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

REPLY BRIEF

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The state's brief in opposition confirms that its blanket, retrospective, confiscatory prohibition on the continued possession of common, standard-issue magazines—even those that have been lawfully and safely possessed for decades—is the rare state law that simultaneously violates two provisions of the Bill of Rights. There is no dispute that California has banned arms that are commonly owned by millions of law-abiding citizens for lawful purposes, and there is no dispute that California's ban applies even to citizens who lawfully acquired their magazines decades ago and have owned them without incident ever since. That law could only subsist in a polity unconstrained by the Second Amendment and the Takings Clause. The *raison d'être* of the Second Amendment is to prevent government efforts to strip the people of common arms, and the Takings Clause independently requires compensation when a state deprives people of possession of their property.

Unable to reconcile the decision below with this Court's cases, California tries to rewrite them, even to the point of recycling arguments that this Court has already rejected as "bordering on the frivolous." *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008). But the state's felt need to confine the Second Amendment to arms virtually identical to those available at the founding, while touting that it has not (yet) disarmed its citizens *entirely*, succeeds only in underscoring that its ban cannot survive under a straightforward application of *Heller*. Nor can the retrospective aspect of the state's confiscatory ban be reconciled with this Court's recent takings cases,

which have repeatedly rejected the notion that the government can avoid paying just compensation by forcing people to alter or destroy their property rather than surrender it.

That the Ninth Circuit upheld this double-barreled attack on the Bill of Rights—while purporting to apply heightened scrutiny, no less—vividly illustrates the special disfavored treatment that it and other courts of appeals afford the Second Amendment. Indeed, the Ninth Circuit made clear beyond cavil that it has no intention of changing its ways "[u]nless and until the Supreme Court tells" it to stop. Pet.App.14. The Court should accept that invitation, grant certiorari, and make clear that states may neither ban nor confiscate property that the Constitution entitles the people to keep. At a bare minimum, the Court should hold this petition pending resolution of *New York State Rifle & Pistol Association v. Bruen* (*NYSRPA II*), No. 20-843.

I. This Court Should Grant Certiorari To Resolve The Second Amendment Question.

California's brief is notable for what it does not say. The state does not deny that magazines capable of holding more than ten rounds are common and typically possessed by law-abiding people for lawful purposes. Nor could it, as there are more than 100 million such magazines in civilian circulation, accounting for nearly half of all civilian-owned magazines in the country. *See* NSSF Amicus Br.7; Pet.App.4-5, 176; *cf. United States v. Caetano*, 577 U.S. 411, 420 (2016) (Alito, J., concurring) (finding arms common when "hundreds of thousands … have been sold to private citizens"). The state does not

argue that there is any long-standing historical tradition of restricting firing or magazine capacity, let alone of restricting it to ten rounds. Nor could it, as there is none. Pet.6. Indeed, even today, California is among only a tiny minority of states in doing so. Pet.6-7. Those non-denials doom California's magazine ban, as the Second Amendment protects arms "typically possessed by law-abiding citizens for lawful purposes," *Heller*, 554 U.S. at 625, and it is bedrock law that a state may not flatly prohibit what the Constitution protects, Pet.21-22.

The state resists the proposition that the Second Amendment protects common arms typically owned for lawful purposes. BIO.15-16 & n.16. But as much as California might prefer a constitutional right confined to "'the sorts of weapons' that were 'in common use at the time' of the Founding," BIO.12, that is decidedly not the test this Court has embraced, as to the Second Amendment or any other constitutional provision. To the contrary, *Heller* dismissed that kind of cartoon originalism as "bordering on the frivolous." 554 U.S. at 582. As the Court explained, "[j]ust as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of 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." *Id.* (emphasis added, citations omitted). Indeed, *Heller*'s rejection of that frozen-in-time test was so "clear" that this Court later summarily reversed a state court for holding that certain arms "are not protected because they 'were not in common use at the time of the Second Amendment's enactment,'" as

contrary to *Heller*'s teaching "that the Second Amendment 'extends ... to ... arms ... that were not in existence at the time of the founding." *Caetano*, 577 U.S. at 412 (per curiam) (quoting 554 U.S. at 582); *see also id.* at 416 (Alito, J., concurring) ("It is hard to imagine language speaking more directly to the point.").

Shifting gears, California insists that "[m]odern 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." BIO.13. But all the state succeeds in accomplishing is to demonstrate why the magazines it has banned are so commonly possessed by law-abiding citizens for lawful purposes: They increase firing capacity without sacrificing accuracy, functionality, or reliability. Contrary to the state's suggestions, there is nothing revolutionary or sinister about the choice that millions have already made. Centuries of history demonstrate that the people have *always* gravitated toward arms that offer improvements that do not compromise accuracy and functionality. That explains why single-shot muskets and handguns gave way to multi-shot Pepperbox pistols, revolvers, and repeating rifles in the decades after the founding. BIO.1-2. It explains why Winchester rifles capable of firing more than ten rounds quickly became the weapon of choice for many in the late nineteenth century. Pet.App.132.[1] It explains why semi-

[1] Notably, around the same time, and owing to the same industrial-revolution dynamics, print media made a comparable leap, from the hand-operated block-type printing presses used "since the time of Gutenberg" to industrialized printers that

automatic models largely displaced models with more cumbersome, less efficient feeding devices in the twentieth century. Pet.App.132, 189. And it explains why pistols soared in popularity precisely when detachable magazines capable of holding more rounds became more compact and reliable. Pet.5.

The fact that modern firearms are (unsurprisingly) more accurate, more reliable, more portable, and capable of quickly firing more rounds than their founding-era predecessors thus does not make them any less linear descendants of the "small-arms weapons used by militiamen … in defense of person and home" when the Second Amendment was ratified. *Heller*, 554 U.S. at 624-25; *see also Caetano*, 557 U.S. at 416-17 (Alito, J., concurring) (noting that "revolvers and semiautomatic pistols" are protected as descendants of arms in common use at the founding). Indeed, much of what the state says about why the magazines it deems too "large" purportedly "pose[] a materially greater threat to public safety and to police than firearms previously in common use," BIO.4, could be said equally of the handguns that this Court held protected by the Second Amendment in *Heller*. That is precisely why *Heller* eschewed a test focused on which arms are capable of doing the most damage in

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could produce thousands of copies in an hour. D.W. Howe, *What Hath God Wrought* 227 (2007). The effects on mass communication—for good and bad uses—were revolutionary. *See id.* Far from viewing those technological improvements as an excuse for expanded government regulation of their "greater capacity for evil," this Court recognized their capacity for enhancing speech and honored the balance struck by the framers in the text of the Bill of Rights. *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 503 (1952).

the hands of the small number of people bent on *mis*using them, in favor of a test focused on which arms *law-abiding* citizens believe best serve their self-defense needs. The state derides that test as "odd" and "illogical," BIO.16, but the framers presumably would have been far more startled by the notion that the government may literally confiscate arms that millions of people have chosen for self-defense. The framers would have believed that the Second Amendment was more than a mere parchment barrier against such massive disarmament.

In short, *Heller* settled that "the pertinent Second Amendment inquiry is whether [the arm is] commonly possessed by law-abiding citizens for lawful purposes *today*." *Caetano*, 577 U.S. at 420 (Alito, J., concurring). And under that test, California's ban seeks to eviscerate magazines fully protected by the Second Amendment.[2]

The state is thus left arguing that its law does not seriously burden Second Amendment rights because its citizens may still possess as many sub-ten-round-capacity magazines as they please, and still have other means of defending themselves that the state deems sufficient. BIO.14. But this Court has already rejected this we-have-not-banned-everything-yet argument. "It is no answer to say … that it is

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[2] The state does not defend the Ninth Circuit's effort to shift the locus of the inquiry from the commonality of a weapon's ownership to the commonality of its *use* in an actual self-defense situation. *See* Pet.App.28. That approach would nullify Second Amendment rights entirely (consistent with the actual state of play in the Ninth Circuit), as the average firearm is (fortunately) *never* fired in self-defense.

permissible to ban the possession of ['large-capacity' magazines] so long as the possession of other [magazines] is allowed." 554 U.S. at 624. Just as in *Heller*, the people have spoken, and "the American people have considered" firearms equipped with higher capacity magazines "to be the quintessential self-defense weapon." *Id.* That the state continues to press, and the Ninth Circuit continues to embrace, arguments virtually identical to those *Heller* rejected just underscores the need for this Court's review.

II. This Court Should Grant Certiorari To Resolve The Takings Question.

The confiscatory aspect of California's law not only underscores its dramatic overbreadth, but also effects an impermissible uncompensated taking. The state concedes, as it must, that "[a] taking occurs when the government either 'physically appropriates' property or adopts a regulation that 'goes too far[.]'" BIO.17 (quoting *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2072 (2021)). But it insists that its law does not effect a physical appropriation because it provides multiple "options" for citizens to comply with its demand that they dispossess themselves of their lawfully acquired magazines. BIO.17-18. The problem with those options is that each eliminates the most important stick in the bundle of property rights: possession. The owner must literally dispossess themselves of the property as long as they remain in the jurisdiction. *See* Pet.25-26. That is a functional definition of both disarmament and a taking.

The option to "permanently alter" the magazine "so that it cannot accommodate more than 10 rounds," Pet.App.462—also fails to solve the state's takings

problem. The state identifies no authority for the proposition that letting people "keep" lawfully obtained property on the condition that they convert it into something the state views as fundamentally different avoids a takings problem. If a state prohibited the possession of wine, but gave residents the option of converting lawfully acquired vintages into vinegar, it would remain a taking of the wine. If a state ordered a homeowner to lop off the second story of her home to improve the public's ocean views, no one could seriously dispute that it was effecting a taking. And California can hardly dismiss the conversion of a larger magazine into one holding then rounds when the state treats the difference between the two as absolutely critical for its own purposes.

Indeed, this Court has already rejected even less palpably transparent government efforts to disguise a taking. In *Horne*, the raisin growers could have "plant[ed] different crops," or "[sold] their raisin-variety grapes as table grapes or for use in juice or wine." *Horne v. Dep't of Agric.*, 576 U.S. 350, 365 (2015). And in *Loretto*, the property owner could have converted her building into something other than an apartment complex. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982). But this Court rejected the argument that such options eliminated the physical taking, explaining that "property rights 'cannot be so easily manipulated.'" *Horne*, 576 U.S. at 365 (quoting *Loretto*, 458 U.S. at 439 n.17).

California next claims that its ban "does not deprive the gun owners of all economically beneficial or productive uses of their magazines." BIO.18

(internal quotation marks omitted). But the principal problem with the state's confiscatory ban is not that it deprives market actors of the expected economic use of their property (although it does). The problem with the ban is more basic: The ban deprives them of their continued *possession* of the property. A complete deprivation of possession is not just a "use" restriction that can be dismissed as a mere regulatory taking. *See Andrus v. Allard*, 444 U.S. 51, 66 (1979); *accord Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 136 (1978). After all, one cannot use *at all* physical property that he cannot possess.

Finally, invoking *Knick v. Township of Scott*, 139 S.Ct. 2162 (2019), the state argues that its ban does not effect a taking because California law provides "recovery 'through inverse condemnation' for a … taking." BIO.20 (quoting *Sutfin v. State*, 261 Cal.App.2d 50, 53 (1968)). That argument turns *Knick* on its head. *Knick* held that the plaintiff did *not* have to bring a state inverse-condemnation proceeding to obtain relief in federal court for a taking. *See* 139 S.Ct. at 2169-70. As this Court put it: "The [Takings] Clause provides: '[N]or shall private property be taken for public use, without just compensation.' It does not say: 'Nor shall private property be taken for public use, without an available procedure that will result in compensation.'" *Id*. at 2170. Indeed, just one Term after *Knick*, this Court ruled in favor of plaintiffs challenging a California regulation on takings grounds even though the relief they sought was to enjoin application of the law. *See Cedar Point*, 141 S.Ct. at 2070. California's confiscatory ban of commonly owned magazines is at least as intrusive as

the novel regulation in *Cedar Point* was, and it is every bit as worthy of this Court's attention.

III. This Court Should Grant Certiorari And Reject Heightened-In-Name-Only Scrutiny.

The state's opposition only underscores the need for this Court's intervention to reject the heightened-in-name-only scrutiny that has taken hold in the lower courts. California does not deny that the form of "intermediate scrutiny" the Ninth Circuit applies in Second Amendment cases allows courts to "assum[e]" that firearms are protected by the Second Amendment yet ban them anyway. Nor does California deny that the Ninth Circuit's approach lacks any tailoring requirement at all. *See* Pet.29-30. In fact, the state's brief contains not a single mention of the words "tailor" or "tailoring." That is remarkable given that this Court reiterated just last Term that heightened scrutiny requires "narrow tailoring" even when strict scrutiny does *not* apply—and did so in a decision that reversed the Ninth Circuit and invalidated another California law, no less. *Ams. for Prosperity Found. v. Bonta*, 141 S.Ct. 2373, 2384 (2021).

Instead of trying to reconcile the Ninth Circuit's approach with this Court's cases (or the Constitution), the state asks the Court to look the other way because "every other circuit to consider the issue" has adopted the same "analytical approach." BIO.11-12, 20-21 (citing *Ass'n of N.J. Rifle & Pistol Clubs v. Bruck*, 910 F.3d 106, 117 (3d Cir. 2018); *Worman v. Healey*, 922 F.3d 26, 37 (1st Cir. 2019); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406, 414-15 (7th Cir. 2015); *Heller v. District of Columbia*

(*Heller II*), 670 F.3d 1244, 1252-53 (D.C. Cir. 2011)). But no circuit has out-Ninth-Circuited the Ninth Circuit in denying meaningful review while purporting to apply the heightened variants of scrutiny applicable to fundamental constitutional rights. And that a number of other circuits have come close is exactly why this Court *should* grant certiorari: It should no longer stand by while lower courts deploy a standard that defies this Court's precedents and denies the people their constitutional right to keep protected arms. *See* States' Amicus Br.5-10. The problem is pervasive and entrenched, and the courts of appeals are not going to course-correct on their own.

Indeed, the Ninth Circuit said as much explicitly. This case marks the 50th time out of 50 that the Ninth Circuit has deployed its rights-denying two-step to rebuff a Second Amendment challenge. Pet.17. And far from suggesting any intention of changing its ways, the en banc majority boldly declared that the Ninth Circuit will not abandon its two-step approach "[u]nless and until the Supreme Court tells us." Pet.App.14. The time has come for this Court to take up that invitation and put an end to these systematic efforts to whitewash laws that strip citizens of their Second Amendment rights. At a bare minimum, the Court should hold this petition pending resolution of *NYSRPA II*.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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