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' OPPOSITION TO PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

INTRODUCTION

California has one of the most draconian and confiscatory magazine bans in the nation. With very few and very narrow exceptions, the state prohibits law-abiding citizens from obtaining, possessing, or transferring possession of magazines that come standard-issue with many of the most common firearms possessed by law-abiding citizens for the constitutionally protected purpose of self-defense. As the record developed here amply attests, California's law does not target some esoteric or unusual devices. It targets magazines that account for roughly half of all magazines in the country. And it does not merely regulate possession or even just ban the magazines prospectively; the whole point of the state's most recent amendments was to retroactively confiscate magazines from law-abiding individuals who have lawfully possessed them without incident for decades.

The panel correctly concluded that this sweeping, near-categorical, and fully retroactive magazine ban cannot survive any form of scrutiny that courts may apply to laws that burden Second Amendment rights. In reaching that conclusion, the panel both faithfully followed the Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and faithfully applied the two-step framework that governs Second Amendment challenges in this circuit. Although other circuits have upheld magazine bans, they evaluated different (and less extreme) bans on different records,

and even so those opinions have generated considerable dissent and debate—which is unsurprising since they are irreconcilable with binding Supreme Court precedent. Simply put, the government cannot outright ban what the Constitution protects. And the government certainly cannot target for dispossession law-abiding citizens who have possessed magazines without incident for decades. Such extreme and confiscatory legislation violates both the Second Amendment and the Taking Clause and sheds light on the true nature of California's law. California has targeted magazines that are commonly and safely possessed by the median individual possessing firearms for the not just lawful, but constitutionally protected, purpose of self-defense. It is that law, and not the panel's decision invalidating it, that is the constitutional outlier. This Court should not grant further review.

BACKGROUND

With only the most limited of exceptions, California prohibits the average law-abiding citizen from obtaining, possessing, or transferring possession of magazines that (outside California) come standard with the most common firearms possessed for self-defense. California has long taken the outlier position of prohibiting law-abiding citizens from obtaining new magazines capable of holding more than ten rounds of ammunition. But unsatisfied with that already-draconian law, yet unsupported by evidence that the failure to confiscate pre-ban magazines from law-abiding individuals has contributed to gun violence, California decided to

go further. In November 2016, voters enacted Proposition 63, a sweeping package of firearms regulations. With respect to the state's magazine restrictions, the sole focus of the measure was to convert the state's prospective ban into a retrospective confiscatory law that purported to convert lawfully acquired magazines possessed without incident for decades into contraband. Under that new law, anyone in possession of such a magazine must surrender it to law enforcement for destruction, remove it from the state, or sell it to a licensed firearms dealer. Cal. Penal Code §32310(a), (d). Proposition 63's approach to magazines was wholly retrospective and confiscatory and informs the nature of the broader ban, which makes no amount of demonstrated lawful and safe possession sufficient.

Plaintiffs—a civil rights organization and four individuals who lawfully obtained so-called "large capacity magazines" before 2001 or who would acquire them but for the statewide ban—sued to enjoin enforcement of §32310. Plaintiffs alleged, among other things, that the ban violates their rights under the Second Amendment and the Takings Clause. Plaintiffs secured a preliminary injunction that allowed them to retain magazines long possessed lawfully and without incident by temporarily halting their state-mandated confiscation. A panel of this Court affirmed, distinguishing a prior precedent of this Court affirming a preliminary injunction against a municipal magazine ban as inapposite given the standard of review and different records. *See Duncan v. Becerra*, 742 F. App'x 218, 222 n.2 (9th

Cir. 2018) (distinguishing *Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015)). Meanwhile, plaintiffs assembled a detailed and thorough summary judgment record that demonstrated the historical and present-day ubiquity of the magazines that California seeks to ban and confiscate. After reviewing that voluminous historical and factual record, the district court granted summary judgment, concluding that §32310 violates both the Second Amendment and the Takings Clause. E.R.92-93. At the state's request, the court stayed its judgment as to §32310's prospective prohibitions on acquisition pending resolution of this appeal, while maintaining the injunction preventing the new confiscatory aspects of the law from taking effect. E.R.224.

Applying this Court's two-part test for analyzing Second Amendment claims, a divided panel of this Court—Judges Callahan, Lee, and Lynn (Chief Judge of the Northern District of Texas, sitting by designation)—affirmed, concluding that California's "near-categorical ban" on acquiring and possessing magazines in common use by law-abiding citizens for lawful purposes "strikes at the core … right to armed self-defense" and violates the Second Amendment under both strict and intermediate scrutiny. Slip op. 9. Judge Lynn dissented, contending that the decision conflicts with this Court's decision in *Fyock*, as well as decisions from other circuits. Slip op. 67-81. The state sought rehearing en banc, and the Court requested this response.

ARGUMENT

I. The Panel's Decision Faithfully And Correctly Applies Both Supreme Court And Ninth Circuit Precedent.

Twelve years ago, the Supreme Court held 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. Two years later, the Court confirmed that this individual right is fundamental and held that it is incorporated against states and municipalities as well. *McDonald*, 561 U.S. at 767 (plurality op.).

This Court has adopted a two-prong test for analyzing whether a law infringes on that individual and fundamental right. *See United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). That "inquiry '(1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny,'" which depends on "how 'close' the challenged law comes to the core right of law-abiding citizens to defend hearth and home," and "whether the law imposes substantial burdens on the core right." Slip op. 18-19 (quoting *Chovan*, 735 F.3d at 1136, 1138). The panel faithfully applied that framework (and *Heller* and *McDonald*) to correctly conclude that §32310

prohibits conduct protected by the Second Amendment and cannot survive either level of heightened scrutiny.

First, the panel's conclusion that §32310 burdens conduct protected by the Second Amendment is both eminently correct and consistent with decisions from nearly every circuit to consider the issue. This Court has squarely held that the Second Amendment protects ammunition and accessories such as magazines, for "without bullets, the right to bear arms would be meaningless." *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014). And the Supreme Court has squarely held that the Second Amendment protects those arms that are "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 624-25. Taken together, those two principles compel the conclusion that the Second Amendment protects magazines capable of holding more than ten rounds, for as the record here firmly establishes, such magazines not only are commonly possessed by millions of law-abiding individuals to defend themselves and their families, but have been lawfully available to Americans for centuries. *See, e.g.*, E.R.9-10; E.R.1801-40; S.E.R.126-425.

It should come as no surprise, then, that nearly every appellate court to consider the issue—including this Court—has either concluded, or at least assumed, that bans on magazines capable of holding more than ten rounds burden conduct protected by the Second Amendment. *See, e.g.*, *Fyock*, 779 F.3d at 999; *Worman v.*

Healey, 922 F.3d 26, 31 (1st Cir. 2019); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo* (*NYSRPA*), 804 F.3d 242, 255-56 (2d Cir. 2015); *Ass'n of New Jersey Rifle and Pistol Clubs v. Att'y Gen. New Jersey* (*ANJRPC*), 910 F.3d 106, 116-17 (3d Cir. 2018); *Friedman v. City of Highland Park*, 784 F.3d 406, 415-16 (7th Cir. 2015); *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1261 (D.C. Cir. 2011). Indeed, only one court has reached a contrary conclusion, *see Kolbe v. Hogan*, 849 F.3d 114, 137 (4th Cir. 2017) (en banc), and as the panel explained, that decision squarely conflicts with "the test announced by the Supreme Court in *Heller* and *Caetano*" *v. Massachusetts*, 136 S. Ct. 1027 (2016). Slip op. 26.

Second, the panel correctly concluded that "Section 32310 cannot be considered a longstanding regulation that enjoys presumptive legality." Slip op. 28. As the record established and the panel underscored, "firearms capable of holding more than ten rounds of ammunition have been available in the United States for well over two centuries," yet they were not even "regulated until the 1920s, [and] most of those laws were invalidated by the 1970s.'" Slip op. 25, 28 (quoting *ANJRPC*, 910 F.3d at 117 n.18). Most magazine capacity restrictions "are of an even younger vintage, only enacted within the last three decades," and so cannot "enjoy [the] presumption of lawfulness" that this Court affords "longstanding" firearms regulations. Slip op. 29. Again, that conclusion is in accord with decisions from other circuits, which have recognized the novelty of even less draconian efforts to

ban and confiscate magazines. *See, e.g.*, *ANJRPC*, 910 F.3d at 116, 117 n.18; *Heller II*, 670 F.3d at 1260.

Third, after engaging in an exhaustive review of the historical and factual record, the panel correctly concluded that §32310 should be subjected to strict scrutiny, for it "strikes at the core right of law-abiding citizens to defend hearth and home, and the burden imposed on the core right is substantial." Slip op. 31. While the panel acknowledged that other circuits have applied intermediate scrutiny to magazine bans, it concluded that "many of the other states' laws are not as sweeping as section 32310," as some did not ban possession entirely or did not confiscate even magazines that had long been lawfully possessed without incident. Slip op. 53; *compare, e.g.*, *Worman*, 922 F.3d at 31; *NYSPRA*, 804 F.3d at 251 n.19. But the panel then minimized the practical impact of its adoption of strict scrutiny by concluding that the ban could not survive even intermediate scrutiny under a faithful application of Supreme Court precedent.

As the panel explained, while the interests the state articulated are undoubtedly compelling, "[e]ven with the greater latitude offered by this less demanding standard, section 32310's fit is excessive and sloppy," for it not only "prohibits possession outright," but "operates as a blanket ban on all types of LCMs everywhere in California for almost everyone." Slip op. 63. Moreover, the law takes no account of the decades of lawful possession of magazines without incident by the

law-abiding individuals targeted by Proposition 63 and its confiscatory provisions. The panel noted that the prior exclusion of "pre-ban" magazines purchased and possessed lawfully was "'important[]' in reducing burdens generated by a restriction." Slip op. 64 (quoting *Pena v. Lindley*, 898 F.3d 969, 977 (9th Cir. 2018)). Yet the state offered little more than sheer "speculat[ion] that [its] complete prohibition is necessary to avoid legally owned LCMs from falling into the wrong hands." Slip op. 64. The panel found "the flaws of that argument … obvious" when the magazines had been lawfully possessed for decades without falling into the wrong hands, and explained that "[t]he state could ban virtually anything if the test is merely whether something causes social ills when someone other than its lawful owner misuses it." *Id*. The panel thus correctly concluded that, even under intermediate scrutiny, "California fails to show a reasonable fit between Penal Code section 32310's sweeping restrictions and its asserted interests." Slip op. 66.

II. The Panel's Decision Creates No Conflict That Warrants This Court's Review.

The state claims that the panel's decision conflicts with other decisions from this Court. It does not. The principal case on which the state relies involved an appeal of a preliminary injunction and could not have been more emphatic in instructing that it was not definitively resolving any of the questions before it. Indeed, a different panel of this Court already distinguished that case in affirming the preliminary injunction in the earlier appeal in this case. And while the state

correctly observes that other circuits have rejected challenges to magazine bans, those cases involved different (and less extreme) laws and different records. The recent effort of California to legislate only retroactively and to target magazines that have long been lawfully possessed without incident is without precedent and casts a distinct shadow over California's entire approach to magazines. Having already banned a standard-issue magazine possessed by the average person possessing a firearm for self-defense, California deliberately extended the law to make it less tailored and more confiscatory. The resulting ban is entirely antithetical to the Second Amendment and governing Supreme Court precedent.

1. The state first claims that the panel's decision conflicts with this Court's decision in *Fyock*. Pet. 6. The panel correctly concluded that it does not, just as a different panel previously concluded in the earlier appeal in this case. Slip op. 53; *Duncan*, 742 F. App'x at 222 n.2. While *Fyock* also reviewed a prohibition on possession of magazines capable of holding more than ten rounds (there, a municipal ordinance), it did so in a very different posture—namely, an interlocutory appeal of a denial of a preliminary injunction. The Court accordingly repeatedly stressed the "narrow scope of [its] review," that it was not "determin[ing] the ultimate merits of Fyock's claims," and that it was limiting its inquiry to whether the district court abused its discretion in denying Fyock's motion seeking preliminary injunctive

relief. 779 F.3d at 995. Indeed, "in its eight pages," the opinion "referenced the abuse of discretion standard twelve times." Slip op. 54.

Moreover, the *Fyock* Court emphasized that both it and the district court were limited to an "undeveloped record" at the "early, preliminary injunction stage," and in particular that the parties had "not provide[d] evidence regarding the historical prevalence and regulation of large-capacity magazines." *Id.* at 997 & n.3. The Court thus could not have definitively rejected the proposition that a magazine ban like California's violates the Second Amendment, for it candidly acknowledged that it did not even have at its disposal the tools that it deemed necessary to answer that question. Indeed, had the Court in fact definitively resolved that question, the *Fyock* plaintiffs undoubtedly would have sought en banc and/or Supreme Court review. They did neither—presumably because they took (and assumed both the en banc court and the Supreme Court would take) this Court at its word that it was not "determin[ing] the ultimate merits of Fyock's claims." *Id.* at 995.

Implicitly recognizing this problem, the state makes the narrower argument that *Fyock* forecloses the panel's holding that California's magazine ban "substantially burdens" Second Amendment rights. Pet. 6. That is wrong for all the same reasons, for *Fyock* made explicit that it was holding only that "there was *no abuse of discretion* in finding that the impact the [challenged law] may have on the core Second Amendment right is not severe and that intermediate scrutiny is

warranted." 779 F.3d at 999 (emphasis added). But it is also largely irrelevant, for the panel concluded that §32310 would fail "even … apply[ing] intermediate scrutiny." Slip op. 63. Accordingly, granting rehearing en banc to decide whether the burden §32310 imposes on Second Amendment rights is "substantial" would have no impact on the bottom line, for the state's near-categorical magazine ban would still not be a "reasonable fit" for accomplishing "its asserted interests." Slip op. 66.

The state also contends that the panel's decision conflicts with *Fyock*'s *application* of intermediate scrutiny. Pet. 12-13. But no such conflict could exist because *Fyock* did not apply intermediate scrutiny; it merely held that *the district court* did not "abuse[] its discretion in finding that [the challenged law] was likely to survive intermediate scrutiny." *Fyock*, 779 F.3d at 1000. The state protests that *Fyock* held that the type of evidence the city presented there "was 'precisely the type of evidence' that the government may 'rely upon to substantiate its interest." Pet. 12-13 (quoting *Fyock*, 779 F.3d at 1001). But far from rejecting the state's evidence on the importance of its interest, the panel *agreed* that "[t]he state interests advanced here are compelling." Slip op. 57. Where the panel found the state's evidence wanting was in proving the requisite "reasonable fit" between its compelling interests and its chosen means. Slip op. 65. And while the state baldly declares that *Fyock also* held the evidence before it "sufficient to establish a reasonable fit

between an LCM possession ban and the substantial government interest in public safety," Pet. 13, it tellingly quotes no such language to that effect from *Fyock*—because there is none.

Moreover, although the state neglects to mention it, this is not even the first time that a panel of this Court has concluded that *Fyock* is distinguishable from this case based on the standard of review, the undeveloped record in that case, and the different record in this one. When this Court considered the appeal of the district court's grant of a preliminary injunction earlier in this case, the centerpiece of the state's appeal and the dissenting opinion was once again *Fyock*. *Duncan*, 742 F. App'x at 223-24 (Wallace, J., dissenting). But the majority correctly concluded that *Fyock* was readily distinguishable. *Id.* at 222 n.2 (majority op.).

In short, two different panels have now heard and rejected the state's claim that *Fyock* controls this case and dictates that California's draconian and confiscatory ban is constitutional. Both panels correctly concluded that nothing in *Fyock*'s preliminary assessment of the strength of the challenge it had before it conflicts with the determination, on a full and final factual and historical record, that California's sweeping magazine ban violates the Second Amendment.

2. The state next contends that "the panel's decision will create confusion about how courts should apply intermediate scrutiny in future Second Amendment cases." Pet. 14. That too is incorrect. Indeed, if anything, the decision brings much-

needed clarity to this Court's intermediate scrutiny jurisprudence. As the panel explained, this Court has "used seemingly varying formulations of intermediate scrutiny in the Second Amendment context." Slip op. 59. The panel thus carefully and thoroughly canvased the best source of authority on the contours of that standard: binding Supreme Court precedent, both in the Second Amendment context and more generally. After doing so, the panel concluded that "[w]hatever its precise contours might be, intermediate scrutiny cannot approximate the deference of rational basis review," for "*Heller* forecloses any such notion." Slip op. 61.

The state nonetheless urges this Court to grant en banc review and embrace a standard that would relieve the government of any meaningful burden to prove that its chosen means further its ends in a manner that does not infringe on more constitutionally protected conduct than necessary. Pet. 15-16. But that would be doubly counterproductive. First, this is an unusual and outlying case in which California specifically amended its law to make it less tailored. That hardly makes this case typical or an appropriate vehicle. Second, accepting California's invitation to conclude that intermediate scrutiny under the Second Amendment is so permissive and undemanding as to tolerate even this retroactive and confiscatory ban would succeed only in making this case a prime candidate for the Supreme Court to address the concerns recently expressed by multiple Justices that some lower courts are applying an improperly diluted form of intermediate scrutiny to Second Amendment

claims. *See, e.g.*, *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1527 (2020) (Kavanaugh, J. concurring); *id*. (Alito, J., dissenting). After all, as the panel explained, recent Supreme Court precedent could not be clearer that, "to survive intermediate scrutiny 'a law must be "narrowly tailored to serve a significant governmental interest."'" Slip op. 59 (quoting *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (quoting *McCullen v. Coakley*, 573 U.S. 464, 486 (2014))). The state's proffered standard bears no resemblance to that command.

3. Finally, the state notes that other circuits have rejected challenges to magazine bans. Pet. 12 (citing *Heller II*, 670 F.3d at 1264; *Worman*, 922 F.3d at 40; *NYSRPA*, 804 F.3d at 264; *ANJRPC*, 910 F.3d at 122; *Kolbe*, 849 F.3d at 140). But those cases involved different (and less extreme laws) and different records. In particular, no other court has evaluated a law that was specifically amended for the sole purpose of making it retroactive and confiscatory as to individuals who had long possessed magazines lawfully and without incident. Those amendments not only raise distinct Takings Clause problems, but cast a shadow over the entire law and whether the state can carry its burden of proving the law's constitutionality. Even where other states have enacted a new ban that purported to apply retroactively, they did not face the distinct challenge of explaining how extending a *preexisting* law to target only individuals who have lawfully possessed magazines for literally decades satisfied any meaningful conception of tailoring. Moreover, even though none of

the other challenged laws shares the California law's unique history (or this case's distinct record), those out-of-circuit cases have routinely generated strenuous dissents. *See, e.g.*, *Heller II*, 670 F.3d at 1270 n.2 (Kavanaugh, J., dissenting); *ANJRPC*, 910 F.3d at 126 (Bibas, J, dissenting); *Friedman*, 784 F.3d at 418 (Manion, J., dissenting); *Kolbe*, 849 F.3d at 152 (Traxler, J., dissenting, joined by Niemeyer, Agee, and Shedd); *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Att'y Gen. New Jersey*, No. 19-3142, 2020 WL 5200683, at *17-19 (3d Cir. Sept. 1, 2020) (Matey, J., dissenting).

In the end, while California attempts to portray the panel decision as an outlier, it is California's own law that is an extreme outlier. By taking a ban that was already unconstitutional and extending it in a manner that was entirely retroactive and confiscatory, California has acted entirely antithetically to the Second Amendment. It has attempted not just to ban, but to eradicate entirely, what the Second Amendment clearly protects. The panel decision rejecting that law and vindicating the Constitution was entirely correct and does not merit either vacatur or further review.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2020, 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.

s/Paul D. Clement
Paul D. Clement

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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