APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-3142

ASSOCIATION OF NEW JERSEY RIFLE AND PISTOL CLUBS INC.; BLAKE ELLMAN; ALEXANDER DEMBOWSKI,

Appellants,

v.

ATTORNEY GENERAL NEW JERSEY; SUPERINTENDENT NEW JERSEY STATE POLICE; THOMAS WILLIVER, in his official capacity as Chief of Police of the Chester Police Department; JAMES B. O'CONNOR, in his official capacity as Chief of Police of the Lyndhurst Police Department,

Appellees.

Argued: June 16, 2020
Filed: Sept. 1, 2020

Before: JORDAN, MATEY and ROTH,
Circuit Judges.

OPINION

JORDAN, *Circuit Judge*.

We are asked to determine whether a New Jersey statute that makes it illegal to possess large capacity

magazines ("LCMs")—defined as magazines capable of holding more than ten rounds of ammunition—violates the Second Amendment, the Fifth Amendment's Takings Clause, or the Fourteenth Amendment's Equal Protection Clause. But we cannot answer that question, since it has already been answered. A prior panel of our court reviewed that statute, known as Assembly Bill No. 2761 and codified at N.J. Stat. Ann. § 2C:39-1 ("the Act"), on appeal from an earlier order of the District Court denying a preliminary injunction. It upheld the District Court's order and, in doing so, went beyond simply answering the question of the plaintiffs' likelihood of success on the merits. It directly addressed the merits of the constitutionality of the Act, holding that the Act did not violate the Second, Fifth, or Fourteenth Amendments.

On remand, the District Court ruled on summary judgment that it was bound by that earlier decision and so upheld the constitutionality of the Act. The plaintiffs have now appealed again, arguing that the District Court erred in treating the prior panel's opinion as binding and arguing again that the Act is unconstitutional. Because they are wrong on the first point, we do not reach the second. We will affirm.

I. Background

In 2018, New Jersey enacted Assembly Bill No. 2761, a law making it illegal to possess a magazine capable of holding more than ten rounds of ammunition. N.J. Stat. Ann. § 2C:39-1(y), 2C:39-3(j). Prior to that, it had been illegal in New Jersey to possess magazines capable of holding more than 15

rounds of ammunition. Owners of LCMs had several options for complying with the new Act:

> Specifically, the legislation g[ave] LCM owners until December 10, 2018 to (1) modify their LCMs "to accept ten rounds or less," *id.* at 2C:39-19(b); (2) render firearms with LCMs or the LCM itself inoperable, *id.*; (3) register firearms with LCMs that c[ould not] be "modified to accommodate ten or less rounds," *id.* at 2C:39-20(a); (4) transfer the firearm or LCM to an individual or entity entitled to own or possess it, *id.* at 2C:39-19(a); or (5) surrender the firearm or LCM to law enforcement, *id.* at 2C:39-19(c).

Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. of N.J., 910 F.3d 106, 111 (3d Cir. 2018) ("*Prior Panel Opinion*") (footnote omitted). The statute exempts active military members and active and retired law enforcement officers. N.J. Stat. Ann. § 2C:39-3(g), 2C:39-17.

On the day the bill was signed into law, the plaintiffs filed this action,[1] naming certain state and local law enforcement officials as defendants. (For ease of reference, we refer to the defendants

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[1] The plaintiffs are the Association of New Jersey Rifle and Pistol Clubs, Inc. ("ANJRPC"), Blake Ellman, and Alexander Dembowski. ANJRPC is "an eighty-year old membership organization, representing tens of thousands of members, many of whom possess large capacity magazines for self-defense." *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Grewal*, No. 3:18-cv-10507 (PGS) (LHG), 2018 WL 4688345, at *2 (D.N.J. Sept. 28, 2018). Ellman and Dembowski are members of ANJRPC who possess LCMs. *Id.* The plaintiffs' standing is not in question.

collectively as "the State.") The complaint alleges that the Act violates the Second Amendment, the Fifth Amendment's Takings Clause, and the Fourteenth Amendment's Equal Protection Clause. *Prior Panel Opinion*, 910 F.3d at 111. With their complaint, the plaintiffs also filed a motion for a preliminary injunction. *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Grewal*, No. 3:18-cv-10507 (PGS) (LHG), 2018 WL 4688345, at *1 (D.N.J. Sept. 28, 2018) ("*Preliminary Injunction Opinion*").

The District Court held a three-day hearing on the motion, during which the parties presented conflicting expert testimony on the use of LCMs in mass shootings, including the number of casualties involved and whether the Act would save lives during a mass shooting by forcing the shooter to pause and reload ammunition, thus allowing individuals time to escape or subdue the shooter. *Id.* at *4-8. The Court also heard testimony on whether LCMs are used in self-defense. *Id.* To distinguish law enforcement officers from the general public, the State offered expert testimony that both active and retired police officers who possess firearms are required to pass a qualification course bi-annually, using a weapon equipped with a 15-round magazine. *Id.* at *5. Ultimately, the District Court denied the preliminary injunction, remarking that "the expert testimony [wa]s of little help in its analysis." *Id.* at *8.

In rejecting the plaintiffs' contention that the Act violated the Second Amendment, the District Court applied the two-step analytical approach we set out in *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). *Preliminary Injunction Opinion*, 2018 WL

4688345, at *9. *Marzzarella* requires a court to ask first whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee of the right to bear arms. If it does, the second step is to evaluate that law under some form of heightened scrutiny.[2] 614 F.3d at 89. The level of scrutiny to be applied is determined by whether the law burdens the core of the Second Amendment guarantee. *Id.* The "core … [of] the Second Amendment protects the right of law-abiding citizens to possess non-dangerous weapons for self-defense in the home." *Id.* at 92. *See also District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (explaining that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."). Laws that do burden that core receive strict scrutiny, whereas those that do not burden it

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[2] There are three levels of scrutiny: rational basis review, intermediate scrutiny, and strict scrutiny. In *Binderup v. Attorney General*, 836 F.3d 336 (3d Cir. 2016) (en banc), we explained the three levels of scrutiny by saying:

> Depending on the importance of the rights involved and the nature of the burden on them, a law's purpose may need to be only legitimate and the means to achieve it rational (called rational basis scrutiny); the purpose may need to be important and the means to achieve it substantially related (called intermediate scrutiny); or the purpose may need to be compelling and the means to achieve it narrowly tailored, that is, the least restrictive (called strict scrutiny). The latter two tests we refer to collectively as heightened scrutiny to distinguish them from the easily met rational basis test.

836 F.3d at 341.

receive intermediate scrutiny. *Marzzarella*, 614 F.3d at 89, 96-97.

The District Court concluded that the New Jersey Act imposes a burden on the Second Amendment because magazines, including LCMs, are integral components of guns. *Preliminary Injunction Opinion*, 2018 WL 4688345, at *9-11. Having answered the step-one question from *Marzzarella*, the Court proceeded to the second step and determined that the law should be evaluated under intermediate scrutiny because the core of the Second Amendment right to keep and bear arms is not burdened by the Act. As the Court saw it, the Act "does not prohibit the possession of the quintessential self-defense weapon, the handgun," nor does it "effectively disarm individuals or substantially affect their ability to defend themselves." *Id.* at *12 (internal quotation marks and citation omitted).

Then, applying intermediate scrutiny, the District Court upheld the Act. *Id.* at *12-13. Intermediate scrutiny requires the government to prove that the objective of the government regulation is "significant, substantial, or important[,]" and that "the fit between the challenged regulation and the asserted objective [is] reasonable[.]" *Marzzarella*, 614 F.3d at 98 (internal quotation marks omitted). "The regulation need not be the least restrictive means of serving the interest, but may not burden more [conduct] than is reasonably necessary." *Id.* (citations omitted). The District Court concluded that New Jersey has a significant, substantial, and important interest in the safety of its citizens. *Preliminary Injunction Opinion*, 2018 WL 4688345, at *12. While the Court did not

make a definitive finding that the Act will significantly reduce casualties in a mass shooting by limiting the number of shots that can be fired from a single gun, it did decide that there was a reasonable fit between the Act and its stated object. It said, "the expert testimony established that there is some delay associated with reloading, which may provide an opportunity for potential victims to escape or for a bystander to intercede and somehow stop a shooter." *Id.* at *12. Finally, the Court concluded that the Act places a minimal burden on lawful gun owners because it does not impose a restriction on the number of magazines an individual may own and instead limits only the lawful capacity of a single magazine. *Id.* at *13.

The District Court also rejected the plaintiffs' Fifth and Fourteenth Amendment claims. It concluded that there had been no taking of property in violation of the Fifth Amendment because the Act allows for gun owners to permanently modify their magazines to accept ten rounds, and, if those magazines or guns cannot be modified, they can be kept as long as the owner registers them. *Id.* at *16. As to the plaintiffs' argument that the Act violates the Fourteenth Amendment's Equal Protection clause because it treats active and retired law enforcement officers differently than other individuals, the District Court concluded that law enforcement officers are not similarly situated to other New Jersey citizens for a number of reasons.[3] Officers are required to pass gun

[3] The plaintiffs did not argue that the Act's exemption for active military personnel violates the Equal Protection Clause but did argue that there was disparate treatment between retired police

safety requalification tests, which are not required of other individuals; officers have "an unusual ethos of public service … and are expected to act in the public's interest[;]" and "retired police officers face special threats that private citizens do not[.]" *Id.* at *14 (internal quotation marks and citations omitted).

Dissatisfied with the denial of their motion for a preliminary injunction, the plaintiffs appealed, but a divided panel of our Court affirmed. *Prior Panel Opinion*, 910 F.3d at 110. The panel announced its holding in these straightforward words: "Today we address whether [the Act] 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.* While the panel explained that its task was to "decide whether Plaintiffs have a reasonable probability of showing that the Act violates [these constitutional rights,]" *id.* at 115, it nevertheless immediately went beyond that task, reached the merits, and determined that the Act withstands the plaintiffs' constitutional challenge.

Addressing the Second Amendment claim, the panel applied the analytical approach from *Marzzarella*, as had the District Court. *Id.* at 116-24. First, it assumed without deciding that LCMs are "typically possessed by law-abiding citizens for lawful purposes and that they are entitled to Second Amendment protection." *Id.* at 117. It then turned to the second step of *Marzzarella* and determined that

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officers and military veterans. The Court rejected that, saying, "there is no evidence to suggest that military veterans receive equivalent training [to law enforcement officers]." *Preliminary Injunction Opinion*, 2018 WL 4688345, at *14.

intermediate scrutiny should apply because the Act does not burden the core Second Amendment guarantee, for five reasons: (1) it does not categorically ban a class of firearms but is rather a ban on a subset of magazines; (2) it is not a prohibition of a class of arms overwhelmingly chosen by Americans for self-defense in the home; (3) it does not disarm or substantially affect Americans' ability to defend themselves; (4) New Jersey residents can still possess and use magazines, just with fewer rounds; and (5) "it cannot be the case that possession of a firearm in the home for self-defense is a protected form of possession under all circumstances. By this rationale, any type of firearm possessed in the home would be protected merely because it could be used for self-defense." *Id.* at 117-18 (citations and internal quotation marks omitted).

The panel also agreed with the District Court that the Act survives intermediate scrutiny. It recognized New Jersey's significant, substantial, and important interest in protecting its citizens' safety. *Id.* at 119. And, the panel said, the Act reasonably fits the State's interest because, by reducing the number of shots that can be fired from one gun, victims will be able to flee, bystanders to intervene, and numerous injuries will be avoided in a mass shooting incident. *Id.* at 119. The panel further decided that the Act did not burden more conduct than is reasonably necessary because it imposes no limit on the number of firearms, magazines, or ammunition an individual may possess, and there is no record evidence that LCMs are "well-suited or safe for self-defense." *Id.* at 122. The panel also rejected the plaintiffs' Fifth Amendment and

Equal Protection Clause claims, for the same reasons as did the District Court. *Id.* at 124-26.

In ruling for the State, the panel's decision was in line with the decisions of at least four other circuits that have decided that laws regulating LCMs are constitutional. *See Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc) (affirming grant of summary judgment upholding Maryland's ten round limit); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015) (upholding, on review from summary judgment, New York and Connecticut's laws imposing a ten round limit); *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406 (7th Cir. 2015) (affirming grant of summary judgment upholding City of Highland Park's ten round limit); *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) ("*Heller II*") (affirming grant of summary judgment upholding D.C.'s ten round limit).[4]

The decision was not, however, unanimous. The dissenting member of the panel said that, in two ways, the majority treated the Second Amendment differently from other parts of the Bill of Rights: first, the majority weighed the merits of the case in order to pick a tier of scrutiny, and second, the majority, while purporting to use intermediate scrutiny, actually

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[4] Since the prior panel opinion was issued, the First Circuit has also concluded that Massachusetts's ten round limit is constitutional. *See Worman v. Healey*, 922 F.3d 26 (1st Cir. 2019) (affirming grant of summary judgment upholding Massachusetts ten round limit). The Ninth Circuit, however, has very recently held that California's ban on LCMs of more than ten rounds is unconstitutional under either strict scrutiny or intermediate scrutiny. *Duncan v. Becerra*, --- F.3d ---, No. , 2020 WL 4730668, at *25 (9th Cir. Aug. 14, 2020).

applied rational basis review. *Id.* at 126 (Bibas, J., dissenting). Among other things, the dissent was concerned that the majority failed to demand actual proof to justify the State's regulation, as heightened scrutiny demands in other contexts, and that the majority had likewise failed to put the burden of proof on the State to demonstrate that the regulation was sufficiently tailored. *Id.*

When the case was remanded to the District Court, the parties promptly filed cross-motions for summary judgment, and the State's motion won. Although the Court recognized that different standards apply at the summary judgment stage than at the preliminary injunction stage, it said that it was granting summary judgment because "the Third Circuit has issued a precedential decision that resolves all legal issues in this case and there remains no genuine disputes of material fact." (App. at 8.) The District Court noted that the prior panel opinion said the Act does not violate the Second, Fifth, or Fourteenth Amendments, so there was "binding Third Circuit precedent that the New Jersey law is constitutional[.]" (App. at 8-9.)

This timely appeal followed.

II. Discussion[5]

"It is the tradition of this court that the holding of a panel in a precedential opinion is binding on

[5] The District Court had jurisdiction under 28 U.S.C. § 1331, and we have jurisdiction under 28 U.S.C. § 1291. "It is well established that we employ a plenary standard in reviewing orders entered on motions for summary judgment, applying the same standard as the district court." *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 265 (3d Cir. 2014).

subsequent panels." (3d Cir. I.O.P 9.1.) The plaintiffs argue, however, that we are not under that restriction here, for two reasons. First, they contend the outcome can differ here because this appeal arises in a different procedural posture than did the earlier one, with different standards and different inferences in play. Second, they say that the prior panel decision was clearly wrong and should be disregarded, to prevent manifest injustice. Neither argument succeeds.

True enough, the standards for obtaining a preliminary injunction and summary judgment are different. Under the well-known standard for obtaining a preliminary injunction, the moving party must show "both a likelihood of success on the merits and a probability of irreparable harm. Additionally, the district court should consider the effect of the issuance of a preliminary injunction on other interested persons and the public interest." *Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1175 (3d Cir. 1990) (citations omitted). On summary judgment, by contrast, the moving party must establish that "there is not a genuine dispute with respect to a material fact and thus the moving party is entitled to judgment as a matter of law." *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 265 (3d Cir. 2014). Our standards of review are also different. We will affirm a district court's order on a preliminary injunction, "unless the court abused its discretion, committed an obvious error of law, or made a serious mistake in considering the proof." *Bradley*, 910 F.2d at 1175. On the other hand, we exercise plenary review over an order on summary judgment. *Blunt*, 767 F.3d at 265.

But despite the differing standards pertaining to the differing procedural postures, a panel of our Court reviewing a decision on a preliminary injunction motion can indeed bind a subsequent panel reviewing an appeal from an order on summary judgment. As then-Judge Alito explained in *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004),

> although a panel entertaining a preliminary injunction appeal generally decides only whether the district court abused its discretion in ruling on the request for relief and generally does not go into the merits any farther than is necessary to determine whether the moving party established a likelihood of success, a panel is not always required to take this narrow approach. If a preliminary injunction appeal presents a question of law and the facts are established or of no controlling relevance, the panel *may* decide the merits of the claim.

Id. at 105 (internal quotation marks and citations omitted). Thus, "[i]n the typical situation—where the prior panel stopped at the question of likelihood of success—the prior panel's legal analysis must be carefully considered, but it is not binding on the later panel." *Id.* "On the other hand, if the first panel does not stop at the question of likelihood of success and instead addresses the merits, the later panel, in accordance with our Court's traditional practice, should regard itself as bound by the prior panel opinion."[6] *Id.* "We have recognized, however, that

[6] There are sound reasons why a panel reviewing a ruling on a preliminary injunction should focus on the question of likelihood

reconsideration is justified in extraordinary circumstances such as where: (1) there has been an intervening change in the law; (2) new evidence has become available; or (3) reconsideration is necessary to prevent clear error or a manifest injustice." *Council of Alt. Political Parties v. Hooks*, 179 F.3d 64, 69 (3d Cir. 1999).

Here, the prior panel's opinion immediately went beyond the question of likelihood of success and declared a holding on the merits. Again, it held very plainly that the Act does not violate the Second Amendment, the Fifth Amendment's Takings Clause, and the Fourteenth Amendment's Equal Protection Clause. *Prior Panel Opinion*, 910 F.3d at 110. In short, it addressed the ultimate merits of the dispute, as the plaintiffs rightly admit.[7] (Oral Arg. At 2:02-40,

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of success on the merits rather than reaching the merits of the claim before them. Given the already-mentioned different standards on a motion for preliminary injunction and motion for summary judgment and our different standards of review, going to the merits on a preliminary record, under hurried circumstances, can lead to premature and less informed decisions. On review at the preliminary injunction stage, a panel may conclude that the district court did not abuse its discretion or commit obvious errors of law or serious mistakes in its findings of fact. But a subsequent panel reviewing an order on summary judgment may, in its plenary review of the record, identify errors the district court committed that, while not obvious or serious, impact the analysis or outcome of a case. We therefore make it a general practice to proceed cautiously, to avoid ending a case on review from a preliminary injunction when the record could be more developed on summary judgment and we can conduct a plenary review of that record.

[7] *See Prior Panel Opinion*, 910 F.3d at 122 ("[W]e hold that laws restricting magazine capacity to ten rounds of ammunition do not violate the Second Amendment."); *id.* at 125 ("In short, the Act

https://www2.ca3.uscourts.gov/oralargument/audio/19-3142_AssnNJRiflePistolClubsv.AttyGenNJ.mp3.) And the panel did so primarily on the basis of facts that are uncontested.[8]

To avoid the conclusion that the law of the case has been set and a precedent established,[9] the plaintiffs do not argue that there has been an intervening change in the law or the discovery of new evidence, but they do point out an intervening procedural step in our Court. They note that the State asked a motions panel of our Court to summarily affirm the District Court's grant of summary judgment on remand but that the motions panel

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does not result in a taking."); *id.* at 126 ("[R]etired 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.").

[8] The case-determinative facts here centered on reloading. The District Court's conclusion that the Act survived intermediate scrutiny relied on its finding that "there is some delay associated with reloading, which may provide an opportunity for potential victims to escape or for a bystander to intercede[.]" *Preliminary Injunction Opinion*, 2018 WL 4688345, at *12. The prior panel also relied heavily on that finding. *Prior Panel Opinion*, 910 F.3d at 119-20. The plaintiffs' own witness before the District Court acknowledged that there would be some pause while a shooter reloaded. *Preliminary Injunction Opinion*, 2018 WL 4688345, at *6-7. And, on appeal, the plaintiffs have presented only legal, not factual, arguments.

[9] We have explained that "[u]nder the law of the case doctrine, once an issue is decided, it will not be relitigated in the same case, except in unusual circumstances." *Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 165 (3d Cir. 1982). Thus, the prior panel's opinion is both the law of the case and binding precedent.

denied that request. According to the plaintiffs, that means "the motions panel necessarily rejected [the State's] argument that the prior merits panel's denial of a preliminary injunction binds the outcome of this appeal." (Reply Br. at 2.)

Not so. According to our Internal Operating Procedures, we "*may* take summary action … if it clearly appears that no substantial question is presented or that subsequent precedent or a change in circumstances warrants such action." (3d Cir. I.O.P. 10.6 (emphasis added)). Thus, although we may choose to summarily affirm, a decision of a motions panel declining to affirm is not the same as a determination that there is a substantial question left in the case. It often means nothing more than that the presentation made by motion has left that particular motions panel wondering whether there is a substantial question.

Moreover, we do not afford the same deference to decisions made by a motions panel that we afford to opinions by a merits panel. Although "a merits panel does not lightly overturn a decision made by a motions panel during the course of the same appeal, we do not apply the law of the case doctrine as strictly in that instance as we do when a second merits panel is asked to reconsider a decision reached by the first merits panel on an earlier appeal." *Council Tree Commc'ns, Inc. v. FCC*, 503 F.3d 284, 292 (3d Cir. 2007). That is in part because litigants can seek en banc review and review by certiorari of merits panel decisions but do not have similar opportunities with respect to a motions panel decision. *Id.* at 291-92. Here, the order denying the motion for summary affirmance does not

explain why the motion was being denied. Thus, even if the decisions of the merits panel and the motions panel were in conflict (which they are not), the merits panel is the one owed deference.

The plaintiffs next argue that we need not follow the prior panel's decision because it is clearly wrong and would work a manifest injustice. The burden that accompanies that contention is heavy. The plaintiffs must "persuade us not only that our prior decision was wrong, but that it was *clearly wrong*[.]" *See In re City of Phila. Litig.*, 158 F.3d 711, 720-21 (3d Cir. 1998) (emphasis added). Similarly, a manifest injustice occurs only when there is "direct, obvious, and observable error[.]" *Manifest Injustice*, Black's Law Dictionary (11th ed. 2019). "The law of the case will be disregarded only when the court has a clear conviction of error[.]" *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981) (internal quotation marks and citation omitted). "Mere doubt on our part is not enough to open the point for full reconsideration." *Id.* (internal quotation marks omitted).

There is certainly room for vigorous debate about the prior decision. The thorough dissent shows that. But whether we agree with the majority's opinion or not, we cannot say that it is clearly wrong or manifestly unjust. Even if we ignore that many other circuit courts have reached the same conclusion as the prior panel, with respect to very similar laws, there is evident in the prior panel's work thoughtful consideration of the record and the relevant legal principles. Whether the prior panel ultimately got things wrong is not the question now. The question is whether it went so far astray that its decision can be

called clearly wrong and manifestly unjust. The answer to that is no. We are therefore bound to respect the decision rendered by the prior panel, which ends this appeal.[10]

III. Conclusion

For the foregoing reasons, we will affirm the District Court's grant of summary judgment in favor of the State and its denial of the plaintiffs' cross-motion for summary judgment.

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[10] The dissent concludes that the law of the case doctrine does not bar our consideration of the merits of the parties' dispute, for two reasons: first, the prior panel assumed without deciding that magazines holding more than ten rounds are protected under the Second Amendment, and, second, the prior panel was imprecise and interchangeably used the terms "magazines," "LCMs," and "large capacity magazines" to refer to magazines of different capacities and to magazines and firearms with different capabilities. In our view, neither of those considerations affects whether we are bound by the prior panel's decision. Even though the prior panel assumed without deciding that magazines holding more than ten rounds are protected under the Second Amendment, that assumption did not leave the parties' rights unsettled. That assumption was in plaintiffs' favor, and, under that assumption, the prior panel clearly held that the Act does not violate the Second Amendment. That holding settled the parties' rights. Similarly, the prior panel's language describing magazines, even if not as precise as our dissenting colleague would like, does not, in our opinion, create anything that we can call clear error or manifest injustice and thus that would permit us to disregard the prior panel's case dispositive holdings and reach the merits afresh.

MATEY, *Circuit Judge,* dissenting.

The majority concludes that a prudential principle bars our consideration of the meaning of the Constitution. But "[t]he interpretation of the laws is the proper and peculiar province of the courts," The Federalist No. 78, at 525 (Alexander Hamilton) (J. Cooke ed., 1961), and a judicially created tool for case management does not, in my opinion, supersede the expectation that the judiciary will decide cases and controversies arising under the Constitution. No doubt, there are rational reasons behind the "law-of-the-case doctrine." Allowing courts to repeatedly consider questions already decided would undermine the stability and predictability of the law. In contrast, where issues remain undecided, or the assumptions underlying those decisions are unclear, then the opposite conclusion holds. And in such cases, the twin aims of finality—constancy and certainty—do not support limiting the judicial power granted in the Constitution and extended by Congress.

This case, in my view, is an example of the latter category for two reasons. First, in *Association of New Jersey Rifle and Pistol Clubs, Inc. v. Attorney General of New Jersey*, 910 F.3d 106 (3d Cir. 2018) ("*NJ Rifle I*"),[1] the panel did not decide whether all "magazines" enjoy the guarantee of the Second Amendment under *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010); and second, the decision did not define what constitutes a "large capacity magazine." Because both issues are central to the resolution of this case, I would

[1] For convenience, I sometimes refer to the *NJ Rifle I* panel as "the prior panel."

decline to apply the law-of-the-case doctrine and would consider the issues raised by the appellant. Doing so, I would reverse the order of the District Court and remand this matter to permit the State to provide evidence that N.J. Stat. Ann. § 2C:39-1(y) ("New Jersey Magazine Act" or "the Act") is narrowly tailored to advance the State's interests.

Finally, given the difficulty applying our existing framework in cases implicating the Second Amendment—illustrated by the deeply reasoned, but still deeply divergent opinions in *NJ Rifle I*—I believe we should reconsider our decision in *Marzzarella* in favor of a standard that draws on the text, history, and original meaning of the constitutional guarantee of "the right of the people to keep and bear Arms." U.S. Const. amend. II.

I. Law-of-the-Case Doctrine

A. Background

Under the law-of-the-case doctrine, "one panel of an appellate court generally will not reconsider questions that another panel has decided on a prior appeal in the same case." *In re City of Phila. Litig.*, 158 F.3d 711, 717 (3d Cir. 1998). The doctrine does not appear in statute. Instead, it is a prudential limitation that "directs courts to refrain from re-deciding issues that were resolved earlier in the litigation." *Pub. Int. Rsch. Grp. of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 116 (3d Cir. 1997). But "[t]he law of the case doctrine does not limit a federal court's power; rather, it directs its exercise of discretion." *Id.* It is, in short, a judicially created self-direction on when to choose to limit further judicial review. And the reasoning is simple: declining to reconsider issues in

the same case "promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988) (internal quotation marks and citation omitted). So a "settled" issue is the key and, in this case, I do not find the rights of the parties settled.

B. The *NJ Rifle I* Decision

NJ Rifle I concluded that "laws restricting magazine capacity to ten rounds of ammunition do not violate the Second Amendment." *NJ Rifle I*, 910 F.3d at 122. That conclusion rests on assumptions about the scope of the constitutional right to keep and bear arms, and the technical operation of self-loading firearms.

1. *NJ Rifle I* Did Not Decide That Magazines Holding More Than Ten Rounds Are Arms Protected under the Second Amendment

I start by asking what constitutional question *NJ Rifle I* answered. We know the Second Amendment confers "an individual right to keep and bear arms." *District of Columbia v. Heller*, 554 U.S. 570, 595, 598, 622 (2008). We have also read *Heller* to require "a two-pronged approach to Second Amendment challenges." *Marzzarella*, 614 F.3d at 89. "First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *Id.* "If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid." *Id.*

I do not read *NJ Rifle I* to have fully applied this framework. To begin, the majority opinion held that "a magazine is an arm under the Second Amendment." *NJ Rifle I*, 910 F.3d at 116. But it did not view "magazines" as the relevant "arm" regulated by New Jersey in the Act. Quite differently, the opinion focused on what it viewed as a *narrower* category of magazines called "Large Capacity Magazines" or "LCMs." *Id.* at 116-17. And then, the opinion "assume[d] *without deciding* that LCMs . . . are entitled to Second Amendment protection." *Id.* at 117 (emphasis added). So are "LCMs" an "arm" under the Second Amendment? It is doubtful New Jersey thinks so. Indeed, when pressed at oral argument, the State declined to characterize *NJ Rifle I* as holding that such magazines enjoy constitutional protection.[2] That waffling is no small matter. It would of course be significant that some twenty-two million individuals residing in our Circuit are left to wonder whether they have, since the Founding, surrendered a fundamental right. But that unanswered question takes sharper focus when coupled with a second: what, exactly, is a "Large Capacity Magazine?"

2. *NJ Rifle I*'s Alternating Technical Definitions

Narrowing the issue presented from "magazines" to a specific kind of magazine appears, in my reading, to have obscured the reasoning in *NJ Rifle I.* Consider a few examples in which the terms "magazines," "LCMs," and "large capacity magazines"

[2] (Oral Arg. Tr. at 28:13, https://www2.ca3.uscourts.gov/oralargument/audio/19-3142_AssnNJRiflePistolClubsv.AttyGenNJ.mp3.)

interchangeably refer to 1) magazines within the New Jersey Magazine Act because they can hold more than ten rounds of ammunition, *id.* at 110; 2) magazines subject to laws in other states limiting the amount of rounds of ammunition, *id.* at 110 n.1; 3) firearms with "combat-functional ends" capable of "rapidly" discharging ammunition, *id.* at 117 n.16; and 4) magazines used in fully-automatic firearms, *id.* at 119 (citing *NJ Rifle I* App. at 1057, 1118-26). Each of these four concepts is different, yet they blend together throughout *NJ Rifle I*. For instance, early on the decision defines the term "LCM" to be coterminous with the object regulated by the New Jersey Magazine Act: magazines for semi-automatic firearms able to hold more than ten rounds of ammunition. *Id.* at 110 (citing N.J. Stat. Ann. § 2C:39-1(y)). A few pages later, the opinion states that "LCMs are used in mass shootings," citing portions of the record that describe a host of different *types* of firearms—repeaters, semi-automatic, and automatic—and various *sizes* of magazines used in both automatic and semi-automatic firearms. *See id.* at 119 (citing *NJ Rifle I* App. at 1057 (defining "LCM firearms" to include "assault weapons" and "high-capacity semiautomatic firearms" and stating that those "LCMs" jointly "appear to account for 22 to 36% of gun crimes in most places"); *NJ Rifle I* App. at 1118-26 (describing sixty-one mass shootings and the weapons used, including repeaters, semi-automatic firearms, and automatic firearms, along with magazines of varying capacities, ranging from 13-round magazines to 100-round magazines)). So the reader is left with the impression that the "LCMs" regulated in New Jersey are the same devices involved in a host of criminal acts across the country.

But they are not. Yet blending together this wide assortment of firearms and regulatory structures is critical to the prior panel's conclusion that "[n]ot only will the LCM ban reduce the number of shots fired and the resulting harm, it will present opportunities for victims to flee and bystanders to intervene." *Id.* at 119. I do not see how the current record supports that inference. At best, the record could be read to suggest that criminals use a variety of firearms to commit an array of violent acts some, all, or none of which are impacted by the New Jersey Magazine Act.

3. The Cumulative Result

It is the combination of these two unanswered questions that gives me greatest pause. The collective effect of declining to confirm that "large capacity magazines" enjoy constitutional protection while defining those same magazines to include sizes greater than the New Jersey Magazine Act allows leaves me unable to predict how the Second Amendment will apply in future cases. I do not believe the constitutional character of a "magazine" rises and falls on a single extra round of ammunition. Nor do I imagine the Second Amendment allows any government to diminish an individual's rights through nomenclature. I am, however, confident that new restrictions on firearms will continue to flourish throughout our Circuit. Under *NJ Rile I*, that leaves District Court judges with the difficult task of determining whether a magazine is small enough to satisfy the Second Amendment or large enough to slip outside its guarantee. And it leaves this Court with the certainty that we will need to address those unanswered questions.

Respectfully, we need not wait. "[T]he law of the case doctrine bars courts from reconsidering matters actually decided[;] it does not prohibit courts from revisiting matters that are 'avowedly preliminary or tentative.'" *Council of Alt. Pol. Parties v. Hooks*, 179 F.3d 64, 69 (3d Cir. 1999) (quoting 18B Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction § 4478 (3d ed. 1981)). So we have taken care to "to prevent the doctrine from being used to prevent a properly raised argument from being considered even *once*." *United Artists Theatre Cir., Inc. v. Township of Warrington*, 316 F.3d 392, 398 (3d Cir. 2003) (emphasis in original). And that is why we have recognized that "[w]here there is substantial doubt as to whether a prior panel actually decided an issue, the later panel should not be foreclosed from considering the issue." *Id.*

Here, there is substantial doubt about whether all magazines enjoy the guarantee of the Second Amendment or if, instead, that protection turns on the number of rounds of ammunition inside. In my opinion, it is necessary to address that issue to settle the rights of the parties here. Given that uncertainty, I would decline to apply the law-of-the-case doctrine, as I do not believe it applies to these circumstances. For that reason, I would, and therefore do, consider the full question presented by the appellants.

II. Application of the Second Amendment

A. The Scope of the Second Amendment

I begin with *Heller* and the Supreme Court's consideration of the text, history, and tradition of

firearms regulations in the United States to best understand the meaning of the Second Amendment.

Naturally, the Court began with the "operative clause" which provides that "the right of the people to keep and bear Arms, shall not be infringed." *Heller*, 554 U.S. at 576, 578-79. The Court observed that "[t]he 18th-century meaning [of 'arms'] is no different from the meaning today." *Id.* at 581 (citing 1 S Johnson, Dictionary of the English Language 106 (4th ed. 1773) (reprinted 1978) (defining "arms" as "[w]eapons of offence, or armour of defence")); 1 Timothy Cunningham, A New and Complete Law Dictionary (1771) (defining "arms" as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another."); *see also* N. Webster, American Dictionary of the English Language (1828) (reprinted 1989) (similar)). With this foundation, the Court held that "the Second Amendment extends . . . to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Heller*, 554 U.S. at 582. In so holding, the Court rejected the "frivolous" argument "that only those arms in existence in the 18th century are protected by the Second Amendment." *Id.* An unsurprising observation, because "[w]e do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, *e.g.*, *Reno v. Am. C.L. Union*, 521 U.S. 844, 849 (1997), and the Fourth Amendment applies to modern forms of search, *e.g.*, *Kyllo v. United States*, 533 U.S. 27, 35-36 (2001), the Second Amendment extends" to modern bearable arms. *Id.*

Next, the Court held that "the most natural reading of 'keep Arms' in the Second Amendment is to 'have weapons.'" *Id.* As to "bear," the Court held that "[w]hen used with 'arms' . . . the term has a meaning that refers to carrying for a particular purpose—confrontation." *Id.* at 584; *see id.* ("From our review of founding-era sources, we conclude that this natural meaning was also the meaning that 'bear arms' had in the 18th century."). "Putting all of these textual elements together," and drawing on historical context, the Court held "that they guarantee the individual right to possess and carry weapons in case of confrontation." *Id.* at 592, 595.

But the Court acknowledged that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Id.* at 626. For example, it did "not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*." *Id.* at 595 (emphasis in original). "From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. Rather, the Court acknowledged the propriety of "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27. It also "recognize[d] another important limitation": that "the sorts of weapons protected were those 'in common use

at the time.'" *Id.* at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)). The Court held that this "limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id.* (citation omitted). As a result, the Court held that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of the scope of the right." *Id.* at 625.

With this foundation, the Court turned to the handgun ban at issue, which prohibited keeping operable handguns in the home. *Id.* at 628. Rather than cabining the standard of review to a balancing of interests, the Court held that the law was unconstitutional because it banned an entire class of firearms commonly owned by citizens for the lawful purpose of self-defense in the home. *Id.* at 628-29. Although *Heller* focused its holding on the handgun ban before it, the Court acknowledged that "whatever else it leaves to future evaluation," the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635. *Heller* makes clear that judicial review of Second Amendment challenges proceeds from text, history, and tradition. This is because "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Id.* at 634-35.[3]

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[3] Two years later, in *McDonald v. City of Chicago*, the Supreme Court reiterated that the right to keep and bear arms is a

B. Applying *Heller* and This Court's Interpretative Framework

Since *Heller*, circuit and district courts have varied in their approaches to evaluating the Second Amendment. Most have now settled on some version of the two-pronged approach we created in *Marzzarella*.[4] As noted, we first "ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee," and, if it does, "we evaluate the law under some form of means-end scrutiny." *Marzzarella*, 614 F.3d at 89. I apply both steps, concluding that the New Jersey Magazine Act does not satisfy the rigorous scrutiny required for the fundamental rights of the Second Amendment.

"fundamental" constitutional right "deeply rooted in this Nation's history and tradition." 561 U.S. 742, 767-68, 778 (2010) (citation omitted).

[4] *See* David B. Kopel, Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 St. Louis U. L. J. 193, 212 n.105 (2017) (citing *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo,* 804 F.3d 242, 254 (2d Cir. 2015); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *NRA v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *United States v. Chovan*, 735 F.3d 1127, 1136-37 (9th Cir. 2013); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010) ("*Heller* thus suggests a two-pronged approach to Second Amendment challenges to federal statutes.") (internal quotations omitted); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1261 n.34 (11th Cir. 2012); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1252 (D.C. Cir. 2011)).)

1. Step One: Determining Whether the Challenged Law Imposes a Burden on Conduct Falling Within the Second Amendment

The "threshold inquiry, then, is whether [the Act] regulates conduct that falls within the scope of the Second Amendment." *Id.* at 89. That analysis turns on "whether the type of arm at issue is commonly owned," *id.* at 90-91, and "'typically possessed by law-abiding citizens for lawful purposes,' *Heller*, 554 U.S. at 625." *NJ Rifle I*, 910 F.3d at 116. I conclude the magazines, including those regulated by the New Jersey Magazine Act, are protected arms under the Second Amendment as best understood by history and tradition.

i. Defining the Regulated Arms

I begin by defining the kinds of arms controlled by the New Jersey Magazine Act, which prohibits the possession of magazines "capable of holding more than 10 rounds of ammunition to be fed continuously and directly therefrom into a semi-automatic firearm." N.J. Stat. Ann. § 2C:39-1(y).[5] As ordinarily

[5] At issue in this appeal are only magazines for semi-automatic firearms. A "semi-automatic" firearm is "a weapon that fires only one shot with each pull of the trigger, and which requires no manual manipulation by the operator to place another round in the chamber after each round is fired." *Staples v. United States*, 511 U.S. 600, 602 n. 1 (1994). This is distinct from an "automatic" firearm, which "fires repeatedly with a single pull of the trigger. That is, once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted." *Id.* Individual ownership of automatic firearms is prohibited in New Jersey. *See* N.J. Stat. Ann. § 2C:39-5(a) (making unlawful the possession of "a machine gun or any

understood, a "magazine" is "a device that holds cartridges or ammunition." *NJ Rifle I*, 910 F.3d at 116 (citing *Magazine*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/magazine (last visited Nov. 21, 2018)). What is more, this contemporary definition tracks the ordinary understanding of magazines since at least the 1800s.[6] Having defined what a magazine is, I next consider whether a magazine is an arm within the Second Amendment.

As the Supreme Court explained in *Heller,* regulation requiring "that firearms in the home be rendered and kept inoperable at all times" is unconstitutional as it necessarily makes "it impossible

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instrument or device adaptable for use as a machine gun"); N.J. Stat. Ann. § 2C:39-1(i) (defining "machine gun" as "any firearm, mechanism or instrument not requiring that the trigger be pressed for each shot and having a reservoir, belt or other means of storing and carrying ammunition which can be loaded into the firearm, mechanism or instrument and fired therefrom").

[6] *Compare* Noah Webster, An American Dictionary of the English Language 510 (1842) (defining "magazine" as "[a] store of arms, ammunition or provisions; or the building in which such store is deposited; New Illustrated Edition of Dr. Webster's Unabridged Dictionary of All the Words in the English Language 799 (1864) (defining "magazine" as "[t]o store up or accumulate for future use"); Webster's Condensed Dictionary 336 (1887) (expanding the definition of "magazine" to include a "cartridge chamber of a repeating rifle"); Webster's Collegiate Dictionary 590 (3d ed. 1917) (defining "magazine" to include "[a] chamber in a gun for holding cartridges to be fed automatically to the piece"); Merriam-Webster Unabridged Dictionary (2020) (defining "magazine" to include "a supply chamber: such as . . . a holder that is incorporated in or attachable to a gun and that contains cartridges to be fed into the gun chamber by the operation of the piece").

for citizens to use them for the core lawful purpose of self-defense[.]" *Heller*, 554 U.S. at 630. From this holding flows the logical conclusion that the Second Amendment's use of the term "arms" should be ordinarily understood as "operable arms," meaning that the Second Amendment likewise guarantees components required to make a protected firearm work for self-defense. *See Heller*, 554 U.S. at 581.

That necessarily includes ammunition and, by extension, magazines that hold ammunition, as components of an operable firearm. *See Miller*, 307 U.S. at 180 (observing that in the context of the colonial militia system, "[t]he possession of arms also implied the possession of ammunition, and the authorities paid quite as much attention to the latter as to the former") (quoting The American Colonies In The 17th Century, Osgood, Vol. 1, ch. XIII). For these reasons, the best reading of "arms" in the Second Amendment includes magazines because "[a] regulation eliminating a person's ability to obtain or use ammunition could thereby make it impossible to use firearms for their core purpose." *Jackson v. City & Cty. of San Francisco,* 746 F.3d 953, 967 (9th Cir. 2014).

ii. History and Tradition: The Development of Magazine-Operated Firearms and the Regulations That Followed

That a magazine is an "arm" does not foreclose governmental regulation because "the right secured by the Second Amendment is not unlimited." *Heller*, 554 U.S. at 626. So I next consider what, if any, restrictions on magazines satisfy the history and

tradition of the Second Amendment. Answering that question begins with a review of magazines and magazine-operated firearms to understand: 1) the use and ownership of these arms over time, 2) traditional regulations, and 3) common use.

a. The Development of Repeating Firearms

"The desire for . . . repeating weapons is almost as old as the history of firearms, and there were numerous attempts to achieve this goal, beginning at least as early as the opening years of the 16th century." Harold L. Peterson, Arms and Armor in Colonial America, 1526-1783, at 215 (1956). "Successful systems [of repeating arms] definitely had developed by 1640, and within the next twenty years they had spread throughout most of Western Europe and even to Moscow." Harold L. Peterson, The Treasury of the Gun 229 (1962). "[T]he two principal magazine repeaters of the era [were] the Kalthoff and the Lorenzoni. These were the first guns of their kind to achieve success . . . ." *Id.* The Kalthoff repeater magazines held between six and thirty charges, and "were undoubtedly the first magazine repeaters ever to be adopted for military purposes." *Id.* at 230. Also developed during the 17th century, the Lorenzoni was "a magazine-fed Italian repeating pistol that 'used gravity to self-reload'" and held about seven shots. (Brief of Amici Curiae Professors of Second Amendment Law, et al. in Support of Appellants and Reversal ("Amici Professors") at 12 (quoting Martin Dougherty, Small Arms Visual Encyclopedia 34 (2011)).) *See also* Gerald Prenderghast, Repeating and Multi-Fire Weapons: A History from the Zhuge

Crossbow Through the AK-47, at 97 (2018) ("The Lorenzoni is also referred to as the Cookson rifle by American collectors[.]"); David Westwood, Rifles: an Illustrated History of Their Impact 71 (2005).

By the mid-17th century, Americans also began developing repeaters. These repeaters "often employed a revolving cylinder that was rotated by hand." (Amici Professors Br. at 15 (citing 2 Charles Winthrop Sawyer, Firearms in American History 5 (1939) (six-shot flintlock); Charles Edward Chapel, Guns of the Old West 202-03 (1961) (revolving snaphance)).) For example, the *Boston Gazette* advertised the American Cookson in 1756 and boasted that it could "fire 9 Times distinctly, as quick, or as slow as you please[.]" Peterson, The Treasury of the Gun 232. In 1777, the Continental Congress ordered Belton rifles able to discharge sixteen or twenty rounds, but then later cancelled the order based on the extraordinary expense. (*See* Amici Professors Br. at 18.) *See also* 7 Journals of the Continental Congress 1774-1789, at 324, 361 (1907) (describing the ordering of Belton rifles and later the cancellation of the same rifles over Belton's request for "an extraordinary allowance"); Peterson, The Treasury of the Gun 197. All of which documents both the existence and public knowledge of repeating weapons.

That public knowledge grew into private practice by at least the early 19th century, when repeaters began circulating for personal use. For instance, in 1821, the *New York Evening Post* described the invention of a new repeater as "importan[t], both for public and private use," whose "number of charges may be extended to fifteen or even twenty." *Newly*

Invented Muskets, N.Y. Evening Post, Apr. 10, 1822, *in* 59 Alexander Tilloch, The Philosophical Magazine and Journal: Comprehending the Various Branches of Science, the Liberal and Fine Arts, Geology, Agriculture, Manufactures, and Commerce 467-68 (1822). Technical challenges, however, limited widespread adoption and "none achieved real popularity." Peterson, The Treasury of the Gun 199.

Then, in the 1830s, Samuel Colt introduced the revolver, which fired repeating rounds using a rotating cylinder. Peterson, The Treasury of the Gun 202-03, 209-11 ("The real father of the revolver in its modern sense, however, was Samuel Colt."). *See also* Ian V. Hogg, The Complete Illustrated Encyclopedia of the World's Firearms 40 (1978) ("[Colt] had developed a percussion revolver and patented it in England in 1835 and in America in 1836."). By the mid- to late 19th century, some revolvers could fire up to twenty-one rounds. David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 856 (2015) ("Pin-fire revolvers with capacities of up to twenty or twenty-one entered the market in the 1850s[.]"). Around this time, repeating rifles could fire between fifteen and sixty shots per minute. *Id*. at 854. In addition, the lever-action repeating rifle arrived by the 1850s, and could fire thirty times per minute. *Id.* at 854-55. The arms development during this time was "fueled by the Civil War market." Robert L. Wilson, Winchester: An American Legend (1991).

b. The Development of Semiautomatic Firearms and Magazines

The first commercially successful rifles holding more than ten rounds of ammunition appeared around 1866, with handguns holding more than ten rounds following by 1935. *See* Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. at 849-50. And "[o]wing to their simplicity and ease of use, by the mid-twentieth century the use of detachable magazines loaded through the base of the grip far exceeded all other loading methods." Jeff Kinard, Pistols: An Illustrated History of Their Impact 174 (2003). Given that easy operation, "semiautomatic handguns grew from 28% of handgun production in 1973 to 80% in 1993." (*NJ Rifle I* App. at 1272.) As they became more readily available, semiautomatic handguns gradually became more predominant. "Pistol magazines manufactured before September 1994 commonly [held] five to 17 bullets, and magazines produced for some models [held] as many as 30 or more bullets." (*NJ Rifle I* App. at 1060.) As for rifles, the AR-15 semiautomatic rifle appeared in 1963 and sold with a standard twenty-round magazine. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. at 859-60. Since that time it has become "[t]he most popular rifle in American history." *Id.* at 859.

Possession of magazines exceeding ten rounds grew rapidly "given the growing popularity of semi-automatic rifles and of large-capacity handguns. Nearly 80 percent of ammunition magazines owned by gun owners at the time of [a 1994] survey held fewer

than 10 rounds." Edward W. Hill, *How Many Guns are in the United States: Americans Own between 262 Million and 310 Million Firearms*, Urban Publications 3 (2013). By contrast, a market survey conducted in or around 2013 "of owners of semi-automatic assault rifles . . . showed that 63 percent of owners of these guns had ammunition magazines that held more than 10 rounds." *Id*.

Today, "there are at least 58.9 million civilian-owned [magazines capable of holding more than ten rounds] in the United States." (*NJ Rifle I* Opening Br. at 17 (emphasis omitted) (citing Gary Kleck, *How Many Large Capacity Magazines (LCMs) Are Possessed By Americans?*, SSRN (2018)); *see also NJ Rifle I* App. at 275 (Tr. 372:14-16 (Kleck)) (percentage of firearms with capacity to hold eleven or more rounds); App. at 516-17 (Hill, *How Many Guns are in the United States: Americans Own between 262 Million and 310 Million Firearms*, Urban Publications).) "Magazines capable of holding more than 10 rounds come standard on some of the most popular handguns and rifles, including the most popular rifle in America." (*NJ Rifle I*, Opening Br. at 17-18) (emphasis omitted) (citing *NJ Rifle I*, App. at 696-704 (Gun Digest 2018); App. at 753 (National Shooting Sports Foundation, Modern Sporting Rifle Comprehensive Consumer Report 2013 (2013); App. at 500 (Dan Haar, *America's Rifle: Rise of the AR-15*, Hartford Courant (Mar. 9, 2013)); App. at 1239 (Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849).)

The State does not appear to have rebutted the fact that magazines holding more than ten rounds are

commonly owned.[7] The commonality of magazines holding more than ten rounds fits with findings by other courts as well. *See, e.g.*, *Heller II*, 670 F.3d at 1261 ("We think it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in 'common use,' as the plaintiffs contend" because "fully 18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding more than ten rounds, and approximately 4.7 million more such magazines were imported into the United States between 1995 and 2000.").

c. Regulating Magazine Capacity

With the history of magazines and magazine-equipped firearms as a guide, I next consider traditional regulation. *Heller*, 554 U.S. at 627; *McDonald*, 561 U.S. at 786 (reaffirming that *Heller* "did not cast doubt on . . . longstanding regulatory measures" and "does not imperil every law regulating firearms"). That analysis first requires answering how a prohibition can be "traditional" or "longstanding" when it regulates arms of the modern era. That is because *Heller* permits "[s]tate and local experimentation with reasonable firearms regulations." *McDonald*, 561 U.S. at 785 (alteration in original). Logically, then, "when legislatures seek to address new weapons that have not traditionally

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[7] One of the State's experts also conceded the readily available nature of "large capacity magazines." (*NJ Rifle I* App. at 195 ("Many of the mass shooters did not seek out large capacity magazines, they just used what was easily available, and it would have been hard or impossible for many of those mass shooters to seek out [smaller-capacity] magazines.").)

existed or to impose new gun regulations because of conditions that have not traditionally existed, there obviously will not be a history or tradition of banning such weapons or imposing such regulations." *Heller II*, 670 F.3d at 1275 (Kavanaugh, J. dissenting).

Instead, I believe "the proper interpretive approach is to reason by analogy from history and tradition." *Id.* (citing *Parker v. District of Columbia,* 478 F.3d 370, 398 (D.C. Cir. 2007) ("[J]ust as the First Amendment free speech clause covers modern communication devices unknown to the founding generation, e.g., radio and television, and the Fourth Amendment protects telephonic conversation from a 'search,' the Second Amendment protects the possession of the modern-day equivalents of the colonial pistol."), *aff'd sub nom. Heller,* 554 U.S. 570; Tr. of Oral Arg. at 77, *Heller,* 554 U.S. 570 (Chief Justice Roberts: "[Y]ou would define 'reasonable' in light of the restrictions that existed at the time the amendment was adopted. . . . [Y]ou can't take it into the marketplace was one restriction. So that would be—we are talking about lineal descendants of the arms but presumably there are lineal descendants of the restrictions as well."); *cf. Kyllo v. United States,* 533 U.S. 27, 31-35 (2001) (applying traditional Fourth Amendment standards to novel thermal imaging technology); *California v. Ciraolo,* 476 U.S. 207, 213 (1986) (allowing government to view property from airplanes based on common-law principle that police could look at property when passing by homes on public thoroughfares)). So I turn to historical regulation of both magazines and other restrictions on ammunition capacity.

Limits on ammunition capacity emerged during the Prohibition Era, when six states adopted restrictions.[8] *See also* Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. at 864-68 (internal footnotes and citations omitted). But all were repealed over time. Only the District of Columbia maintained an uninterrupted ban on semi-automatic magazines holding more than twelve rounds from 1932 until 1975, when it banned all functional firearms in the home and handguns altogether. (*See* Amici Professors Br. at 33 (citing Pub. L. No. 72-275, §§ 1, 8, 47 Stat. 650, 650, 652).)

New Jersey first limited magazine capacity to fifteen rounds in 1990. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. at 867 (citing Act of May 30, 1990, ch. 32, §§ 2C:39-1(y), -3(j), 1990 N.J. Laws 217, 221, 235 (codified at N.J. Stat. Ann. § 2C:39-1(y), -3(j) (West 2014)). Around the same time, Hawaii enacted a limitation of ten

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[8] These states include California, Michigan, Minnesota, Ohio, Rhode Island, and Virginia. (*See* Amici Professors Br. at 31-32 (citing 1927 R.I. Pub. Laws 256, §§ 1, 4 (banning sales of guns able to fire more than twelve shots without reloading); 1927 Mich. Pub. Acts ch. 372, § 3 (banning sales of firearms "which can be fired more than sixteen times without reloading"); 1933 Minn. Laws ch. 190 (banning "machine gun[s]," including semi-automatics "which have been changed, altered or modified to increase the magazine capacity from the original design as manufactured by the manufacturers"); 1933 Ohio Laws 189 (requiring a license for semi-automatics with capacity of more than 18); 1933 Cal. Laws, ch. 450 (requiring license for machine guns, which were defined to include semi-automatics with detachable magazines of more than ten rounds); 1934 Va. Acts ch. 96 s137, §§ 1(a), 4(d) (defining machine guns as anything able to fire more than sixteen times without reloading).))

rounds. (*See NJ Rifle I* App. at 9 (citing Haw. Rev. Stat. Ann. § 134-(8)).) A few years later, Congress passed the Violent Crime Control and Law Enforcement Act of 1994 prohibiting the possession or transfer of magazines holding more than ten rounds. *See* Pub. L. 103-322, § 110103 (Sep. 13, 1994). But that law expired in 2004 and has never been reauthorized. Since then, states including California, Colorado, Connecticut, Hawaii, Maryland, Massachusetts, and New Jersey have enacted or maintained regulations limiting magazine capacity. *See* Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. at 867-68.

This history reveals a long gap between the development and commercial distribution of magazines, on the one hand, and limiting regulations, on the other hand. The State reasons, "It is logical that state limits on such weapons do not predate their popularity." (*NJ Rifle I* Response Br. at 22.) That is doubtful, as New Jersey has actively regulated firearms lacking any popular use. *See, e.g.*, N.J. Stat. Ann. §§ 2C:39-3(m) (prohibiting "[c]overt or undetectable firearms," such as 3D printed firearms); Guidelines Regarding the "Substantially Identical" Provision in the State's Assault Firearms Laws, N.J. Att'y Gen. Op. (August 1996) (prohibiting "bayonet mounts" on rifles). At any rate, the State concedes that magazine-equipped rifles first achieved "mass-market success" in the 1860s and magazine-equipped handguns achieved similar success in the 1930s. (*NJ Rifle I* Response Br. at 22.) Yet regulations did not grow until the 1990s and 2000s, and even today, only a handful of states limit magazine capacity. Given that the "success" of magazine-equipped firearms

predated these first regulations by at least fifty years, I do not see evidence of the longstanding tradition required under *Heller* to remove magazines from the protection of the Second Amendment. *Cf. Drake v. Filko*, 724 F.3d 426, 432 (3d Cir. 2013) (holding New Jersey's permit requirement was longstanding because its origins dated to 1924). Nor is it clear that there is a longstanding tradition of regulating magazines as "dangerous and unusual." For one thing, more than eight states would have rushed to regulate magazine capacity following the end of the federal ban in 2004.

Some will argue there must be an outer boundary to this analysis that, when crossed, renders a magazine dangerous and unusual. If so, it does not appear in the history and traditions of our Nation. But in any event that question is not before us. So while "[t]here may well be some capacity above which magazines are not in common use . . . the record is devoid of evidence as to what that capacity is." *Heller II,* 670 F.3d at 1261 (Kavanaugh, J., dissenting). As a result, and limited to this record, I would hold that magazines are arms protected by the Second Amendment and an act limiting magazine capacity to ten rounds burdens the Appellants' Second Amendment rights.

2. Step Two: Evaluating the Challenged Law Under Means-End Scrutiny

Although not required by *Heller*, our precedent uses some form of means-end scrutiny. *See Marzzarella*, 614 F.3d at 96-97. *Marzzarella* does not insist on a uniform standard in all cases. Rather, we observed that if, like the First Amendment, "the

Second Amendment can trigger more than one particular standard of scrutiny," then intermediate scrutiny should be applied when the challenged law does not burden the "fundamental interest protected by the [Second Amendment]—the defense of hearth and home." *Id.* at 97. By extension, strict scrutiny should be applied when a challenged law does burden such a fundamental interest. I conclude that the New Jersey Magazine Act burdens the right to maintain operable protected arms without regard to location or circumstances, warranting strict scrutiny. But regardless of the level of scrutiny applied, the state does not satisfy its burden on this record.

i. Strict Scrutiny

As the Supreme Court has not applied the tiers of scrutiny to gun regulations, *see Heller*, 554 U.S. at 634, "we look to other constitutional areas for guidance in evaluating Second Amendment challenges." *Marzzarella*, 614 F.3d at 89 n.4. Using this rationale, we concluded "the First Amendment is the natural choice. *Heller* itself repeatedly invokes the First Amendment in establishing principles governing the Second Amendment." *Id.*

Cases considering restrictions on speech and expression hold the appropriate level of scrutiny is a fact-specific inquiry tied to the type of regulation at issue. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (applying intermediate scrutiny to content-neutral time, place, and manner restrictions in a public forum); *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Oh.*, 471 U.S. 626, 651 (1985) (applying rational basis review to disclosure requirements for commercial speech). Strict scrutiny

applies to content-based restrictions that infringe on the First Amendment's core guarantee. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (applying strict scrutiny in the context of infringement on "political speech"); *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 813 (2000) (applying strict scrutiny in context of content-based speech restriction). So following the direction of *Marzzarella*, strict scrutiny applies to restrictions burdening rights at the core of the Second Amendment. *See NJ Rifle I*, 910 F.3d at 134 (Bibas, J., dissenting).

One of the Second Amendment's core purposes is to protect the "use [of] arms in defense of hearth and home." *Heller*, 554 U.S. at 591, 636. For that reason, prohibiting operable firearms in the home violates the Second Amendment. *Id*. The same result applies here, because the New Jersey Magazine Act prohibits the possession of magazines exceeding ten rounds at all times, including inside the home for defense. The State argues that the Act "does not ban magazines; it imposes a restriction on the capacity of a single magazine that can be inserted into a firearm" and does not restrict the number of magazines an individual may possess. (*NJ Rifle I* Response Br. at 34-35.) That is only partially correct, as it leaves owners of a "noncompliant" magazine without an operating firearm. But even assuming the Act is not a categorical ban on all magazines, it still burdens a core Second Amendment right without exception or limitation, including the defense of "hearth and home" specifically noted in *Heller*. Following our prior analogy to decisions applying the First Amendment jurisprudence, this "ban on a class of arms is not an 'incidental' regulation. It is equivalent to a ban on a

category of speech." *See Heller II*, 670 F.3d at 1285 (Kavanaugh, J., dissenting); *see also NJ Rifle I*, 910 F.3d at 127 (Bibas, J., dissenting) ("I would apply strict scrutiny to any law that impairs the core Second Amendment right to defend one's home.").

New Jersey has not offered record evidence meeting that test. "Strict scrutiny asks whether the law is narrowly tailored to serve a compelling government interest." *Marzzarella*, 614 F.3d at 96 n.14. When "a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Playboy Ent. Grp.*, 529 U.S. at 813. As Judge Bibas observed, "[h]ere, the government has offered no concrete evidence that magazine restrictions have saved or will save potential victims. Nor has it made any showing of tailoring." *NJ Rifle I*, 910 F.3d at 134 (Bibas, J., dissenting). New Jersey once imposed a fifteen-round limit on magazine capacity. Now it claims ten is essential for public safety. The Second Amendment demands more than back-of-the-envelope math. At a minimum, it asks the government to explain, to offer but one example, why eleven rounds is too many while nine remains fine. Unless competent evidence answers those questions, New Jersey cannot show why a ten-round limit is the least restrictive means of achieving public safety. For this reason, I would hold that the Act fails to satisfy strict scrutiny.

ii. Intermediate Scrutiny

For largely the same reasons, the New Jersey Magazine Act does not satisfy intermediate scrutiny where "the government's asserted interest must be more than just legitimate but need not be compelling.

It must be 'significant, substantial, or important.'" *Drake*, 724 F.3d at 436 (quoting *Marzzarella*, 614 F.3d at 98). "'[T]he fit' between the asserted interest and the challenged law need not be 'perfect,' but it must be 'reasonable' and 'may not burden more [conduct] than is reasonably necessary.'" *Id*. (quoting *Marzzarella*, 614 F.3d at 98).

Here, the record does not show the State reasonably tailored the regulation to serve its interest in public safety without burdening more conduct than reasonably necessary. First, the State rests on the ambiguous argument that "when LCM-equipped firearms are used, more bullets are fired, more victims are shot, and more people are killed than in other gun attacks." (*NJ Rifle I* Response Br. at 28.) Perhaps, but "this still begs the question of whether a 10-round limit on magazine capacity will affect the outcomes of enough gun attacks to measurably reduce gun injuries and death." (*NJ Rifle I* App. at 1280 (Christopher S. Koper, An Updated Assessment of the Federal Assault Weapons Ban 89 (2004)).) In fact, "studies suggest that state-level [assault-weapon] bans have not reduced crime[.]" (*NJ Rifle I* App. at 1272, Koper, *supra* at 81 n.95.)

Second, as Judge Bibas observed, "since 1990 New Jersey has banned magazines that hold more than fifteen bullets. The ban affects everyone. The challengers do not contest that ban. And there is no evidence of its efficacy, one way or the other." *NJ Rifle I*, 910 F.3d at 132 (Bibas, J., dissenting). Third, statistics in the record report that out of sixty-one

"mass shootings,"[9] eleven used fifteen-round magazines, two used fourteen-round magazines, and two used thirteen-round magazines. That alone casts doubt on the ten-round tailoring. As does the declaration of the Commissioner of the Baltimore Police Department's stating that the use of a ten round magazine offers more opportunities to intervene in a shooting incident than if "*30- or 50-round magazines, or 100-round drums*" are used. (*NJ Rifle I* App. at 865.) (emphasis added). So too, of course, would use of a magazine holding eleven or twenty-nine rounds. That is why narrow tailoring requires more than a ninety-round spread in logic.[10]

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[9] The term "mass shootings" does not appear to have an objective definition. *See*, *e.g.*, *NJ Rifle I* App. at 1042, Louis Klarevas, Rampage Nation: Securing America From Mass Shootings (2016) (defining mass shootings as "attacks that resulted in six or more people—not including the perpetrator(s)—*dying* as a result of gunshot wounds") (emphasis in original); App. at 1067, Cong. Rsch. Serv., Mass Murder with Firearms: Incidents and Victims, 1999-2013 (2015) (defining "mass shooting" as "a multiple homicide incident in which four or more victims are murdered with firearms—not including the offender(s)—within one event, and in one or more locations in close geographical proximity); App. at 1118, Violence Pol'y Ctr., High-Capacity Ammunition Magazines are the Common Thread Running Through Most Mass Shootings in the United States (defining "mass shooting" as "3 or more fatalities").

[10] Diving deeper, the record evidence casts doubt on the State's intervention theory. For example, "it takes two to four seconds for shooters to eject an expended magazine from a semi-automatic gun, insert a loaded magazine, and make the gun ready to fire." (*NJ Rifle I* App. at 1197, Declaration of Gary Kleck in Support of Plaintiffs' Motion for a Preliminary Injunction at 12). Investigations from criminal attacks show "that the killers typically do not fire at high rates, instead firing deliberately, at

All of this leads to one conclusion: "the Government bears the burden of proof on the appropriateness of the means it employs to further its interest[,]" but "the Government falls well short of satisfying its burden—even under intermediate scrutiny." *Binderup v. Att'y Gen.*, 836 F.3d 336, 353 (3d Cir. 2016) (en banc). New Jersey must "present some meaningful evidence, not mere assertions, to justify its predictive [and here conclusory] judgments[,]" and it failed to meet that burden here. *Id.* at 354 (alteration in original) (citing *Heller II*, 670 F.3d at 1259); *see also N.Y. State Rifle & Pistol Ass'n, Inc*, 804 F.3d 242, 264 (2d Cir. 2015) ("[O]n intermediate scrutiny review, the state cannot 'get away with shoddy data or reasoning.' To survive intermediate scrutiny, the defendants must show '*reasonable* inferences based on *substantial* evidence' that the statutes are substantially related to the governmental interest.") (emphasis in original) (internal citations omitted).

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rates far below the fastest rates that can be maintained with semiautomatic weapons." (*NJ Rifle I* App. at 1203, Kleck Decl. at 18.) In fact, "[t]he average interval between shots in mass shootings . . . is nearly always more than two to four seconds, which means that magazine changes do not even slow the shooter's rate of fire." (*NJ Rifle I* App. at 1203, Kleck Decl. at 18.) Shooters can "avoid the necessity of reloading by carrying several firearms, carry[ing] several magazines which can be exchanged quickly, or simply tak[ing] the time to reload." (*NJ Rifle I* App. at 748, Carlisle E. Moody, Large Capacity Magazines and Homicide, 160 C. Wm. & Mary Working Paper 6, 6 (2015).) Crediting all of this testimony seems to undermine the State's theory, and suggests that reducing magazine does not meaningfully assist intervention.

For these reasons, I would hold that the Act cannot satisfy intermediate, or any applicable level of, scrutiny.

III. Reconsidering *Marzzarella* and Tiered Scrutiny

Decided two years after *Heller*, our decision in *Marzzarella* ushered in a two-part framework for analyzing the Second Amendment. That test has proved popular, and is now used by a majority of circuit courts. But our approach has come into question, and I have serious doubts that it can be squared with *Heller*. *See, e.g.*, *Rogers v. Grewal*, 140 S. Ct. 1865, 1867 (2020) (mem.) (Thomas, J., dissenting) (criticizing the two-part framework as "rais[ing] numerous concerns" that "yield[] analyses that are entirely inconsistent with *Heller*"); *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1540 (2020) (Alito, J., dissenting) (explaining that *Heller* is based "on the scope of the right to keep and bear arms as it was understood at the time of the adoption of the Second Amendment"); *id.* at 1527 (Kavanaugh, J., concurring) ("I share Justice Alito's concern that some federal and state courts may not be properly applying *Heller* and *McDonald*."). I reach that conclusion on two grounds.

First, the widespread popularity of the two-step balancing test does not address the clear repudiation of interest-balancing by the Supreme Court in *Heller* and *McDonald*. When twice presented with the opportunity to import tiered scrutiny from decisions considering the First Amendment, the Supreme Court instead focused on text, history, and tradition. *See Heller*, 554 U.S. at 634 (declining to apply a specified

level of scrutiny and observing that "[w]e know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach."); *McDonald*, 561 U.S. at 785 ("[W]e expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing"); *Binderup*, 836 F.3d at 378 (Hardiman, J., concurring) ("Applying some form of means-end scrutiny in an as-applied challenge against an absolute ban—after it has already been established that the individual has a right to keep and bear arms—eviscerates that right via judicial interest balancing in direct contravention of *Heller*.").

Second, this historical approach is significant because, as *Heller* explains, "it has always been widely understood" that "[t]he very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'" *Heller*, 554 U.S. at 592 (quoting *United States v. Cruikshank*, 92 U.S. 542, 553 (1876)) ("This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence."); *see also Robertson v. Baldwin*, 165 U.S. 275, 281 (1897) ("The law is perfectly well settled that the first 10 amendments to the constitution . . . were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors[.]"). And rather than turning to the reservoir of decisions, doctrines, and debates flowing from generations of First Amendment cases and tiered tolerance of governmental speech restraints, *Heller* "pores over

early sources to show that while preventing Congress from eliminating state militias was the 'purpose that prompted the [Amendment's] codification,'" that purpose did not limit the right's substance. *Wrenn v. District of Columbia*, 864 F.3d 650, 658 (D.C. Cir. 2017) (quoting *Heller*, 554 U.S. at 600). At its core, the Second Amendment recognizes the widely accepted principle at the Founding that the right to self-defense derived directly from the natural right to life, giving the people predictable protections for securing the "Blessings of Liberty." U.S. Const. pmbl.; *see also* Declaration of Independence para. 2.[11] So "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634 (emphasis in original).

For those reasons, I would follow what I believe to be the direction of the Supreme Court and focus our

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[11] Several Founding Era documents reflect this sentiment. Hamilton wrote in Federalist Paper 28 that the "original right of self-defense" is "paramount to all positive forms of government." The Federalist No. 28, at 146 (Alexander Hamilton) (Colonial Press, ed., 1901). Similarly, Samuel Adams listed self-preservation under "Natural Rights of the Colonists as Men": "First, a right to life; Secondly, to liberty; Thirdly, to property; together with the right to support and defend them in the best manner they can." Samuel Adams, The Rights of the Colonists: The Report of the Committee of Correspondence to the Boston Town Meeting Nov. 20, 1772 *reprinted in* Old South Leaflets no. 173 (Directors of the Old South Work 1906). Those sentiments, in turn, echo the classical understanding that "[s]elf-defence, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society." 3 William Blackstone, Commentaries *4.

approach "based on text, history, and tradition" rather "than under an interest-balancing test." *Heller II*, 670 F.3d at 1275 (Kavanaugh, J. dissenting).

IV. Conclusion

The law-of-the-case doctrine can serve important, practical purposes in litigation. But it remains a prudential rule that "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messenger v. Anderson*, 225 U.S. 436, 444 (1912). I would decline to invoke that discretion here, as I conclude that determining whether magazines enjoy the guarantees of the Second Amendment, and whether that protection varies based on their capacity, would "not reopen issues decided in earlier stages of the same litigation." *Agostini v. Felton*, 521 U.S. 203, 236 (1997). Both issues affect the rights of individuals throughout our Circuit. Likewise, resolving those questions will allow state governments to design public safety solutions that respect the freedoms guarded by the Second Amendment. So I would reverse the order of the District Court, hold that magazines are arms under the Constitution, and remand this matter to permit the State to provide evidence that the Act is narrowly tailored to advance the State's interests. For these reasons, I respectfully dissent.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-3142

ASSOCIATION OF NEW JERSEY RIFLE AND PISTOL CLUBS INC.; BLAKE ELLMAN; ALEXANDER DEMBOWSKI,

Appellants,

v.

ATTORNEY GENERAL NEW JERSEY; SUPERINTENDENT NEW JERSEY STATE POLICE; THOMAS WILLIVER, in his official capacity as Chief of Police of the Chester Police Department; JAMES B. O'CONNOR, in his official capacity as Chief of Police of the Lyndhurst Police Department,

Appellees.

Filed: Nov. 25, 2020

Before: SMITH, *Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPRO, BIBAS, PORTER, MATEY, PHIPPS, and ROTH,[*] *Circuit Judges*.

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[*] Judge Roth's vote is limited to panel rehearing only.

ORDER

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is DENIED. Judges Jordan, Hardiman, Bibas, Porter, Matey and Phipps would have granted the petition.

BY THE COURT

s/Kent A. Jordan
Circuit Judge

Appendix C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

No. 3:18-cv-10507

ASSOCIATION OF NEW JERSEY RIFLE AND PISTOL CLUBS INC., et al.,

Plaintiffs,

v.

GURBIR GREWAL, et al.,

Defendants.

Filed: July 29, 2019

MEMORANDUM & ORDER

SHERIDAN, U.S.D.J.

This matter comes before the Court on several motions: three motions for summary judgment filed by Defendants, (ECF Nos. 84, 85, 86); a cross-motion for summary judgment filed by Plaintiffs, (ECF No. 92); and a motion to stay proceedings in this action, filed by Plaintiffs, pending the outcome of a case, which is currently pending before the Supreme Court, (ECF No. 91). This action concerns the constitutionality of a New Jersey statute regulating the capacity of firearm magazines. More specifically, on June 13, 2018, New Jersey enacted a law which, with certain exceptions, makes it unlawful for any person in the state to

possess any firearm magazines that are capable of holding more than ten rounds of ammunition. *See* L. 2018, c. 39 § 1.

I.

On the same day that New Jersey enacted that law, Plaintiffs filed the present lawsuit, seeking its invalidation and sought a preliminary injunction. The Court held a three-day hearing on August 13, 16, and 17, 2018, during which it heard the testimony of various expert witnesses. Closing arguments were made on September 6, 2018. On September 28, 2018, the Court entered a Memorandum and Order wherein it denied Plaintiffs' motion to enjoin enforcement of the statute.

On December 5, 2018, over a dissent, the Third Circuit affirmed. *See Ass'n of N.J. Rifle and Pistol Clubs, Inc. v. Attorney General New Jersey,* 910 F.3d 106 (3d Cir. 2018). On January 9, 2019, the Third Circuit denied Plaintiffs' petition for rehearing en bane. *Ass'n of N.J. Rifle and Pistol Clubs, Inc. v. Attorney General New Jersey,* No. 18-3170 (3d Cir. Jan. 9, 2019).

II.

As this case was proceeding, another, similar case was proceeding in a neighboring state. Specifically, a group of Plaintiffs brought an action in the Southern District of New York seeking:

> to partially invalidate 38 RCNY § 5-23, which limits transport of a handgun through the following provision: "To maintain proficiency in the use of the handgun, the licensee may transport her/his handgun(s) directly to and

> from an unauthorized small arms range/shooting club, unloaded, in a locked container, the ammunition to be carried separately."

N.Y. State Rifle & Pistol Ass'n (NYSRPA) v. City of New York, 86 F. Supp. 3d 249, 253 (S.D.N.Y. 2015). On February 5, 2015, the court entered summary judgment in favor of the City of New York.

On February 23, 2018, the Second Circuit affirmed the district court opinion. *NYSRPA v. City of New York,* 883 F.3d 45 (2d Cir. 2018). On January 22, 2019, the Supreme Court granted the plaintiffs' petition for a writ of certiorari. *NYSRPA v. City of New York,* 139 S. Ct. 939 (2019).

LEGAL ANALYSIS

Stay

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. American Co.,* 299 U.S. 248, 254 (1936). A court considering a motion to stay proceedings "must weigh competing interests and maintain an even balance." *Id.* at 254-55. The party seeking a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay . . . will work damage to someone else." *Id.* at 255.

A multifactor balancing test applies to the determination:

> (1) whether a stay would unduly prejudice or present a clear tactical disadvantage to the

> non-moving party, (2) whether denial of the stay would create a clear case of hardship or inequity for the moving party; (3) whether a stay would simplify the issues and the trial of the case, and (4) whether discovery is complete and/or a trial date has been set.

Akishev v. Kapustin, 23 F. Supp. 3d 440, 446 (D.N.J. 2014) (citation omitted). Additional considerations also "arise depending upon the circumstances for which the movant requests a stay." *Id.* "Where a stay is sought pending resolution of purportedly related litigation, . . . courts consider whether resolution of the related litigation would substantially impact or otherwise render moot the present action." *Id.* Applying these factors, the Court finds as follows.

First, Defendants—the nonmoving parties will suffer prejudice by the issuance of a stay. Although the statute has already gone into effect, a stay would create uncertainty with regard to its constitutionality. The State would be prejudiced by enforcing a law the constitutionality of which remains in doubt. Therefore, the first factor weighs against issuing a stay.

Second, is it unclear how denying a stay would create a clear hardship or inequity for the moving party. If the Court were to rule against Plaintiffs, they would suffer no prejudice, as they have already had to comply with the requirements of the new law by divesting themselves of magazines that hold over ten rounds of ammunition. If the Court were to rule in favor of Plaintiffs, they would clearly suffer no prejudice. Therefore, the second factor weighs against issuing a stay.

Third, the legal issue before the Supreme Court is distinct from that before this Court. The *NYSRPA* case involves a restriction on the right to carry a firearm in public. This case involves the possession of large capacity magazines. Therefore, the Supreme Court's decision in *NYSRPA* is unlikely to simplify the legal issues presented in this case. The third factor weighs against issuing a stay.[1]

Fourth, the Court has already heard testimony in a motion for a preliminary injunction, and the Third Circuit has resolved an appeal of that ruling. Also, discovery appears to be complete, as both parties have moved for summary judgment. Therefore, the fourth factor also weighs against issuing a stay.

In determining whether to issue a stay, the Court finds that all four factors weigh against doing so. Therefore, a stay is not warranted pending the outcome of the Supreme Court's decision in *NYSRPA*.

Summary Judgment

Summary judgment is appropriate under Fed. R. Civ. P. 56(c) when the moving party demonstrates that there is no genuine issue of material fact and the evidence establishes the moving party's entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). A factual dispute is genuine if a reasonable jury could return a verdict for the non-movant, and it is material if, under the substantive law, it would affect the outcome of the

[1] This analysis also shows that the resolution of *NYSRPA* by the Supreme Court would neither render moot nor substantially impact he present action; another consideration noted in *Ashkev*, 23 F. Supp. 3d at 446.

suit. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). In considering a motion for summary judgment, a district court may not make credibility determinations or engage in any weighing of the evidence; instead, the non-moving party's evidence "is to be believed and all justifiable inferences are to be drawn in his favor." *Marino v. Indus. Crating Co.,* 358 F.3d 241, 247 (3d Cir. 2004) (quoting *Anderson,* 477 U.S. at 255).

Once the moving party has satisfied its initial burden, the party opposing the motion must establish that a genuine issue as to a material fact exists. *Jersey Cent. Power & Light Co. v. Lacey Twp.,* 772 F.2d 1103, 1109 (3d Cir. 1985). The party opposing the motion for summary judgment cannot rest on mere allegations and instead must present actual evidence that creates a genuine issue as to a material fact for trial. *Anderson,* 477 U.S. at 248; *Siegel Transfer, Inc. v. Carrier Express, Inc.,* 54 F.3d 1125, 1130-31 (3d Cir. 1995). "[U]nsupported allegations . . . and pleadings are insufficient to repel summary judgment." *Schoch v. First Fidelity Bancorp.,* 912 F.2d 654,657 (3d Cir. 1990); *see also* Fed. R. Civ. P. 56(e) (requiring nonmoving party to set forth specific facts showing that there is a genuine issue for trial"). Moreover, only disputes over facts that might affect the outcome of the lawsuit under governing law will preclude the entry of summary judgment. *Anderson,* 477 U.S. at 247-48. If a court determines, after drawing all inferences in favor of [the non-moving party] and making all credibility determinations in his favor "that no reasonable jury could find for him, summary judgment is appropriate." *Alevras v. Tacopina,* 226 Fed. App'x 222,227 (3d Cir. 2007).

The Court recognizes that a different standard applies here—at the summary judgment stage—than applied on the petition for preliminary injunction. However, the Third Circuit has issued a precedential decision that resolves all legal issues in this case and there remains no genuine disputes of material fact. More specifically, the Third Circuit explicitly held that the New Jersey law "does not" violate "the Second Amendment, the Fifth Amendment's Takings Clause, and the Fourteenth Amendment's Equal Protection Clause." Therefore, because it is binding Third Circuit precedent that the New Jersey law is constitutional, the Court shall grant Defendants' motions for summary judgment and deny Plaintiffs' cross-motion.

ORDER

For the reasons stated herein and for good cause shown,

IT IS on this [handwritten: 24] day of July, 2019

ORDERED that the motion for summary judgment filed by Defendants Patrick Callahan and Gurbir Grewal (ECF No. 84) is granted; and it is further

ORDERED that the motion for summary judgment filed by Defendant James O'Connor (ECF No. 85) is granted; and it is further

ORDERED that the motion for summary judgment filed by Defendant Thomas Williver (ECF No. 86) is granted;

ORDERED that Plaintiffs' cross-motion to stay (ECF No. 91) is denied; and it is further

ORDERED that Plaintiffs' cross-motion for summary judgment (ECF No. 92) is denied.

[handwritten: signature]
PETER G. SHERIDAN,
U.S.D.J.

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-3170

ASSOCIATION OF NEW JERSEY RIFLE AND PISTOL CLUBS INC.; BLAKE ELLMAN; ALEXANDER DEMBOWSKI,

Appellants,

v.

ATTORNEY GENERAL NEW JERSEY; SUPERINTENDENT NEW JERSEY STATE POLICE; THOMAS WILLIVER, in his official capacity as Chief of Police of the Chester Police Department; JAMES B. O'CONNOR, in his official capacity as Chief of Police of the Lyndhurst Police Department,

Appellees.

Argued: Nov. 20, 2018*
Filed: Dec. 6, 2018

Before: GREENAWAY, JR., SHWARTZ, and BIBAS,
Circuit Judges

AMENDED OPINION

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* Because of recording issues on the original date for argument, the panel convened a second argument session to allow the parties to re-present their oral arguments.

SHWARTZ, *Circuit Judge.*

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.

I

A

Active shooting and mass shooting incidents have dramatically increased during recent years. Statistics from 2006 to 2015 reveal a 160% increase in mass shootings over the prior decade. App. 1042. Department of Justice and Federal Bureau of

Investigation ("FBI") studies of active shooter incidents (where an individual is actively engaged in killing or attempting to kill people with a firearm in a confined, populated area) reveal an increase from an average of 6.4 incidents in 2000 to 16.4 incidents in 2013. App. 950, 953. These numbers have continued to climb, and in 2017, there were thirty incidents. App. 1149, 1133. In addition to becoming more frequent, these shootings have also become more lethal. App. 906-07 (citing 2018 article noting "it's the first time [in American history] we have ever experienced four gun massacres resulting in double-digit fatalities within a 12-month period").

In response to this trend, a number of states have acted. In June 2018, New Jersey became the ninth state to pass a new law restricting magazine capacity.[1] New Jersey has made it illegal to possess magazine capable of holding more than ten rounds of ammunition ("LCM").[2] N.J. Stat. Ann. 2C:39-1(y), 2C:39-3(j) ("the Act").

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[1] As of spring 2018, eight states and the District of Columbia had adopted bans on large capacity magazines. Cal. Penal Code § 16740 (ten rounds); Conn. Gen. Stat. § 53-202w (ten rounds); D.C. Code § 7-2506.01(b) (ten rounds); Haw. Rev. Stat. § 134-8(c) (ten rounds); Md. Code Ann., Crim. Law § 4-305(b) (ten rounds); Mass. Gen. Laws ch. 140 §§ 121, 131M (ten rounds); N.Y. Penal Law § 265.00(23) (ten rounds); 13 Vt. Stat. Ann. 4021(e)(1)(A), (B) (ten rounds for a "long gun" and fifteen rounds for a "hand gun"); Colo. Rev. Stat. § 18-12-301(2)(a)(I) (fifteen rounds).

[2] Under the New Jersey statute, a "[l]arge capacity ammunition magazine" is defined 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. The term shall not include an attached tubular device which is capable of holding only .22 caliber rimfire

Active law enforcement officers and active military members, who are "authorized to possess and carry a handgun," are excluded from the ban. N.J. Stat. Ann. 2C:39-3(g). Retired law enforcement officers are also exempt and may possess and carry semi-automatic handguns with magazines that hold up to fifteen rounds of ammunition.[3] *Id.* at 2C:39-17.

The Act provides several ways for those who are not exempt from the law to comply. Specifically, the legislation gives LCM owners until December 10, 2018[4] to (1) modify their LCMs "to accept ten rounds or less," *id.* at 2C:39-19(b); (2) render firearms with LCMs or the LCM itself inoperable, *id.*; (3) register firearms with LCMs that cannot be "modified to accommodate ten or less rounds," *id.* at 2C:39-20(a); (4) transfer the firearm or LCM to an individual or entity entitled to own or possess it, *id.* at 2C:39-19(a); or (5) surrender the firearm or LCM to law enforcement, *id.* at 2C:39-19(c).

B

On the day the bill was signed, Plaintiffs Association of New Jersey Rifle and Pistol Clubs and members Blake Ellman and Alexander Dembrowski

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ammunition." *Id.* at 2C:39-1(y). Prior to the 2018 Act, New Jersey had prohibited LCMs holding more than 15 rounds of ammunition. *See id.* (Jan. 16, 2018); *id.* (1990).

[3] To be exempt from the Act's prohibition, a retired law enforcement officer must, among other things, follow certain procedures, qualify semi-annually in the use of the handgun he is permitted to carry, and pay costs associated with the semi-annual qualifications. *Id.* at 2C:39-6(l).

[4] The law gave 180 days from its June 13, 2018 effective date to comply.

(collectively, "Plaintiffs")[5] filed this action under 42 U.S.C. § 1983, alleging that the Act violates the Second Amendment, the Fifth Amendment's Takings Clause, and the Fourteenth Amendment's Equal Protection Clause. App. 46-64. Plaintiffs also sought a preliminary injunction to enjoin Defendants Attorney General of New Jersey, Superintendent of New Jersey State Police, and the Chiefs of Police of the Chester and Lyndhurst Police Departments from enforcing the law.

The District Court held a three-day evidentiary hearing on the preliminary injunction request. The Court considered declarations from witnesses, which served as their direct testimony, and then these witnesses were thoroughly examined.[6] The parties also submitted various documents, including declarations presented in other cases addressing LCM bans, books and journal articles on firearm regulations, reports on the efficacy of the 1994 federal assault weapons ban, statistics about gun ownership and use, news articles about shooting incidents, FBI reports on active shooter incidents, historical materials on LCMs, and police academy training

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[5] Both Ellman and Dembrowski have worked at gun ranges, and Dembrowski is a Marine Corps veteran. App. 470, 476.

[6] Plaintiffs offered expert witness Gary Kleck, Professor Emeritus at Florida State University. Defendants offered three expert witnesses: (1) Lucy Allen, Managing Director of NERA Economic Consulting; (2) Glen Stanton, State Range Master for the New Jersey Office of the Attorney General Division of Criminal Justice; and (3) John Donohue, Professor of Law at Stanford Law School.

materials.[7] The evidence disclosed the purpose of LCMs, how they are used, and who uses them.

A magazine is an implement that increases the ammunition capacity of a firearm. App. 128. An LCM refers to a particular size of magazine. App. 159. LCMs allow a shooter to fire multiple shots in a matter of seconds without reloading. App. 225, 865. Millions of LCMs have been sold since 1994, App. 1266, and 63% of gun owners reported using LCMs in their modern sporting rifles, App. 516, 753. LCMs often come factory standard with semi-automatic weapons. App. 656, 994-95.

Gun owners use LCMs for hunting and pest control. App. 655. LCMs have also been used for self-defense. App. 225, 844-51, 915-16, 1024. The record does not include a reliable estimate of the number of incidents where more than ten shots were used in self-defense,[8] but it does show that LCMs "are not

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[7] The exhibits include writings from Christopher Koper, Professor of Criminology, Law, and Society at George Mason University, *see* App. 663-67, 768-72, 1047-50, 1051-59, 1060-65, 1247-53, 1254-85, and David Kopel, Research Director at the Independence Institute, Associate Policy Analyst at the Cato Institute, and Adjunct Professor at Denver University Sturm College of Law, App. 654-59, 1233-46.

[8] Allen testified that most defensive gun use involves the discharge of between two and three rounds of ammunition. App. 844-48. Kleck acknowledged that there is no current estimate of the number of incidents where more than ten shots were used in self-defense, App. 240, but then relied on data from Allen to assert that 4,663 incidents of defensive gun use have involved more than ten rounds. App. 239, 328. This figure is based on an extrapolation. As Amicus Everytown for Gun Safety explained,

> That number was reached by taking Kleck's . . . out-of-date, 2.5 million defensive-gun-uses number,

necessary or appropriate for self-defense," App. 861, and that use of LCMs in self-defense can result in "indiscriminate firing," App. 863, and "severe adverse consequences for innocent bystanders," App. 1024.

There is also substantial evidence that LCMs have been used in numerous mass shootings,[9] App. 851-53, 909-10, 914, 967-88, 1024, 1042, 1057, 1118-26, 1165-71, and that the use of LCMs results in

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> multiplying that by his estimate of the percentage of defensive gun uses in the home, and then multiplying that by the percentage of such incidents found in the NRA's [Armed Citizen] defensive-gun-use database in which more than ten shots were reportedly fired (2 of 411). [App. 328.] This approach takes 411 of what are certainly some of the most extreme and newsworthy cases of defensive gun [use] across a period of more than six years, [App. 69], and assumes that they are representative of *all* defensive gun uses.

Amicus Everytown for Gun Safety Br. at 23-24 (footnote omitted) (emphasis in original). Plaintiffs attempt to embrace a figure based on data they themselves challenged because the expert did not know the data compilation method, the data may not have been representative, and the search criteria were limited. *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Grewal*, No. 18-1017, 2018 WL 4688345, at *5, *12 (D.N.J. Sept. 28, 2018). App. 73-81.

[9] As the District Court observed, some of the studies and articles use different definitions for the term "mass shootings," which led it to give less weight to these materials. *See Ass'n of N.J. Rifle & Pistol Clubs*, 2018 WL 46888345, at *5, *8. For instance, Mother Jones has changed its definition of a mass shooting over time, setting a different minimum number of fatalities or shooters, and may have omitted a significant number of mass shooting incidents. App. 90-102, 1037-38 (noting deficiencies in Mother Jones report). While it questioned the reliability of the statistics, the District Court did consider the specific incidents of LCM use described in the record. *Id.* at *3.

increased fatalities and injuries, App. 562. "[W]hen you have a high capacity magazine it allows you to fire off a large number of bullets in a short amount of time, and that gives individuals much less opportunity to either escape or to try to fight back or for police to intervene; and that is very valuable for mass shooters." App. 225, 865. The record demonstrates that when there are pauses in shooting to reload or for other reasons, opportunities arise for victims to flee, as evidenced by the 2017 Las Vegas and 2013 D.C. Navy Yard shootings, App. 114, 914, 1045, or for bystanders to intervene, as in the 2018 Tennessee Waffle House shooting and 2011 Arizona shooting involving Representative Gabrielle Giffords, App. 830, 1113.

While a trained marksman or professional speed shooter operating in controlled conditions can change a magazine in two to four seconds, App. 109, 263-67, 656, 1027, an inexperienced shooter may need eight to ten seconds to do so, App. 114. Therefore, while a ban on LCMs does not restrict the amount of ammunition or number of magazines an individual may purchase, App. 231, without access to LCMs, a shooter must reload more frequently.

"[S]hooters in at least 71% of mass shootings in the past 35 years obtained their guns legally," App. 853, or from a family member or friend (as was the case with the Newtown shooter who took his mother's lawfully-owned guns), App. 190, 195, 486, and gun owners in lawful possession of firearms are a key source of arming criminals through loss and theft of their firearms, App. 221-22, 800-01, 924-25.

New Jersey law enforcement officers regularly carry LCMs, App. 116, 1102, and along with their retired counterparts, are trained and certified in the use of firearms, App. 143-46, 1101-02. Law enforcement officers use certain firearms not regularly used by members of the military and use them in a civilian, non-combat environment.[10] App. 137, 140, 1103.

After carefully considering all of the evidence and the parties' arguments, the District Court denied the motion to preliminarily enjoin the Act. The Court found the expert witnesses were credible but concluded that the testimony of certain experts was "of little help in its analysis . . . . [because] their testimony failed to clearly convey the effect this law will have on reducing mass shootings in New Jersey or the extent to which the law will impede gun owners from defending themselves." *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Grewal*, No. 18-1017, 2018 WL 4688345, at *8 (D.N.J. Sept. 28, 2018). Specifically, the Court stated that although it found both Kleck and Allen credible, their testimony "relied upon questionable data and conflicting studies," suggesting that both of the experts' methodologies and conclusions were flawed.[11] *Id.*

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[10] Because their duties require access to LCMs, active military members and active law enforcement officers are exempt from the ban. N.J. Stat. Ann. 2C:39-3(g).

[11] Our dissenting colleague is of the view that the District Court rejected all of the expert testimony offered during the preliminary injunction hearing. This does not accurately reflect the Court's opinion. The Court's opinion shows that while it found the testimony of Kleck and Allen unhelpful, *Ass'n of N.J. Rifle & Pistol Clubs*, 2018 WL 4688345, at *5, *7-8, it did not similarly

The District Court, however, considered other evidence in the record to reach its conclusion, *see, e.g.*, *id.* at *6, *6 n.7, *12, that the Act was constitutional. The District Court held that a "ban on magazines capable of holding more than ten rounds implicates Second Amendment protections," *id.* at *11, but that it does not violate the Second Amendment. Specifically, the District Court held that the Act (1) should be examined under intermediate scrutiny because it "places a minimal burden on lawful gun owners," *id.* at *13, and (2) "is reasonably tailored to achieve [New Jersey's] goal of reducing the number of casualties and fatalities in a mass shooting," *id.*, based in part on evidence showing that "there is some delay associated with reloading, which may provide an opportunity for potential victims to escape or for a bystander to intercede," *id.* at *12.

The District Court also held that the Fifth Amendment Takings and Fourteenth Amendment Equal Protection claims lacked merit. The Court concluded that the Takings claim failed because the modification and registration options "provided property owners with . . . avenue[s] to comply with the law without forfeiting their property." *Id.* at *16. The Court also determined that the Act's exemption for retired law enforcement officers did not violate Plaintiffs' right to equal protection because law enforcement officers, in light of their "extensive and stringent training" and experience "confronting unique circumstances that come with being a police

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critique Donohue and Stanton, *id.* at *5-7. The Court relied upon evidence from Donohue, Stanton, and a myriad of other sources to reach its conclusion. *Id.* at *3.

officer," are different from, and hence not similarly situated to, other residents. *Id.* at *14.

After concluding that Plaintiffs failed to demonstrate a likelihood of success on their claims, the District Court stated that Plaintiffs did not satisfy the other requirements for a preliminary injunction, *id.* at *16, and denied their motion. Plaintiffs appeal.

Plaintiffs do not advocate an absolutist view of the Second Amendment but believe that the State's ability to impose any restriction on magazine capacity is severely limited. Plaintiffs argue that the Act is categorically unconstitutional because it bans an entire class of arms protected by the Second Amendment, there is no empirical evidence supporting the State ban, and the rights of law abiding citizens are infringed and their ability to defend themselves in the home is reduced.

On the other hand, the State asserts that it is imperative to the safety of its citizens to take focused steps to reduce the devastating impact of mass shootings. The State argues that the Act does not hamper or infringe the rights of law abiding citizens who legally possess weapons.

II[12]

The decision to grant or deny a preliminary injunction is within the sound discretion of the district court. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 33 (2008). "We employ a tripartite standard of review for . . . preliminary injunctions. We review the District Court's findings of fact for clear error. Legal

[12] The District Court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

conclusions are assessed de novo. The ultimate decision to grant or deny the injunction is reviewed for abuse of discretion." *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 105 (3d Cir. 2013) (internal quotation marks and citations omitted).[13]

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[13] Plaintiffs' argument that the clear error standard does not apply to legislative facts and that the Court is not limited to the record below in adjudicating questions of legislative fact is unpersuasive.

Legislative facts have been described as: (1) general facts or things "knowable to the industry at all relevant times," *In re Asbestos Litig.*, 829 F.2d 1233, 1245, 1248, 1252 n.11 (3d Cir. 1987) (Becker, J., concurring); (2) facts that underlie a policy decision and "have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court in the enactment of a legislative body." *Id.* at 1248 (quoting Fed. R. Evid. 201, advisory committee note to subsection (a)); (3) facts not limited to the activities of the parties themselves that a government body may rely upon to reach a decision, *see Omnipoint Communc'ns Enters., LP v. Zoning Hearing Bd. of Easttown Twp.*, 248 F.3d 101, 106 (3d Cir. 2001); and (4) in the words of one academic, "social facts" known to society at large related to individual constitutional rights, Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 Cal. L. Rev. 1185, 1186-87 (1994).

To the extent the record includes legislative facts, Plaintiffs have not met their burden of showing that the legislative facts New Jersey relied upon "could not reasonably be conceived to be true." *In re Asbestos Litig.*, 829 F.2d at 1252 n.11 (holding that "[i]n an equal protection case, those challenging state law must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.") (internal quotation marks and citations omitted)). Moreover, many of the facts in this record do not fall into the category of legislative facts as they are not known to the general public. For example, the amount of time needed to reload a magazine or the

To obtain a preliminary injunction, the movants must:

> demonstrate (1) that they are reasonably likely to prevail eventually in the litigation and (2) that they are likely to suffer irreparable injury without relief. If these two threshold showings are made the District Court then considers, to the extent relevant, (3) whether an injunction would harm the [defendants] more than denying relief would harm the Appellants and (4) whether granting relief would serve the public interest.

Id. (alteration in original) (quoting *Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 157 (3d Cir. 2002)); Fed. R. Civ. P. 65. A plaintiff's failure to establish a likelihood of success on the merits "necessarily result[s] in the denial of a preliminary injunction." *Am. Express Travel Related Servs., Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 366 (3d Cir. 2012) (internal quotation marks and citation omitted). On this factor, "a sufficient degree of success for a strong showing exists if there is 'a reasonable chance or probability, of winning.'" *In re Revel AC, Inc.*, 802 F.3d 558, 568 (3d Cir. 2015) (quoting *Singer Mgmt.*

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details of various active shooter incidents are not facts known to the general public. Accordingly, clear error review applies.

Even if it were within this Court's discretion to refrain from applying the clearly erroneous standard to legislative facts, we are not compelled to do so. *See Lockhart v. McCree*, 476 U.S. 162, 168 n.3 (1986) (declining to reach the standard of review issue for legislative facts at issue). We therefore decline Plaintiffs' invitation to review the District Court's factual findings de novo.

Consultants, Inc. v. Milgram, 650 F.3d 223, 229 (3d Cir. 2011) (en banc)). Here, we must decide whether Plaintiffs have a reasonable probability of showing that the Act violates the Second Amendment, the Fifth Amendment's Takings Clause, and the Fourteenth Amendment's Equal Protection Clause. We consider each claim in turn.

III

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects the right of individuals to possess firearms and recognized that the "core" of the Second Amendment is to allow "law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 628-30, 635 (invalidating a statute banning the possession of handguns in the home).[14]

We therefore must first determine whether the regulated item is an arm under the Second Amendment. The law challenged here regulates magazines, and so the question is whether a magazine is an arm under the Second Amendment. The answer is yes. A magazine is a device that holds cartridges or ammunition. "Magazine," Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/magazine (last visited Nov. 21, 2018); App. 128 (describing a magazine as "an implement that goes

[14] *Heller*'s teachings apply beyond the handgun ban at issue there.

into the weapon to increase the capacity of the weapon itself"). Regulations that eliminate "a person's ability to obtain or use ammunition could thereby make it impossible to use firearms for their core purpose." *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014). Because magazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended, magazines are "arms" within the meaning of the Second Amendment. *Id.*; *see also United States v. Miller*, 307 U.S. 174, 180 (1939) (citing 17th century commentary on gun use in America that "[t]he possession of arms also implied the possession of ammunition.").

Having determined that magazines are arms, we next apply a two-step framework to resolve the Second Amendment challenge to a law regulating them. *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). First, we consider whether the regulation of a specific type of magazine, namely an LCM, "imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *Id.* Second, if the law burdens conduct that is protected by the Second Amendment, "we evaluate the law under some form of means-end scrutiny." *Id.* "If the law passes muster under that standard, it is constitutional. If it fails, it is invalid." *Id.*

A

Under step one, we consider whether the type of arm at issue is commonly owned,[15] *Marzzarella*, 614

[15] "Common use" is not dispositive since weapons illegal at the time of a lawsuit would not be (or at least should not be) in

F.3d at 90-91, and "typically possessed by law-abiding citizens for lawful purposes,"[16] *Heller*, 554 U.S. at 625. The record shows that millions of magazines are owned, App. 516, 753, often come factory standard with semi-automatic weapons, App. 656, are typically possessed by law-abiding citizens for hunting, pest-control, and occasionally self-defense, App. 655, 554-55,[17] and there is no longstanding history of LCM regulation.[18] We will nonetheless assume without

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common use and yet still may be entitled to protection. *Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015).

[16] This plain language from *Heller* makes clear that the Second Amendment, like all of the amendments in the Bill of Rights, is not limitless. Aside from requiring consideration of whether the arm is typically possessed by law-abiders for lawful purposes, *Heller* also examines whether the weapon is "dangerous and unusual." 554 U.S. at 627; *Marzzarella*, 614 F.3d at 91; *see also United States v. One (1) Palmetto State Armory Pa-15 Machinegun*, 822 F.3d 136, 142 (3d Cir. 2016) (holding machine guns not protected because they are "exceedingly dangerous weapons" that are "not in common use for lawful purposes"). While the record suggests that LCMs are not unusual, they have "combat-functional ends" given their capacity to inflict "more wounds, more serious, in more victims," and because a shooter can hit "multiple human targets very rapidly," *Kolbe v. Hogan*, 849 F.3d 114, 137 (4th Cir. 2017) (en banc) (internal quotation marks and citation omitted).

[17] We are also mindful of *Heller*'s admonition that disproportionate criminal use of a particular weapon does not mean it is not typically possessed for lawful purposes. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 256 (2d Cir. 2015).

[18] LCMs were not regulated until the 1920s, but most of those laws were invalidated by the 1970s. App. 1242-44. The federal LCM ban was enacted in 1994, but it expired in 2004. App. 1244. While a lack of longstanding history does not mean that the regulation is unlawful, *see Heller v. District of Columbia*, 670

deciding that LCMs are typically possessed by law-abiding citizens for lawful purposes and that they are entitled to Second Amendment protection. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 257 (2d Cir. 2015); *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) [hereinafter *Heller II*].

B

Assuming that the Act implicates an arm subject to Second Amendment protection, we next address the level of means-end scrutiny that must be applied. *Marzzarella*, 614 F.3d at 89. The applicable level of scrutiny is dictated by whether the challenged regulation burdens the core Second Amendment right. If the core Second Amendment right is burdened, then strict scrutiny applies; otherwise, intermediate scrutiny applies.[19] *See Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013). "At its core, the Second Amendment protects the right of law-abiding citizens to possess non-dangerous weapons for self-defense in the home." *Marzzarella*, 614 F.3d at 92 (citing *Heller*, 554 U.S. at 635); *see Drake*, 724 F.3d at 431 (declining to definitively hold that Second Amendment core "extends beyond the home"). Thus, laws that severely burden the core Second Amendment right to self-defense in the home are subject to strict scrutiny. *Drake*, 724 F.3d at 436; *Marzzarella*, 614 F.3d at 97;

F.3d 1244, 1266 (D.C. Cir. 2011), the lack of such a history deprives us of reliance on *Heller*'s presumption that such regulation is lawful.

[19] Rational basis review is not appropriate for laws that burden the Second Amendment. *Heller*, 554 U.S. at 628 n.27; *Marzzarella*, 614 F.3d at 95-96.

see also Kolbe v. Hogan, 849 F.3d 114, 138 (4th Cir. 2017) (en banc) (applying intermediate scrutiny where the law "does not severely burden the core protection of the Second Amendment"); *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 260 (applying intermediate scrutiny where "[t]he burden imposed by the challenged legislation is real, but it is not 'severe'" (citation omitted)); *Fyock v. City of Sunnyvale*, 779 F.3d 991, 998-99 (9th Cir. 2015) (determining appropriate level of scrutiny by considering "how severely, if at all, the law burdens [the Second Amendment] right"); *Heller II*, 670 F.3d at 1261 (determining "the appropriate standard of review by assessing how severely the prohibitions burden the Second Amendment right").

1

The Act here does not severely burden the core Second Amendment right to self-defense in the home for five reasons. First, the Act, which prohibits possession of magazines with capacities over ten rounds, does not categorically ban a class of firearms. The ban applies only to magazines capable of holding more than ten rounds and thus restricts "possession of only a subset of magazines that are over a certain capacity." *Fyock*, 779 F.3d at 999 (describing LCM ban as a restriction); *S.F. Veteran Police Officers Ass'n v. City & Cty. of San Francisco*, 18 F. Supp. 3d 997, 1002-03 (N.D. Cal. 2014) (emphasizing that the law was not "a total ban on all magazines" but "a total ban only on magazines holding more than ten rounds"); *see also* App. 159 (testimony explicitly addressing that the law "does not ban any particular class of gun" because "it just deals with the size of the magazine").

Second, unlike the ban in *Heller*, the Act is not "a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for [self-defense in the home]." 544 U.S. at 628. The firearm at issue in *Heller*, a handgun, is one that the Court described as the "quintessential self-defense weapon." *Id.* at 629. The record here demonstrates that LCMs are not well-suited for self-defense. App. 225, 861, 863, 915, 1024.

Third, also unlike the handgun ban in *Heller*, a prohibition on "large-capacity magazines does not effectively disarm individuals or substantially affect their ability to defend themselves." *Heller II*, 670 F.3d at 1262 (citing *Marzzarella*, 614 F.3d at 97). Put simply, the Act here does not take firearms out of the hands of law-abiding citizens, which was the result of the law at issue in *Heller*. The Act allows law-abiding citizens to retain magazines, and it has no impact on the many other firearm options that individuals have to defend themselves in their home.[20] *Marzzarella*, 614 F.3d at 97; App. 230-32, 917-18.

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[20] *Heller* stated that "[i]t is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed." 554 U.S. at 629 (emphasis omitted). However, as discussed above, the handgun ban at issue in *Heller*, which forbade an entire class of firearms, differs from the LCM ban here, which does not prevent law-abiding citizens from using any type of firearm provided it is used with magazines that hold ten rounds or fewer. In fact, at oral argument, 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. N.J. Stat. Ann. 2C:39-20(a).

Fourth, the Act does not render the arm at issue here incapable of operating as intended. New Jersey citizens may still possess and utilize magazines, simply with five fewer rounds per magazine. *Ass'n of N.J. Rifle & Pistol Clubs*, 2018 WL 4688345, at *12; *see also N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 260 ("[W]hile citizens may not acquire high-capacity magazines, they can purchase any number of magazines with a capacity of ten or fewer rounds. In sum, numerous alternatives remain for law-abiding citizens to acquire a firearm for self-defense." (internal quotation marks and citation omitted)).

Fifth, "it cannot be the case that possession of a firearm in the home for self-defense is a protected form of possession under all circumstances. By this rationale, any type of firearm possessed in the home would be protected merely because it could be used for self-defense." *Marzzarella*, 614 F.3d at 94.

For these reasons, while the Act affects a type of magazine one may possess, it does not severely burden, and in fact respects, the core of the Second Amendment right. *See N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 258; *Marzzarella*, 614 F.3d at 94 (observing that machine guns are not protected by the Second Amendment even though they may be used in the home for self-defense). As a result, intermediate scrutiny applies.[21]

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[21] No court has applied strict scrutiny to LCM bans, reasoning that the bans do not impose a severe or substantial burden on the core Second Amendment right. *Kolbe*, 849 F.3d at 138; *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 260; *Fyock*, 779 F.3d at 999; *Heller II*, 607 F.3d at 1262; *see also Duncan v. Becerra*, No. 17-56081, 2018 WL 3433828, at *2 (9th Cir. July 17, 2018) (holding

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"[U]nder intermediate scrutiny[,] the government must assert a significant, substantial, or important interest; there must also be a reasonable fit between that asserted interest and the challenged law, such that the law does not burden more conduct than is reasonably necessary." *Drake*, 724 F.3d at 436; *Marzzarella*, 614 F.3d at 98 (requiring serial numbers on guns reasonably fits government interest). The law need not be the least restrictive means of achieving that interest. *Drake*, 614 F.3d at 439.[22]

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district court did not abuse its discretion in applying intermediate scrutiny and considering whether the arm was in common use for lawful purposes). Four courts applied intermediate scrutiny, and one court upheld an LCM ban without applying any level of scrutiny. Instead, it considered whether the banned weapon was "common at the time of the ratification," had a relationship to "the preservation or efficiency of a well regulated militia," and whether law-abiding citizens retained adequate means for self-defense. *Friedman*, 784 F.3d at 410.

[22] Our dissenting colleague seems to misunderstand the analytical approach that we have adopted and which is consistent with our precedent. The dissent suggests that we engage in interest-balancing. Our analysis demonstrates that we do not. The scrutiny analysis described above is not the interest-balancing approach advocated by Justice Breyer and rejected by the *Heller* majority, where a court, focused on proportionality, weighs the government interest against the burden on the Second Amendment right. 554 U.S. at 634. At the first step of *Marzzarella*, assessing the burden that this Act places on the core of the Second Amendment does not consider the government interest. At the second step of *Marzzarella*, we identify a substantial government interest and whether the legislation is a reasonable fit for that interest. There is no balancing at either step.

"The State of New Jersey has, undoubtedly, a significant, substantial and important interest in protecting its citizens' safety." *Id.* at 437. Given the context out of which the Act was enacted, this clearly includes reducing the lethality of active shooter and mass shooting incidents. Thus, the State has asserted a qualifying interest.

New Jersey's LCM ban reasonably fits the State's interest in promoting public safety. LCMs are used in mass shootings. App. 1057 (stating that "LCM firearms are more heavily represented among guns used in murders of police and mass murders"); *see* App. 269 (noting 23 mass shootings using LCMs), 1118-26 (describing weapons used in sixty-one mass shootings, eleven of which used fifteen-round magazines, two of which used thirteen, and two of which used fourteen round magazines). LCMs allow for more shots to be fired from a single weapon and thus more casualties to occur when they are used. App. 562 (noting, however, that this does not imply that LCMs "caused shooters to inflict more casualties"), 865, 895-98. By prohibiting LCMs, the Act reduces the number of shots that can be fired from one gun, making numerous injuries less likely.

Not only will the LCM ban reduce the number of shots fired and the resulting harm, it will present opportunities for victims to flee and bystanders to intervene. App. 919-20. Reducing the capacity of the magazine to which a shooter has access means that the shooter will have fewer bullets immediately available and will need to either change weapons or

reload to continue shooting.[23] Weapon changes and reloading result in a pause in shooting and provide an opportunity for bystanders or police to intervene and victims to flee. As the Commissioner of the Baltimore Police Department explained, if a shooter uses a ten-round magazine, rather than a 30, 50, or 100-round magazine, the chances to act increase:

> [u]se of ten-round magazines would thus offer six to nine more chances for bystanders or law enforcement to intervene during a pause in firing, six to nine more chances for something to go wrong with a magazine during a change, six to nine more chances for the shooter to have problems quickly changing a magazine under intense pressure, and six to nine more chances for potential victims to find safety during a pause in firing. Those six to nine additional chances can mean the difference between life and death for many people.

App. 865; *see also Kolbe*, 849 F.3d at 128 (same).

This view is corroborated by other items in the record demonstrating that a delay occurs when a shooter needs to reload, *see* App. 114 (eight to ten seconds for inexperienced shooter or two to four seconds for trained shooter), and that such delay can be consequential. Videos from the Las Vegas shooting

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[23] While it is true that some active shooters carry multiple weapons, *see* App. 967-88 (describing active shooter incidents 2000-2013, some of which the shooter had rifles, handguns, and/or shotguns), 1141-46 (same for 2014-2015), 1156-64 (same for 2016-2017), when those weapons are equipped with LCMs, there are more continuously-fired shots from each gun, which means fewer interruptions in the shooting.

in 2017 show that "concert attendees would use the pauses in firing when the shooter's high capacity magazines were spent to flee." App. 914. During the Navy Yard shooting, one victim had a chance to escape when the shooter was forced to reload. App. 1045 (describing Navy Yard shooting where shooter attempted to kill a woman, was out of ammunition, and left to reload, at which time she found a new hiding spot and ultimately survived); *see also* App. 658-59, 1027 (describing escape during reloading in 2012 Newtown shooting). There are multiple instances when individuals have intervened in mass shootings and active shooter incidents to stop the shooter. App. 830 (Waffle House shooting), 969 (Florida's Gold Leaf Nursery shooting where "shooter was restrained by a citizen while attempting to reload his gun"), 1113 (Arizona's Giffords shooting), 1142 (Seattle Pacific University shooting where shooter was confronted/pepper-sprayed by student while reloading). While each incident may not have involved delay due to a need to reload, *see* App. 282 (distinguishing Waffle House incident on the basis that the intervener "said he didn't know one way or another, and when he was interviewed the first possibility he offered was the guy's—the shooter's gun jammed"), it was the pause in shooting that allowed individuals and bystanders to act. *See* App. 865, 979, 1142. In light of this evidence, the District Court did not clearly err when it concluded that the evidence "established that there is some delay associated with reloading, which may provide an opportunity for potential victims to escape or for a bystander to intercede and somehow stop a shooter." *Ass'n of N.J. Rifle & Pistol Clubs*, 2018 WL 4688345, at *12.

Therefore, the ban reasonably fits New Jersey's interest.[24] *See Drake*, 724 F.3d at 437.

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[24] Our dissenting colleague says that our analysis has placed the burden of proof on Plaintiffs. That is incorrect. The State bears the burden of proving that the Act is constitutional under heightened scrutiny. *Hassan v. City of New York*, 804 F.3d 227, 301 (3d Cir. 2015). It has done so with appropriate evidence. The record demonstrates concrete examples of intervention and escape permitted by pauses in reloading, including the episodes in Tennessee, Las Vegas, Florida, Newtown, D.C., Arizona, and Seattle. App. 830, 914, 969, 1027, 1045, 1113, 1142.

The dissent prefers, and in fact insists, on a particular type of evidence, namely empirical studies demonstrating a causal link between the LCM ban and a reduction in mass shooting deaths. This is not required. First, intermediate scrutiny requires not a causal link but a reasonable fit between the ban and the State's goal, and the record supports this reasonable fit. As explained above, the LCM ban provides the circumstance that will enable victims to flee and bystanders to intervene, and thereby reduce harm. Second, while in some contexts empirical evidence may be useful to examine whether a law furthers a significant government interest, *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2212 (2016) (examining both statistical and anecdotal data in support of the University's position), this is not the only type of evidence that can be used or is even necessary for a state to justify its legislation. To take the dissent's suggestion concerning the need for empirical studies to its logical conclusion, the State would have to wait for studies analyzing a statistically significant number of active and mass shooting incidents before taking action to protect the public. The law does not impose such a stringent requirement.

Moreover, the dissent criticizes us for reviewing the entire record to determine whether the District Court clearly erred in its factual determinations, but clear error review requires it. *See In re Lansdale Family Rests., Inc.*, 977 F.2d 826, 828 (3d Cir. 1992) (holding that clear error review "requires us to determine whether, although there is evidence to support it, we are left with the definite and firm conviction from the entire record" that the

Plaintiffs attempt to discount the need for the LCM ban by describing mass shootings as rare incidents, and asserting that the LCM ban burdens the rights of law-abiding gun owners to address an infrequent occurrence.[25] The evidence adduced before

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court "committed a mistake of fact"). When reviewing for clear error, we examine the record to determine if there is factual support for the District Court's conclusion. *Marxe v. Jackson*, 833 F.2d 1121, 1125 (3d Cir. 1987) (stating that "if a study of the record suggests the district court did not completely miss the mark in its conclusion that [the movant] is likely to succeed on the merits of her case, we must uphold the court's finding on that criterion."). Because we are tasked with reviewing the record, we are not limited to the facts the Court specifically mentioned to determine if the factual finding is erroneous. Indeed, it is often the case that a factual finding can be supported by various pieces of evidence, some of which may be mentioned and some of which may not. For example, the factual finding that pauses in shooting permit escape and intervention is borne out in the record by various eyewitness accounts, the declarations of law enforcement officers, and the twelve-minute video of the Las Vegas shooting, which has images of individuals fleeing the area during breaks in the shooting. These are real events that provide real evidence that allow us to conclude that the District Court's factual findings were not clear error.

[25] Plaintiffs also argue that the LCM ban burdens the rights of law-abiding gun owners by depriving them of the tactical advantage that LCMs provide to criminals and law enforcement officers. Transcript of Oral Argument at 11:17-23, 13:3-19, 16:7-17:2, *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Grewal, et al.*, No. 18-3170 (Nov. 20, 2018). Plaintiffs' expert testified that, given the average citizen's poor shooting accuracy and the potential for multiple assailants, LCMs are important for self-defense. App. 555, 655-56.

We recognize that *Heller* instructs that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635. The Act here does not undermine this interest.

the District Court shows that this statement downplays the significant increase in the frequency and lethality of these incidents. *See, e.g.*, App. 906, 1133-34; *see also* App. 1042-43 (noting that pre-2015, there was never a year with more than five gun massacres, and 2015 had seven "massacres" as defined by Mother Jones, but acknowledging discrepancies with Mother Jones' definition of massacre or mass shooting). Despite Plaintiffs' assertion to the contrary, New Jersey has not been spared from a mass shooting. Just days after the Act was passed, a mass shooter injured twenty-two individuals and killed one at an arts festival in Trenton. *Ass'n of N.J. Rifle & Pistol Clubs*, 2018 WL 4688345, at *3; App. 1288-95. Even if this event had not occurred, "New Jersey need not wait for its own high-fatality gun massacre before curtailing access to LCMs." Giffords Law Ctr. Amicus Br. at 3; App. 247.

Lastly, the Act does not burden more conduct than reasonably necessary. As we have already discussed, the prohibition on LCMs does not disarm an individual. While the Act does limit access to one tool—magazines that hold over ten rounds—it imposes no limit on the number of firearms or magazines or amount of ammunition a person may lawfully possess.[26] In any event, the record does not

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The record reflects that most homeowners only use two to three rounds of ammunition in self-defense. App. 626. Furthermore, homeowners acting in self-defense are unlike law enforcement officers who use LCMs to protect the public, particularly in gunfights, App. 1103-04, or active and mass shooters who use their weapons to inflict maximum damage.

[26] The dissent incorrectly asserts that our analysis lacks a limiting principle. We have a limiting principle and have applied

show that LCMs are well-suited or safe for self-defense.[27] App. 844-51, 861, 863, 923, 1024. Thus, the Act is designed to "remove these especially lethal items from circulation so that they will be unavailable, or at least less available, to mass murderers," *S.F. Veteran Police Officers Ass'n*, 18 F. Supp. 3d at 1004; *see also Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015); App. 195, 221-22, 846, 800-01, 853, and it does not burden a gun owner's right to self-defense, *Drake*, 724 F.3d at 439 (upholding a gun law that "takes into account the individual's right to protect himself from violence as well as the community at large's interest in self-protection" and general public safety).

For these reasons, 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.[28]

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it, namely whether the law severely and substantially burdens the core right to self-defense in the home. *See Drake*, 724 F.3d at 436; *Marzzarella*, 614 F.3d at 97; *see also Kolbe*, 849 F.3d at 138. Moreover, the only issue we are deciding is whether New Jersey's limit on the capacity of magazines to no more than ten rounds is constitutional. We rule on no other issue.

[27] Plaintiffs rely on evidence from Kleck to support their assertion that LCMs are needed for self-defense. He asserts that attacks by multiple offenders are common, postulates the number of shots an average citizen, as compared to a proficient police officer, needs to shoot an offender, and then multiplies that by four to conclude that average persons need more than ten rounds of ammunition to act in self-defense. App. 555. This calculation is speculative.

[28] Plaintiffs argue that three First Amendment standards should be used to evaluate a Second Amendment challenge to a gun law, namely that: (1) the Act cannot regulate the secondary

effects of gun violence by suppressing the right to possess firearms; (2) the Act must alleviate the harm it seeks to address; and (3) New Jersey was required to consider other less restrictive alternatives. The dissent also applies First Amendment, as well as Equal Protection, articulations of the intermediate scrutiny test to the case before us. The controlling case law, however, sets forth the governing law for evaluating Second Amendment challenges.

While our Court has consulted First Amendment jurisprudence concerning the appropriate level of scrutiny to apply to a gun regulation, *see Binderup v. Att'y Gen.*, 836 F.3d 336, 345 (3d Cir. 2016) (en banc); *Marzzarella*, 614 F.3d at 89 n.4, we have not wholesale incorporated it into the Second Amendment. This is for good reason: "[t]he risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental rights . . . ." *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015). We said in *Marzzarella* that the First Amendment "is a useful tool in interpreting the Second Amendment," but we are also "cognizant that the precise standards of scrutiny and how they apply may differ under the Second Amendment." 614 F.3d at 96 n.15. The Court of Appeals for the Second Circuit has also noted that there are "salient differences between the state's ability to regulate" First and Second Amendment rights, and therefore, "it would be as imprudent to assume that the principles and doctrines developed in connection with the First Amendment apply equally to the Second, as to assume that rules developed in the Second Amendment context could be transferred without modification to the First." *Kachalsky v. County of Westchester*, 701 F.3d 81, 92 (2d Cir. 2012) (declining to adopt First Amendment prior restraint doctrine for public carriage restrictions). For the same reasons, the articulation of intermediate scrutiny for equal protection purposes is not appropriate here. Accordingly, we decline to deviate from the standards set forth in *Drake* and *Marzzarella* for considering a Second Amendment challenge.

Even if we evaluated the First Amendment considerations Plaintiffs advocate, they do not change the outcome. First, Plaintiffs rely on Justice Kennedy's concurring opinion in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 445 (2002)

(Kennedy, J., concurring) ("[A] city may not regulate the secondary effects of speech by suppressing the speech itself."), to assert that the State impermissibly seeks to regulate secondary effects of gun violence by banning LCMs. Unlike the zoning ordinance in *Alameda Books*, the Act has the "purpose and effect" of enhancing public safety and reducing the lethality of mass shootings, it does not suppress the Second Amendment right. *Id.* at 445.

Second, Plaintiffs argue that the Act must "in fact alleviate the problem meant to be addressed," *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994), and may not simply be a predictive judgment to survive intermediate scrutiny. The record here provides a basis to conclude that the Act would achieve New Jersey's goal to protect public safety and reduce the lethality of active and mass shootings. As we have already explained, the evidence shows that pauses in shooting, which would occur if a shooter needs to reload because he lacks an LCM, save lives.

Third, Plaintiffs claim that New Jersey failed to consider any less restrictive alternatives in passing the Act and that this is fatal to the law's survival. In *Bruni v. City of Pittsburgh*, 824 F.3d 353 (3d Cir. 2016), we examined a content-neutral speech regulation under intermediate scrutiny and considered whether the state "show[ed] either that substantially less-restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out for good reason." *Id.* at 369; *see also McCullen v. Coakley*, 134 S. Ct. 2518, 2540 (2014). To the extent we must examine whether the legislature considered less restrictive means, we can take into account that New Jersey has historically used gun regulations to address public safety. At the same time New Jersey enacted the LCM ban, it passed five other regulations, which focused on background checks, set mental health limitations, amended requirements for concealed carry, and prohibited armor piercing ammunition. *See* N.J. Stat. Ann. 2A:62A-16, 2C:39-1, 2C:39-3, 2C:58-3, 2C:58-4, 2C:58-20. A state is not required to choose a single avenue to achieve a goal and wait to see whether it is effective. Further, one of the alternatives Plaintiffs suggest, limiting magazines to the home, is already addressed by New Jersey's concealed carry law. *See* N.J. Stat. Ann. 2C:58-4. The other alternatives that Plaintiffs claim that

See Kolbe, 849 F.3d 114 (upholding Maryland ten round limit); *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 263-64 (upholding New York and Connecticut's ten-round limit); *Friedman*, 784 F.3d at 411-12 (upholding city's ten-round limit); *Fyock*, 779 F.3d at 1000 same)[29]; *Heller II*, 670 F.3d at 1262-64 (upholding D.C.'s ten-round limit).[30]

IV

Plaintiffs' Fifth Amendment Takings claim also fails. The Takings Clause provides that "private property [shall not] be taken for public use, without

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New Jersey should have pursued, namely background checks and registration, Oral Argument Transcript at 9:7-19, would not address the fact that 71% of active and mass shooters were in lawful possession of the firearms that they used and thus these alternatives would have had no impact on them.

[29] In a more recent non-precedential opinion, a separate panel of the Court of Appeals for the Ninth Circuit affirmed the United States District Court for the Southern District of California's order preliminarily enjoining California's LCM ban, relying on the district court's fact findings, which it properly recognized it could not reweigh. *See Duncan*, 2018 WL 3433828, at *1-2. The district court had distinguished the evidentiary record before the *Fyock* panel, which issued a precedential opinion upholding analogous ban, as "credible, reliable, and on point." *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1120 (S.D. Cal. 2017) (quoting *Fyock*, 779 F.3d at 1000). Thus, *Duncan* seems to reflect a ruling based upon the evidence presented and not a general pronouncement about whether LCM bans violate the Second Amendment.

[30] The United States District Court for the District of Massachusetts also rejected a Second Amendment challenge to Massachusetts's LCM ban. *Worman v. Healey*, 293 F. Supp. 3d 251, 264-66 (D. Mass. 2018), *appeal docketed*, *Worman v. Baker*, No. 18-1545 (1st Cir. June 19, 2018).

just compensation."[31] U.S. Const. amend. V. "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005). In addition, a government regulation "may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster," and "such 'regulatory takings' may be compensable under the Fifth Amendment." *Id.*

Here, the compliance measures in the Act do not result in either an actual or regulatory taking.[32] There is no actual taking because owners have the option to transfer or sell their LCMs to an individual or entity who can lawfully possess LCMs, modify their LCMs to

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[31] The Takings Clause applies to the states through the Fourteenth Amendment. *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897).

[32] New Jersey's LCM ban seeks to protect public safety and therefore it is not a taking at all. A compensable taking does not occur when the state prohibits the use of property as an exercise of its police powers rather than for public use. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027-28, 1027 n.14 (1992); *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887); *Nat'l Amusements Inc. v. Borough of Palmyra*, 716 F.3d 57, 63 (3d Cir. 2013). We, however, need not rest on this ground to conclude that the Act does not violate the Takings Clause because it does not result in either an actual or regulatory taking.

Plaintiffs assert that *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015), dictates that the Act constitutes a taking. We disagree. *Horne* dealt with a taking involving property for government use. *Id.* at 2425 (addressing constitutionality of a reserve requirement that grape growers set aside a certain percentage of their crop for the government to sell in noncompetitive markets). The Act here does not involve a taking for government use in any way.

accept fewer than ten rounds, or register those LCMs that cannot be modified. *See* N.J. Stat. Ann. 2C:39-19, 2C:39-20. With these alternatives, "[t]he ban does not require that owners turn over their magazines to law enforcement." *Wiese v. Becerra*, 306 F. Supp. 3d 1190, 1198 (E.D. Cal. 2018); *see Rupp v. Becerra*, No. 8:17-cv-00746, 2018 WL 2138452, at *8 (C.D. Cal. May 9, 2018) (dismissing takings claim where "[t]he law offers a number of options to lawful gun owners that do not result in the weapon begin surrendered to the government").

The Act also does not result in a regulatory taking because it does not deprive the gun owners of all economically beneficial or productive uses of their magazines. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017) (stating that "a regulation which denies all economically beneficial or productive use of land will require compensation under the Takings Clause" (internal quotation marks and citation omitted)); *see also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992) (describing a "total taking" where a regulation "declares 'off-limits' all economically productive or beneficial uses of land"). Simply modifying the magazine to hold fewer rounds of ammunition than before does not "destroy[] the functionality of the magazine." *Wiese*, 306 F. Supp. 3d at 1198 (internal quotation marks omitted). Indeed, there is no assertion that a gun owner cannot use a modified magazine for its intended purpose. A gun owner may also retain a firearm with a fixed magazine that is "incapable of being modified to accommodate 10 or less rounds" or one that only "accepts a detachable magazine with a capacity of up to 15 rounds which is incapable of being modified to

accommodate 10 or less rounds" so long as the firearm is registered. N.J. Stat. Ann. 2C:39-20(a). Thus, owners may keep their unmodifiable LCMs and modified versions. These magazines may be used in the same way expected: to hold multiple rounds of ammunition in a single magazine. In short, the Act does not result in a taking.

V

Finally, Plaintiffs' Equal Protection claim fails. The Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "This is essentially a direction that all persons similarly situated should be treated alike." *Shuman ex rel. Shertzer v. Penn Manor Sch. Dist.*, 422 F.3d 141, 151 (3d Cir. 2005) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)). Thus, to establish an equal protection claim, Plaintiffs "must demonstrate that they received different treatment from that received by other individuals similarly situated." *Id.* (citations omitted).

Plaintiffs assert that the Act violates the Fourteenth Amendment's Equal Protection Clause because it allows retired law enforcement officers to possess LCMs while prohibiting retired military members and ordinary citizens from doing so. N.J. Stat. Ann. 2C:39-3(g), 2C:39-17. Plaintiffs have not shown that retired law enforcement officers are similarly situated to other New Jersey residents. Retired law enforcement officers have training and experience not possessed by the general public. *Kolbe*, 849 F.3d at 147 (holding that retired law enforcement officers "are not similarly situated to the general

public with respect to the assault weapons and large-capacity magazines banned"). Police officers in New Jersey must participate in firearms and defensive tactics training, including mandatory range and classroom training, under a variety of simulated conditions. App. 144; *see, e.g.*, App. 1361, 1369, 1368, 1383. Law enforcement officers are also tested on a periodic basis after initial qualification and must re-qualify twice a year and meet certain shooting proficiency requirements. App. 144-45; *see* App. 1322-410 (describing standards, requirements, and full courses for law enforcement firearms qualification). Retired law enforcement officers must also satisfy firearms qualification requirements. N.J. Stat. Ann. 2C:39-6(l). Moreover, because the standard-issue weapon for many New Jersey law enforcement officers is a Glock 19 with a loaded fifteen round magazine, App. 116-17, these officers have experience carrying and using LCMs. Thus, law enforcement officers, both active and retired, have training and experience that distinguishes them from the general public.

Law enforcement officers are also different from members of the military. Unlike military personnel trained for the battlefield, law enforcement officers are trained for and have experience in addressing volatile situations in both public streets and closed spaces, and they operate in noncombat zones where the Constitution and other rules apply. App. 148-49. Even if some military members receive firearms training comparable to the training law enforcement officers receive, App. 140-41, the scope and nature of their training and experience are different, App. 141, 147-49.

For these reasons, 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.

VI

For the foregoing reasons, we will affirm the order denying Plaintiffs' motion for a preliminary injunction.

BIBAS, *Circuit Judge*, dissenting.

The Second Amendment is an equal part of the Bill of Rights. We must treat the right to keep and bear arms like other enumerated rights, as the Supreme Court insisted in *Heller*. We may not water it down and balance it away based on our own sense of wise policy. 554 U.S. at 634-35.

Yet the majority treats the Second Amendment differently in two ways. *First*, it weighs the merits of the case to pick a tier of scrutiny. That puts the cart before the horse. For all other rights, we pick a tier of scrutiny based only on whether the law impairs the core right. The Second Amendment's core is the right to keep weapons for defending oneself and one's family in one's home. The majority agrees that this is the core. So whenever a law impairs that core right, we should apply strict scrutiny, period. That is the case here.

Second, though the majority purports to use intermediate scrutiny, it actually recreates the rational-basis test forbidden by *Heller*. It suggests that this record favors the government, but make no mistake—that is not what the District Court found. The majority repeatedly relies on evidence that the District Court did not rely on and expert testimony that the District Court said was "of little help." 2018 WL 4688345, at *8. It effectively flips the burden of proof onto the challengers, treating both contested evidence and the lack of evidence as conclusively favoring the government.

Whether strict or intermediate scrutiny applies, we should require real evidence that the law furthers the government's aim and is tailored to that aim. But

at key points, the majority substitutes anecdotes and armchair reasoning for the concrete proof that we demand for heightened scrutiny anywhere else. New Jersey has introduced no expert study of how similar magazine restrictions have worked elsewhere. Nor did the District Court identify any other evidence, as opposed to armchair reasoning, that illuminated how this law will reduce the harm from mass shootings. *Id.* at *12-13. So New Jersey cannot win unless the burden of proof lies with the challengers. It does not.

The majority also guts heightened scrutiny's requirement of tailoring. Alternatives to this ban may be less burdensome and as effective. New Jersey has already gone further than most states. It has a preexisting fifteen-round magazine limit and a restrictive permitting system. These laws may already do much to allay its public-safety concerns. New Jersey needs to show that these and other measures will not suffice.

The majority stands in good company: five other circuits have upheld limits on magazine sizes. These courts, like the New Jersey legislature, rightly worry about how best to reduce gun violence. But they err in subjecting the Second Amendment to different, watered-down rules and demanding little if any proof. So I would enjoin this Act until New Jersey provides real evidence to satisfy its burden of proving the Act constitutional.

I. Strict Scrutiny Applies to Laws That Impair Self-Defense in the Home

Unlike the majority, I would apply strict scrutiny to any law that impairs the core Second Amendment

right to defend one's home. This law does so. And it fails strict scrutiny.

A. Other core constitutional rights get strict scrutiny

The Supreme Court has not set up tiers of scrutiny for gun regulations. *Heller*, 554 U.S. at 634. That may be intentional: many rights do not have tiers of scrutiny. *E.g.*, *Duncan v. Louisiana*, 391 U.S. 145 (1968) (jury trial); *Crawford v. Washington*, 541 U.S. 36 (2004) (Confrontation Clause). But our precedent mandates them for the Second Amendment, at least for laws that do not categorically ban commonly used weapons. *See Marzzarella*, 614 F.3d at 96-97.

As the majority recognizes, if we apply tiers of scrutiny, we apply strict scrutiny to the right's core. Maj. Op. at 22. For other rights, that is the end of the question. The "bedrock principle" of the Free Speech Clause forbids limiting speech just because it is "offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). So content-based speech restrictions get strict scrutiny. *Id.* at 412. The Free Exercise Clause was designed as a bulwark against "religious persecution and intolerance." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (internal quotation marks omitted). So laws that target religion or religious conduct get strict scrutiny. *Id.* at 533. And the Equal Protection Clause targets classifications that historically were used to discriminate. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995). So laws that classify based on race get strict scrutiny. *Id.* at 235.

B. The Second Amendment's core is self-defense in the home

The Second Amendment merits the same level of scrutiny. As *Heller* and *McDonald* confirm, and the majority acknowledges, its core turns on the weapon's function and its location: self-defense and the home. Maj. Op. 18-19, 22. Laws that tread on both warrant strict scrutiny.

Self-defense is the quintessential protected function of weapons. As *Heller* stressed, "it [i]s the *central component* of the right itself." 554 U.S. at 599 (emphasis in original); *accord id.* at 628. *Heller* thus focused on laws that deprive people of weapons commonly used for self-defense. *Id.* at 624, 629. And *McDonald* focused on the history of colonists' and freedmen's defending themselves, whether from King George's troops or the Ku Klux Klan. 561 U.S. at 768, 772 (majority opinion); *id.* at 857 (Thomas, J., concurring in part and concurring in the judgment).

Not every gun law impairs self-defense. Our precedent applies intermediate scrutiny to laws that do not affect weapons' function, like serial-number requirements. *Marzzarella*, 614 F.3d at 97. But for laws that do impair self-defense, strict scrutiny is apt.

And the home is the quintessential place protected by the Second Amendment. In the home, "the need for defense of self, family, and property is most acute." *McDonald*, 561 U.S. at 767 (quoting *Heller*, 554 U.S. at 628). So the core is about using weapons in common use for self-defense in the home.

C. This Act burdens the core right

A ban on large magazines burdens that core right. Large magazines, unlike machineguns, are in common use. The ban extends to the home. Indeed, that is the main if not only locale of the law, as New Jersey can already deny most people permits to carry large magazines publicly. *See* N.J. Stat. Ann. § 2C:58-4(c). And the ban impairs using guns for self-defense. The government's entire case is that smaller magazines mean more reloading. That may make guns less effective for ill—but so too for good. The government's own police detective testified that he carries large magazines because they give him a tactical "advantage[]," since users must reload smaller magazines more often. App. 116-18. And he admitted that "law-abiding citizens in a gunfight" would also find them "advantageous." App. 119. So the ban impairs both criminal uses and self-defense.

The law does not ban all magazines, so it is not per se unconstitutional. But it does impair the core Second Amendment right. We usually would stop there. *How much* the law impairs the core or *how many people* use the core right that way does not affect the tier of scrutiny. So like any other law that burdens a constitutional right's core, this law warrants strict scrutiny.

D. The majority's responses are unconvincing

The majority tries to justify using intermediate scrutiny. But it errs twice over.

1. *Forbidden interest-balancing*. First and most fundamentally, the majority weighs the merits of the right to possess large magazines. It extends a passing

phrase from *Marzzarella* into a requirement that a burden "*severely* burden the core Second Amendment right to self-defense in the home" before it will receive strict scrutiny. Maj. Op. at 22 (emphasis added) (citing *Marzzarella*, 614 F.3d at 97); *accord id.* at 25. It demands evidence that people commonly fire large magazines in self-defense. The challengers offer some data, and the government offers different data. The majority observes that the record is unclear on how many people fire more than ten rounds in self-defense. Maj. Op. at 10 & n.8. And it argues that people can use smaller magazines and "many other firearm options" anyway. *Id.* at 23-24; *accord id.* at 25, 33.

But the Second Amendment provides a right to "*keep* and bear Arms." U.S. Const. amend. II (emphasis added). It protects possessing arms, not just firing them. So the majority misses a key part of the Second Amendment. The analysis cannot turn on how many bullets are fired.

And we never demand evidence of how severely a law burdens or how many people it hinders *before* picking a tier of scrutiny. That demand is backwards and explicitly forbidden by *Heller*. We should read our precedent in keeping with the Supreme Court's instructions. Polling defensive gun uses and alternatives to set a level of scrutiny, as the majority does, boils down to forbidden interest-balancing. Any gun regulation limits gun use for both crime and self-defense. And any gun restriction other than a flat ban on guns will leave alternative weapons. So the majority's test amounts to weighing benefits against burdens.

That balancing approach is a variant of the position of Justice Breyer's *dissent* in *Heller*; the *Heller* majority rejected it. *Compare* 554 U.S. at 634-35 (majority), *with id.* at 689-90 (Breyer, J., dissenting). It makes no difference whether we break out the balancing into two steps or one. Maj. Op. at 26 n.22. And looking to smaller magazines and other options is the same argument, adapted to magazines, that the Court dismissed in *Heller*: "It is no answer to say . . . that it is permissible to ban the possession of [large magazines] so long as the possession of other []arms [like small magazines] is allowed." *Id.* at 629. In picking a tier of scrutiny, our job is to ask only whether the ban extends to the home and impairs the gun's self-defense function.

Otherwise, we put the cart before the horse. Deciding the severity of the burden before picking a tier of scrutiny is deciding the merits first. It is backwards. That upends *Heller*'s careful approach. The Supreme Court insisted that the Second Amendment has already made the basic policy choice for us. *Id.* at 634-36. By enacting it, the Framers decided that the right to keep and bear arms is "*really worth* insisting upon." *Id.* at 634 (emphasis in original). So the Court needed no data on how many people wield handguns defensively. It did not evaluate alternatives. It was enough that banning handguns impaired self-defense in the home. *Id.* at 628.

That is how we approach other constitutional rights. The level of scrutiny for speech restrictions does not change if speech is unpopular or hateful. *See Snyder v. Phelps*, 562 U.S. 443, 458 (2011). Nor does it change if a content-based burden is modest. *See Reed*

v. Town of Gilbert, 135 S. Ct. 2218, 2224-27 (2015). Our scrutiny of classifications does not depend on how many people the law burdens. *See United States v. Virginia*, 518 U.S. 515, 531-34, 542 (1996) (*VMI*) (noting that "most women would not choose VMI"). So it should not change our scrutiny of gun laws, no matter how unclear the record is on how many times "more than ten shots were used in self-defense." Maj. Op. at 10 & n.8.

Nor does the availability of alternatives lower our tier of scrutiny. Bans on flag-burning get strict scrutiny even though there are other ways to express one's views. *See Johnson*, 491 U.S. at 412. Racial preferences for college applicants face the toughest scrutiny even though applicants can always go to other colleges. *See Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). The availability of alternatives bears on whether the government satisfies strict scrutiny, not on whether strict scrutiny applies in the first place. We focus on whether the government can achieve its compelling goal by using other restrictions, not on whether the rights-holder still has other avenues to exercise the right.

So the only question is whether a law impairs the core of a constitutional right, whatever the right may be. Any other approach puts the cart before the horse by weighing the merits of the case to pick a tier of scrutiny.

2. *Limiting* Heller*'s core to handgun bans.* Second, though it denies it, the majority effectively cabins *Heller*'s core to bans on handguns. *Compare* Maj. Op. at 19 n.14 (denying that *Heller* is so limited), *with id.* at 23-24 (stressing that this law, unlike the law in

Heller, "does not take firearms out of the hands of law-abiding citizens" and leaves them with "many other firearm options"). But that is like cabining *VMI* to military institutes. *Heller* never limited its reasoning to handguns or complete bans, and for good reason. No other right works that way. Strict scrutiny applies to laws that burden speech or religion even if they do not nearly eliminate the right to speak or believe. *E.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017); *Reed*, 135 S. Ct. at 2225-27.

People commonly possess large magazines to defend themselves and their families in their homes. That is *exactly why* banning them burdens the core Second Amendment right. For any other right, that would be the end of our analysis; for the Second Amendment, the majority demands something much more severe.

So I would apply strict scrutiny to this Act, at least insofar as it limits keeping magazines to defend one's home. But as discussed below, the government has not shown that this Act can survive even intermediate scrutiny.

II. Even Under Intermediate Scrutiny, on This Record, The Law Fails

Our precedent holds that intermediate scrutiny governs limits on weapons outside the home. *Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013). The majority purports to apply that test. But its version is watered down—searching in theory but feeble in fact. It takes a record on which the District Court did not rely and construes everything in favor of the government, effectively flipping the burden onto the challengers.

Even then, its analysis boils down to anecdotes and armchair reasoning. And the majority overlooks tailoring. None of that would be enough for other rights. I would apply true intermediate scrutiny, demanding evidence for the government's assertions and some showing of tailoring. Under either strict or true intermediate scrutiny, the law fails.

A. Intermediate scrutiny must be searching, not feeble

Though the Supreme Court has yet to specify a tier of scrutiny for gun laws, it forbade rational-basis review. *Heller*, 554 U.S. at 628 n.27. So our scrutiny must not be so deferential that it boils down to a rational-basis test.

Intermediate scrutiny requires much more. As the majority concedes, the government bears the burden of proof. Maj. Op. at 30 n.24; *Binderup*, 836 F.3d at 353 (Ambro, J., controlling opinion). This is true even for preliminary injunctions. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). It must prove that the Act advances a substantial governmental interest. *Marzzarella*, 614 F.3d at 98. And though we may give some deference to the legislature's predictive judgments, those judgments must rest on real, hard evidence. *Compare Drake*, 724 F.3d at 436-37 ("accord[ing] substantial deference to the [legislature's] predictive judgments") (internal quotation marks omitted), *with Frontiero v. Richardson*, 411 U.S. 677, 689-90 (1973) (castigating government's armchair, supposedly empirical reasoning unsupported by "concrete evidence").

It is not enough to base sex classifications on armchair reasoning. *Frontiero*, 411 U.S. at 689-90

(applying intermediate scrutiny); *see VMI*, 518 U.S. at 541-43 (same). So that should not be enough for gun laws either. Almost any gun law would survive an armchair approach; there are always plausible reasons to think that limiting guns will hinder criminals. That starts to look like rational-basis review.

The government must also prove that its law does not "burden more [conduct] than is reasonably necessary." *Marzzarella*, 614 F.3d at 98. To be sure, intermediate scrutiny does not demand the least restrictive means possible. But the government may not impair a constitutional right simply because doing so is convenient. *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014). It must make some showing that alternatives will not work. *Id.* at 2540. True intermediate scrutiny thus requires proof of tailoring.

So we must require that the government introduce substantial proof. We may not reflexively defer to its justifications. And we must look for tailoring. None of these requirements is met here.

B. The government has not met its burden of proof

New Jersey has not met its burden to overcome intermediate scrutiny, let alone strict scrutiny. True, the government has a compelling interest in reducing the harm from mass shootings. No one disputes that. But New Jersey has failed to show how the ban advances its interest. Nor does it provide evidence of tailoring.

1. *The record lacks evidence that magazine restrictions reduce mass-shooting deaths.* This record lacks any evidence tying that interest to banning large

magazines. The reader could be forgiven for any surprise at that statement: the majority acts as if the record abounds in this evidence. But that is not what the District Court found. That Court offered three rationales for upholding the ban. None of them withstands scrutiny.

First, the District Court, like the majority here, reasoned that people can still own many, smaller magazines. 2018 WL 4688345, at *13. But *Heller* rejected that very argument. *See* 554 U.S. at 629.

Second, the District Court stressed its deference to the legislature's judgment about the local needs of densely populated urban states. 2018 WL 4688345, at *13. In doing so, it relied not on the majority opinion in *Heller* but on Justice Breyer's *dissent*. *Id.* (quoting 554 U.S. at 705 (Breyer, J., dissenting)). That citation alone shows how the deferential decision below conflicts with our governing instructions from above.

Third, the District Court detailed the testimony and evidence of all four expert witnesses. But it then "f[ou]nd the expert testimony is of little help in its analysis." *Id.* at *8. It found that evidence "of little help" in figuring out how the law would impair self-defense *and* how it would reduce the harm from mass shootings. *Id.* So none of this satisfied the government's burden of proof.

The only expert finding on which the District Court could rely was a vague and general one: "[T]he expert testimony established that there is some delay associated with reloading, which may provide an opportunity for potential victims to escape or for a bystander to intercede and somehow stop a shooter." *Id.* at *12. In other words, it rested on the armchair

proposition that smaller magazines force shooters to pause more often to reload. When shooters must reload, potential victims should have more chances to escape or tackle the shooter. This speculation is plausible. But the Court cited no concrete causal link between that plausible speculation and its effect on mass-shooting deaths.

So with no support from the District Court, the majority digs through the record to link large magazines with the harm from mass shootings. By construing a record that the District Court found unhelpful in favor of the government, the majority effectively flips the burden of proof onto the challengers. It cites many portions of the record never mentioned by the District Court. It details the rise of mass shootings. It cites reports of mass shootings to show that people can escape when the shooter stops shooting. And it quotes a police chief as evidence that smaller magazines require more reloading.

The District Court was admirably clear about the state of the record. It did not rely on any of this "anecdotal evidence." *Compare* 2018 WL 4688345, at *3 (noting "anecdotal evidence"), *with id.* at *12 (not relying on it). And rightly so. The majority cannot tell us how many mass shooters use large magazines. It cannot tell us how often mass shooters use magazines with ten to fifteen rounds. And it cannot tell us any specifics about the increase in reload time. In short, the majority has no record citation, let alone evidence relied on by the District Court, that specifically links large magazines to mass-shooting deaths.

It has no citation because there isn't one. The government's own experts never examined the causal

link between these magazines and crime. Its best evidence came from a lone CNN article that mentioned a study linking large magazines to mass shootings. But the government never introduced the actual study, the expert, or the underlying data. Nor was the study ever peer-reviewed. Without examination or cross-examination of the study, we cannot rely on it.

So to link reports of mass shootings to generalities about reload times, the majority resorts to saying: "[T]here is some delay associated with reloading, which may provide an opportunity for potential victims to escape or for a bystander to intercede." Maj. Op. at 29-30 (quoting 2018 WL 4688345, at *12). With no support for this analysis, the majority's case thus boils down to the same armchair reasoning that the District Court relied on, plus some "anecdotal evidence." 2018 WL 4688345, at *3. Though the majority insists otherwise, finding for the government on this basis alone effectively flips the burden of proof. Maj. Op. at 30 n.24. And the majority offers no limiting principle: its logic would equally justify a one-round magazine limit.

This reasoning would be enough for rational-basis review. And it *could* be enough for intermediate scrutiny too. But the government has produced no substantial evidence of this link. It could compile that evidence by, for example, studying other jurisdictions that have restricted magazine size. Until it does so, we should grant the preliminary injunction.

2. *There is no evidence of tailoring*. The majority does not even demand evidence of tailoring. But tailoring is not limited to the First Amendment, as our precedent makes clear. *Marzzarella*, 614 F.3d at 98.

Tailoring is fundamental to intermediate scrutiny, wherever applied. *McCullen*, 134 S. Ct. at 2534; *Caban v. Mohammed*, 441 U.S. 380, 392 & n.13 (1979) (illegitimacy).

If anything, the evidence shows that other effective laws are already on the books. In a footnote, the majority suggests that these other laws prove tailoring. Maj. Op. at 36-37 n.28. But far from it. If other laws already restrict guns, New Jersey has to show that the laws already on the books will not suffice. *See McCullen*, 134 S. Ct. at 2538-39. It has not done so.

To start, since 1990 New Jersey has banned magazines that hold more than fifteen bullets. The ban affects everyone. The challengers do not contest that ban. And there is no evidence of its efficacy, one way or the other. Though the government cites mass shootings involving large magazines, these shooters often used magazines with thirty or more rounds. So we do not know if a ten-round limit is tailored.

New Jersey also has a may-issue permitting law, requiring people to show a "justifiable need" before they may carry handguns outside the home. *Drake*, 724 F.3d at 428. We have upheld that law. *Id.* at 440. So the only people who can carry large magazines outside the home are those who face "specific threats or previous attacks which demonstrate a special danger" to their lives. *Id.* at 428 (quoting N.J. Admin. Code § 13:54-2.4(d)(1)). This limited universe of people includes abused women, those being stalked, and those fleeing gangs. Banning large magazines thus harms those who need the Second Amendment most.

Given its may-issue law, the government offers nothing to explain why this added ban is necessary, let alone tailored to its interests. If only those with a justifiable need can carry these magazines, why is New Jersey's law not tailored enough already? The government's only answer is that the may-issue requirement does not currently extend to the home. And the majority's only response is that many previously law-abiding citizens commit crime. But these arguments run up against strict scrutiny in the home. At most, they would warrant extending a may-issue permit requirement to the home, rather than banning large magazines entirely. And once again, the majority lacks a limiting principle: since anyone could commit crime, the government could forbid anyone to have a gun.

3. *The majority muddles defensive gun uses.* Instead of a real tailoring analysis, the majority again demands evidence of how often people use large magazines for self-defense. But tailoring does not depend on how many times a right is impaired.

The majority cannot even decide what the evidence shows. In places, it concedes that large magazines "have also been used for self-defense." Maj. Op. at 10; *accord id.* at 21. If so, this undercuts the ban. Elsewhere, it notes that the record is unclear on how often people shoot more than ten rounds in self-defense. Maj. Op. at 10 & n.8; *accord id.* at 33-34 n.27. If so, then New Jersey has not borne its burden of proof. Relying on unclearness amounts to flipping the burden of proof onto the challengers. Lastly, the majority most often concludes—even in the same breath—that large magazines are not appropriate for

self-defense. Maj. Op. at 10-11, 23. But that is not what the District Court found. That Court specifically observed that the evidence "failed to clearly convey . . . the extent to which the law will impede gun owners from defending themselves." 2018 WL 4688345, at *8. These contradictory assertions cannot bolster the law, nor satisfy the government's burden of proof.

4. *The majority's watered-down "intermediate scrutiny" is really rational-basis review*. This law would never survive the intermediate scrutiny applied by the Supreme Court in speech or sex-discrimination cases. Those cases demand compelling evidence and tailoring. *See McCullen*, 134 S. Ct. at 2534; *VMI*, 518 U.S. at 524.

In a footnote, the majority candidly admits that it is not applying intermediate scrutiny as we know it. It concedes that its approach does not come from the First Amendment or the Fourteenth Amendment (or any other constitutional provision, for that matter). Maj. Op. at 34-35 n.28. It offers only one reason: guns are dangerous. *Id.* (quoting and relying on the Tenth Circuit's decision in *Bonidy*, 790 F.3d at 1126). But as *Heller* explained, other rights affect public safety too. The Fourth, Fifth, and Sixth Amendments often set dangerous criminals free. The First Amendment protects hate speech and advocating violence. The Supreme Court does not treat any other right differently when it creates a risk of harm. And it has repeatedly rejected treating the Second Amendment differently from other enumerated rights. *Heller*, 554 U.S. at 634-35; *McDonald*, 561 U.S. at 787-91. The Framers made that choice for us. We must treat the

Second Amendment the same as the rest of the Bill of Rights.

So the majority's version of intermediate scrutiny is too lax. It cannot fairly be called intermediate scrutiny at all. Intermediate scrutiny requires more concrete and specific proof before the government may restrict any constitutional right, period.

* * * * *

I realize that the majority's opinion aligns with those of five other circuits. But *Heller* overruled nine, underscoring our independent duty to evaluate the law ourselves. And unlike most other states, New Jersey has layered its law on top of not only a previous magazine restriction, but also a may-issue permit law that greatly limits public carrying. Those laws may have prevented or limited gun violence. That cuts against the law's necessity and its tailoring.

The majority's concerns are understandable. Guns kill people. States should be able to experiment with reasonable gun laws to promote public safety. And they need not wait for mass shootings before acting. The government's and the majority's position may thus be wise policy. But that is not for us to decide. The Second Amendment is an equal part of the Bill of Rights. And the Supreme Court has repeatedly told us not to treat it differently.

So we must apply strict scrutiny to protect people's core right to defend themselves and their families in their homes. That means holding the government to a demanding burden of proof. Here, the government has offered no concrete evidence that magazine restrictions have saved or will save

potential victims. Nor has it made any showing of tailoring.

I would thus enjoin the law and remand to let the government provide evidence that the Act will advance its interests and is tailored to do so. On remand, the government would be free to introduce real studies of any causal evidence that large-magazine limits prevent harm from mass shootings or gun violence in general. It could also introduce proof of tailoring and discuss its existing laws and alternatives. The challengers could try to rebut those studies. And we could then find whether the government has met its burden to justify this law. But it has not yet done that. So the law may well irreparably harm the challengers by infringing their constitutional rights. I respectfully dissent.

Appendix E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

No. 3:18-cv-10507

ASSOCIATION OF NEW JERSEY RIFLE AND PISTOL CLUBS INC., et al.,

Plaintiffs,

v.

GURBIR GREWAL, et al.,

Defendants.

Filed: Sept. 28, 2018

MEMORANDUM & ORDER

SHERIDAN, U.S.D.J.

Presently before the Court is Plaintiffs' Motion for a Preliminary Injunction, (ECF No. 7), seeking to enjoin the enforcement of a recently enacted New Jersey statute, L. 2018, c. 39 § 1, which reduces large capacity magazines from fifteen rounds of ammunition to ten. (hereinafter, "Large Capacity Magazine [LCM]" law). Specifically, Plaintiffs contend the LCM law is unconstitutional, under the Second, Fifth, and Fourteenth Amendments. New Jersey contends that because large capacity magazines do not fall within the Second Amendment's protections, the LCM law is lawful, and alternatively that the LCM

law nevertheless reasonably fits to accomplish a significant governmental interest. The government also contends that the law does not constitute an unconstitutional taking without compensation. For the reasons set forth herein, Plaintiffs' motion is denied.

BACKGROUND

Our country is facing a significant and widespread problem concerning the prevalence of mass shootings and it pits the rights of gun owners against the governmental objective of ensuring public safety. Various state and federal legislatures have proposed solutions, including expanding mental health services, increasing security in public places, banning certain types of guns and restricting ammunition, and others; but no one solution itself will ends mass shootings. The question before this Court concerns the constitutionality of New Jersey's restriction on the legal capacity of a magazine. New Jersey contends this law will mitigate death tolls during mass shootings by requiring shooters to reload more often, creating additional opportunities for escape and for bystanders or law enforcement to stop the shooter. *See* Brief of Defendants in Opposition to Preliminary Injunction, at 2, 22.

On June 13, 2018, New Jersey strengthened its already robust gun laws by enacting the LCM law, which makes it unlawful for any person in New Jersey, with certain exceptions,[1] to possess any firearm magazines that are capable of holding more than ten rounds of ammunition. In doing so, New Jersey joins

[1] The most notable exception applies to retired police officers.

California, Connecticut, Hawaii, Maryland, Massachusetts, and New York, which have all enacted similar statutes restricting the possession and sale of firearm magazines to ten rounds.[2]

A subsection of the New Jersey Criminal Code, which preexists the law at issue, provides, with some exceptions, "Any person who knowingly has in his possession a large capacity ammunition magazine is guilty of a crime of the fourth degree." N.J.S.A. 2C:39-3(j). The new law defines "[l]arge capacity ammunition 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," N.J.S.A. § 2C:39-1(y), a reduction from the 15-round-restriction under the pre-amendment definition, N.J.S.A. § 2C:39-1(y) (1990).[3]

The law also provides a six-month grace period for owners of the now-banned magazines to come into compliance, providing them with one of three options: (1) "[t]ransfer the semi-automatic rifle or magazine to any person or firm lawfully entitled to own or possess that firearm or magazine"; (2) "[r]ender the semi-automatic rifle or magazine inoperable or permanently modify a large capacity ammunition magazine to accept 10 rounds or less"; or

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[2] *See* Cal. Penal Code §§ 16740, 32310; Conn. Gen. Stat. § 53-202w; Haw. Rev. Stat. Ann. § 134-8(c); Md. Code Ann., Crim. Law § 4-305(b); Mass. Gen. Laws ch. 140, §§ 121, 131; N.Y. Penal Law §§ 265.00(23), 265.02(8), 265.11.

[3] The definition does not apply to "an attached tubular devise which is capable of holding only .22 caliber rimfire ammunition." N.J.S.A. § 2C:39-1(y).

(3) "[v]oluntarily surrender the semi-automatic rifle or magazine." *Id.* at § 5. The law exempts firearms "with a fixed magazine capacity holding up to 15 rounds which [are] incapable of being modified to accommodate 10 or less rounds" and firearms "which only accept[] a detachable magazine with a capacity of up to 15 rounds which [are] incapable of being modified to accommodate 10 rounds or less." N.J.S.A. 2C:39-20(a). Owners of such a firearm may lawfully retain the high-capacity magazine if they "register that firearm within one year from the effective date." *Id.* Individuals who fail to timely dispossess or modify the LCM potentially face a maximum sentence of 18 months' imprisonment and a fine of $10,000. *See* N.J.S.A. § 2C:39-3(j); N.J.S.A. § 2C:43-3(b)(2); N.J.S.A. § 2C:43-6(a)(4).

As noted above, the LCM law also sets forth several statutory exceptions for individuals who may possess a magazine holding more than 10 rounds. First, active and retired law enforcement officers are entitled to possess and carry magazines capable of holding up to fifteen rounds of ammunition. *See* L. 2018, c. 39 §§ 2-3. In addition, actors may possess these magazines as movie or television props, so long as "the large capacity ammunition magazine has been reconfigured to fire blank ammunition and remains under the control of a federal firearms license holder." *Id.* at § 4. While the law also recognizes exceptions for licensed retail and wholesale firearms dealers, N.J.S.A. 2C:39-3(g)(3), no exceptions exist for active or former servicemen; security guards and armored vehicle employees; or firearms instructors.

Notably, New Jersey's LCM law does not prevent ownership of any type of gun and does not restrict the quantity of ammunition a gun owner may possess. It merely restricts the quantity of bullets a magazine may hold. To illustrate, a citizen who owns a gun, thirty rounds of ammunition, and two fifteen-round magazines prior to the LCM law's enactment will be permitted to retain his gun, ammunition, and three ten-round magazines. The LCM law restricts the amount of ammunition one magazine can hold.

On the same day that New Jersey enacted the LCM law, Plaintiffs filed the present lawsuit, seeking its invalidation. Plaintiff New Jersey Rifle and Pistol Clubs, Inc. ("NJRPC") is an eighty-year old membership organization, representing tens of thousands of members, many of whom possess large capacity magazines for self-defense. (Complaint at ¶¶ 9, 45). Plaintiff Blake Ellman is a law-abiding citizen of New Jersey and member of the NJRPC; however, he is not a retired law enforcement officer and, therefore, does not fall within the LCM law's limited exceptions. (*Id.* at ¶ 36). Ellman is a firearms instructor, range safety officer, armorer, and competitive shooter and currently possesses magazines that would qualify as "large capacity ammunition magazines" under the new law. (*Id.* at ¶¶ 36-37). Plaintiff Alexander Dembowski is also a law-abiding citizen of New Jersey and member of the NJRPC; he is not a retired law enforcement officer, but did serve in the United States Marine Corps for four years, before retiring from service. (*Id.* at ¶¶ 39-40). While in the Marines, Dembowski received annual training on firearms and magazines and served as a Combat Marksmanship Instructor. (*Id.* at ¶ 40).

Presently, Dembowski serves as a Chief Range Safety Officer at a gun range in New Jersey, where he routinely trains individuals using a fifteen-round magazine. (*Id.* at ¶ 41). Like Ellman, Dembowski currently possesses "large capacity ammunition magazines" for defense of his home. (*Id.* at ¶ 42). Plaintiffs bring this present action as a facial challenge under 42 U.S.C. § 1983, seeking a declaratory judgment that New Jersey's LCM law violates New Jersey citizens' constitutional right to keep and bear arms under the Second and Fourteenth Amendment and nevertheless constitutes an unlawful taking of property, contrary to the Fifth and Fourteenth Amendments.

Mass Shootings in the United States

There is anecdotal evidence that some mass shootings reveal clear examples in which lives may have been saved because a shooter needed to reload. Between 1984 and 1993, LCM-equipped semiautomatic weapons were used in 40 percent of mass shootings where six or more people were killed or a total of 12 or more people were wounded. (Joint Exhibit 14, at 14). In 1994, the year the federal LCM ban[4] went into effect, LCM-equipped guns were estimated to have been used in between 31 percent and 41 percent of gun murders of police officers. (*Id.* at 18).

During a January 8, 2011 mass shooting, a gunman wielding a Glock G19 semiautomatic pistol, two thirty-one-round magazines, and two fifteen-round magazines shot and killed six individuals,

[4] *See infra*, p. 8

including United States District Judge John Roll, and wounded thirteen individuals, including United States Representative Gabrielle Giffords. (Defendants' Exhibit 83, at 3; Defendants' Proposed Findings of Fact, at ¶ 52). The thirteenth shot fired from one of the gunman's thirty-one-round magazines killed Christina-Taylor Green, a nine-year-old girl. (Defendants' Exhibit 23, Donohue Declaration, at ¶ 50). When the shooter paused to reload, several bystanders subdued him. (*Id.*).

In 2011, an individual purchased various firearms in Texas, which does not limit magazine capacity, and specifically requested the highest capacity magazines available. Defendants' Exhibit 23, Donohue Declaration, at ¶ 37). That year, in Fort Hood, he used LCM-equipped semiautomatic pistols to kill thirteen people and wound thirty-two in a mass shooting. *Id.*

Also, during a September 16, 2013 mass shooting at the District of Columbia's Navy Yard, a shooter used a seven-round shotgun to kill twelve people and injure several more. (Defendants' Exhibit 83, at 2). Although that shooter did not use a high-capacity magazine, there is evidence that he spotted a woman hiding next to a filing cabinet, approached her, and pulled the trigger. (Defendants' Exhibit 63 at 7). The gun—out of ammunition—did not fire and the shooter retreated, permitting the woman to escape. *Id.*

The Court also notes that a declaration provided by Baltimore County Police Chief Jim Johnson claimed that during the mass shooting at Sandy Hook Elementary School in Connecticut in 2012, multiple potential victims escaped harm while the shooter

paused to reload. (Defendants' Exhibit 59, Jim Johnson Declaration, at ¶ 55).

New Jersey was also the site of a recent mass shooting at a June 10, 2018 art festival in Trenton. The shooting—suspected to be gang-related—caused seventeen gunshot injuries and one death. Sophie Nieto-Munoz & Paige Gross, *Trenton Shooting: Suspected Gunman Killed at Art All Night was Gang Member with Violent Past,* NJ.com, June 17, 2018, www.nj.com/index.ssf/2018/06/art_ all_ night_ trenton shooting.html. According to news stories, law enforcement seized multiple weapons from the scene including a handgun with a high capacity magazine. Luis Ferre-Sadurni & Mihir Zaveti, *Mass Shooting at New Jersey Arts Festival Leaves 22 Injured and 1 Dead,* The New York Times, June 17, 2018, www.njtimes.com/2018/06/17/nyregion/trenton-mass-shooting.html; Kristine Phillips, *Gang Fistfight Escalated into a Mass Shooting at New Jersey Arts Festival, Prosecutor Says,* The Washington Post, June 18, 2018, www.washingtonpost.com/news/post-nation/wp/2018/06/17/suspect-killed-at-least-20-injured-in-shooting-at-new-jersey-arts-festival.

History and Tradition of LCM Restrictions

Much of the legal history and tradition of LCM restrictions in the United States is relatively recent and evolving. The first rifle to achieve mass-market success in the United States was in 1866. (Joint Exhibit 12, at 1-2). The popularity of such firearms expanded in the twentieth century, and the first handgun to achieve mass-market success did so in 1935. (*Id.* at 9). State-law restrictions on the possession, use, sale, and purchase of weapons based

on the number of rounds they could fire without needing to reload corresponded with the increased use. *See* 1927 R.I. Pub. Laws 256 §§ l, 4 (banning firearms "which shoot[] more than twelve shots semi-automatically without reloading; 1933 Cal. Stat. 1170, § 3 (banning "all firearms which are automatically fed after each discharge from or by means of clips, discs, drums, belts or other separable mechanical device having a capacity of greater than ten cartridges"); 1927 Mich. Pub. Acts 887, § 3 (prohibiting possession of "any machine gun or firearm which can be fired sixteen times without reloading"); 47 Stat. 650, ch. 465, §§ 1, 14 (1932) (prohibiting weapons capable of firing twelve or more times without reloading (including semiautomatic firearms) from the District of Columbia); 1933 S.D. Sess. Laws 245 § 1 (banning machine guns that could fire more than five rounds without reloading); 1933 Tex. Gen. Laws 219 § 1 (same); 1931 Ill. Laws 452 § 1 (banning machine guns that could fire more than eight rounds without reloading); 1932 La. Acts 336 § 1 (same); 1934 S.C. Acts 1288 § 1 (same).

For the majority of the twentieth century, the handgun most commonly owned by Americans was the revolver, which can hold six rounds of ammunition. (Defendant's Exhibit 103). Between 1980 and 1991, semiautomatic pistols became the dominant handgun. Defendants' (Exhibit 69). Two states—New Jersey and Hawaii—responded to this trend by restricting magazine capacity to fifteen and ten rounds respectively. *See* L. 1990, c. 32; Haw. Rev. Stat. Ann. § 134-(8). In 1994, the federal government enacted a ban on the possession of certain assault weapons and, in doing so, prohibited the possession or transfer of

LCMs capable of holding more than ten rounds of ammunition. Pub. L. 103-322, § 110103 (Sep. 13, 1994). The law however did not apply to "the possession or transfer of any large capacity ammunition feeding device otherwise lawfully possessed on or before the date of the enactment of" the federal ban. P.L. 103-322, § 110103(a). In 2004, in accordance with the statute's sunset provision, the law expired after Congress declined to reauthorize it.

Additionally, nine states have enacted restrictions on magazine capacity; seven of those restricting magazines to ten rounds or less. *See* Cal. Penal Code §§ 16740 (ten rounds); Conn. Gen. Stat. § 53-202w (ten rounds); D.C. Code Ann. § 7-2506.01(b) (ten rounds); Haw. Rev. Stat. Ann. § 134-8(c) (ten rounds); Md. Code Ann., Crim. Law § 4-305(b) (ten rounds); Mass. Gen. Laws ch. 140 §§ 121; 131M (ten rounds); N.J. Stat. Ann. § 2C:39-1(y) (ten rounds); N.Y. Penal Law §§ 265.00(23) (ten rounds); 13 Vt. Stat. Ann. § 4021(e)(1)(A), (B) (ten rounds for a "long gun" and fifteen rounds for a "hand gun"); Colo. Rev. Stat. § 18-12-301(2)(a)(I) (fifteen rounds). And, several localities across the country have enacted restrictions on magazine capacity. San Francisco (Cal.) Ord. § 249-13 (ten rounds); Sunnyvale (Cal.) Municipal Code § 9.44.030-60 (ten rounds); Highland Park (Ill.) Municipal Code § 136.001 (ten rounds); Oak Park (Ill.) Village Code Ch. 27 § 1 (ten rounds).

Expert Evidence

To better assess the credibility of the evidence presented by the parties, the Court held a three-day hearing on August 13, 16, and 17, 2018. Defendants presented Lucy Allen, Glenn Stanton, and John

Donohue as expert witnesses; Plaintiffs presented Gary Kleck.[5] Thereafter, the parties submitted findings of facts and conclusions of law on September 4, 2018; closing arguments were made on September 6, 2018.

a. Lucy P. Allen

Lucy Allen is an economist and the Managing Director of NERQA Economic Consulting, Inc., which provides economic advice for complex business and legal issues arising from competition, regulation, public policy, strategy, finance, and litigation. (Defendants' Exhibit 3, "Allen Declaration" at ¶ 2). Allen holds an A.B. from Stanford University, and an M.B.A., M.A., and M. Phil. Degrees in Economics from Yale University. (*Id.* at ¶ 4). Allen has provided expert reports in several other cases involving the reduction of large capacity magazines.

In her declaration, Allen stated that it is rare for an individual, in self-defense, to fire more than ten rounds. (*Id.* at ¶ 10). Relying on data from the NRA Armed Citizen database, from January 2011 to May 2017, Allen concluded that "[self-]defenders fired 2.2 shots on average." (*Id.*). Notably, out of the 736 reported incidents—411 of which occurred in the home—there were only two incidents where the self-defender was reported to have fired more than 10 bullets. (*Id.*). In another study, Allen used Factiva, an online news reporting service that aggregates news content from nearly 33,000 sources, to compare her findings from the NRA Armed Citizen database. (*Id.*

[5] It should be noted that the parties stipulated that the experts' respective declarations were deemed admitted as direct examination testimony, as such; only cross- and re-direct examinations were conducted at the hearing.

at ¶ 13). Using specific string searches, Allen searched the database for stories that reported the number of rounds fired by self-defenders. (*Id.*).[6] Consistent with the NRA Armed Citizen database, Allen's Factiva analysis reported that "the average number of shots fired per incident covered is 2.34." (*Id.* at ¶ 17). In addition, "[i]n 97.3% of incidents the defender fired 5 or fewer shots. There were no incidents where the defender was reported to have fired more than 10 bullets." (*Id.* at ¶ 18).

Lastly, Allen performed an analysis on the use of LCMs in mass shootings, relying on data from a Mother Jones investigation, which covered mass shootings from 1982 to 2017, and a study by the Citizens Crime Commission of New York City, which covered mass shootings from 1984 to 2012. (*Id.* at ¶ 20). Based on the combined data from these two sources, Allen concluded that LCMs, which she defined as magazines capable of holding more than ten rounds, were known to have been used in 54 out of 83 mass shootings, where the magazine capacity was reported. (*Id.* at ¶ 22). In addition, when comparing the number of casualties involved in mass shootings where LCMs are used with those without, the number of casualties was significantly higher in shootings where LCMs were used. (*Id.* at ¶ 24). Specifically, the average number of fatalities or injuries per mass shooting involving an LCM was 31, as compared to 9 without LCMs. (*Id.*).

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[6] The precise string searches used were: "(gun* or shot* or shoot* or fire* or arm*) and ('broke in' or 'break in' or 'broken into' or 'breaking into' or burglar* or intrud* or inva*) and (home* or 'apartment' or 'property')." (*Id.* at ¶ 13 n.5).

On cross-examination, Plaintiffs focused primarily on the reliability, or lack thereof, of the data Allen used in preparing this declaration. Allen conceded that the NRA Armed Citizen Database is not a scientific study and is not representative of overall statistics on the use of arms in self-defense. (P.I. Hearing at 1T20:19 to 21). She also conceded that her analysis of Factiva data could have excluded defensive gun use incidents among residents of the same home and that her search criteria omitted some important terms. (*Id.* at 32:19 to 33:10). She admitted there were problems with the Mother Jones study relating to the definition of mass shooting. For example, the study claimed to rely on only mass shootings involving a lone gunman but included various mass shootings that involved multiple shooters, including Columbine High School, San Bernardino, and Westside Middle School. (*Id.* at 1T43:24 to 46:19; 52:15 to 53:19). Plaintiff's counsel showed Allen an exhibit showing that the Mother Jones study omitted over 40% of mass shooting cases. (*Id.* at 1T54:25 to 55:24). Finally, Allen admitted that none of the studies she relied upon set forth any evidence that LCMs caused mass shootings or that mass shootings would not have occurred if smaller magazines were required. (*Id.* at 1T60:17 to 20).

b. Glenn L. Stanton

Glenn Stanton is an expert in the use of firearms and is currently a State Range Master for the New Jersey Office of the Attorney General, Division of Criminal Justice. (Defendants' Exhibit 98, "Stanton Declaration" at ¶ 3). Prior to working for the State, Stanton was the Principal Firearms Instructor for the

Federal Bureau of Investigations' New York Office, from 1992 until 2011. (*Id.* at ¶ 6). From 1978 to 1982, Stanton was a police officer for the Princeton, New Jersey Police Department. (*Id.* at ¶ 7).

Stanton's declaration provides a police officer's perspective on the use of LCMs. According to Stanton, both active and retired police officers are required to pass the Handgun Qualification Course and the Night Handgun Qualification Course bi-annually. (*Id.* at ¶¶ 17-18). In performing these tests, officers use their standard issued weapon, which is a 9-millimeter Glock 19, equipped with a 15-round magazine. (*Id.* at ¶ 19). According to Stanton, the firearms training required in New Jersey is enforced upon all individuals; as such, "[i]ndividuals with military backgrounds are not exempted from the firearms training . . . because the firearms training military recruits receive is vastly different than what is required of recruits in the police academy." (*Id.* at ¶ 22). In fact, unlike military recruits, who receive little, if any, handgun training, law enforcement officers are required to undergo extensive handgun training. (*Id.* at ¶ 23). Moreover, Stanton discussed the advantages of law enforcement using LCMs: "gunfights are highly stressful situations. Accordingly, officers go through rounds quickly. [LCMs] are advantageous and necessary for law enforcement officers because it reduces their need to reload." (*Id.* at ¶ 25). These advantages are lost, however, when these same LCMs are possessed by individuals that are committing crimes. (*Id.* at ¶ 26). In addition, given that gunfights are unpredictable, and at the discretion of the aggressor, Stanton stressed that "law enforcement officers need every advantage they can get." (*Id.* at ¶ 27).

Stanton testified on cross-examination that a civilian is less likely than a law enforcement officer to possess more than one magazine and that civilians have "lower hit rates," which suggests that law abiding citizens would benefit from large capacity magazines. (P.I. Hearing, at 2T78:16 to 79:5; 83:2 to 6). He nonetheless maintained that he was unaware of a situation in which someone used greater than ten rounds of ammunition in self-defense.

Stanton also testified that military servicepersons do not receive handgun training, likely because the military serves a different role than law enforcement. However, he admitted he was unfamiliar with current statistics regarding military training and that there is no difference in training based on magazine size. (*Id.* at 75:11 to 15).

c. John J. Donohue

Professor Donohue is an expert in empirical research and currently teaches courses on empirical law and economics at Stanford Law School. (Defendants' Exhibit 23, "Donohue Declaration" at ¶ 3). Professor Donohue received his J.D. from Harvard Law School and holds a Ph.D. in economics from Yale University. (*Id.*). In addition to teaching at Stanford, Professor Donohue is a member of the Committee on Law and Justice of the National Research Council, which "reviews, synthesizes, and proposes research related to crime, law enforcement, and the administration of justice, and provides an intellectual resource for federal agencies and private groups." (*Id.* at ¶ 6). Like Allen, Professor Donohue has provided expert declarations in several cases

involving Second Amendment challenges to laws restricting the possession of LCMs.

According to Professor Donohue, LCM bans have little to no effect on an individual's ability to possess weapons for self-defense purposes but would "have a restraining impact on the effectiveness of those who have the criminal intent to kill as many individuals as possible." (*Id.* at ¶ 12). Moreover, having reviewed mass shootings involving LCMs, Professor Donohue concluded, "bans on [LCMs] can help save lives by forcing mass shooters to pause and reload ammunition." (*Id.* at ¶ 30). In fact, since 1991, at least twenty shooting attempts were stopped, or the harm was curtailed, when bystanders were able to subdue the perpetrator while he reloaded his weapon. (*Id.*). For instance, during the tragic Newtown shooting, nine children were able to escape gunfire, while the assailant reloaded his gun. (*Id.* at ¶¶ 30, 50). More recently, in April 2018, in Nashville, Tennessee, a man opened fire into a Waffle House, killing four and wounding another seven. (*Id.* at ¶ 31). However, the shooting was cut short when a customer apprehended the assailant while he tried to reload his weapon. (*Id.*).[7] As such, Professor Donohue reasoned, "[w]hen shooters stop to reload, they are overtaken by citizens, shot by police, or provide opportunities for escape, all of which government policy should seek to facilitate.

[7] It should be noted that the parties dispute whether the shooter was apprehended while reloading his gun or, as Plaintiffs contend, the shooter's gun jammed. In any event, the point—as the Court sees it—is that the LCM law invites more opportunities to hinder mass shooting events.

The lower the size of the magazine, the more reloading must take place in mass shooting situations." (*Id.*).

Professor Donohue also noted that the use of LCMs for self-defense purposes is "extremely rare." *(Id.* at ¶ 43). According to Donohue, "the vast majority of the time that an individual in the United States is confronted by violent crime, they do *not* use a gun for self-defense." (*Id.*). Specifically, based on data collected from the National Crime Victimization Survey, from 2007 through 2011—when approximately 6 million violent crimes were committed each year—99.2% of victims were unable to defend themselves with a gun. (*Id.*). Even when guns are used for self- defense purposes, the defender rarely fires any rounds. (*Id.* at ¶ 44). In fact, in 98% of defensive gun use cases, people simply brandish the weapon to stop the attack. (*Id.*).

On cross-examination, Donohue conceded that there is no empirical data scrutinizing the efficacy of LCM bans and that none of the studies upon which he relied considered magazine restrictions. P.I. Hearing, at 2T167:25 to 168:20. He stated he could "not clearly credit the [federal LCM] ban with any of the nation's recent drop in gun violence." *(Id.* at 2T171:16 to 172:1). He also admitted that the LCM ban will not stop mass shootings. (*Id.* at 2T181:17 to 22).

On redirect, Plaintiffs' counsel showed Donohue a study, which claimed that during an average mass shooting "the time it takes to reload a detachable magazine is no greater than the average time between shots that the shooter takes anyway when not reloading." *Id.* at 2T220:23 to 221:1 (quoting Joint Exhibit 10, at 17 (A study conducted by Gary Kleck)).

Donohue dismissed this claim as "terribly flawed," and noted there are several examples that undermined the claim. (*Id.* at 2T221:9 to 224:3).

d. Gary Kleck

Professor Kleck is an expert on violence and gun control and teaches criminology and criminal justice at Florida State University. (Joint Exhibit 9, "Kleck Declaration" at ¶ 9). He holds three degrees from the University of Illinois and frequently writes about gun control, gun violence, and mass shootings. (*Id.* at ¶ 2). Kleck's has written six books on the subject and published several articles, book chapters, book reviews, and letters. (*Id.* at p.28 to 37). Like Allen and Professor Donohue, Kleck las provided expert testimony in other cases involving LCM bans.

In his declaration, Kleck concluded that New Jersey's LCM law "is unlikely to have any detectable effect on the number of homicides or violent acts committed with firearms, or the number of persons killed or injured in violent crimes," (*Id.* at ¶ 10); but it will significantly impair "a crime victim's ability to successfully defend against a criminal attack." (*Id.* at ¶ 11). Citing the 2008 National Crime Victimization Survey, Kleck noted that almost 800,000 violent crime incidents involved multiple offenders (about 25% of all violent crime incidents). (*Id.* at ¶ 13). As such, given the risk of facing multiple offenders, as well as the fact that defenders tend to miss more shots while firing under duress, Kleck contended that the LCM law places law abiding citizens at a distinct disadvantage in defending themselves. (*Id.* at ¶¶ 12-13).

Kleck claimed that the LCM law would have an "inconsequential effect," since "[m]ass murderers are

not going to balk at violating laws banning LCMs and can easily obtain LCMs out of state and illegally bring them back to New Jersey." (*Id.* at ¶ 22). However, "one of the most important sources of arming criminals in the United States is 'law-abiding citizens' whose guns are lost and stolen each year"; on an annual basis, "roughly 400,000 guns move into the hands of criminals." (Donahue Declaration at ¶ 61). As such, it follows that "[t]he more large-capacity magazines in the hand of law-abiding citizens means the more large-capacity magazines in the hands of criminals." (*Id.*). More significantly, the majority of shootings that have taken place in America were perpetuated by previously law-abiding citizens. (*Id.*).

Kleck also dismissed the possibility of a mass shooting assailant being apprehended while reloading, since "the window of opportunity for such heroic intervention closes rapidly; it takes two to four seconds for shooters" to reload. (Kleck Declaration at ¶ 22). However, on cross-examination, Kleck conceded that he based this assertion on his review of several Youtube videos and a practical demonstration he personally conducted. (P.I. Hearing at 3T327:16-24). Specifically, Kleck relied on demonstrations prepared by Doug Koenig, an eighteen-time world champion professional speed shooter. *(Id.* at 3T325:1-4). In this video, Koenig performs his magazine reloads in clinical conditions: alone, perfect weather, and no distractions. National Shooting Sports Foundation, *Speed Reload: Handgun Technique - Competitive Shooting Tips with Doug Koenig* (2011), https://www.youtube.com/watch?v=ZRCjY-GtROY (last visited Aug. 28, 2018). In addition, Koenig is seen wearing a speed shooting gun holster, substantially

easing his ability to reload his gun. (*Id.*) In no way does Koenig's video accurately depict the type of conditions that are common during a mass shooting, where there is chaos, moving targets, and panic. In fact, Kleck acknowledged that it could take a shooter as long as twenty seconds to change an LCM under certain circumstances. (P.I. Hearing at 3T338:17 to 20).

Kleck estimated that around 1993, 2.5 million annual defensive gun-use incidents occur each year. (*Id.* at 3T268:10 to 14). Kleck himself, however, admitted that his current estimate of annual defensive gun use events was approximately half of that 1993 estimate but characterized it as a "guess for which I had no data at all." (*Id.* at 269:10 to 25). Kleck was unable to explain this inconsistency. He estimated that approximately thirty percent of defensive gun use incidents involve only brandishing the firearm. (*Id.* at 309:9 to 313:22).

Findings

The Court finds the expert testimony is of little help in its analysis. Both Allen and Kleck relied upon questionable data and conflicting studies. For example; they relied on different definitions of "mass shooting"; Allen considered a mass shooting to be an incident in which four or more people were shot, fatally or non-fatally, while Kleck's definition included those with more than six killed or injured victims. *See* Kleck Decl., at ¶ 24. Although the Court finds these witnesses credible, their testimony failed to clearly convey the effect this law will have on reducing mass shootings in New Jersey or the extent to which the law will impede gun owners from defending themselves.

LEGAL STANDARD

"A preliminary injunction 'is an extraordinary remedy . . . which should be granted only in limited circumstances.'" *Holland v. Rosen,* 277 F. Supp. 3d 707, 724 (D.N.J. 2017) (quoting *Am. Tel. & Tel Co. v. Winback & Conserve Program, Inc.,* 42 F.3d 1421, 1427 (3d Cir. 1994)). In order to obtain preliminary injunctive relief, the moving party must demonstrate: (1) a reasonable probability of success on the merits; (2) irreparable injury if the requested relief is not granted; (3) the granting of preliminary injunction will not result in greater harm to nonmoving party; and (4) the public interest weighs in favor of granting the injunction. *Reilly v. City of Harrisburg,* 858 F.3d 173, 176 (3d Cir. 2017). The Third Circuit recently clarified the standard for preliminary injunction, "a movant for preliminary equitable relief must meet the threshold for the first two 'most critical' factors: it must demonstrate that it can win on the merits (which requires a showing significantly better than negligible but not necessarily more likely than not) and that it is more likely than not to suffer irreparable harm in the absence of preliminary relief." *Id.* at 179. If the moving party satisfies the first two factors, "a court then considers the remaining two factors and determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief." *Id.*

DISCUSSION

I. Likelihood of Success on the Merits

Plaintiffs present three separate theories to support their contention that New Jersey's LCM law is unconstitutional. First, Plaintiffs contend that the

LCM law violates the Second Amendment, since it unlawfully infringes on their constitutional right to keep and bear arms. Second, Plaintiffs argue the law violates the Equal Protection Clause of the Fourteenth Amendment, since it treats similarly situated people differently. Finally, Plaintiffs aver that the LCM law constitutes an Unconstitutional Taking, contrary to the Fifth and Fourteenth Amendments. The Court shall address each theory in turn.

1. Second Amendment

The Second Amendment of the United States Constitution provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *District of Columbia v. Heller,* 554 U.S. 570, 634-35 (2008), the Supreme Court recognized that the Second Amendment's "core protection" · is the "right of law-abiding, responsible citizens to use arms in defense of hearth and home." By virtue of the Fourteenth Amendment, this fundamental right is incorporated against the states. *McDonald v. City of Chicago,* 561 U.S. 742, 791 (2010). The *Heller* Court also noted that Second Amendment protections are not absolute and extend only to the sorts of weapons that are in "common use at the time." *Heller,* 554 U.S. at 627 (quoting *United States v. Miller,* 307 U.S. 174, 179 (1939)). Put differently, "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Id.* at 625. In addition, these rights are to be tempered with the "historical tradition of prohibiting the carrying of

'dangerous and unusual weapons.'" *Id.* (quoting 4 Blackstone 148-49 (1769)).

In assessing Second Amendment challenges, the Third Circuit has set forth a two-pronged approach. *See United States v. Marzzarella,* 614 F.3d 85, 89 (2010). First, the Court must consider whether "the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *Id.* Second, if the law falls within the scope of the Second Amendment, the Court must "evaluate the law under some form of means-end scrutiny." *Id.* The Court considers each prong in turn.

Prong One: Whether Magazines Are Protected Under the Second Amendment

Here, the threshold inquiry is whether New Jersey's LCM law affects conduct that falls within the scope of the Second Amendment; that is, whether the magazines are entitled to Second Amendment protection. Plaintiffs contend that because magazines constitute "arms," any laws regulating the size or capacity of ammunition, including magazines, would, by necessity, trigger Second Amendment protections. The government responds, arguing that because magazines having a capacity of more than ten bullets constitute "dangerous and unusual weapons," they are afforded no protection under the Second Amendment.

As explained in *Heller,* the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Heller,* 554 U.S. at 592. These protections extend to the "sorts of weapons" that are "in common use at the time for lawful purposes like self-defense." *Id* at 624 (internal quotation marks omitted). As such, the *Heller* Court

explained that "dangerous and unusual weapons;" as well as "weapons not typically possessed by law-abiding citizens for lawful purposes" find no protection under the Second Amendment. *Id.* at 624-25. Determining the scope of the Second Amendment requires a "textual and historical inquiry; if the government can establish that the challenged law regulates activity falling outside the scope of the right as originally understood, then 'the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review.'" *Ezell v. City of Chicago* (*Ezell II*), 846 F.3d 888, 892 (7th Cir. 2011) (quoting *Ezell v. City of Chicago* (*Ezell I*), 651 F.3d 684, 703 (7th Cir. 2011)).

At the outset, the Court notes that "[t]he Second Amendment protects firearms and the ammunition and magazines that enable arms to fire." *Duncan v. Becerra* (*Duncan I*), 265 F. Supp. 3d 1106, 1116-17 (S.D. Cal. 2017), *aff'd, Duncan v. Becerra* (*Duncan II*), 2018 WL 3433828 (9th Cir. July 17, 2018); *see also Fyock v. City of Sunnyvale* (*Fyock II*), 779 F.3d 991, 997-98 (9th Cir. 2015); *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1264 (D.C. Cir. 2014). "[W]ithout bullets, the right to bear arms would be meaningless," and a "regulation eliminating a person's ability to obtain or use ammunition could thereby make it impossible to use firearms for their core purpose." *Jacton* v. *City & Cnty. of San Francisco,* 746 F.3d 953, 967 (9th Cir. 2014). As such, since magazines are considered "integral components to the vast categories of guns," they ought to be treated as "arms" for purposes of Second Amendment protection. *Fyock v. City of Sunnyvale* (*Fyock I*), 25 F. Supp. 3d

1267, 1277 (N.D. Cal. 2014) (citing *Heller,* 554 U.S. at 581), *aff'd,* 779 F.3d 991 (9th Cir. 2015).

The government next contends that large capacity magazines are nevertheless beyond protection by the Second Amendment since: (1) they are considered dangerous and unusual weapons and (2) New Jersey has a longstanding history of regulating such weapons.

"To measure whether a weapon is dangerous and unusual, the court looks at whether it is 'in common use,' or whether such weapons are 'typically possessed by law-abiding citizens for lawful purposes."' *Fyock,* 25 F. Supp. 3d at 1275 (quoting *Miller,* 307 U.S. at 179; *Heller,* 554 U.S. at 625). Here, Plaintiffs contend that magazines holding more than ten rounds are commonly possessed for self-defense and lawful purposes and, as such, the prohibition of the same would impose a substantial burden. In support of their contention, Plaintiffs note that such magazines are lawful in 43 States and that there are approximately 133 million such magazines owned throughout the United States, representing almost half of all magazines. Plaintiffs also note that two-thirds of semiautomatic rifles currently listed in Gun Digest, a popular gun magazine, hold more than ten rounds of ammunition. Plaintiff's Ex. 48.

The government, in response, argues that because these large-capacity magazines are both "dangerous and unusual" they are not entitled to Second Amendment protection. The government cites statistics which represent that the vast majority of mass shootings involve the use of large capacity magazines and semi-automatic weapons. (ECF No. 31-

2, "Allen Declaration" at ¶ 22). In addition, the government relies principally on the Fourth Circuit's decision in *Kolbe v. Hogan,* 849 F.3d 114, 135 (4th Cir. 2017), which deviates from the Second, Ninth, and District of Columbia Circuits, by holding that large capacity magazines are "among the arms that the Second Amendment does not shield." In doing so, the Fourth Circuit disregarded the "common use" test set forth in *Heller* and its progeny and created a new test: "Are the banned assault weapons and large-capacity magazines 'like' 'M-16 rifles,' i.e., 'weapons that are most useful in military service,' and thus outside the ambit of the Second Amendment?" *Id.* at 136 (quoting *Heller,* at 554 U.S. at 627). Framing the inquiry this way, the Fourth Circuit concluded, "[b]ecause the banned assault weapons and large-capacity magazines are clearly most useful in military service, we are compelled by *Heller* to recognize that those weapons and magazines are not constitutionally protected." *Id.* at 137.

Contrary to the government's assertion, the Court finds *Kolbe*'s inquiry to be at odds with *Heller's* "common use" test, which explained that if a weapon is "typically possessed by law-abiding citizens for lawful purposes," it cannot be a "dangerous or unusual weapon." *Heller,* 554 U.S. at 625, 627. In fact, other circuits that have addressed this issue employ the "common use" test and conclude that large-capacity magazines are protected by the Second Amendment. *See, e.g., New York State Rifle & Pistol Ass'n* v. *Cuomo,* 804 F.3d 242, 255-56 (2d Cir. 2015); *Fyock II,* 779 F.3d at 998; *Heller II,* 670 F.3d at 1260-61. Guided by these decisions, the Court sees no reason to deviate from employing the "common use" standard. In addition,

under this standard, the Court is satisfied, based on the record presented, that magazines holding more than ten rounds are in common use and, therefore, entitled to Second Amendment protection. *See Heller II,* 670 F.3d at 1261; *Duncan,* 265 F. Supp. 3d at 1116-17; *Fyock I,* 25 F. Supp. 3d at 1276.

The government contends that there is no evidence suggesting that large capacity magazines are possessed by law abiding citizens for lawful purposes. However, this argument fails for several reasons. First, courts are reluctant to engage in a "typical use" analysis, since "empirical evidence of lawful possession for lawful purposes [is] 'elusive." *New York State Rifle & Pistol Ass'n,* 804 F.3d at 257 (citation omitted); *see also Heller II,* 670 F.3d at 1260-61. Instead, these circuits deem it more appropriate to assume common use and proceed to the second step of the analysis, level of scrutiny. *See New York State Rifle & Pistol Ass'n,* 804 F.3d at 257; *Heller II,* 670 F.3d at 1260-61. Second, the government fails to acknowledge that it bears the burden of demonstrating that the banned magazines are not in common use; noting the absence of evidence does not suffice. *See Fyock I,* 25 F. Supp. 3d at 1276.

The LCM law is also consistent with this country's history and tradition of "imposing conditions and qualifications on the commercial sale of arms." *Heller I,* 554 U.S. at 626-27. Several states began to "impose restrictions on the capacity of magazines shortly after they became commercially available in the early part of the century.[8] Further, until the 1980s and 1990s the

[8] Although Plaintiffs correctly note that some of these early 20th century laws regulated automatic weapons, rather than

most commonly owned handgun in the United States was the revolver, which generally held six rounds of ammunition. (Defendants' Exhibit 103). Once production—and ownership—of handguns with magazines holding more than ten rounds increased, two states and the federal government soon responded.

The prohibition-era limitations on the number of rounds a gun could fire without reloading ranged from five to sixteen; five state laws restricted that number to ten rounds or fewer. Of the states that currently regulate magazine capacity, the majority of restrictions limit capacity to ten rounds. *See Heller II,* 670 F.3d at 1296 n.20 (Kavanaugh, J., dissenting) (noting that he would remand to the District Court for analysis of "whether magazines with more than 10 rounds have traditionally been banned and are not in common use").

In sum, based on the record presented, New Jersey's ban on magazines capable of holding more than ten rounds implicates Second Amendment protections. As such, the Court proceeds to step two, as outlined in *Marzarrella,* and considers whether the LCM law passes constitutional muster.

Prong Two: Constitutional Scrutiny

Having concluded that magazines fall within the purview of Second Amendment protections, the Court next assesses the LCM law under the appropriate

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semiautomatic weapons, those statutes nonetheless inform the Court's analysis in that they focused on the number of bullets that could be fired *without reloading*, not the number of times the shooter needed to pull the trigger.

standard of constitutional scrutiny. *Marzzarella,* 614 F.3d at 95. Neither *Heller* nor *McDonald* explicitly prescribed the appropriate standard of scrutiny to review Second Amendment challenges. As such, the parties predictably offer conflicting standards of scrutiny upon which to review the present matter. The government contends that intermediate scrutiny is appropriate since the law does not severely burden the core right to bear arms. Plaintiffs, on the other hand, contend that strict scrutiny must be applied, since the right to bear arms is a fundamental constitutional right. Likening New Jersey's LCM law to the District of Columbia handgun ban in *Heller,* Plaintiffs argue that strict scrutiny should apply, since they contend that the law would prohibit an entire class of arms.

In *Marzzarella*, the Third Circuit faced a similar challenge in determining the appropriate level of scrutiny to use, in reviewing the constitutionality of a statute that generally prohibits possession of a firearm with an obliterated serial number. 614 F.3d at 96-97. Like the First Amendment right to free speech, the Third Circuit explained that Second Amendment challenges are susceptible to varying levels of scrutiny, depending on the severity of the burden the law places on the Second Amendment right. *Id.* at 97. Where the law in question severely limits the possession of firearms, as was the case in *Heller,* strict scrutiny should apply. *Id.* Ultimately, the *Marzzarella* court concluded that because the statute nevertheless "le[ft] a person free to possess any otherwise lawful firearm he chooses—so long as it bears its original serial number," intermediate scrutiny was appropriate. *Id.* at 97.

Here, the Court sees no reason to stray from *Marzzarella*'s reasoning. Contrary to Plaintiffs' assertion, New Jersey's LCM law does not prohibit the possession of "the quintessential self-defense weapon," the handgun, as was the case in *Heller*. 554 U.S. at 629. Nor does the prohibition of large capacity magazines "effectively disarm individuals or substantially affect their ability to defend themselves." *Heller II,* 670 F.3d at 1262. As such, since the LCM law nevertheless leaves law abiding citizens free to possess lawful firearms, albeit with five less rounds per magazine, intermediate scrutiny is appropriate. *See Marzzarella,* 614 F.3d at 97. This is also consistent with the majority of Circuit Courts that have considered similar restrictions on magazine capacities and have, likewise, utilized intermediate scrutiny. *See New York State Rifle & Pistol Ass'n,* 804 F.3d at 260-61; *Fyock II,* 779 F.3d at 998-99; *Heller II,* 670 F.3d at 1261-62; *see also Kolbe,* 849 F.3d at 138 (assuming that large capacity magazines were protected by the Second Amendment, the Fourth Circuit would apply intermediate scrutiny).

To survive intermediate scrutiny, the government must demonstrate: (1) "a significant, substantial, or important interest;" and (2) "a reasonable fit between that asserted interest and the challenged law, such that the law does not burden more conduct than is reasonably necessary." *Drake v. Filko,* 724 F.3d 426, 436 (3d Cir. 2013) (citing *Marzzarella,* 614 F.3d at 98). Put differently, "a regulation that burdens a plaintiffs Second Amendment rights 'passes constitutional muster if it is substantially related to the achievement of an important governmental interest.'" *Kwong v. Bloomberg,* 723 F.3d 160, 168 (2d Cir. 2013) (quoting

Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 96 (2d Cir. 2012)). "When reviewing the constitutionality of statutes, courts 'accord substantial deference to the [legislature's] predictive judgments.'" *Drake,* 724 F.3d at 436-37 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997)).

It is well-established that "[t]he State of New Jersey has, undoubtedly, a significant, substantial and important interest in protecting its citizens' safety." *Id.* at 437 (quoting *United States v. Salerno,* 481 U.S. 739, 745 (1987)). Here, the parties dispute whether New Jersey's LCM law reasonably fits within this interest in safety. The government defends the constitutionality of the LCM law, contending it seeks to prevent mass shootings, which is likely to advance public safety interests. Plaintiffs respond, contending that the proposed law would not be fruitful and, in enforcing the law, would place law abiding citizens at a greater risk of danger.

The Court finds neither Allen nor Kleck provided a clear analysis based on the various studies. Allen's analysis, based on an NRA report, does not support with statistical reliability her claim that individuals only use an average of 2.2 or 2.3 bullets when using handguns in self- defense. Similarly, the report relied on by Kleck used a poor sample, and he failed to explain why the defensive gun use events in his report were cut in half one year later. However, the expert testimony established that there is some delay associated with reloading, which may provide an opportunity for potential victims to escape or for a bystander to intercede and somehow stop a shooter.

The LCM law places a minimal burden on lawful gun owners. The new law imposes no new restrictions on the quantity of firearms, magazines or bullets an individual may possess. It merely limits the lawful capacity of a single magazine. A gun owner preparing to fire more than ten bullets in self-defense can legally purchase multiple magazines and fill them with ten bullets each. The Court therefore finds the new law imposes no significant burden, if any, on Plaintiffs' second amendment right.

The Court also notes that New Jersey, a densely populated urban state, has a particularly strong local interest in regulating firearms. New Jersey, like other states with densely populated areas (Massachusetts, New York, California, Connecticut, the District of Columbia), has concluded that this restriction on magazine capacity is necessary for public safety and this Court will defer to that legislative finding. *See City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 438 (2002) (recognizing that "the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems"); *Heller I,* 554 U.S. at 705 (Breyer, J., dissenting) (noting that "deference to legislative judgment seems particularly appropriate [with regard to firearm legislation], where the judgment has been made by a local legislature with particular knowledge of local problems and insight into appropriate local solutions").

Conclusion

In sum, the Court finds that the government has enacted the LCM law in response to a growing concern over mass shootings and the law, based on the evidence presented, is reasonably tailored to

accomplish that objective. Plaintiffs challenge the ban since it will have "an inconsequential effect on reducing the number of killed or injured victims in mass shootings." (Kleck Declaration at ¶ 22). However, this contention fails to recognize that, under intermediate scrutiny, a regulation need not be perfect, but fit within the government's purpose. *See Woollard v. Gallagher,* 712 F.3d 865, 881-82 (4th Cir. 2013); *see also Kachalsky,* 701 F.3d at 100. As such, simply because the challenged ban does not completely solve a problem, here being mass shooting, does not render it unconstitutional. *See id.* Because the Court is satisfied that the state has presented sufficient evidence that demonstrates that the LCM law is reasonably tailored to achieve their goal of reducing the number of casualties and fatalities in a mass shooting, and that it leaves several options open for current LCM owners to retain their magazines and for purchasers to buy large amounts of ammunition, it passes constitutional muster. Therefore, Plaintiffs have failed to prove that they are likely to succeed on the merits on their Second Amendment claim. This is consistent with nearly every Circuit Court to examine laws that reduce large magazine capacity to hold no more than ten rounds, all of which have found these laws constitutional. *See Kolbe,* 849 F.3d at 140-41; *Friedman v. City of Highland Park,* 784 F.3d 406, 411-12 (7th Cir. 2015); *New York State Rifle* & *Pistol Ass'n,* 804 F.3d at 264; *Fyock II,* 779 F.3d at 1000-01; *Heller II,* 670 F.3d at 1262-64. *But see Duncan II,* 2018 WL 3433828.

2. Equal Protection

Plaintiffs next argue that the LCM law violates the Equal Protection Clause of the Fourteenth Amendment, since it treats active and retired law enforcement officers differently than other individuals. The Equal Protection Clause guarantees that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1. "This is essentially a direction that all persons similarly situated should be treated alike." *Shuman v. Penn Manor Sch. Dist.*, 422 F.3d 141, 151 (3d Cir. 2005) (*City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 439 (1985)). "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne,* 473 U.S. at 440.[9]

Here, Plaintiffs challenge the validity of New Jersey's LCM law and bring this equal protection claim on a "class of one" theory. Under a "class of one" claim, the plaintiff must demonstrate that: "1) it 'has been intentionally treated differently from others similarly situated,' and 2) 'there is no rational basis for the difference in treatment.'" *Highway Materials,*

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[9] It should be noted that Plaintiffs argue that the Court should apply a heightened level of scrutiny, since the LCM law implicates fundamental rights protected under the Second Amendment. However, because the Court has already determined that the Plaintiffs' Second Amendment claim fails, their equal protection claim is subject to rational basis review. *See Kwong* v. *Bloomberg,* 723 F.3d 160, 169-70 (2d Cir. 2013); *Hightower v. City of Boston,* 693 F.3d 61, 83 (1st Cir. 2012) ("Given that the Second Amendment challenge fails, the equal protection claim is subject to rational basis review").

Inc. v. Whitemarsh Twp., 386 F. App'x 251,259 (3d Cir. 2010) (quoting *Vill. of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000)). As such, the Court first considers whether the Plaintiffs have been treated differently from similarly situated individuals and, if so, whether there is a rational basis for the differential treatment.

Turning to the first issue, the Court finds that Plaintiffs have not be not been treated differently from others similarly situated. "[R]etired police officers possess a unique combination of training and experience related to firearms[,]" not commonly possessed by the general public. *Kolbe,* 813 F.3d at 185 (citing *Shew v. Malloy,* 994 F. Supp. 2d 234, 252 (D. Conn. 2014); *Pineiro v. Gemme,* 937 F. Supp. 2d 161, 176 (D. Mass. 2013)). In New Jersey, the Attorney General has issued guidelines dictating the semi-annual firearms requalification standards for state law enforcement officers, "to ensure the safety of law enforcement officers as well as promote the public safety and ensure a high level of public confidence in the competence and integrity of our law enforcement personnel in the performance of their official functions." *Semi-Annual Firearms Qualification and Requalification Standards for N.J. Law Enforcement* (June 2003), *available at* http://www.state.nj.us/lps/dcj/pdfs/dcj-firearms.pdf. These qualifications apply to both active and retired law enforcement officers. *Id.; see also* Stanton Declaration at ¶¶ 17-18. However, no similar requirements are imposed on regular law abiding individuals. Second, as the *Kolbe* court recognized, "police officers are instilled with what might be called an unusual ethos of public service," and are expected to act in the public's interest, which does not apply to the public at large.

813 F.3d at 186-87. Finally, "retired police officers face special threats that private citizens do not," such as from past criminals that they have arrested." *Id.* at 187 (citing H.R. Rep. 108-560, at 4 (2004)). In addition, to the extent Plaintiffs complain of the disparate treatment between retired officers and military veterans, there is no evidence to suggest that military veterans receive equivalent training. In fact, the government notes that "the firearms training military recruits receive is vastly different than what is required of recruits in the police academy" and "military recruits generally receive very little, if any handgun training." (Stanton Declaration at ¶¶ 22-23).

In sum, given the extensive and stringent training that law enforcement officers receive, in addition to the unique circumstances that come with being a police officer, they are not similarly situated to other New Jersey citizens. As such, Plaintiffs' equal protection claim fails. *See Plyler v. Doe,* 457 U.S. 202, 216 (1982) ("Dissimilar treatment of dissimilarly situated persons does not violate equal protection."). Therefore, since Plaintiffs' fail to establish a prima facie Fourteenth Amendment claim, they are unlikely to succeed on the merits of this claim.

3. Unconstitutional Taking

Finally, Plaintiffs challenge the LCM law on the basis that it constitutes a unconstitutional governmental taking, under the Fifth and Fourteenth Amendments, since they are required to dispossess themselves of these magazines or modify them to accept no more than ten rounds. In either case, Plaintiffs claim the LCM law deprives them of the

beneficial use of their fifteen round magazines, without receiving just compensation.

The Takings Clause, as incorporated against the states by the Fourteenth Amendment, guarantees that no "private property shall be taken for public use, without just compensation." U.S. Const. amend. V. A physical taking occurs "[w]hen the government physically takes possession of an interest in property for some public purpose." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,* 535 U.S. 302, 322 (2002). Where no physical dispossession of property occurs, a regulation may nevertheless be deemed a "regulatory taking" if considered overly burdensome. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922).

"[T]wo guidelines" inform the Supreme Court's regulatory takings jurisprudence." *Murr v. Wisconsin,* 137 S. Ct. 1933, 1942 (2017). "First, 'with certain qualifications . . . a regulation which "denies all economically beneficial or productive use of land" will require compensation under the Takings Clause."' *Id.* (quoting *Palazzolo v. Rhode Island,* 533 U.S. 606, 617 (2001)). Additionally, where a regulation does not deprive the owner of all economically beneficial use, courts assess "'complex of factors,' including (1) the economic impact of the regulation on the claimant; (2) the extend to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Id.* at 1943 (quoting *Palazzolo,* 533 U.S. at 617).

Under the police power doctrine, the government may pass regulations to "protect the general health, safety and welfare of its citizens[,]" without having to

recompense the aggrieved. *Akins v. United States*, 82 Fed. Cl. 619, 622 (2008) (quoting *Amerisource Corp. v. United States,* 75 Fed. Cl. 743, 747 (2007)). This is because,

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests

Mugler v. Kansas, 123 U.S. 623, 668-69 (1887). A state's power to legislate that which is injurious to the health, morals, or safety of the community, however, "cannot serve as a touchstone to distinguish regulatory 'takings'—which require compensation—from regulatory deprivations that do not require compensation." *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1026 (1992).

The Court notes a recent case from the Southern District of California, which declined to apply the police power doctrine to a similar regulation, finding the state's classification of LCMs as a nuisance to be "dubious" because "[g]uns in general are not 'deleterious devices or products or obnoxious waste materials.'" *Duncan I,* 265 F. Supp. 3d at 1137 (quoting *Staples v. United States,* 511 U.S. 600, 610

(1994)). That decision held "the Takings Clause prevents [California] from compelling the physical *dispossession* of . . . lawfully acquired private property [(magazines over 10 rounds)] without just compensation." *Id.* at 1138.

There are clear distinctions between the statute considered in *Duncan* and the one at issue here. As the court recognized,

> Section 32310(d) provides three options for dispossession. First, a person may "remove the large-capacity magazine from the State" § 32310(d)(1). Second, a person may "sell the large-capacity magazine to a licensed firearm dealer." § 32310(d)(2). Third, a person may "surrender the large-capacity magazine to a law enforcement agency for destruction.

Id. at 1110. This the court found deprived gun owners "not just of the use of their property, but of *possession,* one of the most essential sticks in the bundle of property rights."

Two provisions of the New Jersey law at issue here remedy the *Duncan* court's concern. First, section five permits gun owners to permanently modify their magazines "to accept 10 rounds or less." L. 2018, ch. 39, § 5. Second, section seven—which applies to magazines that cannot be modified and to guns which do not accept the smaller magazines—permits gun owners to register their firearms. L. 2018, c. 39, § 7. These avenues, unlike the California statute, ensure that gun owners who wish to keep their magazines may do so, provided they bring them into compliance with the new law. As such, New Jersey is not imposing a regulation that goes "too far," nor is it permanently

depriving anyone of their property. The Court finds Plaintiffs' Taking Clause fails because the statute provides property owners with an avenue to comply with the law without forfeiting their property.

For the reasons discussed above, Plaintiffs have failed to demonstrate a likelihood of success regarding their takings claim.

II. Irreparable Injury, Balance of Hardships, Public Interest

Having concluded that New Jersey's restriction on magazine capacity is not unconstitutional and thus that Plaintiffs have failed to demonstrate a likelihood of success on the merits, the Court concludes that Plaintiffs cannot establish the other three requirements for a preliminary injunction: (1) that they will suffer irreparable harm absent injunction;[10] (2) that granting preliminary relief will not result in even greater harm to the non-moving party; and (3) that the public interest favors injunctive relief.

ORDER

Having carefully reviewed and taken into consideration the submissions of the parties, as well as the arguments and exhibits therein presented, and the testimony adduced; for good cause I shown, and for all of the foregoing reasons,

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[10] Although there is no need to address the irreparable harm prong, it is noteworthy that the Court does not find same, the gun owners still possess the right to own a weapon without any numerical limit on the quantity of bullets and magazines one can own. There is no evidence this regulation on the capacity of the magazine places any burden on Plaintiffs' Second Amendment right.

IT IS on this [handwritten: 28] day of September, 2018,

ORDERED that Plaintiffs' Motion for Preliminary Injunction be and hereby is DENIED.

[handwritten: signature]

PETER G. SHERIDAN, U.S.D.J.

Appendix F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-3170

ASSOCIATION OF NEW JERSEY RIFLE AND PISTOL CLUBS INC.; BLAKE ELLMAN; ALEXANDER DEMBOWSKI,

Appellants,

v.

ATTORNEY GENERAL NEW JERSEY; SUPERINTENDENT NEW JERSEY STATE POLICE; THOMAS WILLIVER, in his official capacity as Chief of Police of the Chester Police Department; JAMES B. O'CONNOR, in his official capacity as Chief of Police of the Lyndhurst Police Department,

Appellees.

Filed: Jan. 9, 2019

Before: SMITH, *Circuit Judge*, McKEE, AMBRO, CHAGARES, JORDAN, *HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, and PORTER *Circuit Judges*

ORDER

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* Hon. Thomas M. Hardiman would have granted the petition.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/Patty Shwartz

Circuit Judge

Appendix G

RELEVANT STATUTORY PROVISIONS

N.J. Stat. Ann. § 2C:39-1(w)(4), (y)

w. "Assault firearm" means:

. . .

(4) A semi-automatic rifle with a fixed magazine capacity exceeding 10 rounds. "Assault firearm" shall not include a semiautomatic rifle which has an attached tubular device and which is capable of operating only with .22 caliber rimfire ammunition.

. . .

y. "Large capacity ammunition magazine" means 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. The term shall not include an attached tubular device which is capable of holding only .22 caliber rimfire ammunition.

N.J. Stat. Ann. § 2C:39-3(j)

j. Any person who knowingly has in his possession a large capacity ammunition magazine is guilty of a crime of the fourth degree unless the person has registered:

(1) an assault firearm pursuant to section 11 of P.L.1990, c. 32 (C.2C:58-12) and the magazine is maintained and used in connection with participation in competitive shooting matches sanctioned by the Director of Civilian Marksmanship of the United States Department of the Army; or

(2) a firearm with a fixed magazine capacity or detachable magazine capable of holding up to 15 rounds pursuant to section 7 of P.L.2018, c. 39 (C.2C:39-20).

N.J. Stat. Ann. § 2C:39-5(b), (f)

b. Handguns. (1) Any person who knowingly has in his possession any handgun, including any antique handgun, without first having obtained a permit to carry the same as provided in N.J.S.2C:58-4, is guilty of a crime of the second degree. (2) If the handgun is in the nature of an air gun, spring gun or pistol or other weapon of a similar nature in which the propelling force is a spring, elastic band, carbon dioxide, compressed or other gas or vapor, air or compressed air, or is ignited by compressed air, and ejecting a bullet or missile smaller than three-eighths of an inch in diameter, with sufficient force to injure a person it is a crime of the third degree.

. . .

f. Assault firearms. Any person who knowingly has in his possession an assault firearm is guilty of a crime of the second degree except if the assault firearm is licensed pursuant to N.J.S.2C:58-5; registered pursuant to section 11 of P.L.1990, c. 32 (C.2C:58-12); or rendered inoperable pursuant to section 12 of P.L.1990, c. 32 (C.2C:58-13).

N.J. Stat. Ann. § 2C:39-19

Except as provided in section 7 of P.L.2018, c. 39 (C.2C:39-20), a person who legally owns a semi-automatic rifle with a fixed magazine capacity exceeding 10 rounds or a large capacity ammunition magazine as defined under subsection y. of

N.J.S.2C:39-1 which is capable of holding more than 10 rounds of ammunition on the effective date of P.L.2018, c. 39 (C.2C:39-17 et al.) may retain possession of that rifle or magazine for a period not to exceed 180 days after the effective date of this act. During this time period, the owner of the semi-automatic rifle or magazine shall:

a. Transfer the semi-automatic rifle or magazine to any person or firm lawfully entitled to own or possess that firearm or magazine;

b. Render the semi-automatic rifle or magazine inoperable or permanently modify a large capacity ammunition magazine to accept 10 rounds or less; or

c. Voluntarily surrender the semi-automatic rifle or magazine pursuant to the provisions of N.J.S.2C:39-12.

N.J. Stat. Ann. § 2C:39-20(a)

a. A person who legally owns a firearm as set forth in paragraph (1) or (2) of this subsection prior to the effective date of P.L.2018, c. 39 (C.2C:39-17 et al.)[1] shall register that firearm within one year from the effective date:

(1) a firearm with a fixed magazine capacity holding up to 15 rounds which is incapable of being modified to accommodate 10 or less rounds; or

(2) a firearm which only accepts a detachable magazine with a capacity of up to 15 rounds which is incapable of being modified to accommodate 10 or less rounds.

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[1] L.2018, c. 39, approved June 13, 2018, effective June 13, 2018.