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January 28, 2013

Honorable Judges of the
United States Court of Appeals
For the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106-1790

Re: Piszczatoski v. Filko (formerly Muller v. Maenza)
Third Circuit Case No. 12-1150
District Case No. 2-10-cv-06110

Dear Honorable Judges:

Please accept this supplemental letter brief on behalf of Defendants-Appellees, in the above-referenced matter pursuant to the Clerk's January 16, 2013 request to address the recent Courts of Appeal decisions of *Moore v. Madigan*, ___ F.3d ___, 2012 U.S. App. LEXIS 25264 (7th Cir. 2012), and *Kachalsky v. County of Westchester*, 701 F.3d 81 (2nd Cir. 2012), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Jan. 8, 2013) (No. 12-845).[1] Both of these decisions support Defendants' position that New

[1] Defendants incorrectly cited the District Court decision as *Kachalsky v. Croce* in its initial submission to this Court.

Jersey's Carry Permit Law does not impermissibly burden conduct protected by the Second Amendment.

In *Moore v. Madigan*, the Seventh Circuit struck down a handgun licensing scheme from Illinois that operated as a complete prohibition on possession of a handgun in public. 2012 U.S. App. LEXIS 25264, at *21-22. In doing so, the Seventh Circuit commented that the right to bear arms for self-defense is considered "as important outside the home as inside." Id. at *22. To resolve this appeal, this Court need not take that step of announcing that the right protected by the Second Amendment is the same both in and out of the home. Indeed, the Supreme Court's discussion in *District of Columbia v. Heller*, 554 U.S. 570 (2008), as well as the weight of authority throughout the Nation, plainly suggest otherwise. *See Kachalsky*, 701 F.3d at 89 (discussing that "[w]hat we know from [*Heller* and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010)] is that Second Amendment guarantees are at their zenith within the home. What we do not know is the scope of that right beyond the home and the standards for determining when and how the right can be regulated by a government.") (internal citations omitted). This Court need not follow the Seventh Circuit because the law they considered was entirely different than New Jersey's "careful

grid" of handgun regulatory provisions. *In re Preis*, 573 A.2d 148, 150 (N.J. 1990).

No other state in the Nation has as broad a ban on carrying a handgun outside the home as Illinois. *Moore*, 2012 U.S. App. LEXIS 25264 at *21-22. As New Jersey's law does not operate as an outright ban, *Moore* is not particularly helpful to plaintiffs here. In fact, the courts in both *Moore* and *Kachalsky* recognized that regulation of handguns is sensible. 2012 U.S. App. LEXIS 25264 at *23-26; 701 F.3d at 100. In *Moore*, the court simply concluded that – whatever the limits are that may be constitutionally imposed on the right to carry a firearm in public – Illinois went too far. 2012 U.S. App. LEXIS 25264, at *27-28. Importantly, in reversing, the Seventh Circuit stayed the matter to allow Illinois "to craft a new gun law that will impose reasonable limitations, consistent with public safety and the Second Amendment." Id. at *29.

State regulation of the use of firearms in public was "'enshrined with[in] the scope'" of the Second Amendment when it was adopted. *Kachalsky*, 701 F.3d at 96. The ability to regulate firearms is "qualitatively different in public than in the home." *Id.* at 94. "The Second Amendment does not foreclose regulatory measures to a degree that would result in 'handcuffing lawmakers' ability to prevent armed mayhem in

public places.'" *Id.* at 96 (citing *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir.), *cert. denied*, 132 S. Ct. 756 (2011)).

Nor did the Seventh Circuit make any pronouncement on the appropriate level of scrutiny to be applied in considering Second Amendment challenges. 2012 U.S. App. LEXIS 25264, at *26-27 ("our analysis is not based on degrees of scrutiny, but on Illinois's failure to justify the most restrictive gun law of any of the 50 states.") But the Second Circuit easily concluded that intermediate scrutiny made "eminent sense" as the appropriate standard of review in considering regulations beyond that core Second Amendment protection, 701 F.3d at 93, because the nation's " tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public," *id.* at 96. In doing so, *Kachalsky*'s approach is consistent with the conclusions of its sister circuits, including this Court's conclusion in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010). *See Kachalsky*, 701 F.3d at 93 n.17 (collecting cases from other circuits).

Marzzarella applied intermediate scrutiny. *Kachalsky* applied intermediate scrutiny. Sister circuits have adopted intermediate scrutiny. Defendants urge such an approach here

and, because the District Court properly applied that standard below, the District Court's determinations should be affirmed.

As the Second Circuit correctly recognized, it is the legislature, not the court, that is required to weigh evidence and make policy choices in shaping a state's handgun licensing scheme. *Kachalsky*, 701 F.3d at 99; *see also Schrader v. Holder*, 2013 U.S. App. LEXIS 730, *25 (D.C. Cir. 2013). New Jersey's Legislature weighed the risks, benefits, and competing policy objectives in crafting our careful grid of regulatory provisions. *In re Preis*, *supra*, 573 A.2d at 150.

State regulation under the Second Amendment has historically been "more robust than of other enumerated rights." *Kachalsky*, 701 F.3d at 100. Indeed, "extensive state regulation of handguns has never been incompatible with the Second Amendment or, for that matter, the common-law right to self-defense." *Id.* Appellants here advance the same incorrect arguments concerning the character and scope of the Second Amendment that they urged in the Second Circuit. *Id.* at 99. The Second Circuit rejected those arguments. Similarly, the Seventh Circuit agreed that regulation of the right to carry a handgun outside the home was "sensible." This Court, too, should reject Plaintiffs' arguments.

Finally, *Kachalsky* supports Defendants' position as to the application of the prior restraint doctrine. Like the District Court, the Second Circuit was "hesitant to import substantive First Amendment principles wholesale into Second Amendment Jurisprudence." 701 F.3d at 91. Such an application would be "incautious" given the "salient differences between the state's ability to regulate each of these rights." Id. at 92.

Just like the law at issue in *Kachalsky*, the NJ Carry Permit Law is a "poor vehicle for [the] maiden voyage," *id.*, were this Court to even apply prior-restraint doctrine to Second Amendment Claims. New Jersey's law has a clearly established standard that has been in place for almost a century and has been "defined by binding judicial precedent." *Id.; see e.g., Siccardi v. State,* 284 A.2d 533, 538 (N.J. 1971); *In re Preis; In re Borinsky*, 830 A.2d 507 (N.J. Super. Ct. App Div. 2003). This Court should reject appellants' argument for the same reason that *Kachalsky* did: their argument that the justifiable need standard grants public officials unbridled discretion is "something of a red herring" that comes up short.

For the foregoing reasons, and the reasons set forth in Defendants' initial submission, this Court should affirm the District Court's conclusions that the Second Amendment does not confer an absolute right to carry a handgun outside the home;

that the NJ Carry Permit Law is a longstanding licensing provision of the kind deemed presumptively lawful by the United States Supreme Court; that the NJ Carry Permit Law is not an unlawful prior restraint; and that, using the intermediate scrutiny standard, New Jersey's law passes constitutional muster.

Respectfully submitted,

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