No. 21-55608

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES MILLER, ET AL.,
Plaintiffs-Appellees,
v.
ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of California, No. 19-cv-1537-BEN-JLB

MOTION OF PROSPECTIVE AMICI CURIAE STATES OF ARIZONA AND TWENTY-ONE OTHER STATES FOR LEAVE TO FILE A BRIEF IN SUPPORT OF APPELLEES' OPPOSITION TO APPELLANTS' EMEGENCY MOTION FOR STAY PENDING APPEAL

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June 15, 2021

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Prospective amici curiae are the States of Arizona, Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, West Virginia, and Wyoming. They respectfully move for leave to file the attached brief in support of Appellees' response in opposition to Appellants' Emergency Motion Under Circuit Rule 27-3 To Stay Judgment Pending Appeal.

REASONS FOR GRANTING THE MOTION

The Court should grant leave to file the proposed amici curiae brief for three reasons. First, the prospective amici have a substantial interest in this case. *See* Fed. R.. App. P. 29(a)(3)(A). As explained in the attached brief, prospective amici "are among the forty-five states that permit their citizens to build, buy, and own 'modern rifles' and have advanced their compelling interests in promoting public safety, preventing crime, and reducing criminal firearm violence without banning modern rifles in the manner that the State of California has here." Moreover, prospective amici have an interest in protecting the constitutional rights of their citizens and ensuring that the Court does not imperil the rights of citizens in this Circuit and other states with its analysis. The undersigned Attorneys General, therefore, submit this brief on behalf of prospective amici to provide their unique perspective on the constitutional issues involved and to protect the critical rights at issue.

Second, circuit courts, including this Court, routinely accept amicus briefs filed in these circumstances. *See* Doc. 43, *FTC v. Qualcomm Inc.*, 19-15159, 19-16122 (9th Cir. July 23, 2020); Doc. 77, *Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 6, 2017); *In re Abbott*, 800 F. App'x 296 (5th Cir. 2020); *see also Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J.) (explaining that circuit courts should "err of the side of granting leave" to file amicus briefs). Consistent with that practice, this Court often accepts amicus briefs from States when considering motions for stays. *See, e.g.*, Br. of Amici Curiae States of W. Va., Tex., & 16 Other States, *Northern Plains Resource Council v. U.S. Army Corp. of Eng'rs*, No. 20-35412 (9th Cir. May 15, 2020) (ECF 33); *id.* (ECF 62) (granting filing of States' amicus brief); *see also* Amicus Br. of the States of Cal., et al., *Sierra Club v. Trump*, No. 19-16102 (9th Cir. June 11, 2019) (ECF 37); *id.* (ECF 41) (granting filing of States' amicus brief).

Third, the parties, through counsel, have consented to the filing of this brief. And though the prospective amici are not ordinarily subject to Federal Rule Appellate Procedure 29(a)(4)(E), they certify that no party's counsel authored the proposed brief in whole or part, and that no party contributed money that was intended to fund preparing or submitting this brief.

CONCLUSION

The Court should grant the prospective amici States' motion for leave to file the proposed brief.

June 15, 2021

Respectfully submitted,

/s/ Michael S. Catlett

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CERTIFICATE OF COMPLIANCE

1. I certify that this motion complies with the length limitations for a motion set forth in Circuit Rule 27-d because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this motion contained fewer than 20 printed pages.

2. In addition, this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type, which complies with Fed. R. App. P. 32(a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that on this June 15, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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Appeal from the United States District Court
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BRIEF OF ARIZONA AND TWENTY-ONE OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES' OPPOSITION TO APPELLANTS' EMERGENCY MOTION UNDER RULE 27-3 TO STAY JUDMENT PENDING APPEAL

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June 15, 2021

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INTEREST OF *AMICI CURIAE*

This brief is filed on behalf of the states of Arizona, Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, West Virginia, and Wyoming (the "Amici States"). The undersigned are their respective states' chief law enforcement or chief legal officers and have authority to file briefs on behalf of the states they represent. The Amici States through their Attorneys General have a unique perspective that will aid this Court in resolving Appellants' Emergency Motion Under Circuit Rule 27-3 To Stay Judgment Pending Appeal.[1]

First, the Attorneys General have experience protecting public safety and citizen interests in states where the rifles at issue in this case are lawfully possessed and used. The Amici States the Attorneys General serve are among the forty-five states that permit their citizens to build, buy, and own "modern rifles"[2] and have advanced their compelling interests in promoting public safety, preventing crime, and reducing criminal firearm violence without banning modern rifles in the manner that the State of California has here.

[1] The Amici States submit this brief solely as *amici curiae*. The undersigned certifies that no parties' counsel authored this brief, and no person or party other than the undersigned Attorneys General or their offices made a monetary contribution to the brief's preparation or submission.

[2] The Amici States use the term "modern rifle" in the same manner as the District Court to refer principally to a rifle built on the AR-15 platform with prohibited features.

The experience in Arizona and other states shows that modern rifles are common to the point of ubiquity among law-abiding gun owners and their use promotes public safety. Calling modern rifles "assault weapons" is a misnomer—they are most often used by law-abiding citizens for lawful purposes like personal protection or target and sport shooting. There is nothing sinister about citizens keeping or bearing a modern rifle. Law-abiding citizens keeping and bearing modern rifles benefit public safety, counter-balance the threat of illegal gun violence, and help make our homes and streets safer.

The Amici States believe that in holding California Penal Code §§ 30515(a)(1) through (8), 30800, 30915, 30925, 30945, and 30950, and the penalty provisions of §§ 30600, 30605, and 30800 unconstitutional (collectively "the ban"), the District Court correctly applied the U.S. Constitution, thereby safeguarding the Second Amendment rights of millions of citizens. The Attorneys General submit this brief on behalf of the Amici States they serve to provide their unique perspective on these constitutional questions and further protect the critical rights at issue, including the rights and interests of their own citizens.

The Amici States join together on this brief not merely because they disagree with California's policy choice, but because the challenged law represents a policy choice that the Second Amendment forecloses. States may enact reasonable firearm regulations that do not categorically ban common arms core to

the Second Amendment, but the challenged law fails as it is prohibitive rather than regulatory. California should not be permitted to invade its own citizens' constitutional rights, and this Court should not imperil the rights of citizens in this Circuit and other states with its analysis. The District Court's decision declaring the ban unconstitutional is sound; Appellants cannot show a likelihood of success on the merits of this appeal.

SUMMARY OF ARGUMENT

The Amici States urge the Court to deny Appellants' Emergency Motion. Appellants cannot show a likelihood of success on the merits of this appeal because the District Court correctly concluded that California's ban on modern rifles is unconstitutional under the Second Amendment. The District Court correctly concluded that the ban is unconstitutional under "the *Heller* test," which is the correct constitutional test, but the ban is also unconstitutional under this Court's incorrect balancing approach.

In *Heller*, the U.S. Supreme Court rejected a balancing approach to determine the constitutionality on an outright ban of firearms protected under the Second Amendment. Instead, the Court held that such a ban was unconstitutional without conducting any interest-balancing. This Court, therefore, should ask only whether government has *banned arms commonly used by law abiding citizens for*

lawful purposes. If so, as in *Heller*, *McDonald*, and *Caetano*, the government has violated the Second Amendment.

The arms at issue in these proceedings are commonly used by millions of law-abiding citizens for a myriad of lawful purposes. California's law criminalizes mere possession of commonly-used arms even in the home for self-defense, and therefore the law strikes at the core of the Second Amendment. Therefore, even under a balancing-approach, the Court should apply strict scrutiny. By outright banning constitutionally protected arms, California has failed to engage in any tailoring, let alone the narrow tailoring required to pass strict scrutiny.

ARGUMENT

Appellants have not satisfied each of the requirements to obtain a stay of the District Court's judgment pending appeal.

I. Appellants Have Not Shown A Likelihood Of Success On The Merits.

A. The Correct *Heller* Test.

In holding the ban unconstitutional, the District Court first applied what it referred to as "the *Heller* test," asking "is a modern rifle commonly owned by law-abiding citizens for a lawful purpose?" Decision at 13. The District Court's articulation and application of that test was correct.

The Second Amendment protects "the right of the people to keep and bear Arms." U.S. Const. amend. II. The Second Amendment protects an individual right that "belongs to all Americans," except those subject to certain "longstanding

prohibitions" on the exercise of that right, such as "felons and the mentally ill." *District of Columbia v. Heller*, 554 U.S. 570, 581, 622, 626-27 (2008); *see McDonald v. City of Chicago*, 561 U.S. 742 (2010) (incorporating the Second Amendment against the states). In *Heller*, the Supreme Court created an easily understood and applied test for those "Arms" that enjoy the Constitution's protections: the Second Amendment protects a right to possess "Arms" that are "typically possessed by law-abiding citizens." *Id.* at 624-25.

Thus, when a law bans possession of an item, under *Heller*, the Court should first ask whether the banned item qualifies as "Arms" under the Second Amendment. If so, the Court should ask only whether the banned item is (1) commonly used, (2) by law abiding citizens, (3) for lawful purposes, including for self-defense or defense of "hearth and home." *See Heller*, 554 U.S. at 624, 635. If so, then the banned item is categorically protected under the Second Amendment and no further analysis is needed. *Id.* at 634-35.

B. This Court's Interest Balancing Approach.

Heller expressly rejected an interest-balancing approach to the Second Amendment. Justice Breyer, dissenting, thought the Court should adopt an "interest-balancing inquiry." *See* 554 U.S. at 689-90. The majority rejected that suggestion, explaining that the Second Amendment "elevates above all other

interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635.

Two years later, in *McDonald*, Justice Breyer tried again, questioning incorporation because he thought doing so would require judges to make difficult empirical judgments. 561 U.S. at 922-25. The majority rejected Justice Breyer's suggestion: "As we have noted, while [Justice Breyer's] opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion." *Id.* at 791; *see also Caetano v. Massachusetts*, 136 S. Ct. 1027, 1031 (2016) (Alito, J., concurring) ("[T]he relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes."); *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.").

Unfortunately, this Court has strayed from the *Heller* test, instead creating an indeterminate and value-laden, sliding scale balancing test. *See Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016). Under that test, the Court first makes a value judgment about whether the law or regulation at issue, even a categorical ban, places a severe burden on the Second Amendment right. *See id.* Those that do are subject to strict scrutiny, which requires that a law be narrowly tailored to a

compelling government interest. *See id.* Those that the Court determines do not place a severe burden on the Second Amendment right are subject to intermediate scrutiny, which requires a significant, substantial or important government interest and a reasonable fit between the challenged regulation and the asserted objective. *See id.* at 821-22.

C. California's Ban On Modern Rifles Fails Either Test.

Appellants tellingly characterize the state laws at issue as "barring" modern rifles. Mot. at 12. This outright ban strikes at the core of the Second Amendment**.** The District Court correctly held, and it is self-evident, that modern rifles are "Arms" under the Second Amendment. Modern rifles are also commonly used by law-abiding citizens for lawful purposes, including in defense of the home. As the District Court explained, "between at least 200,000 and perhaps 1,000,000 modern rifles are owned in California alone." Decision at 16. Nationwide in 2018, over 664,000 modern rifles were produced, comprising about 50% of all rifles produced that year. *Id.* at 15. Modern rifles are legal in 45 states and under federal law. *Id.* California does not dispute any of these facts. Thus, when California enacted a statewide ban on the mere possession of modern rifles, it destroyed the core of the Second Amendment right. And when such destruction occurs, interests should not be balanced. *See Heller*, 554 U.S. at 634-35.

Even if interests are balanced, and even if intermediate scrutiny applies, California's outright ban is unconstitutional. An outright ban on constitutionally protected activity is the antithesis of tailoring. *See Young v. Hawaii*, 992 F.3d 765, 784 (9th Cir. 2021) (en banc) ("If a regulation 'amounts to a destruction of the Second Amendment right,' it is unconstitutional under any level of scrutiny."). Appellants claim California's ban is necessary to reduce the lethality of mass shootings. While mass shootings are tragic, and government can take constitutional steps to attempt to prevent them, the District Court made a factual conclusion that mass shootings are rare—a finding Appellants do not dispute. Appellants also have not established that, when such shootings have occurred, more lives have been lost or injuries sustained because of the features that under California law make an otherwise ordinary rifle a modern rifle, which is the minimum necessary to show sufficient tailoring under the Second Amendment.

In fact, Appellants admit that "79 percent of the firearms used in mass shootings were obtained legally" and that, at most, a decade-long federal ban on assault weapons resulted in 66 less deaths nationwide (from 155 to 89). Mot. at 18, 19 n.16. Again, the Amici States acknowledge the heartache that results from mass shootings, but the Second Amendment, even if the Court erroneously uses intermediate scrutiny, requires significantly more tailoring than California has engaged in here.

Meanwhile, California does not dispute that thousands of citizens possess modern rifles for defense of their homes and families or that modern rifles have in fact repeatedly been used for that purpose, including stopping mass shootings. Decision at 34-39. Instead, California claims that modern rifles can be used for unlawful purposes and that California's citizens still have other options for self-defense. Both arguments—handguns can be used for unlawful purposes and there are other options besides handguns for self-defense—were made and rejected in *Heller*. 554 U.S. at 629. Otherwise, California relies on five decisions from other Circuit Courts purportedly upholding similar laws. The District Court correctly explained in detail why each of those cases is legally distinguishable and California does not refute any of that explanation. Decision at 71-80.

In any event, the District Court's fact-bound decision here came after a full bench trial and was based on the District Court's factual conclusions and credibility determinations about the documents and testimony presented, including expert testimony. Having utilized the correct legal standards, the District Court's decision can only be reversed if those factual conclusions and credibility determinations were clearly erroneous. *United States v. Temkin*, 797 F.3d 682, 688 (9th Cir. 2015) ("Following a bench trial, a district court's conclusions of law are reviewed de novo and findings of fact are reviewed for clear error."). Appellants make no effort to show that to be the case. Because Appellants have not shown a

likelihood of success on the merits, they are not entitled to an emergency stay of the District Court's judgment.[3]

CONCLUSION

Amici States respectfully request that the Court deny Appellants' emergency stay request.

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[3] Although this brief is focused on Appellants' failure to show a likelihood of success on the merits, Appellants also have not shown that California will suffer irreparable harm if a stay does not issue. True, States always suffer a form of irreparable injury when their laws are enjoining. But that injury is not relevant to the question whether to grant an injunction when the law at issue is unconstitutional. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). Appellants, moreover, claim that irreparable harm will result from modern rifles flowing into the state while this appeal is pending. As proof for this prediction, they primarily cite a single newspaper article about the purported impact the District Court's injunction in *Duncan v. Becerra* had on sales of ammunition magazines. Not only are the statistics relied upon within the article hearsay within hearsay, the article acknowledges that the statistics are based on "anecdotal indications" and explains that gun-control advocates "said the projections are inflated and self-serving." *See* Dkt. 2-2 pp. Appellants are not entitled to stay relief based on "anecdotal," "inflated and self-serving," hearsay within hearsay.

June 15, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and Fed. R. App. P. 29(a)(5).

1. This brief is 2,281 words excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.
2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type, which complies with Fed. R. App. P. 32(a)(5) and (6).

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