Case No. 20-55437

In the United States Court of Appeals for the Ninth Circuit

KIM RHODE, et al.,
Plaintiffs-Appellees,

v.

ROB BONTA, in his official capacity as Attorney General of the State of California,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of California (No. 18-cv-00802-BEN-JLB)

APPELLEES' THIRD SUPPLEMENTAL BRIEF

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INTRODUCTION

The Supreme Court's decision in *New York State Rifle & Pistol Association v. Bruen*, 142 S.Ct. 2111 (2022), makes two things crystal clear: The Second Amendment presumptively protects all conduct that falls within its ambit, and the government bears the burden to prove that efforts to regulate such conduct are consistent with our Nation's historical tradition. Those now-settled principles make the resolution of this case straightforward. The conduct in which plaintiffs seek to engage—obtaining ammunition—unquestionably falls within the ambit of the Second Amendment, as the right to keep and bear firearms plainly includes the right to acquire the ammunition necessary to *use* them. And as the district court already concluded, California's effort to require repeated background checks for each and every ammunition acquisition has not a shred of historical grounding. Indeed, the regime is, by the state's own telling, the first ever of its kind.

That suffices to doom any effort by the state to carry its burden of justifying its regime by reference to historical tradition, as the regime is wholly novel, even though both ammunition sales and the capacity to conduct background checks are nothing new. Background checks have been around for more than a century, yet only California and one other outlier have ever attempted to impose them on ammunition purchases—presumably because all

other states recognize that to do so would be to impose ongoing burdens on an exercise of a fundamental right that are different in kind from anything our historical tradition has ever countenanced.

It is little surprise, then, that the state spends the bulk of its brief trying to escape a historical inquiry altogether, and the balance asking for a remand. But the state cannot evade its obligations under *Bruen* by attempting to minimize the burdens imposed by its novel regime, as *Bruen* asks only whether the state seeks to regulate conduct covered by the Second Amendment, not whether the state has eviscerated that constitutional right entirely. And there is no basis for a remand: The state has already had more than ample opportunity to try to prove that its regime is consistent with historical tradition, as the district court squarely resolved that question, and this Court then ordered supplemental briefing devoted exclusively to that topic. Unable to identify any law even remotely resembling its novel ammunition regime, moreover, the state devoted most of that supplemental brief to exactly the kind of reasoning by analogy that it now claims it has not yet had an opportunity to explore. The state's problem thus is not a lack of opportunity, but a lack of evidence, and that is a problem that remand cannot cure. The far better course, then, is to recognize what *Bruen* has made plain: California's novel ammunition regime cannot be reconciled with the Second Amendment.

ARGUMENT

I. *Bruen* Discarded This Court's "Two-Step" Framework In Favor Of An Analysis Focused Solely On Text And Historical Tradition.

In *Bruen*, the Supreme Court recognized that "Courts of Appeals have coalesced around a 'two-step' framework for analyzing Second Amendment challenges." 142 S.Ct. at 2125. The first step, the Court explained, asked if the government could justify a given regulation by showing that "the original scope of the [Second Amendment] based on its historical meaning" countenanced that kind of restriction on the right to keep and bear arms. *Id.* at 2126. If it could, then the analysis would "stop there." *Id.* But if history suggested that such a restriction was not "originally understood" as consistent with the right, or if the historical record was inconclusive, courts moved to a second step at which they typically subjected the regulation to intermediate scrutiny. *Id.*

The Supreme Court listed this Circuit as among the courts that had adopted this two-step framework. *See id.* at 2126-27 n.4 (citing *Young v. Hawaii*, 992 F.3d 765, 783 (9th Cir. 2021) (en banc)); *id.* at 2174 (Breyer, J., dissenting). That was no mistake. *Bruen*'s discussion maps neatly onto the test that this Court applied in Second Amendment cases for the past decade, and that this Court has observed "is similar to tests adopted by other circuits." *Young*, 992 F.3d at 783. First, this Court would ask whether history shows that the regulation at issue is "longstanding [and] accepted" and thus consistent with "the Second

Amendment right as it was historically understood." *Id.* Second, if history could not sustain the regulation on its own, this Court would subject it to "one of three levels of scrutiny," usually intermediate scrutiny. *Id.* at 784.

The Supreme Court has now jettisoned that two-step approach, making clear that it involved "one step too many." *Bruen*, 142 S.Ct. at 2127. The correct Second Amendment analysis starts and stops with text and historical tradition. *Id.* Accordingly, when confronted with a Second Amendment challenge, a court must now begin by asking whether the conduct in which an individual seeks to engage is within the ambit of the Second Amendment. *Id.* at 2129-30. If so, then "the Constitution presumptively protects that conduct," *id.*, and "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms," *id.* at 2127. "Only" if the government can "identify a well-established and representative historical analogue" to the regulation it seeks to defend, *id.* at 2133, "may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command,'" *id.* at 2130 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)).

Bruen also reaffirmed certain critical principles that govern (and constrain) the historical analysis. For one thing, the Court made emphatically clear that the government shoulders the burden of justifying a restriction on Second

Amendment rights by proving that a longstanding American tradition supports that restriction. Indeed, the Court said so over and over again:

- "[*T*]*he government must demonstrate* that the regulation is consistent with this Nation's historical tradition of firearm regulation." 142 S.Ct. at 2126.
- "[*T*]*he government must affirmatively prove* that its firearms regulation is part of the historical tradition." *Id.* at 2127.
- "*The government must then justify* its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2130.
- "[A]nalogical reasoning requires … that *the government identify* a well-established and representative historical analogue." *Id.* at 2133.
- "[*T*]*he burden falls on respondents* [the government] to show that New York's proper-cause requirement is consistent with this Nation's historical tradition of firearm regulation. Only if respondents carry that burden can they show that the pre-existing right codified in the Second Amendment … does not protect petitioners' proposed course of conduct." *Id.* at 2135.
- "[T]he historical record compiled by respondents does not demonstrate a tradition of broadly prohibiting the public carry …. [*R*]*espondents have failed to meet their burden* to identify an American tradition justifying New York's proper-cause requirement." *Id.* at 2138.
- "[A]gain, *the burden rests with the government* to establish the relevant tradition of regulation." *Id.* at 2149 n.25.
- "Of course, we are not obliged to sift the historical materials for evidence to sustain New York's statute. That is *respondent's burden*." *Id.* at 2150.
- "[W]e conclude that *respondents have not met their burden* to identify an American tradition justifying the State's proper-cause requirement." *Id.* at 2156.

As for what history courts should examine, the Court reminded that, "when it comes to interpreting the Constitution, not all history is created equal."

Id. at 2136. For example, "[h]istorical evidence that long predates" the Constitution "may not illuminate the scope of the right" if it is inconsistent with American traditions, and courts must "guard against giving postenactment history more weight than it can rightly bear." *Id.* The Court also made clear that the kind of historical tradition the government must prove is "an *enduring* American tradition of state regulation," not just a handful of laws in "outlier jurisdictions." *Id.* at 2155-56 (emphasis added). Finally, while the Court noted that "unprecedented societal concerns or dramatic technological changes may require a more nuanced approach" to determining whether a law is consistent with historical tradition, it cautioned that reasoning by analogy in such cases must be constrained by an inquiry into both "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified." *Id.* at 2133.

II. Historical Tradition Confirms That The District Court Did Not Abuse Its Discretion By Enjoining California's One-Of-A-Kind Ammunition Regime.

Applying the *Bruen* framework, this is a straightforward case. The district court has already conducted a thorough historical analysis, and it concluded that California's ammunition regime "has no historical pedigree" whatsoever. *Rhode v. Becerra*, 445 F.Supp.3d 902, 931-32 (S.D. Cal. 2020). And while the state devoted relatively minimal attention to that holding in its principal briefs, this

Court remedied any deficiency by ordering the parties to file supplemental briefs dedicated exclusively to whether California's ammunition laws have any "historical pedigree." ECF 64. The parties proceeded to do so, *see* ECF 65; ECF 67, and the meager evidence the state managed to muster falls woefully short.

That is not surprising; California's ammunition regime is, by the state's own telling, the first *ever* of its kind. Indeed, throughout both the legislative and the ballot initiative that produced the regime, its lead proponent openly touted it as a "historic" measure that would make California "the first state in America" to impose background checks on the acquisition of ammunition.[1] That is not because there is anything new about either ammunition sales or the use of background checks for *other* purposes. It is because no other state in the Nation (save one that promptly abandoned a short-lived 2013 effort) has ever seen fit to force law-abiding citizens who have already passed a background check to obtain

[1] Gavin Newsom (@GavinNewsom), Twitter (Aug. 6, 2019, 3:33 PM), https://bit.ly/2OYVB3l; *Cox, Newsom Face Off in Final California Gubernatorial Debate*, KQED (Oct. 8, 2018), https://bit.ly/3xId3wM (statement of Gov. Gavin Newsom at 00:29:22); *see also, e.g.*, Press Release, Office of Governor Gavin Newsom, *Ahead of Implementation Date of New Gun Safety Policies in California, Governor Newsom and State Leaders Reaffirm Commitment to Ending Epidemic of Gun Violence* (Jun. 25, 2019), https://bit.ly/3xK5QfM; McClatchy, *Gavin Newsom Discusses Prop. 63 (Gun Regulation) with the Bee Editorial Board*, San Luis Obispo Trib. (Feb. 6, 2018), https://bit.ly/3RW9jzP.

a *firearm* to then submit to repeated background checks every time they want to buy the ammunition necessary to make that firearm functional.

It is little surprise, then, that the state devotes most of its supplemental brief to contending that the burdens from its regime are so minimal that they do not even implicate the Second Amendment. That argument was strained even before *Bruen*; after *Bruen*, it is dead on arrival. And while the state promises that it has "strong arguments" that its regime is "'consistent with this Nation's historical tradition of firearm regulation,'" ECF 92 at 24-25, they will never materialize because grounding a self-styled *avant-garde* approach in historical tradition is impossible. The state thus offers no basis to disturb the district court's conclusion that its alone-in-the-nation regime "has no historical pedigree" whatsoever, *Rhode*, 445 F.Supp.3d at 931-32, which, under *Bruen*, means it is unconstitutional.

A. California's Novel Ammunition Regime Regulates Conduct Squarely Within the Ambit of the Second Amendment.

1. The first question under *Bruen* is whether the conduct in which an individual seeks to engage is covered by the Second Amendment. 142 S.Ct. at 2129-30. The answer here is obviously yes. Plaintiffs simply want to purchase the ammunition that is essential to putting their firearms to practical use. That conduct falls comfortably within the Second Amendment. The text of the Second Amendment guarantees individuals the rights "to keep and bear Arms."

U.S. Const. amend. II. That, of course, includes the right to *use* them "for offensive or defensive action." *Bruen*, 142 S.Ct. at 2134; *see also id.* at 2127, 2134-35 (Second Amendment protects the right to keep and bear arms "in common *use*," "in case of *confrontation*," "*for* self-defense" (emphases added)); *id.* at 2158-59, 2161 (Alito, J., concurring) (Second Amendment protects both "possessing … *and using* a gun" (emphasis added)). The Constitution does not enshrine merely the right to have an 1873 Winchester Repeater or some non-functional antique draped over the fireplace as a decoration. *See id.* at 2132; *cf. Smith v. United States*, 508 U.S. 223, 242 (1993) (Scalia, J., dissenting).

After all, the Amendment's text must be interpreted as it would ordinarily have "be[en] understood by the voters" who ratified it. *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008). And history shows that those who ratified the Second Amendment understood it to guarantee a right to use a firearm for a multitude of lawful purposes, including self-defense, for which ammunition is indispensable. The English Bill of Rights guaranteed some (but not all) English subjects the right to have arms "for their Defence suitable to their Conditions." 1 W. & M., 2d sess., c. 2, 16 Dec. 1689. "But under various pretences the effect of this provision ha[d] been greatly narrowed," 3 Joseph Story, *Commentaries on the Constitution* §1891 (1833), including by interpreting it not to cover certain uses, like hunting, 1 St. George Tucker, *Blackstone's Commentaries* app. at 300

(1803). *See also* William Rawle, *A View of the Constitution of the United States* 125-26 (2d ed. 1829).

To avoid England's mistakes, the Framers of the Second Amendment opted for an open-ended guarantee: a right to keep and bear all manner of "arms" for all manner of uses—whether that be "self-defense," "hunting," "military" operations, or some other lawful purpose. *Heller*, 554 U.S. at 585-86, 599. Those manifold uses all have one thing in common: They require *ammunition*. That is particularly true of the self-defense purpose that *Heller* and *Bruen* place at the heart of the right.

Early state court decisions interpreted analogous state guarantees as protecting the *effective* use of firearms. *See, e.g.*, *State v. Reid*, 1 Ala. 612, 616-17 (1840) (Alabama's guarantee would bar the state legislature from adopting rules that "render [firearms] wholly useless"); *Bliss v. Commonwealth*, 12 Ky. 90, 92 (1822) (Kentucky's analogous guarantee "consisted in nothing else but in the liberty of the citizens to bear arms"). And nineteenth century commentators read the Second Amendment the same way. *See, e.g.*, Joel Tiffany, *A Treatise on the Unconstitutionality of American Slavery* 117-18 (1849) (without "impl[ying] the right to use" firearms the "guarantee would have hardly been worth the paper it consumed"); Thomas M. Cooley, *General Principles of Constitutional Law* 271

(1880) ("to bear arms implies something more than the mere keeping; it implies the learning to handle and use them").

Even this Circuit's pre-*Bruen* precedent confirms that "the right to possess firearms for protection implies a corresponding right to obtain the bullets necessary to use them." *Jackson v. City & County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014). This Court has repeated that observation again and again.[2] Other circuits likewise agree that the Second Amendment protects those predicate activities necessary to use a firearm for lawful purposes. *See, e.g.*, *Drummond v. Robinson Twp.*, 9 F.4th 217, 224, 227-28 (3d Cir. 2021) (zoning rules barring for-profit shooting ranges and practice with center-fire ammunition); *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) (access to firing range for training); *Kolbe v. Hogan*, 813 F.3d 160, 175 (4th Cir. 2016) (possession of "component parts" like detachable magazines), *vacated*, 849 F.3d 114 (4th Cir. 2017) (en banc), *abrogated by Bruen*, 142 S.Ct. at 2126-27; *cf. United States v. Emerson*, 270 F.3d 203, 236 (5th Cir. 2001).

That all accords with principles that apply in other areas of constitutional law. In the news media context, for example, the government cannot get around

[2] *See Jones v. Bonta*, 34 F.4th 704, 716 (9th Cir. 2022), *vacated on reh'g*, 2022 WL 4090307; *Duncan v. Becerra*, 742 F. App'x 218, 221 (9th Cir. 2018); *Teixeira v. County of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (en banc).

the First Amendment by saying that ink and paper are just predicates to the exercise of "the freedom … of the press." *Minneapolis Star Trib. Co. v. Commissioner*, 460 U.S. 575, 592-93 (1983) (state tax on ink and paper impermissibly burdened Press Clause freedoms). Nor can the government exempt restrictions on the expenditure of money from constitutional scrutiny by labeling them as mere predicates to exercising "the freedom of speech." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 336, 339 (2010) (restrictions on campaign contributions impermissibly burdened Speech Clause freedoms). "Constitutional rights implicitly protect those closely related acts necessary to their exercise." *Luis v. United States*, 578 U.S. 5, 26-27 (2016) (Thomas, J., concurring) (collecting examples). The Second Amendment likewise protects those "acts necessary to the[] exercise" of the right to keep and bear firearms, with none more essential than purchasing ammunition.

2. The state does not seriously suggest that *Bruen*'s "new text-and-history standard," ECF 92 at 11, somehow silently parted ways with more than 200 years of American history and commentary, multiple square holdings from this Court and other circuits, or the interpretive principles applicable to other Constitutional rights. It instead attempts a sleight of hand, trying to characterize plaintiffs' proposed course of conduct as purchasing ammunition "without

conducting a face-to-face transaction" or "without successfully completing a background check." ECF 92 at 3.

That is not how the inquiry works. *Bruen* did not define the conduct in which the plaintiffs there sought to engage as carrying a firearm in public "without first showing special need." It defined it as "carrying handguns publicly for self-defense"—full stop. 142 S.Ct. at 2134. Because *that conduct* fell within the plain text of the Second Amendment, the state bore the burden of trying to prove that *the restrictions* it imposed on that conduct are "part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127. Here, too, plaintiffs' right to purchase ammunition stands on its own, and the state must justify its restrictions on that right by identifying a longstanding historical tradition in this country of imposing similar restrictions. The state cannot escape its burden by redefining the proposed course of conduct by reference to the absence of its (novel) regulatory hoops.

The state next makes the sweeping argument that its law should escape Second Amendment scrutiny entirely because, at least "[a]s a facial matter," the burdens it imposes on obtaining ammunition "do not prevent anyone from keeping or bearing any arms." ECF 92 at 11-23. In other words, in the state's view, unless a plaintiff proves that a restriction is so severe as to eviscerate her right to keep or bear arms, the Second Amendment is not even implicated.

It is difficult to imagine an argument less faithful to *Bruen*. Indeed, that is just a thinly veiled effort to resuscitate the two-step test that *Bruen* discarded—as evidenced by the fact that the state purports to divine this test not from *Bruen*, but from this Court's pre-*Bruen* two-step cases. *See, e.g.*, ECF 92 at 18 (citing *Bauer v. Becerra*, 858 F.3d 1216 (9th Cir. 2017) and *Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016)). But *Bruen* leaves no room for such a rights-diluting approach. Whether a law is subject to Second Amendment scrutiny does not turn on how "severe" a burden it imposes on Second Amendment rights, with some burdens escaping meaningful scrutiny. It turns on whether the plaintiff's "proposed course of conduct" is covered by "the plain text of the Second Amendment," *i.e.*, whether the law burdens constitutionally protected conduct in any way. 142 S.Ct. at 2134. If it does, then the state must prove that "historical regulations impose[d] a comparable burden on the right of armed self-defense," both in terms of "how and why the regulations burden" the right. *Id.* at 2133. The state cannot short-circuit that analysis by observing that it has not yet prevented people from keeping or bearing arms altogether.[3]

[3] To the extent the state means to attack plaintiffs' Article III standing, that argument is equally baseless. Standing is obvious from the fact that the state is charging plaintiffs extra money to purchase ammunition. *Cf. Bauer*, 858 F.3d at 2020. And in all events, the district court's detailed factual findings provide ample support for its conclusion that the individual and organizational plaintiffs

B. The State Has Identified No Historical Tradition Lending Any Support to Conditioning the Purchase of Ammunition on Perpetual Background Checks.

1. Because the state seeks to regulate conduct that is presumptively protected by the Second Amendment, it is the state's job to "demonstrate that [its] regulation is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S.Ct. at 2126. The Supreme Court could not have been clearer that the burden rests with the state. *See supra* at 4-5. Yet rather than even attempt to satisfy its burden, the state seeks a mulligan. While it promises that it "has strong arguments as to why the Ammunition laws are 'consistent with this Nation's historical tradition of firearm regulation,'" ECF 92 at 24-25, it declines to share them with this Court, instead summarily deeming itself entitled to hold them in reserve until the remand that it presumes it will be granted, *id.* at 18, 26.

That is as inexplicable as it is inexcusable. This is not a case in which history has played only a bit part to date. After the parties litigated the history below as required by this Court's pre-*Bruen* precedent, *see Fyock v. City of Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015), the district court reached an affirmative and explicit conclusion that the state's (admittedly) novel

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have suffered concrete injuries as a result of the state's novel scheme. *See Rhode*, 445 F.Supp.3d at 919-22, 927 (detailing past and future burdens on plaintiffs).

ammunition regime "has no historical pedigree" whatsoever, *Rhode*, 445 F.Supp.3d at 931-32. And when the state declined to seriously contest that conclusion on appeal, this Court gave it a second chance, ordering the parties to file supplemental briefs devoted exclusively to that issue. ECF 64. The state has thus had more than ample opportunity in both the district court and this court to produce whatever historical evidence it can muster to try to "demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S.Ct. at 2126. Yet when given a *third* chance by the Court to explain why it should prevail under a standard that all now agree focuses on historical tradition, the state instead opted to willingly forfeit any argument on that case-dispositive issue—after securing a two-week extension and with almost 4,000 words to spare in its brief, no less.

On that basis alone, this Court should affirm. *See, e.g.*, *Gomez Fernandez v. Barr*, 969 F.3d 1077, 1091 n.9 (9th Cir. 2020) (party waived issue on which it bore the burden by failing to brief it); *United States v. Cervantes*, 703 F.3d 1135, 1142 n.1 (9th Cir. 2012) (same); *Rivera v. Green*, 775 F.2d 1381, 1384 n.2 (9th Cir. 1985) (same). Under normal rules, any effort the state may undertake to satisfy its historical tradition burden in its reply brief will be forfeited. *See Loher v. Thomas*, 825 F.3d 1103, 1120 (9th Cir. 2016) (state forfeited arguments not made in its opening brief); *United States v. Van Smith*, 530 F.3d 967, 973 (D.C. Cir. 2008)

("A reply brief is for replying."). And this Court certainly should not reward the state's gambit with a remand to give it a fourth bite at the historical apple.

A remand would be particularly inappropriate considering how the Supreme Court resolved *Bruen* itself. *Bruen* undoubtedly announced a new legal standard. 142 S.Ct. at 2125-26. But rather than remand, the Court proceeded to apply its new standard to the case before it. *See id.* at 2134 ("Having made the constitutional standard endorsed in *Heller* more explicit, we now apply that standard to New York's proper-cause requirement."). The Court did so because the historical inquiry required under *Bruen* is ultimately a "legal inquiry" that asks only "*legal* questions." *Id.* at 2130 n.6. And just as here, the parties there had already fully aired all the relevant history. Remanding for the state to develop new legal arguments here thus would flout the same "principle of party presentation," *id.*, that the Supreme Court recently chastised this Circuit for failing to follow, *see United States v. Sineneng-Smith*, 140 S.Ct. 1575, 1582 (2020). The Court should not repeat that error today.[4]

[4] In the event this Court disagrees and considers vacatur and remand appropriate, then it must also vacate its decision staying the district court's preliminary injunction. *See Rhode v. Becerra*, 2020 WL 9938296 (9th Cir. May 14, 2020). To the extent changes in the legal landscape require vacating the district court's analysis, there is no basis to permit this Court's previous analysis in the stay posture to remain on the books.

2. In all events, no amount of extra words or remands will help the state because the state cannot promote its ammunition restrictions as cutting edge and then defend them as consonant with historical tradition. There is no squaring that circle. The state did not engage in the historical analysis required by *Bruen* for the simple reason that there is no historical evidence that could even begin to justify this first-of-its-kind regime. Indeed, the principal historical antecedents the state has claimed are some "early-20th century regulations," ECF 92 at 26; *see* ECF 65 at 8-11, 15-20, which it now acknowledges (with considerable understatement) are "less probative of the original understanding" of the Second Amendment, ECF 92 at 27. If California actually had any historical evidence that was more "probative of the original understanding," it surely would have included it in its first supplemental brief. After all, it is not as if this Court's pre-*Bruen* test *favored* twentieth-century laws over founding-era ones. And if the state had discovered any additional evidence over the intervening two years, it would be eager to share it.

It is little surprise, then, that the state does not claim that it has unearthed some cache of founding-era laws imposing cumbersome restrictions on the ability of law-abiding citizens to purchase ammunition to make their firearms functional for all the purposes protected by our fundamental law. Instead, it just complains that it has not yet had the chance to "employ[] … reasoning by

analogy" to *other* types of historical laws. ECF 92 at 26. That is simply not true. Since there never has been any on-point historical precedent for California's novel law, the state engaged in little other than reasoning by analogy in its earlier supplemental historical briefing before this Court, where it tried to analogize its novel regime to everything from permitting laws, to recordkeeping laws, to background checks for firearms purchases, and more. *See* ECF 65 at 16-21. If the state plans to go even farther field in its search for analogies, those efforts would be a fool's errand in light of *Bruen*.

For one thing, *Bruen* made clear that reasoning by analogy is appropriate only when "unprecedented societal concerns or dramatic technological changes" make the search for a dead-ringer futile. *Bruen*, 142 S.Ct. at 2132. That alone presents an insuperable obstacle for the state, as there is nothing novel about the problem it seeks to address. The state is worried about ammunition falling into the hands of people who would misuse firearms. There may be some things new under the sun, but the availability of ammunition in stores and the risk that dangerous individuals might avail themselves of it is not one of them. States have faced that risk since the dawn of the union. But for the vast majority of our Nation's history—and, in the vast majority of the country, still today—to the extent states addressed that concern at all, they did so by regulating *firearms*, not by layering cumbersome secondary layers of restrictions onto each and every

acquisition of *ammunition*. Indeed, few nineteenth century laws addressed ammunition at all, and those that did were blatantly discriminatory measures designed to deprive Black Americans of their fundamental rights. *See* ECF 67 at 7-8; *McDonald v. City of Chicago*, 561 U.S. 742, 771 (2010) (plurality op.); Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 516 (2004). More probative laws passed contemporaneously with the Second Amendment's ratification *required* individuals to obtain ammunition. *See, e.g.*, An Act for Establishing a Militia, 1785 Del. Laws § 7, at 59 (requiring "every person between the ages of eighteen and fifty" to "at his own expence, provide himself … with a musket or firelock" and "a cartouch box to contain twenty three cartridges"); Second Militia Act, ch. 33, §1, 1 Stat. 271 (1792) (requiring "every free able-bodied white male citizen" between 18 and 45 to "provide himself with a good musket or firelock" and at least "twenty-four cartridges" or "a good rifle" and "twenty balls").

Nor at this point in our Nation's history is there anything novel about the ability to impose background checks for purchasing firearms; the only thing novel is California's well-nigh unprecedented effort to impose them for ammunition purchases. As the state itself documented in the earlier supplemental brief where it actually addressed historical tradition, background checks for *firearms* began to become prevalent in the early 1900s. *See* ECF 65 at

20-22. Yet it took nearly a century before the first state tried to impose background checks for ammunition sales, *see* James B. Jacobs & Zoe A. Fuhr, *Universal Background Checking – New York's SAFE Act*, 79 Alb. L. Rev. 1327, 1349-52 (2016), and it took even longer than that for California to become the first state in history to implement one. Thus, even if one were to conceive of the ability to conduct point-of-sale background checks as a "dramatic technological change[]," *Bruen*, 142 S.Ct. at 2132, that change came 100 years too early to justify California's novel regime.[5]

All of that creates not just a timing problem, but a more fundamental problem for the state's efforts to reason by analogy. As *Bruen* explained, to be "relevantly similar," "historical regulations must impose a comparable burden on the right of armed self-defense," both in terms of "how and why the regulations burden" the right. 142 S.Ct. at 2133. In other words, they must address a similar problem in a similar way that imposes a similar degree of burden. Yet the vast majority of the laws to which the state has pointed as

[5] California claims that "the late 20th century information technology revolution" now "allows it to be more comprehensive than it has been in the past" when running background checks. ECF 65 at 22. But being able to do more effectively something that it has already been doing for a century is hardly a "dramatic technological change[]." *Bruen*, 142 S.Ct. at 2132. If anything, that ought to make it easier for the state to deploy that information technology to better enforce its prohibited-person laws without imposing ever greater burdens on law-abiding citizens.

potential comparators do not even concern the *same subject matter* as the regime challenged here—the acquisition of ammunition—much less burden Second Amendment rights to the same degree.

Indeed, for the most part, the state has just tried to generically analogize to the entire universe of "conditions and qualifications on the commercial sale of arms," trotting out various laws enacted between 1911 and the 1960s that required a permit to purchase a firearm; obligated a vendor to keep firearm sales records and report them to law enforcement officials; prohibited the sales of firearms to certain classes of persons (e.g., minors, addicts, criminals); or erected a waiting period before a purchaser could take possession of a firearm. ECF 65 at 14-20. But there is an obvious difference between imposing one-time burdens on the acquisition of a firearm and imposing those same burdens (or, for many, even more onerous ones) virtually every time a law-abiding citizen wants to put that firearm to a permissible use. Every state save California and New York has recognized that distinction for at least a century—a fact that itself speaks volumes.

That same principle of relevant similarity dooms the state's effort to analogize to the handful of laws it has unearthed that actually involve the acquisition of ammunition. For instance, the state notes that a few jurisdictions began to prohibit sales of ammunition to minors or violent criminals in the early

twentieth century. ECF 65 at 20. But those prohibited-person rules "in no way represent[] the 'direct precursor'" to California's ammunition regime. *Bruen*, 142 S.Ct. at 2148. One need look no further than *Bruen* to see why. It was not enough there that nineteenth century surety statutes dealt with the *same subject matter* ("a right to public carry") using the *same standard* ("a showing of special need") as New York's regime because they dealt with these matters in a way that imposed a categorically *different burden* on Second Amendment rights. *Id.* at 2148. Whereas the surety laws "presumed" that the gun owner was authorized to carry in public and allowed the gun owner to continue to do so by posting a surety bond, *id.*, New York's law presumed exactly the opposite and left the average law-abiding citizen with no way to overcome that presumption.

Here too, the state can point only to laws that "presumed that individuals had a right to" purchase ammunition and left the onus on the government to police that presumption. *Id.* California, by contrast, has flipped the presumption, treating everyone—even someone who has passed a background check just a few days earlier (and another one a few days before that, and so on)—as if they were a prohibited person, and requiring law-abiding citizens to overcome that presumption again and again.

That likewise distinguishes California's law from the handful of state laws enacted in the mid-twentieth century that merely require an individual to

produce a firearms card when purchasing ammunition, ECF 65 at 20: There is an obvious difference between a law that requires a driver to *supply* a driver's license to purchase gasoline and a law that requires a driver to *reapply* for a driver's license every time she needs to fill up. Even assuming those scant laws were analogous (or from a relevant time period), moreover, they are quintessential "outlier[s]" that come nowhere close to establishing an "enduring American tradition." *Bruen*, 142 S.Ct. at 2154; *see, e.g.*, *id.* at 2142 ("we doubt that *three* colonial regulations could suffice to show a tradition of public-carry regulation"); *id.* at 2147 n.22 (law from the Territory of New Mexico was "an outlier statute"); *id.* at 2153 ("[T]he Texas statute, and the rationales set forth in *English* and *Duke*, are outliers. … "[W]e will not give disproportionate weight to a single state statute and a pair of state-court decisions.").

In short, "subject to a few late-in-time outliers," American governments have not "required law-abiding, responsible citizens to" submit to a Kafkaesque oversight regime every single time they purchase ammunition, where denials are unexplained today and approvals count for nothing tomorrow. *Bruen*, 142 S.Ct. at 2156. California has sought to address a problem—present for hundreds of years—in a way that no other state (save one) ever contemplated. Its regulatory regime is more akin to a form of probation, under which the state engages in constant supervision of anyone who seeks to exercise their Second Amendment

rights, assuming always and everywhere that any such person must be "more likely … to violate the law" than follow it, *United States v. Knights*, 534 U.S. 112, 120 (2001), no matter how many or how recently past background checks have proven otherwise.[6] That is no way to treat law-abiding citizens even when fundamental rights are not concerned. To countenance such a law in this context would be to impermissibly convert the Second Amendment into a "second-class right" all over again. *Bruen*, 142 S.Ct. at 2156.

[6] That makes it particularly ironic that California continues to tout that its regime "allows purchasers to buy as much ammunition as they want." ECF 92 at 21; *see also* ECF 76 at 27 ("a person could purchase a year's supply—*or more*—in a single transaction" (emphasis added)). If there were really any legitimate basis to assume that the average law-abiding citizen is at such constant risk of becoming a prohibited person as to warrant monthly or even weekly background checks, then that would make the state's law not just divorced from our historical tradition, but utterly irrational.

CONCLUSION

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

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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