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 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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The state's opposition confirms that its blanket, retrospective, confiscatory prohibition on the continued possession of common, standard-issue magazines—even when they have been lawfully and safely possessed for decades—is the rare state law that violates two provisions of the Bill of Rights at once. The Second Amendment exists to prevent this kind of disarmament, and the Fifth Amendment prohibits such an uncompensated taking. The state does not dispute that the Second Amendment protects arms "typically possessed by law-abiding citizens for lawful purposes," *District of Columbia v. Heller,* 554 U.S. 570, 625 (2008), or that magazines capable of holding more than ten rounds of ammunition satisfy that standard. The state is thus left arguing that it may categorically ban possession of what the Second Amendment protects. To state that proposition is to refute it, and to lay bare the conflict between the decision below and *Heller*, where this Court made abundantly clear that a flat ban on protected arms cannot be reconciled with the Second Amendment.

New Jersey's law is equally incompatible with the Takings Clause. New Jersey not only has flatly banned constitutionally protected magazines, but has gone so far as to confiscate them from citizens who lawfully acquired them and have safely possessed them without incident for decades. The state's only answer to that clear Takings Clause problem is to emphasize that it gives citizens a choice to surrender, sell, or destroy their protected property. But none of those options would prevent a taking of real property, and this Court has made clear that the Takings Clause

protects personal property from comparable confiscatory efforts. This Court should grant certiorari and make clear that states may neither ban nor confiscate property that the Constitution entitles the people to keep. At a bare minimum, this Court should hold this petition until it disposes of *New York State Rifle & Pistol Association v. Bruen* (*NYSRPA II*), No. 20-843.

I. The Court Should Grant Certiorari To Resolve The Second Amendment Question.

1. The state's opposition is striking for what it does not say. It does not take issue with *Heller*'s holding that all arms "typically possessed by law-abiding citizens for lawful purposes" are protected by the Second Amendment, 554 U.S. at 625. Pet.15-17. Nor does it contend that the magazines it has banned are anything but. The state does not—and could not, Pet.16—argue that magazines capable of holding more than ten rounds are rare. It does not—and could not, Pet.16-17—argue that such magazines are *typically* possessed for unlawful purposes. It does not—and could not, Pet.4-5—argue that there is any historical tradition of restricting firing or magazine capacity. And it never takes issue with the Third Circuit's assumption that magazines capable of holding more than ten rounds are constitutionally protected. BIO.4-5; Pet.10, 14, 20.

The state instead makes the remarkable claim that it may flatly prohibit such magazines even if the Second Amendment fully protects them. *Heller* suffices to refute that proposition, as do decades of cases reiterating the commonsense proposition that the government cannot flatly prohibit what the

Constitution protects. *See* Pet.17. New Jersey never even acknowledges the latter cases, let alone makes any attempt to explain why the analysis would be any different under the Second Amendment.

The state instead makes the dubious claim that *Heller* somehow supports "the idea that 'bans' on a class of weapons" are not "necessarily unconstitutional." BIO.19. But *Heller* declined to cast doubt on bans on machineguns and short-barreled shotguns precisely because it concluded they are "not typically possessed by law-abiding citizens for lawful purposes," and hence are not protected by the Second Amendment. *Heller*, 554 U.S. at 625. Magazines capable of holding more than ten rounds, by contrast, have been commonly possessed by law-abiding citizens for more than a century, and continue to be lawfully possessed by millions of Americans today. Pet.4; Pet.App.142. To state the obvious, that the government may ban arms that are *not* protected by the Second Amendment lends no support to the proposition that it may ban arms that are.

The state maintains that its law is not akin to the law in *Heller* because it "do[es] not ban any firearms." BIO.18. But the law bans magazines capable of holding more than ten rounds, which the state nowhere disputes are constitutionally protected. And the state itself treats those magazines as a distinct category. The state cannot single out "large capacity magazines" for distinct treatment; have that treatment take the form of a blanket, retrospective, and confiscatory ban; and then plead that it has not banned anything. The state protests that treating the banned magazines (or firearms equipped with them)

as protected arms is "circular" and would have "radical consequences." BIO.18. But there is an obvious difference between "a requirement that guns be serialized," BIO.18, and a requirement that guns be capable of firing no more than ten rounds without reloading: The former does not diminish citizens' ability to defend themselves; the latter makes firearms less effective for their core, constitutionally protected purpose.

The state protests that magazines capable of holding more than ten rounds are not "necessary or appropriate for self-defense" because it is rarely necessary to fire more than ten rounds to ward off an attack. BIO.15. That claim is in serious tension with the fact that the standard-issue weapon for the state's own law-enforcement officers is the Glock 19 pistol with a 15-round magazine. *See* Pet.App.131. But more to the point, the test this Court articulated in *Heller*, drawing on centuries of common-law tradition, asks whether arms are commonly *possessed* by law-abiding citizens for lawful purposes, not whether law-abiding citizens commonly need to *use* them for self-defense. *See Heller*, 554 U.S. at 625. And the American people have "overwhelmingly chosen" magazines capable of holding more than ten rounds. *Id.* at 628.

New Jersey's crabbed view ignores that Second Amendment rights promote self-defense even when the firearms are not discharged. Most individuals who keep a firearm will never have to use it in self-defense, presumably because the very fact that the people have a constitutionally protected right to keep such arms deters would-be assailants. It is thus New Jersey's

proffered "necessity" test, not the view of petitioners (and *Heller*), that would produce "radical consequences," as the state's view would justify confining law-abiding citizens to one firearm, one magazine, one box of ammunition, or one round in the chamber.

2. The state's defense of the Third Circuit's tailoring holding falls equally flat. The state does not even mention the phrase "narrow tailoring," although this Court just reaffirmed that heightened scrutiny, whether strict or intermediate, requires narrow tailoring. *See Ams. for Prosperity Found. v. Bonta*, 141 S.Ct. 2373 (2021). As the Court explained, "[a] substantial relation" between the state's proffered ends and its chosen means "is necessary but not sufficient" to justify burdening constitutional rights; the inquiry "requires narrow tailoring." *Id.* at 2384-85. The decision below did not demand narrow tailoring, and the state does not claim otherwise.

Nor could the state satisfy any meaningful form of tailoring, for by its own admission, its ban applies to virtually "everyone"—even law-abiding citizens with a proven track record of lawfully possessing the now-prohibited magazines without incident for decades—and is designed to "[r]emove[]" constitutionally protected magazines "from circulation" entirely. BIO.6-7. The state boasts that it "did not 'limit … the number of firearms or magazines or amount of ammunition a person may lawfully possess.'" BIO.17. But setting aside that the state's arguments would allow it to do just that next, narrow tailoring focuses on whether the state's chosen policy is sufficiently tailored, not whether it theoretically could have been

coupled with even more draconian policies. Here, New Jersey legislated with the broadest possible strokes, which is the antithesis of tailoring, narrow or otherwise.

The state closes its merits argument with an ode to federalism reminiscent of the one this Court rejected in *McDonald v. City of Chicago*, 561 U.S. 742, 783-84 (2010), but it conspicuously ignores that the process of enumeration and incorporation took "certain policy choices off the table." *Heller*, 554 U.S. at 636. New Jersey also ignores that its law has virtually no historical or even present-day pedigree. The same magazines that New Jersey insists are so dangerous that they must be removed from circulation entirely have been commonly possessed for more than a century and remain legal in 42 states and under federal law. And far from endorsing New Jersey's states-rights pleas, nearly half the states have asked this Court to grant certiorari and reverse. *See* Br. of Ariz., La., & Twenty-Two Other States as *Amici Curiae* in Supp. of Pet'rs. As that outpouring underscores, New Jersey's policy has its own federalism costs, as residents of a sister state may have to leave their only firearm at home, no matter how safely they transport it, if they plan to step foot in New Jersey, because a standard-issue firearm that is perfectly lawful in 42 states is absolutely verboten in New Jersey. That is not how fundamental constitutional rights are supposed to work.

3. The state is thus left putting all its eggs in the basket that the circuits are not (presently) divided on this question. But a circuit split is hardly the only criterion for granting certiorari, as New Jersey well

knows. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S.Ct. 1461 (2018). Conflict with this Court's cases (such as *Heller*) is a well-settled ground for review and has twice justified review in the Second Amendment context alone. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York* (*NYSRPA I*), 140 S.Ct. 1525 (2020); *Caetano v. Massachusetts*, 577 U.S. 411 (2016); S.Ct. R. 12(c). And this Court has no hard-and-fast rule against granting certiorari to resolve questions it has previously declined to resolve—even "repeatedly and recently," BIO.11. *See, e.g.*, *NYSPRA II* (No. 20-843).

Moreover, the state seriously understates the degree of division in the lower courts. More than a dozen judges have decried the position embraced by the decision below as flatly inconsistent with this Court's precedent. *See* Pet.18-19. That no two of those many jurists have been empaneled together (until the Ninth Circuit panel recently en banced) cannot be outcome determinative. And even more jurists have taken issue with the watered-down form of scrutiny the Third Circuit applied to uphold New Jersey's ban. *See, e.g.*, *United States v. McGinnis*, 956 F.3d 747, 761-62 (5th Cir. 2020) (Duncan, J., concurring); *United States v. Skoien*, 614 F.3d 638, 654 (7th Cir. 2010) (en banc) (Sykes, J., dissenting). For the state to try to brush this off as nothing more than an ordinary 2-1 panel decision, BIO.12, is wishful thinking. The disagreement in the lower courts is pervasive and profound. This Court should grant certiorari and resolve this critical constitutional question.

II. This Court Should Grant Certiorari To Resolve The Takings Question.

The confiscatory aspect of New Jersey's law not only underscores its dramatic overbreadth, but also effects an impermissible uncompensated taking. New Jersey resists that conclusion, emphasizing the "multiple avenues" it provides for "compliance" with its dispossession demand. BIO.4, 22-23. But with the exception of the exceedingly rare magazine that cannot be permanently modified, none of those options allows citizens to keep their constitutionally protected property. The state does not dispute that "surrender[ing]" a banned magazine amounts to a physical taking. BIO.22. And forcing citizens to sell their property to a third party to avoid such a forced surrender does not absolve the government of takings liability; at most, it may affect the amount of compensation due.

Nor does the option to modify their magazines somehow mean that citizens are not dispossessed. The state cavalierly describes this as "simply alter[ing]" the device, but the state cannot have it both ways. BIO.26. It views a magazine capable of holding 11 or more rounds as so fundamentally different from a magazine capable of holding 10 rounds that the former is contraband, while the latter is largely unregulated (at least for now). Having treated that difference as fundamental for its own purposes, the state cannot turn around and dismiss it as a matter of degree such that there is no physical taking. This Court has already rejected even less palpably transparent government efforts to disguise a taking. In *Horne*, the raisin growers could have "plant[ed] different crops,"

or "[sold] their raisin-variety grapes as table grapes or for use in juice or in wine." *Horne v. Dep't of Agric.*, 576 U.S. 350, 365 (2015). And in *Loretto*, the property owner could have converted her building into something other than an apartment complex. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982). But this Court rejected the argument that those options eliminated the physical taking, explaining that "property rights 'cannot be so easily manipulated.'" *Horne*, 576 U.S. at 365 (quoting *Loretto*, 458 U.S. at 439 n.17).

The state tries to distinguish *Horne* as involving a law that "set aside certain property 'for the government' to use," whereas the law here "does not involve a taking for government use." BIO.23 (quotation marks omitted). That is wrong as a matter of fact. The set-aside in *Horne* was not motivated by the government's desire to use the raisins; it was designed to "stabilize prices by limiting the supply of raisins on the market"—in other words, to remove excess raisins from circulation. *Horne v. Dep't of Agric.*, 569 U.S. 513, 516 (2013). *Horne* thus reinforces the conclusion that whether the state confiscates property for its own *use* or for some other perceived benefit is beside the point. Indeed, just months ago—in another case New Jersey fails to mention—this Court found a *per se* physical taking where a regulation required agricultural employers to open their property to union organizers, not government inspectors. *See Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021).

The state alternatively suggests that it may freely take private property without compensation pursuant

to its "police powers." BIO.24. But far from being compelled by "over a century of consistent cases from this Court," *id.*, that proposition is squarely *foreclosed* by a wall of precedents, starting with *Chicago, B&Q Railway v. Illinois*, where this Court made crystal clear that "if, in the execution of any power, no matter what it is, the government … finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner." 200 U.S. 561, 593 (1906). The Court reaffirmed that holding in *Loretto*, where it held that a law requiring physical occupation of private property was both "within the State's police power" *and* a physical taking that required compensation. 458 U.S. at 425; *see also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1020-27 (1992).

New Jersey boldly contends that *Chicago, B&Q Railway* stands for the opposite proposition. But when the Court said there was no taking when an interference with the *enjoyment* of property was "only incidental to the legitimate exercise of governmental powers for the public good," 200 U.S. at 593-94, it was emphasizing the degree of the intrusion, not the source of state power. No intrusion could be greater than a confiscatory ban. And far from helping the state, *Mugler v. Kansas* drew a sharp distinction between restrictions on a property's *use* and restrictions on continued *possession*. 123 U.S. 623, 669 (1887). New Jersey's confiscatory ban clearly falls on the wrong side of that line.

New Jersey protests that if it cannot confiscate any arms it deems a "nuisance," then it could not prohibit possession of various deadly items without

paying compensation. *See* BIO.23. But the state confuses the prospective aspects of its law with the retrospective ones. States may confiscate property that was illegal *when it was acquired*, like hazardous chemicals and bombs, without running afoul of the Takings Clause. But whatever expectations citizens may have about how they may *use* property they lawfully acquire, they "do not expect their property, real or personal, to be actually occupied or taken away." *Horne*, 576 U.S. at 361. That is true *a fortiori* as to property that the Constitution affirmatively entitles the people to keep.

III. This Case Is An Excellent Vehicle To Resolve These Exceptionally Important Questions.

The state does not dispute that the questions presented are exceptionally important. Granting review not only would afford the Court the opportunity to restore to the citizens of New Jersey (and the handful of other states with similar restrictions) their constitutional right to keep and bear arms that are commonly possessed for lawful purposes, but would give the Court an opportunity to ensure the lower courts are "properly applying *Heller* and *McDonald*." *NYSRPA I*, 140 S.Ct. at 1527 (Kavanaugh, J., concurring); *see id.* at 1544 (Alito, J., dissenting); *Rogers v. Grewal*, 140 S.Ct. 1865, 1866 (2020) (Thomas, J., dissenting from denial of certiorari). Nor does the state identify any vehicle problem that would frustrate this Court's review of either question presented—because none exists.

At the very least, the Court should hold this petition pending resolution of *NYSRPA II*. The state contends that a hold is not warranted because the

cases do not present the same "issue[s]," BIO.13-14, but one of the principal disputes in both cases is whether the state can outright ban as to the ordinary person what the Second Amendment protects, and, if such laws are not *per se* unconstitutional, then what level of scrutiny applies. The Court's resolution of that dispute may well confirm that the dilutive two-step methodology the Third Circuit applied below cannot stand. The state's effort to analogize to other constitutional areas where the appropriate mode of analysis has been settled for decades ignores the paucity of Second Amendment precedent and that the proper mode of analysis is directly at issue in *NYSRPA II*. Accordingly, while the Court should grant this petition outright, at the very least the Court should hold this case for *NYSRPA II*.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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