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## Press Release

### **Americans Against Gun Violence Commends *En Banc* Panel of 9<sup>th</sup> Circuit Court of Appeals for Upholding California's Large Capacity Magazine Ban**

**Sacramento, California, December 8, 2021:** In 2016, California voters approved Proposition 63, which included a ban on large capacity ammunition magazines, (abbreviated "LCM's" and defined as magazines that hold more than 10 rounds) by almost a two to one margin (63% in favor to 37% opposed).<sup>1</sup> On June 29, 2017, two days before the ban was to go into effect, in response to a lawsuit filed by the gun lobby (the case of *Duncan v. Becerra*, later retitled *Duncan v. Bonta*, after Rob Bonta succeeded Javier Becerra as California's attorney general),<sup>2</sup> a San Diego District Court Judge, Roger Benitez, issued a preliminary injunction blocking enforcement of the ban.<sup>3</sup> In an 86 page ruling that reads more like a gun lobby manifesto than the opinion of an objective jurist, Benitez subsequently made the injunction permanent.<sup>4</sup> Benitez's opinion included 78 references to the Supreme Court's rogue 2008 *Heller* decision as binding precedent.<sup>5</sup> In *Heller*, a narrow 5-4 majority of the Court reversed over two centuries of legal precedent, including four prior Supreme Court opinions,<sup>6</sup> in ruling that the Second Amendment conferred individual right to keep a handgun in the home unrelated to service in a "well regulated militia." The *Heller* decision makes no mention, though, of LCM's.

California's Attorney General appealed Benitez's decision to the Ninth Circuit Court of Appeals, and in a split decision, the panel upheld Benitez's ruling.<sup>7</sup> In the panel's majority opinion, written by Trump appointee, Kenneth Lee, and joined by George W. Bush appointee Consuelo Callahan, Judges Lee and Callahan repeated much of the misinformation in the Benitez ruling and went further to imply that because AR-15's are now "the most popular rifle in American history,"<sup>8</sup> civilian ownership of such rifles, commonly referred to as "assault rifles," should also be constitutionally protected. Judges Lee and Callahan also referred to the Glock handgun, which is manufactured by an Austrian company, and which comes with a standard 17 round magazine, as "America's gun,"<sup>9</sup> and opined that in light of the current civil unrest in our country, "...communities of color have a particularly compelling interest in exercising their Second Amendment rights" to arm themselves with such weapons.<sup>10</sup>

The California Attorney General appealed the ruling of the three judge panel to the

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full Ninth Circuit Court of Appeals, and on November 30, 2021 (a day in which the news was dominated by the mass shooting committed by a 15 year-old student using a handgun equipped with a 15 round magazine at the Oxford High School in Oakland County, Michigan<sup>11</sup>), in a 7-4 decision, an eleven judge *en banc* panel of the Ninth Circuit Court of Appeals reversed the previous rulings of judges Benitez, Lee, and Callahan and ruled instead that California's LCM ban did not violate the Second Amendment or any other part of the United States Constitution.<sup>12</sup> The four dissenting judges, Trump appointees Bumatay, and VanDyke, George W. Bush appointee Ikuta, and Carter appointee Nelson, filed vitriolic dissents in the case, with Judge VanDyke filing a particularly personal attack against the judges in the majority.

Several gun violence prevention organizations, including Americans Against Gun Violence, filed *amicus curiae* (friend of the court) briefs in the *Duncan* case in support of California's LCM ban, but Americans Against Gun Violence was the only organization to make the point in its brief that the Supreme Court's 2008 *Heller* decision, upon which the gun lobby's challenge to California's LCM ban was based, was wrongly decided, is egregiously flawed, and therefore, should be interpreted by lower courts as narrowly as possible until *Heller* is overturned by the Supreme Court itself. Americans Against Gun Violence has also filed an *amicus* brief in the current Second Amendment case before the Supreme Court - the case of the *New York State Rifle and Pistol Association v. Bruen et al (NYSRPA v. Bruen)* – in which the gun lobby is claiming that New York State's laws concerning carrying loaded handguns in public violate the Second Amendment.<sup>13</sup> Like the *Duncan* case, the *NYSRPA v. Bruen* case is based entirely on the *Heller* decision. Thirty-five other organizations have joined Americans Against Gun Violence in filing *amicus* briefs in support of New York's handgun laws in *NYSRPA v. Bruen*, but as in the *Duncan* case, our brief is the only one that makes the point that *Heller* was wrongly decided and should be overturned. The Supreme Court heard oral arguments in *NYSRPA v. Bruen* on November 3, and a decision is expected within the next few months.

Americans Against Gun Violence commends the majority of judges in the Ninth Circuit *en banc* panel for upholding the constitutionality of California's LCM ban. It must be recognized, however, that this decision is a minor victory, and probably only a temporary one, in the effort to stop our country's shameful epidemic of gun violence. It's likely that the gun lobby will appeal the *Duncan* decision to the Supreme Court, and even if the high court upholds the ruling of the Ninth Circuit *en banc* panel, banning magazines that hold more than 10 rounds will have minimal effect in reducing the rate of gun related deaths and injuries in our country.

In order to stop our shameful epidemic of gun violence, we must do much more than ban LCM's. We must adopt stringent gun control laws comparable to the laws in the other high income democratic countries of the world – countries in which mass shootings, including shootings on school campuses, occur rarely if ever, and in which the rate of gun related deaths is, on average, one tenth the rate in the United States.<sup>14</sup> Such laws include a complete ban on civilian ownership of all

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automatic and semi-automatic rifles (including so-called “assault rifles”) comparable to the bans that Great Britain,<sup>15</sup> Australia,<sup>16</sup> and New Zealand<sup>17</sup> all promptly adopted after mass shootings committed with semi-automatic long guns in Hungerford, England in 1987; in Port Arthur, Australia in 1996; and in Christchurch, New Zealand in 2019; and a complete ban on civilian ownership of handguns, comparable to the ban that Britain adopted after the 1996 Dunblane Primary School massacre, which was committed with handguns.<sup>18</sup> And in order to adopt such bans, we must first overturn the Supreme Court's rogue 2008 *Heller* decision.

Respected authorities have described the *Heller* decision as “gun rights propaganda passing as scholarship”<sup>19</sup> and as “evidence of the ability of well-staffed courts to produce snow jobs.”<sup>20</sup> In his autobiography, *The Making of a Justice*, the late Supreme Court Justice John Paul Stevens, who wrote a dissenting opinion in *Heller*, described the *Heller* majority opinion as “unquestionably the most clearly incorrect decision that the Court announced during my [35 year] tenure on the bench.”<sup>21</sup> Stevens also noted that the *Heller* majority endorsed an interpretation of the Second Amendment that the late Supreme Court Chief Justice Warren Burger had called “[O]ne of the greatest pieces of fraud – I repeat the word, ‘fraud,’ – on the American public by special interest groups that I have ever seen in my lifetime.”<sup>22</sup> But the Supreme Court's 2008 *Heller* decision is worse than even these harsh criticisms might indicate. In creating a constitutional obstacle, where none previously existed, to the adoption of stringent gun control laws in the United States comparable to the laws in the other high income democratic countries of the world, *Heller* is literally a death sentence for tens of thousands of Americans annually.

## References

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<sup>1</sup> “California Proposition 63 — Background Checks for Ammunition Purchases and Large-Capacity Ammunition Magazine Ban Initiative — Results: Approved,” *The New York Times*, August 1, 2017, sec. U.S., <https://www.nytimes.com/elections/2016/results/california-ballot-measure-63-firearm-and-ammo-control>.

<sup>2</sup> “Duncan v. Becerra, Court of Appeals, 9th Circuit 2020,” August 14, 2020, [https://scholar.google.com/scholar\\_case?case=6809998583405327539&q=Duncan+v.+becerra&hl=en&as\\_sdt=2006](https://scholar.google.com/scholar_case?case=6809998583405327539&q=Duncan+v.+becerra&hl=en&as_sdt=2006).

<sup>3</sup> Eric Johnson, “Federal Judge Blocks California Ban on ‘Large-Capacity’ Gun Magazines,” *Reuters*, June 30, 2017, sec. Healthcare Sector, <https://www.reuters.com/article/california-court-guns-idINL1N1JR02A>.

<sup>4</sup> *Duncan v. Becerra*, 366 F. Supp. 3d 1131 (Dist. Court 2019).

<sup>5</sup> *District of Columbia v. Heller*, 554 US (Supreme Court 2008).

<sup>6</sup> *United States v. Cruikshank*, 92 US 542 (Supreme Court 1876); *Presser v. Illinois*, 116 US (Supreme Court 1886); *U.S. v. Miller*, 307 U.S. 174 (1939) (n.d.); *Lewis v. United States*, No. 55 (U.S. 1980).

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<sup>7</sup> “Duncan v. Becerra, Court of Appeals, 9th Circuit 2020.”

<sup>8</sup> “Duncan v. Becerra, Court of Appeals, 9th Circuit 2020,” 25.

<sup>9</sup> “Duncan v. Becerra, Court of Appeals, 9th Circuit 2020,” 12.

<sup>10</sup> “Duncan v. Becerra, Court of Appeals, 9th Circuit 2020,” 38.

<sup>11</sup> Livia Albeck-Ripka, “What We Know About the Michigan High School Shooting,” *The New York Times*, December 1, 2021, sec. U.S., <https://www.nytimes.com/2021/12/01/us/oxford-school-shooting-michigan.html>.

<sup>12</sup> *Miller v. Bonta*, No. Case No. 19-cv-1537-BEN (JLB) (Dist. Court June 4, 2021).

<sup>13</sup> *New York State Rifle and Pistol Association, Inc, et al v. Bruen, et al*, No. 20-843 (n.d.).

<sup>14</sup> Erin Grinshteyn and David Hemenway, “Violent Death Rates: The US Compared with Other High-Income OECD Countries, 2010,” *The American Journal of Medicine* 129, no. 3 (March 1, 2016): 266–73, <https://doi.org/10.1016/j.amjmed.2015.10.025>.

<sup>15</sup> Michael J. North, “Gun Control in Great Britain after the Dunblane Shootings,” in *Reducing Gun Violence in America: Informing Policy with Evidence and Analysis* (Baltimore: The Johns Hopkins University Press, 2013), 185–93.

<sup>16</sup> Rebecca Peters, “Rational Firearm Regulation: Evidence-Based Gun Laws in Australia,” in *Reducing Gun Violence in America: Informing Policy with Evidence and Analysis* (Baltimore: The Johns Hopkins University Press, 2013), 195–204; Joel Negin et al., “Australian Firearm Regulation at 25-Successes, Ongoing Challenges, and Lessons for the World,” *New England Journal of Medicine* 384, no. 17 (2021): 1581–83.

<sup>17</sup> “2019 Firearm Law Changes (Arms Amendment Bill 2),” New Zealand Police, accessed August 27, 2020, <https://www.police.govt.nz/advice-services/firearms-and-safety/2019-firearm-law-changes-arms-amendment-bill-2>.

<sup>18</sup> North, “Gun Control in Great Britain after the Dunblane Shootings.”

<sup>19</sup> Saul Cornell, “Originalism on Trial: The Use and Abuse of History in *District of Columbia v. Heller*,” *Ohio State Law Journal* 69 (2008): 629.

<sup>20</sup> Richard Posner, “In Defense of Looseness,” *The New Republic* 239, no. 3 (August 27, 2008): 35.

<sup>21</sup> John Paul Stevens, *The Making of a Justice: Reflections on My First 94 Years* (New York: Little, Brown, 2019), 482.

<sup>22</sup> Stevens, 483; Warren Burger, PBS News Hour, December 16, 1991, c.