No. 20-1507

In the Supreme Court of the United States

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

Petitioners,

v.

ANDREW J. BRUCK, IN HIS OFFICIAL CAPACITY AS ACTING 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 IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

1. Whether New Jersey's limit on the maximum capacity of an individual magazine is consistent with the Second Amendment.

2. Whether New Jersey's limit on the maximum capacity of an individual magazine is consistent with the Fifth Amendment.

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STATEMENT OF THE CASE

1. For 31 years, the State of New Jersey has placed careful limits on the maximum capacity for an individual firearm magazine. The New Jersey Legislature has consistently adopted this policy on the basis that large-capacity magazines (LCMs) are used disproportionately in mass shootings and enable more shots to be fired in less time—without requiring the shooter to even pause briefly to reload—thus causing far greater harm in mass casualty events. See N.J. Stat. §§ 2C:39-1(y); 2C:39-3(j). But while New Jersey law limits how many rounds each individual magazine could feed into a semi-automatic weapon, that law does not interfere with individuals' ability to own and possess as many firearms and magazines as they choose.

In 2018, the New Jersey Legislature amended its capacity restrictions. From 1990 to 2018, the limit on the number of rounds was 15. Pet. App. 65-66 n.2. In 2018, the law was amended to revise the limit to 10 rounds. See N.J. Stat. § 2C:39-19 ("the Act"); see also *id.*, § 2C:39-1(y) (defining "large capacity ammunition magazine[s]" 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"). That change brought New Jersey law in line with the capacity limits of multiple other States, and with the prior federal limits that governed from 1994 to 2004. See, *e.g.*, H.R. Rep. No. 103-489, at 19 (1994) (explaining, in connection with the previous federal law, that LCMs "make it possible to fire a large number of rounds without reloading, then to reload quickly when those rounds are spent," such that "a single person with a single assault

weapon can easily fire literally hundreds of rounds within minutes").

The Act gave owners of the affected subset of magazines 180 days to comply with the new limit. It also provided multiple avenues for them to come into compliance. First, all owners could "[t]ransfer the ... magazine to any person or firm lawfully entitled to own or possess that firearm or magazine." Second, owners could "[r]ender the ... magazine inoperable or permanently modify a large capacity magazine to accept 10 rounds or less." Third, they could "[v]oluntarily surrender ... the magazine." N.J. Stat. § 2C:39-19. And finally, owners of firearms with magazine capacities of more than ten rounds that were "incapable of being modified to accommodate 10 or less rounds" just had to register them within a year. See *id.*, § 2C:39-20(a). Thus, "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." Pet. App. 122.

The Act contains limited exemptions to the capacity limits. For example, it exempts active-duty members of the armed forces or National Guard and specified law enforcement officers and government employees. See, *e.g.*, N.J. Stat. §§ 2C:39-3(g)(1); 2C:39-6(a). Licensed retired law enforcement officers can carry LCMs that hold up to 15 rounds, subject to certain qualifications. See *id.*, §§ 2C:39-6(l); 2C:39-17; see also *id.*, §§ 2C:39-1(w)(4); 2C:39-1(y) (exemption for .22 caliber rimfire ammunition tubular magazines); *id.*, §

2C:39-3(j)(1) (exemption for certain certified competitive shooting matches).

2. Petitioners—one individual firearms owner and one firearms advocacy organization—filed suit to challenge the 2018 Act. They also filed a motion for a preliminary injunction. Petitioners claimed, among other things, that the law violated the Second Amendment and the Takings Clause of the Fifth Amendment.[1]

The District Court (Sheridan, J.) denied Petitioners' motion for preliminary relief after a three-day evidentiary hearing. Pet. App. 118-58. The court found ample factual justification for the state law, identifying that limits on the capacity of a firearm magazine can reduce the spread and lethality of mass shootings, in part because expert testimony demonstrated "there is some delay associated with reloading" a new magazine, "which may provide an opportunity for potential victims to escape or for a bystander to intercede and somehow stop a shooter." Pet. App. 148; see also, *e.g.*, Pet. App. 123-25 (acknowledging that LCM-equipped semiautomatic weapons had been used in numerous mass shootings, including a recent shooting at an arts festival in Trenton). As "a densely populated urban state," New Jersey had "a particularly strong local interest in regulating firearms"; and, like "other states with densely populated areas," New Jersey restricted magazine capacity to promote public safety. See Pet.

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[1] Petitioners also challenged the New Jersey law under the Equal Protection Clause of the Fourteenth Amendment. See Pet. App. 151-53. The District Court rejected that claim and the Third Circuit affirmed. Pet. App. 96-98, 152-53. Petitioners do not renew that claim in this Court.

App. 149. While the District Court recognized that "no one solution itself will end[] mass shootings," it found the evidence showed the LCM ban "fit within the government's purpose" to reduce deaths and injuries from such incidents. See Pet. App. 119, 149-50.

Addressing Petitioners' Second Amendment claim, the court found that intermediate scrutiny applied because the Act "imposes no significant burden, if any, on Plaintiffs' [S]econd [A]mendment right." Pet. App. 149 (characterizing the burden as "minimal"). After all, the District Court's fact-finding observed, the Act "merely limits the lawful capacity of a single magazine," and not the "quantity of firearms, magazines or bullets an individual may possess." *Id.* Applying intermediate scrutiny, the court determined that the Act survived because it "is reasonably tailored to achieve" New Jersey's "significant, substantial, and important" "goal of reducing the number of casualties and fatalities in a mass shooting." Pet. App. 148, 150 (quoting *Drake v. Filko*, 724 F.3d 426, 436 (CA3 2013)).

The court also rejected Petitioners' Takings Clause challenge. Pet. App. 153-57. Rather than requiring owners to forfeit property, the court explained, the Act provided options to "ensure that gun owners who wish to keep their magazines may do so." Pet. App. 156-57. The court concluded that the options provided ensured that the statute does not go "too far" nor "permanently depriv[e] anyone of their property" since it "provides property owners with an avenue to comply with the law without forfeiting their property." *Id.*

3. The Third Circuit affirmed. Pet. App. 63-117. In addressing Petitioners' Second Amendment claims,

the panel "assumed without deciding that LCMs are typically possessed by law-abiding citizens for lawful purposes and that they are entitled to Second Amendment protection." Pet. App. 78-79. The Third Circuit acknowledged that the record showed that "millions of magazines are owned [and] often come factory standard with semi-automatic weapons." Pet. App. 78. The court then evaluated whether the statute would survive means-end scrutiny.

Like six other circuits to uphold analogous laws, the court reviewed the record and concluded the law does not severely burden the core Second Amendment right for five reasons. Pet. App. 80-82. As it reasoned, a 10-round capacity limit on magazines "does not categorically ban a class of firearms." Pet. App. 80. Further, while the handgun ban in *District of Columbia v. Heller* barred residents from possessing the "quintessential self-defense weapon," 554 U.S. 570, 629 (2008), the record in this case demonstrated that these magazines are "not well-suited for self-defense." Pet. App. 81; see also Pet. App. 68-69 (identifying evidence that such magazines are "not necessary or appropriate for self-defense" and results in "indiscriminate firing" and "severe adverse consequences for innocent bystanders"). Unlike in *Heller*, the New Jersey law "does not effectively disarm individuals" or "take firearms out of the hands of law-abiding citizens," Pet. App. 81 (quoting *Heller v. District of Columbia*, 670 F.3d 1244, 1262 (CADC 2011) ("*Heller II*")); to the contrary, New Jersey citizens could own and use as many magazines as they wished, just each containing at most five fewer rounds than before. Pet. App. 82.

The Third Circuit then upheld the statute, finding based on the record that the capacity restriction "reasonably fits the State's interest in promoting public safety." Pet. App. 84. The majority found that the record contained "substantial evidence that LCMs have been used in numerous mass shootings" and that their use "results in increased fatalities and injuries." Pet. App. 69-70; see also Pet. App. 84. By reducing the total number of times a shooter can fire a weapon before that attacker must pause to reload, the Act would "reduce the number of shots fired and the resulting harm" in a mass shooting, and would present more opportunities "for bystanders or police to intervene and victims to flee." Pet. App. 84-85. The panel noted that the record contained testimony from experts and law enforcement professionals describing how such pauses "can mean the difference between life and death for many people." Pet. App. 85. The testimony was reinforced by evidence from six mass shootings at which such pauses created opportunities to escape or intervene, including the Las Vegas shooting and at Sandy Hook Elementary School. Pet. App. 85-86.

The court also concluded that the Act does not burden more conduct than necessary. Pet. App. 89-90. It bars only those "magazines that hold over ten rounds," which the record showed were neither well-suited not necessary to self-defense, while imposing "no limit on the number of firearms or magazines or amount of ammunition a person may lawfully possess." *Id.* Also, the evidence documented a need to broadly place limits on capacity for everyone: a majority of mass shooters "in the past 35 years obtained their guns legally or from a family member or friend," and loss or theft of legally

owned firearms played a key role in arming criminals. Pet. App. 70. Removing LCMs from circulation would hinder mass shooters but would "not burden a gun owner's right to self-defense." Pet. App. 90. Thus, the court found: "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." *Id.*

The court also rejected Petitioners' Takings Clause claim. Pet. App. 93-96. The court held that "the compliance measures in the Act do not result in either an actual or regulatory taking" requiring compensation. Pet. App. 94 (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005)). No actual taking occurred, because owners of magazines beyond the allowable capacity limit could "transfer or sell their LCMs to an individual or entity who can lawfully possess LCMs, modify their LCMs to accept fewer than ten rounds, or register those LCMs that cannot be modified"; owners did not have to surrender LCMs to the government at all. Pet. App. 94-95. No regulatory taking resulted, because the Act certainly "does not deprive the gun owners of all economically beneficial or productive uses of their magazines." Pet. App. 95 (citing *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017)). The record had no evidence that *any* "gun owner cannot use a modified magazine for its intended purpose." Pet. App. 95. And owners of firearms that could not be modified for magazines with a 10-round limit simply had to register them. Pet. App. 95-96. The Act enabled any owners to "keep their unmodifiable LCMs and modified versions" and to continue using these magazines "in the

same way expected: to hold multiple rounds of ammunition in a single magazine." Pet. App. 96.[2]

One judge dissented, reasoning that he would have applied strict scrutiny to Petitioners' Second Amendment claim, and disagreeing with the majority's application of the intermediate-scrutiny analysis to this capacity limit. Pet. App. 99. That dissenting opinion did not address the Takings Clause claim. While the dissent strongly disagreed with the majority's approach, it nevertheless recognized the Third Circuit "stands in good company: five other circuits have upheld limits on magazine sizes," and no circuit had adopted a holding to the contrary. Pet. App. 100.

4. On remand, both parties filed motions for summary judgment. Pet. App. 55. On July 29, 2019, the court granted summary judgment for New Jersey, reasoning that the Third Circuit already upheld the Act. Pet. App. 61. On September 1, 2020, the Third Circuit affirmed on the same basis. Pet. App. 1-52. The panel concluded that the Third Circuit's prior decision upholding the constitutionality of the capacity limits was binding on appeal. Pet. App. 2, 14-18. The dissent declined to apply the law-of-the-case doctrine and would instead have reconsidered the merits of the Second Amendment challenge. Pet. App. 19-20. The dissent-

[2] In a footnote, the majority observed that because the Act "prohibits the use of property as an exercise of its police powers rather than for public use," it "is not a taking at all." Pet. App. 94 n.32. But it did not rest its decision on this ground alone, holding instead that the absence of any actual or regulatory taking whatsoever disposed of the issue. *Id.*

ing opinion did not address the takings claim. Petitioners' request for rehearing en banc was then denied by an 8-6 vote. Pet. App. 53-54. No judge authored an opinion explaining their dissent from denial. *Id.*

REASONS FOR DENYING THE PETITION

This Petition, like the five other petitions addressing LCM laws that this Court has denied in the last six years, does not present a question warranting this Court's review. For one, there is no circuit split to reconcile; the Third Circuit's decision to uphold New Jersey's law against a Second and Fifth Amendment challenge accords with the rulings of six other circuits in both result and reasoning. That renders this Petition indistinguishable from the petitions this Court has repeatedly and recently denied. For another, the ruling below is consistent with this Court's decisions in both *Heller* and *McDonald v. City of Chicago*, 561 U.S. 762 (2010), as it rightly concluded that the Act is reasonably tailored to advance the important government interest in reducing the lethality of mass shootings. Nor does the Act contravene the Takings Clause, since it is neither a physical nor a regulatory taking.

I. Petitioners' Second Amendment Claims Do Not Warrant Certiorari.

Petitioners offer two general arguments in support of their request for certiorari. First, they cherry pick a series of dissenting opinions to raise the specter of a circuit split. See Pet. 18-19. Second, Petitioners argue that capacity limits run afoul of this Court's holdings in *Heller*. Pet. 15-17. But the circuits are unanimous that state laws limiting the total maximum capacity

of a magazine to ten are constitutional. And their conclusions are correct under *Heller*.

a. Petitioner Cannot Satisfy The Traditional Criteria For Certiorari.

This Court's criteria are not met: the circuits are unanimous regarding the validity of laws like this one, and on that basis this Court repeatedly and recently denied petitions raising the same issue.

1. Most importantly, there is no circuit split that requires resolution. The First, Second, Fourth, Seventh, and D.C. Circuits have all upheld nearly identical magazine capacity limits against nearly identical Second Amendment theories, and no other circuit has reached a different result. Indeed, each case involved restrictions on magazines exceeding 10 rounds and all concluded—like the Third Circuit did—that such laws withstand Second Amendment scrutiny. See *Wilson v. Cook Cty.*, 937 F.3d 1028 (CA7 2019); *Worman v. Healey*, 922 F.3d 26 (CA1 2019); *Kolbe v. Hogan*, 849 F.3d 114 (CA4 2017) (en banc); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242 (CA2 2015) ("*NYSRPA*"); *Heller II*, 670 F.3d 1244. In short, there is uniformity among the courts of appeal—with six in total, including the Third Circuit, reaching that consensus.

Beyond this unanimity on result, there is also unanimity on its reasoning: every court of appeals applies some form of means-end scrutiny to Second Amendment challenges, just like they do to myriad other constitutional challenges. See, *e.g.*, *Gould v. Morgan*, 907 F.3d 659, 668-69 (CA1 2018) (noting circuit uniformity as to this approach); *Binderup v. Atty. Gen.*, 836 F.3d 336, 346 (CA3 2016) (noting the approach of applying

some form of means-end scrutiny to Second Amendment challenges has "escaped disparagement by any circuit," and collecting cases from the Second, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits). That further confirms the lack of a circuit split to resolve in this particular case.

Not only is there a lack of disagreement among the circuits, but that uniformity has led this Court to repeatedly and recently deny similar petitions. Just last year, this Court denied two petitions that challenged magazine capacity limits. See *Wilson v. Cook Cty.*, 141 S. Ct. 110 (2020) (petitioning Court to review a decision upholding capacity limits out of the Seventh Circuit); *Worman v. Healey*, 141 S. Ct. 109 (2020) (same from the First Circuit). And this Court took the same approach in 2018, 2016, and 2015. See *Kolbe v. Hogan*, 138 S. Ct. 469 (2018); *Shew v. Malloy*, 136 S. Ct. 2486 (2016); *Friedman v. City of Highland Park*, 577 U.S. 1039 (2015). This Court rarely grants a question it has denied repeatedly absent intervening cause to do so—and none exists here, where there remains no circuit conflict on this constitutional question.

Unable to surmount this hurdle, Petitioners seek to create a conflict where none exists by cherry picking comments from *dissents* in (among other cases) *Kolbe* and *Friedman v. City of Highland Park*, 784 F.3d 406 (CA7 2015), to argue there is "deep division on this issue among lower-court jurists." Pet. at 18-19. But this Court already declined certiorari *in those very cases*.[3]

[3] Moreover, Petitioners overstate the extent of disagreement among appellate jurists. Most importantly, Petitioners' reliance

Moreover, a dissent does not create a circuit split. If it were enough to have disagreement among appellate jurists—which happens whenever a panel divides 2-1 or a judge dissents from denial of rehearing en banc—the number of this Court's merits cases would grow by orders of magnitude. Instead, certiorari is appropriate only if a "United States court of appeals has entered a *decision* in conflict with the *decision* of another United States court of appeals on the same important matter," S. Ct. Rule 10(a) (emphasis added), such that different regions are living under different legal regimes. As applied here, the operative decisions of every court of appeals to consider similar limits are in accord.

Petitioners' other response is no more moving. Although Petitioners reference that a divided panel of the Ninth Circuit previously ruled in favor of a challenge to magazine capacity limits in California, see Pet. 18 (citing *Duncan v. Becerra*, 970 F.3d 1133 (CA9 2020)), that decision was vacated pending en banc review, 988 F.3d 1209 (CA9 2021). Needless to say, a decision that has been vacated so that a circuit can reevaluate its conclusion obviously cannot provide evidence of a circuit split either. See *Durning v. Citibank*, 950 F.2d 1419, 1424 n.2 (CA9 1991) ("[A] decision that has been vacated has no precedential authority whatsoever."). In short, every circuit that actually resolved the question presented has thus reached the same result: capacity restrictions of this kind are constitutional.

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on then-Judge Kavanaugh's dissent in *Heller II*, Pet. at 19, is inapposite, as that opinion never resolved whether the District of Columbia's capacity restrictions were in fact constitutional. *Heller II*, 670 F.3d, at 1270, n.2 (Kavanaugh, J., dissenting).

2. The criteria for holding this Petition pending the resolution of another case are also not met. In short, there is no reason to hold this case pending resolution in *New York State Rifle & Pistol Association, Inc. v. Corlett*, No. 20-843, *cert. granted*, __ S. Ct. __ (Apr. 26, 2021). That case involves a meaningfully distinct issue—*i.e.*, whether denial of certain individuals' applications for concealed-carry licenses violated the Second Amendment. While both cases of course involve the same underlying constitutional provision, they involve challenges to entirely different laws.

Notably, the mere fact that both cases involve Second Amendment challenges is not a sufficient justification to hold this case until *Corlett* is decided. This Court routinely decides cases based on constitutional provisions that touch on all manner of disputes. Yet not all of those cases are held, nor should they be. This Court will usually "hold cases" that "involve the same *issue* as a case on which certiorari has been granted and plenary review is being conducted." *Lawrence v. Chater*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting) (emphasis in original). That is a far cry from holding every petition that involves overlapping constitutional provisions. Indeed, were it otherwise, this Court would be expected to hold all cases involving the First, Fourth, Sixth, Eighth, and Fourteenth Amendments, or involving the Armed Career Criminal Act, Federal Arbitration Act, and Medicaid Act (to name a few), in light of the docket for the upcoming Term. That is not this Court's typical approach.

Beyond both involving the same constitutional provision, this case otherwise does not touch on the same

"issue" as *Corlett*. *Corlett* mounts an as-applied challenge to another state's denial of applications for concealed-carry licenses, which limits them from carrying a firearm outside the home. *Corlett*, No. 20-843 at 24. The challenge in this case, by contrast, is a facial suit that solely concerns the number of bullets that can be held in each individual magazine, and does not speak to who can possess weapons, when or where they can carry weapons, or even how many firearms and magazines they can possess. See Pet. App. 81 (emphasizing that New Jersey law only speaks to maximum capacity of each individual magazine to stop mass shooters from doing maximal damage before pausing to reload). Whatever this Court says about concealed-carry laws or about the application of such a law to Petitioners, that should not change the result in this case. And the consequences of a denial are limited: Even if this Petition is denied, there is nothing that would prevent litigants from re-initiating a challenge to New Jersey's capacity restrictions based on *Corlett* if they believe that eventual decision ultimately helps them.

If anything, *Corlett* simply confirms how far these particular Petitioners come from establishing the case for certiorari. The petitioners in *Corlett* called on this Court to resolve a circuit split, arguing that some circuits were invalidating public-carry laws while others were upholding them. See *Corlett*, No. 20-843 Pet. for Cert. at 9-15. In contrast, this case features unanimity among the circuits, and on a question that this Court has repeatedly and recently denied. This Court should deny this Petition too.

b. The Third Circuit's Decision Is Correct And Consistent With *Heller*.

There is a good reason that all six circuits to reach the validity of capacity restrictions have come out the same way: these statutes are consistent with the Second Amendment and with *Heller* itself.

Petitioners err in repeatedly attacking the Third Circuit's careful application of traditional means-end scrutiny as watered-down and unlawful. To the contrary, while the handgun ban in *Heller* and the stun gun ban in *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016), curtailed self-defense in the home, the same is not true of capacity restrictions. The district court and panel canvassed the record and found 10-round limits do not burden self-defense. Pet. App. 81 ("The record here demonstrates that LCMs are not well-suited for self-defense."). As in previous cases, Petitioners and their experts could not "identify even a single example … of a self-defense episode in which ten or more shots were fired." *Worman*, 922 F.3d, at 37. It follows, as the Third Circuit determined based on expert and law enforcement testimony, that these magazines are "not necessary or appropriate for self-defense" and instead result in "indiscriminate firing" and "adverse consequences for innocent bystanders." Pet. App. 69. That meant strict scrutiny was not warranted.

There is no basis to find that the panel's thorough analysis reflects a bad-faith effort to disfavor the Second Amendment right, instead of a good-faith effort by judges to apply this Court's precedents to distinct laws and records. The panel followed *Heller* in rejecting rational basis review and adopted the same framework

as every other circuit. There is also nothing unusual or problematic with tying the applicable level of scrutiny to whether a statute burdens the core of self-defense in the home; different levels of scrutiny often apply based on the nature of the burden, including under the First Amendment, see *Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 735 (2011) (noting Court has "subjected strictures on campaign-related speech that we have found less onerous to a lower level of scrutiny"), or in voting cases, see *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (requiring federal courts to "weigh the character and magnitude of the burden the State rule imposes on rights against the interests the State contends justify that burden," and explaining that "lesser burdens" on the right to vote "trigger less exacting review"). After all, *Heller* expressly declined "to establish a level of scrutiny for evaluating Second Amendment restrictions," 554 U.S., at 634, and there is no reason to think that a state law with no demonstrated impact on self-defense would merit strict scrutiny.

Turning to the intermediate-scrutiny analysis, the panel also rightly canvassed the record and found capacity restrictions can further public safety. Although LCMs play little role in self-defense, they play an outsized role in "numerous mass shootings" in this country, and New Jersey's law serves therefore its interest in "reducing the lethality of active shooter and mass shooting incidents." Pet. App. 84. Law enforcement officers, experts, emergency room doctors, and all courts of appeals to consider the question have consistently acknowledged that LCMs "allow for more shots to be fired from a single weapon and thus more casualties

to occur when they are used." Pet. App. 84. By preventing potential mass shooters from gaining access to such high-capacity magazines, not only does New Jersey's law "reduce[] the number of shots that can be fired from one gun, making numerous injuries less likely," but it means the potential attacker "will need to either change weapons or reload to continue shooting," in turn "result[ing] in a pause in shooting and provid[ing] an opportunity for bystanders or police to intervene and victims to flee." *Id.*, at 84-85 (detailing law enforcement and expert testimony, bolstered by evidence from prior shootings, that these brief pauses allow for intervention and flight).

The Third Circuit also correctly made record-based findings that a 10-round capacity restriction burdens no more conduct than is necessary. Petitioner makes much of the fact that New Jersey law will dispossess even law-abiding citizens from owning magazines that can fire more than ten rounds without being reloading, but (just as with a machine-gun ban) New Jersey had good reason for taking this approach: "shooters in at least 71% of mass shootings in the past 35 years obtained their guns legally … or from a family member or friend," including in Newtown, and "gun owners in lawful possession of firearms are a key source of arming criminals through loss and theft of their firearms." Pet. App. 70. Even so, the New Jersey Legislature tailored its action as much as possible: it did not "limit … the number of firearms or magazines or amount of ammunition a person may lawfully possess," meaning that while this provision hinders mass shooters and gives individuals the chance to stop them or to flee in the interregnum between bullets, it would

"not burden a gun owner's right to self-defense." Pet. App. 89-90; see also Pet. App. 122 (noting "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."). No wonder that six circuits found equivalent capacity restrictions carefully tailored and lawful.

Petitioners' lead-off response—that a "flat ban" on an arm could never be constitutional, Pet. 17—fails for two reasons. First and most importantly, it has no application here: these restrictions on magazine capacity do not ban any firearms, and Petitioners "were unable to identify a single model of firearm that could not be brought into compliance with New Jersey's magazine capacity restriction." Pet. App. 81 n.20. And while Petitioners treat a capacity limit as a "ban" on arms over that limit, such wordplay "is circular: essentially, it amounts to a suggestion that whatever group of weapons a regulation prohibits may be deemed a 'class.' By this logic … any regulation could be considered an 'absolute prohibition' of a class of weapons." *Worman*, 922 F.3d at 32. That view would have radical consequences; even a requirement that guns be serialized so that law enforcement can trace them when they are used in a crime would become a "flat ban" on unserialized weapons. But neither that law nor this one—which are common-sense safety tools—qualify as bans on possession. See Pet. App. 81 (finding based on the record that New Jersey law "does not take firearms out of the hands of law-abiding citizens," but requires

a shooter simply pause to reload before firing the eleventh bullet to reduce mass casualty events).

Second, and in any event, Petitioner's analysis is entirely inconsistent with *Heller*. Indeed, *Heller* itself rejected the idea that "bans" on a class of weapons are necessarily unconstitutional. 554 U.S. at 624; see also *id.,* at 624-27 & n.26 (cautioning the Second Amendment "should not be taken to cast doubt on" all firearms laws and balking at the "startling" idea that certain bans, like the ones on machine guns, are unconstitutional); *Friedman*, 784 F.3d, at 408 (agreeing that "*Heller* deemed a ban on private possession of machine guns to be obviously valid"). And while the Court did reject the "interest balancing" that Justice Breyer had proposed, there is no evidence that *Heller* sub silentio replaced *traditional* means-end scrutiny with an inquiry that only asks whether a firearm is in common use. *Heller II*, 670 F.3d, at 1265 (holding "heightened scrutiny is clearly not the 'interest-balancing inquiry' proposed by Justice Breyer and rejected by the Court"); Pet. App. 83 n.22 (agreeing "balancing" would be improper, but means-end scrutiny is justified). Using typical scrutiny, rather than Petitioner's categorical rule, "is no different than" how all manner of other constitutional rights are analyzed, requiring States to make "the showing necessary to surmount heightened scrutiny." *Binderup*, 836 F.3d, at 344. Were it otherwise, then no limitations on such a firearm could *ever* be allowed, even if an undisputed record showed that the law saves lives and would have *no* impact on self-defense. No case stands for that approach.

Moreover, the Third Circuit's analysis of the record and of precedent fits with overarching constitutional principles of federalism and judicial humility on matters of public safety. As Judge Easterbrook put it, "the Constitution establishes a federal republic where local differences are cherished as elements of liberty, rather than eliminated in a search for national uniformity." *Friedman*, 784 F.3d, at 412. Although *Heller* of course "circumscribe[s] the scope of permissible experimentation by state[s]," and States must comply fully with its rule, "federalism and diversity still have a claim" within its bounds. *Id.* After all, *Heller* made clear that the Second Amendment is not "an invitation to courts to preempt this most volatile of political subjects and arrogate to themselves decisions that have been historically assigned to other, more democratic, actors." *Kolbe*, 849 F.3d at 150 (Wilkinson, J., concurring); see *id.* (adding that "disenfranchising the American people on this life and death subject" beyond the suppression of certain outlier laws like in *Heller* "would be the gravest and most serious of steps," especially "in the wake of so many mass shootings in so many localities across this country"); *Heller*, 554 U.S., at 636 (recognizing "the problem of handgun violence in this country" and agreeing "the Constitution leaves" States "a variety of tools for combating" it). Without undermining anyone's self-defense right, New Jersey enacted a law to mitigate the spate of shootings in schools and public spaces across the Nation, and every circuit has agreed its limit falls within lawful bounds under *Heller*. That holding that does not merit review.

II. Petitioners' Fifth Amendment Claims Do Not Warrant Certiorari.

Petitioners' other question presented likewise provides no basis for certiorari. For one, this question has rarely arisen, but every court of appeals to assess the question agrees that similar restrictions do not violate the Takings Clause, and so this Court unsurprisingly recently denied a petition on a similar issue. For another, the decision below is plainly correct, as the state law works no physical or regulatory taking.

1. First, the certiorari criteria are again not satisfied given the lack of a circuit split. Petitioners do not cite—and the State is unaware of—*any* appellate decision endorsing a Fifth Amendment challenge to a capacity restriction or to any analogous law.

Although the case law is sparse, it cuts against Petitioners. The only remotely analogous appellate decision of which the State is aware was resolved the same way as the Third Circuit: another court of appeals rejected a Takings Clause challenge to a statute restricting possession of bump stocks. See *Md. Shall Issue v. Hogan*, 963 F.3d 356 (CA4 2020) (holding the state law is not a "physical appropriation" since it does not require owners of these devices to "physically turn them over to the Government" or to any third party, and the prohibition is not a regulatory taking).[4] And although concurring and dissenting opinions cannot form a circuit split (as laid out above), it is striking

[4] While one district court agreed with plaintiffs' takings argument, *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1137 (S.D. Cal. 2017), its decision is pending en banc review by the Ninth Circuit. There remains no division among the circuits.

Petitioners cannot identify any opinion in which *any* appellate jurist endorsed the claim that a magazine capacity restriction is a taking. Indeed, this argument was not adopted by a single judge on either Third Circuit panel that reviewed the New Jersey law.

Moreover, this Court recently denied another petition raising this takings challenge. In *Maryland Shall Issue v. Hogan*, mentioned above, the party challenging the bump-stock law specifically sought certiorari on the takings question. See Pet. for Cert., at i (No. 20-855). There, as here, those challengers argued that a firearm regulation qualified as a taking, and that the Fourth Circuit's contrary position "effectively eliminate[d] any protection for lawfully purchased personal property." *Id.* And it emphasized heavily its view that *Horne* requiring ruling in its favor. *Id.* This Court denied the petition. __ S. Ct. __ (May 3, 2021). Given a continued lack of any circuit court conflict, Petitioners' takings claim—which relies upon the same arguments and cannot find support in any intervening decision—warrants the same result.

2. There is also a good reason for the consensus—a law regulating maximum magazine capacity presents neither a physical nor regulatory taking. As explained above, the Act gave owners of affected magazines multiple avenues to comply: owners could simply "modify a large capacity magazine to accept 10 rounds or less"; transfer or sell the magazine to someone who can lawfully possess it (whether in or outside of New Jersey); or, only if the owner preferred, voluntarily surrender it. N.J. Stat. Ann. § 2C:39-19. Moreover, the owners of firearms with magazine capacities of more than ten

rounds that were "incapable of being modified to accommodate 10 or less rounds" simply had to register them within a year, and did not need to make modifications to the items. See *id.*, § 2C:39-20(a).

Although Petitioner primarily argues that this law is a physical taking, the Third Circuit rightly rejected that argument for two independently sufficient reasons. For one, the entire paradigm of a physical taking is inapplicable: physical takings involve "direct appropriations" of property for public use, not the regulation of use or possession by the property owner. See *Horne v. Dep't of Ag.*, 576 U.S. 350, 361 (2013). As the panel explained, whereas cases like *Horne* involve laws that set aside certain property "for the government" to use (including to sell or to transfer to another party), this statute by contrast "does not involve a taking for government use in any way." Pet. App. 94 n.32. Instead, turning over an LCM to the government is but one *voluntary* form of statutory compliance; as noted above, there is no "confiscat[ion]" whatsoever, since individuals can continue possessing any firearms with minor modifications (or sell or transfer them if they prefer). N.J. Stat. Ann. §§ 2C:39-19, 2C:39-20(a); Pet. App. 94 (listing the available options). The basis of takings jurisprudence—that the government owes its residents money if it takes their property for public use—thus has no application to this capacity limit. Were it otherwise, States could not restrict individuals from possessing such deadly items as chemicals, bombs, drugs, or wild animals without paying owners along the way. That is not, and has never been, the law.

Second and independently, over a century of consistent cases from this Court and the circuits confirm that "[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." Pet. App. 94 n.32. As the Court held in *Mugler v. Kansas*, 123 U.S. 623 (1887), 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." *Id.,* at 668-69; see also, *e.g.*, *Chicago B. & Q. Railroad Co. v. Illinois*, 200 U.S. 561, 594 (1906) ("It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property and though no compensation is given."). Petitioners' contrary position would "effectively compel the government to regulate by *purchase*," which this Court has not endorsed, and would extend well beyond the firearm safety context to drug regulations and more. *Andrus v. Allard*, 444 U.S. 51, 65 (1979) (emphasis in original); see also *id.* (adding that "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law"). Petitioner is unsurprisingly unable to identify a single case to the contrary.

The New Jersey law is also not a regulatory taking as it falls under neither of the "two discrete categories of regulatory action" necessitating compensation. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). The first concerns "regulations that compel the property owner to suffer a physical 'invasion' of his property." *Id.* The archetype for this taking is *Loretto*

v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), in which owners of apartment buildings were required to allow third parties to permanently attach equipment to their buildings. *Id.*, at 421-22. That is plainly inapplicable, as New Jersey is not "physically inva[ding]" any LCM owners' property, and there is no plausible way to characterize the law as "press[ing]" such magazines "into some form of public service." *Lucas*, 505 U.S., at 1018.

The second type of *per se* regulatory taking arises "where regulation denies all economically beneficial or productive use of land." *Id.*, at 1015. But this law is not such a regulation. First, as *Lucas* made clear, this type of per se taking is limited to restrictions on "real property." *Lucas*, 505 U.S., at 1019; see also *Murr*, 137 S. Ct., at 1943 (describing *Lucas*'s categorical rule as requiring "the denial of all economically beneficial use of land"); *Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404, 411 n.2 (CA4 2007) ("*Lucas* by its own terms distinguishes personal property."). Indeed, *Lucas* itself distinguished "the case of personal property," in which "the State's traditionally high degree of control" means that owners "ought to be aware of the possibility that new regulation might" affect their ability to use the property in certain ways. *Id.*, at 1027-28; see also *Md. Shall Issue*, 963 F.3d, at 367 (noting an owner's expectation that a law may diminish personal property's value is particularly appropriate when that property is already "heavily regulated"); *Holliday*, 493 F.3d, at 411 n.2 (holding that statute outlawing possession of previously legal video

gaming machines did not effect a taking based on reduction in value, especially if the risk of loss was anticipated in a "heavily regulated" area).

In any event, Petitioners' property has hardly been "rendered valueless." *Lucas*, 505 U.S., at 1020, 1075. Petitioners never assert the capacity limit deprives an arm of "all economically beneficial or productive use." *Id.*, at 1015. Owners in New Jersey may simply alter the device to accept ten or fewer rounds while owning as many rounds of ammunition as they wish, and if a firearm is unable to be modified in that way, it can simply be registered. See Pet. App. 95 ("Simply modifying the magazine to hold fewer rounds of ammunition than before does not destroy the functionality of the magazine."); Pet. App. 96 (adding that "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."). And even if an owner does not pursue these options, Petitioners can still obtain value by selling or transferring LCMs to someone who may legally possess them (*e.g.*, a New Jersey resident exempted from the law, or any individual in another state). Far from confiscation or a total destruction of economic value, New Jersey law is a narrow public safety restriction that allows individuals to maintain their arms as before, simply modified to reduce the risk that they can be used in a mass shooting event. That conclusion flows inexorably from a century or more of takings jurisprudence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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