No. 17-56081

In The United States Court of Appeals For the Ninth Circuit

VIRGINIA DUNCAN, ET. AL.
Plaintiffs-Appellees,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of California
Case No. 1:17-CV-1017-BEN-JLB (HON. ROGER T. BENITEZ)

BRIEF OF *AMICUS CURIAE*, THE SHOOTER'S COMMITTEE ON POLITICAL EDUCATION, IN SUPPORT OF PLAINTIFF-APPELLEES' POSITION ON APPEAL AND URGING THAT THE PRELIMINARY INJUNCTION BE AFFIRMED
BRIEF FILED WITH THE CONSENT OF THE PARTIES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(A), the *amicus curiae*, the Shooter's Committee on Political Education ("SCOPE, Inc."), makes the following disclosures: it is a not-for-profit organization registered in the State of New York that has no parent corporation and no publicly held corporation or any portion of it.

Respectfully submitted,

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CERTIFICATION PURSUANT TO FED R. APP. P. 29(A)(4)(E)

Pursuant to Fed. R. App. P. 29(a)(4)(E), the Shooter's Committee On Political Education ("SCOPE, Inc.") affirms that no counsel for a party authored this brief in whole or in part and that no person other than the *amicus*, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Shooter's Committee on Political Education is an organization dedicated to the defense of Second Amendment liberties secured by law. Counsel for SCOPE, Inc. is dedicated to legal work concerning the Second Amendment and firearms law. SCOPE, Inc. has actively defended, through non-partisan advocacy, legal policies that protect American citizens' rights to keep and bear arms for lawful purposes. This brief is supported by members of SCOPE, Inc., which defends the Second Amendment rights of the legions of New York State gun owners. The Shooter's Committee on Political Education submits this *amicus curiae* brief to support the Plaintiff-Appellees' position on appeal and urge this Court to affirm the preliminary injunction. Counsel for Appellant (ANTHONY O'BRIEN, ESQ.) and Counsel for Appellees (ANNA BARVIR, ESQ.) consented to the filing of this *amicus curiae* brief on behalf of their clients via telephone communication. This brief is timely filed in accordance with this Court's briefing schedule.

PRELIMINARY STATEMENT

Amicus submits this brief on behalf of Virginia Duncan and all similarly situated persons whose Second Amendment rights are being violated because of an arbitrary legislative fiat. Virginia Duncan is an ordinary, law-abiding, American citizen. She has done nothing wrong to deserve deprivation of her fundamental constitutional Right to Keep and Bear Arms for lawful purposes. She has never done anything to deserve deprivation of any of her fundamental rights under the United States Constitution, except in the eyes of the California legislature.

The California state legislature, like the New York state legislature, seems to think that many common and otherwise lawful exercises of the Second Amendment Right to Keep and Bear Arms need to be constrained, curtailed, and legislated out of existence. For many such legislators, the Second Amendment is an unfortunate inkblot on the fabric of our otherwise perfect Constitution. Some legislators in these states wish they could take an eraser to this constitutional right.

Allowing a state actor to erase a clear constitutional right gives that actor the license to erase any clear constitutional right it sees fit. The Second Amendment is not an inkblot on our timeless, treasured Constitution. California Penal Code § 32310 criminalizes the possession of

"large capacity magazines," which are in effect standard capacity magazines that were designed to be used with commonly owned, constitutionally protected firearms such as Glock pistols. California has an interest, even a duty, to protect its citizens from violent crime. There is, however, no rational relationship between limiting magazine capacity and the lethality of a shooting.

Section 32310 does nothing to reduce a firearm's lethality. Besides, magazines can be changed in a split-second. With the millions of so-called "large capacity magazines" in circulation, there is no reason to believe that a determined criminal would abide by § 32310. *Amicus* submits that "public safety" is not the real, or only, rationale behind § 32310. It is a matter of common knowledge that the State of California and other states like New York have some of the most oppressive and hostile laws to burden law-abiding gun owners among the fifty states. California's gun restrictions are analogous in law and policy to the New York SAFE Act, passed by legislatures and a governor who are openly hostile to gun rights. However, the Supreme Court set forth precedent that law-abiding citizens have a right to keep and bear commonly owned weapons within the home for self-defense, unconnected with service in a militia, and this right extends to even

modern weapon designs that were not in existence at the time the Second Amendment was ratified. *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016).

The mere fact that a state disagrees with the policy choices underlying a particular guarantee of the Bill of Rights, like the Second Amendment, says more about that legislature's policy goals than our honorable body of jurisprudence. States that attempt to subvert clear Supreme Court directives find themselves on the wrong side of history.

Our national history has seen this pattern of behavior before: the Constitution protects a right, the Supreme Court applies that right against the states, and then a state — or states — resist enforcement of the Supreme Court's ruling. The most sorrowful example of this delinquent kind of state action occurred in the wake of *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). The landmark *Brown* decision, a zenith of justice, reversed the horrific *Plessy v. Ferguson*, 163 U.S. 537 (1896), precedent that permitted "separate but equal" segregated accommodations and banned racial segregation in public schools. Sadly, certain states at the time were resistant to the *Brown* court's holding that the "separate but equal" facilities are inherently unequal. Notably, the Texas Attorney General John Ben Shepperd attempted to create legal barriers to prevent implementation of *Brown*. Mark C. Howell, John Ben Shepperd, Attorney General of the State

of Texas: His Role in the Continuation of Segregation in Texas, 1953–1957 (July 2003) (unpublished Master's thesis, University of Texas) (on file with University of Texas). Even more distressingly, President Eisenhower deployed the 101st Airborne Division to prevent the Arkansas National Guard from preventing black students from attending Little Rock Central High School. *See* Anthony Lewis, *President Sends Troops to Little Rock, Federalizes Arkansas National Guard; Tells Nation He Acted to Avoid An Anarchy*, N.Y. Times, September 24, 1957, at A1.

Justice Scalia's majority opinion made it clear that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *District of Columbia v. Heller*, 554 U.S. 570, (2008) (holding that an absolute prohibition of handguns held and used for self-defense in the home violates the Second Amendment to the United States Constitution). Since what California refers to as "large capacity magazines" are components designed to work with constitutionally protected handguns and rifles, a plain reading of *Heller* implies that California Penal Code § 32310 is one such option that is off the table to California policymakers. For the reasons set forth below, *amicus* argues that § 32310 violates even minimal rational basis review; that a violation of rational basis review is a violation of any applicable standard of scrutiny in this case; and that § 32310 violates the central value behind

the Second Amendment. For these reasons, *amicus* respectfully requests that this Court AFFIRM the District Court's issuance of a preliminary injunction against Appellant, and DISMISS this appeal in its entirety.

ARGUMENT

I. CALIFORNIA PENAL CODE § 32310 FAILS ANY STANDARD OF REVIEW BECAUSE THERE IS NO RATIONALLY DERIVABLE RELATIONSHIP BETWEEN PROHIBITING POSSESSION OF LARGE CAPACITY MAGAZINES AND PREVENTING GUN CRIME.

a. Section 32310 is at minimum subject to rational basis review.

The rational basis test is the minimum standard of review applicable to any law challenged under the Fourteenth Amendment. While states are permitted a wide scope of discretion to enact laws, any statute that lacks rational basis review is doomed to be enjoined. *See McGowan v. Maryland,* 366 U.S. 420, 425 (1961). Although the rational basis test has been formulated in number of different ways, the test, at a minimum requires determining whether: (1) the law is rationally related to (2) a legitimate state interest. *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). A statute fails rational basis review if a particular legal classification "rests on grounds wholly irrelevant to the achievement of the State's objective." *McGowan v. Maryland*, 366 U.S. at 425.

In the case at bar, neither Appellant nor Appellee argue that minimum rational basis scrutiny is appropriate. In the seminal case *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court did not set forth any particular standard of scrutiny in adjudicating Second Amendment claims. Instead, it held that a categorical ban on in-home possession of handguns violated any constitutional standard of scrutiny. Similarly, *amicus* argues that California Penal Code § 32310 violates any standard of scrutiny.

Amicus asks the court to consider its point of counsel that § 32310's failure to meet rational basis scrutiny necessarily ends the analysis and requires a decision in favor of the Appellees.

b. A rational relationship requires a rational derivation.

The rational basis test requires that a law bear a rational relationship to a legitimate state interest. American case law is replete with examples of many statutes affirmed and others enjoined under the rational basis test. However, the Supreme Court has never defined precisely what counts as a "rational relationship." Some guidance has been given that a statute will stand unless the government action is "clearly wrong, a display of arbitrary

power," and "not an exercise of judgment." *Matthews v. DeCastro*, 429 U.S. 181, 185 (1976) (citing *Helvering v. Davis*, 301 U.S. 619, 640 (1937)).

For example, rational basis review has been used to declare a county tax assessor's fifty-percent valuation-at-sale-price. The Supreme Court reasoned that the assessor's valuation and result were arbitrary and unsupported under Pennsylvania state law. *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336, 345 (1989). The Supreme Court, however, did not expressly spell out its reasoning; rather, the Court implicitly applied a standard rational derivation to reach its holding. Words like "arbitrary" and "clearly wrong" help to narrow the scope of rational basis review, but they do not get at the heart of what rational basis review is supposed to accomplish. For that, it is necessary to refer to what making a commitment to rationality means.

Logical consistency and the correctness of the reasoning process underscore any definition of rationality. *A*ny purported legal justification lacking in logical consistency and validity by definition lacks a rational relationship to whatever end the law seeks to obtain.

Therefore, the process of rational derivation, using the standard logical tools must be the *sin qua non* of establishing a rational relationship

under the rational basis test. Otherwise, the rational basis test bears no meaning or value.

c. <u>One cannot derive a logically valid relationship between banning magazines that hold more than ten ammunition cartridges and California's state interest of preventing gun crime.</u>

The ten-round limit argument is logically and empirically invalid because limitations on magazine capacity do not take into account the facts that magazine changes occur in a split second, or that magazines themselves do not impart any "extra lethality" onto a firearm. To invalidate a law under the rational basis standard of review, the burden is on the party attacking the legislative arrangement to negative every conceivable basis which might support it. *Heller v. Doe*, 509 U.S. 312, 320 (1993). There are multiple ways to "negative every conceivable basis," but this standard does not require a litigant or this Court to create an exhaustive list of every possibility. Rather, all that must be shown to satisfy the *Heller v. Doe* standard is to show that a purported legitimate governmental interest is not validly implicated by the statute. Once invalidity is established, every conceivable rational relationship has been proven by impossibility.

Validity and consistency are bedrock requirements for logical derivation. Logician Willard Van Orman Quine illustrated the logical

concepts of validity and consistency better than anyone. Validity is an argument form consisting of such structure "as to be incapable of leading from true premises to a false conclusion." W.V. Quine, Methods of Logic 102 (4th ed. 1982). Any purported argument setting forth either true premises that lead to a false conclusion are accordingly invalid and cannot bear a rational relationship between facts asserted and the conclusion proffered. Likewise, "a truth functional schema is called consistent if it comes out under some interpretation of its letters; otherwise inconsistent." *Id.* at 40. Quine essentially describes the requirement that a logically consistent relationship must involve preservation of the truth-value of a logical system under an interpretation of the truth-value of its constituent components.

Amicus urges this Court to incorporate Quine's definition of validity and consistency in evaluating the relationship between § 32310 and California's legitimate governmental objective in preserving public safety. A close analysis demonstrates there simply is no rational relationship between the magazine ban and protecting public safety. If a magazine can be changed almost immediately, then limiting magazine capacity does not render the gun less lethal than a magazine with a standard capacity. Instead, it hampers law-abiding citizens who bear the unnecessary burden of needlessly purchasing more magazines to achieve the same effect that the

weapon was designed to have. On the other hand, criminals are under no such practical disability. Therefore, limiting magazine capacity does not limit the harm from crime.

Notwithstanding the calls of certain legislators to "do something" about gun violence, the rational basis standard requires that what is done must satisfy the constitutional standard of rationality and not the mere good feelings that come with mere action.

Amicus agrees that the protection of citizens from violent crime is a legitimate state interest. Also axiomatic, however, is the plain truth that firearm lethality is strictly a function of bullet construction, bullet weight, and muzzle velocity. A firearm does not become "more lethal" or "more dangerous" because of a larger capacity magazine. The magazine only feeds ammunition into the firing chamber. While it is true that magazines must be reloaded when they run out of ammunition, the shooter does not have to reload the magazine to keep firing the weapon. The shooter can swap magazines, a process that *amicus* through its collective hundreds of years of experience knows can occur in a split second. Magazines are small and easy to carry. Whether a magazine holds ten rounds or thirty rounds makes little difference; a determined criminal would have no trouble carrying the same amount of ammunition to commit a shooting. Thus, assuming that

Appellant's contentions are true, the State of California cannot put forth a valid or consistent argument that shows limitations in magazine capacity reduce the number of victims shot in the commission of a crime.

Contrary to the Appellant's assertion on Page 51 of its Opening Brief, the statute cannot escape the basic requirements of the rational basis test. Since there is no rational relationship between magazine capacity and California's interest in protecting citizens from gun crime, the Courts inquiry should end. Appellant also errs in showing that a reasonable inference that the law promotes any government interest that would be less efficiently achieved absent the regulation (*see* Page 52 of Appellant's Opening Brief). Since magazine capacity has no effect on a weapon's lethality or ability to shoot any particular number of rounds, the Appellant errs in showing

II. SECTION 32310 VIOLATES THE CENTRAL VALUE OF THE SECOND AMENDMENT.

The central value of the Second Amendment protects the right of individuals to keep commonly owned weapons within the home for self-defense, independent of service in a militia. *District of Columbia v. Heller*, 554 U.S. 570 (2008). The Second Amendment right incorporates against the states through the Due Process Clause of the Fourteenth Amendment.

McDonald v. Chicago, 561 U.S. 742 (2010). Moreover, the Second Amendment protections extend to weapons that were not in existence at the time the Second Amendment was ratified. *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016). *Amicus* asks this Court to extend Second Amendment protections to magazines, an interpretation consistent with the Supreme Court's *Heller* line of cases.

Professor Laurence Tribe formulated the definitive test for discerning the central value behind a constitutional provision. To identify the central value or values implicit in a specific constitutional clause is "to locate that clause within the overall structure of the rest of the Constitution — to ask whether the practices that are either mandated or proscribed by the Constitution presuppose some view without which these textual requirements are incoherent." Laurence H. Tribe & Michael C. Dorf, *On Reading the Constitution* 69-70 (1991). Viewing Tribe's method of analysis vis-à-vis *Heller*, *McDonald*, and *Caetano* sheds light on why magazines deserve Second Amendment protection. Since the Second Amendment protects commonly owned firearms, it must by extension also protect standard features that constitutionally protected firearms were designed with to function properly. Most, semiautomatic pistols are designed to be used with magazines that hold more than ten rounds. Handicapping the

firearms of their ammunition feeding design is equivalent to forcing the gun to perform below its designed specifications. If a protected firearm, for example a Glock 9mm handgun, is designed to fire with a large capacity magazine, then its cyclic rate of fire is designed into the weapon platform. Thus, the State of California is forcing law-abiding gun owners to make their constitutionally protected handgun operate outside of the firearm's design parameters. By logical extension, if a constitutionally protected firearm is designed to fire according to a particular cyclic rate with a particular magazine, then the firearm's design should enjoy the same constitutional protections.

Appellants in the State of California have one pathway to enacting a categorical magazine ban. That option is to amend the United States Constitution. Until then, the Second Amendment cannot be deemed a second-class right.

CONCLUSION

For the foregoing reasons, amicus respectfully asks this Court should AFFIRM the District Court's issuance of the preliminary injunction and DISMISS the appeal in its entirety.

Dated: Buffalo, New York
January 11, 2018

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit on January 11, 2018, using CM/ECF, which will send notification of such filing to counsel of record.

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