No. _____

In the
# Supreme Court of the United States

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

*Petitioners*,

v.

ROB BONTA, in his official capacity as Attorney General of the State of California,

*Respondent*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTION PRESENTED

In *District of Columbia v. Heller*, this Court held that the Second Amendment protects arms that are "typically possessed by law-abiding citizens for lawful purposes." 554 U.S. 570, 625 (2008). Yet California prohibits the possession of firearm magazines capable of holding more than 10 rounds of ammunition, even though these magazines are widely owned and standard-issue for handguns and long guns typically owned for self-defense. And California does not stop at banning the acquisition of these common magazines prospectively; its law applies retrospectively to treat any non-compliant magazine as contraband—no matter how long, lawfully, or safely it has been possessed—thereby dispossessing citizens of lawfully acquired and constitutionally protected property without any compensation from the state. A divided en banc panel of the Ninth Circuit nevertheless upheld California's ban—even as it purported to assume that the prohibited magazines are protected by the Second Amendment—in an opinion that generated multiple dissents and over panel and district court opinions to the contrary. In doing so, moreover, the en banc panel made clear that the Ninth Circuit will continue to apply a heightened-in-name-only form of scrutiny in the Second Amendment context "unless and until the Supreme Court tells" it otherwise. App.14.

The questions presented are:

1. Whether a blanket, retrospective, and confiscatory law prohibiting ordinary law-abiding citizens from possessing magazines in common use violates the Second Amendment.

2. Whether a law dispossessing citizens without compensation of property that was lawfully acquired and long possessed without incident violates the Takings Clause.

3. Whether the "two-step" approach that the Ninth Circuit and other lower courts apply to Second Amendment challenges is consistent with the Constitution and this Court's precedent.

## PARTIES TO THE PROCEEDING

Virginia Duncan, Richard Lewis, Patrick Lovette, David Marguglio, Christopher Waddell, and the California Rifle & Pistol Association, Inc., are petitioners here and were plaintiffs-appellees below.

Rob Bonta, in his official capacity as Attorney General of California, is respondent here and was defendant-appellant below.

Xavier Becerra, in his official capacity as Attorney General of California, was also a defendant-appellant below, but was appointed to serve as Secretary of Health and Human Services and is no longer a party to these proceedings.

## CORPORATE DISCLOSURE STATEMENT

The California Rifle & Pistol Association has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

## STATEMENT OF RELATED PROCEEDINGS

*Duncan v. Bonta*, No. 19-55376 (9th Cir.) (en banc) (opinion issued Nov. 30, 2021; mandate stayed in part pending petition for certiorari Dec. 20, 2021).

*Duncan v. Becerra*, No. 19-55376 (9th Cir.) (panel opinion issued Aug. 14, 2020; rehearing en banc granted, opinion vacated Feb. 25, 2021).

*Duncan v. Becerra*, No. 17-cv-1017-BEN-JLB (S.D. Cal.) (order granting preliminary injunction issued June 29, 2017; order granting plaintiffs' motion for summary judgment, declaring California Penal Code §32310 unconstitutional and enjoining enforcement issued Mar. 29, 2019; order staying in part judgment pending appeal issued Apr. 4, 2019).

*Duncan v. Becerra*, No. 17-56081 (9th Cir.) (memorandum opinion affirming preliminary injunction issued July 17, 2018).

There are no other proceedings in any court that are directly related to this case.

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## PETITION FOR WRIT OF CERTIORARI

In *District of Columbia v. Heller*, this Court held that the Second Amendment protects arms that are "typically possessed by law-abiding citizens for lawful purposes." 554 U.S. 570, 625 (2008). Given that *Heller* abrogated longstanding circuit precedent denying that the Second Amendment protected an individual right, one might have expected that states would readjust their firearms restrictions to make them *more protective* of this newly reaffirmed individual right. Instead, some states have spent the past decade moving in the opposite direction, imposing ever more draconian restrictions on common firearms and their components, including on magazines that come standard with the kind of handguns that *Heller* declared indispensable to exercising the right enshrined in the Constitution. California's ban is the *non plus ultra* of this constitutionally dubious trend, as California was not content to prohibit the possession of standard-issue magazines prospectively, but now insists on confiscating such magazines from law-abiding citizens who lawfully acquired them and have possessed them without incident for decades. That retrospective and confiscatory prohibition is the rare law that manages to offend two guarantees of the Bill of Rights, violating both the Second Amendment and the Takings Clause.

The decision below upheld this constitutional dual threat, reversing district-court and panel decisions that correctly identified its constitutional infirmities, amidst vigorous en banc dissents. Like other courts upholding such laws (albeit few as extreme as this one), the Ninth Circuit approved California's

confiscatory law by applying a dilutive two-step mode of analysis that resembles no other form of heightened scrutiny, but operates almost exactly like the balancing approach expressly rejected by this Court in *Heller*. Indeed, as one dissenting judge noted, this case marks at least the *fiftieth* time since *Heller* that the Ninth Circuit has rejected a Second Amendment challenge, having *not once* ruled the other way. App.156. That remarkable track record confirms beyond doubt that the Ninth Circuit's watered-down approach cannot be reconciled with this Court's admonition that the Second Amendment may not be "singled out for special—and specially unfavorable—treatment." *McDonald v. City of Chicago*, 561 U.S. 742, 779-80 (2010) (plurality opinion).

The decision below disregards the basic protection of the Takings Clause for good measure. It is well settled that requiring citizens to physically dispossess themselves of lawfully acquired property is a physical taking that categorically requires just compensation. Yet the decision below concluded that a state may freely deprive people of any property it deems "too dangerous to society for persons to possess"—even as the court purported to assume (albeit without actually deciding) that the property at issue is property that the Constitution explicitly entitles the people to "keep." App.39-40. It is bad enough to hold that a state may prohibit arms that the Second Amendment protects. To hold that a state may *confiscate* protected arms that have been lawfully and safely possessed for decades is plainly a bridge too far. This Court should grant review, resolve the intense disagreement about what arms citizens have a right to keep for self-

defense, and confirm that California can neither prohibit nor confiscate what the Constitution protects.

## OPINIONS BELOW

The Ninth Circuit's en banc opinion is reported at 19 F.4th 1087 and reproduced at App.1-171. The Ninth Circuit's panel opinion is reported at 970 F.3d 1133 and reproduced at App.172-252. The Ninth Circuit's opinion at the preliminary-injunction stage is reported at 742 F. App'x 218 and reproduced at App.253-67. The district court's summary-judgment and preliminary-injunction opinions are printed at 366 F. Supp. 3d 1131 and 265 F. Supp. 3d 1106 and reproduced at App.268-383 and App.384-452. The district court's opinion staying the judgment in part pending appeal is unreported but available at 2019 WL 1510340 and reproduced at App.453-60.

## JURISDICTION

The Ninth Circuit issued its en banc opinion on November 30, 2021. This Court has jurisdiction under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

The Takings Clause of the Fifth Amendment provides: "Nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The relevant provisions of California's laws, Cal. Penal Code §§32310 & 16740 are reproduced at App. 461-62.

## STATEMENT OF THE CASE

### A. Factual Background

1. Magazines that hold more than 10 rounds of ammunition are commonly owned by millions of Americans for all manner of lawful purposes, including self-defense, sporting, and hunting. Americans own roughly 115 million of these magazines, App.176, which have long come standard-issue with many of the most popular handguns and long guns on the market, accounting for "approximately half of all privately owned magazines in the United States," App.4-5.

Firearms capable of firing more than 10 rounds without reloading are nothing new. "[T]he first firearm that could fire more than ten rounds without reloading was invented around 1580," and several such handguns and long guns "pre-date[d] the American Revolution," some by "nearly one hundred years." App.188. For example, the popular Pepperbox-style pistol could "shoot 18 or 24 shots before reloading individual cylinders," and the Girandoni air rifle, which "had a 22-round capacity," "was famously carried on the Lewis and Clark expedition." *Id.* By the 1830s, these and other models of arms capable of firing more than 10 rounds without reloading had become "common." App.130.

In the 1860s, "repeating, cartridge-fed firearms" gained popularity, and many of the most popular models had magazines that held more than 10 rounds. App.189. For example, the Winchester 66 had a 17-

round magazine and could fire all 17 rounds plus the one in the chamber in under nine seconds. App.132. Later models, including the famed Winchester 73 (also known as "the gun that won the West"), likewise had magazines that held more than 10 rounds and sold a combined "over 1.7 million total copies" between 1873 and 1941. App.189.

As detachable box-style magazines became more popular around the turn of the twentieth century, so too did rifles and handguns with box magazines capable of holding more than 10 rounds, such as Auto Ordinance Company's semi-automatic rifle (1927, 30 rounds) and the Browning Hi-Power pistol (1935, 13 rounds). App.190. In 1963, the U.S. government sold hundreds of thousands of surplus 15- and 30-round M-1 carbines to civilians at a steep discount. *Id.* That same year, the first AR-15 rifle was released. *Id.* The AR-15 comes standard with a 30-round magazine and remains the most popular rifle in America today. *Id.*; App.293-94.

Although long guns were the weapon of choice for most Americans during the first half of the twentieth century, pistol sales grew exponentially during the latter half. *See* App.190. Unsurprisingly, that trend closely correlated with technological advancements that enabled pistols to hold higher capacity magazines in a more compact and user-friendly style. *See* ER1801-20; ER1706-08; SER126. Today, the most popular handgun in America is the Glock 17, which comes standard with a 17-round magazine. App.176-77, 190. Many other popular pistols likewise come standard with magazines that hold more than 10 rounds. For example, "the Beretta Model 92 … comes

standard with a sixteen-round magazine," "Smith & Wesson (S&W) M&P 9 M2.0 nine-millimeter magazines contain seventeen rounds," and "[t]he Ruger SR9 has a 17-round standard magazine." App.177 & n.4.

While arms that could fire more than 10 rounds without reloading would by no means have been "unforeseen inventions to the Founders," App.188, laws prohibiting their possession most certainly would. Although there is a long historical tradition of law-abiding citizens possessing these firearms for lawful purposes, there is no similar tradition of government regulation. There were no restrictions on firing or magazine capacity when the Second and Fourteenth Amendments were ratified. The first such laws did not come until the Prohibition Era, and, even then, they were few and far between. Although many states and the federal government began regulating *automatic* weapons (*i.e.*, machine guns) in the 1920s and 1930s, only three states and the District of Columbia restricted the firing capacity of *semi*-automatic firearms, and most of those laws were repealed within a few decades. App.194 & n.10.

The first state law restricting *magazine* capacity did not come until 1990, two centuries after the founding. And only eight other states have followed suit in the ensuing three decades.[1] The federal

[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

government did not regulate magazine capacity until 1994, when Congress adopted a nationwide ban on magazines with a capacity of more than 10 rounds. *See* Pub. L. 103-322, 108 Stat. 1796 (1994) (formerly codified at 18 U.S.C. §922(w)). Unlike California's statute, that law was time-limited and operated only prospectively, allowing people who had already lawfully acquired such magazines to keep them. *Id.* And Congress allowed the law to expire in 2004 after a study by the Department of Justice revealed that it had produced "no discernable reduction" in gun violence across the country. Christopher S. Koper et al., *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets & Gun Violence, 1994-2003*, Rep. to the Nat'l Inst. of Justice, U.S. Dep't of Justice 96 (2004), *available at* https://bit.ly/3wUdGRE. Under federal law today—just as under the laws of 41 of the 50 states—law-abiding citizens may lawfully possess magazines capable of holding more than 10 rounds of ammunition.

2. Since 2000, California has been one of the very few states to prohibit the manufacture, importation, sale, and transfer of any "large-capacity magazine," which California misleadingly and broadly defines as "any ammunition feeding device with the capacity to accept more than 10 rounds," with some exceptions not relevant here. App.461-62. At first, California did not try to confiscate such magazines from those who had

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§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).

already lawfully obtained them. Instead, by prohibiting only the means of acquiring them, not the act of possessing them, the law created a de facto grandfather clause.

In July 2016, however, the California legislature decided that this modest nod in the direction of reliance interests and the Takings Clause was actually a "loophole" in need of closing. It therefore prohibited the continued possession of magazines capable of holding more than 10 rounds, even though everyone affected had possessed the pre-ban magazines lawfully and safely since at least 2000. S.B. 1446, 2015-2016 Reg. Sess. (Cal. 2016). The legislation required those in possession of lawfully acquired (and theretofore lawfully possessed) magazines to surrender, permanently alter, or otherwise dispossess themselves of the magazines.

Later that year, in November 2016, the voters approved a ballot initiative, Proposition 63, that took a similar approach. *See* App.461-62. Proposition 63 requires Californians currently in possession of a magazine capable of holding more than 10 rounds of ammunition to surrender it to law enforcement for destruction, permanently alter it, remove it from the state, or sell it to a licensed firearms dealer, who in turn is subject to the transfer and sale restrictions of the law. *Id.* Failure to dispossess oneself of a lawfully acquired magazine is punishable by up to a year in prison, as well as a fine. App.461. This retrospective and confiscatory ban on the possession of lawfully acquired magazines has never had any analog in federal law and is a radical outlier among state laws.

### B. Procedural History

1. Petitioner Patrick Lovette is an "honorably retired 22-year United States Navy veteran [who f]or more than 20 years … has lawfully possessed and continues to possess" magazines capable of holding more than 10 rounds. App.390. But as a resident of San Diego, Lovette is now prohibited by California law from continuing to do so. Petitioners Virginia Duncan, David Marguglio, and Christopher Waddell all likewise live in San Diego, and each would like to acquire, for lawful purposes, magazines capable of holding more than 10 rounds of ammunition but are prohibited by California law from doing so. Petitioner California Rife & Pistol Association, Inc., is a nonprofit organization that represents law-abiding owners of magazines that can hold more than 10 rounds who, but for California's ban, would retain and/or acquire and possess such magazines.

Shortly before the new confiscatory possession ban was scheduled to take effect, petitioners brought this lawsuit challenging California's magazine ban under the Second Amendment and the Takings Clause. While petitioners challenged the ban in its entirety, they sought a narrow preliminary injunction limited to the new possession ban—in other words, limited to the command that law-abiding citizens dispossess themselves of magazines that they lawfully acquired. The district court granted the motion. Reasoning that the ban "burdens the core of the Second Amendment by criminalizing the mere possession of these magazines that are commonly held by law-abiding citizens for defense of self[ and] home," and that "the Takings Clause prevents [California]

from compelling the physical *dispossession* of such lawfully-acquired private property without just compensation," the court concluded that petitioners were likely to prevail under both *Heller*'s "text, history, and tradition" approach and intermediate scrutiny. App. 403-04, 448-450.

The state took an interlocutory appeal, and a divided panel of the Ninth Circuit affirmed, concluding that the district court did not abuse its discretion by preliminarily enjoining the dispossession command until petitioners' claims could be resolved. App.259. That unpublished order, which the state did not challenge and which did not resolve the ultimate question of the constitutionally of any aspect of the law, nonetheless prompted a *sua sponte* request for briefing on whether the court should rehear the appeal en banc. Only after the state opined that the court should allow the case to proceed to final judgment in the district court was the *sua sponte* request withdrawn. *See* Appellant's Brief Regarding Rehearing En Banc 1-2, *Duncan*, 742 F. App'x 218 (No. 17-56081), Dkt. 104; Order, *Duncan*, 742 F. App'x 218 (No. 17-56081), Dkt. 110.

2. After considering comprehensive briefing and oral argument, the district court granted summary judgment to petitioners on their Second Amendment and Takings Clause claims. App.382. The court first explained that the magazines California seeks to prohibit are typically possessed by law-abiding citizens for lawful purposes, and that "there is no longstanding historically-accepted prohibition on detachable magazines of any capacity." App.310. The court therefore concluded that California's magazine

ban could not withstand Second Amendment scrutiny under a straightforward application of *Heller*. App.311-14. The court then went on to evaluate the ban under the Ninth Circuit's "two-part" approach, which entails a "tripartite binary test with a sliding scale and a reasonable fit." App.314.

The court concluded that strict scrutiny *ought* to apply under Ninth Circuit precedent, as the magazine ban "implicates the core of the Second Amendment right and severely burdens that right," App.317, and that the ban could not survive strict scrutiny, App.324-25. But given the Ninth Circuit's repeated refusal to subject firearm restrictions to strict scrutiny, the court also analyzed the law under intermediate scrutiny. App.325. And after undertaking an exhaustive review of the state's evidence, the court concluded that "even under the modest and forgiving standard of intermediate scrutiny, [the magazine ban] is a poor fit to accomplish the State's important interests." App.375.

The district court also held that the ban effects unconstitutional takings. App.380. The court rejected the state's argument that the Takings Clause does not apply to exercises of the police power, explaining that "whether a law amounts to a physical taking is 'a separate question' from whether the state has the police power to enact the law." App.377 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425-26 (1982)). The court then reasoned that California's law violates the Takings Clause because it forces owners to either surrender their magazines for destruction or sell or remove them from the state,

all without any form of compensation from the state. App.379-80.

At the state's request, the district court granted a partial stay pending appeal, staying its judgment as to the law's prospective prohibitions, but leaving the injunction in place as to the state's effort to confiscate magazines from law-abiding individuals who lawfully obtained them (in other words, leaving the narrower preliminary-injunction relief in place). App.458-60. The court also enjoined the state from enforcing the law against individuals who acquired magazines acting in reliance on its judgment before the court entered the stay. App.459-60.

3. A divided three-judge panel of the Ninth Circuit affirmed. The panel observed that it was obligated by circuit precedent to apply an unwieldy "two-prong" test that involves at least a half-dozen questions. App.183-84. The first prong "asks whether the challenged law burdens conduct protected by the Second Amendment[,]" which depends on the answer to four sub-questions: "whether the law regulates 'arms' for purposes of the Second Amendment"; whether the arms in question are "dangerous *and* unusual"; "whether the regulation is longstanding and thus presumptively lawful"; and "whether there is any persuasive historical evidence … that the regulation affects rights that fall outside the scope of the Second Amendment." App.183-84.

If a law does burden conduct protected by the Second Amendment, then the second prong, "in turn, requires the court to ask two more questions": "how 'close' the challenged law comes to the core right of law-abiding citizens to defend hearth and home," and

"whether the law imposes substantial burdens on the core right." App.184. Only then is a tier of scrutiny selected—strict, if the regulation goes to the core of the right *and* substantially burdens it, and intermediate if either of those conditions is deemed not satisfied. The panel acknowledged the criticism that this test "'appears to be entirely made up'" and "'yield[s] analyses that are entirely inconsistent with *Heller*.'" App.179 n.6 (quoting *Rogers v. Grewal*, 140 S.Ct. 1865, 1867 (2020) (Thomas, J., dissenting from denial of certiorari)). But, consistent with circuit precedent, the panel applied the test nonetheless.

Applying the Second Amendment two-step, the panel held that California's magazine ban violates the Second Amendment. The panel first concluded that the prohibited magazines are the "antithesis of unusual," as "nearly half of all magazines in the United States today hold more than ten rounds of ammunition," and such magazines are "overwhelmingly owned and used for lawful purposes." App.187. Surveying the historical record, the panel found no evidence that magazine capacity restrictions have any historical pedigree. While "firearms capable of holding more than ten rounds of ammunition have been available in the United States for well over two centuries," restrictions on such magazines have been rare, relatively recent, and short-lived: "Only during Prohibition did a handful of state legislatures enact capacity restrictions," and "'most of those laws were invalidated by the 1970s.'" App.191, 194 (quoting *ANJRPC v. Att'y Gen. of N.J.*, 910 F.3d 106, 117 n.18 (3d Cir. 2018)).

Because "any law that comes close to categorically banning the possession of arms that are commonly used for self-defense imposes a substantial burden on the Second Amendment," the panel held that strict scrutiny should apply. App.199. The panel also held that the ban "cannot withstand strict scrutiny analysis because the state's chosen method—a statewide blanket ban on possession everywhere and for nearly everyone—is not the least restrictive means of achieving [its] compelling interests." App.226.

In the alternative, the panel subjected the law to intermediate scrutiny. The panel began by explaining that, even under intermediate scrutiny "a law must be 'narrowly tailored to serve a significant governmental interest'"—a point, it noted, that this Court has recently "emphasized." App.227-28 (quoting *Packingham v. North Carolina*, 137 S.Ct 1730, 1736 (2017)). The panel found California's chosen means "excessive and sloppy," applying in "rural and urban areas, in places with low crime rates and high crime rates, areas where law enforcement response times may be significant, to those who may have high degrees of proficiency in their use for self-defense, and to vulnerable groups who are in the greatest need of self-defense." App.232. On top of that, moreover, the ban "applies to all firearms, including handguns that are the 'quintessential self-defense weapon.'" App.232 (quoting *Heller*, 554 U.S. at 629). The panel also agreed with the district court that the state's evidence of the supposed link between magazine capacity and mass shootings is "remarkably thin." App.234. The panel thus concluded that the ban also flunks intermediate scrutiny.

Because the panel invalidated the law under the Second Amendment, it did not reach the Takings Clause claim. *See* App.235-36. Judge Lynn, sitting by designation, dissented and would have upheld the magazine ban in its entirety. App.237-52.

4. The Ninth Circuit granted the state's petition for rehearing en banc, and a divided en banc panel reversed. The majority first expressly declined to reconsider any aspect of its "two-step" test, declaring that "[u]nless and until the Supreme Court tells us and the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits that, for a decade or more, we all have fundamentally misunderstood the basic framework for assessing Second Amendment challenges, we reaffirm our two-step approach." App.14.

Employing that approach, the majority began by taking the "well-trodden" course of "assuming, without deciding, that California's law" both "implicates the Second Amendment" and implicates the "core" of the Second Amendment right, which it described as "self-defense in the home." App.18-19. Turning to the second step, the majority concluded that intermediate scrutiny applies. While it acknowledged that half of all privately owned magazines are capable of holding more than 10 rounds, and that such magazines come standard with "[m]ost pistols and … and many popular rifles," App.4 (quoting *Kolbe v. Hogan*, 849 F.3d 117, 129 (4th Cir. 2017)), it nevertheless opined that prohibiting such magazines "interferes only minimally with the core right of self-defense" because "'most homeowners only *use* two to three rounds of ammunition in self-

defense.'" App.3-4, 21 (emphasis added) (quoting *ANJRPC*, 910 F.3d at 121 n.25).

Applying intermediate scrutiny, the majority acknowledged (with considerable understatement) that the ban is "an imperfect" fit for the state's "compelling goal of reducing the number of deaths and injuries caused by mass shootings." App.35. But it concluded that it must give "deference" to the state's "reasonable judgment" "that large-capacity magazines significantly increase the devastating harm caused by mass shootings and that removing those magazines from circulation will likely reduce deaths and serious injuries." *Id.*

Turning to the Takings Clause claim, the majority concluded that forcing people to dispossess themselves of lawfully acquired magazines does not effect a physical taking, positing that "[n]othing in the case law suggests that any time a state adds to its list of contraband … it must pay all owners for the newly proscribed item." App.38. The majority tried to distinguish *Horne v. Department of Agriculture*, 576 U.S. 350 (2015), and *Loretto*, 458 U.S. 419, on the ground that the state itself is not "tak[ing] title to, or possession of, the" magazine. App.39. It further posited that those cases are different because they "concerned regulations of non-dangerous, ordinary items." *Id.* In the majority's view, the Takings Clause does not "requir[e] a government to pay whenever it concludes that certain items are too dangerous to society for persons to possess," App.40—apparently even if the Constitution specifically protects the right to "keep" those items, a proposition that the majority had earlier assumed to be true, App.10, 18.

Judge Graber, who authored the majority opinion, also issued a concurrence principally defending the two-step approach, as did Judge Berzon. App.41-47, 48-96. Judge Hurwitz wrote a short concurrence critiquing Judge VanDyke's dissent. App.97-99.

Judge Bumatay authored a dissent, joined by Judges Ikuta and R. Nelson, in which he criticized the Ninth Circuit's two-step approach as "function[ing] as nothing more than a black box used by judges to uphold favored laws and strike down disfavored ones." App.101. Under the approach employed by *Heller*, which "requires an extensive analysis of the text, tradition, and history of the Second Amendment," he explained, the unconstitutionality of California's law is "not a close question": "Firearms and magazines capable of firing more than ten rounds have existed since before the Founding of the nation. They enjoyed widespread use throughout the nineteenth and twentieth centuries. They number in the millions in the country today," and there are "no longstanding prohibitions against them." App.101-02, 105. Judge Bumatay thus concluded that the state cannot prohibit them, and he observed that "[i]f California's law applied nationwide, it would require confiscating half of all existing firearms magazines in this country." App.100.

Judge VanDyke authored a dissent in which he criticized the Ninth Circuit's Second Amendment jurisprudence, pointing out that the court has had "at least 50 Second Amendment challenges since *Heller*—significantly more than any other circuit—*all* of which we have ultimately denied" while purporting to apply heightened scrutiny. App.156; *accord* App.30 (maj.

op.) (acknowledging that the Ninth Circuit "ha[s] not struck down any state or federal law under the Second Amendment"). Judge VanDyke criticized the majority's focus on how often law-abiding citizens actually need to *fire* more than 10 rounds for self-defense. As he explained, "the average number of times that any law-abiding citizen *ever* needs to 'bear arms' at all in a self-defense situation is far below one—most people will (thankfully) *never* need to use a gun to defend themselves." App.145. By the majority's logic, then, "possession of a gun itself [would] fall[] outside the 'core' of the Second Amendment." *Id.*

## REASONS FOR GRANTING THE PETITION

California's retrospective and confiscatory ban on magazines capable of holding more than 10 rounds of ammunition is unconstitutional twice over. The Ninth Circuit acknowledged that such magazines are commonly possessed by law-abiding citizens for lawful purposes—indeed, they constitute fully *half* of the magazines in the country. They cannot accurately be described as large, any more than a 12-ounce can of beer can be described as "large." These are standard-issue magazines owned by millions of ordinary law-abiding citizens. The court assumed that such magazines *are* protected by the Second Amendment, but just as in every other case in which the Ninth Circuit was willing to make that assumption, it made no difference. The Ninth Circuit held that these utterly commonplace and constitutionally protected magazines not only can be banned prospectively, but can be confiscated, without running afoul of the Second Amendment. But the state may not prohibit

what the Constitution protects. And it certainly may not do so retrospectively by confiscating lawfully acquired and constitutionally protected property that has been safely possessed for decades. That the decision below upheld such a law is proof positive of the pressing need for the Court's intervention.

As the district court, the three-judge panel majority, and the dissenting judges on the en banc panel all made clear, California's radically overbroad and confiscatory law could not be sustained based on anything even resembling actual heightened scrutiny. Flat bans are the very model of overbreadth. And confiscatory efforts to wrest from the hands of law-abiding citizens constitutionally protected property that was lawfully obtained and has been safely used for decades goes beyond mere overbreadth to ignore the basic relationship between the government and the governed. There is no constitutional tradition in this country of the government simply declaring items lawfully possessed for decades to be contraband—let alone items that the Constitution explicitly entitles the people to "keep." Even when the government has tried to limit less common firearms, it has done so only prospectively, out of respect for the Second Amendment, the Fifth Amendment, and the governed.

The decision here aptly captures the lower-court two-step that proceeds in the name of heightened scrutiny, but inevitably—50 times out of 50—upholds even draconian restrictions on a fundamental constitutional right. This has to stop. This mode of review undervalues a basic constitutional right (here, two constitutional rights) and sows disregard for the Constitution and this Court's precedents. But the en

banc court made crystal clear that it will not refrain from assuming the Second Amendment is fully applicable and then finding it entirely toothless "unless and until the Supreme Court tells us" to stop. This Court should accept that invitation.

## I. This Court Should Resolve The Protracted Disagreement Over Whether States May Ban Arms Protected By The Second Amendment.

1. The Second Amendment protects arms that are "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 624-25. It "confers an individual right" that belongs to "the people"—a term that "unambiguously refers to all members of the political community," with certain exceptions not relevant here. *Id.* at 580, 622, 626-27. After *Heller*, therefore, when a court confronts a flat possession ban on a type of arm, the only question is whether it is an arm "typically possessed by law-abiding citizens for lawful purposes." *Id.* at 625. If the answer is "yes," then the ban is unconstitutional, because a state cannot flatly prohibit people from possessing what the Constitution entitles them to "keep."

California's ban on the acquisition and possession of magazines that account for "approximately *half* of all privately owned magazines," App.4, plainly flunks that test. Magazines are indisputably "arms" protected by the Second Amendment, as the right to keep and bear arms includes the right to keep and bear components such as ammunition and magazines that are necessary for the firearm to operate. *See United States v. Miller*, 307 U.S. 174, 180 (1939) (citing 17th-century commentary recognizing that "[t]he possession of arms also implied the possession

of ammunition"). Indeed, even the Ninth Circuit has recognized that, "without bullets, the right to bear arms would be meaningless." *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014). And magazines that hold). And magazines holding more than 10 rounds of ammunition are typically possessed by law-abiding citizens for lawful purposes. The most popular handgun and the most popular long gun in America both come standard with a magazine that holds more than 10 rounds, as do countless others. *See supra* p.5-6. Millions of law-abiding Americans have lawfully purchased these arms, putting hundreds of millions of these magazines in civilian circulation. *Id.* That is why the district court, three-judge panel, and en banc panel all agreed that magazines capable of holding more than 10 rounds are ordinary—not large—magazines and are typically possessed for lawful purposes.

That should be the end of the inquiry. *Heller* made clear that bans on protected arms cannot be sustained under the Second Amendment. That holding followed a long line of cases making clear that the government may not flatly ban constitutionally protected items or activities, even when there is a prospect of abuse. *See, e.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002) (government cannot ban virtual child pornography on the ground that it might lead to child abuse because "[t]he prospect of crime" "does not justify laws suppressing protected speech"); *Edenfield v. Fane*, 507 U.S. 761, 770-71, 773 (1993) (state cannot impose a "flat ban" on solicitation by public accountants on the ground that solicitation "creates the dangers of fraud, overreaching, or compromised independence"). Such extreme

prophylaxis is simply incompatible with the idea of constitutional protection. Flat bans, moreover, violate the foundational principle that "a free society prefers to punish the few who abuse [their] rights … after they break the law than to throttle them and all others beforehand." *Se. Promotions Ltd. v. Conrad*, 420 U.S. 546, 559 (1975); *accord Vincenty v. Bloomberg*, 476 F.3d 74, 84-85 (2d Cir. 2007); *Robb v. Hungerbeeler*, 370 F.3d 735, 743 (8th Cir. 2004).

2. The Ninth Circuit nevertheless upheld California's ban in all its overbroad, retrospective, and confiscatory glory. While other courts have reached similar conclusions when confronting the handful of state magazine prohibitions (though generally in the context of less draconian provisions), this issue has generated deep division among lower-court jurists, as evidenced by the views of the panel majority and the en banc dissents in this very case. For instance, in *Association of New Jersey Rifle & Pistol Clubs v. Grewal*, currently pending before this Court on petition for a writ of certiorari, the Third Circuit split 8-6 on the same issue, with Judges Jordan, Hardiman, Bibas, Porter, Matey, and Phipps voting to rehear en banc a panel decision that upheld a similar confiscatory ban. As Judge Bibas put it in an earlier dissent on the same question, "[p]eople commonly possess large magazines to defend themselves and their families in their home[]," and that should be the "end of [the] analysis" under *Heller*. *ANJRPC,* 910 F.3d at 130 (Bibas, J., dissenting).

The Fourth Circuit's history with this issue reflects a similar pattern. A panel majority of Judges Traxler and Agee held that Maryland should at least

have to try to justify its 10-round magazine limit under strict scrutiny. *Kolbe v. Hogan*, 813 F.3d 160 (4th Cir. 2016) (vacated panel opinion). But, just as in the Ninth Circuit, the panel promptly had its decision reversed en banc, over the dissent of Judges Traxler, Niemeyer, Shedd, and Agee. *Kolbe*, 849 F.3d at 160 (Traxler, J., dissenting). Meanwhile, Judge Manion in the Seventh Circuit reasoned that "a total prohibition of a class of weapons … used to defend [the plaintiff's] home and family" deserves "the highest level of scrutiny" and thus would have invalidated a local ordinance banning magazines capable of holding more than 10 rounds of ammunition. *Friedman v. City of Highland Park*, 784 F.3d 406, 418 (7th Cir. 2015) (Manion, J., dissenting). As he explained, an "outright … ban[]" is the "bluntest of instruments," so a prohibition on citizens acquiring or possessing magazines in their homes is necessarily "unconstitutional." *Id.* at 419.

Many of those opinions also drew on the views expressed by then-Judge Kavanaugh in *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244 (D.C. Cir. 2011). Dissenting from a decision upholding the District of Columbia's ban on semi-automatic rifles and magazines capable of holding more than 10 rounds, Judge Kavanaugh held that because such rifles are "in common use by law-abiding citizens for self-defense in the home, hunting, and other lawful uses," they are "constitutionally protected" and thus "D.C.'s ban on them is unconstitutional." *Id.* at 1269-70 (Kavanaugh, J., dissenting). That is exactly the case with respect to the magazines California has banned.

This case presents an ideal vehicle to address this important question that has divided leading jurists from coast to coast. This case comes to the Court after final judgment, with multiple lengthy opinions on both sides of the issue, and after extensive percolation in the lower courts, including district-court and panel decisions assessing the law under multiple different forms of scrutiny. And this Court is the last thing standing between California and its law-abiding citizens who have safely possessed magazines without incident since before the first prospective ban in 2000. California's efforts to confiscate those long-held and constitutionally protected magazines have been on hold since this litigation was first filed, but the decision below green lights that confiscation. The Court's intervention is thus both justified and absolutely vital.

## II. This Court Should Decide Whether Law-Abiding Citizens May Be Compelled To Dispossess Themselves Of Lawfully Acquired Property Without Just Compensation.

California's decision not only to prospectively ban magazines capable of holding more than 10 rounds of ammunition, but also to confiscate them from law-abiding citizens who lawfully acquired them before the ban was enacted, is one of the rare government initiatives that violates not one, but two provisions of the Bill of Rights. The majority's takings holding is as profoundly wrong as it is profoundly important.

The Takings Clause provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V; *see Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166

U.S. 226, 239 (1897) (applying Takings Clause to the states). A physical taking occurs whenever the government "dispossess[es] the owner" of property. *Loretto*, 458 U.S. at 435 n.12; *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 324 n.19 (2002). That is true of personal property just as of real property; the "categorical duty" imposed by the Takings Clause applies "when [the government] takes your car, just as when it takes your home." *Horne*, 576 U.S. at 358. And it is true even when the government-authorized "invasion" is only partial. *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2072 (2021). California's confiscatory ban plainly runs afoul of those settled principles: It forces citizens to dispossess themselves of their lawfully acquired property without any compensation from the state.

The en banc court dismissed petitioners' takings claim only by embracing positions that are at profound odds with this Court's precedents. The panel held that California's ban effects no physical taking because the law allows property owners to "modify or sell" their property, rather than surrender it. App.3; *see* App.38. But the panel missed the forest for the trees: None of those so-called "options" provides a viable way for ordinary, law-abiding citizens to *keep* their constitutionally protected property. There can be no question that three of the means of compliance—surrendering the magazine to law enforcement, transferring or selling it to someone else, or removing it from the state, App.462—require physical dispossession. The owner must literally hand the property over to a third party or "keep" it somewhere where it cannot actually be possessed. *See Kelo v. City of New London*, 545 U.S. 469, 473-75 (2005) (sale to

private entity); *Cedar Point*, 141 S.Ct. 2063 (temporary visit by union organizers).

The option to modify the magazines, App.461, fares no better, as this Court's precedents make abundantly clear. In *Horne*, it made no difference that the raisin growers could have avoided the taking by "plant[ing] different crops" or selling "their raisin-variety grapes as table grapes or for use in juice or wine." 576 U.S. at 365. And in *Loretto*, it made no difference that the property owner could have avoided the taking by converting her building into something other than an apartment complex. 458 U.S. at 439 n.17. As this Court has repeatedly admonished, "property rights 'cannot be so easily manipulated.'" *Horne*, 576 U.S. at 365 (quoting *Loretto*, 458 U.S. at 439 n.17).[2]

The en banc panel's efforts to distinguish *Horne* and *Loretto* only underscore how far the Ninth Circuit has strayed from this Court's precedents. According to the panel, *Loretto* and *Horne* are different because they "concerned regulations of non-dangerous, ordinary items." App.39. Even putting to one side that the magazines at issue are ordinary, constitutionally protected, and useful in averting danger, the Takings Clause does not distinguish based on the characteristics of the property. And even if it did, surely it would provide *more* protection to property that *another* provision of the Constitution

[2] At a minimum, forcing citizens to permanently modify their property or render it inoperable places an unconstitutional condition on the possession of their property, which itself is a taking. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 605 (2013).

specifically entitles the people to "keep" than to property that does not enjoy any special constitutional status.

The Ninth Circuit's effort to exempt firearms from the scope of the Takings Clause is both wrong and upside down. It is bad enough to hold that the state may flatly prohibit citizens from possessing what the Constitution protects. To hold that the state may freely *confiscate* what the Constitution protects without even providing just compensation adds constitutional insult to constitutional injury. Even if that result could somehow be reconciled with the Second Amendment, there is no Second Amendment exception to the Takings Clause.

## III. This Court Should Reject The Convoluted Heightened-In-Name-Only Form Of Scrutiny Embraced By Numerous Courts Of Appeals.

This case also provides an ideal opportunity—and a veritable challenge—to inter the malleable, rights-denying Second Amendment "two-step" that pervades courts of appeals, which allows courts to decide (or at least assume) that something is protected by the Second Amendment, yet then proceed to "balance" that protection away. *See* App.14, 18, 29; *ANJRPC*, 910 F.3d at 117; *Worman v. Healey*, 922 F.3d 26, 37 (1st Cir. 2019); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo* (*NYSRPA*), 804 F.3d 242, 254 (2d Cir. 2015); *Friedman*, 784 F.3d at 414-15; *Heller II*, 670 F.3d at 1252-53. As courts that have embraced this approach undoubtedly recognize, there is no harm in assuming that something is constitutionally protected if it can be suppressed anyway. But that is the exact opposite of the dynamic with constitutional rights subject to

actual heightened scrutiny, where defendants fight tooth and nail to avoid a finding that a case involves protected speech, as opposed to government speech or libel, because the nearly inevitable consequence of such a finding is that the government loses, and the Constitution is vindicated. Yet that massive disconnect has not stopped courts from labeling this Second Amendment two-step "heightened scrutiny."

There is no better illustration of the fatal defects of that approach than its application to magazine bans. Courts upholding such bans have assumed that such magazines are protected "arms." *See* App.18; *ANJRPC*, 910 F.3d at 116-17; *Worman*, 922 F.3d at 37; *NYSRPA*, 804 F.3d at 260; *Friedman*, 784 F.3d at 415; *Heller II*, 670 F.3d at 1261. That assumption prevents the courts from having to linger too long over the undeniable fact that millions of magazines capable of holding more than 10 rounds are safely owned by law-abiding citizens for lawful purposes. That fact, which should be well-nigh outcome-determinative, can be dealt with summarily and assumed arguendo. The en banc court was certainly correct that this path is "well-trodden." App.18; *ANJRPC*, 910 F.3d at 117 ("assum[ing] without deciding that LCM's are typically possessed by law-abiding citizens for lawful purposes and that they are entitled to Second Amendment protection"); *Worman*, 922 F.3d at 30 ("We assume, without deciding, that the proscribed weapons have some degree of protection under the Second Amendment."); *NYSRPA*, 804 F.3d at 257 ("[W]e proceed on the assumption that these laws ban weapons protected by the Second Amendment."); *Heller II*, 670 F.3d at 1261 ("assuming" Second Amendment is implicated).

That quick, if begrudging, assumption then paves the way for the systematic deprivation of any meaningful protection at the second phase of the Second Amendment two-step. The decision below is again illustrative. According to the en banc majority, "[t]he *only* question" at step two "is whether California's ban is a 'reasonable fit' for reducing the harm caused by mass shootings." App.31 (emphasis added). Yet even though the majority acknowledged (with incredible understatement) that a blanket ban is "an imperfect" fit, the court nonetheless "must" give "deference" to the purportedly "reasonable legislative judgment" that prohibiting law-abiding citizens from possessing magazines with a higher capacity will somehow meaningfully "reduce deaths and serious injuries" arising from mass shootings. App.35. That kind of reflexive deference to legislative judgments is not scrutiny. It barely even entails balancing, which is exactly what *Heller* rejected precisely because it would make it too easy for courts to balance away rights the framers went to the trouble of enshrining in our founding document. 554 U.S. at 634; *id.* at 693-705 (Breyer, J., dissenting) (treating the state's interest as grave, balancing the interests, deferring to the legislature's evaluation of the evidence, and upholding the law in face of the Second Amendment challenge).

Moreover, wholly missing from that approach is the hallmark of any heightened scrutiny worthy of the name: meaningful analysis of whether a law is "narrowly tailored to serve a significant governmental interest." *Packingham*, 137 S.Ct. at 1736. The Ninth Circuit is a case in point, as in the Second Amendment context the court has repeatedly "required … only that

the regulation 'promote[] a substantial government interest that would be achieved less effectively absent the regulation." *Silvester v. Harris*, 843 F.3d 816, 829 (9th Cir. 2016) (quoting *Fyock v. Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015)). But as this Court just reiterated—in a case reversing the Ninth Circuit, no less—heightened scrutiny requires narrow tailoring even when strict scrutiny does not apply. *Ams. for Prosperity Found. v. Bonta*, 141 S.Ct. 2373, 2384 (2021); *see also, e.g.*, *McCullen v. Coakley*, 573 U.S. 464, 486 (2014); *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 218 (2014) (plurality op.).

Remarkably, the majority here completely ignored *Americans for Prosperity* even though that case rejected the exact same "substantia[l] relat[ion] to the important government interest" test that the Ninth Circuit routinely employs in Second Amendment cases. *See, e.g.*, *Silvester,* 843 F.3d at 827. As that and other cases from this Court make abundantly clear, the real question is not simply whether it was "reasonable" for the legislature to think that its chosen means might advance its interests. It is whether the government can carry its burden of demonstrating that its chosen means are narrowly tailored to avoid "burden[ing] substantially more [protected conduct] than is necessary to further [its] legitimate interests." *McCullen*, 573 U.S. at 486. Flat bans are the antithesis of narrow tailoring. Indeed, there is no greater burden on constitutionally protected activity than flatly prohibiting it. Any test that deems a flat ban a "reasonable" means of accomplishing the state's objectives thus virtually by definition does not entail the requisite tailoring analysis.

In short, under the normal rules (and certainly the rules that the Court just reiterated in *Americans for Prosperity*), California's law plainly could not survive. The state painted with the broadest strokes possible, simply obliterating the right to keep magazines typically and commonly possessed for self-defense, even if they had been lawfully purchased and safely possessed without incident for decades. Such a law could be upheld only under a test that requires no tailoring at all, which is exactly what the Ninth Circuit employs. Yet the Ninth Circuit has announced that its Second Amendment two-step is here to stay. Indeed, the en banc panel essentially dared the Court to review this case by boldly declaring that it will not abandon its rights-denying two-step "[u]nless and until the Supreme Court tells us." App.14.

The time has come to take the Ninth Circuit up on its invitation. Court after court has used the "two-step" approach to deny the Second Amendment's protection, while purporting to profess fleeting fealty to the right and this Court's precedents by assuming that the right is implicated. That approach radically unprotects Second Amendment rights. And the corrosive effects of that approach extend far beyond the Second Amendment. When "the people" are told by this Court that they have a Second Amendment right to keep and bear arms, and yet witness the lower courts deny that right in practice—50 times out of 50 in the Ninth Circuit—while giving lip service to the right and this Court's precedents, that cannot help but breed cynicism. This Court has already promised the people that the fundamental right to keep and bear arms should not be "singled out for special—and specially unfavorable—treatment." *McDonald*, 561

U.S. 778-79 (plurality opinion). The standard of review needs to match that promise, not render it illusory time after time.

This case presents an excellent vehicle to provide the guidance necessary to ensure that lower courts will begin "properly applying *Heller* and *McDonald*" in the future. *N.Y. State Rifle & Pistol v. City of New York*, 140 S.Ct. 1525, 1527 (2020) (Kavanaugh, J., concurring). It comes to this Court after final judgment, with express consideration of the standard of review, with reasoned dissents, with panel and district court decisions that came out the other way, and after extensive percolation in the lower courts. And the en banc Ninth Circuit has made crystal clear that it will not alter its approach unless and until this Court mandates it. This Court should take the Ninth Circuit up on that offer and confirm that the Ninth Circuit has indeed "fundamentally misunderstood the basic framework for assessing Second Amendment challenges." App.14.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

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