No. 19-55376

In the
United States Court of Appeals for the Ninth Circuit

VIRGINIA DUNCAN, *ET AL.*,
Plaintiffs-Appellees,
v.
ROB BONTA, in his official capacity as
Attorney General of the State of California, *ET AL.*,
Defendants-Appellants.

On Appeal from the
United States District Court for
the Southern District of California

Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, Heller Foundation, Oregon Firearms Federation, Virginia Citizens Defense League, Tennessee Firearms Association, Grass Roots North Carolina, Rights Watch International, America's Future, Inc., Downsize DC Foundation, DownsizeDC.org, Conservative Legal Defense and Education Fund, and Restoring Liberty Action Committee on Remand in Support of Plaintiffs-Appellees

JOHN HARRIS
Nashville, TN

GARY KREEP
Ramona, CA

Joseph W. Miller
Fairbanks, AK

JEREMIAH L. MORGAN*
WILLIAM J. OLSON
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Avenue W., Suite 4
Vienna, VA 22180-5615
(703) 356-5070
Attorneys for Amici Curiae

August 23, 2022
*Attorney of Record

DISCLOSURE STATEMENT

The *amici curiae* herein, Gun Owners of America, Inc., Gun Owners Foundation, Heller Foundation, Oregon Firearms Federation, Virginia Citizens Defense League, Tennessee Firearms Association, Grass Roots North Carolina, Rights Watch International, America's Future, Inc., Downsize DC Foundation, DownsizeDC.org, Conservative Legal Defense and Education Fund, and Restoring Liberty Action Committee, through their undersigned counsel, submit this Disclosure Statement pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A). These *amici curiae*, other than Restoring Liberty Action Committee, are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them. Restoring Liberty Action Committee is not a publicly traded corporation, nor does it have a parent company which is a publicly traded corporation.

s/Jeremiah L. Morgan
Jeremiah L. Morgan

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INTEREST OF *AMICI CURIAE*[1]

Gun Owners of America, Inc., Gun Owners Foundation, Heller Foundation, Oregon Firearms Federation, Virginia Citizens Defense League, Tennessee Firearms Association, Grass Roots North Carolina, Rights Watch, International, America's Future, Inc., Downsize DC Foundation, DownsizeDC.org, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Restoring Liberty Action Committee is an educational organization. Each is dedicated, *inter alia*, to the correct construction, interpretation, and application of law.

Most of these *amici* have filed three other *amicus* briefs in this case:

- *Duncan v. Becerra*, Brief *Amicus Curiae* of Gun Owners of America, *et al.* (September 23, 2019) (Ninth Circuit);
- *Duncan v. Bonta*, Brief *Amicus Curiae* of Gun Owners of America, *et al.* (May 21, 2021) (Ninth Circuit); and
- *Duncan v. Bonta*, Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.* (April 1, 2022) (U.S. Supreme Court).

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[1] All parties have consented to the filing of this brief *amicus curiae*. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

STATEMENT OF THE CASE

In 2000, California prohibited the manufacture, importation, sale, and transfer of so-called large-capacity magazines, which it defines as "any ammunition feeding device with the capacity to accept more than 10 rounds." California Penal Code § 16740. In July 2016, the California legislature banned the possession of large-capacity magazines, and in November 2016, California approved Proposition 63, with the same effect.

Plaintiffs-appellees filed suit before the ban was to take effect and filed a motion for a preliminary injunction. Two days before the ban was to become effective on July 1, 2017, the district court issued a preliminary injunction pending a full hearing on the merits. Then, on March 29, 2019, the district court granted plaintiffs' motion for summary judgment.

The district court reached its conclusion by conducting two tests. First, it applied the test used in *District of Columbia v. Heller*, 554 U.S. 570 (2008), which asks whether the banned arms are "'in common use' 'for lawful purposes like self-defense.'" *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1142 (S.D. Cal. 2019). Second, the district court applied the Ninth Circuit's two-step test from *United States v. Chovan*, 735 F.3d 1127 (2013), which it described as "a

tripartite binary test with a sliding scale and a reasonable fit." *Duncan v. Becerra* at 1155.

On appeal, a three-judge panel of this Court only applied the *Chovan* test, and found that the high-capacity ban failed even that test. *See Duncan v. Becerra*, 970 F.3d 1133 (9th Cir. 2020). California then petitioned for rehearing *en banc*, which the Ninth Circuit granted, vacating the panel's opinion. The *en banc* majority easily upheld the large-capacity magazine ban using the two-step test. *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021) (hereinafter "*Duncan*").

Plaintiffs-appellees filed a petition for writ of certiorari with the Supreme Court, which granted the petition, vacated this Court's decision, and remanded to this Court following the Supreme Court's decision in *New York State Rifle & Pistol Association v. Bruen* on June 23, 2022. That remand led to this Court's August 2, 2022 request for supplemental briefing about "the effect of *Bruen* on this appeal, including whether the en banc panel should remand this case to the district court for further proceedings in the first instance."

ARGUMENT

For more than a decade after its landmark decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the U.S. Supreme Court stood back and allowed the lower federal courts to resolve hundreds of Second Amendment challenges based on the principles articulated in those cases. Not until two months ago, on June 23, 2022, in *New York State Rifle & Pistol Association, Inc. v. Bruen,* 142 S. Ct. 2111 (2022), did the Supreme Court attempt to return order to the nation's Second Amendment jurisprudence, rescuing it from regular and repeated infringement facilitated by use of the "judge empowering" two-part test widely embraced by federal circuit courts.

The *Bruen* decision can be seen as an exercise in Supreme Court frustration, while giving lower court judges another chance to get it right. If the lower courts continue to allow infringement to gun rights, it is likely petitions for certiorari will be responded by being granted, vacated and remanded (GVR) or with summary reversals.

I. THE ORIGINS OF THE JUDGE-EMPOWERING, INTEREST BALANCING TWO-STEP TEST IN THE NINTH CIRCUIT.

There are many lessons that the lower courts must take from the *Bruen* decision — but the most fundamental is its unequivocal prohibition on use of the two-step test: "Today, we decline to adopt that two-part approach…. Despite the popularity of this two-step approach, it is one step too many…." *Bruen* at *20, *22-*23. Another look should be given to the history of this test to ensure no aspect of that test creeps back into this Court's jurisprudence.

The two-step test was not invented in the Ninth Circuit, but it has been used in this Circuit since 2013. In *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013), the Court considered a Second Amendment challenge to 18 U.S.C. § 922(g)(9), prohibiting firearm possession by those convicted of misdemeanor crimes of domestic violence ("MCDV"). The two-step test appears to have been adopted in this criminal case **by default**, perhaps because the defendant was represented not by any organization focused on gun rights, but rather by Federal Defenders. In *Chovan*, the "appellant d[id] not argue [against] the familiar 'scrutiny' tests … of our sister circuits … but [rather] accepts it." *Id.* at 1142-3 (Bea, J., concurring). The *Chovan* panel did not conduct any analysis of the propriety of the two-step interest balancing test or consider other approaches

before adopting "the two-step Second Amendment inquiry undertaken by the Third Circuit in *Marzzarella* … and the Fourth Circuit in *Chester*." *Id.* at 1136 (Bea, J., concurring). Its adoption was questioned at the time, however. Judge Bea, concurring, noted the majority treated the framework issue not so much decided as "waived" — "accept[ing] the application of the tiers of scrutiny," but pointing out competing frameworks for Second Amendment analysis, such as by then-Judge Kavanaugh ("'text, history, and tradition'") and commentators who note that interest balancing tests "'don't make sense here' in the Second Amendment context because the language of *Heller* seems to foreclose scrutiny analysis." *Id.* at 1143 (Bea, J., concurring).

Applying the two-step test, the *Chovan* Court concluded that the right of a person convicted of a MCDV to have a firearm "'is not within the core right identified in *Heller* — the right of a *law-abiding, responsible* citizen to possess and carry a weapon for self-defense….'" *Id.* at 1138. Nevertheless, the Court concluded that "[t]he burden … is quite substantial," because it "amounts to a 'total prohibition'" of his right to keep and bear arms. Applying intermediate scrutiny to this non-core-but-severe-burden statute, the Court recited the "important … government interest of preventing domestic gun violence," and

concluded that prohibiting those convicted of a MCDV from having firearms could further that interest. *Id.* at 1139-1141.

II. THE *FYOCK* FINDINGS ON LARGE CAPACITY MAGAZINES.

In *Fyock v. City of Sunnyvale*, 779 F.3d 991 (9th Cir. 2015), this Court reviewed the denial of a preliminary injunction in a challenge to an ordinance banning magazines with a capacity over 10 rounds. The Court determined that the ordinance had **no historical analogue**, governed magazines that were "'**typically possessed by law-abiding citizens for lawful purposes**,'" and such magazines were **not "'dangerous and unusual weapons**....'" *Id.* at 996-97 (emphasis added). Nevertheless, the Court concluded that, even though the ordinance affected "core" rights, it did not impose a "severe burden" because gun owners could still own neutered magazines holding 10 or fewer rounds. *Id.* at 999. Upholding the ban under intermediate scrutiny, the Court reasoned that "reducing the harm of intentional and accidental gun use"[2] is a "'substantial government interest,'" and deferred to the government's conclusion that fewer "large-capacity magazines in circulation **may** decrease the use of such magazines in gun crimes." *Id.* at 1000 (emphasis added).

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[2] It makes no sense to say that a so-called "large capacity" magazine is more subject to *accidental* discharge than a limited capacity magazine.

With the *en banc* panel opinion in *Duncan* now being vacated, this Circuit's treatment of a magazine ban in *Fyock*'s becomes significant. Presumably, any effort by this Court to uphold the magazine ban would need to be based on any of either: (i) historical analog; (ii) not being typically possessed by law-abiding citizens for lawful purposes; or (iii) dangerous and unusual weapons. But all of these approaches were foreclosed by the clear and unequivocal findings in *Fyock*, further demonstrating that remand to the district court is not required.

III. THE FAITHFUL APPLICATION OF *BRUEN* TO *DUNCAN* COULD NOT BE MORE SIMPLE.

In *Bruen*, the U.S. Supreme Court made clear that the two-step test used by this Court in *Duncan* was no longer permitted: "Despite the popularity of this two-step approach, it is one step too many…." *Bruen* at *22-*23. The Court set out the test to be used by reviewing courts:

> In the years since, the Courts of Appeals have coalesced around a "two-step" framework for analyzing Second Amendment challenges that combines history with means-end scrutiny.
>
> Today, **we decline to adopt that two-part approach**. In keeping with *Heller*, we hold that when the Second Amendment's **plain text covers an individual's conduct**, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, **the government must demonstrate** that

> the regulation is **consistent with this Nation's historical tradition** of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command." *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n.10 (1961). [*Bruen* at *20-*21 (emphasis added).]

Although step one of the discredited two-part test allowed courts to claim that many firearms restrictions fell "outside the scope of the right as originally understood" — if there was any historical antecedent to the restrictions — that often led to a finding that the right did not even implicate the Second Amendment, or that the court would casually "assume" without determining that it did.[3] *Bruen*, correctly, elevates the Constitution's text to first place, so that lower courts may not continue to allow infringements on gun rights.

Applying *Bruen* here, magazines over 10 rounds are obviously covered by the "plain text" of an "arm" — as without magazines, most handguns will only fire one round without reloading. No longer is this Court authorized to declare that the text does not cover the infringement by finding some type of historical analogue, as was done under the discredited two-step test. After *Bruen*, any

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[3] *See, e.g., United States v. Chapman,* 666 F.3d 220, 226 (4th Cir. 2012).

court that would find the text does not cover a gun magazine would, in the words of Justices Alito and Thomas, "defy" the Supreme Court. *See* Section V, *infra*.

The only issue to decide is whether California has "demonstrate[d] that the regulation is **consistent with this Nation's historical tradition** of firearm regulation." There is to be no means-end scrutiny, no need for recitations of the dangers and risks of firearms. *Bruen* at *20-*21. There is no deference to the legislative branch whatsoever, because "while that judicial deference to legislative interest balancing is understandable — and, elsewhere, appropriate — it is not deference that the Constitution demands here. The Second Amendment 'is the very *product* of an interest balancing by the people….'" *Bruen* at *31, citing *Heller* at 635.

This Court earlier concluded, "The record shows that firearms capable of holding more than ten rounds of ammunition have been available in the United States for well over two centuries." *Duncan* v. Becerra, 970 F.3d 1149. "In sum, laws restricting ammunition capacity emerged in 1927 and all but one have since been repealed." *Id*. at 1150-51 (citations omitted). *See also* discussion of *Fyock* in Section II, *supra*.

There is great simplicity in the Supreme Court's approach, and it can only lead to the striking down of the ban. Some who oppose gun rights, no doubt, could labor mightily to take comments from *Bruen* out of context to justify California's law banning magazines, but that would only delay the inevitable, but only if judges allow their personal opposition to gun rights to interfere with their judicial duty to decide cases in accord with clear Supreme Court precedents.

IV. PUTTING *DUNCAN* INTO THE CONTEXT OF NINTH CIRCUIT REMANDS.

When *NYSRPA v. Bruen* was decided on June 23, 2022, not just one case, but two of this Court's *en banc* Second Amendment decisions then were pending before the U.S Supreme Court on petitions for writ of certiorari. *See Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021) *(en banc*), and *Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021) (*en banc*). Shortly after the Supreme Court issued its decision in *Bruen*, it granted, vacated, and remanded those two petitions for writ of certiorari back to this Court. *See Duncan v. Bonta*, 2022 U.S. LEXIS 3233 (June 30, 2022) and *Young v. Hawaii*, 2022 U.S. LEXIS 3235 (June 30, 2022). The background on *Duncan* is set out *supra*, and some background on the *Young* case is set out below.

***Young v. Hawaii* (No. 12-17808).** The *en banc* court which heard the *Young* case has already remanded the case to the district court in Hawaii. Dissenting from the remand, Judge O'Scannlain stated that the Court failed to answer the simple question before it. Instead, the Court's choice "delays the resolution of this case, wastes judicial resources, and fails to provide guidance to the lower courts of our Circuit." *Young v. Hawaii*, 2022 U.S. App. LEXIS 23140, *8 (9th Cir. 2022) (O'Scannlain, J., dissenting). Judge O'Scannlain, joined by three other judges from the *en banc* panel, explained application of the Second Amendment and *Bruen* to that case and concluded that "We are bound, now, by *Bruen*, so there is no good reason why we could not issue a narrow, unanimous opinion in this case. The traditional justifications for remand are absent here. The issue before us is purely legal, and not one that requires further factual development." *Id*. at *16-17.

These *amici* believe that the same situation identified by Judge O'Scannlain is present here. Like *Young*, *Duncan* involves a purely legal matter, and there are no relevant factual issues in dispute. The Court's decision in this case would provide guidance in other cases pending in this Circuit as well as to other cases

now pending in district court — and other cases that likely will follow in light of the *Bruen* decision.

There are other cases in similar postures.

***Rhode v. Bonta* (No. 20-55437).** In *Rhode*, the three-judge panel heard oral argument on November 9, 2020, after which the case was held in abeyance pending the resolution of *Duncan*. Following the Supreme Court's remand of *Duncan*, this court vacated its abeyance and directed supplemental briefing in light of *Bruen*. *See Rhode v. Bonta*, No. 20-55437, order of June 24, 2022. There, the three-judge panel did not remand it to the district court to consider application of *Bruen*.

***Miller v. Bonta* (No. 21-55608).** Last year, the three-judge panel considering *Miller* stayed the briefing schedule in that case pending resolution of the appeal in *Rupp v. Bonta*, a case which involved a challenge to the same law at issue in *Miller*. Following the *Bruen* decision, the panel granted California's motion to remand to the Southern District of California, which has ordered supplemental briefing in light of *Bruen*. *See Miller v. Bonta*, No. 21-55608, order of August 1, 2022.

***Rupp v. Bonta* (No. 19-56004).** The appeal in *Rupp* had been held in abeyance by a panel pending a decision in *Bruen*, and following that decision, the panel vacated the district court opinion and remanded to the Central District of California for consideration consistent with *Bruen*. *See Rupp v. Bonta*, No. 19-56004, order of June 28, 2022.

***Yukutake v. Connors* (No. 21-16756).** The panel in *Yukutake*, which has not heard oral argument yet, last week ordered supplemental briefing in light of *Bruen*, and will proceed to oral argument without remanding to the district court.

***Flanagan v. Becerra* (No. 18-55717).** On July 30, 2019, this Court stayed proceedings in *Flanagan* pending resolution of *Young v. Hawaii*. As of the date of the filing of this brief, the Court has not lifted the stay.

These *amici* urge that the *en banc* panel apply *Bruen* and rule on the challenge without remand to the district court. The present case is already before an *en banc* panel, indicating the significance of the issues involved. With facts not in dispute, it is a purely legal matter to consider whether California's magazine ban at issue here is consistent with the Second Amendment applying the test laid out in *Bruen*. Deciding this case now will promote judicial

efficiency and provide guidance to the lower courts and other panels of this Court in handling the cases identified above, as well as others that will come.

V. BEFORE *BRUEN*, THE SUPREME COURT WARNED LOWER COURTS NOT TO DEFY THE *HELLER* AND *MCDONALD* DECISIONS.

The one significant Supreme Court Second Amendment case decided since *Heller* and *McDonald* was the Court's unanimous *per curiam* decision in *Caetano v. Massachusetts*, 577 U.S. 411 (2016). There the Court ruled that a stun gun was a Second Amendment-protected arm. *Caetano* reiterated many of the important principles of *Heller* and *McDonald* as it rejected in summary fashion the three reasons given by the Massachusetts courts for upholding the ban. First, it rejected the rationale that stun guns "'were not in common use at the time of the Second Amendment's enactment,'" as being "inconsistent with *Heller*'s clear statement that the Second Amendment 'extends … to … arms … that were not in existence at the time of the founding.'" *Caetano* at 411-12. Second, it rejected the claim that stun guns were "'dangerous'" and were "'unusual weapons'" because they are "'a thoroughly modern invention.'" *Id*. The Court found unpersuasive the lower court's equating "'unusual'" with "'not in common use at the time of the Second Amendment's enactment.'" *Id*. Third, the Supreme

Court found that the Massachusetts rationale that stun guns were not "'readily adaptable to use in the military'" violated *Heller*, which rejected the proposition "'that only those weapons useful in warfare are protected.'"

A concurrence by Justice Alito, joined by Justice Thomas, stated the obvious — that the Massachusetts court's "reasoning **defies** our decision in *Heller*, which rejected as 'bordering on the frivolous' the argument 'that only those arms in existence in the 18th century are protected by the Second Amendment.' …. Although the Supreme Judicial Court **professed to apply** *Heller*, each step of its analysis **defied *Heller*'s** reasoning…. The lower court's ill treatment of *Heller* cannot stand. The reasoning of the Massachusetts court poses a grave threat to the fundamental right of self-defense." *Id*. at 414-15, 421 (emphasis added). Accusing a lower court of intentional **defiance** of Supreme Court precedent is strong stuff, and hopefully it will not be needed in the aftermath of *Bruen*.

CONCLUSION

For the reasons set out above, *Bruen* and *Fyock* provide sufficient guidance that this court should strike down the California ban on magazines without the need to remand the case to the district court.

Respectfully submitted,

/s/Jeremiah L. Morgan

JOHN I. HARRIS III
SCHULMAN, LEROY & BENNETT, P.C.
3310 West End Avenue
Suite 460
Nashville, TN 37203

GARY G. KREEP
932 D Street, Suite 2
Ramona, CA 92065

JOSEPH W. MILLER
JOSEPH MILLER LAW OFFICES, LLC
P.O. Box 83440
Fairbanks, AK 99708

JEREMIAH L. MORGAN*
WILLIAM J. OLSON
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Avenue W., Suite 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae

*Attorney of Record
August 23, 2022

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.*, on Remand in Support of Plaintiffs-Appellees, was made, this 23rd day of August 2022, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

/s/Jeremiah L. Morgan
Jeremiah L. Morgan
Attorney for *Amici Curiae*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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