No. 19-55376

In the United States Court of Appeals for the Ninth Circuit

VIRGINIA DUNCAN, *et al.*,
Plaintiffs-Appellees,

v.

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

On Appeal from the United States District Court
for the Southern District of California
Hon. Roger T. Benitez
No. 3:17-cv-01017-BEN-JLB

BRIEF OF *AMICUS CURIAE* THE NATIONAL SHOOTING SPORTS FOUNDATION, INC. ON REHEARING *EN BANC* IN SUPPORT OF PLAINTIFFS-APPELLEES, FILED WITH THE CONSENT OF ALL PARTIES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, The National Shooting Sports Foundation, Inc. states it is a non-profit organization under section 501(c)(6) of the Internal Revenue Code and has no parent corporation and no publicly held corporation that owns 10 percent or more of its stock.

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STATEMENT OF CONSENT

All parties consented to the filing of this *amicus curiae* brief. No party/party's counsel authored this brief in whole or in part. No one other than *amicus curiae*, its members or its counsel contributed money to fund preparation and submission of this brief.

INTEREST OF *AMICUS CURIAE*

The National Shooting Sports Foundation, Inc. ("NSSF") is the national trade association for the firearm, ammunition, hunting and shooting sports industry. Formed in 1961, NSSF is a 501(c)(6) tax-exempt Connecticut non-profit trade association. NSSF's membership includes over 8,400 federally licensed firearms manufacturers, distributors and retailers; companies manufacturing, distributing and selling shooting and hunting related goods and services; sportsmen's organizations; public and private shooting ranges; gun clubs; and endemic media. Currently, nearly 700 NSSF members are located within California. NSSF's mission is to promote, protect and preserve hunting and the shooting sports.

NSSF's interest in this case derives principally from the fact its federally licensed firearms manufacturer, distributor and retail dealer members engage in lawful commerce in firearms and ammunition in California and throughout the United States, which makes the exercise of an individual's constitutional right to

keep and bear arms under the Second Amendment possible. The Second Amendment protects NSSF members from statutes and regulations seeking to ban, restrict or limit the exercise of Second Amendment rights. As such, the determination of whether a statute improperly infringes upon the exercise of Second Amendment rights is of great importance to NSSF and its members. NSSF, therefore, submits this brief in support of Plaintiffs-Appellees.

INTRODUCTION AND SUMMARY OF ARGUMENT

As the Ninth Circuit recognized in the Opinion at issue here, mass shootings are heart-wrenching. And those who commit mass shootings are monsters. One cannot sufficiently condemn criminals who misuse firearms and ammunition against members of the public or law enforcement. However, such vexing societal ills do not justify laws like California Penal Code section 32310 ("Section 32310"):a complete ban on a particular class of arms significantly infringing upon Second Amendment rights of law-abiding citizens using firearms and ammunition for lawful purposes, including self-defense.

Yet, that is exactly what the State of California ("Defendant-Appellant") seeks to do here. Section 32310, enacted following highly publicized mass shootings, completely bans and criminalizes the lawful possession and use of magazines holding more than 10 rounds of ammunition by nearly every person everywhere in California. As correctly set out in the panel decision, Section 32310

simply cannot pass constitutional muster, whether analyzed under strict or intermediate scrutiny. *See Duncan v. Becerra*, 970 F.3d 1133 (9th Cir. 2020) reh'g *en banc* granted, opinion vacated 988 F.3d 1209 (9th Cir. 2021). And *nowhere in the record* does Defendant-Appellant explain why this arbitrary "magic number" of 10 rounds is in any way, shape or form narrowly tailored to fit its stated purposes or is a reasonable fit to curb gun violence. "[Section 32310] is a poor means to accomplish the state's interests and cannot survive strict scrutiny. But even if we applied intermediate scrutiny, the law would still fail." *Id*. at 1143. Defendant-Appellant argues – incorrectly –magazines holding more than 10 rounds are unusual and dangerous. But overwhelming and incontrovertible data shows otherwise: an estimated ***133 million***[1] 11+ round magazines are possessed[2] throughout the United States. Such magazines are in no way "unusual," rather, they are the norm. The panel opinion recognizes "half of all magazines in America hold more than 10 rounds." *Duncan*, 970 F.3d at 1142. Though Defendant-

[1] This number would likely be higher if not for the Public Safety and Recreational Firearms Act (resulting in a 10-year ban on 11+ round magazines between 1994 and 2004) and similar statutes/regulations/ordinances.

[2] While California now seeks to dispossess its citizens of currently owned 11+ round magazines, other states enacting magazine restrictions allowed citizens already in possession of such magazines to keep them. *See* Colo. Rev. Stat. Ann. § 18-12-302(a); Conn. Gen. Stat. Ann. § 53-202w(a)(2); Md. Code Ann., Crim. Law § 4-305(2); N.J. Stat. Ann. § 2C:39-3(j)(2); N.Y. Penal Law § 265.00(23); Vt. Stat. Ann. tit. 13, § 4021(c).

Appellant attempts to include a requirement that the arm be commonly used for a particular purpose, *i.e.* self-defense, no such requirement is found in the Second Amendment, nor anywhere in *District of Columbia v. Heller*, 554 U.S. 570, 624-25, 627 (2008) ("*Heller*") (recognizing the arms the Second Amendment protects are those "in common use at the time" for lawful purposes but never specifying or qualifying "lawful purpose").

Defendant-Appellant additionally argues 11+ round magazines are unnecessary because individuals have other options available for self-defense. As *Heller* makes clear, availability of an alternative does not confer constitutionality on a statute infringing upon Second Amendment rights. The Second Amendment takes that choice from the government. 554 U.S. at 634.

Finally, Defendant-Appellant relies heavily on a handful of other states which enacted laws restricting magazine capacity. While a few states have passed such restrictions, the overwhelming majority have not. Moreover, Defendant-Appellant seeks to apply a contradictory standard to advance its argument. On the one hand it asks the *en banc* panel to consider the fact several circuits analyzing other states' laws have affirmed restrictions on magazine capacity, yet on the other hand it complains Plaintiffs-Appellees' data on common ownership of magazines holding more than 10 rounds (estimated at 133 million) is not limited only to California. In other words, Defendant-Appellant asks the *en banc* panel to look at

the nation as a whole if it supports its argument but to focus solely on California where nationwide information undercuts it. The Supreme Court in *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742, 783 (2010) ("*McDonald*") did not create a California-specific Second Amendment analysis.

For these reasons (and others), the United States District Court of the Southern District of California correctly granted summary judgment in favor of Plaintiffs-Appellees and the August 14, 2020 Opinion correctly affirmed the District Court's decision. California's ban on magazines holding 11+ rounds directly and severely infringes upon core Second Amendment rights of *law-abiding citizens* seeking to purchase, own, possess and use magazines Californians commonly own and use for a myriad of *lawful purposes*, including but not limited to self-defense in the home. Accordingly, NSSF urges the *en banc* panel to affirm the August 14, 2020 Opinion.

ARGUMENT

Section 32310 impermissibly bans the import, sale, acquisition, possession, and use of magazines capable of holding more than 10 rounds[3] in violation of the Second Amendment – even though such magazines are incredibly common with

[3] Section 32310 has limited exceptions to its widespread ban on magazines holding 11+ rounds. Strangely, the exceptions allow persons in the movie industry to possess such magazines while making it a crime for military or National Guard members to possess them. 1-ER-68–69, 1-ER-170–173.

approximately 133 million throughout the country.[4] As such, it is "directly at odds with the central holdings of *Heller* and *McDonald*: that the Second Amendment protects a personal right to keep arms for lawful purposes, most notably for self-defense within the home." *Friedman v. City of Highland Park*, 784 F.3d 406, 412–13 (7th Cir. 2015) (Manion, J., dissenting). The panel opinion applied a multi-part analysis to correctly determine Section 32310 is unconstitutional and violates the Second Amendment under the correct strict scrutiny standard and under the more lenient intermediate scrutiny standard. *Duncan*, 970 F.3d at 1143. Section 32310 is unconstitutional under any analysis given the commonality of magazines holding 11+ rounds and the broad strokes of the statute – with no attempt to tailor the statute narrowly or at all.

I. The Second Amendment Protects the Right to Keep and Bear Arms, Including Magazines Holding 10 or More Rounds, Commonly Owned and Used for Lawful Purposes.

Heller provided "crystal clear language" to test the constitutionality of statutes infringing upon Second Amendment rights. 1-ER-22. If the arm is commonly owned by law-abiding citizens for lawful purposes, it is protected and the inquiry ends because the Constitution guarantees the right to keep and bear arms "'in common use at the time' for lawful purposes like self-defense." *Heller*,

[4] Magazines holding more than 10 rounds are common and number in the millions. 1-ER-24–26; *Duncan*, 970 F.3d at 1142–43.

554 U.S. at 624. Though the panel opinion does not appear to adopt this simple *Heller* test, NSSF urges the *en banc* panel to do so.

Instead, the August 14, 2020 Opinion engaged in multiple multi-part tests to assess the constitutionality Section 32310 and reached the same result as the District Court – **that Section 32310 is unconstitutional**. *Duncan*, 970 F.3d at 1145. The inquiry began by asking whether Section 32310 burdens conduct protected by the Second Amendment. *Id*. (internal citations omitted). "[A]s a threshold matter, we determine whether the law regulates "arms" for purposes of the Second Amendment." *Id*. The panel then examined "whether the law regulates an arm that is ***both*** dangerous and unusual." *Id*. (emphasis added). If the answer to the first two inquiries is in the affirmative, the next step is to assess whether the regulation is longstanding and thus presumptively lawful. *Id*. Finally, the court will inquire whether there is any persuasive historical evidence in the record showing the regulation affects rights falling outside the scope of the Second Amendment. If these last two questions[5] are in the negative, the law burdens protected conduct and the appropriate level of scrutiny must be determined. *Id*. at 1145–46.

[5] This brief does not address the last two questions.

There is no real dispute that the subject magazines are arms and Defendant-Appellant concedes as much (though it contends they are not protected arms under the Second Amendment).[6] *Duncan*, 970 F.3d at 1146 ("Firearm magazines are 'arms' under the Second Amendment. Magazines enjoy Second Amendment protection for a simple reason: Without a magazine, many weapons would be useless, including "quintessential" self-defense weapons like the handgun."); *see also Jackson v. City and Cty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) ("[W]ithout bullets, the right to bear arms would be meaningless."). Thus, the real question presented in determining whether Section 32310 "comport[s] with the Second Amendment" (Defendant-Appellant Opening Brief at pp. 3–4) is whether magazines holding more than 10 rounds are commonly owned and used by law-abiding citizens for lawful purposes. They are.

Unsatisfied with this test, however, Defendant-Appellant attempts to include an extra requirement: that citizens must commonly *use* 11+ round magazines *for self-defense*. *See generally* Defendant-Appellant Opening Brief. But this

[6] No court has found magazines such as the ones at issue here do not qualify as "arms" under the Second Amendment. *See generally Fyock v. City of Sunnyvale*, 25 F.Supp.3d 1267, 1276 (N.D. Cal. 2014), aff'd sub nom. *Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015) (compiling cases). Thus, magazines holding over 10 rounds receive Second Amendment protection. If this were not the case, any jurisdiction could essentially ban firearms via a ban on magazines/ammunition. Defendant-Appellant stops shy of such a ban – for now.

requirement appears nowhere in *Heller* nor is there any suggestion "common use" means only self-defense as opposed to other lawful purposes (shooting competitions, recreational target shooting, training to become a safe and competent shooter and hunting). Rather, *Heller* provides Second Amendment protection encompassing firearms whose features are "in common use," "typically possessed," and "preferred" by law-abiding Americans for lawful purposes. *Id.* at 624, 625, 628–29. Both historically and in modern times magazines holding 11+ rounds of ammunition are common for many lawful purposes, not just self-defense.

As the panel opinion recognized, "That LCMs are commonly used today for lawful purposes ends the inquiry into unusualness. But the record before us goes beyond what is necessary under *Heller*: Firearms or magazines holding more than ten round capacities existed even before our nation's founding, and the common use of LCMs for self-defense is apparent in our shared national history." *Duncan*, 970 F.3d at 1147. These types of magazines date back *several hundred years* (to 1580). *See* David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALB. L. REV. 849, 852–57 (2015). They have been "commonly possessed" in the United States since 1863. *Id*. at 871. As time progressed, magazines holding more than 10 rounds gained popularity, with more than 20 firearm models from American manufacturers holding magazines of 16 to 30 rounds being available between 1936 and 1971. *Id*. at 857–859, 858, n. 82. In the

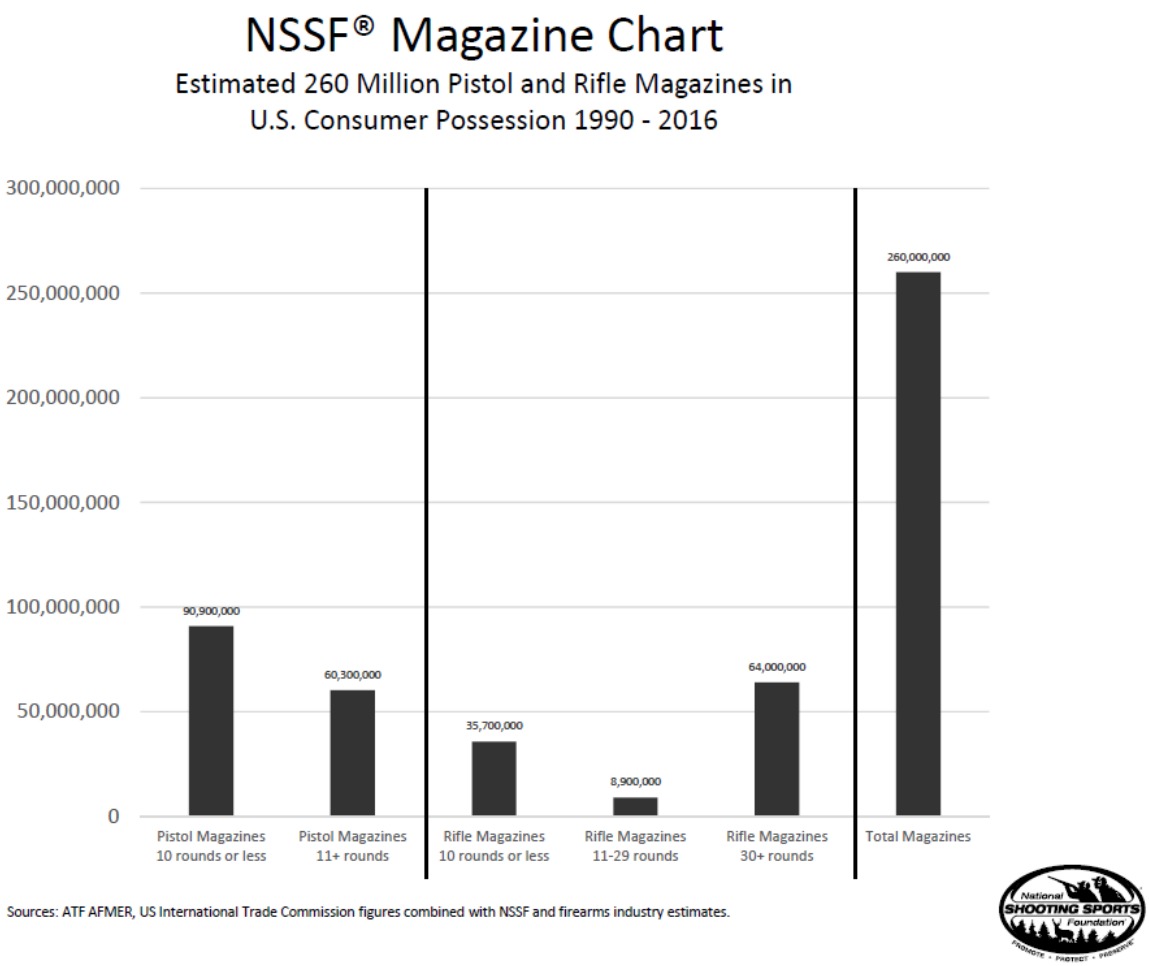
late 1950s over a dozen companies manufactured over 200,000 of the popular M-1 carbine for the civilian market. *Id*. at 859, 859, n. 88. Standard magazines for the M-1 are 15 and 30 rounds. *Id*.

In the 1970s, additional firearm models from European manufacturers were available with magazines holding 20 and 30 rounds. *Id*. at 861. Beretta's model 92, holding 16 rounds, entered the market in 1976 and, in its various iterations, is one of the most popular of all modern handguns. *Id*. But "[l]ong before 1979, magazines of more than ten rounds had been well established in the mainstream of American gun ownership." *Id*. at 862. Technological improvements after 1979 increased the popularity of magazines holding 11+ rounds. *Id*. at 862–864.

> Common sense tells us that the small percentage of the population who are violent gun criminals is not remotely large enough to explain the ***massive market*** for magazines of more than ten rounds that has existed since the mid-nineteenth century. We have more than a century and a half of history showing such magazines ***to be owned by many millions*** of law-abiding Americans.

Id. at 871 (emphasis added). "While the Supreme Court has ruled that arms need not have been common during the founding era to receive protection under the Second Amendment, the historical prevalence of firearms capable of holding more than ten bullets underscores the heritage of LCMs in our country's history." *Duncan*, 970 F. 3d at 1149.

As the panel opinion appreciated, "[w]hile common use is an objective and largely statistical inquiry, typical possession requires us to look into both broad patterns of use and the subjective motives of gun owners." *Duncan*, 970 F.3d at 1147. (citation omitted). Even with such a limitation, modern figures estimate 230 million pistol and rifle magazines were in the possession of United States consumers between 1990 and 2015. 7-ER-1697–1703. Magazines capable of holding more than 10 rounds of ammunition accounted for *approximately half* (133 million) of all magazines owned. *Id.* As noted in the Kopel article, it is only "[c]ommon sense" that criminal misuse and possession of 11+ round magazines does not account for the presence of 133 million such magazines throughout the United States.



Rather, it is law-abiding citizens with lawful intentions who account for most, if not all, of the estimated 133 million 11+ round magazines. Though Defendant-Appellant makes much of various crimes, including mass shootings involving magazines with more than 10 rounds, the fact such magazines are misused by criminals does not eliminate or detract from law-abiding citizens' Second Amendment rights . If criminal misuse were the touchstone for constitutionality the Second Amendment would cease to exist. *See generally Heller*, 554 U.S. at 636.

For example, in *McDonald v. City of Chicago*, Justice Alito reminded the parties that "[a]ll of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category." 561 U.S. 742, 783 (2010) (citing *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) ("The exclusionary rule generates 'substantial social costs,' [], which sometimes include setting the guilty free and the dangerous at large"); *Barker v. Wingo*, 407 U.S. 514, 522 (1972) (reflecting on the serious consequences of dismissal for a speedy trial violation, which means "a defendant who may be guilty of a serious crime will go free"); *Miranda v. Arizona*, 384 U.S. 436, 517 (1966) (Harlan, J., dissenting); *id*. at 542 (White, J., dissenting) (objecting that the Court's rule "[i]n some unknown number of cases ... will return a killer, a rapist or other criminal to the streets ... to repeat his crime"); *Mapp v. Ohio*, 367 U.S. 643, 659 (1961)).

In *McDonald*, the court also emphasized that resolving Second Amendment cases would not "require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise." 561 U.S. at 785, 790–91 (recognizing *Heller* expressly rejected judicial interest balancing in deciding the scope of Second Amendment rights). "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon." *Heller*, 554 U.S. at 634. "[T]he

Supreme Court made clear in *Heller* that it wasn't going to make the right to bear arms depend on casualty counts." *Moore v. Madigan*, 702 F.3d 933, 939 (7th Cir. 2012). "If the mere possibility that allowing guns to be carried in public would increase the crime or death rates sufficed to justify a ban, *Heller* would have been decided the other way . . . ." *Id*. The desire to enhance public safety should not and cannot be allowed to infringe upon law-abiding citizens' Second Amendment rights.

From all available data, it cannot seriously be disputed that law abiding citizens commonly own and use magazines with 11+ rounds for lawful purposes,[7] including for self-defense in the home, and have been for hundreds of years. This commonality mandates Second Amendment protection and a finding that Section 32310 is unconstitutional under all analyses.

II. The Availability of Smaller Capacity Magazines Does Not Cure Section 32310's Infringement Upon Core Second Amendment Rights.

Defendant-Appellant suggests Section 32310's ban on magazines holding more than 10 rounds does not severely burden Second Amendment rights because it does not prohibit all firearm magazines – "it merely limits magazine capacity to ten rounds." Defendant-Appellant Opening Brief at p. 33. Nor, according to

[7] The bulk of handguns sold today have magazines holding more than ten rounds. 7-ER-1706. Most handgun standard magazines hold 15 or 17 rounds.

Defendant-Appellant, does Section 32310 limit the number of magazines holding 10 or fewer rounds an individual may possess.[8] *Id*. Thus, Section 32310 does not severely burden – or burden at all – Second Amendment rights. However, "restating the Second Amendment right in terms of what IS LEFT after the regulation . . . is exactly backward from *Heller's* reasoning." *National Rifle Ass'n of America, Inc. v. BATFE*, 714 F.3d 334, 345 (5th Cir. 2013) (Jones, J., joined by Jolly, Smith, Clement, Owen, and Elrod, JJ., dissenting from denial of rehearing *en banc*) (emphasis in original); *Duncan*, 970 F.3d at 1157 ("[W]e look to what a restriction takes away rather than what it leaves behind."). "A 'substantial burden' on the Second Amendment is viewed not through a policy prism but through the lens of a fundamental and enumerated constitutional right. We would be looking through the wrong end of a sight-glass if we asked whether the government permits the people to retain some of the core fundamental and enumerated right." *Id*. One would never tolerate under the First Amendment a law banning books over an arbitrary number of pages because there are books with fewer pages in the library, yet that is precisely Defendant-Appellant's rationale here. The panel opinion, in discussing the burden Section 32310 places on Second Amendment rights, provided several analogies, including, "[N]o court would hold that the First

[8] It requires little imagination to predict the next step in Defendant-Appellant's endless attack on the Second Amendment rights of its citizens: "Who needs more than [insert arbitrary number] magazines?"

Amendment allows the government to ban "extreme" artwork from Mapplethorpe just because the people can still enjoy Monet or Matisse. Nor would a court ever allow the government to outlaw so-called "dangerous" music by, say, Dr. Dre, merely because the state has chosen not to outlaw Debussy." *Duncan*, 970 F.3d at 1159–60.

As *Heller* pointed out in reference to handguns, "[i]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." *Heller*, 554 U.S. at 629; *see also Caetano v. Massachusetts*, 136 S. Ct. 1027, 1033 (2016) (Alito, J., concurring) ("But the right to bear other weapons is "no answer" to a ban on the possession of protected arms."). "[T]he American people have considered the handgun to be the quintessential self-defense weapon" and "[t]here are many reasons that a citizen may prefer a handgun for home defense . . . Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Id*. at 629.

The same reasoning applies here. Magazines holding more than 10 rounds are extremely popular (approximately 133 million) and useful in self-defense and many Americans "[w]hatever the reason" will choose a magazine with a capacity over 10 rounds. Allowing law abiding citizens to possess multiple magazines with

10 or fewer rounds does not lessen the burden on Second Amendment rights.[9] As such, Section 32310 is unconstitutional.

III. If Heightened Scrutiny, Rather than the Simple *Heller* Test, Must Be Used, the Scrutiny Applied Should be Strict.

Since *Heller* and *McDonald*, it is well-established the Second Amendment protects a fundamental, individual right to keep and bear arms which extends to state and local governments. Although neither decision sets forth precisely how lower courts should evaluate laws infringing Second Amendment rights, *Heller* explicitly requires something more than rational basis scrutiny. As *Heller* teaches: (1) some form of heightened scrutiny will apply in evaluating the constitutionality of laws infringing on Second Amendment rights, and (2) rational basis is insufficient. *Heller*, 554 U.S. at 628 n. 27; *see Silvester v. Harris*, 843 F.3d 816, 821–22 (9th Cir. 2016).

To determine the appropriate level of scrutiny, the *en banc* panel must look to the severity of the burden Section 32310 places on Second Amendment rights. A severe burden implicating the "core of the Second Amendment right" will be subject to strict scrutiny. Both the District Court and the August 14, 2020 Opinion correctly conclude the burden Section 32310 places on the Second Amendment rights of law-abiding citizens is severe. "A law like § 32310 that prevents a law-

[9] Criminals and others intending to misuse firearms and magazines for *unlawful* purposes may do the same.

abiding citizen from obtaining a firearm with enough rounds to defend self, family, and property in and around the home certainly implicates the core of the Second Amendment. When a person has fired the permitted 10 rounds and the danger persists, a statute limiting magazine size to only 10 rounds severely burdens that core right to self-defense." 1-ER-45. "Section 32310's wide ranging ban with its acquisition-possession-criminalization components exacts a severe price on a citizen's freedom to defend the home." *Id*. at 52. Section 32310 "substantially burdens core Second Amendment rights because of its sweeping scope and breathtaking breadth. This is so because half of all magazines in the United States are now illegal to own in California." *Duncan*, 970 F.3d at 1156. Even though the subject magazines are not unusual and are used commonly in guns for self-defense, Section 32310 requires "[l]aw-abiding citizens [to] alter or turn them over — or else the government may forcibly confiscate them from their homes and imprison them up to a year." *Id*. Worse, "[t]he law's prohibitions apply everywhere in the state and to practically everyone. It offers no meaningful exceptions at all for law-abiding citizens. These features are the hallmark of substantial burden." *Id*. There is no doubt Section 32310 severely burdens the core Second Amendment right of self-defense and should be evaluated under the highest level of scrutiny.

IV. Regardless of the Level of Scrutiny Applied, Section 32310 Fails Because it is Overbroad.

Whether strict[10] or intermediate scrutiny[11] applies, Section 32310 fails because the "fit is excessive and sloppy." *See Duncan*, 970 F.3d at 1165–68. Both levels of scrutiny require Section 32310 "fit" Defendant-Appellant's goals. Under strict scrutiny, the fit must be "the least restrictive means to further the articulated interest." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 197 (2014). Intermediate scrutiny is less exacting but still requires the fit be reasonable and employ "not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Id*. The required fit should "not [be] more extensive than necessary" to serve Defendant-Appellant's interest. *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 816 (9th Cir. 2013). As explained in more detail

[10] To satisfy strict scrutiny, Defendant-Appellant must prove Section 32310 is "narrowly tailored to achieve a compelling governmental interest." *See Abrams v. Johnson*, 521 U.S. 74, 82 (1997).

[11] Intermediate scrutiny requires Defendant-Appellant to "demonstrate that the harms it recites are real" beyond "mere speculation or conjecture." *Edenfield v. Fane*, 507 U.S. 761, 770–771 (1993). "Our intermediate scrutiny test under the Second Amendment requires that (1) the government's stated objective . . . be significant, substantial, or important; and (2) there . . . be a 'reasonable fit' between the challenged regulation and the asserted objective." *U.S. v. Chovan*, 735 F.3d 1127, 1139 (9th Cir. 2013); *see also Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993).

below, Section 32310 is not tailored to fit Defendant-Appellant's stated interests in any way.

A. Section 32310 is Not Narrowly Tailored to Fit Defendant-Appellant's Objectives.

The burden is on Defendant-Appellant to establish the law is "closely drawn to avoid unnecessary abridgment" of constitutional rights. *McCutcheon*, 572 U.S. at 218. Defendant-Appellant's stated ends are public safety, preventing gun violence and keeping our police safe. While these are worthy objectives, "[a]t this level of generality, these interests can justify any law and virtually any restriction." 1-ER-66. "[E]ven well-intentioned laws must pass constitutional muster." *Duncan*, 970 F.3d at 1140. Defendant-Appellant cannot show a "reasonable fit" between its purposes and Section 32310 because Section 32310 operates as a complete ban on 11+ round magazines without rhyme or reason. As the District Court phrased it, Section 32310 is, "at best, ungainly and very loose." 1-ER-67. "The fit is like that of a father's long raincoat on a little girl for Halloween." 1-ER-67. The panel opinion further explains Section 32310 is not the least restrictive means of achieving Defendant-Appellant's interests because it "provides few meaningful exceptions for the class of persons whose fundamental rights to self-defense are burdened." *Duncan*, 970 F.3d at 1164. Section 32310 "necessarily covers areas from the most affluent to the least. It prohibits possession by citizens who may be in the greatest need of self-defense like those in

rural areas or places with high crime rates and limited police resources. . . . It is indiscriminating in its prohibition." *Id*. For example, the same arguments Defendant-Appellant makes about 11+ round magazines can apply equally to magazines holding fewer rounds, say 6 or 8 (i.e., the "critical pause" when a mass shooter is reloading). It is impossible to see how Section 32310 is narrowly tailored to the ends Defendant-Appellant seeks[12] or if it will accomplish Defendant-Appellant's objectives at all.

B. Defendant-Appellant's Ban of 11+ Round Magazines is Arbitrary.

Perhaps the most important question here is *why did Defendant-Appellant select 10 rounds as the limit for magazine capacity*? The District Court raised this query multiple times at the hearing on Plaintiffs-Appellees' Motion for Summary Judgement but never received a persuasive, or even satisfactory, answer from Defendant-Appellant. *See generally* 1-ER-94–218. This question speaks directly to the heart of whether Section 32310 is narrowly tailored. Yet Defendant-Appellant cannot provide an objective, evidence-based rationale for why 10 rounds

[12] Defendant-Appellant cites to incidents where criminals misused magazines with more than 10 rounds. However, those same criminals had multiple firearms and multiple magazines in most of those incidents.

is the "magic" number. Nor does the legislative history behind Section 32310[13] provide an answer. The only plausible explanation is the 10-round restriction is an arbitrary number with no relationship to Defendant-Appellant's objectives.

As the District Court noted, the decision to allow magazines with 10 or fewer rounds, instead of some other number, is a "theoretical abstract concept that someone came up with, some arbitrary number that they picked out of the air, because there's nothing in this evidence, by the way, that I can see that indicates that, you know, if you had a magazine of 11 rounds, anything would change from 10 rounds or even if you had 15 rounds that the outcome or the safety of the people would be any greater, or 20 rounds, or 30 rounds." 1-ER-159–160 (in the context of discussing other states' magazine capacity restrictions).

Defendant-Appellant suggested a 10 round limit does not severely impair any self-defense use because on average only 2.2 rounds are shot in self-defense. But this assertion rings hollow. "[T]he threat to life does not occur in an average act in the abstract; self-defense takes place in messy, unpredictable, and extreme events." *Duncan*, 970 F.3d at 1160. Under Defendant-Appellant's flawed logic, the state "could limit magazines to as few as three bullets and not substantially burden Second Amendment rights because, on average, 2.2 bullets are used in

[13] The same is true for the federal ban on 11+ round magazines and for states with similar statutes. No legislative history provides an objective, fact-based rationale for the 10 round limitation.

every defensive encounter according to one study." *Duncan*, 970 F.3d at 1160. The panel opinion takes Defendant-Appellant's logic one step further and asks why limit the number of bullets in a magazine if the state could impose a one gun per person rule? The answer: "This cannot be right. We would never uphold such a draconian limitation on other fundamental and enumerated constitutional rights." *Id*. at 1161.

First, *Heller* recognized, "There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." 554 U.S. at 629. The same holds true for individuals choosing a 11+ round magazine instead of a smaller magazine. The larger magazine may be chosen for self-defense over smaller magazines for many reasons, including but not limited to providing sufficient rounds to account for poor aim during the stress of a criminal invasion in one's home, allowing sufficient rounds for multiple attackers, allowing the individual to aim/shoot with one hand while dialing the police without needing to use both hands to reload and more. 7-ER-1709–10.

Second, *Heller* did not address whether individuals actually shot handguns for self-defense. Rather, an individual "uses" a 11+ round magazine simply by keeping it ready for self-defense. For example, law enforcement officers "use" their guns and corresponding magazines every day, even if they are not shooting criminals. But those magazines are available should they be needed and may be possessed or used for self-defense even if the trigger is never pulled. The overwhelming number of firearm owners will never fire their weapon in self-defense. While a good thing, it is irrelevant to the constitutional analysis here. Having the choice of more than 10 rounds provides an individual the confidence needed to ward off a criminal attack. By enacting Section 32310, the government makes that choice for its citizens when *Heller* makes clear it is a right belonging to the People who choose to reside in California. Because Section 32310 takes choice away from California citizens, it violates their Second Amendment rights.

C. There is No Relationship Between a 10-Round Magazine Capacity Limitation and Defendant-Appellant's Objectives.

In addition to failing to explain *why* Section 32310 limits magazine capacity to no more than 10 rounds, Defendant-Appellant fails to produce evidence Section 32310 will meet its vaguely stated goals. Defendant-Appellant produced ***no evidence*** the magazine limitation will have an effect on mass shootings or crimes where 11+ round magazines are used. Only three of the incidents Defendant-

Appellant cited "definitely involved" magazines with 11+ rounds (magazines illegally smuggled into California). *See Duncan*, 970 F.3d at 1168.

Defendant-Appellant's own expert's research showed a Department of Justice study concluded that 10 years after the 1994 federal 11+ round magazine ban was imposed "there [had been] no discernible reduction in the lethality and injuriousness of gun violence." 3-ER-668. There was no evidence lives were saved [and] no evidence criminals fired fewer shots during gun fights. 3-SER-670. Defendant-Appellant's expert's final report declared the federal ban could not be "clearly credit[ed] . . . with any of the nation's recent drop in gun violence" and "[s]hould [a nationwide ban] be renewed, the ban's effects on gun violence are likely to be small at best and perhaps too small for reliable measurement." 3-ER-575. Additionally, a comprehensive Centers for Disease Control (CDC) study in 2003 looked at 51 studies covering the full array of gun-control measures, including the federal Public Safety and Recreational Firearms Act , and was unable to show the federal ban had reduced crime. Centers for Disease Control and Prevention "*First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws. Findings from the Task Force on Community Preventative Services*," MORBIDITY AND MORTALITY WEEKLY REPORTS; 52 (RR14), October 3, 2003.

In light of these studies, there is no evidence the availability of magazines over ten rounds is causally related to violent crime. Thus, the pre-*Heller* federal ban on 11+ round magazines is nothing more than a failed experiment from which Defendant-Appellant learned nothing.[14] And if such a ban did not work on a national level, why does Defendant-Appellant expect different results here? Defendant-Appellant never explains *why* it chose a 10-round magazine capacity limit and there is no reason to believe Section 32310 will not fail same way the federal ban did. With this failure in mind, how can the current limitation in Section 32310 be considered narrowly tailored to meet Defendant-Appellant's ends and satisfy heightened scrutiny? The answer is, it cannot.

D. Defendant-Appellant's Magazine Capacity Restriction Steepens the Slide to Additional Restrictions in Violation of the Second Amendment.

At the hearing on Plaintiffs-Appellees' Motion for Summary Judgment, the District Court recognized the potential for the slippery slide of the Second Amendment into oblivion and the difficulty with determining the stopping point:

> When you look at the incremental way that we have been addressing the Second Amendment, logic and reason tells us that that's exactly what's going to happen. . . [T]he state is going to come in and say, you know what, we got to get rid of 10-round magazines so we're going to go to 7. . . And then the next mass shooter is going to use a weapon that kills with a 7-round

[14] Neither did Colorado, Connecticut, D.C., Maryland, Massachusetts, New Jersey, New York and Vermont – all states which continue this failed experiment in some form.

> magazine, and then the next person after that is going to use a 7-round magazine, and the next person after that is going to use a 7-round magazine.
>
> Then the state is going to come and say, look, judge, law enforcement is being assaulted with these 7-round magazines, and people are being killed in mass shootings with 7-round magazines. We got to ban 7-round magazines.. . . But my question is: at what point in time, where, when, because the evidence is not going to change. There's going to be people that are going to be killed. There's going to be people that are going to be injured. There's going to be police officers that are going to be assaulted whether it be with a 10-round magazine or 7-round magazine or 5-round magazine. . . . But when you get down to 2.2 rounds, someone is going to say, look, for self-defense, you only need one round. That's all you need. . . . And you're going to come in and say, look, judge, law enforcement officers are being assaulted with these derringers that use two rounds, and people are being killed by people using derringers with two rounds.

1-ER-154–157.

The failure of Defendant-Appellant to set forth the reasoning behind the 10-round limit and establishing *why* 10 rounds is a reasonable fit reinforces this slippery slope concern. This has already occurred in other jurisdictions where legislative bodies tried to reduce magazine capacity below 10 rounds with no seeming rationale. For example, in New Jersey, magazine capacity was limited to 15 rounds or less from 2000 until June 2018. In 2018, New Jersey reduced the magazine capacity limit to 10 rounds. *See* N.J. Stat. Ann. §§ 2C:39-1(y) (amending § 2C:39-1(y) (2018)), 39-3(j), 39-9(h) New York began with a magazine capacity limit of 10 rounds and later attempted to amend the statute to

limit magazines to a seven-round load limit and make it "unlawful for a person to knowingly possess an ammunition feeding device where such device contains more than seven rounds of ammunition." N.Y. Pen. Code §§ 265.00 (amending § 265.00 (2013)), 265.36; *see also New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 264 (2d Cir. 2015) (finding the seven-round limitation unconstitutional). In Maryland, magazines holding more than 20 rounds were banned until that number was reduced to 10 rounds in 2013. Md. Code Crim. Law § 4-305(b) (amending § 4-305(b) (2013)).

Even the federal government fell victim to this slippery slope: when the Public Safety and Recreational Firearms Act was originally proposed in 1990, the statutory language limited magazine capacities to 15 rounds. *See* 136 Cong. Rec. S6725-02, 136 Cong. Rec. S6725-02, S6726, 1990 WL 67557. A few years later, and without explanation, the statute was amended (and ultimately enacted) to reduce magazine capacity to 10 rounds or less. *See* 139 Cong. Rec. S15475-01, 139 Cong. Rec. S15475-01, S15480, 1993 WL 467099.

Allowing Defendant-Appellant to dictate an arbitrary number of rounds a magazine may hold – without any tailoring, let alone narrow tailoring, to its purposes – is dangerous and potentially fatal to Second Amendment rights. The "very enumeration of [a constitutional] right takes out of the hands of government -- even the Third Branch of Government -- the power to decide on a case-by-case

basis whether the right is really worth insisting upon." *Heller*, 554 U.S. at 634. Indeed, a "constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Id*.

V. Only a Few States Impose Restrictions on Magazine Capacity.

As Defendant-Appellant recognizes, only nine states (this number includes California)[15] restrict civilian access to magazines holding a specific number of rounds. Defendant-Appellant Opening Brief at p. 7, 7 n. 2. Of those, two states limit magazine capacity to 15 rounds. Colo. Rev. Stat. §§ 18-12-301–302; 13 V.S.A. § 4021. Thus, the number of states actually restricting magazine capacity to 10 or less is only seven; six without California. That equates to just 12% of the states. Thus, to the extent Defendant-Appellant relies on those six states to support the constitutionality of Section 32310, such reliance is misplaced. Magazine restrictions are instead quite *uncommon.* Even if this number were higher, an oft-repeated parental phrase comes to mind: if some (12%) of your friends jumped off a bridge would you jump too? The choice of other states to infringe on the Second

[15] *See* Cal. Penal Code § 32310 (California); Colo. Rev. Stat. §§ 18-12-301–302 (Colorado); Conn. Gen. Stat. § 53-202w (Connecticut); D.C. Code § 7-2506.01(b) (District of Columbia); Haw. Rev. Stat. § 134-8(c) (Hawaii); Mass. Gen. Laws Ann. Ch. 140, §§ 121, 131(a) (Massachusetts); Md. Code, Crim. Law § 4-305(b) (Maryland); N.J. Stat. Ann. §§ 2C:39-1(y), 39-3(j), 39-9(h) (New Jersey); N.Y. Pen. Law §§ 265.00, 265.36 (New York); 13 V.S.A. § 4021 (Vermont).

Amendment rights of their citizens, and the corresponding circuits which have upheld such restrictions, does not make such restrictions constitutional.

Further, Defendant-Appellant's reliance on these other states and affirming circuits is contradictory.[16] On the one hand, Defendant-Appellant looks to other states and other circuits in the U.S. for magazine restriction laws. On the other, Defendant-Appellant complains about the use of data regarding the number of 11+ round magazines nationwide to support commonality because the data is not specific to California. Defendant-Appellant cannot have it both ways.

Regardless of what other states and circuits have done in relation to 11+ round capacity magazines, NSSF implores the *en banc* panel not to repeat the mistakes of its sister courts in allowing magazine capacity restrictions to chip away at the Second Amendment. Instead, NSSF urges the *en banc* panel to find Section 32310 is unconstitutional.

CONCLUSION

Section 32310 overreaches in limiting the possession and use of magazines to 10 or fewer rounds for nearly all people anywhere in California and severely burdens Californians' Second Amendment rights. It simply takes the choice out of

[16] As the panel opinion notes, may of these other states' laws are "not as sweeping" as Section 32310. *See Duncan*, 970 F.3d at 1162.

Californian's hands and operates as a complete ban on a particular kind of arm. Such a ban is clearly unconstitutional under the simple *Heller* test.

Nor can Section 32310 pass constitutional muster under heightened scrutiny. There is no explanation for why a 10-round restriction will reduce mass shootings or crimes involving such magazines and the reality is magazines of any size will allow more injuries and deaths than a one-shot firearm (or no firearms at all). This begs the question of how far Defendant-Appellant will go in restricting Californian's Second Amendment rights.

As the District Court set forth in its well-reasoned opinion and as set forth in the August 14, 2020 Opinion, Section 32310 is unconstitutional no matter the test applied. Accordingly, NSSF strongly encourages the *en banc* panel to find Section 32310 unconstitutional and affirm the August 14, 2020 Opinion.

Dated: April 23, 2021

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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