LAW OFFICES
HARTMAN & WINNICKI, P.C.

Dariusz M. Winnicki *º
Richard L. Ravin *º□
Daniel L. Schmutter*
Andrew T. Wolfe*

74 PASSAIC STREET
RIDGEWOOD, NEW JERSEY 07450

Phone: (201) 967-8040
Fax: (201) 967-0590

* * *

* New York and New Jersey Bars
º Florida Bar
□ Washington, D.C. Bar
◊ New Jersey Bar

WEBSITE
www.hartmanwinnicki.com

Porter E. Hartman (1920-2009)
Charles R. Buhrman (1938-1994)
William T. Marsden (1943-1993)
Cyrus D. Samuelson (1911-1998)

July 27, 2022

Via ECF
United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Re: Association of New Jersey Rifle & Pistol Clubs, Inc., et al. v. Attorney General New Jersey, et al.
Case No.: 19-3142

PLAINTIFFS-APPELLANTS' LETTER BRIEF IN SUPPORT OF REVERSAL OF JUDGMENT BELOW

Dear Honorable Judges:

We represent Plaintiffs-Appellants in the above-referenced matter. We submit this letter brief in response to the Court's order dated July 7, 2022 directing the parties to address the proper disposition of this matter in light of the U.S. Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U. S. ___, 142 S. Ct. 2111 (2022). As the Supreme Court recognized in vacating this Court's decision in light of *Bruen*, that decision plainly can no longer stand, as it was the product of the precise interest-balancing test that *Bruen* repudiated. And under the text- and history-based test that now governs Second Amendment claims, the appropriate resolution of this case is clear: The Court should reverse the judgment below, hold that New Jersey's confiscatory ban on ammunition magazines capable of holding more than 10 rounds violates the Second Amendment, and direct entry of judgment for Plaintiffs-Appellants.

1. Introduction

The Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v. Bruen* provides an unambiguous mandate as to how lower courts must address Second Amendment challenges. The two-step framework first developed by this Court in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), has been explicitly repudiated as inconsistent with *District of Columbia v. Heller*, 554 U.S. 570 (2008). *See Bruen*, 142 S. Ct. at 2126-27. Instead, *Bruen* "demands a test rooted in the Second Amendment's text, as informed by history." *Id.* at 2127. Under that test, so long as the Second Amendment "presumptively covers" the conduct the government seeks to regulate, "[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2130. "Only" if the government meets that heavy burden "may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.*

New Jersey cannot come close to meeting that burden here. There is no question that the standard-capacity ammunition magazines the state has banned are "presumptively cover[ed]" by the Second Amendment, as they plainly satisfy the test that *Bruen* reiterated determines which "arms" are protected—namely, "they are indisputably in 'common use' for self-defense today." *Id.* at 2143 (quoting *Heller*, 554 U.S. at 627). Indeed, this Court has already so held. And there is no history or tradition whatsoever in our nation of magazine-capacity limits. The first such restriction was not passed until the tail end of the twentieth century, and even today magazine-capacity restrictions are the exception, not the norm. The absence of any "distinctly similar historical regulation" is particularly conspicuous given that firearms capable of firing more than 10 rounds without reloading are nothing novel; they pre-date the founding and have been common for well over a century. The potential for their misuse is thus a quintessential "general societal problem that has persisted since the 18th century." *Id.* at 2131. Yet for two centuries, even as the firing capacity of firearms available to the public regularly increased to meet consumer demand, there was no meaningful record of governments addressing that problem by restricting how many rounds a common arm possessed by a law-abiding citizen could fire without reloading. Because New Jersey cannot begin to "demonstrate[e] that it[s magazine ban] is consistent with the Nation's historical tradition of firearm regulation," *id.* at 2130, this Court should hold that the ban violates the Second Amendment and direct entry of judgment for Plaintiffs-Appellants.

2. Background

A. The Statutory Framework

In 1990, New Jersey became the first state in the nation to regulate magazine capacity, criminalizing the possession of magazines capable of holding more than 15 rounds of ammunition. *See* N.J. Stat. §2C:39-1(y) (1990). Nearly 30 years later—and after the Supreme Court clarified that the Second Amendment protects an individual right to keep and bear arms—in 2018 the state enacted an even more restrictive law, lowering the permissible magazine capacity to 10 (with very few and limited exceptions) for both handguns and long guns. *See* N.J. Stat. §§2C:39-1(w)(4), 2C:39-1(y), 2C:39-3(j), 2C:39-5(f). In doing so, New Jersey became just the eighth state to ban magazines with the capacity to hold more than 10 rounds of ammunition, following California, Connecticut, Hawaii, Maryland, Massachusetts, New York, Vermont, and the District of Columbia. *See* Cal. Penal Code §§16740, 32310, 32390; Conn. Gen. Stat. §53-202w; Haw. Rev. Stat §134-8(c)-(d); Md. Code Ann., Crim. Law §4-305(b); Mass. Gen. Laws ch. 140, §§121, 131M; N.Y. Penal Law §§265.00(23), 265.02(8), 265.36, 265.37; Vt. Stat. tit. 13, §4021; D.C. Code. §§7-2506.01(b), 7-2507.06.[1] In the vast majority of the country, such magazines remain both lawful and common.

Unlike the now-repealed federal law and the laws of most of the states that restrict magazine capacity, New Jersey's ban is not merely prospective; it is retrospective and confiscatory. Law-abiding citizens who lawfully obtained the now-banned magazines and have lawfully possessed them safely and without incident for decades were required to

[1] Vermont's law bans the acquisition of magazines that contain more than 10 rounds for a long gun or 15 rounds for a handgun. *See* Vt. Stat. tit. 13, §4021(e)(1)(A)-(B). Washington recently became the ninth state to impose a 10-round limit. *See* Wash. Rev. Code Ann. §9.41.0003, .0004, .010. Colorado has banned magazines capable of holding more than 15 rounds. Colo. Rev. Stat. §§18-12-301, 18-12-303.

dispossess themselves of their magazines by (1) surrendering them to law enforcement, (2) transferring or selling them to someone who can lawfully own them, (3) permanently modifying them to accept 10 rounds or fewer, or (4) rendering them inoperable. N.J. Stat. §2C:39-19(a)-(c). Failure to take one of those steps is a crime, carrying up to a 10-year sentence and $150,000 in fines. *See id.* §§2C:39-3(j), 2C:39-5(f), 2C:43-3(a)(2), 2C:43-3(b)(2), 2C:43-6.

New Jersey's law admits of only a few very limited exceptions, which serve only to exacerbate its constitutional problems. A theoretical class of firearms with magazines that are "*incapable* of being modified to accommodate 10 or less rounds" may be retained if registered with the local law-enforcement agency or police station. *Id*. §2C:39-20(a) (emphasis added). And narrow classes of favored individuals—certain active-duty members of the armed forces or National Guard, federal law-enforcement officers, members of the state police, and certain state government employees—are exempt from the ban. *See id.* §2C:39-6(a). The law also provides that certain retired law enforcement officers—but not retired members of our nation's military or anyone else with a similar record and training—may still possess and carry magazines that hold up to 15 rounds. *Id*. §2C:39-17. Underscoring both the breadth of the prohibition and the unseriousness with which New Jersey approaches a fundamental constitutional right, the banned magazines may be used as props for a motion picture, television, or video production. *Id*. §2C:39-18.

B. Procedural History

Plaintiff-Appellant Association of New Jersey Rifle & Pistol Clubs, Inc. ("ANJRPC") is a not-for-profit membership organization that, for the past eight decades, has represented the interests of tens of thousands of members, many of whom possessed or would like to possess magazines capable of holding more than 10 rounds of ammunition for lawful purposes such as self-defense, target shooting, and hunting. 18-3170 A5.[2] Plaintiff-Appellant Blake Ellman is a law-abiding citizen, resident of New Jersey, and member of ANJRPC. He is a firearms instructor, range safety officer, armorer, and competitive shooter. Because of the law, Ellman was required to permanently modify, render inoperable, transfer, or surrender to the police magazines he previously lawfully acquired and lawfully possessed for decades without incident. *Id*. But for New Jersey's ban, Ellman would once again acquire, own, and keep magazines capable of holding more than 10 rounds of ammunition.

Plaintiffs-Appellants sued the responsible New Jersey state officials seeking to enjoin enforcement of the state's retrospective and confiscatory magazine ban on the ground (as relevant here) that it violates the Second Amendment. Although the district court recognized in the preliminary-injunction proceedings that the banned magazines are "in common use" and therefore "entitled to Second Amendment protection," it nevertheless

---

[2] Citations in the form "18-3170 A__" refer to the Joint Appendix filed with this Court in the first appeal in this lawsuit under Docket No. 18-3170.

concluded that Plaintiffs-Appellants were not likely to succeed under the two-step approach that governed in this Circuit at the time. 18-3170 A28.

A divided panel of this Court affirmed. *Association of New Jersey Rifle and Pistol Clubs, Inc. v. Attorney General New Jersey*, 910 F.3d 106 (3d Cir. 2018) ("*ANJRPC I*"). Although the appeal arose from the denial of a preliminary injunction, the panel bypassed the likelihood-of-success inquiry and proceeded to the merits of Plaintiffs-Appellants' claims. The majority acknowledged that the banned magazines are common, observing that "millions" have been lawfully sold; that they are used for a number of lawful purposes, including self-defense and sporting; and that there is "no longstanding history" of restricting their possession or use. 910 F.3d at 116-17. Applying the "two-step framework" now explicitly disapproved by *Bruen,* however, the majority concluded that the law does not burden the "core" of the Second Amendment's protection and therefore subjected it to only intermediate scrutiny, which the panel concluded the ban passed. *Id.* at 117-23.

Judge Bibas dissented. He would have held that the law burdens the core Second Amendment right to self-defense because "[p]eople commonly possess large magazines to defend themselves and their families in their homes." *Id*. at 130. In his view, under *Heller* and this Court's precedents involving other constitutional rights, that should have been the "end of [the] analysis." *Id*. The full court declined to rehear the case *en banc*, over the vote of Judge Hardiman, who would have granted the petition. Docket No. 18-3170, ECF No. 3113129100.

Back in the district court, the parties filed cross-motions for summary judgment, which the court held were controlled by this Court's preliminary-injunction opinion. 19-3142 A8.[3] On appeal, a majority of a different panel affirmed, holding that the prior panel's opinion was "binding" because it "directly addressed the merits of the constitutionality of the Act." *Association of New Jersey Rifle and Pistol Clubs Inc. v. Attorney General New Jersey*, 974 F.3d 237, 240 (3d Cir. 2020) ("*ANJRPC II*"). Judge Matey disagreed and would have reversed and remanded for the state to try to meet its burden of proving that the law is "narrowly tailored to advance the State's interests." *Id*. at 251-61.

Plaintiffs-Appellants filed a petition for rehearing *en banc*, which this Court denied by a closely divided 8-6 vote. Docket No. 19-3142 ECF No. 131. Judges Jordan, Hardiman, Bibas, Porter, Matey, and Phipps would have granted rehearing. *Id*.

Plaintiffs-Appellants filed a petition for a writ of certiorari with the Supreme Court. On June 30, 2022, the Supreme Court granted the petition, vacated the judgment of this Court, and remanded the case for further proceedings in light of *Bruen*. *Association of New Jersey Rifle & Pistol Clubs, Inc. v. Bruck*, --- S. Ct. ----, 2022 WL 2347576 (Mem) (2022).

3. Argument

The Supreme Court "reiterate[d]" in *Bruen* that the test for analyzing Second Amendment challenges focuses on text and history, not means-ends scrutiny. As the Court

[3] Citations in the form "19-3142 A__" refer to the Joint Appendix filed with this Court in the second appeal in this lawsuit under Docket No. 19-3142.

explained, "reliance on history to inform the meaning of constitutional text is more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments' about 'the costs and benefits of firearms restrictions.'" *Bruen*, 142 S. Ct. at 2130 (quoting *McDonald v. Chicago*, 561 U.S. 742, 790-91 (2010) (plurality opinion)). Accordingly, when faced with a Second Amendment challenge, courts must now begin by asking whether "the Second Amendment's plain text covers an individual's conduct." *Id.* at 2129-30. If it does, then "the Constitution presumptively protects that conduct," *id.* at 2130, and "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms," *id.* at 2127. To meet that burden, the government must "identify a well-established and representative historical analogue" to the regulation it seeks to defend. *Id.* at 2133. "Only" if the government is able to do so "may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* at 2130 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)). Applying that test here, New Jersey's magazine ban plainly cannot survive Second Amendment scrutiny, as it imposes on the possession and use of constitutionally protected arms restrictions that have no historical analogue whatsoever.

A. Magazines Capable of Holding More than 10 Rounds Are in Common Use and Therefore Presumptively Protected by the Second Amendment.

Just as the First and Fourteenth Amendments protect modern forms of communications and search, "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Heller*, 554 U.S. at 582; *Caetano v. Massachusetts*, 577 U.S. 411, 411–412 (2016) (*per curiam*) (stun guns). Thus, as the Supreme Court reiterated in *Bruen,* when assessing whether arms are protected by the Second Amendment, the question is whether they are "in common use today." 142 S. Ct. at 2134; *see also id.* at 2143; *Heller*, 554 U.S. at 625. If they are, then they are presumptively protected by the Second Amendment, and it is the state's burden to prove that any efforts to restrict their possession or use have a "well-established and representative historical analogue." 142 S. Ct. at 2133.

Magazines are indisputably "arms" protected by the Second Amendment, as the right to keep and bear arms necessarily includes the right to keep and bear components such as ammunition and magazines that are necessary for the firearm to operate. *See United States v. Miller*, 307 U.S. 174, 180 (1939) (citing 17th-century commentary recognizing that "[t]he possession of arms also implied the possession of ammunition"); *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) ("without bullets, the right to bear arms would be meaningless"). And as both the district court and this Court have already correctly recognized, the magazines the state has banned unquestionably satisfy the "common use" test. *See ANJRPC I*, 910 F.3d at 116-17; 18-3170 A28. Magazines that hold more than 10 rounds of ammunition are commonly owned by millions and millions of Americans for all manner of lawful purposes, including self-defense, sporting, and hunting. They come standard-issue with many of the most popular handguns and long guns on the market, and Americans own roughly 115 million of them, *Duncan v. Becerra*, 970

F.3d 1133, 1142 (9th Cir. 2020), *vacated en banc*, 988 F.3d 1209 (9th Cir 2021), accounting for "approximately half of all privately owned magazines in the United States," *Duncan v. Bonta*, 19 F.4th 1087, 1097 (9th Cir. 2021) (*en banc*), *vacated*, *Duncan v. Bonta,* --- S. Ct. ----, 2022 WL 2347579 (Mem.); *Kolbe v. Hogan*, 849 F.3d 114, 129 (4th Cir. 2017) (*en banc*).

Indeed, the most popular handgun in America—the Glock 17 pistol—comes standard with a 17-round magazine. *See Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1145 (S.D. Cal. 2019). And the standard-issue weapon for law-enforcement officers in New Jersey and elsewhere—the Glock 19 pistol—comes standard with a 15-round magazine. 18-3170 A12; *see also*, *e.g.*, *Rocky Mountain Gun Owners Association v. Town of Superior*, No. 22-cv-01685-RM *8 (D. Colo. July 22, 2022); *Murphy v. Guerrero*, 2016 WL 5508998, at *15 (D.N.M.I. Sept. 28, 2016); *Colorado Outfitters Association v. Hickenlooper*, 24 F. Supp. 3d 1050, 1068 (D. Colo. 2014), *vacated in part and remanded*, 823 F.3d 537 (10th Cir 2016). Accordingly, there can be no serious dispute that magazines capable of holding more than 10 rounds are "presumptively protected" by the Second Amendment. *Bruen*, 142 S. Ct. at 2126.

B. There Is No Historical Tradition of Restricting Firearms with a Capacity of More than 10 Rounds.

Because keeping and bearing common firearms equipped with the magazines New Jersey has banned is conduct presumptively protected by the Second Amendment, the state may not "justify" its ban by "simply posit[ing] that [it] promotes an important interest."

Bruen, 142 S. Ct. at 2126. The state must instead "affirmatively prove that its [magazine ban] is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127. To do so, it must "identify a well-established and representative historical analogue" to its ban. *Id.* at 2133. In other words, the state must establish that (1) the magazine ban shares common features with historically analogous regulations from the 18th to the mid-19th Centuries; (2) those analogues were prevalent, not historical outliers; and (3) the modern regulation and the historical analogues are *relevantly* similar, i.e., similar in both "how" they operated and "why." *Id.* Only if the state meets that heavy burden may this Court conclude that the regulated conduct (i.e., keeping and bearing the banned magazines for self-defense and other lawful purposes) "falls outside the Second Amendment's 'unqualified command.'" *Id.* at 2126.

The state cannot come close to proving that restrictions on firing or magazine capacity are part of the nation's historical tradition. To the contrary, history and tradition demonstrate the exact opposite. Indeed, this Court already specifically found in *ANJRPC I* that "there is no longstanding history of LCM regulation." 910 F.3d at 116-17 & n.18. That conclusion was inescapable, as there were no restrictions on firing or magazine capacity when either the Second or the Fourteenth Amendment was ratified. The first such laws did not come until the Prohibition Era, and, even then, they were few and far between. Although many states and the federal government began regulating *automatic* weapons (i.e., machine guns) almost as soon as they came on the market in the 1920s and 1930s, only three states and the District of Columbia put in place restrictions on the firing capacity of semi-automatic firearms back then,[4] and most of those laws (none of which imposed a limit as low as 10) were repealed within a few decades.[5] *Id.*; *Duncan*, 970 F.3d at 1150 & n.10; *see Heller v. D.C. (Heller II)*, 670 F.3d 1244, 1292 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (six states not enough to make a "strong showing that such laws are common").

New Jersey itself became the first state to restrict magazine capacity in 1990—more than two centuries after the founding. And only nine other states have followed suit in the ensuing three decades. *See supra* p. 3-4 & n.1. The federal government did not regulate magazine capacity until 1994, when Congress adopted a nationwide ban on magazines with a capacity of more than 10 rounds. *See* Pub. L. 103-322, 108 Stat. 1796 (1994) (formerly codified at 18 U.S.C. §922(w)). Unlike New Jersey's statute, that law was time-limited and operated only prospectively, allowing people who had already lawfully acquired such magazines to keep them. *Id*. And Congress allowed the law to expire in 2004, after a study by the Department of Justice revealed that it had produced "no discernable reduction" in

---

[4] While this Court previously described those Prohibition-era laws as regulating "LCMs," *see ANJRPC I*, 910 F.3d at 117 n.18, they did not actually regulate magazine capacity, but rather imposed restrictions on arms capable of firing more than a specified number of rounds without reloading. *See* 1927 Mich. Pub. Acts 887, §3 (prohibiting "any … firearm which can be fired sixteen times without reloading"); 1927 R.I. Pub. Laws 256 §§1, 3 (prohibiting firearms "which shoot[] more than twelve shots semi-automatically without reloading"); 47 Stat. 650, §§1, 14 (1932) (prohibiting "any firearm which shoots ... semiautomatically more than twelve shots without reloading" in the District of Columbia); 1933 Ohio Laws 189, §§12819-3, -4 (prohibiting "any firearm which shoots more than eighteen shots semi-automatically without reloading").

[5] *See* 1959 Mich. Pub. Acts 249, 250; 1959 R.I. Acts & Resolves 260, 260, 263 (amended 1975); 48 Stat. 1236 (1934), currently codified as amended at 26 U.S.C. §§5801-72; 1972 Ohio Laws 1866, 1963 (setting 32-round limit); *see also* 2013- 2014 Leg., H.R. 234 (Ohio) (fully repealing magazine ban) (codified at Ohio Rev. Code Ann. §2923.11).

gun violence across the country. Christopher S. Koper et al., An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets & Gun Violence, 1994-2003, Rep. to the Nat'l Inst. of Justice, U.S. Dep't of Justice 96 (2004), available at https://bit.ly/3wUdGRE. Under federal law today—just as under the laws of 40 of the 50 states—law-abiding citizens may lawfully possess magazines capable of holding more than 10 rounds of ammunition, and they do possess them to the tune of more than 100 million magazines. Accordingly, the state cannot even identify a "well-established" tradition of restricting magazine capacity *today*, let alone identify any "representative historical analogue" that might justify its confiscatory magazine ban. *Bruen*, 142 S. Ct. at 2133; *cf. id.* at 2126 (cautioning "against giving postenactment history more weight than it can rightly bear").

C. The Absence of Historical Capacity Restrictions Is Dispositive Given the Long Tradition of Arms Capable of Firing More than 10 Rounds Without Reloading.

The complete absence of historical laws restricting firing capacity is not owing to some "dramatic technological change[]" or "unprecedented societal concerns" that did not exist until 1990. *Bruen*, 142 S. Ct. at 2131. Firearms capable of firing more than 10 rounds without reloading have been around since before the founding. "[T]he first firearm that could fire more than ten rounds without reloading was invented around 1580," and several such handguns and long guns "pre-date[d] the American Revolution," some by "nearly one hundred years." *Duncan*, 970 F.3d at 1147. For example, the popular Pepperbox-style pistol could "shoot 18 or 24 shots before reloading individual cylinders," and the Girandoni air rifle, which "had a 22-round capacity," "was famously carried on the Lewis and Clark expedition." *Id; see also* David B. Kopel, The History of Firearm Magazines and Magazine Prohibitions, 78 Alb. L. Rev. 849 (2015). "[I]n 1821, the New York Evening Post described the invention of a new repeater as 'importan[t], both for public and private use,' whose 'number of charges may be extended to fifteen or even twenty.'" *ANJRPC II*, 974 F.3d at 255 (Matey, J., dissenting). By the 1830s, these and other models of arms capable of firing more than 10 rounds without reloading had become "common." *Duncan*, 19 F.4th at 1154-55 (Bumatay, Ikuta, and R. Nelson, JJ., dissenting).

"[R]ifle magazines of more than ten rounds had become popular by the time the Fourteenth Amendment was being ratified." Kopel at 851. In the 1860s, "repeating, cartridge-fed firearms" gained popularity, and many of the most popular models had magazines that held more than 10 rounds. *Duncan*, 970 F.3d at 1148. For example, the Winchester 66, which was on the market by 1867 and would go on to sell 170,000 copies, had a 17-round magazine and could fire all 17 rounds plus the one in the chamber in under nine seconds. *Id; see also Duncan*, 19 F.4th at 1154-55 (Bumatay, Ikuta, and R. Nelson, dissenting). Later models, including the famed Winchester 73 (also known as "the gun that won the West"), also had magazines that held more than 10 rounds and sold a combined "over 1.7 million total copies" between 1873 and 1941. *Duncan*, 970 F.3d at 1148.

As detachable box-style magazines became more popular around the turn of the twentieth century, so too did rifles and handguns with box magazines capable of holding more than 10 rounds, such as Auto Ordnance Company's semi-automatic rifle (1927, 30 rounds) and the Browning Hi-Power pistol (1935, 13 rounds). *Id.* In 1963, the U.S. government sold hundreds of thousands of surplus 15- and 30-round M-1 carbines to civilians at a steep discount. *Id.* That same year, the first AR-15 rifle was released. *Id.* The AR-15 comes standard with a 30-round magazine and remains the most popular rifle in America today. *Id.*; *ANJRPC II*, 974 F.3d at 256 (Matey dissenting); *Duncan*, 366 F. Supp. 3d at 1145.

Although long guns were the weapon of choice for most Americans during the first half of the twentieth century, pistol sales grew exponentially during the latter half. Kopel at 862-64. Unsurprisingly, that trend closely correlated with technological advancements that enabled pistols to hold higher capacity magazines in a more compact and user-friendly style. *See id.* at 857-64. Today, the most popular handgun in America is the Glock 17, which comes standard with a 17-round magazine. *Duncan*, 970 F.3d at 1142, 1148. Many other popular pistols likewise come standard with magazines that hold more than 10 rounds. For example, "the Beretta Model 92 … comes standard with a sixteen-round magazine," "Smith & Wesson (S&W) M&P 9 M2.0 nine-millimeter magazines contain seventeen rounds," and "[t]he Ruger SR9 has a 17-round standard magazine." *Id.* at 1142 & n.4.

In short, arms that could fire more than 10 rounds without reloading were by no means "unforeseen inventions to the Founders." *Id.* at 1147. They have been available for literally centuries, and "magazines of more than ten rounds had been well established in the mainstream of American gun ownership" "long before" a handful of capacity restrictions started to pop in the late 20th Century. *See* Kopel at 862-64. Yet although there is a long historical tradition of law-abiding citizens possessing these firearms for lawful purposes, there is no similar tradition of government regulation, let alone confiscation. To the contrary, the historical tradition of advancement in firearms technology reflects a steady trend toward *increasing* the capacity of the most popular and common arms, with no corresponding trend of government restrictions on capacity. New Jersey thus cannot possibly meet its burden of "affirmatively prov[ing] that its [magazine ban] is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Bruen*, 142 S. Ct. at 2127.

D. There is No Need for a Remand.

Presumably anticipating this problem, New Jersey has informed Plaintiffs-Appellants that it intends to try to buy its ban more time by urging this Court to remand so it can develop a factual record. That would be an exercise in futility. The state has had four years to try to develop historical support for its ban, yet it has repeatedly failed to do so. It failed to do so, moreover, even though the historical question was plainly before this Court as part of the now-defunct two-step test, under which a regulation was not treated as "presumptively lawful" if there was no "longstanding history" supporting it. *See ANJRPC I*, 910 F.3d at 117 n.18. This Court thus did not defer resolution of whether the state's ban has a historical analogue for lack of sufficient information; after reviewing the full record the parties produced, it squarely resolved that question against the state, finding that "the record shows that … there is no longstanding history of LCM regulation." *Id.* at 116-17 & n.18; *cf. Bruen*, 142 S. Ct. at 2130 n.6 ("[i]n our adversarial system of adjudication, we follow the principle of party presentation"). The state is not entitled to a second (let alone third) bite at the apple, with the attendant delay in vindicating fundamental constitutional rights, just because it failed to manufacture any non-existent historical support for its ban at any of the earlier stages of this case. A remand for that purpose not only would be futile (as no historical evidence exists) but would merely delay giving effect to the Supreme Court's clear teaching in *Bruen*.

In all events, the inquiry required by the Supreme Court is ultimately a legal inquiry, and legal history is appropriately presented in briefs. If the state has somehow managed to identify something that it thinks will help show that its ban is part of a longstanding tradition of historically relevant regulation (a highly doubtful proposition), then the time and place to produce it is in the supplemental briefing this Court has requested. And if the state cannot make that showing even at this late date, it is not for lack of opportunity. It is because there is simply no denying that no state regulated firing capacity until 1927, and such laws remain few and far between even today. That suffices to doom any claim that New Jersey's confiscatory magazine ban "is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2130.

4. Conclusion

Because magazines with a capacity of more than 10 rounds are in common use and therefore presumptively protected by the text of the Second Amendment, and because New Jersey cannot show any historical tradition supporting its magazine ban, the ban is unconstitutional, and the Court should reverse the judgment below.

Respectfully submitted,

/s/ Daniel L. Schmutter
Daniel L. Schmutter, Esq.
Hartman & Winnicki, PC
74 Passaic Street
Ridgewood, New Jersey 07450
Phone: (201) 967-8040
dschmutter@hartmanwinnicki.com

Paul D. Clement, Esq.
Erin E. Murphy, Esq.
Clement & Murphy PLLC
706 Duke Street
Alexandria, Virginia 22314
Phone: (202) 742-8900
paul.clement@clementmurphy.com
erin.murphy@clementmurphy.com

Attorneys for Plaintiffs-Appellants