No. 25-198

In the
Supreme Court of the United States

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.

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

BRIEF OF AMICUS CURIAE SECOND AMENDMENT FOUNDATION, SECOND AMENDMENT LAW CENTER, AND MINNESOTA GUN OWNERS CAUCUS IN SUPPORT OF PETITIONERS

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AMICUS CURIAE STATEMENT OF INTEREST

Second Amendment Foundation ("SAF") is a non-profit membership organization founded in 1974 with over 720,000 members and supporters in every state of the union. Its purposes include education, research, publishing, and legal action focusing on the constitutional right to keep and bear arms. Currently, SAF is involved in other litigation concerning bans on common arms and is thus greatly interested in the outcome of this case.[1]

The Second Amendment Law Center ("2ALC") is a nonprofit corporation in Henderson, Nevada. The Center defends the individual right to keep and bear arms as envisioned by the Founders. 2ALC also educates the public about the social utility of firearm ownership and provides accurate historical, criminological, and technical information to policymakers, judges, and the public.

Minnesota Gun Owners Caucus ("MGOC") is a 501(c)(4) non-profit organization incorporated under

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[1] Counsel of record for *Amici* previously represented the Petitioners in this matter approximately three years ago when the case was last in the district court, but he has not worked on the matter during its appellate proceedings and has since departed his employment with the law firm that represents Petitioners (Michel & Associates, P.C.). No counsel for a party, nor any party, made a monetary contribution to fund this brief. No person other than the amicus parties, its members or counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The Parties were notified that this brief would be filed on August 21, 2025, in compliance with Rule 37.2.

the laws of Minnesota with its principal place of business in Shoreview, Minnesota. MGOC seeks to protect and promote the right of citizens to keep and bear arms for all lawful purposes. MGOC serves its members and the public through advocacy, education, elections, legislation, and legal action. MGOC's members reside both within and outside Minnesota.

SUMMARY OF ARGUMENT

The stakes here are as high as they could be in a Second Amendment case. If this Court refuses to act, thousands of peaceable gun owners in California will be forced to dispossess themselves of arms that are common in most of the country. Or worse, after feeling abandoned by this Court, and knowing in their bones that California's law defies the constitution, some may refuse to comply and thereby put themselves in legal jeopardy. Waiting for sufficient "percolation" from other appellate courts is a luxury they do not have and cannot afford. It will be cold comfort to them if this Court vindicates their rights in some future case years from now, after they have given up their constitutionally protected magazines or been imprisoned for refusing to do so.

The desire to wait for more input from appellate courts is understandable in most contexts, but "percolation is of little value when lower courts in the jurisdictions that ban AR-15s appear bent on distorting this Court's Second Amendment precedents." *Snope v. Brown*, 145 S. Ct. 1534, 1538 (2025) (Thomas, J., dissenting from denial of certiorari). This Court can wait for another case, or even ten more cases, but the rulings will all follow the same tired *Bruen*-defying logic the Ninth Circuit exhibited here: They first attempt to sidestep the *Bruen* analysis entirely by arguing common firearms and magazines owned by millions of Americans are somehow not even "arms" under the plain text of the right, but then decide that even if they *are* arms, banning them is consistent with historical tradition

because some states restricted bowie knives in the mid-19th century. That no state banned the *actual* 19th century analogue to the modern arms at issue (revolvers and repeating rifles) is rarely even mentioned.

While *Amici* are aware that this Court is looking to "address the AR-15 issue soon, in the next Term or two", *Snope*, 145 S. Ct. at 1535 (Kavanaugh, J., statement respecting denial of certiorari), resolving the magazine question is just as critical, and affects far more than AR-15s. For many decades now, magazines over ten rounds have come standard with the most common handguns in the country. *See, e.g.* Paul Barrett, *How the Glock Became America's Weapon of Choice*, NPR (Jan. 24, 2012), https://www-.npr.org/2012/01/24/145640473/how-the-glock-beca-me-americas-weapon-of-choice ("The original Glock 17 . . . could hold 17 bullets in its magazine."). Tens of millions of them are thus in circulation for use in the "quintessential self-defense weapon." *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008).

In this brief, *Amici* will address two methodological reasons this case should be granted certiorari. First, this Court could use this matter to re-confirm the definition of an "arm" within the plain text of the Second Amendment. Second, it can explain that in proceeding with historical analogues, lower courts must not resort to higher levels of generality to avoid closer and more apt historical regulation.

But there is another reason *this* case should be granted certiorari: the Ninth Circuit's Second Amendment jurisprudence is in particular disarray,

with numerous dissenting judges openly calling out what they see as the bad faith of their colleagues. As this brief will demonstrate, gun rights litigants have virtually no chance of prevailing on the west coast absent this Court's firm intervention here. The Ninth Circuit is clearly testing whether it is really true that "[l]ower court judges may sometimes disagree with this Court's decisions, but they are never free to defy them." *Nat'l Insts. of Health v. Am. Pub. Health Ass'n*, No. 25A103, 2025 U.S. LEXIS 2742, at *6 (Aug. 21, 2025) (Gorsuch, J., and Kavanaugh, J., concurring in part and dissenting in part.).

Enough is enough. This petition should be granted, as this Court must not stand idly by while the Ninth Circuit "butcher[s] the Second Amendment and give[s] a judicial middle finger to [this Court]." *Duncan v. Bonta*, 133 F.4th 852, 890 (9th Cir. 2025) (R. Nelson, J., dissenting). If this Court is not inclined to grant certiorari in this matter and denies the petition, immediate harm would result to countless California gun owners who possess the magazines at issue, because after the Ninth Circuit's mandate issues, those magazines would be illegal to possess. *Amici* request that in that circumstance, this Court should hold this case indefinitely until the issue is decided elsewhere, and remand it thereafter for further proceedings.

ARGUMENT

I. Magazines Are "Arms" Under the Plain Text of the Second Amendment.

By its plain language, *Bruen* eschews a two-step analytical test for deciding Second Amendment challenges: "Despite the popularity of th[e] two-step approach, it is one step too many." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 19 (2022). Indeed, just last year, this Court reiterated its one-step substantive analysis: "In *Bruen*, we explained that when a firearm regulation is challenged under the Second Amendment, the United States must show that the restriction 'is consistent with the Nation's historical tradition of firearm regulation.'" *United States v. Rahimi*, 602 U.S. 680, 689 (2024) (citing *Bruen*, 597 U.S. at 24); *see also id.* at 691 ("when the Government regulates arms-bearing conduct, . . . it bears the burden to 'justify its regulation.'").

To be sure, a Second Amendment challenge requires that the restriction at least *implicate* the right to keep and bear arms. *Bruen*, 597 U.S. at 17. That's why a plaintiff challenging a gun law "has the initial burden of showing that 'the Second Amendment's plain text covers [his] conduct.' " *Snope*, 145 S. Ct. at 1538 (Thomas, J., dissenting from denial of certiorari) (quoting *Bruen*, 597 U.S. at 17.). Just as a First Amendment free speech case must involve speech, so too must a Second Amendment case involve the acquisition, ownership, possession, carry, use of, or commerce in, arms.[2] This is not meant to be an

[2] *See Luis v. United States*, 578 U.S. 5, 26 (2016) (Thomas, J., concurring in the judgment) ("Constitutional rights thus

intensive analytical step, but rather a simple qualifier. For example, if a law in any way regulates arms-bearing conduct, the plain text is met. *Id*. at 1536 (Thomas, J., dissenting from denial of certiorari) (quoting *Rahimi*, 602 U.S. at 691.).

This discussion is critical here because, ever since *Bruen* was decided, courts have exaggerated the requirements of the "first step" to dodge the historical analysis altogether, shifting the burden away from the government. Under these "extremely narrow reading[s]," the Second Amendment is "wrongly. . .reduced to 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *Yukutake v. Lopez*, 130 F.4th 1077, 1092 (9th Cir. 2025) (citing *Bruen*, 597 U.S. at 70).[3] This exaggerated "plain text analysis" approach ultimately allows lower courts to treat obvious arms-related questions as though they are not, making a mockery of the Second Amendment and *Bruen*.[4]

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implicitly protect those closely related acts necessary to their exercise.").

[3] Unsurprisingly, because *Yukutake* was a Ninth Circuit ruling that sided with plaintiffs challenging a gun law, it has now been vacated to be reheard en banc. Order, *Yukutake v. Lopez*, No. 21-16756, 2025 U.S. App. LEXIS 18691 (9th Cir. July 28, 2025). More on that later.

[4] Several Members of this Court have already cautioned that lower courts are departing from *Bruen*'s framework. Justice Thomas has criticized the practice of inflating the "plain text" inquiry to avoid historical analysis, emphasizing that once a law regulates arms-bearing conduct, the burden shifts to the government. *Snope,* 145 S. Ct. at 1536–38 (Thomas, J., dissenting from denial of certiorari) (citing *Rahimi*, 602 U.S. at 691). Justice Kavanaugh likewise stated that the "common use"

Magazines are "arms" that meet the plain text of the Second Amendment because they are a critical piece of modern "weapon[s] of offence" that a person "takes into his hands, or useth in wrath to cast at or strike another." *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008) (citing founding-era dictionaries).[5] Indeed, as one 1794 thesaurus observed, "*all firearms* constituted 'arms," *id.* (emphasis added), and magazines are necessary to the function of many modern firearms.

Even the Ninth Circuit did not dispute that necessity, conceding that some "firearms require the use of a magazine in order to operate." *Duncan v. Bonta*, 133 F.4th 852, 867 (9th Cir. 2025). But it then decided that there was no reason any firearm needed a magazine over ten rounds to function (though it did not explain why this logic wouldn't apply to any magazine with a capacity of more than a single round). *Id.* at 868.

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test remains controlling. *Id.* at 1535 (Kavanaugh, J., statement respecting denial of certiorari). In *Rahimi*, Justice Gorsuch warned against allowing analogical reasoning to devolve into the same "two-step" balancing test this Court repudiated, 602 U.S. at 711 (Gorsuch, J., concurring), and Justice Barrett highlighted the dangers of reading history at such a high level of generality that it "waters down the right," *id.* at 740 (Barrett, J., concurring). These concerns map directly onto the Ninth Circuit's reasoning here, reinforcing why review is warranted now.

[5] This definition was consistent after the founding too: "Arms. . .is used for whatever is intentionally made as an instrument of offence. . ." Joseph Bartlett Burleigh, *The American Manual: Containing a Brief Outline of the Origin and Progress of Political Power and the Laws of Nations* 31 (1852).

Of course, the same could be said about *any* part of a firearm except what is strictly necessary for one to fire. Sights, scopes, grips, handguards, and so forth are not strictly "necessary" to a firearm. They just all contribute to making it usable and effective. "Thus, in the view of the Ninth Circuit in *Duncan*, no attachment, accessory, or accoutrement, regardless of its increased efficiency, its safety enhancements, or historical availability is protected." *Morse v. Raoul*, No. 3:22-cv-02740-DWD, slip op. at 14 (S.D. Ill. Sept. 5, 2025). "Even something as essential to the firearm as a manufacturer-issued trigger could be considered an unprotected "accessory" under the majority's view because *that particular* trigger is not essential to the function of the firearm, as it could be swapped out for one with less effective, and therefore less 'dangerous,' attributes." *Duncan*, 133 F.4th 8at 917 (VanDyke, J., dissenting).

This "standard" very obviously amounts to blatant interest balancing,[6] as the judges in the Ninth Circuit majority are announcing that they and the government—and not the American people—get to

[6] For all intents and purposes, the Ninth Circuit has revived interest balancing. Before *Bruen*, that court would look to the "severity of the burden" before deciding which level of scrutiny to apply. *See, e.g., Pena v. Lindley*, 898 F.3d 969, 977 (9th Cir. 2018). Now, it looks to whether a gun law "meaningfully constrains" the Second Amendment right before any historical analysis even occurs, borrowing language lifted directly from pre-*Bruen* precedent. *B&L Productions, Inc. v. Newsom,* 104 F.4th 108, 118 (9th Cir. 2024) (citing *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 680 (9th Cir. 2017)). Of course, asking whether a gun law "meaningfully constrains" the right to keep and bear arms *is* obviously just an inquiry into the "severity of the burden." It's the same concept, stated with different words.

determine what is "necessary" for self-defense, balanced against their perceived benefits to public safety. But that is not what this Court's precedent says. As the main dissent explained, "the Second Amendment grants citizens the *choice* of commonly owned arms to protect themselves. The government doesn't get to decide for the people." *Duncan*, 133 F.4th at 899 (Bumatay, J, Ikuta, J., R. Nelson, J., and VanDyke, J., dissenting) (citing *Heller*, 554 U.S. at 629).

Yet even if the Ninth Circuit were right that magazines are somehow not "arms," that still would not change the result. As stated previously, the Ninth Circuit conceded that magazines are necessary for many firearms to function. That concession alone requires the historical analysis to proceed, because as the Tenth Circuit recently explained, "[t]he Second Amendment's text is not limited to direct prohibitions on possessing or using firearms. It states that the 'right of the people to keep and bear Arms, shall not be infringed.'" *Ortega v. Grisham*, No. 24-2121, 2025 U.S. App. LEXIS 21192, at *13 n.3 (10th Cir. Aug. 19, 2025).

Likewise, this Court has not endorsed any separate interest-balancing Second Amendment test for "lesser" implied rights. Instead, it has stated clearly that "when a firearm regulation is challenged under the Second Amendment, the [government] must show that the restriction 'is consistent with the Nation's historical tradition of firearm regulation.'" *Rahimi*, 602 U.S. at 689 (citing *Bruen*, 597 U.S. at 24).

In sum, magazines are arms, and clearly so, because they are "modern instruments that facilitate armed self-defense." *Bruen*, 597 U.S. at 28. But even if they were not, restrictions on them plainly at least implicate the plain text of the Second Amendment, so they can only be restricted if there is a historical tradition of doing so.

II. This Court Should Grant Certiorari to Confirm That Courts Must Not Turn to Higher Levels of Generality When Closer Analogues Are Available.

The proverbial square peg does not fit in the round hole – unless you keep making the round hole bigger until it does. The Ninth Circuit's en banc analysis adopts exactly this tactic.

The Ninth Circuit relied on a few types of historical laws to uphold magazine capacity restrictions: gunpowder storage laws, trap gun laws, and bowie knife concealed carry restrictions (as well as similar laws in that vein). *Duncan*, 133 F.4th at 874-876. *Amici* need not revisit why each of these comparisons fail as the en banc dissenting judges did a splendid job of that. *See id*. at 901-909 (Bumatay, J, Ikuta, J., R. Nelson, J., and VanDyke, J., dissenting).

Perhaps more problematic than the historical evidence the en banc court relied on is the historical evidence that it ignored. Substantially closer analogues to modern-day magazines *did* exist in the 19th century in the form of revolvers and repeating

rifles.[7] The majority acknowledged this, but only in passing: "Repeating Henry and Winchester rifles, which became popular in the decades following the Civil War, required a shooter to pump a lever manually, a process that allowed about one shot per three seconds—much slower than the firing rate of a modern semi-automatic firearm." *Id.* at 874.

While it is true that lever-action rifles and single-action revolvers were slower than modern semiautomatics, they were a dramatic advancement from the single-shot firearms than preceded them. In terms of speed of firing, they are far closer to modern semiautomatic handguns and rifles than they are to muskets. *See* Slick Sixguns, *Firing 129 Year Old Winchester 1873 .44-40*, YouTube (Jan. 5, 2023), https://www.youtube.com/shorts/O8Xz2EhDpAU (demonstrating how fast a Winchester 1873 can be fired.).

As most relevant here, these firearms were also a massive technological advancement in terms of *capacity*. Where a flintlock pistol or a musket gave its wielder one shot before needing to reload, a revolver's cylinder held 5 or 6 rounds, while a repeating rifle held 6 to 17 rounds, depending on the caliber and size of the rifle. The first popular repeating rifle, the Henry Rifle, gained notoriety during the Civil War. Thanks

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[7] *Amici* believe that the lack of similar analogues in the founding era is dispositive because it is "the balance struck by the founding generation" that matters most in interpreting the Second Amendment. *Rahimi*, 602 U.S. at 692. But for the purposes of this brief, *Amici* will assume that Reconstruction-era laws and circumstances have some weight too, in order to show that the Ninth Circuit's analysis is still erroneous even with that extra leeway.

to its 15-round capacity, it was dubbed by the Confederates as "that damned Yankee rifle that they load on Sunday and shoot all week." U.S. Nat'l Park Serv., *1860 Henry* (Apr. 10, 2015), https://www.nps.gov/fosm/learn/historyculture/1860-henry.htm. "Though not issued by the army, a soldier could buy one of these rifles if they saved their money." *Id*.

Even accepting for the sake of argument that Reconstruction Era laws are relevant to the analysis, the proper analogue to modern firearm magazines are the commonly owned repeating arms of the 19th century, not bowie knives or poorly stored gunpowder. Yet the Ninth Circuit, like other courts, relied on a very high level of generality in order to uphold the law at issue. It is no wonder why they had to do so: revolvers and repeating rifles were almost never restricted or banned; at most, only concealed carry of such arms was limited. As the District Court in this case observed, "[t]hough 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." *Duncan v. Bonta*, 695 F. Supp. 3d 1206, 1242 (S.D. Cal. 2023).

Even if we are even more generous to the government and look beyond the Reconstruction Era through to the end of the century, "[t]he only pre-1900 statutory precedent for such a law is from Florida in 1893, and it is dubious. Before that, there were three prior sales prohibitions that covered many or most handguns. One of these was held to violate the Second Amendment, and the other two are plainly

unconstitutional under *Heller*." David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. Legis. 223, 293 (2024).

The lack of historical restrictions on repeating arms, including those with capacities over ten rounds, should be dispositive in this case. Instead, the Ninth Circuit looked to increasingly vague "analogues" to bend over backwards for the government's benefit. In doing so, it ignored what several Justices of this Court advised in *Rahimi*. "Courts must proceed with care in making comparisons to historic firearms regulations, or else they risk gaming away an individual right the people expressly preserved for themselves in the Constitution's text." 602 U.S. at 711 (Gorsuch, J., concurring); *see also id.* at 736 (Kavanaugh, J., concurring) (courts must not "let constitutional analysis morph into policy preferences under the guise of a balancing test that churns out the judge's own policy beliefs.").

In other words, the Ninth Circuit "read a principle at such a high level of generality that it water[ed] down the right." *Id.* at 740. (Barrett, J., concurring). While there may always be disagreements in the analysis when it comes to the degree of similarity between a modern law and proposed analogues, one rule this Court should more clearly articulate is that when a close analogue exists to the modern technology or societal problem at issue, lower courts may not resort to more stretched analogies in order to avoid the inconvenient fact that the closer historical analogue does not support their position. This Court has already implied as much, but some lower courts have not gotten the message. *See, e.g., Bruen*, 597 U.S. at

26 ("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.).

This has become a widespread issue. For example, in a case concerning (in part) new carry bans in restaurants that happen to serve alcohol in Hawaii and California, the Ninth Circuit ignored the lack of historical carry restrictions in bars and taverns. Instead, it pointed to colonial laws that restricted the sale of liquor to militia members, and also a few cities that banned carry in ballrooms, and upheld the modern laws. *See, e.g., Wolford v. Lopez*, 116 F.4th 959, 986 (9th Cir. 2024). It also ignored that prior generations solved this problem by barring only presently intoxicated people from carrying arms, not sober individuals who happened to be in proximity to alcohol. *See United State v. Connelly*, 117 F.4th 269, 282 (5th Cir. 2024) (history supports "at most, a ban on carrying firearms while an individual is *presently* under the influence.").

In a case concerning non-resident firearms carry and the onerous permitting processes which included wait times spanning over eight months (required even for individuals that have a carry permit in their home state), the Supreme Judicial Court of Massachusetts upheld the non-resident permit requirement by pointing to "going armed" and surety laws. *Commonwealth v. Marquis*, 495 Mass. 434, 456 (2025). In doing so, it ignored the far closer historical analogue: the very extensive historical tradition of

"traveler's exception" laws, which exempted visitors from other states from concealed carry restrictions. *See* Brief for Nat'l Rifle Ass'n of Am. & Second Amend. Found. as *Amici Curiae*, *Commonwealth v. Donnell*, No. SJC-13561 (Mass. filed Aug. 16, 2024), at 16–28 (discussing many traveler's exception laws).[8]

When a close historical analogue is apparent, courts should not rise to higher levels of generality, particularly when prior generations solved the same problem in a different way (i.e., exempting travelers from carry restrictions rather than requiring them to get a permit). That is exactly what this Court has already suggested, but lower courts are ignoring its guidance. *See Bruen*, 597 U.S. at 26-27 ("[I]f earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional.").

More generalized analogues should be reserved only to those cases that present a truly new societal problem or technological change that lacks a distinctly similar analogues in our history. This Court can re-confirm and strengthen that methodological principle by granting cert here.

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[8] *Commonwealth v. Donnell* was heard by the Supreme Judicial Court of Massachusetts alongside *Commonwealth v. Marquis*. Mr. Marquis is now seeking certiorari with this Court. *See* Petition for a Writ of Certiorari, *Marquis v. Massachusetts*, No. 25-5280 (U.S. July 31, 2025). *Amici* hope that petition will also be granted.

III. The Ninth Circuit's Mistreatment of the Second Amendment is Exceptional and Independently Warrants Certiorari

While *Amici* have raised concerns about several circuit courts of late, none has been more determined in its efforts to undermine B*ruen* than the Ninth Circuit. This case therefore presents an opportunity to correct the most defiant of the inferior courts. This Court need not take *Amici*'s word for it; the hostility of the Ninth Circuit towards the Second Amendment has been confirmed by several judges on that court and demonstrated by its own statistics as to granting petitions for en banc rehearing.

By way of timely and illustrative example: recently, the Ninth Circuit decided to rehear en banc a case challenging Hawaii state laws[9] which impose a ten-day (later amended to 30-day) time limit to buy a firearm after having receiving the requisite permit to purchase, and then require the purchaser to appear with their new firearm at their local law enforcement agency for "inspection" within five days. *Yukutake*, 130 F.4th at 1081. As there is no historical tradition to support these novel restrictions the three-judge panel correctly struck them down.

In a vacuum, it would be unclear why a court enjoining such an idiosyncratic pair of laws that are unique to one state would warrant the extraordinary measure of en banc rehearing. *See Cassirer v. Thyssen-Bornemisza Collection Found.,* 107 F.4th 882, 883 (9th Cir. 2024) (Graber, J., dissenting from

[9] Hawaii Revised Statutes § 134-2(e), Hawaii Revised Statutes § 134-3

the denial of rehearing en banc) (rehearing en banc is reserved for "extraordinary" cases.) Even if some may disagree with the three-judge panel's ruling or aspects of its analysis, "we do not rehear en banc every appeal where the panel gets it wrong." *United States v. Fort*, 478 F.3d 1099, 1104 (9th Cir. 2007) (Wardlaw, J., Pregerson, J., Reinhardt, J., W. Fletcher, J., Fisher, J., and Paez, J., dissenting from the denial of rehearing en banc).

But news of rehearing being granted in *Yukutake* was not surprising to those who have closely followed or participated in Second Amendment litigation in the Ninth Circuit. If a gun owner living in Hawaii or the West Coast desires to challenge a particular gun law they believe violates the Second Amendment, the Ninth Circuit's track record serves as the ultimate chilling effect to dissuade them from bothering to turn to the court system. Even before *Bruen*, it had an astonishing "undefeated, 50-0 record" in rejecting Second Amendment challenges–a record that even caught the notice of this Court. *Rahimi*, 602 U.S. at 712 (Gorsuch, J., concurring) (quoting *Duncan v. Bonta*, 19 F.4th 1087, 1167 n.8 (9th Cir. 2021) (VanDyke, J., dissenting)).

This apparent disconnect from the demands of binding caselaw is not limited only to marginal issues but strikes at the core of the Second Amendment. Two decades ago, the Ninth Circuit ruled that there was no individual right to own or possess arms in *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002)—a decision that would be corrected by *Heller* six years later. As another example, in *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016), the Ninth Circuit ruled that

there was no right to carry a concealed firearm in public. *Id.* at 929. To be sure, that ruling left open the possibility that openly carrying arms may be protected by the Second Amendment. *Id.* at 942. But the Ninth Circuit slammed that door shut a couple of years later in *Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021), where it held that the "and bear" part of the Second Amendment meant nothing at all, and there was no right to publicly bear arms either openly or concealed. That obviously erroneous ruling was, of course, ultimately undone by *Bruen*.

Besides wrongly rejecting the existence of a right to carry, *Peruta* and *Young* had something else in common, too: both were en banc rulings that vacated earlier rulings by three-judge panels of the Ninth Circuit that had ruled in the plaintiffs' favor. They are not unusual in that respect, because when a panel of the Ninth Circuit actually strikes down a law for violating the Second Amendment, the ruling "will almost certainly face an en banc challenge. This prediction follows from the fact that this is *always* what happens when a three-judge panel upholds the Second Amendment in this circuit." *McDougall v. Cty. of Ventura*, 23 F.4th 1095, 1119 (9th Cir. 2022) (VanDyke, J., concurring).[10] It's nearly as certain to occur as tomorrow's sunrise.

The statistics on the Ninth Circuit's en banc petition grants bear this out. Normally, a case

[10] Judge VanDyke was exactly right. The *McDougall* panel ruling was indeed vacated following a vote to take the case en banc, though it was never heard en banc because it was instead remanded after *Bruen*. *See McDougall v. Cty. of Ventura*, 26 F.4th 1016, 1016 (9th Cir. 2022).

receiving en banc review is exceedingly rare. For context, in 2022 and 2023, there were a combined 16,343 new appeals filed in the circuit. *See* U.S. Cts. for the Ninth Cir., *2023 Annual Report* 59 (2023). In that same two-year period, 1,351 en banc petitions were filed, of which just *26* were granted rehearing. *Id*. at 61. In other words, only about 2% of en banc petitions are granted, and only about 0.16% of all filed appeals ever get en banc review. Yet despite how rare en banc rehearing is overall, somehow every single case in a final judgment posture in which plaintiffs prevail on Second Amendment challenges has received en banc review in the Ninth Circuit, with only one very recent exception in which California did not seek en banc review.[11]

By *Amici*'s count, since *Heller*, there have been at least nine instances of the Ninth Circuit vacating Second Amendment rulings and granting en banc review. Besides *Yukutake*, *Peruta*, *Young,* and *McDougall* which were already mentioned, the court also granted en banc review and vacated Second Amendment victories in *Teixeira v. Cty. of Alameda*, 873 F.3d 670 (9th Cir. 2017), *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021), *Teter v. Lopez*, 125 F.4th 1301 (9th Cir. 2025), *Duncan v. Bonta*, 133 F.4th 852 (9th Cir. 2025), and *United States v. Duarte*, 137 F.4th 743 (9th Cir. 2025).

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[11] *Nguyen v. Bonta*, 140 F.4th 1237 (9th Cir. 2025). With the mandate having recently issued, *Nguyen* becomes the first ever lasting Second Amendment victory in Ninth Circuit history, 17 years after *Heller*. Of course, one token victory being allowed to stand does not undo the much longer history of en banc reversals.

This would perhaps be more understandable if it reflected a general interest by the Ninth Circuit in developing Second Amendment jurisprudence. Were that the case, however, one would expect it to have reheard a panel decision *upholding* a gun law too. But with only one exception over a decade ago,[12] that has not happened even when rehearing was plainly merited.

As an example, *Amici* recently requested en banc review in one of their own cases about expansive new bans on public carry by California and Hawaii. *See* Petition for Rehearing En Banc*, May v. Bonta*, No. 23-4356 (9th Cir. filed Sept. 19, 2024).[13] While there were many errors in the panel's ruling, the most disheartening was the panel's (hopefully mistaken) reliance on a racist "Black Code" as one of just two historical laws it used to justify Hawaii's modern ban on carrying a firearm on any private property open to the public unless the owner gives permission.[14] *Wolford v. Lopez*, 116 F.4th 959, 995 (9th Cir. 2024). The other was a colonial hunting regulation entitled "An Act for the Preservation of Deer." *Id.* The ruling ignored *Bruen*'s clear instruction that a mere two outlier laws are not enough to create a historical tradition--even if you could set aside the repugnant

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[12] *Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012). And even in that case, the government still ultimately won.

[13] *May v. Bonta* was consolidated on appeal with *Wolford v. Lopez*, which was the title of the eventual ruling.

[14] The former Governor of Louisiana, who served from 1868-72 later confirmed in his memoir that the law "of course, was aimed at the freedman." Henry Clay Warmoth, *War, Politics, and Reconstruction: Stormy Days in Louisiana* 278 (2nd ed., Univ. of S. Carolina Press 2006).

provenance of racist laws like the one the *Wolford* panel relied on. *Bruen*, 597 U.S. at 65 ("the Texas statute, and the rationales set forth in *English* and *Duke*, are outliers. In fact, only one other State, West Virginia, adopted a similar public-carry statute before 1900."). In this aspect of the ruling, the panel also created a circuit split with the Second Circuit's ruling in *Antonyuk v. James*, 120 F.4th 941, 1048 (2d Cir. 2024). That alone justified en banc review, but rehearing was even more appropriate considering the exceptional importance of the question of limiting public carry on almost all private property held open to the public. *See* Fed. R. App. P. 40(b)(2) (2024).

Despite all of these factors that merited rehearing, the Ninth Circuit denied the petition, even over the dissent of eight judges who would have granted it and reheard the case en banc. *Wolford v. Lopez*, 125 F.4th 1230, 1231 (9th Cir. 2025) (Collins, J., and Bress, J., dissenting); *Id.* (VanDyke, J., Callahan, J., Ikuta, J., R. Nelson, J., Lee, J., and Bumatay, J., dissenting).

This very case is certainly no exception, as it was in *Duncan* that the Ninth Circuit proved that it will even break its own internal rules to ensure that Second Amendment litigants lose. *Duncan v. Bonta*, No. 23-55805, 2023 U.S. App. LEXIS 25723, at *7 (9th Cir. Sep. 28, 2023) (VanDyke, J., dissenting) (explaining how after missing a deadline to call for en banc review, "a discrete collection of judges—again, not the entire court—struck a 'compromise,' circumvented our own rules, and allowed the en banc call to move forward. But only in this one case."). It is now clear to every informed observer that the *Duncan*

plaintiffs never had any real chance of prevailing, barring this Court's intervention on this petition.

It's hard not to imagine citizens simply intent on exercising their rights losing confidence in the system itself in the face of the Ninth Circuit's track record. This is not a "win some, lose some" scenario for Second Amendment litigants like *Amici*. Instead, they always lose in the Ninth Circuit, and even if they do win, that court consistently reverses their wins en banc. Judges of the Ninth Circuit have confirmed as much. "If the protection of the people's fundamental rights wasn't such a serious matter, our court's attitude toward the Second Amendment would be laughably absurd." *Duncan v. Bonta*, 83 F.4th 803, 808 (9th Cir. 2023) (Bumatay, J., Ikuta, J., R. Nelson, J., and VanDyke, dissenting); "17/29ths of our bench is doing its best to avoid the [Supreme] Court's guidance and subvert its approach to the Second Amendment. That is patently obvious to anyone paying attention. To say it out loud is shocking only because judges rarely say such things out loud." *United States v. Duarte*, 108 F.4th 786, 788 (9th Cir. 2024) (VanDyke, J., dissenting from grant of rehearing en banc).

Second Amendment litigants in the Ninth Circuit have nothing left but the hope that this Court finally tires of receiving the "judicial middle finger" from the Ninth Circuit and begins regularly reversing its rulings. *Duncan,* 133 F.4th at 890 (R. Nelson, J., dissenting). It can begin to do so by granting certiorari in this case.

CONCLUSION

For the reasons discussed above and in Petitioner's brief, this Court's intervention is both appropriate here and urgently needed.

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