21-55608

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES MILLER, et al.,

Plaintiffs-Appellees,

v.

CALIFORNIA ATTORNEY GENERAL ROB BONTA; and DOJ BUREAU OF FIREARMS DIRECTOR LUIS LOPEZ,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of California

No. 3:19-cv-01537-BEN-JLB
The Honorable Roger T. Benitez, Judge

DEFENDANTS-APPELLANTS' REPLY TO PLAINTIFFS-APPELLEES' OPPOSITION TO MOTION TO VACATE AND REMAND FOR FURTHER PROCEEDINGS

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INTRODUCTION

Consistent with the disposition of numerous other Second Amendment cases, this Court should vacate the district court's judgment and remand this case for further proceedings consistent with *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). This is not an "extraordinary" request, nor one seeking a "do-over." Appellees' Opp'n to Appellants' Mot. to Vacate & Remand for Further Proceedings (Pls.' Opp'n) at 1. Rather, the Attorney General seeks the opportunity to present relevant evidence to the district court and offer the district court the opportunity to assess the constitutionality of California's Assault Weapons Control Act (AWCA) under the text-and-history standard explained in *Bruen*.

In rejecting the two-step framework embraced by most federal courts of appeals, *Bruen* refocused the standard for adjudicating Second Amendment claims and provided important guidance on how the lower courts' textual and historical inquiry must be conducted. The district court and the parties did not have the benefit of *Bruen* in developing the record and conducting the textual and historical analysis in the proceedings below. Vacatur and remand would allow the parties to develop the kind of record that *Bruen* requires and provide the district court with the opportunity to examine the

constitutionality of the AWCA under the standard announced in *Bruen* in the first instance.

ARGUMENT

I. THE DISTRICT COURT'S ANALYSIS DID NOT CONFORM WITH THE TEXT-AND-HISTORY STANDARD ADOPTED IN *BRUEN*

Plaintiffs principally argue that remand is not appropriate because the district court's analysis under "the *Heller* test" is identical to the historical analysis that *Bruen* requires. As explained in the Attorney General's motion to vacate and remand and below, Plaintiffs are mistaken. *Bruen* broke new ground in Second Amendment jurisprudence and provided important guidance for courts adjudicating Second Amendment claims. *See* Defs.' Opp'n to Mot. to Lift Stay & Defs.' Mot. to Vacate & Remand for Further Proceedings (Defs.' Mot.) (Dkt. 22) at 1–2, 12.

A. *Bruen* Announced and Explained a New Text-and-History Standard

In replacing the two-step framework, *Bruen* announced a new standard for Second Amendment claims. Although Plaintiffs contend that *Bruen* merely "prun[ed] the two-step" framework and "did not add anything or change anything that was not already addressed below," Pls.' Opp'n at 12, this is incorrect. The first step of this Court's prior two-step framework focused on the Second Amendment's text and history to determine whether

the challenging party's proposed conduct fell within the "historical scope of the Second Amendment," *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014), and this first step was "broadly consistent with *Heller*," 142 S. Ct. at 2127 (citing *District of Columbia v. Heller*, 554 U.S. 570 (2008)). But it is a misreading of *Bruen* to claim, as Plaintiffs do, that the first step of the two-step framework was the *same* standard described in *Heller* and "the entirety of the required analysis after *Bruen*." Pls.' Opp'n at 18. Rather, *Bruen*'s text-and-history standard builds on *Heller* and clarifies the methodology for applying the text-and-history standard going forward.

Bruen specifies that the Second Amendment's protective scope is limited to its "plain text." *Bruen*, 142 S. Ct. at 2126, 2129, 2134, 2135. In Second Amendment cases, courts must determine whether the "textual elements" of the Second Amendment's operative clause cover the regulated conduct, *Bruen*, 142 S. Ct. at 2134 (quoting *Heller*, 554 U.S. at 592)—*i.e.*, whether the challenged law prevents any member of "the people" from "keep[ing]" or "bear[ing]" "Arms," U.S. Const. amend. II. The Court clarified that this textual inquiry involves an examination of whether the plaintiffs are "part of 'the people' whom the Second Amendment protects." *Bruen*, 142 S. Ct. at 2134. It also considers whether the regulated weapons "are weapons 'in common use' today for self-defense" to qualify as "Arms"

that the Second Amendment protects. *Id.* Only if the "plain text" of the Second Amendment covers the regulated conduct will the Second Amendment "presumptively" protect that conduct, requiring the government to then demonstrate that the challenged law is "consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2135.

With respect to the historical analysis, the Court squarely assigned the burden of proof to the government to show that the challenged regulation is justified historically. *Id.* The Court explained that the government may rely on analogies to laws enacted around the time of ratification in defending modern firearms regulations. *Id.* at 2126, 2135.[1] The Court explained that this historical analysis may be "straightforward" in some cases, such as when the challenged law "addresses a general societal problem that has persisted since the 18th century." *Id.* at 2131. *Bruen*, for example, concerned a societal problem that existed at the founding—"'handgun violence,' primarily in 'urban area[s]'"—requiring the government to produce "'historical precedent' from before, during, and even after the founding." *Id.* at 2131–32. Other cases, by contrast, may involve

[1] *Bruen* left open the question of whether courts should "primarily rely" on historical evidence from the time of the ratification of the Fourteenth Amendment in defining the scope of the Second Amendment. *Bruen*, 142 S. Ct. at 2138.

"unprecedented societal concerns or dramatic technological changes" that require "a more nuanced approach." *Id.* at 2132. The Court explained that this "more nuanced approach" allows the government to justify a modern firearm regulation "by analogy" to a "relevantly similar" "well-established and representative historical analogue." *Id.* at 2132–33 (emphasis omitted). To qualify as "relevantly similar," the modern and historical laws must be comparable in terms of both the burden imposed "on the right of armed self-defense" and the justification for the laws. *Id.* at 2133.

B. The District Court's and the Parties' Analyses Did Not Conform to *Bruen*'s Text-and-History Standard

The district court did not apply the text-and-history standard adopted in *Bruen*, and the parties' arguments did not conform to that standard. Plaintiffs argue that the district court has already done the textual and historical work required under *Heller* and that *Bruen* did not change the analysis. *See* Pls.' Opp'n at 2. But the district court's analysis focused principally on the two-step framework, which the court acknowledged was the standard adopted by this Court for Second Amendment claims at that time. *Miller v. Bonta*, 542 F. Supp. 3d 1009, 1023 (S.D. Cal. 2021). Indeed, the district court's "*Heller* test" analysis spanned just four pages of the court's 56-page order. *See id.* at 1020–23.

In any event, the district court's application of "the *Heller* test" was based on a view that *Heller* and *United States v. Miller*, 307 U.S. 174 (1939), extended Second Amendment protection to weapons that are "useful for the common defense for a militia member." *Miller*, 542 F. Supp. 3d at 1020 (citing *Miller*, 307 U.S. at 178). That is not the same as the text-and-history standard required by *Bruen*. And *Bruen* strongly suggests that this view is incorrect, as it repeatedly confirms that self-defense (and not militia service) is the "central component" of the right protected by the Second Amendment. *Bruen*, 142 S. Ct. at 2133 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010)); *see also id.* at 2125 (noting that *Heller* and *McDonald* "held that the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense"); *id.* at 2128 (same).[2]

In addition, the district court's common-use analysis was based on a view that the Second Amendment protects "guns commonly *owned* by law-abiding citizens for lawful purposes." *Miller*, 542 F. Supp. 3d at 1014

[2] Despite citing *United States v. Miller*, *see Bruen*, 142 S. Ct. at 2128, the Court did not discuss *Miller*'s reference to arms that have "some reasonable relationship to the preservation or efficiency of a well regulated militia," *Miller*, 307 U.S. at 178, or premise the right to public carry on any need to bear arms for militia service.

(emphasis added).[3] Again, *Bruen* casts doubt on this interpretation. In *Bruen*, the Court indicated that to qualify as protected "arms," the weapon must be commonly used for lawful self-defense—not simply manufactured, produced, sold, or owned. *See Bruen*, 142 S. Ct. at 2138 (referring to "commonly *used* firearms for self-defense" (emphasis added)); *id.* at 2144 n.13 (finding that pocket pistols were "commonly *used* at least by the founding" (emphasis added)); *id.* at 2143 (noting that certain belt and hip pistols "were commonly *used* for lawful purposes in the 1600s" (emphasis added)); *id.* at 2156 (describing the "right to bear commonly *used* arms" (emphasis added)); *id.* (noting that American governments would not have broadly prohibited the "public carry of commonly *used* firearms for personal defense" (emphasis added)).[4]

[3] Plaintiffs reference one of their proposed conclusions of law, which relied on Justice Alito's concurrence in *Caetano v. Massachusetts* to state that the Second Amendment protects weapons that are "commonly possessed by law-abiding citizens for lawful purposes today." Pls.' Opp'n at 14 (quoting *Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016) (Alito, J., concurring)). Despite citing to *Caetano*'s per curiam opinion, *Bruen* did not cite Justice Alito's concurrence in *Caetano*. *See* 142 S. Ct. at 2132, 2134.

[4] While an evaluation of a weapon's "prevalence must play *some* role in a court's analysis," "*Heller* focused not just on the prevalence of a weapon, but on the primary use or purpose of that weapon." *Duncan v. Bonta*, 19 F.4th 1087, 1127 (9th Cir. 2021) (Berzon, J., concurring), *vacated on other grounds*, 2022 WL 2347579, at *1 (U.S. June 30, 2022).

With respect to the history in the record, the district court did not conduct the kind of historical inquiry required under *Bruen*. In district court proceedings, guided by *Heller*'s reference to "longstanding prohibition[s]," 554 U.S. at 627, the Attorney General presented numerous state and federal restrictions addressing the firing capacity of certain semiautomatic and automatic weapons, which were enacted in the early 20th century. *See* Pls.' Opp'n at 15. Even though these firing-capacity restrictions were "relevantly similar" in terms of both burden and justification to the AWCA, *Bruen*, 142 S. Ct. at 2132, the district court found that the AWCA has "no historical pedigree" because, prior to the 1990s, there had been "no national history of banning weapons because they were equipped with furniture like pistol grips, collapsible stocks, flash hiders, flare launchers, or barrel shrouds," *Miller*, 542 F. Supp. 3d at 1024. *Bruen*, however, clarified that the government need not identify a "dead ringer" or a "historical twin." *Bruen*, 142 S. Ct. at 2133 (emphasis omitted). Looser analogies may be authorized when the challenged law addresses "unprecedented societal concerns or dramatic technological changes. *Id.* at 2132. Though *Bruen* has clarified that 20th century historical evidence may not be considered if that evidence contradicts earlier evidence from around the time of ratification, *id.* at 2153

n.28, the AWCA and earlier firing-capacity laws are consistent with, *inter alia*, a tradition of restricting dangerous and unusual weapons.

The Attorney General expresses no view on whether *Bruen* changes Plaintiffs' pre-*Bruen* "claims and theories." Pls.' Opp'n at 13. But *Bruen* did change the nature and requirements of the Attorney General's defense of the AWCA. And even if there were room for debate on this point, the district court should have the opportunity to assess the effects of *Bruen* on its textual and historical analysis.

II. VACATUR AND REMAND ARE APPROPRIATE

In light of *Bruen*'s text-and-history standard, the Attorney General respectfully requests that the Court vacate the judgment and remand the case to the district court for further proceedings. The district court should have the opportunity in the first instance to assess *Bruen* and consider (1) whether the Second Amendment protects the weapons regulated under the AWCA, and (2) whether the AWCA restrictions are "relevantly similar" to historical traditions at the pertinent times (*e.g.*, at the time of ratification of the Second or Fourteenth Amendment). Plaintiffs do not dispute that the Attorney General will have an opportunity to submit further historical support for the AWCA in this appeal. Pls.' Opp'n at 13 ("And, of course, Appellants can supplement their arguments with any relevant history."). The Attorney

General submits that the district court—and not this Court in the midst of an appeal—would be the appropriate forum for introducing that additional evidence and argument in the first instance, subject to "various evidentiary principles and default rules." *Bruen*, 142 S. Ct. at 2130 n.6 (citation and quotation marks omitted). That is especially true here, given that the district court consolidated Plaintiffs' motion for a preliminary injunction with an expedited bench trial, limiting the fact and expert discovery available in the record.[5]

Repeating arguments raised in support of their motion to lift the stay, Plaintiffs argue that this case should not be remanded and, instead, that this appeal should proceed, with either summary affirmance or expedited briefing, in light of *Bruen*. Pls.' Opp'n at 19–20. According to Plaintiffs, *Bruen* has rendered "this appeal all the more simple" by eliminating the second step of the two-step framework. *Id.* at 12. But as discussed, *Bruen*

[5] At the conclusion of the October 2020 evidentiary hearing on Plaintiffs' motion for a preliminary injunction, the district court ordered that the motion be consolidated with a trial on the merits pursuant to Federal Rule of Civil Procedure 65(a)(2). Dist. Ct. Dkt. 59 at 115; Dkt. 2-2 ¶ 20. The Court set a February 2021 trial date, and the parties were permitted to depose witnesses who submitted declarations in connection with the motion for a preliminary injunction prior to trial. Dist. Ct. Dkt. 72; Dkt. 2-2 ¶ 25. During December and January 2021, the Attorney General deposed seven of Plaintiffs' declarants, and Plaintiffs deposed one of the Attorney General's declarants. *See* Dkt. 2-2 ¶ 26.

raises numerous issues for the district court to consider that may impact its textual and historical analysis. *See supra* at pp. 2–9. *Bruen* did not "decide anything about the kinds of weapons that people may possess," and it did not "disturb[] anything" that the Court stated previously "about restrictions that may be imposed on the possession or carrying of guns." 142 S. Ct. at 2157 (Alito, J., concurring). And consistent with *Bruen*, States are allowed to adopt "a 'variety' of gun regulations." *Id.* at 2162 (citation omitted). The district court should be given the opportunity to assess Plaintiffs' interpretation of *Bruen* and whether, as discussed, *Bruen* requires a revised methodological approach to the case.

The interests of judicial economy and the orderly administration of justice strongly support vacatur and remand. Such an order would be consistent with this Court's treatment of other Second Amendment cases that had been pending on appeal when *Bruen* was decided, including *Rupp v. Bonta*, 9th Cir. No. 19-56004, which involves a substantially similar Second Amendment challenge to the AWCA's restrictions on certain semiautomatic

rifles. *See* Defs.' Mot. at 2, 14.[6] There is no good reason to depart from that approach in this case.

CONCLUSION

The Court should vacate the district court's judgment and remand this case for further proceedings in light of *Bruen*.

Dated: July 28, 2022

Respectfully submitted,

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[6] *See also Sibley v. Watches*, No. 21-1986-cv, 2022 WL 2824268, at *1 (2d Cir. July 20, 2022) (vacating judgment and remanding to the district court to "consider in the first instance the impact, if any, of *Bruen*" on challenge to "good moral character" requirement for concealed carry licenses); *Taveras v. New York City*, No. 21-398, 2022 WL 2678719, at *1 (2d Cir. July 12, 2022) (vacating and remanding because "neither the district court nor the parties' briefs anticipated and addressed [*Bruen*'s] *new legal standard*" (emphasis added)).

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Defendants-Appellants' Reply to Plaintiffs-Appellees' Opposition to Motion to Vacate and Remand for Further Proceedings complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because it contains 2,571 words. This document complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 27 because it has been prepared in a proportionally spaced typeface using 14-point font.

Dated: July 28, 2022 s/ John D. Echeverria

CERTIFICATE OF SERVICE

Case Name: ***James Miller, et al. v. Rob Bonta, et al.*** Case No. **21-55608**

I hereby certify that on July 28, 2022, I electronically filed the following document with the Clerk of the Court by using the CM/ECF system:

DEFENDANTS-APPELLANTS' REPLY TO PLAINTIFFS-APPELLEES' OPPOSITION TO MOTION TO VACATE AND REMAND FOR FURTHER PROCEEDINGS

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

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct.

Executed on July 28, 2022, at San Francisco, California.

Vanessa Jordan	s/ Vanessa Jordan
Declarant	Signature