UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-3142

Association of New Jersey Rifle & Pistol Clubs, Inc., et al.,
Plaintiffs-Appellants,

v.

Gurbir Grewal, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of New Jersey, No. 3:18-cv-10507-PGS-LHG
(Hon. Peter G. Sheridan, U.S.D.J.)

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INTRODUCTION

This case is a familiar one to this Court. Two years ago, seeking to promote public safety and law enforcement safety by limiting the spread and lethality of mass shootings, New Jersey enacted restrictions on the lawful capacity of a magazine. The state law barred individuals from possessing large-capacity magazines ("LCMs")—magazines that allow the owner to fire more than ten bullets at a time, without ever pausing to reload—because such LCMs have been used disproportionately in mass shootings, and result in greater shots fired and greater harm done in a shorter period. That law does not violate the Constitution. For one, it "does not unconstitutionally burden the Second Amendment's right to self-defense in the home" because the law "reasonably fits the State's interest in public safety." For another, it "does not require gun owners to surrender their magazines but instead allows them to retain modified magazines or register firearms that have magazines that cannot be modified" and so it "does not violate the Fifth Amendment's Takings Clause." Finally, although New Jersey decided to exempt retired law enforcement officers from this state law given their background and their training, that exemption "does not violate the Fourteenth Amendment's Equal Protection Clause."

This Court need not even take the State's word for it, as the above quotations all come from the Third Circuit itself—in a panel opinion rejecting Appellants' three challenges to this law at an earlier stage of this very case. *See Ass'n of N.J. Rifle &*

Pistol Clubs v. Grewal ("*NJRPC II*"), 910 F.3d 106, 110 (3d Cir. 2018). Although that opinion was issued at the preliminary injunction stage, that is of no moment—where a preliminary injunction "panel does not stop at the question of likelihood of success and instead addressed the merits, the later panel … should regard itself as bound by the prior panel opinion." *Pitt News v. Pappert*, 379 F.3d 96, 105 (3d Cir. 2004) (Alito, J.). That is exactly what happened here; the Third Circuit's past opinion in this litigation "resolve[d] all legal issues in this case and there remains no genuine disputes of material fact." JA008. Just as summary judgment was warranted on that basis alone, so too is an affirmance by this Court.

Appellants mount a last ditch effort to avoid this result, arguing that this Court can disregard its recent and well-reasoned decision upholding this LCM law because the decision was purportedly clearly wrong and manifestly unjust. But (although the point hardly bears repeating) fidelity to this Court's precedents is the cornerstone of a well-functioning court of appeals. Stare decisis in this Court, as in all other circuits, ensures stability in the law and consistency across panels, and it allows judges to be sure that their decisions will be respected by colleagues regardless of ideology. That is why the Third Circuit has concluded that "the holding of a panel in a precedential opinion is binding on subsequent panels" and that, conversely, "no subsequent panel [may] overrule[] the holding in a precedential opinion of a previous panel." 3d Cir. Internal Operating Procedures 9.1. And that is why this panel lacks the power to do

what Appellants ask—*i.e.*, to overrule a thorough, careful opinion by this Court, that has never been abrogated by an intervening Supreme Court or en banc decision, and that reflects the position of every circuit to consider the issue. If such a decision can qualify as a clear error and as manifestly unjust, then it is hard to see what protection stare decisis rules provide. Appellants' request to reject the prior decision in this case thus should be declined, and the decision below should be affirmed.

COUNTERSTATEMENT OF JURISDICTION

The U.S. District Court for the District of New Jersey had jurisdiction under 28 U.S.C. §1331 because the Association of New Jersey Rifle & Pistol Clubs, Inc., Blake Ellman, and Alexander Dembowski (collectively, "Appellants") asserted civil claims arising under the U.S. Constitution. Appellants appeal the District Court's July 29, 2019 order and opinion granting Appellees summary judgment, and the subsequent August 19, 2019 clerk's judgment, granting summary judgment in favor of Appellees and denying Appellants' cross-motion for summary judgment and for a stay. Appellants timely filed their Notice of Appeal on September 17, 2019. JA1. This Court has jurisdiction pursuant to 28 U.S.C. §1291.

COUNTERSTATEMENT OF ISSUES

Whether this Court must follow its own precedent rejecting this constitutional challenge to New Jersey's restrictions on large capacity magazines.

STATEMENT OF RELATED CASES AND PROCEEDINGS

Appellees are unaware of any related case or proceeding before this Court. Appellees are aware of two other pending cases addressing the constitutionality of LCM laws: a pending appeal in *Duncan v. Becerra*, No. 19-55376 (9th Cir.), and a pending petition for certiorari in *Worman v. Healey*, No. 19-404 (S. Ct.).

COUNTERSTATEMENT OF THE CASE

On June 13, 2018, the Governor of New Jersey signed Assembly Bill 2761 ("A2761") into law, in an effort to prevent the spread and lethality of mass shootings. A2761 limits the number of rounds of ammunition a single magazine can lawfully hold, reducing the permissible capacity from 15 to 10. N.J. Stat. Ann. § 2C:39-1(y). State law thus defines an unlawful "large capacity magazine" as "a box, drum, tube or other container which is capable of holding more than 10 rounds of ammunition to be fed continuously and directly therefrom into a semi-automatic firearm." *Id.* § 2C:58-1y. Although the law restricts the capacity of a single magazine, it imposes no limitation on the number of firearms or magazines or the amount of ammunition that a person can lawfully purchase or own.

The law provided owners of prohibited magazines 180 days to comply with the new limits. *Id.* § 2C:39-19. The law also provided owners with multiple avenues to come into compliance: they could "[t]ransfer the semi-automatic rifle or magazine to any person or firm lawfully entitled to own or possess that firearm or magazine;

[r]ender the semi-automatic rifle or magazine inoperable or permanently modify a large capacity magazine to accept 10 rounds or less; or [v]oluntarily surrender the semi-automatic rifle or magazine." *Id.* A2761 also creates exemptions for firearms "with a fixed magazine capacity [of up to] 15 rounds which is incapable of being modified to accommodate 10 rounds or less" and for firearms "which only accept[] a detachable magazine with a capacity of up to 15 rounds which is incapable of being modified to accommodate 10 or less rounds." Owners of those weapons simply had to register them within one year. *Id.* § 2C:39-20. A2761 also contains an exemption allowing certain retired law enforcement officers to carry LCMs "capable of holding up to 15 rounds of ammunition." *Id.* § 2C:39-17. The exemption applies to retired law enforcement officers authorized under federal and state law to possess and carry a handgun. *Id.* To qualify, that retired officer must "semi-annually qualif[y] in the use of the handgun he is permitted to carry in accordance with the requirements and procedures established by the Attorney General." *Id.* § 2C:39-6(l).

On the same day A2761 was signed into law, Appellants filed the instant suit, alleging that A2761 violates the Second Amendment, the Takings Clause, and the Equal Protection Clause. Eight days later, Appellants filed a motion to preliminarily enjoin enforcement of the law. On September 28, 2018, after a comprehensive three-day fact-finding hearing, the District Court (Sheridan, J.) denied the motion. *Ass'n of N.J. Rifle & Pistol Clubs v. Grewal* ("*NJRPC I*"), 2018 WL 4688345, *16 (D.N.J.

Sept. 28, 2018). The District Court rejected Appellants' claims that A2761 violated the Second, Fifth, and Fourteenth Amendments. *See id.* at *8-16.

Appellants appealed. On December 5, 2018, this Court issued an opinion that affirmed the District Court's decision in all respects. *See Ass'n of N.J. Rifle & Pistol Clubs v. Grewal* ("*NJRPC II*"), 910 F.3d 106 (3d Cir. 2018). This Court held that A2761 is constitutional. *Id.* at 110. Although this was at the preliminary injunction stage, the Court made clear that it was resolving all the legal challenges on the merits and upholding the law. As the panel summarized:

> Today we address whether one of New Jersey's responses to the rise in active and mass shooting incidents in the United States—a law that limits the amount of ammunition that may be held in a single firearm magazine to no more than ten rounds—violates the Second Amendment, the Fifth Amendment's Takings Clause, and the Fourteenth Amendment's Equal Protection Clause. We conclude that it does not. New Jersey's law reasonably fits the State's interest in public safety and does not unconstitutionally burden the Second Amendment's right to self-defense in the home. The law also does not violate the Fifth Amendment's Takings Clause because it does not require gun owners to surrender their magazines but instead allows them to retain modified magazines or register firearms that have magazines that cannot be modified. Finally, because retired law enforcement officers have training and experience that makes them different from ordinary citizens, the law's exemption that permits them to possess magazines that can hold more than ten rounds does not violate the Fourteenth Amendment's Equal Protection Clause. We will therefore affirm the District Court's order denying Plaintiffs' motion to preliminarily enjoin enforcement of the law.

Id.

After summarizing why it believed that A2761 was constitutional, the panel addressed in detail and rejected each of the three claims. With respect to the Second Amendment claim, this Court held that "the Act survives intermediate scrutiny," and that "like our sister circuits, we hold that laws restricting magazine capacity to ten rounds of ammunition do not violate the Second Amendment." *Id.* at 119. That was so because "New Jersey's LCM ban reasonably fits the State's interest in promoting public safety." *Id.* After all, "LCMs are used in mass shootings" and, when used in such incidents, "allow for more shots to be fired from a single weapon and thus more casualties to occur." *Id.* And, this Court held, A2761 does not burden more conduct than necessary because the statute "imposes no limit on the number of firearms or magazines or amount of ammunition a person may lawfully possess." *Id.* at 122.

This Court also rejected Appellants' takings claim. *Id.* at 124-25. Specifically, the Court held that A2761's restrictions on the lawful capacity of a magazine did not "result in either an actual or regulatory taking." *Id.* As the panel explained, A2761 permits owners of now-prohibited LCMs "the option to transfer or sell their LCMs … modify their LCMs … or register those LCMs that cannot be modified." *Id.* at 124. New Jersey law, the panel continued, simply "does not deprive the gun owners of all economically beneficial or productive uses of their magazines." *Id.*

Finally, this Court held that A2761 does not violate equal protection doctrine. *Id.* at 125-26. Although A2761 maintains different rules for retired law enforcement officers than for the general public, the Court recognized that these two groups were not similarly situated when it came to firearm safety. *See id.* at 125 ("Police officers in New Jersey must participate in firearms and defensive tactics training, including mandatory range and classroom training…."). The New Jersey Legislature was thus free to treat them differently under its LCM law.

Appellants' request for rehearing *en banc* was denied. Only one judge on the Third Circuit voted to grant the petition.

On remand to the District Court, Appellees sought summary judgment on the basis that the Third Circuit's opinion had resolved the issues in the case. The Court agreed and granted summary judgment. JA009. Appellants timely filed a notice of appeal on September 17, 2019. JA001.

SUMMARY OF ARGUMENT

I. Although Appellants contend that New Jersey's limits on the capacity of a single firearm magazine violate the Second Amendment, the Takings Clause, and the Equal Protection Clause, this Court has previously reviewed and rejected all three of those arguments in this very case. As this Court concluded, New Jersey law "does not" violate any of these provisions. *NJRPC II*, 910 F.3d at 110. The fact that this Court issued this ruling in the context of an appeal over a preliminary injunction

does not change the analysis; if a preliminary injunction "panel does not stop at the question of likelihood of success and instead addresse[s] the merits, the later panel … should regard itself as bound by the prior panel opinion." *Pitt News*, 379 F.3d at 105. That is what happened in this case.

II. Appellants are wrong to argue that this Court can set aside its precedent because that decision was purportedly "clearly erroneous and should be disregarded to prevent manifest injustice." Brief for Plaintiffs-Appellants at 13 (quoting *ACLU v. Mukasey*, 534 F.3d 181, 192 (3d Cir. 2008)) (hereinafter "Br."). For one, every circuit to consider the constitutionality of state LCM laws on de novo review—five in total—have concluded that these laws withstand muster. *See Friedman v. City of Highland Park*, 784 F.3d 406, 419 (7th Cir. 2015); *Heller v. Dist. of Colum.*, 670 F.3d 1244, 1258 (D.C. Cir. 2011) *(Heller II)*; *Kolbe v. Hogan*, 849 F.3d 114, 138 (4th Cir. 2017) (en banc); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 260 (2d Cir. 2015) (*NYSRPA*). If that judicial consensus reflects a "clear error" that engenders "manifest injustice," the test has little meaning, and panel decisions can be re-litigated based on no more than a challenger's displeasure with the result. Still more, the panel appropriately applied this Court's precedents upholding analogous laws under the intermediate scrutiny framework. Appellants provide no basis to find that this decision—and the many precedents on which it relies—qualify as clear error

demanding reconsideration to avoid manifest injustice. The District Court's decision to grant summary judgment therefore should be affirmed.

COUNTERSTATMENT OF THE STANDARD OF REVIEW

This Court "exercise[s] plenary review of the District Court's grant of summary judgment" by applying "the same standard as a district court [to] determine whether there [is] any 'genuine dispute as to any material fact.'" *Halsey v. Pfeiffer*, 750 F.3d 273, 287 (3d Cir. 2014) (quoting Fed. R. Civ. P. 56(a)). An issue is "genuine" if it is supported by evidence such that a reasonable jury could find in favor of the non-moving party, and a fact is "material" if a dispute about it might affect the outcome of the suit under governing substantive law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

Once the moving party shows the absence of a genuine issue of material fact, the non-moving party must identify, by affidavits or otherwise, specific facts showing a genuine issue for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Doe v. Luzerne Cnty.*, 660 F.3d 169, 175 (3d Cir. 2011). While all inferences must be viewed in the light most favorable to the non-moving party, *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), "an inference based upon a speculation or conjecture does not create a material factual dispute sufficient to defeat summary judgment." *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n.12 (3d Cir. 1990).

ARGUMENT

I. THIS COURT ALREADY REJECTED APPELLANTS' CLAIMS.

There can be no dispute that this Court has already resolved all of Appellants' Second Amendment, Takings Clause, and Equal Protection Clause challenges to the State's LCM law. *Compare* ECF 1 ¶51 ("[The LCM law] is invalid under the Second Amendment, regardless of the applicable level of scrutiny."), *with NJRPC II*, 910 F.3d at 122 ("the Act survives intermediate scrutiny, and like our sister circuits, we hold that laws restricting magazine capacity to ten rounds of ammunition do not violate the Second Amendment"); ECF 1 ¶¶59-60 ("A2761 violates Plaintiffs' rights under the Fifth and Fourteenth Amendments by taking their property without putting it to a public use and without providing just compensation."), *with NJRPC II*, 910 F.3d at 124 ("Plaintiffs' Fifth Amendment claim also fails [because] the compliance measures in the Act do not result in either an actual or regulatory taking"); and ECF 1 ¶68 ("A2761 draws a distinction [between retired law enforcement officers and the public] that fails any applicable level of scrutiny [and] violates the Equal Protection Clause of the Fourteenth Amendment"), *with NJRPC II*, 910 F.3d at 126 ("retired law enforcement officers are not similarly situated to retired military personnel and ordinary citizens, and therefore their exemption from the LCM ban does not violate the Equal Protection Clause"). Simply put, this Court directly rejected Appellants'

arguments on the merits and concluded that the New Jersey law "does not" violate these constitutional provisions. *NJRPC II*, 910 F.3d at 110.

The fact that the "earlier panel decision reviewed the denial of [Appellants'] request for a preliminary injunction," Br. 13, is of no moment. Though it is true that decisions granting or denying a motion for preliminary injunction do not always bind subsequent merits dispositions, *see, e.g.*, *Doeblers Pa. Hybrids, Inc. v. Doebler*, 442 F. 3d 812, 820 (3d Cir. 2006), they do serve as binding precedent in the Third Circuit when the panel decision "does not stop at the question of likelihood of success and instead addresses the merits." *Pitt News*, 379 F.3d at 106; *see also Minard Run Oil Co. v. U.S. Forest Serv.*, 549 F. App'x 93, 96-97 (3d Cir. 2013) ("Any conclusions as to the merits of [the] claims reached by [a prior preliminary injunction] panel are binding upon this Court since the panel made a precedential ruling."); *Cavel Intern., Inc. v. Madigan*, 500 F.3d 551, 559 (7th Cir. 2007) (affirming denial of a preliminary injunction and dismissing case because "the merits of [plaintiff's] challenge ... have been fully briefed and argued and there are no unresolved factual issues"). Decisions that resolve the merits of a case at the preliminary injunction stage thus may only be disturbed if the matter is heard *en banc* or if there is an intervening Supreme Court or *en banc* decision—circumstances that are not present in this case.[1]

[1] The same result obtains under the "law of the case" doctrine. Stated succinctly, if "a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Farina v. Nokia, Inc.*, 625 F.3d 97,

In its earlier decision in this case, the Third Circuit plainly did "not stop at the question of likelihood of success and instead addresse[d] the merits" of Appellants' Second Amendment, Takings, and Equal Protection arguments. *Pitt News*, 379 F.3d at 106. Indeed, this Court was unequivocal in doing so. *See NJRPC II*, 910 F.3d at 110 ("Today we address whether one of New Jersey's responses to the rise in active and mass shooting incidents in the United States—a law that limits the amount of ammunition that may be held in a single firearm magazine to no more than ten rounds—violates the Second Amendment, the Fifth Amendment's Takings Clause, and the Fourteenth Amendment's Equal Protection Clause. We conclude that it does not."); *id.* (holding explicitly "that laws restricting magazines capacity to ten rounds of ammunition do not violate the Second Amendment"); *id.* (adding "the law also does not violate the Fifth Amendment's Takings Clause"); *id.* (concluding "the law's exemption that permits [retired law enforcement officers] to possess magazines that

117 n. 21 (3d Cir. 2010) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). Under this doctrine, "once an issue is decided, it will not be re-litigated in the same case, except in unusual circumstances." *Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 165 (3d Cir. 1982); *see also Bellevue Drug Co. v. Caremarks PCS*, 582 F.3d 432, 439 (3d Cir. 2009) ("Law of the case rules have developed 'to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.'"). This doctrine applies where, as here, a court rules on the merits of the suit in addressing a preliminary injunction. *See Pitt News*, 379 F.3d at 106; *Brown v. City of Pittsburgh*, 586 F.3d 263, 288 (3d Cir. 2009) (noting that "a decision on the merits" at the preliminary injunction stage is appropriate where the issue of an ordinance's "facial validity" has already been briefed and argued).

hold more than ten rounds does not violate the … Equal Protection Clause"); JA008 (District Court recognizing the conclusive nature of the prior panel decision).

Nor is it any surprise that the preliminary injunction panel resolved the lawsuit on the merits, even in this "different procedural context." Br. 13. For one, that was what Appellants asked the prior panel to do. Though the case arose on a preliminary injunction posture, Appellants contended that "a court of appeals *must* reverse if the district court has proceeded on the basis of an erroneous view of the applicable law," even if appellate review is for abuse of discretion. Brief of Plaintiffs-Appellants at 10, *Ass'n of N.J. Rifle & Pistol Clubs, Inc., v. Grewal*, No. 18-3170 (Oct. 9, 2018) (emphasis in original) (quoting *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004)); *see also id.* (arguing that this Court should conduct "plenary" review "as to the applicable law," even if it is reviewing a preliminary injunction decision). For another, even at the preliminary injunction stage, the parties had built a sufficient record for this Court to evaluate whether the Legislature could have concluded—with all the deference warranted on this public safety matter—that LCM laws protect the public and law enforcement, and thus to reach full conclusions on the legal issues at hand. Indeed, even before ruling on the preliminary injunction, the District Court held a three-day hearing that involved expert testimony and documentary evidence, and it reviewed detailed findings of fact based on more than 100 exhibits. The Third Circuit relied upon the same record in affirming A2761's constitutionality.

Appellants' final argument—that the first panel's decision should be set aside because it "was bound to draw all factual inferences in Defendants' favor and review the decision for abuse of discretion," Br. 13—also rings hollow. The claim goes like this: while the preliminary injunction panel drew inferences in support of *the State*, a summary judgment panel must draw all inferences in favor of the *challengers*, and the ultimate legal disposition should now be different. There are multiple flaws with this argument, but the most important is that it mischaracterizes what the prior panel did. After the dissent at the prior stage of this case similarly asserted that the panel majority had "placed the burden of proof on Plaintiffs," the majority replied that the dissent was entirely "incorrect" and instead acknowledged that the "State bears the burden of proving that the Act is constitutional under heightened scrutiny" even at the preliminary stage. *NJRPC II,* 910 F.3d at n. 24. The panel simply found that the State met this burden "with appropriate evidence," without providing it any benefit of the doubt. *Id.* Appellants' asserted distinction thus falls apart.

Nor is that the only shortcoming in Appellants' argument. For one, even at the summary judgment stage, case law makes clear the State is supposed to benefit from "substantial deference to the predictive judgments of the legislature," because "the legislature is far better equipped than the judiciary to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks." *NYSRPA*, 804 F.3d at 261. For another, most

of Appellants' arguments—regarding whether any tiers of scrutiny apply, and which one—are purely legal and do not turn on any factual inferences at all. And finally, if Plaintiffs were right that any appellate decision issued at the preliminary injunction stage can be reconsidered by a subsequent panel using a different standard of review, it would call into doubt the general rule that a preliminary injunction panel's decision is still binding when it "does not stop at the question of likelihood of success and instead addresses the merits." *Pitt News*, 379 F.3d at 106. For any of these reasons, Appellants request for a "do over" should be rejected.[2]

II. THIS COURT MAY NOT DISCARD ITS PRECEDENT REJECTING APPELLANTS' THREE CONSTITUTIONAL CLAIMS.

There is also no basis for this panel to disregard the Third Circuit's reasoned decision on the grounds that this is an "exceptional circumstance" where a precedent is "clearly erroneous" and where adherence to it would work a "manifest injustice." *In Re Phila. Litigation*, 158 F.3d 711, 720 (3d Cir. 1998). Indeed, that bar is nearly impossible to meet, and this case does not even come close. *See id.* at 720-21 (finding

[2] Appellants also strangely argue that a decision by this Court to follow its previous precedent in this case somehow "preempt[s] Supreme Court procedure by effectively requiring parties to petition the Supreme Court for certiorari review following the grant or denial of a preliminary injunction." Br. 15 n.2. Not so. If this Court adheres to its precedent and rejects Appellants' claims, as it must, Appellants can then file a petition for certiorari; nothing requires them to do so at the preliminary injunction stage (though they could have). When Appellants file such a petition has nothing to do with whether this Court is bound by its own decisions—a separate issue that Third Circuit case law already conclusively resolves.

that a challenger must "persuade us not only that our prior decision was wrong, but that it was clearly wrong"); *United States v. Thomas*, 750 Fed. Appx. 120, 125-26 (3d Cir. 2018) (confirming this test is "a high bar" and requires this panel to be "left with a clear conviction of error" and not merely "doubt") (citations omitted); *In Re Roemmele*, 466 B.R. 706, 712 (Bankr. E.D. Pa. 2012) (noting in the reconsideration context that to find "'manifest injustice,' the record presented must be so patently unfair and tainted that the error is manifestly clear to all who view it").[3]

It makes sense that it would be nearly impossible for a panel to disregard the decision of a prior panel. For one, that is what this Court's procedures say, *i.e.*, that "the holding of a panel in a precedential opinion is binding on subsequent panels" and, conversely, "no subsequent panel [may] overrule[] the holding in a precedential opinion of a previous panel." 3d Cir. Internal Operating Procedures 9.1. And there are good reasons to bind panels to prior decisions, which is why every circuit does so. This rule, like other stare decisis doctrines, promotes stability of the law, ensuring that a case will not come out differently across years (or months) simply because the panel's composition has changed. Any contrary practice would yield inconsistencies and invariably undermine confidence in the rule of law. Moreover, requiring judges

[3] A panel can also potentially reconsider "previously decided issues in extraordinary circumstances such as where (1) new evidence is available; [or] (2) a supervening new law has been announced." *Pub. Interest Research Grp. of N.J. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 116-17 (3d Cir. 1997). Appellants have offered no such evidence or intervening law, and there is none.

to follow panel precedent inures to the benefit of every judge by guaranteeing their thoughtful decisions will be respected in all but the rarest of circumstances. Finally, there is no reason to worry about unfairness from this approach, because a court can rehear a case en banc—the long-established mechanism for correcting decisions with which the majority of a court of appeals disagrees. Appellants sought en banc review of the prior panel decision, and they were unsuccessful. Appellants should not now be allowed to create a workaround to that approach in this case.

Appellants cannot satisfy the high bar of showing that the Third Circuit ruling rejecting Appellants' three theories was clearly erroneous and manifestly unjust. As a threshold matter, four other circuit courts have held on de novo review that limits on magazine capacity like New Jersey's withstand constitutional muster, and none have gone the other way. *See Friedman*, 784 F.3d at 419; *Heller II*, 670 F.3d at 1258; *Kolbe*, 849 F.3d at 138; *NYSRPA*, 804 F.3d at 260.[4] And they relied on the analysis this Court used—that state legislatures are free to find that LCM laws advance public safety without overburdening the right to self-defense in the home. *See id.* It is hard to see how a decision could be sufficiently wrong and unjust where so many federal

[4] The only inconsistent decisions come from the Ninth Circuit, which upheld lower court rulings both denying and granting preliminary injunctions against LCM laws. *Compare Fyock v. Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015), *with Duncan v. Becerra*, 2018 WL 3433828 (9th Cir. July 17, 2018). As this Court held, however, "*Duncan* seems to reflect a ruling based upon the evidence presented and not a general pronouncement about whether LCM bans violate the Second Amendment." *NJRPC II*, 910 F.3d at 123 n. 29.

judges have adopted exactly the same position, and where no federal appellate court has held the opposite. *Thomas*, 750 Fed. Appx. at 126.

In any event, the previous decision is also correct as a matter of Third Circuit precedent. Appellants' primary argument is that the *NJRPC II* panel erred in using the well-established intermediate scrutiny test when it should have instead said that New Jersey's LCM law "is inconsistent with the Second Amendment's text, history, and tradition," Br. 16, because any "ban of firearms typically possessed for lawful purposes" is automatically invalid under *District of Columbia v. Heller*, 554 U.S. 570 (2008) (*Heller I*), Br. 17. But Appellants' view finds no support in this Court's cases, which specifically hold that the traditional "tiers of scrutiny" apply to Second Amendment lawsuits just as they do in First Amendment actions. *See, e.g., Drake v. Filko*, 724 F.3d 426, 435 (3d Cir. 2013) ("[T]he Second Amendment can trigger more than one particular standard of scrutiny, depending, at least in part, upon the type of law challenged and the type of Second Amendment restriction at issue."); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (specifically adopting the tiers of scrutiny approach); *Binderup v. Attorney General*, 836 F.3d 336, 339 (3d Cir. 2016) (en banc) (affirming *Marzzarella*'s use of these tiers). Appellants even recognize that this Court has used this framework in the past, Br. 21, and simply argue that this whole body of case law misapplied *Heller I*. But the fact that the *NJRPC II* panel's approach follows from multiple Third Circuit rulings offers further

proof that it acted properly, and that it certainly did not clearly err in refusing to cast this approach aside in favor of Appellants' unprecedented theory.

Even accepting these tiers of scrutiny, Appellants next criticize the *NJRPC II* panel for applying intermediate scrutiny instead of strict scrutiny. But as a threshold matter, as both the majority and the dissent recognized, every court to consider this question rejects the use of strict scrutiny. *See* 910 F.3d at 118 n.21 ("No court has applied strict scrutiny to LCM bans…. Four courts applied intermediate scrutiny, and one court upheld an LCM ban without applying any level of scrutiny." (internal citations omitted)); *id.* at 134 (Bibas, J., dissenting) (recognizing "that the majority's opinion aligns with those of five other circuits"). And once again, the Third Circuit's cases confirm this panel's analysis; as the panel laid out, "laws that severely burden the core Second Amendment right to self-defense in the home are subject to strict scrutiny"; "otherwise, intermediate scrutiny applies." *Id.* at 117 (majority opinion) (citing, e.g., *Marzzarella*, 614 F.3d at 92; *Drake*, 724 F.3d at 436). There is no severe burden on the right to self-defense in the home, the majority and every other circuit to consider the issue explained, because the LCM statute "does not categorically ban a class of firearms" and instead just restricts their capacity; only addresses a weapon that is "not well-suited for self-defense"; and "allows law-abiding citizens to retain magazines, and … has no impact on the many other firearm options that individuals have to defend themselves in their home." *Id.* at 118; *see* also *id.* at 118 n.20 (noting

"Plaintiffs were unable to identify a single model of firearm that could not be brought into compliance with New Jersey's magazine capacity restriction, and even if such firearms exist, they simply need to be registered for owners to legally retain them"). Whether or not jurists can disagree on the proper tier of scrutiny, use of intermediate scrutiny was not a "clear error" that works a "manifest injustice."

Finally, there was no clear error or manifest injustice in the way that the panel majority applied intermediate scrutiny to the law at hand. At the outset, as all agree, the panel rightly determined that the State has a substantial interest in the safety of its people. *See NJRPC II*, 910 F.3d at 119 (noting, *inter alia*, New Jersey's interest in "reducing the lethality of active shooter and mass shooting incidents"). The panel then went on to examine the evidence and concluded that "New Jersey's LCM ban reasonably fits the State's interest in promoting public safety." *Id.* Both the majority and the dissent accepted that the State was entitled to considerable deference on this, and the majority laid out clearly why the State offered enough evidence to conclude that LCM laws promote public safety. Among other things, by reducing the number of times that a mass shooter can fire his weapon before pausing to reload, LCM laws "reduce the number of [total] shots fired and the resulting harm" in a mass shooting event and "present opportunities for victims to flee and bystanders to intervene." *Id.*; *see also id.* (collecting examples of shootings in which a pause allowed individuals

to escape or intervene).[5] The Third Circuit did not clearly err in deferring to legislative judgments on the best way to protect public safety in the wake of mass shootings across this country.

Nor is there any reason to worry about manifest injustice from adhering to the circuits' unanimous position on the constitutionality of LCM laws. These laws, after all, are important to the protection of public safety and law enforcement safety, and they achieve those goals without undermining anyone's right or ability to act in self-defense. *See NJRPC II*, 910 F.3d at 119 (noting "the LCM ban reduce[s] the number of shots fired and the resulting harm, [and] it will present opportunities for victims to flee and bystanders to intervene" in a mass shooting situation); *Heller II*, 670 F.3d at 1264 (noting the "substantial relationship between the prohibition of [LCMs] and the objectives of protecting police officers and controlling crime"); *NYSRPA*, 804 F.3d at 264 (confirming LCM laws have "the greatest potential to prevent and limit shootings in the state over the long-run"). And importantly, the decisions upholding these laws properly respect the role of state legislatures in protecting their residents. *See, e.g.*, *Kolbe*, 849 F.3d at 150 (Wilkinson, J., concurring) (noting it is not possible

[5] The Court also refuted Appellants' argument that LCM restrictions are unnecessary due to the rarity of mass shootings, highlighting studies showing that the frequency and lethality of such incidents has increased in recent years and, regardless, that New Jersey need not stand by and wait for a "high-fatality gun massacre before curtailing access to LCMs." *NJRPC II* at 121.

"to draw from the profound ambiguities of the Second Amendment an invitation to courts to preempt this most volatile of political subjects and arrogate to themselves decisions that have been historically assigned to other, more democratic, actors," and adding that it would be inappropriate to "[d]isenfranchis[e] the American people on this life and death subject" in "the wake of so many mass shootings"); *Friedman*, 784 F.3d at 412 ("The central role of representative democracy is no less part of the Constitution than the Second Amendment: when there is no definitive constitutional rule, matters are left to the legislative process."). It is not unjust to let states to protect their residents; to the contrary, it is the only lawful result.[6]

[6] Although Appellants reiterate a series of other arguments in support of their Second Amendment, Takings, and Equal Protection claims, the Third Circuit considered and rejected each argument in the prior appeal, and this Court did not clearly err in doing so. Appellants are not entitled to a second bite at the apple on these issues.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's grant of summary judgment.

Dated: March 11, 2020

Respectfully Submitted,

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CERTIFICATION OF BAR MEMBERSHIP

I certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

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Dated: March 11, 2020

CERTIFICATION OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C)(i) and L.A.R. 31.1(c), I certify that:

1. This brief complies with Fed. R. App. P. 32(a)(7) because the brief contains 6,186 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and thus does not exceed the 13,000-word limit.

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 the brief has been prepared in a proportionally spaced typeface using the Microsoft Word word-processing system in 14-point Times New Roman font.

3. The text of the brief filed with the Court by electronic filing is identical, except for the signature, to the text of the paper copies being filed with the Court.

4. This brief complies with L.A.R. 31.1(c) in that prior to being electronically mailed to the Court today, it was scanned by the following virus detection software and found to be free from computer viruses:

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Deputy Attorney General

Dated: March 11, 2020

CERTIFICATION OF SERVICE

I hereby certify that on March 11, 2020, I caused the Brief for Defendants-Appellees, Gurbir Grewal and Patrick J. Callahan, to be filed with the Clerk of the United States Court of Appeals for the Third Circuit via electronic filing and by causing an original and six paper copies of the Brief to be sent via UPS overnight mail. Counsel of record fort the Plaintiffs-Appellants will be served with the Brief via the Court's electronic filing system and will receive paper copies via UPS overnight mail.

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Dated: March 11, 2020