**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.

ROB BONTA, 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

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## INTRODUCTION

Under the text- and history-based test that now governs Second Amendment claims, the appropriate resolution of this case is clear: The Court should hold that California's confiscatory ban on ammunition magazines capable of holding more than 10 rounds violates the Second Amendment. The Supreme Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen* "demands a test rooted in the Second Amendment's text, as informed by history." 142 S.Ct. 2111, 2127 (2022). Under that test, so long as the Second Amendment "presumptively protects" the conduct the government seeks to regulate, "[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2130. "Only" if the government meets that heavy burden "may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.*

There is no question that the standard-capacity ammunition magazines that California has banned are "presumptively protect[ed]" by the Second Amendment. They plainly satisfy the test that *Bruen* reaffirmed governs which "arms" are protected—namely, "they are indisputably in 'common use' for self-defense today." *Id.* at 2143 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)). It is beyond dispute that such magazines are arms. *See Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014). It is equally beyond dispute that they

are commonly owned by law-abiding citizens for lawful purposes; indeed, they constitute half of all magazines in the United States. The state thus bears the burden to "justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S.Ct. at 2130.

As both the district court and every member of this Court that has surveyed the comprehensive historical record has recognized, the state cannot come remotely close to doing so. There is no history or tradition in our nation of magazine-capacity limits. Restrictions on firing capacity were nonexistent until well into the twentieth century, and even then, they were rare and "short lived." *Id*. at 2155; *see Duncan v. Becerra* ("*Duncan IV*"), 970 F.3d 1133, 1150 & n.10 (9th Cir. 2020). The absence of any "distinctly similar historical regulation," *Bruen*, 142 S.Ct. at 2131, is all the more conspicuous because firearms capable of firing more than 10 rounds without reloading are nothing novel. They pre-date the founding and have been ubiquitous since at least the ratification of the Fourteenth Amendment. The potential for their misuse is thus a quintessential "general societal problem that has persisted since the 18th century." *Id.* Yet for two centuries, even as the firing capacity of firearms available to the public regularly increased to meet consumer demand, there was no meaningful record of governments addressing that problem by restricting how many rounds a common arm possessed by a law-abiding citizen could fire without reloading. Because California cannot begin to "demonstrate[e] that it[s magazine

ban] is consistent with the Nation's historical tradition of firearm regulation," *id.* at 2130, this Court should hold the ban unconstitutional.

## FACTUAL AND PROCEDURAL HISTORY

### A. Factual Background

Magazines capable of holding more than 10 rounds of ammunition are commonly owned by millions of Americans for all manner of lawful purposes, including self-defense, sporting, and hunting. Americans own roughly 115 million of these magazines, *Duncan IV*, 970 F.3d at 1142, which have long come standard with many of the most popular handguns and long guns on the market, accounting for "approximately half of all privately owned magazines in the United States," *Duncan v. Bonta* ("*Duncan V*"), 19 F.4th 1087, 1097 (9th Cir. 2021) (en banc).

Firearms capable of firing more than 10 rounds without reloading are nothing new. "[T]he first firearm that could fire more than ten rounds without reloading was invented around 1580," and several such handguns and long guns "pre-date[d] the American Revolution." *Duncan IV*, 970 F.3d at 1147. Well before the framing of the Fourteenth Amendment, they had become "common," as witnessed by popular firearms such as the Pepperbox-style pistol, which could "shoot 18 or 24 shots before reloading individual cylinders." *Id.* By the end of the Civil War, "repeating, cartridge-fed firearms" were ubiquitous, and many of the most popular models had magazines that held more than 10 rounds. *Id.* at 1148. For example, the Winchester

66 had a 17- round magazine and could fire all 17 rounds plus the one in the chamber in under nine seconds. *Id.* Later models, including the famed Winchester 73 ("the gun that won the West"), likewise had magazines that held more than 10 rounds and sold a combined "over 1.7 million total copies" between 1873 and 1941. *Id.*

As detachable box-style magazines became more popular around the turn of the twentieth century, so too did rifles and handguns with box magazines capable of holding more than 10 rounds, such as Auto Ordnance Company's semi-automatic rifle (1927, 30 rounds) and the Browning Hi-Power pistol (1935, 13 rounds). *Id.* In 1963, the U.S. government sold hundreds of thousands of surplus 15- and 30-round M-1 carbines to civilians at a steep discount. *Id.* That same year, the first AR-15 rifle was released. *Id.* The AR-15 comes standard with a 30-round magazine and remains the most popular rifle in America today. *Id.*; *Duncan v. Becerra* ("*Duncan III*"), 366 F.Supp.3d 1131, 1145 (S.D. Cal. 2019).

Although long guns were the weapon of choice for most Americans during the first half of the twentieth century, pistol sales grew exponentially during the latter half. *See id.*; ER1809-11. That trend closely correlated with technological advancements that enabled pistols to hold higher capacity magazines in a more compact and user-friendly style. *See* ER1706-08; ER1801-20. Today, the most popular handgun in America is the Glock 17, which comes standard with a 17-round magazine. *Duncan IV*, 970 F.3d at 1142, 1148. Many other popular pistols likewise

come standard with magazines that hold more than 10 rounds. For example, "the Beretta Model 92 … comes standard with a sixteen-round magazine," "Smith & Wesson (S&W) M&P 9 M2.0 nine-millimeter magazines contain seventeen rounds," and "[t]he Ruger SR9 has a 17-round standard magazine." *Id.* at 1142 & n.4.

While arms that could fire more than 10 rounds without reloading would by no means have been "unforeseen inventions to the Founders," *id*. at 1147, laws prohibiting their possession most certainly would. Although there is a long historical tradition of law-abiding citizens possessing these firearms for lawful purposes, there is no similar tradition of government regulation. There were no restrictions on firing or magazine capacity when the Second and Fourteenth Amendments were ratified. The first such laws did not come until the Prohibition Era, and, even then, they were rare. Although many states and the federal government began regulating *automatic* weapons (i.e., machine guns) in the 1920s and 1930s, only three states and the District of Columbia restricted the firing capacity of *semi*-automatic firearms, and most of those laws were repealed within a few decades. *Id*. at 1150 & n.10.[1]

[1] *See* 1927 Mich. Pub. Acts 887, §3 (prohibiting "any … firearm which can be fired sixteen times without reloading"), repealed via 1959 Mich. Pub. Acts 249, 250; 1927 R.I. Pub. Laws 256 §§1, 3 (prohibiting firearms "which shoot[] more than twelve shots semi-automatically without reloading"), repealed via 1959 R.I. Acts & Resolves 260, 260, 263 (amended 1975); 1933 Ohio Laws 189, §§12819-3, -4 (prohibiting "any firearm which shoots more than eighteen shots semi-automatically without reloading"), repealed via 1972 Ohio Laws 1866, 1963 (setting 32-round limit); *see also* 2013-2014 Leg., H.R. 234 (Ohio) (fully repealing magazine ban) (codified at Ohio Rev. Code Ann. §2923.11); 47 Stat. 650, §§1, 14 (1932)

The first state law restricting *magazine* capacity did not come until 1990—two centuries after the founding. And only nine other states have followed suit in the ensuing three decades.[2] The federal government did not regulate magazine capacity until 1994, when Congress adopted a nationwide ban on magazines with a capacity of more than 10 rounds. *See* Pub. L. 103-322, 108 Stat. 1796 (1994) (formerly codified at 18 U.S.C. §922(w)). Unlike California's ban, that law was time-limited and prospective only, allowing people who had already lawfully acquired such magazines to keep them. *Id.* And Congress allowed the law to expire in 2004 after a study by the U.S. Department of Justice revealed that it had produced "no discernible 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* 96 (2004), *available at*

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(prohibiting "any firearm which shoots ... semiautomatically more than twelve shots without reloading" in the District of Columbia), repealed via 48 Stat. 1236 (1934), currently codified as amended at 26 U.S.C. §§5801-72.

[2] *See* 1990 N.J. Laws 217, 221, 235 (codified at N.J. Stat. Ann. §2C:39-1(y), -3(j)); 1992 Haw. Sess. Laws 740, 742 (codified at Haw. Rev. Stat. §134-8); 1994 Md. Laws 2165 (amended 2013); 2013 Md. Laws 4195, 4210 (codified at Md. Code Ann., Crim. Law §4-305); 1999 Cal. Stat. 1781, 1785, 1793; Act of Aug. 8, 2000, ch. 189, sec. 11, §265.02(8); 2000 N.Y. Laws 2788, 2793 (amended 2013); 2013 N.Y. Laws 1, 16, 19 (codified at N.Y. Penal Law §265.36); 2013 Colo. Sess. Laws 144, 144-45 (codified at Colo. Rev. Stat. §18-12-302(1)); Conn. Gen. Stat. §53-202w; Vt. Stat. Ann. tit. 13, §4021; Mass. Gen. Laws ch. 140 §§121, 131(a); N.Y.C., N.Y., Admin. Code §10-306(b). Since this case was last briefed before this Court, Washington has imposed a 10-round limit. *See* Wash. Rev. Code Ann. §§9.41.010, .370, .375.

https://bit.ly/3wUdGRE. Under federal law today—just as under the laws of 40 of the 50 states—law-abiding citizens may lawfully possess magazines capable of holding more than 10 rounds of ammunition.

### B. Proceedings Below

Since 2000, California has been one of the very few states to prohibit the manufacture, importation, sale, and transfer of any "large-capacity magazine," which California misleadingly and capaciously defines as "any ammunition feeding device with the capacity to accept more than 10 rounds," with some exceptions not relevant here. Cal. Penal Code §§32310, 16740. While California did not initially try to confiscate such magazines from those who had already lawfully obtained them, in July 2016 the California legislature eliminated even this modest nod in the direction of reliance interests and the Takings Clause. *See* S.B. 1446, 2015-2016 Reg. Sess. (Cal. 2016). The legislation required those in possession of lawfully acquired (and until then lawfully possessed) magazines to surrender, permanently alter, or otherwise dispossess themselves of the magazines.

Later that year, in November 2016, the voters approved Proposition 63, a ballot initiative that took a similar approach. *See* Cal. Penal Code §32310. Proposition 63 requires any Californian currently in possession of a magazine capable of holding more than 10 rounds of ammunition to surrender it to law enforcement for destruction, permanently alter it, remove it from the state, or sell it

to a licensed firearms dealer, who in turn is subject to the law's transfer and sale restrictions. *Id.* §32310(a), (d). Failure to dispossess oneself of a lawfully acquired magazine is punishable by up to a year in prison, as well as a fine. *Id.* §32310(c).

Shortly before this draconian and confiscatory possession ban was scheduled to take effect, plaintiffs sued, challenging the law under the Second Amendment and the Takings Clause.[3] While plaintiffs challenged the ban in its entirety, they sought a narrow preliminary injunction limited to the new possession ban—in other words, limited to the command that law-abiding citizens dispossess themselves of magazines that they lawfully acquired. Recognizing that the ban "criminaliz[es] the mere possession of these magazines that are commonly held by law-abiding citizens for defense of self[ and] home," the district court held that plaintiff were likely to prevail under both *Heller*'s "text, history, and tradition" approach and the now-defunct two-step test that this Court then employed. *Duncan v. Becerra* ("*Duncan I*"), 265 F.Supp.3d 1106, 1118, 1139 (S.D. Cal. 2017). The state took an interlocutory appeal, and a divided panel of this Circuit affirmed. *Duncan v. Becerra* ("*Duncan II*"), 742 F.App'x 218, 222 (9th Cir. 2018).

[3] Plaintiffs include individuals who "lawfully possessed and continue[] to possess" magazines capable of holding more than 10 rounds; individuals would like to acquire, for lawful purposes, magazines capable of holding more than 10 rounds; and a nonprofit organization that represents law-abiding individuals who, but for California's ban, would retain and/or acquire and possess such magazines. *Duncan v. Becerra* ("*Duncan I*"), 265 F.Supp.3d 1106, 1112 (S.D. Cal. 2017).

On remand, the parties developed a comprehensive record that detailed the history of firearms capable of firing more than 10 rounds without reloading. *See, e.g.*, ER1706-08; ER1801-20; SER126-425 (recounting history of rifles and handguns with capacities of more than 10 rounds). After considering that historical record, the district court granted summary judgment to plaintiffs. *Duncan III*, 366 F.Supp.3d at 1186. The court first found that magazines capable of holding more than 10 rounds are unquestionably common, as roughly 115 million of them are owned by Americans for all manner of lawful purposes. *See id.* at 1143-45. The court then thoroughly considered—and thoroughly rejected—the state's argument that there is a longstanding historical tradition of regulating firing or magazine capacity. *See id.* at 1149-53. To the contrary, the court explained, "[h]istory shows … restrictions on the possession of firearm magazines of any size have no historical pedigree." *Id.* at 1149. Indeed, "while detachable firearm magazines have been common for a century, "the earliest firing-capacity regulation appeared in the 1920s and 1930s," and "[e]ach was repealed." *Id*. at 1150, 1153. Even today, moreover, magazine capacity remains "unregulated in four-fifths of the states." *Id*. at 1149.

A divided three-judge panel of this Court affirmed. The panel first concluded that "[t]he record … amply shows" that the prohibited magazines are the "antithesis of unusual," as "nearly half of all magazines in the United States today hold more

than ten rounds of ammunition," and such magazines are "overwhelmingly owned and used for lawful purposes." *Duncan IV*, 970 F.3d at 1146-47. After conducting a "long march through the history of firearms," the panel likewise found no evidence that magazine capacity restrictions have any historical pedigree. *Id.* at 1148-49. While "firearms capable of holding more than ten rounds of ammunition have been available in the United States for well over two centuries," restrictions on such magazines have been rare, relatively recent, and short-lived: "Only during Prohibition did a handful of state legislatures enact capacity restrictions," and "'most of those laws were invalidated by the 1970s.'" *Id.* at 1149-50 (quoting *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. of N.J.* ("*ANJRPC I*"), 910 F.3d 106, 117 n.18 (3d Cir. 2018)).

This Court then granted the state's petition for rehearing en banc, and a divided en banc panel reversed. *See Duncan V*, 19 F.4th 1087. The en banc majority first expressly refused to embrace the text, history, and tradition approach that *Bruen* now mandates, declaring that "[u]nless and until the Supreme Court tells us … that, for a decade or more, we all have fundamentally misunderstood the basic framework for assessing Second Amendment challenges, we reaffirm our two-step approach." *Id*. at 1101. Employing that (now-abrogated) approach, the majority began by "assuming, without deciding, that California's law" both "implicates the Second Amendment" and implicates the "core" of the Second Amendment right, which

obviated the need to engage in "an extensive historical inquiry." *Id*. at 1103. Giving "deference" to the state's "reasonable … judgment" "that large-capacity magazines significantly increase the devastating harm caused by mass shootings and that removing those magazines from circulation will likely reduce deaths and serious injuries," *id.* at 1111, this Court then concluded that the ban satisfies intermediate scrutiny, reasoning that it "interferes only minimally with the core right of self-defense" because "'most homeowners only use two to three rounds of ammunition in self-defense.'" *Id*. at 1096, 1104 (quoting *ANJRPC I*, 910 F.3d at 121 n.25).

Judge Bumatay authored a dissent, joined by Judges Ikuta and R. Nelson, in which he engaged in the "extensive analysis of the text, tradition, and history of the Second Amendment" that the majority foreswore. *Id.* at 1140 (Bumatay, J., dissenting).[4] Exhaustively surveying the historical record, he found the core inquiry "not a close question": "Firearms and magazines capable of firing more than ten rounds have existed since before the Founding of the nation. They enjoyed widespread use throughout the nineteenth and twentieth centuries. They number in the millions in the country today," and there are "no longstanding prohibitions against them." *Id.* at 1140-42. Judge Bumatay thus concluded that California cannot prohibit them. *Id*.

[4] Judge VanDyke also authored a dissent, while Judges Berzon and Hurwitz authored concurrences.

Plaintiffs filed a petition for a writ of certiorari. *See* Dkt.195. The Supreme Court held the petition pending resolution of *Bruen*, and shortly after it issued its decision in *Bruen*, the Court granted the petition, vacated the en banc panel's decision, and remanded "for further consideration in light of" *Bruen*. *See Duncan v. Bonta*, 2022 WL 2347579, at *1 (U.S. June 30, 2022). On August 2, 2022, this Court directed the parties "to file supplemental briefs on the effect of *Bruen* on this appeal, including whether the en banc panel should remand this case to the district court for further proceedings in the first instance." Dkt.202.[5]

## ARGUMENT

### I. California's Magazine Ban Violates The Second Amendment.

When this case was last before this Court, the Court declared that, "[u]nless and until the Supreme Court tells us … that, for a decade or more, we all have fundamentally misunderstood the basic framework for assessing Second Amendment challenges, we reaffirm our two-step approach." *Duncan V*, 19 F.4th at 1101. The Supreme Court has now done exactly that, declaring that, "[d]espite the popularity of this two-step approach, it is one step too many." *Bruen*, 142 S.Ct. at 2127. The Constitution instead "demands a test rooted in the Second Amendment's

[5] Because the supplemental briefing order asked the parties to focus on the effect of *Bruen* on this appeal, plaintiffs have confined this brief to their Second Amendment claims. But as plaintiffs have explained elsewhere, the confiscatory aspect of California's magazine ban violates the Takings Clause as well. *See* AB31-46; Supp.Br.16-23.

text, as informed by history." *Id.* As the Court explained, "reliance on history to inform the meaning of constitutional text … is … more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments' about 'the costs and benefits of firearms restrictions.'" *Id.* at 2130 (quoting *McDonald v. Chicago*, 561 U.S. 742, 790-91 (2010) (plurality opinion)).

Accordingly, when faced with a Second Amendment challenge, courts must begin by asking whether "the Second Amendment's plain text covers an individual's conduct." *Id.* at 2129-30. If it does, then "the Constitution presumptively protects that conduct," *id.* at 2130, and "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms," *id.* at 2127. To meet that burden, the government must "identify a well-established and representative historical analogue" to the regulation it seeks to defend. *Id.* at 2133. "Only" if the government can do so "may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* at 2130 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)). Applying that test to the fully developed record here, it is plain that California's magazine ban cannot survive Second Amendment scrutiny, as it imposes on the possession and use of constitutionally protected arms restrictions that have no historical analog at all.

### A. Magazines Capable of Holding More Than 10 Rounds Are in Common Use and Therefore Presumptively Protected by the Second Amendment.

Just as the First and Fourteenth Amendments protect modern forms of communications and search, "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Heller*, 554 U.S. at 582; *Caetano v. Massachusetts*, 577 U.S. 411, 411-12 (2016) (per curiam) (stun guns). Thus, as the Supreme Court reiterated in *Bruen*, when assessing whether arms are protected by the Second Amendment, the question is whether they are "in common use today." 142 S.Ct. at 2134; *see also id.* at 2143; *Heller*, 554 U.S. at 625. If they are, then they are presumptively protected by the Second Amendment, and it is the government's burden to prove that any efforts to restrict their possession or use have a "well-established and representative historical analogue." *Bruen*, 142 S.Ct. at 2133.

Magazines are indisputably "arms" protected by the Second Amendment, as the right to keep and bear arms necessarily includes the right to keep and bear components such as ammunition and magazines that are necessary for the firearm to operate. *See United States v. Miller*, 307 U.S. 174, 180 (1939) (citing seventeenth-century commentary recognizing that "[t]he possession of arms also implied the possession of ammunition"); *Jackson*, 746 F.3d at 967 ("[W]ithout bullets, the right to bear arms would be meaningless"). And the magazines California has banned

unquestionably satisfy the "common use" test, as both the district court and the panel correctly held. *See Duncan III*, 366 F.Supp.3d at 1143-45; *Duncan IV*, 970 F.3d at 1142, 1146-47. Magazines capable of holding more than 10 rounds of ammunition are commonly owned by millions and millions of Americans for all manner of lawful purposes, including self-defense, sporting, and hunting. They come standard with many of the most popular handguns and long guns on the market, and Americans own roughly 115 million of them, *Duncan IV*, 970 F.3d at 1142, accounting for "approximately half of all privately owned magazines in the United States," *Duncan V*, 19 F.4th at 1097. Indeed, the most popular handgun in America, the Glock 17 pistol, comes standard with a 17-round magazine. *See Duncan III*, 366 F.Supp.3d at 1145. In short, there can be no serious dispute that magazines capable of holding more than 10 rounds are bearable arms that satisfy the common use test and thus are "presumptively protect[ed]" by the Second Amendment. *Bruen*, 142 S.Ct. at 2126.

### B. There Is No Historical Tradition of Restricting Firearms Capable of Firing More Than 10 Rounds Without Reloading.

Because keeping and bearing common firearms equipped with the magazines California has banned is conduct presumptively protected by the Second Amendment, the state may not "justify" its effort to prohibit that conduct by "simply posit[ing] that [it] promotes an important interest." *Bruen*, 142 S.Ct. at 2126. The state must instead "affirmatively prove that its [magazine ban] is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at

2127. To do so, it must "identify a well-established and representative historical analogue" to its ban. *Id.* at 2133 (emphasis omitted). In other words, the state must establish that (1) the magazine ban shares common features with historically analogous regulations from the eighteenth to the mid-nineteenth centuries; (2) those analogous regulations were prevalent, not historical outliers; and (3) the modern regulation and the historical analogs are *relevantly* similar—i.e., similar in both "how" they operated and "why." *Id.* Only if the state meets that heavy burden may this Court conclude that keeping and bearing the banned magazines for self-defense and other lawful purposes "falls outside the Second Amendment's 'unqualified command.'" *Id.* at 2126.

California cannot come close to proving that restrictions on firing or magazine capacity are part of the Nation's historical tradition. To the contrary, as both the district court and every member of this Court to study the historical record has concluded, history and tradition establish the exact opposite. *See Duncan III*, 366 F.Supp.3d at 1149-53; *Duncan IV*, 970 F.3d at 1147-51; *Duncan V*, 19 F.4th at 1148-59 (Bumatay, J., dissenting). There were no restrictions on firing or magazine capacity—none—when either the Second or the Fourteenth Amendment was ratified. The first such laws did not come until the Prohibition Era, and, even then, they were few and far between. Although many states and the federal government began regulating *automatic* weapons almost as soon as they came on the market in

the 1920s and 1930s, only three states and the District of Columbia adopted restrictions on the firing capacity of semi-automatic firearms back then, and most of those laws (none of which imposed a limit as low as 10) were repealed within a few decades. *See supra* n.1; *Duncan IV*, 970 F.3d at 1150 & n.10. These anomalous laws not only were "short lived," *Bruen*, 142 S.Ct. at 2155, but emerged several decades *after* the isolated "late-19th-century" territorial laws that the Supreme Court found to be too few and too late to have meaningful historical relevance in *Bruen*. *Id*. at 2154; *cf. Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1292 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (six states not enough to make a "strong showing that such laws are common"). Here too, then, "the bare existence of these localized restrictions cannot overcome the overwhelming evidence of an otherwise enduring American tradition permitting" law-abiding citizens to keep and bear arms with a firing capacity of more than 10 rounds. 142 S.Ct. at 2153-54.

The first state to restrict *magazine* capacity, meanwhile, did not do so until 1990—more than two centuries after the founding. Obviously, that is far too late to demonstrate anything about the original meaning of the Second or Fourteenth Amendment, no matter which is the relevant historical reference point. *See id.* at 2126 (cautioning "against giving postenactment history more weight than it can rightly bear"); *cf. id.* at 2162-63 (Barrett, J., concurring). The federal government did not restrict magazine capacity until 1994, and Congress allowed that law to

expire in 2004 after the Justice Department concluded that it produced "no discernible reduction" in gun violence. Koper, *supra* at 96. In the three decades since the first magazine capacity restriction was adopted, a grand total of 10 states have enacted such restrictions. *See supra* p. 3-4 & n.1. In most of the country, law-abiding citizens remain free to lawfully possess magazines capable of holding more than 10 rounds of ammunition—and they do so to the tune of more than 100 million. California thus cannot even identify a "well-established" tradition of restricting magazine capacity *today*, let alone identify any "representative historical analogue" that might justify its confiscatory magazine ban. *Bruen*, 142 S.Ct. at 2133 (emphasis omitted).

### C. The Absence of Historical Capacity Restrictions Is Dispositive Given the Long Tradition of Arms Capable of Firing More Than 10 Rounds Without Reloading.

The complete absence of historical laws restricting firing capacity is not owing to some "dramatic technological change[]" or "unprecedented societal concern[]" that did not exist until 1990. *Bruen*, 142 S. Ct. at 2132. As detailed above, *see supra* pp.3-5, firearms capable of firing more than 10 rounds predate the founding by more than a century. *See Duncan IV*, 970 F.3d at 1147. Such arms were neither novelties nor confined to the military; to the contrary, they were marketed to and bought by civilians from the start. "[I]n 1821, the New York Evening Post described the invention of a new repeater as 'importan[t], both for public and private

use,' whose 'number of charges may be extended to fifteen or even twenty.'" *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. of N.J.* ("*ANJRPC II*"), 974 F.3d 237, 255 (3d Cir. 2020) (Matey, dissenting). The popular Pepperbox-style pistol was marketed to civilians, the Girandoni air rifle "was famously carried on the Lewis and Clark expedition," and millions of Winchesters were sold to civilians in the decades following the ratification of the Fourteenth Amendment. *Duncan IV*, 970 F.3d at 1147-48; *Duncan V*, 19 F.4th at 1154-55 (Bumatay, J., dissenting). And the federal government itself sold hundreds of thousands of surplus 15- and 30-round M-1 carbines to civilians at a steep discount just as the AR-15 and its standard 30-round magazine came on the market. *Duncan IV*, 970 F.3d at 1148.

Unable to deny the long history of firearms capable of firing more than 10 rounds without reloading, the state has suggested that "technological improvements in plastic polymer and 'double-stack magazine capabilities'" "beginning in the 1970s" caused such a sea change in technology as to shift the appropriate historical baseline. CA.Supp.Br.10-11. It is hard to understand why the state has fixated on that particular technology, for California has not confined itself to banning "double-stack" magazines. It prohibits "*any* ammunition feeding device with the capacity to accept more than 10 rounds," with only a few exceptions of little present-day relevance. Cal. Penal Code §§32310, 16740 (emphasis added). But that aside, the state's claim is squarely refuted by the historical record, which confirms that, "[l]ong

before 1979, magazines of more than ten rounds had been well established in the mainstream of American gun ownership." David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 862 (2015). To be sure, improvements to the double-stack magazine (which existed long before the 1970s) increased their popularity (particularly in handguns) by making "relatively larger capacity magazines … possible for relatively smaller cartridges." *Id.* at 862-63. But that neither takes such magazines outside the scope of the Second Amendment nor justifies ignoring the complete absence of capacity restrictions for the first century-and-a-half of our Nation's (and larger capacity arms') existence. Simply put, the historical inquiry does not start all over every time technological advancements make already-common arms even more popular.

In all events, the state's effort to shift the historical baseline is futile, for its law would fare no better even if (contrary to reality) the magazines it has banned were late-twentieth century novelties. While the state itself acknowledges that double-stack magazines have been ubiquitous since the 1970s, even today the vast majority of states do not restrict magazine capacity at all, *see Duncan IV*, 970 F.3d at 1142; ER24, 34, and most of the few that do did not enact such laws until the past decade. *See supra* n.2. Only three states and the District of Columbia had any sort of ban on firing capacity before the 1990s, and most of those laws were repealed in short order. *Id.* Moreover, the very existence of those Prohibition-era laws gives the

lie to the state's claim that semi-automatic arms capable of firing more than 10 rounds without reloading were not "widely available" until the 1970s.

In short, arms that could fire more than 10 rounds without reloading would by no means have been "unforeseen inventions to the Founders." *Duncan IV*, 970 F.3d at 1147. They have been available for centuries, and "magazines of more than ten rounds had been well established in the mainstream of American gun ownership" "long before" a handful of capacity restrictions started to pop in the late twentieth century. *See* Kopel, *supra* at 862-64. Yet despite a long historical tradition of law-abiding citizens possessing these firearms for lawful purposes, there is no similar tradition of government regulation, let alone confiscation. To the contrary, the historical tradition of advancement in firearms technology reflects a steady trend toward *increasing* the firing capacity of the most popular and common arms, with no corresponding trend of government restrictions on firing capacity. California thus cannot possibly meet its burden of "affirmatively prov[ing] that its [magazine ban] is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Bruen*, 142 S.Ct. at 2127.

## II. This Court Can And Should Definitively Resolve This Case Now.

There is no need to remand this case to the district court to reach the glaringly obvious conclusion that California's magazine ban violates the Second Amendment. While this case has been governed (until now) by the now-defunct two-step test, that

has in no way precluded the parties from developing the record necessary to inform the inquiry that *Bruen* mandates. The ubiquity of ownership was highly relevant even under the two-step inquiry. Thus, the parties have already developed a full record on whether the banned magazines are "typically possessed by law-abiding citizens for lawful purposes," *Heller*, 554 U.S. at 625, and the district court resolved that question in plaintiffs' favor. *See Duncan III*, 366 F.Supp.3d at 1143-45. The state has never identified any legitimate basis for disturbing that finding.

The parties likewise have already developed a full record—complete with historical documentation and expert testimony—on the relevant history and tradition. Indeed, both parties *had* to develop that record because this Court's two-step test treated "longstanding prohibitions" as "outside the scope of the Second Amendment." *Fyock v. City of Sunnyvale*, 779 F.3d 991, 996-97 (9th Cir. 2014); *cf. id.* at 997 (faulting parties for failing to "provide evidence regarding the historical prevalence and regulation of large-capacity magazines"). Both parties thus had every incentive to develop the historical record—and develop it they did. Plaintiffs supplied detailed historical compilations about the development of firearms and magazines with a higher firing capacity, *see* ER1706-08; ER1801-20; SER126-425, as well as the dearth of laws restricting firing or magazine capacity, ER1811-13. The state, meanwhile, tried (albeit in vain) to prove that such restrictions have a sufficient historical pedigree. *See, e.g.*, CA.Supp.Br.9-13. The district court, the panel, and

the en banc dissent thus were already able to conduct the historical inquiry that *Bruen* reaffirms, and after a "long march through the history," *Duncan IV*, 970 F.3d at 1149, each concluded that "restrictions on the possession of firearm magazines of any size have no historical pedigree" at all. *Duncan III*, 366 F.Supp.3d at 1149; *see also, e.g.*, *Duncan IV*, 970 F.3d at 1147-51; *Duncan V*, 19 F.4th at 1140-42, 1148-59 (Bumatay, J., dissenting).

Given that procedural history in this now five-years-running case, remanding to the district court at this late date would accomplish nothing but delay. Indeed, remand here would provoke only head-scratching and needless delay because the district court has already—twice—conducted the historical analysis that it understood *Heller* to require, first at the preliminary-injunction stage and then at the summary-judgment stage. Both times, the court engaged with the history of firearms that could fire and magazines that could hold more than 10 rounds of ammunition, their current commonality, and the state's purported history of regulation. And the court's exhaustive survey of the historical record confirmed that while "firearms with a firing-capacity of more than 10 rounds" date back centuries and "were widely used" by the time of the Civil War, "the earliest firing-capacity regulation appeared in the 1920s and 1930s," were few, and were "repealed" in short order. *Duncan III*, 366 F.Supp.3d at 1150, 1153. Thus, all a remand would do is give the district court a third opportunity to reiterate its conclusion that "restrictions on the possession of

firearm magazines of any size have no historical pedigree." *Id*. at 1149; *cf. Montgomery v. Union Pac. R.R. Co.*, 848 F.App'x 314, 316 (9th Cir. 2021) (concluding that remand "would be pointless" where it was clear the district court would reach the same result) (collecting cases).

In short, there is simply no question asked by *Bruen* that is not already fully explored in the extensive record in this fully litigated case. The remaining issues are pure questions of law that have been aired at every level, including before an en banc panel of this Court. The time has thus come for this Court to finally recognize what is undeniable after *Bruen*: California's magazine ban cannot be reconciled with the individual and fundamental rights that text, history, and tradition confirm the Second Amendment protects.

## CONCLUSION

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

Respectfully submitted,

s/Paul D. Clement

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of this Court's order of August 2, 2022 because this brief contains 5,932 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.

August 23, 2022

s/Paul D. Clement
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**CERTIFICATE OF SERVICE**

I hereby certify that on August 23, 2022, 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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