No. 19-55376

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGINIA DUNCAN, ET AL.,
Plaintiffs-Appellees,

v.

ROB BONTA,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of California
No. 17-cv-1017-BEN-JLB
The Honorable Roger T. Benitez, Judge

SUPPLEMENTAL BRIEF FOR THE ATTORNEY GENERAL IN RESPONSE TO THE COURT'S AUGUST 2, 2022 ORDER

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INTRODUCTION

In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court changed the legal landscape for analyzing Second Amendment claims. Instead of the "two-step test" adopted by this and most other federal courts of appeals, *Bruen* directed courts to apply a standard "rooted in the Second Amendment's text, as informed by history." *Id.* at 2126-2127. *Bruen* also provided important guidance about how that test should be applied. *See id.* at 2127-2134, 2136-2138. And it recognized that this historical analysis "can be difficult," requiring courts to make "nuanced judgments about which evidence to consult and how to interpret it." *Id.* at 2130 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 803-804 (2010) (Scalia, J., concurring)).

In light of *Bruen*, California respectfully submits that this Court should vacate the district court's judgment and its order enjoining the Attorney General from enforcing California Penal Code Section 32310, and remand this case for further proceedings. Plaintiffs here challenge California's restrictions on large-capacity magazines, regulations that this Court previously concluded were an important component of the State's effort to "reduce the devastating harm caused by mass shootings." *Duncan v. Bonta*, 19 F.4th 1087, 1110 (9th Cir. 2021) (en banc), *vacated and remanded*, 142 S. Ct. 2895 (2022). In resolving plaintiffs' Second Amendment claim, both this Court and the district court addressed the

constitutionality of California's large-capacity magazine restrictions under the then prevailing two-step framework.

The Supreme Court has dramatically changed the ground rules with respect to plaintiffs' Second Amendment claim. Vacatur and remand is necessary to allow the parties to compile the kind of historical record that *Bruen* now requires, and would allow the district court to address a number of important issues raised by *Bruen* in the first instance. That course would also be consistent with this Court's orders vacating district court judgments and remanding six other appeals raising Second Amendment claims that were pending when *Bruen* was decided—including two that raise a Second Amendment challenge to California's related restrictions on assault weapons. *See Rupp v. Bonta*, No. 19-56004 (June 28, 2022) (9th Cir. Dkt. 71); *Miller v. Bonta*, No. 21-55608 (Aug. 1, 2022) (9th Cir. Dkt. 27); *see also McDougall v. Cty. of Ventura*, No. 20-56220 (June 29, 2022) (en banc) (9th Cir. Dkt. 55); *Martinez v. Villanueva*, No. 20-56233 (July 6, 2022) (9th Cir. Dkt. 45); *Young v. Hawaii*, No. 12-17808 (Aug. 19, 2022) (en banc) (9th Cir. Dkt. 329); *Cupp v. Bonta*, No. 21-16809 (Aug. 19, 2022) (9th Cir Dkt. 23).

ARGUMENT

I. *BRUEN* ALTERED THE LEGAL STANDARD FOR ANALYZING SECOND AMENDMENT CLAIMS

In *Bruen*, the Supreme Court addressed the constitutionality of New York's requirement that individuals show "proper cause" as a condition of securing a

license to carry a firearm in public. 142 S. Ct. at 2122-2123. Before turning to the merits, the Court announced a new methodology for analyzing Second Amendment claims. It recognized that lower courts had "coalesced around a 'two-step' framework for analyzing Second Amendment challenges that combines history with means-end scrutiny." *Id.* at 2125. At the first step of that approach, the government could "justify its regulation by establishing that the challenged law regulates activity falling outside the scope of the Second Amendment right as originally understood." *Id.* at 2126 (brackets and quotation marks omitted). Courts asked whether there was "persuasive historical evidence showing that the regulation does not impinge on the Second Amendment right as it was historically understood." *Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021) (en banc), *vacated and remanded*, 142 S. Ct. 2895 (2022). Laws "restricting conduct that [could] be traced to the founding era" fell "outside of the Second Amendment's scope" and were upheld "without further analysis." *Id.* In addition, courts would "uphold a law without further analysis if it f[ell] within the 'presumptively lawful regulatory measures' that *Heller* identified." *Id.* (quoting *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016)).

If the first step of the pre-*Bruen* analysis revealed that the challenged restriction burdened conduct protected by the Second Amendment, courts proceeded to the second step of the analysis. *See Young*, 992 F.3d at 783-784.

Alternatively, in many cases—"particularly where resolution of step one [wa]s uncertain and the case raise[d] 'large and complicated' questions"—this and other federal courts of appeals "assumed, without deciding, that the challenged law implicate[d] the Second Amendment," and analyzed the challenge solely at step two. *Duncan v. Bonta*, 19 F.4th 1087, 1102-1103 (9th Cir. 2021) (en banc), *vacated and remanded*, 142 S. Ct. 2895 (2022).[1] That part of the inquiry required courts to determine "how close[ly] the law c[ame] to the core of the Second Amendment right and the severity of the law's burden on the right." *Bruen*, 142 S. Ct. at 2126. If the law severely burdened the "'core' Second Amendment right" of self-defense in the home, strict scrutiny applied; otherwise, courts applied intermediate scrutiny. *Id.*; *see also* Appellant's Opening Br. 21-24 (describing the two-step framework); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960-961 (9th Cir. 2014) (same).

The Supreme Court jettisoned the two-step approach in *Bruen*. 142 S. Ct. at 2126. The Court explained that its earlier decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), "do not support applying means-end scrutiny in the Second Amendment

[1] *See also, e.g.*, *Pena v. Lindley*, 898 F.3d 969, 976 (9th Cir. 2018); *Bauer v. Becerra*, 858 F.3d 1216, 1221 (9th Cir. 2017); *Silvester*, 843 F.3d at 826-827; *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013).

context." *Id.* at 2127. It then announced a new standard for analyzing Second Amendment claims that is "centered on constitutional text and history." *Id.* at 2128–2129. Under this text-and-history approach,

> 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.

Id. at 2129–2130.

This test requires courts to make two inquiries. As a threshold matter, courts must assess whether the "Second Amendment's plain text covers an individual's conduct," *Bruen*, 142 S. Ct. at 2126—*i.e.*, whether the regulation at issue prevents the "people" from "keep[ing]" or "bear[ing]" "Arms" for lawful purposes, U.S. Const. amend. II. If the plain text of the Second Amendment covers the conduct in which plaintiffs wish to engage, the Constitution "presumptively protects that conduct." *Bruen*, 142 S. Ct. at 2126; *see also id.* at 2129–2130 ("When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."); *id.* at 2134 (examining whether the "plain text of the Second Amendment" protected the *Bruen* plaintiffs' course of conduct); *id.* at 2135 (similar). The burden then shifts to the government to justify its regulation by showing that the law is "consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2126.

Bruen also provided guidance about how courts should conduct the Second Amendment historical inquiry. In some cases—such as when a challenged law addresses a "general societal problem that has persisted since the 18th century"—the Court observed that this historical inquiry will be "fairly straightforward." *Bruen*, 142 S. Ct. at 2131. But in others, the Court recognized that the historical analysis requires a "more nuanced approach." *Id.* at 2132. For example, when a regulation addresses "unprecedented societal concerns or dramatic technological changes," *Bruen* instructs courts to "reason[] by analogy." *Id.* To justify regulations of that sort, *Bruen* held that governments are not required to identify a "historical *twin*," but need only identify a "well-established and representative historical *analogue*." *Id.* at 2133.

And the Court also explained how courts should conduct this "analogical reasoning." *Bruen*, 142 S. Ct. at 2132. In evaluating whether a "historical regulation is a proper analogue for a distinctly modern firearm regulation," *Bruen* directs courts to determine whether the two regulations are "'relevantly similar.'" *Id.* The Court identified "two metrics" by which regulations must be "relevantly similar under the Second Amendment": "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2132-2133. The Court explained that those considerations are especially important because "'individual self-defense is "the *central component*" of the Second Amendment right.'" *Id.*

(quoting *McDonald*, 561 U.S. at 767, in turn quoting *Heller*, 554 U.S. at 599).[2] Thus, after *Bruen*, a regulation that restricts conduct protected by the plain text of the Second Amendment is constitutional if it "impose[s] a comparable burden on the right of armed self-defense" as its historical predecessors, and the modern and historical laws are "comparably justified." *Id.*

II. THE COURT SHOULD VACATE THE DISTRICT COURT'S JUDGMENT AND REMAND THIS CASE TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS IN LIGHT OF *BRUEN*

In light of the new text-and-history standard for adjudicating Second Amendment claims, this Court should vacate the district court's judgment and remand this case for further proceedings consistent with *Bruen*. The parties litigated this case—and this Court and the district court analyzed plaintiffs' Second Amendment claim—under the now-defunct two-step approach. Vacatur and 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.

[2] *See also Heller*, 554 U.S. at 628 ("[T]he inherent right of self-defense has been central to the Second Amendment right.").

For example, consistent with the then-prevailing approach, in this Court and the district court, the parties focused on the burden imposed by California's large-capacity magazine restrictions on plaintiffs' ability to defend themselves, and whether those restrictions satisfied the relevant standard of scrutiny.[3] And in its decision, this Court assumed without deciding that California's large-capacity magazine restrictions burdened conduct protected by the Second Amendment, *Duncan*, 19 F.4th at 1103, before upholding them because they imposed only a minimal burden on plaintiffs' ability to defend themselves and because they satisfied the appropriate standard of review—intermediate scrutiny, *see id.* at 1103-1111. But *Bruen* has since made clear that "*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context." 142 S. Ct. at 2127. Instead, courts must apply a test "centered on constitutional text and history." *Id.* at 2128-2129.

Remand is necessary to allow the parties to develop evidence and present argument under this new test. In particular, remand is required to allow the parties to develop evidence about whether California's large-capacity magazine

[3] *See* Appellant's Opening Br. 31-52 (9th Cir. Dkt. 7); Answering Br. for Appellees 21-31 (9th Cir. Dkt. 46); Attorney General's Opening Supplemental Br. 15-30 (9th Cir. Dkt. 162); Plaintiffs' Opening Supplemental Br. 7-16 (9th Cir. Dkt. 164); Attorney General's Opposition to Plaintiffs' Motion for Summary Judgment 13-22 (D. Ct. Dkt. 53); Plaintiffs' Memorandum of Points & Authorities in support of Plaintiffs' Motion for Summary Judgment 12-19 (D. Ct. Dkt. 50-1).

restrictions are "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2130. Here, California has strong arguments as to why its large-capacity magazine restriction is constitutional under that test: Even assuming that the plain text of the Second Amendment protects large-capacity magazines because they are "arms," U.S. Const. amend. II, *Bruen* repeats *Heller*'s assurance that States may regulate access to "dangerous and unusual weapons" consistent with the Second Amendment, *Bruen*, 142 S. Ct. at 2128 (quoting *Heller*, 554 U.S. at 627); *see also id.* at 2162 (Kavanaugh, J., concurring) (same).[4] Remand will allow California to develop a record showing that its large-capacity magazine restrictions impose a "comparable burden on the right of armed-self-defense" as historical restrictions on dangerous or unusual weapons, and that the modern and historical regulations are "comparably justified." *Id.* at 2133.

To be sure, *Bruen* recognizes that the historical analysis conducted at step one of the two-step approach was "broadly consistent with *Heller*." 142 S. Ct. at 2127. And in this case, the parties introduced evidence regarding the history of regulating especially dangerous weapons. For example, in its supplemental brief to the en

[4] As the Fourth Circuit has observed, while *Heller* "invoked Blackstone for the proposition that 'dangerous and unusual' weapons have historically been prohibited, Blackstone referred to the crime of carrying 'dangerous *or* unusual weapons.'" *Kolbe v. Hogan*, 849 F.3d 114, 131 n.9 (4th Cir. 2017) (en banc) (quoting 4 Blackstone 148-149 (1769)).

banc Court, California explained how its large-capacity magazine restriction was part of a longer tradition of regulating especially dangerous weapons once they began to circulate widely in society. Attorney General's Opening Supplemental Br. (ASB) 9-15 (9th Cir. Dkt. 162). For their part, plaintiffs argued that certain weapons that could fire more than 10 rounds—including the Pepperbox pistol, the Puckle Gun, and the Girandoni air rifle—had been around since the time of the founding, and that the absence of government regulation of these weapons demonstrated that large-capacity magazines fell within the scope of the Second Amendment. Plaintiffs' Opening Supplemental Br. 2-7 (9th Cir. Dkt. 164). *But see* ASB 10-11 (explaining that most of these firearms were not widely available and none presented the same dangers posed by modern large-capacity magazines).

On remand, much of this history will be relevant to the district court's consideration of the issues presented here. But *Bruen* clarified how the historical inquiry should proceed, and the analysis it requires differs from the one courts used before *Bruen* in important respects. Among other things, neither the parties, nor the district court, nor this Court employed the reasoning-by-analogy analysis—with its emphasis on comparable burdens and comparable justifications—that *Bruen* requires. *See Bruen*, 142 S. Ct. at 2133 (noting that these questions "are *central* considerations when engaging in an analogical inquiry") (quotation marks omitted). In addition, California's historical arguments were consistent with

guidance from this Court that laws from the early 20th century could be considered "longstanding" and therefore presumptively constitutional under *Heller*. *See, e.g.*, *Silvester*, 843 F.3d at 831 (Thomas, C.J., concurring) (concluding that a law that dated to 1923 was a longstanding regulation); *see also Duncan*, 19 F.4th at 1102 (observing that there is "significant merit" to California's argument that its large-capacity magazine restrictions are longstanding because of a tradition of imposing firing-capacity restrictions that dates back "nearly a century"). But *Bruen* has since suggested that when determining whether a law is "longstanding," the focus should be on gun regulations predating the 20th century. *See* 142 S. Ct. at 2137.

Bruen also left open other questions that are best resolved by the district court in the first instance. The Court did not decide "whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope" or look to the "public understanding of the right to keep and bear arms" when the Second Amendment was ratified in 1791. *Bruen*, 142 S. Ct. at 2138. More broadly, the Court "d[id] not resolve" the "manner and circumstances in which postratification practice may bear on the original meaning of the Constitution." *Id.* at 2162-2163 (Barrett, J., concurring).

In resolving these and other historical questions, *Bruen* directs district courts (and then, later, courts of appeals) to follow "'various evidentiary principles and

default rules,'" including "the principle of party presentation." 142 S. Ct. at 2130 n.6. And as *Bruen* recognizes, this historical analysis "can be difficult," and sometimes requires judges to "resolv[e] threshold questions" and "mak[e] nuanced judgments about which evidence to consult and how to interpret it." *Id.* at 2130 (quoting *McDonald*, 561 U.S. at 803–804 (Scalia, J., concurring)).[5] That is especially true in cases like this one, which implicates "unprecedented societal concerns [and] dramatic technological changes." *Id.* at 2132; *see also id.* (recognizing that these cases "require a more nuanced approach"). The parties should have the opportunity to develop a record and arguments consistent with *Bruen*, and the district court should have the opportunity to conduct the analysis *Bruen* requires, before this Court passes on these questions on the basis of a record that was developed before *Bruen*. *Cf. Shirk v. U.S. ex rel. Dep't of Interior*, 773 F.3d 999, 1007 (9th Cir. 2014) (federal courts of appeals are "court[s] of review, not first view").

In addition, vacating the district court's judgment and remanding for further proceedings in light of *Bruen* would accord with what this Court has done in six other appeals raising Second Amendment claims that were pending when *Bruen*

[5] *See also Bruen*, 142 S. Ct. at 2134 ("[W]e acknowledge that 'applying constitutional principles to novel modern conditions can be difficult and leave close questions at the margins.'" (quoting *Heller v. District of Columbia*, 670 U.S. 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting))).

was decided. *See Rupp v. Bonta*, No. 19-56004 (June 28, 2022) (9th Cir. Dkt. 71); *McDougall v. Cty. of Ventura*, No. 20-56220 (June 29, 2022) (en banc) (9th Cir. Dkt. 55); *Martinez v. Villanueva*, No. 20-56233 (July 6, 2022) (9th Cir. Dkt. 75); *Miller v. Bonta*, No. 21-55608 (Aug. 1, 2022) (9th Cir. Dkt. 27); *Young v. Hawaii*, No. 12-17808 (Aug. 19, 2022) (en banc) (9th Cir. Dkt. 329); *Cupp v. Bonta*, No. 21-16809 (Aug. 19, 2022) (9th Cir Dkt. 23). Other courts of appeals have similarly vacated district court judgments resolving Second Amendment claims and remanded for further proceedings in light of *Bruen*.[6] And vacatur and remand here would be consistent with what this Court has done in other cases where the Supreme Court vacated a judgment issued by this Court and remanded for further consideration in light of an intervening Supreme Court decision. *See, e.g.*, *Padilla v. Immigration & Customs Enforcement*, 41 F.4th 1194 (9th Cir. 2022); *Foothill*

[6] *See, e.g.*, *Oakland Tactical Supply, LLC v. Howell Twp.*, 2022 WL 3137711, at *2 (6th Cir. Aug. 5, 2022) (vacating district court judgment and remanding to decide whether the plaintiff's "proposed course of conduct is covered by the plain text of the Second Amendment" and, if so, whether the regulation is "consistent with the nation's historical tradition of firearm regulation"); *Sibley v. Watches*, 2022 WL 2824268, at *1 (2d Cir. July 20, 2022) (vacating judgment and remanding to the district court to "consider in the first instance the impact, if any, of *Bruen*" on challenge to "good moral character" requirement for concealed carry licenses); *Taveras v. New York City*, 2022 WL 2678719, at *1 (2d Cir. July 12, 2022) (vacating and remanding because "neither the district court nor the parties' briefs anticipated and addressed [*Bruen*'s] new legal standard").

Church v. Watanabe, 3 F.4th 1201 (9th Cir. 2021); *Rodriguez v. Swartz*, 800 F. App'x 535 (9th Cir. 2020).

CONCLUSION

The Court should vacate the district court's judgment and its order enjoining the Attorney General from enforcing California Penal Code Section 32310, and remand this case for further proceedings.

Dated: August 23, 2022

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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