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' REPLY TO DEFENDANTS-APPELLANTS' OPPOSITION TO LIFT STAY

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I. INTRODUCTION

Appellants have opposed the present motion to lift the stay, and further seek affirmative relief of vacating the judgment and remand to the district court.[1] Here, there is no reason either to lift the stay, or to vacate the District Court's decision and remand, because the District Court's judgment is entirely consistent with *District of Columbia v. Heller,* 554 U.S. 570 (*Heller*) and *New York State Rifle & Pistol Ass'n v. Bruen,* 142 S.Ct. 2111, 2022 WL 2251305 (U.S. June 23, 2022) (*Bruen*). Appellants have provided no legitimate justification for leaving the stay in place, as both the merits and equitable considerations support lifting the stay.

First, Appellants incorrectly state that the Supreme Court "announced a new framework for analyzing Second Amendment Claims" "in lieu of the 'two-step test.'" Appellants' Opp. at 1 (Dkt. No. 22). *Bruen* did not establish a new framework, but *affirmed* the existing framework established in *Heller* fourteen years ago ("We have *already recognized* in *Heller* at least one way in which the Second Amendment's historically fixed meaning applies to new circumstances: Its reference to 'arms' does not apply 'only [to] those arms in existence in the 18th century.' *Bruen,* 142 S.Ct. at 2132 (quoting *Heller*, 554 U.S. at 582) (italics added). *Bruen*

[1]Appellants' request to vacate the District Court's judgment and remand this case to that court for further proceedings will be separately addressed in Appellees' opposition to that motion, to be filed on or before July 21, 2022 pursuant to FRAP 27(a)(3)(A).

also *explicitly rejected* the entirely fabricated "two-step test" that had never been adopted or endorsed by the Supreme Court. The proper test under *Heller* was always the foundation of Appellees' claims, and the District Court faithfully applied it in this case. See *Miller v. Bonta*, 542 F.Supp.3d 1009, 1020-1021, including fn. 22 (S.D. Cal. 2021) (applying the "*Heller* test").

Second, and contrary to Appellants' baseless claims, the District Court principally resolved this case under the proper test established by *Heller*. Despite the length of the District Court's analysis, that court applied the now abrogated two-step test only as an *alternative* to the analysis set forth in *Heller*. See *Miller*, 542 F.Supp.3d at 1020-1021. Appellants concede this fact in their opposition. See Def. Opp. at 8 (Dkt. No. 22).

II. APPELLANTS PROVIDE NO LEGITIMATE JUSTIFICATION FOR LEAVING THE STAY IN PLACE.

Appellants claim that both the merits and equitable considerations "militate" against lifting the stay. However, neither the merits nor equitable considerations support leaving the stay in place. If Appellants desire to relitigate the District Court's judgment, they should proceed hastily with their appeal. However, the District Court's judgment was rendered after party presentation of relevant history and a bench trial on the merits. That judgment applied the appropriate test under *Heller*; and the recent decision in *Bruen* eliminates any likelihood of Appellants' success on the merits.

As the Supreme Court in *Bruen* 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*, 142 S.Ct. at 2117, 2130. 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 right to keep and bear arms "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*, 142 S.Ct. at 2118, 2131 (quoting *Heller*, 554 U.S. at 635) (cleaned up).

After *Bruen*, there is no question that the District Court in this case assessed whether the "Second Amendment's plain text covers" the regulated conduct. The District Court found that Appellants' ban prohibited law-abiding individuals from acquiring, purchasing, transferring, owning, and possessing common firearms deemed "assault weapons" under California Penal Code section 30515. The District Court also found that the "Second Amendment protects modern weapons [citation omitted]" and that the "firearms banned by California Penal Code § 30515 and deemed 'assault weapons' are modern weapons." *Miller*, 542 F. Supp.3d 1009, 1019-1020 (S.D. Cal. 2021). Further, in the context of considering Appellants'

claims that its "firing capacity" regulations were somehow a longstanding regulation, the District Court adjudicated and rejected Appellants' assertion, namely, that history and tradition support prohibiting the carrying of "'dangerous and unusual weapons.'" See Def. Opp. at 16 (Dkt. No. 22). Specifically, the District Court held:

> "This case is not about extraordinary weapons lying at the outer limits of Second Amendment protection. The banned 'assault weapons' are not bazookas, howitzers, or machine guns. Those are dangerous and solely used for military purposes. Instead, the firearms deemed 'assault weapons' are fairly ordinary, popular, modern rifles. This is an average case about average guns used in average ways for average purposes."

Miller, 542 F.Supp.3d at 1014-1015.

The District Court not only rejected Appellants' argument on this point, but found the opposite—that the arms in question are common, ordinary firearms, well-suited for self-defense, and lawfully owned in the vast majority of jurisdictions across the United States. *Miller*, 542 F.Supp.3d at 1029, 1059-1061. Moreover, the Supreme Court in *Bruen* eliminated any basis for Appellants' claim that these modern firearms are not protected because they are both dangerous *and* unusual. "Whatever the likelihood that handguns were considered 'dangerous and unusual' during the colonial period, they are today 'the quintessential self-defense weapon.'" *Bruen*, 142 S.Ct. at p. 2120, 2143. The same is true for common firearms Appellants prohibit as "assault weapons." As Appellees resoundingly demonstrated at trial, the firearms banned under the State's AWCA are some of the most widely possessed

and used firearms in the United States. *Miller*, 542 F.Supp.3d at 1021-23. As the Supreme Court opinion recognized in *Caetano v. Massachusetts*, 577 U.S. 411 (2016), it is a conjunctive test: A weapon may not be banned unless it is *both* dangerous *and* unusual. And, just like the Supreme Court "reject[ed] the lower court's conclusion that stun guns are 'unusual'" in *Caetano v. Massachusetts*, 577 U.S. 411, 417 (Alito, J., concurring), because the arms prohibited by Appellants are typically possessed by law-abiding citizens for lawful purposes, the fact that the weapons at issue here may be "dangerous" is irrelevant. Thus, any historical laws restricting the public from carrying "dangerous and unusual" weapons provide no justification for prohibitions on firearms that are unquestionably in common use (and thus not dangerous and unusual) today.

Because the conduct of keeping and bearing these arms is protected, the burden falls on Appellants to justify a ban by showing that the ban is consistent with the Nation's history and tradition of regulating firearms. *Bruen*, 142 S.Ct. at 2117, 2130. Appellants already provided historical evidence of arms prohibitions when they attempted to show that California's ban "is one of the presumptively lawful regulatory measures identified in *Heller*, or whether the record includes persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment." *Miller*, 542 F.Supp.3d at 1024-25. Appellants admit this fact, confirming they submitted "evidence

showing that the AWCA was consistent with regulations adopted by various States and the federal government in the early twentieth century." Def. Mot. at 6 (Dkt. No. 22). But the District Court considered this evidence and found Appellants' ban on modern firearms was "not one of the presumptively lawful measures identified in *Heller"* and that a ban on modern firearms "has no historical pedigree." *Miller,* 542 F.Supp.3d at 1024. In fact, the District Court noted that "[p]rior to the 1990's, there was no national history of banning weapons because they were equipped with furniture like pistol grips, collapsible stocks, flash hiders, flare launchers, or barrel shrouds." *Id.* The District Court also considered Appellants' evidence of "state firing-capacity regulations from the 1920's and 1930's and one District of Columbia law from 1932" to support its contentions, but found that Appellants' arguments were exactly what the Supreme Court in *Heller* "broadly cautioned" courts against when "deciding whether an analogous regulation is long-standing." *Miller*, 542 F.Supp.3d at 1024-1025.

Appellants' ban on modern firearms is unconstitutional under *Heller* and *Bruen*, and there is nothing that the District Court needs to reconsider as its judgment is already consistent with Supreme Court precedent. Thus, the merits provide no justification for leaving the stay in place. Indeed, the stay should be lifted and either the lower court's opinion summarily affirmed or the merits appeal expedited.

Appellants' arguments on the equitable considerations are equally insufficient to justify leaving the stay in place because they are based on pure speculation. While Appellants state that the March 2019 District Court decision in *Duncan v. Becerra* "resulted in a substantial number of large-capacity magazines entering the State" (Def. Mot. at p. 18 (Dkt. No. 22) [citing Def. Emergency Mot. at 20]), Appellants have provided no evidence to support the so-called "influx" of magazines that actually *caused* harm, let alone irreparable harm. To show any kind of harm *beyond speculation*, Appellants would have to provide evidence that this "influx" directly caused an increase in criminal activity in the *three years* since the injunction *Duncan* was imposed. Appellants have not done so. To the contrary, millions of magazines were legally purchased in California without any harm being imposed on the citizens of this state. Thus, any claim that a similar "influx" of legally purchased, commonly owned firearms entering California will cause irreparable harm is also entirely speculative and unsupported by any evidence.

Moreover, the District Court in this case already found that, according to Appellants' own evidence, there are at least "185,569 'assault weapons' currently registered with the California Department of Justice. [Citation omitted.] Another 52,000 assault weapon registrations were backlogged and left unregistered when the last California registration period closed in 2018." *Miller*, 542 F.Supp.3d at 1021. The District Court also found that as of 2021, "assault weapons" made up

approximately 1,000,000 firearms in the State of California. *Id*. at 1021-1022. There is no "influx"—the popular, common firearms at issue here are already likely owned by "many more" Californians than the statistics show. *Id*.

In contrast, the District Court found that the State's assault weapon prohibition causes irreparable harm to Appellees and other similarly situated, law-abiding gun owners in California:

> As one commentator describes it, '[m]ere possession of an object that is commonplace and perfectly legal under federal law and in forty-four states will land you in prison, [will] result in the loss of your rights including likely the right to vote, and probably [will] cause you irreparable monetary and reputational damages, as well as your personal liberty. All of this despite the absence of even a single victim [footnote omitted].'

Miller, 542 F.Supp.3d at 1019.

Appellants' final claim is that the harm of denying Appellees' fundamental rights is "minimized" because there are other firearm types available to Appellees. Def. Mot., at 18. However, the Supreme Court has twice rejected this exact argument in *Heller* and now *Bruen* because "[i]t is no answer to say … that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed." 554 U.S. at 629.[2] The same is true here.

[2] *See also*, *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007) ("The District contends that since it only bans one type of firearm, 'residents still have access to hundreds more,' and thus its prohibition does not implicate the Second Amendment because it does not threaten total disarmament. We think that argument frivolous. It could be similarly contended that all firearms may be banned so long as

III. CONCLUSION

This Court should lift the stay of the District Court's judgment.

July 18, 2022

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s/ Erik S. Jaffe
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sabers were permitted. Once it is determined--as we have done--that handguns are 'Arms' referred to in the Second Amendment, it is not open to the District to ban them. *See Kerner*, 107 S.E. at 225 ("To exclude all pistols . . . is not a regulation, but a prohibition, of . . . 'arms' which the people are entitled to bear.").").

CERTIFICATE OF COMPLIANCE

I am counsel of record for Plaintiffs-Appellees in the above action. I hereby certify that the foregoing PLAINTIFFS-APPELLEES' REPLY TO DEFENDANTS-APPELLANTS' 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 2,023 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: July 18, 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: July 18, 2022

s/ John W. Dillon
John W. Dillon