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August 10, 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:

Please accept this reply letter brief in further support of the State's position that this matter should be remanded to the district court for further development of the record, in accordance with the recent decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). The question presented at this posture is not one of the ultimate merits, but is only whether the State should have an opportunity to meet the burden *Bruen* assigns it to demonstrate that the challenged law fits within the broad historical tradition of firearms regulation in this country. As *Bruen* recognized, the parties must be able to introduce the evidence—including from analogically similar prior laws—that bears on that constitutional

inquiry. There is no basis to deprive the State, or to deprive the reviewing district court, of that opportunity here.

I. This Case Should Be Remanded For Further Record Development.

Although Plaintiffs urge this Court to invalidate the State's large-capacity magazine law outright, it has no support for that proposition. Indeed, as the State already explained in its opening brief, this Court is one "of review, not first view," meaning that district courts must make factual and legal findings in the first instance. *Jerri v. Harran*, 625 F. App'x 574, 579 (3d Cir. 2015); *see also United States v. Brewster*, 128 F. App'x 271, 273 (3d Cir. 2005) (holding that "the sentencing issues appellant raises are best determined by the District Court in the first instance" and remanding for resentencing in accordance with the intervening decision of *United States v. Booker*, 543 U.S. 220 (2005)). That is an important responsibility, and it allows this Court to perform its appellate function effectively.

It should thus come as no surprise that several other courts of appeals already have remanded analogous cases to the district court in light of *Bruen*, and that no court of appeals has taken the dramatic step Plaintiffs seek of resolving a post-*Bruen* challenge in the absence of a post-*Bruen* record or district court ruling. As detailed in the State's opening brief, a number of Second Amendment cases have been remanded to the district court for further action in light of *Bruen*'s historically-guided framework. *See* Br. of Defs.-Appellees at 7-8 (citing *Martinez v. Villanueva*, No. 20-56233, 2022 WL 2452308, at *1 (9th Cir. July 6, 2022)); *McDougall v. County of Ventura,* No. 20-56220, 2022 WL 2338577, at *1 (9th Cir. June 29, 2022); *Rupp v. Banta,* No. 19-56004, 2022 WL 2382319, at *1 (9th Cir.

June 28, 2022)). Since that time, yet another Second Amendment case—this one involving a challenge to California's Assault Weapons Control Act—was remanded to the district court "for further proceedings consistent with the United States Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. ____ (2022)." *Miller v. Bonta*, No. 21-55608, (9th Cir. Aug. 1, 2022), ECF No. 27. And the Ninth Circuit is hardly alone in this approach. *See, e.g.*, *Sibley v. Watches*, No. 21-1986, 2022 WL 2824268, at *1 (2d Cir. July 20, 2022) (vacating and remanding to district court to "consider in the first instance the impact, if any, of Bruen" on challenge to other requirements for carry permit); *Taveras v. New York City*, No. 21-398, 2022 WL 2678719, at *1 (2d Cir. July 12, 2022) (similar, and acknowledging that "neither the district court nor the parties' briefs anticipated and addressed [*Bruen*'s] new legal standard"). And notably, despite knowing the State would seek remand, Plaintiffs' brief fails to cite a single analogous case declining remand to the district court, let alone in light of *Bruen*.

Bruen itself compels this approach. *Bruen* has made clear that particularly where a challenged state law relates to "unprecedented societal concerns or dramatic technological changes," the constitutional inquiry is "nuanced." *Bruen*, 142 S. Ct. at 2132. Recognizing that "[t]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868," the State may support a statute by "reasoning by analogy"—that is, by showing a law is "relevantly similar," *id.*, to a "well-established and representative historical analogue," *id.* at 2133. That is not as simple as asking about the provenance of the challenged statute; "analogical

reasoning requires . . . that the government identify a well-established and representative historical *analogue*, not a historical *twin*," and that evidence need not be a "dead ringer" for the challenged law. *Id.* A record would thus allow the parties to show "how and why" a prior statute "burden[ed] a law-abiding citizen's right to armed self-defense." *Id.* In other words, the parties can offer competing evidence as to whether a historical predecessor law "impose[d] a comparable burden on the right of armed self-defense" and was "comparably justified." *Id.* The Court was express in contemplating that evidentiary records can be built as part of this analysis, recognizing that courts have to "mak[e] nuanced judgments about which *evidence* to consult and how to interpret it." *Id.* at 2130 (emphasis added) (quoting *McDonald v. Chicago*, 561 U.S. 742, 803-804 (2010) (Scalia, J., concurring)); *see also id.* at 2130 n. 6 (noting that courts are equipped to resolve historical questions by applying "various evidentiary principles" to the record presented by the parties.).

Plaintiffs' brief in fact demonstrates why this Court likewise needs a record in this case in light of *Bruen*, and why this Court should not be the first appellate panel to resolve a post-*Bruen* challenge without one. For one, Plaintiffs repeatedly make a *factual* assertion that LCMs are in common use, but this Court has so far only "assume[d] without deciding" that LCMs are possessed by law-abiding persons for law-abiding purposes. *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. N.J.* (*ANJRPC*), 910 F.3d 106, 117 (3d Cir. 2018). That remains one of many factual issues for the district court to address in the first instance based on a complete record. For another, Plaintiffs contend that this Court already found that no relevant history can support LCM regulations. But that is entirely mistaken.

This Court was, at that time, simply making a comment about the length of time *identical* state magazine capacity restrictions had been in effect. *See id.* at 116-17 & n.18. This Court was not asking whether any historical analogues existed to support the challenged statute. And it was not inquiring into "how and why" previous historical restrictions on kinds of firearms or gunpowder existed—that is, whether they "impose[d] a comparable burden" and were "comparably justified." Such issues have never been addressed by this Court or any other court, and there is no basis to resolve them without record evidence.

Plaintiffs take a stab at trying to answer that inquiry in their supplemental briefing, but they rely on the very sort of evidence that should be considered by the district court on a full record in the first instance. Plaintiffs claim there is a "long tradition of arms capable of firing more than 10 rounds without reloading," and highlight in particular firearms like the Pepperbox-style pistol, the Girandoni air rifle, and the Winchester 66. *See* Pls.' Supp. Br. at 14-16. But the State has not yet been given the opportunity to provide the historical evidence of weapons that *were* regulated at the Founding, or to demonstrate the profound technological changes and evolving threats to public safety that have occurred since that demonstrate the "how and why" of this current capacity restriction. And the district court has thus not yet been called on to "mak[e] nuanced judgments about which evidence to consult and how to interpret it." *Bruen*, 142 S. Ct. at 2130. To the limited extent prior briefing and proposed findings addressed firearms regulatory history, the prior submissions were cursory—at most, a couple of double-spaced pages per filing—and no expert testimony was presented on analogies. *See, e.g.*, Pls.' Reply Br. at 56, *ANJRPC v. Grewal*,

No. 18-cv-10507 (D.N.J. July 9, 2018), ECF No. 39; Pls.' Proposed Findings of Fact & Conclusions of Law at 7-9, *ANJRPC v. Grewal*, No. 19-cv-10507 (D.N.J. Sept. 4, 2018), ECF No. 60; Defs.' Proposed Findings of Fact & Conclusions of Law at 47-50, *ANJRPC v. Grewal*, No. 19-cv-10507 (D.N.J. Sept. 4, 2018), ECF No. 61; Reply Br. of Pls.-Appellants at 7-9, *ANJRPC v. Grewal*, No. 18-3170 (3d Cir. Nov. 2, 2018); Corrected Br. of Pls.-Appellants at 20-21, *ANJRPC v. Grewal*, No. 18-3170 (3d Cir. Oct. 9, 2018). That Plaintiffs recognize the need to go into much greater detail about such history for the first time in a supplemental brief, relying on factual and historical assertions that have not been vetted by the State or the district court to date, underscores that the record in this litigation is not yet appropriate for the inquiry *Bruen* lays out.

II. It Is Not Too Late To Develop The Factual Record.

Perhaps recognizing that the normal course would be to develop a record in the wake of a decision like *Bruen*, Plaintiffs incorrectly suggest that it is simply too late for the State to develop a record. But Plaintiffs misunderstand the procedural history and the law.

The procedural history of this case refutes Plaintiffs' claims. Plaintiffs make much of the fact that they initiated this lawsuit four years ago, and they claim that was more than ample time to build the appropriate record. But for the vast majority of that time, there was no reason for either party to build the kind of record New Jersey is now seeking to establish. After all, this Court issued its decision finding the statute constitutional at the preliminary injunction stage back in 2018. *See ANJRPC*, 910 F.3d at 110. As the State explained in its opening brief to this panel, that decision became law of the case, and it was unnecessary to

seek additional discovery or introduce any further historical evidence into the record (and it might not have been appropriate to do so). *See* Br. of Defs.-Appellees at 13, *ANJRPC v. Grewal*, No. 19-3142, 2020 WL 1325629 (3d Cir. Mar. 11, 2020). Indeed, the district court granted summary judgment to the State on the sole basis that this Court's 2018 preliminary injunction ruling "explicitly held" that the Act does not violate the Constitution, *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), and this panel affirmed on that basis too, *see Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. N.J.*, 974 F.3d 237 (3d Cir. 2020). In other words, this law was upheld on December 5, 2018, and since that time it would have made no sense—and was unnecessary—for the State to build a historical record in a case it had won.

Of course, the State agrees with Plaintiffs that the Court's decision in *Bruen* and the Court's subsequent "grant, vacate, and remand" order in this case changed that calculus. Like Plaintiffs, the State recognizes the law-of-the-case doctrine no longer applies (and so the district court's decision should be vacated) because *Bruen* both declined to adopt this Circuit's two-step means-end framework and clarified that Second Amendment challenges will be decided under an analogically-guided framework. But Plaintiffs cannot have it both ways. Plaintiffs want this Court to hold both that *Bruen* frees them from the prior judgment the Third Circuit issued in 2018 and yet that the State is still bound to the record that was developed in light of that prior Third Circuit judgment. That is wrong; for the very reason that *Bruen* allows Plaintiffs to continue to press forward with a constitutional challenge to the Act, it also requires that the State have an opportunity to develop the historical record

and defend the Act under the new legal standard. In short, *Bruen* now requires the parties to embark on the difficult but important project of identifying historical analogies for the challenged law, and making "nuanced" and likely competing arguments to the district court regarding "which evidence to consult and how to interpret it." *Bruen,* 142 S. Ct. at 2132. This Court's precedent did not previously mandate this analogical analysis, so there was no occasion to litigate it in this case—whatever the length of the lawsuit.

More broadly, Plaintiffs' cramped view of when a remand is appropriate would be inconsistent with traditional circuit practice after a GVR issues. Not surprisingly, courts of appeals have repeatedly remanded cases where, as here, a vacatur from the Supreme Court means their prior decision is no longer law of the case. *See, e.g.*, *United States v. Castillo*, 220 F.3d 648 (5th Cir. 2000) (on remand from Supreme Court, remanding to district court for further proceedings consistent with the Court's intervening opinion in C*astillo v. United States*, 530 U.S. 120 (2000)). Plaintiffs' view that such a remand is only appropriate based on how long the case has been around would be strange. A GVR order almost by definition comes late in a case—after a district court has rendered a judgment and an appellate court has ruled. Instead, the question is not how long the case has existed, but whether there is a need for additional record development in light of the intervening decision by the Supreme Court. Such a need plainly exists here, as several other federal appellate panels to consider these questions after *Bruen* have concluded. A remand to the district court best makes sure that this Court can ultimately perform its reviewing function most effectively.

* * *

In short, several circuit courts considering similar cases after *Bruen* have decided to remand the cases to the district court, so that the parties can build the historical records the Court emphasized. Plaintiffs point to no case to the contrary. The questions *Bruen* raises are challenging and will require serious historical inquiries and debates over the proper analogies. None of that should happen for the first time in supplemental briefing before an appellate court, particularly where the entirety of the prior summary judgment proceedings turned on the law-of-the-case doctrine. Plaintiffs should have an opportunity to press their claims, and the State likewise should have the chance to meet its legal burden, but the parties must do so in the first instance before the district court.

Sincerely yours,

MATTHEW J. PLATKIN
ACTING ATTORNEY GENERAL OF NEW JERSEY

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

cc: All counsel of record (via ECF)

CERTIFICATE OF SERVICE

I certify that on August 10, 2022, the foregoing Appellees' Reply 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: August 10, 2022

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