



**ANSWERS TO FAQ
ABOUT THE NINTH CIRCUIT’S DECISION IN
DUNCAN V. BECERRA “LARGE CAPACITY” MAGAZINE CASE**

On August 14, 2020, a three-judge panel of the Ninth Circuit issued its opinion in the CRPA and NRA supported lawsuit *Duncan v. Becerra*. This historic decision strikes down California’s statewide prohibitions on magazines capable of holding more than 10 rounds as unconstitutional. In doing so, the Ninth Circuit upheld the 2019 decision from the United States District Court in San Diego that resulted in hundreds of thousands—if not millions—of magazines being lawfully purchased by California gun owners during what has become known as “Freedom Week.”

Naturally, many gun owners have questions regarding the impact of the most recent ruling in *Duncan*, and its effects on gun owners and those who want to sell, buy, or possess magazines that can hold over ten rounds.

To answer the many question that CRPA has been receiving, we have prepared the following list of commonly asked questions with answers to assist our members and gun owners.

1. What did the Ninth Circuit three-judge panel hold?

The Ninth Circuit held that the entirety of California Penal Code section 32310—which bans the possession, manufacture, importation, sale, transfer, and receipt of magazines capable of holding more than 10 rounds (so-called “large capacity” magazines)—is unconstitutional under the Second Amendment. The ruling affirms the 2019 order of the Honorable Judge Roger Benitez of the United States District Court for the Southern District of California.

You can read the entire Ninth Circuit opinion [here](#). There is a very concise and clear summary at the beginning of the opinion.

2. What does it mean that the Ninth Circuit applied strict scrutiny in this case?

When courts review constitutional challenges to government action, they can apply one of several levels of review. Three of the most common levels of review, called levels of “scrutiny,” are rational basis, intermediate scrutiny, and strict scrutiny. Whether a law will be upheld as constitutional can depend heavily on which level of scrutiny is applied to evaluate the constitutionality of a law.

“Rational basis” is the most deferential to the government. It merely asks whether the challenged law is rationally related to a legitimate government purpose. Laws subject to rational basis review are almost always upheld as constitutional. What’s more, the challenger (not the state) bears the burden to prove the law does not satisfy rational basis.

“Intermediate scrutiny” requires that the challenged law further an *important* government interest by means that are *substantially related* to that interest. As explained below, intermediate scrutiny is, when applied correctly, a stricter test that requires the government to justify its infringement on protected conduct. Unfortunately, in the Second Amendment context courts have often manipulated the intermediate scrutiny test to heavily favor the government, finding that just about any gun law will survive this level of scrutiny and be deemed constitutional.

“Strict scrutiny,” however, requires the government to show that the challenged law is necessary to a *compelling* state interest; that it is *narrowly tailored* to that end; and that it uses the “*least restrictive means*” necessary to achieve it. When strict scrutiny is applied, the law is almost always found unconstitutional.

What makes the *Duncan* ruling so important is that it marks one of the few times strict scrutiny has been explicitly applied in a Second Amendment case. While CRPA is thrilled that this decision struck the ban on magazines over 10 rounds, the court’s application of strict scrutiny is also great news for current and future Second Amendment cases in California. This precedent will no doubt help CRPA in its challenges to numerous other infringements the state has imposed on the right to bear arms.

3. What did the Ninth Circuit say about the use of intermediate scrutiny?

Since the *Heller* and *McDonald* decisions, CRPA has been disappointed to see courts apply intermediate scrutiny in name only. Courts often conduct what are effectively rational basis analyses and flout the Supreme Court’s holding that the Second Amendment protects a fundamental right. While strict scrutiny is certainly the appropriate test, CRPA has long believed that most of California’s gun rights restrictions would not survive even intermediate scrutiny if a fair intermediate scrutiny analysis was applied in good faith. Unfortunately, so far, intermediate scrutiny in gun law cases has mostly been a toothless standard.

Today, the Ninth Circuit finally gave us the fair analysis we’ve been waiting for. While the panel found that strict scrutiny applies, it also conducted a review of California’s magazine ban under intermediate scrutiny and found that it would not survive that more permissive standard either. According to the court, the statute was simply not a reasonable fit to the important public safety interests that it was enacted to serve. As the court writes, “[w]hile the precise contours of intermediate scrutiny may vary, this much is certain: It has bite. It is a demanding test.” And, in what appears to be a clear criticism of the bad-faith review of other circuits, the court states that “intermediate scrutiny cannot approximate the deference of rational basis review.”

CRPA is pleased to see that, at least to some judges, intermediate scrutiny still has some teeth. And we are confident that this precedent will help us in future Second Amendment challenges whenever the court decides that intermediate scrutiny must be applied instead of strict scrutiny.

4. Does this mean that it is now lawful to own or possess magazines over 10 rounds in California?

YES! And that has always been the case. When California banned the manufacture, importation, and sale of magazines over 10 rounds in 2000,¹ and when it banned the purchase and receipt of such magazines in 2013,² the state did not then bar the possession of such magazines obtained before the acquisition and manufacture bans took effect. In other words, the state “grandfathered” these magazines.

California voters approved Proposition 63 in 2016, making possession of magazines over 10 rounds a potential misdemeanor offense. But on June 29, 2017, *before Prop 63’s possession ban took effect*, the Honorable Judge Roger Benitez issued a preliminary injunction in *Duncan* barring enforcement of the

¹ See Act of July 19, 1999, ch. 129, 1999 Cal Stat. §§ 3, 3.5 (codified as amended at Cal. Penal Code § 12020(a)(2) (2000)) (superseded by Deadly Weapons Recodification Act of 2010, ch. 711, 2010 Cal. Stat. § 6 (codified at Cal. Penal Code § 32310)); *see also* Cal. Penal Code § 16740 (defining what constitutes a so-called “large capacity” magazine).

² See 2013 Cal. Stat. 5299, § 1 (amending Cal. Penal Code § 32310(a)).

law.³ That preliminary injunction was upheld by a three-judge panel of the Ninth Circuit in 2018 and remains in effect to this day.⁴

It is also lawful to possess all those magazines over 10 rounds purchased during “Freedom Week.” Recall, when Judge Benitez granted summary judgment in the *Duncan* plaintiffs’ favor, he immediately halted enforcement of the acquisition ban.⁵ This resulted in the lawful purchase of countless magazines over 10 rounds in California. A week later, Judge Benitez paused the importation and transfer of these magazines pending appeal, but he also held that enforcement of the possession ban remained enjoined, ensuring that Californians could retain possession of those magazines acquired during “Freedom Week.”⁶

But be careful, not all police officers understand what happened. Consider keeping your paperwork showing the period when you bought the magazine handy.

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If you are arrested or charged with possession of a “large capacity” magazine under the enjoined Penal Code section 32310(c) and (d), we urge you to contact CRPA attorneys by emailing helpdesk@michellawyers.com or by calling (562) 216-4444.

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5. Can I start buying or selling magazines over 10 rounds in California today?

NO! The Ninth Circuit panel opinion may not have immediately ended enforcement of the statewide ban on the manufacture, importation, sale, transfer, or receipt of magazines over 10 rounds (“the acquisition ban”). While it is clear from the *Duncan* opinion that the law is unconstitutional, it is unclear whether the Ninth Circuit panel’s decision alone satisfied Judge Benitez’s 2019 order staying the injunction halting enforcement of the acquisition ban.

Without an active injunction against enforcement of the law, it is the DOJ’s express position that the state’s ban “on the acquisition of new large-capacity ammunition magazines [remains] in effect pending further appellate proceedings.” (You can read the DOJ’s published position below.) This suggests that the state will continue to enforce the law, exposing sellers and buyers to a risk of criminal liability.

According to the terms of Judge Benitez’s 2019 stay order, it remains in effect “pending *final* resolution” of the *Duncan* appeal. This may be open to various reasonable interpretations, but at this point the safest interpretation is that the stay will remain in effect until the Ninth Circuit issues its “mandate,” which signifies that the appeal is final and returns the case to the district court for final proceedings.⁷

On August 28, 2020, Attorney General Becerra filed a petition for [rehearing en banc](#), so the “mandate” will not issue until after the entry of an order denying that petition or, if the petition is granted, after the

³ Order Granting Preliminary Injunction, *Duncan v. Becerra*, No. 17-cv-01017 (S.D. Cal. June 29, 2017), ECF No. 28, available at https://michellawyers.com/wp-content/uploads/2017/05/Duncan-v.-Becerra_Order-Granting-Preliminary-Injunction.pdf.

⁴ *Duncan v. Becerra*, 742 Fed. Appx. 218 (9th Cir. 2018) (memorandum opinion affirming preliminary injunction order available at <https://michellawyers.com/wp-content/uploads/2018/07/Duncan-2018-07-17-Memorandum-Affirming.pdf>).

⁵ Judgment in a Civil Case, *Duncan v. Becerra*, No. 17-cv-01017 (S.D. Cal. Mar. 29, 2019), ECF No. 88, available at <https://michellawyers.com/wp-content/uploads/2019/03/Duncan-2019-03-29-Judgment-Granting-Plaintiffs-MSJ.pdf>.

⁶ Order Staying in Part Judgment Pending Appeal at 1, *Duncan v. Becerra*, No. 17-cv-01017 (S.D. Cal. April 4, 2019), ECF No. 97, available at <https://michellawyers.com/wp-content/uploads/2019/04/2019-04-04-Order-Staying-in-Part-Judgment-Pending-Appeal.pdf>.

⁷ There is a possibility that Judge Benitez might choose to lift the 2019 stay order at some other time. If that happens, we will inform our members and the public promptly.

en banc decision is issued.⁸ And, even then, the state may ask the court to delay the issuance of the “mandate” pending petition to the Supreme Court. As such, it may be months (or years) before this appeal is finally resolved.

Put simply, EXERCISE CAUTION! It is unclear whether it is lawful for California residents to purchase magazines over 10 rounds yet. And the DOJ says it is going to enforce the law and prosecute people despite the Ninth Circuit’s recent decision. So - do you feel lucky?

6. Can I use magazines over 10 rounds that I lawfully acquired at a shooting range?

YES! Again, California does not currently prohibit the “possession” of magazines over 10 rounds. Only activities involving the manufacture, importation, sale, transfer, or receipt of such magazines remain prohibited until Judge Benitez’s 2019 stay order is lifted. The mere “use” of a magazine at a shooting range, for example, is not specifically prohibited.

BEWARE: The use of any so-called “large capacity” magazine in either a semiautomatic, centerfire rifle with a fixed magazine or a semiautomatic pistol with a fixed magazine could classify the firearm as an illegal “assault weapon” under California law.⁹

7. Can I carry the magazines I lawfully acquired with a firearm pursuant to a carry license?

YES! But your local licensing authority’s policies may still restrict such activity. Again, California law does not prohibit the “use” of any so-called “large capacity” magazine. However, department policies of a local licensing authority may prohibit individuals from carrying such magazines in connection with their CCW permits. Individuals should review their CCW license authority’s policies before carrying any “large capacity” magazine in connection with their CCW permit.

8. I own magazines over 10 rounds that are currently out of state, can I bring them back to California now?

NO! Again, until it is clear that Judge Benitez’s 2019 stay order is lifted, you should assume that California laws prohibiting the manufacture, *importation*, sale, transfer, or receipt of any so-called “large capacity” magazine remain in effect. Attempting to bring back magazines into California, despite already being owned by you, might be construed as “importation,” exposing you to a risk of criminal liability.

9. Can I travel outside of California with magazines over 10 rounds that I lawfully acquired and then bring them back into California?

NO! Before the enactment of Prop 63 in 2016, California law allowed individuals to travel with their lawfully acquired magazines over 10 rounds outside of California and then return to California with them.¹⁰ But this provision was repealed by Prop 63. As a result, individuals can no longer travel outside of California with their lawfully acquired magazines unless they plan on leaving their magazines out of state.

CCW holders take note: Regardless of what you can carry in or outside of California under your license, the terms of the license do not overrule the statute. And, until it is clear that Judge Benitez’s 2019 stay order is lifted, you should assume that California laws prohibiting the *importation* of any so-called “large capacity” magazine remain in effect. As such, you risk criminal liability for importing magazines over ten

⁸ Fed. R. App. P. 41.

⁹ See Cal. Penal Code § 30515(a)(2), (a)(5).

¹⁰ See Cal. Penal Code § 32420 (repealed 2016).

rounds, whether or not you possessed them legally in California initially, before taking them out of state. Once you take them out, you can't legally "import" them back into California.

10. What are the penalties for violating California's magazine restrictions?

Anyone who "manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, buys, or receives any large-capacity magazines" can be charged with either a misdemeanor punishable by up to a year imprisonment or felony punishable by up to 3 years imprisonment (known as a "wobbler").¹¹ Until it is clear that Judge Benitez's 2019 stay order is lifted, law enforcement might seek to enforce these provisions, exposing you to criminal liability.

Should California's ban on the possession of magazines over 10 rounds ever take effect, the penalty is: (1) a fine up to \$100 per magazine; (2) imprisonment up to one year; or (3) both a fine and imprisonment.¹² Lastly, California law declares any "large capacity" magazine to be a "nuisance" subject to confiscation and summary destruction.¹³

11. How does the court's ruling affect California's "nuisance" provision?

While law enforcement might in fact seize so-called "large capacity" magazines as a "nuisance" under Penal Code section 32390, it is our attorneys' view that there is no legal authority for it to do so—at least not for those who lawfully acquired their magazines. In fact, our attorneys believe section 32390 is unenforceable against at least lawfully acquired "large capacity" magazines, regardless of this ruling, as it was never intended to apply to them.

In 2010, the Legislature reorganized the state's firearm laws to make them easier to understand by renumbering, breaking up, and rewording long, complicated statutes. All those alterations were expressly intended to make no substantive legal change to the existing statutes.

The predecessor of section 32390 was an ambiguous provision that, at most, applied only to "large capacity" magazines that were *unlawfully* made, imported, sold, or acquired, but not merely possessed. This is because the previous statute applied to a whole host of weapons whose possession was illegal, while the "large capacity" magazine statute only applied to acquisition of new ones. The legislative history for the original "large capacity" magazine statute expressly stated that it did not intend to affect lawfully possessed magazines. It would make no sense, nor would it likely pass constitutional muster under the Due Process Clause, to construe section 32390 as applying to the lawful possession of magazines.

In any event, even if our attorneys' analysis of section 32390 is wrong, the *Duncan* decision makes clear that it is unconstitutional and thus unenforceable. The notion that an item whose possession is protected by the Second Amendment can be seized by government provided there is no criminal penalty is absurd.

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If you have a "large capacity" magazine seized by law enforcement on the basis that it is a nuisance under section 32390, we urge you to contact CRPA attorneys by emailing helpdesk@michellawyers.com or by calling (562) 216-4444.

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¹¹ Cal. Penal Code § 32310(a). For the purposes of this restriction, "manufacturing" includes "both fabricating a magazine and assembling a magazine from a combination of parts, including, but not limited to, the body, spring, follower, and floor plate or end plate, to be a fully functioning large-capacity magazine." Cal. Penal Code § 32310(b).

¹² Cal. Penal Code § 32310(c).

¹³ Cal. Penal Code § 32390; *see also* Cal. Penal Code § 18010(b).

12. What's next for the *Duncan* appeal?

In line with the state's long history of refusing to let a pro-Second Amendment decision stand, California Attorney General Xavier Becerra filed a [petition](#) asking to have an 11-judge "en banc" panel rehear the case. Now that the petition for a rehearing has been filed, the panel *may* order the prevailing appellees to respond and you can generally expect the court to take one of the following actions.

- **5.4(b) Notice Request:** Any judge of the Ninth Circuit who was not on the three-judge panel can request notice of the panel's vote on a petition for rehearing within **21 days**. This request requires the panel judges to inform the rest of the active judges on the circuit whether they vote to rehear the case en banc or if they decide to amend their opinion--ordinarily no later than 90 days after the notice.
- **Call for En Banc Vote:** Any interested off-panel judge may call for an en banc vote by the judges of the circuit either (1) in response to notice of the panel's vote that a petition for rehearing has been denied or (2) "sua sponte." Once a call has been made, if we have not already been ordered to respond to the petition, we will be given the opportunity to respond at this time. And the judges will exchange memoranda in favor of or opposition to rehearing before a vote is taken. This process takes several weeks.
- **Do Nothing and Reject the Petition:** If no action is taken by any judge of the Ninth Circuit within **21 days** of the receipt of the petition for rehearing, the panel will enter an order rejecting it. At that point, the only options left for the Attorney General would be to appeal the panel's decision to the United States Supreme Court or accept it.¹⁴

Should the Ninth Circuit grant the Attorney General's petition, the three-judge panel opinion will no longer have precedential effect in the Ninth Circuit or any district court of the circuit. In other words, it would be as if the three-judge panel decision never existed. We must then wait for the decision of the en banc court. At that point, the losing party will decide whether to ask the Supreme Court to weigh in by filing a petition for writ of certiorari.

This process can take months or years. But rest assured, our attorneys will continue to work tirelessly to defend the panel's decision and oppose any effort to overturn this victory.

13. Where can I view the filings in the *Duncan v. Becerra* lawsuit?

All case filings can be viewed online for free at <http://michellawyers.com/duncan-v-becerra/>.

14. Who is responsible for litigating *Duncan v. Becerra*?

The California Rifle & Pistol Association (CRPA), with financial support from the National Rifle Association and The CRPA Foundation (CRPAF) filed this lawsuit after hearing the concerns, outrage, and fear from members who were being forced by the passage of Prop 63 and Senate Bill 1446 to either surrender their magazines to the government or become criminals and face prosecution.

¹⁴ At any time during this already lengthy process, any judge may "stop the clock," extending the date by which the Ninth Circuit must act on the petition by 14 days. The clock may only be "stopped" once, however.