No. 20-1507

In The Supreme Court of the United States

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

Petitioners,

v.

GURBIR S. GREWAL, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF NEW JERSEY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL SHOOTING SPORTS FOUNDATION, INC. IN SUPPORT OF PETITIONERS ASSOCIATION OF NEW JERSEY RIFLE & PISTOL CLUBS, INC., ET AL.

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INTEREST OF *AMICUS CURIAE*[1]

The National Shooting Sports Foundation, Inc. ("NSSF") is the national trade association for the firearm, ammunition, hunting and shooting sports industry. Formed in 1961, NSSF is a 501(c)(6) tax-exempt Connecticut non-profit trade association. NSSF's membership includes over 8,600 federally licensed firearms manufacturers, distributors and retailers; companies manufacturing, importing, distributing and selling goods and services for the shooting, hunting and self-defense markets; sportsmen's organizations; public and private shooting ranges; gun clubs; and endemic media. Currently, 72 NSSF members are located within the State of New Jersey. NSSF's mission is to promote, protect and preserve hunting and the shooting sports.

NSSF's interest in this case derives principally from the fact its federally licensed firearms manufacturer, distributor and retail dealer members engage in lawful commerce in firearms and ammunition in New Jersey and throughout the United States, which makes the exercise of an individual's constitutional rights to keep and bear arms under the Second Amendment

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[1] The National Shooting Sports Foundation, Inc. respectfully submits this *amicus curiae* brief in support of Petitioners pursuant to Supreme Court Rule 37.2. *Amicus* certifies counsel of record for all parties received timely notice of the intent to file this brief and they have consented in writing to its filing. *Amicus* further certifies, pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, nor did any party or its counsel make a monetary contribution to fund its preparation or submission.

possible. The Second Amendment protects NSSF members from statutes and regulations seeking to ban, restrict or limit the exercise of Second Amendment rights. As such, the determination of whether a statute improperly infringes upon the exercise of these rights, and the appropriate standard to apply in making such a determination, is of great importance to NSSF and its members. NSSF, therefore, submits this brief in support of Petitioners.

INTRODUCTION AND SUMMARY OF ARGUMENT

There is no doubt those who commit mass shootings are monsters seeking to harm as many people as possible. However, the goal of preventing such tragedies does not justify state laws, such as the New Jersey statutes at issue here (restricting magazine capacity to 10 rounds or less and criminalizing the possession of such magazines), which significantly infringe upon and detract from the Second Amendment rights of law-abiding citizens using firearms and ammunition for lawful purposes, including self-defense. The Third Circuit opinion from which certiorari is sought analyzes the constitutionality of New Jersey Statute section 2C:39-1(y)[2] ("Section 2C:39-1(y)") (changing the definition of "large capacity magazine" from magazines holding more than 15 rounds to magazines holding more

[2] Additional statutes refer to "large capacity magazine" and prohibit possession of such magazines subject to limited exceptions.

than 10 rounds) under a diluted version of intermediate scrutiny and erroneously concludes the statutes are constitutional.

Since *District of Columbia v. Heller*, 554 U.S. 570 (2008) ("*Heller*") and *McDonald v. City of Chicago*, 561 U.S. 742 (2010) a disturbing trend has emerged among several circuits where Second Amendment rights are treated as second-class rights. *See generally Peruta v. California*, 137 S.Ct. 1995, 1999 (2017) (Mem.) (Thomas, J., dissenting) ("The Court's decision to deny certiorari in this case reflects a distressing trend: the treatment of the Second Amendment as a disfavored right."); *see also Friedman v. Highland Park*, 577 U.S. 1039, ___, 136 S.Ct. 447, 449 (2015) (Mem.) (Thomas, J., dissenting) ("The Court's refusal to review a decision that flouts two of our Second Amendment precedents stands in marked contrast to the Court's willingness to summarily reverse courts that disregard our other constitutional decisions."); *Jackson v. City and County of San Francisco*, 576 U.S. 1013, ___, 135 S.Ct. 2799, 2799-2800, 2802 (2015) (Mem.) ("Second Amendment rights are no less protected by our Constitution than other rights enumerated in that document."). The Third Circuit's opinion upholding a ban on commonly owned ammunition magazines is demonstrative of this trend where lower courts incorrectly analyze the constitutionality of laws implicating the Second Amendment and fail to apply heightened scrutiny required by the Second Amendment's guarantee of the rights to keep and to bear arms. Challenged laws restricting those rights are being upheld based on an

interest balancing analysis expressly rejected by this Court in *Heller*. Accordingly, guidance from this Court is needed to clarify the scope of the Second Amendment and the proper constitutional analysis of laws challenged for infringing upon it. Without guidance from this Court, the erosion of Second Amendment rights will continue unchecked. The Second Amendment will be doomed to a death by a thousand cuts. Second Amendment rights will be treated as "second-class right(s), subject to an entirely different body of rules than other *Bill of Rights* guarantees." *McDonald*, 561 U.S. at 780. Second Amendment rights will be decided by the "the Third Branch of Government. . . . on a case-by-case basis. . . ." *Heller*, 554 U.S. at 634.

NSSF strongly urges this Court to grant Petitioners' Petition for Writ of Certiorari.

ARGUMENT

It is well-established the Second Amendment protects the fundamental, individual rights to keep and bear arms which extends to state and local governments. *See Heller*, 554 U.S. 570; *see also McDonald*, 561 U.S. 742. And there is no dispute about whether ammunition magazines are "arms" within the Second Amendment—they clearly are.[3] Below, the Third

[3] No court considering magazines such as the ones at issue has found they do not qualify as "arms" under the Second Amendment. *See generally Fyock v. City of Sunnyvale*, 25 F.Supp.3d 1267, 1276 (N.D. Cal. 2014), aff'd sub nom. *Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015) (compiling cases: *Heller v. District of*

Circuit "assumed without deciding" that magazines holding more than 10 rounds are "typically possessed by law-abiding citizens for lawful purposes"[4] and entitled to Second Amendment protection. *Ass'n of N.J. Rifle & Pistol Clubs v. AG N.J.*, 910 F.3d 106, 117 (3d Cir. 2018). However, the Third Circuit panel then purported to apply intermediate scrutiny to Section 2C:39-1(y) and determined Respondents undoubtedly had a significant, substantial and important interest in protecting its citizens' safety and the "LCM ban reasonably fits the State's interest in promoting public safety." *Id*. at 119. The lower court's reasonable fit analysis relied heavily on the "pause" between reloading magazines, a pause which would allegedly allow persons in danger to flee or seek cover and for law enforcement or others to intervene and stop a mass shooter. *Id*. at 119-22.

But the Third Circuit's "intermediate scrutiny" analysis was unnecessary here because the text of the Second Amendment should be the touchstone of

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Columbia, 670 F.3d 1244, 1264 (D.C. Cir.2011); *San Francisco Veteran Police Officers Ass'n v. City & Cnty. of San Francisco*, 18 F.Supp.3d 997, 1005-06 (N.D. Cal. 2014); *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 990 F.Supp.2d 349, 371-72 (W.D.N.Y. 2013); *Shew v. Malloy*, 994 F.Supp.2d 234, 250 (D. Conn. 2014); *Tardy v. O'Malley*, C-13-2861, TRO Hr'g Tr., at 66-71 (D. Md. 2013)).

[4] There were an estimated 260 million pistol and rifle magazines in the possession of United States consumers between 1990 and 2016. Magazines capable of holding more than 10 rounds of ammunition accounted for approximately half (133 million). *See* NSSF Magazine Chart at App. 1.

constitutionality. Moreover, the "intermediate scrutiny" applied here was no real scrutiny at all.

The time is ripe for much-needed guidance as to the scope of Second Amendment protection for those purchasing, selling, possessing, owning and using firearms and ammunition. More than ever, this Court is poised to provide direction on such issues as: (1) the contours of Second Amendment protection for firearms and ammunition, including ammunition magazines; (2) how to evaluate constitutionality where the text of the Second Amendment provides for specific, enumerated rights; and (3) the level of scrutiny, with guidance on its application, where the language of the Second Amendment does not explicitly provide for or protect a particular right.

I. "Intermediate Scrutiny" Has No Foundation in Constitutional Language and Gives Judges Unacceptably Broad Discretion to Approve or Disapprove Laws Such as Section 2C:39-1(y).

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. As set forth in *Heller* and *McDonald*, the right to keep and bear arms is a fundamental—***and enumerated***—individual right applicable to state and local governments. *See Heller*, 554 U.S. 570; *see also McDonald*, 561 U.S. 742. Such a right is "fundamental to our scheme of ordered

liberty" and should be afforded the same respect as rights guaranteed by the First, Fourth and Fifth Amendments. *See generally McDonald*, 561 U.S. at 767.

The "intermediate scrutiny" standard, especially as applied by the Third Circuit to Section 2C:39-1(y), has no basis in the language of the Constitution or the Second Amendment and should not be used to limit the scope of a textually grounded constitutional right.[5] When a court applies a standard such as "intermediate scrutiny" to a right explicitly protected by the Constitution's language, it is arrogating to itself the power to decide the policy goals that are sufficiently "important" to surmount constitutional text. That is incompatible with the very notion of enumerated constitutional rights. As this Court explained in *Heller*:

> The 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. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them,

[5] That is not to say every gun-control law is unconstitutional, but it does mean gun-control laws must be measured against the text of the Second Amendment rather than the court-created jargon of "intermediate scrutiny."

> whether or not future legislatures or (yes) even future judges think that scope too broad.

Heller, 554 U.S. at 634-35. Thus, instead of continuing to apply intermediate, or even strict, scrutiny to Second Amendment challenges such as the one here, NSSF encourages this Court to reject the notion that laws may infringe the constitutional right to keep and bear arms so long as they satisfy the interest balancing "intermediate scrutiny" test, or even strict scrutiny.

Certain individual rights have been enshrined in our constitution specifically to prevent these rights from being overridden, or even disregarded, when legislators and judges think there are "important" reasons for doing so. Yet a troubling trend has emerged whereby lower courts simply do not give the same deferential treatment to the Second Amendment as challenges brought under other amendments. Courts have tended to read the Second Amendment more narrowly than other amendments and therefore treat it as a disfavored or second-class right. *See generally Peruta*, 137 S.Ct. at 1999 (Thomas, J., dissenting). As recognized in *Heller*, "The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. **The Second Amendment is no different**. Like the First, it is the very product of an interest balancing by the people. . . . And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in

defense of hearth and home." *Heller*, 554 U.S. at 635 (emphasis added).

And still, "the lower courts are resisting this Court's decisions in *Heller* and *McDonald* and are failing to protect the Second Amendment to the same extent that they protect other constitutional rights." *Silvester v. Becerra*, 138 S.Ct. 945, 950-51 (2018) (Mem.) (Thomas, J., dissenting) (noting the Supreme Court has not heard argument in a Second Amendment case for nearly eight years[6] at the time of his dissent). As the dissenters recognized in *Teixeira*, those who engage in firearms commerce and their customers are part of a "politically unpopular" and highly regulated group. *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 677-78 (9th Cir. 2017) (en banc) 694 (Tallman, J., dissenting), 697 (Bea, J., dissenting).

This disdainful treatment makes it is even more imperative *the text of the Second Amendment*—not the judicially created interest weighing intermediate scrutiny applied here and in other cases—be the

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[6] Since Justice Thomas' dissent, the U.S. Supreme Court granted certiorari in *New York State Rifle & Pistol Association, Inc. v. City of New York, New York*, 140 S.Ct. 1525 (2020), a case involving Second Amendment rights. However, after certiorari was granted, the respondent city amended the ordinance at issue and the majority of the Court dismissed the case as moot. More recently, this Court granted certiorari in *New York State Rifle, et al. v. Corlett*, ___ S.Ct. ___, 2021 WL 1602643 (2021) (whether the state's denial of petitioner applications for concealed carry licenses for self-defense violated the Second Amendment).

touchstone of constitutionality.[7] And the text of the Second Amendment is straightforward. It does not say that "the right of the people to keep and bear Arms shall not be infringed, except by legislation that is substantially related to an important governmental objective." Rather, it provides " . . . the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. Period. There is no room for courts to balance Second Amendment rights against competing governmental interests, or for legislators to

[7] Courts have used the "intermediate scrutiny" standard in other areas of constitutional doctrine, such as sex equality and regulation of adult bookstores. *See*, *e.g.*, *Craig v. Boren*, 429 U.S. 190, 197 (1976); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). But neither of those court-protected rights can be found *in the Constitution's language*. The text of the equal protection clause does not require equal treatment of men and women. It requires only the "equal protection of the laws," and section 2 of the Fourteenth Amendment makes abundantly clear the disenfranchisement of women would remain permissible after the amendment's ratification. *See* David A. Strauss, Foreword: Does The Constitution Mean What It Says?, 129 HARV. L. REV. 1, 38, 41-42 (2015). Similarly, the peddling of smut is conduct rather than "speech," and the judicial protections it receives are not rooted in constitutional language. *See City of Los Angeles*, 535 U.S. at 443-44 (Scalia, J., concurring) ("The Constitution does not prevent those communities that wish to do so from regulating, or indeed entirely suppressing, the business of pandering sex.").

When a right is derived from judicial precedent rather than constitutional text, the courts creating the right hold the prerogative to define the appropriate standard of review—or even to modify or overrule the right itself if the court sees fit to do so. *See*, *e.g.*, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (replacing *Roe v. Wade*'s trimester framework with an "undue burden" test); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overruling *Lochner*-era protections for liberty of contract).

subordinate the constitutionally protected right to policy goals courts deem "important."

Further, "intermediate scrutiny" is hopelessly indeterminate and leads inevitably to result-oriented judging. Any judge can assert any gun-control measure is "substantially" related to the "important" governmental objective of public safety regardless of the data or evidence the litigants produce. That is exactly what happened here. "[I]t is always possible to disagree with such judgments and never to refute them." *Blakely v. Washington*, 542 U.S. 296, 308 (2004). This is not the standard to apply to an enumerated right the Constitution is supposed to protect from the vagaries of political and judicial opinion.

Moreover, *Heller rejected* such interest-balancing: "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach. The 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. This Court's majority went on to observe that a "constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional 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. We would not apply an 'interest-balancing' approach to the prohibition of a peaceful neo-Nazi march through

Skokie." *Id*. at 634-35 (citing *Nat'l Socialist Party of Am. v. Skokie*, 432 U.S. 43 (1977) (per curiam)).

Instead, the proper inquiry is: (1) do magazines holding more than 10 rounds qualify as "arms" described in the Second Amendment; and (2) does a prohibition on this subset of arms qualify as an "infringement" of the right to keep and bear arms. Because magazines holding more than 10 rounds are commonly possessed arms[8] falling within the Second Amendment, New Jersey's prohibition and criminalization of the possession of such arms infringes on the Second Amendment right to keep and bear arms.

Yet, the Third Circuit did not even discuss whether Section 2C:39-1(y) could be upheld using a textual analysis of the Second Amendment and instead applied the intermediate scrutiny standard embraced in *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010): asking whether the regulation of a specific type of magazine "imposes a burden on conduct falling within the scope of the Second Amendment's guarantee" and, if so, evaluating "the law under some form of means-end scrutiny." *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 116. The lower court here then chose to apply what it termed intermediate scrutiny.

This Court's review is needed to correct the Third Circuit's further erosion of those rights guaranteed to Petitioners under the Second Amendment—including

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[8] These types of magazines date back *several hundred years* (to 1580). *See* David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALB. L. REV. 852-57 (2015).

the right to *keep and bear arms* such as magazines holding more than 10 rounds. The Second Amendment takes the choice regarding magazine capacity from the government and allows *the individual* the right to choose the magazine capacity appropriate for their needs (in other words, how much self-defense they feel they need).

II. If a Form of Heightened Scrutiny Must be Applied, the Scrutiny Should be Strict.

Heller explicitly requires something more than rational basis scrutiny and rejects interest balancing. *Heller* teaches that some form of heightened scrutiny is required in evaluating the constitutionality of laws infringing on Second Amendment rights. *See Heller*, 554 U.S. at 628 n. 27. To determine the appropriate level of scrutiny, the Court must look to the severity of the burden placed on Second Amendment rights. A severe burden implicating the "core of the Second Amendment right" will be subject to strict scrutiny. There can be no more severe a burden than a complete ban such as the one at issue here—a ban which also criminalizes possession (including in the home) of magazines holding over 10 rounds, even if those magazines are commonly—ubiquitously—owned, were legally purchased and lawfully owned for decades.

The Third Circuit justified its application of " intermediate scrutiny" by, in essence, lumping all magazines together as one "arm" and also finding the availability (at least for now) of multiple smaller

magazines lessened the severity of the burden imposed.[9] *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 118 (presenting five reasons 2C:39-1(y) does not burden the core Second Amendment right to self-defense in the home and attempting to distinguish the current ban from the handgun ban in *Heller*). With such rationalizations, it is only a matter of time before "arms" (the type of firearm or magazine capacity) are even more severely limited. At a minimum, strict scrutiny should have been used to assess Section 2C:39-1(y).

III. Regardless of the Form of Heightened Scrutiny Applied, Section 2C:39-1(y) and Similar Statutes are Overbroad.

Under strict scrutiny, the fit must be "the least restrictive means to further the articulated interest." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 197 (2014). Intermediate scrutiny, on the other hand, is less exacting but still requires the fit be reasonable and employ "not necessarily the least restrictive means but

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[9] As *Heller* pointed out in reference to handguns, "[i]t is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed." *Heller*, 554 U.S. at 629; *see also Caetano v. Massachusetts*, 136 S.Ct. 1027, 1033 (2016) (Alito, J., concurring). "[R]estating the Second Amendment right in terms of what IS LEFT after the regulation . . . is exactly backward from *Heller's* reasoning." *National Rifle Ass'n of America, Inc. v. BATFE*, 714 F.3d 334, 345 (5th Cir. 2013) (Jones, J., joined by Jolly, Smith, Clement, Owen, and Elrod, JJ., dissenting from denial of rehearing *en banc*) (emphasis in original). This is akin to allowing a state to ban books over 100 pages because other books with fewer pages are available.

. . . a means narrowly tailored to achieve the desired objective." *Id*. Intermediate scrutiny requires Respondents "demonstrate that the harms it recites are real" beyond "mere speculation or conjecture." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). Regardless, Section 2C:39-1(y) and others like it do not pass muster under intermediate or strict scrutiny.

A. Section 2C:39-1(y) and Statutes Like it are Not Narrowly Tailored to Fit Government Objectives.

The burden is on Respondents to establish the challenged law is "closely drawn to avoid unnecessary abridgment" of constitutional rights. *McCutcheon*, 572 U.S. at 218. Respondents' stated ends, like those of most governments advocating for increased firearm restrictions, are public safety, including the prevention of mass shootings. While these are worthy objectives, Respondents cannot show a "reasonable fit" between this general purpose and Section 2C:39-1(y) because Section 2C:39-1(y) is exceedingly overbroad and operates as a complete ban on 11+ round magazines without rhyme or reason.

The same arguments Respondents set forth about 11+ round magazines apply equally to smaller magazines[10] (for example, the "pause in shooting" when a

[10] Those harmed by 1 or more of the first 10 rounds in a magazine are no less important than those Respondent believes might escape injury or death if 10+ magazines are banned. But Respondents' public safety interest really forecasts the continued erosion of the Second Amendment by future statutes which will further

mass shooter is reloading, and which was persuasive to the Third Circuit's decision).

Considering the seemingly arbitrary nature of Respondents' decision to reduce magazine capacity to 10 or less, it is impossible to see how Section 2C:39-1(y) is narrowly tailored to the ends Respondents seek or if it will even accomplish Respondents' objectives. Respondents here presented no evidence that restricting or limiting magazine capacity to 10 or fewer rounds of ammunition will prevent mass shootings and can only speculate the pause in shooting will reduce the scope of the tragedy. In reality, such restrictions are more likely to encourage shooters to acquire larger magazines or weapons illegally, carry more than one firearm during the mass shooting or resort to a deadlier method of mass destruction. Respondents never provided, and the Third Circuit does not appear to have asked for, an objective, evidence-based rationale for why 10 rounds is the "magic" number for a magazine. In fact, as was the case with California's similar statute, it is nothing more than an arbitrary number the state picked.[11]

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reduce magazine capacity and, ultimately, ban magazines (and firearms which use them) completely. One need not be clairvoyant to envision a time when Respondents and other state legislatures ban semi-automatic pistol magazines with capacity beyond that of Old West revolvers (typically 5 or 6 rounds), or perhaps go even further and limit their citizens to single shot firearms which require manual reloading.

[11] As the panel opinion recognized in *Duncan v. Becerra*, 970 F.3d 1133, 1167 (9th Cir. 2020), reh'g en banc granted at 988 F.3d 1209 (9th Cir. 2021) (discussing California's similar magazine

Moreover, the pause in reloading can have a detrimental impact to individuals who use a firearm in self-defense. As *Heller* recognized, "There are many reasons that a citizen may prefer a handgun for home defense: It is easier to store in a location that is readily accessible in an emergency; it cannot easily be redirected or wrestled away by an attacker; it is easier to use for those without the upper-body strength to lift and aim a long gun; it can be pointed at a burglar with one hand while the other hand dials the police. Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Heller*, 554 U.S. at 629. The same holds true for individuals choosing an 11+ round magazine instead of a smaller magazine. The larger magazine may be chosen for self-defense over smaller magazines for many reasons, including but not limited to providing sufficient rounds to account for poor aim during the stress of a criminal invasion in one's home, allowing

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ban), "Section 32310 fails intermediate scrutiny for many of the same reasons it fails strict scrutiny. . . . section 32310's fit is excessive and sloppy." "While the harms that California attempts to address are no doubt real, section 32310 does not address them in a 'material' way. . . . The data relied on by the state in defense of section 32310 is, as the trial court found, "remarkably thin.' " *Id*. at 1168. The *Duncan* panel opinion also found that one of the state surveys the state relied upon as evidence of a "reasonable fit" documented that in 14 of 17 mass shooting in California, the assailants brought multiple weapons—which undercut the state's claims that larger magazines are to blame for casualties. *Id*. Moreover, only three of the incidents in the survey definitively involved large capacity magazines (however defined), magazines smuggled into California. *Id*. at 1168.

sufficient rounds for multiple attackers, allowing the individual to aim/shoot with one hand while dialing the police without needing to use both hands to reload and more.

To the extent Respondents claim individuals do not use more than 10 rounds in self-defense, *Heller* did not address whether individuals actually shot handguns for self-defense.[12] Rather, an individual "uses" an 11+ round magazine simply by keeping it ready for self-defense. For example, law enforcement officers "use" their firearms and corresponding magazines every day, even if they are not actually firing them. But those magazines are available should they be needed. Such magazines may be possessed or "used" for self-defense even if the trigger is never pulled.

Thankfully, the overwhelming number of firearm owners will never have to fire their weapon in self-defense. But this fact is irrelevant to the constitutional analysis here. Having the choice of more than 10 rounds may provide an individual the confidence

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[12] Nothing in *Heller* required an "arm" to be "commonly used" to receive protection—just commonly *owned*. Magazines holding multiple rounds have been "commonly possessed" in the United States since 1863. *See* David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALB. L. REV. at 871. As time progressed, magazines holding more than 10 rounds gained popularity, with more than 20 firearm models from American manufacturers holding magazines of 16 to 30 rounds being available between 1936 and 1971. *Id*. at 857-59, 858, n. 82. Beretta's model 92, holding 16 rounds entered the market in 1976 and, in its various iterations, is one of the most popular of all modern handguns. *Id*.

needed to ward off a criminal attack. By enacting Section 2C:39-1(y), the government makes that choice for its citizens even though *Heller* makes clear that the Second Amendment takes the choice away from the government. It is a right that belongs to the People who choose to reside in New Jersey. Section 2C:39-1(y) takes that choice away from those citizens in violation of their Second Amendment rights.

B. There is No Relationship Between a 10-Round Magazine Capacity Limitation and Respondents' Objectives.

In addition to failing to explain why Section 2C:39-1(y) limits magazine capacity to no more than 10 rounds (as opposed to 15 rounds as previously allowed or some other number), Respondents produced no evidence that the magazine limitation will have an effect on mass shootings or crimes where 11+ round magazines are used.[13]

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[13] Statutes like those at issue here term magazines capable of holding 10 or more rounds as "Large Capacity Magazines" or "LCMs." Like New Jersey, those states adopting the "LCM" term are using semantics to highjack the debate. "LCM" is used to suggest such magazines that are *too* big, unnecessary, excessive and therefore dangerous. Upon what evidence does a legislature term a 10+ round magazine "large"? Whether they are called "large," "jumbo" or "super-sized," such semantic games are irrelevant to the constitutional analysis; rather, the key inquiry is whether 10+ magazines (or "arms") are "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 624-25. The answer to this question is a resounding "yes" as this court has already acknowledged.

In fact, a comprehensive study by the Centers for Disease Control (CDC) in 2003 looked at 51 studies covering the full array of gun-control measures, including the federal Public Safety and Recreational Firearms Act (also known as the Assault Weapons Ban), and was unable to show the federal ban and its magazine capacity limitation (10 or less) had reduced crime. Centers for Disease Control and Prevention, "*First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws. Findings from the Task Force on Community Preventative Services*," MORBIDITY AND MORTALITY WEEKLY REPORTS; 52 (RR14), October 3, 2003. In light of these studies, there is no evidence the availability of magazines over ten rounds is causally related to violent crime or mass shooting.

Thus, the pre-*Heller* federal Public Safety and Recreational Firearms Act's ban on 11+ round magazines is nothing more than a failed experiment from which Respondents learned nothing.[14] And if such a ban did not work on a national level, why do Respondents expect different results in New Jersey? There is no reason to believe Section 2C:39-1(y) will not fail in the same way the federal ban did. How then can the current limitation set forth in Section 2C:39-1(y) be considered narrowly tailored to meet Respondents' ends and satisfy strict or intermediate scrutiny? The answer is, it cannot.

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[14] Neither did California, Colorado, Connecticut, D.C., Maryland, Massachusetts, New York and Vermont.

IV. Only a Handful of States Impose Magazine Capacity Restrictions—For Now.

Only 10 states (this number includes New Jersey) restrict civilian access to magazines holding a specific number of rounds. *See* Cal. Penal Code § 32310 (California); Colo. Rev. Stat. §§ 18-12-301-302 (Colorado); Conn. Gen. Stat. § 53-202w (Connecticut); D.C. Code § 7-2506.01(b) (District of Columbia); Haw. Rev. Stat. § 134-8(c) (Hawaii); Mass. Gen. Laws Ann. Ch. 140, §§ 121, 131(a) (Massachusetts); Md. Code, Crim. Law § 4-305(b) (Maryland); N.J. Stat. Ann. §§ 2C:39-1(y), 39-3(j), 39-9(h) (New Jersey); N.Y. Pen. Law §§ 265.00, 265.36 (New York); 13 V.S.A. § 4021 (Vermont). Of those, two states limit magazine capacity to 15 rounds. Colo. Rev. Stat. §§ 18-12-301-302; 13 V.S.A. § 4021. Thus, the number of states actually restricting magazine capacity to 10 or less is only seven; six if New Jersey is excluded. That equates to just 12-14% of the states—which is 12-14% too many. Thus, to the extent the Third Circuit opinion relies on those other six states to support the constitutionality of Section 2C:39-1(y), such reliance is misplaced.[15]

The fact is, magazine restrictions are actually quite *uncommon*. That a few other states infringe on the Second Amendment rights of their citizens does not make such restrictions constitutional. Bearing in mind this growing trend of states enacting laws which

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[15] In fact, ***133 million*** 11+ rounds magazines are commonly owned in the United States—a number which would be higher if not for the now expired 10-year federal ban and states banning such magazines.

infringe on Second Amendment rights, and the corresponding circuit courts not faithfully applying the holding in *Heller* and finding those restrictions constitutional, NSSF implores this Court to grant certiorari and provide guidance to the lower courts.

V. Respondents' Magazine Capacity Restriction Steepens the Slide to Additional Restrictions in Violation of the Second Amendment.

New Jersey originally limited magazine capacity to 15 rounds or less in 2000. For unknown and unexplained reasons, in 2018 it enacted the current challenged version of this law which reduces magazine capacity to 10 rounds or less. *See* N.J. Stat. Ann. §§ 2C:39-1(y) (amending § 2C:39-1(y) (2018)), 39-3(j), 39-9(h). Without any evidence relating to why 10 rounds, as opposed to 15 or some other number, will address Respondents' generally stated interests, there seems to be no doubt the state will, at some point, seek a further magazine capacity restriction.[16]

In Maryland, magazines holding more than 20 rounds were banned until that number was reduced to 10 rounds in 2013. Md. Code Crim. Law § 4-305(b)

[16] What's to say the next move in New Jersey will be to limit magazines to 8 cartridges, then 6—because many revolvers hold 6 cartridges—and then maybe 5 or 4? For advocates of gun control and further erosion of the Second Amendment, such incremental changes are seen as victorious skirmishes in the larger battle to eliminate firearms and ammunition from modern American society.

(amending § 4-305(b) (2013)). Even the federal government fell victim to this slippery slope: when the Public Safety and Recreational Firearms Act was originally proposed in 1990, the statutory language limited magazine capacities to 15 rounds. *See* 136 Cong. Rec. S6725-02, 136 Cong. Rec. S6725-02, S6726, 1990 WL 67557. A few years later, and without explanation, the statute was amended (and ultimately enacted) to reduce magazine capacity to 10 rounds or less. *See* 139 Cong. Rec. S15475-01, 139 Cong. Rec. S15475-01, S15480, 1993 WL 467099.

Allowing Respondents to dictate an arbitrary number of rounds a magazine may hold—without any tailoring, let alone narrow tailoring, to its purposes—is dangerous to the continued protection of Second Amendment rights. The "very enumeration of [a constitutional] 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*, 630 F.3d at 634. Indeed, a "constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Id*.

CONCLUSION

Guidance from this Court is urgently needed to clarify how courts should analyze the constitutionality of laws infringing upon Second Amendment rights.

Section 2C:39-1(y), in limiting magazines to 10 or fewer rounds, severely burdens and infringes upon the core Second Amendment rights of New Jersey citizens who may choose magazines holding more than 10 rounds for self-defense, including in the home. The government has taken the choice out of their hands of the People which commonly possessed arms they wish to keep for lawful self-defense in their home. Such a ban is unconstitutional under *Heller*.

This case provides this Court the opportunity to further define the contours of the Second Amendment and rein-in lower courts failing to follow the lessons *Heller* and *McDonald* taught about how Second Amendment challenges are properly analyzed. Intervention from this Court is necessary to prevent further erosion of the rights enumerated by the Second Amendment and "fundamental to our scheme of ordered liberty." *McDonald*, 561 U.S. at 767.

Accordingly, NSSF strongly urges this Court to grant the Petition for Writ of Certiorari.

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