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8
9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

11 VIRGINIA DUNCAN, et al.,
12
13 Plaintiffs,
14
15 v.

16 XAVIER BECERRA, in his official
capacity as Attorney General of the State
of California, et al.,

17 Defendant.
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Case No: 17-cv-1017-BEN-JLB

**PLAINTIFFS' SUPPLEMENTAL
BRIEF**

TABLE OF CONTENTS

	Page
Table of Contents	ii
Table of Authorities.....	iv
Introduction	1
Background.....	3
I. Prevalence of Firearms and Magazines Able to Hold More Than Ten Rounds of Ammunition	3
II. The History of Magazine Capacity Restrictions.....	4
III. California’s Ban on Magazines Over Ten Rounds	5
IV. Procedural History	6
Argument.....	9
I. California’s Magazine Ban Violates the Second Amendment	9
A. The Proper Standard for Analyzing Second Amendment Claims.....	9
B. California’s Modern Magazine Ban Restricts Conduct Within the Ambit of the Second Amendment	11
1. Magazines Are “Arms” Within the Scope of the Second Amendment	11
2. Magazines Over Ten Rounds Are in Common Use for Lawful Purposes.....	16
C. California Cannot Show That Relevant Historical Tradition Justifies Its Modern Magazine Ban Under <i>Bruen</i>	21
1. None of the Historical Evidence that the State Relies on Establishes a Relevant and Enduring Historical Tradition of Firearm Regulation.....	23
a. Medieval and pre-founding English history	23
b. Colonial America and the Founding Era	25
c. Antebellum America and Reconstruction.....	28
d. Twentieth Century regulations.....	33
2. The State’s Unmoored Use of Analogical Reasoning Defies <i>Bruen</i> and Should Be Ignored	37

1	a.	California’s modern magazine ban does not address an unprecedented societal concern or dramatic technological change	38
2			
3	b.	Even if resorting to “analogical reasoning” were appropriate, the State has not established that its modern magazine ban imposes a “comparable burden” as any historical analogue or is “comparably justified”	41
4			
5	II.	Plaintiffs’ Takings Clause and Due Process Claims.....	44
6	III.	The State Does Not Need More Time to Pack the Record with Even More Irrelevant Historical Evidence	45
7			
8	IV.	The State Is Not Entitled to the Extraordinary Relief of a Stay, Indefinitely Denying Californians of Their Constitutional Rights Yet <i>Again</i> While This Case Winds Through the Courts	47
9			
10		Conclusion	49

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Andrews v. State</i> , 50 Tenn. 165 (1871)	31
<i>Antonyuk v. Hochul</i> , No. 22-cv-0986, 2022 U.S. Dist. LEXIS 182965 (N.D.N.Y. Oct. 6, 2022)	42
<i>Antonyuk v. Hochul</i> , No. 22-cv-0986, 2022 U.S. Dist. LEXIS 201944 (N.D.N.Y. Nov. 7, 2022)	34, 46, 49
<i>Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Atty Gen. of N.J.</i> , 910 F.3d 106 (3d Cir. 2018)	8, 14, 16
<i>Bliss v. Commonwealth</i> , 12 Ky. 90 (1822)	12
<i>Caetano v. Massachusetts</i> , 577 U.S. 411 (2016)	19, 23
<i>Canterbury Liquors & Pantry v. Sullivan</i> , 999 F. Supp. 144 (D. Mass. 1998)	48
<i>Christian v. Nigrelli</i> , No. 22-cv-695, 2022 U.S. Dist. LEXIS 211652 (W.D.N.Y. Nov. 22, 2022)	49
<i>Costco Wholesale Corp. v. Hoen</i> , No. C04-360P, 2006 U.S. Dist. LEXIS 65774 (W.D. Wash. Sep. 14, 2006)	47
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008)	<i>passim</i>
<i>Drummond v. Robinson Twp.</i> , 9 F.4th 217 (3d Cir. 2021)	12
<i>Duncan v. Becerra</i> , 265 F. Supp. 3d 1106 (S.D. Cal. 2017)	6

1	<i>Duncan v. Becerra,</i>	
2	366 F. Supp. 3d 1131 (S.D. Cal. 2019).....	<i>passim</i>
3	<i>Duncan v. Becerra,</i>	
4	742 F. App'x 218 (9th Cir. 2018)	6, 12
5	<i>Duncan v. Becerra,</i>	
6	970 F.3d (9th Cir. 2020).....	7, 8, 21
7	<i>Duncan v. Bonta,</i>	
8	142 S. Ct. 2895 (2022)	44
9	<i>Duncan v. Bonta,</i>	
10	19 F.4th 1087 (9th Cir.).....	<i>passim</i>
11	<i>Duncan v. Bonta,</i>	
12	2022 WL2347579 (U.S. June 30, 2022)	8, 9
13	<i>Elrod v. Burns,</i>	
14	427 U.S. 347 (1976)	49
15	<i>Ezell v. City of Chicago,</i>	
16	651 F.3d 684 (7th Cir. 2011).....	13, 20
17	<i>Firearms Pol'y Coal., Inc. v. McCraw,</i>	
18	No. 21-cv-1245, 2022 U.S. Dist. LEXIS 152834 (N.D. Tex. Aug. 25,	
19	2022).....	34
20	<i>Friedman v. City of Highland Park,</i>	
21	784 F.3d 406, 415 (7th Cir. 2015).....	16
22	<i>Funk v. United States,</i>	
23	290 U.S. 371 (1933)	24
24	<i>Fyock v. City of Sunnyvale,</i>	
25	25 F. Supp. 3d. 1267 (N.D. Cal. 2014)	14, 18
26	<i>Fyock v. Sunnyvale,</i>	
27	779 F.3d 991 (9th Cir. 2015).....	<i>passim</i>
28	<i>Gamble v. United States,</i>	
	-- U.S. --, 139 S. Ct. 1960 (2019) (Thomas, J., concurring)	31
	<i>GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs,</i>	
	788 F.3d 1318 (11th Cir. 2015).....	20

1	<i>Hardaway v. Nigrelli</i> ,	
2	No. 22-cv-771, 2022 U.S. Dist. LEXIS 200813 (W.D.N.Y. Nov. 3,	
3	2022).....	34, 46, 49
4	<i>Heller v. District of Columbia (Heller II)</i> ,	
5	670 F.3d 1244 (D.C. Cir. 2011)	16
6	<i>Hollis v. Lynch</i> ,	
7	827 F.3d 436 (5th Cir. 2016).....	19
8	<i>Hurtado v. California</i> ,	
9	110 U.S. 516 (1884)	21
10	<i>Index Newspapers LLC v. United States Marshals Serv.</i> ,	
11	977 F.3d 817 (9th Cir. 2020).....	47
12	<i>Jackson v. City & Cnty. of San Francisco</i> ,	
13	746 F.3d 953 (9th Cir. 2014).....	12, 20
14	<i>Jones v. Bonta</i> ,	
15	34 F.4th 704 (9th Cir. 2022).....	12
16	<i>Kolbe v. Hogan</i> ,	
17	813 F.3d 160 (4th Cir. 2016).....	13
18	<i>Kolbe v. Hogan</i> ,	
19	849 F.3d 114 (4th Cir. 2017).....	14, 16, 19
20	<i>Konigsberg v. State Bar of Cal.</i> ,	
21	366 U.S. 36 (1961)	10
22	<i>Luis v. United States</i> ,	
23	578 U.S. 5 (2016)	12, 13
24	<i>McDonald v. City of Chicago</i> ,	
25	561 U.S. 742 (2010)	19, 20, 24, 42
26	<i>Melendres v. Arpaio</i> ,	
27	695 F.3d 990 (9th Cir. 2012).....	49
28	<i>Miller v. Bonta</i> ,	
	542 F. Supp. 3d 1009 (S.D. Cal. 2021)	40
	<i>N.Y. State Rifle & Pistol Ass’n v. Bruen</i> ,	
	142 S. Ct. 2111 (2022)	<i>passim</i>

1	<i>N.Y. State Rifle & Pistol Ass’n v. Cuomo</i> ,	
2	804 F.3d 242 (2d Cir. 2015).....	<i>passim</i>
3	<i>Nken v. Holder</i> ,	
4	556 U.S. 418 (2009)	48
5	<i>Parker v. District of Columbia</i> ,	
6	478 F.3d 370 (D.C. Cir. 2007)	22
7	<i>Peterson v. Martinez</i> ,	
8	707 F.3d 1197, 1218-19 (10th Cir. 2013)	20
9	<i>Preminger v. Principi</i> ,	
10	422 F.3d 815 (9th Cir. 2005).....	49
11	<i>Staples v. United States</i> ,	
12	511 U.S. 600, 612 (1994)	35
13	<i>State v. Reid</i> ,	
14	1 Ala. 612 (1840)	12
15	<i>State v. Wilburn</i> ,	
16	66 Tenn. 57 (1872)	31
17	<i>Teixeira v. Cnty. of Alameda</i> ,	
18	873 F.3d 670 (9th Cir. 2017) (en banc).....	12
19	<i>United States v. Decastro</i> ,	
20	682 F.3d 160 (2d Cir. 2012).....	20
21	<i>United States v. Nutter</i> ,	
22	No. 21-cr-00142, 2022 U.S. Dist. LEXIS 155038 (S.D. W. Va. Aug.	
23	29, 2022).....	34
24	<i>Wilson v. Cook Cty.</i> ,	
25	937 F.3d 1028 (7th Cir. 2019).....	20
26	<i>Wilson v. State</i> ,	
27	33 Ark. 557 (1878)	31
28	<i>Worman v. Healey</i> ,	
	922 F.3d 26 (1st Cir. 2019)	13, 19

Statutes

1 Stat. 271 (1792) (Militia Act).....	26
18 U.S.C. § 922(w).....	5
1927 Cal. Stat. 938	36
1933 Cal. Stat. 1169	36
1932 La. Acts 337-38	36
1785 Va. Statutes at Large 12 (12 Hening c. 1)	26
1784 Mass. Acts 142	26
1927 Mass. Acts 413	36
1786 N. Y. Laws 228.....	26
1821 Me. Laws 98, An Act for the Prevention of Damage by Fire, and the Safe Keeping of Gun Powder, chap. 25, § 5	43
1933 Or. Laws 488	36
1933 Wis. Sess. Laws 245, 164.01.....	36
1929 Pa. Laws 777, §1	36
Act of Apr. 10, 1933, ch. 190, 1933 Minn. Laws 231, 232	36
Act of July 2, 1931, § 1, 1931 Ill. Laws 452, 452.....	35
Act of July 7, 1932, no. 80, § 1, 1932 La. Acts 336, 337	35
Act of Mar. 7, 1934, ch. 96, § 1(a), 1934 Va. Acts 137.....	35
Act of Mar. 2, 1934, no. 731 § 1, 1934 S.C. Acts 1288.....	35
Acts of the General Assembly of Arkansas, No. 96 § 3 (1881).....	31
Cal. Penal Code § 16740	5
Cal. Penal Code § 16900	13
Cal. Penal Code § 31910	13
Cal. Penal Code § 32310	5, 6, 49, 50

1	Colo. Rev. Stat. §§ 18-12-301–302.....	4
2	Conn. Gen. Stat. § 53-202w	5
3	D.C. Code § 7-2506.01(b)	5
4	Del. Code Ann. tit. 11, § 1469(a)	5
5	Haw. Rev. Stat. § 134-8(c)	5
6	Mass. Gen. Laws ch. 140, § 121	5
7	Mass. Gen. Laws ch. 140, § 131	5
8	Md. Code, Crim. Law § 4-305(b).....	5
9	N.J. Stat. § 2C:39-1y, -3j, -9h	5
10	N.Y. Penal Law § 265.00	5
11	N.Y. Penal Law § 265.36	5
12	Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1999 (1994)	5
13	Vt. Stat. Ann. tit. 13, § 4021.....	5
14	Other Authorities	
15	Christopher S. Koper, et al., <i>An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003</i> (Nat’l Instit. Just. June 2004).....	4
16	David B. Kopel, <i>The History of Firearm Magazines and Magazine Prohibitions</i> , 78 Alb. L. Rev. 849, 851-64, 871-72 (2015)	3
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2	of Boston: Together with the Acts of the Legislature Relating to the	
3	City at 142-143 (1834), <i>available at Modern Law of Modern Law:</i>	
4	<i>Primary Sources</i>	27
5	Matthias Gafni, <i>For One Week, High-Capacity Ammunition Magazines</i>	
6	<i>Were Legal in California: Hundreds of Thousands May Have Been</i>	
7	<i>Sold</i> , S.F. Chron. (April 11, 2019), <i>available at</i> https://www.sfchronicle.com/bayarea/article/for-one-week-high-capacity-gun-	
8	magazines-were-13757973.php (last accessed Nov. 22, 2022)	48
9	S.B. 1446, 2015-2016 Reg. Sess. (Cal. 2016).....	6
10	Stephen P. Halbrook, <i>America's Rifle: The Case for the AR-15</i>	
11	(Bombardier Books 2022). M1	18
12	Thomas M. Cooley, <i>General Principles of Constitutional Law</i> 271 (1880)	12
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15	Uniform Machine Gun Act, ch. 206, § 1, 1933 S.D. Sess. Laws 245	35
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17	visited Nov. 29, 2022)	1

INTRODUCTION

Bruen’s embrace of the text-and-history test provides clear guideposts for how the constitutionality of these types of bans must now be assessed. In short, there is zero historical support from the Founding—or even the Reconstruction era—for banning commonly possessed arms; under the *Bruen* test, that is the end of the matter.¹

That should indeed be the end of the matter. But California refuses to respect the fundamental right to keep and bear arms, and rages against the confines of *Bruen*’s text-and-history test. The State knows there are no “well-established and representative analogues” for banning magazines that are commonly owned by millions of Americans for lawful purposes, including self-defense, hunting, target shooting, and competition shooting. Certainly, historical predecessors to modern firearms equipped with magazines able to hold more than ten rounds did exist. What did not exist is a longstanding American tradition of banning them. Regular Americans could—and did—lawfully own these weapons in the 19th century.

The State, dealing with a Second Amendment that has at long last been restored and will now be much more difficult to infringe, presents a Gish gallop² of a brief and evidentiary record to try and bully Plaintiffs into submission. Without asking for leave of this Court, it filed an over 60-page supplemental brief, and supplemented that brief with over 7,500 pages of exhibits attached to its experts’ declarations in an attempt to elevate the opinions of modern academics into equivalence with historical laws. Yet

¹ Mark W. Smith, *NYSRPA v. Bruen: A Supreme Court Victory for the Right to Keep and Bear Arms—and a Strong Rebuke to “Inferior Courts”*, 24 Harvard J. L. & Pub. Policy Per Curiam 8 (2022).

² The Gish gallop “is a rhetorical technique in which a person in a debate attempts to overwhelm their opponent by providing an excessive number of arguments with no regard for the accuracy or strength of those arguments.... During a Gish gallop, a debater confronts an opponent with a rapid series of many specious arguments, half-truths, misrepresentations, and outright lies in a short space of time, which makes it impossible for the opponent to refute all of them within the format of a formal debate.” Wikipedia, Gish gallop, https://en.wikipedia.org/wiki/Gish_gallop (last visited Nov. 29, 2022).

1 try as one might to find the needle in this haystack, few of the voluminous pages
2 contain *any* “relevantly similar” analogues to California’s modern ban on magazines
3 over ten rounds. The State devotes pages to immaterial pre-Founding and 20th century
4 history, but when it comes to the most relevant time period—the Founding—it
5 presents nothing remotely analogous to a ban on commonly possessed arms. As to the
6 Reconstruction era, the best the State offers are laws restricting the *carry* (but not
7 possession) of concealed pistols and certain other weapons like Bowie knives. All the
8 while, its experts openly admit that no state laws regulated the repeating rifles the
9 paved the way for today’s semiautomatic firearms equipped with detachable
10 magazines over ten rounds.

11 When all else fails, the State tries to revive the interest-balancing test that *Bruen*
12 definitively rejects, mentioning mass shootings and presenting expert declarations that
13 mostly have no bearing on the merits of this case. While they should not need to,
14 Plaintiffs’ experts respond to the State’s experts at length, establishing that: (1) mass
15 murder is not a new societal problem; (2) repeating arms able to fire more than ten
16 rounds before reloading were common in the 19th century and were not regulated; (3)
17 magazines over ten rounds are commonly owned and used today for lawful purposes;
18 and (4) the State’s evidence has not established that such magazines make mass
19 shootings worse, even if that were a valid consideration under *Bruen*.

20 The State concludes by again demanding more time to conduct more discovery.
21 But it does not need more time. It needs historic laws that simply do not exist. If the
22 State is given more time, it will simply continue its efforts to overwhelm Plaintiffs and
23 their limited resources with more “experts” offering opinions on everything *but*
24 relevant historic laws. Plaintiffs (and all Californians who seeks to obtain standard
25 magazines over ten rounds) have waited long enough for their rights to be respected.
26 This Court should rule on the merits promptly.

27 ///

28 ///

BACKGROUND

I. PREVALENCE OF FIREARMS AND MAGAZINES ABLE TO HOLD MORE THAN TEN ROUNDS OF AMMUNITION

Today, magazines are essential to the operation of most modern firearms, Hanish Decl. ¶¶ 21-25; Helsley Decl. ¶ 9; Hlebinsky Decl. ¶ 12. But firearms and magazines able to accept more than ten rounds have been commonly possessed by the American public for generations. Hanish Decl. ¶ 18; Helsley Decl. Ex. 10 at 3-5; Hlebinsky Decl. ¶¶ 22-23, 27; *see also* Barvir Decl. Ex. 39 at 307-316, 320-321 [David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 851-64, 871-72 (2015)]. They have existed since well before the American Revolution. Helsley Decl. Ex. 10 at 4; Barvir Decl. Ex. 39 at 307-316, 320-21; *see also* Helsley Decl. ¶¶ 7-8 (noting that Washington and Adams were personally involved in negotiations for a deal that would have seen the United States purchase multi-shot muskets); Barvir Decl. Supp. Mot. Summ. J. (ECF No. 50-8) (“Barvir MSJ Decl.”) ¶¶ 12-15, Exs. 13-20. And they “have been very commonly possessed in the United States since 1862.” *Id.*, Ex. 39 at 320; *see also* Helsley Decl. Ex. 10 at 5. “In terms of large-scale commercial success, rifle magazines over more than ten rounds had become popular by the time the Fourteenth Amendment was being ratified. Handgun magazines of more than ten rounds would become popular in the 1930s.” Barvir Decl. Ex. 39 at 320. Their popularity has only steadily increased over time, especially as technology has improved. *Id.*, Ex. 39 at 307-08; Helsley Decl. ¶ 11 (between 500 million and 1 billion magazines with a capacity of over ten rounds produced), Ex. 10 at 307-15; *see also* Barvir MSJ Decl. ¶¶ 13-31, 36-38, Exs. 15-51, 55-57.³

³ For an enlightening list of “highlights” from the long history of firearms and magazines over ten rounds in this country, see Judge Bumatay’s dissent from the (now reversed) en banc decision in this matter. *Duncan v. Bonta* (“*Duncan V*”), 19 F.4th 1087, 1155 (9th Cir.) (Bumatay, J., dissenting) (recounting the historical precedents for “large capacity magazines” from a 16-shooter developed in 1580 to the Winchester M1873, able to hold 10 to 11 rounds, of which over 720,000 copies were made from 1873 to 1919).

Between 1990 and 2015, by one count, about 115 million magazines able to hold more than ten rounds were in circulation in the United States. Hanish Decl. ¶ 18; Helsley Decl. ¶ 11; Barvir Decl. Ex. 40 at 362 [Christopher S. Koper, et al., *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003* at 65 (Nat’l Instit. Just. June 2004)]. This number represents roughly half of all magazines acquired during that period. Barvir Decl. Ex. 39 at 321. Indeed, magazines of a much larger capacity—up to 30 rounds for rifles and up to 20 rounds for handguns—are “*standard equipment* for many popular firearms.” *Id.*, Ex. 39 at 312-14, 322 (emphasis added); *see also* Hanish Decl. ¶ 27; Helsley Decl. Ex. 10 at 3; Barvir Decl. Exs. 30-35.

II. THE HISTORY OF MAGAZINE CAPACITY RESTRICTIONS

As an historical matter, no relevant evidence suggests an “enduring American tradition,” *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2155-56 (2022), of government restrictions on arms based on their magazine or firing capacity. Firearms and magazines able to hold more than ten rounds have existed since the mid-1500s, yet there were no restrictions on them at the time of the ratification of the Second Amendment. *Id.*, Ex. 39 at 316; Hlebinsky Decl. ¶ 47. In fact, the first such law appeared “during the prohibition era, nearly a century and half after the Second Amendment was adopted, and over half a century after the adoption of the Fourteenth Amendment.” *Id.* Save for a single law in the District of Columbia, a version of which remains in effect, those original laws have since been repealed. *Id.*, Ex. 39 at 317; Hlebinsky Decl. ¶ 47.

Today, the overwhelming majority of states place *no* restrictions on magazine-capacity, let alone demand that citizens surrender magazines considered too “large” under threat of criminal penalty. The restrictions that *are* in place are of recent vintage, and they vary greatly as to what constitutes a “large capacity magazine.” Barvir Decl. Ex. 12 at 303-06 (history of magazine capacity restrictions in the U.S.); Req. Jud. Ntc., Ex. 12 [Colo. Rev. Stat. §§ 18-12-301–302] (15-round limit; adopted 2013); Ex. 13

[Conn. Gen. Stat. § 53-202w] (10-round limit; adopted 2013), Ex. 14 [D.C. Code § 7-2506.01(b)] (12-round limit adopted in 1932, reduced to ten rounds in 2009), Ex. 15 [Haw. Rev. Stat. § 134-8(c)] (10-round limit for handguns only; adopted in 1992), Ex. 16 [Md. Code, Crim. Law § 4-305(b)] (20-round limit on transfer adopted in 1994; reduced to 10 in 2013), Ex. 17 [Mass. Gen. Laws ch. 140, §§ 121, 131(a)] (10-round limit without permit; adopted 1994), Ex. 18 [N.J. Stat. § 2C:39-1y, -3j, -9h] (15-round limit; adopted 1990), Ex. 19 [N.Y. Penal Law §§ 265.00, 265.36] (10-round limit; transfer banned in 2000, possession banned in 2013); Ex. 20 [Vt. Stat. Ann. tit. 13, § 4021] (10-round limit for a long gun, 15-round limit for a handgun; adopted 2017); Ex. 21 [Del. Code Ann. tit. 11, § 1469(a)] (17-round limit; adopted 2022); Ex. 22 [*see* 2022 Oregon Ballot Measure 114, Sec. 11] (10-round limit; adopted 2022).

Except for one brief period, the federal government has taken the same approach as most states. It did not regulate magazine capacity at all. In 1994, Congress adopted a nationwide prospective ban on certain magazines, which included a grandfather clause. Req. Jud. Ntc., Ex. 11 [Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1999 (1994) (formerly codified at 18 U.S.C. § 922(w))]; *see also* Barvir Decl. Ex. 39 at 317. Ten years later, Congress vindicated the wisdom of the grandfather clause, but not the efficacy of the ban, allowing the ban to expire after a study commissioned by the Department of Justice revealed that the law made no appreciable impact on crime. Barvir Decl. Ex. 41 at 400 [David B. Kopel, *What Should America Do About Gun Violence?*: Hearing Before U.S. S. Comm. on Judiciary, 113th Cong. 11 (2013)], Ex. 39 at 317. The possession and acquisition of magazines able to hold more than ten rounds of ammunition remains legal under federal law today.

III. CALIFORNIA’S BAN ON MAGAZINES OVER TEN ROUNDS

Since 2000, California has been one of the very few states to prohibit the manufacture, importation, sale, and transfer of any “large-capacity magazine,” which California broadly defines as “any ammunition feeding device with the capacity to accept more than 10 rounds,” with some exceptions not relevant here. Cal. Penal Code

1 §§ 32310, 16740. While California did not, at first, try to confiscate such magazines
 2 from those who had lawfully obtained them, in July 2016, the Legislature eliminated
 3 even this modest nod in the direction of reliance interests and the Taking Clause. *See*
 4 S.B. 1446, 2015-2016 Reg. Sess. (Cal. 2016). The legislation required those in
 5 possession of lawfully acquired (and until then lawfully possessed) magazines to
 6 surrender, permanently alter, or otherwise dispossess themselves of their magazines.

7 A few months later, the voters approved Proposition 63, a ballot initiative that
 8 took a similar approach. *See* Cal. Penal Code § 32310. Proposition 63 requires any
 9 Californian in possession of a magazine over ten rounds to surrender it to law
 10 enforcement for destruction, permanently alter it, remove it from the state, or sell it to a
 11 licensed firearms dealer. *Id.* § 32310(a), (d). Failure to dispossess oneself of a lawfully
 12 acquired magazine is punishable by up to a year in prison, as well as a fine. *Id.* §
 13 32310(c).

14 **IV. PROCEDURAL HISTORY**

15 Plaintiffs sued to enjoin enforcement of California’s magazine restrictions.
 16 Compl. (May 17, 2017) (ECF No. 1). They alleged that the ban violates their rights
 17 under the Second Amendment, the Takings Clause, and the Due Process Clause. *Id.* ¶¶
 18 64-76. While Plaintiffs challenged the ban as a whole, they immediately sought a
 19 narrow preliminary injunction limited to enjoining enforcement of the new possession
 20 ban. Pls.’ Mot. Prelim. Inj. 1 (May 26, 2017) (ECF No. 6). This Court, recognizing that
 21 the ban “criminaliz[es] the mere possession of these magazines that are commonly held
 22 by law-abiding citizens for defense of self[and] home,” held that Plaintiffs were likely
 23 to prevail under *both* *Heller*’s “text, history, and tradition” approach and the now-
 24 defunct two-step test that this Ninth Circuit then employed. *Duncan v. Becerra*
 25 (“*Duncan I*”), 265 F. Supp. 3d 1106, 1118, 1139 (S.D. Cal. 2017). The state took an
 26 interlocutory appeal, and a divided panel of the Ninth Circuit affirmed. *Duncan v.*
 27 *Becerra* (“*Duncan II*”), 742 F. App’x 218, 222 (9th Cir. 2018) (unpublished).

28 While the preliminary injunction order was on appeal, the parties engaged in

1 substantial discovery efforts. Plaintiffs assembled a summary judgment record
 2 establishing, among other things, (1) that ammunition magazines are “arms” within the
 3 scope of the Second Amendment, (2) the historical and present-day ubiquity of the
 4 magazines that California seeks to ban and confiscate, and (3) the lack of a
 5 longstanding historical tradition of laws in the United States restricting firearm
 6 capacity. After reviewing the parties’ historical and factual record, this Court granted
 7 Plaintiffs’ motion for summary judgment. *Duncan v. Becerra* (“*Duncan III*”), 366 F.
 8 Supp. 3d 1131, 1186 (S.D. Cal. 2019).

9 This Court first found that magazines over 10 rounds are unquestionably
 10 common, as roughly 115 million of them are owned by Americans for all manner of
 11 lawful purposes. *See id.* at 1143-45. The Court then thoroughly considered—and
 12 thoroughly rejected—the State’s argument that there is a longstanding historical
 13 tradition of regulating firing or magazine capacity. *See id.* at 1149-53. To the contrary,
 14 the Court explained, “[h]istory shows ... restrictions on the possession of firearm
 15 magazines of any size have no historical pedigree.” *Id.* at 1149. Indeed, “the earliest
 16 firing-capacity regulation appeared in the 1920s and 1930s,” and “[e]ach was
 17 repealed.” *Id.* at 1150, 1153. Even today, magazine capacity remains “unregulated in
 18 four-fifths of the states.” *Id.* at 1149.

19 A divided panel of the Ninth Circuit affirmed. *Duncan v. Becerra*
 20 (“*Duncan IV*”), 970 F.3d, 1133 (9th Cir. 2020), *reversed en banc*, *Duncan V*, 19 F.4th
 21 1087 (9th Cir. 2021), *vacated and remanded*, 2018 U.S. App. LEXIS 31051 (9th Cir.
 22 Sept. 23, 2022). The panel first concluded that “[t]he record ... amply shows” that the
 23 prohibited magazines are the “antithesis of unusual,” as “nearly half of all magazines
 24 in the United States today hold more than ten rounds of ammunition,” and such
 25 magazines are “overwhelmingly owned and used for lawful purposes.” *Id.* at 1146-47.
 26 After conducting a “long march through the history of firearms,” the panel likewise
 27 found no evidence that magazine capacity restrictions have any historical pedigree. *Id.*
 28 at 1148-49. While “firearms capable of holding more than ten rounds of ammunition

1 have been available in the United States for well over two centuries,” restrictions on
 2 such magazines have been rare, recent, and short-lived. *Id.* at 1149-50. Indeed, the
 3 panel held, “[o]nly during Prohibition did a handful of state legislatures enact capacity
 4 restrictions,” and ““most of those laws were invalidated by the 1970s.”” *Id.* (quoting
 5 *Ass’n of N.J. Rifle & Pistol Clubs, Inc. v. Atty Gen. of N.J.* (“*ANJRPC I*”), 910 F.3d
 6 106, 117 n.18 (3d Cir. 2018)).

7 The Ninth Circuit then took the case en banc, and a divided en banc panel
 8 reversed. *See Duncan V*, 19 F.4th 1087. The en banc majority first expressly refused to
 9 embrace the text, history, and tradition approach that *Bruen* now mandates, declaring
 10 that “[u]nless and until the Supreme Court tells us ... that, for a decade or more, we all
 11 have fundamentally misunderstood the basic framework for assessing Second
 12 Amendment challenges, we reaffirm our two-step approach.” *Id.* at 1101. Employing
 13 that (now-abrogated) approach, the majority began by “assuming, without deciding,
 14 that California’s law” both “implicates the Second Amendment” and implicates the
 15 “core” of the Second Amendment right, which obviated the need to engage in “an
 16 extensive historical inquiry.” *Id.* at 1103. Giving “deference” to the State’s
 17 “reasonable ... judgment” “that large-capacity magazines significantly increase the
 18 devastating harm caused by mass shootings and that removing those magazines from
 19 circulation will likely reduce deaths and serious injuries,” *id.* at 1111, the en banc panel
 20 then concluded that the ban satisfies intermediate scrutiny, *id.*

21 Plaintiffs petitioned for a writ of certiorari. The Supreme Court held the petition
 22 pending resolution of *Bruen*, and shortly after it issued its decision in that case, the
 23 Court granted the petition, vacated the en banc decision, and remanded “for further
 24 consideration.” *See Duncan v. Bonta* (“*Duncan VI*”), 2022 WL2347579, at *1 (U.S.
 25 June 30, 2022). On remand to the Ninth Circuit, the en banc panel ordered the parties
 26 “to file supplemental briefs on the effect of *Bruen* on th[e] appeal, including whether
 27 the en banc panel should remand this case to the district court.” Order (Aug. 2, 2022)
 28 (9th Cir. Dkt. No. 202). After the parties’ filed their supplemental briefs, the Ninth

1 Circuit remanded the case to this Court for further proceedings. *Duncan VI*, 2022 U.S.
2 App. LEXIS 31051.

3 This Court issued an order spreading the mandate, reinstating the preliminary
4 injunction while this case proceeds, and setting a schedule for supplemental briefing
5 under *Bruen*. Order (Sept. 26, 2022) (ECF No. 111). Weeks later, the State filed a
6 motion for reconsideration, requesting that the Court re-open discovery to give the
7 State time to engage in fact and expert discovery it opted not to engage in when this
8 case was first before this Court. Def.’s Mot. for Reconsid. (Oct. 12, 2022) (ECF No.
9 112). Plaintiffs opposed that request. That motion is still pending.

10 ARGUMENT

11 I. CALIFORNIA’S MAGAZINE BAN VIOLATES THE SECOND AMENDMENT

12 A. The Proper Standard for Analyzing Second Amendment Claims

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

22 The Supreme Court has now jettisoned that analysis, expressly stating that
23 “[d]espite the popularity of this two-step approach, *it is one step too many.*” *Bruen*, 142
24 S. Ct. at 2127 (emphasis added). The correct Second Amendment analysis starts and
25 stops with consideration of text and historical tradition. *Id.* So, when faced with a
26 Second Amendment challenge, courts must begin by asking whether the conduct in
27 which an individual seeks to engage is within the ambit of the Second Amendment. *Id.*
28 at 2129-30. If it is, “the Constitution presumptively protects that conduct,” *id.*, and “the

1 government must affirmatively prove that its firearms regulation is part of the
 2 historical tradition that delimits the outer bounds of the right to keep and bear arms,”
 3 *id.* at 2127. “Only” if the government can “identify a well-established and
 4 representative historical analogue” to the regulation it seeks to defend, *id.* at 2133,
 5 “may a court conclude that the individual’s conduct falls outside the Second
 6 Amendment’s ‘unqualified command,’” *id.* at 2130 (quoting *Konigsberg v. State Bar*
 7 *of Cal.*, 366 U.S. 36, 50 n.10 (1961))

8 *Bruen* also reaffirmed certain critical principles that govern (and constrain) the
 9 historical analysis. For one thing, the Court made emphatically clear that the
 10 government shoulders the burden of justifying a restriction on Second Amendment
 11 rights by proving that a longstanding American tradition supports that restriction.
 12 Indeed, the Court said so over and over:

- 13 ▪ “[T]he *government must demonstrate* that the regulation is
 14 consistent with this Nation’s historical tradition of firearm
 regulation.” *Bruen*, 142 S. Ct. at 2126.
- 15 ▪ “[T]he *government must affirmatively prove* that its
 16 firearms regulation is part of the historical tradition.” *Id.* at
 2127.
- 17 ▪ “The *government must then justify its regulation* by
 18 demonstrating that it is consistent with the Nation’s
 historical tradition of firearm regulation.” *Id.* at 2130.
- 19 ▪ “[A]nalogical reasoning requires ... that the *government*
 20 *identify* a well-established and representative historical
 analogue.” *Id.* at 2133.
- 21 ▪ “[A]gain, *the burden rests with the government* to establish
 22 the relevant tradition of regulation.” *Id.* at 2149, n.25.
- 23 ▪ “Of course, we are not obliged to sift the historical
 24 materials for evidence to sustain New York’s statute. *That*
 25 *is respondent’s burden.*” *Id.* at 2150.
- 26 ▪ “[W]e conclude that *respondents have not met their*
 27 *burden* to identify an American tradition justifying the
 28 State’s proper-cause requirement.” *Id.* at 2156.

As for what history courts should examine, the Court admonished 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

1 illuminate the scope of the right” if it contradicts American traditions, and courts must
 2 “guard against giving postenactment history more weight than it can rightly bear.” *Id.*
 3 The Court also restricted the kind of historical tradition on which the government may
 4 rely is “an *enduring* American tradition of state regulation,” and not just a handful of
 5 laws in “outlier jurisdictions.” *Id.* at 2155-56 (emphasis added).

6 Under the correct application of *Bruen*’s history-and-tradition test, California’s
 7 total ban on magazines over ten rounds is out of step with this country’s tradition of
 8 firearm regulation. It is unconstitutional.

9 10 **B. California’s Modern Magazine Ban Restricts Conduct Within the Ambit of the Second Amendment**

11 The first question under *Bruen* is whether the Second Amendment protects the
 12 conduct in which an individual seeks to engage. 142 S. Ct. at 2129-30. The answer
 13 here is obviously yes. Plaintiffs simply want to purchase, possess, and use common
 14 magazines for lawful purposes. That conduct falls comfortably within the Second
 15 Amendment.

16 **1. Magazines Are “Arms” Within the Scope of the Second** 17 **Amendment**

18 The text of the Second Amendment guarantees individuals the rights “to keep
 19 and bear Arms.” U.S. Const. amend. II. That, of course, includes the right to use them
 20 “for offensive or defensive action.” *Bruen*, 142 S. Ct. at 2134; *see also id.* at 2127,
 21 2134- 35 (Second Amendment protects the right to keep and bear arms “in common
 22 use,” “in case of confrontation,” “for self-defense”); *id.* at 2158- 59, 2161 (Alito, J.,
 23 concurring) (Second Amendment protects both “possessing ... and *using* a gun”
 24 (emphasis added)). After all, the Amendment’s text must be interpreted as it would
 25 ordinarily have “be[en] understood by the voters” who ratified it. *District of Columbia*
 26 *v. Heller*, 554 U.S. 570, 576 (2008). And history shows that those who ratified the
 27 Second Amendment understood it to guarantee a right to *use* a firearm for a multitude
 28 of lawful purposes, including self-defense.

1 Indeed, early state court decisions interpreted analogous state guarantees as
 2 protecting the effective use of firearms. *See, e.g., State v. Reid*, 1 Ala. 612, 616-17
 3 (1840) (Alabama’s guarantee barred the legislature from adopting rules that “render
 4 [firearms] wholly useless”); *Bliss v. Commonwealth*, 12 Ky. 90, 92 (1822) (Kentucky’s
 5 analogous guarantee “consisted in nothing else but in the liberty of the citizens to bear
 6 arms”). And nineteenth century commentators read the Second Amendment the same
 7 way. *See, e.g., Joel Tiffany, A Treatise on the Unconstitutionality of American Slavery*
 8 117-18 (1849) (without “impl[ying] the right to use” firearms the “guarantee would
 9 have hardly been worth the paper it consumed”); Thomas M. Cooley, *General*
 10 *Principles of Constitutional Law* 271 (1880) (“to bear arms implies something more
 11 than the mere keeping; it implies the learning to handle and use them”).

12 Because the Second Amendment right to “keep and bear arms” implies the right
 13 to *use* them, the fact that the challenged law bans magazines and not firearms
 14 themselves changes nothing. “Constitutional rights implicitly protect those closely
 15 related acts necessary to their exercise.” *Luis v. United States*, 578 U.S. 5, 26-27
 16 (2016) (Thomas, J., concurring) (collecting examples). “No axiom is more clearly
 17 established in law, or in reason, than that wherever the end is required, the means are
 18 authorized.” The Federalist No. 44, at 282 (James Madison) (Charles R. Kesler ed.,
 19 2003). For that reason, even the Ninth Circuit’s pre-*Bruen* precedent confirms that
 20 “the right to possess firearms for protection implies a corresponding right to obtain the
 21 bullets necessary to use them.” *Jackson v. City & Cnty. of San Francisco*, 746 F.3d
 22 953, 967 (9th Cir. 2014). Indeed, the Ninth Circuit repeated that observation again and
 23 again.⁴ Other circuits agree that the Second Amendment protects those predicate
 24 activities necessary to use a firearm for lawful purposes. *See, e.g., Drummond v.*
 25 *Robinson Twp.*, 9 F.4th 217, 224, 227-28 (3d Cir. 2021) (zoning rules barring for-

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

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.

As this Court already held, the same is true for magazines. *Duncan III*, 366 F. Supp. 3 at 1142; *see also Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015) (recognizing the “right to possess the magazines necessary to render ... firearms operable”). “Without protection for the closely related right to keep and bear ammunition magazines for use with the arms designed to use such magazines, ‘the Second Amendment would be toothless.’” Order Granting Prelim. Inj. at 16 (ECF No. 28) (quoting *Luis*, 136 S. Ct. at 1097). Magazines are essential to the operation of most modern firearms. Hlebinsky Decl. ¶ 12; Helsley Decl. ¶ 9; Hanish Decl. ¶¶ 21-25; *see also Barvir Decl. Ex. 25 at 69-79, Ex. 26 at 88-90, Ex. 27 at 107*. Their function is to hold and to automatically feed individual ammunition cartridges into the chamber for firing. Barvir Decl. Ex. 25 at 69-79, Ex. 26 at 89-90, Ex. 27 at 107. Without the magazine in place, firearms designed for use with magazines are limited to firing a single round—or none at all. *See id.*, Ex. 29 at 119. Indeed, for safety reasons, many pistols are designed to fire *only* when the magazine is in place. *Id.*, Ex. 26 at 89, Ex. 28 at 29.⁵ It is thus no surprise that *no* court has held that magazines are not arms. *See, e.g., Worman v. Healey*, 922 F.3d 26, 36 (1st Cir. 2019) (assuming without deciding that a magazine restriction implicates the Second Amendment); *N.Y. State Rifle & Pistol Ass’n v. Cuomo* (“NYSRPA”), 804 F.3d 242, 257 (2d Cir. 2015)

⁵ In fact, California prohibits licensed dealers from selling pistols that will fire a chambered cartridge with the detachable magazine removed. Cal. Penal Code § 31910(b)(6) (requiring pistols to be equipped with a “magazine disconnect mechanism”); *id.* § 16900 (defining “magazine disconnect mechanism” as “a mechanism that prevents a semiautomatic pistol that has a detachable magazine from operating ... when a detachable magazine is not inserted in the semiautomatic pistol”).

1 (“we proceed on the assumption that these laws [bans on “assault weapons” and “large
2 capacity magazines” ban weapons protected by the Second Amendment”]; *ANJRPC I*,
3 910 F.3d at 116 (“The law challenged here regulates magazines, and so the question is
4 whether a magazine is an arm under the Second Amendment. The answer is
5 yes.”); *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d. 1267, 1276 (N.D. Cal. 2014), *aff’d*,
6 779 F.3d 991 (9th Cir. 2015) (“[T]he court finds that the prohibited magazines are
7 ‘weapons of offence, or armour of defence,’ as they are integral components to vast
8 categories of guns.”).⁶

9 The State tries to relitigate this already well-settled question, arguing for the first
10 time, after years of litigation, that magazines are not “arms” at all because, the State’s
11 linguistics expert opines, they would have been considered “accoutrements,” not
12 “arms,” during the Founding and Reconstruction Eras. Def.’s Suppl. Br. 17 (citing
13 Baron Decl. ¶ 25). The claim (even if true) does not support the State’s position that
14 magazines are not protected by the Second Amendment. It ignores the long line of
15 precedent discussed above that unquestionably holds that items like ammunition and
16 magazines are protected because they are “necessary to render ... firearms operable”
17 for their lawful purposes. *Fyock*, 779 F.3d at 998.

18 Baron claims that historical evidence “shows that during the Founding Era and
19 the Reconstruction Era, *arms* [was] used as a general term for weapons,” like swords,
20 knives, rifles, and pistols. Baron Decl. ¶ 7. The term apparently did not include
21 “ammunition, ammunition containers, flints, scabbards, holsters, armor, or shields,”
22 which Baron explains were often called “accoutrements.” *Id.* Baron can only speculate
23 that modern detachable magazines would also fall under that umbrella term in early
24 America because, as he admits, detachable magazines did not appear until 1919 or
25 later. *Id.* ¶ 57; *see also* Hlebinsky Decl. ¶ 47. And a modern magazine is nothing like
26

27
28 ⁶ In fact, only the Third Circuit has ruled that magazines over ten rounds are not
protected—though not because they are not arms, but because the court held they are
most useful in military service. *Kolbe v. Hogan*, 849 F.3d 114, 137-38 (4th Cir. 2017).

1 an ammunition container of the type Baron references. Those containers did not attach
2 to the firearm. Nor were they necessary for the firearm to function. Magazines, on the
3 other hand, are essential to the firearm that individuals “take into [their] hands,” and
4 are thus classified as part of the “arm” itself. *Heller*, 554 U.S. at 581.⁷

5 Even if magazines are “accoutrements,” like ammunition, they must still be
6 protected, like ammunition, because they are *essential* to the operation of the firearms
7 that use them. Hlebinsky Decl. ¶ 12; Helsley Decl. ¶ 9; Hanish Decl. ¶¶ 21-25. The
8 State admits as much. Def.’s Suppl. Br. 17, n.10 (“To be sure, some type of magazine
9 is essential to the use of many handguns.”). Still, the State argues that, because
10 firearms can accept smaller magazines, magazines *over ten rounds* are not necessary to
11 the operation of any firearm. *Id.* at 16 (citing Busse Decl. ¶¶ 7, 9). But that is not an
12 argument that magazines over ten rounds are not *arms* for Second Amendment
13 purposes. If a magazine under ten rounds is an *arm*, as the State concedes, it does not
14 magically transform into something else once it meets the State’s arbitrary threshold
15 for being “too large.”

16 And the State’s argument that a larger magazine is not “necessary” for a firearm
17 to function for self-defense does not change anything. Otherwise, sights, stocks, rifles
18 barrels, and all but one caliber could be banned. Taken to its logical conclusion, no
19 particular firearm model would enjoy Second Amendment protection because none is
20 “necessary” for self-defense. To allow government the power to whittle down all
21 aspect of arms to those it deems “necessary” would be affording it the power to destroy
22 the right.

23 At bottom, the State is arguing that the government may ban a subcategory of
24 arms (here, magazines) as long as other arms remain available for effective self-
25

26
27 ⁷ Under *Heller*, anything that “a man wears for his defence” or “armour of
28 defence” is considered a protected “arm” as well. *Heller*, 554 U.S. at 581. It would be
strange indeed if body armor was protected by the Second Amendment, but not a
firearm’s magazine.

1 defense—a borderline frivolous argument that *Heller* soundly rejected. 554 U.S. at 629
 2 (“It is no answer to say ... that it is permissible to ban the possession of handguns so
 3 long as the possession of other firearms (i.e., long guns) is allowed.”)

4 For these reasons, it is hardly debatable that California’s modern magazine ban
 5 restricts *arms* under a plain reading of the Second Amendment.

6 **2. Magazines Over Ten Rounds Are in Common Use for Lawful** 7 **Purposes**

8 The Second Amendment protects arms that are “typically possessed by law-
 9 abiding citizens for lawful purposes.” *Heller*, 554 U.S. at 624-25. In support of their
 10 motion for summary judgment, Plaintiffs presented overwhelming evidence that the
 11 magazines California bans are in common use for lawful purposes—and have been for
 12 decades. Barvir MSJ Decl. Ex. 2 at 30-32; Ex. 12 at 295, Ex. 56, Ex. 58 at 846-48; *see*
 13 *generally* Barvir MSJ Decl. Exs. 52-57, 62. And nearly every appellate court that has
 14 analyzed this issue has found, or was willing to assume, that bans on magazines over
 15 ten rounds burden conduct protected by the Second Amendment. *See, e.g., Fyock*, 779
 16 F.3d at 999; *ANJRPC I*, 910 F.3d at 116; *N.Y. State Rifle & Pistol Ass’n, Inc. v.*
 17 *Cuomo*, 804 F.3d 242, 255 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784
 18 F.3d 406, 415 (7th Cir. 2015); *Heller v. District of Columbia*, 670 F.3d 1244, 1261
 19 (D.C. Cir. 2011); *but see Kolbe*, 849 F.3d at 137-38 (standing alone in its holding that
 20 “large capacity magazines” are unprotected because they are best suited for military
 21 purposes). In short, it is well documented and almost universally accepted that the
 22 restricted magazines have long been commonly possessed in the United States for
 23 lawful purposes—including, *but not limited to*, the core lawful purpose of self-defense.

24 *Bruen* did not alter the common-use analysis, so it is improper to relitigate the
 25 issue here. The State attempts to do so nonetheless, but it has provided nothing new
 26 that should prompt this Court to disturb its earlier holding that magazines over ten
 27 rounds are protected because they “are used for self-defense by law-abiding citizens.
 28 And they are common.” *Duncan III*, 366 F. Supp. 3d at 1143.

1 In short, firearms able to discharge more than ten rounds without reloading were
 2 common in the United States by the time the Second and Fourteenth Amendments
 3 were ratified. Helsley Decl. Ex. 10 at 4; Hlebinsky Decl. ¶¶ 23, 29; Barvir Decl. Ex. 12
 4 at 295; *see generally* Barvir MSJ Decl. Exs. 13-51 (recounting the history of rifles and
 5 handguns with capacities over ten rounds). And that popularity has only solidified as
 6 technology has improved and become more affordable. Barvir Decl. Ex. 39 at 307-15;
 7 Helsley Decl. ¶ 11, Ex. 10 at 5; *see also* Barvir MSJ Decl. ¶¶ 13-31, 36-38, Exs. 15-51,
 8 55-57. Indeed, many of the nation’s best-selling firearms—including the ever-popular
 9 Glock pistol—have for decades come *standard* with magazines California now
 10 prohibits. Helsley Decl. Ex. 10 at 3-4; Barvir Decl. Ex. 39 at 314-15, Ex. 31, Ex. 34
 11 at 240-42; *see also Duncan III*, 366 F. Supp. 3d at 1145 (discussing, among others, the
 12 popular “Glock 17, which is designed for, and typically sold with, a 17-round
 13 magazine” and the AR-15 style rifle, of which more than 5 million have been sold
 14 since the 1980s and which “are typically sold with 30-round magazines”). Today,
 15 *millions* of these magazines are in the hands of law-abiding Americans, and they are
 16 lawful in at least 40 states and under federal law. Hanish Decl. ¶ 18; Helsley Decl. ¶
 17 11; Barvir Decl. Ex. 40 at 362. Under any reasonable measure, they are common. *N.Y.*
 18 *State Rifle & Pistol Ass’n*, 804 F.3d at 255-57 (noting “large-capacity magazines” are
 19 “in common use” based on even the most conservative estimates).

20 What’s more, these magazines are overwhelmingly used for lawful purposes.
 21 Renowned firearms historian, Stephen Helsley, explains that firearms and magazines
 22 over ten rounds were developed for self- and home-defense. Helsley Decl. Ex. 10 at 7-
 23 9. Firearm industry senior executive, Mark Hanish, explains that firearms that come
 24 standard with magazines over 10 rounds, like AR-15 style rifles, have many benefits
 25 including “personal defense, target shooting, competition, and hunting,” all of these
 26 being lawful purposes under *Heller*. Hanish Decl., ¶ 11. Manufacturers specifically
 27 market them for those purposes. Hanish Decl. ¶¶ 18-20, 26-29. Civilians
 28 overwhelmingly choose them to increase their chances of staying alive in violent

1 confrontations. Helsley Decl. ¶ 11, Ex. 10 at 5; Barvir Decl. Ex. 39 at 307-09. And
 2 even the U.S. government played a part in the distribution of them: Through the
 3 Civilian Marksmanship Program, between 1958 and 1967, the federal government sold
 4 around 207,000 M1 Carbines rifles to American citizens. Stephen P. Halbrook,
 5 *America's Rifle: The Case for the AR-15* at 198 (Bombardier Books 2022). M1
 6 carbines came standard with 15-round and later 30-round magazines. *Id.* at 58.
 7 “Common sense tells us that the small percentage of the population who are violent
 8 gun criminals is not remotely large enough to explain the massive market for
 9 magazines of more than ten rounds that has existed since the mid-nineteenth century.”
 10 Barvir Decl. Ex. 39 at 320-21. It is no wonder, then, that few courts have had trouble
 11 concluding that these magazines are typically possessed for lawful purposes.

12 Unable to rebut the overwhelming evidence (and the trail of precedent, including
 13 this very Court's findings) that magazines over ten rounds are “typically possessed for
 14 lawful purposes,” including self-defense, the State retreats to yet another specious
 15 argument that has already been rejected by this Court. The State claims that “the test
 16 for Second Amendment protection of a particular weapon is common *use*, not common
 17 *ownership*.” Def.'s Suppl. Br. 21 (citing *Bruen*, 142 S. Ct. at 2138, 2142, n.12, 2143,
 18 2156). According to the State, “a firearm being ‘commonly owned’ ‘for lawful
 19 purposes,’ *Duncan [III]*, 366 F. Supp. at 142, is not enough.” *Id.* It must also,
 20 apparently, be both *suitable for* and *in actual use for* that purpose. *Id.* (citing
 21 *Duncan V*, 19 F.4th at 1105 (Berzon, J., concurring); *Heller*, 554 U.S. at 629
 22 (explaining the “reasons that a citizen may prefer a handgun for home defense”)).

23 As the district court in *Fyock* held, “Second Amendment rights do not depend on
 24 how often the magazines are used. Indeed, the standard is whether the prohibited
 25 magazines are ‘typically *possessed* by law-abiding citizens for lawful purposes,’ not
 26 whether the magazines are often *used* for self-defense.” 25 F. Supp. 3d at 1276
 27 (quoting *Heller*, 554 U.S. at 625) (double emphasis added). It is enough that they are
 28 commonly possessed for self-defense and other lawful purposes, not that their actual

1 uses in self-defense meet some threshold the State has not identified. If it were
 2 otherwise, the State could justify a ban on all firearms able to fire more than 2 or 3
 3 shots since, according to the State’s expert Lucy Allen, “on average, only 2.2 shots
 4 were fired by defenders.” Def.’s Suppl. Br. 21 (citing Allen Decl. ¶ 10). Taken to its
 5 natural conclusion, the State’s reasoning would justify banning *any* firearm for that
 6 matter. For most firearms have never *actually* been used in self-defense at all. Surely,
 7 that cannot be the result under *Bruen* or *Heller*.

8 The State then complains that a “mere popularity” test for protection of arms is
 9 unworkable. Def.’s Suppl. Br. 20.⁸ It argues that “the phrase ‘in common use’ as used
 10 in *Bruen*, *Heller*, and *McDonald* does not simply refer to a weapon’s prevalence in
 11 society, or the quantities manufactured or sold.” *Id.* The claim is unsupported, and it
 12 conflicts with Justice Alito’s guidance on what really matters: “[T]he more relevant
 13 statistic is that ‘hundreds of thousands of tasers and stun guns [the arms at issue] have
 14 been sold to private citizens,’ who it appears may lawfully possess them in 45 states.”
 15 *Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016) (Alito, J., concurring))

16 Even if that is so, the record does not merely establish that magazines over ten
 17 rounds are popular for popularity’s sake. It shows (1) that they are marketed for self-
 18 defense, Hanish Decl., ¶¶ 18-20, 26-29; (2) that they often come standard with the
 19 most popular self-defense firearms, Helsley Decl., Ex. 10 at 3-4; Barvir Decl., Ex. 39
 20 at 314-15, Ex. 31, Ex. 34 at 240-42; and (3) that they are overwhelmingly chosen by
 21 Americans for self-defense, Helsley Decl., ¶11, and Ex. 10 at 5; Hanish Decl., ¶ 18,
 22 and Ex. 5; Barvir Decl., Ex. 39 at 307-09. The record also reflects many reasons many
 23

24
 25 ⁸ The courts appear to be divided over whether “mere popularity” or something
 26 more is required. *Compare Hollis v. Lynch*, 827 F.3d 436, 447 (5th Cir. 2016)
 27 (analyzing commonality by reviewing raw number percentage and jurisdiction
 28 counting); *NYSRPA*, 804 F.3d at 255 (holding that “large capacity magazines” are in
 common use because 50 million units were available for purchase); *with Kolbe*, 849
 F.3d at 141-42 (noting that *Heller* did not “confirm that it was sponsoring the
 popularity test”); *Worman v. Healey*, 922 F.3d 26, 35 n.5 (1st Cir. 2019) (noting that
 “measuring ‘common use’ by the sheer number of weapons lawfully owned is
 somewhat illogical”).

1 citizens prefer them for that purpose. Helsley Decl., ¶11, Ex. 10 at 5; Hanish Decl., ¶
 2 26 This is more than is needed to show that magazines over ten rounds are “typically
 3 possessed” for the core lawful purpose of self-defense.

4 The State’s belief that the magazines are “unsuitable for self-defense,” Def’s.
 5 Suppl. Br. 21, is not supported by the record and is, quite frankly, irrelevant. Whatever
 6 politicians might think citizens “need” for effective self-defense is beside the point.
 7 The record shows that Americans overwhelmingly choose magazines over ten rounds
 8 for lawful self-defense. That choice is entitled to “unqualified deference.” *Bruen*, 142
 9 S. Ct. at 2131.

10 The State also rests much of its argument on the claim that these magazines’
 11 usefulness for military purposes makes them both “unsuitable” for lawful self-defense
 12 and unprotected. Def.’s Suppl. Br. 18 (citing *Bruen*, 142 S. Ct. at 2133); *id.* at 21
 13 (citing *Duncan V*, 19 F.4th at 1105). But the Supreme Court’s precedents do not
 14 withhold Second Amendment protection from arms merely because they are useful in
 15 militia service. It is true that *Bruen* “repeatedly confirms that self-defense ... is the
 16 ‘central component’ of the right” the Second Amendment protects. Def.’s Suppl. Br.
 17 18 (quoting *Bruen*, 142 S. Ct. at 2133 (quoting *McDonald v. City of Chicago*, 561 U.S.
 18 742, 767 (2010))); *id.* at 2125 (also discussing *Heller* and *McDonald*); *id.* at 2128
 19 (same)) (emphasis added). But this was equally true before *Bruen* came down. Indeed,
 20 one thing the courts could agree on, even before *Bruen*, was that the “core” of the
 21 Second Amendment protected right was “self-defense.”⁹ But referring to the “central
 22 component” or the “core” of the right does not suggest that the arms used in “militia
 23

24
 25 ⁹ See, e.g., *Wilson v. Cook Cty.*, 937 F.3d 1028, 1032 (7th Cir. 2019) (discussing
 26 the core right of self-defense); *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng’rs*,
 27 788 F.3d 1318, 1323 (11th Cir. 2015) (same); *Peterson v. Martinez*, 707 F.3d
 28 1197, 1218-19 (10th Cir. 2013) (same); *United States v. Decastro*, 682 F.3d 160, 166
 (2d Cir. 2012) (same); *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) (same);
 see also *Fyock*, 779 F.3d at 998 (recognizing that protection extends to magazines);
Jackson v. City & Cty. of San Francisco, 746 F.3d 953, 967-68 (9th Cir. 2014)
 (recognizing that protection extends to ammunition).

1 service” are altogether without Second Amendment protection. That would be an odd
 2 reading of the Second Amendment indeed. Indeed, it would render its entire prefatory
 3 clause meaningless; a result that cannot be. *Hurtado v. California*, 110 U.S. 516, 534
 4 (1884) (“[W]e are forbidden to assume, without clear reason to the contrary, that any
 5 part of this most important amendment is superfluous.”).

6 In sum, magazines over ten rounds are used by tens of millions of Americans for
 7 lawful purposes across this country, with restrictions on such magazines being in effect
 8 in only a handful of states. Lawful purposes indisputably include self-defense, but they
 9 also include hunting, target shooting, competition shooting, and as our history teaches
 10 us, as a final failsafe against a tyrannical government. Such magazines are thus
 11 protected by the Second Amendment.

12 **C. California Cannot Show That Relevant Historical Tradition Justifies**
 13 **Its Modern Magazine Ban Under *Bruen***

14 Under a faithful application of the *Bruen* test, the State cannot come close to
 15 meeting its burden of proving that its magazine ban is part of the Nation’s historical
 16 tradition. There simply is no “well established and representative” historical analogues
 17 dating to the 19th century or before. To the contrary, as both this Court and every
 18 member of the Ninth Circuit to engage with the historical record on appeal has
 19 concluded, history and tradition establish the complete *absence* of “a well-established
 20 and representative historical analogue.” *See Duncan III*, 366 F. Supp. 3d at 1149-53;
 21 *Duncan IV*, 970 F.3d at 1147-51 (after conducting a “long march through the history
 22 of firearms,” the panel found no evidence that magazine capacity restrictions have any
 23 historical pedigree); *Duncan V*, 19 F.4th at 1156-59 (Bumatay, J. dissenting) (“In the
 24 end, California fails to point to a single Founding-era statute that is even remotely
 25 analogous to its magazine ban.”).

26 This is likely why the State resorts to disfiguring the *Bruen* test beyond
 27 recognition, summarizing it as follows: “A modern regulation that restricts conduct
 28 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.’” Def.’s Suppl. Br. 13 (citing *Bruen*, 142 U.S. at 2133). But whether there is a comparable burden on the right of armed self-defense is appropriate only when a challenged regulation seeks to address some “unprecedented societal concern” or “dramatic technological change.” *Bruen*, 142 U.S. at 2133. And even then, such reasoning requires the State to first show that a “well established and representative,” *id.*, historical analogue *even exists*. Because there are no comparable restrictions on the possession of common arms, let alone flat bans on firearms based on their firing capacity, in the 19th century or earlier, the State resorts to arguing that *Bruen* allows it to rely on *incomparable* regulations that imposed a “comparable burden.” This it cannot do.

Moreover, all of the State’s attempts to point to evidence of a relevant historical tradition, rests on the misguided premise that California’s modern magazine ban is part of an Anglo-American tradition of “restrictions on ‘dangerous’ *or* ‘unusual’ weapons, *Heller*, 554 U.S. at 627, while allowing law-abiding residences to possess and acquire other firearms for self-defense purposes.” Def.’s Suppl. Br. 3 (emphasis added). The argument itself rests on two borderline frivolous premises.

First, the idea that the government may ban a class of commonly possessed arms just because it leaves others untouched was soundly rejected in *Heller*. Indeed, “[t]t is no answer to say ... that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed.” 554 U.S. at 629; *see also*, *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007) (“The District contends that since it only bans one type of firearm, ‘residents still have access to hundreds more,’ and thus its prohibition does not implicate the Second Amendment because it does not threaten total disarmament. *We think that argument frivolous*. It could be similarly contended that all firearms may be banned so long as sabers were permitted.”), *aff’d sub nom. Heller*, 554 U.S. 570 (emphasis added)).

Second, and perhaps most shockingly, the State literally rewrites the *Heller* test

1 for what arms are protected. While it may be true that there is some “historical
 2 tradition” of excluding “‘dangerous *and* unusual’ weapons from the Amendment’s
 3 protection,” *Duncan V*, 19 F.4th at 1148 (quoting *Heller*, 554 U.S. at 627), the
 4 Supreme Court does not speak in terms of “dangerous [*or*] unusual” weapons—no
 5 matter how many times the State uses brackets to slip “or” into the test. *See* Def.’s
 6 Suppl. Br. 24:2, 33:2, 39:12, 52:5 (referring to “dangerous [*or*] unusual weapons”); *see*
 7 *also id.* at 24, n.13, 26:1, 26:5-6, 26:9-10, 33:7, 39:20, 39:21, 40:10-11, 41:5, 42:1,
 8 55:18 (referring to “dangerous or unusual weapons”). The State engages in a sleight of
 9 hand that is neither accidental nor harmless.

10 As this Court once explained: “The Second Amendment does not exist to protect
 11 the right to bear down pillows and foam baseball bats. *It protects guns and every gun is*
 12 *dangerous*. ‘If *Heller* tells us anything, it is that firearms cannot be categorically
 13 prohibited just because they are dangerous.’ ... ‘[T]he relative dangerousness of a
 14 weapon is irrelevant when the weapon belongs to a class of arms commonly used for
 15 lawful purposes.” *Duncan III*, 366 F. Supp. 3d at 1146 (quoting *Caetano*, 577 U.S. at
 16 418 (Alito, J., concurring)) (double emphasis added). The State’s citation to
 17 Blackstone’s reference “to the crime of carrying ‘dangerous *or* unusual weapons”
 18 notwithstanding, Def.’s Suppl. Br. 24, n.13, the Second Amendment protects arms
 19 unless they “dangerous *and* unusual.” It “is a conjunctive test: A weapon may not be
 20 banned unless it is *both* dangerous *and* unusual.” *Caetano*, 577 U.S. at 417 (Alito, J.,
 21 concurring).

22 **1. None of the Historical Evidence that the State Relies on**
 23 **Establishes a Relevant and Enduring Historical Tradition of**
 24 **Firearm Regulation**

25 **a. Medieval and pre-founding English history**

26 In reaffirming *Heller*’s test rooted in our historical tradition of firearm
 27 regulation, the Court cautioned that not all history is created equal: “The Second
 28 Amendment was adopted in 1791; the Fourteenth in 1868. Historical evidence that

1 long predates either date may not illuminate the scope of the right if linguistic or legal
 2 conventions changed in the intervening years.” *Bruen*, 142 S. Ct at 2136. The Court
 3 also made clear that the kind of historical tradition the government must prove is “an
 4 enduring *American* tradition of *state* regulation.” *Id.* at 2155-56 (emphasis added).

5 When it came to pre-founding and English history, the Court gave such history
 6 very little weight because “Constitutional rights are enshrined with the scope they were
 7 understood to have *when the people adopted them*.” *Id.* at 2136 (citing *Heller*, 554 U.S.
 8 at 634). English history is ambiguous at best, and the Court saw “little reason to think
 9 that the Framers would have thought it applicable in the New World.” *Id.* at 2139.
 10 That’s not to say pre-founding history is *never* relevant to the analysis, but the standard
 11 for when it can be is high. As the Court explained, a “long, unbroken line of common-
 12 law precedent stretching from Bracton to Blackstone is far more likely to be part of our
 13 law than a short-lived, 14th-century English practice.” *Id.* at 2136. “Sometimes, in
 14 interpreting our own Constitution, ‘it [is] better not to go too far back into antiquity for
 15 the best securities of our liberties,’ [citation omitted] unless evidence shows that
 16 medieval law survived to become our Founders’ law.” *Id.* (citing *Funk v. United*
 17 *States*, 290 U.S. 371, 382 (1933)).

18 Given how limited pre-colonial history is in value, it is curious the State chose to
 19 rely on it so heavily. Opp’n at 34-37. Because the history of banning mere possession
 20 of commonly owned arms is almost nonexistent, it is obvious that the State is grasping
 21 at anything it can. For example, relying on pre-founding history, the State argues that
 22 the right to bear arms is a “subordinate right” that fell beneath other, “primary right.”
 23 *Id.* at 35. The Supreme Court has already rejected this argument. The Second
 24 Amendment recognizes a preexisting fundamental right, not some ancillary,
 25 conditional afterthought. *McDonald*, 561 U.S. at 778.

26 It only gets worse from there. The State cites the very laws *Bruen* itself
 27 considered, including a 1541 law under Henry VIII in which the use or keeping of
 28 handguns was restricted. The State claims that “Henry VIII was concerned about safety

1 issues associated with the particular prohibited weapons; the prohibition targeted ‘little
 2 short handguns’ and ‘little haquebuts,’ which were a source of ‘great peril and
 3 continual feare and danger of the kings loving subjects.’ ” Opp’n at 36. The Supreme
 4 Court looked at this very law and rejected it, explaining:

5 Henry VIII’s displeasure with handguns arose not
 6 primarily from concerns about their safety but rather their
 7 inefficacy. Henry VIII worried that handguns threatened
 8 Englishmen’s proficiency with the longbow—a weapon
 many believed was crucial to English military victories in
 the 1300s and 1400s, including the legendary English
 victories at Crécy and Agincourt.

9 *Bruen*, 142 S. Ct. at 2140. The Court also explained the larger issue with these
 10 enactments—they contradict *Heller*’s historical analysis:

11 In any event, lest one be tempted to put much evidentiary
 12 weight on the 1541 statute, it impeded not only public
 13 carry, but further made it unlawful for those without
 sufficient means to “kepe in his or their houses” any
 14 “handgun.” 33 Hen. 8 c. 6, §1. Of course, this kind of
 limitation is inconsistent with *Heller*’s historical analysis
 15 regarding the Second Amendment’s meaning at the
 founding and thereafter. *So, even if a severe restriction*
 16 *on keeping firearms in the home may have seemed*
 17 *appropriate in the mid-1500s, it was not incorporated*
into the Second Amendment’s scope. We see little
 reason why the parts of the 1541 statute that address
 public carry should not be understood similarly.

18 *Id.* at n.10.

19 The Supreme Court has thus already considered—and rejected—the very history
 20 the State now wants to relitigate in this Court. That precedent binds this Court. On a
 21 more basic level, the history cited by the State did not save New York’s *carry* regime
 22 at issue in *Bruen*. So it is puzzling why the State thinks it would save its flat ban on
 23 mere *possession* of commonly owned magazines.

24 **b. Colonial America and the Founding Era**

25 Moving to the Founding Era—the only era that *Bruen* makes unmistakably clear
 26 is relevant to the analysis—the State’s mountain of historical evidence fares no better.
 27 Just as it did on appeal, “California fails to point to a single Founding-era statute that is
 28 even remotely analogous to its magazine ban.” *Duncan V*, F.4th at 1159 (Bumatay, J.

1 dissenting). Indeed, not one of the State’s historians could identify a single Founding-
 2 era law flatly banning a class of arms commonly chosen by Americans for lawful
 3 purposes. “Ironically, the closest Founding-era analogues to ammunition [or firing
 4 capacity] regulations appear to be laws *requiring* that citizens arm themselves with
 5 particular arms and a specific *minimum* amount of ammunition.” 1784 Mass. Acts 142;
 6 1786 N. Y. Laws 228; 1785 Va. Statutes at Large 12 (12 Hening c. 1); 1 Stat. 271
 7 (1792) (Militia Act); Herbert L. Osgood, *The American Colonies in the Seventeenth*
 8 *Century* 499-500 (1904) (showing that states required citizens to equip themselves with
 9 adequate firearms and ammunition—varying between twenty and twenty-four
 10 cartridges *at minimum*).” *Id.* The existence of such laws cuts *against* the State’s
 11 argument, not in favor of it.

12 That said, Plaintiffs will the State’s proposed Founding-era regulations in turn.
 13 In support of its claim that “[d]uring the colonial period and through the Founding,
 14 colonial and state governments imposed regulations on firearms hardware and
 15 accessories and other weapons deemed to pose threats to public safety,” Def.’s Suppl.
 16 Br. 37, the State relies primarily on three types of laws: restrictions on the storage of
 17 gunpowder, restrictions on “trap guns,” and bans on the “carrying of dangerous *and*
 18 unusual weapons,” *id.* at 37-40.¹⁰ None of the proposed laws is remotely similar to the
 19 State’s flat ban on acquiring and possessing a class of arms typically possessed for
 20 lawful purposes.

21 ***Gunpowder Laws:*** The State first introduces several Colonial Period regulations
 22

23
 24 ¹⁰ The State also cites the Conductor Generalis, “a founding-era guide for
 25 justices of the peace, sheriffs, and constables” that described an “affray,” and included
 26 instances “where a man arms himself with dangerous and unusual weapons, in such a
 27 manner as will naturally cause a terror to the people.” Def.’s Suppl. Br. at 40 (quoting
 28 The Conductor Generalis: Or, the Office, Duty, and Authority of Justices of the Peace,
 High-Sheriffs, Under-Sheriffs, Coroners, Constables, Gaolers, JuryMen, and Overseers
 of the Poor, and also The Office of Clerks of Assize, and of the Peace, &c. Albany,
 1794, at 26). The Conductor Generalis is merely a guide for law enforcement, not an
 enactment. But even if it were a law, it does not ban any “dangerous and unusual
 weapon.” It does nothing more than define “affray” to include the carry of “dangerous
 and unusual weapons” in a way that would “*naturally cause terror to the people.*” *Id.*

on gunpowder storage . But those laws were enacted, as the State admits, Def.’s Suppl. Br. at 38 (citing Cornell Decl. ¶¶ 41, 45), to prevent catastrophic explosions and fires in town limits or near a powder house.¹¹ They were necessary because of the highly combustible and unstable nature of loose gunpowder, which is not a modern concern. They were not enacted to combat crime, in general, or mass killings, more specifically. And, more importantly, they regulated only the *manner* of storing gunpowder; they did not prohibit possession or use of any common arm. These distinctions are key because, as explained below, *see infra*, Argument, Part I.C.2.b, the State’s proposed historical analogues must be both similar in type and similar in justification. *Bruen*, 142 S. Ct. at 2133. Dissimilar laws are not legitimate analogues rooted in “an enduring American tradition of state regulation” of arms. *Id.* at 2155-56.

Trap Gun Restrictions: “Trap guns” were devices rigged to fire without the presence of a person. Spitzer Decl. ¶ 50. They could be triggered by any unsuspecting animal or person that happened to walk by. The State claims that the existence of laws restricting the use of “trap guns” in early America provides relevant historical support for its modern magazine ban because they “originated during the colonial period” and “were enacted due to the threat posed to innocent life.” Def.’s Suppl. Br. at 38-39 (citing Spitzer Decl. ¶¶ 50-53, Ex. F). But like early gunpowder restrictions, these laws, by and large, did not ban any class of arms. Rather, they regulated the *manner* of using them. That is, they banned setting a loaded, unattended gun to prevent unintended discharges. For instance, the 1771 New Jersey law the State relies on, *id.* at 39, does not ban “trap guns” (or any class of arms) per se; it prohibits the manner of setting “any loaded Gun in such Manner as that the same shall be intended to go off or

¹¹ *See, e.g.*, Thomas Wetmore, Commissioner, The Charter and Ordinances of the City of Boston: Together with the Acts of the Legislature Relating to the City at 142-143 (1834), *available at The Making of Modern Law: Primary Sources* (An Act ... Prudent Storage of Gun Powder within the Town of Boston. Whereas the depositing of loaded arms in the houses of the town of Boston, . . . is dangerous . . . when a fire happens to break out in said town”).

1 discharge itself, or be discharged by any String, Rope, or other Contrivance,” 1763-
 2 1775 N.J. Laws 346, An Act for the Preservation of Deer and Other Game, and to
 3 Prevent Trespassing with Guns, ch. 539, § 10.

4 What’s more, these laws (according to the State) were enacted “due to the threat
 5 posed to innocent life,” Def.’s Suppl. Br. at 39 (citing Spitzer Decl. ¶ 50), (both
 6 human and animal). But that characterization of the justification for such laws is far
 7 too broad. Just about any gun restriction can be described as necessary to promote
 8 public safety or protect life. But “trap gun” restrictions were necessary because setting
 9 loaded, unattended guns to discharge automatically imposes an incredibly specific
 10 threat to life that is entirely unrelated to violent crime.

11 ***Bans on Carry:*** Finally, the State turns to Colonial-era restrictions on carrying
 12 “dangerous *and* unusual” weapons. Def.’s Suppl. Br. at 39 (citing *Bruen*, 142 S. Ct. at
 13 2143; *see also* Spitzer Decl. Ex. E). Once again, the State is relying not on flat bans on
 14 the possession or use of any arm, but rather the *manner* of carrying them in public
 15 (i.e., concealed). Like restrictions on gunpowder storage and setting “trap guns,” early
 16 restrictions on concealed public carry are not remotely analogous to California’s
 17 magazine ban. It matters not that, according to the State, some such laws targeted the
 18 concealed public carry of particular types of firearms. *See* Def.’s Suppl. Br. at 39
 19 (citing *See* Spitzer Decl. Ex. E (citing *The Grants, Concessions, And Original*
 20 *Constitutions of The Province of New Jersey* (1881)). What matters is that, unlike the
 21 magazine ban at issue here, such laws did *not* ban possession of even those arms
 22 targeted for restriction.

23 **c. Antebellum America and Reconstruction**

24 Failing to identify a single relevant Founding-era law, let alone an “enduring
 25 American tradition” of regulation, the State shifts its focus to antebellum America and
 26 the Reconstruction Era. The State argues that “[d]uring the antebellum and postbellum
 27 period, around the time that the Fourteenth Amendment was ratified, numerous states
 28 restricted particular weapons deemed to be particularly dangerous or susceptible to

1 criminal misuse.” Def.’s Suppl. Br. at 41. Even if that is true, such a tradition is
 2 irrelevant to the prohibition of standard magazines over ten rounds—arms that millions
 3 of Americans possess and use for lawful purposes, including (but not limited to) self-
 4 defense. What’s more, *Heller* already rejected the premise that arms that are otherwise
 5 commonly chosen by the law-abiding for lawful purposes can be banned just because
 6 criminals might misuse them. 554 U.S. at 628-29 (maj. op.). Indeed, *Heller* struck
 7 D.C.’s modern handgun ban even though such weapons made up a significant majority
 8 of all stolen guns and are *overwhelmingly* used in violent crimes. *Id.* at 698 (Breyer, J.,
 9 dissenting). Beyond these fundamental flaws in the State’s reasoning, however,
 10 Reconstruction-era history does nothing to justify California’s modern magazine ban
 11 under the *Bruen* test.

12 ***Restrictions on Carrying Blunt Weapons, Bowie Knives, and Similar Arms:***

13 The State first argues that “[t]hroughout the 1800s, states enacted a range of laws
 14 restricting the *carrying* of blunt weapons,” including laws restricting “bludgeons,”
 15 “billies,” certain “clubs,”¹² “slungshots,” “sandbags,” and concealed weapons,
 16 generally. Def.’s Suppl. Br. at 41 (citing Spitzer Decl. Ex. C) (emphasis added). And
 17 49 states banned so-called Bowie knives. *Id.* (Spitzer Decl. ¶ 39 & Ex. C). But as the
 18 State itself admits, “[m]ost of these restrictions targeted the *carrying* of such” items,
 19 not the mere possession. *Id.* (citing Spitzer Decl. Ex. E at 24). The State cites a *single*
 20 such law, adopted in Iowa in 1887, that also banned the possession of Bowie knives
 21 and other “dangerous or deadly weapon[s].” *Id.* (citing Spitzer Decl. Ex. E at 24). Both
 22 common sense and Supreme Court precedent are clear that courts should “not ‘stake
 23 [their] interpretation of the Second Amendment upon a single law, in effect in a single
 24

25
 26 ¹² The State candidly admits that “[t]hese 19th century laws generally prohibited
 27 slaves from carrying clubs.” Def.’s Suppl. Br. at 41, n. 22. It should go without saying
 28 that racist laws enacted to disarm classes of marginalized people provide no legitimate
 analogue for modern day arms bans. If they did, certainly *Bruen* would have mentioned
 them even once.

1 [State], that contradicts the overwhelming weight of other evidence regarding the right
 2 to keep and bear arms for defense.’’ *Bruen*, 142 S. Ct. at 2153 (quoting *Heller*, 554
 3 U.S. at 632).

4 What’s more, David Kopel, a renowned Second Amendment historian and
 5 prolific legal scholar whose work was cited favorably in *Bruen*, recently published a
 6 detailed evaluation of Reconstruction-era Bowie knife laws. He concluded:

7 *At the end of the 19th century, no state prohibited*
 8 *possession of Bowie knives.* Two states, Tennessee and
 9 Arkansas, prohibited sales. The most extreme tax
 10 statutes, such as Alabama’s \$100 transfer tax from 1837,
 11 had been repealed.

12 Only a very few statutes had ever attempted to regulate
 13 the peaceable possession or carrying of Bowie knives
 14 more stringently than handguns or other fighting knives,
 15 such as dirks and daggers. Of those, only the 1838
 16 Tennessee sales ban was still on the books by the end of
 17 the century.... As with handguns, *the states were nearly*
 18 *unanimous in rejecting bans on adult possession or*
 19 *acquisition of Bowie knives....* The much more common
 20 approach was to legislate against concealed carry,
 21 criminal misuse, or sales to minors.

22 Barvir Decl. Ex. 38 at 304.

23 So, once again, the State relies primarily on historical laws restricting just the
 24 *manner* of carrying arms in public, not their possession or even use. At best, the State
 25 has provided evidence that the act of concealed carry was disfavored in
 26 Reconstruction-era America. But such evidence was not enough to justify modern-day
 27 bans on concealed carry in *Bruen*, so it is difficult to see how such enactments could
 28 bear the weight of California’s flat ban on the acquisition, possession, and use of
 commonly possessed magazines.

29 ***Bans on Carrying Revolvers and Pistols:*** Next, the State takes aim at
 30 restrictions on carry of revolvers and pistols. Def.’s Suppl. Br. at 42 (citing Roth Decl.,
 31 ¶ 26) (discussing restrictions on the *carrying of certain concealable weapons* in
 32 Kentucky, Louisiana, Indiana, Georgia, and Virginia between 1813 and 1838). And
 33 again, the State misses the mark. Because, again, restrictions on the manner of carrying

1 arms in public do not impose a burden on the Second Amendment that is in any way
 2 like the burden imposed by a ban on their acquisition and possession. They are not
 3 “relevantly similar” as *Bruen* requires. 142 S. Ct. at 2122.

4 Perhaps the closest the State comes to identifying relevant historical analogue
 5 are two laws, adopted in the 1870s in Arkansas and Tennessee, that restricted not just
 6 public carry, but also imposed “regulations on dealers selling pistols.” Def.’s Suppl.
 7 Br. at 43 (citing Rivas Decl. ¶ 15). But even those late laws are not persuasive. As the
 8 State’s brief bizarrely explains, in less than ten years, both of “[t]hese attempts to
 9 regulate pistols *were invalidated by the state courts* for being overly broad in
 10 prohibiting the keeping and carrying of all pistols in public. *Id.* at 43 (citing *Andrews v.*
 11 *State*, 50 Tenn. 165 (1871); *Wilson v. State*, 33 Ark. 557 (1878)) (emphasis added).
 12 The State tries to resuscitate these short-lived restrictions by explaining that they were
 13 later amended to restrict only concealed public carry of certain pistols, *id.* at 43 (citing
 14 *State v. Wilburn*, 66 Tenn. 57, 61 (1872); Acts of the General Assembly of Arkansas,
 15 No. 96 § 3 (1881); Rivas Decl. ¶ 17). But these narrower concealed carry bans are still
 16 concealed carry bans. And historical concealed carry bans (especially in just two
 17 states) justify modern day concealed carry bans, let alone flat bans on the possession
 18 and acquisition of protected arms.

19 What’s more, *Bruen* warned that courts should refrain from “giving
 20 postenactment history more weight than it can rightly bear.” 142 S. Ct. at 2136. “[T]o
 21 the extent later history contradicts what the text says,” as the State’s Reconstruction-
 22 era concealed carry bans do, “the text controls.” *Id.* at 2137 (citing *Gamble v. United*
 23 *States*, -- U.S. --, 139 S. Ct. 1960, 1987 (2019) (Thomas, J., concurring)).

24 ***Non-statutory Regulation of Repeaters:*** Finally, in a last-ditch effort to find
 25 support for its unprecedented ban on magazines over ten rounds, the State resorts to
 26 tales of regulation of repeating rifles, like the Winchester and Henry lever-action
 27 repeating rifles. Def.s’ Suppl. Br. at 45-46. But instead of pointing to an actual *law*
 28 regulating these rifles, the State makes dubious claims that these firearms were not

1 really popular amongst civilians at the time, Def.’s Suppl. Br. at 45 (citing Vorenberg
 2 Decl. ¶¶ 21-25, 47, 96-97, and that “de facto regulation of repeating rifles effectively
 3 controlled the[ir] use and circulation ... reducing any need for legislative responses to
 4 the threats that they posed,” *id.* at 46 (citing Vorenberg Decl. ¶ 8). Neither claim
 5 provides the relevant historical justification for California’s modern magazine ban.

6 First, Vorenberg strangely claims that few civilians bought repeating rifles, but
 7 also, that they were so plentiful that Native Americans somehow acquired enough of
 8 them to legitimately threaten U.S. military forces. Vorenberg Decl. ¶ 63 (“Native
 9 Americans [at the Battle of the Little Bighorn] carried a variety of weapons, many of
 10 which were Winchesters.”). Native Americans did not have factories to manufacture
 11 their own rifles—they acquired them secondhand. Indeed, as Vorenberg explains,
 12 “[m]any of the weapons had been seized from American emigrants and settlers whom
 13 the Natives had attacked. Many also had been robbed from shippers heading to or
 14 through the Western Territories.” *Id.* at ¶ 60. Henry-Winchester rifles then *must* have
 15 been possessed by American citizens

16 Vorenberg also acknowledges that Americans came to regard self-defense as
 17 important in the western states, and the Winchester Company capitalized on this in
 18 their marketing. *Id.* at ¶ 54. Yet he contends they were not popular and did not sell
 19 well, and even the U.S. army rarely had them. *Id.* at ¶¶ 55-59. Unfortunately for
 20 Vorenberg and the State, only about one-third of the rifles produced went to foreign
 21 governments, and the rest stayed in the United States. Hlebinsky Decl. ¶ 31. Given that
 22 the military did not adopt Henry-Winchester rifles, and given that over 100,000 of
 23 them that were produced in the Reconstruction era stayed in the United States, it
 24 follows that they were commonly owned by regular citizens. *Id.*; *see also* Barvir Decl.
 25 Ex. 39 at 319 (“The best of these was the sixteen-shott Henry Rifle, introduced in 1861
 26 with a fifteen-round magazine. The Henry Rifle was commercially successful, but
 27 Winchester Model 1866, with its seventeen-round magazine, was massively
 28 successful.”)

1 While Henry-Winchesters were quite clearly popular by the time the Fourteenth
 2 Amendment was ratified, the State failed to identify a single *law* banning the
 3 acquisition and possession of these rifles based on their firing capacity at any time in
 4 history. Indeed, as the State has candidly admitted, *there simply are no such*
 5 *enactments* to be found. *Id.*; Vorenberg Decl. ¶ 8 (“[E]xplicit legal text prohibiting
 6 civilian possession of the most dangerous weapons of war was not commonly the
 7 means by which such weapons were regulated in the United States.”). Its attempt to
 8 instead rely on post-Civil War regulation that was never adopted by any legislative
 9 body in the country does not constitute the sort of “*enduring American tradition of*
 10 *state regulation*” that *Bruen* requires. Nor do its convoluted and speculative
 11 explanations for why legislative action was purportedly unnecessary. *See* Def.’s Suppl.
 12 Br. at 46 (citing Vorenberg Decl. ¶¶ 63-64) (characterizing the U.S. army’s ban on
 13 trade of repeating rifles to Native Americans after Little Big Horn as a restriction on
 14 their ownership by non-statutory means). To the contrary, *Bruen* demands that the
 15 State identify relevant and well-established historical laws evidencing an American
 16 tradition of similar regulation—not excuses for why no such laws exist.

17 **d. Twentieth Century regulations**

18 As discussed above, the Supreme Court gave little weight to pre-Founding era
 19 history, finding it only relevant where there is a “long, unbroken line of common-law
 20 precedent stretching from Bracton to Blackstone” that is “far more likely to be part of
 21 our law than a short-lived, 14th-century English practice.” *Bruen*, 142 S. Ct at 2136.
 22 The Court considered 20th century history even *less* important. It only referenced it in
 23 a footnote, stating that it would not even “address any of the 20th-century historical
 24 evidence brought to bear by respondents or their *amici*. As with their late-19th-century
 25 evidence, the 20th-century evidence presented by respondents and their *amici* does not
 26 provide insight into the meaning of the Second Amendment when it contradicts earlier
 27 evidence.” *Id.* at 2154, n.28. The State nevertheless cites several laws adopted in the
 28 20th century that it claims banned firearms based on their firing capacity. Def.’s Suppl.

Br. 48-49. These laws contradict this country’s long history of *not* banning classes of arms in common use for lawful purposes. They are thus irrelevant outliers that provide no insight into the original meaning of the Second Amendment. This Court should thus follow the *Bruen* Court’s lead and ignore the State’s 20th century evidence.

Indeed, based on *Bruen*’s clear guidance, the first wave of post-*Bruen* Second Amendment decisions have rebuked calls to rely on evidence of 20th century regulations. As the Northern District of New York recently observed, “to the extent these laws were from the 17th or 20th centuries, the [c]ourt has trouble finding them to be ‘historical analogues’ that are able to shed light on the public understanding of the Second Amendment in 1791 and/or of the Fourteenth Amendment in 1868.” *Antonyuk v. Hochul*, No. 22-cv-0986, 2022 U.S. Dist. LEXIS 201944, at *127 (N.D.N.Y. Nov. 7, 2022). And the Western District of New York likewise observed that:

Bruen itself invalidated a century-old New York proper-cause requirement similarly in effect in five other states as well as the District of Columbia. That seven jurisdictions enacted similar restrictions was *insufficient* in the face of a much broader and much older public-carry tradition. ***If such was a failure of analogs or tradition in Bruen, the State’s argument must also fail here.***

Hardaway v. Nigrelli, No. 22-cv-771, 2022 U.S. Dist. LEXIS 200813, at *37, n.16 (W.D.N.Y. Nov. 3, 2022) (double emphasis added); *see also United States v. Nutter*, No. 21-cr-00142, 2022 U.S. Dist. LEXIS 155038, at *9 (S.D. W. Va. Aug. 29, 2022) (holding that laws originating in the 20th century alone cannot uphold a law unless similar laws existed in the Founding era); *Firearms Pol’y Coal., Inc. v. McCraw*, No. 21-cv-1245, 2022 U.S. Dist. LEXIS 152834, at *29 (N.D. Tex. Aug. 25, 2022) (holding that 22 state laws adopted in the 20th century was insufficient historical justification for a ban on firearms purchases for those under the age of 21).

In an apparent effort to see just how many pages it can fill, the State ignores all of this precedent to argue that 20th century history justifies its modern magazine ban. Def.’s Suppl. Br. 48-49. While such evidence is irrelevant to the question before this

1 Court, Plaintiffs address the State’s proposed 20th century supposed “analogues.”

2 To begin with, this Court already considered much of the 20th century history
 3 the State’s supplemental brief references and found it unpersuasive. *Duncan v.*
 4 *Becerra*, 366 F. Supp. 3d 1131, 1149, 1150 (S.D. Cal. 2019). Because the State could
 5 find no restrictions on magazines over ten rounds enacted before 1990, the State
 6 argued in its opposition to summary judgment that “the historical prohibition question
 7 is not one of detachable magazine size, but instead is a question of firearm ‘firing-
 8 capacity.’” *Id.* Casting that wider net, the State presented several laws dating to the
 9 1930s. Def.’s Opp’n Mot. Summ. J. 4-5 (citing Uniform Machine Gun Act, ch. 206, §
 10 1, 1933 S.D. Sess. Laws 245, 245; Act of Mar. 7, 1934, ch. 96, § 1(a), 1934 Va. Acts
 11 137, 137; Act of July 2, 1931, § 1, 1931 Ill. Laws 452, 452; Act of July 7, 1932, no. 80,
 12 § 1, 1932 La. Acts 336, 337; Act of Mar. 2, 1934, no. 731, § 1, 1934 S.C. Acts 1288).
 13 But, as this Court observed, the laws the State cited then (and cites again now) were
 14 actually restrictions on *machine guns*,¹³ and all were repealed within decades. *Duncan*,
 15 366 F. Supp. 3d at 1150.¹⁴ What’s more, all had limits of *over* ten rounds. *Id.* And two
 16 of the cited laws only punished offensive uses, but “protected citizen machine gun
 17 possession for defensive use or any other use that was not manifestly aggressive or
 18 offensive.” *Id.* at 1153. Only the District of Columbia has had a capacity restriction in
 19 place since the 1930s, and even there, the limit was more than 10. *Id.* The State
 20 submits these same laws once again, even though the intervening decision in *Bruen*
 21 weakened their persuasive value by making clear that 20th century laws are of little use
 22 to the Second Amendment analysis. Opp’n at 48.

23 Through one of its experts, the State submits additional laws from the 1920s and
 24

25 ¹³ For the full text of all the laws the state referred to in its earlier briefing, as
 26 well as the new laws it submits for the first time, see the Spitzer Declaration at Ex. D.

27 ¹⁴ Of course, what makes a machine gun “dangerous and unusual” is its ability to
 28 fire automatically, not to accept detachable magazines over 10 rounds. *See Staples*, 511
 U.S. 600, 612 (1994) (identifying the difference between the lawfully possessed AR-15
 and the unlawfully possessed M-16 military machine gun, both capable of accepting
 “large capacity magazines,” as the latter’s ability to fire automatically).

1 1930s for the Court’s consideration. Opp’n at 48 (citing Spitzer Decl. ¶¶ 12-14, Ex. D).
 2 Just like the 20th-century firing-capacity laws this Court already rejected, *Duncan*, 366
 3 F. Supp. 3d at 1150, several of Mr. Spitzer’s newly uncovered laws restricted
 4 automatic firearms only, with three (Oregon, Pennsylvania, and Wisconsin) limiting
 5 such magazines to just *two* rounds. Spitzer Decl. ¶ 13 (citing 1933 Or. Laws 488, An
 6 Act to Amend Sections 72-201, 72-202, 72-207; 1929 Pa. Laws 777, §1; 1933 Wis.
 7 Sess. Laws 245, 164.01). The State also draws special attention to a 1927 California
 8 law, but that too applied only to automatic weapons. Opp’n at 48 (citing 1927 Cal. Stat.
 9 938). The State even bizarrely talks about federal restrictions that *failed* to pass. Opp’n
 10 at 49 (discussing an earlier draft of the National Firearms Act that would have
 11 restricted semiautomatic weapons).

12 Of the restrictions purportedly applying to semiautomatic firearms¹⁵ that were
 13 not already rejected by this Court, some limited magazines to just one or two rounds,
 14 revealing that the restriction was not so much about capacity as it was about restricting
 15 *automatic* weapons. Otherwise, the restriction would have made most firearms of the
 16 time illegal. Spitzer Decl. ¶ 13 (citing 1927 Mass. Acts 413, 413-14; Act of Apr. 10,
 17 1933, ch. 190, 1933 Minn. Laws 231, 232). Others were not capacity restrictions at all,
 18 except as they pertained to hunting, as Mr. Spitzer explains in a footnote. Spitzer Decl.
 19 ¶ 13, n.30. The State’s brief attempts to mislead this Court, grouping all of these
 20 unrelated restrictions together as if they all pertained to blanket magazine capacity
 21 restrictions on weapons in common use for lawful purposes. That is not the case. More
 22

23
 24 ¹⁵ Spitzer refers to “ambiguous law[s] that could apply to semi-automatic in
 25 addition to automatic firearms.” Spitzer Decl. ¶ 10. But several laws he categorizes as
 26 “ambiguous” *unmistakably* refer to machine guns. *See, e.g.* 1933 Cal. Stat. 1169
 27 (referring to machine guns); 1932 La. Acts 337-38 (“An Act to Regulate the Sale,
 28 Possession and Transportation of Machine Guns”); 1927 Mass. Acts 413 (defining
 machine guns); 1934 S.C. Acts 1288 (“For the purposes of this Act the word “machine
 gun” applies to and includes all firearms commonly known as machine rifles, machine
 guns and sub-machine guns of any caliber whatsoever, capable of automatically
 discharging more than eight cartridges successively without reloading, in which the
 ammunition is fed to such gun from or by means of clips, disks, belts or other
 separable mechanical device.”). There is no “ambiguity.”

1 importantly, most of these laws were later repealed. Barvir Decl. Ex. 39 at 317 (“The
2 [District of Columbia] stands alone in its historical restriction of magazines.”).

3 To be clear, 20th century laws do not establish a historical tradition; they can
4 only confirm what came before. And as already discussed, there is no relevant
5 Founding-era or Reconstruction-era tradition of banning a class of arms commonly
6 chosen for lawful purposes. *See supra*, Argument, Part I.C.1.b-c. The 20th century
7 laws the State cites thus contradict the relevant historical tradition instead of
8 reaffirming it. Under *Bruen*, that makes them irrelevant to the analysis.

9 10 **2. The State’s Unmoored Use of Analogical Reasoning Defies *Bruen* and Should Be Ignored**

11 The State finally argues that its modern magazine ban addresses an
12 “unprecedented societal concern” and “dramatic technological changes” that entitle the
13 State to wide latitude in identifying “relevant historical analogues.” Def.’s Suppl.
14 Br. 26 (citing *Bruen*, 142 S. Ct. at 2132). To be sure, the *Bruen* Court did note that
15 “unprecedented societal concerns or dramatic technological changes may require a
16 *more nuanced approach*” to determining whether a law is consistent with historical
17 tradition. 142 S. Ct. at 2132 (emphasis added). But it cautioned that reasoning by
18 analogy in such cases must be carefully constrained by an inquiry into both “whether
19 modern and historical regulations impose a comparable burden on the right of armed
20 self-defense and whether that burden is comparably justified.” *Id.* at 2133. It did not
21 suggest, as the State does, that such changes give the government a blank check to rely
22 on just about any historical practice no matter how far removed from *Bruen*’s clear
23 dictate that burdens on the Second Amendment must be rooted in “an *enduring*
24 American tradition of *state regulation*,” *Id.* at 2155-56 (emphasis added). Even if it
25 did, California’s modern magazine ban addresses neither an “unprecedented societal
26 concern” nor a “dramatic technological change” in firearms.

27 ///

28 ///

a. California’s modern magazine ban does not address an unprecedented societal concern or dramatic technological change

“[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment.” *Bruen*, 142 S. Ct. at n. 2131. The State contends that its modern magazine ban addresses the supposedly unprecedented social problem of mass shootings, arguing that modern weapons equipped with magazines over ten rounds have empowered individuals, *acting alone*, to commit such atrocities. Opp’n at 31.¹⁶

But, tragically, mass murder is not some new phenomenon in America. It has plagued the world for centuries, as the State’s own expert concedes (though contending early mass murders were a “group activity”): “[M]ass murder has been a fact of life in the United States since the mid-nineteenth century, when lethal and non lethal violence of all kinds became more common.” Roth Decl. ¶ 40. “From the 1830s into the early twentieth century, mass killings were common.” *Id.* “Mass murder is not particularly new.... Almost everything can be, and has been, used to commit mass murder in America.” Cramer Decl. ¶46; *see also* Cramer Decl. ¶ 24 (confirming that there were over 1,600 known mass murders by 1960).

Such killings committed by a single person acting alone is not a new development either; it has persisted since at least the end of the 18th century (and probably longer). The State’s own expert witness, Professor Vorenberg, tells of an 1869 mass shooting in Florida. Vorenberg Decl. ¶ 97. A single shooter “fired ‘thirteen or fourteen shots in rapid succession,’ killing and wounding many of the party.” *Id.*

¹⁶ The State arbitrarily limits its historical overview to mass shootings involving ten or more victims killed. Def.’s Suppl. Br. 31. While there are many competing definitions and standards, Plaintiffs know of no definition of “mass shooting” or “mass killing” that limits it to incidents where ten or more are killed.

1 “because of the speed and volume of the shots fired,” it was reported that the assailant
2 had likely used a Henry rifle. *Id.*

3 Plaintiffs’ expert witness, Clayton Cramer, has been working on research into
4 the history of mass murder since 2019. Cramer Decl. ¶ 3. He has painstakingly
5 examined archived articles to identify thousands of mass murders in American history.
6 *Id.* ¶¶ 12-17. While there are competing definitions of “mass murder,” he has
7 synthesized the FBI and Secret Service definitions for his project, defining a mass
8 murder to include at least two murder victims within 24 hours. *Id.* ¶ 4. Further, Cramer
9 excludes mass murders committed during riots, gang disputes, mutual combat, acts of
10 war or other government-backed mass killings, and most mass murders of Native
11 Americans by other Native Americans. *Id.* ¶¶ 5-11. Cramer finds that “individual mass
12 murder is neither particularly modern nor dependent on technological advances.” *Id.* ¶
13 19. And he has found that firearms were used to commit several mass murders in the
14 19th century. *Id.* ¶ 24 (detailing firearm-related mass murders that occurred in 1860,
15 1865, 1870, and 1889).

16 Given its arbitrary limitation of “*shootings* with ten or more victims killed,”¹⁷
17 the State may complain that many of these mass killings were not as lethal as the mass
18 public shootings of today. Def.’s Suppl. Br. 31-32 (emphasis added). But mass killings
19 with ten or more victims did happen in the past, they just tended to involve explosives
20 or arson more often than firearms, as Cramer details extensively. Cramer Decl. ¶¶ 32-
21 34 (detailing mass murders that killed 10 or more people in 1903, 1913, 1916, 1920,
22 1925, 1927, 1944, 1955, and 1958). Some of the mass murders described had horrific
23 numbers of victims, such as the 1955 dynamite bombing of an airliner that killed 44
24 people, an arsonist killing 27 people in 1913, or another arsonist killing 95 in 1958. *Id.*
25 All three of these were acts of individuals acting alone. *Id.* Mass killings are simply not
26

27 ¹⁷ The limitation is arbitrary indeed. The State’s new tactic is “to restrict [the]
28 analyses to only the rarest kinds of mass shootings, those with a huge number (10 or
more) of fatalities (Klarevas 2022)....

1 a new problem in our history.

2 But even if there were good reason to arbitrarily limit the definition to only
 3 *shootings* with ten or more killed and comparing that to only firearm-related mass
 4 killings of earlier eras, this is a difference in degree, not in kind. The State is engaging
 5 in a forbidden interest-balancing and legislative-deference argument, essentially telling
 6 this Court that because, it claims, our mass shooting (but not mass killing) problem is
 7 worse now, the State should be given more room to rely on stretched analogies to
 8 uphold its otherwise unprecedented law. This Court should reject that invitation. *Bruen*
 9 tells us that its examination of analogues is not meant to be a way to sneak back in the
 10 abrogated interest-balancing tests: “This does not mean that courts may engage in
 11 independent means-end scrutiny under the guise of an analogical inquiry.... Analogical
 12 reasoning requires judges to apply faithfully the balance struck by the founding
 13 generation to modern circumstances.... It is not an invitation to revise that balance
 14 through means-end scrutiny.” *Bruen*, 142 S. Ct. at 2133, n.7.

15 What’s more, the State’s premise that mass shootings, specifically, are so
 16 common today that they rise to the level of an “unprecedented societal concern” that
 17 justifies resort to a “more nuanced approach,” does not really comport with findings
 18 that (even today) such crimes, though horrific, really are relatively rare. *Miller v.*
 19 *Bonta*, 542 F. Supp. 3d 1009, 1018 (S.D. Cal. 2021) (“In the *terrible mass shooting*
 20 *context, which fortunately is a rare event*, reducing the number of innocent victims is
 21 the State’s goal, although it is not at all clear that a less accurate rifle would reduce the
 22 number of victims. A less accurate rifle in the hands of a mass shooter may very well
 23 result in different victims, but not necessarily less victims. On the other hand, *in the*
 24 *self-defense context, which seems to be more common*, taking accurate shots at
 25 attackers is vitally important for the innocent victim.”); *see also* Kleck Decl. ¶ 40
 26 (“[T]he risk of an American being killed in a ‘gun massacre’ is less than 1/14th of the
 27 risk of being killed by a bolt of lightning—itself a freakishly rare event.”).

28 Nor has there been, as the State argues, Opp’n at 26-30, a dramatic change in

1 firearm technology that would justify the State’s use of overextended analogies to
 2 justify its modern magazine ban. Semiautomatic firearms with detachable magazines
 3 are a technological *improvement* over what came before; that much cannot be denied.
 4 But the more significant shift occurred between the American Revolution and the
 5 ratification of the 14th Amendment. In 1791, most firearms were single-shot weapons
 6 requiring time to reload between shots. *But see* Hlebinsky Decl. ¶¶ 21-23 (commenting
 7 on various multi-shot firearms that existed during or before the founding era). But by
 8 1868, and over the decades that followed, revolvers gave Americans five or six shots in
 9 a single compact firearm, while repeating rifles like the Henry Rifle allowed the bearer
 10 to fire up to 16 shots before reloading, with only a quick operation of the lever action
 11 between each shot. Hlebinsky Decl. ¶¶ 30, n.43. The Model 1866 Winchester Rifle
 12 similarly had a capacity over ten rounds, and of the 164,466 combined Henry and
 13 Winchester Rifles that were made between 1861 and 1877, two-thirds were sold to
 14 civilians. *Id.* ¶ 31.

15 Going from single-shot firearms to repeating rifles and revolvers is a far more
 16 significant technological leap than going from repeating rifles and revolvers to
 17 modern-day semiautomatics with detachable magazines. Yet as Plaintiffs established
 18 above, not one law banned possession of repeating rifles, nor did any state limit
 19 civilians to repeating rifles with capacities of 10 rounds or less. Indeed, the Civil War
 20 and Reconstruction eras saw a dramatic change in individual firepower, but the
 21 government did not respond to that change by banning (or even regulating) firearms
 22 based on their firing capacity.

23
 24 **b. Even if resorting to “analogical reasoning” were**
 25 **appropriate, the State has not established that its modern**
 26 **magazine ban imposes a “comparable burden” as any**
 27 **historical analogue or is “comparably justified”**

28 If this Court concludes that the State’s modern magazine ban really does address
 some dramatic technological change or new social issue, the sort of “analogical
 reasoning” *Bruen* requires demands that the State present “well established and

1 representative” historical analogues. *Bruen*, 142 S. Ct. at 2133. But not just any law or
 2 tradition can be plucked from the history books. While the State need not identify a
 3 “historical twin,” it must present a genuine analogue—one that is “relevantly similar”
 4 to the modern restriction it seeks to defend. *Id.* at 2122. The *Bruen* Court did not
 5 establish all the ways proposed analogues may be relevantly similar, but it explained
 6 that “*Heller* and *McDonald* point toward at least two metrics: *how* and *why* the
 7 regulations burden a law-abiding citizen’s right to armed self-defense.” *Id.* at 2133
 8 (emphasis added). Speaking very generally, “a historical statute cannot earn the title
 9 ‘analogue’ if it is clearly more distinguishable than it is similar to the thing to which it
 10 is compared.” *Antonyuk v. Hochul*, No. 22-cv-0986, 2022 U.S. Dist. LEXIS 182965, at
 11 *20 (N.D.N.Y. Oct. 6, 2022). In short, dissimilar historical laws cannot meet the *Bruen*
 12 standard even if they impose comparable burdens.

13 To that end, when looking at the “how,” courts must analyze whether a historical
 14 analogue imposes a “comparable burden.” *Bruen*, 142 S. Ct. at 2133. In conducting
 15 that analysis, courts should consider whether the challenged modern law and the
 16 proposed historical analogue impose a similar *type* of burden (not just a similar *severity*
 17 of burden) on the right of armed self-defense. For example, old laws prohibiting the
 18 concealed carry of small pistols (but allowing for their open carry, or for the open carry
 19 of larger pistols) do not impose a comparable burden as, for example, D.C.’s total ban
 20 on handguns that was invalidated in *Heller*. *See* 554 U.S. at 573 (“The District’s total
 21 ban on handgun possession in the home amounts to a prohibition on an entire class of
 22 ‘arms’ that Americans overwhelmingly choose for the lawful purpose of self-
 23 defense.”) The former limited only the particular method of *carry* of *some* pistols,
 24 while the latter restricted even the mere possession of all pistols in the home. The
 25 burdens imposed are wildly different—even if it might be said that they impose as
 26 severe or even more severe a burden on the ability to engage in self-defense at a given
 27 moment. So they cannot meet the test laid out in *Bruen*.

28 When looking at the “why,” courts consider “whether th[e] burden is

1 comparably justified.” *Bruen*, 142 S. Ct. at 2133. This side of the analogical reasoning
 2 coin ensures that historical laws enacted for one purpose are not used as a pretext to
 3 justify a modern law that was enacted for entirely different reasons. *Id.*

4 This is the sort of strained comparison-making that all of the State’s proposed
 5 historical analogues rely on. For instance, as discussed above, the State’s reliance on
 6 Founding-era gunpowder storage laws, Def.’s Suppl. Br. 37-38 (citing Cornell Decl. ¶¶
 7 41, 45), misses the analogical mark because they do not impose “comparable burdens”
 8 nor are they “comparably justified.” So while it is true that there are examples of
 9 restrictions on keeping loaded guns in the home or storing gun powder, those laws
 10 were not enacted to address crime (let alone mass killings, even though those existed at
 11 the time). They were fire prevention measures enacted to prevent explosions and
 12 unintended discharges because of the highly combustible nature of gunpowder at the
 13 time. Def.’s Suppl. Br. 38 (citing Cornell Decl. ¶¶ 41, 45). More important, while such
 14 laws restricted the *manner of storing arms*, they indisputably did *not* prohibit the
 15 possession or acquisition of any arms—the burden that the State’s modern magazine
 16 ban challenged here imposes.¹⁸ These things are not “relevantly similar” under *Bruen*
 17 or any reasonable analysis.

18 As Judge Bumatay observed in his dissent en banc:

19
 20 Not only is California’s ban not historically longstanding,
 21 but it also *differs in kind* from the regulatory measures
 22 mentioned in *Heller*. Regulations on possession by
 23 people dangerous to society, where a firearm may be
 24 carried, and how firearms may be exchanged, *see Heller*,
 554 U.S. at 626-27, *are about the manner or place of*
use and sale or the condition of the user. California’s
 ban, on the other hand, is much more like a “prohibition

25
 26 ¹⁸ As an aside, the State also points out an 1821 Maine law that apparently
 27 “authoriz[ed] town officials to enter any building to search for gun powder.” Def.’s
 28 Suppl. Br. 38, n. 19 (citing Cornell Decl., ¶ 45 (citing 1821 Me. Laws 98, An Act for
 the Prevention of Damage by Fire, and the Safe Keeping of Gun Powder, chap. 25, §
 5)). But a law that merely authorizes law enforcement to search for evidence of a
 crime upon reasonable suspicion *and* after obtaining a warrant, Cornell Decl., ¶ 45, is
not the sort of “relevantly similar” law that *Bruen* requires.

on an entire class of ‘arms’ that is overwhelmingly chosen by American society” for home defense. *Id.* at 628. Also, like the ban in *Heller*, California’s ban extends “to the home, where the need for defense of self, family, and property is most acute.” *Id.*

Duncan V, 19 F.4th at 1158-59 (Bumatay, J. dissenting) (double emphasis added).

Moreover, the State’s reliance on comparable burdens and justifications appears to be just a thinly veiled use of the now-rejected interest-balancing approach. But the Supreme Court did not expressly reject the interest-balancing approach only to re-adopt it later in the same case. “The Second Amendment ‘is the very product of an interest balancing by the people’ and it ‘surely elevates above all other interests the right of law-abiding, responsible citizens to use arms’ for self-defense. (Citation.) It is this balance—struck by the traditions of the American people—that demands our unqualified deference.” *Bruen*, 142 U.S. at 2131 (quoting *Heller*, 554 U.S. at 635). The State seems to want to rid itself of the responsibility of having to establish similar eighteenth or nineteenth century laws altogether, but it cannot do so. *Bruen* may not impose a “regulatory straightjacket,” but it also forbids the “regulatory blank check” the State is apparently requesting. *Id.* at 2133.

II. PLAINTIFFS’ TAKINGS CLAUSE AND DUE PROCESS CLAIMS

The State argues that because the Ninth Circuit sitting en banc decided Plaintiffs’ takings and due process claims, and because *Bruen* does not expressly or implicitly abrogate the en banc panel’s holdings, this Court should enter judgment in favor of the State on those claims. Def.’s Suppl. Br. 37-38 (citing *Duncan V*, 19 F.4th at 1112). The problem with the State’s request is that Plaintiffs’ petition for writ of certiorari asked the Supreme Court to reconsider not only the en banc’s erroneous Second Amendment decision, but also its Takings Clause holding. Petition for Writ of Certiorari at ii, *Duncan v. Bonta*, 142 S. Ct. 2895 (2022) (No. 21-1194).

When the Supreme Court granted certiorari, vacated the en banc ruling, and remanded this case, it did not limit the remand to just Plaintiffs’ Second Amendment claims, and it never decided Plaintiffs’ takings claim. *Duncan v. Bonta*, 142 S. Ct.

1 2895 (2022). That claim (as well as the related due process claim) are thus still very
 2 much alive until all appeals are exhausted.

3 Plaintiffs rest on the takings and due process arguments they made in their
 4 motion for summary judgment.

5 **III. THE STATE DOES NOT NEED MORE TIME TO PACK THE RECORD WITH EVEN** 6 **MORE IRRELEVANT HISTORICAL EVIDENCE**

7 If it weren't enough to submit a 63-page supplemental brief,¹⁹ supported by no
 8 fewer than 10 expert declarations and over 7500 pages of documentary evidence, the
 9 State resurrects its complaint that it needs more time to prepare its case, asking the
 10 Court yet again to delay deciding the matter by several more months so that it might
 11 conduct further discovery and build a historical record. Opp'n at 56-60. Plaintiffs need
 12 not repeat all the reasons that indulging the State's request is improper, but they do
 13 reiterate that *Bruen* requires that the State "demonstrate that [its modern magazine ban]
 14 is consistent with this Nation's historical tradition of *firearm regulation*." *Bruen*, 142
 15 S. Ct. at 2126 (emphasis added). If it can, the law might stand. If it cannot, the law is
 16 unconstitutional. This test does not demand (or even countenance) that the parties
 17 present Ph.D.-level dissertations on American history.

18 Here, all the State must do is present laws from the relevant period that it claims
 19 are "well established and representative" analogues to its modern magazine ban. *Id.* at
 20 2133. This Court then determines whether: (1) those proposed analogues are indeed
 21 well established and representative, and (2) whether they are relevantly similar enough
 22 to uphold the State's magazine ban. *Id.* at 2132-33. Judges are better equipped than
 23

24
 25 ¹⁹ Plaintiffs maintain that Local Rule 7.1(h), which governs the length of all
 26 "briefs or memoranda in support of or in opposition to all motions," applies to the
 27 parties' court-ordered supplemental briefs. Because the State did not request leave
 28 from this Court before filing their oversized brief, the State's supplemental brief
 violates the 25-page page limitation set by the local rules. Pls.' Mot. to Strike Def.'s
 Oversized Suppl. Br. (Dec. 1, 2022) (ECF No. 130). Plaintiffs must still respond to the
 State's arguments and have thus sought leave to file their own oversized brief to do so.
 Ex Parte Mot. to Extend Pg. Limits (Dec. 1, 2022) (ECF No. 131).

1 anyone to compare modern laws to old ones without extrinsic aids. A New York
 2 district court has agreed, stating that “[t]he Court’s view of the State’s expert’s
 3 declaration is that live testimony and cross examination are not needed... The
 4 historical record itself, and not expert arguments or opinions, informs the analysis.”
 5 *Hardaway v. Nigrelli*, No. 22-cv-771, 2022 U.S. Dist. LEXIS 200813, at *6 n.6
 6 (W.D.N.Y. Nov. 3, 2022). Still another New York district court explained that “[t]he
 7 State Defendants are fully capable of meeting their burden of producing analogues
 8 (especially when prodded to do so), and judges appear uniquely qualified at
 9 interpreting the meaning of statutes.” *Antonyuk v. Hochul*, 2022 U.S. Dist. LEXIS
 10 201944, at *125 n.73.

11 These district courts’ observations reflect the realities of *Bruen* itself. Recall,
 12 *Bruen* never even made it past the pleadings in the district court. There was no
 13 discovery. No battle of the experts. No lengthy diatribes from history professors
 14 speculating about why our Forefathers refrained from passing restrictions on public
 15 carry with any real regularity. There was nothing like that. And still, the Supreme
 16 Court managed to analyze the historical laws the government presented and, without
 17 remanding the case for further development, held that New York’s modern carry law is
 18 not “consistent with this Nation’s historical tradition of firearm regulation.” *Bruen*, 142
 19 S. Ct. at 2126, 2156; *but see id.* at 2164 (Breyer, J., dissenting) (complaining that the
 20 Court should remand the case to develop the record).

21 The State’s plot to undermine *Bruen* here is as transparent as it is malicious. The
 22 Attorney General intends to elevate the opinions of its anti-gun “experts” to the
 23 equivalent of historical laws. That is because the State knows it will not find support in
 24 historical laws alone. Indeed, at least of the State’s experts has practically admitted that
 25 the relevant analogues that would be necessary to uphold the State’s modern magazine
 26 ban simply do not exist. Vorenberg Decl. ¶ 8 (“Evidence for these assertions does not
 27 necessarily take the form of statutes or court decisions, and that is entirely
 28 unsurprising: explicit legal text prohibiting civilian possession of the most dangerous

1 weapons of war was not commonly the means by which such weapons were regulated
 2 in the United States during the Civil War and Reconstruction.”). So the State wants
 3 more time so its “experts” can “expand the scope of their research to include additional
 4 archival and unpublished sources.” Opp’n at 59.

5 No such material is relevant here. Only old laws (and potentially historical
 6 evidence that clarifies those laws) are relevant. But the State has not presented a single
 7 18th or 19th century law banning the mere possession of arms commonly possessed by
 8 Americans for lawful purposes. And it has certainly failed to present any historically
 9 relevant law that bans firearms based on their firing capacity—despite the prevalence
 10 of firearms able to fire more than 10 rounds at the Founding. *Helsley Decl.* ¶ 8;
 11 *Hlebinsky Decl.* ¶¶ 20-23. There is not even an outlier to speak of, let alone a “well
 12 established and representative” analogue. *Bruen*, 142 S. Ct. at 2133. The reason the
 13 State has not presented such laws is not because it has had insufficient time to do so, it
 14 is because such laws simply do not exist.

15 **IV. THE STATE IS NOT ENTITLED TO THE EXTRAORDINARY RELIEF OF A STAY,**
 16 **INDEFINITELY DENYING CALIFORNIANS OF THEIR CONSTITUTIONAL RIGHTS**
YET AGAIN WHILE THIS CASE WINDS THROUGH THE COURTS

17 Having failed to raise a single appropriate analogue, the State still insists that the
 18 Court should stay enforcement of its eventual judgment pending appeal. “To decide
 19 whether to grant the Federal Defendants’ motion for a stay pending appeal, our case
 20 law requires that we consider: (1) whether the Federal Defendants have made a strong
 21 showing that they are likely to succeed on the merits; (2) whether the Federal
 22 Defendants will be irreparably injured absent a stay; (3) whether issuance of the stay
 23 will substantially injure the other parties interested in the proceeding; and (4) where the
 24 public interest lies.” *Index Newspapers LLC v. United States Marshals Serv.*, 977 F.3d
 25 817, 824 (9th Cir. 2020).

26 It is true that “[w]hen the request for a stay is made to a district court, common
 27 sense dictates that the moving party need not persuade the court that it is likely to be
 28 reversed on appeal.” *Costco Wholesale Corp. v. Hoen*, No. C04-360P, 2006 U.S. Dist.

1 LEXIS 65774, at *7 (W.D. Wash. Sep. 14, 2006) (citing *Canterbury Liquors & Pantry*
 2 *v. Sullivan*, 999 F. Supp. 144, 150 (D. Mass. 1998)). At the same time, that does not
 3 mean the State meets this first element simply by claiming it has raised novel issues. It
 4 is not enough that the chance of success on the merits be “better than negligible”; more
 5 than a mere possibility of relief is required. *Nken v. Holder*, 556 U.S. 418, 434 (2009).
 6 Remember, the State has failed to cite a *single relevant analogue* to uphold its
 7 magazine ban. This is not a close case. The State fails to meet the first element.

8 Second, the State has offered no evidence of the imaginary irreparable harm it
 9 would suffer if a stay is denied. This is despite the fact that the banned magazines were
 10 bought by the hundreds of thousands (or perhaps the millions) when this Court
 11 temporarily enjoined the State’s ban in 2019,²⁰ creating a natural experiment to see if
 12 any actual harms would result. Did the parade of horrors the State warns of come to
 13 pass? If it did, the State has not tried to substantiate as much. The State even
 14 acknowledges that over a million such magazines “flooded” the State during Freedom
 15 Week, Opp’n at 62, but it never even hints that their presence in California caused any
 16 notable harm.²¹

17 Finally, under the third and fourth factors, other parties and the public interest
 18 benefit from this Court’s ruling taking effect immediately. The public interest would be
 19 harmed if the ruling is stayed because “[i]t is well established that the deprivation of
 20

21
 22 ²⁰ Matthias Gafni, *For One Week, High-Capacity Ammunition Magazines Were*
 23 *Legal in California: Hundreds of Thousands May Have Been Sold*, S.F. Chron. (April
 24 11, 2019), available at <https://www.sfchronicle.com/bayarea/article/for-one-week-high-capacity-gun-magazines-were-13757973.php> (last accessed Nov. 22, 2022) (“[I]n
 25 the span of a single week after a federal judge temporarily set aside the prohibition,
 26 hundreds of thousands of the devices, if not millions, made their way into the hands of
 27 state residents, industry leaders say. The run on high-capacity magazines from March
 28 29 to April 5—so fervid that online traffic from gun enthusiasts around the state
 crashed at least one retail website—was hailed as ‘Freedom Week’ by the California
 Rifle and Pistol Association.”).

²¹ And too that the State somewhat misleads the Court when it claims that
 magazines over ten rounds have been illegal to acquire since 2000, Opp’n at 61-62,
 given that so many were legally bought when they were legal after this Court enjoined
 the enforcement of section 32310(c) in 2019.

1 constitutional rights ‘unquestionably constitutes irreparable injury.’” *Melendres v.*
 2 *Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373
 3 (1976)). Further, “all citizens have a stake in upholding the Constitution” and have
 4 “concerns [that] are implicated when a constitutional right has been violated.”
 5 *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005).

6 As the *Hardaway* district court recently explained in rejecting the government’s
 7 request for a stay:

8
 9 Here, a stay pending appeal is not warranted. As
 10 discussed above, Plaintiffs’ constitutional rights are being
 11 violated absent a preliminary injunction. The State fails
 12 to establish irreparable injury in the absence of a stay.
 13 The balance of hardships and public interest weigh in
 14 favor of Plaintiffs, also as discussed above. Finally, it
 15 is *Plaintiffs* who have demonstrated that they are likely to
 16 succeed on the merits. ***Legislative enactments may not***
 17 ***eviscerate the Bill of Rights. Every day they do is one***
 18 ***too many.***

14 2022 U.S. Dist. LEXIS 200813, at *47-48 (double emphasis added); *see also*
 15 *Antonyuk*, 2022 U.S. Dist. LEXIS 201944, at *243 (agreeing with *Hardaway* and
 16 declining to grant a stay pending appeal); *Christian v. Nigrelli*, No. 22-cv-695, 2022
 17 U.S. Dist. LEXIS 211652, at *26 (W.D.N.Y. Nov. 22, 2022) (declining to grant the
 18 government’s request for a stay because “it is *Plaintiff* who has demonstrated that he is
 19 likely to succeed on the merits”).

20 In short, Plaintiffs—and all Californians seeking to have their Second
 21 Amendment rights vindicated—have waited long enough. Should this Court rule in
 22 Plaintiffs’ favor and declare section 32310 unconstitutional, it should not stay its
 23 ruling.

24 CONCLUSION

25 The State has not presented—and cannot present—a “well established and
 26 representative” analogue to its modern-day ban on magazines able to hold over ten
 27 rounds of ammunition. *Bruen*, 142 S. Ct. at 2133. It thus cannot “demonstrate that [the
 28 magazine ban] is consistent with this Nation’s historical tradition of firearm

1 regulation.” *Id.* at 2126. The law violates the Second Amendment.

2 For these reasons, the Court should (again) declare California Penal Code
3 section 32310 unconstitutional in its entirety and permanently enjoin its enforcement.
4 The Court should also reject the State’s invitations to keep delaying the vindication of
5 Plaintiffs’ rights either through months of additional, irrelevant discovery or by
6 needlessly staying the enforcement of any permanent injunction while this case is on
7 appeal.

8
9 Dated: December 1, 2022

MICHEL & ASSOCIATES, P.C.

10 /s/ Anna M. Barvir

11 Anna M. Barvir

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13 Attorneys for Plaintiffs
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CERTIFICATE OF SERVICE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case Name: *Duncan, et al. v. Becerra*
Case No.: 17-cv-1017-BEN-JLB

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, declare under penalty of perjury that I am a citizen of the United States over 18 years of age. My business address is 180 East Ocean Boulevard, Suite 200 Long Beach, CA 90802. I am not a party to the above-entitled action.


I have caused service of the following documents, described as:

PLAINTIFFS' SUPPLEMENTAL BRIEF

on the following parties by electronically filing the foregoing on December 1, 2022, with the Clerk of the District Court using its ECF System, which electronically notifies them.

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I declare under penalty of perjury that the foregoing is true and correct.
Executed on December 1, 2022, at Long Beach, CA.


Laura Palmerin