No. 20-55437

In the
United States Court of Appeals for the Ninth Circuit

KIM RHODE, *ET AL.*,
Plaintiffs-Appellees,
v.
ROB BONTA, in his official capacity as
Attorney General of the State of California,
Defendant-Appellant.

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

Supplemental Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Heller Foundation, Oregon Firearms Federation, Virginia Citizens Defense League, Tennessee Firearms Association, Grass Roots North Carolina, Rights Watch International, America's Future, Downsize DC Foundation, DownsizeDC.org, Conservative Legal Defense and Education Fund, and Restoring Liberty Action Committee in Support of Plaintiffs-Appellees and Affirmance

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DISCLOSURE STATEMENT

The *amici curiae* herein, Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Heller Foundation, Oregon Firearms Federation, Virginia Citizens Defense League, Tennessee Firearms Association, Grass Roots North Carolina, Rights Watch International, America's Future, Inc., Downsize DC Foundation, DownsizeDC.org, 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). Restoring Liberty Action Committee is an unincorporated educational organization, and the other *amici curiae* are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them.

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

Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Heller Foundation, Oregon Firearms Federation, Virginia Citizens Defense League, Tennessee Firearms Association, Grass Roots North Carolina, Rights Watch International, America's Future, Downsize DC Foundation, DownsizeDC.org, 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.

These *amici* have filed numerous other *amicus* briefs in federal and state courts in support of the Second Amendment, and some filed a prior *amicus* brief in this case on August 7, 2020.

Since the U.S. Supreme Court's June 23, 2022 decision in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), these *amici* have filed two *amicus* briefs in this Circuit:

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[1] All parties have consented to the filing of this brief *amicus curiae*. 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.

- *Duncan v. Bonta*, No. 19-55376, Brief *Amicus Curiae* of Gun Owners of America, *et al.* (August 23, 2022); and

- *Yukutake v. Shikada*, No. 21-16756, Supplemental Brief *Amicus Curiae* of Gun Owners of America, *et al.* (September 19, 2022).

STATEMENT OF THE CASE

In 2018, Plaintiffs, a coalition of California citizens and firearms sellers doing business in the State of California, filed suit seeking to have State Proposition 63 ("Prop. 63") ruled unconstitutional as violative of the Second Amendment right to keep and bear arms. *See Rhode v. Becerra*, 342 F. Supp. 3d 1010, 1012 (S.D. Cal. 2018). Proposition 63 requires California citizens to undergo a background check every time they wish to purchase ammunition for firearms. *Rhode v. Becerra*, 445 F. Supp. 3d 902, 912 (S.D. Cal. 2020).

On April 23, 2020, the district court granted Plaintiffs an injunction, declaring the law unconstitutional. *Id.* 910. The following day, the district court denied the state's motion to stay the injunction. *Rhode v. Becerra*, 2020 U.S. Dist. LEXIS 72863, at *4 (S.D. Cal. 2020). However, this Court granted an emergency stay (*Rhode v. Becerra*, 2020 U.S. App. LEXIS 13406 (9th Cir. 2020)), and then issued a permanent stay pending appeal of the underlying case. *Rhode v. Becerra,* 2020 U.S. App. LEXIS 15525 (9th Cir. 2020).

The three-judge panel heard oral argument on November 9, 2020, and on March 19, 2021, this Court directed the appeal to be held in abeyance pending this Court's *en banc* decision in the related case of *Duncan v. Becerra* (Case No. 19-55376). *Rhode v. Rodriquez*, 2021 U.S. App. LEXIS 8165 (9th Cir. 2021).

On June 24, 2022, this Court vacated its March 19, 2021 order, and ordered the parties to file "supplemental briefing in light of the [United States] Supreme Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*…" which had been decided on June 23, 2022. *See Rhode v. Bonta*, 2022 U.S. App. LEXIS 17486 (9th Cir. 2022).

STATEMENT

As this Court makes its fresh examination of the pending challenge to California's effort to restrict access to ammunition, in light of the Supreme Court's June 23, 2022 decision in *Bruen*, it would be a good time to re-examine first principles.

> [T]he Second Amendment prohibits Congress from **infringing** upon the right "to keep and bear arms" which is immediately derived from the **unalienable right** to self-defense…. The concept of unalienable rights … **preclude[s]** civil government from **balancing** rights against governmental interests, whether such interests are compelling, rational or just made up by some bureaucrat. [K.L. Morgan, Origin of Civil Government at 135, 137 (Lonang Institute: 2022) (emphasis added).]

Judicial balancing — pitting the Constitution's text against the government's interest in public safety — was very much a part of the two-step test, but now has, again, been repudiated by the Supreme Court in *Bruen*. Government always believes it has good reasons to restrict gun rights since politicians feel they must "do something" to respond to each tragedy so that it "will never happen again" — even if that "something" results in the undermining of the Second Amendment. Through balancing, every conceivable type of restriction on gun rights has been upheld by this Circuit.[2]

However, in the process of interest balancing, the text and meaning of the Second Amendment — "the right of the people to keep and bear Arms, shall not be infringed" — has been lost in the shuffle. The Framers made clear that they believed anti-infringement language of the Second Amendment was necessary for "the security of a free state…." They were prescient, for as gun rights are allowed to erode, all forms of freedom also erode with them.

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[2] "The 9th Circuit Court of Appeals has applied the lower courts' contrived two-step balancing test in some 50 cases, upholding every California and Hawaii restriction coming before that court." S. Halbrook, "Supreme Court Second Amendment ruling is about self-defense," *Washington Examiner* (July 15, 2022).

Using interest balancing, the text of the Second Amendment has been ignored and twisted. Judge Benitez explained that each anti-gun law has been advertized as a way to plug a "loophole." *Rhode v. Becerra*, 445 F. Supp. 3d at 912. However, he stated, "the Second Amendment is not a 'loophole' that needs to be closed" — either by the voters, or legislators, or judges.

Numerous Ninth Circuit decisions addressing challenges to firearms laws under the two-step test repudiated by *Bruen* have been replete with assertions of the dangers of firearms and occasions when they are misused.[3] So-called "social science" studies have been relied upon by the courts speculating as to the cause of tragedies. But tragedies have been with us as long as people have been on earth, and if each tragedy provides an excuse to take away another constitutional right, then it is surprising that Californians have any right whatsoever to purchase or possess any firearms or ammunition.

The government of the State California has been allowed to impose ever higher barriers to the exercise of the God-given right of self-defense (*see, e.g.,*

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[3] *See, e.g., Jackson v. City & County of San Francisco*, 746 F.3d 953, 966 (9th Cir. 2014) ("Accordingly, San Francisco has carried its burden of demonstrating that its locked-storage law serves a significant government interest by reducing the number of gun-related injuries and deaths from having an unlocked handgun in the home.").

Nehemiah 4:17-18; *Psalm* 144:1; *Luke* 11:21) with laws that impair law abiding citizens but have no effect on criminals. In this way, California actually is siding with the criminal against the citizen, as its gun laws have helped criminals by impairing the ability of Californians to effectively resist crime. As Holy Writ states: "Or else how can one enter into a strong man's house, and spoil his goods, except he first bind the strong man? and then he will spoil his house." *Matthew* 12:29.

Consider how these anti-gun laws violate the chief duty of any governmental leader, which is to ensure the "punishment of evildoers," and to "praise … them that do well." 1 *Peter* 2:14; *see also Romans* 1:1-7. The district court explained the challenged restrictions on ammunition sales do exactly the opposite:

> No doubt, to prevent gun crime by preventing felons and other prohibited persons from acquiring ammunition is a laudable goal. But there is little evidence that pre-purchase ammunition background checking will accomplish the goal and the burden it places on the Constitutional rights of law-abiding firearm owners is profound. Furthermore, compared to the discouraging effect on criminals, **the laws have a severely disproportionate effect on law-abiding citizen-residents**. [*Rhode*, 445 F. Supp. 3d at 911 (emphasis added).]

Now, after *Bruen*, and with the U.S. Supreme Court's complete rejection of the two-step test and interest balancing, this Court has the opportunity to get on the right course, both constitutionally and Biblically.

ARGUMENT

I. THE ORIGIN OF THE JUDGE-EMPOWERING, INTEREST BALANCING TWO-STEP TEST IN THE NINTH CIRCUIT.

There are many lessons that the lower courts must take from the *Bruen* decision — but the most fundamental is its unequivocal prohibition on use of the two-step test: "Today, we decline to adopt that two-part approach.… Despite the popularity of this two-step approach, it is one step too many…." *Bruen* at 2126-27. Another look should be given to the history of this test to ensure no aspect of that test creeps back into this Court's jurisprudence.

The two-step test was not invented in the Ninth Circuit, but it has been used in this Circuit since 2013. In *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013), the Court considered a Second Amendment challenge to 18 U.S.C. § 922(g)(9), prohibiting firearm possession by those convicted of misdemeanor crimes of domestic violence ("MCDV"). The two-step test appears to have been adopted in this criminal case by default, perhaps in part because the defendant was represented not by any organization focused on winning Second Amendment

cases based on the correct analysis, but rather by Federal Defenders less focused on the test employed. In *Chovan*, the "appellant d[id] not argue [against] the familiar 'scrutiny' tests … of our sister circuits … but [rather] accepts it." *Id.* at 1142-3 (Bea, J., concurring). The *Chovan* panel did not conduct any analysis of the propriety of the two-step interest balancing test or consider other approaches before adopting "the two-step Second Amendment inquiry undertaken by the Third Circuit in *Marzzarella* … and the Fourth Circuit in *Chester*." *Id.* at 1136 (Bea, J., concurring).

Its adoption was questioned at the time, however. Judge Bea noted that the majority treated the framework issue not so much decided as "waived" — "accept[ing] the application of the tiers of scrutiny," but pointing out competing frameworks for Second Amendment analysis, such as by then-Judge Kavanaugh ("'text, history, and tradition'") and commentators who note that interest balancing tests "'don't make sense here' in the Second Amendment context because the language of *Heller* seems to foreclose scrutiny analysis." *Id.* at 1143 (Bea, J., concurring).

Applying the two-step test, the *Chovan* Court concluded that the right of a person convicted of an MCDV to have a firearm "'is not within the core right

identified in *Heller* — the right of a *law-abiding, responsible* citizen to possess and carry a weapon for self-defense….'" *Id.* at 1138. Nevertheless, the Court concluded that "[t]he burden … is quite substantial," because it "amounts to a 'total prohibition'" of his right to keep and bear arms. Applying intermediate scrutiny to this non-core-but-severe-burden statute, the Court recited the "important … government interest of preventing domestic gun violence," and concluded that prohibiting those convicted of an MCDV from having firearms could further that interest. *Id.* at 1139-1141.

This two-step test has been applied to literally dozens of Second Amendment challenges in this Circuit during the intervening years.

II. THE FAITHFUL APPLICATION OF *BRUEN* TO *RHODE* COULD NOT BE MORE SIMPLE.

In *Bruen*, the U.S. Supreme Court made clear that the two-step test long used by this Court was no longer permitted: "Despite the popularity of this two-step approach, it is one step too many…." *Bruen* at 2127. The Court set out the test to be used by reviewing courts:

> In the years since, the Courts of Appeals have coalesced around a "two-step" framework for analyzing Second Amendment challenges that combines history with means-end scrutiny.
>
> Today, **we decline to adopt that two-part approach**. In keeping with *Heller*, we hold that when the Second Amendment's

> **plain text covers an individual's conduct**, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, **the government must demonstrate** that the regulation is **consistent with this Nation's historical tradition** of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command." *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n.10 (1961). [*Bruen* at 2125-26 (emphasis added).]

Although step one of the discredited two-part test allowed courts to claim that many firearms restrictions fell "outside the scope of the right as originally understood" — if there was any historical antecedent to the restrictions — that often led to a finding that the right did not even implicate the Second Amendment, or that the court would casually "assume" without determining that it did.[4] *Bruen*, correctly, elevates the Constitution's text to first place, so that lower courts may not continue to allow infringements on gun rights.

There is to be no means-end scrutiny, nothing gained from endless recitations of the dangers and risks of firearms. *See Bruen* at 2125-26. There is no deference to the legislative branch whatsoever, because "while that judicial deference to legislative interest balancing is understandable — and, elsewhere,

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[4] *See, e.g., United States v. Chapman,* 666 F.3d 220, 226 (4th Cir. 2012).

appropriate — it is not deference that the Constitution demands here. The Second Amendment 'is the very *product* of an interest balancing by the people….'" *Bruen* at 2131 (citing *Heller* at 635).

The only issue to decide is whether California has acted consistent with the text "shall not be infringed," and "demonstrate[d] that the regulation is **consistent with this Nation's historical tradition** of firearm regulation." *Id*. at 2126 (emphasis added).

III. THE DISTRICT COURT'S "SIMPLE *HELLER* TEST" IS FULLY CONSISTENT WITH *BRUEN*.

District Judge Benitez applied two alternative tests in his opinion. One he called the "Simple *Heller* Test," and the other was the Ninth Circuit's two-step test — which he described as a "tripartite binary test with a sliding scale and a reasonable fit." *Rhode*, 445 F. Supp. 3d at 930. With that second test having now been once-and-for-all rejected by the Supreme Court in *Bruen*, we can focus on Judge Benitez's use of the simple *Heller* test. In every respect, this portion of Judge Benitez's opinion is consistent with *Bruen*.

Judge Benitez first examined whether the items in question were "commonly owned for lawful purposes," determining that ammunition met that test thus was protected. *Id.* at 930-31. Then Judge Benitez examined whether

the regulation is one of the presumptively lawful regulatory measures identified in *Heller*, or whether the record includes persuasive historical evidence establishing that the regulation at issue falls outside the historical scope of the Second Amendment. On that point, he cited *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 676-77 (9th Cir. 2017) (*en banc*) and *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 968 (9th Cir. 2014) for the proposition that "an ammunition background check has no historical pedigree." *Rhode*, 445 F. Supp. 3d at 931. Considering the multiple times that this issue has arisen, and the briefing of the issue in the district court below, the likelihood that the State of California would now be able to demonstrate from relevant history that the sale of ammunition has been regulated in a manner that would satisfy the test in *Bruen*, is nil.

Judge Benitez concluded: "Using the simple *Heller* test, it is obvious that the California background check laws that *de facto* completely block some law-abiding responsible citizens from buying common ammunition are unconstitutional. Under the simple *Heller* test, judicial review could end right here." *Rhode*, 445 F. Supp. 3d at 931 (footnote omitted). The Supreme Court

in *Bruen* basically re-affirmed the test Judge Benitez applied, rendering the challenged ammunition restrictions unconstitutional.

IV. PUTTING *RHODE* INTO THE CONTEXT OF NINTH CIRCUIT REMANDS.

When *NYSRPA v. Bruen* was decided on June 23, 2022, two of this Court's *en banc* Second Amendment decisions, both of which applied the two-step test, were pending before the U.S. Supreme Court on petitions for writ of certiorari. *See Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021) *(en banc)*, and *Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021) (*en banc*). Shortly after the Supreme Court issued its decision in *Bruen*, it granted, vacated, and remanded those two petitions for writ of certiorari back to this Court. *See Duncan v. Bonta*, 2022 U.S. LEXIS 3233 (June 30, 2022) and *Young v. Hawaii*, 142 S. Ct. 2895 (June 30, 2022).

***Duncan v. Bonta* (No. 19-55376).** Following the Supreme Court's decision in *New York State Rifle & Pistol Association v. Bruen* on June 23, 2022, it granted the petition for writ of certiorari, vacated this Court's *en banc* decision, and remanded to this Court. That remand led to the *en banc* panel's request on August 2, 2022 for supplemental briefing about "the effect of *Bruen* on this appeal, including whether the en banc panel should remand this case to

the district court for further proceedings in the first instance." Just last week, the *en banc* panel remanded the case to the district court, with two members dissenting. *Duncan v. Bonta*, 2022 U.S. App. LEXIS 26737 (9th Cir. Sept. 23, 2022).

***Young v. Hawaii* (No. 12-17808).** The *en banc* court which heard the *Young* case has already remanded the case to the district court in Hawaii. Dissenting from the remand, Judge O'Scannlain stated that the Court failed to answer the simple question before it. Instead, the Court's choice "delays the resolution of this case, wastes judicial resources, and fails to provide guidance to the lower courts of our Circuit." *Young v. Hawaii*, 2022 U.S. App. LEXIS 23140, *8 (9th Cir. 2022) (O'Scannlain, J., dissenting). Judge O'Scannlain, joined by three other judges from the *en banc* panel, explained application of the Second Amendment and *Bruen* to that case and concluded that "We are bound, now, by *Bruen*, so there is no good reason why we could not issue a narrow, unanimous opinion in this case. The traditional justifications for remand are absent here. The issue before us is purely legal, and not one that requires further factual development." *Id*. at *16-17.

***Miller v. Bonta* (No. 21-55608).** Last year, the three-judge panel considering *Miller* stayed the briefing schedule in that case pending resolution of the appeal in *Rupp v. Bonta*, a case which involved a challenge to the same law at issue in *Miller*. Following the *Bruen* decision, the panel granted California's motion to remand to the Southern District of California, which has ordered supplemental briefing in light of *Bruen*. *See Miller v. Bonta*, No. 21-55608, order of August 1, 2022.

***Jones v. Bonta* (No. 20-56174).** Earlier this year, a three-judge panel struck down California's ban on possession of firearms by adults aged 18 to 20 years. California filed a petition for rehearing *en banc* after the *Bruen* decision, and on September 7, 2022, this Court granted rehearing and summarily reversed and remanded to "the district court for further proceedings consistent with" *Bruen*.

***Rupp v. Bonta* (No. 19-56004).** The appeal in *Rupp* had been held in abeyance by a panel pending a decision in *Bruen*, and following that decision, the panel vacated the district court opinion and remanded to the Central District of California for consideration consistent with *Bruen*. *See Rupp v. Bonta*, No. 19-56004, order of June 28, 2022.

***Flanagan v. Becerra* (No. 18-55717).** On July 30, 2019, this Court stayed proceedings in *Flanagan* pending resolution of *Young v. Hawaii*. As of the date of the filing of this brief, the Court has not lifted the stay.

***Yukutake v. Shikada* (No. 21-16756).** The *Yukutake* case involves challenges to Hawaii gun restrictions and has been fully briefed to the Ninth Circuit panel. The panel did not remand to the district court, and instead directed supplemental briefing in light of *Bruen* and will be scheduled for the next available argument calendar. *Yukutake v. Connors*, 2022 U.S. App. LEXIS 23154 (9th Cir. Aug. 18, 2022).

In resolving the *Rhode* case, These *amici* believe this should rule without remand to the district court. With facts not in dispute, it is a purely legal matter to consider whether the ammunition background check requirement at issue here is consistent with the Second Amendment applying the test laid out in *Bruen*. When this Court has directed supplemental briefing, it did not ask whether the parties support a remand. Nevertheless, the Attorney General requested in the alternative that the case be remanded to the district court. *Amici* join with Plaintiffs-Appellees in urging this Court to reject that request. Deciding this case now will promote judicial efficiency and provide guidance to the lower courts

and other panels of this Court in handling the cases identified above, as well as others that will come.

V. BEFORE *BRUEN*, THE SUPREME COURT WARNED LOWER COURTS NOT TO DEFY THE *HELLER* AND *MCDONALD* DECISIONS.

The one significant Supreme Court Second Amendment case decided since *Heller* and *McDonald* was the Court's unanimous *per curiam* decision in *Caetano v. Massachusetts*, 577 U.S. 411 (2016). There the Court ruled that a stun gun was a Second Amendment-protected arm. *Caetano* reiterated many of the important principles of *Heller* and *McDonald* as it rejected in summary fashion the three reasons given by the Massachusetts courts for upholding the ban. First, it rejected the rationale that stun guns "'were not in common use at the time of the Second Amendment's enactment,'" as being "inconsistent with *Heller*'s clear statement that the Second Amendment 'extends … to … arms … that were not in existence at the time of the founding.'" *Caetano* at 411-12. Second, it rejected the claim that stun guns were "'dangerous'" and were "'unusual weapons'" because they are "'a thoroughly modern invention.'" *Id*. at 412. The Court found unpersuasive the lower court's equating "'unusual'" with "'not in common use at the time of the Second Amendment's enactment.'" *Id*. Third, the

Supreme Court found that the Massachusetts rationale that stun guns were not "'readily adaptable to use in the military'" violated *Heller*, which rejected the proposition "'that only those weapons useful in warfare are protected.'" *Id*.

A concurrence by Justice Alito, joined by Justice Thomas, stated the obvious — that the Massachusetts court's "reasoning **defies** our decision in *Heller*, which rejected as 'bordering on the frivolous' the argument 'that only those arms in existence in the 18th century are protected by the Second Amendment.' … Although the Supreme Judicial Court **professed to apply** *Heller*, each step of its analysis **defied *Heller*'s** reasoning…. The lower court's ill treatment of *Heller* cannot stand. The reasoning of the Massachusetts court poses a grave threat to the fundamental right of self-defense." *Id*. at 414-15, 421 (emphasis added). Accusing a lower court of intentional **defiance** of Supreme Court precedent is strong stuff, and hopefully it will never again be needed in the aftermath of *Bruen*.

CONCLUSION

For the foregoing reasons, based on *Bruen* and the findings made by the district court as to the absence of any historical analogue, the decision of the district court should be affirmed.

Respectfully submitted,

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September 29, 2022

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Supplemental Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.*, in Support of Plaintiffs-Appellees and Affirmance, was made, this 29th day of September 2022, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

/s/Jeremiah L. Morgan
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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