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PERSPECTIVE

Ruling in gun case puts every Californian at risk

By Scott A. Edelman, Vivek Gopalan and Zach Tan

Last month, the California legal community observed a tragic anniversary, marking 27 years since the mass shooting at the law offices of Pettit & Martin at 101 California Street in San Francisco. This month, a 9th U.S. Circuit Court of Appeals panel marked a very different type of milestone when, in a first for a federal appeals court, it struck down California's law prohibiting the sale and possession of large-capacity ammunition magazines (LCMs). With its divided decision in *Duncan v. Becerra*, 2020 DJDAR 8764 (Aug. 14, 2020), the 9th Circuit became the first appeals court in the country to hold that the Second Amendment bars regulation of the magazines used at the law firm shooting 27 years ago and in every single one of the last decade's deadliest gun massacres.

The court's outlier ruling departs from six other federal circuits and hobbles our state's efforts to prevent tragedies like the 101 California mass shooting. On that July afternoon 27 years ago, a man in a business suit armed with semiautomatic pistols, LCMs, and "hellfire triggers" took the elevator up to the 34th floor of an office highrise, where he killed eight people and injured six others. The shooting survivors include an attorney whose 28-year-old husband, Pettit & Martin lawyer John Scully, was fatally wounded while shielding her body. She recalls a spray of bullets coming so fast there was no space between each one. After being struck by a half-dozen bullets he took for his wife, John's last words were "I'm dying. I love you."

These legal errors will not be confined without consequence to the pages of the Duncan decision. They put all Californians at risk. Large-capacity magazines have repeatedly been shown to increase the lethality of public mass shootings by letting perpetrators fire more bullets without pause.

Over and over, we've seen far too many lives lost the way John lost his. But the *Duncan* panel brushed aside California's interest in preventing these deaths and the collective trauma that follows every gun massacre. Using California's success at reducing gun violence against it, the court pointed out that there have "only" been three mass shootings in the state's recent history that "definitively involved LCMs." However, no law should be condemned for its own effectiveness in preventing lethal violence before it occurs. That's especially true given how often our government takes action to protect people from particularly horrific dangers even if they occur only rarely, like terrorism, plane crashes, and now, pandemic illnesses.

But even setting aside this particular logical misstep, the *Duncan* panel majority made three other major errors that undermine its conclusion that LCM restrictions violate the Second Amendment.

First, the panel held that prohibiting LCMs restricts an "entire class of arms" that are commonly sold for use in self-defense, so must be subject to strict scrutiny review. Strict scrutiny treats regulations as presumptively unconstitutional. But in *District of Columbia v. Heller* and *McDonald v. City of Chicago*, the Supreme Court promised that the Second Amendment does not protect all types of arms, and deemed a non-inclusive list of gun safety laws to be presumptively lawful, including laws banning military-grade weaponry. Surely, gun purveyors shouldn't be able to attain strict scrutiny protections for high-capacity weapons and accessories simply by selling enough of them to saturate the gun market. That reasoning would override the Supreme Court's stated promises, and apply to 100-round magazines as easily as 15. But that is exactly what the *Duncan* panel found, handing the gun industry the power to determine the presumptive constitutionality of firearm and magazine restrictions.

Next, the court erred by failing to give any meaningful credit to the state's position that LCMs haven't proven useful or effective for self-defense by law-abiding citizens, but are inordinately lethal in the hands of mass shooters. Alarmingly, the court was able to evade full consideration of the state's evidence by inexplicably deeming gun violence prevention to be a simple, non-technical issue that the Legislature is no better equipped than the court to evaluate. By downplaying the complexities involved in firearms regulation, and overestimating its own competence to

resolve these issues, the panel was able to override binding 9th Circuit precedent that afforded deference to legislative decisions requiring nuanced policy expertise. This unjustified departure alone is enough to warrant en banc reconsideration.

Third, the court distinguished nearly every one of the 9th Circuit's past Second Amendment rulings into nonexistence. Gun rights absolutists claim that courts treat the Second Amendment as a second-class right, rhetoric that the *Duncan* majority adopted in dramatically expanding the Second Amendment's reach. In doing so, the *Duncan* majority treated binding precedent as second-class, skimming over the 2015 decision in *Fyock v. City of Sunnyvale* upholding an LCM ban enacted by the city of Sunnyvale. Disturbingly, the *Duncan* panel viewed Sunnyvale's ban as more constitutionally acceptable since Sunnyvale "is a small and affluent community" with a crime rate "less than half of the statewide violent crime rate." There is no basis in Second Amendment law for permitting wealthy communities to regulate gun use while forcing those disproportionately impacted by gun violence to engage in an arms-race through proliferation of deadlier and deadlier weapons. This fallacy will only harm Californians who are already at greater risk of experiencing gun violence and its traumatic after-effects.

These legal errors will not be confined without consequence to the pages of the *Duncan* decision. They put all Californians at risk. Large-capacity magazines have repeatedly been shown to increase the lethality of public mass shootings by letting perpetrators fire more bullets without pause. But LCM firepower fuels other violence as well: national estimates suggest 40% of guns used in serious violent crimes are equipped with LCMs. If the *Duncan* panel ruling stands, California will be seriously hindered in its efforts to protect its residents from gun violence, whether they are in wealthier communities or less privileged ones. The full 9th Circuit should revisit this case to avoid this dangerous and inequitable outcome. ■

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