**No. 19-55376**

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

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VIRGINIA DUNCAN; RICHARD LEWIS; PATRICK LOVETTE; DAVID MARGUGLIO; CHRISTOPHER WADDELL; CALIFORNIA RIFLE & PISTOL ASSOCIATION, INC., a California Corporation,

*Plaintiffs-Appellees*,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California,

*Defendant-Appellant*.

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On Appeal from the United States District Court for the Southern District of California,
No. 17-cv-1017-BEN-JLB

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# APPELLEES' SUPPLEMENTAL REPLY BRIEF ON EN BANC REHEARING

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## INTRODUCTION AND SUMMARY OF ARGUMENT

Nothing in the state's supplemental brief casts any doubt on the panel's conclusion that California's retrospective and confiscatory magazine ban violates the Second Amendment. The panel's conclusion that magazines capable of firing more than 10 rounds are constitutionally protected is unassailable, and California's contrary arguments only underscore that the question is not even close. California does not dispute that arms capable of firing more than 10 rounds pre-dated the Founding, or that there is virtually no history of regulation of those arms until very recently. Instead, California tries to move the baseline, arguing that the arms were not *widespread* until the 1970s. That is legally backwards and factually flawed. When possession of arms becomes "widespread" *before* governmental efforts to restrict them, Second Amendment protections are at their zenith. In all events, not only were such arms popular a century earlier, but laws restricting them remain outliers even today.

With both modern and historical practice clearly against it, the state urges this Court to subject its ban to a watered-down version of scrutiny that relegates the text, tradition, and history to an afterthought. The state's effort to ban and confiscate what other jurisdictions leave unregulated (in some cases based on experience that such bans are unnecessary and ineffective) could only be justified by a level of scrutiny that is heightened in name only. And California does not even pretend that the

version of scrutiny it urges resembles any other form of heightened scrutiny, despite the Supreme Court's admonishment that courts may not "single[] out" the Second Amendment for "special—and specially unfavorable—treatment." *McDonald v. City of Chicago*, 561 U.S. 742, 778-79 (2010) (plurality op.). In reality, this extraordinary law would fail any form of scrutiny consistent with the Second Amendment's undoubted status as a fundamental right. By outright prohibiting (and retroactively confiscating) what the Second Amendment protects, the law is so radically overbroad that it cannot satisfy even intermediate scrutiny. Indeed, a retroactive and confiscatory ban is the antithesis of tailoring. The panel was thus eminently correct to hold that California has not come anywhere close to carrying its burden of justifying its effort to treat as absolutely verboten what the Constitution treats as fundamentally protected.

## ARGUMENT

### I. The Historical Record Confirms That The Banned Magazines Are Protected By The Second Amendment.

Binding Supreme Court precedent instructs that arms are protected by the Second Amendment if they are "typically possessed by law-abiding citizens for lawful purposes." *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008). The state does not and cannot dispute that the largely uncontested record evidence proves that magazines capable of holding more than 10 rounds come standard with many of the most popular handguns and rifles purchased and account for roughly half the

magazines in circulation. *Duncan v. Becerra*, 970 F.3d 1133, 1142, 1147-48 (9th Cir. 2020), *reh'g en banc granted, opinion vacated*, 988 F.3d 1209 (9th Cir. 2021). Instead, the state derides *Heller*'s "typically possessed" test as "illogical." Dkt.162 at 19. Setting aside the problem that this Court is bound by Supreme Court precedents no matter how it (or the state) grades their logic, the state does not even try to dispute that the overwhelming majority of the many millions of those magazines in lawful circulation are owned by law-abiding individuals for entirely lawful purposes. Nor can California dispute that the overwhelming majority of the magazines it seeks to confiscate have been owned for years without incident. To the contrary, the state admits that its concern is that "it is difficult to predict" which of its citizens might use such magazines "to commit an atrocity." *Id.* at 29.

Unable to establish that the banned magazines are anything but commonly and typically used for lawful purposes, the state devotes most of its attention to advancing the erroneous claim that these commonly owned magazines are entitled to no constitutional protection whatsoever because they have been "heavily regulated" ever since "they became widely available" to civilians. *Id.* at 9; *see also id.* at 1. Given that the overwhelming majority of states have *never* imposed *any* restrictions on magazine capacity, this claim does not pass the straight-face test. Unsurprisingly, it also rests on a tortured reading of the very sources the state invokes.

California does not dispute that firearms capable of firing more than ten rounds of ammunition without reloading, like the Girandoni air rifle, are as old as the nation itself (in fact, older). Instead, the state invites the Court to ignore all of that history on the theory that such arms were not "widely available" to the public until the 1970s. *Id.* at 10. But the principal authority the state offers in support of that dubious claim says precisely the opposite. Invoking the historical research of David Kopel, one of *plaintiffs*' experts, the state credits modern "technological improvements" with "[e]xpanded commercial availability" of magazines capable of holding more than 10 rounds. *Id.* at 11 (citing David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 862-64 (2015)). But the state ignores what Kopel established and concluded before turning to the improvements of the 1970s: "Long before 1979, magazines of more than ten rounds had been well established in the mainstream of American gun ownership." Kopel, *supra*, at 862. Indeed, Kopel documented the prevalence of such magazines dating to the early 19th century.

As he explained, the Colt revolver and the "Pepperbox" pistol were invented in the 1830s and quickly became "commercially successful," and the "great breakthrough" that led to modern repeating rifles occurred in the 1850s. *Id.* at 854. Thus, by the time of the ratification of the Fourteenth Amendment—the ultimate source of the restraint on California's legislative authority, *see McDonald*, 561 U.S.

at 767; *Duncan*, 970 F.3d at 1144—magazines capable of holding more than 10 rounds were already in common circulation, and they became even more popular in the decades that followed. Kopel, *supra*, at 851 ("In terms of large-scale commercial success, rifle magazines of more than ten rounds had become popular by the time the Fourteenth Amendment was being ratified."). For example, the Winchester Model 66, with a 17-round magazine, was on the market by 1867 and would go on to sell 170,000 copies. *Duncan*, 970 F.3d at 1148; Kopel, *supra*, at 855. Its successors, "the Model 73 and Model 92, combined selling over 1.7 million total copies between 1873 and 1941." *Duncan*, 970 F.3d at 1148; *see also* Kopel, *supra*, at 855-56. And the federal government subsidized the distribution of a quarter of a million M-1 carbines, with standard magazines of 15 and 30 rounds, to the public after World War II—decades before most of the few states that regulate magazine capacity began to do so. *Id.* at 859.

Rather than meaningfully grapple with this history, California claims that the magazines of the 1970s (and later) are so fundamentally different from their predecessors as to render the long history of common, lawful, and uneventful possession of magazines capable of holding more than 10 rounds constitutionally irrelevant. *See* Dkt.162 at 10-12. But setting aside the problem that the state's own regulatory regime does not draw any distinction between pre- and post-1970 magazines and instead seeks to retroactively ban them *all*, the state does not identify

any watershed technological change that converted commonly owned and lawfully possessed magazines into "dangerous and unusual weapons," *Heller*, 554 U.S. at 627.

For example, while the state emphasizes the double-stack magazine design, Dkt.162 at 11, Kopel explained that magazines capable of holding more than 10 rounds were common both before and after that design came on the market; the double-stack design just helped "foster the[ir] popularity" by making "relatively larger capacity magazines … possible for relatively smaller cartridges." Kopel, *supra*, at 862-63. The state notes that some earlier models—like the popular Winchester Models 66, 73, and 92—took longer to reload. *See* Dkt.162 at 10-11. But the notion that arms can be treated as *categorically* different from their historical analogs just because they are easier to use or reload is just a variation on the argument "that only those arms in existence in the 18th century are protected by the Second Amendment," which *Heller* rejected as "bordering on the frivolous." 554 U.S. at 582. Simply put, the historical inquiry does not start all over every time technological advancements make already-common arms even more popular or whenever states belatedly assert a regulatory interest over arms that have long been lawfully possessed. To the contrary, state efforts to literally disarm the people of arms they have long possessed strike at the very heart of the Second Amendment.

Of course, the state's benighted effort to reset the constitutional clock is ultimately beside the point, for even today the vast majority of states—41—do not restrict magazine capacity *at all*, *see Duncan*, 970 F.3d at 1142; ER 24, 34, and most of the few that do did not enact such laws until the past *decade*.[1] In fact, only three states and the District of Columbia had any sort of ban on firing capacity before the 1990s, and those laws did not impose limits as low as 10 rounds.[2] If anything, moreover, the very existence of those Prohibition-era laws (all since repealed[3]) gives the lie to the state's claim that arms capable of firing more than 10 rounds without

[1] *See* 1990 N.J. Laws 217, 221, 235 (codified at N.J. Stat. Ann. §2C:39-1(y), -3(j)); 1992 Haw. Sess. Laws 740, 742 (codified at Haw. Rev. Stat. §134-8); 1994 Md. Laws 2165 (amended 2013); 2013 Md. Laws 4195, 4210 (codified at Md. Code Ann., Crim. Law §4-305); 1999 Cal. Stat. 1781, 1785, 1793; Act of Aug. 8, 2000, ch. 189, sec. 11, §265.02(8), 2000 N.Y. Laws 2788, 2793 (amended 2013); 2013 N.Y. Laws 1, 16, 19 (codified at N.Y. Penal Law §265.36); 2013 Colo. Sess. Laws 144, 144-45 (codified at Colo. Rev. Stat. §18-12-302(1)); Conn. Gen. Stat. §53-202w; Vt. Stat. Ann. tit. 13, §4021; *see also* Mass. Gen. Laws ch. 140 §§121, 131(a); N.Y.C., N.Y., Admin. Code §10-306(b); *see generally* Kopel, *supra*, at 867-68.

[2] *See* 1927 Mich. Pub. Acts 887, §3 (prohibiting "any … firearm which can be fired sixteen times without reloading"); 1927 R.I. Pub. Laws 256 §§1, 3 (prohibiting firearms "which shoot[] more than twelve shots semi-automatically without reloading"); 47 Stat. 650, §§1, 14 (1932) (prohibiting "any firearm which shoots ... semiautomatically more than twelve shots without reloading" in the District of Columbia); 1933 Ohio Laws 189, §§12819-3, -4 (prohibiting "any firearm which shoots more than eighteen shots semi-automatically without reloading").

[3] *See* 1959 Mich. Pub. Acts 249, 250; 1959 R.I. Acts & Resolves 260, 260, 263 (amended 1975); 48 Stat. 1236 (1934), currently codified as amended at 26 U.S.C. §§5801-72;, 1972 Ohio Laws 1866, 1963 (setting 32-round limit); *see also* 2013-2014 Leg., H.R. 234 (Ohio) (fully repealing magazine ban) (codified at Ohio Rev. Code Ann. §2923.11).

reloading were not "widely available" until the 1970s. As for the federal government, its brief effort did not begin until 1994 and was subsequently discontinued as unnecessary and ineffective. Moreover, that now-defunct law was prospective-only. That California would revive that discarded pre-*Heller* law despite the Court's reaffirmation of Second Amendment rights and in a retrospective and confiscatory manner is a testament to California's utter disregard for the Second Amendment, *Heller*, and its citizens who have long lawfully possessed these magazines without incident.

At bottom, then, the state's argument boils down to a claim that a handful of mostly twenty-first century laws can suffice to demonstrate a "longstanding" history of restricting arms that predate the Second Amendment. To state that claim is to refute it. Indeed, the state's argument is a case study in why "twentieth-century developments" are of questionable "reliabil[ity] as evidence of the original meaning of the American right to keep and bear arms." *Young v. Hawaii*, 992 F.3d 765, 811 (9th Cir. 2021) (en banc). The state's felt need to move the historical baseline thus succeeds only in reinforcing the conclusion that the arms at issue here have a long historical tradition that does not include regulation, let alone confiscation. The state's magazine ban therefore plainly prohibits conduct protected by the Second Amendment.

## II. California's Ban Cannot Withstand Any Meaningful Form Of Scrutiny.

That should be the end of the inquiry, as a state may not outright prohibit what the Second Amendment protects. Indeed, a flat confiscatory ban flunks any version of means-end scrutiny that is heightened in anything but name only, as such a categorical ban is the very antithesis of tailoring and by definition fails to "avoid unnecessary abridgement" of constitutional rights. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 218 (2014) (plurality op.); *see also, e.g.*, *Heller*, 554 U.S. at 628-29 (flat ban "fail[ed] constitutional muster" without resort to scrutiny); *Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016) (Alito, J., concurring) ("categorical ban" on protected arms "violates the Second Amendment" without resort to scrutiny).

It is no surprise, then, that the state urges this Court to employ a mode of analysis that bears no resemblance to any form of heightened scrutiny applied by the Supreme Court. For example, the state simply ignores that even intermediate scrutiny demands a law to be "*narrowly tailored* to serve a significant governmental interest." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (emphasis added). And while the state insists that intermediate scrutiny "accords substantial deference to the legislature's predictive judgments," Dkt.162 at 24 (quotation marks omitted), the Supreme Court in fact holds that the government is entitled to *no* deference when assessing the fit between its purported interests and the means its selects to advance them, *see Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 214

(1997). Rather, the state bears the burden of proving that its means *in fact* do not burden "substantially more" constitutionally protected conduct than is "necessary to further [its] interest." *Id.*

California cannot come close to meeting that burden. The state begins by claiming that "[a]ll agree that" its retrospective and confiscatory law "serves compelling government interests." Dkt.162 at 24. But the state confuses whether it has articulated some interest that is compelling with whether its chosen means actually further any such interest in a manner that does not "burden substantially more [protected conduct] than is necessary." *Packingham*, 137 S. Ct. at 1736 (quoting *McCullen v. Coakley*, 573 U.S. 464, 486 (2014)). "All" decidedly do *not* "agree that" the state's ban actually furthers any compelling interest, let alone in a remotely tailored way. Indeed, to the extent the state's retrospective ban would confiscate magazines that have been lawfully possessed without incident for years, the ban does not serve the state's purported interests in the least.

The state barely even tries to carry its burden to prove that its law is meaningfully tailored. California concedes that the law "applies to almost everyone," and attempts to justify that incredible breadth on the ground that "it is difficult to predict in advance whether an individual will use" a banned magazine "to commit an atrocity." Dkt.162 at 29 (quotation marks omitted). But while that may provide insight into why California did not even try to tailor its law, it is no

substitute for showing the law is actually tailored. That failure would be fatal in virtually any context, but in a context where 41 states take no action, and the federal government abandoned a prospective-only ban as unnecessary, California's effort to ban every magazine capable of holding more than 10 rounds because "it is difficult to predict" which magazines will be misused is woefully inadequate.

California's effort to defend its retrospective and confiscatory possession ban fares even worse. It is not "difficult to predict" that individuals who lawfully obtained and have lawfully possessed magazines for decades without incident pose no material threat, yet California would confiscate those magazines along with everything else. Nor does the state even claim, let alone try to prove, that those magazines might fall into the hands of someone who *would* misuse them. Again, decades of safe-keeping and lawful use demonstrate the absence of any material risk.

The state instead seeks to justify confiscating magazines from law-abiding citizens (without even offering them any compensation) on the theory "that police could not easily distinguish between 'grandfathered' and prohibited" magazines. *Id.* at 29-30. But ease of policing is not a trump card, or even a constitutional value, when it comes to fundamental rights. Moreover, if the state's concern is being able to distinguish lawful and unlawful magazines, it plainly has more tailored means at its disposal. And the federal government maintained a prospective-only ban for a decade without being overwhelmed with the difficulty of distinguishing pre-ban

magazines. More fundamentally, California is not the first jurisdiction to try to ban constitutionally protected conduct because isolating unprotected conduct was difficult, and those efforts never succeed, *see, e.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002), because narrow tailoring requires the government to err on the side of allowing constitutionally protected activity. "The Government may not suppress lawful [activity] as the means to suppress unlawful [activity]. Protected [activity] does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *Id.* at 255.

California's effort to literally disarm law-abiding citizens of magazines they have lawfully possessed for decades is the *raison d'etre* of the Second Amendment and its historical antecedents. The state counters that it is not disarming individuals entirely. Dkt.162 at 29. But "[i]t is no answer to say … that it is permissible to ban the possession of [some protected arms] so long as the possession of other firearms … is allowed." *Heller*, 554 U.S. at 629. Moreover, if anything, the state's repeated insistence that it places no limits on how *many* 10-round magazines its citizens may possess raises the question how its ban even furthers its proffered interests at all—particularly given its claim that what purportedly differentiates modern-day magazines from their predecessors is how easily modern firearms can be reloaded. That the state's ban is both "seriously overinclusive" and "seriously underinclusive" "when judged against its asserted justification … raises serious

doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular" constitutional right. *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 802, 805 (2011).

Finally, the state urges this Court to follow the lead of other circuits that have upheld other magazine bans. But "many of the other states' laws are not as sweeping as" California's, *Duncan*, 970 F.3d at 1162, which is not just a distinction but a further demonstration of California's want of tailoring. Moreover, most of those decisions failed to apply any meaningful scrutiny—a point often highlighted in dissent, *see, e.g.*, *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Grewal*, 974 F.3d 237, 259-63 (3d Cir. 2020) (Matey, J., dissenting); *Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1289-91, 1294-95 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). Any version of scrutiny so malleable and dilutive as to permit the state to outright ban what the Constitution protects cannot be reconciled with *Heller*, *McDonald*, or the very notion of heightened scrutiny. Such rights-denying scrutiny would not be tolerated in any other context. Commercial speech may lie outside the core protection of the First Amendment, but no court would uphold a commercial-speech restriction simply because it reduces the volume of commercial speech. To deem firearms restrictions constitutional not in spite of but because of the burdens they impose on Second Amendment rights is just another variation on the theme that the

fundamental right to keep and bear arms should be "singled out for special—and specially unfavorable—treatment." *McDonald*, 561 U.S. 778-79 (plurality opinion).

In short, the state acknowledges that its ban applies to practically everyone, everywhere, at any time. Regardless of the standard of review or the strength of the state's asserted interests, that abject lack of tailoring requires this Court to affirm the district court's holding that the law is unconstitutional.

## CONCLUSION

For the reasons set forth above, this Court should affirm the district court.

Respectfully submitted,

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June 1, 2021

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of this Court's order of March 22, 2021 and Circuit R. 32-1 because this brief contains 3,346 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type.

June 1, 2021

s/Paul D. Clement
Paul D. Clement

**CERTIFICATE OF SERVICE**

I hereby certify that on June 1, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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Paul D. Clement