No. 19-55376

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VIRGINIA DUNCAN; RICHARD LEWIS; PATRICK LOVETTE; DAVID MARGUGLIO; CHRISTOPHER WADDELL; CALIFORNIA RIFLE & PISTOL ASSOCIATION, INC., a California Corporation,

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
No. 3:17-cv-01017-BEN-JLB

APPELLEES' UNOPPOSED MOTION TO PARTIALLY STAY ISSUANCE OF THE MANDATE OR, IN THE ALTERNATIVE, FOR A BRIEF ADMINISTRATIVE STAY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Pursuant to Rule 41(d) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 41-1, Plaintiffs-Appellees respectfully ask this Court to partially stay issuance of the mandate pending the filing and disposition of a timely petition for a writ of certiorari. While most of the magazine ban has remained in effect throughout most of this litigation, the new possession ban has never taken effect as applied to individuals who lawfully acquired now-prohibited magazines when it was lawful to do so. The district court preliminarily enjoined that aspect of the ban before it was scheduled to take effect; a panel of this Court affirmed that preliminary injunction on interlocutory appeal; and the state declined to ask the district court to stay that aspect of its ruling pending this appeal. Thus, staying the mandate to that limited extent would simply continue to preserve the status quo while plaintiffs exercise their right to seek Supreme Court review.

As is clear from the close division this case has produced among across the multiple panels that have considered it, the petition unquestionably will present substantial constitutional issues, including issues that the Supreme Court is actively considering right now in *New York State Rifle & Pistol Association v. Bruen*, No. 20-843 (U.S.). Indeed, the Supreme Court is already holding a petition challenging New Jersey's similar magazine ban on the same grounds pending its decision in *Bruen*, *see Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Bruck*, No. 20-1507 (U.S.) (*ANJRPC*), and it is likely to do the same here.

It is equally clear that there is good cause for a stay, as plaintiffs who lawfully acquired now-prohibited magazines could be irrevocably deprived of their constitutionally protected property—without compensation, to boot—if the possession ban takes effect as to them at this late date only to later be invalidated by the Supreme Court. Preserving the status quo while the Supreme Court considers these weighty constitutional issues thus will best serve the interests of orderly judicial review. But in the event this Court disagrees, it should at a minimum grant an administrative stay to give plaintiffs time to seek interim relief from the Supreme Court itself.

Plaintiffs have conferred with Defendant-Appellant, and Defendant-Appellant does not oppose this request to partially stay the mandate while plaintiffs seek Supreme Court review.

BACKGROUND

Since January 1, 2000, California has banned the manufacture, importation, sale, and transfer of "any ammunition feeding device with the capacity to accept more than 10 rounds," with some exceptions not relevant here. Cal. Penal Code §§32310, 16740. Although the 2000 law operated as a prospective ban on acquisition of the prohibited magazines, it did not prohibit possession of them. Accordingly, while individuals who did not already possess prohibited magazines

could no longer legally obtain them, citizens who had obtained such magazines before the law took effect could continue to keep them.

In July 2016, however, California amended the law to prohibit even the mere possession of magazines capable of holding more than ten rounds of ammunition, thus prohibiting continued possession of such magazines by those who had lawfully obtained them. As a result, under California law, anyone currently in possession of a magazine capable of holding more than 10 rounds of ammunition must physically dispossess themselves of it by surrendering it to law enforcement for destruction, removing it from the state, or selling it to a licensed firearms dealer. *Id.* § 32310(a), (d). Failure to do so is a crime punishable by up to a year in prison or fines. *Id.* § 32310(c).

Plaintiffs sued to enjoin enforcement of California's restrictions on the acquisition and possession of the banned magazines, alleging that the law violates the Second Amendment and the Takings Clause. E.R.1943-65. Both the individual plaintiffs and many members of associational plaintiff California Rifle & Pistol Association either had acquired now-banned magazines when it was lawful to do so and wished to continue to possess them or would acquire such magazines if the law did not prohibit them from doing so. While plaintiffs challenged the ban as a whole, they moved for a preliminary injunction on only the ban's retrospective and confiscatory aspects—i.e., application of the possession ban to those who lawfully

acquired the now-banned magazines when it was permissible to do so. The district court granted the limited preliminary injunction plaintiffs sought, thus ensuring that those law-abiding citizens would not be dispossessed of their property before their constitutional challenges could be resolved. A panel of this Court affirmed the entry of that preliminary injunction, agreeing with the district court that the law likely violated both the Second Amendment and the Takings Clause. *Duncan v. Becerra*, 742 Fed. Appx. 218, 220-22 (9th Cir. 2018) (unpublished).

Meanwhile, plaintiffs assembled a thorough record on the history and constitutional protection of the banned magazines. After reviewing that voluminous record, the district court granted summary judgment to plaintiffs, holding that the ban violates both the Second Amendment and the Takings Clause. E.R.92-93. The state appealed and asked the district court to grant a partial stay pending appeal that would leave the injunction in place (as it had been from the outset) as to the state's effort to require individuals who lawfully obtained now-banned magazines to dispossess themselves of them. E.R.224. The district court agreed, subject to the caveat that the court enjoined the state from enforcing the law against individuals who acted in reliance on the court's judgment to lawfully acquire magazines before the court entered that limited stay. E.R.224.

A divided panel of this Court affirmed, holding that California's "near-categorical ban" on acquiring and possessing magazines in common use by law-

abiding citizens for lawful purposes "strikes at the core … right to armed self-defense" and violates the Second Amendment under both strict and intermediate scrutiny. *Duncan v. Becerra*, 970 F.3d 1133, 1140, 1164-68 (9th Cir. 2020), *vacated*, 988 F.3d 1209 (9th Cir. 2021).

But on November 30, 2021, a divided en banc panel reversed and remanded for entry of judgment for the state. The majority assumed without deciding that California's magazine ban implicates the Second Amendment but applied only intermediate scrutiny because, in its view, the law imposes only a "minimal burden" on the right to keep and bear arms. Slip Op. 32. The majority then held that the law survives that level of scrutiny. *Id.* at 40-46. The majority also concluded that the law did not effect a taking. *Id.* at 46-50. Judges Bumatay, Ikuta, Nelson, and VanDyke dissented. *Id.* at 103 (Bumatay, J., joined by Judges Ikuta and Nelson, dissenting); *id.* at 143 (VanDyke, J., dissenting).

Appellees intend to file a timely petition for writ of certiorari to the Supreme Court seeking review of both the Second Amendment and the Takings Clause issue.

Reasons for Granting a Stay

To obtain a stay of the mandate, the moving party must show that its "petition would present a substantial question and there is good cause for a stay." Fed. R. App. P. 41(d)(1). While the Court may deny a request to stay the mandate if it "determines that the petition for certiorari would be frivolous or filed merely for

delay," 9th Cir. Rule 41-1; *see also United States v. Pete*, 525 F.3d 844, 851 n.9 (9th Cir. 2008), a movant "need not demonstrate that exceptional circumstances justify a stay." *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528 (9th Cir. 1989). It is enough that the petition will present a substantial question and that there is good cause. Both requirements are readily satisfied here.

The Supreme Court has already recognized the substantiality of the questions presented by holding a petition raising the same issues pending resolution of *Bruen*. And good cause plainly exists as to the ban's retrospective and confiscatory aspects because law-abiding citizens should not be forced to dispossess themselves of their lawfully acquired magazines before the Supreme Court can consider whether the Constitution permits that result. Plaintiffs therefore ask the Court to stay its mandate as to the relief that has remained in place for the duration of this appeal. In the alternative, the Court should at the very least grant an administrative stay to give plaintiffs time to seek interim relief from the Supreme Court.

A. This Case Presents Substantial Questions.

While plaintiffs appreciate that the en banc panel concluded that the state's magazine ban is constitutional, there can be no serious dispute that the constitutional questions this case presents are substantial. Those questions divided the panel that affirmed the preliminary injunction, they divided the panel that affirmed the final judgment, they led this Court to grant en banc review, and they generated six

separate opinions from the en banc panel. Of the 15 judges on this Court to consider this case, seven have embraced plaintiffs' arguments in whole or in part. That alone should satisfy the substantiality standard.

On top of that, the Supreme Court has for several months been holding a petition that presents the very questions this case presents. In *ANJRPC*, the petitioners are seeking review of a challenge to a nearly identical magazine ban in New Jersey on both Second Amendment and Takings Clause grounds. *See* Petition for Writ of Certiorari at i, *ANJRPC v. Bruck*, No. 20-1507 (U.S.) (April 26, 2021) (presenting Second Amendment and Takings Clause questions). That petition has been fully briefed since August, but the Court has taken no action on it, reflecting that it is likely holding the petition pending resolution of *Bruen*, in which the Court heard argument this past month. The Supreme Court thus has apparently already recognized that its decision in *Bruen could* impact resolution of these issues. And with good reason, as one of the issues the Court is considering in *Bruen* is whether the "two-step" approach to Second Amendment challenges employed by most lower courts (including the Third Circuit in *ANJRPC*) is consistent with the Second Amendment and the Court's precedents. *See* Brief for Respondents 36-42, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, No. 20-843 (U.S.) (Sept. 14, 2021); Reply Brief for Petitioners 22-23, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, No. 20-843 (U.S.) (Oct. 14. 2021).

That question has been the subject of substantial disagreement in this Court and others, including in this very case. *See* slip op. 147 (VanDyke, J., dissenting); slip op. 112 (Bumatay, J., dissenting) ("Nowhere in *Heller* or *McDonald* did the Supreme Court pick a tier of scrutiny for Second Amendment challenges. . . . The Court made clear that such judicial balancing is simply incompatible with the guarantees of a fundamental right."); *see also, e.g.*, *Mai v. United States*, 974 F.3d 1082, 1083 (2020) (Collins, J., dissenting from the denial of reh'g en banc); *id*. at 1097 (VanDyke, J., dissenting from the denial of reh'g en banc); *Ass'n of N.J. Rifle & Pistol Clubs v. Att'y Gen. N.J.*, 910 F.3d 106, 127 (3d Cir. 2018) (Bibas, J. dissenting); *Mance v. Sessions*, 896 F.3d 390, 394 (5th Cir. 2018) (Elrod, J., joined by Jones, Smith, Willett, Ho, Duncan, and Engelhardt, JJ., dissenting from the denial of reh'g en banc); *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 702 (6th Cir. 2016) (Batchelder, J., concurring); *id.* at 710 (Sutton, J., concurring).

Several Justices have also expressed skepticism over the two-step approach. In *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, a case that (among other things) upheld a ban on magazines capable of holding more than ten rounds, then-Judge Kavanaugh dissented, maintaining that "*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." *Id.* at 1271 (Kavanaugh, J., dissenting). Justices Alito and Gorsuch have expressed "concern"

over "the mode of review" in the lower courts. *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1544 (2020). And Justice Thomas has repeatedly expressed that concern as well—including in multiple cases from this Court. *See, e.g.*, *Rogers v. Grewal*, 140 S. Ct. 1865, 1866 (2020) (Thomas, J., dissenting from the denial of certiorari) (two-step approach "appears to be entirely made up") (quoting *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1117 (S.D. Cal. 2017)); *Silvester v. Becerra*, 138 S. Ct. 945, 948 (2018) (Thomas, J., dissenting from the denial of certiorari); *Jackson v. City & Cnty. of San Francisco*, 135 S. Ct. 2799, 2802 (2015) (Thomas, J., dissenting from the denial of certiorari). As these and other opinions confirm, the Second Amendment question that plaintiffs' forthcoming petition will present is both substantial and hotly debated.

The Takings Clause question is substantial as well. Just this past term, the Supreme Court reversed a decision from this Court on the ground that a regulation authorizing even a temporary "invasion[]" of a property owner's rights—and even if not by the government itself—can amount to a per se taking. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021). That decision reinforces the conclusion that compelling citizens to destroy, surrender, sell, or permanently modify their lawfully acquired property with no offer or promise of compensation presents serious concerns under the Takings Clause.

B. Good Cause Support Partially Staying the Mandate.

Good cause plainly supports staying the mandate as to the retrospective and confiscatory possession ban while plaintiffs seek Supreme Court review. The ban has never been enforced as applied to individuals who lawfully acquired now-banned magazines when it was permissible to do so. That aspect of the ban was preliminarily enjoined before it was scheduled to take effect; a panel of this Court affirmed that preliminary injunction; and the state declined to ask the district court to stay that aspect of its summary judgment ruling pending this appeal. Thus, if that aspect of the ban were to take effect now, plaintiffs—and every other similarly situated Californian—would for the first time be required to physically dispossess themselves of their lawfully acquired (and, they submit, constitutionally protected) property immediately.

It is "well established" that any "deprivation of constitutional rights 'unquestionably constitutes irreparable injury.' " *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). And the harm here is irreparable twice over, as California's law not only bans plaintiffs from continuing to possess property that they maintain is constitutionally protected but risks permanently dispossessing them of that property without compensation. On top of that, moreover, "[o]nce the property is sold," surrendered, or destroyed, it "may be impossible for plaintiffs to reacquire it." *Taylor v. Westly*, 488 F.3d 1197,

1202 (9th Cir. 2007). Allowing the ban to take effect now could thus risk subjecting plaintiffs to truly irreparable injury should the Supreme Court later reverse or vacate this Court's decision.

No countervailing interest warrants changing the status quo at this late stage of the litigation. The state acquiesced in the district court in preserving the injunction against the retrospective and confiscatory aspects of the possession ban pending this appeal. The state presumably did so in recognition that Californians whose rights are implicated by that narrow relief are citizens who have peaceably owned the now-banned magazines without creating any public safety issues for more than 20 years. Unless this Court withholds the mandate, those law-abiding citizens will immediately become criminals unless they hand over their lawfully acquired property for destruction or otherwise dispossess themselves of it. There is no reason to disrupt the status quo, and turn law-abiding citizens into criminals overnight, before the Supreme Court can even consider the substantial questions that plaintiffs' forthcoming petition will present.

If the Court disagrees, however, plaintiffs respectfully request that the Court stay application of the possession ban to those who lawfully acquired now-banned magazines while plaintiffs seek interim relief from the Supreme Court.

CONCLUSION

For these reasons, the Court should enter a partial stay of the mandate pending the filing and disposition of plaintiffs' forthcoming petition for writ of certiorari that maintains the relief from the possession ban that has been in place throughout this appeal.

Respectfully submitted,

s/ C.D. Michel
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December 14, 2021

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: December 14, 2021

s/ C.D. Michel
C.D. Michel