No. 21-1194

In the Supreme Court of the United States

VIRGINIA DUNCAN, *et al.*,

Petitioners,

v.

ROB BONTA, ATTORNEY GENERAL OF CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether California's restrictions on firearm magazines capable of holding more than 10 rounds of ammunition violate the Second Amendment or the Takings Clause.

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STATEMENT

This petition raises constitutional challenges to California's restrictions on certain firearm magazines. Under California law, residents who pass a background check may acquire as many approved firearms as they want, *see, e.g.*, *Silvester v. Harris*, 843 F.3d 816, 824-825 (9th Cir. 2016), and as much ammunition as they want, *see* Cal. Penal Code §§ 30352, 30370. Magazines holding up to 10 rounds of ammunition are legal and "widely available" in the State, C.A. E.R. 256; such magazines are "compatible with most, if not all, semiautomatic firearms," *id.*; and law-abiding residents may purchase and possess as many such magazines as they desire, Pet. App. 20-21. But California Penal Code Section 32310 prohibits, in most circumstances, the possession of "large-capacity magazines," defined to include most ammunition-feeding devices that can accept more than 10 rounds. *See* Cal. Penal Code § 16740; *infra* pp. 5-6. Petitioners contend that Section 32310 violates the Second Amendment and the Takings Clause.

1. Because the right to keep and bear arms must be construed and applied with careful attention to its historical background, *see District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), we begin by briefly reviewing the relevant history.

The firearms commonly used and available at the time of the Founding were muskets or handguns that required reloading of a ball, powder, and primer after every shot. *See* C.A. S.E.R. 166.[1] While firearms capable of firing more than 10 rounds without reloading were not unknown around the time of the Founding,

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[1] *See also* Maloy, *Small Arms of the Revolution*, Am. Battlefield Tr., https://bit.ly/3JXxwky (last visited April 21, 2022).

see Pet. 4, they were novelties that were either unreliable or impractical. For example, "the Girandoni air rifle, which 'had a 22-round capacity,'" *id.*, required more than a thousand strokes of a hand pump to charge, C.A. S.E.R. 166, 186; only 1,500 were ever manufactured and even fewer made their way to America, *id.* at 182.[2]

Nineteenth-century manufacturers developed new weapons that could fire more than 10 rounds without reloading, but they were materially less dangerous than modern firearms equipped with large-capacity magazines. For example, "Pepperbox-style pistol[s]" (Pet. 4) were prone to malfunction and inaccurate at longer range—and most could fire only five or six shots before reloading. *See* Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 853-854 (2015).[3] The Winchester 66 and 73 rifles (*see* Pet. 4-5) required users to operate a lever after firing each shot to load a new round into the chamber. C.A. S.E.R. 101-103. Unlike modern firearms that allow users to quickly swap in a new magazine, *see infra* pp. 3-4, the Winchester 66 and 73 had tubular magazines that were permanently affixed to the barrel of the gun, *see* C.A. S.E.R. 331. To refill those magazines, users were required to "push[] the cartridges, one after another, inward and forward through a

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[2] *See also* NRA, *Girandoni Air Rifle as Used by Lewis and Clark*, Youtube, https://bit.ly/1mU3PA6; Hiltz, *The Lewis and Clark Air Rifle*, War Hist. Online (June 16, 2021), https://bit.ly/3KUK7WE.

[3] *See also* Winant, Pepperbox Firearms 30-32 (1952); Kinard, Pistols: An Illustrated History of Their Impact 62-63 (2003).

spring-tempered loading gate in the right side of the receiver." *Id.*[4]

Fully automatic and semiautomatic firearms—which did not require a user to take any action to load new rounds into the chamber after firing—were not widely available until the twentieth century. *See* C.A. E.R. 1707; C.A. S.E.R. 104; *infra* p. 4. When automatic firearms became "available for civilian purchase after World War I"—and soon became a "preferred weapon for gangsters"—a number of States promptly banned them. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 L. & Contemp. Probs. 55, 68 (2017). Congress followed suit in 1934, making it illegal to "ship, carry, or deliver" unregistered machineguns in interstate commerce. Pub. L. No. 73-474, §§ 5, 11, 48 Stat. 1236, 1238, 1239 (1934). Around the same time, several States also banned semiautomatic firearms or adopted firing-capacity restrictions. *See* Pet. App. 16; Spitzer, *supra*, at 67-71. While those particular restrictions were later repealed, modern regulations have pursued similar public-safety goals by focusing on the capacity of magazines.

Detachable "box" magazines, which can easily be detached from a firearm and quickly replaced, first emerged in the latter half of the nineteenth century. *See, e.g.*, Kopel, *supra*, at 856-857 (describing magazine for Jarre harmonica pistol, patented in 1862); C.A. E.R. 1707 (describing magazine for Remington-Lee rifle, introduced in 1879). But box magazines did not become "common for handguns" until the 1890s, Kopel,

[4] The Winchester 66 (and its predecessor, the Henry rifle, *see* Pet. App. 132) also used rimfire ammunition, which limited their range. *See* Petzal, *The Gun that Won the West*, Field & Stream, Jan. 5, 2021, https://bit.ly/3OmUlRQ.

supra, at 856, and the "most common" configurations at that time had capacities of 10 or fewer rounds, *id.* at 857. Automatic and semiautomatic long guns with box magazines were developed for military use in both World Wars, and semiautomatic long guns started to become popular among civilians in the second half of the twentieth century. *See id.* at 858-861; C.A. E.R. 793-794, 919, 1707. During the 1970s and 1980s, large-capacity magazines capable of holding more than 10 rounds became more widespread because of a "confluence of events," C.A. E.R. 1707, including technological improvements that "greatly reduced the risk of a misfeed" and allowed "relatively larger capacity magazines" for "relatively smaller cartridges," Kopel, *supra*, at 862-864, and marketing and sales practices that led to the replacement of traditional six-shot revolvers with "high-capacity semiautomatic pistols."[5]

When used with large-capacity magazines, semiautomatic weapons posed a materially greater threat to public safety and to police than firearms previously in common use. *See* C.A. E.R. 356-357, 1618. During the 1980s and early 1990s, for example, semiautomatic firearms equipped with large-capacity magazines were "involved in a number of highly publicized mass murder incidents that first raised public concerns and fears about the accessibility" of weapons that could discharge "high numbers of rounds in a short period of time." C.A. E.R. 402. Large-capacity

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[5] Violence Policy Center, *Backgrounder on Glock 19 Pistol and Ammunition Magazines Used in Attack on Representative Gabrielle Giffords and Others* 1, Jan. 2011, https://www.vpc.org/fact_sht/AZbackgrounder.pdf; *see also* C.A. E.R. 933, 1509, 1708; Affidavit of Robert Spitzer, Ph.D. at ¶ 8 in *Worman v. Healey*, No. 17-cv-10107-WGY (D. Mass. Dec. 15, 2017), ECF No. 61-5.

magazines also imperiled the lives of police, who suddenly found themselves "look[ing] down the barrel of a TEC-9 with a 32 round clip" instead of the "cheap Saturday Night Special[s] that could fire off six rounds before loading" that they had previously confronted. H.R. Rep. No. 103-489, at 13-14 (1994); *see also* C.A. E.R. 1013-1014.

In the early 1990s, several States responded by restricting magazine capacity. *See* 1990 N.J. Laws 217, 221, 235 (15 rounds); 1992 Haw. Sess. Laws 740, 742 (10 or 20 rounds, depending on purchase date); 1994 Md. Laws 2162, 2165 (20 rounds). In 1994, the federal government banned the possession of magazines that held "more than 10 rounds of ammunition." Pub. L. No. 103-322, § 110103, 108 Stat. 1796, 1998-2000 (1994). That federal law expired in 2004, *id.* § 110105, but nine States comprising more than a quarter of the Nation's population continue to restrict the size of magazines to this day.[6]

2. California began regulating large-capacity magazines in 2000. Pet. App. 5. "Large-capacity magazines" are defined as any "ammunition feeding device with the capacity to accept more than 10 rounds," with certain exceptions that include .22 caliber tube ammunition feeding devices and tubular magazines that are contained in lever-action firearms. Cal. Penal Code § 16740. Initially, California prohibited the manufacture, importation, or sale of large-capacity magazines

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[6] *See* Cal. Penal Code § 32310; Colo. Rev. Stat. §§ 18-12-301-302; Conn. Gen. Stat. § 53-202w; D.C. Code § 7-2506.01(b); Haw. Rev. Stat. § 134-8(c); Md. Code Ann., Crim. Law § 4-305(b); Mass. Gen. Laws ch. 140, §§ 121, 131M; N.J. Stat. Ann. §§ 2C:39-1(y), 39-3(j), 39-9(h); N.Y. Pen. Law §§ 265.00(23), 265.36; Vt. Stat. Ann. tit. 13, § 4021; *see also* Wash. Sess. Laws ch. 104, Laws of 2022 (effective July 1, 2022).

in the State. Pet. App. 5. After the federal ban expired in 2004, California added prohibitions on the purchase and receipt of large-capacity magazines, *id.*, and authorized police to confiscate and destroy unlawfully possessed magazines, *id.* at 175. But those provisions, which were eventually codified in California Penal Code Section 32310, did not bar individuals from possessing large-capacity magazines that they acquired before 2000. *Id.* at 5. As a result, "enforcement of the existing laws was 'very difficult,'" *id.* at 5-6, because police could not readily distinguish between magazines that were lawfully grandfathered and those that were prohibited, *see, e.g.*, *Wiese v. Becerra*, 263 F. Supp. 3d 986, 993 (E.D. Cal. 2017).

In 2016, California addressed that problem through Proposition 63, which the voters adopted shortly after the Legislature enacted a similar statute. Pet. App. 6. Among other reforms, Proposition 63 amended Section 32310 to make it unlawful to possess large-capacity magazines in the State after June 2017. Cal. Penal Code § 32310(c).[7] It also required individuals who possessed large-capacity magazines to remove them from the State, sell them to a licensed firearms dealer, modify them so that they could not hold more than 10 rounds, or turn them over to law enforcement officials. *Id.* § 32310(d); *see also id.* § 16740(a).

3. Petitioners filed this lawsuit in 2017, shortly after the voters adopted Proposition 63 and before the new possession restriction went into effect. Pet.

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[7] The law provides exceptions, including for certain law enforcement officials. *See* Pet. App. 176 n.2 (citing Cal. Penal Code §§ 32400, 32405, 32406, 32435, 32440, 32445, 32450, 32455).

App. 8. They argued that amended Section 32310 violates the Second Amendment, the Takings Clause, and the Due Process Clause, *id.*, and sought a declaratory judgment that the entire statute is unconstitutional on its face, as well as a permanent injunction barring the State from enforcing Section 32310 "in its entirety." C.A. E.R. 1961

Shortly before Proposition 63 took effect, the district court preliminarily enjoined the new ban on possessing large-capacity magazines. Pet. App. 384-452. A divided panel of the court of appeals affirmed in an unpublished decision. *Id.* at 253-267. The district court then permanently enjoined Section 32310 in its entirety. *Id.* at 268-383.[8] After a divided panel of the court of appeals affirmed, *id.* at 172-252, the full court granted the State's petition for rehearing en banc, *id.* at 10.

Following supplemental briefing and argument, an en banc panel of the court of appeal reversed. Pet. App. 1-171. The court first asked whether "the challenged law affects conduct that the Second Amendment protects," *id.* at 15, and ultimately "assum[ed], without deciding, that" Section 32310 "implicates the Second Amendment," *id.* at 18.[9] In assessing the appropriate level of scrutiny, the court concluded that

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[8] The district court eventually stayed that injunction pending appeal, except with respect to the new possession restrictions. Pet. App. 453-460

[9] It was therefore unnecessary for the court to decide whether the law fell outside the scope of the Second Amendment, either based on a long history of regulation, *see, e.g., Heller*, 554 U.S. at 626-627, or because large-capacity magazines are "weapons that are most useful in military service," *id.* at 627. But the court acknowledged the potential merit of those arguments. *See* Pet.

Section 32310 "implicates, at least in some measure, the core Second Amendment right to self-defense in the home." *Id.* at 19. It recognized, however, that "[t]he law has no effect whatsoever on which firearms may be owned," *id.* at 20, and that California allows law-abiding adults to possess and use "as many firearms, bullets, and magazines as they choose," *id.* at 20-21; *see also id.* at 21-25. The court therefore held that Section 32310 "imposes only a minimal burden on the exercise of the Second Amendment right," and it followed the analytical approach of other federal circuits that "unanimously have applied intermediate scrutiny to other laws banning or restricting large-capacity magazines." *Id.* at 20; *see id.* at 20 n.3 (collecting cases).

Applying intermediate scrutiny, the court of appeals assessed the fit between Section 32310 and the law-enforcement and public-safety interests it serves. Pet. App. 29-36. As the court recognized, the statute was adopted to "prevent and mitigate gun violence"—an "undoubtedly important" interest. *Id.* at 31; *see id.* ("[R]educing the harm caused by mass shootings is an important governmental objective."). With respect to fit, both "data and common sense" support the conclusion 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 35. For example, the record included studies establishing that mass shooters who use large-capacity

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App. 16-17 (discussing the "longstanding" nature of regulations regarding firing-capacity restrictions and noting that large-capacity magazines may be "'most useful in military service'" because they have "limited lawful, civilian benefits" but "significant benefits in a military setting").

magazines inflict far more casualties than those who do not. *Id.* at 31-32. And expert reports explained why that is so: "large-capacity magazines allow a shooter to fire more bullets from a single firearm uninterrupted, and a murderer's pause to reload or switch weapons allows potential victims and law enforcement officers to flee or to confront the attacker." *Id.* at 32; *see id.* at 32-34 (discussing examples and noting that most mass shooters possessed their weapons and magazines lawfully). Based on the record developed by the parties below, the court held that there was a sufficient fit between Section 32310 and "the compelling goal of reducing the number of deaths and injuries caused by mass shootings." *Id.* at 35.

The court of appeals also reversed the district court's judgment with respect to petitioners' claim under the Takings Clause. Pet. App. 36-40. It noted, among other things, that owners of a large-capacity magazine may "continue to use the magazine, either by modifying it to accept a smaller number of bullets or by moving it out of state," or may sell the magazine to a firearms dealer. *Id.* at 38. Petitioners had "neither asserted nor introduced evidence that no firearms dealer will pay for a magazine or that modification of a magazine is economically impractical." *Id.* at 37.[10]

Judges Graber and Hurwitz each wrote concurring opinions. Pet. App. 41-47 (Graber, J., concurring); *id.* at 97-99 (Hurwitz, J., concurring). Judge Berzon also wrote a concurring opinion, joined by five other judges. *Id.* at 48-96. Judge Bumatay wrote a dissent that was

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[10] Because petitioners' due process claim was based on the same arguments as their takings claim, the court of appeals rejected it for the same reasons. *See* Pet. App. 10 n.1.

joined by two other judges. *Id.* at 100-142. Judge Vandyke wrote a separate dissent. *Id.* at 143-171.

ARGUMENT

Petitioners ask the Court to grant plenary review with respect to three questions related to their Second Amendment and Takings Clause claims. But they do not argue that any of those questions implicates a conflict of authority in the lower courts. To the contrary, each of the federal circuits to consider a similar constitutional challenge has agreed with the conclusions of the court of appeals below, without any difference in analytical approach that would warrant this Court's review. And even under other possible approaches to analyzing petitioners' principal claim, the restrictions challenged here are consistent with this Court's Second Amendment precedent and with the history that informs the meaning of the right to keep and bear arms. This Court is currently holding a petition presenting similar issues, presumably to await the Court's forthcoming decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, No. 20-843, and it may wish to follow the same approach in this case. But unless the decision in *Bruen* reformulates the standard governing Second Amendment claims in a way that would likely affect the outcome in this case, there is no need for remand or any further review.

1. The principal question presented by petitioners is whether Section 32310's restriction on possessing large-capacity magazines violates the Second Amendment. Pet. i, 20-24. Petitioners do not allege any conflict in the courts of appeals on that question. Nor could they—each of the seven circuit courts to consider a challenge to a similar law has upheld the law as consistent with the Second Amendment. *See* Pet. App. 10-36; *Worman v. Healey*, 922 F.3d 26, 30-31 (1st Cir.

2019); *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. N.J.* (*ANJRPC*), 910 F.3d 106, 122-123 (3d Cir. 2018); *Kolbe v. Hogan*, 849 F.3d 114, 138 (4th Cir. 2017) (en banc); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 263-264 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406, 411-412 (7th Cir. 2015); *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1263-1264 (D.C. Cir. 2011).[11]

Nor are there analytical differences among the lower courts that might warrant review by this Court: the court below followed the prevailing analytical framework and applied the same tier of constitutional scrutiny as every other circuit to consider the issue. *See infra* p. 21.[12] Petitioners disparage that consensus and argue that Section 32310's possession restriction amounts to an unconstitutional "ban[] on protected arms." Pet. 21. But that argument is incorrect under any analytical approach.

This Court has recognized that the Second Amendment right is "not unlimited," *District of Columbia v.*

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[11] The Third Circuit's decision in *ANJRPC* affirmed the denial of a preliminary injunction. *See* 910 F.3d at 110, 114. The plaintiffs did not seek further review of that interlocutory decision in this Court. On remand, the district court entered a final judgment in New Jersey's favor. *See Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Grewal*, 2019 WL 3430101, at *3 (D.N.J. July 29, 2019). After the Third Circuit affirmed that judgment, *see Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. N.J.*, 974 F.3d 237, 245-248 (3d Cir. 2020), the plaintiffs filed a petition for a writ of certiorari, which remains pending, *see Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Platkin*, No. 20-1507 (filed Apr. 26, 2021).

[12] Although the Seventh Circuit in *Friedman* did not expressly characterize its analysis as intermediate scrutiny, the analysis was "fully consistent" with other courts' application of intermediate scrutiny. Pet. App. 20 n.3 (citing *Friedman*, 784 F.3d at 410-412).

Heller, 554 U.S. 570, 626 (2008); that it is subject to many reasonable regulations and prohibitions, *see, e.g.*, *id.* at 626-627, 627 n.26; and that "certain types of weapons" are not protected, *id.* at 623; *see, e.g.*, *id.* at 623-624, 627-628 (discussing sawed-off shotguns and M-16 rifles); *cf. Kolbe*, 849 F.3d at 136-137, 142-143 (applying *Heller*'s reasoning to large-capacity magazines). And while *Heller* did not attempt to "clarify the entire field," 554 U.S. at 635, it did instruct that the right to keep and bear arms must be construed and applied with careful attention to its "historical background," *id.* at 592, in light of what would have been commonly understood and expected by "ordinary citizens in the founding generation," *id.* at 577; *see also id.* at 576-619.

As a historical matter, large-capacity magazines are not "the sorts of weapons" that were "'in common use at the time[]'" of the Founding. *Heller*, 554 U.S. at 627. On the contrary, detachable box magazines (of any size) were not even invented until the second half of the nineteenth century, and did not become widely available until much later. *See supra* pp. 3-4. The founding-era "[f]irearms capable of firing more than 10 rounds without reloading" that petitioners reference (Pet. 4) were both uncommon and impractical. *See supra* p. 2. And contrary to the assertions of petitioners and the dissent below (Pet. 4-5; Pet. App. 132), lever-action rifles like the Winchester 66 and 73 did not become common among civilians until well after the incorporation of the Second Amendment. *See supra* p. 2. In any event, those rifles were materially different from modern rifles and pistols equipped with large-capacity magazines in terms of their operation and the threat to public safety they posed. *See supra* pp. 2-4. And they are not prohibited by California law. *See* Cal. Penal Code § 16740(c).

Of course, *Heller* made clear that the Second Amendment protects weapons beyond those "in existence in the 18th century." 554 U.S. at 582. But it also provided that governments may restrict access to "'dangerous and unusual weapons,'" *id.* at 627, and may continue to impose "longstanding" regulations, *id.* at 626-627.[13] When it comes to regulations on "new weapons that have not traditionally existed," some jurists have proposed "reason[ing] by analogy from history and tradition." *E.g.*, *Heller II*, 670 F.3d at 1275 (Kavanaugh, J., dissenting). Under that type of analytical framework, petitioners' Second Amendment challenge would fail: Modern large-capacity magazines are not analogous to any of the arms that were widely available at the time of the founding or the ratification of the Fourteenth Amendment. *See supra* pp. 1-5. And the decision by California (and many other States) to restrict access to large-capacity magazines is part of a long tradition of governments regulating especially dangerous weapons once they begin to circulate more widely in society, a tradition that *Heller* itself embraced. *See* 554 U.S. at 624 (rejecting the "startling" proposition that machine guns are protected by the Second Amendment).

Moreover, Section 32310 does not "make[] it impossible for citizens to use" firearms—including semiautomatic weapons—for the "core lawful purpose of self-defense." *Heller*, 554 U.S. at 630. To the contrary, "[t]he law has no effect whatsoever on which firearms may be owned[.]" Pet. App. 20. Law-abiding adults

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[13] Although *Heller* "invoked Blackstone for the proposition that 'dangerous and unusual' weapons have historically been prohibited, Blackstone referred to the crime of carrying 'dangerous *or* unusual weapons.'" *Kolbe*, 849 F.3d at 131 n.9 (quoting 4 Blackstone 148-149 (1769)).

may possess and use "as many firearms, bullets, and magazines as they choose." *Id.* at 21. As the record below demonstrates, the panoply of firearms, magazines, and ammunition available for possession and use in California provides gun owners with ample means to defend themselves: Most homeowners who find themselves in self-defense situations use only "two to three rounds of ammunition in self-defense." *Id.* The record does not identify any example of self-defense in the home in which it was necessary "to fire more than ten bullets in rapid succession[.]" *Id.* at 22; *see also ANJRPC*, 910 F.3d at 118, 121 n.25 (similar). And if such a need ever arose, the "sole practical effect of" Section 32310 would be to require the defender "to pause for a few seconds after firing ten bullets" in order "to reload or to replace the spent magazine." Pet. App. 21.[14]

The record also amply demonstrates that "large-capacity magazines significantly increase the devastating harm caused by mass shootings[.]" Pet. App. 35. They allow mass shooters—whose objective is destruction, not self-defense—to fire "more bullets from a single firearm uninterrupted," without having to stop to "pause to reload or switch weapons," thus depriving "potential victims and law enforcement officers" of the opportunity "to flee or to confront the attacker." *Id.* at 32. As a result, mass shooters who use large-capacity magazines inflict up to nearly three-and-a-half times

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[14] *See also* Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense*, 56 UCLA L. Rev. 1443, 1489 (2009) (positing that a 10-round "magazine size cap" likely "would not materially interfere with self-defense," because "the ability to switch magazines in seconds, which nearly all semiautomatic weapons possess, should suffice for the extremely rare instances when more rounds were needed").

as many casualties as those who do not. *See* C.A. E.R. 756-757; *see also* C.A. E.R. 253, 294-296, 357-358, 405-408, 971-972, 1019-1021, 1106-1107. Since 1968, large-capacity magazines have been used in "74 percent of all gun massacres with 10 or more deaths"—and "in 100 percent of all gun massacres with 20 or more deaths." Pet. App. 32.

And the record supports the effectiveness of restrictions on large-capacity magazines in reducing deaths and serious injuries from mass shootings. Approximately "three-quarters of mass shooters" have "possessed their weapons, as well as their large-capacity magazines, lawfully." Pet. App. 34 (emphasis omitted). Prohibiting the possession of large-capacity magazines "thus reasonably supports California's effort to reduce the devastating harm caused by mass shootings." *Id.* Empirical evidence from the last three decades confirms that conclusion. On a per capita basis, jurisdictions with similar restrictions have witnessed significantly fewer mass shootings—and significantly fewer fatalities in the mass shootings that did occur—than jurisdictions without them. *See* C.A. E.R. 360-365, 388-389, 1018-1021; Klarevas et al., *The Effect of Large-Capacity Magazine Bans on High-Fatality Mass Shootings, 1990-2017*, 109 Am. J. Pub. Health 1754 (2019) (peer-reviewed study from State's expert reporting similar results).

Petitioners' primary response is that Section 32310 violates the Second Amendment because of the prevalence of large-capacity magazines among modern firearms owners. *See* Pet. 20-21. They note that "[m]illions of law-abiding Americans have lawfully purchased these arms," and that there are "hundreds of millions of these magazines in civilian circulation."

Id. at 21.[15] That is an odd approach to analyzing the contours of the Second Amendment, which "codified a *pre-existing* right" and must be applied based on the "historical background" of that right. *Heller*, 554 U.S. at 592. In light of the particularly significant role that history plays in Second Amendment analysis, focusing on how common a weapon is at the time of litigation would be "illogical." *Worman*, 922 F.3d at 35 n.5; *see also Friedman*, 784 F.3d at 409 (similar). That is especially so where, as here, it appears that the recent prevalence of a weapon was substantially driven by marketing and sales decisions by the firearms industry. *See supra* p. 4; *see also Kolbe*, 849 F.3d at 141 (rejecting a "popularity test" under which a "new weapon would need only be flooded on the market prior to any governmental prohibition in order to ensure it constitutional protection").[16]

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[15] Petitioners (and some of the judges below) assert that large-capacity magazines "constitute fully *half* of the magazines in the country." *E.g.*, Pet. 18. They do not cite any particular source for that assertion; it appears to derive from a report by one of petitioners' experts, who cautioned that his estimate was based on "extrapolation from indirect sources and cannot be confirmed as unequivocally accurate." C.A. E.R. 1700. But even the survey data recently invoked by petitioners' amici indicates that fewer than 16 percent of American adults own or have owned large-capacity magazines. *See* English, 2021 National Firearms Survey 1 (July 13, 2021); *see also* Nat'l Shooting Sports Found. Br. 7-8 (discussing survey).

[16] This Court has never adopted the kind of contemporary popularity test argued for by petitioners (at i, 20-21). In support of that argument, petitioners selectively quote a single passage from *Heller*. Pet. 20. That passage construed a prior decision, *United States v. Miller*, 307 U.S. 174 (1939), "to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as

2. Petitioners also ask this Court to review the court of appeals' conclusion that Section 32310 does not facially violate the Takings Clause. Pet. 24-27. A taking occurs when the government either "physically appropriates" property or adopts a regulation that "goes too far" by, for example, depriving the property owner of all economically beneficial use of the property. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021); *see also id.* at 2070. Again, petitioners do not identify any conflict in the lower courts on this question. Indeed, they do not even mention the only other federal appellate decision to resolve a similar challenge. *See ANJRPC*, 910 F.3d at 124-125, *petition for cert. pending*, No. 20-1507 (filed Apr. 26, 2021); *see also supra* p. 11 n. 11.

Like the court of appeals below, the Third Circuit in *ANJRPC* correctly rejected a takings challenge to a prohibition on the possession of large-capacity magazines. *See* 910 F.3d at 124-125. The two decisions do not exhibit any difference in result or analytical approach warranting review by this Court. The Third Circuit held that the challenged law did not effect a physical or regulatory taking, reasoning that the "owners have the option to transfer or sell their LCMs to an individual or entity who can lawfully possess LCMs" or to "modify their LCMs to accept fewer than

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short-barreled shotguns." *Heller*, 554 U.S. at 625. But the analysis in both *Heller* and *Miller* focused on the relevance of whether a type of weapon was "'in common use at the time'" of the Founding. *Heller*, 554 U.S. at 627 (quoting *Miller*, 307 U.S. at 179); *see also id.* at 625-627. Indeed, the sentence in *Heller* immediately following the one quoted by petitioners underscores that the focus of the Second Amendment analysis is "the *historical* understanding of the scope of the right." *Id.* at 625 (emphasis added); *see also id.* at 623 (noting that *Miller* "did not even purport to be a thorough examination of the Second Amendment").

ten rounds," and that the prohibition "does not deprive the gun owners of all economically beneficial or productive uses of their magazines." *Id.* at 124. As the decision below explains, *see* Pet. App. 37-38, the same is true in California, where owners of large-capacity magazines may sell them "to a licensed firearms dealer," Cal. Penal Code § 32310(d)(2), or "permanently alter[]" the magazines "so that [they] cannot accommodate more than 10 rounds," *id.* § 16740(a). That alteration is straightforward: even petitioners have acknowledged that there are "countless articles and videos online on how to modify LCMs to hold 10 rounds," and that "Californian firearm owners, dealers, and manufacturers [have] made or remade LCMs 'California compliant' through 'permanent alteration'" for more than two decades. C.A. E.R. 1920. Under these circumstances, the challenged "law plainly does not deprive an owner of all economically beneficial use of the property." Pet. App. 37 (internal quotation marks omitted); *see also ANJRPC*, 910 F.3d at 124-125.

Although only the Third and Ninth Circuits have considered takings challenges to restrictions on large-capacity magazines, other courts have rejected similar challenges to laws prohibiting the possession of personal property that poses a threat to public health or safety. The Fourth Circuit, for example, has held that a law newly prohibiting possession of rapid fire trigger activators (or "bump stocks") did not effect a taking, *see Md. Shall Issue, Inc. v. Hogan*, 963 F.3d 356, 364-367 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2595 (2021), and reached the same conclusion with respect to a prohibition on certain previously legal gambling machines, *see Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404, 409-411 (4th Cir. 2007); *cf. Miller v. Schoene*, 276 U.S. 272, 279-280

(1928) (state-ordered destruction of trees infected by cedar rust not a taking).

This body of decisions is consistent with the principle underlying "'takings' jurisprudence, which has traditionally been guided by the understanding of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992). A "property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers[.]" *Id.* "And in the case of personal property," an owner "ought to be aware of the possibility that new regulation might even render his property economically worthless," *id.* at 1027-1028, or prohibit the continued possession of property that poses a particular threat to public safety.

Petitioners argue (at 25-27) that the court of appeals' conclusion is inconsistent with this Court's decisions in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and *Horne v. Department of Agriculture*, 576 U.S. 350 (2015). But those cases addressed fundamentally different questions: in the one, a "permanent physical occupation" of real property, *Loretto*, 458 U.S. at 426; in the other, a government directive requiring the transfer of raisins "from the growers to the Government" for public use—with the "[t]itle to the raisins pass[ing]" to a government entity, *Horne*, 576 U.S. at 361. Neither case establishes that the government effects a taking "whenever it concludes that certain items are too dangerous to society for persons to possess without a modest modification that leaves intact the basic functionality of the

item." Pet. App. 40; *see ANJRPC*, 910 F.3d at 124-125, 125 n.32.

In any event, even if petitioners were correct that Section 32310 effected a facial taking, that would not support affirmance of the injunctive relief that they sought and obtained in the district court. *See* Pet. App. 382-383; C.A. E.R. 7 (permanent injunction barring the State from enforcing Section 32310). As this Court recently recognized, "equitable relief is generally unavailable" where "state governments provide just compensation remedies[.]" *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2176 (2019). And California law allows recovery "through inverse condemnation" for a government taking of personal property. *Sutfin v. State*, 261 Cal. App. 2d 50, 53 (1968).[17]

3. The final question raised by petitioners turns back to the Second Amendment, asking "[w]hether the 'two-step' approach that the Ninth Circuit and other lower courts apply to Second Amendment challenges is consistent with the Constitution and this Court's precedent." Pet. ii; *see id.* at 27-32.

Yet again, petitioners do not (and cannot) allege a conflict of authority: every federal circuit court to address the question since *Heller* has adopted the same

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[17] Petitioners also ignore the express severability clause in the statute that adopted the restriction on possession. *See* C.A. E.R. 1670. In light of that clause, even if the Court agreed with petitioners that the amended Section 32310 violates the Second Amendment by prohibiting them "from possessing" large-capacity magazines (Pet. i), it would not support the district court's permanent injunction barring the State from enforcing *any* provision of the statute, C.A. E.R. 7, including longstanding provisions that petitioners do not squarely address here. *See, e.g.*, Cal. Penal Code § 32310(a) (prohibiting manufacturing of large-capacity magazines).

two-step framework that the court of appeals applied here. *See Gould v. Morgan*, 907 F.3d 659, 668-669 (1st Cir. 2018); *Kachalsky v. County of Westchester*, 701 F.3d 81, 93-94 (2d Cir. 2012); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *NRA v. ATF*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell v. City of Chicago*, 651 F.3d 684, 701-704 (7th Cir. 2011); *United States v. Chovan*, 735 F.3d 1127, 1136-1137 (9th Cir. 2013); *United States v. Reese*, 627 F.3d 792, 800-801 (10th Cir. 2010); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); *Heller II*, 670 F.3d at 1252 (D.C. Cir. 2011).

Petitioners criticize this judicial consensus as a "rights-denying" framework, Pet. 27, that is "fatal[ly] defect[ive]," *id.* at 28. As the Fifth Circuit has explained, however, the framework "comports with the language of *Heller*." *NRA*, 700 F.3d at 197. "As for step one, *Heller* itself suggests that the threshold issue is whether the party is entitled to the Second Amendment's protection." *Id.* (citing *Heller*, 554 U.S. at 626-627, 635). As for step two, by "taking rational basis review off the table," "faulting a dissenting opinion for proposing an interest-balancing inquiry *rather than* a traditional level of scrutiny," and stating that D.C.'s handgun ban would be "unconstitutional 'under any of the standards of scrutiny that the Court has applied to enumerated constitutional rights,'" *Heller* supports the view that intermediate and strict scrutiny "are on the table" in this context. *Id.* at 197 & n.10 (quoting *Heller*, 554 U.S. at 628-629) (brackets omitted). And as Judge Ikuta has explained, the intermediate scrutiny standard applied below is derived from this Court's First Amendment precedents addressing regulations that "'leave open alternative channels for

communication of information.'" *Jackson v. City & County of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014). That standard is appropriate when reviewing regulations that, like Section 32310, "leave open alternative channels for self-defense." *Id.*

In any event, petitioners' criticisms of the two-step framework do not provide any basis for plenary review in this case. As explained above, *see supra* pp. 11-13, the Second Amendment claim here would fail even if reviewed under "the text, history, and tradition" standard favored by the dissenting judges in the court below. *See* Pet. App. 118-123; *see also* Pet. Br. 2, *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, No. 20-843. We recognize that the Court is currently holding the petition in *Association of New Jersey Rifle & Pistol Clubs, Inc. v. Platkin*, No. 20-1507, which raises a Second Amendment challenge to New Jersey's restrictions on large-capacity magazines. Presumably the Court is holding that petition to await the forthcoming decision in *Bruen*, and it may wish to follow the same approach with respect to this petition. But unless the Court in *Bruen* reformulates the legal standard in a way that would likely affect the outcome in this case, there is no need for remand or further review here.

CONCLUSION

The petition for a writ of certiorari should be denied.

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