

No. 19-55376

**In the United States Court of Appeals
for the Ninth Circuit**

VIRGINIA DUNCAN, *et al.*,
Plaintiffs-Appellees,

v.

XAVIER BECERRA, in his official capacity as
Attorney General of the State of California,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of California
Hon. Roger T. Benitez
No. 3:17-cv-01017-BEN-JLB

**BRIEF OF *AMICUS CURIAE* THE NATIONAL SHOOTING SPORTS
FOUNDATION, INC. IN SUPPORT OF PLAINTIFFS-APPELLEES**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, The National Shooting Sports Foundation, Inc. states it is a non-profit organization under section 501(c)(6) of the Internal Revenue Code and has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

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STATEMENT OF CONSENT

All parties consented to the filing of this *amicus curiae* brief pursuant to Federal Rule of Appellate Procedure 29(a). No party or party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than *amicus curiae*, its members or its counsel contributed money to fund preparation and submission of this brief.

INTEREST OF *AMICUS CURIAE*

Amicus curiae The National Shooting Sports Foundation, Inc. ("NSSF") is the national trade association for the firearms, ammunition, hunting and shooting sports industry. Formed in 1961, NSSF is a 501(c)(6) tax-exempt Connecticut non-profit trade association with its principal place of business in Newtown, Connecticut. NSSF has a membership of over 8,600 federally licensed firearms manufacturers, distributors and retailers; companies manufacturing, distributing and selling shooting and hunting related goods and services; sportsmen's organizations; public and private shooting ranges; gun clubs; and endemic media. At present, more than 700 NSSF members are located within the State of California.

NSSF's mission is to promote, protect and preserve hunting and the shooting sports by providing trusted leadership in addressing industry challenges; advancing participation in and understanding of hunting and shooting sports; reaffirming and

strengthening its members' commitment to the safe and responsible sale and use of their products; and promoting a political environment that is supportive of America's traditional hunting and shooting heritage and Second Amendment freedoms.

NSSF's interest in this case derives principally from the fact its federally licensed firearms manufacturer, distributor and retail dealer members engage in lawful commerce in firearms and ammunition in California and throughout the United States, which makes the exercise of an individual's constitutional right to keep and bear arms under the Second Amendment possible. The Second Amendment protects NSSF members and others from statutes and regulations seeking to ban, restrict or limit the exercise of Second Amendment rights. As such, the determination of whether a statute improperly infringes upon the exercise of Second Amendment rights by way of a complete ban on commonly owned magazines capable of holding more than 10 rounds is of great importance to NSSF and its members. NSSF, therefore, submits this brief in support of Plaintiffs-Appellees and encourages this Court to affirm the District Court's Judgment in their favor.

INTRODUCTION AND SUMMARY OF ARGUMENT

Those who commit mass shootings are monsters who want to harm as many people, and wreak as much havoc, as they possibly can. One cannot sufficiently

condemn criminals who misuse firearms and ammunition against law enforcement in commission of their crimes. However, such societal ills do not justify state laws which significantly infringe upon and detract from the Second Amendment rights of law-abiding citizens using firearms and ammunition for lawful purposes including self-defense.

Yet, that is exactly what the State of California (“Defendant-Appellant”) seeks to do here by taking away the rights of law-abiding citizens to possess and use magazines holding more than 10 rounds of ammunition for lawful purposes.

And nowhere does Defendant-Appellant explain why this “magic number” of 10 is narrowly tailored to fit its purposes. Defendant-Appellant argues – incorrectly – that magazines holding more than 10 rounds are unusual and dangerous. But overwhelming and incontrovertible data shows otherwise: an estimated **133 million**¹ 11+ round magazines are possessed² throughout the United

¹ This number would likely be higher if not for the Public Safety and Recreational Firearms Act (resulting in a 10-year ban on 11+ round magazines between 1994 and 2004) and other statutes/regulations/ordinances similarly violating the Second Amendment.

² While California now seeks to dispossess its citizens of currently owned 11+ round magazines (allowed under the previous statute), other states enacting magazine restrictions have allowed citizens already in possession of such magazines to keep them. *See* Colo. Rev. Stat. Ann. § 18-12-302(a); Conn. Gen. Stat. Ann. § 53-202w(a)(2); Md. Code Ann., Crim. Law § 4-305(2); N.J. Stat. Ann. § 2C:39-3(j)(2); N.Y. Penal Law § 265.00(23); Vt. Stat. Ann. tit. 13, § 4021(c). Even the federal ban allowed persons already in possession of magazines holding more than 10 rounds to keep them. *See* 18 U.S.C. §922(w)(2) (amended 2004).

States. To be protected by the Second Amendment Defendant-Appellant invented a requirement that the arm be commonly used for a particular purpose, i.e. self-defense. However, no such requirement is to be found in the text of the Second Amendment, nor anywhere in *District of Columbia v. Heller*, 554 U.S. 570 at 624-25, 627 (2008) (“*Heller*”) (recognizing the arms the Second Amendment protects are those “in common use at the time” for lawful purposes but never specifying or qualifying the “lawful purpose”).

Defendant-Appellant additionally argues that 11+ round magazines are unnecessary because individuals have other options available for self-defense. But as *Heller* makes clear, availability of an alternative does not equate to constitutionality if the statute infringes upon Second Amendment rights. *Heller* teaches that the Second Amendment takes that choice from the government. 554 U.S. at 634.

Finally, Defendant-Appellant focuses on a handful of other states which have enacted laws restricting magazine capacity. While just a few states have passed such restrictions, the overwhelming majority of states have not. Moreover, Defendant-Appellant’s argument makes clear they seek to apply a contradictory standard in order to advance their argument. On the one hand it asks the Court to consider the fact several circuits analyzing other states’ laws have affirmed restrictions on magazine capacity yet on the other hand it complains that Plaintiffs-

Appellees' data on common ownership of magazines holding more than 10 rounds (estimated at 133 million) is not limited only to California. In other words, Defendant-Appellant asks the court to look at the nation as a whole if it supports their argument but then to focus solely on California where nationwide information does not. The Supreme Court in *Heller* and *McDonald* ("*McDonald*") did not create a California-specific Second Amendment analysis.

For these reasons (and others), the United States District Court of the Southern District of California correctly granted summary judgment in favor of Plaintiffs-Appellees. California's ban on magazines holding 11+ rounds directly and severely infringes upon the Second Amendment rights of *law-abiding citizens* seeking to purchase, own, possess and use magazines commonly owned by Californians and used for a myriad of *lawful purposes*, including but not limited to self-defense in the home. Accordingly, NSSF urges this Court to affirm the District Court's Judgment in Plaintiffs-Appellees' favor.

ARGUMENT

California Penal Code section 32310 ("Section 32310") impermissibly and in violation of the Second Amendment bans the import, sale, acquisition, possession, and use of magazines capable of holding more than 10 rounds³ – even

³ Section 32310 has very limited exceptions to its widespread ban on magazines holding more than 10 rounds. Strangely, the exceptions allow for persons in the movie industry to possess such magazines to possess such magazines while making