No. 19-55376

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 A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE DISTRICT OF COLUMBIA, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING EN BANC

KARL A. RACINE
Attorney General for the District of Columbia

LOREN L. ALIKHAN
Solicitor General

CAROLINE S. VAN ZILE
Principal Deputy Solicitor General

CARL J. SCHIFFERLE
Deputy Solicitor General

SONYA L. LEBSACK
Assistant Attorney General
Office of the Solicitor General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 724-5667
sonya.lebsack@dc.gov

Additional counsel listed on signature page

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INTEREST OF *AMICI CURIAE*

The District of Columbia and the States of Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington ("*Amici* States") submit this brief in support of appellant's petition for rehearing en banc. The *Amici* States have vital sovereign interests in the correct application of the federalism principles and constitutional doctrines that control this case. The panel majority's Second Amendment analysis breaks sharply from every other court of appeals and conflicts with Supreme Court precedent allowing States leeway to respond to gun violence within their borders. This raises issues of "exceptional importance," Fed. R. App. P. 35(b)(1)(B), in which the *Amici* States have a direct and substantial interest.

INTRODUCTION AND SUMMARY OF ARGUMENT

The *Amici* States agree with appellant that en banc review of the panel's decision is urgently needed. The panel majority's embrace of strict scrutiny and its misapplication of intermediate scrutiny—in conflict with a prior panel of this Court and every other circuit to consider similar regulations—alone makes this case worthy of rehearing. So too does the fact that the judgment strips California of a law that both its legislature and its electorate advanced in response to the public-safety threat posed by ammunition magazines that hold more than ten rounds. As

appellant persuasively argues, California's prohibition of these large-capacity magazines ("LCMs")—which result in more shots fired in a given period of time, more victims wounded, more wounds per victim, and more fatalities—is fully compatible with the Second Amendment's guarantee of self-defense in the home. It represents a policy choice California is constitutionally free to adopt.

The *Amici* States write separately to emphasize that the majority's outlier reasoning is in tension with the flexibility that courts have rightly given states and localities to enact public-safety measures that limit the spread of particularly lethal weapons. Consistent with *Heller*, *McDonald*, and the conclusions of every other court of appeals, the Second Amendment does not bar States from restricting access to particular, and often particularly dangerous, subsets of firearms or firearm accessories—here, large-capacity ammunition magazines.[1] These laws neither effectively disarm individuals nor substantially affect their ability to defend themselves at home. Accordingly, the Second Amendment permits them.[2]

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[1] In referring to "States," *amici* include the District of Columbia and, as relevant, localities with the authority to regulate firearms.

[2] This argument assumes that LCMs are entitled to Second Amendment protection. For the reasons stated by California and other *amici*, however, it is not clear that LCM prohibitions even burden Second Amendment rights. *See, e.g.*, Cal. Br. 23-31; Everytown Amicus Br. 4-16; *see also Kolbe v. Hogan*, 849 F.3d 114, 135-37 (4th Cir. 2017) (LCMs are not constitutionally protected because they are "like M-16 rifles"—*i.e.*, "weapons that are most useful in military service").

ARGUMENT

I. The Second Amendment Preserves States' Authority To Enact Firearm Restrictions In Furtherance Of Public Safety.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court made clear that the scope of the Second Amendment "is not unlimited." *Id.* at 626. It does not amount to "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* And in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), eight of the Court's nine members specifically stressed the role of state and local innovation in addressing the formidable issue of gun violence. As Justice Alito explained, the Second Amendment "by no means eliminates" States' "ability to devise solutions to social problems that suit local needs and values." *Id.* at 785 (plurality op.). Accordingly, "state and local experimentation with reasonable firearms regulations will continue under the Second Amendment." *Id*. (quotation marks and brackets omitted); *see id.* at 877, 902-03 (Stevens, J., dissenting); *id*. at 926-27 (Breyer, J., dissenting).

This view of state and local authority rightly recognizes the States' primary responsibility for ensuring public safety in our federal system. *See United States v. Morrison*, 529 U.S. 598, 618 (2000) ("[W]e can think of no better example of the police power . . . reposed in the States[] than the suppression of violent crime and vindication of its victims."); *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995)

("Under our federal system, the States possess primary authority for defining and enforcing the criminal law." (internal quotation marks omitted)). That responsibility includes the "self-evident" duty to take steps to reduce the likelihood that the State's residents will fall victim to preventable firearm violence. *Bauer v. Becerra*, 858 F.3d 1216, 1223 (9th Cir. 2017).

Because "conditions and problems differ from locality to locality," state and local governments require flexibility to tailor their firearm regulations to their distinct circumstances. *McDonald*, 561 U.S. at 783 (plurality op). Population density, economic conditions, and the strength of local law enforcement all vary widely across jurisdictions, and all may have an impact on crime and effective crime-fighting efforts.[3] An approach to firearm violence that may be appropriate in one state or locality may not be appropriate in another. All States, however, have an interest in being able to fashion regulations aimed at preventing and mitigating firearm violence, while also allowing law-abiding citizens to use arms for self-defense consistent with *Heller* and *McDonald*.[4]

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[3] FBI, Uniform Crime Reporting Statistics: Their Proper Use (May 2017), https://ucr.fbi.gov/ucr-statistics-their-proper-use (last visited Sept. 8, 2020).

[4] The panel majority's suggestion that the constitutionality of a State's effort to regulate firearms or firearm accessories can be undercut by criminal ingenuity, such as by mass shooters "smuggl[ing]" LCMs over state lines, Maj. Op. 65, turns this principle of federalism on its head. It "proves far too much." *Friedman v. City of*

The panel majority overreads *Heller* out of a concern that the Second Amendment not be treated as "second-class" right, *see* Maj. Op. 39-43—but in so doing, it overlooks the flexibility that States have traditionally been given in a variety of constitutional contexts. *See, e.g.*, *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 301, 314 (2014) (plurality op.) (affirming State "innovation and experimentation" with respect to "whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in . . . school admissions"); *Oregon v. Ice*, 555 U.S. 160, 164 (2009) (leaving to state judges the determination of certain facts that dictate whether a court may impose consecutive as opposed to concurrent sentences). Indeed, laws implicating other equally important constitutional rights do not uniformly trigger strict scrutiny. For instance, different levels of scrutiny govern First Amendment free-speech claims, *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (applying intermediate scrutiny to content-neutral restriction imposing incidental burden on speech), and Fourteenth Amendment equal protection claims, *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (classifications "based on sex or illegitimacy" receive intermediate scrutiny),

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Highland Park, 784 F.3d 406, 412 (7th Cir. 2015). In particular, "it would imply that no jurisdiction *other than the United States as a whole* can regulate firearms[,] . . . [b]ut that's not what *Heller* concluded." *Id*. (emphasis added).

depending on the type of restriction at issue and how closely it cuts to the core of the right.

Of particular relevance here—and contrary to the majority's suggestion that "no court would ever countenance similar restrictions for other fundamental rights," Maj. Op. 47—the Supreme Court has long recognized that the governmental interest in protecting public safety can limit constitutional protections. For instance, the Supreme Court has held that the First Amendment's protection of speech does not extend to fighting words or incitements to violence, *see, e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942), or to falsely shouting fire in a crowded theater, *see Schenk v. United States*, 249 U.S. 47, 52 (1919). Similarly, in the Fifth Amendment context, the Court has recognized a public-safety exception to the requirement to provide *Miranda* warnings before a suspect's answers may be admitted into evidence. *See New York v. Quarles*, 467 U.S. 649, 655-56 (1984). It has also held that the Eighth Amendment does not prohibit long sentences under "three-strikes" laws because of the special public-safety dangers posed by recidivist offenders. *See Ewing v. California*, 538 U.S. 11, 24-26 (2003) (plurality op.).

Promoting public safety is no less compelling in the context of the Second Amendment, where the use of firearms affects "the safety and indeed the lives of [State] citizens." *United States v. Salerno*, 481 U.S. 739, 755 (1987). This Court should reject the panel majority's attempt to stretch the "core protection"

annunciated in *Heller* and *McDonald* in ways that conflict with the assurance that state and local policymakers retain "a variety of tools for combating [gun violence]" within their borders. *Heller*, 554 U.S. at 634, 636; *see McDonald*, 561 U.S. at 786 (plurality op.). That includes States' ability to limit the use or possession of a particular type of firearm or firearm accessory.

II. The Panel Majority's Erroneous Reasoning Gives Short Shrift To States' Ability To Enact Reasonable Public Safety Regulations.

Five other circuits have applied intermediate scrutiny to an LCM prohibition and concluded that it was lawful. *See* Cal. Pet. 2, 7-8. The panel majority's application of strict scrutiny to California's LCM prohibition is incorrect and, if retained, could call into question a variety of firearm restrictions on which *Heller* took care *not* to "cast doubt." 554 U.S. at 626 & n.26. The panel majority's contrary approach is problematic for at least two reasons.

First, under intermediate scrutiny, a firearm restriction can be upheld where it is "substantially related to an important governmental objective." *Clark*, 486 U.S. at 461. But strict scrutiny requires that the law be narrowly tailored to serve a compelling state interest, *see, e.g.*, *Johnson v. California*, 543 U.S. 499, 505 (2005), which could affect the government's ability to rely on predictive judgments, *see Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799-800 (2011); *but see id.* at 806 (Alito, J., concurring in the judgment); *cf. City of Los Angeles v. Alameda Books*,

Inc., 535 U.S. 425, 438-39 (2002). Such judgments are essential, however, to the state and local "experimentation" that *McDonald* expressly endorsed. 561 U.S. at 785 (plurality op.); *see United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011) (applying strict scrutiny would "handcuff[] lawmakers' ability to prevent armed mayhem in public places, and depriv[e] them of a variety of tools for combating th[e] problem" (internal quotation marks, citations, and original brackets omitted)).

Leeway is needed if governments are to weigh evidence and proactively address firearm violence and gun-related deaths instead of merely reacting to the latest tragedy. Contrary to the panel majority's suggestion that "the issue of gun violence" is not an area of special legislative competence, Maj. Op. 62, it is—within the outer constitutional limits established by *Heller*—among the most complex and sensitive public policy judgments to which "States lay claim by right of history and expertise," *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). A court's application of strict scrutiny to a firearm regulation is accordingly "the gravest and most serious of steps," as it could "impair the ability of government to act prophylactically" on a "life and death subject." *Kolbe v. Hogan*, 849 F.3d 114, 150 (4th Cir. 2017) (Wilkinson, J., concurring).

Second, because the panel majority incorrectly equates a statutory prohibition on a subset of ammunition magazines with *Heller*'s "prohibition of an entire class

of 'arms,'" 554 U.S. at 628, many questions about which weapons are appropriate for self-defense could be taken out of States' hands. Maj. Op. 41 & n.15. But as Chief Judge Lynn's dissent points out, defining a "class" as whatever group of weapons *the regulation* restricts is circular: It means that "virtually any regulation could be considered an 'absolute prohibition of a class of weapons.'" Dissenting Op. 71 (quoting *Worman v. Healey*, 922 F.3d 26, 32 n.2 (1st Cir. 2019)). As a consequence, "any type of firearm possessed in the home could be protected [from regulation] merely because it *could* be used for self-defense." *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d 106, 118 (3d Cir. 2018) (emphasis added). That, of course, "cannot be." *Id.*[5] If a discrete regulation could so easily be transformed into a class-of-arms prohibition, *Heller*'s instruction that the Second Amendment is not a "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose," 554 U.S. at 626, would have little effect.

The panel majority's reasoning also nowhere follows from the "class" of arms with which *Heller* was concerned, namely the "handgun"—or, the "quintessential self-defense weapon." 554 U.S. at 629. Nothing about prohibiting a subset of ammunition magazines is akin to an "absolute prohibition of handguns." *Id.* at 636.

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[5] The majority does not deny this result, other than to note that were the weapon to be both "dangerous *and unusual*," it would fail under *Heller* for that reason. Maj. Op. 52 n.22 (quoting 554 U.S. at 627) (emphasis added).

Indeed, regulating the size of ammunition magazines merely restricts the number of bullets a person may shoot from a firearm *without reloading*. As this Court has explained, "laws which regulate only the manner in which persons may exercise their Second Amendment rights are less burdensome than those which bar firearm possession completely." *Silvester v. Harris*, 843 F.3d 816, 827 (9th Cir. 2016) (internal quotation marks omitted); *see* Dissenting Op. 70-72.

Nor are large-capacity ammunition magazines "quintessential" or even "well-suited for" self-defense. *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d. at 118 (citing to the record); *see, e.g.*, Cal. Br. 24-27, 34-35, 44-46. Indeed, the *Amici* States are unaware of *any* evidence that LCMs are commonly used for this purpose.[6] When the First Circuit recently examined Massachusetts's LCM law, it noted that "when asked directly, not one of the plaintiffs or their six experts could . . . identify even a single example of a self-defense episode in which ten or more shots were fired." *Worman*, 922 F.3d at 37. The court therefore concluded that, "[v]iewed as a whole, the record suggests that wielding [LCMs] for self-defense within the home is

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[6] By contrast, even when used by law-abiding civilians, LCMs remain dangerous because "the tendency is for defenders to keep firing until all bullets have been expended, which poses grave risks to others in the household, passersby, and bystanders." *Heller v. District of Columbia*, 670 F.3d 1244, 1263-64 (D.C. Cir. 2011); *see Kolbe*, 849 F.3d at 127 ("[W]hen inadequately trained civilians fire weapons equipped with large-capacity magazines, they tend to fire more rounds than necessary and thus endanger more bystanders."); Cal. Br. 48-50.

tantamount to using a sledgehammer to crack open the shell of a peanut." *Id*. The record before this Court requires a similar result. *See, e.g.*, ER 286-88 (Allen Expert Rep. ¶¶ 8-10 (citing National Rifle Association reports that individuals engaging in self-defense fired on average 2.2 shots)); ER 1014 (Webster Decl. ¶ 16 ("aware of no study or systematic data that indicate that LCMs are necessary for personal defense more so than firearms that do not have a LCM")); Cal. Br. 25-27, 34. Even if "millions of LCMs are in circulation," Maj. Op. 68, this does not render them useful or needed for "the core lawful purpose of self-defense," recognized in *Heller*, 554 U.S. at 630.

A prohibition on a subset of ammunition magazines thus neither prohibits "an entire class of 'arms,'" nor "severe[ly]" restricts a "core" Second Amendment right. *Heller*, 554 U.S. at 628, 629. Rather, myriad firearms and firepower for individuals' use in home- or self-defense remain available, as this Court and other federal courts of appeals have determined. *See Fyock v. City of Sunnyvale*, 779 F.3d 991, 999 (9th Cir. 2015); *see N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 260 (2d Cir. 2015); *Heller v. District of Columbia*, 670 F.3d 1244, 1261-62 (D.C. Cir. 2011); *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d. at 118. LCM prohibitions neither render "lawfully possessed firearms"—including handguns—"inoperable," nor do they impose limits on "the number of magazines that an individual may possess." *Fyock*, 779 F.3d at 999. Law-abiding citizens may continue to use any number of firearms

in home- or self-defense, and may equip themselves with any amount of ammunition, including any number of ten-round magazines. Cal. Pet. 3, 7-9, 17. Indeed, "for nearly two decades, . . . magazine manufacturers have been producing compliant magazines for sale in California," which are "widely available . . . and compatible with most, if not all, semiautomatic firearms." ER 256 (Graham Decl. ¶ 23); *see Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 118 n.20 (noting that the plaintiffs in that case "were unable to identify a single model of firearm that could not be brought into compliance with New Jersey's [10-round] magazine capacity restriction."). In actual practice, there is no "substantial" burden on the core right "to defend hearth and home." Maj. Op. 31.

The panel majority's outlier reasoning strips California of a law that its legislature and its electorate deemed appropriate. It also conflicts with precedent in five other circuits that have considered large-capacity ammunition magazine restrictions—decisions that rightly took care not to hobble important state and local public-safety judgments. The Court should rehear this case en banc and restore ordinary principles of constitutional law to the treatment of the Second Amendment in this Circuit.

CONCLUSION

The Court should grant rehearing en banc.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

LOREN L. ALIKHAN
Solicitor General

CAROLINE S. VAN ZILE
Principal Deputy Solicitor General

CARL J. SCHIFFERLE
Deputy Solicitor General

/s/ Sonya L. Lebsack
SONYA L. LEBSACK
Assistant Attorney General
Office of the Solicitor General

Office of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 724-5667
(202) 730-1450 (fax)
sonya.lebsack@dc.gov

September 2020

WILLIAM TONG
Attorney General
State of Connecticut
165 Capitol Avenue
Hartford, CT 06106

KATHLEEN JENNINGS
Attorney General
State of Delaware
820 North French Street
Wilmington, DE 19801

CLARE E. CONNORS
Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813

KWAME RAOUL
Attorney General
State of Illinois
100 West Randolph Street
Chicago, IL 60601

BRIAN E. FROSH
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Place, 20th Floor
Boston, MA 02108

GURBIR S. GREWAL
Attorney General
State of New Jersey
R.J. Hughes Justice Complex
P.O. Box 080
Trenton, NJ 08625

HECTOR BALDERAS
Attorney General
State of New Mexico
408 Galisteo Street
Santa Fe, NM 87501

LETITIA JAMES
Attorney General
State of New York
28 Liberty Street
New York, NY 10005

DANA NESSEL
Attorney General
State of Michigan
P.O. Box 30212
Lansing, MI 48909

KEITH ELLISON
Attorney General
State of Minnesota
75 Rev. Dr. Martin Luther
King Jr. Blvd.
St. Paul, MN 55155

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court Street NE
Salem, OR 97301

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania
Strawberry Square
Harrisburg, PA 17120

PETER F. NERONHA
Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609

MARK R. HERRING
Attorney General
Commonwealth of Virginia
202 North Ninth Street
Richmond, VA 23219

ROBERT W. FERGUSON
Attorney General
State of Washington
P.O. Box 40100
Olympia, WA 98504

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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