

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 the United States District Court
for the Southern District of California
Hon. Roger T. Benitez
No. 3:17-cv-01017-BEN-JLB**

**BRIEF OF *AMICUS CURIAE* THE NATIONAL SHOOTING SPORTS
FOUNDATION, INC. ON REHEARING *EN BANC* IN SUPPORT OF
PLAINTIFFS-APPELLEES, FILED WITH THE CONSENT OF ALL
PARTIES**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, The National Shooting Sports Foundation, Inc. states it is a non-profit organization under section 501(c)(6) of the Internal Revenue Code and has no parent corporation and no publicly held corporation that owns 10 percent or more of its stock.

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STATEMENT OF CONSENT

All parties consented to the filing of this *amicus curiae* brief pursuant to Federal Rule of Appellate Procedure 29(a) and Ninth Circuit Rule 29-2(a). No party or party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than *amicus curiae*, its members or its counsel contributed money to fund preparation and submission of this brief.

INTEREST OF *AMICUS CURIAE*

Amicus curiae The National Shooting Sports Foundation, Inc. ("NSSF") is the national trade association for the firearm, ammunition, hunting and shooting sports industry. Formed in 1961, NSSF is a 501(c)(6) tax-exempt Connecticut non-profit trade association with its principal place of business in Newtown, Connecticut. NSSF has a membership of over 8,400 federally licensed firearms manufacturers, distributors and retailers; companies manufacturing, distributing and selling shooting and hunting related goods and services; sportsmen's organizations; public and private shooting ranges; gun clubs; and endemic media. At present, nearly 700 NSSF members are located within the State of California.

NSSF's mission is to promote, protect and preserve hunting and the shooting sports by providing trusted leadership in addressing industry challenges; advancing participation in and understanding of hunting and shooting sports; reaffirming and strengthening its members' commitment to the safe and responsible sale and use of

their products; and promoting a political environment that is supportive of America's traditional hunting and shooting heritage and Second Amendment freedoms.

NSSF's interest in this case derives principally from the fact its federally licensed firearms manufacturer, distributor and retail dealer members engage in lawful commerce in firearms and ammunition in California and throughout the United States, which makes the exercise of an individual's constitutional right to keep and bear arms under the Second Amendment possible. The Second Amendment protects NSSF members and others from statutes and regulations seeking to ban, restrict or limit the exercise of Second Amendment rights. As such, the determination of whether a statute improperly infringes upon the exercise of Second Amendment rights by way of a complete ban on commonly owned magazines capable of holding more than 10 rounds is of great importance to NSSF and its members. NSSF, therefore, submits this brief in support of Plaintiffs-Appellees and encourages this Court to find California Penal Code section 32310 unconstitutional.

INTRODUCTION AND SUMMARY OF ARGUMENT

As the Ninth Circuit recognized in the Opinion at issue here, mass shootings are heart-wrenching. And those who commit mass shootings are monsters who want to harm as many people, and wreak as much havoc, as they possibly can.

One cannot sufficiently condemn criminals who misuse firearms and ammunition against the public at large or against law enforcement in the commission of crimes. However, such societal ills do not justify state laws like California Penal Code section 32310 (“Section 32310”), which operates as a complete ban on particular class of arms and significantly infringes upon and detracts from the Second Amendment rights of law-abiding citizens using firearms and ammunition for lawful purposes, including self-defense.

Yet, that is exactly what the State of California (“Defendant-Appellant”) seeks to do here. Section 32310, enacted following highly publicized mass shootings, completely bans the possession and use of magazines holding more than 10 rounds of ammunition by nearly every person anywhere in California and criminalizes such possession and use, even if for lawful purposes¹. As correctly set

¹ The panel opinion discusses self-defense and states, “[T]he Golden State is in fact a much more diverse and vibrant place [than only Hollywood and the Bay Area], with people living in sparsely populated rural counties, seemingly deserted desert towns, and majestic mountain villages. In such places, the closest law enforcement may be far, far away — and it may take substantial time for the county sheriff to respond. And it is no guarantee that the things that go bump in the night come alone; indeed, burglars often ply their trade in groups recognizing strength in numbers. *See* Carl E. Pope, Law Enf’t Assistance Admin., U.S. Dep’t of Justice, 148223, Crime-Specific Analysis: An Empirical Examination of Burglary Offenses and Offender Characteristics 48 (1977) (finding that 70% of burglars operate in groups); *see also* Andy Hochstetler, Opportunities and Decisions: Interactional Dynamics in Robbery and Burglary Groups, 39 *Criminology* 737, 746–56 (2001) (suggesting that burgling in groups reduces anxiety of punishment). Law-abiding citizens in these places may find security in a gun that comes standard with an LCM.”

out in the panel decision, Section 32310 simply cannot do so, whether analyzed under strict scrutiny or intermediate scrutiny. *See generally Duncan v. Becerra*, 970 F.3d 1133 (9th Cir. 2020) reh’g *en banc* granted, opinion vacated 988 F.3d 1209 (9th Cir. 2021). And *nowhere in the record* does Defendant-Appellant explain why this “magic number” of 10 rounds is in any way, shape or form narrowly tailored to fit its stated purposes or is even a reasonable fit with its asserted objective to curb gun violence. “[Section 32310] is a poor means to accomplish the state’s interests and cannot survive strict scrutiny. But even if we applied intermediate scrutiny, the law would still fail.” *Id.* at 1143. Defendant-Appellant argues – incorrectly – that magazines holding more than 10 rounds are unusual and dangerous. But overwhelming and incontrovertible data shows otherwise: an estimated **133 million**² 11+ round magazines are possessed³

² This number would likely be higher if not for the Public Safety and Recreational Firearms Act (resulting in a 10-year ban on 11+ round magazines between 1994 and 2004) and other statutes/regulations/ordinances similarly violating the Second Amendment.

³ While California now seeks to dispossess its citizens of currently owned 11+ round magazines (allowed under the previous statute), other states enacting magazine restrictions have allowed citizens already in possession of such magazines to keep them. *See* Colo. Rev. Stat. Ann. § 18-12-302(a); Conn. Gen. Stat. Ann. § 53-202w(a)(2); Md. Code Ann., Crim. Law § 4-305(2); N.J. Stat. Ann. § 2C:39-3(j)(2); N.Y. Penal Law § 265.00(23); Vt. Stat. Ann. tit. 13, § 4021(c). Even the now-expired federal ban allowed persons already in possession of magazines holding more than 10 rounds to keep them. *See* 18 U.S.C. § 922(w)(2) (amended 2004).

throughout the United States. Such magazines are in no way “unusual,” rather, they are the norm. The panel opinion recognizes “half of all magazines in America hold more than 10 rounds.” *Duncan*, 970 F.3d at 1142. Though Defendant-Appellant attempts to include a requirement that the arm be commonly used for a particular purpose, *i.e.* self-defense, no such requirement is found in the text of the Second Amendment, nor anywhere in *District of Columbia v. Heller*, 554 U.S. 570, 624-25, 627 (2008) (“*Heller*”) (recognizing the arms the Second Amendment protects are those “in common use at the time” for lawful purposes but never specifying or qualifying the “lawful purpose”).

Defendant-Appellant additionally argues that 11+ round magazines are unnecessary because individuals have other options available for self-defense. But as *Heller* makes clear, availability of an alternative does not confer constitutionality on a statute that infringes upon Second Amendment rights. *Heller* teaches that the Second Amendment takes that choice from the government. 554 U.S. at 634.

Finally, Defendant-Appellant relies heavily on a handful of other states which have enacted laws restricting magazine capacity. However, while just a few states have passed such restrictions, the overwhelming majority of states have not. Moreover, Defendant-Appellant seeks to apply a contradictory standard in order to advance their argument. On the one hand it asks the *en banc* panel to consider the

fact several circuits analyzing other states' laws have affirmed restrictions on magazine capacity, yet on the other hand it complains that Plaintiffs-Appellees' data on common ownership of magazines holding more than 10 rounds (estimated at 133 million) is not limited only to California. In other words, Defendant-Appellant asks the *en banc* panel to look at the nation as a whole if it supports their argument but then to focus solely on California where nationwide information undercuts it. The Supreme Court in *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742, 783 (2010) ("*McDonald*") did not create a California-specific Second Amendment analysis.

For these reasons (and others), the United States District Court of the Southern District of California correctly granted summary judgment in favor of Plaintiffs-Appellees and the August 14, 2020 Opinion correctly affirmed the District Court's decision. California's ban on magazines holding 11+ rounds directly and severely infringes upon core Second Amendment rights of *law-abiding citizens* seeking to purchase, own, possess and use magazines commonly owned by Californians and used for a myriad of *lawful purposes*, including but not limited to self-defense in the home. Accordingly, NSSF urges the *en banc* panel to find Section 32310 unconstitutional and affirm the August 14, 2020 Opinion.

ARGUMENT

Section 32310 impermissibly and in violation of the Second Amendment bans the import, sale, acquisition, possession, and use of magazines capable of holding more than 10 rounds⁴ – even though such magazines are incredibly common with approximately 133 million throughout the country.⁵ As such, it is “directly at odds with the central holdings of *Heller* and *McDonald*: that the Second Amendment protects a personal right to keep arms for lawful purposes, most notably for self-defense within the home.” *Friedman v. City of Highland Park*, 784 F.3d 406, 412–13 (7th Cir. 2015) (Manion, J., dissenting). The panel opinion applied a multi-part analysis to correctly determine Section 32310 is unconstitutional and violates the Second Amendment whether analyzed under the correct strict scrutiny standard or under the more lenient intermediate scrutiny standard. *Duncan*, 970 F.3d at 1143. Section 32310 is unconstitutional under any

⁴ Section 32310 has very limited exceptions to its widespread ban on magazines holding more than 10 rounds. Strangely, the exceptions allow for persons in the movie industry to possess such magazines while making it a crime for military or National Guard members to possess the same. 1-ER-68–69, 1-ER-170–173 (discussion regarding exceptions to Section 32310).

⁵ As the District Court and the original panel correctly recognized, magazines holding more than 10 rounds are common and number in the millions. 1-ER-24–26; *Duncan*, 970 F.3d at 1142–43. Moreover, this number might be lower in California as a result of the state “long criminalizing the buying, selling, importing, and manufacturing of those magazines,” and cannot be used as “constitutional support for further banning.” 1-ER-27.

analysis given the commonality of magazines holding more than 10 rounds and the broad strokes of the statute – with no attempt to tailor the statute narrowly or at all.

I. The Second Amendment Protects the Right to Keep and Bear Arms, Including Magazines Holding 10 or More Rounds, Commonly Owned and Used for Self-Defense in the Home and Other Lawful Purposes.

The District Court correctly stated that *Heller* provided “crystal clear language” to test the constitutionality of statutes infringing upon Second Amendment rights. 1-ER-22. If the arm (or the firearm and hardware as the District Court termed it) is commonly owned by law-abiding citizens for lawful purposes, it is protected and the inquiry ends because the Constitution guarantees the right to keep and bear arms “‘in common use at the time’ for lawful purposes like self-defense.” *Heller*, 554 U.S. at 624 (emphasis added); 1-ER-22. Though the panel opinion does not appear to adopt this simple *Heller* test, NSSF urges the *en banc* panel to do so.

Instead, the August 14, 2020 Opinion engaged in multiple multi-part tests to assess the constitutionality Section 32310 and reached the same result as the District Court – **that Section 32310 is unconstitutional**. *Duncan*, 970 F.3d at 1145. The inquiry began by asking whether Section 32310 burdens conduct protected by the Second Amendment. *Id.* (citing *U.S. v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013) (internal citations omitted). “To determine whether the law burdens protected conduct, this court appears to ask four questions.” *Id.* “[A]s a

threshold matter, we determine whether the law regulates “arms” for purposes of the Second Amendment.” *Id.* The panel then examined “whether the law regulates an arm that is **both** dangerous and unusual.” *Id.* (emphasis added). If the answer to the first two inquiries is in the affirmative, the next step is to assess whether the regulation is longstanding and thus presumptively lawful. *Id.* Finally, the court will inquire whether there is any persuasive historical evidence in the record showing that the regulation affects rights that fall outside the scope of the Second Amendment. If these last two questions⁶ are in the negative, the law burdens protected conduct and the appropriate level of scrutiny must be determined. *Id.* at 1145–46.

There is no real dispute that the subject magazines are arms.⁷ *Duncan*, 970 F.3d at 1146 (“Firearm magazines are ‘arms’ under the Second Amendment.

⁶ This brief does not address the last two questions.

⁷ No court has found magazines such as the ones at issue here do not qualify as “arms” under the Second Amendment. *See generally* *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1276 (N.D. Cal. 2014), *aff’d sub nom. Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015) (compiling cases: *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1264 (D.C. Cir.2011); *San Francisco Veteran Police Officers Ass’n v. City & Cnty. of San Francisco*, 18 F.Supp.3d 997, 1005–06 (N.D. Cal. Feb. 19, 2014); *New York State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 990 Supp.2d 349, 371-72 (W.D.N.Y. Dec. 31, 2013); *Shew v. Malloy*, 994 F.Supp.2d 234, 250 (D. Conn. Jan. 30, 2014); *Tardy v. O’Malley*, C–13–2861, TRO Hr’g Tr., at 66–71 (D. Md. Oct. 1, 2013)). Thus, magazines holding over 10 rounds receive Second Amendment protection. If this were not the case, any jurisdiction could essentially ban firearms via a ban on magazines and ammunition. *Id.* Defendant-Appellant stops shy of such a ban – for now.

Magazines enjoy Second Amendment protection for a simple reason: Without a magazine, many weapons would be useless, including “quintessential” self-defense weapons like the handgun.”); *see also Jackson v. City and Cty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (stating, “without bullets, the right to bear arms would be meaningless.”). Thus, the real question presented in determining whether Section 32310 “comport[s] with the Second Amendment” (Defendant-Appellant Opening Brief at pp. 3–4) is whether magazines holding more than 10 rounds are commonly owned and used by law-abiding citizens for lawful purposes. There can be no legitimate dispute that they are.

Unsatisfied with this test, however, Defendant-Appellant, attempts to include an extra requirement: that citizens must commonly *use* 11+ round magazines *for self-defense*. *See generally* Defendant-Appellant Opening Brief. But this requirement appears nowhere in *Heller* nor is there any suggestion that “common use” means only self-defense as opposed to other lawful purposes such as shooting competitions, recreational target shooting, training to become a safe and competent shooter and hunting. Rather, *Heller* provides Second Amendment protection encompassing firearms whose features are “in common use,” “typically possessed,” and “preferred” by law-abiding Americans for lawful purposes. *Id.* at 624, 625, 628–29. Both historically and in modern times magazines holding over

10 rounds of ammunition are common for many lawful purposes, not just self-defense.

As the panel opinion recognized, “That LCMs are commonly used today for lawful purposes ends the inquiry into unusualness. But the record before us goes beyond what is necessary under *Heller*: Firearms or magazines holding more than ten round capacities existed even before our nation’s founding, and the common use of LCMs for self-defense is apparent in our shared national history.” *Duncan*, 970 F.3d at 1147. Such information is useful to show just how common magazines with a capacity exceeding 10 rounds are. These types of magazines date back *several hundred years* (to 1580). See David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALB. L. REV. 849, 852–57 (2015). They have been “commonly possessed” in the United States since 1863. *Id.* at 871. As time progressed, magazines holding more than 10 rounds gained popularity, with more than 20 firearm models from American manufacturers holding magazines of 16 to 30 rounds being available between 1936 and 1971. *Id.* at 857–859, 858, n. 82. In the late 1950s more than a dozen companies manufactured over 200,000 of the popular M-1 carbine for the civilian market. *Id.* at 859, 859, n. 88. Standard magazines for the M-1 are 15 and 30 rounds. *Id.*

In the 1970s, additional firearm models from European manufacturers were available with magazines holding 20 and 30 rounds. *Id.* at 861. Beretta’s model

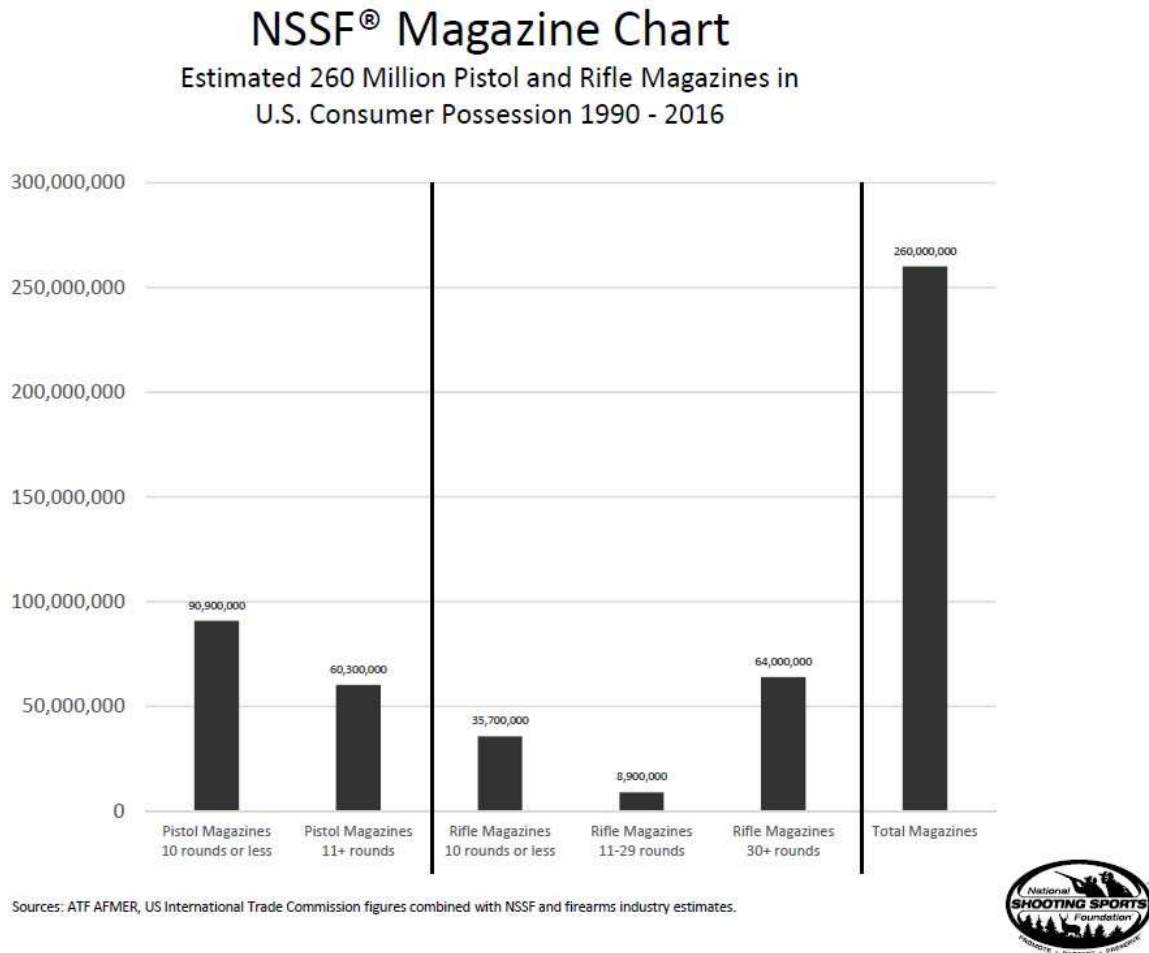
92, holding 16 rounds entered the market in 1976 and, in its various iterations, is one of the most popular of all modern handguns. *Id.* But “[l]ong before 1979, magazines of more than ten rounds had been well established in the mainstream of American gun ownership.” *Id.* at 862. Technological improvements after 1979 only increased the popularity of magazines holding more than 10 rounds. *Id.* at 862–864.

Common sense tells us that the small percentage of the population who are violent gun criminals is not remotely large enough to explain the **massive market** for magazines of more than ten rounds that has existed since the mid-nineteenth century. We have more than a century and a half of history showing such magazines **to be owned by many millions** of law-abiding Americans.

Id. at 871 (emphasis added). “While the Supreme Court has ruled that arms need not have been common during the founding era to receive protection under the Second Amendment, the historical prevalence of firearms capable of holding more than ten bullets underscores the heritage of LCMs in our country’s history.” *Duncan*, 970 F. 3d at 1149.

“Commonality is determined largely by statistics. But a pure statistical inquiry may hide as much as it reveals. In the Second Amendment context, protected arms may not be numerically common by virtue of an unchallenged, unconstitutional regulation.” *Duncan*, 970 F.3d at 1147. As the panel opinion appreciated, “[w]hile common use is an objective and largely statistical inquiry,

typical possession requires us to look into both broad patterns of use and the subjective motives of gun owners.” *Id.* (citation omitted). Even with such a limitation, modern figures estimate 230 million pistol and rifle magazines were in the possession of United States consumers between 1990 and 2015. 7-ER-1697–1703. Magazines capable of holding more than 10 rounds of ammunition accounted for *approximately half* (133 million) of all magazines owned. *Id.* As noted in the Kopel article, it is only “[c]ommon sense” that criminal misuse and possession of 11+ round magazines does not account for the presence of 133 million such magazines throughout the United States.



Rather, it is law-abiding citizens with lawful intentions who account for most, if not all, of the estimated 133 million 11+ round magazines. Though Defendant-Appellant makes much of various crimes, including mass shootings involving magazines with more than 10 rounds, the fact such magazines are also misused by criminals does not eliminate or detract from the Second Amendment rights of law-abiding citizens. If criminal misuse were the touchstone for constitutionality the Second Amendment would cease to exist. *See generally Heller*, 554 U.S. at 636.

For example, in *McDonald v. City of Chicago*, Justice Alito reminded the parties (in the context of Chicago defending a challenged ordinance on grounds of public safety) that “[a]ll of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category.” 561 U.S. 742, 783 (2010) (citing *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (“The exclusionary rule generates ‘substantial social costs,’ *United States v. Leon*, 468 U.S. 897, 907 (1984), which sometimes include setting the guilty free and the dangerous at large”); *Barker v. Wingo*, 407 U.S. 514, 522 (1972) (reflecting on the serious consequences of dismissal for a speedy trial violation, which means “a defendant who may be guilty of a serious crime will go free”); *Miranda v. Arizona*, 384 U.S. 436, 517 (1966) (Harlan, J., dissenting); *id.* at 542 (White, J., dissenting) (objecting that the Court’s rule “[i]n some unknown number of cases ... will return a killer, a rapist or other criminal to the streets ... to repeat his crime”); *Mapp v. Ohio*, 367 U.S. 643, 659 (1961)).

In *McDonald*, the court also emphasized that resolving Second Amendment cases would not “require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise.” 561 U.S. at 785, 790–91 (also recognizing *Heller* expressly rejected judicial interest balancing in deciding the scope of Second Amendment rights). “The very enumeration of the right takes out of the hands of government—

even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon.” *Heller*, 554 U.S. at 634. “[T]he Supreme Court made clear in *Heller* that it wasn’t going to make the right to bear arms depend on casualty counts.” *Moore v. Madigan*, 702 F.3d 933, 939 (7th Cir. 2012) (citing *Heller*, 554 U.S. at 636). “If the mere possibility that allowing guns to be carried in public would increase the crime or death rates sufficed to justify a ban, *Heller* would have been decided the other way” *Id.* The desire to enhance public safety should not and cannot be allowed to infringe upon law-abiding citizens’ rights under the Second Amendment.

From all available data, it cannot seriously be disputed that magazines with 11+ rounds are commonly owned and used by law abiding citizens for lawful purposes,⁸ including for self-defense in the home, and have been for hundreds of years. This commonality mandates Second Amendment protection and a finding that Section 32310 is unconstitutional under all analyses.

II. The Availability of Smaller Capacity Magazines Does Not Cure Section 32310’s Infringement Upon Core Second Amendment Rights.

Defendant-Appellant suggests Section 32310’s ban on magazines holding more than 10 rounds does not severely burden Second Amendment rights because

⁸ In truth, the bulk of handguns sold today are sold with magazines holding more than ten rounds. 7-ER-1706. Most standard magazines for handguns hold 15 or 17 rounds.

it does not prohibit all firearm magazines – “it merely limits magazine capacity to ten rounds.” Defendant-Appellant Opening Brief at p. 33. Nor, according to Defendant-Appellant, does Section 32310 limit the number of magazines holding 10 or fewer rounds an individual may possess.⁹ *Id.* Thus, Section 32310 does not severely burden – or burden at all – Second Amendment rights. However, “restating the Second Amendment right in terms of what IS LEFT after the regulation . . . is exactly backward from *Heller*’s reasoning.” *National Rifle Ass’n of America, Inc. v. BATFE*, 714 F.3d 334, 345 (5th Cir. 2013) (Jones, J., joined by Jolly, Smith, Clement, Owen, and Elrod, JJ., dissenting from denial of rehearing *en banc*) (emphasis in original); *Duncan*, 970 F.3d at 1157 (“[W]e look to what a restriction takes away rather than what it leaves behind.”). “A ‘substantial burden’ on the Second Amendment is viewed not through a policy prism but through the lens of a fundamental and enumerated constitutional right. We would be looking through the wrong end of a sight-glass if we asked whether the government permits the people to retain some of the core fundamental and enumerated right.” *Id.*

⁹ It requires little imagination to predict the next step in Defendant-Appellant’s endless attack on the Second Amendment rights of its citizens. As Defendant-Appellant is sure to argue in the next case, “Who needs more than [insert arbitrary number] magazines?”

One would never tolerate under the First Amendment a law banning books over an arbitrary number of pages because there are books with few pages in the library, yet that is precisely Defendant-Appellant’s rationale here. The panel opinion, in discussing the burden Section 32310 places on Second Amendment rights, provides the following analogies:

[N]o court would hold that the First Amendment allows the government to ban “extreme” artwork from Mapplethorpe just because the people can still enjoy Monet or Matisse. Nor would a court ever allow the government to outlaw so-called “dangerous” music by, say, Dr. Dre, merely because the state has chosen not to outlaw Debussy. And we would never sanction governmental banning of allegedly “inflammatory” views expressed in Daily Kos or Breitbart on the grounds that the people can still read the New York Times or the Wall Street Journal.

Duncan, 970 F.3d at 1159–60.

As *Heller* pointed out in reference to handguns, “[i]t is no answer to say . . . 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*, 554 U.S. at 629; *see also Caetano v. Massachusetts*, 136 S. Ct. 1027, 1033 (2016) (Alito, J., concurring) (“But the right to bear other weapons is “no answer” to a ban on the possession of protected arms.”). The Supreme Court noted “the American people have considered the handgun to be the quintessential self-defense weapon” and found “[t]here are many reasons that a citizen may prefer a handgun for home defense . . .

Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.”

Id. at 629.

The same reasoning applies here. Magazines holding more than 10 rounds are extremely popular (to the tune of approximately 133 million) and useful in self-defense and many Americans “[w]hatever the reason” will choose a magazine with a capacity of more than 10 rounds. Allowing law abiding citizens to possess as many magazines with 10 or fewer rounds does not lessen the burden on Second Amendment rights.¹⁰ As such, Section 32310 is unconstitutional.

III. If Heightened Scrutiny, Rather than the Simple *Heller* Test, Must Be Applied to Section 32310, the Scrutiny Applied Should be Strict.

Since *Heller* and *McDonald*, it is well-established the Second Amendment protects a fundamental, individual right to keep and bear arms which extends to state and local governments. Although neither decision sets forth precisely how lower courts should evaluate laws infringing Second Amendment rights, *Heller* explicitly requires something more than rational basis scrutiny and rejected interest balancing. As *Heller* teaches: (1) some form of heightened scrutiny will apply in evaluating the constitutionality of laws infringing on Second Amendment rights,

¹⁰ By the same token, criminal and others intending to misuse firearms and magazines for *unlawful* purposes may do the same.

and (2) rational basis is insufficient. *See Heller*, 554 U.S. at 628 n. 27; *see also Silvester v. Harris*, 843 F.3d 816, 821–22 (9th Cir. 2016).

To determine the appropriate level of scrutiny, the *en banc* panel must look to the severity of the burden Section 32310 places on Second Amendment rights. A severe burden implicating the “core of the Second Amendment right” will be subject to strict scrutiny. Both the District Court and the August 14, 2020 Opinion correctly conclude the burden Section 32310 places on the Second Amendment rights of law-abiding citizens is severe. “A law like § 32310 that prevents a law-abiding citizen from obtaining a firearm with enough rounds to defend self, family, and property in and around the home certainly implicates the core of the Second Amendment. When a person has fired the permitted 10 rounds and the danger persists, a statute limiting magazine size to only 10 rounds severely burdens that core right to self-defense.” 1-ER-45. “Section 32310’s wide ranging ban with its acquisition-possession-criminalization components exacts a severe price on a citizen’s freedom to defend the home.” *Id.* at 52:21–22. Section 32310 “substantially burdens core Second Amendment rights because of its sweeping scope and breathtaking breadth. This is so because half of all magazines in the United States are now illegal to own in California.” *Duncan*, 970 F.3d at 1156. Even though the subject magazines are not unusual and are used commonly in guns for self-defense, Section 32310 requires “[l]aw-abiding citizens [to] alter or turn

them over — or else the government may forcibly confiscate them from their homes and imprison them up to a year.” *Id.* Worse, “[t]he law’s prohibitions apply everywhere in the state and to practically everyone. It offers no meaningful exceptions at all for law-abiding citizens. These features are the hallmark of substantial burden.” *Id.* As set out above, there is no doubt Section 32310 severely burdens the core Second Amendment right of self-defense and should be evaluated under the highest level of scrutiny.

IV. Regardless of the Level of Scrutiny Applied, Section 32310 Fails Because it is Overbroad.

Whether strict scrutiny¹¹ or intermediate scrutiny¹² applies, Section 32310 will fail because the “fit is excessive and sloppy.” *See Duncan*, 970 F.3d at 1165–

¹¹ To satisfy strict scrutiny, Defendant-Appellant must prove Section 32310 is “narrowly tailored to achieve a compelling governmental interest.” *See Abrams v. Johnson*, 521 U.S. 74, 82 (1997).

¹² If the implicated right is not a “core” Second Amendment right, or if the challenged law does not place a “substantial burden” on the exercise of the Second Amendment right, intermediate scrutiny is appropriate. *Silvester*, 843 F.3d at 821. Thus, Section 32310 must *at least* pass intermediate scrutiny if it makes it past the simple *Heller* test. Intermediate scrutiny requires Defendant-Appellant to “demonstrate that the harms it recites are real” beyond “mere speculation or conjecture.” *Edenfield v. Fane*, 507 U.S. 761, 770–771 (1993). “Our intermediate scrutiny test under the Second Amendment requires that (1) the government’s stated objective . . . be significant, substantial, or important; and (2) there . . . be a ‘reasonable fit’ between the challenged regulation and the asserted objective.” *U.S. v. Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013); *see also Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993).

68. Both levels of scrutiny require Section 32310 “fit” with Defendant-Appellant’s goals. Under strict scrutiny, the fit must be “the least restrictive means to further the articulated interest.” *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 197 (2014). Intermediate scrutiny is less exacting but still requires the fit be reasonable and employ “not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.” *Id.* The required fit should “not [be] more extensive than necessary” to serve Defendant-Appellant’s interest. *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 816 (9th Cir. 2013). As explained in more detail below, Section 32310 is not tailored to fit Defendant-Appellant’s stated interests in any way.

A. Section 32310 is Not Narrowly Tailored to Fit Defendant-Appellant’s Objectives.

The burden is on Defendant-Appellant to establish the law is “closely drawn to avoid unnecessary abridgment” of constitutional rights. *McCutcheon*, 572 U.S. at 218. Defendant-Appellant’s stated ends are public safety, preventing gun violence and keeping our police safe. While these are worthy objectives, “[a]t this level of generality, these interests can justify any law and virtually any restriction.” 1-ER-66. “[E]ven well-intentioned laws must pass constitutional muster.” *Duncan*, 970 F.3d at 1140. Defendant-Appellant cannot show a “reasonable fit” between its general purpose and Section 32310 because Section 32310 is exceedingly overbroad and operates as a complete ban on 11+ round magazines

without rhyme or reason. As the District Court phrased it, Section 32310 is, “at best, ungainly and very loose.” 1-ER-67. “The fit is like that of a father’s long raincoat on a little girl for Halloween.” 1-ER-67. The panel opinion further explains Section 32310 is not the least restrictive means of achieving Defendant-Appellant’s interests:

[S]ection 32310 provides few meaningful exceptions for the class of persons whose fundamental rights to self-defense are burdened. The scope of section 32310 likewise dooms its validity. Section 32310 applies statewide. It necessarily covers areas from the most affluent to the least. It prohibits possession by citizens who may be in the greatest need of self-defense like those in rural areas or places with high crime rates and limited police resources. It applies to nearly everyone. It is indiscriminating in its prohibition. Nor is the law limited to firearms that are not commonly used for self-defense. These are not features of a statute upheld by courts under the least restrictive means standard.

Duncan, 970 F.3d at 1164–65.

For example, the same arguments Defendant-Appellant makes about 11+ round magazines can apply equally to magazines holding fewer rounds, say 6 or 8 (i.e., the “critical pause” when a mass shooter is reloading¹³). It is impossible to

¹³ But what makes the lives of the 11th, 12th, 13th and so on person more valuable than those injured or killed when the first 10 rounds are shot? And doesn’t this really forecast Defendant-Appellant’s continued chipping away of the Second Amendment and likely future statutes further reducing magazine capacity and eventually banning magazines (and ultimately firearms) completely? Taking Defendant-Appellant’s argument to its logical conclusion, California could ban all magazines and limit citizens to single shot firearms which require manual reloading. Yet, semiautomatic firearms are ubiquitous (commonly owned) in America, even in California, and have been for more than a century.

see how Section 32310 is narrowly tailored to the ends Defendant-Appellant seeks¹⁴ or if it will accomplish Defendant-Appellant's objectives at all.

B. Defendant-Appellant's Choice of a 10-Round Magazine Restriction is Arbitrary.

Perhaps the most important question here is *why did Defendant-Appellant select 10 rounds as the limit for magazine capacity?* The District Court raised this query multiple times at the hearing on Plaintiffs-Appellees' Motion for Summary Judgement. *See generally* 1-ER-94–218. This question speaks directly to the heart of whether Section 32310 is narrowly tailored to achieve its desired objective. Yet Defendant-Appellant never provided a satisfactory answer, let alone a persuasive one. They cannot provide an objective, evidence-based rationale for why 10 rounds is the “magic” number. Nor does the legislative history behind Section 32310¹⁵ provide an answer as to why a magazine holding 10 rounds is acceptable and one with 11 or more rounds (as is common with many popular handguns) is

¹⁴ Defendant-Appellant cites to incidents where criminals misused magazines with more than 10 rounds. However, those same criminals in most, if not all, of those incidents had multiple firearms and multiple magazines. Thus, a limitation on magazine capacity will not prevent such criminal misuse of firearms and magazines and likely would not reduce associated injuries and/or fatalities.

¹⁵ The same is true for the 10-year federal ban on 11+ round magazines and for states with similar statutes. No legislative history explains why Congress chose 10 rounds as opposed to some other number, let alone an objective, fact-based rationale.

not. The only plausible explanation is that the 10-round restriction is simply an arbitrary number with no real relationship to Defendant-Appellant's purported objectives.

As the District Court noted, the decision to allow magazines with 10 or fewer rounds, instead of some other number, is a "theoretical abstract concept that someone came up with, some arbitrary number that they picked out of the air, because there's nothing in this evidence, by the way, that I can see that indicates that, you know, if you had a magazine of 11 rounds, anything would change from 10 rounds or even if you had 15 rounds that the outcome or the safety of the people would be any greater, or 20 rounds, or 30 rounds." 1-ER-159–160 (in the context of discussing other states' restrictions on magazine capacities). Under Defendant-Appellant's flawed logic, the state "could limit magazines to as few as three bullets and not substantially burden Second Amendment rights because, on average, 2.2 bullets are used in every defensive encounter according to one study." *Duncan*, 970 F.3d at 1160. The panel opinion takes Defendant-Appellant's logic one step further and asks why limit the number of bullets in a magazine if the state could impose a one gun per person rule? The answer: "This cannot be right. We would never uphold such a draconian limitation on other fundamental and enumerated constitutional rights." *Id.* at 1161.

Defendant-Appellant had a further opportunity to address the District Court's concern in supplemental briefing following the summary judgment hearing, but again, failed to provide a persuasive answer. Defendant-Appellant suggested a 10 round limit does not severely impair any self-defense use because on average only 2.2 rounds are shot in self-defense. But this assertion rings hollow. "[T]he threat to life does not occur in an average act in the abstract; self-defense takes place in messy, unpredictable, and extreme events." *Duncan*, 970 F.3d at 1160.

First, *Heller* recognized, "There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Heller*, 554 U.S. at 629. The same holds true for individuals choosing a 11+ round magazine instead of a smaller magazine. These individuals have their reasons for such a choice. The larger magazine may be chosen for self-defense over smaller magazines for many reasons, including but not limited to providing sufficient rounds to account for poor aim during the stress of a criminal invasion in

one's home, allowing sufficient rounds for multiple attackers, allowing the individual to aim/shoot with one hand while dialing the police without needing to use both hands to reload and more. 7-ER-1709–10.

Second, *Heller* did not address whether individuals actually shot handguns for self-defense. Rather, an individual “uses” a 11+ round magazine simply by keeping it ready for self-defense. For example, law enforcement officers “use” their guns and corresponding magazines every day, even if they are not shooting criminals. But those magazines are available should they be needed. Such magazines may be possessed or used for self-defense even if the trigger is never pulled. The overwhelming number of firearm owners will never have to fire their weapon in self-defense. While a good thing, it is irrelevant to the constitutional analysis here. Having the choice of more than 10 rounds may provide an individual the confidence needed to ward off a criminal attack. By enacting Section 32310, the government makes that choice for its citizens when *Heller* makes clear that the Second Amendment takes the choice. It is a right that belongs to the People who choose to reside in California. Because Section 32310 takes that choice away from its citizens it violates their Second Amendment rights to keep and bear arms.

C. There is No Relationship Between a 10-Round Magazine Capacity Limitation and Defendant-Appellant's Objectives.

In addition to failing to explain why Section 32310 limits magazine capacity to no more than 10 rounds, Defendant-Appellant fails to produce evidence Section 32310 will meet its goals (however vaguely stated). Defendant-Appellant produced *no evidence* the magazine limitation will have an effect on mass shootings or crimes where 11+ round magazines are used. Only three of the incidents Defendant-Appellant cited “definitely involved” magazines with 11+ rounds, magazines which had been illegally smuggled into California. *See Duncan*, 970 F.3d at 1168.

Defendant-Appellant's own expert's research showed a Department of Justice study to review the effects of the 1994 federal ban on magazines over ten rounds and “assault weapons” concluded that, 10 years after the ban was imposed “there [had been] no discernible reduction in the lethality and injuriousness of gun violence.” 3-ER-668. There was no evidence that lives were saved [and] no evidence that criminals fired fewer shots during gun fights. 3-SER-670. Defendant-Appellant's expert's final report declared the federal ban could not be “clearly credit[ed] . . . with any of the nation's recent drop in gun violence” and that, “[s]hould [a nationwide ban] be renewed, the ban's effects on gun violence are likely to be small at best and perhaps too small for reliable measurement.” 3-ER-575. Additionally, a comprehensive study by the Centers for Disease Control

(CDC) in 2003 looked at 51 studies covering the full array of gun-control measures, including the federal Public Safety and Recreational Firearms Act (also known as the Assault Weapons Ban), and was unable to show that federal ban and its magazine capacity limitation had reduced crime. Centers for Disease Control and Prevention “*First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws. Findings from the Task Force on Community Preventative Services*,” MORBIDITY AND MORTALITY WEEKLY REPORTS; 52 (RR14), October 3, 2003.

In light of these studies, there is no evidence the availability of magazines over ten rounds is causally related to violent crime. Thus, the pre-*Heller* federal Public Safety and Recreational Firearms Act’s ban on 11+ round magazines is nothing more than a failed experiment from which Defendant-Appellant learned nothing.¹⁶ And if such a ban did not work on a national level, why does Defendant-Appellant expect different results from Section 32310? Because Defendant-Appellant never explains *why* it chose a 10-round magazine capacity limit, there is no reason to believe Section 32310 will not fail in the same way the federal ban did. With this failure in mind, how can the current limitation set forth

¹⁶ Neither did Colorado, Connecticut, D.C., Maryland, Massachusetts, New Jersey, New York and Vermont – all states which continue this failed experiment in some form.

in Section 32310 be considered narrowly tailored to meet Defendant-Appellant's ends and satisfy strict or intermediate scrutiny? The answer is, it cannot.

D. Defendant-Appellant's Magazine Capacity Restriction Steepens the Slide to Additional Restrictions in Violation of the Second Amendment.

At the hearing on Plaintiffs-Appellees' Motion for Summary Judgment, the District Court recognized the potential for the slippery slide of the Second Amendment into oblivion and the difficulty with determining the stopping point:

When you look at the incremental way that we have been addressing the Second Amendment, logic and reason tells us that that's exactly what's going to happen. . . [T]he state is going to come in and say, you know what, we got to get rid of 10-round magazines so we're going to go to 7. . . And then the next mass shooter is going to use a weapon that kills with a 7-round magazine, and then the next person after that is going to use a 7-round magazine, and the next person after that is going to use a 7-round magazine.

Then the state is going to come and say, look, judge, law enforcement is being assaulted with these 7-round magazines, and people are being killed in mass shootings with 7-round magazines. We got to ban 7-round magazines. You can see where this is going to progress, and this is why I was asking you the question because it's a tough question. It's not an easy question. It's not an easy question for me. It should not be an easy question for anyone. But my question is: at what point in time, where, when, because the evidence is not going to change. There's going to be people that are going to be killed. There's going to be people that are going to be injured. There's going to be police officers that are going to be assaulted whether it be with a 10-round magazine or 7-round magazine or 5-round magazine. . . . But when you get down to 2.2 rounds, someone is going to say, look, for self-defense, you only need one round. That's all you need. If you're a good shot, and you put the shot center

mass, you got the person. That's all you need. And you're going to come in and say, look, judge, law enforcement officers are being assaulted with these derringers that use two rounds, and people are being killed by people using derringers with two rounds. Then guess what? As the evidence shows, and you know it, and I know it, in a large number of these mass shootings, the shooter has more than one weapon.

...

They usually come in with many weapons. And so now the argument is going to come and the state is going to come in and the state is going to say, look, judge, we need to pass a law, and the law is you can't own more than -- pick a number -- 10 guns because if you got more than 10 guns, the chances are you're going to kill and injure more people, assault more law enforcement officers and so on. We're going to get down, doing the same progression, until we're at the point where you have maybe one gun with one round, and you better hope to heck that whoever is breaking into your house to rape your wife or rape your daughter that you can hit him or her with that one round and hit him center mass. It's a difficult question, but what I'm asking you is why the 10 rounds, and why do I have to give substantial weight to the legislature, and would I do the same thing if they said 7? Would I do the same thing if they said 5?

1-ER-154–157.

The failure of Defendant-Appellant to set forth the reasoning behind selecting the 10-round limit and establishing *why* 10 rounds is a reasonable fit reinforces this slippery slope concern. This has already occurred in other jurisdictions where legislative bodies have tried to reduce magazine capacity below 10 rounds with no seeming rationale behind their chosen limitations. For example, in New Jersey, magazine capacity was limited to 15 rounds or less from 2000 until

June 2018. In 2018, New Jersey reduced the magazine capacity limit to 10 rounds. *See* N.J. Stat. Ann. §§ 2C:39-1(y) (amending § 2C:39-1(y) (2018)), 39-3(j), 39-9(h). New York began with a magazine capacity limit of 10 rounds and later attempted to amend the statute to limit magazines to a seven-round load limit and make it “unlawful for a person to knowingly possess an ammunition feeding device where such device contains more than seven rounds of ammunition.” N.Y. Pen. Code §§ 265.00 (amending § 265.00 (2013)), 265.36; *see also New York State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 804 F.3d 242, 264 (2d Cir. 2015) (finding the seven-round limitation unconstitutional). In Maryland, magazines holding more than 20 rounds were banned until that number was reduced to 10 rounds in 2013. Md. Code Crim. Law § 4-305(b) (amending § 4-305(b) (2013)).

Even the federal government fell victim to this slippery slope: when the Public Safety and Recreational Firearms Act was originally proposed in 1990, the statutory language limited magazine capacities to 15 rounds. *See* 136 Cong. Rec. S6725-02, 136 Cong. Rec. S6725-02, S6726, 1990 WL 67557. A few years later, and without explanation, the statute was amended (and ultimately enacted) to reduce magazine capacity to 10 rounds or less. *See* 139 Cong. Rec. S15475-01, 139 Cong. Rec. S15475-01, S15480, 1993 WL 467099.

Allowing Defendant-Appellant to dictate an arbitrary number of rounds a magazine may hold – without any tailoring, let alone narrow tailoring, to its

purposes – is dangerous and potentially fatal to the continued protection of Second Amendment rights. The “very enumeration of [a constitutional] right takes out of the hands of government -- even the Third Branch of Government -- the power to decide on a case-by-case basis whether the right is really worth insisting upon.”

Heller, at 634. Indeed, a “constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.” *Id.*

V. Only a Few States Impose Restrictions on Magazine Capacity.

As Defendant-Appellant recognizes, only nine states (this number includes California)¹⁷ restrict civilian access to magazines holding a specific number of rounds. Defendant-Appellant Opening Brief at p. 7, 7 n. 2. Of those, two states limit magazine capacity to 15 rounds. Colo. Rev. Stat. §§ 18-12-301–302; 13 V.S.A. § 4021. Thus, the number of states actually restricting magazine capacity to 10 or less is only seven; six if California is not included. That equates to just 12% of the states. Thus, to the extent Defendant-Appellant relies on those six states to support the constitutionality of Section 32310, such reliance is misplaced. Magazine restrictions are instead quite *uncommon*. Even if this number were

¹⁷ See Cal. Penal Code § 32310 (California); Colo. Rev. Stat. §§ 18-12-301–302 (Colorado); Conn. Gen. Stat. § 53-202w (Connecticut); D.C. Code § 7-2506.01(b) (District of Columbia); Haw. Rev. Stat. § 134-8(c) (Hawaii); Mass. Gen. Laws Ann. Ch. 140, §§ 121, 131(a) (Massachusetts); Md. Code, Crim. Law § 4-305(b) (Maryland); N.J. Stat. Ann. §§ 2C:39-1(y), 39-3(j), 39-9(h) (New Jersey); N.Y. Pen. Law §§ 265.00, 265.36 (New York); 13 V.S.A. § 4021 (Vermont).

higher, an oft-repeated parental phrase comes to mind: if some (12%) of your friends jumped off a bridge would you jump too? The choice of other states to infringe on the Second Amendment rights of their citizens, and the corresponding circuits which have upheld such restrictions, does not make such restrictions constitutional.

Further, Defendant-Appellant's reliance on these other states and affirming circuits is contradictory.¹⁸ On the one hand, Defendant-Appellant looks to other states and other circuits in the U.S. for magazine restriction laws. On the other, Defendant-Appellant complains about the use of data regarding the number of 11+ round magazines nationwide to support commonality because the data not specific to California. Defendant-Appellant cannot have it both ways.

Regardless of what other states and circuits have done in relation to 11+ round capacity magazines, NSSF implores the *en banc* panel not to repeat the mistakes of its sister courts in allowing magazine capacity restrictions to chip away at the Second Amendment. Instead, NSSF urges the *en banc* panel to affirm the District Court's Judgement in Plaintiff-Appellees' favor as was done in the August 14, 2020 Opinion because Section 32310 is unconstitutional.

¹⁸ As the panel opinion notes, may of these other states' laws are "not as sweeping" as Section 32310. *See Duncan*, 970 F.3d at 1162.

CONCLUSION

Section 32310 overreaches in limiting the possession and use of magazines to 10 or fewer rounds for nearly all people anywhere in California and in doing so severely burdens the Second Amendment rights of Californians who may choose magazines holding more than 10 rounds for self-defense. It simply takes the choice out of Californian's hands and operates as a complete ban on a particular kind of arm. Such a ban is clearly unconstitutional under the simple *Heller* test.

Even assuming strict or intermediate scrutiny applies, Section 32310 cannot pass constitutional muster. There is simply no explanation for why a 10-round restriction will reduce mass shootings or crimes involving such magazines. Worse, this lack of explanation can only mean the continued erosion of the Second Amendment because the reality is magazines of any size will allow more injuries and deaths than a one-shot firearm or no firearms at all. This then begs the question of how far Defendant-Appellant will go in restricting Californian's Second Amendment rights.

As the District Court set forth in its lengthy and well-reasoned opinion and as set forth in the August 14, 2020 Opinion, Section 32310 is unconstitutional no matter the test applied, be it the simple *Heller* test or some form of heightened scrutiny. Accordingly, NSSF strongly encourages the *en banc* panel to find Section 32310 unconstitutional and affirm the August 14, 2020 Opinion.

Dated: April 1, 2021

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

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