No. 21-1194

In The Supreme Court of the United States

VIRGINIA DUNCAN, et al.,

Petitioners,

v.

ROB BONTA, Attorney General of California,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL SHOOTING SPORTS FOUNDATION, INC. IN SUPPORT OF PETITIONERS

CRAIG A. LIVINGSTON
Counsel of Record
CRYSTAL L. VAN DER PUTTEN
LIVINGSTON LAW FIRM, PC
1600 South Main Street,
Suite 280
Walnut Creek, CA 94596
Tel: (925) 952-9880
clivingston@livingstonlawyers.com
cvanderputten@
livingstonlawyers.com

Attorneys for Amicus Curiae The National Shooting Sports Foundation, Inc.

LAWRENCE G. KEANE
General Counsel
THE NATIONAL SHOOTING SPORTS FOUNDATION, INC.
11 Mile Hill Road
Newtown, CT 06470
Tel: (202) 220-1340
lkeane@nssf.org

Of Counsel for Amicus Curiae The National Shooting Sports Foundation, Inc.

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICUS CURIAE*[1]

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. NSSF's membership includes over 9,651 federally licensed firearms manufacturers, distributors and retailers; companies manufacturing, importing, distributing and selling goods and services for the shooting, hunting and self-defense markets; sportsmen's organizations; public and private shooting ranges; gun clubs; and endemic media, including 797 NSSF members within California. NSSF's mission is to promote, protect and preserve hunting and the shooting sports.

NSSF's interest in this case derives principally from its federally licensed firearms manufacturer, distributor and retail dealer members engaging in lawful commerce in firearms and ammunition in California and throughout the United States, which makes the exercise of an individual's constitutional rights to keep and bear arms under the Second Amendment possible. The Second Amendment protects NSSF members from statutes and regulations seeking to ban, restrict or

[1] The National Shooting Sports Foundation, Inc. respectfully submits this *amicus curiae* brief in support of Petitioners pursuant to Supreme Court Rule 37.2. *Amicus* certifies counsel of record for all parties received timely notice of its intent to file this brief and they have consented in writing. *Amicus* further certifies, pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and made no monetary contribution to fund its preparation or submission.

limit the exercise of Second Amendment rights. As such, the determination of whether a statute improperly infringes upon these rights, and the appropriate standard to apply in making such a determination, is of great importance to NSSF and its members. NSSF, therefore, submits this brief in support of Petitioners and strongly encourages this Court to grant the instant Petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

No one questions the tragic nature of mass shootings or doubts the importance of preventing them. But this goal of prevention does not justify state laws, such as California Penal Code section 32310 ("Section 32310") (restricting magazine capacity to 10 rounds and criminalizing possession of 11+ round magazines), which significantly infringe upon the Second Amendment rights of *law-abiding citizens* using firearms and ammunition *for lawful purposes*, including self-defense. The Ninth Circuit *en banc* opinion, from which certiorari is sought, analyzes the constitutionality of Section 32310 under a diluted version of intermediate scrutiny—which in practice is an interest balancing test this Court rejected when it decided *District of Columbia v. Heller*, 554 U.S. 570 (2008) ("*Heller*"). In doing so, the Ninth Circuit erroneously, but predictably, concludes Section 32310 is constitutional.

Since this Court decided *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010) ("*McDonald*"), lower courts, including the Ninth Circuit, have developed a two-step test specific to deciding Second Amendment rights, a test which all but guarantees the failure of constitutional challenges. *Duncan v. Bonta*, 19 F.4th 1087, 1100 (9th Cir. 2021) (identifying cases in First, Second and Eleventh circuits); *see also Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021) (collecting cases from Third, Fourth, Fifth, Sixth, Seventh, Tenth and D.C. circuits). Despite *Heller* and *McDonald* recognizing the importance of Second Amendment rights, lower courts continue to treat them as second-class rights. *See generally Peruta v. California*, 137 S.Ct. 1995, 1999 (2017) (Mem.) (Thomas, J., dissenting) ("The Court's decision to deny certiorari in this case reflects a distressing trend: the treatment of the Second Amendment as a disfavored right."); *see also Friedman v. Highland Park*, 577 U.S. 1039, ___, 136 S.Ct. 447, 449 (2015) (Mem.) (Thomas, J., dissenting) ("The Court's refusal to review a decision that flouts two of our Second Amendment precedents stands in marked contrast to the Court's willingness to summarily reverse courts that disregard our other constitutional decisions."); *Jackson v. City and County of San Francisco*, 576 U.S. 1013, ___, 135 S.Ct. 2799, 2799–2800, 2802 (2015) (Mem.) (Thomas, J., dissenting) ("Second Amendment rights are no less protected by our Constitution than other rights enumerated in that document.").

The Ninth Circuit's *en banc* opinion upholding the ban on commonly owned ammunition magazines—a ban which is both prospective and retrospective with no real limitation—illustrates this disturbing trend of incorrectly analyzing the constitutionality of laws implicating the Second Amendment. This is especially true of the Ninth Circuit—a "monstrosity of a court exercising jurisdiction over 20% of the U.S. population and almost one-fifth of the states—including states pushing the most aggressive gun-control restrictions in the nation." *Duncan*, 19 F.4th at 1165 (VanDyke, J., dissenting). As Justice VanDyke noted in his dissent, the Ninth Circuit alone has had "at least 50 Second Amendment challenges since *Heller*—significantly more than any other circuit—all of which we have ultimately denied. In those few instances where a panel of [the Ninth Circuit] has granted Second Amendment relief, we have without fail taken the case *en banc* to reverse that ruling." *Id*.

Accordingly, guidance from this Court is desperately needed on the scope of the Second Amendment, as well as on the proper constitutional analysis for challenges to laws infringing upon it. Without such guidance, Second Amendment rights will continue to be treated as "second-class right(s), subject to an entirely different body of rules than other *Bill of Rights* guarantees." *McDonald*, 561 U.S. at 780. And at the end of the day, without clear direction from this Court, the right to keep and bear arms in the nine Western states, and states with similar restrictions, may continue to mean "*at most*, you might get to possess one

janky handgun and 2.2 rounds of ammunition, and only in your home under lock and key. That's it." *Duncan*, 19 F.4th at 1172 (VanDyke, J., dissenting). NSSF therefore strongly urges this Court to grant Petitioners' Petition for Writ of Certiorari.

ARGUMENT

It is well-established the Second Amendment protects the fundamental, individual rights to keep and bear arms which extends to state and local governments. *See Heller*, 554 U.S. 570; *see also McDonald*, 561 U.S. 742. Further, there is no dispute that ammunition magazines like the ones Section 32310 bans are "arms" within the Second Amendment.[2] As many other courts before it have done, however, the Ninth Circuit "assumed without deciding" that Section 32310 implicates the Second Amendment. *Duncan*, 19 F.4th at 1103. The *en banc* panel then purported to apply intermediate scrutiny to Section 32310, determining Respondent's

[2] All courts to consider magazines such as the ones at issue here have found they qualify as "arms" under the Second Amendment. *See generally Duncan*, 19 F.4th at 1103; *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*, 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 F.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)).

interest in preventing and mitigating gun violence was undoubtedly an important interest, while concluding magazines holding more than 10 rounds provide "at most a minimal benefit for civilian, lawful purposes." *Id*. at 1106, 1108. The lower court's reasonable fit analysis relied heavily on the "precious down-time" between reloading magazines, which allegedly allows persons in danger to flee or seek cover and for law enforcement or others to intervene and stop a mass shooter. *Id*. at 1108–11.

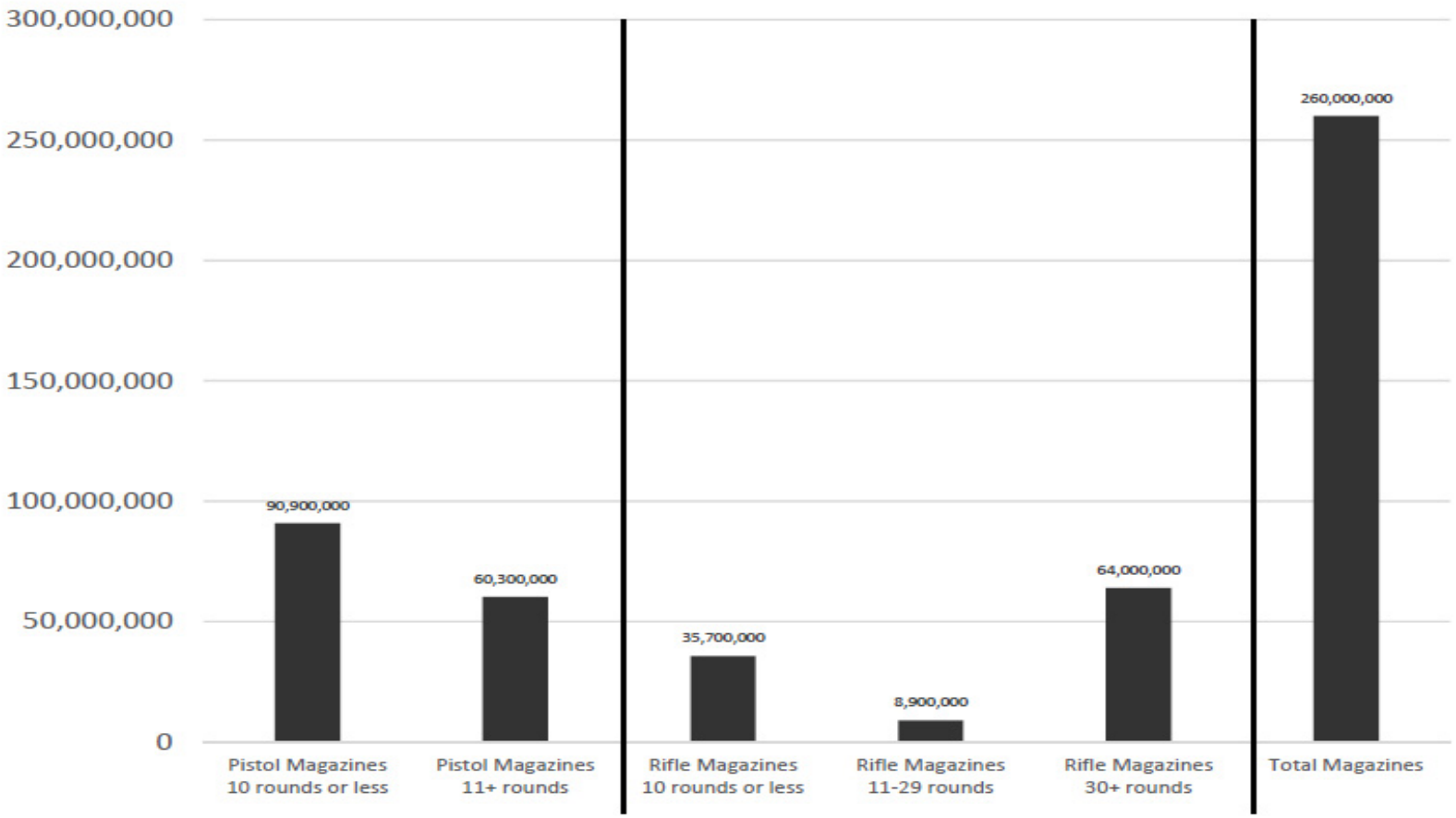
But the Ninth Circuit's watered down "intermediate scrutiny" analysis was not only erroneous, it was unnecessary because the text of the Second Amendment forecloses such an analysis. Moreover, the *en banc* opinion, and many other opinions like it, impact the millions of law-abiding citizens possessing and using 11+ round magazines for lawful purposes, including, but not limited to, self-defense.[3] Demographically, gun owners are diverse: "42.2% are female and 57.8% are male. Approximately 25.4% of Blacks own firearms, 28.3% of Hispanics own firearms, 19.4% of Asians own firearms, and 34.3% of Whites own firearms." English, William, 2021 NATIONAL FIREARMS SURVEY at pp. 1, 17

[3] Approximately 81.4 million Americans own a firearm. English, William, 2021 NATIONAL FIREARMS SURVEY at pp. 7–9 (July 14, 2021), Georgetown McDonough School of Business Research Paper No. 3887145, available at SSRN: https://ssrn.com/abstract=3887145 or http://dx.doi.org/10.2139/ssrn. There have been approximately 1.67 million defensive uses of firearms per year. *Id*. at p. 9. Based on those statistics, an estimated 25.3 million Americans have used a firearm (handgun (65.9%), shotguns (21.0%) or rifles (13.1%)) in self-defense. *Id*.

(July 14, 2021), Georgetown McDonough School of Business Research Paper No. 3887145, available at SSRN: https://ssrn.com/abstract=3887145 or http://dx.doi.org/10.2139/ssrn. Nearly half (48%) of all gun owners have owned magazines that Section 32310 bans and confiscates. *Id*. at pp. 1, 17. In fact, 30.2% of gun owners—totaling about 24.6 million individuals—have owned an AR15 or similarly styled rifle. (*Id*. at p. 1.) At last count, there were an estimated 260 million pistol and rifle magazines in the possession of United States consumers between 1990 and 2016 and 11+ round magazines accounted for approximately half (133 million) of this number. App.133 (stating it is "uncontested that ammunition magazines that hold more than ten rounds enjoy widespread popularity today" and there are as many as 100 million currently lawfully owned in the United States); 289–90 (recognizing magazines holding 11+ rounds number in the millions, citing evidence in support of the number exceeding 100 million, and collecting cases recognizing the commonality of such magazines).

NSSF® Magazine Chart

Estimated 260 Million Pistol and Rifle Magazines in U.S. Consumer Possession 1990 - 2016



Sources: ATF AFMER, US International Trade Commission figures combined with NSSF and firearms industry estimates.

Much-needed guidance as to the scope of Second Amendment protection for those purchasing, selling, possessing, owning and using such commonly owned firearms and magazines is long overdue. With the number of state laws infringing on Second Amendment rights growing by the day, this Court is poised to provide direction on such issues as: (1) the contours of Second Amendment protection for firearms and ammunition; (2) how to evaluate constitutionality where the text of the Second Amendment provides for specific, enumerated rights; and (3) the level of scrutiny, with guidance on its application, where the language of the Second Amendment does not explicitly provide for or protect a particular right.

I. The "Intermediate Scrutiny" Analysis Applied by the Ninth Circuit Gives Judges Unacceptably Broad Discretion to Uphold Laws Such as Section 32310.

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. As set forth in *Heller* and *McDonald*, the right to keep and bear arms is a fundamental—*and enumerated*—individual right applicable to state and local governments. *See Heller*, 554 U.S. 570; *see also McDonald*, 561 U.S. 742. Such a right is "fundamental to our scheme of ordered liberty" and should be afforded the same respect as rights guaranteed by the First, Fourth and Fifth

Amendments. *See generally McDonald*, 561 U.S. at 767.

The "intermediate scrutiny" standard, especially as the Ninth Circuit applied to Section 32310, has no basis in the language of the Constitution or the Second Amendment and should not be used to limit the scope of a textually grounded constitutional right.[4] When a lower court applies a standard such as "intermediate scrutiny" to a right expressly protected by the Constitution's text, it is arrogating to itself the power to further the policy goals it finds are sufficiently "important" to surmount constitutional text. This type of judicial review is wholly incompatible with the very notion of enumerated constitutional rights. As this Court explained in *Heller*:

> 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. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.

---

[4] That is not to say every gun-control law is unconstitutional, but it does mean gun-control laws must be measured against the text and historical context of the Second Amendment rather than the court-created jargon of "intermediate scrutiny."

Heller, 554 U.S. at 634–35. Thus, instead of continuing to apply intermediate, or even strict, scrutiny to Second Amendment challenges such as the one here, NSSF encourages this Court to reject the notion that laws may infringe the constitutional right to keep and bear arms so long as they satisfy either the interest balancing "intermediate scrutiny" test or even the strict scrutiny test.

Certain individual rights have been enshrined in our constitution specifically to prevent these rights from being overridden, or even disregarded, when legislators and judges think there are "important" reasons for doing so. The current tendency, which shows no sign of abating, is for lower courts to read the Second Amendment more narrowly than other amendments and therefore treat it as a disfavored or second-class right. *See generally Peruta*, 137 S. Ct. at 1999 (Thomas, J., dissenting).

As recognized in *Heller*, "The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. **The Second Amendment is no different**. Like the First, it is the very product of an interest balancing by the people. . . . And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635 (emphasis added). And still, "the lower courts are resisting this Court's decisions in *Heller* and

McDonald and are failing to protect the Second Amendment to the same extent that they protect other constitutional rights." *Silvester v. Becerra*, 138 S. Ct. 945, 950–51 (2018) (Mem.) (Thomas, J., dissenting) (noting the Supreme Court had not heard argument in a Second Amendment case for nearly eight years[5] at the time of his dissent).

As the dissenters recognized in *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 677–78 (9th Cir. 2017) (*en banc*) 694 (Tallman, J., dissenting), 697 (Bea, J., dissenting), those who engage in firearms commerce and their customers are part of a "politically unpopular" and highly regulated group. This disdainful treatment makes it even more imperative *the text of the Second Amendment*—not the judicially created interest balancing intermediate scrutiny applied here and in so many other cases—be the touchstone of constitutionality.

---

[5] Since Justice Thomas' dissent, the U.S. Supreme Court granted certiorari in *New York State Rifle & Pistol Ass'n, Inc. v. City of New York, New York*, 140 S.Ct. 1525 (2020), a case involving Second Amendment rights. However, after certiorari was granted, the Respondent city amended the ordinance at issue and the majority of the Court dismissed the case as moot. More recently, this Court granted certiorari in *New York State Rifle, et al. v. Corlett*, ___ S.Ct. ___, 2021 WL 1602643 (2021) (whether the state's denial of petitioner applications for concealed carry licenses for self-defense violated the Second Amendment). This Court has not yet decided the pending certiorari petition in *Young v. Hawaii*, No. 20-1639 (9th Cir. 2020) (asking whether the Ninth circuit erred in holding the Second Amendment does not apply outside the home at all and whether denial of petitioner's application for a handgun carry license violated the Second Amendment).

The text of the Second Amendment is straightforward. It does not say that "the right of the people to keep and bear arms shall not be infringed, except by legislation that is substantially related to an important governmental objective." Rather, it provides " . . . the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. Period. There is no room for courts to balance Second Amendment rights against competing governmental interests, or for legislators to subordinate the constitutionally protected right to policy goals courts deem "important."

Further, "intermediate scrutiny" is hopelessly indeterminate and leads inevitably to result-oriented judging. Any judge can assert any gun-control measure is "substantially" related to the "important" governmental objective of public safety regardless of the data or evidence the litigants produce. That is exactly what happened here. "[I]t is always possible to disagree with such judgments and never to refute them." *Blakely v. Washington*, 542 U.S. 296, 308 (2004). This is not the standard to apply to an enumerated right the Constitution is supposed to protect from the vagaries of political and judicial opinion.

Moreover, *Heller rejected* such an interest-balancing approach: "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach. . . ." *Heller*, 554 U.S. at 634. This Court's majority went on to observe that a "constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional

rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an 'interest-balancing' approach to the prohibition of a peaceful neo-Nazi march through Skokie." *Id*. at 634–35 (citing *Nat'l Socialist Party of Am. v. Skokie*, 432 U.S. 43 (1977) (per curiam)).

Instead, the proper inquiry is: (1) do magazines holding more than 10 rounds qualify as "arms" described in the Second Amendment; and (2) does a prohibition on this subset of arms qualify as an "infringement" of the right to keep and bear arms. Because magazines holding more than 10 rounds are commonly possessed arms[6] falling within the Second Amendment, California's prohibition and criminalization of the possession of such arms infringes on the Second Amendment right to keep and bear arms.

Yet, the Ninth Circuit did not even discuss whether Section 32310 could be upheld using a textual analysis of the Second Amendment, choosing not to read this Court's cases as foreclosing the application of heightened scrutiny as the final step of the analysis. *Duncan*, 19 F.4th at 1107. Instead, the lower court asked: (1) how close does the law come to the core of the Second Amendment right; and (2) what is the severity of the law's burden on the right. *Duncan*, 19

---

[6] 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. 852–57 (2015).

F.4th at 1103 (embracing *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) and other cases). Because the lower court found Section 32310 imposed only a "minimal burden," it applied what it deemed intermediate scrutiny. *Id*. at 1107.

This Court's review is needed to correct the Ninth Circuit's further erosion of those rights guaranteed to Petitioners under the Second Amendment—including the right to *keep and bear arms* such as magazines holding more than 10 rounds. The Second Amendment takes the choice regarding magazine capacity away from the government and allows *the individual* the right to choose the magazine capacity appropriate for their needs (in other words, how much self-defense they feel they need).

II. If a Form of Heightened Scrutiny Must be Applied, the Scrutiny Should be Strict.

Heller explicitly requires something more than rational basis scrutiny and rejects interest balancing. *Heller* teaches that some form of heightened scrutiny is required in evaluating the constitutionality of laws infringing on Second Amendment rights. *See Heller*, 554 U.S. at 628 n. 27. To determine the appropriate level of scrutiny, the Court must look to the severity of the burden placed on Second Amendment rights. A severe burden implicating the "core of the Second Amendment right" will be subject to strict scrutiny. There can be no more severe a burden than a complete ban such as the one at issue here—a ban which also

criminalizes, both prospectively and retroactively, possession (including in the home) of magazines holding over 10 rounds, even if those magazines are commonly—ubiquitously—owned, were legally purchased and lawfully owned for decades. The Ninth Circuit justified its application of " intermediate scrutiny" by declaring that magazines are "merely a subset (large-capacity) of a part (a magazine) that some (but not all) firearms use" and thus, "entirely different from the handgun ban at issue in *Heller*." *Duncan*, 19 F.4th at 1100, 1107. It also completely disregarded the fact that approximately half the magazines in circulation hold 10 or more rounds and questioned whether such numbers meaningfully reflect an affirmative choice by consumers.[7] *Id*. The Ninth Circuit went on to state: "Plaintiffs have offered little evidence that large-capacity magazines are commonly used, or even suitable, for" self-defense in the home—adding yet another step to its multi-tiered two-step inquiry (*i.e.*, not simply asking if the subject arm is common, but whether it is common for a particular *use*). *Id*. The lower court further justifies its opinion by stating Section 32310 "has no effect whatsoever on which firearms may be owned" and does not prevent an individual from possessing as "many firearms, bullets, and magazines as they choose." *Id*. at 1104. However, the pertinent inquiry, as this Court recognized in *Caetano v. Massachusetts*, 577 U.S. 1027 (2016) (analyzing a categorical ban of stun

[7] Notably, the *en banc* panel seemingly did not consider the impact to circulation percentages of the now repealed federal ban and other states' bans on magazines holding 11+ rounds.

guns under the Second Amendment), is whether 11+ round magazines are commonly possessed; there can be no real question that they are—48% of firearms owners own or have owned an 11+ round magazine and an estimated 133 million such magazines are in the possession of Americans. English, William, 2021 NATIONAL FIREARMS SURVEY at pp. 1, 17. But with the Ninth Circuit *en banc* panel's rationalizations, it is only a matter of time before "arms" (the type of firearm or magazine capacity) are even more severely limited. It takes no imagination to envision a law that limits the number of magazines California will permit its subjects to possess in the name of public safety. At a minimum, strict scrutiny should have been used to analyze Section 32310.

III. Regardless of the Form of Heightened Scrutiny Applied, Section 32310 and Similar Statutes are Overbroad.

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, on the other hand, 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*. Intermediate scrutiny requires Respondent "demonstrate that the harms it recites are real" beyond "mere speculation or conjecture." *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993). Regardless,

Section 32310 does not pass muster under intermediate or strict scrutiny.

A. Section 32310 is Not Narrowly Tailored to Fit Government Objectives.

The burden is on Respondent to establish the challenged law is "closely drawn to avoid unnecessary abridgment" of constitutional rights. *McCutcheon*, 572 U.S. at 218. Respondent's stated ends, like those of most governments advocating for increased firearm restrictions, are public safety, including the prevention of mass shootings. While these are worthy objectives, Respondent cannot show a "reasonable fit" between this 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.

The reasoning the Ninth Circuit uses to justify the ban on 11+ round magazines applies equally to smaller magazines[8] (for example, the "precious down-time"

[8] Those harmed by 1 or more of the first 10 rounds in a magazine are no less important than those Respondent believes might escape injury or death if 10+ magazines are banned. But Respondent's public safety interest really forecasts the continued erosion of the Second Amendment by future statutes which will further reduce magazine capacity and, ultimately, ban magazines (and firearms which use them) completely. One need not be clairvoyant to envision a time when Respondent and other state legislatures ban semi-automatic pistol magazines with capacity beyond that of Old West revolvers (typically 5 or 6 rounds), or perhaps go even further and limit their citizens to single shot firearms which require manual reloading.

when a mass shooter is reloading, and which was persuasive to the Ninth Circuit's *en banc* decision). Considering the seemingly arbitrary nature of Respondent's decision to limit magazine capacity to 10 or less, it is impossible to see how Section 32310 is narrowly tailored to the ends Respondent seeks or if it will even accomplish Respondent's objectives. Neither Respondent nor the Ninth Circuit opinion at issue present any evidence that restricting or limiting magazine capacity to 10 or fewer rounds of ammunition will prevent mass shootings. They can only speculate the pause in shooting will reduce the scope of the tragedy.

Additionally, Respondent never provided,[9] and the Ninth Circuit does not appear to have considered, whether an objective, evidence-based rationale exists for *why* 10 rounds is the "magic" number for a magazine. In fact, as was the case with New Jersey's similar statute (New Jersey Statute section 2C:39-1(y)),[10] 10 is nothing more than an arbitrary number the state pulled out of thin air.

Moreover, as *Heller* recognized, "There are many reasons that a citizen may prefer a handgun for home

---

[9] The District Court granting Petitioners' Motion for Summary Judgment (finding Section 32310 unconstitutional) noted, "So, how did California arrive at the notion that any firearm magazine size greater than a 10-round magazine is unacceptable? It appears to be an arbitrary judgment." App.370.

[10] This Court has not yet decided the pending Petition for Writ of Certiorari in the Third circuit matter (*Assoc. of N.J. Rifle & Pistol Clubs, Inc. v. Bruck*, No. 20-1507 (3d Cir. 2020)) challenging the similar New Jersey statute.

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. 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.

To the extent Respondent and the Ninth Circuit *en banc* panel reason that few individuals use more than 10 rounds in self-defense, *Heller* did not address whether individuals actually fired handguns for self-defense.[11] Rather, an individual "uses" a 11+ round

[11] Nothing in *Heller* required an "arm" to be "commonly used" to receive protection—just commonly *owned*. Magazines holding multiple rounds have been "commonly possessed" in the United States since 1863. *See* David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALB. L. REV. 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

magazine simply by keeping it ready for self-defense and 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.

Thankfully, the overwhelming number of firearm owners will never have to fire their weapon in self-defense. But this fact 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, however, the government takes that choice away from its citizens even though *Heller* makes clear that the Second Amendment takes the choice away from the government. It is a Second Amendment right that belongs to the People who choose to reside in California and Section 32310 violates that right.

B. There is No Relationship Between a 10-Round Magazine Capacity Limitation and Respondent's Objectives.

At the district court level, Respondent was unable to explain why Section 32310 limits magazine capacity to no more than 10 rounds (as opposed to some other number). Respondent also failed to produce *any* evidence this magazine capacity limitation will have an

---

available between 1936 and 1971. *Id*. at 857–59, 858 n. 82. 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*.

effect on mass shootings or crimes where 11+ round magazines are used.[12]

In fact, 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 the federal ban and its magazine capacity limitation (10 or less) had reduced crime. *See* 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, it is no wonder Respondent could not provide any evidence that the availability of 11+ round magazines is causally related to violent crime or mass shootings.

Thus, the pre-*Heller* federal Assault Weapons Ban is nothing more than a failed experiment from which

---

[12] Statutes like Section 32310 term magazines capable of holding 10 or more rounds as "Large Capacity Magazines" or "LCMs." Like California, those states adopting the "LCM" term are using semantics to highjack the debate. "LCM" is used to suggest such magazines that are *too* big, unnecessary, excessive and therefore dangerous. Upon what evidence does a legislature term a 10+ round magazine "large"? Whether they are called "large," "jumbo" or "super-sized," such semantic games are irrelevant to the constitutional analysis; rather, the key inquiry is whether 10+ magazines (or "arms") are "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 624–25. The answer to this question is a resounding "yes."

Respondent learned nothing.[13] And if such a ban did not work on a national level, why does Respondent expect different results in California? There is no reason to believe Section 32310 will not fail in the same way the federal ban did. How then can the current limitation set forth in Section 32310 be considered narrowly tailored to meet Respondent's ends and satisfy strict, or even intermediate, scrutiny? The answer, of course, is it cannot.

IV. Only a Handful of States Impose Magazine Capacity Restrictions—For Now.

Only 11 states (this number includes California) restrict civilian access to magazines holding a specific number of rounds. *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); S.B. 5078, Reg. Sess. 2021-2022 (Wash. 2022). 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 eight; seven excluding

[13] Similarly, Colorado, Connecticut, D.C., Maryland, Massachusetts, New Jersey, New York and Vermont learned nothing as well.

California. That equates to 14-16% of the states—which is 14-16% too many. To the extent the Ninth Circuit opinion relies on those other six states to support the constitutionality of Section 32310, such reliance is misplaced.[14]

The fact is, magazine restrictions are actually quite *uncommon*. That a few other states infringe on the Second Amendment rights of their citizens does not make such restrictions constitutional. Bearing in mind this growing trend of states enacting laws infringing on Second Amendment rights, and the corresponding circuit courts not faithfully applying *Heller* and finding those restrictions constitutional, NSSF implores this Court to grant certiorari and provide guidance to the lower courts.

V. Respondent's Magazine Capacity Restriction Hastens the Slide to Additional Restrictions in Violation of the Second Amendment.

Respondent's failure in the district court to set forth sound reasoning behind the 10-round limit, to establish why 10 rounds is a reasonable fit, reinforces this slippery slope concern. Indeed, this has already occurred in other jurisdictions where legislative bodies have tried to restrict magazine capacity without any apparent rationale. For example, in New Jersey, magazine capacity was limited to 15 rounds or less from

[14] In fact, ***133 million*** 11+ rounds magazines are commonly owned in the United States—a number which would likely be higher if not for the expired 10-year federal ban and state bans.

2000 until June 2018. In 2018, New Jersey further 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).) 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, 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, S15480, 1993 WL 467099.

Allowing Respondent to dictate an arbitrary number of rounds a magazine may hold—without any tailoring, let alone narrow tailoring, to its purposes—will further erode individual Second Amendment rights. Indeed, a "constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Heller*, 554 U.S. at 634.

CONCLUSION

Section 32310 severely burdens and infringes upon the core Second Amendment rights of California citizens who may choose magazines holding more than 10 rounds for self-defense, including in the home. The government has fully taken the choice from the people

regarding which commonly possessed arms they wish to keep for lawful self-defense in their home. Such a ban is unconstitutional under *Heller*.

Guidance from this Court is urgently needed to clarify how courts should analyze the constitutionality of laws infringing upon Second Amendment rights. Intervention is necessary to prevent further limitations to the rights enumerated by the Second Amendment and "fundamental to our scheme of ordered liberty." *McDonald*, 561 U.S. at 767. This case provides this Court the opportunity to further define the contours of the Second Amendment and rein in lower courts failing to follow the lessons *Heller* and *McDonald* taught about how Second Amendment challenges are properly analyzed.

Accordingly, NSSF strongly urges this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

CRAIG A. LIVINGSTON
Counsel of Record
CRYSTAL L. VAN DER PUTTEN
LIVINGSTON LAW FIRM, PC
1600 South Main Street,
Suite 280
Walnut Creek, CA 94596
Tel: (925) 952-9880
clivingston@livingstonlawyers.com
cvanderputten@
livingstonlawyers.com

Attorneys for Amicus Curiae
The National Shooting
Sports Foundation, Inc.

LAWRENCE G. KEANE
General Counsel
THE NATIONAL SHOOTING
SPORTS FOUNDATION, INC.
11 Mile Hill Road
Newtown, CT 06470
Tel: (202) 220-1340
lkeane@nssf.org

Of Counsel for Amicus Curiae
The National Shooting
Sports Foundation, Inc.