No. 26-452

In the
Supreme Court of the United States

JENNIFER DAVENPORT, in her official capacity as Attorney General of New Jersey, et al.,

Petitioners,

v.

ASSOCIATION OF NEW JERSEY RIFLE AND PISTOL CLUBS, 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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November 4, 2026

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QUESTION PRESENTED

1. Whether the Second and Fourteenth Amendments guarantee the right to possess semiautomatic rifles, including AR-15-platform rifles.

2. Whether the Second and Fourteenth Amendments guarantee the right to possess the ammunition feeding devices that come standard with semiautomatic rifles, including AR-15-platform rifles.

CORPORATE DISCLOSURE STATEMENT

Respondent the Association of New Jersey Rifle & Pistol Clubs, Inc. ("ANJRPC") has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

Respondent Firearms Policy Coalition, Inc. also has no parent corporation, and no publicly held company owns 10 percent or more of its stock.

The remaining respondents, Blake Ellman, Thomas Rogers, Marc Weinberg, Mark Cheeseman, and Timothy Connelly, are all individuals.

TABLE OF CONTENTS

QUESTION PRESENTED i
CORPORATE DISCLOSURE STATEMENT ii
TABLE OF AUTHORITIES iv
INTRODUCTION 1
STATEMENT OF THE CASE 1
A. Legal Background 1
B. Procedural History 4
REASONS FOR HOLDING THE PETITION 12
CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Bruck,
142 S.Ct. 2894 (2022) 6

Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.,
974 F.3d 237 (3d Cir. 2020) 5

Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Grewal,
2019 WL 3430101 (D.N.J. July 29, 2019) 5

Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.,
910 F.3d 106 (3d Cir. 2018) 5, 10

Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Grewal,
2018 WL 4688345 (D.N.J. Sept. 28, 2018) 4

District of Columbia v. Heller,
554 U.S. 570 (2008) 5, 7, 8, 9, 11

Drake v. Filko,
724 F.3d 426 (3d Cir. 2013) 4

Duncan v. Bonta,
No. 25-198 (U.S. filed Aug. 15, 2025) 13

Gator's Custom Guns v. Washington,
No. 25-153 (U.S. filed Aug. 6, 2025) 13

Grant v. Higgins,
No. 25-566 (U.S. filed Nov. 7, 2025) 1, 12

N.Y. State Rifle & Pistol Ass'n v. Bruen,
597 U.S. 1 (2022) 6

NAGR v. Lamont,
No. 25-421 (U.S. filed Oct. 3, 2025) 13

Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos,
605 U.S. 280 (2025) 13

Stutson v. United States,
516 U.S. 163 (1996) 12

United States v. Rahimi,
602 U.S. 680 (2024) 9

Viramontes v. Cook Cnty.,
No. 25-238 (U.S. filed Aug. 27, 2025)) 1, 12

Statutes

N.J.S. §2C:39-1(w)(1) 2

N.J.S. §2C:39-1(w)(2) 2

N.J.S. §2C:39-1(w)(3)-(4) 2

N.J.S. §2C:39-1(y) 4

N.J.S. §2C:39-5(f) 1, 2

N.J.S. §2C:39-5(h) 2

N.J.S. §2C:39-5(*i*) 2

N.J.S. §2C:39-19 4

N.J.S. §2C:43-3(a)(2) 2

N.J.S. §2C:43-6(a)(2) 2

1990 N.J. Laws 217 4

Other Authorities

Att'y Gen. Peter Verniero, *Guidelines Regarding the "Substantially Identical" Provision in the State's Assault Firearms Laws* (Aug. 19, 1996),
perma.cc/67VX-BBXR 3, 4

INTRODUCTION

The en banc Third Circuit correctly held that New Jersey's ban on AR-15-platform and similar semiautomatic rifles violates the Second Amendment, as does New Jersey's ban on the ammunition feeding devices that come standard with them (and with most modern semiautomatic handguns as well). As the state notes, however, this Court will soon address whether "the Second and Fourteenth Amendments guarantee the right to possess AR-15 platform and similar semiautomatic rifles" in *Viramontes v. Cook County*, No. 25-238 and *Grant v. Higgins*, No. 25-566. And while that case does not directly involve feeding devices, this Court's decision may provide guidance on that aspect of New Jersey's ban as well. This Court appears to have already recognized as much, as it is presently holding other petitions that present challenges to bans on ubiquitous magazines that can hold more than ten rounds of ammunition. Respondents accordingly agree with the state that holding this petition pending the disposition of *Viramontes* and *Grant* would be prudent. To the extent this Court decides those cases consistent with how the en banc Third Circuit decided this case, then the Court can and should deny the petition at that time.

STATEMENT OF THE CASE

A. Legal Background

1. Enacted in 1990, New Jersey's Assault Firearms Law makes it a crime to possess an "assault firearm" in the Garden State. N.J.S. §2C:39-5(f). The statute defines "assault firearm" to include dozens of rifles, pistols, and shotguns listed by make and model-

type, *id.* §2C:39-1(w)(1), as well as "[a]ny firearm … which is substantially identical to any of the firearms listed [there]," *id.* §2C:39-1(w)(2). It also bans "semi-automatic rifle[s] with a fixed magazine capacity exceeding 10 rounds" (unless they fire only .22 caliber rimfire ammunition) and "semi-automatic shotgun[s] with either a magazine capacity exceeding six rounds, a pistol grip, or a folding stock." *Id.* §2C:39-1(w)(3)-(4); *see* Pet.App.5a-6a.[1] Knowingly possessing a banned firearm "is a crime" punishable by up to ten years in prison and a $150,000 fine. Pet.App.4a-5a; *see* N.J.S. §2C:39-5(f), (h), (*i*); *id.* §§2C:43-3(a)(2), 43-6(a)(2).[2]

In 1996, New Jersey's Attorney General promulgated guidelines purporting to clarify what makes a firearm "substantially identical" to an "assault firearm" for purposes of §1(w)(2). *See* Att'y Gen. Peter Verniero, *Guidelines Regarding the "Substantially Identical" Provision in the State's Assault Firearms Laws* (Aug. 19, 1996),

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[1] Any "part or combination of parts designed or intended to convert a firearm into an assault firearm[,] or any combination of parts from which an assault firearm may be readily assembled if those parts are in the possession or under the control of the same person," also constitutes an "assault firearm." N.J.S. §2C:39-1(w)(5). And in 2017, the legislature amended the statute to outlaw any "firearm with a bump stock attached." 2017 N.J. Laws ch.323 (codified in N.J.S. §2C:39-1(w)(6)); *see* N.J.S. §2C:39-1(ee) (defining "bump stock").

[2] Theoretically, a New Jerseyan could lawfully possess an "assault firearm" if a judge grants her a license to do so under N.J.S. §2C:58-5(b). *See* N.J.S. §2C:39-5(f). But as far as respondents are aware, "no one in the State has ever received a license." Pet.App.6a.

perma.cc/67VX-BBXR. Under the Guidelines, a firearm's features, not its model-type designation, determine whether it is lawful.

A "semi-automatic rifle" is "considered to be 'substantially identical' … to a named assault weapon," and thus banned, if it "has the ability to accept a detachable magazine and has at least [two] of the following: 1. a folding or telescoping stock; 2. a pistol grip that protrudes conspicuously beneath the action of the weapon; 3. a bayonet mount; 4. a flash suppressor or threaded barrel designed to accommodate a flash suppressor; and 5. a grenade launcher." *Id.* at 2. Many of the most popular semiautomatic rifles on the market today satisfy that definition.

A "semi-automatic pistol" is "considered to be 'substantially identical' … to a named assault weapon," and thus banned, if it "has an ability to accept a detachable magazine and has at least [two] of the following: 1. an ammunition magazine that attaches to the pistol outside of the pistol grip; 2. a threaded barrel capable of accepting a barrel extender, flash suppressor, forward handgrip, or silencer; 3. a shroud that is attached to, or partially or completely encircles, the barrel and that permits the shooter to hold the firearm with the nontrigger hand without being burned; 4. manufactured weight of 50 ounces or more when … unloaded; and 5. a semi-automatic version of an automatic firearm." *Id.* at 2-3. Many popular pistols today have at least two of those features.

Finally, "a semi-automatic shotgun" is "substantially identical" to a named firearm, and thus

banned, if it "has at least [two] of the following: 1. a folding or telescoping stock; 2. a pistol grip that protrudes conspicuously beneath the action of the weapon; 3. a fixed magazine capacity in excess of 5 rounds; and 4. an ability to accept a detachable magazine." *Id.* at 3. Again, many popular shotguns today have at least two of those features.

2. Alongside the Assault Firearms Law, in 1990 New Jersey became the first state in the Nation to outlaw the possession of so-called "large capacity magazines." *See* 1990 N.J. Laws 217, 235 (codified at N.J.S. §2C:39-3(j)). The law initially defined "large capacity" to mean "capable of holding more than 15 rounds of ammunition." 1990 N.J. Laws 217, 221 (previously codified at N.J.S. §2C:39-1(y)). But the state amended the definition in 2018, lowering the threshold capacity to ten rounds. N.J.S. §2C:39-1(y). Residents who had lawfully acquired magazines exceeding that capacity were given just 180 days to surrender their heretofore-lawful magazines, transfer them out of state, or permanently modify them to accept ten rounds or fewer or be wholly inoperable. *Id.* §2C:39-19; *see* Pet.App.7a-8a.

B. Procedural History

1. Respondents ANJRPC and Blake Ellman brought suit in 2018 challenging New Jersey's revamped magazine ban. The district court rejected that challenge, applying a form of intermediate scrutiny that "accord[ed] substantial deference to the [legislature]." *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Grewal* (*ANJRPC I*), 2018 WL 4688345, at *9 (D.N.J. Sept. 28, 2018) (quoting *Drake v. Filko*, 724 F.3d 426, 436-37 (3d Cir. 2013)). A divided panel of

the Third Circuit affirmed. The majority first "determined that magazines are arms." *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.* (*ANJRPC II*), 910 F.3d 106, 116 (3d Cir. 2018). It further concluded that "millions of magazines are owned, often come factory standard with semi-automatic weapons, are typically possessed by law-abiding citizens for hunting, pest-control, and occasionally self-defense, and there is no longstanding history of LCM regulation." *Id.* at 116-17 (citations and footnote omitted). Nevertheless, it applied intermediate scrutiny and held that the state's interest in preventing criminals from putting such common arms to unlawful use outweighed the burden placed on law-abiding citizens. *Id*. at 119-24. Judge Bibas dissented. In his view, *District of Columbia v. Heller*, 554 U.S. 570 (2008), dictated the outcome of the case: "People commonly possess large magazines to defend themselves," and that should be the "end of [the] analysis." *ANJRPC II*, 910 F.3d at 130 (Bibas, J., dissenting).

2. On remand, the district court granted summary judgment for the state. *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Grewal* (*ANJRPC III*), 2019 WL 3430101, at *3 (D.N.J. July 29, 2019). Respondents again appealed, and the Third Circuit again affirmed in a divided opinion. *Ass'n of N.J. Rifle & Pistol Clubs Inc. v. Att'y Gen. N.J.* (*ANJRPC IV*), 974 F.3d 237, 247-48 (3d Cir. 2020). Judge Matey dissented and urged this Court to reconsider its two-step balancing test. *See id.* at 253-62 (Matey, J., dissenting).

Respondents petitioned for certiorari. While that petition was pending, this Court decided *New York*

State Rifle & Pistol Association v. Bruen, 597 U.S. 1 (2022), which rejected the "two-step approach" and held that *Heller* "do[es] not support applying means-ends scrutiny in the Second Amendment context." *Bruen*, 597 U.S. at 19. This Court then granted respondents' petition, vacated the Third Circuit's decision, and remanded "for further consideration in light of" *Bruen*. *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Bruck* (*ANJRPC V*), 142 S.Ct. 2894 (2022).

3. Separately, respondents Mark Cheeseman, Timothy Connelly, and the Firearms Policy Coalition filed suit on June 30, 2022, challenging New Jersey's "assault weapons" ban as inconsistent with the Second Amendment, and respondents ANJRPC, Blake Ellman, Thomas Rogers, and Marc Weinberg filed a lawsuit of their own on July 1, 2022, challenging the "assault weapons" ban as well. All three cases were then consolidated and proceeded to cross-motions for summary judgment. Pet.App.215a-16a.

Although respondents challenged the state's "assault firearms" ban as to *all* of the firearms the statute outlaws, the district court began by holding that respondents had not challenged anything but the ban on the "Colt AR-15" (the specific model mentioned by name in New Jersey's law, *see* Pet.App.60a). Pet.App.181a-82a & n.4, 228a. Applying *Bruen* and *Heller*, the court held that the plain text of the Second Amendment covers keeping and bearing an AR-15, just as it protects keeping and bearing a handgun. Pet.App.218a-19a. The court treated "common use" as part of the threshold-textual inquiry, rather than the historical-tradition inquiry, but concluded that AR-15s are "'overwhelmingly chosen by American society

for [a] lawful purpose.'" Pet.App.219a-24a (quoting *Heller*, 554 U.S. at 628). Moving to historical tradition, the court held that "a categorical ban on a class of weapons commonly used for self-defense is unlawful." Pet.App.226a.

Turning to New Jersey's magazine ban, the district court adhered to the Third Circuit's prior conclusions that "large capacity ammunition magazines are … arm[s] within the meaning of the Second Amendment" and are in "common use" for lawful purposes. Pet.App.229a-231a. Understanding both of those questions to inhere in *Bruen*'s threshold inquiry, the court then moved on to the historical-tradition stage. It recognized that "firearms with detachable magazines" were "widely available" by the "end of the Nineteenth Century," yet there was no tradition of banning them. Pet.App.234a. But it then puzzlingly held that the same analogues it had rejected as to AR-15s because they were not complete bans somehow *are* analogous to a complete ban on common magazines. Pet.App.233a-239a. In the court's view, concerns about mass shootings justified a more "nuanced" approach that ultimately blessed New Jersey's magazine ban. Pet.App.232a, 239a.

The parties cross-appealed, and a panel of the Third Circuit heard oral argument in the three consolidated cases. After oral argument, the Third Circuit *sua sponte* elected to rehear the case en banc. CA3.Dkt.79.

4. An overwhelming 10-5 majority affirmed the district court's decision in large part, holding that New Jersey's bans on semiautomatic rifles and magazines

capable of accepting more than 10 rounds violate the Second Amendment. Pet.App.3a-59a.

At the outset, the majority declined to decide whether New Jersey's ban on numerous semiautomatic pistols and shotguns violates the Second Amendment, concluding that the "record" on those firearms was "too sparse to support the analysis required under *Bruen* and its progeny." Pet.App.32a-35a. The majority agreed with respondents, however, that the district court was wrong to limit its decision to just the *Colt* AR-15, and so proceeded to analyze the constitutionality of New Jersey's law vis-à-vis all the semiautomatic rifles it bans. Pet.App.32a.

Applying "step one of the *Bruen* framework," the majority held that those semiautomatic rifles are "Arms" covered by the plain text and thus presumptively protected by the Second Amendment. Pet.App.35a-36a. The required "textual analysis is straightforward," the majority stressed, as "[e]ven the narrowest Founding-era definition of 'Arms' addressed by the *Heller* Court 'stated that all firearms constituted 'arms.'" Pet.App.35a (quoting *Heller*, 554 U.S. at 581-82). "Because semi-automatic rifles are firearms, they are 'Arms' within the meaning of the Second Amendment," and "[t]he Constitution thus 'presumptively protects' individuals' right to keep and bear [them]." Pet.App.36a.

As to "*Bruen*'s second step," the majority held that the state did "not carr[y] [its] burden" to show that its ban on common semiautomatic rifles is "consistent with the principles that underpin our regulatory tradition" of firearms regulation. Pet.App.36a (quoting *United States v. Rahimi*, 602 U.S. 680, 692

(2024)). Starting with the "why" inquiry, the majority found that New Jersey's motivation for enacting its law—to "bar[] people from misusing weapons to harm or menace others"—is consistent with historical tradition, Pet.App.36a-38a (quoting *Rahimi*, 602 U.S. at 693). No historical tradition, however, justifies "how" the law burdens the Second Amendment right. Pet.App.38a-39a. New Jersey's "law amounts to a de facto ban on the possession of semi-automatic rifles." Pet.App.39a-40a. And "*Heller* and *Bruen* teach" that "bans … on possessing or carrying of a class of weapons in common use for lawful purposes fail to find support in our Nation's tradition of firearm regulation." Pet.App.42a. Because "there are around 24 million AR-15s and similar sports weapons" possessed by law-abiding Americans for lawful purposes, the majority reasoned that New Jersey's law "functions like the firearm ban at issue in *Heller*" and therefore cannot stand. Pet.App.41a-43a. There simply is "no historical support," the majority concluded, for "a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for [the] lawful purpose' of self-defense." Pet.App.43a (quoting *Heller*, 554 U.S. at 628).

The majority also rejected the state's (and the dissenters') view that the "common use" test "amounts to 'a popularity poll,'" and that it should otherwise be evaluated at *Bruen*'s step one analysis. Pet.App.27a-31a & n.20. The common-use test, the majority explained, was expressly endorsed by this Court in *Heller* and *Bruen* and applied in the context of evaluating our Nation's historical tradition—not the Second Amendment's plain text. Pet.App.27a-31a & n.20.

Even if it "were to conduct the analogical analysis anew," however, the majority concluded that it "would reach the same [result]." Pet.App.43a. While the state offered "examples of historical analogues" such as "Founding-era gunpowder aggregation laws," and restrictions on the carry of "Bowie knives" and similar arms, "[n]one [is] a relevantly similar analogue for a ban on an entire class of arms in common use for lawful purposes." Pet.App.44a-49a. The majority further explained that this case "falls into the category of cases where 'the historical analogies … are relatively simple to draw,' not the category for a 'more nuanced approach." Pet.App.50a. But it concluded that "the outcome here" "would not change" even if "semi-automatic rifles implicate 'unprecedented societal concerns or dramatic technological changes.'" Pet.App.50a-51a.

Turning to New Jersey's ban on magazines capable of accepting more than 10 rounds, the majority concluded that "those provisions" too "are inconsistent with the Second Amendment." Pet.App.51a. "Because magazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended, magazines"—including "those that can hold more than 10 rounds of ammunition"—the court held that magazines "are 'arms' within the meaning of the Second Amendment." Pet.App.52a-55a. (quoting *ANJRPC II*, 910 F.3d at 116). The majority rejected the state's insistence that magazines are more akin to "accoutrements" like the cardboard "cartridge boxes" of yore as "at odds" with this Court's "instruction in *Bruen*" regarding the relevant textual analysis, and inconsistent with the reality that "modern magazines go beyond merely

facilitating self-defense; they are required for some firearms to function." Pet.App.53a. What is more, the court continued, "even where a particular arm does not require the use of a magazine, a magazine unquestionably facilitates the arm user's ability 'to cast at or strike another,'" Pet.App.53a-54a (quoting *Heller*, 554 U.S. at 581), and "the text of the Second Amendment does not limit 'Arms' to the minimum equipment necessary to operate a weapon," Pet.App.54a.

Having concluded that the banned magazines are "presumptively entitled to constitutional protection," Pet.App.55a, the court turned to "*Bruen*'s second step" and found, again, that the state failed to carry its burden to show that its magazine ban is "consistent with our Nation's historical tradition." Pet.App.55a. As with the ban on semiautomatic rifles, the ban on so-called "large-capacity" magazines addresses a "concern" regarding the misuse of weapons "that dates back to the Founding era." Pet.App.55a-56a. Likewise, as to the "how," New Jersey's magazine restriction "impose[s] a de facto ban" on a class of arms that "are in common use for lawful purposes." Pet.App.56a-57a. The majority once again rejected the historical analogues the state offered in support of its magazine ban, as they were "the same analogues" the state offered to support its semiautomatic rifle ban. Pet.App.57a-58a. And the majority again concluded that it would reach the same conclusion regardless of any "nuance" that may be warranted, as nothing in the Nation's historical tradition supports New Jersey's magazine ban. Pet.App.59a. Accordingly, the en banc court held that both of New

Jersey's arms bans "violate the Second Amendment." Pet.App.59a.

Numerous judges issued separate opinions. *See* Pet.App.62a-83a (Matey, J., concurring); Pet.App.84a-87a (Phipps, J., concurring); Pet.App.88a-90a (Montgomery-Reeves, J., concurring); Pet.App.91a-92a (Mascott, J., concurring in part and concurring in judgment); Pet.App.93a-121a (Chung, J., concurring in part and dissenting in part); Pet.App.122a-49a (Shwartz, J., dissenting); Pet.App.150a-74a (Krause, J., dissenting); Pet.App.175a (Smith, J., dissenting).

The Third Circuit granted the state's motion to stay the mandate pending resolution of a petition for certiorari. CA3.Dkt.129. New Jersey's two unconstitutional arms bans thus remain in effect.

REASONS FOR HOLDING THE PETITION

Respondents agree that this Court should hold the petition pending resolution of *Viramontes* and *Grant*. Since those cases will likely answer one of the questions presented here—namely, whether "the Second and Fourteenth Amendments guarantee the right to possess AR-15 platform and similar semiautomatic rifles," *Viramontes v. Cook County*, No. 25-238; *Grant v. Higgins*, No. 25-566—judicial economy would be best served by holding the state's petition until they are resolved. *See Stutson v. United States*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted and plenary review is being conducted[.]").

To be sure, the petition also presents a question not posed in *Viramontes* or *Grant*: whether the Second and Fourteenth Amendments guarantee the right to

possess magazines capable of holding more than 10 rounds. That is why the Third Circuit issued a decision instead of awaiting resolution of *Viramontes* and *Grant*. *See* Pet.App.13a n.12 ("[O]ur decision in these cases resolves a question the Supreme Court has not committed to addressing: the constitutionality of a law restricting possession of magazines that can hold more than 10 rounds of ammunition."). But as the state correctly notes, this Court has held several other petitions concerning other bans on magazines. *See NAGR v. Lamont*, No. 25-421 (semiautomatic rifles and magazines); *Duncan v. Bonta*, No. 25-198 (magazines); *Gator's Custom Guns v. Washington*, No. 25-153 (magazines). Respondents agree that the same approach would be prudent here.

To be clear, respondents believe that the Third Circuit correctly resolved both questions presented, as the Second Amendment plainly protects the right to possess "the most popular rifle in the country" and the equally (if not more) common magazines that come standard with countless popular rifles and pistols. *See Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280, 297 (2025). But respondents also recognize that denying the petition now could waste resources by requiring the parties to continue litigating the remainder of the case—including the pending challenges to New Jersey's ban on semiautomatic pistols and shotguns, *see supra* p.7-8—before this Court provides further guidance on how courts should analyze arms bans in *Viramontes* and *Grant*. Respondents accordingly have no objection to the state's request that this Court hold its petition pending *Viramontes* and *Grant*, and then dispose of

the petition as appropriate in light of the resolution of those cases.

CONCLUSION

For the foregoing reasons, this Court should hold the petition for certiorari pending resolution of *Viramontes* and *Grant*.

Respectfully submitted,

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