

No. \_\_\_\_\_

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In the  
**Supreme Court of the United States**

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

v.

ROB BONTA, in his official capacity  
as Attorney General of the State of California,  
*Respondent.*

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

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Vol. II of III**

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*Appendix E*

**UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF CALIFORNIA**

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No. 17-cv-1017

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VIRGINIA DUNCAN, et al.,  
*Plaintiffs,*

v.

ROB BONTA, in his official capacity as Attorney  
General of the State of California,  
*Defendant.*

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Filed: Sept. 22, 2023

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**DECISION**

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We begin at the end. California's ban and mandatory dispossession of firearm magazines holding more than 10 rounds (California Penal Code § 32310(c) and (d)), as amended by Proposition 63, was preliminarily enjoined in 2017.<sup>1</sup> That decision was affirmed on appeal.<sup>2</sup> In 2019, summary judgment was granted in favor of Plaintiffs and § 32310 in its entirety was judged to be unconstitutional.<sup>3</sup> Initially,

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<sup>1</sup> *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1138 (S.D. Cal. 2017).

<sup>2</sup> *Duncan v. Becerra*, 742 F. App'x 218, 221 (9th Cir. 2018).

<sup>3</sup> *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1133 (S.D. Cal. 2019).

that decision was also affirmed on appeal.<sup>4</sup> However, the decision was re-heard and reversed by the court of appeals *en banc*.<sup>5</sup> In 2022, the United States Supreme Court granted certiorari, vacated the appellate *en banc* decision, and remanded the case.<sup>6</sup> The court of appeals, in turn, remanded the case to this Court “for further proceedings consistent with *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).”<sup>7</sup> All relevant findings of fact and conclusions of law set forth in the prior decision concluding § 32310 is unconstitutional are incorporated herein.

## I. Introduction

“There is a long tradition of widespread lawful gun ownership by private individuals in this country,” according to the United States Supreme Court.<sup>8</sup> Americans have an individual right to keep and bear firearms.<sup>9</sup> The Second Amendment to the United States Constitution “guarantee[s] the individual right to possess and carry weapons in case of confrontation.”<sup>10</sup> This guarantee is fully binding on the States and limits their ability to devise solutions

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<sup>4</sup> *Duncan v. Becerra*, 970 F.3d 1133, 1147 (9th Cir. 2020), *reh’g en banc granted, opinion vacated*, 988 F.3d 1209 (9th Cir. 2021).

<sup>5</sup> *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021) (*en banc*).

<sup>6</sup> *Duncan v. Bonta*, 142 S. Ct. 2895 (2022).

<sup>7</sup> *Duncan v. Bonta*, 49 F.4th 1228, 1231 (9th Cir. 2022).

<sup>8</sup> *Staples v. United States*, 511 U.S. 600, 610 (1994).

<sup>9</sup> *District of Columbia v. Heller*, 554 U.S. 570, 630 (1980).

<sup>10</sup> *Id.* at 606 (quoting 2 Tucker’s Blackstone 143) (“This may be considered as the true palladium of liberty .... The right to self defence is the first law of nature: in most governments it has been the study of rulers to confine the right within the narrowest limits possible.”).

to social problems.<sup>11</sup> And the guarantee protects “the possession of weapons that are ‘in common use,’”<sup>12</sup> or arms that are “typically possessed by law-abiding citizens for lawful purposes.”<sup>13</sup> These are the decisions this Court is bound to apply. “It’s our duty as judges to interpret the Constitution based on the text and original understanding of the relevant provision—not on public policy considerations, or worse, fear of public opprobrium or criticism from the political branches.”<sup>14</sup>

This case is about a California state law that makes it a crime to keep and bear common firearm magazines typically possessed for lawful purposes. Based on the text, history, and tradition of the Second Amendment, this law is clearly unconstitutional.

The detachable firearm magazine solved a problem with historic firearms: running out of ammunition and having to slowly reload a gun.<sup>15</sup>

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<sup>11</sup> *McDonald v. City of Chicago, Illinois*, 561 U.S. 742, 785 (2010) (emphasis in original).

<sup>12</sup> *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2128 (2022).

<sup>13</sup> *Caetano v. Massachusetts*, 577 U.S. 411, 416 (Alito and Thomas concurring) (quoting *Heller*, 554 U.S. at 625, in turn quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)) (“We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes.”)

<sup>14</sup> *United States v. Rahimi*, 61 F.4th 443, 462 (5th Cir. 2023) (Ho, J., concurring) (citations omitted).

<sup>15</sup> *United States v. Gonzalez*, 792 F. 3d. 534, 536-37 (5th Cir. 2015) (“The problem of limited ammunition capacity has plagued rifles since their invention centuries ago. The earliest rifles fired a single shot, leaving the user vulnerable during reloading. Numerous inventions have sought to eliminate this problem. But

When more ammunition is needed in case of confrontation, a larger the magazine is required. Many gun owners want to have ready more than 10 rounds in their guns. As a result, in the realm of firearms, magazines that hold more than 10 rounds are possibly the most commonly owned thing in America. These larger magazines number over one hundred million. For handguns, the most popular sizes range up to 17 rounds; the most popular size for rifles is 30 rounds. Yet, regardless of the overwhelming popularity of larger magazines, California continues to prohibit any magazine capable of holding more than 10 rounds.<sup>16</sup>

There is no American tradition of limiting ammunition capacity and the 10-round limit has no historical pedigree and it is arbitrary and capricious. It is extreme. Our federal government and most states impose no limits<sup>17</sup> and in the states where limits are

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from repeating rifles to clips, none has proved as effective as the magazine.”) (citing David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALB. L. R. 849 (2015)).

<sup>16</sup> See Cal. Penal Code § 32310 and § 16740. The term “large-capacity magazine” is defined in California Penal Code § 16740 as “any ammunition feeding device with the capacity to accept more than 10 rounds,” but excludes: (a) a “feeding device that has been permanently altered so that it cannot accommodate more than 10 rounds,” (b) a “.22 caliber tube ammunition feeding device,” and (c) a “tubular magazine that is contained in a lever-action firearm.”

<sup>17</sup> Federal law imposes only a sentencing enhancement. United States Sentencing Guideline § 2K2.1(a)(4)(B) increases the base offense level for a violation of 18 U.S.C. § 922(g)(1) (felon in possession) when the offense involves a firearm with an attached magazine larger than 15 rounds. *United States v. Lucas*, No. 22-



imposed, there is no consensus. Delaware landed on a 17-round magazine limit.<sup>18</sup> Illinois and Vermont picked limits of 15 rounds for handguns and 10 rounds for a rifles.<sup>19</sup> Colorado went with a 15-round limit for handguns and rifles, and a 28-inch tube limit for shotguns.<sup>20</sup> New York tried its luck at a 7-round limit; that did not work out.<sup>21</sup> New Jersey started with a 15-round limit and then reduced the limit to 10-rounds.<sup>22</sup> The fact that there are so many different numerical limits demonstrates the arbitrary nature of magazine capacity limits.

In a stealth return to the interest balancing test rejected by *Heller* and *Bruen*, the State ostensibly justifies its magazine limits by deeming the smaller magazines “well-suited” for its citizens.<sup>23</sup> Suitability,

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50064, 2023 U.S. App. LEXIS 14768, at \*7 (9th Cir. June 14, 2023).

<sup>18</sup> *Del. State Sportsmen’s Ass’n, Inc. v. Del. Dep’t of Safety & Homeland Sec.*, Civil Action No. 22-951-RGA, 2023 U.S. Dist. LEXIS 51322, at \*4 (D. Del. Mar. 27, 2023) (“Large-capacity magazine[s] are those ‘capable of accepting, or that can readily be converted to hold, more than 17 rounds of ammunition.’”).

<sup>19</sup> 720 ILCS 5/24-1.10(a); Vt. Stat. Ann. tit. 13, § 4021.

<sup>20</sup> Colo. Rev. Stat. Ann. § 18-12-301.

<sup>21</sup> The 7-round limit was found to be unconstitutional. *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 269 (2d Cir. 2015).

<sup>22</sup> “New Jersey once imposed a fifteen-round limit on magazine capacity. Now it claims a lower limit of ten is essential for public safety. The Second Amendment demands more than back-of-the-envelope math.” *Ass’n of N.J. Rifle & Pistol Clubs Inc. v. AG N.J.*, 974 F.3d 237, 260 (3d Cir. 2020) (Matey, J. dissenting).

<sup>23</sup> At least a dozen times in its briefing before this Court, the State of California insists magazines larger than 10 rounds are

in turn, is based on concocted statistics about what a hypothetical average person needs to defend against an attacker or attackers in an average self-defense situation. Based on this hypothetical statistically average case scenario, the State permits its citizen to have a gun, but the State decides the number of rounds in the gun that it finds suitable.<sup>24</sup>

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unsuitable. Here are some examples. “[T]he Attorney General has demonstrated that LCMs are not necessary or even *suitable* to engage in private self-defense.” Dkt. 145, at 9. “Nor are LCMs particularly *suitable* for self-defense.” Dkt. 142, at 8. “[T]he accessory at issue here (an LCM) is not *well-suited* for lawful self-defense.” *Id.*

<sup>24</sup> And be grateful for 10 rounds. Duncan, 19 F.4th at 1168 n.10, cert. granted, judgment vacated, 142 S. Ct. 2895 (2022), and vacated and remanded, 49 F.4th 1228 (9th Cir. 2022) (Bumatay, J., dissenting) (“California currently allows more than 2.2 rounds in a magazine, and does not prohibit carrying multiple magazines. But don’t be fooled. Under the majority’s Version 2.2 of the Second Amendment, there is no reason a state couldn’t limit its citizens to carrying a (generous) 3 rounds total for self-defense.”).

As this Court explained in its prior decision, “[a]rtificial limits will eventually lead to disarmament. It is an insidious plan to disarm the populace and it depends on for its success a subjective standard of ‘necessary’ lethality. It does not take the imagination of Jules Verne to predict that if all magazines over 10 rounds are somehow eliminated from California, the next mass shooting will be accomplished with guns holding only 10 rounds. To reduce gun violence, the state will close the newly christened 10-round ‘loophole’ and use it as a justification to outlaw magazines holding more than 7 rounds. The legislature will determine that no more than 7 rounds are ‘necessary.’ Then the next mass shooting will be accomplished with guns holding 7 rounds. To reduce the new gun violence, the state will close the 7-round ‘loophole’ and outlaw magazines holding more than 5 rounds determining that no more than 5 rounds are ‘suitable.’ And so it

In so doing, the State denies a citizen the federal constitutional right to use common weapons of their own choosing for self-defense. There have been, and there will be, times where many more than 10 rounds are needed to stop attackers.<sup>25</sup> Yet, under this statute,

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goes, until the only lawful firearm law-abiding responsible citizens will be permitted to possess is a single-shot handgun. Or perhaps, one gun, but no ammunition. Or ammunition issued only to persons deemed trustworthy.” *Duncan*, 366 F. Supp. 3d at 1146 n.33.

<sup>25</sup> Some have wishfully believed “there is no evidence that anyone ever has been unable to defend his or her home and family due to the lack of a large-capacity magazine,” or that more than 10 rounds is ever needed. But there is actually the evidence to support this. In fact, the State’s own expert reports otherwise.

See *Duncan*, 366 F. Supp. 3d at 1134 (“As two masked and armed men broke in, Susan Gonzalez was shot in the chest. She made it back to her bedroom and found her husband’s .22 caliber pistol. Wasting the first rounds on warning shots, she then emptied the single pistol at one attacker. Unfortunately, now out of ammunition, she was shot again by the other armed attacker. She was not able to re-load or use a second gun. Both she and her husband were shot twice. Forty-two bullets in all were fired. The gunman fled from the house—but returned. He put his gun to Susan Gonzalez’s head and demanded the keys to the couple’s truck.

When three armed intruders carrying what look like semi-automatic pistols broke into the home of a single woman at 3:44 a.m., she dialed 911. No answer. Feng Zhu Chen, dressed in pajamas, held a phone in one hand and took up her pistol in the other and began shooting. She fired numerous shots. She had no place to carry an extra magazine and no way to reload because her left hand held the phone with which she was still trying to call 911. After the shooting was over and two of the armed suspects got away and one lay dead, she did get through to the police. The home security camera video is dramatic.

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A mother, Melinda Herman, and her nine-year-old twins were at home when an intruder broke in. She and her twins retreated to an upstairs crawl space and hid. Fortunately, she had a .38 caliber revolver. She would need it. The intruder worked his way upstairs, broke through a locked bedroom door and a locked bathroom door, and opened the crawl space door. The family was cornered with no place to run. He stood staring at her and her two children. The mother shot six times, hitting the intruder five times, when she ran out of ammunition. Though injured, the intruder was not incapacitated. Fortunately, he decided to flee.” (Citations omitted).

More examples have been reported since those words were written. When four suspects in a stolen car with stolen guns and ammunition used stolen house keys to enter the victims’ home in Tallahassee, Florida at 3:37 a.m., the victim fired 25 rounds before the suspects retreated out of the home. *Police: Tallahassee homeowner shot 2 out of 4 home invasion suspects, all 4 charged*, ABC27 WTXL (May 24, 2019) <https://www.wtxl.com/news/local-news/tpd-investigating-home-invasion-robbery> [<https://perma.cc/AQ36-S2ZH>].

In Kentucky, when a home intruder wearing a bulletproof vest shot and killed one daughter asleep in her bed, the father awoke and needed to fire 11 shots from one gun and 8 shots from a second gun, while suffering 3 gunshot wounds himself, to protect his other daughter, his wife, and himself. Krista Johnson and Hayes Gardner, *Jordan Morgan’s death: Suspect Shannon Gilday arrested in Madison County*, Louisville Courier J. (Feb. 28, 2022), <https://www.courier-journal.com/story/news/local/2022/02/28/shannon-gilday-arrested-in-jordan-morgan-richmond-ky-shooting/6941351001/> [<https://perma.cc/Q49M-ZFF9>].

On a Chicago train this year, a citizen was robbed at gunpoint by a suspect who had been previously arrested 32 times. The victim, a bank security guard, shot back 18 times (4 of the rounds jammed) before the suspect retreated off the train. *Arrested 32 times since 2014, man allegedly engaged in a ‘firefight’ with a concealed carry holder on a CTA train*, CWBChicago (Jan. 22, 2023), <https://cwbchicago.com/2023/01/arrested-32-times-since->

the State says “too bad.” It says, if you think you need more than 10 chances to defend yourself against criminal attackers, you must carry more magazines. Or carry more bullets to hand reload and fumble into your small magazine while the attackers take advantage of your pause. On the other hand, you can become a criminal, too. So, the previously law-abiding California citizen who buys and keeps at her bedside a nationally popular Glock 17 (with its standard 17-round magazine) becomes the criminal, because the State dictates that a gun with a 17-round magazine is not well-suited for home defense.<sup>26</sup>

Numbers vary, but some estimate that 81 million Americans own between 415<sup>27</sup> and 456<sup>28</sup> million firearms. Further, millions of Americans across the country own large capacity magazines. “One estimate ... shows that ... civilians possessed about 115 million LCMs out of a total of 230 million magazines in circulation. Put another way, half of all

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2014-man-allegedly-engaged-in-a-firefight-with-a-concealed-carry-holder-on-a-cta-train.html [https://perma.cc/EAV2-8F2E].

<sup>26</sup> Criminals sometimes do not abide by gun regulations and pass around “gang guns” with magazines larger than 10 rounds. See, e.g., *People v. Cyrus*, No. E075271, 2023 Cal. App. Unpub. LEXIS 1301, at \*5 (Mar. 3, 2023) (describing a Glock .40 cal. handgun and 29-round magazine and explaining, “[a] ‘gang gun’ is a gun that is passed around the gang and used by numerous gang members to commit crimes.).

<sup>27</sup> William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* 7 (Geo. McDonough Sch. of Bus. Rsch. Paper No. 4109494, 2022), available at https://ssrn.com/abstract=4109494 [https://perma.cc/83XT-75YG].

<sup>28</sup> See Suppl. Decl. of Louis Klarevas, Dkt. 137-5 (“Suppl. Klarevas Decl.”), at ¶ 15 and n.13.

magazines in America hold more than 10 rounds.”<sup>29</sup> A more recent large-scale survey estimates that Americans today own 542 million rifle and handgun magazines that hold more than 10 rounds.<sup>30</sup> Home defense and target shooting are the two most common reasons for owning these larger magazines.<sup>31</sup> Moreover, the survey reports 48% of gun owners have owned a handgun or rifle magazine that holds more than 10 rounds.<sup>32</sup> But California bans these typically possessed magazines kept and used for self-defense.

Why are larger magazines chosen for self-defense? Crime happens a lot. One recent estimate holds that guns are needed defensively approximately 1,670,000 times a year.<sup>33</sup> Another report, originally commissioned and long cited by the Centers for Disease Control and Prevention estimated that there are between 500,000 and 3,000,000 defensive gun uses

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<sup>29</sup> *Duncan*, 970 F.3d at 1142, *reh’g en banc granted, opinion vacated*, 988 F.3d 1209 (9th Cir. 2021), *and on reh’g en banc sub nom. Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021), *cert. granted, judgment vacated*, 142 S. Ct. 2895 (2022), *and vacated and remanded*, 49 F.4th 1228 (9th Cir. 2022).

<sup>30</sup> English, *supra*, at 25 (“These estimates suggest that Americans have owned some 542 million rifle and handgun magazines that hold over 10 rounds.”). Plaintiff’s expert, Stephen Helsley, a retired California Department of Justice Assistant Director of the Division of Law Enforcement, estimates there are between 500 million and one billion magazines able to hold more than 10 rounds. *See Declaration of Helsley in Support of Plfs.’ Suppl. Br., Exh. 10, Dkt. 132-4, at ¶ 11.*

<sup>31</sup> English, *supra*, at 23.

<sup>32</sup> *Id.* at 22.

<sup>33</sup> *Id.* at 35.

in the United States every year.<sup>34</sup> Woe to the victim who runs out of ammunition before armed attackers do. The police will mark the ground with chalk, count the number of shell casings, and file the report.

All of this was decided earlier.

What remains to be done? California Penal Code § 32310 must be assessed in light of *Bruen*. Now, on remand, the State has to justify this ban under *Bruen*, which makes clear that “[t]o justify its regulation, the government may not simply posit that the regulation promotes an important interest.”<sup>35</sup> After all, “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.”<sup>36</sup> So, the State must demonstrate that its extreme ban is consistent with this Nation’s historical tradition of firearms regulation. As explained below, there is no

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<sup>34</sup> See Inst. of Med. & Nat’l Rsch. Council, *Priorities for Research to Reduce the Threat of Firearm-Related Violence* 15 (The Nat’l Acads. Press ed., 2013), <https://doi.org/10.17226/18319> [<https://perma.cc/K3N4-FEXQ>]. For many years the CDC’s “fast facts” webpage referred to this report. The report itself had two different ranges. The second range estimated from 60,000 to 2,500,000 annual defensive gun uses in America. See Internet Archive Wayback Machine, CDC Firearm Violence Prevention, captured July 26, 2021, <https://web.archive.org/web/20210726233739/https://www.cdc.gov/violenceprevention/firearms/fastfact.html>. The Court notes that the CDC has changed its reporting to delete reference to this study and the Court will not comment on how or why that happened as the CDC website does not reflect why it was deleted.

<sup>35</sup> *Bruen*, 142 S. Ct. at 2126.

<sup>36</sup> *Id.* at 2129 (quoting *Heller*, 554 U.S. at 634).

national tradition of prohibiting or regulating firearms based on firing capacity or ammunition capacity.

## II. Constitutional Standards

The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to *keep and bear* Arms, shall not be infringed.”<sup>37</sup> “[T]he 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.”<sup>38</sup> According to *Heller*, “[t]he Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, but rather announces a purpose. The Amendment could be rephrased, ‘Because a well regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.’”<sup>39</sup> “The first salient feature ... is that it codifies a ‘right of the people.’”<sup>40</sup> *Heller* then examines the substance of the constitutional right, the verbs *to keep* and *to bear* and their object: *arms*. So, what does it mean to keep and bear arms?

The Supreme Court concludes, “[t]he 18th-century meaning [of “arms”] is no different from the meaning today. The 1773 edition of Samuel Johnson’s dictionary defined ‘arms’ as ‘weapons of offence, or armour of defence.’ Timothy Cunningham’s important

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<sup>37</sup> U.S. Const. amend. II (emphasis added).

<sup>38</sup> *Caetano*, 577 U.S. 411 (quoting *Heller*, 554 U.S. at 581).

<sup>39</sup> *Heller*, 554 U.S. at 577 (citations omitted).

<sup>40</sup> *Heller*, 554 U.S. at 579.



1771 legal dictionary defined ‘arms’ as ‘any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.’”<sup>41</sup> In the past, the term “arms” included weapons that were not specifically designed for military use and were not employed in a military capacity. “Although one founding-era thesaurus limited ‘arms’ ... to ‘instruments of offence generally made use of in war,’ even that source stated that all firearms constituted ‘arms,’” according to *Heller*.<sup>42</sup> And it is now clear that “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.”<sup>43</sup> *Heller* later describes the types and kinds of arms that are guaranteed Second Amendment protection. But first, *Heller* describes the meanings of “to keep” and “to bear” arms.

“We turn to the phrases ‘keep arms’ and ‘bear arms.’ Johnson defined ‘keep’ as, most relevantly, ‘to retain; not to lose,’ and ‘to have in custody.’ Webster defined it as ‘to hold; to retain in one’s power or possession’.... Thus the most natural reading of ‘keep Arms’ in the Second Amendment is to ‘have weapons.’”<sup>44</sup> “Keep arms,” according to *Heller*, “was simply a common way of referring to possessing arms, for militiamen and everyone else.”<sup>45</sup> “To bear” meant to carry for the purpose of being armed and ready in

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<sup>41</sup> *Heller*, 554 U.S. at 581 (citations omitted).

<sup>42</sup> *Heller*, 554 U.S. at 581 (citations omitted).

<sup>43</sup> *Heller*, 554 U.S. at 582.

<sup>44</sup> *Heller*, 554 U.S. at 582 (citations omitted).

<sup>45</sup> *Heller*, 554 U.S. at 583.

case of conflict with another person. *Heller* even cited with approval the meaning of the phrase “carries a firearm” proposed by Justice Ginsburg in *Muscarello v. United States*: “as the Constitution’s Second Amendment indicates: ‘wear, bear, or carry upon the person or in the clothing or in a pocket, for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person.’”<sup>46</sup> Providing our modern understanding of the Second Amendment’s text, *Heller* concludes, “[p]utting all of these textual elements together, we find that they *guarantee the individual right to possess and carry weapons in case of confrontation*.”<sup>47</sup>

Very important in the past, still important in the future, *Heller* describes the concept of America’s militia. “In *Miller*, we explained that ‘the Militia comprised all males physically capable of acting in concert for the common defense.’”<sup>48</sup> And *Heller* explains why the militia was important. Two of the three reasons remain important today. “There are many reasons why the militia was thought to be ‘necessary to the security of a free State.’ First, of

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<sup>46</sup> *Heller*, 554 U.S. at 584 (quoting *Muscarello*, 524 U.S. 125, 143 (1998) (Ginsburg, J. dissenting)).

<sup>47</sup> *Heller*, 554 U.S. at 592 (emphasis added). “As the most important early American edition of Blackstone’s Commentaries (by the law professor and former Antifederalist St. George Tucker) made clear in the notes to the description of the arms right, Americans understood the ‘right of self-preservation’ as permitting a citizen to ‘repel force by force’ when ‘the intervention of society in his behalf, may be too late to prevent an injury.’” *Id.* at 595 (quoting 1 Blackstone’s Commentaries, 145-46, n.42 (1803)).

<sup>48</sup> *Heller*, 554 U.S. at 595.

course, it is useful in repelling invasions and suppressing insurrections .... Third, when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny.”<sup>49</sup> Once one understands the history of tyrants resorting to taking away people’s arms to suppress political opposition, *Heller* explains, one can see that the militia clause fits perfectly with the operative clause. *Heller* teaches,

We reach the question, then: Does the preface fit with an operative clause that creates an individual right to keep and bear arms? It fits perfectly, once one knows the history that the founding generation knew and that we have described above. That history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people’s arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights.<sup>50</sup>

While the protection of a citizen militia was important, most people regarded the Second Amendment as even more important for its protection of self-defense and hunting. “The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; *most*

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<sup>49</sup> *Heller*, 554 U.S. at 598 (citations omitted).

<sup>50</sup> *Heller*, 554 U.S. at 598.

*undoubtedly thought it even more important for self-defense and hunting.*<sup>51</sup> After all, “[t]he right to self defence is the first law of nature: in most governments it has been the study of rulers to confine the right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.”<sup>52</sup> As one commentator wrote at the time the Fourteenth Amendment was adopted in 1868, “[t]he purpose of the Second Amendment is to secure a well-armed militia .... But a militia would be useless unless the citizens were enabled to exercise themselves in the use of warlike weapons.”<sup>53</sup> In this way, a general public knowledge and skill with weapons of war is beneficial to the nation at large and is protected by the Second Amendment. “No doubt, a citizen who keeps a gun or pistol under judicious precautions, practices in safe places the use of it, and in due time teaches his sons to do the same, exercises his individual right.”<sup>54</sup> And “[t]he right to bear arms has always been the distinctive privilege of freemen.”<sup>55</sup> In the end, the

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<sup>51</sup> *Heller*, 554 U.S. at 599 (emphasis added).

<sup>52</sup> *Heller*, 554 U.S. at 606 (citation omitted).

<sup>53</sup> *Heller*, 554 U.S. at 618 (quoting J. Pomeroy, *An Introduction to the Constitutional Law of the United States* §239, pp. 152-153 (1868)).

<sup>54</sup> *Heller*, 554 U.S. at 619 (quoting B. Abbott, *Judge and Jury: A Popular Explanation of the Leading Topics in the Law of the Land* 333 (1880)).

<sup>55</sup> *Heller*, 554 U.S. at 619 (quoting J. Ordronaux, *Constitutional Legislation in the United States* 241-242 (1891)).

Supreme Court deems the Second Amendment as valuable for both preserving the militia and for self-defense—which is the heart of the right. *McDonald* put it this way:

In *Heller*, we recognized that the codification of this right was prompted by fear that the Federal Government would disarm and thus disable the militias, but we rejected the suggestion that the right was valued only as a means of preserving the militias. On the contrary, we stressed that the right was also valued because the possession of firearms was thought to be essential for self-defense. As we put it, self-defense was “the central component of the right itself.”<sup>56</sup>

*Heller* specifically considered “whether a District of Columbia prohibition on the *possession of usable* handguns in the home violates the Second Amendment to the Constitution.”<sup>57</sup> And “District of Columbia law also require[d] residents to keep their lawfully owned firearms, such as registered long guns, ‘unloaded and disassembled or bound by a trigger lock or similar device’ unless they are located in a place of business or are being used for lawful recreational activities.”<sup>58</sup> In the end, the Supreme Court struck down both parts of the statute. “In sum, we hold that the District’s ban on handgun possession in the home violates the Second Amendment, as does its

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<sup>56</sup> *McDonald*, 561 U.S. at 926-27.

<sup>57</sup> *Heller*, 554 U.S. at 573 (emphasis added).

<sup>58</sup> *Heller*, 554 U.S. at 575. The Court declared both aspects of the statute to be in violation of the Second Amendment.

prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.”<sup>59</sup> While reaching its conclusion, the Supreme Court considered what types of firearms were, and were not, protected by the Constitution. Highlighting the central tenant of the Second Amendment, the Supreme Court wrote,

We may as well consider at this point (for we will have to consider eventually) what types of weapons *Miller* permits. Read in isolation, *Miller*’s phrase “part of ordinary military equipment” could mean that only those weapons useful in warfare are protected. That would be a startling reading of the opinion, since it would mean that the National Firearms Act’s restrictions on machineguns (not challenged in *Miller*) might be unconstitutional, machineguns being useful in warfare in 1939. We think that *Miller*’s “ordinary military equipment” language must be read in tandem with what comes after: “Ordinarily when called for militia service able-bodied men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.” The traditional militia was formed from a pool of men bringing arms “in common use at the time” for lawful purposes like self-defense. “In the colonial and revolutionary war era, small-arms weapons<sup>60</sup> used by militiamen and weapons used in defense of

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<sup>59</sup> *Heller*, 554 U.S. at 635.

<sup>60</sup> Not cannons or mortars.

person and home were one and the same.” ... We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes.<sup>61</sup>

Since it was “the conception of the militia at the time of the Second Amendment’s ratification [that] the body of all citizens capable of military service, [citizens] would bring the sorts of lawful weapons that they possessed at home to militia duty,”<sup>62</sup> the right to keep and carry arms means “the sorts of weapons protected were those ‘in common use at the time.’”<sup>63</sup>

#### **A. Magazines Are Protected “Arms”**

The State argues that larger capacity magazines are not “arms.” First, the State argues that magazines are not essential to the use of firearms and consequently would have been thought of as accessories. But magazines are “integral components to vast categories of guns.” *Fyock v. City of Sunnyvale*, 25 F.Supp.3d 1267, 1276 (N.D. Cal. 2014), *aff’d sub nom. Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015). “Most pistols are manufactured with magazines holding ten to seventeen rounds, and many popular rifles are manufactured with magazines holding twenty or thirty rounds.” *Kolbe v. Hogan*, 849 F.3d 114, 129 (4th Cir. 2017) (*en banc*). While the Second

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<sup>61</sup> *Heller*, 554 U.S. at 624-25 (citations omitted). If it existed at the time and were in common use, as it is today, would a militia member bring a firearm with a magazine that holds more than 10 rounds? The answer is, yes, of course.

<sup>62</sup> *Heller*, 554 U.S. at 627.

<sup>63</sup> *Heller*, 554 U.S. at 627 citation omitted).

Amendment does not explicitly mention ammunition or magazines supplying ammunition, “without bullets, the right to bear arms would be meaningless.”<sup>64</sup> This is because the right to keep firearms for protection implies a corresponding right to obtain the bullets necessary to use them. “The possession of arms also implied the possession of ammunition.”<sup>65</sup>

By extension, “arms” includes the magazine component necessary to supply the bullet into the chamber of the gun. “[O]ur case law supports the conclusion that there must also be some corollary, albeit not unfettered, right to possess the magazines necessary to render those firearms operable.”<sup>66</sup> “It is hard to imagine something more closely correlated to the right to use a firearm in self-defense than the ability to effectively load ammunition into the firearm.”<sup>67</sup>

Put more broadly, “the Second Amendment protects ancillary rights necessary to the realization of the core right to possess a firearm for self-defense.”<sup>68</sup> Consequently, whether thought of as a firearm able to fire a certain number of rounds because of its inserted magazine, or as a separate ammunition feeding component, magazines are usable “arms” within the meaning of the Second Amendment. As the Third

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<sup>64</sup> *Jackson v. City & County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014)

<sup>65</sup> *United States v. Miller*, 307 U.S. 174, 180 (1939).

<sup>66</sup> *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015)

<sup>67</sup> *Barnett v. Raoul*, 2023 U.S. Dist. LEXIS 74756, \*26 (S.D. Ill. Apr. 28, 2023).

<sup>68</sup> *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017).



Circuit Court of Appeals found, “[w]e therefore must first determine whether the regulated item is an arm under the Second Amendment. The law challenged here regulates magazines, and so the question is whether a magazine is an arm under the Second Amendment. The answer is yes.”<sup>69</sup>

Proffering two subsidiary arguments, the State says: (1) a magazine of some size may be necessary, but a magazine larger than 10 rounds is not necessary to operate a firearm and thus a larger magazine is not a protected “arm”; and (2) statistically people rarely fire more than 10 rounds in self-defense so it can be said that a magazine larger than 10 rounds is rarely *used* for self-defense, and if a larger magazine is not commonly *used* for self-defense then it is not a protected “arm.”

For the first argument, the State claims that if a standard 17-round magazine is detached from a standard Glock 17 pistol, the 17-round magazine is no longer a weapon (by itself) and because the Glock 17 pistol could still function with a substitute 10-round magazine, then the 17-round standard Glock magazine does not come within the definition of “arms” that the Second Amendment protects.<sup>70</sup> In

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<sup>69</sup> *Ass’n of N.J. Rifle & Pistol Clubs v. Att’y Gen. of N.J.*, 910 F/3d 106, 116 (3d Cir. 2018).

<sup>70</sup> Of course, the argument admits, *sub silentio*, that some magazines are necessary to operate a gun. The State says: “To be sure, some type of magazine is essential to the use of many handguns. But there is no evidence in this record ... that a magazine capable of firing more than 10 rounds without reloading is necessary to the function of any modern firearm.” Def’s Suppl. Br., Dkt. 118 at n.10.

contrast, according to the State, a magazine holding 10 or less may qualify as a protected “arm,” but a magazine able to hold 11 or more is not a protected “arm.” What the State seems to be really saying is that a magazine may be a protected arm, but only the State has the right to pick the number of rounds a citizen may have in his gun.

This Court disagrees. The Supreme Court has not described protected arms in subdivided categories. When *Heller* found handguns were protected, it did not distinguish between semiautomatic pistols and revolvers. *Heller* did not classify protected handguns according to the number of rounds one could hold or the caliber of the ammunition that could be fired. It did not suggest that typically possessed arms could be subcategorized and subjected to judicial ad hoc constitutional determinations. Whether thought of holistically as a “handgun” irrespective of magazine size as *Heller* does, or as an entirely separate attachment, both firearms and their magazines (of all typical sizes) are “arms” covered by the text of the Second Amendment. “This is not even a close call.”<sup>71</sup>

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<sup>71</sup> *Barnett v. Raoul*, No. 3:23-cv-00209-SPM, 2023 U.S. Dist. LEXIS 74756, at \*26-27 (S.D. Ill. Apr. 28, 2023); *Hanson v. District of Columbia*, Civil Action No. 22-2256 (RC), 2023 U.S. Dist. LEXIS 68782, at \*17 (D.D.C. Apr. 20, 2023) (“At least three Courts of Appeals have concluded that LCMs are “arms” within the meaning of the Second Amendment.”); *Del. State Sportsmen’s Ass’n, Inc. v. Del. Dep’t of Safety & Homeland Sec.*, Civil Action No. 22-951-RGA, 2023 U.S. Dist. LEXIS 51322, at \*19 (D. Del. Mar. 27, 2023); *contra*, *Ocean State Tactical, LLC v. Rhode Island*, No. 22-cv-246 JJM-PAS, 2022 U.S. Dist. LEXIS 227097, at \*33-34 (D.R.I. Dec. 14, 2022); *Or. Firearms Fed’n, Inc. v. Brown*, No. 2:22-cv-01815-IM, 2022 U.S. Dist. LEXIS 219391, at \*23-25 (D. Or. Dec. 6, 2022).

As this Court has said before, “[n]either magazines, nor rounds of ammunition, nor triggers, nor barrels are specifically mentioned in the Second Amendment ... But without a right to keep and bear triggers, or barrels, or ammunition and the magazines that hold ammunition, the Second Amendment right would be meaningless.”<sup>72</sup> Using reasoning that is still persuasive, the Ninth Circuit agreed, explaining “[p]ut simply, a regulation cannot permissibly ban a protected firearm’s components critical to its operation.” More recently, counsel for California’s Governor in a related fee-shifting case agreed while pointing out that “[t]he large-capacity magazines ban appears in the Penal Code’s title on ‘Firearms,’” and “a restriction on the ammunition that may be used in a firearm is a restriction on firearms.”<sup>73</sup> Leaving no doubt, even the (vacated) Ninth Circuit’s *en banc* decision assumed that § 32310 implicates the Second Amendment.<sup>74</sup>

Relatedly, the State argues that it is only restricting a firearm component or an accessory.<sup>75</sup>

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<sup>72</sup> *Duncan*, 366 F. Supp. 3d at 1142-43 (citing *Fyock v. City of Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015); *Teixeira v. Cty. Of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (en banc); *Ass’n of N.J. Rifle & Pistol Clubs v. A.G. N.J.*, 910 F.3d 106, 116 (3d Cir. 2018).

<sup>73</sup> *Miller v. Bonta*, 22cv1446-BEN (JLB), Intervenor-Def’s Suppl. Br., Dkt. 35, at 14.

<sup>74</sup> *Duncan*, 19 F.4th at 1103, *cert. granted, judgment vacated*, 213 L. Ed. 2d 1109, 142 S. Ct. 2895 (2022).

<sup>75</sup> Instead of isolating the magazine from the gun, the better understanding is to consider the magazine as part of the gun. There is a federal law analogue leading to the conclusion that a magazine is correctly regarded as a component part of a gun. The

“LCMs are not weapons in themselves,” says the State, “nor are they necessary to operate any firearm for self-defense.” California residents who purchased new pistols in the last decade are probably surprised to hear that magazines are not necessary to operate a pistol. After all, another state law known as the Unsafe Handgun Act requires new semiautomatic pistols to have an integrated magazine-disconnect mechanism in order to be sold to the public.<sup>76</sup>

A magazine-disconnect mechanism prevents a pistol from firing at all, even if one round is left loaded in the chamber, if the magazine is not inserted into the pistol. The state-mandated magazine-disconnect mechanism thus prevents the operation of the firearm without its magazine.<sup>77</sup> While rifles are not required

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Arms Control Export Act criminalizes the unlicensed export of firearms and their components. 22 U.S.C. § 2778(b). Firearm magazines come within the Act because “a magazine is ‘useful’ only when used in conjunction with that end-item [a rifle]: its sole purpose is to load cartridges into the breech so that they can be fired ....”<sup>75</sup> In this view, the magazine is a necessary component part of a gun which, in turn, would obviously fall under the text of the Second Amendment protection of “arms.”

<sup>76</sup> “California’s Unsafe Handgun Act (the ‘UHA’) seeks to prevent accidental discharges by requiring handguns to have particular safety features ... [t]he UHA requires certain handguns to have a magazine disconnect mechanism (‘MDM’), which prevents a handgun from being fired if the magazine is not fully inserted.” *Boland v. Bonta*, No. SACV2201421CJCADSX, 2023 WL 2588565, at \*1 (C.D. Cal. Mar. 20, 2023) (citing Cal. Penal Code §§ 16900, 31910(b)(5)).

<sup>77</sup> Semiautomatic pistols elsewhere in the nation usually do not have a magazine-disconnect mechanism so a pistol can still fire one chambered round without its magazine. Of course, one need not go too far out on a limb to say that a semi-automatic pistol

to have a magazine-disconnect mechanism, the State must concede that at least for semiautomatic handguns the State deems “not unsafe,” firearms for self-defense will not function without a magazine.<sup>78</sup> Modern magazines, submits the State, are more like founding-era cartridge boxes or “ancillary equipment associated with soldiering” that were not strictly necessary to fire a gun. Today, however, as pointed out above, some semiautomatic firearms will not function at all without a magazine, while others can fire no more than one round. As such, a magazine is an essential component without which a semiautomatic firearm is useless for self-defense. Therefore, a magazine falls within the meaning of “arms.”<sup>79</sup>

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that can fire only 1-round is not the sort of self-defense weapon most people would choose.

<sup>78</sup> To be precise, revolvers are handguns that do not require a magazine-disconnect mechanism, but that is because a revolver does not have a detachable magazine.

<sup>79</sup> See e.g., *Hanson v. D.C.*, No. CV 22-2256 (RC), 2023 WL 3019777, at \*7 (D.D.C. Apr. 20, 2023) (“The District’s logic, by contrast, would allow it to ban *all* magazines (not just LCMs)—a result even the District does not endorse here—because a firearm technically does not require *any* magazine to operate; one could simply fire the single bullet in the firearm’s chamber. The Court will therefore follow the persuasive reasoning of *ANJRPC*, *Kolbe*, and *Duncan* in concluding that LCMs are “arms” within the meaning of the Second Amendment.”); see also *Barnett v. Raoul*, No. 3:23-CV-00141-SPM, 2023 WL 3160285, at \*8 (S.D. Ill. Apr. 28, 2023) (“Defendants’ argument is not persuasive. The Seventh Circuit has recognized the Second Amendment as extending to “corollaries to the meaningful exercise of the core right to possess firearms for self-defense.” It is hard to imagine something more closely correlated to the right to use a firearm in self-defense than the ability to effectively load ammunition into the firearm.”).

## B. LCMs Are *Used* for Self-Defense

Notwithstanding that the Second Amendment protects the right to “keep and bear,” the State’s more troubling argument is that magazines holding more than 10 rounds are not being *used* for self-defense. By “used,” the State means actually fired. The State asserts, “there is no evidence that LCMs are frequently used in self-defense.” Continuing, the State asserts, “[t]o the contrary, the record reflects that it is exceedingly rare for an individual, in a self-defense situation, to fire more than ten rounds.” But without conceding the accuracy of the State’s position, infrequent use or “exceedingly rare” is not the same as *never*. To support the State’s argument, it relies on a statistician’s conclusion that an average of only 2.2 rounds are fired in an average self-defense situation. Because more than 10 rounds in the average situation are not being fired for self-defense, the argument goes, magazines holding more than 10 rounds are not *used* or needed for self-defense. And because the Second Amendment protects (according to the State) only those arms commonly “used” for self-defense, the State says larger capacity magazines are not commonly “used,” and therefore they are not protected arms.<sup>80</sup>

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<sup>80</sup> A similar argument was made by the State in *N.A. for Gun Rights v. Lamont*, Case No. 22-1118 (JBA), 2023 U.S. Dist. LEXIS 134880, \*40 (D. Conn. Aug. 3, 2023) (“Defendants maintain that after *Bruen*, Plaintiffs must show not only that the weapons and accoutrements are commonly owned, but they are commonly possessed and used *for self-defense* base on *Bruen*’s repeated use of the phrase ‘common use’ for self-defense.”) (emphasis added), and in *Oregon Firearms Federation v. Kotek*, Case No. 22cv1815-IM, \*67 (D. Ore. July 14, 2023) (“Defendants ... argue for an

It is a remarkable reading of *Heller*, *McDonald*, *Caetano*, and *Bruen* to say that if a gun is not fired more than 10 times in self-defense then the gun's larger magazine is not being "used" in self-defense, and if not "used" in self-defense, then not protected by the Second Amendment. Yet, this is the State's theme.

In this Court's view, it is a crabbed reading of the Supreme Court's Second Amendment decisions and not relevant to the text, history and tradition test. The Supreme Court uses several descriptive phrases to describe the kinds of firearms that are protected by the Constitution. But common to all is the notion that to be protected, an arm needs only to be regarded as *typically* possessed or carried, or *commonly* kept, by citizens to be ready for use, if needed. The Supreme Court has not said that the actual firing of a gun is any part of the test. Indeed, the Second Amendment does not say that the right of the People to keep only such firearms as they actually shoot, shall not be infringed.

*McDonald* begins, "[t]wo years ago, in *District of Columbia v. Heller*, we held that the Second Amendment protects the right to keep and bear arms *for the purpose of self-defense*, and we struck down a District of Columbia law that banned the possession of handguns in the home."<sup>81</sup> What mattered is the purpose for which handguns were possessed, not necessarily the actual use.

The State puts its weight on the words "use," "uses," and "used." One problem with the State's view

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interpretation of 'use' that includes some objective metric of an LCM's actual use in self-defense.").

<sup>81</sup> 561 U.S. at 749-50 (citation omitted) (emphasis added).

is that it treats the Supreme Court’s opinion language like the language of a statute. That is a mistake. “Because ‘opinions, unlike statutes, are not usually written with the knowledge or expectation that each and every word may be the subject of searching analysis,’ we do not follow statutory canons of construction with their focus on ‘textual precision’ when interpreting judicial opinions.”<sup>82</sup>

Under the State’s reading, a homeowner who displays a handgun with a 17-round magazine to scare away home invaders, has not “used” the 17-round magazine. Under the State’s reading, even a citizen who fires his semiautomatic firearm 10 times or less to defend himself, has not *used* his 17-round magazine in self-defense. Admittedly, one can find different meanings of the term “use.” For example, in the context of a criminal statute, the Supreme Court acknowledged “use” offers different possible meanings. “[T]he word ‘use’ poses some interpretational difficulties because of the different meanings attributable to it. Consider the paradoxical statement: ‘I *use* a gun to protect my house, but I’ve never had to *use* it.’”<sup>83</sup> Consequently, context is important, whether interpreting a statute or understanding an opinion.<sup>84</sup>

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<sup>82</sup> *Upper Skagit Indian Tribe v. Sauk-Suiattle Indian Tribe*, 66 F.4th 766, 770 (9th Cir. 2023) (citations omitted).

<sup>83</sup> *Bailey v. United States*, 516 U.S. 137, 143 (1996) (emphasis in original).

<sup>84</sup> *Muscarello v. United States*, 524 U.S. 125, 144 (1998) (“Noting the paradoxical statement, ‘I *use* a gun to protect my house, but I’ve never had to *use* it,’ the Court in *Bailey* emphasized the importance of context.”)



So, considering the words “use” or “used” in context, the State’s notion is far removed from the meaning indicated by the Supreme Court. *Heller* considered merely the simple possession of *usable* handguns in the home. Focusing on the right to possess a usable arm, *Heller* said, “[w]e consider whether a District of Columbia prohibition on the possession of *usable* handguns in the home violates the Second Amendment to the Constitution.”<sup>85</sup> Actual firing of a handgun in the District was irrelevant. Statistical surveys of shots fired in self-defense were not determinative—they were not even mentioned. *Heller* used a simpler test. Constitutional protection is afforded to weapons “typically possessed by law-abiding citizens for lawful purposes,” focusing on typicality and possession rather than frequency of firing.<sup>86</sup>

*McDonald* says “the right was also valued because the possession of firearms was thought to be essential for self-defense.” *McDonald*’s focus is on possession.<sup>87</sup> And *McDonald* says the right applies “to handguns because they are ‘the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family,’” focusing on a national subjective preference for handguns.<sup>88</sup> There was no effort by the Supreme Court to condition the constitutional right

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<sup>85</sup> 554 U.S. at 573 (emphasis added).

<sup>86</sup> 554 U.S. at 625; *see also* at 720 (Breyer, J., dissenting) (describing the majority test in the same terms).

<sup>87</sup> 561 U.S. at 787.

<sup>88</sup> *Id.* at 767 (citations omitted).

upon some objective metric of actual handgun firing in self-defense.

*Bruen* says, “[t]he Second Amendment guaranteed to ‘all Americans’ the right to bear commonly used arms in public.” *Bruen* appears to focus on commonality.<sup>89</sup> *Bruen* injects some ambiguity with the following phraseology, “the Second Amendment protects the possession and use of weapons that are ‘in common use at the time.’”<sup>90</sup> *Bruen* noted that in that case, no party disputed that handguns are weapons “in common use” today for self-defense, but did not say what it meant by “use.”<sup>91</sup> So, what does the Supreme Court mean by its phrase “in common use?” Is the focus placed on a weapon’s commonality in society or the frequency of a weapon’s firing? *Bruen* answers the question elsewhere in its opinion. Commonality is the focus. Consider the following sentence from *Bruen*: “Drawing from this historical tradition, we explained there that the Second Amendment protects only the carrying of weapons that are those ‘in common use at the time,’ *as opposed to those that ‘are highly unusual in society at large.’*”<sup>92</sup> Or consider this sentence from *Bruen*’s footnote 13: “Even assuming that pocket pistols were, as East Jersey in 1686 deemed them, ‘unusual or unlawful,’ it appears that they were commonly used at least by the founding.”<sup>93</sup> *Bruen* contrasts common

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<sup>89</sup> 142 S. Ct. at 2156 (citing *Heller*, 554 U.S. at 581).

<sup>90</sup> *Id.* at 2128 (citing *Heller*, 554 U.S. at 627).

<sup>91</sup> *Id.* at 2134.

<sup>92</sup> *Id.* at 2143 (emphasis added).

<sup>93</sup> *Id.* at n.13 (citation omitted).

pistols against unusual pistols. The focus remains on commonality, not the frequency of actual discharge in self-defense scenarios. Put simply, Second Amendment protection envelops weapons commonly or typically subjectively chosen by citizens to keep in case of confrontation.

From *Bruen*, it is evident that the Supreme Court's focus is on whether a weapon is common (or unusual) amongst the citizenry. This, in turn, requires some sort of generalized numerical estimation of citizen ownership or gauge of present popularity. In *Caetano*, the concurring Justices explained that, "[t]he more relevant statistic is that 'hundreds of thousands of Tasers and stun guns have been sold to private citizens,' who it appears may lawfully possess them in 45 States."<sup>94</sup> That Ms. Caetano did not actually energize and fire her stun gun made no difference to the Supreme Court. In her case, she did no more than display the weapon. "She stood her ground [and] displayed the stun gun."<sup>95</sup> Absent from the opinion is any discussion about the average number of times a stun gun is energized in an average self-defense scenario. Absent from the opinion is any objective metric counting the frequency with which stun guns have been fired. The measure of constitutional protection was that the stun gun was "used" in the sense that stun guns are widely *owned* to satisfy a

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<sup>94</sup> 577 U.S. at 420 (citations omitted) ("While less popular than handguns, stun guns are widely owned and accepted as a legitimate means of self-defense across the country. Massachusetts' categorical ban of such weapons therefore violates the Second Amendment.").

<sup>95</sup> *Id.* at 413, (Alito, J., concurring).

subjective need for protection and that the number in existence was in the hundreds of thousands.

Applying the same measure to magazines, because it is the case that magazines holding more than 10 rounds are owned and possessed by millions of Americans to meet a subjective need for self-defense, this fact alone entitles such magazines to Second Amendment protection. When a magazine is commonly owned by Americans with the subjective intention of using it for self-defense, it is enough to say that it is in common use (or typically used) for self-defense, as the Supreme Court employs the phrase in its opinions.<sup>96</sup>

Probably the vast majority of Americans that own magazines of 11 rounds or more keep them and use them for self-defense in the same way that a driver puts on and uses a seat belt in the case of a collision. Though collisions rarely happen, the seat belt is used for protection and to be ready for the unexpected collision. A reserve canopy is being used on a parachute jump, although it is not deployed, in case the main parachute fails. A cell phone in one's pocket is being used when waiting for a telephone call or in the event one needs to make a call. In the same way, a firearm kept on one's nightstand is used for self-defense even when the night is quiet. It is kept and used in case of confrontation. A person may happily live a lifetime without needing to fire their gun in self-

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<sup>96</sup> At the margin, there may be a weapon that is commonly owned that is not commonly used for self-defense. One could imagine perhaps a reproduction of an 18th century flintlock or a World War II German Luger being commonly owned, but used only as curios or museum pieces.

defense. But that is not to say that such a person does not *use* their gun for self-defense when he or she keeps it under the bed with a hope and a prayer that it never has to be fired.

In 2016, an 81-year old Uniontown, Pennsylvania man and his elderly sister were at home when at night an intruder broke in. In the ensuing struggle, the older man fired one shot from his gun at his attacker. The victim said he had never before fired his gun and that it had been sitting on his nightstand for thirty years.<sup>97</sup> California would say that the victim did not *use* his gun for self-defense on any day of those preceding thirty years. And if his gun had a magazine with eleven or more rounds in it (the news report does not say), California would argue that the victim never did *use* his large capacity magazine in self-defense. This Court would say that the victim *used* his gun every night of the thirty years he subjectively kept it on his bedroom nightstand in case of confrontation, including the night of the burglary. And if his gun had been equipped with a large capacity magazine, it could correctly be said that he also *used* the large capacity magazine for self-defense every night of the thirty years he subjectively kept it on his bedroom nightstand in case of confrontation.

### C. The Invention of the 2.2 Shot Average

Without agreeing that when the Supreme Court discusses firearms “in common use” it means

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<sup>97</sup> *81-year-old fatally shoots home invasion suspect, says gun had never been used in 30 years*, WXPI-TV 11 News (Nov. 4, 2016), <https://www.wpxi.com/news/81-year-old-fatally-shoots-home-invasion-suspect-says-gun-had-never-been-used-in-30-years/464100332/> [https://perma.cc/FRP6-MA9P].

commonly fired, even if it did, the State's statistic is suspect. California relies entirely on the opinion of its statistician for the hypothesis that defenders fire an average of only 2.2 shots in cases of confrontation.

Where does the 2.2 shot average originate? There is no national or state government data report on shots fired in self-defense events. There is no public government database. One would expect to see investigatory police reports as the most likely source to accurately capture data on shots fired or number of shell casings found, although not every use of a gun in self-defense is reported to the police. As between the two sides, while in the better position to collect and produce such reports, the State's Attorney General has not provided a single police report to the Court or to his own expert.<sup>98</sup>

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<sup>98</sup> Allen asked the State for police reports, but she did not receive them. See Transcript, Preliminary Injunction Hearing, 10/19/20, 153:1-16:

“THE COURT: Let me ask you a question. Did you ever ask, for example, [Deputy Attorney General] Mr. Echeverria if he would get you the law enforcement reports of home defense shootings that may have occurred where the homeowner or the person at home fired shots at someone that was intruding?

THE WITNESS: Yes. So I did ask both from the State of California as well as from a number of other states that I have worked for, I have asked for data on incidents of exactly that, or whether there was a broader set of data that they had that I could then review.

THE COURT: And did you get that from the State of California?

THE WITNESS: I did not. It was my understanding that the State of California did not have that data or did not have that in

Without investigatory reports, the State's expert turns to anecdotal statements, often from bystanders, reported in news media, and selectively studied. She indicates she conducted two studies.<sup>99</sup> Based on these two studies of newspaper stories, she opines that it is statistically rare for a person to fire more than 10 rounds in self-defense and that only 2.2 shots are fired on average.<sup>100</sup> Unfortunately, her opinion lacks classic indicia of reliability and her two studies cannot be reproduced and are not peer-reviewed. "Reliability and validity are two aspects of accuracy in measurement. In statistics, reliability refers to reproducibility of results."<sup>101</sup> Her studies cannot be tested because she has not disclosed her data. Her studies have not been replicated. In fact, the formula used to select 200 news stories for the Factiva study is incomprehensible.

For one study, Allen says she conducted a search of stories published in the NRA Institute for Legislative Action magazine (known as the Armed Citizen Database) between 2011 and 2017. There is no

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a way that it could be reviewed. That that is not—that is not a type of data that is collected."

<sup>99</sup> Lucy Allen Supp. Decl. Dkt 118-1.

<sup>100</sup> Allen Supp. Decl. Dkt 118-1, at ¶10. Of course, though one may assume that "LCMs" are only used .3% of the time, for the unfortunate homeowner who makes up part of the .3%, it is 100% of his time.

<sup>101</sup> Federal Judicial Center, *Reference Manual on Scientific Evidence* (3d ed.), 211 Reference Guide on Statistics, 2011 WL 7724256, 10 and n.37 ("*Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 n.9 (1993), for example, distinguishes "evidentiary reliability" from reliability in the technical sense of giving consistent results. We use "reliability" to denote the latter.).

explanation for the choice to use 2011 for the beginning. After all, the collection of news stories goes back to 1958. Elsewhere in her declaration she studies mass shooting events but for that chooses a much longer time period reaching back to 1982. Likewise, there is no explanation for not updating the study after 2017.

However it is that they were chosen, some 736 incidents in the Armed Citizen Database were said to be analyzed and the number of shots tabulated, but details are completely absent. Allen does not list the 736 stories. Nor does she reveal how she assigned the number of shots fired in self-defense when the news accounts use phrases like “the intruder was shot” but no number of shots was reported, or “there was an exchange of gunfire,” or “multiple rounds were fired.” She includes in her 2.2 average of defensive shots fired, incidents where no shots were fired.<sup>102</sup> One would expect the impact of Allen’s choice to include a zero for a no-shot event to be significant because (even using her number) 32.1% of the events in the home in California were no-shot events.<sup>103</sup> She also reported no incidents in California where more than 10 shots were fired in self-defense among the stories she reviewed. It seems obvious that in a state where magazines holding more than 10 rounds have been illegal to buy or sell for twenty years, law-abiding citizens are using the smaller magazines that the law requires for self-defense. Absent from the expert opinion is a statistic reporting the average number of shots fired by

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<sup>102</sup> Allen Supp. Decl. Dkt 118-1 n.10 (“[T]he average includes instances when no shots are fired.”).

<sup>103</sup> Allen Supp. Decl. Dkt 118-1 at ¶ 12 (table).



criminals. Also absent is the number of intruders or whether the homeowner was able to escape unharmed.

In another example, it is not evident from the study how she counted the number of shots fired for one story in the collection where a homeowner “fired back” and three intruders suffered eight gunshot wounds. Considering most victims miss some of their shots, one would expect in defending against three attackers that more than eight shots were fired in self-defense. Instead, all that the Court is told is:

When the exact number of shots fired was not specified, we used the average for the most relevant incidents with [a] known number of shots. For example, if the story stated that “shots were fired” this would indicate that at least two shots were fired and thus we used the average number of shots fired in all incidents in which two or more shots were fired and the number of shots was specified.<sup>104</sup>

She does not reveal the imputed number substitute value that she used where the exact number of shots fired was not specified, so her result cannot be reproduced. Interestingly, substituting an imputed average value for all of the times the number of shots fired is unknown, tends to bring the overall average of shots fired down towards 2.2. For example if there are ten incidents of self-defense where nine times the victim fired two shots and one time the victim fired thirteen shots, the average number of shots fired

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<sup>104</sup> Allen Supp. Decl. Dkt 118-1 n.8.

would be 3.1 but the percentage of times more than ten shots were needed for self-defense would be 10%.

For a second study, Allen says she conducted a word search of a news aggregator called Factiva. Factiva is a commercial database behind a paywall to which the Court and the public have no access. Even if one did have access to the Factiva database, one could not repeat her study. Allen's methodology for the Factiva study is incomprehensible. For the Factiva database of 70 million news stories, her word search returned 35,000 stories.<sup>105</sup> From there she somehow selected 200 stories of defensive gun use in the home and set out to analyze the events.<sup>106</sup> As with the Armed Citizen study, Allen does not provide a list of the 200 stories she analyzed. Compare that to the long, detailed list of 179 mass shooting stories she includes in the second part of her declaration. For the Factiva study, there is no way to check her analysis or her math. And once again she includes in the averages those events where no shots were fired, bringing the overall average down.<sup>107</sup>

Had a table of the stories she and her team analyzed been supplied, it would certainly reveal important information. For example, this Court randomly selected two pages from Allen's mass

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<sup>105</sup> Exh. A at ¶18.

<sup>106</sup> *Id.* at ¶ 19.

<sup>107</sup> Allen Depo. Jan. 12, 2021 at 119:10-18 (“Q. So numerically speaking, inclusion of incidents where the number is zero would tend to drag the average number of shots fired down; would you tend to agree with that? A. So it includes those with zero. That’s correct. Q. Okay. And have you ever looked at the average number of shots fired when shots were fired? A. No.”).

shooting table: pages 10 and 14. From looking at these two pages (assuming that the sources for the reports were accurate and unbiased) the Court is able to make statistical observations, including the observation that the number of shots fired were unknown 69.04% of the time. Without a similar table for the NRA or Factiva studies, this Court cannot ascertain the number of shots fired in each incident, the number of times a homeowner possessed a LCM, the number of times the number of shots fired were unknown, whether the homeowner was unharmed, or the number of intruders.

Allen's 2.2 shot average is suspect for larger reasons. The whole statistical exercise is based on hearsay (anecdotes) upon hearsay news reporting, rather than police investigatory reports. A database of news articles lacks the usual indicia of accuracy and reliability of admissible evidence. According to fifteen national polls conducted by non-law enforcement agencies, there may be from 760,000 defensive handgun uses to 3,600,000 defensive uses each year.<sup>108</sup> Compared to the comprehensive details given for her study on mass shooting events, the NRA and Factiva studies are curiously lacking in depth and breadth and causes the Court to deeply discount her opinion.

The Court is aware of its obligation to act as a gatekeeper to keep out junk science where it does not meet the reliability standard of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and

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<sup>108</sup> Plaintiffs' Exh. 10-10, John R. Lott, Jr., *More Guns, Less Crime* 3d. (2010), at 12.

Federal Rule of Evidence 702.<sup>109</sup> In a bench trial, the relevancy bar is low and Rule 702 is to be applied with a liberal thrust favoring admission.<sup>110</sup> While opinions and evidence may have been deemed admissible, in some cases, the evidence has been given very little weight or no weight at all. This is the fact finder's role.<sup>111</sup> "Challenges that go to the weight of the evidence are within the province of a fact finder ...."<sup>112</sup> So, while questionable expert testimony was admitted, it has now been weighed in light of all of the evidence.

In assessing expert witness opinion, a court looks to see whether the opinion given is newly made or whether it grew naturally out of research conducted outside of the litigation.<sup>113</sup> Bias may be evident,

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<sup>109</sup> See *Estate of Barabin v. Asten-Johnson, Inc.*, 740 F.3d 457, 463 (9th Cir.2014), *overruled on other grounds*, *United States v. Bacon*, 976 F.3d 766 (9th Cir. 2020) (en banc) (duty falls squarely upon the district court to act as gatekeeper to exclude junk science).

<sup>110</sup> *Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1196 (9th Cir. 2014).

<sup>111</sup> *Primiano v. Cook*, 598 F.3d 558, 568 (9th Cir. 2010) (though opinion of doctor is admitted, jury may reject the opinion); see also, e.g., *United States v. Vallejo*, 237 F.3d 1008, 1021 (9th Cir. 2001) (admissibility of expert opinion different than weight to be accorded).

<sup>112</sup> *City of Pomona v. SQM North Am. Corp.*, 750 F.3d 1036, 1044 (9th Cir. 2014).

<sup>113</sup> *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) (after remand) ("One very significant fact to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.");

according to legal authorities, where the expert forms an opinion without peer-reviewed scientific support or before examining sufficient data.<sup>114</sup> Bias may also be evident where an expert opinion is formed solely for the purposes of litigation. Here, the Court is mindful that, “[f]or scientific evidence to be admissible, the proponent must show the assertion is ‘derived by a scientific method,’” and “[o]pinion based on ‘unsubstantiated and undocumented information is the antithesis of scientifically reliable expert opinion.’” “The court must assess the expert’s reasoning or methodology, using as appropriate criteria such as testability, publication in peer-reviewed literature, known or potential error rate, and general acceptance.”<sup>115</sup> Methods and procedures must be followed and undisciplined speculation is not science.<sup>116</sup>

“To aid courts in exercising this gatekeeping role, the Supreme Court has suggested a non-exclusive and flexible list of factors that a court may consider when determining the reliability of expert testimony, including: (1) whether a theory or technique can be tested; (2) whether it has been subjected to peer review

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*Cabrera v. Cordis Corp.*, 134 F.3d 1418, 1422 (9th Cir.1998) (expert's development of opinion expressly for purposes of testifying is a significant consideration in evaluating opinion).

<sup>114</sup> B. Black & P. Lee, *Expert Evidence* (West 1997), Ch. 4(IV)(B), at 147.

<sup>115</sup> *Id.*

<sup>116</sup> *Daubert*, 509 U.S. at 589-90. (“The subject of an expert’s testimony must be ‘scientific ... knowledge.’ The adjective ‘scientific’ implies a grounding in the methods and procedures of science. Similarly, the word ‘knowledge’ connotes more than subjective belief or unsupported speculation.”).

and publication; (3) the known or potential error rate of the theory or technique; and (4) whether the theory or technique enjoys general acceptance within the relevant scientific community.”<sup>117</sup> Allen’s study relies on unverified, uncorroborated second or third hand anecdotal information. Normally, “a witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”<sup>118</sup> Assuming its relevance in the first instance for *Bruen* purposes, the statistical analysis has minimal indicia of accuracy or reliability.

In the end, Allen opines that an average of 2.2 shots are fired in self-defense gun scenarios and only .3% of such incidents involve more than 10 shots fired. Yet, even .3% is a lot in terms of actual times a citizen needs to fire his gun in self-defense. Using the estimate from the Centers for Disease Control mentioned earlier of 500,000 to 3,000,000 times per year nationally, and extrapolating the .3% where more than 10 shots were fired (per Allen’s report), would mean defensive gun uses of more than 10 shots happen between 1,500 and 9,000 times, every year (based on the CDC annual number of defensive gun uses cited on the website Allen cited and relied on<sup>119</sup>).

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<sup>117</sup> *Messick*, 747 F.3d at 1197 (quoting *Daubert*, 509 U.S. at 592-94).

<sup>118</sup> Federal Rule of Evidence 602.

<sup>119</sup> In her Supplemental Declaration, at footnote 4, Dkt. 118-1, Allen cites a Heritage Foundation online visual database: <https://datavisualizations.heritage.org/firearms/defensive-gun-uses-in-the-us>. If one looks at the Heritage Foundation description of its visual database research, one would see that it

#### **D. Magazines Holding More Than 10 Rounds Are Not Dangerous and Unusual**

Taking another tack, the State reframes the “dangerous and unusual” test as a “dangerous *or* unusual” test and then objects that magazines able to hold more than 10 rounds are unusually dangerous. As the Court has stated, all guns and ammunition are dangerous.<sup>120</sup> However, magazines holding more than 10 rounds are not both “dangerous and unusual,” which is the Supreme Court’s test. So-called large capacity magazines banned in California are commonly-owned by law-abiding citizens across the nation<sup>121</sup> and number in the millions.<sup>122</sup>

#### **E. The Most-Useful-for-Military-Service Nostrum**

The State argues, and some courts have reasoned, that magazines holding more than 10 rounds are “most useful in military service” and therefore, can be

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acknowledges the CDC report that Americans use their firearms defensively between 500,000 and 3,000,000 million times each year.

<sup>120</sup> *Staples*, 511 U.S. at 611 (“Despite their potential for harm, guns generally can be owned in perfect innocence.”).

<sup>121</sup> “It is indisputable in the modern United States that magazines of up to thirty rounds for rifles and up to twenty rounds for handguns are standard equipment for many popular firearms.” Kopel, *supra*, *The History of Firearm Magazines*, at 874, Declaration of Anna M. Barvir in Support of Plfs.’ Suppl. Br., Exh. 39, Dkt. 132-6, at 125.

<sup>122</sup> See nn. 28-31, *supra*, and accompanying text.

banned.<sup>123</sup> The Supreme Court said no such thing.<sup>124</sup> *Caetano* addresses this question and says, “*Heller* rejected the proposition ‘that only those weapons useful in warfare are protected.’”<sup>125</sup> *Heller* was explaining *United States v. Miller*.<sup>126</sup> In *Miller*, the Supreme Court applied a reasonable-relationship-to-militia-use test to a short-barreled shotgun, asking whether the shotgun would have a reasonable relationship to the preservation or efficiency of a well-regulated militia. Finding none, it decided the Second Amendment did not guarantee the right to keep that particular firearm.<sup>127</sup> *Miller*’s realm of Second Amendment protection encircled a firearm if it was reasonably related to militia use. This “reasonably-related” construct received a nod again in *Lewis v. U.S.*,<sup>128</sup> where the Supreme Court sang *Miller*’s

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<sup>123</sup> See, e.g., *Hanson v. D.C.*, No. CV 22-2256-RC, 2023 WL 3019777, at \*28-29 (D.D.C. Apr. 20, 2023) (“LCMs are not covered by the Second Amendment because they are most useful in military service.”).

<sup>124</sup> See, e.g., *Bevis v. City of Naperville*, No. 22 C 4775, 2023 U.S. Dist. LEXIS 27308, at \*22 (N.D. Ill. Feb. 17, 2023) (“Relatedly, the Supreme Court has unequivocally dismissed the argument that ‘only those weapons useful in warfare are protected.’ To the extent that the Seventh Circuit classified the weapon as either ‘civilian’ or ‘military,’ the classification has little relevance.”) (citation omitted).

<sup>125</sup> *Caetano*, 577 U.S. at 412 (quoting *Heller*, 554 U.S. at 624-25).

<sup>126</sup> 307 U.S. 174 (1939)

<sup>127</sup> *Id.* (“Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.”).

<sup>128</sup> 445 U.S. 55, 65 n.8 (1980).



refrain, “the Second Amendment guarantees no right to keep and bear a firearm that does not have ‘some reasonable relationship to the preservation or efficiency of a well regulated militia.’” There was no undercutting of *Miller* in the *Heller* or *Bruen* decisions. Rather, *Heller* embraced *Miller* and said “[w]e therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of the scope of the right.”<sup>129</sup> And *Bruen* “quoted, explained, re-affirmed, and then applied” *Miller*.<sup>130</sup> *Heller* took the already expansive zone of protection for weapons that could be used by the militia and focused on the core use of firearms for self-defense.

In other words, *Heller* made the logical connection between weapons commonly possessed by law-abiding citizens for lawful purposes that would also be useful, if necessary, for military purposes, *i.e.*, in the militia. Since *Miller*, the Supreme Court has enlarged the breadth of firearms protected by the Second Amendment to include commonly owned firearms useful for the core right of self-defense and other lawful purposes like hunting, sporting, and target shooting. Until the Supreme Court clearly says otherwise, commonly owned weapons that are useful for war and are reasonably related to militia use are also fully protected, so long as they are not useful solely for military purposes. Firearms with magazines

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<sup>129</sup> *Heller*, 554 U.S. at 625.

<sup>130</sup> *United States v. Saleem*, No. 3:21-cr-00086-FDW-DSC, 2023 WL 2334417, at \*7 (W.D.N.C. Mar. 2, 2023).

holding more than 10 rounds are such reasonably-related arms. Even *Miller* understood the Constitution to protect the possession of ammunition. For the militia system to function, “[t]he possession of arms also implied the possession of ammunition, and the authorities paid quite as much attention to the latter as to the former.”<sup>131</sup> All considered, the best reading of “arms” includes magazines.<sup>132</sup>

### III. *Bruen* And The Magazine Capacity Limit

Plaintiffs challenge § 32310, which prohibits manufacturing, importing, keeping for sale, offering for sale, giving, lending, buying, receiving or possessing a magazine able to hold more than 10 rounds. For simple possession of a magazine holding more than 10 rounds, the crime is an infraction under § 32310(c). It is a much more serious crime to acquire a magazine holding more than 10 rounds in California by importing, buying, borrowing, receiving, or manufacturing. These acts may be punished as a misdemeanor or a felony under § 32310(a). Under the subsection’s provision, “or imprisonment pursuant to subdivision (h) of Section 1170,” punishment may be either a misdemeanor or a felony.

This Court concludes, once again, that manufacturing, importing, selling, giving, loaning

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<sup>131</sup> *Miller*, 307 U.S. at 180 (quoting *The American Colonies In The 17th Century*, Osgood, Vol. 1, ch. XIII).

<sup>132</sup> *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 968 (9th Cir. 2014) (“Because restrictions on ammunition may burden the core Second Amendment right of self-defense and the record contains no persuasive historical evidence suggesting otherwise, section 613.10(g) regulates conduct within the scope of the Second Amendment.”).

buying, receiving, acquiring,<sup>133</sup> possessing, storing, or using commonly-owned magazines capable of holding more than 10 rounds for self-defense at home or in public is protected by the Second Amendment. Whether 50-round, 75-round, or 100-round drum magazines are constitutionally protected is a different question because they may be much less common and may be unusual.

### A. Remand for *Bruen* Review

This case was remanded from the United States Court of Appeals for the Ninth Circuit in order to consider the challenged laws under the recent Supreme Court decision in *Bruen*. Under *Bruen*, the government must affirmatively prove that its firearm regulation is part of a constitutional historical tradition. It is the same text, history, and tradition standard the Court used in *Heller* and *McDonald*. What is different is that the old means-end, interest balancing, tiers-of-scrutiny test is no longer viable.<sup>134</sup> The State now has a second chance to defend its large capacity magazine ban and must do so applying the *Bruen* test.

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<sup>133</sup> “This acquisition right is protected as an ‘ancillary right’ necessary to the realization of the core right to possess a firearm for self-defense.” *Renna v. Becerra*, No. 20-cv-02190-DMS (DEB), 2021 WL 1597933, at \*6 (S.D. Cal. Apr. 23, 2021) (quoting *Teixeira v. County of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017)) (*en banc*) (core Second Amendment right “wouldn’t mean much” without ability to acquire arms).

<sup>134</sup> *Baird v. Bonta*, 2023 WL 5763345, \*5 (9th Cir. Sept. 7, 2023) (“In *Bruen*, the Supreme Court expressly rejected the use of such ‘means-end scrutiny in the Second Amendment context’ and described the two-step approach as ‘one step too many.’”).

*Bruen* says,

When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation. Only then may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.”<sup>135</sup>

And *Bruen* confirms, once again, that the Second Amendment applies to modern arms. “Thus, even though the Second Amendment’s definition of ‘arms’ is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense,” like magazines able to hold more than 10 rounds.<sup>136</sup>

#### **i. Already Determined: No Historical Pedigree**

This Court previously determined that a ban on magazines able to hold more than 10 rounds has no historical pedigree. Detachable magazines were invented in the late 19th Century.<sup>137</sup> In 1990, New Jersey introduced the first ban on detachable

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<sup>135</sup> 142 S. Ct. at 2129-30 (emphasis added).

<sup>136</sup> *Id.* at 2132.

<sup>137</sup> “In 1879, Remington introduced the first ‘modern’ detachable rifle magazine. In the 1890s, semiautomatic pistols with detachable magazines followed. During WWI, detachable magazines with capacities of 25 to 32-rounds were introduced.” Plaintiff’s Exh. 2 (Stephen Helsley Report), at 4.

magazines, initially imposing a 15-round limit and later a 10-round limit. California put its ban in place in the year 2000. A historical tradition of magazine bans, this is not.

Before *Bruen*, the State unpersuasively argued that its magazine capacity restriction was analogous to a handful of state machinegun firing-capacity regulations from the 1920's and 1930's and one District of Columbia law from 1932—a law the Supreme Court ignored while dismantling the District of Columbia's handgun ban in *Heller*. That argument remains unpersuasive today. That was pre-*Bruen*. *Bruen* invites a look farther back into the Nation's history.

## ii. The State Asked for Time for Discovery

Because the *Bruen* approach places the burden upon the government to justify its firearm restrictions by demonstrating that they are consistent with the Nation's historical tradition of firearm regulation as understood at the founding, and because judicial review under the *Bruen* standard is in its infancy, the State has been given generous time and leeway to satisfy its new burden. The State's experts have been studying historic firearm regulations for more than 20 years.<sup>138</sup> This Court has reviewed all of the

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<sup>138</sup> The State's expert, professor Robert Spitzer, has studied gun policy for 30 years. See Decl. of Robert Spitzer, Dkt. 137-8 ("Spitzer Decl."), at ¶ 5. The State's expert, professor Saul Cornell, said that he has been studying gun regulations for 20 years. That was in 2017. See Saul Cornell, Five Types of Gun Laws the Founding Fathers Loved, Salon (Oct. 22, 2017, 7:29 a.m.), [https://www.salon.com/2017/10/22/five-types-of-gun-laws-the-founding-fathers-loved\\_partner/](https://www.salon.com/2017/10/22/five-types-of-gun-laws-the-founding-fathers-loved_partner/) [https://perma.cc/73SL-

declarations of the State’s experts and historians as well as many of their cited sources, and finds no support for the State’s ban.

### iii. Some Text, History, and Tradition Analysis is Already Done

Some of the time spent analyzing text, history, and tradition, has already been done by the Supreme Court. To begin, “the ‘textual elements’ of the Second Amendment’s operative clause—the right of the people to keep and bear Arms, shall not be infringed’—‘guarantee the individual right to possess and carry weapons in case of confrontation.’”<sup>139</sup> Further, “the right to ‘bear arms’ refers to the right to ‘wear, bear, or carry ... upon the person or in the clothing or in a pocket, for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person.’”<sup>140</sup> The Supreme Court explains that the terms “keep” and “bear” mean that the Second Amendment’s text protects a citizen’s right to “‘keep’ firearms in their home, at the ready for self-defense,” and to carry arms on one’s person in and outside the

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VAKV]. Ten years ago, Mark Anthony Frassetto compiled a list of over 1,000 historical gun laws spanning the years 1607 to 1934 and available on the Social Science Research Network. [<https://perma.cc/Q2L8-SW6U>]. His law collection was not unknown. It was described in detail in 2017 by professor Spitzer in his article *Gun Law History in the United States and Second Amendment Rights*, 80 L. & Contemp. Probs. 55 (2017), and included in professor Cornell’s Compendium of Works cited in his Declaration, Dkt. 154-3, at 1707-33.

<sup>139</sup> *Bruen*, 142 S. Ct. at 2134 (quoting *Heller*, 554 U.S. at 592).

<sup>140</sup> *Bruen*, 142 S. Ct. at 2134 (quoting *Heller*, 554 U.S. at 584).

home in case of confrontation.<sup>141</sup> As to the types of weapons the Second Amendment protects, *Bruen* echoes *Heller*, *McDonald*, *Caetano*, *Miller*, and Blackstone, pronouncing that it “protects the possession and use of weapons that are ‘in common use at the time.’”<sup>142</sup>

In this case, Plaintiffs are law-abiding citizens who want to possess (or keep) and carry (or bear), magazines able to hold more than 10 rounds commonly-owned for lawful purposes. Plaintiffs’ proposed conduct is covered by the plain text of the Second Amendment. Under the plain text, the State’s statute infringes on the constitutional rights of American citizens. Therefore, Plaintiffs have met their burden of showing that the prohibited magazines fall within the Second Amendment’s text.

*Bruen* next instructs courts to assess whether the initial conclusion is confirmed by the historical understanding of the Second Amendment. *Bruen* has already confirmed that the Second Amendment protects an individual right to armed self-defense. It repeats *Heller*’s lesson to not engage in means-end scrutiny, because, “[a] constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.”<sup>143</sup> After all, “[t]he Second Amendment ‘is the very product of an interest balancing by the people’ and it ‘surely elevates above all other interests the right of law-abiding, responsible citizens to use arms’ for self-defense. It is

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 2128 (citations omitted).

<sup>143</sup> *Id.* at 2129 (quoting *Heller*, 554 U.S. at 634).

this balance—struck by the traditions of the American people—that demands our unqualified deference.”<sup>144</sup>

### **B. *Bruen*’s Guidelines for Historical Inquiry**

For conducting a historical inquiry, *Bruen* identifies a number of guidelines. First, “when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment.”<sup>145</sup> Second, “if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional.”<sup>146</sup> Third, “if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.”<sup>147</sup> Fourth, “cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach.”<sup>148</sup> Fifth, “[w]hen confronting such present-day firearm regulations, this historical inquiry that courts must conduct will often involve reasoning by analogy.”<sup>149</sup> “Determining whether a

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<sup>144</sup> *Bruen*, 142 S. Ct. at 2131 (quoting *Heller*, 554 U.S. at 635).

<sup>145</sup> *Bruen*, 142 S. Ct. at 2131.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 2132.

<sup>149</sup> *Id.*



historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are ‘relevantly similar.’”<sup>150</sup> *Bruen* notes,

analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check. On the one hand, courts should not “uphold every modern law that remotely resembles a historical analogue,” because doing so “risks endorsing outliers that our ancestors would never have accepted.” On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical analogue, not a historical twin. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.<sup>151</sup>

In surveying American history, the task is to stay within *Bruen*’s guardrails. As to the road ahead, it is a road back to 1791.

**i. The Significant Time Period—1791 to 1868**

*Bruen* teaches the most significant historical evidence comes from 1791, and secondarily 1868. For the Second Amendment (and other protections in the Bill of Rights), “Constitutional rights are enshrined with the scope they were understood to have *when the*

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 2133.

*people adopted them.*”<sup>152</sup> The Second Amendment was adopted in 1791. “[W]e have generally assumed that the scope of the [Second Amendment] protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791.”<sup>153</sup> Consequently, whatever evolving standards of gun regulation the state legislature thought was good policy in the year 2000 (when it decided 11 rounds is not well-suited for a person to have in a gun) or the year 2016 (when it was amended by Proposition 63), or today, is not the test for constitutional scrutiny.

Courts are to “afford greater weight to historical analogues more contemporaneous to the Second Amendment’s ratification.”<sup>154</sup> British sources pre-dating the Constitution are not particularly

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<sup>152</sup> *Id.* at 2136 (quoting *Heller*, 554 U.S. at 634-35); *cf. Kennedy v. Bremerton*, 142 S. Ct. 2407, 2428 (2022) (“[T]his Court has instructed that the Establishment Clause must be interpreted by reference to historical practices and understandings. The line ... has to accord with history and faithfully reflect the understanding of the Founding Fathers.”) (cleaned up); *Riley v. California*, 573 U.S. 373, 403 (2014) (“Our cases have recognized that the Fourth Amendment was the founding generation’s response to the reviled ‘general warrants’ and ‘writs of assistance’ of the colonial era.”).

<sup>153</sup> *Bruen*, 142 S. Ct. at 2137.

<sup>154</sup> *Rahimi*, 61 F.4th at 456; *contra Nat’l Rifle Ass’n v. Bondi*, 61 F.4th 1317, 1323 (11th Cir. 2023) (“For most cases, the Fourteenth Amendment Ratification Era understanding of the right to keep and bear arms will differ from the 1789 understanding. And in those cases, the more appropriate barometer is the public understanding of the right when the States ratified the Fourteenth Amendment and made the Second Amendment applicable to the States.”).

instructive because the American Revolution was a rejection of British rule. Sources post-enactment are also less helpful.<sup>155</sup> “[T]o the extent later history contradicts what the text says, the text controls .... Thus, post-ratification adoption or acceptance of laws that are inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text.”<sup>156</sup> Late 19th century evidence is not particularly instructive, “because post-Civil War discussions of the right to keep and bear arms ‘took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources.’”<sup>157</sup> Even so,

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<sup>155</sup> *Bruen*, 142 S. Ct. at 2136 (“Similarly, we must also guard against giving postenactment history more weight than it can rightly bear.”).

<sup>156</sup> *Id.* at 2137 (citations omitted) (cleaned up).

<sup>157</sup> *Id.* (quoting *Heller*, 554 U.S. at 614). There is little reason to rely on laws from the later part of the 1800’s or the 1900’s rather than ones put into effect at the time of the founding in view of *Bruen*’s central question about the meaning of the Second Amendment as understood by the people who adopted it. See *Worth v. Harrington*, No. 21-cv-01348-KMM-LIB, 2023 WL 2745673, at \*12 (D. Minn. Mar. 31, 2023) (“But the Commissioner offers no persuasive reason why this Court should rely upon laws from the second half of the nineteenth century to the exclusion of those in effect at the time of the founding in light of *Bruen*’s warnings not to give post-Civil War history more weight than it can rightly bear.”); *Firearms Pol’y Coalition, Inc. v. McCraw*, No. 4:21-cv-01245-P, 2022 WL 3656996, at \*11 (N.D. Tex. Aug. 25, 2022); *United States v. Harrison*, No. CR 22-00328-PRW, 2023 WL 1771138, at \*8 (W.D. Okla. Feb. 3, 2023) (quoting *Bruen*, 142 S. Ct. at 2136 (Barrett, J., concurring) (“[T]oday’s decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights.”)); *contra Hanson*, No. CV 22-2256-RC, 2023 WL 3019777, at \*16 (“In this

evidence from the time period enforces the claim that the right to keep and bear arms continued to be regarded as a fundamental right. The Supreme Court gauged the most explicit evidence appeared in the Freedmen's Bureau Act of 1866. "The most explicit evidence of Congress' aim," according to *McDonald*, "appears in § 14 of the Freedmen's Bureau Act of 1866, which provided that 'the right ... to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security [and] ... including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens.'"<sup>158</sup> *McDonald* points to one senator's description of the right to bear arms for one's defense as an "indispensable safeguard of liberty." *McDonald* writes,

"Every man ... should have the right to bear arms for the defense of himself and family and his homestead. And if the cabin door of the freedman is broken open and the intruder enters for purposes as vile as were known to slavery, then should a well-loaded musket be in the hand of the occupant to send the polluted wretch to another world, where his wretchedness will forever remain complete."<sup>159</sup>

Thus, it can be said that, even at the time of the Fourteenth Amendment, the right to keep and bear guns was a necessary right to preserve. "In sum, it is

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case, it is appropriate to apply 20th century history to the regulation at issue.").

<sup>158</sup> *McDonald*, 561 U.S. at 773.

<sup>159</sup> *McDonald*, 561 U.S. at 775-76 (citation omitted).

clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”<sup>160</sup>

*Bruen* and *Heller* have already considered some of the historical firearm statutes. Consequently, we know that colonial laws restricting handguns that were dangerous and unusual in the 1690’s do not justify modern laws restricting handguns. The Court explains that even if handguns were considered “dangerous and unusual” in the 1690’s, it would not matter because handguns are common today. As *Bruen* puts it,

Whatever the likelihood that handguns were considered “dangerous and unusual” during the colonial period, they are indisputably in “common use” for self-defense today. They are, in fact, “the quintessential self-defense weapon.” Thus, even if these colonial laws prohibited the carrying of handguns because they were considered “dangerous and unusual weapons” in the 1690s, they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use.

### **C. The State’s List of Relevant Laws**

To aid in the task of looking for a national “historical tradition of firearm regulation,” the State was directed to create a list of relevant laws regulating arms dating from the time of the Second Amendment (1791) to 20 years after the Fourteenth Amendment

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<sup>160</sup> *McDonald*, 561 U.S. at 778.

(1868 + 20). This was not an acknowledgement that 20 years after the Fourteenth Amendment is a relevant period. Twenty years after the Fourteenth Amendment is an admittedly arbitrary limit and probably includes laws too late to shed much light.

In any event, the State went far beyond. The State produced a list of 316 laws covering 550 years—from 1383 to 1933.<sup>161</sup> Many of the entries are not relevant because they came much earlier or later than the most significant time period of 1791-1868. The first fourteen listed laws pre-date the Second Amendment.<sup>162</sup>

On the other end, the last 225 laws post-date the adoption of the Fourteenth Amendment. Also, two-thirds of the State's list (199 laws) are restrictions on *use*—not on possession or acquisition. Here, the

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<sup>161</sup> See Def's Survey of Relevant Statutes, Dkt. 139-1 to 3 (citations to the individual law entries herein are indicated by brackets [--]).

<sup>162</sup> The State includes in its list a concealed carry statute in East New Jersey from 1686 which treated pocket pistols as "unusual" weapons. [6]. *Bruen* bulldozed that citation. The East New Jersey statute was too old and too different. *Bruen* found little there to commend a present-day ban on carrying pistols. The statute prohibited only the concealed carrying of pocket pistols; it did not prohibit possession or public carrying. *Bruen*, 142 S. Ct. at 2143. The statute did not apply to all pistols, much less all firearms. Moreover, even if pocket pistols were uncommon in 1686 in East New Jersey, they were commonly used by the time of the founding. *Id.* at 2144 and n.13. The statute did not survive the merger of East and West New Jersey in 1702. Consequently, the Court made short work of the history summing it up, "[a]t most eight years of history in half a Colony roughly a century before the founding sheds little light on how to properly interpret the Second Amendment." *Id.* at 2144.

magazine ban prohibits possession, manufacturing, giving, lending, offering for sale, etc., rather than regulating the *use* or *manner* of carrying ammunition or its magazines. Twenty-two tax laws are included in the State’s historical list, yet the law challenged here imposes no tax on magazines. The State’s historical list also includes, surprisingly, 38 laws that applied only to particular groups, such as slaves, Blacks, or Mulattos. Those laws are not relevant to the magazine prohibition challenged in this case. “And Founding-era statutes that disarmed groups of persons who governments thought might be dangerous because of their race or religion were not considered analogous to modern carry prohibitions on released felons also thought to be dangerous: ‘any such analogy would be far too broad.’”<sup>163</sup> Even if they were, this Court would give such discriminatory laws little or no weight.

#### **IV. In America People Were Generally Free To Carry Firearms Publicly And Peaceably From 1791 to 1868**

##### **A. Traditions**

The history and tradition of the United States is a tradition of widespread gun ownership and expertise. *Bruen* says, “those who sought to carry firearms publicly and peaceably in antebellum America were generally free to do so.”<sup>164</sup> Thomas Jefferson pointed out that our soldiers were good shots because they had practiced with guns since they were children. Jefferson wrote,

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<sup>163</sup> *Baird*, 2023 WL 5763345 at \*8 (citations omitted).

<sup>164</sup> 142 S. Ct. at 2146.

I inclose you a list of the killed, wounded, and captives of the enemy from the Commencement of hostilities at Lexington in April 1775, until November 1777. since which there has been no event of any consequence ... I think that upon the whole it has been about one half the number lost by them. In some instances more, but in others less. *This difference is ascribed to our superiority in taking aim when we fire; every soldier in our army having been intimate with his gun from his infancy.*<sup>165</sup>

Then, having firearms was commonplace. Carrying firearms was accepted. Proficiency with firearms was encouraged. Readiness with firearms was required. Then, as now, terrorizing with a firearm or carrying a firearm with the intent to assault another was punishable. But, “[n]one of the [] historical limitations on the right to bear arms ... operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose.”<sup>166</sup>

Notwithstanding having significant time to do so, the State has identified no historical statute or national tradition of firearm regulation so broad in its coverage or so far reaching in its effect as its large

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<sup>165</sup> Letter from Thomas Jefferson, to Giovanni Fabbroni, *Founders Online*, National Archives (June 8, 1778), <https://founders.archives.gov/documents/Jefferson/01-02-02-0066> [<https://perma.cc/8VTV-K9HB>]; [Original source: *The Papers of Thomas Jefferson*, vol. 2, 1777-18 June 1779, ed. Julian P. Boyd. Princeton: Princeton University Press, 1950, pp. 195-98] (emphasis added).

<sup>166</sup> *Bruen*, 142 S. Ct. at 2150.



capacity magazine ban. So, what are the traditions of firearm regulation evidenced by the State's law list?

Historical regulations are considered chronologically, "mindful that greater weight attaches to laws nearer in time to the Second Amendment's ratification."<sup>167</sup> The Court has reviewed every law cited in the State's list. It has sometimes searched for the actual text of a cited law rather than the parties' summary in order to understand any legal nuance. It has reviewed the laws with a view to understanding the tradition of all the states and their contexts. For example, as the nation expanded old states became interior states and new states became frontier states. Frontier states often had different social and security concerns than did the interior of the new nation. The Court sought to understand how states responded to new technological developments in ammunition, revolvers, repeaters, and high-capacity, fast-shooting, lever-action rifles.

The State's experts opine that gun laws were plentiful and widespread and firearm regulation was the norm. But, if the test were to look at gun laws with that level of generality, no gun law would ever fail scrutiny and *Heller*, *McDonald* and *Bruen* could not have been decided as they were. Furthermore, as will be shown, it is an exaggeration. The State also says regulations on dangerous or unusual *weapons* existed throughout American history. By "weapons," the State means non-firearms.

Relevantly similar regulations are *firearm* prohibitions—not bladed or melee weapon

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<sup>167</sup> *Rahimi*, 61 F.4th at 456.

regulations. And neither “dangerous or unusual” nor “unusually dangerous” is the test, although the State cannot point to an outright prohibition on even unusual or unusually dangerous *firearms* until Alabama’s 1868 prohibition on the dangerous and unusual rifle-walking cane. [87]

Because the State cannot find a historic regulation of *firearms*, it turns to the historic regulations of *weapons*, whether bladed weapons, melee weapons, blunt weapons, or leaded weapons. Yet, the Supreme Court does not look to knife laws when reviewing a restriction about guns. *Bruen* teaches that a state’s burden is to identify a historical tradition of *firearm* regulation, not a tradition of knife regulation. Underscoring the importance of its words, three different times *Bruen* repeats the specific phrase “firearm regulation,” as in the following instances: (1) “Rather, the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of *firearm regulation*;<sup>168</sup> (2) “The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of *firearm regulation*;<sup>169</sup> and (3) “[T]he burden falls on respondents to show that New York’s proper-cause requirement is consistent with this Nation’s historical tradition of *firearm regulation*.”<sup>170</sup> In contrast, the *Bruen* majority opinion did not mention bowie knives at all. The Supreme Court was not interested in traditions of knife

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<sup>168</sup> *Bruen*, 142 S. Ct. at 2126 (emphasis added).

<sup>169</sup> *Id.* at 2130 (emphasis added).

<sup>170</sup> *Id.* at 2135 (emphasis added).

regulation or melee regulation. Even in the dissent, bowie knife laws were hardly mentioned. Consequently, when the State asserts, “weapons restrictions proliferated,” it misses the mark by referring to non-firearm weapon restrictions or concealed carrying restrictions.<sup>171</sup>

During the most important period of history, there were relatively few firearm regulations.<sup>172</sup> This conclusion can be drawn from inspecting the State’s historic law list, and is confirmed by at least one historian: “Between 1607 and 1815 ... the colonial and state governments of what would become the first fourteen states neglected to exercise any police power over the ownership of guns by members of the body politic .... These limits on colonial and early state regulation of arms ownership outlined a significant zone of immunity around the private arms of the individual citizen.”<sup>173</sup> It is a conclusion confirmed by the Supreme Court. “Apart from a few late 19th-century outlier jurisdictions, American governments

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<sup>171</sup> Def’s Br. in Resp., Dkt. 142, at 20.

<sup>172</sup> It is true that there were laws criminalizing the *use* of guns for criminal acts such as carrying a gun with intent to assault another, or displaying a gun in a threatening manner. These were crimes of violence, not crimes of possession. California, as it should, has similar laws today, such as California Penal Code § 245(a)(2) & (3) (assault with a deadly weapon—firearm) and § 417(a)(2) (exhibition of a firearm in a rude, angry, or threatening manner).

<sup>173</sup> Robert H. Churchill, *Forum: Rethinking the Second Amendment*, 25 L. & Hist. Rev. 139, 161 (2007).

simply have not broadly prohibited the public carry of commonly used firearms for personal defense.”<sup>174</sup>

There were regional differences, no doubt.<sup>175</sup> As the nation aged, northern states had virtually no restrictions on guns and none on ammunition while southern states tended to mainly prohibit concealed carrying.<sup>176</sup> In short, the State argues that because some states have regulated in some ways the use of some *weapons* (primarily knives and melee devices), that translates into the State being able to regulate any magazine in any way. That is a *non sequitur* and in this particular case—a bridge too far.

#### **i. No Prohibitions on Possessing Guns**

It is remarkable to discover that there were no outright prohibitions on keeping or possessing guns. No laws of any kind.<sup>177</sup> Based on a close review of the

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<sup>174</sup> *Bruen*, 142 S. Ct. at 2156.

<sup>175</sup> “[T]here were profound regional differences in early America.” Decl. of Saul Cornell, Dkt. 118-4 (“Cornell Decl.”) at n.49.

<sup>176</sup> Don B. Kates, Jr., *Restricting Handguns* 12 (North River Press ed., 1979), found in Compendium Works Cited in Decl. of Randolph Roth, Dkt. 118-8, at n.53 and 0349 (“By 1850, every Western state barred the carrying of concealed weapons. In contrast, none of the Northeastern states adopted even that mild a restriction until nearly the turn of the twentieth century. Until 1924, for instance, the only gun law in New Jersey was the prohibition of dueling.”).

<sup>177</sup> According to one scholar, the first prohibition on simple ownership of a gun came in 1911. Churchill, *supra*, at 139 n.61 (“The first law restraining gun ownership by citizens mentioned in the secondary literature is New York’s 1911 Sullivan Law, which prohibited the ownership of concealable arms without a police permit.”); *see also* David B. Kopel and Joseph G.S. Greenlee, *This History of Bans on Types of Arms Before 1900* 50

State's law list and the Court's own analysis, Plaintiffs are correct in asserting that there are no Founding-era categorical bans on firearms in this nation's history. Though it is the State's burden, even after having been offered plenty of opportunity to do so, the State has not identified any law, anywhere, at any time, between 1791 and 1868 that prohibited simple possession of a gun or its magazine or any container of ammunition (unless the possessor was an African-American or a slave or a mulatto).<sup>178</sup>

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J. of Legis., Apr. 25, 2023, at 45-46 (2024), <https://ssrn.com/abstract=4393197> [<https://perma.cc/P85U-ASTZ>] ("Before, during, and after the Revolution, no state banned any type of arm, ammunition, or accessory. Nor did the Continental Congress, the Articles of Confederation Congress, or the federal government created by the U.S. Constitution in 1787 .... There is no evidence that any of the Founders were concerned about individuals having too much firepower. After a long, grueling war against the world's strongest military, limiting individuals' capabilities was not a concern.").

<sup>178</sup> Even before *Bruen* was decided, at least one other judge has applied the text, history, and tradition test with analogical reasoning for a 10-round magazine ban, and came to the same conclusion. See *Ass'n of N.J. Rifle & Pistol Clubs Inc. v. AG N.J.*, 974 F.3d 237, 258 (3d Cir. 2020) (Matey, J. dissenting) ("This history reveals a long gap between the development and commercial distribution of magazines, on the one hand, and limiting regulations, on the other hand.... Some will argue there must be an outer boundary to this analysis that, when crossed, renders a magazine dangerous and unusual. If so, it does not appear in the history and traditions of our Nation.... As a result, and limited to this record, I would hold that magazines are arms protected by the Second Amendment and an act limiting magazine capacity to 10 rounds burdens the Appellants' Second Amendment rights.").

Surely, with 315 other entries in the State's law list, there must be many other laws in the relevant time period of demonstrating a tradition of firearm regulation analogous to the large capacity magazine ban. What else is there?

## **ii. No Gun Laws In The Northern States For 50 Years**

From the adoption of the Second Amendment through the next 50 years, there were no firearm restrictions in any states north of the Mason-Dixon Line.<sup>179</sup> One could live in any of the northern states without restrictions of almost any kind.<sup>180</sup> A gun

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<sup>179</sup> The Mason-Dixon Line established the boundary line between Pennsylvania and Maryland. Beyond its importance as a literal boundary between states, "the Mason-Dixon Line has become known as the boundary between the North and the South. It took on that association on March 1, 1790, when the Pennsylvania Assembly passed legislation ending slavery in the state. Thus, the Mason-Dixon Line became the legal and the philosophical boundary between slave territory and free land, since slavery was still allowed in Maryland. That was especially true after the Missouri Compromise was passed in 1820, which prohibited slavery north of the Mason-Dixon Line. To the many slaves who used whatever means necessary to reach free land, the Mason-Dixon Line became important to their freedom. For the slaves located in Maryland, they only needed to get to the state line to secure their freedom, although many continued traveling north in an attempt to get as far away from their former masters as possible." Kathryn DeVan, *Our Most Famous Border: The Mason-Dixon Line*, Pa. St. Univ. (fall 2008), <https://pabook.libraries.psu.edu/literary-cultural-heritage-map-pa/feature-articles/our-most-famous-border-mason-dixon-line> [<https://perma.cc/B6WN-DHAC>].

<sup>180</sup> The State lists one New Jersey statute from 1799 as a law purportedly prohibiting the carrying of a pistol with the intent to assault [19], but this appears to be a sentencing enhancement

owner enjoyed freedom with no infringing prohibitions from 1789 to 1845 in Pennsylvania, New York, Connecticut, Massachusetts, New Hampshire, Rhode Island, Vermont, Maine, Ohio, Illinois, Michigan, or Indiana. One might never be subject to a later surety statute in Massachusetts (1836) [29] and Maine (1841) [46].<sup>181</sup> If anything, regulations were not about what kind of firearm one was *not* allowed to keep, but about the kind of firearm one was *required* to buy and have ready for militia duties.

The same was largely true south of the Mason-Dixon Line (disregarding laws targeting slaves and Indians, neither of which were considered to be citizens by lawmakers). A citizen could reside in any of the northern states and half of the southern states for the first fifty years free from state government firearm restrictions. This understanding is based on a methodical reading and assessment of the laws set out in the State's survey. While the parties' experts express some disagreements, their contrary opinions are unpersuasive.

In the northern states there were hardly any firearm laws at all, let alone a tradition of

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statute applicable only if one was apprehended for burglary. See An Act to Describe, Apprehend and Punish Disorderly Persons (1799), Duke Ctr. For Firearms L., *Charles Nettleton, Laws of the State of New-Jersey Page 474, Image 501 (1821)* available at *The Making of Modern Law: Primary Sources*, <https://firearmslaw.duke.edu/laws/charles-nettleton-laws-of-the-state-of-new-jersey-page-474-image-501-1821-available-at-the-making-of-modern-law-primary-sources/>.

<sup>181</sup> That the two states would share similar laws makes sense since Maine was part of the larger Commonwealth of Massachusetts prior to achieving statehood in 1820.

criminalizing the act of keeping or carrying any firearm. For the District of Columbia, governed by Congress, there were no firearm laws for the first 80 years until a concealed carry prohibition was enacted in 1871. [97]. Maine enacted its first law, a gunpowder storage regulation to prevent fires, in 1821. [27]. Massachusetts enacted its first firearm statute in 1836 as a surety law [29] with Maine following suit in 1841. [46]. *Bruen* already notes that under the surety laws everyone started out with robust carrying rights and *Bruen* saw little evidence that the laws were enforced.

Illinois was admitted to the Union in 1818. In 1845, Illinois enacted its first firearm statute criminalizing carrying a gun *with the intent to assault another person*. [49]. Indiana became a state in 1816. In 1855, Indiana criminalized shooting a gun, or throwing stones or sticks, at a train. [62]. The law did not concern keeping any gun whatsoever, or carrying a gun anywhere, in any manner whatsoever.<sup>182</sup> Ohio became a state in 1808. The State's law list shows no Ohio state laws respecting firearms until 1859. [70]. Ohioans did not have a gun law until nearly 70 years after the adoption of the Second Amendment. Its first

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<sup>182</sup> The State's law list erroneously describes the 1855 Indiana law as one prohibiting the carrying of a pistol with the intent to injure another. This appears to be a scrivener's error. Although the State does not include it in its law list, Indiana may have enacted an earlier statute prohibiting carrying a pistol concealed, with an exception made for travelers. "In *State v. Mitchell*, 3 Blackf. 229, 1833 WL 2617 (Ind. 1833), the Supreme Court of Indiana, in a one-sentence opinion, upheld a state statute prohibiting the general public from carrying concealed weapons." *Peruta v. Cnty. of San Diego*, 824 F.3d 919, 933 (9th Cir. 2016).



gun law was one that prohibited carrying a pistol, bowie knife, dirk, or other dangerous weapon *concealed*. California enacted its first gun regulation in 1853, which criminalized the act of having “upon him any pistol, gun, knife, dirk, bludgeon, or other offensive weapon, with intent to assault any person.” [57].

In short, the history and tradition of the northern states, states north of the Mason-Dixon Line, was to leave firearm ownership and use completely unregulated. From the time of the adoption of the Second Amendment to the time of the adoption of the Fourteenth Amendment, there were no state gun laws in Pennsylvania, New York, Connecticut, Rhode Island, Vermont, New Hampshire, Michigan, Wisconsin, Minnesota, Iowa, Nebraska, Kansas, Missouri, or the District of Columbia. In Massachusetts and Maine there were only surety statutes. In New Jersey there was a sentencing enhancement for carrying a pistol while committing a burglary. In this half of the nation, keeping and bearing firearms was done freely without government interference.

### **iii. No Gun Laws In The Southern States For 50 Years**

South of the Mason-Dixon Line, where slavery was practiced, there were many laws restricting firearms for slaves, African-Americans, and Indians. Setting aside that obviously unconstitutional tradition, among the southern states firearm ownership was largely unregulated for at least the first 50 years after 1791. Like the northern states, from 1791 to 1868 there were no state gun laws in

Delaware, North Carolina, South Carolina, Mississippi, Florida, West Virginia, and Texas, according to the State's law list.

The few laws in other southern states that did exist concerned mainly: (1) carrying a pistol *with the intent to assault another*; and (2) carrying a pistol in a *concealed* manner. Tennessee enacted the first firearm regulation in the southern states in 1801 in the form of a surety law—it was a law dismissed by *Bruen*. [20]. A decade later in 1811, Maryland passed the second firearm regulation in the south. [23]. The Maryland law was, not a prohibition, but a sentencing enhancement for carrying a pistol *with the intent to assault another*.

In 1813, Louisiana passed the first law prohibiting the carrying of a *concealed* gun. [24].<sup>183</sup> Bruen noticed that a Louisiana court found the prohibition on concealed carrying constitutional only because it permitted open carrying of a firearm.<sup>184</sup> Kentucky passed a prohibition on carrying a *concealed* pistol that year, although it is omitted from the State's law list. Perhaps it is omitted because Kentucky's concealed carry law was struck down as unconstitutional a short time later. The only other firearm regulation in the south during this time period was Georgia's 1816 law prohibiting the carrying of a pistol *with intent to assault* another person. [25].

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<sup>183</sup> Louisiana reenacted similar, if not the same, statutes two more times, in 1842 and again in 1855. [63].

<sup>184</sup> 142 S. Ct. at 2146 and n.19 (quoting *State v. Chandler*, 5 La. 489, 490 (1850) (“Louisiana concealed-carry prohibition ‘interfered with no man’s right to carry arms (to use its words) ‘in full open view,’ which places men upon an equality”)).

Around 50 years after the Second Amendment, four southern states passed their own first firearm regulations, also in the form of *concealed* carry prohibitions. In 1837, Arkansas banned carrying a pistol concealed unless on a journey. [32]. In 1837, Georgia added its own prohibition on carrying a pistol concealed. [33]. The constitutionality of the Georgia law was upheld because open carry was unregulated.<sup>185</sup> In 1838, Virginia prohibited carrying a pistol concealed. [40]. In 1839, Alabama prohibited carrying a firearm concealed [41], later adding exceptions for self-defense and for travelers. [45].<sup>186</sup>

Three more regulations were enacted in the south in the years leading up to the Fourteenth Amendment's adoption. In 1856, Tennessee passed a law affecting only minors. [65]. In 1868, Florida prohibited carrying secretly "arms of any kind whatever" and the outright carrying of a pistol or other arm or weapon. [90]. The Florida law was not scrutinized in a published court decision.<sup>187</sup>

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<sup>185</sup> *Nunn v. State*, 1 Ga. 243, 251 (1846) ("We are of the opinion, then, that so far as the act of 1837 seeks to suppress the practice of carrying certain weapons secretly, that it is valid, inasmuch as it does not deprive the citizen of his natural right of self-defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms openly, is in conflict with the Constitution, and void.").

<sup>186</sup> *Lockett v. State*, 47 Ala. 42, 45-46 (1872) ("Nor is it required that he should have any necessity for the use of his pistols. It is enough if he was traveling on a journey, long or short.").

<sup>187</sup> However, an 1867 court decision considered an earlier law where only *concealed* carrying was prohibited. See *Sutton v. State*, 12 Fla. 135, 136 (1867) ("The statute under which this indictment was found provides, 'that hereafter it shall not be

Significantly, the first restriction on a *dangerous and unusual* firearm did not occur until 1868, the year the Fourteenth Amendment was adopted. That year, Alabama prohibited carrying a rifle walking cane. [87]. A rifle walking cane was a single shot rifle disguised to appear as a walking cane with a variety of handles. When fired, one bullet would exit through the bottom of the cane. It was patented in 1858 and manufactured by the E. Remington & Sons company until approximately 1888, with less than 2,000 produced.<sup>188</sup> Remington was the only major gun maker to produce a rifle walking cane gun. California currently has a law prohibiting possession of a “cane gun.” See Cal. Penal Code § 24410.

In short, the history and tradition of the states south of the Mason-Dixon Line, was to leave firearm ownership and use mostly unregulated. At least for the first half of the century, in this half of the nation, keeping and bearing firearms was done freely, with a handful of states enacting prohibitions on carrying pistols in public in a concealed manner, and Maryland

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lawful for any person in this State to carry arms of any kind secretly on or about their person, &c.: Provided, that this law shall not be so construed as to prevent any person from carrying arms openly outside of all their clothes’ .... The statute was not intended to infringe upon the rights of any citizen to bear arms for the ‘common defense.’ It merely directs how they shall be carried, and prevents individuals from carrying concealed weapons of a dangerous and deadly character, on or about the person, for the purpose of committing some malicious crime, or of taking some undue advantage over an unsuspecting adversary.”).

<sup>188</sup> See Remington Soc’y of Am., *Remington Cane Guns*, <https://www.remingtonsociety.org/remington-cane-guns/> [https://perma.cc/A74W-EHPT] (last visited May 26, 2023).

and Georgia making it a crime to carry a firearm with the intent to assault another person.

#### iv. Territories

Among the State's law list is a number of regulations from 19th century territories. *Bruen* has already considered such laws and decided they are not particularly helpful for several reasons. "First, the bare existence of these localized restrictions cannot overcome the overwhelming evidence of an otherwise enduring American tradition ...."<sup>189</sup> "These territorial 'legislative improvisations,' which conflict with the Nation's earlier approach to firearm regulation, are most unlikely to reflect 'the origins and continuing significance of the Second Amendment' and we do not consider them 'instructive.'"<sup>190</sup> "Second, because these territorial laws were rarely subject to judicial scrutiny, we do not know the basis of their perceived legality .... we fail to see how they inform 'the origins and continuing significance of the Amendment.'"<sup>191</sup> "Finally, these territorial restrictions deserve little weight because they were—consistent with the transitory nature of territorial government—short lived .... Thus, they appear more as passing regulatory efforts by not-yet-mature jurisdictions on the way to statehood, rather than part of an enduring American tradition of state regulation."<sup>192</sup> One commentator

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<sup>189</sup> *Bruen*, 142 S. Ct. at 2154.

<sup>190</sup> *Id.* (quoting *Heller*, 554 U.S. at 614).

<sup>191</sup> *Bruen*, 142 S. Ct. at 2155 (quoting *Heller*, 554 U.S. at 592).

<sup>192</sup> *Id.* (citations omitted).

disagrees.<sup>193</sup> Even so, the territorial regulations suggest an absence of gun bans during the most important historical period.

None of the territorial regulations from 1791 to 1868 prohibited a firearm. There were no prohibitions on owning firearms of any type. There were no prohibitions on keeping a firearm of any type for self-defense, whether in the home or in public. The first territorial regulation came approximately 47 years after the Second Amendment (in 1839) and prohibited the carrying of a firearm in a *concealed* manner in the Florida Territory. [42]. In other words, for the first 40 years of the nation's history, the only territorial restriction on firearms, was in the Florida territory taken from Spain in 1819.

In 1853, the New Mexico Territory also adopted a *concealed* carrying prohibition. [58]. In 1854, the Washington Territory prohibited *exhibiting* a pistol in a rude, angry, or threatening manner, reenacting a similar law in 1859. [60, 71]. The Nebraska Territory made it a crime to carry a pistol *with the intent to assault* another person in 1858. [68] The Colorado Territory (in 1862 and again in 1867) and the Montana Territory (in 1864) restricted the *concealed* carrying of a pistol in a city, town, or village. [75, 79, 84]. While these territorial laws do evidence some later restrictions on the manner of carrying firearms in some public places, they do not evidence a history or tradition of prohibiting any firearms of any type.

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<sup>193</sup> See Andrew Willinger, *The Territories Under Text, History, and Tradition*, 101 Wash. Univ. L. Rev. (2023), <https://ssrn.com/abstract=4372185>.

### v. California's First Concealed Carry Law Was a Failure

In 1863, California's homicide rate reached "catastrophic levels."<sup>194</sup> With no Second Amendment analogue in the state constitution, California's solution was to ban carrying concealed weapons. The experiment failed. In 1870, the legislature repealed the law, because it disarmed the good citizen, but the law was not followed by "the vast majority of roughs, fighting men, and predatory characters,"<sup>195</sup> and the police were "apt to arrest any quiet citizen" with a concealed weapon.<sup>196</sup>

### B. Historical Twins

*Bruen* concluded that "[n]one of these historical limitations on the right to bear arms approach New York's proper-cause requirement because none operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose."<sup>197</sup> The same can be said about California's magazine ban. To paraphrase the Supreme Court, none of these historical limitations on the right to bear arms approach California's complete ban on magazines able to hold more than 10 rounds.

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<sup>194</sup> Decl. of Randolph Roth, Dkt. 118-8 ("Roth Decl."), at ¶ 36.

<sup>195</sup> *Id.* at ¶ 37 and n.84 (citing Clayton E. Cramer and Joseph E. Olson, *The Racist Origins of California's Concealed Weapon Permit Law*, SSRN (Aug. 12, 2016) (quoting *The Carrying of Concealed Weapons*, Daily Alta (San Francisco) California, March 13, 1869, at 2, and *Concealed Deadly Weapons*, Sacramento Daily Union, December 16, 1870, at 2.)).

<sup>196</sup> *Id.*

<sup>197</sup> 142 S. Ct. at 2150.

None operated to prevent law-abiding citizens from possessing as much ammunition as they thought best.

A historical twin is not unimaginable. It could have been the case that the early states prohibited having large capacity gunpowder sacks, or, they might have prohibited carrying more than 10 lead bullets. There were no such restrictions. There are no Founding-era dead ringers or historical twins. Of course, the State does not need to find a historical twin, but a second cousin twice-removed, is not enough.

## **V. Analogues**

Although the State does not identify any historical twins of its restrictions on magazines, it may not have to. A history and tradition of a relevantly similar firearm regulation could suffice. After all, it can be argued that removable magazines represent a dramatic change in technology and the State is attempting to address a modern societal concern. In such cases, *Bruen* allows a more nuanced approach. On one hand, compared to muskets of the colonial era, a Glock 17 with its 17-round magazine clearly represents a dramatic technological advancement. On the other hand, the lever-action repeating Henry and Winchester rifles popular at the time of the Fourteenth Amendment were already dramatic technological advancements in firearms. These popular lever-action rifles had large tubular magazines that held a lot of ammunition and could be fired multiple times in succession, accurately and quickly. Yet, there are no state prohibitions on possession or manufacture of these lever-action rifles in the State's law list.



In any event, while California does not need to identify a dead ringer for its magazine ban, “California cannot satisfy the requirement for a closely analogous historical regulation by reference to any general firearm regulation California might unearth.”<sup>198</sup>

**A. The State’s Best Historic Analogue? A New York City Gunpowder Storage Law Following the Worst City Fire in Colonial America**

Asked to identify the best historic analogue to its sweeping prohibition on large capacity magazines, the State identified a New York City gunpowder storage law following the worst city fire in Colonial America. With the assistance of scholars who have studied historic laws for years the State identified a 1784 statute regulating the amount of gunpowder that could be stored inside a New York City building.<sup>199</sup> Because the State has identified this as its best analogue, it deserves closer consideration.

The gunpowder storage law has nothing to do with gun violence. It was *a fire safety regulation*. Unsurprisingly, the law was enacted after New York City suffered two great fires, one of which is described as, “The most destructive fire in colonial North America.”<sup>200</sup> The first fire, in the year 1776, burned much of Manhattan to the ground and destroyed 493

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<sup>198</sup> *Baird*, 2023 WL 5763345, at \*8.

<sup>199</sup> See Defendant’s Response Brief in Response to the Court’s Order Entered on February 7, 2023, Dkt. 143, at 1, identifying 1784 Laws of N.Y. 627, chapter 28.

<sup>200</sup> New York City Fire Museum, *The Great New York Fire of 1776* (Mar. 21, 2023), <https://www.nycfiremuseum.org/greatfire1776> [<https://perma.cc/A3BW-TQRP>].

houses in its path. In 1778, a second fire swept through the city and destroyed 54 more houses and several warehouses.<sup>201</sup> After these two terrible fires the New York State legislature responded with a law for New York City limiting the quantity of gunpowder that a person could store in any one building to 28 pounds. It applied only to that part of Manhattan from city hall on the south end to one mile north.<sup>202</sup> Gunpowder was to be stored in fireproof stone jugs or tin canisters holding no more than 7 pounds each. Reinforcing that the law was enacted to prevent fires, it also required gunpowder be contained to prevent spills during transport through the streets.<sup>203</sup>

There was much the law did not do. It did not limit the total amount of gunpowder a person could own or use, as long as quantities over 28 pounds were kept in the public magazine or in additional buildings. It placed no limit on the number of lead bullets a person could keep or possess. It did not restrict a person from

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<sup>201</sup> Richard Howe, *Notes on the Great Fires of 1776 and 1778* (2014), The Gotham Center for New York City History, <https://www.gothamcenter.org/blog/notes-on-the-great-fires-of-1776-and-1778> [<https://perma.cc/WJ4V-3QKP>].

<sup>202</sup> “[I]t shall not be lawful ... to have or keep any quantity of gun powder exceeding twenty-eight pounds weight, in any one place, less than one mile to the northward of the city hall ... except in the public magazine at the Fresh-water ....”

<sup>203</sup> The law specified, “[a]nd in order to prevent any fatal consequences which may arise, from the carriage of gun powder, in and through the streets of the city of new York, by carts, carriages, or by hand, or otherways [sic], it shall be in a tight cask, well headed and hooped, and shall be put into bags or leather-cases, and intirely [sic] covered therewith, so as that none be spilt or scattered in the passage thereof ....” 1784 Laws of N.Y. at 628.

keeping his firearms loaded with gunpowder and bullets in his home, business, or when in public. Beyond the one mile stretch of lower Manhattan island, the law had no application anywhere else in the state. And 28 pounds is a lot of gunpowder. One New York militia soldier was required to bring 1/4 pound of gunpowder when called to muster.<sup>204</sup> So, 28 pounds of gunpowder could outfit 112 militia men. As the State's expert Professor Cornell notes, "Twenty to thirty pounds of gunpowder is certainly not an inconsiderable amount."<sup>205</sup>

For nuanced analogues, the New York City gunpowder storage law fails the why and how tests.<sup>206</sup> The "why" of the large capacity magazine ban is to introduce a "critical pause" into a mass shooter's unrelenting attack. The "why" of the historic gunpowder storage law is to reduce the risk of building fires. The "how" of the large capacity magazine ban is limiting the number of ammunition rounds that can be loaded in a gun for self-defense. The "how" of the

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<sup>204</sup> See Stats. at Large, New York 1867, Chapter X, Title VII, Article 1, §6, at 287 (eff. 1835) (penalties for militia men ill-equipped) ("[F]or want of two spare flints and a knapsack, twenty four cartridges, shot-pouch, powder-horn, twenty balls, and *a quarter of a pound of powder*, twenty five cents each ...."), [https://books.google.com/books/content?id=RkkwAQAAMAAJ&pg=PA287&img=1&zoom=3&hl=en&bul=1&sig=ACfU3U3ooEDz2oBmZb\\_g3qythhk8S6UJOg&ci=99%2C102%2C820%2C820&edge=0](https://books.google.com/books/content?id=RkkwAQAAMAAJ&pg=PA287&img=1&zoom=3&hl=en&bul=1&sig=ACfU3U3ooEDz2oBmZb_g3qythhk8S6UJOg&ci=99%2C102%2C820%2C820&edge=0) [<https://perma.cc/KS72-L87G>].

<sup>205</sup> Saul Cornell & Nathan DeNiro, *A Well Regulated Right*, 73 Fordham L. Rev. 487 n.173 (2004).

<sup>206</sup> Courts should examine "how and why the regulations burden a law-abiding citizens' right to armed self-defense." *Bruen*, 142 S. Ct. at 2132-33.

historic gunpowder storage law burden was generously limiting the storage (and not the amount loaded into guns for self-defense) of gunpowder for a geographic area smaller than one square mile. In the end, the State's proposed analogue is not relevantly similar.

One other gunpowder storage law mentioned by the State which applied only in the city of Boston, Massachusetts, fares no better. This was also a *fire* safety regulation—nothing more.<sup>207</sup> “The ordinance did not prohibit *carrying* loaded firearms within the City of Boston—only leaving them unattended in a building—and ... this law was for the protection of those fighting fires.”<sup>208</sup> In fact, one scholar mused, “Strictly speaking, the law did not forbid bringing an unloaded gun into a building, and then loading it when inside. So, occupants of homes or businesses remained free to keep loaded guns.”<sup>209</sup> Moreover, the State offers no evidence that the Massachusetts law was enforced. A search of *Thacher's Reports*, a collection of reports of criminal cases tried in the City of Boston Municipal Court from 1823-1843 reveals no such prosecutions.<sup>210</sup>

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<sup>207</sup> See *Renna*, 20-cv-2190-DMS-DEB, 2023 WL 2846937, \*12-13 (citing *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 963 (9th Cir. 2014) (stating “Boston’s firearm-and-gunpowder storage law is historically distinct from the challenged firearm regulation in light of *Heller*”).

<sup>208</sup> Clayton E. Cramer and Joseph Edward Olson, *Pistols, Crime, and Public: Safety in Early America*, 44 Willamette L. Rev. 699, 705 (2008) (emphasis in original).

<sup>209</sup> *Id.*

<sup>210</sup> *Thacher's Reports* may be found at <https://www.mass.gov/info-details/historical-massachusetts-cases#1800-1899->.

This whole gunpowder storage argument has been raised before and it has been rejected before. It was raised a dissent in *Heller* and relied on the same laws of New York and Massachusetts, and the same writings of Cornell.<sup>211</sup> The *Heller* majority was unimpressed. *Heller* says,

The other laws Justice Breyer cites are gunpowder-storage laws that he concedes did not clearly prohibit loaded weapons, but required only that excess gunpowder be kept in a special container or on the top floor of the home. Nothing about those fire-safety laws undermines our analysis; they do not remotely burden the right of self-defense as much as an absolute ban on handguns.<sup>212</sup>

Applying the same reasoning to this case, the early fire-safety gunpowder storage laws do not remotely burden the self-defense right as much as an absolute ban on magazines holding more than 10 rounds.

### **B. The State's Historic Analogue No. 2: Concealed Carry Laws**

Next, the State turns to historic laws regulating the *concealed* carrying of bowie knives, dirks, sword canes, and some pistols, as analogues.

#### **i. Pocket Pistols**

Some historic laws prohibited carrying a pocket pistol in a concealed manner. By 1868, about a dozen states had laws prohibiting carrying concealed pistols. Importantly, the concealed carry laws did not prohibit

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<sup>211</sup> *Heller*, 554 U.S. at 684-86 (Breyer, J., dissenting).

<sup>212</sup> *Id.* at 631-32.

either keeping pistols for all lawful purposes or carrying all guns openly. And none included long guns or ammunition containers in their restrictions. Pocket pistols were entirely lawful to keep and use at home for self-defense.

Prohibiting the concealed carrying of a pistol was constitutionally permissible only when a citizen could freely keep and carry the same gun openly. The statutes were often tested in court, suggesting that any broad carrying restriction ran close to the constitutional line. Today's large capacity magazine ban prohibits carrying magazines in any manner—and even more restrictively prohibits simple possession.

Historic concealed carry laws for pistols have a different “why” and “how” than do the State's large capacity magazine ban. The “why” of a concealed carry law was to prevent unfair surprise attacks by a person who appeared to be unarmed. The “how” of the historic concealed carry prohibitions was to proscribe the manner of carrying a pocket pistol and only when in public. The substantial burden imposed by the large capacity magazine ban is not analogous to the burden created by a concealed carry restriction for public carrying of a pocket pistol. Such a history and tradition of concealed carry prohibitions are not nuanced analogues for California's magazine ban as they are not relevantly similar.

## **ii Dirks, Daggers, Sword Canes, and Bowie Knives**

The State now asks the Court to compare firearms equipped with large capacity magazines to knives. Undoubtedly, dirks, daggers, and bowie knives are

dangerous. But dirks, daggers, sword canes, and bowie knives were not firearms; they were bladed instruments. *Bruen* says the state’s burden is to identify a historical *firearm* regulation, not a knife regulation. In the dissent, knives were cited only where territorial laws also affected the carrying of pistols, presumably because of the pistols.<sup>213</sup> *Heller* did not mention knife laws at all in evaluating the District of Columbia’s handgun ban. And the Supreme Court’s plurality did not mention bowie knives in evaluating Chicago’s handgun ban, except as an example of Reconstruction-era efforts to disarm African-Americans.<sup>214</sup> This is not to say that bowie knives are not “arms” imbued with Second Amendment protection.<sup>215</sup> Historical knife laws would be relevant in evaluating a modern prohibition on knives. It is simply to say that historical *firearm* regulations are obviously more likely to be relevant analogues for modern *firearm* restrictions.

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<sup>213</sup> *Id.* at 2186 (Breyer, J. dissenting) (“For example, Georgia made it unlawful to carry, ‘unless in an open manner and fully exposed to view, any pistol, (except horseman’s pistols,) dirk, sword in a cane, spear, bowie-knife, or any other kind of knives, manufactured and sold for the purpose of offence and defence.’ Ga. Code § 4413 (1861).”).

<sup>214</sup> *McDonald*, 561 U.S. at 771.

<sup>215</sup> *See, e.g.*, David B. Kopel, Clayton E. Cramer and Joseph E. Olson, *Knives and the Second Amendment*, 47 U. Mich. J. L. Reform 167, 168 (2013); Defs.’ Compendium of Works, Dkt. 158-2, at 65, 67 (“This Article analyzes Second Amendment protection for the most common ‘arm’ in the United States—the knife.”).

Even if knife regulations were relevant, they would not help the State much.<sup>216</sup> There were laws

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<sup>216</sup> This opinion is shared by two historians. See David B. Kopel and Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. of Legis., Apr. 25, 2023, at 168-69 (2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4393197](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4393197) [<https://perma.cc/P85U-ASTZ>] (“Bans on modern rifles and magazines cannot be rescued by diverting attention away from the legal history of firearms law, and instead pointing to laws about other arms. Dozens of state and territorial legislatures enacted laws about Bowie knives, as well as dirks and daggers. Prohibitory laws for these blades are fewer than the number of bans on carrying handguns, and Bruen found the handgun laws insufficient to establish a tradition constricting the Second Amendment.”

As for other non-blade impact weapons, the sales and manufacture bans in a minority of states for slungshots and knuckles could be considered as involving arms “not typically possessed by law-abiding citizens for lawful purposes.”

Other flexible impact arms, most notably blackjacks, were “typically possessed by law-abiding citizens for lawful purposes,” especially by law enforcement officers. Likewise, modern semiautomatic rifles and standard magazines are also highly preferred by today’s law enforcement officers.

For blackjacks and sand clubs, only one state, New York, enacted a sales and manufacture ban. That came at a time when the legislature was unencumbered by a Second Amendment enforceable against the states or by a state constitution right to arms. As *Bruen* teaches, a lone eccentric state does not create a national legal tradition.

For every arm surveyed in this article, the mainstream American legal tradition was to limit the mode of carry (no concealed carry), to limit sales to minors (either with bans or requirements for parental permission), and/or to impose extra punishment for use in a crime.



restricting bowie knives in some states in the 1800's, but not the vast majority of states. There is also little evidence of actual prosecutions for simply possessing a bowie knife, much less a judicial opinion on constitutionality. One court observed that a Tennessee bowie knife law was generally disregarded.<sup>217</sup>

The argument that a cluster of laws prohibiting the carrying of dangerous knives could justify a gun ban, lost its wind in *McDonald*. If the regulation of knives was not a sufficient analogue for restricting handguns in Chicago, neither are regulations of dirks, daggers, sword canes, and bowie knives useful analogues for prohibiting modern magazines.

### **C. The State's Historic Analogue No. 3: Guns Set as Traps**

Historic laws prohibiting trap guns are proposed as a third analogue by the State. What the State does not admit or seem to recognize is that “trap guns” are not guns at all. They are a method by which a gun, any gun, can be set up to fire indiscriminately through the use of springs, strings, or other atypical triggering mechanism without needing an operator. Nonetheless, absent from our history is a tradition of trap gun restrictions in the important years between

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The fact that most states banned concealed carry of Bowie knives is not a precedent to criminalize the mere possession of modern rifles and magazines.”).

<sup>217</sup> See, e.g., *Day v. State*, 37 Tenn. 496, 499 (Tenn. 1858) (“It is a matter of surprise that these sections of this act, so severe in their penalties, *are so generally disregarded* in our cities and towns.”) (describing state law prohibiting the concealed carrying of bowie knives) (emphasis added).

the 1791 and 1868. The 1771 New Jersey trap gun law, upon which the State relies, predates the Declaration of Independence, New Jersey statehood,<sup>218</sup> and the Second Amendment. Ninety-five years passed before a second restriction on trap gun was enacted and that one applied only to the Utah Territory (1865). [80]. Within the states, the first regulation on setting a trap gun, was enacted in Minnesota in 1873. [109]. Two states followed later in 1875 (Michigan) and 1884 (Vermont). In other words, trap guns were not prohibited by law in the District of Columbia or 36 of the 37 states (then existing), until 1873. California did not enact its own trap gun law until 1957.<sup>219</sup> Court decisions between 1791 and 1868 recognized that it was entirely lawful to use trap guns (or spring guns, as they were sometimes called) to defend one's property.<sup>220</sup> If this is what a national tradition of trap gun regulation looks like, it is a strange look, indeed.

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<sup>218</sup> New Jersey was one of the few states that did not have in its state constitution a provision like the Second Amendment. (Six states do not have provisions protecting a right to arms in their state constitutions: California, New Jersey, New York, Maryland, Minnesota, and Iowa.) See David B. Kopel and Clayton E. Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 Santa Clara L. Rev 1113, 1145 n.51 (2010).

<sup>219</sup> See Cal. Fish & Game Code § 2007.

<sup>220</sup> See, e.g., *Gray v. Combs*, 7 J. J. Marsh, 478 (Ky. 1832) (one who sets traps or spring guns to protect valuable property by means of which another is killed while attempting to enter the premises is guilty of no crime); *Loomis v. Terry*, 1837 WL 2808 (N.Y. Sup. Ct. 1837) ("It is not like setting spring guns with public notice of the fact; for even that has been held warrantable as being necessary (*Ilott v. Wilkes*, 3 Barn. & Ald. 304)."); *State v. Moore*, 31 Conn. 479, 479-80 (Conn. 1863) ("Breaking and entering a shop in the night season with intent to steal, is by our

Claiming trap guns were “dangerous weapons commonly used for criminal behavior and not for self-defense,”<sup>221</sup> the State has a problem with the facts. There is little historical evidence that trap guns were used for criminal behavior. Rather, guns were set as traps by common people to protect their property from thieves and sometimes for self-defense against burglars. Perhaps just as often trap guns were used to hunt game. Historian and expert witness for the State, Robert Spitzer opines about trap guns: (1) “[t]hose who set gun traps typically did so to defend their

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law burglary, and the placing of spring guns in such a shop for its defense, would be justified if a burglar should be killed by them.”); *Maenner v. Carroll*, 46 Md. 193, 208 (Md. Ct. App. 1877) (“While it is decided that traps, spring-guns, and other dangerous instruments, may be lawfully placed on private grounds, for the purpose of deterring trespassers or catching strange animals doing damage ....”); *see also Simpson*, 59 Ala. at 18 (citing *Moore*, 31 Conn. at 479) (“The setting a spring-gun on his premises, by the owner, is culpable only because of the intent with which it is done. Unless the public safety is thereby endangered, it is not indictable. If dangerous to the public, it is indictable as a nuisance.”); *United States v. Gilliam*, 25 F. Cas. 1319, 1320 and n.2 (D.C. Crim. Ct. 1882) (“The setting of a spring-gun as a protection for property, though not in itself unlawful and indictable, is certainly undeserving of encouragement....”) (citing English common law and the court of King’s Bench, *Ilott v. Wilkes*, 3 Barn. & Ald. 304 (‘A trespasser, having knowledge that there are spring-guns in a wood, although he may be ignorant of the particular spots where they are placed, cannot maintain an action for an injury received in consequence of his accidental treading on the latent wire connecting with the gun, and thereby letting it off.’)).

<sup>221</sup> Defs’ Br. in Resp., Dkt. 145, at 10 (quoting *Oregon Firearms Fed’n, Inc. v. Brown*, No. 2:22-cv-01815-IM, 2022 WL 17454829, at \*13 (D. Or. Dec. 6, 2022), *appeal dismissed*, No. 22-36011, 2022 WL 18956023 (9th Cir. Dec. 12, 2022)).

places of business, properties, or possessions;” and (2) “opinion was more divided ... with some arguing that thieves or criminals hurt or killed by the devices had it coming.”<sup>222</sup> So, when the State claims trap guns were used by criminals and not for self-defense, it gets the facts backwards. The how and why of the two types of regulations are not relevantly similar, thus trap gun laws are not useful analogues for prohibiting modern magazines.

**D. The Best Analogue: Laws Requiring Citizens to Keep and Carry Sufficient Bullets and Gunpowder for Service in the Militia**

California ignores Founding-era laws that present the best analogue to its present-day magazine law. These are the manifold early militia laws requiring each citizen, not to limit the amount of ammunition he could keep, but to arm himself with *enough* ammunition: at least 20 rounds.<sup>223</sup>

Government remains fixed on the notion that it alone can decide that anything larger than a 10-round

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<sup>222</sup> (U.S.D.C. Oregon Dkt. 17-2 at ¶¶ 34-53) (first filed in the instant case).

<sup>223</sup> See, e.g., 1784 Mass. Acts 142; 1786 N. Y. Laws 228; 1785 Va. Statutes at Large 12 (12 Hening c. 1); 1 Stat. 271 (1792) (Militia Act); Herbert L. Osgood, *The American Colonies in the Seventeenth Century*, 499-500 (1904) (explaining that states often required citizens to equip themselves with adequate firearms and ammunition, including between 20 and 24 cartridges at minimum); *Silveira v. Lockyer*, 328 F.3d 567, 586 (9th Cir. 2003) (“Much as building codes today require smoke detectors in the home, a man had to have a bullet mould, a pound of powder, four pounds of lead, and twenty bullets, to be produced when called for by a militia officer.”) (Kleinfeld, J., dissenting).

magazine is not “suitable” for a citizen to have. But, there are no analogous cases in our history. There are no cases where American government dictated that lever-action rifles were unsuitable because single shot rifles were good enough, or revolvers were unsuitable because derringers were good enough.<sup>224</sup> These choices have always belonged to the People to decide for themselves how much firepower they need.

The right to have firearms for social security was important at the time the Constitution was adopted. There were many enemies of the young nation. An armed citizenry provided a much-needed deterrent effect. Early citizens remembered how the Minutemen of Lexington and Concord, Massachusetts, by assembling as a militia, fought back against the hostile British march to take away guns and gunpowder in April 1776.

During the Nation’s founding-era, federal and state governments enacted laws for the formation and maintenance of citizen militias. Three such statutes are described in *Miller*.<sup>225</sup> Rather than restricting too much firing capacity, the laws mandated a minimum firing capacity. These statutes required citizens to

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<sup>224</sup> “I surveyed the gun regulations in the Duke Historical Database from the early medieval period through 1885 to see what terminology was used. None of the laws that prohibit weapons, aside from the Maryland statute above, specifies a gun part or ammunition case or accoutrements of any kind. Although many present a list of banned or prohibited weapons—usually without defining them [the assumption is that the reader knows what they refer to], none of the laws mention cartridge boxes, bullets, barrels, or other parts of any weapons.” Declaration of Dennis Baron, Dkt. 118-2, at ¶ 56.

<sup>225</sup> 307 U.S. 174 (1939)

arm themselves with arms and a minimum quantity of bullets and gunpowder, not to disarm themselves. When Congress passed the Militia Act in 1792,<sup>226</sup> the law required a citizen to be equipped to fire at least 20 to 24 shots.<sup>227</sup> A 1786 New York law required “no less than Twenty-four Cartridges,” and a 1785 Virginia law required a cartridge box and “four pounds of lead, including twenty blind cartridges.” In 1776, Paul Revere’s Minutemen were required to have 30 bullets and gunpowder.

These and other citizen militia laws demonstrate that, contrary to the idea of a firing-capacity upper limit on the number of rounds permitted, there was a legal obligation for the average citizen to have at least 20 rounds available for immediate use.<sup>228</sup> There were no upper limits like § 32310; there were floors and the floors were well above 10 rounds.<sup>229</sup> California’s large

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<sup>226</sup> 1 Stat. 271, 2 Cong. Ch. 33.

<sup>227</sup> “That every citizen so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than *twenty-four cartridges*, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch and powder-horn, *twenty balls* suited to the bore of his rifle and a quarter of a pound of powder.” (Emphasis added).

<sup>228</sup> *Teixeira v. Cty. Of Alameda*, 873 F.3d 670, 685 (9th Cir. 2017) (citing Joyce Lee Malcolm, *To Keep and Bear Arms* 139 (1994)) (“the colonial militia played a primarily defensive role .... The dangers all the colonies faced ... were so great that not only militia members but all householders were ordered to be armed.”).

<sup>229</sup> *Duncan*, 366 F. Supp. at 1150.

capacity magazine ban is a diametrically opposed analogue.

As one court explained, “[u]nder *Bruen*, the Second Amendment does not ‘forbid all laws other than those that *actually existed* at or around the time of the Second Amendment’s adoption,’ but rather ‘the Second Amendment must, at most, forbid laws that could not have existed under the understanding of the right to bear arms that prevailed at the time.’”<sup>230</sup> California’s large capacity magazine ban did not exist and could not have existed under the understanding of the Second Amendment at the time of the Founding. This is clear because militia laws of the federal and state governments required citizens to keep and carry more ammunition supplies than 10 rounds. A prohibition like § 32310 would have been impossible to enforce and runs contrary to legal commands for militia readiness.

## VI. Conclusion

Removable firearm magazines of all sizes are necessary components of semiautomatic firearms. Therefore, magazines come within the text of the constitutional declaration that the right to keep and bear arms shall not be infringed. Because millions of removable firearm magazines able to hold between 10 and 30 rounds are commonly owned by law-abiding citizens for lawful purposes, including self-defense, and because they are reasonably related to service in the militia, the magazines are presumptively within

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<sup>230</sup> Def’s Br. in Resp., Dkt. 142 at 16 (quoting *United States v. Kelly*, No. 3:22-cr-00037, 2022 U.S. Dist. LEXIS 215189, at \*14 n.7 (M.D. Tenn. Nov. 16, 2022)).

the protection of the Second Amendment. There is no American history or tradition of regulating firearms based on the number of rounds they can shoot, or of regulating the amount of ammunition that can be kept and carried. The best analogue that can be drawn from historical gun laws are the early militia equipment regulations that required all able-bodied citizens to equip themselves with a gun and a minimum amount of ammunition in excess of 10 rounds.

Because the State did not succeed in justifying its sweeping ban and dispossession mandate with a relevantly similar historical analogue, California Penal Code § 32310, as amended by Proposition 63, is hereby declared to be unconstitutional in its entirety and shall be enjoined. At this time, the Court's declaration does not reach the definition of a large capacity magazine in California Penal Code § 16740 where it is used in other parts of the Penal Code to define other gun-related crimes or enhance criminal penalties.

One government solution to a few mad men with guns is a law that makes into criminals responsible, law-abiding people wanting larger magazines simply to protect themselves. The history and tradition of the Second Amendment clearly supports state laws against the use or misuse of firearms with unlawful intent, but not the disarmament of the law-abiding citizen. That kind of a solution is an infringement on the Constitutional right of citizens to keep and bear arms. The adoption of the Second Amendment was a freedom calculus decided long ago by our first citizens who cherished individual freedom with its risks more than the subservient security of a British ruler or the



smothering safety of domestic lawmakers. The freedom they fought for was worth fighting for then, and that freedom is entitled to be preserved still.

The Attorney General respectfully requests a stay of any judgment in Plaintiffs' favor for a sufficient period to seek a stay from the Court of Appeals. Dkt. 118 at 61-63; Dkt. 142 at 25. That request is granted. Therefore, the enforcement of the injunction is hereby stayed for ten days.

**IT IS HEREBY ORDERED** that:

1. Defendant Attorney General Rob Bonta, and his officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with him, and those duly sworn state peace officers and federal law enforcement officers who gain knowledge of this injunction order, or know of the existence of this injunction order, are enjoined from enforcing California Penal Code § 32310.

2. Defendant Rob Bonta shall provide, by personal service or otherwise, actual notice of this order to all law enforcement personnel who are responsible for implementing or enforcing the enjoined statute.

3. This injunction is stayed for ten (10) days from the date of this Order.

**IT IS SO ORDERED.**

Date: September 22, 2023 [handwritten: signature]

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HON. ROGER T. BENITEZ  
United States District  
Judge

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*Appendix F*

**SUPREME COURT OF THE UNITED STATES**

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No. 21-1194

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VIRGINIA DUNCAN, et al.,

*Petitioners,*

v.

ROB BONTA, in his official capacity as Attorney  
General of the State of California,

*Respondent.*

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Filed: June 30, 2022

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**ORDER**

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On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 U.S. —, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022).

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*Appendix G*

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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No. 19-55376

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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.*

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Argued and Submitted En Banc: June 22, 2021  
Filed: Nov. 30, 2021

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Before: Sidney R. Thomas, Chief Judge, and Susan P.  
Graber, Richard A. Paez, Marsha S. Berzon, Sandra  
S. Ikuta, Mary H. Murguia, Paul J. Watford, Andrew  
D. Hurwitz, Ryan D. Nelson, Patrick J. Bumatay and  
Lawrence VanDyke, Circuit Judges.

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OPINION

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GRABER, Circuit Judge:

In response to mass shootings throughout the nation and in California, the California legislature enacted Senate Bill 1446, and California voters adopted Proposition 63. Those laws amended California Penal Code section 32310 to prohibit possession of large-capacity magazines, defined as those that can hold more than ten rounds of ammunition. California law allows owners of large-capacity magazines to modify them to accept ten rounds or fewer. Owners also may sell their magazines to firearm dealers or remove them from the state. And the law provides several exceptions to the ban on large-capacity magazines, including possession by active or retired law enforcement officers, security guards for armored vehicles, and holders of special weapons permits.

Plaintiffs, who include persons who previously acquired large-capacity magazines lawfully, bring a facial challenge to California Penal Code section 32310. They argue that the statute violates the Second Amendment, the Takings Clause, and the Due Process Clause. We disagree.

Reviewing de novo the district court's grant of summary judgment to Plaintiffs, *Salisbury v. City of Santa Monica*, 998 F.3d 852, 857 (9th Cir. 2021), we hold: (1) Under the Second Amendment, intermediate scrutiny applies, and section 32310 is a reasonable fit for the important government interest of reducing gun violence. The statute outlaws no weapon, but only limits the size of the magazine that may be used with firearms, and the record demonstrates (a) that the limitation interferes only minimally with the core

right of self-defense, as there is no evidence that anyone ever has been unable to defend his or her home and family due to the lack of a large-capacity magazine; and (b) that the limitation saves lives. About three-quarters of mass shooters possess their weapons and large-capacity magazines lawfully. In the past half-century, large-capacity magazines have been used in about three-quarters of gun massacres with 10 or more deaths and in 100 percent of gun massacres with 20 or more deaths, and more than twice as many people have been killed or injured in mass shootings that involved a large-capacity magazine as compared with mass shootings that involved a smaller-capacity magazine. Accordingly, the ban on legal possession of large-capacity magazines reasonably supports California's effort to reduce the devastating damage wrought by mass shootings. (2) Section 32310 does not, on its face, effect a taking. The government acquires nothing by virtue of the limitation on the capacity of magazines, and because owners may modify or sell their nonconforming magazines, the law does not deprive owners of all economic use. (3) Plaintiffs' due process claim essentially restates the takings claim, and it fails for the same reasons. Accordingly, we reverse the judgment of the district court and remand for entry of judgment in favor of Defendant Rob Bonta, Attorney General for the State of California.

## FACTUAL AND PROCEDURAL HISTORY

### **A. *Large-Capacity Magazines***

A magazine is an "ammunition feeding device" for a firearm. Cal. Penal Code § 16890. On its own, a magazine is practically harmless and poses no threat

to life or limb. But when filled with bullets and attached to a firearm, its deadliness is equally obvious. A magazine enables a shooter to fire repeatedly—a number of times up to the ammunition capacity of the magazine—without reloading. Once a magazine is empty, the shooter may continue to fire only after pausing to change magazines or to reload the original magazine. The time it takes to change magazines ranges from about two to ten seconds, depending on the skill of the shooter and the surrounding circumstances. *Ass’n of N.J. Rifle & Pistol Clubs, Inc. v. Att’y Gen. N.J. (“ANJRPC”)*, 910 F.3d 106, 113 (3d Cir. 2018).

California and many other jurisdictions define a “large-capacity magazine” as a magazine capable of holding more than ten rounds of ammunition. *E.g.*, Cal. Penal Code § 16740; 18 U.S.C. § 921(a)(31)(A) (1994); Conn. Gen. Stat. § 53-202w(a)(1); D.C. Code § 7-2506.01(b); N.J. Stat. Ann. § 2C:39-1(y). Large-capacity magazines thus allow a shooter to fire more than ten rounds without any pause in shooting.

Most, but not all, firearms use magazines. For those firearms that accept magazines, manufacturers often include large-capacity magazines as a standard part of a purchase of a firearm. “Most pistols are manufactured with magazines holding ten to seventeen rounds, and many popular rifles are manufactured with magazines holding twenty or thirty rounds.” *Kolbe v. Hogan*, 849 F.3d 114, 129 (4th Cir. 2017) (en banc). Although data on magazine ownership are imprecise, some experts estimate that approximately half of all privately owned magazines

in the United States have a capacity greater than ten rounds. *Id.*

As we will discuss in detail below, Defendant introduced evidence that mass shootings often involve large-capacity magazines, to devastating effect. Shooters who use large-capacity magazines cause significantly more deaths and injuries than those shooters who are equipped with magazines of smaller capacity. Intended victims and law enforcement officers use brief pauses in shooting to flee or to fight back. Because shooters who are equipped with large-capacity magazines may fire many bullets without pause, shooters are able to—and do—inflict far more damage using those magazines than they otherwise could.

### **B. *California's Ban***

In 1994, Congress banned the possession or transfer of large-capacity magazines. Pub. L. 103-322, § 110103, Sept. 13, 1994, 108 Stat. 1796, 1998-2000 (formerly codified at 18 U.S.C. § 922(w)). The federal ban exempted those magazines that were legally possessed before the date of enactment. *Id.* The law expired ten years later, in 2004. *Id.* § 110105(2).

California began regulating large-capacity magazines in 2000, prohibiting their manufacture, importation, or sale in the state. Cal. Penal Code § 12020(a)(2) (2000). After the expiration of the federal ban, California strengthened its law in 2010 and again in 2013 by, among other things, prohibiting the purchase or receipt of large-capacity magazines. Cal. Penal Code § 32310(a) (2013). But possession of large-capacity magazines remained legal, and law enforcement officers reported to the California

legislature that, as a result, enforcement of the existing laws was “very difficult.”

In 2016, the California legislature enacted Senate Bill 1446, which barred possession of large-capacity magazines as of July 1, 2017, and imposed a fine for failing to comply. 2016 Cal. Stat. ch. 58, § 1. Later in 2016, voters in California approved Proposition 63, also known as the Safety for All Act of 2016, which subsumed Senate Bill 1446 and added provisions that imposed a possible criminal penalty of imprisonment for up to a year for unlawful possession of large-capacity magazines after July 1, 2017. Cal. Penal Code § 32310(c). Proposition 63 declared that large-capacity magazines “significantly increase a shooter’s ability to kill a lot of people in a short amount of time.” Prop. 63 § 2(11). “No one except trained law enforcement should be able to possess these dangerous ammunition magazines,” and the present law’s lack of a ban on possession constituted a “loophole.” *Id.* § 2(12). The law’s stated purpose is “[t]o make it illegal in California to possess the kinds of military-style ammunition magazines that enable mass killings like those at Sandy Hook Elementary School; a movie theater in Aurora, Colorado; Columbine High School; and an office building at 101 California Street in San Francisco, California.” *Id.* § 3(8).

California law defines a “large-capacity magazine” as

any ammunition feeding device with the capacity to accept more than 10 rounds, but shall not be construed to include any of the following:



- (a) A feeding device that has been permanently altered so that it cannot accommodate more than 10 rounds.
- (b) A .22 caliber tube ammunition feeding device.
- (c) A tubular magazine that is contained in a lever-action firearm.

Cal. Penal Code § 16740. The ban on possession of large-capacity magazines exempts persons who are active or retired law enforcement officers, security guards for armored vehicles, and holders of special weapons permits for limited purposes; the law also allows the manufacture of magazines for government use and the use of magazines as props in film production. *Id.* §§ 32400-55. Finally:

Any person who may not lawfully possess a large-capacity magazine commencing July 1, 2017 shall, prior to July 1, 2017:

- (1) Remove the large-capacity magazine from the state;
- (2) Sell the large-capacity magazine to a licensed firearms dealer; or
- (3) Surrender the large-capacity magazine to a law enforcement agency for destruction.

*Id.* § 32310(d).

California is not alone in banning the possession of large-capacity magazines after the federal prohibition expired in 2004. The District of Columbia and eight other states have imposed significant restrictions on large-capacity magazines. 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); Mass. Gen. Laws Ann. ch. 140, §§ 121, 131(a), 131M; Md. Code Ann., Crim. Law § 4-305(b); N.J. Stat. Ann. §§ 2C:39-1(y), 39-3(j), 39-9(h); N.Y. Penal Law §§ 265.00, 265.36; 13 Vt. Stat. Ann. § 4021. Municipalities, too, have banned the possession of large-capacity magazines. *E.g.*, Highland Park, Ill. City Code § 136.005; Sunnyvale, Cal. Mun. Code § 9.44.050 (enacted before the statewide ban).

### **C. *Procedural History***

Plaintiffs brought this action in 2017, arguing that California’s prohibition on the possession of large-capacity magazines violates the Second Amendment, the Fifth Amendment’s Takings Clause, and the Fourteenth Amendment’s Due Process Clause. Plaintiffs own, or represent those who own, large-capacity magazines, and they do not want to comply with California’s requirement that they modify the magazines to accept ten or fewer rounds, remove the magazines from the state, sell them to a licensed firearms dealer, or allow state authorities to destroy them.

Shortly before July 1, 2017, the district court preliminarily enjoined the state from enforcing the law, holding that Plaintiffs were likely to succeed on their claims under the Second Amendment and the Takings Clause. *Duncan v. Becerra*, 265 F. Supp. 3d 1106 (S.D. Cal. 2017). On appeal to this court, a two-judge majority affirmed the preliminary injunction, concluding that the district court did not abuse its discretion in holding that Plaintiffs had shown a likelihood of success on their claims. *Duncan v. Becerra*, 742 F. App’x 218, 221-22 (9th Cir. 2018)

(unpublished); *see also id.* at 220 (“We do not determine the ultimate merits, but rather determine only whether the district court correctly distilled the applicable rules of law and exercised permissible discretion in applying those rules to the facts at hand.” (internal quotation marks omitted)). Judge Wallace dissented. *Id.* at 223-26. He acknowledged the deferential standard of review on appeal from a preliminary injunction but he “d[id] not consider it a close call to conclude the district court abused its discretion in finding Plaintiffs were likely to succeed on the merits of their constitutional challenges.” *Id.* at 226 (Wallace, J., dissenting). Judge Wallace reasoned that “California’s evidence—which included statistical studies, expert testimony, and surveys of mass shootings showing that the use of [large-capacity magazines] increases the lethality of gun violence—was more than sufficient to satisfy intermediate scrutiny.” *Id.* at 223. And he further concluded that the California law did not violate the Takings Clause, because there is no physical taking and no evidence that alteration or sale of large-capacity magazines would be economically infeasible. *Id.* at 225.

In 2019, the district court granted summary judgment to Plaintiffs on the Second Amendment and takings claims and permanently enjoined Defendant from enforcing the law. *Duncan v. Becerra*, 366 F. Supp. 3d 1131 (S.D. Cal. 2019). On appeal, a divided panel affirmed the district court’s grant of summary judgment as to the Second Amendment claim. *Duncan v. Becerra*, 970 F.3d 1133 (9th Cir. 2020). Chief District Judge Lynn dissented; she would have rejected Plaintiffs’ Second Amendment claim. *Id.* at 1169-76.

The panel majority’s opinion conflicted with decisions by all six circuit courts to have considered—and rejected—Second Amendment challenges to similar laws. *Worman v. Healey*, 922 F.3d 26 (1st Cir. 2019), *cert. denied*, 141 S. Ct. 109 (2020); *ANJRPC*, 910 F.3d 106; *Kolbe*, 849 F.3d 114; *N.Y. State Rifle & Pistol Ass’n, Inc. v. Cuomo* (“*NYSRPA*”), 804 F.3d 242 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015); *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) (“*Heller II*”). We granted rehearing en banc and, pursuant to our ordinary practice, vacated the panel’s opinion. *Duncan v. Becerra*, 988 F.3d 1209 (9th Cir. 2021) (order); Ninth Cir. Rules 35-1 to 35-3, Adv. Comm. Note 3.

## DISCUSSION

We address (A) the Second Amendment claim and (B) the takings claim.<sup>1</sup>

### A. *Second Amendment Claim*

The Second Amendment states: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II. The Second Amendment “protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home.” *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010). The Second Amendment “is fully applicable to the States.” *Id.* at 750.

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<sup>1</sup> In a footnote, Plaintiffs state that summary judgment was proper in their favor on the due process claim “[f]or all the same reasons” that apply to the takings claim. Because we reject the takings claim, we reject the due process claim.

In *District of Columbia v. Heller*, 554 U.S. 570, 574, 628 (2008), the Supreme Court struck down, as inconsistent with the Second Amendment right to keep and bear arms, the District of Columbia's laws that "generally prohibit[ed] the possession of handguns" and "totally ban[ned] handgun possession in the home." The Court declined to define the applicable framework for addressing Second Amendment claims, holding that the handgun ban failed "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." *Id.* at 628.

"Following *Heller* and *McDonald*, we have created a two-step framework to review Second Amendment challenges." *Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021) (en banc), *petition for cert. filed*, (U.S. May 11, 2021) (No. 20-1639). We first ask "if the challenged law affects conduct that is protected by the Second Amendment." *Id.* If not, then the law is constitutional, and our analysis ends. *Id.* If, on the other hand, the law implicates the Second Amendment, we next choose and apply an appropriate level of scrutiny. *Id.* at 784. Ten of our sister circuits have adopted a substantially similar two-step test. *Gould v. Morgan*, 907 F.3d 659, 668-69 (1st Cir. 2018), *cert. denied*, 141 S. Ct. 108 (2020); *NYSRPA*, 804 F.3d at 254; *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs*, 788 F.3d 1318, 1322 (11th Cir. 2015); *see Young*, 992 F.3d at 783 (listing cases from the Third, Fourth, Fifth, Sixth, Seventh, Tenth and D.C. Circuits that apply a similar two-step framework).

Judge Bumatay's dissent would jettison the two-step framework adopted by us and our sister circuits,

in favor of a “text, history, and tradition” test. Dissent by J. Bumatay at 108. Plaintiffs have not sought this test, despite having filed supplemental briefs after we granted rehearing en banc, and Defendant has not had a chance to respond. The dissent nevertheless asks us to disrupt a decade of caselaw and to create a circuit split with ten of our sister circuits, not because of any recent development in the law, but because of the dissent’s preferred reading of the same Supreme Court cases that we have applied many times. We reject the dissent’s invitation. Our test is fully consistent with every other circuit court’s approach and, for the reasons that follow, we agree with those decisions that have thoroughly and persuasively rejected the dissent’s alternative approach to Second Amendment claims. *E.g.*, *NYSRPA*, 804 F.3d at 257 n.74; *Heller II*, 670 F.3d at 1264-67.

Our two-step inquiry faithfully adheres to the Supreme Court’s guidance in *Heller* and *McDonald*. The Court looked extensively to history, text, and tradition in discussing the scope of the Second Amendment right. Accordingly, history, text, and tradition greatly inform step one of the analysis, where we ask whether the challenged law implicates the Second Amendment. *See, e.g.*, *Young*, 992 F.3d at 784-826 (undertaking a detailed historical review); *Teixeira v. County of Alameda*, 873 F.3d 670, 682-87 (9th Cir. 2017) (en banc) (reviewing historical materials at length). Those sources also inform step two, where we choose strict scrutiny, intermediate scrutiny, or no scrutiny at all (as in *Heller*) by examining the effect of the law on the core of the Second Amendment right as traditionally understood.

*E.g., United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013).

But we do not read the Supreme Court’s cases as foreclosing the application of heightened scrutiny as the final step of the analysis. The Court expressly held that rational basis review is never appropriate. *Heller*, 554 U.S. at 628 n.27. Had the Court intended to foreclose the other forms of traditional review, it could have so held. Instead, and to the contrary, the Court referred specifically to “the standards of scrutiny that we have applied to enumerated constitutional rights” and held that application of heightened scrutiny is unnecessary when the law at issue “would fail constitutional muster” under any standard of scrutiny. *Id.* at 628-29.

The Court clearly rejected Justice Breyer’s “judge-empowering ‘interest balancing inquiry’” that, rather than corresponding to any of “the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis),” asked instead “whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.” *Id.* at 634 (citing *id.* at 689-90 (Breyer, J., dissenting)). But the standards that we apply—strict and intermediate scrutiny—plainly are the traditional tests and are not the interest-balancing test proposed by Justice Breyer. In *Heller*, the Court emphasized that the Second Amendment, “[l]ike the First, ... is the very *product* of an interest balancing by the people.” *Id.* at 635. The Court regularly assesses First Amendment challenges using intermediate and strict scrutiny, depending on the nature of the law and the

context of the challenge. *E.g.*, *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017); *Reed v. Town of Gilbert*, 576 U.S. 155, 163-65 (2015). We see no reason why those same standards do not apply to Second Amendment challenges as well. Unless and until the Supreme Court tells us and the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits 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.

Here, Plaintiffs bring a facial Second Amendment challenge to California’s ban on large-capacity magazines. Accordingly, Plaintiffs “must show that no set of circumstances exists under which the [statute] would be valid.” *Young*, 992 F.3d at 779 (alteration in original) (internal quotation marks omitted). Our review is “limited to the text of the statute itself,” and Plaintiffs’ (and amici’s) individual circumstances do not factor into our analysis. *Id.*

We are guided by the decisions of six of our sister circuits, all of which upheld laws banning or restricting large-capacity magazines as consistent with the Second Amendment. *Worman*, 922 F.3d 26; *ANJRPC*, 910 F.3d 106; *Kolbe*, 849 F.3d 114; *NYSRPA*, 804 F.3d 242; *Friedman*, 784 F.3d 406; *Heller II*, 670 F.3d 1244; *see Fyock v. City of Sunnyvale*, 779 F.3d 991 (9th Cir. 2015) (affirming the denial of a preliminary injunction in a case in which the plaintiffs challenged a municipal ban on large-capacity magazines). Most of those decisions applied the same general two-step approach that guides us and reached the same conclusions that we reach. In



particular, they assumed without deciding, at step one, that the law implicated the Second Amendment; and held, at step two, that intermediate scrutiny applied and that the ban or restrictions survived that form of review. *Worman*, 922 F.3d at 33-40; *ANJRPA*, 910 F.3d at 116-24; *NYSRPA*, 804 F.3d at 254-64; *Heller II*, 670 F.3d at 1260-64; see *Fyock*, 779 F.3d at 996-1001 (following that same general approach in the context of an appeal from a preliminary injunction).<sup>2</sup>

**1. *Step One: Whether the Challenged Law Implicates the Second Amendment***

At step one, we ask whether the challenged law affects conduct that the Second Amendment protects. *Young*, 992 F.3d at 783. Defendant argues that California’s ban withstands scrutiny at this step for two reasons. First, Defendant asks us to follow the lead of the Fourth Circuit and hold that large-capacity magazines lack Second Amendment protection because they are similar to “M-16 rifles and the like,”

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<sup>2</sup> Sitting en banc, the Fourth Circuit reached two alternative holdings in upholding Maryland’s ban on large-capacity magazines. It first held, at step one, that bans on large-capacity magazines do *not* implicate the Second Amendment. *Kolbe*, 849 F.3d at 135-37. The court next held, in the alternative and in accord with the four decisions cited in the text that, assuming any scrutiny was warranted, intermediate scrutiny applied and that the ban withstood such scrutiny. *Id.* at 138-41.

For its part, the Seventh Circuit declined to apply that court’s ordinary two-step inquiry, holding instead that a municipal ban on large-capacity magazines was constitutional because those magazines were not common at the time of ratification, and the ordinance leaves residents “ample means to exercise the inherent right of self-defense that the Second Amendment protects.” *Friedman*, 784 F.3d at 411 (internal quotation marks omitted).

i.e., ‘weapons that are most useful in military service.’” *Kolbe*, 849 F.3d at 142 (quoting *Heller*, 554 U.S. at 627). Second, Defendant argues that longstanding regulations have governed magazine capacity such that California’s ban on large-capacity magazines survives scrutiny at this initial step of the analysis. See *Young*, 992 F.3d at 783 (holding that, if longstanding, accepted regulations have governed the subject of the challenged law, then the Second Amendment is not implicated).

Both arguments appear to have significant merit. As we describe below, large-capacity magazines have limited lawful, civilian benefits, whereas they provide significant benefits in a military setting. Accordingly, the magazines likely are “most useful in military service,” at least in an ordinary understanding of that phrase. *Kolbe*, 849 F.3d at 135-37.

Moreover, Congress and some states have imposed firing-capacity restrictions for nearly a century. In 1932, Congress banned, in the District of Columbia, “any firearm which shoots automatically or semiautomatically more than twelve shots without reloading.” Around the same time, several states, including California, enacted bans on firearms that could fire automatically or semi-automatically more than 10, 12, 16, or 18 bullets. 1933 Cal. Stat. 1170, § 3. The state bans were later repealed, but the District of Columbia’s ban appears to have remained in place in some form continuously since 1932. We also take note of the more recent bans, first imposed by Congress in 1994 and later imposed by nine states and some municipalities after the federal ban expired in 2004. Cf. *United States v. Henry*, 688 F.3d 637, 640 (9th Cir.

2012) (holding, nine years ago, that machine guns are “unusual” because they had been banned since 1986, a total of 26 years). In addition, governments long have imposed magazine capacity limits on hunters. *See, e.g.*, 50 C.F.R. § 20.21(b) (prohibiting the hunting of most migratory game birds “[w]ith a shotgun of any description capable of holding more than three shells, unless it is plugged with a one-piece filler, incapable of removal without disassembling the gun, so its total capacity does not exceed three shells”); Cal. Fish & Game Code § 2010 (“It is unlawful ... to use or possess a shotgun capable of holding more than six cartridges at one time, to take a mammal or bird.”).

Ultimately, though, we decline to decide those two sub-issues definitively. Neither we nor the Supreme Court has decided whether the passage in *Heller* pertaining to weapons “most useful in military service” should be read as establishing a legal standard and, if so, how to interpret that phrase for purposes of step one of the constitutional analysis. *See Heller*, 554 U.S. at 627 (“It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause.”). Similarly, determining whether sufficiently longstanding regulations have governed large-capacity magazines likely would require an extensive historical inquiry. *See, e.g., Young*, 992 F.3d at 784-826 (undertaking a detailed historical review of regulations concerning the open carrying of arms); *Teixeira*, 873 F.3d at 682-87 (reviewing historical materials in determining whether the Second Amendment encompasses a right to sell firearms).

In many cases raising Second Amendment challenges, particularly where resolution of step one is uncertain and where the case raises “large and complicated” questions, *United States v. Torres*, 911 F.3d 1253, 1261 (9th Cir. 2019), we have assumed, without deciding, that the challenged law implicates the Second Amendment. *E.g.*, *United States v. Singh*, 979 F.3d 697, 725 (9th Cir. 2020), *cert. denied*, *Matsura v. United States*, 2021 WL 2044557, No. 20-1167 (U.S. May 24, 2021); *Mai v. United States*, 952 F.3d 1106, 1114-15 (9th Cir. 2020), *cert. denied*, 2021 WL 1602649, No. 20-819 (U.S. Apr. 26, 2021); *Pena v. Lindley*, 898 F.3d 969, 976 (9th Cir. 2018), *cert. denied*, 141 S. Ct. 108 (2020). Our sister circuits have followed this approach specifically with respect to laws restricting large-capacity magazines. *See Worman*, 922 F.3d at 36 (assuming, without deciding, at step one due to “reluctan[ce] to plunge into this factbound morass”); *ANJRPC*, 910 F.3d at 117 (assuming, without deciding, at step one); *NYSRPA*, 804 F.3d at 257 (assuming, without deciding, at step one “[i]n the absence of clearer guidance from the Supreme Court or stronger evidence in the record”); *Heller II*, 670 F.3d at 1261 (assuming, without deciding, at step one because “we cannot be certain whether” the requirements at this step are met). Accordingly, we follow the “well-trodden and ‘judicious course’” of assuming, without deciding, that California’s law implicates the Second Amendment. *Pena*, 898 F.3d at 976 (quoting *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013)).

**2. *Step Two: Application of an Appropriate Level of Scrutiny***

**a. *Determination of the Appropriate Level of Scrutiny***

At step two, we first determine the appropriate level of scrutiny. *Torres*, 911 F.3d at 1262. “[L]aws burdening Second Amendment rights must withstand more searching scrutiny than rational basis review.” *Id.* We apply either strict scrutiny, which requires both narrow tailoring to a compelling governmental interest and the use of the least-restrictive means, *Victory Processing, LLC v. Fox*, 937 F.3d 1218, 1226-28 (9th Cir. 2019), or intermediate scrutiny, which requires a reasonable fit with an important governmental interest, *Torres*, 911 F.3d at 1263.

“The precise level of heightened scrutiny depends ‘on (1) how close the law comes to the core of the Second Amendment right and (2) the severity of the law’s burden on the right.’” *Mai*, 952 F.3d at 1115 (quoting *Chovan*, 735 F.3d at 1138). “Strict scrutiny applies only to laws that both implicate a core Second Amendment right and place a substantial burden on that right.” *Id.* Intermediate scrutiny applies to laws that either do not implicate a core Second Amendment right or do not place a substantial burden on that right. *Id.*

Defendant does not dispute that California’s ban on large-capacity magazines implicates, at least in some measure, the core Second Amendment right of self-defense in the home. *See, e.g., Pena*, 898 F.3d at 977 (assuming without deciding that firearm regulations implicate the core right); *see also Worman*, 922 F.3d at 30, 36 (assuming without deciding that

Massachusetts’ ban on large-capacity magazines implicates the core right); *Heller II*, 670 F.3d at 332 (declining to decide whether the District of Columbia’s prohibition on large-capacity magazines “impinge[s] at all upon the core right protected by the Second Amendment”). Instead, Defendant argues that the ban imposes only a small burden on the Second Amendment right and that, accordingly, intermediate scrutiny is the appropriate lens through which to view California’s law. We agree. Just as our sister circuits unanimously have applied intermediate scrutiny to other laws banning or restricting large-capacity magazines,<sup>3</sup> we hold that intermediate scrutiny applies to California’s ban.

California’s ban on large-capacity magazines imposes only a minimal burden on the exercise of the Second Amendment right. The law has no effect whatsoever on which firearms may be owned; as far as the challenged statute is concerned, anyone may own any firearm at all. Owners of firearms also may

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<sup>3</sup> *Worman*, 922 F.3d at 36-38; *ANJRPC*, 910 F.3d at 117-18; *Kolbe*, 849 F.3d at 138-39; *NYSRPA*, 804 F.3d at 257-61; *Heller II*, 670 F.3d at 1261-62; see *Fyock*, 779 F.3d at 998-999 (holding that the district court did not abuse its discretion in applying intermediate scrutiny to a municipal ban on large-capacity magazines).

As we described in note 2, the Seventh Circuit did not apply, at least by name, any of the traditional levels of scrutiny. *Friedman*, 784 F.3d at 410-12. But in upholding the municipal ban on large-capacity magazines, the court plainly applied a standard far less demanding than strict scrutiny, and its analysis is fully consistent with our selection of intermediate scrutiny. See, e.g., *id.* at 411 (holding that the ordinance leaves residents “ample means to exercise the inherent right of self-defense that the Second Amendment protects” (internal quotations omitted)).

possess as many firearms, bullets, and magazines as they choose. *See ANJRPC*, 910 F.3d at 118 (holding that intermediate scrutiny applied, in part because the challenged law “has no impact on the many other firearm options that individuals have to defend themselves in their home”); *Kolbe*, 849 F.3d at 138 (same: “citizens [remain] free to protect themselves with a plethora of other firearms and ammunition”); *NYSRPA*, 804 F.3d at 260 (same: “while citizens may not acquire high-capacity magazines, they can purchase any number of magazines with a capacity of ten or fewer rounds”).

Owners of firearms also may *use* those items at will. They may fire as many bullets as they would like for whatever lawful purpose they choose. The ban on large-capacity magazines has the sole practical effect of requiring shooters to pause for a few seconds after firing ten bullets, to reload or to replace the spent magazine.

Nothing in the record suggests that the restriction imposes any more than a minimal burden on the Second Amendment right to keep and bear arms. Plaintiffs do not point to any evidence that a short pause after firing ten bullets during target practice or while hunting imposes any practical burden on those activities, both of which fall outside the core Second Amendment right in any event.

Similarly, the record suggests at most a minimal burden, if any burden at all, on the right of self-defense in the home. Experts in this case and other cases report that “most homeowners only use two to three rounds of ammunition in self-defense.” *ANJRPC*, 910 F.3d at 121 n.25. The use of more than

ten bullets in defense of the home is “rare,” *Kolbe*, 849 F.3d at 127, or non-existent, *see Worman*, 922 F.3d at 37 (noting that neither the plaintiffs nor their experts “could ... identify even a single example of a self-defense episode in which ten or more shots were fired”). An expert in this case found that, using varying methodologies and data sets, more than ten bullets were used in either 0% or fewer than 0.5% of reported incidents of self-defense of the home. Even in those situations, the record does not disclose whether the shooter fired all shots from the same weapon, whether the shooter fired in short succession such that reloading or replacing a spent cartridge was impractical, or whether the additional bullets had any practical effect after the first ten shots. In other words, the record here, as in other cases, does not disclose whether the added benefit of a large-capacity magazine—being able to fire more than ten bullets in rapid succession—has *ever* been realized in self-defense in the home. *See ANJRPC*, 910 F.3d at 118 (“The record here demonstrates that [large-capacity magazines] are not well-suited for self-defense.”); *Kolbe*, 849 F.3d at 138 (noting the “scant evidence ... [that] large-capacity magazines are possessed, or even suitable, for self-protection”); *Heller II*, 670 F.3d at 1262 (pointing to the lack of evidence that “magazines holding more than ten rounds are well-suited to or preferred for the purpose of self-defense or sport”). Indeed, Plaintiffs have not pointed to a single instance in this record (or elsewhere) of a homeowner who was



unable to defend himself or herself because of a lack of a large-capacity magazine.<sup>4</sup>

Evidence supports the common-sense conclusion that the benefits of a large-capacity magazine are most helpful to a soldier: “the use of large-capacity

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<sup>4</sup> Judge VanDyke’s dissent faults us for relying on the rarity of instances of self-defense that use more than ten bullets while not giving enough weight to the infrequency of mass shootings, which the dissent describes as “statistically very rare.” Dissent by J. VanDyke at 160. To the extent that the dissent concludes that reducing the harm caused by mass shootings is not an “important” governmental objective at step two of the analysis, we disagree. Focusing solely on the frequency of mass shootings omits the second, critical part of the analysis set out below at pages 42 to 46[C]: the incredible harm caused by mass shootings. We do not ignore the relative infrequency of mass shootings. We instead conclude—and Plaintiffs do not dispute—that, considering the frequency of mass shootings *in combination with* the harm that those events cause, reducing the number of deaths and injuries caused by mass shootings is an important goal. The dissent’s analogy to commercial flights, [Dissent by J. VanDyke at 161 n.11, is illustrative: Although accidents involving commercial flights are rare, legislatures recognize that the serious harm caused by even a single crash justifies extensive regulation of the industry.

To the extent that the dissent asks us to balance the interests of the lawful use of large-capacity magazines against the interests of the State in reducing the deaths and injuries caused by mass shootings, we disagree for two independent reasons. First, the Supreme Court expressly rejected that type of interest balancing. *Heller*, 554 U.S. at 634. Second, to the extent that an interest-balancing inquiry is relevant, we reiterate that Plaintiffs have not pointed to a single instance—in California or elsewhere, recently or ever—in which someone was unable to defend himself or herself due to a lack of a large-capacity magazine, whereas the record describes the many deaths and injuries caused by criminals’ use of large-capacity magazines during mass shootings.

magazines results in more gunshots fired, results in more gunshot wounds per victim, and increases the lethality of gunshot injuries.” *Fyock*, 779 F.3d at 1000; see *Kolbe*, 849 F.3d at 137 (“Large-capacity magazines enable a shooter to hit ‘multiple human targets very rapidly.’”); *NYSRPA*, 804 F.3d at 263-64 (“Like assault weapons, large-capacity magazines result in ‘more shots fired, persons wounded, and wounds per victim than do other gun attacks.’” (quoting *Heller II*, 670 F.3d at 1263)). A 1989 report by the Bureau of Alcohol, Tobacco, and Firearms concluded that “large capacity magazines are indicative of military firearms,” in part because they “provide[] the soldier with a fairly large ammunition supply.” A 1998 report by that agency found that “detachable large capacity magazine[s] [were] originally designed and produced for ... military assault rifles.” The Fourth Circuit concluded that, “[w]hatever their other potential uses ... large-capacity magazines ... are unquestionably most useful in military service.” *Kolbe*, 849 F.3d at 137.

Recent experience has shown repeatedly that the same deadly effectiveness of a soldier’s use of large-capacity magazines can be exploited by criminals, to tragic result. In Thousand Oaks, California, a shooter equipped with large-capacity magazines murdered twelve people at a bar in 2018. Firearms equipped with large-capacity magazines “have been the weapons of choice in many of the deadliest mass shootings in recent history, including horrific events in Pittsburgh (2018), Parkland (2018), Las Vegas (2017), Sutherland Springs (2017), Orlando (2016), Newtown (2012), and Aurora (2012).” *Worman*, 922 F.3d at 39. As the Fourth Circuit explained:

Other massacres have been carried out with handguns equipped with magazines holding more than ten rounds, including those at Virginia Tech (thirty-two killed and at least seventeen wounded in April 2007) and Fort Hood, Texas (thirteen killed and more than thirty wounded in November 2009), as well as in Binghamton, New York (thirteen killed and four wounded in April 2009 at an immigration center), and Tucson, Arizona (six killed and thirteen wounded in January 2011 at a congresswoman's constituent meeting in a grocery store parking lot).

*Kolbe*, 849 F.3d at 120.

In sum, large-capacity magazines provide significant benefit to soldiers and criminals who wish to kill many people rapidly. But the magazines provide at most a minimal benefit for civilian, lawful purposes. Because California's ban on large-capacity magazines imposes only a minimal burden on the Second Amendment right to keep and bear arms, we apply intermediate scrutiny.

Before applying intermediate scrutiny, we address Plaintiffs' argument that we need not apply any scrutiny at all. Plaintiffs assert that California's law falls within the category of regulations, like the handgun ban at issue in *Heller*, 554 U.S. at 628, that fail "[u]nder any of the standards of scrutiny." We have held that the only laws that are necessarily unconstitutional in this way are those laws that "amount[] to a destruction of the Second Amendment right." *Young*, 992 F.3d at 784 (quoting *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016)). Because

California's law imposes, as explained above, only a slight burden on the Second Amendment right, the law plainly does not destroy the right.

The handgun ban at issue in *Heller* failed under any level of scrutiny because it “amount[ed] to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society” for the lawful purpose of self-defense, including in the home. 554 U.S. at 628. The Supreme Court explained:

There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.

*Id.* at 629.

California's prohibition on large-capacity magazines is entirely different from the handgun ban at issue in *Heller*. The law at issue here does not ban any firearm at all. It bans merely a subset (large-capacity) of a part (a magazine) that some (but not all) firearms use.<sup>5</sup> *Heller* clearly did not prohibit

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<sup>5</sup> Judge VanDyke's dissent suggests that California's ban on large-capacity magazines is akin to a ban on all cars or on large vehicles. Dissent by J. VanDyke at 151-152. But those analogies

governments from banning some subset of weapons. *See, e.g., Pena*, 898 F.3d at 978 (applying intermediate scrutiny to a ban on the commercial sale of handguns lacking certain safety features and upholding the ban); *Kolbe*, 849 F.3d at 138-39 (holding that *Heller*’s “special consideration” for handguns “does not mean that a categorical ban on any particular type of bearable arm is unconstitutional”); *Friedman*, 784 F.3d at 410 (“[A]t least some categorical limits on the kinds of weapons that can be possessed are proper.”).

Nor does the fact that, among the magazines in circulation, approximately half are of large capacity alter our conclusion. As an initial matter, we question whether circulation percentages of a part that comes

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are inapt. A ban on large-capacity magazines cannot reasonably be considered a ban on firearms any more than a ban on leaded gasoline, a ban on dangerously designed gas tanks, or speed limits could be considered a ban on cars. *E.g.*, 42 U.S.C. § 7545(n); 49 C.F.R. § 393.67; Cal. Veh. Code § 22348. Like a ban on large-capacity magazines with respect to firearms, those laws retain the basic functionality of cars—driving within reasonable limits—while preventing specific societal harms from known dangers.

The same reasoning applies to the dissent’s analogy to a ban on all commercial flights. Dissent by J. VanDyke at 161 n.11. A ban on large-capacity magazines cannot reasonably be considered a ban on firearms any more than the existing, extensive regulations of commercial airlines, aircraft, pilots, and so on could be considered a ban on commercial flights. All of the dissent’s analogies start from the false premise that a ban on large-capacity magazines somehow amounts to a ban on the basic functionality of all firearms, despite the fact that, as we have explained, many firearms do not use magazines; all firearms may be used with magazines of ten or fewer rounds; and no limit applies to the number of firearms or magazines that a person may possess and use.

standard with many firearm purchases meaningfully reflect an affirmative choice by consumers. More to the point, *Heller*'s ruling that handguns, "the quintessential self-defense weapon," cannot be prohibited rested on the premise that consumers overwhelmingly chose to purchase handguns *for the purpose of self-defense in the home*. *Heller*, 554 U.S. at 628-29; *see Kolbe*, 849 F.3d at 138 (emphasizing this point). By contrast, and as described in detail above, Plaintiffs have offered little evidence that large-capacity magazines are commonly used, or even suitable, for that purpose. *See Worman*, 922 F.3d at 36-37 (holding that, unlike "the unique popularity of the handgun as a means of self-defense," "the record ... offers no indication that [large-capacity magazines] have commonly been used for home self-defensive purposes"); *Kolbe*, 849 F.3d at 138-39 ("The handgun, of course, is 'the quintessential self-defense weapon.' In contrast, there is scant evidence ... that ... large-capacity magazines are possessed, or even suitable, for self-protection." (citation omitted)); *NYSRPA*, 804 F.3d at 260 n.98 ("*Heller* ... explain[ed] that handguns are protected as 'the most popular weapon chosen by Americans for self-defense in the home.' Of course, the same cannot be said of [large-capacity magazines]." (citation omitted)).

In sum, we decline to read *Heller*'s rejection of an outright ban on the most popular self-defense weapon as meaning that governments may not impose a much narrower ban on an accessory that is a feature of some weapons and that has little to no usefulness in self-defense. We therefore reject Plaintiffs' entreaty that we strike down California's law without applying any scrutiny at all. Because California's law imposes only

a minimal burden on the Second Amendment right, we apply intermediate scrutiny.

**b. *Application of Intermediate Scrutiny***

“To satisfy intermediate scrutiny, the government’s statutory objective must be ‘significant, substantial, or important,’ and there must be a ‘reasonable fit’ between the challenged law and that objective.” *Mai*, 952 F.3d at 1115 (quoting *Silvester*, 843 F.3d at 821-22). The legislature must have drawn “reasonable” conclusions, and the evidence must “fairly support” the legislative judgment. *Pena*, 898 F.3d at 979-80.

“The test is not a strict one,” and the government need not use the “least restrictive means.” *Silvester*, 843 F.3d at 827 (internal quotation marks omitted). “[W]e are weighing a legislative judgment, not evidence in a criminal trial,” *Pena*, 898 F.3d at 979, so “we do not impose an ‘unnecessarily rigid burden of proof,’” *id.* (quoting *Mahoney v. Sessions*, 871 F.3d 873, 881 (9th Cir. 2017)), and “we do not require scientific precision,” *Mai*, 952 F.3d at 1118 (internal quotation marks omitted). We may consider “the legislative history of the enactment as well as studies in the record or cited in pertinent case law.” *Fyock*, 779 F.3d at 1000 (quoting *Jackson*, 746 F.3d at 966).

We defer to reasonable legislative judgments. *Pena*, 898 F.3d at 979. “[I]n the face of policy disagreements, or even conflicting legislative evidence, ‘we must allow the government to select among reasonable alternatives in its policy decisions.’” *Id.* at 980 (quoting *Peruta v. County of San Diego*, 824 F.3d 919, 944 (9th Cir. 2016) (en banc) (Graber, J., concurring)). “Sound policymaking often requires

legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable.” *Mai*, 952 F.3d at 1118 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994)); *see also Jackson*, 746 F.3d at 969 (holding that, even if the relevant science were “an open question,” that conclusion “is insufficient to discredit [a legislative body’s] reasonable conclusions”).

Both dissents suggest that, because we have not struck down any state or federal law under the Second Amendment, we have “give[n] a blank check to lawmakers to infringe on the Second Amendment right.” Dissent by J. Bumatay at 111-112; *accord* Dissent by J. VanDyke at 169. To the contrary, we have carefully examined each challenge on its own merit. The Constitution binds legislators just as it binds us. That Congress and state legislatures located in our circuit have legislated within constitutional bounds is, properly viewed, a credit to those legislatures, not evidence of an abdication of our duty. Notably, California’s law is more restrained than similar laws considered by our sister circuits. *See, e.g., Worman*, 922 F.3d 26 (considering a Massachusetts law that bans large-capacity magazines *and assault weapons*); *Kolbe*, 849 F.3d 114 (same: Maryland law); *NYSRPA*, 804 F.3d 242 (same: New York law & Connecticut law); *Friedman*, 784 F.3d 406 (same: City of Highland Park, Illinois law); *Heller II*, 670 F.3d 1244 (same: District of Columbia law). And our sister circuits, applying the same two-step inquiry that we apply today, have not hesitated to strike down provisions that go too far. *See, e.g., NYSRPA*, 804 F.3d at 264 (striking down, under intermediate scrutiny, a



provision of New York law that prohibited the loading of a magazine with more than seven rounds of ammunition).

The California legislature, and the people of California, enacted the ban on large-capacity magazines to prevent and mitigate gun violence. As Plaintiffs properly concede and, as we have recognized before, that interest is undoubtedly important. *E.g.*, *Wilson v. Lynch*, 835 F.3d 1083, 1093 (9th Cir. 2016). California’s law aims to reduce gun violence primarily by reducing the harm caused by mass shootings. Although mass shootings may be an irregular occurrence, the harm that flows from them is extensive. We readily conclude that reducing the harm caused by mass shootings is an important governmental objective. The only question, then, is whether California’s ban is a “reasonable fit” for reducing the harm caused by mass shootings. *Silvester*, 843 F.3d at 821.

Many mass shootings involve large-capacity magazines, and large-capacity magazines tragically exacerbate the harm caused by mass shootings.<sup>6</sup> One expert reported that “it is common for offenders to fire more than ten rounds when using a gun with a large-capacity magazine in mass shootings. In particular, in mass shootings that involved use of large-capacity

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<sup>6</sup> Plaintiffs dispute the reliability of Defendant’s experts and the underlying data, all of which are identical or similar to the reports and data that our sister circuits have cited. *E.g.*, *ANJRPC*, 910 F.3d at 121; *Kolbe*, 849 F.3d at 124 n.3. We conclude that the evidence is sufficiently reliable for purposes of weighing California’s legislative judgment. *Pena*, 898 F.3d at 979-80.

magazine guns, the average number of shots fired was 99.” More than twice as many people were killed or injured in mass shootings that involved a large-capacity magazine compared to mass shootings where the shooter had magazines with a smaller capacity. One expert looked solely at fatalities and the deadliest mass shootings (those with at least six deaths), and he discovered that the number of fatalities from mass shootings that involved a large-capacity magazine was at least 50% greater than the number of fatalities from those shootings that involved smaller magazines. “Moreover, since 1968, [large-capacity magazines] have been used in 74 percent of all gun massacres with 10 or more deaths, as well as in 100 percent of all gun massacres with 20 or more deaths.”

The reasons are simple and verified by events: 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. One expert described the period after a shooter has exhausted the current magazine as “precious down-time” that “affords those in the line of fire with a chance to flee, hide, or fight back.” *Accord ANJRPC*, 910 F.3d at 119 (“Weapon changes and reloading result in a pause in shooting and provide an opportunity for bystanders or police to intervene and victims to flee.”); *Kolbe*, 849 F.3d at 128 (“[R]educing the number of rounds that can be fired without reloading increases the odds that lives will be spared in a mass shooting ... [because there are] more chances for bystanders or law enforcement to intervene during a pause in firing, ... more chances for the shooter to have problems quickly changing a

magazine under intense pressure, and ... more chances for potential victims to find safety.” (internal quotation marks omitted)).

As other courts have pointed out, and as the record here establishes, examples abound of the harm caused by shooters using large-capacity magazines and of people fleeing, hiding, or fighting back during a shooter’s pause. The Fourth Circuit noted high-profile examples in “Newtown (where nine children were able to run from a targeted classroom while the gunman paused to change out a large-capacity thirty-round magazine), Tucson (where the shooter was finally tackled and restrained by bystanders while reloading his firearm), and Aurora (where a 100-round drum magazine was emptied without any significant break in firing).” *Kolbe*, 849 F.3d at 128. The Third Circuit updated that list a year later by noting that “[v]ideos from the Las Vegas shooting in 2017 show that concert attendees would use the pauses in firing when the shooter’s high capacity magazines were spent to flee.” *ANJRPC*, 910 F.3d at 120 (internal quotation marks omitted). We provide yet another intervening example: after the 2018 shooting in Thousand Oaks, California, news outlets reported survivors’ accounts of escaping when the shooter paused firing. See *Thousand Oaks Mass Shooting Survivor: “I Heard Somebody Yell, ‘He’s Reloading,’”* (ABC News, Nov. 8, 2018), <https://abc7.com/thousand-oaks-ca-shooting-california/4649166/> (“I heard somebody yell, ‘He’s reloading!’ and that was when a good chunk of us had jumped up and went and followed the rest of the people out the window.”); *People Threw Barstools Through Window to Escape Thousand Oaks, California, Bar During Shooting*, (USA Today, Nov. 8,

2018), <https://www.usatoday.com/story/news/nation-now/2018/11/08/thousand-oaks-bar-shooting-people-broke-windows-stools-escape/1928031002/> (“At that point I grabbed as many people around me as I could and grabbed them down under the pool table we were closest to until he ran out of bullets for that magazine and had to reload.”). The record contains additional examples of persons confronting a shooter or escaping during a pause in firing. *See also ANJRPC*, 910 F.3d at 120 & n.24 (listing other examples).

Approximately three-quarters of mass shooters possessed their weapons, as well as their large-capacity magazines, *lawfully*. Removing the ability of potential mass shooters to possess those magazines legally thus reasonably supports California’s effort to reduce the devastating harm caused by mass shootings. “[L]imiting a shooter to a ten-round magazine could mean the difference between life and death for many people.” *Kolbe*, 849 F.3d at 128 (internal quotation marks omitted). Moreover, removing all large-capacity magazines from circulation reduces the opportunities for criminals to steal them. *See, e.g., id.* at 140 (noting the “evidence that, by reducing the availability of ... [large-capacity] magazines overall, the [challenged law] will curtail their availability to criminals and lessen their use in mass shootings, other crimes, and firearms accidents”). For example, the shooter who targeted Sandy Hook’s elementary school stole his mother’s lawfully-possessed weapons and large-capacity magazines, which he then used to kill more than two dozen people, including twenty children.

Just as our sister circuits have concluded in assessing the fit between restrictions on large-capacity magazines and the goal of reducing gun violence, we conclude that California's ban is a reasonable fit, even if an imperfect one, for its compelling goal of reducing the number of deaths and injuries caused by mass shootings. *Worman*, 922 F.3d at 39-40; *ANJRPC*, 910 F.3d at 119-22; *Kolbe*, 849 F.3d at 139-41; *NYSRPA*, 804 F.3d at 263-64; *Heller II*, 670 F.3d at 1263-64. Because we apply intermediate scrutiny, the law need not be the least restrictive means, and some measure of over-inclusiveness is permissible. *E.g.*, *Torres*, 911 F.3d at 1264 n.6. Plaintiffs and their experts speculate about hypothetical situations in which a person might want to use a large-capacity magazine for self-defense. But Plaintiffs' speculation, not backed by any real-world examples, comes nowhere near overcoming the deference that we must give to the reasonable legislative judgment, supported by both data and common sense, 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. *See, e.g.*, *Worman*, 922 F.3d at 40 (rejecting, as "too facile by half," the argument that a ban on large-capacity magazines sweeps too broadly because it bars law-abiding citizens from possessing them); *Pena*, 898 F.3d at 980 (upholding a firearm-safety restriction because of the deference we owe to "[t]he legislative judgment that preventing cases of accidental discharge outweighs the need for discharging a gun" in the "rare instance" where the

safety restriction “disables a gun capable of providing self-defense”).

Because California’s ban on large-capacity magazines is a reasonable fit for the compelling goal of reducing gun violence, we reverse the district court’s grant of summary judgment to Plaintiffs on their Second Amendment claim.

### **B. *Takings Claim***

The Fifth Amendment provides, “nor shall private property be taken for public use, without just compensation.” U.S. Const. amend. V. “There are two types of ‘per se’ takings: (1) permanent physical invasion of the property, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); and (2) a deprivation of all economically beneficial use of the property, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015-16 (1992).” *Laurel Park Cmty., LLC v. City of Tumwater*, 698 F.3d 1180, 1188 (9th Cir. 2012). Alternatively, a regulatory taking may occur if the regulation goes “too far.” *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). “[R]egulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).” *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005); *see generally Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071-72 (2021) (describing these concepts).

Because Plaintiffs bring a facial takings claim, they must show that “the mere enactment of [California’s law] constituted a taking.” *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 318 (2002). Plaintiffs must demonstrate that “no set of circumstances exists under which the [law]

would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987).

California’s law requires an owner of a large-capacity magazine to choose one of four options: (1) modify the magazine so that it accommodates ten rounds or fewer; (2) sell the magazine to a firearms dealer; (3) remove the magazine to another state (where, depending on that state’s laws, the owner may lawfully possess it or sell it to any third party); or (4) turn it over to a law enforcement agency for destruction.<sup>7</sup> Cal. Penal Code §§ 16740(a), 32310(d)(1)-(3). California’s law plainly does not deprive an owner of “all economically beneficial use of the property.” *Laurel Park*, 698 F.3d at 1188. For example, Plaintiffs have neither asserted nor introduced evidence that no firearms dealer will pay for a magazine or that modification of a magazine is economically impractical.

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<sup>7</sup> Judge Bumatay’s dissent begins by asserting that, “[i]f California’s law applied nationwide, it would require confiscating half of all existing firearms magazines in this country.” Dissent by J. Bumatay at 103. That dramatic assertion is inaccurate. The government seizes nothing; many owners are unaffected entirely; and all owners have several choices other than voluntary relinquishment of large-capacity magazines for destruction. More specifically, if every state adopted California’s law, many owners of large-capacity magazines, such as current and retired law enforcement officers, would be able to keep them. Other owners would retain many options. For instance, they could modify the magazines to accommodate ten or fewer rounds; or they could sell the magazines to a firearms dealer (who could sell the magazines to buyers abroad or to those who remain authorized to possess them, such as the thousands of current and retired law enforcement officers in this country).

Plaintiffs' facial regulatory takings claim fails for similar reasons. Assuming, without deciding, that a facial regulatory takings claim is ever cognizable, *id.* at 1189, Plaintiffs' claim fails because they have not introduced evidence of the "economic impact of the regulation on," or the "investment-backed expectations" of, any owner of a large-capacity magazine. *Penn Cent.*, 438 U.S. at 124. Whatever merit there may be to an individual's *as-applied* regulatory takings claim, an issue that we do not reach in connection with this facial challenge, we cannot say on this record that a regulatory taking has necessarily occurred with respect to every owner of a large-capacity magazine.

Nor does the law on its face effect a physical taking. California reasonably chose to prohibit the possession of large-capacity magazines due to the danger that they pose to society. Nothing in the case law suggests that any time a state adds to its list of contraband—for example, by adding a drug to its schedule of controlled substances—it must pay all owners for the newly proscribed item. To the contrary, the Supreme Court has made clear that "the 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." *Lucas*, 505 U.S. at 1027. Here, an owner 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 the owner may sell it. On review of a facial challenge, we fail to see how those options are necessarily inadequate in all circumstances.



We do not read the Supreme Court’s decisions in *Loretto*, 458 U.S. 419, and *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), as expansively as Plaintiffs do. In *Loretto*, 458 U.S. at 426, the Court held that a mandated physical invasion of a landlord’s real property for the installation of cable-television devices constituted a taking. The Court rejected, as “prov[ing] too much,” the argument that a landlord could avoid the regulation by ceasing to rent the property. *Id.* at 439 n.17. Similarly, in *Horne*, 576 U.S. at 361, the Court held that a requirement that raisin growers and handlers grant the government possession and title to a certain percentage of raisins constituted a physical taking. The Court rejected the argument, “at least in this case,” that no taking had occurred because grape farmers could avoid the raisin market altogether by, for example, making wine instead of raisins. *Id.* at 365.

Those cases differ from this one in at least two material ways. First, unlike in *Loretto* and *Horne*, the government here in no meaningful sense takes title to, or possession of, the item, even if the owner of a magazine chooses not to modify the magazine, remove it from the state, or sell it. That California opted to assist owners in the safe disposal of large-capacity magazines by empowering law enforcement agencies to accept magazines voluntarily tendered “for destruction,” Cal. Penal Code § 32310(d)(3), does not convert the law into a categorical physical taking.

Second, *Loretto* and *Horne* concerned regulations of non-dangerous, ordinary items—rental buildings and raisins, “a healthy snack.” *Id.* at 366. Like the Third Circuit, *ANJRPC*, 910 F.3d at 124 & n.32, we do

not read *Loretto* and *Horne* as requiring a government to pay 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. *See Loretto*, 458 U.S. at 436 (holding that a taking had occurred because the owner “can make no nonpossessory use of the property”). Mandating the sale, transfer, modification, or destruction of a dangerous item cannot reasonably be considered a taking akin to a physical invasion of a rental building or the physical confiscation of raisins. *See ANJRPC*, 910 F.3d at 124 (rejecting a similar takings challenge to a ban on large-capacity magazines because the owners can, among other things, sell or transfer the magazines or modify them to accept fewer rounds).

Because Plaintiffs’ facial takings claim fails, we reverse the district court’s grant of summary judgment to Plaintiffs on their takings claim.

**REVERSED and REMANDED for entry of judgment in favor of Defendant.**

GRABER, Circuit Judge, concurring:

As the majority opinion explains, *District of Columbia v. Heller*, 554 U.S. 570 (2008), does not provide a clear framework for deciding whether a statute does or does not violate the Second Amendment. Indeed, the Court recognized as much when it wrote:

Justice BREYER chides us for leaving so many applications of the right to keep and bear arms in doubt .... But since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, any more than *Reynolds v. United States*, 98 U.S. 145 (1879), our first in-depth Free Exercise Clause case, left that area in a state of utter certainty.

*Id.* at 635. But *Heller* does strongly suggest an analogy to the free speech guarantee of the First Amendment. For example:

-“Just as the First Amendment protects modern forms of communications, *e.g.*, *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849 (1997), ... 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.* at 582.

-In regard to the extent of the Second Amendment right, the Court observed: “Of course the right [to keep and bear arms] was *not unlimited*, just as the First Amendment's right of free speech was not, *see, e.g.*, *United States v. Williams*, 553 U.S. 285 (2008).” *Id.* at 595 (emphasis added).

-“Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods. This Court first held a law to violate the First Amendment’s guarantee of freedom of speech in 1931, almost 150 years after the Amendment was ratified .... Even a question as basic as the scope of proscribable libel was not addressed by this Court until 1964, nearly two centuries after the founding.” *Id.* at 625-26 (citations omitted).

-Rational-basis scrutiny cannot “be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech ... or the right to keep and bear arms.” *Id.* at 628 n. 27.

-And, finally:

*The First Amendment contains the freedom-of-speech guarantee* that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong[-]headed views. *The Second Amendment is no different.* Like the First, it is the very *product* of an interest balancing by the people.

*Id.* at 635 (first and second emphases added).

Under the First Amendment, we review laws that regulate speech under the standard of intermediate scrutiny; laws that “leave open ample alternative channels for communication of the information” and that place “reasonable restrictions on the time, place, or manner of protected speech” are permissible. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). By repeatedly drawing an analogy to the First

Amendment's Free Speech Clause, *Heller* strongly suggests that intermediate scrutiny can apply to the Second Amendment, too. Accordingly, reasonable restrictions on the time, place, or manner of exercising the Second Amendment right to keep and bear arms are permissible if they leave open ample alternative means of exercising that right, the central component of which is individual self-defense. *Heller*, 554 U.S. at 599.

Other courts, including ours, have applied the First Amendment analogy to analyze a Second Amendment challenge. We held in *Jackson v. City & County of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014), that “First Amendment principles” inform our analysis. In particular, “firearm regulations which leave open alternative channels for self-defense are less likely to place a severe burden on the Second Amendment right than those which do not,” and “laws which regulate only the ‘*manner* in which persons may exercise their Second Amendment rights’ are less burdensome than those which bar firearm possession completely.” *Id.* (quoting *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013)); accord *Hirschfield v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 5 F.4th 407, 415 (4th Cir. 2021) (“Just as the First Amendment employs strict scrutiny for content-based restrictions but intermediate scrutiny for time, place, and manner regulations, the scrutiny in [the Second Amendment] context depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.” (internal quotation marks omitted)); *Nat’l Rifle Ass’n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 198 (5th Cir. 2012) (“In harmony with well-developed

principles that have guided our interpretation of the First Amendment, we believe that a law impinging upon the Second Amendment right must be reviewed under a properly tuned level of scrutiny—i.e., a level that is proportionate to the severity of the burden that the law imposes on the right.”); *United States v. Decastro*, 682 F.3d 160, 167 (2d Cir. 2012) (“In deciding whether a law substantially burdens Second Amendment rights, it is therefore appropriate to consult principles from other areas of constitutional law, including the First Amendment (to which *Heller* adverted repeatedly.”); *Heller v. District of Columbia*, 670 F.3d 1244, 1257 (D.C. Cir. 2011) (“*Heller II*”) (“As with the First Amendment, the level of scrutiny applicable under the Second Amendment surely depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.” (internal quotation marks omitted)); *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) (“Borrowing from the Court’s First Amendment doctrine” in formulating an appropriate test for Second Amendment challenges); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (looking to “the First Amendment speech context” in applying intermediate scrutiny to a law that “is more accurately characterized as a regulation of the manner in which persons may lawfully exercise their Second Amendment rights”).

Applying those principles here, intermediate scrutiny is the appropriate standard for assessing California’s ban on large-capacity magazines. Other circuits have recognized, and I agree, that a ban on large-capacity magazines leaves open ample alternative means of self-defense. *Ass’n of N.J. Rifle &*

*Pistol Clubs, Inc. v. Att’y Gen. N.J.*, 910 F.3d 106, 118 (3d Cir. 2018) *N.Y. State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 804 F.3d 242, 260 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406, 411 (7th Cir. 2015). As the majority opinion describes more fully, citizens have a nearly unlimited array of weapons that they may use, and very close to 100% of instances of self-defense use fewer—typically far fewer—bullets than ten. But even considering a rare situation in which someone defending a home wishes to fire more than ten bullets in a short period of time, alternatives nevertheless remain: the shooter may carry more than one firearm, more than one magazine, or extra bullets for reloading the magazine. Because of the inconvenience of carrying more than one firearm or the delay of a few seconds while a magazine is changed, those options are not a perfect substitute for a single magazine loaded with scores of bullets. But alternative-means analysis does not require an exact match. *See, e.g., Jackson*, 746 F.3d at 964 (applying intermediate scrutiny to San Francisco’s requirement that a gun be kept in a safe at home when not carried on the person because “a modern gun safe may be opened quickly” and because “San Franciscans are not required to secure their handguns while carrying them on their person”); *Mastrovincenzo v. City of New York*, 435 F.3d 78, 101 (2d Cir. 2006) (“The requirement that ample alternative channels exist does not imply that alternative channels must be perfect substitutes for those channels denied to plaintiffs by the regulation at hand.” (internal quotation marks omitted)). Individuals plainly have ample alternative means for self-defense.

And, because the only practical effect of California's law is the inability of a shooter to fire more than ten bullets without pause, the regulation is akin to a reasonable manner restriction. As far as the challenged statute is concerned, a shooter may fire any firearm at all and as many times as the shooter chooses, but only in a manner that requires briefly pausing after ten shots. *See Heller II*, 670 F.3d at 1262 (holding that D.C.'s ban on large-capacity magazines was akin to a regulation of the manner in which speech takes place). In conclusion, because California's ban on large-capacity magazines imposes only a minimal burden on the Second Amendment right to keep and bear arms, intermediate scrutiny applies. The majority opinion explains why California's law meets that constitutional standard.

To be sure, the First Amendment and the Second Amendment differ in many important respects (including text and purpose), and the analogy is imperfect at best. *See Young v. Hawaii*, 992 F.3d 765, 827-28 (9th Cir. 2021) (en banc), *petition for cert filed*, (U.S. May 11, 2021) (No. 20-1639) (rejecting analogy to the First Amendment's "prior restraint" doctrine when analyzing firearms-licensing laws). Among other things, firearms present an inherent risk of violence toward others that is absent in most First Amendment cases. *See Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015) (distinguishing the Second Amendment right from other fundamental rights on this ground, as one justification for refusing to apply strict scrutiny). Nonetheless, in my view *Heller* suggests that we should apply that analogy when appropriate. And I think that it is appropriate here to conclude that the challenged law is similar to



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a permissible “manner” restriction on protected speech.

BERZON, Circuit Judge, with whom THOMAS, Chief Judge, and PAEZ, MURGUIA, WATFORD, and HURWITZ, Circuit Judges, join, concurring:

I concur in Judge Graber’s principal opinion for the Court. I write separately to respond to the substance of the “text, history, and tradition” approach to Second Amendment legal claims, laid out in detail and advocated by Judge Bumatay’s Dissent. Bumatay Dissent at 103-143. In connection with that response, I shall offer a brief theoretical and historical defense of the two-step, tiered scrutiny approach used by eleven of the federal courts of appeal in Second Amendment cases. *See* Principal Opinion at 23-24 (referencing cases from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits).

As I hope to demonstrate, the notion that judges can avoid so-called subjectivity—meaning, I gather, adjudging the validity of an arms-control regulation on the basis of their own biases rather than on the basis of ascertainable, self-limiting standards and procedures—more successfully under the “text, history, and tradition” approach than under the two-step, tiered scrutiny analysis is a simplistic illusion. Unlike the “text, history, and tradition” approach, the two-step, tiered scrutiny approach requires courts to show their work, so to speak, both to themselves and to readers and other courts. It incorporates historical analysis at the initial stage—that is, in considering whether a given kind of arms-related behavior falls within the scope of Second Amendment’s protection at all. *See, e.g., Young v. Hawaii*, 992 F.3d 765, 783-84 (9th Cir. 2021) (en banc), *petition for cert. filed* (U.S.

May 11, 2021) (No. 20-1639); *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017) (en banc); *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014). But where the available historical materials are either indeterminate, as here, Principal Opinion at 30, or indicate that the particular behavior *does* fall within the scope of the “right of law-abiding, responsible citizens to use arms in defense of hearth and home” that the Second Amendment was intended to protect, *District of Columbia v. Heller*, 554 U.S. 570, 616, 628, 635 (2008), a court applying the two-step approach moves on to the second stage of the inquiry. That stage requires the court expressly to consider and carefully to calibrate the nature of the challenged regulation and the government interests at hand, exposing the court’s analysis and interpretive choices to plain view.

In contrast, resort to text, history, and tradition alone when assessing the constitutionality of particular, discrete arms regulations (as opposed to when assessing broader questions regarding the general reach of the Second Amendment, as was undertaken in *Heller*, 554 U.S. at 576-628) obscures the myriad decisions that underlie coming to a resolution regarding the validity of a specific arms regulation using such an analysis. And so, far from limiting judicial discretion, the “text, history, and tradition” approach draws a veil over a series of decisions that are not preordained and that materially impact the outcome in any given case.

Additionally, the notion that text, history, and, especially, “tradition” are objectively ascertainable disregards what linguists, historians, and

anthropologists have long recognized: language can be indeterminate, especially as time passes; ascertaining what happened in the past is contingent and variable, because both the data available and the means of structuring and analyzing that data vary over time; and “tradition” is a term with little stable meaning, both as to the time period it takes for a “tradition” to become established and as to the individuals or communities whose habits and behaviors are said to establish a “tradition.”

In short, the appeal to objectivity in the *Bumatay* Dissent, while alluring, is spurious, as the “text, history, and tradition” approach is ultimately an exercise in wishful thinking. There is good reason that jurists have come to favor application of the tiered scrutiny approach to many forms of constitutional adjudication, including in Second Amendment cases. The tiered scrutiny approach requires judges carefully to attend to their own thought processes, keeping their eyes open, rather than closed, to the aspiration of bias-free and objective decisionmaking.

### I.

An evaluation of the text of the Second Amendment and the history and traditions of our nation are assuredly important considerations in any case involving the Second Amendment. “[T]he Supreme Court’s guidance in *Heller* and *McDonald* ... looked extensively to history, text, and tradition in discussing the scope of the Second Amendment right.” Principal Opinion at 25; *see also Young*, 992 F.3d at 783-84; *Teixeira*, 873 F.3d at 682; *Jackson*, 746 F.3d at 960. The principal opinion recognizes the important role that text, history, and tradition play in a Second

Amendment case, noting that those considerations factor into both parts of the Court’s two-step analysis. Principal Opinion at 25. Specifically, text, history, and tradition “greatly inform step one of the analysis, where we ask whether the challenged law implicates the Second Amendment,” and they “also inform step two, where we choose strict scrutiny, intermediate scrutiny, or no scrutiny at all (as in *Heller*) by examining the effect of” a disputed law “on the core of the Second Amendment right as traditionally understood.” *Id.*

Judge Bumatay agrees that the text, history, and tradition of the Second Amendment should guide our inquiry with respect to the overall scope of the Second Amendment. Bumatay Dissent at 104, 109-110. But his proposition is that those three factors must also be *dispositive* with respect to the question whether any given gun regulation, no matter how discrete, is constitutional. *Id.* In other words, under his view, *every* Second Amendment case should begin *and end* with an examination of text, history, and tradition. *Id.*

According to the Bumatay Dissent, precedent directs us to “dispense[]” with the principal opinion’s two-step, tiered scrutiny approach and replace it with the “text, history, and tradition” test. *See, e.g.*, Bumatay Dissent at 104-105, 108, 111-112. Judge Graber’s opinion for the Court explains why that precedent-based argument is mistaken, Principal Opinion at 25-26, as does Judge Ginsburg’s majority opinion for the D.C. Circuit in *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1264-67 (D.C. Cir. 2011). I do not repeat that discussion.

Aside from the incorrect precedent argument, the Bumatay Dissent maintains, principally, that the “text, history, and tradition” test should govern Second Amendment legal disputes because it is inherently more objective and less subject to manipulation than the two-step approach. *See, e.g.*, Bumatay Dissent at 109-112, 121-125. Contrary to that assertion, there are several reasons why text and history and, especially, tradition fall short of the judge-constraining attributes with which they are endowed by Judge Bumatay and the (uniformly non-controlling) appellate opinions on which he relies. *See* Bumatay Dissent at 115-118. This concurrence will explain why a framework that relies exclusively on text, history, and tradition to adjudicate Second Amendment claims provides only the aura, but not the reality, of objectivity and resistance to manipulation based on a judge’s supposed biases when applied to discrete regulations governing activity that falls within the scope of the Second Amendment, as that scope was determined by *Heller*.<sup>1</sup>

#### A.

Beginning with the “text” prong of the “text, history, and tradition” framework, the evolution of language over time poses a significant problem. Words do not have inherent meaning. To the contrary, the

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<sup>1</sup> There is no reason to think that “personal motives” such as a distaste for firearms or a lack of familiarity with firearms influenced the outcome of this case. Hurwitz Concurrence at 100-103. A judge’s obligation is to be aware of their biases and vigorously avoid using them to decide cases, not to bleach their minds, an impossibility. *See, e.g., Miles v. Ryan*, 697 F.3d 1090, 1090-91 (9th Cir. 2012).

meaning of a text depends in large part on “how the interpretive community alive at the time of the text’s adoption understood” the words as they were used in the text, and that understanding is unlikely to match the understanding of a future interpretive community. Frank H. Easterbrook, *Foreword* to Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* xxv (2012).

This problem arises frequently in textual interpretation cases involving “statutes of long-standing vintage.” *United States v. Kimsey*, 668 F.3d 691, 699-701 (9th Cir. 2012). To be sure, it is not impossible to navigate this difficulty and avoid erring in some such cases, *see, e.g., id.* But the older a text is, the more distant we become from the interpretive community alive at the time of the text’s adoption, and the less able we are to approach a text through the perspective of such people. Easterbrook, *supra*, at xxv. There comes a point where the original meaning of the text “is no longer recoverable reliably,” as it has simply been lost to the passage of time. *Id.* When problems of this kind surface in Second Amendment cases involving the constitutionality of discrete firearm regulations, the text of the Second Amendment is unlikely to offer a dependable solution.

More importantly for present purposes, although the word “text” appears in the title of the Bumatay Dissent’s “text, history, and tradition” test, the language of the Second Amendment does not play much of an operative role in the Dissent’s application of that test to the large-capacity magazine regulation here challenged, and for good reason.

As the reasoning of the Dissent illustrates, the primary focus of the “text, history, and tradition” framework, as applied to specific regulations, is, unsurprisingly, on evidence of our nation’s history and traditions. *Bumatay Dissent* at 125-142. The language of the Constitution was necessarily drafted at a high level of abstraction. Its broad language becomes less informative the more specific the inquiry at issue, and textual analysis therefore often plays only a minimal role in analyzing how a constitutional provision applies to a specific regulation. Put differently, although the language of the Second Amendment played a vital role in determining the overall scope of the Amendment in *Heller*, 554 U.S. at 576-603, the Amendment’s text is unlikely to provide much guidance in cases involving the validity of discrete regulations. The “text” prong of the “text, history, and tradition” approach is therefore unlikely to yield ascertainable answers in cases where the Second Amendment’s general language is applied to narrow, particular regulations targeting modern arms devices. I therefore concentrate my critique on the “history” and “tradition” prongs of the *Bumatay Dissent*’s “text, history, and tradition” approach.

## B.

The “history” prong, when relied upon as a mandatory, independently dispositive element of the “text, history, and tradition” approach, as applied to discrete regulations, has considerable shortcomings. To begin, without expressing any opinion regarding the actual accuracy of the historical analysis embedded in the *Heller* decision—which would be inappropriate, given that *Heller* is controlling



precedent—I note that many “historians, scholars, and judges have...express[ed] the view that the [Supreme Court’s] historical account was flawed.” *McDonald v. City of Chicago*, 561 U.S. 742, 914 (2010) (Breyer, J., dissenting) (citing David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. Rev. 1295 (2009); Paul Finkelman, *It Really Was About a Well Regulated Militia*, 59 Syracuse L. Rev. 267 (2008); Patrick J. Charles, *The Second Amendment: The Intent and Its Interpretation by the States and the Supreme Court* (2009); William G. Merkel, *The District of Columbia v. Heller and Antonin Scalia’s Perverse Sense of Originalism*, 13 Lewis & Clark L. Rev. 349 (2009); Nathan Kozuskanich, *Originalism in a Digital Age: An Inquiry Into the Right to Bear Arms*, 29 J. Early Republic 585 (2009); Saul Cornell, *St. George Tucker’s Lecture Notes, the Second Amendment, and Originalist Methodology: A Critical Comment*, 103 Nw. U. L. Rev. 1541 (2009); Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, New Republic, Aug. 26, 2008 (“In Defense of Looseness”); Richard A. Epstein, *A Structural Interpretation of the Second Amendment: Why Heller Is (Probably) Wrong on Originalist Grounds*, 59 Syracuse L. Rev. 171 (2008)); see also Robert J. Spitzer, *Saving the Constitution from Lawyers: How Legal Training and Law Reviews Distort Constitutional Meaning* 146-48 (2008); Dennis Baron, *Corpus Evidence Illuminates the Meaning of Bear Arms*, 46 Hastings Const. L.Q. 509, 510-11, 513 (2009); Noah Shusterman, *Armed Citizens* 223-24 (2020).

We are, of course, bound by the conclusion *Heller* drew from historical materials regarding the protection accorded by the Second Amendment to the individual right to keep and bear arms for self-defense, and I do not mean to suggest that that conclusion should be revisited. Rather, the salient fact for present purposes is that many jurists and scholars well-educated on the subject fundamentally disagree with the Supreme Court's historical analysis in *Heller*, demonstrating that Second Amendment history is very much open to dispute.

The Bumatay Dissent nonetheless characterizes history as both certain and static, as if we can obtain an enduring understanding of what happened in the past after engaging in a single, meticulous review of cut-and-dried evidence. *See, e.g.*, Bumatay Dissent at 120-121. But our understanding of history is, in fact, ever-changing. For one thing, we unearth new historical documents over time, and those documents sometimes lead us to revise our earlier understandings of history. *Cf.* Josh Blackman & James C. Phillips, *Corpus Linguistics and the Second Amendment*, Harv. L. Rev. Blog, Aug. 7, 2018. The advent of the internet and other tools has also dramatically changed our ability to access and systematically review historical documents. When *Heller* was decided, for example, the Supreme Court had access to “only a fairly narrow range of sources” regarding the common usage of the Second Amendment's terms at the time the Second Amendment was drafted. *Id.* Now, there are enormous databases of historical documents, including one overseen by Brigham Young University that comprises about one hundred thousand works

produced between 1760 and 1799, such as letters, newspapers, sermons, books, and journals. *Id.* The ability to perform electronic searches using such databases has led to substantial new discoveries regarding our nation's history, including hypotheses related to the meaning of the term "keep and bear arms" in the Second Amendment. *Id.*

Society also progresses over time, resulting in changed attitudes that may in turn affect our view of history. Take the Reconstruction Era as an example. A "traditional portrait" of the era, showcased in films like *Birth of a Nation* and embraced for much of the twentieth century, framed President Andrew Johnson as a hero who restored home rule and honest government to the South in a triumph over radical Northerners, who sought to plunder the spoils of the region, and childlike freedmen, who were not prepared to exercise the political power that had been foisted upon them. Eric Foner, *Reconstruction Revisited*, 10 *Revs. Am. Hist.* 82, 82-83 (1982). But in the 1960s, following the Second Reconstruction and a change in attitude toward people of color, the narrative flipped. Freedmen were recast as heroes, white Southerners as villains, and the Reconstruction governments as far more competent than had previously been let on. *Id.* at 83-84. A decade later, wary of exaggerating the faults and virtues of the people of the time, historians rejected both accounts and began questioning whether "much of importance happened at all" during the Reconstruction Era. *Id.* at 84-85. The dominant account of the Reconstruction Era has continued to evolve over time, both because new scholars, many of them scholars of color, have contributed to the conversation, and because the events of the period

appear quite different from the vantage point of passing time. *Id.* at 86-95. In other words, interpreting history is not as simple as compiling and processing stacks of paper. *See also, e.g.*, David W. Blight, *Historians and “Memory,”* Common Place, Apr. 2002; Jonathan Gienapp, *Constitutional Originalism and History*, Process: A Blog for American History (Mar. 20, 2017), <http://www.processhistory.org/originalism-history/>.

Additionally, judges are not trained historians, and the study of history is rife with potential methodological stumbling blocks. The volume of available historical evidence related to the legal question in any discrete Second Amendment controversy, for example, will vary enormously and may often be either vast or quite sparse.

On the one hand, for legal questions as to which there is a wealth of historical evidence, an imprecise research methodology can lead to what has been “derisively referred to ... as ‘law office history.’” *In Defense of Looseness, supra*. As then-Judge Posner explained it, “law office history” refers to a process by which a judge or advocate “sends his law clerks” or associates “scurrying to the library and to the Web for bits and pieces of historical documentation” that will support a given position on a legal issue. *Id.* When the clerks or associates are “numerous and able,” when they “enjoy[] the assistance of ... capable staffs” such as the staff at the Supreme Court library, or when they can rely on similar labor distilled into “dozens and sometimes hundreds of amicus curiae briefs,” it becomes “a simple matter ... to write a plausible historical defense” of the desired position. *Id.*

Accordingly, even if an opinion appears to rely on a “breathtaking” number of historical references, the underlying analysis may not constitute “disinterested historical inquiry,” but may instead represent “the ability of well-staffed courts” or firms to pick from among the available historical sources those most conducive to a given proposition. *Id.*

To so recognize is not to suggest that judicial inquiries under the “text, history, and tradition” test—as opposed to the inquiries of advocates, which are necessarily result-driven—would be directed in advance at reaching a foreordained result. Rather, the inquiries would be directed at reaching *a* result, which necessitates marshaling the available historical materials such that they support a single legal conclusion. *See, e.g.,* Avani Mehta Sood, *Motivated Cognition in Legal Judgments—An Analytic Review*, 9 Ann. Rev. L. & Soc. Scis. 307, 308-10 (2013). But history, assessed in a genuinely neutral fashion, may not support one conclusion. Instead, it may support conflicting conclusions or no conclusion at all.

Although a historical account with a thesis or viewpoint may read better than one that acknowledges ambiguity or irresolution, historians are trained to sift through materials with an underlying acceptance that the materials may or may not support one conclusion or another, or that the conclusions that can be drawn from the evidence may evolve over time. Put differently, historians need not resolve apparent contradictions and may follow the evidence where it leads. *See* Gienapp, *supra*. Courts do not have that luxury. Judges must definitively answer specific, detailed legal questions—here, whether the

Second Amendment permits states to ban high-capacity magazines that allow a weapon to fire more than ten rounds without reloading. That need to provide an answer—referred to in the literature as “motivated thinking” or “motivated reasoning,” *see, e.g.,* Sood, *supra*—can skew a court’s historical analysis, much as scientific research can be undermined by the desire to make some discovery rather than none, *see, e.g.,* Danielle Fanelli & John P. A. Ioannidis, *U.S. Studies May Overestimate Effect Sizes in Softer Research*, Proc. Nat’l Acad. Scis. U.S., Sept. 10, 2013, at 1-6.

On the other hand, an inquiry into some legal questions—such as the question whether a specific contemporary arms regulation is lawful under the “text, history, and tradition” test—may turn on a very narrow array of available historical resources. As the Supreme Court recognized in the context of a Title VII dispute, “small sample size may, of course, detract from the value” of evidence. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977). This Court has so recognized as well, noting that if an inquiry relies on an unduly small number of data points, it will have “little predictive value and must be disregarded.” *Morita v. S. Cal. Permanente Med. Grp.*, 541 F.2d 217, 220 (9th Cir. 1976). This “small sample size” problem has been discussed in numerous scholarly contexts, including with respect to historical analyses involving firearms. *See, e.g.,* James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 Wm. & Mary L. Rev. 1777, 1826 (2002) (maintaining that a scholar published a book that made unsubstantiated claims about gun ownership in America based on faulty science, including a failure to

account for and report sample sizes). So there may be occasions in which the universe of available historical evidence is too small for courts to draw reliable conclusions, rendering the “history” prong of the “text, history, and tradition” framework inoperable.

Sample size issues and the drive to draw a single legal conclusion are not the only potential methodological pitfalls for the “text, history, and tradition” test. Cognitive biases ranging from confirmation bias to anchoring bias, *see, e.g.*, Daniel Kahneman, *Thinking Fast and Slow* 80-81, 119-28, 324, 333 (2011), can cloud a judge’s analysis.<sup>2</sup>

And very few judges have received formal training on technical elements of historiographical research design, such as the importance of drawing from varied sources and assessing sources to ferret out potential bias imparted by the author. The risk that error will result from these imperfections in the “history” prong of the “text, history, and tradition” framework counsels against adopting the framework as the *controlling* test for *all* Second Amendment disputes, as opposed to relying on history as a useful tool embedded in a structured, sequential inquiry such as the two-step, tiered scrutiny approach.

### C.

As flawed as the suppositions of objectivity and certainty are for the “text” and “history” prongs of the

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<sup>2</sup> Confirmation bias refers to the tendency to interpret new information as confirmation of one’s pre-existing assumptions or theories. Anchoring bias refers to the tendency to over-rely on the initial evidence we discover as we learn about a given topic. *See id.*

Bumatay Dissent’s proposed framework, as applied to discrete regulations, the focus on “tradition” is even more problematic with regard to those supposed virtues. Courts have “vast discretion in deciding which traditions to take into account” and “substantial discretion in determining how to define the tradition at issue.” John C. Toro, *The Charade of Tradition-Based Substantive Due Process*, 4 N.Y.U. J. L. & Liberty 172, 181 (2009). Additionally, even if a court finds that tradition does support a given legal outcome, the court “must take the further step of determining whether” that tradition “*should* receive modern-day protection—an inquiry which depends heavily” on the court making a contextual judgment that accounts for the contemporary legal milieu. *Id.*

In particular, a foundational question plaguing any tradition-based framework is “[w]hose traditions count.” *Id.* at 181. For example, in several substantive due process cases such as *Lawrence v. Texas*, 539 U.S. 558, 567-68 (2003), the Supreme Court appealed to historical attitudes going back to ancient times to support its interpretation. Toro, *supra*, at 181-83. But when determining in *Washington v. Glucksberg*, 521 U.S. 702 (1997), whether individuals have a right to physician-assisted suicide, the Supreme Court disregarded a trove of ancient history supporting the practice even though that history had been extensively referenced in the opinion on review, and instead began its analysis by citing commentators from the thirteenth century. *Id.* at 710; *see also* Toro, *supra*, at 183-85. Whereas ancient authorities were, by and large, tolerant of suicide, St. Augustine’s interpretation of the demands of the Fifth Commandment drastically reshaped the way Western



societies viewed the subject by the time of the thirteenth century. Toro, *supra*, at 184-85. The Supreme Court chose to begin its analysis at that point and, accordingly, held that the right to physician-assisted suicide is not deeply rooted in tradition. *Glucksberg*, 521 U.S. at 735.

As this example illuminates, a framework that relies heavily on tradition is inherently indeterminate, because it often depends upon the choice of traditions on which to rely. My point is not that such choices are illegitimate—courts have to make decisions between competing legal positions, and such decisions necessarily require choices—but instead that there *are* choices that must be made in appealing to tradition. Without transparency as to those choices and a structured procedure for making those choices, the pretense of objectivity collapses.

Moreover, there are frequently traditions that support each side of a constitutional controversy. *Id.* at 186. A framework focused predominantly on tradition leaves litigants free to cherry-pick from those traditions to justify their preferred results. *Id.*

In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), for example, the Supreme Court addressed the constitutionality under the Fourteenth Amendment's Due Process Clause of a California statute providing that "a child born to a married woman living with her husband is presumed to be a child of the marriage." *Id.* at 113 (plurality opinion). The natural father of an adulterously conceived child brought suit, arguing that the law infringed upon his and the child's due process right to maintain a relationship with one another. *Id.* Justice Scalia, writing for the plurality,

disagreed, concluding that “our traditions have protected the marital family” and have generally declined to afford rights to the natural father of an adulterously conceived child. *Id.* at 124-27 & n.6.

Justice Brennan, in dissent, maintained that rather than focusing on historical traditions related to the rights of an adulterous natural father, the Court should instead focus on the historical tradition of affording great respect to the parent-child relationship. *Id.* at 139. In defending that position, Justice Brennan noted that the concept of tradition “can be as malleable and as elusive as ‘liberty’ itself,” and admonished the plurality for “pretend[ing] that tradition places a discernible border around the Constitution.” *Id.* at 137. Although that “pretense is seductive” because “it would be comforting to believe that a search for ‘tradition’ involves nothing more idiosyncratic or complicated than poring through dusty volumes on American history,” “reasonable people can disagree about the content of particular traditions” and about “which traditions are relevant.” *Id.*

With respect to the Second Amendment, historical sources from the Founding Era through the late nineteenth century indicate that members of the public held vastly different views on gun ownership and gun regulation depending on where they lived, both in terms of geographical region and in terms of whether the individual lived in an urban or rural environment. *See, e.g.*, Joseph Blocher & Darrell A. H. Miller, *The Positive Second Amendment: Rights, Regulation, and the Future of Heller* 20, 29-35 (2018); Joseph Blocher, *Firearm Localism*, 123 Yale L.J. 82,

112-21 (2013). Because a litigant who advocates a certain outcome may cite predominantly to authorities from a region or locality that tends to support the litigant's view, the "tradition" prong of the "text, history, and tradition" test is highly manipulable. Indeed, this aspect of the approach renders it akin, in many ways, to an analysis of legislative intent—a practice rejected by textualists because the "legislature is a hydra-headed body whose members may not" share a common view. Richard A. Posner, *Reflections on Judging* 189 (2013); see also Gienapp, *supra*. Similarly, the annals of history and lore rarely divulge a common view on what practices qualify as traditional.

Relatedly, there are often permissive and restrictive traditions that "cut in opposite directions." Toro, *supra*, 189. In the context of a case involving a patient's right to refuse life-prolonging medical treatment, for example, the Supreme Court had to choose between two traditions—one permissive tradition of allowing the state to regulate suicide, and one restrictive tradition of forbidding states from interfering in private medical decisions involving refusal of treatment. *Cruzan ex rel. Cruzan v. Dir., Mo. Dept. Health*, 497 U.S. 261, 269-82 (1990). The Supreme Court ultimately ruled in favor of the restrictive tradition, but, from the perspective of adhering to our nation's traditions, the opposite conclusion would have also been justified.

So far, no jurist or academic has come forward with a workable method of choosing between conflicting restrictive and permissive traditions. See Toro, *supra*, at 190-91. Crucially, for our purposes, the

“text, history, and tradition” test provides no guideposts on how a court should navigate indistinct traditions or weigh between conflicting traditions, and it therefore cannot provide a workably objective or bias-filtering framework for adjudicating Second Amendment controversies regarding discrete, specific regulations.

Even if there is only one relevant tradition at issue within a given case, there is still the problem of deciding how narrowly or broadly to define the tradition. That choice can be outcome determinative regarding the court’s assessment of the impact of the given tradition on, for example, the validity of a specific arms regulation. *Id.* at 186. A historical prohibition on carrying firearms in “fairs, markets, and in the presence of the King’s ministers,” for example, “could support regulations of wildly different scope: wherever people congregate, wherever the state is in control, wherever people buy things, or wherever government agents are stationed.” Blocher & Miller, *supra*, at 130; *see also* Peter J. Smith, *Originalism and Level of Generality*, 51 Ga. L. Rev. 485, 487 (2017); Frank H. Easterbrook, *Abstraction and Authority*, 59 U. Chi. L. Rev. 349, 358 (1992).

According to an analysis of fifty recent Second Amendment opinions, a court’s decision to use a higher level of generality when describing the core legal question in a given dispute usually supported striking down a challenged arms regulation, whereas a court’s decision to use a lower degree of generality typically led to the law being upheld. Mark Anthony Frassetto, *Judging History: How Judicial Discretion in Applying Originalist Methodology Affects the*

*Outcome of Post-Heller Second Amendment Cases*, 29 Wm. & Mary Bill Rights J. 413, 415, 438-39 (2020). In the context of public carry disputes, for example, the study found that “[j]udges favoring a broad right to carry in public have generally framed the question as whether the Second Amendment protects a right to carry arms in public at all,” whereas “judges who have favored upholding public carry restrictions have” phrased the question more narrowly, characterizing the question as “whether carrying a concealed weapon in public was understood to be within the scope of the right protected by the Second Amendment at the time of ratification.” *Id.* at 439-41 (citation omitted). As this discussion highlights, several factors inherent in the “tradition” inquiry can have a dispositive impact on the outcome of a legal dispute. A mandatory, rigid “text, history, and tradition” framework, contrary to the assertions of its proponents, provides no objective method for navigating such factors that would ensure objectivity and consistency in the law.

Next, even if an asserted right does find support in a relevant tradition and even if courts can agree on the proper way to characterize that tradition, courts would still be left with the problem of determining whether a particular tradition should be carried forward as constitutionally sanctioned. That determination necessarily involves, albeit behind a veil, policy and value-balancing judgments of the kind that the Bumatay Dissent claims the “text, history, and tradition” test would avoid.

Our nation’s history includes many traditions that would not now be accorded constitutional protection. *See Toro, supra*, at 193. One example that

has been given is the now-rejected assumption that a woman is subject to her husband's control and governance, a concept that gave rise to the widespread doctrinal rule at common law that a husband could not be convicted of sexually assaulting his wife. *Id.* If a man sought constitutional protection for "the right to have forcible intercourse" with his wife, his claim would, unfortunately, find ample support in our nation's history and traditions. *Id.*; see also, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257-62 (1964) (holding that private race discrimination in places of public accommodation, although traditional at the time, could be constitutionally forbidden). A test that places great weight on historical traditions can undermine the very bedrock of constitutional governance, by overriding later, well-accepted legislative policies and by precluding the judiciary from deriving and applying principles of constitutional interpretation capable of adjudging when our practices, however traditional, have deviated from our nation's precepts.

Considering in this regard the Second Amendment in particular, racially discriminatory gun regulations have been commonplace throughout our nation's history, ranging from statutes that expressly singled out people of color in their text, to statutes that disproportionately impacted people of color, such as prohibitions on the sale of certain less costly guns. Br. of Amicus Curiae Rutherford Institute in Supp. Of Pet'rs at 13-18, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, No. 20-843 (July 20, 2021). Although a court would invalidate such a law in the modern day under the Equal Protection Clause, it is notable that the "text, history, and tradition" test itself provides no

mechanism to distinguish unjust or unconstitutional traditions, such as the tradition of having race-based arms restrictions, from other traditions.

In short, the tradition prong of the “text, history, and tradition” test offers even less guidance on the validity of discrete arms regulations under the Second Amendment than the already inadequate “text” and “history” prongs. It thereby invites inconsistency in the law and reliance of judges on their own personal policy preferences, contrary to the purported attributes of the approach touted by Judge Bumatay and by others who have supported the adoption of the “text, history, and tradition” test.

#### D.

The “text, history, and tradition” approach, as laid out in the Bumatay Dissent, suffers from two major additional defects. First, a key aspect of the rubric—the one most emphasized by the Dissent, *see* Bumatay Dissent at 127-137—is whether a particular weapon, ammunition, or other arms-related hardware is “in common use at the time.” *Heller*, 554 U.S. at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)). If so, the Bumatay Dissent posits, the device should receive Second Amendment protection.

But *when* must a device be in “common use” to receive protection? Apparently, at the time of a court’s decision. Bumatay Dissent at 103, 105, 134-137 (reasoning that large-capacity magazines “are owned by millions of people nationwide” and “enjoy widespread popularity today”); *see also* VanDyke Dissent at 165-167 (discussing the present-day popularity of high-capacity weapons and relying on that evidence when assessing which weapons are “in

common use”). Federal courts of appeal have indeed largely relied upon present-day statistical data when discussing whether a weapon qualifies as “in common use at the time.” Blocher & Miller, *supra*, at 89 & n.126.<sup>3</sup> But, as our colleagues on the Seventh Circuit explained, “relying on how common a weapon is at the time of litigation would be circular.” *Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015). “[I]t would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it” which, in turn, prevented the weapon from becoming commonly owned. *Id.* In other words, “[a] law’s existence can’t be the source of its own constitutional validity.” *Id.*; *see also* Blocher & Miller, *supra*, at 89 (“law-abiding people [must] choose weapons from among the weapons that are lawful to possess, leading to the seemingly circular result that what is protected by the Constitution depends on what has been regulated by the government”).

To regard an arms-related device’s popularity as “the source of its own constitutional[ity]” is no less circular. Devices may become popular before their

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<sup>3</sup> An unanswered question regarding this interpretation of the “common use” inquiry is what metric a court should apply when determining whether a weapon qualifies as in common use. “One can come to quite a range of conclusions” regarding the prevalence of the same weapon “depending on whether one calculates common use by absolute numbers, by absolute dollars, or by the percentage of the market,” whether that be the market for firearms in general, for the specific type of firearm at issue, “or for all self-defense technology.” Blocher & Miller, *supra*, at 89 (citing Eugene Volokh, Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda, 56 UCLA L. Rev. 1443, 1480 (2009)).



danger is recognized and regulated, or the danger of a particular device may be exacerbated by external conditions that change over time. And a device may become popular because of marketing decisions made by manufacturers that limit the available choices. Here, for example, large-capacity magazines come as a standard part on many models of firearms, so a consumer who wants to buy those models has no choice regarding whether the weapon will include a magazine that can fire more than ten rounds without reloading. Principal Opinion at 17, 39-40. In any event, the prevalence of a particular device *now* is not informative of what the Second Amendment encompassed when adopted, or when the Fourteenth Amendment was added to the Constitution, or when the Second Amendment was declared incorporated into the Fourteenth Amendment and so applicable to state and local governments in *McDonald*, 561 U.S. at 791 (plurality opinion).

This is not to say that new weapons do not receive Second Amendment protection. To the contrary, *Heller* makes clear that the Second Amendment protects “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; *see also Caetano v. Massachusetts*, 577 U.S. 411, 411-12 (2016). And an assessment of prevalence must play *some* role in a court’s analysis; *Heller* explained that the Second Amendment’s protection extends only to those weapons commonly used “by law-abiding citizens for lawful purposes.” *Heller*, 554 U.S. at 624-25, 627; *see also Fyock v. Sunnyvale*, 779 F.3d 991, 997-98 (9th Cir. 2015).

Notably, however, *Heller* focused not just on the prevalence of a weapon, but on the primary use or purpose of that weapon. The Supreme Court explained that, at the time of the Second Amendment’s adoption, “all citizens capable of military service . . . would bring the sorts of lawful weapons that they possessed at home to militia duty” and although “[i]t may well be true today that a militia, to be as effective as militias in the [eighteenth] century, would require [more] sophisticated arms,” such “modern developments” cannot change the scope of the Second Amendment right, which remains rooted in that original rationale. *Id.* at 627-28. The Bumatay Dissent’s excessive focus on the current prevalence of high-capacity magazines is therefore misplaced, as a proper analysis must account for the purpose and use of a weapon in addition to its current popularity.

This discussion also surfaces another defect in the “text, history, and tradition” test—namely, the framework provides courts with little to no guidance in cases involving the regulation of new and emerging weapons technologies. Presumably, history and tradition will either be silent on or offer very little insight into the constitutionality of measures aimed at such weapons, since, by definition, the weapons lack a historical pedigree.

*Heller* approves of the practice of adopting new regulations in the face of new technologies, as it expressly indicates that bans on the private possession of machine guns are valid. 554 U.S. at 624. Such bans arose gradually in the 1920s and 1930s after machine guns became widespread, more than 130 years after the states ratified the Second

Amendment. *Friedman*, 784 F.3d at 408. And “[n]othing in *Heller* suggests that a constitutional challenge to bans on private possession of machine guns brought during the 1930s, soon after their enactment, should have succeeded.” *Id.*

It appears likely that in many Second Amendment cases, courts will be called upon to assess whether a regulation targeting new and emerging weapons technologies adheres to the commands of the Second Amendment. Now-Justice Kavanaugh, in *Heller II*, responded to this concern by stating that courts must “reason by analogy from history and tradition.” *Heller II*, 670 F.3d at 1275. But resort to analogy can go only so far, as it does not provide room to account for contemporary circumstances not foreseeable at the time of the Second Amendment’s adoption or incorporation. Additionally, reasoning by analogy in these circumstances would have no guiderails and would be subject to the “level of generality” concerns discussed above. *See supra* pp. 73-74.

In sum, because the “text, history, and tradition” test does not adequately account for the primary purpose of currently popular weapons technologies and does not speak to how courts should analyze regulations targeting new and emerging technologies, the framework is, for those reasons as well, inadequate for addressing the constitutionality of specific gun regulations.

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We are, of course, bound by *Heller*, which directs us to consider the text of the Second Amendment and our country’s history and traditions when determining

the general scope of the Second Amendment right. But a framework that relies exclusively on those considerations simply does not provide an administrable framework for adjudicating Second Amendment controversies once a court's analysis moves beyond the overall scope of the Second Amendment and into the constitutionality of specific gun measures. As the Supreme Court of Ohio helpfully summarized, the "text, history, and tradition" test is not workable because it leaves the following critical questions unanswered:

What should a court do when [text, history, and tradition] do not provide a clear answer? If the [district court] reviewed this case again and found the historical record unclear, would we not be right back where we started? More generally, how would the dissenting opinion address the concern that historical evidence can be viewed in different ways by different people? How would it deal with an argument that changed circumstances make reliance on certain Framing Era practices unjustified? Would it reject that notion reflexively on the ground that modern concerns are wholly irrelevant under the text-history-and-tradition-based approach? Or does it acknowledge that present-day judgments have a role to play? ... Does one simply look for an historical analogue to the law at issue? And if analogues exist, how widespread must they be? How does one deal with modern technologies and circumstances that did not exist at the time of the Founding?

*State v. Weber*, 163 Ohio St. 3d 125, 139-40 (2020), *cert. denied*, --- S. Ct. --- (2021). Because the “text, history, and tradition” approach does not fill these gaps, it cannot supply both a necessary *and sufficient* condition for striking down a law which seeks to regulate the Second Amendment right. Nor, for the reasons I have surveyed, is the “text, history, and tradition” test the objective, principled method for adjudicating Second Amendment legal controversies that the *Bumatay* Dissent repeatedly insists that it is.

In contrast, the two-step, tiered scrutiny framework—which I discuss more fully in Part III—consistently applied in Second Amendment cases in this Court and in ten other Circuits, *see* Principal Opinion at 23-24, offers two cures for the key defects in the propounded “test, history, and tradition” approach. Specifically, under the two-step approach, a court may forthrightly recognize that, as to a specific form of contemporary regulation, the historical record is thin or inconclusive. The court may then move forward with its analysis by assuming without deciding that the Second Amendment is nevertheless implicated by the policy or regulation at issue, as the principal opinion does here. Principal Opinion at 30 (citing several additional examples). Moreover, the two-step approach provides guidance regarding a court’s proper steps once ambiguity in the available materials is acknowledged, thereby *constraining* judicial discretion at that juncture. Once a court moves on to step two, it must decide what level of heightened scrutiny applies, and then engage in a relevant, above-board, tiered analysis. *Id.* at 23-24, 30-46. Under the “text, history, and tradition” approach, by contrast, the well runs dry as soon as the court has

exhausted the text of the Second Amendment and evidence of our nation's history and traditions, even when those factors are, by any fair evaluation, indeterminate. The "text, history, and tradition" approach therefore obscures, rather than reveals and channels, the pivotal decisionmaking process, leaving judges with unfettered and unexamined discretion once a court's regulation-specific Second Amendment analysis moves beyond incontestable history and tradition, as it is often bound to do.

## II.

The Bumatay Dissent provides a powerful illustration of the shortcomings of the "text, history, and tradition" approach. Beginning with the "common use" inquiry, the Dissent repeatedly emphasizes that large-capacity magazines are currently prevalent, but it spends close to no time discussing the primary purpose or use of such weapons, instead simply asserting that the weapons are "commonly used by Americans for lawful purposes." *See, e.g.*, Bumatay Dissent at 103, 108, 127-131, 134-137. Relatedly, in response to the principal opinion's observation that high-capacity magazines are specifically suited for large-scale military use rather than for self-defense, Principal Opinion at 28, 35-37, Judge VanDyke avers that, "almost every attribute of a weapon that makes it more effective for military purposes also makes it more effective for self-defense: more accurate, faster firing, the ability to engage multiple targets quickly—these are all characteristics of a weapon that make it better for *both* military and self-defense purposes." VanDyke Dissent at 162-163.

But, as Judge Gould explained in his concurrence in *Nordyke v. King*, 644 F.3d 776 (9th Cir. 2011) (Gould, J., concurring), *on reh'g en banc*, 681 F.3d 1041 (9th Cir. 2012), although “laws barring possession of military-grade weapons might be argued to substantially burden the right to have weapons,” such laws “are indisputably permissible because they do not tread on the Second Amendment’s core purposes.” *Id.* at 797 n.6. “I do not mean to be facetious,” Judge Gould wrote, “but to me it is obvious that the Second Amendment does not protect the right to keep a nuclear weapon in one’s basement, or a chemical or biological weapon in one’s attic.” *Id.* Although nuclear bombs and chemical and biological weapons are, of course, in a completely different class of weapon than large-capacity magazines in terms of the level of danger they pose, and they are thankfully nowhere near as widespread as large-capacity magazines, neither of those observations gets to the heart of what the primary purpose or use of a large-capacity magazine *is*. Arguably, the primary use of a large-capacity magazine, by design, is for effective combat engagement in a theater of war. Principal Opinion at 28, 35-37. If true, then regardless of their prevalence in society, large-capacity magazines would not fall within the shelter of the Second Amendment.

Turning to the subject of assessing the constitutionality of regulations addressing new or emerging technologies, Judge Bumatay’s analysis again misses the mark. As California and amici supporting the government explain, restrictions on semi-automatic weapons capable of firing a large number of rounds without reloading were enacted nationally and in several states shortly after such

weapons became widely commercially available. Opening Br. at 27-31; Reply Br. at 10-12; Br. of Amicus Curiae Everytown for Gun Safety in Supp. Of Def.-Appellant at 4-9; *see also* Blocher & Miller, *supra*, at 42-45; Robert J. Spitzer, *America Used to Be Good at Gun Control*, N.Y. Times (Oct. 3, 2017). Historically, gun regulation has followed that pattern, with regulations arising not when a new technology is *invented*, but instead when the technology begins “to circulate widely in society.” Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 Law & Contemp. Probs. 55, 67-71 (2017). The ban on high-capacity magazines at issue in this case therefore represents a “continuation of nearly a century” of arms regulations targeting weapons that can fire a large number of rounds without reloading, Br. of Amicus Curiae Everytown for Gun Safety in Supp. Of Def.-Appellant at 9. The statute thereby arguably constitutes a longstanding prohibition that should not be disturbed by application of the Second Amendment, at least as long as the “longstanding prohibition” inquiry accounts for the date when the target of a restriction became commonplace. And based on *Heller’s* commentary regarding machine guns, 554 U.S. at 624; *see also supra* p. 79, the inquiry should account for that factor.

The Bumatay Dissent ignores this context. It asserts that large-capacity magazines have not been “subject to longstanding regulatory measures,” and that it is “not a close question” whether the statute at issue must accordingly be struck down. Bumatay Dissent at 108. In support, the Dissent provides scattered examples of weapons with similar firing capacities that date back as far as 1580, but it does not



contend that such weapons were widely commercially available at the time, arguing only that such weapons had become common “by the time of the Second Amendment’s incorporation,” apparently referring to 1868. Bumatay Dissent at 132-134 (citing David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 851 (2015)). Judge Bumatay nevertheless declares that, because regulations targeting high-capacity magazines did not exist during the Founding Era, they cannot be considered longstanding regulations under the “text, history, and tradition” test. *Id.* at 140-141; *see also id.* at 137-142.

But, as explained, even taking a generous (to the Bumatay Dissent) view on what qualifies as “common,” and even relying on the same source cited by the Dissent, high-capacity magazines did not become common until the late nineteenth century or early twentieth century. *See* Br. of Amicus Curiae Everytown for Gun Safety in Supp. Of Def.-Appellant at 4-9; Kopel, *supra*, at 851. The Bumatay Dissent’s “text, history, and tradition” framework would thereby require states to adopt regulations before circumstances warrant, sometimes before a problem even exists. Such a requirement would hamstring the ability of states to regulate nearly any new or emerging weapons technologies. The “text, history, and tradition” test, as a result, would fail to comply with *McDonald*’s instruction that the Second Amendment must be construed such that states retain the ability to “devise solutions to social problems that suit local needs and values” and to “experiment[] with

reasonable firearms regulations.” 561 U.S. at 785 (plurality opinion).<sup>4</sup>

In terms of methodology, Judge Bumatay does not explain how he approached the historical research underlying the observations made in his opinion. Although such methodological disclosures are not common in judicial opinions, they are standard in academic articles, and for good reason. As explained above, *see supra* pp. 65-68, even slightly defective methodology can undermine the persuasive force of research, and historiographical research is full of potential methodological pitfalls. How large is the pool of available evidence that the Bumatay Dissent drew upon? Is it large enough that we may glean reliable conclusions from it? Did the Dissent draw from that pool in a fashion that would reflect the range of differing opinions throughout history on gun ownership and gun regulation, such as by ensuring that its sources came from differing geographical regions and from both urban and rural areas? Is it possible the Bumatay Dissent relies upon inaccurate sources, or sources that include bias imparted by the

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<sup>4</sup> The dissents assert that the Second Amendment right has been treated as if it were “disfavored.” *See, e.g.*, Bumatay Dissent at 111-112; VanDyke Dissent at 145-146. But in terms of what the Second Amendment protects, the Supreme Court explained in *Heller* that the Second Amendment right has long existed in harmony with reasonable regulation, and the Court approved a non-exhaustive range of presumptively lawful regulations, without announcing any criteria for determining whether non-listed kinds of arms regulations are or are not lawful. 554 U.S. at 626-27; *see also, e.g.*, Blocher & Miller, *supra*, at 185. And there are several prominent examples of state and federal courts striking down gun regulations that press those indistinct boundaries. *Id.* at 185-86; *see also* Principal Opinion at 41-42.

author? Is it possible that Judge Bumatay approached the research with a desire to find *a* clear answer—not any particular clear answer—to the legal question in this case, such that the research process itself became skewed? Were the individuals who performed the key research tasks for the Bumatay Dissent aware of cognitive biases like confirmation bias and anchoring bias, and did those individuals actively seek to counteract the impact of such biases on their research?

The truth is, we simply do not know the answer to those questions, and the “text, history, and tradition” test is not designed to supply readers with those answers. As a result, we cannot be confident in the validity of the observations made in the Bumatay Dissent. In contrast, the two-step, tiered scrutiny approach embraced by the principal opinion, as I will explain in more detail in Part III, relies on a familiar, well-established methodology that requires judges to expressly disclose, on the public record, the reasoning that guides their decision in any given case. And it is designed to accommodate situations where evidence of history and tradition is conflicting or inconclusive. In this respect, the two-step, tiered scrutiny approach represents a superior framework for adjudicating Second Amendment controversies involving the constitutionality of discrete regulations.

### III.

Looking in detail at the attributes of the two-step, tiered scrutiny approach more broadly, I begin from the established proposition that the Second Amendment is “not unlimited.” *Heller*, 554 U.S. at 595. Although its reach extends to modern weapons just as the First Amendment protects modern forms of

speech and the Fourth Amendment applies to searches of modern forms of technology, *id.* at 582, the Second Amendment has multiple limitations. It does not prevent regulation aimed at “dangerous or unusual” weapons, including complete bans on such weapons. *Id.* at 623, 627. It does not undermine the validity of “longstanding prohibitions” such as laws that prevent firearms from being carried into schools. *Id.* at 626-27. And it “by no means eliminates” a state’s ability “to devise solutions to social problems that suit local needs and values,” and to “experiment[] with reasonable firearms regulations.” *McDonald*, 561 U.S. at 785 (plurality opinion). Because the Second Amendment provides nuanced, not absolute, protection to individuals’ right to keep and bear arms for self-defense, and because, for the reasons I surveyed, the “text, history, and tradition” test cannot meaningfully and predictably resolve which discrete regulations accord with the Amendment’s protections, *see supra* Parts I, II, some other method of structuring judicial inquiry into that question is needed.

As the principal opinion explains, the two-step approach—which provides for *both* a historical inquiry and a tiered scrutiny inquiry similar to that used to apply other constitutional protections to discrete and variable regulations—has been embraced by the federal courts of appeal. Principal Opinion at 23-24. A consideration of the theoretical and historical underpinnings of the tiers of scrutiny indicates that the two-step approach represents a well-established framework for guiding and openly communicating, as opposed to hiding, a court’s dual attention to historical background as well as to the real-world burdens and the governmental concerns at stake. The principal

opinion's two-step, tiered scrutiny approach, in particular, is in no way the free-for-all vehicle for sanitizing judges' policy preferences that Judge Bumatay makes it out to be. To the contrary, the set of prescribed steps embedded in the tiers of scrutiny demand self-awareness on the part of judges and lead to a public-facing decisionmaking process grounded in an evidentiary record.

#### A.

*Lochner v. New York*, 198 U.S. 45 (1905), can be viewed as the “starting point” for the development of each of the three tiers of scrutiny. See Donald L. Beschle, *No More Tiers?: Proportionality as an Alternative to Multiple Levels of Scrutiny in Individual Rights Cases*, 38 Pace L. Rev. 384, 387-88 (2018); see also Moshe Cohen-Eliya & Iddo Porat, *American Balancing and German Proportionality: The Historical Origins*, 8 Int'l J. Const. L. 263, 280 (2010). There were three opinions in *Lochner*. Justice Peckham's opinion for the majority held that the “right” of employers and employees to contract with one another regarding working conditions was subsumed within the Fourteenth Amendment's Due Process Clause. *Lochner*, 198 U.S. at 53-54. For New York's statute limiting the working hours of bakers to survive review, Justice Peckham wrote, the government would need to satisfy an exacting test: demonstrating that the statute had a “direct relation” and was “necessary” to serve an “appropriate and legitimate” state interest, such as the state's interest in health and safety. *Id.* at 56-58. The opinion went on to invalidate the statute, concluding that the government failed to carry its burden under that test.

*Id.* at 64-65. Over time, Justice Peckham's somewhat familiar test "evolve[d] into the modern strict scrutiny test." Beschle, *supra*, at 388.

Justice Holmes, in dissent, advocated on behalf of a substantially more deferential approach, whereby the statute would be invalidated only if it was clear that any "rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles." *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting). The Holmes dissent may therefore be viewed as an early predecessor of the rational basis test. Justice Harlan, also in dissent, struck a middle ground. He agreed with Justice Holmes that any "liberty of contract" implicit in the Constitution may be constitutionally subject to regulation that "the state may reasonably prescribe for the common good and the well-being of society." *Id.* at 68 (Harlan, J., dissenting). But his proposed approach was not nearly as deferential as Justice Holmes's. Instead, he would have required the state to produce a reasonable amount of evidence in support of the regulation before it could be found valid. *Id.* at 69-74. This middle-of-the-road alternative can be characterized as a forebear to intermediate scrutiny.

Although *Lochner* did not survive the test of time, "a significant question remained" regarding whether the analytical frameworks employed by Justices Peckham, Holmes, and Harlan were themselves inappropriate, as opposed to being inappropriately applied in that case. *Id.* at 389. The Supreme Court began addressing this question in the late 1930s, ultimately embracing the use of heightened scrutiny in a variety of cases. *Id.*; Cohen-Eliya & Porat, *supra*,

at 282-83. In *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), for instance, the Supreme Court clarified that heightened scrutiny is appropriate when a court evaluates any one of three types of legislation: a statute in conflict with a fundamental right such as those enumerated in the Bill of Rights, a statute that undermines the healthy functioning of our democracy, or a statute that harms “discrete and insular minorities.” *Id.* at 152 n.4.

From the 1960s through the 1980s, the strict scrutiny test became entrenched in constitutional decisionmaking and was gradually shaped into the familiar two-part standard that requires government actors to demonstrate that a statute has a compelling underlying purpose, and that the statute is necessary—meaning there are not any less restrictive alternatives—to achieve the relevant purpose. *See, e.g.,* *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 290-91 (1978); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966); *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307-08 (1964); *see also* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1273-85 (2007). The earliest applications of the strict scrutiny test included, among other subjects, racial discrimination cases involving the Equal Protection Clause, *e.g.,* *Palmore*, 466 U.S. at 432-33, free speech cases, *e.g.,* *Flowers*, 377 U.S. at 307-08, and voting rights cases, *e.g.,* *Harper*, 383 U.S. at 670. Each application fell within at least one of the three buckets outlined in the *Carolene Products* footnote four. Rational basis review also became widespread during

the same period, applying in essentially all other cases. See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981); *N.D. State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 164-67 (1973); *Ferguson v. Skrupa*, 372 U.S. 726, 728-29 (1963).

Around this time, constitutional scholars such as Professor Gerald Gunther voiced a concern that strict scrutiny was overly harsh, as it was “strict in theory, [but] fatal in fact.” Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 794 (2006). Others lamented that rational basis scrutiny veered too far in the opposite direction, leading to essentially per se findings of validity in every case where it applied. Beschle, *supra*, at 392. There was a sense that the two-tiered system of judicial scrutiny was lacking, and that some middle ground was needed. *Id.* at 393. After a series of cases in which the Supreme Court nominally applied rational basis review to gender discrimination claims but engaged in an analysis that appeared much more like strict scrutiny review, see *Weinberger v. Weisenfeld*, 420 U.S. 636, 642-45, 648-53 (1975); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-48 (1974); *Reed v. Reed*, 404 U.S. 71, 74-77 (1971), the Supreme Court eventually expressly adopted a new tier of scrutiny, one that was less exacting than strict scrutiny but more rigorous than rational basis review, see *Craig v. Boren*, 429 U.S. 190, 197-98 (1976); see also *Plyler v. Doe*, 457 U.S. 202, 215-21 (1982). The middle-ground approach that had its roots in Justice Harlan’s *Lochner* dissent developed into what is now referred to as intermediate scrutiny. Beschle, *supra*, at 393-94.



Although the development of intermediate scrutiny created a more nuanced version of the tiered system of judicial scrutiny in constitutional cases, a perception persisted that it may be useful for the tiers of scrutiny both to become less rigid and to include more context-specific guidance. *Id.* at 394-97. Over time, these critiques were met with changes to the tiered scrutiny method of analysis. For example, differing tests that embed a tiered scrutiny method of review have arisen in free speech cases, such that a slightly different structure of analysis applies depending on whether the speech is commercial in nature or occurs in a public forum, as well as whether a disputed regulation targets specific speech-related content, including by targeting a specific viewpoint. *See, e.g., Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) (commercial speech regulation); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980) (public forum speech regulation); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (content-neutral speech regulation); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 48-49 (1983) (content-based speech regulation); *see also* R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and "Reasonableness" Balancing*, 8 *Elon L. Rev.* 291, 292-95 (2016). Numerous cases have also applied strict scrutiny and rational basis review more flexibly, such that per se findings of validity and invalidity have become less common. *See, e.g., Romer v. Evans*, 517 U.S. 620, 631-36 (1996); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-42 (1985); *Grutter v. Bollinger*, 539 U.S. 306, 326-44 (2003); *see also* Marcy Strauss,

Reevaluating Suspect Classification, 35 Seattle U. L. Rev. 135, 135-36 n.5 (2011). Thus, more than one hundred years after *Lochner* first aired the predecessors of the various available approaches, the tiered scrutiny method of analysis has developed into a framework that serves to guide and constrain judicial decisionmaking across a variety of scenarios. Although imperfect, the tiered scrutiny method of analysis has risen to the challenge of providing a structured framework for adjudicating cases involving individual rights.

## B.

Today, a heightened tier of scrutiny applies when courts evaluate a wide range of legal claims, including equal protection claims involving suspect and quasi-suspect classifications; claims involving fundamental rights such as the right to vote, the right to free speech, and the right to freely exercise one's religion; and claims involving the inverse commerce clause. *See, e.g., Loving*, 388 U.S. at 11 (race discrimination); *Craig*, 429 U.S. at 197-98 (gender discrimination); *Clark v. Jeter*, 486 U.S. 456, 465 (1988) (legitimate parenthood discrimination); *Burdick v. Takushi*, 504 U.S. 428, 432-34 (1992) (right to vote); *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566 (commercial speech regulation); *Turner Broad. Sys., Inc.*, 520 U.S. at 189 (content-neutral speech regulation); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876-77 (2021) (free exercise of religion); *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2467-68 & n.11, 2473-74 (2019) (inverse commerce clause); *see also* Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* 510-11 (2012).

The second stage of the principal opinion's two-step approach, as mentioned, analyzes the degree to which an arms-related regulation burdens the Second Amendment right when determining whether to apply strict scrutiny, intermediate scrutiny, or "no scrutiny at all (as in *Heller*)."

Principal Opinion at 25. Of the established, non-Second Amendment tiered scrutiny frameworks, this aspect of the two-step, tiered scrutiny approach is perhaps most analogous to the *Anderson-Burdick* doctrine used for election and voting rights cases. Under that doctrine, the rigor of a court's inquiry into the validity of an election-related regulation depends upon the extent to which the challenged regulation burdens constitutional rights, such as the right to vote. *Burdick*, 504 U.S. at 432-34. If the right to vote is severely burdened, strict scrutiny applies. *Id.* If the right to vote is burdened in a "reasonable" manner, then less rigorous scrutiny applies instead. *Id.*; see also *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 353-54 (1951) (applying a similar framework to disputes involving the inverse commerce clause).

Use of the two-step, tiered scrutiny approach for Second Amendment cases, then, represents yet another instantiation of the tiered method of analysis evolving to meet the filtering needs of various contextual scenarios involving constitutional rights. No reason has been suggested, in the dissents in this case or elsewhere, as to why a well-established structure for constitutional adjudication should apply to a wide range of constitutional protections but not to the Second Amendment.

We adopted the two-step approach for Second Amendment claims in *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013). There, we reviewed and analyzed other Circuits' application of the two-step inquiry and explained that the two-step approach "reflects the Supreme Court's holding in *Heller* that, while the Second Amendment protects an individual right to keep and bear arms, the scope of that right is not unlimited." *Id.* at 1136. As *Chovan* suggests, we adopted the two-step approach because it provides crucial guideposts that assist and constrain our inquiry once we move beyond assessing the overall scope of the Second Amendment and into applying the Amendment to a specific measure or regulation. This aspect of the two-step approach is, indeed, its greatest asset. The elements of a heightened scrutiny analysis are fixed and widely known, lending themselves to a mode of reasoning and explication on the part of judges that disciplines the judicial inquiry and is accessible to the litigants and the public. Application of the two-step approach to the Second Amendment is therefore likely to promote both judicial introspection and public insight into the judicial decisionmaking process.

Use of the two-step approach may also encourage participation in the development of an understanding about the constitutional reach of the Second Amendment by the other branches of government, nationally and locally. Because the tiers of scrutiny offer a clear structure that communicates to the audiences of judicial opinions the type and sequence of arguments that must be made to ensure that a piece of legislation or other governmental enactment survives constitutional review, application of the

tiered scrutiny approach may encourage legislators and other government actors carefully to assess whether their actions have a proper purpose and are appropriately tailored to serving that purpose. In other words, judicial review under the two-step, tiered scrutiny approach would have a disciplining effect not only on the judiciary, but on lawmakers as well.

The tiered method of scrutiny may also assist courts in isolating “process failures” in the legislative process. Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 Yale L.J. 3094, 3151 (2015). As the Bumatay Dissent acknowledges, *see* Bumatay Dissent at 103-104, 110, one of the primary functions of the judiciary is to ensure that the legislative process is not systemically infected by “process failures,” which arise when lawmakers, either consciously or subconsciously, allow prejudice or discrimination to shape the law. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 102-04 (1980). But as I have explained, the “text, history, and tradition” approach is ill-suited to that end. *See supra* Parts I, II.

In contrast, at the second stage of the two-step, tiered scrutiny approach, a court must carefully consider—as the principal opinion does here, *see* Principal Opinion at 30-40—the parties’ submissions and the evidentiary and legislative record to assess the degree of impact a particular regulation has on the Second Amendment right. Having done so, the court then chooses which level of scrutiny is appropriate and applies the prescribed level of rigor to its assessment of both the interests that gave rise to the regulation and—again, after detailed attention to the parties’

submissions and the evidentiary and legislative records—the degree to which the regulation advances that asserted interest. Because heightened scrutiny requires the government to both articulate a justification for its disputed action and provide an evidentiary record supporting that justification, it is likely to smoke out process failures. At the same time, because legislators are aware of this fact, application of the two-step approach may also produce front-end incentives that prevent many process failures from occurring in the first place. Application of the tiered scrutiny approach may thereby facilitate judicial oversight into whether the legislative branch is acting impartially and responsibly, with due regard to the underlying constitutional protection.

Rejecting this process-oriented mode of protecting constitutional rights as unreliable, Judge Bumatay characterizes the two-step, tiered scrutiny approach as “nothing more than a black box used by judges to uphold favored laws and strike down disfavored ones.” Bumatay Dissent at 104. He is mistaken. For the reasons explained, the two-step approach is not an invitation to engage in freewheeling judicial decisionmaking or generalized interest-balancing. Instead, it prescribes a careful, structured evaluation that is preserved for posterity and based on an evidentiary record. The two-step, tiered scrutiny approach thus places a heavy burden on the state to justify any intrusions into individual rights and, again, requires judges to explain their decisions in an accessible, transparent fashion that encourages public oversight.

To be sure, analyses of this kind can be poorly done, and in any specific instance may or may not succeed in uncovering and minimizing the impact of judges' policy preferences on the outcome of the case. But where there is such failure, the failure will be exposed via ascertainable lapses in the court's logical or factual analysis, giving rise to either critiques by other courts or reversal on appeal. So the process-structuring aspects of the tiered scrutiny approach constrain the ability of the judicial system *as a whole* to allow personal policy preferences to determine outcomes, whether or not the process has the same success in each opinion written. The "text, history, and tradition" framework offers none of these benefits. It provides no guidelines for the many cases in which the historical record is inconclusive, and thereby both invites biased decisionmaking and shrouds that decisionmaking in secrecy.

The Bumatay Dissent further asserts that the Supreme Court already rejected the two-step, tiered scrutiny approach when it "bristled" at the suggestion in Justice Breyer's dissent that courts should engage in a "freestanding 'interest balancing' approach" when adjudicating Second Amendment cases. *Id.* at 112-115 & n.10 (quoting *Heller*, 554 U.S. at 634). But, in fact, Justice Breyer's proposal was a thinly veiled reference to the proportionality test, the dominant international framework for adjudicating gun rights cases. *See, e.g.*, Moshe Cohen-Eliya & Iddo Porat, *The Hidden Foreign Law Debate in Heller: The Proportionality Approach in American Constitutional Law*, 46 San Diego L. Rev. 368, 369-70 (2009). Although the proportionality test has some broad similarities to the tiers of scrutiny, comparative law theorists note that the tiered

scrutiny approach offers substantial benefits that the proportionality approach lacks. Namely, the proportionality approach directs judges to engage in a case-by-case weighing analysis that assesses whether the benefits of a disputed policy outweigh or are sufficient to justify the degree of intrusion into the right at issue in the case. *Id.* at 380-81. The tiers of scrutiny, in contrast, supply a pre-determined weighing calculus triggered by the details of each case. Barak, *supra*, at 512, 521-22. In other words, the tiered scrutiny approach provides a real check on judicial power, because much of the central weighing analysis in each case is not within the control of individual judges and is instead “bounded” by a pre-existing categorical framework. *Id.* Once again, this aspect of the tiered scrutiny approach cabins judicial discretion and promotes long-run objective decisionmaking, to the degree such decisionmaking is possible.

Finally, the Bumatay Dissent states that this Circuit’s precedent regarding intermediate scrutiny in Second Amendment cases has “dispense[d] with the requirement of narrow tailoring” by adopting a “reasonable fit” tailoring requirement. Bumatay Dissent at 111 n.8. But *Vivid Entertainment, LLC v. Fielding*, 774 F.3d 566 (9th Cir. 2014), the case cited by the Dissent for the proposition that intermediate scrutiny ordinarily requires “narrow tailoring,” clarified that “[i]n order to be narrowly tailored for purposes of intermediate scrutiny,” the regulation need not be the least restrictive means of achieving the government interest, as the requirement is “satisfied so long as the regulation promotes a substantial government interest that would be



achieved less effectively absent the regulation.” *Id.* at 580. Our Second Amendment case law defines the “reasonable fit” requirement in exactly the same way, noting that although a firearm regulation need not utilize the least restrictive means of achieving its underlying objective, it must “promote a substantial government interest that would be achieved less effectively absent the regulation.” *See, e.g., Mai v. United States*, 952 F.3d 1106, 1116 (9th Cir. 2020), *reh’g denied*, 974 F.3d 1082 (2020), *cert. denied*, 141 S. Ct. 2566 (2021); *United States v. Torres*, 911 F.3d 1253, 1263 (9th Cir. 2019); *Fyock*, 799 F.3d at 1000. There is therefore no merit to the suggestion that the Ninth Circuit’s application of intermediate scrutiny in Second Amendment cases is somehow less exacting than its application of the standard in other kinds of cases.

Further, Judge Bumatay cites no precedent in support of his assertion that intermediate scrutiny review would allow the government to justify a policy on grounds that are not “genuine.” Bumatay Dissent at 111 n.8. To the contrary, in cases where intermediate scrutiny applies, the burden falls on the government to demonstrate that an important interest underlies the policy, and that interest “must be genuine, not hypothesized or invented *post hoc* in response to litigation.” *United States v. Virginia*, 518 U.S. 515, 533 (1996); *see also, e.g., Karnoski v. Trump*, 926 F.3d 1180, 1199-1202 (9th Cir. 2019).

### CONCLUSION

Rather than representing a “much less subjective” framework for decisionmaking in Second Amendment cases involving discrete arms regulations, Bumatay

Dissent at 121, the “text, history, and tradition” test obscures the myriad indeterminate choices that will arise in most such cases. The tiered scrutiny approach, in contrast, serves to guide and constrain a court’s analysis in Second Amendment disputes regarding discrete arms regulations, as it has done for numerous other constitutional provisions. I therefore have no doubt that the principal opinion in this case properly rejects the Bumatay Dissent’s invitation to abandon the tiered scrutiny approach for adjudicating Second Amendment controversies involving discrete regulations in favor of the “text, history, and tradition” approach. We are very wise not to do so, for all of the reasons I have explained.

HURWITZ, Circuit Judge, concurring:

I join Judge Graber's opinion for the Court unreservedly. I ordinarily would not say more, but I am reluctantly compelled to respond to the dissent of my brother Judge VanDyke, who contends that the "majority of our court distrusts gun owners and thinks the Second Amendment is a vestigial organ of their living constitution." That language is no more appropriate (and no more founded in fact) than would be a statement by the majority that today's dissenters are willing to rewrite the Constitution because of their personal infatuation with firearms. Our colleagues on both sides of the issue deserve better.

I recognize that colorful language captures the attention of pundits and partisans, and there is nothing wrong with using hyperbole to make a point. But my colleague has no basis for attacking the personal motives of his sisters and brothers on this Court. His contention that prior decisions of this Circuit—involving different laws and decided by different panels—somehow demonstrate the personal motives of today's majority fails to withstand even cursory analysis. By such reasoning, one also would have to conclude that my friends in today's minority who, like me, are deciding a Second Amendment case for the first time, are also driven by personal motives.

Judge VanDyke has no way of knowing the personal views of other members of the Court about firearms. Indeed, members of the Court not among today's dissenters have firearms in their homes. Members of this Court not among today's dissenters have volunteered for service in the active military or the National Guard (the modern "well regulated

Militia”) and bore arms during that service. But those personal experiences—or the lack of them—do not drive the decision on the important issue at hand. That issue is whether the people of the State of California are forbidden by the United States Constitution to enact measures like the contested statute to protect themselves from gun violence.

Reasonable judges can disagree as to whether the California statute crosses a constitutional line. I believe that Judge Graber has persuasively explained why it does not. But I do not question the personal motives of those on the other side of that issue. On the seriousness of the problem that California seeks to address, however, there should be no dispute. However infrequent mass shootings may be, hardly anyone is untouched by their devastation. The Ninth Circuit lost one of its own, Chief Judge Roll of the District of Arizona, to precisely such a shooting, notwithstanding Judge VanDyke’s assumption that federal judges are somehow immune from such dangers. Other members of the Court have lost family and friends to gun violence. I recount these matters of common knowledge not, as Judge VanDyke suggests, to import my personal experiences into the decision-making process in this case, but instead to emphasize that despite the alleged “infrequency” of mass shootings, they have effects far beyond the moment that are the proper subject of legislative consideration. And, to the extent that the frequency of such carnage is relevant, surely the people and their elected representatives are far better situated in the first instance than we to make that determination. The people of California should not be precluded from attempting to prevent mass murders simply because

they don't occur regularly enough in the eyes of an unelected Article III judge.

The crucial issue here is what level of scrutiny to apply to the California law. We can respectfully disagree whether the measures California has adopted violate the Second Amendment. But an attack on the personal motives of the members of this Court who reach the same result in this case as every other Circuit to address this issue neither advances our discourse nor gives intellectual support to the legal positions argued by my respected dissenting colleagues. I start from the assumption that Judge VanDyke, whose dissent displays an admirable knowledge of firearms and ammunition, dissents today not because of his personal experiences or policy preferences but instead because he sincerely believes that his oath of fidelity to the Constitution requires that we invalidate what our colleague Judge Lee described in the now-vacated majority opinion for the three-judge panel as a "well-intentioned" law designed by the sovereign state of California to "curb the scourge of gun violence." *Duncan v. Becerra*, 970 F.3d 1133, 1140-41 (9th Cir. 2020). I simply ask that today's majority, each of whom took the very same oath, be treated with the same level of respect.

BUMATAY, Circuit Judge, with whom IKUTA, and R. NELSON, Circuit Judges, join, dissenting:

When Justice Brandeis observed that states are the laboratories of democracy, he didn't mean that states can experiment with the People's rights. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). But that's what California does here. The state bans magazines that can carry over ten rounds—a firearm component with a long historical lineage commonly used by Americans for lawful purposes, like self-defense. Indeed, these magazines are lawfully owned by millions of people nationwide and come standard on the most popular firearms sold today. If California's law applied nationwide, it would require confiscating half of all existing firearms magazines in this country. California nevertheless prevents its citizens from owning these magazines. But the Constitution protects the right of law-abiding citizens to keep and bear arms typically possessed for lawful purposes. On en banc review, we should have struck down the law.

Contrary to the Second Amendment, however, our court upholds California's sweeping ban on so-called large-capacity magazines.<sup>1</sup> It can't be because these magazines lack constitutional protection. The majority assumes they are. And it can't be because the ban is longstanding. California's law is of recent vintage. Rather, the law survives because the majority

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<sup>1</sup> We use the term "large-capacity magazine" for consistency with the majority but note that magazines with the capacity to accept more than ten rounds of ammunition are standard issue for many firearms. Thus, we would be more correct to refer to California's ban on "standard-capacity magazines."

has decided that the costs of enforcing the Second Amendment's promise are too high. The majority achieves this result by resorting to the tiers-of-scrutiny approach adopted by this court years ago. Under that balancing test, the government can infringe on a fundamental right so long as the regulation is a "reasonable fit" with the government's objective.

In reality, this tiers-of-scrutiny approach functions as nothing more than a black box used by judges to uphold favored laws and strike down disfavored ones. But that is not our role. While we acknowledge that California asserts a public safety interest, we cannot bend the law to acquiesce to a policy that contravenes the clear decision made by the American people when they ratified the Second Amendment.

In *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the Supreme Court held that the Second Amendment confers "an individual right to keep and bear arms." This watershed case provided clear guidance to lower courts on the proper analytical framework for adjudicating the scope of the Second Amendment right. That approach requires an extensive analysis of the text, tradition, and history of the Second Amendment. Our court should have dispensed with our interest-balancing approach and hewed to what the Supreme Court told us to do. Under that approach, the outcome is clear. 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. With no longstanding prohibitions against them, large-capacity magazines are thus entitled to the Second Amendment's protection. It's the People's decision in ratifying the Constitution, not California's, that dictates the result here.

For these reasons, we respectfully dissent.

### **I. Factual Background**

In California, a "large-capacity magazine" is "any ammunition feeding device with the capacity to accept more than 10 rounds." Cal. Penal Code § 16740. Since 2000, California has prohibited the manufacture, importation, and sale of large-capacity magazines. *See* Act of July 19, 1999, ch. 129, 1999 Cal. Stat. §§ 3, 3.5. Thirteen years later, the California legislature prohibited the receipt and purchase of large-capacity magazines. *See* 2013 Cal. Stat. 5299, § 1. And three years after that, the California legislature made it unlawful to possess large-capacity magazines. *See* 2016 Cal. Stat. 1549, § 1; Cal. Penal Code § 32310(a), (c). Shortly after, California voters adopted Proposition 63, which strengthened California's magazine ban by making possession punishable by up to one year in prison. *See* Cal. Penal Code § 32310(c). There's no grandfather clause—the law applies no matter when or how the magazine was acquired. *See id.*

Today, California citizens who possess large-capacity magazines have four options: remove the magazine from the state; sell the magazine to a licensed firearms dealer; surrender the magazine to a law enforcement agency for destruction; or permanently alter the magazine so that it cannot



accept more than ten rounds. *Id.* §§ 16740(a), 32310(d).

The question before us is whether California’s magazine ban violates the Second Amendment. It does.

## **II. Legal Background**

The Second Amendment commands that the “right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. Amend. II. At the outset, it’s worth emphasis that the Second Amendment guarantees a pre-existing, fundamental, natural right. That’s because it is necessary to “protect and maintain inviolate the three great and primary rights of personal security, personal liberty, and private property.”<sup>1</sup> William Blackstone, *Commentaries on the Laws of England*, \*136, \*139. In other words, the right is among “that residuum of human rights, which is not intended to be given up to society, and which indeed is not necessary to be given for any good social purpose.”<sup>2</sup>

The Second Amendment’s fundamental nature follows from its close connection to the right of self-defense. As John Adams explained:

Resistance to sudden violence, for the preservation not only of my person, my limbs and life, but of my property, is an indisputable right of nature which I have never surrendered to the public by the

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<sup>2</sup> Letter from Richard Henry Lee to Governor Edmund Randolph (Oct. 16, 1787), [https://archive.csac.history.wisc.edu/Richard\\_Henry\\_Lee\\_to\\_Edmund\\_Randolph.pdf](https://archive.csac.history.wisc.edu/Richard_Henry_Lee_to_Edmund_Randolph.pdf).

compact of society, and which perhaps, I could not surrender if I would.<sup>3</sup>

Judge George Thatcher, a member of the First United States Congress, contrasted rights conferred by law with those that are natural; the right of “keeping and bearing arms” belonged in the latter category as it is “coeval with man.”<sup>4</sup>

The fundamental nature of the Second Amendment has been well recognized by the Supreme Court. At its core, the Court held, the Second Amendment protects the “right of law-abiding, responsible citizens to use arms in defense of hearth and home.” *Heller*, 554 U.S. at 635. The protection is an individual one and extends to all bearable arms that are typically possessed by law-abiding citizens for lawful purposes, like self-defense. *Id.* at 582, 595, 625. Moreover, the right is so “fundamental” and “deeply rooted in this Nation’s history and tradition,” that it is “fully applicable to the States.” *McDonald v. City of Chicago*, 561 U.S. 742, 750, 767 (2010) (simplified).

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<sup>3</sup> Boston Gazette, Sept. 5, 1763, *reprinted in* 3 The Works of John Adams 438 (Charles F. Adams ed., 1851), in Anthony J. Dennis, *Clearing the Smoke from the Right to Bear Arms and the Second Amendment*, 29 Akron L. Rev. 57, 73 (1995).

<sup>4</sup> Scribble-Scrabble, Cumberland Gazette, Jan. 26, 1787, *reprinted in* Firearms Law and the Second Amendment: Regulation, Rights, and Policy, Johnson et al. 300 (2d ed. 2017). Scribble-Scrabble was the pen name of George Thatcher. See Patrick J. Charles, *Scribble Scrabble, the Second Amendment, and Historical Guideposts: A Short Reply to Lawrence Rosenthal and Joyce Lee Malcolm*, 105 Nw. U. L. Rev. 1821, 1825 (2011).

### **III. California's Large-Capacity Magazine Ban Is Unconstitutional**

From this background, we turn to the Second Amendment's application to this case. From the start, the majority misses the mark, the most fundamental error being the use of an improper framework to analyze Second Amendment challenges. Once again, our court applies a two-step, tiers-of-scrutiny approach. But that approach is inconsistent with what the Second Amendment commands and what the Supreme Court requires. On en banc review, we should have scrapped this regime and adopted what the Supreme Court tells us is the proper analytical framework—one that looks to the text, history, and tradition of the Second Amendment.

Under that analytical framework, California's ban on large-capacity magazines cannot withstand a Second Amendment challenge. Large-capacity magazines are bearable arms that are commonly owned for lawful purposes, and not subject to longstanding regulatory measures. This is not a close question. It flows directly from *Heller*.

#### **A. *Heller's* Analytical Framework**

##### **1. The Supreme Court Rejected an Interest-Balancing Test**

Before turning to what *Heller* did, it's important to understand what it did not do. *Heller* did not give lower courts license to pursue their own conception of the Second Amendment guarantee. While *Heller* did not answer all questions for all times, as discussed below, it provided a framework for analyzing Second Amendment issues without resorting to the familiar tiers-of-scrutiny approach. Instead of recognizing this,

lower courts, including our own, routinely narrow *Heller* and fill the supposed vacuum with their own ahistorical and atextual balancing regime. This contradicts *Heller*'s express instructions.

The majority continues this error by reaffirming our court's two-step Second Amendment inquiry. Maj. Op. 23-24. Under that test, we ask two questions: (1) "if the challenged law affects conduct that is protected by the Second Amendment"; and if so, (2) we "choose and apply an appropriate level of scrutiny." *Id.* (simplified).

The step one inquiry often pays lip service to *Heller*: it asks whether the law "burdens conduct protected by the Second Amendment," *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013), "based on a historical understanding of the scope of the [Second Amendment] right," *Jackson v. City & Cnty. Of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (simplified). To determine whether the challenged law falls outside the scope of the Amendment, we look to whether "persuasive historical evidence show[s] that the regulation [at issue] does not impinge on the Second Amendment right as it was historically understood." *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016). Thus, the first step asks if the conduct is protected by the Second Amendment as a historical matter.<sup>5</sup>

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<sup>5</sup> The majority does not bother to do the hard work of examining the historical record and merely assumes that the magazine ban infringes on the Second Amendment. Such an analytical step blinds the majority to the long historical tradition of weapons capable of firing more than ten rounds in this country and the exceptional nature of California's ban here. *Cf. Mai v. United*

It is at step two where our court goes astray. Instead of ending the inquiry based on history and tradition, our court layers on a tier of scrutiny—an exercise fraught with subjective decision-making. In picking the appropriate tier, we operate a “sliding scale” depending on the severity of the infringement. *Id.* Practically speaking, that means putting a thumb on that scale for “intermediate scrutiny.” In over a dozen post-*Heller* Second Amendment cases, we have never adopted strict scrutiny for any regulation.<sup>6</sup> That’s because our court interprets the sliding scale to require intermediate scrutiny so long as there are “alternative channels for self-defense.” *Jackson*, 746 F.3d at 961.<sup>7</sup>

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*States*, 974 F.3d 1082, 1091 (Bumatay, J., dissenting from the denial of reh’g en banc) (“By punting the analysis of the historical scope of the Second Amendment ..., we let false assumptions cloud our judgment and distort our precedent even further from the original understanding of the Constitution.”).

<sup>6</sup> See *Young v. Hawaii*, 992 F.3d 765, 773 (9th Cir. 2021) (en banc); *United States v. Singh*, 979 F.3d 697, 725 (9th Cir. 2020); *Mai v. United States*, 952 F.3d 1106, 1115 (9th Cir. 2020); *United States v. Torres*, 911 F.3d 1253, 1263 (9th Cir. 2019); *Pena v. Lindley*, 898 F.3d 969, 979 (9th Cir. 2018); *Teixeira v. County of Alameda*, 873 F.3d 670, 678 (9th Cir. 2017) (en banc); *Mahoney v. Sessions*, 871 F.3d 873, 881 (9th Cir. 2017); *Bauer v. Becerra*, 858 F.3d 1216, 1221 (9th Cir. 2017); *Fisher v. Kealoha*, 855 F.3d 1067, 1070-71 (9th Cir. 2017); *Fortson v. L.A. City Attorney’s Office*, 852 F.3d 1190, 1194 (9th Cir. 2017); *Silvester*, 843 F.3d at 827; *Wilson v. Lynch*, 835 F.3d 1083, 1093 (9th Cir. 2016); *Peruta v. Cnty. of San Diego*, 824 F.3d 919, 942 (9th Cir. 2016) (en banc); *Fyock v. City of Sunnyvale*, 779 F.3d 991, 999 (9th Cir. 2015); *Jackson*, 746 F.3d at 965; *Chovan*, 735 F.3d at 1138.

<sup>7</sup> Once again, our court fails to pay attention to *Heller* with this type of analysis. *Heller* expressly says, “[i]t is no answer to say ... that it is permissible to ban the possession of handguns so

What’s more, we often employ a toothless “intermediate scrutiny,” upholding the regulation if it “reasonabl[y] fit[s]” the state’s asserted public-safety objective.<sup>8</sup> Maj. Op. 15. In other words, so long as a

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long as the possession of other firearms (i.e., long guns) is allowed.” 554 U.S. at 629; *see also Caetano v. Massachusetts*, 577 U.S. 411, 421 (2016) (Alito, J., concurring) (“But the right to bear other weapons is ‘no answer’ to a ban on the possession of protected arms.”). Likewise, it is no answer to say—as Judge Graber’s concurrence explicitly does—that citizens may defend their homes during an attack with multiple firearms or magazines or by reloading their firearms instead of using a large-capacity magazine. Graber Concurrence 54-55. While the concurrence calls the burden of carrying multiple firearms or magazines and the delay of reloading magazines mere “inconvenience[s],” *id.*, the record shows that such alternatives impair the ability of citizens to defend themselves. Stated simply, the unpredictable and sudden nature of violent attacks may preclude the effective use of multiple firearms and magazines and the ability to reload weapons. Limiting self-defense to these alternate means would disadvantage law-abiding citizens, who may not have proper training to reload firearms or gather multiple armaments under the trauma and stress of a violent attack.

<sup>8</sup> The “reasonable fit” modification to intermediate scrutiny dispenses with the requirement of narrow tailoring. *See, e.g., Vivid Entertainment, LLC v. Fielding*, 774 F.3d 566, 580 (9th Cir. 2014) (holding that a statute must be “narrowly tailored” to survive intermediate scrutiny). We appropriated the “reasonable fit” standard from “a specific, and very different context” under the First Amendment: “*facially neutral* regulations that *incidentally* burden freedom of speech in a way that is *no greater than is essential*.” *Mai*, 974 F.3d at 1101 (VanDyke, J., dissenting from the denial of reh’g en banc). But tailoring ensures that the government’s asserted interest is its “genuine motivation”—that “[t]here is only one goal the classification is likely to fit ... and that is the goal the legislators actually had in mind.” Brief for J. Joel Alicea as Amicus Curiae Supporting Petitioners at 20, *N.Y.*

firearms regulation aims to achieve a conceivably wise policy measure, the Second Amendment won't stand in the way. In effect, this means we simply give a blank check to lawmakers to infringe on the Second Amendment right. Indeed, post-*Heller*, we have never struck down a single firearms regulation.<sup>9</sup>

All this interest balancing is in blatant disregard of the Court's instructions. Nowhere in *Heller* or *McDonald* did the Supreme Court pick a tier of scrutiny for Second Amendment challenges. Nor did the Court compare the relative costs of firearms regulations to their potential public-safety benefits, adopt a sliding scale, look at alternative channels of self-defense, or see if there was a reasonable fit between the regulation and the state's objective. The absence of these balancing tools was not accidental. The Court made clear that such judicial balancing is simply incompatible with the guarantees of a fundamental right. Time and time again, the Supreme Court expressly rejected the means-end balancing approach inherent in the two-step test applied by our court. We should have followed their directions.

First was *Heller*. In that case, the Court soundly rejected any sort of interest-balancing in assessing a handgun ban. In dissent, Justice Breyer criticized the majority for declining to establish a level of scrutiny to evaluate Second Amendment restrictions. He then

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*State Rifle & Pistol Ass'n v. Bruen*, (July 20, 2021) (No. 20-843) (quoting John Hart Ely, *Democracy and Distrust* 146 (1980)). Dispensing with narrow tailoring thus abdicates our responsibility to test the government's true interest in a regulation.

<sup>9</sup> See footnote 6.

proposed adopting an “interest-balancing inquiry” for Second Amendment questions, weighing the “salutary effects” of a regulation against its “burdens.” *Heller*, 554 U.S. at 689-90 (Breyer, J., dissenting). In response, the Court bristled at the suggestion that a constitutional right could hinge on the cost-benefit analysis of unelected judges:

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.

*Heller*, 554 U.S. at 634 (majority opinion). Rather than entertaining what tier of scrutiny should apply to the Second Amendment, the Court noted that the Amendment itself was “the very *product* of an interest balancing by the people,” and that courts are simply not permitted to “conduct [that balancing] anew.” *Id.* at 635 (emphasis in original). In sum, *Heller* struck down the handgun ban at issue because those firearms are commonly used by law-abiding citizens for lawful purposes, not because the ban failed intermediate scrutiny.<sup>10</sup>

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<sup>10</sup> The majority asserts that *Heller* rejected Justice Breyer’s “interest balancing inquiry”—not because of the Court’s disapproval of tiers of scrutiny—but because Justice Breyer did



Two years later came *McDonald*. There, the Court was again emphatic that the Second Amendment right was not subject to “interest balancing.” 561 U.S. at 785. *McDonald* reiterated the Court’s “express[] reject[ion]” of “the argument that the scope of the Second Amendment right should be determined by judicial interest balancing.” *Id.* (citing *Heller*, 554 U.S. at 633-35). The Court explicitly rejected some state courts’ approach to permit balancing tests for firearm rights. *Id.* The Court reasoned that the Fourteenth Amendment did not apply “only a watered-down, subjective version of the individual guarantees of the Bill of Rights” against the States. *Id.* (simplified).

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not use the precise words “intermediate scrutiny.” Maj. Op. 25-26. We do not think the Court would be so focused on form over substance to reject Justice Breyer’s argument because of nomenclature. Indeed, the type of inquiry the majority engages in—such as weighing the ban’s effect on mass shooters, *id.* at 46—is exactly the kind of balancing between “government public-safety concerns” and Second Amendment interests that Justice Breyer called for, *see Heller*, 554 U.S. at 689 (Breyer, J., dissenting).

The majority also relies on *Heller*’s passing reference to D.C.’s handgun ban failing “under any standard of scrutiny” as license to engage in the judicial-interest balancing adopted by this court. Maj. Op. 25. But that misreads the statement. As then-Judge Kavanaugh noted, “that [reference] was more of a gilding-the-lily observation about the extreme nature of D.C.’s law—and appears to have been a pointed comment that the dissenters should have found D.C.’s law unconstitutional even under their own suggested balancing approach—than a statement that courts may or should apply strict or intermediate scrutiny in Second Amendment cases.” *Heller v. District of Columbia* (“*Heller II*”), 670 F.3d 1244, 1277-78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

Once again responding to Justice Breyer, *McDonald* disclaimed the notion that the Amendment is to be assessed by calculating its benefits and costs. Justice Breyer, in dissent, noted that incorporating the Second Amendment against the States would require judges to face “complex empirically based questions,” such as a gun regulation’s impact on murder rates, which are better left to legislatures. *Id.* at 922-26 (Breyer, J., dissenting). The Court answered that Justice Breyer was “incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise.” *Id.* at 790-91. On the contrary, rejecting any “interest-balancing test” for the Second Amendment right obviates the courts from making those “difficult empirical judgments.” *Id.* (citing *Heller*, 554 U.S. at 634).

Most recently, *Caetano* demonstrated the Court’s application of *Heller* and, unsurprisingly, that case did not involve interest balancing. *See* 577 U.S. 411. *Caetano* viewed *Heller* as announcing rules for determining the constitutionality of firearms regulations and applied these rules to a state ban on stun guns. *See* 577 U.S. at 411. There, the Court drew three takeaways from *Heller*: (1) the Second Amendment protects arms “not in existence at the time of the founding”; (2) a weapon not “in common use at the time of the Second Amendment’s enactment” does not render it “unusual”; and (3) the Second Amendment protects more than “only those weapons useful in warfare.” *Id.* at 411-12 (simplified). The Court held the state court’s reasoning contradicted *Heller*’s “clear statement[s]” and vacated its decision.

*Id.* at 412. Notably, *Caetano* did not adopt a tier of scrutiny or otherwise engage in interest balancing. It certainly did not ask whether the stun gun ban was a “reasonable fit” with the state’s public safety objective.

That the Court has uniformly rejected “interest balancing” when it comes to the Second Amendment is nothing new. Then-Judge Kavanaugh understood as much shortly after *Heller* and *McDonald* were decided. As he explained, the Supreme Court “set forth fairly precise guidance to govern” Second Amendment challenges. *Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting). “*Heller* and *McDonald*,” he said, “leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.” *Id.* More recently, Justice Kavanaugh has articulated his “concern that some federal and state courts may not be properly applying *Heller* and *McDonald*.” *N.Y. State Rifle & Pistol Ass’n v. City of New York*, 140 S. Ct. 1525, 1527 (2020) (Kavanaugh, J., concurring).

Other justices have similarly questioned the continued use of tiers of scrutiny by lower courts. Justice Thomas, for instance, observed that many courts of appeals “have resisted [the Court’s] decisions in *Heller* and *McDonald*” and sought to “minimize [*Heller*’s] framework.” *Rogers v. Grewal*, 140 S. Ct. 1865, 1866 (2020) (Thomas, J., dissenting from the denial of certiorari) (simplified). He emphasized that *Heller* “explicitly rejected the invitation to evaluate Second Amendment challenges under an ‘interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental

public-safety concerns on the other.” *Id.* at 1867 (simplified).

*Rogers* wasn’t the first time that Justice Thomas sounded the alarm on this issue. In *Friedman v. City of Highland Park*, Justice Thomas reiterated that the Court “stressed that 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.” 136 S. Ct. 447, 448 (2015) (Thomas, J., dissenting from denial of certiorari) (simplified); see also *Silvester v. Becerra*, 138 S. Ct. 945, 948 (2018) (Thomas, J., dissenting from the denial of certiorari) (explaining that *Heller* rejected “weigh[ing] a law’s burdens on Second Amendment rights against the governmental interests it promotes”); *Jackson v. City & Cnty. of San Francisco*, 135 S. Ct. 2799, 2802 (2015) (Thomas, J., dissenting from the denial of certiorari). Moreover, Justice Thomas has criticized tiers-of-scrutiny jurisprudence in general as an atextual and ahistorical reading of the Constitution. See *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2327-28 (2016) (Thomas, J., dissenting) (characterizing the use of “made-up tests” to “displace longstanding national traditions as the primary determinant of what the Constitution means” as illegitimate (simplified).)<sup>11</sup>

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<sup>11</sup> For most of this country’s history, judges viewed their role not as “weighing or accommodating competing public and private interests,” but instead employing “boundary-defining techniques” which made their job a more “objective, quasi-scientific one.” Richard Fallon, *Strict Judicial Scrutiny*, 54 *UCLA L. Rev.* 1267, 1274, 1285-86 (2007) (simplified). As Judge Berzon’s concurrence demonstrates, the tiers-of-scrutiny

Justices Alito and Gorsuch have also taken issue with how lower courts are applying *Heller*. After determining that the lower court improperly upheld a New York City handgun ordinance under “heightened scrutiny,” Justice Alito, joined by Justice Gorsuch, commented, “[w]e are told that the mode of review in this case is representative of the way *Heller* has been treated in the lower courts. If that is true, there is cause for concern.” *N.Y. State Rifle & Pistol Ass’n*, 140 S. Ct. at 1544 (Alito, J., dissenting).

A chorus of circuit judges from across the country has also rejected the tiers-of-scrutiny approach adopted by this and other courts. *See, e.g., Mai*, 974 F.3d at 1083 (Collins, J., dissenting from the denial of reh’g en banc); *id.* at 1097 (VanDyke, J., dissenting from the denial of reh’g en banc); *Ass’n of N.J. Rifle & Pistol Clubs v. Att’y Gen. N.J.*, 910 F.3d 106, 127 (3d Cir. 2018) (Bibas, J. dissenting); *Mance v. Sessions*, 896 F.3d 390, 394 (5th Cir. 2018) (Elrod, J., joined by Jones, Smith, Willett, Ho, Duncan, and Engelhardt, JJ., dissenting from the denial of reh’g en banc); *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t*, 837 F.3d 678, 702 (6th Cir. 2016) (Batchelder, J., concurring); *id.* at 710 (Sutton, J., concurring).

We join this chorus. We cannot “square the type of means-ends weighing of a government regulation inherent in the tiers-of-scrutiny analysis with *Heller*’s directive that a core constitutional protection should

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approach is of recent vintage. Berzon Concurrence 90-91. Judge Berzon, thus, confirms Professor Fallon’s view that strict scrutiny (and its rational-basis and intermediate-scrutiny cousins) have no “foundation in the Constitution’s original understanding.” Fallon, *supra*, at 1268.

not be subjected to a freestanding interest-balancing approach.” *Mai*, 974 F.3d at 1086-87 (Bumatay, J., dissenting from the denial of reh’g en banc) (simplified)). That judges are not empowered to recalibrate the rights owed to the people has been stated again and again:

Our duty as unelected and unaccountable judges is to defer to the view of the people who ratified the Second Amendment, which is itself the “very *product* of an interest balancing by the people.” *Heller*, 554 U.S. at 635. By ignoring the balance already struck by the people, and instead subjecting enumerated rights, like the Second Amendment, to our own judicial balancing, “we do violence to the [constitutional] design.” *Crawford v. Washington*, 541 U.S. 36, 67-68 (2004).

*Id.* at 1087. After all, “[t]he People, through ratification, have already weighed the policy tradeoffs that constitutional rights entail.” *Luis v. United States*, 136 S. Ct. 1083, 1101 (2016) (Thomas, J., concurring).

Despite these warnings, our court charges ahead in applying the two-step-to-intermediate-scrutiny approach. Application of “intermediate scrutiny” to the large-capacity magazine ban, however, engages in exactly the sort of “costs and benefits” analysis the Court said we should not be doing. *McDonald*, 561 U.S. at 790-91. This approach, moreover, is nothing more than a judicial sleight-of-hand, allowing courts to feign respect to the right to keep and bear arms while “rarely ever actually using it to strike down a

law.”<sup>12</sup> Intermediate scrutiny, we fear, is just window dressing for judicial policymaking. Favored policies may be easily supported by cherry-picked data under the tier’s black box regime. But whether we personally agree with California’s firearms regulations, that is no excuse to disregard the Court’s instructions and develop a balancing test for a fundamental right. Our job is not to give effect to our own will, but instead to “the will of the law”—in this case, the Constitution. *Osborn v. Bank of U.S.*, 22 U.S. 738, 866 (1824) (Marshall, C.J.).

Of course, this would not be the first time that our court struggled mightily to understand the Supreme Court’s directions. *See, e.g., Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (per curiam) (“This is the fifth time the Court has summarily rejected the Ninth Circuit’s analysis of California’s COVID restrictions

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<sup>12</sup> Allen Rostron, *Justice Breyer’s Triumph in the Third Battle over the Second Amendment*, 80 Geo. Wash. L. Rev. 703, 757 (2012) (explaining that lower courts consistently apply intermediate scrutiny in line with Justice Breyer’s dissent despite *Heller*’s rejection of that approach). Even if we were to ignore *Heller* and continue to follow our own misguided precedent, the majority still gets it wrong. As Judge Lee ably pointed out, strict scrutiny should apply because § 32310’s categorical ban substantially burdens “the core right of law-abiding citizens to defend hearth and home.” *Duncan v. Becerra*, 970 F.3d 1133, 1152 (9th Cir. 2020), reh’g en banc granted, opinion vacated, 988 F.3d 1209 (9th Cir. 2021). As the Supreme Court noted, laws that impinge on a “fundamental right explicitly ... protected by the constitution” require “strict judicial scrutiny.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (“[C]lassifications affecting fundamental rights are given the most exacting scrutiny.” (simplified)).

on religious exercise.”). We have done so again here, and it is a shame.

## **2. The Supreme Court Looks to Text, History, and Tradition**

Contrary to the majority’s reiteration of a tiers-of-scrutiny, sliding scale approach, *Heller* commands that we interpret the scope of the Second Amendment right in light of its text, history, and tradition. That’s because 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.” *Heller*, 554 U.S. at 634-35.

*Heller* announced a straightforward analytical framework that we are not free to ignore: the Second Amendment encompasses the “right of law-abiding, responsible citizens to use arms in defense of hearth and home.” *Id.* at 635. As a “prima facie” matter, that right extends to “all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” *Id.* at 582. Any regulation that infringes on the exercise of this right implicates conduct protected by the Second Amendment.

But because the Second Amendment right is “not unlimited,” *id.* at 595, regulations that are “historical[ly] justifi[ed]” do not violate the right, *id.* at 635. Primarily, the “Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes,” such as M-16s and short-barreled shotguns. *Id.* at 625. In making this inquiry, we look to the “historical tradition,” which has excluded “dangerous and unusual” weapons from the Amendment’s protection. *Id.* at 627. In the



same way, the Amendment *does* protect weapons in “common us[age].” *Id.* Finally, the Second Amendment does not disturb “longstanding prohibitions” on the sale, possession, or use of guns with sufficient historical antecedents. *Id.* at 626-27.

Rather than rely on our own sense of what is the right balance of freedom and government restraint, then, the Court instructs lower courts to follow the meaning of the People’s law as understood at the time it was enacted. Such an approach is more determinate and “much less subjective” because “it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor.” *McDonald*, 561 U.S. at 804 (Scalia, J., concurring).

Far from obscuring the decision-making process, as Judge Berzon’s concurrence contends, applying the text, history, and tradition approach forces judges to put their cards on the table. It sets out the ground rules under which constitutional decision-making is made. It ensures that only proper sources, datapoints, and considerations are used to determine the scope of the Second Amendment right. Adopting this approach necessarily constrains judges to the text and the historical record rather than to their own policy preferences. To be sure, no mode of judicial decision-making is perfect or can eliminate discretionary calls, but relying on a historical methodology provides discernible rules that “hedge[]” discretion and expose the “misuse of these rules by a crafty or willful judge”

as “an abuse of power.”<sup>13</sup> Even if the method requires complicated historical research or interpretative choices, the text, history, and tradition approach offers a common ground to criticize a judge who glosses over the text or misreads history or tradition.<sup>14</sup> Otherwise, we are left with the majority’s approach which all too often allows judges to simply pick the policies they like with no clear guardrails.

Moreover, contrary to Judge Berzon’s portrayal, the fact that “[w]ords do not have inherent meaning” is a feature—not a bug—of *Heller*’s text-based approach. See Berzon Concurrence 61. We agree that the meaning of words may evolve over time. But enumerated rights do not. The People ratified the Second Amendment in 1791 to protect an enduring right—not one subject to the whims of future judges or the evolution of the words used to articulate the right.<sup>15</sup> This view is radical. Chief Justice Marshall

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<sup>13</sup> Frank H. Easterbrook, Foreword to Antonin Scalia and Bryan A. Garner, *Reading Law* at xxiii (2012).

<sup>14</sup> See generally William Baude, *Originalism as a Constraint on Judges*, 84 U. Chi. L. Rev. 2213 (2018).

<sup>15</sup> See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 862 (1989) (“The purpose of constitutional guarantees ... is precisely to prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable.”); see also William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693, 697 (1976) (“Once we have abandoned the idea that the authority of the courts to declare laws unconstitutional is somehow tied to the language of the Constitution that the people adopted, a judiciary exercising the power of judicial review appears in a quite different light. Judges then are no longer the keepers of the covenant; instead they are a small group of fortunately situated people with a roving commission to second-

expressed a similar sentiment in 1827: The Constitution's words, he said, "are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them." *Ogden v. Saunders*, 25 U.S. 213, 332 (1827) (Marshall, C.J., dissenting).

Without hewing to the meaning of the right as understood at the time of enactment, we alter the rights chosen by the People and risk injecting our own policy judgments into the right's meaning. As for Judge Berzon's concern that the meaning of constitutional text may be "lost to the passage of time," Berzon Concurrence 61, we have been interpreting language going back millennia. As Justice Gorsuch observed, "[j]ust ask any English professor who teaches Shakespeare or Beowulf." Neil M. Gorsuch, *A Republic, If You Can Keep It* 112 (2020). Simply put, original meaning gives enduring meaning to the Constitution and preserves our rights as they were enshrined at the time of adoption.

The criticisms of history and tradition playing a role in constitutional interpretation fall equally flat. See Berzon Concurrence 62-75. As *Heller* shows, by looking to tradition and history, we see how constitutional text came to be and how the People closest to its ratification understood and practiced the right.<sup>16</sup> And by examining a firearm's history of

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guess Congress [and] state legislatures ... concerning what is best for the country.").

<sup>16</sup> See Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 Notre Dame L. Rev. 1,

common usage, we come to see the fundamental nature of the right and illuminate how a modern governmental regulation may infringe on a longstanding protection. Tradition and history may also allow us to take interpretive options off the table: they might say that two possible “answers” to a legal question are permissible, which “is worth something” because courts should not “impose a third possibility.”<sup>17</sup> So, tradition and history inform the meaning of constitutional rights in ways that no tier-of-scrutiny can.

For sure, this approach can be difficult. Some of Judge Berzon’s process critiques are not all wrong. *See* Berzon Concurrence 57-58 (noting that the “volume of available historical evidence ... will vary enormously and may often be either vast or quite sparse”). Looking to text, history, and tradition to uncover meaning takes time and careful analysis.<sup>18</sup> And interpreting the meaning of documents and events from long-ago is much harder than simply consulting our own policy views. But it is the high price our Constitution

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28 (2015) (“[T]he original public meaning was, in part, determined by the public context of constitutional communication. Thus, the public at large would have been aware of (or had access to) the basic history of the Constitution.”).

<sup>17</sup> Ilan Wurman, *Law Historians’ Fallacies*, 91 N.D. L. Rev. 161, 171 (2015).

<sup>18</sup> *See, e.g.*, Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 Const. Comment. 47, 74-75 (2006); William Baude & Jud Campbell, *Early American Constitutional History: A Source Guide* (2021), <https://ssrn.com/abstract=2718777> (describing the wide variety of available originalist sources such as ratification debates, dictionaries, treatises, and linguistic corpora).

demands from judges who swear an oath to apply it faithfully. Indeed, the same criticisms leveled by Judge Berzon apply with greater force to the tiers-of-scrutiny approach because there is no historical backdrop to cabin a judge's discretion. While judges may not be historians, neither are we economists, statisticians, criminologists, psychologists, doctors, or actuarialists.<sup>19</sup> But that is exactly the type of expertise judges use to render judgment under the majority's approach. *See, e.g., Mai*, 952 F.3d at 1118-20 (using Swedish statistical studies to justify the deprivation of the Second Amendment right of a formerly mentally ill citizen). While the text, history and tradition methodology may have shortcomings, it is better than the majority's approach.<sup>20</sup> Their judicial black box leaves critics grasping to understand the court's method for balancing policy interests. At the very least, text, history, and tradition has nothing to hide.

### **B. Under *Heller*, Large-Capacity Magazine Bans Are Unconstitutional**

With a firm understanding of the approach directed by *Heller*, we turn to California's large-capacity ban.

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<sup>19</sup> *See* William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 *Law and Hist. Rev.* 809, 816 (2019) (“[L]egal uncertainty is hardly restricted to matters of history. Judges and juries frequently face questions that might stump expert economists or toxicologists.”).

<sup>20</sup> *See* Scalia, *supra*, at 862-63.

**1. Large-capacity magazines are  
“arms” under the Second  
Amendment.**

To begin, when assessing a ban on a category of weapons, we look to whether the regulation infringes on the use of instruments that constitute “bearable arms” under the Second Amendment. *Heller*, 554 U.S. at 582. The Court tells us that the term “bearable arms” includes any “[w]eapons of offence” or “thing that a man wears for his defence, or takes into his hands,” that is “carr[ied] ... for the purpose of offensive or defensive action.” *Id.* at 581, 584 (simplified). It doesn’t matter if the “arm” was “not in existence at the time of the founding.” *See id.* at 582.

At issue here are magazines capable of carrying more than ten rounds. A “magazine” is a firearm compartment that stores ammunition and feeds it into the firearm’s chamber.<sup>21</sup> The magazines are integral to the operation of firearms. As a result, many popular firearms would be practically inoperable without magazines.

That the law bans magazines rather than the guns themselves does not alter the Second Amendment inquiry. Constitutional rights “implicitly protect those closely related acts necessary to their exercise.” *Luis*, 136 S. Ct. at 1097 (Thomas, J., concurring). “No axiom is more clearly established in law, or in reason, than that wherever the end is

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<sup>21</sup> *See Magazine*, Oxford English Dictionary Online, <https://www.oed.com/view/Entry/112144>; *Magazine*, Merriam-Webster Online, <https://www.merriam-webster.com/dictionary/magazine>.

required, the means are authorized[.]” The Federalist No. 44, at 282 (James Madison) (Charles R. Kesler ed., 2003). Without protection of the components that render a firearm operable, the Second Amendment would be meaningless. See *Luis*, 136 S. Ct. at 1098 (Thomas, J., concurring); see also *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015) (recognizing the “right to possess the magazines necessary to render ... firearms operable”).

Because California’s law prohibits the possession of large-capacity magazines, it is within the scope of the Second Amendment’s protection.<sup>22</sup>

**2. Large-capacity magazines are typically possessed by law-abiding citizens for lawful purposes.**

The next step in the Court’s analysis requires that we determine whether large-capacity magazines are “typically possessed by law-abiding citizens for lawful purposes.” *Heller*, 554 U.S. at 625. As we stated, this inquiry examines the historical record to determine

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<sup>22</sup> California asserts that the Second Amendment doesn’t extend to weapons “most useful in military service.” *Heller* did not establish such an exception. In fact, *Heller* said the opposite: the Amendment’s prefatory clause reference to the “conception of the militia” means that the right protects “the sorts of lawful weapons that [citizens] possessed at home [to bring] to militia duty.” 554 U.S. at 627. Justice Alito squarely dispensed with California’s argument in *Caetano*, stating that the Court has “recognized that militia members traditionally reported for duty carrying the sorts of lawful weapons that they possessed at home, and that the Second Amendment therefore protects such weapons as a class, regardless of any particular weapon’s suitability for military use.” 577 U.S. at 419 (Alito, J., concurring) (simplified).

whether the weapons are “dangerous and unusual,” on the one hand, or whether they are in “common use,” on the other. *Id.* at 627 (simplified).<sup>23</sup>

First, a word about “common usage.” We start with the well-established premise that the Constitution protects enduring principles: “The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.” *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 404 (1937). Thus, absent amendment, “the relevant [constitutional] principles must be faithfully applied not only to circumstances as they existed in 1787, 1791, and 1868, for example, but also to modern situations that were

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<sup>23</sup> We believe this inquiry is one and the same. *Heller* mentions both in the same breath. Referring to the Court’s prior precedent that “the sorts of weapons protected were those ‘in common use at the time,’” the Court noted that “that limitation is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’” 554 U.S. at 627 (citing *United States v. Miller*, 307 U.S. 174, 179-80 (1939)). As then-Judge Kavanaugh recognized, *Heller* “said that ‘dangerous and unusual weapons’ are equivalent to those weapons not ‘in common use.’” *Heller II*, 670 F.3d at 1272 (Kavanaugh, J., dissenting) (simplified); see also *United States v. Fincher*, 538 F.3d 868, 874 (8th Cir. 2008) (“Machine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use.”); *Wilson v. Cnty. of Cook*, 968 N.E.2d 641, 655 (Ill. 2012) (“*Heller* explicitly recognized a historical and long-standing tradition of firearms regulations prohibiting a category of ‘dangerous and unusual weapons’ that are ‘not typically possessed by law-abiding citizens for lawful purposes.’”).



unknown to the Constitution's Framers." *Heller II*, 670 F.3d at 1275 (Kavanaugh, J., dissenting).

Here, we look to the Second Amendment's text for its enduring meaning. Its prefatory clause reads: "A well regulated Militia, being necessary to the security of a free State[.]" U.S. Const. amend. II. The Court has told us that this prefatory clause "fits perfectly" with the Amendment's operative clause's individual right to keep and bear arms: "the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents." *Heller*, 554 U.S. at 598. Thus, the prefatory clause "announces the purpose for which the right was codified: to prevent elimination of the militia." *Id.* at 599.

Understanding this background informs the type of weapons protected by the Second Amendment. As the Court wrote:

In all the colonies, as in England, the militia system was based on the principle of the assize of arms. This implied the general obligation of all adult male inhabitants to possess arms, and, with certain exceptions, to cooperate in the work of defence. The possession of arms also implied the possession of ammunition, and the authorities paid quite as much attention to the latter as to the former.

*Miller*, 307 U.S. at 179-80 (simplified). The militia system then created a central duty: "ordinarily when called for [militia] service [able-bodied] men were

expected to appear bearing arms supplied by themselves and of the kind in common use at the time.” *Id.* at 179. Thus, the lifeblood of militia service was citizens armed with weapons typically possessed at home for lawful purposes. As a result, the Second Amendment protects such weapons *as a class*. See *Heller*, 554 U.S. at 627.

So, the Second Amendment protects the type of bearable weapons commonly used by citizens and at the ready for militia service—whether it be in 1791 or today.<sup>24</sup> What remains is an inquiry that is simultaneously historical and contemporary. The historical inquiry is relevant because we “reason by analogy from history and tradition” when interpreting the Constitution. *Ass’n of N.J. Rifle & Pistol Clubs v. Att’y Gen. N.J.*, 974 F.3d 237, 257 (3d Cir. 2020) (Matey, J., dissenting) (simplified). The Second Amendment right thus extends to “modern-day equivalents” of arms protected at the Founding. See *Parker v. District of Columbia*, 478 F.3d 370, 398 (D.C. Cir. 2007) (“[J]ust as the First Amendment free speech clause covers modern communication devices unknown to the founding generation, e.g., radio and television, and the Fourth Amendment protects telephonic conversation from a ‘search,’ the Second Amendment protects the possession of the modern-day equivalents of the colonial pistol.”), *aff’d sub nom.*,

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<sup>24</sup> It is no matter that citizens don’t typically serve in militias today, or that the weapons protected by the Second Amendment would be comparatively ineffective in modern warfare. As *Heller* explained, “the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.” *Heller*, 554 U.S. at 627-28.

*Heller*, 554 U.S. 570. For this reason, even new or relatively unpopular firearms today might enjoy the Second Amendment’s protection if they are “modern-day equivalents” of firearms that have been commonly owned for lawful purposes. Of course, the protection extends equally to weapons not in common use as a historical matter, so long as they are “commonly possessed by law-abiding citizens for lawful purposes today.” *Caetano*, 577 U.S. at 420 (Alito, J., concurring).

Some courts have reviewed that common usage requirement as being “an objective and largely statistical inquiry.” *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 256 (2d Cir. 2015). For example, Justice Alito noted the quantity of stun guns (200,000) in circulation as proof that they’re commonly owned for lawful purposes. *Caetano*, 577 U.S. at 420 (Alito, J., concurring). But a narrow focus on numbers may not capture all of what it means to be a weapon “typically possessed by law-abiding citizens for lawful purposes.” *Heller*, 554 U.S. at 625. As Judge Lee noted, “pure statistical inquiry may hide as much as it reveals.” *Duncan*, 970 F.3d at 1147. A straight quantitative inquiry could create line-drawing problems and lead to bizarre results—such as the exclusion of a protectable arm because it is not widely possessed “by virtue of an unchallenged, unconstitutional regulation.” *Id.*; see also *Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015) (“Yet it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn’t commonly used. A law’s existence can’t be the source of its own constitutional validity.”). Indeed, notably absent from *Heller* is any analysis of the number of handguns in

circulation or the proportion of owned firearms that were handguns. *Heller* instead focused on the purpose for which the firearms are owned and used. *See* 554 U.S. at 629 (“It is enough to note, as we have observed, that the American people have considered the handgun to be the quintessential self-defense weapon.”). Thus, in addition to statistical analysis, some courts also look to “broad patterns of use and the subjective motives of gun owners.” *N.Y. State Rifle & Pistol Ass’n*, 804 F.3d at 256. We need not resolve all these questions today, since large-capacity magazines, as we show below, are “in common use” today under either rubric.

**a. Large-capacity magazines enjoy a long historical pedigree.**

Looking at the historical record, large-capacity magazines are clear modern-day equivalents of arms in common use by the incorporation of the Second Amendment and are, thus, entitled to constitutional protection. As Judge Lee concluded: “Firearms or magazines holding more than ten rounds have been in existence—and owned by American citizens—for centuries. Firearms with greater than ten round capacities existed even before our nation’s founding, and the common use of [large-capacity magazines] for self-defense is apparent in our shared national history.” *Duncan*, 970 F.3d at 1147; *see also* David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 851 (2015) (“[I]n terms of large-scale commercial success, rifle magazines of more than ten rounds had become popular by the time the Fourteenth Amendment was being ratified.”).

Rather than re-tell the long history of large-capacity magazines in this country, we offer some highlights:

- The first known firearm capable of firing more than ten rounds without reloading was a 16-shooter invented in 1580.
- The earliest record of a repeating firearm in America noted that it fired more than ten rounds: In 1722, Samuel Niles wrote of Indians being entertained by a firearm that “though loaded but once, ... was discharged eleven times following, with bullets, in the space of two minutes.” Harold L. Peterson, *Arms and Armor in Colonial America 1526-1783*, 215 (2000).
- At the Founding, the state-of the-art firearm was the Girandoni air rifle with a 22-shot magazine capacity.
- In 1777, Joseph Belton demonstrated a 16-shot repeating rifle before the Continental Congress, seeking approval for its manufacture. Robert Held, *The Belton Systems, 1758 & 1784-86: America’s First Repeating Firearms* 37 (1986).
- By the 1830s, “Pepperbox” pistols had been introduced to the American public and became commercially successful. Depending on the model, the Pepperbox could fire 5, 6, 12, 18, or 24 rounds without reloading.
- It took several years for Samuel Colt’s revolvers (also invented in the 1830s) to surpass the Pepperbox pistol in the marketplace.

- From the 1830s to the 1850s, several more rifles were invented with large ammunition capacities, ranging from 12- to 38-shot magazines.
- By 1855, Daniel Wesson (of Smith and Wesson fame) and Oliver Winchester collaborated to introduce the lever action rifle, which contained a 30-round magazine that could be emptied in less than one minute. A later iteration of this rifle, the 16-round Henry lever action rifle, became commercially successful, selling about 14,000 from 1860 to 1866.
- By 1866, the first Winchester rifle, the Model 1866, could hold 17 rounds in the magazine and one in the chamber, all of which could be fired in nine seconds. All told, Winchester made over 170,000 copies of the from 1866 to 1898. *See* Norm Flayderman, *Flayderman's Guide to Antique Firearms and Their Values* 268 (6th ed. 1994).
- A few years later, Winchester produced the M1873, capable of holding 10 to 11 rounds, of which over 720,000 copies were made from 1873 to 1919.

From this history, the clear picture emerges that firearms with large-capacity capabilities were widely possessed by law-abiding citizens by the time of the Second Amendment's incorporation. In that way, today's large-capacity magazines are "modern-day equivalents" of these historical arms, and are entitled to the Second Amendment's protection.

**b. Magazines with over ten rounds are widely used for lawful purposes today.**

It is also uncontested that ammunition magazines that hold more than ten rounds enjoy widespread popularity today. This is evident from the fact that as many as 100,000,000 such magazines are currently lawfully owned by citizens of this country. It's also apparent from the fact that those magazines are a standard component on many of the nation's most popular firearms, such as the Glock pistol, which comes with a magazine that holds 15 to 17 rounds.<sup>25</sup> They are lawful in at least 41 states and under Federal law. Indeed, large-capacity magazines account for *half* of all magazines owned in the United States today. Thus, the record in this case shows that large-capacity magazines are in common use for lawful purposes today, entitling them to Second Amendment protection.

Not only are they ubiquitous, the large-capacity magazines are used for lawful purposes, like home

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<sup>25</sup> We can go on and on with examples. Since 1964, Ruger has sold six million copies of its 10/22 rifles, which is manufactured with 10-round, 15-round, and 25-round magazines. More than five million AR-15 rifles have been sold, typically with 30-round magazines. The commonality of large-capacity magazines is well accepted by other courts. *See, e.g., Heller II*, 670 F.3d at 1261 (“We think it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in ‘common use,’ as the plaintiffs contend” because “fully 18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds, and approximately 4.7 million more such magazines were imported into the United States between 1995 and 2000.”).

defense. Millions of semiautomatic pistols, the “quintessential self-defense weapon” for the American people, *Heller*, 554 U.S. at 629, come standard with magazines carrying over ten rounds. Many citizens rely on a single, large-capacity magazine to respond to an unexpected attack. As one firearms expert put it: firearms equipped with a magazine capable of holding more than ten rounds are “more effective at incapacitating a deadly threat and, under some circumstances, may be necessary to do so.” This is why many Americans choose to advantage themselves by possessing a firearm equipped with a large-capacity magazine and why the ownership of those magazines is protected by the Second Amendment.

California does not refute any of this.<sup>26</sup> Indeed, courts throughout the country agree that large-capacity magazines are commonly used for lawful purposes. *See Ass’n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 116-17 (“The record shows that millions of magazines are owned, often come factory standard with semi-automatic weapons, are typically possessed by law-abiding citizens for hunting, pest-control, and

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<sup>26</sup> Instead, California points to data suggesting that people using firearms in self-defense fire only “2.2 shots on average.” On this basis, California argues that the banned magazines are not useful for self-defense. This is a non-sequitur. That a citizen did not expend the full magazine does not mean that the magazine was not useful for self-defense purposes. It is also immaterial that plaintiffs have not shown when a large-capacity magazine was *necessary* to fend off attackers. That is not the test. *Heller* only looks to the *purpose* of the firearm’s ownership—not that it is *effectively used* or *absolutely necessary* for that purpose. In fact, we are hopeful that most law-abiding citizens never have to use their firearms in self-defense.



occasionally self-defense[.]” (simplified)); *N.Y. State Rifle & Pistol Ass’n*, 804 F.3d at 255 (“[S]tatistics suggest that about 25 million large-capacity magazines were available in 1995, ... and nearly 50 million such magazines—or nearly two large-capacity magazines for each gun capable of accepting one—were approved for import by 2000.). Even our court has begrudgingly admitted as much. *See Fyock*, 779 F.3d at 998 (“[W]e cannot say that the district court abused its discretion by inferring from the evidence of record that, at a minimum, [large-capacity] magazines are in common use. And, to the extent that certain firearms capable of use with a magazine—e.g., certain semiautomatic handguns—are commonly possessed by law-abiding citizens for lawful purposes, our case law supports the conclusion that there must also be some corollary, albeit not unfettered, right to possess the magazines necessary to render those firearms operable.”).

In sum, firearms with magazines capable of firing more than ten rounds are commonplace in America today. And they are widely possessed for the purpose of self-defense, the very core of the Second Amendment. Accordingly, an overwhelming majority of citizens who own and use large-capacity magazines do so for lawful purposes. “Under our precedents, *that is all that is needed* for citizens to have a right under the Second Amendment to keep such weapons.” *Friedman*, 136 S. Ct. at 449 (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (emphasis added). So, unless subject to “longstanding prohibition,” they are protected by the Second Amendment.

**3. Bans on large-capacity magazines are not a presumptively lawful regulatory measure.**

After completing its analysis, *Heller* cautioned: “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Heller*, 554 U.S. at 626-27. The Court also noted that its list of “presumptively lawful regulatory measures” was not “exhaustive.” *See id.* at 627 n.26. Thus, it would be wise to ask whether California’s law enjoys the endorsement of history. Our task, therefore, is to determine “whether the challenged law traces its lineage to founding-era or Reconstruction-era regulations,” *Duncan*, 970 F.3d at 1150, because “[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them,” *Heller*, 554 U.S. at 634-35. As a preview, California cannot meet this showing: the magazine ban’s earliest analogues only show up in the early twentieth century, which doesn’t meet the definition of “longstanding” under *Heller*.

The Court’s first example of a longstanding and presumptively lawful regulatory measure is the “prohibition[] o[f] the possession of firearms by felons and the mentally ill.” *Heller*, 554 U.S. at 626. Prohibiting the possession of arms by those found by the state to be dangerous, like violent criminals, dates

to the Founding<sup>27</sup> And prohibiting the mentally ill from exercising firearms rights also has roots dating to the Founding. *See Mai*, 974 F.3d at 1090 (Bumatay, J., dissenting from the denial of reh’g en banc).

*Heller* next points to laws that forbid “the carrying of firearms in sensitive places,” as an example of longstanding regulatory measures. 554 U.S. at 626. Again, this practice dates to the Founding: “colonial and early state governments routinely exercised their police powers to restrict the time, place, and manner in which Americans used their guns.” Robert H.

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<sup>27</sup> *See Kanter v. Barr*, 919 F.3d 437, 464 (7th Cir. 2019) (“History ... support[s] the proposition that the state can take the right to bear arms away from a category of people that it deems dangerous.”) (Barrett, J., dissenting); C. Kevin Marshall, *Why Can’t Martha Stewart Have A Gun?*, 32 Harv. J.L. & Pub. Pol’y 695, 698 (2009) (“‘[L]ongstanding’ precedent in America and pre-Founding England suggests that a firearms disability can be consistent with the Second Amendment to the extent that ... its basis credibly indicates a present danger that one will misuse arms against others and the disability redresses that danger.”); Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to ‘Bear Arms’*, 49 Law & Contemp. Probs. 151, 161 (1986) (“[V]iolent criminals, children, and those of unsound mind may be deprived of firearms[.]”); *Binderup v. Att’y Gen. United States of Am.*, 836 F.3d 336, 369 (3d Cir. 2016) (Hardiman, J., concurring in part and concurring in the judgments) (“[T]he historical record leads us to conclude that the public understanding of the scope of the Second Amendment was tethered to the principle that the Constitution permitted the dispossession of persons who demonstrated that they would present a danger to the public if armed.”). Because such prohibitions—in their contemporary form—date only to the early twentieth century, *Marshall, supra* at 695, some (including the majority) have mistakenly concluded that *any* firearm regulation dating to that period must be presumptively lawful. *See, e.g.*, Maj. Op. 28-29.

Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 Law & Hist. Rev. 139, 162 (2007). For example, the Delaware Constitution of 1776 stated that “no person shall come armed to any” of the state elections, so as to “prevent any violence or force being used at the said elections.” Del. Const., art. 28 (1776). And the multitude of Founding-era laws regulating the times and places in which firearms could be used are well documented. See Churchill, *supra* at 161-66.

The final demonstrative category in *Heller* is the imposition of “conditions and qualifications on the commercial sale of arms.” 554 U.S. at 627. The historical lineage of such a broad set is necessarily difficult to trace; the more specific the “condition” or “qualification,” the more varied the history will be. Cf. *Pena v. Lindley*, 898 F.3d 969, 976 (9th Cir. 2018) (“Our circuit similarly has strained to interpret the phrase ‘conditions and qualifications on the commercial sale of arms.’”). Still, in analyzing this category, our circuit has traced its antecedents to the Founding. We’ve noted that “colonial government regulation included some restrictions on the commercial sale of firearms.” *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 685 (9th Cir. 2017) (en banc).<sup>28</sup>

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<sup>28</sup> For example, several colonies “passed laws in the first half of the seventeenth century making it a crime to sell, give, or otherwise deliver firearms or ammunition to Indians.” *Teixeira*, 873 F.3d at 685. And, for instance, “Connecticut banned the sale of firearms by its residents outside the colony.” *Id.* Connecticut law also required a license to sell gunpowder that had been manufactured in the colony outside the colony. See An Act for encouraging the Manufactures of Salt Petre and Gun Powder,

As mentioned above, a pattern emerges. *Heller's* examples of longstanding, presumptively lawful regulations have historical analogues at least dating to the Founding. This makes sense: determining the core of the Second Amendment's protection is, after all, a "historical inquiry [that] seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification." *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010).

That pattern is problematic for California. The first law limiting magazine capacity was enacted by Michigan in 1927, setting an upper limit of 16 rounds. *See* Act of June 2, 1927, No. 373, § 3, 1927 Mich. Public Acts 887, 888 (repealed 1959). Rhode Island passed a similar ban that year, prohibiting any firearm that could shoot more than 12 times without reloading. *See* Act of Apr. 22, 1927, ch. 1052, §§ 1, 4, 1927 R.I. Acts & Resolves 256, 256-57 (amended 1959). In 1932, the District of Columbia prohibited the possession of a firearm that could shoot more than 12 rounds without reloading. *See* Act of July 8, 1932, Pub. L. No. 72-275,

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December 1775, *reprinted in* The Public Records of the Colony of Connecticut From May, 1775, to June, 1776 191 (Charles J. Hoadly ed., 1890); ("Be it . . . enacted, That no salt petre, nitre or gun-powder made and manufactured, or that shall be made and manufactured in this Colony, shall be exported out of the same by land or water without the licence of the General Assembly or his Honor the Governor and Committee of Safety[.]"). Similarly, New Jersey law required that any gunpowder be inspected and marked before its sale. An Act for the Inspection of Gun-Powder, ch. 6, §1. 1776 N. J. Laws 6. (making it an "Offence" for "any Person" to "offer any Gun-Powder for Sale, without being previously inspected and marked as in herein after directed").

§§ 1, 8, 47 Stat. 650, 650, 652. The next year, Ohio passed a law requiring a permit to possess any firearm with an ammunition capacity over 18 rounds. *See* Act of Apr. 8, 1933, No. 166, sec. 1, §§ 12819-3, -4, 1933 Ohio Laws 189, 189 (amended 1972). California’s law, meanwhile, dates only to 1999.

California does not dispute the historical record—it points to the above Prohibition-era laws of Michigan, Rhode Island, and Ohio to defend its own ban’s historical pedigree. But such laws aren’t nearly old enough to be longstanding. Even if, for the sake of argument, we granted that a regulation need only date to the Reconstruction era to be sufficiently longstanding, California’s large-capacity magazine ban still fails. Thus, California’s magazine ban is not longstanding or presumptively lawful.<sup>29</sup> *See Ass’n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 116-17 (“[T]here is no longstanding history of LCM regulation.”); *id.* at 117 n.18 (“LCMs were not regulated until the 1920s, but most of those laws were invalidated by the 1970s. The federal LCM ban was enacted in 1994, but it expired in 2004.”) (simplified).

Not only is California’s ban not historically longstanding, but it also differs in kind from the

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<sup>29</sup> Sufficient historical pedigree is only capable of establishing a presumption in favor of constitutionality. But that presumption is not dispositive. Thus, even if California’s magazine ban dated to a period that would plausibly render it longstanding (*i.e.*, the Founding or Reconstruction), we would still need to answer whether that presumption could be overcome. California’s law effectively outlaws massive swaths of firearms chosen by law-abiding citizens for lawful purposes like self-defense. If a court were forced to answer the question, it’s possible that the ban’s history couldn’t save it.

regulatory measures mentioned in *Heller*. Regulations on possession by people dangerous to society, where a firearm may be carried, and how firearms may be exchanged, *see Heller*, 554 U.S. at 626-27, are about the manner or place of use and sale or the condition of the user. California's ban, on the other hand, is much more like a "prohibition on an entire class of 'arms' that is overwhelmingly chosen by American society" for home defense. *Id.* at 628. Also, like the ban in *Heller*, California's ban extends "to the home, where the need for defense of self, family, and property is most acute." *Id.*

In the end, California fails to point to a single Founding-era statute that is even remotely analogous to its magazine ban. Ironically, the closest Founding-era analogues to ammunition regulations appear to be laws *requiring* that citizens arm themselves with particular arms and a specific minimum amount of ammunition. *See* 1784 Mass. Acts 142; 1786 N.Y. Laws 228; 1785 Va. Statutes at Large 12 (12 Hening c. 1); 1 Stat. 271 (1792) (Militia Act); Herbert L. Osgood, *The American Colonies in the Seventeenth Century* 499-500 (1904) (showing that states required citizens to equip themselves with adequate firearms and sufficient ammunition—varying between twenty and twenty-four cartridges *at minimum*). That does not offer historical support for California's ban; in fact, it runs directly counter to California's position.

#### IV.

California's experiment bans magazines that are commonly owned by millions of law-abiding citizens for lawful purposes. These magazines are neither dangerous and unusual, nor are they subject to

longstanding regulatory measures. In ratifying the Second Amendment, the People determined that such restrictions are beyond the purview of government. Our court reaches the opposite conclusion in contravention of the Constitution and Supreme Court precedent. In so doing, it once again employs analytical tools foreign to the Constitution—grafting terms like “intermediate scrutiny,” “alternative channels,” and “reasonable fit” that appear nowhere in its text. So yet again, we undermine the judicial role and promote ourselves to the position of a super-legislature—voting on which fundamental rights protected by the Constitution will be honored and which will be dispensed with.

We respectfully dissent.



VANDYKE, Circuit Judge, dissenting:

I largely agree with Judge Bumatay's excellent dissent. And to paraphrase James Madison, if judges were angels, nothing further would need be said. But unfortunately, however else it might be described, our court's Second Amendment jurisprudence can hardly be labeled angelic. Possessed maybe—by a single-minded focus on ensuring that any panel opinions actually enforcing the Second Amendment are quickly reversed. The majority of our court distrusts gun owners and thinks the Second Amendment is a vestigial organ of their living constitution. Those views drive this circuit's caselaw ignoring the original meaning of the Second Amendment and fully exploiting the discretion inherent in the Supreme Court's cases to make certain that *no* government regulation ever fails our laughably "heightened" Second Amendment scrutiny.

This case is par for the course. The majority emphasizes the statistical rarity of law-abiding citizens' need to fire more than an average of 2.2 shots in self-defense, but glosses over the statistical rarity of the harm that California points to as supporting its magazine ban. Instead of requiring the government to make an actual heightened showing, it heavily weighs the government's claim that guns holding more than 10 rounds are "dangerous" (of course they are—all guns are) against a self-defense interest that the majority discounts to effectively nothing. Once again, our court flouts the Supreme Court's exhortation against such "a freestanding 'interest-balancing' approach" to the Second Amendment. *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008).

If the Second Amendment is ever going to provide any real protection, something needs to change. I have some suggestions, which I offer below after first discussing some of the flaws in the majority’s analysis of this case.<sup>1</sup> Until the Supreme Court requires us to implement a paradigm shift, the Second Amendment will remain a second-class right—especially here in the Ninth Circuit.

\* \* \*

It should be presumptively unconstitutional to burden constitutional rights. But looking at our court’s cases, you would assume that any burden on the right to bear arms is presumptively permitted. I’ve described before how our circuit’s version of Second Amendment “heightened” scrutiny has no height. It is practically indistinguishable from rational basis review. *See Mai v. United States*, 974 F.3d 1082, 1097-106 (9th Cir. 2020) (VanDyke, J., dissenting from denial of rehearing en banc). While our court gives lip service to *Heller*, its practice of effectively applying rational basis review ignores *Heller*’s admonition that if passing rational basis review was “all that was required to overcome the right to keep and bear arms ... the Second Amendment would be redundant ....” *Heller*, 554 U.S. at 628 n.27.

The brokenness of our court’s balancing approach is particularly evident in this case, where the majority weighs rarity like lead when it favors the ban, but then weighs rarity like helium when it undermines

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<sup>1</sup> Because Judge Bumatay’s dissent explains at length the shortcomings of the majority’s analysis, I provide only some supplemental observations.

California's asserted interest. On one hand, the majority ignores the fact that California's claimed reason for its ban—mass shootings—involves a harm that, while tragic and attention-grabbing, is thankfully extremely rare by any statistical metric. You are much more likely to be randomly injured or killed by a drunk driver than a mass shooter. But on the other hand, the majority emphasizes the rarity of any individual American's use of ammunition in self-defense, latching onto California's argument that only 2.2 rounds are used on average in a self-defense shooting, and concludes that any more rounds than that are thus outside the "core" of the Second Amendment.

We might call this Version 2.2 of the Second Amendment. It cannot be the right way to analyze an alleged violation of the right to bear arms. The average number of times that any law-abiding citizen *ever* needs to "bear arms" at all in a self-defense situation is far below one—most people will (thankfully) *never* need to use a gun to defend themselves. Thus, applying the majority's rarity analysis, possession of a gun itself falls outside the "core" of the Second Amendment. But we know that cannot be true from *Heller*, where the Supreme Court determined "self-defense ... was the *central component*" of the Second Amendment, notwithstanding the practical infrequency of any particular person's need to actually defend herself with a gun. 554 U.S. at 599.

So the majority's rarity balancing isn't just lopsided—it starts from the wrong premise. We would never treat fundamental rights we care about this way, particularly those expressly enumerated in the

Constitution. We don't protect the free speech of the taciturn less than the loquacious. We don't protect the free exercise of religion in proportion to how often people go to church. We wouldn't even allow soldiers to be quartered only in those parts of your house you don't use much. Express constitutional rights by their nature draw brighter and more prophylactic lines—precisely because those who recognized them were concerned that people like California's government and the judges on our court will attempt to pare back a right they no longer find useful. This is the sentiment James Madison expressed in extolling “the wisdom of descrying ... the minute tax of 3 pence on tea, the magnitude of the evil comprized in the precedent. Let [us] exert the same wisdom, in watching agst every evil lurking under plausible disguises, and growing up from small beginnings.” *Madison's “Detached Memoranda,”* 3 Wm. & Mary Q. (3d ser.) 534, 557-58 (E. Fleet ed., 1946). The majority here extends our circuit's practice of chipping away at a disfavored constitutional right, replacing the Second Amendment with their 2.2nd Amendment.

This case is the latest demonstration that our circuit's current test is too elastic to impose any discipline on judges who fundamentally disagree with the need to keep and bear arms. I consequently suggest two less manipulable tests the Supreme Court should impose on lower courts for analyzing government regulations burdening Second Amendment rights, replacing the current malleable two-step, two-pronged inquiry with something that would require courts to actually enforce the second provision of the Bill of Rights.

First, the Supreme Court should elevate and clarify *Heller*'s "common use" language and explain that when a firearm product or usage that a state seeks to ban is currently prevalent throughout our nation (like the magazines California has banned here), then strict scrutiny applies. Second, the Court should direct lower courts like ours to compare one state's firearm regulation to what other states do (here a majority of states allow what California bans), and when most other states don't similarly regulate, again, apply strict scrutiny. Where many law-abiding citizens seeking to prepare to defend themselves have embraced a particular product or usage, or the majority of states have not seen a necessity to restrict it, real heightened scrutiny should be required instead of allowing our court to sloppily balance the citizen's "need" against the government's claimed "harm."

No doubt these proposed tests are not perfectly satisfying—doctrinally or academically. Few actual legal tests are, since the application of legal rules happens in the messiness of the real world. Nor would these suggested tests address every situation. Judge Berzon observes, for example, that under the "common use" test I seek to invigorate, gun-adverse states like California will predictably react to new technologies by trying to kill the baby in the cradle—immediately banning any new technology before it can become "commonly used." Perhaps so, but those are difficulties at the margin. Right now, as I discuss further below, we have a Second Amendment test that enables *zero* enforcement in this circuit. Ultimately, Judgeumatay's and Judge Berzon's opinions converge at one very important point: *neither* our current two-step test *nor* any proposed alternative that allows much

interpretative or balancing discretion will ultimately lead to consistent and rigorous enforcement of the Second Amendment—particularly with the many judges who disagree with its very purpose.<sup>2</sup> It’s now beyond obvious that you can’t expect our court to faithfully apply any Second Amendment test that allows us to exercise much discretion. Many fundamental rights are protected by more bright-line tests.<sup>3</sup> It’s past time we bring that to the Second Amendment.

### **I. The Majority Takes Our Circuit’s “Heightened” Scrutiny to a New Low.**

I’ve observed before how, for Second Amendment cases, our circuit has “watered down the ‘reasonable fit’ prong of intermediate scrutiny to little more than rational basis review,” starting by borrowing an inapt test from the First Amendment context and then weakening it with each passing case upholding government restrictions. *Mai*, 974 F.3d at 1101-04 (VanDyke, J., dissenting from denial of rehearing en

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<sup>2</sup> To be clear, I think Judge Bumatay has penned an exemplary dissent addressing “text, tradition, and history.” My objection is not that judges *cannot* do good analysis under this framework, but rather that without a more bright-line test there is far too much opportunity for manipulation, especially with a right as unpopular with some judges as the Second Amendment.

<sup>3</sup> See David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits’ Second Amendment Doctrines*, 61 St. Louis U.L.J. 193, 303 (2017) (“Bright-line rules declaring certain government actions categorically unconstitutional, without the need for a means/ends test, are common in constitutional law. They are found in the First Amendment, Fifth Amendment, Sixth Amendment, Eighth Amendment, Tenth Amendment, and Fourteenth Amendment.”) (footnotes omitted).

banc). This case furthers that trend. Instead of “demand[ing] a closer regulatory fit for a law that *directly* burdens a fundamental right,” our en banc court fails to apply any “real heightened scrutiny, or even just faithfully appl[y] the [heightened scrutiny] test as articulated in” comparable First Amendment jurisprudence. *Id.* at 1104. Indeed, notwithstanding our court’s early commitment that “we are ... guided by First Amendment principles” in applying the Second Amendment, *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014), it is telling that comparisons between the First and Second Amendment in this latest case have largely been dropped by the majority and relegated to concurring opinions—likely because it gets embarrassing and wearisome to constantly rationalize why we treat the Second Amendment so differently than its close constitutional neighbor.

In analyzing whether California’s magazine ban violates the Second Amendment, the majority here follows a now well-traveled path. It starts like many of our Second Amendment cases: by assuming, instead of deciding, that the Second Amendment even applies to California’s ban. *See, e.g., Mai v. United States*, 952 F.3d 1106, 1114-15 (9th Cir. 2020); *Pena v. Lindley*, 898 F.3d 969, 976 (9th Cir. 2018); *Fyock v. City of Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015).<sup>4</sup> This

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<sup>4</sup> The majority claims that the current two-step inquiry “faithfully adheres” to *Heller*, since “history, text, and tradition greatly inform step one of the analysis ....” But this only illustrates my point about the malleability of our current framework. Our court consistently uses step one of our test to either: (1) wade through the complicated history to conclude the regulation does *not* burden conduct protected by the Second

itself is very telling. It emphasizes the practical vacuity of the second step in our court’s two-step test. The reason it is so effortless for our court to “assume” that the Second Amendment applies is because the plaintiff will always lose at our court’s step-two intermediate scrutiny. If we genuinely applied any form of heightened scrutiny, we would have to be more careful and concise about what activity or item warrants protection under the Second Amendment. And something is wrong when most of our court’s judges can’t bring themselves to say the Second Amendment actually covers anything beyond a *Heller*-style total handgun ban. It’s the judicial equivalent of holding your nose.

After the majority here assumes that California’s magazine ban “implicates” the Second Amendment at step one of our test, at step two it concludes that banning the most commonly purchased magazine used in handguns for self-defense only places a “small burden” on the exercise of the right to bear arms and thus only intermediate scrutiny applies. And by this point we all know what that means: the regulation

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Amendment at all, *see, e.g., Young v. Hawaii*, 992 F.3d 765, 785 (9th Cir. 2021) (en banc) (“As we might expect in this area, fraught with strong opinions and emotions, history is complicated, and the record is far from uniform.”); or (2) as here, side-step this inquiry altogether by *assuming* the conduct implicates the Second Amendment, only to uphold the regulation at step two by applying an extremely loose balancing test (more on that below). It’s clear that history, text, and tradition is currently comatose in our circuit’s jurisprudence *enforcing* the Second Amendment—we only rely on it when deemed useful to support the conclusion that something falls outside our court’s illusory Second Amendment protection.



burdening the citizens' Second Amendment rights *always* wins under our version of Second Amendment "intermediate scrutiny." Repeatedly characterizing the legislation as a "minimal burden," the majority decries any possible need for the banned magazines and relies heavily on the rarity of their full use in self-defense, while giving no weight to the *effectiveness* of such magazines in self-defense.

Building on this rationale, Judge Graber's concurrence provides a list of unrealistic alternatives one could use in lieu of a higher-capacity magazine: carry multiple guns; carry extra magazines; carry some loose rounds in your pocket; carry a cop (okay, I made that last one up). I doubt many who actually carry a gun for self-defense would find these alternatives realistic. And the majority references no "heightened" showing made by the government, other than listing past tragic events across the nation in which criminals misused guns. Those events were, of course, horrific. But citing select (and in this case, statistically very rare) examples of misuse cannot be a basis to overcome the Second Amendment. If it was, then the much more prevalent misuse of guns in criminal activity generally would suffice to ban all guns. That is why, when applying real heightened scrutiny, a "substantial relation is necessary but not sufficient." *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021) (applying exacting scrutiny in a First Amendment case).

The truth is that what our court calls "intermediate scrutiny" when reviewing Second Amendment cases doesn't even rise to the level of real rational basis review. That's a bold claim, I know. But

think about it: if your state banned all cars, forcing all its citizens to use bicycles because many people are killed by drunk drivers (not to mention automobile accidents generally), would you think that was rational? No. What if California just banned all *large* vehicles (trucks, vans, etc.) because on rare occasions some crazed individual intentionally drives his car into a group of people, and large cars presumably do more damage? I doubt it. But that is what California has done here—banned a type of firearm magazine that has obvious self-defense benefits when used against a *group* of assailants, based on a purported harm that, while high-profile, is statistically extraordinarily improbable.<sup>5</sup> Much more improbable than harm from misuse of a car. And while cars are not expressly protected by the Constitution, “arms” are.<sup>6</sup>

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<sup>5</sup> By emphasizing their statistical rarity, I do not belittle the tragedy experienced by those affected by a mass shooting (any more than observing that airline crashes are thankfully rare detracts from the heartbreak of those involved when they happen).

<sup>6</sup> Characterizing my car ban analogies as “inapt,” the majority says that California’s magazine ban is more akin to “speed limits.” But in attempting to trade my analogies for a more favorable one, the majority misses the obvious point: that in every context except our distorted Second Amendment jurisprudence, everyone agrees that when you evaluate whether a response to avoid some harm is “rational”—much less a “reasonable fit”—you take into account *both* the gravity of the possible harm *and* the risk of it occurring. The majority here completely ignores the latter. Perhaps if I use the majority’s own analogy it might click: If California chose to impose a state-wide 10 mph speed limit to prevent the very real harm of over 3,700 motor-vehicle deaths each year experienced from driving over 10 mph, *no one* would think such a response is rational—precisely

The reason I think most of my colleagues on this court would genuinely struggle more with a car ban than they do with a gun ban is that they naturally see the value in cars. They drive cars. So they are willing to accept some inevitable amount of misuse of cars by others. And my colleagues similarly have no problem protecting speech—even worthless, obnoxious, and hateful speech<sup>7</sup>—because they like and value speech generally. After all, they made their careers from exercising their own speech rights. On the other hand, as clearly demonstrated by this case, most of my colleagues see “limited lawful” value in most things firearm-related.

But the protections our founders enshrined in the Bill of Rights were put there precisely because they worried our future leaders might not sufficiently value them. That is why our court’s “intermediate scrutiny” balancing approach to the Second Amendment is no more appropriate here than it would be for any other fundamental right. As the Supreme Court explained in rejecting Justice Breyer’s “interest-balancing” approach,” noting that “no other enumerated constitutional right[s] ... core protection” was subject to such a test,

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because, even though the many deaths from such crashes are terrible, they are a comparatively rare occurrence (although much *more* common than deaths caused by mass shootings).

<sup>7</sup> See, e.g., *Sable Commc’ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) (“indecent ... [expression] is protected by the First Amendment”); *Nat’l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 44 (1977) (per curiam) (protecting the First Amendment rights of Nazis to protest).

[t]he 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.

*Heller*, 554 U.S. at 634-35.

The majority repeatedly denies that it is engaging in the type of “judge-empowering interest-balancing inquiry” rejected in *Heller*, insisting instead that it is merely applying our “traditional test” in this case. It’s doing both. Our traditional two-part test *is* a “judge-empowering interest-balancing inquiry.” It’s a convoluted, multi-step balancing test that weighs different considerations at different times so as to give judges maximum discretion and mask when they treat the same considerations differently at the various stages of the balancing (like here). When one steps back and evaluates our current Second Amendment test, it is clear the court is engaging in an interest-balancing test—it’s just that the balancing is done in two or more steps instead of all together.

What we call our two-step test really has three parts, since the second “step” is divided into two parts. A play in two acts, so to speak. Step II, Part I: the court determines the proper level of scrutiny, which includes *weighing* “the severity of the law’s burden on the right.” Step II, Part II: the court then applies the “appropriate” level of scrutiny (which, in our court’s case, is always intermediate), where the court *weighs* the government’s interest in the regulation (including

“reasonable fit”). An ever-adapting script, it is always these two *competing interests* that drive the court’s analysis. Ultimately, the court is *comparing* the plaintiff’s burden against the state’s interest. If the burden on the plaintiff’s Second Amendment rights is great (i.e., near the mythical “core” of the Second Amendment), then the government is (theoretically) required to make a stronger showing of its interest and fit. And vice-versa. Like a good Marvel movie, there’s always lots of drama, but the result is fore-ordained.

This particularly pernicious balancing test is a shell game. The balancing is done piecemeal so that the court can use differently weighted scales at each step and obfuscate the stark disparity between how it weighs the impact from the claimed violation of an express constitutional right, versus how it weighs the government’s justification and the regulation’s fit. When weighing the impact on the elusive “core” of the Second Amendment, the court whips out a scale specially calibrated to always read “minimal burden” (unless the government officials were dumb enough to do exactly the same thing Washington, D.C. and Chicago did in *Heller* and *McDonald*: entirely ban all handguns). But when it comes time to weigh the government’s interest and the reasonableness of the regulation’s fit under “intermediate scrutiny,” the court puts away the first scale and pulls out a different scale calibrated to always read “close enough,” even where, as here, the fit between the ban and the ultrarare harm asserted is not even rational.

The majority acknowledges that, applying our super-pliable test, “we have not struck down any state

or federal law under the Second Amendment.” But it insists “we have carefully examined each challenge on its own merit.” If every case without fail leads to the same anti-firearms conclusion, however, then at some point it begs credulity to deny that something else is driving the outcomes.

Judge Hurwitz has penned a short concurrence respectfully characterizing as inappropriate and hyperbolic my observations regarding how my colleague’s personal views influence our court’s Second Amendment cases. I agree that it is a troubling charge to posit personal views as a driving force behind judicial decision-making, and not one I make lightly. But whatever else it may be, my claim is hardly hyperbolic. Here are the facts: We are a monstrosity of a court exercising jurisdiction over 20% of the U.S. population and almost one-fifth of the states—including states pushing the most aggressive gun-control restrictions in the nation. By my count, we have had at least 50 Second Amendment challenges since *Heller*—significantly more than any other circuit—*all* of which we have ultimately denied. In those few instances where a panel of our court has *granted* Second Amendment relief, we have *without fail* taken the case en banc to reverse that ruling. This is true regardless of the diverse regulations that have come before us—from storage restrictions to waiting periods to ammunition restrictions to conceal carry bans to open carry bans to magazine capacity prohibitions—the common thread is our court’s ready willingness to bless any restriction related to guns. Respectfully, Judge Hurwitz’s claim that our judges’ personal views about the Second Amendment and

guns have not affected our jurisprudence is simply not plausible. *Res ipsa loquitur*.

Judge Hurwitz's own concurrence demonstrates this reality. In defending the validity of California's interest, he doesn't dispute that mass shootings are "infrequent," but expressly dismisses that reality as irrelevant. Why? Because, in his view, "hardly anyone is untouched by the[] devastation." His proof? A *very personal* anecdote about losing our beloved colleague to a mass shooting. No one disputes the depth of that tragedy, which is exactly why such uncommon occurrences nonetheless deeply influence my colleagues' views about gun control and the Second Amendment. But the fact that members of our court have been *personally* affected by a mass shooting is not a legitimate reason to ignore the undisputed statistical rarity when weighing the government's interest in its ban—it falls in the same category as choosing to drive instead of flying because you know someone who was tragically killed in a rare commercial airline accident. As a personal psychological phenomenon, such exaggeration of risks is completely understandable. As a legal matter, it should have no place in applying fundamental constitutional rights, including the Second Amendment. And just as irrelevant is Judge Hurwitz's reliance on yet more *personal* anecdotes—that "[o]ther members of the Court have lost family and friends to gun violence"—that are entirely unrelated to mass shootings. Defending California's regulation by sharing such deeply personal examples only demonstrates just how hard it is for any judge, including my esteemed and talented colleagues, to evaluate these cases in the objective and detached

manner required when the legal test itself offers no meaningful guiderails.

It is important to emphasize that I point to my valued colleagues' personal views not to engage in some unrelated ad hominem attack, but rather because the impact of those views is directly relevant to the purpose of this dissent. When judges are effectively told to balance the necessity for some particular gun-control regulation against that regulation's effect on the "core" of the Second Amendment, there isn't much for the judges to work with other than their own personal views about guns and the Second Amendment. Whether judges intend to bring in their personal views or not, those views inescapably control our holdings when applying a test as malleable as our Second Amendment intermediate scrutiny standard. Without rules that actually bind judges, personal intuition inescapably fills the void. The result of individual judges applying a formless test is a world where "equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve ...." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182 (1989).

Instead of striving to *avoid* this inequality of treatment, the majority *highlights* the inequality among the circuits as a defense of *our* current two-step approach. They do this by citing *one* case to show "our sister circuits, applying the same two-step inquiry that we apply today, have not hesitated to strike down provisions that go too far." This again bolsters my point. Because the prevailing two-step balancing test is so malleable and discretionary, one would expect



that different judges with different conceptions of guns and gun rights would weigh the different considerations differently and come to different conclusions.<sup>8</sup>

## **II. The Majority's Second Amendment Scales Are Rigged.**

Not content to just tilt the rules of the game heavily in the government's favor via our pathetically anemic "intermediate scrutiny," the majority here also stacks the evidentiary deck. The majority balances the average rarity of the use of ammunition in lawful self-defense situations as weighing heavily against its protection under the Second Amendment. Meanwhile, it studiously ignores the rarity of the harm (mass shootings) that California puts forward to support its ban. As explained, such balancing should have no place in a case like this—the founders already settled the weighty interest citizens have in lawfully bearing commonplace self-defense arms like those California has banned here. But the stark disparity between how the majority treats the very same attribute depending on whether it supports or undercuts the majority's desired outcome illustrates well that, even if we

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<sup>8</sup> The majority defends our undefeated, 50-0 record against the Second Amendment by pointing out that the states in our circuit simply have "more restrained" gun-control laws than the states in other circuits. While the majority is apparently serious, this claim can't be taken seriously given that our circuit's jurisdiction includes states like California and Hawaii—which have enacted many of the most aggressive gun-control laws in the nation. The majority's failure to comprehend that reality underscores my point that something other than objective and impartial application of the two-part test is driving the outcomes in our Second Amendment cases.

thought balancing might have a proper role in evaluating our Second Amendment rights, we can't expect judges who fundamentally disagree with the Second Amendment to fairly read the scales.

The reality is that essentially everything the Second Amendment is about is rare, for which we all should be very grateful. Government tyranny of the sort to be met by force of arms has been, in the short history of our country, fortunately rare. The actual need for any particular person to use her firearm to defend herself is, again, extremely rare—most of us will thankfully never need to use a gun to defend ourselves during our entire life.<sup>9</sup> And in those rare instances where a firearm is used in self-defense, the amount of ammunition needed is generally very little—oftentimes none at all. It is certainly true that most of us will use exactly zero rounds of ammunition to defend ourselves—ever. So if the Second Amendment protects anything, it is our right to be prepared for dangers that, thankfully, very rarely materialize.

Given that, the majority's focus on the fact that only 2.2 bullets are used *on average* in a self-defense shooting, and concluding that a law banning more than that "interferes only minimally with the core right of self-defense," is grossly misplaced.<sup>10</sup> An

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<sup>9</sup> Observing the rarity does not diminish the fact that thousands of citizens use their firearms for lawful self-defense each year. It simply means that as a percentage of the population generally, or even lawful gun owners, that percentage is tiny.

<sup>10</sup> California currently allows more than 2.2 rounds in a magazine, and does not prohibit carrying multiple magazines. But don't be fooled. Under the majority's Version 2.2 of the

average of 0.0 rounds are fired on average in preventing government tyranny. And the average person will fire an average of 0.0 rounds in self-defense in their entire lifetime. If the rarity alone of *exercising* one's Second Amendment rights cuts so dispositively against their protection, then the Second Amendment protects nothing.

Yet when it comes to the uncommonness of mass shootings—the reason California says it needs its magazine ban—the majority counts *that* as nothing. You would think that if the government seeks to interfere with a fundamental right, the infrequency of the claimed harm would be a very important consideration. For example, if the government sought to ban some type of communication because it very infrequently resulted in harm, we would never countenance that. On the other hand, where some type of communication *frequently* results in harm, it might survive heightened scrutiny (e.g., fighting words).

Here, California relies on a statistically very rare harm as justifying its ban, but a harm that, while infrequent, grabs headlines and is emotionally compelling. The emotional impact of these tragedies does all the work for the government and our court. But if a court was going to balance a fundamental right against a claimed harm, that is precisely where judges must cut through the emotion and do their job of holding the government to its (supposedly

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Second Amendment, there is no reason a state couldn't limit its citizens to carrying a (generous) 3 rounds total for self-defense.

heightened) burden. The majority here doesn't even try.<sup>11</sup>

The majority's uneven treatment of rarity is not the only example where its anti-Second Amendment bias shows through in how it reads the record. The majority questions whether law-abiding citizens even *want* higher capacity magazines for self-defense, speculating "whether circulation percentages of a part that comes standard with many firearm purchases meaningfully reflect an affirmative choice by consumers." But such musings only reveal a clear lack of knowledge about guns—or even basic economics, apparently. In free countries like this one, unless a market is interfered with by regulations like the one at issue in this case, it generally provides what consumers want. The market for self-defense firearms is no exception. Until only a few years ago, if you wanted a "micro-compact" firearm for self-defense (of the type that serves little or no military usage), you were generally limited to a six to eight-round magazine capacity. For example, the KelTec P3AT

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<sup>11</sup> The majority implies that by emphasizing the rarity of mass shootings, I omit the other relevant part of the analysis: "the incredible harm caused by mass shootings." I'm not ignoring the "incredible harm"; I'm simply saying that, just as we do with all serious harms, we must evaluate the seriousness of that harm *along with* the probability of it occurring. For example, no one doubts that commercial airline crashes, when they occur, result in "incredible harm." And yet no government has seriously considered banning commercial flights. Why? Because airplane crashes are extremely rare—just like mass shootings. The majority's response—doubling down on its emphasis of the harm while continuing to intentionally avoid its rarity—demonstrates that it is the majority, not me, that "omits ... [a] critical part of the analysis."

came with a six-round magazine, as did the Ruger LCP, Glock 43, Kimber Solo, and Walther PPK (of James Bond fame). The Kahr PM9 and Sig Sauer P238 offered six or seven-round magazines, while the Smith & Wesson M&P Shield came with seven or eight rounds. Not too long ago, it was basically impossible to find a lightweight, micro-compact firearm even capable of holding 10 rounds in its magazine.

Then, in 2019, Sig Sauer released the P365, which took the self-defense market by storm because suddenly law-abiding citizens could have the same size micro-compact firearm, but now carrying 12 or 15 rounds in its magazine. Other companies quickly followed suit, with Springfield Armory releasing the Hellcat (11 to 13-round magazines), Ruger releasing the Max-9 (12+1), Smith & Wesson releasing the M&P Shield Plus (13+1), and Kimber releasing the R7 Mako (13+1). Aftermarket magazine manufacturers like Shield Arms released flush-fitting magazines holding 15 rounds for diminutive guns like the Glock 43x and 48.

All this has happened in just the past few years, in segment of the firearms market that has essentially no “military” application. It has happened because many law-abiding citizens want higher capacity magazines for one purpose: self-defense. The majority’s odd speculation that maybe the self-defense market doesn’t want higher capacity magazines is as uninformed as wondering why cruise-control comes standard on their cars since nobody in their urban neighborhood wants it.

While the majority is happy to engage in ill-informed speculation when it comes to limiting gun

rights, it demonstrates a distinct lack of imagination and basic logic when it comes to understanding why so many citizens desire a magazine holding over 10 rounds. First, the majority posits a classic false dilemma (a.k.a. an either-or fallacy) by waxing on at length about how larger magazines “provide significant benefits in a military setting,” not self-defense. Of course, almost every attribute of a weapon that makes it more effective for military purposes also makes it more effective for self-defense: more accurate, faster firing, the ability to engage multiple targets quickly—these are all characteristics of a weapon that make it better for *both* military and self-defense purposes. The majority’s fixation on the effectiveness of higher-capacity magazines in the military context does not somehow demonstrate that the magazines are not also useful for self-defense.

The majority relatedly adopts California’s argument that magazines over 10 rounds are “dangerous” when misused. Again, essentially every attribute of a weapon that makes it more effective for self-defense makes it more dangerous when misused. Good sights on a handgun make it more effective for lawful self-defense—but also make it more dangerous when misused. A pistol that doesn’t malfunction is really nice to have in a self-defense situation—but is also more dangerous when misused. Modern hollow-point ammunition, with its dramatically increased stopping potential, has seriously improved the performance of handguns in a self-defense situation—but of course also make the handgun more dangerous when misused. This type of logic, applied the way the majority does, would justify banning all semi-automatics since they are more dangerous than

revolvers, all revolvers since they are more dangerous than derringers, all derringers since they are more dangerous than knives ... until we are left with toothpicks. That is why the Supreme Court in *Heller* only talked about weapons that are *both* “dangerous **and** unusual” being outside the purview of the Second Amendment. 554 U.S. at 627 (emphasis added) (citation omitted). The mere fact that some attribute (like a larger capacity magazine) might make a weapon more “dangerous” when misused cannot be a basis to avoid the Second Amendment—if so, the Second Amendment protects only nerf guns.

The majority also latches onto California’s argument that “mass shootings often involve large-capacity magazines.” That is hardly surprising, given that, as the majority itself acknowledges, “[m]ost pistols are manufactured with magazines holding ten to seventeen rounds, and many popular rifles are manufactured with magazines holding twenty or thirty rounds” (citation and internal quotation marks omitted). So, in other words, mass shootings involve the most common types of firearms. This is the sort of evidence that suffices to meet our circuit’s “heightened” review under the Second Amendment?

The majority also relies on the argument that limiting magazine capacity provides “precious down-time” during reloading, giving “victims and law enforcement officers” time to “fight back.” But here again, that same “down-time” applies equally to a mother seeking to protect herself and her children from a gang of criminals breaking into her home, or a law-abiding citizen caught alone by one of the lawless criminal mobs that recently have been terrorizing

cities in our circuit. The majority focuses only on ways higher capacity magazines might cause more harm in the very rare mass shooting, while dismissing the life-threatening impact of being forced to reload in a self-defense situation as a mere “inconvenience,” and characterizing as mere “speculat[ion] ... situations in which a person might want to use a large-capacity magazine for self-defense.”

Ultimately, it is not altogether surprising that federal judges, who have armed security protecting their workplace, home security systems supplied at taxpayer expense, and the ability to call an armed marshal to their upper-middleclass home whenever they feel the whiff of a threat, would have trouble relating to why the average person might want a magazine with over ten rounds to defend herself. But this simply reinforces why those same judges shouldn’t be expected to fairly balance any Second Amendment test asking whether ordinary law-abiding citizens *really need* some firearm product or usage.

### **III. The Supreme Court Needs to Constrain Lower Courts’ Discretion.**

We need tests that require real heightened scrutiny and will pull our courts out of the habit of inverted deference to burdens on Second Amendment rights. In that vein, I propose several less-discretionary tests the Supreme Court should impose to cabin my errant brethren.

#### **A. Common Use**

My first proposal is for the Supreme Court to put real teeth into a consideration that has been around since at least as far back as 1939, when the Supreme Court noted that the Second Amendment’s reference



to the Militia signified that the “arms” referenced by that provision are those “of the kind in common use at the time.” *United States v. Miller*, 307 U.S. 174, 179 (1939). Again in *Heller*, the Court reiterated that “the sorts of weapons protected” by the Second Amendment are “those ‘in common use at the time.’” 554 U.S. at 627 (quoting *Miller*, 307 U.S. at 179). Reinforcing this precedent, the Supreme Court should make clear that any regulation that prohibits a firearm product or usage that is “in common use” nationally must pass strict scrutiny. Not only would that curtail lower courts’ abuse of their discretion in applying the Second Amendment, but it would also help address a perennial line-drawing difficulty inherent in the right to keep and bear arms.

One of the ongoing problems with defining the contours of any constitutional right is determining how it applies to technologies that did not exist when the constitutional provision was enacted. For example, how does the First Amendment apply to social media or blog posts? But that problem is particularly vexing in applying the Second Amendment because “arms” by their very nature change over time as technology advances. As the Court in *Heller* correctly observed, the Second Amendment does not protect “only those arms in existence in the 18th century .... We do not interpret constitutional rights that way.” *Id.* at 582. But while we know that “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), in an age where weapons run the gamut from fighter jets to tanks to fully-automatic machine guns to AR-15s to handguns to pocketknives, which weapons are

protected by the Second Amendment and which are not? As this case and others like it demonstrate, we cannot rely on insular federal judges to weigh which weapons are appropriate for self-defense—they honestly don’t have a clue, and their intuitions about firearms are not good. And we can’t rely on governments to decide—that’s who the Second Amendment was intended to protect against. But as *Heller* discusses, we can look to what weapons law-abiding citizens have chosen to defend themselves—that is, what weapons are currently “in common use ... for lawful purposes.” *Id.* at 624 (internal quotation marks omitted).

Here, law-abiding citizens across the nation have purchased literally millions upon millions of the type of magazines that California has banned. Americans currently possess between seventy to one hundred *million* of those magazines for self-defense.<sup>12</sup> The majority here concludes that banning them is a “small burden” on the Second Amendment because they “provide at most a minimal benefit for civilian, lawful purposes.” *Millions* of our fellow Americans disagree with my seven colleagues in the majority, evincing by their purchase and “keep[ing]” of those magazines that they consider them necessary for self-defense. That should count for something—actually, it should

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<sup>12</sup> 67% of gun owners say self-defense is a major reason why they own their firearm. See Kim Parker, et al., *The demographics of gun ownership in the U.S.*, Pew Research Center (June 22, 2017), <https://www.pewresearch.org/social-trends/2017/06/22/the-demographics-of-gun-ownership/>; see also Christopher S. Koper et al., *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2002*, (June 2004), <https://www.ojp.gov/pdffiles1/nij/grants/204431.pdf>.

count for a lot, especially for a constitutional guarantee that ostensibly protects “the right of *the people* to keep and bear arms.” As the *Heller* Court explained in rejecting the argument that handguns could be banned because rifles weren’t, it was “enough to note ... that the American people have considered the handgun to be the quintessential self-defense weapon.” *Id.* at 629. That same rationale should apply for any firearm product or usage that law-abiding citizens across the nation have chosen for self-defense.

### **B. B. State Law Survey**

A government should also have to meet strict scrutiny if it bans a firearm product or usage that is allowed throughout most of our nation. If most of the states in the Union allow a particular item to be used in the course of exercising a Second Amendment right, then the government’s justification for forbidding or restricting that item or usage should be subjected to strict scrutiny.

Our court has often cited the practice of other states when it suits its purpose in analyzing constitutional rights. *See, e.g., Young*, 992 F.3d at 805 (analyzing the Second Amendment, the court observed “[i]n contrast to these states, other states—also from the South—upheld good-cause restrictions on the open carry of certain dangerous firearms”); *Family PAC v. McKenna*, 685 F.3d 800, 811 n.12 (9th Cir. 2012) (First Amendment); *S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1131 (9th Cir. 2004) (First Amendment); *Cammack v. Waihee*, 932 F.2d 765, 766-67 (9th Cir. 1991) (Establishment Clause). Indeed, the majority does so here, strangely observing that “California is not alone” because a few other states and

local governments also ban some magazines (even though a super-majority of states don't).

The majority's instinct that it makes sense to look at other states is right; its execution is just wrong. The fact that a handful of states similarly regulate should not help justify infringement of a fundamental right. But the fact that *most* other states—here, 41 states and the federal government—*don't* similarly regulate should cause a court to suspect that maybe the government's supposed justification for its ban is lacking.

Like looking at “common use,” considering other states' regulation would have at least one serious incidental side-benefit: it would reduce the troubling balkanization that currently afflicts a fundamental right supposedly protected by the Constitution. Right now, a lawful gun-owner's ability to lawfully “keep and bear arms” is subject to a widely varying patchwork quilt of state and local restrictions and bans that would be an embarrassment for any other constitutional right. Requiring governments to satisfy real heightened scrutiny before they step too far out of line with what is working in most other jurisdictions would help deter states like California from using their “laboratory of democracy” to conduct ongoing experiments on how to subject a fundamental right to death by a thousand cuts. *See Teixeira v. Cty. of Alameda*, 873 F.3d 670, 694 (9th Cir. 2017) (en banc) (Tallman, J., concurring).

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Our court is fond of saying that Second Amendment rights are not absolute. *See, e.g., Young*, 992 F.3d at 793; *Silveira v. Lockyer*, 312 F.3d 1052,

1063 (9th Cir. 2002) *abrogated on other grounds by Heller*, 554 U.S. 570; *United States v. Vongxay*, 594 F.3d 1111, 1117 (9th Cir. 2010). I don't disagree with that truism—I just disagree with our court's reliance on it to uphold every single firearm regulation, ever. Requiring that any regulation that prohibits a firearm product or usage “in common use” must pass strict scrutiny would not mean that a government would be helpless to address substantial genuine threats from weapons or uses protected by the Second Amendment. It would just mean that those governments would actually need to make a real “heightened” showing of harm, and a response that is narrowly tailored to that harm. That shouldn't be asking too much for a constitutionally protected right.

If ever there was a case study illustrating Madison's concern about “evil lurking under plausible disguises, and growing up from small beginnings,” it is our circuit's Second Amendment jurisprudence. In the thirteen years since the Supreme Court ruled in *Heller* that the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation,” 554 U.S. at 592, our court has trimmed back that right at every opportunity—to the point that now, in the nine Western states covered by our court, the right to “keep and bear arms” means, *at most*, you might get to possess one janky handgun and 2.2 rounds of ammunition, and only in your home under lock and key. That's it.

That's ridiculous, and so I must respectfully dissent.