

No. 19-3142

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**In the  
United States Court of Appeals  
for the Third Circuit**

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**ASSOCIATION OF NEW JERSEY RIFLE AND PISTOL CLUBS, INC.;  
BLAKE ELLMAN; ALEXANDER DEMBOWSKI,**

*Plaintiffs-Appellants,*

**v.**

**ATTORNEY GENERAL NEW JERSEY; SUPERINTENDENT NEW  
JERSEY 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.*

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On Appeal from the United States District Court  
for the District of New Jersey  
Case No. 3:18-cv-10507  
The Honorable Peter G. Sheridan

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**PLAINTIFFS-APPELLANTS' MEMORANDUM REGARDING  
*N.Y. STATE RIFLE & PISTOL ASSOCIATION, INC. V. CITY OF N.Y.***

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## INTRODUCTION

Plaintiffs-Appellants (“Plaintiffs”) respectfully submit this memorandum pursuant to this Court’s April 28, 2020 Order directing the parties to “file their supplemental memoranda addressing the impact, if any, of the Supreme Court’s decision [in *New York State Rifle & Pistol Association v. City of New York* (“*NYSRPA*”)] on this appeal ....”

## BACKGROUND

On April 27, 2020, the Supreme Court issued its decision in *NYSRPA*. That case addressed whether New York City’s “ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment.” Pet. for Writ of Certiorari, No. 18-280 (U.S. Sept. 4, 2018). The Court vacated as moot the Second Circuit’s judgment upholding New York City’s ban because the City had repealed the challenged ordinance and the state had passed legislation forbidding enactment of a similar ordinance in the future. *NYSRPA*, Slip op., Per Curiam at 2. The fact that New York went to such lengths to avoid defending a law that had survived the Second Circuit’s review suggests that the Supreme Court’s Second Amendment precedents require more rigorous review than the Second Circuit’s version of heightened scrutiny. *See NYSRPA*, Slip op., Alito, J., dissenting at 27. Because this Court’s Second Amendment standard of review is if anything even more deferential than that of the Second Circuit, *NYSRPA*

suggests that this Court should apply a more rigorous standard of scrutiny in this case. (*Compare, e. g., New York State Rifle & Pistol Ass’n, Inc. v. City of New York*, 883 F.3d 45, 62 (2d Cir. 2018) (“The key question is whether the statute at issue is substantially related to the achievement of an important governmental interest.”) *with Ass’n of N.J. Rifle & Pistol Clubs v. Grewal*, 910 F.3d 106, 119 (3d Cir. 2018) (To survive intermediate scrutiny, “the government must assert a significant, substantial, or important interest; there must also be a reasonable fit between that asserted interest and the challenged law.”)).

At issue here is a New Jersey law that bans possession of ammunition magazines capable of holding more than ten rounds. N.J.S.A. § 2C:39-1(y). These magazines are common items that come standard on many protected firearms and are kept for lawful purposes by millions of law-abiding, responsible citizens. *Ass’n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 116; *see also* Br. at 6-9.

### **IMPLICATIONS OF *NYSRPA***

The *NYSRPA* per curiam order did not address the merits of Petitioners’ challenge, but Justice Alito’s dissent, joined by Justices Gorsuch and Thomas, and Justice Kavanaugh’s concurrence reiterated that challenges brought under the Second Amendment must be analyzed under the Second Amendment’s text, history, and tradition. *NYSRPA*, Slip op., Alito, J., dissenting at 25-26, Kavanaugh, J., concurring at 1. “Once it is recognized that the right at issue” is protected by the

Second Amendment, “it [is] incumbent on the [State] to justify the restrictions its rule imposes” by presenting “evidence of laws in force around the time of the adoption of the Second Amendment that prevented gun owners from” exercising the right at issue. *NYSRPA*, Slip op., Alito, J., dissenting at 26. Because “neither the City, the courts below, nor any of the many amici supporting the City have shown that municipalities during the founding era prevented gun owners from” exercising the right at issue, the *NYSRPA* dissenting justices would have held that the City’s restriction violated the Second Amendment. *Id.* at 27; *see also id.* at 25 (the Second Amendment violation “is not a close question”).

Similarly, New Jersey’s magazine ban cannot be squared with the text, history, or tradition of the Second Amendment. It is undisputed that the Second Amendment protects the right of law-abiding, responsible citizens to possess magazines capable of holding more than ten rounds of ammunition. *See* Defendants-Appellees’ Opp. Br., at 19-21; *see also Ass’n of New Jersey Rifle & Pistol Clubs, Inc.*, 910 F.3d at 116-17 (assuming that the Second Amendment protects magazines capable of holding more than 10 rounds of ammunition).

Defendants therefore must present evidence of analogous restrictions in force around the time of the adoption of the Second Amendment. *See NYSRPA*, Slip Op., Alito, J. dissenting at 26. Defendants failed to cite a single example of such a law. *See* Opp. Br., at 19-20. This Court’s prior panel decision confirmed that “there is no

longstanding history of’ regulating magazines capable of holding more than 10 rounds. *Ass’n of New Jersey Rifle & Pistol Clubs, Inc.*, 910 F.3d at 116 & n.18 (“LCMs were not regulated until the 1920s, but most of those laws were invalidated by the 1970s.”). Plaintiffs in contrast presented evidence confirming that a ban on arms typically possessed for lawful purposes—such as the magazines banned by New Jersey—has no basis in the Second Amendment’s text, history, and tradition. Br., at 16-20; Reply Br., at 7. For this reason alone, New Jersey’s magazine is per se unconstitutional. No means-end scrutiny is necessary or proper. *See NYSRPA*, Slip op., Alito, J., dissenting at 27.

The *NYSRPA* dissent also disapproved the standard of review used by the Second Circuit to uphold New York City’s restriction because it involved “no serious probing.” *See id.* (“We are told that the mode of review in this case is representative of the way *Heller* has been treated in the lower courts. If that is true, there is cause for concern.”). Courts may not accept at face value the government’s assertion that a challenged law promotes public safety. *Id.* The *NYSRPA* dissent thoroughly tested each piece of evidence presented by the City to determine whether the City’s restriction actually promoted public safety and concluded that the City’s evidence failed to show that it did. *See id.* at 27-31

Like New York City in *NYSRPA*, Defendants argue that the magazine ban promotes public safety. Opp. Br., at 22. Like the City’s evidence in *NYSRPA*,

Defendants' evidence fails to demonstrate that the magazine ban curbs any criminal misuse of firearms. While Defendants claim that the magazine ban is "important to the protection of public safety and law enforcement safety," Opp. Br., at 22, Defendants fail to cite any evidence demonstrating that to be true. This Court's prior panel predicted that New Jersey's magazine ban "will . . . reduce the number of shots fired and the resulting harm" and will "present opportunities for victims to flee and bystanders to intervene." *Ass'n of New Jersey Rifle & Pistol Clubs, Inc.*, 910 F.3d at 119-20. But beyond speculating that New Jersey's magazine ban might present such opportunities, the prior panel found no evidence that the ban actually enhances public safety. After thoroughly assessing the same arguments relied upon by the State here, the Southern District of California held that California's similar magazine ban failed intermediate scrutiny. *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1120-34 (S.D. Cal. 2017), *aff'd*, 742 F. App'x 218 (9th Cir. 2018). A similarly fair review of the evidence here requires the same conclusion.

Even though New Jersey's magazine ban prohibits its law-abiding, responsible citizens from lawfully possessing common magazines in the home for self-defense, the prior panel held that it was not an abuse of discretion to deny the request for a preliminary injunction, making that determination by employing a form "intermediate scrutiny" (*Ass'n of New Jersey Rifle & Pistol Clubs, Inc.*, 910 F.3d at 113), precisely the sort of deferential interest-balancing approach that *Heller* ruled



out. *See District of Columbia v. Heller*, 554 U.S. 570, 634 (2008); *NYSRPA*, Slip op., Alito, J., dissenting at 27. The prior panel contradicted the Supreme Court’s clear teachings by applying an overly deferential form of means-end scrutiny that leaves law-abiding, responsible citizens unable to exercise a fundamental right.

This Court should use this case to “properly apply[]” the Supreme Court’s landmark Second Amendment opinions in *Heller* and *McDonald v. Chicago*, 561 U.S. 742 (2010). Slip op. 1, *NYSRPA* (Kavanaugh, J., concurring) (“I share JUSTICE ALITO’s concern that some federal and state courts may not be properly applying *Heller* and *McDonald*. The Court should address that issue soon, perhaps in one of the several Second Amendment cases with petitions for certiorari now pending before the Court.”).<sup>1</sup> The Court should erase all doubt about the Second Amendment’s protection of a meaningful right to keep and bear arms for self-defense.

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<sup>1</sup> Ten petitions for writ of certiorari raising Second Amendment challenges are currently pending before the Supreme Court. On May 11, 2020, the Supreme Court distributed each of these petitions for May 15, 2020 conference. If the Supreme Court grants any of these petitions, Plaintiffs may seek to again stay this case pending a decision by the Supreme Court.

Dated: May 12, 2020

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1,490 words.

2. 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: May 12, 2020

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2020, I filed the foregoing with the Clerk of the Court via CM/ECF, which will serve the following counsel of record:

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### **CERTIFICATE OF VIRUS SCAN**

I certify that the Portable Document Format version of the attached document has been scanned for viruses using Windows Defender Antivirus Software, and according to that program, the document is free of viruses.

Dated: May 12, 2020

Respectfully submitted,

/s/ John Parker Sweeney

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### **CERTIFICATE OF BAR MEMBERSHIP AND PRIVACY REDACTIONS**

I hereby certify that the signatory to this brief, John Parker Sweeney, is a member of the bar of this Court. I further certify that no privacy redactions were necessary for this filing.

Dated: May 12, 2020

Respectfully submitted,

/s/ John Parker Sweeney

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