No. 18-3170

In The United States Court of Appeals
For the Third Circuit

ASSOCIATION OF NEW JERSEY RIFLE & PISTOL CLUBS, INC.,
BLAKE ELLMAN, ALEXANDER DEMBOWSKI,

Plaintiffs-Appellants,

v.

GURBIR GREWAL, in his official capacity as Attorney General of New Jersey, PATRICK J. CALLAHAN, in his official capacity as Superintendent of New Jersey Division of State Police, THOMAS WILLIVER, in his official capacity as Chief of Police of the Chester Police Department, JAMES B. O'CONNOR, in his official capacity as Chief of Police of the Lyndhurst Police Department,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY (No. 18-cv-10507) (Hon. Peter G. Sheridan, Presiding)

BRIEF OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant Association of New Jersey Rifle & Pistol Clubs, Inc. has no parent corporation, and no publicly held corporation owns its stock. Nor is there any publicly held corporation that is not a party to this proceeding but that has a financial interest in the outcome of this proceeding.

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INTRODUCTION

The State of New Jersey has prohibited its citizens, on pain of imprisonment, from possessing or using ammunition magazines capable of holding more than 10 rounds ("standard-capacity magazines" or "SCMs"). There can be no serious dispute that these magazines are protected by the Second Amendment, which means that the State has banned an entire class of constitutionally protected items. Were this case about the First Amendment, such an action would be met with swift and appropriate condemnation by the courts. If, for instance, New Jersey prohibited its citizens from reading a particular class of constitutionally protected books, or limited the number of those books that its citizens could read at any given time, there would be no doubt that such a law was unconstitutional. But this case concerns the right to keep and bear arms, and the District Court's decision below "reflects a distressing trend" among federal courts: "the treatment of the Second Amendment as a disfavored right." *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., dissenting from the denial of certiorari). But the Second Amendment is not "a second-class right," *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion), and this Court ought not countenance its being treated like one. The District Court's denial of a preliminary injunction must be reversed.

The District Court committed several legal errors, each of which independently requires reversal even if all its findings of legislative fact are

accepted. The Supreme Court has said that a ban on a class of arms protected by the Second Amendment "fail[s] constitutional muster" "[u]nder any of the [potentially applicable] standards of scrutiny," *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008); the District Court upheld such a ban. The Supreme Court has said that the government "may not regulate the secondary effects of [protected conduct] by suppressing the [protected conduct] itself," *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 445 (2002) (controlling opinion of Kennedy, J.); the District Court ignored this prohibition. The Supreme Court has said that, under heightened scrutiny, the State must show that its law does not "burden more [conduct] than is reasonably necessary," *United States v. Marzzarella*, 614 F.3d 85, 98 (3d Cir. 2010); the District Court required no such showing. The Supreme Court has said that offering citizens the choice between physical dispossession and altering their property constitutes a taking, *Horne v. Department of Agric.*, 135 S. Ct. 2419, 2430–31 (2015); the District Court relied on that choice to hold there was *not* a taking. The Supreme Court has said that "classifications affecting fundamental rights are given the most exacting scrutiny" under the Equal Protection Clause, *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (citations omitted); the District Court applied rational-basis review to an acknowledged fundamental right. At almost every step, the District Court's analysis contravenes Supreme Court precedent.

"[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U.S. at 636. Banning standard-capacity magazines is one of them. This Court should reverse and remand for entry of an injunction, and because the end of New Jersey's compliance period is fast-approaching, Plaintiffs respectfully request that this Court act far enough in advance of the December 10 deadline to provide certainty to New Jersey's citizens.[1]

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343 because this case involves constitutional challenges to Act A2761 and seeks relief under 42 U.S.C. §§ 1983 and 1988. The District Court denied Appellants' motion for a preliminary injunction on September 28, 2018, *see* JA2, and Appellants filed a timely notice of appeal that same day, *see* JA1. This Court has jurisdiction over the denial of a preliminary injunction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

1. Whether Act A2761's ban on ammunition magazines capable of holding more than 10 rounds violates the Second Amendment to the U.S. Constitution. JA19–28 (D.N.J. Opinion).

[1] Plaintiffs have moved for an injunction pending appeal. Should that motion be granted, there would be no need for this Court to issue its decision on this appeal before December 10.

2. Whether Act A2761's ban on ammunition magazines capable of holding more than 10 rounds violates the Takings Clause of the Fifth Amendment to the U.S. Constitution. JA31–33 (D.N.J. Opinion).
3. Whether Act A2761's exemption of retired law-enforcement officers from its ban on ammunition magazines capable of holding more than 10 rounds violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. JA28–30 (D.N.J. Opinion).

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before this Court previously. In a similar case, the U.S. Court of Appeals for the Ninth Circuit affirmed the grant of a preliminary injunction against California's ban on ammunition magazines capable of holding more than 10 rounds. *See Duncan v. Becerra*, No. 17-56081, 2018 WL 3433828 (9th Cir. July 17, 2018). The Ninth Circuit has ordered and received supplemental briefing on whether to rehear *Duncan en banc*. The case remains pending.

STATEMENT OF THE CASE

On June 13, 2018, the Governor of New Jersey signed into law Act A2761. *Bills 2018–2019, A2761*, N.J. STATE LEGISLATURE, https://goo.gl/THsvqi. That statute criminalizes the knowing possession of ammunition magazines capable of holding more than 10 rounds, with minor exceptions not relevant here. *See* Act A2761 § 1(y), *codified at* N.J.S.A § 2C:39-1(y); *id.* § 2C:39-3(j); *see also* Act A2761

§ 1(w)(4), *codified at* N.J.S.A § 2C:39-1(w)(4); *id.* § 2C:39-5(f). The new law applies to both the prospective purchase of SCMs and to those lawfully purchased prior to the statute's enactment. Violators of the ban face the prospect of imprisonment and fines. N.J.S.A § 2C:43-3(a)(2), (b)(2); *id.* § 2C:43-6(a)(4). The statute provides a 180-day compliance period during which New Jersey citizens who possess SCMs have three choices: (1) surrender their magazines to the State, *see* Act A2761 §§ 4(c), 5, *codified at* N.J.S.A § 2C:39-19(c); (2) transfer their magazines to "any person or firm lawfully entitled to own or possess that firearm or magazine," N.J.S.A § 2C:39-19(a); or (3) "[r]ender the . . . magazine inoperable" or permanently alter it to accept 10 rounds or less, *id.* § 2C:39-19(b). Retired law-enforcement officers, however, are specifically exempted from the ban. *See* Act A2761 § 2, *codified at* N.J.S.A § 2C:39-17.

The Association of New Jersey Rifle & Pistol Clubs, Inc. (ANJRPC) is a not-for-profit membership corporation, incorporated in New Jersey, which represents the interests of firearm owners. JA5 (D.N.J. Opinion). Blake Ellman and Alexander Dembowski are ANJRPC members and law-abiding citizens of New Jersey who do not qualify for any of the exceptions to the magazine ban. *Id.* at 5–6. They own and desire to purchase magazines capable of holding as many as 15 rounds of

ammunition (the prior legal limit)[2] to use for lawful purposes like home defense.[3] *Id.* Mr. Ellman and Mr. Dembowski, as well as other members of ANJRPC, refrain from purchasing additional SCMs because of Act A2761, and without injunctive relief, they will be forced to transfer, render inoperable, permanently modify, or surrender to the police the standard-capacity magazines they currently own by December 10.[4]

The same day that the magazine ban was signed into law, Plaintiffs filed a complaint in the District of New Jersey. *See* JA46 (Complaint). Eight days later, Plaintiffs moved for a preliminary injunction, Notice of Mot. for a Prelim. Inj. (June 21, 2018), Doc. 7, and the District Court ordered that an evidentiary hearing take place on August 13, 16, and 17, Order (July 13, 2018), Doc. 47. Following post-hearing briefing and oral argument, the District Court issued its decision on September 28 denying Plaintiffs' motion for a preliminary injunction and their motion for an injunction pending appeal. JA2, 438. Plaintiffs immediately filed a notice of appeal in the District Court. JA1. They subsequently filed a motion for

[2] JA475 (PX18, Ellman Decl. ¶¶ 6, 9); JA469 (PX10, Dembowski Decl. ¶¶ 8, 11).

[3] JA475 (PX18, Ellman Decl. ¶ 7); JA469 (PX10, Dembowski Decl. ¶ 9).

[4] JA475 (PX18, Ellman Decl. ¶¶ 8–9); JA469 (PX10, Dembowski Decl. ¶¶ 10–11). Although the compliance deadline is December 10, Citizens awaiting a decision on the appeal will soon be faced with a dwindling period in which to comply, creating (among other things) a backlog among gunsmiths "which could make it impossible to comply in time." JA452 (PX6, Bach Decl. ¶ 10).

expedited consideration of their appeal and a motion for an injunction pending appeal in this Court. This Court granted the motion to expedite on October 2. The motion for an injunction pending appeal remains under consideration.

SUMMARY OF THE ARGUMENT

New Jersey's magazine ban rests on a foundation of multiple constitutional violations. Indeed, even if this Court were to accept *all* the District Court's findings of legislative fact and were to credit *all* the State's evidence, this Court can and should reverse the District Court for five independent legal reasons.

First, the District Court found—and the evidence in the record uniformly shows—that standard-capacity magazines are in common use and typically possessed for lawful purposes such as self-defense. Once that is established, the magazine ban must fall. The Supreme Court has held that the outright prohibition of a class of arms that is protected by the Second Amendment would "fail constitutional muster" "[u]nder any of the standards of scrutiny that [it] ha[s] applied to enumerated constitutional rights." *Heller*, 554 U.S. at 628–29. That description perfectly describes New Jersey's magazine ban. The District Court erred by failing to heed *Heller*'s holding.

Second, even if it were necessary to conduct a Second-Amendment heightened-scrutiny analysis, New Jersey could not meet its burden under that framework because the ban is premised on the idea that, to regulate the *criminal* use

of SCMs, the State may ban the *lawful* use of SCMs. But that is directly contrary to the controlling opinion in *Alameda Books*, which held that the government "may not regulate the secondary effects of [protected conduct] by suppressing the [protected conduct] itself." 535 U.S. at 445 (controlling opinion of Kennedy, J.). The State's justification for the law is therefore impermissible under heightened scrutiny, yet the District Court completely ignored this limitation on governmental power.

Third, even assuming (wrongly) that the magazine ban advanced the State's asserted interests, the State would still have to show that a 10-round limit does not "burden more [conduct] than is reasonably necessary." *Marzzarella*, 614 F.3d at 98. Yet, the State submitted *no evidence*—and the District Court cited none—demonstrating that alternative measures would not meet the State's interests just as well as its 10-round magazine limit. For instance, there is *nothing* in the record that shows that a 15-round magazine limit (New Jersey's previous maximum before Act A2761) is less effective than the new 10-round limit in achieving the State's goals. This failure of proof on one of the prongs of the intermediate-scrutiny test—which the District Court never acknowledged—renders the magazine ban invalid under the Second Amendment.

Alternatively, if the Court conducts a fact-driven analysis of the State's asserted interests, the magazine ban fails to advance them. The evidence in the record—reviewed *de novo* on findings of legislative fact—overwhelmingly

demonstrates that the magazine ban will do nothing to reduce the incidence or lethality of mass shootings.

Fourth, by giving New Jersey citizens the choice between dispossessing themselves of their private property or permanently altering or disabling it, Act A2761 constitutes a physical taking of property without Just Compensation. No factual findings are necessary to adjudicate this claim, which is dictated by well-established Supreme Court precedent and the text of the Takings Clause.

Fifth, Act A2761's exception for retired law-enforcement officers violates the Equal Protection Clause. Despite holding that SCMs are protected by the fundamental Second Amendment right, the District Court erroneously applied rational-basis review to a classification affecting that right. The State's sole justification for this classification is that retired law-enforcement officers have better training with firearms compared with military veterans and average citizens. But its own expert testified that firearms training has nothing to do with a citizens' ability to safely possess ammunition magazines, and the State has failed to consider obvious alternatives to a magazine ban. The District Court ignored these flaws in the State's argument, and the proper remedy is to invalidate the ban and extend the benefit of the exemption to all New Jersey citizens.

There are multiple paths this Court could choose to reverse the District Court, but all of them lead to the same place: New Jersey's magazine ban is unconstitutional

and must be enjoined. Moreover, because there would be nothing left to adjudicate on remand, this Court should order entry of a permanent injunction.

STANDARD OF REVIEW

In seeking a preliminary injunction, a movant must show "(1) a reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured . . . if relief is not granted." *Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017). In addition, the Court, "in considering whether to grant a[n] . . . injunction, 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*. The movant need only meet the first two factors, after which a court balances all the factors, and the first factor is met where the prospect of success on merits is "significantly better than negligible." *Id.* at 179 & n.3. "How strong a claim on the merits is enough depends on the balance of the harms: the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief." *Id.* at 178.

"Despite oft repeated statements that the issuance of a preliminary injunction rests in the discretion of the trial judge[,] whose decisions will be reversed only for 'abuse,' a court of appeals *must* reverse if the district court has proceeded on the basis of an erroneous view of the applicable law." *Kos Pharms., Inc. v. Andrx Corp*., 369 F.3d 700, 708 (3d Cir. 2004) (emphasis added). "The customary discretion

accorded to a District Court's ruling on a preliminary injunction yields to [this Court's] plenary scope of review as to the applicable law." *Thornburgh v. American Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 757 (1986); *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 701 & n.9 (9th Cir. 1997).

Furthermore, aside from facts about the Plaintiffs themselves, the facts relevant to the constitutional arguments in this case—such as whether a magazine ban will reduce mass shootings—are legislative facts, not adjudicative facts. "Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." Advisory Committee Note, FED. R. EVID. 201. "Because the determination of legislative facts is thus a component of fashioning a rule of law, the clearly erroneous standard of Rule 52(a) does not apply to review of a federal court's findings concerning legislative facts." *In re Asbestos Litig.*, 829 F.2d 1233, 1252 n.11 (3d Cir. 1987) (Becker, J., concurring); *see also Lockhart v. McCree*, 476 U.S. 162, 169 n.3 (1986); *Landell v. Sorrell*, 382 F.3d 91, 135 n.24 (2d Cir. 2004), *rev'd and remanded on other grounds by* 548 U.S. 230 (2006); *United States v. Singleterry*, 29 F.3d 733, 739–40 (1st Cir. 1994); *Menora v. Illinois High Sch. Ass'n*, 683 F.2d 1030, 1036 (7th Cir. 1982). For that reason, the Supreme Court routinely finds legislative facts without according deference to

lower-court findings. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 540–46 (1996); *Dunagin v. Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (en banc) (collecting cases).

Nor is this Court limited to the record below in adjudicating questions of legislative fact. *See Daggett v. Commission on Governmental Ethics & Election Practices*, 172 F.3d 104, 112 (1st Cir. 1999); *United States v. Gould*, 536 F.2d 216, 219–20 (8th Cir. 1976); 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 2:12 (4th ed. 2018). The Supreme Court routinely relies on extra-record sources when assessing legislative facts, *see Dunagin*, 718 F.2d at 748 n.8 (collecting cases), and so may this Court.

ARGUMENT

I. Plaintiffs Are Likely to Succeed on the Merits.

A. New Jersey's Magazine Ban Violates the Second Amendment.

In *Heller*, the Supreme Court held that the Second Amendment "protect[s] an individual right to use arms for self-defense." 554 U.S. at 616. This Court has looked to the First Amendment as "the natural choice" for "guidance in evaluating Second Amendment challenges." *Marzzarella*, 614 F.3d at 89 n.4. In doing so, it has established a two-step approach. Just as the "the [Supreme] Court has identified categories of speech as fully outside the protection of the First Amendment," *Ezell v. City of Chicago*, 651 F.3d 684, 702 (7th Cir. 2011) (quotation marks omitted), this

Court first asks "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee," *Marzzarella*, 614 F.3d at 89. And just as it is the Government's burden to show that the speech at issue in a First Amendment case falls outside the scope of constitutional protection, *see United States v. Stevens*, 559 U.S. 460, 469–72 (2010), it is the Government's burden to show that the "Arms" at issue in a Second Amendment case are categorically unprotected, *see* JA20, 23 (D.N.J. Opinion); *Ezell*, 651 F.3d at 702–03; *see also New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 257 n.73 (2d Cir. 2015).

If the Government fails to meet its burden of showing that an arm is unprotected by the Second Amendment, the second step in the *Marzzarella* analysis is to "evaluate the law under some form of means-end scrutiny." 614 F.3d at 89. Because *Heller* rejected the rational-basis test, *id.* at 96–97, "some form of heightened scrutiny" is required, *id.* at 96. Thus, like step one of the *Marzzarella* test, the Government bears the burden to show that the law survives review. *Id.* at 97–98. And as *Heller* makes clear, there are some laws that do not require a heightened-scrutiny analysis because they would "fail constitutional muster" "[u]nder any of the standards of scrutiny that [courts] have applied to enumerated constitutional rights." 554 U.S. at 628–29. Rather, such laws are "categorically unconstitutional." *Ezell*, 651 F.3d at 703; *see also Young v. Hawaii*, 896 F.3d 1044,

1070–71 (9th Cir. 2018); *Wrenn v. District of Columbia*, 864 F.3d 650, 665 (D.C. Cir. 2017).[5] They include those laws, like the handgun ban in *Heller*, that "extend[ ] . . . to the home" and prohibit the possession of "a class of 'arms' " protected by the Second Amendment. 554 U.S. at 628–29.

Because "the Government bears the burden of proof on the ultimate question of [the magazine ban's] constitutionality," Plaintiffs "must be *deemed* likely to prevail" at both steps of the *Marzzarella* analysis unless the Government can carry its burden. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (emphasis added); *see also Reilly*, 858 F.3d at 180. Proper application of *Heller* and *Marzzarella* requires invalidation of New Jersey's magazine ban.

1. SCMs Are Protected by the Second Amendment.

The District Court held, and the State does not dispute, that standard-capacity magazines are "Arms" within the meaning of the Second Amendment. JA21 (D.N.J. Opinion) (collecting cases); *see also Kolbe v. Hogan*, 813 F.3d 160, 175 (4th Cir. 2016), *on reh'g en banc*, 849 F.3d 114 (4th Cir. 2017). Because SCMs are "Arms," they are presumptively protected by the Second Amendment because "the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms."

[5] Plaintiffs reserve the right to argue in subsequent proceedings that a tiers-of-scrutiny analysis is *always* inappropriate 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).

Heller, 554 U.S. at 582; *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1027 (2016). As recounted above, the burden is therefore on the State—at step one of the *Marzzarella* analysis—to show that standard-capacity magazines are outside the scope of the Second Amendment. The State asserts that two limitations on the scope of the Second Amendment apply: the exception for dangerous and unusual weapons and the presumptive legality of longstanding regulatory measures. The District Court rejected both arguments, and so should this Court.

a. SCMs Are in Common Use in the United States.

Heller was very clear about the test for determining whether arms are within the Second Amendment's scope: "the sorts of weapons protected" are those "in common use." 554 U.S. at 627; *see also id.* at 624–27. Accordingly, this Court has recognized that common use is the relevant test: "In *Heller*, the Court explained that *Miller* stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons—*those commonly owned by law-abiding citizens*." *Marzzarella*, 614 F.3d at 90 (emphasis added) (citation and quotation marks omitted); *see also United States v. One (1) Palmetto State Armory PA-15 Machinegun Receiver/Frame, Unknown Caliber Serial No. LW001804*, 822 F.3d 136, 141 (3d Cir. 2016).

Heller acknowledged that there is a historical tradition exempting "dangerous and unusual" arms from Second Amendment protection, but it did so in contrast with

those arms in common use. 554 U.S. at 627. As this Court has recognized, the "proposition" that "the Second Amendment right . . . extends only to . . . [arms] commonly owned by law-abiding citizens" "reflected a historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.' " *Marzzarella*, 614 F.3d at 90 (quotation marks omitted). In other words, if a type of arm (such as SCMs) is in "common use," it cannot be dangerous *and unusual*. *See Caetano*, 136 S. Ct. at 1031 (Alito, J., concurring). That is why, in *One (1) Palmetto*, this Court held that machine guns were unprotected by the Second Amendment only after first finding that they were *both* "not in common use for lawful purposes" *and* "exceedingly dangerous weapons." 822 F.3d at 142.

Openly flouting these binding precedents, the State argued below that *Heller* established an "exception [to the Second Amendment] for 'dangerous weapons' " Brief in Opp'n to Pls.' Mot. for a Prelim. Inj. at 9 (July 5, 2018), Doc. 31 ("PI Opp'n"), adopting the Fourth Circuit's test from *Kolbe v. Hogan*, 849 F.3d 114, 137 (4th Cir. 2017) (*en banc*). But as the District Court correctly held, the Supreme Court has rejected a free-floating "dangerousness" test. JA22–23 (D.N.J. Opinion); *Kolbe*, 849 F.3d at 155 (Traxler, J., dissenting). Indeed, it was precisely that type of balancing test that Justice Breyer proposed in *dissent* in *Heller*. Justice Breyer would have upheld the D.C. ban based on the danger handguns posed. Handguns are "the overwhelmingly favorite weapon of armed criminals" and crimes committed with

handguns are "7 times more likely to be lethal than a crime committed with any other weapon." 554 U.S. at 682, 695 (Breyer, J., dissenting). Notwithstanding that argument, *Heller* held that handguns were protected by the Second Amendment and invalidated the D.C. handgun ban. *Id.* at 636. The State's arbitrary test is foreclosed.

Applying the common-use test, there can be no question that SCMs are protected by the Second Amendment. The State submitted *no evidence* as to the quantity or availability of SCMs in the United States, and the uncontradicted evidence is that there are *at least* 58.9 million civilian-owned SCMs in the United States.[6] Magazines capable of holding more than 10 rounds come standard on some of the most popular handguns[7] and rifles,[8] including *the* most popular rifle in

[6] *See* Gary Kleck, *How Many Large Capacity Magazines (LCMs) Are Possessed By Americans?*, SSRN (2018), https://goo.gl/XFYkpc; *see also* JA67 (Tr. 372:14–16 (Kleck)) (percentage of firearms with SCMs); JA516–17 (PX30, Edward W. Hill, *How Many Guns are in the United States: Americans Own between 262 Million and 310 Million Firearms*, URBAN PUBLICATIONS (2013)) (total number of firearms).

[7] JA680–82 (PX48, GUN DIGEST 2018 (Jerry Lee and Chris Berens, ed. 2017)); (Glocks); *id.* at 670 (Beretta); *id.* at 671 (Bersa); *id.* at 695 (Dan Wesson); *id.* at 680 (Fabrique Nationale); *id.* at 688 (Smith & Wesson); *id.* at 685 (Ruger); *id.* at 674–75, 694–95 (CZ); *id.* at 678 (European American Armory); *id.* at 688 (Sig Sauer); *id.* at 691 (Taurus); JA449, 451 (PX5, MASSAD AYOOB, THE COMPLETE BOOK OF HANDGUNS (2013)); JA994–96 (DX39, Brian Freskos, *Baltimore Police Are Recovering More Guns Loaded With High-Capacity Magazines, Despite Ban on Sales*, THE TRACE (Mar. 28, 2017)).

[8] JA696–704 (PX48, GUN DIGEST 2018); JA753 (PX58, NSSF, MODERN SPORTING RIFLE COMPREHENSIVE CONSUMER REPORT 2013 (2013)).

America.[9] SCMs are legal under the laws of 42 states, *Caetano*, 136 S. Ct. at 1032 (Alito, J., concurring),[10] and even the State's expert, Professor John Donohue, admits that SCMs have been "easily available."[11] "There may well be some capacity above which magazines are not in common use but . . . that capacity surely is not ten." *Heller II*, 670 F.3d at 1261; *see also New York State Rifle & Pistol Ass'n, Inc.*, 804 F.3d at 255; *Kolbe*, 813 F.3d at 174. As the District Court correctly held, because SCMs are in common use, the "dangerous and unusual" limitation on the scope of the Second Amendment does not apply. JA23 (D.N.J. Opinion).

The State argued below that the foregoing evidence is insufficient to demonstrate common use because (it asserts) firearm ownership is increasingly concentrated among fewer households and there is no evidence as to how SCMs are actually *used* by Americans. Those assertions are both irrelevant and wrong. *Heller* held that handguns were in common use and protected by the Second Amendment without inquiring into either the concentration of firearms ownership or how handguns were used. It was sufficient that handguns were extremely popular and

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[9] JA500 (PX27, Dan Haar, *America's Rifle: Rise of the AR-15*, HARTFORD COURANT (Mar. 9, 2013)); JA1239 (JX12, David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALB. L. REV. 849 (2015)).

[10] JA1185 (JX8, GIFFORDS LAW CENTER, SUMMARY OF STATE LAW (2018) (entries for New Jersey and Vermont not yet updated); JA67 (Tr. 183:20–23; 152:1–6 (Donohue)).

[11] JA67 (Tr. 183:20–23; 152:1–6).

typically *possessed*—rather than *used*—for lawful purposes. 554 U.S. at 624–29. Indeed, this Court has squarely rejected the argument that how an arm is actually used is relevant under the common-use test. *See One (1) Palmetto*, 822 F.3d at 143–44. Moreover, the District Court rightly pointed out that the burden is on the State to show that SCMs are not in common use, and "noting the absence of evidence does not suffice" to carry that burden. JA23 (D.N.J. Opinion). But, in any event, the evidence shows that the number of households that own firearms has remained fairly constant since the 1990s[12] and that SCMs are typically used for lawful purposes.[13] Indeed, even if (contrary to all evidence and common sense) *all* firearm-related crimes were committed using SCMs, that would still amount to *less than 1%* of the entire population of SCMs.[14] SCMs are within the Second Amendment's scope.

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[12] JA822–23 (PX83, GALLUP, GUNS (2018)); JA67 (Tr. 158:10–16 (Donohue)); JA718 (PX50, ALAN I. LESHNER, ET AL., PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE (2013)); JA760 (PX63, KIM PARKER, ET AL., AMERICA'S COMPLEX RELATIONSHIP WITH GUNS, PEW RESEARCH CENTER (2017)); JA67 (Tr. 161:24–162:4 (Donohue)).

[13] JA67 (Tr. 163:22–165:17 (Donohue)); JA857 (DX8, Deborah Azrael et al., *The Stock and Flow of U.S. Firearms: Results from the 2015 National Firearms Survey*, 3 RUSSELL SAGE FOUNDATION J. OF THE SOCIAL SCIENCES 38 (2017)); JA463–65 (PX8, PHILIP J. COOK AND JENS LUDWIG, GUNS IN AMERICA (1996)); JA762 (PX63, PARKER); JA753, 756 (PX58, NSSF); JA604, 606–07 (PX40, KLECK).

[14] JA1286 (GUN VIOLENCE, NATIONAL INSTITUTE OF JUSTICE (Mar. 13, 2018), https://goo.gl/73Apha) (467,321 victims of gun crimes in 2011 divided by at least 58.9 million SCMs).

b. There Is No Tradition of Limiting Magazine Capacity.

The State also asserts that its magazine ban is "presumptively lawful" as a "longstanding" regulatory measure under *Heller*, 554 U.S. at 626–27 & n.26, but it is undisputed that New Jersey had never enacted a limit on ammunition magazines until 1990.[15] Nor is there is a historical tradition outside of New Jersey for limiting magazine capacity. Although standard-capacity magazines are older than the Second Amendment and were mass-produced by the 1860s,[16] the first state or federal limitation on magazine capacity was not enacted until 1927.[17] During the Prohibition Era, California, Michigan, Rhode Island, and Virginia enacted magazine limits (though California's and Virginia's were not flat-out bans), but all four laws were repealed by the 1970s.[18] *Cf. Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 797 (2011) (Court's previous decisions permitting censorship of movies were not evidence of "longstanding tradition" because the Court later "reversed course"). Other laws either were not interpreted as bans on any particular magazine or gun[19]

[15] JA1245 (JX12, Kopel).

[16] JA1235–36 (JX12, Kopel).

[17] JA1242–43 (JX12, Kopel).

[18] JA1242–43 (JX12, Kopel); JA522 (PX33, NICHOLAS J. JOHNSON, ET AL., FIREARMS LAW & THE SECOND AMENDMENT: REGULATION, RIGHTS, & POLICY (2018)).

[19] JA1243 (JX12, Kopel).

or were not generally applicable laws restricting the magazine capacity of semiautomatic firearms.[20] The only magazine ban originating in the Prohibition Era that remains in place in some form today is the District of Columbia's.[21] Far from *supporting* New Jersey's ban, historical tradition *condemns* it. JA24 (D.N.J. Opinion); *Heller II*, 670 F.3d at 1260; *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1119 (S.D. Cal. 2017).

2. New Jersey's Magazine Ban Is *Per Se* Unconstitutional.

Once it is established that the Second Amendment protects standard-capacity magazines, the second step of the *Marzzarella* analysis requires little discussion. New Jersey has banned an entire class of arms covered by the Second Amendment, even prohibiting possession in the home. Under *Heller*, there is no need to conduct a tiers-of-scrutiny analysis; such a law is categorically unconstitutional.

Although *Heller* is a lengthy opinion, its analysis of the constitutionality of the D.C. handgun ban is remarkably brief. The Court required only two pages to explain why the law was invalid, and it saw no need to apply any of the tiers of scrutiny. *See* 554 U.S. at 628–29. Its analysis in those two pages is fully applicable to Act A2761. The D.C. handgun ban "amount[ed] to a prohibition of an entire class of 'arms,' " *id.* at 628; the same is true of New Jersey's magazine ban. The D.C.

[20] JA65 (Everytown Br. 6 n.11).

[21] JA1244 (JX12, Kopel).

handgun ban "extend[ed], moreover, to the home, where the need for defense of self, family, and property is most acute," *id.*; the same is true of New Jersey's magazine ban. And "[f]ew laws in the history of our Nation have come close to the severe restriction of [the D.C. handgun ban]," *id.* at 629; the same is true of New Jersey's magazine ban. Like the D.C. handgun ban, the New Jersey magazine ban is flatly unconstitutional.

Subsequent Supreme Court precedent confirms that New Jersey's ban is *per se* unconstitutional. In *McDonald*, the Supreme Court described *Heller*'s analysis as follows: having "found that [the Second Amendment] right applies to handguns," the Court "concluded" that "citizens must be permitted to use handguns for the core lawful purpose of self-defense." *McDonald*, 561 U.S. at 767–68 (quotation marks and brackets omitted). Then, in *Caetano*, the Court summarily vacated a decision of the Massachusetts Supreme Judicial Court that had departed from this approach in upholding a ban on stun guns. 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).

This approach is consistent with *Marzzarella*'s second step. Previously, this Court has not had to declare a law categorically unconstitutional because none of its

post-*Heller* cases has involved a law that this Court regarded as a ban on a class of arms, conduct, or persons protected by the Second Amendment. *See Binderup v. Attorney General*, 836 F.3d 336, 345 (3d Cir. 2016) (Ambro, J.) (18 U.S.C. § 922(g) not a ban); *One (1) Palmetto*, 822 F.3d at 142 (machine guns not protected by Second Amendment); *United States v. Napolitan*, 762 F.3d 297, 311 (3d Cir. 2014) (violating 18 U.S.C. § 924(c) not protected conduct); *Drake v. Filko*, 724 F.3d 426, 428–29, 431 (3d Cir. 2013) (issue was right to carry, not class of arms, and this Court held that law in question was longstanding and presumptively constitutional); *Marzzarella*, 614 F.3d at 97 (18 U.S.C. § 922(k) not a ban on types of arms); *United States v. Huet*, 665 F.3d 588, 602 (3d Cir. 2012) (aiding and abetting a violation of 18 U.S.C. § 922(g) not protected conduct); *United States v. Barton*, 633 F.3d 168, 175 (3d Cir. 2011) (felon not protected).[22] Nonetheless, at least five judges of this Court have applied *Heller*'s categorical analysis where they believed that a law *did* ban protected conduct, *see Binderup*, 836 F.3d at 363–65 (Hardiman, J.), and other courts with two-step tests similar to *Marzzarella*'s have done the same, *see, e.g.*,

[22] The same is true of this Court's unpublished opinions. *See Bell v. United States*, 574 F. App'x 59, 60 (3d Cir. 2014) (felon not protected); *United States v. Hauck*, 532 F. App'x 247, 250 (3d Cir. 2013) (same); *Dutton v. Commonwealth*, 503 F. App'x 125, 127 n.1 (3d Cir. 2012) (same); *United States v. Ross*, 323 F. App'x 117, 119 (3d Cir. 2009) (machine guns unprotected); *United States v. Zuckerman*, 367 F. App'x 291, 294 (3d Cir. 2009) (conduct not protected); *Costigan v. Yost*, 334 F. App'x 460, 462 (3d Cir. 2009) (*Heller* inapplicable).

Young, 896 F.3d at 1070–71; *Wrenn*, 864 F.3d at 665. Applying that analysis here, New Jersey's law is *per se* invalid.

The District Court disregarded *Heller*'s *per se* invalidity rule, asserting that New Jersey has not banned a class of arms because citizens remain free to use magazines holding 10 or fewer rounds. JA25–26 (D.N.J. Opinion). But *Heller* expressly rejected that reasoning. Just as "[i]t is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed," *Heller*, 554 U.S. at 629, it is no answer to say that it is permissible to ban the possession of SCMs so long as the possession of *other* magazines is allowed. *Heller*'s "common use" test is premised on the idea that the individual, not the State, gets to choose which among the various commonly used arms he or she wishes to possess for self-defense.

Although law-abiding individuals do not need to provide a reason for such a choice, "[t]here are many reasons that a citizen may prefer a [standard-capacity magazine] for home defense." *Id.* There are approximately 2.5 million defensive gun

uses (DGUs) each year,[23] almost 1 million of which occur in the home,[24] and the majority of DGUs involve fighting off multiple attackers.[25] Indeed, in 2008 there were 247,388 violent crime incidents in which the victim faced four or more assailants.[26] Because police hit about 37% of their targets, it is reasonable to assume that average citizens will require at least 12 rounds to shoot four attackers.[27] It is not surprising, therefore, that evidence collected by the State's own expert indicates that

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[23] JA633–35 (PX42, GARY KLECK & DON B. KATES, JR., ARMED: NEW PERSPECTIVE ON GUN CONTROL (2001)); JA1227 (JX11, Gary Kleck and Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, J. OF CRIM. L. & CRIMINOLOGY 150 (1995)); JA615, 619, 262–29 (PX41, Gary Kleck, *What Do CDC's Surveys Say About the Frequency of Defensive Gun Uses?*, SSRN (2018); JA718 (PX50, LESHNER, ET AL.); JA812 (PX78, CHARLES F. WELLFORD, ET AL., FIREARMS AND VIOLENCE: A CRITICAL REVIEW (2005)). The District Court asserted that this study was based on a "poor sample" and that the 2.5 million-DGU estimate is inconsistent with Professor Kleck's subsequent statements. JA17, 27 (D.N.J. Opinion). The District Court ignored Professor Kleck's lengthy and detailed responses to critics of his sample, *see* JA637–52 (PX42, KLECK & KATES), as well as his explanation of his subsequent statements, JA67 (Tr. 357:1–19 (Kleck)).

[24] 37.3% of DGUs occur in the home. JA67 (Tr. 297:7–14 (Kleck)); JA1230 (JX11, Kleck and Gertz). 37.3% multiplied by 2.5 million DGUs is 932,500 DGUs.

[25] JA67 (Tr. 358:18–22 (Kleck)); JA1231 (JX11, Kleck and Gertz).

[26] JA1192 (JX9, Kleck Decl.); JA67 (Tr. 358:12–17 (Kleck)); JA790 (PX76, DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES (2010)).

[27] JA67 (Tr. 359:2–360:17 (Kleck)); JA67 (Tr. 78:16–79:5, 83:2–6 (Stanton)); JA1192–93 (JX9, Kleck Decl. ¶¶ 14–15)); JA1274 (JX14, CHRISTOPHER S. KOPER, AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN (2004)); JA442, 443, 446 (PX4, THOMAS J. AVENI, OFFICER-INVOLVED SHOOTINGS: WHAT WE DIDN'T KNOW HAS HURT US (2003)).

annually at least 4,663 DGUs in the home involve the defender firing more than 10 rounds.[28] And while criminals choose the time and place of their attacks and come ready with their preferred weaponry, it is unrealistic to expect victims to have access to multiple firearms or magazines in every room of their homes.[29] New Jersey's ban therefore disadvantages victims relative to their attackers, JA16 (D.N.J. Opinion), notwithstanding the District Court's suggestion that citizens can simply purchase multiple magazines, *id.* at 26. As the State's expert, Detective Stanton, testified, all else being equal, it would be preferable for civilians to have SCMs during a gunfight.[30]

"Whatever the reason, [standard-capacity magazines] are [among] the most popular weapon[s] chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Heller*, 554 U.S. at 629.

3. Alternatively, New Jersey's Magazine Ban Fails Heightened Scrutiny.

[28] The State's expert, Lucy Allen, found that 0.5% of DGUs in the home involve the defender firing more than 10 rounds. JA67 (Tr. 14:2–4); JA846 (DX3, Allen Decl.). Thus, according to Professor Allen's data, approximately 4,663 DGUs in the home each year involve the defender firing more than 10 rounds (0.5% x 932,500).

[29] JA76 (Tr. 355:17–356:21 (Kleck)); JA76 (Tr. 80:15–21, 79:10–80:4 (Stanton)); JA1190 (JX9, Kleck Decl. ¶¶ 16–17).

[30] JA67 (Tr. 78:4–80:4).

If this Court nonetheless proceeds to a tiers-of-scrutiny analysis, the answer is the same: New Jersey's ban is unconstitutional. Even under a scrutiny analysis, this Court need not delve into the factual disputes between the parties. New Jersey's ban fails heightened scrutiny for two independent legal reasons, both of which the District Court *completely ignored* in its opinion.

First, the theory underlying the State's magazine ban is contrary to *Alameda Books*. There, Los Angeles banned the establishment of more than one adult bookstore in a single building to reduce the secondary effects associated with such bookstores, including crime. 535 U.S. at 429–30 (plurality opinion). The Supreme Court reversed and remanded to allow the city another opportunity to defend its law after correcting for an error in the court of appeals' analysis. Concurring in the judgment, Justice Kennedy's controlling opinion warned the city that, although it could impose content-neutral regulations to reduce crime, it

> may not regulate the secondary effects of speech by suppressing the speech itself . . . . Though the inference may be inexorable that a city could reduce secondary effects by reducing speech, this is not a permissible strategy. The purpose and effect of a zoning ordinance must be to reduce secondary effects and not to reduce speech.

Id. at 445.

Applying this principle, the D.C. Circuit rejected D.C.'s argument that it could limit its citizens to one pistol registration per month to reduce the "misuse of firearms." *Heller v. District of Columbia* ("*Heller III*"), 801 F.3d 264, 280 (D.C. Cir.

2015). As the D.C. Circuit said, the district's rationale "taken to its logical conclusion," "would justify a total ban on firearms kept in the home," which is unconstitutional. *Id.*

Just as D.C. sought to limit the quantity of firearms that its citizens could use at any given time, New Jersey seeks to limit the quantity of ammunition that its citizens can use at any given time. The State wishes to "regulate the secondary effects of [a class of protected arms] by suppressing the [the class] itself." *Alameda Books*, 535 U.S. at 445 (Kennedy, J.). That is an impermissible means of achieving the State's interests, regardless of whether the magazine ban actually advances those interests. *Cf. Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002) ("The prospect of crime, however, by itself does not justify laws suppressing protected speech."); *Annex Books, Inc. v. City of Indianapolis*, 740 F.3d 1136, 1137 (7th Cir. 2014).

Second, even assuming (wrongly) that a magazine ban would advance the State's asserted interests, New Jersey would still have to show that a 10-round limit does not "burden more [conduct] than is reasonably necessary." *Marzzarella*, 614 F.3d at 98. If, for example, New Jersey's previous 15-round limit would achieve the State's objectives equally as well as a 10-round limit, the 10-round limit would *ipso facto* burden the right to keep and bear arms more than is reasonably necessary. Yet, the State offered *no evidence* comparing the relative efficacy of a 10-round limit and

a 15-round limit, both parties' experts agree that no such evidence exists,[31] and the District Court cited none. Indeed, New Jersey suffered *no mass shootings* while its 15-round limit was in effect,[32] which would be powerful evidence that the previous limit was effective and less burdensome if one (incorrectly) assumed that magazine bans prevent mass shootings. Furthermore, the State has offered no evidence regarding any of the following alternative means of achieving its interests: limiting the magazine ban to outside the home; imposing a licensing requirement for SCMs; or requiring SCMs to be stored in a secure way when not in use. Under *McCullen v. Coakley*, this failure of proof on one of the prongs of the intermediate-scrutiny test—standing alone—requires holding New Jersey's 10-round limit unconstitutional. *See* 134 S. Ct. 2518, 2537–40 (2014); *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370–71 & nn.17–18 (3d Cir. 2016).

But even if this Court were to overlook these two decisive legal flaws in the State's argument (as well as *Heller*'s clear teaching that a ban on a protected class of arms is categorically unconstitutional), the State has failed to satisfy heightened scrutiny. By banning the possession of SCMs *everywhere* in the State, New Jersey's law "implicates [the] interest in the defense of hearth and home—the core protection of the Second Amendment," *Marzzarella*, 614 F.3d at 94, and as the State concedes,

[31] JA67 (Tr. 377:3–6 (Kleck)); JA928 (DX24, Donohue Dep. Tr. 23:15–18).

[32] JA67 (Tr. 173:3–5 (Donohue)).

"if a law burdens the core of the right conferred upon individuals by the Second Amendment, strict scrutiny is required," PI Opp'n at 19 (quotation marks omitted). Whereas this Court has suggested that intermediate scrutiny might be appropriate where a law "was neither designed to nor ha[d] the effect of prohibiting the possession of any class of firearms," *Marzzarella*, 614 F.3d at 97, New Jersey's law has precisely that design and effect, so strict scrutiny applies. In applying intermediate scrutiny, the District Court failed to appreciate the distinction between a law that permits citizens to continue to possess a class of arms under certain conditions (the situation in *Marzzarella*) and a law that forbids citizens from continuing to possess a class of arms under *any* conditions (the situation here and in *Heller*). JA25 (D.N.J. Opinion). *Marzzarella* makes clear that the latter context warrants strict scrutiny. 614 F.3d at 97.

Nonetheless, even under intermediate scrutiny—where New Jersey must show that the ban advances a substantial governmental interest and that the statute does not "burden more [of the right to keep and bear arms] than is reasonably necessary," *id.* at 98—the State has failed to carry its burden of showing that its magazine ban will advance its asserted interests. The State posits three interests: (1) the reduction of firearm-related crime in general; (2) the reduction of police murders; and (3) the reduction of the incidence and lethality of mass shootings. The magazine ban will accomplish none of these objectives.

The State barely defends its first two rationales, and the District Court did not rely on them. That is not surprising, since there is no evidence to support either one. The State's own expert, Professor John Donohue, testified that an SCM ban will not reduce violent crime generally,[33] and when asked about the federal SCM ban that was in place between 1994 and 2004, he agreed with a government-commissioned 2004 report that concluded "we cannot clearly credit the [federal SCM] ban with any of the nation's recent drop in gun violence."[34] JA15 (D.N.J. Opinion). Indeed, the failure of the federal ban to reduce firearm-related violence is well-established in the literature, even among supporters of the ban.[35]

The police-protection rationale is equally flimsy. The only evidence that the State cites in support of that justification is a study of FBI data that, by its own terms,

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[33] JA67 (Tr. 169:19–171:2).

[34] JA67 (Tr. 171:16–172:1).

[35] JA1284 (JX14, KOPER); JA749 (PX56, Carlisle E. Moody, *Large capacity magazines and homicide*, COLLEGE OF WILLIAM & MARY WORKING PAPER (2015)); JA664, 665–66 (PX45, Christopher S. Koper, *America's Experience with the Federal Assault Weapons Ban, 1994–2004*, *in* REDUCING GUN VIOLENCE IN AMERICA 157 (Daniel W. Webster and Jon S. Vernick, ed. 2013)); JA1049 (DX66, Christopher S. Koper and Jeffrey A. Roth, *The Impact of the 1994 Federal Assault Weapons Ban on Gun Violence Outcomes: An Assessment of Multiple Outcome Measures and Some Lessons for Policy Evaluation*, 17 J. OF QUANTITATIVE CRIMINOLOGY 33 (2001)); JA1249 (JX13, JEFFREY A. ROTH & CRISTOPHER S. KOPER, IMPACT EVALUATION OF THE PUBLIC SAFETY & RECREATIONAL FIREARMS USE PROTECTION ACT OF 1994 (1997)).

says *nothing* about what portion of police murders actually involve SCMs.[36] Rather, the study merely shows what portion of police murders involve firearms that *could* use SCMs.[37] The same is true of the study relied upon by the District Court.[38] When Plaintiffs' expert, Professor Gary Kleck, analyzed FBI data regarding police murders, he found that *none* of the incidents could be verified as having involved an SCM and only 1.4% of them had any suggestion that they *might* have involved an SCM.[39] Of course, even if a significant portion of police murders involved SCMs, that would not prove that SCMs *cause* police murders. This rationale, like the crime-reduction rationale, has no basis in evidence.

In truth, the State's justification for its magazine ban stands or falls on its mass-shooting rationale, the only interest relied on by the District Court. JA26–28 (D.N.J. Opinion). Such incidents are, of course, extremely rare in comparison with the DGUs in the home involving multiple attackers, accounting for only four

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[36] JA1054 (DX68, Christopher S. Koper, et al., *Criminal Use of Assault Weapons and High-Capacity Semiautomatic Firearms: an Updated Examination of Local and National Sources*, J. Urban Health (2017).

[37] *Id.*

[38] JA6 (D.N.J. Opinion) (citing JA1263 (JX14, KOPER)).

[39] JA547 (PX37, Kleck, Supp. Decl. ¶¶ 63–64).

incidents per year[40] and "[l]ess than one percent of gun murder victims recorded by the FBI in 2012."[41] But here, again, the evidence is overwhelmingly against New Jersey, and the District Court's rationale has no limiting principle that would prevent the State from banning *all* magazines.

"Despite the good intentions behind the [federal SCM] ban, its impact on mass killings was negligible . . . . [T]he frequency of incidents was virtually unchanged during the decade when the ban was in effect."[42] That is not surprising, since a person who is willing to commit murder on a mass scale is unlikely to dutifully obey a law prohibiting the use of SCMs.[43] As the State's experts conceded, mass shooters "will use whatever they have available" to commit their crimes,[44] and "somebody who is about to . . . break a law" is "[p]robably not" "going to limit himself or herself to

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[40] JA1068–69 (DX70, William J. Krouse and Daniel J. Richardson, *Mass Murder with Firearms: Incidents and Victims, 1999–2013*, CONGRESSIONAL RESEARCH SERVICE (2015)).

[41] JA940 (DX27, EVERYTOWN FOR GUN SAFETY, ANALYSIS OF RECENT MASS SHOOTINGS (2015)).

[42] JA827–28 (PX84, James Alan Fox and Emma E. Fridel, *The Tenuous Connections Involving Mass Shootings, Mental Illness, and Gun Laws*, 3 VIOLENCE AND GENDER 14 (2016)); *see also* JA666 (PX45, Koper).

[43] JA67 (Tr. 182:3–193:6 (Donohue)).

[44] JA67 (Tr. 184:14–20 (Donohue)).

firearms or magazines that are legal under state law."[45] It is particularly nonsensical to believe that a *state-level* ban will prevent mass shooters from acquiring SCMs.[46] The uncontradicted evidence shows that mass murderers are highly motivated and engage in extensive planning,[47] and given the availability of SCMs in Delaware and Pennsylvania,[48] mass shooters will continue using SCMs to the extent they desire to do so, since "anyone in New Jersey can drive across state lines to purchase one of these magazines."[49] The ease with which criminals can circumvent a state-level ban explains why Maryland's SCM law "has done little to stamp out the use of big magazines by criminals" and has been "hobbled by inflows of weapons from other states, few of which limit magazine size."[50]

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[45] JA67 (Tr. 81:13–19 (Stanton)); JA512 (PX29, Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right to "Bear Arms,"* 49 L. & CONTEMP. PROBS. 151 (1986)).

[46] *Cf.* JA1272 (JX14, KOPER) (state-level automatic-weapon bans undermined by "influx of [automatic weapons] from other states").

[47] JA67 (Tr. 370:7, 20–22 (Kleck)); *see also* JA67 (Tr. 363:8–13 (Kleck)); JA826 (PX84, Fox and Fridel (describing "detailed planning involved in large-scale mass shootings")); JA574 (PX38, Gary Kleck, *Mass Shootings in Schools: The Worst Possible Case for Gun Control*, 52 AM. BEHAVIORAL SCIENTIST 1447 (2009) (Columbine murderers planned their attack for over a year)).

[48] JA998 (DX45, GIFFORDS LAW CENTER).

[49] JA67 (Tr. 82:6–13 (Stanton)).

[50] JA993, 996 (DX39, Brian Freskos, *Baltimore Police Are Recovering More Guns Loaded With High-Capacity Magazines, Despite Ban on Sales*, THE TRACE (Mar. 28, 2017)). The District Court was therefore wrong in asserting that a state-

Even if New Jersey's ban *would* prevent mass shooters from acquiring SCMs, the State has offered no evidence that SCMs *cause* mass shootings. In fact, contrary to the District Court's assertions, there is not even a statistical *association* between mass shootings and SCMs: between 94% and 99% of mass shootings do not involve SCMs.[51] Even Everytown for Gun Safety, an amicus supporting the State, calculates that at least 89% of mass shootings do not involve SCMs.[52] And in those instances in which magazines above 10 rounds *are* used, there is no evidence that they typically are magazines holding 11–15 rounds; rather, the evidence shows that the magazines generally would have *already been banned* by New Jersey's previous 15-round limit.[53] The State has only been able to identify five mass shootings in *all of*

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level ban will decrease the number of SCMs in the hands of criminals. JA16 (D.N.J. Opinion).

[51] JA547 (PX37, Kleck Supp. Decl. ¶¶ 26–29) (99%); JA67 (Tr. 347:14– 23 (Kleck)); JA1212 (JX10, Gary Kleck, *Large-Capacity Magazines and the Casualty Counts in Mass Shootings: The Plausibility of Linkages*, 17 JUSTICE & RESEARCH POL. 28 (2016)) (94%).

[52] JA942 (DX27, EVERYTOWN). The District Court relied on an analysis of 1984–1993 data for its claim that 40% of mass shootings involve SCMs, JA6 (D.N.J. Opinion), but the data analyzed by Professor Kleck and Everytown covers a much broader—and more recent—universe of shootings. For instance, Everytown analyzed 133 mass shootings between January 2009 and July 2015 in concluding that at least 89% of them did not involve SCMs. JA940, 942 (DX27, EVERYTOWN). The District Court did not acknowledge this contrary evidence.

[53] *See, e.g.*, JA67 (Tr. 178:23–179:5 (Donohue describing Las Vegas shooting)); JA1165–66 (JX3, MASS SHOOTING INCIDENTS IN AMERICA (1984–2012), CITIZENS CRIME COMMISSION (2017) (Sandy Hook and Aurora shootings)).

U.S. history involving SCMs holding 11–15 rounds.[54] The District Court did no better: SCMs holding 11–15 rounds were not known to have been used in *any* of the mass shootings it cited.[55] JA6–7, 14 (D.N.J. Opinion). New Jersey's ban will thus have an insignificant effect on mass shootings, even if it stopped mass shooters from acquiring SCMs. The District Court failed to mention—let alone refute—any of the foregoing evidence on mass shootings.

But assume, for the sake of the argument, that New Jersey's law prevented mass shooters from acquiring SCMs and that SCMs of 11–15 rounds were used in a significant number of mass shootings. Even under those (false) assumptions, the ban would have no effect on the incidence or lethality of mass shootings. That is because *every single mass shooter* known to have used an SCM between 1994 and 2013 used multiple firearms, multiple magazines, or both,[56] so a ban on SCMs would not affect the number of rounds that the mass shooter could deploy. The District Court and the

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[54] *See* Defs.' Proposed Findings of Fact and Conclusions of Law ¶¶ 45, 50 (Sept. 4, 2018), Doc. 61 ("DFOF").

[55] *See* JA1165 (JX3, CITIZENS CRIME COMMISSION) (Lanza used 30-round magazines); *id.* at 4 (Hasan used 30- and 20-round magazines); DFOF ¶ 52–53 (Loughner used a 31-round magazine to inflict all wounds); JA1288 (Melanie Burney, *Second Man Charged in Trenton Art Festival Shooting*, PHILADELPHIA ENQUIRER (June 19, 2018), https://goo.gl/2Z988e) (30-round magazine used). The Navy Yard shooting involved a shotgun, which does not have a magazine, and the size of the magazine used in the Waffle House shooting is unknown.

[56] JA1190 (JX9, Kleck Decl. ¶¶ 22–25); JA1208–09, 1214–16 (JX10, Kleck); JA828 (PX84, Fox and Fridel).

State speculate that, by forcing a mass shooter to change magazines more often, the magazine ban will create pauses in shooting that will give victims the chance to escape or tackle the shooter. JA27 (D.N.J. Opinion). But the only peer-reviewed study in the record that examined the State's hypothesis concluded that mass shooters almost always take longer between shots than the time it would take to change a magazine, which means more magazine changes will have no effect on their rate of fire.[57] The District Court discounted this peer-reviewed study based on its own assertion that the study assumed unrealistic magazine change-times, JA17 (D.N.J. Opinion), but the State's *own witness* agreed with the study's estimate of magazine change-times.[58] Moreover, the District Court ignored Professor Kleck's explanation of why his estimate realistically approximated mass-shooting change-times, in particular.[59] Instead, the District Court's based its view on three mass shootings, JA6–7 (D.N.J. Opinion), none of which definitively involved intervention or escape while the shooter was reloading a firearm that uses a magazine.[60] Perhaps that is why bystanders almost never intervene to stop mass shootings involving

[57] JA67 (Tr. 360:23–367:2) (Kleck)); JA1190 (JX9, Kleck Decl. ¶¶ 22, 30–31); JA1207, 1216–18 (JX10, Kleck).

[58] JA67 (Tr. 74:19–22 (Stanton)).

[59] JA67 (Tr. 363:2–24).

[60] *See* JA1190 (JX9, Kleck Decl. ¶ 27) (Giffords shooting); JA547 (PX37, Kleck Supp. Decl. ¶ 32) (Sandy Hook). The District Court conceded that the Navy Yard shooting involved a shotgun.

SCMs while the murderer is reloading; that is known to have occurred only once since 1984.[61] And even if reloading pauses did provide opportunities for escape or intervention that would not otherwise exist, the State's argument proves too much: if banning SCMs is constitutional because it leads to fewer deaths, there is no reason why the State should stop at 10 rounds or could not ban magazines *altogether*, yet that plainly would be unconstitutional. *See Heller III*, 801 F.3d at 280.

At bottom, the District Court's holding is premised on the refutation of a strawman: "simply because the challenged ban does not completely solve a problem, here being mass shooting[s], does not render it unconstitutional." JA28 (D.N.J. Opinion). Plaintiffs do not claim otherwise. Nonetheless, Supreme Court precedent requires the State to prove "that the regulation will *in fact* alleviate [the asserted] harms in a direct and material way," *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (emphasis added), and it must "present some meaningful evidence, not mere assertions, to justify its predictive judgments." *Binderup*, 836 F.3d at 354 (Ambro, J.) (alteration and quotation marks omitted); *id.* at 378–79 (Hardiman, J.). New Jersey has not done so, and the magazine ban fails heightened scrutiny.

B. New Jersey's Magazine Ban Violates the Takings Clause.

The State does not and cannot dispute that standard-capacity magazines are

[61] JA67 (Tr. 368:1–369:15 (Kleck)); JA1190 (JX9, Kleck Decl. ¶¶ 26–29); JA547 (PX37, Kleck Supp. Decl. ¶¶ 30–34); JA1213–14 (JX10, Kleck); JA609–10 (PX40, KLECK).

private property under the Takings Clause. *See Horne v. Department of Agric.*, 135 S. Ct. 2419, 2425–26 (2015). Once that is accepted, it becomes clear that Act A2761 effects an uncompensated taking.

Property can be "taken" within the meaning of the Fifth Amendment in one of two ways: A "physical taking" occurs when the government appropriates or otherwise physically dispossesses the owner of property. *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 537 (2005). A "regulatory taking" occurs when the government regulates the use of that property in a manner that "is tantamount to a direct appropriation or ouster." *Id.*; *see also Horne*, 135 S. Ct. at 2427.

Act A2761 effects a physical taking because it dispossesses New Jersey citizens of their property. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 n.19 (2002). Under the statute, citizens have three options. First, they may surrender their SCMs to the government, N.J.S.A § 2C:39-19(c), which is a "direct government appropriation . . . of private property" and a "paradigmatic taking requiring just compensation." *Lingle*, 544 U.S. at 537; *see also Horne*, 135 S. Ct. at 2428.

Second, they may transfer their SCMs to "any person or firm lawfully entitled to own or possess that firearm or magazine." N.J.S.A § 2C:39-19(a). A taking occurs when the government provides for a third party instead of itself to dispossess a property owner. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419,

432 n.9 (1982); *International Paper Co. v. United States*, 282 U.S. 399, 408 (1931). A taking occurred in *Kelo v. City of New London*, for example, even though owners of the condemned parcels had the option of selling to a private entity. 545 U.S. 469, 475 (2005). *Cf. Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004–05 (1984).

Third, New Jersey citizens may "[r]ender the . . . magazine inoperable" or permanently alter it to accept 10 rounds or fewer. N.J.S.A § 2C:39-19(b). Apparently recognizing that an outright dispossession *would* constitute a taking, the District Court relied on this option—combined with a provision permitting owners to register arms or magazines not capable of being modified—to conclude that New Jersey's law does not.[62] JA33 (D.N.J. Opinion). But the registration option is a red herring, as it is unclear that there are any arms or magazines that fall within its scope and, in any event, it does not cover Plaintiffs' arms and magazines.[63] And the government cannot escape its obligations under the Fifth Amendment by affording owners the alternative of modifying their property. In *Horne*, for example, the raisin growers could have "plant[ed] different crops," or "[sold] their raisin-variety grapes as table

[62] The District Court mistakenly believed that the modification option distinguishes New Jersey's ban from California's ban, JA32–33 (D.N.J. Opinion), but California also permits its residents to modify their magazines to accept 10 rounds or fewer. CAL. PENAL CODE §§ 16740, 32425. Although acknowledged by the parties and the court alike, *see, e.g.*, *Duncan*, 265 F. Supp. 3d at 1111, this feature of the law tellingly did not feature prominently in the constitutional analysis.

[63] JA469 (PX10, Dembowski Decl. ¶ 10); JA475 (PX18, Ellman Decl. ¶ 8).

grapes or for use in juice or wine." 135 S. Ct. at 2430 (quotation marks omitted). Likewise, in *Loretto*, the owner could have converted her building into something other than an apartment complex. *See* 458 U.S. at 439 n.17. The Supreme Court nonetheless held that these were takings. *See Horne*, 135 S. Ct. at 2430 (quoting *Loretto*, 458 U.S. at 439 n.17); *see also Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1329 (9th Cir. 1977).

This makes sense: any other rule would permit the government to sidestep the Fifth Amendment by simply imposing a condition on continued ownership, no matter how infeasible or expensive that condition may be. *Cf. Duncan*, 265 F. Supp. 3d at 1138 (noting that the out-of-state storage option authorized by California's magazine ban may be "more costly than the fair market value (if there is any) of the magazine itself"). "[P]roperty rights 'cannot be so easily manipulated.' " *Horne*, 135 S. Ct. at 2430 (quoting *Loretto*, 458 U.S. at 439 n.17). As with other constitutional rights, the government cannot "coerc[e] people into giving them up" (here, by surrendering property without just compensation) by imposing conditions on their exercise (here, by requiring owners to modify or destroy their property). *Koontz v. St. Johns Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). Neither can the government do the reverse: threatening uncompensated confiscation to force property owners to alter their property. *See id.* at 606.

Act A2761 fares no better when analyzed as a regulatory taking. The State

asserts that the statute does not deprive Plaintiffs of all economically beneficial use of their property. But even if that were true, regulatory action may constitute a taking if it interferes with a property owner's reasonable, investment-backed expectations. Property owners "do not expect their property, real or personal, to be actually occupied or taken away." *Horne*, 135 S. Ct. at 2427; *see also Duncan*, 265 F. Supp. 3d at 1138. Nor do they expect to be forced to sell, destroy, or alter property. *Yancey v. United States*, 915 F.2d 1534, 1540 (Fed. Cir. 1990).

Because the magazine ban works a taking of property, the state "has a categorical duty to compensate the former owner." *Tahoe-Sierra*, 535 U.S. at 322. The State's own expert conceded below that citizens will suffer economic loss from the taking of their property,[64] and even if Plaintiffs obtain *some* compensation, Act A2761 does not secure *just* compensation. To the contrary, Act A2761 virtually guarantees that any sale would return less than just compensation by providing for an influx of magazines into a limited market (and for a limited time) of those "entitled to own or possess" them. A2761 § 5(a). That is a narrow class, consisting primarily of retired and active police officers and active military personnel and dealers who sell to them. N.J.S.A. § 2C:39-3(g); A2761 § 3.[65]

[64] JA67 (Tr. 126:3–4 (Stanton)).

[65] To the extent an out-of-state sale is possible, New Jersey cannot justify its ban by the less restrictive laws of other jurisdictions. *See Ezell*, 651 F.3d at 697.

The State may not escape its compensation obligation by acting pursuant to its police power. *See Duncan*, 2018 WL 3433828, at *3 (9th Cir. July 17, 2018). As the District Court recognized, Supreme Court precedent forecloses that argument. In *Loretto*, the Court held that a law requiring physical occupation of private property was both "within the State's police power" *and* an unconstitutional taking. 458 U.S. at 425. Whether a law effects a taking is a "separate question" from whether the State has the police power to enact it, for an uncompensated taking is unconstitutional "without regard to the public interests that it may serve." *Id.* at 425–26; *see also Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985). Critically, the Supreme Court has *never* "employed the logic of 'harmful use' prevention to sustain" an uncompensated *per se* taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026 (1992). Neither should this Court.

Finally, the power to abate nuisances is not a justification for the ban. Governments may act to abate nuisances without paying compensation only to the extent consistent with preexisting, background principles of nuisance law. *See id.* at 1029–30. The State has made no argument that A2761 "expressly prohibit[s]" that which was "*always* unlawful," *id.* at 1030–31, so it cannot evade the Takings Clause on this ground.

A recent wave of gun regulation has prompted court decisions on takings

challenges to laws that are—to varying degrees—similar to New Jersey's magazine ban. Federal courts in California, for example, have divided on the status of that State's confiscatory magazine ban. The district court in *Duncan v. Becerra* squarely rejected a "police power" exception to the Takings Clause and found that Plaintiffs were likely to succeed in their challenge to the ban. 265 F. Supp. 3d at 1136–37. (As noted above, the District Court distinguished this decision based on a misunderstanding of California's law.) The Ninth Circuit affirmed, holding that the district court "outlined the correct legal principles" governing the takings claim and did not abuse its discretion in concluding that Plaintiffs were likely to succeed. *Duncan*, 2018 WL 3433828, at *3. The decision on the other side, by contrast, cited *no authority* for its analysis and completely ignored the foregoing cases. *Wiese v. Becerra*, 306 F. Supp. 3d 1190, 1198 (E.D. Cal. 2018).

C. New Jersey's Magazine Ban Violates the Equal Protection Clause.

As described above, the District Court correctly held that SCMs are protected by the Second Amendment, which is a fundamental right. *McDonald*, 561 U.S. at 778. Although the Supreme Court has clearly stated that "classifications affecting fundamental rights are given the most exacting scrutiny," *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (citations omitted), the District Court applied rational-basis review. This blatant error infects the District Court's entire equal-protection analysis.

The District Court pointed to *Kwong v. Bloomberg*, 723 F.3d 160, 169–70 (2d

Cir. 2013), and *Hightower v. City of Boston*, 693 F.3d 61, 83 (1st Cir. 2012), for the proposition that rational-basis review applies where there is no Second Amendment violation, JA29 (D.N.J. Opinion), but if that view were correct, heightened scrutiny review for classifications affecting fundamental rights would be a doctrine without purpose, since it would only apply where there was already an independent constitutional violation. That is plainly wrong. Strict scrutiny applies when a classification "*implicates* fundamental rights," *see Tolchin v. Supreme Court of N.J.*, 111 F.3d 1099, 1114 (3d Cir. 1997) (emphasis added); *see also Clark*, 486 U.S. at 461 (strict scrutiny applies for classifications "*affecting* fundamental rights" (emphasis added)), not only when it *violates* them.

At the very least, intermediate-scrutiny should apply, and the State must show "that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Virginia*, 518 U.S. at 533 (quotation marks omitted). "The burden of justification is demanding and it rests entirely on the State," and its justification must be "exceedingly persuasive." *Id.* Thus, this Court must presume that Plaintiffs have shown a likelihood of success on the merits. *Ashcroft*, 542 U.S. at 666; *Reilly*, 858 F.3d at 180.

There are two steps to the equal-protection analysis.[66] First, courts ask whether the groups are "similarly situated." *See Congregation Kol Ami v. Abington Twp.*, 309 F.3d 120, 136–38 (3d Cir. 2002). Second, courts examine whether the justification offered for the distinction drawn between the groups survives the appropriate form of scrutiny. *Id.* Under the first step, courts determine whether the law would treat the two classes the same *absent the challenged statutory distinction*. *See Frontiero v. Richardson*, 411 U.S. 677, 688 (1973); *see also Virginia*, 518 U.S. at 530. Thus, if the statute under review would treat two groups the same way *except for* the distinction being challenged, the groups are similarly situated. *See Melrose, Inc. v. City of Pittsburgh*, 613 F.3d 380, 394 (3d Cir. 2010).

Absent Act A2761's exception for retired law-enforcement officers, those officers, veterans of the armed forces, and ordinary, law-abiding citizens would all be prohibited from possessing SCMs. Therefore, retired law-enforcement officers are similarly situated to (1) veterans of the armed forces and (2) ordinary, law-abiding citizens. The District Court asserted otherwise because it believed that retired law-enforcement officers have specialized firearms training that military

[66] The District Court mistakenly characterized Plaintiffs' claim as a "class of one" claim, JA29 (D.N.J. Opinion), but a "class of one" claim only arises "where the plaintiff d[oes] not allege membership in a class or group." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Here, Plaintiffs are members of identifiable groups prohibited from possessing SCMs: (1) typical law-abiding citizens of New Jersey, and (2) retired members of the military.

veterans and ordinary citizens do not. JA30 (D.N.J. Opinion). But that alleged difference goes to the *justification* for the statute's classification, which is the *second* step of the equal-protection analysis.

The State's sole justification for Act A2761's classification—and the primary justification offered by the District Court[67]—is that retired law-enforcement officers have specialized training in the use of firearms that ordinary citizens and military veterans do not. That justification fails for three independent reasons, all of which the District Court failed to address.

First, the testimony of the State's own expert proves that firearms training is irrelevant to a citizens' ability to safely possess SCMs. As Detective Stanton testified, "no special training is required for a citizen to possess a standard capacity magazine as distinguished from a magazine holding 10 or fewer rounds."[68] Therefore, "a citizen who would safely possess a weapon capable of holding 10 or fewer rounds can also safely possess a firearm capable of holding 11 to 15 rounds."[69] The specialized-training justification is irrelevant to the statutory classification.

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[67] The District Court cited the police "ethos" as another justification, JA30 (D.N.J. Opinion), but there is no evidence in the record to support that or any explanation as to why it would be relevant to the ability to possess 11-round magazines but not 10-round magazines.

[68] JA67 (Tr. 88:13–16); *see also* JA67 (Tr. 89:13–17, 95:23–96:1).

[69] JA67 (Tr. 73:15–20); *see also* JA67 (Tr. 96:6–11); JA67 (Tr. 101:2–8); JA67 (Tr. 102:16–24).

The second problem with the State's training argument is that, even if training *were* important to ensuring the safe use of an SCM, the obvious logical response would be to *require training*, not to *ban all SCMs*. The State offered no credible evidence that this alternative was considered by the New Jersey legislature, could not be implemented, or would fail to meet the State's interests. In fact, Detective Stanton conceded that he was not "aware of any reason that New Jersey could not put in place a training system along the lines of what Florida has done,"[70] which has allowed Florida to grant almost 1 million concealed-carry licenses with the cost borne by private parties.[71] Under intermediate scrutiny, "the [government] may not forego a range of alternatives[,] which would burden substantially less [conduct] than a blanket prohibition[,] . . . without a meaningful record demonstrating that those options would fail to alleviate the problems meant to be addressed." *Bruni*, 824 F.3d at 371; *see also id.* at 370 nn. 17–18. That is enough to invalidate the ban. *McCullen*, 134 S. Ct. at 2537–40.

Third, the foregoing assumes that there *is* a relevant distinction in training between retired law-enforcement officers and military veterans or ordinary citizens. But the District Court found that Appellants Ellman and Dembowski have significant experience and training with firearms using standard-capacity magazines,

[70] JA67 (Tr. 96:2–5).

[71] JA67 (Tr. 94:4–21).

JA5–6 (D.N.J. Opinion), and Detective Stanton conceded that "the military is a large group with diverse [training] requirements and [he] do[es] not have specific knowledge of what those requirements are."[72] There is no evidence to show that the individual Appellants in this case in particular, or military veterans in general, lack the requisite training required to safely use standard-capacity magazines.

"[T]he retired officers exception arbitrarily and unreasonably affords a privilege to one group of individuals that is denied to others, including plaintiffs." *Silveira v. Lockyer*, 312 F.3d 1052, 1091 (9th Cir. 2002). The proper remedy is to "extend the coverage of the statute to include those who are aggrieved by the exclusion." *Califano v. Westcott*, 443 U.S. 76, 89 (1979); *see also Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 (2017). The magazine ban must be invalidated both on its face and as applied to military veterans such as Appellant Dembowski.[73]

II. Appellants Are Likely To Suffer Irreparable Harm.

Given the unconstitutionality of New Jersey's magazine ban, there can be no doubt that Plaintiffs and other New Jersey citizens will suffer irreparable harm in the absence of an injunction. *See, e.g., K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*,

[72] JA67 (Tr. 98:16–19).

[73] The District Court characterized Plaintiffs' challenge as facial, but Plaintiffs also challenge Act A2761 as-applied to retired military members like Appellant Dembowski. JA46 (Compl. ¶ 68).

710 F.3d 99, 113 (3d Cir. 2013); *Lewis v. Kugler*, 446 F.2d 1343, 1350 (3d Cir. 1971). December 10 is the last day of the 180-day compliance period under Act A2761. Thereafter, New Jersey citizens who continue to possess SCMs will face the prospect of prison. Alternatively, they can take any one of three steps that the State has no power to require of them: forfeit, transfer, or permanently modify or disable their standard-capacity magazines. Putting Plaintiffs and other New Jersey citizens to the choice between prison or forfeiting their constitutional rights constitutes irreparable harm, *see Taylor v. Westly*, 488 F.3d 1197, 1202 (9th Cir. 2007); *see also Free Speech Coal.*, 535 U.S. at 244; *Toomer v. Witsell*, 334 U.S. 385, 392 (1948), and with the clock ticking away until the December 10 deadline, injunctive relief is necessary to prevent that harm. As noted above, this Court looks to the First Amendment for guidance in the Second Amendment analysis, and just as the presumption of irreparable harm applies to First Amendment cases, it applies to Second Amendment cases. *See Ezell*, 651 F.3d at 699.

III. The Remaining Factors Favor Granting an Injunction.

The public interest and balance of equities likewise favor an injunction. "[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, the State has no valid interest in enforcing its unconstitutional ban and, as explained above, the ban will not advance public safety. *Ashcroft*, 542 U.S. at 671.

IV. This Court Should Remand for Entry of a Permanent Injunction.[74]

Although this appeal comes to the Court from the denial of a preliminary injunction, it would be pointless to remand for further proceedings. Instead, permanent injunctive relief is appropriate because there is no additional evidence that the State could offer that would affect the merits of Plaintiffs' constitutional claims. *See Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1102–03 (9th Cir. 1998).

There can be no reasonable dispute that standard-capacity magazines are in common use and protected by the Second Amendment. Once common-use is established, *Heller* instructs that a ban on SCMs is categorically unconstitutional. No evidence can or will change that. *See Wrenn*, 864 F.3d at 667.

Nor will any evidence change the unconstitutionality of the theory underlying the magazine ban. The State seeks to prohibit lawful, constitutionally protected conduct to regulate the criminal, secondary effects of that conduct. Under *Alameda Books*, that reasoning is anathema to the Constitution irrespective of any evidence the State would offer on remand.

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[74] Plaintiffs requested permanent injunctive relief from the District Court during post-hearing briefing. *See* JA2. The District Court denied that request by denying the motion for a preliminary injunction.

Nor does the State claim that there is any evidence that could demonstrate that a 10-round magazine limit is more effective than a 15-round limit at achieving its interests. In fact, both sides' experts agree that no such evidence exists,[75] which means it is impossible for the State to carry its burden of showing that its magazine ban burdens no more conduct than reasonably necessary.

Nor will any evidence change the reality that Act A2761 takes private property without Just Compensation. That conclusion follows from a straightforward reading of the statute, the text of the Takings Clause, and Supreme Court precedent.

"[H]ere the merits of the plaintiffs' challenge are certain and don't turn on disputed facts." *Wrenn*, 864 F.3d at 667. "Because [New Jersey's] law merits invalidation . . . regardless of its precise benefits, [this Court] would be wasting judicial resources if [it] remanded for the court to [further] develop the records in th[is] case[ ]." *Id.*; *see also Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012). Permanent injunctive relief is warranted.

CONCLUSION

Appellants respectfully request that this Court reverse the District Court's denial of a preliminary injunction. They also respectfully request that this Court instruct the District Court to enter a permanent injunction on remand.

[75] JA67 (Tr. 377:3–6 (Kleck)); JA928 (DX24, Donohue Dep. Tr. 23:15–18).

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CERTIFICATE OF BAR MEMBERSHIP, PRIVACY REDACTIONS, AND IDENTICAL ELECTRONIC AND HARD COPY VERSIONS

I hereby certify that the signatories to this motion, David H. Thompson and Daniel L. Schmutter, are members of the bar of this Court. I further certify that no privacy redactions were necessary for this filing. Finally, I certify that the text of the electronic brief is identical to the text in the paper copies.

Dated: October 5, 2018

s/ David H. Thompson
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CERTIFICATE OF VIRUS SCAN

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Dated: October 5, 2018

s/ J. Joel Alicea
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because this brief contains 12,982 words, excluding the parts of the motion exempted by FED. R. APP. P. 32(f).

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and I hereby certify that I have caused the document to be mailed by First Class USPS Mail to the following:

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