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July 12, 2021

**VIA ECF**

Molly C. Dwyer
Clerk of Court
United States Court of Appeals for the Ninth Circuit
James R. Browning Courthouse
95 7th Street
San Francisco, CA 94103

Re: *Virginia Duncan et al. v. Rob Bonta*, No. 19-55376 (en banc)

Dear Ms. Dwyer:

Appellees submit this Rule 28(j) letter to inform the panel of the Supreme Court's recent decision in *Americans for Prosperity Foundation v. Bonta*, No. 19-251 (U.S. July 1, 2021), which reversed a decision of this Court that applied an insufficiently demanding version of heightened scrutiny to a California law burdening fundamental rights. Considering the same "substantial relationship" test the state has urged this Court to apply here, *see, e.g.*, Dkt.79 at 14 & n.7, the Supreme Court reiterated that, even when strict scrutiny does not apply, "[a] substantial relation is necessary but not sufficient" to justify a law that burdens constitutional rights. *Bonta*, slip op. at 11. "[A] reasonable assessment of the burdens imposed" by a law "should begin with an understanding of the extent to which the burdens are unnecessary," an inquiry that "requires narrow tailoring." *Id.* While the state need not adopt the "least restrictive means," the Court explained, its means must be "narrowly tailored to [its] asserted interest." *Id.* at 8. The Court therefore explicitly reversed this Court's holding that narrow tailoring is reserved for strict scrutiny cases. *Id.* at 12. And in explaining that this "need for tailoring" is deeply rooted in its precedent, the Court invoked the same intermediate scrutiny decisions on which Appellees have relied in this case, including *McCutcheon v. Federal Election Commission*, 572 U.S. 185 (2014) (requiring "a means narrowly tailored to achieve the desired objective"). *Bonta*, slip op. at 10; *see, e.g.*, Dkt.164 at 9, 11, 16.

*Americans for Prosperity* confirms that California's ban on constitutionally protected magazines cannot survive any form of heightened scrutiny the Supreme Court recognizes. By the

state's own telling, the law "applies to 'almost everyone.'" Dkt.162 at 29; *see also Duncan v. Becerra*, 970 F.3d 1133, 1164-65 (9th Cir. 2020), *reh'g en banc granted & panel opinion vacated*, 988 F.3d 1209 (9th Cir. 2021) (the ban "applies to nearly everyone"). A flat and confiscatory ban is the very antithesis of narrow tailoring. To uphold that ban thus would require this Court to repeat the same error that the Supreme Court just corrected in *Americans for Prosperity*.

Sincerely,

s/Erin E. Murphy
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