

ELLEN F. ROSENBLUM
Attorney General of Oregon
BENJAMIN GUTMAN
Solicitor General
ROBERT A. KOCH
Assistant Attorney General
1162 Court St.
Salem, Oregon 97301
Telephone: (503) 378-4402

Counsel for State Defendants-Appellees

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK FITZ; GRAYGUNS, INC.; G4
ARCHERY, LLC; SECOND
AMENDMENT FOUNDATION;
FIREARMS POLICY COALITION,
INC.,

Plaintiffs - Appellants,

v.

ELLEN ROSENBLUM, In her official
capacity as Attorney General of the
State of Oregon; TERRI DAVIE, In her
official capacity as Superintendent of
the Oregon State Police,

Defendants - Appellees.

U.S.C.A. No. 23-35478

DANIEL AZZOPARDI;
SPORTSMAN'S WAREHOUSE INC.,

Plaintiffs - Appellants,

v.

ELLEN ROSENBLUM, In her official
capacity as Attorney General of the
State of Oregon; TERRI DAVIE, In her
official capacity as Superintendent of
the Oregon State Police,

Defendants - Appellees.

U.S.C.A. No. 23-35479

Page 1 – REPLY IN SUPPORT OF MOTION TO HOLD APPEAL IN ABEYANCE
AND TO SUSPEND THE BRIEFING SCHEDULE

RAK:kw5\932722970

KATERINA B. EYRE; TIM
FREEMAN; MAZAMA SPORTING
GOODS; NATIONAL SHOOTING
SPORTS FOUNDATION, INC.;
OREGON STATE SHOOTING
ASSOCIATION,

Plaintiffs - Appellants,

v.

ELLEN ROSENBLUM, In her official
capacity as Attorney General of the
State of Oregon; TERRI DAVIE, In
her official capacity as Superintendent
of the Oregon State Police,

Defendants - Appellees,

and

OREGON ALLIANCE FOR GUN
SAFETY,

Intervenor-Defendant -
Appellee.

U.S.C.A. No. 23-35539

OREGON FIREARMS
FEDERATION, INC., an Oregon
public benefit corporation; BRAD
LOHREY, Sherman County Sheriff;
ADAM JOHNSON, an individual;
CODY BOWEN, Union County
Sheriff; BRIAN WOLFE, Malheur
County Sheriff; HAROLD RICHARD
HADEN, Jr., an individual; KEVIN
STARRETT; TERRY ROWAN;
BRIAN PIXLEY; DAMIAN
BUNTING,

Plaintiffs - Appellants,

v.

KATE BROWN, Governor of the
State of Oregon; ELLEN
ROSENBLUM, Attorney General of

U.S.C.A. No. 23-35540

Page 2 – REPLY IN SUPPORT OF MOTION TO HOLD APPEAL IN ABEYANCE
AND TO SUSPEND THE BRIEFING SCHEDULE

RAK:kw5\932722970

the State of Oregon, in both their
official and personal capacities;
TERRI DAVIE, In her official
capacity as Superintendent of the
Oregon State Police,

Defendants - Appellees,

and

OREGON ALLIANCE FOR GUN
SAFETY,

Intervenor-Defendant -
Appellee.

**REPLY IN SUPPORT OF MOTION TO HOLD APPEAL IN ABEYANCE
AND TO SUSPEND THE BRIEFING SCHEDULE**

The Oregon state Defendants-Appellees have moved to hold these consolidated appeals in abeyance, and to suspend the briefing schedule, pending this Court's en banc resolution of *Duncan v. Bonta*, No. 23-55805 (9th Cir.). As explained in the motion, *Duncan* is currently scheduled for en banc oral argument the week of March 18, 2024, and one of the primary questions of law presented in this case is squarely before the *Duncan* en banc court, namely, the constitutionality of state restrictions on magazines with a capacity of more than ten rounds.

In response, Plaintiffs-Appellants concede those basic facts. (Opp'n at 2–3). But plaintiffs oppose holding the appeal in abeyance for two reasons, neither of which has merit. First, plaintiffs argue that the en banc court may not fully resolve the constitutional merits due to a procedural question raised by a single judge on

the en banc panel. (Opp'n at 3). Notably, the en banc court already rejected a separate procedural objection, similarly raised sua sponte, "regarding the propriety, under circuit rules and practices, of the en banc panel's decision to accept this appeal as a comeback case." *Duncan v. Bonta*, 83 F.4th 803, 807 (9th Cir. 2023) (en banc). Regardless, it makes little sense to proceed with briefing in this case when the parties do not know how the en banc court will resolve *Duncan*, and the ruling in *Duncan* likely will at least inform the arguments made in this case. In other words, not staying the proceedings here will not speed up the Court's resolution of this consolidated appeal. Instead, a stay pending *Duncan* would prevent a duplicative expenditure of litigant and judicial resources.

Second, plaintiffs appear to imply that they may suffer potential hardship from holding the appeal in abeyance, at some unspecified future date, due to separate proceedings in state court. (Opp. at 4). As noted in defendants' motion, an Oregon state trial court had entered a preliminary injunction enjoining enforcement of the law in its entirety. (Mot. at 9). On November 24, 2023, the state trial court entered a permanent injunction against enforcement of the law. *Arnold v. Kotek*, No. 22CV41008 (Harney Cnty. Cir. Ct. Nov. 24, 2023) (amended letter opinion permanently enjoining Measure 114). To be sure, the state

defendants intend to appeal that permanent injunction. But at present, the state court proceedings offer no sound reason to proceed with briefing in this case.

Respectfully submitted,

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General

/s/ Robert A. Koch

ROBERT A. KOCH #072004
Assistant Attorney General
robert.a.koch@doj.state.or.us

Attorneys for State Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2023, I directed the Reply in Support of Motion to Hold Appeal in Abeyance and to Suspend the Briefing Schedule to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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.

/s/ Robert A. Koch

ROBERT A. KOCH #072004
Assistant Attorney General
robert.a.koch@doj.state.or.us

Attorney for State Defendants-Appellees

RAK:kw5\932722970