No. 21-1194

In the Supreme Court of the United States

VIRGINIA DUNCAN; RICHARD LEWIS; PATRICK LOVETTE; DAVID MARGUGLIO; CHRISTOPHER WADDELL; CALIFORNIA RIFLE & PISTOL ASSOCIATION, INC., A CALIFORNIA CORPORATION,
Petitioners,

v.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION FOR GUN RIGHTS, INC., IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

Amicus Curiae the National Association for Gun Rights, Inc. ("NAGR") is a non-profit social welfare organization exempt from income tax operating under IRC § 501(c)(4). The NAGR was established to inform the public on matters related to the Second Amendment, including publicizing the related voting records and public positions of elected officials. The NAGR encourages and assists Americans in public participation and communications with elected officials and policy makers to promote and protect the right to keep and bear arms through the legislative and public policy process.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's ruling has decided an important question of federal law in a way that conflicts with this Court's past precedence. *See* Supreme Court Rule 10(c). California prohibits the possession of firearm magazines capable of holding more than 10 rounds of ammunition, even though these magazines are widely owned and standard-issue for handguns and long guns typically owned for self-defense. A divided *en banc* panel of the Ninth Circuit nevertheless upheld California's ban—even as it purported to assume that the prohibited magazines are protected by the Second

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1 All parties have consented to the filing of this brief. Counsel of Record for all parties received timely notice of the amici curiae's intention to file this brief. Pursuant to Rule 37.6 no counsel for a party authored this brief in whole or in part; and no person other than these amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Amendment—in an opinion that marked a disturbing trend by some lower courts to treat the Second Amendment as a second-class right, and over multiple dissents and panel and district court opinions to the contrary. In doing so, the *en banc* panel made clear that the Ninth Circuit will continue to apply a watered-down standard of review "unless and until the Supreme Court tells" it otherwise. App.14. This Court should accept the Ninth Circuit's invitation to clarify that the Second Amendment is not a second-class right.

ARGUMENT

I. The Ninth Circuit's Treatment of the Right to Keep and Bear Arms as Second-Class Right is Inconsistent with This Court's Jurisprudence.

The right to keep and bear arms is a "fundamental righ[t] necessary to our system of ordered liberty." *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010) (plurality opinion). As such, it is not a "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Id*. at 780. Yet that is precisely how the Ninth Circuit and other lower courts continue to treat the right to keep and bear arms.

Further, it is an individual right that existed prior to the Founding. *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) (stating the Second Amendment "codified a right 'inherited from our English ancestors.'"). This pre-existing right is protected by the Second Amendment which states, "the right of the people to keep and bear Arms, shall not be infringed."

California's attempt to limit the right to disallow essential components to firearms found in more than half the firearms in circulation today, finds no support in the understanding of the right at the time of the founding.

The scope of the right to keep and bear arms extends as far as it was understood to extend by the people who adopted the Second Amendment. *Heller*, at 634 ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad."). That original understanding binds government from creating policy and regulations which encroach on the original understanding of the pre-existing right that the Second Amendment protects.

Restrictions on 10-round magazines are contrary to *Heller*'s guidance that any law that restricts the right to keep and bear arms must be analyzed against the historical context of the right as understood at the Founding, and any decision must be made in light of that understanding. *Heller*, 554 U.S. at 635. Contrary to popular mythology, the technology behind magazines with more than a ten-round capacity has been available for hundreds of years. David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L.Rev. 849, 852 (2015). One early design was the eleven-round "Defence Gun," patented in 1718 by lawyer and inventor James Puckle. *Id.* At the time that the Second Amendment was being ratified, the state of the art for multi-shot guns was the Girandoni air rifle, with a twenty-two-shot magazine capacity. *Id.* Thirty-

round magazines have been in use at least since 1927. *Id.*, at 858–59. Since the 1960s, twenty and thirty-round magazines have been commonly in use. *Id.*, at 859-60. Double stack, polymer magazines have been used in handguns and rifles since 1979, increasing handgun capacity up to twenty-one rounds. *Id.*, at 863.

Today, magazines that hold 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, App.176, which have long come standard-issue 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," App.4-5. Yet, for far too long, governmental entities including the federal government—California is not alone—have attempted to restrict the right of Americans to keep and bear arms. Even after *Heller* and *McDonald*—which applied the Second Amendment to the states through the Fourteenth Amendment—governmental entities at all levels have both sought to maintain existing laws that infringe upon the right to keep and bear arms and even enact new restrictions contrary to this Court's holdings. Unfortunately, many lower courts have upheld those restrictions. In doing so, those courts often ignore *Heller*'s guidance that any law that restricts the right to keep and bear arms must be analyzed against the historical context of the right as understood at the Founding, and any decision must be made in light of that understanding. *Heller*, 554 U.S. at 635.

II. Lower Courts Have Applied a Balancing Test to Second Amendment Challenges That is Inconsistent with This Court's Precedent.

In addition, lower courts often treat *Heller*'s reasoning and discussion as creating constraining limits on the rights' application, rather than taking to heart this Court's guidance that *Heller* left "many applications of the right to keep and bear arms in doubt," which should be worked out by analyzing potential Second Amendment violations in light of the right's "historical justifications." *Id.*

In essence, many courts eschew the roadmap for examining Second Amendment rights provided by *Heller*, essentially adopting Justice Breyer's "weighing needs and burdens" balancing test approach proffered in his *Heller* dissent. *Heller*, 554 U.S. at 710. Balancing tests and sliding scales find no support in either the text of the Second Amendment or the history and traditions of the right to keep and bear arms as understood by Americans at the Founding. *Rogers v. Grewal*, 140 S. Ct. 1865, 1867 (2020) (Thomas, J. dissenting from denial of certiorari). *Heller* could not have been clearer on this point:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee

> subject to future judges' assessments of its usefulness is no constitutional guarantee at all.

554 U.S. at 634. Yet these infringements persist in the lower courts.

This persistence demonstrates that the lower courts often treat the right to keep and bear arms as a second-class right. Such treatment has no basis in the history or traditions of the right. This inferior treatment does not find any refuge in the text of the Second Amendment, nor should it find any in the jurisprudence of this Court or any lower court either.

To understand the issues that plague the "two-step" approach employed by the Ninth Circuit and other Courts one need look no further than another recent Ninth Circuit opinion, and its concurrence. In *McDougall v. Cty. of Ventura*, 23 F.4th 1095 (9th Cir. 2022), *en banc* review granted and opinion vacated in *McDougall v. Cty. of Ventura*, --- F.4th ---, 2022 WL 680652 (9th Cir. 2022), the panel undertook analysis of California's waiting period for firearm ownership, coupled with COVID-19 shutdown orders directed, in part, at gun stores, resulting in months without the ability to purchase a firearm. The panel opinion reflected California's onerous requirements to obtain firearms, and the state's licensing, regulation, and restriction on practically every aspect of firearm and ammunition acquisition and ownership. *Id.*

The court in *McDougall*, 23 F.4th 1095 determined that the restriction was outside one of the presumptively lawful regulatory measures identified in *Heller*, 554 U.S. 570 at 626-27, and thus burdened

conduct protected by the Second Amendment, and the court proceeded to the second step to determine the appropriate level of scrutiny. That test questions whether the restriction at issue impacts the "core" of Second Amendment activity, and, if so, if it "severely burdens" that right. *Id.* The panel determined that the inability to obtain a firearm for months was a severe burden, and triggered strict scrutiny. *Id.* But even if strict scrutiny did not apply, intermediate scrutiny was not satisfied because there was not an appropriate fit towards meeting the Government's proffered interests. *Id.*

Judge VanDyke, the author of the majority opinion, took the time to write a concurrence to his own majority opinion. *Id.* (VanDyke, concurring). Judge VanDyke observed "our circuit can uphold any and every gun regulation because our current Second Amendment framework is exceptionally malleable and essentially equates to rational basis review." *Id.* "The complex weave of multi-prong analyses embedded into this framework provide numerous off-ramps for judges to uphold any gun-regulation in question without hardly breaking a sweat." *Id.*

He further observed that "I'm not a prophet, but since this panel just enforced the Second Amendment, and this is the Ninth Circuit, this ruling will almost certainly face an *en banc* challenge." *Id.* "This prediction follows from the fact that this is always what happens when a three-judge panel upholds the Second Amendment in this circuit." *Id.* "Our circuit has ruled on dozens of Second Amendment cases, and without fail has ultimately blessed every gun

regulation challenged, so we shouldn't expect anything less here." *Id.* He then undertook to analyze, in detail, with footnotes, the flaws in the Ninth Circuit's approach to eviscerating the Second Amendment. *Id.* As it turns out, Judge Van Dyke's prediction proved prescient: the court granted *en banc* review and vacated Judge Van Dykes's opinion. *Cty. of Ventura*, --- F.4th ---, 2022 WL 680652.

III. The Ninth Circuit's Analysis of "Fit" is Inconsistent with This Court's Precedence.

In this case, the *en banc* majority upheld California's law even though it concluded that the capacity restriction was a "imperfect" fit towards meeting California's purported interests in preventing mass casualty incidents. *Duncan v. Bonta*, 19 F.4th 1087, 1010-1111 (9th Cir. 2021) (*en banc*).

After *Heller*, 554 U.S. at 624-25, when a court confronts a flat possession ban on a type of arm (or a component that is part and parcel with more than half the firearms in circulation today), the only question should be whether it is an arm or firearm accessory "typically possessed by law-abiding citizens for lawful purposes." *Id.* at 625. If the answer is "yes," strict scrutiny applies, and the Government must make the showing required under strict scrutiny. "[S]trict scrutiny requires the State to further 'interests of the highest order' by means 'narrowly tailored in pursuit of those interests.'" *Tandon v. Newsom*, 141 S. Ct. 1294, 1298 (2021). "That standard 'is not watered down'; it 'really means what it says.'" *Id.*

Even assuming that intermediate scrutiny applied, and that the Second Amendment is "singled out for special—and specially unfavorable—treatment," the restrictions here, and the analysis employed by the Ninth Circuit cannot stand. *McDonald*, 561 U.S. 778-79 (plurality opinion). The theory of the capacity ban was that large-capacity magazines "significantly increase a shooter's ability to kill a lot of people in a short amount of time." *Duncan*, 19 F.4th 1087 at 1097.

Of course, that presumes that someone planning or plotting to engage in the mass-murder of others: (i) would not obtain a large capacity magazine – maybe even from another state -- because it would be illegal to do so; (ii) would not obtain multiple firearms with magazines filled with ten rounds, which could then also "kill a lot of people in a short amount of time"; (iii) would not fill up a U-Haul with fertilizer and "kill a lot of people in a short amount of time" (perhaps we should ban U-Hauls);[2] or (iv) would not just drive through a crowd and "kill a lot of people in a short amount of time" (perhaps we should ban automobiles also).[3] The ability to engage in mass casualty incidents through objects other than large-capacity magazines, along with the history of mass casualty incidents committed without the use of large capacity magazines, demonstrates the lack of fit, or tailoring, inherent in

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2 https://www.nytimes.com/1997/02/19/us/truck-was-rented-by-oklahoma-bomb-suspect-witnesses-say.html (last visited 3/23/2022).

3 https://www.cnn.com/2021/11/22/us/waukesha-car-parade-crowd-monday/index.html (last visited 3/23/2022); https://www.cnbc.com/2016/07/14/truck-plows-into-crowd-in-nice-france-sending-pedestrians-fleeing.html (last visited 3/22/2022).

these types of restrictions. Why isn't there bans on U-Haul trucks, or automobiles? Of course, to ask these questions is to answer them.

More broadly, if the theory here is that anything that has the capacity to kill can be banned by Government, on the basis that a criminal might misuse or abuse the object in question, that would permit the Government to ban a whole host of items, from knives (in use in every kitchen in America), every firearm, every automobile, fertilizer, or even sharpened pencils. Yet of that list, few of those items have explicit protection from regulation, as firearms and their necessary accessories do, in the Bill of Rights.

In the First Amendment context, where restrictions that do not involve content-based restrictions involve intermediate scrutiny, this Court has not shied away from striking down ill-fitting measures such as the restrictions here. *McCullen v. Coakley*, 573 U.S. 464 (2014). Indeed, "demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily "'sacrific[ing] [Second Amendment rights] for efficiency.'" *Id.* at 486, *citing Riley v. National Federation of Blind of N. C., Inc.*, 487 U.S. 781, 795, (1988). And thus, even in intermediate scrutiny, while the measure "need not be the least restrictive or least intrusive means of serving the government's interests," "the government still 'may not regulate [firearms or accessories] in such a manner that a substantial portion of the burden on [the right to keep and bear arms] does not serve to advance its goals." *Id.* That ends and means inquiry does not permit or allow for the type of expansive deference the

Ninth Circuit applied, or the grossly imperfect fit it countenanced.

But no matter – the *en banc* Court below was able to overcome any hurdles presented by such an imperfect fit, *Duncan*, 19 F.4th 1087 at 1108, by providing "a degree of deference that is tantamount to unquestioning acceptance." *Holt v. Hobbs*, 574 U.S. 352, 364 (2015). And, by doing so, upheld the law. 19 F.4th 1087, 1111.

CONCLUSION

The infringement on the Second Amendment will continue, until and unless this Court steps in, and makes good on its promise that the fundamental right to keep and bear arms should not be "singled out for special—and specially unfavorable—treatment." *McDonald*, 561 U.S. 778-79 (plurality opinion). This case involved a matter that received a full trial on the merits, with a complete record after trial, and presents an appropriate vehicle for review.

History, tradition, and text, as well as this Court's own jurisprudence, demonstrate that the right to keep and bear arms is not a separate but (not actually) equal right, not a second class right, and must not be the only enumerated right subject to a second-tier, less-than-favored analysis that erodes that right. This Court's jurisprudence makes clear no enumerated right can be treated in such a manner. This Court should put to rest lower courts' second-class treatment of the right to keep and bear arms.

Accordingly, the petition for certiorari should be granted and this Court should clarify whether the

appropriate standard is the one expressed by this Court in its past cases or the exceptionally deferential standard applied by the Ninth Circuit.

Respectfully Submitted,

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