 (VanDyke, J., dissenting).

The only way the majority can classify a large-capacity magazine as "an optional accessory" is if it

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a flintlock firearm "operate as intended." A flintlock will not work without flint.

has some idea of what is (and is not) "optional." Put differently, the majority must have at least some idea of what a "standard" firearm is. The majority's logic is premised on its assumption that there is some Platonic ideal of a firearm, which I guess makes sense if you think judges are the Platonic Guardians of the Second Amendment. That's a nice job if you can get it, but it should be clear enough by now that many judges (and gun-banning governments) know next to nothing about how guns actually work, which perhaps explains why they would invent such an obviously inadministrable test for guns, but never for any other constitutional right.

Ultimately, just as with televisions and sewing machines, there is no such thing as a stock-part basic firearm, unadorned and without any "accessories," that constitutes the only "arm" protected under the Second Amendment. There are many parts that constitute the arm, most of which usually can be swapped out to emphasize and improve certain functions over others. Consider, for example, heavier grips that make the gun steadier when shooting versus lighter ones that are easier to carry and conceal. Just as the First Amendment doesn't apply only to "necessary" or "essential" speech, the Second Amendment cannot apply only to firearms containing just those parts that a state like California deems essential and necessary. Instead, what constitutes the "arm" includes every *functional* component and not only the most downgraded version of a "necessary" component. *Cf. Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967-68 (9th Cir. 2014) (holding that hollow-point ammunition is covered by the Second Amendment because of the "corresponding

right to obtain the bullets necessary to use firearms" (cleaned up)); *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015) (recognizing that this same principle applies to magazines).

II.

The majority's analytical flaws do not end at the first step of its analysis. Despite initially (and incorrectly) determining that large-capacity magazines are not part of the arms covered by the Second Amendment at all, the majority proceeds to assess whether a ban on large-capacity magazines is consistent with history and tradition. Judge Bumatay aptly explains how the majority's analysis errs as a historical matter. I will elaborate on just a few points. The majority explains that for "cases implicating unprecedented societal concerns or dramatic technological changes," we should apply "a more nuanced approach."[2] It is true that the Supreme Court explained that some societal changes would be so unprecedented—and some technological changes so

[2] Here, the majority determines that such an approach is justified because "[l]arge capacity magazines, when attached to a semi-automatic firearm, … represent a dramatic technological change" because they "fire with an accuracy, speed, and capacity that differ completely from the accuracy, speed, and capacity of firearms from earlier generations." The majority seems to recognize the truth that most of the "dramatic technological" jump since the Founding is attributable to the automatic cycling mechanism—not the large-capacity magazines at issue here. Presumably then, because that mechanism accounts for most of the "dramatic" change making modern firearms "especially dangerous" compared to the muzzleloaders of our forefathers, the unstated conclusion that follows from the majority's misguided analysis is that a state could ban semi-automatic handguns altogether.

great—that historical regulations would not have contemplated them. *Bruen*, 597 U.S. at 27. In those cases, courts should "reason[] by analogy." *Id.* at 28. But rather than look for close analogues that "impose a comparable burden on the right of armed self-defense" that "is comparably justified," *id.* at 29, the majority warms up by opining that analogues should be "flexible." What the majority's new "flexible" and "nuanced" approach devolves into is that the government need only show the sloppiest of a fit between the historical example and the modern regulation.

To show you what I mean, consider the majority's use of gunpowder storage laws as an example of a historical regulation analogous to California's ban on magazines holding more than ten rounds. Under *Bruen*, we must look to "why" gunpowder storage laws existed and "how" those regulations burdened the Second Amendment by requiring gunpowder to be stored in a special container or place in the home.

Start with the "why." As the majority acknowledges, those laws existed "to prevent … fires and explosions from the storage of gunpowder," or by "prohibiting what had proved to be an especially dangerous" practice. *Heller* itself summarized these storage laws in a similar way. 554 U.S. at 632 (distinguishing gunpowder storage laws because they "did not clearly prohibit loaded weapons, but required only that excess gunpowder be kept in a special container or on the top floor of the home").

So far so good. But how do those laws look anything like the magazine ban at issue here? If that leap confuses you, you're in good company. To get from

gunpowder storage laws to bans on magazines with more than ten rounds, the majority must summarize the "why" as "to prevent a specific, infrequent type of harm to innocent persons," or as they further summarize it, to stop "an especially dangerous use of firearms." Turning to the next step, the majority characterizes the "how" as completely "prohibiting" certain methods of storage. So the majority generalizes the history-and-tradition test—first explicated in *Bruen* and then expanded upon in *United States v. Rahimi*, 602 U.S. 680 (2024)—to the level of "especially dangerous" and posits that the government can completely ban anything that fits that definition. It is hard to imagine a degree of fit much sloppier than that.[3]

By taking any historical example that completely bans a specific activity and raising the level of generality for the "why" to something akin to mere "dangerous[ness]," it is hard to see how *any* gun regulation wouldn't pass muster, because governments have been banning "dangerous" stuff and activities since time immemorial. In fact, I would venture to guess that even the regulations that failed in *Heller* or *Bruen* would survive such trifling scrutiny. After all, (1) lots of historical laws have prohibited dangerous things, and (2) even the jankiest firearm in the hands of the wrong person is "especially dangerous." So what stops the government from banning the possession of all firearms under the majority's loose test?

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[3] I use this one example to illustrate my point, but the point stands for the other historical analogues the majority suggests, as discussed in Judge Bumatay's dissent.

But that's not the only way the majority overhauls the Supreme Court's test. The majority goes on to candidly acknowledge that, in its view, "*every* Second Amendment case involves dramatic technological changes." One can imagine now the reasoning our court will employ in the future to substantiate this pronouncement. Cases like *Rahimi*—with a focus on domestic violence—will come to stand for the proposition that all modern societal ills even conceivably related to firearms are "dramatic [societal] changes" justifying the majority's sloppier, "more nuanced approach." And any appreciable advance in firearms technology—whether that is the automatic cycling mechanism, higher ammunition capacity, better optics, an improved barrel, etc.—will come to represent a "dramatic technological change" that the Founders could not possibly have comprehended.

The inevitable consequence—and presumably the intended effect—of such a rule is that circumstances will always be different enough to justify the "more nuanced approach." And the "more nuanced approach" will always justify ill-fitting comparators. What is the end effect of this scheme? It essentially writes *Bruen* out of the United States Reports—at least out here in the Ninth Circuit. Notwithstanding *Bruen*'s clear command that the government *will* be held to its burden of showing a "*distinctly similar* historical regulation" to succeed in a Second Amendment case, 597 U.S. at 24, 26 (emphasis added), the judges of this circuit will *always* find some reason or another to excuse the government from meeting that burden. *E.g.*, *United States v. Perez-Garcia*, 115 F.4th 1002,

1011 (9th Cir. 2024) (VanDyke, J., dissenting from the denial of rehearing en banc).

To summarize, the majority's test boils down to whether any new gun regulation was passed to deal with situations that are "especially dangerous." Why "*especially* dangerous" as opposed to just dangerous? Perhaps because the majority implicitly recognizes that merely "dangerous" would be too obviously defiant. Dangerousness itself is clearly inherent in the definition of a weapon: "An instrument used or designed to be used to injure or kill someone." *Weapon*, Black's Law Dictionary (12th ed. 2024); *see also Commonwealth v. Canjura*, 240 N.E.3d 213, 221-22 (Mass. 2024) ("In the most basic sense, all weapons are 'dangerous' because they are designed for the purpose of bodily assault or defense."). And because the very purpose of a weapon is to be "dangerous," the more dangerous a weapon is—whether because of concealability, stopping power, ease of use, rate of fire, or any number of other considerations—the better it is at doing what it was designed to do. A rule that allows a ban on all "dangerous" weapons could thus effectively be a ban on all weapons. Full stop. The majority—and California—know they cannot create a test that bans any firearm that anyone could perceive as "dangerous" because every firearm has the capacity to cause serious harm if used improperly or placed in the wrong hands. So instead, California points to its conclusion that large-capacity magazines are "uniquely dangerous," and the majority finds a historical underpinning for a ban on all weapons that are "especially dangerous."

Of course, the test for what qualifies as "especially dangerous" looks quite a lot like the majority's interest-balancing test from the days of *Duncan*'s past. To begin, the majority evaluates the "how" by explaining that California's law imposes only a "minimal burden" on a plaintiff interested in exercising his Second Amendment right, which sounds a lot like a cut-and-paste of the first step of intermediate scrutiny. *Compare Duncan V*, 19 F.4th at 1104, 1108 ("California's ban on large-capacity magazines imposes only a minimal burden on the exercise of the Second Amendment right."), *with* the majority here ("California's law imposes only a minimal burden on the right of armed self-defense."). According to the majority, the burden on such an individual is only minimal because the law "imposes no limit whatsoever on the number of magazines a person may own, the number of bullets a person may own, … the number of firearms a person may own, … the number of rounds a person may fire[,] or the number of firearms a person may fire." Judge Graber, in both the majority opinion and her concurrence, made that point last time too. *See Duncan V*, 19 F.4th at 1104; *id.* at 1115 (Graber, J., concurring) ("[A]lternatives nevertheless remain: the shooter may carry more than one firearm, more than one magazine, or extra bullets for reloading the magazine."). And I already pointed out how that is unrealistic. *Id.* at 1163 (VanDyke, J., dissenting). The majority also again emphasizes that firing more than ten rounds "occurs only rarely, if ever, in armed self-defense." My colleagues made this same argument last time, and I explained then why it doesn't hold water. *Id.* at 1167. Nevertheless, as before, the majority concludes that

the large-capacity magazine ban is minimally burdensome because it only "prohibit[s] one specific and rare use of semi-automatic firearms." *Compare with id.* at 1104 (majority op.) ("The ban on large-capacity magazines has the sole practical effect of requiring shooters to pause for a few seconds after firing ten bullets.").

Next, the majority goes on to evaluate the "why," determining that California's law is similar to its historical analogues because "[m]ass shootings are devastating for the entire community, and large-capacity magazines exacerbate the harm." This again looks quite a lot like the discredited intermediate scrutiny test that the majority applied the last time around. *Id.* at 1109-11. Because California's law seeks "to prevent or mitigate … devastating harm … to innocent persons" due to "especially dangerous uses of weapons," California's law must be justified. *See id.* at 1109 ("California's law aims to reduce gun violence primarily by reducing the harm caused by mass shootings.").

Is it just me, or do we seem to be right back where we were before *Bruen*? Except somehow worse. In important ways, the majority's lax historical balancing test is even *easier* for the government to satisfy than intermediate scrutiny. Here, the majority discusses the burden on an individual's right to self-defense, just like it did in *Duncan V.* But if the majority can already point to a historical analogue of a complete ban on a weapon, why does it need to show a minimal burden at all? Really, so long as it has a matching "why"—and there always will be a matching "why" because the inherently dangerous nature of

firearms will always match the majority's permissive "especially dangerous" level of generality—any new law could similarly burden the individual's right to self-defense in the same way as any ban at the Founding. *Cf. Canjura*, 240 N.E.3d at 221-22 (recognizing that all weapons are inherently dangerous).

More glaringly, when considering whether the risk of harm is justified, the majority weighs everything in favor of the government and ignores the always-corresponding burden that the ban imposes on law-abiding citizens. Like every part of a firearm, large-capacity magazines are of course "especially dangerous" in the hands of a criminal. So is having a semi-automatic instead of a single-shot handgun. And so is having good sights that help the criminal hit what he's aiming at.

On the other hand, *not* having good sights decreases the usefulness for law-abiding citizens. And so does having a lower capacity magazine and being forced to reload when put in a lawful self-defense situation. Take the majority's thrice-repeated line: "The short pauses when a shooter must reload a firearm afford intended victims and law enforcement officers a precious opportunity to flee, take cover, and fight back." But what of armed victims attempting to defend themselves and others? They too must pause to reload, and their pauses give assailants time to get off more shots. Not to mention the greater potential for malfunction with every magazine swap. And that is only if the victim happens to be carrying an extra magazine in a place where she can quickly get to it. Pauses in shooting don't just mean a chance for

victims to take cover. Pauses in shooting while trying to reload also mean a chance for victims to be overwhelmed by criminal assailants. It always works both ways.

Yet the majority sees only a one-way street, claiming that the need to reload in a self-defense situation "seldom" occurs. We've been down this road before, too. Statistically, mass shootings almost never occur either. *Duncan V*, 19 F.4th at 1160 (VanDyke, J., dissenting). But for the majority, extremely rare criminal acts count against the Second Amendment while similarly rare self-defense needs are irrelevant.

The majority's assumption that the need to reload in a self-defense situation "almost never" happens in real life may not be as justified as it thinks, though, and becomes even less so in a modern society increasingly plagued by unchecked group violence. There is at least one disturbing example from right here in the Ninth Circuit—indeed, not far from where we heard oral argument in this case. In October 2021, retired police captain Ersie Joyner was pumping gas in Oakland when a group of assailants attempted to rob him at gunpoint in broad daylight.[4] The assailants pointed their guns and repeatedly told each other to shoot Joyner, even as he complied with all their demands.[5] Joyner was carrying a Glock 43, and

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[4] *See* KTVU Newsroom, *Retired Oakland police captain wounded, 1 other killed during gas station gun battle*, KTVU Fox 2 (Oct. 22, 2021, 5:30 AM), https://perma.cc/8E35-Z8SB.

[5] *See* Lisa Fernandez & Andre Senior, *Ersie Joyner 'humbled and humanized' after surviving 22 bullet wounds in Oakland shootout*, KTVU Fox 2 (Feb. 26, 2022, 6:26 AM), https://perma.cc/54ZA-BVF7.

eventually made the choice to defend himself. He fired at the assailants, and they returned fire. Joyner fired ten times, emptying his magazine. He can be seen on the gas station's security footage having to then take cover and *pretend* to shoot back while the assailants continued to shoot him at close range before finally driving away. Remarkably, Joyner survived. But he was shot multiple times before the assailants fled, leaving twenty-two bullet holes in his body.

Again, that is just one anecdote, and I don't dispute that these situations are uncommon.[6] But as I explained in my previous *Duncan* en banc dissent, so are *all* instances where individuals need to actually fire a gun to defend themselves—including against mass shootings, which form the majority's and California's shared rationale for these bans. *Id.* As I stated then, the standard cannot be based on the "practical infrequency of any particular person's need to actually defend herself with a gun," or on the practical infrequency of her need to use multiple rounds to do so. *Id.* We shouldn't be balancing the Second Amendment at all. But if the majority can't help itself, it should at least stop loading the scales. Watering down the history-and-tradition test the way that the majority does here creates real consequences

[6] Indeed, as I've emphasized before, all self-defense uses of firearms are *relatively* uncommon. *Duncan V*, 19 F.4th at 1160 (VanDyke, J., dissenting) (noting "the practical infrequency of any particular person's need to actually defend herself with a gun"). So the uncommonness of the need to use a firearm for self-defense cannot be a reason to deny the Second Amendment's protections.

for real people exercising their Second Amendment rights.

III.

Finally, I must respond to Judge Berzon's concurrence attacking at some length the video portion of this dissent as "wildly improper." She levels three criticisms: (1) that our court's rules don't allow for part of my dissent to be presented in video format, (2) that I have "egregiously … appointed [my]self as an expert witness in this case," and (3) that my video improperly introduces "facts outside the record." I'll respond to each of these accusations in turn.

Demonstrating the majority's consummate textualist bona fides, Judge Berzon's first criticism starts and ends with the text of our court's General Orders: "[T]he determination of each appeal … shall be evidenced by a *written* disposition." 9th Cir. Gen. Ord. 4.5(a) (emphasis added). Judge Berzon emphasizes "written," and I'm never one to dispute that words can be "a real workhorse when *italicized*," particularly in Second Amendment cases. *McDougall v. Cnty. of Ventura*, 23 F.4th 1095, 1122 n.5 (9th Cir. 2022) (VanDyke, J., concurring). But emphasizing one word doesn't license us to ignore the rest of the text. General Order 4.5(a) doesn't even say that "the determination of each appeal" shall be "in writing," much less that it shall be *entirely* or *solely* in writing. It says only that the "determination of each appeal … shall be *evidenced by* a written disposition." 9th Cir. Gen. Ord. 4.5(a) (*different* emphasis added). It should be self-evident that if the rule requires only that "the determination … *be evidenced by* a written disposition" then it doesn't require that it *be* "a written

disposition"—just evidenced by one. In other words, our court can't just issue an oral ruling from the bench disposing of a case that is never memorialized—i.e., "evidenced"—in writing. The administrative need for such a rule is obvious enough.

My dissent clearly is "evidenced by" a written disposition. Much of the dissent is *actually* written, and this written portion evidences (i.e., refers to) the oral portion. And even if the rule required that the disposition itself be written, that too would be satisfied by my dissent—which again, is written in part. Indeed, only if the rule unambiguously required that the "determination of each appeal" be *only* in writing would Judge Berzon's criticism have any merit. But aside from running squarely into the phrase "evidenced by," such an extreme reading of General Order 4.5(a) would also be inconsistent with our court's established practice. We have long included links to videos in our court's opinions, as well as pictures, timelines, and diagrams. Nobody thought that was a problem until now, and Judge Berzon even defends that practice in her concurrence. In short, Judge Berzon's overreading of General Order 4.5(a) is just that—an overreading. Like the majority's invention of its facile arms-accessory test, the "textual" argument against my video dissent seems driven more by a desire for a certain result than anything in the text or reason itself.

Most of Judge Berzon's withering fire, however, is directed at the perception that I've made myself a factual expert in this case. First, I would be remiss if I didn't say thank you. But as much as I may be flattered, I think the accusation misses the mark—

indeed, I think my colleagues aren't even aiming at the right target. My criticism of the majority's reliance on the arms-accessory distinction to decide this constitutional case is fundamentally a conceptual one, not a factual one. As already noted, it has nothing to do with any unique characteristics of firearms per se, but is rather an intrinsic conceptual shortcoming with the majority's ill-advised approach that makes a fundamental right turn on whether some object has certain "inherent" qualities or is instead an "unnecessary" add-on to the Platonic ideal of some category. Illustrating that conceptual shortcoming with the majority's approach doesn't necessarily require any factual "expertise" about firearms. It just requires a certain level of logical and analytical rigor combined with good judgment in not creating clearly inadministrable constitutional tests—precisely the type of *legal* expertise we expect in our jurists. So again, thank you.

Judge Berzon's related accusation that the video portion of my dissent introduces "facts outside the record" is misguided for the same reason. Again, the fundamental purpose of the video is to convey a conceptual point, not any particular disputable facts about guns. The same conceptual point could have been illustrated in video form using essentially any tangible object. I could, for example, have referred to the variety in foot types or bobbin styles on a sewing machine to illustrate the inherent indeterminability in making the majority's inappropriate legal test turn on whether part of an object is an "integral part" or merely an "accessory." Or I could have stood by a car and talked about tires and windshield wipers. The factual specifics of how any particular parts work on

any particular object is not what is important—it's the conceptual point that matters.

But this is a case about guns, after all, and the Constitution protects the right to bear arms, not cars or sewing machines. So it seems appropriate to use firearms to illustrate my conceptual criticism. The majority's odd obsession with the factual content of the video—while intentionally blinding itself to my conceptual point—appears to be a bad case of intentionally avoiding the forest by fixating on the trees.

There are several strong indicators that Judge Berzon's and the majority's "facts outside the record" complaint about my video dissent is just a manufactured concern. First, if you have watched the video portion of my dissent and also read up to this point you are no doubt aware that the written portion of my dissent makes the same conceptual argument as the video: it talks about the same firearms parts except in written form. Yet the majority has never complained that the written portion of my dissent "includes facts outside the record." The difference between the two formats (written and video) is not the supposed factual content, but rather that for some reason the video format is harder to ignore. So the majority has fabricated a sham procedural reason to justify ignoring it anyway.

The majority's newfound punctiliousness for scrupulously avoiding any reference to facts outside the record would perhaps ring truer if it was evenly applied in Second Amendment cases. Only a few years ago, the same judge who has authored the majority opinion in this case authored an opinion in another

case denying Second Amendment rights—and relied extensively on extra-record facts in doing so. *See Mai v. United States*, 952 F.3d 1106, 1117 & n.6, 1118 & n.7, 1121 (9th Cir. 2020) (Graber, J.) (relying on extra-record studies, including "[i]n other contexts" like smoking, to support the majority's conclusion). Nobody in today's majority batted an eye. *See Mai v. United States*, 974 F.3d 1082, 1082-83, 1097 (9th Cir. 2020) (en banc) (containing multiple dissents from the denial of rehearing en banc without a single member of today's majority joining).

The majority doesn't dispute (because it can't) that the *Mai* panel relied on extra-record materials to directly support the outcome in that case. Instead, the majority belatedly attempts to justify that reliance because the extra-record materials existed in "publicly available scientific studies" and because "the parties had asked [the court] to assess the scientific evidence." Okay. Whatever post-hoc rationalization the majority offers now, nothing alters that the *Mai* panel felt free, so long as it was *rejecting* a Second Amendment claim, to cite and directly rely on facts that were neither in the record nor cited by the parties.

In contrast, as I've now explained at length, the *conceptual* point I'm making in both the written and oral portions of this dissent in no way relies on any specific or unique facts—"scientific" or otherwise. The video portion of my dissent doesn't engage in *any* factfinding. It makes a broad conceptual point that can be easily illustrated by a literal universe of commonly known objects without being tethered to any specific facts about those objects. But if my colleagues were genuinely bothered by referencing non-record facts in

Second Amendment cases, maybe they would have voted for en banc review in *Mai*—a case where the panel expressly relied on non-record facts to drive the outcome in that case.[7]

There is also a heads-I-win, tails-you-lose quality to the majority's crocodile tears over the supposed non-record facts in my video dissent. Remember, it is the majority, urged on by California, that has introduced a plainly conceptually flawed but supposedly *fact-based* constitutional test, and then purported to invent a farcical factual distinction to support its constitutional conclusion. It cannot be the case that, when judges make up such conceptually flawed constitutional tests, the further the invented test is from factual reality the more insulated it is from criticism. The majority's real beef with my video is not that it introduces any new facts, but that it unmasks

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[7] The panel's reliance on extra-record materials in *Mai* was neither tangential nor "offhand." The panel *directly* and *repeatedly* relied on the extra-record materials as factually supporting its decision. Yet the majority now attempts to partially justify that reliance as merely taking "judicial notice" because it supposedly only "took notice of the existence of evidence of a particular sort, regardless of its accuracy." But in *Mai* itself, the panel never attempted to make such a claim. And for good reason—it would have been a transparent misstatement. It is obvious to anyone reading the *Mai* decision that the panel there was relying on the substance of the claims made in extra-record materials, not just their mere existence. *See, e.g.*, *Mai*, 952 F.3d at 1117 ("The authors found that studies of persons released from involuntary commitment reported a combined 'suicide risk *39 times* that expected.' That extraordinarily increased risk of suicide clearly justifies the congressional judgment …." (citation and footnote omitted)).

their invented constitutional test as obviously grounded in a factual fantasy.

It would be one thing for me to introduce the majority's fact-based constitutional concept for the first time in my opinion, and then use my own (or someone else's) firearms knowledge to show why that concept belongs in our Second Amendment jurisprudence. It is quite another for the majority to purportedly rely on that factual concept, introduce it into our jurisprudence, and then complain only when I *show* the concept is completely divorced from reality. California and the majority came up with their silly conceptual test, not me. If some extra-record facts about what is actually "integral" to firearms and what is a nonintegral "accessory" have entered the picture, that is not due to my response, whether expressed via video or written word. It is because the majority invited us to analyze a nonexistent reality. Don't shoot the messenger simply for showing that this reality doesn't exist.

Ultimately, however, any debate over my supposedly introducing facts is just a distraction. The majority is trying to manufacture a controversy over the medium I chose to make my point. But the force of my argument is the same regardless of the format. The majority's new test was never based on some deep factual understanding gleaned from experts and well-observed reality. It was concocted based on the majority searching for some way—any way—to declare high-capacity magazines not protected by the Second Amendment. If nothing else, my colleagues are at least consistent because doing so is in line with this court's long tradition of finding a way to neuter the

Second Amendment under whatever test the Supreme Court directs us to apply. Now the majority projects onto my dissent its insecurities about the very flawed factual concept *it contrived* to do so. If you don't like the video portion of my dissent, then don't watch it. But don't let that distract you from grasping the conceptual absurdity of the novel test the majority has concocted to, once again, justify its refusal to apply the Second Amendment.

* * *

To sum it up: the majority's rationale in this case, followed to its (il)logical conclusion, means that now—perhaps even more so than before *Bruen*—only the jankiest guns are even facially protected by the Second Amendment. And even those can be banned outright consistent with the Second Amendment so long as the government can find a historical analogue with the flimsiest connection to the challenged law. Despite the Supreme Court's intervention, we're right back where we started when it comes to the Second Amendment, "trimm[ing] back that right at every opportunity." *Duncan V*, 19 F.4th at 1172 (VanDyke, J., dissenting). Except worse. It sadly seems our court has somehow now established an even more government-friendly version of the very interest balancing the Supreme Court rejected in *Bruen*. In doing so today, this court once again improves its undefeated record against the Second Amendment, demonstrating both its misunderstanding of firearms and its disdain for the People's constitutional right to have them in the process.

And once again, I respectfully dissent.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-55805

VIRGINIA DUNCAN; PATRICK LOVETTE; DAVID MARGUGLIO; CHRISTOPHER WADDELL; CALIFORNIA RIFLE & PISTON ASSOCIATION, INC., a California corporation,

Plaintiffs-Appellees,

v.

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

Defendant-Appellant.

Filed: Mar. 20, 2025

Before: Mary H. Murguia, Chief Judge, and Sidney R. Thomas, Susan P. Graber, Kim McLane Wardlaw, Richard A. Paez, Marsha S. Berzon, Sandra S. Ikuta, Andrew D. Hurwitz, Ryan D. Nelson, Patrick J. Bumatay and Lawrence VanDyke, Circuit Judges.

ORDER

PER CURIAM:

This action concerns the constitutionality of California's ban on large-capacity magazines. At the request of a member of this en banc court, we ordered the parties to brief the preliminary question of the statutory authority of this en banc court to decide this appeal. That question is separate from, and logically antecedent to, the merits. Just as the Supreme Court and we often resolve questions of recusal in a separate order, *e.g.*, *Moore v. United States*, 144 S. Ct. 2 (2023) (Alito, J.); *Cheney v. U.S. Dist. Ct. for D.C.*, 541 U.S. 913 (2004) (Scalia, J.); *Suever v. Connell*, 681 F.3d 1064 (9th Cir. 2012) (D.W. Nelson, J.) (order), we address in this separate order the preliminary question of this en banc court's statutory authority.

Title 28 U.S.C. § 46(c) authorizes courts of appeals to decide cases and controversies en banc, and it prescribes the composition of the en banc court in resolving cases and controversies. The first sentence of § 46(c) grants courts of appeals the power to decide cases en banc:

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service.

28 U.S.C. § 46(c). The second sentence of § 46(c) prescribes the composition of the en banc court and

authorizes the participation of senior circuit judges in two circumstances:

> A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service.

Id. Section 6 of Public Law 95-486 authorizes a court of appeals with more than fifteen active judges to "perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals." Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 (1978).

The Supreme Court long ago explained that § 46(c) "is simply a grant of power to order hearings and rehearings en banc and to establish the procedure governing the exercise of that power." *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 267 (1953). "[T]he statute does not compel the court to adopt any particular procedure governing the exercise of the power; but whatever the procedure which is adopted, it should be clearly explained, so that the members of

the court and litigants in the court may become thoroughly familiar with it." *Id.*; *see also Shenker v. Balt. & Ohio R.R. Co.*, 374 U.S. 1, 4-5 (1963) (reiterating those principles and approving of a practice by the Third Circuit as "clearly within the scope of the court's discretion as we spoke of it in *Western Pacific*").

Consistent with Congress' instructions and the Supreme Court's direction, the Ninth Circuit has adopted and consistently applied several rules and procedures that are relevant here.[1] "If a majority of the judges eligible to vote on the en banc call votes in favor of en banc consideration, the Chief Judge shall enter an order taking the case en banc pursuant to Circuit Rule 35-3." 9th Cir. Gen. Order 5.5(d). Ninth Circuit Rule 35-3, in turn, provides that "[t]he en banc court, for each case or group of related cases taken en banc, shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges of the Court." Once the en banc court has been constituted, it may decide all matters in the case including, at the en banc court's option, future appeals in the same case. General Order 3.6(b), titled "Matters Arising After Remand By an En Banc Court," states that, "[w]here a new appeal is taken following a remand or other decision by an en banc court, ... [t]he en banc court will decide whether to keep the case or to refer it to the three judge panel." 9th Cir. Gen.

[1] This court amended its general orders and rules, effective December 1, 2024. The amendments do not affect the issue discussed in this order. For simplicity, we refer to the version of the orders and rules that were in effect when the en banc court was constituted and when this appeal was filed.

Order 3.6(b); *see also id.* 1.12 (defining a comeback case as a "subsequent appeal[] or petition[] from a district court case or agency proceeding involving substantially the same parties and issues from which there previously had been a calendared appeal or petition").

All actions in this case have accorded fully with those directives. A three-judge panel decided the first appeal, of a preliminary injunction, *Duncan v. Becerra*, 742 F. App'x 218 (9th Cir. 2018) (unpublished), and a different three-judge panel initially decided the second appeal, of a summary judgment, 970 F.3d 1133 (9th Cir. 2020). As authorized by § 46(c), a majority of active judges then voted, in 2021, to rehear this case or controversy en banc. 988 F.3d 1209 (9th Cir. 2021) (order). Pursuant to Ninth Circuit Rule 35-3, the Chief Judge and ten active judges, drawn by lot, comprised the en banc court. We issued an initial substantive ruling, *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021) (en banc), but then remanded the case to the district court following the Supreme Court's vacatur of that judgment, 49 F.4th 1228 (9th Cir. 2022) (en banc) (order). After the district court issued its latest opinion on remand and Defendant appealed again, the Clerk assigned the case a new appellate case number as a matter of routine and consulted the en banc court about whether it would retain the case or refer it to a three-judge panel, as provided by General Order 3.6(b). Consistent with this court's rules, the en banc court decided to

keep the case rather than refer it to the three-judge panel. Docket No. 3.[2]

This is a new appeal, with a new appellate case number, and several judges on the en banc court have assumed senior status since the en banc court was first constituted. But those facts have no bearing on the en banc court's statutory authority to decide this ongoing case.

Section 46(c) authorizes the en banc court to hear "[*c*]*ases and controversies*" and specifically authorizes senior circuit judges "to continue to participate in the decision of a *case or controversy* that was heard or reheard by the court in banc at a time when such judge was in regular active service." 28 U.S.C. § 46(c) (emphases added). All eleven judges on the en banc court were "in regular active service" in 2021 when the court voted to hear the case en banc and when the en banc court was constituted. Congress' use of the terms "case," "controversy," "cases and controversies," and "case or controversy" authorizes the en banc court to decide *the entire case*, not merely a discrete step in the overall suit.

The terms "case" and "controversy," separately or in combination, are commonly understood to apply to litigation as a whole, rather than to a discrete phase of litigation. Dictionary definitions of the terms—both in 1948, when Congress enacted the first sentence of § 46(c), and in 1996, when Congress enacted the relevant part of the second sentence of § 46(c)—all

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[2] Following Judge Watford's resignation, Judge Wardlaw was drawn to replace him on the en banc court pursuant to general order 5.1(b)(1). Docket No. 3 at 1 n.1. No one challenges that replacement.

describe them as encompassing an entire suit or action. *See Case*, *Black's Law Dictionary* (3d ed. 1933) ("an action, cause, suit, or controversy, at law or in equity"); *Controversy*, *Id.* ("a civil action or suit, either at law or in equity"); *Cases and Controversies*, *Id.* ("claims or contentions of litigants" having "a form that the judicial power is capable of acting upon it"); *Case, Controversy, and Cases and Controversies*, *Black's Law Dictionary* (6th ed. 1990) (similar to the third edition's definitions); *Case*, *Webster's New Int'l Dictionary* (2d ed. 1939) ("a suit or action in law or equity"); *Controversy*, *Id.* ("[a] suit in law or equity"); *Case, and Controversy*, *Webster's Third New Int'l Dictionary* (3d ed. 1993) (similar to the second edition's definitions).

Other Congressional enactments reflect that same broad meaning of the terms. The supplemental jurisdiction statute, for example, authorizes district courts to adjudicate state-law claims that "form part of the same *case or controversy*." 28 U.S.C. § 1367(a) (emphasis added). The Supreme Court has held that, in using that phrase, Congress meant to encompass all claims that "derive from a common nucleus of operative fact." *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 165 (1997) (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966)).

The same broad meaning is also found in judicial doctrines. For instance, the law of the case doctrine instructs that, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages *in the same case*," *Arizona v. California*, 460 U.S. 605, 618 (1983) (emphasis

added), and "subsequent stages" of the "same case" include later appeals involving the same district court case, *e.g.*, *Fikre v. FBI*, 35 F.4th 762, 770 (9th Cir. 2022); *Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997) (en banc), *overruled in part on other grounds by Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc).

Under any of those definitions, this appeal clearly is part of the same case or controversy that this court confronted in 2021, when the court voted to rehear the case en banc and when this en banc court was constituted. This appeal asks us to resolve the *same* legal issue, between the *same* parties, arising from the *same* district court action and the *same* facts. The appeal thus is one segment of the overall suit or action, arises from the same common nucleus of facts, and constitutes a subsequent appeal from the same district court case. Indeed, we are not aware of *any* definition of "case or controversy" that would not encompass this appeal.

In sum, Congress authorized this court to rehear en banc "[c]ases and controversies" and authorized senior circuit judges "to continue to participate in the decision of a case or controversy." 28 U.S.C. § 46(c). This appeal is plainly part of the same case or controversy. Thus, we have statutory authority to decide the appeal—even though some judges have assumed senior status and even though this appeal has a new appellate case number.

Two additional contentions warrant discussion. First, § 46(c) authorizes senior circuit judges to "continue to participate in *the decision* of a case or controversy." (Emphasis added.) In one view, "the

decision" means a single decision solely in the appeal in which the court voted to rehear the case en banc. Of course, even a single appeal often involves many decisions by this court, so the suggestion is that we interpret the statute to authorize the en banc court to issue all decisions in an appeal but only until the mandate issues.

We find no support in the statutory text for that proposed rule. We must consider the words "the decision" in context, not in isolation, and a "crucial part of that context is the other words in the sentence," *Diaz v. United States*, 602 U.S. 526, 536 (2024). Congress did not choose to authorize senior circuit judges to participate in "the decision" without modification, or in "the decision of the appeal," or in "the decision of the appeal until the mandate issues." Consistent with Congress' authorization of the en banc court to hear "[*c*]*ases and controversies*," not single appeals, Congress authorized senior circuit judges "to continue to participate in the decision *of a case or controversy*," not the decision of a discrete appeal. 28 U.S.C. § 46(c) (emphases added). Congress knows how to grant courts the limited authority to decide "an appeal," as it has done in many other provisions. *E.g.*, 28 U.S.C. §§ 47, 1292(b), 1292(c)(1), 1292(c)(2), 1292(d)(4)(A), 1292(e), 1453(c)(1), 1915(a)(1). Congress chose broader terms when enacting § 46(c), thereby authorizing us to decide the entire case or controversy, including this appeal.

The second contention starts with the observation that, when Defendant filed this appeal, the en banc court, in accordance with General Order 3.6(b), "decide[d] whether to keep the case or to refer it to the

three judge panel." The assertion is that our decision to keep the case somehow constituted a new vote on whether to rehear the case en banc and that, accordingly, the "vote" was improper because only a subset of active judges participated in the vote.

That contention is mistaken. This court voted to rehear the case en banc only once, in 2021, thus authorizing us to hear en banc the entire case or controversy, including later appeals. By operation of this court's ordinary procedures, the case returned automatically to the en banc court upon the filing of a new appeal in 2023, and the en banc court decided whether to *keep* the case or, alternatively, to *refer* it to the three-judge panel. No new vote on whether to *rehear* the case en banc took place. At any point in the life of a case or controversy, sua sponte or by motion of a party, an en banc court may refer part—or all—of the case to the three-judge panel. 9th Cir. Gen. Order 3.6(b). Each such intermediate decision is made by the en banc court hearing that case, as many en banc courts have done. *See, e.g.*, *De La Rosa-Rodriguez v. Garland*, No. 20-71923, Docket No. 88 (9th Cir. Apr. 3, 2024) (en banc order referring the entire case to the original three-judge panel, without deciding any substantive issues); *Kohn v. State Bar of Cal.*, 87 F.4th 1021 (9th Cir. 2023) (en banc) (opinion deciding one issue and remanding the remaining issues to the original three-judge panel); *Alam v. Garland*, 11 F.4th 1133 (9th Cir. 2021) (en banc) (same). Nothing suggests that those ordinary decisions constitute votes on whether to hear the case en banc. This court voted in 2021 to rehear this case en banc, and § 46(c) and our general orders authorize us to decide the entire case

or controversy without calling for additional votes on whether to hear the case en banc.

Judge Ryan Nelson's dissent advocates for a rule that the authority of the en banc court to hear a case or controversy dissolves when the mandate issues after the en banc court first hears a case. For all the reasons described above, that approach contravenes the clear statutory text that authorizes the en banc court to decide the entire case or controversy, not merely one aspect of a case or controversy.

The approach suggested by Judge Nelson's dissent also would have remarkably broad consequences. Because the authority of the en banc court would dissolve when the mandate issues, the formula proposed by Judge Nelson's dissent would mean that no en banc court ever could accept a comeback appeal—even if the composition of the court had not changed and even if no judge on the en banc court had assumed senior status. In other words, despite the many protestations concerning senior status and the composition of the court, at bottom, those facts would be irrelevant under the rule suggested by Judge Nelson's dissent: because the mandate issued in the first appeal, the authority of the en banc court dissolved, regardless of the composition of the court and regardless of the active or senior status of the judges on the en banc court.

Judge Nelson's dissent also plainly elevates form over substance, as this case demonstrates. Our 2022 remand order also served as the mandate. 49 F.4th at 1231-32. But because the Supreme Court's remand concerned only one claim among several that were at issue—the Second Amendment claim—our remand

was effectively a limited one, as the district court's decision made clear. There is thus no meaningful difference between our 2022 remand order and a formally limited remand, which returns an issue to the district court without a mandate. *See, e.g.*, *Detrich v. Ryan*, No. 08-99001, Docket Nos. 169, 172, 182 (remanding to the district court for further proceedings, without issuing a mandate, in an appeal initiated in 2008, followed by replacement briefing in 2024 after the district court issued a decision on remand). Judge Nelson's dissent appears to agree that, had we issued a formally limited remand, the en banc court would have retained jurisdiction. Dissent by Judge Ryan Nelson at 73 n.6. In other words, the approach suggested by Judge Nelson's dissent would freely allow an en banc court to hear later proceedings in the same case or controversy—even decades later—so long as the en banc court used the proper incantation but would prohibit an en banc court from deciding a later appeal—even just months later—if the court did not use that procedure. We find no support for the contention that Congress intended an en banc court's authority, or senior judges' participation on en banc courts, to hinge on arbitrary procedural distinctions.

Finally, the approach suggested by Judge Nelson's dissent overlooks Congress' clear intent to promote the efficient use of judicial resources. As § 46(c) reflects, and as courts have recognized, there is nothing inherent in senior status that disqualifies a judge from continuing to participate in a case or controversy once it has gone en banc. Senior judges are fully commissioned Article III judges, and the Supreme Court has expressly held that, upon

assuming senior status, a senior judge "does not surrender his commission, but continues to act under it." *Booth v. United States*, 291 U.S. 339, 350-51 (1934). "Senior circuit judges, of course, normally have great experience in the law of the circuit, and their presence on appellate panels within the circuit is wholly consistent with Congress's purpose of promoting the stability of circuit law." *In re Bongiorno*, 694 F.2d 917, 918 n.1 (2d Cir. 1982). Indeed, continued participation promotes the statute's obvious purpose of judicial efficiency. *See, e.g.*, *Igartúa de la Rosa v. United States*, 407 F.3d 30, 32 (1st Cir. 2005) (en banc) (per curiam) (memorandum and order) (holding that the purpose of 46(c) is to "give[] the en banc court the benefit of the knowledge and judgment of all of the judges of th[e] circuit" who have worked on the case); *United States v. Hudspeth*, 42 F.3d 1013, 1015 (7th Cir. 1994) (en banc) (noting that "the purpose of making the exception for a senior judge who had been on the three-judge panel was that the time the judge had put in on the case should not go to waste"); *Allen v. Johnson*, 391 F.2d 527, 529-30 (5th Cir. 1968) (en banc) (per curiam) ("[B]ecause [a narrow reading of § 46(c)] would deprive the Court sitting en banc of the work, research, study and deliberation done earlier by the Senior Circuit Judge during the pendency of the case before the panel, it is not reasonable to suppose Congress desired or intended any such wasteful consequences." (duplicate "the" omitted)). The statute clearly provides that only active judges have authority to decide *whether to hear en banc* a case or controversy. 28 U.S.C. § 46(c). But the statute makes equally clear that Congress intended, as relevant here, for now-senior circuit judges to participate in the *adjudication*

of a case taken en banc when those judges already have devoted time and effort to hearing the same case or controversy.

Our holding is narrow: Congress authorized the en banc court to decide a case or controversy, not a single appeal. Consistent with that statutory authorization, our rules require the en banc court, at the outset of a later appeal, to decide whether it is prudent to retain jurisdiction or to refer the case to the three-judge panel. The specific legal issue in this appeal is identical to the issue that we addressed at great length in the first appeal; the issue is a question of law; and little time—precisely one year—passed between our remand in September 2022 and the filing of this appeal in September 2023. Our decision to retain jurisdiction is a prudential exercise of discretion in these particular circumstances. Nothing in this order requires future en banc courts, facing different circumstances, to exercise discretion in the same manner.

In conclusion, we have statutory authority to decide this case. Accordingly, this en banc court will proceed to resolve the merits.

IT IS SO ORDERED.

S.R. THOMAS, Circuit Judge, with whom MURGIA, Chief Judge, and WARDLAW, PAEZ, BERZON and HURWITZ, Circuit Judges, join, concurring:

I join the majority order in its entirety. I write separately to provide some context to our en banc procedures and to underscore that our Circuit has consistently followed the en banc procedures that our General Orders provide, both in terms of how en banc courts have treated cases or controversies returning to them after remand, and how senior judges participate. Our en banc procedures are consistent with the governing statute, and also in accord with those employed by our sister Circuits.

I

In *Textile Mills Sec. Corp. v. Comm'r*, 314 U.S. 326 (1941), the Supreme Court held that federal courts of appeal had the power to convene themselves en banc. The Court noted that allowing a court to sit en banc "makes for more effective judicial administration," avoids inter-circuit conflicts, and promotes "[f]inality of decision in the circuit courts of appeal." *Id.* at 334-35.

In 1948, Congress codified the *Textile Mills* decision in § 46(c) of the Judicial Code. 28 U.S.C. § 46(c). Following the adoption of § 46(c), the Supreme Court held that the statute was a grant of power to the courts of appeals, and "that the statute does not compel the court to adopt any particular procedure governing the exercise of the power ...." *W. Pac. R.R.*

Corp v. W. Pac R.R. Co., 345 U.S. 247, 267 (1953).[1] The Court confirmed that, pursuant to § 46(c), "each Court of Appeals is vested with a wide latitude of discretion to decide for itself just how that power shall be exercised." *Id.* at 259. At each juncture when the issue has arisen, the Supreme Court has continued to endorse its interpretation of § 46(c) as affording Courts of Appeals the discretion to determine the means by which the en banc process was administered.

As the Supreme Court noted in *United States v. American-Foreign S. S. Corp.*, 363 U.S. 685, 688 (1960), "the procedure to be followed by a Court of Appeals in determining whether a hearing or rehearing en banc is to be ordered" is "largely to be left to intramural determination by each of the Courts of Appeals."

In *Shenker v. Baltimore & O. R. Co.*, 374 U.S. 1, 5 (1963), the Supreme Court upheld the Third Circuit's en banc process, noting that the "procedure is clearly within the scope of the court's discretion as we spoke of it in Western Pacific." It added: "For this Court to hold otherwise would involve it unnecessarily in the internal administration of the Courts of Appeals."

Similarly, in *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 625 (1974), the Court reiterated that the statute left Circuit Court of Appeals "free to devise its own administrative machinery," (*quoting W. Pac. R.R.*

[1] The Dissent asserts a different meaning as to the authority granted to § 46(c) but only cites cases involving prior versions of § 46(c), which are not applicable here.

Corp., 345 U.S. at 250), and noted that the delegation of "[t]his discretion has been subsequently confirmed."

In accordance with the Supreme Court guidance, each Circuit has adopted en banc procedures that best fit their Circuit.[2]

In the Omnibus Judgeship Act of 1978, Congress granted federal circuit courts consisting of more than fifteen judges the power to delegate en banc authority to a limited en banc court. Pub. L. No. 95-486, § 6, 92 Stat. 1629,1633 (codified at 28 U.S.C. § 41 note).[3] The

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[2] There are slight differences among the Circuits as to en banc procedures. For example, some Circuits provide that a senior judge continues to participate in an en banc proceeding that was heard or reheard at a time when such judge was in regular active service. *See, e.g.,* Second Circuit Internal Operating Procedure 40.1; Fourth Circuit Local Rule 40(e). However, the Third Circuit provides that any judge participating in the en banc poll as an active judge may continue to participate on the en banc court, even if the judge assumed senior status before the en banc hearing. Third Circuit Internal Operating Rule 9.6.4. In the Ninth Circuit, we determine the eligibility to serve on the court at the time the en banc court is drawn. General Order 5.1(a)(4). In short, within the authority of § 46(c) and *W. Pac. R.R. Corp,* the Circuits have adopted procedures that best suit their Court and culture.

[3] Congress had considered adopting uniform limited en banc courts for all circuits. Congress had created a Commission on the Revision of the Federal Appellate Courts. Public Law 92-489; 86 Stat. 807. The Commission, popularly known as the "Hruska Commission," recommended that "participation in en banc hearings and determinations should be limited to the chief judge and the eight other active judges of the circuit." *Commission on Revision of the Federal Court Appellate System: Recommendations for Change, Part II*, as reprinted in 67 F.R.D. 195, 202. However, Congress ultimately allowed each Circuit larger than fifteen active judges to decide for themselves whether to adopt a limited en banc court system, and left the mechanism

Ninth Circuit is unique in that it is the only Circuit that has adopted a limited en banc court procedure pursuant to the statute.[4]

In 1980, after consultation with statisticians, the bar, and the public, the Ninth Circuit adopted the limited en banc procedure, with the limited en banc court consisting of the Chief Judge and ten additional active judges to be drawn by lot. *See Ninth Circuit Rule* 35-3. The Court also provided a mechanism for a full court en banc in appropriate cases. *Id.*

The goal in establishing the size of the en banc court was to ensure adequate representation, a sound deliberative process, and decisions that would be accepted as authoritative. Over the decades, our en banc process has satisfied those goals. The en banc process is necessary to avoid intra-circuit conflicts, to examine and resolve potential inter-circuit conflicts, and to address cases of exceptional importance. Although rehearing en banc is a relatively rare occurrence, the Ninth Circuit has an extensive history of en banc activity.[5]

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for implementing the limited en banc courts to the discretion of each Circuit. *See* Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 (codified at 28 U.S.C. § 41 note).

[4] However, pursuant to § 46(c) and our General Orders, only active judges who are not recused or disqualified are eligible to vote on whether the case should be heard or reheard en banc. *See* General Order 5.1.a.3. In this case, a majority of the non-recused active judges voted to rehear the case en banc on February 25, 2021. (Dkt. 117). No senior judge participated in that vote. Thereupon, the en banc court assumed jurisdiction over the case.

[5] Nationally, in calendar year 2024, en banc opinions constituted .016% of terminated cases. In the Ninth Circuit, en banc opinions constituted .012% of cases terminated in 2024.

Our en banc procedures have been comprehensively described in our Circuit Rules and General Orders.[6] We have modified them numerous times to address specific issues and changing circumstances. For example, with the advent of electronic communication, we discarded some of the procedures that were designed for a paper-dominant era. We have also experimented with different processes. For example, in 2005, we voted to expand our eleven-judge en banc court to fifteen judges for a two year experiment. The reaction from litigants and judges was not positive, and we returned to an eleven-judge en banc court in 2007.

However, we still have a relatively large volume. Since 1996, in our Circuit there have been 991 en banc calls by members of our Court (requests to conduct a vote of the non-recused active members of the Court on whether to hear or rehear a case en banc), and we have granted hearing or rehearing en banc in 460 cases to date. Since I assumed the position of En Banc Coordinator in December 2000, in our Circuit there have been 794 en banc calls, and we have granted hearing or rehearing en banc in 380 cases to date.

[6] Our General Orders not only comply with the applicable statutory language but mirror it. *See* General Order 5.1(a)(4) ("Judge eligible to serve on the En Banc Court—means any active or senior judge who is not recused or disqualified and who entered upon active service prior to the date the Court is drawn. Senior judges shall not serve on an en banc court except: (i) a senior judge who was a member of the three judge panel assigned to the case being heard or reheard en banc may elect to be eligible to be selected as a member of the en banc court" or "(ii) a senior judge who takes senior status while serving as a member of an en banc court may continue to serve until all matters pending before that en banc court, including remands from the Supreme Court, are finally disposed of.").

The en banc court does not conduct appellate review of the three judge panel decision. The three judge panel decision is neither affirmed or reversed. Rather, "when a case is heard or reheard *en banc*, the *en banc* panel assumes jurisdiction over the entire case ...." *Summerlin v. Stewart*, 309 F.3d 1193 (9th Cir. 2002); *see also Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987, 995 (9th Cir. 2003) (en banc) (same). In other words, the en banc court is substituted for the three judge panel in considering the case. The en banc court is not limited to consideration of the "issues that may have caused any member of the Court to vote to hear the case *en banc*." *Id.* However, the en banc court may, in its discretion, limit the issues it considers. *Id*; *see, e.g.*, *Rand v. Rowland*, 154 F.3d 952, 954 n.1 (9th Cir. 1998); *United States v. Perez*, 116 F.3d 840, 843 n.2 (9th Cir. 1997); *Asherman v. Meachum*, 957 F.2d 978, 983-84 (2d Cir. 1992).

Because the en banc court is substituted for the three judge panel in its entirety and assumes jurisdiction over the case, an en banc court may—consistent with the practice before a three judge panel—decide that there are issues worthy of further development in the district court before it issues its decision on the merits. Very few of the remanded cases return to the Circuit. However, when they do, in accordance with our General Orders, the en banc court decides how the subsequent appeal should be handled. *See* General Order 3.6(b).

For example, in *Eyak Native Village v. Daley*, 375 F.3d 1218 (9th Cir. 2004) (en banc) ("*Eyak I*") the en banc court vacated and remanded to the district court

to decide whether the plaintiff had aboriginal fishing rights in a given territory. The mandate issued. After the district court had decided that issue, the plaintiffs appealed, and the case returned to the en banc court. *Native Village of Eyak v. Blank*, 688 F.3d 619 (9th Cir. 2012) ("*Eyak II*") (en banc) (per curiam). The en banc court initially decided to refer the new appeal to the three judge panel. *Eyak II*, No. 09-35881, Dkt. No. 33. However, after discussion and closer examination of the prior en banc order, the en banc court decided to retain jurisdiction and to decide the new appeal in the first instance. *Eyak II*, No. 09-35881, Dkt. No. 39.

Likewise, in *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008) (en banc) ("*Sarei I*"), we set forth standards for determining whether exhaustion was required, and then remanded to the district court to determine in the first instance whether to impose an exhaustion requirement on plaintiffs. *Id.* at 832. After the remand and a district court decision, a new appeal was taken and returned to the original en banc court. *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 742 (9th Cir. 2011) (en banc) ("*Sarei II*").

In *Norse v. City of Santa Cruz*, 629 F.3d 966, 978 (9th Cir. 2010) (en banc) ("*Norse I*"), the en banc court reversed the district court and remanded for further proceedings in the district court. The mandate issued. *See Norse v. City of Santa Cruz*, No. 07-15814, Dkt. 55. After a jury trial, a new appeal was taken, and the clerk's office assigned a new appeal number to the case, No. 13-16432. The new appeal was referred to the prior en banc court. The en banc court accepted the case as a comeback. *See Norse v. City of Santa Cruz*, No. 13-16432, Dkt. 23. Then as authorized by our

General Orders, the en banc court *decided* to refer the case to the original three judge panel. *Id.* Our General Orders allow the en banc court to "*decide* whether to keep the case or to refer it to the three judge panel." General Order 3.6(b) (emphasis added); *see also McDaniels v. Kirkland*, 813 F.3d 770, 781 (9th Cir. 2015) (en banc) ("Remand to the original three-judge panel of issues extraneous to an en banc call is at times a useful mechanism to conserve judicial resources and achieve an expeditious resolution of issues on appeal.") In *Norse*, the en banc court decided to refer the case to the original three judge panel, that was within the en banc court's discretion, but was by no means required by our General Orders. The three judge panel subsequently issued a decision on the new appeal. *Norse v. City of Santa Cruz*, 599 Fed.Appx. 702, 703 (9th Cir. 2015) (unpublished).

In this case, the Supreme Court remanded our decision for reconsideration in light of *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 U.S. 1 (2022). The en banc court solicited the views of the parties. California requested a remand to the district court, noting that in light of *Bruen,* "remand would serve the interests of both parties, allowing them a full and fair opportunity to address the new emphasis on historical analogues, and would allow the district court in the first instance to address several important questions about how *Bruen* applies." *Duncan v. Bonta*; no.19-55376; Dkt. 203 at 7. The appellees argued that the en banc court should conduct that inquiry itself without remand. *Id.*; Dkt. 207 at 21-24. After consideration, and consistent with its procedure in prior cases, the en banc court, by majority vote, elected to remand to the district court for proceedings consistent with *Bruen*.

Duncan v. Bonta, 49 F.4th 1228, 1231 (9th Cir. 2022) (en banc).

There was nothing unusual about the remand. Nor is it unusual for the case to return to the court that remanded the case for further development in the district court—whether that be the three judge panel or the en banc court. Indeed, it would be unusual for a remanded case to be returned to a different court.[7]

With that background in mind, a discussion of our historical en banc court practice is in order.

II

A

In accordance with the Supreme Court's direction that en banc procedures "be clearly explained, so that the members of the court and litigants in the court may become thoroughly familiar with [them]," *W. Pac. R.R. Corp.*, 345 U.S. at 267, we adopted Ninth Circuit

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[7] There is no support for the suggestion that the new appeal should have proceeded to the three judge panel. Such an action would have violated our General Orders and past practice. General Order 3.6(b) specifically states, "[w]here a *new appeal* is taken *following a remand* or other decision by an en banc court, the Clerk's Office shall notify the en banc court that the new appeal is pending ... The en banc court *will decide whether to keep the case* or to refer it to the three judge panel." (emphasis added). The General Orders clearly describe the course of action to be taken when a "new appeal" returns to the Court "following a remand." Of course, there may be disagreements with the discretion exercised by the en banc court in deciding whether to retain or refer the case. However, the power and authority is vested in the en banc court. Here, the en banc court decided to keep the case, as it was authorized to do. The decision was within its power, which was granted by § 46(c) and codified in our General Orders.

General Order 3.6(b), which provides that "[w]here a new appeal is taken following a remand or other decision by an en banc court, the Clerk's Office shall notify the en banc court that new appeal is pending, and proceed only after hearing instructions from that en banc court."

The General Orders further provide that, after notification from the Clerk's Office, "[t]he en banc court will decide whether to keep the case or to refer it to the three judge panel." *Id.* The General Orders additionally state that "[i]f the en banc panel so elects, a new en banc court will not be drawn from the eligible pool of judges at the time of future proceedings." *Id.* There is no provision in our General Orders that provides for a new en banc vote, or for the new appeal to be heard first by a three judge panel.[8] A court always retains the power to determine its own jurisdiction. *United States v. Ruiz*, 536 U.S. 622, 628 (2002). There is no case, rule, statute, or General Order providing that an en banc court loses jurisdiction of the current or future appeal when it refers all or part of the case to a three judge panel. Such a construction would be contrary to the structure of rehearings en banc, given that the en banc court is empowered by a vote of the majority of nonrecused active judges to exercise jurisdiction over the case.

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[8] As noted previously, under our General Orders, the en banc court can elect to refer the case to the three judge panel. General Order 3.6(b). If that is done, and the three judge panel issues a new decision, then an en banc vote may be requested as to the new decision. If successful, the case returns to the original en banc court. *Id.* ("If the en banc panel so elects, a new en banc court will not be drawn from the eligible pool of judges at the time of future proceedings.")

The relevant en banc General Orders were adopted to codify existing practice and to remove any potential confusion about how remanded cases should be handled in our Court.[9]

We have consistently adhered to these procedures by referring a new appeal to the en banc court that issued the remand order. *See, e.g., Detrich v. Ryan*, No. 08-99001 (2022) (return to en banc court after remand to district court; pending); *Democratic Natl. Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020) (en banc) (new appeal, with new appellate case number, returned to same en banc court following dismissal of prior appeal as moot); *League of United Latin American Citizens v. Wheeler*, 940 F.3d 1126 (9th Cir. 2019) (en banc) (new petitions for review after remand to agency returned to en banc court and referred to the original three judge panel); *Fue v. McEwen*, 2018 WL 3391609 (9th Cir. June 20, 2018) (en banc) (unpublished) (request for issuance of certificate of appealability, with new appellate case number, decided by the same en banc court[10] after remand in prior case); *Eyak II* (new opinion by en banc court after remand to district court by en banc court); *Norris I* (new appeal, with new appellate case number, referred to the original en banc court, which referred it to the original three judge panel); *Sarei II* (new opinion by en banc court after remand by en banc

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[9] We, of course, can alter our General Orders and Circuit Rules pertaining to our en banc procedures. However, to date our adopted procedure has served us well.

[10] The en banc court remained the same with the exception of Judge Kozinski, who participated in the initial en banc decision, but had fully retired before the second decision was filed.

court); *United States v. Hovsepian*, 422 F.3d 883 (9th Cir. 2005) (en banc) (new opinion by en banc court after remand by en banc court); *WMX Techs., Inc. v. Miller*, 197 F.3d 367 (9th Cir. 1999) (en banc) (opinion by en banc court on new appeal, with new appellate case number, after dismissal and remand to district court by en banc court).

The underlying guiding philosophy for these provisions is consistency in judicial administration—that when a case returned to a court of appeals after remand, the case should be heard by the same panel, and our General Orders so provide. General Order 3.6.

B

Our court has also been consistent in allowing judges who have assumed senior status after remand to the district court or agency, or upon certification to a state court, to remain on the en banc court upon a new appeal or petition, as provided in the General Orders.

As originally adopted, § 46(c) provided that the en banc court would "consist of all active circuit judges of the circuit." 28 U.S.C. § 46(c) (1948). In *American-Foreign S. S. Corp.*, 363 U.S. at 690-91, the Supreme Court held that only active judges could participate in en banc proceedings, although it noted that it would be desirable to allow senior judges who had participated on the three judge panel and senior judges who were active when the case was heard en banc to participate on the en banc court. In 1963, in response to that decision, Congress amended 28 U.S.C. § 46(c) to clarify that "[a] circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in

banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof."

In 1996, following a circuit split[11] regarding whether senior judges could continue to participate in en banc proceedings after taking senior status, Congress clarified that senior judges could in fact continue to participate in en banc proceedings. This clarification is codified in the current verison of § 46(c), which makes clear that "any senior circuit judge of the circuit shall be eligible (1) to participate ... as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service."

The "case or controversy" language is important, because it makes clear that senior judge participation is not limited to "a specific appeal." Rather, senior judge participation is retained as to the "case or controversy," which applies to the entire course of the litigation. As the Supreme Court has explained, in using the phrase "case or controversy," Congress intended to encompass all claims that "derive from a common nucleus of operative fact." *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 165 (1997) (quoting *United Mine Workers of Am. v. Gibbs*, 383

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[11] The Fifth Circuit held in 1968 that a senior judge may continue to participate in en banc proceedings. *United States v. Cocke*, 399 F.2d 433, 435 n. a1 (5th Cir. 1968) (en banc). On the other hand, the Seventh Circuit held in 1994 that a senior judge could not continue to participate in an en banc proceeding. *United States v. Hudspeth*, 42 F.3d 1013 (7th Cir. 1994) (en banc).

U.S. 715, 725 (1966)). Under this standard, the Supreme Court has clarified that a single "case or controversy" may include claims by other litigants, *see Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 558-59 (2005), and may endure even after the original claims are severed or dismissed, *Osborn v. Haley,* 549 U.S. 225, 245 (2007). In this statutory context, the phrase "case or controversy" clearly encompasses the full duration of a civil action beyond individual decision points, including the resolution of discrete legal questions on appeal.

We also presume "that statutory language is not superfluous." *McDonnell v. United States*, 579 U.S. 550, 569 (2016) (quoting *Arlington Central School Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 299, n.1 (2006). The Supreme Court has also emphasized the importance of the use of the disjunctive "or," as signaling that "the words it connects are to be given separate meanings." *Loughrin v. United States*, 573 U.S. 351, 357 (2014). Thus, the phrase "case or controversy" cannot be read simply to mean "case." To hold otherwise, would be to write "or controversy" out of the statute.

Even leaving the phrase "or controversy" aside, as the majority order points out, the interpretation of a "case" as including subsequent appeals is consistent with other doctrinal rules, such as the law-of-the case doctrine, that treat subsequent appeals as part of the same "case." *See Pepper v. United States*, 562 U.S. 476, 506 (2011) (noting that law of the case applies to subsequent stages of the same case). Indeed, subsequent stages may include subsequent appeals, collateral attacks, *United States v. Jingles*, 702 F.3d

494, 499-500 (9th Cir. 2012), or "decisions of a coordinate court," *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816 (1988). Here, our Court is considering the same case that was presented all along. There was no new complaint filed or opened, the case that is returned to us is the same case we remanded.

Consistent with the governing statute and these principles, we adopted General Order 5.1(a)(4), which provides for senior judges who participated in the three judge panel decision to be eligible to be drawn for the en banc court, and also provides that "a senior judge who takes senior status while serving as a member of an en banc court may continue to serve until all matters pending before that en banc court, including remands from the Supreme Court, are finally disposed of." *Id.*

Thus, pursuant to the General Orders, a judge assuming senior status while a member of the en banc court continues to serve on the en banc court through all subsequent proceedings, including appeals considered after remand to the district court or agency, remands from the Supreme Court, and certifications to state courts. Maintaining the composition of the en banc court through all proceedings assures consistency in judicial administration of the case. It is also consistent with the underlying en banc theory that the en banc court is substituted for the three judge panel. We do not, nor does any other Circuit, deem a judge on a three judge panel disqualified from sitting on the panel upon the assumption of senior status. We have consistently

followed this procedure in practice. Examination of a few examples illustrates the point.

In *Murray v. BEJ Minerals, LLC*, 962 F.3d 485 (9th Cir. 2020) (en banc), the case returned to the en banc court after the Supreme Court of Montana decided the certified question. In the interim, Judge Bybee had taken senior status, but remained on the en banc court and participated in the ultimate opinion issued in the case.

In *Fue v. Biter*, 842 F.3d 650 (9th Cir. 2016) (en banc), the en banc court reversed the district court's judgment that a habeas petition was untimely. *Id.* at 657. In 2018, the same petitioner subsequently sought a certificate of appealability. The COA request received a new docket number, *Fue v. McEwen*, No. 18-55040, and the COA request was referred to the original en banc court. *See Fue v. McEwen*, No. 18-55040, Dkt. No. 5. In the interim, Judges Tallman and Clifton had assumed senior status. They remained on the en banc court, and participated in the decision as senior judges. *See* 2018 WL 3391609 (9th Cir. June 20, 2018) (en banc) (unpublished). In *Feldman v. Az. Sec'y of State*, No. 16-16698, we voted to hear a preliminary injunction appeal en banc.[12] The district court subsequently granted a final injunction, rendering the appeal moot. *See Feldman v. Az. Sec'y of State*, No. 16-16698, Dkt. No. 97. Thus, the en banc court dismissed the appeal, and the mandate issued. *See id.*; *see also Feldman v. Az. Sec'y of State*, No. 16-16698, Dkt. No. 99. After final judgment was entered, a new

[12] On November 17, 2016, Judge N.R. Smith became unavailable to hear the case, and Judge Graber was drawn in his place.

appeal was filed, which was given a new docket number, No. 18-15845. The new appeal was referred to the prior en banc court. *See Democratic Natl. Comm. v. Hobbs,* No. 18-15845*,* Dkt. No. 18; *see also Feldman v. Az. Sec'y of State*, No. 16-16698, Internal Docket Citation (Nov. 2, 2016). The Defendants filed a motion to refer the new appeal to the original three judge panel. *See Democratic Natl. Comm. v. Hobbs,* No. 18-15845*,* Dkt. No. 12. The en banc court elected to refer the new appeal to the original three judge panel, but the en banc court retained jurisdiction over any subsequent en banc hearing. *See Democratic Natl. Comm. v. Hobbs,* No. 18-15845*,* Dkt. No. 18.

The original three judge panel issued a new opinion affirming the district court's ruling. *See Democratic Nat'l Comm. v. Reagan*, 904 F.3d 686, 732 (9th Cir. 2018). The new opinion was subject to a successful en banc call, and was argued and submitted in March 2019 before the original en banc court. *See Democratic Natl. Comm. v. Hobbs,* No. 18-15845*,* Dkt. Nos. 68, Internal Docket Citation (Jan. 2, 2019), 104,; *see also Feldman v. Az. Sec'y of State*, No. 16-16698, Internal Docket Citation (Nov. 2, 2016).[13] Judges O'Scannlain and Clifton assumed senior status after the initial en banc draw, but before the new appeal was filed. *See Feldman v. Az. Sec'y of State*, No. 16-16698, Internal Docket Citation (Nov. 2, 2016); *Democratic Natl. Comm. v. Hobbs*, No. 18-15845, Dkt. No. 1. Judge Bybee assumed senior status after the new appeal was argued and submitted, but before the

[13] Pursuant to General Order 5.1(b)(1), Judge Berzon was drawn to replace Judge Graber. *See Democratic Natl. Comm. v. Hobbs,* No. 18-15845*,* Dkt. No. 114.

decision was issued. *See Democratic Natl. Comm. v. Hobbs*, No. 18-15845, Dkt. Nos. 104, 123. All three judges remained on the en banc court and participated in the new en banc decision. *Hobbs*, 948 F.3d at 989.

In *Sarei I*, the case was remanded to the district court. 550 F.3d at 852. A new appeal was taken after the district court acted. *See Sarei v. Rio Tinto PLC*, 650 F.Supp. 2d 1004 (C.D. Cal. 2009); *see also Sarei II*, 671 F.3d at 743. A new number was assigned to the new appeal.[14] *See Sarei v. Rio Tinto PLC*, No. 09-56381, Dkt., No.1. The case was returned to the en banc court, and a new opinion was issued. *Sarei II*, 671 F.3d at 742. In the interim, Judge Kleinfeld had assumed senior status, but remained on the en banc court.

In *Lombardo v. Warner*, 391 F.3d 1008 (9th Cir. 2004) (en banc), the en banc court certified a question to the Oregon Supreme Court. Judge Ferguson, who assumed senior status in 1986, was eligible to be drawn for the en banc court as a member of the three judge panel who heard the case, and was drawn to serve on the en banc court. *Lombardo v. Warner*, 353 F.3d 774 (9th Cir. 2003). Judge Tashima was eligible to be drawn for the en banc court, not as a senior circuit judge serving on the three judge panel, but as an active judge, and he was drawn for service on that basis. After the court voted to take the case en banc, but prior to argument, Judge Tashima assumed senior status. *Lombardo v. Warner*, No. 02-35269, Dkt. Nos. 49, 59. Along with Judge Ferguson, Judge

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[14] The *Sarei I* and *Sarei II* were subsequently consolidated. *See Sarei II*, No. 9-56381, Dkt. No. 10; *see also Sarei I*, No.02-56256, Dkt. No. 253.

Tashima remained on the en banc panel through the issuance of the order regarding certification, and also remained on the en banc panel when the case returned from the Oregon Supreme Court. *See Lombardo v. Warner*, 391 F.3d 1008 (9th Cir. 2004) (en banc); *see also Lombardo v. Warner*, 481 F.3d 1135 (9th Cir. 2007) (en banc).

In *Eyak I*, the en banc court remanded the case to the district court, and the mandate issued. *Eyak I*, 375 F.3d, at 1219; *Eyak I*, No. 02-36155, Dkt. No. 66. The plaintiffs appealed the new district court decision. *Eyak II*, 688 F. 3d at 622. The new appeal was assigned a new docket number, but assigned to the original en banc court. *Eyak II*, No. 09- 35881, Internal Docket Citation (June 21, 2011); *see also Eyak I*, No. 02-36155, Dkt. No. 44.[15] As noted previously, the en banc court initially decided to refer the new appeal to the three judge panel. *Eyak II*, No. 09-35881, Dkt. No. 33. However, after discussion and closer examination of the prior en banc order, the en banc court decided to retain jurisdiction and to decide the new appeal in the first instance. *Eyak II*, No. 09-35881, Dkt. No. 39. In between the mandate issuing in *Eyak I* and argument in *Eyak II*, Judge Kleinfeld assumed senior status. *Eyak II*, No. 09-35881, Dkt. No. 51; *see also Eyak I*, No. 02-36155, Dkt. No. 66. Judge Kleinfeld remained on the en banc court and participated in the decision. *Eyak II*, 688 F. 3d at 622.

In *WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc), the en banc court dismissed an appeal for want of jurisdiction because the district

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[15] Judge O'Scannlain was replaced by Judge Pregerson after Judge O'Scannlain was recused due to a change in counsel.

court had not issued a final judgment. *Id.* at 1136-37. The order directing that the case be reheard en banc was issued on September 26, 1996. *WMX Techs., Inc. v. Miller*, No. 93-55917, Dkt. No. 40. After the case was argued but before the decision was issued, Judge Noonan assumed senior status, but remained on the en banc court. *WMX Techs., Inc. v. Miller*, No. 93-55917, Dkt. Nos. 53, 58. Following the issuance of the mandate and remand to the district court, Judge Leavy took senior status. *See WMX Techs., Inc. v. Miller*, No. 93-55917 Dkt. No. 60. After the district court issued a final judgment on remand, the plaintiff again appealed. *See WMX Techs., Inc. v. Miller*, No. 97-55336, Dkt. No. 3. The new appeal was assigned a new docket number. *Id.* The original en banc court heard the new appeal, with senior Judges Noonan and Leavy participating in the new decision. *See WMX v. Miller*, 197 F.3d 367 (9th Cir. 1999) (en banc); *see also WMX Techs., Inc. v. Miller*, No. 97-55336, Dkt. No. 8.[16]

In *Detrich v. Ryan*, 740 F.3d 1237 (9th Cir. 2013) (en banc), the en banc court remanded the case to the district court. Once the district court proceedings concluded, the case returned to the same en banc court. *See Detrich v. Ryan*, No. 08-99001, Internal Docket Citation (Sept. 19, 2022).[17] In between the case

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[16] The dissent asserts the *Fue*, *Miller*, and *Hobbs* are distinguishable from the facts here because the votes of the senior judges did not change the outcome of the appeal. The Rules and General Orders of our Circuit do not function in this outcome determinative fashion. We follow our established rules and procedures regardless of the outcome.

[17] On September 16, 2022, Chief Judge Murguia, in accordance with General Order 5.1(b)(1), instructed the calendar unit to

being remanded to the district court and the amended notice of appeal being filed, Judges Graber, W. Fletcher, and Bea assumed senior status. *See Detrich v. Ryan*, No. 08-99001, Dkt. Nos. 177, 180. Judge S. R. Thomas assumed senior status after the new notice of appeal was filed. *See Detrich v. Ryan*, No. 08-99001, Dkt. No. 180. The appeal remains pending.

We have also retained judges on the en banc court when the judge assumed senior status after the en banc draw, a practice consistent with the governing statute and our General Orders. *See, e.g.*, *Price v. Stevedoring Services of America*, *Inc.*, 697 F.3d 820 (9th Cir. 2012) (en banc) (Judge Schroeder assumed senior status between the oral argument before the en banc court and the issuance of the opinion); *Lacey v. Maricopa Cnty.*, 693 F.3d 896 (9th Cir. 2012) (en banc) (Judge Schroeder assumed senior status between the oral argument before the en banc court and the

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draw replacements for Judges Pregerson and Reinhardt, who had died in the interim, and Judge Kozinski, who had fully retired. Judges S.R. Thomas, Owens, and Bade were drawn as replacements. On January 25, 2023, Judge Lee replaced Judge Watford after Judge Watford resigned from the Court. *See Detrich v. Thornell*, No. 08-99001, Internal Docket Citation (Jan. 25, 2023). This procedure was consistent with, and dictated by, our General Orders and Circuit Rules. *See* General Order 5.1(b)(1) ("If a judge becomes unavailable to sit on the en banc court by reason of death, disability, recusal, or retirement from the Court, a replacement judge shall be selected."); *see also* Circuit Rule 35-3 ("If a judge whose name is drawn for a particular en banc Court is disqualified, recused, or knows that he or she will be unable to sit at the time and place designated for the en banc case or cases, the judge will immediately notify the Chief Judge who will direct the Clerk to draw a replacement judge by lot.").

issuance of the opinion); *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc) (Judge Schroeder assumed senior status between the oral argument before the en banc court and the issuance of the opinion); *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012) (en banc) (Judge Schroeder assumed senior status between the oral argument before the en banc court and the issuance of the opinion); *Ibrahim v. Dep't of Homeland Sec.*, 912 F.3d 1147 (9th Cir. 2019) (en banc) (Judge N. R. Smith assumed senior status between the oral argument before the en banc court and the issuance of the opinion); *In re Sunnyslope Housing Limited Partnership*, 859 F.3d 637 (9th Cir. 2017) (en banc) (after the court voted to take the case en banc, but prior to argument, Judge O'Scannlain assumed senior status but remained on the en banc court through the decision); *Lowery v. City of San Diego*, 858 F.3d 1248 (9th Cir. 2017) (en banc) (after the court voted to take the case en banc, but prior to argument, Judge O'Scannlain assumed senior status but remained on the en banc court through the decision); *United States v. Ressam*, 679 F.3d 1069 (9th Cir. 2012) (en banc) (Judge Schroeder was drawn as an active judge, but assumed senior status after oral argument and prior to the decision being issued).

C

In addition, our General Orders provide that "[m]atters on remand from the United States Supreme Court will be referred to the last panel that previously heard the matter before the writ of certiorari was granted." Ninth Circuit General Order 3.6(a). Thus, we have followed the consistent practice of retaining judges on the en banc court who have assumed senior

status after the filing of the writ of certiorari. *See, e.g.*, *Young v. Hawaii*, 45 F.4th 1087 (9th Cir. 2022) (en banc) (senior Judges O'Scannlain, W. Fletcher, Clifton, and Bybee participated on en banc court after Supreme Court remand);[18] Democratic National Committee v. Hobbs, 9 F.4th 1218 (9th Cir. 2021) (en banc) (senior Judges O'Scannlain, Clifton, and Bybee participated on en banc court after remand); *Marinelarena v. Garland*, 992 F.3d 1143 (9th Cir. 2021) (en banc) (senior Judges Tashima and Bybee participated on the en banc court following remand);[19] *Rizo v. Yovino*, 950 F.3d 1217 (9th Cir. 2020) (en banc) (senior Judges Tallman and Bea participated on en banc court after remand);[20] *Sarei v. Rio Tinto, PLC*, 722 F.3d 1109, 1110 (9th Cir. 2013) (en banc) (senior Judges Schroeder and Kleinfeld remained on the en banc court after Supreme Court remand).[21]

D

In addition, in accordance with the comeback provisions of the General Orders, Chief Judges have

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[18] Judges O'Scannlain and Clifton had already assumed senior status when the en banc panel was drawn, but were members of the original three judge panel. *See Young v. Hawaii,* No. 12-17808, Dkt. 128.

[19] Judge Tashima had already assumed senior status when the en banc panel was drawn, but was a member of the original three judge panel. *See Marinelarena v. Garland*, No. 14-72003, Dkt. 55.

[20] Judge Tallman assumed senior status before the initial en banc decision was issued. *See Rizo v. Yovino*, No. 16-15372, Dkt. No. 89. Judge Bea assumed senior status after the remand, but before the new decision was filed. *See Rizo v. Yovino*, 950 F.3d 1217 (9th Cir. 2020) (en banc).

[21] Judge Kleinfeld assumed senior status before the initial en banc decision was issued. *See Sarei II*.

remained on subsequent en banc courts after their term as Chief has ended. This practice is consistent with, and dictated by, our General Orders. Our General Orders make clear that when matters return to our Circuit from either a remand from United States Supreme Court or where a new appeal is taken following a remand, the matter must return to the *same* en banc panel. Removing a former-Chief Judge from the panel would change the composition of the en banc panel and directly contradict our Circuit's General Orders. *See* General Order 3.6(a) ("Matters on remand from the United States Supreme Court will be referred to the *last panel* that previously heard the matter before the writ of certiorari was granted.") (emphasis added); *see also* General Order 3.6(b) ("Where a new appeal is taken following a remand or other decision by an en banc court, the Clerk's Office shall notify the en banc court that the new appeal is pending, and proceed only after hearing instructions from *that en banc court*.") (emphasis added).[22] *See e.g. McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015) (en banc) (former Chief Judge Kozinski remained on en banc court after his term expired);[23] *Henry v. Ryan*, 775 F.3d 1112 (9th Cir. 2014) (en banc) (former Chief Judge Kozinski remained on en banc court after his

[22] It is also consistent with General Order 3.3.e, which provides that once a case has been assigned to a panel, "that panel shall have responsibility for all further proceedings in the case, unless it directs otherwise."

[23] Former Chief Judge Kozinski's term as Chief ended in between the vote to take the case en banc and the issuance of the opinion. *See McKinney v. Ryan,* No.9-99018, Dkt. Nos. 57, 114.

term expired);[24] *U.S. v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015) (en banc) (former Chief Judge Kozinski remained on en banc court after his term expired);[25] *Big Lagoon Rancheria v. California*, 789 F.3d 947 (9th Cir. 2015) (en banc) (former Chief Judge Kozinski remained on en banc court after his term expired);[26] *Maldonado v. Lynch*, 786 F.3d 1155 (9th Cir. 2015) (en banc) (former Chief Judge Kozinski remained on en banc court after his term expired);[27] *United States v. Bonds*, 784 F.3d 582 (9th Cir. 2015) (en banc) (per curiam)(former Chief Judge Kozinski remained on en banc court after his term expired);[28] *Arizona v. ASARCO LLC*, 773 F.3d 1050 (9th Cir. 2014) (en banc) (former Chief Judge Kozinski remained on en banc court after his term expired);[29] *Sarei II* (former Chief

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[24] Former Chief Judge Kozinski's term as Chief ended after the en banc panel was drawn, but before oral argument. *See Henry v. Ryan*, No. 09-99007, Dkt. Nos. 111,119.

[25] Former Chief Judge Kozinski's term as Chief ended between oral argument in front of the en banc court and the issuance of the opinion. *See United States v. Zepeda,* No.10-10131*,* Dkt. Nos. 145, 173.

[26] Former Chief Judge Kozinski's term as Chief ended between oral argument in front of the en banc court and the issuance of the opinion.

[27] Former Chief Judge Kozinski's term as Chief ended between oral argument in front of the en banc court and the issuance of the opinion. *See Maldonado v. Lynch,* No. 09-71491*,* Dkt. Nos. 72, 76.

[28] Former Chief Judge Kozinski's term as Chief ended between oral argument in front of the en banc court and the issuance of the opinion. *See United States v. Bonds,* No. 11-10669*,* Dkt. Nos. 69, 74.

[29] Former Chief Judge Kozinski's term as Chief ended between oral argument in front of the en banc court and the issuance of

Judge Schroeder remained on en banc court after her term expired);[30] *Anderson v. Terhune*, 516 F.3d 781 (9th Cir. 2008) (en banc) (former Chief Judge Schroeder remained on en banc court after her term expired);[31] *Frantz v. Hazey*, 533 F.3d 724 (9th Cir. 2008) (en banc) (former Chief Judge Schroeder remained on en banc court after her term expired);[32] *Bates v. United Parcel Service, Inc.*, 511 F.3d 974 (9th Cir. 2007) (en banc) (former Chief Judge Schroeder remained on en banc court after her term expired);[33] *Robinson v. Solano Cnty.*, 278 F.3d 1007 (9th Cir. 2002) (en banc) (former Chief Judge Hug remained on en banc court after his term expired);[34] *Idaho v. Horiuchi*, 253 F.3d 359 (9th Cir. 2001) (en banc)

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the opinion. *See Arizona v. ASARCO LLC,* No. 11-17484*,* Dkt. Nos. 81, 82.

[30] Former Chief Judge Schroeder's term as Chief ended between oral argument in front of the en banc court and the issuance of the opinion. *See Sarei v. Rio Tinto,* No.02-56256*,* Dkt. Nos. 239, 247.

[31] Former Chief Judge Schroeder's term as Chief ended between oral argument in front of the en banc court and the issuance of the opinion. *See Anderson v. Terhune*, No.04-17237*,* Dkt. Nos. 91, 97.

[32] Former Chief Judge Schroeder's term as Chief ended between oral argument before the en banc court and the issuance of the opinion. *See Frantz v. Hazey,* No. 05-16024*,* Dkt. Nos. 54, 59.

[33] Former Chief Judge Schroeder's term as Chief ended between oral argument before the en banc court and the issuance of the opinion. *See Bates v. United Parcel Service, Inc,* No. 04-17295*,* Dkt. Nos. 129, 136.

[34] Former Chief Judge Hug's term as Chief ended after the en banc panel was drawn, but before oral argument. *See Robinson v. Solano Cnty,* No. 99-15225*,* Dkt. No. 40, 53.

(former Chief Judge Hug remained on en banc court after his term expired);[35] *Lipscomb By and Through DeFehr v. Simmons*, 962 F.2d 1374 (9th Cir. 1992) (en banc) (former Chief Judge Goodwin remained on en banc court after his term expired);[36] *Redman v. Cnty. of San Diego*, 942 F.2d 1435 (9th Cir. 1991) (en banc) (former Chief Judge Goodwin remained on en banc court after his term expired);[37] *United States v. Anderson*, 942 F.2d 606 (9th Cir. 1991) (en banc) (former Chief Judge Goodwin remained on en banc court after his term expired);[38] and *Collazo v. Estelle*, 940 F.2d 411 (9th Cir. 1991) (en banc) (former Chief Judge Goodwin remained on en banc court after his term expired).[39]

III

Our procedures are consistent with the practices of other circuits.[40] Our General Orders and Local

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[35] Former Chief Judge Hug's term as Chief ended after the en banc panel was drawn, but before oral argument. *See Idaho v. Horiuchi,* No. 98-30149*,* Dkt. Nos. 79, 99.

[36] Former Chief Judge Goodwin's term as Chief ended between oral argument before the en banc panel, but before the issuance of the opinion.

[37] Former Chief Judge Goodwin's term as Chief ended between oral argument before the en banc panel, but before the issuance of the opinion.

[38] Former Chief Judge Goodwin's term as Chief ended after oral argument before the en banc panel, but before the issuance of the opinion.

[39] Former Chief Goodwin's term as Chief ended after oral argument before the en banc panel, but before the issuance of the opinion.

[40] The Dissent asserts otherwise, but fails to cite a single case or rule supporting that claim. The Dissent appears to rely

Rules mirror those adopted by our sister Circuits.[41] And those procedures have been observed in practice.

Consistent with our procedure, the Seventh Circuit reheard en banc appellate case number 08-3770, and the en banc court decided the appeal. *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc). After the en banc court had ruled and after the mandate had issued, the district court issued a new ruling, and the defendant filed a new appeal, which was given a new appellate case number, number 10-3023. The original en banc court, including Senior

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exclusively on the fact that our General Orders do not use the phrase "decision of a case or controversy." As discussed in Section II.B, we agree that the "case or controversy" language is important given it makes clear § 46(c) was meant to encompass the full duration of a civil action beyond individual decision points, including the resolution of discrete legal questions on appeal. We drafted General Order 5.1(a)(4) consistent with § 46(c) and these principles. Therefore, although the exact "case of controversy" language may not appear in the General Orders, General Order 5.1(a)(4) is consistent with the governing statute.

[41] *See*, *e.g.*, First Circuit Local Rule 40.0 (senior judges continue to participate in the decision of a case or controversy that was heard or reheard by the court en banc at a time when such judge was in regular active service); Second Circuit Internal Operating Procedure 40.1 (same); Third Circuit Rule Internal Operating Procedure 9.6.4 ("Any judge participating in an en banc poll, hearing, or rehearing while in regular active service who subsequently takes senior status may elect to continue participating in the final resolution of the case."); Fourth Circuit Local Rule 40(e) (senior judges participate in the decision of a case or controversy that was heard or reheard by the en banc court at a time when the judge was in regular active service); Fifth Circuit Local Rule 40.2.6 (same); Eleventh Circuit Local Rule 40-10 (same); Federal Circuit Internal Operating Procedure 14.7 (same).

Judge Bauer,[42] accepted and decided the new appeal. *United States v. Skoien*, No. 10-3023, Dkt. No. 75 (7th Cir. Sept. 1, 2010) (order). The Seventh Circuit's practice, like ours, recognizes that Congress authorized senior judges to continue to serve on the en banc court in a comeback case, even though the mandate issued in the original appeal and a new appellate case number was assigned. *See United States v. Skoien*, No. 08-3770, Dkt. No. 38; *see also United States v. Skoien*, No. 10-3023, Dkt. No. 1.[43]

In *United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019) (en banc), the Fifth Circuit reheard a case en banc that had previously been decided en banc and remanded by the Supreme Court. *See United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018) (en banc), vacated and remanded, 139 S. Ct. 2712 (2019). Senior

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[42] Judge Bauer was on the original three judge panel. *See United States v. Skoien*, No. 08-3770, Dkt. No. 8.

[43] The Dissent asserts that according to the Seventh Circuit's Operating Procedures, successive appeals are automatically assigned to the three judge panel that heard the earlier appeal. However, the procedures, like ours, state "[b]riefs in a subsequent appeal in a case in which the court has heard an earlier appeal *will be sent to the panel that heard the prior appeal*." 7th Cir. Operating Procedures 6(b) (emphasis added); *see also* General Order 3.6(b) ("Where a new appeal is taken following a remand or other decision by an en banc court, the Clerk's Office shall notify the en banc court that the new appeal is pending, and proceed only after hearing instructions from *that en banc court*.") (emphasis added). The Seventh Circuit, however, further clarifies that "[c]ases that have been *heard by the court en banc are outside the scope of this procedure*, and *successive appeals* will be assigned at random *unless the en banc court directs otherwise*." *Id* (emphasis added). Therefore, the Seventh Circuit's Operating Procedures, like our own General Orders, allow for the en banc court to determine how to proceed following a successive appeal.

Judge Clement, assumed senior status following the first en banc decision but prior to the remand. *Id.* Senior Judge Jolly assumed senior status after the oral argument but before the decision of the first en banc panel. *See United States v. Herrold*, No. 14-11317, Dkt. Nos. 220, 235. Both Judges remained on the en banc court and continued to participate in the case following remand. *See United States v. Herrold*, 883 F.3d 517 (5th Cir. 2018) (en banc).

In *United States v. Gonzalez-Longoria*, 893 F.3d 339 (5th Cir. 2018) (en banc), the Fifth Circuit ordered rehearing en banc of a case that was previously heard en banc and vacated by the Supreme Court. *See United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016) (en banc), vacated and remanded, 585 U.S. 1001 (2018). Senior Judges Davis, Jolly, and Clement, who were all members of the original en banc court and assumed senior status before the remand, continued to participate in the case following remand. *United States v. Gonzalez-Longoria*, 894 F.3d 1274 (5th Cir. 2018) (en banc).

In *Hernandez v. Mesa*, 885 F.3d 811 (5th Cir. 2018) (en banc), the Fifth Circuit en banc court reheard the case en banc after remand from the Supreme Court. *See Hernandez v. United States*, 785 F.3d 117 (5th Cir. 2015) (en banc), vacated and remanded sub nom. *Hernandez v. Mesa*, 582 U.S. 548 (2017). In the interim, Judge Davis assumed senior status, but continued on the en banc court as a senior judge.

In *United States v. Unknown (In re Unknown)*, 754 F.3d 296 (5th Cir. 2014) (en banc) (per curiam), the Fifth Circuit reheard the case en banc after

remand from the Supreme Court. *In re Amy Unknown*, 701 F.3d 749 (5th Cir. 2012) (en banc), vacated and remanded sub nom. *Paroline v. United States*, 572 U.S. 434 (2014), and cert. granted, judgment vacated sub nom. *Wright v. United States*, 572 U.S. 1083 (2014). Judge King assumed senior status prior to the remand. *Id.* Judge Garza assumed senior status after oral argument before the en banc court, but before the initial en banc decision was issued. *United States v. Unknown (In re Unknown*), No. 09-41238, Dk. Nos. 310, 334. Both Judges continued to participate in the case before the en banc court as senior judges.

In *Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007) (en banc), Judge Selya assumed senior status while the en banc case was pending, and remained on the en banc court as a senior judge. *See Carcieri v. Kempthorne*, No. 03-2647, Dkt. (Dec. 05, 2006); Dkt. (Jan. 09, 2007). The Supreme Court reversed. *Carcieri v. Salazar*, 555 U.S. 379 (2009). On remand from the Supreme Court, senior Judge Selya participated in the subsequent en banc proceedings. *See* No. 03-2647, Dkt. (April 1, 2009) (judgment).

In *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 344 F.3d 1359 (Fed. Cir. 2003) (en banc), the Federal Circuit reheard a case en banc that it had previously heard en banc, but had been vacated by the Supreme Court. *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 234 F.3d 558 (Fed. Cir. 2000) (en banc), vacated, 535 U.S. 722 (2002). In the interim, Judge Plager had assumed senior status in 2000, but remained on the en banc court. *Id.*

In *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 237 F.3d 639, 640 (D.C. Cir. 2001) (en banc), Judge

Silberman assumed senior status, November 1, 2000, during the pendency of the initial en banc proceedings. Judge Williams assumed senior status on September 30, 2001. The Supreme Court reversed. *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137 (2002). Senior Judges Silberman and Williams continued to participate in the post-remand en banc proceedings. *See Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 2002 WL 1974028 (D.C. Cir. Aug. 27, 2002) (en banc) (unpublished).

In *Consolidated Gas Co. v. City Gas Co.*, 931 F.2d 710 (11th Cir. 1991) (en banc), the Eleventh Circuit reheard a case vacated by the Supreme Court. *Consolidated Gas Co. v. City Gas Co.*, 912 F.2d 1262 (11th Cir. 1990) (en banc), cert. granted, judgment vacated, 499 U.S. 915 (1991). Judges Roney and Morgan had participated in the earlier en banc proceedings as members of the three judge panel. *See Consol. Gas Co. of Fla. v. City Gas Co. of Fla.*, 880 F.2d 297 (11th Cir. 1989). Judge Morgan was already senior status when he served on the three judge panel. Judge Roney was Chief when he served on the three judge panel and assumed senior status before the first en banc decision was issued. Both Judges continued to participate in the remanded case.

IV

In sum, the majority is entirely correct that 18 U.S.C. § 46(c) authorizes courts of appeals to hear cases and controversies en banc, and further authorizes a judge who assumes senior status after the en banc court is composed to continue to participate on the en banc court—as part of the continuing case or controversy—on a new appeal after

remand to the district court or agency, or upon remand from the Supreme Court. It is telling that the Dissent fails to cite any authority that would lead to contrary conclusion: not one case; not a single rule.

The Supreme Court has underscored that § 46(c) is a grant of power to the courts of appeals, and "that the statute does not compel the court to adopt any particular procedure governing the exercise of the power ...." *W. Pac. R.R. Corp*, 345 U.S. at 267. Our procedure follows the Supreme Court dictate to provide an en banc process that "makes for more effective judicial administration," avoids inter-circuit conflicts, and promotes "[f]inality of decision in the circuit courts of appeal." *Textile Mills Sec. Corp.*, 314 U.S. at 334-35. A contrary rule would sow inconsistency in appellate decision-making and thwart the purpose of rehearing en banc in order that a Circuit "secure uniformity and continuity in its decisions." *American-Foreign S.S. Corp.*, 363 U.S. at 690.

The clear grant of authority in the current version of § 46(c), coupled with the Supreme Court's directive that each Circuit develop its own procedures to implement the en banc process, should end the discussion. Our consistent practice of applying the applicable rules in accordance with the governing statute, over many decades and countless cases, bolsters that conclusion.

IKUTA, Circuit Judge, specially concurring:

Our General Order 3.6 is a strained interpretation of 28 U.S.C. § 46(c), and should be revisited by the Ninth Circuit to ensure better harmony with Congress's language and intent. But because General Order 3.6 is not contrary to the statute, I reluctantly concur in today's order.

The question whether an en banc panel of this court can include judges who have taken senior status can be best determined by viewing § 46(c) historically. In 1960, § 46(c) provided that:

> Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit.

28 U.S.C. § 46(c) (1958); *United States v. Am.-Foreign S. S. Corp.*, 363 U.S. 685, 685 (1960) (quoting same).

The Supreme Court determined that a judge who took senior status under 28 U.S.C. § 371(b) (referred to as "retired" throughout the opinion) was ineligible to participate in an en banc decision. *Am.-Foreign*, 363 U.S. at 691. "The view that a retired circuit judge is eligible to participate in an en banc decision thus finds support neither in the language of the controlling statute nor in the circumstances of its enactment." *Id.* at 689. Rather, en banc courts are "convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of

the law of the circuit." *Id.* According to the Court, "the evident policy of [§ 46(c)] was to provide 'that the active circuit judges shall determine the major doctrinal trends of the future for their court.'" *Id.* at 690 (quoting *Am.-Foreign S.S. Corp. v. United States*, 265 F.2d 136, 155 (2d Cir. 1958) (statement of C.J. Clark), *vacated sub nom. United States* v. *Am.-Foreign S. S. Corp.*, 363 U.S. 685 (1960)).

Notwithstanding this conclusion, the Court added that "[p]ersuasive arguments could be advanced that an exception should be made to permit a retired circuit judge to participate in en banc determination of cases" in certain unique situations, such as where a senior judge "took part in the original three-judge hearing, or where, as here, he had not yet retired when the en banc hearing was originally ordered." *Id.* The Court further noted that "the Judicial Conference of the United States has approved suggested legislative changes that would provide such an exception, and a bill to amend the statute has been introduced in the Congress." *Id.*

In 1963, Congress adopted the Supreme Court's and the Judicial Conference's approach, Act of Nov. 13, 1963, Pub. L. No. 88-176, 77 Stat. 331, which is still present in the statute before us. After further amendment, § 46(c) now states that:

> A court in banc shall consist of all circuit judges in regular active service ... except that any senior circuit judge of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment ... as a member of an in banc court reviewing a decision of a panel of which such judge was a

> member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service.

28 U.S.C. § 46(c).

Given that Congress added this language in the wake of *American-Foreign*, we can readily infer that Congress intended to allow senior judges to participate on en banc panels in only limited circumstances, specifically when the senior judge "took part in the original three-judge hearing," or where the senior judge had been active "when the en banc hearing was originally ordered" and then participated in the decision of the case. *Am.-Foreign S.S. Corp.*, 363 U.S. at 690. Any broader reading of § 46(c) would be in tension with the Court's concern that an en banc opinion should show the "authoritative consideration and decision by those charged with the administration and development of the law of the circuit," and that active circuit judges would "determine the major doctrinal trends of the future for their court," *id.* at 689, 690 (internal quotation omitted).

But the Ninth Circuit has interpreted § 46(c) broadly. Our General Orders hold that "[w]here a new appeal is taken following a remand or other decision by an en banc court," the en banc court may keep the case, and may retain "jurisdiction over any future en banc proceedings." 9th Cir. Gen. Ord. 3.6(b). Therefore, "[i]f the en banc panel so elects, a new en banc court will not be drawn from the eligible pool of judges at the time of future proceedings." *Id.* By

adopting this strained interpretation of § 46(c), the Ninth Circuit allows the en banc panel that was originally formed at the time the then-active circuit judges took a vote to retain control of any new appeal. This grandfathered en banc panel can thus avoid any vote by a majority of the active judges as to whether the new appeal should be heard en banc. It also means that the grandfathered en banc panel—which may be composed of any number of senior judges—may decide the appeal of a new opinion issued by a district court, long after the original decision of the en banc panel has been vacated.

That is the situation in this case. A vote to rehear the original three-judge panel decision took place in 2021. *Duncan v. Becerra*, 988 F.3d 1209 (9th Cir. 2021). After a decision issued, *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021) (en banc), the Supreme Court vacated the judgment in 2022 and returned it to the Ninth Circuit. *Duncan v. Bonta*, 142 S. Ct. 2895 (2022). The en banc panel then remanded the case to the district court and issued our mandate. *Duncan v. Bonta*, 49 F.4th 1228 (9th Cir. 2022) (en banc). The district court issued a new opinion. *Duncan v. Bonta*, 695 F. Supp. 3d 1206 (S.D. Cal. 2023). On appeal of the district court opinion, the en banc panel (now with five senior judges) sidestepped the normal assignment to a three-judge panel, and took the new decision as an en banc case, without a vote, in October 2023. *Duncan v. Bonta*, 83 F.4th 803, 807 (9th Cir. 2023) (en banc). Thus, without a vote of active judges to take the district court decision en banc, the 2021 en banc panel—with five senior judges—decided to "determine the major doctrinal trends of the future for their court." *Am.-Foreign*, 363 U.S. at 690 (internal

quotation omitted). Even if these procedural steps fall within the language of General Order 3.6(b), they stray far from the spirit of § 46(c), as detailed in *American-Foreign*.

Even if § 46(c) is susceptible to the interpretation provided in our General Orders, we should agree it is not the best interpretation of this statute, in light of the history and purpose of an en banc consideration. Under a narrower reading, the text of § 46(c) can reasonably be construed as allowing a judge who takes senior status during deliberations by the en banc panel to continue participating in a decision issued by the en banc panel. But such judge may no longer participate after the decision is published (or the mandate has issued), regardless whether the decision is subsequently vacated by the Supreme Court or remanded to the district court. Under a reasonable construction of § 46(c), the senior judge is no longer "continu[ing] to participate" in the same decision, 28 U.S.C. § 46(c), and active judges should be taking the lead in securing "uniformity and continuity" in the Ninth Circuit's case law. *Am.-Foreign*, 363 U.S. at 690.

Our en banc panels should reflect the decisions of active judges who are tasked with the administration and development of the law of the circuit, and it is the active judges who should "determine the major doctrinal trends of the future for their court," *Am.-Foreign*, 363 U.S. at 690 (internal quotation omitted). With that goal in mind, I would revisit and revise our

current General Order 3.6 to make it more consistent with congressional intent.[1]

[1] The dispute about our past procedures, *see generally* S. Thomas Concurrence, R. Nelson Dissent, further supports taking a fresh look at § 46(c) and revising our General Orders.

R. NELSON, Circuit Judge, dissenting:

The majority erroneously interprets 28 U.S.C. § 46(c) to allow a limited en banc court to exercise permanent control of a case after it issues "the decision," remands to the district court, and issues the mandate. The Ninth Circuit stands alone in this strained interpretation. Every other circuit applies § 46(c) to require a new en banc vote after remand. And for good reason. That is the only interpretation of § 46(c) consistent with the statutory requirements that a majority of all active judges vote to take a new appeal en banc and only active judges serve on the en banc court (with exceptions for senior judges not satisfied here).

The majority's interpretation frustrates the purpose of the en banc process. It allows a future appeal to bypass the statutory en banc voting process and proceed to an en banc court not representative of the active judges on the court as it excludes new active judges who joined the court since the prior remand. No other court has ever allowed this to happen. Our limited en banc process, as authorized by Congress, does not permit this perverse result. To be sure, Congress has allowed senior judges in limited circumstances to sit en banc *in addition* to the court's active judges. But the majority's interpretation turns Congress's statutory exception on its head and injects senior judges *in lieu* of active judges. That is plainly contrary to the statutory language.

Judge S.R. Thomas argues that our procedure here is permissible because the Supreme Court has vested us with "discretion to determine the means by which the en banc process [is] administered." S.R.

Thomas Concurrence at 23. But it should go without saying that we lack discretion to violate a statute. The cases he cites make this clear.[1] In *Moody v. Albemarle Paper Co.*, the Supreme Court struck a Fourth Circuit procedure allowing senior judges who were members of the original three-judge panel to vote on whether to hear the case en banc. 417 U.S. 622, 623-24 (1974) (per curiam). Why? Because that procedure violated § 46(c). *Id.* at 627. In *Shenker v. Baltimore & Ohio Railroad Co.*, the Court blessed a Third Circuit rule requiring an absolute majority vote of the active judges to take a case en banc. 374 U.S. 1, 4-5 (1963). That common practice is expressly required by § 46(c). And in 1994, the Seventh Circuit held that certain senior judges could not participate in an en banc case because it was barred under § 46(c). *United States v. Hudspeth*, 42 F.3d 1013, 1014-15 (7th Cir. 1994) (en banc). In response, Congress amended § 46(c) in 1996 to clarify senior judge participation in situations not applicable here.

Thus, Judge S.R. Thomas's suggestion that the Supreme Court has blessed our improper application of § 46(c) is wrong. The Supreme Court has never endorsed, and § 46(c) does not permit, the several statutory violations we committed here: (1) allowing less than the full court to vote to rehear a new appeal en banc; (2) allowing senior judges to vote to rehear a new appeal en banc; and (3) allowing senior judges at

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[1] Judge S.R. Thomas asserts that I "only cite[] cases involving prior versions of § 46(c), which are not applicable here." S.R. Thomas Concurrence at 22 n.1. He then bizarrely relies on the *same* cases to convey half-truths about how the Supreme Court has interpreted § 46(c).

the time of the new appeal to participate in the new appeal.

Indeed, as Judge S.R. Thomas's comprehensive research makes clear, no other court has ever applied § 46(c) in this way. Of the 460 en banc cases since 1996, Judge S.R. Thomas can point to only five (just one percent) where the Ninth Circuit has previously violated some aspect of § 46(c). *See* S.R. Thomas Concurrence at 25 n.5. Those five cases are all distinguishable and far less egregious than the violations here. In one of them, the en banc court did not proceed to decide the new appeal after the mandate issued and a new appeal was filed. In the other cases, the procedural error was harmless because the decision to proceed en banc was not outcome determinative of the case. So any insinuation that our procedure here is either authorized by § 46(c) or consistent with our court's prior practice is false and misleading.

What's more, the majority's decision is not even supported by a majority of active judges on the panel. And it is the active judges—or those senior judges who were on the three-judge panel—who are empowered by statute to make en banc decisions for the court. This en banc court lacks statutory jurisdiction to proceed without a new en banc vote and a new panel composition that reflects the current active judges of the court. I dissent.

I

In 2017, Plaintiffs filed a complaint alleging that California's "large-capacity magazine" ban violated their rights under the Second Amendment and the Takings Clause. *See* Cal. Penal Code § 32310. Shortly

before the ban was to take effect, Plaintiffs sought a preliminary injunction to maintain the status quo and prevent California from enforcing the law. *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1112-13 (S.D. Cal. 2017). The district court enjoined § 32310, holding that Plaintiffs were likely to succeed on the merits. *Id.* at 1115-36. California took an interlocutory appeal. That appeal was assigned to an initial three-judge panel, which affirmed.[2] *Duncan v. Becerra*, 742 F. App'x 218, 220 (9th Cir. 2018).

Later, the district court granted summary judgment to Plaintiffs and permanently enjoined enforcement of California's law. *Duncan v. Becerra*, 366 F. Supp. 3d 1131 (S.D. Cal. 2019), *aff'd*, 970 F.3d 1133 (9th Cir. 2020), *reh'g en banc granted*, *vacated*, 988 F.3d 1209 (9th Cir. 2021). California again appealed, and a different three-judge panel affirmed.[3] *Duncan v. Becerra*, 970 F.3d 1133, 1169 (9th Cir. 2020). California petitioned for rehearing by the en banc court.

Title 28 U.S.C. § 46 governs what happens next. For a case to be "heard or reheard" en banc, a majority of the court's active judges must agree. 28 U.S.C. § 46(c); *see* 9th Cir. Gen. Order 5.5(d). When California first sought rehearing in 2020, a majority of the then-active judges voted to take this case en banc.

An en banc court typically "consist[s] of all circuit judges in regular active service." 28 U.S.C. § 46(c). But

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[2] None of the judges on that first panel served on the en banc court.

[3] Again, none of the judges on this second panel served on the en banc court.

the Ninth Circuit is different. Congress has allowed any court with 15 or more active judges to choose a smaller en banc panel. *See* Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633 (1978). Because our court has 29 active judges, we use an 11-member limited en banc court consisting of the Chief Judge and ten other judges drawn at random. 9th Cir. R. 40-3. The Clerk's Office drew a limited en banc panel including then-Chief Judge S.R. Thomas and ten randomly chosen judges—all active judges at the time. In a decision that generated six opinions, the divided en banc court reversed and remanded for entry of judgment for California. *Duncan v. Bonta*, 19 F.4th 1087, 1113 (9th Cir. 2021) (en banc).

Plaintiffs sought certiorari. While the petition was pending, the Supreme Court decided *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022). In *Bruen*, the Court announced a new framework for evaluating Second Amendment claims, one that "is consistent with the Nation's historical tradition of firearm regulation." 597 U.S. at 24. Soon after, the Supreme Court granted Plaintiffs' petition, vacated our en banc decision, and remanded for additional consideration under *Bruen*. *Duncan v. Bonta*, 142 S. Ct. 2895 (2022). The en banc court, in turn, remanded the case to the district court for further proceedings consistent with *Bruen*. *Duncan v. Bonta*, 49 F.4th 1228, 1231 (9th Cir. 2022) (en banc). That "order constitute[d] the mandate of this court." *Id.* at 1232.

After remand, the district court again enjoined § 32310. *Duncan v. Bonta*, 695 F. Supp. 3d 1206, 1255 (S.D. Cal. 2023). And again, California appealed.

Here is where things go wrong. Rather than allow the new appeal to proceed to the three-judge panel, the en banc court from the first appeal voted to reclaim jurisdiction under General Order 3.6(b). That internal rule says that "[w]here a new appeal is taken following a remand or other decision by an en banc court, ... [t]he en banc court will decide whether to keep the case or to refer it to the three judge panel." 9th Cir. Gen. Order 3.6(b). By the time the en banc court voted to keep the case, the status of its members had changed dramatically. The en banc court was no longer comprised of eleven active judges. Before this new appeal was filed, five active judges on the prior en banc court took senior status.[4] Thus, the decision to "hear[] or rehear[]" this new appeal en banc was made by senior judges who are statutorily prohibited from voting on that decision. *See* 28 U.S.C. § 46(c).

The court's active judges were not permitted to vote on that decision, as § 46(c) and our rules require. *See id.* ("hearing or rehearing" before the en banc court may only be "ordered by a majority of the circuit judges of the circuit who are in regular active service"); 9th Cir. Gen. Order 5.1(a)(3) (similar). Worse, seven new active judges had joined the Ninth Circuit since we took the prior appeal en banc.[5] Those active

[4] Senior Judge Paez assumed senior status on December 13, 2021; Senior Judge Graber assumed senior status on December 15, 2021; Senior Judge Berzon assumed senior status on January 23, 2022; Senior Judge Hurwitz assumed senior status on October 3, 2022; and Senior Judge S.R. Thomas assumed senior status on May 4, 2023.

[5] They include Judge Koh, Judge Sung, Judge Sanchez, Judge H.A. Thomas, Judge Mendoza, Judge Desai, and Judge Johnstone.

judges—who are set to serve for decades—were given no say in the matter.

The en banc court then, by a vote of 7-4, stayed the district court's injunction. *Duncan v. Bonta*, 83 F.4th 803, 807 (9th Cir. 2023) (en banc). Judge Bumatay, joined by three other judges, dissented on the merits. *Id.* at 808-23 (Bumatay, J., dissenting). I also dissented, finding that the en banc court likely lacked statutory jurisdiction over this new appeal. *Id.* at 807-08 (R. Nelson, J., dissenting).

We asked the parties to brief whether the en banc court has jurisdiction under § 46(c). California argued that § 46(c) and our General Orders permit the process here. Plaintiffs instead argued that § 46(c) and Supreme Court precedent "make clear that this en banc panel lacks statutory authority to decide this case." Plaintiffs explained that § 46(c) places the gatekeeping function of the en banc process with the court's active judges, which requires that a vote of all active judges be held before an appeal can proceed en banc. Amicus curiae Gun Owners of America, Inc., joined by several other gun rights organizations, agreed, concluding that "[i]t was error to have the en banc panel of the prior appeal [] vote to determine whether the new appeal [] should be heard initially en banc."

The en banc court now reverses the district court's injunction and enters judgment instead for California. Maj. Op. at 13. It does so despite lacking statutory jurisdiction over this case. No new vote by the active judges of the court was taken when the appeal was filed—thus disenfranchising seven new active judges. That decision was unprecedented. But the problem

was only exacerbated. The en banc court now includes five senior judges who are not eligible to participate in the new appeal. All five of these judges were in senior status after our en banc court's prior decision, remand, and mandate. They were thus senior judges when this new appeal was filed and none served on either prior three-judge panel. As a result, the majority's decision excludes seven of our new active judge colleagues and ignores the statutory justifications for en banc review.

II

Congress has the power to define the jurisdiction of federal courts. *Patchak v. Zinke*, 583 U.S. 244, 252 (2018). This includes the process by which federal courts may rule on the merits of a case. *See, e.g.*, *Ankenbrandt v. Richards*, 504 U.S. 689, 697-98 (1992) (Congress has the "sole power" to confer jurisdiction on federal courts "in the exact degrees and character which to Congress may seem proper for the public good" (citation omitted)). Statutory limitations on our jurisdiction "must be neither disregarded nor evaded," because if we lack power to hear a case, any decision issued is invalid. *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978).

In *Textile Mills Securities Corp. v. Commissioner of Internal Revenue*, the Supreme Court held for the first time that federal courts of appeals have the power to convene themselves en banc. 314 U.S. 326, 334-35 (1941). Section 46(c)—enacted in 1948—is a "legislative ratification" of that decision. *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 250 (1953). It is a "grant of power to order hearings and rehearings en banc." *Id.* at 267. Thus, courts lack power over en banc proceedings outside § 46(c)'s parameters.

Originally, § 46 limited en banc panels to all "active circuit judges." 28 U.S.C. § 46 (1948). Senior judges were categorically excluded. More, all active judges *had* to participate; a circuit court could not choose a limited en banc. Today's version of § 46 stems from two amendments—one in 1963 and another in 1996. Each amendment answered a different question about the composition of the en banc court. A brief history is critical to understand the modern version of § 46.

A

The first question concerned when senior judges could participate in en banc proceedings, if at all. In 1960, the Supreme Court held that the original version of § 46 barred senior judges from participating in an en banc case the moment they took senior status. *United States v. Am.-Foreign S. S. Corp.*, 363 U.S. 685, 685-86 (1960), *superseded by statute* 28 U.S.C. § 46(c) (1963). "Congress may well have thought that it would frustrate a basic purpose of the legislation not to confine the power of en banc decision to the permanent active membership of a Court of Appeals." *Id.* at 689. After all, "[e]n banc courts are the exception, not the rule." *Id.* The Court acknowledged that there may be "[p]ersuasive arguments" for why senior judges should participate on some en banc panels, such as when they "took part in the original three-judge hearing." *Id.* at 690. But the Court declined to expand § 46's meaning based on policy. Any revisions, the Court explained, must be left to Congress. *Id.* at 690-91.

Congress answered that call in 1963 by amending § 46 to allow senior judges to sit on the en banc court in one limited instance: if they served on the original

three-judge panel. 28 U.S.C. § 46 (1963). The 1963 amendment allowed senior judges to participate *in addition* to all the active judges. *See id.* (a senior judge "shall *also* be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof" (emphasis added)). It did not allow senior judges to participate in lieu of other active judges. That exception does not apply here since none of the senior judges on the en banc court served on either three-judge panel.

B

The second question concerned a circuit split on whether a judge who took senior status after hearing the en banc argument could still participate in the en banc decision. In *United States v. Cocke*, the Fifth Circuit held in a footnote that § 46(c) allows a judge to participate in an en banc decision even if they took senior status after oral argument. 399 F.2d 433, 435 n.a1 (5th Cir. 1968) (en banc). The court relied on a previous decision that underscored "the work, research, study and deliberation done earlier by the Senior Circuit Judge." *Allen v. Johnson*, 391 F.2d 527, 529 (5th Cir. 1968) (en banc). Excluding senior judges from en banc decisions, the court reasoned, would have "wasteful consequences." *Id.* at 530.

The Seventh Circuit took a different approach in *United States v. Hudspeth*. As in *Cocke*, a judge who was active when the case was heard en banc took senior status before the en banc decision. The *Hudspeth* court acknowledged *Cocke* but concluded that "[t]he statute is crystal clear in confining en banc participation by senior judges to participants in the

[original] panel decision." 42 F.3d at 1015. Put differently, the then-governing version of § 46 did not allow a judge who was active during the en banc argument (and who did not sit on the original three-judge panel) to remain on the en banc court after assuming senior status. The Seventh Circuit recognized, however, that the plain text undercut the purported justifications for permitting senior judge participation on the en banc court. *Id.* ("[W]e cannot think of any rationale ... for the disqualification of a judge who has taken senior status between the argument and decision of a case en banc."). But because "judges should be reluctant to exempt themselves from plain statutory commands," the court left any "corrective legislation" to "the appropriate committees of Congress." *Id.*

Two years later, in 1996, Congress resolved the circuit split by amending § 46(c) to its current form. In response to *Hudspeth*, Congress enacted the limited exception at the heart of this dispute: senior judges can "continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service." 28 U.S.C. § 46(c).

C

Congress also addressed the size of the en banc court. Under the original language, every en banc court consisted of all active judges on the circuit. 28 U.S.C. § 46 (1948). Circuits could not compose an en banc court of fewer than all active judges, even if it were more efficient. Only Congress could permit a limited en banc court, and in the original statute, it did not.

Then Congress enacted the Omnibus Judgeship Act of 1978. Pub. L. No. 95-486, § 6, 92 Stat. 1629. That law allows circuits with more than 15 authorized judgeships to "perform its en banc function by such number of [judges] as may be prescribed by rule of the court of appeals." *Id.* at 1633. Congress incorporated this grant of power into § 46(c), which now reads, "[a] court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with [the Omnibus Judgeship Act]." Courts authorized to conduct limited en banc proceedings include the Ninth, Fifth, and Sixth Circuits.

In 1980, the Ninth Circuit adopted a limited en banc procedure. Our rules say that "[t]he en banc Court ... shall consist of the Chief Judge of this circuit and 10 additional judges to be drawn by lot from the active judges and any eligible senior judges of the Court." 9th Cir. R. 40-3. Although a case can be reheard en banc by the full 29-member court, we have never voted to do so. *See id.*

* * *

In short, although all active, non-recused judges on the Ninth Circuit vote on whether to take a case en banc, only eleven currently will serve on the en banc court. Section 46(c) makes clear that en banc cases "shall be heard and determined" by a court consisting entirely of active judges, unless one of two narrow exceptions applies. First, a senior judge may sit on the en banc court if they are "reviewing a decision of a panel of which such judge was a member." 28 U.S.C. § 46(c). Or, second, if they are "continu[ing] to participate in the decision of a case or controversy that

was heard or reheard by the court in banc at a time when such judge was in regular active service." *Id.*

III

The majority's decision to bypass a new en banc vote in this new appeal and instead keep the prior en banc court violates § 46(c). We "heard and determined" this case when we issued "the decision" remanding for post-*Bruen* deliberations in an order that "constitute[d] the mandate of this court." 28 U.S.C. § 46(c); *Duncan*, 49 F.4th at 1232. At that moment, the en banc court's jurisdiction—which the Supreme Court has recognized as the "exception"—terminated. *See Am.-Foreign*, 363 U.S. at 689. The active judges needed to conduct a new vote before hearing this new appeal en banc. And that vote needed to include the seven active judges who joined our court in the interim. That is the normal process in every other circuit. And it tracks § 46(c). That did not happen.

Instead, the en banc court plowed ahead with five senior judges who cannot sit on this en banc court to hear the new appeal. The two narrow exceptions in § 46(c) do not apply: none of the five senior judges on the en banc court sat on either three-judge panel, nor could they "continue to participate" in a "decision" that had already occurred. The result? Five of the seven judges in the majority—nearly a majority of the en banc court—are ineligible to hear this case.

Yet the majority insists that we still have jurisdiction over this appeal. That conclusion departs from Supreme Court precedent, the text and history of § 46(c), and the statutory purpose of the en banc process.

A

All "[c]ases and controversies shall be heard and determined" by either a three-judge panel or an en banc court. 28 U.S.C. § 46(c). "A case or controversy is 'determined' when it is decided." *Am.-Foreign*, 363 U.S. at 688. We decided this case when we issued "the decision" remanding to the district court. That decision—accompanied by a mandate—severed the en banc court's jurisdiction.

The Supreme Court reinforced that a case is "determined" when it is "decided" in *Yovino v. Rizo*, 586 U.S. 181 (2019) (per curiam). There, the Court considered whether Judge Reinhardt's vote could be counted toward an en banc decision filed eleven days after he passed away. *Id.* at 182-83. The Ninth Circuit included Judge Reinhardt's vote, which was outcome determinative, because "the votes and opinions in the en banc case were inalterably fixed at least 12 days prior to the date on which the decision was 'filed,' entered on the docket, and released to the public." *Id.* at 184. The Supreme Court disagreed, rejecting that view as "inconsistent with well-established judicial practice, federal statutory law, and judicial precedent." *Id.* The Court reiterated *American-Foreign*'s pronouncement that "[a] case or controversy is 'determined' when it is decided," meaning the time of "public release," and so Judge Reinhardt's vote could not be counted. *Id.* at 184-85 (quoting *Am.-Foreign*, 363 U.S. at 688).

Other clues confirm that a case is "determined" when it is "decided." First, senior judges may only "continue to participate in *the decision* of a case or controversy." 28 U.S.C. § 46(c) (emphasis added).

Second, Congress added the disputed language in § 46(c) to solve a circuit split on a different question: whether a judge who takes senior status after en banc argument can participate in deciding *the same appeal*. Third, § 46(c) only allows a senior judge to participate in "the decision" if it "was *heard or reheard* by the court in banc *at a time when such judge was in regular active service*." *Id.* (emphasis added).

1

The term "the decision" in § 46(c) is undefined. So we start with its common-law meaning. *See United States v. Castleman*, 572 U.S. 157, 162 (2014) ("It is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses." (cleaned up)). The common-law meaning of "decision" in the late 1990s, when Congress enacted the disputed portion of § 46(c), was a "ruling, order, or judgment pronounced by a court when considering or disposing of a case." *Decision*, Black's Law Dictionary (7th ed. 1999). "Decision," then, most naturally refers to a court's singular, specific decision. That is only reinforced by Congress's use of the article "the" and the singular form of decision.

To hear the majority tell it, the relevant language is not "the decision," but "case or controversy." Maj. Order at 14-17. No question "case or controversy" is a term of art referring to the broader legal dispute. And if that were the only language in the statute, the majority's reasoning may have some force. But that is not the full statutory language. Congress chose to modify "case or controversy" with another phrase—"the decision." That is unique. When Congress uses

"case or controversy" to confer jurisdiction on the federal courts, it often uses that phrase alone. *E.g.*, 16 U.S.C. § 2440 ("The district courts of the United States shall have exclusive jurisdiction over any case or controversy arising under the provisions of this chapter ...."); 30 U.S.C. § 1467 (same). The Supreme Court has said time and again that we "must give effect, if possible, to every clause and word of a statute." *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (citation omitted). Without interpreting "the decision," we cannot make sense of § 46(c).

Granted, a single appeal involves many decisions. *See* Maj. Order at 16. A court may, for example, decide to issue orders requesting supplemental briefing or granting a party's motion. But "the decision of a case or controversy" does not extend beyond judgment, which occurs when the mandate issues. *E.g.*, *Carver v. Lehman*, 558 F.3d 869, 878 (9th Cir. 2009) ("No opinion of this circuit becomes final until the mandate issues ...."). Once the mandate issues, a court's jurisdiction ends. *United States v. Foumai*, 910 F.2d 617, 620 (9th Cir. 1990).

Section 46(c) incorporates that common procedure. Congress's use of the phrase "continue to participate" implies that "the decision" must be outstanding. 28 U.S.C. § 46(c). When the mandate issues and "the decision" becomes final, there is nothing to "continue" on with. So, properly understood, § 46(c) only permits senior judges to "continue to participate in the decision of a case or controversy" until the mandate issues.[6]

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[6] The majority labels the decision to issue the mandate as an "arbitrary" procedural choice. Maj. Order at 20. In its view, there

Let's apply that understanding to the facts here. The en banc court issued its first substantive decision in 2021. The Supreme Court vacated that decision. The en banc court retained jurisdiction when the case returned—even though three judges had taken senior status—because vacatur wipes away a decision as if it never existed. *See Camreta v. Greene*, 563 U.S. 692, 713 (2011).[7] The en banc court then exercised its jurisdiction by remanding to the district court to apply the new *Bruen* framework. The en banc court issued its mandate simultaneously. C.A. 9, 19-55376,

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is "no meaningful difference" between the 2022 remand order and a limited remand order, which does not come with a mandate. *Id.* Our case law, however, is not so cavalier. *See United States v. Washington*, 172 F.3d 1116, 1119-21 (9th Cir. 1999) (B. Fletcher, J., dissenting) (explaining the difference between a remand and a limited remand). A limited remand requires "clear evidence" that the court of appeals meant to narrow the scope of the remand. *United States v. Caterino*, 29 F.3d 1390, 1395 (9th Cir. 1994), *overruled on other grounds by Witte v. United States*, 515 U.S. 389 (1995). The normal practice—including in en banc cases—is to include an express statement that the remand order has limited scope. *See, e.g.*, *United States v. Montoya*, 82 F.4th 640, 656 (9th Cir. 2023) (en banc) ("[W]e exercise our discretion to remand to the district court for the *limited purpose* of reconsidering the supervised release conditions we have vacated herein." (cleaned up)). The 2022 remand order included no such express limitation. *Compare id.*, *with Duncan*, 49 F.4th at 1231 ("[T]his case is remanded to the district court for further proceedings consistent with [*Bruen*].").

[7] The Supreme Court's reversal of an en banc court's decision would have the same effect, because reversal "annuls [a decision] to all intents and purposes." *Harrison v. Nixon*, 34 U.S. 483, 506 (1835).

Dkt. 215. At that moment, our jurisdiction terminated.[8]

When California filed this new post-*Bruen* appeal (No. 23-55805) in 2023, a new "decision" was in order. By then two additional judges in the majority had taken senior status, bringing the total to five. Those five senior judges could no longer "continue to participate" in the new "decision" because this new decision was not "heard or reheard by the court in banc at a time when such judge[s] [were] in regular active service." 28 U.S.C. § 46(c). There lies the problem.

To be clear, a majority of all active non-recused judges still had the power to order this case en banc in the first instance. *See id.* And given the stakes, we likely would have voted to take this dispute en banc once again—we have yet to allow a three-judge panel decision invalidating a law under the Second Amendment to stand without en banc review. But the judges entitled to make that call were those in active status when the new appeal was taken of the district court's post-*Bruen* final order, not the senior judges who were no longer statutorily authorized to vote to take a case en banc or sit on the en banc court.

2

The history of the 1996 amendment to § 46(c) underscores the majority's error. Recall that Congress

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[8] The majority faults this reasoning for precluding an en banc court from accepting a comeback appeal after the mandate issues. Maj. Order at 18-19. But why is that such a surprise? En banc cases are the "exception," not the rule. *Am.-Foreign*, 363 U.S. at 689. That is why every other circuit, except the Ninth, allows comeback cases for three-judge panels, but not for en banc courts without an intervening vote by a majority of active judges.

added the disputed exception permitting senior judge participation on the en banc court to remedy a specific circuit split: whether a judge who took senior status after the en banc argument could participate in the decision in the *same* appeal.[9] *See Cocke*, 399 F.2d at 435 n.a1; *Hudspeth*, 42 F.3d at 1015. Answering the Seventh Circuit's clear invitation in *Hudspeth*, Congress allowed senior judges to "continue to participate" in decisions that were "heard or reheard" en banc when the judge was still in active status. 28 U.S.C. § 46(c) (1996); *see Hudspeth*, 42 F.3d at 1015 ("We believe that the omission of Congress to provide for this case was probably an oversight, and that corrective legislation would be warranted."). In other words, Congress added the second exception in § 46(c) only to address the question presented in the circuit split, and nothing more.

Unlike *Hudspeth* or *Cocke*, this case involves a *new* appeal. Appellants conceded as much at oral argument. *See* Oral Arg. at 13:28-13:30. The 1996 amendment did not address this issue, nor was it ever meant to authorize a roving en banc court with indefinite authority over a given dispute. That reading of § 46(c) would be odd given that the life cycle of an en banc appeal can last for several years, if not a decade or more. *See United States v. Hardesty*, 958 F.2d 910, 917 (9th Cir. 1992) (Alarcón, J., concurring and dissenting) ("[E]n banc review may add months or even years to the shelf-life of a matter before this court.").

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[9] The circuit split also concerned whether a senior judge could serve in addition to the court's active judges. Because of our limited en banc process, that is not implicated here.

3

Finally, to participate in "the decision," § 46(c) says that a senior judge must have been active at the time the case was "heard or reheard." That phrase refers to the court's power to go en banc initially or after a three-judge panel has first considered the case. "Ordinarily ... cases are to be heard by divisions of three." *W. Pac. R.R. Corp.*, 345 U.S. at 258.[10] But because "§ 46(c) treats 'hearings' and 'rehearings' with equality," *id.* at 259, the statute gives the court two distinct options. Thus, we can entrust the en banc court to "hear" a case in lieu of a three-judge panel, *but only by a majority vote of active judges*. *See id.* That makes sense—after all, "the statute commits the en banc power to the majority of active circuit judges." *Id.* at 261.

It does not matter that some of the now-senior judges on the en banc court were active when we "heard" briefing or arguments in the first appeal. "[D]ecision" refers to a single act—a "ruling, order, or judgment." *Decision*, Black's Law Dictionary (7th ed. 1999). We often conduct hearings or rehearings on briefing related to a particular stage of a case. And our work before, during, and after a particular hearing or rehearing is specific to that stage of the case. So, by any definition, none of the five senior judges were active at the time of the new "hearing or rehearing" of this appeal.

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[10] This interpretation of § 46(c) would not prohibit a common practice among all circuit courts, including the Ninth Circuit, of allowing three-judge panels to take a comeback appeal of the same case. Section 46(c) does not limit a three-judge panel's ability to rehear any case—it only applies to en banc courts.

B

The majority's procedural blunder had troubling consequences. It disenfranchised seven of our colleagues—nearly a quarter of the active judges on our court. It barred the active judges from their proper role of shaping the future of this court and its precedents. And it undermined public confidence in this decision, perhaps the most consequential Second Amendment case in our circuit post-*Bruen*.

1

Section 46(c) places the gatekeeping function for the en banc process with the court's active judges. It allows us "to devise [our] own administrative machinery to provide the means whereby a majority may order [an en banc] hearing." *W. Pac. R.R. Corp.*, 345 U.S. at 250. But it limits "who" that majority may be.

The Supreme Court addressed that point in *Moody*. There, the question was whether a senior judge "may vote to determine whether [a] case should be reheard [e]n banc" if she was on the panel that "originally decided that appeal." *Id.* at 622 n.1, 624. The Court definitively answered: No. "The language of [§ 46(c)] confines the power to order a rehearing in banc to those circuit judges who are in 'regular active service.'" *Id.* at 626. And although courts have leeway in constructing their en banc process, the decision to hear or rehear a matter en banc "can be reached only by voting." *Id.*; *see In re Watts*, 298 F.3d 1077, 1084 n.3 (9th Cir. 2002) (O'Scannlain, J., concurring in the judgment) ("[T]he decision to *convene* the en banc court is made by a majority of the court's active, nonrecused circuit judges, as the governing statute

mandates."). Put simply, "senior judges have not been authorized by implication to participate in ordering a hearing or rehearing in banc." *Moody*, 417 U.S. at 626.

Yet that is exactly what happened here. Most of the original 11-judge en banc panel—including five senior judges—voted to hear this new appeal en banc. The other active judges (22 in all) were never asked to vote. And because several active judges were not on the court when we drew the original panel, they lost their sole opportunity to hear this dispute on the en banc court. Worse, the senior judges who voted to hear the case en banc account for the majority of judges who did so. Without them there would not have been a majority—even of the panel—to hear this new appeal en banc. This en banc proceeding was not initiated by "a majority of the circuit judges ... who are in regular active service," § 46(c), but by a majority consisting mainly of senior judges—over the dissent of a majority of the (very few) active judges allowed to vote. None of this fits with § 46(c) or *Moody*.

The majority counters that the en banc court's decision to keep this new appeal was not a new "vote" on whether to hear the case en banc. Maj. Order at 17-18. That is hard to believe, as each member of the en banc court voted on whether to treat this as a comeback case for the en banc court under General Order 3.6(b). And as I explained, the en banc court's jurisdiction terminated when we issued the mandate in the first appeal. The original vote in 2021 did not authorize the en banc panel to exercise indefinite authority over this dispute after its jurisdiction was terminated.

The majority claims this interpretation makes little practical sense considering that the en banc court could have chosen to retain jurisdiction on remand from the Supreme Court. *See* Maj. Order at 21; *see also supra*, at 73-74. But the considerations for retaining jurisdiction and remanding are starkly different and justify § 46(c) treating those situations differently. If the en banc court retains jurisdiction on remand from the Supreme Court, it faces the same decision and can proceed expeditiously. If the en banc court remands to the district court, as it did here, it is an acknowledgment that more proceedings are necessary below, resulting in a new decision to review. And that process is far longer and can take several years. That further counsels against retaining jurisdiction because the active judges on the court are far more likely to change. Indeed, only three judges on the en banc panel were senior on remand from the Supreme Court. Another two were senior for the new appeal.

It thus makes sense why Congress terminated an en banc court's jurisdiction once it remands to the district court and issues the mandate. Section 46(c) requires a new vote of the active judges before a new appeal from a new decision can be heard en banc. And that vote better reflects the court's current views by soliciting the input of active judges who may have joined the court in the years-long gap between the first en banc vote and the new appeal.

2

Disenfranchising active judges undermines the statutory purpose of the en banc process. En banc rehearing "is normally reserved for questions of

exceptional importance." *Moody*, 417 U.S. at 626; *see* Fed. R. App. P. 35(a). By preventing "[c]onflicts within a circuit," the en banc process "enable[s] the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions." *Am.-Foreign*, 363 U.S. at 689-90. Section 46(c) achieves this by empowering the active judges to "'determine the major doctrinal trends of the future' for a particular Circuit." *Moody*, 417 U.S. at 626 (quoting *Am.-Foreign*, 363 U.S. at 690).

Section 46(c) ensures that active judges are fulfilling their role in the en banc process by limiting the participation of senior judges. This is not because senior judges do not play a valuable role in our court's work. Indeed, "[s]enior judges provide a judicial resource of extraordinary value by their willingness to undertake important assignments 'without economic incentive of any kind.'" *Id.* at 627 (quoting *Am.-Foreign*, 363 U.S. at 688 n.4). So the majority's focus on judicial efficiency is a red herring. *See* Maj. Order at 20-21. What statutorily matters is that the en banc court is designed to minimize long-term friction within a circuit by vesting the determination of major doctrinal trends with active judges who will serve the longest. When it comes to tension between generalized efficiency and active judge involvement in the en banc process, Congress has spoken: efficiency must yield by statute.

With that in mind, the exclusion of our newest active judge colleagues is even more disturbing. They are likely to serve on the court for decades. Omitting them from this important case raises the chances that

our Second Amendment jurisprudence will stay jumbled and erratic. The next time a Second Amendment case goes en banc, the composition of that panel will be dramatically different. Section 46(c) is meant to encourage continuity in our circuit precedent. The majority's view does the opposite.

C

Judge S.R. Thomas writes separately to paint the majority's procedural maneuver as just the latest application of our long-standing en banc rules. But as he did at oral argument, Judge S.R. Thomas spars with a strawman. *See* Oral Arg. at 1:00:11-1:01:59. Judge S.R. Thomas's research, comprehensive as it is, only proves my point—no other circuit interprets § 46(c) as we do. And our prior practice does not support the majority's action here.

1

Nearly every case cited in Judge S.R. Thomas's compilation of his greatest hits as En Banc Coordinator is distinguishable. And those few with any relevance do not justify the majority's weaponization of our General Orders. In the end, I would have preferred not to air publicly what was previously an internal discussion about our en banc procedures and whether they have indeed "served us well." *See* S.R. Thomas Concurrence at 31 n.9. Yet the concurrence's attempt to muddy the water with irrelevant string cites requires a response. And perhaps a public view will make clear what we have dealt with behind the scenes. There should be no false impression that what happened here was our normal practice.

Start with the cases where, following remand, the en banc court retained jurisdiction over a new appeal without an intervening vote of the active judges. In most of those cases, the mandate did not issue between the original en banc decision and the new appeal, meaning the court did not issue "the decision" as that term is used in § 46(c).[11] In *Sarei v. Rio Tinto, PLC*, the en banc court issued a limited remand for the district court to address an exhaustion requirement under the Alien Tort Statute. 550 F.3d 822, 832 & n.10 (9th Cir. 2008) (en banc). The mandate was initially issued in error, but quickly recalled. C.A. 9, 02-56256, Dkt. 245, 246. When the case returned following remand, the en banc court—with one judge who had taken senior status in the interim—chose to keep the case under our General Orders. *See Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 742 (9th Cir. 2011) (en banc); C.A. 9, 02-56256, Dkt. 253. It was only after the en banc court rendered a decision in the new appeal that the mandate issued, thus terminating the court's

[11] *Norse v. City of Santa Cruz* is the lone exception. *See* 629 F.3d 966, 978 (9th Cir. 2010) (en banc). There, the en banc court reversed the district court and remanded for further proceedings. It also issued the mandate, and thus "the decision" under § 46(c). C.A. 9, 07-15814, Dkt. 55. The same en banc court later reclaimed jurisdiction over a new, post-remand appeal. C.A. 9, 13-16432, Dkt. 23. But rather than adjudicate the new appeal, the en banc court did what our Order authorizes and what we should have done here—referred the new appeal to the original three-judge panel. *Id.* The panel resolved the appeal in a memorandum disposition. *Norse v. City of Santa Cruz*, 599 F. App'x 702 (9th Cir. 2015). So while the procedure in *Norse* was improper, it did not lead to the same en banc court deciding the new appeal in violation of § 46(c).

jurisdiction under § 46(c). C.A. 9, 02-56256, Dkt. 393, 394.

Same with *League of United Latin American Citizens v. Wheeler*, 922 F.3d 443 (9th Cir. 2019) (en banc). The en banc court granted a petition for a writ of mandamus, sent the case back to the district court, and purported to "retain jurisdiction over this and any related cases." 922 F.3d at 445. But it did not issue the mandate. The petitioners later returned to the Ninth Circuit, and a majority of the en banc court at first voted to accept petitioners' cases as comebacks under General Order 3.6(b). *See League of United Latin Am. Citizens v. Wheeler*, 940 F.3d 1126, 1126-27 (9th Cir. 2019) (en banc); *see also id.* at 1130 (Bea, J., dissenting) ("[W]e should decline to accept the new petitions as comeback cases. The new petitions should be assigned to a random three-judge panel through the normal process."). Only after the en banc court referred the case to the original three-judge panel did the mandate issue. *See id.* at 1127; C.A. 9, 17-71636, Dkt. 191. That constituted "the decision" of the en banc court. And the en banc court explained that it "will retain jurisdiction over any subsequent en banc hearing arising out of any decision of the three-judge panel." 940 F.3d at 1127. So the en banc court implicitly recognized that a new en banc vote had to occur. The same process should have been followed here and was not.

Also consider *United States v. Hovsepian*, 359 F.3d 1144 (9th Cir. 2004) (en banc). There, the en banc court issued an initial decision reversing and remanding to the district court for further proceedings. 359 F.3d at 1169. And there, unlike the

other cases, the en banc court *did* issue the mandate—at least at first. C.A. 9, 99-50041, Dkt. 161. When the United States filed a new appeal, the en banc court recalled the mandate, set the case for argument, and issued a new decision. *United States v. Hovsepian*, 422 F.3d 883 (9th Cir. 2005) (en banc); C.A. 9, 99-50041, Dkt. 186, 188, 198. So while the en banc court's statutory authority terminated when it issued its original decision and mandate, it was able to "[re]assume jurisdiction" by recalling the mandate upon the filing of the new appeal. *Williams v. Calderon*, 83 F.3d 281, 289 (9th Cir. 1996). Because the recall wiped away "the decision," the procedure employed in *Hovsepian*—while unusual—did not violate § 46(c).

Finally, the reliance on *Detrich v. Ryan* is (to put it mildly) odd. *Detrich* only reinforces the absurdity of the majority's approach. *Detrich*, a habeas case, was initially sent to an en banc panel in 2012. *See Detrich v. Ryan*, 696 F.3d 1265 (9th Cir. 2012) (en banc). That panel had seven judges who are now retired, deceased, or have taken senior status.[12] Only four of the original eleven are still active judges on this court. That en banc panel issued a limited remand in 2013 and "retain[ed] jurisdiction over any subsequent appeal." *Detrich v. Ryan*, 740 F.3d 1237, 1259 (9th Cir. 2013) (en banc). The mandate was issued in error, and three years later, the en banc court recalled the mandate

[12] The en banc court included Judge Kozinski (now retired), Judge Pregerson (now deceased), Judge Reinhardt (now deceased), Judge Graber (now senior status), Judge W. Fletcher (now senior status), Judge Bea (now senior status), now-Chief Judge Murguia, Judge Gould, Judge Christen, Judge Nguyen, and Judge Watford (since resigned). C.A. 9, 08-99001, Dkt. 160.

while expanding the scope of the limited remand. C.A. 9, 08-99001, Dkt. 177, 178. The *Detrich* en banc court lay dormant until 2022, when the case was finally returned to the eleven-judge panel. It has since begun to hear this new appeal. C.A. 9, 08-99001, Dkt. 193, 202. But, because of our rules, the now-active judges did not vote to order the case en banc. Nor was the en banc court redrawn. Now the en banc court consists of a hodge podge of senior judges—none of whom retain any institutional knowledge about the case—and new active judges who were picked, without following the correct process, to replace those judges no longer available to serve. *Detrich* explains even better than this case why our General Order bears no authority from § 46(c). Proceeding en banc ten years later with a new cast of players undermines, rather than furthers, "consistency in judicial administration." S.R. Thomas Concurrence at 32, 36. Judicial efficiency would have been better served by sending *Detrich* to a new three-judge panel.

Next, the concurrence shifts its focus to senior judge participation on the en banc court. Again, its cited cases are nothing like the five-senior-judge power play at issue. In *Murray v. BEJ Minerals, LLC*, the en banc court certified a question to the Montana Supreme Court. 924 F.3d 1070, 1074 (9th Cir. 2019) (en banc). It did not issue the mandate. While the case was pending in the state supreme court, Judge Bybee took senior status. He continued to participate in the final decision once the case returned to the en banc court. *See Murray v. BEJ Minerals, LLC*, 962 F.3d 485 (9th Cir. 2020) (en banc). And he had every right to do so. Section 46(c) allowed Judge Bybee to "continue to participate in the decision" of *Murray*, which was

"heard or reheard by the court in banc at a time when [he] was in regular active service." 28 U.S.C. § 46(c). The mandate only issued after the en banc court's post-certification disposition, so there was no intervening "decision" barring Judge Bybee from serving on the en banc court. C.A. 9, 16-35506, Dkt. 70.

The concurrence's explanation of *Lombardo v. Warner* also falls flat. *See* 391 F.3d 1008 (9th Cir. 2004) (en banc); S.R. Thomas Concurrence at 38-39. Two senior judges participated in the decision of the case, which occurred following certification to the Supreme Court of Oregon. The concurrence notes that Judge Ferguson could hear the case en banc as a member of the original three-judge panel. Judge Tashima—who also served on the three-judge panel—remained on the en banc court after taking senior status and after the certified question was resolved. He too could participate in the post-certification en banc proceedings, despite having taken senior status after the en banc draw, because the en banc court had not yet rendered its "decision" by issuing the mandate. So § 46(c) expressly authorized both judges' participation on the en banc court, no matter when they took senior status.

Somewhat puzzlingly, the concurrence highlights cases where judges kept their spot on the en banc court despite taking senior status after the en banc draw or en banc argument.[13] *See* S.R. Thomas Concurrence at

[13] *See, e.g.*, *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820 (9th Cir. 2012) (en banc); *Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012) (en banc); *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc); *Veterans for Common Sense v. Shinseki*, 678 F.3d

41-42. As Judge Bumatay and I explain, that situation—and *only* that situation—is what Congress approved when it resolved a circuit split on the issue with the 1996 amendment to § 46(c). *See supra*, at 74-75; Bumatay Dissent to Order at 99. By invoking cases that comport with § 46(c), the concurrence only highlights what is clear: the degree of senior judge participation in this en banc case is unprecedented.

The concurrence points to only four cases from the last 26 years where an en banc court, invoking our General Orders, violated § 46(c) by allowing subsequently-senior judges to participate after the mandate issued in the original appeal. *See Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020) (en banc); *Fue v. McEwen*, No. 18-55040, 2018 WL 3391609 (9th Cir. June 20, 2018) (en banc); *Native Vill. of Eyak v. Blank*, 688 F.3d 619 (9th Cir. 2012) (en banc); *WMX Techs., Inc. v. Miller*, 197 F.3d 367 (9th Cir. 1999) (en banc). Those errors pale in comparison to the one here. In *Fue* and *Miller*, no active judge joined the court between the first en banc vote and the later decision to retain the en banc court for a new appeal. Not one active judge was disenfranchised. And because there were no noted dissents, the senior judge votes—three in *Fue* and two in *Miller*—did not make a difference in the outcome of the case.[14] Compare that

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1013 (9th Cir. 2012) (en banc); *Ibrahim v. U.S. Dep't of Homeland Sec.*, 912 F.3d 1147 (9th Cir. 2019) (en banc); *In re Sunnyslope Hous. Ltd. P'ship*, 859 F.3d 637 (9th Cir. 2017) (en banc); *Lowry v. City of San Diego*, 858 F.3d 1248 (9th Cir. 2017) (en banc); *United States v. Ressam*, 679 F.3d 1069 (9th Cir. 2012) (en banc).

[14] Judge S.R. Thomas counters that we "follow our established rules and procedures regardless of the outcome." S.R. Thomas Concurrence at 40 n.16. But once again, he fails to grasp the

to this situation. The majority cut *seven* new active judges out of this en banc process. Plus, the five senior judges on this panel cast dispositive votes—without them, there would not have been a majority to decide this new appeal en banc or to reverse the district court on the merits. There is simply no history of General Order 3.6(b) being used this way.

Now consider *Democratic National Committee v. Hobbs*. In 2016, we drew an en banc panel to review an interlocutory appeal from the district court's denial of a preliminary injunction. *See Feldman v. Ariz. Sec'y of State's Off.*, 843 F.3d 366, 367 (9th Cir. 2016) (en banc). The en banc court scheduled oral argument and granted an injunction pending appeal. *Id.* It did not issue a mandate at that time.

On May 8, 2018, the district court entered final judgment during the pendency of the en banc proceedings. C.A. 9, 16-16698, Dkt. 93. Two days later, the appellants filed a new appeal (No. 18-15845) of the district court's order on the merits. C.A. 9, 18-15845, Dkt. 1. Only after the new appeal was filed did the en banc court dismiss the original appeal (No. 16-16698) as moot and issue the mandate. C.A. 9, 16-16698, Dkt. 97, 99. The *same day* that the mandate issued in the preliminary injunction appeal, the en banc court referred the merits appeal to a three-judge panel, while retaining jurisdiction over any subsequent en banc hearing. C.A. 9, 18-15845, Dkt. 18; C.A. 9, 16-16698, Dkt. 99. The back and forth in *Hobbs*—meant in part to "preserv[e] the status quo" for the 2016

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point: *Fue* and *Miller* highlight how unprecedented it is to have a five-senior-judge voting bloc assert control over an en banc case.

election—does not support a consistent practice under our General Orders. C.A. 9, 16-16698, Dkt. 70.

And the subsequent history only proves my point: our practice required a new en banc vote with the new appeal. After the three-judge panel decision in the merits appeal, the active nonrecused judges voted again to take the case en banc. *See Democratic Nat'l Comm. v. Reagan*, 911 F.3d 942 (9th Cir. 2019) (en banc). We failed to follow our procedure in *Reagan* here.

The en banc court retained the prior panel. So active judges who joined the court between the en banc draw and the second en banc vote never had an opportunity to serve on the en banc panel. And by the second en banc vote, Judge O'Scannlain and Judge Clifton—both members of the original en banc court—had assumed senior status.[15] But like in *Fue* and *Miller*, their two dissenting votes did not change the outcome of the new appeal. *See Hobbs*, 948 F.3d at 997; *see also id.* at 1046 (O'Scannlain, J., joined by Clifton, Bybee & Callahan, JJ., dissenting). Despite the erroneous application of § 46(c), *Reagan* supports that our prior procedure requires a new en banc vote in a new appeal—which we failed to do here.

Native Village of Eyak v. Blank is also distinguishable. There, an initial en banc panel issued a limited remand while retaining jurisdiction over all future proceedings in the matter. *See Eyak Native Vill. v. Daley*, 375 F.3d 1218, 1219 (9th Cir. 2004) (en banc).

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[15] Judge Bybee took senior status after the new appeal was argued, but before the decision was issued. Again, Judge Bybee's participation on the en banc court was consistent with § 46(c).

The *Eyak* appellants later filed a new appeal—just as Plaintiffs did here. The en banc panel first voted not to retain jurisdiction over the new appeal, despite having previously reserved that right. C.A. 9, 09-35881, Dkt. 33. That only proves that contrary to the concurrence's assertion, the practice has not been consistent to retain the en banc court in a new appeal. *See also Norse*, *supra*, at 28 n.11. Then four months later it reversed course and reasserted jurisdiction over the case. C.A. 9, 09-35881, Dkt. 39. With one exception, the composition of the en banc panel remained the same.[16]

By the time a decision was issued in the new appeal, three judges on the en banc court had taken senior status. Judge Schroeder took senior status after oral argument, so her participation followed what Congress was trying to achieve with the 1996 amendment to § 46(c). *See supra*, at 74-75; Bumatay Dissent to Order at 99. Things are different with Judge Kleinfeld and Judge Hawkins—they both took senior status before the decision to treat the new appeal as a comeback case. Thus, their continued participation on the en banc court violated § 46(c). But like the senior judge participation in *Fue* and *Miller*, their votes did not make a difference in the outcome. Excluding Judge Kleinfeld and Judge Hawkins, there remained a 5-4 majority vote of the active judges on every issue in the case. And besides, one stray example from a case that is procedurally distinct hardly establishes a common practice. That is particularly true when there is no evidence § 46(c) was considered

[16] Judge Pregerson replaced Judge O'Scannlain on the en banc court.

in that case. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed.").

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Struggling to defend our past practice, the concurrence turns to our sister circuits for help. It first suggests that our procedures "mirror" those of other courts, citing the local rules of seven circuits. S.R. Thomas Concurrence at 47 & n.41. Unlike our General Order, most of those examples simply quote § 46(c). *E.g.*, 1st Cir. R. 40.0; 4th Cir. R. 40(e); 5th Cir. R. 40.2.6; Fed. Cir. I.O.P. 14.7; *see also* 11th Cir. R. 40-10 (senior circuit judges "may continue to participate in the decision of a case that was heard or reheard by the court en banc at a time when such judge was in regular active service"). One permits senior judge participation on the en banc court until the "final resolution of the case." 3d Cir. I.O.P. 9.6.4. Another allows a judge who "took senior status after a case was heard or reheard en banc [to] participate in the en banc decision." 2d Cir. I.O.P. 40.1. But none of these examples "mirror" our General Order, which omits the statutory phrase "decision of a case or controversy" and permits senior judge participation until "all matters" pending before the en banc court "are finally disposed of."[17] 9th Cir. Gen. Order 5.1(a)(4); *see* 9th Cir. R. 40-3. The concurrence's confusing attempt to remake our General Order in no way suggests that

[17] For the same reasons, it is wrong to say that "[o]ur General Orders not only comply with the applicable statutory language but mirror it." S.R. Thomas Concurrence at 26 n.6.

"[o]ur procedures are consistent with the practices of other circuits." S.R. Thomas Concurrence at 47.

Next, the concurrence only points to one illustrative case from twelve other circuits over nearly 30 years remotely relevant. *See* S.R. Thomas Concurrence at 48. In *United States v. Skoien*, the en banc Seventh Circuit, including Senior Judge Bauer, retained jurisdiction over a new appeal after the mandate issued in the original appeal. Order, No. 10-3023 (7th Cir. Sept. 1, 2010) (en banc), Dkt. 75. Judge Bauer took senior status in 1994, well before the first en banc decision in *Skoien*. *See United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc). Judge Bauer was on the en banc court, consistent with § 46(c), because he served on the original three-judge panel. *See United States v. Skoien*, 587 F.3d 803 (7th Cir. 2009), *reh'g en banc granted*, *vacated*, No. 08-3770, 2010 WL 1267262 (7th Cir. Feb. 22, 2010). That key fact makes all the difference: because § 46(c) independently authorizes a senior judge to serve on an en banc court "reviewing a decision of a panel of which such judge was a member," *Skoien* does not implicate the disputed language permitting a senior judge to "continue to participate in the decision of a case or controversy" heard en banc while such judge was in active service. *See* 28 U.S.C. § 46(c).

The concurrence also invokes *Skoien* for the proposition that other circuits allow an en banc court to hear a comeback case, even after the mandate issues in the original appeal, and without an intervening vote of the active judges. *See* S.R. Thomas Concurrence at 48. First, *Skoien* is hardly a typical comeback case. The new, post-mandate appeal in

Skoien involved a district court order requiring the defendant to return to prison after the en banc court affirmed his conviction in the original appeal. *See Skoien*, 614 F.3d at 645; C.A. 7, 10-3023, Dkt. 1. The defendant immediately filed an emergency motion asking the Seventh Circuit to order that he be released from prison pending the filing of a cert petition in the Supreme Court. C.A. 7, 10-3023, Dkt. 3. The en banc court denied the defendant's motion in a short, unpublished order. Order, No. 10-3023 (7th Cir. Sept. 1, 2010) (en banc), Dkt. 75. This rare procedural posture—which involved a decision on a motion rather than a new substantive appeal—offers little support for the concurrence's position.

Second, *Skoien* does not support any practice by other courts not to hold an intervening en banc vote in a subsequent appeal. In the Seventh Circuit, successive appeals are automatically assigned to the three-judge panel that heard the earlier appeal. 7th Cir. Operating Procedures 6(b). And barring some limited exceptions, the default rule is that the panel will decide the new appeal on the merits. *Id.* But "[c]ases that have been heard by the court en banc are outside the scope of this procedure, and *successive appeals will be assigned at random unless the en banc court directs otherwise*." *Id.* (emphasis added). In other words, the Seventh Circuit does not permit comeback en banc cases, unless the en banc court votes to retain the case. And because the en banc court includes all active judges, every active, nonrecused Seventh Circuit judge votes on whether to take a comeback case en banc after the mandate issues in the original appeal. Indeed, there were no new active judges between the first and second en banc decisions in

Skoien. The Seventh Circuit practice is exactly what § 46(c) requires, and we did not follow that.

The concurrence's rejoinder misses the point. It notes that the Seventh Circuit's procedures, like ours, permit an en banc court to decide whether to retain jurisdiction over a comeback appeal. S.R. Thomas Concurrence at 48 n.43. But as I explained, the key difference is that the en banc Seventh Circuit includes every active judge on the court. Our en banc court does not. Thus, if this exact same situation arose in the Seventh Circuit, every active, nonrecused judge would vote on whether to take the new, post-remand appeal en banc. Not true here.[18] And that highlights our General Order's deviation from § 46(c). Our General Order improperly delegates the en banc gatekeeping function to just 11 judges—and in this case five senior judges who are statutorily barred from voting to rehear a case en banc. And while Judge S.R. Thomas claims that nothing we did here violated our General Orders, that ignores that our Orders are inconsistent with § 46(c).

Putting *Skoien* aside, the concurrence invokes several out-of-circuit en banc cases reheard by senior judges after those decisions were vacated and remanded (or reversed) by the Supreme Court.[19] S.R.

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[18] Judge S.R. Thomas says that I failed "to cite a single case or rule" supporting the view that our en banc procedures are inconsistent with those of other circuits. S.R. Thomas Concurrence at 47 n.40. But no other circuit has applied § 46(c) consistent with our General Orders. And the preceding discussion of *Skoien* and the Seventh Circuit's Operating Procedures makes clear why.

[19] *See, e.g.*, *United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019) (en banc); *Hernandez v. Mesa*, 885 F.3d 811 (5th Cir. 2018)

Thomas Concurrence at 49-51. These examples are beside the point. As noted, vacatur and reversal wipe away a lower court opinion, "stripping the decision below of its binding effect and clearing the path for future relitigation." *See Camreta*, 563 U.S. at 713 (cleaned up); *supra*, at 73-74; *see also Harrison*, 34 U.S. at 506 ("[R]eversal annuls [a decision] to all intents and purposes ...."). So there is no "decision" on the books, and the prior en banc panel—even with now-senior judges—can retain jurisdiction to issue a new "decision" when the case returns from the Supreme Court. But once that "decision" is issued, along with a mandate, the en banc court's jurisdiction ends.

The concurrence is right that we have consistently allowed senior judges to participate in en banc proceedings on remand from the Supreme Court.[20] S.R. Thomas Concurrence at 42-43; *see* 9th Cir. Gen. Order 3.6(a) ("Matters on remand from the United States Supreme Court will be referred to the last panel that previously heard the matter before the writ of

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(en banc); *United States v. Gonzalez-Longoria*, 894 F.3d 1274 (5th Cir. 2018) (en banc); *In re Unknown*, 754 F.3d 296 (5th Cir. 2014) (en banc); *Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007) (en banc); *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 344 F.3d 1359 (Fed. Cir. 2003) (en banc); *Hoffman Plastic Compound, Inc. v. NLRB*, No. 98-1570, 2002 WL 1974028 (D.C. Cir. Aug. 27, 2002) (en banc); *Consol. Gas Co. v. City Gas Co.*, 931 F.2d 710 (11th Cir. 1991) (en banc).

[20] *See, e.g.*, *Young v. Hawaii*, 45 F.4th 1087 (9th Cir. 2022) (en banc); *Democratic Nat'l Comm. v. Hobbs*, 9 F.4th 1218 (9th Cir. 2021) (en banc); *Marinelarena v. Garland*, 992 F.3d 1143 (9th Cir. 2021) (en banc); *Rizo v. Yovino*, 950 F.3d 1217 (9th Cir. 2020) (en banc); *Sarei v. Rio Tinto, PLC*, 722 F.3d 1109 (9th Cir. 2013) (en banc).

certiorari was granted."). We even did so here. When the Supreme Court vacated and remanded our prior decision in light of *Bruen*, the en banc court—then with three senior judges—exercised its jurisdiction by remanding the case to the district court in an order that "constitute[d] the mandate of this court." *Duncan*, 49 F.4th at 1232. At that moment, we terminated the en banc court's jurisdiction by issuing "the decision" under § 46(c).

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All that nuance aside, Judge S.R. Thomas thinks the majority's authority to keep this case boils down to a simple truth: "§ 46(c) is a grant of power to the courts of appeals," and that "clear grant of authority ... coupled with the Supreme Court's directive that each Circuit develop its own procedures to implement the en banc process, should end the discussion." S.R. Thomas Concurrence at 52 (citing *W. Pac. R.R. Corp.*, 345 U.S. at 267). Tell that to the Supreme Court. If § 46(c) were a blank check, then why did the Court hold that the original version of § 46 barred circuit courts from permitting senior judge participation on the en banc court? *See Am.-Foreign*, 363 U.S. at 685-86. And why did the Court reject as inconsistent with § 46(c) a Fourth Circuit practice that allowed certain senior judges to vote on whether to rehear a case en banc? *See Moody*, 417 U.S. at 623-24.

The *Moody* Court relied on the same cases as the concurrence—it even went so far as to "confirm[]" each circuit's "discretion" to fashion its en banc procedures. *Id.* at 624-25 (citing *Shenker*, 374 U.S. at 5; *Am.-Foreign*, 363 U.S. at 688; *W. Pac. R.R. Corp.*, 345 U.S. at 250). But Judge S.R. Thomas omits what the Court

said next: "Although, as the Court has held, [the active] judges are largely free to devise whatever procedures they choose to initiate the process of decision to order [en banc] rehearing, and to decide who may participate in those preliminary procedures, neither the Court nor Congress has suggested that any other than a regular active service judge is eligible to participate in the making of the decision whether to hear or rehear a case in banc." *Id.* at 626 (internal citation omitted). As "the decisional and statutory evolution of the institution of the in banc court" reveals, the "eligibility of senior judges for participation therein has been the exception, not the rule." *Id.* Thus, the Court concluded that it was "not at liberty to engraft upon [§ 46(c)] a meaning inconsistent with its historical limitations." *Id.*

Moody cuts the concurrence off at the knees. Like Judge S.R. Thomas, *Moody* pointed to the discretion afforded to courts of appeals under cases like *Western Pacific Railroad*, *Shenker*, and *American-Foreign*. But *Moody* still held that the exercise of that discretion—particularly when it comes to senior judge participation—must comply with § 46(c). At no point has the Supreme Court given courts of appeals unfettered discretion to construct their en banc procedures.

Indeed, the Fourth Circuit in *Moody* did not understand § 46(c) as Judge S.R. Thomas does. Faced with uncertainty, every active and senior judge certified to the Supreme Court the question of how to interpret the statute's application to senior judges. *Moody*, 417 U.S. at 624; *see also* 28 U.S.C. § 1254(2); Sup. Ct. R. 19. That little-known procedure would

have been an option here. *See United States v. Seale*, 558 U.S. 985, 985 (2009) (Stevens, J., joined by Scalia, J., respecting the dismissal of the certified question). But we will never know. Any threats to the majority's control over this case are quickly squashed.

More to the point, Judge S.R. Thomas's assertions about § 46(c) reveal a misunderstanding about how the law works. For example, he cites *Western Pacific Railroad* for the view that § 46(c) is "a grant of power to the courts of appeals, and 'that the statute does not compel the court to adopt any particular procedure governing the exercise of the [en banc] power.'" S.R. Thomas Concurrence at 22, 52 (quoting *W. Pac. R.R. Corp.*, 345 U.S. at 267). While § 46(c) grants courts of appeals significant leeway in structuring their en banc procedures, those procedures must still comply with the statute. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9-10 (1941). Or otherwise said, just because our internal rules authorize a particular procedure does not mean they are faithful to the statutory text.[21]

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[21] It is not clear that we even complied with our Rules. Again, our en banc court consists of the Chief Judge plus ten additional judges drawn at random. *See* 9th Cir. R. 40-3. We complied with that procedure when we first composed an en banc court in 2021. Between the first and second appeal, a colleague who was randomly drawn to serve on the en banc court became Chief Judge. Yet former Chief Judge S.R. Thomas remains on this en banc panel, even though he was not chosen at random to serve. His response? This is how we have always done it. *See* S.R. Thomas Concurrence at 43-47. But it is not how our Rule is written. *See* 9th Cir. R. 40-3. Whether such a practice exists, it has not been formalized. True, our General Orders—invalid as they are—permit a case to return to the same en banc court, even when the Chief Judge initially assigned to the en banc court is no longer serving in that role. *See* S.R. Thomas Concurrence at 43-

One final note. Judge S.R. Thomas suggests that our limited en banc procedure is entitled to special treatment. He asserts that each court of appeals can adopt procedures "that best suit their Court and culture," and that our en banc process routinely "ensure[s] adequate representation, a sound deliberative process, and decisions that would be accepted as authoritative." S.R. Thomas Concurrence at 24 n.2, 25. How does this case possibly fit that mold? What Judge S.R. Thomas's revisionist history ignores is that nothing about the limited en banc procedure exempts our court from § 46(c)'s commands. Congress's limited en banc procedure addresses how many judges can serve on the en banc court. But § 46(c) still requires the votes of a majority of all active judges before proceeding en banc, and the limited en banc procedures do not alter that.[22] While an en banc court assumes jurisdiction over an entire case, § 46(c) limits that jurisdiction, no matter what our General Order says. *Cf.* S.R. Thomas Concurrence at 26 (quoting *Summerlin v. Stewart*, 309 F.3d 1193, 1193 (9th Cir. 2002)). Judges—even by General Order—may not alter a statute's meaning. *See, e.g.*, *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). In sum, allowing

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44. But if we have proceeded without the current Chief Judge on the en banc court, then perhaps it is time to reconsider why our Rules guarantee the Chief Judge a seat on the limited en banc court.

[22] Judge S.R. Thomas asserts that I have not offered a single case or rule to support my position. *See* S.R. Thomas Concurrence at 52. The weight of authority proves otherwise. But until now, we did not need a specific rule to confirm what § 46(c) makes clear. Just like how we did not need a rule clarifying that dead judges cannot vote. *See Yovino*, 586 U.S. at 186.

General Order 3.6(b) to be applied as the majority wishes does not comply with § 46(c), our past practice, or the procedures of other circuits.

IV

This en banc court lacks statutory authority under § 46(c). Congress adopted two narrow exceptions permitting senior judge participation on the en banc court. Neither apply here. And despite the majority's insistence that all is well, our General Orders—which have never been applied like this—cannot amend § 46(c). "[I]f the statute is to be changed, it is for Congress, not for us, to change it." *Am.-Foreign*, 363 U.S. at 690-91.

I respectfully dissent.

BUMATAY, Circuit Judge, with whom VANDYKE, Circuit Judge, joins dissenting:

Plaintiffs-Appellees and Judge Nelson raise important questions about the scope of 28 U.S.C. § 46(c)—the statute that governs our use of en banc panels. Congress wasn't speaking to the precise issue here when it enacted § 46(c). It tried to do something different. Congress amended § 46(c) in response to a narrow question. It addressed a circuit split over whether active judges who heard argument in an en banc case and then took senior status after the hearing—but before the decision was issued—could continue to participate in that decision. Section 46(c) said *yes*—there's no need to reconstitute the en banc panel under those limited circumstances. But we face a very different and far more complex procedural posture today. Here, the judges didn't go senior in the brief period between an en banc hearing and decision. Instead, multiple judges took senior status *years before* the en banc hearing and decision. Regardless of whether § 46(c) prohibits this odd situation, we should have used better judgment and reconstituted our en banc panel before issuing the decision in this important case.

Before diving into the history of this case, it helps to look at how appellate decisions are normally handled. First, a three-judge panel decides appeals from a district court decision in the first instance—only after the decision of a three-judge panel will our court take the extraordinary step of reviewing the case en banc. This isn't always the case, but it's the norm. And there's good reason for this default rule. The three-judge panel conserves judicial resources and

allows circuit judges to focus their attention and energy on a manageable part of our court's docket. That focus allows for better collaboration between judges on difficult issues and helps us to get the law right. Usually, three-judge panels can resolve thorny issues on their own. To the extent further review is required, three-judge panels help clarify questions for an en banc panel. Indeed, after seeing how a case is decided, the full court can then make a more informed choice on whether to rehear the case en banc. After all, "[e]n banc courts are the exception, not the rule." *United States v. Am.-Foreign S. S. Corp.*, 363 U.S. 685, 689 (1960). And that norm protects against gamesmanship. Initial review by three-judge panels ensures that en banc panels don't try to engineer certain outcomes. And an en banc vote after a three-judge panel decision guarantees that all active judges get to participate. We shouldn't have a years-long standing committee of eleven judges on a certain area of the court's jurisprudence—especially to the exclusion of newer judges of the court.

Second, en banc panels usually consist of only active judges of the court. Again, this isn't always the case, but it's the norm. Allowing only active judges to serve on en banc panels ensures that "the active circuit judges ... determine the major doctrinal trends of the future for their court." *Id.* at 690 (simplified). This promotes uniformity and continuity in the circuit's law, as all active judges have an equal chance to decide these important issues. Though senior judges serve a vital role on our court, by assuming senior status, they pass the torch to others to set this court's jurisprudence in the exceptional cases requiring en banc review.

The tortuous path of this case challenges these norms. A three-judge panel first decided the case in August 2020. *Duncan v. Becerra*, 970 F.3d 1133 (9th Cir. 2020). Over the dissent of a visiting judge, two active judges upheld the district court's injunction of California Penal Code § 32310, which banned the possession of so-called "large capacity magazines." *Id.* at 1140. This prompted the one and only en banc vote in this case back in February 2021. *See Duncan v. Becerra*, 988 F.3d 1209 (9th Cir. 2021). At the time, a majority of active judges voted to vacate and rehear the three-judge panel decision. An en banc panel of eleven active judges was drawn. The en banc majority issued its opinion along with a dissent joined by four judges of the panel. *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021) (en banc). So far so good.

Things went awry after the Supreme Court vacated our en banc panel decision in light of *N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen*, 597 U.S. 1 (2022). *See Duncan v. Bonta*, 142 S. Ct. 2895 (2022). By that point in June 2022, our court's composition had changed dramatically. Three judges on the en banc panel had taken senior status and four new judges were appointed to the Ninth Circuit.

Rather than decide the case based on the clear commands of *Bruen*, the en banc panel remanded the case to the district court. *See Duncan v. Bonta*, 49 F.4th 1228 (9th Cir. 2022) (en banc). It didn't have to be this way. Although several of the en banc judges had gone senior, § 46(c) would have permitted those senior judges to decide the merits of the case post-*Bruen*. That's because the Supreme Court vacated our prior en banc decision and senior judges may

"continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service." 28 U.S.C. § 46(c). So the en banc panel, even with the three senior judges, could have resolved the merits of this case then and there. Judge VanDyke and I dissented from that decision because we thought remanding to the district court simply kicked the can down the road. But the majority of the en banc panel disagreed. Not only did the majority remand the case to the district court, but it issued a mandate with its decision. *See Duncan v. Bonta*, 49 F.4th 1228 (9th Cir. 2022). Issuance of the mandate returns the case to the district court to implement our decision—generally ending our involvement in the matter unless a party appeals the case anew. *See Calderon v. Thompson*, 523 U.S. 538, 550 (1998).

After remand, in September 2023, the district court once again enjoined California Penal Code § 32310—this time under *Bruen*. *See Duncan v. Bonta*, 695 F. Supp. 3d 1206 (S.D. Cal. 2023). But by late 2023, two more members of the en banc panel had assumed senior status and four more judges were appointed to the Ninth Circuit. To recap, that means that five out of the eleven judges on the en banc panel had taken senior status. And eight new judges joined the Ninth Circuit since the February 2021 en banc vote.

By giving up authority over the case, we should have returned to regular order and followed the norms of appellate review. With a new district court decision under new Supreme Court precedent, eight new judges, and now five senior judges on the en banc

panel, we should have let a regular three-judge panel take a crack at deciding the case. If the full court disagreed with the three-judge panel's resolution, we could have taken a new en banc vote and then reconstituted the en banc panel with only active judges. Under this straightforward approach, all active judges would have participated in the en banc vote and would have been eligible to be drawn on the en banc panel. But that is not what happened.

When California filed its emergency motion to stay the injunction, the en banc panel voted to take possession of the case immediately. *See Duncan v. Bonta*, No. 23-55805, 2023 U.S. App. LEXIS 25723* (9th Cir. Sept. 28, 2023) (unpublished) (granting administrative stay over appeal). This power grab was without precedent. For the first time in our court's history, an en banc panel decided an emergency appellate motion in the first instance. Four active judges dissented from the en banc majority's unorthodox move. The en banc majority—with only two active judges—then stayed the district court's injunction. *See Duncan v. Bonta*, 83 F.4th 803 (9th Cir. 2023). And it did all this without ever consulting our full court or benefiting from a three-judge panel's review of the case. Once again, four active judges dissented from the merits of the en banc majority's decision. Judge Nelson dissented to raise his concerns that we are violating § 46(c). *Id.* at 807 (Nelson, J., dissenting).

Now, the en banc majority's overreach achieves its end result: five senior judges with two active judges tagging along craft and shape an en banc opinion in a divisive area of constitutional law years after

assuming senior status. Over the objection of four active judges, the en banc majority cements the Second Amendment ruling for our court. But because of the lack of any en banc vote since 2021, this ruling stands despite six active judges ruling the other way and only two active judges supporting the en banc majority. Whether § 46(c) or our rules permit this, it was unwise to do so. As Judge Nelson persuasively shows, our actions in this case are unprecedented and once again make us an outlier among circuit courts. *See* R. Nelson Dissent 80-98 (establishing that the history of en bancs in the Ninth Circuit and other circuits does not support the majority's decision to proceed en banc here). Although I appreciate my colleagues' new-found interest in history and tradition, Judge Nelson shows that our uniquely odd maneuvering here is the first of its kind.

We should have chosen to conduct ourselves differently. We should have returned to regular order. If a three-judge panel decided the case in the first instance, then an en banc vote could have been taken, and all active judges would have had the opportunity to be drawn for our en banc panel. At the very least, this would have assured the parties and the public that we handled this case under our usual norms. It would have guarded against impressions of an entrenched en banc majority trying to maintain a certain result. And it would have advanced respect for our process and our court. Too bad we didn't take this easy path.

I thus respectfully dissent from the majority's order.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-55805

VIRGINIA DUNCAN; PATRICK LOVETTE; DAVID MARGUGLIO; CHRISTOPHER WADDELL; CALIFORNIA RIFLE & PISTON ASSOCIATION, INC., a California corporation,

Plaintiffs-Appellees,

v.

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

Defendant-Appellant.

Filed: Sept. 28, 2023

Before: Mary H. Murguia, Chief Judge, and Sidney R. Thomas, Susan P. Graber, Kim McLane Wardlaw, Richard A. Paez, Marsha S. Berzon, Sandra S. Ikuta, Andrew D. Hurwitz, Ryan D. Nelson, Patrick J. Bumatay and Lawrence VanDyke, Circuit Judges.[1]

ORDER

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[1] Judge Wardlaw was drawn to replace Judge Watford. *See* Ninth Cir. Gen. Order 5.1(b)(1).

The en banc panel has elected to accept this case as a comeback. *See* Ninth Cir. Gen. Order 3.6(b).[2]

Appellant Attorney General Rob Bonta has moved to stay the district court's permanent injunction except to the extent that California Penal Code Section 32310 prohibits possession of large-capacity magazines that were lawfully acquired and possessed prior to the district court's judgment. This emergency motion seeks relief on or before October 2, 2023, when the district court's stay of the injunction expires. In the event the court cannot resolve the motion by October 2, Appellant seeks a temporary administrative stay.

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[2] The Supreme Court has held that the governing statute leaves it to each Court of Appeals "to establish the procedure for exercise of the [en banc] power." *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 257 (1953). In this circuit, "matters arising after remand" are directed to the en banc court, which "will decide whether to keep the case or to refer it to the three judge panel." Ninth Cir. Gen. Order 3.6(b). Here, the en banc panel has exercised its discretion to keep the comeback appeal, as our rules contemplate. "[W]hen a case is heard or reheard en banc, the en banc panel assumes jurisdiction over the entire case, *see* 28 U.S.C. § 46(c) ...." *Summerlin v. Stewart*, 309 F.3d 1193, 1193 (9th Cir. 2002) (Mem.). General Order 6.4, moreover, provides that emergency motions in potential comeback cases are directed to the previous panel that heard the case which, in this case, is the en banc court. Ninth Cir. Gen. Order 6.4(a). At this time, therefore, Appellant's emergency motion is pending before the en banc panel. Although this case presents the unusual circumstances of a comeback en banc case combined with an emergency motion for a stay pending appeal, the procedures undertaken by this court have been fully consistent with our longstanding rules and practices and do not in any sense represent a departure from regular order.

The motion for a temporary administrative stay is granted. The injunction issued by the district court is stayed through October 10, 2023. The stay does not apply to the district court's order enjoining Section 32310(c) and (d) for large-capacity magazines that were lawfully acquired before the district court's order. Appellees are directed to file a response to the emergency motion on or before Saturday, September 30, 2023. Appellant may file a reply on or before Tuesday, October 3, 2023.

Judges Ikuta, R. Nelson, Bumatay, and VanDyke dissent from the granting of the administrative stay.

Hurwitz, Circuit Judge, concurring:

The only thing the Court does today is grant a *one-week* administrative stay that effectively extends the stay ordered by the district court, while we take up the State's emergency motion for a stay pending appeal. Despite the rhetoric from my dissenting colleagues, this temporary stay evinces no more disrespect for the Supreme Court or the Second Amendment than the district court's stay (issued by a judge who found the California statute unconstitutional in order to give the State sufficient time to seek a stay pending appeal).

I therefore concur in the order granting the stay.

VanDyke, J., dissenting

I share Judge Bumatay's concerns about the irregularities created by this en banc panel's all-too-predictable haste to again rule against the Second Amendment. Apparently, even summary reversal by the Supreme Court has not tempered the majority's zeal to grab this case as a comeback, stay the district court's decision, and make sure they—not the original three-judge panel—get to decide the emergency motion (and ultimately, the eventual merits questions) in favor of the government. I think it is clear enough to everyone that a majority of this en banc panel will relinquish control of this case only when it is pried from its cold, dead fingers. And I think it is clear enough to everyone why.

There is a phenomenon that long has been recognized in abortion cases—sometimes called "abortion distortion"—that describes courts' willingness to jettison procedural norms or other normal rules of decision making when a case concerns abortion. As the Supreme Court recently observed in *Dobbs*, abortion cases have led to a distortion in legal doctrines ranging from severability to First Amendment doctrine. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2275-76 (2022). And Justice Thomas has likewise decried the "troubling tendency 'to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue.'" *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016) (Thomas, J., dissenting) (citation omitted); *see also June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2153 (2020) (Alito, J., dissenting) ("[T]he abortion right recognized in this Court's

decisions is used like a bulldozer to flatten legal rules that stand in the way."); *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 785 (1994) (Scalia, J. concurring in part and dissenting in part) ("The entire injunction in this case departs so far from the established course of our jurisprudence that in any other context it would have been regarded as a candidate for summary reversal. But the context here is abortion."). "Abortion exceptionalism" has too often "mean[t] the rules are different for abortion cases." Caroline Mala Corbin, *Abortion Distortions*, 71 Wash. & Lee L. Rev. 1175, 1210 (2014). After *Dobbs*, "we can no longer engage in those abortion distortions." *SisterSong Women of Color Reprod. Just. Collective v. Governor of Georgia*, 40 F.4th 1320, 1328 (11th Cir. 2022). Or at least we shouldn't.

Cases involving the Second Amendment in our circuit have unfortunately suffered from a like phenomenon. And just as we should no longer distort our rules in abortion cases, we should no longer apply "different rules to different constitutional rights." *Whole Woman's Health*, 136 S. Ct. at 2321 (Thomas, J., dissenting). We should not give Second Amendment cases "special" treatment.

But the current irregularities highlighted by Judge Bumatay's dissent are not the only way this case continues to demonstrate our court's enduring bellicosity toward the Second Amendment. The irregularities in this case run much deeper—indeed, all the way back to when this case was first called en banc. This en banc panel was born in illegitimacy, and this case should never have been taken en banc in the first place.

After the three-judge panel first issued its opinion in August 2020, one judge on our court requested Rule 5.4(b) notice in three cases (including this one) but then inadvertently missed the deadlines to timely call the cases en banc under our clear rules. That could happen to any judge. But rather than simply accepting the result dictated by our rules, or even deciding as an *entire* court to waive our rules, we went in a different direction. First, the decision was made by someone—not by the rules, or even the entire court—to allow the respective panels to waive the deadlines on behalf of the entire court. Then, the campaign started: earnest conversations were had, hearts were poured out, tears were shed, and pressure was applied to the panels with mace-like collegiality. And in the end, a discrete collection of judges—again, not the entire court—struck a "compromise," circumvented our own rules, and allowed the en banc call to move forward. But only in this one case. The agreement was made to call this case but drop the en banc calls in two other cases—*including a death penalty case*. Priorities.

A lot about this is deeply troubling. First and foremost, we have rules for a reason. We operate under them every day. They should apply equally and consistently, unless and until we change those rules in the normal course. There is no exception for "cases that some of the judges on our court really, really care about." That would be capricious and erode external and internal confidence in our court. If we lack the temerity to codify a "Second Amendment exception" in our en banc rules, we should have refrained from employing it behind the double veil of "internal court matters" in which only some members of the court participated.

Second, because we have clear, settled, court-wide rules, a discrete group of panel and off-panel judges interested in en banc rehearing shouldn't have been permitted to circumvent those rules on their own. We have a process for suspending the rules, upon a vote of the entire court. *See* 9th Cir. General Order 12.11. But no judge tendered a Rule 12.11 request. Instead, this was handled off the books by a handful of judges. Which makes it even worse. This off-books approach allowed the would-be en banc advocates to pressure the panels to be "collegial," and simultaneously concealed these conversations from the rest of the court. It also delimited the scope of the question to whether we would "bend the rules" and allow some exceptions in three specific cases, which prevented the entire court from considering the weightier question of whether, as an institution, we should be suspending our settled rules for "particularly important cases." Such agreement—however procured—does not somehow confer legitimacy.

In sum, not only is our court treating this case "special" now, but the process that brought this case en banc in the first place was illegitimate from the start. This demonstrates and perpetuates this court's anti-Second Amendment posture, rewards the weaponization of (one-sided) collegiality, and damages the internal and external integrity of the court. How are we to uphold the rule of law, and reassure the public we are doing so, when we disregard our own rules and make questionable decisions like this behind closed doors?

The story of the Second Amendment in this circuit has been a consistent tale of our court versus the

Supreme Court and the Constitution. That tale continues today, and will continue as long as a number of my colleagues retain the discretion to twist the law and procedure to reach their desired conclusion. As uncomfortable as it is to keep pointing that out, it is important the public keeps being reminded of that fact.

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-55805

VIRGINIA DUNCAN; PATRICK LOVETTE; DAVID MARGUGLIO; CHRISTOPHER WADDELL; CALIFORNIA RIFLE & PISTON ASSOCIATION, INC., a California corporation,

Plaintiffs-Appellees,

v.

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

Defendant-Appellant.

Filed: Oct. 11, 2023

Before: Mary H. Murguia, Chief Judge, and Sidney R. Thomas, Susan P. Graber, Kim McLane Wardlaw, Richard A. Paez, Marsha S. Berzon, Sandra S. Ikuta, Andrew D. Hurwitz, Ryan D. Nelson, Patrick J. Bumatay and Lawrence VanDyke, Circuit Judges.

ORDER

California Penal Code section 32310(a) creates criminal liability for "any person ... who manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who

gives, lends, buys, or receives" a large-capacity magazine ("LCM"), which is defined as "any ammunition feeding device with the capacity to accept more than 10 rounds". Cal. Penal Code § 16740. Plaintiffs—five individuals and the California Rifle & Pistol Association, Inc.—filed this action in the Southern District of California challenging the constitutionality of Section 32310 under the Second Amendment. On September 22, 2023, the district court issued an order declaring Section 32310 "unconstitutional in its entirety" and enjoining California officials from enforcing the law. *Duncan v. Bonta*, No. 17-CV-1017-BEN (JLB), 2023 WL 6180472, at *35-36 (S.D. Cal. Sept. 22, 2023). On September 26, Defendant Rob Bonta, the Attorney General of California, filed an emergency motion for a partial stay pending appeal. The Attorney General seeks to stay "all portions of the order except those regarding Sections 32310(c) and (d), which relate to large-capacity magazines that were acquired and possessed lawfully prior to the district court's order granting a permanent injunction." Mot. at 2. We grant the motion.

When deciding whether to grant a stay pending appeal, "a court considers four factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Nken v. Holder*, 556 U.S. 418, 425-26 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Here, a stay is appropriate.

First, we conclude that the Attorney General is likely to succeed on the merits.[1] In *New York State Rifle & Pistol Ass'n v. Bruen*, the Supreme Court reiterated that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." 142 S. Ct. 2111, 2128 (2022) (quoting *Dist. of Columbia v. Heller*, 554 U.S. 570, 626 (2008)). The Attorney General makes strong arguments that Section 32310 comports with the Second Amendment under *Bruen*. Notably, ten other federal district courts have considered a Second Amendment challenge to large-capacity magazine restrictions since *Bruen* was decided. Yet only one of those courts—the Southern District of

[1] Importantly, this order granting a partial stay pending appeal, neither decides nor prejudges the merits of the appeal, which will be decided after full briefing and oral argument. *Cf. Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173, 1177 n.4 (9th Cir. 2021) (explaining that "predicting the likelihood of success of the appeal" is a "step removed from the underlying merits" (quoting *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 660-61 (9th Cir. 2021))); *Doe #1 v. Trump*, 957 F.3d 1050, 1062 (9th Cir. 2020) (noting that when adjudicating a motion before considering the merits of the underlying appeal, "we must take care not to prejudge the merits of the appeal, but rather to assess the posture of the case in the context of the necessity of a stay pending presentation to a merits panel"). Our dissenting colleagues fault us for granting a stay pending appeal in a summary order. A summary order is not unusual in these circumstances, given the time constraints and limited briefing. Indeed, earlier this year, the Seventh Circuit granted a similar stay in a single sentence: "based on our review of the parties' submissions, the breadth of the litigation, and the differing conclusions reached by different district judges, we conclude that the stay of the district court's order already entered will remain in effect until these appeals have been resolved and the court's mandate has issued." *Herrera v. Raoul*, No. 23-1793 (7th Cir. May 12, 2023) (order).

Illinois—granted a preliminary injunction, finding that the challenge was likely to succeed on the merits. *See Barnett v. Raoul*, 2023 WL 3160285 (S.D. Ill. Apr. 28, 2023) (granting plaintiffs' preliminary injunction); *Or. Firearms Fed'n v. Kotek*, 2023 WL 4541027 (D. Or. July 14, 2023) (holding that the state's restriction on large-capacity magazines did not violate the Second Amendment); *Brumback v. Ferguson*, 2023 WL 6221425 (E.D. Wash. Sept. 25, 2023) (denying plaintiffs' motion for a preliminary injunction); *Nat'l Ass'n for Gun Rights v. Lamont*, 2023 WL 4975979 (D. Conn. Aug. 3, 2023) (same); *Herrera v. Raoul*, 2023 WL 3074799 (N.D. Ill. Apr. 25, 2023) (same); *Hanson v. Dist. of Columbia*, 2023 WL 3019777 (D.D.C. Apr. 20, 2023) (same); *Del. State Sportsmen's Ass'n v. Del. Dep't of Safety & Homeland Sec.*, 2023 WL 2655150 (D. Del. Mar. 27, 2023) (same); *Bevis v. City of Naperville, Ill.*, 2023 WL 2077392 (N.D. Ill. Feb. 17, 2023) (same); *Ocean State Tactical, LLC v. Rhode Island*, 646 F. Supp. 3d 368 (D.R.I. 2022) (same); *Or. Firearms Fed'n, Inc. v. Brown*, 644 F. Supp. 3d 782 (D. Or. 2022) (same). In that case, the Seventh Circuit subsequently stayed the district court's order pending appeal—the very relief the Attorney General seeks here. *Herrera v. Raoul*, No. 23-1793 (7th Cir. May 12, 2023) (order).

Second, the Attorney General has shown that California will be irreparably harmed absent a stay pending appeal by presenting evidence that large-capacity magazines pose significant threats to public safety. If a stay is denied, California indisputably will face an influx of large-capacity magazines like those used in mass shootings in California and elsewhere. As Plaintiffs concede, "[i]n 2019, when the district court first enjoined section 32310, decades of pent-up

demand unleashed and Californians bought millions of magazines over ten rounds, essentially buying the nation's entire stock of them in less than one week." Resp. at 10-11.

Third, it does not appear that staying portions of the district court's order while the merits of this appeal are pending will substantially injure other parties interested in the proceedings. This stay does not interfere with the public's ability "to purchase and possess a wide range of firearms, as much ammunition as they want, and an unlimited number of magazines containing ten rounds or fewer." Mot. at 12. Section 32310 has no effect on these activities.

Finally, we conclude that the public interest tips in favor of a stay. The public has a compelling interest in promoting public safety, as mass shootings nearly always involve large-capacity magazines, and, although the public has an interest in possessing firearms and ammunition for self-defense, that interest is hardly affected by this stay.

In sum, we conclude that a stay pending appeal is warranted. We emphasize that at this stage of the litigation, we decide only whether to stay, in part, the district court's order while this appeal is pending.

Some of our colleagues have raised procedural questions regarding the propriety, under circuit rules and practices, of the en banc panel's decision to accept this appeal as a comeback case. These contentions are without merit. The Supreme Court has held that the governing statute leaves it to each Court of Appeals "to establish the procedure for exercise of the [en banc] power." *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 257 (1953). In this circuit, "matters

arising after remand" are directed to the en banc court, which "will decide whether to keep the case or to refer it to the three judge panel." Ninth Cir. Gen. Order 3.6(b). Here, the en banc panel has exercised its discretion to keep the comeback appeal, as our rules contemplate. "[W]hen a case is heard or reheard *en banc*, the *en banc* panel assumes jurisdiction over the entire case, *see* 28 U.S.C. § 46(c) ...." *Summerlin v. Stewart*, 309 F.3d 1193, 1193 (9th Cir. 2002) (Mem.). General Order 6.4, moreover, provides that emergency motions in potential comeback cases are directed to the previous panel that heard the case, which in this case, is the en banc court. Ninth Cir. Gen. Order 6.4(a). Thus, both this appeal and the motion for an emergency stay are properly before the en banc panel.

One of our colleagues raises novel questions about whether our rules are consistent with 28 U.S.C. § 46(c). We have asked the parties to brief these issues and will address them in due course.

The Attorney General's emergency motion for a partial stay pending appeal (Doc. 2) is **GRANTED**.

R. NELSON, Circuit Judge, dissenting:

I join Judge Bumatay's dissent, as the majority's decision to stay the district court's order pending appeal cannot be squared with *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

But I have a more fundamental concern with the majority's decision to proceed with this new appeal en banc in the first instance. No other circuit court would allow a prior en banc panel to hear a comeback case without an intervening majority vote of the active judges.

In 2022, this panel remanded the prior appeal to the district court and the mandate issued. When this new appeal was filed, the appeal could have been sent to a three-judge panel; or a new en banc vote could have been requested from "all circuit judges in regular active service," 28 U.S.C. § 46(c). Both those options are firmly rooted in § 46's statutory text and consistent with our General Orders. Moreover, either option would avoid disenfranchising seven new active judges (a full quarter of the court's active judges) from participating in this new appeal. Our General Orders do not require this. And we have never followed this process in such circumstances.

The majority, however, chose a third option—one that raises serious questions about this panel's statutory authority under § 46(c) that we must now address. And these statutory concerns are determinative, as five of the seven judges in the majority (more than 70 percent) are senior judges. Complying with statutory requirements is not voluntary. *See, e.g.*, *Am.-Foreign S.S. Corp.*, 363 U.S.

685, 685-86 (1960), *superseded by statute* § 46(c) (1963) (holding that prior version of § 46 did not permit senior judges ever to serve on an en banc panel); *United States v. Hudspeth*, 42 F.2d 1013, 1015 (7th Cir. 1994) (holding that as amended § 46(c) did not allow a judge who took senior status between the argument and the decision to serve on the en banc panel), *superseded by statute* § 46(c) (1996).

Just four years ago, we were chastened by the Supreme Court for ignoring § 46 in an en banc case. *See, e.g.*, *Yovino v. Rizo*, 139 S. Ct. 706, 708 (2019) (vacating our en banc decision for counting a judge's determinative vote who passed away before the decision). We should not proceed down such an uncertain statutory path, particularly when viable alternatives are available. Our decision to proceed with this process undermines public confidence in the process and our ultimate decision. I respectfully dissent.

BUMATAY, Circuit Judge, joined by IKUTA, R. NELSON, and VANDYKE, Circuit Judges, dissenting:

If the protection of the people's fundamental rights wasn't such a serious matter, our court's attitude toward the Second Amendment would be laughably absurd. For years, this court has shot down every Second Amendment challenge to a state regulation of firearms—effectively granting a blank check for governments to restrict firearms in any way they pleased. We got here by concocting a two-part tiers-of-scrutiny test, which permitted judges to interest-balance away the Second Amendment guarantee. But this approach was "nothing more than a judicial sleight-of-hand, ... feign[ing] respect to the right to keep and bear arms" but never enforcing its protection. *Duncan v. Bonta*, 19 F.4th 1087, 1147 (9th Cir. 2021) (en banc) (Bumatay, J., dissenting).

Several of us warned that our precedent contradicted the commands of both the Constitution and the Supreme Court. *See id.* (Bumatay, J., dissenting, joined by Ikuta & R. Nelson, JJ.); *id.* at 1159 (VanDyke, J., dissenting). We cautioned this very panel of the need to jettison our circuit's ahistorical balancing regime and adhere to an analysis more faithful to the constitutional text and its historical understanding. But our warnings went unheard.

Last year, the Supreme Court had enough of lower courts' disregard for the Second Amendment. It decisively commanded that we must no longer interest-balance a fundamental right and that we must look to the Second Amendment's text, history, and tradition to assess modern firearm regulations.

N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2129-31 (2022). Now, firearm regulations may stand only after "the government ... affirmatively prove[s] that [they are] part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127.

Despite this clear direction, our court once again swats down another Second Amendment challenge. On what grounds? Well, the majority largely doesn't think it worthy of explanation. Rather than justify California's law by looking to our historical tradition as *Bruen* commands, the majority resorts to simply citing various non-binding district court decisions. There's no serious engagement with the Second Amendment's text. No grappling with historical analogues. No putting California to its burden of proving the constitutionality of its law. All we get is a summary order, even after the Supreme Court directly ordered us to apply *Bruen* to this very case. The Constitution and Californians deserve better.

* * *

At issue here is California's ban on so-called large-capacity magazines.[1] *See* Cal. Penal Code § 32310. These magazines refer to "any ammunition feeding device with the capacity to accept more than 10 rounds." Cal. Penal Code § 16740. California law prohibits manufacturing, importing, selling, receiving, or purchasing these magazines. *See* Cal.

[1] We use the term "large-capacity magazine" for consistency with the majority but note that magazines with the capacity to accept more than ten rounds of ammunition are standard issue for many firearms. Thus, we would be more correct to refer to California's ban on "standard-capacity magazines."

Penal Code § 32310(a). The law also punishes possessing large-capacity magazines with up to one year of imprisonment. § 32310(c). The law requires persons who possessed this type of magazine before July 1, 2017, to remove, sell, or surrender the magazine. § 32310(d).

California's ban on large-capacity magazines has moved up and down the federal courts since 2017. That year, several California citizens challenged the law's constitutionality. Two years later, the district court ruled that the ban was unconstitutional. *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1147 (S.D. Cal. 2019). On appeal, a three-judge panel affirmed that decision. *Duncan v. Becerra*, 970 F.3d 1133, 1141 (9th Cir. 2020). Our court took the case en banc. *Duncan v. Becerra*, 988 F.3d 1209, 1210 (9th Cir. 2021). A majority of that eleven-judge panel reversed, holding that interest-balancing favored the constitutionality of the law—just as we have done for every firearm regulation that our court has encountered. *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021) (en banc). All four of us dissented from that decision. *Id.* at 1140 (Bumatay, J., dissenting, joined by Ikuta & R. Nelson, JJ.); *id.* at 1159 (VanDyke, J., dissenting). The Supreme Court vacated our en banc interest-balancing and remanded for further consideration in light of *Bruen*. *Duncan v. Bonta*, 142 S. Ct. 2895 (2022). Our en banc panel then remanded the case to the district court. *Duncan v. Bonta*, 49 F.4th 1228, 1231 (9th Cir. 2022).

The district court again ruled that California's large-capacity magazine ban violated the Constitution—this time using the clear instructions

from *Bruen*. *Duncan v. Bonta*, No. 17-cv-1017-BEN (JLB), 2023 WL 6180472, at *35 (S.D. Cal. Sept. 22, 2023). In a thorough 71-page opinion, the district court held that magazines were protected arms under the Second Amendment and that California failed to meet its burden of showing a historical analogue for the prohibition. *Id.* The district court enjoined California officials from enforcing § 32310. *Id.* at *36. At California's request, the district court stayed its order for ten days. *Id.* California then appealed to our court. It now seeks an emergency stay of the injunction pending appeal, except as to enforcing § 32310(d).

In an unusual move, our en banc panel retained the emergency stay motion as a comeback case in the first instance—bypassing our traditional three-judge consideration of motions. Indeed, it's perhaps the first time our court has ever done so. The majority then granted an administrative stay, with four judges dissenting. Now a majority of the en banc court grants the stay pending appeal—with little analysis or explanation of *Bruen*'s requirements—saving California's ban on large-capacity magazines yet again.

Three times now, the Supreme Court has warned courts not to treat the Second Amendment as a disfavored right. *See District of Columbia v. Heller*, 554 U.S. 570, 594 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010); *Bruen*, 142 S. Ct. at 2156. We should follow the Supreme Court's direction. Reviewing our historical tradition consistent with *Bruen* demonstrates that the Second Amendment does not countenance California's ban on large-capacity magazines.

Because the majority once again deprives Californians of a fundamental right, we respectfully dissent.

I.

The Second Amendment's Text and Historical Understanding

The operative clause of the Second Amendment commands that the "right of the people to keep and bear Arms, shall not be infringed." U.S. Const. Amend. II. It codifies a preexisting, fundamental right—one rooted in the "natural right of resistance and self-preservation." *Heller*, 554 U.S. at 594 (quoting 1 Blackstone, Commentaries on the Laws of England 140). Thus, central to the Second Amendment right is the "inherent right of self-defense." *Id.* at 628. And the right is so "deeply rooted in this Nation's history and tradition" that it is "fully applicable to the States." *McDonald*, 561 U.S. at 750, 767 (simplified).

Despite lower courts' treatment of the constitutional provision for many years, the right to bear arms is not a "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Bruen*, 142 S. Ct. at 2156 (simplified). The Second Amendment is not subject to "any judge-empowering interest-balancing inquiry." *Id.* at 2129 (simplified). That's because '[t]he very enumeration of the right 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." *Id.* (quoting *Heller*, 554 U.S. at 634). The Court thus rejected the two-part "means-end scrutiny" test adopted by our court. *Id.* at 2127.

In its place, the Supreme Court directed lower courts to follow a "fairly straightforward" methodology "centered on constitutional text and history." *Id.* at 2128-29, 2131. Under this framework, courts are guided by "the plain text of the Second Amendment." *Id.* at 2134. And "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 2126. Of course, this does not mean the Second Amendment's "textual elements" give people the "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 2128 (quoting *Heller*, 554 U.S. at 626).

So what do the Second Amendment's "textual elements" convey?

First, when considering the "people" protected by the Second Amendment, "ordinary, law-abiding, adult citizens" are easily encompassed within the term. *Id.* at 2134.

Second, "Arms" refers to "weapons 'in common use' today for self-defense." *Id.* Such a definition excludes "dangerous and unusual weapons." *Id.* at 2128. And "Arms" does not mean "only ... those arms in existence in the 18th century." *Id.* at 2132 (quoting *Heller*, 554 U.S. at 554). Instead, it "covers modern instruments that facilitate armed self-defense." *Id.*

Third, "keep" and "bear" denote the "course of conduct" protected by the Second Amendment. *Id.* at 2134-35. In *Bruen*, the ordinary definition of "bear" "naturally encompasses" "carrying handguns publicly for self-defense." *Id.* And at a minimum, "keep" encompasses the possession of "firearms in the[] home, at the ready for self-defense." *Id.* at 2134.

If the "course of conduct" at issue falls within the "textual elements" of the Second Amendment, then the Constitution "presumptively protects that conduct." *Id.* at 2130, 2134. The burden then falls on the government to prove that the firearm regulation is "consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2126.

To answer this question, we must engage in "reasoning by analogy—a commonplace task for any lawyer or judge." *Id.* at 2132. Thus, courts must determine whether a historical regulation serves as a "proper analogue" to modern firearm regulations. *Id.* And whether a historical regulation is a good fit as a historical analogue depends on whether they are "relevantly similar." *Id.* (simplified). In turn, we judge similarity based on the "how and why" of the two regulations. *Id.* at 2132-33. That is, "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are central considerations when engaging in an analogical inquiry." *Id.* at 2133 (simplified).

In conducting our inquiry, the Court left us with a warning: "[T]he Second Amendment is neither a regulatory straightjacket nor a regulatory blank check." *Id.* While we are under no duty to "uphold every modern law that remotely resembles a historical analogue," this inquiry "requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*." *Id.* (simplified). So while the government doesn't need a "dead ringer for historical precursors,"

it also cannot satisfy its burden by resorting to historical "outliers." *Id.* (simplified).

To illustrate how this methodology works, we can look to the Court's analysis of New York's public-carry law in *Bruen*. New York sought to justify its restricted public-carry licensure scheme by referencing: (1) colonial and founding era common-law offenses prohibiting unpeaceable, public carry, *id.* at 2145-46; (2) mid-18th century proscriptions on concealed carrying of pistols and other small weapons, *id.* at 2146-47; and (3) mid-18th century surety statutes that required certain individuals to post bond before carrying weapons publicly, *id.* at 2148-50. The Court understood these historical regulations to raise the kinds of public-safety concerns raised by a strict public-carry requirement. But "because none operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose," they could not suffice to establish a "relevantly similar" analogue. *Id.* at 2132, 2150.

Finally, before turning to the application of this law to this case, we address a criticism often lodged at the Court's so-called "text, history, and tradition" approach—the confusion between "history" and "tradition." What do "history" and "tradition" mean in this context? Do they mean something different? Well, when assessing analogous regulations under the Second Amendment, it is relatively straightforward.

History means that analogous laws must be sufficiently "longstanding" and from the relevant "timeframe." *Id.* at 2131, 2133 (citing *Heller*, 554 U.S. at 626). That's because "not all history is created equal." *Id.* at 2136. History's role in this inquiry is to

help establish the public meaning of the Constitution as "understood ... when the people *adopted*" it. *Id.* (citing *Heller*, 554 U.S. at 634-35). Thus, "[h]istorical evidence that long predates [ratification] may not illuminate the scope of [a constitutional] right if linguistic or legal conventions changed [or became obsolete] in the intervening years." *Id.* at 2136. Likewise, "we must also guard against giving postenactment history more weight than it can rightly bear." *Id.* The further we depart from ratification, the greater the chance we stray from the "original meaning of the constitutional text." *Id.* at 2137 (simplified). Thus, the Court tells us that the public understanding of the Second Amendment from only two historical timeframes is relevant—from the adoption of the Second Amendment in 1789 and from the ratification of the Fourteenth Amendment in 1868. *Id.* Thus, laws enacted after the "end of the 19th century" must be given little weight. *Id.* at 2136-37 (simplified).

Tradition, on the other hand, connotes that the comparison must be to laws with wide acceptance in American society. *Id.* at 2136. Take territorial restrictions. The Court considered them unhelpful for historical analysis because they were "transitory" and "short lived." *Id.* at 2155. Such "passing regulatory efforts by not-yet-mature jurisdictions" do little to show what is "part of an enduring [and broad] American tradition of state regulation." *Id.* This is all the more true because territorial laws governed less than 1% of the American population at the time. *Id.* Tradition thus demands that we don't justify modern regulations with reference to "outliers," such as a law from a "single State, or a single city, that contradicts

the overwhelming weight of other evidence" on the meaning of the Second Amendment right. *Id.* at 2154 (simplified). On the other hand, laws that enjoyed "widespread" and "unchallenged" support form part of our tradition. *Id.* at 2137 (simplified).

With this understanding of the Second Amendment, we now turn to the emergency motion.

II.

California Is Not Entitled to a Stay

The State of California moves for an emergency stay of the injunction against enforcement of the State's large-capacity magazine ban pending appeal.

On review of a stay pending appeal, we must determine whether (1) California has made "a strong showing that [it] is likely to succeed on the merits;" (2) California will be "irreparably injured absent a stay;" (3) issuance of the stay will "substantially injure the other parties interested in the proceeding;" and (4) the "public interest lies" with a stay. *Nken v. Holder*, 556 U.S. 426, 426 (2009) (simplified). The first two factors are "the most critical"; the last two factors become relevant only if California establishes the first two and they merge into one inquiry assessing the balance of the public and State's interests. *Id.* at 434; *see also Doe #1 v. Trump*, 984 F.3d 848, 861 (9th Cir. 2020) ("When the Government is a party to the case, the balance of the equities and public interest factors merge.") (simplified). Ultimately, the issuance of a stay is a matter of discretion and California "bears the burden of showing that the circumstances justify an exercise of that discretion." *Nken*, 556 U.S. at 433-34.

None of these factors support California's request for a stay. Taking seriously that "[a] stay is not a matter of right," *id.* at 433, we thus should have denied the State relief.

A.

California's Magazine Ban Has No Likelihood of Success

California cannot succeed on the merits of this appeal.

As a recap, to determine whether a modern regulation survives a Second Amendment challenge, we first determine whether California's regulation burdens conduct within the Amendment's textual elements. *Bruen*, 142 S. Ct. at 2126. If so, "the Constitution presumptively protects that conduct" and the burden shifts to California to establish that the regulation is "consistent with this Nation's historical tradition of firearm regulation." *Id.* To meet this burden, California must provide sufficient historical analogues to show that the regulation may escape the Second Amendment's "unqualified command." *Id.* (simplified).

California's large-capacity magazine ban fails under this framework because possessing magazines holding more than ten rounds of ammunition by law-abiding citizens is protected conduct under the Second Amendment,[2] and California has failed to show that

[2] California does not dispute that Plaintiffs-Appellees are law-abiding citizens and, thus, part of the "people" protected by the Second Amendment. Likewise, possession of a firearm falls within the "keep and bear" textual element and so it is conduct

the ban aligns with our historical tradition of firearm regulation.

1. Large-Capacity Magazines Are Protected "Arms" Under the Second Amendment

To start, California halfheartedly suggests that large-capacity magazines are not "Arms" under the Second Amendment. We can easily dispense with this argument.

The term "bearable arms" includes any "[w]eapons of offence" or "thing that a man wears for his defence, or takes into his hands," that is "carr[ied] ... for the purpose of offensive or defensive action." *Heller*, 554 U.S. at 581, 584 (simplified).

Magazines are included within that definition. Without protection of the components that render a firearm operable, like magazines, the Second Amendment right would be meaningless. After all, constitutional rights "implicitly protect those closely related acts necessary to their exercise." *Luis v. United States*, 578 U.S. 5, 26 (2016) (Thomas, J., concurring). If not, then States could make an easy end-run around the Second Amendment by simply banning firearm components, such as magazines and ammunition. Our court has thus recognized a "right to possess the magazines necessary to render ... firearms operable." *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015), *abrogated on other grounds by Bruen*, 142 S. Ct. 2111. Firearm magazines, including those holding more than ten rounds, fall into that category.

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protected by the Second Amendment. We thus focus on the disputed elements of this challenge.

And it makes no difference that large-capacity magazines did not exist at the time of the Founding. While the Second Amendment's "meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Bruen*, 142 S. Ct. at 2132 (simplified). Thus, "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." *Heller*, 554 U.S. at 582. So it is the common possession of large-capacity magazines that governs our analysis, not their specific historical pedigree.

2. Large-Capacity Magazines Are Commonly Possessed for Self-Defense

California mainly argues that large-capacity magazines are not in "common use" for lawful purposes like self-defense. We take this question in two parts: First, whether large-capacity magazines are in "common use." Second, whether they are used for self-defense.

a. Common Use

Both as a matter of modern statistics and historical analogy, large-capacity magazines and their analogues are in common use today and were at the time of the Second Amendment's incorporation.

While estimates vary, it is undisputed that more than 100 million large-capacity magazines circulate in the United States. One recent study cited by the district court found that Americans own 542 million magazines that hold more than 10 rounds today.

Duncan, 2023 WL 6180472, at *4.[3] And this fact isn't surprising given that those magazines are a standard component on many of the Nation's most popular firearms, such as the Glock pistol, which commonly comes with a magazine that can hold 17 rounds. They are lawful in at least 41 States and under federal law. They account for half of all magazines owned in the United States today.

And as a historical matter, the initial three-judge panel in this case rightfully concluded 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 [large-capacity magazines] for self-defense is apparent in our shared national history." *Duncan*, 970 F.3d at 1147; *see also* David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 851 (2015) ("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.").

We briefly chronicled the history of firearms firing more than ten rounds in the United States in our previous en banc dissent. *See Duncan*, 19 F.4th at 1154-55 (Bumatay, J., dissenting). From this history, the clear picture emerges that firearms able to fire more than ten rounds were widely possessed by law-

[3] The district court also noted that Plaintiffs-Appellees' expert estimates there are between 500 million and one billion magazines able to hold more than 10 rounds. *Duncan*, 2023 WL 6180472, at *4 n.30.

abiding citizens by the Second Amendment's incorporation. In that way, today's large-capacity magazines are "modern-day equivalents" of these historical arms.

b. Lawful Purpose

While acknowledging that large-capacity magazines are commonly owned in this country, California argues that these magazines are not in common use for lawful purposes like self-defense. California's argument goes like this: Because an average of only 2.2 shots are fired in self-defense situations, magazines carrying more than ten shots are not *used* for self-defense. There are two main problems with this argument.

First, as an empirical and factual matter, the district court's findings undercut the State's argument. After examining the record, the district court concluded that California's 2.2 average-shot statistic was "suspect." *Duncan*, 2023 WL 6180472, at *12. Such a statistic, the district court said, "lacks classic indicia of reliability" and is based on "studies [that] cannot be reproduced and are not peer-reviewed." *Id.* at *13. Instead, the studies used by California's expert relied on "anecdotal statements, often from bystanders, reported in news media, and selectively studied" without any aid of investigatory reports. *Id.* (noting that California has not provided a single police report to the court or to the State's own expert, no national or state government data report on shots fired in self-defense events exists, and no public government database corroborates the State expert's conclusions). The district court also noted that the State's expert found that though it is "exceedingly

rare" for a person to fire more than 10 rounds in self-defense, that is not "never," and California's 2.2 statistic is only an average in those rare situations. *Id.* at *20, 27. In this emergency appeal, California doesn't contend that the district court's factual determinations are clearly erroneous and we are bound by them. *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 824 (9th Cir. 2020) ("To decide whether the [movants] have demonstrated a likelihood that they will succeed on the merits of their claim, we review the district court's findings of fact for clear error.").

Second, and more importantly, California misunderstands the "lawful purposes" inquiry. As discussed below, the Supreme Court has never looked at the average number of times that a handgun had been fired in self-defense to determine whether it is commonly used for that purpose. *See Heller*, 554 U.S. at 628-36. Likewise, it 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. Indeed, it would be troubling if our constitutional rights hung on such thin evidence.

And California's conception of a firearm's "use" is overly cramped. While "use" will encompass the number of times the firearm is discharged, it is not limited to that. "Use" will also cover the possession of a firearm for a purpose even if not actually fired. Our criminal laws don't require the discharge of the firearm for it to be "used." *See, e.g.*, *Smith v. United States*, 508 U.S. 223 (1993). That's like saying we don't "use" our seatbelts whenever our cars don't crash. *Cf. Bailey v. United States*, 516 U.S. 137, 143 (1996)

(acknowledging that "use draws meaning from its context," such that someone can "*use* a gun to protect [his] house" while "never ha[ving] to *use* it" (simplified)). And that a citizen did not expend a *full* magazine does not mean that the magazine was not "used" for self-defense purposes, further undermining California's focus on the 2.2 statistic.

It is also immaterial that large-capacity magazines are not strictly "necessary" to ward off attackers. Lawful *purpose*, not *necessity*, is the test. And so it is not dispositive that a firearm or its component is not used to the *full extent* of its capabilities or that it is not *absolutely necessary* to accomplish its purpose. *See Heller*, 554 U.S. at 629 (holding it irrelevant to the constitutionality of D.C.'s "handgun" ban that the law allowed citizens the possession of substitutes, like "long guns"). Indeed, we are glad that most law-abiding citizens never have to discharge their firearms in self-defense.

Rather than going down this statistical rabbit hole, the Supreme Court looked to Americans' overall *choice* to use a firearm for self-defense. Take *Heller* and the District of Columbia's handgun ban. The Court didn't dissect statistics on self-defense situations or look at anecdotes of a handgun's use in self-defense. Instead, "[i]t is enough to note," the Court observed, "that the American people have considered the handgun to be the quintessential self-defense weapon." *Heller*, 554 U.S. at 629. To the Court, it was sufficient that the handgun was "overwhelmingly chosen by American society for th[e] lawful purpose" of self-defense. *Id.* at 628. Thus, "banning from the home the most preferred firearm in the nation to keep

and use for protection of one's home and family would fail constitutional muster" under any standard of review. *Id.* at 628-29 (simplified). So "[w]hatever the reason" for its "popular[ity]," we look to Americans' choice to use a firearm for self-defense to find its purpose—not finely cut statistics of shots fired or news clippings. *Id.* at 629. And unless it can be proven that a certain firearm is unsuitable for self-defense, we must respect the people's choice.

Here, large-capacity magazines are the most common magazine chosen by Americans for self-defense. Indeed, millions of semiautomatic pistols, the "quintessential self-defense weapon" for the American people, *id.*, come standard with magazines carrying over ten rounds. That many citizens rely on large-capacity magazines to respond to an unexpected attack is enough for our inquiry. *See Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Att'y Gen. New Jersey*, 910 F.3d 106, 116 (3d Cir. 2018) ("The record shows that millions of magazines are owned, often come factory standard with semi-automatic weapons, are typically possessed by law-abiding citizens for hunting, pest-control, and occasionally self-defense[.]" (simplified)), *abrogated by Bruen*, 142 S. Ct. at 2111. Even our court has begrudgingly admitted as much. *See Fyock*, 779 F.3d at 998 ("[W]e cannot say that the district court abused its discretion by inferring from the evidence of record that, at a minimum, [large-capacity] magazines are in common use. And, to the extent that certain firearms capable of use with a magazine—e.g., certain semiautomatic handguns—are commonly possessed by law-abiding citizens for lawful purposes, our caselaw supports the conclusion that there must also be some corollary, albeit not

unfettered, right to possess the magazines necessary to render those firearms operable" (simplified)).[4]

In sum, firearms with magazines capable of firing more than ten rounds are commonplace in America today. And they are widely possessed for the purpose of self-defense, the very core of the Second Amendment. Accordingly, an overwhelming majority of citizens who own and use large-capacity magazines do so for lawful purposes. "Under our precedents, *that is all that is needed* for citizens to have a right under the Second Amendment to keep such weapons." *Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (emphasis added).

3. The Large-Capacity Magazine Ban Is Not Consistent with the Nation's Historical Tradition of Firearm Regulation

Once it is established that large-capacity magazines are protected arms used for lawful purposes, California has the burden of showing that its ban on large-capacity magazines is "consistent with this Nation's historical tradition of firearm

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[4] California argues that our inquiry here must be objective rather than "subjective." We addressed this question in our en banc dissent. *See Duncan*, 19 F.4th at 1153-54 (Bumatay, J., dissenting) (observing that courts have relied on both an "objective and largely statistical inquiry" on common usage as well as "broad patterns of use and the subjective motives of gun owners") (quoting *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 256 (2d Cir. 2015)). Because large-capacity magazines represent half of all magazines in the country, we need not settle this question here. Given their overwhelming numbers, they are *necessarily* used for lawful purposes.

regulation." *Bruen*, 142 S. Ct. at 2135. To meet this burden, California must show historical regulations that are analogues to its modern magazine ban. We recently explored how this comparison works—

> In determining whether the modern regulation and the historical analogue are "relevantly similar," we must look to the "how and why" of the two regulations; that is, "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are central considerations when engaging in an analogical inquiry."

Teter v. Lopez, 76 F.4th 938, 951 (9th Cir. 2023) (quoting *Bruen*, 142 S. Ct. at 2132-33).

California points to four historical analogues to defend its absolute ban on large-capacity magazines: (1) regulations on "trap gun" contraptions; (2) regulations on the carry of fighting knives and certain blunt objects and on the concealed carry of pistols and revolvers; (3) regulations on the use and possession of fully automatic and semi-automatic firearms and ammunition feeding devices; and (4) regulations on the storage of gunpowder.

But these historical analogues do not even come close to the "relevantly similar" laws required by the Supreme Court.

a. Laws Regulating Trap-Gun Mechanisms

California first points to regulations on "trap gun" mechanisms as a historical analogue for the banning

of large-capacity magazines. These devices refer to string or wire contraptions that allowed a firearm to be discharged remotely when triggered—without a user present. According to California, 16 States had laws against trap-gun devices, with the laws being enacted after the 1870s except for a New Jersey ordinance dating to 1771.[5] The New Jersey law, for example, proscribed "a most dangerous Method of setting Guns" when the gun is rigged "in such Manner" as to "discharge itself, or be discharged by any String, Rope, or other Contrivance." 1763-1775 N.J. Laws 346, An Act for the Preservation of Deer and Other Game, and to Prevent Trespassing with Guns, ch. 539, §10.

Even if these laws are temporally relevant and could be considered part of our tradition, there's an obvious problem with California's comparison of trap-gun devices to large-capacity magazines—trap-gun devices are not a firearm or even part of a firearm. According to California's expert, the devices are made from string or wire hooked up to firearms. So it's doubtful that trap-gun devices themselves fall with the "Arms" protected by the Second Amendment. *See Bruen*, 142 S. Ct. at 2132; *Heller*, 554 U.S. at 581-84 (concluding that to "bear arms" includes any "[w]eapons of offence" or "thing that a man wears for his defence, or takes into his hands," that is

[5] Several of the States that California cites for anti-trap laws seemingly only banned the use of trap devices for hunting. We count Maryland, Rhode Island, South Carolina (in 1869), South Dakota, and Wisconsin as having only hunting—not absolute—bans.

"carr[ied] ... for the purpose of offensive or defensive action").

But even if we viewed trap-gun contraptions as subject to the Second Amendment's protection, the burdens of regulating trap-gun mechanisms are not at all analogous to the burdens of banning large-capacity magazines. These anti-trap laws only proscribed the method of discharging of a firearm *remotely*. None worked to punish the possession of any firearm or necessary firearm component. Nor did they restrict a person's direct use of a firearm for self-defense or limit the number of bullets a person may discharge from the firearm. So these laws are not "relevantly similar" to California's ban on the most common magazine used in the Nation.

b. Laws Regulating the Carry of Fighting Knives and Blunt Objects and the Concealed Carry of Pistols

California next justifies its ban by looking at laws regulating the carrying of bowie knives, long-bladed knives, clubs, and blunt weapons and the concealed carry of pistols. According to California, in the 1830s, four States enacted laws barring the carrying of bowie knives, which later expanded to most States by the 20th century. California's expert also asserts that several States enacted "anti-carry laws" for clubs and other blunt weapons. Finally, California claims that, by 1868, about a dozen States had laws prohibiting carrying concealed pistols. These historical analogues also fail to meet California's burden.

Again, assuming the laws are historically relevant and part of our tradition, most of these statutes suffer from a similar flaw: They did not ban

the *possession* of a weapon. Instead, they mostly regulated the open or concealed carrying of certain knives, clubs, or firearms. As for laws on knives and clubs, they dealt mostly with carrying, concealed carry, or taxes.[6] In its emergency motion, California identifies no specific historical law banning the possession of a knife or club.[7] As for the concealed-pistol laws, the district court concluded that none prohibited keeping pistols for all lawful purposes or carrying the guns openly. *Duncan*, 2023 WL 6180472, at *62. Nor has California identified laws banning the possession of a pistol at home.

On the other hand, we agree with the district court that it is "remarkable" that no law categorically banning all law-abiding citizens from keeping or

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[6] *See, e.g.*, 1837 Miss. Laws 294 (prohibiting the use of bowie knives, dirks, and some pistols in any fight in which a combatant was killed, as well as prohibited their exposition in a rude or threatening manner unnecessary for self-defense); 1871 Miss. Laws 819-20 (taxing bowie knives, dirks, sword canes, and pistols); 1839 Ala. Laws 67 (banning concealed carry of "any species of fire arms, or any bowie knife," dirk, or "any other deadly weapon"); 1887 Va. Acts 897 (banning concealed carry of certain weapons, including dirks and bowie knives); 1927 R.I. Pub. Laws 256 (allowing one-year concealed carry permits). *See also* David B. Kopel et al., Knives and the Second Amendment, 47 U. Mich. J.L. Reform 167, 180 (2013).

[7] On appeal in a separate case, the State of Hawaii identified one statute banning the possession of bowie knives: an 1837 Georgia statute that said that no one shall "keep, or have about or on their person or elsewhere ... Bowie, or any other kind of knives." *Teter*, 76 F.4th at 951 (quoting 1837 Ga. Laws 90, An Act to Guard and Protect the Citizens of this State, Against the Unwarrantable and too Prevalent Use of Deadly Weapons, §1). Our court held that this "one solitary statute is not enough to demonstrate a *tradition* of an arms regulation." *Id.* at 952.

possessing a firearm existed during the relevant time periods. *Id.* at *49. According to one scholar cited by the district court, the first regulation prohibiting all law-abiding citizens from simple ownership of a gun came in 1911—too late for our purposes. *Id.* (citing Robert H. Churchill, *Forum: Rethinking the Second Amendment*, 25 L. & Hist. Rev. 139, 161 (2007)).

California argues that this distinction makes no difference—that we should treat anti-carry and anti-possession laws as equivalent. But that ignores both *Heller* and *Bruen*. In *Bruen*, we are told that the "central" consideration in assessing historical analogues is "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified." *Bruen*, 142 S. Ct. at 2133. In fact, the Court in *Bruen* rejected surety laws that required certain persons to post bond before carrying weapons in public as being insufficiently analogous to restrictions on public carry for law abiding citizens. It did so because the surety laws did not amount to a "*ban*[] on public carry" and their "burden" on public carry was "likely too insignificant." *Id.* at 2148-49.

And in *Heller*, the Supreme Court made clear that the need for "defense of self, family, and property is most acute" at "the home." 554 U.S. at 628. The Second Amendment then "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of *hearth and home*." *Id.* at 635 (emphasis added). Thus, prohibitions "banning from the home" the "most preferred firearm in the nation to 'keep' and use for protection" does not pass "constitutional muster." *Id.* at 628-29.

Contrary to the State's contention, the distinction between anti-carry and anti-possession laws is critical. The former limits only the way a person may *use* a firearm in *public*. The latter categorically denies all *possession* of a firearm for any purpose—even at *home*. While restrictions on carrying a firearm—whether open or concealed—are a significant burden, the burden of prohibiting a large-capacity magazine *anywhere,* including in the home for self-defense, is greater in kind and magnitude.

Indeed, we recently rejected a similar argument when Hawaii made it illegal to possess "butterfly knives." *See Teter*, 76 F.4th at 951. We noted that laws banning carrying a weapon are "different" than laws banning possession because "they regulate different conduct." *Id.* Thus, when confronted with statutes that regulated only the carry of knives, we considered it more important that Hawaii had not identified a statute "categorically bann[ing] the possession of any type of pocketknife." *Id.*

c. Laws Regulating Fully Automatic and Semi-Automatic Firearms and Ammunition Feeding Devices.

California next argues that 20th-century restrictions on automatic and semi-automatic firearms and ammunition feeding devices act as historical analogues. California groups a wide range of laws in this category. Some focused solely on semi-automatic weapons capable of firing a set number of rounds. Others on only fully automatic firearms. *Id.* More still covered firearms of both types. *Id.* The one commonality for all these laws is that they were all enacted after 1917, with most passed after 1932. Thus,

they cannot serve as historical analogues justifying a large-capacity magazine ban.

Given their recent vintage, these regulations offer little support for the original public meaning of the Second Amendment. To be clear, post-ratification history can be relevant to show how meaning has been "liquidate[d] & settle[d]." *Bruen*, 142 S. Ct. at 2136. But we must be careful not to "giv[e] postenactment history more weight than it can rightly bear." *Id.* at 2136. Immediate post-ratification history is the strongest at illuminating the understanding of those steeped in the contemporary understanding of a constitutional provision. But evidence from later in time diminishes in relevance—otherwise, we risk "adoption or acceptance of laws that are inconsistent with the original meaning of the constitutional text [to] overcome or alter that text." *Id.* at 2137 (quoting *Heller v. District of Columbia*, 670 F.3d 1244, 1274 n.6 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)). Thus, the Supreme Court has largely cabined our inquiry to the period "through the end of the 19th century." *Id.* at 2136 (quoting *Heller*, 554 U.S. at 605).

Here, the restrictions on automatic and semi-automatic firearms and ammunition feeding devices are far too late to shed meaningful light on the original meaning of the Second Amendment. Laws passed nearly half a century after the ratification of the Fourteenth Amendment do little to clarify what was understood when the constitutional text was adopted.

Plus, to the extent that these laws ban automatic weapons or features of automatic weapons, like machine guns, such weapons are not analogous to large-capacity magazines. Those weapons function

differently, have a different historical lineage and record of use, and offer a different type of hazard than large-capacity magazines. Accordingly, automatic weapons would warrant a separate consideration of history and tradition under the Second Amendment. These laws thus offer no relevance for large-capacity magazines, which are in "common use" today and analogous to arms in "common use" at the time of the ratification of the Fourteenth Amendment.

d. Laws Regulating Gunpowder Storage

California lastly relies on 18th- and 19th-century gunpowder-storage laws. Concerned with the dangers of massive fires and explosions, the laws prohibited the stockpiling of large quantities of gunpowder in one place. Take the 1784 New York City law. It made it unlawful "to have or keep any quantity of gun powder exceeding twenty-eight pounds weight, in any one place, less than one mile to the northward of the city hall ... except in the public magazine at the Fresh-water." 1784 N.Y. Laws 627, An Act to Prevent the Danger Arising from the Pernicious Practice of Lodging Gun Powder in Dwelling Houses, Stores, or Other Places, ch. 28. Another 1821 Maine law did the same "for the prevention of damage by Fire." 1821 Me. Laws 98-99, An Act for the Prevention of Damage by Fire, and the Safe Keeping of Gun Powder, ch. 25, §5.

These gunpowder-storage restrictions fail to establish a historical tradition supporting a large-capacity magazine ban. First, these laws do not offer a comparable burden on the possession of a firearm or the way it is discharged. While California's ban on large-capacity magazines is directed at prohibiting a

firearm from firing more than ten rounds at once, the gunpowder laws were only directed at preventing the accumulation of explosive material. Foreclosing gun owners from using the most common magazine is a starkly greater burden than limiting the storage of gunpowder for fire safety. In other words, gunpowder storage laws would have a minimal effect on law-abiding citizens' use of firearms for self-defense. The same cannot be said for limits on firing more than ten rounds at once.

Indeed, the Supreme Court was well acquainted with these gunpowder laws at the time of *Heller*. Justice Breyer, in dissent, referred extensively to these laws as an analogue to the District of Columbia's handgun ban. *Heller*, 554 U.S. at 685-87 (Breyer, J., dissenting). But the Court rejected that comparison: "Justice BREYER cites ... gunpowder-storage laws that he concedes did not clearly prohibit loaded weapons, but required only that excess gunpowder be kept in a special container or on the top floor of the home. Nothing about those fire-safety laws undermines our analysis; they do not remotely burden the right of self-defense as much as an absolute ban on handguns." *Id.* at 632 (majority opinion). Likewise, those fire-safety laws do not create a comparable burden to the absolute ban on the most owned magazines.

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Based on this analysis, no historical analogue justifies California's ban. It thus will not succeed on the merits.

B.

California's Asserted Irreparable Injury Does Not Justify a Stay

Beyond likelihood of success on the merits, California also fails to establish a sufficient irreparable injury to warrant a stay. "[A]t this juncture, the government has the burden of showing that irreparable injury is likely to occur during the period before the appeal is decided." *Doe #1 v. Trump*, 957 F.3d 1050, 1059 (9th Cir. 2020).

Often, a State may "suffer a form of irreparable injury" when it is "enjoined by a court from effectuating statutes enacted by representatives of its people." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (simplified) (Roberts, C.J., in chambers); *see also Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997). But that doesn't always settle the question. We've long said that the government "cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations." *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983); *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013) (holding that the government "cannot suffer harm from an injunction that merely ends an unlawful practice").

With this background, California cannot make a strong showing of irreparable harm sufficient to tip this factor in favor of a stay. California argues that without a stay, large-capacity magazines would immediately flood the State. But, as we've said, California does not suffer any harm by being prevented from infringing Second Amendment rights.

Even still, nothing in the district court's injunction prevents California's enforcement of its rigorous background, registration, and prohibited-person laws. *See, e.g.*, Cal. Penal Code § 30370 (setting out the background check procedure for approving purchase or transfer of ammunition); Cal. Penal Code § 29810 (restricting certain felons from possessing magazines); Cal. Code Regs. Tit. 11, § 5483 (requiring maintenance of transaction records for large-capacity magazines); Cal. Penal Code § 16150(b) (defining ammunition as "any bullet, cartridge, magazine, clip, speed loader, autoloader, ammunition feeding device, or projectile capable of being fired from a firearm with a deadly consequence").

Moreover, we cannot ignore large-capacity magazines' ubiquity elsewhere in the country. As stated earlier, it is undisputed that over 100 million large-capacity magazines exist nationwide—with some estimates being five times that number. They account for half of all magazines nationwide. Likely tens of millions of these magazines already exist in other parts of the Ninth Circuit. Indeed, the majority even concedes that Californians purchased millions of large-capacity magazines in 2019. Given the widespread popularity and common usage of large-capacity magazines, we need not defer to California's speculative prediction of catastrophic harm.

Given these considerations, California has not made a sufficient showing of irreparable harm.

C.

The Balance of Interests Favors No Stay

For the balance-of-interests factor, we generally "explore the relative harms to [an] applicant and

respondent, as well as the interests of the public at large." *Trump v. Int'l Refugee Assistance Project*, 582 U.S. 571, 580 (2017) (per curiam) (simplified). Given California's failure to satisfy the first two stay factors, we don't need to address this factor. *See Al Otro Lado v. Wolf*, 952 F.3d 999, 1007 (9th Cir. 2020). But even if California could meet the first two stay factors, it still cannot prevail on the last.

We acknowledge that California has a legitimate interest in promoting public safety and preventing gun violence. And, in general, the State may enact laws to further these aspirations. We also don't doubt California's sincere belief that large-capacity magazines may pose "particular threats to public safety." For example, California points to statistics showing the use of large-capacity magazines in mass shootings. While California's concerns are serious, they are not enough to tip this factor in favor of a stay.

We reach this conclusion for three reasons:

First, "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *Index Newspapers*, 977 F.3d at 838 (simplified); *see also Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[E]nforcement of an unconstitutional law is always contrary to the public interest."). California's ban deprives its citizens of the ability to fire a gun more than ten times in self-defense. Contrary to the majority's claim, the existence of a "wide range of firearms"—which cannot fire more than ten rounds without reloading—does not mitigate that deprivation. So the public interest favors denying a stay here.

Second, as stated above, California can have "no legitimate interest in enforcing an unconstitutional ordinance." *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006). So any conversation about the importance of the State's interests in public safety and the prevention of gun violence ends when the means used to further them violate the Constitution. Thus, California cannot point to a strong interest on its side.

Finally, we cannot forget that the Supreme Court has very clearly ended interest balancing when it comes to the Second Amendment. The Second Amendment, the Court said, "is the very *product* of an interest balancing by the people and it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms for self-defense." *Bruen*, 142 S. Ct. at 2131 (simplified). It is "this balance—struck by the traditions of the American people—that demands our unqualified deference." *Id.* And we cannot backdoor interest-balancing through the stay factors. Thus, while we understand the right to bear arms' "controversial public safety implications," *McDonald*, 561 U.S. at 783, that does not give us license to ignore its "unqualified command," *Bruen*, 142 S. Ct. at 2126 (simplified).

The balance of public and State interests is clear. It weighs against granting a stay.

III.

Over and over, our circuit has enjoined government actions that would lead to "the deprivation of constitutional rights," much like the district court did here. *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (simplified). We have done

this for the First Amendment, *Riley's Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 731 (9th Cir. 2022), the Fourth Amendment, *Melendres*, 695 F.3d at 1002, and the Fifth Amendment, *Rodriguez*, 715 F.3d at 1144-45. Today, the majority proves yet again that our court treats the Second Amendment as somehow inferior to the others. But the right of the people to keep and bear arms cannot be dismissed as "second-class." *McDonald*, 561 U.S. at 780; *Bruen*, 142 S. Ct. at 2156.

This court has repeatedly acquiesced to the violation of Californians' right to bear arms. Now it does so again, without even analyzing the merits of this case. Enough should be enough.

We respectfully dissent.