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

PARTIES' JOINT STATUS REPORT

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I. INTRODUCTION

Pursuant to this Court's Order entered June 21, 2021 (Dkt. No. 13), Plaintiffs-Appellees James Miller, *et al*. ("Appellees"), and Defendants-Appellants Rob Bonta (in his official capacity as Attorney General of the State of California) and Luis Lopez (in his official capacity as Director of the Department of Justice Bureau of Firearms) ("Appellants"), through their respective counsel of record, timely submit this Joint Status Report.

II. PROCEDURAL BACKGROUND

Appellees filed their Complaint on August 15, 2019. On December 6, 2019, Appellees filed a motion for preliminary injunction. On October 22, 2020, the Court set a bench trial on the merits following a multi-day evidentiary hearing. After further briefing, a three-day evidentiary hearing, and a two-day bench trial, the U.S. District Court for the Southern District of California entered its final judgment in favor of Appellees on June 4, 2021, holding certain provisions of California's Assault Weapons Control Act (AWCA) unconstitutional under *District of Columbia. v. Heller*, 554 U.S. 570 (2008), as well as this Court's now-abrogated two-step test for Second Amendment claims. *Miller v. Bonta*, 542 F.Supp.3d 1009 (S.D. Cal. 2021) (*Miller*). On June 10, 2021, Appellants filed a notice of appeal in the District Court, D. Ct. Dkt. No. 117, and moved this Court for an emergency stay pending appeal, Dkt. No. 2-1. On June 21, 2021, this Court ordered a stay pending resolution

of *Rupp v. Bonta*, No. 19-56004. Dkt. No. 13. The Court further ordered the parties to file a status report, allowing requests for appropriate relief, within 14 days of the Court's decision in *Rupp*. *Id*.

On June 23, 2022, the United States Supreme Court decided *New York State Rifle & Pistol Ass'n v. Bruen*, invalidating a New York statute restricting public carriage of firearms for self-defense absent a showing of "proper cause." 142 S. Ct. 2111, 2022 WL 2251305, at *5 (U.S. June 23, 2022), slip op. at 1–2, 30. In *Bruen*, the Court expressly 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 and specifically applies to conduct covered by the plain text of the Second Amendment, 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 8, 10.

On June 28, 2022, the Court's panel in *Rupp* issued an order vacating the District Court's judgment—entered after the District Court granted the Attorney General's motion for summary judgment and held that similar AWCA provisions challenged here satisfied both steps of the Court's previous two-step framework—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 and Pistol Association v. Bruen*." *Rupp*, Dkt. No. 71 (June 28, 2022).

On June 30, 2022, Appellees filed their Motion to Lift Stay, pursuant to Circuit Rule 27-1(3), Dkt. No. 21, in light of the recent *Bruen* decision and the fact that *Rupp* had been remanded, requesting that this Court "immediately lift the stay pending appeal and summarily affirm the lower court's judgment," or, in the alternative, "to expedite this appeal to reduce the continued irreparable harm caused by the stay of the lower court's judgment" under Circuit Rule 27-12 if this Court declines to lift its stay. Dkt. No. 21.

On July 5, 2022, counsel for Appellees and Appellants met and conferred by telephone to discuss the status report and each parties' respective positions moving forward. Appellants' counsel informed Appellees' counsel of their view that the case should be remanded to the District Court. Appellees' counsel reiterated their position that this Court should immediately lift the stay and expedite appellate briefing and argument under Circuit Rule 27-12. Appellants indicated that they intend to file a motion to remand to the District Court for further proceedings. On July 11, 2022, Appellants filed their Opposition to Motion to Lift Stay and Motion to Vacate and Remand for Further Proceedings (Opposition and Motion to Remand). Dkt. No. 22. Appellees intend to oppose that motion.

III. Appellees' Position Moving Forward

As stated in Appellees' motion, Dkt. No. 21, Appellees contend the stay of the District Court's judgment should be lifted and the lower court's judgement summarily affirmed, a result consistent with *Bruen* and appropriate in consideration of the continuing irreparable harm to Appellees' fundamental rights. If Appellants still assert that there is merit to their appeal, they are free to continue to promptly appeal the District Court's judgment. However, there is no need for remand since the District Court already found in favor of Appellees under a searching review of the parties' historical evidence consistent with *Heller*, and now *Bruen*.

Bruen closely tracks in methodology then-Judge Kavanaugh's dissent in the D.C. Circuit reasoning that a 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, largely foreshadowed that decision. 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).

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*, 542 F.Supp.3d 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." *Id*. at 1020-1023. Specifically, the District Court found that nationally, "modern rifles" (*e.g.*, firearms that would be classified as prohibited weapons under California law) "are ubiquitous," with an estimated 19 million (or more) having been manufactured or imported into the United States, and that such firearms were "in common use for lawful purposes" under *Heller*, 554 U.S. 570 (2008). *Id*. at 1022. That finding, not 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 District Court also ruled Appellants' enforcement of prohibitions on common modern rifles has no historical pedigree. *Miller*, 542 F.Supp.3d at 1024-25. Appellees offered extensive evidence detailing the lack of any historical pedigree of firearms prohibitions, such as California's AWCA, and 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.[1]

Appellants' assertion this case should be remanded is their attempt at an additional bite at the apple. Despite Appellants' claims that additional historical evidence is required, they already had an opportunity to submit historical evidence

[1] The District Court also and separately applied this Court's previous two-part balancing test, *Miller*, 542 F.Supp.3d at 1023-1033, and that discussion is now surplusage in light of *Bruen*.

of laws analogous to the State's assault weapon law to the District Court, and in fact, did so. *Miller*, *supra*, at 1023-25. The District Court already properly considered this evidence and determined that Appellants' enforcement of prohibitions on common modern arms has no historical pedigree. *Miller*, 542 F.Supp.3d at 1024-25. If Appellants wish to supplement the appellate record with additional historical evidence of early laws or legislation, they can do so on appeal through judicial notice. However, Appellants' desire to drag Appellees through unnecessary litigation, and re-argue the State's previously submitted historical evidence, is without merit, with the material effects of causing delay and increased expense. And it is a continuation of Appellants' enforcement of unconstitutional laws that deny Appellees their fundamental right to keep and bear common, constitutionally protected arms. That Appellants have completely failed to establish the required textual and historical support for their expansive criminal restrictions on modern arms in common use for lawful purposes are insufficient grounds for remand. Indeed, both the facts and the law in this case more readily support *summarily affirming* the District Court's ruling.

However, should this Court maintain the stay in spite of the Appellants' now-abrogated arguments in support of such a stay, and if the Court does not summarily affirm the *Miller* judgment in light of *Bruen*, Appellees have requested that this Court expedite the appellate briefing, argument, and disposition of this case under

Circuit Rule 27-12, as remand is not only unnecessary but irreparably harmful to Appellees. Every day this Court's stay prevents the District Court's judgment from taking effect, millions of eligible individuals will be 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.). Remanding this case would only extend this effect.

Appellees anticipate that their position, summarized above, will be more fully treated in opposing Appellants' motion to vacate and remand, Dkt. No. 22.

IV. Appellants' Position Moving Forward

As explained in Appellants' Opposition and Motion to Remand, the Court should vacate the judgment and remand this case to the District Court for further proceedings consistent with the Supreme Court's decision in *Bruen*, as the Court has ordered in other Second Amendment cases following the issuance of *Bruen*.

In *Bruen*, the Court declined to adopt the two-step framework developed by this Court and most other federal courts of appeal for resolving Second Amendment challenges, and instead held that courts must apply a standard "rooted in the Second Amendment's text, as informed by history." *Bruen*, 2022 WL 2251305, at *9. The Court also provided important guidance about how that test should be applied. *See id.* at *11-*14. And it recognized that this historical analysis "can be difficult" and

requires courts to make "nuanced judgments about which evidence to consult and how to interpret it." *Id.* at *11.

In light of *Bruen*, this Court should vacate the District Court's judgment and remand this case to the District Court for further proceedings. The parties and the District Court focused principally on the constitutionality of the challenged AWCA provisions under the prior two-step framework. In the District Court, Appellants presented some evidence showing that the AWCA was consistent with regulations adopted by various States and the federal government in the early twentieth century. *See* D. Ct. Dkt. 33-20–33-24; Defs.' Trial Exs. S-W. But Appellants principally focused on providing evidence showing that the AWCA is reasonably fitted to important government interests. *See* D. Ct. Dkt. 33-1–33-5; Defs.' Trial Exs. A-E.

Neither the parties nor the District Court had the benefit of *Bruen* during the proceedings below. And while the District Court briefly reviewed some of the history relevant to the question presented here, *see Miller*, 542 F. Supp. 3d at 1024-1025, it did so without the benefit of *Bruen*, which clarified the historical inquiry that the lower court must conduct in important ways. For example, the District Court did not consider whether the AWCA imposes a "comparable burden on the right of armed self-defense" to the relevant historical analogue, nor whether the AWCA is "comparably justified." *Bruen*, 2022 WL 2251305, at *13. In conducting that inquiry, the District Court will need to determine which "evidentiary principles and

default rules" apply, a process that will be informed by "the principle of party presentation." *Id.* at *11 n.6. These and other "difficult" questions, *id.* at *11, should be addressed by the District Court in the first instance.[2]

Vacatur and remand would allow the parties compile the kind of historical record that *Bruen* requires, and would allow the District Court to answer a number of important questions about how *Bruen* should be applied in the first instance. Indeed, that course is especially appropriate in this case, which involves "unprecedented societal concerns" and "dramatic technological changes," and thus requires an especially "nuanced approach." *Bruen*, 2022 WL 2251305, at *12. And vacatur and remand here would accord with how this Court has handled other cases involving Second Amendment claims that were pending when *Bruen* was decided, including one that challenged many of the same AWCA provisions at issue here. *See Rupp v. Bonta*, 9th Cir. No. 19-56004 (June 28, 2022) (9th Cir. Dkt. 71); *McDougall v. Cty. of Ventura*, 9th Cir. No. 20-56220 (June 29, 2022) (en banc) (9th Cir. Dkt. 55); *Martinez v. Villanueva*, 9th Cir. No. 20-56233 (July 6, 2022) (9th Cir. Dkt. 75).

[2] Although the District Court alternatively applied what it called the "*Heller* test," *Miller*, 542 F. Supp. 3d at 1021-1023, *Bruen* makes clear that governments can justify their restrictions on firearms—even those that are "popular," *id.* at 1021—by reference to an appropriate historical tradition, *see Bruen*, 2022 WL 2251305, at *11; *id.* at *39 (Kavanaugh, J., concurring) (noting an "important limitation on the right to keep and carry arms" providing that "the sorts of weapons protected were those in common use at the time," which is "fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons." (quoting *Heller*, 554 U.S. at 627)).

Bruen sets forth a new standard that should be applied with careful attention to the relevant "evidentiary principles and default rules," *id.* at *11 n.6—matters that should be left to the District Court, not resolved by this Court in a hurried fashion. Therefore, the Court should vacate the District Court's judgment and remand this case for further proceedings in accordance with *Bruen*.

Respectfully submitted,

Dated: July 12, 2022

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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: July 12, 2022

s/ George M. Lee
George M. Lee