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August 10, 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' REPLY LETTER BRIEF IN SUPPORT OF REVERSAL OF JUDGMENT BELOW

Dear Honorable Judges:

We represent Plaintiffs-Appellants in the above-referenced matter. We submit this reply letter brief in response to the letter brief filed by Defendant-Appellee Attorney General of New Jersey in which he argues for remand to the district court 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 set forth in Plaintiffs-Appellants' Opening Letter Brief, remand is neither necessary nor appropriate. The text, history, and tradition approach that the Supreme Court embraced in *Bruen* does not mark the first time the Supreme Court has made clear that history and

tradition play an important role in Second Amendment cases; the Court surveyed history and tradition in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Moreover, even under this Court's now defunct two-part test, historical tradition still mattered. Plaintiffs-Appellants accordingly have spent the past four years assiduously compiling a detailed record of the long historical tradition of protecting the right of law-abiding citizens to keep and bear arms capable of firing more than 10 rounds without reloading. The state, meanwhile, made a strategic decision to ignore text, history and tradition (none of which supports its novel confiscatory ban) in favor of arguing that its magazine ban furthers public safety, leading this Court to resolve the core historical questions at issue here against the state.

What the state really seeks now, then, is a do-over in which it gets a second chance to create the historical record that it made a strategic choice to forego the first time around. Not only would that unfairly burden Plaintiffs-Appellants with years of additional delay and expense while continuing to deprive them of their fundamental constitutional rights; it would be an exercise in futility, for the historical record is not going to change and is already clear: "[T]here is no longstanding history of LCM regulation." *Association of New Jersey Rifle and Pistol Clubs, Inc. v. Attorney General New Jersey*, 910 F.3d 106, 117 (3d Cir. 2018) ("*ANJRPC I*") "); *see also Rutherford v. Barnhart*, 399 F.3d 546, 553 (3d Cir. 2005) (Remand is only appropriate when there could be a different outcome). Accordingly, the far more sensible path is for this Court to finally resolve this long-running case and hold New Jersey's confiscatory magazine ban unconstitutional.

1. There Is No Need to Develop Any Further Record in the District Court to Resolve This Case.

The state ostensibly seeks remand to the district court to "build the factual record *Bruen* requires." Def. Br. at 6. But historical tradition is not a factual question for district court fact-finding. It is a legal inquiry that can and should be resolved without expert testimony or discovery. There is no better illustration of that than *Heller*, *McDonald*, and *Bruen*, each of which was resolved without *any* factual or expert testimony on historical tradition at the district court level or otherwise. That is presumably because the Supreme Court recognized in each of those cases that the kind of historical record on which constitutional interpretation turns does not consist of non-public information in the possession of one party or the other, but rather is out there for any party to develop as much or as little as it chooses to do so, just as with other constitutional inquiries where history and tradition are relevant. *See, e.g., Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 575-85 (2014).

Consistent with that understanding, Plaintiffs-Appellants have already provided the historical record necessary to resolve the only remaining question in this case—namely, whether New Jersey can prove 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 2130. All the way back in their motion for a preliminary injunction filed more than four years ago, Plaintiffs-Appellants explained to the district court, with supporting citations to sources examining the issues at great length, that firearms capable of firing more than ten rounds have existed for centuries, that there is not "any historical tradition of banning

standard-capacity magazines," and that, to the contrary, "there is a nearly universal and unbroken tradition of Americans owning standard-capacity magazines *without* being subject to restrictions like New Jersey's." D. Ct., ECF No. 14 at 13. Plaintiffs-Appellants have continued to make that case at every juncture since, including in the detailed historical analysis that they supplied in their Opening Letter Brief. *See* 3d. Cir. Docket No. 18-3170, ECF No. 003113054091 at 20-21 (Opening Brief - first appeal); 3d. Cir. Docket No. 18-3170, ECF No. 003113113700 at 15 (Petition for Rehearing – first appeal); 3d. Cir. Docket No. 19-3142, ECF No. 68 at 9, 16-20 (Opening Brief - second appeal); 3d. Cir. Docket No. 19-3142, ECF No. 100 at 2-4 (Supplemental Brief - second appeal); 3d. Cir. Docket No. 19-3142, ECF No. 117 at 4-8 (Petition for Rehearing - second appeal); S. Ct. Docket No. 20-1507, Petition for Writ of Certiorari at 4-6.

For four years, the state has had both ample opportunity and ample incentive to try to prove otherwise if it could. After all, had the state managed to prove that laws like New Jersey's are "longstanding," then the ban likely would have escaped Second Amendment scrutiny entirely under this Court's then-governing test. *See ANJRPC I*, 901 F.3d at 117 n.18. Instead, the state opted to effectively concede the point, leading this Court to affirmatively conclude that "there is no longstanding history of LCM regulation." *Id.* at 117. And even when presented with yet another opportunity to address the issue in a 20-page supplement brief, the state made the strategic decision to file a barely 9-page brief putting all of its eggs in the remand basket rather than even trying to rebut any of the well-documented historical arguments that Plaintiffs-Appellants have been making for years.

Ultimately, then, the state has offered this Court no reason to think that a remand will accomplish anything beyond delaying even longer the vindication of Plaintiffs-Appellants' Second Amendment rights.

2. The Treatment of Similar Cases Supports Denial of a Remand

Rather than explain what it could actually hope to accomplish on remand, the state notes that the Ninth Circuit *sua sponte* remanded a few Second Amendment cases to district court in light of *Bruen*. But the state neglects to mention that the Ninth Circuit did *not* follow that course in *Duncan v. Bonta*, No. 19-55376, ECF No. 202 (9th Cir. August 2, 2022), a case much like this one that challenges *California's* ban on magazines capable of holding more than 10 rounds. *Duncan* is one of three other cases that the Supreme Court GVR'd in light of *Bruen* along with this case.[1] And in *Duncan*, the Ninth Circuit recognized that it is not at all obvious that these cases ought to be remanded to the district court, and thus directed the parties to file supplemental briefs addressing proper resolution. *See id.*

So, too, in the Fourth Circuit case *Bianchi v. Frosh*, No. 21-1255, ECF No. 34 (4th Cir. August 1, 2022) -- another of the GVR'd cases. Rather than presume that remand was the appropriate step, the Fourth Circuit ordered the clerk both to "establish a supplemental briefing schedule for the parties to address the application of *New York State Rifle & Pistol*

[1] The GVR'd cases are those, like this one, in which the Supreme Court granted the petition for certiorari, vacated the judgment below, and remanded for further proceedings in light of *Bruen* all in a single order.

Ass'n v. Bruen, 142 S. Ct. 2111 (2022), to this case" and to "tentatively calendar" the case for supplemental oral argument. Defendant-Appellee also relies on *Martinez v. Villanueva*, No. 20-56233, 2022 WL 2452308 (9th Cir. July 6, 2022), for the proposition that remand is proper, but in that case, there was an *unopposed* motion to remand. Here, by contrast, Plaintiffs-Appellants very much oppose remand and the inevitable delay it would produce.

One of the (non-magazine) cases the Ninth Circuit did remand *sua sponte*, moreover, prompted a dissent from Judge Bumatay:

> For over a decade, our court has improperly interest-balanced our way around the Second Amendment. The Supreme Court has had enough of it. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, —— U.S. ——, 142 S.Ct. 2111, —— L.Ed.2d —— (2022). With a clear legal standard now in hand, we should have ordered supplemental briefing to further this case along. Instead, we instinctively kick the can back to the district court. And we do so without the benefit of the parties' position on whether our three-judge panel could have directly resolved this case based on *Bruen*. A remand here may just prolong the inevitable as we will eventually have to decide this case—adding unnecessary delays and expenses for the parties. At the very least, we should have given the parties a chance to let us know where they stand on the question of remand. I thus respectfully dissent from vacating and remanding this matter.

Rupp v. Bonta, No. 19-56004, 2022 WL 2382319 (9th Cir. June 28, 2022) (Bumatay, J., dissenting). Judge Bumatay is entirely correct, and his logic applies with full force to a magazine ban, as even the Ninth Circuit appears to recognize. Remand adds substantial delay and expense – delay that should not be imposed on parties that have already been waiting years to vindicate their fundamental constitutional rights. If one thing is clear from *Bruen*, it is that Second Amendment rights are not second-class rights procedurally or substantively.

In short, remand to the district court has been by far the *exception* rather than the rule in the wake of *Bruen*. Only the Ninth Circuit – and only *some* panels of the Ninth Circuit at that – has reflexively ordered automatic remand to the district court. As other courts (and panels) have correctly recognized, extensive district court proceedings are neither necessary nor necessarily appropriate to resolve the historical tradition inquiry, as the parties can fully address that inquiry through supplemental briefs, just as this Court gave the state the opportunity to do here.

3. Conclusion

The State of New Jersey has had years to develop a historical record to support its ban on standard-capacity ammunition magazines. It chose not to do so. It even had 20 pages to do so on remand from the Supreme Court in the current round of briefing. Again, it chose not to do so. That is presumably because no historical tradition supports the state's novel ban. The history is not changing, and if the state still cannot muster any sort of historical tradition to support its ban at this late date, it plainly never will.

Under those circumstances, the Court should not facilitate the state's no so subtle effort to further delay the vindication of Plaintiffs-Appellants' fundamental constitutional rights.

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. The Court should decline New Jersey's request for a remand, resolve this appeal on its merits, and reverse the judgment below.

Respectfully submitted,

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