No. _____

In the
Supreme Court of the United States

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under recent amendments to New Jersey law, an ordinary law-abiding citizen is prohibited from possessing a firearm magazine capable of holding more than 10 rounds of ammunition, even though such magazines are widely owned and come standard issue for handguns and long guns typically owned for self-defense. New Jersey's new law does not stop at banning the purchase of such magazines prospectively; it applies retrospectively to treat any non-compliant magazine as contraband no matter how long, lawfully, or safely it has been possessed. The law is thus unconstitutional twice over. This Court in *District of Columbia v. Heller* held that the Second Amendment protects arms that are "typically possessed by law-abiding citizens for lawful purposes," 554 U.S. 570, 625 (2008), which concededly describes the magazines here to a T. And dispossessing citizens of lawfully acquired property without just compensation effects an impermissible physical taking. A divided panel of the Third Circuit nevertheless upheld the law, in opinions that generated multiple dissents and escaped en banc review by a narrow 8-6 vote.

The questions presented are:

1. Whether a blanket, retrospective, and confiscatory law prohibiting ordinary law-abiding citizens from possessing magazines in common use violates the Second Amendment.

2. Whether a law dispossessing citizens without compensation of property that was lawfully acquired and long possessed without incident violates the Takings Clause.

PARTIES TO THE PROCEEDING

The Association of New Jersey Rifle & Pistol Clubs, Inc. and Blake Ellman are petitioners here and were plaintiffs-appellants below.

Alexander Dembowski was also a plaintiff-appellant below, but is no longer a party to these proceedings.

Gurbir S. Grewal, in his official capacity as Attorney General of New Jersey; Colonel Patrick J. Callahan, in his official capacity as Superintendent of the New Jersey Division of State Police; and Thomas Williver, in his official capacity as Chief of Police of the Chester Police Department, are respondents here and were defendants-appellees below.

James B. O'Connor, in his official capacity as Chief of Police of the Lyndhurst Police Department, was also a defendant-appellee below, but has since retired and is no longer a party to these proceedings. To the extent that Richard L. Jarvis, in his official capacity as Chief of Police of the Lyndhurst Police Department, was substituted in his official capacity as the successor to former defendant-appellee O'Connor, Jarvis is also no longer a party to these proceedings.

CORPORATE DISCLOSURE STATEMENT

The Association of New Jersey Rifle & Pistol Clubs, Inc., has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

Association of New Jersey Rifle & Pistol Clubs, Inc., et al. v. Attorney General New Jersey, et al., No. 19-3142 (3d Cir.) (opinion issued Sept. 1, 2020; order denying petition for en banc and panel rehearing issued Nov. 25, 2020; mandate issued Dec. 3, 2020).

Association of New Jersey Rifle & Pistol Clubs, Inc., et al. v. Attorney General New Jersey, et al., No. 18-3170 (3d Cir.) (initial opinion affirming district court's order denying preliminary injunction issued Dec. 5, 2018; amended opinion affirming district court's order denying preliminary injunction issued Dec. 6, 2018; order denying petition for en banc and panel rehearing issued Jan. 9, 2019).

Association of New Jersey Rifle & Pistol Clubs, Inc., et al. v. Attorney General of New Jersey, et al., No. 3-18-cv-10507 (D.N.J.) (memorandum and order denying motion for preliminary injunction issued Sept. 28, 2018; memorandum and order granting motion for summary judgment issued July 29, 2019).

There are no additional proceedings in any court that are directly related to this case.

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In *District of Columbia v. Heller*, this Court held that the Second Amendment protects arms that are "typically possessed by law-abiding citizens for lawful purposes." 554 U.S. 570, 625 (2008). Given that *Heller* abrogated longstanding circuit precedent denying that the Second Amendment protected an individual right, one might have expected that states would have readjusted their firearms restrictions to make them *more protective* of the newly reaffirmed individual right. Instead, some states have spent the past decade moving in the opposite direction, imposing ever more draconian restrictions on magazines that come standard with the kind of handguns *Heller* found to be indispensable to exercising the right enshrined in the Constitution. New Jersey's ban is the *non plus ultra* of this constitutionally dubious trend, as New Jersey was not content to prohibit the possession of these standard-issue magazines prospectively, but insisted on *confiscating* such magazines from law-abiding citizens who lawfully acquired them and have lawfully possessed them safely for years, if not decades. That retrospective and confiscatory prohibition is the rare law that manages to offend two guarantees of the Bill of Rights at once, violating both the Second Amendment and the Takings Clause.

The decision below upheld this constitutional dual threat, over the dissent of six judges who voted to hear the matter en banc. Like other courts upholding such laws (albeit few as draconian as this one), the Third Circuit approved New Jersey's confiscatory law by applying a dilutive two-step mode of constitutional analysis that resembles no other form of heightened

scrutiny, but operates almost exactly like the balancing approach expressly rejected by this Court in *Heller*. Indeed, the Third Circuit discarded even the pretense of treating the Second Amendment as a textually enshrined right subject to the same dignity and treatment as "other fundamental rights." App.91 n.28. While candor is often a virtue, that candid admission puts the Third Circuit in square conflict with this Court's explicit admonition that the Second Amendment may not be "singled out for special—and specially unfavorable—treatment." *McDonald v. City of Chicago*, 561 U.S. 742, 779-80 (2010) (plurality opinion). That open disregard of this Court's Second Amendment teaching cannot be sustained.

The decision below also disregards the basic protection of the Takings Clause for good measure. It is well settled that requiring citizens to physically dispossess themselves of their lawfully acquired property is a physical taking that categorically requires just compensation. Yet the decision below managed to dismiss petitioners' takings claim in all of two sentences and a footnote, declaring that no taking occurred because New Jersey chose to give its citizens a menu of options for dispossessing themselves of their property that includes permanently altering it into something else. But this Court has made clear that being forced to effectively destroy one's property just to "keep" it does not cure a takings problem. *See, e.g.*, *Horne v. Dep't of Agric.*, 576 U.S. 350, 361-67 (2015). It is bad enough to hold that the state may prohibit what the Second Amendment protects. To hold that the state may *confiscate* what the Second Amendment protects is downright punitive. This Court should grant review, resolve the intense disagreement among

lower court judges about what arms citizens are entitled to keep for the core lawful purpose of self-defense, and confirm that New Jersey can neither prohibit nor confiscate what the Constitution protects.

OPINIONS BELOW

The Third Circuit's opinion is reported at 974 F.3d 237 and reproduced at App.1-52, and its order denying rehearing is unreported and reproduced at App.53-54. The Third Circuit's opinion at the preliminary-injunction stage is reported at 910 F.3d 106 and reproduced at App.63-117, and its order denying rehearing is unreported and reproduced at App.159-60. The district court's summary-judgment and preliminary-injunction opinions are unreported but available at 2019 WL 3430101 and 2018 WL 4688345 and reproduced at App.55-62 and App.118-58.

JURISDICTION

The Third Circuit issued its panel opinion on September 1, 2020. That judgment became final when the full court denied rehearing by an 8-6 vote on November 25, 2020. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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.

The Takings Clause of the Fifth Amendment provides: "Nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The relevant provisions of New Jersey's law, including portions of N.J. Stat. §§2C:39-1, 2C:39-3, 2C:39-5, 2C:39-17, 2C:39-19, and 2C:39-20, are reproduced at App.161-63.

STATEMENT OF THE CASE

A. Factual Background

1. Magazines capable of holding more than 10 rounds of ammunition are standard-issue for some of the most popular handguns and long guns used for self-defense. They are typically owned by law-abiding citizens for all manner of lawful purposes, including self-defense, sporting, hunting, and pest control. App.78; App.144-45. Indeed, the most popular handgun in America—the Glock 17 pistol—comes standard with a 17-round magazine. *See Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1145 (S.D. Cal. 2019). And the standard-issue weapon for law-enforcement officers in New Jersey and elsewhere—the Glock 19 pistol—comes standard with a 15-round magazine. App.131; *see also, e.g.*, *Murphy v. Guerrero*, 2016 WL 5508998, at *15 (D.N.M.I. Sept. 28, 2016). In the past two decades alone, millions of Americans have lawfully purchased firearms with magazines capable of holding more than 10 rounds, and hundreds of millions of such magazines are currently in circulation. App.142.

Magazines capable of holding more than 10 rounds of ammunition are no modern innovation. They "have been in existence—and owned by American citizens—for centuries." *Duncan v. Becerra*, 970 F.3d 1133, 1147 (9th Cir. 2020), *reh'g en banc granted & panel opinion vacated*, 988 F.3d 1209 (9th Cir. 2021); *see also id.* at 1147-49 (summarizing

historical evidence). They existed "even before our nation's founding." *Id.* at 1147. The first firearm able to "fire more than ten rounds without reloading was invented around 1580." *Id.* "British soldiers were issued magazine-fed repeaters as early as 1658," and numerous guns with magazine capacities well exceeding 10 rounds "pre-dated the American Revolution," some by "nearly a hundred years." *Id.* Those arms include variants of the Pepperbox pistol that could "shoot 18 or 24 shots before reloading individual cylinders," rapid-fire guns like the "famous Puckle Gun," and the "Girandoni air rifle" that "had a 22-round capacity and was famously carried on the Lewis and Clark expedition." *Id.* Then, as now, the "common use" of these arms was "self defense." *Id.* at 1147-49; *see also* David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849 (2015).

Although these magazines enjoy a long historical tradition, there is no similar tradition of government regulation. There were no restrictions on magazine capacity at all at the time of the ratification of the Second Amendment, and the few states that have chosen to regulate magazine capacity did not do so until (at the very earliest) the prohibition era. With the exception of one brief period in time, the federal government has taken the same hands-off approach as the overwhelming majority of states. For nearly all of the nation's history, it did not regulate magazine capacity at all. In 1994, Congress briefly adopted a nationwide *prospective* ban on certain magazines, allowing those who had already lawfully acquired them to keep them. Pub. L. 103-322, 108 Stat. 1796 (1994) (formerly codified at 18 U.S.C. §922(w)). But

Congress allowed the ban to expire 10 years later after a study by the Department of Justice revealed that it had resulted in "no discernable reduction" in gun violence across the country. Christopher S. Koper et al., *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets & Gun Violence, 1994-2003*, Rep. to the Nat'l Inst. of Justice, U.S. Dep't of Justice 96 (2004), *available at* https://bit.ly/3wUdGRE. Under federal law today—and the law of 42 states—law-abiding citizens may lawfully possess magazines capable of holding more than 10 rounds of ammunition.

2. In 1990, New Jersey began to regulate magazine capacity, criminalizing the possession of magazines capable of holding more than 15 rounds of ammunition. *See* N.J. Stat. §2C:39-1(y) (1990). Nearly 30 years later, and after this Court clarified that the Second Amendment protects individuals rights in *Heller*, in 2018, it enacted an even more restrictive law, lowering the permissible magazine capacity to 10 (with very few and limited exceptions) for both handguns and long guns. *See* N.J. Stat. §§2C:39-1(w)(4), 2C:39-1(y), 2C:39-3(j), 2C:39-5(f). In doing so, New Jersey became the eighth state to ban magazines with the capacity to hold more than 10 rounds of ammunition, following California, Connecticut, Hawaii, Maryland, Massachusetts, New York, Vermont, and the District of Columbia. *See* Cal. Penal Code §§16740, 32310, 32390; Conn. Gen. Stat. §53-202w; Haw. Rev. Stat §134-8(c)-(d); Md. Code Ann., Crim. Law §4-305(b); Mass. Gen. Laws ch. 140, §§121, 131M; N.Y. Penal Law §§265.00(23), 265.02(8),

265.36, 265.37; Vt. Stat. tit. 13, §4021; D.C. Code. §§7-2506.01(b), 7-2507.06.[1]

Unlike the now-repealed federal law and the laws of most of the states that restrict magazine capacity, New Jersey's ban is not merely prospective; it is retrospective and confiscatory. Law-abiding citizens who lawfully obtained the now-banned magazines and have lawfully possessed them safely and without incident for decades must dispossess themselves of their magazines by (1) surrendering them to law enforcement, (2) transferring or selling them to someone who can lawfully own them, (3) permanently modifying them to accept 10 rounds or fewer, or (4) rendering them inoperable. N.J. Stat. §2C:39-19(a)-(c). Failure to take one of those steps is a crime, carrying up to a 10-year sentence and $150,000 in fines. *See id.* §§2C:39-3(j), 2C:39-5(f), 2C:43-3(a)(2), 2C:43-3(b)(2), 2C:43-6.

The law admits of only a few, very limited exceptions. A theoretical class of firearms with magazines that are "*incapable* of being modified to accommodate 10 or less rounds" may be retained if registered with the local law-enforcement agency or police station. *Id.* §2C:39-20(a) (emphasis added). And narrow classes of people—certain active-duty members of the armed forces or National Guard, federal law-enforcement officers, members of the state police, and certain state government employees—are

[1] Vermont's law bans the acquisition of magazines that contain more than 10 rounds for a long gun or 15 rounds for a handgun. *See* Vt. Stat. tit. 13, §4021(e)(1)(A)-(B). Additionally, Colorado bans magazines capable of holding more than 15 rounds. Colo. Rev. Stat. §§18-12-301, 18-12-303.

exempt from the ban. *See id.* §2C:39-6(a). The law also provides that certain retired law enforcement officers—but not retired members of our nation's military or anyone else with a similar record and training—may still possess and carry magazines that hold up to 15 rounds. *Id.* §2C:39-17. And to underscore both the breadth of the prohibition and the unseriousness with which New Jersey approaches a fundamental constitutional right, the banned magazines may be used as props for a motion picture, television, or video production. *Id.* §2C:39-18.

3. Petitioner ANJRPC is a not-for-profit membership organization that, for the past eight decades, has represented the interests of tens of thousands of members, many of whom possessed or would like to possess magazines capable of holding more than 10 rounds of ammunition. App.122. Its members include target shooters, hunters, competitors, outdoors people, and other law-abiding firearms owners. Its members possessed or would like to possess the banned magazines for handguns and long guns used for those purposes as well as for self-defense. ANJRPC's mission is to support and defend the People's right to keep and bear arms, including the right of its members and the public to purchase and possess firearms and standard-issue magazines.

Petitioner Blake Ellman is a law-abiding citizen, resident of New Jersey, and member of ANJRPC. He is a firearms instructor, range safety officer, armorer, and competitive shooter. App.122. He is not a retired law-enforcement officer, and he does not fall within any of the other limited exceptions to New Jersey's ban. But for New Jersey's ban, Ellman would once

again acquire, own, and keep magazines capable of holding more than 10 rounds of ammunition. Because of the law, Ellman was required to permanently modify, render inoperable, transfer, or surrender to the police the magazines he previously lawfully acquired and lawfully possessed for decades without incident.

B. Procedural History

1. Petitioners sued New Jersey seeking to declare unlawful and preliminarily and permanently enjoin enforcement of its retrospective and confiscatory ban, alleging as relevant here that the law violates the Second Amendment and the Takings Clause. Although the district court recognized in the preliminary-injunction proceedings that the banned magazines are "in common use" and therefore "entitled to Second Amendment protection," it nevertheless concluded that petitioners were not likely to succeed on the merits of their Second Amendment claim. App.143-45. And the court rejected petitioners' takings claim on the theory that New Jersey's ban does not actually dispossess any citizens of a banned magazine because the law allows the owner to keep it if he permanently alters it to hold only 10 or fewer rounds. App.156-57.[2]

A divided panel of the Third Circuit affirmed. App.63. Although the appeal arose from the denial of a preliminary injunction, the panel bypassed the

[2] The district court also rejected petitioners' claim that the exception for retired law enforcement officers—but not others with similar skills, experience, and training like former members of the military—violated the Equal Protection Clause. App.153.

likelihood-of-success inquiry and proceeded to the merits of petitioners' claims. On the Second Amendment, the majority applied a "two-step framework" to assess the law's constitutionality, first asking whether the law burdens conduct protected by the Second Amendment, and, if it does, then evaluating the law under "some form of means-end scrutiny." App.77.

At the first step, the majority acknowledged that the banned magazines are common, observing that "millions" have been lawfully sold; that they are used for a number of lawful purposes, including self-defense and sporting; and that there is "no longstanding history" of regulating them. App.78. Nonetheless, the panel chose only to "assume without deciding" that magazines capable of holding more than 10 rounds are "typically possessed by law-abiding citizens for lawful purposes" and thus "entitled to Second Amendment protection." App.78-79 (citing *Heller*, 554 U.S. at 625).

At step two, the majority considered whether the law burdens the "core" of the Second Amendment, which it narrowly (and oxymoronically) described as to "protect[] the right of law-abiding citizens to possess non-dangerous weapons for self-defense in the home." App.79. Notwithstanding that the banned magazines are concededly common and used for self-defense in the home, the majority reasoned that the law does not burden the "core" of the Second Amendment's protection. In the panel's view, because the law does not ban *all* magazines, is not a categorical bar on a class of weapons, does not completely disarm citizens, and does not render the magazines totally inoperable, it does not implicate the "core" of the right. App.80-

82. The panel also posited that magazines capable of holding more than 10 rounds "are not well-suited for self-defense." App.81. Finally, the panel reasoned that because not *all* firearms kept at home for self-defense are deserving of protection, the fact that millions of the banned magazines are possessed for the lawful purpose of self-defense is not enough to bring them within the "core" of the Second Amendment's protections. App.82. The panel thus held that the law is subject to intermediate scrutiny. *Id.*

The court openly acknowledged that the intermediate scrutiny it applied was different from the intermediate scrutiny it would find appropriate for cases involving "other fundamental rights." App.91 n.28. Although it "consulted" this Court's First Amendment framework, the court reasoned that the Second Amendment is "distinguish[able]" because of "the risk inherent in firearms and other weapons." *Id.* Applying its special "Second Amendment" version of intermediate scrutiny, the panel upheld New Jersey's law as a "reasonable fit[]" for the state's interest in promoting public safety. App.84. The court acknowledged that New Jersey previously had restricted magazine capacities to 15 rounds, yet never explained how the state satisfied its burden to show that the incremental reduction from 15 to 10 would advance its interests while not unnecessarily burdening lawful conduct. Nor did the court explain how confiscating the magazines from citizens with a proven track record of lawfully possessing them safely was remotely tailored to avoid burdening more constitutionally protected conduct than necessary.

Turning briefly to the Takings Clause, the majority dedicated all of two sentences and a footnote to rejecting petitioners' claim that the retrospective and confiscatory nature of the law effects a taking that requires just compensation. The court reasoned that there is no taking because, as an alternative to surrendering the magazines to law enforcement, the law allows citizens to sell them to a private party who is not prohibited from possessing them, permanently modify them, or render them inoperable. App.94-95. The majority never explained how requiring a citizen to either get rid of lawfully obtained personal property or convert it to something else is not a physical taking. The majority also observed that the law does not effect a taking because it is a valid exercise of the state's police power, although it maintained that it did "not rest on this ground" for its holding. App.94 n.32. Finally, the majority concluded that the law did not effect a regulatory taking, reasoning that *the firearm* will retain its "functionality" with a smaller-capacity magazine. App.95.

Judge Bibas dissented. He would have held that the law burdens the core Second Amendment right to self-defense because "[p]eople commonly possess large magazines to defend themselves and their families in their homes." App.107. In his view, under *Heller* and this Court's precedents involving other constitutional rights, that should have been the "end of [the] analysis." *Id.* He went on to explain why the law would not satisfy the version of intermediate scrutiny set forth in this Court's precedent, criticizing the majority for upholding the law based on "armchair reasoning" rather than actual evidence. App.99-100, 107-16. In his view, the state fell woefully short of its

burden to provide substantial evidence of its claimed link between magazines that hold more than 10 (but fewer than 16) rounds and mass shootings. App.109-16. The majority's "logic," he lamented, would "equally justify a one-round magazine limit." App.112.

The full court declined to rehear the case en banc, over the vote of Judge Hardiman, who would have granted the petition. App.159-60.

2. Back in the district court, the parties filed cross-motions for summary judgment, which the district court held were controlled by the Third Circuit's preliminary-injunction opinion. App.61. On appeal, a different panel of the Third Circuit affirmed, over Judge Matey's dissent. The majority held that the prior panel's opinion was "binding" because it "directly addressed the merits of the constitutionality of the Act, holding that the Act did not violate the Second, Fifth, or Fourteenth Amendments." *See* App.2. Judge Matey disagreed, App.19-25, and would have reversed and remanded for the state to try to meet its burden of providing evidence that the law is "narrowly tailored to advance the State's interests," App.25-52.

Petitioners filed a petition for rehearing en banc, which the Third Circuit denied by a closely divided 8-6 vote. App.53-54. Judges Jordan, Hardiman, Bibas, Porter, Matey, and Phipps would have granted rehearing. App.54.

REASONS FOR GRANTING THE PETITION

New Jersey's retrospective and confiscatory ban on magazines capable of holding more than 10 rounds of ammunition is unconstitutional twice over. The

Third Circuit acknowledged that such magazines are typically possessed by law-abiding citizens for lawful purposes. Indeed, it assumed that the magazines *are* protected by the Second Amendment, but nonetheless concluded that they could be not only banned prospectively, but *confiscated*, without running afoul of the Second Amendment. That "logic" aptly reflects the seemingly unlimited capacity of courts to give lip service to the Second Amendment while denying it any real-world effect, but it is incoherent as a matter of legal reasoning. The state may not prohibit what the Constitution protects. And it certainly may not do so retrospectively by confiscating lawfully acquired and constitutionally protected property that has been possessed for years—in some cases decades—without incident. That the decision below upheld such a law is proof positive of the pressing need for the Court's intervention.

As the dissenting judges have made clear, New Jersey's overbroad and confiscatory law cannot withstand any meaningful constitutional scrutiny. Flat bans are the very model of overbreadth and thus fail any meaningful scrutiny. And confiscatory efforts to wrest out of the hands of law-abiding citizens constitutionally protected property that has been lawfully obtained and safely used for years goes beyond mere overbreadth to ignore the basic relationship between the government and the governed. We have no constitutional tradition in this country of the government simply declaring items lawfully possessed for decades to be contraband. Even when the government has tried to limit less commonly owned firearms, it has done so only prospectively out

of respect for the Second Amendment, the Fifth Amendment, and the governed.

This radically overbroad and confiscatory law could not be sustained based on anything even resembling heightened scrutiny. The Third Circuit all but acknowledged as much when it openly held that restrictions on Second Amendment rights should not be subjected to the same scrutiny as restrictions on "other fundamental rights." App.91 n.28. That statement cannot be reconciled with this Court's decision in *McDonald* and makes this case an ideal vehicle for the Court to intervene and ensure that courts are "properly applying *Heller* and *McDonald*." *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S.Ct. 1525, 1527 (2020) (Kavanaugh, J., concurring).

Indeed, the extreme confiscatory approach New Jersey has taken enables this Court to confirm both the commonsense principle that the Second Amendment actually protects the people's right to keep the arms that fall within in its ambit, and the equally commonsense principle that the rest of the Constitution's protections do not go out the window just because guns are involved. Both of those things should go without saying. But unless and until this Court reiterates them, lower courts will continue to chip away at the individual and fundamental right recognized by *Heller* until there is nothing left.

I. This Court Should Resolve The Protracted Disagreement Over Whether States May Ban Arms Protected By The Second Amendment.

1. *Heller* made abundantly clear that the Second Amendment protects arms that are "typically

possessed by law-abiding citizens for lawful purposes." 554 U.S. at 624-25. It "confers an individual right" that belongs to "the people"—a term that "unambiguously refers to all members of the political community," except those subject to certain "longstanding prohibitions" on the exercise of the right, such as "felons and the mentally ill." *Id.* at 580, 622, 626-27. In other words, it belongs to all "law-abiding, responsible citizens." *Id.* at 635. Under that clear precedent, the only relevant questions when assessing a flat possession prohibition are whether what is banned qualifies as an "arm" and, if so, whether it is an arm "typically possessed by law-abiding citizens for lawful purposes." *Id.* at 625. If the answer to both of those questions is "yes," then the ban is unlawful, because a state cannot flatly prohibit what the Constitution protects.

Applying that test, it is plain that New Jersey's ban—as well as the similar bans in seven other states and the District of Columbia—prohibits arms that are protected by the Second Amendment. Magazines are protectable "arms," as the right to keep and bear arms plainly includes the right to keep and bear components such as ammunition and magazines that are necessary for the firearm to operate. *See United States v. Miller*, 307 U.S. 174, 180 (1939) (citing 17th-century commentary recognizing that "[t]he possession of arms also implied the possession of ammunition"); *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) ("without bullets, the right to bear arms would be meaningless"). And magazines capable of holding more than 10 rounds of ammunition are typically possessed by law-abiding citizens for lawful purposes, including for self-

defense. The most popular handgun in America comes standard with a magazine that holds more than 10 rounds, as does the most common pistol carried by law enforcement. *See supra* p.4. Millions of Americans have purchased magazines with that capacity for handguns and long guns, and hundreds of millions are in circulation. *Id.* In short, there can be no serious dispute that magazines capable of holding more than 10 rounds are typically possessed by law-abiding citizens for lawful purposes, as every court to consider that question has recognized.

That should be the end of the matter. *Heller* made clear that flat bans on protected arms cannot be sustained under the Second Amendment. That holding followed a long line of cases making clear that the government may not flatly ban constitutionally protected items or activities, even when there is evidence that they could lead to abuses. *See, e.g.*, *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002) (government cannot ban virtual child pornography on the ground that it might lead to child abuse because "[t]he prospect of crime" "does not justify laws suppressing protected speech"); *Edenfield v. Fane*, 507 U.S. 761, 770-71, 773 (1993) (state cannot impose a "flat ban" on solicitations by public accountants on the ground that solicitations "create[] the dangers of fraud, overreaching, or compromised independence"). That extreme degree of prophylaxis is simply incompatible with the decision to give something constitutional protection. And flat bans violate the basic principle that "a free society prefers to punish the few who abuse [their] rights … after they break the law than to throttle them and all others beforehand." *Se. Promotions Ltd. v. Conrad*, 420 U.S.

546, 559 (1975); *accord Vincenty v. Bloomberg*, 476 F.3d 74, 84-85 (2d Cir. 2007); *Robb v. Hungerbeeler*, 370 F.3d 735, 743 (8th Cir. 2004).

2. The decision below nonetheless upheld New Jersey's ban in all its overbroad, retrospective, and confiscatory glory. While other courts have reached similar conclusions (though generally in the context of less draconian provisions), there is deep division on this issue among lower-court jurists, as exemplified by the dissenting opinions of Judges Bibas and Matey and the narrow 8-6 margin by which the panel's decision escaped rehearing en banc. As Judge Bibas explained, "[p]eople commonly possess large magazines to defend themselves and their families in their home," and that should be the "end of [the] analysis" under *Heller*. App.107.

Judge Bibas is far from alone in that view. A panel of the Ninth Circuit recently reached the same conclusion—only to have its decision promptly vacated by the en banc court. *Duncan*, 970 F.3d 1133, *reh'g en banc granted & panel opinion vacated*, 988 F.3d 1209 (9th Cir. 2021). As Judge Lee, joined by Judge Callahan, explained in that now-vacated opinion, because magazines capable of holding more than 10 rounds of ammunition "are commonly owned and typically used for lawful purposes," a "near-categorical ban" like New Jersey's infringes "the fundamental right of self-defense." *Id.* at 1146, 1169. The same thing happened in the Fourth Circuit: A panel held that Maryland should at least have to try to justify its 10-round magazine limit under strict scrutiny—and promptly had its decision reversed en banc, over the dissent of Judges Traxler, Niemeyer, Shedd, and Agee.

Kolbe v. Hogan, 849 F.3d 114, 160 (4th Cir. 2017) (en banc) (Traxler, J., dissenting); *see also Kolbe v. Hogan*, 813 F.3d 160 (4th Cir. 2016) (vacated panel opinion).

And there is more. Judge Manion in the Seventh Circuit would have invalidated a local ordinance banning magazines with the capacity to hold more than 10 rounds of ammunition, reasoning that "a total prohibition of a class of weapons … used to defend [the plaintiff's] home and family" deserves "the highest level of scrutiny" and cannot survive. *Friedman v. City of Highland Park*, 784 F.3d 406, 418 (7th Cir. 2015) (Manion, J., dissenting). In his view, an "outright … ban[]" is the "bluntest of instruments," so a prohibition on citizens acquiring or possessing them in their homes is "unconstitutional." *Id.* at 419. Many of these dissents drew on the views expressed by then-Judge Kavanaugh, who, when dissenting from a decision upholding the District of Columbia's ban on semi-automatic rifles and magazines capable of holding more than 10 rounds, concluded that because the semi-automatic rifles are "in common use by law-abiding citizens for self-defense in the home, hunting, and other lawful uses," they are "constitutionally protected" and thus "D.C.'s ban on them is unconstitutional." *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1269-70 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

3. As those opinions reflect, the case for holding these bans unconstitutional is straightforward: States may not flatly prohibit what the Constitution protects. The case for upholding them, by contrast, has proven anything but straightforward. Indeed, courts cannot even agree on how to determine which

arms the Second Amendment protects, let alone identify any theory consistent with either the text, history, and tradition of the Second Amendment or this Court's broader constitutional jurisprudence that would justify their holdings that states may ban standard-issue magazines even if they *are* entitled to constitutional protection.

Most courts, including the decision below, have employed some version of the malleable Second Amendment "two-step": deciding (or better yet only assuming) that the banned magazines are protected, only to "balance" that protection away. *See* App.77-78; *Worman v. Healey*, 922 F.3d 26, 37 (1st Cir. 2019); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo* (*NYSRPA*), 804 F.3d 242, 254 (2d Cir. 2015); *Friedman*, 784 F.3d at 414-15; *Heller II*, 670 F.3d at 1252-53. Those courts largely agreed (as they must) that magazines are protectable "arms." *See* App.76; *Worman*, 922 F.3d at 37; *NYSRPA*, 804 F.3d at 260; *Friedman*, 784 F.3d at 415; *Heller II*, 670 F.3d at 1261. Yet while they could not dispute that millions of such magazines are owned by law-abiding citizens for lawful purposes, they nonetheless were willing only to "assume without deciding" that they are protected by the Second Amendment. *See* App.79 ("assum[ing] without deciding that LCM's are typically possessed by law-abiding citizens for lawful purposes and that they are entitled to Second Amendment protection"); *Worman*, 922 F.3d at 30 ("We assume, without deciding, that the proscribed weapons have some degree of protection under the Second Amendment."); *NYSRPA*, 804 F.3d at 257 ("[W]e proceed on the assumption that these laws ban weapons protected by

the Second Amendment."); *Heller II*, 670 F.3d at 1261 ("assuming" Second Amendment is implicated).

That begrudging assumption quickly proves irrelevant, however, as courts systematically deprive the magazines of any meaningful protection at the second phase of the Second Amendment two-step. The decision below is illustrative. To arrive at its decision to apply intermediate scrutiny, the panel reasoned that New Jersey's law "does not categorically ban a class of *firearms*," but instead applies "only [to] a subset of magazines that are over a certain capacity." App.80 (emphasis added). In its view, unless a law "effectively disarm[s]" the citizenry, such as by rendering handguns "incapable of operating as intended," it does not implicate the "core of the Second Amendment." App.81-82. The panel thus joined other circuits in "effectively cabin[ing] *Heller*'s core to bans on handguns," which is akin to "cabining [*United States v. Virginia*, 518 U.S. 515 (1996)] to military institutes." App.107 (Bibas, J., dissenting). That is exactly the kind of (il)logic that *Heller* rejected, declaring it "no answer" that the District of Columbia left its citizenry free to possess "other firearms." 554 U.S. at 629.

4. The decision below is also the product of a version of "heightened scrutiny" that is "heightened" in name only, and barely constitutes "scrutiny." This Court has made clear time and again that intermediate scrutiny requires an examination of whether the law is "narrowly tailored to serve a significant governmental interest." *Packingham v. North Carolina*, 137 S.Ct. 1730, 1736 (2017); *see also McCullen v. Coakley*, 573 U.S. 464, 486 (2014);

McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 218 (2014). The state is entitled to no deference when assessing the fit between its purported interests and the means selected to advance them. *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 214 (1997). Rather, the state must prove that those means *in fact* do not burden the right "substantially more" than "necessary to further [its important] interest." *Id.*

The decision below did not even pretend to apply that level of scrutiny to New Jersey's law. It held that the Second Amendment merits its own special (and especially lax) variant of "intermediate scrutiny" because of the "risk inherent in firearms and other weapons." App.91 n.28. Thus, while the court "consult[ed]" this Court's cases on the First Amendment, it decided that the Second Amendment is in a (second) class of its own, and that laws implicating it are deserving of less scrutiny than any "other fundamental right." *Id.* That felt need to create a special second-class variant of intermediate scrutiny for the Second Amendment—and the Second Amendment alone—just confirms the obvious: Under the normal rules, New Jersey's (and other states') laws plainly could not survive. A flat ban on possession is, after all, the polar opposite of tailoring. The state painted with the broadest strokes possible, simply obliterating the right to acquire, keep, and use magazines typically and commonly possessed for self-defense. That is the model of overbreadth, as it involves no tailoring at all.

That the Third Circuit abdicated its role to assess tailoring is particularly clear given that the court was confronted with a law that not only incrementally

reduced permissible magazine capacity from 15 to 10, but retrospectively confiscates lawfully obtained magazines. At the very least, that should have required the state to explain both why 15 versus 10 makes a meaningful difference for purposes of its asserted interests, and why it needed to remove magazines from the hands of from law-abiding citizens who have lawfully owned them for years, if not decades, without incident. Yet when it came to apply intermediate scrutiny, the Third Circuit ignored those particularly draconian aspects of the law entirely, declaring that the ban "does not burden more conduct than reasonably necessary" because it "does not disarm an individual." App.89. In other words, the same logic that purportedly warranted *application* of intermediate scrutiny made the outcome of that scrutiny a foregone conclusion, even as to the state's effort to wrest lawfully acquired magazines out of the hands of law-abiding citizens.

That circular reasoning proves the wisdom of *Heller*'s rejection of the kind of "interest-balancing" that has taken hold, 554 U.S. at 634, as court after court has used the "two-step" approach to chip away at the Second Amendment's protection. This rights-denying "two-step" would not be tolerated in any other context, as the Third Circuit candidly acknowledged. Commercial speech may lie outside the core protection of the First Amendment, but no court would uphold a commercial-speech restriction simply because it reduces the amount of commercial speech. Because such circular reasoning denies the activity in question the constitutional protection that warrants heightened scrutiny in the first place, it is utterly alien to this Court's decisions. To deem firearms

restrictions constitutional not in spite of but because of the burdens they impose on Second Amendment rights is just another variation on the theme that the fundamental right to keep and bear arms should be "singled out for special—and specially unfavorable—treatment." *McDonald*, 561 U.S. 778-79 (plurality opinion). The decision below cannot be reconciled with that central lesson of *McDonald*.

It is time for the Court to put an end to this pervasive and disturbing trend. The decision below provides a compelling vehicle for ensuring that lower courts are "properly applying *Heller* and *McDonald*," *N.Y. State Rifle & Pistol*, 140 S.Ct. at 1527 (Kavanaugh, J., concurring), as it comes to this Court after final judgment, with a reasoned dissent, after extensive percolation in the lower courts, and with an acknowledged effort to single out the Second Amendment for specially disfavored treatment. This Court should grant certiorari and invalidate New Jersey's and other states' extraordinary efforts to prevent law-abiding citizens from possessing arms protected by the Second Amendment.

II. This Court Should Decide Whether Law-Abiding Citizens May Be Compelled To Dispossess Themselves Of Lawfully Acquired Property Without Just Compensation.

New Jersey's decision not only to prospectively ban magazines capable of holding more than 10 rounds of ammunition, but also to confiscate them from law-abiding citizens who lawfully acquired them before the ban was enacted, is one of the rare government initiatives that violates not one, but two

provisions of the Bill of Rights. The panel's rejection of petitioners' takings claim is as profoundly wrong as it is profoundly important.

The Takings Clause provides that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V; *see Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897) (applying Takings Clause to the states). A physical taking occurs whenever the government "dispossess[es] the owner" of property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 324 n.19 (2002). That is true of personal property just as real property; the "categorical duty" imposed by the Takings Clause applies "when [the government] takes your car, just as when it takes your home." *Horne*, 576 U.S. at 358. New Jersey's confiscatory ban plainly runs afoul of those settled principles: It forces citizens to dispossess themselves of their lawfully acquired property with no compensation from the state.

The panel dismissed petitioners' takings claim in a mere two sentences, finding it sufficient that the law gives citizens a menu of "options" for *how* to dispossess themselves of their property with no compensation from the state. App.94-95. But the panel missed the forest for the trees: None of those "options" provides a viable way for ordinary, law-abiding citizens to *keep* their constitutionally protected property. There can be no question that two of the means of compliance—surrendering the magazine to law enforcement or transferring it to someone else, N.J. Stat. §2C:39-

19(a), (c)—require physical dispossession. The owner must literally hand over his property. *Kelo v. City of New London*, 545 U.S. 469, 473-75 (2005) (sale to private entity). And the other two options—to permanently alter the magazine to accept fewer than 10 rounds or to render the magazine permanently "inoperable," N.J. Stat. §2C:39-19(b)—fare no better, as this Court's precedents have made abundantly clear. In *Horne*, it made no difference that the raisin growers could have avoided the taking by "plant[ing] different crops" or selling "their raisin-variety grapes as table grapes or for use in juice or wine." 576 U.S. at 365. And in *Loretto*, it made no difference that the property owner could have avoided the taking by converting her building into something other than an apartment complex. 458 U.S. at 439 n.17. As this Court has repeatedly admonished, "property rights 'cannot be so easily manipulated.'" *Horne*, 576 U.S. at 365 (quoting *Loretto*, 458 U.S. at 439 n.17).[3]

In a footnote, the panel purported to distinguish *Horne* on the ground that the government took the raisins at issue for the "government use" of "sell[ing them] in noncompetitive markets." App.94 n.32. In

[3] At a minimum, forcing citizens to permanently modify their property or render it inoperable places an unconstitutional condition on the possession of their property, which itself is a taking. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 605 (2013). And it is no answer that the statute provides that if a banned magazine is "incapable" of being modified then the owner can register and keep it. N.J. Stat. §2C:39-20(a). That an owner of such a theoretical magazine (which may not even exist) may not have a valid takings claim does nothing to undermine the property rights of everyone who lawfully acquired now-banned magazines that are not covered by that exception.

fact, the government in *Horne* was free to "dispose of" the raisins "in its discretion," including by simply giving them away to third parties. *Horne*, 576 U.S. at 355. The panel did not explain how confiscating property so that the government may give it to someone else is a taking, but ordering the owner to give it away directly is not. Nor could it.

The panel also toyed in that same footnote with an even more dangerous theory: that New Jersey's law is "not a taking at all" because it was passed pursuant to the state's "police power." App.94 n.32. That argument is a nonstarter. The force of the Takings Clause does not vary with the source of power the state invokes. While identifying an enumerated power that justifies government action is often a critical matter for the *federal* government, as it is a government of enumerated powers, the states have plenary authority restricted only by the constitutional protections incorporated against the states. The Takings Clause is one of those protections. Indeed, the Takings Clause assumes that the government has the power to take property pursuant to eminent domain, but insists that it can only do so if (unlike here) it ensures just compensation. Thus, labeling the law an exercise of the police power simply means New Jersey had the power to enact the law (which, in that sense, no one doubts), but says nothing about whether the law complies with the Takings Clause (or the Second Amendment).

Indeed, this Court has squarely rejected any police-power exception to the Takings Clause for more than a century. In *Chicago, Burlington & Quincy Railway Co. v. Illinois*, the 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) (emphasis added). And the Court reaffirmed that holding in *Loretto*, where it held that the state law "dispossess[ing]" an owner of property amounts to a physical "taking" even if the law was "within the State's police power." *Loretto*, 458 U.S. at 425, 435 n.12; *see also Williamson Cnty. Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985) (distinguishing between physical taking and exercise of police power). This Court has also held that a law enacted pursuant to a state's "police power" is not immune from scrutiny even under the *regulatory* takings doctrine. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1020-27 (1992). As the Court explained there, the "legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated." *Id.* at 1026. The same is true *a fortiori* for the categorical rule that the government must compensate for physical takings.

To be sure, *Lucas* recognized that personal property is subject to "an implied limitation" that allows a state to regulate in a way that may deprive citizens' property of *value*. *Id.* at 1027. But the "implied limitation" to which the Court referred was "the State's traditionally high degree of control over *commercial* dealings." *Id.* (emphasis added). Thus, the Court observed that to the extent "property's only economically productive use is sale or manufacture for sale," restricting sale might "render [the] property

economically worthless." *Id.* at 1028. But *Lucas* certainly never suggested that personal property is held subject to the "implied limitation" that the state may order its owner to dispossess himself of the property entirely or physically alter it into something else. And *Loretto* and *Horne* say precisely the opposite.

Moreover, *Lucas* emphasized the importance of inquiring whether a property owner was able to use his property in a particular manner *before* the state attempted to restrict it. *See id.* Here, the state seeks to dispossess its citizens of magazines that they lawfully obtained *before* the state decided to prohibit them. Of course a citizen who *unlawfully* obtained such a magazine after the ban was already in place could not object (at least under the Takings Clause) to having it confiscated. But just as "confiscatory regulations" of real property "cannot be newly legislated or decreed (without compensation)," *id.* at 1029, nor can confiscations of personal property be decreed after the fact. Whatever expectations citizens may have about property regulations, they "do not expect their property, real or personal, to be actually occupied or taken away." *Horne*, 576 U.S. at 361.

The takings analysis thus should have been straightforward: Confiscatory takings of lawfully acquired property require just compensation, which New Jersey does not purport to furnish. But it should have been even more straightforward given that the Third Circuit purported to assume that it was dealing with property that is *protected by the Constitution*. It is bad enough to hold that the state may flatly prohibit citizens from possessing what the Constitution

protects. To hold that the state may *confiscate* what the Constitution protects without even providing just compensation adds constitutional insult to constitutional injury. Even if that result could somehow be reconciled with the Second Amendment, there is no Second Amendment exception to the Takings Clause.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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