State of New Jersey

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO BOX
TRENTON, NJ 08625-0

MATTHEW J. PLATKIN
Acting Attorney General

MICHAEL T.G. LONG
Director

July 27, 2022

VIA CM/ECF
Patricia S. Dodszuweit, Clerk of Court
Office of the Clerk
United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Re: **Association New Jersey Rifle, et al. v. Attorney General New Jersey, et al.**
Case Number: 19-3142
District Court Case Number: 3:18-cv-10507

Dear Ms. Dodszuweit:

The State writes in response to this Court's July 7, 2022 order seeking letter briefs addressing the proper disposition of this case in light of the Supreme Court's intervening decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). This Court should vacate the district court's order granting summary judgment on law-of-the-case grounds and remand the matter to the district court so that the parties can develop the record, consistent with that decision.

I. Background and Procedural History

In 2018, New Jersey enacted Assembly Bill 2761, codified at N.J. Stat. Ann. § 2C:39-1 ("the Act"). The Act revised the definition of unlawful "large capacity magazine" ("LCM"), reducing the number of rounds of ammunition a single magazine can lawfully hold from fifteen to ten. N.J. Stat. Ann. § 2C:39-1(y). On the day the Act was signed into law, a group of firearms owners and a firearms advocacy organization ("Plaintiffs") filed suit, alleging, *inter alia*, that the Act violates the Second Amendment.

Plaintiffs filed a motion for a preliminary injunction, which the district court denied. *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Grewal*, No. 3:17-cv-10507, 2018 WL 4688345, at *1 (D.N.J. Sept. 28, 2018). A panel of this Court affirmed the denial of preliminary relief. *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. N.J.*, 910 F.3d 106, 110 (3d Cir. 2018). In its opinion, this Court directly addressed the constitutionality of the Act, applying intermediate scrutiny and holding that the statute did not violate the Second Amendment. *Id*. Among other things, the panel concluded that "New Jersey's law reasonably fits the state's interest in public safety" given the evidence that LCMs are used in mass shootings. *Id.* The Court also found that the Act does not burden more conduct than necessary because "it imposes no limit on the number of firearms or magazines or amount of ammunition a person may lawfully possess." *Id*. at 122.

On remand, both Plaintiffs and the State filed cross-motions for summary judgment without developing any additional summary judgment record. As the State explained, it did not seek additional discovery or introduce more evidence into the summary judgment record because the Third Circuit had already found the challenged statute constitutional—

meaning that decision was now law of the case. *See* Br. of Defs.-Appellees at 13, No. 19-3142, 2020 WL 1325629 (3d Cir. Mar. 11, 2020). On July 29, 2019, the district court agreed with the State; it granted summary judgment for New Jersey on the sole basis that the Third Circuit already "explicitly held" that the Act does not violate the Constitution when upholding the denial of the preliminary injunction application. *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Grewal*, No. 3:18-cv-10507, 2019 WL 3430101, at *3 (D.N.J. July 29, 2019). On September 1, 2020, this Court affirmed on that same basis—that is, that the previous panel decision was law of the case. *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. N.J.*, 974 F.3d 237 (3d Cir. 2020).

On April 26, 2021, Plaintiffs filed a petition for writ of certiorari to the United States Supreme Court. On June 23, 2022, the Supreme Court issued its decision in *Bruen*, a case concerning New York's concealed carry permitting regime. The majority in *Bruen* rejected the use of means-end scrutiny in assessing the constitutionality of laws under the Second Amendment, 142 S. Ct. at 2129-30, overruling the traditional two-step approach taken by this circuit and all of its sister circuits. The following week, on June 30, 2022, the Supreme Court granted Plaintiffs' petition, vacated the judgment of the Third Circuit, and remanded ("GVR") this case for further consideration in light of the decision in *Bruen*.

II. This Court Should Remand This Case To The District Court, Which Can Re-Consider Plaintiffs' Challenge On A Proper Record.

Remand is warranted both so that the parties can develop the appropriate record in light of *Bruen*, and so that the district court can apply the new legal test that case announced to this challenge in the first instance. That is consistent with how this Court and its sister

circuits have traditionally handled intervening decisions by the Supreme Court, and is particularly justified given the procedural history of this case.

1. A decision to remand this case to the district court for reconsideration in light of *Bruen* is consistent with how this Court has traditionally handled cases in which there has been a GVR order from the Supreme Court—particularly when the intervening ruling may require additional record development by the parties. *See, e.g.*, *United States v. Byrd*, 742 F. App'x 587, 588 (3d Cir. 2018) (after "request[ing] and review[ing] further briefing from the parties on the effect of the Supreme Court's decision" overturning the prior Third Circuit ruling, "conclud[ing] that further remand to the District Court is appropriate" for additional fact finding and development of the record and for consideration of additional legal issues); *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 824 F.2d 287 (3d Cir. 1987) (remanding to district court to take "further action consistent with the Supreme Court's mandate"); *Higgins v. Burroughs*, 834 F.2d 76, 77-78 (3d Cir. 1987) (remanding to the district court "because the parties may require additional evidence in connection with the standard now announced by the Supreme Court"); *see also In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 184 (3d Cir. 2015) (remanding to district court when, prior to issuance of a briefing schedule in the case, the Supreme Court decided intervening precedent regarding class certification).

Nor is this Court unusual in its approach; other courts of appeals regularly remand matters to the district court in light of intervening Supreme Court precedent. *See, e.g.*, *Matter of Ritz*, 832 F.3d 560, 568-69 (5th Cir. 2016) (remanding to district court following reversal by Supreme Court where fact finding was necessary on the issue of intent); *June*

Med. Servs., L.L.C. v. Gee, No. 16-30116, 2016 WL 11494731, at *1 (5th Cir. Aug. 24, 2016) (granting motion to remand "so that the district court can engage in additional fact finding required by the decision in" *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016)); *Application of Nelson*, 445 F.2d 631 (8th Cir. 1971) (receiving a GVR and remanding to the district court for additional fact finding). In short, this Court, as well as its sister circuits, have remanded a wide variety of civil and criminal cases to the district court for development of the factual record and disposition.

There is a good reason why the circuits often remand cases to district courts in the wake of a GVR order. Because this Court has repeatedly held that it is "'a court of review, not first view,'" it makes eminent sense that the district court would be responsible for first engaging in the fact finding and the legal determinations that an intervening Supreme Court decision has made relevant or dispositive. *Jerri v. Harran*, 625 F. App'x 574, 579 (3d Cir. 2015) (quoting *Haskell v. Harris*, 745 F.3d 1269, 1271 (9th Cir. 2014) (finding that it is "prudent to remand to the District Court" to resolve legal issue in the first instance)); *see also City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1476 (2022) (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) ("This Court, however, is 'a court of final review and not first view,' and it does not '[o]rdinarily ... decide in the first instance issues not decided below.'"); *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (same).

This case presents a compelling example for why that would be so. The *Bruen* Court announced a new legal standard that abrogates the one on which this Court had relied in deciding Second Amendment cases since 2010—*compare, e.g.*, *Bruen*, 142 S. Ct. at 2127, *with United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010)—and given the recency

of *Bruen*, no district court in this circuit has had occasion to apply its test to *any* statute, let alone one similar to the law challenged here. On top of that, *Bruen* recognized that its decision left open significant legal questions—the sorts of questions that district courts must sort through in the first instance, and that appellate tribunals can subsequently review, consistent with their traditional roles. *See Bruen*, 142 S. Ct. at 2132-33 (acknowledging a range of questions remain open under the analogical-reasoning approach and declining to "provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment").

2. Remand is especially appropriate here because the parties need an opportunity to build the factual record *Bruen* requires—which, given the procedural history of this case, the parties must do for the first time on remand. As noted above, it is frequently the case that an intervening decision by the Supreme Court will make new factual inquiries relevant to the legal challenge and thereby change what record development is necessary to properly resolve the case. *See, e.g.*, *Burney v. Housing Auth. of Beaver County*, 735 F.2d 113, 115-16 (3d Cir. 1984) (declining to resolve question involving calculation of attorney's fees after an intervening Supreme Court decision "elucidated the principles to guide the federal courts," and remanding to district court instead, because the "district court here made no findings as to" the central fact question the intervening decision made relevant); *June Med. Servs.*, 2016 WL 11494731, *1 (remanding for district court to "engage in additional fact finding" in wake of significant Supreme Court constitutional decision); *cf. Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 253-54 (1999) (declining to address a question where, *inter alia*, the "claims do not appear to have been sufficiently developed below"); *Higgins*, 834 F.2d

at 77-78 (same).

Bruen is no exception. Although the parties previously litigated this case within the confines of this Court's established means-end scrutiny approach for Second Amendment claims, *Bruen* announced that "[d]espite the popularity of this two-step approach" it would no longer be good law. *Bruen*, 142 S. Ct. at 2127. In its place, the Court concluded, would be a historically-informed inquiry asking whether the State can identify a proper "historical analogue" for its challenged law. *Id.* at 2133. As the Court noted, the State need not identify "a historical *twin*" and in "cases implicating unprecedented societal concerns or dramatic technological changes," this newly-established analysis "may require a more nuanced approach" that assesses whether the historical analogues identified are "relevantly similar" to the challenged law and "how and why" such analogues "burden[ed] a law-abiding citizen's right to armed self-defense." *Id.* at 2132; *see also id.* at 2134 (tasking courts "with answering these kinds of historical, analogical questions" in future cases). Finally, in response to the arguments that this analogical inquiry may prove unworkable, the Court noted that in the "adversarial system" courts can count on "party presentation" and thus may "decide a case based on the historical record compiled by the parties." *Id.* at 2130 n.6.

Because the Court both abrogated the test employed across the courts of appeals and adopted a new analogical framework that makes different record evidence relevant to the ultimate legal analysis, it is unsurprising that other, similar Second Amendment cases have already been remanded to district courts in the wake of *Bruen*. *See, e.g.*, *Martinez v. Villanueva*, No. 20-56233, 2022 WL 2452308, at *1 (9th Cir. July 6, 2022) (remanding Second Amendment challenge in light of *Bruen* because the district court had applied

intermediate scrutiny); *McDougall v. County of Ventura*, No. 20-56220, 2022 WL 2338577, at *1 (9th Cir. June 29, 2022) (same); *Rupp v. Bonta*, No. 19-56004, 2022 WL 2382319, at *1 (9th Cir. June 28, 2022) (likewise remanding where district court applied intermediate scrutiny in considering constitutionality of assault weapon restriction). The same result is appropriate in this case, where the district court has not yet had the opportunity to apply *Bruen*'s analysis to the instant challenge, and the parties have not appropriately developed the record with additional historical analogues (or addressed "how and why" those prior analogues limited the use of particularly dangerous weapons) that may bear on the ultimate resolution of the case. This Court, as a tribunal of review, should give the parties a chance to develop the record *Bruen* contemplates and allow the district court to make findings in the first instance.

That is especially necessary in light of the procedural history of this case. This Court in 2018 issued a decision affirming the denial of a preliminary injunction on the basis that the challenged law withstood intermediate scrutiny. As a result, New Jersey concluded—and both the district court and this Court ultimately agreed—that the panel decision had wholly resolved "the merits" of Plaintiffs' Second Amendment claim and thus no additional record development would be necessary. *See* Br. of Defs.-Appellees, *supra*, 2020 WL 1325629, at *12-13 & n.1 (citing, *inter alia*, *Pitt News v. Pappert*, 379 F.3d 96, 106 (3d Cir. 2004)). At the time, Plaintiffs agreed that if the law-of-the-case doctrine foreclosed relief, no further discovery would be necessary. *See* Br. in Supp. of State Defs.' Mot. for Summ. J. at 14-15, No. 18-10507, 2019 WL 1200640 (D.N.J. Feb. 13, 2019) (collecting district court and appellate briefs from Plaintiffs, acknowledging that

dispositive decision at the preliminary injunction stage would obviate the need for future factual development). As a result, the parties did not develop any summary judgment record beyond the record developed at the preliminary relief stage, let alone develop a record in light of *Bruen*. Now that the parties agree the past denial of preliminary relief is no longer law of the case, the parties should have the chance to develop a record before this Court dives into the ultimate questions presented in the instant challenge.

Sincerely yours,

MATTHEW J. PLATKIN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: /s/ Stuart M. Feinblatt
Stuart Feinblatt
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that on July 27, 2022, the foregoing Appellees' Letter Brief was electronically filed with the clerk of the court with the United States Court of Appeals for the Third Circuit through the Court's CM/ECF system, which filing effected service upon counsel of record through the CM/ECF system.

Dated: July 27, 2022

By: /s/ Stuart M. Feinblatt
Stuart M. Feinblatt (NJ ID# 018781979)
Assistant Attorney General