UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DIANNA MATHEWS, BOB'S LITTLE SPORT SHOP, INC., IRENE KOCZERUK, *and* ASSOCIATION OF NEW JERSEY RIFLE & PISTOL CLUBS, INC., *Plaintiffs*, v. PHILIP D. MURPHY, in his official capacity as Governor of New Jersey, GURBIR S. GREWAL, in his official capacity as Attorney General of New Jersey, *and* PATRICK J. CALLAHAN, in his official capacity as Superintendent of the New Jersey Division of State Police and as State Director of Emergency Management, *Defendants*.	HON. ROBERT B. KUGLER, U.S.D.J. HON. ANNA MARIE DONIO, U.S.M.J. CIVIL ACTION NO. 20-cv-7220 **CIVIL ACTION** **(ELECTRONICALLY FILED)**

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Case **Page**

Constitutions, Statutes, and Rules

Other Authorities

INTRODUCTION

The State of New Jersey has begun in earnest to reopen from the COVID-19-induced shutdown ordered by Governor Murphy. Retail businesses that once were deemed "non-essential" and ordered to close are now free to reopen their doors. Individuals may once again worship at their churches, synagogues, and mosques. Governor Murphy's order requiring individuals to remain in their homes except for specified purposes has been rescinded. Starting June 22, personal care businesses such as barbershops, tattoo parlors, nail salons, day spas, and massage parlors may reopen. And yet Governor Murphy irrationally continues to insist that indoor shooting ranges must stay closed, despite their critical role in facilitating the exercise of Second Amendment rights by New Jerseyans. If public health does not require closure "even for business activities involving close and extended personal interaction such as at hair salons and barbershops," *Connecticut Citizens Defense League, Inc. v. Lamont*, 2020 WL 3055983, at * 12 (D. Conn. 2020), public health simply cannot require closure of indoor shooting ranges, operation of which *does not* involve close and extend personal interaction, and which typically employ sophisticated air ventilation systems making them particularly safe. Governor Murphy's continued infringement of Second Amendment rights must be stopped.

The United States Constitution was designed to endure through "the various *crises* of human affairs." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415

(1819) (emphasis added). Those who wrote it "knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation." *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure*), 343 U.S. 579, 650 (1952) (Jackson, J., concurring). And the rights and liberties they passed down to us, and safeguarded in the pages of the charter they wrote, have force not only in good times but also in bad—not only in times of peace and plenty, but also (perhaps especially) in times of crisis.

That is particularly true of the Second Amendment. The right to keep and bear arms safeguarded by that provision, the Supreme Court has explained, was "a *pre-existing* right"—"the natural right of resistance and self-preservation"—that predated the Amendment's adoption in 1791, and, indeed, predated *government itself*, according to the political theory of the Founding. *District of Columbia v. Heller*, 554 U.S. 570, 592, 665 (2008). And it is in times of social upheaval—times of crisis—that the fundamental right of an individual, law-abiding citizen to engage in armed defense of herself, her family, and her home is at its zenith. During the present moment of unprecedented social disruption—when police forces are strained to the breaking point and thousands of prison inmates are being released back onto the streets—the importance of recognizing and protecting the fundamental right of law-abiding citizens to defend themselves and their families has never been greater.

The Second Amendment right to firearms also protects the right of a law-

abiding citizen "to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective." *Ezell v. City of Chicago* (*Ezell I*), 651 F.3d 684, 704 (7th Cir. 2011). Accessibility to shooting ranges is therefore essential to the exercise of Second Amendment rights.

Governor Murphy, however, apparently fails to appreciate the fundamental nature of Second Amendment rights and their critical importance during this time of pandemic and social upheaval. The Governor has established a pattern and practice of trampling on the Second Amendment during this pandemic, forcing Plaintiff Association of New Jersey Rifle and Pistol Clubs ("ANJRPC") repeatedly to seek relief in the courts from his unconstitutional overreaching. The story began on March 21, 2020, with the issuance of the Governor's initial executive order requiring individuals to stay and home and the closure of "non-essential" retail businesses, Executive Order 107 ("EO 107") (Mar. 21, 2020) (Ex. 1 to Decl. of Daniel L. Schmutter ("Schmutter Decl.")). That Order failed to deem firearm retailers as essential, despite bestowing essential status on outfits such as liquor stores and marijuana dispensaries. *See* Ex. 1 at 6–7. ANJRPC and two of its members promptly sued to enjoin this infringement of Second Amendment rights, *see ANJRPC v. Murphy*, NO. 20-3269 (D.N.J.), but on March 30, before the case could be adjudicated—and after the federal government deemed firearm retailers critical infrastructure during the pandemic, Christopher C. Krebs, Director, Cybersecurity

& Infrastructure Security Agency, Advisory Memorandum On Identification of Essential Critical Infrastructure Workers During COVID-19 Response 8, U.S. DEP'T OF HOMELAND SEC. (Apr. 17, 2020) (emphasis added) (Schmutter Decl. Ex. 2)—Governor Murphy backed down and allowed gun stores to reopen. *See* Admin. Order No. 2020-6 (Mar. 30, 2020) ("AO2020-6") (Schmutter Decl. Ex. 3).

Despite allowing New Jerseyans once again to obtain firearms—many for the first time during the pandemic—Governor Murphy refused to let them *train* with those firearms by continuing to require all shooting ranges to remain closed, both open-air and indoor. He did so despite the federal government's guidance listing *both* firearm retailers *and* shooting ranges as critical infrastructure. While this policy was always unconstitutional, it became unbearable when, on April 29, Governor Murphy allowed *golf courses* and *tennis courts* to reopen, *see* Executive Order 133 ("EO 133") (Apr. 29, 2020) (Schmutter Decl. Ex. 4), but refused to allow even outdoor shooting ranges to reopen. ANJRPC once again was forced to sue, *see Ricci v. Murphy*, No. 20-5800 (D.N.J.), and Governor Murphy once again backed down before the case could be adjudicated on the merits, *see* Executive Order 147 ("EO 147") (May 18, 2020) (Schmutter Decl. Ex. 5).

That brings us to the third act, the present controversy. Despite opening outdoor ranges, Governor Murphy continues to insist that indoor ranges remain closed. As with his closure of firearm retailers and outdoor ranges, this policy has

been unconstitutional from the beginning. Indoor ranges are included within the federal government's critical infrastructure guidance, and they are the only avenue for many New Jerseyans to exercise their right to train with firearms because outdoor ranges are often private clubs with expensive dues and limited membership. And the matter once again has come to a head, now that Governor Murphy has opened up non-essential retail, expanded the opportunity for indoor gatherings, rescinded his stay-at-home order, and scheduled the imminent reopening of hair salons, barbershops, nail salons, spas, tattoo parlors, and massage parlors. *See* Executive Order ("EO 150") ¶ 8 (June 3, 2020) (Schmutter Decl. Ex. 6); Executive Order 152 ("EO 152") ¶ 1 (June 9, 2020) (Schmutter Decl. Ex. 7); Executive Order 153 ("EO 153") ¶ 11 (June 9, 2020) (Schmutter Decl. Ex. 8); Executive Order 154 ("EO 154") ¶ 1 (June 13, 2020) (Schmutter Decl. Ex. 9).

The Court must close the curtain on this unconstitutional conduct. It is utterly fanciful to acknowledge that individuals can safely shop to their heart's content, go to the spa, get their hair cut and their nails done, get a massage, and get a tattoo, yet insist that they cannot go to an indoor range to obtain proficiency in handling a firearm. The Constitution does not protect any of these allowed activities, while the Second Amendment enshrines in our highest law that "the right of law-abiding, responsible citizens to use arms in defense of hearth and home" must be "elevate[d] above all other interests." *Heller*, 554 U.S. at 635. At the very least, this fundamental

right cannot be treated any *worse* than hair salons, tattoo parlors, and massage parlors. This Court should restrain and enjoin Governor Murphy's unnecessary infringement of Second Amendment rights and order Defendants to allow individuals to exercise their constitutional right to train at indoor shooting ranges.

BACKGROUND

I. EO 107 Effectively Bans Firearms Training for Many New Jerseyans.

In response to the spread of the COVID-19 virus within the United States, Governor Murphy signed an Executive Order, on March 21, 2020, imposing a variety of extraordinary lockdown measures in New Jersey. *See* Ex. 1. EO 107 prohibited nonessential travel, required all citizens to practice "social distancing" measures when in public, limited the use of public transit, and barred "gatherings of individuals." Ex. 1 at 5, 6. In addition, EO 107 directed that "[t]he brick-and-mortar premises of all non-essential retail businesses must close to the public as long as th[e] Order remains in effect." *Id.* at 6. The Order further specified certain outdoor "recreational" and "entertainment" businesses subject to closure. *Id.* at 8.

The Order also included a subjective list of retail establishments deemed "essential," which included not only such businesses as "Grocery stores," "Pharmacies," and "gas stations," but also "alternative treatment centers that dispense medicinal marijuana," "Pet stores," and "Liquor stores." Ex. 1 at 6–7. It did not include firearm or ammunition retailers or gun ranges. *Id.* In response to

questions about his closure of gun stores, Governor Murphy stated that "[a] safer society for my taste has fewer guns and not more guns." *See* Alex Napoliello, *Gun Advocates Say Shops Should Reopen Now. Murphy Says No*, NJ.COM (March 25, 2020) (Schmutter Decl. Ex. 10).

EO 107 was soon challenged in multiple suits in this Court as violating the Second and Fourteenth Amendments to the extent that it banned the sale of firearms and ammunition in the State. *See Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Murphy*, No. 20-3269 (D.N.J.); *Kashinsky v. Murphy*, No. 20-3127 (D.N.J.). Soon after these lawsuits were filed, Governor Murphy backed down and determined that firearm retailers could reopen. *See* Ex. 3 ¶ 3. Firing ranges, however, remained closed, so law-abiding citizens of New Jersey could once more acquire firearms but still could not train to gain or maintain proficiency in using them.

On April 29, 2020, Governor Murphy issued EO 133, which permitted the reopening of golf courses "to the public and to members associated with private golf clubs," Ex. 4 at 7, so long as those courses agreed to adopt a variety of social distancing policies, *see id.* at 7–9. EO 133 also allowed county and municipal officials to reopen public tennis courts. *See TRANSCRIPT: May 1st, 2020 Coronavirus Briefing Media*, STATE OF N.J. GOVERNOR PHIL MURPHY (May 1, 2020) (Schmutter Decl. Ex. 11). But shooting ranges—including outdoor shooting ranges—remained closed pending further order by the Governor.

Again, Governor Murphy's arbitrary discrimination against Second Amendment activity was challenged in Court, this time in *Ricci v. Murphy*, No. 20-5800 (D.N.J.), which challenged Governor Murphy's arbitrary decision to allow golf courses and tennis courts to reopen but not outdoor shooting ranges. Once again, shortly after that lawsuit was filed, Governor Murphy backed down and allowed *outdoor* ranges to reopen. *See* Ex. 5.

Now, within the past two weeks, Governor Murphy has issued a succession of executive orders that substantially expand activities of multiple types yet continue to keep indoor ranges closed.

First, on June 3, Governor Murphy issued EO 150, which specified that non-essential retail businesses that previously had been ordered to close would be allowed to reopen on June 15. *See* Ex. 6 ¶ 8.

Second, on June 9, Governor Murphy issued EOs 152 and 153. EO 152 provides for a substantial expansion of indoor activity, allowing individuals to congregate in groups of up to 50 provided that specified social distancing measures are followed. *See* Ex. 7 ¶ 1. This includes religious gatherings, and indeed the Order privileges gatherings for "religious services and political activity" by providing that "the restrictions on these gatherings can be relaxed to an even greater degree than for other gatherings." *Id*. at 4. EO 153 lifts the Governor's stay-at-home order, *see* Ex. 8 ¶ 11, while at the same time making clear that indoor shooting ranges must

stay closed, *see id.* ¶ 8(b).

EO 153 purports to justify keeping indoor "recreation" facilities such as shooting ranges close by stating that indoor recreation "entails a higher risk than indoor retail settings, as indoor recreation typically involves individuals congregating together in one location for a prolonged period of time, while in indoor retail settings, individuals neither congregate in large groups nor remain in close proximity for extended periods." *Id*. at 4. Whatever the persuasiveness of this rationale generally, it does not distinguish indoor ranges from indoor retail because indoor firing ranges do not entail congregation in large groups or individuals being in close proximity for extended periods. To the contrary, firing ranges employ natural social distancing because for safety purposes, firing positions are, by design, significantly separated from each other laterally across the firing line. Ranges can also limit the number of firing positions being occupied at any one time.

Third, on June 15, Governor Murphy issued EO 154 which allows the reopening on June 22, 2020 of "cosmetology shops; barber shops; beauty salons; hair braiding shops; nail salons; electrology facilities; spas, including day spas and medical spas, at which solely elective and cosmetic medical procedures are performed; massage parlors, tanning salons, and tattoo parlors." *See* Ex. 9 ¶ 1. It is hard to imagine how such personal care businesses, which by their very nature *require* staff and customers to "remain in close proximity for extended periods"

could possibly be safer than indoor shooting ranges. Indeed, due to their frequent employment of sophisticated and powerful air-handling systems designed to meet EPA, NIOSH, and OSHA standards for lead exposure, indoor gun ranges are less risky for the transmission of disease than even indoor retail. *See, e.g.,* NIOSH, *Indoor Firing Ranges* (Aug. 15, 2013) (Schmutter Decl. Ex. 12); OSHA FactSheet, *Protecting Workers from Lead Hazards at Indoor Firing Ranges* at 2 (Schmutter Decl. Ex. 13).

Plaintiff BLSS operates such a system manufactured and installed by Carey's Small Arms Range Ventilation of Tinley Park, IL, one of the premier manufacturers/installers of such systems. Declaration of Robert Viden, Jr. ¶ 5 (June 16, 2020) ("Viden Decl."). According to the National Shooting Sports Foundation, Carey's range ventilation design was installed at the U.S. Navy's Recruit Training Command Great Lakes and is now the standard for all Navy indoor firing ranges. See Nat'l Shooting Sports Found., Press Release: Carey's Small Arms Range Ventilation is Newest Sponsor of Fall 2016 NSSF Lead Management and OSHA Workshop (Aug. 10, 2016) (Schmutter Decl. Ex. 14).

II. EO 107 and EO 153 Prevent Plaintiffs From Engaging in Constitutionally Protected Training To Use Their Firearms.

Governor Murphy's ban on firearms training through the closure of indoor shooting ranges infringes Plaintiffs' Second Amendment rights. Mathews is a 35-year-old single mother of a teenage daughter. Declaration of Dianna Mathews ¶ 4

(June 16, 2020) ("Mathews Decl."). She is a first-time firearm owner, who has not handled any kind firearm for the last 20 years. Mathews Decl. ¶ 5. Koczerzuk is a 66-year-old retiree on a fixed income and a first-time firearm owner. She recently purchased a handgun for self-defense after first obtaining a Handgun Purchase Permit. Declaration of Irene Koczerzuk ¶ 4 (June 16, 2020) ("Koczerzuk Decl."). Before she purchased her new handgun, she took a basic handgun safety course but has never had the opportunity train with, practice with, or even fire her new handgun. Koczerzuk Decl. ¶ 5.

Mathews and Koczerzuk both believe that the current emergency necessitates that they keep a handgun at home for self-defense, but both are of modest means and cannot afford to join an exclusive member–only club. Mathews Decl. ¶¶ 4–6, Koczerzuk Decl. ¶¶ 4–6

However, Plaintiffs Mathews and Koczerzuk ultimately learned that because of EO 107, shooting ranges in the State had been forced to close, and due to EO 153, indoor shooting ranges, the only ones they could reasonably afford, must remain closed. Mathews Decl.¶¶ 7–8, Koczerzuk Decl. ¶¶ 7–8. Accordingly, as a direct result of EO 107 and EO 153, Plaintiffs Mathews and Koczerzuk have been and remain unable to engage in training and target practice since EO 107 went into effect. *Id*. But for EO 107, EO 153, and Defendants' actions implementing them, Plaintiffs Mathews and Koczerzuk would travel to an indoor shooting range forthwith and

participate in target practice and training. Mathews Decl. ¶ 9, Koczerzuk Decl. ¶ 9.

Defendants' actions have also injured Plaintiff Bob's Little Sport Shop, Inc. ("BLSS"). In conjunction with its retail firearms store, BLSS also owns and operates an indoor shooting range that provides target practice and training opportunities to its customers. Viden Decl. ¶ 2. Plaintiff BLSS has been forced to stop operating its range indefinitely, since it is not deemed an "essential business." Viden Decl. ¶ 2. BLSS has many customers who wish to participate in target practice and training forthwith, and it would allow those customers to use its range for such practice if it were legally allowed to do so. Viden Decl. ¶¶ 2–3. If allowed to open its range, BLSS would also implement sanitary and safety measures, including limiting the number of patrons on the premises at any one time, strictly observing and enforcing social distancing protocols, requiring employees and patrons to wear masks or other face coverings, and regularly sanitizing exposed surfaces. Viden Decl. ¶ 4.

And Defendants' actions have injured Plaintiff Association of New Jersey Rifle & Pistol Clubs, Inc. ("ANJRPC"), which represents the interests of law-abiding firearm owners and member clubs throughout out New Jersey. Declaration of Scott Bach Decl. ¶¶ 2, 4 (June 15, 2020) ("Bach Decl."). Plaintiff ANJRPC has many members, including Plaintiffs Mathews and Koczerzuk, who wish to participate in target practice and training forthwith, but who are of modest means and cannot afford an exclusive, member-only private club, and who would do so at a commercial

indoor range if they were legally allowed to do so. Bach Decl. ¶¶ 3–4.

Finally, EO 107 and EO 153 have had a similar impact on other members of Plaintiff ANJRPC. ANJRPC is a nonprofit membership association organized for the primary purpose of representing the interests of target shooters, sportsmen, and other law-abiding firearms owners, and defending and advocating their right to keep and bear arms. ANJRPC has many thousands of members in New Jersey, including Plaintiff Mathews and Koczerzuk. Many of them wish to engage in firearms training but are disabled and cannot traverse the grassy terrain at an outdoor range or are of modest means and cannot afford an exclusive, member-only private club. They would train at a commercial indoor range if they were legally allowed to do so but are unable to because of EO 107 and EO 153. *Id.* ¶ 3; Mathews Decl. ¶ 8, Koczerzuk Decl. ¶8. Likewise, ANJRPC has many member clubs that are unable to allow their members to use their firing ranges for firearms training because of EO 107 and EO 153 and their continued enforcement. Bach Decl. ¶ 3.

ARGUMENT

A plaintiff seeking preliminary injunctive relief must demonstrate (1) a likelihood of success on the merits and (2) a prospect of irreparable injury if the injunction is not granted. *Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017). In addition, "the district court . . . should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or

denial of the injunction, and (4) the public interest." *Id.* Here, all four factors favor preliminarily enjoining Defendants from enforcing EO 107 to indefinitely prohibit firearms training at outdoor shooting ranges.[1]

I. Plaintiffs Are Likely To Succeed on the Merits.

Establishing likelihood of success on the merits "requires a showing significantly better than negligible but not necessarily more likely than not." *Id.* at 179. Plaintiffs' Second Amendment challenge is likely to succeed under this standard and preliminary injunctive relief should issue.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. The Supreme Court has held that this provision "protect[s] an individual right to use arms for self-defense," *Heller*, 554 U.S. at 616, and that because "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty," it applies to the States, *McDonald v. City of Chicago*, 561 U.S. 742, 778, 791 (2010) (plurality opinion).

The Third Circuit has established "a two-pronged approach to Second Amendment challenges." *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir.

[1] "These same factors are used to determine a motion for a temporary restraining order," *Miller v. Skumanick*, 605 F. Supp. 2d 634, 641 (M.D. Pa. 2009), *aff'd sub nom. Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010).

2010). "First, [courts] ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee . . . . [Second,] [i]f it does, [they] evaluate the law under some form of means-end scrutiny." *Id.*[2] The first prong is a "threshold inquiry" into whether the challenged conduct is protected by the right to keep and bear arms. *Id.* Here, the answer to that threshold inquiry is beyond dispute: if the right to keep and bear arms for lawful self-defense is to have any meaning, it must protect the right of firearm owners to obtain and maintain proficiency in using their firearms. EO 107's and EO 153's infringement of this right is unconstitutional under any standard that could conceivably apply.

A. The Ban on Target Practice and Training at Indoor Shooting Ranges Burdens Conduct Protected by the Second Amendment.

The Second Amendment "protect[s] an individual right to use arms for self-defense." *Heller*, 554 U.S. at 616, 636. As federal courts have repeatedly recognized, the "right to possess firearms for protection implies . . . corresponding right[s]" without which "the core right wouldn't mean much." *Ezell I*, 651 F.3d at 704. The right to keep and bear arms would mean little indeed without the corresponding right to obtain and maintain proficiency in firearm use. *Id.* at 708. As the Seventh Circuit cogently explained in *Ezell I*, a "firing-range ban is . . . a serious

[2] Plaintiffs reserve the argument that a tiers-of-scrutiny approach is never appropriate in Second Amendment cases. *See Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1271–85 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense." *Id.* Such a ban on firing ranges works a serious infringement on Second Amendment rights because, as the Second Circuit recently acknowledged, "[p]ossession of firearms without adequate training and skill does nothing to protect, and much to endanger, the gun owner, his or her family, and the general public." *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 883 F.3d 45, 58 (2d Cir. 2018), *vacated and remanded*, No. 18-280, 2020 WL 1978708 (U.S. Apr. 27, 2020); *see also Teixeira v. County of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (en banc) (noting that the right to keep and bear arms for self-defense would be trivial without the ability to "maintain[ ] proficiency in firearms use").

The Third Circuit recently endorsed *Ezell I*'s reasoning on this score. In *Drummond v. Township of Robinson*, 784 Fed. Appx. 82 (3d Cir. 2019), the district court had dismissed the plaintiff's Second Amendment challenge to a local zoning ordinance that he alleged violated the Second Amendment by preventing him from opening and operating a gun club. In vacating the district court's judgment, the court of appeals emphasized that the Circuit's two-step *Marzzarella* test requires reviewing courts to perform, at the first step, a textual and historical analysis to determine whether the burdened conduct—"acquiring firearms and maintaining proficiency in their use"—were exercises of Second Amendment rights. *Id.* at 84.

And in remanding for the district court to perform that textual and historical analysis, the Court noted that *Ezell I*'s analysis was "illustrative." *Id.* at 84 n.8. On remand, the district court held that the challenged ordinance burdened conduct "within the scope of the Second Amendment's protection," *Drummond v. Robinson Township*, — F. Supp. 3d —, 2020 WL 1248901, at *3 (W.D. Pa. Mar. 16, 2020), but that the ordinance was constitutional primarily because—unlike EO 107—it "provides ample alternative channels for commercial gun range activity," *id.* at *4.

The traditional understanding and practices of the people of this nation leave no question that the right to firearm training is protected by the Second Amendment. Indeed, the centrality of firearm training was forthrightly stated by *Heller*, quoting from a "massively popular" late-nineteenth century treatise, that "to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use." *Heller*, 554 U.S. at 617–18 (quoting Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 271 (1880)) (alteration added). And another source quoted by *Heller* stated that "a citizen who keeps a gun or pistol under judicious precautions, *practises in safe places the use of it*, and in due time teaches his sons to do the same, exercises his individual right." *Id*. at 619 (emphasis added) (quoting Benjamin Vaughan Abbott, *Judge and Jury: A Popular Explanation of the Leading Topics in the Law of the Land* 333 (1880)).

Moreover, very recently, four Justices of the Supreme Court have indicated that they likewise view the right to train in firearm use as "an important corollary to the meaningful exercise of the core right to possess firearms for self-defense." *Ezell I*, 651 F.3d at 708. In *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, No. 18-280, 2020 WL 1978708 (U.S. Apr. 27, 2020), a majority of the Justices found that the petitioner's challenge to a New York City regulation that limited firearm owners to patronizing only a handful of gun ranges—all located in New York City and only one of which was open to the public—was moot. *See id.* at *1.

Justice Alito, joined by Justices Thomas and Gorsuch, disagreed and addressed the merits of the City's regulation. These three Justices concluded that the right "to take a gun to a range in order to gain and maintain the skill necessary to use it responsibly" was a "necessary concomitant" of the right to keep a firearm in the home for self-defense. *Id.* at *14 (Alito, J., dissenting). In support, Justice Alito quoted *Heller*'s invocation of Cooley's treatise and the Seventh Circuit's pathbreaking decision in *Ezell I*. *See id.* And because the right to take a gun to ranges was "a concomitant of the same right recognized in *Heller*," the dissenting Justices concluded that the City's regulation required a historical precursor to justify the restrictions imposed. *Id.* The City, however, "point[ed] to no evidence of laws in force around the time of the adoption of the Second Amendment" so limiting citizens' rights to practice, so the dissenters found the regulation unconstitutional.

No other Justice contradicted Justice Alito's analysis in *New York State Rifle & Pistol Ass'n*. Indeed, Justice Kavanaugh—who voted with the majority on mootness grounds—nevertheless authored a concurring opinion emphasizing that he "agree[d] with Justice Alito's general analysis of *Heller* and *McDonald*," *id.* at *2 (Kavanaugh, J., concurring), impliedly endorsing Justice Alito's analysis of the concomitant right to practice with a firearm lawfully possessed.

It is also important to put EO 107's and 153's restrictions in context. The constitutional right in "learning to handle and use" firearms is especially important in times of national crisis and social upheaval. *Heller*, 554 U.S. at 617–18. "The Second Amendment is a doomsday provision," *Silveira v. Lockyer*, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc), and in this time of crisis Americans across the Nation are preparing for the worst by acquiring arms for the defense of themselves and their families. The right to self-defense is "the *central component* of the [Second Amendment] right," *Heller*, 554 U.S. at 599 (emphasis added), and it is "a basic right, recognized by many legal systems from ancient times to the present day," *McDonald*, 561 U.S. at 767. Indeed, the right to self-protection was viewed at the Founding as a *natural* right that predates government and is necessarily reserved to the people when government is established. *See Heller*, 554 U.S. at 593–94 (citing, *e.g.*, 1 William Blackstone, *Commentaries* 136, 139–40 (1765)). The importance of the right to self-defense is

shown in sharp relief in times of national emergency, such as the present pandemic, when ordinary social routines, practices, and safeguards begin to break down.

The COVID-19 outbreak, and society's response, have upended life as we know it, calling into question basic governmental functions and protections that we take for granted. Across the country, for example, police departments have been forced to "make[ ] major operational changes in preparation for the continued spread of coronavirus, as they face potential strains in resources and staffing without precedent in modern American history." Alexander Mallin & Luke Barr, *Police Implement Sweeping Policy Changes To Prepare for Coronavirus Spread*, ABC NEWS (Mar. 18, 2020) (Schmutter Decl. Ex. 15). Those measures include reducing police response to certain types of crimes and announcements that certain criminal laws will simply not be enforced at the present time. *Id.* Hundreds of police officers in New Jersey have already been infected by COVID-19, and thousands more have been forced to quarantine. *See* Alex Napoliello, *645 N.J. Cops Have Tested Positive for Coronavirus, Another 2,300 in Self-Isolation*, NJ.COM (Apr. 13, 2020) (Schmutter Decl. Ex. 16). Indeed, many States—including New Jersey, as well as California, New York, Ohio, and Texas—have taken the extraordinary and unprecedented step of *releasing* thousands of inmates into the public, due to the coronavirus outbreak. Lucas Manfredi, *Jails Release Thousands of Inmates To Curb Coronavirus Spread*, FOX BUSINESS (Mar. 22, 2020) (Schmutter Decl. Ex. 17);

Tracey Tully, *1,000 Inmates Will Be Released From N.J. Jails to Curb Coronavirus Risk*, N.Y. TIMES (Mar. 23, 2020) (Schmutter Decl. Ex. 18).

In recent weeks we have even seen rioting, looting, burning, and destruction in cities throughout the nation, including in Trenton and Atlantic City. Kevin Shea & Noah Cohen, *Hours After Trenton Cops Kneel in Solidarity with Protesters, Rioters Set Police Car Ablaze*, NJ.COM, May 31, 2020 (Schmutter Decl. Ex. 19); Joe Atmonavage, *N.J. Man Faces Rioting Charge During Protest over George Floyd's Death*, NJ.COM (May 31, 2020) (Schmutter Decl. Ex. 20).

The importance of safeguarding "the natural right of resistance and self-preservation," *Heller*, 554 U.S. at 594, has never been higher than during this extraordinary moment of social upheaval and unprecedented strain on government resources. Millions of Americans across the Nation have come to the same conclusion: "Gun sales are surging in many U.S. states, especially in those hit hardest by the coronavirus—California, New York and Washington," Kurtis Lee & Anita Chabria, *As the Coronavirus Pandemic Grows, Gun Sales Are Surging in Many States*, L.A. TIMES (Mar. 16, 2020) (Schmutter Decl. Ex. 21), with dealers reporting "an unusually high proportion of sales . . . to first-time gun buyers," Richard A. Oppel, Jr., *For Some Buyers With Virus Fears, the Priority Isn't Toilet Paper. It's Guns.*, N.Y. TIMES, Mar. 16, 2020 (Schmutter Decl. Ex. 22); Nat'l Shooting Sports Found., *Millions of First-Time Gun Buyers During COVID-19*

(June 1, 2010) (Schmutter Decl. Ex. 23). And federal background checks have surged. Indeed, an industry trade group analysis that sought to screen out background checks for non-purchase purposes such as obtaining a carry license found year-over-year increases in federal background checks of 80% and 69% in March and April 2020, respectively. *Id.*

These are exactly the circumstances that confront Plaintiffs Mathews and Koczerzuk, who each acquired their handguns shortly before COVID-19 began its spread across the United States. Mathews Decl. ¶¶ 5–6, Koczerzuk Decl. ¶¶ 5–6.

Mathews is a first-time firearm owner, who has not handled any kind of firearm for the last 20 years. Mathews Decl. ¶ 5. Koczerzuk is also a first-time firearm owner, but she has never had the opportunity train with, practice with, or even fire her new handgun. Koczerzuk Decl. ¶ 5.

Mathews and Koczerzuk both believe that the current emergency necessitates that they keep a handgun at home for self-defense, but both are of modest means and cannot afford to join an exclusive member–only club. Mathews Decl. ¶¶ 4, 6 Koczerzuk Decl. ¶¶ 4, 6. And merely possessing a handgun in the home is not the same as actually being able to *use* it with any level of effectiveness.

As Americans across the country are demonstrating, the fundamental right of self-defense has never been more important. And as many Americans—including Plaintiffs Mathews and Koczerzuk—are purchasing firearms for the first time in

their adult lives, the need for firearm training has perhaps never been more acute. EO 107's and EO 153's mandated closure of indoor shooting ranges in the State thus unquestionably burdens conduct protected by the Second Amendment.

B. The Closure of Indoor Ranges Is Categorically Unconstitutional.

The necessary function of EO 107 and EO 153 is to impose a flat, categorical ban on the public's exercise of the constitutionally protected right to train in the use of firearms through controlled target practice and training for those individuals without ready access to an outdoor shooting range. By its plain language, EO 107 requires "recreational" and "entertainment" businesses "[to] close to the public as long as this Order remains in effect," which Governor Murphy construes to include firing ranges. Ex. 1 at 5–7. While Governor Murphy has allowed outdoor ranges to reopen,¶ 8(b) of EO 153 continues this mandated closure for indoor ranges.

Governor Murphy's ban is total and applies to *all* indoor firing ranges (subject to the irrelevant exceptions in Executive Order 29 ("EO 129") (Apr. 27 2020) (Schmutter Decl. Ex. 24, which allows the small number of atypical people who can qualify for a carry license to access ranges to complete the required training). It is far more draconian than the New York City regulation disparaged by four Justices in *New York State Rifle & Pistol Ass'n*, which permitted access to firing ranges located within the City. And it is likewise far more sweeping than the zoning regime upheld in *Drummond*, which "provide[d] ample alternative channels for commercial

gun range activity . . . within the Township as a whole." 2020 WL 1248901, at *4. EO 107 instead has the effect of eliminating indoor "commercial gun range activity" *within an entire State*. It thus represents a prohibition of shooting range activity over an unprecedented geographic expanse.

The totality of the prohibition is further evident from the fact that EO 107 closes off indoor shooting ranges to *all persons* (again, aside from the minuscule class covered by EO 129) within the State. Worse yet, the effects of this prohibition reverberate into individuals' hearths and homes—the place "where the need for defense of self, family, and property is most acute." *Heller*, 554 U.S. at 628. Without the ability to train at a range, gun owners are handicapped in their ability to effectively protect themselves.

EO 107's application to indoor shooting ranges thus amounts to the following: a flat ban on *all* training and target practice, by virtually *any* person, *anywhere* in the state, except for those limited individuals with ready access to an outdoor range. And most relevant here, EO 107 completely deprives Plaintiffs Mathews and Koczerzuk from exercising their constitutional right to train with firearms. It is hard to imagine a more direct assault on the Second Amendment.

Given that Governor Murphy has completely prohibited typical, law-abiding citizens without access to outdoor ranges from training with their firearms, *Heller* makes the next analytical steps clear. Because the Second Amendment "elevates"

the right to self-defense "above all other interests," infringements upon this "core protection" must be held unconstitutional categorically, not "subjected to a freestanding 'interest-balancing' approach." *Id.* at 634–35. Defendants' prohibition on the right of law-abiding citizens to maintain proficiency in firearms is precisely such an infringement of Second Amendment rights. It is flatly unconstitutional.

Heller requires *per se* invalidation of bans that strike at the heart of the Second Amendment. In *Heller*, the Supreme Court declined the invitation to analyze the ban on the right to keep arms at issue there under "an interest-balancing inquiry" based on the "approach . . . the Court has applied . . . in various constitutional contexts, including election-law cases, speech cases, and due process cases," *id.* at 689–90 (Breyer, J., dissenting). Instead, the Court ruled that the right to keep and bear arms was "elevate[d] above all other interests" the moment that the People chose to enshrine it in the Constitution's text, *id.* at 635 (majority opinion). And in *McDonald*, the Court reaffirmed that *Heller* had deliberately and "expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing." 561 U.S. at 785. This reasoning applies equally to the ban on range training at issue here.

The flat unconstitutionality of New Jersey's ban on indoor firearm training under *Heller* is reinforced by subsequent Supreme Court precedent. In *McDonald*, the Supreme Court described *Heller*'s holding as a simple syllogism: having "found

that [the Second Amendment] right applies to handguns," the Court therefore "concluded" that "citizens must be permitted to use handguns for the core lawful purpose of self-defense." *Id.* at 767–68 (quotation marks and brackets omitted). Then, in *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016), the Court summarily and unanimously reversed a decision of the Massachusetts Supreme Judicial Court that had departed from this approach in upholding a ban on stun guns. *Id.* at 1027–28. The Massachusetts court got the message: "Having received guidance from the Supreme Court in *Caetano II*, 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). In like manner, New Jersey's attempt to ban many of its citizens from training with firearms lawfully obtained and possessed is an option that the Second Amendment simply takes "off the table." *Heller*, 554 U.S. at 636.

Likewise, Justice Alito—who authored the Court's opinion in *McDonald*—recently reiterated in *New York State Rifle & Pistol Ass'n* that even a regulation falling short of an absolute ban—one requiring residents to practice only at a handful of ranges within the City's limits—likely was categorically unconstitutional unless the City could offer evidence showing "that municipalities during the founding era" engaged in similar regulation. 2020 WL 1978708, at *14; *see also Heller*, 631–34

(explaining why the District of Columbia's handgun ban could not be justified based on "founding-era historical precedent," including "various restrictive laws in the colonial period"); *Heller II*, 670 F.3d at 1273 (Kavanaugh, J., dissenting) (explaining that *Heller* invalidated the District's law because "handguns had not traditionally been banned"). Defendants have not—and cannot—point to any analogous state-wide prohibitions on indoor firearm practice that existed at the Founding—or at any other time in this nation's history, for that matter. That's enough to doom EO 107.

To be sure, the Third Circuit generally requires restrictions on Second Amendment rights to be scrutinized under "some form of means-end scrutiny," *Marzzarella*, 614 F.3d at 89, but such scrutiny is not necessary or appropriate here, where the restriction in question is a flat, categorical ban on the practice of *any* firearm training by *any* member of the general public at *any* indoor shooting range within the State. That is why other circuits that have adopted a tiers-of-scrutiny analysis as the default form of analysis for most Second Amendment challenges nevertheless apply *Heller*'s categorical approach to " 'complete prohibition[s]' of Second Amendment rights." *Wrenn v. District of Columbia*, 864 F.3d 650, 665 (D.C. Cir. 2017) (quoting *Heller*, 554 U.S. at 629); *see also Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) (striking down ban on carrying arms categorically despite circuit precedent applying levels-of-scrutiny analysis in other Second Amendment cases). EO 107 operates as just such a "compete prohibition," and it thus must be

struck down without any further analysis.

C. Defendants' Ban on Firearm Training at Indoor Shooting Ranges Fails Any Level of Heightened Constitutional Scrutiny.

1. Strict Scrutiny Should Apply.

Even if this Court concludes that Defendants' ban on firearms training at indoor shooting ranges is not *categorically* unconstitutional, the ban must at least be subjected to the highest level of constitutional scrutiny. As the Supreme Court has explained, "strict judicial scrutiny [is] required" whenever a law "impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). And the right to bear arms is not only specifically enumerated in the constitutional text but also was counted "among those fundamental rights necessary to our system of ordered liberty" by "those who drafted and ratified the Bill of Rights." *McDonald*, 561 U.S. at 768, 778. Applying anything less than strict scrutiny would relegate the Second Amendment to "a second-class right." *Id.* at 780 (plurality opinion).

This conclusion is in accord with precedent. Even *Marzzarella* recognized that firearm regulations fall along a continuum, with laws like the District of Columbia's handgun ban falling "at the far end of the spectrum of infringement." 614 F.3d at 97. That was because the District of Columbia law "did not just regulate possession of handguns; it prohibited it, even for the stated fundamental interest protected by the right—the defense of hearth and home." *Id.* So while *Marzzarella* maintained that

laws imposing burdens that "do[ ] not severely limit the possession of firearms" "should be evaluated under intermediate scrutiny," the Court left open whether "the Second Amendment can trigger more than one particular standard of scrutiny." *Id.*

Because the right to "[r]ange training . . . lies close to the core of the individual right of armed defense," *Ezell v. City of Chicago* (*Ezell II*), 846 F.3d 888, 893 (7th Cir. 2017), and because EO 107 *prohibits* that right for many New Jerseyans, including Plaintiffs Mathews and Koczerzuk, it severely limits the use of firearms for self-defense in the home and therefore clearly lies "at the far end of the spectrum of infringement," *Marzzarella*, 614 F.3d at 97, manding "strict scrutiny," *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. of N.J.*, 910 F.3d 106, 117 (3d Cir. 2018).

Therefore, even if EO 107 is not categorically unconstitutional, it warrants review under the most exacting scrutiny. That is what a Virginia trial judge reasoned in a recent challenge to Governor Northam's executive order closing indoor shooting ranges. *See Lynchburg Range & Training, LLC v. Northam*, CL20000333, slip letter op. at 4 (Va. Cir. Ct. Apr. 27, 2020). This Court should do the same.

2. The Indoor Range Training Ban Fails Heightened Scrutiny.

Ultimately, determining the correct standard of scrutiny is immaterial, because Defendants' actions are unconstitutional under any level of heightened scrutiny. (Rational basis review is not an option. *See Heller* 554 U.S. at 628 n.27.)

Under intermediate scrutiny, the State "must assert a significant, substantial,

or important interest; there must also be a reasonable fit between that asserted interest and the challenged law, such that the law does not burden more conduct than is reasonably necessary." *Ass'n of N.J. Rifle & Pistol Clubs, Inc.*, 910 F.3d at 119 (quotation omitted). Assuming EO 107's closure of indoor shooting ranges was undertaken to promote public health, Defendants cannot carry their burden because EO 107 and subsequent related executive orders suffer from an utter lack of tailoring.

That is shown by EO 107's exemptions and later permissions to reopen. While the indoor shootings ranges necessary to ensure the exercise of Plaintiffs' constitutional rights are not deemed "essential," under the Order, Defendants *have* included exemptions for a variety of establishments, including "alternative treatment centers that dispense medicinal marijuana" and "Liquor stores." Ex. 1 at 5–6. And now Governor Murphy has allowed indoor retail to reopen generally, Ex. 6 ¶ 8, as well as "personal care" businesses that involve substantial person-to-person contact such as hair and nail salons and tattoo and massage parlors, as of June 22, Ex. 8.

Moreover, as far as Plaintiffs are aware, there is no constitutional right to a bottle of liquor, six-pack of beer, the latest iPhone, a nice haircut, sculpted fingernails, or a tattoo. And medical marijuana facilities operate in flagrant violation of federal law. *See* 21 U.S.C. § 812. Yet establishments vending these goods and services have been deemed safe to open by New Jersey, even while indoor shooting ranges—which enable the right to effective self-defense protected by the Second

Amendment—have not. In stark contrast, meanwhile, the federal government, recognizing the critical role that shooting ranges play in actualizing the guarantee of the Second Amendment, has deemed as part of the "essential critical infrastructure workforce" "[w]orkers supporting the operation of firearm, or ammunition product manufacturers, retailers, importers, distributors, *and shooting ranges*." Ex. 2 at 8.

Other of EO 107's and EO 152's exemptions, while perhaps justifiable on their own terms, show that Defendants have erected a hierarchy of constitutional values—with the Second Amendment relegated to the very bottom rung. EO 107 specifically allowed travel "for any educational, religious, or political reason"—presumably out of concern that banning these activities would raise serious First Amendment concerns. EO 152 now provides even greater exclusivity of treatment for political and religious activities as follows, stating that "the restrictions on these gatherings can be relaxed to an even greater degree than for other gatherings." Ex. 7 at 4. By failing to show similar solicitude to the right to keep and bear arms, New Jersey has in effect imposed an impermissible "hierarchy of constitutional values," *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982)—in direct contravention of the Supreme Court's instruction that the Second Amendment may not be treated "as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees," *McDonald*, 561 U.S. at 780 (plurality opinion).

And perhaps more than anything else, reopening hair salons, nail salons, tattoo parlors, and massage parlors demonstrates the illogic behind these classifications. What makes no sense is the Governor's decision to open *those* venues, even though indoor shooting ranges can be operated far more safely than those services due to their natural social distancing through the separation of firing positions, as well as the highly sophisticated air handling systems they frequently employ.

Therefore, at bottom, Governor Murphy's insistence on closing indoor shooting ranges is irrational. Indoor shooting ranges in New Jersey continue to face indefinite closure, even though other indoor businesses are likely to pose a greater risk of spreading COVID-19. This unfavorable treatment of indoor shooting ranges is all the more inexplicable given that ranges like BLSS can—and would—undertake the same mitigation measures—enforcing social distancing protocols, requiring employees and patrons to wear masks, and sanitizing exposed surfaces, etc.—that justified reopening other indoor businesses in the State. The State has not, and surely could not, offer any plausible explanation supporting the disparate treatment of shooting ranges expressed in its laws.

As the Sixth Circuit recently noted when confronting a challenge to a gubernatorial order in Kentucky that prohibited faith-based gatherings to stave the spread of COVID-19, stay-at-home orders of the kind issued by the Governor here raise constitutional problems when "many of the serial exemptions for [some]

activities pose comparable public health risks to [constitutionally protected activities]." *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 614 (2020) (per curiam). Such a regulatory patchwork is problematic precisely because "restrictions inexplicably applied to one group and exempted from another do little to further [the goal of lessening the spread of the virus] and do much to burden [constitutionally protected] freedom." *Id.* at 615. While the Sixth Circuit initially only required Kentucky to allow outdoor services, it later extended its order to encompass indoor services as well. *See Roberts v. Neace*, 958 F.3d 409 (2020). Plaintiffs respectfully ask this Court to recognize these same dangers and order New Jersey to allow indoor range training.

Where a challenged law is drastically under-inclusive in the way that EO 107 and 153 are—failing to regulate activity that, by the Government's own account of the interest justifying the law, ought to be regulated *a fortiori*—that raises serious doubts about whether the challenged restriction is necessary. No one doubts the seriousness of the threat posed by the COVID-19 pandemic, or the importance of "flattening the curve." But if—as New Jersey has concluded—these public-health interests may be served while allowing Buy-Rite Wine & Liquor to remain open and permitting Supercuts and Massage Envy to welcome back their customers, it cannot be said that indoor shooting ranges must be closed in the name of public health.

Even under intermediate scrutiny, a law cannot burden substantially more

constitutionally protected conduct than necessary to achieve the State's interest. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2540 (2014). In *McCullen*, for example, the Supreme Court struck down a Massachusetts "buffer zone" law forbidding certain types of speech outside of abortion clinics, reasoning that the State had failed to show that regulations substantially less restrictive than such an extreme prophylactic measure were not just as "capable of serving its interests." *Id.* at 494. Massachusetts's law, the Court noted, was "truly exceptional," and the State was able to "identify no other State with a law" that was comparable, raising the "concern that the Commonwealth has too readily forgone options that could serve its interests just as well." *Id.* at 490. And even in the context of intermediate scrutiny, the Court concluded, the State must "show[ ] that it seriously undertook to address the problem with less intrusive tools readily available to it," or at least, "that it considered different methods that other jurisdictions have found effective." *Id.* at 494. This requirement, the Court explained, "prevents the government from too readily sacrificing speech for efficiency." *Id.* at 490 (brackets and quotation marks omitted).

Governor Murphy's closure of indoor shooting ranges flunks intermediate scrutiny under the very same reasoning. While New Jersey concluded that less intrusive measures were sufficient to safeguard public health in the context of indoor retail, hair salons, and tattoo parlors, it did not similarly exempt indoor shooting ranges—even though the federal government recognized their essential role during

a pandemic. *See* Ex. 2 at 8. And even apart from a simple exemption, as in *McCullen*, there are other, far less-restrictive means available for achieving the State's professed goals. New Jersey could have, for example, (1) limited the number of people allowed on the premises of a shooting range at any one time to maintain social distancing; and (2) mandated enhanced sanitizing procedures for shooting ranges that remained open—exactly the same requirement for the reopening of outdoor shooting ranges. *See* Ex. 5 ¶ 3 (listing a variety of social-distancing and sanitation measures for outdoor shooting ranges seeking to reopen). Employing these methods may be less simple than a flat ban. But while nakedly suppressing constitutionally protected conduct "is sometimes the path of least resistance," intermediate scrutiny's tailoring requirement is designed precisely to "prevent[ ] the government from too readily sacrificing [constitutional rights] for efficiency." *McCullen*, 573 U.S. at 486 (brackets and quotation marks omitted); *see also Bruni v. City of Pittsburgh*, 824 F.3d 353, 371 (3d Cir. 2016).

This same tailoring problem has been recognized during this pandemic with respect to the closure of firearm retailers. Justice Wecht of the Pennsylvania Supreme Court explained the inadequate tailoring behind Pennsylvania's order: "just as the Governor has permitted restaurants to offer take-out service but restricted dine-in options, the Governor may limit the patronage of firearm retailers to the completion of the portions of a transfer that must be conducted in-person." *Civil*

Rights Defense Firm, P.C. v. Wolf, — A.3d —, 2020 WL 1329008, at *2 (Pa. Mar. 22, 2020) (Wecht, J., concurring in part and dissenting in part).

Even more pertinent to this case is the reasoning of Judge Meyer of the District of Connecticut in enjoining the suspension of fingerprint collection in connection with the application for a firearm permit:

> [T]he Commissioner himself in one of his affidavits lists available protective measures that would be less overbroad than a shutdown of the permitting process. . . . These are the types of protective measures that have already been approved by the Governor and put into operation across broad sectors of the state economy, **including even for business activities involving close and extended personal interaction such as hair salons and barbershops.** What is expected from a barber or hair stylist is not too much to expect from a police officer in the service of allowing the people to exercise their constitutional rights.

Connecticut Citizens Defense League, Inc. v. Lamont, 2020 WL 3055983, at *12 (D. Conn. 2020) (emphasis added, footnote deleted).

This same need for accommodation exists here. To sustain EO 107's and 153's application to indoor shooting ranges under intermediate scrutiny, Defendants must show that the Governor's ban on indoor firearm training is reasonably necessary to protect public health: (1) even though it has allowed other indoor establishments, including liquor stores, marijuana dispensaries, hair salons, nail salons, tattoo parlors, and massage parlors, to remain open or reopen; and (2) even though various means are available to protect the public health *while allowing* law-abiding New Jersey citizens to continue to exercise their Second Amendment rights.

The bottom line is this: if indoor firing ranges can adopt reasonable, tailored social-distancing measures and enhanced sanitation—as BLSS has offered to do at its range, *see* Viden Decl. ¶ 4—Defendants cannot show that their outright *ban* on training at indoor shooting ranges is necessary to advance public safety. Plaintiffs are therefore likely to succeed on the merits of their Second Amendment challenge.

II. Plaintiffs Face Irreparable Harm Absent a Preliminary Injunction.

The conclusion that Plaintiffs are likely to succeed on their Second Amendment claim compels the conclusion that they face continuing irreparable injury absent injunctive relief. It is well-accepted that the deprivation of a constitutional right constitutes irreparable harm. *See, e.g.*, *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 113 (3d Cir. 2013). The Third Circuit has recognized this rule for a variety of constitutional rights. *See, e.g.*, *id.* (First Amendment); *Lewis v. Kugler*, 446 F.2d 1343, 1350 (3d Cir. 1971) (Fourth Amendment). Rights under the Second Amendment should be treated no differently. *See McDonald*, 561 U.S. at 780; *Ezell v. City of Chicago* (*Ezell I*), 651 F.3d 684, 699 (7th Cir. 2011). Each day Defendants' unconstitutional ban on indoor firearm training continues, Plaintiffs Mathews and Koczerzuk and others like them risk injury because they are unable to engage in range training. That injury cannot be compensated through money damages. *See id.*

III. The Balance of the Equities Favors Preliminary Injunctive Relief.

The public interest and balance of equities likewise favor Plaintiffs given that

they are likely to succeed on the merits of their constitutional claims. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights," *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998), for "the enforcement of an unconstitutional law vindicates no public interest," *K.A. ex rel. Ayers*, 710 F.3d at 114; *see also Wrenn*, 864 F.3d at 667. On the other side of the scale, Defendants suffer little harm, as they have no valid interest in enforcing New Jersey's unconstitutional ban on indoor range training and, as explained above, there is no substantial reason demonstrating it is needed to safeguard public health.

IV. The Court Should Waive Bond or Set Bond at a Nominal Amount.

While Federal Rule of Civil Procedure 65 provides that "[t]he court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined," the Third Circuit has recognized that the district court may sometimes dispense with that requirement. *Temple Univ. v. White*, 941 F.2d 201, 219 (3d Cir. 1991). In "noncommercial cases" such as this one, the Court should "balance . . . the equities of the potential hardships that each party would suffer as a result of a preliminary injunction" and may excuse the bond on that basis. *Elliott v. Kiesewetter*, 98 F.3d 47, 59–60 (3d Cir. 1996). "The court should also consider whether the applicant seeks to enforce a federal right and, if so, whether imposing the bond requirement would unduly interfere with that right." *Borough of*

Palmyra, Bd. of Educ. v. F.C. ex rel. R.C., 2 F. Supp. 2d 637, 646 (D.N.J. 1998). Here, Defendants will not suffer costs and damages from the proposed preliminary injunction, while imposing a more than *de minimis* bond would unduly interfere with Plaintiffs' Second Amendment Rights. Plaintiffs should therefore not be required to post security or should be required to post only a nominal amount.

V. The Court Should Enter a Permanent Injunction.

Since Plaintiffs' claims require no further factual development, permanent injunctive relief is appropriate. Federal Rule of Civil Procedure 65(a)(2) authorizes a court considering a motion for preliminary injunctive relief to "advance the trial on the merits and consolidate it with the hearing" on the motion for preliminary relief. *See DeLeon v. Susquehanna Cmty. Sch. Dist.*, 747 F.2d 149, 152 n.6 (3d Cir. 1984). Such consolidation is appropriate where "no factual or legal disputes will remain once the Court resolves the preliminary injunction motion," *Morris v. District of Columbia*, 38 F. Supp. 3d 57, 62 n.1 (D.D.C. 2014), such that "the eventual outcome on the merits is plain at the preliminary injunction stage," *Curtis 1000, Inc. v. Suess*, 24 F.3d 941, 945 (7th Cir. 1994).

That is the case here. The facts relevant to Plaintiffs' challenge are not plausibly in dispute. Rather, whether Plaintiffs will prevail turns entirely on the Court's resolution of constitutional questions—questions that the Court should resolve in Plaintiffs' favor as a matter of law. Thus, "the merits of the plaintiffs'

challenge are certain and don't turn on disputed facts," and the Court should enter final judgment and permanent, not merely preliminary, injunctive relief. *Wrenn*, 864 F.3d at 667; *see also Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012).

CONCLUSION

The Court should restrain and enjoin enforcement of EO 107 and 153 against indoor shooting ranges and patrons visiting them.

Dated: June 16, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2020, I electronically filed the following documents with the Clerk of the Court using the CM/ECF system:

1. Notice of Motion For a Temporary Restraining Order and/or Preliminary Injunction;
2. Declaration of Dianna Mathews
3. Declaration of Robert Viden, Jr.
4. Declaration of Irene Koczerzuk
5. Declaration of Scott Bach
6. Declaration of Daniel L. Schmutter with accompanying exhibits
7. Brief in Support of Motion
8. Proposed Form of Order; and
9. Certificate of Service.

I further certify that on or about June 17, 2020, one courtesy copy of each of the foregoing documents, marked as "Courtesy Copy," will be sent by regular mail to chambers.

I further certify that one copy of the foregoing documents is being served as follows on the 16th day of June 2020 upon the following counsel for Defendants:

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with consent in lieu of paper copies.

I hereby certify that the foregoing statements are true. I understand that if any of the foregoing statements made by me are willfully false that I am subject to punishment.

June 16, 2020

s/ Daniel L. Schmutter
DANIEL L. SCHMUTTER

Attorney for Plaintiffs