No. 20-55437

In the
United States Court of Appeals for the Ninth Circuit

KIM RHODE, *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

Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, Heller Foundation, Virginia Citizens Defense League, Grass Roots North Carolina, Tennessee Firearms Association, BamaCarry, Inc., Florida Carry, Inc., Arizona Citizens Defense League, New Jersey Second Amendment Society, and Conservative Legal Defense and Education Fund in Support of Plaintiffs-Appellees and Affirmance

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DISCLOSURE STATEMENT

The *amici curiae* herein, Gun Owners of America, Inc., Gun Owners Foundation, Heller Foundation, Virginia Citizens Defense League, Grass Roots North Carolina, Tennessee Firearms Association, BamaCarry, Inc., Florida Carry, Inc., Arizona Citizens Defense League, New Jersey Second Amendment Society, and Conservative Legal Defense and Education Fund, through their undersigned counsel, submit this Disclosure Statement pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A). These *amici curiae* are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them.

s/Jeremiah L. Morgan
Jeremiah L. Morgan

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INTEREST OF *AMICI CURIAE*[1]

Gun Owners of America, Inc., Gun Owners Foundation, Heller Foundation, Virginia Citizens Defense League, Grass Roots North Carolina, Tennessee Firearms Association, BamaCarry, Inc., Florida Carry, Inc., Arizona Citizens Defense League, New Jersey Second Amendment Society, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Each is dedicated, *inter alia*, to the correct construction, interpretation, and application of law.

Some of these *amici* have filed numerous other *amicus* briefs in federal and state courts in support of the Second Amendment, including several in this Court:

- *Duncan v. Becerra*, No. 19-55376, Brief *Amicus Curiae* of Gun Owners of America, *et al.* (September 25, 2019);
- *Young v. Hawaii*, No. 12-17808, Brief *Amicus Curiae* of Gun Owners of America, *et al.* (November 19, 2018);
- *Harris v. Silvester*, No. 14-16840, Brief *Amicus Curiae* of Gun Owners of America, *et al.* (June 2, 2015);

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[1] All parties have consented to the filing of this brief *amicus curiae*. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

- *Peruta v. San Diego*, Nos. 10-56971 & 11-16255, Brief *Amicus Curiae* of Gun Owners of America, *et al.* (April 30, 2015);
- *Jackson v. San Francisco*, No. 12-17803, Brief *Amicus Curiae* of Gun Owners of America, *et al.* (July 3, 2014);
- *Montana Shooting Sports Association v. Holder*, No. 10-36094, Brief *Amicus Curiae* of Gun Owners of America, *et al.* (June 13, 2011); and
- *Nordyke v. King*, No. 07-15763, Brief *Amicus Curiae* of Gun Owners of California, *et al.* (August 18, 2010).

ARGUMENT

I. THIS COURT'S TWO-STEP TEST IS A DECEPTIVE CHARADE.

As District Judge Benitez demonstrated in his opinion below, this Court has never devoted much effort to understand the scope of the right to keep and bear arms by examining the text of the Second Amendment. At best, this Court treats this preexisting, enumerated right as a government-bestowed privilege. In reality, this Court's opinions have demonstrated little respect for the Second Amendment, steadfastly refusing to apply the text as written. Rather, the Ninth Circuit utilizes what is often called the "two-step test," designed by judges in other circuits, vesting broad discretion in courts to circumvent the right to keep and bear arms. Compared to the "simple *Heller* test" applied by Judge Benitez

in two paragraphs (*Rhode v. Becerra*, 2020 U.S. Dist. LEXIS 71893 (S.D. Cal. 2020) ("Op.") at *43-44), application of this Court's two-step analysis took Judge Benitez *more than 40 pages*. *See id.* at *44-85.

As Judge Benitez explained, the "two-part test" is really a "tripartite binary test with a sliding scale and a reasonable fit." Op. at *42-43. Indeed, as applied by this Circuit, the two-step test contains at least four levels of analysis, each requiring several different questions to be answered. *Id.* at *42. First, a court asks if a given restriction is "presumptively lawful" or "historically-approved." *Id.* at *45. If not, then a court moves on to inquire whether a restriction is "within the scope" of the Second Amendment (interpreted as narrowly as possible).[2] If not, the restriction is found outside the Amendment's

[2] Arguably, some aspect of "step one" is appropriate under *District of Columbia v. Heller*, 554 U.S. 570 (2008), including a determination whether a given restriction regulates persons, arms, or activities protected by the Second Amendment, or instead is entirely outside the Amendment's protection. Ironically, however, this Court often skips "step one" entirely, refusing to decide whether a challenged restriction regulates within the scope of the Second Amendment and moving directly to "step two" — interest balancing. *See, e.g., Bauer v. Becerra*, 858 F.3d 1216, 1221 (9th Cir. 2017); *Pena v. Lindley*, 898 F.3d 969, 973 (9th Cir. 2018) (also refusing to answer the question of whether the "core" of the Second Amendment was affected, alleging only that any burden was not severe). In practice, the "two-step" test boils down to an application of intermediate scrutiny, invariably resulting in the upholding of the challenged restriction.

scope, and it is upheld. If the law does restrict Second Amendment activity, then a court asks "how close the statute hits at the core of the Second Amendment right," and then examines the "'severity of the law's burden on that right.'" *Id.* at *46-47.

Under this test, severe infringements on core rights are subject to strict scrutiny (requiring a narrowly tailored fit to a compelling governmental interest), while less severe infringements on peripheral rights are subject to intermediate scrutiny (requiring a reasonable fit to an important governmental interest).[3] *Id.* at *49-*50. Under either balancing test, restrictions that infringe rights that "shall not be infringed" still can be upheld. Since this Court has limited "core" rights to include nothing more than the precise conduct falling within the four factual corners of *Heller* (the right of a law-abiding person to keep a single operable handgun in the home for self-defense),[4] nearly all — if not all —

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[3] A restriction must be both "core" and "severe" in order to obtain strict scrutiny. *Cf. United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013) (not core, but severe) with *Jackson v. San Francisco*, 746 F.3d 953 (9th Cir. 2014) (core, but not severe).

[4] Just last month, in *Our Lady of Guadalupe School v. Morrissey-Berru*, 207 L.Ed.2d 870 (2020), the U.S. Supreme Court criticized a mistake committed by two separate Ninth Circuit panels in their efforts to apply *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012) to the facts of cases before them: "[b]oth panels treated the circumstances that we

restrictions have been analyzed under intermediate scrutiny. Any assertion about "increasing public safety" is automatically deemed a "compelling" government interest.[5] Since restrictions dealing with firearms can always be claimed to involve "public safety," and since governments are always able to amass an impressive cadre of "experts" with a parade of sociological and public policy "evidence," virtually every restriction on the right to keep and bear arms has been upheld as reasonably related to the government's interest — giving the government "'a reasonable opportunity to experiment'" with Americans' constitutional rights. *See Pena* at 986.

In the end, this Court's two-step test is legal mumbo jumbo, an absurdly complicated framework that no one really understands (*see* Op. at *43), and which permits judges to "run roughshod over constitutionally protected rights"

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found relevant in that case [*Hosanna-Tabor*] as checklist items to be assessed and weighed against each other in every case….." *Our Lady of Guadalupe* at 889. Rather, the Supreme Court explained, the panels should have examined whether the issue in question "implicated the fundamental purpose" (*id*.) of the Court's rule. Likewise here, rather than seeking to limit the Supreme Court's decision in *Heller* to its precise facts, this Court should acknowledge and defer to the "fundamental purpose" of the Second Amendment — which was to protect "the right of the people to keep and bear arms," rather than to devise tests designed to limit that right while enhancing government power.

[5] *See* Op. at *52 ("is there anything that a government cannot claim to be a substantial state interest?").

(Op. at *52) in order to do literally whatever they want in any given case. Each step along the "two-step" path provides a court with yet another opportunity to justify the government's "impinge[ment]"[6] or "burdening"[7] or "limit[ing] but … not destroy[ing]"[8] of rights that "shall not be infringed." In this Court, the "two-step" test represents verbal legerdemain, enabling this Court to uphold every infringement of Second Amendment rights that comes before it.

And that is exactly what this Court has done, systematically, in every case since *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010) were decided. Allowing judges to act based on nothing more than their personal policy predilections,[9] this Court's amassed Second Amendment jurisprudence is viewed by many as evidencing an open hostility to an enumerated right and

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[6] *See Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016).

[7] *See Chovan* at 1134.

[8] *See Jackson* at 957.

[9] As Justice Gorsuch has explained, "a judge who likes every result he reaches is very likely a bad judge, reaching for results he prefers rather than those the law compels." https://www.whitehouse.gov/briefings-statements/president-trumps-nominee-supreme-court-neil-m-gorsuch/.

representing the naked exercise of raw political power rather than reasoned judgment.[10]

II. THIS COURT'S POST-*HELLER* JURISPRUDENCE AMOUNTS TO A NULLIFICATION OF THE SECOND AMENDMENT.

A review of this Court's Second Amendment decisions since *Heller* and *McDonald* in 2008 and 2010 demonstrates the capriciousness of the two-step technique being employed.

A. Adoption of the Atextual, Judge-Empowering, Interest Balancing Test.

In *Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012), this Court sitting *en banc* considered a challenge to a county's restrictions on the hosting of gun shows on county fairgrounds. A majority of the Court found that the county's last minute concessions that gun shows could operate on its property meant that the plaintiffs could no longer "succeed, no matter what form of scrutiny applies to Second Amendment claims." *Id.* at 1045. Concurring in the judgment, four

[10] Occasionally, federal judges have admitted how their biases affect their decisions. *See, e.g.,* W.O. Douglas, The Court Years, 1939-1975 at 8 (Random House: 1980) (quoting Chief Justice Hughes as saying "At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections.").

judges wrote that they would have adopted the two-step test used by the three-judge panel and adopted by other circuits. *Id.*

About a year and a half later, the Ninth Circuit still had not expressly adopted the interest balancing two-step test used in other circuits. In *United States v. Chovan*, the Court considered a Second Amendment challenge to 18 U.S.C. § 922(g)(9), prohibiting firearm possession by those convicted of misdemeanor crimes of domestic violence ("MCDV"). In *Chovan*, the "appellant d[id] not argue [against] the familiar 'scrutiny' tests … of our sister circuits … but [rather] accepts it." *Id.* at 1142-3 (Bea, J., concurring). Likewise, the *Chovan* panel did not conduct any analysis of the propriety of the two-step interest balancing test or consider alternative approaches. *Id.* at 1136 (adopting without discussion of any contrary authority "the two-step Second Amendment inquiry undertaken by the Third Circuit in *Marzzarella* … and the Fourth Circuit in *Chester*."). *See also id.* at 1143 (Judge Bea, *concurring*, treating the framework issue as "waived" and "accept[ing] the application of the tiers of scrutiny," but pointing out competing frameworks for Second Amendment analysis, such as by then-Judge Kavanaugh ("'text, history, and tradition'") and commentators who note that interest balancing tests "'don't make

sense here' in the Second Amendment context because the language of *Heller* seems to foreclose scrutiny analysis."). *Id.*

Thus, without any analysis whatsoever, and aware that competing frameworks (including the "simple *Heller* test") exist, the *Chovan* Court *by default* adopted the interest balancing two-step approach for the Ninth Circuit. Applying the two-step test, the Court concluded that the right of a person convicted of a MCDV to have a firearm "'is not within the core right identified in *Heller* — the right of a *law-abiding, responsible* citizen to possess and carry a weapon for self-defense….'" *Id.* at 1138. Nevertheless, the Court concluded that "[t]he burden … is quite substantial," because it "amounts to a 'total prohibition'" of his right to keep and bear arms. The Court thus arrived at the unreconcilable conclusion that laws prohibiting firearms possession by those convicted of a MCDV are a severe burden on rights *that such persons purportedly*[11] *do not have to begin with*. Applying intermediate scrutiny to this non-core-but-severe-burden statute, the Court recited the "important … government interest of preventing domestic gun violence," and concluded that

[11] In concurrence, Judge Bea took issue with this assumption, noting that "in the Founding period, felonies historically resulted in disqualification … But misdemeanors did not…." *Id.* at 1149 (Bea, J., concurring).

prohibiting those convicted of a MCDV from having firearms could further that interest. *Id.* at 1139-1141.

B. Application of Intermediate Scrutiny to Cripple the Right to Keep and Bear Arms.

In *Jackson v. City & County of San Francisco*, this Court again used intermediate scrutiny to uphold a San Francisco ordinance that required a handgun in the home to be "'stored in a locked container or disabled with a trigger lock,'" or else "'carried on the person.'" *Id.* at 958. It did not bother the Court that the San Francisco ordinance was nearly identical to one of the provisions in the D.C. ordinance at issue in *Heller*, which required firearms in the home to be "'unloaded and dissembled or bound by a trigger lock or similar device.'" *Heller* at 575.

Heller never applied or even mentioned intermediate scrutiny, striking down the D.C. trigger lock ordinance because it interfered with a citizen's ability to keep "any lawful firearm in the home operable for the purpose of immediate self-defense." *Id.* at 635. This Court, however, upheld San Francisco's nearly identical ordinance. First, the Court held that the ordinance "resembles none of" the "'presumptively lawful' regulations" in *Heller*, ignoring the resemblance to *Heller itself*. *Jackson* at 962. The Court then admitted that the ordinance

"burdens rights protected by the Second Amendment" and "implicates the core" but — disregarding *Heller*, which concluded precisely the opposite[12] — claimed that it "does not impose [a] severe burden" allegedly because it "does not substantially prevent[13] law-abiding citizens from using firearms to defend themselves in the home." *Id.* at 963-64.

Thus, because the *Jackson* ordinance allegedly did not impose a "severe burden," the Court proceeded to apply "intermediate scrutiny." *Id.* at 966. Approving of the argument that more handguns in homes leads to "'increased risk of gun-related injury and death'" (presumably including legitimate self-defense shootings), the Court claimed that the "significant government interest" prong was met. *Id.* at 965-66. Next, the Court used the same argument to

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[12] Audaciously, the Court compared the *trigger lock* ordinance in *Jackson* to the *handgun ban* in *Heller*, apparently not finding it relevant to mention *Heller*'s separate rejection of the District's trigger lock requirement. *See Jackson* at 964-65.

[13] By this logic, the *Jackson* court would have approved of a statute requiring automated external defibrillators ("AED") to be stored inoperable, disassembled, or with their operating mechanisms locked, in order to further the government's compelling interest in preventing accidental electrocutions. Certainly, such a requirement would no more "substantially prevent" a person from accessing an AED in the event of a heart attack than it would "substantially prevent" a person from accessing a firearm in the event of a violent home invasion.

conclude that the ordinance was reasonably related to the government interest, claiming that "San Francisco has drawn a reasonable inference" that fewer guns will "reduce firearm casualties." *Id.* at 966. Finally, the Court concluded by assuring that its ruling was required for the "children." *Id.*

In *Jackson*, the Court also considered an ordinance banning the purchase of "hollow-point ammunition" within city limits, the type of ammunition most commonly used for self-defense across the nation. *Id.* at 967. The Court first found that the plaintiffs had standing, disregarding the government's argument that city residents could obtain hollow-point ammunition outside the city.[14] *Id.* However, the Court claimed that a ban on quintessential self-defense ammunition "neither regulates conduct at the core of the Second Amendment right nor burdens that right severely…." *Id.* at 968. Thus, applying intermediate scrutiny, the Court concluded that government has a "substantial … interest in

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[14] Ironically, the Court then concluded that the Second Amendment burden was not severe because "Jackson is not precluded from using the hollow-point bullets in her home if she purchases such ammunition outside of San Francisco's jurisdiction." *Id.* at 968. Likewise, the Court concluded that the trigger lock requirement was permissible because it "leaves open alternative channels for self-defense…." *Id.* Of course, *Heller* made clear that "[i]t is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed." *Heller* at 629. But as usual, the *Heller* decision has not constrained outcomes in the Ninth Circuit.

reducing the fatality of shootings," presumably including the lives of criminals justifiably shot in self-defense shootings. *See id.* at 969.

In *Fyock v. City of Sunnyvale*, 779 F.3d 991 (9th Cir. 2015), a panel of this Court reviewed the denial of a preliminary injunction, in a challenge to an ordinance banning magazines with a capacity over 10 rounds. The Court determined that the ordinance had no historical analogue, governed magazines "'typically possessed by law-abiding citizens for lawful purposes,'" and found that such magazines were not "'dangerous and unusual weapons….'" *Id.* at 996-97. Nevertheless, the Court went on to find that, even though the ordinance affected "core" rights, it did not impose a "severe burden" because gun owners could still own neutered magazines holding 10 or fewer rounds. *Id.* at 999. Proceeding to uphold the ban under intermediate scrutiny, the Court reasoned that "reducing the harm of intentional *and accidental* gun use"[15] is a "'substantial government interest,'" and deferred to the government's once-again circular and self-fulfilling conclusion that fewer "large-capacity magazines in circulation may

[15] Of course, it is ridiculous to say that a large capacity magazine has any effect on the *accidental* discharge of a firearm as compared to a limited capacity magazine.

decrease the use of such magazines in gun crimes." *Id.* at 1000 (emphasis added).[16]

C. A Seeming Hiatus from Interest Balancing.

Interestingly enough, after *Chovan* expressly adopted the two-step balancing test in the Ninth Circuit, this Court did not get to balancing in *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016 (*en banc*)) ("*Peruta en banc*"). There, the Court looked at a California statute which prohibited concealed carry without a license and denied such a license to virtually everyone by requiring them to prove their "good moral character" and demonstrate "good cause" to have a permit. *Id.* at 926. Separately, California restricted "open carry" of firearms, arguably amounting to a flat ban. *Id.* at 942. Together, the two statutes mean that ordinary Californians are prohibited from bearing arms in public.

In *Peruta*, neither the panel nor the *en banc* decision applied the *Chovan* interest balancing framework or engaged in application of intermediate scrutiny. First, the panel majority, both judges of whom had advocated for the adoption of

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[16] Likewise, a ban on chainsaws no doubt will reduce chainsaw-related injuries, which the government certainly has a compelling interest in preventing. Of course, people can also freeze to death in the winter from lack of firewood.

interest balancing in *Nordyke*, questioned "whether a tiered-scrutiny approach was even appropriate in the first place," and instead decided the case by "[c]onsulting the text's original public meaning" along with "'both text and history'…." *Peruta v. County of San Diego*, 742 F.3d 1144, 1149-50 (9th Cir. 2014) ("*Peruta*"). After conducting an extensive and exhaustive "analysis of text and history," the panel concluded that "the carrying of an operable handgun outside the home for the lawful purpose of self-defense … constitutes 'bear[ing] Arms' within the meaning of the Second Amendment." *Id.* at 1166. The panel claimed that, while a state might be able to ban open carry or to ban concealed carry, it could not entirely ban both. *Id.* at 1171-72.

This Court then *sua sponte* granted *en banc* review of the panel's decision. In its decision, the *Peruta en banc* Court — like the panel — neither interest balanced nor applied a level of scrutiny. Whereas the panel had looked at the California statutory scheme as a whole, the *en banc* Court refused to do so, leaving the issue of open carry for another day (*Peruta en banc* at 941-42). Rather, the *en banc* Court (like the panel) conducted an extensive (but deeply flawed) historical analysis,[17] coming to the limited conclusion that "the

[17] The *en banc* Court even appeared to question its earlier adoption of interest balancing, claiming that "[i]n analyzing the meaning of the Second

overwhelming consensus of historical sources" demonstrated that "there is no Second Amendment right for members of the general public to carry concealed firearms in public."[18] *Id.* at 927.

D. Back to Balancing.

In *Silvester v. Harris*, the Court upheld California's "10-day waiting period for all lawful purchases of guns" including as applied to "'subsequent purchasers,' all of whom likely already possessed a gun." *Id.* at 818, 825. Even

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Amendment, the Supreme Court in *Heller* and *McDonald* treated its historical analysis as determinative." *Id.* at 929.

[18] The *en banc* court apparently did not see its decision as a departure from *Chovan*, but rather considered its history-and-tradition analysis to be "step one" of the two-step test — whether the Second Amendment applies at all. The Court went on to note that, "[e]ven if we assume that the Second Amendment applies, California's regulation of the carrying of concealed weapons in public survives intermediate scrutiny because it 'promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Id.* at 942.

Likewise, the *Peruta* panel majority had tried to reconcile its two seemingly diametric approaches, claiming that its "text and history" approach was what "we have done in the past [in] *United States v. Chovan*." *Peruta* at 1150. But at the same time, concluding that a "varying sliding-scale and tiered-scrutiny approach[]" was unnecessary because "an alternative approach … the approach used in *Heller* itself" was applicable (*id.* at 1167-68), the panel came to the conclusion that a statutory scheme which prohibited both open carry and concealed carry went "too far." *Id.* at 1170.

Later Ninth Circuit panels, as well, treated *Peruta* as not having needed to get to "step two," since the right to bear arms was determined to be "outside the scope of the Second Amendment." *Silvester* at 822.

though noting that "*Heller* gave us the framework" which was "a textual and historical analysis," the Court also claimed that *Heller* "left for future evaluation the precise level of scrutiny to be applied…." *Id.* at 819-20.

Touting the "near unanimity" of the federal circuits in applying the two-step test (*id.* at 823) (but failing to mention the pre-*Heller* "near unanimity" of the federal circuits erroneously concluding the Second Amendment is a collective right[19]), the *Silvester* court claimed that a 10-day waiting period on the purchase of a firearm "does not place a substantial burden on Second Amendment rights" (which many Californians seeking to buy firearms to respond to recent rioting would dispute) because during the founding era the country did not have highways and computers, and thus early Americans had to wait for delivery of their firearms.[20] *Id.* at 827. Applying intermediate scrutiny, the panel once again confirmed that "promoting [public] safety" is an important government

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[19] *See, e.g., Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002) (finding no individual right to keep and bear arms).

[20] By this theory, the panel would have consented to a 10-day cooling off period prior to the distribution of judicial opinions (so that judges could reconsider the impact of their decisions), on the grounds that there were no such things as SCOTUSBlog and LexisNexis when *Marbury v. Madison* was decided.

interest (to no one's surprise), and that a "cooling-off period" theoretically "may prevent or reduce impulsive acts of gun violence or self harm."[21] *Id.* at 827-28.

In *Pena v. Lindley*, the Court considered challenges to California's Unsafe Handgun Act ("UHA"), which requires any newly designed handgun models to have certain safety features, including microstamping — a technology that does not exist and which no firearm design employs. In other words, the UHA has imposed a complete ban on new handguns in California.

The Court skipped over the question of whether there was a Second Amendment right to purchase handguns, moving full steam ahead towards intermediate scrutiny. *Id.* at 973. Passing by *Heller*'s admonition that "[i]t is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed" (*Heller* at 629), the Court concluded that it is permissible for California to outright ban all new makes and models of handguns, so long as possession of other handguns (older ones) is allowed. *Pena* at 978-79. Reasoning that the restrictions governing which handguns Californians can buy is at best a *de*

[21] Not getting a gun for 10 days certainly will keep a person without a gun from using a gun for 10 days — including to defend himself from a criminal, who already has a gun obtained from an unlawful source where a "cooling off" period is not applicable.

minimis burden on their rights, the Court applied intermediate scrutiny. *Id.* at 979.

The Court asserted that preventing "'injuries to firearms operators and crime'" are "substantial … governmental safety interests," and concluded that the government reasonably can require firearms to contain all manner of features — including made-up technology that does not exist in the real world[22] — in order to further those alleged interests. *Id.* at 979-86.

The above cases do not exhaust the list of this Court's interest balancing Second Amendment cases, but rather are representative of its decisions. *See also Wilson v. Lynch*, 835 F.3d 1083 (9th Cir. 2016) (using intermediate scrutiny to uphold ATF's interpretation of 18 U.S.C. § 922(d)(3) to prohibit those with medical marijuana cards from obtaining firearms, even without evidence of actual drug use); *United States v. Torres*, 911 F.3d 1253 (9th Cir. 2019) (refusing to find that even criminal illegal aliens are not part of "the people" protected by the Second Amendment, but instead using intermediate scrutiny to uphold 18 U.S.C. § 922(g)(5)); *United States v. Singh*, 924 F.3d 1030 (9th Cir. 2019) (same for nonimmigrant visa holders); *Mai v. United States*, 952 F.3d 1106 (9th Cir.

[22] Perhaps California next will require all new firearms sold in the state to come equipped with a "stun" setting, like a Star Trek phaser.

2020) (using intermediate scrutiny to uphold the 18 U.S.C. § 922(g)(4) prohibition for involuntary commitments).

III. IS THERE *ANY* RESTRICTION THAT WOULD VIOLATE THE SECOND AMENDMENT?

Based on this compilation of cases, the judge-empowering, interest-balancing two-step test used in this Circuit has permitted this Court to justify literally every Second Amendment-related restriction to come across its desk since *Heller*. So far as *amici* can ascertain, this Court has a *perfect record* of ruling against the Second Amendment. This Court has found "reasonable regulations" in every single case, leading to the question of what sort of infringement of Second Amendment rights the court might consider unreasonable, or to ever meet the "gone too far" test. *See Peruta* at 1170.

As even this Court is forced to admit, *Heller* recognized — *at the very minimum* — the Second Amendment protects the right of law-abiding persons to keep operable handguns in the home for self-defense. Yet this Court's cases have systematically undermined (if not totally obliterated) every aspect of that right. This Court has concluded that Americans have no right to buy the most common and popular handguns for self-defense (*Pena*) and, even if they did, that dealers have no right to sell to them (*Teixeira v. County of Alameda,* 873 F.3d

670 (9th Cir. 2017)); that people may not purchase quintessential self-defense ammunition (*Jackson*); that they may not purchase quintessential self-defense magazines (*Fyock*); and that they cannot keep even the permissible types of handguns, limited capacity magazines, and restricted types of ammunition they *are* permitted to have in their homes in an operable condition (*Jackson*). Separately, this Court has supported waiting periods (*Silvester*) and the payment of fees (*Bauer v. Becerra*) as preconditions to the exercise of this enumerated right — restrictions that this Court certainly would never permit for other judicially favored, atextual (made-up) rights.

Unfortunately, this Court has not received much resistance to its application of intermediate scrutiny. As noted above, *Chovan* adopted the two-step test without any briefing, argument, analysis, or discussion. Regrettably, since then, most lawyers appearing before this Court similarly have chosen not to argue for "the simple *Heller* test" used by the court below, instead defaulting to strict-versus-intermediate scrutiny. Whether because of the familiarity of such tests from First Amendment case law, or perhaps in an attempt to appear "reasonable" to a Court that is openly hostile to an enumerated constitutional right, rarely is this Court told that *Chovan* — and the litany of cases since then —

employ the wrong analysis.[23] As American journalist M. Stanton Evans once said, "he who writes the Resolved Clause, wins the debate." In other words, when it comes to Second Amendment litigation in the Ninth Circuit, conceding application of the two-step test invariably leads to the infringement of Second Amendment rights.

Occasionally, a district court in this Circuit, or even a "rogue" panel of this Court, steps out of line, and dares to *get it right* on the Second Amendment. When that happens, this Court is quick to stay, and then reverse, the lower court, or to vacate and grant *en banc* review of a panel decision, thus suppressing any dissent that might have occurred. *See Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018) (rehearing *en banc* granted in 915 F.3d 681 (9th Cir. 2019); *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014) (rehearing en banc granted *sua sponte* in 781 F.3d 1106 (9th Cir. 2015)). This pattern should not continue in

[23] That is not to say that *all* of these cases reached the wrong result. For example, *Torres* could have reached the same result with "the simple *Heller* test," on the basis that "the people" protected by the Second Amendment does not include illegal aliens.

this case,[24] or in the pending appeal from *Duncan v. Becerra*, 366 F. Supp. 3d 1131 (S.D. Cal. 2019).

Certainly, the panel in this case may consider itself bound by the prior erroneous decisions of this Court. But that should not stop the panel from conducting the "simple *Heller* test" as Judge Benitez did below, and explaining why the two-step test is wrong. As *Heller* made clear, "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. 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* at 634-5. It is time for this Court to stop its broadside attack on Second Amendment rights, the personal views of federal judges notwithstanding.

CONCLUSION

The district court's opinion should be affirmed.

Respectfully submitted,

/s/Jeremiah L. Morgan
ROBERT J. OLSON

[24] Indeed, a majority of a three-judge motions panel of this Court has already stayed the district court's opinion pending appeal. *Rhode v. Becerra*, No. 20-55437, ECF # 13-1 (May 14, 2020).

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.*, in Support of Plaintiffs-Appellees and Affirmance, was made, this 7th day of August 2020, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

/s/Jeremiah L. Morgan
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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