No. 25-198

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**

## REPLY BRIEF FOR PETITIONERS


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## REPLY BRIEF

The decision below deepens acknowledged circuit splits over whether magazines capable of holding more than ten rounds are "Arms" covered by the Second Amendment's plain text at all and whether and how courts should conduct the common-use inquiry. Those issues demand resolution, as do the related questions of whether these common devices may be banned notwithstanding historical tradition—or even confiscated notwithstanding the Takings Clause. And this is an especially appropriate case in which to resolve those questions. The decision below is neither preliminary nor tentative: This case has been going on for almost a decade, and it has now reached final judgment on a full record. This Court should grant certiorari and reverse.

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

#### A. The Decision Below Deepens Three Circuit Splits.

1. This Court has made clear that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms," *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 28 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008)), and that the "arms" of which the Second Amendment speaks include "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. Yet the circuits are divided on whether the ubiquitous ammunition feeding devices California outlaws fit within the Second Amendment's plain-text coverage.

The D.C. and Third Circuits have held that magazines fit squarely within the Second Amendment's plain text, no matter whether they hold two rounds or 20. *See Hanson v. District of Columbia*, 120 F.4th 223, 232 (D.C. Cir. 2024); *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d 106, 116-17 (3d Cir. 2018). The First Circuit has assumed the same. *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 43 (1st Cir. 2024). But the Ninth and Seventh Circuits (plus Washington's Supreme Court) have reached the opposite conclusion, holding that some or all magazines are not covered by the plain text at all. *See* Pet.App.19-20; *Bevis v. City of Naperville*, 85 F.4th 1175, 1195-97 (7th Cir. 2023); *Washington v. Gator's Custom Guns, Inc.*, 568 P.3d 278, 284-86 (Wash. 2025).

Unable to deny that division, respondent tries to downplay it, noting that some decisions were made in a "preliminary-injunction posture." BIO.12-13. But nothing in the Ninth Circuit's decision here was preliminary; this is a final judgment from the en banc court. And while the D.C. Circuit's decision in *Hanson* was issued at the preliminary-injunction stage, its legal determination as to the plain-text inquiry was unequivocal. Indeed, the *Hanson* court reasoned that any decision holding that 10-plus-round magazines are *not* covered by the plain text of the Second Amendment would impermissibly "allow the government to sidestep the Second Amendment with a regulation prohibiting possession at the component level." 120 F.4th at 232.

2. Respondent's effort to deny the split the Ninth Circuit itself highlighted over "'whether the common-

use issue' is a threshold, textual inquiry or a historical inquiry," Pet.App.16 n.2, fares no better. Respondent ignores the Second, Fourth, and Tenth Circuits, which have squarely held that "common use" is part of the plain-text inquiry. Pet.18-19. And while he at least acknowledges the Sixth Circuit's contrary conclusion in *United States v. Bridges*, 150 F.4th 517 (6th Cir. 2025), he tries to brush *Bridges* aside by claiming "the issue was undisputed" there. BIO.13. In reality, the government there argued that common use was *both* a plain-text and a historical inquiry, U.S.Br., No. 24-5874, 2024 WL 5379131, at *19, 23-36 (6th Cir. Dec. 27, 2024), but the Sixth Circuit rejected that approach, holding that common use is not part of the plain-text inquiry. *Bridges*, 150 F.4th at 524-26.

As for the split regarding what the common-use inquiry entails, respondent claims that every circuit approaches the inquiry the same. BIO.13-14. But he can do so only by ignoring the Ninth Circuit's derision of this Court's common-use test as too "simplistic," "undefined," "speculative," and "facile," Pet.App.51-54, the Seventh Circuit's estimation that the test is "slippery," "circular," and not "very helpful," *Bevis*, 85 F.4th at 1190, 1198-99, and the First and Fourth Circuit's comments that common use is an "ill-conceived popularity test," *Bianchi v. Brown*, 111 F.4th 438, 460 (4th Cir. 2024) (en banc); *see also Ocean State*, 95 F.4th at 45-51. In stark contrast, the Sixth Circuit has faithfully applied this Court's common-use test. *Bridges*, 150 F.4th at 526-27; Pet.19. This clear division of authority on a recurring question central to the meaning of the Second Amendment cries out for resolution.

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

1. It should be beyond debate that a semiautomatic firearm equipped with a magazine that feeds ammunition into the firing chamber is a "thing that a man … takes into his hands," *Heller*, 554 U.S. at 581, that "facilitate[s] armed self-defense," *Bruen*, 597 U.S. at 28. A contrary conclusion would not only flout this Court's precedents, but allow states to gut the Second Amendment via component-level regulation. *See Hanson*, 120 F.4th at 232. Perhaps that is why respondent urges this Court to ignore the Ninth Circuit's holding that the magazines California has banned are not "arms" at all. *See* BIO.14. But there is no getting around what the court held: According to the Ninth Circuit, feeding devices that hold more than ten rounds are mere "accoutrements"—so banning them does not even *implicate* the Second Amendment. *See* Pet.App.3, 15-23.

Respondent's embrace of the Ninth Circuit's backup theory—that "the Second Amendment's text necessarily encompasses [a] right to possess a magazine," just not one that holds more than ten rounds, Pet.App.20—only highlights the problems with the decision. As respondent admits, the Ninth Circuit held that 10-plus-round magazines do not implicate the Second Amendment because they are "not necessary to operate any firearm." BIO.15; *see* Pet.App.20. But nothing in the Second Amendment's plain text (let alone historical tradition) confines the people to the bare minimum of a functional arm. Respondent also has no explanation for how, as a

*textual* matter, a 10-round magazine is presumptively protected but an 11-round magazine is definitively unprotected.

2. Respondent tries to tether the decision below to the tradition this Court has recognized of restricting "'dangerous and unusual' weapons." BIO.15. But he cannot help but admit reality: The supposed tradition on which the decision below *actually* relied is an invented one under which states may ban any and all arms that legislators deem "especially dangerous" in the hands of criminals. BIO.15. That criminals'-veto theory of the Second Amendment should sound familiar: It is the same one the dissenters in *Heller* and *Bruen* advanced, *Heller*, 554 U.S. at 713 (Breyer, J., dissenting); *Bruen*, 597 U.S. at 83 (Breyer, J., dissenting), but the majority rejected as inconsistent with historical tradition and the very notion that the Second Amendment secures a fundamental right.

Respondent's attempted defense of the decision below ultimately just underscores how free some states and courts feel to disregard this Court's precedents. Even though "*Bruen* and *Rahimi* did not disturb the historically based 'common use' test," *Snope v. Brown*, 145 S.Ct. 1534, 1534 (2025) (Kavanaugh, J., respecting the denial of certiorari), respondent derides that test as a "numbers-only approach" that ignores "historical tradition." BIO.17. In fact, the common-use test derives *directly from* historical tradition, which teaches that the government may restrict only those arms that are both "dangerous and unusual." *See Bruen*, 597 U.S. at 21-22, 47; *Heller*, 554 U.S. at 627. And it focuses on who uses arms and for what purposes, and what are widely

recognized as lawful instruments, not just on "numbers only."

Respondent nonetheless claims that this Court could not have meant what it has plainly and repeatedly said, and that "dangerous and unusual" really must mean "unusually dangerous." BIO.15. While the *Heller* dissenters advanced a similar claim, *see Heller*, 554 U.S. at 713 (Breyer, J. dissenting), a majority of this Court has rejected it—at least twice, *see* Pet.23. And that argument does not even help respondent, as it just begs the question: Unusually dangerous as compared to what? The obvious answer is as compared to arms that law-abiding citizens commonly use for lawful purposes—which is precisely why both *Heller* and *Bruen* recognized that arms that are in common use for lawful purposes cannot be banned consistent with the "dangerous and unusual" tradition.[1]

3. When respondent turns to the historical record, he tellingly ignores essentially every historical argument in the petition. He has no defense of the Ninth Circuit's reliance on gunpowder-storage laws, which this Court made clear in *Heller* were "fire-safety laws" that could not possibly support a possession ban. 554 U.S. at 632; *see Hanson*, 120 F.4th at 235 (rejecting Ninth Circuit's argument as "silly"). Nor

[1] California's hypothetical regarding a rush to buy machine guns is both fanciful, *see Bridges*, 150 F.4th at 528, and ahistorical. When machine guns were legal in America, law-abiding citizens did not rush to buy them en masse. They rushed to ban them en masse—and have never looked back since. *See id.* at 543-44 (Nalbandian, J., concurring in part and concurring in the judgment).

does he defend the court's invocation of regulations on non-bearable arms like trap guns or of concealed-carry restrictions on Bowie knives that are not remotely analogous to California's possession ban. *See* Pet.28-29. Indeed, respondent does not even acknowledge that this Court has already held that concealed-carry laws are not analogous to all-carry bans; *a fortiori*, they are not analogous to a possession ban. *See* Pet.29. And to round all of that out, respondent makes no effort to defend the Ninth Circuit's mangling of the "why" inquiry. *See* Pet.28-29.

Instead, he homes in on a version of the "how" inquiry—but not the one this Court demands. Rather than ask "how" the mechanics of California's regulation compare to those of historical laws, *see United States v. Rahimi*, 602 U.S. 680, 698-700 (2024), respondent defends the Ninth Circuit's decision by arguing about how burdensome (he thinks) California's ban is, BIO.16. Because the ban leaves smaller magazines untouched, respondent thinks it imposes a minimal (and thus acceptable) burden on the right. BIO.16. Once again, this Court has already rejected that miserly approach to the Second Amendment. *See Heller*, 554 U.S. at 629 ("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."). And while respondent may not think that Americans really *need* more than ten bullets for self-defense (apparently, they need only 2.5 on average), BIO.16, this Court has also made clear that the Second Amendment does not turn on what judicial or political officials think the people really need. *See Bruen*, 597 U.S. at 22-23. Respondent's dogged insistence on recycling the same

arguments this Court has squarely and repeatedly rejected confirms the need for course-correction.

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

Unless this Court grants certiorari, countless Californians who lawfully purchased ten-plus-round magazines will have only two options: accept their new felon status for their long-lawful possession, or dispossess themselves of their property. If that is not an "[e]xtortionate demand[]," *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 607 (2013), it is a mystery what would be. *Contra* BIO.20.

Respondent notes that states have long banned disfavored items, like controlled substances, without paying for them. BIO.18. But he cites no controlled substance law that, like California's magazine ban, *has retroactive criminal and confiscatory effect*. The best he has is *James Everard's Breweries v. Day*, which held that a law preventing "physicians from prescribing intoxicating malt liquors for medicinal purposes" was not a taking. 265 U.S. 545, 554 (1924). That law is in no way "similar" to California's ban, BIO.18-19, which does not merely restrict a particular use of long-lawful possession; it puts Californians to the Hobson's choice of criminality or dispossession.

That gives the lie to respondent's sheepish invocation of the state's "police power[]" to enact "use[]" restrictions on personal property "from time to time." BIO.19. California's ban is no mere use restriction. And invoking the "police power" does not relieve the state of its burden to comply with the

Takings Clause. This Court rejected that argument more than a century ago, *see Chi., Burlington & Quincy Ry. Co. v. Illinois ex rel. Grimwood*, 200 U.S. 561, 593 (1906)—and with good reason, as the Takings Clause would be nugatory if the police power were a get-out-of-paying-just-compensation-free card.

Respondent's fallback position that states simply must have the power to "destroy[]" property "to prevent the spread of [harm]," BIO.19 (citing *Miller v. Schoene*, 276 U.S. 272, 279-80 (1928)), fares no better. This Court did not even conduct a Takings Clause analysis in *Miller*, which, in any event, long pre-dates this Court's cases illuminating (among other things) the role of background property-law principles in takings analysis. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030-32 (1992). And while respondent insists that California's ban does not effect a taking because owners can transfer their property to another, he does not dispute that this Court rejected exactly that line of argument in *Kelo v. City of New London*, 545 U.S. 469 (2005).

Nor does respondent dispute that a mandate to transfer property out of state—where Californians do not reside—obviously strips owners of their essential right to *possess* that property. *See* Pet.32. And while respondent claims that "[i]t is not difficult to modify a magazine to bring it into compliance," BIO.19, he cites no authority for the proposition that states can avoid paying just compensation by letting people retain lawfully acquired property only on the condition that they convert it into something *the state itself views as fundamentally different*. That is because none exists.

Finally, respondent fails to distinguish *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), or *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Nothing in *Horne* turned on the transfer of "title"; the principles undergirding *Loretto* are not limited to "physical occupation of real property"; and, as noted, California's choice between felon-status or dispossession is an "[e]xtortionate demand[]" if there ever was one. *Contra* BIO.20.[2]

## III. The Questions Presented Are Exceptionally Important, And This Is An Excellent Vehicle.

Respondent does not deny the importance of the questions presented. Instead, he argues the Court should deny certiorari because it has denied magazine-related petitions in the past. BIO.9. But this Court was "wary of taking" those "cases" because they arose "in an interlocutory posture." *Harrel v. Raoul*, 144 S.Ct. 2491, 2492 (2024) (Thomas, J., respecting the denial of certiorari). And, even then, there were three votes for certiorari. *See Ocean State Tactical, LLC v. Rhode Island*, 145 S.Ct. 2771 (2025). Unlike those cases, this case has reached final judgment—after nearly a decade of litigation and multiple rounds of en banc proceedings. There is no longer any reason to wait—especially given the consequences that denying certiorari would have for the countless Californians who, like petitioner

[2] Respondent argues that petitioners' challenge is barred because California law provides recovery through "inverse condemnation." BIO.20-21. But this Court held in *Knick v. Township of Scott*, 588 U.S. 180, 189 (2019), that a plaintiff need not bring an inverse-condemnation action under state law to obtain relief in federal court for a taking.

Lovette, will become criminals overnight if the Ninth Circuit's mandate issues. Respondent tries to run away from that reality, but he ultimately ends up blaming the victims of California's legislative overreach for lawfully purchasing arms that he thinks they should not have. BIO.10.

*Contra* BIO.9, the Third Circuit's recent decision to sua sponte en banc a Second Amendment challenge to New Jersey's similar magazine (and firearm) ban, *see Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, No. 24-2415 (3d Cir.), just proves the need for this Court's guidance.[3] And while respondent asserts that this Court would "benefit from awaiting further development in the lower courts," BIO.11, none of the cases he says are "proceeding apace in the district courts" can or will contribute to any further percolation, as the circuits where those cases are pending have either already weighed into the debate, *see Hanson*, 120 F.4th at 232, or made clear how they will resolve it, *see Ocean State*, 95 F.4th at 43. Indeed, even the United States has weighed in, recently moving to vacate a D.C. defendant's conviction for possessing a "large-capacity ammunition feeding device" on the ground that bans like California's are unconstitutional. Mot. to Vacate, *Peterson v. United States*, No. 24-CF-430 (D.C. App. Ct. Sept. 12, 2025);

[3] At minimum, the Court should hold this petition pending the sure-to-come petitions in that case or the Seventh Circuit's second go-round in the *Bevis* litigation, so that law-abiding Californians are not forced to destroy or dispossess themselves of their constitutionally protected property only to have their Second Amendment rights vindicated shortly thereafter.

*see also* Br. for U.S. as *Amicus Curiae* 22-26, *Barnett v. Raoul*, No. 24-3060 (7th Cir. June 13, 2025).

Finally, this Court's recent grant of certiorari in *Wolford v. Lopez*, No. 24-1046, does not counsel against certiorari. *Contra* BIO.11. That case, about the default rules for constitutional rights on private property, has little to do with this one—apart from the fact that it too arises out of a circuit-splitting decision from the Ninth Circuit. And even if *Wolford* (or *United States v. Hemani*, No. 24-1234) might have some bearing on this case, that would at most be a reason to hold this petition, not to deny it. But the far better course would be to grant certiorari and make clear once and for all that the Second Amendment protects the right to keep and bear arms—including their constituent components—that are commonly used by law-abiding citizens for lawful purposes.

## CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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