No. 21-55608

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES MILLER, *et al.*,
Plaintiffs–Appellees,

vs.

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
Hon. Roger T. Benitez
Case No. 3:19-cv-01537-BEN-JLB

PLAINTIFFS-APPELLEES' MOTION TO LIFT STAY
Pursuant to Cir. Rule 27-1(3), Immediate Relief Requested

GEORGE M. LEE
SEILER EPSTEIN LLP
275 Battery Street, Suite 1600
San Francisco, CA 94111
(415) 979-0500
gml@seilerepstein.com

JOHN W. DILLON
DILLON LAW GROUP APC
2647 Gateway Road, Suite 105
Carlsbad, CA 92009
(760) 642-7151
jdillon@dillonlawgp.com

ERIK S. JAFFE
SCHAERR | JAFFE LLP
1717 K Street, NW, Suite 900
Washington, D.C. 20006
(202) 415-7412
ejaffe@schaerr-jaffe.com

June 30, 2022

Counsel for Plaintiffs-Appellees

I. INTRODUCTION AND PROCEDURAL BACKGROUND

Plaintiffs-Appellees James Miller, *et al.* ("Appellees") hereby move for an order immediately lifting the current stay pending appeal of the district court's final judgment or, in the alternative, to expedite briefing and argument under Circuit Rule 27-12. In light of the Supreme Court's decision in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. __ (2022), Appellants have no meaningful prospect of success on the merits, the stay denies Appellees' fundamental right to keep and bear arms, and allowing the stay to persist will cause continued irreparable harm.

Over a year ago, on June 4, 2021, the district court in this case entered its final judgment in favor of Appellees and held that multiple aspects of California's so-called assault weapon ban were unconstitutional. *Miller v. Bonta*, 542 F.Supp.3d 1009 (S.D. Cal. Jun. 4, 2021) (*Miller*). On June 21, 2021, this Court granted Appellants' motion for emergency stay pending appeal (Dkt. No. 13) pending the resolution of *Rupp v. Bonta*, No. 19-56004 (*Rupp*).

Recently, just over a year later, the Supreme Court in *Bruen* invalidated a New York statute restricting public carriage of firearms. 597 U.S. __ (2022), slip op. at 1–2; 30. In doing so, the Court rejected "the two-step test that Courts of Appeals have developed to assess Second Amendment claims," holding its precedent did "not support applying means-end scrutiny in the Second Amendment context." *Id*. at 9–10. Instead, when a law restricting Second Amendment activity is challenged, the

burden falls squarely on the government to "affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id*. at 10.

Recognizing that the *Rupp* plaintiffs had appealed from a dismissal under the now-abrogated two-step test and intermediate scrutiny, and the dramatic impact *Bruen* had on the previously extant caselaw upholding improper restrictions on Second Amendment rights, this Court promptly resolved the *Rupp* appeal by vacating the district court's dismissal and remanding the case to the district court for further proceedings "consistent with the United States Supreme Court's decision in *New York State Rifle & Pistol Association v. Bruen." Rupp,* Dkt. No. 71 (June 28, 2022).

Here, however, there is no need for remand since the district court found in favor of Appellees under a searching review of the parties' historical evidence consistent with *Bruen*. In light of the Supreme Court's decision in *Bruen*, and this Court's vacatur of the conflicting decision in *Rupp*, Appellants' merits-based arguments in support of the stay have been eviscerated and the State cannot possibly show a *likelihood* of success on the merits or, indeed, any of the other factors required for a stay pending appeal. The interests of justice thus require this Court to immediately lift the stay in this matter and permit the judgment below—consistent with *Bruen* and protecting Appellees' Second Amendment rights—to take effect.

II. THE DECISION IN *BRUEN* ELIMINATES ANY JUSTIFICATION TO CONTINUE TO ENFORCE THE STAY

Where the "circumstances and balance of hardships" that supported issuance of a stay "have changed," a party may ask that the stay be lifted. *Log Cabin Republicans v. United States*, Nos. 10-56813 & 10-56634, 2022 WL 2637191, at *1 (9th Cir. July 6, 2011), reversed in part, 2011 WL 2982102 (9th Cir. July 15, 2011). Upon such a request, the Court will re-evaluate the stay factors to determine whether continuance of the stay is justified. *Id*. (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)).

The Supreme Court's decision in *Bruen* eliminates any plausible argument for a stay in this case. Whereas Appellants here relied on this and other courts' familiar two-step interest-balancing approach to claim a likelihood of success on the merits, the Supreme Court explicitly *rejected* that framework as "having one step too many." *Bruen*, at pp. 2-3, 22-23. Each of the cases relied upon by Appellants in their motion depended upon such two-step balancing, and none of those decisions remains good law in light of *Bruen*.[1] Appellants thus have no plausible remaining support for their claim that they are likely to succeed on the merits on appeal.

[1] *See* Appellants' Motion, at 8-9 (citing *Wilson v. Cook Cty*., 937 F.3d 1028, 1036 (7th Cir. 2019) (following *Friedman v. City of Highland Park, Ill*., 784 F.3d 406, 412 (7th Cir. 2015)); *Worman v. Healey*, 922 F.3d 26, 38-41 (1st Cir. 2019); *Kolbe v. Hogan*, 849 F.3d 114, 138-146 (4th Cir. 2017) (en banc); *N.Y. State Rifle & Pistol Ass'n v. Cuomo* (*NYSRPA*), 804 F.3d 242, 260-263 (2d

By contrast, *Bruen* closely tracks in methodology then-Judge Kavanaugh's dissent in the D.C. Circuit reasoning that a D.C. rifle ban similar to California's here violated the Second Amendment. *See Heller II*, 670 F.3d at 1290-91 (Kavanaugh, J., dissenting). As then-Judge Kavanaugh correctly concluded, "semi-automatic rifles have not traditionally been banned and are in common use today, and are thus protected under *Heller*." *Id*. at 1287.

The district court's decision below is entirely consistent with *Bruen* and, indeed, foreshadowed it to a large degree. As the *Bruen* decision reaffirmed, "[u]nder *Heller*, when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct, and to justify a firearm regulation the government must demonstrate that the regulation is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, at pp. 2, 29. Moreover, while judicial deference to legislative interest balancing may be appropriate in other circumstances, "it is not deference that the Constitution demands here," as the Second Amendment "is the very *product* of an interest balancing by the people, and it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms for self-defense." *Bruen* at p. 17 (quoting *Heller*, 554 U.S. at 635) (cleaned up).

Cir. 2015); *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1261-1264 (D.C. Cir. 2011)).

The district court applied just such an analysis, starting with what it called the "*Heller* Test," rooted in the Second Amendment's text, as informed by relevant history. *Miller*, *supra,* at 1020-25.. In considering the text of the Second Amendment, the district court found that "the Second Amendment extends at the very least to common modern arms." *Miller*, *Id*., at 1020-1023. Specifically, the district Court correctly found that nationally, "modern rifles" (*e.g.*, firearms that would be classified as prohibited weapons under California law) "are ubiquitous," with an estimate of over 19 million having been manufactured or imported into the United States, and that these types of firearms were "in common use for lawful purposes" under *Heller*, 554 U.S. 570 (2008). *Id*., at 1022. That finding, not realistically challengeable on appeal, demonstrates the plain text of the Second Amendment presumptively protects these arms. As the Supreme Court previously held in *Heller*, a ban that "amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose" cannot withstand constitutional scrutiny under any standard, let alone the standard required by *Bruen*. *Heller*, 554 U.S. at 628-629; *see also Bruen*, Slip Op. at 5-6, 25-26.

The *Miller* district court elsewhere found that Appellants' enforcement of prohibitions on common modern rifles has no historical pedigree. *Miller*, *surpa,* at 1024-25. Appellees had offered extensive evidence detailing the complete lack of any historical pedigree of firearms prohibitions like California's AWCA. The district

court found that Appellants' reliance on a single District of Columbia firing-capacity regulation from 1932 was insufficient to contradict "the overwhelming weight of other evidence regarding the right to keep and bear arms for defense of the home." *Id*., at 1025 (citing *Heller*, 554 U.S., at 632); *see also Bruen*, Slip Op. at 83. Indeed, a statute from 1932 is not even within the proper timeframe delineated by *Bruen*, and offers no support for limiting the scope of Second Amendment rights as they were understood when the Second or the Fourteenth Amendments were adopted. *See Bruen*, Slip Op. at pp. 6-7, 23-27, 42-46.[2]

In the end, Appellants' principal, and necessary, argument supporting their request for a stay was their claim that they were likely to succeed on the merits on appeal. That claim no longer has even the slightest merit post-*Bruen*. Indeed, *Bruen* establishes quite the opposite: Appellants have completely failed to establish the required historical and textual support for their restrictions on bearing modern rifles in common use for lawful purposes, and both the facts and the law in this case *more readily support summary affirmance* than they do a stay. Because appellants are not even remotely "likely" to succeed on the merits, the stay pending appeal should be lifted immediately.

[2] While the district court also applied this Court's previous two-part balancing test, *Miller*, 542 F.Supp.3d at 1023-1033, that discussion is now surplusage in light of *Bruen* (though it does serve to strongly negate all of the other factors required for a stay).

III. NO OTHER FACTORS SUPPORT A CONTINUED STAY

The remaining factors for a stay, while irrelevant absent any plausible likelihood of success, also can no longer be established by Appellants. All that the Judgment below will do is to bring California in line with a vast majority of the other states—at least 41 of 50—that allow non-prohibited persons to acquire, possess, and use for lawful purposes the common firearms at issue here. The ubiquity of these types of firearms throughout the country demonstrates that there will be no sudden catastrophe in California once the stay is lifted. Any speculation or conjecture about the "harm" that may result from enforcing constitutionally protected fundamental rights is just that—speculation and conjecture—and cannot justify a stay of a properly entered judgment where there is no likelihood of success on the merits.

In contrast to such speculative concerns, the district court here correctly found that Appellees and others have been and continue to be deprived of their fundamental rights and are subject to severe restrictions under pain of severe criminal penalties. *Miller*, 542 F.Supp.3d at 1026. Indeed, facing felony charges, imprisonment, and the lifetime loss of rights, plus other effects, for *peacefully possessing* a firearm that has the "wrong" grip angle, or a muzzle safety device that incidentally redirects flash, is not a minor burden. The loss of these rights for any amount of time constitutes irreparable injury. *Duncan v. Becerra*, 265 F.Supp.3d 1106, 1135 (S.D. Cal. 2017), citing *Grace v. District of Columbia*, 187 F.Supp.3d 124, 150 (D.D.C. 2016) and

Ezell v. City of Chicago, 651 F.3d 684, 699, 700 (7th Cir. 2011) (a deprivation of the right to arms is "irreparable," with "no adequate remedy at law"). Under the current stay, Appellees have continued to suffer this irreparable injury for the last year. It must now end.

However, should this Court maintain the stay in spite of the Appellants' now-abrogated arguments in support of it, and if the Court does not summarily affirm the *Miller* judgment in light of *Bruen*, Appellees respectfully ask this Court to expedite briefing, argument, and disposition of this case under Circuit Rule 27-12. Every day this Court's stay prevents the district court's judgment from taking effect, millions of individuals are prevented from peaceably exercising their fundamental rights, and more people are subject to arrest, prosecution, and incarceration (not to mention the ruinous effects of such on their families, loss of employment, and good names, etc.). Should this Court decline to lift the stay, Appellees respectfully suggest the following schedule:

- Appellants' opening brief due: July 29, 2022
- Appellees' answering brief due: August 26, 2022
- Appellants' reply brief due: September 9, 2022
- Oral argument: Week of September 26, 2022

Lifting the stay and summary affirmance are appropriate since the lower court was briefed on and properly applied the analysis required under *Heller* and *Bruen*.

This record is replete with relevant historical evidence, as noted in the lower court's decision, and this Court has the benefit of a case on appeal from a final judgment in the current posture. Put simply, there's nothing left for this Court to do except summarily affirm the lower court's analysis and judgment or review the record and affirm the judgment on similar grounds. Unlike in *Rupp*, nothing but delay would be accomplished by a remand. At bare minimum, if the Court declines those options, it should expedite briefing to minimize the ongoing irreparable injury to constitutional rights.

IV. CONCLUSION

For the foregoing reasons, this Court should immediately lift the stay pending appeal and summarily affirm the lower court's judgment. Alternatively, if this Court declines to lift its stay, it should expedite this appeal to reduce the continued irreparable harm caused by the stay of the lower court's judgment.

June 30, 2022

DILLON LAW GROUP, APC

/s/ John W. Dillon
John W. Dillon

SCHAERR | JAFFE LLP

s/ Erik S. Jaffe
Erik S. Jaffe
Counsel for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

I am counsel of record for Plaintiffs-Appellees in the above action. I hereby certify that the foregoing PLAINTIFFS-APPELLEES' MOTION TO LIFT STAY complies with the type-volume limitation of Ninth Circuit Rule 27-1 and Fed. Rule App. P. 32(a)(7), because it is nine pages and contains 2,117 words, excluding the items exempted by Fed. Rule App. P. 32(f). This motion complies with the typeface and type style requirements of Fed. R. App. Pro. 32(a)(6) because it has been prepared in Times New Roman, a proportionally spaced typeface using 14-point font.

Dated: June 30, 2022

DILLON LAW GROUP APC

s/ John W. Dillon
John W. Dillon

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished to all participants by and through the CM/ECF system.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 30, 2022

s/ John W. Dillon
John W. Dillon