No. 19-3142

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ASSOCIATION OF NEW JERSEY RIFLE & PISTOL CLUBS, INC., ET AL.,
Plaintiffs-Appellants,

v.

ATTORNEY GENERAL NEW JERSEY, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the District of New Jersey, No. 3:18-cv-10507

BRIEF OF EIGHTEEN STATES AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING EN BANC

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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, Mississippi, Missouri, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and West Virginia. 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 the Court in its consideration of rehearing this case en banc.[1]

The Attorneys General have experience protecting public safety and citizen interests in states where the affected magazines are lawfully possessed and used. The *Amici* States the Attorneys General serve are among the forty-three states that permit the standard, eleven plus capacity magazines that New Jersey has banned (the "Affected Magazines") and have advanced their compelling interests in promoting public safety, preventing crime, and reducing criminal firearm violence without a magazine ban such as the one here.

The experience in other states shows that these magazines are common to the point of ubiquity among law-abiding gun owners and their use promotes public safety. Calling the Affected Magazines "large-capacity" is a misnomer—they

[1] The 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.

often hold only in the range of eleven to fifteen rounds (in no way a large absolute number) and come standard with many of the most popular firearms. There is nothing sinister about citizens bearing these magazines. Law-abiding citizens bearing these magazines with lawful firearms benefits public safety, counter-balances the threat of illegal gun violence, and helps make our streets safer.

The *Amici* States believe that in upholding Assembly Bill No. 2761 (codified at N.J. Stat. Ann. § 2C:39-1(y), 2C:39-3(j)) ("the Act") the Court utilized an erroneous construction of the U.S. Constitution, thereby allowing the Second Amendment rights of millions of citizens to be compromised. The Attorneys General submit this brief on behalf of the *Amici* States they serve to provide their unique perspective on these constitutional questions and 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 New Jersey's policy choice, but because the challenged law represents a policy choice that is foreclosed by the Second Amendment. 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. New Jersey should not be allowed to invade its own citizens' constitutional rights, and this Court should not imperil the rights of citizens in other states with its analysis.

SUMMARY OF ARGUMENT

The *Amici* States urge the Court to grant rehearing en banc to reverse the trial court's decision that the New Jersey law banning magazines that carry more than ten rounds of ammunition is constitutional. This proceeding satisfies both independent conditions for rehearing en banc. *See* F.R.A.P. 35.

Rehearing en banc is appropriate because "the panel decision conflicts with a decision of the United States Supreme Court." *See id.* R. 35(b)(1)(A). The Court, including both panels in these proceedings, applies a "severity of burden and interest balancing test" in Second Amendment cases, including cases where, as here, government has imposed a categorical ban on arms. That test should not apply to a ban on arms and is inconsistent with the decisions of the Supreme Court in *Heller*, *McDonald*, and *Caetano*. The test has understandably been the subject of immense criticism from at least four of the Justices, seven judges of this Circuit, and trial and appellate judges in other circuits. Instead of the Court's current test, it should ask only whether government has banned arms that are commonly used by law abiding citizens for lawful purposes. If so, as in *Heller*, *McDonald*, and *Caetano*, the government has violated the Second Amendment.

Rehearing en banc is independently appropriate because "the proceeding involves one or more questions of exceptional importance" and "it involves an issue on which the panel decision conflicts with the authoritative decisions of other

United States Courts of Appeals that have addressed the issue." F.R.A.P. 35(b)(1)(B). The enumerated right to bear arms reflected in the Second Amendment is fundamental and predates the Bill of Rights. The right is important to millions of Americans, including many of our most vulnerable citizens. The arms at issue in these proceedings are commonly used by millions of law-abiding citizens for a myriad of lawful purposes. New Jersey's law criminalizes possession of commonly-used arms even in the home for self-defense, and therefore the law strikes at the core of the Second Amendment. And the panel majority's decision conflicts with a published decision of the Ninth Circuit Court of Appeals striking down California's ban on large-capacity magazines, which ban is materially identical to New Jersey's ban. *See Duncan v. Becerra*, 970 F.3d 1133 (9th Cir. 2020).

ARGUMENT

I. THE COURT SHOULD GRANT REHEARING TO RE-ALIGN ITS SECOND AMENDMENT JURISPRUDENCE WITH *HELLER* AND ITS PROGENY.

The Second Amendment plainly states that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The Supreme Court made clear over a decade ago that 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). The Second Amendment right, therefore, belongs to all "law-abiding, responsible citizens." *Heller*, 554 U.S. at 635. The Supreme Court created a simple 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 625. With this formulation, the Supreme Court provided an easily understood test. *See Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1142 (S.D. Cal. 2019).

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 625, 635. If so, then the banned item is categorically protected under the Second Amendment and no further analysis is needed. *Id.* at 634-35. By adopting this test, the Court would honor the text, history, and tradition, of the Second Amendment, as instructed in *Heller*. *See id.* at 628-29.

In the aftermath of *Heller*, this Court strayed from the simple test set forth therein (it was not the only Court to do so). Instead of asking whether the item banned is commonly used by law-abiding citizens for lawful purposes, the Court

created an indeterminate and value-laden balancing test. *See United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010). Under that test, the Court first makes a value judgment about whether the laws or regulations at issue, even categorical bans, "severely limit the possession of firearms." *See id.* Even those that do still may survive under strict scrutiny. *See id.* Those that do not are subject to intermediate scrutiny, which requires a "'significant,' 'substantial,' or 'important'" government interest and a "reasonable fit" that does not burden more conduct than is "reasonably necessary[.]" *See id.* at 97-98.

This test is inconsistent with *Heller* and its progeny. Justice Breyer, in dissent in *Heller*, argued that the Court should adopt an "interest-balancing inquiry" that "asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." 554 U.S. at 689-90. Justice Scalia, for the majority, rejected such an inquiry, explaining that the Second Amendment "takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* at 634. 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.

Just two years later, in *McDonald*, Justice Breyer, again in dissent, questioned the propriety of incorporating the Second Amendment against the states when doing so would require judges to make difficult empirical judgments. 561 U.S. at 922-25. Justice Alito's controlling opinion for the Court rejected Justice Breyer's suggestion that a balancing test would apply: "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. Similarly, in *Caetano v. Massachusetts*, the Court, without employing a balancing test, rejected a decision from the Supreme Judicial Court of Massachusetts upholding a ban on the possession of stun guns.[2] 136 S. Ct. 1027, 1027-28 (2016); *see id.* at 1031 (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.").

Not only is a balancing approach for bans on "Arms" inconsistent with the text and structure of the Second Amendment and with *Heller* and *McDonald*, but it has rightly been the subject of immense criticism. *See Jackson v. City and Cty. of San Francisco*, 135 S. Ct. 2799, 2802 (2015) (Thomas, J., dissenting from denial of certiorari) ("[C]ourts may not engage in this sort of judicial assessment as to the

[2] On remand, the Supreme Judicial Court overturned the ban, reasoning that "we now conclude that stun guns are 'arms' within the protection of the Second Amendment. Therefore, under the Second Amendment, the possession of stun guns may be regulated, but not absolutely banned." *Ramirez v. Commonwealth*, 94 N.E.3d 809, 815 (Mass. 2018).

severity of a burden imposed on core Second Amendment rights."); *Heller v. District of Columbia*, 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."); *Ass'n of N.J. Rifle & Pistol Clubs Inc. v. Att'y Gen. of N.J.*, No. 19-3142, 2020 WL 5200683 at *19 (3d Cir. Sept. 1, 2020) (Matey, J., dissenting) (expressing "serious doubts" that the Court's test "can be squared with *Heller*"); *Ass'n of N.J. Rifle & Pistol Clubs Inc. v. Att'y Gen. of N.J.*, 910 F.3d 106, 128-29 (3d. Cir. 2018) (Bibas, J., dissenting) (criticizing the majority's "balancing approach" because "the *Heller* majority rejected it"); *Binderup v. Att'y Gen. of the U.S.*, 836 F.3d 336, 378 (3d Cir. 2016) (en banc) (Hardiman, Fisher, Chagares, Jordan, and Nygaard, JJ., concurring in part) ("Applying some form of means-end scrutiny in an as-applied challenge against an absolute ban … eviscerates that right [to keep and bear arms] via judicial interest balancing in direct contravention of *Heller*."); *Duncan*, 970 F.3d at 1157 (rejecting the state's invitation to "engage in a policy decision that weighs the pros and cons of an LCM ban to determine 'substantial burden'"); *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1117 (S.D. Cal. 2017) ("These complicated legal tests, which usually result in Second Amendment restrictions passing an

intermediate scrutiny test (a test that is little different from a rational basis test), appear to be at odds with the simple test used by the Supreme Court in *Heller*.").

The lack of clarity inherent in the Court's balancing approach is immensely problematic. All Americans, including citizens of the *Amici* States and this Circuit, deserve a standard they can understand and that they can use to readily determine the line that government cannot cross when banning "Arms." And they deserve a standard that does not expose the Second Amendment to subjective judicial value judgments, but instead turns on the text, structure, and history of the Second Amendment. *See McDonald*, 561 U.S. at 804 (Scalia, J., concurring) (a historically-based test "is less subjective because it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor"). The simple test the Supreme Court set forth in *Heller* for legislative bans on "Arms" fulfills each of these needs. *See Duncan*, 265 F. Supp. 3d at 1117 (describing the balancing approach as "an overly complex analysis that people of ordinary intelligence cannot be expected to understand" and the *Heller* test as "a test that anyone can figure out").

Providing objective clarity is extremely important here. After all, we are talking about an enumerated, fundamental constitutional right. While some may write the Second Amendment off as a relic of a bygone era, in reality, the ability to

defend one's self is extremely important to millions of Americans. As the Ninth Circuit recently explained, "[o]ur country's history has shown that communities of color have a particularly compelling interest in exercising their Second Amendment rights." *Duncan*, 970 F.3d at 1155. "For many women, a firearm may be the equalizer against their abusers and assailants when the state fails to protect them." *Id.* "So, too, for members of the lesbian, gay, bisexual, and transgender (LGBT) communities." *Id.* The Second Amendment is important to "people living in sparsely populated rural counties, seemingly deserted desert towns, and majestic mountain villages," and is especially important to those "trapped in high-crime areas where the law enforcement is overtaxed[.]" *Id.* at 1161. Given the broad importance of the Second Amendment to so many people, this case is well-deserving of rehearing *en banc*. And the Court should use this opportunity to re-align its Second Amendment jurisprudence with the test for bans on "Arms" set forth in *Heller*.

II. THE ACT IS UNCONSTITUTIONAL BECAUSE IT IS A CATEGORICAL BAN ON "ARMS" COMMONLY USED BY LAW-ABIDING CITIZENS FOR LAWFUL PURPOSES.

New Jersey's ban on Affected Magazines strikes at the core of the Second Amendment. The prior injunction panel in this case correctly held that the Affected Magazines are "Arms" under the Second Amendment. 910 F.3d at 116. The panel majority in this appeal did not reconsider that holding. Thus, because

the Affected Magazines are "Arms" commonly used by law-abiding citizens for lawful purposes, include defense of hearth and home, and the Act categorically bans citizens from keeping or bearing Affected Magazines, the Act is unconstitutional.[3]

Possessing Affected Magazines is an integral aspect of the right to "keep and bear arms." *See, e.g., Luis v. United States*, 136 S. Ct. 1083, 1097 (2016) (Thomas, J., concurring) ("The right to keep and bear arms ... 'implies a corresponding right to obtain the bullets necessary to use them[.]'"); *Duncan*, 970 F.3d at 1146 ("Without a magazine, many weapons would be useless, including 'quintessential' self-defense weapons like the handgun."); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 967-68 (9th Cir. 2014) ("restrictions on ammunition may burden the core Second Amendment right of self-defense"; "without bullets, the right to bear arms would be meaningless"). Indeed, no court has indulged an illusory distinction between firearms and magazines. *See, e.g., Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1276 (N.D. Cal. 2014), *aff'd*, 779 F.3d 991 (9th Cir. 2015) (collecting cases). Thus, that New Jersey is banning magazines, and not the firearms for which they are needed, does not alter the constitutional analysis.

[3] This, of course, does not mean that New Jersey cannot regulate the possession or use of Affected Magazines.

As for commonality, the Affected Magazines are essential to "bear[ing] arms" in that they are standard and integral to some of the most popular firearms in America. *See Ass'n of N.J. Rifle and Pistol Clubs*, 2020 WL 5200683 at *15 (Matey, J., dissenting) (collecting sources). The Affected Magazines "are commonly used in many handguns, which the Supreme Court has recognized as the 'quintessential self-defense weapon.'" *Duncan*, 970 F.3d at 1142 (quoting *Heller*, 554 U.S at 629). "[N]early half of all magazines in the United States today hold more than ten rounds of ammunition." *Id.* at 1147. By banning magazines needed to operate millions of guns, including some of the most widely-used guns in America, New Jersey necessarily has banned use of those guns, including in the home for self-defense.

Moreover, use of Affected Magazines is not a new phenomenon; magazines holding more than ten rounds have existed for centuries. *See Ass'n of N.J. Rifle and Pistol Clubs*, 2020 WL 5200683 at *13-15 (Matey, J., dissenting) ; *see also Duncan*, 970 F.3d at 1147 ("Firearms or magazines holding more than ten rounds have been in existence—and owned by American citizens—for centuries."); *id.* at 1147-48 (detailing the long history of arms equipped with multi-round capabilities). And government regulation of large capacity magazines is of relatively recent vintage. *See Ass'n of N.J. Rifle and Pistol Clubs*, 2020 WL 5200683 at *15-16 (Matey, J., dissenting) ("Yet regulations did not grow until the

1990s and 2000s, and even today, only a handful of states limit magazine capacity."); *Duncan*, 970 F.3d at 1151 ("Modern [large capacity magazine] restrictions are of an even younger vintage, only enacted within the last three decades.").

It is evident, therefore, that the Act fails under the Second Amendment because it is a categorical ban on the possession of Affected Magazines, which are "Arms." Here, like in *Heller*, the state has outlawed a class of arms "overwhelmingly chosen by American society for [the] lawful purpose [of self-defense]." 554 U.S. at 628. Moreover, New Jersey's ban reaches into the home, where "Second Amendment guarantees are at their zenith." *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012); *see also McDonald*, 561 U.S. at 780 (right to keep and bear arms applied "most notably for self-defense within the home"). Therefore, New Jersey's ban should be held unconstitutional.[4]

[4] An outright ban such as that New Jersey adopted also fails under the intermediate or strict scrutiny tests.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing en banc and hold that the Act is unconstitutional under the Second Amendment.

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 2,589 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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COMBINED CERTIFICATIONS

Pursuant to Local Appellate Rules 31.1(c) and 46.1(e), I hereby certify that I am counsel of record in this matter and a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit. I further certify that the text of the electronically filed brief and the hard copies of the brief mailed to the Clerk of Court on September 22, 2020 by overnight mail are identical. I also certify that the PDF copy of this brief submitted to the Court on September 22, 2020 was checked for viruses by anti-virus software CrowdStrike, version 5.36.11809, last updated September 2, 2020, and that no virus was detected.

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CERTIFICATE OF SERVICE

I hereby certify that on this September 22, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third 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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