UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-3170

Association of New Jersey Rifle & Pistol Clubs, Inc., et al.,
Plaintiffs-Appellants,

v.

Gurbir Grewal, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of New Jersey, No. 3:18-cv-10507-PGS-LHG
(Hon. Peter G. Sheridan, U.S.D.J.)

Brief for Defendants-Appellees, Gurbir Grewal and Patrick J. Callahan, in Opposition to Appellants' Motion for an Injunction Pending Appeal

Joseph C. Fanaroff
Jeremy Feigenbaum
Stuart M. Feinblatt
Assistant Attorneys General
Of Counsel and On the Brief

Evan A. Showell
Bryan Edward Lucas
Deputy Attorneys General
On the Brief

GURBIR S. GREWAL
Attorney General of New Jersey
R.J. Hughes Justice Complex
P.O. Box 112
Trenton, New Jersey 08625
Attorney for Defendants,
Gurbir S. Grewal and Patrick J. Callahan
973-648-3573
Bryan.Lucas@law.njoag.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Other Authorities

INTRODUCTION

Earlier this year, a 19-year-old walked into the Marjory Stoneman Douglas High School in Parkland, Florida, armed with an assault rifle and over 300 rounds of ammunition, and opened fire—killing 17 students and staff and wounding 17 others. In 2016, a man in Orlando, Florida, carrying both a rifle with a 30-round magazine and a pistol with a 17-round magazine, killed 49 people at a nightclub. In 2012, a shooter in Newtown, Connecticut, killed 20 children and 6 adults at Sandy Hook Elementary School, using 30-round magazines that enabled him to fire 154 rounds in under 5 minutes. In 2011, a gunman in Tucson, Arizona, killed 6 people, including U.S. District Court Judge John Roll, and wounded 13 others, using a handgun with a 33-round magazine—an attack that ended only when that shooter paused to reload and a bystander tackled him. These are merely a handful of the tragic mass shootings this Nation has suffered in recent years.[1]

Seeking to prevent the spread and lethality of mass shootings, New Jersey prohibited one of the devices that made them possible—large-capacity magazines (LCMs). LCMs enable shooters to fire an unusually high number of rounds of

[1] Information on each can be found at: Patricia Mazzei, *Parkland Gunman Carried Out Rampage Without Entering a Single Classroom*, N.Y. TIMES (Apr. 24, 2018); Mary Ellen Clark & Noreen O'Donnell, *Newtown School Gunman Fired 154 Rounds in Less than 5 Minutes*, REUTERS (Mar. 28, 2013); Bart Jansen, *Weapons gunman used in Orlando shooting are high-capacity, common*, USA TODAY (June 15, 2016); and Sam Quinones & Nicole Santa Cruz, *Crowd Members Took Gunman Down*, L.A. TIMES (Jan. 9, 2011).

ammunition without pausing to reload. LCMs thus allow "shooters to inflict mass casualties while depriving victims and law enforcement officers of opportunities to escape or overwhelm the shooters while they reload their weapons." *Kolbe v. Hogan*, 849 F.3d 114, 127 (4th Cir. 2017) (en banc). Given the danger that New Jersey was addressing by adopting new LCM limits, the District Court (Sheridan, J.) refused to preliminarily enjoin the law from going into effect. As the Court put it, "the state has presented sufficient evidence that demonstrates that the LCM law is reasonably tailored to achieve their goal of reducing the number of casualties and fatalities in a mass shooting, and that it leaves several options open for current LCM owners to retain their magazines and for purchasers to buy large amounts of ammunition." JA28. Appellants' claims were thus unlikely to succeed.

Appellants rush to this Court demanding an injunction while they appeal the denial of a preliminary injunction, but there is no reason for that drastic measure. Practically speaking, this Court has already granted Appellants' motion to expedite the appeal—a motion that the State did not oppose—and the matter is scheduled for disposition during the week of November 12, 2018. That undercuts Appellants' claims of irreparable harm, since this Court will be able to rule on the preliminary injunction appeal long before much of the new law takes effect. Indeed, owners of now-prohibited LCMs will have until December 10, 2018, to comply. Appellants cannot make the threshold showing of irreparable harm if this Court will resolve

their appeal nearly a month before the law's compliance date. Owners have more than enough time to alter their devices at little cost, sell them, surrender them to law enforcement, or transport them out of state.

Appellants' demand for an injunction pending their appeal also fails because they cannot demonstrate that they are likely to win this case—as the District Court and every appellate court to consider the issue on the merits has determined. Judge Sheridan's ruling was narrow: New Jersey was within its rights to "enact[] the LCM law in response to a growing concern over mass shootings" because its "law, based on the evidence presented, is reasonably tailored to accomplish that objective." JA28. That's exactly right. Because the law does not burden the core Second Amendment right identified in *Heller*—individuals remain free to possess a range of firearms, including handguns—this Court must subject it only to intermediate scrutiny. And whatever the standard, the LCM law survives review: the statute advances state interests in public safety, fits that interest hand-in-glove, and does not burden more conduct than is reasonably necessary. Because Appellants cannot show a likelihood of success in their appeal from the denial of a preliminary injunction, and because they face no harm while their appeal is being adjudicated, they are not entitled to any relief in this Court pending that appeal.

FACTUAL AND PROCEDURAL BACKGROUND

On June 13, 2018, New Jersey enacted Assembly Bill 2761 ("A2761") into law. A2761 bans firearm magazines capable of holding more than ten rounds of ammunition, specifically revising the definition of "large capacity magazine" from fifteen to ten. N.J. Stat. Ann. § 2C:39-1(y). New Jersey law now defines an LCM as "a box, drum, tube or other container which is capable of holding more than 10 rounds of ammunition to be fed continuously and directly therefrom into a semi-automatic firearm." N.J. Stat. Ann. § 2C:58-1y.

A2761 gives owners of now-prohibited LCMs 180 days—until December 10, 2018—to comply with the law. *See* N.J. Stat. Ann. § 2C:39-19. Owners have several options: "[t]ransfer the semi-automatic rifle or magazine to any person or firm lawfully entitled to own or possess that firearm or magazine; [r]ender the semi-automatic rifle or magazine inoperable or permanently modify a large capacity magazine to accept 10 rounds or less; or [v]oluntarily surrender the semi-automatic rifle or magazine." *Id.* The law also contains exemptions for firearms "with a fixed magazine capacity [of up to] 15 rounds which is incapable of being modified to accommodate 10 rounds or less" and a "firearm which only accepts a detachable magazine with a capacity of up to 15 rounds which is incapable of being modified to accommodate 10 or less rounds." Owners of those weapons have

to register them within one year, but do not need to dispossess themselves of those weapons. N.J. Stat. Ann. § 2C:39-20.

A2761 also contains an exemption allowing certain retired law enforcement officers to carry an LCM "capable of holding up to 15 rounds of ammunition." N.J. Stat. Ann. § 2C:39-17. This exemption only applies to retired law enforcement officers who are authorized under federal and state law to possess and carry a handgun. *Id*. In order to qualify for that exemption, the retired law enforcement officer must "semi-annually qualif[y] in the use of the handgun he is permitted to carry in accordance with the requirements and procedures established by the Attorney General." N.J. Stat. Ann. § 2C:39-6(l).

On the same day A2761 was enacted, the Association of New Jersey Rifle and Pistol Clubs, Inc., Blake Ellman, and Alexander Dembowski ("Appellants") filed suit in the United States District Court for the District of New Jersey, alleging that A2761 violates the Second Amendment, the Takings Clause, and the Equal Protection Clause. Among those named as defendants were the Honorable Gurbir S. Grewal, Attorney General of New Jersey, and Colonel Patrick J. Callahan, Superintendent of the New Jersey State Police ("Appellees").

On June 21, 2018, Appellants filed a motion for a preliminary injunction, asking the Court to prohibit enforcement of A2761, or, in the alternative, to allow owners of unaltered up-to-15-round magazines to load those magazines with up to

10 rounds of ammunition and to toll the 180-day compliance period. Following a court conference, Judge Peter G. Sheridan requested that the parties depose each of the individuals who had submitted declarations in support of, or in opposition to, Appellants' motion. The court further ordered a three-day fact-finding hearing to take place on August 13, 16, and 17, 2018. After the three-day hearing, the court heard oral argument on September 6, 2018. On September 19, 2018, Appellants filed an anticipatory motion for an injunction pending appeal.

On September 28, 2018, the District Court issued a memorandum and order denying Appellants' motion for a preliminary injunction. On the same day, the District Court also denied Appellants' motion for an injunction pending appeal. As the District Court explained, Appellants had no right to preliminary relief because their Second Amendment, Equal Protection, and Takings Clause claims were all unlikely to succeed on the merits. *See* JA 28, 30, 33. Judge Sheridan added that his ruling was in line with the Second, Fourth, Seventh, Ninth, and D.C. Circuits, which had "examine[d] laws that reduce large magazine capacity to hold no more than ten rounds" and had "all … found these laws constitutional." JA28.

ARGUMENT

A request for an injunction pending appeal is "rarely granted," particularly in the Third Circuit where "the bar is set particularly high." *Conestoga Wood Specialties Corp. v. Sec'y of Dept. of Health & Human Servs.*, No. 13-1144, 2013

WL 1277419, *1 (3d Cir. Feb. 8, 2013). That is because "the standard for obtaining a stay pending appeal is essentially the same as that for obtaining a preliminary injunction." *Id.* In other words, the party seeking an injunction must "demonstrate '(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief.'" *Id.* (quoting *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004)). Appellants' failure to "establish any element" in their favor thus makes an injunction pending appeal "inappropriate." *Id.* (quoting *NutraSweet Co. v. Vit–Mar Enter., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999)). The most important factors are the likelihood of success and irreparable harm. *See id.* (noting that these two "gateway factors" must be satisfied before the court "considers the remaining two factors and determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief."); *see also, e.g., Reilly v. City Of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017).[2]

In this case, the District Court, on a substantial record that included a three-day hearing and hundreds of exhibits, held that Plaintiffs "failed to demonstrate a likelihood of success on the merits" of their claims. JA33. The Court also disputed

[2] Appellants' suggestion that an injunction pending appeal should be granted by this Court simply if they can show that a "serious legal question is involved," Br. at 6, is thus foreclosed by this Court's precedent.

that Appellants will suffer any irreparable harm absent an injunction, explaining that A2761 does not impose any "burden on Plaintiffs' Second Amendment right." JA32, n.10. The District Court was plainly correct.

I. Appellants Have No Likelihood of Success on the Merits.

A. *New Jersey's LCM Law Does Not Violate the Second Amendment*.

The District Court rightly held that a preliminary injunction is not warranted because A2761 passes intermediate scrutiny. [3]

As the District Court found, because A2761 does not burden the "core" of the Second Amendment, this Court should subject it only to intermediate scrutiny. JA25. As under the First Amendment, "the Second Amendment can trigger more than one particular standard of scrutiny, depending, at least in part, upon the type of law challenged and the type of Second Amendment restriction at issue." *Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013). The analysis is simple: if a law burdens "the core of the right conferred upon individuals by the Second Amendment," strict scrutiny is required, and if it does not, intermediate scrutiny is called for instead. *Id.* The Third Circuit went on to articulate the core of that right: "to possess usable

[3] Appellees also argued before the District Court that A2761's regulation of LCMs does not even implicate the Second Amendment because LCMs are "dangerous and unusual" devices, and, in the alternative, have long been subject to regulation. The court rejected these arguments. Appellees submit that the trial court erred in these rulings, and plan to reiterate those arguments in opposing Appellants' appeal from the denial of the preliminary injunction. But there is no need to address these arguments at this interim stage given that the court rightly denied the preliminary injunction motion.

handguns in the home for self-defense." *Id.* In line with the views of several courts of appeals, the District Court explained that LCM statutes do not severely burden that core right, because they leave open myriad other firearms for individuals' use in self-defense. JA25 ("New Jersey's LCM law does not prohibit the possession of 'the quintessential self-defense weapon,' the handgun, as was the case in *Heller*."); *see also, e.g.*, *N.Y. State Rifle & Pistol Ass'n v. Cuomo (NYSRPA)*, 804 F.3d 242, 260 (2d Cir. 2015) (an LCM restriction "does not effectively disarm individuals or substantially affect their ability to defend themselves" because they "can purchase any number of magazines with a capacity of ten or fewer rounds"); *Heller v. Dist. of Colum.*, 670 F.3d 1244, 1263 (D.C. Cir. 2011) (*Heller II*) (adding LCM laws "do not prohibit the possession of 'the quintessential self-defense weapon,' to wit, the handgun"). Intermediate scrutiny is thus proper. *See Kolbe*, 849 F.3d at 138 (holding that "intermediate scrutiny is the appropriate standard because the [LCM law] does not severely burden the core protection of the Second Amendment"); *Friedman v. City of Highland Park*, 784 F.3d 406, 419 (7th Cir. 2015) (same); *Fyock v. City of Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015); *NYSRPA*, 804 F.3d at 260; *Heller II*, 670 F.3d at 1258. To survive, A2761 need only promote an important interest, reflect a reasonable way of achieving it, and not burden more conduct than necessary. *See Drake*, 724 F.3d at 436.

That New Jersey has a "substantial interest" in the safety of its residents is beyond dispute. *Drake*, 724 F.3d at 437 (agreeing "New Jersey, has, undoubtedly, a significant, substantial and important interest in protecting its citizens' safety."); *see also NYSRPA*, 804 F.3d at 261 ("It is beyond cavil that both states … have substantial, indeed compelling, governmental interests in public safety and crime prevention.") (citation omitted). That is why courts of appeals examining similar statutes have found that LCM laws advance an interest in safety. *See, e.g.*, *Heller II*, 670 F.3d at 1263-64; *NYSRPA*, 804 F.3d at 264; *Kolbe*, 849 F.3d at 138.

The only remaining questions are whether the LCM law is a "reasonable" fit to achieve those important interests, and whether the law burdens more conduct than reasonably necessary. In answering those questions, of course, courts have to accord "substantial deference to the predictive judgments of the legislature," and to "remain mindful that, in the context of firearm regulation, the legislature is far better equipped than the judiciary to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks." *NYSRPA*, 804 F.3d at 261 (citing, *inter alia*, *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 195 (1997)) (quotation marks omitted). Courts thus may only "assure [them]selves that, in formulating their respective laws, [the states] have drawn reasonable inferences based on substantial evidence." *NYSRPA*,

804 F.3d at 261-62. The state has satisfied that test whenever its interest "would be achieved less effectively absent the regulation." *Fyock*, 779 F.3d at 1000.

This statute easily clears that bar—as the District Court concluded. *See* JA27 ("defer[ring] to [the State's] legislative finding" that "this restriction on magazine capacity is necessary for public safety"). The record before the trial court established that when LCM-equipped firearms are used in violence, more bullets are fired, more victims are shot, and more people are killed than in other gun attacks. *See NYSRPA*, 804 F.3d at 264.[4] In particular, the record before the trial court shows that guns equipped with LCMs are often used in mass shootings and in one-third or more of all killings of law enforcement officers. *See, e.g.*, *Kolbe*, 849 F.3d at 126-27 ("One study of sixty-two mass shootings between 1982 and 2012, for example, found that the perpetrators were armed with . . . [LCMs] in 50% or more" of the attacks and another study found that LCMs "were used in 31% to 41% of" murders of on-duty police officers); *S.F. Veteran Police Officers*, 18 F. Supp. 3d 997, 1005 (N.D. Cal. 2014) (noting that during "the last thirty years, 86 percent of mass shootings involved at least one" LCM). That is true even when the LCMs are purchased lawfully; while Appellants say criminals will simply violate LCM laws, Br. 16-17, they ignore that "one of the most important sources of

[4] Contrary to Appellants' suggestion, the question is not whether a 10-round limit will be more effective than a 15-round limit, Br. 15, but rather whether a 10-round limit promotes the state's unchallenged interest in public safety and that it does so without burdening more conduct than necessary.

arming criminals in the United States are 'law-abiding citizens' whose guns are lost and stolen each year"—to the tune of about 400,000 each year. JA16. And "many of the most horrific mass shootings in America were perpetrated by previously law-abiding citizens." *Id*.

Not only do restrictions help reduce the number of mass shootings, but LCM bans can help save lives and reduce the lethality of a mass shooting by forcing shooters to pause and exchange magazines more often. Appellants' effort to minimize the importance of a shooter's pause, Br. 17, is belied by the trial record. For example, in mass shootings in Newtown, Connecticut, and in Washington, D.C., potential victims were able to escape harm when the shooter had to reload or his weapon jammed. *See* JA14 (finding that "during the tragic Newtown shooting, nine children were able to escape gunfire, while the assailant reloaded his gun"); JA7 (finding that a woman was able to similarly escape during a mass shooting in D.C.). Indeed, "at least twenty shooting attempts were stopped, or the harm was curtailed, when bystanders were able to subdue the perpetrator while he reloaded his weapon." JA14. These seconds mean the difference between "life or death," and so (as multiple courts have held) "reducing the number of rounds that can be fired without reloading increases the odds that lives will be spared in a mass shooting." *Kolbe*, 849 F.3d at 128.

Finally, this Court must address whether the law burdens more conduct than necessary to achieve the State's interest in safety. It does not. Although Plaintiffs argue that A2761 creates a total ban on handgun ownership akin to that at issue in *Heller*, Br. 15, they fundamentally misunderstand LCM laws. The statute "restricts possession of only a subset of magazines that are over a certain capacity. It does not restrict the possession of magazines in general … nor does it restrict the number of magazines that an individual may possess." *Fyock*, 779 F.3d at 998; *see also, e.g., NYSRPA*, 804 F.3d at 260 (explaining an LCM law "does not effectively disarm individuals or substantially affect their ability to defend themselves" because those individuals "can purchase any number of magazines with a capacity of ten or fewer rounds."). As the District Court explained, "The new law imposes no new restrictions on the quantity of firearms, magazines or bullets an individual may possess. It merely limits the large capacity of a single magazine. A gun owner preparing to fire more than ten bullets in self-defense can legally purchase multiple magazines and fill them with ten bullets each." JA27. The Court was plainly right to conclude that, as a result, "the new law imposes no significant burden, if any, on Plaintiffs' second amendment right"—and no more than is necessary to combat the spread and lethality of mass shootings. *Id.*

As the District Court found, A2761 does not violate the Second Amendment, and so an injunction pending appeal is not warranted.

B. *New Jersey's LCM Law Does Not Violate the Equal Protection Clause.*

The District Court also properly found that Appellants' equal protection arguments lack merit. Appellants assert that A2761 violates the Equal Protection Clause because the statute's exemption for retired law enforcement officers favors such officers over other residents. But equal protection only requires that similarly situated individuals be treated similarly, and even then allows the state to treat individuals differently when it has a rational basis for doing so.[5] Here, retired law enforcement officers are not similarly situated to other residents—even veterans—and the State has a rational basis for exempting them from A2761's reach.

Appellants "must demonstrate [they] received different treatment from that received by other individuals similarly situated." *Shuman ex rel. Shertzer v. Penn Manor Sch. Dist.*, 422 F.3d 141, 151 (3d Cir. 2005) (citation omitted). When it comes to possession of lethal weapons, retired law enforcement officers are not like other state residents "in all relevant aspects." *Startzell v. City of Philadelphia*, 533 F.3d 183, 203 (3d Cir. 2008) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)). As the District Court observed, "'retired police officers possess a unique

[5] Appellants assert that strict scrutiny should apply because, in their view, A2761 implicates fundamental rights under the Second Amendment. To the contrary, as the District Court concluded, because Appellants' Second Amendment claim fails, their equal protection claim remains subject only to rational basis review. JA28 n.9 (citing *Kwong v. Bloomberg*, 723 F.3d 160, 169-70 (2d Cir. 2013); *Hightower v. City of Boston*, 693 F.3d 61, 83 (1st Cir. 2012)).

combination of training and experience related to firearms[,]' not commonly possessed by the general public." JA28 (quoting *Kolbe*, 813 F.3d at 185; citing *Shew v. Malloy*, 994 F. Supp. 2d 234, 252 (D. Conn. 2014); *Pineiro v. Gemme*, 937 F. Supp. 2d 161, 176 (D. Mass. 2013)). In New Jersey, the Attorney General has issued standards requiring all active duty and retired law enforcement to pass semi-annual requalification tests to ensure that they maintain firearms proficiency. JA30 (citing *Semi-Annual Firearms Qualification & Requalification Standards for N.J. Law Enforcement* (June 2003), *available at* http://www.state.nj.us/lps/dcj/pdfs/dcj-firearms.pdf).[6] Law enforcement officers are also "instilled with what might be called an unusual ethos of public service,' and are expected to act in the public's interest, which does not apply to the public at large." JA29 (quoting *Kolbe*, 813 F.3d at 186-87). Furthermore, "retired police officers face special threats that private citizens do not,' such as from past criminals that they have arrested." *Id.* (quoting *Kolbe*, 813 F.3d at 187). The differences are not only between law enforcement and the public: because military veterans' training and experience differs from that of law enforcement (such as receiving little or no handgun training), even veterans are not like law enforcement in all relevant aspects. *See*

[6] While Appellants argue that one of Defendants' experts, Detective and State Range Master Glenn Stanton, testified that firearms training was irrelevant to the safe possession of LCMs, Br. 19, that is beside the point. As Detective Stanton also testified, proper firearms training *is* critical to the safe use of firearms into which the magazine is inserted. JA156.

JA29 (relying on testimony from the New Jersey State Police that "the firearms training military recruits receive is vastly different than what is required of recruits in the police academy"). These groups are situated differently when it comes to firearm safety, and so New Jersey has the ability to treat them accordingly.

In short, Appellants do not have a likelihood of success on the merits of their Equal Protection claim.

C. *New Jersey's LCM Law Does Not Violate the Takings Clause.*

Appellants are no more likely to succeed on their Takings Clause claim than on either of their first two theories. First, A2761 falls within the State's police power to protect the public from dangerous items. Second, Appellants have not been deprived of all economically beneficial use of their property.

It is well-established that the State may protect the public from dangerous items without having to provide compensation. An unbroken line of decisions since the Nineteenth Century establishes that the Clause presents no barrier to state laws prohibiting the possession of dangerous products. *See Wiese* I, 263 F. Supp. 3d at 995 (noting that a "long line of federal cases has authorized the taking or destruction of private property in the exercise of the state's police power"); *AmeriSource Corp. v. United States*, 525 F.3d 1149, 1153 (Fed. Cir. 2008) ("Property seized and retained pursuant to the police power is not taken for a 'public use' in the context of the Takings Clause."); *Mugler v. Kansas*, 123 U.S.

623, 668-69 (1887) (holding that any "prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."). That is as it should be, or else states could not restrict individuals from possessing such dangerous items as chemicals, bombs, drugs, or wild animals without paying owners along the way. That is not, and has never been, the law.

It is therefore not surprising that several courts considering challenges to laws restricting dangerous firearms or their accessories—including LCM laws like A2761—have held that no compensation is due because the actions taken by the state are a proper exercise of its police power. *See, e.g.*, *Wiese I*, 263 F. Supp. 3d at 995 (rejecting takings argument and denying request for preliminary injunction of state LCM ban); *Roberts v. Bondi*, No. 8:18-cv-1062, 2018 WL 3997979, *7-10 (M.D. Fla. Aug. 21, 2018) (dismissing takings challenge to Florida's recent ban on bump stocks because the law was an appropriate exercise of the state's police power); *Rupp v. Becerra*, No. 8:17-cv-00746, 2018 WL 2138452, at *7-9 (C.D. Cal. May 9, 2018) (finding that a ban on assault weapons represented an exercise of police power, not a taking); *Akins v. United States*, 82 Fed. Cl. 619, 622-23 (Fed. Cl. 2008) (rejecting takings claim relating to an order that the plaintiff register or surrender a machine gun); *Fesjian v. Jefferson*, 399 A.2d 861, 866 (D.C.

Ct. App. 1979) (finding no compensation due after town banned machine guns). This law works no taking since it "does not compel conveyance of the guns for public use, but regulates possession of an object the legislature has found to be dangerous." *Rupp*, 2018 WL 2138452, at *9.

Appellants' takings claim also fails because they have not been deprived of all economically beneficial use of their property—as the District Court determined. Indeed, as the Court laid out, "section five [of the new law] permits gun owners to permanently modify their magazines 'to accept 10 rounds or less.'" JA33 (quoting L. 2018, ch. 39, §5). Plaintiffs never allege that they cannot use such magazines—nor can they say that the modification "destroys the functionality" of the device. *See Wiese v. Becerra*, No. 2:17-903, 2018 WL 746398, *5 (E.D. Cal. Feb. 6, 2018) (*Wiese II*). The LCM would have a lower capacity than an owner may wish, but that is not the Takings Clause's test. Still more, "section seven—which applies to magazines that cannot be modified and to guns which do not accept the smaller magazines—permits gun owners to register their firearms" instead of selling or surrendering them. JA33 (quoting L. 2018, ch. 39, §7). Thus, even if an individual has a weapon he cannot modify, he can keep it—subject only to registration rules. So the District Court reached the obvious conclusion: "[t]hese avenues … ensure that gun owners who wish to keep their magazines may do so."

Id. It thus follows inexorably that "New Jersey is not imposing a regulation that goes 'too far,' nor is it permanently depriving anyone of their property." *Id.*[7]

II. Appellants Are Facing No Irreparable Harm.

There is no reason to enjoin A2761 from taking effect while the underlying appeal is adjudicated. Simply put, Appellants face no imminent risk of having to modify the LCMs they currently possess during the pendency of the appeal. Under the plain terms of A2761, Appellants have 180 days from the law's effective date (June 13, 2018) to transfer their LCMs "to any person or firm lawfully entitled to own or possess that ... magazine, render the ... magazine inoperable or permanently modify a large capacity ammunition magazine to accept 10 rounds or less." L. 2018, ch. 39, §5(b). In an effort to resolve the preliminary injunction appeal well before that date, this Court has already granted Appellants' motion to expedite—which the State did not oppose—and set disposition for the week of November 13, 2018. This Court will thus be able to rule on the preliminary injunction appeal long before much of the new law takes effect, and owners will have weeks to come into compliance. That undercuts Appellants' claims of irreparable harm: there is

[7] This is also the basis on which the District Court distinguished the primary case on which Appellants rely—*Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1137-38 (S.D. Cal. 2017). That court believed that gun owners subject to a different LCM law had been deprived "not just of the use of their property, but of possession, one of the most essential sticks in the bundle of property rights." *Id.* at 1138. But that is clearly not true of A2761: Appellants are not deprived of possession because the law permits owners to permanently modify their LCMs to accept ten or fewer rounds, or to register their weapons where modification is impossible. JA32-33.

no need for relief pending an appeal when the Appellants can litigate their appeal, unharmed, in the normal course.

There is also little reason for this Court to be concerned about allowing the bar on purchasing new LCMs to stay in effect for another month—because the law does not impose burdens on anyone's rights. As the District Court explained, "The LCM law places a minimal burden on lawful gun owners. The new law imposes no new restrictions on the quantity of firearms, magazines or bullets an individual may possess. It merely limits the lawful capacity of a single magazine." JA27. Even without an injunction pending this appeal, then, "[a] gun owner preparing to fire more than ten bullets in self-defense can legally purchase multiple magazines and fill them with ten bullets each." *Id.* Given that the District Court found that "the new law imposes no significant burden, if any" on Appellants' constitutional rights," *id.*, this Court should not enjoin a democratically-enacted state law from remaining in effect for the additional few weeks of this appeal.

CONCLUSION

For the reasons stated above, this Court should deny Appellants' motion for an injunction pending appeal.

Dated: October 10, 2018

Respectfully Submitted,
GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: /s/ Bryan Edward Lucas

Joseph Fanaroff
Jeremy Feigenbaum
Stuart M. Feinblatt
Assistant Attorneys General
Of Counsel and On the Brief

Evan A. Showell
Bryan Edward Lucas
Deputy Attorneys General
On the Brief