No. 19-55376

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of California,
No. 17-cv-1017-BEN-JLB

APPELLEES' SUPPLEMENTAL BRIEF ON EN BANC REHEARING

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INTRODUCTION

The panel was eminently correct to conclude that California's sweeping prohibitions on magazines that come standard-issue with many of the nation's most popular firearms and are typically possessed by law-abiding citizens for self-defense violate the Second Amendment. As the panel explained, Americans overwhelmingly choose the standard-capacity magazines for the most popular handguns for self-defense, and those magazines typically hold more than 10 rounds. Because magazines that can hold more than 10 rounds are "typically possessed by law-abiding citizens for lawful purposes," the Second Amendment protects them. *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008). California's complete and confiscatory ban—which not only prospectively prohibits the acquisition, transfer, or possession of such magazines, but retrospectively confiscates them from law-abiding citizens who lawfully obtained and have long possessed them without incident—fails any level of constitutional scrutiny, for it is the antithesis of tailoring. Simply put, the state cannot banish what the Constitution protects.

Because it operates not just prospectively, but also to wrest magazines from those who lawfully acquired magazines and have safely used them ever since, the state's ban violates not only the Second Amendment, but the Takings Clause as well. By affirmatively requiring individuals who lawfully obtained and have long lawfully possessed magazines to dispossess themselves of that property without

compensation, the retrospective aspect of the law effects an uncompensated taking, which the Takings Clause plainly proscribes. The law is thus unconstitutional twice over, and the en banc Court should affirm.

ARGUMENT

I. The Panel Correctly Held That California's Magazine Ban Violates The Second Amendment.

The panel correctly affirmed the district court's holding that California's ban of the most commonly owned firearm magazines violates the Second Amendment. California's law imposes the most severe kind of burden, as it flatly bans not only the manufacture, sale, and transfer of magazines protected by the Second Amendment, but even their mere possession. That ban is plainly unconstitutional, for the banned magazines are protected by the Second Amendment, and the state cannot flatly prohibit what the Constitution protects. But if resort to tiers of scrutiny were necessary, the state plainly failed to meet its burden of supplying credible, reliable, and admissible evidence that the ban is tailored at all, much less narrowly or reasonably so.

A. The Magazine Ban Plainly Implicates Plaintiffs' Second Amendment Rights.

The panel was eminently correct that California's magazine ban burdens conduct protected by the Second Amendment. The Second Amendment provides that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II; *see McDonald v. City of Chicago*, 561 U.S. 742 (2010)

(incorporating the Second Amendment against the states). Nearly a decade ago, the Supreme Court made clear that the Second Amendment "confers an individual right" that belongs to "the people"—a term that "unambiguously refers to all members of the political community," except those subject to certain "longstanding prohibitions" on the exercise of the right, such as "felons and the mentally ill." *Heller*, 554 U.S. at 580, 622, 626-27. The rights protected by the Second Amendment thus belong to all "law-abiding, responsible citizens." *Id.* at 635.

Heller likewise made clear that the Second Amendment protects the right to possess weapons that are "typically possessed by law-abiding citizens for lawful purposes." *Id.* at 624-25. This Court has made equally clear that that right plainly encompasses ammunition, for "without bullets, the right to bear arms would be meaningless." *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014). And California readily concedes that the Second Amendment protects the possession of magazines. *See* Dkt.7 at 23. That concession is consistent with the conclusions (or assumptions) of both this Court and nearly every other court of appeals to consider the question. *See, e.g.*, *Fyock v. City of Sunnyvale*, 779 F.3d 991, 998-99 (9th Cir. 2015) (holding lower court did not abuse its discretion in holding that magazines capable of holding more than ten rounds are in common use); *Worman v. Healey*, 922 F.3d 26, 37 (1st Cir. 2019); *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. of N.J.*, 910 F.3d 106, 117 (3d Cir. 2018), *N.Y. State Rifle & Pistol*

Ass'n, Inc. v. Cuomo, 804 F.3d 242, 257, 260 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406, 415 (7th Cir. 2015) (Manion, J., dissenting); *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1261 (D.C. Cir. 2011). *But see Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017).

That conclusion is unassailable. As the panel explained, both handguns and long-guns capable of firing more than ten rounds "have been in existence—and owned by American citizens—for centuries." *Duncan v. Becerra*, 970 F.3d 1133, 1147 (9th Cir. 2020), *reh'g en banc granted & panel opinion vacated*, 988 F.3d 1209 (9th Cir. 2021); *see also id.* at 1147-49 (summarizing historical evidence). They existed "even before our nation's founding," and then, as now, their "common use" was for "self-defense." *Id* at 1147. The first firearm able to "fire more than ten rounds without reloading was invented around 1580." *Id.* "British soldiers were issued magazine-fed repeaters as early as 1658," and numerous firearms with capacities well exceeding 10 rounds "pre-dated the American Revolution," some by "nearly one hundred years." *Id.* Those arms include variants of the Pepperbox pistol that could "shoot 18 or 24 shots before reloading individual cylinders," rapid-fire guns like the "famous Puckle Gun," and the "Girandoni air rifle" that "had a 22-round capacity and was famously carried on the Lewis and Clark expedition." *Id.*

In the mid-1930s, gun manufacturer Browning "developed the 13-round Hi-Power pistol which quickly achieved mass-market success." *Id.* at 1148. Since then,

new semi-automatic pistol designs with detachable magazines "have replaced the revolver as the common, quintessential, self-defense weapon." *Id.* Indeed, "[o]ne of the most popular handguns in America today is the Glock 17, which comes standard with a magazine able to hold 17 bullets." *Id.*

The development of modern magazines for rifles "paralleled" that of modern magazines for pistols. *Id*. at 1148. A 30-round magazine for a semi-automatic rifle was released by the Auto Ordinance Company in 1927. *Id.* Fifteen years later, the "common and popular" M-1 rifle was released, and it came standard with a 30-round magazine. *Id.* And in 1963, its successor the AR-15 was introduced with a standard 20-round magazine. *Id.* The AR-15 rifle "remains today the most popular rifle in American history." *Id*. American and European rifles with similar magazine capacities entered the American market in the 1970s and 1980s, increasing their circulation and popularity. *See id*. In short, magazines capable of holding more than ten rounds of ammunition are the "antithesis of unusual," as they are "overwhelmingly owned and used for lawful purposes." *Id.* at 1147.

Although these magazines enjoy a long historical tradition, there is no similar tradition of government regulation. As the panel recognized, "when the Founders ratified the Second Amendment, no laws restricted ammunition capacity despite multi-shot firearms having been in existence for some 200 years." *Id.* at 1150. The few states that have chosen to regulate magazine capacity did not do so until (at the

very earliest) the Prohibition era. And "most of those laws were invalidated by the 1970s." *Id.*

Except for one brief period in time, the federal government has taken the same hands-off approach as the overwhelming majority of states. For nearly all of the nation's history, it did not regulate magazine capacity at all. In 1994, Congress briefly adopted a nationwide *prospective* ban on certain magazines, allowing those who had already lawfully acquired them to keep them. Pub. L. 103-322, 108 Stat. 1796, 1999 (1994) (formerly codified at 18 U.S.C. §922(w)). As the panel acknowledged, during the years of the federal ban, "a grandfather clause allowed continued possession" of magazines that had been "previously purchased." *Duncan*, 970 F.3d at 1150. Congress allowed the federal ban to expire 10 years later after a study by the Department of Justice revealed that it had resulted in "no discern[a]ble reduction" in gun violence across the country. Christopher S. Koper et al., *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets & Gun Violence, 1994-2003*, Rep. to the Nat'l Inst. of Justice, U.S. Dep't of Justice 96 (2004), https://bit.ly/3wUdGRE. Under federal law today—and the law of 42 states—law-abiding citizens may lawfully possess magazines capable of holding more than 10 rounds of ammunition.

In sum, the magazines California seeks to ban plainly fall within the scope of the Second Amendment under the test articulated in *Heller*. The state's effort to ban

magazines capable of holding more than ten rounds thus clearly implicates (and just as clearly violates) the Second Amendment.

B. The Magazine Ban Cannot Withstand Second Amendment Scrutiny.

As in *Heller*, California's complete and confiscatory magazine ban would fail "any of the standards of scrutiny" that courts apply in reviewing restrictions on constitutional rights. *Heller*, 554 U.S. at 628. Just like a ban on handguns that are protected by the Second Amendment, a ban on magazines that are protected by the Second Amendment is categorically unconstitutional. When the time, place, and manner allowed by state law is never, never, never, there is no need to consider the sufficiency of the tailoring because there is none. But at the least, it cannot satisfy strict or intermediate scrutiny because such a ban is not *at all* tailored to further the state's proffered interests without infringing on more constitutionally protected conduct than necessary. Treating constitutionally protected firearms in common use as contraband is the very antithesis of tailoring.

1. California's categorical and "indiscriminate" magazine ban cannot be sustained because the government cannot flatly prohibit what the Constitution protects. That conclusion follows not just from *Heller*, but from a long line of cases rejecting the notion that the government may flatly ban constitutionally protected activity just because it could lead to abuses. *See, e.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002) (government cannot ban virtual child pornography on the

ground that it might lead to child abuse because "[t]he prospect of crime" "does not justify laws suppressing protected speech"); *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (state cannot impose a "flat ban" on solicitations by public accountants on the ground that solicitations "create[] the dangers of fraud, overreaching, or compromised independence"). That extreme degree of prophylaxis is incompatible with the decision to give the activity constitutional protection. Simply put, California's overinclusive approach violates the basic principle that "a free society prefers to punish the few who abuse [their] rights … after they break the law than to throttle them and all others beforehand." *Se. Promotions Ltd. v. Conrad*, 420 U.S. 546, 559 (1975); *accord Vincenty v. Bloomberg*, 476 F.3d 74, 84-85 (2d Cir. 2007); *Robb v. Hungerbeeler*, 370 F.3d 735, 743 (8th Cir. 2004).

Indeed, the state's own defense of its ban essentially concedes that it reflects the *non plus ultra* of its policy choices. According to the state, "LCM restrictions [read: prohibitions] have the greatest potential to 'prevent and limit shootings in the state over the long-run.'" Dkt. 7 at 46 (quoting *N.Y. State Rifle & Pistol Ass'n, Inc.*, 804 F.3d at 264). But as *Heller* made clear, when it comes to constitutional rights, minimizing misconduct at the expense of minimizing constitutionally protected conduct is not an option. Surely the most effective way to eliminate defamation is to prohibit printing presses, and the most effective way to eliminate crime is to empower police officers with unlimited search authority, and so on. But by

protecting free speech and the privacy of the home, the Constitution prohibits such extreme measures, no matter how effective they might be in maximizing the government's pursuit of some goal. But the point of the Constitution, and the Bill of Rights in particular, was not to maximize government efficacy, but to enhance liberty. The Second Amendment is no different. *Heller* made clear that the Second Amendment "necessarily takes certain policy choices off the table." 554 U.S. at 636. That includes, at a bare minimum, the policy of outright banning constitutionally protected arms. There is thus no need to resort to tiers of scrutiny; a flat ban on constitutionally protected conduct obviates the need to test was the government has unnecessarily abridged constitutional rights. A ban does not just abridge a right; it obliterates it.

2. If the Court were to apply a level of scrutiny, only strict scrutiny could suffice, because such a "serious encroachment on the core right," *Jackson*, 746 F.3d at 964, demands an equivalent justification, accompanied by the narrowest of tailoring. But the state could not satisfy any variant of heightened scrutiny, for even intermediate scrutiny requires the state to prove that its law is "narrowly tailored to serve a significant governmental interest," *Packingham v. North Carolina*, 137 S.Ct. 1730, 1736 (2017), while "avoid[ing] unnecessary abridgement" of constitutional rights, *McCutcheon v. FEC*, 572 U.S. 185, 199 (2014) (plurality op.). The state has

come nowhere near justifying the "sweeping scope and breathtaking breadth" of its magazine prohibitions. *Duncan*, 970 F.3d at 1156.

While the state no doubt has an important interest in promoting public safety and preventing crime, that does not mean that every firearms-related restriction the state imposes necessarily advances that interest, let alone does so in a sufficiently tailored manner. After all, "it would be hard to persuasively say that the government has an interest sufficiently weighty to justify a regulation that infringes constitutionally guaranteed Second Amendment rights if the Federal Government and the states have not traditionally imposed—and even now do not commonly impose—such a regulation." *Heller II*, 670 F.3d at 1294 (Kavanaugh, J., dissenting). That is precisely the case here. For the first 200 years of our nation, limits on ammunition capacity were virtually unheard of, even though firearms capable of firing more than ten rounds have been existence for centuries. Even today, the vast majority of states do not impose magazine-capacity restrictions, and except for a brief failed, prospective-only effort a few decades ago, neither does the federal government.

At any rate, no matter how strong the state's proffered interest, intermediate scrutiny requires the state to prove that its law is "narrowly tailored to serve [that] significant governmental interest." *Packingham*, 137 S. Ct. at 1736; *see also United States v. Chovan*, 735 F.3d 1127, 1136, 1139 (9th Cir. 2013). That fit requirement

seeks to ensure that the encroachment on liberty is "not more extensive than necessary" to serve the government's interest. *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 816 (9th Cir. 2013). The state thus bears the burden of establishing that its law is "closely drawn to avoid unnecessary abridgment" of constitutional rights, *McCutcheon*, 572 U.S. at 218 (plurality op.); s*ee Ward v. Rock Against Racism*, 491 U.S. 781, 782-83 (1989). The state is entitled to no deference when assessing the fit between its purported interests and the means selected to advance them. *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 213-14 (1997). Rather, it must prove that those means in fact do not burden the right "substantially more" than "necessary to further [its important] interest." *Id.* at 214.

Here, the means the state has chosen to implement its purported interests are the opposite of tailoring. The ban "applies statewide," covering "areas from the most affluent to the least"; it flatly prohibits possession, even by "citizens who may be in the greatest need for self-defense like those in rural areas or places with high crime rates and limited police resources"; it "applies to nearly everyone." *Duncan*, 970 F.3d at 1164-65. Indeed, it applies even to people who lawfully acquired and have lawfully possessed the now-prohibited magazines for decades without incident—in other words, to people that have demonstrated that the ban is overbroad to them. And that retrospective feature does virtually nothing to advance the state's proffered interests since the only people likely to comply with its confiscatory commands are

the law-abiding citizens whose possession of the now-banned magazines poses the least public-safety risk.

In short, as the panel correctly concluded, this "indiscriminate" prohibition cannot survive the "least restrictive means standard" or any scrutiny requiring a "reasonable fit." *Id.* at 1163-67. The means the state has selected are simply far too draconian for restrictions on constitutional rights. Indeed, "taken to its logical conclusion," the state's defense of its magazine ban would "justify a total ban on firearms kept in the home." *Heller v. District of Columbia*, 801 F.3d 264, 280 (D.C. Cir. 2015). Whatever the state may think about that result as a policy matter, any theory that supports it is one that the Second Amendment "necessarily takes … off the table." *Heller*, 554 U.S. at 636.

Making matters worse, the state failed to prove that its magazine ban even meaningful furthers its proffered public safety interests. For a law to be substantially related to the government's interests, the government must demonstrate that the "restriction will in fact alleviate" its concerns. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001). The government cannot meet that burden by relying on "mere speculation or conjecture." *Id.* Instead, the government must offer evidence showing that the restriction it seeks to impose will in fact further its stated interests. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 437 (2002).

Here, the state fell woefully short of meeting that burden, offering nothing but "mere speculation," *Lorillard Tobacco*, 533 U.S. at 555, to support its theory that magazines capable of carrying more than ten rounds exacerbate crime. A Department of Justice study commissioned by the Clinton administration to study the effects of the 1994 federal ban on magazines capable of holding more than ten rounds and "assault weapons" concluded that, ten years after the ban was imposed, "there [had been] no discernible reduction in the lethality and injuriousness of gun violence." ER668. Indeed, "[t]here was no evidence that lives were saved [and] no evidence that criminals fired fewer shots during gun fights." SER670. The state's own expert, Dr. Koper, declared that the federal ban could not be "clearly credit[ed] ... with *any* of the nation's recent drop in gun violence," ER574 (emphasis added), and that "[s]hould [a nationwide ban] be renewed, the ban's effects on gun violence are likely to be small at best and perhaps too small for reliable measurement," ER575. Vindicating that research, Congress allowed the ban to expire in 2004. Since that time, likely millions more of the formerly banned magazines have been purchased throughout the United States. ER1700. Yet violent crime has steadily declined. What the 1994 federal experiment thus proves, as the district court rightly concluded, is that there is no credible support for the theory that the availability of magazines capable of holding more than ten rounds is causally related to violent crime. ER66.

In fact, plaintiffs produced evidence that such laws may well *decrease* public safety because they restrict the self-defense capabilities of the law-abiding—as the time it takes to change magazines is much more likely to hurt victims of crime than their attackers. ER1709-10. As the panel observed, "it does not take a wild imagination to conclude that citizens may need [the banned magazines] to defend hearth and home." *Duncan*, 970 F.3d at 1161. Unlike perpetrators of violent crime and mass shootings, victims do not choose when or where an attack will take place. The number of attackers, the location of the attack, the attacker's intentions, and the time of the attack are completely unknown. ER1710; *see also Duncan*, 970 F.3d at 1161. The reasons citizens benefit from having more than ten rounds immediately available in a self-defense emergency are clear: Given that criminal attacks occur at a moment's notice, taking the victim by surprise, usually at night and in confined spaces, victims rarely have multiple magazines or extra ammunition readily available for reloading. ER1708-10. Most people do not keep back-up magazines or firearms strapped to their bodies while they sleep; they must typically make do with a single gun and its ammunition capacity. ER1709. Those who do may be unable to hold onto a spare magazine while using both hands to grasp the firearm or using one hand to hold the phone to call the police. *Id.*

Even if additional magazines are available, moreover, it is extremely difficult—and potentially deadly—to stop to change magazines while under attack,

the stress of which degrades the fine motor skills necessary for the task. That same stress can also reduce the accuracy of any shots that are fired. *Id.* Even if accurate, a single shot will rarely immediately neutralize an attacker. ER1710-12. And the presence of multiple attackers may require far more defensive discharges to eliminate the threat. Limited to ten rounds by the state's ban, victims are left defenseless should they be unable to incapacitate their attackers with ten shots.

Rather than make any serious attempt to refute that evidence, the state focused on trying to prove that the banned magazines are often used in mass shootings, and that prohibiting them would decrease the fatality rate when individuals employ firearms to perpetrate such crimes. But the two centerpieces of the state's case—a "Mayors Against Illegal Guns" report and a survey from *Mother Jones* magazine—did not substantiate this claim. As the district court explained, these studies reviewed only a few such events in California, and for most of those, the ban would have had no effect. ER55-58.[1] The court therefore correctly concluded that this limited data simply could not suffice to prove that depriving all law-abiding Californians of their constitutional right to possess the prohibited magazines substantially furthers the

[1] The district court also rightly noted that neither of these reports was actually admissible evidence. ER60; *see In re Oracle Corp. Secs. Litig.*, 627 F.3d 376, 385 (9th Cir. 2010) ("A district court's ruling on a motion for summary judgment may only be based on admissible evidence."). While likely relevant under Rule 403, both are based on hearsay, were compiled by organizations critical of firearms ownership, and are of highly questionable reliability even on their own terms. ER60.

state's proffered interests at all, let alone in a manner that is remotely tailored to "avoid unnecessary abridgement" of constitutional rights, *McCutcheon*, 572 U.S. at 199. ER55.

II. The Confiscatory And Retrospective Aspects Of California's Law Violate The Takings Clause.

California's decision not only to prospectively ban magazines capable of holding more than 10 rounds of ammunition, but also to confiscate them from law-abiding citizens who lawfully acquired them before the ban was enacted, is one of the rare government initiatives that violates not one, but two provisions of the Bill of Rights. Although the panel did not reach plaintiffs' takings claim because it correctly recognized that the confiscatory aspect of California's ban is part and parcel of its impermissible overbreadth in contravention of the Second Amendment, the district court's sound conclusion that California's extraordinary decision to confiscate magazines that were lawfully acquired and have been lawfully possessed for decades violates the Takings Clause should be affirmed.

The Takings Clause provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V; *see Chi., Burlington & Quincy Ry. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897) (applying Takings Clause to the states). A physical taking occurs whenever the government "dispossess[es] the owner" of property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe*

Reg'l Plan. Agency, 535 U.S. 302, 324 n.19 (2002). That is true of personal property just as real property; the "categorical duty" imposed by the Takings Clause applies "when [the government] takes your car, just as when it takes your home." *Horne v. Dep't of Agric.*, 576 U.S. 350, 358 (2015). California's confiscatory ban plainly violates those settled principles: It forces citizens to dispossess themselves of their lawfully acquired property with no compensation from the state.

It is no answer that California allows citizens to surrender their property to persons or places other than the state, or destroy it altogether. The option to move the lawfully acquired property out of California to another state is no less a taking than if the government seized it. Like a mandatory sale to a third party or surrender to the government, a mandatory transfer of property out of state, often away from the owner's primary home, is "a direct interference with or disturbance of" the owner's right to the property. *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1330 (9th Cir. 1977).

A forced sale to another private party is no better (especially when most would-be purchasers are subject to the same statewide ban). Whether the government edict forces the owner to hand the property over to the government or to a third party, there is still a taking. In the landmark *Kelo* case, it made no difference to the Court's analysis that the law allowed Kelo to sell her property to a "private nonprofit entity." *Kelo v. City of New London*, 545 U.S. 469, 473-75 (2005).

Instead, as this Court has emphasized, "it is sufficient" that the law "involves a direct interference with or disturbance of property rights," even if the government itself does not "directly appropriate the title, possession or use of the propert[y]." *Richmond Redevelopment Agency*, 561 F.2d at 1330. At a minimum, forcing citizens to sell their property places an unconstitutional condition on the possession of their property, which effects an unconstitutional taking. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595-96 (2013). [2]

Nor does the option to permanently alter the magazines to accept fewer than ten rounds eliminate the taking. Dkt.7 at 7. In *Horne*, for example, the raisin growers could have "[sold] their raisin-variety grapes as table grapes or for use in juice or wine." 576 U.S. at 365. And in *Loretto*, the property owner could have converted her building into something other than an apartment complex. *See* 458 U.S. at 439 n.17. The Supreme Court rejected those arguments in both cases,

[2] To the extent the option to sell or move the magazines is viewed as a regulatory taking, rather than a physical one, the result is the same. As the district court correctly observed, "whatever expectations people may have regarding property regulations, they 'do not expect their property, real or personal, to be actually occupied or taken away.'" ER91 (quoting *Horne*, 576 U.S. at 361); *see also Loretto*, 458 U.S. at 436. Indeed, most regulatory takings restrict the use of property without transferring a property interest to the government, which underscores that government possession (as opposed to private dispossession) is not a prerequisite for a taking.

admonishing that "property rights 'cannot be so easily manipulated.'" *Horne*, 576 U.S. at 365 (quoting *Loretto*, 458 U.S. at 439 n.17).[3]

The state is thus ultimately left arguing that the government may evade the just compensation requirement when it effects a physical taking pursuant to its police power. Dkt.7 at 54. But the force of the Takings Clause does not vary with the source of power the state invokes. When the Supreme Court extended the Bill of Rights to the states, it assumed that states had near-plenary powers. Yet it still held that states could not use any of those powers to violate fundamental constitutional rights. The Takings Clause is no different. The Supreme Court long ago rejected the argument that invoking the police power immunizes the government from its obligation to pay just compensation when it takes private property.

To be sure, the police power may make a taking *permissible*, insofar as it tends to show that the state took the property for public use, because "the 'public use' requirement is … coterminous with the scope of a sovereign's police powers." *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984); *see also Richardson v. City & Cnty. of Honolulu*, 124 F.3d 1150, 1156 (9th Cir. 1997). But that has nothing to do

[3] For all the same reasons, the retroactive application of the magazine ban also violates due process. The ban "change[s] the legal consequences of transactions long closed," thus "destroy[ing] the reasonable certainty and security which are the very objects of property ownership." *E. Enters. v. Apfel*, 524 U.S. 498, 502 (1998) (Kennedy, J.).

with whether the government has an obligation to pay just compensation. The Supreme Court long ago rejected the argument that the source of the state's authority determines whether it must pay just compensation. In *Chicago, Burlington & Quincy Railway Co. v. Illinois*, 200 U.S. 561 (1906), the Court made clear that "if, in the execution of *any power, no matter what it is*, the government … finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner." *Id.* at 593 (emphasis added). The Court reaffirmed that holding in *Loretto*, where it held that a law requiring physical occupation of private property was both "within the State's police power" *and* a physical taking that required compensation. 458 U.S. at 425. As the Court explained, whether a law effects a physical taking is "a separate question" from whether the state has the police power to enact it, and an uncompensated taking is unconstitutional "without regard to the public interests that it may serve." *Id.* at 425-26; *see also Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985) (distinguishing between physical taking and exercise of police power).

Indeed, the Supreme Court has held that a law enacted pursuant to a state's "police power" is not immune from scrutiny even under the *regulatory* takings doctrine. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1020-27 (1992). As the Court explained there, the "legislature's recitation of a noxious-use justification

cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated." *Id.* at 1026. The same is true *a fortiori* for the categorical rule that the government must compensate for physical takings. To be sure, *Lucas* recognized that personal property is subject to "an implied limitation" that a state may regulate in a way that may deprive citizens' property of value. *Id.* at 1027. But the "implied limitation" to which the Court referred was "the State's traditionally high degree of control over *commercial* dealings." *Id.* at 1027 (emphasis added). Thus, the Court observed that to the extent "property's only economically productive use is sale or manufacture for sale," restricting sale might "render [the] property economically worthless." *Id.* at 1027-28. But *Lucas* certainly never suggested that personal property is held subject to the "implied limitation" that the state may order its owner to dispossess himself of the property entirely or physically alter it into something else.

Moreover, *Lucas* emphasized the importance of asking whether a property owner could use his property in a particular manner *before* the state tried to restrict it. *See id.* Here, the state seeks to dispossess its citizens of magazines that they lawfully obtained *before* the state decided to prohibit them. Of course a citizen who *unlawfully* obtained such a magazine after the ban was already in place could not object (at least under the Takings Clause) to having it confiscated. But just as "confiscatory regulations" of real property "cannot be newly legislated or decreed

(without compensation)," *id.* at 1029, nor can confiscations of personal property be decreed after the fact. After all, "whatever expectations people may have regarding property regulations, they 'do not expect their property, real or personal, to be actually occupied or taken away.'" ER91 (quoting *Horne*, 576 U.S. at 361).

Accordingly, the district court correctly rejected the state's assertion of a police-power exception to the Takings Clause. In addition to finding no support in precedent, the state's position would essentially rewrite takings law and constitutional law more generally. As a general matter, the Constitution is indifferent to the source of state power used to violate a constitutional prohibition. While the federal government is one of limited and enumerated powers, the Constitution generally assumes that states exercise plenary or police powers. And once the Supreme Court incorporated the Bill of Rights against the states, those provisions prohibited certain state actions, whatever the source of power under state law. The only reason the source of state power is even discussed in takings cases is because it has some relevance to whether the government can satisfy the threshold requirement of taking private property for public use. But once that hurdle is cleared, the source of power used to take private property is of no further moment. Otherwise, the very fact that the taking was for a public use not only would allow it to occur but would obviate the need for just compensation. That result would be wholly antithetical to the Takings Clause. Such a rule would mean that, as the state

put it, the state is free to take at will, and without paying any compensation at all, anything "that could reasonably be deemed dangerous by the state." Appellant's Excerpts of Record at ER0118, *Duncan v. Becerra*, No. 17-56081, (9th Cir. filed Oct. 12, 2017). That sweeping proposition would subordinate property rights to government whim, in direct contravention of the Takings Clause.

To make matters worse, California is confiscating property that is *protected by the Constitution.* It is bad enough that the state is flatly prohibiting citizens from possessing what the Constitution protects. To hold that the state may *confiscate* what the Constitution provides the people may "keep," U.S. Const. amend. II, without even providing just compensation, adds constitutional insult to constitutional injury. Even if that result could somehow be reconciled with the Second Amendment, there is no Second Amendment exception to the Takings Clause.

CONCLUSION

For the reasons set forth above, this Court should affirm the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of this Court's order of March 22, 2021 and Circuit R. 32-1 because this brief contains 5,642 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type.

May 14, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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