No. 19-55376

In the
United States Court of Appeals for the Ninth Circuit

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

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

Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, Heller Foundation, California Constitutional Rights Foundation, Virginia Citizens Defense League, Montana Shooting Sports Association, Oregon Firearms Federation, Tennessee Firearms Association, Conservative Legal Defense and Education Fund, and Restoring Liberty Action Committee in Support of Plaintiffs-Appellees

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DISCLOSURE STATEMENT

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

s/Jeremiah L. Morgan
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INTEREST OF *AMICI CURIAE*[1]

Gun Owners of America, Inc., Gun Owners Foundation, Heller Foundation, California Constitutional Rights Foundation, Virginia Citizens Defense League, Montana Shooting Sports Association, Oregon Firearms Federation, Tennessee Firearms Association, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Restoring Liberty Action Committee is an educational organization. Each is dedicated, *inter alia*, to the correct construction, interpretation, and application of law.

Many of these *amici* filed a prior *amicus* brief in this case on September 23, 2019. Additionally, some of these *amici* have also filed *amicus* briefs in this Court in other firearms-related cases, including:

- Nordyke v. King, No. 07-15763, Brief *Amicus Curiae* of Gun Owners of California, Inc., *et al.* (August 18, 2010);
- Montana Shooting Sports Association v. Holder, No. 10-36094, Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.* (June 13, 2011);

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[1] All parties have consented to the filing of this brief *amicus curiae*. On April 2, 2021, this Court granted these *amici*'s motion for extension of time to file this *amicus* brief by May 21, 2021. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

- Jackson v. San Francisco, No. 12-17803, Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.* (July 3, 2014);

- Peruta v. San Diego, Nos. 10-56971 & 11-16255, Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.* (April 30, 2015);

- Harris v. Silvester, No. 14-16840, Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.* (June 2, 2015);

- Young v. Hawaii, No. 12-17808, Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.* (November 19, 2018); and

- Rhode v. Becerra, No. 20-55437, Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.* (August 7, 2020).

INTRODUCTION

Appellees' Supplemental Brief provides compelling support for the panel's decision that California's ban on standard capacity magazines (arbitrarily described by California's statute as "large capacity magazines" ("LCMs")) violates both the Second Amendment and the Takings Clause. Appellees' Supplemental Brief on En Banc Rehearing ("App. Supp. Br.") at 2-23. The Attorney General's Supplemental Brief, on the other hand, asserts that virtually every aspect of the panel opinion is erroneous and asserts that the panel departed from this Court's Second Amendment jurisprudence. Supplemental Brief for The Attorney General ("A.G. Supp. Br.") at 1.

While it is true that the panel departed from this Court's remarkably consistent record of upholding every manner of restriction on firearms,[2] it is not true that it abandoned this Circuit's two-step test. To be sure, the two-step test may have been designed to, and certainly has the effect of, confining the protections of the Second Amendment to an absolute minimum — primarily the specific facts of the District of Columbia v. Heller, 554 U.S. 570 (2008) decision ("Heller I").[3] However, even with the high bar for challenges set by the two-step test, in the case of an egregious restriction on gun rights, that test can allow a court to invalidate a firearms restriction. Indeed, the fact that the panel was able to use that test faithfully and still strike down a firearms restriction

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[2] *See* Mai v. United States, 974 F.3d 1082, 1104-05 (9th Cir. 2020) (VanDyke, J., dissenting) ("To the rational observer, it is apparent that our court just doesn't like the Second Amendment very much. We always uphold restrictions on the Second Amendment right to keep and bear arms. Show me a burden — any burden — on Second Amendment rights, and this court will find a way to uphold it. Even when our panels have struck down laws that violate the Second Amendment, our court rushes in en banc to reverse course.... There exists on our court a clear bias — a real prejudice — against the Second Amendment and those appealing to it. That's wrong. Equal justice should mean *equal* justice.").

[3] In Jackson v. City and County of San Francisco, 746 F.3d 953, 964-65 (9th Cir. 2014), this Circuit actually applied its two-step test to uphold an ordinance violating the holding of Heller I, which invalidated a prohibition against a firearm "operable for the purpose of immediate self-defense." Heller I at 635.

demonstrates how extraordinary California's ban on half of the magazines in the nation truly is.

Although these *amici* agree with Appellees that the vacated panel opinion reached the correct result by faithfully applying this Court's two-step test, unlike the position advanced by either party, these *amici* seek to demonstrate that the two-step test itself is deeply flawed and should be withdrawn.

ARGUMENT

I. THE TWO-STEP TEST IS WHOLLY INCONSISTENT WITH THE SECOND AMENDMENT AND THE HELLER AND MCDONALD DECISIONS.

A. The Attorney General's Alternative Means Test Fails to Protect the Second Amendment.

The Attorney General's first argument is that its ban on LCMs "do[es] not severely burden the core Second Amendment right so long as gun owners have **alternative means** to defend themselves — as they surely do in California, where there are no limits on the number of **approved** firearms or **authorized** magazines they may possess."[4] A.G. Supp. Br. at 1 (emphasis added). (Note that the State of California is impliedly asserting the power to tell Californians which firearms

[4] Such an "alternative means" test would never be deemed sufficient to limit other freedoms, such as freedom of the press.

are "approved" and which magazines are "authorized.") This "alternative means" rationale was totally rejected in the Second Amendment context by the Heller I decision:

> It is no answer to say, as petitioners do, 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 I at 629.][5]

Moreover, the "alternative means" test allows the government to move incrementally up to the very brink of radical gun confiscation, unimpaired by courts, as it is not until the right is fully extinguished that the Second Amendment is infringed — when there are no "alternative means" remaining. This is exactly what appears to be happening in California. As the Attorney General explained, California banned the "manufacture, importation, and sale of LCMs in 2000" and then "added other LCM restrictions, including prohibitions on the purchase and receipt of LCMs…." A.G. Supp. Br. at 3. Next, legislation and Proposition 63 "made it unlawful to possess LCMs after June 2017" and "required individuals who possessed LCMs to dispose of them." *Id.* at 4. Thus, in this multi-step process, where the courts have declined to give

[5] *See also* Caetano v. Massachusetts, 136 S.Ct. 1027, 1033 (2016) (Alito, J., concurring).

effect to the Second Amendment, we are now in a situation where, as the Attorney General correctly describes it:

> California law now prohibits [i] manufacturing, [ii] importing, [iii] selling, [iv] lending, [v] gifting, [vi] purchasing, [vii] receiving, or [viii] possessing LCMs." [*Id.*]

Having incrementally moved from comparatively mild restrictions, to tighter and tighter restrictions, and now to a complete ban, what part of the "alternative means" test would stop California next from declaring magazines of more than five rounds to be unlawful LCMs because they are deemed "especially lethal weapons" and a "potent threat to law enforcement and the public by allowing shooters to fire scores of rounds from the same firearm in a short period of time"? *Id.* at 2. There is no limiting principle in California's argument on magazines until we return to single shot firearms, and even a single shot firearm certainly is a "lethal weapon" and, in the hands of a criminal, a "potent threat to law enforcement and the public."

B. The Two-Step Test Fails to Protect the Second Amendment.

The panel set out its understanding of the Ninth Circuit's "two-prong test" as one which:

> (1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an

> appropriate level of scrutiny. [Duncan v. Becerra, 970 F.3d 1133, 1145 (9th Cir. 2020) (internal quotations omitted).]

The Attorney General believes that almost all Second Amendment challenges fail the first step, urging:

> courts [should] consider whether the law at issue "affects conduct that is protected by the Second Amendment," principally by looking for "persuasive historical evidence that the regulation does not impinge on the Second Amendment right as it was historically understood" or that it "falls within the presumptively lawful regulatory measures that *Heller* identified…." Restrictions of that sort may be upheld "without further analysis." *Id*. [A.G. Supp. Br. at 6 (citation omitted).]

Drawn from the *en banc* opinion in Young v. Hawaii, 2021 U.S. App. LEXIS 8571 (9th Cir. 2021), this statement is deeply flawed. First, this approach avoids the need to even consider the text of the Second Amendment, rendering it wholly irrelevant to the Court's decision. Then, elevating longstanding restrictions over text and context, the Attorney General erodes the Amendment further. As the panel in this case explained, just because a statute bans a particular weapon, preventing it from being commonly owned, that "can't be the source of its own constitutional validity."[6] Duncan at 1147 (citation

[6] Under this approach, since the Second Amendment was long viewed not protecting a collective, rather than an individual right, any restriction on individual rights before Heller I could be deemed valid by virtue of the historical pedigree.

omitted). Any of the regulations deemed in Heller I to be "presumptively lawful" are automatically considered by the Attorney General to be conclusively lawful "'without further analysis.'" A.G. Supp. Br. at 6. But Justice Scalia did not believe that, as he declared "there will bey time enough to expound upon the historical justifications for the exceptions we have mentioned…." Heller I at 635.

Lastly, none of the three presumptively lawful examples offered by the Heller I court ("felons and the mentally ill," "sensitive places," or "commercial sale" regulations) provide any support whatsoever for California's ban on LCMs. Heller I at 626-27.

In truth, if the first test of the two-step test were applied fairly and literally, virtually every challenge to a firearms law brought in the Ninth Circuit would meet that test, because those challenges generally have been brought to laws which clearly restrict the right of the People to "keep and bear arms."[7]

[7] That is to say, for example, the challenges are not generally being brought to laws which clearly do not infringe on conduct protected by the Second Amendment, challenges brought by persons illegally in the United States who are not part of "the People," or challenges involving weaponry which are not properly understood to constitute "arms."

However, the first test has taken on a life of its own (*id*.), containing what the panel described as four subtests:

Test IA: Whether the law regulates "arms."

These *amici* would concede that this is the only one of the judge-created tests that is textually based and should be applied.

Test IB: Whether the law regulates an arm that is "dangerous and unusual."

Here, the panel later cites to Justice Alito's concurring opinion (joined by Justice Thomas) in Caetano v. Massachusetts, *supra*, for the proposition that, since all firearms are dangerous, arms are protected unless they are both "dangerous and unusual."[8] The panel explained that the "dangerous and

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[8] Second Amendment scholar David Hardy has commented on the type of weapons that might have been considered "dangerous and unusual" at common law and thus viewed as outside the right to keep and bear arms:

> Blunderbusses, the equivalent of a sawed-off shotgun, were pretty common. Apparently private artillery was commonly privately owned.... Tom Jefferson had a pocket pistol specifically designed for concealed carry. The only thing I can readily think of is the Infernal Machine, a generic term for various large assassination tools (i.e., wine kegs filled with gunpowder and surrounded with metal straps for fragmentation.... [D. Hardy, "Dangerous and Unusual Weapons," *Of Arms & The Law* (Oct. 2008).]

unusual" test was tied to the concept of an arm being "in common use"[9] or "commonly owned." The panel correctly explained that when a statute bans ownership of a particular type of arm, thus deeming it not commonly owned, the state cannot argue that it should be banned because it is not commonly owned. However, the Second Circuit test is equally unsettling, looking to "'broad patterns of use and the subjective motives of gun owners.'" *Id*. at 1147. Fortunately, the magazine ban challenged here met that test, but many other types of arms, although fully protected by the Second Amendment, might not.

Test IC: Whether the regulation is longstanding and thus presumptively lawful.

This test is drawn from a footnote in Heller, which essentially stated a truism: statutes are presumptively lawful. However, under this test applied in this Circuit, any regulation which is longstanding is considered not presumptively

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[9] The "in common use" standard originated in United States v. Miller, 307 U.S. 174, 178-179 (1939) in describing the weapons possessed by the militia: "[O]rdinarily … these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." The Miller Court declined to find a Second Amendment right to own a sawed-off shotgun, but that was due to the limited briefing by the parties in that case resulting in the "'absence of any evidence tending to show that the possession or use of [such a weapon] has some reasonable relationship to the preservation or efficiency of a well regulated militia.'" *See also* Heller I at 622.

lawful, but conclusively lawful. If this test is applied, the constitutional rights of the People, which long go unenforced by Courts, become written out of the Constitution. Judges have no such power to excise protections from the Constitution.

Test ID: Whether there is any persuasive historical evidence showing that the regulation affects rights that fall outside the scope of the Second Amendment.

For this subtest, the Court cites Silvester v. Harris, 843 F.3d 816, 821 (9th Cir. 2016), which upheld a 10-day waiting period based on Heller I's presumptively lawful regulatory measures without serious analysis, thereby creating the situation that those who were not already gun owners learned, many for the first time, that they could not obtain guns when they most needed them.[10]

If, and only if, all four tests are met, the court will go on to consider the appropriate level of scrutiny. This choice of levels of scrutiny is based on two additional factors:

Test IIA: How close the challenged law comes to the "core right" of law-abiding citizens to defend hearth and home.

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[10] *See* D. Zimmerman, "With a 10-Day Waiting Period, Mandatory Stay-At-Home Order Means California Buyers Can't Get Their Guns," *The Truth About Guns* (Mar. 20, 2020).

This test appears quite obviously to have been designed to confine the Heller I decision to its facts — defining that core right as having an operational handgun in the home for self-defense.[11] If the restriction is not imposed on the "core right," then intermediate scrutiny is used. However, as Justice Thomas has explained, there are no "core" and "peripheral" Second Amendment rights. See Rogers v. Grewal, 140 S.Ct. 1865, 1867 (2020).

Test IIB: Whether the law imposes "substantial burdens" on what the court believes to be the core right protected by the Second Amendment.

If the burden is not substantial, then intermediate scrutiny is used.

In their 19-page dissent from the Supreme Court's denial of a petition for certiorari, Justices Thomas and Kavanaugh found Judge Benitez's description of this Circuit's two-part test to be accurate:

> Moreover, there is nothing in our Second Amendment precedents that supports the application of what has been described as "a tripartite binary test with a sliding scale and a reasonable fit." *Duncan v. Becerra*, 265 F.Supp.3d 1106, 1117 (SD Cal. 2017). [Rogers v. Grewal, at 1867.]

Only if both tests are met (a substantial burden on a core right) is strict scrutiny used. When strict scrutiny is applied, one would ordinarily expect that

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[11] This method of applying a seminal court decision is quite unlike how judges treat other constitutional rights (even unenumerated, but highly judicially favored rights).

the restriction would be struck down, but in the area of firearms, the judicial animus to firearms is so strong that even when strict scrutiny is applied, the challenge still can be unsuccessful.[12]

Thus, gun owners who take the time to examine how this judicially created "two-step" operates quickly conclude that these tests were designed not to be faithful to the Second Amendment or the Heller I and McDonald v. Chicago, 561 U.S. 742 (2010), decisions, but to dismiss challenges to laws that go beyond how anti-gun judges view the Heller I decision: a handgun in the home for self-defense.

District Court Judge Benitez likewise was bound to follow the two-step test, and did, as did the panel, but it was only because the law being challenged was so egregious that it was found wanting. *See* Duncan v. Becerra, 366 F. Supp. 3d 1131 (S.D. Cal. 2019). It should not have been so difficult to apply the Second Amendment and the Heller I and McDonald decisions properly to reach the same result.

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[12] *See, e.g.*, Kolbe v. Hogan, 849 F.3d 114, 121 (4th Cir. 2017), where a panel determined that strict scrutiny applied to a challenge to a Maryland gun law, but on rehearing *en banc*, the full court determined that "assault weapons and large-capacity magazines are not protected by the Second Amendment," and thus no interest balancing was required.

C. The Two-Step Test Undermines the Heller I Decision.

The two-step test employs precisely what Justice Scalia warned against — the use of "judge-empowering 'interest balancing inquir[ies].'" Heller I, at 634. That atextual two-step test gives judges every possible opportunity to uphold the constitutionality of an infringement of the right to keep and bear arms. It also violates Justice Scalia's additional warning against any approach which allows judges to decide for themselves whether the Second Amendment right "is *really worth* insisting upon." *Id*.

Judges must not have latitude to sanction a constitutional violation by applying an atextual test that facilitates their ability to decide a case based on their personal public policy views. An atextual test should have no place in constitutional jurisprudence, for it would undermine what Justice Marshall "deemed the greatest improvement on political institutions — a written constitution." Marbury v. Madison, 5 U.S. 137, 178 (1803).

> That **the people have an original right** to establish. for their future government. such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected.... The principles, therefore, so established, are deemed fundamental.... And as the authority, from which they proceed, is **supreme**, and can seldom act, they are designed to be **permanent**. [*Id*. at 176 (emphasis added).]

By jettisoning the atextual test previously fashioned by this Court and applied by the panel, this Court has the opportunity to put itself under, rather than over, the Framers, and help restore the public's confidence that federal courts are interpreting the People's Constitution faithfully, and operating within the rule of law rather than under the arbitrary rule of judges.

It is important for the Court to remember that the Second Amendment contains an express purpose clause which should be honored — to secure and preserve the existence of "a free State." A disarmed population has no means to preserve a free state by protecting itself from a tyrannical state. The sequence of the "tightening of the screws" on gun owners by California over two decades is instructive. From this progression it can be concluded that the State of California and the anti-gun forces which dominate its state legislature will not be satisfied even if they achieve the ban on LCMs, as that is only a way station to a complete disarmament of the People in their State, which will make it impossible for them to resist tyranny.

This rehearing *en banc* provides this Court with an excellent opportunity to reassess and correct its Second Amendment jurisprudence to conform it to both

that Amendment's text and history, as applied by the U.S. Supreme Court in Heller I and McDonald.

II. A PROPOSAL FOR APPLYING THE SECOND AMENDMENT'S TEXT.

If a test must be fashioned to interpret and apply the Second Amendment, it should reflect the fact that "'[t]he Constitution was written to be understood by the voters'" (Heller I at 576) when they ratified an Amendment which stated:

> A well regulated Militia, being necessary to the security of a free State, the right of **the people** to **keep** and **bear Arms**, shall not be infringed. [Second Amendment (emphasis added).]

This plain text raises three simple issues to be addressed to decide the case under review — which are far different from the two-step test employed by this Circuit.

1. Does the Second Amendment protect the Appellees? The Second Amendment protects a right of those who are part of the polity — "the People." *See* Heller at 579-80. The Appellees qualify to own arms. Here, there are no complicating questions, such as whether a citizen may lose or regain his right to keep and bear arms.

2. Does the item being regulated constitute an "arm"? Here, California concedes, as it must, that a magazine is an "arm" under the Second Amendment. *See* App. Supp. Br. at 3. In this case, there are no

complicating issues, such as whether a taser, a nunchuck, or a machinegun is a bearable arm.

3. Does the law regulate the "keeping" or "bearing" of "arms"? The California law not only restricts but also bans "keeping" and "bearing" LCMs and then goes as far as it possibly could, as it, in the words of the Attorney General, "prohibits manufacturing, importing, selling, lending, gifting, purchasing, receiving, or possessing LCMs." *See* A.G. Supp. Br. at 4.

The resolution of a challenge to the banning of large capacity magazines should be so simple that it should have been ruled upon summarily, or in a short *per curiam* decision.

III. CIRCUIT COURT OPINIONS UPHOLDING RESTRICTIONS ON MAGAZINES ARE NOT PERSUASIVE.

The Attorney General asserts:

> Every court of appeals to consider a comparable LCM law at step two has applied intermediate scrutiny — on the basis that the law does not severely burden the core Second Amendment right to defend the home — and has correctly held that the law survives under that standard. [A.G. Supp. Br. at 15-16.]

For this proposition, the Attorney General cites four cases: Heller II (D.C. Cir. 2011); Kolbe (4th Cir. 2017); Association of New Jersey Rifle and Pistol Clubs

(3d Cir. 2018); Worman (1st Cir. 2019). *See* A.G. Supp. Br. at 16. None of those four decisions is persuasive.

In Heller v. District of Columbia, 670 F.3d 1244 ("Heller II") (D.C. Cir. 2011), a divided panel of the D.C. Circuit upheld the District's ban on large-capacity magazines, skipping analysis of whether they are even within the scope of protection of the Second Amendment because it concluded that "intermediate scrutiny is the appropriate standard of review and the prohibitions survive that standard." Heller II at 1261. Applying intermediate scrutiny, the court majority relied on a report from the D.C. Committee on Public Safety which, in turn, relied on testimony sponsored by an antigun organization that LCMs are dangerous not just because "'they greatly increase the firepower of mass shooters," but also because, remarkably, they were "dangerous in self-defense situations.'" *Id*. at 1263. In dissent, then-Judge Kavanaugh explained that the Heller I decision did not allow such interest balancing, and an examination of the Amendment's "text, history, and tradition" established that the restriction would not stand. *See* Heller II, at 1271 (Kavanaugh, J., dissenting).

In Kolbe v. Hogan, *supra*, the *en banc* Fourth Circuit upheld a high capacity magazine ban by the State of Maryland. The majority opinion was

replete with factual misstatements designed to buttress its opinion by making LCMs sound more like WMDs than standard components of tens of millions of firearms:

> large-capacity magazines prohibited by the [Maryland law] allow a shooter to fire more than ten rounds without having to pause to reload, and thus "are particularly designed and most suitable for **military** and **law enforcement** applications."… [Kolbe at 125 (emphasis added).]

Incorrectly interpreting Heller I as drawing a bright line "between weapons that are most useful in military service and those that are not," the Fourth Circuit reached the conclusion that LCMs are "outside the ambit of the Second Amendment." Kolbe at 136-37. Thus, that court concluded that if the military happens to find a particular firearm or accessory useful, then any state may restrict or ban it: "Whatever their other potential uses — including self-defense — … large-capacity magazines prohibited by [Maryland] are unquestionably most useful in military service," and are thus "not constitutionally protected." *Id*. at 137.

Like the District of Columbia, the Fourth Circuit was not content to worry about LCMs in the hands of criminals — it conjured up a reason not to trust them in the hands of the law-abiding citizens:

> **Even in the hands of law-abiding citizens, large-capacity magazines are particularly dangerous**. The State's evidence demonstrates that, when inadequately trained civilians fire weapons equipped with large-capacity magazines, they tend to fire more rounds than necessary and thus endanger more bystanders. [*Id*. at 127 (emphasis added).]

Concurring Judges Wilkinson and Wynn actually thought enforcing the Constitution threatened the Republic:

> Disenfranchising the American people on this life and death subject would be the gravest and most serious of steps…. [Invalidating the Maryland gun restrictions] would deliver a body blow to democracy as we have known it since the very founding of this nation. [*Id*. at 150 (Wilkinson, J., concurring).]

In Association of New Jersey Rifle and Pistol Clubs v. Attorney General New Jersey, 974 F.3d 237 (3d 2018), a divided panel of the Third Circuit concluded that a LCM ban does not burden the core Second Amendment guarantee, for five reasons:

> (1) it does not categorically ban a class of firearms but is rather a ban on a subset of magazines; (2) it is not a prohibition of a class of arms overwhelmingly chosen by Americans for self-defense in the home; (3) it does not disarm or substantially affect Americans' ability to defend themselves; (4) New Jersey residents can still possess and use magazines, just with fewer rounds; and (5) "it cannot be the case that possession of a firearm in the home for self-defense is a protected form of possession under all circumstances." [*Id*. at 243.]

Judge Paul Matey issued a comprehensive and persuasive dissent from that panel's decision, correctly concluding that the law does not survive "intermediate scrutiny," but more importantly demonstrating how the panel's decision undermines, rather than follows, Heller I and McDonald.

> When twice presented with the opportunity to import tiered scrutiny from decisions considering the First Amendment, the Supreme Court instead focused on **text, history, and tradition**. *See Heller*… (declining to apply a specified level of scrutiny and observing that "[w]e know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach."); *McDonald*…("[W]e expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing"). [Association of New Jersey Rifle and Pistol Clubs at 262 (Matey, J., dissenting) (emphasis added).]

Lastly, in Worman v. Healey, 922 F.3d 26 (1st Cir. 2019), the First Circuit concluded that the right to keep and bear arms, which the Second Amendment says "shall not be infringed," is merely a "right that is protected in varying degrees by the Second Amendment." *Id.* at 41. The court saw the decision whether to restrict Second Amendment rights as a legitimate balancing for the state legislatures to perform, and the court's only consideration (under intermediate scrutiny) was to consider whether the legislature "'has drawn reasonable inferences based on substantial evidence.'" *Id*. at 40.

IV. FOUR SITTING JUSTICES AND OTHER JUDGES HAVE AFFIRMED THE PROTECTIONS AFFORDED BY THE SECOND AMENDMENT AND EXPRESSED DISSATISFACTION WITH THE TWO-STEP TEST.

A. Criticism of the Two-Step Test by Supreme Court Justices.

In McDonald, the Supreme Court refused to treat the Second Amendment "as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees…." McDonald at 780. However, that is exactly what this Court's two-step test does. Although the High Court has gone largely silent since Heller and McDonald in refusing to grant certiorari in numerous Second Amendment cases, the Court has made clear that its silence must not be viewed as approval of the unreviewed decisions.[13] Rather, it is the duty of the lower federal courts to act consistent with the Supreme Court's last word on the subject — its decisions in Heller and McDonald. For the last six years, four sitting justices have gone out of their way in commenting about the need to bring the Second Amendment jurisprudence of certain lower federal courts into line.

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[13] *See* Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 917-19 (1950) ("The sole significance of … denial of a petition for writ of certiorari [is] that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter 'of sound judicial discretion' [and] carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review.")

In 2015, this Court upheld San Francisco's highly restrictive requirement that a handgun in a home must be stored in a gun safe when it is not physically on the person. Justices Thomas and Scalia dissented from this Court's denial of certiorari, explaining that "Second Amendment rights are no less protected by our Constitution than other rights enumerated in that document" and that, "[d]espite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts … have failed to protect it." Jackson v. City & Cnty. of San Francisco, 576 U.S. 1013-14 (2015). Disagreeing with the Ninth Circuit's "tiers-of-scrutiny analysis," the dissent noted that the Court should have granted the petition "to reiterate that courts may not engage in this sort of judicial assessment as to the severity of a burden imposed on core Second Amendment rights." *Id*. at 1017.

Later in 2015, Justices Thomas and Scalia once again dissented from a denial of certiorari from a Seventh Circuit decision upholding an Illinois city's ban on so-called "assault weapons." Justice Thomas criticized the Seventh Circuit's "crabbed reading of *Heller*," which left the Circuit "free to adopt a test for assessing firearm bans that eviscerates many of the protections recognized in *Heller* and *McDonald*." Friedman v. City of Highland Park, 577 U.S. 1039,

1041 (2015). The dissent reiterated that "*Heller* … forbids subjecting the Second Amendment's 'core protection … to a freestanding "interest-balancing" approach.'" *Id*. at 1042 (quoting Heller I at 634). And the dissent pointed out the disparity of treatment that the Second Amendment has received: "The Court's refusal to review a decision that flouts two of our Second Amendment precedents stands in marked contrast to the Court's willingness to summarily reverse courts that disregard our other constitutional decisions." *Id*. at 1043 (citing several summary reversals).

Also, in 2015, while still a circuit court judge, Justice Kavanaugh explained that he would have struck down the District of Columbia's modified gun regulation scheme because "*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny." Heller II at 1271 (Kavanaugh, J., dissenting). Justice Kavanaugh emphasized his reliance on a "text, history, and tradition" test, and that test has come to be viewed as the test which embodies the Scalia opinion for the court, while the two-step test used by this Court reflects the Breyer dissent.[14]

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[14] *See* Allen Rostron, "Justice Breyer's Triumph in the Third Battle over the Second Amendment," 80 GEO. WASH. L. REV. 703 (2012) ("The lower

In 2016, Justice Alito, joined by Justice Thomas, issued a concurring opinion in Caetano v. Massachusetts, *supra*, which criticized not the two-step test, *per se*, but rather a test being employed by the Supreme Court of Massachusetts to evaluate Second Amendment challenges. Justice Alito criticized the Massachusetts Supreme Court's "common use" test, which had resulted in a finding that stun guns were not in common use at the time of the enactment of the Second Amendment and in the Massachusetts Court's conclusion that stun guns were within the traditional prohibition against carrying dangerous and unusual weapons. Of particular relevance to the Attorney General's argument that Californians can still use 10-round magazines to protect themselves, Justice Alito offered this analysis:

> The Supreme Judicial Court suggested that Caetano could have simply gotten a firearm to defend herself. But **the right to bear other weapons is "no answer" to a ban on the possession of protected arms**. *Heller*, 554 U.S., at 629, 128 S. Ct. 2783, 171 L. Ed. 2d 637. [*Id*. at 1033 (Alito, J., concurring) (emphasis added) (citation omitted).]

The stun gun in Caetano had been acquired for self-defense purposes, leading Justice Alito to the following ringing criticism of courts that refuse to

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court's decisions strongly reflect the pragmatic spirit of the dissenting opinions that Justice Breyer wrote in Heller and McDonald.")

give effect to the Second Amendment's "right to keep and bear arms…" — which is a right that "vindicates the 'basic right' of 'individual self-defense.'" *Id.* at 1028.

> If the fundamental right of self-defense does not protect Caetano, then the safety of all Americans is left to the mercy of **state authorities** who may be **more concerned about disarming the people than about keeping them safe**. [*Id.* at 1033 (emphasis added).]

In 2017, Justices Thomas and Gorsuch dissented from denial of certiorari of an *en banc* decision of this Court. The Ninth Circuit had *sua sponte* granted rehearing *en banc* after a panel of that court faithfully applied the text, history, and tradition of the Second Amendment to find California's "good cause" requirement for concealed carry permits to be unconstitutional. Peruta v. California, 137 S. Ct. 1995, 1996-97 (2017). This *en banc* court reversed, finding that the Second Amendment does not protect carrying firearms concealed in public. *Id.* Justice Thomas's dissent addressed "a distressing trend: the treatment of the Second Amendment as a disfavored right." *Id.* at 1999. Justice Thomas observed that, from the McDonald decision to the denial of certiorari in Peruta, the Court had granted review in about 35 cases involving the First

Amendment and 25 cases involving the Fourth Amendment, but none involving the Second Amendment. *Id*.

In 2018, Justice Thomas once again dissented from a denial of certiorari of another decision of this Court. *See* Silvester v. Becerra, 138 S. Ct. 945 (2018). His dissent found the Ninth Circuit's decision upholding a 10-day waiting period for firearm purchases to be "symptomatic of the lower courts' general failure to afford the Second Amendment the respect due an enumerated constitutional right," and that "[i]f a lower court treated another right so cavalierly, I have little doubt that this Court would intervene." *Id*. at 945. The dissent again stressed that "the lower courts are resisting this Court's decisions in *Heller* and *McDonald* and are failing to protect the Second Amendment to the same extent that they protect other constitutional rights," and added that the Court's "continued refusal to hear Second Amendment cases only enables this kind of defiance." *Id*. at 950-51. Justice Thomas noted the curiosity that "rights that have no basis in the Constitution receive greater protection than the Second Amendment, which is enumerated in the text." *Id*. at 951. "The right to keep and bear arms is apparently this Court's constitutional orphan. And the lower courts seem to have gotten the message." *Id*. at 952.

In Rogers v. Grewal, *supra*, Justices Thomas and Kavanaugh dissented from the denial of a petition for certiorari, observing: "[i]n the years since [Heller and McDonald], lower courts have struggled to determine the proper approach for analyzing Second Amendment challenges…." and "many courts have resisted our decisions…. " *Id*. at 1866 (Thomas, J., dissenting). Not the least of the "numerous concerns" raised by the "two-step inquiry" is that the test "appears to be entirely made up. The Second Amendment provides no hierarchy of 'core' and peripheral rights." *Id*. at 1867.

Last year, when the Supreme Court dismissed New York State Rifle & Pistol Ass'n v. New York, 140 S. Ct. 1525 (2020) based on mootness, Justice Kavanaugh concurred, but noted: "I share Justice Alito's concern that some federal and state courts may not be properly applying *Heller* and *McDonald*. The Court should address that issue soon." *Id*. at 1527 (Kavanaugh, J., concurring). Justice Alito, dissenting from the dismissal and joined by Justices Thomas and Gorsuch, concluded, "I believe we should" rule in the case, and "hold, as petitioners request … that [the challenged statute] violated petitioners' Second Amendment right…. We are told that the mode of review in this case is

representative of the way *Heller* has been treated in the lower courts. If that is true, there is cause for concern." *Id*. at 1535, 1544 (Alito, J., dissenting).

B. Criticism of the Two-Step Test by Lower Court Judges.

The criticism of the two-step test has also been shared by some lower court judges. When this Circuit upheld the ban on firearms possession by an individual who had been convicted of a misdemeanor crime of domestic violence[15] in Fisher v. Kealoha, 855 F.3d 1067 (9th Cir. 2017), Judge Kozinski concurred in the *per curiam* decision, but issued a separate "ruminating" opinion to encourage equal treatment of the Second Amendment among the Bill of Rights:

> In other contexts, we don't let constitutional rights hinge on unbounded discretion [of a governor's pardon]; the Supreme Court has told us, for example, that "[t]he First Amendment prohibits the vesting of such unbridled discretion in a government official." Despite what some may continue to hope, the Supreme Court seems unlikely to reconsider *Heller*. **The time has come to treat the Second Amendment as a real constitutional right. It's here to stay**. [Fisher at 1072 (Kozinski, J., ruminating) (emphasis added) (citation omitted).]

Although the Fifth Circuit also uses the two-step test, many judges on that court disagree with interest balancing in the Second Amendment context. *See*

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[15] *See* 18 U.S.C. § 922(g)(9).

Houston v. City of New Orleans, 675 F.3d 441, 448 (5th Cir. 2012) (Elrod, J., dissenting), opinion withdrawn and superseded on reh'g, 682 F.3d 361 (5th Cir. 2012) (*per curiam*); NRA v. BATFE, 714 F.3d 334 (5th Cir. 2013) (six judges dissenting from a denial of rehearing *en banc*). When the Fifth Circuit once again denied rehearing *en banc* in a Second Amendment case involving a challenge to the residency requirement for firearms purchases from federally licensed firearms dealers,[16] seven judges vigorously dissented from the denial of rehearing, explaining, "[s]imply put, unless the Supreme Court instructs us otherwise, we should apply a test rooted in the Second Amendment's text and history — as required under *Heller* and *McDonald* — rather than a balancing test like strict or intermediate scrutiny." Mance v. Sessions, 896 F.3d 390, 394 (5th Cir. 2018) (Elrod, J., dissenting). Also, Judge Willett commented on the judicial hostility to the Second Amendment:

> Constitutional scholars have dubbed the Second Amendment "the Rodney Dangerfield of the Bill of Rights…."
>
> The Second Amendment is neither second class, nor second rate, nor second tier. The "right of the people to keep and bear Arms" has no need of penumbras or emanations. It's right there, 27 words enshrined for 227 years. [*Id*. at 396 (Willett, J., dissenting).]

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[16] *See* 18 U.S.C. §§ 922(a)(3) and 922(b)(3).

CONCLUSION

California treats the Second Amendment as though it was a civil right granted to the People, and whatever rights the government grants, it can restrict. On the contrary, the Second Amendment affirms and protects a pre-existing human right of the People to defend themselves against individuals, groups, and even governments. *See, e.g.*, Luke 11:21 ("When a strong man armed keepeth his palace, his goods are in peace."). *See also* Nehemiah 4:16-18; Psalm 144:1; Luke 22:35-37. These Biblical passages are particularly relevant, because the Declaration of Independence asserts that "all Men … are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness" and it is "to secure these Rights [that] Governments are instituted among Men." The Supreme Court declared a century and a half ago that the Second Amendment:

> is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed. [United States v. Cruikshank, 92 U.S. 542, 553 (1876).]

Based on that principle, Justice Scalia explained, "the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right" (Heller at 592) which cannot be "infringed" by California.

This Court has a solemn duty to act and repudiate its deeply flawed "two-step" test to protect both the U.S. Constitution and the People of California who value their constitutional rights. Applying Justice Scalia's conclusion in Heller to this Court: "it is not the role of this Court to pronounce the Second Amendment extinct." Heller at 636.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.*, in Support of Plaintiffs-Appellees, was made, this 21st day of May 2021, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

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