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, *ET AL.*,
Defendants-Appellants.

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

Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, California Constitutional Rights Foundation, Virginia Citizens Defense League, Conservative Legal Defense and Education Fund, Policy Analysis Center, The Heller Foundation, and Restoring Liberty Action Committee in Support of Plaintiffs-Appellees and Affirmance

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DISCLOSURE STATEMENT

The *amici curiae* herein, Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, California Constitutional Rights Foundation, Virginia Citizens Defense League, Conservative Legal Defense and Education Fund, Policy Analysis Center, The Heller Foundation, and Restoring Liberty Action Committee, through their undersigned counsel, submit this Disclosure Statement pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A). These *amici curiae*, other than Restoring Liberty Action Committee, are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them. Restoring Liberty Action Committee is not a publicly traded corporation, nor does it have a parent company which is a publicly traded corporation.

s/Jeremiah L. Morgan
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[1] All parties have consented to the filing of this brief *amicus curiae*. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

I. THE TWO-STEP TEST IS ONE STEP TOO MANY.

A. The Two-Step Test Eviscerates the Heller Decision and the Second Amendment's Text.

Prior to D.C. v. Heller, 554 U.S. 570 (2008), with the notable exception of the Fifth Circuit,[2] the prevailing "collective rights" view among the federal courts was that the Second Amendment "right of the People" in fact did not protect the people at all. Rather, prevailing judicial thought was that the Second Amendment only provided every state with the authority to create an organized militia — which actually is not a right, but a power. This collective-rights approach led many to conclude that "the lower courts have strayed so far from the Court's original holding to the point of being intellectually dishonest." B. Denning, "Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment," 26 CUMB. L. REV. 961, 963 (1996).

Heller set the record straight, ruling that the Second Amendment protects an individual right that "belongs to all Americans." *Id.* at 581. Yet many lower court judges have appeared unhappy with Justice Scalia's opinion for the Court,

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[2] United States v. Emerson, 270 F.3d 203 (5th Cir. 2001).

preferring Justice Breyer's dissenting views. Such judges certainly would not share the lower court's view that it is "**[f]ortunate[]** [that] the Second Amendment protects a person's right to keep and bear firearms." Duncan v. Becerra, 366 F. Supp. 3d 1131, 1135 (S.D. Cal. 2019) (emphasis added).

To give cover to the *de facto* adoption of the Breyer dissent, the "two-step test" was created by judges out of whole cloth, in a concerted effort to circumvent Heller and to return Second Amendment jurisprudence to a near pre-Heller status. Almost all the circuits have appeared eager to adopt it, because it empowered judges to approve statutes infringing firearms rights. Thus, California urges this court to use this "two-step test" to analyze this Second Amendment case. Appellants' Opening Brief ("Opening Br.") at 22-52.

The court below euphemistically termed the two-step test a "tripartite binary test with a sliding scale and a reasonable fit." Duncan at 1154-55. It explained that this contrived test may be preferred by judges, but it is "an overly complex analysis that people of ordinary intelligence cannot be expected to understand." *Id.* at 1155. Finally, the district court concluded simply "[i]t is the wrong standard." *Id.*

Indeed, the gun-owning public increasingly understands that the two-step inquiry is a legal charade, carefully crafted solely for the purpose of circumventing the Second Amendment's text and the Supreme Court's Heller and McDonald[3] decisions.[4] Use of intermediate scrutiny, one of what Justice Scalia called "judge-empowering 'interest balancing test[s],'" was expressly prohibited in Heller. *Id.* at 634. Intermediate scrutiny is also expressly prohibited by the text of the Second Amendment, which declares unequivocally that the rights it protects "shall not be infringed" — *not* shall be infringed if a judge believes that

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[3] McDonald v. Chicago, 561 U.S. 742 (2010).

[4] The district court below relied foremost on what it called the "simple *Heller* test," but also analyzed California's ban under both strict and intermediate scrutiny, finding that the ban also failed both interest-balancing tests. Duncan at 1142, *et seq.* Plaintiffs too argued primarily for a sort of categorical test — stating numerous times that "the state cannot outright prohibit what the Constitution protects." Answering Brief for Appellees ("Answering Br.") at 1, 13-15, 21, 23, 30. Indeed, these *amici* take the position that, according to the text, the state cannot infringe **even the slightest bit** what the Constitution protects. Secondarily, Plaintiffs argue that California's magazine ban fails "heightened scrutiny" even "if the Court were to apply a level of scrutiny." *Id.* at 23.

Strikingly, however, California makes **only** an intermediate scrutiny argument. Appellants' Opening Brief at 31, *et seq.* By its silence, California concedes that its magazine ban should be struck down if this Court analyzes the case based either on strict scrutiny or on the actual text of the Second Amendment using the "simple *Heller* test."

the government shows a compelling reason to violate constitutional rights using a narrowly tailored approach.[5]

As the district court noted, "Constitutional rights stand through time holding fast through the ebb and flow of current controversy." Duncan at 1141. The court explained that "the rights protected by the Second Amendment are not to be trimmed away as unnecessary because today's litigation happens during the best of times." Duncan at 1157. The court makes an excellent point, and paradoxically, it is often the case that the more important the government believes it is to infringe Americans' rights, the more important it is to protect those rights. In other words, "if the government says you don't need a gun, then you *need* a gun."

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[5] Some have resorted to the position that there are "two types of challenged gun statutes … those … that 'prohibit' and those that 'limit.'" L. Colvin, "History, Heller, and High-Capacity Magazines: What is the Proper Standard of Review for Second Amendment Challenges?" 41 FORDHAM URB. L.J. 1041 (2014). According to this view, laws that merely limit — *i.e.*, infringe — Second Amendment rights get some form of heightened scrutiny, while laws that "prohibit" entire classes of arms or activities are categorically unconstitutional. *See* Answering Br. at 21, 23 ("a ban does not just abridge a right; it obliterates it" and "a categorical ban on either is categorically unconstitutional."). Although a categorical ban is certainly unconstitutional, laws that "merely" infringe Second Amendment rights are just as noxious as those that amount to a "complete destruction" of Second Amendment rights. Both are categorically unconstitutional.

Unlike the two-step test, the Second Amendment does not speak in terms of "core" and non-core rights — rather, it categorically protects certain persons engaged in certain activities, with respect to certain weapons. Nor does the Second Amendment turn on the "severity" of the infringement, but instead draws clear, bright lines that are not to be crossed — even slightly. Finally, the Second Amendment does not speak of balancing tests, weighing government interests and needs against constitutional rights. *See* Duncan at 1154-56.

Yet under the two-step test, virtually no thought is given to the meaning of the constitutional text. So long as the infringements at issue seem subjectively reasonable to judges, they will be approved. Justice Scalia explained that the Second Amendment "is the very product of an interest-balancing by the people," and judges are not permitted to conduct that task "anew." Heller at 635.

B. The "Simple *Heller* Test" Applied.

The district court correctly recognized that it is not up to judges to weigh and balance the desirability of protecting constitutional rights, noting that "the Second Amendment takes the legislative experiment off the table." Duncan at 1136. Citing then-Judge Kavanaugh's dissenting opinion in Heller II[6] (perhaps

[6] Heller v. District of Columbia, 670 F.3d 1244 (D.C. Cir. 2011).

the first judicial opinion which faithfully applied the teachings of Heller), the district court explained 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.'" Duncan at 1142. The district court called this the "simple *Heller* test," written in "crystal clear language … that anyone can understand." *Id.*

Actually, in cases such as this one, it is not even necessary to reach the "history and tradition" part of the "simple *Heller* test." Rather, review of the constitutional text itself is sufficient. Since there has been no dispute that Plaintiffs are law-abiding citizens, and that they seek to engage in protected activity (keeping arms), the only question here is whether so-called "large capacity magazines" are "arms" under the Second Amendment. If they are, that is the end of the inquiry. There is no justification — regardless of how lofty-sounding or how allegedly legitimate, compelling, or even overwhelming the interest of the state may be.

Thus, the district court below considered whether (i) "the firearm hardware [is] commonly owned," (ii) it is "commonly owned by law-abiding citizens," and (iii) it is "owned by those citizens for lawful purposes." Duncan

at 1142. Since California did not contest "that magazines qualify as 'arms' for purposes of the Second Amendment," the district court readily concluded that "California's [statute] directly infringes Second Amendment rights…. [T]he test is over. The hardware is protected." *Id.* at 1142-43, 1172.

C. This Court Should Decline California's Presumptuous Invitation to "Not Adopt" the Second Amendment.

In a strikingly candid statement (something of a Freudian slip), California has claimed that "this Court has not adopted the 'simple *Heller* test,'" as if this Court were authorized to make such a choice. Opening Br. at 16. (California might as well have said that the Ninth Circuit has not adopted the Second Amendment.) Rather, the state noted, this Court "instead applies constitutional scrutiny…." *Id.* In other words, California, believing that this Court has ignored the Supreme Court's decisions in the past, asks the Court to do it again here.

This Court should decline the California Attorney General's invitation to disregard the guidance provided by Heller and the Second Amendment's text. The district court opinion below provides a textbook example of a proper Second Amendment analysis based on the constitutional text. This Court need only affirm.

II. STATES SHOULD NOT WIN SECOND AMENDMENT CASES SIMPLY BECAUSE THEY OFFER THE MOST EXHIBITS.

As discussed above, the two-step test empowers federal judges to determine the scope of constitutional rights. Where that test is used, Plaintiffs challenging gun laws normally are at a disadvantage before they even begin to litigate. If they feel obliged to join in the two-step analysis, challengers are forced onto the intermediate versus strict scrutiny path, required to offer "evidence" as to why they would need to exercise their rights in the first place (here, by owning what are actually standard capacity magazines). *See* Answering Br. at 26-27. They often are required to show a real threat of being victimized if not allowed exercise their rights.[7] *Id.* Here, they must prove that standard capacity magazines are used by good guys and counter the state's evidence that such magazines are used by the bad guys. *Id.* at 27, 31; *see also* Worman at 39. And they are compelled to counter the state's public policy

[7] *See, e.g.*, Worman v. Healey, 922 F.3d 26, 37 (1st Cir. 2019) ("In fact, when asked directly, not one of the plaintiffs or their six experts could identify even a single example of the use of an assault weapon for home self-defense, nor could they identify even a single example of a self-defense episode in which ten or more shots were fired."). By contrast, the district court had no trouble citing examples of crime victims who needed many more rounds to resist attack. *See* Duncan at 1135-36.

arguments that the government has good reasons to tinker with Second Amendment rights.[8] Answering Br. at 25-26; *see also* Worman at 40.

In other words, cases involving the two-step test quickly devolve into a contest to see which side can marshal the most exhibits and declarations supporting the reasonableness of their respective positions. Of course, the Second Amendment does not turn on how much evidence the parties can muster. In determining the scope of the Second Amendment's protections, it is irrelevant whether some criminals may use firearms for criminal activity, just as it is irrelevant for determining the scope of the Fourth Amendment whether some drug dealers may escape police detection without warrantless searches. Nor does the Second Amendment turn on how important the government thinks its reasons to infringe the rights of citizens, just as the Fifth Amendment does not care how important the government believes it is to "relocate" innocent American citizens into concentration camps during wartime.

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[8] The district court explained that "[n]eeding a solution to a current law enforcement difficulty cannot be justification for ignoring the Bill of Rights as bad policy…. [T]he government response to a few mad men with guns and ammunition [cannot] be a law that turns millions of responsible, law-abiding people trying to protect themselves into criminals. Yet, this is the effect of California's large-capacity magazine law." Duncan at 1141.

As the district court correctly explained, "[n]one of these policy arguments on either side affects what the Second Amendment says…." Duncan at 1136. While "[f]rom a public policy perspective, the choices are difficult and complicated," under the Second Amendment, the determinations are easy, and it is not permissible to "limit self-defense to only those methods acceptable to the government…." *Id.* at 1136 n.14.

III. ARMS THAT ARE "MOST USEFUL IN MILITARY SERVICE" ARE EXACTLY THOSE PROTECTED BY THE SECOND AMENDMENT.

Unfortunately, many courts (and many litigants) have grossly misread the Heller decision to stand for the proposition that military-grade arms are not protected by the Second Amendment. The state of California, for example, argues that "the Second Amendment does not extend to 'weapons that are most useful in military service'…." Opening Br. at 24. California argues that large capacity magazines "'are particularly designed and most suitable for military and law enforcement applications,'" are "'indicative of military firearms,'" and allegedly "are not 'weapons of the type characteristically used to protect the

home,'"[9] and hence they *per se* fall outside the scope of the Second Amendment. *Id.* at 24-25.

California's argument that weapons useful to the military be banned appears to be the position adopted by some federal courts.[10] Ironically, then, the

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[9] Of course, this is nonsense. Magazines with a capacity over 10 rounds are not uniquely designed for the battlefield. Nor are they somehow strange or ill-suited for home defense. If someone disagrees with this assessment, sit them in a chair in front of two identical handguns, and tell them that, in 60 seconds, three men are going to break into their house. Now, would they prefer the handgun with the 17-round magazine, or the one with the 10-round magazine? After all, as the state repeatedly points out, the *average* self-defense shooting takes only 2.2 rounds. *See* Opening Br. at 26, 34. The question answers itself. No one but a fool would choose the 10-round magazine. Similarly, would anyone seriously allege that, if they had been available, the revolutionary colonists would have decided to carry neutered 10-round magazines to the Lexington and Concord greens, while high capacity magazines were being used only by Great Britain's redcoats? In another context, no sane person is going to conclude that only a half million dollars of life insurance will be adequate to support their spouse and two small children, when a million dollar policy carries the same cost. Or that a four-pound fire extinguisher will be perfectly fine during a house fire, a ten or twenty-pound unit being completely unnecessary, and suitable only by *professional* firefighters. In other words, there is nothing like real-world scenarios to elicit an honest answer.

[10] *See, e.g.*, Hollis v. Lynch, 827 F.3d 436, 445 (5th Cir. 2016) ("The Second Amendment does not create a right to possess a weapon solely because the weapon may be used in or is useful for militia or military service."); Kodak v. Holder, 342 Fed. Appx. 907, 908 (4th Cir. 2009) (finding that so-called "armor-piercing" ammunition is not protected by the Second Amendment because it is useful in military service); Kolbe v. Hogan, 849 F.3d 114, 131 (4th Cir. 2017) ("the Heller Court specified that 'weapons that are most useful in military service — M-16 rifles and the like — may be banned' without

same courts that previously concluded the Second Amendment protects only a collective right of states to maintain organized military units now conclude that the Second Amendment does not protect weapons that are used by nearly every organized military unit.

In fact, the exact opposite is true. As Plaintiffs note, "[t]hat limitation finds no support in *Heller* — likely because it is antithetical to the Second Amendment itself…. [T]here is no 'useful in military service' exception to the Second Amendment." Answering Br. at 18, 20. Indeed, it would have *made no sense* that this nation's founders — who had just fought a war against the strongest military power on earth — would have memorialized an amendment protecting only their privilege to go deer hunting. Rather, they sought a robust guarantee "to provide new Guards for their future Security," and to secure the ability of citizens, if necessary in the future, to again "throw off such Government." *See* Duncan at 1150 (noting of founding-era statutes that "[r]ather than restricting firing capacity, they required firing capacity."). The court below

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infringement upon the Second Amendment right"); United States v. One (1) Palmetto State Armory PA-15 Machinegun Receiver/Frame, 822 F.3d 136, 141-42 (3d Cir. 2016); New York State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 256 (2d Cir. 2015). *Cf.* Worman at 36 (refusing to decide whether "weapons that are most useful in military service" are "thus outside the ambit of the Second Amendment.").

noted "[t]hat large capacity magazines are useful in military service, there is no doubt. But the fact that they may be useful, or even 'most useful,' for military purposes does not nullify their usefulness for law-abiding responsible citizens…. *Kolbe's* decision that large capacity magazines are outside the ambit of the Second Amendment is an outlier and unpersuasive." *Id.* at 1174.

The Second Amendment protects *first and foremost* the right to self-defense — not just against petty criminals, but against governments, both foreign and domestic.[11] In order to combat foreign aggression or domestic tyranny, military-grade arms are, as the framers understood, "necessary to the security of a free State."

A. Miller Established a Baseline.

In United States v. Miller, 307 U.S. 174 (1939), the Supreme Court decided that — based on the limited record before the Court — it was impossible to conclude that a short-barrel shotgun "has some reasonable relationship to the preservation or efficiency of a well regulated militia…. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense." Miller at 178. Thus, the

[11] *See, e.g.*, R. J. Rummel, Death by Government (Transaction Publishers, Dec. 31, 2011).

obvious corollary of the Court's rule is that those weapons that *are* "part of the ordinary military equipment" and *can* "contribute to the common defense" *are* protected by the Second Amendment. *See also* Heller at 621-22.

Of course, that proposition may make little sense to those who think the Second Amendment exists only to protect hunting and target shooting, and *perhaps* self-defense against lightly armed criminals. To dispel that notion, the Miller Court cited an 1840 case which explains *why* military-grade weapons are critical in the hands of civilians: "to protect the public liberty, to keep in awe those who are in power, and to maintain the supremacy of the laws and the constitution." Aymette v. State, 21 Tenn. 154, 158, 1840 Tenn. LEXIS 54, **8, 2 Hum. 154. Break-barrel shotguns and bolt action hunting rifles do not "keep in awe those who are in power." Thus, according to the Tennessee court, weapons that were useful in military combat and weapons that would provide for the "common defense" were one and the same. *Id.* at 159 ("[t]he legislature, therefore, have a right to prohibit the wearing, or keeping weapons dangerous to the peace and safety of the citizens, and which are *not* usual in civilized warfare, or would not contribute to the common defence.").

The court below correctly understood the Miller holding, noting that "this Court is unpersuaded by *Kolbe's* interpretation of the Miller finding that weapons most useful for military service are not protected. The dissenting *Kolbe* judges persuasively pointed out that the approach turns Supreme Court precedent upside down."[12] Duncan at 1174.

B. Heller Added to the Miller Baseline.

Miller made clear that the Second Amendment, first and foremost, protects military-grade weapons because they are most useful in fulfilling the preamble of the Second Amendment — to preserve a "free state." The Heller Court made clear, first and foremost, the Second Amendment exists to protect the right to self-defense — not only from private violence, but also from public violence perpetrated by governments. Thus, the Court noted three public purposes of the right — "First … in repelling invasions and suppressing insurrections. Second, it renders large standing armies unnecessary…. Third, when the able-bodied men of a nation are trained in arms and organized, they are better able to resist

[12] Some of these *amici* filed briefs exposing the illogic of Maryland's arguments opposing such weapons. *See* Kolbe v. O'Malley, Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.* (4th Cir.) (Nov. 12, 2014); and Kolbe v. Hogan, Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.* (U.S. Supreme Court) (Aug. 25, 2017).

tyranny." *Id.* at 597-98. *See also* Duncan at 1140-41. The Heller Court then explained its understanding of Miller:

> Read in isolation, *Miller*'s phrase "part of ordinary military equipment" could mean that **only those weapons useful in warfare** are protected. That would be a startling reading of the opinion, since it would mean that the National Firearms Act's restrictions on machineguns (not challenged in *Miller*) might be unconstitutional, machineguns being useful in warfare in 1939. We think that *Miller*'s "ordinary military equipment" language must be read in tandem with what comes after: "[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." … The traditional militia was formed from a pool of men bringing arms "in common use at the time" for lawful purposes like self-defense. "**In the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same**." … Indeed, that is precisely the way in which the Second Amendment's operative clause furthers the purpose announced in its preface. [Heller at 624-25 (emphasis added).[13]]

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[13] Heller continues that "It may be objected that if weapons that are most useful in military service — M-16 rifles and the like — may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right." *Id.* at 627-28.

To be sure, these Heller passages could have been made more clear, but the Second Amendment's preface makes clear that its ultimate purpose is to preserve a "free State." Unsurprisingly, the only way to read Miller and Heller in harmony is to conclude that both military weapons **and** nonmilitary weapons are protected by the Second Amendment.

Heller in no way questioned Miller's conclusion that military-grade arms are protected by the Second Amendment. Indeed, Heller noted that, during the founding era, the rifle of the battlefield was the same rifle used for hunting and for self-defense from petty criminals. *Id.* at 625. At that time, there was no need to distinguish — the weapons were one and the same. Today, however, modern technology and societal developments means that people own all sorts of weapons for all sorts of different purposes. Thus, whereas Miller made clear that military-grade weapons *are* protected, Heller added on to that holding that all sorts of other weapons *are also* protected arms, such as the handguns at issue in that case.

The court below recognized this, noting that "[t]oday, self-protection is most important. In the future, the common defense may once again be most important." Duncan at 1141. Likewise, Heller concluded that "the fact that

modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right." Heller at 627-28. That is why Heller explained that, no matter what the current needs of "the People," the protections of the Amendment remain fixed, and thus "the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.* at 582. According to the Supreme Court, it would be just as startling to conclude that only military-grade weapons are protected as it would be to conclude that they are not protected. The Second Amendment protects them all.

CONCLUSION

The district court's opinion should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.*, in Support of Plaintiffs-Appellees and Affirmance, was made, this 23rd day of September 2019, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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