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. 3:18-cv-00802-BEN-JLB
The Honorable Roger T. Benitez, Judge

APPELLANT'S SUPPLEMENTAL REPLY BRIEF IN ACCORDANCE WITH THE COURT'S JUNE 24, 2022 ORDER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

The parties agree that *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), substantially altered the legal standard applicable in this case from what it was when the case was litigated at the district court. The two-step test that this Court and most other federal courts adopted for resolving Second Amendment claims has been jettisoned. Further, both sides agree on what the new test requires. Under that new test, courts must first determine whether "the Second Amendment's plain text covers" the regulated conduct. *Bruen*, 142 S. Ct. at 2129–30. If so, that conduct is "presumptively protect[ed]" by the Second Amendment and "[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.*

The parties disagree about how to proceed in light of these changed circumstances. As the Attorney General explained in his Third Supplemental Brief (Dkt. 92, at 1–2), the standard procedure would be to vacate and remand. That is the approach that has been taken multiple times by this Court, and many other courts other since *Bruen*. And that may be a sensible approach here.

However, in this case, there is a question of whether the "Second Amendment's plain text covers" the conduct the Ammunition Laws regulate. [1]

[1] As in earlier briefs, the Attorney General uses "Ammunition Laws" to refer to all four of the laws challenged in this case. Those laws are: (1) the requirement that ammunition transactions take place in a face-to-face interaction at a licensed

Both sides agree that this question can be resolved by this Court at this time. If this Court concludes that the Second Amendment's plain text does not "cover" the conduct the Ammunition Laws regulate, there is no violation of the Second Amendment and the district court's decision awarding relief to plaintiffs should be reversed. If this Court concludes that the Second Amendment's plain text does "cover" the regulated conduct (or concludes that the district court should conduct the analysis in the first instance), then the case should be remanded to the district court to allow the Attorney General to submit additional evidence showing that the Ammunition Laws are "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2130.

I. THE AMMUNITION LAWS DO NOT REGULATE CONDUCT PROTECTED BY THE PLAIN TEXT OF THE SECOND AMENDMENT.

Plaintiffs fail to establish that the Ammunition Laws burden any conduct covered by the plain text of the Second Amendment. *Bruen* makes clear that the party challenging a restriction under the Second Amendment must first demonstrate that the law regulates conduct protected by the "plain text" of the Second Amendment. *Bruen*, 142 S. Ct. at 2126; *accord id.* at 2129–30, 2135. The

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ammunition vendor, (2) the requirement that purchasers submit to a background check before the ammunition sale or transfer may be completed, (3) the requirement that purchasers demonstrate proof of lawful presence in this country, and (4) the requirement that ammunition vendors report certain information to the California Department of Justice. Opening Br. (Dkt. 14) at 6–15 (providing an overview of the Ammunition Laws).

Second Amendment "presumptively protects that conduct" only if covered by the plain terms of the amendment. *Id.* at 2126; *see also id.* at 2129–30 ("When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct."). To establish that the plain text applies, a plaintiff must demonstrate that each of the "textual elements" of the Second Amendment's operative clause covers the proposed course of conduct. *Id.* at 2134 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008)).

As explained in the Attorney General's previous briefing, the Ammunition Laws do not impair plaintiffs' Second Amendment right to keep and bear arms because those laws do not prevent any "law-abiding, responsible citizens" from keeping, carrying, or "us[ing] arms for self-defense." *Bruen*, 142 S. Ct. at 2131 (quoting *Heller*, 554 U.S. at 635) (quotation marks omitted). Appellant's 3rd Suppl. Br. at 12–14, 17–18. This is evidenced by the fact that not a single plaintiff was even substantially delayed—let alone prevented—from obtaining ammunition because of these laws. As the Attorney General has previously explained, Opening Br. at 43–46, Reply Br. (Dkt. 58) at 3–7, this alone is reason enough to resolve this appeal in his favor. *Teixeira v. County of Alameda*, 873 F.3d 670, 680–81 (9th Cir. 2017) (en banc) (ordinance did not infringe on potential customers' Second Amendment rights where "conspicuously missing from this lawsuit is any honest-to-God resident . . . complaining that he or she cannot lawfully buy a gun nearby")

(internal alterations, quotations and citations omitted); *United States v. Chovan*, 735 F.3d 1127, 1135 (9th Cir. 2013) ("A person to whom a statute properly applies can't obtain relief based on arguments that a differently situated person might present.") (quotations and citations omitted).

Plaintiffs' primary textual argument appears to be that access to ammunition is an essential component of the right to keep and bear arms. Appellees' 3rd Suppl. Br. (Dkt. 97) at 8–14. But the Ammunition Laws do not interfere with a person's ability to possess ammunition. Nor do they impose any cognizable burden on those seeking ammunition. Rather, they establish the same type of "condition precedent" to purchasing ammunition that this Court has approved before in the context of purchasing firearms, *Silvester v. Harris*, 843 F.3d 816, 830–31(9th Cir. 2016) (concurrence), and that *Bruen* explicitly recognizes as constitutional. Appellant's 3rd Suppl. Br. at 12–13 (citing *Bruen*, 142 S. Ct. at 1238 n.9; *id.* at 2162).

The required backgrounds checks are neither "abusive" nor legally burdensome. *Bruen*, 142 S. Ct. at 1238 n.9 (approving of "background check[s]" or requirements to "pass a firearms safety course" so long as the schemes are not "put toward abusive ends" where "lengthy wait times" or "exorbitant fees deny ordinary citizens their right to public carry"). For purchasers using the Standard Check background check option, the required check takes, on average, five to ten

minutes and costs only a dollar. 4-ER-956–57; 4-ER-849. For others who use the Basic Ammunition Eligibility Check ("Basic Check") option, it takes a day or two to complete and costs nineteen dollars. 2-ER-288–89; 4-ER-849. Rejections of persons who are not otherwise prohibited from possessing ammunition are rare and can be easily handled by addressing the reason for the rejection (by, for example, updating records), using a different method of background check, or both. 2-ER-242–43; 4-ER-948–50.[2] Thus, even under the worst-case scenario, the Ammunition Laws cannot be said to impair one's right to keep and bear arms. *Cf. Bauer v. Becerra*, 858 F.3d 1216, 1222 (9th Cir. 2017) (a nineteen-dollar fee on firearms transfers does not "ha[ve] any impact on the plaintiffs' actual ability to obtain and possess a firearm"); *Silvester*, 843 F.3d at 827–28 (10-day wait to purchase firearms does not violate the Second Amendment); *see also Jackson v. City & County of San Francisco,* 746 F.3d 953, 966 (9th Cir. 2014) (requiring compliance every time a handgun is used rather than at the point of sale); Appellant's 2d Suppl. Br. at 19–22 & n.11 (applying these precedents to this case).[3]

[2] While much has been made about the precise error rate and purported difficulties in correcting errors, plaintiffs have made clear that these issues do not impact their constitutional claims. In their opinion, "no amount of accuracy" could make this system constitutional. Appellees' 2d Suppl. Br. (Dkt. 79) at 4.

[3] Plaintiffs' attempts to invent hypothetical scenarios in which the Ammunition Laws might burden an individual's right to keep and bear arms are so

Plaintiffs essentially argue that under *Bruen*, all requirements or conditions precedent applied to any aspect of firearms use and possession, regardless of their content or effect, are "covered" by the Second Amendment's "plain text." Appellees' 3rd Suppl. Br. at 14. But as this Court recognized in granting the emergency stay in this case, Second Amendment rights are not unlimited. Dkt. 13-1 (citing. *Heller*, 554 U.S. at 626–27). The right to purchase ammunition "may be subjected to governmental restrictions[.]" *Jackson*, 746 F.3d at 970. *Bruen* did not change this.

Indeed, several Justices emphasized that the decision in *Bruen* did not "disturb[] anything" that the Court previously said "about restrictions that may be imposed on the possession or carrying of guns." 142 S. Ct. at 2157 (Alito, J., concurring); *id.* at 2162 (Kavanaugh, J., concurring). Rather, *Bruen* explicitly acknowledges that "nothing" in its analysis casts doubt on the constitutionality of

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strained as to be nonsensical. For example, they suggest that an individual would buy ammunition in separate transactions several times within a week while never using the Standard Check and instead opting for the slightly longer, slightly more expensive Basic Check every time. Appellees' 3rd Suppl. Br. at 23; Appellees' 2d Suppl. Br. at 5–6. Even if this hypothetical person did exist, as explained above and in previous briefing, the Basic Check does not violate the Second Amendment. Appellant's 2d Suppl. Br. 10–29. Further, courts "may not resolve questions of constitutionality with respect to each potential situation that might develop, especially when the moving party does not demonstrate that the legislation would be unconstitutional in a large fraction of relevant cases." *Jackson*, 746 F.3d at 962 (quotation marks omitted).

licensing regimes that require applicants to "undergo a background check or pass a firearms safety course" as a condition of carrying firearms in public. *Id.* at 2138 n.9. Concurring justices confirmed that "presumptively lawful regulatory measures" described in *Heller*—which include but are not limited to laws "imposing conditions and qualifications on the commercial sale of arms" and "longstanding prohibitions on the possession of firearms by" prohibited persons—remain presumptively lawful. *Id.* at. 2162 (Kavanaugh, J., concurring); *see also id.* (states can adopt "a variety of gun regulations" consistent with *Bruen*) (internal quotations and citations omitted). These are the exact types of regulations that the Ammunition Laws codify.[4]

The Ammunition Laws do not prevent law-abiding citizens from keeping or bearing arms of any sort. Accordingly, the "plain text of the Second Amendment" does not "cover" the conduct regulated by Ammunition Laws. No historical analysis is needed, and the Attorney General should prevail.

[4] Plaintiffs continue to misconstrue the term "presumptively lawful" in a way that is inconsistent with Supreme Court and this Court's precedents. *See*, *e.g.*, Appellees' 3rd Suppl. Br. at 23. Because the errors in plaintiffs' reasoning on this point are fully briefed elsewhere, Appellant's 2d Suppl. Br. at 10–14 & nn.6–7, the Attorney General does not reiterate that explanation here.

II. ALTERNATIVELY, THIS COURT MAY REMAND THIS CASE FOR FURTHER PROCEEDINGS CONSISTENT WITH *BRUEN*.

If this Court concludes that the plain text of the Second Amendment does cover the conduct the Ammunition Laws regulate, then it should remand this case for further factual development.[5] The parties agree that if the conduct regulated by a challenged law is covered by the plain text of the Second Amendment, *Bruen* instructs that the government can defend the law by showing that it is "consistent with the Nation's historical tradition of firearm regulation." 142 S. Ct. at 2130. To do so here, the Attorney General must be given the opportunity to compile historical evidence that the challenged laws impose a "comparable burden on the right of armed self-defense" as "relevantly similar" historical analogues and is "comparably justified." *Id.* at 2132–33.

This is precisely the sort of factual development that is appropriately done at the district court. Plaintiffs' suggestion that this Court should summarily conclude that the Attorney General could never meet this burden, Appellees' 3rd Suppl. Br. at 18, is surprising, given that the parties agree that the *Bruen* analysis has never been applied by this Court before. Plaintiffs rely heavily on the district court's conclusion that that the Ammunition Laws have "no historical pedigree."

[5] Remand is also warranted if this Court determines that the textual analysis presents questions that should be addressed by the district court in the first instance.

Appellees' 3rd Suppl. Br. at 6–8, 15–16. As previously explained, that conclusion was erroneous even under the governing standard at the time.[6] *See* Appellant's 1st Suppl. Br. (Dkt. 65) at 14–25. In any case, *Bruen* controls now and the governing standard is substantially different.

Plaintiffs attempt to make much of the idea that the Ammunition Laws are the first of their kind. *See*, *e.g.*, Appellees' 3rd Suppl. Br. at 7. It is true that the Ammunition Laws are new, but that does not preclude them from being constitutional. The Ammunition Laws are part of a longstanding regulatory practice, even as they were designed to meet modern challenges. Appellants' 2d Suppl. Br. at 13–14 (explaining how the Ammunition Laws are both necessary and possible because of modern technology). The Attorney General has explained in detail how the Ammunition Laws use modern technology to more effectively carry out longstanding regulatory practices. *See* Appellant's Opening Br. at 6–15.

The recent example of the proliferation of "ghost guns" demonstrates how ammunition background checks can be a key tool in curbing modern gun violence. Ghost guns are self-assembled fully-functional firearms that are typically made

[6] Notably, plaintiffs' position that background checks are not necessarily unconstitutional as a general matter, Answering Br. (Dkt. 33) at 26, must mean that they agree there is some historical grounding for them. At a minimum, this acknowledgment serves as further support for remand, so that the district court can explore these nuances.

from user-friendly kits purchased online. 87 Fed. Reg. at 24662. As the California Legislature recently recognized in passing legislation to regulate these modern firearms, ghost guns have become "a leading source of crime guns, including firearms built by people such as minors who cannot legally possess or acquire firearms in our state, as well as individuals seeking to conceal their involvement in firearm trafficking and other crimes." Assembly Bill No. 1621 (Reg. Sess. 2021-2022) ("AB 1621") § 1(a)(5). The manufacture and sale of these unregulated and unserialized firearms has "caused enormous harm and suffering, hampered the ability of law enforcement to trace crime guns and investigate firearm trafficking and other crimes, and dangerously undermined the effectiveness of laws and protections critical to the health, safety, and well-being of Californians." AB 1621 § 1(a). People who are prohibited from possessing firearms or ammunition can evade a background check by acquiring a ghost gun, but might be stopped from buying ammunition for these weapons because of the background check the Ammunition Laws require. Thus, the Ammunition Laws are increasingly significant tools to combat the unlawful use of firearms obtained without a background check—conditions that result from the kind of "dramatic technological changes" that *Bruen* recognized would impact the historical analysis. 142 S. Ct. at 2132.

Moreover, while the Attorney General may be unable to point to a "dead ringer" for a modern background check or a face-to-face transaction requirement in 1792 or 1868—for the obvious reason that the internet and computers did not exist at that time—this is not the Attorney General's burden under *Bruen*. The Ammunition Laws regulate modern ammunition acquisition technologies and address increased public safety risks posed by modern firearms manufacturing technologies, using tools developed after ratification of the Fourteenth Amendment. *Bruen* not only allows for this, it explicitly explains how lower courts should evaluate laws under these circumstances.

Because the technologies the Ammunition Laws utilize and regulate did not exist in 1791 or 1868, the historical analysis requires an even "more nuanced approach." *Bruen*, 142 S. Ct. at 2132. A modern-day regulation need not be a "dead ringer for historical precursors" to pass constitutional muster. *Id.* at 2133. Instead, in evaluating whether a "historical regulation is a proper analogue for a distinctly modern firearm regulation," *Bruen* directs courts to determine whether the two regulations are "'relevantly similar.'" *Id.* at 2132 (citation omitted). The Court identified "two metrics" by which regulations must be "relevantly similar under the Second Amendment": "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2132–33. The Court explained that those dimensions are especially important because

"'individual self-defense is "the central component" of the Second Amendment right.'" *Id.* at 2133 (emphasis omitted) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010), and *Heller*, 554 U.S. at 599). After *Bruen*, a modern regulation that restricts conduct protected by the plain text of the Second Amendment is constitutional if it "impose[s] a comparable burden on the right of armed self-defense" as its historical predecessors, and the modern and historical laws are "comparably justified." *Id.*

Conducting the analysis *Bruen* mandates requires a complete and extensive evidentiary record.[7] It is well-established that developing the record and making findings of fact is in the purview of the district court. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574–75 (1985). This is always the case, but is especially true where, as here, the historical inquiry will be derived from difficult and complicated source materials that will likely require expert interpretation. Indeed, *Bruen* recognizes that the historical analysis "can be difficult," and will require judges to "resolv[e] threshold questions" and "mak[e] nuanced judgments about which evidence to consult and how to interpret it." 142 S. Ct. at 2130 (quoting *McDonald*, 561 U.S. at 803–04 (Scalia, J., concurring)); *see also id*. at

[7] Plaintiffs' contention that this case presents purely legal questions, Appellees' 3rd Suppl. Br. at 17, stands in stark contrast with *Bruen*'s guidance on how to weigh the evidence. Of course, all court cases "ultimately" require a "legal inquiry" and ask "legal questions," that does not mean no evidence is necessary.

2134 ("[W]e acknowledge that 'applying constitutional principles to novel modern conditions can be difficult and leave close questions at the margins.'") (quoting *Heller v. District of Columbia*, 670 F.3d 1244, 1275 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)).

Plaintiffs suggest that the Attorney General missed his opportunity to develop the factual record by not including new historical evidence in appellate briefing, but this cannot be correct. Appellees' 3rd Suppl. Br. at 16 (quoting new standard articulated in *Bruen*, and arguing that the Attorney General should be penalized for failing to present evidence under this standard nearly three years ago). Moreover, neither party should be attempting to present the type of evidence *Bruen* requires without the assistance of trained legal historians whose methods, analyses and conclusions can be interrogated by the district court. *Cf. Bruen*, 142 S. Ct. at 2130 n.6. The parties certainly should not be presenting such evidence for the first time in an appellate brief. *See Sierra Club Inc. v. Comm'r*, 86 F.3d 1526, 1532 n.13 (9th Cir. 1996) ("Normally, [the court] will not consider issues not raised below for the first time on appeal"); *Cf. Shirk v. U.S. ex rel. Dep't of Interior*, 773 F.3d 999, 1007 (9th Cir. 2014) (federal courts of appeals are "court[s] of review, not first view") (quotation marks and citation omitted).

Plaintiffs' contention that this nuanced historical analysis should be performed by this Court in the first instance is inconsistent this Court's precedents.

When the applicable standard in a case is changed by an intervening Supreme Court decision, it is common for this Court to remand affected cases back to the district court to apply the new standard in the first instance. *See*, *e.g.*, *Padilla v. Immigration & Customs Enforcement*, 41 F.4th 1194 (9th Cir. 2022); *Foothill Church v. Watanabe*, 3 F.4th 1202 (9th Cir. 2021); *Rodriguez v. Swartz*, 800 F. App'x 535 (9th Cir. 2022). Consistent with this practice, this Court has vacated and remanded multiple Second Amendment cases that were pending when *Bruen* was decided. *See Rupp v. Bonta*, No. 19-56004 (June 28, 2022) (9th Cir. Dkt. 71); *Miller v. Bonta*, No. 21-55608 (Aug. 1, 2022) (9th Cir. Dkt. 27); *see also McDougall v. Cty. of Ventura*, No. 20-56220 (June 29, 2022) (en banc) (9th Cir. Dkt. 55); *Martinez v. Villanueva*, No. 20-56233 (July 6, 2022) (9th Cir. Dkt. 45); *Young v. Hawaii*, No. 12-17808 (Aug. 19, 2022) (en banc) (9th Cir. Dkt. 329); *Cupp v. Bonta*, No. 21-16809 (Aug. 19, 2022) (9th Cir. Dkt. 23). Other circuit courts have done the same.[8]

[8] *See*, *e.g., Association of New Jersey Rifle & Pistol Clubs Inc. v. Attorney General of New Jersey*, No. 19-3142 (3d. Cir. Dkt. 147-1) (Order) (Aug. 25, 2022) (remand post-*Bruen* was appropriate to allow the parties to further develop the record in a matter "targeted at the legal and historical analysis required under *Bruen*"); *Oakland Tactical Supply, LLC. v. Howell Twp.,* No. 21-1244, 2022 WL 3137711, at *2 (6th Cir. Aug. 5, 2022); *Sibley v. Watches*, No. 21-1986-CV, 2022 WL 2824268, at *1 (2d Cir. July 20, 2022); *Taveras v. New York City*, No. 21-398, 2022 WL 2678719, at *1 (2d Cir. July 12, 2022).

That this has become common practice in response to *Bruen* should be no surprise. In *Bruen*, the Supreme Court explicitly stated that courts would need to consider the evidence when performing the required analysis. 142 S. Ct. at 2130 (courts must make "nuanced judgments about which *evidence* to consult and how to interpret it") (emphasis added) (citation and quotation marks omitted); *see also id.* at 2130 n.6 (courts should apply "various *evidentiary principles*" to the record presented when conducting the requisite historical analysis) (emphasis added) (citation and quotation marks omitted). Thus, if there were any doubt about whether further factual development is needed and where such development should take place, the Supreme Court has already resolved that issue.

Moreover, given the intervening change in standard, this Court cannot, as plaintiffs suggest, Appellees' 3rd Suppl. Br. at 6–7, 16, simply assume that the Attorney General has already submitted all necessary evidence. Nor can this Court assume what conclusions the district court might reach given a new standard and a new factual record. If this Court determines that the plain text of the Second Amendment covers the regulated conduct, *Bruen* places the burden of developing the record on the government. *See*, *e.g.*, 142 S. Ct. at 2150 (a court is "not obligated to sift the historical materials for evidence to sustain" laws that burden conduct protected by the Second Amendment because "[t]hat is [the State's] burden"). Indeed, plaintiffs recognize that the State has this burden even as they

also argue that the State should be deprived of any opportunity to show it can meet that burden. Appellees' 3rd Suppl. Br. at 5, 15.

Remands in other cases confirm that the Attorney General has been able to marshal historical evidence to meet that burden. For example, it has become routine in post-*Bruen* Second Amendment cases to retain expert legal historians. *See*, *e.g.*, Declaration of Zachary Schrag, *Miller v. Becerra*, No. 3:19-cv-1537-BEN-JLB (S.D. Cal. Aug. 29, 2022), Dkt. 129-1. These historians not only provide information about historical firearm regulations, they provide necessary historical context to help courts determine, as *Bruen* requires, whether a regulation imposes a "comparable burden on that right of armed self-defense" as the relevant historical analogue and is "comparably justified." 142 S. Ct. at 2133. Plaintiffs' approach would entirely prevent this type of factual development and thereby deprive the Attorney General of the opportunity to defend the Ammunition Laws.[9]

Finally, as the Supreme Court recognized in *Bruen*, modern gun violence poses urgent threats to the well-being of all Americans. *See Bruen*, 142 S. Ct. at

[9] Though the Attorney General's First Supplemental Brief (Dkt. 65) provides historical evidence that the Ammunition Laws are part of a longstanding regulatory practice, that brief cannot, and was never meant to, serve as a substitute for the type of historical development that *Bruen* demands. As with the rest of the district court record, that brief does not address the "more nuanced" questions of "how and why the regulations burden a law-abiding citizen's right to armed self-defense" that *Bruen* now requires courts to answer. 142 S. Ct. at 2132–33.

2132 (acknowledging "unprecedented societal concerns"). The people of California, through their representatives and at the ballot box, have chosen to address this urgent problem through regulations like the Ammunition Laws. As the Supreme Court acknowledged, the Second Amendment is not a "regulatory straightjacket." *Id.* at 2133. Nor does it provide a right to "keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 2128 (quoting *Heller*, 554 U.S. at 626). Indeed, it remains the case that the Second Amendment "by no means eliminates" state and local governments' "ability to devise solutions to social problems that suit local needs and values." *McDonald*, 561 U.S. at 785; *Bruen*, 142 S. Ct. 2157 (Alito, J., concurring) (*Bruen* does not "disturb[] anything that we said in *Heller* or *McDonald* . . . about restrictions that may be imposed on the possession or carrying of guns."). In *Bruen*, the Supreme Court identified how a state can show that its regulations meet constitutional standards. If this Court determines that the Second Amendment's plain text covers the conduct regulated by the Ammunition Laws, this Court should remand this case and give the Attorney General the opportunity to do exactly that.

CONCLUSION

The decision of the district court should be reversed or, in the alternative, vacated and remanded.[10]

Dated: October 13, 2022

Respectfully submitted,

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[10] In the event this Court considers vacatur and remand appropriate, there is no need under the circumstances presented in this case for it to take any action on its May 14, 2020 stay order (Dkt. 13-1) because the district court's preliminary injunction order itself would be vacated. *See* Appellees' 3rd Suppl. Br. at 17 n.4 (suggesting otherwise).

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Reply Brief in Accordance With the Court's June 24, 2022 Order complies with the word limit designated by court order, dated June 24, 2022, because it contains 4,265 words. 9th Cir. Dkt. 87. This document complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 32 because it has been prepared in a proportionally spaced typeface using 14-point font.

Dated: October 13, 2022 *s/ Elizabeth K. Watson*

CERTIFICATE OF SERVICE

Case Name: ***Rhode, Kim, et al. v. Xavier Becerra, et al.*** Case No. **20-55437**

I hereby certify that on October 13, 2022, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

- **APPELLANT'S SUPPLEMENTAL REPLY BRIEF IN ACCORDANCE WITH THE COURT'S JUNE 24, 2022 ORDER**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on October 13, 2022, at San Francisco, California.

M. Mendiola
Declarant

M. Mendiola
Signature

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