No. 20-56174

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MATTHEW JONES, *et al.*,

Plaintiffs-Appellants,

v.

ROB BONTA, in his official capacity as

Attorney General of the State of California, *et al.*,

Defendants-Appellees,

Appeal from United States District Court for the Southern District of California
Civil Case No. 3:19-cv-01226-L-AHG (Honorable M. James Lorenz)

PLAINTIFFS-APPELLANTS' OPPOSITION TO PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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August 23, 2022

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INTRODUCTION

This case is on appeal from denial of a preliminary injunction. The panel opinion on which the government has sought rehearing, published at *Jones v. Bonta*, 34 F.4th 704 (9th Cir. 2022), did not grant a preliminary injunction, it merely held that the district court had erred in concluding (1) that Plaintiffs were not likely to succeed on the merits on one of their two claims and (2) that Plaintiffs did not face irreparable harm. Other considerations, including the final weighing of the preliminary injunction factors to determine whether relief is appropriate, it left to the district court on remand.

Given the narrow scope of its holding, this case is not appropriate for panel or en banc rehearing, even in light of the Supreme Court's recent decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). Although *Bruen* rejected the two-part standard applied by the panel in favor of a test solely focused on the text and history of the Second Amendment, the panel in fact undertook the analysis *Bruen* calls for, it just called it "step one." And in this case the step-two analysis, which *Bruen* makes clear the panel should not have done, only altered the result indicated by the step-one analysis as to one of Plaintiffs' two claims. The government has sought rehearing because it believes *Bruen*'s test differs in its nuances from the old "step one" and it would like the opportunity to compile a more complete historical record. Neither is an appropriate goal at this stage of the

proceedings. Even assuming the panel's analysis diverged from *Bruen*'s new test in minor ways, the panel was merely deciding whether Plaintiffs would *likely* succeed on the merits of their claims and rehearing or vacatur to apply *Bruen* would not change the analysis enough to alter that *preliminary conclusion*. And with respect to the record, the government will have the opportunity to compile a complete historical record in the district court if this Court denies its rehearing request. Preliminary injunctions are often decided on an incomplete record and the appropriate time for the government to present its full historical case will be on summary judgment, after the preliminary injunction issue is resolved. This Court should deny rehearing of any kind and the panel opinion should not be vacated.

STATEMENT

Plaintiffs are "young adults, gun shops, and advocacy groups" who have sought a declaration of that California laws regulating the acquisition of long guns by adults 18-to-20-years-old are unconstitutional and an injunction against their enforcement. *Jones*, 34 F. 4th at 710–11. The two restrictions at issue in this motion for rehearing are the "hunting license requirement," which requires 18-to-20-year-olds in California to acquire a hunting license before they can legally acquire a long gun of any kind, and the "semiautomatic rifle ban," which bans all 18-to-20-year-olds from purchasing semiautomatic rifles (even if they have a hunting license)

unless they are law enforcement officers or active-duty servicemembers. *Jones*, 34 F.4th at 724.

Plaintiffs sought a preliminary injunction against enforcement of both the hunting license requirement and the semiautomatic rifle ban in the district court. Applying the now-overruled two-step framework that the Ninth Circuit applied to Second Amendment challenges before *Bruen*, the district court denied preliminary injunctive relief after finding Plaintiffs unlikely to succeed on the merits because the laws at issue did not burden conduct protected by the Second Amendment and were longstanding. *Id.* at 711. The district court held in the alternative that the laws could be justified under intermediate scrutiny. *Id.* Furthermore, the district court held that Plaintiffs had not shown they faced irreparable harm in the absence of a preliminary injunction and concluded that the public interest was not in favor of an injunction. *Id.*

This Court reversed, in part, the district court's decision. First, the Court explained that because the Second Amendment applies to commerce in firearms as well as to possessing them, and because neither long guns nor semiautomatic rifles qualify as "dangerous and unusual weapons," the question of whether both laws implicated the Second Amendment turns on "whether the right of young adults to bear arms is 'conduct [that is] protected by the Second Amendment.' " *Id.* at 716–17 (quoting *Mai v. United States*, 952 F.3d 1106, 1114 (9th Cir. 2020)) (brackets in

original). To answer that question, the Court undertook an extensive analysis of historical sources, the arms-bearing practices of England and the pre-ratification colonies, and the uniform practices of the states in the Founding era of including 18-year-olds in the militias which the Second Amendment "was designed to protect." *District of Columbia v. Heller*, 554 U.S. 570, 667 (2008); *Jones*, 34 F.4th at 720–21. Additionally, the Court reviewed 28 laws from the time period surrounding the ratification of the Fourteenth Amendment on which the State had relied to show that restrictions on sales to 18-to-20-year-olds were longstanding and found that they were "not convincing" because almost all of them were dissimilar to California's laws at issue in this case and, more importantly, they could not be used to contradict the earlier, "founding-era evidence of militia membership [that] undermines Defendants' interpretation" of the Second Amendment right. *Jones* 34 F.4th at 722. The Court also considered evidence that the age of majority at the Founding was 21 rather than 18, but agreed with other courts that have found "majority or minority is a status that lacks content without reference to the right at issue," and held history did not suggest 18-to-20-year-olds lacked firearm rights because other evidence demonstrated that 18-year-olds possessed Second Amendment rights at the Founding. *Id*.

Having concluded that both the hunting license requirement and the semiautomatic rifle ban therefore implicated conduct protected by the Second

Amendment, the panel went on to consider whether either could be justified under the then-applicable tier of scrutiny, finding that the hunting license requirement likely would satisfy intermediate scrutiny while the semiautomatic rifle ban likely could not satisfy either strict or intermediate scrutiny. *Id.* at 728. Judge Stein dissented in part and would have upheld the semiautomatic rifle ban as well as the hunting license requirement, arguing that while "the question of whether the challenged law burdens conduct protected by the Second Amendment . . . is debatable, the most significant flaw in the majority's analysis under the second step, i.e., the appropriate tier of scrutiny." *Id.* at 750 (cleaned up).

This Court subsequently extended the time to move for rehearing en banc to account for the Supreme Court's then-pending decision in *Bruen*, Text Order, Doc. 90 (May 18, 2022), and following *Bruen* the Defendants moved for rehearing, requesting that the panel (or in the alternative, the en banc court) vacate its opinion and remand for further proceedings. *See* Pet. for Panel Rehearing or Rehearing En Banc, Doc. 93 (July 25, 2022) ("Pet.").

REASONS FOR DENYING THE PETITION

Defendants use expansive language to describe the way that *Bruen* "jettisoned" the analysis the panel applied in this case and "announced a new standard" that "dramatically changed the ground rules" for Second Amendment challenges in order to ask this Court to vacate its prior decision as well as the district

court's and return this case to the district court for entirely new briefing on the preliminary injunction. Pet. at 2, 7. This overblown language significantly overstates the need for reconsidering the decision in this case, especially in light of its preliminary posture.

While it is true that *Bruen* did away with the Ninth Circuit's old two-part test, the change was heavily concentrated on the second step (which *Bruen*, of course, eliminated as "one step too many"). 142 S. Ct. at 2127. The first step of the test used by most courts of appeals, including the Ninth Circuit in this case, was "broadly consistent with *Heller*." *Id.* This is readily apparent from a comparison of the panel's opinion here and the Supreme Court's in *Bruen*. In its opinion, this Court explained the first step this way: "First, we ask whether the challenged law burdens conduct protected by the Second Amendment. In this step, we explore the amendment's reach based on a historical understanding of the scope of the Second Amendment right." *Jones*, 34 F.4th at 752 (internal citations omitted). This mode of analysis closely matches *Bruen*'s prescription for the government to justify a restriction on conduct falling within the text of the Second Amendment "by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.' " 142 S. Ct. at 2130.

In addition to the similarity in how it described the test, as the panel progressed through its analysis at step one, it demonstrated the sort of reasoning that the Supreme Court has now held is dispositive of these cases. As *Bruen* would later command, the panel decision discussed the historical scope of the right to bear arms at the Founding and at the time the Fourteenth Amendment was ratified and conducted a detailed analysis of historical analogues for California's challenged laws, identifying 28 state laws regulating access to firearms by minors passed between 1856 and 1897. *Jones*, 34 F.4th at 719; *see also Bruen*, 142 S. Ct. at 2132 ("[H]istory guide[s] our consideration of modern regulations that were unimaginable at the founding. When confronting such present-day firearm regulations, this historical inquiry that courts must conduct will often involve reasoning by analogy—a commonplace task for any lawyer or judge."). In rejecting the Reconstruction-era laws California had identified as providing support for the challenged regulations, the panel concluded the "laws themselves are not convincing" because they are not similar enough to California's present-day restrictions—again, exactly the sort of analogical conclusion the Supreme Court has said these cases require. *Jones*, 34 F.4th at 722. Noting that the majority of the laws were focused on handguns, not long guns, the panel concluded that the laws actually "show that long guns were far less regulated than handguns" and emphasized that just *five* states had outright bans on sales of firearms to minors that swept as broadly as California's. *Id.* In other

words, this Court has already undertaken precisely the analogical review that *Bruen* prescribed by testing whether prior restrictions "impose[d] a comparable burden on the right of armed self-defense" to the modern regulations at issue "and whether that burden [was] comparably justified." 142 S. Ct. at 2133.

In short then, the analysis the panel conducted here at step one was the same analysis that *Bruen* has said should govern these cases; there is no need to redo that work with added citations to *Bruen*. *Cf. Santiago-Barrales v. Garland*, No. 17-70314, 2022 WL 832068 (9th Cir. Mar. 21, 2022) (reviewing a BIA determination based on an allegedly improper standard and concluding "[t]he BIA's formulation [of the standard] is materially indistinguishable from the proper standard, so no legal error occurred"). *Id*. at *1. The most significant difference between the panel decision and *Bruen* is that *Bruen* very clearly placed the burden for demonstrating that a law fits into a tradition of firearms regulation on the government, 142 S. Ct. at 2126, whereas the panel did not state which party carried that burden (though it did note that the government had "relie[d] on" the Reconstruction-era laws it discussed), 34 F.4th at 721. Plainly, any error in the Court's analysis on that front was harmless, since it found 18-to-20-year-olds were within the scope of the Second Amendment notwithstanding the Reconstruction-era evidence.

Furthermore, any minor differences between the panel's analysis and the *Bruen* analysis are of less importance here because of this case's procedural posture.

The decision this Court rendered regarding the district court's denial of a preliminary injunction was just that—a *preliminary* decision. This Court did not enter a final judgment regarding the validity of the challenged California statutes. Whatever the minor differences might be between the *Bruen* analysis and the analysis the Court undertook at step one, the conclusions at step one of the panel opinion are still accurate forecasts of the likely result in this case.

Regarding the second step of the analysis, of course there *Bruen* did make a fundamental change in the law that would impact the panel's consideration of these issues.[1] But it would not dictate a different result with respect to the semiautomatic rifle ban, where the panel applied a tiers-of-scrutiny analysis but nevertheless held the law was likely invalid (the same conclusion *Bruen* would require by cutting off analysis at step one). 34 F.4th. 724. It *could* dictate a different result with respect to the hunting license requirement, which the panel upheld based on the application of intermediate scrutiny, and if rehearing is granted Plaintiffs intend to argue *Bruen* requires a finding of likely success on the merits on that claim as well. *Id.* However, in view of the preliminary nature of this decision and out of a desire to reach the merits of this suit as quickly as possible, Plaintiffs are content to accept the denial

[1] It was on the now-defunct second step where Judge Stein, dissenting, argued the majority made its most significant error in analysis. *Jones*, 34 F.4th at 750 (Stein, J., dissenting).

of a preliminary injunction as to the hunting license requirement and move on to the merits.

Defendants' arguments in favor of vacatur are unconvincing. They claim that it is necessary to "allow the parties to compile the kind of historical record that *Bruen* now requires." Pet. at 2. But again, the historical analysis required by *Bruen* was the historical analysis that the panel conducted. And there is no need to have a complete historical record at this early stage in any event—a decision on a preliminary injunction "is not necessarily the court's final word on the merits." *Pom Wonderful LLC v. Purely Juice, Inc.*, 277 Fed. App'x 744, 746 (9th Cir. 2008). Defendants get the importance of this case's interlocutory posture backwards when they argue the preliminary injunction makes vacatur *more* necessary instead of *less*, because vacatur would "allow the parties to present a full historical record under the standard announced in *Bruen*." Pet. at 13. "Given [its] limited purpose, and given the haste that is often necessary . . . a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). It is true that Defendants will need to compile a historical record if they wish to justify their laws against a motion for summary judgment, but it is entirely appropriate for the panel's decision to stand based on the record that was before it at the time. That is the nature of a *preliminary* injunction.

Defendants also attempt to create space between the panel's analysis and what *Bruen* requires where there is none. They argue that *Bruen* "provided important new guidance about how to conduct [the text and history] inquiry." Pet. at 8. But for examples of this "new guidance," the Defendants merely note that *Bruen* stated that the government need not identify "a 'historical twin' " to its regulation, but can carry its burden by identifying a tradition of regulations that impose comparable burdens that are comparably justified. Pet. at 8–9. As explained above, that is precisely what the panel did here. And the government's claim that the panel's application of strict scrutiny to the semiautomatic rifle ban (and the finding that it failed that level of scrutiny as well as intermediate scrutiny) requires rehearing is confusing. *See* Pet. at 9. It is true that *Bruen* made clear such an analysis is inappropriate, but since it was only conducted after the panel *first* determined whether the text and history of the Second Amendment demonstrated that the right to bear arms was implicated by the semiautomatic rifle restriction, the application of that test did not lead to a different result than the pure text-and-history standard required by *Bruen* would have.

Finally, this case is not similar to the other cases in which this Court has vacated and remanded for reconsideration in light of *Bruen*. Pet. at 13–14. In *McDougall v. Cnty. of Ventura*, No. 20-56220, the panel had reversed the grant of a motion to dismiss because it found that COVID-19-related closure of gun shops, ammunition shops, and firing ranges infringed the plaintiffs' Second Amendment

rights and could not be justified under any tier of scrutiny. Unlike the panel opinion here, the resolution of those issues was not preliminary or based on a likelihood of success, and so the panel's decision (or rather the en banc decision that was forthcoming at the time of vacatur and remand) would have decided the case once and for all. Similarly, *Martinez v. Villanueva*, No. 20-56233, which involved the same issues as *McDougall* and was resolved the same way by the panel, was on appeal from a grant of judgment on the pleadings. *Rupp v. Bonta*, No. 20-56220, was on appeal from a grant of summary judgment and the appellants had sought reversal of that grant and entry of judgment in their favor. In each of these cases, unlike this one, the question the Court was deciding was not whether the Plaintiffs would likely prevail, but whether they did in fact prevail. The reasons for vacating and remanding those decisions are thus stronger than they are here.

CONCLUSION

The petition for panel rehearing should be denied. This case should be remanded to the district court for further proceedings in light of the panel opinion.

Dated: August 23, 2022

Respectfully Submitted,

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◉ Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words**: 2,932.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 23, 2022. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 23, 2022

s/ David H. Thompson
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